

## 5. *Country Case Studies*

### I. CAN THE LAW STOP FGM?

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#### **CAN THE LAW STOP THE PRACTICE OF FEMALE CIRCUMCISION?**

This is a question many people around the world and mainly in Africa frequently find themselves asking. The only thing that many activists in NGOs, in governments and in intergovernmental groups don't ask themselves is whether they have tried using the law to combat this cultural practice.

There are various categories of laws. Conventionally we have the following types:

- Criminal Law
- Civil Law
- Administrative Law
- Constitutional Law
- The Law of the contract
- International Law

I also wish to include the Rules of procedures as a special part of this legal regime.

Many lawyers and activists find it difficult to relate (FGM) to any of these laws. In most cases their failure to use law is either out of ignorance of the law or out of lack of serious commitment to deeply look at FGM as a legal issue or human rights violation.

However, in this paper I want to relate FGM to each branch of law.

#### **CRIMINAL LAW**

I am convinced beyond reasonable doubt that FGM is a crime. This is especially true when it is performed on minors. In most legal outlines any person below the age of 18 is a minor and therefore cannot give informed consent to anything.

Luring or compelling a minor girl into accepting to be circumcised is a crime because her consent is not mature enough to distinguish between good and bad.

Many countries across the globe have passed criminal laws to prohibit FGM. In Kenya, this was done under the Children Act, 2002. Under this act, FGM is prohibited and any person found circumcising a girl will be charged and imprisoned for one year or fined Kshs. 50,000 an equivalent of 710 US dollars, or both.

FGM can also be looked at from the angle of child abuse, or causing grievous bodily harm, or unlawful dismembering of an organ of the body.

Criminal sanctions can serve as restraint mechanisms to those who disregard any peaceful

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appeal to stop the practice. It can be used against those die-hards who refuse to heed advice and counseling. However, criminal law has its weaknesses in the sense that it waits until a girl is mutilated. When applying criminal sanctions a parent will be arrested, remanded and charged and perhaps jailed. The girl has already been circumcised. She has been injured and has suffered, you cannot reverse the suffering. Again law enforcement officers may be reluctant to even get involved. And for criminal proceedings to be filed, the police play a big role. Where they refuse or out rightly ignore the statements recorded at the station then no case will be filed.

In Kenya at least one case of a girl who bled to death was prosecuted and the traditional surgeon involved was found guilty of the offence of manslaughter. She was jailed for merely 3 years.

### **CIVIL LAW**

This is a branch of law that I feel can help us fight FGM in Africa and other parts of the world. It involves a possible victim or victims of FGM seeking protection from courts of law before they are circumcised. I don't know whether it has been tried anywhere else around the world, but I have always thought that I am the first person on Earth to use it. In December 2000, I made history when I moved to court seeking legal protection for two sisters who had run away from their home to avoid being circumcised. In the ensuing legal battle, I was able to win the case on behalf of the two sisters where I sued as the next friend, as they were both minors. In this suit popularly known as Civil Suit No. 10 of 2000, the presiding Magistrate made the following statement and I quote.

"FGM as it is popularly known is an outdated mode of practice. It has been over taken by events and circumstances. It is an illegal kind of practice because it is repugnant to justice and morality. The practice also violates human rights as stipulated in our constitution".

And this was historic. This ruling was being made in the absence of any specific law on FGM. I had combined various sections of laws and legal conventions to come up with a very strong case.

### **PROCEDURES ON HOW TO FILE AN FGM MOTION IN COURT**

*Interview victims and write statements.*

Draft affidavits – if a girl is a minor someone responsible will sign on her behalf. I mostly do this as the next friend. Many people are reluctant to sign such affidavits for fear of incurring costs in the event that they loose.

Make an application in court under a Certificate of Urgency. This is known as an Exparte Application and Temporary Orders restraining those behind the scheme to carry out the act of circumcision to stop until the matter is resolved in court.

Then a date for an inter-parties hearing is set by the court and the interim order is served

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to the respondent.

There are other technical papers that have to be worked out and they include:

- A plaint
  - Supporting affidavit
  - Verifying affidavit
  - Authority to act as next friend
  - Affidavit of service of the initial interim order
- Finally when the matter is resolved,
- an ORDER.

In court I ask for the following.

— A permanent prohibitory order or injunction restraining the defendant, respondent, his agents, servants or people of like mind, from ever attempting to, or actually circumcising or causing to be circumcised, the applicants.

— That the parents or guardians be compelled to continue discharging their parental responsibilities to the applicant(s) despite the court action.

— That an office of a government security or peace officer be compelled to monitor the situation and ensure that the order is fully obeyed by the respondents who are parents or guardians.

— That, that particular court declares FGM illegal and unacceptable in its area of jurisdiction.

— And that the parents, guardians or their servants or agents desist from molesting or harassing the applicant(s) at any one time. Those orders carry penal notice and a violation of such orders amounts to contempt of court, which in the Kenyan law is a criminal offence.

There are peculiar civil cases of FGM.

In Civil Suit No. 12 of 2000, the two sisters Beatrice and Edna Kandie sued their father.

In the Civil case No. 126 of 2002. Alice Cherop sued her mother. The mother is a senior circumciser in the community. She has 5 other daughters older than Alice, and all had been circumcised. Alice was the sixth and second to last daughter and the mother saw nothing wrong in having her circumcised, but she however defied and we went to court.

In the Civil Suit No. 10 of 2002 Maureen Yego sued her mother and father for conspiring to have her circumcised.

In the Civil Suit No. 18 of 2002 Rebecca Chebet sued the grandmother Josephine. Both of her parents objected but the community under the leadership of the grandmother insisted that she had to undergo that rite of passage.

It is important to note that I have since December 2000 won 19 cases in court. I have lost none and I have no pending case now.

## **DEFENSE**

There is no formidable defense for the practice of FGM in court. At least from my experience, no serious defense has ever been filed in court in all the 19 cases I've tried.

In the first case the father of Edna and Beatrice cited ignorance of the dangers and the legal implications. This has continued to manifest itself in most of the other cases. Many parents or guardians ask for leniency.

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### **IMPACT OF THE LAW ON FGM**

Legal actions have instant and permanent impacts and FGM is one of the areas. Law can work. Without exaggerating the outcomes of my court actions, I wish to state my faith in law as an important tool to combat FGM.

In the district where Edna and Beatrice come from, FGM declined drastically and in December 2001, only 30 girls were reportedly circumcised. In December 2002, none were reported to have been circumcised.

In Ngeria village where Alice comes from, no girl undergoes FGM anymore. Why? For fear of prosecution.

In Marakwet district where I have saved 16 girls, the statistics show that in December 2001, an estimated 1,300 girls were circumcised. In December 2002, only 155 were circumcised due to the impact of the cases.

### **HOW TO EFFECT LEGAL MEASURES AGAINST FGM**

- Create a monitoring system and develop a readily available litigation mechanism or scheme.
- Train law enforcement agents on the existing legal provisions on FGM.
- Carry out community awareness campaigns on the existence of laws on FGM.
- Sensitize judicial officers on the same.
- Empower girls to speak out and to be aware of the basic law that protects their bodily integrity.

### **CONCLUSION**

Law is an important tool for advocacy against female circumcision.

Law can act as a restraint to this cultural practice.

Civil law is the most suitable weapon, as it protects the girls, no circumcision takes place, and no arrests and no family separation or breakage occurs as a result.

To effectively ensure that legal and court actions are sustainable, there is a need to have follow-ups and reconciliatory meetings between both parties (girls and parents or guardians).

Legal actions spur debate and mobilization leading to the process of self-help and civic education in the community on the relevance or irrelevance of the practice.

FGM is torture by non-state actors and, under our national constitutions and the provisions of international conventions like presidential directives against FGM, can be used with other sections of the law to build a very formidable case. There exists a natural law, a contract between parent or guardian and child (girl-child), and in every action or decision when said girl is the subject, the best interest of such girl-child should prevail.

Lawyers from the communities that the girls I have dealt with come from, have more than once declined to represent some of the parents, arguing that morally there was nothing to defend in FGM as a practice. This has sent a very strong message to the community forcing them to rethink the cultural significance of the practice.

## II. CASE STUDY: MALI

### **KHADIDIA SIDIBE AOU DOU MAIGA**

*President of AMSOPT, MALI*

*Association malienne pour le suivi et l'orientation des pratiques traditionnelles  
(Malian Association for the Monitoring and Adjustment of Traditional Practices)*

Mali is a continental country with a population of 10.4 million inhabitants. The surface area is 1,204,000 square km. It is bordered by Algeria to the north, Nigeria to the east, Burkina to the southeast, the Ivory Coast to the south, Guinea to the southwest, Senegal to the west and Mauritania to the northwest.

It is composed of 8 administrative regions, in addition to the district of Bamako. FGM (Female Genital Mutilation) is practiced in nearly all of these regions, with the exception of the 7th and 8th regions.

The ethnicities these regions comprise are: Sarakolés, Bamanan, Peulhs, the Dogons, the Bobos, the Mossis, Miankas, Senoufos, and others.

The practice is not known among some Songhois, Arabs and Tamasheq.

According to the EDS II of 1996, it is prevalent in 94% of the country.

Politically, since 1991, the country has opted for a complete multiparty system and for the expression of basic liberties.

### **HISTORY AND EVOLUTION OF THE FIGHT AGAINST FGM**

The fight against FGM began under the 1st Republic with Congresswoman Feue Awa KEITA (may she rest in peace), who proposed a law that was misunderstood by her peers and so never passed.

Subsequently, under the Second Republic, a national committee was set up following the international seminar held in 1984 in Dakar, during which the current CI-AF (Comité inter-africain, or Inter-African Committee) was established.

At the end of this international meeting, at least 24 African countries created national committees immediately upon their return to their respective countries.

That same year, Mali established its committee, run by the UNFM (Union Nationale des Femmes du Mali, or National Union of Malian Women).

Then, under the Third Republic, with the advent of democracy, the country witnessed the emergence of a vast number of NGOs and associations.

AMSOPT is the only association exclusively dedicated to FGM. International structures and the involvement of the State and its technical structures have provided support for the fight.

### **PRESENTATION OF THE LEGAL FRAMEWORK REGARDING FGM**

Since the 1980s, the debate over circumcision has been at the center of conferences and seminars regarding the health and rights of women.

Nevertheless, the subject continues to bring into conflict—and even divide—the points of

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view of many Africans.

While some African countries such as Burkina Faso, Nigeria, Ivory Coast, Senegal, and Guinea—countries bordering Mali—have passed laws, this is not the case in Mali.

How can we explain Mali's attitude, considering that the country has been dealing with this issue for a very long time?

Are opportunities for change available to the country—yes or no? If yes, what obstacles must be overcome—and how?

I will attempt to respond to these questions based on my own experiences, as well as on the activities that have determined my position.

The National Context of Mali provides many opportunities.

— Individuals, informal groups, and associations have all studied the issue of FGM. Research has been carried out to explain its basis, its socio-economic and cultural stakes, and what consequences it has for the health of women and children.

There are legislative and regulatory items concerning FGM, namely:

— Decree no. 99/PMRM of June 16th 1999, which led to the creation of the National Committee established as part of the program for the abandonment of traditional practices harmful to the health of women and children

— Circular no. 0019 MSPS – SG of January 7th 1999, which banned the practice in health centers

— The constitution of 1992, which sets forth:

Article 1: the human being is sacred and inviolable. Every individual has the right to the life, liberty, safety, and physical integrity of his or her person.

Article 3: No one shall be subjected to torture, or to duties or treatments that are inhumane, cruel, or humiliating.

These two articles lead us to the clauses of the penal code, whose articles 160, 161, and 171, respectively, call for the repression of intentional cuts and wounds, and test treatments. FGM can be penalized based on these articles of the penal code.

A clause concerning FGM does exist in law no. 2, though it is referred to as the educational and persuasive law clause.

— Law no. 02044 of June 24th 2002 concerning reproductive health was deliberated and passed by the National Assembly in its session of June 7th 2002.

Some members of parliament, religious figures, individuals, NGOs and associations are in favor of abandoning FGM and of passing a law against it.

Some villages have abandoned, and others continue to abandon the practice. These communities wish to and should be supported by governmental authorities for their courageous decisions, for their awareness that it is necessary to evolve with the times and to take advantage of scientific advances achieved for their well being.

This raising of awareness has been possible thanks to the treatment of woman and girl victims of the consequences of FGM in the form of fistulas, cysts, sterility, infibulations, and

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infections... Discussion groups regarding reproductive and sexual rights, and the culture of non-violence have helped these communities realize that FGM really is an issue of public health, human rights, and reproductive and sexual health and rights. A network composed of some fifty NGOs and associations is prepared to fight FGM by spreading information and raising public awareness, and by encouraging the passing of a law that would discourage some practices and prohibit others.

There is no one who is unaware that the practice of FGM today is comparable to an empty eggshell drained of its contents. The fact that FGM involves babies aged 7-40 days or 4-year-old girls, who, moreover, are physically incapable of defending themselves, deserves particular attention and consideration because it concerns us parents, and the national and international governmental authorities.

On an international level, Mali has many opportunities, having ratified the agreement regarding all forms of discrimination and violence towards women, the charter of the rights of man, the agreement concerning children's rights, the peoples' charter, etc.

As far as the context of sub-regional integration is concerned, the cases of bordering countries such as Burkina Faso, Nigeria, Senegal, the Ivory Coast, and Guinea are, in my opinion, relevant examples to follow because these nations share the same socio-cultural and linguistic conditions, and thus are in a position to support and back Mali in its decision.

To conclude, we may confirm that Mali has ample sub-regional, national, and international opportunities that would permit the country to pass a law against FGM.

Difficulties exist, in the form of:

- incoherence among intervention strategies and various players
- the powerful influence of socio-cultural determinants over both illiterate and educated populations
- the reaction of certain Islamists
- the failure to recognize FGM as a problem of health, violence, and human rights by a very large majority of Malians, male and female alike
- the attitude of our lawyers, of state security agents
- Mali's vast surface area, which has been impossible to cover to date because of the insufficient funds of the NGOs and associations, and because of the lack of a strategic approach on the part of our governments since they do not consider FGM a priority.

**RECOMMENDATIONS:**

- Strengthening the NGOs and associations involved in the issue to enable them to spread information and raise awareness across all of Mali
- Organizing information and awareness discussion groups with the 4 coalitions of the CAFO (Coordination des associations et ONG féminines, or Committee of Women's Associations and NGOs) and the eleven committees of the National Assembly
- Organizing a partnership and drawing up a monitoring plan with the commission of constitutional laws, justice and governmental institutions
- Deepening the partnership between AMSOPT and the Lawyer Association of Mali
- Providing the assembly with assessable data such as reports of places where FGM has been abandoned, proposals for community laws, and lists of signatures from villages, families and individuals having abandoned the practice

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— Supporting the complaints of parents wishing to lodge a complaint

The example of the father whose daughter was circumcised without his permission and who lodged a complaint at the level of the national committee, which in turn filed the case with the AJM (Association des juristes du Mali, or Association of Mali Lawyers), is a case worth supporting.

### CONCLUSION

The relevance of passing a law regarding FGM is beyond question. At the individual, national, sub-regional and international levels, opportunities to do so exist and are available to Mali. All that is needed is the will to do so on the part of governmental authorities.

### AMSOPT CASE REPORT

Malian populations and communities do not recognize the concept of reproductive and sexual rights for women and girls because sexuality is and remains masculine. A husband alone decides whether to have sexual intercourse with his wife. This attitude, which concerns both illiterate and highly educated populations, seems normal to men and women alike because it has been so deeply engrained over the centuries. In light of this, it is necessary to clarify the relationship between human rights and the law, because we cannot speak of laws if we do not accord an individual "rights."

To give concrete expression to this view, AMSOPT has developed the following methodology, which is built around:

- a) personal experiences regarding human rights;
- b) an analysis of a documentary entitled "The Victim," based on an actual, concrete case;
- c) a comparison between the real experiences and the analysis of the documentary;
- d) and, in conclusion, demonstrating that human rights are sacred.

This approach methodology has been applied to community leaders.

The first exercise was introduced by asking the participants:

Tell a story from your life, or one that you've heard, about the violation of rights—what are those rights?

The aim is to raise the participants' awareness based on their own experiences.

A summary of the responses from the sub-groups yielded the following results:

— The violations of rights took the form of forced marriage, the prohibition of an education at the university level, embezzlement, non-participation in national celebrations or in certain communities, etc.

— The individuals who were subjected to these abuses all experienced feelings of frustration, rebellion, and injustice.

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— The institutions where these violations occurred were: the family, governmental institutions, and schools.

The point of analyzing this exercise is to make participants realize, based on their own experiences, that human rights are constantly being violated, and that they themselves are at the root of these violations, more or less unconsciously.

The second exercise began with the screening of a documentary entitled “The Victim.”

The film describes the real case of a little girl who was circumcised 5 years ago and who now, at the age of 12, suffers from urinary incontinence.

Despite the goodwill and commitment of Italian partners, her case remains irreversible.

Following the screening of the documentary, participants were asked to:

List what rights were violated in the case of this victim.

Compare these rights to the universal human rights by referring to various articles.

The rights violated in the victim’s case are:

- the right to physical integrity
- the right to an education
- the right to health and care
- sexual rights
- reproductive rights
- the right to participate in society

The analysis only confirmed that these universal human rights are precisely those violated both in the personal experiences of the participants and in the case of the victim.

The point of the exercise is to trigger awareness about basic and universal rights in general, and about the concept of reproductive and sexual rights in particular.

The research project concluded with the organization of two large discussion groups for the benefit of community leaders, and in support of the benefits gained by those villages that have abandoned FGM and by those little girls, aged 0 to 6 years, who have not been circumcised in 30 villages supervised by AMSOPT. The villages whose 0 to 6-year-old girls were physically examined included both villages that have and those that have not abandoned FGM.

The results were satisfactory 73.52% of the time; of a total of 1798 girls examined, 1322 had not been circumcised.

The aim of the discussion groups is to identify social contracts and existing community laws in order to apply them to the issue of FGM.

Once the responses of the discussion groups had been summarized, social contracts taking the place of laws were classified according to the seriousness of each case.

The penalties range from the payment of a fine of 10,000 to 30,000 CFA francs, to banning participation in community functions such as burials, weddings, christenings, harvesting, and the putting in place of tortures.

These penalties are often initiated by the villagers themselves.

The signatures of the heads of households and of their family members express commitment to and support of the benefits gained by villages that have abandoned FGM,

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and, at the same time, make it possible to identify those households or individuals who have failed to abide by the community decision.

Suitable strategies are developed for these cases, such as counseling and house visits intended to provide information and increase awareness about FGM in the 11 parliamentary commissions. The signatures of community members in addition to community laws, will serve as data that can be considered and assessed in order to turn members of parliament towards, and to encourage the passing of a clear and precise law regarding FGM.

AMSOPT firmly believes in this long-term undertaking, which is a more original approach because it tackles the problem at its root. Furthermore, it is participative and provides political and governmental institutions with assessable facts.

#### **THE REASONS FOR MY INVOLVEMENT IN FGM ISSUES**

My involvement in the fight against FGM began from the shocking moment I first came into contact with this practice, which changed my life because I had been completely unaware of this practice even though I am Malian. I cannot forget that young, 16-year-old girl who died from the consequences of an infibulation. I cannot comprehend how a human hand—a woman's hand at that—is capable of carrying out the appalling deed I witnessed without shuddering; how it is possible to withstand the nauseating smell I breathed in, or to ignore the wide-open eyes of this young girl begging in vain to be rescued.

I heard a song of rebellion that has dictated my mission ever since: to use my abilities as a teacher to inform, raise awareness, and change the attitude of a peoples regarding FGM.

This is the sense of conviction that aids me in my constant search—my search to put an end to this practice.

### **III. THE LAW AS AN INSTRUMENT FOR BEHAVIORAL CHANGE: THE CASE OF BURKINA FASO**

#### **GISÈLE KAMBOU**

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We are going to successively examine the process of the passage of a law on Female Genital Mutilation (FGM) in Burkina Faso, and the contents thereof.

Subsequently, we will examine the role of the CNLPE and Burkinese NGOs involved in the fight against this practice through the application of the law.

We will conclude with possible recommendations for the fight against FGM.

#### **PASSAGE OF THE LAW ON FGM**

Excision is the most common form of female genital mutilation in Burkina Faso, as in the majority of West African countries.

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According to the report of the 1996 national survey of excision in Burkina Faso,<sup>49</sup> 66.35% of women aged 0 to 49 years are excised.

Excision is practiced both in rural and urban communities, and is generally performed on girls between the ages of 0 and 12 years.

Factors such as town, ethnic group, and religion effect the incidence of the practice.

Three principal factors have led to the passage of legislation against FGM in Burkina:

The consciousness-raising campaigns conducted since the creation of the CNLPE<sup>50</sup> in May 1990 have increased awareness in local populations about the harmful effects of this practice.

The involvement of politically committed civil society<sup>51</sup> in the battle against FGM has caused it to become more involved in the various meetings, in the course of which recommendations have been formulated calling for the repression of the practice of excision.

Finally, Burkinese authorities have demonstrated unequivocal political determination to fight the practice of excision.

These are the conditions that encouraged the passage of the legislation against FGM: namely, law no. 043/96/ADP of November 13, 1996, with its penal code.

It should be noted that this law was the result of a long process:

July 1995,<sup>52</sup> the national committee for the second reading of the penal code is established and begins working on a draft of the document;

October 1996, the government passes the bill;

November 1996, the National Assembly votes on the law;

February 1997, the law is promulgated.

## THE CONSTITUENT ELEMENTS OF THE LAW

Before excision was deemed an offence, Burkinese law dealt with mutilations in general under the heading of intentional cuts and wounds, under the chapter of first and second-degree murders, and under the label of acts of violence and assault and battery.

It bears reminding that Burkina Faso is one of the few African countries to have passed, very early on, a law explicitly prohibiting excision/FGM.

*But what does this law consist of?*

Three articles (380, 381, 382) in the penal code:

article 380: "a prison sentence of six months to three years and/or a fine of 150,000 to 900,000 CFA francs (approximately 215 to 1,286 US\$).<sup>53</sup>

If the practice results in death, the penalty is a five to ten-year prison sentence."

article 381: "a maximum penalty is applied if the guilty party is a member of the medical or paramedical profession. The court of law handling the case may also prohibit him or her from exercising his or her profession for a period of no more than five years."

article 382: "a fine of 50,000 to 100,000 CFA francs (71 to 143 US\$) for any person who, aware of the events provided for in article 380, fails to notify the concerned authorities

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thereof.”

### **WHAT IS MEANT BY FGM?**

According to the terms of the penal code, FGM comprises any act that “damages the integrity of a woman’s genital organs by complete removal, excision, infibulation, anesthetization, or any other means.”

The individuals concerned:

- the perpetrator of the act, that is, the person excising,
- the co-perpetrator(s), those who decide on the act,
- the guilty parties and accomplices,
- but also anyone who, aware of an imminent excision, fails to alert the concerned authorities.

### **THE APPLICATION OF THE LAW**

#### *The role of the CNLPE*

The results of studies<sup>54</sup> carried out in 2000, 2001 & 2002 show prevalence rates ranging from 43% to 16%, depending on the region and age group. In other words, the phenomenon is on the decline, considering that the 1996 survey revealed a notably higher prevalence rate (66.35%).

One of the positive aspects of putting this law into effect has been the series of strategies developed by the CNLPE as part of a national program<sup>55</sup> against FGM that emphasizes consciousness-raising.

It has been necessary to encourage greater awareness on the part of the population to ensure that it upholds the spirit of the law.

In other words, the committee considers the law a deterrent measure that complements awareness-raising campaigns.

In keeping with this spirit, it has educated not only judges and lawyers, but police agents as well, about the contents of the law and the damaging effects of FGM.

Following these meetings, the police agents have suggested and put into effect various rehabilitation activities at the level of the general population and in the barracks.

A rapid intervention unit has also been set up within the CNLPE whose objectives are:

- to open files for all excised women who have been identified, and to follow up on them;
- to intervene directly in the case of an alert announcing an intended or actual case of excision; on this level, it is necessary to distinguish between two cases:
  - cases of intervention following disclosure of an intended excision: a team consisting of a policeman assigned to intervention services, and one or more officials, goes directly to the concerned family to raise their awareness about the practice of excision and the law.
  - cases of excision involving a police raid of the site where the excision is performed:<sup>56</sup> once the offence has been reported, the perpetrators and their accomplices are arrested and proceedings are immediately instigated. Local populations follow these trials<sup>57</sup> with interest.

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The intervention unit has an "SOS/excision" hotline (311571) where cases of excision can be reported; a fair portion of the population is familiar with this number, and anonymity is assured. The population is also familiar with deterrence patrols; these controls allow policemen to demonstrate their real and permanent presence in the region, and to explain the contents of the law. They have also led to the identification and registration of several excisionists.

By way of example, since the law was passed, there have been:  
— 57 trials for cases of excision<sup>58</sup> (with the law on FGM applied), and, thanks to this program:

- 2,632 awareness-raising and deterrence patrols by policemen,
- 488 on-site visits in cases of excision

These positive effects have not come without difficulties; increasingly, one notes that:  
— the practice of excision has gone underground;  
— the age at which the practice is performed has fallen from 7 to 12 years of age formerly, to just 0 to 1 years of age currently;  
— the excisionists migrate across borders to countries that have no law on FGM;  
— parents continue to have their daughters excised, subsequently finding themselves passive witnesses likely to be taken in for questioning, prosecuted and sentenced as accomplices or co-perpetrators, as already mentioned above.

The immediate consequence of both parents being prosecuted is that the familial situation can be affected, especially in the case of a mother with young children. This makes it difficult for the penal law regarding excision to be strictly applied. In practice, depending on the particular case, the father or mother will be arrested.

**OTHER PARTICIPANTS IN THE FIGHT AGAINST THE PRACTICE OF FGM**

To oversee the application of the law, at the level of the public prosecutor's office in Ouagadougou, a judge has been trained in IEC (Information, Education, and Communication)/excision and informed about the consequences of the practice in order to follow all excision cases to assure that the various verdicts are actually carried out.

Numerous NGOs and associations are also actively engaged in working to eradicate the practice of excision in Burkina. These include Voix de Femmes, MWANGAZA, les Six "S," MUGNU and others.

Their activities include:

- awareness-raising campaigns
- pleading/lobbying with community leaders,
- research,<sup>59</sup>
- training,
- monitoring and supervision, etc.

I would like to emphasize the contribution of Voix de Femmes (Voice of the Women) here.

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Thanks to a partnership with AIDOS and the European Union in the context of the project "Stop FGM," it has succeeded in collecting some 1500 signatures in support of the official call launched for the eradication of FGM. *Voix de Femmes* has also integrated the legal aspect<sup>60</sup> in its awareness raising campaigns against excision.

It is worth noting that *Voix des Femmes* collaborates closely with the CNLPE in the context of the various activities concerning FGM. This spirit of joining forces and partnership also characterises *Voix de Femmes'* relationships with other associations engaged in this field. Thanks to this collaboration, last May 3rd, we were able to witness the practice of excision abandoned by 23 villages in the province of Zoundwéogo in Burkina.

Nonetheless, excision continues to be practiced and we must redouble our efforts against it. Thus, new approaches must be discovered to continue the fight.

### SEVERAL APPROACHES

It is a question of:

- encouraging incentives for reporting abuses;
- working a great deal with young people (school and university students, local youths, etc.);
- working closely with the media;
- considering alternative measures such as the retraining of excisionists, but by encouraging them to become members of organizations and associations that would allow them to benefit from small loans, for example;
- creating databases of excision cases in which proceedings were successful.

## IV. LEGAL TOOLS FOR THE PREVENTION OF FGM: A PERSPECTIVE FROM EUROPE

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### INTRODUCTION

"Passing anti-FGM legislation is one of the most controversial aspects of the FGM elimination movement."<sup>62</sup>

This statement in a World Health Organization (WHO) publication highlights the complexity surrounding the theme of this conference. However, given that the WHO report focuses on Africa and the Eastern Mediterranean<sup>63</sup>, it leaves one wondering whether the same can be said for northern countries where the people most likely to be affected by the legislation are in the minority?<sup>64</sup> This paper explores that question by looking at the practice of using law in eradication efforts of European countries focusing on Britain and France. These

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two countries have between them, the highest number of migrants from FGM risk countries.<sup>65</sup> Although both have legislation outlawing the practice,<sup>66</sup> they have dealt with the issue in very different ways. Britain has chosen the “softly softly approach” refusing to prosecute violators whilst France has elected to enforce the law by prosecuting offenders. The paper explores the rationales behind these two positions. In outline it could be that whilst Britain takes the *laissez-faire* approach where immigrant customs, ‘cultures’ and traditions are concerned, France adopts a more assimilationist stance/favours a policy of assimilation.<sup>67</sup> The paper then moves on to consider the more robust stance being taken in Europe to the FGM issue.<sup>68</sup> In particular, the paper considers the provisions of the European Parliament Resolution on FGM<sup>69</sup> and what they reveal about the current European approach to the problem. Finally the paper considers the asylum debate and the possibility of women using the United Nations Convention on Refugees, 1951 to seek protection from a fear of persecution based on FGM.

### FGM AND THE LAW IN BRITAIN

In 1985 the United Kingdom Parliament enacted the Prohibition of Female Circumcision Act. The Act outlawed FGM and made violation of its provisions punishable by a fine or imprisonment of up to five years. Later came the enactment of the Children Act, 1989 which makes provisions for local authorities to investigate to see if a child is suffering or is in danger of suffering significant harm. There is also the possibility of applying for a prohibited steps order under the Children Act 1989 to prevent the child from being cut. The Prohibition of Female Circumcision Act has never been used. This is despite evidence that cutting does occur in the UK.<sup>70</sup> Indeed an empirically based survey amongst the Somali community found that some of the cutting had been performed by a medical professional in a hospital or clinic.<sup>71</sup> A policewoman wrote an article identifying the impediments to using the law.<sup>72</sup> A major impediment in her view was the fear of offending minorities who may feel persecuted and “picked upon” by the establishment. Prosecutions would lead to minorities feeling alienated. The policewoman also questioned the efficacy of using criminal law to deal with what she saw as an essentially cultural problem.

Dr. Toubia has noted that criminalization and regulation “are only effective once a substantial body of public opinion has been raised against the practice.”<sup>73</sup> This is an interesting argument which calls into question the use of law when FGM is practiced by a minority of the population (as in some northern states) and when it is “culturally” grounded and practiced by the majority (many) as in some African states.<sup>74</sup> In northern states it may well be that the majority opinion is in favour of laws prohibiting the practice whereas those from communities where the practice is prevalent are not –leading to an “us v. them” situation arising. If the “us” in this is the dominant group, then one can see how condemnation of the practice can be used by some of the more reactionary elements to justify racist behaviour towards non-white immigrants, whether or not they come from practicing communities.<sup>75</sup> The British approach can be said to show cultural sensitivity and a desire to work with minority communities without criminalizing them. The problem with the British approach is that it panders to cultural sensitivity at the expense of the health and security of the victims.

France by way of contrast has taken a more robust approach.<sup>76</sup> The French Penal Code outlaws acts of violence “resulting in mutilation or permanent disability.”<sup>77</sup> Like the English statute, violation is punishable by imprisonment or a fine. However, unlike the English,

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French authorities have used the law several times to prosecute both practitioners and the parents of the girls/young women who permit the cutting to occur.<sup>78</sup> A cause célèbre was the case of the 19 year old woman who reported her mother for trying to get her cut as well as the woman who had been carrying out cuttings in their community. The circumcisor received a prison sentence of eight years and her mother was given a two-year prison sentence.<sup>79</sup> However more often than not, parents are given suspended sentences or made to do community service.<sup>80</sup> Weil-Curiel notes that this is because 'judges know that they are acting on the basis of a cultural context.'<sup>81</sup>

The French approach is less tolerant of the "cultural defense" and more attuned to the uniform application of the law. Indeed France has made a declaration to article 30 of the United Nations Children's Rights Convention, 1989 which provides for the rights of children who are minorities to "enjoy his or her own culture, to profess and practice his or her own religion, or to use his or her own language".<sup>82</sup> The French declaration makes clear that France does not consider itself bound by this provision so in effect contradicting the English "'respect for 'other' approach". In effect the French position is that all children within its jurisdiction should enjoy the same rights to be protected from parental or other abuse of their rights.<sup>83</sup> Arguably the French approach is in line with the provisions of the Children's Rights Convention, 1989 particularly those on abuse, health and development and the prohibition of harmful traditional practices.<sup>84</sup>

Until recently, authorities in the UK would no doubt have argued that prosecuting parents thereby separating them from their children or taking the children into care would do more harm than good. This is a dilemma not least because it is extremely rare for children in Africa to be removed from the family environment, widely constructed, and put into institutional care. The balance between protecting the child from potential harm and putting the child into an alien environment thus heightening their isolation is a difficult one to draw. Given what is known about the life chances of children who have been in care and indeed of abuses within the care system, there are powerful reasons for not taking the criminal route. In the context of Britain however, it is arguable that this last point has been overtaken by events following the Climbié case.<sup>85</sup> It remains true though that migrants may resent what they see as institutional "targeting" of them. This fear is borne out by empirical research carried out in Switzerland. Cottier's socio-legal study of the practice of Swiss child protection authorities showed a tendency to intervene on the basis of a perception of the superiority of values of the host system over the parental one.<sup>86</sup> This leads to an over representation of non European minorities in the care system and reflects, in Cottier's view, the racist underpinnings of the Swiss immigration and child care system which does not admit of any derogations from the "Swiss way."<sup>87</sup>

However, the French would no doubt counter the laissez-faire approach by saying that inaction or silence sends out a message that the behaviour –that is cutting of young girls– is acceptable. Prosecutions, especially when accompanied by widespread media coverage, make clear to practising communities that the action is illegal, and, also communicates the fact that the full force of the law will be brought to bear on them. Weil-Curiel notes that coupled with education, penalties can have a beneficial effect, reducing incidence of FGM. "In one Paris suburb for example, 500 excisions were carried out in 1985; after enforcement of the law, no excisions took place in 1997-1998."<sup>88</sup> A cynic might note wryly that the authorities did not discover/ record any excisions having taken place, which is a radically different proposition to saying that none actually occurred. Of course laws can only be enforced if health

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professionals and others know about their existence. Research undertaken by the Daphne project showed that knowledge of laws on FGM amongst health professionals working in Europe varied enormously. Swedish officials were the best versed.<sup>89</sup> (On a more cheerful note, FGM is also said to be “dramatically reduced” in Africa.<sup>90</sup>)

These debates notwithstanding, it would appear that the UK has now begun to move towards the French position. Increasingly the “softly softly approach,” is being criticized, with debates in the House of Lords indicating quite clearly that culture is not seen as a legitimate defense to a criminal charge and with a call to end the prevailing *laissez faire* approach.<sup>91</sup> With this in mind there have been debates in the House of Lords about amending the law to make it an offence to remove a child from the jurisdiction of the United Kingdom with the intention of having that child cut.<sup>92</sup> In 2003 a Private Member’s Bill was introduced to the English parliament.<sup>93</sup> It seeks the repeal and re-enactment of the 1985 Act. The Bill aims to outlaw the removal of a child from England and Wales for the purpose of having her cut even if the practice is legal in the country where the cutting occurs.<sup>94</sup> It also aims to increase the maximum penalty for facilitating or performing the cutting from 5 to 14 years imprisonment.<sup>95</sup>

While one can welcome the renewed focus on the issue of FGM, it is not clear that it will bring about tangible change, not least because of enforcement issues already identified with the existing Act. Some NGOs working on the issue in the UK have questioned the efficacy of using law as a tool for eradication. Specifically it has been noted that:

“While the proposals to amend the 1985 Female Circumcision Act and strengthen legislation banning FGM are welcome, we have serious concerns about the extent to which legislation will in fact protect women and girls and prevent FGM. We feel that legislation must go hand in hand with awareness raising about changes in law among communities where FGM is practiced, and that careful measures must be put in place to ensure that the legislation does not cause further harm to children and break up families.”<sup>96</sup> Questions have also been raised on the matter of jurisdiction. Specifically the Act seems to protect/cover only UK nationals or permanent UK residents who are defined thus:

“6(2) A United Kingdom national is an individual who is-

- (a) A British citizen, a British overseas territories citizen, a British National (Overseas) or a British Overseas citizen,
- (b) A person who under the British Nationality Act 1981 (c.61) is a British subject, or
- (c) A British protected person within the meaning of that Act.

(3) A permanent United Kingdom resident is an individual who is settled in the United Kingdom (within the meaning of the Immigration Act 1971 (c.77)).”

As the definitions do not cover illegal immigrants or people without residence can it be assumed that the Act will not prosecute the extra-territorial removal of a non-UK/non resident child? It would seem so. The explanatory note to the Bill provides:

“This offence (assisting a non-UK person to mutilate a girl’s genitalia overseas) only applies where the victim of the FGM operation is a UK national or permanent UK resident.”<sup>97</sup>

This caveat notwithstanding, the new UK parliamentary initiative reflects the growing concern over FGM in Europe as a whole.<sup>98</sup> A collective response to the problem can be found

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in the European Parliament Resolution on FGM of 2001.<sup>99</sup> Over time there appears to be developing a European approach which is intolerant of practices such as FGC and which has little sympathy for calls for cultural sensitivity or respect for immigrant communities whose practices are out of step with the majority.<sup>100</sup> This is best seen by looking at the European Parliament Resolution on FGM<sup>101</sup> which although recognizing the need to work with communities to eradicate the practice,<sup>102</sup> explicitly notes that:

“...The protection of cultures and traditions has its limits, consisting in respect for fundamental rights and the prohibition of customs which resemble torture.”<sup>103</sup>

The Resolution makes clear that immigrants have to abide by the national legal systems which do not allow FGC and which punish by way of imprisonment or fine those who engage in the practice. To make sure that immigrants understand this ban, they are to be given information on the law before they leave their home countries and on arrival.<sup>104</sup> Although alive to the importance of adopting a multi-agency approach, the Resolution is clear on the place of law noting that member states are to:

“Regard any form of FGM as a specific crime, irrespective of whether or not the woman concerned has given any form of consent, and to punish anybody who helps, encourages, advises or procures support for anybody to carry out any of these acts on the body of a woman or girl...”

Approve legislative measures to allow judges or public prosecutors to adopt precautionary and preventive measures if they are aware of cases of women or girls at risk of being mutilated...

Consider that, from the point of view of legislation to protect children, the threat and/or risk of being subjected to FGM may justify intervention by authorities”<sup>105</sup>

Clearly the European Union favours an assimilationist approach with direct intervention into the lives of immigrants, even if it involves the removal of children from their families in order to protect them from the risk of harm.

In the penultimate paragraph, the Resolution calls:

“On the European Union and hence all the institutions and Member States vigorously and firmly to uphold European values based on human rights, the rule of law and democracy; no cultural or religious practice can be allowed to oppose these principles which underlie our democracy.”<sup>106</sup>

Arguably some might see this penultimate paragraph linking “European values” with principles of human rights, good governance and democracy as arrogant and condescending. However the new Draft Protocol to the African Charter on Human and Peoples’ Rights on the Rights of African Women has a similar provision on dignity which provides:

“Women contribute to the preservation of those African values that are based on principles of equality, dignity, justice and democracy.”<sup>107</sup>

It may well be then, that as Maya Angelou says, “we are more alike my friend, than we are

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unlike.” Still, the European Resolution can arguably also be said to be somewhat “imperialist” in tone, particularly when it calls for the prioritization of FGM as a development concern in the agenda of donor receiving countries. It provides:

“[Believes] that, in the context of the human rights provisions of the EU’s development programmes, FGM constitutes such a grave assault on the rights of women that the Commission should be prepared to invoke these provisions, should the governments concerned not be willing to include the fight against FGM as a sector of cooperation.”<sup>108</sup>

Now I am not so naïve as to suggest that Europe should just give money without asking for it to be accounted for, but some might find this level of prescription disturbing. As long as government ministers are not lining their own pockets, building expensive white elephants or buying Mercedes Benz (with apologies to the Germans), governments should be allowed to determine their own development agenda. However, in their defence European colleagues would no doubt point to paragraph 25 of the Resolution which provides:

“Emphasises that medium and long term change must come from within the countries concerned and that there is a crucial complementary role to be played by international development assistance such as development programmes of the EC.”

This takes us to the next point, which is the linking of aid with legislative change. The European Resolution calls:

“...on the Council, Commission and Member States to use the human rights clause to make combating female genital mutilation a priority issue in relations with non-Member States, particularly with those States which have preferential relations with the EU under the Cotonou Agreement, and to put pressure (my emphasis) on them to adopt all the necessary legislative, administrative, judicial and preventive measures to end these practices.”<sup>109</sup>

Far be it for me to tell the EU how to run its affairs, but I would argue that it is precisely dictates such as these which lead to African governments hastily passing legislation, the implications of which are not fully thought through, the implementation and enforcement mechanisms for which do not exist; for the “benefit” of a largely indifferent and unknowing population –and people wonder about backlash<sup>10</sup> and ask why law does not work.

Admittedly what I have just said is controversial, so I shall move on to consider issues of asylum. Unfortunately however, the controversy continues, not least because nothing more clearly highlights European hypocrisy on issues of human rights than the issue of asylum. Let us see if European states practice what they preach. If a young woman or girl presented herself as an asylum applicant fleeing her country on the basis of fear that she would be cut, would she be shown compassion, interviewed by a female officer, given accommodation and basic state provision and helped to find her feet in her new country, or would she be deprived of her liberty thrown into a “detention/holding center,” her story received with the raised eyebrow which spells incredulity, and then promptly returned to her country “because they

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all lie?"<sup>111</sup> I am getting ahead of myself. Not all of her problems would be due to attitudinal barriers, some may be because of the framing of the provisions of the United Nations Convention on Refugees, 1951 which sets out the framework for claiming refugee status.

### **ASYLUM AND FGM**

The United Nations Convention Relating to the Status of Refugees, 1951 defines a refugee as a person with a well founded fear of persecution on the basis of one or more of five grounds namely: race, religion, nationality, membership of a particular social group or political opinion.<sup>112</sup> The Refugee Convention has been criticized for not defining what is meant by persecution<sup>113</sup> and also for not including sex or gender<sup>114</sup> as a ground upon which a claim for asylum can be founded. However over time both criticisms have been addressed so that persecution is taken to include two elements, the first being serious harm or ill-treatment and the second being the "inability or unwillingness of the State to protect the victim from such harm or ill-treatment."<sup>115</sup> The omission of sex or gender from the grounds has also been mitigated by the issuing of guidelines by the United Nations High Commission for Refugees,<sup>116</sup> various governments<sup>117</sup> and judicial interpretation<sup>118</sup> all of which aim to show how issues of gender are to be considered when claims for asylum are presented. Much of what constitutes gender persecution has been considered under the heading social group.<sup>119</sup> This includes claims relating to a fear of persecution based on FGC.<sup>120</sup> Canada was the first country to grant asylum on the basis of FGC.<sup>121</sup> Since then other countries including France, Norway and Sweden have followed suit. Indeed the European Resolution 2001:

"Expresses the hope that, in their work on the Community immigration and asylum policy provided for under Title IV of the Amsterdam Treaty, the Commission and the Council will, together with the Member States, take measures as regards the issuing of residence permits and protection for the victims of this practice and will recognize the right of asylum of women and girls at risk of being subjected to FGM."<sup>122</sup>

One of the most famous cases on FGM and asylum is that of Fauziya Kasinga,<sup>123</sup> a Togolese woman who fled being cut in preparation for marriage, and was granted asylum in the United States on the basis of belonging to a 'social group of Togolese women likely to suffer FGM and not receiving state protection'.<sup>124</sup> She faced a struggle with the authorities who initially rejected her claim as not being credible.<sup>125</sup> What is clear from cases where women claim asylum as a result of fear of FGM or other forms of violence, is the failure of state machinery to protect women and girls from violation of their rights at the hands of family and community members.<sup>126</sup> The cases also reveal the difficulties faced by women, often without independent resources, fleeing families and communities with which they are familiar and from which they may be forever ostracized and going to lands and cultures which are often unfamiliar and sometimes downright hostile. The "credibility test" such as that imposed on Kasinga, may be hard to meet not least because there may not be people available who can testify, with knowledge and expertise, on the practices of the group from which one comes, thus raising the possibility that the applicant's story will be disbelieved.<sup>127</sup>

Given that children are the main victims of FGC, issues of capacity arise. Often they are not able to access travel documents to enable them to leave. This is of course assuming that they know that fleeing one's country is possible. Internal flight may be equally problematic for reasons of ethnicity, language and custom.<sup>128</sup> Like adult women, children may often lack

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the necessary financial and socio-psychological resources needed to flee. Although UNHCR guidelines exist on the treatment of unaccompanied minors claiming refugee status,<sup>129</sup> they face added difficulties of isolation. Arguably the child's parent may accompany the child as happened in the Canadian case of *Re Khadra Hassan Farah*<sup>130</sup> but this action is more likely than not to result in the break up of the family unit.

The asylum issue also raises issues of diplomacy. This is because the granting of asylum to an applicant can be seen to constitute a negative assessment of the country from which the applicant is fleeing.<sup>131</sup> In short, when a country grants asylum it can more often than not be seen to be making a value judgement about the (negative) values of the "sending" state or about that state's inability to protect its citizens from harm.<sup>132</sup> Moreover, in accepting the claims of gender-based persecution, the receiving State may in itself be making a statement about what it considers to be acceptable societal norms around the treatment of women.<sup>133</sup>

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