3. Programs for the Prevention of FGM

I. THE ACTIVITIES OF THE NATIONAL COUNCIL FOR CHILDHOOD AND MOTHERHOOD IN THE FIELD OF FGM

MOUSHIRA KHATTAB
Ambassador, Secretary General of the National Council for Childhood and Motherhood (NCCM), Egypt

INTRODUCTION

The FGM Free Community Model is the result of a 4-month project formulation process, carried out by NCCM with the support of UNDP (United Nations Development Programme), with NGOs, advocates and experts in social communication, as well as representatives of other organisations that had been previously involved in relevant activities.

Based on the assessment of previous experiences, the project formulation task force recommended the adoption of the socio-cultural approach. The approach will accommodate FGM within a comprehensive developmental package addressing the Rights of the Girl Child. Furthermore, the approach aims at addressing the false beliefs justifying the practice through the creation of an environment conducive to dialogue, initiative, interaction and advocacy. An integrated social communications campaign will be developed targeting the different groups influencing decisions relating to FGM at the family level, aimed at ultimately reducing community peer pressure. The project model is intended for dissemination on a national scale. To this end, the FGM-Free Community Model will be developed.

THE FEASIBILITY OF COMPLIANCE AND ENFORCEMENT: AN EGYPTIAN PERSPECTIVE

MEASURES OF COMPLIANCE (Demand-side Management)

— Public perceptions of the tradition, its origin and the legal context for its practice
— Socio-cultural influences triggered by individuals, families, and communities
— Expression of demand for services by families
— Advocacy role of the government, NGOs, opinion leaders

**MEASURES OF ENFORCEMENT (Supply-side Management)**

— Definition and commitment to ethics by practitioners
— Clarity, conformity and sustained communication of legal, medical and religious stands
— Monitoring and reporting mechanisms revealing the actual situation of the practice
— A solid foundation of basic facts relating to the practice accessible at the family level to counteract false medical arguments

**KEY PLAYERS**

— NCCM
— Ministry of Health
— Ministry of Social Affairs
— Other government stakeholders
— Religious leaders
— Intellectuals
— National FGM taskforce
— Donor Assistance Group and UNDP
— UNICEF
— UNFPA
— Ford Foundation
— National and International NGOs

**EGYPTIAN INITIATIVES TOWARD THE ELIMINATION OF FGM LED AND CO-ORDINATED BY THE NATIONAL COUNCIL FOR CHILDHOOD AND MOTHERHOOD**

**NCCM’s APPROACH**

— To demonstrate the best use of advocacy and communication tools to eradicate the practice
— To mobilize networks at the village, governorate and national level in support of national and local interventions
— To ensure that the transmission of the practice to the next generation is halted
— To introduce FGM within a package of initiatives addressing the rights of young girls
— To provide a platform for coordinating and sharing experiences at the national and regional levels

**NCCM’S LEADERSHIP THROUGH THE FGM FREE VILLAGE MODEL PROJECT**

Converging efforts in an effectively coordinated national framework

**Co-ordination Mechanisms:**

— Steering Committee chaired by NCCM bringing together key players (Donors and counterpart organizations)
— National FGM Taskforce (Non-governmental players)
— Policy Resource Group (governmental players)

**NCCM partnership with DAG and UNDP**
— 3 year program ending in 2006
— 60 villages in 6 governorates
— 12 focal NGOs: 2 per governorate
— A network of community leaders as the basis for local FGM taskforces
— Social marketing campaign: “The Girl is Egyptian”
— Village socio-cultural profiles
— Community initiatives
— Monitoring based on socio-cultural indicators
— Policy dialogue
— Support to national NGO networking
— FGM Free Village Model Kit

**NCCM’s Partnership with UNICEF**
— 5-year program ending in 2006
— 32 villages in Assuit and Alexandria
— Community mobilization influencing youth and influential leaders in 5 governorates
— Capacity building of governmental entities and NGOs
— Supporting the national dialogue through communication interventions
— Review of IEC materials and refinement of messages
— Mainstreaming FGM advocacy in ongoing UNICEF programs

**SOCIAL COMMUNICATION CAMPAIGN**

*Messages to be addressed*
— It is an obsolete social tradition
— Is not required by religion
— Does not control sexuality
— Does not impact hygiene
— Communication channels
— Communication resources group

**SCOPE OF VILLAGE PROFILES**

*Main Features*
— Human Development Indicators
— Leadership structure (formal and informal)
— Changing socio-cultural trends and popular tendencies
— Pressure groups
— Perceptions, rituals and patterns of FGM practice
— Gender relations
— Advocacy skills and capacity within the community
— Perceptions relevant to the status of girls and their rights
Development priorities, trends and ongoing development interventions

COMMUNITY SERVICES INITIATIVES

*Functional Literacy Classes*
- Family well being
- Communication skills
- Team organization
- Initiative Planning

*Family Counseling Services*
- Reproductive Health Services

**NCCM’s APPROACH IN MONITORING AND EVALUATION**

**Objectives**
- To measure the impact of activities implemented by both projects
- To assess the processes
- To determine the sustainability potential of projects’ investment in advocacy networks at the village, governorate and national levels
- To monitor indicators of socio-cultural change

**FEATURES OF PROGRESS IN COOPERATION WITH DAG, UNDP AND UNICEF**

- Launch of the communication campaign
- Initiation of village socio-cultural profiles
- Community Initiatives program to be launched by the end of the year
- Capacity building program to NGOs
- Opinion leaders survey
- Demonstration of success stories at the village level by NGOs
- Production of FGM Advocacy Kit
- Training and mobilization of religious leaders at the local level
- Introduction of socio-cultural indicators to monitor change of attitude within communities toward the practice
- National dialogue among policy makers

**EXPECTED IMPACT**

- Individual vs. community pressure
- National debate on FGM
- National reporting on FGM
- National experience on FGM
- Institutional Advocacy
- Supporting local initiatives
II. THE STOP FGM CAMPAIGN

DANIELA COLOMBO

President of AIDOS (Italian Association Women for Development), Italy

In the name of the organisation I represent, AIDOS – the Italian Association for women in Development – and the other partners of the STOP FGM campaign, No Peace Without Justice, the Egyptian society for The Prevention of harmful practices and seven other NGOs in Africa, I would like first of all to express my deepest gratitude to the First Lady, Ms. Mubarak, for having honoured us with her presence. I would like also to warmly thank Ambassador Moushira Khattab, for the support given to this expert consultation by the National Council of Childhood and Motherhood.

This meeting has been made possible through the generous contribution of many donors, which I would like to acknowledge with deep appreciation: the European Commission, UNDP, UNIFEM, the Open Society Institute, the designer Elsa Peretti, Alitalia and the Conrad Hotel.

Exactly fifteen years ago, in June 1988, AIDOS and the Somali Women’s Democratic Organisation had organized one of the first international Conferences on the subject of FGM in the Parliament House in Mogadishu, titled “Female Circumcision: Strategies to Bring About Change,” that saw the presence of the most important actors at that time involved in the struggle against this traditional practice. At that time, the issue of using the law to prevent and eradicate FGM was the theme of one of the working groups.

Some of the women who participated in that conference are here today and we are pleased to see that some of them now hold the position of ministers in their countries. Some others are no longer with us, but their daughters and sons are continuing the struggle. Many others have come on board and I am particularly glad that Emma Bonino is now among us.

In these fifteen years, much water has passed under the bridges. The agencies and funds of the UN system have taken position several times against FGM and through their activities have had a great impact on globalising the struggle.

Various international organisations, mainly the Inter African Committee, RAINBO, the Center for Reproductive Law and Policy (now CRR), and many national and local associations and government bodies have experimented with different research, training, information, and sensitisation methodologies so that now we may hear not only about their success stories, but also the difficulties they have encountered. I am pleased to see that their leaders are all here today and that we have left behind all misunderstandings and competitions that in the past have somehow undermined our struggle and that now we are all working for the same objective, each of us bringing our added value.

The project STOP FGM, of which this Afro Arab consultation on legal tools for the prevention of FGM is a component, has the aim of contributing to build and reinforce this
partnership and at the same time to stimulate African and Arab public opinion favourable to the abandonment of the practice, by contributing to the creation of an international front of actors fighting against FGM with shared approaches, strategies and contents.

We have created a web portal available now in English and French, that will also be available in Arabic very shortly, which has been set up and is maintained through a hidden online administration engine, directly by all our partners from Gambia, Mali, Burkina Faso, Egypt, Somaliland, Ethiopia, Kenya and Tanzania, which have been specially trained and have been given equipment for this task. The web portal includes among other information, a database of relevant actors, international, national and local organisations, international and national legal tools and plans of action, statements of personal commitment, bibliographies, training materials, and a press review of international news related to FGM which is updated on a daily basis.

It also contains the thousands of signatures from the International Appeal that was launched in Brussels in December last year, on Human Rights Day. This Appeal has been published by international and African newspapers. Many signatures are of eminent personalities in Africa, in the Arab States and in the western world, but for the first time a major effort has been done to involve the civil society of African countries as well.

These signatures will be handed officially by all the partners in the project to the Secretary General of the UN, on the occasion of the next Session of the General Assembly in New York.

In Tanzania, the NGO TAMWA, the Tanzanian Media Women’s Association, with our financial and technical backing, has launched the largest media campaign so far conducted in an African country, making use of all modern and traditional media. This two year campaign will be presented on the last day of the Conference as an example of the activities that have to accompany the enactment of the legislation to prevent FGM: news, features, reports for the printed media, weekly radio program spots, television talk shows, but also poetry and theatre plays to animate group discussions and meetings, together with IEC materials and training for media performers.

I wish the greatest success to this expert consultation and I am confident that the declaration that will be issued at the end of these three days of work will be a concrete instrument to guide legislators and governments in their future actions.

I would like to conclude this brief introduction to the STOP FGM project by citing the last lines of a poem which was declaimed by the female Somali poet, Dahabo Elmi Muse, during the closing ceremony of the Mogadishu Conference:

"And now hear my appeal!  
I appeal for dreams broken  
I appeal for my right to live as a whole human being  
I appeal to you and all peace loving people  
Protect, support and give a hand  
To innocent little girls who do no harm, trusting and  
Obedient to their parents and their elders  
And all they know are only smiles  
Initiate them to the world of love not to the world of feminine sorrow!"
III. LEGAL TOOLS FOR THE PREVENTION OF FGM IN EGYPT: A 20-YEAR OVERVIEW

AZIZA HUSSEIN

President of the Egyptian Society for the Prevention of Harmful Practices (ESPHP)

Fifty years ago, in 1954, I was initiated into the FGM debate without knowing it, through my participation in the UN General Assembly, 3rd Committee, whose agenda included at that time "harmful traditional practices," which did not mention FGM by name. Apparently, as it turned out later, WHO had brought the question out worldwide and urged governments to adopt clear policies to abolish female circumcision, as it was first called. Since then, WHO continued to lead national and international agencies in the fight against FGM. A WHO regional Seminar was held in Sharm El Sheikh Egypt three years ago. As to our NGOS in Egypt, they caught on to this issue in due time playing their traditional role of path finding and taboo breaking to pave the way for official programs.

THE NGO EXPERIENCE (1975 – 2000)

The International women’s Movement had begun to express concern with this issue, prompted by writings of Egyptian doctors abroad, particularly Dr. Nawal Saadawi. They began to bomb hard the Cairo Family Planning Association, which I have the honor of chairing, with questions regarding FGM. Our reaction at that time revealed our total ignorance. First, we did not think it had anything to do with family planning; second, we were under the impression that the practice was illegal. "FGM was abolished by law," we said. When urged by Fran Hoskens, the famous activist, to produce the text of the so-called law, we found to our surprise that there was no law, only a ministerial decree No 74 issued in 1959, an ambivalent one at that, which banned the operation in hospitals while recommending the superficial excision. In the meantime, clandestine operations in back streets abounded at the hands of unlicensed nurses, midwives and barbers – in full contravention of a general law forbidding surgical practice at the hands of unlicensed cadres. The last straw came when I received a communication from international feminist organizations asking me to join them in signing a statement addressed to Kurt Waldheim, the then UN Secretary General, asking him to take steps to eliminate female circumcision in different parts of the world. I politely declined to join the effort and decided to take responsibility for this issue inside my country, as an Egyptian citizen in charge of an NGO that had previously managed to break other taboos such as Family planning. FGM would be another similar challenge.

THE FIRST FGM SEMINAR

Taking advantage of the International Year of the Child in 1979, the Cairo FPA launched a Seminar entitled "the Bodily Mutilation of Young Females," aimed at investigating the question objectively and scientifically, through the participation of a high level inter-
disciplinary team, medical doctors, sociologists, researchers, religious leaders and feminist, groups etc... with the attendance of representatives of important national, regional and international organizations, and the inauguration by the minister of Social Affairs. The media was well represented and was surprisingly positive. We had no public backlash despite it being the first time that this question had ever been raised in public.

The conclusions of the Seminar are worth summarizing here because they are still relevant. Its 14 recommendations have been used to guide the program for years thereafter. “The practice of female circumcision pre-dated Islam and Christianity. There was no mention of it in any Sacred Books. It is practiced by Christians and Moslems alike in Egypt, but is unknown in other Moslem countries like Saudi Arabia. Where it is practiced, it is mainly motivated by tradition without any connotation of violence. In fact it is performed out of concern for the girl’s chastity and good name and to insure her eligibility for marriage. Nevertheless the Seminar ended with a call for a legislation to incriminate FGM, the first such forum to make an appeal to law.”

Subsequently a National Committee was formed composed of multi-disciplinary experts, including social, medical, religious and legal experts, which were later affiliated with the Inter-African Committee for the Elimination of Harmful Traditional Practices. Under its supervision, a full-scale program of information, education and training was implemented targeting special categories which have a critical influence on attitudes and behavior regarding this issue. These were identified as doctors, nurses, midwives, social workers, teachers, media, TV and Broadcasting personnel... A full-scale television and broadcasting program was launched for a few months. The impact was very promising but the sustainability of this program required more funds than were at our disposal. As to evaluation, it was mostly based on anecdotal evidence and some positive indicators of performance, but a proper scientific survey would have also required more funds than we could afford. For a long time the FGM project operated on a shoestring budget with volunteers supporting most of its activities.

THE FIRST NGO AGAINST FGM

In 1992 the first NGO against FGM was established as an offshoot of the Cairo Family Planning Project. It has been working zealously for over 10 years, collaborating with different government departments as well as with other NGOs. The legitimacy it gained through its registration under the law enabled it to work more effectively. The ICPD Forum gave it the chance to intensify its activities and to build coalitions with various national and international organizations in addition to former allies like the Population Action International which gave the first seed money, the Rada Barnen of Sweden, the Inter-African Committee, Ford Foundation etc... all of which gave it funding and valuable support. It later forged strong links with the NCPD FGM Taskforce and other national and international organizations, the Fertility Care Society, Caritas, CESS, the Population Council, CEDPA and NGOs in the Provinces etc. Because of the immensity of the task to be achieved, it became very clear to some of us that all these stakeholders should work together in harmony and in a complementary manner, in order to tackle this daunting problem comprehensively and
effectively. This fact became very clear in a Seminar set up by the Population Council held in the year 2000 to evaluate the impact of all these efforts and which brought all the stakeholders together. The National Council for Motherhood and Childhood promises to be a good umbrella to help coordinate and/or synchronize all FGM activities with the leadership of Mrs. Suzanne Mubarak.

**The Law as Seen by the Legal Member of the National Committee.**

Because of periodic appeals to the Law as a means of prohibiting harmful practices, our society decided to study this question through the Legal Member of our National Committee. Hence a study was undertaken at our request by Counselor Salah Eweis, entitled "Female Circumcision, Criminal and Civil Liability under Egyptian Law" which starts with the right to bodily integrity as a basic natural right which all the successive religious legislation have been keen to protect, with a view to maintaining the dignity of man, the most glorified of "God’s Creatures." Egyptian law regulates this protection by stipulating a series of penal codes which incriminate all acts considered an infringement of the human body, be it for men or women, young or old– starting with the simple infringement that leave no trace, i.e. light beating etc… and ending with intentional homicide and murder. This stand is obviously endorsed by all legislation world wide, says Counselor Eweis.

As regards Female Circumcision, the Counselor regards it as a case of infringement of the female body which inflicts an injury by will and intention, and results in depriving the female of a naturally functioning part of her reproductive organs, the responsibility and liability of the prime perpetrator, but which is also shared by the guardian of the child, be it a father, mother or grandparent. As such, it is considered a crime of intentional injury, punishable according to Article 241 and 242 of the Penal Code, in varying degrees according to the duration of the treatment. This does not apply to male circumcision, which he claims, is a very superficial excision and may have health or religious justifications.

In this regard, the Egyptian Court of Cassation decreed that if a person undertakes to give another person an unlicensed "medical" treatment, which infringes upon his or her physical integrity, here the basic conditions for a crime of intentional injury are realized according to the provisions of article 242 of the Penal Code. It is to be remembered that a doctor is legally authorized to perform operations according to specified rules and controls, the most important of which should be the intention to treat an illness, to perform a diagnosis or to remove or alleviate pain etc… This does not apply to female circumcision, says Counselor Eweis, because the consensus of the foremost medical authorities has been that a girl’s reproductive organ in its normal shape is not considered an illness nor is it a direct cause of illness or of pain, hence any infringement of that part of her body is not a medical treatment or a diagnostic search for a disease or the removal or alleviation of pain. This act therefore is completely outside of the boundaries of a doctor’s medical competence and authority and his performing it places him under the accusation of committing a crime of intentional injury for which he will be liable under Articles 241 and 242 of the Egyptian Penal Code in varying degrees according to the duration of the treatment. This applies to the medical doctor as well as to non-medical personnel. The latter are criminally liable on two counts, the inflicting of an intentional injury as well as practicing a “medical” procedure without license.
CONCLUSION

According to Counselor Eweis, it is clear enough that female circumcision is illegal under the existing law, a fact that should not require us to seek a special legislation to ban it. But no one seems to be aware of it, because not only is there a usual gap between law and its implementation, but this gap is aggravated by lack of social awareness about laws in general, and their social implications in particular. Furthermore, the cultural, historical and gender factors involved in the perpetuation of FGM seem to elude attempts at a clear legal resolution. At best, new laws serve to reinforce the work of activists and give them some moral authority in their effort to seek to influence a change in attitudes and behavior.

In the past for example, because of the taboos surrounding the subject of sex, there was no information in our cultural milieu even about the extent of its occurrence, compounded by our own misconception for a long time that there was a law prohibiting it. Nowadays it seems that because in our own awareness we did not link FGM with the penalty under Egyptian law, mentioned above by Counselor Eweis and applicable to any infringement on bodily integrity without health justifications, we did not diligently pursue this line in our lobbying efforts and instead, there have been periodic attempts to resort to some form of legal prohibitions or decrees within certain limits and boundaries (hospitals for example) targeting certain categories etc. Some of the NGOs, particularly in the FGM Task Force, while generally conscious of a generic law prohibiting FGM, have been supportive of the relevant draft decrees in their public advocacy programs and in their lobbying efforts in courts. This particularly applied to a decree issued by the Minister of Health and Population, Dr. Sallam, in 1997, which was the most comprehensive and straightforward decree to-date, completely banning FGM in and out of hospitals and was confirmed by court decision. The most important concern of NGOs had been the attempt by some physicians to “medicalise” the FGM operation in the name of health and/or religion.

In their lobbying efforts some NGOs have been researching and reformulating their advocacy messages according to different approaches: the medical, religious, legal, social, status of women, community participation etc…The FGM Task Force and the Fertility Care Society took the lead in investigating these questions. NGOs in general also probably need to research the impact of the law on the practice of FGM within a certain framework and the role of law in supporting or complementing social efforts aimed at the elimination of FGM. Within this exercise, it is pertinent also to investigate how much the law is perceived as a reflection of the will of the people as opposed to its being a top-down imposition. At the same time, we need to tackle perhaps the question of legal illiteracy among the lay public which is rampant, mostly because they feel they should leave the question to lawyers and wait until they get into trouble. Some NGOs as well as the National Council of Women have included in their programs citizenship education programs aimed at raising legal awareness of the public, in general, and of women, in particular. This we believe should include understanding of the simple citizen’s part in initiating law, following it up and moving to revoke or amend it when necessary. Ideally speaking, however, civil society should be able to resolve its problems outside of the courts.

In conclusion, laws apart, we need to undertake an intensive information education and communication program on all levels, aimed at eliminating FGM as a priority. Indeed we should make a sustained comprehensive effort to change attitudes and behaviour through
formal and informal education, particularly regarding the status of women in society which happens to be the prime objective of the National Council of Women, chaired by Mrs. Mubarak. For example the prevalent misconception that FGM will insure the girl's eligibility for marriage is based on a gender bias reflecting an inferior status of women in society. One of the arguments that impressed me most in one of the society's workshops was that "chastity has nothing to do with the organs of the body, but with the mind, which needs to be cultivated through good upbringing at home and education in school, only this will insure good conduct." Incidentally, this statement which was given by a traditionally clad female physician, in one of the FGM training sessions was later quoted in the New York Times by one of its reporters who attended the session in 1994.

Furthermore, the dissemination of information and knowledge about these issues on the Internet will serve to consolidate the movement nationally and internationally. We can now say that the taboo of silence on these issues has been broken, as manifested by the increased international interest in the FGM subject in the world at large and the consensus which has obviously been reached on the importance of maintaining human rights in our global village, which should not be violated in the name of traditions or other parochial considerations. In this connection we can say that Ignorance has been the main problem, Knowledge will be the solution. So let us make the maximum use of the age of information and communication technology to propagate knowledge and to "help make their world a better place."

Evidently many lessons were learned from our twenty years or more of experience – the first one being that the human approach in dealing with any developmental issue is indispensable. No technology is a substitute to the human element. We have to listen carefully and to give due respect to others, before involving ourselves with any project which is as sensitive as this one. Of course, funds are important to spend on issues like the media and we have lacked this financial capability despite a good start with media projects which could not be sustained. For example, we have undertaken some media pilot projects through cooperation with the Egyptian TV which resulted in the broadcasting of some 25 productions under the Channel III "Reportage" program, all of which are available in video tapes, and which could be used for future reference. We also have some indicators of performance in statistical terms from our training programs which could be useful in any future strategy. Finally we have an array of publications on several issues related to FGM, written by experts including the religious, medical, legal and social dimensions, published and distributed throughout the last twenty years.

We expect that the new era of collaboration with the National Council of Childhood and Motherhood will give a chance for all other dimensions of FGM to be tackled within a comprehensive national context.
IV. THE “ZERO TOLERANCE TO FGM” IAC PROGRAM

AMNA ABDEL RAHMAN

Vice President, Vice President of the Inter-African Committee Against Traditional Practices – IAC, Sudan

THE INTER-AFRICAN COMMITTEE FOR ZERO TOLERANCE TO FGM PROGRAM, 2003 to 2010

I have to give you a very brief introduction to this organisation. The IAC is an African non-governmental network. It has twenty-eight African national committees where FGM has prevailed and it has many affiliates from Europe, the US, Asia and other parts of the world. What is the Zero Tolerance program? It was initiated by IAC, proposed and implemented on the 6th of February 2003 in Ethiopia. Many NGOs at the international level, many donors, and many Africans participated in the contribution and the support of this conference. The conference’s goal was to invite private sectors, individuals who are interested in the abolition of FGM, many institutions and universities, and all the UN agencies to contribute together in the conference. There were more than 400 participants present at the conference, among them were the First Ladies of Burkina Faso, Guinea, Mali and Nigeria and many Ministers from Burkina Faso and other African countries. The European Parliament of the European Union, the African Union and the ECA also participated.

One of the major presentations was when the IAC national committee shared their best experiences on many projects, the challenges incurred therein, and how they met those challenges, changing the attitudes in many religious programs, so that people shared their ideas and approaches. Also, youth campaigns and training manuals produced by the WHO in the African region were shared, as well as tools for impact assessment to abolish FGM and the tools for data collection. IAC also presented their vast experience in the process indicators for interventions and behaviour change, which were developed recently and are now given in training to whomever works on FGM. The draft protocol to the African Charter of Human Rights and People’s Rights, on the Rights of Women and Children in Africa at the African Union level was also discussed thoroughly in that conference. UNICEF called for the government to fulfil their pledge to end FGM and for UNIFA support. Suggested methods to stop FGM were shared in that conference.

Now let us see the impact of the conference. The conference declared the 6th of February as an international day of Zero Tolerance toward FGM. I will take this opportunity to remind you that it is already declared and adopted, so the 6th of February is going to be the international day for it. The adoption of the common agenda for action on Zero Tolerance to FGM is an example of the joint collaboration agreed to during the conference. We need joint collaboration all over, out of Africa, in Africa, and we need to consolidate our efforts to put an end to FGM by the year 2010. The short-term objective of the Zero Tolerance to FGM program is to adopt a common agenda and to identify priority areas for intervention and the agreement on different approaches and modalities for co-operation. The long-term objective of Zero Tolerance is to see the end of FGM by the target date, decreasing the prevalence of the
practice and abolishing it completely. Finally, the proposed activity for the common agenda was operational research, which is very important. Without operational research, we cannot revise our strategies and approaches. The development and production of IAC materials, conduction of training and awareness campaigns to different target groups, holding training workshops for the circumcisers, mobilising traditional leaders and communities are all important in the struggle to stop FGM. A special program targeting religious leaders is becoming very vital as is media participation and the re-orientation of health personnel to stop FGM from being taught in medical training facilities. In Sudan, this is one of the things that we are fighting. We need to provide alternative income generation activities for TBAs (Traditional Birth Attendees), and we are moving our efforts now toward lobbying the government for legislation. We need to adopt an integrated approach involving all the stakeholders and I can tell you that from our quantitative and qualitative research, we have found fourteen negative consequences of FGM on women and the community as a whole. Time does not allow me to state them — we can discuss it in the group work — but indeed, there are fourteen negative consequences.

Monitoring and evaluation of the activities is also very important, and without monitoring and evaluation we cannot assess our work. The time frame set for this program is eight years, 2003 to 2010 and the key players, as my sister, Her Excellency Moushira said (and she had presented them very well), are very important. They are the same stakeholders here: government departments, WHO, all UN agencies, the EU and the African Union, and all the international NGOs who are partners in the implementation. The budget, or rather the estimated budget, is quoted at $15,528,800, in U.S. dollars. This is the amount projected for the eight year duration of this proposal. It has to be shared by the different stakeholders and whoever is interested in any part of it. So, for more details on who will do what and who the implementing agencies are, I have given you a copy of this information to be photocopied and sent to you, or you may contact the IAC website. Thank you very much.

V. USING LEGISLATION FOR THE PREVENTION OF FGM

1. CONSIDERATIONS IN DRAFTING AND IMPLEMENTING LEGISLATION TO PREVENT FGM

LAURA KATZIVE
Center for Reproductive Rights, United States

INTRODUCTION

While female circumcision/female genital mutilation (FC/FGM) has been the target of government action in some countries for several decades, it is primarily since the 1990s that governments have taken a legislative approach to stopping the practice. With some variations, this approach has principally entailed the assigning of criminal penalties to those
who perform, assist or solicit FC/FGM. As governments and advocates for women’s health and reproductive rights grow increasingly united in calls for legal measures prohibiting FC/FGM, the time is ripe for an evaluation of how these measures complement broader strategies to prevent the practice. It is also important to analyze the legislative approaches adopted to date in order to identify ways to optimize the law’s effectiveness while promoting and protecting the rights of women and young girls.

Part I of this background paper examines the role of law in preventing the practice of FC/FGM. It discusses the benefits of legislation, as well as some of the concerns that any legislator should consider when adopting a law specifically on FC/FGM. Part II provides an analysis of legislation adopted to date addressing FC/FGM. Following an overview of the types of legislative measures that have been adopted in African countries where FC/FGM is practiced, it discusses the common elements of most legal systems and considers the different approaches available to legislatures. It places special emphasis on criminal laws adopted to prohibit FC/FGM, highlighting the issues that governments should consider before adopting legislation of this type.

THE ROLE OF LAW IN STOPPING THE PRACTICE OF FC/FGM

Governments have increasingly adopted legislation to further efforts in the struggle to stop the practice of FC/FGM. Of the 28 African countries where FC/FGM is prevalent, 15 have at least one specific law or regulation addressing the practice. Twelve of these countries have criminal laws, three have constitutional provisions, and two have child-protection laws prohibiting it. It is significant that few of these measures pre-date 1994, the year of the International Conference on Population and Development in Cairo. At that conference, FC/FGM received a great deal of attention and governments agreed to take action to stop the practice.

Few advocates for legislation prohibiting FC/FGM would argue that law alone can change individual behavior. The effectiveness of any law will depend upon a number of factors, including the strength of enforcement mechanisms, the importance of formal law in norm-setting and social control, and the extent to which legal measures are accompanied by other manifestations of government commitment to stopping a particular practice. Nevertheless, legal measures specifically condemning and prohibiting FC/FGM can help strengthen the position of those advocating for change. This section considers the manner in which legislation addressing FC/FGM can contribute to efforts to prevent the practice. It also considers barriers to successful implementation of such legislation.

A. The benefits of a legal approach

Where measures are enforced, they may create incentives for change in individual or communal behavior. The most obvious of such incentives is the avoidance of punishment – in the forms of imprisonment, fines, social stigma or professional sanctions. Practitioners of FC/FGM who learn that their actions may be punishable under the law may cease their activities for fear of being caught and prosecuted. Parents may dread the potential consequences of attempting to have their daughters circumcised illegally. In addition, under certain conditions, law may have a moral force that is persuasive to members of society. The sheer desire to be law-abiding may be enough to persuade some individuals to abandon a
practice that has been criminalized by the state.

Legal measures may also act as educational tools, publicizing information about the risks associated with the practice of FC/FGM. The passage of a law criminalizing FC/FGM creates an opportunity for media coverage of the issue and opens the door for wider discussion of the harmful nature of the practice. Likewise, a government’s condemnation of the act may lead some individuals to seek out more information themselves. In addition, the passage of legislation may facilitate communication within families across generations, providing an occasion for those who oppose the practice to broach the subject with more traditional members of the family. Finally, where a prohibition against FC/FGM is placed within a broader bill on, for example, women’s reproductive and sexual health, the law can help shape people’s perception of the practice. Such bills send the message that the right to be free from FC/FGM is an essential reproductive right, based upon women’s basic right to reproductive and sexual autonomy.

Notwithstanding the increasingly united call to address FC/FGM by legislative means, lawmakers contemplating a specific legal approach to FC/FGM face several challenges. The following subsection considers some of these challenges and discusses means of addressing them.

B. Barriers to implementing FC/FGM laws

1. Women’s low social status
   Legislation targeting FC/FGM is likely to have little positive effect in a legal context in which women’s rights are not recognized or are explicitly undermined. Governments should ensure that they have ratified the major human rights treaties guaranteeing women’s rights, including the Convention on the Elimination of All Forms of Discrimination against Women. They should then bring all national-level laws into conformity with the rights guaranteed in these treaties.

   In reforming national-level laws, it is critical that governments modify laws that discriminate against women. Constitutions should be unambiguous in securing the equality of women and men under the law in all matters, protecting the rights of children and guaranteeing women and children protection against harmful practices. The constitutions of several African countries, including those of Kenya and Gambia, explicitly declare that guarantees of non-discrimination are not applicable in matters governed by customary law. Because customary law frequently governs such matters as marriage and inheritance in Africa, a government’s refusal to enforce women’s equality when customary law is at issue may result in a perpetuation of conditions that lead to women’s subordination. Women’s weak social standing, in turn, reinforces their inability to reject FC/FGM. In matters affecting individual rights, constitutions of all countries should declare their supremacy over customary and religious law. Such explicit statements upholding the primacy of the constitution and guarantees of individual rights are found in several constitutions, including those of Eritrea, Ethiopia, Gambia, Ghana, Niger, Nigeria, and Uganda. In South Africa, a country not otherwise discussed in this paper, customary law may only be applied subject to the constitution and to legislation that permits its application only when it is not “opposed to principles of public policy and natural justice.”
In addition to removing formal discrimination from the constitution and other national laws, governments should adopt affirmative measures aimed at promoting women’s rights. Women cannot abandon the practice of FC/FGM until they have the information, material conditions, and skills to enable them to do so. In countries in which FC/FGM is seen as a prerequisite for marriage, women and girls whose economic security depends upon their ability to be married have little choice but to undergo FC/FGM. Governments should adopt measures enabling women to raise their economic, social and political status, including ensuring that both women and men have the right to work and the right to equal pay for equal work. Governments also have a responsibility and obligation to support women and encourage their participation in all aspects of community life. Barriers to women’s ability to access credit and training should therefore be addressed. Governments should ensure girl’s equal access to education by allocating sufficient resources and adopting gender appropriate policies. Governments should also work to ensure women’s participation in public office and decision-making. Finally, where popular knowledge of the law and government is limited due to high levels of illiteracy and remoteness from urban areas, national campaigns should be instituted to disseminate information about the legal protections that do exist, particularly those aimed at upholding women’s rights.

2. Resistance at the community level

A law condemning FC/FGM can only have weight where the practice’s harmful effects are understood and recognized at the community level. In kinship-based societies, behavioral change at the individual level is difficult to achieve without the approval of the community. In such a context, using the law to subvert the demands of one’s own relatives or community members may cause graver social and economic repercussions for the person resisting FC/FGM than for the person trying to impose it.

It is therefore critical to ensure that a broader governmental strategy which includes outreach and awareness-raising programs aimed at individual behavior and social norms, is in place prior to any national-level criminalization of the practice. Legislation that targets FC/FGM may itself call for such measures prior to enforcement of criminal sanctions. Governments should be devoted to reaching out to those communities that practice FC/FGM. This outreach should aim to: promote human rights and demonstrate the connection between human rights and FC/FGM; focus on the needs of women and girls while involving the entire community; and emphasize the impact of FC/FGM on the lives of women, girls, and members of the community-at-large. Governments should rely on the assistance of NGOs, local leaders, and health care professionals to create and to provide this information in an effort to generate social dialogue. Moreover, government resources should support the dissemination of accurate information about FC/FGM and women’s health and rights, enable people to access services, and support skills development and other training programs.

At the same time, as noted above, specific legislation that is appropriately and effectively publicized can itself serve as an educational tool to inform communities, individuals, members of the judiciary and law enforcement about the practice, its consequences, and available recourse. Well-disseminated laws not only inform potential perpetrators about what behavior is considered criminal (putting them on “notice”), but they also communicate that the government has taken a stance against the practice.

3. Vulnerability of minority groups

When FC/FGM is common among one ethnic group or community
and not the majority, enacting and applying a criminal law could fuel ethnic tensions. In countries in which FC/FGM is practiced primarily by a minority ethnic group, criminal laws prohibiting FC/FGM may be perceived as a pretext for harassing or persecuting members of that group. This may particularly be the case when criminal legislation is enacted in the absence of concerted governmental efforts to reach women and girls through outreach and empowerment programs. Governments should show a consistent pattern of interest in eliminating FC/FGM as a means of improving the lives of women and girls. In countries in which minority rights are vulnerable, governments should take steps to show that their actions are not motivated by an interest in disrupting the lives of members of a minority ethnic group. Such steps may involve increased consultations with minority organizations and enhanced appropriate outreach programs, as well as allocating resources to community groups – particularly women’s groups. It is advisable that lawmakers specify within legislation that efforts to prevent FC/FGM should comport with guarantees of minority rights and general protections against non-discrimination.

4. Weak enforcement mechanisms

In some countries, law enforcement mechanisms are weak and lack resources. Where FC/FGM is widely practiced and approved by most members of society, there are likely to be few cases brought to the attention of the authorities. The burden thus falls on law enforcement officials to investigate and uncover evidence of the practice. The logistical difficulties of performing such investigations, particularly in rural areas, are obvious. Adopting criminal legislation with no means of enforcing the law risks engendering disrespect not only for that measure, but also for the rule of law in general. In the context of FC/FGM, some have argued that criminalizing the practice will do no more than drive it further underground.

Under such circumstances, even occasional enforcement, if highly publicized, may be sufficient to send the message that those who practice FC/FGM incur criminal liability. In all cases, it is important that enforcement of any kind be accompanied by public education informing people that a law criminalizing FC/FGM has been adopted. To date, while enforcement of legal measures aimed at stopping the practice of FC/FGM has been uneven, news reports of arrests in several countries with legislation criminalizing FC/FGM, including Senegal and Ghana, have received international attention. There have also been scattered prosecutions for FC/FGM in cases where the girl undergoing the procedure died as a result, as in Egypt and Sierra Leone.

5. General denial of reproductive health care

Governments should bear in mind the link between the practice of FC/FGM and the need for reproductive health services for all women. First, where such services are lacking, women have less information about their own reproductive health. Women who understand the harmful health consequences of FC/FGM may be less likely to undergo the procedure or encourage their daughters to do so. Second, women who have already undergone FC/FGM have the greatest need for medical attention, particularly during pregnancy, childbirth, and the post-partum period.

Legislation addressing FC/FGM should therefore be accompanied by measures to ensure women’s access to reproductive health care. An example of such an effort is Togo’s legislation prohibiting FC/FGM, which takes special note of these health needs and directs public and
private health facilities “to ensure the most appropriate medical care to the victims of female genital mutilation arriving in their centers or establishments.”

**MATTERS TO CONSIDER IN LEGISLATING AGAINST FC/FGM**

The discussion in Part II of this paper considers the elements of legislation aimed at stopping FC/FGM. It provides a brief background on legal systems generally and then reviews the types of legal measures that can be employed to address FC/FGM, with a particular emphasis on laws that assign criminal penalties for the practice of FC/FGM.

**A. Background**

1. Legal measures and their hierarchy

   Legislators should consider what type of legal measure is an appropriate vehicle by which to address the practice of FC/FGM. Legal approaches to FC/FGM are, broadly speaking, of three types: constitutional, statutory, and decreed or regulatory. Generally at the apex of a country’s legal system is a written constitution, which represents the law of highest authority. All legislation and government action should conform to the norms established in the constitution. Adopting amendments to the constitution is generally a heavily political process, requiring the broad agreement of various constituencies.

   Codes and statutes are also adopted via the political process with the approval of the parliament, or legislative branch. Like constitutional amendments, though to a lesser degree, they reflect political, and usually popular support, which often signals some receptivity to the substance of the legislation and its implementation.

   In contrast, a ministerial ordinance, policy, or regulation, which tends to focus on a specific issue, is usually drafted and adopted by the responsible ministry or bureau in a relatively closed and swift process. Nearly every country surveyed has issued some type of policy addressing FC/FGM. A new minister or administrative body can easily revoke such policies. Many policies, however, are sustained over time and even strengthened by subsequent administrations. For example, Mali’s strategy on FC/FGM initially consisted of a multi-stakeholder five-year plan of action (1998-2002) extended to 2007. It has recently been bolstered by a legal ordinance setting out a specific national program designed to stop the practice.

2. Federal versus state law

   Where a country’s constitutional structure provides for governance at the sub-national level, an additional consideration is whether adopting local or state legislation is preferable to a federal or national law. Depending on a country’s political stability, social agenda priorities, religious, ideological or cultural divisions, a localized process may prove more or less controversial than a national-level effort. For example, faced with tremendous political hurdles at the federal level, activists in Nigeria advocated for state-level laws. It is important to note that national-level legislation prohibiting FC/FGM may co-exist with legislation at the state level, as is the case in the United States. In some cases, state legislation might complement national-level criminal sanctions by calling for additional outreach programs and provider training.
B. Elements of a Legislative Approach

Provisions with general applicability to the practice of FC/FGM can be found in the constitutions of each of the 28 countries where the practice is prevalent. All of these constitutions enshrine the equality of the sexes, as well as guarantee the right to life and physical integrity. Addressing FC/FGM with greater specificity requires a careful evaluation of a number of different factors. This subsection discusses the different approaches governments may take to legislating on FC/FGM and points out considerations for each approach.

1. Constitutional Reform

Constitutional protections against practices that are harmful to women and girls have been adopted in Ethiopia, Ghana and Uganda. The Constitution of Ethiopia guarantees women protection from “harmful customs.”\(^{13}\) It provides that “[l]aws, customs and practices that oppress women or cause bodily or mental harm to them are prohibited.”\(^{14}\) The Constitution of Ghana provides that “[a]ll customary practices which dehumanize or are injurious to the physical and mental well-being of a person are prohibited.”\(^{15}\) It states further that “traditional practices” injurious to peoples’ health and well-being shall be abolished.\(^{16}\) Uganda’s Constitution declares that customs or traditions that are “against the dignity, welfare or interest of women or which undermine their status” are prohibited.\(^{17}\) In addition, the constitutions of a number of countries explicitly protect the rights of children.

Constitutional measures that uphold the rights of women and girls to be free from FC/FGM can shape governmental responses to the practice. The legal effects of constitutional protections vary according to each country’s legal system. In some countries, constitutional provisions provide legal remedies for women and girls whose rights have been violated. In addition, in many countries, a judicial body might have the power to strike down laws and policies that are inconsistent with such a protection. Finally, a provision of constitutional status may guide members of the government in their drafting and implementation of law and policy. Whatever the legal significance of a constitutional provision condemning FC/FGM, it would represent a clear government commitment to stopping the practice and would give weight to a developing movement.

2. Criminal Legislation

In most countries, criminal or penal provisions ban intentional injury, wounding or mutilation, often increasing penalties when the crime is committed against minors. Such provisions may be applied to prosecute the practice of FC/FGM. In the absence of specific legislation, however, criminal laws against bodily injury are rarely invoked or interpreted to cover FC/FGM.\(^{18}\) This subsection is based upon an analysis of criminal legal measures specifically addressing FC/FGM adopted in 19 countries in Africa and around the world.

a. What act is prohibited?

i) Definition

Governments that elect to enact legislation specifically criminalizing FC/FGM should bear in mind that FC/FGM occurs in several different forms. Penal laws should therefore state clearly whether all procedures commonly referred to as FC/FGM are prohibited under the
law. Legislation can achieve such clarity in one of two ways. Drafters may adopt an “inventory” approach, listing the various types of FC/FGM that are prohibited. Alternatively, they may adopt a “blanket” approach, prohibiting all forms of FC/FGM. Both approaches risk some degree of ambiguity. The former creates a possibility that one form of FC/FGM will be left unnamed, thereby creating a loophole for some practitioners. The latter, on the other hand, leaves open the possibility of disagreement over which practices constitute FC/FGM. For example, some practices of FC/FGM do not involve cutting, including a custom in Nigeria of “deadening feeling and retarding growth” of the clitoris by use of hot compresses on female infant’s genitals. Whether or not this practice would commonly be understood to be prohibited under a general ban on FC/FGM is open to speculation.

Among the laws that have been enacted to address FC/FGM in African countries, the degree of specificity varies substantially. The laws enacted prior to 1990, namely those of the Central African Republic and Guinea, merely state that the practice is prohibited and assign a penalty. Among the more recently enacted laws, those of Djibouti and Tanzania follow a similar model, stating only that FC/FGM is prohibited and subject to penalties. The laws of Burkina Faso and Ghana are more complex. Both attempt to define precisely the behavior that is prohibited. Ghana’s Criminal Code, for example, specifically prohibits the excision or infibulation of any part of the labia minora, labia majora and the clitoris and the terms “excise” and “infibulate” are explicitly defined.

In addition, a number of laws, such as that of Senegal, assign criminal penalties to one who incites or instructs another to perform FC/FGM. Canada, New Zealand, and Sweden also prohibit arranging for the illegal practice of FC/FGM in a country in which the procedure is not prohibited.

Benin and Burkina Faso explicitly made it a crime for a person with knowledge that FC/FGM has occurred, to fail to report the act to the proper authorities. Benin’s law, which requires that supervisors of health care facilities provide appropriate care to women who have undergone FC/FGM, expressly demands that such personnel report FC/FGM cases to law enforcement authorities. Mandatory reporting requirements are troubling from a legal perspective, and may also prove to undermine broader government objectives. The legal concern raised by such requirements relates to a patients’ right to confidentiality in the use of health care services. Requiring health care providers to violate their basic duty to maintain provider-patient confidentiality is a breach of universally recognized principles of medical ethics. The practical effect of such a provision is likely to be greater hesitation on the part of parents and other individuals to seek care for girls who are suffering from complications related to FC/FGM. To do so would be to make oneself vulnerable to criminal prosecution. Girls and young women themselves may avoid seeking care for fear of subjecting parents or loved ones to arrest and prosecution.

ii) Who is subject to punishment?

In keeping with the requirements of the Child’s Rights Convention, “the best interests of the child” should be the guiding principle in formulating the law. Laws that provide criminal sanctions for parents who procure FC/FGM for their daughters may create undue hardship for the girls who have undergone the procedure. Long prison terms for parents of young children, involving separation of members of a family, can have severe effects on the emotional lives of the children involved. Governments should consider either assigning criminal sanctions only to the practitioners of FC/FGM themselves or assigning lighter
penalties to parents than to practitioners.

All laws providing a basis for prosecution in cases of FC/FGM potentially impose liability upon parents who procure FC/FGM for their daughters. The laws of several African countries, including those of Burkina Faso, Senegal, and Togo, explicitly apply to parents and family members, as well as to practitioners of FC/FGM. The law in Côte d'Ivoire punishes the relatives “by blood or marriage” (to the fourth degree) of the victim who have solicited FC/FGM or who did not report a known imminent case to the authorities. Other laws render parents and family members guilty under general legal principles of accomplice liability, according to which anyone who procures the procedure or otherwise cooperates with the practitioner could be prosecuted.

Even where laws do potentially subject parents to prison sentences, judges may, in their discretion, elect not to impose such penalties on parents who have been convicted in cases of FC/FGM. In France, one of the few countries to have prosecuted parents for procuring FC/FGM for their daughters, the result of most prosecutions has been that convicted parents have not been assigned criminal penalties. In the most recent case of this type, for example, a practitioner of FC/FGM was sentenced to eight years in prison for performing the procedure on 48 girls. The 27 parents who were tried as accomplices received suspended sentences from three to five years.

iii) Consequences of “victim’s” consent

Governments should consider whether there are any circumstances under which FC/FGM should not be considered a crime. In particular, governments may wish to recognize an exception to a prohibition of FC/FGM when a woman who undergoes the procedure has given her informed consent. Informed consent, according to the United Nations General Assembly, is consent to a medical intervention that is “obtained freely, without threats or improper inducements. . . .” Prior to giving consent, the patient must be provided with “adequate and understandable information in a form and language understood by the patient” on such matters as alternative treatments and “possible pain or discomfort, risks and side-effects of the proposed treatment.” Informed consent thus requires that a woman be free from coercion and that she have adequate information in order to make her decision. Often, there is a presumption that to provide informed consent, a woman must have reached a minimal age (18 years of age in many countries). Where requisite conditions exist, laws should respect women’s autonomy in making decisions about their bodies.

In many contexts, however, it may be difficult to ensure the conditions that will enable girls and women to give their informed consent. Children will generally not have the capacity to make a decision freely, with full understanding of the health consequences of their decision. Enabling women and girls of any age to reject FC/FGM requires profound social change resulting in equal access to educational and economic opportunities. Because women may not be empowered to refuse FC/FGM, some women’s groups have advocated that FC/FGM should be a crime when committed even upon a consenting, adult woman. Governments should take these concerns into account when formulating criminal laws that address FC/FGM. At the same time, they should strive to create the conditions under which women will be free to reject FC/FGM in the absence of criminal sanctions.

Criminal laws addressing FC/FGM have generally not recognized circumstances in which a woman is deemed to have the capacity to consent to undergoing the procedure. Only Canada, Kenya, Tanzania, and the United States have limited their prohibitions of FC/FGM to
procedures performed upon a child under the age of 18. The Kenyan and Tanzanian prohibitions of FC/FGM are incorporated into criminal provisions pertaining to children which both laws define as persons under the age of 18. Implicit in these laws is an assumption that by attaining the age of 18, a woman is in a position to consent to FC/FGM in the absence of coercion and with full understanding of the procedure’s consequences. What remains in question is whether women will be given the information and life choices necessary to abandon FC/FGM or whether the force of cultural norms and lack of economic and legal autonomy will prove stronger.

On the extreme end of this debate are two Nigerian states that have passed anti-FC/FGM laws that punish the “female who offers herself” for circumcision or genital mutilation, the practitioners, and parents and guardians, regardless of whether the woman consents to the procedure. Thus, not only does an adult woman’s consent not exempt the perpetrators of FC/FGM from criminal liability, the consenting woman herself is subject to prosecution.

b. Criminal Punishment
Countries that have addressed FC/FGM in criminal legislation have assigned widely varying penalties to punish the practice. Kenya’s law calls for a relatively light maximum sentence of 12 months in prison, while Tanzania’s law imposes a minimum prison sentence of five years. The severity of sentences may reflect governments’ view of the degree to which FC/FGM is accepted by society at large. In national contexts in which FC/FGM is widely practiced and not viewed as a serious infraction, legislators may anticipate courts’ unwillingness to convict practitioners of a crime carrying severe punishments. On the other hand, where only a minority of the population practices FC/FGM, popular sentiment against the practice may be sufficiently negative that courts will be willing to convict practitioners and impose severe minimum sentences. It is noteworthy that Tanzania, with its severe criminal penalties, has an FC/FGM prevalence rate of only 18%.

A number of laws note aggravating circumstances that give rise to elevated penalties. When the practice results in death, the prison sentence provided for in Togo’s law, for example, goes from a maximum of five years to a maximum of ten. It is also not uncommon for laws to assign greater penalties to members of the medical or paramedical professions. In Burkina Faso and Senegal, such individuals are assigned the “maximum” penalty for performing FC/FGM. Provisions such as these reflect governments’ condemnation of the “medicalisation” of FC/FGM, that is, the practice of FC/FGM in hospital or clinical settings by trained members of the medical profession. While medicalisation of FC/FGM reduces many of the health risks associated with the practice, the underlying violations of women’s rights – their rights to the highest attainable standard of health, bodily integrity, and non-discrimination – are no less undermined.

Finally, a number of laws punish recidivists more severely. Under Togo’s criminal law, for example, penalties are doubled for repeat offenders. Nigeria’s Cross Rivers State law prescribes imprisonment of two years for a first-time offender and up to three years for each subsequent offense. Such provisions have the effect of punishing regular practitioners of FC/FGM more severely than, for example, individuals implicated in a one-time circumcision of a daughter or grand-daughter.

3. Civil actions
All legal systems distinguish between civil and criminal actions. Criminal offenses are often viewed as violations against the community and the state. Civil law addresses the wrongs suffered by private individuals and generally covers a greater range of topics than criminal law, including torts, breached contracts, constitutional challenges, and family law adjudications. Administrative and regulatory law constitutes another, often separate, body of law.

In countries with adequate mechanisms for adjudicating civil claims and enforcing judgments, FC/FGM can be recognized as an injury that gives rise to a civil lawsuit for damages or other remedies. Girls and women who have undergone FC/FGM can seek money damages from practitioners or, theoretically, from their parents. Such lawsuits would have a long-term effect of deterring individuals from performing or soliciting FC/FGM. Other procedures, such as injunctions or stays, may be available to prevent the procedure from occurring in the first place. While civil legal actions are a potentially effective means of influencing individual behavior and protecting girls and women from FC/FGM, such mechanisms have not consistently been utilized.

There are scattered reports of instances in which civil remedies have been employed to sanction or prevent the practice of FC/FGM. In all of these cases, no specific criminal law had been adopted. For example, in Liberia in 1994 a Grebo girl forced to undergo the procedure took legal action against the offending FC/FGM practitioner, who was ordered to pay $500 (US$11.75) in compensation for the girl’s injuries. Another successful litigation took place in Kenya, prior to the adoption of the Children Act, which specifically outlaws the practice. In 2000, the Iten magistrate, northwest of Nairobi, issued a historic permanent injunction to prevent a father from coercing his two adolescent daughters into undergoing FC/FGM. Using general legal principles, the magistrate ruled that “[FC/FGM] is an illegal kind of practice because it is repugnant to morality and justice. The practice also violates human rights as stipulated in our constitution.”

At least three differences between civil and criminal law can influence the decision whether to choose either types of measures, or a combination of both. These differences center on the party responsible for bringing claims, the burden of proof, and the outcome for the perpetrator and the victim.

a. **Who may bring claims**

While criminal cases must, with some exceptions, be carried out by an agent of the state, such as a public prosecutor, civil cases are brought by the individual (or a person authorized by her) who claims to have been wronged. Consequently, in states with criminal laws prohibiting FC/FGM, the local prosecutor wields control over whether a law will be enforced in a particular instance. The prosecutor has the discretionary power to decide whether the facts of the case merit prosecution, including whether the violator and the act fall under the definition of the law, and whether enough evidence is available to prove guilt. Therefore, while criminal laws bear the official stamp of state protection and prosecution, their enforcement relies heavily on prosecutors’ and judges’ discretion in initiating and managing cases.

In civil actions, individuals seeking redress for an actual or potential injury lack the status, clout, resources and access to information available to a public prosecutor mounting a criminal case. In addition, most individuals at risk of FC/FGM are adolescent girls who may be unable to navigate a complex legal system, gather evidence against their perpetrators, or...
hire qualified lawyers. As minors, they may face intimidation and pressure from family and community members not to bring a case. Moreover, under some legal systems, minors lack the ability to bring a suit in court. In such situations, they may be required to authorize an adult to bring a case on their behalf. While some civil systems explicitly allow adult third persons to bring a case on behalf of a child or minor in need of protection, it is questionable whether adolescent girls subject to FC/FGM have access to a trusted adult or guardian willing to take up their cause.

In considering which approach is preferable, policymakers should keep in mind that most of the girls and women seeking protection and/or redress may wish or be forced to return to their homes and communities. It is therefore important to consider what approach would best enable these girls and women to obtain relief without antagonizing and alienating family and community members with whom they reside.

b. Burden of proof
Perhaps a less critical consideration is the differing evidentiary burden tied to civil and criminal laws. In most Commonwealth systems, the standard of proof in criminal cases is higher (e.g., beyond a reasonable doubt, or near certainty) than in civil cases (e.g., on the balance of probabilities, or preponderance of the evidence, or 51% probability of guilt). However, given that in a civil case the plaintiff - often a minor - must prove the guilt of the other party, even the lower standard of proof may be difficult to establish.

c. Outcome for perpetrator and victim
Finally, the type of “punishment” or “remedy” available also merits consideration. Criminal measures subject violators to punishment, such as imprisonment, or a criminal fine paid to the state. These measures are meant to “penalize” and “punish.” In contrast, civil measures provide for “remedies” – an outcome designed to remedy the wrong inflicted on the individual. Civil remedies include compensation to the victim (e.g. “damages” from the harm, which may include damages for “pain and suffering,” physical and mental distress), and protection orders or injunctions ordering the other party to refrain from carrying out or continuing to carry out the alleged wrong. Civil laws do not carry an imprisonment sentence.

4. Regulatory and disciplinary measures
Regulations passed and implemented by licensing authorities regulate the practice of a profession and require the licensed practitioner to maintain certain standards of competency and fitness. Lawmakers considering a legislative approach may wish to consider and incorporate existing professional standards, including codes of ethics, into new laws. While legislation can apply to all potential perpetrators, professional and regulatory measures only cover registered members of that profession, such as medical providers or traditional healers.

Medical ethics standards should make it clear that the practice of FC/FGM upon children or non-consenting women violates professional standards. Medical practitioners who engage in the practice should be subject to disciplinary proceedings and should lose their licenses to work in the medical field. In Egypt, a Ministry of Health decree, upheld by the highest administrative court, has declared FC/FGM an unlawful practice of medicine, thereby making practitioners susceptible to criminal prosecution. In the Sudan, government health
authorities have sanctioned traditional birth attendants and village midwives who participate in FC/FGM by confiscating their midwifery kits and placing them under close supervision.\textsuperscript{44} The medical licensing and disciplinary bodies of Denmark, France, and the United Kingdom have declared that physicians who practice FC/FGM may lose their licenses to practice medicine.\textsuperscript{45} Notably, some criminal laws contain provisions on professional discipline. However, conduct that violates regulatory and disciplinary measures need not also be a breach of criminal law. Such measures may stand alone or provide for penalties to supplement those defined in criminal law. For example, in 2000, Ghana passed the Traditional Medicine Practice Act, which establishes a council empowered to regulate the registration and licensing of traditional healers.\textsuperscript{46} Under the act, the council may revoke, suspend or refuse renewal of a license to practice when the practice constitutes a “risk to public health, safety or is indecent.”\textsuperscript{47} Though addressing a different harmful practice, the Medical and Dental Council of Nigeria, which accredits medical practitioners, announced that any medical practitioner who amputates human hands or legs for non-medical purposes shall lose his or her license.\textsuperscript{48}

5. Child Protection Measures

Most industrialized countries, and some African countries, have child-protection laws that could potentially be applied to prevent girls from undergoing FC/FGM. Child-protection laws provide for state intervention in cases of child abuse by a parent or guardian. Unlike criminal laws, child protection laws are concerned less with punishing parents or guardians than with ensuring that a child’s interests are being served. These laws provide mechanisms for removing the child from his or her parent or guardian when the state has reason to believe that abuse has occurred or is likely to occur.

A number of countries, such as the United Kingdom, have declared the applicability of child protection laws to FC/FGM. State authorities may thus remove a girl from her family if there is reason to believe that she will be subjected to FC/FGM. Authorities in the United Kingdom may also prevent a girl from being removed from the country if there is evidence that the girl will likely undergo FC/FGM in another country. Note that because FC/FGM is not an indication of on-going abuse, child protection measures are best employed as a means of preventing FC/FGM, not as a means of safeguarding children once FC/FGM has occurred. Whether any such measures would be appropriate in the legal contexts of the African countries in which FC/FGM is prevalent should receive special consideration.

CONCLUSION

This paper has attempted to summarize the principal considerations for policymakers taking a legislative approach to preventing the practice of FC/FGM. It is premised on the view that law can and should play a role in improving women’s status and shaping social norms to respect women’s autonomy and bodily integrity. Examining FC/FGM-related legislation within its social and cultural context, the paper supports a holistic and multi-strategy approach to preventing the practice. Such an approach should focus simultaneously on promoting women’s human rights, reaching out to communities, protecting members of minority groups, supporting governments’ capacity for law enforcement, and ensuring women’s access to the full range of reproductive health services.

The paper also provides an analysis of the types of legal strategies available to
policymakers, examining elements of the approaches taken to date in a number of African states. It recommends broad constitutional protections proclaiming women’s equality and their right to be free from harmful practices such as FC/FGM. Where criminal legislation is adopted, policymakers should consider how they wish to define the crime of FC/FGM, who they wish to punish, the effect of a woman’s consent to the act, and the desired severity of criminal punishment. Civil actions provide an alternative to criminal law enforcement, and may be used effectively to deter FC/FGM or prevent the practice by court order. Finally, the paper considers how regulating the health care professions can prevent medicalisation of FC/FGM, and how child-protection mechanisms may be used to prevent the practice under some circumstances.

2. LEGISLATION AS A TOOL FOR BEHAVIOURAL AND SOCIAL CHANGE

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For many years, activists seeking ways to stop the practice of female circumcision (FC), or female genital mutilation (FGM), have wondered about the possible role of law in combating this deeply rooted and socially sanctioned violation of girls. Two competing instincts were constantly at play. On the one hand there was a strong belief that passing legislation on its own cannot possibly dissuade the public away from a practice that has long been used, symbolically and physically, to curb and control women’s sexuality. On the other hand there was the desire to bring the weight of the modern state, and its legal system, to bear on the shaping of a new national consensus to protect girls and their bodily integrity. Some of the questions raised over the years are:

1. Should we lobby for new legislation to criminalise FC/FGM or will such legislation only manage to drive it underground?
2. Is passing new legislation even necessary in countries where child protection and prohibition of grievous bodily injury laws already exist?
3. Is passing a law against FC/FGM desirable in a context where citizens (both men and women) have few rights and/or in law enforcement environments with poor resources, not sensitive to women’s rights and easily corruptible?
4. Is it appropriate to speak of individual (girls’) rights under the law in kinship-based economies the same as in modern free market economies?
5. Should we be creating a situation where members of a family or a community are encouraged to report a criminal act perpetrated by their own people thus taking the risk of fracturing important social and economic units and alienating the dissenting members?
6. Have we learnt any lessons on the role and usefulness of anti-FGM legislation passed in the West and those passed in Africa?
7. When is passing a law a legal measure, an advocacy tool, or a political act?
8. Is passing prohibitive legislation desirable in all countries at any time or should this be strategic as to the timing of the legislation and activities surrounding their introduction?
These and many more questions need to be asked, researched and answered as we struggle to find the appropriate role of legislation in changing behaviours and practices that are deemed unnecessary or harmful to society. In the case of FGM there has not been enough thinking, research and analysis on the role of the law in stopping the practice in the rush to pass laws in as many countries as possible. A previous effort to gather and analyse the content of the emerging anti-FGM laws in Africa and in the West discussed the need for more understanding of the complexity of interaction between legal change and social, political and economic realities (Rahman and Toubia Zed Press 2000). This paper reflects on what we know of what fuels the continuation of the practice in order to foresee whether criminalising the act will be effective or will be, at best, ignored or at worst be counter productive to the objective of protecting women and girls against violation.

As professionals, activists and policy makers we condemn this practice too easily without enough consideration to the social function it serves for those in our communities who strongly believe in preserving it (ref Boabab article). Without compromising our position on the need to stop this regressive and violating practice we must acknowledge that unless we get to the root of the social and economic importance of FC/FGM to those who perpetrate it we will not achieve our goals. For most people in our communities who practice FC/FGM this is still an act of loyalty to ancestors, a duty to preserve social integrity and regulate sexuality and reproduction. In short it is an act whose perpetrators until now have been celebrated and rewarded, not punished. By passing a law we run the risk of turning concerned and faithful citizens into criminals overnight. The history and reality of dealing with social problems through legislation without getting at the root causes of the so called ‘criminal behavior’ speaks for itself in the form of expanding prisons full of unemployed and alienated youth, particularly those from urban slums and from racial and ethnic minorities.

The history of passing laws against FGM goes back to 1946 when the British colonial administration passed a law to prohibit infibulation in the Sudan. Most of us are aware of the negative repercussions of that law as more girls were circumcised that year than before or after, and political leaders used the occasion to rally community support against the colonizers. This clearly demonstrates a case of the bad timing of a law passed by an administration which was denying a population their right to freedom, while claiming and pretending to care and protect their girls’ genitals.

Today we are in world that is in some ways different from that of 1946 and in other ways quite similar. Traditional colonialism has been relegated to history and replaced by a new-world order. Independent states in Africa have been in existence for over 30-40 years and the world is linked through an unprecedented network of telecommunication and Internet based information. Yet in Africa today, we are still struggling with ethnic rivalry, stagnating or reversing economies and easily corruptible legal and health systems with poor resources. African societies in the continent, and in the Diaspora, are facing challenges that they never considered before and can no longer protect themselves against. The debates around FC or FGM, within the African community, are symbolic of the tension between attempts to preserve an inherited social order which seemingly worked for years, and the search for a new and viable one that can withstand the new challenges they now face.

Whether FC/FGM or other forms of violations and oppression of women, for that matter,
can survive the changing African society, will depend upon whether or not the underlying reasons for its continuation over the centuries are still meaningful today.

Why is FC/FGM such a strongly upheld ‘traditional practice’ and is it in fact ‘harmful’ or useful to women?

As a Sudanese feminist and physician I have, in the past, been plagued and irritated by the nagging question: why do women in Africa insist on circumcising their girls and why do even the educated among them still defend the practice? Studies in Sudan show that women medical doctors refuse to condemn the practice in a society where infibulation is the norm. It may be easy to lay the burden of the demand for FC/FGM on the shoulders of men or, more accurately, on patriarchal society including the women within it. While such analysis still holds, there is still the unresolved issue of why women defend the practice even when men in their family or their community want to abandon it.

The answer to this question revealed itself while we were conducting an analytical review of major approaches taken against FGM in the past twenty years, which we undertook between 2001-2002. In extracting the elements of what worked and what didn’t in persuading people to abandon the practice, we found that projects which focused on changing women’s consciousness and, in some cases, their material conditions had a significant effect on accelerating the rate of abandonment. We also found that for the change in women’s attitude and behaviour towards FC/FGM to take root and be sustained it must gather sufficient support from power holders in the community such as, husbands, health professionals, religious leaders and policy makers.

This finding made us look more carefully at our perceived notion that FC/FGM is harmful to women. On the basis of objective logic and scientific criteria FC/FGM is undoubtedly harmful to girls as it deprives them of vital sexual organs necessary for their health and holistic development. The fact that the cutting happens to minors who have no true powers of consent is a violation of their human rights under the Convention of the Rights of the Child. But these are ‘our’ logical and rational reasons for condemning the practice, which we attempt to transplant onto the women who want to preserve the practice. Women living in circumcising communities have ‘their’ own logic and rational reasons for not readily adopting our logic. For them living under a strong patriarchal social and economic regime with very few options for choices in livelihood, the room for negotiating a limited amount of power is extremely small. Circumcising your daughter and complying with other certain social norms, particularly around sexuality and its link to the economics of reproduction, is an essential requirement to these silent power negotiations. Women instinctively know this. We may scare them with all the possible risks of FC/FGM to health. We may bring religious leaders to persuade them that the practice is not a requirement. We can try to bring the wrath of the law to bear upon them. But in their desperate hold on the little negotiated power they have known for centuries, they are not willing to let go unless they see a benefit that is equal to or more than what they already have.

The Relation between FGM, Social change and Women’s Empowerment

Hypothesis 1

Women use FGM as a power-gaining tool. They forego their sexual organs in exchange for
social acceptability, material survival (marriage) and other freedoms such as mobility, choice and education. Therefore women protect and practice FGM.

Hypothesis 2
By changing women’s consciousness, material conditions and decision-making ability, we shift their power base away from the need for FGM.

Hypothesis 3
Shifting women’s power base will be ineffective (and maybe detrimental) unless community support and consensus is built around them.

Hypothesis 4
Behavioural and social change is a cumulative non-linear process. To catalyse and sustain it requires supportive inputs over the longer term (laws, policies, investment in education, etc).

So beyond ‘educating’ people on the harmful effect of FC/FGM and how it is now illegal to practice it, we owe it to women to provide them with ‘alternative’ tools for self-empowerment and a new social consensus that will make them feel safe if they decide to abandon the practice. Passing legislation as part of measures to empower women must address the suffering they’ve endured, and the violations of which they are daily victims. Legislation that ignores the crucial needs of women will result in making them criminals and end up punishing the same victims that we aim to protect. The latter, would be unpopular and will be resisted by communities as in Ghana among the people of the Sahel (ref Pop Council paper in Bellagio 2002) and by women themselves as in Kenya (paper presented in AMANITARE Conference 2003).

If actions are not taken by governments and by project implementers to redress issues of women’s empowerment and help negotiate a new social order more beneficial to women, our efforts to stop FC/FGM will not succeed even if legislation is passed.

But the process of individual behaviour change and the cumulative change in those individuals that results in social change, is neither linear nor a simple summation formula. People are complex beings, women are no exception. To bring about change in women’s beliefs, attitudes, and ultimately a decision to abandon FC/FGM, is to gently prompt them along a road of self realization, a sense of entitlement and strength that takes a little while to achieve. Our tools should be better information, new and different skills for reasoning and organizing, a space to speak and share thoughts and feelings. A timely passing of laws to protect emerging resistance to FC/FGM against conservative forces and to give legitimacy to women’s voices is essential to escalating social change and redressing the balance of power.

How can we ensure that laws prohibiting FC/FGM empower rather than penalize women? As modern legislators and human rights activists we would like to believe that passing a law to prohibit and criminalise a violating act such as FC/FGM could only be a good thing. We would like to view our action as standing by and protecting the victims of a tragic atrocity, particularly if the victims are helpless young girls. It maybe true that a law, if effective, may protect the girl as a non-consenting child. But the woman who was once that child and had no say on what happened to her is now the person holding down that girl to be cut. Should we, with all good conscience, arrest that woman and put her in jail or deport her from her new

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home? We can decide that in drafting and implementing laws we cannot be held hostage to the mitigating circumstances of the perpetrators. That is one way of using laws that belong to authoritarian and non-democratic systems of repression. Humanistic laws that are meant to enhance the quality of life of citizens, and claims to protect the vulnerable, must look at the totality of the rights of those it aims to protect as much as they uphold the principles of absolute right and wrong.

For example passing laws in a Western country that severely punishes health practitioners who perform FGM is highly desirable and acceptable. The case is different for members of a refugee community who have not been well informed, and little investment is made in providing them with services or to integrate them into the new society. Even more unacceptable is that the same authorities that pass such laws refuse to give women independent legal status from their husbands as refugees and immigrants. If under these unchanged and dependent circumstances women are caught facilitating the circumcision of their daughters, they are liable to be imprisoned or deported.

In the case of perpetrators in Africa it is inappropriate and unacceptable that laws are passed against FGM while laws to protect women’s rights and enhance their positions within their families and their communities are ignored. Are land and property ownership laws favourable to women? What about family laws that govern divorce and child custody? Immigration laws, citizenship and employment laws among others must be revised for their compatibility with international human rights standards on women’s rights and sometimes to the countries own constitution. While empowering women to become equal citizens economically and socially is a long-term project, at least legal equity is more within reach.

If legislative bodies are contemplating passing laws against FGM why not pass a package of laws that will cover a range of violations of women’s rights at the same time as passing an anti-FGM law?

In our proposed framework for better design, monitoring, and implementation FC/FGM interventions, we place legal change as part of creating enabling environments for women’s empowerment. An isolated act of criminalizing FGM without empowering women or involving the community could easily create an environment that is hostile to women.

**Conclusion**

Legislating against FGM is no longer a theoretical debate but a reality that must be addressed as a matter of urgency. Laws are being passed in an increasing number of African countries and in most Western countries where Africans have immigrated. Yet the motivation behind passing these laws and their possible consequences on the targeted communities, and particularly women, has barely been considered.

While facilitating the passage of such legislation serves the purpose of demonstrating political will on the part of governments, we must invest in a certain amount of deliberation and consultation regarding the timeliness, content and use of these laws. Good governance and democratic principles dictate that protection of the vulnerable need not happen against their will, or while ignoring or repressing their other rights. In the case of women and the practice of FGM a whole host of other legal and non-legal measures must be considered as an essential accompaniment to passing specific anti-FGM laws. Failure to do so runs the risk of
making a mockery of the law or creating a situation where girls and women are faced with the double jeopardy of suffering FGM to appease an old social order and then being penalized by the modern legal system. This need not be the case if women’s and girls interests are truly at the heart of efforts to stop FGM and therefore central to considerations for any new legislation.

III. THE RIGHT LAW: LEGAL TREATMENT OF FEMALE GENITAL MUTILATION

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THE QUESTION ON AN INTERNATIONAL LEVEL

In a more or less clearly, legally binding manner, the question of female genital mutilation falls within the sphere of the principles embraced by numerous declarations, pacts and international conventions ratified in Italy. While the question was never dealt with explicitly in international documents defending human rights – the Universal Declaration of Human Rights (1948) and the Pacts on Civil and Political Rights (1966), as well as of economic, social and cultural rights (1966), the Convention for Elimination of all Forms of Racial Discrimination (1969), the Convention against Torture (1984), the Convention for the Elimination of Discrimination Against Women (CEDAW, 1979), the Convention of the State of Refugees (1956) and, finally, the Convention of the Rights of Childhood (1990) – it can be considered as covered by numerous articles of these conventions. In particular, we should mention article 37 and article 24, paragraph three, of the Convention on the Rights of Childhood. In the first article, adhering states undertake to apply all possible measures to ensure that no male or female child is subjected to torture or cruel, inhuman or degrading treatment or punishment. In the second article, they undertake to abolish traditional practices that menace the health of male or female children.

The question of female genital mutilation also falls under measures that are part of regional pacts and conventions, like the African Charter on the Rights of Human Beings and Peoples (1981). The relevant articles here are article 5 (against every sort of degradation, humiliation and degrading and inhuman treatment), article 16 (on the right of every person to enjoy the highest possible level of physical and mental health), and article 18, paragraph three (against every form of discrimination against women and the safeguarding of the rights of women and children). Another important convention is the Charter of the Rights and Well-being of African Children, particularly article 21, the first paragraph, which commits states to adopt measures for the elimination of traditional customs and practices that are harmful to children’s health and development. The European Convention for the Safeguarding of Human Rights and Fundamental Freedoms (1953) and the European Social Charter (1965) are two other documents that take these problems into consideration.
THE LEGISLATION OF EUROPEAN COUNTRIES

Only Great Britain, Sweden and Norway have specific laws against female genital mutilation. In other European countries, FGM is included in other types of crimes, such as serious and very serious personal lesions, attempted homicide and, of course, homicide when mutilation causes death. The only countries where trials have been held in cases of FGM is France, which first prosecuted the crime under article 312 of the French Penal Code that punished the mutilation, amputation, or loss of a limb or death voluntarily caused without premeditation to minors of 15 years. After March 1, 1994, these crimes were punished on the basis of two new articles (222-9 and 222-10) added to the Penal Code regarding mutilation (not specifically female genital mutilation), which call for 10 years imprisonment and/or a fine of one million French francs for the offender. The punishment is increased to 15 years in prison if the victim is under the age of 15. The trials in France were the subject of widespread debate, which we will discuss later. In the European countries (almost all) where no specific legislation exists, all initiatives lay within the judiciary. Whenever mutilation is reported and prosecuted, it is thanks to jurisprudential interpretations that include it within existing crimes. The debate is open on the advisability of making FGM a specific crime, a request advanced by feminist associations in many European countries.

As mentioned above, there are many cases of crimes that can include FGM. In Italy, for example, it could be construed as lesions, but also as an infringement of article 5 of the Italian Civil Code (use of own body) or part of the abuses and ill treatment of minors. Sweden was the first country to adopt specific legislation (1982, modified in 1988), by which any form of female genital mutilation can be punished with a maximum of 4 years imprisonment. The punishment is greater if the mutilation is life threatening. Great Britain passed legislation on this point in 1985 with the law “Prohibition of Female Circumcision.” The law considers it a crime to “cut, infibulate, or in any way mutilate the labia majora or minora in whole or in part, and the clitoris; aid, advise or procure the practice by another person of any of these acts on the body of another person.” The punishing foreseen is imprisonment up to five years, a fine or both. No one has ever been brought to trial under these laws, either in Sweden or Great Britain. Aside from the specific penal aspect, other measures might also include FGM, first of all those for the protection of minors. In Great Britain, for example, article 47, the first paragraph of the 1989 Children’s Act, obliges local authorities to investigate whenever there is suspicion that a child under their jurisdiction runs the risk of damage or abuse and, in that case, to take all necessary measures, including suspension of parental authority. There is no doubt that in Italy as well, justice for minors also requires this obligation of social services, physicians, school authorities, etc. In Norway, the law prohibiting female genital mutilation went into effect in 1998. As for physicians, their ethical codes explicitly prohibit any operation not justified by health reasons.

LEGISLATION IN NON-EUROPEAN COUNTRIES

Some African and Asian countries where female genital mutilation is a widespread traditional practice, explicitly forbid it including: Burkina Faso, the Ivory Coast, Djibouti, Egypt, Ethiopia, Ghana, Guinea, Senegal, Sudan, Togo, Tanzania, and Uganda. However, state law is in conflict with the law of custom which is much more binding. What we have is
juridical pluralism, already existing in the countries of origin, which leads to pluralism and conflicting legislation, even more acute in the host countries.

An example of the contradiction between differing legal systems in the countries of origin can be seen in the case of Egypt. Here, the official prohibition was first abolished, allowing mutilations to be performed in hospitals and later, following pressure by national and international associations, restored.

The question of the so-called "medicalisation," i.e., delegating mutilations to physicians and hospitals to avoid the most serious, immediate dangers of the practice, was also controversial. The question has now been virtually resolved, since the practice has been almost universally condemned with the position adopted in 1982 by WHO (World Health Organization), both because medicalisation implies legitimization of FGM and because it contradicts medical ethics. Australia approved a similar law in 1994.

In the United States, the Congress approved a law in 1995 charging the Department of Health and Human Services to gather reliable data on African immigrants in order to start up educational programs informing immigrant communities of the harmful effects of female genital mutilation. Fifteen American states have approved specific laws forbidding the practice.

In Canada, a 1993 law made substantial changes to the sections of the Penal Code regarding crimes against children, forbidding taking children out of the country when there is suspicion that they might be subjected to genital mutilation elsewhere. This protects the daughters of resident immigrants from the risk of being taken back to their countries of origin for mutilation.

Worthy of note are the cases of two girls from Togo and from Ghana who were accorded refugee status in the United States because they risked genital mutilation in their own countries. A similar case also occurred in France, while Norway is debating the case of a Somali woman who requested political asylum for herself and her daughter stating that her daughter risked infibulation if she returned to Somalia. There are two positions confronting each other at the legislative level. According to the first, and still the most common, there is no need to resort to, nor is any use made of, any independent definition of criminal offence since genital mutilation is included under other types of offences. The second position, supported by few nations thus far, is put forward increasingly by many associations, lobbies, and parliaments in a number of countries. It underlines the need to define a new criminal offence. We will discuss these two positions below.

**Trials and Case Law**

As mentioned earlier, the only trials for female genital mutilation so far were held in France. The trials gave rise to impassioned debate (cf. Facchi, 1992). In 1983, a sentence of the French Court of Cassation found that excision should be declared mutilation in accordance with article 312 of the French Penal Code which states that parents who perform mutilation of their children’s limbs or organs are liable to life imprisonment and imprisonment between 10 to 20 years in the case of complicity. On this precedent, a numbers of trials were held against parents and “accomplices,” the people who actually performed the mutilations. The trials all ended with light sentences that were suspended or not executed.

A number of controversial questions emerged in the debates that arose around these trials. The first question concerns ignorance of the law. On one hand, most of the people
brought to trial showed little, or no, knowledge of not only the law but even of the French language. On the other hand, the lack of any specific offence in the penal code meant that the case under consideration was subject to judicial interpretation. It was, if anything, difficult for the first defendant at least (a woman from Mali who did not even speak French), to know that traditional mutilation was considered a crime under French law. If this first problem (which, from a judicial point of view, concerns the question of presumed knowledge of the law) was in some way resolved with the first trial, others concerned the suitability and advisability of bringing penal charges in this matter, and therefore going beyond the specific context of France.

The first issue is the lack of willful malice. Parents who carry out mutilations on their daughters not only are not trying to “hurt” them; they are convinced that they are doing it for their own good. This conviction is supported by fact, documented by ethnologists and anthropologists: girls without mutilation risk being isolated from their communities, they “cannot find husbands,” they are not really considered women.

Secondly, there is the normative conflict. The practice of genital mutilation is a tradition with a strong normative connotation. Not only have people “always done it,” but people “have to do it.” As Facchi (1992) observes, the sanction for transgression of custom is not only mortal, but also social, taking the concrete form of isolation of non-mutilated girls. The rule of custom is therefore more coercive and binding not only than the host country, but even more than the official law of the country of origin when it prohibits mutilation. The sanction for transgression of the rule of custom is seen as much harsher than that which may ensue from transgression of official law.

A further question has to do with protection of the victim’s interests, this being the main argument of those who champion the suitability and advisability of applying penal law in this matter. The law is aimed at safeguarding a girl’s physical and mental well being, both of which are menaced by mutilation. While there is undoubtedly serious damage deriving from the operation, it is still unclear just where the victims’ interests lie. When plans are to migrate temporarily to another country, the damage suffered by a non-mutilated woman who returns to her country of origin from the ensuing isolation might be greater than the damage suffered from the operation. Moreover, there is the risk that non-mutilated girls might have to undergo the operation at a later age once they have returned definitively to their countries of origin or during a vacation. But even when the families migrate definitively, if integration in the host country is difficult, isolation within the girl’s community might be construed as strongly detrimental to her interests. Therefore, the reasoning in favor of considering this matter a penal offence on the basis of the victim’s interests is controversial. It depends on how and what one sees as interests, and is in reality tied to the interpretation given to the relations between an individual and the culture of origin and an individual and the host culture, as well as of course the policies towards immigrants. On the other hand, it is plausible, and there is confirmation in this sense, that wherever there is real integration into the host culture (through schooling, access to health and social services, etc.), actual or impending mutilations are eventually experienced as an unacceptable difference or obstacle to genuine integration. From this point of view, the reasoning in favor of the victim’s interests becomes convincing and compelling.

In general, the debate around these trials brings up another question to be discussed later,
i.e., the role attributed to the law, penal law in particular. Should the law’s task be to repress or to promote proper behavior? Which role is more suitable in this situation? What juridical instruments are more relevant to which role?

**The Situation in Italy**

As of today, only one sentence has been passed, by the Court of Milan for lesions in conformity with articles 582 and 583 of the Penal Code. An Italian woman, the wife of an Egyptian, filed a complaint against her husband (in 1997) for having subjected their two children, a boy (5 years old) and a girl (10 years old) to genital mutilation during a vacation with his relatives in Egypt. The woman was forced to stay in Milan for work but when the children returned, suspicious at the girl’s poor health (hemorrhaging, infection and fever), she realized what happened and brought charges. The trial ended on November 25, 1999 with a sentence for extremely serious personal lesions. It was the first trial in Italy for a crime of this kind. The man was sentenced to two years in prison and a deal was struck.

A brief study of records in the Public Prosecutor’s Office and the Minor’s Court of Rome and a study of other Italian Prosecutor’s Offices did not reveal any other cases of this kind. As this one case demonstrated, and as Livia Turco, former Minister for Social Solidarity, said during a Parliamentary hearing on the question in 1999, girls are mutilated during visits to their countries of origin. No Italian doctors or health structures appear to be involved, although there is talk of private clinics where Somalian or Italo-Somalian doctors are said to operate.

Since these operations often have significant physical outcomes, we might well wonder why no charges or reports have been made by physicians, pediatricians or school and social service personnel. This is particularly true at a time when suspected ill treatment or sexual abuse of minors is so zealous.

In Italy, given the absence of any specific offence, mutilations are liable to prosecution under article 3 of the Italian Civil Code (prohibition of acts against the body), articles 582 and 583 of the Italian Penal Code (serious and very serious lesions), and article 32 of the Constitution (the right to health).

The lack of a specific offence can also influence the fact that charges are not brought. For the people in the community, the lack of charges is probably due to cohesion within the community and the high degree of consensus and acceptance of the practice which, as mentioned above, is seen as a veritable duty (probably legal but most certainly normative). But, when some of the people most closely affected in the process of assimilation in the host culture start doubting or dissenting, the lack of protest is also due to the fact that Italian law provides no pretext for bringing charges against parents for the mutilation of their daughters.

As for social and education workers, lack of knowledge of the issue also plays a role. They might be influenced by a sort of passive acceptance of a “foreign” custom, not explicitly defined as a crime in Italy. The absence of malice may contribute to the non-perception of the practice as abuse or ill treatment of the minors involved (although, in accordance with our laws regarding minors, abuse is also a “state of abandonment” requiring the intervention of the judicial authorities which must not be considered “intentional”).

Articles 330 (forfeiture of parental authority) and 333 (parental behavior detrimental to children) of the Italian Civil Code give the judiciary the authority to remove the children from their parents, with loss of parental authority in the most serious cases. Otherwise, they may
adopt “reasonable measures” when the behavior of one or both of the parents is detrimental to their son/daughter. These provisions could be applied to protect girls “at risk”; their parents could be given specific orders to prevent them from being mutilated. The fact that there are no cases of this kind (as of yet) brings to mind that most likely there is widespread ignorance, indifference or difficulty in considering the question as “behavior that is detrimental” to minors.

**If and How to Bring Criminal Charges**

As seen above, whether or not specific offences exist, female genital mutilation is subject to penal prosecution. Before discussing the advantages or disadvantages of an ad hoc law, we need to consider the suitability and advisability of the use of penal law in this area.

Considering a problem as a crime (or prosecuting it as such) means believing that a penal response is most suitable. But why is a penal response suitable? There are three possible objectives, all intertwined, in addressing a problem with a penal law: 1) a reduction of the problem through the threat of punishment; 2) recognition of the problem as “bad”; 3) changes in the attitude and cultural dictums related to that problem. These three objectives are related to the three roles normally attributed to penal law: general prevention, the symbolic reorganization of what is perceived as good and protected by a certain community, and its pedagogic function.

First point: The more the sentence is certain and exceeds the advantages attained by committing the crime, the more successful the threat of punishment. Neither of the two conditions seems to occur in this case (as in many, many others), unless we are to hope for a punitive system which is not only quick, but also contains such severe sanctions, really applied, as to discourage an act considered necessary for the good of one’s daughters. Moreover, the threat of punishment, especially when the sentence would be severe, could (as happens in other cases), induce the community involved to isolate itself, pushing the behavior further into the shadows. It could, for example, discourage subsequent use of healthcare facilities when complications occur following mutilation.

Second point: symbolic recognition of a behavior as “bad” would, in this case, be useful within the host community, preparing it to recognize mutilation as unacceptable according to prevalent cultural models. It is, however, doubtful that it would be equally useful within the community involved in the practice, unless it already had a cultural basis to understand the concept. Otherwise, it could add to the community’s isolation from the host culture, with sharp discrimination between “us” (who condemn the practice) and “them” (who consider it a binding law). While defining a specific offence would reinforce the symbolic potential of the prohibition (making it clear and obligatory and therefore not open to any judicial interpretation) by “us,” it could be seen by the community involved as discrimination aimed strictly and only at “them”.

Third point: There is an “educational” role when criminalization or actual prosecution of an action as an offence is accompanied by widespread public debate involving all the actors as active participants. For example, the campaign for a new law against rape shows how attitudes and cultural models have changed throughout the campaign’s sixteen years, without even considering the questionable law finally passed. But this example teaches us that the
prior debate is more useful than the law itself. The truer this is, the more the actors affected by legal or judicial changes on female genital mutilation depict a particular community with its own rules and cultural models. In a case of this type, the educational role of a law could be seen as authoritarian, discriminatory and paternalistic.

With respect to the request made by a number of countries to define a specific offence, there is no doubt that the symbolic potential would be exploited more in this case, and the debate to create a law would be “educational.” Moreover, any dissent in the community involved would facilitate those who wanted to save girls from mutilation by appealing to the explicit legislative prohibition. As mentioned above, this might lead to greater attention to the question on the part of healthcare, social and education workers who would be induced to start preventive activities and help the girls “at risk.” We share the opinion of Minister Turco during her response to the Parliamentary inquiry mentioned above. According to Ms. Turco, an ad hoc law would only make sense if the community itself were to request it. Given the lack of that kind of request, i.e., given the absence of any semblance of a pluralistic attitude indicating that the community is willing to question its traditional laws, any specific legislation would be more of a “manifesto law”, ineffective and probably producing the reverse consequences mentioned above (the community closing onto itself, instances of discrimination, pushing the behavior further into secrecy and accentuated isolation).

On the other hand, it is no accident that there have been no trials, even when a specific offence is contemplated. The implicit choice has been to criminalize but not to prosecute. In France, where prosecution did take place, the choice was made not to punish (sentences were light and then suspended). As regards Sweden and Great Britain, the existence of a specific crime does not seem to have sensitized the population enough for people to bring charges. Still, we do not know whether and to what extent, the existence of this offence was enough to give any dissenting members of the community a pretext to refuse the practice. In both cases, use of the punishment’s symbolic potential seems to prevail over any deterrent role. The risk in these cases is that this potential would develop as a merely declarative role (the “manifesto law”), a way for the country and the government passing the law to give themselves legitimacy, rather than as an educational role. The result would be to delegitimize the legislation (and the legal system as a whole), whenever it becomes a dead letter and is not or cannot be applied.

Indeed, the problem is one of application. It is not only difficult to prosecute and punish this behavior, it might also be inadvisable and self-defeating when, as mentioned above, there is no consensus or sensitization of the community involved. Approval of legislation creating a specific offense without any will or possibility of applying it could also be counterproductive, lowering the standing of the law in general and of this law in particular.

While the use of penal law seems to carry with it risks and contradictions, that does not mean that there should be no legislation in this area. Information campaigns, support to organizations and groups, public policies aimed at improving individual and collective integration into the community and assistance to those who want to escape the practice are all indirect measures that might have a more incisive effect on concrete behavior than a symbolic prohibition which is actually not applied.

IV. INTERNATIONAL TREATY PROVISIONS GUARANTEEING FREEDOM FROM FEMALE CIRCUMCISION/FEMALE GENITAL MUTILATION

THE CENTER FOR REPRODUCTIVE RIGHTS

The Right to be Free from Discrimination Against Women

Universal Declaration of Human Rights, Article 2: “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex . . .”

United Nations Charter, Articles 1 and 55: one of the purposes of the UN is to promote “respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion . . .”

Convention on the Elimination of All Forms of Discrimination against Women (CEDAW): Article 1: “... the term ‘discrimination against women’ shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”

Article 2: “States Parties ... agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:
(e) To take all appropriate measures to eliminate discrimination against women by any person, organisation or enterprise;
(f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.”

Article 5: “States Parties shall take all appropriate measures ... [t]o modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes.”

Convention on the Rights of the Child (Child’s Rights Convention), Article 2(2): “States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination . . .”

International Covenant on Civil and Political Rights (Civil and Political Rights Covenant), Article 2.1: “Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion . . .”

International Covenant on Economic, Social and Cultural Rights (Economic, Social and Cultural Rights Covenant), Article 2.2: “The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language . . .”

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African Charter on Human and Peoples’ Rights (Banjul Charter):
Article 18.3: “The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.”
Article 28: “Every individual shall have the duty to respect and consider his fellow being without discrimination . . .”
Programme of Action, World Conference on Human Rights,
Paragraph 38: “The world conference on Human Rights stresses the importance of working towards the eradication of any conflicts which may arise between the rights of women and the harmful effects of certain traditional or customary practices, cultural prejudices and religious extremism.”
Paragraph 224: “… Any harmful aspect of certain traditional, customary or modern practices that violates the rights of women should be prohibited and eliminated.”

THE RIGHT TO LIFE AND PHYSICAL INTEGRITY, FREEDOM FROM VIOLENCE AGAINST WOMEN

Universal Declaration of Human Rights:
Article 1: “All human beings are born free and equal in dignity and rights.”
Article 3: “Everyone has the right to life, liberty and security of person.”

Civil and Political Rights Covenant:
Preamble: recognises the “inherent dignity … of all members of the human family . . .”
Article 9 (2): “Everyone has the right to liberty and security of person . . .”

Economic, Social and Cultural Rights Covenant, Preamble: recognises that human rights “derive from the inherent dignity of the human person.”

Child’s Rights Convention, Article 19: “States Parties shall take appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence . . .”

Banjul Charter:
Article 4: “Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person . . .”
Article 5: “Every individual shall have the right to the respect of the dignity inherent in a human being . . .”

Declaration on the Elimination of Violence against Women:
Article 1: “…the term ‘violence against women’ means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women . . ., whether occurring in public or in private life.”

Article 2 (a): “Violence against women shall be understood to encompass, but not be limited to … female genital mutilation and other traditional practices harmful to women . . .”

Platform for Action of the Fourth World Conference on Women:
Paragraph 107(d): “. . . [E]nsure full respect for the integrity of the person, take action to ensure the conditions necessary for women to exercise their reproductive rights and eliminate coercive laws and practices . . . .”

Paragraph 118: “Violence against women throughout the life cycle derives essentially from cultural patterns, in particular the harmful effects of certain traditional or customary practices and all acts of extremism linked to . . .”

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the lower status accorded to women in the family, the workplace, the community and society.”

Paragraph 232 (h): urges governments to “[p]rohibit female genital mutilation wherever it exists and give vigorous support to efforts among non-governmental and community organisations and religious institutions to eliminate such practices.”

**THE RIGHT TO HEALTH**

Universal Declaration of Human Rights, Article 25: “Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family.”

Economic, Social and Cultural Rights Covenant, Article 12: “The States Parties to the present Covenant recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”

Banjul Charter:
Article 16: “Every individual shall have the right to enjoy the best attainable state of physical and mental health.”

Article 16 (2): “States Parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.”

“States Parties shall . . . take measures:
(f) to develop preventive health care and family life education and provision of services.”

Programme of Action of the International Conference on Population and Development, Paragraph 7.2: “Reproductive health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity, in all matters relating to the reproductive system and to its functions and processes. Reproductive health therefore implies that people are able to have a satisfying and safe sex life . . . .It also includes sexual health, the purpose of which is the enhancement of life and personal relations.”

Platform for Action of the Fourth World Conference on Women:
Paragraph 106: Recommends that governments “Remove all barriers to women’s health services and provide a broad range of health-care services.”

**THE RIGHTS OF THE CHILD**

Child’s Rights Convention:
Article 2(1): “States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child’s or his or her parent’s or legal guardian’s race, colour, sex, language.”

Article 3(1): “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”

Article 6:
(1): “States Parties recognise that every child has the inherent right to life.”
(2): “States Parties shall ensure to the maximum extent possible the survival and
development of the child.

Article 16(1): “No child shall be subjected to arbitrary or unlawful interference with his or her privacy.”

Article 24(1): “States Parties recognise the right of the child to the enjoyment of the highest attainable standard of health.”

Article 24(3): “States Parties [to] take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.”

African Charter:

Article 4(1): “In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration.”

Article 5(2): “States Parties . . . shall ensure, to the maximum extent possible, the survival, protection and development of the child.”

Article 10: “No child shall be subject to arbitrary or unlawful interference with his privacy.”

Article 14(1): “Every child shall have the right to enjoy the best attainable state of physical, mental and spiritual health.”

Article 21(1): “States Parties to the present Charter shall take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child and in particular:

(a): those customs and practices prejudicial to the health or life of the child; and

(b): those customs and practices discriminatory to the child on the grounds of sex or other status.”

Programme of Action of the International Conference on Population and Development, Paragraph 5.5: “Measures should be adopted and enforced to eliminate child marriages and female genital mutilation.”

Platform for Action of the Fourth World Conference on Women, Paragraph 39: Girls are “often subjected to various forms of ... violence and harmful practices such as female infanticide and prenatal sex selection, incest, female genital mutilation and early marriage, including child marriage.”

Programme of Action of the World Conference on Human Rights, Paragraph 49: Urges “States to repeal existing laws and regulations and remove customs and practices which discriminate against and cause harm to the girl child.”

**The Right to Culture**

Universal Declaration of Human Rights

Article 27 (1): “Everyone has the right to freely participate in the cultural life of the community...”

Article 30: Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.

Economic, Social and Cultural Rights Covenant

Article 15 (1) (a): “The States Parties to the present Covenant recognise the right of everyone to take part in cultural life.”

Article 5(1): “Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognised herein . . . .”

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Banjul Charter, Article 29 (7): gives the individual the duty “To preserve and strengthen positive African cultural values in his relations with other members of the society ...”

**THE RIGHTS OF MINORITIES**

Civil and Political Rights Covenant
Article 3: States Parties "undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant."

Article 5(1): “Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognised herein.”

Article 27: “In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.”

Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities:

Article 2 (1): “Persons belonging to national or ethnic, religious and linguistic minorities ... have the right to enjoy their own culture, to profess and practice their own religion, and to use their own language, in private and in public, freely and without interference or any form of discrimination.”

Article 8(2): The exercise of these rights “shall not prejudice the enjoyment by all persons of universally recognised human rights and fundamental freedoms.”