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LET'S TALK ABOUT VAGINAS ... FEMALE GENITAL MUTILATION: THE FAILURE OF INTERNATIONAL OBLIGATIONS AND HOW TO END AN ABUSIVE CULTURAL TRADITION

FELICITY GERRY QC*

While the term “vagina” may be used in different contexts throughout social media, female genital mutilation (‘FGM’) does not receive the same social acknowledgement that it deserves. This article explores the history and culture, and explains that tackling the practice of FGM has been affected by estimated data and the failure to implement decades of international obligations. Social convention associated with ideas of cultural relativism have been prioritised over protection, resulting in a lack of recognition. Simply making law is not the answer. Criminal prosecution combined with non-legal community and social media engagement can draw attention to the controversial topic of FGM and provide a voice for the women and girls who are victim to its practices. Women and girls should have the right not to be subjected to violence. This means not having their vaginas cut. Acknowledgment, debate, and enforcement of FGM’s truths can change how the world complies with international obligations, and can eradicate FGM.

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I INTRODUCTION

As she takes to the stage, Mahabanoo Mody Kotwal has a question for the audience. 'How many of you feel comfortable saying the word vagina?' she asks as a ripple of embarrassed laughter erupts. About two-thirds of the audience raise their hands, but there are some too shy to put their hands up, let alone join in a group chant of the word, which follows.¹

Key "vagina" into "discover" on Twitter and on any one day there are numerous tweets using the word in numerous contexts. Tweets on female genital mutilation are rarer and

¹ Rajini Vaidyanathan, 'Vagina Monologues challenges India's taboos' *BBC News* (online), 8 March 2013 <<http://www.bbc.co.uk/news/world-asia-india-21696040>>.

are usually confined to the FGM campaigners. The practice of FGM continues despite decades of international condemnation and prohibitive legislation in numerous countries. Perhaps in no other area is it more clearly demonstrated that international obligations lie unfulfilled, as decades of legislation are unenforced despite the fact that, sometimes, the best message is the publicity that follows a criminal trial. Taking a canter through FGM history and culture, where social conventions associated with ideas of cultural relativism have been prioritised over the protection of women and girls from abuse, this paper analyses how tackling the practice of FGM is affected by estimated data and the failure to implement decades of international obligations. Making law is not enough. The threat or use of criminal prosecution, together with non-legal community engagement, works more swiftly to protect women and girls from FGM. Combined with modern media, such an approach gives women in every community a voice. Ultimately, giving women a voice on the issue of FGM is a major step towards empowerment that the modern international community should no longer ignore.

II WHAT IS FGM?

FGM is mostly carried out on young girls sometime between infancy and age 15.² The key facts are set out in the World Health Organisation ('WHO') Female Genital Mutilation Fact Sheet:

FGM includes procedures that intentionally alter or cause injury to the female genital organs for non-medical reasons. FGM comprises all procedures that involve partial or total removal of the external female genitalia, or other injury to the female genital organs for non-medical reasons. The procedure has no health benefits for girls and women.³

FGM is usually classified into four major types:

- Clitoridectomy: partial or total removal of the clitoris and/or the prepuce (the fold of skin) surrounding the clitoris.
- Excision: partial or total removal of the clitoris and the labia.

² World Health Organisation, *Female Genital Mutilation: Fact Sheet No 241* (February 2014) <<http://www.who.int/mediacentre/factsheets/fs241/en/>>.

³ Ibid.

- Infibulation: narrowing of the vaginal opening through the creation of a covering seal.
- Other: all other harmful procedures to the female genitalia for non-medical purposes.⁴

Complications from any of these procedures can include severe pain, shock, haemorrhage, tetanus or bacterial infection, urine retention, open sores, cysts, infertility, an increased risk of childbirth complications, newborn deaths, and the need for later surgeries.⁵ It is grim stuff and millions of women have suffered in silence for generations under the pressure of patriarchal cultural traditions.⁶

III STATISTICS ON FGM

In 2003, the WHO estimated that between 100 and 140 million women and girls were believed to have undergone FGM worldwide.⁷ The 2014 WHO Fact Sheet gives similar figures.⁸ That is an awful lot of silent women currently living with the consequences of FGM. Logically, it is also an awful lot of children at risk.

That there is no change in the statistics in a decade must in part be attributable to estimated data. The reality is that 'prevalence has dropped in more than half of the 29 countries in Africa and the Middle East where the practice is concentrated'.⁹ Implementation of legislation followed by community engagement has been effective in empowering some communities to voluntarily abandon the practice but progress is

⁴ For a characteristic description of infibulation, see Binaifer A Davar, 'Women: Female Genital Mutilation' (1996–1997) *Texas Journal of Women and the Law* 257; For "other" types (including introcision by Indigenous Australians) see Elizabeth W Moen, *The Sexual Politics of Female Circumcision*, Department of Sociology, University of Colorado <<http://www.colorado.edu/Sociology/gimenez/Betsy/moen.html>>.

⁵ For a detailed survey of the health impacts of FGM, see the study by Efua Dorkenoo, *Cutting the Rose: Female Genital Mutilation, The Practice and its Prevention* (Minority Rights Publications, 1994).

⁶ Fran P Hosken, 'Female Circumcision and Fertility in Africa' (1976) 1(6) *Women and Health* 3; See also Fran P Hosken, *The Hosken Report: Genital/Sexual Mutilation of Females* (Women's International News Network, 1993); August Z Huelsman, 'An Anthropological View of Clitoral and Other Female Genital Mutilations' in T P Lowry and T S Lowry (eds), *The Clitoris* (Warren H Green, 1976) 111-161; Bettina Shell-Duncan et al, 'Dynamics of change in the practice of female genital cutting in Senegambia: Testing predictions of social convention theory' (2011) 73 *Social Science & Medicine* 1275.

⁷ World Health Organisation, 'Report of the Director-General 1998–2003' (Report: 2003) [89].

⁸ World Health Organisation, above n 2, states more than 125 million girls and women alive today have been cut.

⁹ UNICEF, 'Female Genital Mutilation/Cutting: A statistical overview and exploration of the dynamics of change' (Report, July 2013) <http://www.unicef.org/publications/index_69875.html>, cited in UNFPA, *Aligning with local cultures to end female genital mutilation/cutting* (2013) 2 <http://www.unfpa.org/webdav/site/global/shared/documents/events/2013/UNFPA%20Booklet%20Culture_EN.pdf>.

slow. According to the UN Population Fund, currently the annual rate of reduction ('ARR') of FGM is only one per cent.¹⁰ Speeding things up is achievable if, like any other crime, nations act positively to combat the practice and treat FGM as child abuse.

IV CULTURAL HISTORY

It is widely accepted that FGM is not related to any colour or religion but to a patriarchal system.¹¹ For many, FGM is a social norm.¹² The WHO publication, *Global strategy to stop health care providers from performing female genital mutilation*, states it most succinctly:

FGM functions as a self-enforcing social convention or social norm. Families and individuals continue to perform it because they believe that their community expects them to do so. They further expect that if they do not respect the social rule, they will suffer social consequences such as derision, marginalization and loss of status.¹³

Amnesty International have referred to FGM as 'an attempt to confer inferior status on women by branding'.¹⁴ Changing the traditional mindset is a tall order that cannot be left to community engagement alone. The legislation has to work. International declarations for the benefit of women and girls have no currency whatsoever if the words do not translate into action on the ground.

As long ago as 1977, Elizabeth Moen contended that FGM is a method of control.¹⁵ She called for worldwide recognition 'that all of these practices are linked via sexual

¹⁰ Ibid.

¹¹ Nawal El Saadawi, 'Prisoner of Conscience' in Julie Riggs and Julie Copeland (eds), *Coming Out! Women's Voices, Women's Lives* (Australian Broadcasting Corporation, 1985) 84; Mary-Jane Ierodiaconou, "'Listen to us!' Female Genital Mutilation, Feminism and the law in Australia' (1995) 20 *Melbourne University Law Review* 562.

¹² World Health Organisation, *Female Genital Mutilation: Programmes To Date: What Works And What Doesn't* (1999) <http://www.who.int/reproductivehealth/publications/fgm/wmh_99_5/en/>; See also,

FGM survives because of the strong roots it has in various cultures and because of multiple false beliefs ... Underlying all the explanations given by the countries where the practice still occurs, however, is another reason: the control of a woman's sexuality and her reproductive functions.

Isabel Coello 'Female Genital Mutilation: Marked by Tradition' (1999) 7 *Cardozo Journal of International and Comparative Law* 213, 215.

¹³ World Health Organisation, *Global strategy to stop health-care providers from performing female genital mutilation* (2010) 2 <http://whqlibdoc.who.int/hq/2010/WHO_RHR_10.9_eng.pdf>.

¹⁴ Amnesty International, *Female Genital Mutilation and International Human Rights Standards* (1997) <<http://www.amnesty.org/en/library/asset/ACT77/014/1997/fr/1fb285a5-e90e-11dd-be8c-cfccbdfcd668/act770141997en.html>>, cited in Coello, above n 12, 215.

¹⁵ Moen, above n 4.

politics'.¹⁶ Essentially, combatting FGM, she said, may 'encourage women everywhere to join in a common battle for self-determination'.¹⁷ In the decades that have followed, social convention associated with ideas of cultural relativism continue to be prioritised over criminal justice and the protection of women and girls from abuse.

V INTERNATIONAL OBLIGATIONS

To demonstrate clearly the slow pace of change, it is helpful to pick out some events:

- 1948 The *Universal Declaration on Human Rights*, although not mentioning FGM specifically, enshrines rights such as security of person and equality in dignity and rights.¹⁸
- As do the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*. Article 12 of the latter provides specific rights in relation to 'highest attainable' mental and physical health.¹⁹
- 1979 WHO seminar in Khartoum to study and campaign against FGM.
- 1981 *Convention on the Elimination of All Forms of Discrimination against Women*.²⁰

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ *Universal Declaration on Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) arts 1, 3.

¹⁹ See, *International Covenant on Economic, Social and Cultural Rights*, opened for signature on 16 December 1966, 993 UNTS (entered into force 3 January 1976) art 12; United Nations Population Fund, *Programme of Action of the International Conference on Population and Development in Cairo in 1994* (1994) <<http://www.unfpa.org/public/icpd>>.

²⁰ *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981);

On 3 September 1981, 30 days after the twentieth member State had ratified it, the Convention entered into force - faster than any previous human rights convention had done - thus bringing to a climax United Nations efforts to codify comprehensively international legal standards for women.

United Nations Department of Public Information, *A Short history of the CEDAW Convention* (1999) <<http://www.un.org/womenwatch/daw/cedaw/history.htm>>.

- 1984 Formation of the Inter-African Committee on Traditional Practices Affecting the Health of Women and Children dedicated to the elimination of FGM.
- 1989 The UN *Convention on the Rights of the Child* stipulates that, 'states parties shall take *all* effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children'.²¹ FGM can be considered as falling within these harmful traditional practices.
- 1990 *African Charter on the Rights and Welfare of the Child*.²²
- 1994 Joint Plan of Action adopted by the UN's Sub-Commission on Prevention of Discrimination and Protection of Minorities for the Elimination of Harmful Traditional Practices Affecting the Health of Women and Children.²³ This was endorsed by WHO, the United Nations International Children's Education Fund ('UNICEF'), and the United Nations Fund for Population Activities ('UNFPA').²⁴
- 1995 *Beijing Declaration and Platform for Action at the Fourth World Conference for Women*.²⁵
- 1997 The WHO, UNICEF, and UNFPA issued a joint statement on the elimination of FGM.²⁶

²¹ *Convention of the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 24(3).

²² *African Charter on the Rights and Welfare of the Child*, opened for signature 11 July 1990, Organisation of African Unity (entered into force 29 November 1999).

²³ UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities*, 46th sess, UN Doc E/CN.4/Sub.2/1994/56 (1994); See also, UNFPA, 'Report of the International Conference on Population and Development' (Report, 1994), [1.1]–[1.15] <<http://www.unfpa.org/public/home/sitemap/icpd/International-Conference-on-Population-and-Development/ICPD-Summary>>.

²⁴ Patricia Wheeler 'Eliminating FGM: The role of the law' (2004) 11 *The International Journal of Children's Rights* 257, 262.

²⁵ UNFPA, *Report of the Fourth World Conference on Women*, UN Doc A/CONF.177/20/Rev.1 (4–15 September 1995) 1–135 <<http://www.un.org/esa/gopher-data/conf/fwcw/off/a--20.en>>.

- 1999 A workshop on concerted action against the practice of FGM in the West African Economic and Monetary Union ('UEMOA') was organised in Ouagadougou from 4 to 6 May 1999. Participants made three recommendations: a) the preparation of an African charter on FGM; b) the adoption of specific legislation against FGM in all UEMOA states and ratification by these of regional and international instruments relating to the protection of women and girls; and c) the establishment of sub-regional networks of traditional and religious leaders and modern and traditional communicators to support the national committees in their campaign against FGM. A declaration known as the *Declaration of Ouagadougou* was adopted at the end of the workshop.²⁷
- 2000 *UN Millennium Declaration*, where the states' parties resolved to protect the vulnerable, combat all forms of violence against women, and implement the *Convention on the Elimination of All Forms of Discrimination against Women*.²⁸ In the same year, the 23rd special session of the General Assembly was entitled *Women 2000: Gender Equality, Development and Peace for the 21st century*.²⁹
- 2003 *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*, which contains, inter alia, undertakings and commitments on ending FGM.³⁰ In the

²⁶ World Health Organisation, *Female genital mutilation: a joint WHO/UNICEF/UNFPA Statement* (1997) <http://www.childinfo.org/files/fgmc_WHOUNICEFJointdeclaration1997.pdf>.

²⁷ UNFPA, *Frequently Asked Questions on FGM/Cutting* <<http://www.unfpa.org/gender/practices2.htm>>.

²⁸ *United Nations Millennium Declaration*, GA Res 34/180, UN SCOR, 55th sess, Agenda Item 60(b), UN A/RES/55/2 (18 September 2000) annex.

²⁹ *Women 2000: Gender Equality, Development and Peace for the 21st Century*, GA Res S-23/3, Ad Hoc Comm, 23rd sess, Agenda Item 10 (16 November 2000) annex.

³⁰ *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*, African Union (entered into force 11 July 2003).

- same year came the *Cairo Declaration for the Elimination of FGM*.³¹
- 2005 *2005 World Summit Outcome* commitments to women and girls.³²
- 2007 The 51st session of the Commission on the Status of Women ('CSW') provided the foundation for the UN General Assembly Resolution's adoption of CSW Resolution 51/2, *Ending Female Genital Mutilation*.³³
- 2008 The WHO, with nine other UN agencies, issued a joint statement on the elimination of FGM. A resolution by the WHO World Health Assembly on the elimination of FGM followed. Both emphasised the need for action on FGM in health, education, finance, justice, and women's affairs.³⁴ This same year saw the launch of the UNFPA–UNICEF Joint Programme on FGM, which issues an annual report.
- 2010 The CSW's resolution to end FGM called on states to condemn the practice,³⁵ indicating deep concern

about discrimination against the girl child and the violation of the rights of the girl child, which often result in less access for girls to education, nutrition and physical and mental health care, in girls enjoying fewer of the rights, opportunities and benefits of childhood and adolescence than boys, and in their often being subjected to various forms of cultural, social, sexual and economic exploitation and to violence and harmful practices, such

³¹ *Cairo Declaration for the Elimination of FGM*, The National Council for Childhood and Motherhood (23 June 2003) <http://www.childinfo.org/files/fgmc_Cairodeclaration.pdf>.

³² *2005 World Summit Outcome*, GA Res 60/1, UN GAOR, 60th sess, Agenda Items 46 and 120, UN Doc A/RES/60/1 (24 October 2005).

³³ *Ending Female Genital Mutilation*, GA Res 51/2, UN GAOR, UN Doc E/CN.6/2008/1 (19 November 2007).

³⁴ World Health Organisation et al, *Eliminating female genital mutilation: an interagency statement* (2008) <http://www.un.org/womenwatch/daw/csw/csw52/statements_missions/Interagency_Statement_on_Eliminating_FGM.pdf>.

³⁵ *Ending female genital mutilation*, ESC Res, 44th sess, Agenda Item 3, UN doc E/CN.6/2010/L.8 (10 March 2010, adopted 12 March 2010).

as female infanticide, rape, incest, early marriage, forced marriage, prenatal sex selection and female genital mutilation.³⁶

It stressed 'that the empowerment of women and girls is key to breaking the cycle of discrimination and violence and for the promotion and protection of human rights' and again called for *all* necessary measures.³⁷ In the same year, WHO published a global strategy to stop health care providers from performing FGM, in collaboration with other key UN agencies and international organisations.³⁸

- 2011 Decision of the African Union to support the adoption of the General Assembly at its 66th session of a resolution banning FGM.³⁹
- 2012 UN General Assembly accepted a resolution on the elimination of FGM, recognising that it is a violation of the human rights of girls and women.⁴⁰ In that same year, the UNFPA–UNICEF Joint Programme on FGM Annual Report

³⁶ Ibid 3.

³⁷ Ibid 1 (emphasis added).

³⁸ World Health Organisation, above n 12; See also, *Commission on the Status of Women*, ESC Dec E/2010/27, UN ESCOR, 44th sess, Supp No 7, UN Doc E/2010/27 (13 March and 14 October 2009 and 1-12 March 2010) 1(a).

³⁹ See African Union, Assembly/AU/12 (XVII), 17th sess (30 June–1 July 2011) 383.

⁴⁰ *Intensifying global efforts for the elimination of female genital mutilations*, GA Res/67/146, UN GAOR, 3rd Comm, 67th sess, Agenda Item 28(a), UN doc Res/A/67/146 (5 March 2013). To understand the significance:

On 20 December 2012, following sustained leadership from the African Union Member States, the 67th United Nations General Assembly (UNGA) adopted Resolution 67/146 '*Intensifying global efforts for the elimination of female genital mutilations*,' which provides a clear political call to action to strengthen efforts aimed at the elimination of female genital mutilations. The UNGA Resolution calls upon Member States to ensure effective implementation of international and regional instruments protecting the human rights and fundamental freedoms of women and girls and to take all necessary measures, including enacting and enforcing legislation to prohibit female genital mutilations. It also urges Member States to pursue a common, coordinated approach that promotes positive social change at the community, national, regional, continental and international levels. Further, the UNGA Resolution calls for the international community to increase the financial resources and technical assistance aimed at supporting women and girls at risk of or subjected to female genital mutilations, including through strong support for a second phase of the UNFPA-UNICEF Joint Programme on Female Genital Mutilation/Cutting.

UNFPA, 'Concept Note' (Paper presented at International Conference on Female Genital Mutilations, Rome Italy, 22-25 October 2013) 1; See also, *Ending female genital mutilation*, ESC Dec 2012/27, 48th mtg, Un Doc E/2012/SR.48 (27 July 2012).

entitled 'Scaling up a comprehensive approach to abandonment in 15 African countries',⁴¹ comprehensively analysed the progress of abandonment of FGM and the new Constitution of Somalia (where it is estimated 96 per cent of women and girls undergo FGM), which prohibited the practice on the basis that 'circumcision of girls is a cruel and degrading customary practice, and is tantamount to torture'.⁴² In the same year came the European Parliament Resolution on ending FGM.⁴³

2013

International conference organised by the government of Italy, UNFPA, and UNICEF on FGM to consolidate global political commitment, plan specific strategies, and further galvanise national action to build a broad-based movement to end FGM and related discriminatory practices in the next generation.

VI INTERNATIONAL FAILURE

There is no doubt that numerous countries have enacted prohibitive legislation.⁴⁴ Some countries are ahead of others, already reviewing and improving existing legislation. As recently as March 2013, the Attorney General's Department in Australia issued their final report, 'Review of Australia's Female Genital Mutilation legal framework' which, while leading to some reform, has proven that implementation of legislation is not enough.⁴⁵ Similarly, in the UK there has been prohibitive legislation in place for 28 years

⁴¹ UNFPA, 'Scaling up a comprehensive approach to abandonment in 15 African countries' (Annual Report, 2012) <<http://www.unfpa.org/public/home/publications/pid/14643>>.

<<http://www.unfpa.org/public/home/publications/pid/14643>>.

⁴² *Federal Republic of Somalia Constitution* art 15(4).

⁴³ *The European Parliament Resolution of 14 June 2012 on ending female genital mutilation* (2012/2684 RSP) <<http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2012-261>>.

⁴⁴ Berhane Ras-Work, 'Legislation to address the issue of female genital mutilation (FGM)' (Paper presented at the Expert Group Meeting on good practices in legislation against harmful practices against women, United Nations Conference Centre, Addis Ababa, Ethiopia 25–28 May 2009); See also Coello, above n 12.

⁴⁵ Australian Government, Attorney General's Department, 'Review of Australia's Female Genital Mutilation legal framework' (Final Report, March 2013) <<http://www.ag.gov.au/Publications/Documents/ReviewofAustraliasfemalegenitalmutilationlegalframework/Review%20of%20Australias%20female%20genital%20mutilation%20legal%20framework.pdf>>.

and not one successful prosecution. Examining the extent to which states can be held responsible for human rights violations by individuals, Patricia Wheeler observed in 2004:

If it can be demonstrated that legislation at the national level is an essential part of the 'effective measures' required to put a stop to the practice of FGM ... States which fail to adopt appropriate legislation will be in breach of their obligations under the Convention [on the Rights of the Child].⁴⁶

Wheeler recognised that most organisations were asserting that the answer was to legislate in 2004. She gave an example of where an excision was prevented by intervention of the authorities where legislation gave the police and health professionals the legitimacy to intervene.⁴⁷ What is important here is the interrelationship between legislation and community engagement.⁴⁸

VII CRIMINAL PROSECUTION

Successful prosecution of child abuse depends on reports to the police followed by a proactive investigation.⁴⁹ Arguments that the criminalisation of family members can deter victims would not be used in any other child abuse context, and thus should not be used in the context of FGM.⁵⁰

In France there have been some successful prosecutions partly due to better reporting and investigatory procedures along with the routine monitoring of childrens' genitalia as part of ordinary health checks. The French prosecutions have demonstrated that criminal legislation can be effective both in identifying and dealing with cutters and those who conspire to continue the practice of FGM, but also in creating an open conversation. Linda Weil-Curiel is the French lawyer who acts on behalf of the

⁴⁶ Wheeler, above n 24, 263.

⁴⁷ Ibid.

⁴⁸ World Health Organisation, *Female Genital Mutilation: Programmes To Date: What Works And What Doesn't* (1999) <http://whqlibdoc.who.int/hq/1999/WHO_CHS_WMH_99.5.pdf?ua=1>.

⁴⁹ In December 2013, it was reported that a man had been arrested for committing FGM after the mother took the child to the doctor and the doctor reported to the police: Megan Levy, 'Father charged over alleged genital mutilation of infant daughter' *The Sydney Morning Herald* (online), 2 January 2014 <<http://www.smh.com.au/nsw/father-charged-over-alleged-genital-mutilation-of-infant-daughter-20140102-306kk.html>>.

⁵⁰ Holly Maguigan, 'Will Prosecutions for Female Genital Mutilation stop the practice in the US?' (1998–1999) 8 *Temple Political & Civil Rights Law Review* 391.

Commission *pour l'abolition des mutilations sexuelles*. In response to a press article by sociologist Hilary Burrage in the UK, Linda wrote:

I am troubled by the excuse that 'evidence' is not easy to gather: in France the evidence is the mutilation itself, medically established ... The perpetrator is not easily identified because families will protect her, but there is hardly any question about the parents' accountability: it is they who decide that it is time for the mutilation, it is they who bring the child to the knife (or the razor blade) and they who pay the fees, and the expenses when the child is sent abroad ... Thanks to highly publicised trials and prevention measures, the number of mutilations has greatly decreased. I am not saying that there are no more children taken abroad to be mutilated but it is a fact that prosecutions followed by a trial with a penalty outcome are a powerful deterrent. The detection of FGM is usually done through medical examination. It is a duty for doctors, or others such as social services, to report any mutilation or abuse committed on a minor. In the last case for which I was in court, the first mutilation in that family was discovered when one of the girls had appendicitis. The surgeon discovered that the child was mutilated and the hospital reported to the prosecutor. Therefore a criminal case was opened. This lead systematically to the medical examination of the sisters in order to detect if they too are mutilated.⁵¹

Here it can be seen that the successful prosecutions involved agencies working together. It is however plain that education is the key — Linda continued:

Added to this, in prevention, in the medical centres dedicated to mother and child, doctors are invited to check the girls' genitals (up to six years) as a routine, as is done for the little boys. An explanation must be given to the family (mother usually) that it is important to keep the child intact, that the doctor will see to it, and if a mutilation is observed the s/he must report it to the police ... families are well aware that FGM is illegal and they know the consequences if they do it. Cases have also been successfully investigated in Spain in a similar way.⁵²

⁵¹ Linda Weil-Curiel, 'The UK Can Learn From France On Female Genital Mutilation Prosecutions' on *Hilary Burrage* (28 November 2012) <<http://hilaryburrage.com/2012/11/28/the-uk-can-learn-from-france-on-fgm-prosecutions/>>.

⁵² *Ibid.*

Given that some victims are infants, they either cannot or will not want to give evidence against their family and community.⁵³ To some extent, targeting the cutters rather than the parents could assuage this — the prosecution has to look for proof in other ways that might not require some witnesses to come to court. Sometimes this means cases must remain open or be reopened to consider fresh evidence over time. Collecting evidence against a cutter can expose those parents who aid, abet, counsel, or procure (flights booked, events arranged on Facebook, etc). Principles of fairness entrenched in any system of justice should enable suspects to be fairly tried even if it becomes necessary to rely on evidence of frightened or absent witnesses. FGM is one of the situations where hearsay evidence from absent or frightened witnesses could be of real use. The victim is not always a necessary witness (as every murder trial shows). In international cases, cooperation between countries will be vital. Laws on the admissibility of hearsay evidence need to be effective. Hearsay evidence (recorded DVD interviews, notes, drawings, other statements) can be used to successfully prosecute trials without a traumatised child having to come to court. This was most recently achieved in a child rape trial prosecuted by the author in October 2012. The appeal in that case was rejected on 17 January 2014.⁵⁴ It is a timely decision that can be used in FGM cases.

The publicity which can follow a criminal prosecution is a vital tool in raising awareness, thus leading to crime prevention. In the end, that is the best use of the law as it is better that girls are not cut at all.

VIII NON-LEGAL INTERVENTION

Article 24(3) of the *UN Convention of the Rights of the Child* is mandatory and is not limited to the making of laws. It requires states to take 'all effective and appropriate measures'.⁵⁵ Perhaps in this area more than any other, the eradication of FGM can be met by the involvement of legal practitioners together with other professionals.

⁵³ Janice Rymer, 'Female Genital Mutilation' (2003) 13(3) *Current Obstetrics & Gynaecology* 185, 187-188.

⁵⁴ Currently unreported but prosecuted by Felicity Gerry; Market Rasen Mail, 'Paedophile pensioner fails to clear name' *Market Rasen Mail* (online), 30 January 2014

<<http://www.marketrasenmail.co.uk/news/local/paedophile-pensioner-fails-to-clear-name-1-5840857>>.

⁵⁵ *Convention of the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 24(3) (emphasis added); see also John Tobin, 'The International

Timing is as much of the essence as it has ever been as regime changes following the Arab Spring have threatened to remove the ban on FGM.⁵⁶ The importance of public debate and a criminal prosecution is that the consequent publicity reinforces the message that cutting genitalia is a crime and it encourages victims, or those at risk, to challenge perpetrators and report to the authorities wherever they read about the issue.

Legislation must be accompanied by education. Patricia Wheeler also refers to Christine Naré's study of FGM in Senegal, Gambia, Ghana and Benin, which says

legislation on its own is not enough to effect a fundamental change in age-old cultural practices. Adopting a law is, rather, the beginning of another long struggle to ensure its implementation. However, the existence of a law is an achievement.⁵⁷

Now is not the time to lose these achievements that benefit the health and well-being of women and girls. Public discussion of the plight of women in the countries where FGM is practised will generate change. The next step is to enforce the law, implement complementary legislation, and engage communities.

IX FURTHER LEGISLATION

There are some practical legislative solutions which could be made. It is perhaps unfortunate that these did not form part of the proposals in the *2013 Review of Australia's FGM legal framework*,⁵⁸ and they could easily be considered globally:

1. Practical procedures to assist witnesses to give their best evidence should be automatically applicable to FGM cases. These measures include pre-recorded testimony, TV links for those who give evidence live and, in appropriate cases, witness anonymity.

Obligation to Abolish Traditional Practices Harmful to Children's Health: What does it mean and Require of States?' (2009) 9 *Human Rights Law Review* 373.

⁵⁶ Women's Learning Partnership for Rights, Development and Peace, *Fact Sheet on Women and The Arab Spring* (27 June 2013) <<http://www.learningpartnership.org/withwomen4democracy-facts>>.

⁵⁷ Christine Naré, *A survey of female genital mutilation practices in West Africa: final report, April–July 2000* (Amnesty International, 2000), cited in Wheeler, above n 24, 264.

⁵⁸ Australian Government, Attorney General's Department, 'Review of Australia's Female Genital Mutilation legal framework' (Final Report, March 2013) <<http://www.ag.gov.au/Publications/Documents/ReviewofAustraliasfemalegenitalmutilationlegalframework/Review%20of%20Australias%20female%20genital%20mutilation%20legal%20framework.pdf>>.

2. Enacting a failure to protect law which provides for prosecution of a parent or carer for failing to protect a child from FGM, similar to those laws used in baby death or serious harm cases in the UK where it cannot be proved who the perpetrator is.⁵⁹ In those circumstances, a prosecution could be brought for the fact of cutting whilst in parental care without the child being a necessary witness.
3. Issuing a statutory code of practice to the police in FGM investigations dealing, for example, with treatment of survivors and witnesses, surveillance, and building circumstantial evidence cases.
4. Use hearsay evidence. In *R v Clifton*, grounds of appeal were rejected in a child rape trial where hearsay evidence from the traumatised child replaced the child coming to court or being cross examined.⁶⁰ There was other evidence from video and audio recordings, indecent images, writings, and drawings by the child which were admitted at trial with clear directions from the trial judge on how to treat evidence from an absent witness. Arguments that the trial was unfair failed.
5. Issuing clear sentencing guidelines which should make provisions for reduced sentences for those involved in FGM who assist the police.
6. The implementation of a system whereby the police can apply for an FGM prevention order against the relevant carer prohibiting the mutilation of a child/the removal of the child from the jurisdiction/compelling relatives to reveal the whereabouts of a child where there is clear evidence of risk similar to the system for police application for sexual offences prevention orders/forced marriage orders in the UK. This has the advantage of allowing the child to stay at home but puts carers under threat of prosecution. Crime prevention is always preferable to prosecution.

⁵⁹ *Domestic Violence, Crime and Victim's Act 2004* (UK), s 5.

⁶⁰ Currently unreported but prosecuted by Felicity Gerry; BBC, 'Child rapist Ambrose Clifton jailed for 14 years' *BBC News Lincolnshire* (online), 5 December 2012 <<http://www.bbc.co.uk/news/uk-england-lincolnshire-20594179>>.

7. Amending the law in jurisdictions which do not provide protection for migrant communities, to ensure that *any* child in a given jurisdiction is protected, not just those with residence/citizenship/nationality.⁶¹

X COMPLEMENTARY LEGISLATION

The 2010 UNICEF–UNPFA report makes it clear:

Where large-scale abandonment of FGM has been achieved, it has been the result of an approach that reinforces the human rights values and social support that are shared by communities. This has enabled the communities to collectively explore and agree on better ways to fulfil these values, and led to sustainable large-scale abandonment of FGM as well as other harmful practices. The health professionals, who typically have status in communities, can play a key role in supporting this process by providing correct information on the consequences of FGM and on the benefits of abandoning the practice.⁶²

If the statistics are correct, FGM does continue on a massive scale largely in a non-medical setting. However, according to the 2014 WHO Fact Sheet, more than 18 per cent of all FGM is performed by health care providers, and this trend is increasing.⁶³

What this requires is a carrot and stick approach. Professionals can provide much needed support and information, but complementary legislation can enforce the mandatory reporting of FGM and children at risk of FGM for the purposes of prosecution and crime prevention. The Committee on the Elimination of Discrimination against Women ('CEDAW') *General Recommendation No 24* specifically recommended that governments devise health policies that take into account the needs of girls and adolescents who may be vulnerable to traditional practices such as FGM.⁶⁴ Given the decades that have passed without significant progress, policies are clearly insufficient and professionals need to be required to report children at risk. There is no empirical

⁶¹ Proposals for combatting FGM in the UK in a joint article, Dexter Dias, Felicity Gerry and Hilary Burrage, '10 reasons why our FGM law has failed – and 10 ways to improve it' *The Guardian* (online), 7 February 2014 <<http://www.theguardian.com/commentisfree/2014/feb/07/fgm-female-genital-mutilation-prosecutions-law-failed>>.

⁶² World Health Organisation, *Global strategy to stop health care providers from performing female genital mutilation* (2010) 2 <http://whqlibdoc.who.int/hq/2010/WHO_RHR_10.9_eng.pdf>.

⁶³ World Health Organisation, *Female Genital Mutilation: Fact Sheet*, No 241 (February 2014).

⁶⁴ CEDAW, *General Recommendation No 24: Article 12 of the Convention (Women and Health)*, 20th sess, UN Doc A/54/38/Rev.1 (1999) art 12(b).

research that this would cause families to disengage from medical services. In fact it is probable that, if a professional indicates they are subject to mandatory reporting, this resolves any potential ethical conflict.

For children to complain about their parents or community is tough. Those who have campaigned have been ostracised or when they have chosen to leave have found themselves so lonely away from family and community that they have returned.⁶⁵ Placing the burden on the victim is not going to assist in the eradication of FGM. There are greater prospects of success in a criminal prosecution if health and education professionals follow child abuse safeguarding procedures. Worryingly, the American Academy of Paediatrics once suggested a policy of allowing “ritual nicking” of girls vaginas to prevent parents taking them abroad for more severe cutting, before rescinding the proposal.⁶⁶ Rather than performing FGM, professionals (health, education and, social services) should be reporting it and reporting children at risk. Mandatory reporting is a vital tool in this context and, where it is already part of the legislative package, ought to be specifically applied to FGM. It is pretty clear that mandatory training is also a necessity, as is the collection of data — simple solutions such as compulsory questions for all new mothers by midwives and health visitors where other relevant enquires are routinely made will identify children at risk and trigger mandatory reporting requirements. There are already some sensible schemes such as the project in Victoria, Australia to improve the healthcare of women and girls by FGM.⁶⁷ Knowing there is a range of support services, including reconstruction, will encourage families to change this practice.⁶⁸

The Northern Territory of Australia is one of the few areas that have suggested mandatory reporting to all. In addition to requirements to report sexual abuse and other exploitation, the *Domestic and Family Violence Amendment Bill 2008* (NT) cl 8 proposed that every adult in the NT report to the police, if they believe on reasonable grounds, either or both of the following:

⁶⁵ Coello, above n 12, 215.

⁶⁶ American Academy of Pediatrics, ‘Policy Statement-Ritual Genital Cutting of Female Minors’ (2010) 125(5) *Pediatrics* 1088.

⁶⁷ Family Planning Victoria, ‘Female genital mutilation/cutting (FGM/C) in Victoria’ <<http://www.fpv.org.au/advocacy-projects-research/projects/female-genital-mutilation-cutting-in-victoria/>>.

⁶⁸ Hubert Prolongeau, *Undoing FGM: Pierre Foldes The Surgeon who Restores the Clitoris* (UnCut/Voices Press Collection, 2011).

- Another person has caused or is likely to cause serious physical harm to someone else with whom they are in a domestic relationship.
- The life or safety of another person is under serious or imminent threat because domestic violence has been, is being, or is about to be committed.

If mandatory reporting by professionals is not succeeding then it would be simple to specifically apply this globally to FGM, thus requiring all individuals to speak out.

Reporting (mandatory or otherwise) can also be assisted by telephone helplines.⁶⁹ The effect could be complaints made by siblings and other family members where the tensions between modern upbringing and traditional culture are exposed. The practicalities are simple — individuals can listen out for children speaking about a “ceremony” or “becoming a woman”. Foreign trips, visiting relatives, or post-procedural incontinence should raise professional antennae and will provide evidence of a window of opportunity. Children will confide in school staff in whom they have confidence and who understand the issues. Medical examinations and mandatory reporting create a duty to share information in the same way as reporting any other planned or executed crime. To truly combat FGM any holistic approach has to include the enforcement of legislation, otherwise it becomes a toothless protection. Some have argued FGM can be compared to Chinese foot-binding.⁷⁰ While there are some parallels, this really misses the point as feet can be seen and vaginas cannot. To expose the cutting, communities have to expose the cutter to the rigours of the law.

XI COMMUNITY ENGAGEMENT

Of course, the real answer is for Mothers to say *no*, but in patriarchal societies this is easier said than done. Given the historical context, it is often women who organise the ceremony and the cutting as part of the tradition. The practical reality is that the physical effects disempower women and the continuation of such a practice perpetuates inequality. It remains the case that the vast majority of victims of violence and abuse are

⁶⁹ The National Society for Prevention of Cruelty to Children (‘NSPCC’) has recently launched FGM helplines in the UK, but they need far greater publicity; See NSPCC, *Female genital mutilation helpline launched* (24 June 2013) <https://www.nspcc.org.uk/news-and-views/our-news/child-protection-news/female-genital-mutilation-helpline/fgm-helpline-launched_wda96863.html>.

⁷⁰ See, eg, Gerry Mackie, ‘Ending Foot-binding and Infibulation: A Convention Account’ (1996) 61(6) *American Sociological Review* 999.

girls.⁷¹ In the past it was almost a cultural norm for older men to have sex with underage girls. There were few complaints and not enough prosecutions. Now we are much more aware of child sexual abuse. Meanwhile, despite decades of criminal legislation, there is still an idea that FGM is not a crime but a cultural issue. In 2008, the WHO, with nine other United Nations agencies, issued a joint statement on the elimination of FGM containing evidence which had been collected over the preceding decade. A resolution by the World Health Assembly on the elimination of FGM followed. Both emphasised the need for action on FGM in health, education, finance, justice, and women's affairs.⁷²

Education to combat FGM is the key. It ought to be compulsory. As long ago as 1994, the Family Law Council of Australia recognised the importance of education:

Council has concluded that the strategy for the elimination of female genital mutilation must be based on education of families ... as well as professionals and others within the general community.⁷³

In their Report to the Attorney-General, the Council recommended a national communication and education program on FGM be developed. The Council concluded that 'legislation is necessary because education alone will not result in the elimination of female genital mutilation, at least in an acceptable time frame'.⁷⁴

Modern education is not limited to the classroom. The provision of accessible and easily understandable information on the internet is vital, particularly when posted by governments. For example, in a simple explanation headed, *For the girls – your vagina*, Government Health advice for Queensland, Australia describes a vagina using simple and modern terminology:

Many people think the hymen is like a piece of gladwrap that seals the end of the vagina and that the first time you have sex it is broken. The hymen is actually a

⁷¹ World Health Organisation, *Sexual violence: prevalence, dynamics and consequences*

<http://www.who.int/violence_injury_prevention/resources/publications/en/guidelines_chap2.pdf>.

⁷² World Health Organisation et al, *Eliminating female genital mutilation: an interagency statement* (2008)

<http://www.un.org/womenwatch/daw/csw/csw52/statements_missions/Interagency_Statement_on_Eliminating_FGM.pdf>.

⁷³ Family Law Council, *Female Genital Mutilation*, Report to the Attorney-General (1994) [6.09].

⁷⁴ Ibid.

collar of tissue attached to the vaginal wall just inside the vaginal opening, with an opening in the centre. All women are born with a hymen.⁷⁵

It is basic stuff but simple website information gives those at risk somewhere to look. If a government can be forthright, it allows others to relinquish inhibitions to discuss the more serious issues. Legal and non-legal approaches to eradication of FGM are clearly both required as neither one will effect eradication without the other.⁷⁶

XII PUBLIC DECLARATIONS

The UNFPA–UNICEF Joint Programme on FGM Annual Report 2013 detailed the effect that public declarations can have:

Throughout 2012, activities designed to empower communities, girls and women to take this decision [to end FGM] continued, resulting in 1839 communities representing 6 337 912 individuals, collectively making public declarations of the decision to abandon the practice [of FGM].⁷⁷

One example was Kenya, where ‘four years of consensus-building activities culminated in five ethnic groups — representing over 2 million people — taking action toward the complete elimination of the practice’.⁷⁸ In essence the report concludes that where public declarations are made in relation to FGM, the media gives a voice to those committed to social change.

XIII COORDINATION

Combatting FGM is holistic — a mixture of legal, educational, health, and public awareness responses inevitably need to be coordinated. It is significant that the Hon Dr Linah Jebii Kilimo, who is an avid campaigner in Kenya against FGM, was appointed in December 2013 by Kenya’s President to chair the Kenyan Anti-FGM Board. There is no reason why there cannot be a similar board and figurehead for combatting FGM in every other country.

⁷⁵ Queensland Government, *For the girls – your vagina* (2010) The State of Queensland, <<http://www.health.qld.gov.au/istaysafe/girls/your-vagina.aspx>>.

⁷⁶ Tiffany Ballenger, ‘FGM: Legal and Non-Legal Approaches to Eradication’ (2008) 9 *Journal of Law & Social Challenges* 84.

⁷⁷ UNFPA, ‘Joint Programme on Female Genital Mutilation/Cutting: Accelerating Change’ (Annual Report, 2012) <http://www.unfpa.org/webdav/site/global/shared/documents/publications/2013/UNICEF-UNFPA%20Joint%20Programme%20AR_final_v14.pdf>.

⁷⁸ *Ibid.*

XIV ART AND SOCIAL MEDIA

The power of global social media cannot be underestimated. FGM as a practice has been imported into countries where it was not routine.⁷⁹ With global social media, in countries where FGM has been traditionally inflicted on children, people will question whether they should be the subject of such an ancient and barbaric practice.

It is a connection which has been made in South Africa — in October 2013 a Walk-in 12m-deep screaming vagina was installed in Johannesburg women's prison. Artist Reshma Chhibha said it was designed as a reaction against a symbol of oppression:

It's a screaming vagina within a space that once contained women and stifled women. It's revolting against this space ... mocking this space, by laughing at it ... [it] also opposes deeply entrenched patriarchal systems, and taboos around the vagina.⁸⁰

Women from all sorts of cultural backgrounds have no issues about talking or indeed laughing about vaginas. On Twitter there is an account called *@vaginafacts* with well over 22 000 followers and FGM campaigners routinely exchange global information. It would be naive to suggest that social media will immediately change cultural traditions entrenched for centuries, but it does speed generational change. In August 2013, Sydney University's *Honi Soit* magazine website was shut down when they used an image on the cover of their magazine of female student vaginas. Apparently the suggestion was that the images were indecent and it was potentially a publication in contravention of a criminal offence.⁸¹ In a Facebook statement, the magazine editors said the following, '[w]e are tired of society giving us a myriad of things to feel about our own bodies ... either accept vaginas as normal, non-threatening and not disgusting or explain why you can't'.⁸²

⁷⁹ Patricia A. Broussard, 'The Importation of Female Genital Mutilation to the West: The Cruellest Cut of All' (2009-2010) 44 *University of San Francisco Law Review* 787.

⁸⁰ James Legge, 'Walk-in vagina installed in Johannesburg women's prison', *The Independent Newspaper* (online), 4 October 2013 <<http://www.independent.co.uk/arts-entertainment/art/news/walkin-vagina-installed-in-johannesburg-womens-prison-8792192.html>>.

⁸¹ Anna Watanabe, 'Uni magazine censored for controversial vagina cover' *SBS* (online), 26 August 2013 <<http://www.sbs.com.au/news/article/2013/08/22/uni-magazine-censored-controversial-vagina-cover>>.

⁸² Honi Soit, 'The Vagina Dialogues' *Facebook Post* (online), 21 August 2013 <<https://www.facebook.com/honisoitsydney/posts/10151547912336046>>.

The tension between generations is palpable. In the UK, only two months earlier, a group of young people from the Integrate Bristol project presented their play *My Normal Life* about two sisters and their lives growing up in Britain under the spectre of FGM.⁸³ It was an ambitious and compelling performance by young people from 10 different cultures. The play highlights FGM in the context of violence against women. The young people (male and female) had no qualms about talking about vaginas.

It is the breaking down of these inhibitions that gives women and girls a voice, and it follows that talking about FGM is the way to its eradication.⁸⁴ 'Generational change is possible ... I think we can end it in a generation ... once people say I will not do this to my child'.⁸⁵

XV CONCLUSION

If the current topicality of FGM is the start of Moen's worldwide recognition, it is a long time coming. It is over 30 years since her apparently unpublished paper.⁸⁶ Dominance, victimisation, and mutilation of women is not a traditional dinner table topic, but it is a human rights issue that has been on the burner for far too long.⁸⁷ FGM history is well documented and now it is time for a set of international norms for both legal and non-legal procedures to tackle the issue.⁸⁸ All necessary measures detailed in numerous conventions and resolutions need to be implemented. Talking is what people do and raising awareness can lead to laws being effective and community perceptions being changed. It is a question of emancipation: Women and girls should have the right not to be subjected to violence. This includes not having their vaginas cut. The recognition, debate, and enforcement of these simple truths can speed the process of compliance with international obligations across the world, and eradicate FGM.

⁸³ Oliver Zimmermann, *My Normal Life*, Integrate Bristol <<http://integratebristol.org.uk/2013/09/11/my-normal-life/>>; Jane Duffus stated, 'My Normal Life places FGM in the context of violence against women and girls, cleverly putting it in everyday scenarios' in Jane Duffus, 'Who decides what's normal?' on Helen G et al (eds) *The FWord Blog* (8 July 2013) <http://www.thefword.org.uk/reviews/2013/07/who_decides_whats_normal>.

⁸⁴ Lynn Featherstone, *International Development Minister Lynne Featherstone attends Integrate Bristol's event on FGM* (9 October 2013) KL Productions <<http://www.youtube.com/watch?v=k2Fnz9uDWIU>>.

⁸⁵ *Ibid.*

⁸⁶ See Moen, above n 4.

⁸⁷ Preston D. Mitchum, 'Slapping the Hand of Cultural Relativism: Female Genital Mutilation, Male Dominance and Health as a Human Rights Framework' (2012-2013) 19 *William & Mary Journal of Women and the Law* 585.

⁸⁸ Elizabeth Heger-Boyle and Sharon E Preves, 'National Politics as International Process: The case of Anti-Female-Genital-Cutting Laws' (2000) 34 *Law & Society Review* 703.

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