



PROJECT FOR CRIMINAL LAW REFORM

COMMENTS ON THE BAN OF FEMALE GENITAL MUTILATION IN SUDAN'S LEGISLATION

Position Paper

February 2009

The Criminal Law Reform Project in Sudan presents these comments on the efforts of the Government to legislate against female genital mutilation (FGM). We hope these comments will be useful to the Government and others actors in addressing the practice of FGM and welcome the opportunity to further discuss any issues raised in this paper.¹

We welcome recent efforts to legislate against female genital mutilation (FGM). However, the organizations are deeply concerned about the decision of the Council of Ministers dated 5 February 2009 to remove the prohibition of FGM (article 13) from the Child Act Bill 2009. This decision followed a fatwa of the Islamic Jurisprudence Council, which called for a distinction to be made between the various forms of FGM and not to ban the practice known as Sunna (cutting of the clitoris and/or the prepuce). The Council of Ministers is reportedly planning to define the types of FGM other than Sunna that should be made subject to criminal sanctions.²

All forms of FGM constitute serious violations of a number of rights and are

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² Sudanese activists slam government position on female genital mutilation, Sudan Tribune, 8 February 2009.

incompatible with the Bill of Rights and international human rights standards binding on Sudan. This is based on a growing awareness of the harmful nature of this practice, which, incidentally, does not appear to be mandated by the precepts of any religion. As has been stated by Sheikh Mohamed Sayed Tantawi, “[t]here is no text in the Shari’a, in the Koran, in the prophetic Sunna addressing FGM. All texts on this issue either have been called weak or could not be substantiated. The issue has to be referred to doctors...”³

Distinguishing between various forms of FGM ignores the fact that practices such as Sunna are harmful and equally constitute violations. It is also based on the fallacy that such a distinction would be adhered to in practice, which is not borne out by earlier experiences in Sudan. Indeed, whilst FGM other than Sunna constituted a criminal offence from 1946/1957 until 1983,⁴ infibulation, also known as pharaonic circumcision, remained the most prevalent form of FGM.⁵

The decision of the Council of Ministers constitutes a serious setback in the fight against FGM in Sudan, which is bound to contribute to the perpetuation of the practice. It runs counter to earlier proposals, such as a 2007 resolution of the National Assembly to adopt legislation banning FGM and section 145 of the proposed amendment to the Criminal Code of 1991 of 2008, which envisaged criminalising all forms of FGM.⁶ The Council of Ministers’ decision also undermines official policies, such as the State Plan to Combat Violence against Women, which “seeks to raise awareness of women’s rights and the means to protect those rights...”⁷ Finally, it frustrates the determined effort of Sudanese medical practitioners and civil society, in particular the Sudanese Network for Abolition of Female Genital Mutilation, to put in place measures to combat FGM effectively.

³ Resolution of the conference of scholars in Cairo (November 22 and 23, 2006), issued on November 23, 2006, on female genital mutilation, http://www.target-human-rights.com/HP-00_aktuelles/alAzharKonferenz/index.php?p=beschluss&lang=en Sheikh Mohamed Sayed Tantawi, in: Afro-Arab Expert Consultations on Legal Tools for the Prevention of Female Genital Mutilation, 2004, Islam and Female Genital Mutilation, pp.23,24.

⁴ Landinfo, *Female Genital Mutilation in Sudan and Somalia*, December 2008, p.11.

⁵ See Hamid El Bashir, ‘The Sudanese National Committee on the Eradication of Harmful Practices and the Campaign against Female Genital Mutilation’ in Rogaia Mustafa Abusharaf (ed), *Female Circumcision: Multicultural Perspectives*, University of Pennsylvania Press, 2007, pp.142-170, at p.145.

⁶ Section 145 of the Proposed Amendment of the Criminal Code of 1991 (2008): “(1) There shall be deemed to have committed female circumcision any professional or practitioner using any or all methods that lead to the deformation or partial or total removal of the external sexual organs of the female. (2) Whoever commits female circumcision shall be punished with: (a) Ten years imprisonment and compensation if the act resulted in the death of the victim; (b) Imprisonment for a term not exceeding three years with compensation if the crime is committed for the first time; (c) Life imprisonment in case of repetition. (3) The Court may withdraw the work license for first-time offenders and in case of repetition the Court must withdraw the license and close the premises.” The full text of the proposed amendment is available in English at www.redress.org/reports/Proposed_amendment_of_Criminal_Act%20AS%20Translation.pdf and Arabic at www.redress.org/reports/Arabic%20Version%20of%20Proposed%20Amendment%20Sudan%20Criminal%20Act.pdf.

⁷ Third periodic reports of states party due in 2001: Sudan, UN Doc. CCPR/C/SDN/3, 10 January 2007, para.159.

Legislation to ban and criminalise FGM is an important step towards the eradication of FGM in Sudan. As recommended by the UN Human Rights Committee:

Sudan should:

- (a) Prohibit in its legislation the practice of female genital mutilation, and step up its efforts to completely eradicate the practice, in particular in communities where the practice remains widespread.
- (b) Ensure that the perpetrators of female genital mutilation are brought to justice.⁸

1. The practice of FGM in Sudan

FGM, sometimes referred to as circumcision, is characterised by the mutilation of the external female genitals, by way of total or partial removal or other methods resulting in lasting harm. This understanding of FGM is reflected in the categories developed by the World Health Organisation, which set out the variants of the practice as follows:

1. Partial or total removal of the clitoris (a small, sensitive and erectile part of the female genitals) and/or the prepuce(the fold of skin surrounding the clitoris) (Clitoridectomy)
2. Partial or total removal of the clitoris and the labia minora, with or without excision of the labia majora (the labia are "the lips" that surround the vagina) (Excision)
3. Narrowing of the vaginal orifice with creation of a covering seal by cutting and appositioning the labia minora and/or the labia majora, with or without excision of the clitoris (Infibulation)
4. All other harmful procedures to the female genitalia for non-medical purposes, for example: pricking, piercing, incising, scraping and cauterizing the genital area.⁹

FGM is a painful procedure that frequently results in harm and lasting damage to girls and women. The mutilation may cause direct complications such as shock, bleeding, wound infection and injuries to the genitals, which may be life-threatening. FGM may result in serious long-term harm, including recurrent infections, infertility, cysts and complications during labour and childbirth that increase the risk of newborn death. The mutilation also means that women experience pain during sexual intercourse.¹⁰ Many girls and women subjected to

⁸ Concluding observations of the Human Rights Committee: Sudan, UN Doc. CCPR/C/SDN/CO/3/CRP.1, 26 July 2007, para.15.

⁹ WHO, *Eliminating Female Genital Mutilation, An Interagency Statement*, OHCHR, UNAIDS, UNDP, UNECA, UNESCO, UNFPA, UNHCR, UNICEF, UNIFEM, WHO, 2008, p.4.

¹⁰ *Ibid.*, p.11; Hamdy El Sayed, in *Afro-Arab Expert Consultations on Legal Tools for the Prevention of Female Genital Mutilation, 2004, Medical and Ethical Perspectives*, pp.26-29 at pp.28, 29 and Report of the

FGM also suffer psychological injuries, including trauma, depression and feelings of anxiety and inferiority.

The prevalence of FGM in Sudan is difficult to establish. However, several surveys and estimates indicate that it is widespread and amongst the highest in the world, with estimate figures from 2000 indicating that “89 percent of North Sudanese women between the ages of 15-49 have been subjected to genital mutilations” and “an estimated 74 percent of Sudanese women...infibulated.”¹¹ FGM is practised by Muslims and to a lesser extent Christians, with significant regional variations. Research findings suggest that FGM is an embedded socio-cultural practice and initiation rite, fuelled by beliefs surrounding female sexuality and purity and maintained by significant pressure by family members, communities and peers.¹² The mutilation is predominantly carried out by midwifery assistants, midwives and community members, many of whom make a living out of FGM.¹³

2. The compatibility of Sunna and other forms of FGM with the Bill of Rights and international human rights standards

2.1. FGM as a human rights violation

The practice of FGM constitutes a violation of multiple rights under the Bill of Rights and international human rights law binding on Sudan, namely the prohibition of gender-based violence, in particular as forms of torture or other prohibited ill-treatment, the right to health, the right to non-discrimination and the rights of children. This applies to all forms of FGM, including Sunna.

FGM is explicitly prohibited in the UN Declaration on the Elimination of Violence against Women, according to which:

Violence against women shall be understood to encompass, but not be limited to, the following:

(a) Physical, sexual and psychological violence occurring in the family, including ... female genital mutilation ...¹⁴

Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, UN Doc. A/HRC/7/3, 15 January 2008, para.51.

¹¹ Landinfo, *Female Genital Mutilation*, p.6.

¹² Ibid., p.8 and Dr. Amna A.R. Hassan, *Summary of Research Findings on: Female Genital Mutilation (FGM), Psycho-socio-sexual Consequences & Attitude Change in Khartoum North & East Nile Provinces*, July 2000.

¹³ Landinfo, *Female Genital Mutilation*, pp.9, 10.

¹⁴ Article 2 of the Declaration on the Elimination of Violence against Women, General Assembly Resolution 48/104 of 20 December 1993.

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, which is attracting a growing number of states parties (it has not been ratified by Sudan yet), also stipulates that:

States Parties shall prohibit and condemn all forms of harmful practices which negatively affect the human rights of women and which are contrary to recognised international standards. States Parties shall take all necessary legislative and other measures to eliminate such practices, including:

(b) prohibition, through legislative measures backed by sanctions, of all forms of female genital mutilation, scirfication, medicalisation and para-medicalisation of female genital mutilation and all other practices in order to eradicate them...¹⁵

The Special Rapporteur on the Elimination of Violence against Women found that FGM constituted gender based violence and that states are duty-bound to take effective measures to stop the practice.¹⁶

FGM also constitutes torture or other cruel, inhuman or degrading treatment as it 'involves the deliberate infliction of severe pain or suffering.'¹⁷ The United Nations Human Rights Committee held that FGM constitutes a violation of article 7 of the International Covenant on Civil and Political Rights (ICCPR) and both the Human Rights Committee and other human rights treaty bodies have urged states parties to take effective measures against the practice.¹⁸

FGM violates the right to health. This has been recognised by the United Nations Committee on Economic, Social and Cultural Rights in General Comment No.14 on the right to health under the International Covenant on Economic, Social and Cultural Rights to which Sudan is a state party:

It is also important to undertake preventive, promotive and remedial action to shield women from the impact of harmful traditional cultural practices and norms that deny them their full reproductive rights¹⁹ [and]

¹⁵ Article 5 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2003.

¹⁶ Report by the Special Rapporteur on violence against women, its causes and consequences, Radhika Coomaraswamy, *Cultural Practices in the Family that are violent towards women*, 31 January 2002, UN Doc. E/CN.4/2002/83, para.18.

¹⁷ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, UN Doc. A/HRC/7/3, 15 January 2008, para.50

¹⁸ *Ibid.*, para.54 with further references.

¹⁹ Committee on Economic, Social and Cultural Rights, General Comment No.14: *The right to the highest attainable standard of health* (article 12 of the International Covenant on Economic, Social and Cultural Rights), UN Doc. E/CN.4/2000/4, 11 August 2000, para.21.

There is a need to adopt effective and appropriate measures to abolish harmful traditional practices affecting the health of children, particularly girls, including ...female genital mutilation...²⁰

The Special Rapporteur on the Elimination of Violence against Women has equally found that FGM violates the reproductive rights of women and girls²¹ and the World Health Organisation, as well as UNICEF and UNFPA, have repeatedly raised concerns about the detrimental impact of the practice on the health of women.²²

FGM violates the right to non-discrimination on the grounds of sex, as recognised by several international human rights bodies.²³

FGM contravenes children's right to be free from abuse and the right to health guaranteed in the Convention on the Right of the Child binding on Sudan and the African Charter on the Rights and Welfare of the Child.²⁴

The rights granted in the various international treaties are an integral part of Sudan's legal system by virtue of article 27 (3) of the Bill of Rights in the Interim National Constitution (INC). FGM also violates a series of rights, such as the right to be free from torture (article 33), the right to equality (article 31) and the rights of women and children, in particular as set out in article 32 (3):

The State shall combat harmful customs and traditions which undermine the dignity and the status of women.

FGM is incompatible with the state's duty to protect the child, women and the family as set out in articles 14 and 15 of the INC.

2.2. States' obligations in respect of FGM

States that are parties to international treaties, such as, in the case of Sudan, the ICCPR and the African Charter on Human and Peoples' Rights and the African Charter on the Welfare and the Rights of the Child, have an obligation to respect, protect and fulfil the rights set out therein. This means that no officials should

²⁰ Ibid, para.22.

²¹ Report of the Special Rapporteur on Violence against Women, its causes and consequences, Radhika Coomaraswamy, *Policies and Practices that impact women's reproductive rights and contribute to, cause or constitute violence against Women*, UN Doc. E/CN.4/1999/68/Add.4, 21 January 1999, para. 34.

²² See Interagency statement, above, note 9.

²³ Committee on Social, Economic and Cultural Rights, General Comment No.16: *The equal right of men and women to the enjoyment of all economic, social and cultural rights* (art. 3 of the International Covenant on Economic, Social and Cultural Rights) UN Doc. E/C.12/2005/4, 11 August 2005, para.29 and Committee on the Rights of the Child, General Comment No.7: *Implementing child rights in early childhood*, UN Doc. CRC/C/GC/7/Rev.1, 20 September 2006, para.11 (b) (i).

²⁴ Article 24 (3) of the Convention on the Right of the Child and article 21 (1) of the African Charter on the Rights and Welfare of the Child, 1999.

engage in violations and that the state is obligated to take adequate measures to prevent violations, even where committed by private actors, and to ensure that the rights concerned can be exercised in practice.²⁵

States have a duty to take measures, known as due diligence, to protect women and girls from FGM. This duty comprises the following:

1. FGM must be repressed by appropriate means, including legislation that makes it a criminal offence subject to adequate punishments
2. State authorities must investigate any allegations of FGM that come to their attention promptly, impartially and effectively irrespective of the identity and the status of the alleged perpetrator(s). Effective complaints procedures and victims and witnesses protection must be put in place. Where sufficient evidence is available, those responsible for FGM must be prosecuted and punished.
3. Women and girls who have suffered FGM must have access to judicial and non-judicial avenues that are capable of providing adequate forms of reparation.²⁶

The duty to take a range of measures to end FGM as a form of violence against women is recognised in the Declaration on the Elimination of Violence against Women, whose article 4 makes clear that states

...should not invoke any custom, tradition or religious consideration to avoid their obligations with respect to its elimination. States should pursue by all appropriate means and without delay a policy of eliminating violence against women.

The most comprehensive elaboration of a state's duty to eliminate FGM is stipulated in article 5 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa:

States Parties shall prohibit and condemn all forms of harmful practices which negatively affect the human rights of women and which are contrary to recognised international standards. States Parties shall take all necessary legislative and other measures to eliminate such practices, including:

- a. creation of public awareness in all sectors of society regarding harmful practices through information, formal and informal education and outreach programmes;

²⁵ UN Human Rights Committee, General Comment 31: *The Nature of the General Legal Obligation imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, para.8.

²⁶ Report of the Special Rapporteur on Violence against Women, its causes and consequences, Yakin Ertürk, *The Due Diligence Standard as a Tool for the Elimination of Violence against Women*, UN Doc. E/CN.4/2006/61, 20 January 2006.

- b. prohibition, through legislative measures backed by sanctions, of all forms of female genital mutilation, scarification, medicalisation and para-medicalisation of female genital mutilation and all other practices in order to eradicate them;
- c. provision of necessary support to victims of harmful practices through basic services such as health services, legal and judicial support, emotional and psychological counselling as well as vocational training to make them self-supporting;
- d. protection of women who are at risk of being subjected to harmful practices or all other forms of violence, abuse and intolerance.

The duty of the State to protect girls and women from FGM is also reflected in the Interim National Constitution, which provides that:

The State shall ... ensure that [children and youth] develop morally and physically, and protect them from moral and physical abuse and abandonment (article 14 (1)).

and:

The State shall protect motherhood and women from injustice, promote gender equality and the role of women in family, and empower them in public life (article 15 (1)).

3. Prohibiting FGM in Sudan

The adoption of legislation that bans FGM in Sudan, including by making it a criminal offence subject to adequate punishments, is an important element of a broader strategy to eradicate the practice. If accompanied by awareness-raising campaigns and if the law is effectively implemented, it would make a significant contribution towards preventing this serious form of gender based violence.

Most African states in which FGM is practiced have enacted legislation to counter it²⁷ and representatives of twenty-eight African and Arab countries have adopted the 'Cairo Declaration for the Elimination of FGM', resulting from the Afro-Arab Expert Consultation on 'Legal Tools for the Prevention of Female Genital Mutilation.'²⁸ Together, these initiatives represent valuable resources and hold lessons for the criminalisation of FGM in national law.

²⁷ Laura Katzive, in: Afro-Arab Expert Consultations on Legal Tools for the Prevention of Female Genital Mutilation, 2004, *Considerations in Drafting and Implementing Legislation to Prevent FGM*, pp.53-66, at p.54.

²⁸ http://www.childinfo.org/files/fgmc_Cairodeclaration.pdf

Any legislation needs to address: (a) the types of FGM constituting a criminal offence, (b) the scope of criminal liability; (c) punishments and (d) provision of services and remedies for girls and women.

(a) Types of FGM constituting a criminal offence

According to the Cairo Declaration for the Elimination of FGM:

The legal definition of FGM, which should encompass all forms of FGM, should be formulated by national legislatures on the basis of the World Health Organization definition and in consultation with civil society, including the medical community.

For example, section 69 A (1) of the Ghana Criminal Code, amended in 1994, stipulates that:

Whoever excises, infibulates or otherwise mutilates the whole or any part of the labia minora, labia majora and the clitoris of another person commits an offence and shall be guilty of a second degree felony and liable on conviction to imprisonment of not less than three years. (2) For the purposes of this section 'excise' means to remove the prepuce, the clitoris and all or part of the labia minora; 'infibulate' includes excision and the additional removal of the labia majora.

Section 1 (1) of the UK Female Genital Mutilation Act stipulates that

A person is guilty of an offence if he excises, infibulates or otherwise mutilates the whole or any part of a girl's labia majora, labia minora or clitoris.

(b) Scope of criminal liability

Anyone who instructs, performs or assists in FGM should be criminally liable, including for attempted FGM for the offence to act as effective deterrent. Criminal liability should not be confined to practitioners, such as midwives, their assistants and health professions. It should also encompass parents and guardians who incite, aid or abet the commission of the offence. Given that criminal liability of parents and family members may be detrimental to the best interest of the child and family life, the advice proffered in the Cairo Declaration on the Elimination of FGM should be considered, according to which:

...depending on the national context, it may be desirable to provide for a period of sensitization to precede enforcement of the prohibition as it applies to parents and family members.

(c) Punishments

The punishments for FGM should reflect the seriousness of the offence. National practice varies considerably. In light of the fact that FGM constitutes a form of torture or ill-treatment, there should be a minimum punishment of one year imprisonment and a maximum punishment of life for FGM resulting in the death of the victim. Repeat offenders should be subject to higher punishments.

It is of particular importance to hold practitioners accountable, as stipulated in the Cairo Declaration on the Elimination of FGM:

Licenses medical practitioners should be subject to the maximum available criminal penalties. Professional associations should adopt clear standards condemning the practice of FGM and apply strict sanctions to practitioners who violate those standards. Practitioners may be suspended or lose their licenses to practice. In addition, they should face civil liability for malpractice or unauthorised practice of medicine. Appropriate ethical guidelines against FGM should be incorporated into medical education and training curricula.

Anyone who made financial gains from performing FGM should be liable to have proceeds confiscated upon criminal conviction.

(d) Provision of services and remedies for girls and women

In order for remedies to be effective, girls and women having undergone FGM should be provided treatment free of charge. They should also have a specific right to reparation, to be exercised either in the course of criminal proceedings or independently, which should comprise compensation, rehabilitation and other forms of reparation as appropriate. The state may consider setting up a fund to provide financial assistance to victims of FGM and those working with and on behalf of girls and women facing or having been subjected to FGM.

As stated in the Cairo Declaration on the Elimination of FGM:

Women and girls should be empowered to access legal remedies specified by law to prevent FGM. In particular, women and girls who are victims or potential victims of FGM have the right to bring a civil action to seek compensation from practitioners or to protect themselves from undergoing FGM...

The state should also set up effective mechanisms of protection for girls and women who fear that they will be subjected to FGM.

4. Recommendations

We propose that all forms of FGM be prohibited in the Child Act Bill and made a criminal offence. Anyone taking part in FGM through soliciting, assisting and performing the act should be criminally liable and subject to adequate punishment of imprisonment, the length of which should depend on circumstances, such as the consequences for the victims and the repeated nature of offences. Practitioners should have their licenses revoked and any financial gains resulting from FGM should be subject to confiscation.

Girls and women who have undergone FGM should have the right to free treatment and to effective remedies with a view to obtaining adequate reparation to address the damages suffered. In addition, protective mechanisms should be put in place to prevent FGM.

The legal prohibition of FGM should be accompanied by outreach, awareness and sensitisation campaigns aimed at changing perceptions that perpetuate FGM and at providing incentives for those professionally engaged in the practice to seek alternative means of employment. The medical and legal professions should receive training on the nature and consequences of FGM and on medical and legal interventions to prevent FGM or to respond to violations. This includes a better understanding of the trauma suffered by victims and the need of protection and additional services to be provided in the course of medical treatment and/or judicial proceedings.