Female genital mutilation and human rights

by Greg Swensen[1]

Abstract

The paper considers efforts by Australia and other Western nations to prevent female genital mutilation in refugee and migrant groups by enacting or using existing laws to prohibit the practice. As social workers and other community service workers may be required by law to monitor people from cultures supporting this practice, they need to develop an understanding of the language of human rights.

While debate to support prohibition has focussed on the extreme forms of this practice by characterising them as barbaric and having deleterious effects on health, there has been a failure to recognise criminalisation may be counterproductive as it entails surveillance of high-risk groups and stigmatises and marginalises the women and girls from the cultures involved.

Social workers may better understand the difficulties posed for the groups affected by prohibition as a conflict between cultural relativism and the individual woman's or girl's right to bodily integrity and sexual potential, by increasing their knowledge of the language of human rights. The author proposes the profession should understand female genital mutilation as an issue addressed within a framework of universal fundamental human rights, by comprehending how the principles and rights embodied in relevant United Nations instruments affect Australian policies and domestic law.

Introduction

In January 1994 the Family Law Council published a discussion paper on the topic of female genital mutilation (FGM). The framework adopted by in the Family Law Council's final report, published in June 1994, consistent with analyses elsewhere, is that the practice is contrary to a set of universal fundamental human rights transcending cultural distinctions. Until recently very few Australians would have heard of FGM and in spite of limited information as to the cultural relevance of particular practices, these has been wide support for proposals to specifically prohibit the practice as it is perceived as barbaric.

In a stout criticism of the discourse of FGM within an international human rights framework, it has been observed that our responses to the practice have been shaped by assumptions we are dealing with the 'Exotic Other Female', women in cultures who support and defend FGM. (Engle 1992)

A recent critic of the criminalisation of FGM suggested that *"(t)o speak on 'female genital mutilation' as if it were not in fact, in and of itself, a highly complex set of cultural practices and knowledge not just about the procedures but about family, identity and ... gender ... (and) to define the practice as 'un-Australian' and those who practice it as violating the accepted cultural norms,"* is consistent with attitudes formed by neo-colonist policies towards the Third World countries from which many of the refugee groups come. (Fraser 1994)

Counter arguments against prohibition of FGM involve consideration of the doctrine of cultural relativism, which by taking account of the enormous variation in rules and social institutions between cultures, postulates, in its form as radical relativism, that differences in customs and values between cultures may not be validly criticised by those from other cultures (Donnelly 1984; Kleinig 1981). A solution has been proposed, labelled strong cultural relativism, which recognises that while culture must remain the principal source of the validity of a moral right or rule, that

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> *"(u)niversal human rights standards ... serve as a check on potential excesses of relativism. At its furthest extreme, just short of radical relativism, strong cultural relativism would accept a few basic rights with virtually universal application, but allow such a wide range of variation for most rights that two entirely justifiable sets might overlap only slightly."* (Donnelly 1989, pp 109-110)

The intermediate position, strong cultural relativism, locates the individual at the intersection of a bundle of basic rights a woman enjoys in common with all other fellow human beings with the remainder of her rights made up of local exceptions to these universal rights, to account for specific cultural values and institutions. At the other extreme, radical universalism, we would be required to rank all values according to their compliance with the standards of a universal higher moral community, with the effect that cultural autonomy and diversity would not be tolerated. In this context the debate about FGM involves the underlying issue of which model of human rights is accepted.

History and occurrence of FGM

Female genital mutilation largely occurs in Islamic countries, primarily through the central belt of Africa, from Senegal to Somalia, and as far north as Egypt. Virtually all women in Mali, Sudan and Somalia are infibulated; it also flourishes in Yemen and Oman, and is known to be practised in Malaysia and Indonesia. It has been observed that *"the heavy emphasis on both the physical state of virginity within the Muslim religion and the importance of patrilineage leads to an institutionalisation of female circumcision in some regions as the best method of controlling 'purity'."* (Oosterveld 1993, p 282)

In spite of the prevalence of FGM in these cultures, it is misleading and inaccurate to claim, as has been suggested, that it is a manifestation of Islam's barbaric treatment of women, as FGM predates Christianity, Islam and Judaism (Bardach 1993), as evidence has been found of large numbers of pharonically circumcised mummies in Egypt. (Daly 1979, p 162)

What is female genital mutilation?

The practice female genital mutilation has been defined as entailing

> *"the total or partial cutting away of the female external genital organs with razors, ceremonial knives, or blades under non-hygienic conditions without anaesthesia."* (Ladjali, Rattray & Walder 1993, p 460).

A more expansive definition has been proposed, that FGM

> *"is actually a group of similar practices involving excision of varying degrees of the female genitalia. The practices range from clitoridectomy, removing the tip of the clitoris, or the entire clitoris, to infibulation, which involves excising all of the external female genitalia and suturing the sides of the vagina together using various methods."* (Brennan 1989, p 373)

The former definition, by its emphasis on the lack of adequate medical standards, would appear to imply that with the proper observance of appropriate conditions, FGM may be justifiable:

> *"(i)f the practice could be done without negative health consequences, international law might actually become complicit in the practice, obligating countries to ensure that it is performed under better health conditions."* (Engle 1992, p 1515)

The term "genital mutilation" has had a relatively recent currency, intended to encompass practices ranging from ritualised circumcision, circumcision by removal of the clitoral prepuce ("sunna"), clitoridectomy by excision of the glans of the clitoris and parts of the labia minora, or to its most extreme form of infibulation ("Pharonic" circumcision) by removal of virtually all the external female genitalia. (Armstrong 1991; Family Law Council 1994b; Slack 1988)

The adverse effects of FGM

The medical, social and psychological consequences of FGM may be summarised as follows.

Short-term

- damage to and bleeding from adjacent organs and tissue (eg rectum and urethra);
- haemorrhage;
- shock from pain and blood loss;
- acute infection, septicaemia or tetanus from use of non-sterile instruments and materials used to patch the wound;
- extreme pain; or
- death from blood loss and other complications.

Long-term

- Increased susceptibility to HIV infection and AIDS as subsequent intercourse requires re-injuring the genital area by cutting by instruments or tearing to achieve de-infibulation, for penetration to occur.
- Neuromas may develop at the site of the excised clitoris resulting in chronic and unbearable sensitivity of the genital area.
- Vulvar abscesses and cysts may develop due to damage to the Bartholin gland causing secretions to accumulate.
- Urinary tract infections and urine retention due to occlusion and the process of urination is often prolonged and difficult.
- Menstrual difficulties (eg dysmenorrhoea and hematocolpus) and obstetric complications resulting in prolonged and obstructed labour and internal lacerations due to lack of elasticity of birth canal increasing the risk to mother of haemorrhaging from internal tearing and concomitant risk to the baby.
- Psychological trauma (eg chronic irritability, anxiety, depressive episodes, psychosis) and sexual difficulties.
- Scars may impair mobility through keloid formation (from hardening of tissue from scars) caused by a massive build-up of skin that has lost its elasticity.

The case against the practice of FGM would appear to be overwhelming, given these and other catalogued adverse effects on girls and women. Indeed, these practices have been variously described as *"sado-ritual of initiation of girls into androcacy,"*(Daly 1979, p 175) *"a barbaric crime"* (Harding 1994) and as *"a barbaric practice."*(Cameron 1994, p 899)

Responses to FGM

FGM has become a matter increased concern in Australia as over recent years we have resettled refugees from areas where one or more of the forms of FGM are prevalent. This means that such refugee women will require subsequent medical procedures, for instance, to be de-infibulated and re-infibulated after childbirth, as mandated by their culture.

Another concern about FGM is that girls and young women from families that have come from countries which routinely practice FGM, who even though they may have been born and grown up in Australia, or were brought here as young children, will be circumcised according to the specific traditions of their culture. On the basis of the 1991 Census, there were nearly 76,000 women living in Australia from countries that practice some form of FGM, and during the two years after the Census, a further 1,601 females from Africa arrived in this country, of whom 470 (29%) were girls under 16 years of age. (Family Law Council 1994b, p 12)

The first national conference on female genital mutilation in Britain was held in February 1989. At that time it was estimated there was up to 10,000 children at risk in the UK, based on an analysis of the size of immigrant and refugee populations from Somalia, Sudan, Ethiopia, and West and East Africa. (Armstrong 1991)

A 1992 amendment to the Canadian Criminal Code made it an offence for persons under 18 years of age to be taken outside of Canada to be circumcised. In 1992 a Malian woman living in France was prosecuted for the infibulation of her one month old baby.

> *"When her baby was born, the doctor warned her, 'Do not excise this child. It is against French law, and it will have terrible effects upon her health.' A month later she brought her bleeding child back to the clinic. She was infibulated, completely sewn up at one month old."* (Bardach 1993)

An issue considered at the 1989 British conference was whether FGM constituted child abuse, as the *Prohibition of Female Circumcision Act 1985* had proved to be ineffective in stopping young girls being taken out of the United Kingdom to be circumcised. To deal with this shortcoming the powers under the *Childrens Act 1989* have been used to obtain protective orders for girls considered at risk of child abuse because of the possibility of FGM.

However, there has been concern about the criminalisation of FGM in Britain as it has been regarded as counterproductive because it labels the

> *"families as child abusers, and therefore criminals, (and therefore) is counterproductive because it alienates immigrant groups rather than encouraging them to change. Most such families ... see the circumcision of their daughters as an act of love, not cruelty."* (Armstrong 1991)

It has been argued that logically prohibition should extend beyond female genital mutilation, to encompass the circumcision of male babies. (Brigman 1984-85) For instance, in the USA over 80% of all males are circumcised soon after birth, in England and Wales only 6% of male infants are circumcised, whereas it is virtually unknown in Scandinavia.

Australian policy

The recently reported Australian case of the infibulation of two young sisters in Melbourne, and the subsequent use of a Department of Health and Community Services protection order, illustrates the limits of relying on the criminal law to prevent FGM.

> *"The girls, who first came to the attention of the department after an alleged assault by their father... Ms O'Brien (a spokeswoman for Women Lawyers Against Female Genital Mutilation) said the lobby group became involved in the case when they were told by the department that it did not consider the medical procedure was a protective issue. She said the group asked to be a party to the case so that it could provide the court with information on possible complications linked to genital infibulation."* (Weekes 1994)

As recently as 1991 the Australian Law Reform Commission in Discussion Paper No. 48, Multiculturalism: Criminal Law, after canvassing the options had concluded special legislation should not be enacted, but supported preventive policies to deal with FGM. Earlier in the discussion paper the Commission had recognised there were

> *"some cultural practices which may be unacceptable by international standards. While some customs and beliefs may justify exemptions from the general criminal law, there are other situations where an exemption cannot be considered because a real threat is posed to the rights of others. Female genital mutilation is a practice which cannot be subject to an exemption for this reason."* (Australian Law Reform Commission 1991, p 21)

While the Law Reform Commission's reluctance in 1991 to recommend prohibition was based on a concern it may drive FGM underground, there would appear to have been a recent fundamental shift of thinking in Australia. (Family Law Council 1994a; Family Law Council 1994b) At the March 1994 meeting in Perth of the Health and Community Services Ministerial Council all States and Territories

agreed to *"outlaw FGM as a culturally unacceptable practice."* (Cooper & Irving 1994) We should not overlook the significance of the impetus for this agreement, as it is consistent with the approach elsewhere of characterising the health risks as the major premise by which to prohibit FGM.

FGM and the right to health

Article 25 of the Universal Declaration of Human Rights provides the support for prohibition by recognising that women and girls are entitled to sexual and corporal integrity as FGM constitutes a violation of their right to control their bodies and deprives them of their sexuality.

In the non-Western countries where FGM is prevalent such a proposition is attractive as *"(m)ost African governments are more concerned with basic health and economic problems than with the arguably more elitist right they associate with Western countries, such as political rights and fundamental freedoms."* (Boulware- Miller 1985) A recent statement by Dr Brendon Nelson, President of the Australian Medical Association, supports the proposition that FGM is best dealt with as an infringement of a right to health and bodily integrity.

> *"We do not support this and will be encouraging the Government to introduce and pass legislation which prevents this... We must always, of course, respect the cultural values and rights of human beings. But I think above all else we have to respect the health, welfare and integrity of human beings, and women particularly."* (Worth 1994, p. 895)

Application of universal human rights instruments to FGM

Article 1(3) of UN Charter states the major purpose of the UN is to achieve international cooperation in encouraging and promoting "respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion". This provision supports the notion of inviolable universal human rights. There are provisions in a number of United Nations instruments that specifically support the proposition that FGM seriously transgresses a number of universal human rights. This will be briefly described below.

Universal Declaration of Human Rights
Art 3: Everyone has the right to life, liberty and security of person.
Art 5: No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.
Art 15: Everyone has the right to a standard of living adequate for the health and well-being of himself.

Convention on the Rights of the Child[2]
Art 30: guarantees the right of children belonging to ethnic, religious or linguistic minorities to enjoy their own culture.
Art 24(3): State parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.

Declaration on Violence Against Women[3]
Contains broad definitions of gender-based violence against women - specifically mentions FGM and other harmful traditional practices as gender based violence that results in or is likely to result in physical, sexual or psychological harm or suffering to women.

Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW)[4]
Arts 2(f) and 5: Violence based on inferiority.[5]

[2] Ratified by Australia in 1989.
[3] Adopted by the UN General Assembly in December 1993 - supported by Australia.
[4] Ratified by Australia and came into force in 1984 as a schedule to the *Sex Discrimination Act 1984*.

Art 5 (a): Social and cultural patterns based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.
Art 10(h): Access to educational information on health and family planning.
Art 12: Violence as a health risk.
Art 12(2): Discrimination in relation to pregnancy etc.
Art 16(1): Discrimination in relation to marriage and family relations.

International Covenant on Civil and Political Rights[6]
Art 9: Everyone has the right to life, liberty and security of person.

Convention Relating to the Status of Refugees[7] ***and the Protocol Relating to the Status of Refugees (the Geneva Convention)***[8]
Provision of protection by signatories to any persons who "Owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion". To fall within this definition of refugee, it would be necessary for a female's opposition to FGM to be construed as persecution due to political opinion, or that for females FGM is a form of gender-specific persecution. (Family Law Council 1994; Oosterveld 1993)

It is to be noted there are also a number of conventions that have been ratified by African countries; the African Charter on Human and Peoples' Rights and the Inter-African Committee Against Harmful Traditional Practices Affecting Women and Children. (Ladjali, Rattray & Walder, 1993). While these conventions do not have the force of UN instruments nevertheless they are persuasive in rebutting some of the concerns about the strongly Western emphasis on individual rights in UN conventions.

We must recognise that in many African societies in which FGM occurs, the 'logic' for circumcision must include acknowledgment of women's low social status, and that uncircumcised women may be ostracised as unmarriageable and face very bleak economic and social prospects because rights and privileges are contingent on membership of a group or community. (Engle 1992; Howard 1990)

The UN has specifically investigated FGM, as at the 1981 session of the Sub-commission for the Prevention of Discrimination and the Protection of Minorities, a comprehensive report was presented by the London-based Minority Rights Group. In 1982 the Sub-commission resolved to examine circumcision and other traditional practices harmful to the health of women and children, and published its report in 1986. The Sub-commission concluded

> *"that female circumcision is a custom with serious consequences for physical and psychological health... The report stated that, because the evolution in traditional societies has deprived female circumcision of its former role, the practice is 'at variance with new standards defined by various international instruments relating to human rights'."* (Brennan 1989, p 390)

This report lends credence to the proposition that by dealing with FGM in terms of a simplistic dichotomisation into traditional and modern societies, and as African versus Western, we may overlook culturally relevant factors. (Howard 1990)

Refugee status and FGM

A number of Western countries have grappled with the definition of FGM as persecution to be a ground for granting refugee status for women from African countries who were being forced to return to their country of birth to be circumcised according to cultural requirements by family or as a

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[5] This provision extends to traditional attitudes under which women are regarded as subordinate and contributes to practices involving violence towards or coercion of women, eg forced marriage, dowry deaths, acid attacks, FGM, family violence and abuse. Evatt (1991)
[6] Adopted as a schedule to the *Human Rights and Equal Opportunity Commission Act 1986*.
[7] Ratified by Australia in 1954.
[8] Ratified by Australia in 1989.

precondition to marriage. (Lynch 1993; Mackay 1983; Oosterveld 1993) A number of these cases demonstrate flaws in relying on the provisions in some of these UN instruments.

For instance, the CEDAW recognises that woman's specific rights differ from men's, because of the role of pregnancy and child rearing, and the significant amount of work women perform in the non-monetary sector of most economies (Articles 12(2) and 14(1). The Geneva Convention by comparison, which would be used by women seeking refugee status to avoid FGM, has been largely built around male-oriented concepts of persecution. Persecution is not defined in the Geneva Convention, however the UNHCR Handbook notes that

> *"(f)rom Article 33 of the Convention, it may be inferred that a threat to life or freedom on account of race, religion, nationality, political opinion or membership in a particular social group is always persecution. Other serious violations of human rights - for the same reason - would also constitute persecution."* (United Nations High Commissioner for Refugees 1979)

Valerie Oosterveld points out that for a woman to claim refugee status on grounds of torture under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, FGM would have to be considered as persecution. However, the Geneva Convention definition requires a connection between a state and the refugee, ie that a claimant must be unable or unwilling to avail herself of the protection of her country.

> *"It is hard to imagine a situation in which the threat of, or the performance of, female circumcision will ever be directly attributable to the state. The most likely scenario is one in which a woman is pressured by her family or community to undergo the procedure, and the state does not provide any adequate legal recourse to protect against these pressures, or to punish the perpetrators after the fact."* (Oosterveld 1993, p 299)

It is suggested that it may be quite difficult for a woman to seek refugee status by reliance on either the Geneva Convention or the Convention Against Torture as a basis to establish a ground, because of the restrictive nature of the rights. That women in particular would appear to be substantially disadvantaged on most of the grounds, is a serious criticism of the way the system of international rights are ineffectual with respect to a culturally prescribed practice like FGM.

Conclusion

The difficulty in dealing with FGM by using a rights framework is that the discourse on rights involves a Western political and philosophical tradition. Sinha argues that the formulation of human rights contains three elements that reflect Western values:

> *"One, the fundamental unit of society is the individual, not the family. Two, the primary basis for securing human existence in society is through rights, not duties. Three, the primary method of securing rights is through legalism whereunder rights are claims and adjudicated upon, not reconciliation, repentance, or education."* (cited in Renteln 1984, p 517)

To properly adjudge rights in non-Western societies it could be argued that a relativist approach should be followed, one which conceptualises each culture as having its own concept of human rights. Taken to its logical conclusion this could mean variations in standards between cultures arise because either (a) substantive human rights vary due to national differences, or (b) though there may be a set of substantive human rights, the meaning given to them varies between cultures. (Teson 1992)

However, it is suggested that there are serious disadvantages if the claims of cultural relativism are extended to FGM as it could then be justified as culturally mandated and thereby fail to be recognised as a transgression of a number of universal human rights contained in instruments ratified under the aegis of the United Nations, to which many countries, including Australia, are signatories.

As FGM may become a child protection issue for social workers with families who may attempt to have their children undergo a particular form of culturally mandated practice of FGM they need to be familiar with the risks as well as the human rights issues. Social workers and other community-based workers should be aware of the deleterious effect of criminalisation on women and children, as they may have to renounce their culture if they don't undergo FGM, and ensure that education and outreach programs are put into place to support the groups affected.

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