EGM/GPLHP/2009/EP.12
21 May 2009

ENGLISH only

United Nations Nations Unies

United Nations Division for the Advancement of Women
United Nations Economic Commission for Africa

Expert Group Meeting on good practices in legislation to address harmful practices against women
United Nations Conference Centre
Addis Ababa, Ethiopia
25 to 28 May 2009

HARMFUL TRADITIONAL PRACTICES IN EUROPE: JUDICIAL INTERVENTIONS

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INTRODUCTION

Any discussion on harmful traditional practices in Europe must be predicated on the origins of such practice in the European context. It can be stated as a fact that such practices are a result of the migratory trends of populations across continents. Interestingly, these trends have resulted in patterns that can be related to their origins outside Europe. The range of the practices is broad. It is also true that some of the practices cannot continue in Europe for reason of the strong communal links attached to their execution; these links are for the most part absent in the European context. Yet some practices defy convention and thrive in Europe even where they are actually undertaken outside Europe. This paper addresses the extent to which the legal systems in Europe have addressed harmful traditional practices with a special emphasis on the judicial interventions around FGM. The paper highlights some key pointers to success of these interventions and makes note of some prospects for future engagement with the law as a strategy towards the eradication of FGM and other harmful traditional practices. The most common manifestations of harmful traditional practices include honor killings, early marriages, forced marriages and domestic violence.

It is noted at the outset that one issue remains constant in the nature of the harmful traditional practices; the victimization of women on the basis of discrimination. In coming up with recommendations, a good starting point might therefore be to address discrimination as a fundamental component of these discriminatory laws. In so doing, the fight against these practices would certainly get a head start. The basis for ending discrimination against women in the law and in practice is grounded on previous commitments of governments at regional and international levels and now only needs the will of governments to ensure implementation.

TYPES OF HARMFUL TRADITIONAL PRACTICES MANIFESTING IN EUROPE AND BEYOND

A traditional practice is time honored and is characterized by custom and routine and is handed down from generation to generation[1]. It is argued that it is the lack of interrogation of the longstanding nature of these practices that lends the perpetrators the courage to go on in the face of elaborate legislative processes. Below is a discussion of the various types of practices that are practiced across the continents.

FEMALE GENITAL MUTILATION

Of the harmful traditional practices discussed in this paper, Female Genital Mutilation is the most known as there are very specific provisions in the law against it. The other practices are covered under more general offences such as murder, defilement and kidnapping. To this end, numerous countries in the global north with large numbers of African immigrant communities have passed specific laws against FGM among these communities; these include Australia[2], Canada[3], New Zealand[4], USA

FGM and were decided in Europe and North America. However, all the applicants were originally from FGM practicing communities in Africa.

FGM-related asylum claims

The 1951 Convention relating to the Status of Refugees defines a refugee as one who, owing to a well founded fear of persecution for reasons of race, nationality, religion, political opinion or particular social group and is outside their country of origin, is unable or unwilling to avail himself to the protection of their government.[8] In May 1994, the United Nations High Commission for Refugees (UNHCR) issued general advice on FGM in a memorandum to its Washington Office, entitled *Female Genital Mutilation*. It noted in part that[9]:

> ..we must conclude that FGM, which causes severe pain as well as permanent physical harm, amounts to a violation of human rights, including the rights of the child, and can be regarded as persecution. The toleration of these acts by the authorities, or the unwillingness of the authorities to provide protection against them, amounts to official acquiescence. Therefore, a woman can be considered as a refugee if she or her daughters/dependants fear being compelled to undergo FGM against their will; or, she fears persecution for refusing to undergo or allow her daughters to undergo the practice.

Subsequently the UNHCR revised its asylum guidelines to reflect this position. Prior to this, however, there was already judicial recognition of FGM as a determinant for asylum. In France, in the case of *Aminata Diop CRR 164078* (18th September 1991, concerning Mali), the Commission of Refugee Appeals accepted that FGM could constitute a particular social group (one of the five grounds for 'reasons of' persecution). Though the claim failed to prove the facts alleged, France has maintained its position of principle, which was applied in determining the cases of *Kinda CRR 366892, 19th March 2001*, Somalia and *CCR 369766, 7th December 2001, Mali).*[10]

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This approach has been implemented elsewhere in continental Europe and is buttressed by the 20th September 2001 Resolution of the European Parliament, which asked member states to 'recognize the right to asylum of women and girls at risk of being subjected to FGM'.[11] In *GZ (Cameroonian citizen) 220.2680/0-X1/33/00, Austrian Federal Refugee Council, 21st March 2002*, it was held that 'women in Cameroon who are to be circumcised were amenable to being granted refugee status arising where Cameroon had failed to impose criminal sanctions or bring any charges against the practice of FGM, notwithstanding its duties under the CEDAW.'[12]

The European Court of Human Rights has also ruled on the issue. In the case of *Collins and Akaziebie v Sweden*[13], the applicants had appealed against their removal order on the basis that if they returned to their native Delta State in Nigeria, the second applicant, a young daughter of the first applicant risked being subjected to FGM. Further that the first applicant who had already undergone FGM when she was a child risked being forced to

In 2006 Joshua Kamau Ndegwa, a man of Kenyan origin[14] applied for and was granted an order for judicial review of the decision of the CIRB that he was not a refugee under the 1951 Convention for he was not directly targeted by the persecution that faced his daughter, whom he claimed was likely to undergo FGM if she returned to Kenya. His wife and daughter had already been granted refugee status for the same reasons. The court found that the family is a basic social unity and thus their claims could not be separated. The Canadian case law reflects a focus that 'females who are subjected to FGM' are a particular social group for purposes of the refugee definition criteria.[15]

The jurisprudence in the United States is similar even though it was not until 1996, when a successful application for asylum was recorded. But even before the seminal case of Fauziya Kassindja (*re Kasinga*), it had been held that deportation where the application was likely to face FGM would cause extreme hardship[16]. In this case, the appellant fled Togo to America in 1984 when she was 15 years old, just hours before she was to be subjected to FGM. The US Board of Immigration and Appeals finally granted her asylum on 13th June 1996, when she had already attained the age of majority. The decision in this is case has been applied in a series of subsequent decisions in the United States of America. These include *Abankwah v INS 185 F 3.d 18, 2nd Circuit, (9th July 1999, Ghana)* and *Abay and Amare v Ashcroft 368 F3.D 634 USCA 6th Circuit (19th May, 2004, Ethiopia)* . In a recent decision, *Abebe and Mengistu v Gonzales USCA 9th Circuit (30th December 2005, Ethiopia)* the court described as 'well-settled' the holding that FGM could constitute persecution and warrant the grant of asylum. This ruling in this case supported the argument that parents or guardians may not always be able to protect their children from undergoing FGM.[17] The importance of this judgment is that it recognizes the tremendous amount of social pressure, harassment, coercion, and threats

[14] *Ndegwa v. Canada (Minister of Citizenship and Immigration)*. 2006 FC 847 . Canada: Federal Court. 5 July 2006. Online. UNHCR Refworld, available at: http://www.unhcr.org/refworld/docid/47177d3a27.html
[15] UNHCR, Case for the Intervener in Zainab Esther Fornah (Appellant) v. Secretary of State for the Home Department (Respondent) and UNHCR (Intervener) *op cit*
[16] *re Oluloro (22nd March 1994)*, cited in the submissions by UNHCR, Case for the Intervener in Zainab Esther Fornah (Appellant) v. Secretary of State for the Home Department (Respondent) and UNHCR (Intervener) House of Lords, International Journal of Refugee Law 2007 Vol. 19 Issue 2 (July 2007) pp. 339-359, http://www.oxfordjournals.org/our_journals/reflaw/about.html .
[17] UNHCR, Case for the Intervener, *op cit* pp. 339-359

of isolation and disownment by family and peers, that accompany the decision as to whether to or not to undergo FGM.

The courts in deciding on FGM-related cases have based their judgments on human rights standards and principles. This is best illustrated by the House of Lords in *Secretary of State for the Home Department (Respondent) v. K (FC) (Appellant); Fornah (FC) (Appellant) v. Secretary of State fo*

> *'torture like' in their manifestation. Others such as property and marital rights are inherently unequal and blatantly challenge of international imperatives towards equality. The right to be free from torture is considered by many scholars to be jus cogens, a norm of international law that cannot be derogated from by nation states. So fundamental is the right to be free from torture that, along with the right to be free from genocide, it is seen as a norm that binds all nation States, whether or not they have signed any international convention or document. Therefore those cultural practices that involve 'severe pain and suffering' for the woman or girl child, those that do not respect the physical integrity of the female body, must receive maximum international scrutiny and agitation. It is imperative that practices that brutalize the female body receive international attention; an international leverage should be used to ensure that these practices are curtailed and eliminated as quickly as possible.*
>
> In some countries, including the United Kingdom, effect is given to this international consensus by the prohibition of FGM on pain and severe criminal sanctions.'[19]

Baroness Hale of Richmond concurred stating:-

> 'Hence, it (FGM) is a human rights issue, not only because of the unequal treatment of men and women, but also because the procedure will almost inevitably amount either to torture, or to other cruel, inhuman or degrading treatment within the meaning of not only Article 3 of the European Convention on Human Rights, but also of Article 1 or 16 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Article 7 of the International Covenant on Civil and Political Rights, and Article 37(a) of the Convention on the Rights of the Child.'

some of the girls are young and not physically able to take on the rigors of marriage in terms of sexual activity and the child birth. It is therefore clear that the practices are not considered as a violation of the rights of the child, since these girls are not seen as children. Never mind that the boys of even age are to an extent seen as deserving the protection of their families until they are able to take care of their own families. This is not to say that there are no violations of the rights of the boys. These practices have a great influence on the legislative framework of the countries in Africa. It is for this reason that we have instances in Africa where the laws place the age of majority at 18, with specific rights and obligations that attach to that majority age. There are also laws in these countries that criminalize rape and are clear on statutory rape. However, these laws are hardly ever applied to cases to protec

Swedish law, Swedish researchers said in a new survey[24]. The restrictions are a violation

Sensitization is therefore key. In Burkina Faso, the law is complemented by an elaborate police action that encompasses hotline and community vigilance. Even though there are still instances where FGM escapes the community surveillance systems, there is clear will of the judiciary to prosecute these cases. It however remains to be seen if the cases will serve to deter and eventually eliminate the practice of FGM. On the flip side, the cases of FGM are perpetuated across communities in spite of the law. This is best illustrated in the cross border practices in the West African region where communities separated by geographical borders simply cross over to their relations in the countries with no law. This is common especially between Senegal, Burkina Faso and Mali, where the latter has no law and the former two have laws. Of the 27 countries that have some legislative provisions against FGM, only 6 have specific provisions that broaden the scope of culpability to accomplices. These are Burkina Faso, Cote d'Ivoire, Eritrea, Niger, Nigeria (no federal law but in the state laws) and Togo. It can be argued that the direct reference to the accomplices expands the level of responsibility to the entire community and not only to the circumcisers, parents or the immediate family of the girl who is subjected to FGM.

Sensitization must ultimately result in the protection of the victims from these practices by self, community or the state. This can however only happen where the frameworks of protection are deliberately accessible and integrate the necessary capacity to monitor trends in order to provide timely action to girls and women whose rights are violated in the name of culture. It is the onus of states to provide such frameworks with enablers at policy, fiscal and human resource capacity to prevent violations and address the violations when they occur. The law alone is not enough and must be strengthened by efficient law enforcement and judicial systems, whose personnel should be trained in human rights protection as a fundamental requirement.