ACCESS TO JUSTICE: ACCELERATING THE ABANDONMENT OF FGM/C

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I. INTRODUCTION

Comprehensive national legislation plays a key role in changing social norms.1 Change in national-level legal norms can directly impact traditional, cultural practices, but top-down approaches alone cannot create sustainable norm change.2 Lasting, meaningful social change requires the participation of those most closely affected by the social norm.3 Through a bottom-up approach, legislation can directly empower women, girls and their communities, provide greater leverage for collective action, and support social norm change.4

FGM/C5 affects the lives of millions of women and

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3 Monkman et al., The transformatory potential of a village empowerment program: The Tostan replication in Mali, 30 WOMEN’S STUD. INT’L F. 451 (2007).
5 A word on terminology: “female genital cutting,” “female genital mutilation,” and “female genital mutilation/cutting,” refer to the same practice or “procedure.” “Mutilation” emphasizes the gravity of the act while adding the word “cutting” reflects a more neutral, nonjudgmental approach. See WORLD HEALTH ORGANIZATION [WHO], ELIMINATING FEMALE GENITAL MUTILATION: AN INTERAGENCY STATEMENT 3 (2008) [hereinafter WHO, AN INTERAGENCY STATEMENT]. Attempting to frame the discussion of legislation and issues of access to justice within the social norm and cultural components of the practice, this Note follows the guidance of some United Nations (“U.N.”) agencies and refers to the practice as female genital mutilation/cutting (“FGM/C”); c.f. ISLAMIC RELIEF CANADA, FEMALE GENITAL CUTTING IN INDONESIA: A FIELD STUDY 9 (Mar. 2013–2016) (using “female genital circumcision” throughout a report on the practice in Indonesian society); see also Sandra Danial, Cultural Relativism vs. Universalism: Female Genital Mutilation, Pragmatic Remedies, PRANDIUM, Spring, 2013, at 1–10 (addressing the practice within the cultural relativism and universalism debate).
girls.\(^6\) A global health concern,\(^7\) FGM/C is at once a cultural practice defined by long-held believes and traditions\(^8\) and a form of gender-based violence ("GBV").\(^9\) Efforts to address the practice require an understanding of the deeply entrenched nature of the practice and the social norms which maintain it.\(^10\) Sustainable change and a decrease in prevalence of FGM/C requires collective societal action.\(^11\)

This Note discusses the role comprehensive legislation traditionally plays through a top-down approach and proposes the use of bottom-up approaches to better leverage national laws and new legal norms to support collective societal action. The discussion views legislation and FGM/C through a social norm lens: “a comprehensive, multi-sectorial, culturally sensitive approach that incorporates a social perspective to impact collective change.”\(^12\)

Section II of this Note defines FGM/C as a health issue, a human rights violation, and a social norm. Section III discusses relevant international and regional human rights frameworks; state obligations; divergent views on the effects and usefulness of national legislation; and an overview of current legislation. Section IV proposes the development of Human Rights-Based Approach ("HRBA")\(^13\) access to justice intervention to promote the rights of


\(^7\) WHO, An Interagency Statement, supra note 5. The practice causes devastating short- and long-term physical and mental health consequences; see infra Section II.


\(^11\) Id.

\(^12\) See G.A. Res. 69/150 (Dec. 18, 2014); see also discussion infra Section II.B (defining social norm and social norm change).

\(^13\) Human rights principles provide that human rights are universal and inalienable; indivisible interdependent and interrelated: everyone is born with and possess the same rights, regardless of gender, race, religion, culture, or ethnic background and regardless of where they live; all rights are equal—political, civil, cultural, and economic—in importance and cannot be fully enjoyed without the others. Rights apply to all equally and all have the right to participate in decisions that affect their lives. United Nations Development Group [UNDG], The Human Rights Based Approach to Development Cooperation Towards a Common Understanding Among UN Agencies, attachment 1 (2003). International human rights direct and inform HRBA programing with the goal of promoting and protecting human rights. Based on universally recognized rights, the HRBA integrates gender, culture, and human rights and by definition, cultural and gender perspectives play a central role in all HRBA programs. Thus, an
women and girls, support gender equity and through legal empowerment accelerate collective societal action towards abandonment of FGM/C.

II. BACKGROUND: DEFINING TERMS

A. What is FGM/C

Available data show that FGM/C continues in Africa, the Middle East, Asia, South and Central America as well as in the United Kingdom, Europe, the United States, and Australia, among others. While exact numbers remain unknown, the most recent data indicate that at least, 200 million women and girls in over twenty countries have been subjected to the practice. Most cutting takes place between the ages of zero and fifteen; some adult women (over the age of eighteen) and married women undergo the practice.

The World Health Organization (“WHO”) defines FGM/C as any and all procedures that involve partial or total removal of the external female genitalia or other injury to the female genital organs. The practice interferes with the natural function of the body and has no known medical benefits. Health consequences include both physical and mental harm. Short term consequences include death and risk of death from blood loss and shock and from infection. Examples of long-term health consequences include anemia, cysts, pelvic infections, and urinary tract infections.


See UNICEF, A Global Concern, supra note 6.

See id.

WHO, An Interagency Statement, supra note 5.

Id. The WHO defines FGM/C within four separate types, or categories ranging from pricking or piercing to partial or total removal of the clitoris to infibulation, a narrowing of the vaginal orifice with the creation of a seal formed by cutting and then stitching the labia minor and/or the labia majora with or without removal of the clitoris.

Id.

Id.

Id.

World Health Organization [WHO], An Update on WHO’s Work on Female Genital Mutilation (2011) [hereinafter WHO, An Update].
FGM/C causes complications for both mother and child during childbirth, post-partum hemorrhage, stillbirths and low birth weight.22 Loss of nerves and nerve damage impairs sexual response.23 Long- and short-term mental health consequences include post-traumatic stress disorder, anxiety, depression, and long-term psycho-sexual harm.24 Chronic pain throughout a woman’s life causes not only physical harm, but also negatively affects women throughout their lives: from depression to social isolation.25

The justifications for the practice vary across cultures and communities.26 Linked to ideals of sexuality and beauty, marriage-ability, and religion, communities who practice FGM/C tend to practice other human rights violations such child marriage and forced marriage.27 For many years, researchers, activists, and the United Nations (“U.N.”) framed FGM/C as a health issue.28 Campaigns based on the “health frame” focused predominately on the adverse health effects of FGM/C.29 But, since the 1980s, discussions increasingly framed FGM/C within the context of women’s and girls’ human rights.30 The practice represents society’s control

22 HUMAN RIGHTS WATCH, FEMALE GENITAL MUTILATION IN IRAQI KURDISTAN 42 (2010) [hereinafter HRW, IRAQI KURDISTAN].
23 WHO, AN INTERAGENCY STATEMENT, supra note 5.
25 HRW, IRAQI KURDISTAN, supra note 22.
29 Camilla Yusuf et al., Female Genital Mutilation as a Human Rights Issue: Examining the Effectiveness of the Law against Female Genital Mutilation in Tanzania 2 AFR. HUM. RTS. L.J. 16, 41 (2013).
30 RAHMAN ET AL., supra note 28; see also ICPD, supra note 8; Beijing Declaration, supra note 9; Bettina Shell-Duncan et al., Legislating Change? Responses to Criminalizing Female Genital Cutting in Senegal, 47 L. & Soc’y Rev. 803 (2013) (discussing the history of women’s rights activists and the movement toward viewing FGM/C as a violation of women and girls’ human rights).
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over women, a manifestation of gender inequality.\textsuperscript{31} As Nahid Toubia succinctly notes: “FGM/[C] removes the woman’s sexual organs and leaves her reproductive organs intact.”\textsuperscript{32}

B. FGM/C: A Social Norm

A social norm is a behavioral rule that applies to a social context for a given population.\textsuperscript{33} People follow or obey a rule where a sufficiently high number of the population follows the rule, and where others think they should follow the rule or face sanctions if they don’t.\textsuperscript{34} A social norm resolves social dilemmas and tensions between the best choice for the group and the best choice for individual.\textsuperscript{35} Social norms represent an equilibrium: group incentives aligned with a coordinated outcome.\textsuperscript{36} Once reached an equilibrium becomes very difficult to change.\textsuperscript{37} An individual cannot change the social norm; only a collective agreement can effect a deeply entrenched social norm.\textsuperscript{38}

Parents do not want to harm their daughters, but the entrenched social dynamics create an obligation to conform.\textsuperscript{39} The decision whether to cut their child involves a complex decision-making process.\textsuperscript{40} One family’s decision depends on the assumptions of other families’ choice.\textsuperscript{41} FGM/C, like all social norms, provides rewards and punishments—powerful mechanisms which

\textsuperscript{31} WHO, AN INTERAGENCY STATEMENT, supra note 5.

\textsuperscript{32} HRW, IRAQI KURDISTAN, supra note 21, at 42 (quoting Nahid Toubia, Sudanese surgeon and human rights activist).

\textsuperscript{33} This Note provides only a brief overview of social norm theory in order to better frame the current discussion on legislation and access to justice. Social scientists continue to develop an understanding of social norms and programmatic strategies continue to evolve. For more information, UNICEF documents cited in this Note provide more information social norm theory, including social dynamics, social convention theory, and game theory analysis to promote positive norm change. See, e.g., UNICEF, CHANGING A HARMFUL CONVENTION, supra note 2; see also UNITED NATIONS CHILDREN’S FUND [UNICEF], TECHNICAL NOTE: COORDINATED STRATEGY TO ABANDON FEMALE GENITAL MUTILATION IN ONE GENERATION (2008) [hereinafter UNICEF, TECHNICAL NOTE].

\textsuperscript{34} UNITED NATIONS POPULATION FUND [UNFPA], MANUAL ON SOCIAL NORMS AND CHANGE (2015) [hereinafter UNFPA, MANUAL ON SOCIAL NORMS].

\textsuperscript{35} Id.

\textsuperscript{36} Id.

\textsuperscript{37} Id.

\textsuperscript{38} Id.

\textsuperscript{39} UNICEF, CHANGING A HARMFUL CONVENTION, supra note 2.

\textsuperscript{40} UNFPA, MANUAL ON SOCIAL NORMS, supra note 34.

\textsuperscript{41} UNICEF, TECHNICAL NOTE, supra note at 33.
drive the continuation of the practice. FGM/C provides girls and families social status and respect while failure to perform FGM/C brings shame and social exclusion.

Girls themselves may want to be cut. The outcome influences many aspects of a girl’s life. Societies view uncut women as unmarriedable and impacts the very ideals of female identity. To act outside a social norm endangers a girl’s ongoing acceptance and integration within the community.

An individual’s decision will not change a social norm. The community must accept and perpetuate a new norm. The decision to stop practicing FGM/C requires collective action.

III. INTERNATIONAL AND REGIONAL HUMAN RIGHTS FRAMEWORKS

A. International and Regional Human Rights Treaties

FGM/C violates a number of basic human rights enshrined in the U.N. Declaration of Human Rights. International and regional human rights treaties provide protections for relevant human rights. Under these mechanisms, human rights violations

42 Id.
43 UNICEF, CHANGING A HARMFUL CONVENTION, supra note 2.
45 Id.
46 Id.
47 UNICEF, CHANGING A HARMFUL CONVENTION, supra note 2.
48 Id.
include: the right to health;\(^{51}\) the right to life;\(^{52}\) the right to be free from discrimination;\(^{53}\) the right to be free from violence, the right to physical or bodily integrity;\(^{54}\) and the right to be free from torture and cruel, inhuman or degrading treatment.\(^{55}\) The African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (“Maputo Protocol”) explicitly requires states to prohibit and condemn all harmful practices, specifically prohibiting “all forms of [FGM/C], scarification, medicalization and para-medicalization of [FGM/C].”\(^{56}\)

Because of children’s vulnerability and need for care and support, human rights mechanisms grant them special protections.\(^{57}\) The Convention on the Rights of the Child (“CRC”) makes explicit reference to harmful practices.\(^{58}\) The African Charter on the Rights and Welfare of the Child obligates national governments to eliminate social and cultural practices which are harmful to the “health or life of the child and discriminatory to the child on the grounds of sex.”\(^{59}\)
B. Treaty Monitoring Bodies

No binding international treaty specifically addresses violence based on gender, or specifically, FGM/C. Many of the human rights treaty monitoring bodies ("TMB") have recognized and addressed FGM/C as a harmful practice, a violation of human rights codified in several international and regional treaties, and as an act of violence against women. The General Comments of the Committee on the Elimination of Discrimination against Women ("CEDAW") and the Committee on the Rights of the Child ("CRC") hold the most authoritative interpretive weight, providing consensus on the practice and the application of binding rights treaties. The CEDAW General Recommendation No. 14 calls upon states to take appropriate and effective measures to eradicate FGM/C. In 2014, the CEDAW and the CRC issued a joint statement, noting states’ obligation to condemn harmful practices; provide legal protections for victims; enable government and non-state actors to protect women and children at risk; provide appropriate responses and care; ensure the availability of redress; and end impunity.

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61 See WHO, An Interagency Statement, supra note 5, at 8 (providing a comprehensive overview of relevant treaty monitoring bodies ("TMB")).

62 UNFPA, Human Rights Framework, supra note 60.


64 Committee on the Elimination of Discrimination against Women, Committee on the Rights of the Child, Joint General Recommendation No. 31 of the Committee on the Elimination of Discrimination against Women-General Comment No. 18 of the Committee on the Rights of the Child on Harmful Practices, ¶ 40, U.N. Doc. CEDAW/C/GC/31-CRC/C/GC/18 (2014) [hereinafter CEDAW-CRC Joint Recommendation]. Relatively recent rights documents refer to FGM/C and other similar practices as "harmful practices," specifically removing the term "traditional." See for example, the African Protocol on the Rights of Women and the U.N. General Assembly resolution on the elimination FGM. While acknowledging the ongoing debate between culture, rights, universalism and cultural relativism, and the ripeness of a topic such as FGM/C: a human rights violation and a cultural practice, a full discussion of these viewpoints is beyond the scope of this Note. For a recent and interesting discussion, see Aleksandra Spina, Amid Cultural Relativism and Human Rights Universalism (July 2017) (unpublished doctoral thesis, Tilburg University) http://arno.uvt.nl/show.cgi?fid=144178.
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C. State Obligations

The development of legislation, policy, and practices “requires a proactive, continuing and systematic process . . . through a range of measures, including law, policy and practice.”65 In 2012, the U.N. General Assembly unanimously passed the first resolution on FGM/C.66 The resolution urged Member States to uphold their human rights obligations “protecting the full enjoyment of all human rights and the fundamental freedoms of women and girl.”67 The resolution reconfirmed FGM/C as a harmful practice68 and a social norm. Member States reiterated the need for culturally sensitive approaches, incorporating gender-equality principles, and human rights in developing national implementation of international and regional rights instruments.69 The protection of, and remedies for, women and girls requires states to adopt and enforce comprehensive legislation.70

The creation of a preventive legislative and institutional framework requires a coherent and complementary range of actions, underpinned by an inclusive and participatory approach which includes women and others who face discrimination.71

D. National Legislation

Through national legislation, governments develop measures to ensure compatibility with human rights treaties and, where relevant, promote and protect the constitutional rights of women and girls.72 Legislation promotes gender equality and eradicates dis-

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65 WHO, AN INTERAGENCY STATEMENT, supra note 5, at 26, citing OHCHR A/HRC/30/20, infra note 70.
66 G.A. Res. 67/146, supra note 12.
67 Id. at ¶ 11.
68 Maputo Protocol, supra note 50 (“Harmful practice means all behaviour, attitudes and/or practices which negatively affect the fundamental rights of women and girls, such as their right to life, health, dignity, education and physical integrity.”); id. at art. 1(g).
69 GA Res. 69/150, supra note 12, at ¶ 10.
71 OHCHR A/HRC/30/20, supra note 70.
72 Id.
Policies provide availability to, and accessibility of, health facilities; protective and preventative support mechanisms; and educational and social avenues to address legal access to justice and empowerment for women and girls.74

From a social norms approach, sustainable change depends not only on community-level participation in change, but will also require national level commitment.75 Comprehensive national legislation provides the strongest mechanism for governments to create an enabling environment to accelerate the end of the practice.76 Through a broad range of policy measures, legislation promotes awareness raising and dialogue within and among different groups.77

E. Divergent Views

Although the international community promotes legislation as an important reform strategy, the actual effects of and usefulness of legislation remain debated.78 On the one hand, some commentators and activists believe laws encourage change at the community-level, while others view national laws as a coercive, top-down approach, which ultimately undermines community-level efforts.79

Those who support the resources necessary to develop, promote, and enforce national legislation, argue that laws and policies bolster support for individuals and families already opposed to FGM/C.80 Legislation provides greater legitimacy81 and leverage for those seeking change and acting against social pressures.82 National laws facilitate and coordinate work of government entities, provide protective safeguards for women and girls and supportive

74 WHO, AN INTERAGENCY STATEMENT, supra note 5, at 18–19.
75 UNICEF, CHANGING A HARMFUL CONVENTION, supra note 2, at 14.
76 Id. at 29.
77 U.N. Rep. on Res. 69/150, supra note 70.
78 Shell-Duncan et al., supra note 30, at 803.
79 Id. at 805.
80 UNITED NATIONS POPULATION FUND [UNFPA], DRIVING FORCES IN OUTLAWING THE PRACTICE OF FEMALE GENITAL MUTILATION/CUTTING 8 (2013) [hereinafter UNFPA, OUTLAWING THE PRACTICE].
82 UNFPA, OUTLAWING THE PRACTICE, supra note 80.
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environments for local initiatives.\textsuperscript{83} The argument goes that while data illustrate the failure of enforcing purely punitive legal measures when implemented through educational, administrative, and social measures, legislation becomes a dynamic tool for change.\textsuperscript{84}

Critics of legislation argue legal reforms, particularly criminal laws, fail as a deterrent.\textsuperscript{85} Punitive laws are ineffective at best and counterproductive at worst.\textsuperscript{86} Members of practicing communities ignore formal laws.\textsuperscript{87} Communities adapt and change how they practice FGM/C.\textsuperscript{88} Legal prohibitions result in communities moving the practice underground.\textsuperscript{89} In order to avoid or lower the level of prosecution, communities practice a different type of FGM/C.\textsuperscript{90} Data also show a continual lowering of the age when girls undergo FGM/C.\textsuperscript{91}

Penal laws can worsen conditions for women and girls, without creating any sustainable change away from the practice.\textsuperscript{92} The effects of criminal sanctions, including the arrest of parents, further traumatizes the child.\textsuperscript{93} The impact of fines and imprisonment of practitioners, usually women, further marginalizes and disempowers them.\textsuperscript{94}

The long-term impact and effect of national legislation remains poorly understood.\textsuperscript{95} International bodies, activists, and academics often focus too much on how best to draft, enact, and enforce comprehensive legislation.\textsuperscript{96} Whether the purpose of national legislation is to criminalize the practice, provide protection mechanisms, or act as a deterrent, change in national-level legal

\textsuperscript{84} U.N. Rep. on Res. 69/150, supra note 70.
\textsuperscript{85} UNFPA, OUTLAWING THE PRACTICE, supra note 80.
\textsuperscript{86} Id.
\textsuperscript{87} Crisman et al., supra note 44.
\textsuperscript{88} EGM on Good Practices in Legislation, supra note 83.
\textsuperscript{89} Id.
\textsuperscript{90} Id.
\textsuperscript{91} Id.
\textsuperscript{92} Id.
\textsuperscript{93} CENTER FOR REPRODUCTIVE RIGHTS, FEMALE GENITAL CUTTING: AN ADVOCATE’S GUIDE 24 (2d ed. 2006), (“Governments should consider either assigning criminal sanctions only to the practitioners of FGM/[C] themselves, or assigning lighter penalties to parents than to practitioners.”); laws protecting children, including girls and prohibitions against FGM/C, should use the “best interest of the child” standard rights of the child under the CRC. See CRC supra note 50, at art. 3.
\textsuperscript{94} UNFPA, OUTLAWING THE PRACTICE, supra note 80, at 8.
\textsuperscript{95} Shell-Duncan et al., supra note 30, at 813.
norms directly impacts community-level norms. More research into the complex relationship between national legislation and changing the social norms holding FGM/C in place is needed.

F. National Legislation: Current Situation

1. Criminal Laws

Legislative measures vary in terms of restrictions. For example, Mauritania, Tanzania, Canada, and the United States criminalize FGM/C when performed on minors, which varies according to age stipulated in the legislation. Alternatively, the majority of African countries criminalize the practice regardless of age. Legislation also varies in how the law defines FGM/C. The Uganda legislation defines FGM/C as “all procedures involving the partial or total removal of external female genitalia for non-therapeutic reasons.” Eritrea’s comprehensive approach provides a list of definitions, detailing the different types of FGM/C, and prohibits all forms of the practice.

In countries where multiple legal systems overlap, customary systems can create loopholes, leaving women and girls unprotected by national constitutions and laws. A number of states adopted constitutional provisions explicitly stating customary or other legal systems must function in accordance with human rights standards. Uganda’s constitution specifically stipulates that “[l]aws, cultures, customs, or traditions which are against the dignity, welfare or interest of women or which undermine their status are prohibited by this Constitution.”

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97 Id.
98 UNICEF, Changing a Harmful Convention, supra note 2.
100 UNICEF, Changing a Harmful Convention, supra note 2.
101 Shell-Duncan et al., supra note 30, at 803.
102 Yusuf et al., supra note 29.
104 Id.
105 EGM on Good Practices in Legislation, supra note 83.
106 Id. at 7.
107 The Constitution of the Republic of Uganda 1995, § 33, ¶ 4. A legal case brought, and won, by a Ugandan non-governmental organization (“NGO”), resulted in the Ugandan Constitutional Court holding, for the first time in Uganda, that FGM/C violated the Constitution of Uganda. According to the Ugandan Constitutional Court, although any person is free to practice
process through which legislation developed over time and the level of social support for the legislation.\textsuperscript{108}

For example, Burkina Faso engaged in considerable mobilization before and after the passage of national legislation, integrating both bottom-up and top-down approaches.\textsuperscript{109} The country’s grassroots activism around FGM/C began in the 1970s and culminated in a legal ban against the practice in 1996.\textsuperscript{110} Burkina Faso witnessed a reduction in the practice among young women.\textsuperscript{111} Through radio announcements, broader public awareness campaigns, and the establishment of a hotline to assist those at risk for being cut or those who have undergone the procedure and are experiencing complications, actors within Burkina Faso likely created favorable social and political conditions helping to ensure that the law would be effective.\textsuperscript{112}

In 2000, before the passage of national legislation, a Kenyan regional court in the Rift Valley Province issued a permanent injunction against the father of two teenage girls, preventing him from forcing them to undergo FGM/C.\textsuperscript{113} Based on the rights found in the Kenyan constitution,\textsuperscript{114} the magistrate ordered the father to continue providing the girls with financial support.\textsuperscript{115} Kenya did not pass national legislation until many years later.\textsuperscript{116}

The Anti-FGM Act resulted from collaborations, dialogues, and debates.\textsuperscript{117} Throughout the drafting and ratification stages, a
number of collaborative mechanisms and awareness raising campaigns were developed to garner public support: high visibility of and active support by male parliamentarians; personal testimony by women parliamentarians from practicing ethnic groups; education workshops; and widespread media campaigns stressing the human rights aspects and adverse health consequences of FGM/C.\textsuperscript{118} Through this multisectoral effort, Kenya passed one of the most comprehensive laws,\textsuperscript{119} including modes of implementation built directly into the legal reforms.\textsuperscript{120}

Egypt first criminalized FGM/C in 2008.\textsuperscript{121} The national parliament passed a new amendment in 2016 providing greater punishment for practitioners.\textsuperscript{122} But a high percentage of the population continues to practice.\textsuperscript{123} A 2014 Egypt DHS found that ninety-two percent of currently or formerly married girls and women between the ages of fifteen and forty-nine had undergone FGM/C.\textsuperscript{124} The medicalization of FGM/C gained wide social acceptance.\textsuperscript{125} Although Ministry of Health banned medical personnel from practicing FGM/C in 2007, the medicalization of the practice has only gained further support, becoming more widespread. The most recent DHS data found that trained medical personnel performed eighty-two percent of all cutting.\textsuperscript{126}

Widespread social acceptance of the practice decreases legislative regulations.\textsuperscript{127} In 2015, an Egyptian appeals court convicted a doctor of manslaughter. The physician had performed FGM/C on

\textsuperscript{118} Id.
\textsuperscript{120} Id. For example, the Anti-FGM Prosecution Unit established under the Office of the Director of Public Prosecution formed directly out of the legislation. The Unit fulfills a comprehensive role within the justice system: referring prosecution of alleged charges, educating communities about the crime of FGM/C, and handling reports made through a helpline. Additionally, the Unit is responsible in facilitating intergovernmental partnerships between the judiciary, the prosecutor’s office, and civil society organizations.
\textsuperscript{124} HRW, \textit{Egypt}, supra note 122.
\textsuperscript{125} \textsc{Joint Programme}, 2015 \textit{Annual Report}, supra note 81.
\textsuperscript{126} HRW, \textit{Egypt}, supra note 122.
\textsuperscript{127} \textsc{Joint Programme}, 2015 \textit{Annual Report}, supra note 81.
a thirteen-year-old girl who subsequently died.\textsuperscript{128} The doctor was originally sentenced to two years in prison for manslaughter and three months for practicing FGM/C but served only three months of his sentence.\textsuperscript{129} The girl’s father received a three-month suspended sentence for taking his daughter to undergo the practice.\textsuperscript{130}

In 2013, the Indonesian government endorsed medicalization of FGM/C.\textsuperscript{131} By legalizing FGM/C and providing guidelines, the Department of Health claimed the medicalized practice would ensure a safer procedure and thus, greater protections of girls. After the guidance and endorsement, a study found few communities knew of the guidelines and most health professionals dismissive.\textsuperscript{132} One doctor reported:

How can there be guidelines when in medical school, female circumcision is not embedded in the curriculum . . . medical students are trained and assessed on male circumcision but there is nothing on female circumcision . . . so even if there are guidelines, trained medical professionals have no idea what they are doing.\textsuperscript{133}

Given the trend toward medicalization of FGM in a number of countries, it is particularly important that any definition clearly condemns the practice whether committed within or outside a medical institution.\textsuperscript{134}

2. Protection and Prevention Measures

The CEDAW and the CRC recommend all legislation includes guidance on prevention, protection, support and follow-up services, including physical and psychological recovery.\textsuperscript{135} More recently, legislation mandates the creation of shelters for victims/survivors of FGM/C.\textsuperscript{136} Italy’s legislation provides for the creation of anti-violence centers for women who want to escape FGM/C or women who want their daughters or their relatives to escape FGM/C.\textsuperscript{137}

\textsuperscript{128} Id.
\textsuperscript{129} HRW, Egypt, supra note 122.
\textsuperscript{130} Id.
\textsuperscript{131} ISLAMIC RELIEF CANADA, supra note 5.
\textsuperscript{132} Id.
\textsuperscript{133} Id.
\textsuperscript{134} Id. See discussion, supra note 27 on “cosmetic vaginal surgeries” in previously non-practicing communities.
\textsuperscript{135} CEDAW-CRC Joint Recommendation, supra note 64.
\textsuperscript{136} EGM on Good Practices in Legislation, supra note 83, at 28.
\textsuperscript{137} Id.
Prevention strategies coordinate relevant government sectors such as justice, security, health, and social services to provide for child protection and education.\textsuperscript{138} Awareness-raising and capacity-building programs to guide doctors and other health care providers to educate girls and their families and inform the family that they do not perform FGM/C.\textsuperscript{139} Professionals with specialized knowledge to assess and follow-up with women, girls, families, and communities provides preventative measures, while showing support for decisions to end the practice.\textsuperscript{140}

In a number of countries legislation includes the duty to report.\textsuperscript{141} In Europe the duty to report covers doctors, social workers, and teachers.\textsuperscript{142} Benin’s legislation legally requires anyone who has knowledge of an instance of FGM/C to immediately report the incident. Eritrea’s law contains a similar provision: “whoever, knowing that female circumcision is to take place or has taken place, fails, without good cause, to warn or inform, as the case may be, the proper authorities promptly about it, shall be punishable.”\textsuperscript{143} Alternatively, those best in particularly sensitive entry points, such as teachers and health professionals can find themselves in legally ambiguous positions.\textsuperscript{144} Additionally, \textit{if those professionals} lack effective training and guidance, those tasked with protecting children will not have the knowledge or capacity to protect girls and women at risk.\textsuperscript{145}

\textbf{G. Extraterritoriality}

FGM/C permeates national borders.\textsuperscript{146} The CEDAW and CRC recommend governments enact and adequately enforce extraterritorial laws for citizens who practice in other jurisdictions. In countries where community relationships do not recognize national boundaries, such as Mali and Senegal or Uganda and Ke-

\textsuperscript{138} EGM on Good Practices in Legislation, \textit{supra} note 83.
\textsuperscript{139} CEDAW-CRC Joint Recommendation, \textit{supra} note 68.
\textsuperscript{141} EGM on Good Practices in Legislation, \textit{supra} note 83.
\textsuperscript{142} \textit{Id.} at 17.
\textsuperscript{143} \textit{Id.}
\textsuperscript{144} Leye et al., \textit{supra} note 140.
\textsuperscript{145} \textit{Id.}
national legislation has not consistently addressed these types of extraterritorial considerations. As a result of factors such as globalization and migration, actions and actors cover more than one continent. The CRC noted European countries, for instance, must “continue efforts to end the practice of FGM . . . including the possibility of extra-territorial jurisdiction.” The European Convention on Nationality requires states to ensure the prohibition of FGM/C extends to third party jurisdictions, even if the practice is not considered a criminal offense in that country. The U.K. government estimates that 170,000 girls and women living in Britain have undergone FGM/C with 65,000 girls under age thirteen at risk. In 2003, and again in 2005, the U.K. amended legislation to include additional safeguards and more stringent punishments. Despite these revised legal frameworks, the government documented over 5,000 new cases of FGM/C. Anecdotal evidence suggests FGM/C occurs when women and girls travel outside of the country.

IV. ACCESS TO JUSTICE: A BOTTOM-UP APPROACH

As noted above, national legislation, viewed within social norm theory, provides an enabling environment for social norm change. But, this top-down approach limits the leverage of legislation for women, girls, and those supporting an end to the practice. Beyond limited litigation and infrequent government interventions, marginalized groups, including communities geographically and culturally distant from government institutions, often lack access to justice to take full advantage of comprehensive

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147 Id.
148 Id.
149 EGM on Good Practices in Legislation, supra note 83.
152 Id.
153 Id.
154 Id.
155 Id.
156 UNICEF, CHANGING A HARMFUL CONVENTION, supra note 2.
157 U.N. Secretary-General, Legal Empowerment of the Poor and Eradication of Poverty, U.N. Doc. A/64/133 (July 13, 2009) [hereinafter SG Report 64/133]; Benjamin van Rooij, Bringing Justice to the Poor: Bottom-Up Legal Development Cooperation, 4 HAGUE J. RULE OF L. 286 (2012).
Marginalized individuals and societies do not have opportunities to seek legal protections, redress, or actively impact social justice changes. Lack of cultural sensitivity and gender responsiveness create further barriers for women and girls. But, national legislation does not need to remain purely within formal state institutions. Access to justice models—a bottom-up approach—enhance the overall impact of national legislation through direct interaction at community-level. By empowering individuals and communities with knowledge and skills based on new national legislation, new legal norms can more directly and powerfully support social norm change.

This Note proposes the development of community-led access to justice programs that incorporate active community participation, decision-making, and action through education and dialogue. Two models form the basis of this proposition: the United Nations Development Programme’s (“UNDP”) HRBA access to justice program, and the Senegalese non-governmental organization (“NGO”) Tostan’s Village Empowerment Program (“VEP”). UNDP’s participatory access to justice programs promote legal empowerment by providing knowledge of and the capacity to use national laws to protect and promote women’s and girls’ rights. The VEP model actively promotes participation by providing individuals, particularly women, to exercise their agency; to set the agenda; and to actively drive the process.

A. UNDP’s HRBA Model

UNDP’s HRBA access to justice program reverses the top-down approach. Interventions include paralegals working di-
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rectly with communities, educational programs on human rights, and capacity building around new national legislation. The access to justice model enables communities to examine and support women’s rights, facilitate legal empowerment, and strengthen equality. Gender-based interventions provide women and girls with the capacity to assert their rights. Women and girls become empowered to “transform institutionalized social dynamics” within their own communities.

Access to justice—depending on need and community context—uses educational mechanisms; provides legal aid to oversee local dispute resolution; builds the capacity of informal justice actors, provides citizen’s rights training; and works with elders and leaders to align customary justice with human rights standards. As with FGM/C social norm change interventions, an HRBA access to justice program creates opportunities for positive norm change.

A quantitative study of UNDP’s Women’s Empowerment Program in Nepal found women initiated a predominantly greater number of actions, including health projects, campaigns against domestic violence, and participation in income decisions. Integrating legal and quasi-legal components within literacy activities enhanced the success of the program. A review of a Kenyan access to justice program using paralegal workers, found workers developed local knowledge resources and trained facilitators from within the communities to resolve legal disputes. Paralegal workers promoted rights awareness; informed justice run by community leaders and elders; and through legal empowerment created a catalyst for community-based social change. The Karnataka Women’s Legal Education Program in India works with a group of about twenty community members to develop paralegal skills. The women reported using legal training to fight domestic

171 Id.
172 Yusuf et al., supra note 29.
173 Ubink & van Rooij, supra note 170.
174 Id.
175 Id.
176 Id.
178 Id.
179 Id. at 33.
180 Id.
181 Id.
violence, argue for changes in wage laws, and successfully negotiate with local employers.\textsuperscript{182} In Bangladesh, the Banchte Shekka, a women’s group through literacy training, rights education, and alternative dispute resolution—among other programs—created a reformed version of traditional customary justice.\textsuperscript{183} The community-driven reform resulted in a gender-balanced forum for dispute resolution and redress.\textsuperscript{184}

### B. The Tostan VEP Model

In the late 1980s, Tostan, an NGO based in Senegal, initiated an informal, dialogue-based, educational and literacy program for rural women.\textsuperscript{185} Tostan’s voluntary participatory education program works at community level incorporating literacy and essential health education, including information about FGM/C, into a learning experiences for the entire community.\textsuperscript{186} The participatory method enables people to identify and address problems individually and collectively through a systematic process of examining life conditions, developing awareness of the context and factors that influence their own behavior, and, then, planning and implementing change.\textsuperscript{187} The program’s pedagogy emphasizes “active engagement and transformative learning.”\textsuperscript{188} The Tostan intervention focuses on the agency of the individual and the community.\textsuperscript{189}

The organization begins the program with facilitated mediation sessions and discussions led by community volunteers trained by Tostan.\textsuperscript{190} Once community members gain experience in the problem-solving process, their knowledge and skills increase, and mediation gives way to locally driven socio-political processes.\textsuperscript{191} At this point collective actions transform into social norm change.\textsuperscript{192} Under the Tostan program a number of communities

\textsuperscript{182} Id.
\textsuperscript{183} Golub, Beyond Rule of Law Orthodoxy, supra note 177.
\textsuperscript{184} Id.
\textsuperscript{185} Monkman et al., supra note 3.
\textsuperscript{186} UNICEF, CHANGING A HARMFUL CONVENTION, supra note 2, at 23–24.
\textsuperscript{187} Monkman et al., supra note 3.
\textsuperscript{188} Id.
\textsuperscript{189} Id. at 452.
\textsuperscript{190} Id.
\textsuperscript{191} Id.
\textsuperscript{192} Id. at 461.
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have declared their abandonment of FGM/C, the turning point towards sustainable change.\(^{193}\)

C. Access to Justice to Accelerate the Abandonment of FGM/C

An access to justice intervention integrating the Tostan education and participatory framework, enables communities to examine and support women’s rights, facilitate legal empowerment, and strengthen equality.\(^{194}\) As with the Tostan model,\(^{195}\) any informal justice program relies on context-specific design and implementation.\(^{196}\) UNDP defines access to justice as both interpretative and contextual; when people think of “access to justice”, they are not necessarily thinking of the justice system.\(^{197}\) Any program will only achieve success where context drives the program’s design. Communities have different cultural, religious, structures.\(^{198}\) Essential to any community-driven program, an access to justice intervention must consider community dynamics within an HRBA context as informed by the community itself. Equally as important, programs must engage and empower community-based civil society.\(^{199}\)

A participatory program promotes legal empowerment through educating people on the law, the rights and services provided by national legislation to move beyond the criminal sanctions.\(^{200}\) Participants must drive the program: individuals, specifically women and girls, decide which issues to address while legal facilitators provide the knowledge and skills to inform discussions and solutions.\(^{201}\) An empowerment model provides opportunities for individuals to leverage their legal rights.\(^{202}\) Individuals gain empowerment, access to services, and greater awareness of how to use their rights.\(^{203}\) The knowledge of national legislation,

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\(^{193}\) Monkman et al., supra note 3.

\(^{194}\) Yusuf et al., supra note 29.

\(^{195}\) UNICEF, CHANGING A HARMFUL CONVENTION, supra note 2.

\(^{196}\) UNITED NATIONS DEVELOPMENT PROGRAMME [UNDP], PROGRAMMING FOR JUSTICE: ACCESS FOR ALL (2005) [hereinafter UNDP PROGRAMMING FOR JUSTICE].

\(^{197}\) Id. at 4 ("Perceptions of justice in India: slum dwellers prioritized access to justice with regard to economic issues, whereas members of marginalized castes highlighted the social dimensions of access, and indigenous minorities highlighted the political dimension.").

\(^{198}\) WHO, AN INTERAGENCY STATEMENT, supra note 5.

\(^{199}\) Ubink & van Rooij, supra note 170, at 8.

\(^{200}\) SG Report 64/133, supra note 157, at ¶ 2.

\(^{201}\) Monkman et al., supra note 3, at 453.

\(^{202}\) Ubink & van Rooij, supra note 170.

\(^{203}\) Ubink & van Rooij, supra note 170.
like Tostan’s education on human rights, provide participants with the skill to open dialogue on new legal norms and to situate those norms within their particular community context.204 As with the Tostan VEP, not every member will participate.205 But, a process founded on community empowerment and participation motivates non-participants as well as participants.206 An HRBA participatory access to justice program empowers agents of change; brings the national law—the rights and new legal norms—into the community conversation.207 Legislation through participatory access to justice not only provides an “enabling environment,” but directly impacts a societies collective decision to address positive, sustainable change.208

D. Counter-Points to Consider

Access to justice programs do not come without challenges; informal justice systems, as much as state systems, may reinforce the same social structures keeping FGM/C in place.209 Nor do informal justice systems necessarily provide effective justice or accountability.210 Despite arguments that access to justice models eliminate the “elite” factor within the rule of law paradigm, customary justice systems are just as susceptible to “elite capture.”211 Many traditional and customary judicial systems inherently discriminate based on gender; women become “resigned to being treated as inferior.”212

Traditional justice systems may “serve to reinforce existing hierarchies and social structures,”213 including patriarchic systems often found in practicing communities. Where traditional leaders maintain local political power for economic and political gain, the use of customary justice may be detrimental to empowerment.214

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204 SG Report 64/133, supra note 157.
205 Monkman et al., supra note 3.
206 Id.
207 See generally id.
208 Id.
209 UNDP Programming for Justice, supra note 196.
210 ICJ, supra note 73.
211 Ubink & van Rooij, supra note 170, at 9.
212 Id.
213 Id.
214 Id.
Customary norms and justice can lead to discriminatory outcomes and reinforce unequal structures of control.\textsuperscript{215}

An access to justice program must remain rooted in HRBA; the approach helps to ensure accountability, assess and address capacity, and establish a participatory process.\textsuperscript{216} Informal justice systems based on international and national legal norms create opportunities to strengthen rights, develop new local-level legal norms, and support social norm changes.\textsuperscript{217}

No one model works; recognizing the complexity of any given locality helps to ensure programs remain context oriented.\textsuperscript{218} Customary justice and dispute resolution may violate human rights and constitutional standards.\textsuperscript{219} Before weighing in, reference to international human rights law and frameworks should occur to assess whether an informal system can provide access to justice and empowerment.\textsuperscript{220} Alternatively, customary law constantly shifts and changes.\textsuperscript{221} The adaptability of local level justice systems provides greater potential opportunities for reform than at national and international levels.\textsuperscript{222}

V. Conclusion

Legislation plays an important role in supporting social norm change toward the acceleration of the abandonment of FGM/C. The traditional top-down approach to leverage new legal norms through comprehensive legislation provides an enabling environment for community-level interventions and collection action. A holistic, culturally sensitive, human rights-based access to justice program leverages national laws to work directly for and with individuals and communities.

Legal empowerment at the community level enables local-level norm change, including gender equity while also informing national-level institutions. By educating and empowering individuals and communities on new legal norms, legislation provides greater support to sustainable positive norm change. Interventions

\footnotesize{\textsuperscript{215} Id.\textsuperscript{216} Id. at 11.\textsuperscript{217} Ubink & van Rooij, supra note 170.\textsuperscript{218} Id. at 10.\textsuperscript{219} Id. at 9.\textsuperscript{220} Id.\textsuperscript{221} Id. at 10.\textsuperscript{222} Id.}
at community level, using existing legislation inform communities and may also mitigate negative consequences of criminal laws. Sustainable, positive norm change requires top-down and bottom-up interventions. Access to justice provides a mechanism to use new, comprehensive legislation in an enhanced role to support the acceleration of the abandonment of FGM/C.