

# GENDER EQUALITY PROTECTION IN THE CONTEXTS OF BODILY INTEGRITY AND REPRODUCTIVE RIGHTS

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## A. INTRODUCTION, BACKGROUND AND INTERNATIONAL CONTEXT

This report focuses on the constitutional protection of gender equality through the lens of respect of bodily integrity and reproductive rights. The research team has undertaken research on countries that provide an interesting juxtaposition for our comparative project: the United Kingdom (UK), Indonesia and Burkina Faso as regards bodily integrity; and the United Kingdom, Brazil and Iran as regards reproductive rights.

In order to consider constitutional protection of gender equality, the research teams have asked two key research questions in their chosen subject area, and answered them by means of comparative study: to what extent are there overt protections in each constitution as regards the chosen rights and through what provisions are these achieved and how? To the extent that there are not, are these rights protected by implication and if so how? The report considers both protections in legal terms and the extent to which they are protected in reality. It also looks at what the protections mean in the context of gender equality. Reproductive rights and some forms of bodily integrity provision are necessarily gender differentiated and so a lack of adequate constitutional protection for reproductive autonomy creates a gender disparity within a country. Consequently the report is not looking at equal treatment by the substantive law but rather at whether the law allows for equal outcomes through protection of rights which, if not protected for women, may otherwise lead to increased inequality between men and women.

### Summary of Findings

The report is presented in two main parts and what follows is the product of the two research teams. The first part (researched by a team headed by Manvir Kaur Grewal and including Jennifer Uhram and Ioanna Nino) focuses on the right of bodily integrity with a focus on female genital mutilation or genital cutting. Prohibitions on this practice ensure women and girls are not subjected to any violation which would result in the removal or damage of healthy genital tissue without medical necessity and against their will ('FGM'). This right of bodily integrity is examined through the explicit and implicit constitutional provisions of the United Kingdom, Burkina Faso and Indonesia. In the United Kingdom, the right of bodily integrity is explicitly protected by the Female Genital Mutilation Act 2003, recently amended by the Serious Crime Act 2015, and bolstered by the Human Rights Act 1998, which is considered to be a constitutional statute. Similarly, Burkina Faso has been committed to the eradication of FGM by enacting Article 380 of the Penal code which prohibits 'total ablation, excision, infibulation, desensitisation and other' forms of violence on female organs. Interestingly, Indonesia has overturned its previous ban of FGM, introducing the medicalization of FGM by a Ministry of Health decree. The United Kingdom, alongside Burkina Faso, have enacted explicit and implicit provisions to transform cultural attitudes to FGM. Furthermore, Burkina Faso has found it increasingly difficult to penalize those who carry out FGM citing as reasons respect for the elderly and the consideration of the poor. In Indonesia, FGM is practiced as a recommended ritual and health professionals are provided with specific guidelines to make promote a 'safer' form of FGM. In the United Kingdom and Burkina Faso culture is the underlying justification for the prevalence of FGM. In Indonesia, FGM has strong associations with religion and is considered to be embedded as a religious duty in Islam. Although all three countries have found it necessary to respond to the prevalence of FGM there is a dissimilarity in their approach to the challenges of balancing equal protection of female bodily integrity and reproductive health alongside protection of religious belief and customs.

The second part of the report (researched by a team headed by Livia Carlini Schmidt and including Monique Law and Juliane Oliveira) focuses on the right to abortion in Brazil, Iran and the United Kingdom (UK). Each country has a different system of law: Brazil is a civil law country, religious laws are applied in Iran and the UK has a common law system. In Brazil abortion is a crime and allowed only in special circumstances: when the woman's life is in danger, the pregnancy is the result of rape, or the foetus is anencephalic. Iran also considers abortion a crime, allowing it only before the ensoulment (by the 19<sup>th</sup> week of pregnancy) if the woman's life is in danger or the foetus has abnormalities that would make life after birth impossible. The UK has different provisions for Great Britain and for Northern Ireland. The law in Northern Ireland is much more restrictive than in the rest of the UK. In the former, case law indicates that abortion may be lawful where the woman's life is threatened or where there would be a real and serious risk to her permanent or long term mental or physical health. Although all three countries have different legal systems, abortion is homogeneously considered a crime and allowed only in specific situations. The UK, apart from Northern Ireland, is the most liberal, as compared to Brazil and Iran. Despite the differences, all are influenced by moral and religious considerations, regardless of the system of law in place. A lack of safe access

to abortion services may give rise to increased financial and other forms of female dependency as well as mental and physical health problems for the women and children affected. And in turn this may give rise to gender inequality.

## International Context

The international community has for decades created strategies to ensure gender equality in the context of bodily integrity and reproductive rights.<sup>1</sup> Despite the differences in how various organisations have approached these rights, there is some overlap in how the international community looks to offer protection for women and girls. Both issues explicitly fall under the umbrella labelled women's rights and implicitly under minor's rights. Over the last sixty years, the international community has made many agreements to empower and defend women's rights, which have in turn influenced and developed national policies and legislation. Under international treaties women are entitled to enjoy the same human rights and fundamental freedoms as men. Further, international human rights provisions require nations to take practical steps to ensure women's rights are implemented and respected to eliminate inequalities including practices that negatively affect their rights. It is also noted that women's rights encompass specific additional rights related to their sexual and reproductive health, which affect them distinctly but may also give rise to inequality of outcomes for women and girls if they are not respected.

The United Nations Convention on the Elimination of Discrimination against Women (CEDAW) is one of the most comprehensive treaties that focuses on women's rights. The treaty was entered into in 1981 and condemns any form of discrimination against women; it ensures equal political, economic, cultural, social and civil rights for women. CEDAW requires State parties to take measures to achieve equality between men and women<sup>2</sup> and to change social and cultural trends that perpetuate discrimination.<sup>3</sup> In addition, CEDAW mandated for non-discriminatory health services including a women's right to receive family planning services.<sup>4</sup> The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) recognised genital mutilation as constituting a human rights violation. Further the UN Committee on Economic, Social and Cultural Rights (CECSR) has interpreted Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) to require State parties to the ICESCR to protect women from being coerced to participate in this harmful cultural practice.

This study has sought to interrogate explicit and substantive protection for women and girls in the two case study thematic areas in a range of jurisdictions and in doing so to draw some conclusions about the extent to which there is constitutional protection of gender equality. The next section sets out the research and working methods and the reasons for the chosen case studies and jurisdictions examined.

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<sup>1</sup> The Universal Declaration of Human Rights (UDHR), International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3, Preamble; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 and The Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3

<sup>2</sup> Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), Article 4

<sup>3</sup> Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), Article 5

<sup>4</sup> Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), Article 12

## B. RESEARCH AND WORKING METHODS

Postgraduate students at the University of Westminster have examined the extent to which gender equality is constitutionally protected formally and substantively within a range of countries through a two case study method, those two case studies focusing on the thematic priorities of reproductive rights and bodily integrity. These priorities are in-keeping with CEDAW's affirmation of the health and reproductive rights of women and its acknowledgement that culture and tradition are mediators of women's equality in many contexts. The UN Women constitutional database was used during the study, and supplemented with additional legal research where needed. The thematic priorities were chosen given that reproductive rights and some forms of bodily integrity provisions are often culturally and religiously informed, and necessarily gender differentiated, and yet a lack of adequate constitutional protection for reproductive autonomy for women creates gender disparities within society.

Both case study groups adopted a comparative legal method to develop their findings. Case studies are often used to examine phenomena in context where the object of study and the context cannot be uncoupled, as is frequently the situation where culture and religion inform the development of law in different jurisdictions.<sup>5</sup> The case studies employed are descriptive, considering for each jurisdiction the relevant explicit and implicit legal provisions and the extent to which they provide constitutional gender equality protection given the international norms that apply. The case studies were developed as multi-site or multi-jurisdiction case studies to allow for a more nuanced understanding of the two thematic priorities of bodily integrity and reproductive rights. The reasoning behind the selection of jurisdictions is set out below. Both case study groups developed their conclusions by drawing analytical inferences from within the three jurisdictions that formed the subject of each case study. And subsequently overarching conclusions were also reached on the constitutional protection of gender equality in these two thematic areas.

Case study group one (headed by Manvir Grewal and including Ioanna Nino and Jennifer Urham) explored the right of bodily integrity with a focus on female genital mutilation or genital cutting. Prohibitions on this practice ensure women and girls are not subjected to any violation which would result in the removal or damage of healthy genital tissue without medical necessity and against their will. This right of bodily integrity and reproductive health was examined through the explicit and implied constitutional provisions and substantive law of the United Kingdom, Burkina Faso and Indonesia. Although all three countries have found it necessary to respond to the practice of FGM, there is a dissimilarity in their approach to the challenges of balancing equal protection of female bodily integrity and reproductive health alongside protection of religious belief and customs. These responses have been compared against the constitutional framework within each country and have been assessed to analyse the extent to which the state provides protection to women in-keeping with its stated gender equality intentions within the constitution and commitments made when becoming state parties to CEDAW.

Case study group two (headed by Livia Carlini Schmidt and including Monique Law, Martha Mavima and Juliane Oliveira) explored the constitutional protection of gender equality with reference to the right to abortion in Brazil, Iran and the United Kingdom (UK). Iran is not a signatory to CEDAW and this has afforded an opportunity to consider reasons why the state considers a commitment to CEDAW as undesirable. All three of the selected countries have constitutional frameworks operating within different legal traditions: civilian, common law and religious law. In all three, abortion is considered a crime and allowed only in specific situations; all systems are influenced by moral and religious considerations. The findings on abortion have then been compared against the constitutional provisions on gender equality to consider the extent to which these constitutions provide a lived reality of gender equality.

What follows is an exposition of the two case studies, organised by jurisdiction and ending in a conclusion. Each section has been written by the respective research teams. There is then a final concluding section that brings together the findings from the two case studies and offers some final remarks on the extent to which there is constitutional protection of gender equality in these two contexts.

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<sup>5</sup> See Lisa Webley "Stumbling Blocks in Empirical Legal Research: Case Study Method" *Law and Method* [Accessed 19 December 2017: <https://www.bjutijdschriften.nl/tijdschrift/lawandmethod/2016/10/lawandmethod-D-15-00007>]

## C. GENDER EQUALITY IN THE CONTEXT OF BODILY INTEGRITY

### 1.1 Background and Context

The Sustainable Development Agenda coupled with explicit and implicit provisions seek to eradicate FGM by 2030. The elimination of FGM is a key target under Goal 5 which aims to “eliminate all harmful practices, such as child, early and forced marriage and female genital mutilation”.<sup>6</sup> This section addresses the constitutional provisions of United Kingdom, Burkina Faso and Indonesia to investigate to what extent there is protection of female bodily integrity with specific focus on FGM. Firstly, this section will detail to what extent there are explicit provisions that operate in this field and whether their goals are achieved and how. Secondly, this section will discuss if any rights are protected through a broader interpretation of related provisions. This section with them provide findings are regards the relevant constitutional frameworks with reference to the Gender Equality Constitutional Database provided by the United Nations, before providing conclusions on gender equality in the context of bodily integrity.

Bodily integrity is a general term encapsulating a wide range of physical, mental and sexual rights. This includes the human right not to be subjected to any violation which would result in the removal or damage to healthy genital tissue without medical necessity.<sup>7</sup> The World Health Organisation (WHO), UNICEF, UNFPA released a joint statement that classified FGM into four main categories:

Type I is clitoridectomy which is the partial or total removal of the clitoris and in some cases, only the prepuce. Type II is the partial or total removal of the clitoris and labia minora with or without removal of the labia majora. Type III is infibulation which is the narrowing of the vaginal opening by creating a covering seal. This covering seal is formed through the cutting and repositioning of the labia minora or majora with or without the removal of the clitoris. Type IV includes all other harmful procedures to the genital for any other non-medical reasons, this includes piercing, incision, scraping and/or cauterising the genital area.<sup>8</sup>

In each country the FGM ritual is usually completed without anaesthetic, with the child physically restrained whilst a sharp object, typically a knife or razor blade, is used to perform the mutilation.<sup>9</sup> The potential complications of FGM are manifold and may have immediate, short-term or long-term effects on gynaecological, obstetrical and psychological health throughout a woman’s life span.<sup>10</sup> Previous literature demonstrates the procedure is prevalent and, in some instances, there is substantial pressure on women and girls to undergo FGM. For many societies, this deeply rooted custom is packaged as a rite of passage and seen as the first path to becoming a woman. This section is set out on a jurisdictional basis, with reference to the international and domestic provisions that prevail in each jurisdiction, followed by constitutional guarantees (if any) and an assessment of their success. The section concludes with an overview of the extent to which gender equality is assured in the context of FGM.

### 1.2 International Framework on FGM: Explicit and Implicit Provisions

This section examines the international legal framework and provisions aimed to eradicate FGM. It also provides a brief overview of the implicit legal framework including any policy infrastructures and guidance reports internationally and in the United Kingdom. Historically, there was little explicit redress or condemnation of those that practiced FGM. However, with the development of the international community’s concern about this procedure, various organisations have shown a strong commitment to eradicate FGM. In 2012, the United Nation (UN) and European Union (EU) contended that eliminating FGM required a multi-pronged approach coupled with a pledge to implement anti-FGM strategies across the globe. Further to this, the United Nations General Assembly passed a resolution banning the practice of FGM.<sup>11</sup> The UN FGM Resolution specifically calls on all States to condemn all forms of FGM and take necessary measures

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<sup>6</sup> United Nations Development Programme (UNDP), Sustainable Development Goal 5: Progress of Goal 5 in 2017. [Accessed 22 May 2017: [sustainabledevelopment.un.org/sdg5](https://sustainabledevelopment.un.org/sdg5)]

<sup>7</sup> World Health Organization (WHO), Eliminating Female Genital Mutilation: An Interagency Statement UNAIDS, UNDP, UNECA, UNESCO, UNFPA, UNHCHR, UNICEF, UNIFEM, WHO. World Health Organization, (2008) p4.

<sup>8</sup> WHO, Sexual and Reproductive Health: Classification of Female Genital Mutilation, (2017). [Accessed 21 April, 2017: <http://www.who.int/reproductivehealth/topics/fgm/overview/en/>]

<sup>9</sup> Rushwan, H. 'Female Genital Mutilation: A Tragedy For Women's Reproductive Health' (2013) Vol. 19 (3) *African Journal of Urology* 130-133.

<sup>10</sup> Ibid.

<sup>11</sup> United Nations General Assembly (UNGA), Resolution adopted by the General Assembly 18 December 2014, 69/150 Intensifying Global Efforts for the Elimination of Female Genital Mutilations, A/RES/69/150.

towards this goal.<sup>12</sup> These measures included the enforcement of legislation, implementation of awareness, and allocation of sufficient resources towards the prevention and protection of FGM.<sup>13</sup> Since the Resolution there has been efforts to ensure the allocation of substantial financial resources, the development of national action plans, and data collection and monitoring to determine the level of prevalence in the UK. Alongside the UN, European Parliament has passed resolutions urging states to take action against FGM in 2001, 2009, and 2012.<sup>14</sup> In 2010, EU measures against FGM were secured by the launch of the European Institute for Gender Equality (EIGE). In 2013, the European Commission issued a communication on the elimination of FGM. Within this Communication, the European Commission prescribed logical steps to:

- (a) better understand the prevalence of FGM in the EU
- (b) promote sustainable change to prevent FGM
- (c) support EU member states in prosecuting FGM more effectively
- (d) ensure protection for women at risk of FGM on the EU territory
- (e) promote the elimination of FGM globally implement measures to monitor and evaluate the aforementioned goals<sup>15</sup>

The international explicit and implicit provisions suggest there is a real commitment within the international strategy to eradicate all forms of FGM. Therefore, in theory FGM should be reducing and international constitutional provisions should be assisting in this eradication. Despite the various explicit approaches, there is some room here to speculate that international provisions are not achieving their aims as the practice of FGM is still prevalent and culturally significant. In this sense, it could be argued that until anti-FGM provisions are implemented effectively within each national community, international approaches can only act as mere guides to what is expected of national courts and thus would provide little direct redress.

Despite explicit provisions FGM is implicated as a form of child abuse under rights directly linked to minors. FGM violates the human rights of women and girls as expressed in the European Convention on Human Rights<sup>16</sup>, the EU Charter on Fundamental Rights<sup>17</sup>, and in international treaties such as Convention on the Elimination of All Forms of Discrimination Against Women<sup>18</sup>, the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child.<sup>19</sup> In addition, the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) has recognised genital mutilation as a direct human rights violation.<sup>20</sup> Further, the UN Committee on Economic, Social and Cultural Rights (CECSR) has interpreted Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) to require States to protect women from being coerced to participate in this harmful procedure.<sup>21</sup> In particular, FGM violates the right to physical and mental integrity<sup>22</sup>; the right to

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<sup>12</sup> Ibid.

<sup>13</sup> Ibid.

<sup>14</sup> Council of Europe Parliamentary Assembly resolution 1247 (2001), European Parliament Resolution A6-0054/2009; Resolution 2012/2684(RSP).

<sup>15</sup> European Commission, Communication From The Commission To The European Parliament and The Council: Towards The Elimination Of Female Genital Mutilation, COM (2013) 833 Final (2013).

<sup>16</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) Articles 2 (1), 3, 5.

<sup>17</sup> EU Charter on Fundamental Rights Articles 1, 2, 3, 4, 21, 23, 24.

<sup>18</sup> Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), Articles 1, 2, 3, and 12

<sup>19</sup> Convention on the Rights of the Child (CRC), Articles 3, 5, 19, 24(3)

<sup>20</sup> Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention), Preamble, Article 38.

<sup>21</sup> UN Committee on Economic, Social and Cultural Rights (CECSR), General Comment No. 22 (2016) on the Right to sexual and reproductive health (International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3), E/C.12/GC/22, (4 March 2016).

<sup>22</sup> The Universal Declaration of Human Rights (UDHR), Articles 1 and 3; International Covenant on Economic, Social and Cultural Rights, Preamble; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, Preamble and Article 9 (1); and The Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3, Article 19.

the highest achievable standard of health<sup>23</sup>; the right to freedom from torture and cruel, inhuman, or degrading treatment<sup>24</sup> and when FGM results in death, it also violates the right to life.<sup>25</sup>

## 2.1 United Kingdom

The United Kingdom has been sporadically concerned with FGM for almost a century. Although, the practice is most common in countries such as Africa, Sierra Leone, Burkina Faso and Indonesia, it is also becoming increasingly common in the Western World.<sup>26</sup> This sudden emergence of FGM in the UK may be due to increased migration from endemic countries, which individuals have escaped due to civil unrest or for economic reasons.<sup>27</sup> It is estimated that in Europe approximately 500,000 girls and women have undergone FGM and are suffering with lifelong consequences.<sup>28</sup> Recent prevalence data estimated that approximately 137,000 women and girls in England and Wales had been affected by FGM.<sup>29</sup> Over half of the women aged 15-49 with FGM, 53,000, were born in countries with Type III FGM, and a further 20,500 were born in countries with very high rates of Type I and II FGM.<sup>30</sup> The emergence of understandings about the complications associated with FGM, and the prevalence of the practice, have resulted in legislative responses from the international and national community. These have often been associated with gender equality discourse.

### 2.1.1 International Framework on FGM: Explicit and Implicit Provisions

The UK is bound by all the provisions set out in section 1.2 above. Some of those provisions are directly applicable in the UK, other provisions have been translated into the domestic jurisdiction through domestic primary legislation, as set out below. The UK constitutional framework is dualist and so consequently many forms of international law are only effective within the domestic jurisdiction following an Act of Parliament that authorises this. The Human Rights Act 1998 makes the European Convention on Human Rights effective within the UK (subject to the fact that UK primary legislation will remain constitutionally valid were it to be incompatible with the European Convention, an applicant would have to seek redress from the European Court of Human Rights if this incompatibility was not removed by the UK Parliament). The European Communities Act 1972, at the time of writing, gives overriding priority to most forms of EU law within the domestic jurisdiction. And the UK is bound by other forms of international law, which has been signed by the State, in international terms and may be the subject of legal or political sanction via the relevant body in the event of State breach.

### 2.1.2 National Framework on FGM: Explicit Provisions

This section provides a brief overview of the legal framework including any policy infrastructures and guidance reports in the United Kingdom (UK). It will pay close attention to the amendments made by the Serious Crime Act 2015 to examine the scope of these provisions and to what extent they provide real protection to those at risk to this harmful practice. FGM was first criminalised in the UK in 1985<sup>31</sup> and the law was strengthened again in 2003 with the Female Genital Mutilation Act 2003 (FGM 2003).<sup>32</sup> The FGM 2003 act creates offences in connection with committing acts of mutilation. Section one states, “*a person is guilty of an offence he excises, infibulates or otherwise mutilates the whole or any part of a girl’s labia majora, labia minora or clitoris*”.<sup>33</sup> It provides exceptions for surgical operations necessary for physical or mental health or

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<sup>23</sup> UDHR Article 25; ICESCR Article 12.

<sup>24</sup> UDHR Article 5; ICCPR Article 2;

<sup>25</sup> UDHR, Articles 1 and 3; International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3, Preamble; International Covenant on Civil and Political Rights (ICCPR), Preamble and Article 9 (1); and The Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3, Article 19.

<sup>26</sup> Macfarlane, A. J. & Dorkenoo, E. ‘Prevalence of Female Genital Mutilation in England and Wales: National and local estimates’ (2015) *City University London in association with Equality Now*.

<sup>27</sup> Relph, S. Inamdhar, R. Singh, H. & Young, W. ‘Female Genital Mutilation/Cutting: Knowledge, Attitude and Training of Health Professionals in Inner City London’ Vol 167 (2) *European Journal of Obstetrics & Gynecology and Reproductive Biology* 195-198.

<sup>28</sup> European Commission, *Communication From The Commission To The European Parliament and The Council: Towards The Elimination Of Female Genital Mutilation*, COM (2013) 833 Final (2013).

<sup>29</sup> Macfarlane, A. J. & Dorkenoo, E. (2015). *Prevalence of Female Genital Mutilation in England and Wales: National and local estimates*. London: City University London in association with Equality Now.

<sup>30</sup> *Ibid.*

<sup>31</sup> Prohibition of Female Circumcision Act 1985

<sup>32</sup> Female Genital Mutilation Act 2003

<sup>33</sup> *Ibid.* S 1(1)



on a girl who is in any stage of labour, or for purposes connected with the labour or birth.<sup>34</sup> Other offences arise, including as provided by section two which prohibits assisting a girl to mutilate her own genitalia or aiding, abetting, counselling and procuring a person who is not an UK national or UK resident to carry out FGM.<sup>35</sup> All offences, except for section 4A, are triable either way.<sup>36</sup> A person guilty of offences under sections 1 - 3 of the FGM 2003 act is liable on conviction on indictment, to imprisonment for a term not exceeding 14 years or a fine or both.<sup>37</sup> These explicit provisions suggest the UK's stance on FGM is stringent and punitive. However, in reality the way in which the law has been implemented suggests otherwise and since the criminalisation of FGM in 1985, not a single individual has been convicted and very few have appeared in court. This sends a very mixed message to the victims who experience FGM, perpetrators who carry out FGM and of course the international community who are supposedly monitoring the implementation of international provisions for the sole purpose of eradication.

Recent amendments to the FGM Act 2003 have overhauled the provisions and show a real effort to strengthen the law against FGM in the UK. The Serious Crime Act 2015 (SCA 2015) amended the FGM Act 2003 to incorporate five new provisions.<sup>38</sup> Firstly, sections 1 to 3 of the FGM Act 2003 have been extended to include any act done outside the UK by a UK national or a UK resident.<sup>39</sup> This suggests the UK's national provisions are working in unison with the international provisions to ensure a global eradication of FGM. In addition to this, the Bar Human Rights Committee of England and Wales (BHRC) reinforced the UK's legal obligations and extended this to all children within its jurisdictions.<sup>40</sup> In addition, the BHRC has shown considerable support in launching an anti-FGM unit equivalent to the Forced Marriage Unit. While the previous coalition government pledged to introduce such a unit, none exists nor has there been effort to form it.

The SCA 2015 also introduced section 4A and schedule 1 which provides injunctions to prohibit the publication of any matter that could identify alleged victims.<sup>41</sup> The rationale behind anonymization is that it will encourage individuals to report FGM offences and to increase the number of prosecutions. The introduction of anonymization is encouraged and seeks to ensure individuals are not culturally ostracized for speaking out or for refusing the procedure. However, the reality is that despite this it has not been sufficient to secure prosecutions. This has given rise to two assertions: firstly, anonymization is not enough to encourage individuals to break their silence over a topic considered taboo not only in the West but also within their own communities. Secondly, anonymization is there to provide a safe and secure platform to discuss the impact of FGM on the individuals' life. However, a lack of prosecutions leads to questions about the perceived safety and security of this platform and suggests that the reforms have not provided enough protection in real terms.

Despite the expansion of liability for FGM, evidential problems could make it difficult to prove FGM occurred under parental responsibility. Section 72 SCA 2015 introduced a newer offence as regards persons who are 'responsible' for girls under the age of 16 and who failed to protect that girl from the risk of FGM.<sup>42</sup> Section 3A defines 'responsible' to include any person who has 'parental responsibility' and has 'frequent contact' with girl.<sup>43</sup> Secondly, this definition encompasses any adult who has assumed responsibility for the care of the girl in the manner of a parent. Although, this expansion opens the door to include a variety of persons, there could be temporal issues with establishing evidence for a prosecution. Some questions which may prove difficult include how long ago the FGM occurred, how to prove who had responsibility for her during that time, what steps were taken and whether these were enough to rebut liability based on the material facts. Thus, although in theory this appears to widen liability, in real terms it narrows the possibility of prosecution due to evidential difficulties.

This is similar to the newly inserted section 5B of the FGM act 2003, which seeks to place a duty on 'regulated professionals' in England and Wales.<sup>44</sup> Under this explicit provision, 'regulated professionals', namely healthcare specialists, teachers and social care workers, are to notify the police when, during their

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<sup>34</sup> Ibid. S 1 (2)

<sup>35</sup> Ibid. S 2

<sup>36</sup> Ibid. S 4

<sup>37</sup> Ibid. S 5

<sup>38</sup> Serious Crime Act 2015

<sup>39</sup> Ibid. S 70

<sup>40</sup> Bar Human Rights Committee of England and Wales, Report to the Office of the high Commissioner for Human Rights, (2014). [Accessed 10 May, 2017: <http://www.barhumanrights.org.uk/wp-content/uploads/2014/10/FGM-Report-2014.pdf>]

<sup>41</sup> Serious Crime Act 2015, S 71

<sup>42</sup> Ibid. S 72.

<sup>43</sup> Ibid, Schedule 1

<sup>44</sup> Ibid, S 74

work, they discover a risk of FGM or believe an offence of FGM may have been carried out on a minor.<sup>45</sup> The term 'discover' would refer to circumstances where the victim discloses to the professional that she has been subject to FGM, or where the professional observes the physical signs of FGM, such as pain, haemorrhage, infection and urinary retention.<sup>46</sup> Interestingly, this places a perceived real burden on those who fall under the umbrella of regulated professionals. Although, it is easily argued medical practitioners and healthcare professionals would be able to 'discover' and identify physical signs of FGM, this may not be apparent with teachers and social care workers. Is it then fair to place the same burden on teachers and social care workers and should they be held to the same standard? Is there any monitoring to suggest, when FGM has been carried out, whether 'regulated professionals' could or might have missed signs to suggest the risk of FGM? It could be argued by placing such a huge responsibility on teachers, who do not have the appropriate training, this results in a burden that may inadvertently hinder the prevention of FGM.

Despite a lack of prosecutions, the UK has readily implemented and accepted the use of FGM Protection Orders (FGMPO). The recent amendments introduced protection orders to protect actual or potential victims of FGM under a civil remit.<sup>47</sup> The court order can be made in emergency circumstances and contains legally binding conditions, prohibitions and restrictions to protect the person at risk of FGM.<sup>48</sup> These protections are in place immediately and allow orders to be unique to the individual and are implemented depending on the material facts of each case.<sup>49</sup> The High Court has a wide discretion to make these orders where it considers that there is a need to do so. This provision came into force in 2015 and was immediately used by the police to stop girls being taken to their countries of origin and then being placed at a higher risk of FGM. Interestingly, the FGMPO have been widely used in preference to prosecutions (to date no individual has been held liable). According to Ministry of Justice figures thirty-two such orders had been made in the year of the legislation's inception. This suggests that the UK is able to implement preventative methods to eradicate FGM more readily than be able to successfully prosecute individuals under the FGM Act 2003. To a greater extent, it can be argued a civil law remedy is likely to offer some protection which in turn ensures compliance with the condemnation of FGM from the international community. And prevention is always better, where possible, to prosecution following FGM.

FGM has been a crime since 1985 and has expanded into the FGM Act 2003 and later amended by the SCA 2015 yet there have only ever been three charges within the last thirty years. The first charges were announced in 2014 against Dr Dhanuson Dharmasena, a doctor, who allegedly performed reinfibulation on a woman after she had given birth. However, in a matter of thirty minutes the jury acquitted the doctor and the public labelled him as a "scapegoat" and questioned why the Crown Prosecution Service chose such a marginal case as the UK's first trial.<sup>50</sup> The Crown Prosecution Service was under much pressure to deliver a FGM prosecution, certainly after the Commons Home Affairs Select Committee labelled it a 'national scandal' and MP's have followed suit by describing the lack of prosecutions as "astonishing" and "shocking".<sup>51</sup> The second charge involved a doctor who has been struck off after a tribunal found he offered advice on arranging an FGM procedure.<sup>52</sup> In comparison, there have been 40 FGM-related trials in France, and European Commission figures to January 2012 show that there had been six in Spain; two in Italy and Sweden; and one each in the Netherlands and Denmark.<sup>53</sup> A failure to identify cases, to prosecute and to achieve convictions can only have negative consequences for those who are brave enough to come forward to highlight this crime. In the absence of successful prosecutions, FGM remains a national scandal that is continuing to result in the preventable mutilation of thousands of girls.

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<sup>45</sup> Ibid. S 74

<sup>46</sup> Avalos, L. 'Female Genital Mutilation and Designer Vaginas in Britain: Crafting an Effective Legal and Policy Framework' (2014) Vol 48 *Vanderbilt Journal of Transnational Law*.

<sup>47</sup> Female Genital Mutilation Act 2003, S 5A

<sup>48</sup> Female Genital Mutilation (FGM) Protection Orders, Fact Sheet [Accessed 10 May 2017: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/573786/FGMPO\\_-\\_Fact\\_Sheet\\_-\\_1-12-2016\\_FINAL.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/573786/FGMPO_-_Fact_Sheet_-_1-12-2016_FINAL.pdf)]

<sup>49</sup> Ibid.

<sup>50</sup> Frances Gibb, "NHS 'scapegoat' doctor Dhanuson Dharmasena not guilty of FGM", *The Times*, (February 4, 2015). [Accessed 10 May 2017: <https://www.thetimes.co.uk/article/nhs-scapegoat-doctor-dhanuson-dharmasena-not-guilty-of-fgm-f3tbwgpqn66>]

<sup>51</sup> Peter Walker, "Met Police still don't know where FGM is happening after 32 years without a conviction", *Independent*, (Tuesday 7 March 2017). [Accessed 10 May 2017: <http://www.independent.co.uk/news/uk/crime/met-police-fgm-32-years-no-conviction-where-happen-female-genital-mutilation-a7616536.html>]

<sup>52</sup> BBC News, "'Genital mutilation' doctor struck off after undercover press sting", *BBC News*, (30 May 2014) [Accessed 10 May 2017: <http://www.bbc.co.uk/news/uk-england-birmingham-27641431>]

<sup>53</sup> European Commission, Communication from the Commission to the European Parliament and Council, (2013)

In addition to explicit legislation prohibiting FGM, the UK has published several guidance reports and policies linked to combating FGM. This includes but is not limited to the Home Office publications such as the Government Response to the report on FGM<sup>54</sup>, a policy paper on Ending Violence Against Women and Girls Strategy: 2016 to 2020<sup>55</sup> and Multi-Agency Statutory Guidance on FGM.<sup>56</sup> Moreover, the Department of Health is providing training and awareness materials to ensure healthcare professionals and social care workers understand their role in combating FGM.<sup>57</sup> Constant reforms on explicit provisions and continuous publications linked to the eradication of FGM indicates the UK has taken a firm stand to eliminate FGM. For many reasons, beyond this report, a successful prosecution of FGM is yet to be witnessed. However, unlike other constitutions, in the last thirty years, the UK has shown a consistent firm hand in strengthening legislation which aims to eradicate FGM and in theory the reforms have been remarkable by displaying a real intention of change in how FGM is perceived in the UK.

### 2.1.3 National Framework on FGM: Implicit Provisions

This section provides a brief overview of the implicit national legal framework including any policy infrastructures and guidance reports in the United Kingdom. Despite explicit and direct provisions prohibiting FGM, it is also considered a form of child abuse under rights directly linked to minors. The Children Act 1989 provides protective measures that could be used to protect a girl at risk of FGM, including prohibited steps orders, police protection powers, emergency protection orders, and care orders.<sup>58</sup> In addition, the Children Act 2004 states that each agency governed by this Act must carry out their functions having regard to the need to safeguard and promote the welfare of children.<sup>59</sup> A minor from the West Midlands is the first person in the UK to be given a joint court order to protect her from both forced marriage and female genital mutilation.<sup>60</sup> Her GP, a registered medical practitioner, raised the alarm when she met to discuss FGM during her appointment.<sup>61</sup> Her GP acted swiftly, contacted the NSPCC and she was then referred to the West Midlands Police. Despite allegations of arranging FGM, there was little evidence and no charge was made.<sup>62</sup> It could be argued that implicit provisions act as a backhand in pushing FGM eradication and prosecutions under the umbrella of child welfare and protection. Subtlety, this takes the attention away from FGM being a cultural rite of passage and instead being an alternative to wounding a child and child cruelty. But, it may also lead to prevention of FGM and ultimately to gender equality protection.

To further strengthen the role of each NHS organisation, there are local safeguarding protocols and procedures for helping children and young people who are at risk of or facing abuse.<sup>63</sup> As FGM is a form of child abuse, professionals have a statutory obligation under national safeguarding protocols, such as the Working Together to Safeguard Children 2015, to protect girls at risk of FGM.<sup>64</sup> Despite some immediate responses and swift action from professionals, the National FGM Centre has *been "calling for professionals in contact with girls and women at risk to be 'braver' in using them"*.<sup>65</sup> Thus, suggesting that to eradicate the cultural connection to FGM and increase prosecutions, professionals must remain vigilant and where possible arrange for protective measures. This was further echoed in the case of *Re B and G* where the President of the Family Court stressed the important role of local authorities and courts in taking protective measures when dealing with a suspected case of FGM.<sup>66</sup> This case made it abundantly clear that FGM falls within the threshold of s 31 of the Children Act 1989, which concerns care proceedings for minors who are at

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<sup>54</sup> Presented to Parliament by the Secretary of State for the Home Department by the Command of Her Majesty, Female Genital Mutilation: Abuse Unchecked, (December 2016). [Accessed 10 May 2017:

<https://www.parliament.uk/documents/commons-committees/home-affairs/Govt-Response-FGM-abuse-unchecked.pdf>

<sup>55</sup> HM Government, Ending Violence against Women and Girls: Strategy 2016-2020, (March 2016).

<sup>56</sup> HM Government, Multi-Agency Statutory Guidance on Female Genital Mutilation, (April 2016).

<sup>57</sup> London Child Protection Procedures, 25. Safeguarding children at risk of abuse through female genital mutilation (FGM), London Safeguarding Children Board [Accessed 10 May 2017:

[http://www.londoncp.co.uk/chapters/sg\\_ch\\_risk\\_fgm.html](http://www.londoncp.co.uk/chapters/sg_ch_risk_fgm.html)]

<sup>58</sup> Children Act 1989; Children Act 2004

<sup>59</sup> Children Act 2004

<sup>60</sup> BBC News, "The Woman Saved From her Father's FGM Plans", BBC News, (23 June 2016) [Accessed 10 May 2017: <http://www.bbc.co.uk/news/uk-36587667>]

<sup>61</sup> Ibid.

<sup>62</sup> Ibid.

<sup>63</sup> Department of Health, Female Genital Mutilation Risk and Safeguarding: Guidance for professionals, (May 2016)

<sup>64</sup> HM Government, Working Together to Safeguard Children: A guide to inter-agency working to safeguard and promote the welfare of children, (March 2015).

<sup>65</sup> BBC News, "The Woman Saved From her Father's FGM Plans", (2016).

<sup>66</sup> *Re B and G (Children)* (No 2) [2015] EWFC 3, [2015]

“significant harm”.<sup>67</sup> However, despite recent legislative changes to expand and strengthen the range of implicit provisions and duties to professionals, there has been little evidence of these provisions assisting in prosecutions. To a greater extent, it could be argued these implicit provisions are a way to bypass the evidential problems associated with direct prosecutions and reduce the risk of FGM, in an indirect manner.

#### 2.1.4 Recommendations

Despite legislative modifications and the expansion of offences there have been no FGM related prosecutions since the criminalization of FGM in 1985. It can be argued the newly strengthened FGM Act 2003 lacks clarity and leaves significant gaps in the protection offered by the law. Some of these gaps refer to the limitations of the current legislation: firstly, it is apparent that the current law does not criminalize every form of FGM. Currently, the FGM Act does not provide a definition which means it is difficult to determine whether all ‘pricking, piercing, scraping and cauterizing’ would be included under section 1(1) which only specifies ‘excise, infibulate or mutilate’.<sup>68</sup> Furthermore, section 1(1) is silent on reinfibulation, which involve closing a female’s vulva after it has been opened for childbirth. The FGM Act needs to be reformed so as to include reinfibulation and further detail the scope of FGM by providing a clear definition. The Royal College of Obstetricians and Gynaecologists, the Royal College of Nursing alongside the Royal College of Midwives have recently expressed views that reinfibulation is not covered within the law as it does not involve cutting away healthy tissue.<sup>69</sup> By including all forms of FGM the UK’s position would be in harmony with international provisions which condemn all forms of FGM.

Secondly, the potential prosecutions detailed above represent the government’s efforts to effectively combat FGM, but evidence shows prosecutions by themselves will not restrict a cultural phenomenon entrenched within certain societies. In 2013, a parliamentary committee contended that a range of strategies were necessary.<sup>70</sup> With a unified approach, the well-established charity, UNICEF recommends legislation ought to be accompanied by measures that influence cultural traditions and expectations.<sup>71</sup> This would contextualize FGM and address the practice in a social context. This is echoed by a report published by the Royal College of Midwives suggesting intercollegiate recommendations to tackling FGM in the UK. Interestingly, this suggests a strong FGM law is not enough to end the cultural practice in the UK. It should be noted FGM has a strong social importance in that it allows girls to gain legitimacy and introduces the prospect of marriage.<sup>72</sup> It could further be argued there is an overemphasis on securing a successful prosecution of FGM, however, more attention ought to be paid to eradicating the cultural significance of this harmful practice.

Lastly, a multi-pronged approach coupled with strong commitment in the UK can only implement anti-FGM strategies if there is a constant flow of resources. The FGM Act 2003 does not specify funding commitments to be used for prevention or education purposes. The UN FGM Resolution report revealed more needs to be done for training and teaching purposes but without resources there is limited scope to eliminate FGM. The UK government has expressed some commitment by pledging £35 million to help eradicate FGM. Although this commitment is encouraged, it is too premature to discuss how effective this commitment would be and whether funding secured over a longer period of time would be more beneficial.

### 3.1 Burkina Faso

The small landlocked West African country Burkina Faso has made great progress in combating FGM. Excision (Type II) has been the most common genital mutilation procedure among Burkinabe women. Burkina Faso has reported a 76% percent prevalence in FGM nationwide which is a 13% decrease from 89% in 1980.<sup>73</sup> Most often performed as a rite of passage, FGM is a vital step for girls in becoming a woman. As opposed to the UK, FGM is practiced in Burkina Faso by all faiths and not linked with a particular

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<sup>67</sup> Children Act 1989, S 31

<sup>68</sup> Ibid, S 1 (1)

<sup>69</sup> The Royal College of Midwives, Tackling FGM in the UK: Intercollegiate Recommendations For Identifying, Recording And Reporting, (2013) [Accessed 10 May 2017: <http://perma.cc/4KYA-92ZC>]

<sup>70</sup> Commons Select Comm., Committee Announce New Inquiry into Female Genital Mutilation, UK PARLIAMENT (Dec. 18, 2013) [hereinafter Committee Announcement], <http://www.parliament.uk/business/committees/committees-a-z/commons-select/homeaffairs-committee/news/131218-new-inquiry-fgm/> [<http://perma.cc/VVU9-L2TT>]

<sup>71</sup> UNICEF, Female Genital Mutilation/Cutting: A statistical overview and exploration of the dynamics of change, (2013) [Accessed 18.5.17: [http://www.childinfo.org/files/FGCM\\_Lo\\_res.pdf](http://www.childinfo.org/files/FGCM_Lo_res.pdf)]

<sup>72</sup> Kate Norman, Joanne Hemmings, Eiman Hussein & Naana Otoo-Oyortey, FGM is Always With Us: Experiences, perceptions and beliefs of women affected by female genital mutilation, Options Consultancy Services and FORWARD (July 2009).

<sup>73</sup> World Economic Forum, *Global Gender Gap Report 2016*

community.<sup>74</sup> Factors also associated with being circumcised were education levels, religion, ethnicity, urban residence and age at marriage.<sup>75</sup>

### 3.1.1 International Framework on FGM: Explicit and Implicit Provisions

This section examines the international legal framework aimed to eradicate FGM in Burkina Faso. This section also provides a brief overview of the implicit legal framework including any policy infrastructures and guidance reports internationally and in the Burkina Faso. The Burkinabe government has been an active advocate for the eradication of FGM in the international community. They have ratified an extensive list of international agreements including the CEDAW, (ratified in 1987) the CRC (ratified 1990), the ICCPR and the ICESR (ratified 1999). With the support of the United Nations, Burkina Faso established the National Plan of Action to Promote the Eradication of Female Genital Mutilation in the Perspective of Zero Tolerance in 2010.<sup>76</sup> Using its membership in African unions, the country encourages states within the region to join and accept the Unions' principles. Border crossing activity to neighbouring countries like Mali has fuelled the government's involvement in regional unions.<sup>77</sup> Burkina Faso has worked within the framework of the West African Economic and Monetary Union (UEMOA).<sup>78</sup> Burkina Faso is also a member of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol).<sup>79</sup> The Protocol frames these rights with the understanding of socio-cultural contexts specific to Africa. All forms of FGM including scarification, medicalisation and para-medicalisation has been prohibited under the protocol.<sup>80</sup> FGM is specifically addressed in Article 5 'Elimination of Harmful Practices' which holds member states responsible for prohibiting of all forms of harmful practices through legislative measures and provide necessary support to victims of harmful practices.<sup>81</sup> In this sense, the international community has had a strong influence in providing protection in real terms, however, it is the effective implementation of national policies that suggest how well explicit and implicit provisions provide actual protection.

### 3.1.2 National Framework on FGM: Explicit Provisions

This section provides a brief overview of the legal framework including any policy infrastructures and guidance reports in Burkina Faso. The Burkinabe government established a comprehensive plan involving government regulations and civil society programs to eradicate FGM. One of the government's first actions was establishing Comité National de Lutte Contre la Pratique De l'Excision (CNLPE) in 1990 by presidential decree.<sup>82</sup> Administered by the Ministry for Social Action and the Family, the CNLPE oversees FGM prevention activities throughout the country and is in charge of their evaluation.<sup>83</sup> The CNLPE implemented the national 24 hour telephone hotline for reporting incidents of FGM that has either occurred or is likely to

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<sup>74</sup>Hayford, S. & Trinitapoli, J. 'Religious Differences in Female Genital Cutting: A Case Study' (2011) Vol 50 (2) *Journal of Scientific Study of Religion* 252 -271

The range for ethnic groups has been recorded as 22-87% The range for religions (including 'no religion' as a category) is 73% (other Christians) to 82% (Muslim).

<sup>75</sup> Chikhungu, C. L. and Nyovani, M. J. 'Trends and Protective Factors of Female Genital Mutilation in Burkina Faso: 1999 to 2010' (2015) Vol 14 (42) *International Journal for Equity in Health* 1 - 10

<sup>76</sup> UN Women Global Database on Violence against Women (UN GDVW), Burkina Faso Country Profile.

<sup>77</sup> 28 Too Many, Country Profile: FGM in Burkina Faso (December 2015). Increasing rate of families traveling to border countries like Mali who have not criminalised FGM or enforce laws effectively as Burkina Faso to have the procedure done. Within the western African region, Burkina Faso is one of the few countries to have prosecuted perpetrators under legislation banning FGM. The Burkinabe government has acknowledged this issue by increasing regional negotiation on the issue which will later be discussed in the covert provisions.

<sup>78</sup> Ibid.

<sup>79</sup> UN GDVW, African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) ratified 2004.

<sup>80</sup> Provided in Maputo Protocol "Article 5(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;...."

<sup>81</sup> Provided in Burkina Faso Constitution (1996) "Article 5: States Parties shall prohibit and condemn all forms of harmful practices which negatively affect the human rights of women.... 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...".

<sup>82</sup> UN Women GDVW, 'Comité National de Lutte Contre la Pratique De l'Excision (CNLPE)' (<http://evaw-global-database.unwomen.org/en/countries/africa/burkina-faso/1990/comite-national-de-lutte-contre-la-pratique-de-l-excision-cnlp>)

<sup>83</sup>Anika Rahman and Nahid Toubia, '*Female Genital Mutilation: A Guide to Laws and Policies Worldwide*' (Center for Reproductive Law and Policy, 2000) p115-116

occur.<sup>84</sup> They have established awareness raising campaigns in over 300 villages providing families with information about the harmful effects of FGM and about the legislation which protects them from it.<sup>85</sup> Their success is due to their attention on persons in respected positions, such as community leaders, religious leaders, police officers, teachers, and the cutters themselves.<sup>86</sup>

Amended in 1996 (in effect 1997), the Penal Code explicitly prohibits and criminalizes FGM.<sup>87</sup> Anyone who is found guilty of harming female organs is subject to a large fine and up to three years imprisonment, as provided in Article 380.<sup>88</sup> The Code also criminalizes practitioners of FGM in both the medical and traditional field. Article 381 establishes punishment of individuals who practice medicine by providing maximum punishment for individuals who are in the medical or paramedical profession.<sup>89</sup> Lastly, bystanders are also punished by fines ranging from 50,000 to 100,000 CFA francs according to Article 382.<sup>90</sup> The UN Committee on the Right of the Child reported in 2003 that seven FGM practitioners in the regions of Ougadougou and Bobo-Dioulasso detained under this very law.<sup>91</sup> Despite this example, there is still a substantial problem with enforcement. In 2008, the average sentence was recorded as just over three months.<sup>92</sup> The cases that have been brought to trial have often resulted in suspended sentences for the convicted who are often the parents of the child.

In July of 2009, Burkina Faso took a large step towards gender equality through the establishment of the National Gender Policy. To promote “participatory and equitable” development for all citizens, a seven steps action plan was created involving better access to services and gender rights issues.<sup>93</sup> The policy has not been formally integrated into other national security policies, but its core principles will be taken into account current policy formation. Studies concerning FGM are performed by the L'institut National De La Statistique Et De La Démographie (Insd) Sur L'excision Et Les Violences Conjugales (2008). Their studies have shown the actual prevalence of the practice in both urban (76%) and rural (72%) giving policy makers' information for their targets.<sup>94</sup> The INSD statistics have revealed that the underlying reason for the prevalence of FGM is the overall attitude towards women in Burkina Faso.<sup>95</sup>

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<sup>84</sup> Chikhungu, C. L. and Nyovani, M. J. 'Trends and Protective Factors of Female Genital Mutilation in Burkina Faso: 1999 to 2010' (2015) Vol 14 (42) *International Journal for Equity in Health* 1 – 10: The hotline has made some progress with a recorded 203 cases reported. The callers were mostly women, educated individuals, and younger people. Cases also included calls from religious leaders and administrators which shows positive results in the helpline

<sup>85</sup> UN Women GDVW, 'Comité National de Lutte Contre la Pratique De l'Excision (CNLPE)'

<sup>86</sup> Adiroopa Mikhherjee, 'Female Genital Mutilation in Egypt (Compared to Burkina Faso)', (Scholarly Horizons: University of Minnesota, Morris Undergraduate Journal Vol. 1 Issue 2 Article 8, 2014), p17. The campaign also provides training sessions created for traditional leaders, Islamic associations, churches and pastors, women's associations, and health professionals in addition to other programs. Over 2,200 community leaders have committed to abandoning FGM during public ceremonies.

<sup>87</sup> A. Rahman and N.Toubia (2000) p115

<sup>88</sup> Translation by the Inter-Parliamentary Union, [<http://www.ipu.org/wmn-e/fgm-prov-b.htm>]. "Article 380: Anyone who harms the female genital organs by total ablation, excision, infibulation, desensitisation or any other means shall be punishable by six months to three years' imprisonment and a fine ranging from CFA francs 150,000 to 900,000 or by one of these two punishments only. Should this result in death, the punishment shall be five to ten years' imprisonment."

<sup>89</sup> Ibid. "Article 381: The maximum punishment shall be meted out if the guilty party is a member of the medical or paramedical profession. Moreover, he or she may be disbarred from practice by the courts for up to five years."

<sup>90</sup> Ibid. Article 382, "Any person who is aware of acts as defined by Article 380 and who fails to notify the competent authorities shall be punishable by a fine ranging from CFA francs 50,000 to 100,000. Repression is viewed as a strategy designed to complement awareness-building activities."

<sup>91</sup> Patricia Wheeler, *Eliminating FGM: The Role of the Law* (The international Journal for Child Rights, 2004). pg. 265).

<sup>92</sup> United Nations Population Fund (UNFPA), *Burkina Faso Has a Strong Law Against FGM/C, But Winning Hearts and Minds Remains Crucial* (2008)

<sup>93</sup> United States Department of State (US DoS), *Burkina Faso* ([www.state.gov/documents/organization/186380.pdf](http://www.state.gov/documents/organization/186380.pdf)) "1) Improving access to and control over basic social services for all Burkinabè men and women in an equal and fair manner. 2) Promoting equal rights and opportunities for women and men in terms of access to and control over resources and equitable revenue sharing. 3) Improving equal access of men and women to spheres of decision-making. 4) Promoting the institutionalisation of gender through its integration in systems of planning, budgeting and policy implementation at all levels. 5) Promoting respect for human rights and the elimination of violence. 6) Promoting gender issues in order to change behaviour in favour of equality between men and women in all spheres of socio-economic development. 7) Developing an active partnership to foster gender awareness and reform in Burkina Faso"

<sup>94</sup> UN Women GDVW, Translated: Survey Conducted by the National Institute of Statistics and the Demographics (INSD) On Excision and Conjugales Violence (2008).

<sup>95</sup> UN Women GDVW, 'Enquete-Menee ar l'institut National de la Statistique et' (<http://evaw-global-database.unwomen.org/en/countries/africa/burkina-faso/2008/enquete-menee-par-l-institut-national-de-la-statistique-et>) '71% of women believe that a husband has the right to strike or beat his wife / partner when she neglects children, goes

### 3.1.3 National Framework: Implicit Provisions

This section provides a brief overview of the implicit national legal framework including any policy infrastructures and guidance reports in Burkina Faso. The Burkinabe Constitution (1991) while not explicitly prohibiting FGM, provides women the equality and right to bodily integrity in various articles. Article 1 of the constitution (revised in 2002) states that the all citizens are equal and also outlaws gender discrimination.<sup>96</sup> Further, all citizens are provided the right of life, security, and physical integrity while also forbidding and punishing acts of cruel treatment, slavery, and torture by Article 2.<sup>97</sup> The language of the article also specifically includes mistreatment of children which displays the government's focus on all citizens of their society.

The Burkinabe government has included the FGM prevention measures in many of their policies and education programs involving women's and children's rights. The Family Code (CPF) enacted in 1990 provides protection for young girls and women by providing restrictions on early marriages, ensuring mothers and fathers have an equal share in parental authority, rights of inheritance, allowing women to initiate divorce, and specific laws pertaining to domestic violence.<sup>98</sup> These provisions protect the most vulnerable victims of FGM, such as young brides. Cutting has been proven to cause serious health problems including, in some instances HIV.<sup>99</sup> For this reason, FGM prevention is included in HIV Prevention and Promotion of Reproductive Rights programs and campaigns that focus on male education about the subject such as Involvement in the Fight Against the Violence Against Women (2010) to provide education to both genders. The dedication to eradicating FGM has also been supported by the Chief of State and his wife. Mrs. Chantal Compaore, the Wife of The Chief of State is the Inter African Committee (IAC) and Goodwill Ambassador and the honorary chairperson of the CNLPE.<sup>100</sup>

### 3.1.4 Recommendations

While Burkina Faso has made great progress in the eradication of FGM, through their comprehensive plan, recommendations can still be made. Reforms are necessary in the judicial system to correctly penalise individuals who contribute to the continuation of FGM. It is evident the laws are not widely supported and police officials and local politicians face pressure to not enforce the law from some sections of the public.<sup>101</sup> Judges have been reluctant to incarcerate parents for fear of their children's wellbeing without them.<sup>102</sup> The Burkinabe government should also consider focusing on the increasing trend of circumcising girls at a younger age, including before the age of five years old. While a decrease in the prevalence of the procedure has been reported, the practice is still very widespread at a reported 53%.<sup>103</sup> It is also not clear that these figures capture the actual figure, as women may be less likely to identify that they have been the subject of FGM following the enactment of anti-FGM law by their government.<sup>104</sup> Further, it has been suggested that in the run up to the law prohibiting FGM in 1996, individuals may have circumcised their daughters at younger ages in an attempt to avoid penalty. In these cases, a girl undergoes circumcision before they start school which makes its impact less easily detectable at the time, but also leads to even longer term consequences for the girls. Women who are educated about the harm done by FGM will be less likely to subject their daughters to the practice.<sup>105</sup> Lastly, educational initiatives should continue focus on ending FGM as a marriage prerequisite. FGM is seen throughout the Burkinabe community as a prerequisite for marriage and the parents who exclude their daughters from the practice may face exclusion from the marriage arena.<sup>106</sup> Full elimination of FGM will include the assurance of willing husbands for uncircumcised daughters. Educational initiatives may focus on both genders' misconceptions of women's modesty and the hygiene benefits of FGM so as to lessen the incentive to engage with this procedure.

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out without warning, holds her in discussions, burns food or refuses sex. This proportion is higher in rural areas (76%) than in urban areas (59%)'.

<sup>96</sup> Ibid, *Burkina Faso: Equality and Non-Discrimination* (2016).

<sup>97</sup> UN Women, Global Gender Equality Constitutional Database, *Burkina Faso: Protection from Violence* (2016).

<sup>98</sup> Social Institutions & Gender Index – OECD Development Centre, *Burkina Faso* (2013) p2

<sup>99</sup> Adiroopa Mikherjee, (2014)

<sup>100</sup> US DoS, *Burkina Faso: Report on Female Genital Mutilation (FGM) or Female Genital Cutting (FGC)* (<https://2001-2009.state.gov/g/wi/rls/rep/crfgm/10047.htm>)

<sup>101</sup> UNFP, 2008.

<sup>102</sup> Ibid. There has been reluctance by magistrates to impose fines on the convicted knowing that because of the economic situation of those individuals, the fine could be more detrimental than incarceration

<sup>103</sup> UNICEF, *Statistical Profile on Female Genital Mutilation/Cutting* (UNICEF, 2013)

<sup>104</sup> Chikhungu, C. L. and Nyovani, M. J. 'Trends and Protective Factors of Female Genital Mutilation in Burkina Faso: 1999 to 2010' (2015) Vol 14 (42) *International Journal for Equity in Health* 1 - 10

<sup>105</sup> Ibid. p 8

<sup>106</sup> S.R. Hayford and J.Trinitapoli p6.

### 3.1 Indonesia

There has been much movement in the way Indonesia has approached the eradication of the harmful practice of FGM. In 2016 it was reported by UNICEF that almost half of Indonesian girls under the age of twelve years old have undergone a form of FGM/C.<sup>107</sup> The Ministry of Health (MoH) has created a distinction between their practice of Female Genital Circumcision and the World Health Organization's (WHO) definition of FGM to minimise its gravity.<sup>108</sup> Two of the most common forms of FGM/C practiced in Indonesia Type I (referred to as clitoridectomy) and less invasive procedures (Type IV).<sup>109</sup> Statistics from Indonesia provide an indication of the prevalence of genital cutting in a country where secular and religious attitudes toward the practice are increasingly in conflict. Interestingly, Indonesian authorities attempted to ban cutting 10 years ago, however as religious groups objected, the government softened its stance. It is apparent that circumcision defines female values in Indonesia. By not undergoing the procedure there is a possibility of social sanctions on the female. For example, in villages like Poliwali, Mandar, and Sumenep, a girl who has not been cut is seen as promiscuous or as having a high sexual drive.<sup>110</sup> Indonesian mothers often experience pressure by their community and believe that circumcision will enhance the health of their daughters as well as their marriageability.<sup>111</sup>

#### 3.1.1 International Framework on FGM: Explicit and Implicit Provisions

This section examines the international legal framework and provisions aimed to eradicate FGM. This section also provides a brief overview of the implicit legal framework including any policy infrastructures and guidance reports internationally in Indonesia. The practice violates diverse articles of international covenants such as the International Covenant on Civil and Political Rights (ICCPR), the International Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)<sup>112</sup>, the International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>113</sup> and the Convention on the Rights of the Child (CRC)<sup>114</sup>, of which Indonesia is a signatory. Many of the committees on these international covenants have voiced their concerns in reports on the country. For example, the Committee on the Rights of the Child in their second periodic report on Indonesia (January 2004), provided that States have an obligation to “*protect adolescents from all harmful traditional practices*”, such as early marriages.<sup>115</sup> Indonesia is also a member of the World Health Assembly of the WHO, which passed a resolution in 2008 urging all member states to enact and enforce legislation against FGM and prohibit the performance of FGM by any person.<sup>116</sup> Furthermore, in the 2010 interagency publication “*Global strategy to stop health-care providers from performing female genital mutilation*”, a number of organizations including UN bodies and the WHO found that “*the involvement of health-care providers in the performance of FGM is likely to create a sense of legitimacy for the practice.*”<sup>117</sup> To a greater extent, it gives the impression to victims and perpetrators that the procedure has been validated by medical professionals and thus either provides health benefits or at the very least that it is harmless. This can further contribute to institutionalization of the practice, rendering it a routine procedure and even leading

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<sup>107</sup> UNICEF, Indonesia: Statistical Profile on Female Genital Mutilation/Cutting, Division of Data, Research and Policy. (2016),

<sup>108</sup> UNICEF, Indonesia: Statistical Profile on Female Genital Mutilation/Cutting, Division of Data, Research and Policy. (2016),

<sup>109</sup> UNICEF, Indonesia: Statistical Profile on Female Genital Mutilation/Cutting (2016).

<sup>110</sup> Ayunda Nurvitasari, Ignorance, Social Pressure Behind Rampant FGM Practice in Indonesia, Magdalene (2016). [Accessed 14 April 2017: <http://magdalene.co/news-1018-ignorance-social-pressure-behind-rampant-fgm-practice-in-indonesia.html>]

<sup>111</sup> Hivos Southeast Asia Organization [Accessed 15 May 2017: <http://magdalene.co/news-1018-ignorance-social-pressure-behind-rampant-fgm-practice-in-indonesia.html>] Accessed 15 May, 2017: <https://www.hivos.org/activity/sexual-rights-study-fgm-and-sexual-pleasure-indonesia-2014-2015>: Many mothers believe that FGC is a process that enhances the health of daughter by making the vagina cleaner (84.6% believe) and enhancing fertility (55% believe). As for marriageability, many mothers agreed FGC controls their daughters sex drive (54.6%) and makes it easier for marriage (36%).

<sup>112</sup> Ratified by Indonesia in 1984.

<sup>113</sup> International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3; Ratified by Indonesia 2006

<sup>114</sup> The Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3; Ratified by Indonesia in 1990.

<sup>115</sup> Committee on the Rights of the Child, Consideration of reports submitted by States Parties under Article 44, Concluding Observations – Indonesia, UN Doc. CRC/C/15/Add.223, 26 February 2004

<sup>116</sup> Equality Now, End Government Legitimization of Female Genital Mutilation (FGM), [Accessed 15 August 2017: <https://www.equalitynow.org/action-alerts/end-government-legitimization-female-genital-mutilation-fgm>]

<sup>117</sup> World Health Organization (WHO), Global strategy to stop health-care providers from performing female genital mutilation, WHO/RHR/10.9, World Health Organization (2010) p.9



to its spread into cultural groups that currently do not practice it.<sup>118</sup> The Committee on the Elimination of Discrimination against Women and the Human Rights have both expressed concerns about the 2010 regulation on “female circumcision” and have recommended that it be immediately revoked.<sup>119</sup> In response to international outcry, the Indonesian delegation insisted that the practice of ‘circumcision’ in Indonesia is different from FGM practiced in other continents, as it is conducted properly by medical personnel.<sup>120</sup> Interestingly, the Indonesian Society of Obstetrics and Gynaecology passed a resolution opposing “*any attempt to medicalize FGM or to allow its performance, under any circumstances, in health establishments or by health professionals*”.<sup>121</sup>

### 3.1.2 National Framework on FGM: Explicit Provisions

This section provides a brief overview of the legal framework including any policy infrastructures and guidance reports in Indonesia. Ten years ago Indonesia was one of the first countries to ban FGM, however, today there is no national law prohibiting it. Currently, Indonesian customary law permits symbolic and small-cut incisions of the clitoris. Legislation on FGM first began in 2006 when the MoH prohibited health practitioners from performing FGM under Health decree no. 00.07.1.3047 because it considered it a meaningless practice that could potentially harm the health of women and girls.<sup>122</sup> The ban was quickly opposed by the Indonesian Ulema Council, the highest Islamic advisory body in Indonesia. In 2008, the Indonesian Ulama Council issued a fatwa against the MoH decree which encouraged the government and public to continue female genital mutilation part of lone-established customs stating that ‘female circumcision’ is makrumah - an ‘honourable deed’.<sup>123</sup> In the Islamic faith, a Fatwa is a non-binding but authoritative opinion by an Islamic scholar about a specific issue in the light of Islam’s values.<sup>124</sup> MUI stated that prohibition of female circumcision was against Islamic law and demanded that the state apply the Fatwa as a foundation on issuing any regulation concerning the practice.<sup>125</sup> Nevertheless, MUI warned against excessive practice that could bring harm (muḍārah).

One of the most important pieces of legislation on FGM by the Indonesian government is Decree No. 1636/MENKES/PER/XI/2010.<sup>126</sup> The document legitimized the harmful practice of FGM by allowing medical professionals to perform it under strict instructions.<sup>127</sup> It also provides a definition for the practice in its first article as “*the act of scratching the skin covering the front of the clitoris, without hurting the clitoris*”.<sup>128</sup> According to this decree, the act of “female circumcision” can only be conducted with the request and consent of the person circumcised, parents, and/or guardians which in effect medicalizes the procedure<sup>129</sup>. Consequently, female circumcision is performed in every hospital and most private maternity clinics on the grounds that it is safer and more hygienic to be performed by trained medical professionals.<sup>130</sup> It can be

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<sup>118</sup> Ibid.

<sup>119</sup> Concluding observations of the Committee on the Elimination of Discrimination against Women: Indonesia, UN Doc. CEDAW/C/IDN/CO/6-7, 7 August 2012, paras 21-22 and the Human Rights Committee Concluding observations on the initial report of Indonesia (Advance Unedited Version), July 2013, para 12.

<sup>120</sup> Ibid.

<sup>121</sup> Terre Des Femmes (TDF) and Watch Indonesia!, *Additional Submission to the United Nations Committee on the Rights of the Child 66<sup>th</sup> Session: Medicalization of FGM in Indonesia*, [Accessed 12 July, 2017:

[http://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/IDN/INT\\_CRC\\_NGO\\_IDN\\_16628\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/IDN/INT_CRC_NGO_IDN_16628_E.pdf)

<sup>122</sup> Ministry of Health decree no. 00.07.1.3047 prohibiting ‘female circumcision’ (2006). Minister of Health circulated letter prohibiting FGC by medical professionals. ‘It is suggested that this was introduced in part to respond to the apparent increase in medicalization of the practice by private practitioners who were reportedly offering FGC as part of a ‘birthing package’. (UNFPA)

<sup>123</sup> Equality Now, *End Government Legitimization of Female Genital Mutilation (FGM)*.

<sup>124</sup> In its Fatwa, MUI considered both male and female circumcision as part of Islamic ṭrah (nature) and shī’ār (symbol). MUI regarded female circumcision as ‘makrūmah’, meaning implementation is a recommended ritual (‘ibādah).

<sup>125</sup> Bastiaan Scherpen, ‘Unicef: 200 Million FGM Cases Worldwide, Many in Indonesia’, Jakarta Globe (February 05, 2016), [Accessed 02 August 2017: <http://jakartaglobe.id/news/unicef-200-million-fgm-cases-worldwide-many-indonesia/>]

<sup>126</sup> Regulation of The Minister of Health Number 1636/Menkes/xi/per/2010 2010 (Peraturan Menteri Kesehatan Nomor 1636/MENKES/PER/XI/2010 Tahun 2010), Translated by Microsoft. [Accessed 13 April 2017: <https://www.global-regulation.com/translation/indonesia/2965170/regulation-of-the-minister-of-health-number-1636-menkes-xi-per-2010-2010.html>]

<sup>127</sup> Ibid. Article 1.2,1.3,1.4,1.5,1.6.

<sup>128</sup> Ibid. Article 1.1, “Female Circumcision is the Act of scraping the skin that covers the front part of the clitoris, without injuring the clitoris”.

<sup>129</sup> Ibid. Article 3, “Any implementation of circumcision of women can only be done at the request and consent of the woman who was circumcised, parents and/or guardian”.

<sup>130</sup> UNICEF, Indonesia: Statistical Profile on Female Genital Mutilation/Cutting (2016).

asserted that medicalizing such a harmful practice does little to mitigate and eradicate long term health consequences and raises concerns related to medical ethics.

In 2014, MoH acknowledged its international and domestic critics by releasing a letter revoking its stance on FGC. The Article 2 of the Indonesia MoH Regulation No. 6 of 2014 states: "*Giving a mandate to the Consultative Assembly of Health and Syara'k to publish guidelines for the performance of female circumcision to ensure the safety and health of the women, who are being circumcised as well as to not perform mutilation of female genitalia (female genital mutilation)*"<sup>131</sup>. While this was a big step towards a change in legislation, the letter did not expressly prohibit the harmful procedure, instead it created a clear division between female circumcision and FGM. To a greater extent it infers the former is less painful and does not constitute the removal of healthy skin otherwise referred to as 'mutilation'. However, this is by no means an explicit prohibition of FGM and sound more like a justification to carry out the harmful procedure under the umbrella of 'circumcision'. Interestingly, the connotations and opinions related to circumcision generally focus on male circumcision, which has for years been accepted in western societies. However, 'mutilation', as a verb, is quite short and violent, suggesting the practice is painful and causes serious damage.

### 3.1.3 National Framework: Implicit Provisions

This section provides a brief overview of the implicit national legal framework including any policy infrastructures and guidance reports in Indonesia. The situation of Indonesia is unique in the sense that while the practice of female circumcision has been made legal, its legalization and medicalization contradicts many of their other domestic laws concerning health and the protection of female and children human rights. The Indonesian constitution for example provides the protection for human rights against torture and inhumane treatment<sup>132</sup>. In addition, Article 28 section I.5 provides that these human rights must be guaranteed in Indonesian laws and regulations.<sup>133</sup> Interestingly, the practice of FGC is considered to be an act of torture and inhumane treatment by the international community.<sup>134</sup> This suggests, Indonesia despite being a signatory to many international agreements falls short in protecting girls from FGM and directly violates international agreements. Further, article 28 provides that "*every child shall have the right to live, to grow and to develop, and shall have the right to protection from violence and discrimination*".<sup>135</sup>

Although there is little progress in the eradication of female circumcision in the country, progress has been made in combating the broader issue of gender based violence, which in turn could be implicated as provision to eradicate all descriptions of FGM. The National Commission on Violence against Women (established 1998) was created and followed by a National Action Plan on Elimination of Violence against Women in (established 2001) to ensure intensive and effective actions on combating gender based violence.<sup>136</sup> Government organizations like these have the capability of narrowing their scope towards more specific acts of gender based violence such as female circumcision. Despite, some progress, evidence suggest FGM has been repackaged and sold to society as circumcision, which not only allows the government to uphold the religious and cultural significance but attempts to bypass international agreements and allow for the procedure to continue.

### 3.1.4 Recommendations

While Indonesia has shown some efforts in acknowledging the harm caused by FGM, there are a number of recommendations which would ensure they comply with the international community's injunctions on FGM. The first step would be to reform and explicitly the prohibit FGM using the definitions provided by the international community. This would show Indonesia's firm support in eradicating FGM. It would also indicate that despite religious and secular attitudes the government will not be swayed nor will they soften their approach to comply with cultural rites of passage. However, this may cause dissent in a country that is heavily embedded in religion. There could also be research and awareness with the potential involvement of existing NGOs and women's religious organizations (such as Fatayat NU and Muhammadiyah). An effective role that NGOs can play is as facilitators, training and supporting individuals to become agents of change for

<sup>131</sup> Regulation of the Ministry of Health Number 6 By 2014 (Peraturan Menteri Kesehatan Nomor 6 Tahun 2014) Translated by Microsoft, [Accessed 12 April 2017: <https://www.global-regulation.com/translation/indonesia/8422647/regulation-of-the-minister-of-health-the-number-6-by-2014.html?q=Regulation%20Of%20The%20Minister%20Of%20Health%20The%20Number%206%20By%202014>]

<sup>132</sup> The 1945 Constitution of the Republic of Indonesia, Translated by the World Intellectual Property Organization (WIPO) (2002), WIPO Lex No. ID061.

<sup>133</sup> Ibid. 28 sections I.5.

<sup>134</sup> Ibid. Article 28 (G,2), 28 (I 1).

<sup>135</sup> Ibid.

<sup>136</sup> WHO, Indonesia: Country Policies and Strategies for Combating GBV, WHO Regional Office for South-East Asia, p1, [Accessed 21 August: <http://www.searo.who.int/entity/gender/data/indonesia.pdf?ua=1>]

themselves and their communities. The cooperation and assistance of these NGOs should be sought in the development of a broad-based community education campaign to promote discussion about FGC and encourage local leaders to speak out against the practice. There should be effective policies and strategies in place to empower women to make the decision to circumcise, however, the circumcision offered should in no way pressure or connect to the harmful procedure FGM. The end-goal is to have an empowered community that allows individuals to freely, knowledgeably, and autonomously decide how they wish to deal with their own sexual and reproductive lives.

It is believed that the government should take measures to ensure that officials, health workers and others provide girls and boys with appropriate and comprehensive sexual and reproductive health information and services, regardless of their marital status. Reproductive health programmes should be monitored to ensure that they are implemented free from discrimination. In addition, the state should conduct targeted campaigns to counter discriminatory stereotyping of girls in laws and policies, especially where these stereotypes contribute to limiting girls' gender equality and thus their human rights. These campaigns should be developed in consultation with children and should target, in particular, service providers, educators, and the justice system. They should highlight the link between discriminatory practices, reproductive health, and bodily integrity. It can be argued such empowerment promotes gender equality.

#### 4.1 Conclusions

This report has provided some interesting insights into the protections offered by the international and national explicit/implicit provisions in protecting women and girls against the harmful procedure known as FGM. Since introducing criminal liability in 1985 and strengthening the law through the SCA 2015 to our current FGM 2003 act, the UK has taken a firm position in condemning FGM. Continuous amendments from the SCA 2015 suggest some signs of progress, at least in the way FGM is perceived nationally. Similarly, Burkina Faso was one of the first countries to commit to eradicate FGM by passing the Penal Code which explicitly prohibits and criminalizes the procedure. Unlike the UK, it has successfully prosecuted individuals for carrying out FGM sending a real message of deterrence. Whilst in the UK the FGM Act 2003 may not have produced prosecutions, there has clearly been a change of intent, within the government and law-enforcement agencies, in terms of moving to end FGM. Both countries contrast with Indonesia, which has recently overturned its ban and argues that customary law permits symbolic and small-cut incisions of the clitoris. A legal edict argues FGM is obligatory within Islam and should not be opposed. Even with the variety of legislation and programs created by all three constitutions, it appears that FGM remains prevalent. Despite detailed explicit and implicit provisions designed to eradicate FGM, it has become clear that legislation alone will not eliminate the practice. FGM is a cultural problem that must be addressed in multi-faceted ways, and interventions must be matched with funding commitments that enable eradication, but this dedication must be met on every front. One can consider the lasting effects of the constitutional provisions and programs created by the governments to solve the problem, not necessarily now but in the future and make the solution permanent. It is clear that the rate of FGM overall has decreased and community attitude towards the practice is also changing. But gender equality will not be protected until such time as this practice becomes a historical fact. And consequently, constitutional protection of gender equality in all three countries is not fully effective in this regard, at present.

## D. GENDER EQUALITY IN THE CONTEXT OF REPRODUCTIVE RIGHTS

### 1.1 Introduction

This section of the report focuses on the extent to which there is constitutional protection for gender equality in Brazil, Iran and the United Kingdom through an examination of the explicit and implicit provisions in the constitution that address the right to abortion. Firstly, it will detail to what extent there are explicit provisions and whether these are achieved and how. Secondly, it will discuss whether there is protection by implication, either through other rights in the constitution or through a broader interpretation of the law. It is important to take into account that the chosen countries have different systems of law: Brazil is a civil law country; religious laws are applied in Iran; and the UK has a common law system; so, provisions are created and interpreted in different ways. Health is a fundamental human right. Sexual and reproductive health services should be available and easily accessed by all, as well as education and information about these services too. Obstacles to the access of health services, education and information are the major barriers to sexual and reproductive rights. According to the Amnesty International<sup>137</sup> complications due to unsafe abortions kill 47 thousand pregnant women each year, and in consequence of rape or unwanted pregnancy, every year, over 14 million teenage girls give birth. According to the World Health Organization, health is:

“A state of complete physical, mental and social well-being, and not merely the absence of disease or infirmity, reproductive health addresses the reproductive processes, functions and system at all stages of life. Reproductive health, therefore, implies that people are able to have a responsible, satisfying and safe sex life and that they have the capability to reproduce and the freedom to decide if, when and how often to do so”

Implicit in this are *“the right of men and women to be informed of and to have access to safe, effective, affordable and acceptable methods of fertility regulation of their choice, and the right of access to appropriate health care services that will enable women to go safely through pregnancy and childbirth and provide couples with the best chance of having a healthy infant”*.<sup>138</sup> It is stated in article 14(f), in the World Population Plan of Act (WPPA), that *“All couples and individuals have the basic right to decide freely and responsibly the number and spacing of their children and to have the information, education and means to do so, the responsibility of couples and individuals in the exercise of this right takes into account the needs of their living and future children, and their responsibilities towards the community;”*<sup>139</sup> The Unitarian Universalist Association (UUA) explains that the idea of Sexual and Reproductive Health and Rights have four different areas: sexual health, sexual rights, reproductive health and reproductive rights.<sup>140</sup>

The main reproductive rights women have are<sup>141</sup>:

- Right to education and access to make free and informed reproductive choices.
- Right to birth control
- Right to legal and safe abortion
- Right to access good-quality reproductive healthcare
- Freedom from coerced sterilization and contraception

Being able to access compatible health services that are low cost and accurate, as well as broad health information, is a fundamental human right. Even so, lack of access to education, gender-based discrimination, violence against women and girls, and poverty, can restrain the mentioned rights from being recognized for girls and women. These are questions that are especially intense when it comes to safe motherhood, as well as sexual and reproductive health rights.<sup>142</sup> In addition, it is also all women’s right to

<sup>137</sup> Amnesty International, ‘Sexual and Reproductive Rights’ [www.amnesty.org/en/what-we-do/sexual-and-reproductive-rights](http://www.amnesty.org/en/what-we-do/sexual-and-reproductive-rights) accessed 15 March 2017

<sup>138</sup> World Health Organization ‘Reproductive Health’ [www.who.int/topics/reproductive\\_health/en](http://www.who.int/topics/reproductive_health/en) accessed 15 March 2017

<sup>139</sup> UNGA ‘World Population Plan of Action 1984’ (14 August 1984) UN Doc E/Conf.76/19

<sup>140</sup> Unitarian Universalist Association ‘Women: Sexual and Reproductive Health and Rights’ <<http://www.uua.org/international/action/women>> accessed on 17 March 2017

<sup>141</sup> Unitarian Universalist Association ‘Women: Sexual and Reproductive Health and Rights’ <<http://www.uua.org/international/action/women>> accessed on 17 March 2017

<sup>142</sup> Amnesty International USA ‘Women’s Health, Sexual and Reproductive Rights’, <<http://www.amnestyusa.org/our-work/issues/women-s-rights/women-s-health-sexual-and-reproductive-rights>> accessed 15 March 2017

have adequate, affordable and accessible health care which also respects cultural demands. They have the right to be able to access right to health care that answers to their necessities as women, as well as access health care without any discrimination. Sexual and reproductive health involve a series of services, that include treatment and prevention, such as response to violence against women and the ability to choose when and whether to get pregnant. Being able to access these services is an essential element to the universal right to the highest achievable benchmark of health, nevertheless, as these services are basic care for girls and women only, their protection demands special attention. Similarly, sexual and reproductive autonomy is one of the most essential aspect in the battle for women's human rights.<sup>143</sup>

## 1.2 International Framework on Abortion: Explicit and Implicit provisions

This section examines the international legal framework as well as provisions designed to regulate the right to abortion. The United Nations have been dealing with the concern of unsafe abortion for a prolonged period recognizing that it threatens the lives of many women, and that it is a serious public health problem. The International Covenant on Civil and Political Rights (ICCPR)<sup>144</sup> entered into force on 23 March 1976. Article 3 declares that the State parties have to guarantee the equal rights of men and women regarding the exercise of civil and political rights.<sup>145</sup> The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)<sup>146</sup>, which was adopted by the United Nations General Assembly in 1979, defines discrimination against women and defines some actions to be taken in order to end discrimination against women.<sup>147</sup>

In 1994, the International Conference on Population and Development Programme of Action took place in Cairo, enunciating a new understanding of the link between individual well-being, development and the population. The conference produced a document<sup>148</sup> affirming sexual and reproductive health as a fundamental human right. This document also defined the concept of unsafe abortion<sup>149</sup> and its threat to women's health and lives.<sup>150</sup> The programme was adopted by 179 countries. The Fourth World Conference on Women, in 1995, produced a document, the Beijing Declaration and Platform for Action<sup>151</sup>, reaffirming the commitment of governments to implement actions that guarantee women's rights, and the right to safe abortion is one of them.<sup>152</sup> In 2011, the United Nations Commission on Population and Development passed a resolution<sup>153</sup> where paragraph 10 encouraging governments to strengthen the health system giving priority to sexual and reproductive health, in a way to reduce maternal mortality.<sup>154</sup> It includes complications from

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<sup>143</sup> Amnesty International USA, Women's Health, Sexual and Reproductive Rights, <<http://www.amnestyusa.org/our-work/issues/women-s-rights/women-s-health-sexual-and-reproductive-rights>> accessed 15 March 2017

<sup>144</sup> International Covenant on Civil and Political Rights, Resolution 2200A (XXI) 16 December 1966

<sup>145</sup> Art 3 "The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant."

<sup>146</sup> UNGA 'Convention on the Elimination of All Forms of Discrimination Against Women' (18 December 1979) A/Res/34/180

<sup>147</sup> "Article I: For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

<sup>148</sup> UNGA 'Programme of Action' (18 October 1994) A/Conf 171/13

<sup>149</sup> 'Note 20: Unsafe abortion is defined as a procedure for terminating an unwanted pregnancy either by persons lacking the necessary skills or in an environment lacking the minimal medical standards or both (based on World Health Organization, The Prevention and Management of Unsafe Abortion, Report of a Technical Working Group, Geneva, April 1992 (WHO/MSM/92.5)).'

<sup>150</sup> '12.17: Since unsafe abortion is a major threat to the health and lives of women, research to understand and better address the determinants and consequences of induced abortion, including its effects on subsequent fertility, reproductive and mental health and contraceptive practice, should be promoted, as well as research on treatment of complications of abortions and post-abortion care.'

<sup>151</sup> UNGA 'Beijing Declaration and Platform for Action 1995' (15 September 1995) A/Conf.177/20

<sup>152</sup> "(j) Recognize and deal with the health impact of unsafe abortion as a major public health concern, as agreed in paragraph 8.25 of the Programme of Action of the International Conference on Population and Development;"

<sup>153</sup> Economic and Social Council, 'Fertility, reproductive health and development' (27 April 2011) E/2011/25 E/CN.9/2011/8

<sup>154</sup> '10. Encourages Governments to prioritize universal access to sexual and reproductive health as part of health systems strengthening to eliminate preventable maternal mortality and morbidity and to take action at all levels to address the interlinked root causes of sexual and reproductive ill health, unintended pregnancy, complications arising from unsafe abortion, and maternal mortality and morbidity, including poverty, malnutrition, harmful practices, lack of accessible and appropriate health-care services, information and education, and gender inequality, taking into account people living in the most vulnerable situations, including persons with disabilities, displaced and refugee populations and irregular migrants, and paying particular attention to achieving gender equality and eliminating all forms of violence and discrimination against women and girls, with the full involvement of men;'

unsafe abortion as one of the preventable causes of death. Also, paragraph 1.12 calls on governments and development partners to improve maternal health, reducing mortality by training and equipping staff to ensure accessible and safe abortions, in places where their performance is legal.<sup>155</sup>

## 2.1 Brazil

It is estimated, in unofficial figures, that there are approximately 6,000 legal abortions and 1 million illegal abortions a year in Brazil.<sup>156</sup> The average number of deaths caused by illegal abortions is 5,729 a year. Brazilian legislation regarding abortion is extremely restrictive and both women and doctors may be penalised for the practice. Illegal abortions are more common among women with low educational levels, whereas religious beliefs do not appear to play a relevant role in driving women towards illegal abortions.<sup>157</sup> According to Brazil's last official census,<sup>158</sup> dated from in November 2010, its official population was 190,732,694 persons, and women are the majority, being 51.3% of the population. It is believed that more than one fifth of the Brazilian women will have had an illegal abortion by the end of their reproductive life.<sup>159</sup>

The Brazilian legal system has some significant features. First, Brazil is a civil law system country, which means that principles are codified in a system, as a primary source of law.<sup>160</sup> Statutes and codes support judicial decisions. Consequently, these written laws are seen as vital components for the guarantee of rights. Second, so as to enable implementation and interpretation, all laws are arranged under codes such as the Penal and Civil Codes, these laws being issued by both the three levels of government, federal, states and municipalities. Finally, and inconsistently, this legal system has neglected to protect several of the rights recognised in the Constitution and the Codes, for instance the right to abortion under certain circumstances<sup>161</sup>. Historically, Brazil still has a very strong Catholic influence<sup>162</sup>, besides being a secular state, according to the constitution<sup>163</sup>, as historically it used to be a Portuguese colony, and Portugal had the Catholic Church as the official religion until the end of the monarchy<sup>164</sup>. The Catholic Church continues to have a major impact in the abortion debate in Brazil. For example, it reacted quickly to anti-abortion legislation in 1986. The first Bill, supported by the Catholic Church, intended to penalise not only people who in any way took part in the woman's decision to abort but also anyone who published researches, books or articles, where the practice of abortion was defended. Several politicians are also reluctant to offend the Church or to lose it as an ally, the Church's impact on private behaviour in a population in which 88 per cent are Catholic is less clear, considering the high incidence of clandestine abortion.<sup>165</sup>

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<sup>155</sup> '12. Also urges Governments and development partners, including through international cooperation, in order to improve maternal health, reduce maternal and child morbidity and mortality and prevent and respond to HIV and AIDS, to strengthen health systems and ensure that they prioritize universal access to sexual and reproductive information and health-care services, including family planning, prenatal care, safe delivery and post-natal care, especially breastfeeding and infant and women's health care, emergency obstetric care, prevention and appropriate treatment of infertility, quality services for the management of complications arising from abortion, reducing the recourse to abortion through expanded and improved family planning services and, in circumstances where abortion is not against the law, training and equipping health-service providers and other measures to ensure that such abortion is safe and accessible, recognizing that in no case should abortion be promoted as a method of family planning, prevention and treatment of sexually transmitted infections, including HIV, and other reproductive health conditions and information, education and counselling, as appropriate, on human sexuality, reproductive health and responsible parenthood, taking into account the particular needs of those in vulnerable situations, which would contribute to the implementation of the Programme of Action of the International Conference on Population and Development, the Beijing Platform for Action and the Millennium Development Goals;'

<sup>156</sup> Leila Adesse and Mario F. G. Monteiro, 'Magnitude do Aborto no Brasil: Aspectos Epidemiológicos e Socio-Culturais' <[https://jornalgggn.com.br/sites/default/files/documentos/factsheet\\_mag.pdf](https://jornalgggn.com.br/sites/default/files/documentos/factsheet_mag.pdf)> accessed on 15 March 2017

<sup>157</sup> Debora Diniz and Marcelo Medeiros, 'Abortion in Brazil: a household survey using the ballot technique' (2010), *Ciência & Saúde Coletiva*, Vol 15 (1) 959

<sup>158</sup> IBGE, 2010 Population Census <<http://www.ibge.gov.br/english/estatistica/populacao/censo2010/default.shtm>> accessed on 17 March 2017

<sup>159</sup> Debora Diniz and Marcelo Medeiros, 'Abortion in Brazil: a household survey using the ballot technique' (2010), *Ciência & Saúde Coletiva*, Vol 15 (1) 959

<sup>160</sup> New World Encyclopedia, Civil Law (Legal System)

<[http://www.newworldencyclopedia.org/entry/Civil\\_law\\_\(legal\\_system\)](http://www.newworldencyclopedia.org/entry/Civil_law_(legal_system))> accessed on 20 March 2017

<sup>161</sup> Alessandra Casanova Guedes, 'Abortion in Brazil: legislation, reality and options.' (2000) 8 *Reproductive Health Matters* 16, 66

<sup>162</sup> Thomas C Bruneau, 'The Political Transformation of the Brazilian Catholic Church' (1975) 32 *The Americas* 1, 134

<sup>163</sup> Brazilian Constitution of 1988 - Art 19: "The Union, States, Federal District and Counties are forbidden to:

I. establish religions or churches, subsidize them, hinder their functioning, or maintain dependent relations or alliances with them or their representatives, with the exception of collaboration in the public interest, as provided by law;"

<sup>164</sup> X, 'Present State of Religion in Portugal' (1927) 55 *The Irish Monthly* 645, 128

<sup>165</sup> Alessandra Casanova Guedes, 'Abortion in Brazil: legislation, reality and options.' (2000) 8 *Reproductive Health Matters* 16, 66

### 2.1.1 International Framework: Explicit and Implicit provisions

This section examines the international legal framework as well as provisions designed to regulate the right to abortion. The International Covenant on Civil and Political Rights (ICCPR)<sup>166</sup> was signed by Brazil and ratified in 1992. In addition to the document mentioned before, Brazil is also a signatory state of The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)<sup>167</sup>, ratifying it in 1984. It has also participated in the 1994<sup>168</sup> and which affirmed sexual and reproductive health as a fundamental human right. This document also defined the concept of unsafe abortion<sup>169</sup> and its threat to women's health and lives.<sup>170</sup> Consequently, Brazil has recognised the importance of safe abortion services for women, and the link between these and gender equality protection.

### 2.1.2 National Framework on Abortion: Explicit Provisions

This section provides an overview of the national explicit legal framework, including guidance reports and policy infrastructure in Brazil. It will focus mainly on the Penal Code (Decree-Law 2848). The Penal Code was sanctioned in 1940, a period of time when elections, legislative bodies and political parties had been banned.<sup>171</sup> Issues, such as reproductive rights, could be discussed only in the context of pro- or anti-government positions. In Brazil, abortion is a crime against the potential life of the foetus, and is allowed only in special circumstances, such as: when there is danger to the woman's life, the pregnancy is the result of rape, or the foetus is anencephalic. The Penal Code strictly forbids abortion, providing a penalty to the pregnant woman of 1 to 3 years of imprisonment, 1 to 4 years of imprisonment to a third party who provokes an abortion with the consent of the pregnant woman, and 3 to 10 years of imprisonment to the third party who provokes the abortion without consent.<sup>172</sup> The same Penal Code also provides the special circumstances mentioned above. In these three cases, the public health system performs the abortion at no charge.

### 2.1.3 National Framework on Abortion: Implicit Provisions

This section provides an overview of the national implicit legal framework, including guidance reports and policy infrastructure in Brazil. It will focus mainly on the constitution. The Constitution of the Federative Republic of Brazil, promulgated in 1988, is the supreme and fundamental law in the Brazilian system, providing framework for all specific legislation. The preamble<sup>173</sup> ensures the exercise of rights such as well-being and equality. In the same sense, article 3 (IV)<sup>174</sup> displays Brazilian's constitution fundamental objectives, which include the promotion of well-being without any discrimination, including discrimination related to sex. And finally, article 5, which deals with Individual and Collective Rights and Duties, brings in its item<sup>175</sup> that under the terms of the Constitution, man and women have equal rights.

There are two snapshots of the battleground regarding reproductive rights in Brazil around which the debate over abortion has been framed. They depict the comings and goings of a moment of transition from a debate on abortion purely centred on moral or religious beliefs to a legal framework, based on the ideas of women's

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<sup>166</sup> International Covenant on Civil and Political Rights, Resolution 2200A (XXI) 16 December 1966

<sup>167</sup> UNGA 'Convention on the Elimination of All Forms of Discrimination Against Women' (18 December 1979) A/Res/34/180

<sup>168</sup> UNGA 'Programme of Action' (18 October 1994) A/Conf 171/13

<sup>169</sup> 'Note 20: Unsafe abortion is defined as a procedure for terminating an unwanted pregnancy either by persons lacking the necessary skills or in an environment lacking the minimal medical standards or both (based on World Health Organization, The Prevention and Management of Unsafe Abortion, Report of a Technical Working Group, Geneva, April 1992 (WHO/MSM/92.5)).'

<sup>170</sup> '12.17: Since unsafe abortion is a major threat to the health and lives of women, research to understand and better address the determinants and consequences of induced abortion, including its effects on subsequent fertility, reproductive and mental health and contraceptive practice, should be promoted, as well as research on treatment of complications of abortions and post-abortion care.'

<sup>171</sup> Decree-Law 2848 (Penal Code) 1940

<sup>172</sup> Articles 124 to 128

<sup>173</sup> Brazilian Constitution of 1988, Preamble: 'We, the representatives of the Brazilian People, convened in the National Constituent Assembly to institute a democratic state for the purpose of ensuring the exercise of social and individual rights, liberty, security, well-being, development, equality and justice as supreme values of a fraternal, pluralist and unprejudiced society, founded on social harmony and committed, in the internal and international orders, to the peaceful settlement of disputes, promulgate, under the protection of God, this Constitution of the Federative Republic of Brazil.'

<sup>174</sup> 'Article 3. The fundamental objectives of the Federative Republic of Brazil are: IV – to promote the well-being of all, without prejudice as to origin, race, sex, colour, age and any other forms of discrimination.'

<sup>175</sup> 'Article 5. All persons are equal before the law, without any distinction whatsoever, Brazilians and foreigners residing in the country being ensured of inviolability of the right to life, to liberty, to equality, to security and to property, on the following terms: I – men and women have equal rights and duties under the terms of this Constitution;'

rights and legal status of the foetus.<sup>176</sup> The hardness of the opposition they stirred offers a glimpse of the deep rooted taboo against abortion that has ingrained itself not only in Brazil, but most of the Latin American countries, especially because of strong political influence of the Catholic Church within the region.

The general prohibition on abortion yields its intended effects with astounding rates of success when it comes to disadvantaged women, who rely exclusively on the free public health care system to get the service they need. These women undoubtedly do not have access to quality abortion or post abortion services – therefore they may pay with their own lives when terminating unwanted pregnancy. This prohibition disproportionately impacts poor women and their families and creates a public health concern over maternal death related to botched abortions, incorrect use of abortive medication or lack of post abortion services (illegal abortion is in the top five causes of maternal deaths in Brazil).<sup>177</sup> The Catholic Church continues to have a major impact in the abortion debate in Brazil. For example, it reacted quickly to anti-abortion legislation in 1986. The first bill, supported by the Catholic Church, intended to penalise not only people who in any way took part in the woman's decision to abort but also anyone who published researches, books or articles, where the practice of abortion was defended. Several politicians are also reluctant to offend the Church or to lose it as an ally, the Church's impact on private behaviour in a population in which 88 per cent are Catholic is less clear, considering the high incidence of clandestine abortion.<sup>178</sup> In spite of the apparent lack of change in the legal status of abortion since 1940, however, a debate has permeated the Congress in Brazil with varying degrees of intensity over the years, which is revealed in an analysis of the abortion-related bills. These range from attempts at full decriminalisation of abortion to those that would revoke the only two instances in which the law permits abortions. While these bills can be loosely categorised as 'in favour of' or 'against' abortion, these labels do not necessarily mean they fully support or oppose the decriminalisation of abortion.<sup>179</sup>

#### 2.1.4 Recommendations

Very few Brazilian women have the possibility to have a legal abortion, partially because of the lack of statutory regulations setting methods for the provision of legal abortions in public hospitals. When considering the number of deaths due to illegal abortion, it is possible to conclude that abortion should be a priority on the government agenda regarding national public health. Throughout the years, hundreds of pregnant women in Brazil have carried fetuses with serious health conditions and would have liked to end the pregnancies before the due date. Because there is no specific rule governing the abortion of non-viable fetuses in Brazil, including anencephalic ones, it is not clear from the onset whether the general prohibition should apply, or if this constituted an exception to that rule.

Albeit not permitted by law, the performance of abortion in the case of foetal malformation is occasionally granted by judicial discretion. Between 1993 and 1999, 450 such abortions were authorised<sup>180</sup>, however, in these cases, too, the bureaucratic process was an arduous one, requiring a lawyer's petition and statements by three physicians and a psychiatrist or psychologist. During 2004, for a few months, Judge Marco Aurelio Melo granted a preliminary injunction authorizing women to have abortion in cases of fetal anencephaly.<sup>181</sup> Finally, the concept of the beginning of life is a controversial topic even when the state is constitutionally declared secular, and it challenges the limits of public reasoning, when ethical and juridical arguments mixed. But, in essence, the debate needs to be shifted from the fetus' right to life to the women's right to health and dignity.<sup>182</sup>

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<sup>176</sup> Luis Roberto Barroso, 'Bringing Abortion into Brazilian Public Debate: Legal Strategies for Anencephalic Pregnancy' in Rebecca J. Cook, Joanna N. Erdman and Bernard M. Dickens (eds), *Abortion Law in Transnational Perspective: Cases and Controversies* (University of Pennsylvania Press 2014)

<sup>177</sup> Luis Roberto Barroso, 'Bringing Abortion into Brazilian Public Debate: Legal Strategies for Anencephalic Pregnancy' in Rebecca J. Cook, Joanna N. Erdman and Bernard M. Dickens (eds), *Abortion Law in Transnational Perspective: Cases and Controversies* (University of Pennsylvania Press 2014)

<sup>178</sup> Alessandra Casanova Guedes, 'Abortion in Brazil: legislation, reality and options.' (2000) 8 *Reproductive Health Matters* 16, 66

<sup>179</sup> George Martine and Vilmar Faria, 'Impacts of social research on policy formulation: lessons from the Brazilian experience in the population field' (1988) 23 *Journal of Developing Areas* (1) 43

<sup>180</sup> Gabriela Scheinberg, 'Popularização do teste genético faz mais pais recorrerem ao aborto ilegal' *Folha de São Paulo* (São Paulo 19 December 1999) 3

<sup>181</sup> Debora Diniz and Ana Cristina Gonzalez Velez, 'Abortion at the Supreme Court: the anencephaly case in Brasil' (2008) 4 *Revista Estudos Feministas* (2)

<sup>182</sup> Debora Diniz and Ana Cristina Gonzalez Velez, 'Abortion at the Supreme Court: the anencephaly case in Brasil' (2008) 4 *Revista Estudos Feministas* (2)



### 3.1 Iran

Iran does not have official statistics about legal or illegal abortions, not even about deaths related to unsafe abortion. Although, it is believed that 250,000 women have illegal abortions in Iran every year, while 6,000 have legal abortions.<sup>183</sup> This average rate of illegal abortions is believed to have tripled over the last 15 years. Legislation concerning abortion is clear in the sense that abortion is allowed only in therapeutic situations, under very limited situations.<sup>184</sup> According to the Statistical Centre of Iran's official census<sup>185</sup>, dated from 2016, Iran's total population is 79,926,270 persons, and around 49% of this population is composed of women. Authorities from Iran are attempting to increase the population size to between 150 to 200 million people, but, instead, its birth rate has been declining, as in 1980 each woman gave birth to seven children, in 1988 to 5.5 children, in 1996 to 2.8 children, and in 2014 to 1.85 children.<sup>186</sup>

One of the most important legal characteristics of Iran is that it is a religious law country, meaning the constitution and legislation are based solely on the Islamic Sharia.<sup>187</sup> But democratic representation is also allowed. As there is not a single Sharia Code, each country has its own interpretation. It is mainly based on legal precedent and reasoning by analogy, being thus, considered similar to common law. The rule of autonomy is held high in Islam, the person is the one responsible for deciding what is the best for himself/herself.<sup>188</sup> Being a codified religion, Islam has its basis on the Quran and the records of Prophet Muhammad's rulings and sayings. World religions believe life is sacred, initiating with conception and finishing with death, not usually discussing embryological development of humans. But Islam is unique in this sense, as the Quran, the divine scripture, extensively described and detailed, defining the time when life begins. Other religions, such as the Catholic Church, do not accept abortion under any circumstances.<sup>189</sup> Iran used to have a Family and Population Planning Programme, which was responsible for offering information and services about sexual and reproductive health. The dispensation of subsidized price contraceptives was included in this programme. In 2012, the funding for this planning programme was completely cut.<sup>190</sup>

#### 3.1.1 International Framework: Explicit and Implicit provisions

This section will provide an analysis of the international explicit and implicit provisions related to abortion that Iran has taken part. The ICCPR<sup>191</sup>, from 1966, as mentioned before, guarantees that men and women have equal rights, regarding the exercise of civil and political rights. It was ratified by Iran in 1975.<sup>192</sup> In Iran, conservative politicians and religious figures reject the universal approach for gender equality in CEDAW and instead propose their own "Islamic" alternative. Iran's Leader and other members of the conservative religious establishment promoted the idea that women and men are equal parts of God's creation but that the two genders have manifestly different social roles and duties. This view results in a host of blatantly discriminatory practices that affect women in their public and private lives. To some religious leaders and conservative politicians these laws reflect social roles where women, while spiritually equal to men, are not charged with the same level of social, economic, and political responsibility, and thus are not given agency in these fields. So for them, CEDAW's notion of equality in all areas of life is at odds with Islam. And it is not insignificant that nearly every Muslim country worldwide has ratified CEDAW. Perhaps the real reason Iran has not ratified the Convention has less to do with religion, and more to do with the fact that women's rights are in conflict with the interests of the predominantly male political elite. Moreover, with ratification the State would submit itself to review by UN bodies. This process has led to substantial legal reforms in other Muslim

<sup>183</sup> Mehrnaz Samimi, 'Abortion on the rise in Iran', Al-Monitor (Iran 11 February 2014) <<http://www.al-monitor.com/pulse/originals/2014/02/iran-abortion-rising.html>> accessed 22 April 2017

<sup>184</sup> K M Hedayat, P Shooshtarizadeh and M Raza, Therapeutic abortion in Islam: contemporary views of Muslim Shiite scholars and effect of recent Iranian legislation (2006) 32 J Med Ethics 652

<sup>185</sup> Statistical Center of Iran, 'Census 2016 – General Results' <https://www.amar.org.ir/english/Population-and-Housing-Censuses/Census-2016-General-Results> Accessed 20 May 2017

<sup>186</sup> Amnesty International, 'Sexual and Reproductive Rights in Iran: Facts and Figures' (11 March 2015) <https://www.amnesty.org/en/latest/news/2015/03/sexual-and-reproductive-rights-in-iran/> accessed 10 April 2017

<sup>187</sup> Hadi Ghaemi, 'The Islamic Judiciary', <http://iranprimer.usip.org/resource/islamic-judiciary> accessed on 21 August 2017

<sup>188</sup> Badawary A. B. Khitamy, 'Divergent Views on Abortion and the Period of Ensoulment' (2013) 13 Sultan Qaboos Univ Med J 1, 26

<sup>189</sup> K M Hedayat, P Shooshtarizadeh and M Raza, Therapeutic abortion in Islam: contemporary views of Muslim Shiite scholars and effect of recent Iranian legislation (2006) 32 J Med Ethics 652

<sup>190</sup> Amnesty International, 'Sexual and Reproductive Rights in Iran: Facts and Figures' (11 March 2015) <https://www.amnesty.org/en/latest/news/2015/03/sexual-and-reproductive-rights-in-iran/> accessed 10 April 2017

<sup>191</sup> International Covenant on Civil and Political Rights, Resolution 2200A (XXI) 16 December 1966

<sup>192</sup> 'Article 3 The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.'

countries, like Morocco and Egypt, which have improved the status of women.<sup>193</sup> The government did not sign CEDAW because of religious objections that were never actually specified. When considering CEDAW's provisions and Iran's legislation, it is possible to highlight many situations where CEDAW contradicts Iran's laws. It happens at least 40 times in the Constitutional Sharia Laws and in 70 cases in national laws.<sup>194</sup>

### 3.1.2 National Framework: Explicit provisions

In this section, an overview of the national explicit legal framework will be provided. It will focus mainly on the Penal Code and the Therapeutic Abortion Act. The Iranian Penal Code<sup>195</sup> forbids abortion, in its article 623<sup>196</sup>, when someone causes the abortion, either with or without the woman's consent, and 624<sup>197</sup>, when doctors, midwives or pharmacists help the abortion. Physicians that perform abortion before ensoulment can be sentenced to months of imprisonment and the pregnant woman will be, at least, fined blood money. Abortion performed after ensoulment is sentenced to imprisonment between 3 and 10 years.

Some exceptions to the articles in the Penal Code are detailed in the Therapeutic Abortion Act<sup>198</sup>, in cases when the pregnant woman's life is in danger or when there are foetal abnormalities that make life after birth not possible or are very difficult to be taken care. In any case, it is only allowed before the 19<sup>th</sup> week of pregnancy, when the ensoulment happens. The Therapeutic Abortion Act of 2005<sup>199</sup>, passed by the Iranian parliament, stated that if the reason for an abortion was not listed among one of the 51 reasons listed as disorders or abnormalities according to the Iranian Legal Medicine Organization, the cases could be referred to the physician and then the organization, which would decide on an appropriate course of action<sup>200</sup>. It is considered the first major change related to abortion legislation since Revolution of 1989, which introduced the new Penal Code. Before the act, there were no exceptions for abortion, it was prohibited under any circumstance.<sup>201</sup> Abortion permissions can only be issued in coroners' offices in central provincial cities, with the order of a judiciary official, a request from the couple, an introduction letter written by the couple's doctor and only before the foetus is infused with life.<sup>202</sup>

### 3.1.3 National Framework: Implicit Provisions

This section provides an overview of the national implicit legal framework, focusing mainly on the Iranian National Constitution. Gender equality is assured in the Constitution<sup>203</sup>, in articles 3 item 9<sup>204</sup>, where the

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<sup>193</sup> Leila Alikarami, 'CEDAW and the Quest of Iranian Women for Gender Equality' (18 December 2014)

<https://www.opendemocracy.net/5050/leila-alikarami/cedaw-and-quest-of-iranian-women-for-gender-equality> accessed 10 April 2017

<sup>194</sup> Women's Committee of the National Council of Resistance of Iran, 'Why the Iranian Regime does not join CEDAW?' (March 2016) <http://women.ncr-iran.org/images/documents/CEDAW-NCRI%20Womens%20Committee-March2016.pdf> accessed 08 April 2017

<sup>195</sup> Iran's Code of Criminal Procedure

<sup>196</sup> 'Article 623: Anyone who causes the miscarriage of a pregnant woman by giving her drugs or other means shall be sentenced to six months to one year of imprisonment, and if knowingly and deliberately guides a pregnant woman to use drugs or other means to abort her baby shall be sentenced to three to six months' imprisonment, unless it is proved that it was necessary to save the mother's life; in any case the *dिया* shall be paid according to the relevant provisions.'

<sup>197</sup> 'Article 624: If a doctor or midwife or pharmacist or those who act as doctor or midwife or surgeon or pharmacist provide the tools for abortion or perform the abortion, they shall be sentenced to two to five years' imprisonment, and the *dिया* shall be paid according to the relevant provisions.'

<sup>198</sup> Hooman Movassagh, 'Therapeutic Abortion Act' translated,

[https://www.academia.edu/9661337/Therapeutic\\_Abortion\\_Act\\_of\\_Iran?auto=download](https://www.academia.edu/9661337/Therapeutic_Abortion_Act_of_Iran?auto=download) accessed 17 December 2017

<sup>199</sup> Therapeutic Abortion Act, 'Singular Article- Therapeutic abortion may be carried out upon the conclusive diagnosis by three specialized medical doctors and the verification by the Forensic Examiner of fetal illness that will cause hardship for the mother due to retardation or deformity, or a life threatening illness of the mother, prior to ensoulment (four months) and with the mother's consent. No punishment or liability shall be attributed to the doctor conducting the abortion. Anyone who does not comply with this law shall be subject to the punishments set forth in the Islamic Penal Code.'

<sup>200</sup> Angela Ballantyne, Ainsley Newson, Florencia Luna and Richard Ashcroft, 'Prenatal Diagnosis and Abortion for Congenital Abnormalities: Is It Ethical to Provide One Without the Other?' (2009) 9 *The American Journal of Bioethics* 8, 48

<sup>201</sup> Reed Boland and Laura Katzive, 'Development in Laws on Induced Abortion: 1998-2007' (2008) 34 *International Family Planning Perspectives* 3, 110

<sup>202</sup> Farokzad Jahani, 'Abortion in Iranian Law', (2004) 9(2698) *Pars Times* [http://www.parstimes.com/law/abortion\\_law.html](http://www.parstimes.com/law/abortion_law.html) accessed 8 September 2017

<sup>203</sup> Constitution of the Islamic Republic of Iran 1979

<sup>204</sup> 'Article 3: In order to achieve the objectives mentioned in Article 2, the Islamic Republic government of Iran is obliged to use all of its resources in the following areas:

9. the elimination of all unjust forms of discrimination and the creation of just opportunities for everyone, in all spiritual and material areas;'

government obliges itself to use all resources to finish discrimination, and item 14<sup>205</sup>, where all-inclusive rights are granted for everyone, with equality before the law, article 19<sup>206</sup>, which states that equal rights are assigned to people of Iran, article 20<sup>207</sup>, which says that everyone is equally protected by the law, and finally article 21<sup>208</sup>, where it is stated that the government should secure various women's rights, for special protection as well as personal and spiritual growth.

Women have a special chapter in the introduction of the Iranian Constitution, the chapter "*Women in the Constitution*".<sup>209</sup> This chapter states that more rights should be granted to women and that the family is the primordial unit of the society. Women should not be considered an object and should be equal to men. But the same chapter recognizes that women receive a more demanding responsibility from society in general. Iran, just like Brazil, generally considers abortion a crime, but in some exceptional situations it may be granted. Abortion is allowed only before the ensoulment if the woman's life is in danger or the foetus has abnormalities that would make life after birth not possible. The ensoulment happens by the 16<sup>th</sup> to 18<sup>th</sup> week of pregnancy, when the foetus is considered to be infused with life, as signs of life can be seen in the foetus.<sup>210</sup> Although the principle of respect of autonomy is considered a competent major, for social reasons, in cases of abortion the principle of justice is given priority by the Islamic Sharia.<sup>211</sup>

### 3.1.4 Recommendations

The main reason CEDAW was not ratified is believed to be political and not religious, as most politicians are men and this ratification would induce claims for better policies and laws. President Hassan Rouhani promised during his campaign, in 2014, to promote women's rights by signing the convention. Politicians and religious people in Iran want its own Islamic version of gender equality. Men and women are spiritually equal but have different social roles and duties, which means they are equal in theory but not in practice.<sup>212</sup> Although allowed under some exceptional circumstances, the fact that three experts have to give a definite diagnosis before the abortion is allowed<sup>213</sup> may restrict the access. Also, statistic about the number of legal and illegal abortions would help improve health system and prevent women's death. Illegal abortions are not reported to authorities unless there is a record of grievance, which is not usual, especially among health care providers.<sup>214</sup>

Public health issues need to be properly associated to cultural and social solutions, through effective programmes. Researches have already proved that maternal deaths decrease significantly when abortion is legalised. It is widely recognised that unsafe abortions are one of the principal causes of maternal mortality worldwide. Post abortion health problems are also a serious issue. Also, it is possible to link the incidence of abortion and contraceptive practice. Where modern contraceptives are easily accessed, the number of

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<sup>205</sup> 'Article 3: In order to achieve the objectives mentioned in Article 2, the Islamic Republic government of Iran is obliged to use all of its resources in the following areas: 14. the securing of all-inclusive rights for everyone, man and woman, and the creation of judicial security for everyone, equality for all before the law;'

<sup>206</sup> 'Article 19: The people of Iran enjoy equal rights, regardless of the tribe or ethnic group to which they belong. Color, race, language, and other such considerations shall not be grounds for special privileges.'

<sup>207</sup> 'Article 20: Members of the nation, whether man or woman, are equally protected by the law. They enjoy all the human, political, economic, social, and cultural rights that are in compliance with the Islamic criteria.'

<sup>208</sup> 'Article 21: The government must secure the rights of women in all respects, according to the Islamic criteria. The government must do the following: 1. create an apt environment for the growth of woman's personality and restore her material and spiritual rights;

2. protect the mothers, especially during the child-bearing and child-rearing periods, and protect children without guardians;

3. create competent courts to protect the integrity and subsistence of the family;

4. establish a special insurance for widows, elderly women, and women who are without guardians;

5. bestow the custody of children to qualified mothers, whenever in the interests of the children, and in the absence of a legal guardian.'

<sup>209</sup> Constitution of the Islamic Republic of Iran 1979, Introduction, Women in The Constitution

<sup>210</sup> Farokzad Jahani, 'Abortion in Iranian Law', (2004) 9(2698) Pars Times  
[http://www.parstimes.com/law/abortion\\_law.html](http://www.parstimes.com/law/abortion_law.html) accessed 8 September 2017

<sup>211</sup> Badawary A. B. Khitamy, 'Divergent Views on Abortion and the Period of Ensoulment' (2013) 13 Sultan Qaboos Univ Med J 1, 26

<sup>212</sup> Leila Alikarami, 'CEDAW and the Quest of Iranian Women for Gender Equality' (18 December 2014)  
<https://www.opendemocracy.net/5050/leila-alikarami/cedaw-and-quest-of-iranian-women-for-gender-equality>  
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<sup>213</sup> B Larijani, F Zahedi, 'Changing parameters for abortion in Iran', (2006) III Indian Journal of Medical Ethics 4 <  
<http://ijme.in/articles/changing-parameters-for-abortion-in-iran/?galley=html>> 17 December 2017

<sup>214</sup> B Larijani, F Zahedi, 'Changing parameters for abortion in Iran', (2006) III Indian Journal of Medical Ethics 4 <  
<http://ijme.in/articles/changing-parameters-for-abortion-in-iran/?galley=html>> accessed 17 December 2017

abortions, especially unsafe, is smaller.<sup>215</sup> So, it is possible to conclude that better family planning programs, with better and wider options of effective contraceptive techniques would reduce the number of abortions, legal or illegal.

#### 4.1 The United Kingdom

England and Wales have an average of 185,800 legal abortion each year, 5,190 of these are performed on non-residents, and Scotland has an average of 12,000. Northern Ireland has an average of 16 legal abortions a year, but 833 abortions were performed for Northern Ireland women in England and are part of the non-resident number quoted above. There is no estimate of illegal abortions in Great Britain or Northern Ireland. The estimated number of deaths is one in England and Wales and it is not known in Northern Ireland.

According to the United Kingdom's Office for National Statistics<sup>216</sup>, in 2016 the estimated population is 65,648,100 persons; Great Britain has a population of 63,785,900; and Northern Ireland has a population of 1,862,100. In both Great Britain and Northern Ireland, women represent around 50% of the population. An important feature the UK has is being a common law system country, which means that it places great weight on court decision.<sup>217</sup> Gender equality is treated in Great Britain in constitutional provisions such as ECHR<sup>218</sup>, in art. 14; ICCPR<sup>219</sup>, which was ratified by the UK in 1976; CEDAW, ratified in 1986; the Abortion Act<sup>220</sup>, from 1967 for Great Britain; and Offences Against the Person Act 1861, as well as the Criminal Justice Act (Northern Ireland) 1945, for Northern Ireland.

The UK has different arrangements for Great Britain and Northern Ireland, the Abortion Act operates differently in Great Britain and the Northern Ireland. The law in Northern Ireland is much more restrictive than in the rest of the UK, meaning that the conditions under which abortion may be lawful are much more limited in Northern Ireland than in the rest of the UK. In the former, case law indicates that abortion may be lawful where the woman's life is threatened or where there would be a real and serious risk to her permanent or long term mental or physical health. While in Great Britain, abortion is allowed for pregnancies up to 24 weeks, and after this period in cases where it is necessary to save the woman's life, there is evidence of extreme foetal abnormality, or risk of physical or mental health of the women or other children in the family. Summer 2017 saw developments in the UK Parliament, and in the courts in both London and Belfast, concerning the situation of women in Northern Ireland seeking access to a safe and legal abortion. On 29 June, the UK Government announced that women from Northern Ireland who travel to England for an abortion will no longer be asked for payment. Women will therefore be able to obtain an abortion on the NHS rather than privately.<sup>221</sup> While the amount of £1,400 was highlighted as the cost women will no longer need to bear for the procedure itself, they will continue to have to fund travel and other related costs of the journey to England.<sup>222</sup> The Government made it clear that this practical measure makes no change to the legal position in Northern Ireland, as these do not change the position dedicated to the issue in Northern Ireland.

This positive development followed two weeks after the UK Supreme Court dismissed the appeal against the 2015 Court of Appeal decision that the Secretary of State for Health did not act unlawfully in failing to make provision for UK citizens, normally resident in Northern Ireland, to access an abortion in England free of

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<sup>215</sup> Amir Erfani and Kevin McQuillan, 'Rates of Induced Abortion in Iran: The Roles of Contraceptive Use and Religiosity' (2008) 39 *Studies in Family Planning* 2008 2, 111

<sup>216</sup> Office for national statistics, 'Population estimates' (2017)

<https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/populationestimates> accessed on 30 October 2017

<sup>217</sup> New World Encyclopedia, 'Common Law', <[http://www.newworldencyclopedia.org/entry/Common\\_law](http://www.newworldencyclopedia.org/entry/Common_law)> accessed 15 April 2017

<sup>218</sup> European Convention on Human Rights 1950

<sup>219</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171

<sup>220</sup> Abortion Act 1967

<sup>221</sup> Justine Greening MP, 'Access to Abortion Services in England' (Gov.uk 29 June 2017)

<https://www.gov.uk/government/news/access-to-abortion-services-in-england> accessed 20 September 2017

<sup>222</sup> *Economy and Jobs debate*, 29 June 2017, Volume 626, Columns 796 and 847 – 851, see contributions from The Chancellor of the Exchequer (Mr Philip Hammond) and Stella Creasy, (Walthamstow) (Lab/Co-op), <https://hansard.parliament.uk/Commons/2017-06-29/debates/D199DEF4-2B92-4D43-BF7D-01F7D98591A3/EconomyAndJobs?highlight=abortion#contribution-3E98BD60-7DC2-4636-8172-B4A2E80A2627>

charge through the NHS.<sup>223</sup> Also, on 29 June, but in Belfast, the Court of Appeal in Northern Ireland delivered their judgment<sup>224</sup> on the appeal in respect of the December 2015 ruling that failure to allow access to termination of pregnancy for women, at any time where there is fatal foetal abnormality or up to the date when the foetus becomes capable of an existence independent of the mother where pregnancy resulted from rape or incest, is incompatible with Article 8 of the European Convention on Human Rights.<sup>225</sup> The Court of Appeal ruling did not uphold the declaration of incompatibility. The judges were all in agreement that the question of the conditions under which abortion is legal in Northern Ireland is a matter for the Assembly and not for the courts. Morgan L C J stated: “*I do not consider that it is open to the courts to derive a right to abortion from the Convention*”.<sup>226</sup> With the current stalemate in the Assembly, it seems unlikely that this issue will be addressed there soon.

#### 4.1.1 International Framework: Explicit and Implicit provisions

This section will provide an analysis of the international explicit and implicit legal provisions, focusing in all the constitutional provisions the UK has taken part. It is important to emphasize that besides Northern Ireland having a different set of rules regarding abortion, the international framework is the same. The UK has ratified all core international human rights treaties<sup>227</sup> and has also accepted the individual complaints mechanism in respect of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), in 1986<sup>228</sup>. No individual communications have been submitted in respect of the UK in respect of reproductive issues.<sup>229</sup> The ICCPR was also ratified by the UK, in 1976. Also, the UK is one of the 47 members of the Council of Europe and a signatory to the European Convention on Human Rights (ECHR)<sup>230</sup> which, through its unique enforcement mechanism, the European Court of Human Rights (ECtHR), provides an additional level of protection of human rights. It must be noted that the UK has ratified the ECHR which unlike most human rights treaties has an enforcement mechanism with real substance in the form of the ECtHR. This is a court of last resort, available to individuals who have exhausted all domestic remedies, and it offers an additional supranational level of potential protection above the domestic. Article 14<sup>231</sup> deals with the prohibition of discrimination, covering several grounds.

#### 4.1.2 National Framework: Explicit provisions

This section will analyse the national explicit provisions related to abortion in the UK. As mentioned before, the UK has a different set of rules for Northern Ireland, so this section applies to England, Scotland and Wales. Explicit provisions related to Northern Ireland will be dealt in a different section. The UK does not recognise the right of a woman to access abortion on demand. Performing an abortion remains a criminal

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<sup>223</sup> R (on the application of A and B) (Appellants) v Secretary of State for Health (Respondent) [2017] UKSC 41 On appeal from [2015] EWCA Civ 771, 14 June 2017, Lords Wilson, Reed and Hughes, Lord Kerr and Lady Hale dissenting, <https://www.supremecourt.uk/cases/docs/uksc-2015-0220-judgment.pdf>.

<sup>224</sup> On appeal from the High Court of Justice in Northern Ireland Queen’s Bench division (Judicial Review), In the Matter of an Application by the Northern Ireland Human Rights Commission for Judicial Review, Between The Attorney General for Northern Ireland (Appellant) and The Department for Justice (Appellant) and The Northern Ireland Human Rights Commission (Respondent) [2017] NICA 42.

<sup>225</sup> The Northern Ireland Human Rights Commission’s Application [2015] NIQB 96 In the Matter of an Application by the Northern Ireland Human Rights Commission for Judicial Review In the Matter of the Law on Termination of Pregnancy in Northern Ireland [2015] NIQB 96, [http://www.courtsni.gov.uk/en-GB/Judicial%20Decisions/PublishedByYear/Documents/2015/\[2015\]%20NIQB%2096/j\\_i\\_HOR9740Final.htm](http://www.courtsni.gov.uk/en-GB/Judicial%20Decisions/PublishedByYear/Documents/2015/[2015]%20NIQB%2096/j_i_HOR9740Final.htm) and [2015] NIQB 102 [https://www.courtsni.gov.uk/en-GB/Judicial%20Decisions/PublishedByYear/Documents/2015/\[2015\]%20NIQB%20102/j\\_i\\_HOR9822Final.htm](https://www.courtsni.gov.uk/en-GB/Judicial%20Decisions/PublishedByYear/Documents/2015/[2015]%20NIQB%20102/j_i_HOR9822Final.htm).

(n6), 25, para. 76. See also Gillen L J, 36, paras. 117 – 118 and Weatherup L J, 50, para. 178.

<sup>227</sup> Ratification status for United Kingdom of Great Britain and Northern Ireland, [http://tbinternet.ohchr.org/\\_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=185](http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=185) and see its reservations to CEDAW, <http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm> both accessed: 3 March 17

<sup>228</sup> Through ratification of the Optional Protocol on 17 December 2004.

<sup>229</sup> Decisions/Views, CEDAW, <http://www.un.org/womenwatch/daw/cedaw/protocol/dec-views.htm> accessed: 3.03.17 and, generally on the individual communications mechanism, see Hodson L, ‘Women’s Rights and the Periphery: CEDAW’s Optional Protocol’ 25(2) *European Journal of International Law* 561-578

<sup>230</sup> Convention for the Protection of Human Rights and Fundamental Freedoms 1950

<sup>231</sup> ‘Article 14 Prohibition of discrimination: The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.’

offence under the Offences Against the Persons Act 1861 (the 1861 Act)<sup>232</sup> unless it is carried out under the conditions set out in the Abortion Act 1967, as amended, (the 1967 Act),<sup>233</sup> which applies to England, Wales and Scotland. The key provision is section 1:

Medical termination of pregnancy

*(1) Subject to the provisions of this section, a person shall not be guilty of an offence under the law relating to abortion when a pregnancy is terminated by a registered medical practitioner if two registered medical practitioners are of the opinion, formed in good faith-*

*(a) that the pregnancy has not exceeded its twenty-fourth week and that the continuance of the pregnancy would involve risk, greater than if the pregnancy were terminated, of injury to the physical or mental health of the pregnant woman or any existing children of her family; or*

*(b) that the termination is necessary to prevent grave permanent injury to the physical or mental health of the pregnant woman; or*

*(c) that the continuance of the pregnancy would involve risk to the life of the pregnant woman, greater than if the pregnancy were terminated; or*

*(d) that there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped.*

So, although there is no legal right to an abortion, the 1967 Act aims to provide access to safe, legal abortion in the circumstances carefully defined: a pregnancy must be terminated by a registered medical practitioner and two registered medical practitioners must both agree, in good faith, on one of the grounds (the same ground) set out in section 1. Sub-section (a) has an additional temporal condition which is not required if the basis of the termination falls within sub-sections (b), (c) or (d). The Scotland Act 1998 reserved, *inter alia*, abortion<sup>234</sup> and embryology, surrogacy and genetics<sup>235</sup> as matters for Westminster.<sup>236</sup> However, by the Scotland Act 2016 abortion is no longer a matter reserved for Westminster and this devolution to Scotland gives the Scottish Parliament the power for the first time to legislate in this area.<sup>237</sup> It is too early to assess whether there will be any divergence in abortion policy in Scotland.

#### 4.1.3 National Framework on Abortion: implicit provisions

This section will analyse the national implicit provisions regarding abortion in the UK. It is important to highlight that these provisions refer to the whole UK, including the Northern Ireland. Unlike most other countries the UK has no single written Constitution. In analysing the nature of the UK constitution Turpin and Tomkins look first to the rules and practices of the UK: “a body of rules, conventions and practices which describe, regulate or qualify the organisation, powers and operation of government and the relations between persons and public authorities.”<sup>238</sup> This is supplemented by the “institutions and offices which constitute the machinery” of the government, principally “Parliament, the government and the courts, the monarchy and the civil service” and, since devolution, the devolved assemblies and administrations in Scotland, Wales and Northern Ireland.<sup>239</sup> The ideas, doctrines and principles then add another dimension: “democracy, parliamentary sovereignty, the rule of law, the separation of powers and ministerial responsibility” as does the influence of supranational, regional and international bodies, for example, the

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<sup>232</sup> Section 58 and 59, applicable to England and Wales and Northern Ireland. Procuring a miscarriage is a common law crime in Scotland (see Stephenson D, Westlaw Insight ‘Abortion’, Latest update 29 June 2015, 2, para. 5). Also, see the Infant Life (Preservation) Act 1929, concerning the offence of child destruction, where a child is capable of being born alive.

<sup>233</sup> See <http://www.legislation.gov.uk/ukpga/1967/87/section/1> which details textual amendments, accessed 3 September 2017

<sup>234</sup> Section J1, Part 2 of Schedule 5, <http://www.legislation.gov.uk/ukpga/1998/46/schedule/5>, accessed: 3 September 2017.

<sup>235</sup> Section J3, Part 2 of Schedule 5, <http://www.legislation.gov.uk/ukpga/1998/46/schedule/5>, accessed: 3 September 2017.

<sup>236</sup> That is, the Houses of Commons and Lords, based in London, England.

<sup>237</sup> The Act, by section 53, omits in Part 2 of Schedule 5 (specific reservations) section J1 on abortion, <http://www.legislation.gov.uk/ukpga/2016/11/section/53> accessed 3 September 2017.

<sup>238</sup> Turpin C and Tomkins A in *British Government and the Constitution: Text and Materials* (7<sup>th</sup> edn, Cambridge University Press, Cambridge 2011) 4

<sup>239</sup> Turpin C and Tomkins A in *British Government and the Constitution: Text and Materials* (7<sup>th</sup> edn, Cambridge University Press, Cambridge 2011) 4

Council of Europe and the European Union.<sup>240</sup> The Human Rights Act 1988<sup>241</sup> (HRA 1988) enacts certain rights and freedoms guaranteed under the ECHR thereby bringing them into domestic law.<sup>242</sup> It also provides for matters of interpretation<sup>243</sup> and for the situation where a provision of UK primary legislation may be incompatible with a Convention right.<sup>244</sup> The relevant provisions or part of provisions which impact on the protection of reproductive rights, including the issue of whether there is a right of access to abortion: article 2 - Right to life, Article 8 (1) and (2) - Right to respect for private and family life, Article 12 - Right to marry and Article 14 - Prohibition of discrimination.<sup>245</sup>

## Northern Ireland

As stated in section 4.1, the UK has a different set of explicit provisions regarding abortion rules for Northern Ireland. This section will deal with this exclusive national framework. Any matter that is not either explicitly reserved or accepted by Schedules 2 or 3 to the Northern Ireland Act 1998<sup>246</sup> is deemed to be devolved to the Northern Ireland Assembly. Its legislative competence covers health (including abortion) and social services. The circumstances in which a woman may legally access an abortion remain extremely restrictive compared to the rest of the UK. The 1967 Act does not extend to Northern Ireland.<sup>247</sup> Procuring an abortion is an offence under sections 58 and 59 of the 1861 Act.<sup>248</sup> There is also an offence of child destruction in section 25 of the Criminal Justice Act (Northern Ireland) 1945 (the 1945 Act).<sup>249</sup> There is no statutory exception analogous to the 1967 Act on the basis of which abortion may be legal in Northern Ireland if certain conditions are satisfied.

Case law, most importantly the *Bourne* case, sets out the circumstances in which a doctor who performs an abortion will be protected from prosecution under the 1861 Act.<sup>250</sup> The case concerned a 14 year old girl who was pregnant as a result of a rape of great violence. The abortion was carried out by a highly skilled surgeon, in St Mary's Hospital, London, openly and without charge. In this seminal case Macnaghten J. stated that it was for the Crown to prove beyond reasonable doubt that "*the act was not done in good faith for the purpose of preserving the life of the mother*"<sup>251</sup> and that if a doctor is of the opinion, on reasonable grounds and with adequate knowledge, that the probable consequence of the continuance of the pregnancy will be to make the woman a physical or mental wreck, the jury are quite entitled to take the view that the doctor, who, in those circumstances, and in that honest belief, operates is operating for the purpose of preserving the life of the woman.<sup>252</sup> He also noted that "*the unborn child in the womb must not be destroyed unless the destruction of that child is for the purpose of preserving the yet more precious life of the mother.*"<sup>253</sup> And in March 2016 the Department of Health, Social Services and Public Safety issued Guidance for Health and Social Care Professionals on termination of pregnancy intended "*to provide clarity on the law*

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<sup>240</sup> Turpin C and Tomkins A in *British Government and the Constitution: Text and Materials* (7<sup>th</sup> edn, Cambridge University Press, Cambridge 2011) 4

<sup>241</sup> Human Rights Act 1988 <http://www.legislation.gov.uk/ukpga/1998/42/contents> accessed: 3 Maio 2017.

<sup>242</sup> Human Rights Act 1988, section 1(1).

<sup>243</sup> Human rights Act 1988, sections 2 and 3.

<sup>244</sup> Human rights Act 1988, section 4

<sup>245</sup> Schedule 1 The Articles, Part I The Convention Rights and Freedoms.

'Article 2 Right to life: Everyone's right to life shall be protected by law.'

'Article 8 Right to respect for private and family life:

1 Everyone has the right to respect for his private and family life, his home and his correspondence.

2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

'Article 12 Right to marry: Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.'

'Article 14 Prohibition of discrimination: The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'

<sup>246</sup> See <https://www.gov.uk/guidance/devolution-settlement-northern-ireland> accessed 9 March 17 for background to the devolution settlement.

<sup>247</sup> (n35), section 7(3)

<sup>248</sup> (n34)

<sup>249</sup> Criminal Justice Act (Northern Ireland) 1945, section 25

<sup>250</sup> R v Bourne [1939] 3 All ER 615

<sup>251</sup> R v Bourne [1939] 3 All ER 617, paras. B and C.

<sup>252</sup> R v Bourne [1939] 3 All ER 619 paras. A – C.

<sup>253</sup> R v Bourne [1939] 3 All ER 620, para. G.

*framing termination of pregnancy in Northern Ireland*".<sup>254</sup> It states that "any intervention to a pregnant woman that is potentially harmful to the foetus must only be carried out with the intention of protecting the woman against physical or mental health issues that are 'real and serious' and 'permanent or long term'"<sup>255</sup> and confirms that the guidance makes no change in the law.<sup>256</sup> The circumstances in which an abortion will be legal in Northern Ireland are thus exceedingly limited and mean the right of access to a legal, safe abortion for women resident in Northern Ireland is minimal, even in situations where the woman is carrying a foetus with little or no chance of survival or if the woman is pregnant as the result of sexual violence.

#### 4.1.4 Recommendations

Abortion and contraception are, of course, tightly interlinked and concern has been expressed that for abortion numbers to drop better access to the full range of contraception, not only the pill and the condom which are relatively easily accessible, is needed.<sup>257</sup> Budgetary pressures on public health services will not necessarily facilitate this. Women who are poor, young or vulnerable are thus disadvantaged and at risk - through their circumstances - of resorting to unsafe, illegal abortions.

## 5.1 Conclusion

Although all three countries have different legal systems, abortion is homogeneously considered a crime and allowed only in specific situations. The UK, apart from Northern Ireland, is the most liberal, as compared to Brazil and Iran. Despite the differences, all the three countries are influenced by moral and religious considerations, no matter the law system. And a lack of safe access to abortion services may give rise to increased financial and other forms of female dependency as well as mental and physical health problems for the women and children affected. It impacts women's lives overall, in a bad way. Hoggart and Sheldon's study in the Northern Ireland Assembly's Knowledge Exchange Seminar Series 2016-17 notes that increasing home use of abortion pills is one reason for the decline in women from Northern Ireland seeking abortions in England.<sup>258</sup> As part of their conclusion they note:

"While medical abortion can have unpleasant side effects, robust clinical evidence exists to demonstrate that this is a very safe and effective method of abortion, provided that the woman has authentic medication, clear instructions for how to use it, and knows when and how to access any necessary aftercare. Women benefit from social support at [the] time of their abortion and any regulatory framework that encourages concealment is likely to contribute to feelings of shame, stigma and isolation."<sup>259</sup>

Abortion continues to be a taboo in most societies. Cultural obligations and religious traditions are considered to be above women's desires, and most courts are formed mainly by men. It is unlikely that women will be empowered to choose to have an abortion, in any situation, in the near future, despite the increasing number of them dying every year due to unsafe abortions. Access to efficient birth control methods and safe abortion are important components to health and reproductive rights, which are basic human rights. Restrictive access and lack of information boost the number of illegal abortions and consequently the number of deaths. Women should be protected and have their rights guaranteed and

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<sup>254</sup> Health, Social Services and Public Safety, 'Guidance for Health and Social Care Professionals on termination of pregnancy in Northern Ireland' (2016), para 1.1 <https://www.health-ni.gov.uk/sites/default/files/publications/dhssps/guidance-termination-pregnancy.pdf> accessed 12 March 17.

<sup>255</sup> Health, Social Services and Public Safety, 'Guidance for Health and Social Care Professionals on termination of pregnancy in Northern Ireland' (2016), para 1.2 <https://www.health-ni.gov.uk/sites/default/files/publications/dhssps/guidance-termination-pregnancy.pdf> accessed 12 March 17

<sup>256</sup> Health, Social Services and Public Safety, 'Guidance for Health and Social Care Professionals on termination of pregnancy in Northern Ireland' (2016), para 9 <https://www.health-ni.gov.uk/sites/default/files/publications/dhssps/guidance-termination-pregnancy.pdf> accessed 12 March 17

<sup>257</sup> Z Kmietowicz, 'Medical abortions more common than surgery for first time in 2014 in England and Wales' (2015) 350 *British Medical Journal* h3177 and see also D Munday, C Francome and W Savage W 'Twenty One Years of Legal Abortion' (1989) 298(6682) *British Medical Journal* 1231. Although an old article this provides an interesting snapshot of the situation in the UK twenty years after the 1967 Act was enacted. It provides a brief background to the Act's gestation, reviews numbers of abortions and notes the impact of the introduction of free contraception in reducing abortion numbers. The article highlights the important impact the 1967 Act had in reducing illegal abortions and, in consequence, the number of deaths due to illegal abortions.

<sup>258</sup> L Hoggart and S Sheldon 'Tensions in Abortion Law and Policy, and the Effects on Women' (2017) 4 Knowledge Exchange Seminar Series 2016 – 2017 (16 November 2016, part of 'Abortion policy and law: key considerations' <http://www.niassembly.gov.uk/assembly-business/research-and-information-service-raise/knowledge-exchange/#abortion> and [http://www.niassembly.gov.uk/globalassets/documents/raise/knowledge\\_exchange/briefing\\_papers/series6/hoggart161116.pdf](http://www.niassembly.gov.uk/globalassets/documents/raise/knowledge_exchange/briefing_papers/series6/hoggart161116.pdf) both accessed: 12 March 17.

<sup>259</sup> *Id.*



implemented, independently of culture or religion. Without these guarantees gender equality cannot be said to be constitutionally protected within a country.

## E. OVERALL CONCLUSIONS

This study has explored two thematic priorities on gender equality in-keeping with CEDAW's focus on gender equality widely drawn. The two descriptive case studies have been approached as multi-jurisdictional studies: the constitutions and primary legislation were examined for the United Kingdom, Burkina Faso, Iran, Brazil and Indonesia in regards to abortion rights and FGM using the Gender Equality Constitutional Database provided by the UN. The two research teams have concluded that the constitutional frameworks, both in the form of explicit and implicit provisions, fall short in providing gender equality protection for women and girls at risk of FGM, but provide greater protection, if not complete protection, of gender equality for women and girls in the context of reproductive rights.

The research demonstrates that despite reforms and provisions passed to strengthen the international and national agenda on FGM, there are some difficulties in implementing the frameworks on a national level so as to produce successful and effective prevention of FGM and to prosecute those who fail to heed prohibitions of the practice. All three countries studied have shown little commitment to eradicate the cultural significance attached to FGM. The scope of this study was limited to assess how well national and international frameworks provide real protection in respects of FGM and abortion rights. For a more comprehensive understanding of why these frameworks are not providing real decline in harmful practice of FGM procedure, further work is needed to understand the dynamics of the implementation. It would be interesting, to focus on FGM through a cultural lens and understanding the relationship between FGM and embodiment. Further, it would be interesting to look at this procedure in more depth at a constitutional level to determine why national provisions do not fully conform to the eradication of all types of FGM. The research team hopes to build on the findings of this project by exploring these themes.

The team researching reproductive rights has concluded that besides the fact that the countries examined have different constitutional frameworks, they all broadly guarantee gender equality and ensure women's rights and reproductive rights, both in explicit and implicit provisions. Apart from Iran, which has refused to join the CEDAW, international protection documents and guidelines are followed by the countries explored. Also, gender equality and reproductive rights measures have been implemented, albeit only to a certain degree, as there is little commitment to ensure extensive access to safe abortion. Besides abortion being possible in special circumstances, moral and religious factors interfere in the extent to what legal abortions are performed, even when the case falls into a situation where the explicit national legislation clearly allows it. Also, it is possible to conclude that as the countries use different linguistic approaches when dealing with abortion in legislation, it may seem that access to abortion is an open choice, as the UK allows abortion but only if the conditions are complied, whereas Iran and Brazil forbid unless the case falls into one of the exceptions. Additionally, it would be useful to have access to abortion statistics, both those performed in conformity to the law (as well as, were it possible, an indication of those performed in unlicensed or unlawful ways) as well as details of the number of deaths related to unsafe abortions. It is challenging to suggest adjustments to legislation without the support of official data. The research team expects to develop their research in this area, so as to deepen our understanding of gender equality and constitutional protections for women and girls in this challenging yet important area.

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