

Female Genital Mutilation's Blurred Lines: Where the Right to Cultural Integrity Ends and Where the Right to Health Begins

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I.	INTRODUCTION.....	1123
	A. <i>Female Genital Mutilation (FGM)</i>	
	B. <i>The Definition of FGM</i>	
	C. <i>The Problem</i>	
	D. <i>The Significance of the Note</i>	
II.	FGM AS A CULTURAL PRACTICE	1131
	A. <i>The Definition of Culture</i>	
	B. <i>The Rationale Behind FGM— Religious</i>	
	C. <i>The Rationale Behind FGM— Non-Religious</i>	
	D. <i>The Motive of Local Ethnic Communities in Practicing FGM</i>	
III.	THE EFFECTS OF FGM.....	1138
	A. <i>Psychological Effects</i>	
	B. <i>Physiological Effects</i>	
IV.	INTERNATIONAL AND MUNICIPAL LAWS ON THE RIGHT TO CULTURAL INTEGRITY.....	1140
	A. <i>International Law</i>	
	B. <i>Municipal Law</i>	
	C. <i>Cultural Integrity — Guaranteed but not Absolute</i>	
V.	INTERNATIONAL AND MUNICIPAL LAWS ON THE RIGHT TO HEALTH.....	1155
	A. <i>International Law</i>	
VI.	ANALYSIS.....	1165
	A. <i>The Conflict Between the Right to Cultural Integrity and the Right to Health</i>	
	B. <i>The Response of Other Countries to FGM</i>	
	C. <i>The Response of Philippines to FGM</i>	
	D. <i>Cultural Relativism</i>	
	E. <i>Local Context Sensibility</i>	
	F. <i>Cultural Relativism and Local Context Sensibility as Consistent with the Country's Treaty Obligations</i>	
	G. <i>The Application to the Case of Somali Immigrants in Seattle, Washington</i>	
VII.	RECOMMENDATION.....	1187
	A. <i>Determination of Cultural Practice</i>	
	B. <i>Determination of the Level of Inseparability and Interdependence between the Cultural Practice and the Mode of Life</i>	
	C. <i>Application to the Practice of FGM</i>	

D. <i>The Restriction of the Practice of FGM</i>	
E. <i>Why the Proposal Will Work</i>	
F. <i>The Implementation</i>	
VIII. CONCLUSION	1193

I. INTRODUCTION

Toleration is the greatest gift of the mind; it requires the same effort of the brain that it takes to balance oneself on a bicycle.

— Helen Keller¹

A. *Female Genital Mutilation (FGM)*

Early in the morning, in a spot that faces the *kibla* or sunrise, a pubertal girl is accompanied by a female guardian, usually her mother, to a *Kah Dayang*² — a person performing female circumcision, usually a community elder.³ The *Kah Dayang* will pour water onto the girl's head and simultaneously whisper a *tawal* or prayer to the girl's ear.⁴ Later, the *Kah Dayang* and the girl will enter the *luku*⁵ or a white curtain to keep what is about to take place out of sight.⁶

With a knife, the *Kah Dayang* will repeatedly scrape the girl's labia majora.⁷ As soon as the labia majora reddens, a wad of cotton will be placed on the scraped area.⁸ The *Kah Dayang* will utter another *tawal* or prayer.⁹

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1. 2 TRACY FRIESEN, *RIDE THE WAVES* 332 (2014).
2. Sittinurussamsi A. Calsalin, *Female Circumcision among Yakan in Basilan, Philippines* (A Research Paper Presented to the Faculty of the Graduate School of Ateneo de Zamboanga University) 26, available at <http://aboutphilippine.s.ph/documents-etc/2008-06-25-135433casalin.pdf> (last accessed Apr. 18, 2016).
3. See generally Calsalin, *supra* note 2, at 16-17.
4. *Id.* at 26.
5. *Id.*
6. See Calsalin, *supra* note 2, at 25.
7. *Id.* at 26.
8. *Id.*

The female guardian will then fold the *luku* very neatly, as how well it is folded will determine the kind of life the girl will have in the future.¹⁰ The girl will then blow a candle to drive away the bad spirits, while the female guardian will give a *sadaqqa* or alm to the *Kah Dayang*.¹¹ After two hours, the *Kah Dayang* will ask the female guardian to remove the wad of cotton and keep it.¹² Another *tawal* or prayer will be uttered to mark the end of the ceremony.¹³

B. The Definition of FGM

FGM, as defined by the World Health Organization (WHO), pertains to a whole gamut of procedures which remove, partially or completely, the external female genitalia or which cause any other injury to the same for “cultural or other non-therapeutic reason.”¹⁴ The WHO classifies FGM into four types, and they are as follows:

- (1) Clitoridectomy — partial or total removal of the clitoris (a small, sensitive, and erectile part of the female genitals) and, in very rare cases, only the prepuce (the fold of skin surrounding the clitoris).¹⁵
- (2) Excision — partial or total removal of the clitoris and the labia minora, with or without excision of the labia majora (the labia are ‘the lips’ that surround the vagina).¹⁶
- (3) Infibulation — narrowing of the vaginal opening through the creation of a covering seal. The seal is formed by cutting and repositioning the inner or outer labia, with or without removal of the clitoris.¹⁷
- (4) Other kinds — all other harmful procedures to the female genitalia for non-medical purposes, e.g., pricking, piercing, incising, scraping, and cauterizing the genital area.¹⁸

9. *Id.*

10. *Id.*

11. *Id.*

12. Calsalin, *supra* note 2, at 26.

13. *Id.*

14. World Health Organization, Female genital mutilation, *available at* <http://www.who.int/mediacentre/factsheets/fs241/en> (last accessed Apr. 18, 2016).

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

Locally, *pagsunna*, *pag-islam*, or *turi* are the common terms used to refer to FGM.¹⁹ Though interchangeable, *pagsunna* generally pertains to the “circumcision” of women, whereas *pag-islam* refers to the circumcision of men.²⁰ In Arabic countries, it is called *tahur* or *tahara*, which translates to “purification.”²¹

Universally, FGM is the collective term used to refer to a number of procedures that involve “partial or total removal of the external female genitalia, or other injury to the female genital organs for non-medical reasons.”²² The Harvard Law Review provides a substantially similar definition for female circumcision, which it describes as a “genital operation [] that entail[s] incision and [] removal of [a] part [of] or all of the female external genitalia[.]”²³

While FGM seems outlandish, it is actually practiced in more than 40 countries worldwide.²⁴ In fact, the WHO estimates that more than 125 million women and girls undergo FGM.²⁵ In the African continent alone, it is reportedly observed in approximately 24 countries therein, which include Chad, Egypt, Ethiopia, Kenya, Somalia, and Sudan.²⁶ In Latin America, it is observed in some parts of Brazil, Mexico, and Peru.²⁷ In the Middle East, it is practiced in parts of Bahrain, Oman, South Yemen, and United Arab Emirates.²⁸ In Asia, FGM is performed by some ethnic communities in India, Indonesia, Malaysia, and Pakistan.²⁹ While it is most prevalent in

19. See Calsalin, *supra* note 2, at 3 & Francis F. Temprosa, *Philippines, in VIOLENCE, EXPLOITATION, AND ABUSE AND DISCRIMINATION IN MIGRATION AFFECTING WOMEN AND CHILDREN IN ASEAN: A BASELINE NOTE* 699-700 (2013).

20. Calsalin, *supra* note 2, at 3.

21. ELIZABETH H. BOYLE, *FEMALE GENITAL CUTTING: CULTURAL CONFLICT IN THE GLOBAL COMMUNITY* 24 (2002).

22. World Health Organization, *supra* note 14.

23. Olga Czarina V. Belisario, *Muslim Women and Circumcision: A Study of Intergenerational Practice and Its Continuity in Southern Philippines*, 28 WESTERN MINDANAO STATE UNIV. RESEARCH J. 1, 2 (2009).

24. Ethnic Affairs Commission of New South Wales, *Female Genital Mutilation: Your Questions Answered (A Leaflet Published in September 1995)* 1, available at http://www.multiculturalaustralia.edu.au/doc/ethaffairs_1.pdf (last accessed Apr. 18, 2016).

25. World Health Organization, *supra* note 14.

26. Ethnic Affairs Commission of New South Wales, *supra* note 24, at 1.

27. *Id.*

28. *Id.*

29. *Id.*

African and Asian countries, FGM was also performed on women from Western nations as recent as the 1950s,³⁰ usually upon immigrant women.³¹

The Philippines, like its neighboring Southeast Asian countries, is no stranger to the practice of FGM.³² Based on a number of studies, FGM is still practiced³³ in Mindanao,³⁴ particularly among the Muslim communities,³⁵ the Yakans,³⁶ and the Maranaos.³⁷

The practice, which principally stems from tradition, is done for a variety of reasons. For instance, it is believed that women who do not go through FGM are unclean or unchaste.³⁸ Some also believe that a woman will not be able to get pregnant if she is not mutilated.³⁹ Others believe that a woman will have a difficult life ahead of her if she does not go through FGM.⁴⁰

Another use of FGM for ethnic groups is as a preventive means to protect women from being raped in case of war.⁴¹ Moreover, the practice is used to prevent a woman from being sexually active prior to marriage.⁴² This way, the woman remains chaste before getting married and her wife marketability is increased.⁴³ It is also a means of making all women equal and

30. BOYLE, *supra* note 21, at 24 (citing Ben Barker-Benfield, *Sexual Surgery in Late-Nineteenth-Century America*, 5 INT'L J. HEALTH SERVICES 279 (1975)).

31. *Id.*

32. Ethnic Affairs Commission of New South Wales, *supra* note 24, at 1.

33. Foundation for Women's Health Research and Development, *Female Genital Mutilation: An Information Pack (An Unpublished Research)* 4, available at <http://www.equation.org.uk/wp-content/uploads/2012/12/Forward-Female-Genital-Mutilation-Information-Pack.pdf> (last accessed Apr. 18, 2016) [hereinafter FORWARD].

34. Temprosa, *supra* note 19, at 699-700.

35. Temprosa, *supra* note 19, at 700 (citing Maria Kontoyannis & Christos Katsetos, *Female Genital Mutilation*, 4 HEALTH SCI. J. 1, 32 (2010)).

36. Temprosa, *supra* note 19, at 699 (citing Calsalin, *supra* note 2).

37. Temprosa, *supra* note 19, at 699 (citing Amabelle E. Arquisal, "Turi" among selected Meranao women residing in Iligan City (2007) (Master's Thesis, Mindanao State University – Iligan Institute of Technology) (on file with the National Library)).

38. See Ethnic Affairs Commission of New South Wales, *supra* note 24, at 1.

39. *Id.*

40. See generally Calsalin, *supra* note 2, at 19 & 21-23.

41. Ethnic Affairs Commission of New South Wales, *supra* note 24, at 1.

42. *Id.*

43. *Id.*

is a way of preserving familial honor.⁴⁴ The practice of FGM lives on through the beliefs passed on from generation to generation and the sociological pressure that comes with it. It continues to pervade the mode of life of several ethnic communities.⁴⁵

C. *The Problem*

Pursuant to their right to cultural integrity, ethnic communities may practice FGM as a social custom or tradition.⁴⁶ This vow finds support in no less than the 1987 Constitution, which provides that “[t]he State recognizes and promotes the rights of indigenous cultural communities within the framework of national unity and development.”⁴⁷ In addition to this, Article XIV, Section 17 of the 1987 Constitution provides that “[t]he State shall recognize, respect, and protect the rights of indigenous cultural communities to preserve and develop their cultures, traditions, and institutions. It shall consider these rights in the formulation of national plans and policies.”⁴⁸ Moreover, the Philippines is a State-Party to several international instruments which guarantee the right to take part in cultural life.⁴⁹ These guarantees and declarations of support from the State help cultural communities preserve their customs and traditions despite globalization and the social and technological advances brought about by years of colonization in the past.

However, there is a growing number of medical research and case histories which demonstrate that the practice of FGM may cause permanent risks to health.⁵⁰ Among others, it is identified that FGM may cause immediate violent pain, backache, haemorrhage, post-operative shock, acute

44. *Id.*

45. See generally Ethnic Affairs Commission of New South Wales, *supra* note 24, at 1.

46. See An Act to Recognize, Protect and Promote the Rights of Indigenous Cultural Communities/Indigenous Peoples, Creating a National Commission on Indigenous Peoples, Establishing Implementing Mechanisms, Appropriating Funds Therefor, and for Other Purposes [The Indigenous Peoples’ Rights Act of 1997], Republic Act No. 8731, § 2 (c) (1997).

47. PHIL. CONST. art. II, § 22.

48. PHIL. CONST. art. XIV, § 17.

49. International Covenant on Economic, Social and Cultural Rights, art. 15 (1) (a), *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter ICESCR].

50. Christina Sibian, *Female Genital Mutilation/Circumcision: Reconciling the Ongoing Universalist/Cultural Relativist Debate to Promote a Cross-Cultural Dialogue*, 33 WINDSOR REV. LEGAL & SOCIAL ISSUES 72, 74 (2013).

urine retention, tetanus, and septicaemia.⁵¹ Aside from these, HIV and Hepatitis B may also result if successive operations are performed without observing health sanitation.⁵² The other known effects of FGM are “difficulties with sexual intercourse, menstrual problems, recurrent urinary and kidney infections, chronic infections of the uterus and vagina, infertility, acute problems during [labor] and birth, incontinence, prolapses, chronic vulvar abscesses, difficulty in using contraceptive methods[,] and sexual dysfunction.”⁵³ With all these harmful effects, the government’s obligation, as guaranteed by the 1987 Constitution, to protect and promote the health of its citizens comes in.⁵⁴

Aside from their right to health, the right against discrimination of women is also threatened by the practice of FGM. In Article II, Section 14 of the 1987 Constitution, the role of women in nation-building and the fundamental equality before the law of women and men is ensured.⁵⁵ Furthermore, the Philippines is a State-Party to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),⁵⁶ which mandates all States-Parties thereto to take all appropriate measures

[t]o modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women[.]⁵⁷

Now, with the ethnic communities’ right to cultural integrity on one hand, and their right to health on the other, there arises a conflict. As regards the matter of FGM, where does the right to cultural integrity end and where does the right to health begin? While the 1987 Constitution and the international instruments ratified by the State guarantee both rights, where must the line be drawn?

Without favoring either right, this Note attempts to strike a balance between the seemingly conflicting rights by positing that:

- (1) There is a need to determine what comprises cultural practice;

51. Ethnic Affairs Commission of New South Wales, *supra* note 24, at 2.

52. *Id.*

53. *Id.*

54. PHIL. CONST. art. II, § 15.

55. PHIL. CONST. art. II, § 14.

56. Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW].

57. *Id.* art. 5 (a).

- (2) Once a harmful cultural practice is identified, the depth of inseparability and interdependence between the cultural practice and the way of life of ethnic communities should serve as a standard or guideline in determining whether the State may curtail or restrict such practice;
- (3) Where the practice is not so inseparable and interdependent with the way of life of cultural communities, it may be curtailed; and
- (4) Where the practice is inseparable and interdependent with the way of life of cultural communities, it may only be restricted.

In this Note, it is posited that as regards FGM, the practice is so inseparable and interdependent with the way of life of the ethnic communities that it may not be absolutely curtailed but only restricted. Pursuant to the necessity to restrict it, the Note posits that a specific legislation on the matter will set the demarcation line between the conflicting rights of cultural integrity and health of the members of such ethnic communities. Such specific legislation shall give due regard to the principles of cultural relativism and local context sensibility. Moreover, it shall be enforced pursuant to the rights of such ethnic communities to health information and to give informed consent, which are embraced within the right to health.

D. The Significance of the Note

On the international level, because of its prevalence in certain continents, several studies have been written on the practice of FGM and its legal and sociological implications.⁵⁸ In these studies, FGM is explicitly regarded as a human rights violation.⁵⁹ In fact, by reason of the medically established harmful effects of FGM on health, several countries already have laws and statutes outlawing the practice of FGM.⁶⁰

On the domestic level, only a handful of literature provides a glimpse to the practice of FGM by some ethnic communities in the Philippines.⁶¹ Moreover, because written works on the matter are hard to come by, only a few Filipinos outside of these communities know that it is even being

58. See, e.g., Vanessa Ortiz, *Culture Shock: Expanding the Current Federal Law Against Female Genital Mutilation*, 3 FIU L. REV. 423 (2008).

59. *Id.*

60. This will be discussed in greater detail in the Note's Analysis.

61. See Calsalin, *supra* note 2, at 3.

practiced in the country.⁶² The scarce literature on the practice of FGM results in the ignorance of a sizable population of the country on the matter.

Meanwhile, the previously-cited existing studies and written works which have taken an absolute stand against the practice of FGM⁶³ fail to take into consideration the fact that FGM is practiced pursuant to deeply inculcated and long-standing beliefs that the culture and tradition of these communities espouse. As a component of their culture and tradition, FGM may not be hastily and unequivocally outlawed without, at the same time, disrespecting the culture of the people who practice it. The transmission of the practice of FGM from generation to generation illustrates that it cannot be easily deracinated. It is too entrenched in their lives that its absolute prohibition will seem culturally inappropriate. Thus, to the extent that existing studies absolutely disfavor FGM in view of its harmful health implications with no regard to the cultural bases and integrity of the communities that practice it, they are lacking.

This Note aims to fill in the gap left by these studies. It will attempt to reconcile the cultural integrity of the ethnic communities on the one hand with the right to health on the other. This Note will examine the interplay of these rights and attempt to draw the line between them by proposing a specific legislation on the matter, alongside some guiding principles. This will be done by scrutinizing the two aforementioned rights with the practice of FGM as the backdrop.

The Author posits that this Note will be meaningful, as the evaluation of the said rights with respect to FGM may become a guideline or standard in harmonizing other cultural practices of ethnic communities that may conflict with modern and legal developments in the future. Through this, the Note hopes to contribute to Philippine legal scholarship.

62. *Id.*

63. *See, e.g.,* Ethnic Affairs Commission of New South Wales, *supra* note 24, at 1-2 & Temprosa, *supra* note 19, at 699.

II. FGM AS A CULTURAL PRACTICE

A. *The Definition of Culture*

According to the Committee on Economic, Social, and Cultural Rights, culture is “multifaceted”⁶⁴ and “encompasses all manifestations of human existence.”⁶⁵ To this extent, culture

encompasses, [*inter alia*], ways of life, language, oral and written literature, music and song, non-verbal communication, *religion or belief systems, rites and ceremonies*, sport and games, methods of production or technology, natural and man-made environments, food, clothing[,] and shelter[,] and the arts, *customs[,] and traditions* through which individuals, groups of individuals[,] and communities express their humanity and the meaning they give to their existence, and build their world view representing their encounter with the external forces affecting their lives. Culture shapes and mirrors the values of well-being and the economic, social[,] and political life of individuals, groups of individuals[,] and communities.⁶⁶

To date, it remains contentious whether or not Islam requires FGM.⁶⁷ A thorough examination of this debate will not be discussed, but the existence of such debate will be treated as an existing fact. In this Note, nonetheless, it is asserted that whether or not FGM is practiced pursuant to religion is immaterial, given that culture, as defined, may embrace the practice of FGM whether as part of a religious or belief system, as a rite or ceremony, or as a social custom or tradition.

B. *The Rationale Behind FGM — Religious*

One reason behind the practice of FGM is Islam. There are two sources for Islam — (1) the Qur’an and (2) the Sunnah.⁶⁸ The Qur’an is the main source for God’s declarations to the Prophet Mohammed.⁶⁹ To interpret the Qur’an, believers of Islam or Muslims turn to the Sunnah, which is a

64. U.N. Committee on Economic, Social, and Cultural Rights, *General Comment No. 21: The Right of Everyone to take part in Cultural Life*, ¶ 10, U.N. Doc. E/C.12/GC/21 (Dec. 21, 2009) [hereinafter U.N. ECOSOC General Comment No. 21].

65. *Id.* ¶ 11.

66. *Id.* ¶ 13 (emphases supplied).

67. Doriane Lambelet Coleman, *The Seattle Compromise: Multicultural Sensitivity and Americanization*, 47 DUKE L.J., 717, 730-31 (1998).

68. *Id.*

69. *Id.*

“compendium of [Mohammed’s] sayings and customs.”⁷⁰ Aside from these sources, the Muslims also refer to *hadith* or “individual sayings or customs.”⁷¹

The Qur’an does not specifically mention FGM or even circumcision,⁷² but the subject appears in the Sunnah, where, according to Annemarie Schimmel,⁷³ a “‘barely known’ *hadith* addresses the practice directly.”⁷⁴ This *hadith* says that Mohammed suggests to a female circumciser that excision is allowed but must not be overdone.⁷⁵ According to the same *hadith*, “a more limited cutting ‘brings more radiance to the face [...] and is [...] better for the husband.’”⁷⁶ Because female circumcision is mentioned in the Sunnah, most Muslims believe Islam mandates it.⁷⁷ As mentioned, the Sunnah is a compendium of Mohammed’s sayings and customs.⁷⁸ If Mohammed says it, then the Muslims must follow it.⁷⁹ The way they live must always be in accord with that of Mohammed.⁸⁰ Doriane L. Coleman says, “[t]hese Muslims particularly appear to derive their belief that the practice is religiously-mandated from the overriding principle of Islam — which itself means ‘complete surrender to the Divine will’ — that the religion governs all of their lives’ activities, and from the specific statements of their clerics.”⁸¹

However, Coleman posits that “[t]he religious status of female circumcision is contested despite its existence in a confirming *hadith* because the relevant authority is obscure, and also because not all *hadith* are considered reliable.”⁸² Moreover, those who believe that female circumcision is required are seldom personally familiar with the text or its

70. *Id.*

71. *Id.*

72. *Id.* at 731.

73. Annemarie Schimmel is a well-known German orientalist and scholar who wrote extensively on Islam and Sufism. She was a professor at Harvard University in 1967 and returned to Bonn in 1992. See Stephen Kinzer, *Annemarie Schimmel, Influential Scholar of Islam, Dies at 80*, N.Y. TIMES, Feb. 2, 2003, available at <http://www.nytimes.com/2003/02/02/nyregion/annemarie-schimmel-influential-scholar-of-islam-dies-at-80.html> (last accessed Apr. 18, 2016).

74. Coleman, *supra* note 67, at 731.

75. BOYLE, *supra* note 21, at 32.

76. *Id.*

77. Coleman, *supra* note 67, at 731.

78. *Id.*

79. *Id.* at 731–32.

80. *Id.*

81. *Id.* at 732.

82. *Id.*

substance.⁸³ They usually rely on the word of their community elders.⁸⁴ Because everybody else in the community is going through it, one is convinced that she has to go through it as well. After all, the community favors one who is circumcised. To this extent and in view of the practice's transmission from generation to generation, the practice of FGM as religious duty has transformed, quite simply, into a rite of passage, social custom, or tradition.⁸⁵ This transformation is bolstered by the fact that studies show that the practice of FGM predates Islam.⁸⁶

C. The Rationale Behind FGM— Non-Religious

Because its religious bases are obscure, justifications for the practice became based on gender stereotypes, superstition, and customs.⁸⁷ Among others, it is generally believed that FGM will preserve a woman's virginity, preserve familial honor, prevent a woman from being ostracized by the community, safeguard pure lineage, and secure the woman's economic future.⁸⁸ Furthermore, some ethnic communities who practice the extreme form of FGM believe that the practice is necessary because the clitoris is poisonous and/or might grow bigger if not removed.⁸⁹ It is also believe that the removal of the clitoris is a rite of passage to remove the male features of the woman.⁹⁰

The motives of the local ethnic communities in the practice of FGM are similar to the general justifications for the practice. Based on her research, Sittinurussamsi A. Calsalin arrived at the conclusion that all of her respondents share the same beliefs as regards the practice of FGM.⁹¹ As a quick rundown, the practice of FGM among the Yakans is supported by the following beliefs — “cleanliness[,] dignity, honor[,] and religious duty.”⁹²

Evidently, various explanations are cited to justify the practice of FGM, but the explanations and motives for such practice may be grouped into two general justifications:

83. Coleman, *supra* note 67, at 732.

84. See Calsalin, *supra* note 2, at 5.

85. See also Ortiz, *supra* note 58, at 431.

86. See Thomas von der Osten-Sacken & Thomas Uwer, *Is Female Genital Mutilation an Islamic Problem?*, 14 MIDDLE EAST Q. 1, 29-36 (2007).

87. Ortiz, *supra* note 58, at 433.

88. *Id.* at 431-33.

89. *Id.*

90. *Id.*

91. See Calsalin, *supra* note 2, at 16.

92. *Id.* at 1.

- (1) As a societal custom and tradition;⁹³ and
- (2) As a religious duty.⁹⁴

The practice of FGM as a religious duty is more constricted in scope but is intertwined with societal custom and tradition.⁹⁵ As earlier mentioned, the religious bases for practicing FGM have been overshadowed by the customary or traditional reasons for its observation and to this extent, it has transformed from a religious duty into a cultural habit. When respondents were born and raised in a community that practices FGM, they simply conform. After all, as respondents claimed, it has always been the way things were done and so it must continue to be that way.⁹⁶

FGM, as a societal custom and tradition, sweeps a variety of reasons. For some ethnic communities, FGM serves as a rite of passage into adulthood.⁹⁷ One of the reasons FGM is carried out is for the purpose of maintaining the chastity and honor of a woman prior to marriage.⁹⁸ It is believed that FGM represses or even curbs the sexual urges of a woman.⁹⁹ This way, FGM helps a woman stay pure prior to marriage.¹⁰⁰ And if a woman stays pure and innocent, she is seen as more beautiful,¹⁰¹ and accordingly, her marriageability, so to speak, is increased.¹⁰²

Corollary to the belief that circumcised¹⁰³ women are chaste is the belief that the uncircumcised ones are not. This belief is attested to by the fact that some people belonging to older generations in Singapore believe that modern women are promiscuous because they are not circumcised.¹⁰⁴

93. *Id.* at 6.

94. *Id.*

95. See Calsalin, *supra* note 2, at 6.

96. *Id.* at 20.

97. *Id.*

98. *Id.* at 16-17.

99. FORWARD, *supra* note 33, at 4.

100. *Id.*

101. This is because of the belief that a woman will only be beautiful if she remains chaste. See IRIN Asia, 'Indonesia: Female genital mutilation persists despite ban,' available at <http://www.irinnews.org/report/90366/indonesia-female-genital-mutilation-persists-despite-ban> (last accessed Apr. 18, 2016).

102. Ethnic Affairs Commission of New South Wales, *supra* note 24, at 1.

103. The term "circumcise" is used loosely in this Note to refer to women who have undergone FGM. The Author recognizes that female circumcision does not rightfully cover all the types of FGM. See BOYLE, *supra* note 21, at 24-25.

104. Sya Taha, "A Tiny Cut:" Female Circumcision in South East Asia, available at <http://theislamicmonthly.com/a-tiny-cut-female-circumcision-in-south-east-asia> (last accessed Apr. 18, 2016).

Another way to put it is that FGM is seen as a method of keeping a woman “clean.”¹⁰⁵ It is a means of “purify[ing] genitals and bestow[ing] gender identity.”¹⁰⁶ Aside from this, FGM is also thought of as a protective measure for women in case of war,¹⁰⁷ as the belief is that a circumcised woman will have less chances of getting raped.¹⁰⁸

D. The Motive of Local Ethnic Communities in Practicing FGM

The Yakans have more or less the same justifications for the practice of FGM in their community. In general, their practice of FGM is justified both as a long-standing practice and tradition and as a means for social cohesion and social acceptance.¹⁰⁹

In Calsalin’s study of the Yakans’ practice of FGM, the three *Kah Dayangs* had substantially the same beliefs as regards the practice of FGM despite learning it from different sources.¹¹⁰ Their main basis for the practice, though, is religion.¹¹¹ For the first *Kah Dayang*¹¹² interviewed, FGM is “a cleansing rite that enables [a woman] to pray in the proper fashion, [to] read the Holy Qur’an[,] and [to] live with dignity and honor [within] the community.”¹¹³ For the second *Kah Dayang*,¹¹⁴ undergoing FGM is obligatory because Mohammed teaches it.¹¹⁵ She sees FGM as a means of acquiring female identity that allows a woman to read the Qur’an and pray in mosques.¹¹⁶ The third *Kah Dayang*, meanwhile, learned the practice from her Islamic mentor.¹¹⁷ She believed that FGM is mandatory because it is one of the *fitrah* (or the natural state of a man or woman).¹¹⁸ According to her, the five natural states are the following: circumcised; shaved pubic hair;

105. See Ethnic Affairs Commission of New South Wales, *supra* note 24, at 1.

106. Taha, *supra* note 104.

107. Ethnic Affairs Commission of New South Wales, *supra* note 24, at 1.

108. See Ethnic Affairs Commission of New South Wales, *supra* note 24, at 1.

109. FORWARD, *supra* note 33, at 3.

110. See generally Calsalin, *supra* note 2, at 16–19.

111. See Calsalin, *supra* note 2, at 16–19.

112. Kah Dayang Jainab is a 79-year old woman who has been performing FGM since she turned 27. The practice was passed down to her by her grandmother before the latter passed away. *Id.* at 16.

113. *Id.* at 16–17.

114. Kah Dayang Taas learned the process of FGM from her grandmother as well. *Id.* at 17.

115. *Id.*

116. *Id.*

117. Calsalin, *supra* note 2, at 18.

118. *Id.*

trimmed mustache; cut fingernails; and plucked armpit hair.¹¹⁹ Moreover, she believes that FGM prepares a woman for the responsibilities of adulthood.¹²⁰ Basically, the religious leaders had substantially similar arguments to justify the practice of FGM. According to them, it is practiced in order to emulate the way Mohammed lived.¹²¹ They also believed that undergoing FGM allows a woman to attain “a high degree of respectability and dignity.”¹²²

Although of less depth, the female respondents who were about to be circumcised also had the same beliefs as the *Kah Dayangs* and the religious leaders. As taught to them by their Islamic teachers, FGM “[marks a woman’s] passage into adulthood”¹²³ and makes her eligible to marry.¹²⁴ Moreover, they are willing to endure the pain caused by FGM because otherwise, it is said that they may not go to the mosques to pray and they may not read the Qur’an.¹²⁵ Hence, when they undergo FGM, what they know about Islam consists mainly of what has been orally passed down to them. Furthermore, the practice thereof is for social cohesion and acceptance because their community avoids those who are not circumcised.¹²⁶

The women who already underwent FGM were from different walks of life and yet they have the same beliefs with regard to the practice. They believe that FGM is a cleansing rite; it is like shedding skin and being reborn.¹²⁷ One of the women interviewed, named Bining, said, “[an] uncircumcised [woman], no matter how old she might be, will generally be regarded as a child[] without wisdom[and] will be seen as inferior and not [] blessed.”¹²⁸

The group of Yakan male respondents also had similar beliefs, which they learned from Islamic school.¹²⁹ In fact, they prefer to marry a circumcised woman because she is clean, pure, and dignified.¹³⁰ They also believe that if they marry an uncircumcised woman who bears a child, the

119. *Id.*

120. *Id.* at 18.

121. *Id.* at 17.

122. *Id.* at 20.

123. Calsalin, *supra* note 2, at 20.

124. *Id.* at 20–21.

125. *Id.* at 21.

126. FORWARD, *supra* note 33, at 3.

127. Calsalin, *supra* note 2, at 22.

128. *Id.*

129. *Id.* at 23.

130. *Id.* at 24.

spirits of their ancestors, as well as Allah, would be furious and punish them by causing drought, say, in their financial lives.¹³¹ Hence, Calsalin posits that these respondents respect the practice of FGM, for they believe it is necessary to maintain a harmonious relationship with Allah.¹³²

Just like the Yakans, the other ethnic communities in Mindanao ground the practice of FGM or *paq-sunna* upon their religious beliefs and tradition.¹³³ The women feel that they have a moral obligation to undergo FGM or *paq-sunna*.¹³⁴ It is obligatory because they may not properly function as Muslims without having undergone such a process.¹³⁵ In fact, they believe that one is not considered a Muslim unless she went through *paq-sunna*.¹³⁶ As Olga Czarina V. Belisario puts it in her study, at least with respect to the involved communities, “it is deemed highly unusual for a Muslim woman not to be circumcised because they believe that female circumcision is *the only way* for Muslim males and females and converts to be recognized as followers of the Islam religion.”¹³⁷ The compulsion to go through it is so severe that its non-observance is tantamount to religious disobedience.¹³⁸

The other ethnic communities think about the practice as a means to inculcate chastity and cleanliness.¹³⁹ This belief is similar to those of the Yakans as well. For them, the swabs of cotton used in scraping the genitalia of the girl should either be kept or buried in order to prevent the girl from becoming a loose woman and in order for her to find a suitable husband.¹⁴⁰ Furthermore, the act of washing the vagina is not just for hygiene, it also has a symbolic meaning as it serves as a reminder that they have become abiding Muslims by going through *paq-sunna*.¹⁴¹ Also, the other ethnic communities share the same beliefs as the Yakans that only marriages between circumcised individuals will be blessed spiritually.¹⁴² In this sense, *paq-sunna* becomes a pre-requisite not only for Islam per se,¹⁴³ but also for marriage.¹⁴⁴ This

131. *Id.*

132. *Id.* at 23.

133. Belisario, *supra* note 23, at 7.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.* (emphasis supplied).

138. *Id.*

139. Belisario, *supra* note 23, at 7.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

theory is supported by the fact that the *Imam* first ascertains whether the parties to a marriage are circumcised or not.¹⁴⁵

III. THE EFFECTS OF FGM

Those who practice FGM argue that there is neither harm nor pain in undergoing it because only a trivial amount of flesh is removed.¹⁴⁶ As they put it, it is only the “size of a nail clipping,”¹⁴⁷ or “a quarter grain of rice, a guava seed, a bean, the tip of a leaf, [or] the head of a needle.”¹⁴⁸ However, a number of studies show that it has negative health impacts.¹⁴⁹ In a study conducted in 1997, it was established that the practice of FGM results in short- and long-term health complications.¹⁵⁰ Meanwhile, in the study conducted by Belisario, she posits that the complications caused by the practice of FGM may be categorized into two kinds — psychological and physiological.¹⁵¹

A. Psychological Effects

In her study, Calsalin took note that the psychological effects of FGM range from deep fear to a feeling of accomplishment.¹⁵² The emotional state of a girl subjected to the practice of FGM depends upon the step of FGM at which she is in. In anticipation of the pain that the practice will cause, the girls to be circumcised usually feel a sense of struggle.¹⁵³ One respondent in Calsalin’s research said that she felt scared and worried upon knowing that her turn to undergo the ritual was forthcoming.¹⁵⁴ Others feel a sense of excitement, keeping in mind that the practice serves as a rite of passage to adulthood.¹⁵⁵ After the process though, the respondents generally feel elated for having survived a crucial time in their lives.¹⁵⁶ According to Belisario,

144. *Id.*

145. Belisario, *supra* note 23, at 8.

146. See Sara Corbett, *A Cutting Tradition*, N.Y. Times, Jan. 20, 2008, available at http://www.nytimes.com/2008/01/20/magazine/20circumcision-t.html?_r=0 (last accessed Apr. 18, 2016).

147. *Id.*

148. *Id.*

149. Calsalin, *supra* note 2, at 3.

150. *Id.* at 5.

151. Belisario, *supra* note 23, at 3.

152. Calsalin, *supra* note 2, at 27.

153. *Id.*

154. *Id.*

155. *Id.* at 17.

156. See Calsalin, *supra* note 2, at 28.

the psychological dysfunctions caused by FGM may be grouped into six. These are the following:

- (1) traumas;
- (2) shock;
- (3) depression;
- (4) shame;
- (5) fear; and
- (6) anxiety.¹⁵⁷

B. Physiological Effects

Belisario also claims that the physiological malfunctions caused by the practice of FGM may be divided into six categories:

- (1) infectious;
- (2) urologic;
- (3) dermatologic;
- (4) hematologic;
- (5) obstetric; and
- (6) gynecologic.¹⁵⁸

According to Harry Gordon, a doctor, these effects do not only result from the act of cutting or scraping the female genitalia. Several other variables also come in, such as “the use of crude and unsterilized equipment, the non-use of anesthesia during operations, and the use of unhygienic salves and medication for treating wounds.”¹⁵⁹ Maureen Mswela avers that “[t]he health risks associated with the use of crude equipment that circumcisers use to deform guiltless girls should be widely communicated.”¹⁶⁰

Among the immediate or short-term complications of the practice are “pain, hemorrhage, prolonged bleeding causing shock and death, local and

157. Belisario, *supra* note 23, at 4.

158. *Id.* at 3.

159. *Id.* (citing Daniel Gordon, *Female Circumcision and Genital Operations in Egypt and the Sudan: A Dilemma for Medical Anthropology*, 5 *MED. ANTHROPOLOGY Q.* 3 (1991)).

160. Maureen Mswela, *Cultural Practices and HIV in South Africa: A Legal Perspective*, 12 *POTCHEFSTROOMSE ELEKTRONIESE REGSBLAD* 172, 524 (2009) (citing DANIEL NJOROGÉ KARANJA, *FEMALE GENITAL MUTILATION IN AFRICA: GENDER RELIGION AND PASTORAL CARE* 65 (2003)).

systemic infection, septicemia, anemia, tetanus, gangrene, and fracture or dislocation of the clavicle, femur, humerus, or hip joint because of forcefully being held down.”¹⁶¹ Meanwhile, the long-term complications are said to result from the almost sealed off vagina after infibulation.¹⁶² Due to the difficulty in urinating, chronic urinary tract infection may result.¹⁶³ If left unattended, such infection may creep into the bladder and kidneys, which may in turn result in renal failure, septicemia, and even death.¹⁶⁴ Aside from these, the following may also occur — pelvic infection of the uterus and fallopian tubes, “[i]nfertility, keloid scarring, fistulae, dyspareunia[,] and sexual dysfunction.”¹⁶⁵ Lastly, there are studies asserting that 15% of circumcised women die of bleeding or infection immediately after going through the procedure.¹⁶⁶

IV. INTERNATIONAL AND MUNICIPAL LAWS ON THE RIGHT TO CULTURAL INTEGRITY

Pertinent to the discussion of the practice of FGM are two rights available to the ethnic communities who practice it — these are the right to cultural integrity and the right to health. Both rights, as enshrined in the 1987 Constitution and in several international instruments, shall be discussed in order to show the Philippines’ duty as a State to respect, protect, and promote them in all aspects of governance and legislation.

A. International Law

1. International Covenant on Civil and Political Rights (ICCPR) and General Comment No. 23

The ICCPR is a multi-lateral treaty adopted by the General Assembly of the United Nations on 19 December 1966.¹⁶⁷ It was signed by the countries on the same day and was ratified on 23 October 1986.¹⁶⁸

¹⁶¹ Calsalin, *supra* note 2, at 5.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ Layli Miller Bashir, *Female Genital Mutilation In The United States: An Examination of Criminal and Asylum Law*, 4 J. GENDER & L. 415, 422 (1996).

¹⁶⁷ United Nations Treaty Collection Database, International Covenant on Civil and Political Human Rights, *available at* https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en (last accessed Apr. 18, 2016).

¹⁶⁸ *Id.*

The first paragraph of Article 1 of the ICCPR ensures the right of self-determination of all peoples.¹⁶⁹ Pursuant to this right, all individuals may “freely determine their political status and freely pursue their economic, social, and *cultural development*.”¹⁷⁰ To fortify this right, the third paragraph thereof instructs the States-Parties to the ICCPR to “promote the realization of the right of self-determination”¹⁷¹ and to “respect that right.”¹⁷² Self-determination conveys the legal right of a group of people to determine their own destiny.¹⁷³ In an article for the Max Planck Yearbook of United Nations Law, Dieter Kugelman¹⁷⁴ says that the claim of right of self-determination is the crucial point in the exercise of the rights of ethnic minorities.¹⁷⁵ He then cites Siegfried Wiessner’s conclusion to bolster this point, to wit —

First, *indigenous peoples are entitled to maintain and develop their distinct cultural identity, their spirituality, their language, and their traditional way of life*. Second, they hold the right to political, economic[,] and social self-determination, including a wide range of autonomy and the maintenance and strengthening of their own system of justice. Third, indigenous peoples have a right to demarcation, ownership, development, control[,] and use of the lands they have traditionally owned or otherwise occupied and used. Fourth, governments are to honor and faithfully observe their treaty commitments to indigenous nations.¹⁷⁶

However, he puts the brakes on this assertion and qualifies it by saying that “this far-reaching standard is not consented to as a whole international law.”¹⁷⁷ Nevertheless, he says, “it marks the crucial points of protection.”¹⁷⁸

169. See International Covenant on Civil and Political Rights, art. 1 (1), *adopted* Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

170. *Id.* (emphases supplied).

171. *Id.* art. 1 (3).

172. *Id.*

173. Unrepresented Nations and People Organization, Self-determination, *available at* <http://www.unpo.org/article/4957> (last accessed Apr. 18, 2016).

174. Dieter Kugelman is a German writer and jurist. See Deutsche Hochschule der Ploetzei, Public Law with a Focus on Police Law and incl. International Law and European Law, *available at* <https://www.dhpol.de/en/hochschule/Departments/Polizeirecht.php> (last accessed Apr. 18, 2016).

175. Dieter Kugelman, *The Protection of Minorities and Indigenous Peoples Respecting Cultural Diversity*, 11 MAX PLANCK Y.B. U.N. L. 233, 259 (2007).

176. *Id.* at 259–60 (citing Siegfried Wiessner, Rights and Status of Indigenous Peoples: A Global Comparative and Legal Analysis, 12 HARV. HUM. RTS. J. 57, 127 (1999)) (emphasis supplied).

177. *Id.* at 260.

178. *Id.*

Going back to the ICCPR, another right ensured by the same Covenant is the right to freedom of thought, conscience, and religion.¹⁷⁹ In paragraph 1 of Article 18 thereof, it is stated that “this right shall include *freedom to have or to adopt a religion or belief of his choice*, and *freedom*, either individually or in community with others and in public or private, *to manifest his religion or belief in worship, observance, practice[,] and teaching.*”¹⁸⁰ Moreover, in the second paragraph thereof, it is said that “[n]o one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.”¹⁸¹ In the last paragraph thereof, the States-Parties to the Covenant are enjoined to respect the liberty of parents or legal guardians “to ensure the religious and moral education of their children in conformity with their own convictions.”¹⁸² This is congruous to the recognition by the State of the natural and primary right and duty of parents in the rearing of the youth for the development of their moral character.¹⁸³ This is one of the declared principles of the 1987 Constitution.¹⁸⁴

In Article 27, special consideration to ethnic minorities is given by the ICCPR.¹⁸⁵ It provides that “[i]n those States in which ethnic, religious[,] or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, *to enjoy their own culture*, to profess and practi[c]e their own religion, or to use their own language.”¹⁸⁶ According to Kugelmann, Article 27 of the ICCPR is the most important obligatory provision on the protection of minorities on an international level¹⁸⁷ despite the seeming vagueness of the term “minority”¹⁸⁸ because it sets “culture, religion[,] and language as the most important criteria for a minority.”¹⁸⁹

179. ICCPR, *supra* note 169, art. 18 (1).

180. *Id.* (emphases supplied).

181. *Id.* art. 18 (2).

182. *Id.* art. 18 (4).

183. PHIL. CONST. art. II, § 12.

184. PHIL. CONST. art. II, § 12.

185. Jonathan C. Jo, *Balancing the Right of Indigenous Peoples to Practice Their Culture vis-à-vis the State’s Interest and Obligation to Protect and Conserve Threatened Species of Wildlife* (2013) (unpublished J.D. thesis, Ateneo de Manila University) (on file with the Professional Schools Library, Ateneo de Manila University).

186. ICCPR, *supra* note 169, art. 27.

187. Kugelmann, *supra* note 175, at 246.

188. *Id.* at 245.

189. *Id.* at 246.

This Article may be applied to the subject ethnic communities so long as it may be established that they are minorities based on their culture, religion, and language. According to the Preliminary Report on the Study of the Problem of Discrimination Against Indigenous Populations,¹⁹⁰ released by the Commission on Human Rights, indigenous peoples are “composed of the existing descendants of the peoples who inhabited the present territory of a country wholly or partially at the time when persons from a different culture or ethnic origin arrived there from other parts of the world.”¹⁹¹ Kugelmann supplements this definition by referring to the indigenous peoples as those “who inhabited a land before it was conquered by other peoples or societies during coloni[z]ation by force or by treaty and they consider themselves distinct from the society currently governing those territories.”¹⁹² Following this definition, the Yakans, Tausugs, Samals, Maranaos, and Badjaos may be considered not just as ethnic minorities but as indigenous peoples, too. They were living in Mindanao long before non-Muslims arrived and conquered the country. Moreover, following the criteria of culture, religion, and language,¹⁹³ such indigenous groups may be considered as ethnic minorities falling within the ambit of protection given by Article 27 of the ICCPR.¹⁹⁴

In its 50th session in 1994, the Human Rights Committee adopted General Comment No. 23 on Article 27 of the ICCPR.¹⁹⁵ Essentially, the Committee highlights the distinct protection given by the ICCPR to ethnic, religious, or linguistic minorities.¹⁹⁶ In the first paragraph thereof, the said General Comment phrases such idea in this wise — “[t]he Committee observes that this [A]rticle establishes and recognizes a right[,] which is conferred on individuals belonging to minority groups and which is *distinct from, and additional to, all the other rights* which, as individuals in common with everyone else, they are already entitled to enjoy under the Covenant.”¹⁹⁷ Moreover, the Committee says the enjoyment of the right

190. Human Rights Committee, *Preliminary Report on the Note of the Problem of Discrimination Against Indigenous Populations*, ¶ 18, U.N. Doc. E/CN.4/Sub.2/L.566 (1972).

191. *Id.*

192. Kugelmann, *supra* note 175, at 238.

193. Kugelmann asserts that Article 27 of the ICCPR stresses culture, religion, and language as the criteria of minority. *Id.* at 246.

194. *Id.*

195. Human Rights Committee, *General Comment No. 23: Rights of Minorities (art. 27)*, U.N. Doc. CCPR/C/21/Rev.1/Add.5 [hereinafter HRC General Comment No. 23] (Apr. 8, 1994).

196. *Id.* ¶ 1.

197. *Id.* (emphasis supplied).

under Article 27 is distinct from the right of self-determination recognized by ICCPR in its first article.¹⁹⁸ According to the General Comment, the right recognized under Article 27 of the ICCPR is conferred on individual members of minority groups, “*as such*.”¹⁹⁹ Hence, the protection given by the Article is bestowed upon individuals who belong to minorities.²⁰⁰ However, the Committee still acknowledges that this right still depends, to some extent, upon the conservation of the culture, religion, and language.²⁰¹ This, in turn, impliedly recognizes the role of the collective preservation of the culture by the ethnic minorities, because the only way culture, religion, and language may continually exist is through such effort. To do this, the Committee asserts that “positive measures by States may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practi[c]e their religion, in community with the other members of the group.”²⁰²

In another paragraph of the General Comment, it is likewise stated that Article 27 simply recognizes “the right of individuals belonging to those minorities ... [—] in community with members of their group [—] to enjoy their own culture, to practi[c]e their religion, and [to] speak their language.”²⁰³ In another portion of the General Comment, the Human Rights Committee asserts that States-Parties to ICCPR are obliged to make certain that “the exercise and existence of this right are protected[.]”²⁰⁴ Clearly, these provisions in the ICCPR recognize and respect the rights of ethnic communities to enjoy their own culture and embrace a particular way of life.

2. International Covenant on Economic, Social and Cultural Rights (ICESCR) and General Comment No. 21

Aside from the ICCPR, another instrument that recognizes the right of an individual to enjoy his or her culture is the ICESCR, which was adopted by the United Nations General Assembly on 16 December 1966,²⁰⁵ signed by

198. *Id.* ¶ 2.

199. *Id.* ¶ 3.1 (emphasis supplied).

200. *Id.* ¶ 3.2.

201. HRC General Comment No. 23, *supra* note 195, ¶ 5.1.

202. *Id.* ¶ 6.2.

203. *Id.* ¶ 5.2.

204. *Id.* ¶ 6.1.

205. United Nations Treaty Collection Database, International Covenant on Economic, Social and Cultural Rights, available at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en (last accessed Apr. 18, 2016).

the Philippines on 19 December 1966, and ratified on 7 June 1974.²⁰⁶ Among the rights recognized by the ICESCR are:

- (1) The right of self-determination;²⁰⁷
- (2) The equal right of men and women to the enjoyment of all economic, social, and cultural rights;²⁰⁸
- (3) The right of people to freely dispose of their natural wealth and resources, based upon the principle of mutual benefit;²⁰⁹
- (4) The right to social protection;²¹⁰
- (5) The right to an adequate standard of living;²¹¹
- (6) The right to work;²¹²
- (7) The right of everyone to form trade unions and join a trade union;²¹³
- (8) The right to social security, including social insurance;²¹⁴
- (9) The right to an adequate standard of living, including adequate food, clothing, and housing;²¹⁵
- (10) The right of everyone to be free from hunger;²¹⁶
- (11) The right to the highest attainable standards of physical and mental health;²¹⁷
- (12) The right to education;²¹⁸
- (13) The right to take part in cultural life;²¹⁹ and

206. *Id.*

207. ICESCR, *supra* note 49, art. 1.

208. *Id.* art. 3.

209. *Id.* art. 1 (2).

210. *Id.* art. 9.

211. *Id.* art. 11.

212. *Id.* art. 6.

213. ICESCR, *supra* note 49, art. 8 (1) (a).

214. *Id.* art. 9.

215. *Id.* art. 11 (1).

216. *Id.* art. 11 (2).

217. *Id.* art. 12 (1).

218. *Id.* art. 13 (1).

219. ICESCR, *supra* note 49, art. 15 (1) (a).

(14) The right to the enjoyment of the benefits of scientific progress.²²⁰

Of all these rights, the most relevant provision to this discussion is Article 15 (1) (a), which establishes that States-Parties to the ICESCR shall recognize the right of everyone “to take part in cultural life[.]”²²¹ Aside from Article 15, there is also Article 1, which ensures the right of self-determination of all peoples.²²² Pursuant to such right, peoples may “freely pursue their economic, social[,] and *cultural development*.”²²³ In one respect, it may be argued that the guarantee of self-determination in the ICESCR is conferred on States and not on ethnic communities, since the provision uses the word “peoples.” However, the Author posits that even if the right of self-determination is only guaranteed to States as such, the free pursuit of cultural development may still extend to the ethnic communities as citizens of the State. Hence, Article 1 and Article 15 (1) (a) of the ICESCR both guarantee the right of ethnic communities to practice and enjoy their culture.

On 21 December 2009, the Committee on Economic, Social, and Cultural Rights published General Comment No. 21 to elaborate on Article 15 (1) (a) of the ICESCR, i.e., the right of everyone to take part in cultural life.²²⁴ According to General Comment No. 21, the right of everyone to take part in cultural life may be considered as a freedom, which requires States-Parties to both abstain and positively act.²²⁵ Abstention means the “non-interference with the exercise of cultural practices and with access to cultural goods and services”²²⁶ while positive action means “ensuring preconditions for participation, facilitation[,] and promotion of cultural life, and access to[,] and preservation of cultural goods.”²²⁷

Moreover, the General Comment asserts that the word “everyone” in the right of everyone to take part in cultural life may pertain to an individual or to a collective.²²⁸ This means that the right “may be exercised by a person (a) as an individual, (b) in association with others, or (c) within a community or group, as such.”²²⁹ As citizens of the State, the right to take part in

220. *Id.* art. 15 (1) (b).

221. *Id.* art. 15 (1) (a).

222. *Id.* art. 1.

223. *Id.* (emphasis supplied).

224. U.N. ECOSOC, *supra* note 64.

225. *Id.* ¶ 6.

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.* ¶ 9.

cultural life is extended to the Yakans, Tausugs, Samals, Maranaos, and Badjaos collectively. It does not end there, though. The members of such ethnic communities may also exercise such right individually.

“To take part” or “to participate,” according to the General Comment, has three components — “(a) participation in, (b) access to, and (c) contribution to cultural life.”²³⁰ Participation in cultural life means the right of everyone

*to act freely, to choose his or her own identity, to identify or not with one or several communities or to change that choice, to take part in the political life of society, to engage in one’s own cultural practices[,] and to express oneself in the language of one’s choice.*²³¹

Access to cultural life means “to know and understand his or her own culture and that of others through education and information[] and to receive quality education and training with due regard for cultural identity.”²³² Contribution to cultural life means

the right of everyone to be involved in creating the spiritual, material, intellectual[,] and emotional expressions of the community. This is supported by the right to take part in the development of the community to which a person belongs, and in the definition, elaboration[,] and implementation of policies and decisions that have an impact on the exercise of a person’s cultural rights.²³³

In the interpretation given by the Committee on Economic, Social, and Cultural Rights of the right to take part in cultural life in General Comment No. 21, it is evident that the exercise of such right, in the end, rests in the individual. While “everyone” pertains to both an individual and to a group, in the last analysis, the choice on whether one wants to take part in his or her own culture or to choose another remains in the individual as an individual or in the individual as member of a collective.

3. Universal Declaration of Human Rights (UDHR)

Another international instrument that articulates the rights of ethnic communities to practice their customs and traditions is the UDHR.²³⁴ The UDHR was formulated shortly after the formation of the United Nations,

230. U.N. ECOSOC General Comment No. 21, *supra* note 64, ¶ 15.

231. *Id.* ¶ 15 (a) (emphases supplied).

232. *Id.* ¶ 15 (b).

233. *Id.* ¶ 15 (c).

234. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (Dec. 10, 1948) [hereinafter UDHR].

which was in turn created after the World War II.²³⁵ The Philippines was among the 48 countries which voted in favor of the UDHR,²³⁶ a special document devised by a committee spearheaded by Eleanor Roosevelt.²³⁷ Initially, the UDHR, which was a declaration of “the rights that everyone in the entire world should have,”²³⁸ was only considered as a soft law.²³⁹ As such, it does not give rise to enforceable rights²⁴⁰ as it is only “a non-binding norm[] ... that influence[s] state behavior.”²⁴¹ However, in *Filártiga v. Peña-Irala*,²⁴² the United States (U.S.) Court of Appeals ruled that the UDHR “no longer fits into the dichotomy of [a] ‘binding treaty’ against ‘non-binding pronouncement,’ but is rather *an authoritative statement of the international community*.”²⁴³ Furthermore, the U.S. Court of Appeals enunciated that

a Declaration creates an expectation of adherence, and ‘insofar as the expectation is gradually justified by State practice, a declaration may by custom become recognized as laying down rules binding upon the States.’ Indeed, several commentators have concluded that the [UDHR] has become, in toto, *a part of binding, customary international law*.²⁴⁴

235. The Universal Declaration of Human Rights, History of the Document, *available at* <http://www.un.org/en/sections/universal-declaration/history-document> (last accessed Apr. 18, 2016) [hereinafter UDHR History].

236. R.B. HERATH, *A NEW BEGINNING FOR HUMANKIND: A RECIPE FOR LASTING PEACE ON EARTH* 186 (2012).

237. UDHR History, *supra* note 235.

238. Youth for Human Rights, United Nations Universal Declaration of Human Rights, *available at* <http://www.youthforhumanrights.org/what-are-human-rights/universal-declaration-of-human-rights/introduction.html> (last accessed Apr. 18, 2016).

239. Blake Dawson Waldron Lawyers, International Soft Law Instruments (A Memorandum) 2, *available at* https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKEwik77OiiurKAhVle6YKHUOKD7YQFggdMAA&url=http%3A%2F%2Fhrlc.org.au%2Ffiles%2FFPKAK6X6G65%2FUse%2520of%2520International%2520_Soft%2520Law_%2520in%2520Domestic%2520Law.DOC&usq=AFQjCNHNlRtpAz2SwnViFt7aRYka7v487A&sig=2=ToYfQBeTqb7Lch4IpFRP7A (last accessed Apr. 18, 2016).

240. *Id.*

241. *Pharmaceutical and Health Care Association of the Philippines v. Duque III*, 535 SCRA 265, 297 (2007).

242. *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980) (U.S.).

243. *Id.* ¶ 26 (citing E. SCHWELB, *HUMAN RIGHTS AND THE INTERNATIONAL COMMUNITY* 70 (1964)) (emphasis supplied).

244. *Id.*

The influence that UDHR has may be deduced from the fact that it spawned the ICCPR and ICESCR.²⁴⁵ It is also the first United Nations document to use the term “human rights.”²⁴⁶

So what does the UDHR mandate? UDHR declares several rights that cover various aspects of living. Among others, it ensures the following:

- (1) right to equality;²⁴⁷
- (2) freedom from discrimination;²⁴⁸
- (3) right to life, liberty, and personal security;²⁴⁹
- (4) freedom from slavery;²⁵⁰
- (5) freedom from torture and degrading treatment;²⁵¹
- (6) right to recognition as a person before the law;²⁵²
- (7) right to equality before the law;²⁵³
- (8) right to remedy by competent tribunal;²⁵⁴
- (9) right to marriage and family;²⁵⁵
- (10) freedom of belief and religion;²⁵⁶
- (11) right to education;²⁵⁷
- (12) right to participate in the cultural right of community;²⁵⁸
- (13) right to a social order that articulates the UDHR;²⁵⁹

245. JOAQUIN G. BERNAS, S.J., *THE 1987 CONSTITUTION: A COMMENTARY* 61 (2009 ed.).

246. HRWeb.org, *A Summary of the United Nations Agreements on Human Rights*, available at <http://www.hrweb.org/legal/undocs.html> (last accessed Apr. 18, 2016).

247. UDHR, *supra* note 234, art. 1.

248. *Id.* art. 2.

249. *Id.* art. 3.

250. *Id.* art. 4.

251. *Id.* art. 5.

252. *Id.* art. 6.

253. UDHR, *supra* note 234, art. 7.

254. *Id.* art. 8.

255. *Id.* art. 16.

256. *Id.* art. 18.

257. *Id.* art. 26.

258. *Id.* art. 27.

- (14) community duties essential to free and full development;²⁶⁰ and
(15) freedom from State or personal interference in the
aforementioned rights.²⁶¹

Of these rights, the most pertinent ones to this Note are the rights guaranteed in Articles 18, 27, and 30, which respectively ensure the freedom of belief and religion, the right to participate in cultural life and community, and the freedom from State or personal interference with the rights ensured by the UDHR.²⁶²

In Article 18, the UDHR declares that “[e]veryone has the right to freedom of thought, conscience[,] and religion; this right includes [the] freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship[,] and observance.”²⁶³

In the first paragraph of Article 27, the UDHR guarantees that “[e]veryone has the right to freely participate in the cultural life of the community, to enjoy the arts[,] and to share in scientific advancement and its benefits.”²⁶⁴ This right, following the definition of culture discussed previously, also encompasses religion or belief systems.

Lastly, in Article 30, the UDHR asserts that “[n]othing in the [UDHR] may be interpreted as implying for any State, group[,] or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.”²⁶⁵ Indubitably, the members of the ethnic communities are entitled to such rights and subject to such limitations espoused by the UDHR.²⁶⁶

4. International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and General Recommendation No. 23

The ICERD is an instrument dedicated to the understanding of all races. It was signed by the Philippines on 7 March 1966 and was ratified on 15 September 1967.²⁶⁷ In relation thereto, the Committee on the Elimination

259. UDHR, *supra* note 234, art. 28.

260. *Id.* art. 29.

261. *Id.* art. 30.

262. *Id.* arts. 18, 27, & 30.

263. *Id.* art. 18.

264. *Id.* art. 27.

265. UDHR, *supra* note 234, art. 30.

266. Jo, *supra* note 185, at 31.

267. United Nations Treaty Collection Database, International Convention on the Elimination of All Forms of Racial Discrimination, *available at*

of Racial Discrimination released General Recommendation No. 23,²⁶⁸ which recognizes that the ICERD encompasses the discrimination against indigenous peoples and “that all appropriate means must be taken to combat and eliminate such discrimination.”²⁶⁹ In Paragraph 4 thereof, it elucidates on the right of the indigenous peoples to cultural traditions and customs, to wit²⁷⁰ —

- (4) The Committee calls [] upon States-[P]arties to:
- (a) Recognize and respect indigenous distinct culture, history, language[,] and way of life as an enrichment of the State’s cultural identity and to promote its preservation;
 - (b) Ensure that members of indigenous peoples are free and equal in dignity and rights and free from any discrimination, in particular that based on indigenous origin or identity;
 - (c) Provide indigenous peoples with conditions allowing for a sustainable economic and social development compatible with their cultural characteristics;
 - (d) Ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent; [and,]
 - (e) Ensure that indigenous communities can exercise their rights to practi[c]e and revitalize their cultural traditions and customs and to preserve and to practi[c]e their languages.²⁷¹

As indigenous communities, the Yakans, Tausugs, Samals, Maranaos, and Badjaos are likewise entitled to the protection given by this Convention.

B. Municipal Law

It is not only the international arena that is replete with legal provisions that protect the rights of indigenous peoples. Locally, there is Republic Act No. (R.A.) 8371, or the Indigenous Peoples’ Rights Act of 1997 (IPRA).²⁷² It is the law devised on 29 October 1997²⁷³ for purposes of protection and

https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-2&chapter=4&lang=en (last accessed Apr. 18, 2016).

268. Office of the United Nations High Commissioner for Human Rights, *General Recommendation No. 23 on the Rights of Indigenous Peoples*, ¶ 1, U.N. Doc. A/52/18 (Aug. 18, 1997) [hereinafter ICERD].

269. *Id.*

270. *Id.* ¶ 4.

271. *Id.*

272. The Indigenous Peoples’ Rights Act of 1997, § 2 (e).

273. *See generally* The Indigenous Peoples’ Rights Act of 1997.

promotion of the rights of indigenous peoples,²⁷⁴ perhaps to give teeth to Article II, Section 22 of the 1987 Constitution.²⁷⁵ According to Director Lawrence Jeff Johnson of the International Labor Organization (ILO) Country Office for the Philippines, the IPRA is “consistent with the policy and principles of ILO Convention No. 169[.]” which is “a comprehensive instrument that covers a wide range of issues concerning indigenous peoples, including land rights, access to natural resources, health, education, vocational training, conditions of employment, and contacts across borders.”²⁷⁶ Thus far, the ILO Convention No. 169 is the only international legal instrument that singularly pertains to the protection and promotion of the rights of indigenous peoples.²⁷⁷ However, the Philippines has not ratified it yet, but the same is under consideration.²⁷⁸

Going back, according to Sedfrey M. Candelaria, the IPRA is

one of the social reform agenda of the Philippine government. It aimed to correct the historical injustice[,] which placed the [indigenous peoples] at a disadvantage in comparison to the rest of society. It does not only contain a comprehensive list of rights of the [indigenous peoples,] it also establishes the lead agency for its implementation and the mechanism for the enforcement of these rights.²⁷⁹

Furthermore, the IPRA not only “recogni[z]es the rights of the ‘indigenous peoples’ to their ancestral lands and domains, ... [i]t also touches on the more general topic of human rights and social justice and particularly provides for the rights of the [indigenous peoples] to self-governance and empowerment.”²⁸⁰ Candelaria says that the IPRA is a major feat for advocates of indigenous peoples’ rights.²⁸¹ Additionally, he notes that the

274. *Id.* § 2.

275. See SEDFREY M. CANDELARIA, *COMPARATIVE ANALYSIS ON THE INDIGENOUS AND TRIBAL PEOPLES CONVENTION NO. 169, UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES (UNDRIP), AND INDIGENOUS PEOPLES’ RIGHTS ACT (IPRA) OF THE PHILIPPINES* (2012).

276. Lawrence Jeff Johnson, *Foreword* to SEDFREY M. CANDELARIA, *COMPARATIVE ANALYSIS ON THE INDIGENOUS AND TRIBAL PEOPLES CONVENTION NO. 169, UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES (UNDRIP), AND INDIGENOUS PEOPLES’ RIGHTS ACT (IPRA) OF THE PHILIPPINES* (2012).

277. *Id.*

278. *Id.*

279. CANDELARIA, *supra* note 275, at 6.

280. *Id.*

281. *Id.*

IPRA has “close semblance with UNDRIP and ILO [Convention No. 169].”²⁸²

As the only legislation solely dedicated to the rights of indigenous peoples thus far, the IPRA covers a wide range of rights guaranteed to every member of indigenous cultural communities. For purposes of this Note, however, emphasis shall be given to those provisions, which ensure that:

- (c) [t]he State shall recognize, respect[,] and protect the rights of [indigenous peoples] to preserve and develop their cultures, traditions[,] and institutions. It shall consider these rights in the formulation of national laws and policies;
- ...
- (e) [t]he State shall take measures, with the participation of the [indigenous peoples] concerned, to protect their rights and guarantee respect for their cultural integrity and to ensure that members of the [indigenous peoples] benefit on an equal footing from the rights and opportunities[,] which national laws and regulations grant to other members of the population; and
- (f) [t]he State recognizes its obligations to respond to the strong expression of the [indigenous peoples] for cultural integrity by assuring maximum [indigenous peoples'] participation in the direction of education, health, as well as other services of [indigenous peoples], in order to render such services more responsive to the needs and desires of these communities.²⁸³

Pursuant to these declared policies, several provisions set forth the safeguarding of the cultural integrity of the indigenous peoples. For instance, there is Section 29 — aptly entitled Protection of Indigenous Culture, Traditions, and Institutions — which ensures that “[t]he State shall respect, recognize[,] and protect the right of [indigenous peoples] to preserve and protect their culture, traditions[,] and institutions.”²⁸⁴ The same Section also ensures that the State “consider[s such] rights in the formulation and application of national plans and policies.”²⁸⁵

Furthermore, Section 31 of the IPRA recognizes the cultural diversity of indigenous peoples and enjoins the State to lay down effective measures for this purpose. To wit —

[Section] 31. Recognition of Cultural Diversity. [—] The State shall endeavor to have the dignity and diversity of the cultures, traditions, histories[,] and aspirations of the [indigenous peoples] appropriately

282. *Id.*

283. *Id.* § 2 (f).

284. *Id.* § 29.

285. *Id.*

reflected in all forms of education, public information[,] and cultural [-]educational exchange. Consequently, the State shall take effective measures, in consultation with [indigenous peoples] concerned, to eliminate prejudice and discrimination and to promote tolerance, understanding[,] and good relations among [indigenous peoples] and all segments of society. Furthermore, the Government shall take effective measures to ensure that State[-]owned media duly reflect indigenous cultural diversity. The State shall likewise ensure the participation of appropriate indigenous leaders in schools, communities[,] and international cooperative undertakings like festivals, conferences, seminars[,] and workshops to promote and enhance their distinctive heritage and values.²⁸⁶

Additionally, Section 33 of the IPRA recognizes the rights of indigenous peoples to religious, cultural sites, and ceremonies. According to the said Section,

[indigenous peoples] shall have the right to manifest, practice, develop[,] and teach their spiritual and religious traditions, customs[,] and ceremonies; the right to maintain, protect[,] and have access to their religious and cultural sites; the right to use and control of ceremonial objects; and, the right to the repatriation of human remains. Accordingly, the State shall take effective measures, in cooperation with the [indigenous peoples] concerned to ensure that indigenous sacred places, including burial sites, be preserved, respected[,] and protected.²⁸⁷

C. Cultural Integrity — Guaranteed but not Absolute

Following the litany of international and domestic legal provisions that ensure the rights of ethnic communities to their cultural integrity, it is established that there is an obligation on the part of the State to acknowledge, recognize, preserve, and protect the culture, customs, and traditions of the indigenous peoples. However, these rights are not absolute because the same cited legal instruments provide proper limitations to these rights. For instance, as discussed in the earlier portion of this Note, the ICCPR ensures the right to freedom of thought, conscience, and religion.²⁸⁸ In the same provision, the extent of such right is limited by paragraph 3 thereof which says that “[f]reedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals, or the fundamental rights and freedoms of others.”²⁸⁹ This qualification shows that the protection of public safety, order, health, or morals, or the fundamental rights and freedoms of others are also recognized vis-à-vis the right to freedom of

286. *Id.* § 31.

287. The Indigenous Peoples’ Rights Act of 1997, § 33.

288. ICCPR, *supra* note 169, art. 18 (1).

289. *Id.* art. 18 (3).

thought, conscience, and religion — a right which is circumscribed by the right to take part in cultural life, as earlier asserted by this Note.

Substantially similar limitations are found in the UDHR, which stresses that:

- (1) Everyone has duties to the community in which alone the free and full development of his personality is possible[;]
- (2) In the exercise of his rights and freedoms, everyone shall be subject only to such limitation as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order[,] and the general welfare in a democratic society[; and]
- (3) These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.²⁹⁰

V. INTERNATIONAL AND MUNICIPAL LAWS ON THE RIGHT TO HEALTH

Among the recognized limitations to the exercise of the right to cultural integrity is the right to health. According to John Tobin, the rise of the right to health is a testament to the “[S]tates’ recognition of an individual’s entitlement to the protection of his or her health and the reali[z]ation that the [S]tate bears primary responsibility for the protection of this entitlement.”²⁹¹

Primarily, the right to health is ensured by no less than the 1987 Constitution itself, which establishes in Section II, Article 15 thereof that “[t]he State shall protect and promote the right to health of the people and instill health consciousness among them.”²⁹² Additionally, two sections under Article XIII on Social Justice and Human Rights of the 1987 Constitution are especially dedicated to the promotion and protection of health, to wit —

Section 11. The State shall adopt an integrated and comprehensive approach to health development[,] which shall endeavor to make essential goods, health[,] and other social services available to all the people at affordable cost. There shall be priority for the needs of the underprivileged, sick, elderly, disabled, women, and children. The State shall endeavor to provide free medical care to paupers.

290. UDHR, *supra* note 234, art. 29.

291. Ana S. Ayala, Book Review, *The Right to Health in International Law by John Tobin*, 14 MELBOURNE J. INT’L L. 1, 4 (2013).

292. PHIL. CONST. art. II, § 15.

Section 12. The State shall establish and maintain an effective food and drug regulatory system and undertake appropriate health, manpower development, and research, responsive to the country's health needs and problems.²⁹³

In the landmark case of *Imbong v. Ochoa*,²⁹⁴ where the petitioners assailed the constitutionality of R.A. No. 10354, or the Responsible Parenthood and Reproductive Health Act of 2012 (RH Law), on the grounds that: (1) it violated the right to life of the unborn, and perhaps more pertinent to this Note, (2) it violated the right to health, the respondents thereto posited that the abovementioned provisions were not self-executing.²⁹⁵ The Court said “[c]ontrary to the respondent’s notion, however, these provisions are self-executing. Unless the provisions clearly express the contrary, the provisions of the Constitution should be considered self-executory. There is no need for legislation to implement these self-executing provisions.”²⁹⁶ To fortify this argument, the Court looked into its assertion in *Manila Prince Hotel v. GSIS*²⁹⁷ that

unless it is expressly provided that a legislative act is necessary to enforce a constitutional mandate, the presumption now is that all provisions of the Constitution are self-executing. If the constitutional provisions are treated as requiring legislation instead of self-executing, the legislature would have the power to ignore and practically nullify the mandate of the fundamental law. This can be cataclysmic.²⁹⁸

The same statement is provided in another landmark case — *Oposa v. Factoran, Jr.*²⁹⁹ In *Oposa*, a group of minors represented by their parents sought the cancellation of existing timber license agreements that authorize holders thereof to cut and log the remaining forests in the country.³⁰⁰ According to these minors, these grants result in disastrous consequences and irreparable damage to the natural resources of the country.³⁰¹ In ruling in favor of the minors, the Court said that the focal point of the suit — the right to a balanced and healthful ecology under Article II, Section 16 of the

293. PHIL. CONST. art. XIII, §§ 11-12.

294. *Imbong v. Ochoa*, 721 SCRA 146 (2014).

295. *See Imbong*, 721 SCRA, at 314.

296. *Id.* (citing *Gamboa v. Finance Secretary*, 52 SCRA 690, 738-39 (2011)).

297. *Manila Prince Hotel v. Government Service Insurance System*, 267 SCRA 408 (1997).

298. *Id.* at 315 (citing *Manila Prince Hotel*, 267 SCRA at 431).

299. *Oposa v. Factoran, Jr.*, 224 SCRA 792 (1993).

300. *Id.* at 798.

301. *Id.*

1987 Constitution — is united with the right to health under Article II, Section 15.³⁰²

The Court asserted that

while the right to a balanced and healthful ecology is to be found under the Declaration of Principles and State Policies and not under the Bill of Rights, it does not follow that it is less important than any of the civil and political rights enumerated in the latter. Such a right belongs to a different category of rights altogether for it concerns nothing less than self-preservation and self-perpetuation — aptly and fittingly stressed by the petitioners — the advancement of which may even be said to predate all governments and constitutions. As a matter of fact, these basic rights need not even be written in the Constitution for they are assumed to exist from the inception of humankind. If they are now explicitly mentioned in the fundamental charter, it is because of the well-founded fear of its framers that unless the rights to a balanced and healthful ecology and to health are mandated as [S]tate policies by the Constitution itself, thereby highlighting their continuing importance and *imposing upon the [S]tate a solemn obligation to preserve the first and protect and advance the second*, the day would not be too far when all else would be lost not only for the present generation, but also for those to come — generations which stand to inherit nothing but parched earth incapable of sustaining life.³⁰³

A. *International Law*

1. ICESCR and General Comment No. 14

Interestingly, the right to health is among those rights ensured by the same instruments that recognize the cultural integrity of ethnic communities. For instance, the ICESCR recognizes the right to health of individuals under Article 12 (1), in this wise — “the States[-]Parties to the [ICESCR] recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”³⁰⁴ According to Tobin, the right to health provided therefor does not specifically mention the obligation to eradicate harmful traditional practices such as FGM.³⁰⁵ However, he asserts that the same may be implied therefrom.³⁰⁶ To further elucidate this right, the Committee on Economic, Social, and Cultural Rights adopted General Comment No. 14, which tackles the right of everyone to the highest

302. *Id.* at 817.

303. *Id.* at 804-05 (emphasis supplied).

304. ICESCR, *supra* note 49, art. 12 (1).

305. JOHN TOBIN, *THE RIGHT TO HEALTH IN INTERNATIONAL LAW* 292 (2012).

306. *Id.*

attainable standard of health.³⁰⁷ According to General Comment No. 14, the right to health pertains to certain freedoms and entitlement.³⁰⁸ Such freedoms

include the right to control one's health and body, including sexual and reproductive freedom, and the right to be free from interference, such as the right to be free from torture, non-consensual medical treatment[,] and experimentation. By contrast, the entitlements include the right to a system of health protection[,] which provides equality of opportunity for people to enjoy the highest attainable level of health.³⁰⁹

According to the General Comment, the right to health embraces three levels of obligations on the part of the State, namely:

- (1) The obligation to respect;
- (2) The obligation to protect; and
- (3) The obligation to fulfill, which in turn, comprises the obligations to facilitate, provide, and promote.³¹⁰

What does each component obligation entail?

The General Comment further explicated these points. Firstly, the obligation to respect enjoins the State to abstain “from interfering directly or indirectly with the enjoyment of the right to health.”³¹¹ Secondly, the obligation to protect requires States to set up measures that prevent third parties from interfering with the right to health of individuals.³¹² Lastly, the obligation to fulfill “requires States to adopt appropriate legislative, administrative, budgetary, judicial, promotional[,] and other measures towards the full realization of the right to health.”³¹³ Furthermore, the General Comment expressly instructs the States to prevent the compulsion of undergoing traditional yet harmful practices, particularly FGM.³¹⁴ To wit, the General Comment asserts that —

307. U.N. Committee on Economic, Social and Cultural Rights, *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, ¶ 8, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000) [hereinafter ICESCR General Comment No. 14].

308. *Id.* ¶ 8.

309. *Id.*

310. *Id.* ¶ 33.

311. *Id.*

312. *Id.* ¶ 35.

313. ICESCR General Comment No. 14, *supra* note 307, ¶ 33.

314. *Id.* ¶ 35.

*States are also obliged to ensure that harmful social or traditional practices do not interfere with access to pre- and post-natal care and family-planning; to prevent third parties from coercing women to undergo traditional practices, e.g.[,] female genital mutilation; and to take measures to protect all vulnerable or marginalized groups of society, in particular women, children, adolescents[,] and older persons, in the light of gender-based expressions of violence. States should also ensure that third parties do not limit people's access to health-related information and services.*³¹⁵

As previously mentioned, the General Comment claims that the third component obligation to fulfill in turn comprises three sub-obligations, among which is the obligation to promote.³¹⁶ This obligation requires States to engage in the creation, maintenance, and restoration of the health of the population.³¹⁷ Among others, this obligation includes the State's duty to disseminate "*appropriate information relating to healthy lifestyles and nutrition, harmful traditional practices, and the availability of services[,] and supporting people in making informed choices about their health.*"³¹⁸ It is noteworthy to point out that according to Tobin, the definition given by the ICESCR alongside the definition given by the CRC are "the most comprehensive expression of the right in international law."³¹⁹

2. Convention on the Elimination of All Forms of Discrimination against Women of 1979 (CEDAW) and General Recommendation Nos. 14, 19, and 24

Moreover, the right to health is recognized in Articles 11 (1) (f) and 12 of the CEDAW, which was signed by the Philippines in 15 July 1980 and ratified thereby in 5 August 1981.³²⁰ Under Article 11 (1) (f), it is mandated that:

- (1) States[-]Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on [the] basis of equality of men and women, the same rights, in particular:

...

315. *Id.* (emphases supplied).

316. *Id.* ¶ 37.

317. *Id.*

318. *Id.* ¶ 37 (emphases supplied).

319. Ayala, *supra* note 291, at 6.

320. United Nations Treaty Collection Databases, Convention on the Elimination of All Forms of Discrimination against Women, *available at* https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iv-8&chapter=4&lang=en (last accessed Apr. 19, 2016).

- (f) The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.³²¹

Meanwhile, in Article 12 (1), it is commanded that “States[-]Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care[.]”³²² Corollary to the CEDAW, General Recommendation No. 24³²³ was adopted by the Committee on Elimination of Discrimination Against Women to elaborate on Article 12 thereof. This demonstrates the centrality of women’s health in the promotion of the well-being of women.³²⁴ Pursuant to this, the General Recommendation elaborates on “the Committee’s understanding of [A]rticle 12 and [] addresses measures to eliminate discrimination in order to realize the right of women to the highest attainable standard of health.”³²⁵ Most pertinent to this Note is Paragraph 17 of the General Recommendation, which provides that —

Harmful traditional practices, such as female genital mutilation, polygamy, as well as marital rape, may also expose girls and women to the risk of contracting HIV/AIDS and other sexually transmitted diseases. [...] States [-]Parties should ensure, without prejudice or discrimination, the right to sexual health information, education[,] and services for all women and girls[.] In particular, States[-]Parties should ensure the rights of female and male adolescents to sexual and reproductive health education by properly trained personnel in specially designed [programs] that respect their right to privacy and confidentiality.³²⁶

Perhaps the most well-aimed provisions of the CEDAW on health and FGM would be Articles 2 (f) and 5 (a) thereof. In Article 2 (f), the Convention states that —

States[-]Parties condemn discrimination against women in all its forms, agree to pursue[,] by all appropriate means and without delay[,] a policy of eliminating discrimination against women and, to this end, undertake:

...

321. CEDAW, *supra* note 56, art. 11 (1) (f).

322. *Id.* art. 12 (1).

323. U.N. Committee on the Elimination of Discrimination Against Women, *CEDAW General Recommendation No. 24: Women and Health (Article 12 of the Convention)*, ¶ 2, U.N. Doc. A/54/38/Rev.1 (Feb. 5, 1999).

324. *Id.*

325. *Id.*

326. *Id.* ¶ 18.

- (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs[,] and practices which constitute discrimination against women[.]³²⁷

In relation thereto, Article 1 of the CEDAW defines “discrimination against women” as

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.³²⁸

The practice of FGM among the Yakans, Tausugs, Samals, Maranaos, and Badjaos may be considered as a harmful traditional practice comprised within the CEDAW, not only because of its obvious effects on the health of women subjected to it, but also because of its rational bases. It may be recalled that the practice is rooted in the belief that “[an] uncircumcised woman, no matter how old she might be, will generally be regarded as a child[] without wisdom[] [and] will be seen as *inferior* and not [] blessed.”³²⁹ It is also deemed to increase the woman’s “wife marketability,” as a circumcised woman is deemed to be more beautiful.³³⁰ Furthermore, it is a means for them to prevent the girl from becoming a loose woman and in order for her to find a suitable husband.³³¹

Based on the rationale for the practice of FGM among the ethnic communities, it is evident that it is a harmful traditional practice which do not only threaten the health of women, but also “inhibits [their] ability to enjoy rights and freedoms on [the] basis of equality with men.”³³² This position is bolstered by the elaborations given by General Recommendation No. 19.³³³ The Recommendation asserts that gender-based violence is discrimination when it “impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or

327. CEDAW, *supra* note 56, art. 2 (f).

328. *Id.* art. 1.

329. *See generally* Calsalin, *supra* note 2, at 22 (emphasis supplied).

330. *Id.*

331. *Id.* at 20.

332. *See* U.N. Committee on the Elimination of Discrimination Against Women, *CEDAW General Recommendation No. 19: Violence against women*, U.N. Doc. A/47/38 (1992). [hereinafter CEDAW General Recommendation No. 19] *See also* U.N. Committee on the Elimination of Discrimination Against Women, *CEDAW General Recommendation No. 20: Reservations to the Convention*, U.N. Doc. A/47/38 (1992).

333. CEDAW General Recommendation No. 19, *supra* note 332.

under human rights conventions[.]”³³⁴ Among these rights are the right to life and the right to the highest standard attainable of physical and mental health.³³⁵ Furthermore,

[t]raditional attitudes by which women are regarded as subordinate to men or as having stereotyped roles perpetuate widespread practices involving violence or coercion, such as family violence and abuse, forced marriage, dowry deaths, acid attacks[,] and female circumcision. Such prejudices and practices may justify gender-based violence as a form of protection or control of women. The effect of such violence on the physical and mental integrity of women is to deprive them the equal enjoyment, exercise[,] and knowledge of human rights and fundamental freedoms. [...] [T]he underlying consequences of these forms of gender-based violence help to maintain women in subordinate roles and contribute to the low level of political participation and to their lower level of education, skills[,] and work opportunities.³³⁶

Meanwhile, in Article 5 (a), the Convention mandates its

States[-]Parties [] to take all appropriate measures:

- (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women[.]³³⁷

To elaborate on what exactly would constitute appropriate measures as regards the matter of FGM, General Recommendation No. 14³³⁸ enumerates the following actions:

- (a) Take appropriate and effective measures *with a view to* eradicat[e] the practice of female circumcision. Such measures could include:
 - (i) The collection and dissemination by universities, medical[,] or nursing associations, national women’s organizations[,] or other bodies of basic data about such traditional practices;
 - (ii) The support of women’s organizations at the national and local levels working for the elimination of female circumcision and other practices harmful to women;
 - (iii) The encouragement of politicians, professionals, religious[,] and community leaders at all levels, including the media and

334. *Id.* ¶ 7.

335. *Id.*

336. *Id.* ¶ 11.

337. CEDAW, *supra* note 56, art. 5 (a).

338. U.N. Committee on the Elimination of Discrimination Against Women, *CEDAW General Recommendation No. 14: Female Circumcision*, U.N. Doc. A/45/38 (1990).

the arts, to cooperate in influencing attitudes towards the eradication of female circumcision; [and]

- (iv) The introduction of appropriate educational and training program[s] and seminars based on research findings about the problems arising from female circumcision;
- (b) Include in their national health policies appropriate strategies aimed at eradicating female circumcision in public health care. Such strategies could include the special responsibility of health personnel, including traditional birth attendants, to explain the harmful effects of female circumcision; [and]
- (c) Invite assistance, information[,] and advice from the appropriate organizations of the United Nations system to support and assist efforts being deployed to eliminate harmful traditional practices[.]³³⁹

3. UDHR, the Vienna Declaration and Programme of Action (VDPA 1993), and the Convention on the Rights of the Child of 1989 (CRC)

In addition to the ICESCR and the CEDAW, the UDHR, which, as aforementioned, has the status of customary international law, provides in Article 25 thereof that every individual “has the right to a standard of living adequate for the health and well-being of himself and of his family[.]”³⁴⁰

Meanwhile, the CRC,³⁴¹ which was signed by the Philippines in 26 January 1990 and ratified thereby in 21 August 1990, guarantees protections similar to the ICCPR and ICESCR, this time appropriated specifically to children.³⁴² In Article 14, the CRC mandates the States-Parties to “respect the right of the child to freedom of thought, conscience[,] and religion.”³⁴³ Moreover, it asserts that such States must likewise “respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.”³⁴⁴ Like the other international instruments, the CRC subjects the freedom of the child to manifest his or her religion or beliefs to certain limitations only “when

339. *Id.*

340. UDHR, *supra* note 234, art. 25.

341. Convention on the Rights of the Child, art. 14, ¶ 1, *adopted* Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC].

342. United Nations Treaty Collection Database, Convention on the Rights of the Child, *available at* https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&lang=en (last accessed Apr. 19, 2016).

343. CRC, *supra* note 341, art. 14, ¶ 1.

344. *Id.* art. 14, ¶ 2.

prescribed by law and [when] necessary to protect public safety, order, health, or morals, or the fundamental rights and freedoms of others.”³⁴⁵

Furthermore, in Article 24 of the CRC, it is avowed that:

- (1) States[-]Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States[-] Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.

...

- (3) States[-]Parties shall take all effective and appropriate measures with a view to *abolishing traditional practices prejudicial to the health of children*.³⁴⁶

During the drafting of the provisions of the CRC, there was initially a lack of consensus as to the kind of traditional practice that is prejudicial to the health of the child.³⁴⁷ Some of the delegates deemed that the practices should be seriously harmful.³⁴⁸ As a compromise, the phrase “prejudicial to the health of children” was used.³⁴⁹ According to Tobin, the rejection of the qualifying terms initially suggested, such as “seriously harmful” and “seriously and adversely affect,” signify the intention not to unnecessarily constrain the scope of the Section.³⁵⁰ “On the contrary, it suggests that any aspect of a traditional practice which in any way has a negative impact on the health of a child, whether mental or physical, temporary or permanent, must be abolished.”³⁵¹

In addition to this, the VDPA, which was adopted by the World Conference on Human Rights in Vienna on 25 June 1993, recognized that there is a need to eradicate “any conflicts which may arise between the rights of women and the harmful effects of certain traditional and customary practices, cultural prejudices, and religious extremism.”³⁵²

345. *Id.* art. 14, ¶ 3.

346. *Id.* art. 24, ¶¶ 1 & 3 (emphases supplied).

347. TOBIN, *supra* note 305, at 292.

348. *Id.* at 306 (citing Reports of the Working Group on a Draft Convention on the Rights of the Child, ¶¶ 30 & 32 (Canada)).

349. *Id.* at 307.

350. *Id.*

351. *Id.*

352. Vienna Declaration and Programme of Action, U.N. Doc. A/CONF.157/23 (July 12, 1993).

Clearly, the right to health of every individual, including indigenous peoples, is guaranteed, protected, and promoted by the various instruments cited, whether local or international.

VI. ANALYSIS

A. The Conflict Between the Right to Cultural Integrity and the Right to Health

Upon perusal of the legal provisions that abound the international and domestic legal systems, it is clear that the right of ethnic communities to cultural integrity and their right to health are equally recognized, protected, and promoted, sometimes even by the same legal instruments. While the recognition of both rights is commendable, a question emerges as regards the interplay of such rights with respect to FGM — where does one strike the balance?

B. The Response of Other Countries to FGM

Not all countries attempt to balance the right of cultural integrity of ethnic communities with their right to health. In fact, in the world over, several States and international human rights organizations have already taken an absolute stand against the practice of FGM.³⁵³ As earlier mentioned, various countries already have in place specific legislation against the practice of FGM.³⁵⁴ Aside from these legislations, international comments and recommendations expressing complete disapproval of the practice also abound.³⁵⁵ For example, in 2005, the World Conference on Women explicitly asserted that FGM is a violation of “reproductive and health rights.”³⁵⁶ According to the organization, FGM fails to respect the “physical and psychosexual integrity of women ... without [any] therapeutic [or medical] reason. It is a form of violence against the latter.”³⁵⁷ Pursuant to this stance, World Health Assembly (WHA) Resolution 46.18 urged the States to intensify their efforts in eliminating all forms of FGM “because it is unacceptable from any point of view.”³⁵⁸ Aside from this, as early as 1982, the WHO issued a statement against FGM, to wit — “The WHO has consistently and unequivocally advised that FGM should not be practi[c]ed by any health professionals in any setting[.]”³⁵⁹ This position is sustained by many other organizations such as the Inter-African Committee on

353. See Ortiz, *supra* note 58, at 453-58.

354. *Id.*

355. *Id.*

356. See Calsalin, *supra* note 2, at 4.

357. *Id.* at 28.

358. *Id.* at 4.

359. FORWARD, *supra* note 33, at 14.

Traditional Practices Affecting the Health of Women and Girls (IAC), the International Federation of Gynecology and Obstetrics (FIGO), the International Council of Nurses, and the Royal Colleges of Obstetrics and Gynecology (RCOG).³⁶⁰

Furthermore, FGM is considered a violation of human rights by the United Nations High Commissioner for Refugees.³⁶¹ In a July 1994 statement issued by the same office, it was stated that —

FGM[,] which causes severe pain as well as permanent physical harm, amounts to a violation of human rights, including the rights of the child[,] and can be regarded as persecution. The toleration of these acts by the authorities, or the unwillingness to provide protection against them, amounts to official acquiescence. Therefore[,] a woman can be considered a refugee if she or her daughter[(/s)] fear being compelled to undergo FGM against their will; or, she fears persecution for refusing to undergo or allow her daughters to undergo the practice.³⁶²

According to Foundation for Women's Health Research and Development (FORWARD), most European countries have no specific legislation against FGM up to the present.³⁶³ However, this does not mean that there has been no prosecution of FGM through other means. For instance, in France — a country with no specific legislation against FGM — there were at least 25 prosecutions of FGM practitioners pursuant to its local penal code.³⁶⁴ As of 2002, only the United Kingdom, Norway, and Sweden have laws particularly criminalizing the practice, but no lawsuits have been commenced on the matter yet.³⁶⁵

In other parts of the world and eight years after the study previously conducted by FORWARD, only a few countries have specific legislations against the practice of FGM.³⁶⁶

In Crimes (Amendment) Act (No. 3) 1995 of the Australian Capital Territory,³⁶⁷ FGM is categorized into three types, namely:

- (a) clitoridectomy or the excision of any other part of the female genital organs;

360. *Id.*

361. *Id.*

362. *Id.*

363. *Id.* at 16.

364. *Id.*

365. FORWARD, *supra* note 33, at 16.

366. Laws of the World on Female Genital Mutilation, *available at* <http://www.hsph.harvard.edu/population/fgm/fgm.htm> (last accessed Apr. 19, 2016).

367. Crimes Amendment Act of 1995, pt 3, § 92 (Z) (1) (Austl. Cap. Terr.).

- (b) infibulation or similar procedure; or
- (c) any other mutilation of the female genital organs.³⁶⁸

Under said Australian law, any person may not intentionally perform FGM; otherwise, he or she will be imprisoned for 15 years.³⁶⁹ Furthermore, under Section 92 (W) (2) of the same law, it is not a defense that the person upon whom FGM is carried out or her parent or guardian consented to the performance of the procedure.³⁷⁰ In addition to this, the Australian law provides that it shall not be considered a violation of the said law if FGM was performed as a medical procedure for “genuine therapeutic purpose.”³⁷¹ This exception is further explained by the provision in a subsequent paragraph by saying that “[a] medical procedure that is performed as, or as part of, a cultural, religious[,] or other social custom is not of itself to be regarded as being performed for a genuine therapeutic purpose.”³⁷² Another exception thereto is when FGM is performed for the purpose of sexual reassignment, which is “a surgical procedure performed by a medical practitioner to give a female person, or a person whose sex is ambivalent, the genital appearance of a person of the opposite sex or of a particular sex (whether male or female).”³⁷³

Hence, under the Crimes (Amendment) Act (No. 3) 1995 of the Australian Capital Territory, the performance of FGM may be allowed only in cases where it is pursuant to medical and healthful purposes (therapeutic purpose) or where it is pursuant to control one’s body (sexual reassignment). It may be prosecuted even if it is performed as a part of cultural, religious, or social custom. To this extent, the Crimes (Amendment) Act (No. 3) 1995 of the Australian Capital Territory does not recognize the right to cultural integrity of the indigenous groups that practice FGM; thus, the primacy of promotion and protection of the right to health over the right to cultural integrity is revealed.

Meanwhile, Canada amended Section 268 of Criminal Code in 25 April 1997 through the Act to Amend the Criminal Code (Child Prostitution, Child Sex Tourism, Criminal Harassment, and FGM).³⁷⁴ Through such amendment, the said Criminal Code provides protection against the practice of FGM, the extent of which is similar to the one provided by Australia. Under Article 268 thereof, it is an aggravated assault when one “wounds,

368. *Id.*

369. *Id.*

370. *Id.* § 92 (W) (2).

371. *Id.* § 92 (Y) (1).

372. *Id.* § 92 (Y) (3).

373. Crimes Amendment Act of 1995, § 92 (Z) (1).

374. Criminal Code, art. 268 (Can.).

maims, disfigures[,] or endangers the life of [another].”³⁷⁵ Under Paragraph 3 of the same Article, it is stated —

- (3) For greater certainty, in this [S]ection, ‘wounds’ or ‘maims’ includes to excise, infibulate[,] or mutilate, in whole or in part, the labia majora, labia minora[,] or clitoris of a person, except where[:]
 - (a) a surgical procedure is performed, by a person duly qualified by provincial law to practi[c]e medicine, for the benefit of the physical health of the person or for the purpose of that person having normal reproductive functions or normal sexual appearance or function; or
 - (b) the person is at least [18] years of age and there is no resulting bodily harm.³⁷⁶

Furthermore, under another paragraph thereof, the Canadian Criminal Code expressly states that no consent “to the excision, infibulation[,] or mutilation, in whole or in part, of the labia majora, labia minora[,] or clitoris of a person” shall be valid, except where the consent is exercised pursuant to a surgical procedure or where the person is at least 18 years old.³⁷⁷

Resembling the aforementioned Australian Act on FGM, the Criminal Code of Canada also prohibits FGM, except where it is performed to improve the physical health of a person. Essentially, this is pursuant to the right to health of an individual. Comparably, while the Australian Act against FGM leaves no room for the exercise of consent, the Canadian Criminal Code provides a leeway therefor. If a person is 18, her consent as regards the matter of FGM may be recognized. This mandate impliedly recognizes that FGM, despite the seeming violence of the act per se, may be for purposes other than to inflict pain or to assault someone. In a way, this may also be seen as a window to the possible recognition of the right to practice FGM pursuant to the freedom of one person to manifest his thoughts, religion, and/or belief.

In New Zealand, Crimes Act (1961-1999) Act No. 20 of 1999³⁷⁸ prohibits the practice of FGM subject to certain exceptions. The country defines FGM the same way that Canada defines the said act. Under Section 204 (A) (2), any person who performs or causes the performance of FGM on any other person may be imprisoned for a term not exceeding seven years.³⁷⁹ However, if FGM is performed on account of any medical procedure for the

³⁷⁵. *Id.*

³⁷⁶. *Id.* art. 268 (3) (a) (b).

³⁷⁷. *Id.* art. 268 (4).

³⁷⁸. Crimes Act No. 20 of 1999, (N. Z.).

³⁷⁹. *Id.* at § 204 (A) (2).

benefit of a person's health, it shall not be considered a violation under the said Section.³⁸⁰ Again, this is a recognition of an individual's right to health and FGM is allowed by New Zealand so long as it is beneficial to the person's wellness. In Paragraph 4 thereof, it is expressly stated by the Act that no regard shall be given to the cultural or religious belief of the person who is to undergo such procedure, to wit —

- (4) In determining, for the purposes of subsection (3) of this [S]ection, whether or not any medical or surgical procedure is performed on any person for the benefit of that person's physical or mental health, *no account shall be taken of the effect on that person of any belief on the part of that person or any other person that the procedure is necessary or desirable as, or as part of, a cultural, religious, or other custom or practice.*³⁸¹

Moreover, under the same Article, it is expressly indicated that neither the consent of the person upon whom FGM is to be performed nor the belief of the person carrying it out will constitute a defense to the charge of FGM under Section 204 (A) of the Crimes Act (1961-1999) of New Zealand.³⁸² Virtually, in prosecuting the practice of FGM, New Zealand gives no regard to the cultural, religious, or traditional beliefs of whoever carries it out.

Meanwhile, in South Africa, there is the Protection of Equality of Unfair Discrimination Act of 2000, which provides in Section 8 thereof that —

Subject to [S]ection 6, no person may unfairly discriminate against any person on the ground of gender, including[:]

- (a) *gender-based violence;*
- (b) *female genital mutilation;*
- (c) the system of preventing women from inheriting family property;
- (d) *any practice, including traditional, customary[,] or religious practice, which impairs the dignity of women and undermines equality between women and men, including the undermining of the dignity and well-being of the girl child;*
- (e) any policy or conduct that unfairly limits access of women to land rights, finance, and other resources;
- (f) discrimination on the ground of pregnancy;
- (g) limiting women's access to social services or benefits, such as health, education, and social security;
- (h) the denial of access to opportunities, including access to services[;]

380. *Id.* at § 204 (A) (3) (a) (i).

381. *Id.* § 204 (A) (4) (emphasis supplied).

382. *Id.* § 204 (A) (6).

- (i) contractual opportunities for rendering services for consideration, or failing to take steps to reasonably accommodate the needs of such persons; [and]
- (j) systemic inequality of access to opportunities by women as a result of the sexual division of labor.³⁸³

The Children Statute 1996 (Statute No. 6 of 1996) of Uganda³⁸⁴ provides for a similar penal provision. In Section 8 thereof, it is succinctly put that “[i]t shall be unlawful to subject a child to social or customary practices that are harmful to the child’s health.”³⁸⁵ This provision completely disregards the right to manifest cultural, religious, and traditional beliefs in favor of the right to health of a person.

In the United Kingdom, the Female Genital Mutilation Act of 2003³⁸⁶ outlaws FGM as it is universally defined.³⁸⁷ However, it shall be deemed that no such offense is committed if it were done by an “approved person” who performs it pursuant to medical necessity or in the course of labor or giving birth.³⁸⁸ Moreover, the Act asserts that “[f]or the purpose of determining whether an operation is necessary for the mental health of a girl[,] it is immaterial whether she or any other person believes that the operation is required as a matter of custom or ritual.”³⁸⁹ Again, comparable to the legislations of other countries, the United Kingdom’s prohibition of FGM puts primacy on the right to health over the right of indigenous peoples to cultural integrity.

Meanwhile, in the Domestic Violence Act [Chapter 5:16],³⁹⁰ which was enacted in Zimbabwe, FGM is comprised within the definition of domestic violence, to wit:

- (3) Meaning of domestic violence and its scope[.]

...

For the purposes of this Act, domestic violence means any unlawful act, omission[,], or [behavior] which results in death or the direct infliction of physical, sexual[,], or mental injury to any complainant by a respondent and includes the following[:]

383. Protection of Equality of Unfair Discrimination Act of 2000, § 8 (S. Afr.) (emphases supplied).

384. The Children Statute 1996 (Uganda).

385. *Id.* § 8.

386. Female Genital Mutilation Act of 2003 (U.K.).

387. *Id.*

388. *Id.* at § 1 (2) (b).

389. *Id.* at § 1 (5).

390. Domestic Violence Act of 2006, §§ (3) (1) (i)-(vii) (Zimbabwe).

[...]

- (l) abuse derived from the following cultural or customary rites or practices that discriminate against or degrade women[:]
 - (i) forced virginity testing; []
 - (ii) *female genital mutilation*; []
 - (iii) pledging of women or girls for purposes of appeasing spirits; []
 - (iv) forced marriage; []
 - (v) child marriage; []
 - (vi) forced wife inheritance; or
 - (vii) sexual intercourse between fathers-in-law and newly married daughters-in-law[.]³⁹¹

Lastly, in the U.S., there is Public Law No. 104-208,³⁹² which was adopted on 30 September 1996.³⁹³ Under Section 645 thereof, FGM is criminalized because of its harmful effects upon the health of women involved and because of the resulting infringement of the performance of such practice upon the rights guaranteed by the federal and state laws, to wit —

[Section] 645. [Criminalization of FGM.]

- (a) [] Findings. The Congress finds that —
 - (1) the practice of [FGM] is carried out by members of certain cultural and religious groups within the [U.S.];
 - (2) the practice of [FGM] often results in the occurrence of physical and psychological health effects that harm the women involved;
 - (3) such mutilation infringes upon the guarantees of rights secured by Federal and State law, both statutory and constitutional;
 - (4) the unique circumstances surrounding the practice of [FGM] place it beyond the ability of any single State or local jurisdiction to control;

391. *Id.*

392. An Act Making Omnibus Consolidated Appropriations for the Fiscal Year Ending September 30, 1997, and for Other Purposes, Pub. L. No. 104-208, 110 Stat. 3009 (1996) (U.S.) [hereinafter 1997 Omnibus Consolidated Appropriations].

393. *Id.*

- (5) the practice of [FGM] can be prohibited without abridging the exercise of any rights guaranteed under the first amendment to the Constitution or under any other law; and
- (6) Congress has the affirmative power under [S]ection 8 of [A]rticle I, the necessary and proper clause, [S]ection 5 of the [14th] Amendment, as well as under the treaty clause, to the Constitution to enact such legislation.³⁹⁴

Furthermore, under the same law, it is only when the person upon whom FGM is carried out is below 18 years old that the person who performs it is prosecuted.³⁹⁵ It is also provided therein that where FGM is carried out in the course of a surgical procedure necessary to the health of an individual, it shall not be criminalized.³⁹⁶ Moreover, no regard shall be given to the effect of a belief that FGM is required pursuant to culture or tradition on the part of the person to undergo FGM.³⁹⁷ The text of the law states —

[Section] 116. Female genital mutilation.

- (a) Except as provided in [S]ubsection (b), whoever knowingly circumcises, excises, or infibulates the whole or any part of the labia majora or labia minora or clitoris of another person who has not attained the age of 18 years shall be fined under this title or imprisoned not more than [five] years, or both.
- (b) A surgical operation is not a violation of this section if the operation is[:]
 - (1) necessary to the health of the person on whom it is performed, and is performed by a person licensed in the place of its performance as a medical practitioner; or
 - (2) performed on a person in labor or who has just given birth and is performed for medical purposes connected with that labor or birth by a person licensed in the place it is performed as a medical practitioner, midwife, or person in training to become such a practitioner or midwife.
- (c) In applying [S]ubsection (b) (1), no account shall be taken of the effect on the person on whom the operation is to be performed of any belief on the part of that person, or any other person, that the operation is required as a matter of custom or ritual.³⁹⁸

394. *Id.* §§ 645 (a) (1)-(6).

395. *Id.* § 116 (a).

396. *Id.* § 116 (b) (1).

397. *Id.* § 116 (c).

398. 1997 Omnibus Consolidated Appropriations, *supra* note 392, § 116.

Under the said U.S. law, the first documented case of FGM was that of Khalid Adem in 2003.³⁹⁹ A year after Adem's arrest, another prosecution for FGM transpired, in which case, a Southern Californian couple was accused of "conspiring to perform FGM on two female minors."⁴⁰⁰

An examination of the laws in other countries will show that most of them put an emphasis upon the right to health, with little to no regard for the right to cultural integrity. However, a window of recognition to the right to cultural integrity and, consequently, to manifest their thoughts, beliefs, and religion is slightly open through the decriminalization of FGM by some of the mentioned statutes, where it is performed upon a consenting person who is at least 18 years old. This results in the recognition of both rights — the right to cultural integrity and the right to health.

C. *The Response of Philippines to FGM*

Domestically, there is no particular legislation outlawing FGM per se. The closest legislation that may potentially criminalize FGM is the Revised Penal Code (RPC) on mutilation.⁴⁰¹ Under Article 262 of the RPC, "[t]he penalty of *reclusion temporal* to *reclusion perpetua* [is] imposed upon any person who [] intentionally mutilate[s] another by depriving him, either totally or partially, or some essential organ of reproduction."⁴⁰² Furthermore, under the said Article, "[a]ny other intentional mutilation shall be punished by *prision mayor* in its medium and maximum periods."⁴⁰³ The elements of mutilation under Article 262 are the following:

- (1) There is a castration, that is, mutilation of organs necessary for generation; and
- (2) The mutilation is caused purposely and deliberately, that is, to deprive the offended party of some essential organ for reproduction.⁴⁰⁴

I. No Criminal Intent

Noticeably, the practice of FGM by indigenous peoples may not be prosecuted under the RPC following the elements of the crime of mutilation. Although there is a castration of the organs necessary for

399. Naomi Mendelsohn, *At the Crossroads: The Case For and Against A Cultural Defense to Female Genital Mutilation*, 56 RUTGERS L. REV. 1011, 1011 (2004).

400. *Id.*

401. An Act Revising the Penal Code and Other Penal Laws [REVISED PENAL CODE], Act No. 3815, art. 262 (1932).

402. *Id.* art. 262 (1).

403. *Id.* art. 262 (2).

404. LUIS B. REYES, THE REVISED PENAL CODE 534 (18th ed. 2012).

generation, the purpose is not carried out for the purpose of deprivation of an essential organ for reproduction.⁴⁰⁵ As mentioned, the purpose of the practice of FGM is varied but none of which is for the purpose required by the elements of the mutilation criminalized under the RPC.

As in other crimes penalized under the RPC, mutilation has criminal intent. Meanwhile, the indigenous cultural communities that practice FGM have no criminal intent behind it. There is no intention to hurt or to deprive a woman of her reproduction capabilities, although there is intent to keep her pure or chaste during her juvenescence.

2. FGM as a Cultural Practice Embraces the Manifestation of Belief

The Author posits that the practice of FGM by ethnic communities may be likened to or may be deemed as a manifestation of one's belief, which is embraced by the right to take part in cultural life as earlier discussed. This is so because FGM is not only done for the purpose of inflicting pain but is practiced for some higher purpose as believed by the ethnic communities. For instance, in the case of the Yakans, it is for the purposes of cleanliness, dignity, honor, and religious duty.⁴⁰⁶ As mentioned, the Yakans also carry out FGM because they believe that Islam and the prophet Mohammed command it, despite not having personally read the text, as FGM is believed to be a pre-requisite to becoming a Muslim.⁴⁰⁷ To this extent, the practice of FGM is a means to an end. It is practiced to manifest one's belief.

As a manifestation of their belief, the practice may be considered part of the ethnic communities' culture. This is pursuant to the definition of culture given by the Committee on Economic, Social, and Cultural Rights of culture, to wit —

[Culture] encompasses, inter alia, ways of life, language, oral and written literature, music and song, non-verbal communication, *religion or belief systems, rites and ceremonies*, sport and games, methods of production or technology, natural and man-made environments, food, clothing and shelter and the arts, *customs and traditions* through which individuals, groups of individuals[,] and communities express their humanity and the meaning they give to their existence, and build their world view representing their encounter with the external forces affecting their lives. Culture shapes and mirrors the values of well-being and the economic, social[,] and political life of individuals, groups of individuals[,] and communities.⁴⁰⁸

405. See generally Calsalin, *supra* note 2, at 19.

406. See Calsalin, *supra* note 2, at 19.

407. *Id.*

408. U.N. ECOSOC General Comment No. 21, *supra* note 64, ¶ 13 (emphasis supplied).

Moreover, as earlier discussed, the religious basis of the practice is obscure, contested, and not even reliable. As such, the practice thereof pursuant to religion is questionable. Nonetheless, its continued observance is pursuant to the desire to conform to the community's tradition. Therefore, the practice is *not rooted in faith alone* because to some extent, the individuals subjected to it are swayed to go through it simply because of the community's *expectation* of them. Hence, sociological pressure to conform and to maintain its practice pursuant to the other gender-biased beliefs that it will increase wife marketability or marriageability also plays a part.⁴⁰⁹

3. An Exercise of the Right to a Good Life

In another perspective, the practice or non-practice of FGM may be considered as an exercise of the right to a good life, which is guaranteed by Article II, Section 5 of the 1987 Constitution.⁴¹⁰ Under such Article, “[t]he maintenance of peace and order, the protection of life, liberty, and property, and [the] promotion of the general welfare are essential for the enjoyment by all the people of the blessings of democracy.”⁴¹¹ According to the legal luminary Joaquin G. Bernas, S.J., the right to life protected by this Article is not just any kind of life — it is the right to a good life.⁴¹²

At this point, it is important to determine what the right to a good life entails for an individual member of the ethnic community, and for the ethnic community as a whole. This is pursuant to the view that the right to take part in cultural life belongs to an individual and a group collectively. The Author posits that the right to a good life for the subject ethnic communities in this Note includes the right to practice FGM as it is vital in the manifestation of their belief. Meanwhile, the right to a good life of individual members of such communities may include or exclude the right to undergo FGM.

On the one hand, *while* it poses danger to one's health, the fact remains that some individuals may still want to practice FGM. In the study conducted by Calsalin, some of the women who were subjected to the practice felt they were blessed and fulfilled.⁴¹³ They felt that they finally have

409. The other justifications for asserting that the right to take part in cultural life embraces the practice of FGM are discussed in the section FGM as a Cultural Practice.

410. PHIL. CONST. art. II, § 5.

411. PHIL. CONST. art. II, § 5.

412. JOAQUIN G. BERNAS, S.J., *THE 1987 PHILIPPINE CONSTITUTION: A COMPREHENSIVE REVIEWER* 25 (2011 ed.).

413. Calsalin, *supra* note 2, at 22.

a purpose in life.⁴¹⁴ Some of the responses Calsalin received from the girls who were to undergo the procedure FGM were as follows:

- (1) Samia said, '[I]t was a pretty enjoyable experience. I was glad I had a chance to experience what I thought was [something] worthwhile[.]'
- (2) Laila said, '[I]t was a very special time. You realize how miraculous the process is. It was such a pleasant time[.]'
- (3) Jubis said, 'I was extremely happy since I can pray regularly after the female circumcision. I felt wonderful[] [—] physically and psychologically.'
- (4) Rasmiya said, 'Without circumcision, it felt like, I am not doing something for my religion and my life which is not blessed. Now there [is] a purpose to all of this.'⁴¹⁵

As gathered from the reactions of the girls, the physical pain caused by FGM is counterbalanced by the feeling of satisfaction they feel for having gone through a rite of passage.

On the other hand, *because* it poses a danger to one's health, some of the individual members of the ethnic communities may not want to undergo FGM. As already mentioned, some of the female respondents dreaded the moment they will have to undergo FGM.

The consideration of the varied definitions of a right to a good life of each member of the ethnic communities involved will show that the right to give an informed consent is lacking in the observance of FGM in such communities. As FORWARD aptly stated, "[w]hil[e] an adult is quite free to submit herself to a ritual or a tradition, a [pubertal girl], having no formed [judgment], *does not consent*, but *simply undergoes* the mutilation (which in this case is irrevocable) while she is totally vulnerable."⁴¹⁶

4. The Right to Take Part in Cultural Life is Not Absolute

Given that the practice of FGM may be deemed as a manifestation of one's belief, which is in turn circumscribed by the right to take part in cultural life, Article III, Section 5 of the 1987 Constitution, which guarantees the freedom of religion, may be invoked, by way of parallelism.⁴¹⁷ Under the

⁴¹⁴ *Id.*

⁴¹⁵ *Id.*

⁴¹⁶ Efua Dorkenoo & Scilla Elworthy, Female Genital Mutilation: Proposals for Change, *available at* <http://minorityrights.org/wp-content/uploads/old-site-downloads/download-869-Download-full-report.pdf> (last accessed Apr. 18, 2016).

⁴¹⁷ PHIL. CONST. art. III, § 5.

said constitutional provision, “[n]o law shall be made respecting an establishment of religion, or prohibiting the free exercise thereof. The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed.”⁴¹⁸

Apposite to this is the free exercise component of the guarantee of right to religious freedom. According to Candelaria, “the free exercise clause protected by the [1987] Constitution consists of the right to believe and the right to act on the basis of those beliefs. The first is absolute, whereas the second is subject to regulation and may be derogated under the clear and present danger rule.”⁴¹⁹

Such theory is consistent with the doctrine of *Wisconsin v. Yoder*,⁴²⁰ which admits that under the religious clause, beliefs are absolutely free from the State’s control, whereas religiously grounded actions are beyond the ambit of such protection and may be subjected to the exercise of police power.⁴²¹

In such case, Yoder, Miller, and Yutzy were Amish.⁴²² They stopped sending their children to school after eighth grade, despite a state law requiring them to send their children to school until the age of 16 years.⁴²³ According to that case, the interest of the State does not outweigh that of the parents to freely exercise their religion.⁴²⁴ Moreover, “only those interests of the highest order and those not otherwise served” can outweigh legitimate claims to the free exercise of religion.⁴²⁵ Where only a “general interest” is involved, the State acts reasonably in requiring education until the age of 16.⁴²⁶

In *Yoder*, the U.S. court elaborated on the interplay of religious belief and the power of the State to regulate such belief. It cited the holding in *Braunfeld v. Brown*⁴²⁷ where it was held that “even when the action is in accord with religious convictions, it is not totally free from legislative restrictions.”⁴²⁸ It was held therein that *where the practice of religion or belief*

418. PHIL. CONST. art. III, § 5.

419. Jo, *supra* note 185, at 40 (citing CANDELARIA, *supra* note 275, at 269).

420. *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

421. *Id.*

422. *Id.* at 207.

423. *Id.*

424. *Id.* at 213.

425. *Id.* at 215.

426. *Yoder*, 406 U.S. at 233.

427. *Braunfeld v. Brown*, 366 U.S. 599 (1961).

428. *Id.* at 603.

poses harm upon the physical or mental health of the child or to public safety, peace, order, or welfare, the same may still be curtailed or restricted by the State.⁴²⁹ Furthermore, *Pierce v. Society of Sisters*⁴³⁰ held that “where nothing more than the general interest of the parent in the nurture and education of his children is involved, the State acts ‘reasonably’ and constitutionally in requiring education to age 16 in some public or private school[,] meeting the standards prescribed by the State.”⁴³¹ Furthermore, *Yoder* elucidates that “[t]he power of the parent, even with a free exercise claim, may be limited under *Prince* if that parental decision will jeopardize the child’s health or safety, or have a potential for significant social burdens.”⁴³²

Perhaps the more important takeaway from *Yoder* is the view that before a practice of a certain group may be curtailed or restricted, it must first be determined how inseparable and interdependent their religious faith and their mode of life are.⁴³³ According to *Yoder*, “[a] way of life, however virtuous, may not be interposed as a barrier to reasonable state regulation ... if it is based on purely secular considerations.”⁴³⁴ However, where “religion pervades and determines virtually their entire way of life,” the same may constitute a barrier, for as long as the same is not injurious to health, safety, peace, order, or welfare.⁴³⁵ Put differently, if it is injurious to health, then religion is not a barrier to state regulation.

This is also in accord with the jurisprudential doctrine established in the U.S. case, *Cantwell v. Connecticut*,⁴³⁶ which is also recognized in the Philippines.⁴³⁷ *Cantwell* admits that every person has an absolute freedom to believe whatever he or she wishes to believe, however, he or she may not manifest such belief in any way he or she wants. It may not be freely exercised if it is prejudicial to public safety and welfare.⁴³⁸

Meanwhile, in *Church of Lukumi Babalu Aye, Inc., et al. v. City of Hialeah*,⁴³⁹ the petitioners observed animal sacrifice as “one of [their]

429. *Id.* (emphasis supplied).

430. *Pierce v. Society of Sisters*, 288 U.S. 510 (1925).

431. Michael Imber, et al., *Education Law* 21 (2014) (citing *Pierce*, 288 U.S. at 510).

432. *Yoder*, 406 U.S. at 233-34.

433. *Id.* at 215.

434. *id.* at 216.

435. *Id.* (emphasis supplied).

436. *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

437. BERNAS, *supra* note 245, at 331-32 (citing *Cantwell*, 310 U.S. at 296).

438. *Id.*

439. *Church of Lukumi Babalu Aye, Inc., et al. v. City of Hialeah*, 508 U.S. 520 (1993).

principal forms of devotion.”⁴⁴⁰ The animals’ carotid arteries were cut, cooked, and eaten following the rituals in their religion, which is Santeria.⁴⁴¹ Sometime after, the Church of Lukumi Babalu Aye leased some parcels of land in the City of Hialeah.⁴⁴² When the city council found out about it, an emergency public session was held because of the clamor over the animal sacrifice being practiced by the said religious group.⁴⁴³ Citing the city residents’ concern over Santeria’s religious practices, which are inconsistent with public morals, peace, or safety, some resolutions were passed by the city to prohibit the ritual killing of animals by Santeria.⁴⁴⁴

The Santeria followers then filed a suit against the city alleging that their rights under the free exercise clause of the First Amendment were violated.⁴⁴⁵ The U.S. Supreme Court said that the resolutions passed were not neutral and of general applicability; hence, there was a need to cite a compelling governmental interest to satisfy it.⁴⁴⁶ The U.S. Supreme Court said that a review of the factual circumstances of the case would show that the ordinances were made to specifically apply to the practice of Santeria religion and did not cover other animal killings.⁴⁴⁷ Furthermore, the Court said that although the protection of public health and prevention of cruelty were legitimate governmental interests, the same may be addressed in some other ways which “stop[] far short of a flat prohibition of all Santeria sacrificial practice, such as general regulations on the disposal of organic garbage, on the care of animals regardless of why they are kept, or on methods of slaughter.”⁴⁴⁸

Another case worth looking into is *Employment Division of the Human Resources Department of Oregon v. Smith*,⁴⁴⁹ where two employees were fired by an organization for ingesting peyote, a hallucinogenic drug.⁴⁵⁰ They claimed that they ingested peyote “for sacramental purposes at a ceremony of their Native American Church.”⁴⁵¹ In this case, the U.S. Supreme Court

440. *Id.* at 524.

441. *Id.* at 525.

442. *Id.* at 526.

443. *Id.*

444. *Id.*

445. *Church of Lukumi Babalu Aye, Inc., et al.*, 508 U.S. at 528.

446. *Id.* at 531-34.

447. *Id.* at 534-46.

448. *Id.* at 538-39.

449. *Employment Division of the Human Resources Department of Oregon v. Smith*, 494 U.S. 872 (1990).

450. *Id.* at 874.

451. *Id.* at 872.

said that the free exercise clause allows the State to prohibit the sacramental use of drugs, such as peyote.⁴⁵² Citing *Reynolds v. United States*,⁴⁵³ the case held —

Although a State would be ‘prohibiting the free exercise [of religion]’ in violation of the [c]lause if it sought to ban the performance of (or abstention from) physical acts solely because of their religious motivation, the [c]lause does not relieve an individual of the obligation to comply with a law that incidentally forbids (or requires) the performance of an act that his religious belief requires (or forbids) if the law is not specifically directed to religious practice and is otherwise constitutional as applied to those who engage in the specified act for non[-]religious reasons.⁴⁵⁴

Furthermore, the U.S. Supreme Court elucidated —

[i]f Oregon does prohibit the religious use of peyote, and if that prohibition is consistent with the Federal Constitution, there is no federal right to engage in that conduct in Oregon’ and ‘the State is free to withhold unemployment compensation from respondents for engaging in work-related misconduct, despite its religious motivation.⁴⁵⁵

From such cases, the following principles may be deduced:

- (1) the right to practice religion or manifest belief, as embraced within the right to take part in cultural life is recognized by the State, but it is not absolute;
- (2) such right may be restricted or curtailed;
- (3) before a practice of a certain group may be curtailed or restricted, it must first be determined how inseparable and interdependent their religious faith and their mode of life are;
- (4) where it poses harm upon the physical or mental health of a person or where it is contrary to public safety, peace, order, or welfare, it may be curtailed or restricted; and
- (5) however, the curtailment and/or restriction must not unduly suppress the religious worship of the people concerned.

Given that no local law criminalizes the practice of FGM and based on the foreign laws enacted by other countries with respect to FGM, as well as on the decided cases where manifestation of belief and culture clashes with

452. *Id.*

453. *Reynolds v. United States*, 98 U.S. 145 (1878).

454. *Employment Division of the Human Resources Department of Oregon*, 494 U.S. at 872 (citing *Reynolds*, 98 U.S. at 145).

455. *Id.* at 876.

public health and safety, how may the local conflict between the right to cultural integrity and the right to health be resolved?

In identifying the demarcation line between the two rights, two concepts must be examined. These are cultural relativism⁴⁵⁶ and local context sensibility.⁴⁵⁷ The Author posits that cultural relativism is implicitly recognized in the recognition of the right to cultural integrity and/or right to manifest one's religion or belief whereas local context sensibility should be applied in interpreting the right to health. After discussing such concepts, this Note will look into the application of these concepts in the case of Somali immigrants in Seattle (also known as the "Seattle Compromise").⁴⁵⁸ After which, this Note will attempt to localize the application of these concepts by providing a standard and guideline through which the same may be applied to the case of indigenous peoples in Mindanao who continue to practice FGM.

5. The Difference Between FGM and Male Circumcision In Light of the Equal Protection Clause

At this point, it is important to discuss the difference between FGM and male circumcision. While FGM is considered taboo and is only practiced by select groups of indigenous peoples, most countries with Western influences, such as the Philippines, practice male circumcision.⁴⁵⁹ Hence, whenever the subject of eradication of FGM comes up, those in favor of FGM easily brings up male circumcision as a counter-argument.⁴⁶⁰ After all, if they may circumcise boys, why not circumcise the girls, too?⁴⁶¹

Male circumcision pertains to the removal of the foreskin of the penis.⁴⁶² As mentioned, whereas select indigenous groups practice FGM, the rest of the world practices male circumcision. The motives for the practice of male circumcision are varied, but primarily, it is practiced for purposes of hygiene, custom, and religion.⁴⁶³ The procedure may be done at any point of a male's life, but it is usually done before one hits puberty, as a rite of passage.⁴⁶⁴

456. This principle was derived from Coleman's article. See Coleman, *supra* note 67, at 729.

457. This principle was espoused by Tobin. See TOBIN, *supra* note 305.

458. See Coleman, *supra* note 67, at 723.

459. Coleman, *supra* note 67, at 735.

460. *Id.*

461. *Id.*

462. *Id.* at 759.

463. *Id.*

464. *Id.*

Meanwhile, others have their children go through it as infants.⁴⁶⁵ Typically, the wound therefrom takes approximately seven to 10 days to heal.⁴⁶⁶

The Author posits that the equal protection of laws⁴⁶⁷ guaranteed by the 1987 Constitution may not be raised as regards FGM and male circumcision because there are substantial distinctions between the two. After the healing period for male circumcision, “there are no generally acknowledged ramifications from a properly performed procedure.”⁴⁶⁸ While there are still differing theories, there is no known disease or dysfunction that stem from it.⁴⁶⁹ On the contrary, there is a medical need for male circumcision, such as “when the foreskin is too tight to be ... retracted over the glans.”⁴⁷⁰ It is also performed to reduce the risk of sexually transmitted diseases.⁴⁷¹ As the American Academy of Pediatrics (AAP) asserts, the benefits of male circumcision outweigh the risks thereof.⁴⁷² While the health risks of FGM abound, male circumcision has several health benefits, namely:

- (1) *Easier hygiene.* Circumcision makes it simpler to wash the penis. Washing beneath the foreskin of an uncircumcised penis is generally easy, however[;]
- (2) *Decreased risk of urinary tract infections.* The overall risk of urinary tract infections in males is low, but these infections are more common in uncircumcised males. Severe infections early in life can lead to kidney problems later on[;]
- (3) *Decreased risk of sexually transmitted infections.* Circumcised men might have a lower risk of certain sexually transmitted infections, including HIV. Still, safe sexual practices remain essential[;]
- (4) *Prevention of penile problems.* Occasionally, the foreskin on an uncircumcised penis can be difficult or impossible to retract

465. Coleman, *supra* note 67, at 759.

466. *Id.*

467. PHIL. CONST. art. III, § 1. This Section provides that “[n]o person shall be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of laws.” PHIL. CONST. art. III, § 1.

468. Coleman, *supra* note 67, at 759.

469. *Id.*

470. Mayo Clinic, Circumcision (male) — Why it’s done, available at <http://www.mayoclinic.org/tests-procedures/circumcision/basics/why-its-done/prc-20013585?reDate=28022016> (last accessed Apr. 19, 2016).

471. *Id.*

472. *Id.*

(phimosis). This can lead to inflammation of the foreskin or head of the penis[; and]

- (5) *Decreased risk of penile cancer.* Although cancer of the penis is rare, it [is] less common in circumcised men. In addition, cervical cancer is less common in the female sexual partners of circumcised men.⁴⁷³

Moreover, male circumcision affects neither fertility nor sexual pleasure.⁴⁷⁴ According to Pat Schroeder, “[t]here is no similarity [between FGM and male circumcision] unless one considers circumcision [as] amputation.”⁴⁷⁵ Moreover, although FGM may be done in a medical and sanitized environment in some places and where it is necessary for some legitimate medical purpose, the FGM treated in this Note is the kind performed by ethnic communities who typically use “rough tools [with no] anesthesia.”⁴⁷⁶ As Coleman asserts,

[b]ecause of these profound differences between the traditional forms of FGM and male circumcision, equal protection challenges to [S]tate statutes outlawing FGM brought by circumcised males will likely fail on the ground that boys and girls are not ‘similarly situated’ for the purposes of those statutes. For the same reasons, the analogous argument made by practitioners of the traditional forms of FGM — that equal protection doctrine requires that they be treated the same as practitioners of male circumcision — likely would not succeed.⁴⁷⁷

D. Cultural Relativism

Cultural relativism is one of the principles that must be considered in establishing the boundaries of the right to cultural integrity vis-à-vis the right to health. It pertains to the notion that a person’s beliefs and actions must not be seen in isolation.⁴⁷⁸ According to Barrett A. Breitung, it means that outsiders must not subject variations in moral rules and institutions to criticism.⁴⁷⁹ This means that beliefs and actions must be understood in the context of that person’s society and culture. According to sociology experts, “[c]ultural relativism means that the function and meaning of a trait are relative to its cultural setting. A trait is neither good nor bad in itself. It is

473. *Id.*

474. *Id.*

475. Coleman, *supra* note 67, at 760.

476. *Id.*

477. *Id.* at 761.

478. Sociology Guide, Cultural Relativism, *available at* <http://www.sociologyguide.com/basic-concepts/Cultural-Relativism.php> (last accessed Apr. 19, 2016).

479. Coleman, *supra* note 67, at 729.

good or bad *only with reference to the culture in which it is to function.*"⁴⁸⁰ As Coleman asserts, cultural relativism is germane to the discussion of FGM because its practice is cultural.⁴⁸¹

The right to cultural integrity and the right to manifest one's religion or belief in worship are implicit recognition of the principle of cultural relativism. Such rights afford individuals, particularly those who belong to indigenous cultural communities and to minority groups, a certain latitude through which they may exercise their culture vis-à-vis that of the mainstream society. Such rights also recognize the multiculturalism or diversity of culture that exist in one State.

E. Local Context Sensibility

The concept of cultural relativism is also related to local context sensibility, which is advocated by Tobin as necessary in interpreting the right to health.⁴⁸² According to Tobin, local context sensibility takes into account "the needs and interests of the local populations" in interpreting the right to health.⁴⁸³ Moreover, he posits that this may be best enforced through community participation.⁴⁸⁴ According to Tobin, in eliminating traditional practices that constitute human rights violations, the same must be achieved through a *collaborative and consultative process* "rather than through the imposition of 'hegemonic visions' of the right to health."⁴⁸⁵ This is related to the "margin of appreciation" principle developed by the European Court of Human Rights, "[which] grants [S]tates a level of flexibility as to the measures that they can adopt to meet their obligations under the treaty[.]"⁴⁸⁶ This principle provides States a certain leeway to "accommodate cultural diversity" in complying with their treaty obligations.⁴⁸⁷ This means that States are not required to blindly and absolutely adhere to their State obligations. Consideration should be given to the context in which they are putting such measures. This means that the beliefs of the indigenous cultural communities are not simply dismissed. They are taken into account in every legislative measure imposed by the State.

480. Sociology Guide, *supra* note 478 (emphasis supplied).

481. See Coleman, *supra* note 67, at 178.

482. Ayala, *supra* note 291, at 7.

483. *Id.*

484. *Id.*

485. *Id.* at 8.

486. *Id.*

487. *Id.*

F. Cultural Relativism and Local Context Sensibility as Consistent with the Country's Treaty Obligations

As applied to the case of FGM in the country, through the principles of cultural relativism and local context sensibility, the accommodation of cultural diversity or multiculturalism in formulating measures to balance the rights of indigenous peoples to cultural integrity and health remains consistent with the treaty obligations of the country because, as posited by Tobin, the treaty obligations do not provide “any further [instructions] as to the nature of the specific measures [that] [S]tates ought to adopt.”⁴⁸⁸ For instance, in Article 24 (3) of the CRC, it is mandated that “[S]tates-[P]arties shall take *all effective measures* and appropriate measures with a view to abolishing harmful traditional practices.”⁴⁸⁹ The same is true with the other instruments to which the Philippines is a State-Party, such as the CEDAW, which provides similar phrasing.⁴⁹⁰ As Tobin asserts, “[t]his leaves [S]tates with a wide margin of appreciation to determine what measures are appropriate to meet this obligation within their own particular context.”⁴⁹¹ According to him, the mandate of such instruments does not require the immediate abolition of the practices. For instance, in the CRC and the CEDAW, there is the phrase “with a view to abolishing,” which implies that the eradication of the practice is gradual and over time.⁴⁹² Likewise, as Tobin avers, this provision remains sensitive to the traditional practice, as espoused in Article 30 of the CRC.⁴⁹³

G. The Application to the Case of Somali Immigrants in Seattle, Washington

The Author asserts that the principles of cultural relativism and local context sensibility have been applied by the Harborview Medical Center in Seattle, Washington in addressing the case of Somali immigrants and refugees who wanted to have their female children circumcised. In tackling such issues, the hospital adopted the policy of being “sensitive to [] cultural differences[.]”⁴⁹⁴ How did they do it?

Firstly, they did not reject the wishes of the immigrant mothers.⁴⁹⁵ They actually listened to them and asked them what would happen should they

488. TOBIN, *supra* note 305, at 314.

489. CRC, *supra* note 343, art. 24 (3) (emphasis supplied).

490. See ICCPR, *supra* note 169; ICESCR, *supra* note 49; UDHR, *supra* note 234; ICERD, *supra* note 269; CRC, *supra* note 343; & CEDAW, *supra* note 56.

491. TOBIN, *supra* note 305, at 314.

492. *Id.* at 305 (citing CRC, *supra* note 343, art. 24 (3)).

493. CRC, *supra* note 343, art. 30.

494. Coleman, *supra* note 67, at 739.

495. *Id.* at 736.

refuse to grant their requests.⁴⁹⁶ It is through these consultations that they found out about the beliefs of these immigrants that their daughters would be considered dishonorable, unmarriageable, and unchaste without going through the ritual of FGM.⁴⁹⁷ Moreover, they were very determined to have the ritual carried out because if the hospital would not perform it on their daughters, they would bring their daughters to the local midwives who would willingly practice it or they would send their children back to Somalia, where their daughters may undergo the more extreme form of FGM.⁴⁹⁸ Undoubtedly, they saw it as a cultural and religious ritual. Like the local indigenous groups who practice it, the Somalis believe that “the oral teachings of the clerics require it.”⁴⁹⁹

To resolve the problem and out of respect for the culture of the immigrants, the hospital formed a committee composed of “a urologist, medical ethicists, pediatricians, an obstetrician-gynecologist, hospital administrators, pediatricians, and a plastic surgeon,”⁵⁰⁰ which would come up with a settlement. The compromise was this — instead of the traditional mutilation which involves tissue removal, “the hospital would [only] perform a ‘simple, symbolic cut’ amounting to a mere ‘nick’ [that is] enough to draw blood[.]”⁵⁰¹ Tina Mankowski, Harborview’s spokeswoman, explained this simple, symbolic cut. It is “a small cut to the prepuce, the hood above the clitoris, with no tissue excised, and this would be conducted under local anesthetic for children old enough to understand the procedure and give consent in combination with informed consent of the parents.”⁵⁰² When this was proposed to the Somali immigrants, they surprisingly agreed.⁵⁰³ However, the compromise procedure was never performed because of several oppositions to it.⁵⁰⁴

In approaching the case of Somalis, the Harborview Medical Center remained sensitive to the culture of Somalis and did not readily dismiss their requests for FGM. Albeit it was not executed, the readiness of the Somali immigrants to Harborview’s proposal was a crossroad — it was an avenue for discourse, a point of compromise. The Note posits that this may be applied in the case of local ethnic communities practicing FGM. How so?

496. *Id.*

497. *Id.* at 741.

498. *Id.* at 740.

499. *Id.* at 741.

500. Coleman, *supra* note 67, at 744.

501. *Id.* at 737.

502. *Id.* at 744-45.

503. *Id.* at 737.

504. *Id.*

VII. RECOMMENDATION

In addressing the local practice of FGM by ethnic communities in Mindanao, the Author posits that the same underlying principles of cultural relativism and local context sensibility must be applied. The application of these principles recognizes that the eradication of harmful traditional practices may not be done instantaneously; rather, it takes time and must be gradual. As Maureen Mswela asserts, “[c]ultural transformation can be an outcome from individuals being exposed to accept novel ideas. In this regard, individuals who decide to accept innovative ideas, even if influenced by their personal concerns, can start a procedure of transformation[,] which may control overriding cultural traditions.”⁵⁰⁵ To apply this to the local setting, the Author advances some guidelines.

A. Determination of Cultural Practice

For a dissertation on the use of natural resources by indigenous peoples, Jonathan C. Jo conducted an interview with Maria Luisa Lucas-Fernan, the Program Director of the International Fellowships Program of the Philippines and a member of the faculty of Ateneo de Manila University Department of Sociology and Anthropology.⁵⁰⁶ In such interview, Lucas-Fernan enumerated the characteristics of a cultural practice, namely:

- (1) it must be a community-wide practice, meaning it is observed by most if not all of the members of the indigenous cultural community;
- (2) it must be an intergenerational practice, meaning it is passed on from generation to generation; and
- (3) it must be begun and/or ended with a prayer, meaning it is for some higher purpose or it is deemed to be a manifestation of their belief in worship.⁵⁰⁷

As may be deduced from the discussion of the practice of FGM, all these three characteristics concur in the practice of FGM by the indigenous groups in Mindanao.⁵⁰⁸

505. Mphoeng Maureen Mswela, *HIV/AIDS and the Role of Gender Inequality and Violence in South African Law*, at 155-56 (June 2009) (unpublished M.L.L. thesis, University of South Africa).

506. Jo, *supra* note 185, at 130.

507. *Id.* at 130-31.

508. See Calsalin, *supra* note 2.

B. Determination of the Level of Inseparability and Interdependence between the Cultural Practice and the Mode of Life

There is a need to determine whether a certain practice may be considered a cultural or traditional one. To determine this, the Author asserts that the level of inseparability and interdependence between FGM and the mode of life of indigenous peoples should serve as a basis as to whether the act performed by the indigenous group is a cultural or traditional practice. This basis is derived from the case of *Yoder*, which used it as a yardstick in determining whether a practice by a religious group may be deemed as a manifestation of the Amish's religious belief, and consequently, a manifestation of one's intent to participate in cultural life.

1. Inseparability and Interdependence Defined

For the purpose of determining the level of inseparability and interdependence between the cultural practice and the mode of life of ethnic communities, the terms inseparability and interdependence must be defined. While *interdependence* means "mutually reliant on each other,"⁵⁰⁹ *inseparability* means "incapable of being separated, parted, or disjoined."⁵¹⁰ From these definitions it may be deduced that both imply the utmost importance and indispensability of something. Hence, if it is inseparable and interdependent, it means one cannot exist without the other.

2. Curtailment versus Restriction

If the practice is not inseparable and interdependent with the mode of life of the indigenous peoples, then the same may be absolutely curtailed by the State. However, if the practice is inseparable and interdependent with the mode of life of the indigenous peoples, then the same may not be absolutely curtailed, but may be restricted if it is prejudicial to public health, public safety, public order, or public policy.⁵¹¹

C. Application to the Practice of FGM

In the case of FGM as practiced by the various indigenous cultural communities in Mindanao, FGM is so inseparable and interdependent with the mode of life of the indigenous peoples that it cannot be absolutely curtailed. However, it may be restricted on account of the women's right to

509. Dictionary.com, *Interdependence*, available at <http://dictionary.reference.com/browse/interdependence> (last accessed Apr. 19, 2016).

510. Dictionary.com, *Inseparability*, available at <http://dictionary.reference.com/browse/inseparable> (last accessed Apr. 19, 2016).

511. *Yoder*, 406 U.S. at 215.

health, but with due consideration to the right of the group's cultural integrity.

The inseparability and interdependence of FGM with the mode of life of indigenous peoples in Mindanao may be deduced from the fact that they wholly believe that they may not rightfully practice Islam if they were not circumcised.⁵¹² To them, the practice of FGM is a condition sine qua non to being a legitimate Muslim.⁵¹³ For them, the carrying out of FGM is crucial in the practice of Islam.⁵¹⁴ As mentioned earlier, the explanations and motives for such practice may be grouped under two general justifications:

- (1) As a societal custom and tradition;⁵¹⁵ and
- (2) As a religious duty.⁵¹⁶

The practice of FGM as a religious duty is more constricted in scope but it is intertwined with societal custom and tradition. According to the studies of Calsalin and Belisario, Islam is the frequently cited justification for the practice.⁵¹⁷ Corollary to it, respondents claimed it has always been the way things were done and so it must continue to be that way.⁵¹⁸

D. The Restriction of the Practice of FGM

Given that the practice of FGM is interdependent and inseparable from the mode of life of the indigenous peoples, the Author posits that the practice may be restricted by formulating a legislation that outlaws FGM and, at the same time, provides for exceptions, similar to those given by other countries that already have specific legislations against FGM. In a nutshell, this legislation will outlaw the practice of FGM. However, it will give a certain leeway for the practice thereof as part and parcel of culture by establishing therein that where the subject thereof consents and is at least 18 years of age, FGM may be performed.

This legislation accomplishes three things: (a) it recognizes the prevalence of FGM among certain ethnic communities; (b) it regulates the practice pursuant to the right to health and right against discrimination of

⁵¹². See Calsalin, *supra* note 2, at 21.

⁵¹³. *Id.*

⁵¹⁴. *Id.*

⁵¹⁵. *Id.* at 5.

⁵¹⁶. *Id.*

⁵¹⁷. Belisario, *supra* note 23 & Calsalin, *supra* note 2, at 5.

⁵¹⁸. Calsalin, *supra* note 2, at 10.

those girls or women subjected to it; and (c) it provides a “margin of appreciation”⁵¹⁹ for the cultural aspect of the practice.

The proposal to wait for the female members of the indigenous cultural communities to turn 18 before being given the option to undergo FGM has two components: (1) the female member must reach the age of majority (i.e., 18 years old) and (2) the female member must be able to exercise consent.

This proposal is in line with the specific legislations enacted by foreign countries as regards FGM. The narrow leeway provided thereby balances the right to health with the right to cultural integrity of the ethnic communities. Corollary to such rights, the two components also recognize the right to sexual and bodily integrity of the woman, by giving her a right as to what she wants to do with her body. Her right against discrimination is also protected, as the gender stereotypes that promote the practice FGM are also gradually set aside.

E. Why the Proposal Will Work

As previously mentioned, there are two main sources in Islam: (1) the Qur’an and (2) the Sunnah.⁵²⁰ The Qur’an contains the declarations of Allah to prophet Mohammed.⁵²¹ Meanwhile, the Sunnah is a collection of Mohammed’s sayings.⁵²² It also pertains to the way of life of the prophet, which the Muslims ought to follow.⁵²³ Aside from these two, there is also the *hadith*, which consists of individual sayings and customs.⁵²⁴

According to Coleman, the Qur’an does not specifically allude to FGM.⁵²⁵ However, the subject of female circumcision is mentioned “in the Sunnah, where, according to Professor Annemarie Schimmel, a ‘barely known’ [*hadith*] addresses the practice directly.”⁵²⁶ Despite this, “the religious status of female circumcision is contested ... because the relevant authority is obscure, and also because not all [*hadith*] are considered reliable.”⁵²⁷

519. This is a term borrowed from the European Commission of Human Rights. See TOBIN, *supra* note 305.

520. Coleman, *supra* note 67, at 731.

521. *Id.*

522. *Id.*

523. *Id.*

524. *Id.*

525. *Id.*

526. Coleman, *supra* note 67, at 731.

527. *Id.* at 732.

If the religious status of female circumcision is still debatable, then the relevance of practice of FGM to Islam is still debatable and corollary, the age at which it should be practiced is not well-established, thus, immaterial. Hence, if the indigenous cultural communities will be asked to wait for the female members of their community to turn 18 before they may perform the practice of FGM, then there will be no negative impact upon the belief of the indigenous cultural communities. The same still respects the manifestation of their belief as part and parcel of their culture and tradition. Therefore, their right to cultural integrity is still upheld.

F. The Implementation

In order to put into effect the suggested guidelines and legislation, there must be a body and a program through which the intentions of the State to recognize and, at the same time, regulate the practice of FGM may reach the ethnic communities. For this purpose, the following are proposed by this Note.

1. A Consultative and Collaborative Body

Firstly, there shall be a consultative body, which shall serve as the medium for consultation and collaboration between the government and the indigenous peoples who practice FGM or other traditional harmful practices. This may be an organization formed under the National Commission on Indigenous Peoples, which is created under the IPRA. Section 3 (k) of such Act provides —

Section 3 (k). National Commission on Indigenous Peoples (NCIP) — refers to the office created under this Act, which shall be under the Office of the President, and which shall be the primary government agency responsible for the formulation and implementation of policies, plans[,] and programs to recognize, protect[,] and promote the rights of ICCs/IPs[.]⁵²⁸

Through this body, the government and the indigenous peoples concerned may go through the practices of the indigenous cultural communities and determine whether the same are for the furtherance of the latter's culture and whether the same are inseparable and interdependent with their mode of life. This is an avenue for both sides to weigh their interests as regards harmful traditional cultural practices.

2. An Education Program

Secondly, the right to give consent may only be exercised if the indigenous peoples are informed of their right to health in the first place. For this purpose, the Note recommends the development of an education program for the general public and the indigenous cultural communities

528. The Indigenous Peoples' Rights Act of 1997, § 3 (k).

concerned.⁵²⁹ For instance, in the case of indigenous groups in Mindanao, an information campaign on the health risks of FGM may be developed. This education program is a reinforcement of the assertion that citizens, including indigenous peoples, are entitled to information relevant to the protection of their health. This is also in line with Tobin's claim that locally, "[P]arties must take specific measures ranging from 'ensuring access to health care services to abolition of harmful traditional practices[.]'"⁵³⁰

Moreover, this addresses the reality that the elimination of harmful traditional practices "will take more than simply passing a law."⁵³¹ As Joanne A. Liu said, "legislation, to be effective, needs to be widely communicated to the [people] and needs to be accompanied by special education programs for [them]."⁵³² The same efforts have been made in other countries, for instance

In the United States, Title VI of the Immigration Reform Act includes a requirement that the Immigration and Naturalization Service (INS), in conjunction with the State Department, provide information to immigrants and non-immigrants on the harmful consequences of FGM, and imposes criminal penalties for persons who knowingly perform the practice. The United States Agency for International Development (USAID) is one of several domestic organizations that are participating in the effort to eradicate FGM. Having allocated funds to create and integrate educational programs to eradicate FGM, USAID is currently developing its Strategy for the Eradication of FGM. The agency plans to use operations research to develop and test community-level interventions for the prevention of FGM in Kenya, Mali, and Guinea. Likewise, other Western countries have instituted educational campaigns to eliminate the practice. A few African countries, such as Burkina Faso and Gambia, have government campaigns against FGM. Non-governmental organizations (NGOs) have launched campaigns against FGM in other African nations, such as Ethiopia, Mali, and Tanzania.⁵³³

This will also address the fact that most women who undergo FGM are oblivious to the fact that they may exercise the right to choose, as FGM is not practiced everywhere in the world.⁵³⁴

529. See TOBIN, *supra* note 305.

530. *Id.*

531. Joanne A. Liu, When Law and Culture Clash: Female Genital Mutilation, A Traditional Practice Gaining Recognition as a Global Concern, 11 N.Y. INT'L L. REV. 71, 91 (1998).

532. *Id.*

533. *Id.*

534. *Id.* at 93.

3. Preliminary Prohibitive Injunction

What would be the remedy if the ethnic groups insist on performing the ritual? The solution may be found in Rule 58 of the 1997 Rules of Civil Procedure,⁵³⁵ which provides the possibility of obtaining a preliminary prohibitive injunction against the members of indigenous groups who insist on carrying out FGM upon certain members. Under Section 3 thereof, the grounds for the issuance of preliminary injunction are:

- (a) That the applicant is entitled to the relief demanded, and the whole or part of such relief consists in restraining the commission or continuance of the act or acts complained of, or in requiring the performance of an act or acts either for a limited period or perpetually;
- (b) That the commission, continuance or non-performance of the act or acts complained of during the litigation would probably work injustice to the applicant; or
- (c) That a party, court, agency or a person is doing, threatening, or is attempting to do, or is procuring or suffering to be done some act or acts probably in violation of the rights of the applicant respecting the subject of the action or proceeding, and tending to render the judgment ineffectual.⁵³⁶

This provisional remedy will preserve the status quo of the subject of the action with a view of respecting the rights of the party concerned during the pendency of a principal suit. The principle suit may in turn be one for permanent injunction or one for damages.⁵³⁷

VIII. CONCLUSION

For over a thousand years, the practice of FGM has been carried out in the world over, including the Philippines. Locally, certain ethnic communities in Mindanao, such as the Yakans, Tausugs, Samals, Maranaos, and Badjaos, observe the practice. Varied justifications are cited for its practice. Among others, it is believed to increase one's marriageability and to maintain chastity. Moreover, it is claimed that one may not pray in the mosque and do her religious duties without going through the practice. Claims have been made that the religious leaders of Islam support it, however, to date, it remains debatable whether its performance is really mandated by the

535. 1997 RULES OF CIVIL PROCEDURE, rule 58.

536. *Id.* § 3.

537. Abel D. Alegre, *Circumscribing Circumcision: Re-Examining Routine Male Circumcision as A Violation of Human Rights* (2004) (J.D. diss., Ateneo de Manila University).

religion, as it does not clearly appear in the Qur'an and majority of Muslims globally do not actually observe such practice.⁵³⁸

Notwithstanding the dispute over it, indigenous peoples in the country continue to practice it, typically before the girls reach the age of puberty or before they get married.⁵³⁹ As noted by several scholars on the matter, these groups often carry out FGM without any anesthesia and without proper medical training. This results in a variety of complications to its subjects health-wise.

In dealing with the practice, conflict between the right to cultural integrity and the right to health of these indigenous peoples arise. On the one hand, the indigenous peoples must be allowed to participate in the customs and traditions of their ethnicity, but on the other, the indigenous peoples must be aware of the danger and harm that the tradition of FGM poses upon their health. To address this conflict, the Note looked into several international and local instruments that deal with both rights. In the course thereof, it is established that international and local instruments enshrine both rights. However, how do States strike a balance?

In order to set the demarcation line between the two rights, it is suggested that a specific legislation on the matter of FGM be devised. In the formulation of such legislation, the principles of cultural relativism and local context sensibility must be kept in mind. In addition to such legislation, the Note proposes that there be a determination of two things before curtailment or restriction be applied to the practice. These are the following:

- (1) Determine whether it is cultural practice; and
- (2) Determine whether it is inseparable to and interdependent with the way of life of the indigenous cultural communities.

Accordingly, if it is not so inseparable and interdependent, then it may be curtailed following the ruling in *Yoder*. Meanwhile, if it is inseparable and interdependent, then it may only be restricted. In the case of the FGM, it is the latter. As such, the restriction may be done by waiting for the involved female member of the indigenous groups to reach the age of majority and by allowing such member, once she reaches the age of majority, to give consent to such practice pursuant to her right to sexual and bodily integrity.

The Author posits that such restriction on the practice of FGM may be implemented by providing corollary steps to support it. Firstly, a consultative and collaborative body under or through the NCIP may be formed. Such body will serve as the medium of discourse between the indigenous peoples

538. See Coleman, *supra* note 67, at 759.

539. See Calsalin, *supra* note 2, at 21-23.

and the State. Through such body, they may look into the cultural practices of the former and come up with compromises in case cultural collisions arise.

Aside from the consultative body, an education program on FGM for the general public and for the indigenous groups concerned shall also be had. This program shall aim to increase the indigenous peoples and the public's awareness of harmful traditional practices and, concomitantly, to educate the indigenous women that they have a choice as regards the matter.

While the Note is executed with only the practice of FGM as its backdrop, the Author hopes that the standards and guidelines proposed in the Note will be helpful in dealing with other cases of cultural collision.