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# International Criminal Justice: Why is the Criminalisation of FGM failing?

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*Criminal justice is a concept that is integrated in the laws of every state, but what if the enforcement of such laws is little to none when it comes to a certain crime? This is the case in relation to the prosecution of female genital mutilation (FGM). In the international sphere, breaches of human rights can be prosecuted not only by the national state but also by the International Criminal Court (ICC). However, FGM is a crime that is not prosecuted by either the ICC or many states in which this practice occurs, though it is considered a fundamental breach of human rights and international criminal law.*

*This article explores the reasons why this is the case, especially on a domestic level, in regard to the cultures of these communities and how it can be mitigated. Though it recognises the limitations that exist both culturally and politically, this article contains practical steps that could be taken, as well as considerations, when pursuing the prosecution of FGM. Furthermore, it looks to the future with ways to eradicate the practice of FGM specifically through education with the help of non-governmental organisations.*

## **What is female genital mutilation?**

Female Genital Mutilation (FGM) is described by the World Health Organization (WHO) as 'all procedures that involve partial or total removal of the external female genitalia, or other injury to the female genital organs for non-medical reasons'.<sup>1</sup> This procedure is practiced widely in various countries such as Egypt, Kenya, Uganda, Sierra Leone and many others. The fact that it is performed for non-medical reasons raises the question as to why it is practiced at all and, most importantly, why the procedure is permitted in these countries. FGM has been recognised as a violation of the human rights of girls and women. It violates the principles of non-discrimination, equality, and the right to freedom from torture and cruel, inhuman or degrading treatment or punishment. As FGM is rooted in cultural and religious beliefs, it may be argued that these communities have the right to practice their traditions, and that this right to cultural life is protected by international law. This, however, is first subject to the protection of fundamental rights and the freedom of others which is clearly being compromised in the exercise of this practice.<sup>2</sup>

## **The origin of FGM and its cultural and social stronghold**

The practice of FGM is deeply rooted in gender inequality and society's need to control women which, in the long run, harms women. It is also largely supported by both genders in the countries of practice, and deviating from the practice within such communities is condemned and considered punishable. The United Nations statement on *Eliminating Female Genital Mutilation* puts it this way; 'FGM is a social convention governed by rewards and punishments which are a powerful force for continuing the practice'.<sup>3</sup>

Though the efforts to eliminate FGM have been ongoing for decades, there are pockets of communities in various countries where it is still very much in practice. In many situations, it is the girl or woman that gives consent or agrees to the process to avoid being shunned by her community. This fear tactic is also an example of a tool the states that practice FGM use to control the general population, especially in relation to abiding to their political and social values. Therefore, it is no surprise that this is something that governs the actions and compliance of these women. It has become so

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<sup>1</sup> World Health Organization, <<http://www.who.int/mediacentre/factsheets/fs241/en/>> accessed 15 October 2016.

<sup>2</sup> International Covenant on Civil and Political Rights 1976, Art 18.3.

<sup>3</sup> The United Nations, *Eliminating Female Genital Mutilation: An interagency statement* <[http://www.un.org/womenwatch/daw/csw/csw52/statements\\_missions/Interagency\\_Statement\\_on\\_Eliminating\\_FGM.pdf](http://www.un.org/womenwatch/daw/csw/csw52/statements_missions/Interagency_Statement_on_Eliminating_FGM.pdf)> accessed 3 October 2016.

entrenched in these communities that it is now manifested into a deeply rooted culture.

Kartar-Hyett explores the origin of FGM in Kenya and Uganda, pointing out the impact on the social construction of the countries and the culture that eventually developed as a result.<sup>4</sup> The justification given for FGM finds its heritage in the Maasai Folklore which tells the story of a girl who betrayed her father during a war by sleeping with an enemy soldier. Her father punished her by the cutting of her genitalia in order to deter her from being sexually promiscuous.<sup>5</sup> In order to prevent retaliation against this practice by people in the communities, FGM has now developed and is no longer seen as a punishment, but rather a necessary tradition or rite of passage on the road to womanhood. This has allowed the practice to be sustained over time. The mythical narratives told and believed by these communities has been a 'systemic contributor to the prevailing social attitudes' making an 'arbitrary system of values appear as systems of fact'.<sup>6</sup>

### **Criminalisation: the prosecutorial model and its problems**

It is interesting to note that many of the practicing countries have laws that ban FGM, yet it still takes place openly without prosecution. Considering the serious consequences of FGM, apart from the initial pain, future complications with childbirth and health, it is surprising that FGM is not prosecuted effectively by the International Criminal Court if not by the national state. In the general process of criminalisation, there are different stages to go through before one is eventually prosecuted and then sentenced. When dealing with FGM it is of vital importance that each of the stages are approached in an effective way which will result in successful prosecutions. However, as aforementioned, prosecution for those who commit FGM has proven very difficult for police forces in these countries. For example, in Russia where the practice is now banned, it is still almost impossible to find a culprit, which is essentially the first stage of criminalisation. When the strict measures were introduced it did nothing, but drive the practice underground. So essentially, the first problem is these communities are failing to see the dangers of the practice.

Edouard and Olatubosun suggest that the criminalisation of FGM can only be successful when 'behaviour change strategies have been implemented and social norms have been addressed'.<sup>7</sup> Therefore, the problem with this first stage of criminalisation is the lack of victims and witnesses coming forward due to their compliance with such cultures. As Marina Akhmedova said in relation to Russia, 'first you need to persuade them

that they are victims...if religious leaders say it is right for a girl to undergo circumcision, people will do it'.<sup>8</sup>

Assuming a culprit has been identified, another obstacle is being able to successfully hold them to account for their actions and finding evidence to support their criminalisation. Focusing primarily on Sierra Leone due to the severe, commonplace and everyday practice of FGM, a woman named Elsie Kondromoh was detained by police for violating the ban on FGM in the country. However, she was released soon after because of a protest outside the police station by her supporters.<sup>9</sup> This goes to show the incapability of these police forces to effectively detain those who commit FGM and it also displays their hesitance in causing friction between the community and the authorities. A police inspector said, 'if we had not released her it would have been a problem for us in the station'.<sup>10</sup> This case highlights the stronghold such practices and beliefs can have on a community, that even the authorities recognise such cultures and are reluctant to enforce the law against them. Once again, this point to the fear tactic method mentioned earlier and this case goes to show that it clearly applies to the police force in these areas as well.

Additionally, for these prosecutions to be successful, there needs to be evidence of the accused actions, which in these cases will require witnesses. This is the main obstacle in the criminalisation of FGM. The lack of an effective victim constituency is problematic. They are often not willing to come forward and identify the culprit out of fear. Drawing from a victim's fearful account in Sierra Leone, the Soweis (the cutters, in English) have immense power in their communities that, as one activist puts it, 'nowhere in Sierra Leone will be safe for her again,' highlighting the danger she would be in should she testify against them.<sup>11</sup>

The criminalisation approach does have its merits on a very basic level, as we do not want these people to get away with abusing women and girls. However, due to community resistance to stop and recognise that they are victimising women and the problem with the enforcement of the laws that exist, the impact of the prosecutorial model is diminished.

### **Social impediments to change and building a counter narrative**

Eighteen countries in Africa have enacted legislation criminalising FGM including Djibouti, Egypt, Ghana, Kenya and many others, as well as countries in North America and Europe. In 2015, Nigeria's president at the time, Goodluck Jonathan, signed into national law a ban on the practice nationwide, though it was already banned in certain states. This was seen and praised by many

<sup>4</sup> Luci Kartar-Hyett, 'Simply Unwilling? Is Patriarchy Preventing the Prosecution of Crimes Against Women in African States: A Kenyan and Ugandan Perspective' (2016) African Journal of International and Comparative Law 175.

<sup>5</sup> *ibid* 178.

<sup>6</sup> Philip Smith, 'Cultural Theory: An Introduction' (2<sup>nd</sup> Edition, Wiley Blackwell 2008) 111.

<sup>7</sup> E. Edouard, O. Olatubosun and L. Edouard, 'International Efforts in Abandoning Female Genital Mutilation' (2013) 19(3) African Journal of Urology 150, 152.

<sup>8</sup> Hajra Rahim and Rachel Horner, 'Tough Prison sentences will not end FGM in Dagestan' *The Guardian* (London, 23 August 2016).

<<https://www.theguardian.com/society/2016/aug/23/tough-prison-sentences-will-not-end-fgm-in-dagestan>> accessed 20 October 2016.

<sup>9</sup> Umaru Fofana, 'Captured and cut: FGM returns to Sierra Leone despite official ban' *The Guardian* (London, 29 September 2016). <<https://www.theguardian.com/global-development/2016/sep/29/female-genital-mutilation-returns-sierra-leone-official-ban>> accessed 30 October 2016.

<sup>10</sup> *ibid*.

<sup>11</sup> *ibid*.

campaigners as a positive step to motivating other African countries that did not have similar laws to do the same. Though crucial, as Tanya Barron recognised, prosecution is one strand of the international effort to end FGM. It is still important for further efforts to be taken. For example, 'working with girls and their communities to ensure that they know the risks of the human rights violation'.<sup>12</sup>

Firstly, it is important that these communities start to recognise the nature of victimisation. At the moment, they are adamant on the premise that the practice helps to 'protect the community against evil spirits'<sup>13</sup> and so, they are unable to see the damage they are inflicting on women and girls. Likewise, many of the victims have conformed to this ideology due to the false preaching by these societies. There is a need to empower victims and other responsible members of the community to see a need for change. Unfortunately, this is not something that can be achieved by the communities' efforts alone; it may require interference by, or the support of an external third party such as a Non-Governmental Organisation (NGO).

A main challenge for anti-FGM campaigners is how to tackle societies within the communities that endorse the practice. Due to the amount of power that they hold in these communities, they spread fear to the rest of the community, crippling them from acting even if they wanted to. Additionally, many of these societies do not only hold power in their community, but are also politically connected. As a number of these countries are corrupt, the politicians unfortunately use these societies and their practices to their advantage. They are able to secure votes from the women while the societies are allowed to carry on their practices without major interference or effective criminalisation. This highlights the major difficulty in eradicating FGM as there are a lot of social, political and cultural layers that have influenced the continued practice of FGM over time. Therefore, there is a need to tackle all of these in stages, as that will in turn affect the other connected layers. For example, it has been suggested that perhaps if these women were introduced to new ways of generating an income they would stop practicing FGM. However, this strategy proved unsuccessful in Sierra Leonean villages with the Soweis rejecting the offer of working for an alternative source of income.<sup>14</sup> This emphasises the social norm instilled in these villages that women are meant for the home while men go out to work.

This leads to the second point of the need for women to recognise the power they can have in a community. This involves breaking down gender inequality, a major social norm the practice is built on, which commands the woman to stay in the private

domestic sector while the men stay in the public. For the eradication of FGM, it is important to target this reality especially in the younger generation. It is clear that the older women in the community who have undergone FGM in their lifetime and mostly form the members of these secret societies would be difficult, if not impossible, to persuade. In view of this, strategies and new social norms targeting the youth need to be introduced. FGM cannot be eradicated quickly nor in a short period of time, but rather in stages over a long-term period. It is therefore important to change younger mindsets in order to prevent the practice from continuing through generations.

This can be done mostly through education. FGM can be a major barrier to education in the regions where it is practiced. Many of the girls are unable to attend school during the months in which the ritual goes on and if they do go back to school they are unable to catch up. They also may be married off soon after the procedure. It is clear that education can be an effective tool in spreading messages of autonomy, liberation and empowerment of women, as well as highlighting the dangers of FGM through health education. This has been highlighted in Sierra Leone by the head of the Forum against Harmful Traditional Practices, observing that 'they want to replace Bondo (referring to FGM) with school'.<sup>15</sup> This gives an opportunity for girls and women in these communities to change their position in society and in the domestic sphere. However, this knowledge can only reach them if it is part of the curriculum in schools. This will require the education ministries in these countries to 'develop instruction units and teaching materials on the issue of various age groups and the subjects, and should see that FGM becomes integrated into national curricular and teacher training programmes'.<sup>16</sup>

Alternatively, NGOs and Charities could be useful in helping to organise campaigns together with those willing in the community to inform others of the harmful consequences of FGM, causing them to question their beliefs and culture. The Campaign against Female Genital Mutilation (CAGeM) is a good example of an organisation that focuses primarily on education at the grassroots level as a means to begin eradicating FGM and has so far been successful. Plan International is another example of an NGO that has been working with communities to raise awareness of the harmful consequences of FGM. These organisations' help and presence in such communities can act as a boost for those who are opposed to FGM to step forward and inform their peers. This kind of 'empowering education'<sup>17</sup> is significant in helping these communities think more

<sup>12</sup> Alexandra Topping, 'Nigeria's female genital mutilation ban is important precedent, say campaigners' *The Guardian* (London, 29 May 2015).

<<https://www.theguardian.com/society/2015/may/29/outlawing-fgm-nigeria-hugely-important-precedent-say-campaigners>> accessed 30 October 2016.

<sup>13</sup> Lisa O'Carroll, 'Sierra Leone's secret FGM societies spread silent fear and sleepless nights' *The Guardian* (London, 24 August 2015). <<https://www.theguardian.com/global-development/2015/aug/24/sierra-leone-female-genital-mutilation-soweis-secret-societies-fear>> accessed 3 November 2016.

<sup>14</sup> *ibid.*

<sup>15</sup> *ibid.*

<sup>16</sup> Intact Network, 'Female Genital Mutilation and Education' <[http://www.intact-network.net/intact/cp/files/1290690770\\_FGM%20&%20Education-%20GTZ%20\(2009\).pdf](http://www.intact-network.net/intact/cp/files/1290690770_FGM%20&%20Education-%20GTZ%20(2009).pdf)> accessed 3 November 2016.

<sup>17</sup> OHCHR, UNAIDS, UNDP, UNECA, UNESCO, UNFPA, UNHCR, UNICEF, UNIFEM, WHO, 'The United Nations, Eliminating Female Genital Mutilation: An interagency statement' (World Health Organization 2008) 14. <[http://www.un.org/womenwatch/daw/csw/csw52/statements\\_missions/Interagency\\_Statement\\_on\\_Eliminating\\_FGM.pdf](http://www.un.org/womenwatch/daw/csw/csw52/statements_missions/Interagency_Statement_on_Eliminating_FGM.pdf)> accessed 3 October 2016.

widely about their actions drawing a special focus on gender inequality.

Thirdly, it is important that in order to eradicate such practices, these communities are not simply condemned. This only promotes hostility and even more resistance to the movement. Simply informing them that they are breaching human rights of women is necessary, but also something these communities should be allowed to realise themselves. They do not perform this procedure simply to be evil or to deliberately breach human rights, but because they genuinely believe it is right and have not been taught otherwise. Hence any programmes being implemented have to be community-led. These are 'by nature, participatory and generally guide communities to define the problems and solutions themselves... are non-judgmental and non-coercive'.<sup>18</sup>

To summarise, the criminal prosecutorial model being used as a deterrent to those who practice FGM in the various countries is weak. The introduction of these laws has mostly done nothing to eradicating the practice. Therefore, clearly identifying what hinders these communities from seeing their actions as a violation of human rights and addressing it in other ways is important. Hence, the need for a different interventionist strategy on a community level by the members of the community themselves, along with help from outside organisations to tackle the deep-rooted gender inequality in these communities. Once such issues are in place, the counter narrative could be transformed into a more successful control policy.

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<sup>18</sup> ibid 13.