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THE INTERNATIONAL COMMUNITIES' INEFFECTIVE RESPONSE TOWARDS THE FIGHT AGAINST FEMALE GENITAL MUTILATION

Fernanda Magalhães Santos

Introduction

In November of 2018, the Honorable Judge Bernard A. Friedman presided over *U.S. v. Nagarwala, et al.*, the first and only criminal case in the United States concerning the Female Genital Mutilation Act of 1996 (“FGM Statute”).¹ The FGM Statute made any form of female genital mutilation (“FGM”) procedure on any person below the age of 18 a federal criminal offense.² In what would have been the seminal case in the United States’ fight towards eliminating this practice, Judge Friedman hastily granted the defendant’s Motion to Dismiss and ruled that the FGM Statute was unconstitutional.³

The case concerned eight defendants (including the doctor that performed the procedure and several of the victims’ parents who brought the victims to the doctor’s clinic) that participated in the performance of the FGM procedure to nine girls in Livonia, Michigan.⁴ The defendants argued that the various charges relating to the FGM Statute were unconstitutional because the Necessary and Proper Clause of the Constitution, the only applicable source of Congressional power for this law, had not granted Congress power to do so.⁵ In finding the FGM Statute unconstitutional, Judge Friedman agreed with the defendants that Congress lacked the authority to pass the FGM Statute because the Necessary and Proper Clause, as well as the Commerce Clause, did not grant Congress the authority to prohibit the practice.⁶ Judge Friedman rejected the government’s argument, which maintained that the FGM Statute was “necessary to effectuate [the International Covenant on Civil and Political Rights (“ICCPR”)],” on the grounds that the “ICCPR” had too tenuous of a relationship with the FGM Statute.⁷ Judge Friedman further concluded that outside of the Necessary and Proper Clause, he had federalism concerns because U.S. constitutional balance gives

¹ Pam Belluck, *Federal Ban on Female Genital Mutilation Ruled Unconstitutional by Judge*, NEW YORK TIMES (Nov. 21, 2018), <https://www.nytimes.com/2018/11/21/health/fgm-female-genital-mutilation-law.html>.

² Female Genital Mutilation Act, 18 U.S.C §§116 (2013) [hereinafter “FGM Act”]; Female Genital Mutilation is also known as Female Genital Cutting or Female Circumcision depending on the region.

³ Belluck, *supra* note 1.

⁴ *U.S. v. Nagarwala, et al.*, 350 F. Supp. 3d, 613, 615-16 (E.D. Mich. 2018).

⁵ *Id.* at 616.

⁶ *Id.* at 617-18.

⁷ *Nagarwala*, 350 F. Supp. 3d at 617-18.

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States the primary authority to define and enforce criminal law.⁸ At the time, Michigan did not have a state law criminalizing female genital mutilation.⁹ Thus, the court deemed the statute unconstitutional and six of the eight counts against Dr. Jumana Nagarwala and the other defendants were dismissed.¹⁰

Following decades of individual domestic efforts, FGM was brought to the international arena in 1997 when the World Health Organization (“WHO”), along with the United Nations Children’s Fund (“UNICEF”) and the United Nations Population Fund (“UNFPA”), released a joint statement (“1997 Joint Statement”) regarding FGM, in which they condemned the practice.¹¹ Since then, 44 countries have banned and criminalized the practice either in part or in its entirety.¹² Over time, many countries that have criminalized FGM have seen a decrease in the practice; however, many of these nations have had little success in prosecuting those that promote or perform the procedure. Then, in 2012, the General Assembly signed a resolution (“2012 GA Resolution”), co-sponsored by two-thirds of the Assembly, to ban FGM worldwide. The 2012 GA Resolution condemned the practice and encouraged all signatories to continue the fight against FGM.¹³ Both the 1997 WHO Statement and 2012 GA Resolution, along with other UN initiatives, have referenced conventions such as the ICCPR, the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Convention on the Rights of the Child, to name a few.¹⁴

Since the 1997 Joint Statement and the 2012 GA Resolution, various UN organizations, NGOs, and NPOs have released reports and statements in an effort to eliminate the practice. Despite these efforts, treaties, and joint statements, there is no international *legal* framework in place, nor do enforceable conventions or resolutions specifically mention FGM as a practice. These initiatives have largely been focused on supporting the efforts of local governments.

This commentary will look at the strategies the international community has adopted in its attempts to combat FGM and how states have responded at the domestic level. More specifically, it will examine how the 2012 GA Resolution condemning the practice is insufficient to establish an effective adjudicative strategy in either regulating or eliminating the procedure. Further, this commentary will look to how domestic governments have responded to the international con-

⁸ *Id.* at 619.

⁹ Belluck, *supra* note 1.

¹⁰ *Id.*

¹¹ WORLD HEALTH ORGANIZATION (WHO), *Female Genital Mutilation: A Fact Sheet*, (Feb. 2012), www.who.int/news-room/fact-sheets/detail/female-genital-mutilation.

¹² *Id.*

¹³ UN General Assembly Adopts Worldwide Ban on Female Genital Mutilation, NO PEACE WITHOUT JUSTICE (Dec. 20, 2012), <http://www.npwj.org/FGM/UN-General-Assembly-Adopts-Worldwide-Ban-Female-Genital-Mutilation.html>.

¹⁴ WORLD HEALTH ORGANIZATION (WHO), U.N. POPULATION FUND (UNFPA), U.N. CHILDREN’S FUND (UNICEF), *Female Genital Mutilation: a joint WHO/UNICEF/UNFPA statement*, at 2, (1997) [hereinafter *joint statement*]; see also G.A. Res. 48/104, (I), Declaration on the Elimination of Violence Against Women (Dec. 20, 1993).

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demnation of FGM to determine whether a binding international response, such as a treaty, would be more effective in eliminating the practice at the domestic level. In making this determination, this commentary will look at regions and states that are regulating certain forms of FGM procedures and criminalizing others, as well as regions that have criminalized the entire FGM practice. It will then examine how criminalization has affected the prevalence of the practice and the success of the legal system in holding people accountable. Finally, this commentary will evaluate initiatives from outside organizations and communities—outside of regulations—and whether they have found any success.

Given the complexity of FGM within its cultural and religious framework, along with its prominence in matters relating to migration, this analysis will focus solely on international activity and domestic governmental responses to those activities. This commentary will not focus on FGM in relation to asylum and immigration cases, as these cases are within a larger immigration framework and are outside of the scope of this analysis. Further, the debate on FGM as a religious and cultural right, and whether or not it is “gender discrimination” or a human rights issue will not be analyzed. This comment is based on the UN, WHO, and other international organization’s classifications of FGM.

Background

Defining Female Genital Mutilation

Female Genital Mutilation (“FGM”) or Female Genital Cutting (“FGC”) encompasses all procedures that involve the partial or total removal of the external female genitalia or other injury to the female genital organs for non-medical purposes.¹⁵ The 1997 Joint Statement, released by WHO, UNICEF, and UNFPA, classified the various procedures, with some ambiguity, into four separate types: Type I- Clitoridectomy, Type II- Excision, Type III- Infibulation, and Type IV- any other harmful procedures to the external female genitalia for non-medical purposes.¹⁶ As the procedure moves from Type I to Type IV, the procedure becomes more and more invasive. The first three classifications range from only the partial or complete removal of the clitoris (Clitoridectomy) to the cutting and stitching of the labia minor and major (Infibulation).¹⁷ WHO currently estimates that Type I, Type II, and Type IV account for 90% of FGM cases, with 10% being Type III.¹⁸ Most FGM’s are performed by either local or traditional circumcisers.¹⁹ In very uncommon circumstances, FGM’s are performed by trained

¹⁵ WORLD HEALTH ORGANIZATION (WHO), *Sexual and Reproductive Health: Classification of female genital mutilation*, https://www.who.int/health-topics/female-genital-mutilation#tab=tab_1.

¹⁶ *Joint statement*, *supra* note 14 at 3.

¹⁷ *Female Genital Mutilation: A Fact Sheet*, *supra* note 11.

¹⁸ WORLD HEALTH ORGANIZATION, *Prevalence of female genital mutilation*, <https://www.who.int/reproductivehealth/topics/fgm/prevalence/en/>.

¹⁹ *Id.*

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medical professionals.²⁰ This procedure is typically performed on girls between birth and 16 years of age.²¹

As FGM removes or damages normal female tissue, it interferes with the “natural functions of girl’s and women’s bodies.”²² Serious health complications can arise from FGM, such as chronic pain and discomfort, infections, shock, excessive bleeding, and death.²³ The procedure is often performed without sterile instruments or anesthesia, and the use of un-hygienic salves and ointments increases the risk of health complications.²⁴ Type III Infibulation causes the most severe issues, such as serious complications during childbirth and even death in extreme cases. However, most forms of the procedure can result in, at minimum, “severe physical discomfort” or psychological trauma.²⁵

Prevalence Of Fgm

Although the exact number of cases is unknown, it is estimated that over 200 million girls and women in 30 countries have undergone some form of FGM/C with an estimated 3 million girls at risk of undergoing the procedure each year.²⁶ In UNICEF’s most recent report from 2016, of the 200 million women affected, it is estimated that 44 million are below the age of 15.²⁷ Within the 30 countries that have reported cases of FGM, most are located in Africa, the Middle East, and Asia, with more than half the cases presented originating from Egypt, Ethiopia, and Indonesia.²⁸ In a June 2018 independent report, approximately 87% of women between the ages of 15 and 49 have experienced some type of FGM procedure.²⁹ However, as migration from practicing countries continues, cases of FGM have also been found in the U.K., with 170,000 cases being reported, and the U.S. where 500,000 girls and women are living with the consequences of this procedure.³⁰

²⁰ *Id.*; see also Preeti Jha, *Southeast Asia’s Hidden Female Genital Mutilation Challenge*, THE DIPLOMAT (Aug. 21, 2019), <https://thediplomat.com/2019/08/southeast-asias-hidden-female-genital-mutilation-challenge/>.

²¹ *Female Genital Mutilation: A Fact Sheet*, *supra* note 11.

²² *Id.*

²³ *Id.*

²⁴ Sana Loue, *Sex, Sexuality, and Gender Issues in Immigration Law: Gender Related Issues*, 07-06 IMMIGBRIF 1 (2007) (citing Sandra D. Lane & Robert A. Rubenstein, *Judging the Other: Responding to Traditional Female Surgeries*, 26 HASTING CTR. REP. 31 (1996)).

²⁵ *Id.*

²⁶ UNICEF, *Female Genital Mutilation/Cutting: A Global Concern*, (2016), www.unicef.org/media/files/FGMC_2016_brochure_final_UNICEF_SPREAD.pdf.

²⁷ *Id.*

²⁸ *Id.*

²⁹ 28 Too Many: *The Law and FGM*, 2 THOMSON REUTERS FOUNDATION (June 2018), [hereinafter Egypt: *The Law and FGM*], (Data was collected by the Ministry of Health and Population of Egypt, along with El-Zanaty and Associates and ICF International in 2015).

³⁰ *Female Genital Mutilation/Cutting: A Global Concern*, *supra* note 26.

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One of the root causes for the persistence of this practice is its cultural and religious significance.³¹ In the Muslim community, FGM is frequently seen as a requirement of the Islamic faith.³² In countries such as Ethiopia, Indonesia, and Malaysia the practice is connected with religious teachings.³³ In regions within Africa and Asia, where FGM is attributed to cultural norms and cultural identity, FGM is seen as a sign that a woman is eligible for marriage.³⁴ Members of the woman's extended family typically make the decision for her to undergo an FGM procedure.³⁵ The practice can be attached to "coming-of-age" rituals or ceremonies welcoming girls into "women's secret society."³⁶ This makes it more desirable for girls to seek out the procedure or to accept when their families have made the decision for them.³⁷ Growing migration and displacement has also created an increase in the practice as FGM has been associated as an attempt to preserve ethnic identity, mark a distinction from others, or join the culture if they enter a practicing region.³⁸

Steps Taken By The International Community

In the mid-1990s, a series of international conferences were organized to address FGM and other violence against women, including the 1993 United Nations World Conference on Human Rights and the 1994 International Conference on Population and Development in Cairo.³⁹ In 1994, during its 48th session, the U.N. General Assembly signed a Declaration of the Elimination of Violence Against Women, where "violence against women" was defined as any form of gender-based violence that would result in psychological, physical, or sexual violence to women.⁴⁰ By establishing a universal definition and principle for what "violence against women" and "gender-based violence" is, the 2012 GA Resolution became a valuable tool to combat violence against women,⁴¹ as it declared that FGM is considered a form of violence against women.⁴²

³¹ WORLD HEALTH ORGANIZATION (WHO), *Eliminating Female Genital Mutilation: An Interagency Statement*, 5-6 (2008), https://apps.who.int/iris/bitstream/handle/10665/43839/9789241596442_eng.pdf;jsessionid=871C070FDBCF02BD0C4F52485EE1D236?sequence=1 [hereinafter *Eliminating Female Genital Mutilation*].

³² WHO, U.N. Population Fund, UNICEF, *Female Genital Mutilation: A Joint WHO/UNICEF/UNFPA Statement*, at 4, (1997).

³³ *Id.*

³⁴ Sana Loue, *Sex, Sexuality, and Gender Issues in Immigration Law: Gender Related Issues*, 07-06 IMMIGBRIF 1 (2007).

³⁵ *Eliminating Female Genital Mutilation*, *supra* note 31.

³⁶ *Id.* at 5-6.

³⁷ *Id.* at 9.

³⁸ *Id.* at 7.

³⁹ ONTARIO HUMAN RIGHTS COMM'N, FGM: AN INTERNATIONALLY RECOGNIZED HUMAN RIGHTS ISSUE, [hereinafter ONTARIO HUMAN RIGHTS COMM'N], <http://www.ohrc.on.ca/en/policy-female-genital-mutilation-fgm/3-fgm-internationally-recognized-human-rights-issue>.

⁴⁰ G.A. Res. 48/104, (I), Declaration on the Elimination of Violence Against Women (Feb. 23, 1994).

⁴¹ *Id.*; G.A. Res. 67/146, Intensification of efforts to eliminate all forms of violence against women, 146 (Dec. 20, 2012).

⁴² *Id.* at 2.

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In 1997, WHO along with UNFPA and UNICEF released the 1997 Joint Statement declaring FGM a violation of several basic and well-established human rights, including the right to the integrity of the person and the “highest attainable level of physical and mental health.”⁴³ Since 1997, FGM in any form has been regarded by the international community as a harmful practice and a violation of several human rights including gender discrimination and children’s rights violations.⁴⁴ The 1997 Joint Statement took a “zero tolerance” stance condemning the practice, citing international human rights covenants and UN members’ obligations to “respect and ensure the protection and promotion of human rights, including the rights to non-discrimination, to the integrity of the person and to the highest attainable standard of physical and mental health.”⁴⁵ The 1997 Joint Statement, when condemning the practice, cited several international treaties that most member-states had signed such as the *Universal Declaration of Human Rights* (“UDHR”) in 1948, the *International Covenants on Civil and Political Rights* (“ICCPR”) in 1966, the *Convention on the Elimination of All Forms of Discrimination against Women* in 1979, the 1993 *Vienna Declaration*.⁴⁶

In 2008, WHO released another statement, again condemning the practice and declaring FGM a human rights violation.⁴⁷ In the newest statement, along with the already recognized international treaties, WHO also recognized regional treaties such as the *African Charter on Human Rights and Peoples’ Rights and its Protocol on the Rights of Women in Africa* and the *European Convention for the Protection of Human Rights and Fundamental Freedoms*.⁴⁸ Many of the committees that have been formed within the UN also cite these international and regional treaties whenever releasing their reports or recommendations.⁴⁹ The 2008 statement, unlike its predecessor, discussed, at length different options available to local governments and organizations in the hopes of eliminating FGM.⁵⁰ Although initiatives, such as community-led education and empowerment education programs, and coordinated media, justice, and financial attention, are crucial in stopping these practices these must also be a connection to more robust legislation and criminalization of the practice.⁵¹

Discussion

As FGM gains more international attention, more countries have responded to these concerns through various domestic policies seeking to either eliminate or regulate the practice. Further, non-profits and NGOs that have been working in

⁴³ *Joint statement, supra* note 14, at 2.

⁴⁴ WORLD HEALTH ORGANIZATION (WHO), *supra* note 31, at 8.

⁴⁵ *joint statement, supra* note 14.

⁴⁶ *Id.* at 10-12.

⁴⁷ WORLD HEALTH ORGANIZATION (WHO), *supra* note 31, at 8.

⁴⁸ *Id.*

⁴⁹ *Id.* (UN committees include: The Committee on the Elimination of All Forms of Discrimination against Women, the Committee on the Rights of the Child and the Human Rights Committee).

⁵⁰ *Id.* at 13.

⁵¹ *Id.* at 13-14.

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countries where FGM is most prevalent, have seen more support and resources in large part to this attention.

Relevant International Covenants, Resolutions, And Treaties

As previously stated, many countries and international organizations have cited various covenants and resolutions as the basis for most of the arguments against FGM and the push for its elimination worldwide. The original covenants that many countries, including Egypt, the U.K., and the U.S., have cited include the *Universal Declaration of Human Rights* ("UDHR") as well as the ICCPR.⁵² Although neither covenant expressly mentions FGM, other international entities refer to these Covenants when addressing FGM within the international legal framework. For example, Articles 1 and 3 of the UDHR, along with Article 9 of the ICCPR, refer to the idea of the "right to life, liberty, and security of a person".⁵³ In addition, because FGM is statistically most likely to occur in women under the age of 18, many also refer to the *Covenant on the Rights of Children* ("CRC"), which places the responsibility on protecting the rights of children ultimately on the government.⁵⁴

In 2012, during its 67th Session, the General Assembly signed the resolution intensifying global efforts for the elimination of female genital mutilations.⁵⁵ The 2012 GA Resolution built upon the previous decades of treaties, covenants, regional consensuses, and research.⁵⁶ It concluded that FGM is "a harmful practice that constitutes a serious threat to the health of women and girls, including their psychological, sexual and reproductive health."⁵⁷ It further recognized the discriminatory nature of the practice and encouraged member-states to honor their obligations under the CRC, the *Convention on the Elimination of All Forms of Discrimination against Women*, and the *Declaration on the Elimination of Violence Against Women* by enacting legislation banning all forms of FGM establish programs raising awareness of FGM, and allocate resources to protect all women from FGM.⁵⁸ The 2012 GA Resolution was also the first recognition by the UN General Assembly of the worldwide goal to eliminate FGM and has been used by

⁵² *Sources of International Human Rights Law on Female Genital Mutilation*, U.N WOMEN VIRTUAL KNOWLEDGE CENTRE TO END VIOLENCE AGAINST WOMEN AND GIRLS (Feb. 25, 2011), <https://www.endvawnow.org/en/articles/645-sources-of-international-human-rights-law-on-female-genital-mutilation.html>, (citing U.N. Human Rights, *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW), U.N.H.R. art. 1, Sept. 3, 1981).

⁵³ G.A. Res. 217 (III), 1 & 3, *Universal Declaration of Human Rights* (Dec. 10, 1948); see also G.A. Res. *Convention on the Rights of the Child* (Nov. 20, 1989).

⁵⁴ G.A. Res. 44/25, *Convention on the Rights of the Child* (Nov. 20, 1989).

⁵⁵ G.A. Res. 67/146, at 2 (Dec. 20, 2012).

⁵⁶ *Id.*

⁵⁷ *Id.* at 2.

⁵⁸ *Id.*

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other non-governmental organizations and local governments in their campaigns to enact and enforce national legislation against FGM.⁵⁹

Domestic Criminalization of FGM

Prior to FGM gaining international attention, several countries in which a large percentage of their female population had undergone the procedure had already criminalized it in some form or the entire practice. In 1946, Sudan became the first African nation to criminalize FGM.⁶⁰ In Burkina-Faso and Egypt, ministers of health signed resolutions in 1959 that recommended restrictions that would permit only partial clitoridectomies and suggested that these procedures should only be performed by medical professionals.⁶¹ In 1978, Somalia also agreed to establish a commission to abolish infibulation.⁶² NGOs, advocates, and the international community regarded many of these initial steps as relatively ineffective and as a result, largely ignored them.⁶³ With the advent of Sharia Law in 1986, Sudan even removed its law prohibiting infibulation.⁶⁴

In response to recent attention on FGM, several countries have enacted more comprehensive legislation, begun enforcing existing legislation, and created educational programs.⁶⁵ The U.S., with over 500,000 girls having undergone or at risk of FGM, enacted the FGM Statute in 1996 and criminalized the practice unless deemed medically necessary.⁶⁶ The FGM Statute states that cultural or religious practices are not considered "medically necessary."⁶⁷ Aside from the Statute, only 35 states have implemented their own varying laws criminalizing FGM, with 11 of those states enacting legislation in 2019.⁶⁸

One of the major concerns in the U.S.'s efforts to eliminate the practice came in the case of *U.S. v. Nagarwala*, where Dr. Jumana Nagarwala, Dr. Fakhruddin Attar, Farida Attar, and Tahera Shafiq, along with the mothers of the minors who underwent the procedure, were charged with conspiracy to commit FGM, aiding and abetting, and five counts of committing, FGM.⁶⁹ The defendants had claimed that the FGM Statute was unconstitutional, as Congress lacked the authority to

⁵⁹ *UN General Assembly Adopts Worldwide Ban on Female Genital Mutilation*, NO PEACE WITHOUT JUSTICE, (Dec. 20, 2012), <http://www.npwj.org/FGM/UN-General-Assembly-Adopts-Worldwide-Ban-Female-Genital-Mutilation.html>.

⁶⁰ ONTARIO HUMAN RIGHTS COMM'N, *supra* note 39.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *28 Too Many*, SUDAN: THE LAW AND FGM 9 (2018).

⁶⁵ U.N. CHILDREN'S FUND, *FEMALE GENITAL MUTILATION/CUTTING: A STATISTICAL OVERVIEW AND EXPLORATION OF THE DYNAMICS OF CHANGE* 8 (2013).

⁶⁶ Female Genital Mutilation Act, 18 U.S.C §116 (2011).

⁶⁷ *Id.*

⁶⁸ AMANDA PARKER & GEORGE ZARUBIN, AHA FOUNDATION, *WHY WE HESITATE TO PROTECT GIRLS FROM FGM IN THE UNITED STATES* 8 (2019), https://www.theahafoundation.org/wp-content/uploads/2019/09/MEDIA-REPORT_RGB_REVISED9.11.19.pdf.

⁶⁹ *U.S. v. Nagarwala*, 350 F. Supp. 3d 613, 616 (E.D. Mich. 2018).

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impose restrictions on FGM to all states.⁷⁰ The government argued that their authority came from the Necessary and Proper Clause, which permits Congress to impose restrictions to be in compliance with the U.S.'s obligations under the ICCPR.⁷¹ The Court agreed with the defendants and concluded that the connections drawn by the government between the FGM Statute and the ICCPR were too attenuated.⁷² As Michigan was one of the states that had previously relied on the federal statutes, the majority of the charges brought against the doctors and parents of the victims were dismissed.⁷³ Following the court's decision, the Department of Justice decided not to pursue an appeal citing federalism issues and urged Congress to introduce new legislation instead.⁷⁴ Because not all states have specific FGM legislation, those states that would have depended on the FGM statute would likely face similar constitutional challenges.

Like the disparate legislation and prosecution within the U.S., states that are party to the European Union ("EU") face similar issues. The EU has established several commissions focused on the elimination of FGM, along with providing support to non-governmental organizations that combat FGM.⁷⁵ Each country, however, is responsible for establishing its own anti-FGM strategies. For example, in the United Kingdom ("U.K."), the Prohibition of Female Circumcision Act of 1985 criminalized FGM.⁷⁶ The law was then replaced by the Female Genital Mutilation Act of 2003, which provides that any person who seeks or performs FGM in the U.K. or on a U.K. national outside of the U.K. will face penalties of up to 14 years.⁷⁷

Although anti-FGM legislation has been well-established in the U.K., there have only been three reported charges brought under either act, as well as another case in which charges were brought under child cruelty laws.⁷⁸ Of those cases, the U.K. saw its first conviction in February 2019, where a 37-year old mother was charged under the FGM Act.⁷⁹ No other U.K. cases resulted in convictions.⁸⁰

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* at 618-19.

⁷³ *Id.*

⁷⁴ Parker & Zarubin, *supra* note 68.

⁷⁵ European Commission, *Eliminating female genital mutilation*, https://ec.europa.eu/info/policies/justice-and-fundamental-rights/gender-equality/gender-based-violence/eliminating-female-genital-mutilation_en.

⁷⁶ Prohibition of Female Circumcision Act, 1985 c. 38, § 1.

⁷⁷ Female Genital Mutilation Act 2003, 2003 c. 31, § 1. (UK territory did not include Scotland, which enacted the Female Genital Mutilation Act 2005 with much of the same language as the UK version.)

⁷⁸ Emma Batha, *London Lawyer Cleared of Forcing Daughter to Undergo FGM*, EACH OTHER (Mar. 16, 2018), <https://eachother.org.uk/london-lawyer-cleared-forcing-daughter-undergo-fgm/>.

⁷⁹ *FGM: Mother guilty of genital mutilation of daughter*, BRITISH BROADCASTING CORPORATION (Feb. 1, 2019), <https://www.bbc.com/news/uk-england-47094707>.

⁸⁰ *Id.*; see also *R v. A2*, [2015] NSWSC 1221 (2015). (In the first case in 2015, a doctor was acquitted of charges that he had performed FGM while treating a woman who had given birth, the second case was in 2018 where a lawyer from London was accused of having forced his daughter to undergo FGM was also acquitted).

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The lack of prosecution of FGM cases in the U.K. generally results from a lack of evidence.⁸¹ Under the Children Act of 1989, genital examinations are only permitted once a “care order” has been issued; however “care orders” require suspicion of abuse, which could be difficult to detect in cases of FGM without a physical examination.⁸²

Meanwhile, France has had 29 FGM-related trials and 100 convictions as of 2013 without any FGM statutes.⁸³ Unlike the U.K. and the U.S., France does not specifically penalize FGM, but the practice is actionable under their penal code for violence against children.⁸⁴ France largely attributes their steady conviction rate to the “non-invasive genital health check” that all children, between the ages of zero and six must undergo.⁸⁵

Egypt is considered a high-risk region for FGM, where recent surveys conducted by the Ministry of Health have concluded that FGM is prevalent in approximately 87% of all women between the ages of 15 and 49.⁸⁶ This statistic becomes much higher in rural Egypt.⁸⁷ Despite the prevalence of FGM, Egypt attempted to regulate the practice as early as 1959 and criminalized FGM in 2008.⁸⁸ Under Egyptian national law, any person requesting or seeking any act of FGM without medical justification is subject to penalties, such as fines and imprisonment of up to 15 years.⁸⁹ Their national law also criminalizes “cross-border” FGM and requires health practitioners to report injuries or suspicions.⁹⁰

The two most high-profile FGM cases in Egypt came in 2015 and 2017. In the first case, Dr. Raslan Fadl, the doctor who performed the FGM procedure, and the victim’s father were convicted under FGM laws after the victim died from an allergic reaction during the procedure.⁹¹ The prosecution and conviction were the first in Egypt since it criminalized FGM in 2008.⁹² In the nation’s second case, four people, including both of the victim’s parents, were found guilty of violating

⁸¹ John Lichfield, *The French Way: a Better Approach to Fighting FGM?*, INDEPENDENT (Dec. 15, 2013), www.independent.co.uk/news/world/europe/the-french-way-a-better-approach-to-fighting-fgm-9006369.html.

⁸² Children Act 1989, 1989 c. 41 § 31.

⁸³ Lichfield, *supra* note 81.

⁸⁴ *R v. A2*, [2015] NSWSC at 188.

⁸⁵ Abby Selden, *Compulsory health checks, female genital mutilation and rights balancing at the European Court of Human Rights*, 5 E.H.R.L.R. 480, 481 (2017); *see also* Lichfield, *supra* note 81.

⁸⁶ Egypt: *The Law and FGM*, *supra* note 29, at 1.

⁸⁷ *Id.*

⁸⁸ *Id.* at 3 (Article 242-bis and Article 242-bis(A) of Law no. 58 of 1937 were used to amend the Law No. 78 of the Penal Code).

⁸⁹ *Id.* at 3-5.

⁹⁰ *Id.* at 4.

⁹¹ ASWAT MASRIYA, *Court Sentence Doctor to 2 Years Hard Labour for FGM Charges* (Jan. 26, 2015), <http://en.aswatmasriya.com/news/details/6258>.

⁹² *Id.* (Dr. Fadl also faced manslaughter charges and was sentenced to two-years of hard labor, his clinic was closed for a year, and he was subject to fines; he did not lose his medical license; victim’s father faced a three-month suspended sentence).

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FGM laws and were given suspended sentences in 2017.⁹³ The most recent report in Egypt found that only two cases of FGM were brought to court and six convictions were made in 2016.⁹⁴

When analyzing each state's domestic laws, many NGO's and other non-profit organizations repeatedly cite to each nation's international obligations, most of which have signed the Covenants and Treaties mentioned earlier; however, there are still a number of countries that, although they are signatories to covenants and multilateral treaties, have failed to enact legislation that reflects the international community's aggressive stance against FGM.⁹⁵ Even more concerning are the statistics regarding the low levels of prosecution and conviction in countries that have enacted anti-FGM legislation.

Analysis

While there has been a steady decline in the number of women undergoing any form of FGM, the practice is still very common in many regions due to the lack of resources necessary for enforcement, insufficient national legislation, and non-binding international agreements expressly targeting FGM.

Enactment And Enforcement Of FGM Legislation

Prosecution and enforcement under FGM statutes have posed a challenge to most states across the globe. Many of the issues generally stem from either a state's inability to enforce its current FGM statutes or the insufficiency of the legislation.

Egypt's FGM legislation was incorporated into its Penal Code as an amendment to the Child Act of 1996.⁹⁶ Under Article 242-*bis*, the performance of FGM or seeking FGM are criminal offenses punishable with imprisonment between five and seven years.⁹⁷ If the procedure results in death or permanent disability, the imprisonment increases to between five and fifteen years.⁹⁸ The Child Act No.12 of 1996 prohibits FGM on minors, and Article 7-*bis* and 7-*bis*(a) speaks to the right of children to healthy and clean environments, as well as prohibits exposure to harmful practices that are considered illegitimate.⁹⁹ However, this legislation fails to address punishment for aiding and abetting the practice or create a cause of action for medical malpractice for FGM performed by medical professionals.¹⁰⁰

⁹³ Grace Shutti, *Egyptian judge gives four people suspended sentences over FGM death*, THE GUARDIAN (Jan. 2016), www.theguardian.com/world/2017/jan/18/egyptian-judge-gives-four-people-suspended-sentences-over-fgm-death.

⁹⁴ UNFPA–UNICEF, *2016 Annual Report of the UNFPA–UNICEF Joint Programme on Female Genital Mutilation/Cutting: Accelerating Change by the Numbers*, at 30 (July 2017).

⁹⁵ *Sudan: The Law and FGM*, *supra* note 64, at 7.7.

⁹⁶ *Egypt: The Law and FGM*, *supra* note 29, at 3.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 9.

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Following the *Nagarwala* case, both the House of Representatives and the Senate in the 116th Congressional Session introduced bills seeking to amend the previous FGM statute.¹⁰¹ The amendments to the FGM statute, although constitutional, would limit the scope of the law to only FGM cases involving interstate commerce.¹⁰² Both bills were introduced in the summer of 2019 and are still in their committees with no further recorded action since mid-July 2019,¹⁰³ leaving a major hole in FGM legislation. In response to the Court's holding in the *Nagarwala* case, Michigan has enacted comprehensive legislation, making FGM a felony punishable by up to 15 years, along with revoking the medical licenses of any defendants involved and allowing defendants to be punished for multiple felonies.¹⁰⁴ Other states have also amended their FGM laws to include mandatory state reports on FGM by practitioners.¹⁰⁵ Furthermore, many states have added additional language to their statutes, including prosecuting parents/guardians, revoking medical licenses, and providing cultural defense provisions.¹⁰⁶ There are, however, still 15 states that have no anti-FGM legislation,¹⁰⁷ and even states with such legislation, have disparate penalties and scopes.¹⁰⁸

Medicalization and Regulation of FGM

One of the growing concerns within the international community is the medicalization of FGM.¹⁰⁹ Outside of countries that are attempting to adhere to the hardline stance established by the international community, there has been a shift from traditional methods of FGM to FGM being performed by health professionals.¹¹⁰ Individuals in countries such as Ethiopia and Egypt, take advantage of gaps within current FGM laws that fail to address the practice of FGM by health professionals.¹¹¹

Other countries, such as Malaysia, have used medicalization as a form of regulating FGM, as opposed to criminalizing the practice.¹¹² The medicalization of FGM as a form of regulation has become a growing concern for those seeking its criminalization.¹¹³ As opposed to eradicating the practice, current FGM legislation simply created a shift from traditional practitioners to health professionals

¹⁰¹ H.R. 3583, 16th Cong. §§ 1-3 (2019); S. 2017, 16th Cong. (2019).

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ MICH. COMP. LAWS ANN. § 750.136 (Westlaw through P.A. 2020, No. 375).

¹⁰⁵ Parker & Zarubin, *supra* note 68, at 7-9.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ G.A. Res. 67/146, *supra* note 55, ¶ 1.

¹¹⁰ Egypt: *The Law and FGM*, *supra* note 29, at 3; *see also Sudan: The Law and FGM*, *supra* note 64, at 9.

¹¹¹ Egypt: *The Law and FGM*, *supra* note 29.

¹¹² *Id.*

¹¹³ *Id.*

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such as doctors, nurses, and trained midwives.¹¹⁴ In Egypt, approximately 74% of women in rural areas reported that FGM incidents were medicalized.¹¹⁵ Similarly, in Sudan, 77.9% of women in urban areas and 56.7% of women in rural areas had a medicalized form of FGM.¹¹⁶ Although the 2012 GA Resolution by the UN General Assembly states that the medicalization of FGM is a violation of basic human rights, Egypt has yet to provide legislation or amend current policies to sufficiently address this practice.¹¹⁷ One of the key concerns regarding the medicalization of the practice is that it only helps to address the medical concerns without addressing the social norms and “self-enforcing belief” associated with FGM.¹¹⁸

The Child Act has defined FGM as any unnecessary removal of external female genital organs without medical justification. However, the Child Act failed to define what would constitute medical justifications.¹¹⁹ Further, Egyptian law does not address medical malpractice or FGM performed by health professionals at either public or private hospitals, clinics, or private residences.¹²⁰

There have been several Ministerial Resolutions by Egypt's Ministry of Health and Population (“MOHP”) requiring physicians to notify authorities of any injuries and accidents that are “criminally suspicious,” including suspected FGM, and prohibiting health professionals from performing FGM either in hospitals or any other location.¹²¹ Although these Ministerial Resolutions are very persuasive, they do not have enforcement power as they are not considered legislation and have not been added to the Penal Code.¹²² According to a recent analysis of Egyptian FGM law, the current laws have not been adequately implemented or enforced as evidenced by the low conviction rate and lenient sentences for those convicted.¹²³ The 2015 FGM case serves as an example of this. As referenced earlier, Dr. Fadl was convicted of involuntary manslaughter when he performed an FGM procedure on 13-year old Sohair al-Bata'a that resulted in her death.¹²⁴

¹¹⁴ *Id.*; see also Sudan: *The Law and FGM*, *supra* note 64, at 10.

¹¹⁵ *Egypt: The Law and FGM*, *supra* note 29, at 3.

¹¹⁶ *Sudan: The Law and FGM*, *supra* note 64, at 10.

¹¹⁷ G.A. Res. 67/146, *supra* note 55.

¹¹⁸ *Id.*; see also Gerry Mackie & John LeJeune, *Social Dynamics of Abandonment of Harmful Practices: A New Look at the Theory*, Innocenti Working Paper No. 2009-06, 14 (2009). Social norm is defined as “a social rule of behavior that members of a community follow in the belief that others expect them to follow suit. Compliance with a social rule is motivated by expectations of social rewards for adherence to the rule and social sanctions for non-adherence.”)

¹¹⁹ *Egypt: The Law and FGM*, *supra* note 29, at 3-4.

¹²⁰ *Id.* at 9.

¹²¹ *Id.* at 4.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ Ruth Michaelson, *First Doctor Convicted of FGM Death in Egypt only Spent Three Months in Jail*, THE GUARDIAN (Aug. 2, 2016), <https://www.theguardian.com/world/2016/aug/02/egyptian-doctor-convicted-of-fgm-death-serves-three-months-in-jail>.

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Dr. Fadl was sentenced to two years and three months in prison. However, he only served three months of that sentence.¹²⁵

Proposal

As it stands, the international community's lack of clear codification to criminalize any form of FGM has created disparate practices with mixed results and only slowly reduced FGM rates. The General Assembly resolution, along with attempting to link FGM to already standing Conventions, has not created a binding international obligation, and national legislation alone is ineffective in promoting the abandonment of FGM.¹²⁶ This section will propose that a more binding international obligation, such as a convention, should be created. This binding agreement would detail and codify the expectation for member-states, specify the commitment that the signing parties are making, and create international cooperation to share resources to enact effective new national legislation, strengthen FGM legal framework, and promote the enforcement of those laws. Along with the creation of a convention, non-profit and non-governmental community-based programs that focus on the social dynamic of FGM should continue to be emphasized and utilized as a re-education tool.

Enacting a Binding International Obligation

Although there have been many covenants and treaties that have indirectly addressed FGM, there has not been a codification of the international community's obligation to the abandonment of FGM, and this has created a breakdown within states on proper legislation and enforcement. The UN General Assembly Resolution that explicitly addresses FGM addressed the most important concerns and strategies necessary to combat FGM. However, it is not a binding obligation and therefore, creates room for countries to implement some or none of the 2012 GA Resolution. Without a treaty obligation, countries such as the U.S. have encountered difficulties enacting national legislation,¹²⁷ countries such as Sudan can remove their FGM legislation without breaching their international obligations, and several countries can enact ineffective and insufficient FGM legislation.¹²⁸ Creating a covenant or convention based on the same language of the General Assembly Resolution would create the obligation based on existing agreed-upon principles.

Changing Customary Rules of Behavior

In conjunction with establishing a binding international obligation, there must be more work within practicing communities to alter the social and cultural

¹²⁵ *Id.*

¹²⁶ G.A. Res. 67/146, *supra* note 55.

¹²⁷ Nagarwala, 350 F. Supp. 3d at 613.

¹²⁸ U.N. Children's Fund (UNICEF) Innocenti Research Centre, *The Dynamics of Social Change Towards the Abandonment of Female Genital Mutilation/Cutting in Five African Countries*, 41 (October 2010) [hereinafter *Dynamics of Social Change*].

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norms surrounding the practice. Community-based programs have made great strides by creating targeted approaches based on the norms and culture of each community.¹²⁹ The general goal, however, would be to use these programs to introduce an alternative form of thinking that breaks down these societal norms.¹³⁰ As mentioned earlier, FGM can be deeply ingrained into the traditions, customs, and religious beliefs within those communities that still perform FGM. Therefore, to properly combat FGM there must be re-education programs spearheaded by members of the community to help the community understand the inhumane and discriminatory nature of the practice.

Alternatively, education programs that are directly connected with community members through their local values and daily lives have seen great success in impacting the traditional societal beliefs regarding FGM.¹³¹ For example, in communities that attach FGM to rites of passage, religion, or marriageability, families believe in the moral norm, “do what is best for your child,” which means believing that forcing or encouraging the procedure is what is best for their child.¹³² These education and community-based programs would work within the community to change the social or religious context of FGM, which in turn shifts the moral norm “do what is best for your child” to cause families to abandon the practice.¹³³

Examples of community-based programs that have seen positive results are NGOs like Kembatti-Metti-Gezemma (“KMG”) and Rohi-Weddu in Ethiopia that work with local communities to encourage education and community dialogues regarding FGM.¹³⁴ For the successful abandonment of this practice, the communities need to be aware and trust the intentions of those around them.¹³⁵ Rohi-Weddu focused its intervention efforts in the Gewane District, targeting seven villages for a four-month period.¹³⁶ Their methods included frequent community dialogues with clan members, elders, and religious leaders serving as facilitators, as well as screening films in the Afari language, where they highlighted the risks associated with the practice.¹³⁷ These discussions with community members removed the stigma of discussing FGM outside of the home and introduced alternative practices that were not FGM.¹³⁸ At the end of the four-month period, six of the seven villages created a “collective agreement” to stop FGM practices within

¹²⁹ *Id.* at 8.

¹³⁰ *Id.*

¹³¹ *Id.* at 47.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *The Girl Who Convinced the Maasai to Stop FGM*, BBC NEWS (Mar. 12, 2018), <https://www.bbc.com/news/av/world-africa-43349594/the-girl-who-convinced-the-maasai-to-stop-fgm>.

¹³⁵ *Dynamics of Social Change*, *supra* note 128, at 8.

¹³⁶ *Id.* at 27.

¹³⁷ *Id.* at 27-29. (Afari language is the language of the Gewane District in Ethiopia).

¹³⁸ *Id.* at 29.

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their villages.¹³⁹ The agreement was then sealed with religious leaders performing a special prayer to bind the communities' decision.¹⁴⁰

Similar to Rohi-Weddu, KMG focused on the Kembatta Tembaro Zone, starting as early as 1999.¹⁴¹ The KMG focused on education creating "school-based adolescent reproductive health programmes" and awareness activities and celebrations for girls who had not undergone FGM.¹⁴² By engaging with the female and adolescent community, they were able to introduce an incentive for an alternative to FGM and break the social norms attached with the practice.¹⁴³

Conclusion

FGM is regarded by the international community as a human rights violation because the practice is associated with severe emotional and physical health risks and women's inequality.¹⁴⁴ The international community has taken great strides in its campaign to eliminate the practice. Ultimately, FGM is slowly declining in many regions, and the number of those that have died or contracted infections and/or disease from the practice has substantially decreased.¹⁴⁵ To create an even more effective international strategy to combat this practice, a binding international obligation should be created. Along with the codification of the laws of FGM, organizations such as UNICEF and UNFPA and more regionally-based organizations should continue re-education strategies to combat the customary rules and behaviors that are entrenched in the very practice of FGM. Without creating a standard that both criminalizes the practice, and also provides the resources to explain to communities why FGM is a violation of so many basic human rights, it will never be eliminated.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.* at 30.

¹⁴⁴ U.N. Population Fund (UNFPA) - U.N. Children's Fund (UNICEF) Joint Programme, *Female Genital Mutilation/Cutting: Accelerating Change Summary Report of Phase 1*, 1, (2014).

¹⁴⁵ *Id.*

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