

## The history and role of the criminal law in anti-FGM campaigns: Is the criminal law what is needed, at least in countries like Great Britain?

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**Abstract:** *The history of campaigns against female genital mutilation (FGM) began in the 1920s. From the beginning, it was recognised that FGM was considered an important rite of passage between childhood and adulthood for girls, based on the importance of controlling female sexuality to maintain chastity and family honour, and to make girls marriageable. How to separate the “cut” from these deeply held norms is a question not yet adequately answered, yet I believe the answer is key to stopping the practice. Since the 1994 ICPD, national and international action against FGM has grown and resolutions have been passed in global forums which define FGM as a form of violence and a violation of children’s human rights. These resolutions have contributed to building consensus against FGM and developing national legislation criminalising FGM. Prosecutions or arrests involving FGM have been reported in several African countries and Great Britain, but apart from France, there have been very few. This paper summarises this history and how FGM has been criminalised. It argues that criminalisation may not be the best means of stopping FGM, but can have serious harmful effects itself. It calls for community-led educational information and more support for dialogue within FGM-practising communities, and argues that what is important is addressing the sexual and reproductive health consequences of FGM and gaining the understanding of women who have experienced it and their families as to why they should not make their daughters and grand-daughters go through it too. © 2015 Reproductive Health Matters. Published by Elsevier BV. All rights reserved.*

**Keywords:** female genital mutilation, criminalisation, social norms, female sexuality, sexual and reproductive health, Africa, Europe

The history of campaigns against female genital mutilation (FGM), according to a comprehensive UNICEF report published in 2013,<sup>1</sup> began in the 1920s in Egypt, when the Egyptian Society of Physicians issued a proclamation outlining the negative health effects of FGM\* and received support from the Ministry of Health, the press and religious scholars.

In Kenya, a campaign in 1929–1932 against FGM was initiated by the Church of Scotland. It was met by resistance from the Kikuyu, who practised FGM, and became a focal point of the independence movement against British colonial rule.<sup>2</sup> The Kikuyu regarded FGM as an important rite of passage between childhood and adulthood. Without it, women were outcasts, and abandoning

the practice was unthinkable. Jomo Kenyatta, who became Kenya's first prime minister in 1963, wrote in 1930:

*“The real argument lies not in the defense of the general surgical operation or its details, but in the understanding of a very important fact in the tribal psychology of the Kikuyu – namely, that this operation is still regarded as the essence of an institution which has enormous educational, social, moral and religious implications, quite apart from the operation itself. For the present it is impossible for a member of the tribe to imagine an initiation without clitoridectomy. Therefore the ... abolition of the surgical element in this custom means ... the abolition of the whole institution”.*<sup>2</sup>

How to separate the two is a question not yet adequately answered, yet I believe the answer is the key to stopping the practice.

In Kenya, over the years up to 1956, the British colonial government enacted legislation seeking to

\*The World Health Organization uses the term female genital mutilation (FGM), therefore I do too. Others use female genital cutting (FGC) or put them together (FGM/C).

lessen the effects of the practice, and Parliament held an enquiry on it in 1945. However, due to continued opposition in Kenya, it later revoked all resolutions related to FGM.<sup>1</sup>

In the 1970s, NGOs and women's associations in Africa began to bring the issue to public attention as part of movements to improve women's status, e.g. in Senegal.<sup>1</sup> Another example is the first International Women's Day in Burkina Faso in 1975, when information about the harmful effects of FGM appeared in the popular media for the first time.<sup>1</sup>

The issue received international attention with the publication in the USA of the Hosken Report: Genital and Sexual Mutilation of Females by Fran P Hosken in 1981.<sup>3</sup> At a WHO Seminar on Traditional Practices Affecting the Health of Women and Children in Khartoum (1979), the nine African and Middle Eastern countries that participated formulated ground-breaking recommendations for abolishing FGM, urging that health education and health training programmes should be organised. Fran Hosken had been a temporary advisor on FGM to the WHO Seminar,<sup>4</sup> and she went on to publish an influential but controversial newsletter against the practice for many years.

In 1984, a National Committee for the Abandonment of Harmful Practices Affecting Women and Children was established in Senegal. Also in 1984, at a follow-up conference to the 1979 WHO Seminar in Dakar, a group of African NGOs formed the Inter-African Committee on Traditional Practices Affecting the Health of Women and Children (IAC). Since 1984, IAC national committees have been formed in 28 African countries and affiliates established in 15 countries outside of Africa. The other important global network against FGM in the 1980s and 90s, with a strong feminist perspective, was Rainbo, initiated by Nahid Toubia.<sup>4</sup> Another influential organisation was FORWARD, led by Efua Dorkenoo, a Ghanaian-British campaigner against FGM for 30 years. In 2014, the Girl Generation project was launched by a coalition of African anti-FGM groups, funded by the UK Department for International Development with a remit to reduce FGM by 30% over five years in at least 10 African countries with high FGM prevalence.<sup>†</sup>

<sup>†</sup>Announced by Lynn Featherstone MP, then UK Minister at the Department for International Development, February 2014.

### ***What does FGM mean today in the cultures that practise it?***

As Rainbo's website explains, FGM is still central to the status of women and the normative meaning of being a woman in the cultures that practise it:

*"FGM is based on social, religious and psychosexual beliefs which mainly include the maintenance of chastity to maintain family honor by having control over a woman's sexuality. Community leaders who promote FGM say that it is necessary for hygiene to prevent bad odor and that it's a religious requirement for women to be spiritually clean. Female Genital Mutilation is being supported and sustained as a community enforcement mechanism in ways such as public recognition, through songs and poems celebrating this type of circumcision, while ridiculing the uncircumcised. Although no recorded religious text requires that a woman undergo FGM many men refuse to marry an uncircumcised woman because they fear God's punishment. The custom is found in many religions but has gotten the most attention from its practice within Islam. It's believed by many Muslims in North African countries such as Egypt that all women should be circumcised just like men, because it makes the woman smart and calm."*<sup>5</sup>

This is a huge burden of social and cultural meaning, with the potential for serious medical and psychological consequences. While moving from Africa to Europe may not completely change these views, it is generally thought that prevalence is lower in communities from practising countries who live in Europe, especially among younger girls,<sup>1</sup> in spite of ambivalence about giving it up due to it being a "symbol of the country of origin".<sup>6</sup> The fact is, nonetheless, that giving up FGM has a social cost:

*"If you asked African-born women in Britain, including those who themselves have experienced FGM, whether they would allow their daughters to go through the same thing, some would say yes. Why? It isn't because they don't love their daughters or because they are dumb, but rather because ignoring tradition brings a high social cost for some communities."*<sup>7</sup>

The link with being marriageable is a crucial element. FGM is a precondition for marriage in many parts of Africa, including arranged and child marriages. According to a number of the African NGO representatives at the August 2013 DFID

workshop in London on FGM, which led to the Girl Generation project, substantial change can only take place when marriage and FGM are de-linked. This was also emphasised in a March 2015 BBC TV documentary, “Stop Cutting Our Girls”.<sup>8</sup>

Opposition to FGM has existed for almost 100 years before FGM becomes history. The question, given that FGM is so much more than cutting genitals per se, is how best to address it? Is criminalisation of those who arrange or practise FGM the right answer?

This paper looks at policies opposing FGM and laws criminalising FGM globally, and particularly at the law in Great Britain, to ask whether criminalisation – in Great Britain at least – is part of the solution.

### **Inter-governmental responses to FGM**

The 1994 International Conference on Population and Development (ICPD) in Cairo and its aftermath (an FGM procedure on a small child was filmed and shown on Egyptian TV during the conference, causing an uproar) galvanised efforts against FGM in Egypt for a time, and a national task force against FGM was formed that included some 60 grassroots organisations.<sup>1</sup>

Since then, in addition to growing national action in many countries with FGM, an increasing number of resolutions on FGM have been passed in global and regional forums (Table 1). Most of them define FGM as violence against girls and women and a violation of children’s human rights. Most people think these resolutions have been critical for building consensus against FGM and developing national legislation and programmes.<sup>1</sup>

### **National laws against FGM**

Starting in 1965, 24 of the 29 countries with the highest prevalence of FGM have enacted laws criminalising FGM.<sup>1,9</sup> The penalties range from a minimum of three months to a maximum of life in prison. Several countries also impose monetary fines. Twelve developed countries with substantial populations with origins in countries where FGM is practised have also passed laws criminalising FGM (Table 2).

Some laws ban the provision of FGM in (government) health facilities and by medical practitioners. Some criminalise FGM only if done to minors; others also include adult women. Fines may apply only to practitioners or also to anyone who knows it is happening and does not report it. The crime may cover

only cutting in the country itself or also include taking a girl to another country to have it done.<sup>1</sup> In France, the only country to have prosecuted a substantial number of people, FGM was defined in 1983 as a crime subject to 10 years in prison, or up to 20 years for cutting a girl under the age of 15. Parents who oversee FGM are treated as accomplices to the crime, including if they send French-born children abroad to be cut. Up to 2014, about 40 trials had taken place in France and about 100 people had been prosecuted. In an article describing the reasoning behind this “zero-tolerance”, one doctor states:<sup>10</sup>

*“Tiptoeing around religious or social traditions has no place in the FGM debate. I’ve seen what FGM does and frankly I don’t give a damn about cultural sensibilities. It’s more important to prevent a violent crime being committed against a child or woman. People talk of culture and tradition, but children have a fundamental human right not to be mutilated. It’s racist to think otherwise.”<sup>10</sup>*

And that is the reason why using the criminal law is considered appropriate and necessary – to punish anyone caught engaging in a proscribed practice.

However, UNICEF argues that while using the criminal law against FGM has been widely accepted, it is not sufficient on its own:

*“Debate on the efficacy of legislation banning FGM/C has been largely overtaken by a growing consensus that laws should be one of a set of interventions by governments to support a social movement towards its elimination... Unless legislation is accompanied by measures to influence cultural traditions and expectations, it tends to be ineffective, since it fails to address the practice within its broader social context. Nonetheless, legislation can challenge the traditional status quo by providing legitimacy to new behaviours. Programmatic efforts continue to refine the design of legislative reform, including adjusting legislative strategies to reflect evolving degrees of social support for FGM/C.”(p.9)<sup>7</sup>*

In fact, apart from France, using the criminal law against FGM has proven to be easier said than done in most countries.

### **Prosecutions and arrests for FGM in Africa**

There have been reports of prosecutions or arrests in cases involving FGM in several African countries, including Burkina Faso, Egypt, Ghana, Senegal, and Sierra Leone,<sup>9</sup> but overall there seem to have been very few.

Table 1. Inter-governmental statements and resolutions on FGM <sup>1</sup>		
Year	Agency	Action
1990	Organization of African Unity	African Charter on the Rights and Welfare of the Child
1990	CEDAW	General recommendation No. 14 calls for eradicating FGM
1993	World Conference on Human Rights in Vienna	FGM recognised as a human rights violation
1995	4th World Conference on Women in Beijing	Platform for Action calls for elimination of 'harmful cultural practices', including FGM
1997	WHO, UNICEF and UNFPA	Joint statement against FGM
1998-1999	Demographic & Health Surveys begin to include questions on FGM, allowing data to be collected. <sup>1</sup>	Kenya in 1998 and Burkina Faso in 1998-99
2002	UN General Assembly	Resolution against FGM
2003	UN	Declares 1st International Day of Zero Tolerance to Female Genital Mutilation, 6 February
2005	Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol)	Calls upon States to take measures to eliminate FGM and other traditional practices that are harmful to women
2007, 2008, 2010	United Nations Commission on the Status of Women	Adopts resolutions on ending FGM/C.
2008	10 UN agencies	Eliminating Female Genital Mutilation: An Interagency Statement
2008	UNFPA, UNICEF	Largest global programme on FGM launched
2011	Committee on the Rights of the Child	General comment No.13: children should be free from harmful practices, including FGM
2012	UN General Assembly	First resolution calling on States to intensify efforts to eliminate FGM

In Senegal, for example, according to research by Kandala & Komba,<sup>11</sup> thanks to an active national education programme against FGM, of 5,000 villages previously practising FGM, 3,300 had forsworn the practice in public declarations by 2008. Yet few known arrests or court cases had taken place since the law came into effect in 1999. In January 1999, there were two arrests but no convictions. In July 1999, the grandmother and mother of a five-year-old girl

were arrested after a complaint by the girl's father. The practitioner was also charged. But a public outcry in the region and suggestions in the press that the law was driving the practice underground resulted in these cases not being pursued. In July 1999, a woman was reportedly convicted for allowing the excision of her young daughter. In November 2001, three older people were arrested in one province but subsequently pardoned.<sup>11</sup>

**Table 2. National laws against FGM<sup>1,9</sup>**

Year	Country
1965, 2000	Guinea
1966, 1996	Central African Republic
1982, 1998	Sweden
1985, 2003, 2014	UK
1994, 2007	Ghana
1994-97	Australia 6 states, Canada
1994-2006	USA (17 states)
1995	New Zealand, Norway
1995, 2009	Djibouti
1996	Burkina Faso, USA (federal law)
1998	Côte d'Ivoire, Tanzania, Togo
1999	Senegal
1999-2006	Nigeria multiple states
2000	Belgium
2001	Yemen
2001, 2011	Kenya
2003	Benin, Chad, Niger, Cyprus, Denmark, Spain
2004	Ethiopia
2005	Mauritania, South Africa, Italy
2007	Eritrea
2008	Egypt
2008, 2009	Sudan some states
2010	Uganda
2011	Iraq Kurdistan
2012	Somalia

Even with so few convictions, however, Kandala & Komba argue that:

*“...no national group or NGO would have been engaged in the eradication campaign unless it believed that their actions were legally justified under the Senegal law. Also, the law stands as a formal framework, which confers on public officials the power to ensure legal protection of women. Although the law is not always enforced, its existence may send deterrent signals... In this respect, the... law is regarded as critical to effect a change of social attitudes toward FGM as a social norm.”<sup>11‡</sup>*

In Egypt, in April 2014, six years after FGM was criminalised, a doctor stood trial in Mansoura after a 13-year-old girl died following FGM, allegedly from an allergic reaction to penicillin. Concerns that justice should be served and set a precedent, on the one hand, but that a guilty ruling would push the procedure further underground, on the other hand, were both expressed.<sup>13</sup> The doctor was initially acquitted in November 2014, but the Justice Ministry overturned the ruling. In January 2015 the doctor was found guilty and sentenced to two years in prison (the maximum) and his clinic suspended from practising for a year. The father, who had arranged the procedure, was put under house arrest for three months.<sup>14</sup>

In Uganda in 2012, local opposition in a rural village to police and court action against FGM was expressed in no uncertain terms when police came to arrest FGM suspects and themselves ended up being “arrested” by the residents instead. The second time they came, the police were attacked by the residents with machetes. In both instances the police failed to arrest the suspects. When they returned a third time in November 2014, the two suspects were taken but residents claimed that excessive force had been used, while the police said they had only deployed enough personnel to avoid a repeat of the 2012 incidents. Days after the two men were convicted, the community filed a petition with the Uganda Human Rights Commission (UHRC). The petition recognised that FGM was a crime, but its purpose

<sup>‡</sup>Interestingly, similar arguments have been made in regard to laws against abortion, in that some people believe the act should be criminal but the people involved (women and providers) should not be sent to prison.<sup>12</sup> This is an unresolved legal conundrum.

was to describe the plight of the ten children of the two men in prison, who “have been left behind without parental care, lack of food... [and] have nothing to eat”. The petitioners also argued that if the women elders in their community were against FGM, it would stop. But it was only “outsiders” who opposed it, whom the petitioners accused of making money by campaigning against FGM. The outsiders referred to were the Reach Programme and Reproductive Health Uganda, who were making money only insofar as they were funded by UNFPA to “sensitise communities against FGM through elders’ associations, community meetings, in schools and on radio stations”.<sup>15</sup>

This case indicates that using the police and prison to sensitise communities might have the opposite effect. The criminal law can be a blunt instrument in spite of its positive value.<sup>16</sup> It may not be the best means of convincing people to stop practising FGM, but in some instances it may have serious harmful effects itself.

This has been forcefully shown in Tanzania. A 2012 article describes an illness called *lawalawa*, which several Tanzanian ethnic groups, who had practised FGM before it was made illegal, claimed they were able to cure only by using FGM. Investigation showed that the term *lawalawa* was used to describe various vaginal and urinary tract infections found in infants and children. However, it was re-invented in 1968 as a new illness, curable only by FGM, soon after the 1967 Arusha Declaration banned FGM in the country and those practising FGM were told to stop it, or else parents and practitioners would be tried and sent to prison. Thus, these groups also re-invented FGM, as the cure for this new disease. The authors of the study wrote:

*“Today, the arguments for using FGM to cure lawalawa are used not only in relation to small children, but also adolescent girls and boys. Lawalawa is not always limited to vaginal and urinary tract infections, but sometimes also when girls or boys have a fever for other reasons... Based on information from our continuous work against FGM in 45 villages... from 2003 through 2012, the lesson we have learned is that the only way of eliminating FGM is to accept lawalawa as a fact and to give information and counselling. Only in this way, and not by force, will it be possible to break the connection between lawalawa and FGM.”*<sup>17</sup>

The situation for the children was made even worse because, if signs of the infection reappeared after FGM, the FGM “cure” was repeated. Although members of the communities involved realised that the risk to the children was high, they didn’t know what else to do, as reported in the research:

*“All the little girls with lawalawa are being circumcised, and they are being cut over and over again, and then they finally bleed to death. Now the authorities have said that it is better to bring the children to the hospital. We actually do not know for sure exactly what lawalawa is, but up to now we have believed that the infection (lawalawa) cannot actually be cured in the hospital, so we circumcise. Our little girls die no matter what.”*<sup>17</sup>

Thus, the criminal law against FGM may carry a high risk due to unintended consequences.

### **UK laws criminalising FGM: 1985, 2003 and 2005**

One explanation of how the law against FGM came about in Great Britain was described not long ago in a letter to the Guardian (27 July 2014):

*...In the vanguard of the pioneers of that [FGM] movement is Louise Panton, who was a young producer during my editorship of Forty Minutes (1981–85). Her 1983 film, based in Khartoum, Sudan, was called Female Circumcision and was transmitted on BBC 2 on 3 March 1983. Up to that point the subject had been buried in embarrassed silence... [T]he film ended with moving pictures of two small girls who were to undergo FGM. Their agonised screams, recorded as the procedure was carried out, were overlaid as the film came to a close, and the end credits rolled. This disturbing sequence horrifies and haunts those who saw and heard it to this day. An Early Day Motion was passed in Parliament the day after transmission. A direct result was the Prohibition of Female Circumcision Act, which came into effect in July 1985, and was later revised in 2003 as the Female Genital Mutilation Act...”*<sup>18</sup>

Nothing much happened after the 1985 law was passed. The 2003 Act, which covers England and Wales (Box 1), lacks clarity. Although the offence as stated in Section 1(1) is clear, exceptions to it in Section 1(2a) are not. First, there are few

**Box 1. Anti-FGM Act England & Wales 2003<sup>a,b</sup>****1 Offence of female genital mutilation**

- (1) A person is guilty of an offence if he excises, infibulates or otherwise mutilates the whole or any part of a girl's labia majora, labia minora or clitoris.
- (2) But no offence is committed by an approved person who performs—
  - (a) a surgical operation on a girl which is necessary for her physical or mental health, or
  - (b) a surgical operation on a girl who is in any stage of labour, or has just given birth, for purposes connected with the labour or birth...
- (5) For 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.

**2 Offence of assisting a girl to mutilate her own genitalia**

A person is guilty of an offence if he aids, abets, counsels or procures a girl to excise, infibulate or otherwise mutilate the whole or any part of her own labia majora, labia minora or clitoris.

**3 Offence of assisting a non-UK person to mutilate overseas a girl's genitalia...****5 Penalties for offences**

A person guilty of an offence under this Act is liable—

- (a) on conviction on indictment, to imprisonment for a term not exceeding 14 years or a fine (or both),
- (b) on summary conviction, to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum (or both).

**6 Definitions**

- (1) Girl includes woman.

<sup>a</sup> These are most of the main clauses and sub-clauses, but not all of them are included here, so the numbering in the box appears incomplete. The full text of the law is at: [http://www.legislation.gov.uk/ukpga/2003/31/pdfs/ukpga\\_20030031\\_en.pdf](http://www.legislation.gov.uk/ukpga/2003/31/pdfs/ukpga_20030031_en.pdf).

<sup>b</sup> There is a separate Prohibition of Female Genital Mutilation (Scotland) Act 2005. <http://www.legislation.gov.uk/asp/2005/8/contents>.

reasons why genital excision should be done for the sake of a girl's physical health. The Scottish FGM Act (2005) gives two examples – cancer of the genitals and gender identity change – but these are very rare. As regards mental health reasons, none are offered; the Scottish law says only that if a case is brought to court, the judgement will clarify it. The 2003 Act merely says that custom or ritual are not bona fide mental health grounds.

The offence of “assisting a girl to mutilate her own genitalia” criminalises anyone involved in bringing about FGM. Although the language is very odd, it is not about girls or women choosing to have FGM. However, mainly young women did begin choosing to have a surgical procedure euphemistically called “labia reduction”, a form of cosmetic surgery that had become popular

by 2010, which exposed a contradiction in law and practice. The Department of Health (DoH) website on cosmetic surgery actually listed labia reduction as a bona fide clinical practice but, ironically, described it in practically the same language as the 2003 FGM Act describes FGM.<sup>19</sup>

From this, the question arises: can a woman ask for and give consent for her labia to be “trimmed” or “removed” when FGM is illegal? A child, of course, cannot give any such consent. However, consent is not at issue in the British law on FGM, but rather the fact that it is a harmful practice.<sup>18</sup> Section 6 of the Act states that in defining those who are protected under UK law, “girl includes woman”. This clause clarifies that consent is irrelevant under this Act, but it could also be said to infantilise adult women.<sup>20</sup>

Labia reduction has since disappeared from the DoH website pages, presumably when the contradiction was pointed out to them. I hope my paper contributed to that. Now, in 2015, the Government is considering making “labia reduction” illegal – as a form of FGM.

As regards the exceptions described in Section 1(2b), the question arises: when is a surgical intervention in relation to labour or birth justified and when is it FGM? This question is highly relevant in cases where a woman who has previously had FGM is pregnant and the narrow opening in her genitalia will affect her ability to safely deliver her baby vaginally – possibly requiring not only episiotomy but also surgical opening of scar tissue and potentially surgical repair.

This very issue became the subject of an investigation initiated in 2013 that resulted in the first criminal trial on FGM in Britain, heard over a two-week period in Southwark Crown Court in January 2015, involving a doctor who found himself delivering a woman in this condition in an emergency obstetric case, and another man. Had the law been better delineated, and had the Crown Prosecution Service (CPS) properly understood emergency obstetric care, this trial would never have come to court. However, the CPS was under heavy pressure to find a case they thought they could win, so the trial went ahead.<sup>§</sup> Although the doctor and the other man were acquitted of all charges, the doctor was not permitted to practise for two years while awaiting trial.<sup>21</sup>

### *House of Commons Home Affairs Committee Report on FGM 2014 and its aftermath*

One of the two most important events regarding FGM in Great Britain in 2014 were the international Girls Summit, which starred Prime

<sup>§</sup>See, for example, this newspaper report, which points out that the doctor who was acquitted of all charges in January 2015 was originally charged with FGM four days before the Director of Public Prosecutions was due to be questioned by Members of Parliament about why no prosecutions had taken place in spite of several years of investigations of potential cases. Peachey P. FGM trial: CPS accused of 'show trial' as UK's first female genital mutilation case collapses. 4 February 2015. <http://www.independent.co.uk/news/uk/home-news/fgm-trial-cps-accused-of-show-trial-as-uks-first-female-genital-mutilation-case-collapses-10024487.html>.

Minister David Cameron as the saviour of girls at risk of FGM, and the report on FGM of the House of Commons Home Affairs Committee.<sup>22</sup> The Report puts forward a national plan on FGM, based on public consultation with a wide range of advocates, professional associations, social care bodies, the police and others. In five chapters, the report covers prosecutions, safeguarding at-risk girls (including the role of health professionals, schools, children's social care, the police and advocates), extending and expanding the criminal law, UK residence status, reinfibulation, cosmetic labia surgery, protection orders, parental responsibilities, statutory reporting, and working with communities. The report is filled with positive recommendations on these issues but also proposes sweeping new punitive powers.<sup>22</sup>

The Report also said: “if in a year's time the level of reporting [of FGM cases] has not reached the level that would be expected, we recommend the Government should take steps to make the failure to report child abuse a criminal offence”, but the Government did not wait.

In the second half of 2014, Government Ministers cherry-picked recommendations from the Home Affairs Committee report and created a package of measures against FGM, including some they placed in the Serious Crimes Bill, passed in 2015. As regards working with communities, they offered far too little.\*\*

Mike Penning, then Minister of State at the Home Office and Ministry of Justice with responsibility for policing and child protection, announced in October 2014: “The government is also creating a new offence of failing to protect a girl from FGM. Anyone who has parental responsibility for a girl who has been mutilated when she was under 16, and is in frequent contact with her, or who has assumed responsibility for such a girl, will be potentially liable if they knew, or ought to have known, that there was a significant risk of FGM being carried out, but did not take reasonable steps to prevent it from happening.”<sup>23††</sup>

\*\*A detailed critique is beyond the scope of this paper, but would be valuable.

††See the Serious Crime Bill, passed by Parliament in February 2015. <http://www.legislation.gov.uk/ukpga/2015/9/contents/enacted/data.htm>.

He described FGM as a “scourge”, a stigmatising term that may not be the best way to get people to reconsider an entrenched practice. The aim, he said was: “to strengthen protection for victims, encourage them to report the crime to the police and get support... [and] prosecute those who knowingly let this terrible abuse happen to children they are responsible for.” The new measures included:

- A requirement for passports to be surrendered in order to prevent girls from being taken abroad for FGM. Victims, potential victims or third parties – including teachers, carers, social workers, police and local authorities – who believe there is a real risk of FGM taking place will be able to apply to the court for a non-travel order against particular women and girls.
- Mandatory genital medical examinations of girls believed to be at risk.
- At-risk girls will be required to live at a named address to enable authorities to check they have not been subjected to FGM.
- Victims will receive lifelong anonymity to encourage them to give evidence in court. Plus, a lower burden of proof will be required in FGM cases than for other criminal charges.<sup>24</sup>

These measures raise a myriad of questions. Protection against FGM, i.e. before it happens, is considered the weakest aspect of criminal laws against FGM, according to Kandala & Komba,<sup>9</sup> but it is a crucial part of action against FGM. However, encouraging children and adolescents to report their parents and grandparents to the police is a complex issue. At what age should they be expected to do so? Who should encourage and support them in this – other children, other family members, their teachers?<sup>‡‡</sup>

Should anyone be encouraged to go to the police who believes, rightly or wrongly, that a girl is at risk or already had FGM? Will the child/girl be removed to a “safe place” immediately an accusation is made, or only after an investigation reveals that a crime has been committed? And what does “supporting the girl” afterwards mean? Will there be residences for her to be moved to,

e.g. if she is afraid of violence or her family rejects her? Are there likely to be a lot of reports? Will there be a limit on how long ago and where the FGM actually took place? Where will the police find the resources to do these investigations – and do they need training first?

In fact, almost no young women in Great Britain who have had FGM have reported their own families to the police. Will the new measures change this? If not, what beneficial effect will they have? David Cameron said he wanted schools to do more to warn and protect children from danger. This made great copy for the popular press,<sup>24</sup> but what are the practicalities?

I have to ask: who has the right to deem a girl to be at risk and what corroboration should they have to supply? Mandatory genital examinations – how often and by whom? The French apparently carry these out, but is it ethical? It could be seen as a gross violation of the privacy and bodily integrity of the perceived potential victim. Probable effects on girls and small children need to be better considered. Lastly, what does it mean in practical, legal terms that a lower burden of proof will be required? Will an accusation be enough to warrant investigation, or prosecution? Proving culpability in a crime that has already been committed is one thing, but proving it is planned or intended is another. Who decides when the burden of proof is sufficient? Where will the training come from to manage all this knowledgeably and sensitively, especially considering how long it has taken for other forms of violence against women to be handled thus by the police and courts?

What will happen remains to be seen. However, the police were soon out looking for “perpetrators” (cutters) and “accomplices” (family members with little girls) at several airports. The 2015 BBC3 TV programme, “Stop Cutting Our Girls”<sup>7</sup> shows police officers at Heathrow handing out leaflets and awkwardly talking to people about FGM (described as an “FGM awareness operation”). Is public education on FGM in airports a legitimate, let alone a good use of police time? Were they questioning all the people who looked “suspicious” (black, African, Muslim adults with a young child)? So far, they have made two sets of arrests from these operations and a third case has been heard in family court.

### Three more UK cases to date

One case involved a 72-year-old man who was stopped by police at Heathrow Airport after arriving

<sup>‡‡</sup>Those with expertise in child protection on other grounds need to play a role in defining this, in ways specific to FGM.

with an 11-year-old girl on a flight from Kampala, Uganda. Specialist officers took the girl – a UK national – into the care of social services. The man was subsequently arrested. Then a 40-year-old woman was arrested in Hackney under Section 2 of the FGM Act 2003, for “aiding, abetting, counselling or procuring a girl to carry out FGM on herself”. Both were being held in custody in July 2014.<sup>25</sup> I was unable to find anything further about these arrests. No trial had been announced at this writing.

Another arrest was reported in February 2015: “A police inquiry into a woman arrested at Heathrow Airport on suspicion of conspiracy to commit female genital mutilation (FGM) has been closed. The 42-year-old was about to board a flight travelling to Ghana via Amsterdam when she was held by officers on 6 February [2015]. The woman, from Northampton, is a British national born in Zimbabwe. Northamptonshire Police said no further action was being taken in this case and the woman had been released from bail. The BBC understands that when the woman was released on bail last week she was reunited with her eight-year-old daughter, who had been taken into the care of social workers after her arrest.”<sup>26</sup>

Here is clear evidence that an accusation alone is enough for a small child to be taken into care. Under child protection procedures, this may be considered the right thing to do. But in the case of the older man and the child returning from Kampala, what exactly was the risk to the child at that point? If the girl had had FGM in Uganda, it was too late to protect her from it. She would not continue to be at risk, unlike in cases of sexual abuse. I believe further consideration as to what is ethical and legal is needed, especially considering the following case.

A third, little-known case<sup>27</sup> involved an attempt to take two small children, whose parents were of African origin, into care in a Leeds family court in late 2014. The girl aged  $\pm 3$  and the boy aged  $\pm 4$  had temporarily been placed with foster parents.

Suspicion that the girl (G) had been subjected to FGM arose twice: first in November 2012 in her natal country when blood was found in her nappy at a nursery, but examination by two doctors and a further medical report found the labia and clitoris normal, and no sign of FGM; and second in Britain in November 2013 when

the foster carer reported she thought G had “irregular genitalia”.<sup>27</sup>

Three people, all considered to be experts, gave testimony in court in November 2014. Only one of them was a specialist in paediatric FGM. The three witnesses’ evidence differed considerably, casting doubt on the evidence of two of them. The paediatric expert said she saw no evidence of FGM. Both parents denied that G had been subjected to FGM. Sir James Munby, President of the Family Division, who heard the case, dismissed the FGM charge.<sup>27</sup>

He said there were three issues to consider: Had FGM occurred? Did it amount to significant harm, and if so, what were the implications. Having heard the evidence, he concluded that the “local authority is unable on the evidence to establish that G either has been or is at risk of being subjected to any form of FGM”.<sup>27</sup>

This case illustrates that even experts cannot always tell or agree whether a child has had FGM.<sup>28</sup> §§ The implication, as I see it, is that allowing large numbers of girl children to be examined for FGM by people who are likely to have even less expertise than the witnesses in this trial, is a recipe for disaster.

### *The future: is the criminal law what is needed in Great Britain?*

Considering the four cases to date that have arisen in Britain, I have to ask whether there should be a criminal law against FGM in Britain at all. The Crown Prosecution Service has spent several years trying to find suitable cases with enough evidence to secure a conviction.

To create a law to punish behaviour that has not been shown to be taking place within your own borders, and then go out looking for someone to punish for it, seems ill-judged. I personally do not think little girls’ genitals should be examined in schools or by police doctors. I believe it is equally ill-judged to be suspicious of all African/Muslim grandparents, fathers, mothers and aunties who are taking a child to another country, let alone to take a child into care at an airport, and keep her in care, out of contact with her family, during an investigation that leads nowhere.

§§ For a more detailed summary of this case, see ref<sup>28</sup>.

The answers to these questions may or may not be different for countries where FGM is carried out on a wide scale. But the fact is that there is no hard evidence that FGM is happening in Great Britain.

Serious consideration of what comes next is needed on the part of Parliamentarians, the Ministry of Justice, the police and the legal profession, as well as the medical profession and medical bodies like the Royal College of Obstetricians and Gynaecologists. The General Medical Council has a particularly important role, as they have the power to stop medical professionals from practising for a very long time while their cases are pending and even afterwards. The negative and destructive consequences of criminalising FGM need to be confronted – especially because it is linked to ethnic and racial profiling – which is the bottom line in the many ethical issues involved here. Great concern is already being expressed about this guidance.\*\*\*

There are two sorts of responses possible in efforts to eliminate FGM: one is punitive, the other is educational, community-focused and supportive. Can these coexist? Even based on the handful of criminal cases reported here, the role of the criminal law seems to cause more problems than it solves. As London-based writer Tsedal Tesfamariam said in 2014:

*“Demanding an instant, law-enforced end to FGM does nothing to change the hearts and minds of communities. In fact, vilifying and punishing immigrant parents who already live on the margins of society only pushes them further away from mainstream society, making them cling to their own cultures and traditions more tightly.”*<sup>7</sup>

In contrast, community-led educational information and more support for dialogue within FGM-practising communities can only be a good

thing. What is needed, for example, are meetings such as an awareness-raising meeting that took place among young activists in London in 2014, and one organised for 100 young people in the Gambia, also in 2014. The latter was spearheaded by Gambian-born Jaha Dukureh, who is campaigning against FGM in the USA.<sup>29</sup> Both meetings greatly motivated youth activism.

FGM is a cultural and social issue, but also a sexual and reproductive health one. A study among 820 midwives in Belgium working in labour wards, maternity wards and maternal intensive care units, found that 15% had been confronted with FGM, mostly with the psychological and sexual complications caused by FGM. They had also encountered a range of obstetric complications due to FGM: more episiotomies, increased risk of post-partum haemorrhage and caesarean section, increased risk of prolonged hospital stay, higher risk of newborn resuscitation and perinatal mortality. More than half of the midwives reported seeing one or more complications: the most common mentioned were psychological problems, chronic pain, sexual problems, recurrent urinary tract infections, incontinence, fistula and bleeding.<sup>30</sup> What women with FGM need is for medical and midwifery education to cover these problems, leading to specialisms, especially among midwives, who can provide sympathetic and skilled treatment and support.

These are the kinds of activities and policies that make sense, at least for countries like Belgium and Great Britain, where what is important is addressing the sexual and reproductive health consequences of FGM and gaining the understanding of women who have experienced it and their families as to why they should not make their daughters and grand-daughters go through it too.

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## Résumé

Les campagnes contre les mutilations sexuelles féminines (MSF) ont commencé dans les années 20. Dès le début, il a été admis que les MSF représentaient pour les filles un important rite de passage entre l'enfance et l'âge adulte, fondé sur l'importance du contrôle de la sexualité féminine afin de préserver la chasteté et l'honneur familial, et de permettre aux filles de se marier. Comment séparer la mutilation de ces normes profondément ancrées est une question encore sans réponse ; ce serait pourtant, à mon sens, une démarche essentielle pour mettre un terme à cette pratique. Depuis la CIPD, en 1994, l'action nationale et internationale contre les MSF s'est étendue et des forums internationaux ont adopté des résolutions qui définissent les MSF comme une forme de violence et une violation des droits fondamentaux de l'enfant. Ces résolutions ont contribué à dégager un consensus contre les MSF et à élaborer des législations nationales qui répriment cette pratique. Des poursuites ou des arrestations liées aux MSF ont été signalées dans plusieurs pays d'Afrique et en Grande-Bretagne, mais, à part en France, elles ont été très rares. L'article résume cette histoire et montre comment les MSF ont été sanctionnées par la loi. Il avance que cette pénalisation n'est peut-être pas le meilleur moyen de faire cesser les MSF et qu'elle peut avoir elle-même de graves conséquences. Il préconise une information éducative collective et davantage de soutien au dialogue au sein des communautés qui pratiquent les MSF. Il fait valoir qu'il est important de traiter les conséquences des MSF pour la santé sexuelle et génésique et de faire comprendre aux femmes qui les ont subies et à leur famille les raisons pour lesquelles elles ne devraient pas obliger leur fille ou leur petite-fille à en passer aussi par là.

## Resumen

La historia de las campañas contra la mutilación genital femenina (MGF) comenzó en la década de 1920. Desde el principio, se reconoció que la MGF era considerada un importante rito de paso entre la niñez y la adultez para las niñas, basado en la importancia de controlar la sexualidad femenina para mantener castidad y el honor de la familia, y para preparar a las niñas para el matrimonio. Cómo separar el “corte” de estas normas tan arraigadas es una interrogante que aún no ha sido contestada adecuadamente; sin embargo, creo que la respuesta es clave para eliminar la práctica. Desde la CIPD de 1994, la acción nacional e internacional contra la MGF ha incrementado y se han aprobado resoluciones en foros mundiales que definen la MGF como una forma de violencia y una violación de los derechos humanos de las niñas. Estas resoluciones han contribuido a fomentar consenso contra la MGF y a formular leyes nacionales que penalizan la MGF. En varios países africanos y en Gran Bretaña se han reportado enjuiciamientos o arrestos relacionados con la MGF, pero aparte de Francia, ha habido muy pocos. En este artículo se resume esta historia y cómo la MGF ha sido penalizada. Se argumenta que la penalización quizás no sea el mejor medio para eliminar la MGF, ya que puede tener graves efectos dañinos. Se hace un llamado a la información educativa dirigida por la comunidad y a brindar más apoyo para el diálogo con las comunidades que practican la MGF. Se argumenta que lo importante es tratar las consecuencias de la MGF en la salud sexual y reproductiva y lograr que las mujeres que han pasado por esta experiencia y sus familias entiendan por qué no deben obligar a sus hijas y a sus nietas a hacer lo mismo.