



LAW & FGM

Introduction

We know that FGM is a complex issue deeply embedded in the societies where it is practiced. While criminalization of the practice is generally acknowledged as an important step in the global strategy towards abandonment of FGM, most experts would agree that anti-FGM laws alone cannot solve the problem.

The absence of a decrease of prevalence of FGM in many communities where laws exist and growing critiques against the way laws are implemented raises the question: *Can social change be legislated?*

In this thematic note, drafted for the Community of Practice on Female Genital Mutilation, we look at the **legal measures taken to eradicate FGM, both in high-prevalence countries and low-prevalence countries.**

The aim is to encourage an **exchange of experiences, from different countries, on how to best use the law as a tool in the anti-FGM strategy.** Furthermore, this note also **highlights some of the common critiques against anti-FGM laws.**



International legal instruments on FGM

FGM is recognized internationally as a practice that violates human rights laws. A number of international conventions and declarations form the legal framework for the protection and promotion of women and girls' human rights and are relevant to FGM:

- the Universal Declaration of Human Rights (UDHR)
- the International Covenant on Civil and Political Rights (ICCPR)
- the International Covenant on Economic, Social and Cultural Rights (ICESCR)
- the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)
- the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)
- the Convention on the Rights of the Child (CRC)

According to the UN Human Rights Committee, “FGM/C constitutes cruel, inhumane, or degrading treatment that violates the general prohibition against torture”. (10)

Thus, national governments have international legal obligations to adopt: “effective and appropriate measures to abolish harmful traditional practices affecting the health of children, particularly girls, including early marriage and FGM, as well as preventing third parties, including medical providers, from coercing women to undergo traditional practices, such as FGM/C.” (9)

Moreover, fear of FGM in one's country of origin is grounds for international protection (asylum) under the 1951 Geneva Convention on the Status of Refugees.



Regional legal instruments on FGM

a) Africa

There are specific legal obligations for the African continent, including:

- the African Charter on Human and People's Rights (art 18)
- the African Charter on the Rights and Welfare of the Child (art 21)
- the Maputo Protocol (Protocol to the African Charter on the Rights of Women in Africa, art 5).

The Maputo Protocol obligates African states to take necessary actions to prohibit and condemn FGM (as well as other harmful practices that negatively affect the human rights of women).

b) Europe

In the European region, FGM is considered a violation to several treaties and conventions:

- the European Convention on Human Rights
- the EU Directive on Victims' Rights
- the Istanbul Convention (the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence)

The Istanbul Convention recognized the existence of FGM in Europe and the need to systematically address the practice and its prevention. One of the "four Ps" of the Convention is prosecution, meaning to prosecute offenders that (try to) subject a woman or girl to FGM.

Thus, all States that commit to the international human rights instruments cited above are obliged to prevent FGM and protect women and girls from the practice. One of the key duties is to put in place legislative measures to prohibit FGM. However, as most of them are examples of "Soft law" they are not legally binding.



Which countries have laws against FGM?

Several countries with a high prevalence of FGM, as well as low-prevalence countries with important populations originating from countries where FGM is practiced, have passed national anti-FGM laws.

The first national law worldwide was passed in Guinea Conakry in 1965.

High-prevalence countries

a) Africa

Legal sanctions is *“by far the most common response adopted by African governments to address FGM/C”*. (9)

28 Too Many published a report in 2018 identifying current legislation relating to FGM in each of the 28 African countries where the practice continues. The aim of the report is to consider how the content of the laws as well as their implementation and enforcement might be improved to contribute to the decrease and eventually the elimination of FGM. The NGO also published 29 individual country reports. (1)

Out of the 28 countries in Africa where FGM is known to be practiced, 22 have national legislation criminalising FGM - either through specific anti-FGM laws or within criminal/penal codes or other forms of legislation.

However, the NGO reports that legislation is currently failing to protect women and girls from FGM in most of these African countries because laws are rarely enforced, and prosecutions are rare.



Moreover, 6 countries are currently without laws, meaning FGM is effectively still legal:

- **Chad**
- **Liberia**
- **Mali**
- **Sierra Leone**
- **Somalia** (mentioned in the Constitution but no national legislation)
- **Sudan**

Nevertheless, in 2018, 5 out of 6 of these countries either had a draft legislation waiting to be passed or an expressed intention to pass a law to ban FGM.

28 Too Many emphasizes that these 6 countries have signed international and regional treaties obliging them to put in place legislation and implementation measures against FGM. Nevertheless, they did not find any example of a state being formally challenged for failing to adopt and enforce national anti-FGM legislation (whether by the international and African regional institutions, or by citizens) (1).



a) Asia and Middle-East

There is no law on FGM in **Malaysia** (11). Likewise, in **India**, where FGM is traditionally practiced by several sects and is most prevalent among the Bohras, there is currently no anti-FGM legislation.

FGM is outlawed in the Kurdish Autonomous Region of **Iraq** but is still legal in central Iraq. There is also no specific anti-FGM law in **Iran** but the Islamic Penal Code prohibits bodily mutilation and could be used to combat FGM. (13)

Indonesia previously had a ban prohibiting health care professionals from performing FGM. However, due to opposition from the highest Indonesian Islamic advisory body the ban was repealed in 2010 and a new regulation concerning FGM was issued by the Ministry of Health, authorising certain medical professionals, such as doctors, midwives and nurses, to perform types Ib or IV “without hurting the clitoris”.

Low-prevalence regions

FGM is forbidden in all 27 European Union (EU) member states as well as in other countries in **Europe**. It is also criminalized in the **USA**, in **Australia** and in **New Zealand**. Some countries have laws specifically criminalising FGM, while others prosecute cases under existing criminal law (causing bodily injury, mutilation, removal of organs/body tissue).

Child protection laws are applicable to FGM in Europe as it is considered a form of child abuse. In the US FGM is illegal in all States, either by targeted anti-FGM laws (33 states), or by general laws against child abuse and assault. Up to this day there have been few prosecutions in low-prevalence countries. (1, 6, 7, 11, 14)



What do the laws say?

Several African countries where FGM is illegal are **lacking a clear definition** of what constitutes FGM (Cameroon, Ethiopia, Nigeria and Tanzania). Two countries only prohibit the performance of FGM if the girl is **under 18 years of age** (Mauritania and Tanzania). In 18 countries it is illegal not only to perform FGM but also to **arrange and/or assist** in the act of FGM.

Moreover, in half of the 22 countries with anti-FGM laws in place, there is a **legal requirement to report** knowledge of FGM. The NGO argues that all countries should widen the responsibility to report FGM so that persons who fail to do so could be persecuted. Concerning **medicalized FGM** it is only specifically criminalized in 9 African countries while some laws, on the contrary, provide “loop holes” for FGM practiced by medical professionals (ex Egypt). (1)

The **penalties** for performing FGM vary from one country to another, from a few months’ imprisonment, monetary fines, to life time in prison. The African countries with the longest maximum prison sentences are Cameroon (20 years) and Tanzania (15 years), while those with the highest fines are Benin, Côte d’Ivoire and Kenya. African countries with the lowest penalties overall are Ethiopia, Guinea, Niger, and Sudan. (1)

In Europe and other low-prevalence regions, girls are considered particularly at risk of being cut when travelling to their country of origin or the country of origin of their parents. Therefore, most European countries as well as Australia and some US states, have a “**principle of extraterritoriality**” in their law, meaning it is possible to prosecute acts of FGM committed outside a country’s borders. The application of this principle differs from country to country: the offender and/or the victim must often be a citizen or resident of the country concerned. In some cases FGM must also be illegal in the country where it took place. (14)



The question of Consent in anti-FGM laws

In **Africa**, many anti-FGM laws imply that if consent is given by a woman or girl herself, FGM is not a criminal offence (as she has 'chosen' to be cut). (1, 17)

On the contrary, in most countries in **Europe**, as well as in **Australia**, whether a girl or woman consented or not to the FGM does not affect the legal status of the act. Nevertheless, in some European countries consent may reduce the severity of the sentence. (14)

The fact that FGM is not a criminal offence if a woman consents to it is often considered to be a serious weakness of laws. Critics argue that **women and girls are put under considerable social pressure to undergo FGM** by their families, friends and communities. Consent should therefore not impact on the illegality of FGM and should not be permitted as a defence for the practice. (1, 17)

However, in **Europe** and the **US**, the rise in **aesthetical genital surgeries**, such as 'labia reductions' which became particularly popular in the 2010s, raise important questions on why a woman or teenage girl can consent to her labia being 'trimmed' or even removed, despite FGM being illegal. The "double-standard" created by the criminalization of all forms of (what is seen as "traditional") FGM on the one hand, and the acceptance of other similar types of medicalized genital alterations is the object of increasing discussions among academics and NGOs in Europe and the US. (4)



Critiques of legal measures against FGM

Common critique against legal measures to tackle FGM vary depending on the context in the implementing country and on whether the country has a high or low prevalence of FGM.

Despite criminalization in many **African** countries, **FGM prevalence remains high**. Thus, legal measures have not yet resulted in enough decline of the practice in many countries.

This is partly explained by the fact that FGM is a deeply rooted practice, entrenched in culture and therefore change is slow. However, critiques also argue that laws are not always implemented, that they are not always adequate and that there are several challenges to enforcement. 28 Too Many consider that only 2 out of 22 countries with anti-FGM laws fulfil all criteria that they consider necessary for satisfactory prevention and protection. (1, 9)

In **Europe and other low-prevalence Western societies**, critical voices are challenging what is seen as excessive use of legal measures against communities originating from high-prevalence FGM countries, resulting in stigmatization and negative consequences on the well-being of both children and parents from affected communities.

It should be noted that prosecutions for FGM have been relatively few on all continents.

- **Lack of ownership among communities**

Lack of acceptance of the laws condemning the practice is one of the reasons given for the remaining high prevalence in many practicing African communities. Some critiques argue that affected communities are often not involved in the law-making processes.[1] Thus, there may be a **perception among communities that laws are imposed from the outside** and that they challenge their norms and culture.

[1] In Uganda, in 2012, practicing communities in one village were so strongly opposed to legal measures against FGM that they ended up “arresting” and attacking police officers who had come to arrest suspects of FGM. Another example of adverse effects of anti-FGM laws is the way, in Tanzania, the 1967 law resulted in practicing groups re-invented FGM as the only cure for a “disease” affecting children, lawalawa.



In fact, in some contexts traditional and religious leaders have more power and influence than national governments. Sometimes there is a conflict of interest for police, local political and community leaders who continue to support the practice.

To be effective and prevent FGM, laws need to be **widely known and understood in all communities**. Yet, 28 Too Many argue that affected communities in Africa too often lack knowledge about the law. They stress the importance of drafting laws in such a way that they are easy to understand, including in all local languages.

Furthermore, some diaspora communities affected by FGM lack information about their host country's legal system.

- **Lack of reporting on cases of FGM or risk situations**

Persons from FGM-affected communities may be unwilling to report the practice, either because they are positive to the practice or because of unwillingness to file charges against family or community members. With the presence of anti-FGM laws the practice is further done in the privacy of family and community to avoid detection by law enforcers. Moreover, where FGM is a strong social norm, community members who openly oppose the practice risk stigma and rejection and may feel alienated from their community.

For migrant communities (in low prevalence settings), fear of the host-country authorities may be further obstacle to reporting FGM. (1)

Professionals' and law enforcers' limited knowledge of FGM and of the legal measures seem to be an obstacle for identification and reporting of cases (girls/women at risk or submitted to FGM), both in Africa and in Europe.

Furthermore, according to UEFGM, professionals in Europe may not want to report a suspicion of FGM if it is vague because they fear 'disproportionate responses' which they believe not to be in the best interests of the child (14). While experts stress the importance of protecting all girls against FGM, others also argue that the fear of 'disproportionate responses' are not totally unfounded (see section below).



- **Lack of resources**

In the African region, lack of accountability procedures and law enforcement mechanisms is one of the barriers for effective implementation of anti-FGM laws according to 28 Too Many. They particularly blame ineffective governmental coordinating bodies, weak human rights institutions and ineffective judiciary bodies. Shortage of police and governmental officials in remote rural areas in Africa (where FGM is most prevalent) is also an issue for reporting and prosecution.

Under-funding and practical challenges such as accessing remote, rural areas, also continue to be obstacles in Africa.

- **Barriers to prosecution**

Although there have been prosecutions or arrests in some African countries (Burkina Faso, Egypt, Ghana, Senegal, Sierra Leone), they have overall been very few. In The Gambia, for example, the law against FGM was adopted in 2015 and since there have been only 2 cases.

Similarly, in Europe there have been very few court cases in all countries, with the exception of France.

Moreover, for the African region conflicts of interest are also a problem when local police and judiciary themselves come from practising communities. (15, 16, 17)

Difficulties of gathering enough evidence can hinder a case of FGM being brought to court, particularly in Europe.

- **Loop-holes in the law**

In some African FGM laws references to ‘therapeutic’ and ‘medical’ reasons to perform FGM create loopholes for the practice. This is particularly true in Egypt, where FGM is increasingly medicalized. (1)

In low-prevalence settings such as the US and Europe, aesthetical genital surgeries are not included in the legal definition of FGM. Thus, “medical” types of genital surgeries, which share similarities with “traditional types of FGM”, such as labia reductions, clitoral reductions or vaginal, are legal for adult women and adolescent girls.



- **Some laws do not address cross-border FGM**

In 19 African countries the laws do not specifically address the issue of cross-border FGM, only 3 prohibit & punish it (Guinea Bissau, Kenya and Uganda). Yet, in countries where FGM has become illegal families sometimes cross borders to get their daughters cut, to avoid prosecution.

Some European countries and several US States lack a “principle of extraterritoriality” and make so call “vacation cutting” legally possible.

- **Legal measures are not enough... and may even have negative effects**

Given the difficulties raised, there is general understanding, both in high and low-prevalence settings that legal measures alone cannot put an end to FGM.

However, some authors even argue that anti-FGM laws can have negative effects as they drive the practice underground and make it harder for communities to seek help in case of urgent problems such as excessive bleeding.

Moreover, in low-prevalence countries the main targets of anti-FGM law are migrant communities. Thus, some critics argue that the laws stigmatise and create unnecessarily suspicion against racial and religious minorities in the host country who are already victims of a harsh political landscape.

- **‘Disproportionate responses’ in Europe**

In Europe, critical voices are arguing that legal measures and other strategies to tackle FGM are having negative effects for African-European girls and their communities (4, 7, 13, 14):

- ethnic and racial profiling
- stigmatization of certain communities and exaggerated suspicion against their members
- compulsory genital examination on girls who are unable to consent, sometimes without informing parents
- the detention of parents (without proof of any incident)[1]
- children taken into custody

[1] In two UK cases parents were arrested at the airport because they were travelling with daughters. Both cases were later dropped. Critics emphasis that cases like these show that a mere accusation of FGM, without proof, is enough to remove small girls from their parents. (4)



The use of mandatory genital examinations has been questioned in Europe: who should do these examinations? On what grounds? How often should girls deemed at risk be examined? A recent article by Johnsdotter shows that compulsory genital examinations have been used excessively for Swedish African girls with negative effects on their well-being, and that these examinations have not led to the identification of a single case of FGM performed in Sweden. (7)

Several authors also point out that even experts are not always capable of telling whether a small girl or infant has been subjected to FGM, thus making evidence for trials questionable.

Considering the lack of evidence of FGM taking place in the UK, Berer (4) questions the mere existence of a specific criminal law against FGM in the country. According to her, the UK Prosecution services have “spent several years trying to find suitable cases with enough evidence to secure a conviction.” She critiques the law which, according to her, seeks to “punish behaviour that has not been shown to take place within your own borders [the UK], and then go out looking for someone to punish for it”.

The deterrent effect of anti-FGM laws

Several authors argue that while it is true that there have been few prosecutions of FGM under existing laws, this does not mean that the law doesn't have a positive effect in terms of reducing the prevalence.

In Senegal for example, the law, passed in 1999 has resulted in few arrests or court cases but has had the effect of creating a formal framework for NGOs and national groups engaged in the eradication of the practice. As such it is seen as instrumental for a change in attitudes toward FGM as a social norm.

In Europe, studies also imply that knowledge of anti-FGM laws, and fear of legal consequences, has a deterring effect on migrant communities originating from high-prevalence countries. (5)

More than a strictly legal tool, permitting arrest and prosecution, the mere existence of laws has a symbolic effect and is a tool for prevention. The law gives a strong message that FGM is not an acceptable practice and provides opportunity to explain its negative consequences.



What can be done?

In conclusion, growing criminalization of FGM can create an “enabling environment for change” but is not a guarantee to put a stop to the practice. Also, legal measures must focus on the well-being of affected girls and women and avoid stigmatization.

Specific consideration must also be given to ensuring:

- ownership of laws and information to all members of society
- support by trained professionals
- allocation of adequate resources

Parallel to legal measures other strategies should be adopted, such as:

- awareness-raising
- training of professionals, including those in health-care
- implementation of alternative rites of passage
- partnerships with religious and community leaders
- creating alternative livelihood for ex-circumcisers
- engaging men and boys



What do you think ?

What has been the effect of an anti-FGM law in your country?

Has it been beneficial? Has the law had any negative or undesirable effects?

What have been the difficulties in implementing laws?

Do you think countries should have specific anti-FGM laws or integrate FGM under other laws (child abuse, violence against women...)

How do we avoid stigmatization of families and communities (living in high prevalence or low prevalence settings)?

How should countries best deal with the issue of Consent – should FGM be illegal independently if it is practiced on a girl or on a consenting woman?



Examples of anti-FGM laws and cases in specific countries

BURKINA FASO

The government of **Burkina Faso** passed a law in November 1996 prohibiting and punishing the practice of FGM (art 380 Penal Code). The Constitution of Burkina Faso (adopted in 1991) however does not explicitly reference violence against women and girls, harmful practices or FGM. In 2018 a proposed new draft legislation, further criminalising acts that constitute violence against women and girls and raising the penalties for carrying out FGM, was passed by the Parliament.

Article 380 of the Penal Code provides a clear definition of FGM and criminalises and punishes anyone who 'harms or attempts to harm the integrity of the female genital organ by total ablation, excision, infibulation, by desensitization or by any other means' (i.e. by performing FGM). It also sets out penalties if FGM results in death. The law does not, however, explicitly reference those who procure, aid or abet the practice.

Medicalised FGM is illegal in Burkina Faso but does not appear to be significant in the country (less than 1% of women aged 15-49 years are reported to be cut by a health professional).

Anti-FGM laws seem to have been more strongly enforced in Burkina Faso compared to neighbouring countries. Thus, there is growing concern that families are taking their daughters across borders to avoid prosecution in countries where laws do not exist or are weakly enforced (including Mali, Niger, Ghana and Cote d'Ivoire).

In fact, Burkina Faso is recognized as one of few countries in Africa where FGM legislation is effectively and systematically enforced. This can be attributed to: strong political will, translation of laws in local languages, involvement of members of community.

"An innovative approach to legal proceedings undertaken in Burkina Faso is the use of mobile community courts (audiences foraines), which take the enforcement of the law directly to the practising communities. These have been highly successful in raising awareness of the law and involving all members of the community and local media in the sentencing process of FGM cases." (9)



Examples of anti-FGM laws and cases in specific countries

FRANCE

France, where FGM was criminalized in 1983, is often cited as an example of good practice in the implementation of the law to tackle FGM in Europe. FGM is subjected to 10 years in prison or 20 years if the victim is under 15 years. Up to 2014, more than 40 FGM cases were brought before criminal courts, and about 100 persons prosecuted, most in the mid-1990s. According to UEFGM, “The comparatively high number and visibility of cases prosecuted has played a major part in raising awareness within families and the general public” and the trials, together with community initiatives, have resulted in a decrease in prevalence since the 1980s. Currently, France is the only country to have prosecuted a substantial number of persons for FGM. (4, 14)

UK

In the **UK**, the first law criminalizing FGM was passed in 1985 (revised in 2003). In 2015 several measures against FGM were included in the Serious Crimes Bill, including: making it illegal to fail to protect a girl from FGM, possibility to apply for a travel-restriction for girls at risk, genital examinations, anonymity for victims to encourage reporting, a lower burden of proof than before.

The first trial concerned a doctor who had treated an infibulated woman during an emergency delivery in 2013. The doctor, and another man who had been charged, were finally acquitted. This trial was critiqued as reports indicated that the government was under pressure to have a “show trial” because no prosecution had taken place despite the law and after several years of investigations of potential cases.

(4)



Examples of anti-FGM laws and cases in specific countries

SOMALIA

Somalia has one of the highest prevalence of FGM with 97.9% for women aged 15–49.

“Female circumcision” is mentioned in the Somali Constitution as a “cruel and degrading customary practice”, equivalent to torture. The Constitution states that “circumcision of girls is prohibited”. However, there is no specific national law on FGM and no provision establishes a punishment for breach of the Constitution. The Somali Penal Code (Law No. 05/19623, April 1964), applicable to all jurisdictions in Somalia (and Somaliland) makes it a criminal offence to “cause hurt to another that results in physical or mental illness”. It was reported in 2015 that work had begun on a bill that would criminalise FGM across all of Somalia, but no specific bill has yet been presented. There is also no current legislation at the national level criminalising and punishing medicalisation of FGM, a growing problem in Somalia especially among wealthier families.

Because of the lack of national laws against FGM, cross-border practices are an increasing problem in the Region. Many Somalis live in the border regions of Ethiopia and Kenya, families move across borders to practice FGM in Somalia, avoiding prosecution in countries where a legal framework is in place. Likewise, some families living in low-prevalence settings in the US, Europe or Australia, are thought to take their girls back to Somalia for FGM to avoid prosecution.

There are some regional differences however. In Puntland a FGM legislation is awaiting parliamentary approval and the state has a Sexual Offences Act (2016) including “harmful practices” as well as an Islamic ruling (fatwa) against FGM.

Because of the absence of national legislation on FGM, there are no reported cases of arrest or court cases concerning FGM in Somalia.

One important issue for the Somali context is that people tend to regard all types of FGM which are not infibulation (“Pharaonic circumcision” as “Sunna” and believing the latter to be sanctioned by Islam. Hence, 28 Too Many note that a future legislation will require clear definitions and understanding of all types of FGM.

(2)



Examples of anti-FGM laws and cases in specific countries

USA

In USA, where approximately 500.000 women and girls are thought to be either living with or at risk of FGM, 33 states have anti-FGM legislation. Out of these, 10 have Mandatory Reporting of FGM.

The Aha Foundation stress that 17 states are yet to criminalize FGM. However, others argue that FGM are already covered under general laws on child abuse. The U.S. Congress passed a federal law in 1996 making it illegal to perform FGM, including if American girls undergo the practice abroad.

In 2006, a father was sentenced to 10 years imprisonment for having performed FGM himself on his 2-year-old daughter.

In 2017 an American doctor was charged in Detroit federal criminal court for having performed genital mutilation on young girls from the (Indian) Bohra community. The “Michigan FGM trial” is the only case of FGM that has been brought to court under the federal law. However, in 2019 a federal trial court decision ruled that the federal law banning FGM was unconstitutional because the Constitution does not give Congress any general power to suppress crime, including murder, violence against women or child abuse.

Immediately following the FGM case in Michigan, the state passed the strongest and most comprehensive anti-FGM legislation in the US. Activists are calling for other states to pass their own anti-FGM laws.

(3, 11)



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