

# BEYOND LEGISLATION: EXAMINING THE EFFICACY OF CRIMINALISATION OF FEMALE GENITAL MUTILATION IN AFRICA

*Satang Nabaneh\**

## 1 Introduction

Rights-based advocacy and organised international mobilisation against female genital mutilation (FGM) have emerged in the past 30 years, including at the 1994 International Conference on Population and Development (ICPD).<sup>1</sup> During the 1995 Beijing Conference, African feminists led efforts for the explicit condemnation of FGM in the Beijing Declaration and Platform for Action (POA). This resulted in the POA's call for governments to '[e]nact and enforce legislation against the perpetrators of practices and acts of violence against women, such as female genital mutilation'.<sup>2</sup> However, this framing is not universal. African feminists have decried the Western framing of FGM premised on colonial and neo-colonial underpinnings.<sup>3</sup> In this book the term 'FGM' is used to highlight its human rights implications, especially in respect of sexual and reproductive health. However, it is acknowledged

---

\* LLB (The Gambia) LLM LLD (Pretoria) PhD (University of Washington); Director of Programs and Assistant Professor of Practice, University of Dayton Human Rights Center; Post-Doctoral Fellow, Centre for Human Rights, Faculty of Law, University of Pretoria; satang.nabaneh@gmail.com. ORCID ID: 0000-0003-0543-0555.

1 UN 'International Conference on Population and Development Programme of Action' (1994) para 7.

2 1995 Beijing Declaration and Platform for Action.

3 See A Thiam *Speak out, black sisters: Black women and oppression in black Africa* trans DS Blair (1995); O Nnaemeka *Sisterhood, feminism and power: From Africa to the diaspora* (1998); O Nnaemeka 'Theorising, practicing, and pruning Africa's way' (2004) 29 *Signs: Journal of Women in Culture and Society* 357-385.

that FGM as a practice, including its naming as 'FGM', is contested on various grounds.<sup>4</sup>

FGM was initially opposed by colonial regimes in the early twentieth century.<sup>5</sup> Historically, FGM and post-colonial struggles and nationhood are intertwined in Africa.<sup>6</sup> FGM was regarded by colonisers as contrary to morality and a barrier to civilisation. Attempts were made, for instance, by the British, to ban FGM.<sup>7</sup> The Kikuyu people in Kenya rose up against the attempt by the colonial state and Christian missionaries to ban the practice.<sup>8</sup> The Kikuyu resistance against the ban demonstrated the assertion of indigenous communities in the face of Western imperialism. It became a symbol for the struggle for national independence.<sup>9</sup> At the same time, while serving to contextualise imperialism, the resistance also rendered FGM an entry point for patriarchal nationalism premised on controlling women's bodies as 'symbols' of the nation.<sup>10</sup>

FGM comprises all procedures that involve the partial or total removal of the external female genitalia or other injuries to the female genital organs for non-medical reasons.<sup>11</sup> According to the World Health Organisation (WHO), there are four types of FGM.<sup>12</sup> Type I (clitoridectomy) is the partial or total removal of the clitoris (a small, sensitive and erectile part of the female genitals) and, in very rare cases, only the prepuce (the fold of skin surrounding the clitoris). Type II

4 See, eg, H Lewis 'Between *irua* and "female genital mutilation": Feminist human rights discourse and the cultural divide' (1995) 8 *Harvard Human Rights Law Journal* 1; IR Gunning 'Arrogant perception, world-travelling and multicultural feminism: The case of female genital surgeries' (1992) 23 *Columbia Human Rights Law Review* 189.

5 M Berer '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?' (2015) 23 *Reproductive Health Matters* 145-157.

6 J Snively *Female bodies. Male politics: Women and the female circumcision controversy in Kenyan colonial discourse* (1994).

7 See NW Njambi '*Irua* *ria atumia* and anti-colonial struggles among the Gikuyu of Kenya: A counter-narrative on "female genital mutilation"' (2007) 33 *Critical Sociology* 689-708.

8 As above.

9 J Kenyatta *Facing Mount Kenya* (1962).

10 See BF Frederiksen 'Jomo Kenyatta, Marie Bonaparte and Bronislaw Malinowski on clitoridectomy and female sexuality' (2008) 65 *History Workshop Journal* 23-48; VT le Vine 'African patrimonial regimes in comparative perspective' (1980) 18 *Journal of Modern African Studies* 657-673.

11 WHO 'FGM fact sheet' (2024) <https://www.who.int/en/news-room/fact-sheets/detail/female-genital-mutilation> (accessed 24 February 2024).

12 As above.

(excision) is the partial or total removal of the clitoris and the labia minora (the inner folds of the vulva), with or without excision of the labia majora (the outer folds of skin of the vulva). Type III (infibulation) is the narrowing of the vaginal opening by creating a covering seal. The seal is formed by cutting and repositioning the labia minora, or labia majora, sometimes through stitching, with or without removal of the clitoris (clitoridectomy). Type IV includes all other harmful procedures to the female genitalia for non-medical purposes, for example, pricking, piercing, incising, scraping and cauterising of the genital area.

## 2 International human rights norms and standards

FGM is well recognised as a gross violation of the human rights of girls and women in numerous international conventions, declarations and treaties, consensus documents and policies, which impacts on the enjoyment of sexual and reproductive health and rights of women.<sup>13</sup> The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol) is the only human rights instrument that explicitly refers to FGM.<sup>14</sup> Article 5(b) obligates states to take all necessary measures, including 'prohibition, through legislative measures backed by sanctions, of all forms of female genital mutilation, scarification, medicalisation and para-medicalisation of female genital mutilation and all other practices in order to eradicate them'. The African Commission on Human and Peoples' Rights (African Commission) has called on states to institute harsher penalties for all persons involved, including parents and family members.<sup>15</sup>

---

13 See E Durojaye & S Nabanch 'Addressing female genital cutting/mutilation (FGC/M) in The Gambia: Beyond criminalisation' in E Durojaye, G Mirugi-Mukundi & C Ngwenya (eds) *Advancing sexual and reproductive health and rights in Africa: Constraints and opportunities* (2021) 115.

14 For a comprehensive assessment of the drafting history and obligations arising from the provision, see S Nabanch 'Article 5: Elimination of harmful practices' in A Rudman, CN Musembi & TM Makunya (eds) *The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: A commentary* (2023) 117-134.

15 See Concluding Observations and Recommendations on the Combined 3rd and 4th Periodic Report of Burkina Faso on the Implementation of the African Charter on Human and Peoples' Rights 2011-2013, African Commission on Human and Peoples' Rights adopted at 21st extraordinary session 23 February-4 March 2017, Banjul, The Gambia.

In addition, article 21(1) of the African Charter on the Rights and Welfare of the Child (African Children's Charter) prohibits harmful social and cultural practices that are prejudicial to the health or life of the child.

The African Commission adopted a resolution in 2007 urging African states to outlaw FGM.<sup>16</sup> In their first ever joint General Comment, the African Commission and the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) addressed the human rights violations in the context of child marriage and other harmful cultural practices.<sup>17</sup>

The African Children's Committee and the African Commission have recently adopted a joint General Comment on FGM, clarifying state obligations relating to article 5(b) of the African Women's Protocol and article 21(1) of the African Children's Charter.<sup>18</sup> This General Comment offers extensive guidance on the steps that states must take to eliminate FGM, taking into account various factors such as cultural, religious, economic and patriarchal influences that contribute to its persistence in Africa.

A significant aspect of this joint General Comment is its emphasis on the careful framing of anti-FGM laws. It highlights the need for laws to be crafted meticulously to protect victims from unjust prosecution, ensuring that they are not wrongfully perceived as complicit in criminal activities. This approach signifies a crucial shift in the discourse surrounding FGM, demonstrating a nuanced understanding of legal complexities and human rights imperatives. This is particularly relevant as in certain African countries such as Nigeria and Kenya, victims of FGM have sometimes been arrested, prosecuted, and even convicted of crimes.<sup>19</sup> The African Commission has called on states to not only sensitise, but also closely

---

16 Resolution on the Health and Reproductive Rights of Women in Africa ACHPR/Res.110(XXXXI)07.

17 Joint General Comment of the African Commission on Human and Peoples' Rights and the African Committee of Experts on the Rights and Welfare of the Child on ending child marriage adopted by the African Commission on Human and Peoples' Rights and the African Committee of Experts on the Rights and Welfare of the Child 2017.

18 Joint General Comment of the African Commission on Human and Peoples' Rights and the African Committee of Experts on the Rights and Welfare of the Child (2023).

19 See American Bar Association & Clooney Foundation for Justice 'Monitoring Prosecutions under the Prohibition of FGM ACT In Kenya' (2024).

collaborate with religious, traditional and political leaders in efforts to eliminate harmful practices.<sup>20</sup> The ACERWC has also recommended that the state take necessary measures to create awareness about the adverse effect of FGM among all relevant stakeholders to eliminate the practice.<sup>21</sup>

Moreover, the General Comment provides guidance on safeguarding women from FGM, even in cases where consent is claimed. It stresses the importance of offering comprehensive medical, psychosocial and other forms of support essential for the rehabilitation and well-being of FGM survivors. For instance, the African Children's Committee recommended Eritrea to provide financial, medical and psychological assistance to victims of FGM.<sup>22</sup>

The joint General Comment also addresses the issue of cross-border FGM, outlining preventive measures and mechanisms for accountability. It also underscores the measures that should be taken to protect asylum seekers who flee their countries due to the threat of FGM, as well as those who are internally displaced for the same reason. This comprehensive approach marks a significant milestone in the global effort to eradicate FGM and protect the rights and well-being of women and girls affected by this harmful practice.

The African Commission also adopted the Guidelines on Combating Sexual Violence and its Consequences in Africa (Niamey Guidelines) in 2017.<sup>23</sup> The goal of the Niamey Guidelines is to guide and support the member states of the African Union (AU) in effectively implementing their commitments and obligations to combat sexual violence and its consequences.<sup>24</sup> In the Guidelines the Commission recognises FGM as a

---

20 See for example General Comments on Article 14(1)(d) and (e) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa paras 23 & 46.

21 ACERWC 'Concluding Recommendations on the initial report of Sierra Leone' (2017).

22 Concluding Recommendations on the initial report of Eritrea, African Committee of Experts on the Rights and Welfare of the Child, adopted at the 28th session (21 October-1 November 2016).

23 African Commission 'Guidelines on Combatting Sexual Violence and its Consequences in Africa' (2017) (Niamey Guidelines).

24 See S Nabaneh 'Sexual harassment in the workplace in The Gambia: An analysis of recent developments from a feminist perspective' in E Durojaye, S Nabaneh & T Adebajo (eds) *Sexual harassment, law and human rights in Africa* (2023) 279; A Johnson & S Nabaneh 'The invisible woman: Limits to achieving criminal accountability for violence against women with disabilities' in A Budoo-Scholtz

form of sexual violence that can constitute torture or cruel, inhuman and degrading treatment.<sup>25</sup>

The African Children's Committee has also adopted Agenda 2040, which provides the prohibition of FGM by all African states as a goal under Aspiration 7.<sup>26</sup> Agenda 2063 of the AU also condemns all forms of violence and discrimination against women and girls, including FGM.<sup>27</sup> A continental campaign to end FGM was launched by the AU in 2019.<sup>28</sup> The campaign, also known as the Saleema Initiative, was launched to save more than 50 million girls in Africa under the age of 15 years who are at risk of FGM by 2030 if urgent action is not taken.<sup>29</sup> The Initiative calls for regular reporting by member states to AU statutory bodies and requests the AU Commission (AUC) to develop the AU Accountability Framework on Eliminating Harmful Practices.

At the global level, while early human rights instruments, such as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), make no specific reference to FGM, it explicitly prohibits traditional practices that discriminate against women and harm children under articles 2 and 5. The Convention on the Rights of the Child (CRC) also obligates states under article 24(3) to abolish traditional practices harmful to children. UN treaty-monitoring bodies have also addressed the practice of FGM as a human rights violation.<sup>30</sup> The CEDAW Committee under General Recommendation 24 specifically recommended governments to devise health policies that take into account the needs of girls and adolescents who may be vulnerable to

---

& EC Lubaale (eds) *Violence against women and criminal justice in Africa: Volume II, Sustainable Development Goals Series* (2022) 281-282.

25 Niamey Guidelines (n 18) 15.

26 African Children's Committee 'Africa's agenda for children 2040' (2016), [https://www.acerwc.africa/wp-content/uploads/2018/06/Agenda\\_2040\\_for\\_Children\\_Rights\\_in\\_Africa\\_15x24.pdf](https://www.acerwc.africa/wp-content/uploads/2018/06/Agenda_2040_for_Children_Rights_in_Africa_15x24.pdf) (accessed 18 June 2023).

27 AU 'Agenda 2063: The Africa we want' (2013), [https://au.int/sites/default/files/pages/3657-file-agenda2063\\_popular\\_version\\_en.pdf](https://au.int/sites/default/files/pages/3657-file-agenda2063_popular_version_en.pdf) (accessed 18 June 2023).

28 AU Assembly Decision 737/2019.

29 'The African Union launches a continental initiative to end female genital mutilation and save 50 million girls at risk' (11 February 2019), <https://au.int/fr/node/35892> (accessed 18 June 2023).

30 See Human Rights Committee General Comment 28: Article 3 (The equality of rights between men and women), 29 March 2000, (CCPR/C/21/Rev.1/Add.10). See Committee Against Torture (CAT) General Comment 2: Implementation of Article 2 by States Parties, 24 January 2008, CAT/C/GC/2; Human Rights Committee (HRC).

traditional practices such as FGM.<sup>31</sup> Joint General Recommendation/General Comment 31 of the CEDAW Committee and 18 of the African Children's Committee provides for various legislative to eliminate the practice of FGM.<sup>32</sup>

While international and regional norms have made significant strides in addressing FGM, the effectiveness of these measures remains mixed. The treaty bodies' observations underscore the need for robust enforcement. For example, the CEDAW Committee has also raised concerns during the state reporting process about the obligations of African countries in addressing the practice. The Committee acknowledged Tanzania's law and policies addressing FGM, it remains concerned about the persistent practice.<sup>33</sup> The Committee also highlighted the weak enforcement of the law, the lack of official attention to the recent trend of FGM on newborns in private homes, and the continued legality of FGM for women over 18, who are often pressured or forced into it. The Committee noted that the continued practice of FGM is a serious violation of women's and girls' human rights and a breach of Tanzania's obligations under the Convention.<sup>34</sup> While FGM is not so common in Zanzibar, it persists in Mainland Tanzania, with an overall prevalence rate of 10 percent.<sup>35</sup> Similarly in 2023, it raised concerns about the continued occurrence of this harmful practice in Mauritania and the widespread impunity enjoyed by perpetrators.<sup>36</sup>

In essence, to fulfil their obligation to address FGM, states must take comprehensive legal, administrative, judicial, and budgetary measures. This includes implementing legal reforms and allocating resources for the enforcement of laws and policies.

---

31 CEDAW Committee 'General Recommendation No 14 (9th session, 1990), <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm>. (accessed 5 May 2023).

32 Joint general recommendation/General Comment 31 of the Committee on the Elimination of Discrimination against Women and 18 of the Committee on the Rights of the Child on harmful practices (14 November 2014), CEDAW/C/GC/31/CRC/C/GC/1.

33 CEDAW Committee 'Concluding observations of the Committee on the Elimination of Discrimination against Women: United Republic of Tanzania' (16 July 2008) CEDAW/C/TZA/CO/6.

34 As above, paras 121-122.

35 World Bank 'Tanzania Gender Assessment' (2022).

36 CEDAW Committee 'Concluding observations of the Committee on the Elimination of Discrimination against Women: Mauritania' (2 March 2023) CEDAW/C/MRT/CO/4, para 20.



### 3 Legal and jurisprudential trends around FGM

Globally, more than 60 countries have adopted laws that criminalise FGM, including more than 25 African countries.<sup>37</sup> During the past decade, the trend towards criminalisation is increasingly found in various laws, including penal codes, specific anti-FGM laws, Women's Acts and Domestic Violence Acts. Between 2007 and 2018 countries such as Zimbabwe, Uganda, South Sudan, Kenya, Guinea Bissau, Mozambique, The Gambia and Cameroon adopted laws that punish the practice of FGM. The primary rationale for this trend includes several factors: aligning with international treaties and commitments, protecting human rights, deterring and holding perpetrators accountable, ensuring public health and safety, and promoting gender equality. Subsequently, new laws have been introduced or existing laws amended. The rationale behind amending existing laws is based on the premise that it is easier to amend laws than to draft entirely new ones, especially when relevant laws already exist that can be strengthened. For instance, whereas The Gambia amended its Women's Act 2015, Nigeria adopted the Violence Against Persons (Prohibition) Act in 2015 with article 6 prohibiting FGM, although it is only directly applicable in the federal capital territory, Abuja, and not in all 36 states. In Mauritania, article 12 of the Children's Code of 2015 prohibited FGM. Guinea also adopted a similar provision in its Children's Code, 2008. Guinea-Bissau adopted a separate and specific FGM law in 2011.<sup>38</sup>

Despite an increasing uptake of criminalisation by African states, FGM has persisted. More than 200 million girls and women alive today have been cut throughout countries in Africa, the Middle East and Asia, and increasingly among immigrant populations in Europe, Australia and North America.<sup>39</sup> The WHO estimates that 100 to 140 million girls and

37 See World Bank *Compendium of international and national legal frameworks on female genital mutilation* (2018).

38 S Nabaneh & A Muula 'Female genital mutilation/cutting: A complex legal and ethical landscape' (2019) 145 *International Journal of Gynecology and Obstetrics* 253-257.

39 UNICEF 'Female genital mutilation/cutting: A global concern' (2016) <https://data.unicef.org/resources/female-genital-mutilationcutting-global-concern/> (accessed 5 May 2023). See D Gollaher *Circumcision: A history of the world's controversial surgery* (2000).



women worldwide are currently living with the consequences of FGM.<sup>40</sup> In Africa, an estimated 92 million girls from the age of 10 years and above have undergone FGM.<sup>41</sup> The treatment of FGM-related complications costs billions of dollars every year in high-prevalence countries, with this cost expected to rise to US \$2,3 billion by 2047.<sup>42</sup>

*Table 1: Summary of how FGM is incorporated into national legislative frameworks*

Country	Specific national anti-FGM laws in place	Prohibits FGM within another domestic law	Type of law	Year law was enacted
Benin	✗	✗	Child/VAW	2003
Burkina Faso	✗	✗	Penal Code	1996
Cameroon	—	✗	Penal Code	2016
CAR	—	✗	VAW/Penal Code	1966
Chad	—	—	—	N/A
Côte d'Ivoire	✗	✗	VAW	1998
DRC	✗	✗	Penal Code	2009 (criminalised)
Djibouti	✗	✗	Penal Code	2008
Egypt	✗	✗	Penal Code	2007
Eritrea	✗	—	—	2004
Ethiopia	✗	✗	Criminal Code	1994
The Gambia	✗	✗	Women's Act	1965
Ghana	✗	✗	Criminal Code	2011
Guinea	✗	✗	Child/Criminal Code	2001
Guinea Bissau	✗	✗	—	2011
Kenya	✗	✗	Child/Domestic Violence	2001
Liberia	—	—	—	N/A
Malawi	—	—	—	N/A
Mali	—	—	—	N/A

40 WHO 'FGM fact sheet' (2020), <https://www.who.int/en/news-room/fact-sheets/detail/female-genital-mutilation> (accessed 5 May 2023).

41 As above.

42 As above.

Mauritania	—	✗	Child	2005
Mozambique	—	—	—	N/A
Niger	—	✗	Violence Against Persons	2003
Nigeria	✗	✗	Penal Code	2015
Senegal	✗	✗	Penal Code	1999
Sierra Leone	—	—	—	N/A
Somalia	—	—	—	N/A
Somaliland	—	—	—	N/A
South Sudan	—	✗	Penal Code/Child	2008
Sudan	✗	✗	—	2020
Tanzania	✗	✗	Sexual Offences/ Penal Code	1998
Togo	✗	✗	Penal Code	1998
Uganda	✗	✗	Child	2010
Zambia	✗	✗	Penal Code	2005
Zimbabwe	✗	✗	Domestic Violence	2006

While an increasing number of African countries have adopted specific legislation prohibiting FGM, as illustrated, it predominantly follows a crime and punishment model. For instance, the laws do not impose state duties to educate and raise awareness about the harmful effects of the practice. This also provides insights into the problems embedded in the global travel of legal frameworks responding to violence against women, including FGM. As a socio-cultural and religious phenomenon, the continued practice of FGM in many African countries is illustrative of the challenges related to the enforcement of anti-FGM laws. Power relations, culture and religion continue to be the drivers and determinants of the practice and impact public discourse that shapes policy. Thus, the trend towards criminalising FGM also comes on the heel of the push that legislation should be a supportive tool that serves as a catalyst of social change and fosters an enabling environment for the abandonment of the practice.

There also is emerging constitutional jurisprudence on FGM practice in the region through national courts. For instance, in 2010, on the issue of whether the custom and practice of FGM was unconstitutional, the Ugandan Constitutional Court held that FGM violated the rights of women, including the right to equality and freedom from discrimination,

the right to protection of life, the right to privacy, dignity, and integrity, as well as women's rights. The Court highlighted that FGM poses a direct threat to the lives of girls and women, often leading to fatal consequences. The Court held that FGM must be prohibited in the jurisdiction for being inconsistent with the Constitution. The impact of this case is further discussed in this book.

Recently, in Kenya, a medical professional, Dr Tatu Kamau, challenged the constitutionality of the Prohibition of Female Genital Mutilation Act.<sup>43</sup> She argued that sections of the Act contravened the Kenyan Constitution by prohibiting an adult woman from freely electing to undergo FGM under a trained and licensed medical practitioner, thereby denying women access to the right to health care. She claimed to speak on behalf of communities that practise female circumcision and the women who have been imprisoned for carrying out the rite. On 17 March 2021 the High Court of Kenya ruled that the practice of FGM violates a woman's right to health, human dignity and the right to life when it results in death, and that the practice also undermines international human rights standards. The Court rejected the argument that individuals, including adult women, could choose to undergo a harmful practice like FGM. It held that the fact that someone is an adult does not change the unconstitutionality of FGM. This case is further discussed in one of the chapters.

The emerging jurisprudence not only provides opportunities for holding African governments accountable but also raises important questions on issues of morality, culture and law. For example, how does the jurisprudence speak to African women's intersectional and complex experiences that do not reify the universalisation of women's bodies and culture? Another question that arises is whether there is a legitimate reason to criminalise consent based or voluntary FGM by adult women and whether any such criminalisation violates their human rights.

Overall, while there have been significant efforts to eradicate FGM through criminalisation and enhanced law enforcement, practising communities have reacted with changed tactics resulting in emerging trends such as cross-border cutting, reduced age of practice and medicalisation. In addition, due to COVID-19 disruptions, it has been

---

<sup>43</sup> *Dr Tatu Kamau v Attorney General & Others* Constitutional Petition 244 of 2019, High Court of Kenya.

reported that a one-third reduction in the progress towards ending FGM by 2030 is anticipated.<sup>44</sup> For instance, the President of Kenya in 2020 ordered an investigation into rising reports of violence against women and girls – including rape, domestic violence, FGM and child marriage – as a result of COVID-19 restrictions.<sup>45</sup>

Recent evidence of politicisation of FGM criminalisation is illustrated in the Gambian case, wherein, it became the first country in the world to potentially repeal the anti-FGM law. In 2023, three women were convicted for their involvement in performing and abetting FGM from Niani Bakadaji, Central River Region (CRR), for circumcising eight children between the ages of four months and one year, a direct violation of the provisions outlined in Section 32(a) and (b) of the amended Women's Act of 2015.<sup>46</sup> According to newspaper reports, there seems to be substantial pressure on the Magistrate to prosecute the suspect. However, the sentence imposed is widely perceived as inadequate given the harm caused. They were fined only 15,000 Gambian Dalasis (approximately USD 220) or in default to serve one year imprisonment, a sentence that is not consistent with the prescribed punishment of three years imprisonment or a fine of 50,000 Gambian Dalasi (approximately USD 750) or to both under the law.<sup>47</sup>

Interestingly, on the day that they were fined, Imam Abdoulie Fatty, a religious advisor known for his radical views and associated with former dictator Yahya Jammeh and part of the Supreme Islamic Council paid it, defying the Court's decision to emphasise that this is an integral part

44 UNFPA-UNICEF 'COVID-19 disrupting SDG 5.3: Eliminating female genital mutilation: Technical note' (2020), [https://www.unfpa.org/sites/default/files/resource-pdf/COVID19\\_Disrupting\\_SDG.3\\_Eliminating\\_Female\\_Genital\\_Mutilation.pdf](https://www.unfpa.org/sites/default/files/resource-pdf/COVID19_Disrupting_SDG.3_Eliminating_Female_Genital_Mutilation.pdf) (accessed 5 May 2023). See also UN Women and UNFPA 'Impact of COVID-19 on gender equality and women's empowerment in East and Southern Africa' (2021).

45 UN Women & UNDP 'COVID-19 global gender response tracker. Factsheet: sub-Saharan Africa' (2020), <https://data.undp.org/gendertracker/> (accessed 5 May 2023).

46 T Bojang '3 Women Sentenced for FGM in CRR' *The Standard* (28 August 2023) <https://standard.gm/3-women-sentenced-for-fgm-in-crr/> (accessed 1 September 2023).

47 S Nabaneh and MB Sawo 'Threats to #EndFGM Law in The Gambia' *AfricLaw* (22 March 2024) <https://africlaw.com/2024/03/22/threats-to-endfgm-law-in-the-gambia/#more-3155> (accessed 10 May 2024). See also S Nabaneh & MB Sawo 'En Gambie, l'interdiction des mutilations génitales menacée' *AfriqueXXI* (4 April 2024) <https://afriquexxi.info/En-Gambie-l-interdiction-des-mutilations-genitales-menacee> (accessed 10 May 2024).

of their culture. He argued that if everyone openly supported it, the government would not be able to imprison an entire town, let alone an entire country.<sup>48</sup> This led to intense and regressive debates in the National Assembly, eventually garnering overwhelming support for the repeal of FGM, indicating that the practice should be discontinued.<sup>49</sup> On 4 March 2024, Hon. Almameh Gibba introduced a Private Member's Bill in the National Assembly, the Women's (Amendment) Bill 2024, which seeks to delete Sections 32A and 32B of the Women's (Amendment) Act 2015. The objects and purpose states that:

This Bill seeks to lift the ban on female circumcision in The Gambia, a practice deeply rooted in the ethnic, traditional, cultural, and religious beliefs of the majority of the Gambian people. It seeks to uphold religious purity and safeguard cultural norms and values. The current ban on female circumcision is a direct violation of citizens' rights to practice their culture and religion as guaranteed by the Constitution. Given The Gambia's predominantly Muslim population, any law that is inconsistent with the aspirations of the majority of the people should be reconsidered. Female circumcision is a culturally significant practice supported by Islam, with clear proves of the teachings from our Prophet (S.A.W). It is to be noted that the use of laws to restrict religious or cultural practices, whether intentional or otherwise, can lead to conflict and friction. Interestingly, the continued existence of the ban on female circumcision and penalising practitioners has directly contradicted the broader principles of the United Nations, which encourages, through its agencies, the preservation and practice of cultural and historical heritages ...

Adding to the complexity of the situation, the Supreme Islamic Council on 25 September 2023, issued an unprecedented *Fatwa* supporting the decriminalisation of FGM.<sup>50</sup> In Islamic jurisprudence, this *Fatwa* serves as an equivalent to the Attorney General's legal opinion in the absence of a Supreme Court interpretation. The essence of the Supreme Islamic Council's *Fatwa* is to suggest that FGM is sanctioned by Islam, and it is a part of Gambian culture that should not be abandoned. This declaration

---

48 A Jadam 'Imam Fatty calls for social, economic boycott of FGM campaigners' *The Standard* (11 September 2023) <https://standard.gm/imam-fatty-calls-for-social-economic-boycott-of-fgm-campaigners/> (accessed 15 September 2023).

49 S Nabaneh & MB Sawo 'La Gambie pourrait autoriser à nouveau les mutilations génitales féminines : un nouveau signe d'une tendance mondiale à l'érosion des droits des femmes' *Seneweb* (30 March 2024). [https://www.seneweb.com/news/Afrique/la-gambie-pourrait-autoriser-a-nouveau-l\\_n\\_437108.html](https://www.seneweb.com/news/Afrique/la-gambie-pourrait-autoriser-a-nouveau-l_n_437108.html) (accessed 10 May 2024).

50 B Bah 'Islamic Council issues fatwa in defence of female circumcision' *The Standard* (29 September 2023) <https://standard.gm/islamic-council-issues-fatwa-in-defence-of-female-circumcision/> (accessed 5 October 2023).

further complicates efforts to eradicate the practice, particularly in a majority Muslim society.

On 18 March 2024, after its First Reading and debate, the lawmakers voted to send the bill to a committee for further review and public consultation. Public consultations have occurred over a three month period with direct engagements with 143 witnesses and subject matter experts. On 8th July, the Parliamentary Joint Committee of Health and Gender presented its report on the Bill, highlighting the negative health effects of FGM on women and girls and emphasising that FGM is not a religious obligation. The Joint Committee's report made several key recommendations. Firstly, it suggested that the Women's (Amendment) Act 2015 should be maintained to prohibit FGM in all its forms in The Gambia. It also recommended that legal support and protection be provided to women and girls at risk of FGM, as well as those who have undergone the procedure. Additionally, the government should enforce the law and issue clear policy directives prohibiting FGM. Lastly, the report advised that the government should unequivocally ban any attempts to medicalise the practice of FGM.

Thus, the National Assembly adopted the report, recommending that the law remain unchanged. A week later, following sustained efforts by civil society, including feminist activists and women's rights advocates, the Assembly voted to reject the bill. Subsequently, the parliamentarian and seven others have filed a case before the Supreme Court seeking to decriminalise the practice.<sup>51</sup> The case is ongoing. This potential reversal has thrust the country into the global spotlight as the latest example of the backlash against gender equality.<sup>52</sup>

The criminalisation of FGM, the command has become a global trend, especially on the African continent, even though its efficacy by

---

51 'Almameh Gibba, Others Ask Supreme to Decriminalize Female Circumcision in The Gambia' *Foroyaa*, 31 July 2024.

52 S Nabaneh 'The Gambia may allow female genital mutilation again – another sign of a global trend eroding women's rights' *The Conversation* (28 March 2024) <https://theconversation.com/the-gambia-may-allow-female-genital-mutilation-again-another-sign-of-a-global-trend-eroding-womens-rights-226632> (accessed 10 May 2024). See also, S Nabaneh 'La Gambie pourrait autoriser à nouveau les mutilations génitales féminines : un nouveau signe d'une tendance mondiale à l'érosion des droits des femmes' *The Conversation* (5 April 2023) <https://theconversation.com/la-gambie-pourrait-autoriser-a-nouveau-les-mutilations-genitales-feminines-un-nouveau-signe-dune-tendance-mondiale-a-lerosion-des-droits-des-femmes-227003> (accessed 10 May 2024).

no means has been proven. This evolution, which is illustrative of the influence of international culture and norms on national laws, deserves to be interrogated. For instance, why have African countries adopted anti-FGM laws? How do we explain the discourses that created its seemingly cosmetic acceptance by African governments? Given the increased global effort to criminalise FGM, on the one hand, and continued defiance by practising communities around the continent, on the other, there is a need to critique dominant discourses surrounding criminalisation.

This book seeks to provide a more nuanced and analytical exploration of the practice, going beyond the traditional frameworks of crime and punishment, as well as the human rights lens. Doing so allows one to engage in a more holistic critical discourse on 'universalising' human rights norms and their influences on national laws, which is necessary to understand the complexity of the practice. The continued justifications for the practice are a good portrayal of the anti-neo-colonial discourse, as the practice has often been viewed as morally unacceptable, primitive and barbaric.<sup>53</sup>

#### 4 Objectives

The main objective of the book is to challenge hegemonic epistemologies and expand critical discourses and facilitate learning across disciplinary, national, ethnic and religious boundaries on the use of the law and criminalisation to eradicate FGM on the continent and beyond. It aims to highlight the effectiveness of laws and policies to eradicate FGM in Africa. Other objectives are

- to interrogate universalising human rights norms and standards in creating national laws on FGM;
- to contribute to new scholarship that develops theoretical approaches in gaining an understanding of the limited effectiveness of legislation/criminalisation against FGM;
- to engage in a critical discourse on the impact of culture, religion and social beliefs that drive the practice of FGM; and
- to identify and critically discuss the effects of criminalisation, including emerging issues such as medicalisation of FGM, consent and cross-border cutting.

---

53 See S Tamale 'Researching and theorising sexualities in Africa' in S Tamale (ed) *African sexualities: A reader* (2011) 19-20.



## 5 Structure

The book is divided into four parts, each offering unique insights into the complex issue of FGM in Africa, with contributions from a diverse range of experts, including academics, human rights activists, and members of regional and national human rights bodies. Cross-cutting themes pervade many chapters.

### 5.1 Female genital mutilation: Unpacking the cultural context

In part I the book explores the intricate cultural context of FGM in Africa, critically examining the limitations of previous approaches aimed at eradicating this practice and advocating more inclusive, community-specific strategies tailored to the unique needs of each region.

In chapter 2 ('Developing home-grown approaches to eradicating FGM across communities in Africa') Adegbite argues that previous approaches to eradicating FGM have been too top-down and have not taken into account the specific needs and beliefs of different communities. Adegbite concludes by advocating a home-grown approach that is developed and implemented by community members themselves.

Building on this foundation, chapter 3 ('The disabled genitalia: Countering dominant narratives to ending female genital mutilation in Africa') by Johnson pushes for re-evaluation of the intervention strategies related to FGM in Africa. Johnson emphasises the importance of adopting an intersectional and feminist decolonial perspective that considers disability and sex/gender as interconnected and dynamic, rather than treating them as separate, fixed, uniform, colonial, or essentialist identity categories.

In chapter 4 ('Research and FGM prevention: Evidence from Africa') Dawson continues the discussion by highlighting the crucial role of research in addressing FGM. Dawson argues that research can help one to understand the root causes of FGM, develop effective prevention strategies, and measure the impact of our interventions. She also highlights the need for research, capacity building and ethical research practices.

## 5.2 Ethics, law and criminalisation

Part II explores the ethical and legal dimensions of FGM, delving into the challenges and opportunities associated with the criminalisation of FGM, and shedding light on the complex landscape of laws and regulations surrounding this practice.

In chapter 5 ('Medicalisation of FGM/Cutting: Ethical Dimensions'), Kimani discusses the ethical dilemmas posed by the medicalisation of FGM. Kimani argues that while medicalisation aims to reduce the immediate complications of FGM, it fails to address long-term effects and human rights violations. This chapter explores a dual approach, integrating health and human rights perspectives to combat the medicalisation of FGM, and underscores the need for professional dialogue and engagement to effectively tackle these challenges.

Chapter 6 ('Understanding Women's Rights, Culture, and the Need to Criminalise FGM in Kenya: *Kamau v Attorney General & Others*') by Kinama examines a significant legal case in Kenya involving the Prohibition of Female Genital Mutilation Act. Kinama analyses the key aspects of the judgment, focusing on whether adult women can be restricted from choosing to undergo FGM within their cultural context. The chapter highlights the importance of considering women's rights and state obligations, both domestically and internationally, in addressing violence against women.

Complementing the discussion, chapter 7 ('Eradicating undesirable cultural or religious practices through criminalisation: The need for equity in the case of body modification surgeries') by Tangwa explores the challenges of eradicating deeply rooted cultural and religious practices. Tangwa argues that while criminalisation can be an effective tool for eradicating FGM, it must be implemented carefully and equitably, especially considering the impact on marginalised groups.

## 5.3 Survivor narratives and feminist perspectives

Part III shifts the focus to survivor narratives and feminist perspectives, emphasising the significance of understanding the experiences of FGM survivors and the pivotal role of feminism in challenging and addressing this issue

In chapter 8 ('Re-telling the experiences of african women with FGM through an African feminist lens'), Meroka-Mutua employs an

African feminist perspective to examine the experiences of African women who have undergone FGM. Meroka-Mutua argues that African feminism offers a unique lens for understanding the complex and often contradictory ways in which African women respond to FGM. This chapter provides a nuanced examination of FGM in Africa, considering cultural, social, and gender dynamics

Continuing this exploration, chapter 9 ('Female genital mutilation: A survivor's narrative') by Sawo shares her personal experiences of FGM and discusses the long-term and short-term physical and psychological trauma that she and other survivors have endured. Sawo emphasises the adverse impact of FGM on survivors' quality of life, sexual and reproductive health, well-being, and relationships. She also examines the factors contributing to the high prevalence of FGM in The Gambia and discusses efforts by organisations and survivors to end this practice. Her narrative sheds light on the challenges and the importance of addressing FGM from a survivor's perspective.

#### **5.4 Legal cases and societal responses**

Chapters in part IV examine the complex relationship between criminalisation, state obligations, grassroots communities, and cultural and religious demands in the fight against FGM. It also explores the challenges and opportunities presented by legal and societal responses to eradicate the practice, offering a comprehensive and multifaceted exploration of FGM in Africa.

In chapter 10 ('The curse of beyond reasonable doubt'), Mbaabu examines the complex relationship between criminalisation, state obligations, and grassroots communities in the fight against FGM. Highlighting the importance of considering all three perspectives, Mbaabu uses Kenya as a case study to argue that states have a responsibility to protect women and girls from FGM and to prosecute those who perpetrate this crime. However, he also discusses the challenges in prosecuting the practice due to the high burden of proof required and the lack of resources available to law enforcement and the judiciary.

Chapter 11 ('Should female genital mutilation be decriminalised in Nigeria?') by Abdulraheem-Mustapha explores the practice of FGM in Nigeria, its cultural and religious roots, and its impact on the sexual and reproductive health rights of women. Despite its criminalisation in Nigerian laws, FGM remains prevalent. The chapter explores the

need for a balanced approach that addresses both cultural and religious demands and constitutional and criminal requirements. Abdulraheem-Mustapha advocates for a socio-legal approach that examines the role of legal, social, and political forces in enforcing FGM laws, deploying strategies such as advocacy, political will, educational initiatives, and engaging gatekeepers to amend existing laws to effectively combat FGM.

Following this, chapter 12 ('A case commentary on law and advocacy for women in *Uganda v Attorney General*') by Nyirinkindi provides a comprehensive analysis of the legal efforts in Uganda to combat FGM. The chapter explores Uganda's commitment to international human rights conventions, forming the basis for the country's legal provisions on gender equality and women's rights. Nyirinkindi delves into the Constitutional Court's role as a crucial platform for addressing human rights violations, including those related to FGM. The chapter assesses the implementation of the Prohibition of Female Genital Mutilation Act 2010 and its accompanying regulations, examining their effectiveness in deterring the practice and safeguarding potential victims.

Lastly, chapter 13 ('Female genital mutilation/cutting and the global politics of cultural relativism') by Milde examines the contentious issue of FGM within the framework of cultural relativism. Milde critically examines the concept of cultural relativism and its application as an ethical principle, highlighting the challenges posed by FGM to cultural relativism, especially concerning its impact on the autonomy and well-being of affected communities, particularly women. This analysis sheds light on the complex dynamics between cultural relativism and universalism, and the global discourse surrounding FGM.

## **6 Conclusion**

The criminalisation of FGM has become a global trend, particularly across the African continent, though its effectiveness remains uncertain. This development, influenced by international culture and norms, requires critical examination. There has been a lack of assessment of how the use of criminal law and human rights are deeply interconnected. Debates regarding the use of criminal law in advancing women's rights continue to be a global issue in both the Global South and the Global North.

It appears criminalisation has contested efficacy. Why did it become an option? What kind of discourses created its cosmetic

acceptance by African governments? By examining the contestations and contradictions in criminalising the practice, this book aims to shed light on the complexities of the issue. Given the increased global efforts to criminalise FGM and the ongoing resistance from practicing communities across the continent, it is essential to critique the dominant narratives surrounding criminalisation. This book offers an entrée into such conversations and debates.

The enforcement of laws against FGM varies significantly across African countries where the practice is prevalent. Although legislation outlawing FGM is crucial for its prevention and for promoting its abandonment, in most countries where FGM is practiced, legislation exists, but evidence of its effectiveness in deterring FGM and accelerating its abandonment is limited. The application of criminal law also has material effects, and its potential impact should be part of the policy reform conversation. If criminal law is the last resort, how do we center prevention measures?

## Bibliography

- African Children's Committee 'Africa's Agenda for Children 2040' (2016) [https://www.acerwc.africa/wp-content/uploads/2018/06/Agenda\\_2040\\_for\\_Children\\_Rights\\_in\\_Africa\\_15x24.pdf](https://www.acerwc.africa/wp-content/uploads/2018/06/Agenda_2040_for_Children_Rights_in_Africa_15x24.pdf) (accessed 20 March 2023)
- African Commission 'Guidelines on combatting sexual violence and its consequences in Africa' (2017) (Niamey Guidelines)
- AU 'Agenda 2063: The Africa we want' (2013) [https://au.int/sites/default/files/documents/36204-doc-agenda2063\\_popular\\_version\\_en.pdf](https://au.int/sites/default/files/documents/36204-doc-agenda2063_popular_version_en.pdf) (accessed 20 March 2023)
- AU Assembly Decision 737/2019
- 'The African Union launches a continental initiative to end female genital mutilation and save 50 million girls at risk' (11 February 2019) <https://au.int/fr/node/35892> (accessed 24 March 2023)
- Berer, M '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?' (2015) 23 *Reproductive Health Matters* 145-157
- CEDAW Committee 'General Recommendation No. 14 (9th session, 1990)' <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm> (accessed 5 May 2023)
- Committee Against Torture (CAT) General Comment 2: Implementation of Article 2 by States Parties, 24 January 2008, CAT/C/GC/2
- Durojaye, E & Nabaneh, S 'Addressing female genital cutting/mutilation (FGC/M) in The Gambia: Beyond criminalisation' in Durojaye, E, Mirugi-Mukundi, G & Ngwena, C (eds) *Advancing sexual and reproductive health and rights in Africa: Constraints and opportunities* (Routledge 2021) 115
- Frederiksen, BF 'Jomo Kenyatta, Marie Bonaparte and Bronislaw Malinowski on clitoridectomy and female sexuality' (2008) 65 *History Workshop Journal* 23-48
- Gollaher, D *Circumcision: A history of the world's controversial surgery* (Basic Books 2000)
- Gunning, IR 'Arrogant perception, world-travelling and multicultural feminism: The case of female genital surgeries' (1992) 23 *Columbia Human Rights Law Review* 189
- Human Rights Committee *General Comment 28: Article 3 (The Equality of Rights Between Men and Women)*, 29 March 2000, (CCPR/C/21/Rev.1/Add.10)
- Joint General Comment of the African Commission on Human and Peoples' Rights and the African Committee of Experts on the Rights and Welfare of the Child on Ending Child Marriage adopted by the African Commission on Human

- and Peoples' Rights and the African Committee of Experts on the Rights and Welfare of the Child (2017)
- Joint General Comment of the African Commission on Human and Peoples' Rights and the African Committee of Experts on the Rights and Welfare of the Child on Female Genital Mutilation adopted by the African Commission on Human and Peoples' Rights and the African Committee of Experts on the Rights and Welfare of the Child (2023)
- Joint General Recommendation/General Comment 31 of the Committee on the Elimination of Discrimination against Women and 18 of the Committee on the Rights of the Child on Harmful Practices (14 November 2014), CEDAW/C/GC/31/CRC/C/GC/1
- Johnson, A & Nabaneh, S 'The invisible woman: Limits to achieving criminal accountability for violence against women with disabilities' in Budoo-Scholtz, & Lubaale, EC (eds) *Violence against women and criminal justice in Africa: Volume II, Sustainable Development Goals series* (2022) 281-282
- Kenyatta, J *Facing Mount Kenya* (Vintage 1962)
- Law and Advocacy for Women in Uganda v The Attorney General* [2010] UGCC 4 Constitutional Petition 8 of 2007 Uganda, Constitutional Court
- le Vine, VT 'African patrimonial regimes in comparative perspective' (1980) 18 *Journal of Modern African Studies* 657-673
- Lewis, H 'Between Irua and "Female Genital Mutilation": Feminist human rights discourse and the cultural divide' (1995) 8 *Harvard Human Rights Law Journal* 1
- Nabaneh, S 'The Gambia may allow female genital mutilation again – another sign of a global trend eroding women's rights' *The Conversation* (28 March 2024) <https://theconversation.com/the-gambia-may-allow-female-genital-mutilation-again-another-sign-of-a-global-trend-eroding-womens-rights-226632> (accessed 29 March 2024)
- Nabaneh, S 'Elimination of harmful practices' in Rudman, A, Musembi, CN & Makunya, TM (eds) *The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: A Commentary* (PULP 2023) 117
- Nabaneh, S & Muula, A 'Female genital mutilation/cutting: A complex legal and ethical landscape' (2019) 145 *International Journal of Gynecology and Obstetrics* 253-257
- Nabaneh, S 'Sexual harassment in the workplace in The Gambia: An analysis of recent developments from a feminist perspective' in Durojaye, E, Nabaneh, S & Adebajo, T (eds) *Sexual harassment, law and human rights in Africa* (Palgrave Macmillan 2023) 279



- Njambi, NW 'Irua Ria Atumia and anti-colonial struggles among the Gikuyu of Kenya: A counter-narrative on "Female Genital Mutilation"' (2007) 33 *Critical Sociology* 689-708
- Nnaemeka, O *Sisterhood, feminism and power: From Africa to the Diaspora* (African World Press 1998)
- Nnaemeka, O 'Theorising, practicing, and pruning Africa's Way' (2004) 29 *Signs: Journal of Women in Culture and Society* 357-385
- Resolution on the Health and Reproductive Rights of Women in Africa ACHPR/Res.110(XXXXI)07
- Snively, J *Female bodies, male politics: Women and the female circumcision controversy in Kenyan colonial discourse* (McGill University 1994)
- Tamale, S 'Researching and theorising sexualities in Africa' in Tamale, S (ed) *African sexualities: A reader* (Pambazuka Press 2011)
- Thiam, A *Speak out, black sisters: Black women and oppression in black Africa*, trans. DS Blair (Pluto Press 1995)
- UN Women & UNDP 'COVID-19 Global Gender Response Tracker. Factsheet: Sub-Saharan Africa' (2020) <https://data.undp.org/gendertracker> (accessed 5 May 2023)
- UN Women and UNFPA 'Impact of COVID-19 on gender equality and women's empowerment in East and Southern Africa' (2021)
- UN 'International Conference on Population and Development Programme of Action' (1994)
- UNFPA-UNICEF 'COVID-19 Disrupting SDG 5.3: Eliminating Female Genital Mutilation: Technical Note' (2020)
- UNICEF 'Female genital mutilation/cutting: A global concern' (2016) <https://data.unicef.org/resources/female-genital-mutilationcutting-global-concern/> (accessed 5 May 2023)
- WHO 'FGM Fact Sheet' (2024) <https://www.who.int/en/news-room/fact-sheets/detail/female-genital-mutilation> (accessed 5 January 2024)