

**A CASE COMMENTARY ON LAW
AND ADVOCACY FOR WOMEN
IN *UGANDA V THE ATTORNEY
GENERAL*: EXPLORING THE LEGAL
STEPS TAKEN IN ABOLISHING THE
PRACTICE OF FEMALE GENITAL
MUTILATION AND CHALLENGES
WITH IMPLEMENTING THE
DECISION**

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Abstract

This chapter analyses the case of Law and Advocacy for Women in Uganda v The Attorney General in the context of the various legal steps that have been taken in Uganda to abolish the practice of female genital mutilation. Key factors in this case include the undertaking by Uganda to ratify the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. The Constitution of Uganda, 1995, drawing from international human rights frameworks, including CEDAW, provides enabling legal provisions for gender equality and the substantive rights of women. The establishment of the Constitutional Court claims mechanisms under the Constitution entrenches a critical forum for victims of human rights abuses and violations and those acting on their behalf to challenge constitutional breaches made on a de jure or de facto basis. Apart from the legal and regulatory

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frameworks, this chapter examines the efficacy of the domestication of international and regional frameworks at national level. The extent to which the Prohibition of Female Genital Mutilation Act 2010 and its accompanying regulations enacted in 2013 are being implemented to deter the practice of female genital mutilation and protect actual and would-be victims is discussed. The chapter further investigates the reasons why despite an enabling legal, policy and juridical environment, challenges in eradicating the practice of female genital mutilation persist in some communities in Uganda.

1 Introduction

Strategic litigation involves the identification and trial of a potentially high impact case with a view to achieving wider changes in legal systems and institutions or societal norms and practices. Strategic litigation, sometimes referred to as ‘third party intervention’,¹ has great utility as a tool for advocacy, standard setting and pursuing normative and structural change. In human rights terms, ending violations and clarifying and furthering the protection and promotion of rights is the goal of strategic litigation.² For those seeking to redress wrongs suffered as a result of gender injustice, strategic litigation offers a pathway for litigating against laws, policies, practices, institutions and processes that are blind or neutral to women’s rights, concerns and experiences or perpetuate gender violence, inequality and discrimination. Since the passing of the Constitution of Uganda, 1995, various gender activists in Uganda have employed strategic litigation to promote and protect the rights of women in the area of marriage, divorce and maternal health and female genital mutilation (FGM) in Uganda.

1 Open Society Justice Initiatives ‘Strategic litigation impacts: Insights from global experience (2018) Open Society Foundation; J Robinson ‘Making the law work for women: Investigating feminist interventions via strategic litigation’ (2020) *Engender*, <https://www.engender.org.uk/news/blog/making-the-law-work-for-women-investigating-feminist-interventions-via-strategic-litigation/> (accessed 7 June 2022).

2 Amnesty International ‘Strategic litigation’, <https://www.amnesty.org/en/strategic-litigation/> (accessed 7 June 2022).

1.1 The practice of female genital mutilation (FGM) in Uganda

For a few decades, Uganda has battled to eradicate the harmful custom of FGM in a few communities in the eastern region, although the practice predates Uganda as a polity. The practice is limited to the Tepeth, Kadam and Pokot tribes of Karamoja region and the Sabiny in the eastern region. The Sabiny practise type I or II (clitoridectomy or partial or total excision) while the Pokot practise Type III (infibulation).³ A 2016 government survey conducted in FGM-practising communities established that FGM is carried out among the Pokot communities on girls aged between 14 and 15 years and among Sabiny girls aged between 17 and 19 years.⁴ FGM is being carried out mostly on adolescent Pokot girls as a rite of passage before marriage, as opposed to the Sabiny where FGM is conducted on older, uncut married women.⁵

The prevalence of FGM in Uganda is considered lower than in many African countries⁶ but remains problematic in its persistence. The Uganda Demographic and Health Survey (UDHS) 2011 indicated that FGM prevalence was at 1.4 per cent among women aged 15 to 59 years. In 2016, this figure decreased to 0.3 per cent among women in this age group, according to the Uganda Demographic and Health Survey (UDHS). However, between 2020-2021 during the COVID-19 lockdown period, it is believed that FGM numbers increased due to girls being out of school in the two-year prolonged lockdown period in Uganda. Dubbed the world's longest school closure, schools in Uganda were shut down for 83 weeks between 16 February 2020 and 31 October 2021, and only opened formally on 10 January 2022. A 2021 December survey on FGM revealed that the Moroto in Karamoja region had some of the highest FGM prevalence rates and that FGM conducted across the border appeared to have increased during the pandemic.⁷

The reasons for FGM holding sway in practising communities are varied. While in other regions of the world, the fight against FGM is seen as an attack against religion, in Uganda this largely is not the case.

3 28 *Too Many Countries profile: FGM in Uganda* (2013).

4 Republic of Uganda *Female genital mutilation in Uganda* (2017) UBOS, UNICEF.

5 As above.

6 As above.

7 UNICEF *The impact of COVID-19 on child marriage and female genital mutilation in Uganda research report* (2022).

The tribes that subscribe to FGM adhere to it as a matter of cultural identity and traditional rites of passage for girls into womanhood. The 2016 FGM survey revealed that motivations for undergoing FGM include 'acceptability for marriage, ability to product children, being clean and fidelity to husband'.⁸ Pokot tribal practices link FGM to girls' readiness for marriage; the age of 10 years is acceptable for marriage and, conversely, girls undergo FGM at marriage. The UDHS of 2011 found an inverse relationship between education and wealth and the desire to undergo FGM; women with lower education levels and least wealth were more likely to want FGM to continue. This is most likely because of the desire to marry as a way of receiving dowry, social inclusion and economic support from a husband.

FGM is claimed as a cultural identity rite and right by the communities that practise it in Uganda, thus its framing as a crime creates tensions from the outset. Many practitioners in the Sabiny region call its ban Western-imposed. Kenya's colonial history reveals the intensity of the clash of cultural codes and the extreme polemics they breed. When the Church of Scotland pushed for an end to FGM between 1929 and 1932, this provided more impetus for the Kikuyu independence struggle to mobilise their common cultural identity against the British.⁹ Culture can be a melting pot for shared values and objectives but also impose a collective homogeneity regardless of the internal tensions within the cultural ecosystem, especially gender relations. While culture is always evolving based on social, political and economic factors, protagonists of FGM often seek to claim the practice as immutable. This resistance explains in part why legislating against the practice has yielded low results and, as stated, 'legislation is only one part of the jigsaw'.¹⁰

8 As above.

9 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.

10 Asylum Research Consultancy 'A commentary on the December 2016 country policy and information note issued on female genital mutilation (FGM) in The Gambia' (2017), <https://www.refworld.org/pdfid/5964b61f4.pdf> (accessed 11 July 2022).

1.2 The socio-legal context in addressing female genital mutilation prior to *Law and Advocacy for Women in Uganda v the Attorney General*¹¹

Prior to 2010, no FGM-specific law existed in Uganda, although there were legal texts that could be cited in support of criminalising certain aspects of FGM. In terms of soft law, the provisions of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) on equality and non-discrimination, freedom from torture, cruel, inhuman and degrading treatment were applicable since Uganda has been a state party since 1985. Article 2(f) of CEDAW carries an imperative for member states to take legislative and other measures to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against women.

However, local FGM practitioners rail against what they view as ethnic chauvinism, asserting that such norms are Western-oriented and emanate from a judgmental, superior cultural mindset. It is in this regard that the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) was deemed transcendent when Africa's heads of states and governments clearly pronounced themselves on FGM as a practice harmful to Africa's women. The Maputo Protocol was adopted on 1 July 2003 and entered into force on 25 November 2005.¹²

Article 1 of the Maputo Protocol defines harmful practices to mean 'all behaviour, attitudes and/or practices which negatively affect the fundamental rights of women and girls, such as their right to life, health, dignity, education and physical integrity'. Article 3(1)(b) adds to that list practices that endanger the general well-being of women. Arguably, FGM fits the bill of practices that trigger the dangers and negative consequences of a cultural practice aimed at controlling women's sexuality, for both the willing and unwilling females that undergo the practice. Article 5 specifically enjoins states to enact sanctioning laws that prohibit all forms of FGM, scarification, medicalisation and para-medicalisation of FGM and all related other practices, in order to eradicate them. Uganda

11 Constitutional Petition 13 of 2005 [2007] UGSC 71 (5 April 2007).

12 African Union Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, <https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-rights-women-africa> (accessed 14 May 2022).

signed the Maputo Protocol on 18 December 2003 and ratified it on 22 July 2010.

Uganda's Constitution has provisions that have been important in anti-FGM campaigns. Article 2(2) states that '[i]f any other law or any custom is inconsistent with any of the provisions of this Constitution, the Constitution shall prevail, and that other law or custom shall, to the extent of the inconsistency, be void'. This is buttressed by article 32(2) which states that '[l]aws, cultures, customs and traditions which are against the dignity, welfare or interest of women or any other marginalised group to which clause (1) relates, or which undermine their status, are prohibited by this Constitution'. Article 44(a) states that no person shall be subjected to any form of torture and cruel, inhuman or degrading treatment. This article has been used to denounce the torturous and inhuman aspects of FGM. Article 21(1) guarantees equality and freedom from discrimination for men and women. Unlike male circumcision practised in those communities, women are circumcised for reasons to do with controlling sexual deviation, introducing a discriminatory element. Article 27 prohibits violations on a person's right to privacy, including bodily privacy. This is pertinent given the public exposure of women's genitalia during the cutting process.

Prior to the Prohibition of Female Genital Mutilation Act (PFGMA) 2010, FGM could be prosecuted under Uganda's Penal Code Act which serves as a broad framework for criminal sanctions. Section 216 of the Penal Code criminalises any act intended to cause grievous harm; any person who, with intent to maim, disfigure or disable any person does so commits a crime. Section 236 thereof provides that assaults causing actual bodily harm are offences. This law no doubt bears some applicability in the context of FGM but does not fully lend itself well to the conundrum of FGM. First, intent to harm, maim, disfigure or disable is hard to prove, as is assault, especially in the peculiar context where victims sometimes offer themselves up for FGM. Second, if no physical harm occurs to the victim after the cutting act of FGM but psychological trauma follows, this law's focus on the physical would miss the point. Third, the Penal Code offers no support to girls at risk of FGM or victims. These gaps in the Penal Code underscore the importance of a law on FGM that does not delve into intent, but rather is fault based, emphasising strict liability for the *actus reus* element of the crime.

At the regional level in Kapchorwa district, there were notable steps taken by local communities to combat FGM, again lending credence to the notion that this practice is not universally supported, which weakens arguments about the inviolability of the norm. In 2009 the district leadership of Kapchorwa were presented with a petition supported by 100 community leaders from 16 sub-counties of Kapchorwa district to ban the practice, leading to the Kapchorwa Ordinance.¹³ The Kapchorwa Ordinance made FGM optional in 2009 which gave covering of sorts to the unwilling, but knowledge of the ordinance was very low.¹⁴ However, these efforts were isolated to only one district in Eastern Uganda, whereas the scope of FGM practice is wider. Furthermore, leaving it optional did not adequately address the harmful consequences of FGM nor the coercive circumstances under which a woman or girl may 'opt' for FGM.

The context in which *Law and Advocacy for Women in Uganda v The Attorney General* was lodged in the Constitutional Court of Uganda is significant. Intensive efforts had been undertaken in the regions by local activists and community leaders to end FGM, but the wave of public practice and opinion was heavily in favour of the practice. No effective law existed up to that point to prohibit the practice, which was posited as a cultural right by practitioners. Law and Advocacy for Women in Uganda (LAWU) had conducted research with results indicating extreme suffering by victims of FGM in various dimensions of human rights and worked with activists from the region on various advocacy efforts. As the Chairperson of Equal Opportunities Committee of Parliament, Dora Byamukama, the head of LAWU had already been conducting intensive advocacy over FGM trends, at one point asking the government to enact a law on the extradition of Kenyan surgeons who conduct FGM on Ugandans.¹⁵

LAWU in 2007 had also successfully litigated a strategic interest case in the Constitutional Court leading to the annulment of the Penal

13 CEHURD and others 'Protecting the right to health in the campaign against female genital mutilation: A rapid assessment of stakeholder interventions in Kapchorwa district, Eastern Uganda' (2015) <https://www.cehurd.org/wp-content/uploads/2015/11/FGM-response-and-R2H-1.pdf> (accessed 17 July 2022).

14 As above.

15 'Legislators want law on genital mutilation' *New Vision* 11 March 2005, https://www.newvision.co.ug/new_vision/news/1129357/legislators-law-genital-mutilation (accessed 17 July 2022).

Code and Succession Act provisions that discriminated against women in the instance of penalisation for adultery and provision for inheritance respectively. Armed with a good understanding of the effectiveness of strategic litigation and its wider impact, LAWU in 2007 instituted the FGM case in the Constitutional Court.

2 Law and Advocacy for Women in *Uganda and the Attorney General: A commentary*

Case law in Uganda is important in establishing points of law and fact. Previous court judgments can be used to persuade other courts during court hearings. Judgments derived from the Supreme Court set authoritative precedents on points of law, in similar cases of fact, for lower courts to follow.¹⁶ The Constitutional Court has a specific mandate to interpret any question regard the Constitution and its decisions have wide public policy ramifications. Once this Court declares a law, act or omission null and void, it sets the tone for legal, policy and practice reforms for bureaucrats, politicians, activists and practitioners.

In 2007 a constitutional petition was filed by Law and Advocacy for Women in Uganda (LAWU), a Ugandan non-governmental organisation (NGO) that has been working on anti-FGM campaigns for over two decades. The petition cited violations of the Constitution suffered by women in those tribes, namely, torture, cruel, inhuman and degrading treatment; endangerment of the right to life through poor health or potential of spreading HIV; customs against the dignity, integrity and status of women; and violation of the privacy of the victim caused by public mutilations. The main contestation in the case was that the custom and practice of FGM as practised by several tribes in Uganda are inconsistent with Uganda's Constitution to the extent that it violates the Constitution.

Furthermore, the petition asserted that FGM lacked medical and social advantages and was not justifiable in a free and democratic society. This latter claim was pursuant to a constitutional principle that forbids any limitation on fundamental human rights under article 43(3) of the Constitution, beyond what is acceptable and demonstrably justifiable in a free and democratic society or provided in the Constitution. The

16 S Lewis 'Precedent and the rule of law' (2021) *Oxford Journal of Legal Studies* 873.

petitioners adduced evidence to show that FGM in Uganda is carried out crudely, inflicting excruciating pain and excessive bleeding and could cause consequential physical and psychosocial and psycho-sexual harm and trauma. The case cited incidences of urinary incontinence, paralysis, disability in victims. Social consequences related to the practice were also elaborated, including stigmatisation for health complications related to FGM such as urine incontinence. The petitioners sought the Constitutional Court to declare the custom and practice of FGM unconstitutional as per its mandate.

The state's initial response to the petition was to brand it misconceived, not raising any matter for constitutional interpretation under article 137 of the Constitution. This was a surprising stance, given the work that the Uganda Ministry of Gender, Labour and Social Development had put into combating FGM in the affected regions up to this point. The Attorney General later on abandoned this position and did not contest the petition at the trial stage, a move that was interpreted by the Court as 'the wisdom of the Attorney General who must have felt that the issue had no merit'. The government position seemed more like a knee jerk reaction than a genuine rejection of the grounds for the case. The Minister of State for Justice and Constitutional Affairs later in 2009 fully supported the Bill to pass the PFGMA in Parliament, explaining to the august house that during the trial,¹⁷ '[w]e toiled with the problem of how to go about the matter until we had to concede out of court that certainly there was no need to go to court and defend female genital mutilation. So we conceded that it is unconstitutional.'

One of the effective strategies used by the petitioners was to present comprehensive data and literature on FGM in Uganda and clearly explain the applicable human rights standards for review by the Court. This was not surprising, given the intensive advocacy that LAWU has undertaken on this issue over the years. LAWU, a feminist Ugandan NGO headed by a lawyer and Member of Parliament, Dora Byamukama, had conducted extensive research and advocacy in Uganda and published an informational booklet of its findings. In fact, the petitioner's lawyer stated during the hearings that he was specifically relying on one of LAWU's publications significantly in his pleading. This was important

17 Parliament of Uganda, 10 December 2009, <https://www.parliament.go.ug> (accessed 17 July 2022).

because the practice is not widespread in Uganda, the judiciary would not be expected to have in-depth knowledge of the practice and its harms. The judgment highlights this, stating that a 'lack of understanding in the judiciary of the key issues at stake, biases of judges can all play a role in limiting victim's access to justice'. Given the critical issues that were at stake, providing critical information to the bench was a tactical approach in shedding more light on the ills of FGM and, indeed, the major arguments against FGM relied on by LAWU filtered significantly into the judgment.

The constitutional petition was argued successfully, and the Court found that the practice of FGM not only contravenes the Constitution but also the treaties, covenants, conventions and protocols to which Uganda is a party. Furthermore, the Court in its judgment reflected a good understanding of the associated risks and consequences of FGM, such as infections, dangers for childbirth including increased child mortality and post-partum haemorrhaging, in addition to finding that FGM is a violation of the constitutional principle of equality and non-discrimination. The practice of FGM as a custom was found wholly inconsistent with the Constitution and the custom declared null and void.

The Court also flagged the Prohibition of FGM Bill that had been tabled and passed in Parliament before the Court could deliver its judgment. Although the LAWU petition had been lodged in 2007, the Constitutional Court's judgment was delivered in July 2010. In that time, the Ugandan Parliament had passed the law in December 2009¹⁸ and the President assented to it in March 2010. Clearly, the political climate favoured a positive ruling, which could have paved the way for the positive and politically correct outcome of the Court, as a different position would have resulted in an embarrassing scenario. As candidly pointed out by a justice of the Court, '[t]his judgment is more for the purposes of putting the record right, because whilst the petition was pending in this Court, Parliament passed the Bill outlawing the practice of female genital mutilation'.

However, the Court did not shy away from its responsibility in combating FGM. In addition to the many important pronouncements

18 'Uganda: Parliament passes female genital mutilation Bill' *AllAfrica* 11 December 2009, <https://allafrica.com/stories/200912110220.html> (accessed 17 July 2022).

contained in the judgment, the Court also acknowledged its key role in enforcement, stating:

It is now incumbent upon the judiciary to play the very important role in completely eliminating any form of violence against women including female genital mutilation ... The judiciary being part of the State machinery is enjoined to address this issue aggressively whenever it comes before court by involving innovative and progressive interpretation of the laws. Failure to do so would be tantamount to a breach by the State of its international obligations.

The Court's position in this instance is well identified. In determining the case, one of the principles upon which the Court relied was non-derogation from freedom from torture and cruel, inhuman or degrading treatment or punishment as stated in the Ugandan Constitution. In General Comment 2 of 2008,¹⁹ the United Nations (UN) Committee against Torture examines states' responsibilities to enforce the prohibition against torture and cruel, inhuman and degrading treatment through legislative, administrative and judicial preventative means. In this regard the Committee clearly identifies FGM as falling under this category of human rights violations. The Committee explains that where there is state inaction and failure to prevent, investigate, prosecute and punish non-state officials or private actors, the state should be considered as authors, complicit or otherwise responsible under the Convention against Torture (CAT). This is because a lack of due diligence by states to prevent such acts by public or private perpetrators enables a climate of impunity and is a form of encouragement and or *de facto* permission. Importantly, the Committee applies this standard where state parties fail to prevent FGM and protect victims. The Constitutional Court thus clearly pronounced the responsibility of the judiciary to prevent a climate of impunity through its adjudications.

While the Court stepped up to its duty under international, regional and national law in pronouncing FGM unconstitutional, in essence a declaration of null and void is a legal concept. In practice it is much harder to cancel a customary practice to which that significant elements in a society have consistently adhered for ages as a matter of conviction and social identity. The next part examines the steps that the legislature, law enforcers and local actors have undertaken over the years to ensure that the FGM is legally but also substantively outlawed in Uganda.

19 CAT/C/GC/2.

3 Enacting the Prohibition of Female Genital Mutilation Act 2010 and enabling laws

The Prohibition of FGM Bill was conceived in Parliament not as a government Bill but as a private parliamentary member's Bill moved by Dr Chris Baryomunsi from May 2009.²⁰ Uganda's Constitution allows members of parliament to move a private member's Bill and to be afforded reasonable assistance by the department of government whose area of operation is affected by the Bill. To bolster the individual efforts of parliamentarians wishing to sponsor a bill, the Attorney General's office is required to provide the representative moving the private member's Bill professional assistance in the drafting of the Bill.

Ethnic sentiment among the FGM practitioners, including in the Sabiny region in some quarters, was stirred up to denounce the anti-FGM law and its proponents as not understanding the importance of this ritual to their culture. However, combined strong and visible support from members of parliament from the region, numerous concerned parliamentarians and the elders of Sabiny as well as Sabiny anti-FGM campaigners had led to a high level of buy-in from Parliament to pass the law. During the reading of the Bill in Parliament, Dr Baryomunsi communicated strong community support from the Sabiny for the Bill, stating that the majority of the members in the community were travelling to Parliament to witness the historic event of Parliament pronouncing itself on FGM.²¹ This was important in signalling to the members of the public and of Parliament that there was a significant local ground swell of support for this law, he himself not being from that community.

In building a case for a stand-alone law, Dr Baryomunsi pointed out the *lacuna* on the law on FGM despite progressive constitutional provisions, explaining that

[s]ome people have argued that we could use the existing laws like the Constitution to prosecute those who carry out female genital mutilation. However, when you look at our Constitution in Article 28(12), it clearly states that you cannot prosecute anybody unless an offence and the penalty has been specifically created by this House. Although the Constitution outlaws harmful practices, I think it

20 M Wambi 'Baryomunsi tables private member's anti-FGM Bill in Parliament' *URN* 16 September 2009, <https://ugandaradionetwork.net/story/baryomunsi-tables-private-members-anti-fgm-bill-in-parliament> (accessed 24 May 2022).

21 Parliament of Uganda, 10 December 2009, <https://www.parliament.go.ug> (accessed 5 May 2022).

becomes very important to create an offence and specify the penalties associated with the offence in order for anybody to be prosecuted.

As a testament to the strong political will this Bill received in Parliament and in the executive, including the Ministry of Gender, Labour and Social Development that endorsed it,²² the Bill was introduced in May 2009 and passed by March 2010. Indeed, a national groundswell of support had been built in Parliament by parliamentary missions to the affected geographical areas, strong research and lobbying by LAWU on top of the anti-FGM constitutional petition and the hard work of anti-FGM activists on the ground in the Sabiny region. The Sabiny Elders Association and an NGO called Reproductive Educative and Community Health (REACH) stood out for mobilising the Sabiny community against FGM since 1996.²³ Uganda enacted the Prohibition of FGM Act (PFGMA) (2010) and the Prohibition of Female Genital Mutilation Regulations (2013) were adopted to operationalise the PFGMA 2010 Act.²⁴

3.1 Key elements of the Prohibition of Female Genital Mutilation Act

The PFGMA 2010 not only adopts a punitive stance against offenders but also looks at the protection and care of actual girls and women at risk. Parents, husbands, guardians, health workers and those with authority over a victim who perpetuate FGM are liable to be charged with aggravated FGM. The prohibition applies to a girl or woman who carries out FGM on herself, those procuring, aiding, abetting, inducing, coercing or threatening as well as those participating in events leading to FGM. This law captures the collective and individual components of FGM and is nuanced to address the pre-FGM ceremonies, key peer influencers and the aspect of coercion for those women and girls who are pressured into FGM. Importantly, the victim's consent to FGM, culture

22 R Harshbarger 'Ugandan physician-lawmaker moves to criminalize FGM' *Women eNews* 31 May 2009, <https://womensenews.org/2009/05/ugandan-physician-lawmaker-moves-criminalize-fgm/> (accessed 5 May 2022).

23 Parliament of Uganda, 10 December 2009, <https://www.parliament.go.ug> (accessed 5 May 2022).

24 UN Committee on the Elimination of All Forms of Discrimination Against Women Combined 8th and 9th periodic reports submitted by Uganda under article 18 of the Convention (2020) CEDAW/C/UGA/8-9.

and religion are not a defence, which addresses the key pressure points for FGM being practised. The law addresses other drivers of FGM, the ostracisation of women and girls that have not undergone FGM, from socio-cultural everyday tasks or cultural events. It prohibits the discrimination against or stigmatisation of a girl or woman or any other person whose female relatives have not undergone FGM.

To stem crossing of borders for acts of FGM, the PGMA law extends to FGM-related offences committed outside Uganda, where the girl or woman upon whom the offence is committed is ordinarily resident in Uganda. This is a valid concern, given the high resort to cross-border FGM events in Kenya. However, it raises immediate questions about the adequacy of jurisdiction and cross-border enforcement, as discussed later.

The PFGMA is one of the rare gender-based violence-related laws to elaborate on victim protection and compensation in Uganda. The PFGMA touches on payment of compensation that may be made to an FGM victim. Such compensation may be paid to the victim or the parent, guardian or caretaker of the victim in trust for the victim where the parent, guardian or caretaker has not participated in the act of FGM, or the victim is a minor. Mindful of the familial dialectics around FGM, the law provides for third parties to receive compensation in trust for the victim, such as a probation and social welfare officer where the parent or guardian of the victim is the offender under the Act. In the event of death, compensation is to be awarded to the victim's next of kin.

Three years after passing of the PFGM Act 2010, Uganda made the Prohibition of Female Genital Mutilation Regulations, 2013. These regulations expand on the parent law, laying out procedures to provide a safe place to protect an unwilling girl or woman from the danger of undergoing FGM. Under the regulations, the police have strong search powers on suspicion that a woman or girl is supposed to undergo FGM or intends to or has carried out self-FGM. Health workers and local government councillors can also refer a known case of a girl or woman at risk of FGM to the police. Furthermore, potential or actual FGM victims can apply to court for a protection order, or a third party can make such an application on behalf of a girl or woman who is at risk of FGM.

The Prohibition of FGM Regulations forbid acts of reprisal or backlash against women or girls who choose not to undergo FGM. This most probably was informed by prevailing norms in the FGM-prevalent regions. In the regulations, forbidden acts against women and girls

who do not undergo FGM extend to prohibiting attendance of a son's initiation ceremony; failing to accord proper funeral rites upon death; denying attendance of a son's marriage ceremony; overt and derogatory names calling; denial from depositing or collecting food from the granary or from going to the Kraal or milking cows; prevention from attending or contributing to a talk during a meeting; or denial from attending, talking, or participating in any form of meeting. While it is beyond the scope of this chapter to establish the extent to which such communal sanctions are imposed on the aberrant, the fact that FGM is still widely practised probably reveals the fear of or continued meting out of such draconian measures to women and girls that do not undergo FGM.

A review of the law and its subsidiary regulations shows that considerable effort was put into covering the most important elements of the vice of FGM, including causes and effects and actors involved. The prohibition on FGM for girls was reiterated in the Children (Amendment) Act 2016 which forbids any person from exposing a child to any customary or cultural practice that is harmful to health, well-being, education or socio-economic development. Under the same law, every child has a right to be protected against all forms of violence, including FGM.

Uganda submitted its progressive report to CEDAW report in 2020, in which it outlined other broader regulatory frameworks to combat FGM.²⁵ These frameworks reference FGM in the context of violence against women and include the National Policy and Action Plan on the Elimination of Gender Based Violence in Uganda (2016); the Referral Pathway for Response to Gender Based Violence cases in Uganda (2013); the Guidelines for Establishment and Management of GBV Shelters in Uganda (2013); and Guidelines for Prevention and Response to FGM (2012). Government has put in place shelters in the Sebei and Karamoja sub-regions for victims of FGM. These measures combine a multisectoral approach that emphasises socio-legal as well as victim-centred approaches. However, not much is documented about the performance of these shelters in terms of victim utilisation and value returns.

25 As above.

In 2016 an important regional law was passed by the East African Community Legislative Assembly which once assented to by the Heads of State and Government of the Community will be binding on Uganda in the context of FGM. The East African Community Prohibition of Female Genital Mutilation Act was moved by the same actor behind the Constitutional Court case, the Kapchorwa Ordinance 2009 and stakeholder in the PFGM law, Dora Byamukama. One of the stand-out features of the law, given the cross-border nature of FGM, was the emphasis on co-operation and collaboration of member states in stamping out FGM. The Act calls for the establishment of a regional coordination mechanism to catalyse efforts of the partner states in eliminating FGM in one generation, the establishment of regional data bases on cross border FGM and strengthening of cross-border security.

4 Challenges to the implementation of the Prohibition of FGM Act

The law banning FGM and its accompanying regulations have been in place since 2010 and 2013 respectively, in addition to the constitutional judgment voiding the practice. However, implementation of the law remains a challenge for various reasons. While a number of convictions have been handed down to perpetrators of FGM, they in no way match the scale at which FGM continues to occur. In 2014, when five FGM-related convictions were made, it was branded 'rare'.²⁶ There is a need to some of the institutional, systemic and societal barriers that constrain the effective eradication of FGM.

4.1 Access to justice institutions for victims

Victims' accessing of justice institutions and mechanisms begins with knowledge of the applicable law, one's rights under the law and where to claim redress for breaches or violations. There are low levels of legal and rights awareness in general in Uganda²⁷ with regional and gender

26 'Uganda jails 5 over FGM' *The Guardian* 21 November 2014, <https://www.theguardian.com/world/2014/nov/21/uganda-jails-five-female-genital-mutilation> - :~:text=Five men and women in,to stamp out the practice (accessed 14 April 2022).

27 Justice, Law and Order Sector 'Fourth strategic development Plan (2017-2020) Justice, Law and Order Sector 24.

discrepancies, and women tend to be disproportionately represented in this regard. This is especially so in Karamoja which is one of the least developed regions in Uganda due to a prolonged history of insecurity and cattle rustling predating colonialism. According to the UDHS 2016, Karamoja had the lowest average number of years of education among women at 0.0 in Uganda.

FGM mostly affects the less advantaged, lower-educated and poorer women in rural areas.²⁸ Victims of FGM more often than not hail from poverty and high illiteracy regions and families.²⁹ A 2013/14 government assessment on gender and equity in the justice sector revealed that language barriers, age and gender-related hindrances obstruct remedy-seeking behaviour among the populace.³⁰ In and of itself, low literacy serves as a barrier to accessing justice as victims are less likely to know how to claim their rights, seek prosecution or protection orders or witness protection. This is aggravated by intersectional vulnerabilities women in situations of FGM risks face and bears weighty implications for their capacity to seek justice measures and mechanisms. In the event where a victim is an underage girl or stay-at-home mother in the rural areas, they are less likely to want to seek legal redress when they are up against an entire clan or family. Fewer women and rural residents (49 per cent and 51 per cent respectively) are aware of where to seek legal relief. This could explain why in some instances FGM victims at risk flee to Kenya instead of seeking legal recourse in Uganda.

According to the Uganda National Governance Baseline Survey 2014, only 9 per cent of Ugandans were aware of free legal aid services provided in their sub-counties, and only 18 per cent of Ugandans were receiving legal aid services annually by 2015.³¹ A number of legal aid service providers, including the Uganda Association of Women Lawyers (FIDA Uganda) and the state funded legal aid scheme, Justice Centres Uganda,

28 UNICEF (n 7).

29 UBOS 'National governance, peace and security survey report 2017' Uganda Bureau of Statistics.

30 Justice, Law and Order 'Sector Strategic Investment Plan III Midterm Evaluation Final Report' October 2016, Justice, Law and Order Sector.

31 Justice, Law and Order Sector 'Judiciary urges government to facilitate legal aid policy and law', <https://www.jlos.go.ug/index.php/com-rsform-manage-directory-submissions/services-and-information/press-and-media/latest-news/item/604-judiciary-urges-government-to-facilitate-legal-aid-policy-and-law> (accessed 10 June 2022).

are found in the Karamoja and Sabinu regions. However, these entities are thin on the ground, with low resources and capacity to provide legal education, awareness and representation. Legal aid service providers in Uganda have for long lobbied unsuccessfully for government to pass the Legal Aid Bill 2011 and adopt the Legal Aid Policy in order to establish a far-reaching national legal aid scheme with better human and financial resources.

4.2 Limitations in justice institutional responses

Courts and police physical infrastructure and services in Uganda tend to be geographically unevenly distributed, not adequately resourced or near to the citizenry. Courts and police stations tend to concentrate in mostly in urban centres,³² yet it is estimated that in 2020 about 75 per cent Ugandans lived in the rural areas.³³ This carries transactional burdens for users in terms of transport costs, distance and time taken to seek justice mechanism.

Apart from the limited physical presence of law enforcement institutions, the staffing of courts and police entities reveal human and financial resources capacities. The police coverage in 2011 was one police officer per 709 residents,³⁴ and in 2016 and 2017, one police officer per 754 people. These deficiencies stretch the preventative and responsive capacity of the police, especially in rural, hilly and porous border areas in Karamoja and Sabinu regions. Widely considered a hardship area, the police personnel in Karamoja stay for a maximum of five to seven years, which is plagued by persistent insecurity.³⁵

Health workers such as nurses and doctors are required to examine victims to establish that an act of FGM occurred, as per the FGM Regulations. These reports are relied on by the police and courts during investigation and adjudication phases. However, the law does not explain who meets the costs of the medical examinations. Going by the history of medical examinations of victims of sexual and gender-based violence

32 As above.

33 World Bank Rural Population 'Uganda', <https://data.worldbank.org/indicator/SP.RUR.TOTL.ZS?locations=UG> (accessed 11 June 2022).

34 Justice, Law and Order Sector (n 32).

35 Justice, Law and Order 'Annual performance report 2020/2021' Justice, Law and Order Sector.

by health workers, this modality has tended to present problems for poor and vulnerable women and girls. Traditionally, victims who have sought these medical examinations which, as a precursor to proving the occurrence of the crime have been asked to pay a sum of money, which most poor and vulnerable women are unable to pay. Despite the Ministry of Health issuing guidance to public health workers to refrain from asking monies from victims, this practice has persisted, to the frustration of victims and their relations seeking these services.

4.3 Victim and perpetrator? Double jeopardy for women and girls

One of the conundrums arising out of criminalising FGM is that while self-mutilation or third-party mutilation is forbidden, these circumstances could occur under coercive circumstances yet *prima facie* appear as choice. A girl or woman undergoing FGM may opt for it due to societal, peer and family pressure, and the mother and other female relations in turn may aid the action due to similar influences. In 2015, for example, four women from Kapchorwa pleaded guilty to FGM but explained that their husbands threatened to divorce them if they refused to be mutilated.³⁶ As such, female perpetrators may double as victims. While the PFGM law recognises the coercive element, it does not address what happens to victims in circumstances of coercion and yet consent to FGM by a victim is not a defence under the Act. Presumably the rebuttal of consent as a defence under the PFGMA was directed at third party perpetrators but yet the provision technically criminalises a girl who consents to FGM for fear or rejection by family and society or other harsh reprisals.

Undeniably, there are victims who are complicit in undertaking FGM and will not cooperate in providing evidence.³⁷ One woman who broadcast her FGM ceremony, including sending it to the police, stated that her defiance was aimed at the government's failure to implement

36 'Female circumcision: Uganda still has a long way to zero tolerance' *The Monitor* 5 February 2015 – updated on 5 January 2021, <https://www.monitor.co.ug/uganda/lifestyle/reviews-profiles/female-circumcision-uganda-still-has-a-long-way-to-zero-tolerance-1599444> (accessed 16 June 2022).

37 J Jacobson 'Forced genital mutilation of 120 women and girls in Uganda sparks public debate' 2010, <https://rewirenewsgroup.com/article/2010/12/06/forced-genital-mutilation-girls-uganda-sparks-public-debate/> (accessed 12 April 2022).

its promises for education, better services and infrastructure.³⁸ However, as the saying by Benjamin Franklin goes, ‘it is better 100 guilty persons should escape than that one innocent person should suffer’, and it is important for the nuances of each case of FGM to be closely examined to avoid casting with a very wide net to catch even the innocent victims.

4.4 Criminalisation and the unintended consequence of suppressing female genital mutilation detection

Criminalising FGM for the most part has resulted in FGM public ceremonies and celebrations being re-assigned to undercover, clandestine FGM rituals operations. This makes detection and prevention harder and could conversely increase the communities’ propensity to undertake FGM. The Sebei region is hilly and FGM is conducted furtively and at night, making detection near impossible, while the rocky, hilly and grasslands terrain of some areas in Karamoja makes access difficult. Prolonged insecurity and violence in the regions plagued by FGM in Karamoja has made law surveillance and enforcement more difficult.³⁹ This situation is aggravated by low enforcement because of lack of vehicles for police to patrol these vast and hilly areas.⁴⁰ Additionally, these are the same regions that share porous borders with Kenya, making cross overs for FGM purposes easy and police surveillance and tracking harder. During COVID lockdown restrictions, even the NGOs and police tracking FGM were curtailed in their activities.

Crossing borders to undergo FGM by women and girls occurs to evade detection and arrest in Uganda,⁴¹ meaning that the threat of the law is felt. Uganda evidenced a 56 per cent rise in FGM during the COVID-19 pandemic when schools were closed.⁴² Cross-border

38 C Byaruhanga ‘Uganda FGM ban: “Why I broke the law to be circumcised aged 26”’ *BBC Africa* 6 February 2019, <https://www.bbc.com/news/world-africa-47133941> (accessed 16 May 2022).

39 N Bhalla ‘UN investigating “surge” in female genital mutilation in Uganda’ *Reuters* 26 January 2019, <https://www.reuters.com/article/us-uganda-women-fgm/u-n-investigating-surge-in-female-genital-mutilation-in-uganda-idUSKCN1PJ0X9> (accessed 7 May 2022).

40 Jacobson (n 37).

41 T Abet ‘Ugandans cross to Kenya for female genital mutilation’ *The Monitor* 25 November 2021, <https://www.monitor.co.ug/uganda/news/national/ugandans-cross-to-kenya-for-female-genital-mutilation-3631428> (accessed 7 May 2022).

42 As above.

movement for purposes of FGM is notable between Uganda and Kenya, particularly where similar ethnic groups on the other side of the border practise FGM.⁴³ Not only do FGM candidates cross the border into Kenya, but girls at risk too. In 2021 at least 70 girls from Karamoja fled to Kenya to avoid forcefully being subjected to FGM by parents and traditional leaders during the COVID-19 pandemic. This further raises questions about the efficacy of law enforcement in Uganda.⁴⁴ There is evidence to show that Uganda-Kenya cross-border partnerships have in some instances resulted in girls at risk being rescued from FGM events even during COVID-19.⁴⁵

4.5 Active resistance to female genital mutilation-related law enforcement

Despite the hard work of anti-FGM campaigners in the practising communities, support for FGM remains significant in some pockets and the number of arrests is low. Government reports that FGM-related arrests and prosecutions have increased. Since 2013 there have been at least 62 arrests and 33 convictions across the six districts where FGM is mostly practised. This figure is low compared to the prevalence of FGM and number of girls cut, even though there is paucity of data on the convictions.

FGM is carried out by close relations and witnessed by community members, many of the latter who bear solidarity with the family actors. Information gathering for prosecution in such circumstances is a challenge because of the chilling effect of criminalisation. Communities are more likely to close ranks when legal sanctions are imposed, due to the fact that husbands, fathers and female relatives are involved in aiding and abetting the mutilation of their daughters, sisters and cousins. Effective

43 United Nations Population Fund *Beyond the crossing: Female genital mutilation across borders, Ethiopia, Kenya, Somalia, Tanzania and Uganda* (2019).

44 J Kato '70 girls flee to Kenya over FGM' *Uganda Radio One Network* 2 August 2021, <https://ugandaradionetwork.net/story/70-girls-flee-to-kenya-over-fgm> (accessed 27 April 2022).

45 D Jjuuko & P Mbonye 'Uganda-Kenya cross-border partnership rescues girls from female genital mutilation during COVID' 24 September 2020, UNICEF <https://www.unicef.org/uganda/stories/uganda-kenya-cross-border-partnership-rescues-girls-female-genital-mutilation-during-covid> (accessed 27 May 2022).

criminal investigations and prosecutions require data collection, witness bearing and reporters of crime.

Here the community bands together against law enforcement agents, this makes prosecutions based on legal standards of beyond reasonable doubt much more difficult. Law enforcers report that Victims do not implicate relatives.⁴⁶ In one or two outstanding cases, girls who were caught in the FGM process claimed to have self-mutilated. This could possibly arise from the desire not to implicate family and friends and risk their arrest and conviction, even where the victims were coerced.

There have been public displays of defiance in some of the FGM-practising communities. While FGM abandonment has been voluntarily occurring in communities, forceful FGM is on the rise. In the wake of the PFGMA passing, it was reported that 120 women and girls were forcefully mutilated in 2010.⁴⁷ At the time, critiques decried the failure by government to raise awareness on the new law, but more recent incidents reflect a resurgence of rebellion against the ban. For example, there were 226 cases of FGM reported between December 2018 and January 2019 in the Sebei region. In this time, FGM was conducted openly in Kween district, with victims and those participating protected by machete-wielding youth, observed by the community and even the police.⁴⁸ Furthermore, these armed groups were accused of forcefully mutilating girls. Arrests of 16 men and three women involved in the saga followed reports of more than 400 girls and women being subjected to FGM by gangs of about 100 people, led by elderly women, those who prepare the girls and sing alongside the celebrations and the youth enforcing the FGM.⁴⁹ Unfortunately, some of the cut girls were also arrested, a turn of events that raises disquiet considering the collective rebellious context in which mutilation was performed.

Law enforcement officers also carry out their work at personal risk when dealing with outraged families and communities. In 2012 it

46 Jacobson (n 37).

47 As above.

48 D Cole 'The 2019 report card for the fight to end female genital mutilation' 6 February 2019, <https://www.npr.org/sections/goatsandsoda/2019/02/06/691950128/the-2019-report-card-for-the-fight-to-end-female-genital-mutilation> (accessed 12 May 2022).

49 D Selby '19 people arrested in Uganda after reports of women forced to undergo FGM by gangs' *Global Citizen* (2019), <https://www.globalcitizen.org/en/content/uganda-fgm-arrests-gang/> (accessed 7 April 2022).

was reported that residents of a rural community apprehended police who had come to arrest FGM suspects, on another occasion attacking the police who had returned with machetes, leading to a third, violent skirmish between the two entities.⁵⁰ In 2015 in Kapchorwa, when six people were convicted of FGM offences, their communities became furious with what they deemed arbitrary arrests. Accusing the police of ‘working to destroy their culture’, community members severely beat the suspected police informant and threatened to ‘cut’ the leader of a key anti-FGM campaigner if she set foot in the region.⁵¹ Thereafter, the elders of that area lodged a petition with the Uganda Human Rights Commission over those arrests, protesting the conviction of their Sabinu community members.

There are allegations of local police officers hailing from the FGM-practising regions tipping off those in the community who may face imminent arrest.⁵² It could be the case that such police pay more allegiances to their community cultural practices or that they collaborate with them in order for them and their families to live securely in their homes.

4.6 Nexus between marriage and female genital mutilation

The strategic importance of FGM features heavily around women’s social and reproductive roles, especially marriage and motherhood. A recent study conducted by the United Nations Children’s Fund (UNICEF) in December 2021 in Uganda found correlations between child marriage and FGM and that these two practices are mutually reinforcing, since girls who have undergone FGM fetch a higher dowry.⁵³ During the parliamentary debate around the passing of the PFGM Bill, a member of parliament from Kapchorwa made this similar link, saying:

The marriage institution is blamed for sustaining the practice of female genital mutilation among these communities. Uncircumcised women face considerable pressure from relatives and in-laws to undergo the ritual. Those who reject it are isolated and considered outcasts, ridiculed and barred from carrying out domestic chores such as milking cows and collecting food from granaries, and they are

50 Berer (n 9) 145.

51 ‘Female circumcision: Uganda still has a long way to zero tolerance’ *The Monitor* 5 February 2015.

52 As above.

53 UNICEF (n 9).

also barred from taking part in the festivities of circumcising their sons. Their husbands have to 'borrow' wives to perform their mothers' roles. The father of the boy also misses out on gifts from his peers.

Furthermore, women who underwent FGM are more supportive of only mutilated girls for their sons, in itself a strong source of pressure.⁵⁴

The high premium on bride price adds another layer of pressure to marry off girls, and girls in the rural areas are more challenged in the socio-economic arena especially due to lower education rates and lower opportunities for employment in the formal sector. The Ugandan government has failed to enact the Marriage Bill of 2017 that would set the constitutional minimum age of marriage at 18 years for all types of marriage under culture, religion and civil ceremonies. This creates loopholes in law enforcement whereby underage girls can get married and, as a precursor to marriage, undergo FGM.

4.7 Gaps in victim and witness protection

In 2016 data showed that the judiciary faced low levels of confidence among users, at 37.3 per cent, and the police at 49.3 per cent.⁵⁵ The reasons for this include high corruption levels and complexity of procedures for the public. In order for crime to be prevented through advance information gathering or reporting on planned crime, it is important to establish protection mechanisms in instances where such reporting may carry risks of reprisal. This certainly is relevant in cases of FGM reported by community members. Successful penetration of community practices such as FGM by law enforcers requires reliable insider information on planned FGM activities to be expeditiously shared by well-placed informers to the police. Reportedly, one solution by government to infiltrate the community has been to deploy a network of informers throughout the district's communities to strengthen surveillance on FGM.⁵⁶

Informants could be community-based actors who have been trained, or even girls at risk of FGM themselves. However, these informants work

54 As above.

55 Uganda Justice, Law and Order Sector (n 32).

56 US Department of State *2021 Country Reports on Human Rights Practices: Uganda*, <https://www.state.gov/reports/2021-country-reports-on-human-rights-practices/uganda/> (accessed 27 May 2022).

or live in risky situations that require more secure protection by law enforcement agencies. While the Regulations bestow on informants who blow the whistle on FGM activities in communities the same protection as a witness who testifies in a court, Uganda does not have a witness protection programme nor law. The passing of the Witness Protection Bill 2015 has been delayed due to the resource implications of the law. The Witness Protection Guidelines were launched in the absence of an implementing law, limiting protections for victims and witnesses, a situation the Director of Public Prosecutions described as 'awkward'.⁵⁷

The Prohibition of FGM Regulations state that a probation and social welfare officer may issue an interim protection order in a safe place in which the girl or woman will take refuge for 14 days, pending proceedings for issuance of the court order by the family and children court. However, there is only one probation and social welfare officer per district, which stretches the capacity of the social services to protect girls and women at risk.

4.8 Failure to harmonise positions on laws with a significant bearing on female genital mutilation

Law enforcement suffers when justice is seen to be applied in a haphazard manner and should be avoided at all costs. Reportedly, in a case where the Kapchorwa chief magistrate's court convicted five people, in 2014 the convicts were pardoned by the President. In 2014 President Museveni pardoned seven people, including FGM traditional surgeons, victims and their parents under the prerogative of mercy,⁵⁸ but in so doing he vowed to continue with arrests and prosecutions against FGM.⁵⁹ It is critical for the judiciary, legislative and executive arms of government to have common positions and approaches towards preventing a climate of impunity for FGM.

57 Justice, Law and Order Sector 'DPP launches victims, witness protection guidelines', <https://www.jlos.go.ug/index.php/com-rsform-manage-directory-submissions/services-and-information/press-and-media/latest-news/item/692-dpp-launches-victims-witness-protection-guidelines> (accessed 4 May 2022).

58 'Museveni pardons FGM convicts' *Daily Monitor* 30 December 2014.

59 S Hayden 'Why are victims of FGM ending up in prison?' 12 March 2018, <https://www.elle.com/uk/life-and-culture/culture/longform/a42138/uganda-victims-female-genital-mutilation-prison/> (accessed 25 May 2022).

The government has been slow to expeditiously enact a number of related laws in order to bolster the enforcement of PFGMA. Setting a minimum marriage age, accompanied by sanctions for non-adherence would add another layer of disincentives for parents to prop up underage girls for eligibility for marriage through the FGM rituals. Additionally, enacting a witness protection Bill is necessary to motivate victims and witnesses to report in a secure and protected manner. However, it is not a given that enacting more laws that touch on the personal status of women yet set up a clash of cultural codes between the individual and the collective will be successful, if the reluctance of communities to abandon FGM as a cultural practice is anything to go by.

5 Conclusions

The fight against FGM in Uganda illustrates the normative value of enabling legal and human rights frameworks and gender response laws and policies that can provide a platform for important strategies, including strategic litigation. Much of the success factors of the case links to the consequential processes that came into play. Following the important judicial pronouncement of the Constitutional Court, the executive and legislature executed their mandates and results were evidenced in the passage of the anti-FGM law.

In certain contexts, strategic litigation may not solely be an effective tool for social change, requiring further action. This is especially so where the principle of checks and balances requires that only Parliament can make laws, even though the Constitutional Court has the power to nullify a law or practice. LAWU observed the gaps in compelling action after court rulings on strategic litigation cases in a timely manner⁶⁰ and acted to prevent such a gap. The Private Members Bill on the prohibition of FGM that was introduced in Parliament in 2009 was drafted by LAWU⁶¹ even as LAWU awaited the Court's judgment. Clearly, LAWU sought to close the strategic litigation loop with concrete legislative protections to protect women against FGM.

60 UN 'Expert Group Meeting on good practices in legislation to address harmful practices against women' 11 May 2009, Addis Ababa, Ethiopia EGM/GPLHP/2009/EP.10.

61 As above.

Using strategic litigation to promote women's rights can be effective when linked to other sustained activities for legal mobilisation, including public awareness.⁶² Dr Baryomunsi himself made the point that⁶³

having a law will not necessarily end the practice of female genital mutilation ... we would want to urge government to allocate resources to support communities where female genital mutilation is practised so that advocacy and community mobilisation interventions can go on alongside the enforcement of the law.

There is a need for activists to continue to use the results of strategic litigation to further clarify and raise awareness around the appropriate human rights standards and codes against FGM. At an international conference held in Kenya in 2004 and in the wake of the adoption of the Maputo Protocol, anti-FGM campaigners and activists recognised that 'the use of law should be one component of a multi-disciplinary approach to stopping the practice of FGM'.⁶⁴ In the Third Girls Summit of the African Union (AU), one of the key recommendations of the Niamey Call to Action and Commitment on Eliminating Harmful Practice emphasised eliminating FGM through dialogues and social, behavioural change interventions.⁶⁵

Engaging communities to continually examine the practice of FGM from a gender and human rights perspective remains key to promoting FGM abandonment. LAUW continued to work with the Reproductive, Education and Community Health (REACH) programme to sensitise the community on FGM. Recognising the need to transcend a legal sanction approach, government has promoted FGM abandonment campaigns and educational programmes, FGM prevention dialogue at the grassroots and conceptualisation of alternative rites of passage that do not involve FGM, working with traditional leaders and non-state actors to attain this. Intensifying legal education and awareness among

62 G Fuch 'Using strategic litigation for women's rights: Political restrictions in Poland and achievements of the women's movement' (2013) 20 *European Journal of Women's Studies* 21.

63 Parliament of Uganda (n 22).

64 No Peace Without Justice 'International Conference on Female Genital Mutilation Developing a political, legal and social environment to implement the Maputo Protocol', <http://www.npwj.org/FGM/INTERNATIONAL-CONFERENCE-FEMALE-GENITAL-MUTILATION-Developing-a-political-legal-and-social-envi-0> Overview report - Nairobi, 16-18 September 2004.

65 African Union 'The 3rd girls' summit', <https://au.int/en/newsevents/20211116/3rd-african-girls-summit> (accessed 25 May 2022).

FGM practitioners is key in adopting cultures of legal compliance progressively.

During the parliamentary reading of the PFGM Bill, one legislator opined on the handling of FGM-practising communities that ‘I think there should be very punitive measures; we should not just come like we are persuading them.’ These statements can only raise fears in the FGM-practising communities that the majority with coercive power can trample over their culture. Leadership for the drive against FGM and legal compliance should be seen to strongly come from opinion leaders in the practising communities, despite the risks of backlash. The support by Sabiny elders of the Prohibition of FGM Bill⁶⁶ and their continuing work to persuade communities to abandon FGM can effectively signal the end of a harmful era for women and girls in a community that adheres blindly to a harmful, outdated culture.

LAWU’s pursuit of the regionalisation of the prohibition of FGM at the East Africa legislative level was a bold and arguably logical progression of ending FGM not only in Uganda but in neighbouring countries through common legal standards. The Prohibition of FGM Bill in the East African Community draws from sustained advocacy at the national level by anti-FGM lobbyists. The timely adoption, domestication and implementation of this law can give further impetus to the drive to end FGM for national level actors. A comprehensive regional anti-FGM law could provide a reference framework for strategic litigation for those seeking to eliminate gaps in national laws in protecting women and girls from FGM. Undoubtedly, the LAWU case demonstrates the added value of strategic litigation in casting a broad, strong and remedial light on women’s rights violations occasioned by FGM.

66 Parliament of Uganda, 10 December 2009, <https://www.parliament.go.ug> (accessed 17 July 2022).

Bibliography

- Abdulcadir, J and others 'Research gaps in the care of women with female genital mutilation: an analysis' (2015) 122 *BJOG: An international journal of obstetrics and gynaecology* 294-303
- Adeniyi, OO & Olomola, OO 'Public Interest Litigation (PIL) as strategic legal mechanism on women's socio-economic rights in Nigeria: Making a case for girl child' (2020) *Education. European Scientific Journal* 62-79
- Berg, RC & Denison, E 'A tradition in transition: Factors perpetuating and hindering the continuance of female genital mutilation/cutting (FGM/C) summarized in a systematic review.' (2012) *Health Care for Women International* 414-439
- Center for Reproductive Law and Policy *Female genital mutilation: An advocate's guide to action* (Center for Reproductive Rights 2006)
- Cook, RJ & Dickens, BM 'Fostering legislation and social change to protect women from harmful practices' (2003) *International Journal of Gynecology & Obstetrics* 290
- Esho, T and others 'The perceived effects of COVID-19 pandemic on female genital mutilation/cutting and child or forced marriages in Kenya, Uganda, Ethiopia and Senegal' (2022) *BMC public health* 22
- Manji, A 'The challenges of using the law to address gender-based violence in Tanzania' (2002) *Journal of African Law* 190-209
- Matanda, D and Walgwe, LA *Research Agenda to strengthen evidence generation and utilisation to accelerate the elimination of female genital mutilation* (UNFPA, UNICEF, WHO and Population Council, Kenya 2020)
- Mwambene, L 'Public interest litigation and women's rights in Tanzania: The case of the Legal and Human Rights Centre' (2013) *African Human Rights Law Journal* 431-455
- Mwendwa, Purity and others 'Promote locally led initiatives to fight female genital mutilation/cutting (FGM/C) "lessons from anti-FGM/C advocates in rural Kenya"' (2020) 17 *Reproductive health*
- Musa, SS and others 'COVID-19's threat to the progress in the fight against female genital mutilation in Africa' (2021) 2 *Public health in practice*
- Nabaneh S, & Muula AS 'Female genital mutilation/cutting in Africa: A complex legal and ethical landscape' (2019) *Int J Gynaecol Obstet* 253
- Oloka-Onyango, J, & Banda, F 'Litigating the rights of women and children in Africa: The case of Uganda' (2002) *Human Rights Quarterly* 334-375
- Oyewo, OO 'Public interest litigation as a tool for promoting gender equality in Nigeria' (2010) *Journal of African Law* 257-282

- Shakirat, GO and others 'An overview of female genital mutilation in Africa: Are the women beneficiaries or victims?' *Cureus* 12
- Shell-Duncan, B & Hernlund, Y (eds) *Female "circumcision" in Africa: Culture, controversy, and change* (Lynne Rienner Publishers 2000)
- Shell-Duncan, B & Hernlund, Y 'Are there "stages of change" in the practice of female genital cutting?: Qualitative research findings from Senegal and The Gambia' (2006) 10 *African Journal of Reproductive Health* 57
- Tladi, D 'Public interest litigation and the advancement of women's rights in South Africa' (2017) 33 *South African Journal on Human Rights* 1-26
- UNICEF *Case study on the end Female Genital Mutilation (FGM) programme in the Republic of Kenya* (UNICEF 2021)
- UNICEF *Female genital mutilation/cutting: A statistical overview and exploration of the dynamics of change* (UNICEF 2013)
- UNICEF 'Policy Brief on Cross-Border Female Genital Mutilation in East Africa' UNICEF
- United Nations Population Fund (UNFPA) (2016) *Legislating change: How parliaments can help end female genital mutilation and child marriage*
- Yoder PS and others *Estimates of female genital mutilation/cutting in 27 African countries and Yemen' studies in family planning* (2013) 189-204