



Criminalizing Female Genital Mutilation in Some Islamic Countries Including Iran

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<http://dx.doi.org/10.18415/ijmmu.v6i5.1140>

Abstract

Background and Aim: This article presents some perspective on Female Genital Mutilation by focuses on Islamic countries law.

Materials and Methods: A handful of legal texts and documents and have been reviewed for preparing this study.

Ethical Considerations: Honesty in the literature and citation analysis and reporting were considered.

Findings: Female Genital Mutilation is usual in some countries especially in Islamic countries due to belief that the Sharia made it necessary or at least called it recommended. Although there is no precise virtual and holy verses or texts approve this view but Female Genital Mutilation became a part of some countries custom and tradition. It is obviously a violent act against girls and women and governments try to prohibit it by criminalizing and determining sentence for its performance. Many international and regional instruments and documents also recommended against it.

Conclusion: in some Islamic countries including Iran there is not specific rule or provision criminalizes Female Genital Mutilation. Here the authorities can prosecute the offender under general criminal law. Because Female Genital Mutilation is a kind of inflicting bodily harm, the prosecutor may make a trial based on Assault. And if it results in victim death the judge may convict the performer to Homicide or man slaughter. On the other hand, in some countries like Kenya the legislator passed detailed and comprehensive provision on Female Genital Mutilation.

Keywords: Genital Mutilation; Punishment; International Documents; Custom; Crime; Criminalizing; Islamic Countries.

Introduction

The terms most widely used are “Female Genital Mutilation” (FGM) and “Female Circumcision.”

The World Health Organization defines female genital mutilation (FGM) as all procedures involving partial or complete removal of the external female genitalia or other injury to the female genital organs, whether for cultural or any other non-therapeutic reasons [1]. These procedures are classified into four types ranging from pricking, piercing, stretching or incision of the clitoris and/or labia (Type IV), to the excision of the prepuce and clitoris (Type I), excision of clitoris and part or all of the labia minora (Type II) and to the stitching/ narrowing of the vaginal opening (infibulations or Type III) [1].

- Type 1: often referred to as clitoridectomy, this 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 2: often referred to as ‘excision’, this 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 3: often referred to as ‘infibulations’, this is the narrowing of the vaginal opening through the creation of 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 4: this includes all other harmful procedures to the female genitalia for non-medical purposes, e.g. pricking, piercing, incising, scraping and cauterizing the genital area.

WHO is currently reviewing this classification, to include a Type V: the symbolic practices that involve the nicking or pricking of the clitoris to release little drops of blood [2].

At least 200 million girls and women alive today have had FGM in the 28 African countries where FGM is practiced as well as in parts of Asia. [3]

FGM has been practiced for over 2,000 years. [4] although some communities practicing FGM believe it is a religious requirement, research shows that FGM pre-dates Islam and Christianity. [5] Some anthropologists trace the practice to 5th century BC Egypt, where infibulations was referred to as ‘Pharaonic Circumcision’. [6] Today, FGM continues to be practiced across a wide range of cultures and religions. [7]

Studies show that FGM/C has economic and social consequences [8] and a high obstetric cost [9] although a comprehensive study on the exact extent of these economic, health and social costs is still to be carried out. Beyond the data and the statistics, researcher have shown that FGM/C deprives women of sexual satisfaction, sexual health and psychophysical wellbeing. [10]

Ethical Consideration: Honesty and ethics have been observed in searching and referencing.

Materials and Methods

The material and literature used for this article were limited to open-source information, such as scientific publications, reports, public web pages, and Legal texts, articles regarding cases of FGM.

This study relied upon open-source literature and information from government and non-governmental reporting agencies available through the world-wide web. Among Islamic countries with/without specific law concerning FGM, the author choose them from Asia-Pacific (*Pakistan*); Middle East (*Iran, Iraq, Bahrain, Kuwait and Yemen*) and Africa. In this continent there are at least 22 countries which specifically criminalized FGM but only 5 countries (with / without specific law) were concerned for the purpose of this article. (*Egypt, Liberia, Gambia, Ghana and Kenya*) [11]

Findings

International and Regional Documents

A. International Treaties and Instruments

Concern about FGM at the international level dates from 1990, when the UN Convention on the Elimination of Discrimination Against Women adopted General Recommendation No. 14 calling on states 'to take appropriate and effective measures with a view to eradicating the practice of female circumcision.'¹¹ but there are plenty of international and regional treaties which directly and specifically of generally or indirectly concerns FGM and call countries and states to prohibit and criminalize it.

1- Treaties

Article 1, 2, 3, 5 and 7 of Universal Declaration on Human Rights; article 2 of Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; article 2, 3,6, 7, 24 and 26 of Covenant on Civil and Political Rights; article 12 of Covenant on Economic, Social and Cultural Rights; articles 1, 2, 3, 5, 10, 12 and 14 of Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) and article 19, 24, 27, 37 and 39 of Convention on the Rights of the Child and also paragraph 29, 44 and 79 of Committee on the Rights of the Child General Comment No. 13 (2011) - The right of the child to freedom from all forms of violence are of those legal instruments can be pointed out for prohibition of FGM.

2- Recommendations

In respect of FGM, CEDAW General Recommendation No. 14: Female Circumcision; CEDAW General Recommendation No. 19: Violence against women; CEDAW Recommendation No. 24 Women and Health; CEDAW General Recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women; Joint general recommendation No. 31 of the CEDAW and the Committee on the Rights of the Child on harmful practices; CEDAW General recommendation No. 34 on the rights of rural women and CEDAW General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19 are of importance.

B. Regional Treaties and Instruments

African Charter on the Rights and Welfare of the Child in Africa, European Convention on Human Rights as well as Council of Europe in Europe, Convention on preventing and combating violence against women and domestic violence (Istanbul Convention) in Asia, Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belem Do Para), American Convention On Human Rights "Pact Of San Jose, Costa Rica" as well as Charter of Fundamental Rights in America are important regional treaties and instruments which prohibit FGM.

C. Consensus Documents

Article 39 and 93 of Beijing Declaration and Platform for Action of the Fourth World Conference on Women; Article 2 and 4 of General Assembly Declaration on the Elimination of Violence against Women; Programme of Action of the International Conference on Population and Development (ICPD); Transforming our World: The 2030 Agenda for Sustainable Development. General Assembly Resolution A/RES/70/1 September 2015 and lastly General Assembly Resolution 67/146, intensifying global efforts for the elimination of female genital mutilations. 20 December 2012 are which prohibiting FGM/C.

Domestic Legal Instruments

Above mentioned international and regional legal documents and instruments makes a duty for countries which signed or ratified them to ban performance of any act results in violence against girls and women including FGM. In the other word, it is state's obligation to directly or indirectly criminalize these harmful procedures.

The author chose from Islamic countries in all over the world some states that have a kind of prohibition for doing FGM. However the prohibition can be a specific rule which criminalize FGM or be General provisions (often penal code) which punish inflicting harm. One or more countries from each continent were chosen to be described here:

A. From Asia-Pacific

1- Pakistan

There is no specific rule or provision in this country to criminalize FGM but Article 330 of Penal Code holds any inflicting bodily harm to others causing body or organ loss (Itlaf) punishable by retaliation (Qisas). Whoever dismembers, amputates, severs any limb or organ of the body of another person is said to cause Itlaf-i-udw. If the Qisas is not executable keeping in view the principles of equality in accordance with the Injunctions of Islam, the offender shall be liable to blood money (Arsh) and may also be punished with imprisonment of either description for a term which may extend to ten years.

B. From Middle East

1- Iran (Islamic Republic)

There is no special statutory offences in Iranian criminal law which directly punish performance of FGM. It may be at the result of non-prevalence of FMG in this country. If a person make a compliant based on cutting female genital organs, the judge can prosecute the accused accordance to Article 614 (Book 5: Tasirat): Anyone who commits an assault and battery against someone else that results in damaging or breaking or disabling a victim's limb or causes him a permanent illness or defect or loss of a sense or ability or loss of mind, in cases where Qisas is not possible, if his act disrupts public order and the safety of the society or it is thought that it emboldens the offender or others [to commit assault again], he shall be sentenced to two to five years' imprisonment; and if the victim applies for it, shall be sentenced to blood money (diya) as well. If the injury does not result in the abovementioned defects, and the means of committing the assault is a gun or knife or the like, the offender shall be sentenced to three months to one year of imprisonment. [12]

It is notable based on Article 14 of Islamic Penal Law like most other Islamic laws; Punishments provided in this law are divided into four categories: (a) Hadd (b) Qisas (c) Diya and (d) Ta'zir.

Hadd is a punishment for which the grounds for, type, amount and conditions of execution are specified in holy Shari'a. (e.g. Adultery or intoxication) Qisas is the main punishment for intentional bodily crimes against life, limbs, and abilities. (e.g. Homicide or inflicting bodily harm) Diya, whether fixed or unfixed, is monetary amount under holy Shari'a which is determined by law and shall be paid for unintentional bodily crimes against life, limbs and abilities or for intentional crimes when for whatever reason Qisas is not applicable. Ta'zir is a punishment which does not fall under the categories of Hadd, Qisas, or Diya and is determined by law for commission of prohibited acts under Shari'a or violation of state rules. The type, amount, conditions of execution as well as mitigation, suspension, cancellation and other relevant rules of Ta'zir crimes shall be determined by law.

In addition to above mentioned Article 614 (Book 5: Tazirat), performance of FGM may amount to conviction to Diya. The amount of FGM Diya is accounted based on the scope of harm and wound caused.

2- Bahrain

There is no specific rule to criminalize FMG in Bahrain. FGM is punishable like inflicting other kind of harms and injuries. But due to harsh nature of cutting female genital, it is an aggravated factor in sentencing the offender. Article 75 of Penal Code (1976) provides that: Subject to the cases where the law provides for special causes for aggravation, the following shall be considered as aggravating circumstances: ... Using atrocious methods for committing the offence or mutilating the victim's body. [13]

3- Iraq

In the region of Kurdistan (Self Government) in Iraq there is a Specific provision regarding FGM. According to Article 2 of Combating Domestic Violence Act (2011), any person, bounded to a family relationship, is prohibited to commit a domestic violence act including physical, sexual and psychological violence within the family. In this rule, Female Genital Mutilation was regarded as examples of domestic violence acts. In the other word, FMG is not prohibited in this region. [14]

4- Kuwait

Law 21 of 2015 on Children's Rights has no specific provisions on FGM. It covers children's rights in general, including bodily integrity and the prohibition of all forms of violence. [15]

5- Yemen

In April 2014, a Child Rights bill that criminalizes FGM and stipulates prison sentences and fines for offenders was submitted for ministerial review. [16] In the absence of a functioning government, the draft Child Rights Law that would criminalize child marriage and female genital mutilation is still pending. [17]

C. From Africa

In this continent there are at least 22 countries which specifically criminalized FGM but only 5 countries (with / without specific law) were concerned for the purpose of this research.

1- Egypt

According to Egyptian new (Amended) Penal Code (2016), whoever performs circumcision (*khitan*) on a female by removing any of her exterior genital organs, partially or totally, or inflicts an injury to these organs without any medical necessity will be punished by imprisonment for a period of time of not less than five years and not to exceed seven years. [18]

There are three notes available about this legal text:

Firstly, medical necessity is supposed as justification for doing FGM. But there is no clear definition about this term. This can result in misunderstanding and amounts to undermining any effort to ban all forms of FGM.

Secondly, this penalty becomes maximum security imprisonment in the event that the act caused permanent disability or led to death.

Thirdly, the Egyptian Penal Code criminalized also requesting FGM in addition to its actual performance. Based on Article 242, whoever requests a Mutilation (*khitan*) for a female and the *khitan* took place based on his or her request, shall be punished by imprisonment for a period of not less than one year and not to exceed three years,

2- Liberia

There are three kinds of provisions applicable on FGM. Firstly the General Penal Code; secondly Children's Law and thirdly the Executive Order on Domestic Violence.

Chapter 14 of Liberian Penal code (1976) is about Offenses Involving Danger to the Person. Obviously FGM is one of them. Depends on the result of FGM performance (Death or Simple Assault) the punishment would be different. A person is guilty of a simple assault if he: (a) Purposely knowingly

or recklessly causes bodily injury to another; or (b) Negligently causes bodily injury to another with a deadly weapon. [19]

Simple assault is a misdemeanor of the first degree unless committed in an unarmed fight Or scuffle entered into by mutual consent, in which case it is a misdemeanor of the second Degree.

According to Article 20.1 of Children's Law (2011), every child shall have the right to be protected from work and other practices that may threaten her or his health, educational, spiritual, physical, and moral development. Obviously FGM is against children protection and threat her spiritual and physical development. [20]

Again based on Article 2 of Executive Order No. 92 on Domestic Violence, A person in a domestic relationship who engages in an act or omission which amounts to Domestic Violence shall be guilty of the crime of domestic violence. The *mens rea* and/or *actus reus* of domestic violence shall constitute the following within a domestic relationship if: ...

(1) Female genital mutilation performed on a person under the age of eighteen (18) or a person eighteen (18) years old or over without their consent. [21]

There are three notes available about this legal text:

Firstly, Sentencing FGM perpetrator is subject to two external elements related to victim: the age of the victim and her age.

- The age of the victim should be less than 18 years old to justify punishment of offender. It means that performance of FGM for girls and women over 18 is not a crime. This condition may be as a way to adjust the provision with tradition and Sharia.
- Similarly the consent of the victim is a justificatory factor in dong FGM. This condition is to some extent exhaustive and none less because the consent given in this circumstances is not a real consent but under the pressure of the family, close relatives and friends.

These two exemptory terms make the legislators aims for preventing FGM and acquiring high rate of protection for vulnerable girls and women bootless.

Secondly, a person in a domestic relationship who engages in domestic violence is liable on conviction of a fine. The court may in addition to imposing a fine or imprisonment, order the defendants to pay compensation to the survivor/victim of an amount determined by the court.

3- Gambia

Gambia is of countries with specific provisions which criminalize FGM and punish the offender. The term is used for FGM is circumcision. More Importantly, Women's (Amendment) Act (2015) give fully comprehensive definitions of all types of FGM. A clear definition of all relevant types of FGM is a fundamental feature of a national legislative framework. [22]

According to subtitle 3 of Article 32A, Female circumcision includes:

- (a) The excision of the prepuce with partial or total excision of the clitoris (Clitoridectomy);
- (b) The partial or total excision of the labia minora;
- (c) The partial or total excision of the external genitalia (of the labia minora and the labia majora), including stitching;
- (d) The stitching with thorns, straw, thread or by other means in order to connect the excision of the labia and the cutting of the vagina and the introduction of corrosive substances or herbs into the vagina for the purpose of narrowing it;
- (e) Symbolic practices that involve the nicking and pricking of the clitoris to release drops of blood; or
- (f) Engaging in any form of female genital mutilation or cutting.

Article 32A Prohibit female circumcision and thus no person shall engage in female circumcision. A person who engages in female circumcision commits an offense and is liable on Conviction to imprisonment for a term of three years or a fine of fifthly thousand Dalasis (Local Currency) or to both; and where female circumcision causes death, to life imprisonment.

As well as the actual practitioners of FGM, other perpetrators need to be addressed by laws, including: Those responsible for *requesting and arranging (procuring)* the act of FGM. These may be family members of the victims or others in the community such as local community or religious leaders; And Those who *assist, aid and abet* the practice. The practitioner who performs the FGM is often accompanied by one or more assistants or younger trainees who may be family members or members of the local community (their actions often include holding down the victim of FGM during the procedure).

Gambia law is of one that criminalizes and punishes Accomplices to female circumcision. According to Article 32B (Mentioned Act), A person who requests, incites or promotes female circumcision by providing tools or by any other means commits an offense and is liable on conviction to imprisonment for a term of three years or a fine of fifty thousand Dalasis (Local Currency) or to both.

Gambia requires anyone who is aware of FGM being carried out to report it to the relevant public authorities. Therefore A person who knows that female circumcision is about to take place or has taken place, and fails, without good cause, to warn or inform, as the case may be, the proper authorities promptly, commits an offense and is liable on conviction to a fine of ten thousand Dalasis (Local Currency). (Subsection 2; Article 32B)

4- Ghana

This country has also specific rule about FGM (called Circumcision). Article 69A of Criminal Code (1960) provides that: "Whoever excises, infibulates or otherwise mutilates the whole or any part of the labia minora, labia majora and the clitoris of another person commits an offence and shall be guilty of a second degree felony and liable on conviction to imprisonment of not less than three years." [23]

In the above legal text there is also a kind of definition of Circumcision.

5- Kenya

Prohibition of Female Genital Mutilation Act (2011) of Kenya provides detailed and comprehensive legal provisions about FGM not only in African countries but also in all over the world. Although this Act provides no definition for mutilation, but underlies following features:

Firstly, it criminalizes different kinds of behaviors in addition to performing:

- Aiding and abetting female genital mutilation

Under Section 20: A person who aids, abets, counsels or procures (a) a person to commit an offence; or another person to perform female genital mutilation on that other person, commits an offence.

- Procuring a person to perform female genital mutilation in another country

In some countries where FGM has become illegal, the practice has been pushed underground and across borders to avoid prosecution. The movement of families and traditional practitioners across national borders for the purpose of FGM remains a complex challenge for the campaign to end the practice, and women and girls living in border communities can be particularly vulnerable.

Based on Section 22, a person commits an offence if the person takes another person from Kenya to another country, or arranges for another person to be brought into Kenya from another country, with the intention of having that other person subjected to female genital mutilation.

- Use of premises to perform female genital mutilation

Legal accountability for the offence of FGM should be extended further than those who perform and procure the practice. Members of the community who assist in other ways, such as offering the use of premises for the purposes of FGM, should also face penalties for aiding and abetting a harmful practice. Possession of cutting tools and equipment, too, should be recognized as a criminal offence.

Based on Section 22, A person who knowingly allows any premises, for which that person is in control of, or responsible for, to be used for purposes of performing female genital mutilation commits an offence.

- Possession of tools or equipment

There are other key features of the law that may provide important protection for women and girls at risk of FGM. One of them is criminalizing possession of tools or equipments of FGM performance. In the other word possession means engagement. A person, who is found in possession of a tool or equipment for a purpose connected with the performance of female genital mutilation, commits an offence. (Section 23)

- Failure to report commission of offence

Obviously reporting any criminal acts may have an important role to prevent it in future. FGM is of crimes that needs more sensitivity by citizens. It is moral obligation for citizens to report its performance and call prosecution services. However the legislator made this moral obligation a legal one. In Kenya a person commits an offence if the person, being aware that an offence of female genital mutilation has been, is in the process of being, or intends to be, committed, fails to report accordingly to a law enforcement officer. (Section 24)

- Use of derogatory or abusive language

It is common in FGM-practicing communities for women and girls who choose not to be cut to face discrimination. They are often subjected, along with their families, to abusive and derogatory language or behaviors that exclude them from everyday activities and communal events.

National anti-FGM laws can offer one form of protection for uncut women and girls (and their families) from this discriminatory behavior, by criminalizing and punishing anyone who victimizes them through language or actions.

Such legal provisions are in place in Kenya and have also been included in the regional EAC Act. Based on Section 25, Any person who uses derogatory or abusive language that is intended to ridicule, embarrass or otherwise harm a woman for having not undergone female genital mutilation, or a man for marrying or otherwise supporting a woman who has not undergone female genital mutilation, commits an offence and shall be liable, upon conviction, to imprisonment for a term not less than six months, or to a fine of not less than fifty thousand shillings, (Local Currency) or both. [24]

Secondly, it is not an offence committed by an approved person who performs a surgical operation on another person which is necessary for that other person's physical or mental health.

Conclusion

FGM is a custom in some countries especially in Islamic ones. The Middle East and African countries show high priority in this respect. In some countries it is usual performance and in some others like Iran it is done rarely. Due to its frequency, some countries start criminalizing its performance. In some criminal laws, only the perpetrator is culpable and in some others a person who aids and abet and also a person who procure it will be liable.

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