

Congressional Law Fails to Reach Female Genital Mutilation

Congress passed a law, but a court says it's unconstitutional. What is the remedy?

by Phyllis Chesler



On November 20, 2018, the United States District Court in Michigan ruled that the federal law which criminalized Female Genital Mutilation (FGM) more than twenty years ago is “unconstitutional”, and cannot be used to prosecute the doctors and mothers of the very young girls who were brought to be genitally mutilated in Livonia, Michigan, a suburb of Detroit. (See *United States of America v. Jumana Nagarwala, et al*, 2018 WL 6064968.)

There were eight defendants. A doctor in Michigan, Dr. Jumana Nagarwala, herself a member of the Dawoodi Bohra sect of Indian Islam, was accused of mutilating the genitalia of nine

girls from three states: Michigan, Illinois, and Minnesota. Another doctor, Dr. Fakhruddin Attar, is accused of having allowed Dr. Nagarwala to use his now-shuttered clinic in a Detroit suburb. Two other women, Farida Attar and Taheri Sharia, clinic employees, were also accused of having assisted Dr. Nagarwala. The mothers of the girls were also charged: Farida Atif, Fatima Dahodwala, Haseena Halfal, and Zainab Hariyanawala.

The World Health Organization has spelled out the extraordinary harm and suffering that FGM causes. This includes pain so severe that it can cause shock and trauma; serious infections; urinary problems for life; scarring that makes urination, menstruation, intercourse, and childbirth forms of torture; inability to ever experience sexual pleasure; a fistula which leads to being ostracized and which requires surgery which may not be available; obstetrical complications; and to lifelong psychological post-traumatic stress disorder.

Despite all the understandable outrage and fears about how this ruling will be seen, the decision itself is not really about the epidemic, harmful, and sometimes lethal nature of FGM. It is only concerned with the provisions of the United States Constitution which the prosecution had argued that Congress had the authority to pass a law banning FGM.

I first learned about FGM in the mid-1970s when Dr. Diana Russell and Nicole Van den Ven organized the first-ever Tribunal in Brussels concerning Crimes Against Women. I learned more about FGM in 1979 when Fran Hosken published The Hosken Report, in which she documented the pervasiveness of this plague.

I saw how Hosken's work was attacked by Arab and African women who felt that eliminating or modifying this atrocity was their job, and did not belong to a white Western woman; that exposing their shame would harm, not aid their desire to

abolish this barbaric custom. Egyptian feminist Nawal el-Sadawii revealed that she had been genitally mutilated and crusaded against the practice. African American feminist Alice Walker spent many years documenting and exposing this practice in Africa. In the 21st century, Somali-born American Ayaan Hirsi Ali, author and advocate, has been the most visible crusader against this practice.

However, based on this recent decision, there is no federal remedy available to ban this torturous practice.

According to the Court, in *United States v. Lopez*, 514 U.S. at 566, (1995) the Supreme Court ruled that the “federal government has no ‘plenary police power’” and in *United States v. Bond* 572 U.S. at 858 (2014) that “federalism concerns demand that this division of authority between federal and state governments be respected.”

Thus, the Court found that Congress could not enact this law under the “Necessary and Proper Clause or the Commerce Clause.”

The Court said that Congress cannot enact a ban on FGM based on any treaties the United States had entered into. FGM does not constitute interstate commerce such that Congress could enact such a ban. FGM is not related to commerce between the States, i.e. it does not have a substantial economic effect on interstate commerce. The court found that the prosecution had failed to show that FGM is an economic or commercial activity or that there is an interstate market for FGM (for example, as opposed to the “multi-billion-dollar interstate markets for marijuana and pornography”).

The Court held that FGM is a “local criminal activity” which the States, not the United States Congress, must regulate.

Of course, the practice of FGM is global, not local, and usually involves payment.

But here is the Court's reasoning: The Supreme Court has stated that "(a) criminal act committed wholly within a State 'cannot be made an offense against the United States, unless it (has) some relation to the execution of a power of Congress or to some other matter within the jurisdiction of the United States.'" *Bond*, 572, U.S. at 854 (quoting *United States v. Fox*, 95 U.S. 670, 672 (1878)).

The Court cites a particularly relevant case (*United States v. Morrison*, 529 U.S. 598 (2000)) in which a woman who alleged rape sued under the federal Violence Against Women Act ("VAWA"); in so doing, she created a "private right of action for victims of 'crimes of violence' motivated by gender." The district court, upheld by the Fourth Circuit and ultimately upheld by the Supreme Court dismissed her claim, noting the "importance of the fact that the VAWA did not regulate economic activity. While we may not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far in our nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature."

In another case the Court cites, (*Norton v. Ashcroft* 298 F. 3D 547 (6th Cir. 2002)), anti-abortion protestors were found guilty under the Commerce Clause because abortion services are both national and commercial and forced closings of clinics via blocking access and persuading doctors not to provide services, etc. did have "direct economic effects."

Although Congress can definitely regulate health care, the Court rejected the prosecutor's argument that FGM is an "illegal form of health care." The Court states that: "FGM is a form of physical assault, not anything approaching a healthcare service. The cases the government cites in this section of its brief dealt with abortion services and healthcare generally... which bear no resemblance to the crime of mutilating girls' genitalia."

Each state has the authority to ban or criminalize activities including FGM (as well as other crimes). Twenty-seven states have done so. Michigan did so but only after this suit was brought.

Interestingly, in 1996, Fauziya Kasinga, in flight from being genitally mutilated, obtained asylum in the United States on the grounds that FGM constituted "persecution." And yet, there is no asylum for girls who are already living in our country.

Has Congress failed to protect girls and women by passing a law which this Court found is not constitutionally enforceable? Did Congress exceed its authority in having passed legislation which may be the province of each state? Or is the Court's reasoning faulty?

One may certainly criticize the Court's belief that this issue concerns only the nine girls involved in this particular lawsuit. Surely, the Court must know that FGM is a secret, hidden practice, sometimes carried out via a visit to the home country, but increasingly performed in the United States. In 2004, the African Women's Health Center at Brigham and Women's Hospital reported 227,887 girls and women at risk in United States, with 62,519 under 18. This increase can be attributed to increases in total immigration.

According to Hirsi Ali's latest report (2018), these nine girls are "among the estimated 513,000 women and girls in the U.S. who have been or are at risk of being held down and their genitals cut, typically without anesthetic." Granted, the larger number of victims and the at-risk population were not before the Court.

In addition, Dr. Donna Hughes, an expert in sex trafficking, pointed out that pimps have been arrested and tried based on their use of a cellphone in sex trafficking cases. It is unknown whether these mothers used cellphones. Dr. Hughes led me to a federal law (18 U.S. Code 2421) concerning

transportation: "Whoever knowingly transports any individual in interstate or foreign commerce... with intent that such individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense... shall be fined or imprisoned." However, the Court ruled that FGM is not a "sexual act." While true, it is an act which profoundly effects or rather impedes any future sexual act.

The only remedy that remains is a state-based law.

Are we now looking at "safe" states and "unsafe" states in terms of childhood abuse? What about those parents who will travel to "unsafe" states in order to have this procedure carried out—as they did in this case? Has the prosecution failed girls and women by bringing this suit under grounds that were likely to fail?

While the prosecution is considering an appeal, this group of offenders cannot be re-charged for the same "crimes."

Assuming that FGM is a form of child abuse, and one that may even rise to the level of lifelong torture, there is still no constitutional remedy at hand. According to one lawyer who prefers to remain anonymous, "the federal laws on torture apply to the CIA and armed forces and the like and not to private citizens. In other words, they are concerned with government actors so we ensure they don't torture people in our name."

Whether FGM is understood to be a religious or a tribal custom, like polygamy, child marriage, normalized wife-and-daughter beating, incest, and human sacrifice (honor killing or femicide), it has no place in the United States.

Clearly, each of the remaining American states must be persuaded to pass a ban and must then actually enforce it. In a recently-released report, The Ayaan Hirsi Ali Foundation and the Quilliam Foundation recommended just this.

In addition, the Report recommended “training frontline service providers,” “enforcing mandatory reporting” of FGM, “funding education and outreach for at-risk communities” and giving up the “misguided political correctness around condemning cultural and religious practices... which harm women and girls.”

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