

FEMALE GENITAL MUTILATION

Law and Advocacy for Women in Uganda v. The Attorney General
[2010] UGCC 4 Constitutional Petition no 8 of 2007
Uganda, Constitutional Court

COURT HOLDING

The custom and practice of Female Genital Mutilation (FGM) violates the rights of women enshrined in Articles 21, 22, 24, 32(2), 33, and 44 of the Constitution. FGM is declared prohibited for being inconsistent with the Constitution.

Summary of Facts

The Petitioner, a non-governmental organisation (NGO) duly registered in Uganda, filed a petition challenging the custom and practice of FGM by several tribes in Uganda, as being inconsistent with the Constitution of the Republic of Uganda 1995 (the Constitution). The Petitioner asked the Constitutional Court of Uganda (the Court) to declare FGM unconstitutional in accordance with Article 2(2) of the Constitution, alleging that it violated the right to life guaranteed under Article 22(1); the right to dignity and protection from inhuman treatment, secured under Article 24; the rights of women recognised under Article 33; and the right to privacy guaranteed under Article 27(2) of the Constitution.

Issues

The Court identified two issues for determination:

1. Whether the petition raised any matter for constitutional interpretation.
2. Whether the custom and practice of FGM was unconstitutional and should be prohibited.

Court's Analysis

The main judgment was written by Justice of Appeal Twinomujuni. The Court determined that the petition did raise matters that required constitutional interpretation.

The Court then considered the issue of whether the custom and practice of FGM is unconstitutional and should be prohibited. The Court considered the evidence put forward by the Petitioner, which included affidavits stating that the practice of FGM is carried out crudely, causes excruciating pain, and results in excessive bleeding and trauma. The potential consequences include permanent disfigurement or death. Apart from this, the practice could result in urinary incontinence, rendering the woman a social outcast because of the urine odor. Some women end up with paralysis and/or some other permanent disability.

The Court also considered the fact that the affidavits stated that the practice of FGM does not appear to have any medical or social benefits to the community or to the women and girls subjected to this practice.

After reviewing the evidence, the Court moved on to discuss the constitutional provisions relevant to the determination of the matter. It started by highlighting Article 37 of the Constitution, which recognises every person's right to enjoy and practice one's culture and tradition. The Court juxtaposed this with Article 44 of the Constitution, which provides that there would be no derogation from certain rights including freedom from torture and from cruel, inhuman, or degrading treatment, recognised under Article 24 of the Constitution.

The Court then pointed out that Article 32(2) of the Constitution prohibits laws, cultures, customs, and traditions which are against the dignity, welfare, or interest of women, and Article 33(1) and (3) provide that women shall be accorded equal dignity with men and the state shall protect women and their rights. At this point, the Court concluded that any person is free to practice their culture, traditions, or customs as long as none of these infringe on the human dignity of any person or subject any person to any form of torture or cruel, inhuman, or degrading treatment.

The Court evaluated the evidence in the light of the law, and found that FGM is indeed practised among some tribes in Uganda. It also found that the practice has harmful consequences on the health and dignity of women and girls. It made reference to the document entitled *Eliminating Female Genital Mutilation: An Interagency Statement* (Interagency Statement), published in 2000 by the World Health Organization (WHO), which describes potential harmful consequences of FGM, including chronic pain, decreased sexual pleasure, and post-traumatic stress disorder. The publication also gives evidence of increased risk of childbirth complications and highlights the negative consequences of FGM on newborn babies.

The Court therefore held that FGM violates the rights of women enshrined in Articles 21, 24, 32(2), 33, and 44 of the Constitution, and, to the extent that girls and women are known to die as a direct consequence of FGM, also Article 22 of the Constitution. Further, the Court stated that FGM violates the rights of women, referencing a passage of the Interagency Statement that concluded that FGM violates well-established human rights principles, norms, and standards, including equality and non-discrimination on the basis of sex, the right to life, and the right to be free from inhuman treatment. The passage also stated that FGM has been recognised to manifest discrimination on the basis of sex and is rooted in gender inequalities and power imbalances between men and women, and that FGM is a form of violence against women and girls. The Court therefore held that FGM must be prohibited in the jurisdiction, for being inconsistent with the Constitution.

Conclusion

The petition succeeded.

Note

While this decision was being written, the Ugandan Parliament coincidentally passed a bill on December 10, 2009, titled "Prohibition of Female Genital Mutilation," which was welcomed by the Court as consistent with its own ruling based on the Constitution of Uganda.

Significance

The practice and custom of FGM is said to have been prevalent in 29 countries in Africa including Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Cote d'Ivoire, Democratic Republic of Congo, Djibouti, Egypt, Ethiopia, Eritrea, Gambia, Ghana, Guinea, Guinea-Bissau, Kenya, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone, Somalia, Sudan, Tanzania, Togo, Uganda, and Zambia. The practice has since been banned in several countries including: Benin (2003); Burkina Faso (1996); Central African Republic (1996, 2006); Chad (2003); Cote d'Ivoire (1998); Djibouti (1994, 2009); Egypt (2008); Eritrea (2007); Ethiopia (2004); Ghana (1994, 2007); Guinea (1965, 2000); Guinea Bissau (2011); Kenya (2001, 2011); Mauritania (2005); Niger (2003); Nigeria (1999-2002, multiple states); Senegal (1999); Somalia (2012); South Africa (2000); Sudan (state of South Kordofan 2008, state of Gedaref 2009); Tanzania (1998); Togo (1998); Uganda (2010); and Zambia (2005, 2011). The current application resulted in Uganda joining the group of countries that have prohibited FGM.

FGM has serious implications on the sexual and reproductive health and rights of girls and women who are subjected to it, and has no social or medical benefit to society or to the victims. Some communities continue to practice this custom because it is associated with identity and belonging and it is socially acceptable. Underlying this practice however, is an attitude about women's position in society and their sexuality, and reflects a denial of their self-determination and control over their autonomy in matters relating to their sexuality. However, this practice is accepted and encouraged by socio-cultural norms rooted in traditions and customs that justify holding such views about girls and women. This is contrary to human rights perspectives articulated by human rights treaties to which many countries where FGM is practised have subscribed through accession or ratification.

The 1993 United Nations World Conference on Human Rights (the "Vienna Conference") was an important milestone for advocacy to eliminate FGM because at this meeting FGM became framed as a form of violence against women. The Vienna Conference affirmed FGM as subject to scrutiny under international human rights treaties, including the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (Convention Against Torture), and the Convention on the Rights of the Child (CRC). The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) specifically addresses FGM in Article 5, which provides that states shall prohibit and condemn all forms of harmful practices which negatively affect the human rights of women and which are contrary to recognised international standards, including Female Genital Mutilation.

This decision of the Constitutional Court of Uganda to prohibit FGM is therefore important as it is one of the measures that states are obligated to undertake under Article 5 of the Maputo Protocol. Although the decision was primarily based on the Constitution of Republic of Uganda, the Court acknowledged the place of international human rights when it referred to the Interagency Statement, which articulated international human rights standards and norms that bear upon FGM.

While elimination of FGM is not the exclusive purview of legislative measures, these legislative measures are important to facilitate and support the transformation of socio-cultural norms around women's sexuality and sexual and reproductive rights. It is therefore important for African states to act in unison and solidarity to end the harmful practice of FGM and prohibit such practices, even if the practice may not have been documented in their countries. For instance, and indeed quite coincidentally, anecdotal sources suggest that FGM is being practised among some communities in Malawi even, though Malawi is not among the countries where FGM is deemed prevalent. It is important that Malawi take measures to curb this practice, including legislative measures. Indeed, it is important for all states that have obligations under international and national law to respect, protect, and fulfil women's rights to take such legislative measures and outlaw FGM.