Can the legal concept of ‘neglect of care’ work as a preventive tool in Europe? Potentials and risks of a novel approach to protecting girls from FGC

Sara Johnsdotter
University of Malmö

INTRODUCTION

For a long period of time, legal measures, such as prosecutions, have been promoted as an important tool to combat FGM. There are often concerns that European states neglect the issue of FGM, resulting in there being too few prosecutions (e.g., the Communication from the European Commission ‘Towards the elimination of FGM’ (COM (2013) 833), adopted in 2013).

In this paper, I present an overview of criminal court cases regarding FGM in Europe. Further, I will briefly present a novel legal approach to handling FGM cases that has been implemented in a few countries. Focusing on ‘neglect of care’ in the legal handling of FGM cases involving families that have migrated from FGC-practicing countries has both pros and cons.

THE STUDY

In 2014, the European Commission, Directorate-General for Justice asked The European Network of Experts on Gender Equality (ENEGE) to collect data on criminal court cases regarding FGM in Europe, and also to map transnational movement for the purpose of having FGM performed in another European country. ENEGE appointed me and Ruth Mestre i Mestre, Professor of Philosophy of Law at Valencia University, to carry out the assignment.

During 2015, we monitored data collection in eleven countries in Europe. Some countries were selected based on prior knowledge of the existence of FGM court cases, others because we knew from the literature (especially EIGE, 2013a,
and 2013b) that there had been rumours about transnational movement to have FGM carried out abroad. The countries included in the study were Austria, Denmark, Finland, France, Germany, Italy, the Netherlands, Spain, Sweden, Switzerland, and the UK. Country experts collected and submitted data between June and October 2015. We analysed the data focusing on, among other things, commonalities and disparities of legal aspects in the court cases with a special attention given to the most recent twenty (Johnsdotter & Mestre i Mestre, 2015).

COURT CASES IN EUROPE

All in all, there have been fewer than fifty criminal court cases regarding FGM in Europe. A majority of them, some thirty trials, took place in the 1980s and 1990s against West African immigrants for FGC that had been carried out on French soil. The French country expert also reported a later court case (2012) involving parents of Guinean nationality and four girls who were allegedly cut between 1993 and 2005.

Denmark has had one court case. The girl aged four was cut in Sudan in 2003 and her parents of Eritrean origin were prosecuted in 2009. Her father was acquitted while her mother was sentenced. Denmark has an ongoing court case involving Somalis who are said to have had a girl cut in Africa.

Italy and Spain have had a few court cases (regarding acts taking place in Italy or Africa; and in the Spanish cases, in Senegal or Gambia), ending up in acquittals or convictions. Switzerland has had two court cases, one in 2008 (for FGM in 1996) and one in 2012 (for FGM in 2001), both ending up in convictions with suspended sentences. Both cases involved Somalis; the first one about an act of FGM performed in Switzerland and the other in Somalia.

Sweden has had two court cases, both in 2006, involving parents of Somali origin. Both FGM acts allegedly took place in Somalia. The UK has had one case, but it can hardly be called a ‘typical FGM case’. An obstetrician was taken to court for FGM after having sutured a woman surgically when she was bleeding after delivery. He was acquitted after a very short trial in 2015.

CRIMINAL INTENT REGARDING FGM VS. NEGLECT OF CARE

In most criminal court cases regarding FGM, criminal intent has been the key aspect of the indictment: only persons who have acted in ways that lead to a girl’s being cut – and when it can be corroborated that the alleged perpetrators have had this intention – can be charged in court. However, a couple of cases in Europe stand out in this respect. In these cases, persons have been charged on the ground of ‘neglect of care’; that is, for not having protected the girl well enough from being subjected to FGM.
An illustrative example is one case presented in the Fribourg Criminal Court in Switzerland in 2009. A legal custodian, here called ‘the Stepsister’, was charged for ‘Neglect of duties of care, supervision or education’ (Article 219 in the Swiss Criminal Code) and ‘Abandonment’ (Article 127 in the Swiss Criminal Code). The woman, who argued that the girl was under her biological mother’s custody once in Somalia, was found guilty in 2012, with a suspended sentence:

First, the Stepsister was recognised responsible for the Girl, since she has raised her and been the contact person for the school. Second, the condition of immediate danger was fulfilled. In fact, the court acknowledged that in a country where the rate of FGM is around 98%, the operation of the Girl was only a matter of time. Third, even though it was not the reason why the Stepsister sent her to Somalia, the judge estimated that she could not ignore this risk, being herself cut and her own daughter as well. Therefore, the criterion of intentionality in the sense of Article 127 SCC was fulfilled, since the Stepsister did not react to prevent FGM from happening. Fourth, the Stepsister brought the Girl to Somalia without telling her that it was forever. Although the Girl declared wanting to meet her biological mother, she argued that she would have never accepted to stay indefinitely in Somalia. Fifth, the biological mother cannot be considered a third party, who would break the causal link, since she ‘was one aspect of the danger faced by the Girl’. Sixth, the Stepsister lives in Switzerland since 19 years and cannot stipulate that she did not know about the FGM ban. Seventh, the Swiss law can be applied, since the offence started in Switzerland when the Stepsister bought the flight tickets [Country report, Switzerland, Dina Bader].

The outcome of this case can be compared to a case in Sweden. A teen girl was taken to her father’s family in Somalia with her younger sisters. She ran away and reached the Swedish Embassy in Addis Ababa, Ethiopia, and told the staff there that she and her sisters had been subjected to FGM. Later, during a police interrogation, she related: ‘And one day my father called my [paternal] grandmother and said to her, “I want to take the children back to Sweden, so you have to...” ... one cuts away things from the girl.’ The girl had not overheard the conversation, she said, but that was what her grandmother told her had been said. The girl and her sisters were cut. This all took place while her father was in Sweden. Her father in Sweden was detained and held in custody for three weeks, ‘justifiably suspected’ for instigation of FGM. In November 2008, the man was released because it could ‘not be proven that the suspect(s) had committed a crime’ (prosecutor’s decision after preliminary police inquiry). The charges built only on the FGM Act and therefore had to be dropped due to lack of evidence to prove intent. With an alternative interpretation of existing laws – legislation that focuses on duties to provide care and supervision – it might have been possible to prosecute in such a case.

In sum, states can choose to handle cases of FGM performed abroad – with legal custodians being absent during the act of FGM and even unaware of its accomplishment – either 1) through insisting on criminal intent as regards the FGM Act itself, or 2) through a focus on ‘neglect of care’, making custodians liable on the ground that they have not protected a girl well enough.
THE RISKS AND POTENTIALS OF INTRODUCING ‘NEGLECT OF CARE’ REGARDING FGC

A higher number of immigrants from FGC-practicing countries would probably be prosecuted if European countries to a higher extent applied the neglect-of-care approach in legal proceedings regarding FGM cases. However, there is a general principle of criminal law that prohibits carrying out extensive interpretations in criminal proceedings (Johnsdotter & Mestre i Mestre, 2015). In other cases described in our collected material, parents were acquitted on the grounds that they had left their girls in temporary care among trusted relatives, and honestly, it seems, did not expect this to happen. The question here is whether it is reasonable to sentence people for acts they have not planned, envisaged nor desired.

On the other hand, the neglect-of-care approach could be a powerful tool in preventive work as a deterrent. It has the potential to be an important step in efforts to safeguard young girls in Europe, since it sends a clear message to concerned immigrant groups about the legal ban on FGC. Also, it could potentially work as a useful instrument for families who go back to countries of origin for some time, and need to instil in their social networks that they face the possibility of prison in case someone performs FGC on their girl.

CONCLUSION

The neglect-of-care approach in legal handling of FGC cases is a double-edged sword. On the one hand, if the approach is overused, there is a risk of increased stigmatization of already vulnerable immigrant groups in European countries, and also increased legal vulnerability for individuals in these groups. The measure could be said to emphasize repression rather than prevention.

On the other hand, the approach could, in itself, work in preventive ways, in order to safeguard girls who have not yet been subjected to FGC. If used with subtlety and discretion, we might have a hitherto untapped potential in the form of a powerful preventive tool.

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