

## ***United States v Nagarwala (ED Mich, Crim No 17-CR-20274, 20 November 2018)***

### **Facts**

Eight defendants (two doctors, two assistants and four mothers) were charged with committing female genital mutilation ('FGM') in violation of section 116 of title 18 of the United States Code ('the FGM statute').<sup>1</sup> Charges were also brought against the defendants of conspiring to commit FGM and aiding and abetting each other to commit FGM.

The offences were alleged to have occurred in Michigan and involved nine victims, some of whom came from Illinois and Minnesota.

### **Background**

The defendants sought to have the charges dismissed, on the grounds that Congress<sup>2</sup> lacked authority to make the FGM Statute. It was asserted that Congress had the power to make laws only as allowed by the Constitution, and none of the listed constitutional powers provided Congress with the authority to make FGM a national offence.

In response, the government argued that Congress did have authority to make the FGM Statute based upon two specific powers listed in the Constitution, the 'Necessary and Proper Clause' and the 'Commerce Clause'.

### **Reasoning**

#### **The Necessary and Proper Clause<sup>3</sup>**

Justice Friedman identified that the Necessary and Proper Clause gave Congress the authority to make all laws that were necessary and proper for carrying out the powers listed elsewhere in the Constitution. The clause was not an independent grant of power, and consequently, the FGM statute had to form a means that was 'rationally related' to the implementation of one of the other listed constitutional powers.

The government relied upon the power of Congress to pass treaties. It was argued that by enacting the FGM Statute, Congress was acting reasonably in carrying out treaty obligations under two articles of the International Covenant on Civil and Political Rights ('the ICCPR'): article 3, which provides for the 'equal right of men and women to the enjoyment of all civil and political rights' in the ICCPR; and article 24, which states that 'every child shall have, without any discrimination as to

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<sup>1</sup> The United States Code is a compilation of federal statutory law. Each title corresponds to a subject, and title 18 addresses crimes and criminal procedure. The federal statutory law is distinct from state made laws.

<sup>2</sup> 'Congress' is the legislative, or law making, branch of the federal government in the United States.

<sup>3</sup> *United States Constitution* art 1, § 8, cl 18.

race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State'.<sup>4</sup>

The Court rejected the government's argument. In Justice Friedman's view there was no rational relationship between article 3 and the FGM Statute. While article 3 sought to ensure equal civil and political rights, the FGM Statute aimed to protect girls from a particular form of physical abuse. Although the relationship between Article 24 and the FGM Statute was viewed as closer, it was still tenuous. Justice Friedman considered the former to be an anti-discrimination provision, calling for the protection of minors without regard to characteristics such as sex, race or colour, while the latter did not logically further the goal of protecting children on a non-discriminatory basis.

A separate point of significance identified by Justice Friedman was the notion that implementation of the ICCPR was to occur 'in accordance with constitutional processes'.<sup>5</sup> Such processes were said to include the division of power between the states and federal government. That is, implementation of the ICCPR had to be consistent with the division of power between the states and federal government, and relevant in this regard was that the states possessed primary authority in defining and enforcing the criminal law. Drawing an analogy with comments of the Supreme Court regarding common law assault and 'leaving the prosecution of purely local crimes to the States',<sup>6</sup> Justice Friedman determined that FGM was a 'local criminal activity' that was for the states to regulate, not Congress.<sup>7</sup> As such, even if the FGM Statute was rationally related to articles 3 and 24 of the ICCPR, concerns surrounding federalism and the federal government's lack of general police power, prevented Congress from criminalising FGM. Consequently, in his Honour's view, Congress had 'overstepped its bounds by legislating to prohibit FGM'.<sup>8</sup>

### Commerce Clause

As an alternative argument, the government asserted that Congress had the power to make FGM an offence under the Commerce Clause of the Constitution. According to that clause, Congress has authority to 'regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes'.<sup>9</sup> Justice Friedman identified the applicable test as whether 'a rational basis exists' for concluding that the activity being regulated 'substantially affects' interstate commerce. In this regard, based upon *United States v Morrison* 529 US 598 (2000) and *Norton v Ashcroft*, 298 F 3d 547 (6<sup>th</sup> Cir. 2002), four relevant considerations were discussed:

- (a) the economic nature of the activity;
- (b) a jurisdictional element, limiting the reach of the law to 'a discrete set of activities that has an explicit connection with, or effect on, interstate commerce';
- (c) express congressional findings regarding the activity's effect on interstate commerce; and
- (d) the link between the regulated activity and interstate commerce.

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<sup>4</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 3 and 24.

<sup>5</sup> *United States v Nagarwala*, n1, 6 – 7.

<sup>6</sup> *Bond v United States*, 572 US 844 (2014).

<sup>7</sup> *United States v Nagarwala*, n1,10.

<sup>8</sup> *Ibid.*

<sup>9</sup> *United States Constitution* art 1, § 8, cl 3.

In relation to the first consideration, the government attempted to draw an analogy with cases surrounding child pornography or regulation of marijuana, in which Courts had recognised interstate markets.<sup>10</sup> It asserted that similarly, an interstate market existed for FGM. This was rejected by Justice Friedman, who noted that there was no evidence of such a market.<sup>11</sup> Although some of the alleged victims came from interstate, the number of such victims was small, not a market, and not comparable to multi-billion dollar interstate markets for marijuana or pornography.

Arguments of the government that FGM was ‘an illegal form of healthcare’ or part of a ‘comprehensive regulatory regime’ were also rejected.

Justice Friedman viewed FGM as more akin to cases surrounding possession of a firearm at school,<sup>12</sup> or gender-motivated crimes of violence,<sup>13</sup> which were found to be beyond the law-making power of Congress under the Commerce Clause. In those cases, it was of significance that the activities had nothing to do with commerce or economic enterprise, and it was the states, not the federal government, which had primary authority for enforcing the criminal law and regulating intrastate violence.

Regarding the second consideration, the jurisdictional element, there was no requirement in the FGM Statute for proof that the victims or provider travelling had any effect on interstate commerce. While Justice Friedman noted that a lack of such a jurisdictional element may not be significant if the third and fourth considerations were satisfied, in the circumstances, his Honour also found those to be lacking. There were no congressional findings aside from ‘the pro forma ones’, which appeared to be ‘unsupported conclusions’ rather than findings, and in relation to the fourth consideration, the ‘link between the regulated activity and interstate commerce’, there was no evidence that FGM was a commercial activity, or that anyone beyond the mothers of the nine alleged victims were in the market for the ‘service’. Further, regarding an argument by the government that the unique circumstances of FGM placed it beyond the ability of any single state to control, his Honour noted that twenty-seven states had passed FGM statutes, and nothing prevented others from doing so. The suggestion that states in which FGM had not been criminalised would become ‘refuge states’ for the practice was rejected, as in his Honour’s view, in light of existing sexual conduct statutes and battery or child abuse statutes, no state offered ‘refuge to those who harm children’.<sup>14</sup>

## Findings

Ultimately, the FGM Statute was found to be invalid as Congress had no authority to pass the law under either the Necessary and Proper Clause or the Commerce Clause of the Constitution. Articles 3 and 24 of the ICCPR were not rationally connected to the FGM Statute, and even if they were, issues of the division of power between the states and federal government, particularly state power in relation to local criminal activity, weighed against the validity of the law. Additionally, there was no rational basis to conclude that FGM had any effect, let alone a substantial effect, on interstate commerce.

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<sup>10</sup> *United States v Nagarwala*, n1, 21 and *United States v Chambers*, 441 F 3d 438 (6<sup>th</sup> Cir. 2006); *Gonzales v Raich*, 545 US 1 (2005); *Taylor v United States*, 136 S Ct 2074 (2016).

<sup>11</sup> *United States v Nagarwala*, n1, 21.

<sup>12</sup> *United States v Lopez*, 514 US 548 (1995)

<sup>13</sup> *United States v Morrison*, 529 US 598 (2000).

<sup>14</sup> *United States v Nagarwala*, n1,26.