

**SEXUAL OPPRESSION AGAINST THE MAASAI WOMAN:  
A MAJOR FOCUS ON FGM AND FORCED MARRIAGES AND  
THEIR RECURRENT CONSEQUENCES ADVERSELY  
AFFECTING HER SEXUAL WORTH**

**BY**

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## DEDICATION

First to God who is my everything and for His ever present assurance that he would never place me where His grace could not keep me which has taken me through four years of tough experiences of College life.

To my treasured family. Dad, you are the very best and Mum, I felt your prayers strengthen me all through. This also goes to the greatest girls in my life Lunkat, Nanana, Seela and Nina and not forgetting “the boys”, Sadala, T.T, Mayian, Leshan and Dally, who were always there.



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## **ABBREVIATIONS AND ACRONYMS**

1. CEDAW: The Convention on the Elimination of All forms of Discrimination Against Women.
2. FGM: Female Genital Multilation
3. FIDA (K): Federation for Women Lawyers, Kenyan chapter
4. ICCPR: The International Convention on civil and political Rights.
5. ICESCR: International Convention on Economic Social and Cultural Rights.
6. MYWO: Maendeleo Ya Wanawake Organization
7. UN: United Nations

## **TABLE OF STATUTES**

1. The African Christian Marriage and Divorce Act cap. 151 LK
2. The Children Act of 2001.
3. The Constitution of Kenya.
4. The Marriage Act Cap. 150 Laws of Kenya.
5. The Penal code cap. 63 Laws of Kenya.

## INTRODUCTION

For a long time women have been regarded as second class in all societies across the world and though the problems faced by each group/society take different forms each and every woman has an issue which needs to be addressed by law. To this end, the Maasai woman is not in any way peculiar-only a study model.

Women in the Maasai community are generally regarded as inferior to men. They are regarded as property and expected to bow to the expectations of their men and to treat them as their masters. They are taught from childhood that males were considered to be superior.

This attitude has invaded every aspect of these women's relations to their male counterparts and to a great extent their sexuality has been left to the control of men.

It is against this traditional background that I propose to look at the status of the Maasai woman and the effects of traditional attitudes and practices on her sexuality.

It is necessary to understand that women/girls are socialized from the very beginning to accept their situation and the ideology of male supremacy, which makes them prey to a whole range of discriminatory practices<sup>1</sup>

Eradication of gender discrimination with regard to the employment and control of the woman's sexuality calls for the recognition of the discriminatory practices and the actions to remedy their effects and to establish safeguards against perpetuation.

There is a dire need to look into the laws governing family relations (marriage laws) and reform those that are oppressive. Law can be used to reinforce or give permanence to certain social injustices leading to the marginalization of certain groups of people. This legal systems can also become obstacles when

change is required by the oppressed thus necessitating a further look into what injustices are intertwined within the legal systems and the extent of their operation.<sup>2</sup>

Women and men are entitled to full equality both under the law and in practice and thus each and every one should have full control of their sexuality and have to have others respect the same.

To start off this discussion, we shall in chapter one have an introduction to feminism in an attempt to trace the origins of women subordination in the African context and more so the attitudes behind the control by men of women's sexuality in marriage systems and the practice of FGM. This will enable us devise strategies for change.

In the Second Chapter is a look into the ways in which customary marriage systems and FGM have been used to further sexual oppression against the Maasai women.

Chapter three will lay out the legal framework in place both internationally and the Kenyan status on the regulation of oppressive marriage systems and FGM in an attempt to identify areas in our national laws that need reforms and also areas to borrow from the international legal instruments through their domestication in pursuit of women's sexual liberation.

Recommendations and the conclusion in Chapter four is the most important part of this thesis as we hope that they will be of essence in the attempt to have these women discover their sexual worth.

## ENDNOTES

<sup>1</sup> Katarina Tomaveski, Women and Human Rights; London Zed Books.

<sup>2</sup> Janet Kabeberi Macharia: Women, Laws, Customs and Practices in East Africa; The Legal Status of Women in Kenya, 1995, pg80



# CHAPTER ONE

## AN INTRODUCTION TO FEMINISM

### 1.1 INTRODUCTION

This chapter lays out the concept of feminism in the African context and the need to educate people into the knowledge of the fact that feminism is not for women only but for all and for the benefit of the entire society and also lays out the need to pursue African feminism to establish the root cause of problems that face women with regard to their sexuality culturally and thus be able to deal with the oppressive practices and in our case we shall look into the marriage systems of the Maasai community and the practice of FGM and how they have been used to perpetuate women's sexual oppression.

The women question in Africa poses two dilemmas. First, a dilemma to African men. While decolonization and economic development of the whole region is urgent, no clear strategy has been articulated for combating sex-based inequality. The national framework of development and the strength or weakness of it determines a wide variety of economic and social factors within a society. Men have been primarily concerned with this global framework of how to move the society forward out of colonialism and in the process, they fail to pay due attention to women, particularly in connection with the internal structures and the workings of society and how and where discrimination against women still persists. A number of African men have thus seen gender as a diversionary issue. They feel that, it is taking attention from important

problems of economic development and nation building. Evidently, much depends on how to define nation building. However, it is a major concern to African women that even as we pursue decolonization strategies, sex discrimination persists and continues to affect women negatively. Thus the national framework for development and policies on women – and how far they are being implemented – need to be examined.

The second dilemma is the “*feminist dilemma*.” Feminism as a social movement in Africa should be located within the African cultural bases upon which it is to survive. Feminism in Africa cannot survive as a social movement with a theoretical and ideological foundation but without a cultural base. Why western feminism arose and how feminist questions are posed clearly has to do with the nature of industrial development in Europe and the particular difficulties women faced within the western religions, patriarchal and industrial structures.<sup>1</sup>

There is need to understand the historical and contemporary roots of women’s subordination. Nature has always been used to explain social inequality, patriarchy in an African context, even in the 20<sup>th</sup> century. There is need to look at these historically traditional patriarchal exploitative relations in order to dispel the apparent beliefs that these relations are inborn and beyond the scope of social change. There is need for this analysis so that the myth of “*natural*” position of women can be exploded and the use of societal institutions to perpetrate their subordination exposed. Men and women must begin to see the

attitudes as socially constructed and capable of transformation for the betterment of society as a whole.<sup>2</sup>

## **1.2 DEFINING FEMINISM**

Feminism is a broad term for a variety of conceptions of the relations between men and women in society. Feminists question and challenge the origins of oppressive gender relations and attempt to develop a variety of strategies that might change these relations for better, all feminism pivots around the recognition of existing women's oppression and addresses the prevailing unjust and discriminatory gender relations. Feminism does not just deal with issues of justice and equality but also offers a critique of male dominated institutions, values and social practices that are oppressive and destructive.<sup>3</sup>

On the other hand, a feminist is a person who is interested in improving the situation of women. Thus a feminist at the very best believes that women suffer discrimination and oppression by virtue of their sex and that their needs have been negated in different historical parts. A feminist can be either a woman or a man and not all women are feminist.

In theory, all forms of action which are economical, social, and/or political, which are undertaken with the view to freeing women from long-term vulnerability due to poverty, lack of development opportunity or patriarchal dominance can be rightfully termed as feminism. The African reality must therefore be constructed as honestly as possible as a basis for analyzing the



condition of women. This reality has a cultural as well as a political and economic basis, with varying local manifestations. This needs to be clearly understood and only then can we formulate meaningful strategies for change.<sup>4</sup>

### **1.3 THE ORIGIN OF WOMEN'S SEXUAL OPPRESSION: THE AFRICAN PERSPECTIVE**

A brief glance at women all over the world today shows that they are oppressed. Such a glance suggests that "*educational attainments*," "*participation rates*", "*occupational structure*," private and public laws, family planning systems, technological advance and above all socio-cultural attitudes are all weighted against them.<sup>5</sup>

Across distance and boundaries in history and society, women have been placed on pedestals as goddesses, but imprisoned within domestic injustice (Custom has been nothing but a tyrant hidden in every home). They have been romanticized in literature and lyrics, but commercialized in life. They have been owned, used and worked as horses; even today.<sup>6</sup>

African women are weighed down by super-structural forms deriving from the precolonial past. In most African societies, gender hierarchy or male supremacy or sex asymmetry was known and taken for granted. This follows attitudes inherited from indigenous history and sociological realities. Men are still dominant in private and public life. The ideology that men are naturally superior to women in essence and in all areas, affects the modern day

organization of societal structures. The ideology prolongs the attitudes of negative discrimination against women.<sup>7</sup>

From the traditional past also comes the notion of the physical control of women's bodies and their products and under this issue comes FGM, the lack of control over her body's biology or products such as children, viewed to belong to the man of the family.<sup>8</sup>

A woman is but a beast that produces the men's children on his behalf. These aspects of the oppression of women in Africa are very important though they tend not to wish (African women) to emphasize the quest for sexual freedom and promiscuity which preoccupies the western feminist.

The African male fears the attainment of equal sexual freedom for women. Some men argue that FGM was not wicked or sadistic in intent since it was societal or parental effort to the best they thought fit for their daughters. Nonetheless, backward, (in the sense of unscientific), painful and undemocratic practices should be stopped. A child's body should not be mutilated without their content.<sup>9</sup>

Attitudinal forms, too many to enumerate, have certainly been inherited from the traditional past. These attitudes derive from the socio-economic formations in existence at the time and have lasted into the modern period. Serious work has to be done to educate whole populations out of these attitudes and notions. Outmoded structures such as in marriage also need to be eradicated.

In this context also, women are shackled by their own negative self-image, by centuries of interiorization of the ideologies of patriarchy and gender hierarchy. Woman reacts with fear, dependency complexes and attitudes to please and cajole where more self-assertive actions are needed. It is clear that women need programs to educate them about their positions, the true causes of their plight and possible modalities for effecting change. Both men and women need "*conscientization*."<sup>10</sup>

#### **1.4 TOWARDS THE FULL REALIZATION OF AFRICAN FEMINISM**

Generally, the concept of feminism has been negatively perceived. Many look at it as being for women who hate men and who want to go against nature and God and when we take a close interest in the critics, they know little or nothing at all about the feminism they argue so heatedly against. In most cases, they come to hear about it third hand and have not come to understand it and what it is all about. The general conception is that feminists are a bunch of angry women who want to be like men. This shows how far away from home African feminism is.

People often fail to look at feminism as being about rights; about women gaining equal rights.<sup>11</sup>

In this discussion on the woman's sexuality, the Maasai woman - who basically represents the typical African woman - there is need to adopt feminism in its proper meaning for the purposes of sensitizing the community



on issues that adversely affect the sexuality of women. This will go a long way into the realization of sexual equality in the community.

The definition of feminism as a movement to end sexism, sexist exploitation and oppression,<sup>12</sup> is one that needs to be imparted into African societies as this definition reveals that the movement is not about being anti-male. This clarity helps us remember that all of us, male and female, have been socialized from birth on, to accept sexist thought and action. As a consequence, females can just be as sexist as men. And while that does not excuse or justify male domination, it does mean that it would be naïve and wrong-minded for feminist thinkers to see the movement as simplistically being for women against men. To end patriarchy (another way of naming the institutionalized sexism), we need to be clear that we are all participants in perpetrating sexism until we change our minds and hearts, until we go of sexist thought and action.<sup>13</sup>

Imagine living in a world where there is no domination, where females and males are not alike or even always equal, but where a vision of mutuality is the ethos shaping our interaction. Imagine living in a world where we can all be who we are, a world of peace and possibility. Feminist revolution alone will not create such a world but it will make it possible for us to be fully self actualized females and realizing our dreams of freedom and justice, living the truth that we are all "*created equal*", come closer, see how feminism can touch and change your life and all our lives. Come closer and know first hand what feminist movement is all about. Come closer, and you will see: Feminism is for everybody.<sup>14</sup>

Both formal and informal education is needed in the campaign to internalize feminist thoughts in the society.<sup>15</sup>

The African women ought to realize her sexual worth; first and foremost, as a woman and not in relation to men, a goal to be realized through feminism.

Challenging sexist thinking about the female body was one of the most powerful interventions made by contemporary feminist movement. All women, young and old were socialized by sexist thinking to believe that their value rested solely on appearance and whether or not they were perceived to be good looking, especially by men.<sup>16</sup> While this illustrates the past situation of women as per the contemporary feminist movement, it is the prevalent situation in our African communities where the woman does not know of the existence of an inner sexual beauty. Her beauty is in her ability to please her husband and reproduce for the community.

Feminists call for the need to have the woman develop a healthy self-love if they are to be liberated from sexual bondage.

## **1.5 CONCLUSION**

The African woman depicted in the above analysis demonstrates the typical scenario that surrounds the Maasai woman.

Having identified the source or origins of the sexual oppression subjected to these women as being in deep-rooted societal attitudes of male supremacy, one step towards eradication of these attitudes is through the inception of feminist thoughts in our society so that both men and women accept the fact that the attitudes are indeed oppressive as against women and both to work towards devising institutions in society that will accord equal sexual rights to men and women.

Feminism is about identifying the oppressive moves against women in society and this helps in working towards formulating strategies for change. Having identified that the control of the female body and thus her sexuality through FGM and sexual oppression in the marriage relations as originating from attitudes and customs from the traditional past, it is important that we elaborate how these two institutions (marriage and FGM) have actually resulted in the sexual oppression of women. The next step will thus be to have this reality imparted in society so that the so-called "normal" position of women is done away with and have, first, the woman realise that she has a sexuality to enjoy and for the men too, to share with their wives, the beauty of it all. These feminist thoughts do away with the prevailing selfish position where women have been used as sexual objects in marriage, for reproduction and the practice of FGM where her sexual organs are removed and she remains incapacitated as to the enjoyment of sex and woman is conveniently placed in a situation where she stands to satisfy only her husband's sexual needs.



Our discussion in chapter two goes to elaborate on the hidden reality behind the Maasai marriage relations and the practice of FGM in facilitation of the sexual oppression of the Maasai woman to guide us through the fight against this oppression. This identification of the problems will enable us further formulate avenues through which our laws can come in to address these issues in the fight for the woman's sexual liberation. The noble quest towards which feminism is geared.

## ENDNOTES

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<sup>1</sup> Achola Pala Okeyo: *Women and Law in Kenya: Towards a new theory and Method*, 1989, Nairobi. Pg. 9-10

<sup>2</sup> Wanjiku Kabira, *Celebrating Women's Resistance: African Women's perspectives*. 1993, pg. 1.

<sup>3</sup> Changu Mannathoko, *Feminist theories and the study of gender issues in southern Africa*.

<sup>4</sup> Supra note 1. Pg. 12

<sup>5</sup> Stanley M. James: *Theorizing Black Feminisms; The Visionary Pragmatism of Black women*, London and New York, pg.107.

<sup>6</sup> Ibid

<sup>7</sup> Ibid pg. 12

<sup>8</sup> Ibid.

<sup>9</sup> Ibid.

<sup>10</sup> Ibid g. 14.

<sup>11</sup> Bell Hooks: *Feminism is for Everybody; Passionate Politics*, 2000 Pg. Viii, South End Press.

<sup>12</sup> Bell Hooks: *Feminist Theory; From Margin to Center*, Pg. 1 south End Press.

<sup>13</sup> Supra note 10

<sup>14</sup> Ibid pg. x

<sup>15</sup> Supra note 5.

<sup>16</sup> Anna Julia Cooper: *A Voice from the South; Xenia Ohhio*, 1892.

# CHAPTER TWO

## FORMS OF SEXUAL OPPRESSION AGAINST THE MAASAI WOMAN

### 2.1 INTRODUCTION

Violence against women can take many forms-rape, assault and battering in the privacy of our homes. Whereas rape and assault can happen to any woman, in any part of the world, may be once or twice in a lifetime, domestic violence has become a “*daily*” occurrence to most women. And they remain silent about it. Most women remain submissive as they consider it normal to be dehumanized. Even if they do not, their awareness about their rights is hardly translated into actions that can form a basis for reversing this trend. The silence has been taken to mean, their consent to be brutalized.<sup>1</sup>

In this context sexual violence against women will be taken to include gender-biased violence that results or is likely to result in physical, psychological and other forms of harm or suffering to women and more specifically, family based sexual violence with regard to marital rape facilitated by oppressive marriage systems and community based violence which covers psychological, physical and sexual violence occurring at the wide community or societal levels with special regard to the practice of FGM.<sup>2</sup>

Women in the Maasai community are generally regarded as inferior to men. They are regarded as property and are expected to bow to the expectations of



their men and to treat them as their masters. They are taught from childhood that males are considered to be superior and with these attitudes goes the notion of marriage being the ultimate goal for a Maasai woman/girl. The marriage systems in this community are very influential in the continuance of male supremacy and we are going to look at how marriage, which goes hand in hand with FGM – a pre-requisite to marriage in this community, has been used to deny the Maasai woman her sexual freedom.

## **2.2 THE CUSTOMARY MARRIAGE SYSTEM OF THE MAASAI**

The process of obtaining a wife in this community is simple. A man meets a girl whom he likes and he puts a chain across her neck and the next step is to approach the girl's family where he brings honey and milk as a sign of his intention to marry the girl. The girl's father invites his relatives (males) and other elders of the same age grade as himself whereupon the decision is made for the girl. Where consent is given by these elders, a lifelong friendship is cemented between the girl's and the man's families.<sup>3</sup>

A look at the proceedings that are undertaken in this community before the commencement of a marriage relationship and the relationship between wife and husband until the termination of this relationship is necessary to be able to establish the various cultural practices or customs that are used in this community to continue male supremacy and subsequent female subordination in sexual relations in marriage.

## i) DECISIONS IN MARRIAGE RELATIONS

Age in years does not determine a girl's capacity to marry in this community, rather, puberty, evidenced by the girl's capacity to procreate is treated as the relevant factor. Liberty could be attained at as early as 11 or even 9 years, which in effect means that a child could enter into a marriage as is often the case. These children often lack the ability to make mature decisions as to spouses and if they could, the opportunity to choose a spouse is not afforded to them as the consent to a marriage is a group or family affair which decision is closely linked with bride wealth and the exchange of marriage gifts which cement ties between the two families hence the notion of free individual consent of the girl to enter into a marriage is often subsumed by the larger interests of the families.<sup>4</sup>

The girls in this community are forced to marry older men oftenly with other wives this being a polygamous set up. The father alone with the opinions of other male counterparts is responsible for this decision as to who was to marry the girls. This depicts a male dominated society, where not even the mothers have the power to give consent for the marriage of their daughters.<sup>5</sup>

The major and mostly unnoticed consequence of this practice is marital rape<sup>6</sup>. In definition, rape involves "*having carnal knowledge of a woman or girl without her consent or with her consent obtained by force, or by means of threats or intimidation of any kind, or by fear of bodily harm, or by means of false representations as to the nature of the act*"<sup>7</sup>In this case, there is no consent from the girl and the pressure that is subjected to the girl by a lack of

“say” before her elders or against the decisions of the community could very well amount to duress which qualifies the presence of rape in such marriages upon their consummation. Here we see an abuse of the woman’s sexuality, if not child abuse and the disregard of the woman’s sexual needs where she is not afforded the opportunity to freely choose the person with whom to have sex and when to do the same.

. Ordinarily, the woman has no choice as to the number of children to give birth to and sometimes, the marriage of a subsequent wife by the husband is used as a form of birth control for the first wives whereupon the new wife becomes the centre of interest for the man and the rest are subjected to neglect and a denial of their conjugal rights. Due to the fact that these women are brought up in the belief that this was the normal situation for every woman in the community, they remain in such oppressive marriages with the men enjoying the governance where the woman’s sexual decisions are made by the husband.

This reveals a situation where the woman is simply an object for reproduction and she could qualify for a sex slave because for one, she has no part to play in the decision as to who is to marry her and further as to the number of children of the marriage. Women are also not consulted where the husband intends to marry another wife and the neglect subjected to the older wives (as in the first in marriage) as to their sexual needs is a further demeanor subjected to the woman’s sexual worth and she remains under her husband’s control.



## **(ii) THE INSTITUTION OF BRIDAL DOWRY**

This is another customary practice in marriage which has been used in this community to continue the position of women as sex objects for reproduction. Although the idea behind the payment of dowry was good, that is, providing a forum for cordial relations between the families of the persons marrying, this practice has been abused and does not serve its intended purpose<sup>8</sup>.

The agreement on the payment of bride wealth is an essential element of marriage. Its ideological and social underpinnings are sometimes so strong that it is viewed as part of society's rich cultural heritage, which requires not only preservation but also respect. The process of entrenching this practice has included varied appeals to tradition, culture, religion and mysticism. Non-payment can be seen as a cause of all kinds of misfortunes suffered by the person who fails or neglects to pay it. His children may have ill health and may die. These belief systems help to persuade and reproduce the practice. More importantly, however, the practice is strengthened by a variety of rules determining the rights and obligations of persons who are parties to it.<sup>9</sup>

A number of reasons have been advanced to rationalize the practice and explained as being in the nature of a bond uniting the two families, that it is a mark of the man's respect for his wife; that it is merely a symbol to seal the marriage contract; that because of the liability to repayment on divorce, it acts

The practice has been used as a tool for enrichment and exploitation. Fathers have actually looked at their daughters as some form of investment from whom they will derive a lot of riches for themselves in terms of bride wealth<sup>12</sup> at the expense of the woman's sexual freedom. The control of the woman's sexuality is transferred to her husband on his paying the dowry.

### iii) DIVORCE AND SEPERATION

For a typical Maasai marriage, the wife is expected to live the '*normal*' life of a woman as in, carrying out all the domestic chores and being in the service of her husband. If the wife runs away from the home, she is followed and persuaded to return to her husband. Should she refuse, the elders find out whether she has been properly married and all the bride wealth paid, and if this is the case, then the marriage cannot be broken as earlier stated. She might obstinately refuse to return, but she can never again get married to another man. She could even go and live and have children with another man but the husband is entitled to claim and take away all the children that she may beget. But the man with whom the woman is living is usually left with one of the children.<sup>13</sup>

If after all this the woman still refuses to return to her '*proper*' home, she might continue to have as many children as she can, but her husband retains the right to claim them. Yet women are normally tied to their children and will often return to their rightful homes once they realize what is happening to their children<sup>14</sup>. This demonstrates how the women are tied to the marriage for

puposes of procreation for the continuation of the husband's lineage. On termination of the marriage, the children are deemed to belong to the husband and the role of women is not recognised at all as regarding the custody of children.

Normally, the power to terminate a marriage lies with the husband where the woman may be "thrown out" of the home for one reason or the other but these are rare occurrences. One, because of the reproductive or procreative interest that the husband has in the woman so that the wife is retained in her husband's home to bear children and two, the woman's father may have a material interest in ensuring that the marriage is not terminated because he may be responsible for the return of all or part of the bride wealth.

Due to the above highlighted factors, the woman is always likely to spend extra time or even remain bound in a marriage that she no longer wants and only remains to satisfy her husband and the society never having the chance to freely enjoy her sexuality outside the reproductive role assigned to her by society.

It is therefore unlikely that a woman is very likely to be entirely free from factors that limits true choice in some degree when a divorce looms: concerns for children, social and cultural pressure due to the premium placed on marriage by society, may all play a part in circumscribing her options<sup>15</sup>.



There is a dire need to have legislation to regulate divorce and separation in these marriages so that women are afforded an opportunity to come out of oppressive marriages where she is used as a reproductive object or to fulfill societal needs or interests and upon such terminations both husband and wife should have equal rights as to custody of children who rightfully belong to both parents.

## **2:3 FEMALE GENITAL MUTILATION (FGM)**

### **i) DEFINITION**

Female genital mutilation, female genital cutting and female cutting are internationally recognized terms for various operations that involve the cutting and removal of the female genitalia. In the Maasai community, the operations commonly used on girls are clitoridectomy and excision. Clitoridectomy involves the removal of part or the entire clitoris and bleeding is normally stopped with pressure whereas excision is the removal of the clitoris and the partial or total removal of the *labia minora*.<sup>16</sup>

### **ii) EFFECTS OF FGM**

This operation, clitoridectomy which is also an aspect of excision, takes away the primary specialized female sexual organ and by this altering of the female sexual organs, FGM reduces the ease with which sexual fulfillment is achieved, or makes it extremely difficult. Unlike men's genitals, women's are clearly separated by function. The clitoris is a specialized sexual organ dedicated only for pleasure and it has no reproductive function. The vagina on the other hand, is an organ of reproduction with minimal sensory capacity for

sexual response. In other words, FGM removes the women's sexual organ while her reproductive organs are left intact. Ultimately, women become sexual objects and reproductive vehicles for men.<sup>17</sup>

This role conflicts with the social requirement that a woman be sexually desirable and pleasing to her husband, especially if sexual pleasure requires her to show that, she too, is enjoying the sexual experience.<sup>18</sup>

Although the Maasai woman is faced with various subjugating acts and attitudes, towards her in society, FGM is the most drastic measure taken to control her sexuality and reproduction.

Some of the justifications that this community puts across for FGM are: the practice is seen as an important rite of passage to adulthood; circumcised girls receive recognition among peers and the society; beliefs that only circumcised girls get married and that bearing the pain of FGM "*toughens*" the girl for the subsequent female pain of child bearing and wife beating which justifications are all geared towards the girl's ultimate goal of marriage where male dominance is at its best. This prepares the girl for her reproductive roles and pleasure of her husband. Her sexual worth is killed and she is denied the chance to enjoy her sexuality. She is a sex servant to her husband, as she never gets to benefit from her sexuality and forever remains in the service of her husband.



Besides the sexual effects of FGM, this practice poses a risk to the health of the women who undergo the practice at tender ages of between 9 and 13 years. This covers both physical and psychological problems. The complications and such effects involve bleeding which may lead to hemorrhage and subsequently death; infection can be caused where unsterile instruments are used; pain as a majority of operations are done without anesthesia; inability to pass urine for hours or days caused by pain, swelling and inflammation for the front of the vulva; the pain, fear and stress of screaming may cause the child to faint or enter into a state of shock, which traumatic shock can occasionally cause death and finally, the inexperience of the circumciser may cause damage to the urethra or anus which may occur accidentally if the girl moves suddenly which damage may cause problems for life<sup>19</sup>. It is just not fair that a girl/woman should be exposed to these risks in the pursuit of an oppressive move to control her sexuality.

One of the most important factors that encourage FGM is the lack of ability of people (*girls, boys, mothers and fathers*) in this community, to say no to the practice. This practice persists because of cultural beliefs that dictate its continuation. Everyone in the community needs to be educated and enlightened to be able to distinguish between the cultural factors that promote development and shape that are harmful to the health and general welfare of the community. This means that decision that affect any members of the community need to be shared and arrived at by consensus.

Given the patriarchal nature of our society, most decisions are still made by males, for the Maasai, fathers have a lot of influence on when girls get circumcised. It is therefore important that everyone in the community is well equipped with skill and information that will enable them make informed decisions. When information about FGM is shared in simple terms that people understand, the possibilities of its continuance will be limited<sup>20</sup>.

There is therefore a need to empower everyone, to sharpen their abilities to choose what is best for them and their families and especially, the women/girl, so that they have a choice as to whether to undergo the operation or not<sup>21</sup>.

Men also need to learn about the dangers that go with this practice and that besides the health benefits associated with the eradication of this practice, uncircumcised women are readily able to enjoy sexual intercourse within their partners.<sup>22</sup>

Whereas government action is necessary to create a legal environment that deters people practicing FGM, ultimately, the women, their families and the community at large must be convinced to abandon this practice. Information and education campaigns will play a crucial role in the quest to eradicate FGM otherwise the sudden introduction of stiff legislation without tackling this cultural attitudes may or rather, is proving futile in the fight against FGM<sup>23</sup>.

## 2.4 CONCLUSION

Generally, asked why girls are supposed to marry at such an early stage, the overwhelming majority of interviewees report that the girls were considered to be mature and this confirms that the maturity of marriage in this community is culturally defined and is not based on age nor even the completion of a given level of education. This practice goes against educational policies which call for compulsory education for all and it goes to create a further handicap for women in that they are denied an opportunity to get education that would enable them know how to access their sexual rights in marriage institutions<sup>24</sup> and because girls are always destined for marriage in this community, parents prefer to educate their boys rather than their daughters.<sup>25</sup>

These marriages are definitely contrary to the sexual interests of women and must be discouraged at all costs and any efforts to improve the sexual plight of women should pay particular attention to the problem faced by young girls like child marriages. If these girls are forcefully recruited by outdated traditions into the wrong "*career*" at an early age in their lives, they may never "*recover*", irrespective of the ongoing efforts to empower women in general.<sup>26</sup>

It is necessary to seek legal reforms to have these marriages regulated fully by statutes if the dignity of the woman is to be upheld. There is need for legislative regulation so that women are accorded an opportunity to choose their marriage partners and to arrest the use of the institution of dowry to further the sexual oppression of the woman and the termination of these



marriages to be regulated absolutely by statute so that both men and women are given equal rights for example, the right as to the custody of children.

In the case of FGM, discussions must now begin on where to draw the line between parental rights over children and the state's obligation to protect girl children, hence women from harm and sexual exploitation or oppression. Although laws alone will not eradicate FGM, legal measures need to be pursued. Changes in the law are evidence of the extent of government commitment to dealing with the issue and these changes also legitimize the work of anti-FGM advocacy groups.<sup>27</sup>

## ENDNOTES

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<sup>1</sup> Wanyonyi Musundi.: Women's Voice, MYWO, 1999, Nairobi, Pg 9

<sup>2</sup> Dr Wangui Njau, Women and Violence in Nairobi and Kajiado Districts in Kenya, 1997

<sup>3</sup> S.S. Sankan, The Maasai, KLB, 1980, pg46

<sup>4</sup> Alice Armstrong and others, Uncovering Reality: Excavating Women's Rights in African Family Law, WLSA, Harare, Zimbabwe pg 21

<sup>5</sup> Supra note 2

<sup>6</sup> Physical Violence on Women in Kenya, FIDA(K), Nairobi 1993, pg 13

<sup>7</sup> The penal Code Chapter 63, Laws of Kenya

<sup>8</sup> Supra note 9 pg 28

<sup>9</sup> Supra note 4 pg 22

<sup>10</sup> E Cotran: Restatement of African Law, Sweet and Maxwell, 1987, pg36.

<sup>11</sup> Supra note 13

<sup>12</sup> S. N. Waweru, The Latent Discrimination Against the Girl as a Prelude to the Broader Oppression of Women with special Reference to Kenya, UON, LL.B Dissertation, 1995 pg 27

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<sup>13</sup> Supra note 3 pg 48

<sup>14</sup> Ibid

<sup>15</sup> Supra note 15

<sup>16</sup> Nahid Toubia, Female Genital Mutilation ; A call for Global Action, Research Action Information for Bodily Integrity of Women (rainbq) , 1995,pg 35

<sup>17</sup> Ibid

<sup>18</sup> Ibid

<sup>19</sup> Ibid

<sup>20</sup> Anne Muragu, Legal Status of Kenyan Women; Setting The Pace, FIDA (K) , 1999/2000 pg

29

<sup>21</sup> Tsinu Testaye, Awaken Magazine, 2001, Vol 5 pg 9

<sup>22</sup> Ibid pg 10

<sup>23</sup> Supra note 25

<sup>24</sup> Supra note 5

<sup>25</sup> Supra note 4 pg 22

<sup>26</sup> Supra note 5

<sup>27</sup> Supra note 24

# CHAPTER THREE

## THE LEGAL FRAMEWORK

### 3.1 INTRODUCTION

In looking at the legal framework in place to address the legal status of women regarding their sexuality, and more specifically, provisions on harmful cultural practices and customary marriage systems that are oppressive, one has to look at both international and domestic dimensions.

In this chapter, a look at selected international instruments which address women problems will lead us into analyzing how much these provisions are incorporated into our domestic legal system and we shall also be able to identify the specific local legislations if any, that speak for the woman in pursuit of her sexual freedom.

Despite the gender neutrality of our legal provisions (especially marriage laws), equal rights and privileges cannot be assumed to have been guaranteed and realized. Gender neutral laws have, in many instances resulted in de facto discrimination<sup>1</sup>.

With regard to harmful cultural practices like FGM in our case, we shall also attempt to devise the necessary legal intervention and analyze any existing provisions in an effort to eradicate the menace.

### 3.2 INTERNATIONAL LEGAL INSTRUMENTS

The most important of the international conventions on the status of women is the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW),<sup>2</sup> adopted in 1979 and entered into force in 1981 following ratification by the required 20 countries.<sup>3</sup> Kenya ratified the convention on 9<sup>th</sup> March, 1984.

The convention provides for follow up obliging member states to report to the United Nations Committee on the Elimination of Discrimination against women on legislative and other steps taken to implement the convention's provisions. A government must first report to the Committee one year after the convention has entered into force in its country, and every four years thereafter.<sup>4</sup>

Kenya submitted its first and second periodic reports to the committee in 1991, 7 years after ratifying the convention.<sup>5</sup> Even though Kenya has ratified this convention, its domestication is yet to be done therefore, the provisions of this convention are not yet part of our domestic legislative framework.

The convention in Article 3 provides that: *"states parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation to ensure full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of*



*equality with men.*” And in its article 5, the convention further places a duty on states parties to “*take all appropriate measures;*

- a) *To modify the social and cultural patterns of men and women, with a view to achieving the elimination of prejudices and customary, and all other practices which are based on the idea of the inferiority or the superiority of the sexes or on stereotyped roles of men and women;*  
...”<sup>6</sup>

These provisions if duly incorporated into our national laws would go along way into arresting the forms of cultural and customary practices that lead to the sexual oppression of the Maasai woman and eliminate the very cultural attitudes that facilitate male dominance.

Article 5 (b) further states that appropriate measures shall be taken “*to ensure that family education includes a proper understanding of maternity as a social function and the recognition of the responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases.*”<sup>7</sup> The need to re-engineer the socialization process at the family level is provided for. This article recognises the fact that the socialization process of children needs to be properly conducted and this will avoid the nurturing of sexist thoughts that grow into ideologies that get so internalized in society and are hard to eliminate at advanced stages as they are usually those attitudes of the inferiority of women and usually easily passed from one generation to another through the socialization process.



Article 10 deals with the elimination of discrimination in the area of education which we have seen as a major handicap in the Maasai community of women where FGM and subsequently marriage, take first priority and the women are always left out of the education process.

If the girls are given the same priority as boys in education, the oppressive marriage systems where girls are married off and their education potential cut short, will be eliminated along with the attitudes that marriage was the ultimate goal for every girl. Girls/women are therefore able to learn about their sexual rights that are in place in legislations and ignorance is avoided enabling each woman to make fully informed decisions regarding marriage and the negative effects of FGM on their sexuality. This will go into awakening women to speak for themselves and claim their sexual rights.

Finally in article 16 states parties are enjoined to *“take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:*

- a) *The same right to enter into marriage;*
- b) *The same right to freely choose a spouse and to enter into marriage only with their free and full consent;*
- c) *The same rights and responsibilities during marriage and its dissolution; ...*

d) *The same rights to decide freely and responsibility on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights ...*” and the convention further provides in this Article 16(2) that *“The betrothal and the marriage of a child shall have no legal effects, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.”*<sup>8</sup>

This article in essence addresses the problems that we have highlighted in chapter two on the issue of the Maasai marriage systems which are forms of sexual oppression against the woman on the lack of choice as to her spouse, child marriages, the use of the bride wealth institution to further this oppression and the discriminatory practices against the woman on the dissolution of the marriage. All that we need is the domestication of this convention by enacting an enabling statute so that these oppressive marriage systems can be eliminated. Regulating all customary marriage system under one statute that can adopt the provisions of this convention.

Under this convention also, there is the provision on the need to register all marriages and this if adopted in our national laws will create some security for the woman in marriage unlike the prevailing situation where the husband can decide to throw her out of *‘his’* home at his will.

The International Convention on Civil and Political Rights (ICCPR) of 1966 is another international legal instrument addressing the need for equality in marriages and in its Article 23 it provides that:

- “1. *The family is the natural and fundamental group unit of society and is entitled to protection by society and the state.*
2. *The rights of men and women of marriageable age to marry and found a family shall be recognized.*
3. *No marriage shall be entered into without free and full consent of the identifying spouses.*
4. *States parties to the present covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution ...”<sup>9</sup> and whose provisions as to equality and freedom on the entry into a marriage union are further reiterated in the International covenant on Economic, Social and Cultural Rights (ICESCR) of 1966.<sup>10</sup>*

The above instruments realize the importance for free and full consent in entering into a marriage and equality in this unions of both men and women and adoption of these provisions in our legal system will be a long stride towards the realization of sexual freedom for women.

The African Charter on the Rights and Welfare of the Child of 1990, a regional instrument, does make provisions for the protection of children against harmful social and cultural practices where in article 21, it states that:



*“States parties to the charter shall take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child and in particular;*

- a) Those customs and practices prejudicial to the health or life of the child; and*
- b) Those customs and practices discriminatory to the child on grounds of sex or other status.*

*2. Child marriage and betrothal of girls and boys shall be prohibited and effective action, including legislation, shall be taken to specify the minimum age of marriage to be 18 years and make registration of all marriages in an official registry.”<sup>11</sup>*

This charter provides for the protection of the girl-child from FGM operations which have negative implication as to the sexuality of the woman and are also harmful to health and also provides for the streamlining of marriage systems to promote equality of sexes by taking of effective action by the concerned states parties to the charter.

Again, the domestication of this charter is one way forward for Kenya in the fight against FGM.

### **3.3 THE KENYAN LEGAL FRAMEWORK**

No legislation in Kenya has been formulated in answer to the woman question or motivated by feminist concerns. On the contrary, most political leaders, both men and women argue that the laws of Kenya provide for



equality of the sexes and that women should take advantage of this equality. In reality, there are discriminatory laws in our statute books.<sup>12</sup> However, we shall look into the current laws in place regulating marriages in Kenya and the provision(s) against FGM.

### 3.4 MARRIAGE LAWS

In commencing this discussion we look into the provisions of the '*law of the land*'; the constitution, is of fundamental importance because if anything, it gives sanctity to other legal provisions because in its section 3 it states that "*This constitution is the constitution of the Republic of Kenya and, subject to section 47, if any other law is inconsistent with this constitution, this constitution shall prevail and the other law shall, to the extent of the inconsistency, be void.*"<sup>13</sup>

Section 82(3) of the constitution deals with the protection from discrimination on the grounds of, "*... race, tribe, place of origin or residence or other local connexion, political opinions, colour, creed or sex ...*" and a further provision is made in subsection (4) (c) of this section, to the effect that this protection from discrimination shall not apply with respect to "*... the application in the case of members of a particular race or tribe of customary law with respect to any matter to the exclusion of any law with respect to that matter which is applicable in the case of other persons; ....*"<sup>14</sup>

A number of laws are exempted by section 82 (4) of the constitution from the provisions against discrimination and among these are those laws that directly

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affect women for example, laws on marriage and divorce.<sup>15</sup> These are personal laws crucial to the sexuality of the woman. The constitution legitimizes the traditional position which the Maasai marriages fall which accords women fewer privileges than men. This provision literally throws these marriage systems outside the purview of constitutional protection.

Generally, personal matters pertaining to marriage are governed by different laws which are recognized by the constitution and accorded equal importance. There are four systems of marriages, namely; Customary law, Moslem law, Hindu law and civil law which embodies the English philosophy of life and Christian doctrine. Two of the systems (civil law and Hindu) only recognize monogamous marriage and the other two (customary and Moslem laws) recognize polygamous unions as well. Marriages under the Marriage Act,<sup>16</sup> the African Christian Marriage and Divorce Act,<sup>17</sup> the Islamic and Hindu laws are evidenced by registration and issuance of a marriage certificate if they satisfy the requirements of those legislations as to formality and procedure. Customary law marriages are not thus evidenced and couples who are customarily married either marry against under statute or swear affidavits to the effect that they are married under customary law.<sup>18</sup>

From the above illustration of the regulation of marriages in Kenya, it is clear that the contracting of a customary marriage is insecure due to lack of registration requirements. Further, the requirements for a valid marriage at customary law takes a prolonged process to complete and it is difficult to establish the stage at which the process is interpreted to be a valid marriage

therefore, the need for a registration process in these marriages to protect the women who are at all times at the mercy of their men who are in control of the commencement and the termination of the marriage.

In questions as to the capacity to marry, there is no legislative regulation in customary marriages which leads to child marriages and marital rape due to the lack of consent of one party (the woman) to the union. Legislative provisions as to free consent to enter into a marriage should be contemplated in our national laws so as to guard against marital rape whereby in the traditional customary setting, consent of a woman is deemed to be ever present during the continuance of a marriage which is unfair to the woman whereby she is forced by societal pressure to continue staying in an oppressive marriage to which she had no consent to in the first place.

There is need to establish a standard marriage age so that parties to a marriage can get into it freely without coercion which has led to sexual violence against the woman in case of child marriages. The requirement for registration of marriages will accord equal rights to both men and women so that they are legally bound to the union and this makes it easier to conduct the processes of divorce and separation and also the regulation of the marriage age so that child marriages are avoided.

An important attempt to address to the problems that women face in customary traditional marriages was seen in Kenya in 1968 when the then president of Kenya Jommo Kenyatta, appointed a commission on the law of marriage and divorce and one on the law of succession. The law of



succession was debated, sailed through parliament, and came into force in 1981. The one on marriage and divorce has been debated and even despite of several amendments by the A.G., it still remains blocked.<sup>19</sup>

The Bill was an Act of parliament to consolidate the law relating to marriage, personal rights and property rights between husband and wife, separation, divorce, nullity and custody and maintenance of children. The existing law on marriage, as was earlier stated includes, customary law, Islamic law, Hindu law and relevant Acts of parliament. The proposed Act would have replaced this with a comprehensive and as far as possible uniform law and pay particular attention to the status of women in relation to marriage and divorce in a free democratic society and the bill touches on such issues as marriage age, consent to marriage, polygamy, divorce and custody of children (after death or divorce).<sup>20</sup> This presents the ideal intervention required in order to deliver women from sexual oppression in the customary law marriage systems.

The Law's paramount consideration was to promote the stability of marriage and family life and discourage divorce and was therefore, to lean towards holding that a marriage is valid and that children were legitimate (to both parents). The Law was further to be based on a recognition of human dignity regardless of sex, and that marriage should be designed to cause minimum distress or humiliation.<sup>21</sup>



Generally, the legislators were reluctant to contribute to the debate and the bill was hurriedly killed and among the proposition taken by the A.G. was that, since the age of majority had been brought to 18 years, so should the marriage age but all these doors that were to lead to the sexual liberation of the woman were shut at the rejection of the marriage bill.

If this Bill is ever passed and adopted as an Act of parliament and the constitution amended to afford the protection from discrimination of persons under any personal laws, then we can start talking of a liberalized marriage system where the woman can have the precious chance denied her of enjoying her sexuality in these unions.

### **3.5 FGM**

The only provision made against FGM is in section 14 of the children Act 2001<sup>22</sup> which provides for protection of children (girls) from harmful cultural practices with FGM expressly outlawed.

Efforts by the Kenyan government to curb FGM have always fallen short of a legal ban until the year 2001, and we have had in place before the Children Act, oral directives to ban FGM. In 1982, President Moi issued an official statement against FGM after the death of the fourteen girls from complications of excision and instructed the police to pursue murder charges against people who carry out the procedure with fatal results. The director of medial services also ordered that no health official should carry out the procedure without his office's specific permission. Six months later the

Assistant Minister for culture and social services announced that the government had officially banned FGM.<sup>23</sup>

Despite all these efforts and even with legislation in place outlawing this practice, it is still (FGM) as prevalent as ever and these attempts to curb it have had little or no impact at all in its eradication.

## ENDNOTES

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- <sup>1</sup> Janet Kabeberi Macharia : *Women Laws, Customs and Practices in East Africa*., The legal Status of women in Kenya, 1995, pg 80.
  - <sup>2</sup> Adopted by the United Nations in 1979
  - <sup>3</sup> Dietila H. and Vilers J. *Making Women matter: The Role of the UN*, London, Zed Books, 1990, pg. 115
  - <sup>4</sup> Ibid pg. 125
  - <sup>5</sup> Anne Muragu, Aliya Mawani ad Wanja Ngarai, *Setting the Pace: Legal Status of Kenya women*, 1999/2000, FIDA (K) pg.36
  - <sup>6</sup> Supra note 2
  - <sup>7</sup> Ibid
  - <sup>8</sup> Ibid
  - <sup>9</sup> *The International Covenant on Civil and Political Rights f 1966*
  - <sup>10</sup> *The International Covenant on Economic, Social and Cultural Rights 1966*
  - <sup>11</sup> *The African Charter on the Rights and welfare of the child 1990*
  - <sup>12</sup> Mary Adhiambo Mbeo, Oki Ooko Ombaka, *Women and law in Kenya*, Nairobi, 1989. pg
  - <sup>13</sup> *The Constitution of Kenya*
  - <sup>14</sup> Cap 151, Law of Kenya
  - <sup>15</sup> Supra note 12 note 15 pg. 88
  - <sup>16</sup> Supra note 12 p 42
  - <sup>17</sup> Ibid
  - <sup>18</sup> Ibid
  - <sup>19</sup> ibid
  - <sup>20</sup> Supra note 1 pg. 84
  - <sup>21</sup> Cap 150, Laws for Kenya
  - <sup>22</sup> *The Children Act of 2001*
  - <sup>23</sup> Supra note 5 pg. 3

# CHAPTER FOUR

## 4.0 RECOMMENDATIONS

In Kenya today, patriarchal domination through culture is supported by a moral order which reinforces the husband/wife imbalance. This hampers a woman's struggle against domination and control. Her struggle is construed as an immoral lack of respect and loyalty a wife supposedly owes her husband.<sup>24</sup> This calls for the education of women against such societal attitudes that restrict their freedom to enable the realization of her rights and specifically, her sexual rights.

Both men and women need to be enlightened on of feminism thoughts and the fact that feminism is about exposing oppressive actions against women and that it goes to benefit the whole community and that it is not only for women and neither is it against men. These feminists thoughts are also geared towards liberating women from their attitudes of low self esteem and awaken them to pursue the fight for their sexual freedom.

Though socio-cultural attitudes and gender stereotyping are difficult to change, formulation and enforcement of laws on rights of women as to the right to compulsory education as provided for in international instruments and in the Children Act 2001,<sup>2</sup> would do. The traditional notion whereby girls are socialized into visualising marriage as the ultimate goal will be eradicated in the Maasai community if education policies are enforced. This will lead to the control of female attrition. There is also need to establish an institution that



will monitor and report on female school drop outs in vulnerable areas like the Maasai communities and the institution could provide support programmes to girls' education such as guidance and counselling, legal services and secondary education which will then handicap the perpetrators of child marriages.<sup>3</sup>

To further better the situating of marriages in the Maasai community and the general marriage systems the adoption of the Marriage Bill should be considered. This will enable the marriage laws currently under four different systems be under a uniform legislation and this will make it easy for the government to domesticate the provisions that are set out in international instruments on women issues to allow for the liberation of women who are unduly sexually oppressed in marriages that have no legislative regulations.

However, a uniform family and marriage law may not address the question of dowry or bride price, an institution that has come to be used to further sexual oppression of the women. Therefore, this institution needs to be abolished so that the termination of these marriages if need be, is regulated under statute to avoid the continuation of male domination that this institution of dowry payment has greatly facilitated. Women will be able to be united with their husbands in marriage, not as bought chattels for reproduction purposes, but as companions mutually entitled to their sexual freedom and equal rights to the children of the marriage. This will eliminate the use of women as sex objects in the continuation of patriarchal families.

Marital rape should be introduced into our laws so that non-consensual sexual intercourse in a marriage is prohibited to protect the sexual status of women in marriage to avoid their being used as sexual objects for procreation and the pleasure of their husbands. Here, child marriages will have to stop so that a woman will only get into a marriage union where she is able to freely make decisions on sexual matters. In the marriage systems that we have discussed, children are more often than not unable to make decisions regarding the consummation of marriages having no consent to them and this results in rape in the guise of a marriage union.

In the case of FGM, while government action is necessary to create a legal environment that deters people from practicing FGM, ultimately, the women, their families and the community at large must be convinced to abandon the practice. Information and education campaigns will also play a crucial role in the quest to eradicate the practice and outlawing of FGM then, to come as the last resort,<sup>4</sup> where I propose that it be grouped as aggravated assault to be duly dealt with under the penal Code.<sup>5</sup>

Kenyan women and particularly the Maasai woman for our study, must be informed on the law that concerns her most and of methods to enforce these legal rights that the law has given her. The creation of awareness in people of their legal rights involves educating them or giving them the various legal provisions of basic legal principles and procedures. This in turn creates an awareness of one's obligations and rights in the society enabling one to make rational, and presumably better decisions in one's day-to-day activities.<sup>5</sup> For

example, before a woman gets into a polygamous marriage, they are able to know the recurrent consequences. The immediate problem with the Maasai woman is not absence of, or inadequacy of legal rights but the lack of awareness.

This awareness of one's legal rights will encourage women to speak up against injustices occasioned to them.

In conclusion, there are those problems that emanate from lack of formal guarantee of women's rights, and those where women cannot exercise their guaranteed rights. The former necessitates action to change national laws.<sup>6</sup> Kenya is yet to comply with the requirements laid out in CEDAW and the other relevant international legal instruments through the amendment of the existing laws and the constitution is on the forefront of laws that need such amendment. Our government should borrow a leaf from the Ugandan Government where the attempt to eradicate harmful cultural practices is now provided for under their constitution. The current constitutional reforms should accommodate the need to incorporate issues that will uplift the status of women as stated in the relevant international legal instruments to eradicate every practice that is geared towards the sexual oppression or discrimination of women.

#### **4.1 CONCLUSION**

From chapter one, we started by looking at the general conception of women oppression in the African context and we observe that the subordination of

women has its origin in the traditional past whereupon attitudes of male dominance and supremacy prevailed in society. To this end, feminism is reluctantly embraced in Africa as the situation that prevails as to male dominance is seen as normal and any introduction of notions that are contrary to these attitudes and seek to liberate women pose as a threat to the African male.

These attitudes as to the subordination of women are carried on into every institution in the society that involves interaction between men and women. In marriage for example, the institution is on the basis of male dominance. Men determine who to marry while their female counterparts have no choice and using the Maasai marriage system, we see that African marriage covers a wider range of flexible relationships performing various social functions, which reflect their specific social-economic conditions. Moreover, marriage not only reflects the dominance of men in society but also largely, institutions and practices which though perhaps justified within the specific social context which they developed, may today constitute a source of subordination for women.

The consent to marriage and issues on capacity in these marriages are problematic because the marriage is a matter involving the families and not the parties themselves. This means that a woman may be married to someone of her parents choice, without her consent or she may be pressured into this and since the criteria for determining the capacity to marry is through the attainment of puberty, again the woman has no choice as to the age at which to



get married. These are practices that are against CEDAW and other international legal instruments addressing problems faced by women that demean their sexual worth.

We also found that dowry is an institution that has been used to transfer the woman from her father's guardianship to that of her husband and also a transfer of the woman's reproductive capacity to her husband's lineage and has the effect of excluding the woman's right to her children, especially at the end of the marriage – a step to the abolition of bride wealth should be through the weakening of the same by the state by restraining from including it as an essential for a valid marriage.<sup>8</sup>

FGM is another practice that has been used to further the oppression of the woman sexually where her sexual organs are removed leaving only the reproductive parts thus limiting her sexual pleasure leaving her to be an object of reproduction and to give pleasure to her husband.

The legal framework in Kenya is not sufficient in addressing the problems that are occasioned to the woman through oppressive cultural practices and as in the recommendation, Kenya needs to domesticate the provisions outlined by international instruments in order to eradicate these practices and that calls for an overhaul of our legal systems in matters relating to marriage and devising a proper approach towards the eradication of FGM.

After all is said and done, the government is left with the task of making conducive provisions and with the guidelines set out by the international instruments and coupled with the recommendations above, one can only hope and wait for a day of liberation of the Maasai woman and the Kenyan woman in general, as regarding her sexual rights which she has a right to enjoy as much as the men do.

The government must stop paying lip service to the problems facing women and particularly their sexual oppression through customary marriage systems and FGM. The time to mourn is over. The review of laws in place governing marriage rights is a pre-requisite, women just want a chance to learn, to participate, to improve their lives and also of their families in marriage. They want to develop, not alone but with their men.<sup>9</sup>

## ENDNOTES

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<sup>24</sup> Supra note 19 pg 72

<sup>2</sup> Supra note 22

<sup>3</sup> Kivutha Kibwana, Women and Autonomy in Kenya; Policy ad Legal Framework, 1995, Claripress Ltd Nairobi pg 63,64

<sup>4</sup> Supra note 23

<sup>5</sup> Chapter 63 Laws of Kenya.

<sup>6</sup> Supra note 24 pg 54

<sup>8</sup> Alice Armstrong and others, Uncovering Reality; Excavating Women's Rights in African Family Law, WLSA, Harare, Zimbabwe pg 21

<sup>9</sup> Anne Muragu: Legal Status of Kenyan Women; Setting the Pace, FIDA (K), 1999/2000 pg 29

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