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BY

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**TOWARDS THE ELIMINATION OF FEMALE GENITAL MUTILATION: AN
APPRAISAL OF KENYA'S PROHIBITION OF FEMALE GENITAL MUTILATION
ACT, 2011**

OCTOBER 2018

DECLARATION

Declaration by the candidate

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Declaration by supervisor

This research thesis has been submitted for examination with my knowledge and approval as a University of Nairobi Supervisor.

Dr. Peter Onyango Onyoyo

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Signature

Date

DEDICATION

This thesis is dedicated to my parents

JOAN ATIENO OMBOGO

&

CLEOPHAS OMBOGO OKOTH

‘Educating the mind without educating the heart is no education at all – Aristotle’

&

To the memory of

LEONIDA DINO

(1938 – 2004)

Till we meet at Jesus feet

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God Bless You.

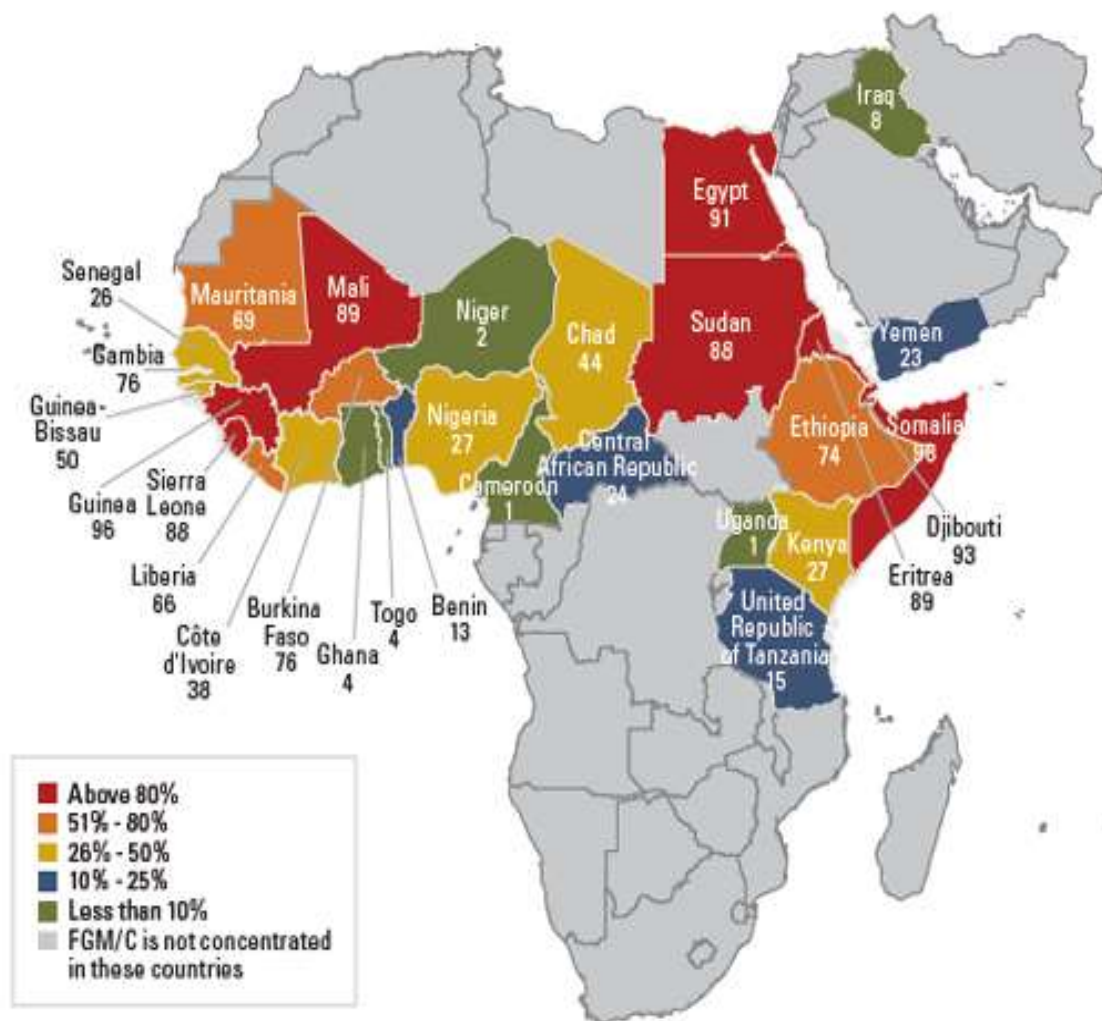
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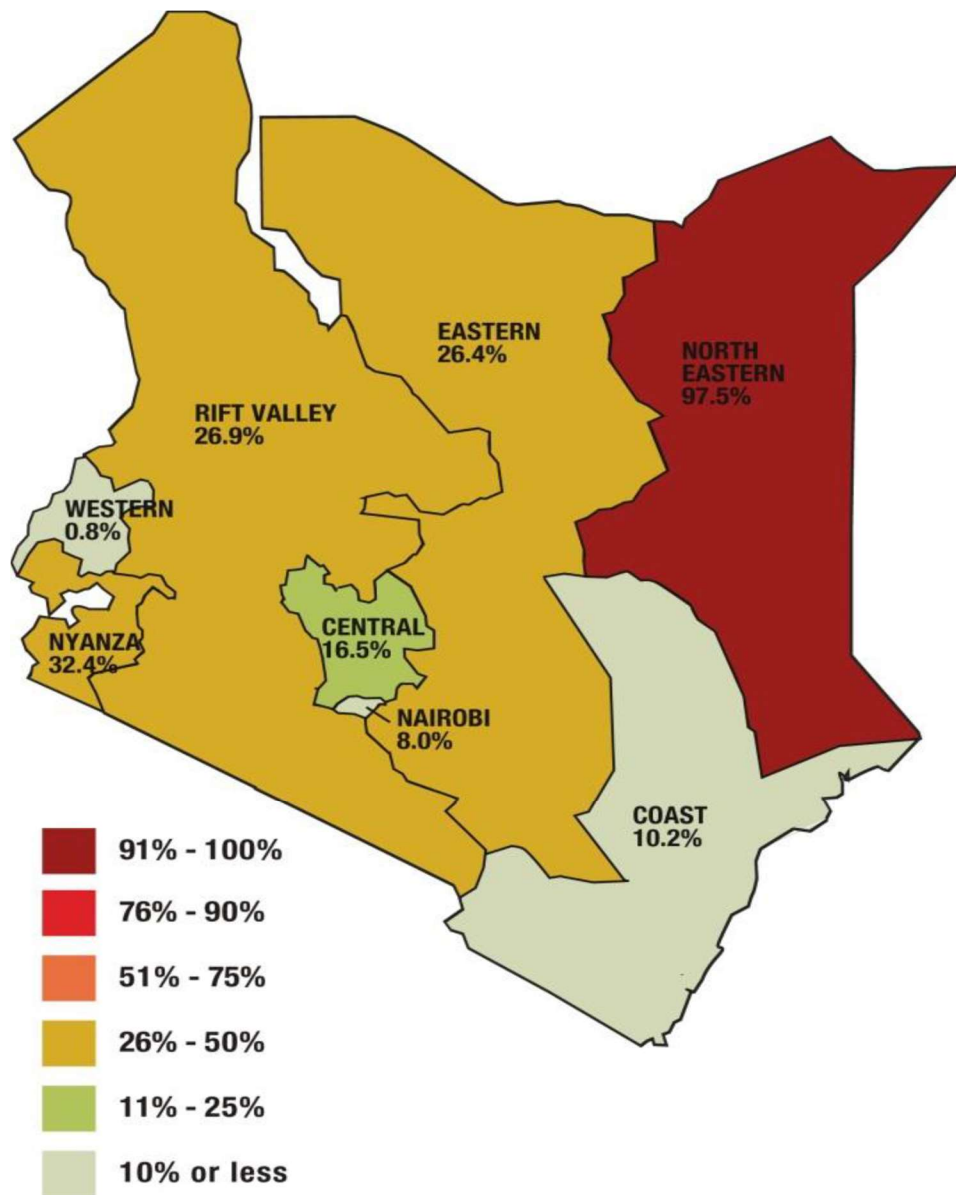
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Source: 28 Too Many, 2016

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UK, Female Genital Mutilation Act of 2003

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United Nations General Assembly, Declaration on the Elimination of Violence against Women, 20 December 1993 (A/RES/48/104).

Universal Declaration of Human Rights, 10 December 1948, Art 17(1), GA Res 217 (III), UN GAOR, 3rd Sess, Supp No 16, UN Doc/A/810.

US, Federal Prohibition of Female Genital Mutilation of Act of 1995.

ABBREVIATIONS AND ACROYNMS

ACPHR	African Charter on Human and Peoples' Rights
CEDAW	Convention on Elimination of All Forms of Discrimination against Women
CoK	Constitution of Kenya (2010)
FGC	Female Genital Cutting
FGM Act	Prohibition of Female Genital Mutilation Act of 2011, Kenya
FGM	Female Genital Mutilation
FIDA Kenya	Federation of Women Lawyers
ICESCR	International Covenant on Economic, Social and Cultural Rights,
ICPD	International Conference on Population and Development
NGO	Non-Governmental Organization
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNGA	United Nations General Assembly
UNICEF	United Nations International Children's Emergency Fund
USA	United States of America
WHO	World Health Organization
Maputo Protocol	Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa

ABSTRACT

The campaign against the eradication of Female Genital Mutilation (FGM) is based on the argument that it poses potential health risk and it's a violation of women and children human rights and fundamental freedoms. On the other hand, supporters of FGM argue that FGM is a cultural right with significance within their communities. It is highly valued and passed from one generation to another.

Due to this campaign, countries practicing FGM and those that receive migrants who practice FGM in their countries have adopted several strategies geared towards elimination of FGM. One of the strategies is through a legislative framework. The aim of a legislative framework was to be used as a deterrent tool and show country's political will towards curbing FGM. Supporters of legislative framework argue that it provides an enabling environment to catalyse social change and lead to abandonment of FGM. Critics on the other hand argue that criminalization of FGM conflicts with the community's right to enjoy their culture. It has the effect of pushing the practice underground and worsening the situation. Law alone cannot be used to curb FGM it should be accompanied by other strategies.

This thesis discusses the criminalisation of FGM and the deterrence effect it has as well as the effectiveness of law as a tool to eliminate FGM in order to provide the way forward.

CHAPTER ONE: INTRODUCTION

1.1 Background of the Study

Female Genital Mutilation/Cutting (FGM/C) is a socio cultural practice that involves the pricking, piercing, stretching, burning or excision, clitoridectomy and or the removal of part of or all tissues around a woman's reproductive organs and in some cases infibulation.¹ Although FGM has existed in millennia, it has not promoted heated debates until the last decades of twentieth century. The actual numbers of women who undergo FGM are not known due the secrecy that surrounds the practice.² However, there exists international campaign on zero tolerance of FGM at the international level.

The condemnation of FGM is based on the argument that it is a violation of human rights and a potential health risk.³ It is an ancient practice that has preserved and persisted for thousands of years. It is one of the harmful traditional practices that is widely practiced in at least 28 African countries⁴, parts of the Middle East some communities in Australia, the Far East, the immigrant population in Europe and America originating from FGM practicing countries.⁵ Estimated country prevalence rates range from as high as 98 per cent in Djibouti to 5 per cent in Uganda and the Democratic Republic of Congo.⁶ FGM is most prevalent in Africa and sometimes viewed as a component part of African culture.⁷

¹ Anika Rahman and Nahid Toubia, *Female Genital Mutilation: A Practical Guide to Laws and Policies Worldwide* (Zed Books 2001).

² Ibid.

³ Ibid.

⁴ The 28 African countries that practice FGM are Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Democratic Republic of Congo, Djibouti, Egypt, Ethiopia, Eritrea, The Gambia, Ghana, Guinea-Bissau, Guinea, Ivory Coast, Kenya, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone, Somalia, Sudan, Tanzania, Togo and Uganda.

⁵ Ashenafi Moges, *What is Behind FGM Tradition* <<http://www.african-women.org/documents/behind-FGM-tradition.pdf>> accessed 2 March 2015;

⁶ World Health Organization, *Female Genital Mutilation: An Overview* (WHO 1998).

⁷ B.L Anderson, 'The Long-Term Reproductive Health Consequences of FGM in Rural Gambia. A Community Based Survey' (2001) 6 *The Tropical Medicine on International Health* 8.

In most of African and Middle Eastern communities practicing FGM, the main justifications concentrate on rite of passage into womanhood, morality, virginity, honour and marriage, and sexual control.⁸ Wangila, in her book emphasizes the importance of understanding the gender relationship and cultural beliefs and the important role played by religion.⁹

Initially FGM was termed as female circumcision but there was outcry from advocates that argued the term minimized the torture of the event.¹⁰ The procedure was later termed female genital cutting, however, World Health Organization (WHO) in the quest to heighten global awareness of the severity and brutality of this procedure referred to it as mutilation.¹¹ WHO defines female genital mutilation as comprising, ‘all procedures involving partial or total removal of the external female genitalia or other injury to the female genital organs for non-medical reasons.’¹² An estimated 100-140 million girls and women currently live with the consequences of FGM.¹³

The WHO classifies FGM into four different types; clitoridectomy,¹⁴ excision,¹⁵ infibulation¹⁶ and unclassified which involves all other harmful procedures to the female genitalia for non-medical purposes such as pricking, piercing, incising, scraping and cauterization. Clitoridectomy and excision are the most common forms of FGM intended to ensure virginity until marriage but primarily to take away all sexual desire or gratification including masturbation.¹⁷ International,

⁸ Moges (n. 5).

⁹ Mary Nyangweso Wangila, *Female Circumcision: The Interplay of Religion, Culture and Gender in Kenya* (Orbis Books 2007).

¹⁰ Sharmon Lynnette Monagan, ‘Patriarchy: Perpetuating the Practice of Female Genital Mutilation’ (2010) 2 *Journal of Alternative Perspectives in the Social Sciences* 161.

¹¹ *Ibid.*

¹² WHO, *Female Genital Mutilation* < <http://www.who.int/mediacentre/factsheets/fs241/en/>> accessed 2 March 2015.

¹³ Population Council, *Female Genital Mutilation Practices in Kenya: The Role of Alternative Rites of Passage, A Case Study of Kisii and Kuria Districts*< http://www.popcouncil.org/uploads/pdfs/2011RH_FGMPracticeKenya.pdf> accessed 3 March 2015; WHO, *Progress in Sexual and Reproductive Health Research* WHO Report No. 72 of 2006.

¹⁴ Clitoridectomy involves partial or total removal of the clitoris or the prepuce.

¹⁵ Excision involves partial or total removal of the clitoris and labia minora with or without excision of the labia majora.

¹⁶ Infibulation involves narrowing of the vaginal orifice with creation of a covering seal by cutting and re-stitching the labia minora and/or the labia majora, with or without excision of the clitoris.

¹⁷ Monagan (n 10).

regional and local communities have viewed FGM as human rights violation against women and children leading to enactment of legislation banning or restricting the practice.¹⁸

In 2012 the United Nations General Assembly passed a resolution affirming that FGM constitutes violation of human rights, which all countries of the world should address through, ‘all necessary measures including enacting and enforcing legislation to prohibit FGM and to protect women and girls from this form of violence, and to end impunity’.¹⁹ Article 5 of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (2003)²⁰ is the only international instrument that explicitly requires the state parties to take all necessary legislative and other measures to eliminate harmful traditional practices, specifically prohibiting FGM.

Whereas the international community views FGM as human rights violation that needs elimination, proponents have different views. Proponents of FGM assert that it is an important cultural practice that symbolizes a rite of passage that must be preserved in order to maintain cultural identity.²¹ It is a rite of passage from girlhood to womanhood and a circumcised woman is seen as mature, obedient and aware of her role in the society. Those who refuse to undergo circumcision are excluded from the community. It also perpetuated as a means of reducing sexual desire of girls and women thereby curbing sexual activity and ensuring fidelity within marriage.²²

¹⁸ Henriette Dahan Kalev, ‘Cultural Rights or Human Rights: The Case of Female Genital Mutilation’ (2004) 51 Sex Roles 339.

¹⁹ UNGA, *Intensifying Global Efforts for the Elimination of Female Genital Mutilation* A/RES/ 67/146, adopted on 20 December 2012.

²⁰ *The Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa* (Maputo Protocol) adopted in Maputo on 11 July 2003 and entered into force on 25 November 2005.

²¹ Kola O Odeku, ‘Curbing the Surge of Female Genital Mutilation’ (2014) 11 Bangladesh e-Journal of Sociology 29.

²² John Cantius Mubangizi, ‘A South African Perspective on the Clash between Culture and Human Rights, with Particular Reference to Gender-Related Cultural Practices and Traditions’ (2012) 13 Journal of International Women Studies 38.

Opponents of the practice argue vehemently that the consequences of the procedure are unbearable and the practice should be banned because it amounts to an extreme form of child abuse.²³ It is also non-consensual torture of a woman's body as it causes permanent physical damage and sometimes death and it is targeted in the most gender-specific way possible at the female genitalia.²⁴ They argue that FGM is highly dangerous and painful, and in some cases its life threatening. It is often performed in unhygienic conditions with razor blades, knives or broken glass and the immediate or long-term physical and psychological consequences, are often grave. Direct complications often include severe pain, shock, severe bleeding, bacterial infection, urine retention, open sores in the genital region and injury to nearby genital tissues.²⁵

In Kenya, the practice of FGM is deeply rooted in tradition and culture.²⁶ According to the 2014 Kenya Demographic and Health Survey, FGM is practiced widely in many Kenyan communities and the prevalence rates vary among the different ethnic and geographical areas in Kenya.²⁷ The proportion of women who are circumcised varies by ethnic group with the majority of women in the Somali 94%, Samburu 86%, Kisii 84%, and Maasai 78% groups being circumcised. In contrast, 2% or less of women in the Luo, Luhya, Turkana, and Mijikenda/Swahili ethnic groups are circumcised.²⁸ The type of cutting also varies from one community to another. For example, excision is practiced by the Abagusii, Meru, Agiikuyu and Maasai, and infibulation by the Somali, Borana, Rendille, and Samburu.²⁹

²³ Ibid.

²⁴ Ibid.

²⁵ Odeku (n 21).

²⁶ Wangila (n. 9)

²⁷ *Kenya Demographic and Health Survey 2014* (December 2015) < www.knbs.or.ke > accessed 15 March 2016.

²⁸ Ibid.

²⁹ Ministry of Gender, Sports, Culture and Social Services, *Contributing Towards Efforts to Abandon Female Genital Mutilation/Cutting in Kenya: A Situational Analysis* (2007).

According to the then Ministry of Gender, Sports, Culture and Social Services the age at which children and women undergo FGM in Kenya varies from one ethnic community to another.

Due to the negative effects associated with FGM, countries affected by FGM practices have devised ways of curbing the vice in order to eliminate it. The interventions have been directed mostly towards advocacy for international and national policies against FGM, raising public awareness and undertaking small-scale community-based programmes aimed at preventing and eliminating the practice.³⁰ At the community level, interventions include alternative rites of passage, use of influential community members as agents of change and rescuing girls escaping FGM/C and early marriages. National governments are creating an enabling protective environment for women and children by supporting abandonment of the practice through social measures and appropriate legislation.

Interest in legislative reform to support the abandonment of FGM stems from a recognition that institutional frameworks play an important role in promoting and supporting social change, human rights, good governance and the rule of law.³¹ The aim of the legislation is to provide an enabling environment to catalyse social change. Currently 24 out of 28 FGM-practicing African countries have laws against the practice. But even though laws have been passed in these countries there are few cases that have gone through the courts.³² Where laws have been implemented, lenient sentences have been given and perpetrators have been let off with a suspended sentence, which sends the wrong message that FGM will be tolerated.³³

³⁰ Ministry of Gender, Sports, Culture and Social Services (n.28).

³¹ Yasmin Wahba, *Legislative Reform to Support the Abandonment of Female Genital Mutilation* (UNICEF 2010).

³² Brenda Kombo, Rainatow Sow and Faiza Jama Mohamed, *Journey to Equality: 10 Years of the Protocol on the Rights of Women in Africa* (2013) < www.equalitynow.org > accessed 10 January 2015.

³³ Ibid.

Whereas there has been legislation in place banning the practice, FGM is still rampant in Kenya. Anti-FGM practices in Kenya date to the colonial times in 1900's, spearheaded by colonial authorities and missionaries who attempted to stop the practice by promulgating criminal regulations and using religious propaganda to curb the practice.³⁴ However, criminalization of FGM received national and cultural resistance. In the end, criminalization of FGM was abandoned, and the colonies turned to education, propaganda and undertaking administrative action with the assistance of the indigenous authorities. In a report by UNICEF Innocent Research Institute, it argues that:

Legislative measures are most effective when complemented and even preceded by a range of broader policy measures, involving both general and focused awareness raising and the promotion of dialogue within and among different groups. If the introduction of a law is poorly timed or is not accompanied by complementary social support mechanisms, it may drive the practice of FGM underground or encourage cross-border movement. The threat of imprisonment or a fine may act as a deterrent, but alone it does little to change parents' perception that it is in the interest of their daughters to undergo this procedure.³⁵

In 2001, Kenya enacted the first legislation after the attainment of independence in order to curb FGM. The Children's Act of 2001 directly states in section 14 that, 'No person shall subject a child to female circumcision, early marriage or other cultural rites, customs or traditional practices that are likely to negatively affect the child's life, health, social welfare, dignity or physical or psychological development'. This section only protected children leaving a loophole as concerns women.

The effectiveness of a criminal justice system is dependent on a number of factors that are all tied to the existence of the prosecutorial mandate. A criminal justice system and by extension the exercise of prosecutorial mandate must be legitimate. When people perceive the criminal process

³⁴ Lynn Thomas, *Imperial Concerns and Women's Affairs: State Efforts to Regulate Clitoridectomy and Eradicate Abortion in Meru, Kenya* (1998) 39 *Journal of African History* 121.

³⁵ UNICEF Innocent Research Centre, *Changing Harmful Social Convention: Female Genital Mutilation* (Alexia Lewnes ed, UNICEF 2005).

as fair and legitimate, they are more likely to accept its results as accurate and are more likely to obey the substantive laws that the system enforces.³⁶

Article 50 (1) (n) of the Constitution, demands that for a person or entity not to be convicted for an act or omission that at the time it was committed or omitted was not an offence in Kenya or a crime under international law.

Accordingly, Kenya enacted the Prohibition of Female Genital Mutilation Act (FGM Act) in 2011 to prohibit the practice of FGM, to safeguard against violation of a person's mental or physical integrity through the practice of FGM and for connected purposes. The FGM Act establishes the Anti-Female Genital Mutilation Board and creates offences.³⁷ Section 29 of the FGM Act provides that, 'a person who commits an offence under the Act is liable, on conviction, to imprisonment for a term of not less than three years, or to a fine of not less than two hundred thousand shillings, or both'. The civil society and women parliamentarians who spearheaded its enactment received the enactment of the FGM Act with celebration. It was believed that its implementation would curb FGM practice in the country.

The Constitution of Kenya, 2010, also supports the Act's legislative framework. It provides expansive human rights and fundamental freedoms under the Bill of Rights. It grants the High Court the authority to enforce human rights and grant appropriate remedies when violated. It recognizes under Article 44 that everyone has the right to use the language and to participate in the cultural life, of the person's choice. Every Kenyan has a choice to choose the cultural activities to participate. However, a person shall not compel another to perform, observe or undergo any cultural practice or rite.³⁸ The right to practice one's culture is not an absolute right and can be

³⁶ Friedrich A. Hayek, *Law, Legislation and Liberty* (1973, University of Chicago Press)

³⁷ See Part II and IV of the Prohibition of Female Genital Mutilation Act, 2011.

³⁸ Constitution of Kenya 2010 (Constitution) Article 44 (3).

limited in accordance with Article 24 of the Constitution. The Constitution through the Bill of Rights aims at protecting and enforcing the rights of Kenyans. The Bill of Rights is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies.³⁹

This study discusses the anti-FGM law and its effectiveness to curb FGM. The aim of this study is to provide a critical discussion on the role of legal responses in eradicating FGM.

1.2 Statement of the Problem

Kenya is one of the many countries in Africa agitated towards the fight against FGM. One of the ways of eradicating the vice is through a legal framework. The role of legal responses to FGM is to provide an enabling environment to catalyze behavioral change and eliminate FGM. However communities that practice FGM protest laws criminalizing FGM on the ground that it interferes with their right to culture. Critics of FGM argue that it involves removing and damaging healthy and normal female genital tissue, and interferes with the natural functions of girls and women's bodies.⁴⁰ FGM practice is in itself painful and has immediate and long-term consequences on the victims. It has also social consequences as women and girls who refrain from FGM are discriminated in their own community. This has made some women and children engage in FGM although against their will so that they can be accepted in their community. They also argue that FGM violates women and children's human rights. State has the obligation through a legal framework to protect young girls and women from harmful cultural practices such as FGM.

The legal response to FGM in Kenya is one way of curbing FGM. However several organization and institutions have argued that banning of FGM through legislation has not eliminated the vice.

³⁹ Constitution, Article 19 (1).

⁴⁰ WHO, *Global Strategy to Stop Health-Care Providers from Performing Female Genital Mutilation* (Geneva, WHO 2010).

It is argued that the vice is still rampant and only few cases are reported. FGM practices are carried out underground and go unnoticed. Wangila argues that:

Some attempts to curb the practice of female circumcision have not only encountered obstacles but have exacerbated the original situation. In some cases ineffective strategies have forced the practice underground, compounding the health risks associated with it. The failures of such strategies lies in a number of factors, including (1) disregard for the cultural context, values and reality that inform the practice; (2) failure to distinguish among the forms of practice; (3) imperialistic assumptions about the practice and the communities that perform it; (4) the tendency of these strategies to adopt an alien, coercive, or confrontational approach; and (5) failure to acknowledge the agency of women in circumcising communities and the need to empower them to critique and transform social behaviour.⁴¹

The development and enforcement of anti-FGM law in Kenya and other countries was intended to bring to an end the practice and deter the perpetrators from committing the offence. The penalty for the offence being a fine not less than two hundred thousand shillings and to imprisonment to a term not less than two years or both. However, critics argue that legislative responses have worsened the situation by enabling FGM to be carried underground in unsanitary conditions. It has led to death and complicated the situation as people fear going to hospitals when a problem occurs for fear of prosecution. Young girls are dropping out of school, undergo FGM and married at a tender age. There are also reports on young girls and women who have lost their lives through the knife. This has called for the need to assess the role of law in eradicating FGM.

1.3 Justification of the Study

Despite the reasons that proponents of FGM put forward, there is no doubt that FGM violates the rights of women and children. FGM violates the right to the integrity of the person and the highest attainable level of physical and mental health; the right to be free from torture and cruel, inhuman or degrading treatment; and - when the procedure results in death - the right to life.⁴² Although

⁴¹ Wangila (n. 9)130.

⁴² Kombo and others (n. 32).

the right to participate in culture and language of one's choice is also protected in international human rights law, it is subject to limitations where it violates the fundamental rights and freedom of others. The need to eliminate FGM is an urgent one.

This study is justified on the ground that it inquiries into the impact that legislation has had in elimination of FGM in Kenya. It also inquiries into the role that prosecution authorities play in the elimination of FGM and the challenges they face in implementation. It discusses the cases that have been before the court, analysing the interpretation of the Prohibition of Female Genital Mutilation Act of 2011. After the inquiry, this research provides other mechanisms that should be adopted in fighting FGM in Kenya in order to reinforce the law. Legislation should only be seen as a tool to deter those who commit the offence and provide social change. However, there is need for intensive education on the effects of FGM and alternative rite to passage practices. Legislation alone without awareness on the dangers of FGM and understanding the social context of FGM is irrelevant. Members of a society practicing FGM might fear reporting the incidents to police for fear of being excluded from the community. People also have to be educated on the contents of the law against FGM.

1.4 Theoretical Framework

This study will be premised on three theories, human rights theory, deterrence and feminism.

1.4.1 Human Rights Theory

This study is underpinned on the theory of human rights. The specific theories under human rights relied upon are cultural relativism and universalism. The theory of cultural relativism gained its prominence in the second part of the twentieth century. Cultural relativism theorists argue that cultural relativism rather than universalism should be used as the primary basis for establishing

moral norms and legislation.⁴³ This leads to a logical contradiction of universal human rights and autonomy of each culture to determine its moral ethical standards. Cultural relativism holds that moral rules and social institutions evidence an astonishing cultural and historical variability.⁴⁴ Each culture must be understood in its own terms and also that each culture must be judged from its own terms.

According to Donnelly, the concept of cultural relativism exists in two extreme positions; radical cultural relativism and radical universalism. He holds that, 'radical cultural relativism would hold that culture is the sole source of the validity of a moral right or rule. Radical universalism would hold that culture is irrelevant to the validity of moral rights and rules, which are universally valid'.⁴⁵ Strong cultural relativism hold that culture is the principal source of the validity of moral rules and rights, but universality of human nature and rights serves as a check on the potential excesses of relativism.⁴⁶ Cultural relativism rests on the notion of moral autonomy and communal self-determination.⁴⁷

The theory of cultural relativism concerning FGM does not form the basis of this study. It can only be relevant if the practice of FGM enhances specific human rights. However, this theory is key in elaborating the reasons why implementation of FGM legislation faces challenges. It is also key in expounding the reasons why communities that practice FGM object its elimination. It is discussed in detail in chapter two.

The multiculturalism theory argues that a state may have various cultures leading to multiculturalism. Multiculturalism occurs when many subcultures exist within the same

⁴³Kalev (n.18).

⁴⁴ Jack Donnelly, 'Cultural Relativism and Universal Human Rights' (1984) 6 Human Rights Quarterly 400.

⁴⁵ Ibid.

⁴⁶ Ibid.

⁴⁷ Ibid.

jurisdictional framework, having comprehensive policy that affects all constituents and allows room for a variety of cultural norms.⁴⁸ According to the multicultural theory, FGM should be allowed among adult consenting members of a minority cultural group and the state does not have the right to impose its morality on the voluntary members of cultural groups.⁴⁹ A state has to respect the practices of its cultural minorities and not suppress its traditions by protecting its rights. These rights may include guaranteed political representation and affirmative action in selected areas; exemptions from laws that interfere with cultural practices; recognition of the minority group's traditional legal code within the dominant legal system; and assistance in doing those things that the majority can do unassisted.⁵⁰

Kukathas, a proponent of multiculturalism theory argues that as long as membership in a cultural community is voluntary and the member is entitled to leave when he chooses, the state should allow the cultural community to pursue its own traditional practices.⁵¹ The state should therefore allow FGM to be practiced in a community where adults consent to it. Kukathas defends the right of an individual to join any community that practices illiberal policies, as long as the policies affect the willing members. His theory only discusses adult women who have a choice to make on whether to practice FGM or not. This theory does not consider children who in major cases are victims and lack consent or freedom of choice to leave the community.

The theory of multiculturalism only values the culture of the communities without considering its effects on the dignity of individual members of that community. Whereas a state has a duty to protect and promote the cultural rights of minorities through legislation, it also has to protect the

⁴⁸ JT Levy , 'Classifying Cultural Rights' in I Shapiro and W Kymlicka (eds), *Ethnicity and Group Rights* (New York University Press, 1997).

⁴⁹ C Kukathas, 'Liberalism, Communitarianism and Political Community' (1996) 13 *Social Philosophy and Policy* 80.

⁵⁰ Kalev (n.18).

⁵¹ C Kukathas, 'Cultural Toleration' in I Shapiro and W Kymlicka (eds), *Ethnicity and Group Rights* (New York University Press, 1997).

human rights and dignity of the individuals. Even if FGM is practiced on a consenting adult, it is not liberal, because it is part of a chain of oppression and violence against woman. Its individuals who make up a society, hence their individual rights and freedom of choice must be respected.

The modern system of international human rights treaties is based on the concept of universalism which holds that there is an underlying human unity which entitles all individuals - regardless of their cultural or regional antecedents - to certain basic minimal rights, known as human rights.⁵²

The existence of universal human rights has been justified by the naturalists who argue that there is a worldwide acceptance and ratification of human rights instruments such as the Universal Declaration of Human Rights of 1948. The theory of universalism has faced numerous challenges. Those objecting argue that the promulgation of universal human rights laws simply do not conform to the extreme diversity of cultural and religious practices found around the world and that universal rights should be subsidiary to local cultural and religious norms.⁵³

The theory of universalism is the best theory that applies to elimination of FGM in Kenya and worldwide.

1.4.2 Feminist Theory

It is important to recognise the multitude of perspectives towards the practice, including defending FGM or sympathising with the practice. In criticising FGM, this study will rely on feminist theory.

In terms of gender, feminist legal theory places women's experiences at the forefront of legal analysis. Conaghan⁵⁴ identifies three mainstream features of feminist legal theory, first, a woman's perspective is essential to understanding the law; second, women should be placed at the centre of

⁵² Elizabeth M Zechenter, 'In the Name of Culture: Cultural Relativism and the Abuse of the Individual' (1997) 53 *Journal of Anthropological Research* 319.

⁵³ *Ibid.*

⁵⁴ Joanne Conaghan, 'Reassessing the Feminist Theoretical Project in Law'(2000) 3 *Journal of Law* 27

legal scholarship rather than embarking on a quest for neutrality and objectivity and third, it is imperative to expose the law's implication in discrimination, domination and oppression of women with a view to bringing about social, political and legal change.

According to Smart⁵⁵, the law is a particularly powerful discourse because of its objective claim to truth, which in turn silences women who encounter the law and feminists who challenge the law. Feminist scholars have been divided about the centrality of law as a means of changing the position of women in society. The law has become seen as an aid to rather than an obstacle to feminist aspirations. Smart argues that feminists cannot predict the outcome of law reform – once law is enacted, the law is in the hands of individuals and agencies far removed from the women's movement.⁵⁶

The continuing and rising influence of cultural and religious justifications for women's inequality is one important reason why it is so significant for women's rights to be recognized as human rights.⁵⁷ Western radical feminist Mary Daly⁵⁸ contends that the cultural justifications for FGM such as initiation into adulthood, serve as smokescreen to perpetuate male control over women's sexuality. Incidentally, the anti-FGM movement coincided with the movement for the liberation of women's sexual desire in the 1970s, when Western feminists discovered their own clitorises and redefined the parameters of sexuality.⁵⁹ In viewing the clitoris as a powerful symbol of women's sexual liberation, FGM became a symbol of patriarchal oppression, because the clitoris had been mutilated in order to de-emphasise women's sexuality and emphasise their reproductive

⁵⁵ Carol Smart, *Feminism and the Power of the Law* (Routledge 1989)

⁵⁶ Ibid

⁵⁷ Susan Moller Okin, 'Feminism, Women's Human Rights, and Cultural Differences' (1998) 13 *Border Crossings : Multicultural and Postcolonial Feminist Challenges to Philosophy* 32

⁵⁸ Mary Daly, *Gyn/Ecology: The Meta Ethics of Radical Feminism* (Beacon Press 1990)

⁵⁹ Juliet Rogers, *Law's Cut on the Body of Human Rights: Female Circumcision, Torture, and Scared Flesh* (Routledge 2013)

utility. The sharp contrast of FGM with women's sexual liberation of the 1970s perhaps incited the wrath of radical Western feminists.

Literature has become a site of polarised debate between Western feminists who define the practice as oppressive, scholars who do not support FGM but reject Westerners' portrayal of the practice as barbarous and African women scholars who argue FGM is a legitimate cultural practice embraced by women. Western feminists depict FGM as a barbaric cultural practice stemming from the tyranny of patriarchy.

Some African women scholars have taken on a crusade against Western feminist intervention, explaining in defensive terms why the practice persists in the continent. They would rather own FGM as an African problem.

There are certainly competing voices in the criticism of FGM. All of these shall be discussed extensively in chapter 2.

1.4.3 Theory of Deterrence

This study is underpinned on the theory of deterrence to the extent that certainty of punishment deters the commission of an offence. Under this theory, people choose to obey or violate the law after calculating the gains and consequences of their actions.

The intellectual roots of this theory can be traced back to Beccaria in his essay *On Crimes and Punishments*⁶⁰ and Bentham's *An Introduction to the Principles of Morals and*

⁶⁰ Cesare Beccaria, 'On Crimes and Punishments' (Henry Paolucci trans., Macmillan 1986) (1784) as quoted by Raymond Paternoster, 'How Much Do We Really Know about Criminal Deterrence' (2010) 3 *Journal of Criminal Law and Criminology* 100

*Legislation.*⁶¹ Beccaria argues that it is better to prevent crime than punish them. That crime can be deterred by threats provided by a rational and efficient legal system of punishment.

Deterrence is an important foundation of the criminal justice system. Law enforcement exists both to apprehend wrongdoers and to convince would-be wrongdoers that there is a risk of apprehension and punishment if they commit a crime. Laws that provide a host of different sanctions for the commission of criminal offences (fines, probation and imprisonment) serve notice that criminal statutes contain a credible threat that will inhibit those who have been punished from committing additional crimes i.e. specific deterrence and those who have not yet offended from committing crimes at all i.e. general deterrence. It is therefore reasonable to argue that a belief or expectation that sanction threats can deter crime is at the very heart of the criminal justice system.

Under general deterrence theory, persons are punished for violating the criminal law to serve as object lessons for the rest of society. Society, according to the theory, transmits the message that it is wrong to behave in certain ways, and if a person behaves in those ways and fails to obey the law, society will punish him accordingly.

By enacting the FGM Act, the drafters envisioned that the implementation of the Act would deter would be offenders from perpetrating the offence. By deterring the offence, then FGM/C would be eliminated.

1.5 Conceptual Framework

A controversy exists as to which term should be used to describe the practice of female genital cutting. Until the 1980s, *female circumcision* was historically used to describe these practices in

⁶¹ Jeremy Bentham, 'The Principles of Morals and Legislation' (Prometheus Books 1988) (1789) as quoted by Raymond Paternoster, 'How Much Do We Really Know about Criminal Deterrence' (2010) 3 Journal of Criminal Law and Criminology 100

the international literature.⁶² However, the growth of the feminist movement and public concern from international health organisations resulted in objection to the term, as it de-emphasises the severity of the practice by comparing it to the removal of foreskin of males.⁶³

The use of *female circumcision* to describe FGM suggests that a parallel can be drawn with male circumcision, which creates confusion about the significance of the practice. Adopting *female genital mutilation* as the standard term for the practices reinforce the gravity of the act and promoted the abandonment of the practices.⁶⁴ The term has been an effective advocacy and policy tool.

Accordingly, this study will use the term *female genital mutilation* to pass the message that such an act is abhorrent and has to be eradicated. Taking into account the balance between culture and human rights, we should call a spade a spade. The justification of FGM on the grounds that it is embedded in culture is absurd. This study in condemning the practice will use the term *female genital mutilation*.

1.6 Research Questions

This study is based on three key research questions:

1. Is legislative framework an effective tool to eliminate FGM in Kenya?
2. What is the role of prosecution authorities in enforcing Anti FGM legislation in Kenya?
3. What is the impact of the FGM Act, 2011 and the challenges facing the implementation of FGM laws?

⁶² Rahman & Toubia (n.1)

⁶³ Bettina Shell-Duncan & Ylva Hernlund, 'Female 'Circumcision' in Africa: Dimensions of the Practice and Debates' in Bettina Shell-Duncan & Ylva Hernlund (eds) *Female 'Circumcision' in Africa: Culture, Controversy and Change* (Lynne Rienner Publishers 2000)

⁶⁴ WHO 'Female Genital Mutilation' (A Joint WHO/UNICEF/UNFPA Statement, 1997).

1.7 Research Objectives

The main objective of this study is to establish the impact of the FGM Act in eliminating FGM.

This study is based on five specific objectives.

1. To provide a conceptual understanding of the issues and debate influencing the FGM discourse.
2. To investigate whether Kenya's legislative framework adequately addresses elimination of FGM.
3. To determine whether the institutional framework involved in elimination of FGM is appropriate.
4. To assess the role of prosecution as a tool for eliminating FGM in Kenya
5. To determine the impact of legislation in deterring the practise of FGM and establish challenges facing the implementation of the anti-FGM law.

1.8 Literature Review

The literature on FGM is expansive. The literature explains the traditional justification of female circumcision based on culture, traditions and religion. It also explains its conflict with western feminist discourse on the effects of female circumcision such as a violation of human rights and its potential health risks.

Isha Abulkadir⁶⁵ narrates oral histories of her and Ishmahan (Somali women) on their experience of female genital mutilation. Ishmahan recounts the painful experience she had during the ordeal especially during her first born birth. However, she does not condemn the practice in entirety. She

⁶⁵ Isha Abulkadir, 'Somali Memories of Female Genital Mutilation' in Tamsin Bradely (ed), *Women, Violence and Tradition: Taking FGM and Other Practices to a Secular State* (Zed Books 2011) 51-72.

argues that she would make her daughters go through the same but if it is simpler and less painful than the one she went through and the government of UK should not ban female circumcision. She views female circumcision as an important part of becoming a respectable Somali woman. Abuldikar on the other hand has a strong view that female circumcision should be stopped because it does not bring anything useful to a girl's life apart from the pain and stress. She advocates that people should be educated on the long-term effects of female circumcision. Abuldikar opines that patriarchal pressures continue to impact on how women think about their bodies. This article is very important in this study as it articulates the views of those who have undergone through female circumcision. It would be used to show why despite legal framework to ban FGM, it is still persistent.

Wangila,⁶⁶ emphasizes the importance of understanding the gender relationships and cultural beliefs behind the female circumcision practice and the role played by religion. In the third chapter of her book she discusses the debate over circumcision including the debate over terminology, justification and opposition of the practice. She discusses the connection of religion and female circumcision in the Kenyan context. The book provides a comprehensive understanding of the practice. However, it only focuses on religion as the main reason for the prevalence of female circumcision. This research focuses on anti-FGM law and the challenges it faces in its implementation. Wangila recommends that eradication of the practice should be done through a well-designed educational practices sensitive to cultural and religious beliefs.⁶⁷

⁶⁶ Wangila (n. 9).

⁶⁷ Ibid.

Kilimo,⁶⁸ discusses how western feminist discourse on female circumcision has influenced the formulation of anti-FGM laws in Kenya. However, despite such formulation FGM is still prevalent in Kenya. She argues that the first ban on female circumcision that was based on civilization of African women did not work. Western feminist discourse on female circumcision underpins the legal directives in Kenya starting with the anti-FGM ban in 1956, the enactment of the Children's Act and the promulgation of the Prohibition of Female Genital Mutilation Act of 2011. She argues that the current anti-FGM law adopted the term FGM that has been adopted by western feminists. She concludes that the fight against female circumcision in Kenya has not borne fruits because of adopting western feminist on civilization, human rights and criminalization of the practice.⁶⁹

Kisaakye,⁷⁰ argues that the argument that legislative interventions against FGM may drive the practice underground instead of eliminating and only gains validity where there is no other complementary efforts. Given the power relation in patriarchal communities, the law offers one powerful tool for those who wish to resist and at the same time sending a powerful message from the government that FGM will not be tolerated.

Faiza⁷¹ argues that the use of the law is critical as an integral part and essential component of the strategies used by different stakeholders to bring an end to FGM. However, legislation as a distinct and only strategy is not effective in ending FGM but must be one of the strategies. She states that 15 countries in Africa by 2008⁷² had enacted laws against FGM. Faiza states that various laws

⁶⁸ Miriam Kilimo, 'Western Discourse in Legal Approaches: A History of Female Circumcision in Kenya' 2014 (African Studies Association of Australasia and the Pacific - AFSAAP 36th Annual Conference – Perth – Australia – 26-28 November 2013 Conference Proceeding).

⁶⁹ Ibid.

⁷⁰ M Kisaakye, 'Women, Culture and Human Rights: Female Genital Mutilation Polygamy and Bride Price' in Wolfgang Benedek, Esther M Kisaakye and Gerd Oberleitner, *Human Rights of Women: International Instruments and African Experiences* (Zed Books 2002) 268-285.

⁷¹ Faiza Jama Mohamed, 'Promulgation of Laws' in UNFPA, *Global Consultation of Female Genital Mutilation/Cutting* (UNFPA Technical Report, 2008).

⁷² Benin, Burkina Faso, Central African Republic, Chad, Cote d'Ivoire, Djibouti, Eritrea, Ethiopia, Ghana, Guinea, Kenya, Mauritania, Niger, Senegal, Togo and the United Republic of Tanzania.

define FGM/C in different ways. The laws of Burkina Faso, Chad, Cote d'Ivoire, Ghana, Niger and Senegal define FGM/C as an assault. In Burkina Faso, Chad, Ghana and Senegal, the laws are part of the criminal laws, whereas in Niger the law is a distinct law on its own. All the laws in other countries penalize the practice of FGM/C and/or excision without defining these terms.⁷³ She identifies the loopholes in these laws. First, the laws do not take into consideration the human rights issues around FGM in the definition, scope of culpability or even punishment of the practice. They confine the definition of FGM in context of criminal law regimes. For legislation against the practice of FGM to be effective, African governments, need to develop comprehensive rights based child-protection frameworks in accordance with universal human rights standards as the basis of all legislation on child rights.

Tamale⁷⁴, in examining the effectiveness of anti-FGM law in her country Uganda, noted that the struggles to eradicate FGM in Uganda have a long and protracted history. When government attempted to outlaw the practice, it created a severe backlash by pushing it underground, with vigilante groups consisting of youthful males hunting down defectors and forcibly subjecting them to the knife. Government quickly retreated and the solution found was to engage the communities practicing the ritual in finding alternative means of preserving the essence of culture while eradicating the violent form in which that rite was practiced.

Wahba,⁷⁵ in a report published by UNICEF argues that a legal framework that clearly states that harmful practices are unacceptable is undeniably an important necessary measure for contributing to the end of these practices. Laws that ban the practice of FGM introduced in contexts where people still expected to engage in the practice and fear social punishment if they do not, does not

⁷³ Ibid.

⁷⁴ Sylvia Tamale, 'The Right to Culture and the Culture of Rights: A Critical Perspective on Women's Sexual Rights in Africa', (2008) 16 Fem Leg Stud 47-69

⁷⁵ Wahba (n. 31).

curb the practice. The practice will continue and may happen underground unnoticed. The challenge is therefore to develop, introduce and implement legislation in ways that contributes to a social change process that ultimately results in the decision by communities to abandon the practice.⁷⁶ Human rights education programmes and community dialogue to foster a consensus on the abandonment of the practice should accompany legislation. The existence of legislation and legal sanctions serves as an additional element in encouraging communities to abandon the practice of FGM. A human rights-based approach is particularly important in the development, enactment, implementation and monitoring of legislation on FGM, especially where there is societal support for the practice.⁷⁷

UNICEF Innocent Research Centre ⁷⁸ carried out a research to determine the social dynamics of FGM. The social expectation surrounding FGM undermines its elimination, as parents who might wish to undermine the practice may not do so due to societal pressure. At its core, legislation has three clear purposes: to make explicit a State's disapproval of FGM; to send out a clear message of support to those who have renounced it, or would wish to renounce the practice; and to act as a deterrent to the practice.⁷⁹ Such legislation have to be introduced or accompanied by children protection measures, comprehensive social support mechanisms, information awareness campaigns, which are dissuasive rather than punitive. UNICEF Innocent Research Centre argues in its report that imposing sanctions alone runs the risk of driving the practice underground and having a very limited impact on behavioural change.

Comic Relief, a UK based organization carried out a research amongst Kisii and Kuria districts to determine the role of alternative rites to passage in curbing FGM practice. The report found out

⁷⁶ Ibid.

⁷⁷ Ibid.

⁷⁸ UNICEF Innocent Research Centre (n.35).

⁷⁹ Ibid.

that despite the legal and policy framework that the government had put in place, FGM was still prevalent in these districts. Comic Relief recommended that there is need for stronger enforcement of existing laws on FGM and promotion of children rights. The organization found that residents of Kisii and Kuria districts were aware of the illegality of the practices but deliberately choose to ignore it.

The Nation Board of Health Welfare, in Sweden carried out a study in Kenya, Ethiopia and Somalia to identify measures that have been put in place to curb the practice.⁸⁰ The purpose of the trip was to collect good examples and experiences of work taking place to prevent and end FGM from countries where migrant communities living in Sweden originate. In Kenya, the study found out that there was a decrease in prevalence of FGM, although this was connoted to the practice being done underground and unnoticeable. The Report recommended that Kenya enact a legislation to curb the vice. Kenya has enacted anti-FGM law in 2011. This study will focus on whether the law has curbed FGM as anticipated by the Nation Board of Health Welfare in Sweden after carrying out a study in Kenya.

Equality Now⁸¹ an NGO carried out a study amongst the Maasai in Kenya and Tanzania. It focused on two rescue centres, which have made systematic inroads into tackling FGM in indigenous communities, by combining social mobilization efforts with a rights and legal framework approach to the prevention of FGM. The study provided an overview of the measures carried out at the rescue centres that not only provide a haven for girls who run from their communities, but also reconcile them with their families. The study did not focus on how the rescue centres had invoked anti-FGM laws in Kenya and Tanzania. The study provided an avenue of understanding the social

⁸⁰ Nation Board of Health Welfare, *Female Genital Mutilation Preventive Work in Africa's Horn* (Socialstyle Sen 2006).

⁸¹ Equality Now, *Protecting Girls from Female Genital Mutilation: The Experience of Working with Maasai Communities in Kenya and Tanzania* (Equality Now 2011).

context of Maasai community. In so doing one is able to identify the reason why they practice FGM, and adopt mechanisms that are friendly to the community.

The literature reviewed above clearly indicates that legislation alone cannot curb FGM practices. It must be accompanied with intensive education on the effects of FGM on the health and dignity of women. A community can view legislation as an attack against its culture. The communities must be aware of the existing law and penalties. However, the literature fails to show that legislation is also a strong tool that NGOs and institutions can use in educating the communities of the penalties. A legislation based on human rights approach can also protect the rights of victims. Legislation against FGM also symbolizes the country's stand against the practice. Although legislation alone cannot curb FGM, it can be used to deter and punish those who engage in the practice.

1.9 Research Methodology

The legal citation style in this study is the Oxford Standard for Citation of Legal Authorities (OSCOLA). The research methodology employed in this study was desk review of various legal instruments and literature review on the one hand and both qualitative and quantitative data collection methods on the other hand. The legal instruments are the Constitution of Kenya, the Prohibition of Female Genital Mutilation Act, the Children's Act and other relevant laws and international and regional instruments. The legal instruments have been interpreted on the basis of past authoritative and binding case law. Case law has been examined as a pertinent to this area of research. The appropriate case law has been interpreted, with reference to the rationale of the decision and contradicting decisions have also been examined in terms of judicial reasoning. Socio-economic factors surrounding the circumstances of a relevant case have been explored in order to establish the context in which the decision was reached.

The legal instruments and literature materials were sourced from the Kenya Law Reports and at the School of Law and Jomo Kenyatta Memorial Libraries.

Qualitative methods were used in order to study perception as well as understand the respondents' issues under discussion whereas quantitative methods were applied to obtain the data and analysing the same. The target population of this study was prosecutors and other stakeholders in the fight for the elimination of FGM. In collecting primary data, the research instrument used was questionnaires and interviews in some isolated instances. The purpose of primary sources was that the data collected was used as a basis of analysis into the situation under study.

The secondary data collection technique entails going through the relevant books, articles, journals, conference papers and information from the Internet.

1.10 Scope and Limitation

This study limits itself to the discussion of the impact of law in curbing FGM. There are various challenges that impede the implementation of anti-FGM law such as lack of political will, poor police investigation, lack of community will to abandon the practice and other economic challenges. However, this thesis limits itself to the impact of the law in bringing about social change and deterring the practise.

1.11 Chapter Breakdown

This research comprises five chapters.

Chapter 1: Introduction

It introduces the topic under study. It sets out the agenda of the study, the research questions, problem statement, objectives, the methodology employed, hypothesis, and justification of the study, background of the study, scope and limitations.

Chapter 2: The Conceptualization and Theoretical Underpinnings of FGM

It discusses the theoretical framework of the topic under study. It discusses the philosophical foundations of practicing female circumcision. The first part discusses the theory of cultural relativism and how it has been used to justify female circumcision; the theory of universalism discusses the debate against FGM, feminist theory to criticise FGM and finally the theory of criminal deterrence and how it has been used to curb FGM. The second part, discusses the debate on legislative reform to support elimination of FGM.

Chapter 3: International and National Legal Framework Prohibiting Female Genital Mutilation in Kenya

This chapter outlines the international and national legal framework prohibiting FGM in Kenya as well as the institutional framework in place. It discusses in detail the anti-FGM laws in Kenya tracing it to the colonial period-1956 ban on female circumcision and the current FGM Act.

Chapter 4: Research Findings

This chapter forms the basis of the study. It presents the findings to a survey which shall be conducted in select counties prone to FGM. The chapter will also discuss the interplay between the findings, effect of the law and challenges in implementation of the legislation on the societies that practice FGM. The second part discusses court decisions made in light of the legislation in place.

Chapter 5: Conclusion and Recommendations

Based on the challenges identified in chapter four, Chapter 5 provides the conclusions of the study and provides further recommendations.

CHAPTER TWO: THE CONCEPTUALISATION AND THEORETICAL UNDERPINNINGS OF FGM

2.1 Introduction

This chapter discusses the philosophical foundations of practicing female circumcision. It also discusses in detail the theories of cultural relativism, universalism and deterrence in relation to the elimination of FGM/C. This is against the backdrop of the GA Res 67/146 of 2012 which calls upon states to take all necessary measures, including enacting and enforcing a legislation to prohibit FGM and to protect women from this form of violence.⁸² Further, it discusses the debate on legislative reform to support elimination of FGM. In doing so, it shall analyse how law has been applied in countries that are similar to Kenya.

2.2 Conceptual Understanding of FGM

2.2.1 Definition, Classification and Prevalence of FGM

FGM is a collective term given to a variety of traditional practices that involve the cutting or modification of female genitalia.⁸³ It is a socio-cultural practice involving the pricking, piercing, stretching, burning, or excision, clitoridectomy, and/or the removal of part of or all tissues around a woman's reproductive organs and in some cases infibulation.⁸⁴ WHO defines FGM as comprising of, 'all procedures involving partial or total removal of the external female genitalia or other injury to the female organs whether for cultural or other non-therapeutic reasons'.⁸⁵ These operations involve the partial or total removal of the female external genitalia including the clitoris,

⁸² UNGA (n.19)

⁸³ Leigh A Trueblood, 'Female Genital Mutilation: A Discussion of International Human Rights Instruments, Cultural Sovereignty and Dominance Theory' (2000) 28, DEN. J. INT'L L. & POL'Y 437.

⁸⁴ Rahman and Toubia (n. 1).

⁸⁵ WHO, *Female Genital Mutilation: An Overview* (WHO 1998).

labia, mons pubis (the fatty tissue over the pubic bone), and the urethral and vaginal openings.⁸⁶

Ramage, Strauss and McEwen describe the four ways in which FGM takes place as:

(i) by cutting away the clitoral hood with or without the removal of the clitoris; (ii) by removal of the clitoris with partial or total removal of the vaginal lips; (iii) by removal of the clitoris, vaginal lips and stitching of the vaginal opening; or (iv) by involving tribal mutilation or burning of the vaginal orifice using corrosives to narrow the vaginal passage.⁸⁷

The WHO classifies FGM into four different types; clitoridectomy, excision, infibulation and unclassified which involves all other harmful procedures to the female genitalia for non-medical purposes such as pricking, piercing, incising, scraping and cauterization.⁸⁸ Clitoridectomy involves the removal of part or all of the clitoris and part or all of the labia minora. It is the most common form of FGM in Africa. Excision involves partial or total removal of the clitoris and labia minora with or without excision of the labia majora.⁸⁹ Infibulation also referred to as ‘Pharaonic circumcision’ is the most extreme form of circumcision and involves the removal of the clitoris, labia majora and minora, sides of vulva and then sewn, so that a little opening is kept for the urine and menstrual blood.⁹⁰ It consists of 15% of all the circumcision and is mainly practiced in Egypt, Sudan, Somalia, Sudan, Nigeria and Mali.⁹¹ Between 80% to 90% of women in Sudan and Somalia have undergone infibulation.⁹²

Wasunna in her article identifies five more types of FGM; mild *sunna* which involves the pricking, slitting or removal of the prepuce of clitoris; modified *sunna* involves partial or total excision of

⁸⁶ Ibid.

⁸⁷ AS Ramage, L Strauss and A McEwen, ‘Somali Women’s Experience of Childbirth in the UK: Perspectives from Somali Health Workers’ (2009) 25, Midwifery 181.

⁸⁸ Ibid.

⁸⁹ Ibid.

⁹⁰ Alina S Cretu and others, ‘Interpreting Female Circumcision’ (University of Roskilde 2004).

⁹¹ After the procedure the legs of the girl are bound together for up to 40 days to promote healing. On the first wedding night the infibulated woman should be cut open again in order to have the first sexual intercourse. After the child birth the opening is being sewed as well.

⁹² Country of Origin Information Centre (LandInfo), *Female Genital Mutilation in Somalia and Sudan* (Report 2008).

the body of the clitoris; and introcusion involves the enlargement of the vaginal opening by tearing it to allow intercourse.⁹³ The other two are: intermediate which is a modified form of paranoiac circumcision consisting of removal of the clitoris and part of labia minora but leaving the labia majora intact; and refibulation or re-circumcision performed on women who have given birth, widowed or divorced to emulate a virginal vaginal.⁹⁴

FGM occurs in almost twenty-eight countries in Africa and it is estimated to have affected more than 132 million girls and women.⁹⁵ The prevalence and type of circumcision varies from one country to another. In some countries, the prevalence is very high such as: Mali at 92%, Djibouti 90%, Eritrea 90%, Ethiopia 85%, Somalia 98% etc.⁹⁶ In Uganda, Zaire the prevalence is at 5%, Tanzania 10% while Senegal, Niger and Cameroon accounts for 20%.⁹⁷ In Sudan and Somalia infibulation is the most prevalent type of FGM. In Kenya almost over 50% of the population practice FGM and it varies from one community. Outside Africa FGM is linked to African migrants groups North America, Europe, Australia and New Zealand. It is rarely practiced in Asia.

2.2.2 Historical Background

It is argued that it is difficult to trace the origins of FGM because it is embedded in the culture of various communities.⁹⁸ The belief on the origins of FGM varies. It is believed that FGM originated in ancient Egypt and then spread to East Africa, hence the term 'Pharaonic circumcision' coined by the Sudanese.⁹⁹ The earliest recorded findings of the practice are from Egypt and suggest that

⁹³ Angela Wasunna, 'Towards Redirecting the Female Circumcision Debate: Legal, Ethical and Cultural Dimensions' (2002) 5 McGill Journal of Medicine 106; Wangila (n. 8).

⁹⁴ Ibid.

⁹⁵ WHO (n.77).

⁹⁶ Wangila (n. 9).

⁹⁷ Ibid.

⁹⁸ Cretu and others (n. 82).

⁹⁹ 'Female Genital Mutilation' <<http://fgm.co.nz/background-to-fgm>> accessed 9 April 2015.

the practice had been in Egypt for over 2000 years.¹⁰⁰ However, records show that the practice predates Islam and Christianity and can be traced as far as the second century B.C.¹⁰¹ It is estimated that FGM is a practice that originated 2500 years ago.¹⁰² In Ethiopia, FGM is assumed to have started before the conversion to Christianity by the emperors in the 4th century and is associated with early Judaic Practices.¹⁰³ Infibulation, which is mainly practiced in Afar region, can be traced back to the Turkish invasion of the Red Sea coast in the early 15th century¹⁰⁴.

The earliest opposition against FGM came from the western world with Catholic missionaries in Egypt spearheading the campaign in the seventeenth century with the mistaken belief that it was a Jewish practice.¹⁰⁵ This was met with little success. In the 1940s and 1950s, the governments of Sudan and Egypt passed laws prohibiting FGM, which were ineffective because they were not accompanied by adequate information campaigns and outreach.¹⁰⁶

In the early 20th century Christian missionaries carried out efforts to eradicate the practice amongst its converts in Kenya.¹⁰⁷ Both the Methodist churches and the Scottish Presbyterian churches in Kenya in the 1920s attempted to stop FGM by excommunicating circumcised girls and parents who allowed the practice on their daughters.¹⁰⁸ Their belief was that the practice was barbaric, backward, medically and hygienically undesirable. However, their efforts were met with resistance

¹⁰⁰ D Carr, *Female genital cutting: Findings from the Demographic and Health Surveys Program* (Macro International 1997).

¹⁰¹ Ibid.

¹⁰² Linda Cipriani, 'Gender and Persecution: Protecting Women under International Refugee Law' (1993) 7 GEO. IMMIGR. L.J. 511.

¹⁰³ Esther W Waweru, 'Strategies Implemented to Stop FGM/C: A Case Study of Kenya and Ethiopia' (2012) 8, *The Interdisciplinary Journal of International Studies* 110.

¹⁰⁴ Ibid.

¹⁰⁵ Cretu and Others (n. 82).

¹⁰⁶ Rahman and Toubia (n. 1).

¹⁰⁷ Stephen Muoki Joshua, 'The Church and the 1929 Female Genital Mutilation (FGM) Contestation in Kenya, with Special Reference to the Scottish Presbyterian Church and the Kikuyu Community' (University of KwaZulu-Natal 2002).

¹⁰⁸ Ibid.

from the Kikuyu community who defended the practice on the basis of culture. Jomo Kenyatta, a stronger supporter of female circumcision amongst the Gikuyu community stressed the importance of the practice in his community and stated that:

In the matrimonial relation, the *rite of passage* is the deciding factor. No proper Gikuyu would dream of marrying a girl who has not been circumcised, and vice versa. It is a taboo for a Gikuyu man or woman to have sexual relations with someone who has not undergone this operation. If it happens, a man or a woman must go through a ceremonial purification, - namely, ritual vomiting of the evil deeds.¹⁰⁹

The British Parliament discussed the debate on FGM outside Africa for the first time in 1930's.¹¹⁰ This was with regard to female circumcision in Sudan. The British government started a campaign to educate the Sudanese on the consequences of the practice and in 1946 passed a law that forbade female infibulation.¹¹¹ Just like in Kenya, the British government was met with resistance and the practice continued in secrecy.

The first global discussion on FGM was presented in 1958 by United Social Council of the United Nations that requested WHO to carry out a study on FGM. However, WHO refused claiming that the practice was outside its jurisdiction as it was rather a cultural than a medical.¹¹² Three years later WHO was requested by women attending United Nations General Assembly meeting in Addis Ababa, to carry out a study on FGM. WHO refused to carry out the study citing that they had a policy that mandated them not to interfere with domestic politics of a country unless they had been invited.¹¹³ In 1979, WHO sponsored the first Seminar on Harmful Traditional Practices Affecting the Health of Women and Children in Khartoum (Sudan).¹¹⁴ A lot of research done was

¹⁰⁹ Barbara Celarent, 'Facing Mount Kenya by Jomo Kenyatta' (2010) 116 American Journal of Sociology 722.

¹¹⁰ Cretu and Others (n. 82).

¹¹¹ Ibid.

¹¹² Elizabeth Boyle, *Female Genital Cutting: Cultural Conflict in the Global Community*, (Johns Hopkins University Press 2002).

¹¹³ Ibid.

¹¹⁴ Rahman and Toubia (n.1).

presented and this seminar proved to be landmark on the debate against FGM. It received opposition and it was suggested from the medical participants that FGM be performed under favourable hygienic conditions. Eradication of FGM was seen as a form of cultural imperialism.

During 1980's and 1990's international organizations, NGO's and feminist activists on educational campaigns about FGM put a lot of effort. The international community again addressed the human rights implications of FGM at a series of international conferences: The World Conference on Human Rights in Vienna in 1993; the International Conference on Population and Development (ICPD) in Cairo in 1994, and the Fourth World Conference on Women in Beijing (Beijing Conference) in 1995. Currently the eradication of FGM is based on the violation of human rights.

2.3 The Debate over Terminology

The issue of female excision primarily became a topic of debate in the 1970s to Second Wave Feminists across Europe and the United States.¹¹⁵ The debate often begins with the term to be used to refer to genital surgeries performed on girls as part of their initiation to adulthood. The choice of terminology reflects author's position in the debate. The name of the practice in communities practicing it is not usually circumcision but a name that symbolizes the importance attached to the practice. In communities where it is practiced different words are used such as *tahar* which when translated means purification or *sunna* meaning tradition.¹¹⁶ In Sudan excision is called '*taour*' from Arabic word '*tahara*' meaning 'to purify'.¹¹⁷ In Igbo it is called '*Isa aru or Iwu aru*' meaning

¹¹⁵ Nasreen Sayed, 'Female Circumcision Debate: What Are The Central Arguments That Surround The International Debate Regarding Female Circumcision and the Ideological Contexts that Shape the Different Positions?' <<http://crossingborders.dk/wp-content/uploads/2014/10/Female-Circumcision-by-Nasreen-Sayed.pdf>> accessed 9 April 2015.

¹¹⁶ Cretu and Others (n. 82).

¹¹⁷ Nahid Toubia, 'Female Circumcision and Public Health' (1994) 331 *New England Journal of Medicine* 712.

‘having a bath’, in Bambara ‘*bolo koli*’ meaning ‘washing of one’s hands’ and in Sarakole ‘*salinde*’ meaning ‘the washing of one’s hands to access prayer’.¹¹⁸

Njambi a scholar who has undergone FGM argues that the term ‘female circumcision’ is a term that erases the unique histories and meanings of genital modification in Africa to what is already understood as circumcision in the context of male circumcision.¹¹⁹ Njambi is of the view that any operation on female genitalia should be named according to the communities’ definition. Names like, ‘excision, circumcision and infibulation are derived from Latin’ hence not the name given to the actions in the societies within which it is taking place.¹²⁰

Opponents of female circumcision use the term *female genital mutilation* to describe all forms of genital surgeries insisting that any definitive removal of a healthy organ or tissues is inherently a mutilation then coined the term female genital mutilation.¹²¹ Feminist activists who are fighting against the practice argue that the term *female circumcision* inappropriately mislabels the extreme forms of female genital surgery, specifically, clitoridectomy and infibulation.¹²² Human and women rights activists, NGOs and representatives of anti-FGM organizations such as WHO and UN, generally use the term FGM to accurately describe the practice, give a clear indication of the harm caused in order to make it an effective advocacy tool. According to Wangila:

The use of the term *female circumcision* used in most African communities is a source of significant controversy among critics of the practice because it is viewed as an inappropriate description of the more extreme forms of genital surgery, especially infibulation and clitoridectomy.¹²³

¹¹⁸ C Zabus, *Between Rites and Rights: Excision in Women's Experiential Texts and Human Contexts*. (Stanford University Press 2007).

¹¹⁹ Wairimu Njambi, 'Dualisms and Female Bodies in Representations of African Female Circumcision: A Feminist Critique' (2002) 5, *Feminist Theory* 281.

¹²⁰ Zabus (n. 104).

¹²¹ Eugenie Anne Gifford, 'The Courage to Blaspheme: Confronting Barriers to Restricting Female Genital Mutilation' (1994) 4 *UCLA Women's Law Journal* 329.

¹²² *Ibid.*

¹²³ Wangila (n. 9).

The term *female genital mutilation* has been criticized on various grounds: first, the phrase inaccurately describes all forms of female genital surgeries as mutilative; and secondly identifying an African religious and cultural practice as mutilative is offensive.¹²⁴ Those who reject the term FGM find it offensive, alienating, criminalizing, psychically mutilating and irrespective to the community's culture. Platt in her article adopts the term 'female circumcision' and argues that she is doing so in order to respect those people who practice it.¹²⁵ The term *mutilation* imposes an external definition on Africans, and scholars argue that the term *female circumcision* should be left intact even when one disagrees with it. Also western feminists have been criticized for adopting double standards for condemning female circumcision without being critical of the many bodily harm that prevail in the West such as piercing of tongues, ears, labia minora and face implants amongst others.¹²⁶

FGM is seen as a term intended to generalize all forms of circumcision including minor procedures and it is therefore judgmental.¹²⁷ The other terms, which are *female genital cutting* and *female circumcision*, seem to be more appropriate for since they can cover all types of the act and they are neutral and non-judgmental.¹²⁸

Female circumcision is sometimes alluded to male circumcision where only the foreskin of the penis is cut. Critics of female circumcision have argued that while both male and female circumcision violate a child's right to physical integrity, the two practices must be understood as distinct.¹²⁹ While male circumcision affirms manhood and virility, female circumcision is

¹²⁴ Jessica A Platt, 'Female Circumcision: Religious Practice v. Human Rights Violations' <<http://lawandreligion.com/sites/lawandreligion.com/files/Platt.pdf>> accessed 15 April 2015.

¹²⁵ Ibid.

¹²⁶ Birgitta Esse'N and Sara Johnsdotter, 'Female Genital Mutilation in the West: Traditional Circumcision versus Genital Cosmetic Surgery' (2004) 83 Acta Obstet Gynecol Scand 611.

¹²⁷ Cretu and Others (n.82).

¹²⁸ Ibid.

¹²⁹ Ibid.

explicitly intended to show a woman's confined role in society and to restrain her sexual desires. Christine Walley, an anthropologist adopted the term "female genital operations" because other terms carry implied assumptions of deliberate harm.¹³⁰

To avoid connotations and inadequacies associated with the use of term such as *female circumcision* and *female genital mutilation* new terminologies have been proposed. The Uganda-based Initiative Reproductive Education and Community Health programme proposed the term *female genital cutting (FGC)*.¹³¹ Other terms include *female genital surgery*, *ritual genital surgery* and *sex mutilation*.¹³² Organizations are now adopting the term FGC in order to give it a neutral meaning and value judgement.

For the purposes of this study the term 'female genital mutilation' will be used. Let's call a spade a spade and not a spoon. The term FGM should send a message home that this practice is barbaric and archaic. It should not be tolerated by communities.

2.4 Justification for the Practice of FGM

Throughout history, culture/tradition has been invoked to justify abhorrent and inhuman practices.¹³³ Justification of FGM is based on: preservation of culture and traditions; control of women's sexuality; religion and social pressure as it is considered a requirement for social acceptance.¹³⁴ FGM is so deeply imbedded in the value systems of the communities that its abolition is likely to be seen as an attack on the age-old respected cultural practices and beliefs of the communities.¹³⁵ On whether religion is a justification for FGM, research has shown that

¹³⁰ Christine Walley, 'Searching for "Voices": Feminism, Anthropology, and the Global Debate over Female Genital Operations' (1997) 12 *Cultural Anthropology* 405.

¹³¹ Wangila (n. 9) 47.

¹³² Ibid.

¹³³ Moges (n. 5).

¹³⁴ Rahman and Toubia (n.1).

¹³⁵ Kisaakye (n. 62).

religion is not.¹³⁶ This has invoked a debate on whether the concept of human rights discourse supersedes community culture.

Supporters of FGM base their arguments on theory of cultural relativism arguing that cultural relativism be used as the basis of establishing moral values and legislation.¹³⁷ Cultural relativists argue that knowledge and truth are culturally contingent, creating a barrier to cross-cultural understanding; and that all cultures are equally valid.¹³⁸ Universalism, which recognizes that human rights are universal, reflects the autonomous individual nature of human beings. It is faulted for disregarding other peoples' culture and perceptions of humanity assuming that Western cultural values are superior and should be used to judge other cultures.

Cultural relativists argue that there are no human rights absolutes, principles used to judge behaviour are relative to society in which people are raised, there exist cultural variability and all cultures are morally equal or valid.¹³⁹ However, opponents of cultural relativism argue that cultural relativism as a concept is used to justify human rights abuses on cultural grounds.¹⁴⁰ Shestack a strong proponent of universalism points out that cultural relativism is used to justify limitation of speech, subjugation of women and female genital mutilation.¹⁴¹

Any effort to eradicate the practice is seen as an attack on the communities' culture and calls for resistance.¹⁴² Any attempt to curb the practice of FGM has not only encountered obstacles but has

¹³⁶ Population Council of Kenya, 'Islamic Scholars Find No Religious Justification for FGM' (Frontiers Report 2008); Alison Jones, 'Working Psychologically with Female Genital Mutilation: An Exploration of the Views of Circumcised Women in Relation to Better Psychological Practice (Thesis, University of East London 2010).

¹³⁷ Kalev (n. 18).

¹³⁸ Donnelly (n. 45).

¹³⁹ Jerome J Shestack, 'The Philosophical Foundations of Human Rights' in Janusz Symonides, *Human Rights: Concept and Standards* (Dartmouth Publishing Limited 2000).

¹⁴⁰ Tracy E Higgins, 'Anti-Essentialism, Relativism, and Human Rights' (1996) 19, *Harvard Women's Law Journal* 240.

¹⁴¹ Shestack (n. 126).

¹⁴² Joan Namulondo, 'Female Genital Mutilation: A Case of the Sabiny in Kapchowra District, Uganda' (Master's Degree, University of Tromso 2009).

also exacerbated the original situation forcing the practice to go underground and compounding the health risks associated with it. In Uganda, District Council of Kapchorwa in an effort to resist a campaign to eradicate FGM by Inter-African Committee for the Eradication of Harmful Traditional Practices passed a resolution making FGM compulsory for every Sabinu girl of 14 years and above or be considered a social outcast.¹⁴³

In most of African and Middle Eastern communities practicing FGM, the main justifications concentrate on rite of passage into womanhood, morality, virginity, honour and marriage, to prevent the death of the woman by removing clitoris which are believed to be poisonous and sexual control.¹⁴⁴ The communities practicing FGM cite different reasons and oppose any effort to curb the practice. Women are presumed to be weak in emotions and FGM is expected to play that role by reducing the girl's sexual desire and prevent sexual experience before marriage.¹⁴⁵

The practice is usually performed by women, a role either inherited or learned from a relative. In Gambia, the procedure is performed by a woman called the Ngasimba who is highly respected and believed to possess supernatural powers.¹⁴⁶ Moges argues that:

The supporters, promoters, guardians and practitioners of FGM broaden their defence by claiming that FGM enhances fertility; controls and prevents waywardness of girls; makes a women faithful wife; excessive growth of clitoris (hypertrophy); clitoris is dangerous and hinders intercourse, creates impotency and kills baby at delivery; the normal genitalia of a women are ugly and disgusting and must be removed (*Tahara*). Socially, an uncircumcised woman cannot be accepted as a serious and responsible adult unless she is operated.

¹⁴³ Ibid.

¹⁴⁴ Kisaakye (n. 62) 272.

¹⁴⁵ Ibid.

¹⁴⁶ Ibid.

2.5 Criticism against FGM

In spite of the justification advanced by communities practicing FGM and supporters of it, those rejecting the whole concept of female circumcision, argue that it is a violation of human rights and poses potential health risks.¹⁴⁷ The campaign against FGM as a health risk led to medicalization of the practice. This led to another contention that it was a violation of women and children's rights. Critics of FGM argue that it is a violation of human rights and an extreme form of violence against women, resulting in psychological damage and physical effects ranging from infections to possibly death.¹⁴⁸ They base their arguments on universalism of human rights, and the health hazards associated with the practice that has led to several reported and unreported cases. FGM is seen as a practice instituted and continues to be practiced in Africa to promote patriarchy and to control women's sexuality.¹⁴⁹

At the centre of criticism against FGM is the debate between western feminists and African women scholars. Western feminist have been criticised for portraying African women as infantile beings who lack autonomy and agency required to resist FGM. Hosken¹⁵⁰ states '....men are responsible for the worsening conditions in Africa, women and children are the abused and voiceless victims...'

There is seemingly a perception that African women are represented as passive cultural dues whose sexual and reproductive functions are controlled by men without resistance. Scholars argue that it is arrogant of Western feminists to dismiss the consent of African women to undergo FGM as a

¹⁴⁷ Wangila (n. 9); Kisaakye (n. 62).

¹⁴⁸ MM Sheridan, 'In Re Fauziya Kasinga: The United States has Opened its Doors to Victims of Female Genital Mutilation' (1997) 71(2) St. John's Law Review 433.

¹⁴⁹ Amede Obiora, 'Bridges and Barricades: Rethinking Polemics and Intransigence in the Campaign against Female Circumcision' (1997) 47 CASE W. RES. L. REV. 275.

¹⁵⁰ Fran Hosken, *The Hosken Report: Genital and Sexual Mutilation of Females*. (Women's International Network News 1979)

product of false consciousness or to offer to change the mind. For some, the western narrative of FGM as the subjugation of women is part of a legacy of neo-colonialism.

A prominent and yet rarely cited act of resistance is women's resistance to anti-FGM laws under colonial rule in Kenya. African-American academic Njambi¹⁵¹ contends in her paper, that the banning of FGM in Kenya mobilised women to engage in anticolonial struggles¹⁵² from the 1920s to the 1960s. Initiation rituals were central to everyday life and thus the ban of FGM sparked women's involvement in the anticolonial resistance. Women's resistance to anti FGM laws symbolised their resistance to colonialism. Women engaged in militant activity in ways that signified their strength and bravery and in turn they were perceived to be coequal with men. Women were unable to prescribe an autonomous existence of equality outside of the divergent boundaries defined by either colonialism or anti-colonialist movements.

Scholars argue that African women's resistance during colonial rule, otherwise referred to as Third world women's movements, have been marginalised by Western feminists. Western feminists have been accused of implicitly siding with colonial rulers who supported eradicating FGM, while ignoring the barbarism of imperialism itself.¹⁵³ Colonial rule was cruel to African women. As Edgerton states, "women were cut, beaten and burned and in addition they had their vaginas stuffed with stinging nettles, penetrated by snakes, or filled with boiling water" by colonial state actors.¹⁵⁴ While some Western scholars criticise colonialism, they still depict women who undergo FGM as oppressed.¹⁵⁵

¹⁵¹ Wairimu Ngaruiya Njambi, W. N., 'Irua Ria Atumia and Anticolonial Struggles among the Gĩkũyũ of Kenya: A Counternarrative on "Female Genital Mutilation" ' In: Oyěwùmí O. (eds) *Gender Epistemologies in Africa*. (Palgrave Macmillan, New York 2011)

¹⁵² Robert B. Edgerton, *Mau Mau: An African Crucible* (Ballantine Books 1989).

¹⁵³ Chandra T. Mohanty, *Feminism without Borders: Decolonizing Theory, Practicing Solidarity* (Duke University Press 2003).

¹⁵⁴ Edgerton (n.153)

¹⁵⁵ Carolyn Martin Shaw, *Colonial Inscriptions: Race, Sex and Class in Kenya* (U of Minnesota Press. 1995).

Njambi contends that the Western story of FGM is hegemonic and fails to reflect the complexities of women's experiences of FGM in different contexts. She argues that there is a persistent colonial legacy, which is still present today, one that presumes the right of the civilised West to intervene in the cultural practices of the barbaric other. Indeed, anti-FGM laws have been imposed on FGM-performing communities throughout the West even in the face of opposition from immigrant communities. Reflecting on the historical trajectory of women's resistance to anti-FGM laws is imperative to exploring women's resistance to laws prohibiting FGM today.

2.6 Deterrence

The deterrence theory can be traced to the early works of Thomas Hobbes, Jeremy Bentham and Cesare Beccaria.

In *Leviathan*¹⁵⁶, Hobbes renowned for the social contract theory was of the opinion that to avoid conflict, and crime, people enter into a social contract with the government so that it will protect them from human predicaments. The role of the state is to enforce the social contract. Hobbes indicated that if one agrees to the social contract that individual authorizes the sovereign to use force to uphold the social contract. In this case, he argues that punishment for crime must be greater than the benefit that comes from committing the crime. Deterrence is the reason individuals are punished for violating the social contract, and it serves to maintain the agreement between the state and the people in the form of a workable social contract.

Still on the ideals of the social contract, Beccaria emphasized that laws should be published so that people may know what they represent – their intent, as well as their purpose.¹⁵⁷ Basing the

¹⁵⁶ Michael Freeman, *Lloyd's Introduction to Jurisprudence* (7th ed., Sweet & Maxwell, 2007)

¹⁵⁷ *Ibid*

legitimacy of criminal sanctions on the social contract, Beccaria called laws the conditions under which men, naturally independent, united them in society.

In his opinion, legislators should pass laws that define crimes and they must provide specific punishments for each crime. To have deterrent value, punishment must be proportionate to the crime committed. Further, he argued that the seriousness of crimes should be based on the extent of harm done to society.¹⁵⁸

It is on the basis of this social contract that Parliament enacts legislation to criminalise and prohibit FGM. The purpose of this is to pass a message that in the event one is caught, they will be charged and punished for the crime. The effect of this is that the punishment acts as a deterrent for the others not to engage in the practice since they will face similar action.

2.7 Severity, Certainty and Celerity of Punishment¹⁵⁹

Beccaria and Bentham believed that the rate of commission of a particular offence varies inversely with celerity, certainty and severity of punishment for that crime. The more severe a punishment, it is thought, the more likely that a human being will desist from criminal acts.

To prevent crime, criminal law must emphasize penalties to encourage citizens to obey the law. Punishment that is too severe is unjust, and punishment that is not severe enough will not deter criminals from committing crimes. Certainty of punishment means making sure that punishment takes place whenever a criminal act is committed.

Therefore, it is important that the penalties that are imposed act as a deterrent to the society.

¹⁵⁸Kevin C Kennedy, 'A Critical Appraisal of Criminal Deterrence Theory' (1983-84) 88 Dick. L. Rev. 1<<http://digitalcommons.law.msu.edu/facpubs>> accessed 2 October 2016

¹⁵⁹Thekwoaba D. Onwudiwe, Jonathan Odo & Emmanuel C. Onyeozili, 'Deterrence Theory' <<https://marisluste.files.wordpress.com/2010/11/deterrence-theory.pdf>> accessed 2nd October 2016

2.8 Debate on Legislative Reform to Support Elimination of FGM

Interest in legislative reform to support the abandonment of FGM/C stems from a recognition that institutional frameworks play an important role in promoting and supporting social change, human rights, good governance and the rule of law.¹⁶⁰ Ensuring a legal framework is in place that supports the abandonment of FGM/C and the fulfilment of women's and children's rights in a sustainable manner is an important step towards ending the practice.¹⁶¹

The approach taken by governments, as well as their reasons for undertaking legislative reform on FGM/C, often determine the results. For legislation on FGM/C to have the necessary public support that facilitates the process of implementation and acceptability of the law, the reform process needs to move beyond "putting the law in place". It should echo concerns existing within society about the practice and strengthen consensus to protect the human rights of girls and women. A number of existing laws that address FGM/C, however, did not emerge from such a process.

2.8.1 Uganda

According to the 2011 Uganda's Demographic Health Survey,¹⁶² 1% of the country's women have undergone FGM/C. FGM is practised among the ethnic groups of the Sabiny, Pokot, Tepeth, Kadam and immigrants such as the Maasai, Nandi and Somali. It is most prevalent among the Pokot and the Sabiny. The nature of the practise ranges from clitoridectomy, which is more common among the Sabiny, to infibulation, mostly among the Pokot.¹⁶³

¹⁶⁰ UNICEF, 'Legislative Reform to Support the Abandonment of Female Genital Mutilation/Cutting (Aug, 2010) <<https://www.unicef.org>> accessed 2nd October 2016

¹⁶¹ *Ibid*

¹⁶² Uganda Bureau of Statistics (UBOS) and ICF International Inc. 2012. *Uganda Demographic and Health Survey 2011*. Kampala, Uganda: UBOS and Calverton, Maryland: ICF International Inc.<<dhsprogram.com/publication>> accessed 2 October 2016

¹⁶³ *Ibid*

Sabiny elders were strong defenders of FGM. However, the community elders have since reviewed this stance and they have begun a determined effort to support its abandonment. The elders, working together with civil society organisations petitioned the local authorities to pass a by law prohibiting FGM. This proved to be a formidable step in a process that eventually led Parliament to enact the Prohibition of Female Genital Mutilation law in 2010.¹⁶⁴

The law prohibits all types of FGM by providing a prison sentence of up to 10 years for perpetrators. The process leading to the passage of the law involved the commitment and leadership of highly respected elders, who are change agents at the grass-roots level.

However, this is not without its challenges. It has been observed that parents are taking their daughters to western Kenya to be cut. Further, strong bonds within the community make it difficult for those opposing the practice to report perpetrators, especially where parents are responsible. Lack of access to police since most of these communities live in isolated areas.

2.9 Conclusion

Although it is questionable as to whether legislation alone promotes behaviour change, it does provide an “enabling environment” for both anti-FGM campaigners and community members who have taken the decision to abandon the practice.¹⁶⁵ Legislation therefore provides a structural framework within which campaigners and individuals can reject arguments that promote the continuation of FGM.¹⁶⁶ However, there is a danger that criminalisation drives FGM further

¹⁶⁴ UNFPA, ‘Driving Forces in Outlawing the Practice of FGM/C in Kenya, Uganda and Guinea-Bissau’ (Oct 2013) <www.unfpa.org/resources> accessed 2 October 2016

¹⁶⁵ Female Genital Mutilation in the European Union and Croatia, European Institute for Gender Equality, Vilnius, Lithuania, 2013.

¹⁶⁶ B. Shell-Duncan, Y. Hernlund, K. Wander, and A. Moreau, ‘Contingency and Change in the Practice of Female Genital Cutting: Dynamics of Decision Making in Senegambia’, University of Washington, Seattle, Wash, USA, 2010.

“underground”, with inexperienced circumcisers conducting the practice or girls and women not seeking health care for complications arising from FGM due to a fear of prosecution.¹⁶⁷

CHAPTER THREE: INTERNATIONAL AND NATIONAL LEGAL FRAMEWORK PROHIBITING FEMALE GENITAL MUTILATION IN KENYA

3.1 Introduction

FGM has been object of legislation not only in Africa where it is practiced but also in western countries where African migrants have settled.¹⁶⁸ The efforts to eliminate FGM in Kenya through a legal framework dates back to the pre-independence period. These efforts have culminated into the enactment of the Children’s Act of 2001 and most recently, the Prohibition of Female Genital Mutilation Act of 2011 (FGM Act).

This chapter outlines the international and national legal framework of FGM that is applied in Kenya. The first part discusses the international and regional instruments applied. The second part provides a critical analytical overview of the legal responses in Kenya through legislation and institutional framework.

3.2 International Legal Framework

The practice of FGM/C is recognized as a violation of the human rights of girls and women, which are codified in several international and regional treaties.

¹⁶⁷ S. Lloyd-Roberts, “Female genital mutilation rife in Egypt despite ban,” BBC Newsnight, London, UK, 2012, <<http://news.bbc.co.uk/1/hi/programmes/newsnight/9696353.stm>> accessed 2 October 2016.

¹⁶⁸ See UK, Female Genital Mutilation Act of 2003; US, Federal Prohibition of Female Genital Mutilation of Act of 1995.

Prior to the 1990's, issues of FGM and violence against women were not seen as a matter of international concern and were left under the purview of national governments.¹⁶⁹ It was seen as a domestic act that required national government regulation. However, this changed in 1990s as the global movement on violence against women became a matter of international concern. Violence against women was approached using a human rights approach. The first landmark approach in the elimination of FGM was the 1990 CEDAW General Recommendation No. 14 on female circumcision.¹⁷⁰ It recommended states to take appropriate measures to eliminate female circumcision.¹⁷¹ In 1992, CEDAW Committee on Elimination of Discrimination against Women adopted General Recommendation No. 19.¹⁷² It recognized FGM under Article 12 as a harmful practice perpetuated by culture and traditions that are harmful to the health of women and children calling for its elimination.

In 1993, the Vienna Declaration and Program of Action recognized the conflict between human rights and the harmful effects of traditional practices such as FGM. In the same year, the General Assembly adopted the Declaration on the Elimination of Violence against Women which recognized FGM as a form of gender based violence.¹⁷³ In 1994, FGM was discussed as a human rights violation during the International Conference on Population and Development held in Cairo.¹⁷⁴ In 1995, the implication of FGM as a human right violation was discussed at the World

¹⁶⁹ UNFPA, *Implementation of the International and Regional Human Rights Framework for the Elimination of Female Genital Mutilation* (November, 2014) <www.unfpa.org> accessed 2 October 2016

¹⁷⁰ Committee on the Elimination of Discrimination against Women, General Recommendation No. 14: Female Circumcision, 1990 (A/45/38 and Corrigendum).

¹⁷¹ Ibid.

¹⁷² Committee on the Elimination of Discrimination against Women, General Recommendation No. 19: Violence against Women, adopted at the Eleventh Session, 1992, contained in document A/47/38 <<https://www1.umn.edu/humanrts/gencomm/gener19.htm>> accessed 10 July 2015.

¹⁷³ General Assembly, Declaration on the Elimination of Violence against Women, 20 December 1993 (A/RES/48/104).

¹⁷⁴ Programme of Action of the International Conference on Population and Development, Cairo, 5-13 September 1994 (UN Doc. A/CONF.171/13/Rev.1), 1995.

Fourth Conference on Women in Beijing. These landmark events brought to the attention of the world that FGM constituted harmful practices that violated women and children's human rights.

The Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (Maputo Protocol) is the only international instrument that has explicitly prohibited FGM.¹⁷⁵ It is the first international instrument to call for an end to all forms of violence against women, whether in private or in public, including sexual harassment; prohibit all forms of female genital mutilation; protect women's right to seek abortion under certain conditions; prohibit forced marriages; and specify 18 years as the minimum age of marriage.¹⁷⁶ Article 2 of the Maputo Protocol calls upon member states to combat all forms of discrimination against women through appropriate legislative, institutional and other measures. In particular, states should enact and effectively implement legislation against discrimination particularly those harmful practices which endanger the health and general well-being of women. Article 5 of the Maputo Protocol requires states to prohibit harmful practices against women including, 'prohibition through legislative measures backed by sanctions, of all forms of female genital mutilation, scarification, medicalization and para-medicalisation of female genital mutilation and all other practices in order to eradicate them'. FGM is linked to violation of women and children's right to health, life, equality, non-discrimination, dignity and expression.¹⁷⁷ The human rights approach against FGM has led to the interpretation of the international human rights legal instruments.

The human rights approach aimed at raising international awareness on the harmful effects of FGM on women and children.¹⁷⁸ To the human rights activists, FGM was as a result of patriarchy and

¹⁷⁵Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, 2nd Ordinary Session, Assembly of the African Union Adopted on July 11 2003.

¹⁷⁶ Solidarity for African Women Rights Coalition, *A Guide to Using the Protocol on the Rights of Women in Africa for Legal Action* (Equality Now 2011).

¹⁷⁷ Wangila (n. 9).

¹⁷⁸ Rahman and Toubia (n. 1).

women's subordination to men.¹⁷⁹ The fact that FGM persists is seen as male domination on women within traditional communities.¹⁸⁰ It is performed in order to control women by weakening their sexual pleasure. Some scholars do not agree with this argument. Barbera argues that in, 'nineteenth century, clitoridectomy and hysterectomy (i.e. the removal of uterus and ovaries) were performed in England as surgical solutions to cure anomalous women's behaviour that were considered as symptoms of mental disorder'.¹⁸¹ They were specifically used for the treatment of masturbation, lesbian inclination, hyper-sexuality, and hysteria.¹⁸² In USA it was used, 'until 1905 to prevent masturbation the labia were sewed together and until 1935 clitoridectomy was used in mental hospital to treat epilepsy, catalepsy, melancholy, and even kleptomania'.¹⁸³ Ehrenreich and Barr argue that other body modifications are done in the western world influenced by patriarchal gender norms.¹⁸⁴ Such practices include, cosmetic genital surgery, such as hymen repair, vaginal tightening, clitoral hood removal (clitoridectomy), lifting, and reduction of the labia performed for non-therapeutic reasons.¹⁸⁵ Breast augmentation is done to give women greater sexual body as perceived by men.

The view that FGM is a human rights violation has received a lot of criticism from scholars especially African scholars who support it on the ground that FGM is a cultural practice. The right of a person to participate in his/her culture is not novel. It surfaced during the adoption of UDHR

¹⁷⁹ C Bob, *The International Struggle for New Human Rights* (2009) 95.

¹⁸⁰ Wangila (n. 9).

¹⁸¹ Maria Caterina La Barbera, 'Revisiting the Anti-Female Genital Mutilation Discourse' (2009) D & Q 485. <http://www.dirittoequestionipubbliche.org/page/2009_n9/05_studi-03_MC_LaBarbera.pdf > Accessed 15 April 2015

¹⁸² Ibid.

¹⁸³ Ibid.

¹⁸⁴ Nancy Ehrenreich and Mark Barr, 'Intersex Surgery, Female Genital Cutting, and Selective Condemnation of Cultural Practices' (2005) 40 *Harvard Civil Rights-Civil Law Review* 71.

¹⁸⁵ Ibid.

in 1948.¹⁸⁶ The American anthropologist who submitted a statement to the drafters of the UDHR fronted the inclusion of the right to culture in UDHR.¹⁸⁷ They argued that the following principles should guide UDHR's adoption:

- a) The individual realizes his personality through his culture, hence respect for individual differences entails a respect for cultural differences;
- b) Respect for differences between cultures is validated by the scientific fact that no technique of qualitatively evaluating cultures has been discovered; and
- c) Standards and values are relative to the culture from which they derive so that any attempt to formulate postulates that grow out of the beliefs or moral codes of one culture must to that extent detract from the applicability of any Declaration of Human Rights to mankind as a whole.¹⁸⁸

This culminated in the inclusion of the right to culture in the UDHR under Article 27. Article 27 of UDHR guarantees every individual to, 'freely participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits'. Since its recognition in the UDHR the right to participate in one's cultural activities has been recognized in various international instruments as a human right. The ICESCR is not much expansive on the issue of cultural rights.¹⁸⁹ Article 15 of the ICESCR obligates state parties to recognize the right of everyone to take part in cultural life and to enjoy the benefits of scientific progress and its applications. The ACHPR¹⁹⁰ differs from other regional human rights instruments (European and American) because it recognizes people's rights and places great emphasis on the right to culture. It was highly influenced by the African traditions and culture.¹⁹¹

¹⁸⁶ Universal Declaration of Human Rights, 10 December 1948, Art 17(1), GA Res 217 (III), UN GAOR, 3rd Sess, Supp No 16, UN Doc/A/810.

¹⁸⁷ American Anthropological Association, 'Statement on Human Rights' (1947) 49 American Anthropologist 539.

¹⁸⁸ Ibid.

¹⁸⁹ International Covenant on Economic, Social and Cultural Rights, 16 December 1966, Art 1, GA Res 2200A(XXI), 21 UN GAOR, 21st Sess, Supp No 16, at 49, UN Doc A/6316 (1966) [hereinafter ICESCR].

¹⁹⁰ African Charter on Human and Peoples Rights (ACHPR), adopted 27 June 1981, OAU Doc. CAB/LEG/67/3/Rev. 5, reprinted in 21 ILM 58 (1981), entered into force 21 Oct. 1986.

¹⁹¹ Ibid, Preamble.

Despite the recognition of the right to participate in one's culture of choice, emphasis on its enjoyment has been placed on the obstacles it places on the enjoyment of individual human rights.¹⁹² The human right system reflects an individualistic concept of rights and right holders leading to a conflict between group rights embedded in culture and individual rights of an individual within that group. The reasons for practicing FGM majorly preservation of culture.¹⁹³ Those who support FGM argue that African women define themselves as whole people through female circumcision and eradicating FGM would deny them their human rights.¹⁹⁴ According to the Universalists, FGM is a violation of women and children human rights: bodily integrity, self-determination, freedom of choice and sexual fulfilment.¹⁹⁵ However, cultural relativists on the other hand argue that FGM is a practice embedded in culture and each community has its own value system upon which each member is judged.¹⁹⁶

3.3 A Critical Overview of Kenya's Legal Framework

Legislation provides an enabling environment to accelerate the abandonment of FGM.¹⁹⁷ The purpose of anti-FGM law is to catalyse social change and send a stern communication that FGM shall not be tolerated. In many African countries, FGM is a deeply rooted cultural practice and Kenya is no exception.¹⁹⁸ Legislative reforms have been adopted by various countries but vary in form and restriction. Some countries have enacted specific laws prohibiting FGM such as US,¹⁹⁹

¹⁹² Walley (n. 122).

¹⁹³ Kalev (n. 18).

¹⁹⁴ Obiora (n. 141).

¹⁹⁵ See Chapter Two.

¹⁹⁶ Janine A Hoitt, 'Female Genital Mutilation: Cultural Right or Violation of Women's Human Rights? An Analysis of Female Genital Mutilation within the Universalist versus Cultural Relativist Debate with Foreign Policy Implications' (2007) 1 The Protection Project Journal of Human Rights and Civil Society 27.

¹⁹⁷ Wahba (n. 32).

¹⁹⁸ Camilla Yusuf and Yonatan Fessha, 'Female Genital Mutilation as a Human Rights Issue: Examining the Effectiveness of the Law against Female Genital Mutilation in Tanzania' (2013) 13. African Human Rights Law Journal 356.

¹⁹⁹ US, Federal Prohibition of Female Genital Mutilation of Act of 1995.

UK,²⁰⁰ Kenya,²⁰¹ Uganda etc. Others such as Senegal and Egypt have added clauses under their penal codes while others such as France addressed FGM under their criminal laws. A legal framework against FGM is intended to change behavioural change leading to the abandonment of the practice. It is used as a deterrent tool to show political will in the eradication of FGM. In essence those against FGM get support from the institutions implementing the practice. It also provides an avenue in which victims can freely participate in eradicating FGM.

In Tanzania, Mauritania, Canada and US, FGM is prohibited if it is performed on minors.²⁰² However, in other countries such as Kenya, Uganda, Egypt, UK and others, FGM is prohibited amongst all ages.

3.3.1 Pre-Independence Period

A legal approach towards curbing FGM in Kenya is not a new phenomenon. It dates back during the colonial system administration.²⁰³ The arrival of European missionaries in the early 20th century set the stage for contestation between Christianity, as understood by the European missionaries, and the African leaders over the rite of initiation.²⁰⁴ Africans practiced FGM as a form of initiation to womanhood and sexual control. FGM in the African context was a form of cultural and ethnic identity that shaped their social life.

Missionaries perceived the practice as sinful, brutal, oppressive and medically and hygienically undesirable.²⁰⁵ They based their arguments on their Christian faith condemning the practice as sinful. They argued that in order for Africa to be liberated it had to stop practicing barbaric cultures

²⁰⁰ UK, Female Genital Mutilation Act of 2003

²⁰¹ Prohibition of Female Genital Mutilation Act of 2011

²⁰² Shell-Duncan and Others (n.152).

²⁰³ Thomas (n .35).

²⁰⁴ Joshua (n. 99).

²⁰⁵ Ibid.

such as FGM. Although missionaries used religion as a tool to eradicate FGM, research has shown that religion does not support FGM.²⁰⁶ Christianity opposes the practice of FGM. However, Christianity promoted FGM during the colonial through various ambiguous justifications and interpretation of inferences. Wangila narrates that sources of justification included: missionary attitudes towards African communities and their cultures; African resisted missionaries' alignment to the colonial government's attempts to curb the practice; and attempts to contextualize and acculturate African values within the Christian church.²⁰⁷ Missionaries wanted to civilize Africans from their barbaric culture. For one to be declared a Christian, they had to renounce cultural practices such as FGM and polygamy. This triggered anger among Africans who were adherents to these practices.²⁰⁸

Tamale argues that colonial powers constructed Africans as bestial and could easily justify the objectives of colonialism.²⁰⁹ The colonial administration attempted to use criminal regulations and religious propaganda to eradicate the practice.²¹⁰ Africans received colonial laws banning FGM in Africa as a threat to their ethnic identity, cultural and social order. In 1929, a number of influential European agencies, missionaries, pro-African bodies and government educational and medical authorities vigorously attacked FGM.²¹¹ The missionaries even put an injunction on circumcised girls and their parents from attending church and school.²¹² This heightened the conflict between missionaries and Africans.

²⁰⁶ Wangila (n. 9).

²⁰⁷ Ibid 119.

²⁰⁸ Jomo Kenyatta, *Facing Mount Kenya: The Tribal Life of the Gikuyu* (Vintage Books 1962).

²⁰⁹ Sylvia Tamale, 'The Right to Culture and Cultural Rights: A Critical Perspective on Women's Sexual Rights in Africa' (A paper presented during a conference on 'Up Against the Nation-States of Feminist Theory' by African Human Rights Commission Research Centre for Law, 2006).

²¹⁰ Joshua (n. 99).

²¹¹ Ibid.

²¹² Ibid.

In 1930, the African leaders and cultural systems resisted the move of missionaries excluding circumcised girls from the church and schools.²¹³ This resulted into the opening of independent churches and schools which tolerated FGM and other African cultural practices. From 1929, the Kikuyu Church of Scotland Mission banned from their schools children whose parents would not denounce clitoridectomy as an attempt to denounce it as a barbaric custom and eradicate it.²¹⁴ During this period FGM became a major contestation issue between the colonial administration and the African societies. African societies rallied their freedom movement to protect their culture on what they perceived as Western imperialism.²¹⁵ Jomo Kenyatta, a former president of Kenya, defended FGM and used it as a tool for national resistance. To show his commitment to nationalism, he took an oath to defend his country and culture including FGM.²¹⁶

The first Kenyan legislation against FGM was the 1956 Meru ban under the Chiefs Act.²¹⁷ The 1956 ban on FGM was issued after the missionaries had called for criminalization of FGM in Kenya.²¹⁸ This approach reflected the western feminist discourse on FGM through the civilization debate.²¹⁹ In response to the ban, the Meru council of elders under the colonial administration voted unanimously to ban clitoridectomy. This law provoked a group of teenage girls who circumcised themselves. They referred to themselves as Ngaitana, meaning ‘I will circumcise myself’.²²⁰

²¹³ Wangila (n. 9).

²¹⁴ Onni Gust, ‘Mau Mau, Anti-Colonialism and “Female Genital Mutilation”’ <notchesblog.com/2014/11/20/mau-mau-anti-colonialism-and-female-genital-mutilation> accessed 15 July 2015.

²¹⁵ Ibid.

²¹⁶ Kenyatta (n.195).

²¹⁷ Kilimo (n.60).

²¹⁸ Thomas (n.35).

²¹⁹ Kilimo (n.60).

²²⁰ Anna Winterbottom, Jonneke Koomen and Gemma Burford, ‘Female Genital Cutting: Cultural Rights and Rites of Defiance in Northern Tanzania’ (2009) 52 *African Studies Review* 47.

The Ngaitana girls chose circumcision as a way to claim their autonomy from African men who wanted to control their bodies and the colonial power controlling African politics.²²¹ They formed part of the Mau Mau revolt in order to demonstrate their loyalty to the kikuyu tradition. The resistance of Ngaitana girls shows that FGM is deeply rooted in the culture of a community and ethnic identity. The Ngaitana girls identified themselves with their culture and could not depart from it despite it being depicted as barbaric. Culture and religion are seen as key explanations as to why certain harmful practices exist.²²²

Barbera argues that the Ngaitana story can be used as a lesson by contemporary western anti-FGM legislators against constructing feminist politics across cultural lines without listening to the voices of those involved in the practice.²²³ Kilimo argues that the 1956 ban during the colonial period was used to influence western feminist discourse in the form of civilization.²²⁴ In fact, the Meru council of elders worded FGM as ‘uncivilized’ practice and declared it an offence against the Native law and Custom.²²⁵ Christian missionaries preached against the local cultures and requested the colonial administration to outlaw FGM. It was viewed as a form of imperialist tendencies, which viewed African culture as barbaric and inferior.²²⁶

In 1958, the colonial government tabled a bill to regulate the age at which girls should be circumcised and to hold parents accountable by forcing those girls who choose to be circumcised to seek parental consent before any operation was performed.²²⁷ The bill was withdrawn after

²²¹ Barbera (n.168).

²²² Tamsin Bradley, ‘Introduction’ in Tamsin Bradley (ed), *Women, Violence and Tradition: Taking FGM and Other Practices to a Secular State* (Zed Books 2011) 15.

²²³ Barbera (n.168).

²²⁴ Kilimo (n.60).

²²⁵ Josiah Mwaniki, *Female Circumcision* (Uzima Press 1990).

²²⁶ Obiora (n. 141).

²²⁷ Nora Ingdal, Joyce Umbima and Anders Lamark Tysse (ed), *Mid-Term Review of Project Practice Reduction and Awareness on Female Genital Mutilation (FGM)* (Nordic Consulting Group 2008).

opposition from communities practicing FGM.²²⁸ The Chiefs Act of 1912 was the only legislation that could be used to protect girls and women from FGM.²²⁹ It however received resistance. The pre-independence efforts to eradicate FGM were based on western idea of civilization. Christian missionaries condemned African cultures arguing that the salvation of Africa would be gauged against abandonment of local cultures.²³⁰ This intensified the conflict between the Africans culture and western culture. Those who abandoned FGM were labelled ‘westernized’ and believed to have the capacity to destroy tribal symbols.²³¹ FGM was identified with national movements such as Mau Mau. In 1958 due to the opposition from the communities that were practicing FGM, the government was forced to revoke legislation.

3.3.2 Post Independence Period.

At the attainment of Kenya’s independence in 1963, the colonial authorities rescinded all public policy measures outlawing FGM because the practice was a deeply rooted and acceptable custom in the affected communities.²³² Kenya’s efforts to curb FGM were revived in 1980s by issuance of presidential decrees. President Moi issued decrees in 1982, 1989 and 1998. In 1982 President Moi issued a ban prohibiting FGM making it a criminal offence.²³³ Those practicing FGM were required to stop or face legal action. However, many communities continued to practice FGM in

²²⁸ Ibid.

²²⁹ Ibid.

²³⁰ Obiora (n. 141).

²³¹ Jomo Kenyatta, ‘Christianity and Clitoridectomy’ in Ram Desai (ed), *Christianity in Africa: As Seen by Africans* (Allan Swallow 1962).

²³² Ministry of Gender, Sports and Social Services, *Contributing Towards Efforts to Abandon Female Genital Mutilation/Cutting in Kenya: A Situation Analysis* (2007).

²³³ Martha Wanjiru Muraya and Colomba Kaburi Muriungi, ‘Historical Analysis of the Role of Female Circumcision in the Construction of Gender Roles, Values and Relations among the Agikuyu People in Kenya,’ (2014) 2 International Journal of Art and Art History 27.

secret by inviting the circumcisers in their homes without the knowledge of the law enforcement authorities.²³⁴ It pushed the practice underground.

Following the 1993 UN Declaration on Elimination of all Forms of Violence against Women, Kenya developed a National Plan for the Eradication of FGM.²³⁵ After the International Conference on Population and Development (ICPD) held in Cairo in 1994 and the Fourth World Conference on Women in Beijing in 1995, Kenya developed a population policy, which advocated against FGM.²³⁶ These steps were as a result of the international community to eradicate FGM.

In 2001, the Kenyan Parliament enacted the Children Act (No. 8 of 2001), which explicitly prohibited FGM on children below the age of eighteen years. Provisions of regarding FGM are contained in section 14 and 119 (1) (h) of the Act. Section 14 of the Children Act provides that, 'No person shall subject a child to female circumcision, early marriage or other cultural rites, customs or traditional practices that are likely to negatively affect the child's life, health, social welfare, dignity or physical or psychological development'. Section 119 (1) (h) provides that a child who is need of protection is one who, 'being female, is subjected or is likely to be subjected to female circumcision, early marriage or to customs and practices prejudicial to the child's life, education and health'. The provisions in the Children's Act were much progressive as they outlawed FGM. The aim of the 2001 legislation was to bring forth social change and protect young girls from undergoing FGM. Traditional practices such as female circumcision, early marriage and other cultural rites or customs that were likely to negatively affect the child's life or health were outlawed.

²³⁴ Geoffrey Towet, Peter Gutwa Oino and Audrey Matere, 'The Female Genital Mutilation Act 2011 of Kenya: Challenges Facing its Implementation in Kajiado Central Sub-County, Kenya' (2014) 10, International Journal of Innovation and Scientific Research 40.

²³⁵ M Faiza, *Protecting Girls from Undergoing Female Genital Mutilation /Cut: The Experience of Working with the Maasai Communities in Kenya and Tanzania* (Pafido Enterprises 2011).

²³⁶ Sessional Paper No.1 of 2000 on Population Policy for Sustainable Development

The Children's Act adopted the term, 'female circumcision' as opposed to FGM. The term 'female genital mutilation' had been adopted by CIA in 1990, and WHO required states to adopt it as a campaign against FGM. A lot of controversy amongst African scholars had arisen as to what name should be adopted. Whereas the pre-independence efforts were geared towards civilization of the African by terming the practice as barbaric, the Children's Act took a different approach. It reframed female circumcision as a human rights and a health issue. The campaigns against FGM during this period were framed along the health frame and human rights frame. Kenya had ratified the UN Convention on Child, which protected the rights of the child against torture and inhumane treatment.²³⁷

The implementation of the Children's Act did not eliminate cases of FGM in the country.²³⁸ While FGM declined due to the implementation of the Children's Act, one in four women in Kenya still underwent FGM.²³⁹ Outlawing FGM led to the practice being done in secret in order to hide from the wrath of law leading to devastating repercussions such as complicated health conditions and death.²⁴⁰ FIDA Kenya carried out a survey in 2009, eight years later after the enactment of the Children's Act to determine the implementation of the Children's Act of 2001 as a legal mechanism to curb FGM amongst children.²⁴¹ The survey which was carried out in Garissa and Samburu districts indicated that communities were aware of the legal provisions against FGM and the protection that the Children's Act offered children who were at risk of the practice. The implementation of the Children's Act in the focal districts however could not be realized due to various reasons that were forwarded by key informants during the survey. The major reasons were:

²³⁷ Obiora (n.141).

²³⁸ Mabel Imali Isolio and Goretti Osur (eds), *Implementation of the Children's Act to Protect against Female Genital Mutilation: Lessons from Samburu and Garissa District* (FIDA-Kenya 2009).

²³⁹ Towet and others (n. 221).

²⁴⁰ Wangila (n. 9).

²⁴¹ Imali and Osur (n.225).

cultural concerns; religious beliefs; law enforcement officers conspiring with perpetrators to defeat the cause of the law; lack of education awareness; and many actors believing that the time for Act had not yet come.²⁴² The Act also only addressed children and young women beyond the age of majority were not protected under the Act. This necessitated the introduction of a more comprehensive law to address the gaps in the Children's Act.

In order to address the inadequacies in the Children's Act, Kenya enacted the Prohibition of Female Genital Mutilation Act, Chapter 62B of the Laws of Kenya. It defines FGM as 'comprises all procedures involving partial or total removal of the female genitalia or other injury to the female genitalia, or any harmful procedure to the female genitalia for non –medical reasons'.²⁴³

The Act goes on to identify three types of FGM; clitoridectomy, excision and infibulation.²⁴⁴ These are types of FGM that are prevalent in Kenya. The Act safeguards against violation of person's mental or physical integrity through the practice of FGM. It recognizes FGM as an offence hence criminalizing it.

Reference to FGM as a human right violation can only be found in the interpretation of the Bill of Rights under the Constitution of Kenya (Constitution). The Constitution has been celebrated because of its progressive nature.²⁴⁵ It recognizes the application of international instruments ratified by Kenya and general rules of international law to form part of Kenyan law.²⁴⁶ The

²⁴² Ibid.

²⁴³ FGM Act 2011, s.2.

²⁴⁴ Ibid.

²⁴⁵ Japhet Biegon, 'The Inclusion of Socio-Economic Rights in the 2010 Constitution: Conceptual and Practical Issues' in Japhet Biegon and Godfrey Musila (eds) *Judicial Enforcement of Socio-economic Rights in the 2010 Constitution: Conceptual and Practical issues* (10th Series of ICJ Kenya's Judiciary Watch Reports Series, Kenyan Section of the ICJ 2012).

²⁴⁶ Constitution, Article 2.

Constitution is the supreme law and any law including customary law inconsistent with it is void to the extent of inconsistency.

The Constitution identifies both individual and cultural rights under the Bill of Rights. Cultural rights are enlisted under Article 44 which provides that, 'every person has the right to use the language and to participate in the cultural life, of the person's choice'. A person belonging to that culture has the right to enjoy their culture and to join, form and maintain cultural and linguistic associations or other organs of the civil society.²⁴⁷ The right to practice one's culture and pass it to the next generation is therefore recognized and protected in the Constitution. However, the right to enjoy and practice one's culture as stipulated in the Constitution is not an absolute right. A person is prohibited from compelling another person to perform, observe or undergo any cultural practice or right.²⁴⁸ A right to culture can be limited under Article 24 of the Constitution.²⁴⁹ The Constitution also recognizes the rights of minorities and marginalized groups.²⁵⁰ The State shall therefore put in place affirmative action programmes designed to ensure that they develop their cultural values, languages and practices.²⁵¹

FGM Act provides for strict penalties on those performing FGM. It criminalizes FGM through law. It prohibits the practice of FGM in order to safeguard against violation of a person's mental or physical integrity through the practice of FGM. The FGM Act establishes the Anti-Female Genital Mutilation Board as an institutional framework with diverse functions established under the Act.²⁵² These functions include: coordination of education awareness programmes; advise the

²⁴⁷ Constitution, Article 44 (2).

²⁴⁸ Constitution, Article 44 (3).

²⁴⁹ A right or fundamental freedom in the Bill of Rights shall only be limited as provided by law and to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

²⁵⁰ Constitution, Article 56.

²⁵¹ Ibid.

²⁵² FGM Act 2011, s. 5.

government on matters relating to FGM; facilitating resource mobilization for programmes and activities aimed at eradicating FGM; and provide technical and other support to institutions, agencies and bodies engaged in the programmes aimed at eradicating FGM. It provides a monitoring mechanism through the establishment of the Anti-Female Genital Mutilation Board.

There are 8 main offences provided for in the Act;

1. The offence of FGM under section 19 of the Act
2. The offence of aggravated FGM under section 19(2) to the effect that it is a serious offence if in the process of committing FGM, a person causes the death of another
3. The offence of aiding and abetting FGM under section 20 of the Act
4. The offence of procuring a person to perform FGM in another country under section 21
5. The offence of use of premises to perform FGM under section 22
6. The offence of being in possession of tools or equipment connected to FGM under section 23
7. The offence of failure to report commission of FGM under section 24
8. The offence of use of derogatory or abusive language under section 25

These offences attract a penalty of not less than three years imprisonment and a fine not less than two hundred thousand shillings or both.²⁵³ The FGM Act has led to various prosecutions, which shall be discussed in detail in Chapter 4.

3.4 Institutional Framework

3.4.1 Anti-Female Genital Mutilation Board

²⁵³ FGM Act 2011, s. 29.

The FGM Act establishes the Anti-Female Genital Mutilation Board under Part III of the Act. The Board has diverse functions including: coordination of education awareness programmes; advise the government on matters relating to FGM; facilitating resource mobilization for programmes and activities aimed at eradicating FGM; and provide technical and other support to institutions, agencies and bodies engaged in the programmes aimed at eradicating FGM. It provides a monitoring mechanism through the establishment of the Anti-Female Genital Mutilation Board.

Through public participation in the activities of the board, it is possible for government to provide health and psycho social support, shelter services and legal service; petitioning for the reporting of case of FGM particularly where agencies responsible have failed to take responsibilities and participate in public policy making processes and national programmes concerning FGM.

3.4.2 Office of the Director of Public Prosecutions

The prosecutor occupies the most critical position in the administration of criminal justice. At one level, the prosecutor's role is quasi-judicial, that is, the holder of the office has to make an objective decision whether to prosecute offences referred by the police or other law enforcer. At another level, the prosecutor operates as counsel, pushing the case on the culpability of an accused person with the aim to obtain a conviction.²⁵⁴

Article 157 of the Constitution establishes the Office of the Director of Public Prosecutions. It gives the DPP state powers of prosecution, including

- Instituting and undertaking criminal proceedings against any person in regard to any offence alleged to have been committed;

²⁵⁴ Waikwa Wanyoike, 'The Director of Public Prosecutions and the Constitution: Inspiration, Challenges and Opportunities' in Yash Pal Ghai and Jill Cottrell Ghai (eds) *The Legal Profession and the New Constitutional Order in Kenya* (2014) Strathmore University Press

- Taking over and continuing any criminal proceedings initiated by another person or authority but with permission of that person or authority;
- Discontinuance of any criminal proceedings being undertaken by DPP at any stage, except that the DPP requires leave of Court to discontinue the case and that discontinuance taken after the close of the prosecution’s case must result in acquittal.

Prosecutorial powers must be exercised in accordance with Article 157(11): “...*must have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process...*”

The powers and functions of the DPP are further elaborated in the Office of the Director of Public Prosecutions Act, 2013.²⁵⁵ The Act elaborates and regulates the operations of the office of the DPP. The Act provides for the ODPP to retain prosecution counsel for the proper provision of prosecution services.²⁵⁶ As part of this, the ODPP has set up an FGM Unit to deal with prosecution of offences under the FGM Act. The prosecution counsels are drawn from regions, either by posting or ethnicity that is largely considered to be prone to the practice.

3.4.3 National Police Service

The National Police Service (NPS) is a key institution in the framework for prosecution. It is established under Article 243 of the Constitution. The NPS consists of the Administration Police and the Kenya Police Service. The NPS is headed by an Inspector General, who is deputised by

²⁵⁵ Section 3 of the ODPP Act states: “the object of this Act is to give effect to the provisions of Articles 157 and 158 and other relevant Articles of the Constitution.”

²⁵⁶ The ODPP Act (2013), s. 19

the Deputy Inspector-General of the Kenya Police Service and the Deputy Inspector-General of the Administration Police.²⁵⁷

The National Police Service Act, 2011 gives effect to the provisions of the Constitution. It outlines the powers and functions of the NPS. It provides for the establishment of the Directorate of Criminal Investigations.²⁵⁸ The Director, oversees the Directorate which detects and prevents crime, collects and provides criminal intelligence; maintains law and order; undertakes investigations on serious crimes; apprehends offenders; maintains criminal records; conducts forensic analysis; executes directions to investigate given to the Inspector-General by the DPP; coordinate Interpol Affairs and investigate matters forwarded by the Independent Policing Oversight Authority.²⁵⁹ The role of the NPS is crucial in tackling offences relating to FGM.

3.5 Conclusion

It is clear; Kenya has a robust legislative and institutional framework to deal with offences relating to FGM. With this backdrop, there is still room to improve the quality of prosecution from our courts. The offences created under the law are not enough. Prosecution of these offences must be done efficiently and effectively for deterrence to take effect. Prosecutors should be well versed with criminal law and procedure in ensuring that no mistake is made on the charge sheet or even on procedure in court.

It is important for the key institutions to engage as often as possible to ensure there are proper strategies to deal with these gaps. There must be deliberate coordinated efforts in order for the institutions to achieve a common goal of ensuring that society is rid of this heinous practice. There

²⁵⁷ Constitution, Art. 245

²⁵⁸ National Police Service Act (2011), s. 28

²⁵⁹ National Police Service Act (2011), s.35

is also need to document the cases that have been before court in order to grow the body of jurisprudence in the area of law. This is also acts as a guide to prosecutors in executing their work.

CHAPTER FOUR: RESEARCH FINDINGS

4.1 Introduction

This chapter summarises findings of the study based on the data collected and analysed. The main objective of this study was to determine whether Kenya's legislative framework adequately addresses elimination of FGM and determine whether the institutional framework is appropriate in tackling the issue.

The study also sought to assess the role of prosecution as a tool for eliminating FGM in Kenya; to determine the impact of legislation in deterring the practise of FGM and establish challenges facing the implementation of the anti-FGM law.

The following is a summary of the findings and analysis of the same.

4.2 Role of Prosecution as a Tool for Eliminating FGM

The study sought to assess the role of prosecution as a tool for eliminating FGM in Kenya. It also sought to establish the trend in reported FGM cases over the past 5 years. The findings are as a

result of questions posed to respondents with a view to establish whether or not there has been a significant incline or decline in FGM and link the same to the prosecutor's roles.

Quite a majority of the respondents were of the opinion that the practice of FGM had declined between 2011 and 2016. Most of the respondents attribute the decline to the enactment of the Prohibition of Female Genital Mutilation Act, 2011. Others attribute the decline to the success in prosecution of cases of FGM and countrywide sensitization carried out by stakeholders on the Act. With a more professional prosecution authority, the standards of prosecution have had an impact on the manner in which prosecution is conducted.

Increased prosecutorial efforts, marked by increase in the institution of criminal proceedings and arrests made by law enforcement agencies, have led to a decline in the number of reported FGM cases. However, the importance of efficient prosecution cannot be underscored. Prosecutors, must be well versed with the provisions of criminal law and procedure. This ensures that no mistake is made.

In *L.C.N v Republic [2014] eKLR*²⁶⁰, The appellant, was charged with failing to report commission of an offence contrary to section 24 of the Prohibition of Female Genital Mutilation Act as read with section 29 of the Act, being aware that an offence of female genital mutilation had been committed on her child, P N, failed to accordingly report to a law enforcement office.

After pleading not guilty, the trial commenced immediately as the victim child needed to be taken to a rescue home. The appellant had no objection with the trial commencing immediately after plea. On conclusion of the trial, the appellant was convicted and sentenced to a fine of Ksh. 200,000/= in default to serve three (3) years imprisonment.

²⁶⁰ LCN v Republic, Kitale HCCA 92 of 2013 [2014] eKLR

From all that, it is the opinion of this court that there was enough credible evidence establishing that the complainant underwent the forbidden female genital mutilation or female circumcision. She said that the act was prompted by her father who took her to the circumciser. She exonerated her mother, the appellant, and contended that all she (appellant) did was to take care of her after the act.

However, the prosecution evidence against the appellant was not satisfactory to meet the threshold required in establishing beyond reasonable doubt that an offence had been committed. She deliberately failed to report to the law enforcers. Her conviction by the learned trial magistrate was neither proper nor sound. Consequently, this appeal was allowed.

In *Halima Mohamed v Republic* [2016] eKLR²⁶¹, The appellant, was charged with an offence of aiding female genital mutilation contrary to section 20(a) as read with section 29 of the Prohibition of Female Genital Mutilation Act.

She pleaded guilty to the offence and was sentenced to three years imprisonment and in addition to pay a fine of Kshs. 200, 000 in default to serve one-year imprisonment. She appealed against both the conviction and sentence.

The appellant paid one D.D.K Kshs. 500/= to circumcise her daughter. After the circumcision, a report was made to the police. The appellant was arrested and her daughter was taken to hospital for examination where it was confirmed that indeed she had undergone the rite.

The penalty for the offence is provided for under section 29 of the Act. It states:

A person who commits an offence under this Act is liable, on conviction, to imprisonment for a term of not less than three years, or to a fine of not less than two hundred thousand shillings, or both.

²⁶¹ *Halima Mohamed v Republic*, Marsabit HCCA 15 of 2016 [2016] eKLR

The judge concurred with the state counsel that in the circumstances the sentence was excessive. He set aside the sentence by the learned trial magistrate and substitute it with a fine Kshs. 200 000/= and in default to serve 12 months' imprisonment.

Respondents were asked about the challenges faced in prosecution of the cases and ways of improving on the same. A majority of the respondents affirmed that there were challenges. The challenges identified include poor investigation, lack of crucial witnesses and in some instances, hostile witnesses, the cases not being prosecuted to logical conclusion because the families decided to settle the matter out of court, lack of collaboration between agencies, inadequate training and staff shortages.

One respondent went to the extent of pointing out that lack of compelling evidence owing to the fact that the victims are intimidated by their parents or relatives not to testify was a great challenge in the fight against FGM.

The respondents, a majority being prosecutors, were also of the opinion that more cases of FGM need to be reported. The website of the National Council for Law Reporting in Kenya, has a case search, whose function is only limited to results of appellate decisions. This is important to enable prosecutors to adequately prepare for cases during prosecution in the lower courts.

From the results, and despite the challenges faced, increased prosecution has in the past 5 years led to a decline in FGM.

4.3 Impact of Legislation in Deterrence of FGM

There are various pieces of legislation that govern prosecution in Kenya. The study sought to determine the impact of legislation in deterring FGM. This section presents the findings to questions asked.

Majority of the respondents were of the opinion that the current legislative framework is sufficient in addressing the prosecution of FGM related offences (68%). This is deeply rooted in that fact that the penalties are severe in comparison to the persons who are caught as culprits.

Respondents were asked to indicate whether criminal cases handled at the moment, is a deterrent to would be offenders. Majority opined that prosecution did have a deterrent effect because the penalties are severe.

One respondent noted that:

“Most of the FGM offenders are given light sentences and as such perpetrators of the offence are not deterred.”

One respondent was of the opinion that most of the time the community will not report the perpetrators because to them, FGM is not considered an offence. In the event that one is arrested, they will not testify in court. It would therefore be unreasonable to hold someone in remand when the witnesses are unwilling to give evidence.

In *Pauline Robi Ngariba v Republic [2014] eKLR*²⁶², the Appellant, faced two counts of performing female genital mutilation contrary to section 19(1) as read with section 29 of the *Prohibition of Female Genital Mutilation Act*.

In his judgment, the learned trial magistrate acquitted the appellant on the first count as he found that the act was performed by use of threats by the public hence the act was not voluntary. He

²⁶² Pauline Robi Ngariba v Republic, Migori HCCA 6 of 2014 [2014] eKLR

found the appellant guilty of the second count, convicted her and sentenced her to 7 years imprisonment. She appealed against the conviction and sentence.

Section 29 of the Prohibition of Female Genital Mutilation Act provides for a minimum sentence of 3 years. In sentencing, the learned magistrate noted as follows,

“...It is well within public knowledge that FGM is widely practiced in this court’s jurisdiction. I agree with the prosecution that stern action needs to be taken to stem this vice. However, I also take cognizance of the accused person’s mitigation albeit without forgetting the impact of the crime on the victim who was a minor. I hereby sentence the accused person to serve seven (7) years imprisonment...”

The appellant had been warned against performing FGM by the District Commissioner yet she proceeded to do so. Although she is a person of mature age, it is that fact that makes her a person experienced in performing FGM and should she be released; she is likely to perform the FGM again. The appeal was dismissed.

Courts take into account the spirit and intention of Parliament in passing the legislation prohibiting FGM, by properly meted out the sentence as prescribed in law. In *Jessica Magerer v Republic [2016] eKLR*²⁶³, The Appellant was convicted and sentenced to pay a fine of Ksh. 200,000/= in default to serve three years imprisonment for three counts; Aiding the commission of female genital mutilation contrary to section 20 (9) as read with s.29 of the Prohibition of Female Genital Mutilation Act; Failing to report commission of an offence contrary to section 24 as read with s.29 of the Prohibition of Female Genital Mutilation Act; and allowing her premises to be used to perform genital mutilation contrary to section 22 as read with s.29 of the Prohibition of Female Genital Mutilation Act.

²⁶³ *Jessica Magerer v Republic*, Bomet HCCA 82 of 2015 [2016] eKLR

She pleaded guilty to the charges that faced her. Facts were read over to her and she admitted them to be correct. She was later convicted on her own plea. She appealed on the sentence terming it harsh and oppressive. However, s.29 of the Prohibition of Female Genital Mutilation Act provides: - “A person who commits an offence under this Act is liable, or conviction to imprisonment for a term of not less than three years, or to a fine of not less than two hundred thousand shillings or both.”

The sentence, which was meted by the learned trial Magistrate, was the minimum one allowable. It cannot therefore be said to be harsh and excessive. The intention of parliament must have been to endeavour to eradicate the culture of genital mutilation. The sentences provided in the Act are towards that goal. The appeal was dismissed.

Further, respondents were asked to indicate the changes that they would want to be made to the legislation in order to improve prosecution. A majority suggested a relook at section 24²⁶⁴. This was informed by a decision of the Kapenguria Law Courts.

In that case, *KL v Republic [2016] eKLR*²⁶⁵, K L, was charged with the offence of failing to report the commission of female genital mutilation, contrary to Section 24 of the Prohibition of Female Genital Mutilation Act 2011. NC together with her two friends, who intended on undergoing FGM left their homes. They went to Mama K’s house because they knew she could perform it. She came back home after 10 days. That was when her mother found out she had undergone FGM. The area chief was informed through a phone call by SP that his daughter had gone missing from home for four days. Several days later, police reservists raided the home of Mama K and found

²⁶⁴ Section 24 of Prohibition of Female Genital Mutilation Act reads that:-

“A person commits an offence if the person, being aware that an offence of female genital mutilation has been, is in the process of being, or intends to be committed, fails to report accordingly to a law enforcement officer.”

²⁶⁵ *KL v Republic, Kapenguria HCCA 18 of 2016 [2016] eKLR*

the girls there. Police arrested the girls together with their parents. NC had undergone FGM. K.L had not reported that NC had gone missing.

KL was charged, tried and convicted for the offence. She appealed against the conviction and sentence.

The court in allowing the appeal, considered the ingredients of section 24 of the FGM Act which are that: -

1. *Another person intends to, is in the process of or has committed an offence of Female Genital Mutilation.*
2. *The accused knew of the said intention, process or commission.*
3. *The accused did not report it to a law enforcement officer.*

The court noted that:

“... The three elements for the offence of failure to report omission of offence if applied strictly can occasion injustice to an accused person. To be aware that an offence of female genital mutilation has, is in the process of being, or intends to be committed might most likely not happen by choice, but by chance. It can therefore happen when and where circumstances cannot allow the suspect to report immediately. The elements suggest the time allowed within which to report is before arrest. Reporting is not just to anyone but to a law enforcement officer, who is destined in Section 2 to include a police officer, a member of the provincial administration, a children’s officer, a probation officer, a gender and social development officer and a cultural officer. These groups of persons are mainly found in Town centres and are hardly accessible by persons living in vast, remote villages of some counties like West Pokot...”

The judge in his obiter relied on the case of *Marbury –vs. - Brooks 20 US [7 Wheat] 556, 5L Ed. 522*) where it was observed that:

“It may be the duty of a citizen to proclaim every offence which comes to his knowledge, but the law which would punish him in every case, for not performing this duty is too harsh.”

He continued that lack of ‘*mens rea*’ provisions in the element of the offence like: - “... *having an opportunity to report fails to do so within a reasonable time or as soon as is practically possible, or without any reasonable cause, fails to report...*” Makes the said offence vague, difficult to apply to real varied situations and amounts to unacceptable encroachment of civil freedom.

The words ‘being aware’ would need some explanation. It would be unjust to hold an accused culpable if he or she was made aware out of some unreliable, unbelievable and undependable information of which a reasonable person given the circumstances would not have taken the information as true. The judge noted that it is time the Attorney General should have Section 24 of the Prohibition of Female Genital Mutilation Act relooked to ensure justice to those charged under it, or have it deleted all together.

In general, majority of the respondents were of the opinion that legislation is not sufficient in addressing the prosecution of FGM. There is need to complement it with public awareness or community sensitization on the criminalization of FGM.

4.4 Institutional Roles

Institutional framework structure is important in the fight to eliminate FGM. The fight towards the elimination of FGM cuts across a number of institutions, each with a particular role to play. The study sought to establish the roles played by these institutions.

4.4.1 Office of the Director of Public Prosecutions

According to the respondents from the ODPP, the institution is tasked with three main roles as far as elimination of FGM is concerned i.e. prosecuting cases involving perpetrators of FGM related offences, direct investigations when called upon to do so and participate in the making of policies and laws on FGM.

ODPP has established within it a 20 person specialised unit dealing with FGM. They however, only handle cases on FGM when called upon, otherwise they prosecute all other offences presented before court. They are adequately trained to deal with cases on FGM.

4.4.2 Anti FGM Board

The Board, has lived up to its functions as set out in the Act. It has undertaken programs to educate communities on the dangers of FGM. The most positive impact has been its ability to reach out the young men in those communities to make a stand not to marry any girls who have undergone the cut. This has a far reaching effect in the community since FGM is closely associated with early marriages.

The Board has been able to partner with other state agencies as well as county governments to reach out as many people as possible. Through these efforts, community elders have been trained on the consequences of FGM and they have since made declarations against FGM in their communities.

Funding for some of these activities has become a thorny issue. However, through donor agencies such as the UNFPA and UNICEF, they are able to undertake their duties.

4.4.3 Courts

Prosecutors constantly interact with the courts since that is where they present cases. In response to the question on the number of judges/magistrates based in particular stations, and how many cases they handle cases of FGM. A respondent provided that they had 1 judge and between 2 to 4 magistrates, all of whom handle matters of FGM with most taking an average of 5 months to conclude the matters.

This is commendable. FGM cases are usually on the rise when schools are on holiday. However, the trend has been that the practise is declining and so the effect is that the courts are in a great position to handle them.

It is noteworthy that stakeholder participation and best interests of the child play a role in the manner in which courts deal with matters relating to FGM. In *Agnes Wanjiru Kiraithe & another v Attorney General & 2 others [2014] eKLR*²⁶⁶ The petitioner filed the petition dated 11th November 2013 in which she applied for various orders to quash *Kajiado Children's Case No. 13 of 2013* and to prohibit her prosecution in Criminal Case No. 3272 of 2013 and a stay of Milimani PC No. 204 of 2013.

The 1st petitioner is the chief administrator of Soila Maasai Girls Centre (“the Centre”) which is established with the objective of rescuing girls facing the risk of female genital mutilation (FGM). The Centre is supported by a charitable foundation based in the United Kingdom. The only criterion for accepting girls at the Centre is that they do not undergo FGM.

In April 2013, the Centre allowed the girls to re-integrate with their families. The girls were allowed to leave for their homes and upon return to the Centre one of the girls fell sick. It was

²⁶⁶ *Agnes Wanjiru Kiraithe & another v Attorney General & 2 others, Milimani HCCP 536 of 2013 [2014] eKLR*

discovered that she had contracted hepatitis as a result of undergoing FGM. The Centre then decided to screen the other girls and it was discovered that 49 girls had undergone FGM and were in various stages of healing. The girls were unwilling to disclose the information on the perpetrators.

As a result of these events the Centre expelled the 49 girls who had undergone FGM. The Children's Department applied to the Children's court vide *Children's Case No. 13 of 2013* to compel the Centre to accept the girls back to the school. The learned magistrate hearing the matter granted interim relief directing the children to go back to the Centre pending hearing of the suit. At the same time, the administrator was charged with violating the rights of the children contrary to section 19 as read with section 20 of the *Children Act, 2001* by causing the private parts of the children to be examined without their consent or that of their guardians. The judges allowed the parties to settle the matter by considering a monitoring protocol presented to them, upon consultations with the parents and guardians of the girls at the Centre. The court urged the FGM Council to consult with stakeholders to ensure that such a situation does not recur.

There are also matters that have been lost owing to courts negligence to follow the right procedure as stipulated. In *SMG v RAM [2015] eKLR*²⁶⁷, the appellants, a husband and wife, were charged with the offence of failing to report commission of female genital mutilation contrary to section 24 of the Prohibition of Female Genital Mutilation Act, 2011.

After pleading not guilty they were tried, convicted and sentenced to pay a fine of Kshs. 300,000.00 and in default to serve four years imprisonment. They appealed against the conviction and sentence

²⁶⁷ SMG v RAM, Migori HCCA 66 of 2014 [2015] eKLR

on the ground that there was insufficient evidence to convict them as they were not involved in taking BM for FGM and that the sentence imposed on them was harsh and excessive.

The appeal was dismissed owing to the fact that the trial magistrate erred in invoking section 150 of the Criminal Procedure Act²⁶⁸ after the close of the prosecution and defence. The judge noted

“...this provision is not a *carte blanche* [section 150 of the Criminal Procedure Code] for the court to call witnesses after the close of the defence case when the court feels that the prosecution has not established its case. There may well be exceptional circumstances where the provision may be invoked but this is not one of them. Furthermore, the learned magistrate did not ask her any questions to clarify any points of evidence he may have noted. The prosecutor had the opportunity to present the relevant evidence or elicit necessary facts from the witnesses but he did not. In light of the paucity of evidence, the only option available to learned magistrate was to acquit the accused....”

The conviction and sentence was quashed.

4.5 Inter-Agency Coordination

Enhanced inter-agency coordination ensures that roles are not duplicated that that institutions complement each other. The study also sought to establish whether inter-agency coordination is a solution to the inadequacies that each institution faces in discharging its role.

A number of the respondents, who gave their views on the question of inter-agency coordination, considered that it was adequate. All of the respondents were in agreement that there exist other

²⁶⁸ Section 150 of the Criminal Procedure Act provides as follows;

A court may, at any stage of a trial or other proceeding under this Code, summon or call any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and reexamine a person already examined, and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case:

Provided that the prosecutor or the advocate for the prosecution or the defendant or his advocate shall have the right to cross-examine any such person, and the court shall adjourn the case for such time (if any) as it thinks necessary to enable the cross-examination to be adequately prepared if, in its opinion, either party may be prejudiced by the calling of that person as a witness.

agencies other than their own organizations that deal with FGM. Some of these agencies were instrumental in putting in place a policy that formulated the Act²⁶⁹.

A majority of the respondents who answered the question whether results of investigations, prosecutions and court decisions are shared among the relevant enforcement agencies, were of the view that there is information sharing through meetings between the agencies concerned and through Court User Committees.

It was clear that partnerships are the starting points towards achieving inter-agency coordination. Respondents gave examples of the partnerships that exist between their organisations. The Anti FGM Board works closely with the ODPP to find out progress made on cases that are reported for prosecution.

It is apparent that the fight to eliminate FGM is not exclusive to one agency but that it is important that agencies work together in order to create a safe environment of the girl child. A number of the respondents proposed training sessions to be conducted together with other agencies in order to bolster their capacity.

4.6 Discussion

From the findings envisaged in this chapter, it is clear that prosecution and public awareness has led to a decline in FGM related offences. The present legislative framework has played a huge role in deterring would-be offenders since it is the backdrop upon which prosecution arises. The study has therefore affirmed its hypothesis that legislation may be used in eliminating FGM.

The Prohibition of Female Genital Mutilation Act, 2011 has created offences and penalties which have in essence played a key role in deterring the practice of FGM. The penalties the law outlines

²⁶⁹ National Policy for the Abandonment of FGM (2008-2012)

are severe. It mandates a sentence of three to seven years or a fine of nearly \$ 6,000 for anyone practising FGM, including traditional excisors, parents, doctors and nurses – even the person who supplies the premises and the knife.²⁷⁰ The same penalties also apply to anyone convicted of bringing a girl into Kenya from abroad to be cut; hiring a person to perform FGM; failing to report an incident of FGM; or carrying it out on a Kenyan in another country.

The Act clearly states that claiming FGM is a cultural or religious custom or practice or that the victim gave consent to be cut will not protect the individual from prosecution for the offence. The law has so far proved effective.

The responses on inter agency coordination are a great indicator that efforts to eliminate FGM have borne fruit thanks to agencies working together. This affirms the question as to whether institutional framework is appropriate.

CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

FGM is a barbaric and archaic custom that should not be tolerated. It is a socio cultural practice that involves the pricking, piercing, stretching, burning or excision, clitoridectomy and or the removal of part of or all tissues around a woman's reproductive organs and in some cases infibulation. It has no place in the modern society. Even though it is deeply embedded in culture it is a harmful practice that violates women and children's rights. It has no medical benefits. Data shows that FGM is a painful practice that subjugates young children to pain and in some circumstances leads to death.

²⁷⁰ UNFPA (n.150)

FGM is prevalent in Africa and western countries that receive migrants who practice FGM. In most of African and Middle Eastern communities practicing FGM, the main justifications concentrate on rite of passage into womanhood, morality, virginity, honour and marriage, and sexual control. In western countries that condemn the practice it is seen as a human rights violation and a health risk. That fact that it exists and supported by women is seen as a form of male domination. The WHO classifies FGM into four different types; clitoridectomy, excision, infibulation and unclassified which involves all other harmful procedures to the female genitalia for non-medical purposes such as pricking, piercing, incising, scraping and cauterization

Initially FGM was termed using indigenous names such as *sunna* and later the term ‘female circumcision’. However critics of FGM argued that FGM could not be compared to male circumcision. In 1990, the term ‘female genital mutilation’ was adopted by western female feminist in order to depict the gruesome effect of FGM. Critics of FGM argue that it is a human rights violation and health risk and should not be tolerated. However, proponents of FGM assert that it is an important cultural practice that symbolizes a rite of passage that must be preserved in order to maintain cultural identity. The term ‘female genital mutilation’ is the best term that describes the practice. Using the term ‘mutilation’ sends a clear message that FGM is barbaric and outdated. Using neutral words such as ‘female circumcision’ or ‘FGC’ does not describe FGM as it is.

Due to the negative effects associated with FGM, countries in collaboration with international organizations and communities have adopted various strategies to eradicate the practice. One of the strategies is formulation of laws or introduction of clauses in the penal code outlawing FGM. Outlawing FGM through legislation is one step in eradicating FGM. Law is used as a deterrent tool. It symbolizes State’s political will to eradicate FGM. In most cases, a legal framework should

bring forth social change. Those who do not support the FGM can encourage others to abandon FGM by using the legal framework as a tool. Beyond offering a deterrent mechanism, legal framework against FGM provided support to those who would like to abandon the practice. It provides them with an avenue to exercise their rights and share information with others on the harmful effects of FGM.

Legal responses to FGM were adopted in Kenya during the pre-colonial period. However, the legal framework against FGM did not work during the pre-colonial period. After independence, Kenya enacted the Children Act and FGM Act. It decreased the prevalence of FGM, however most practices went underground as communities opposed the law. The implementation of the FGM Act has seen various prosecutions across the country. The Anti-Female Genital Mutilation Board in Kenya has also provided a strong institutional framework providing awareness on the effects of FGM.

During the pre-colonial period, the 1956 Meru ban termed FGM as uncivilized culture as propounded by the missionaries and colonial government. The 2001 Children's Act has termed FGM as a human rights violation issue. The 2011 FGM Act has framed FGM as a human rights issue, has adopted the term 'mutilation' and outlawed medicalization of FGM as propounded by western feminist. This has led to resistance from the communities that practice it.

The use of legislative framework as a means to curb FGM has faced numerous challenges. The aim of legislative framework was to catalyse social change and lead to the abandonment of the practice. However, in some communities instead of bringing forth social change it has worsened the situation, leading to the practice going underground. Due to fear of prosecution and wrath of law, people do not report cases even when death occurs. Opponents of criminalizing FGM argue that it derails the efforts to eradicate it by pushing it underground.

Outlawing FGM is also seen as an attack to the community's culture which is held so dearly. The right to enjoy and participate in one's culture is provided for in international human rights instruments such as UDHR, ICESCR ACPHR amongst others. However, the right to culture is not absolute. It is a limited right under circumstances where it is harmful and also when individuals are forced to participate against their choice. FGM is a harmful practice and should not be supported on the pre-text of culture.

In Senegal the Anti-FGM law was resisted because it was seen as an imposition of western culture. It is true that legislators should work with the communities by creating awareness on the negative effects of FGM in order for it to be implemented fully.

Legislative responses alone cannot be used to eradicate FGM. Legislative measures are most effective when complemented and even preceded by a range of broader policy measures, involving both general and focused awareness raising and the promotion of dialogue within and among different groups. If the introduction of a law is poorly timed or is not accompanied by complementary social support mechanisms, it may drive the practice of FGM underground or encourage cross-border movement. The threat of imprisonment or a fine may act as a deterrent, but alone it does little to change parents' perception that it is in the interest of their daughters to undergo this procedure.

5.2 Recommendations

Based on the above general conclusions the researcher recommends that:

- a) Governments should increase their efforts to curb FGM. FGM is an archaic custom that is harmful. Government efforts should be aimed at increasing awareness and the promotion of dialogue within and among different groups. Public awareness and education campaigns

which are community-based education programmes should be established in most areas practicing FGM. Information about the problems associated with the practice should be incorporated into the syllabuses of many schools. Implementation of law includes creating awareness on its content and objectives. Governments and international community should put in place mechanisms to create awareness on the content of law and the offences it creates. Understanding of law as a deterrent tool can provide an enabling environment to catalyse social change.

- b) Women should be included in the government efforts to eradicate FGM. Women who support the abandonment of FGM and who have undergone the practice can be used as a tool to pass to the community the effects of FGM. Also women circumcisers who have abandoned FGM should form part of the group that informs the community on the negative effects of FGM.
- c) Other forms of rite of passage should be promoted amongst the communities that practice. It includes retaining the practice but stopping the cutting of female genitalia. FGM is justified on the ground that it is a form of rite of passage from childhood to womanhood. Those who have not undergone the practice are not eligible for marriage and are considered to be children. During this period women are taught on their role as wives and also societies expectations. Other forms of rite to passage will provide an avenue where women can be taught about their roles without undergoing FGM.
- d) Law alone cannot change behaviour. Legal reform should be accompanied by other change efforts that address culturally mediated social, moral and religious norms that may uphold the practice. The government should develop, introduce and implement legislation in ways that contributes to a social change process that ultimately results in the decision by communities to abandon the practice.

- e) Government should adopt a human rights based approach. A human rights-based approach is particularly important in the development, enactment, implementation and monitoring of legislation on FGM especially where there is societal support for the practice. Such an approach ensures that the legislation is a positive force in promoting the abandonment of FGM/C as it requires public participation of those directly or indirectly affected by the legislation. A legislative approach can promote the abandonment of FGM if accompanied by human rights education programmes and community dialogue.
- f) Government should show a strong political commitment and will. Political commitment should be translated into human, technical and financial resources and comprehensive child protection programmes, policies and mechanisms that coordinate governmental and non-governmental service delivery for children and women – including judicial, police, social, welfare and basic services. This should take into account the level of consensus and social acceptance of FGM. If not it can render laws ineffective, particularly those purely punitive in nature.
- g) There is also need to review the existing laws against its set objectives. The harmonization process should include a review of all existing national laws against the international and regional norms and standards relevant to FGM. This process should include: an analysis of the existing legislation and measures to identify non-compliance or existing gaps against the international and regional provisions, as well as the ways in which that legislation directly or indirectly impacts the lives of women and children of the country concerned; consultations with stakeholders; and the identification of measures to remedy the existing gaps.
- h) Government should also establish a monitoring mechanism to track progress on legislation, as well as on the protection of girls and women from FGM and the realisation of their

rights. Monitoring can be through an independent or self-monitoring mechanism mentioned in the legislation itself, or by a national institutional mechanism that may include various stakeholders, including government, ombudspersons, parliament and civil society. The law should ensure that the coordinating institution responsible for the implementation of the legislation and policy be independent from executive and political authorities.

- i) Government should collaborate with the international community and other NGO's in their efforts to eradicate FGM.

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APPENDIX I: INFORMATION SEEKER'S SURVEY

January 2016

I am a student at the University of Nairobi, conducting a research thesis titled "*Towards The Elimination of Female Genital Mutilation: An Appraisal of Kenya's Prohibition of Female Genital Mutilation Act, 2011.*" The study seeks to investigate whether legislative and institutional framework adequately addresses elimination of FGM.

You have been sampled as one of the interviewees. I would like to ask you some questions detailed in this questionnaire. The entire process will take about 20 minutes. The answers you give will remain confidential and will only be used in analysing the findings of this research.

Please let me know if I have your consent to proceed with the interview.

Yours faithfully,

Frida Ann Akoth Ombogo

APPENDIX II: QUESTIONNAIRE

Name of Organisation.....

Name of Interviewee.....

Age: 20 – 30 31 – 40 41 – 50 51– 60 Above 60

Sex: Male Female

Designation.....

Date.....

ODPP

1. What role does your organization play in eliminating FGM?

.....
.....

2. a) Does your organization have a specialised unit dealing only with FGM?

Yes No

b) If Yes, when was the specialised unit established?

.....

3. How many prosecutors are currently employed in the units charged with enforcing FGM laws in your organization?

.....

4. Is the number sufficient to handle the caseload of cases involving offences relating to FGM?

Yes No

5. Is this their sole responsibility or do they also prosecute other types of offences within the organization?

.....

.....

.....

6. Is there provision for drawing upon other agencies to supplement staff needs for operational requirements or during times of shortages?

Yes No

Offences relating to Female Genital Mutilation

7. Have cases of FGM increased, declined, or remained the same from the year 2010 to 2015, Explain?

Increased Declined remained the same I don't know

.....

.....

8. Which category of persons is most involved in FGM?

.....

.....

9. a) Does liability for FGM extend to persons aiding, abetting, counseling or facilitating the offence, as well as to other accomplices?

Yes No I don't know

b) If yes, what are the requirements to hold persons criminally liable as participants or accessories?

.....
.....

10. Do you consider that the way criminal cases of FGM are handled in Kenya at the moment, is a deterrent to other would-be offenders. Explain?

Yes No I don't know

.....
.....
.....

11. What challenges have you experienced in prosecuting these cases and are there ways of improving them?

.....
.....
.....

12. Do you think it is a good idea to have the ODPP prosecute crimes relating to FGM? Explain

Yes No I don't know

.....
.....
.....

13. Do you think that this has improved the effectiveness of prosecutions in eliminating FGM?

Yes No I don't know

.....
.....
.....

Training

14. What on-the-job training is given to persons joining the relevant Anti FGM unit dealing with FGM related offences in your organisation?

.....
.....

15. a) Are there any planned training sessions on FGM related crime interventions for prosecutors in your organisation?

Yes No I don't know

b) If yes, how often are these training sessions?

.....
.....

16. Is the training received adequate?

Yes No I don't know

17. What may be done to improve training of prosecutors dealing with FGM related offences?

.....
.....
.....

Inter-agency Coordination

18. Are there any inter-agency task forces or other agencies that work on anti-FGM?

Yes No I don't know

.....
.....
.....

19. a) Does the prosecutor in your organization have the power to instigate a prosecution?

Yes No I don't know

.....
.....

b) If No, who instigates prosecutions?

.....
.....
.....

20. Is the responsibility for managing an investigation unambiguous so as to ensure a coordinated investigation and avoid the loss of evidence?

Yes No I don't know

.....
.....
.....

21. Are the results of investigations, prosecutions and court decisions shared among the relevant enforcement agencies, in particular the agencies that handed over the case in question?

Yes No I don't know

.....
.....
.....

22. What partnerships to prevent and suppress FGM currently exist among agencies?

.....
.....
.....

23. a) Are there written protocols, MOUs, committees and so forth?

Yes No I don't know

.....
.....
.....

b) Is Yes, which ones are in place, and with which agencies?

.....
.....
.....
.....

24. a) Are there established ways of sharing information with the other agencies involved in eliminating FGM?

Yes No I don't know

.....
.....
.....

b) Do you think that some agencies tend to hoard information on FGM?

Yes No I don't know

.....
.....
.....

c) If Yes, how do you think this affects the successful prosecution of these cases in court?

.....
.....
.....

25. Do you think there is sufficient coordination among agencies involved in cases of FGM?

- Yes No I don't know

.....
.....
.....

Legislation

26. Do you think the current legislative framework sufficiently addresses prosecution of FGM related offences?

- Yes No I don't know

.....
.....
.....

27. What are some of the changes you would want made to the law, to improve prosecutions of FGM?

.....
.....
.....

Anti FGM Board Representative

28. What role does your organization play in eliminating FGM?

29. Has your organization undertaken any programs to educate Kenyans, particularly communities practising FGM, on the dangers associated with this practice?

30. To what extent has your role on public awareness had an impact on the elimination of FGM?

31. In your opinion, does legislation play a key role in eliminating FGM or is there need to supplement it with other strategies?

32. Have you partnered with any organisations to that end?

33. What are some of the benefits that have come out of the establishment of your organisation?

34. What are some of the changes that you would like to see made to improve your efficiency or capacity to perform your functions as stipulated?

35. Is there provision for drawing upon other agencies to supplement staff needs for operational requirements or during times of shortages?

Judiciary

36. Do you think the courts are addressing FGM related offences as a serious crime?

.....

37. How many Judges/Magistrates are based in your station, and how many handle cases of FGM?

.....

.....

38. How long does the court take to conclude these cases?

.....

39. How many cases of FGM does your station handle on a daily basis?

5-10 10-15 15-20 above 20

.....

40. How many Prosecutors are assigned to each court, and is the number sufficient?

.....

41. Are there any measures that have been put in place by the courts to end FGM Kenya?

.....

.....

Advocates

42. Have you ever had a matter in the courts dealing with FGM?

.....

.....

43. If Any, What was the nature of the offence?

.....

.....

44. Was the matter concluded, and what was the outcome?

.....

.....

45. In your opinion does the ODPP have sufficient capacity to prosecute these matters in court?

.....

.....

46. Are there sufficient Judges/Magistrates to hear these cases?

.....
.....
47. How would you rate the performance of the court in handling these cases? In terms of;

(Very good, good, fair, poor, very poor)

- Speed in handling cases

- Jurisprudence

- Quality of judgments

- Case management

48. Do you think these matters are given the seriousness that they require?

.....
.....

49. What should be done in your opinion to eliminate FGM in Kenya?

.....
.....

Thank you for taking your time to fill in this Questionnaire