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BY

JANESLYVIA ANGUBA OYOLO

STUDENT REGISTRATION NO.

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**RESEARCH TOPIC: TOWARDS ABANDONMENT OF FEMALE GENITAL
MUTILATION IN KENYA**

DECLARATION

DECLARATION BY STUDENT

I declare that this Research Project Paper is my original work and has not been submitted for any other degree.

.....

.....

JANESLYVIA ANGUBA

REG: NO. G62/11382/2018

DATE:

DECLARATION BY SUPERVISOR

This Research Project Paper has been submitted for examination with my approval as the University Supervisor.

.....

.....

DR. NANCY BARAZA

DATE:

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Protocol to The African Charter On Human and People's Rights On the Rights of the Women in Africa
(The Maputo Protocol)

The Universal Declaration of Human Rights of 1948.

LIST OF ACRONYMS / ABBREVIATIONS

ACRWC: African Charter On the Rights and Welfare of the Child.

CEDAW: Convention on the Elimination of all Forms of Discrimination against Women

CRC: Convention on the Rights of the Child DHS: Demographic Health Survey

FGC: Female Genital Cutting

FGM/C: Female Genital Mutilation and Cutting

FGM: Female Genital Mutilation

ICESR: International Covenant On Economic, Social and Cultural Rights.

KDHS: Kenya Demographic Health Survey

KIHBS: Kenya Integrated Household Budget Survey

MoH: Ministry of Health

MYWO: Maendeleo ya Wanawake Organisation

UDHR: THE UNIVERSAL DECLARATION OF HUMAN RIGHTS OF 1948.

WHO: World Health Organisation

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CHAPTER ONE INTRODUCTION

1.0 Background of the Study

The international legal context for the elimination of harmful traditional practices, including Female Genital Mutilation (FGM) is provided for by a number of Human Rights Conventions and Declarations such as The African Charter on the Rights and Welfare of the Child (ACRWC)¹, The United Nations Universal Declaration of Human Rights of 1948 (UDHR)², The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)³ to which Kenya is a Party. Consequently, continuation of the practice of FGM can no longer be justified and defended on the grounds that it is a custom within the Kenyan culture.

The International Day of Zero Tolerance to Female Genital Mutilation is celebrated annually around the world on every 6th of February as adopted by the United Nations Sub-Commission on Human Rights as an international awareness day in effort to promote eradication of FGM.⁴ The World Health Organisation (WHO) estimates that roughly 100 to 140 million women and girls have undergone FGM, a greater percentage being African girls.⁵ This United Nations-sponsored day of awareness has not been the only action aimed at abolition of the practice in recent years. Through numerous print and web-based articles, rallies, conferences, seminars, and legislative efforts, several international and local agencies have led the efforts to eliminate the practice citing its violation of human rights and negative effects on women's health as moral imperatives to its abolition. Of great recognition is the release of an interagency statement on eliminating "female genital mutilation" in 2008 as a reaffirmation of the commitment that the UN and WHO made in 1997 to reduce the prevalence of FGM by the nine UN agencies along with the World Health Organisation. Promisingly, both international and local organizations have in recent years

¹ The African Charter on the Rights and Welfare of the Child adopted by the Organisation of African Unity (OAU) Assembly on 11 July 1990 and entered into force on 29 November 1999 under article 21

² The United Nations Universal Declaration of Human Rights of 1948 under Article 25

³ CEDAW of 1979, article 1

⁴ UN General Assembly. (2012). Resolution [A/RES/67/146](#): Intensifying global efforts for the elimination of female genital mutilations. Retrieved from: www.un.org

⁵ World Health Organization.(2005), Make every Mother and Child. Count, Geneva: WHO Press.

revitalised their efforts to eradicate the practice as recognised in **Ndegwa v. Canada (Minister of Citizenship and Immigration)** [2006].

Statistics relating the numbers of women having undergone some form of FGM are especially inapprehensible considering the numerous legal measures globally promising heavy sanctions against practitioners. In Africa, the Maputo Protocol guarantees numerous rights to women, including a provision for the prohibition of all forms of FGM. The protocol has been ratified by more than 27 countries.⁶ Additionally several states have passed their own legislations against FGM with frightening sanctions for the practitioners. It is agreeable that FGM has unquantified potential consequences to the victims inclusive of a plethora of health risks such as “chronic pain, infections, decreased sexual enjoyment, psychological consequences and post-traumatic stress disorder”. FGM has also been correlated to increased infant mortality.⁷ It is ironic and saddening that the potential ramifications of not being circumcised often seem to carry more weight than potential health risks as per the proponents of FGM.

Kenya has great ethnic and cultural diversity, as reflected in the differing rates of FGM across the ethnic groups, as well as the type of FGM performed and the underlying reasons for practising it. Somalis who live predominantly in the North Eastern province practice FGM at a rate of 97.7%. The next highest prevalence is found among the Kisii (also known as the Abagussi or Gusii) at 96.1% and the Maasai at 73.2%. By contrast, the Luhya and Luo have the lowest rates of less than 1%.⁷

In Kenya, the Ministry of Health launched the National Plan of Action for the Elimination of FGM in order to reduce the proportion of girls, women and families that will be affected over the next twenty years in 1999. This included a government-led commission to coordinate activities for the elimination of the practice, bringing together partners involved in the fight against FGM on national and regional levels to share expertise, raising resources and collaborating on initiatives. The commission has had mixed success in establishing networks at regional level, for example, Kuria has a thriving network which coordinates anti-FGM action, whereas in Kisii attempts to

⁶Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa of July 2003

⁷ Demographic Health Survey Report 2008-09

establish a strong network have been largely unsuccessful to date. Local and international NGOs such as Maendeleo ya Wanawake Organization (MYWO) along with the Programme for Appropriate Technology in Health (PATH), developed a comprehensive programme to end FGM. For instance, Alternative Rites Passage (ARP) which has usually been part of a programme involving raising community awareness, working with schools, health providers, religious and community leaders. Despite both the government and non-governmental organizations' efforts and interventions to reduce the practice, the community still seems to hold on to it. The study therefore seeks to undertake an in-depth investigation into the socio-cultural contexts within which FGM is practised, how it is rationalized, the practitioners, the patterns, trends, effects and efforts to eradicate it and why it goes on undetected.

While efforts to combat FGM are normally presented as part of a large human rights agenda, women continue to receive special attention as “survivors” of male-dominated societies. Joanna Russ studies that the prevailing moral impetus to stop the circumcision of girls has always relied on the perceived helplessness of “native women” and the foreigner’s unique ability to save them.⁸

In **VM (FGM - Risks - Mungiki - Kikuyu/Gikuyu) Kenya v. Secretary of State for the Home Department** [2008], a Kenyan woman and her daughter had claimed asylum on grounds of fear of being subjected to FGM by her boyfriend and other members of the Mungiki which is a banned ethnic organisation sect in Kenya. Mungiki is a kind of a religion, which apparently originated in the late 1980s among the Kikuyu Language speakers of Kenya as a secretive sect and bears some similarity to mystery religions. Specifics of their origin and doctrines are unclear. What is clear is that they favour a return to indigenous African traditions.⁹ Upon reconsideration the Asylum and Immigration Tribunal (AIT) found that she and her daughter could not relocate anywhere in Kenya as there is no sufficiency of protection available to her anywhere in Kenya. She was therefore granted refugee status.

Perhaps the emphasis has changed from needing to protect women from the native men to needing to protect them from human rights violations of ignorant or apathetic governments (incidentally, post-Independence, under the jurisdiction of native men), but international agencies are still

⁸ Joanna, R. (1985) *Magic mommas, trembling sisters, puritans & pervers: Feminist essays*. The Crossing Press Feminist Series.

⁹ McCrummen, Stephanie (2 July 2007). "Brutal Kenyan Sect Aims to Provoke Strife". Retrieved 25 February 2019 – via www.washingtonpost.com.

intervening to protect women with a lot of the same biases of the Second Wave discourse. Women are disproportionately affected by inadequacies in governmental policies and their well-being often directly contributes to the well-being of their communities. However, the discourse that focuses on female circumcision and not male circumcision has always operated on altruistic sexism.¹⁰

At the end of 2011, the existing anti-FGM law was replaced by the more robust Prohibition of Female Genital Mutilation Act 2011. This closed loop holes in the previous law, criminalising all forms of FGM performed on anyone, regardless of age, aiding FGM, taking someone abroad for FGM and stigmatising women who have not undergone FGM. There are many local NonGovernmental Organizations, faith-based organisations, international organisations and multilateral agencies working in Kenya to eradicate FGM. A broad range of initiatives and strategies have been used. Among these are:

- a) health risk/harmful traditional FGM practices approach: addressing the health complications of FGM and educating traditional FGM practitioners and offering alternative income together with alternative rites of passage (ARPs);
- b) religious-oriented approach: Intergenerational dialogue coupled with promotion of girls' education to oppose FGM and supporting girls escaping from FGM/child marriage. This is to cultivate an understanding that even though cultural practices may appear senseless or destructive from the standpoint of others, they have meaning and fulfil a function for those who practise them. However, culture is not static; it is in constant flux, adapting and reforming. People will change their behaviour when they understand the hazards and indignity of harmful practices and when they realise that it is possible to give up harmful practices without giving up meaningful aspects of their culture.
- c) legal approach / human rights approach: A human rights approach acknowledges that FGM is a violation of women's and girls' human rights.

Kenya has a patriarchal society and there are moral and cultural restrictions on women and their behaviour. One prominent religio-social taboo that impacts FGM is the belief against women achieving sexual pleasure. Unplanned pregnancies are also considered taboo and there are many

¹⁰ Oliner, P. M. (1992). *Embracing the Other: Philosophical, Psychological, and Historical Perspectives on Altruism*, New York: University Press.

taboos and rituals associated with the childbirth process. Coinciding with the cultural patterns surrounding reproduction is the taboo of openly discussing sex and sexuality. Studies have shown that Kenyan mothers are struggling to overcome cultural restrictions to teach their daughters about sexual maturation, abstinence, and contraceptives.¹¹ Due to the diversity in underlying ethnic and cultural traditions and beliefs that underpin FGM, organisations need to tailor anti-FGM initiatives and strategies accordingly. Programmes have worked best in Kenya when they are cooperative and inclusive. There are still many challenges to overcome before FGM is eradicated in Kenya, but with new legislation and active anti-FGM programmes progress ought to continue in a positive direction.

1.1 Statement of problem

Although there exists legal provisions and framework protecting women from Female Genital Mutilation, nevertheless, this inhumane treatment and violence against women rights still persists in the name of upholding cultural values. In Kenya, the effects of this legislation are yet to be seen since no valuable steps have been taken to combat the practice beyond having the laws passed in the parliament. It then begs the question of why the stringent legislation on the matter has not seen much success; if such success can indeed be measured in number of prosecutions.

The rights of women and girls are enshrined in various international, regional and national instruments highlighting the right of the girl child to live free from gender discrimination, free from torture, to live in dignity and with bodily integrity. More particularly, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) under article 2 articulates that “the State shall ensure the elimination of every form of discrimination against women and also ensure the protection of the rights of the woman” and article 5 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa which provides for the right to be free from all forms of discrimination particularly those harmful practices which negatively affect the human rights of women and which are contrary to the recognized international standards.¹² Several governments have legislated and signed declarations stating that they support women and girls’ human rights.

¹¹ Crichton J. (2012) Mother–daughter communication about sexual maturation, abstinence and unintended pregnancy: Experiences from an informal settlement in Nairobi. *Kenya Journal of Adolescence*, 35(1): 21–30.

¹² CEDAW of 1979, article 2

Whether this has adequately been done in Kenya in the most effectual manner is the question of this study.

1.2 Justification of the study

In Kenya, barely does a week end without having news about FGM cases in the society aired by our local media. It is therefore very important to assess whether the provisions of the anti-Female Genital Mutilation laws in Kenya have been complied with and their adequacy with regards the subject and the existence of any other measures that may complement it. There has been limited researches conducted to find out why the practice still persists; a basis upon which this study is justified.

Despite the presence of legal regulations and knowledge of its negative effects upon the girl child, FGM still continues to be a headache in the society today. The society therefore needs to establish solid mechanisms to encourage the development of the girl child to her fullest potential and promote safe and productive transition from girlhood to womanhood. Every child needs to be free from all forms of discrimination particularly those harmful practices which endanger their health and general well-being. This will greatly support gender equality and women empowerment which are tools supporting societal development.

1.3 Research Questions

1. Has the Kenyan legal framework adequately addressed Female Genital Mutilation situations and the possible measures that can be taken by societal entities to curb FGM practices?
2. How does the persistence of certain cultural norms, traditions and stereotypes perpetuate violence against women and is there need to free the girl child from the violence?
3. What are the societal perceptions, attitudes and behavior regarding FGM and how does it affect gender equality and societal development?

1.4 Main Objective

The overall objective of the study was to examine the adequacy of the Kenyan legal framework enactments aimed at addressing FGM and make recommendation on the flaws of the laws or establish complementary measures that may back up the legal regulations.

1.4.1 Specific Objectives

- 1) To discuss the possibility of protecting women against violence and thus support their full participation in political, social and economic development hence contribute to the achievement of the millennium development goals and promote gender equality and women empowerment.
- 2) To identify factors influencing the practice of Female Genital Mutilation in Kenya.
- 3) To support the promotion of gender equality through advocacy of community involvement in supporting activities aimed at eradication of harmful practices such as FGM.

1.5 Hypothesis

Although there exist vast legal regulations against FGM, nevertheless, it is astonishing that this inhumane treatment and violation against women rights is still practiced as uncovered by our media as an almost daily occurrence because its proponent believe that it is a way of upholding their cultural values.

This study proceeds on presumption that:

1. Girl child protection is not yet recognized in many Kenyan communities,
2. Distinct sector and comprehensive realistic legal frameworks are inadequate or lacking altogether.

1.6 Theoretical framework: African Feminism

Feminist theories are the most significant theories used for analyzing the status of women and men in society while trying to bring a change to women's subordination caused and reinforced by gender inequalities in patriarchal societies. In the female genital mutilation context, mainstream feminists argue that the practice reinforces men's domination over women and creates inequalities¹³. They also assert that FGM is practiced to control female sexuality as clitoral mutilation weakens women sexual desires.¹⁴ The mainstream feminist perspective, largely originating from the west, condemned FGM as a violation of women's rights that must be handled as universal women's rights and claimed that the cultural practice must be outlawed. African

¹³ Hosken, F.P. (1979). Genital and sexual mutilation of females, (second edition) Lexington, MA: Women's International Network News, 1993, 114-115, 192-202, 216-218.

¹⁴ Rigmor, C. B. & Denison, E. (2012). Does female genital mutilation/cutting affect women's sexual functioning? A systematic review of the sexual consequences of FGM/C. Sex Social Policy, 9, 41-56.

feminism became necessary in part due to mainstream feminism's exclusion of the experiences of the black woman and the continental African woman. Mainstream feminisms does not take into account the particular issues black women face at the intersection of both their blackness and their womanhood. Mainstream feminism often classifies African women as "women of color," which groups and thereby represses the African woman's historical trajectory and specific experience.

African feminism was not wholly a reaction to being excluded from white feminists' vision of feminism, but also from their own ingenuity and desire to create a feminism that embraced their backgrounds and experiences. African feminism voices the realities of women in varying African countries. Women's needs, reality, oppression and empowerment are best addressed by having an inclusive and accommodating understanding of the generic and more general issues as well as the peculiarities and group attitude to self-definition as women. Naomi Nkealah writes that African feminism "strives to create a new, liberal, productive and self-reliant African woman within the heterogeneous cultures of Africa. Feminisms in Africa, ultimately, aim at modifying culture as it affects women in different societies."

African feminists argue that African women's bodies cannot be separated from their cultural contexts hence pointing at the failure of mainstream feminist perspectives.¹⁵ Awa Thiam is one of the most prominent Black African feminists. Thiam's work spoke directly of harmful traditional practices such as female genital mutilation and suggested potential solutions for the abandonment of FGM. Thiam's Black African feminist perspective is more holistic, locally crafted, and brings to light African women's life and lived experiences with the ultimate goal of eliminating such detrimental practices. When such considerations emanate from Black African Feminists, it reflects genuine inquiries while encompassing local knowledge to explain the FGM system and the ways in which African women cope with the actual differential treatment resulting from FGM. Awa Thiam acknowledges the importance of social and cultural contexts as well as the social creation of meanings concerning individual development, and how these meanings affect women's lives. It can be utilized in the exploration of female genital mutilation across locales as well as the diaspora and within multiple contextual, cultural, and structural influences.

¹⁵ Thiam, A. 1995. *Speak out, Black sisters: Black women and oppression in Black Africa*; translated by Dorothy S. Blair. n.p.: Chicago: Research Associates. ²³ Thiam, A. (1978). *La parole aux Negresses*. Paris: Donoel/Gonthier

Dorkenoo Efua, who was a Ghanaian campaigner against FGM reported that FGM does not operate in a socio-cultural and economic vacuum and even armed with knowledge many poor women may still find it difficult to break away from the overt patriarchy which dominates their lives. By focusing purely on mass information campaigns which raise the awareness of people to the health dangers associated with FGM we may not fully meet the needs of rural and poor women. Another lesson from campaigns to combat FGM in Africa is that the elite are breaking away from the practice. The reason often cited for this change is the education of women. Educated urban women are not under the same social pressures: for example they may not be living with the extended families and will therefore have more autonomy in making decisions on the well-being of their girls. Also, their daughters are more likely to marry into a similarly educated social class where conservative attitudes towards women such as insistence on FGM may be slightly modified. We need to focus on the rural, poor and uneducated women if we are to empower them to take control over their health, their bodies and their sexuality Taking into account this idea, the theoretical proposal of this project is based on the Feminist theories. Feminism involves political and sociological theories and philosophies concerned with issues of gender difference, as well as a movement that advocates gender equality for women and campaigns for women's rights and interests.

The different feminist frameworks contemplated thus far brought diverse pieces of the puzzle in our understanding of FGM. For example, mainstream feminist perspectives did very well in interpreting and framing the issues around FGM and was able to demonstrate how it enforces gender discrimination and women's oppression and subordination. However, it did very little in addressing the ways in which these women (plagued by poverty, lack of education, and lack of resources) can understand the external influences that shape their decisions¹⁶. The mainstream feminism failed to consider possibilities of women's autonomy and diversity. As they lump all African women in a homogenous group, they failed to acknowledge diverse ethnicities, social locations, cultural factors, contexts, and multitudes of intersectionality that African women experience.

¹⁶ UNICEF. (2016). UNICEF's data work on FGM/C. Retrieved from UNICEF website <http://www.unicef.org/media/files/FGM/C>

The African feminists were able to take a step further in bringing out issues of contexts that have a great influence in male-female relations that reject the individualistic and adversarial premises as promoted by their western counterparts. However, most African feminists, in their response to what was perceived as an imperialist and colonialist discourse that truly victimized African women while depicting them as passive, powerless, and exploited¹⁷ missed to consider male-female power relations in African traditional patriarchal societies as well as exploring the deplorable economic arrangements for women as their situation turns relations into provider-dependent relationship thus creating female dependency¹⁸

Radical feminism considers the male controlled capitalist hierarchy, which it describes as sexist, as the defining feature of women's oppression. Radical feminists feel that there is a male-based authority and power structure and that it is responsible for oppression and inequality, and that as long as the system and its values are in place, society will not be able to be reformed in any significant way. Radical feminists see no alternatives other than the total uprooting and reconstruction of society in order to achieve their goals.

Submissive attitudes are part of a lifetime of socialization and are solidified by the rituals surrounding FGM. Those rituals teach the female to recognize and submit to male power and authority. Certain rites of passage ceremonies that were considered by locals as the core of African gender socialization. A rite of passage is characterized as a life cycle ritual that marks an individual or group's transition from one state to another. Such gender socialization processes affect individual identities, social values, and social standing.

Liberal feminism asserts the equality of men and women through political and legal reform. It is an individualistic form of feminism, which focuses on women's ability to show and maintain their equality through their own actions and choices. Liberal feminism uses the personal interactions between men and women as the place from which to transform society. According to liberal feminists, all women are capable of asserting their ability to achieve equality, therefore it is possible for change to happen without altering the structure of society. Issues important to liberal

¹⁷ Dorkenoo, E. (1994). Cutting the rose: Female genital mutilation: the practice and its prevention.

¹⁸ Nnaemeka, O. (1998). Sisterhood, feminisms, and power: From Africa to the diaspora. Trenton, NJ: Africa World Press.

feminists include reproductive and abortion rights, sexual harassment, voting, education, "equal pay for equal work", affordable childcare, affordable health care, and bringing to light the frequency of sexual and domestic violence against women hence an important contribution towards abandonment of FGM.

The theory that there are fundamental personality differences between men and women, and that women's differences are special and should be celebrated. The development and continuation of FGM is closely tied to patriarchal ideology and to the structures that support it. Patriarchy is defined as a structure that oppresses women for the benefit of men and refrain them from advancing in society.¹⁹ Johnson identified patriarchal societies as those that promote male privilege, focus on male-centered benefits, and are structurally male-dominant.²⁰ Cultural feminism is the theory that wants to overcome sexism by celebrating women's special qualities, women's ways, and women's experiences, often believing that the "woman's way" is the better way.

Mainstream feminists argue that societies ruled by male power are the ones that warrant women's subordination and exploitation and exercise total control over women's body and Sexuality.²¹ In the FGM context, Mainstream feminists argue that the practice reinforces men's power over women. They also assert that the main function of FGM is to control female sexual and reproduction functions.²² Hosken explored the ways FGM oppresses women and how these latter respond to it. Hosken believed that the practice is meant to control women's emotions, and to enforce female sexual loyalty, and subordination to men.²³ It is obvious in the FGM context that male power manifests itself within their authority to command and control women's body and sexuality; their exploitation of women's labor; their confinement of women to specific areas; their hindrance of women's movements; and their withholding of women's education from among other social benefits.²⁴

¹⁹ Van Rossem, R., & Gage, A. J. (2009). The effects of female genital mutilation on the onset of sexual activity and marriage in Guinea. *Archives of Sexual Behavior*, 38(2), 178-85.

²⁰ Johnson, O. E., & Okon, R. D. (2012). Perception and practice of female genital cutting in a rural community in southern Nigeria. *African Journal of Reproductive Health*, 16(4), 132-9.

²¹ Thiam, A. 1995. *Speak out, Black sisters: Black women and oppression in Black Africa*; translated by Dorothy S. Blair. n.p.: Chicago: Research Associates.

²² Rigmor, C. B. & Denison, E. (2012). Does female genital mutilation/cutting affect women's sexual functioning? A systematic review of the sexual consequences of FGM/C. *Sex Social Policy*, 9, 41-56.

²³ Supra note 13

²⁴ Supra note 17

There is a need for a holistic and culturally relevant approach that could bring an understanding of FGM in its multitude facets and contexts. A holistic, complete, comprehensive, and more culturally relevant theory that addresses perfectly FGM issues, the reasons for its persistence, and the role of women as well as men in the continuation of the practice does not exist. Different feminist perspectives have been primarily applied to bring an understanding of FGM practice/behavior, but they have yet to be integrated into a more cohesive framework. The complexity of the cultural practice along with the myriad of ethnicities and diverse belief systems in Africa ²⁵ make the design of such an efficient theory very challenging. Such holistic theoretical pin that accounts for the multitude of factors that enforce FGM practice and explains realistically and comprehensively the phenomenon has yet to be lay out clearly. Indeed, we hope to bring to light a perspective that has a more holistic outlook on FGM. In order to do so, the researcher will use African womanism as a pertinent theoretical perspective by which to examine the continuation of FGM. African Womanism addresses feminism from an African perspective and places the feminist vision within black women's experiences with culture, colonialism and many other forms of subjugation that impact African Women's lives.

1.7 Conceptual framework

The continued practice of FGM in Kenya is seen to be majorly due to social-cultural factors where the initiates undergo the cut to conform to the norms and values either by individual choice or through force. The practice however has social, psychological, health and legal consequences.

The central theme in this paper is that a revision of certain acts that constitutes violence against women is a necessary action for gender equality and would aid development both domestically and internationally. This conceptualization of FGM has addressed not only the normative concept of violence that is, the use of physical force but has also transformed and repositioned the idea of violence within a broader framework that aims to eradicate psychological, social and political insubordination of women, male dominance and female subverting cultural and traditional practices, as well as economic marginalization and subjugation of women which affects the wellbeing of women in the society and impacts social, economic, cultural and social development.

²⁵ Thiam, A. 1995. *Speak out, Black sisters: Black women and oppression in Black Africa*; translated by Dorothy S. Blair. n.p.: Chicago: Research Associates.

Efforts towards abandonment of the practice by Legal instruments, Human Rights frameworks and Policy frameworks have been unfruitful partly due to the weak structures in enforcing the abandonment strategies.

1.8 Research Methodology

This study relies on Feminist Qualitative Methods, which is concerned with issues of broader social change and social justice and committed to changing the condition of women using a range of research methods. Qualitative methods refer to research procedures which produce descriptive data: people's own written or spoken words and observable behavior. Qualitative research consists of ethnographic methods such as, participant observation, in-depth interviews, group interviews and content analysis.

The qualitative research method involves the use of qualitative data, such as interviews, documents and observation, in order to understand and explain a social phenomenon. Qualitative research methods originated from social sciences to enable researchers to study social and cultural oriented phenomena. The inductive approach that is used in qualitative method begins by observing phenomena, then proceeding to find patterns in the form of categories or concepts that emerge. Today, the use of qualitative method and analysis are extended almost to every research field and area. The method generally includes data sources with observation and respondent observation, interviews and questionnaires, documents and the researcher's impression and perception. A good definition is given by Denzin and Lincoln that a qualitative research focuses on interpretation of phenomena in their natural settings to make sense in terms of the meanings people bring to these settings.²⁶

1.8.1 Types of qualitative research methods employed in this study

- a) **Case Analysis:** This research work deploys the case analysis method through analysis of both criminal and human rights cases. Criminal cases cited include *Katet Nchoe and Nalangu Sekut v. R*, Criminal Appeal No. 115 of 2010 consolidated with Criminal Appeal No. 117 of 2010 and *M.N.N. v. Attorney General of Kenya*. Human rights cases cited include *Ndegwa v. Canada (Minister of Citizenship and Immigration)*, *VM (FGM -*

²⁶ Denzin, & Y. S. Lincoln (Eds.), *Handbook of Qualitative Research* (pp. 1-17). California, CA: Sage Publication, Inc.

Risks - Mungiki - Kikuyu/Gikuyu) Kenya v. Secretary of State for the Home Department [2008] eKLR and Law & Advocacy for women in Uganda v. Attorney General (Constitutional Petition No. 8 of 2007). Courts have held FGM customary practices to be repugnant to justice and morality both in criminal and human rights matters as seen in **Katet Nchoe and Nalangu Sekut v. R.**²⁷ Conclusion have been drawn up from similarities or differences among the cases involved in this research work.

b) Content Analysis A content analysis is a detailed and systematic examination of the contents of a particular material for identifying patterns or themes. The content analysed in this research work includes forms of human communication as well as journals, books, printed media and recorded human interactions.

1.8.2 Data Collection Methods in research methodology

The study used both primary and secondary sources of data in its attempt to resolve the research problem. Data is categorized as primary data and secondary data. Data collection and research method are inextricably interdependent. Primary data are collected from primary sources and secondary data gathered from secondary sources. Primary sources are the original evidence of certain events, objects, persons or work. They enable the researchers to get as close as possible to the actual event. The information in primary sources has not yet been analyzed, summarized or interpreted and this has to be done by the researcher. Examples of primary sources include; experiment results, statistical data, eyewitness accounts, surveys and interviews and legal documents.

Secondary source interprets, analyzes and/or explains primary sources. These sources are one or more steps removed from the original event and therefore sometimes lack the immediacy of the original content. Examples of secondary sources include: literature reviews, opinion pieces, documentaries, television broadcasts and books.

1.9 Literature Review

Female genital mutilation (FGM) is a term used to describe various traditional practices that involve the partial or total removal of the external female genitalia for cultural and traditional

²⁷ Criminal Appeal No. 115 of 2010 consolidated with Criminal Appeal No. 117 of 2010

reasons. This research addresses the concept of this practice by looking at the different beliefs that support its continuation. The study focuses on the experiences of women, who know more about the practice, by looking at their flashbacks, the procedure, consequences involved before and after the mutilation, cultural beliefs, religious views on the practice, and the human rights that are violated by the practice of female genital mutilation. The aim being making it known that FGM is not only a criminal offence according to legislation but it also causes pain, violates the human rights and the health of women and puts girls at risk. This will aid in empowering people in the community with knowledge on the subject and providing the necessary resources that will help eliminate the practice.

FGM as A Form of Violence Against Women

Violence against women manifests in different forms. This include intimate partner violence, non-partner sexual violence, sexual exploitation and harmful practices such as Female Genital Mutilation.

a) as a form of physical Violence

There are several health concerns associated with FGM. More notably are the immediate complications that may arise such as severe pain, shock, haemorrhage (bleeding), tetanus or sepsis (bacterial infection), urine retention, open sores in the genital region and injury to nearby genital tissue. Long-term consequences may include recurrent bladder and urinary tract infections, cysts, infertility, the need for later surgeries to permit for child birth or sexual intercourse, an increased risk of childbirth complications and newborn deaths.

Elchalal notes that FGM/C practices took place as far back as 5,000 years ago; Egyptian mummies have been identified as having undergone the procedure²⁸ Muteshi, J. and Sass, J. state that historically, women have inaccurately been perceived to be predisposed to promiscuous behaviour, and this belief persists in many cultures where FGM/C is common²⁹ This is a particularly unwelcome trait in cultures where a woman's virginity and fidelity are closely associated with

²⁸ Elchalal, U. et al., (1997) Ritualistic Female Genital Mutilation: current status and future outlook.' in *Obstetrical and Gynecological Survey* 52, pp. 643-651. , 52, pp. 643-651.

²⁹ Muteshi, J. and Sass, J. (2005) *Female Genital Mutilation in Africa: An Analysis of Current Abandonment Approaches*. Nairobi: PATH.

parental and familial ‘honour’ . The aim of the procedure is therefore to reduce a woman’s ability to feel sexual pleasure and to seek it outside of marriage by removing her external sexual organs, especially the clitoris, and making sexual intercourse painful. Women’s potential for promiscuous activities and, related to this, reproduction outside of the bonds of marriage is therefore believed to be managed and controlled via the act of FGM/C.³⁰

El Dareer, A. notes that women can also face difficulties with conception, due to associated increased risk of infection from unsanitary conditions, for example pelvic inflammatory disease and related infertility problem.³¹

b) as a form of psychological violence

A study of 1,222 women in four Kenyan districts indicated that 48.5% of the women experienced haemorrhage, 23.9% infection, and 19.4% urine retention at the time of the FGM operation.³² There are reports that women who have undergone FGM have reduced sexual desire, pain during intercourse, and less sexual satisfaction.³³ In relation to psychological issues surrounding FGM data suggests that following FGM, women were more likely to experience psychological disturbances (have a psychiatric diagnosis, suffer from anxiety, somatisation, phobia, and low self-esteem).³⁴

According to Muteshi, J. and Sass, J., Alternative Symbolic Rituals have been found to be an effective approach to the eradication/prevention of FGM/C. The approach is through Community sensitization, Seclusion of girls for life-skills education and Community celebration of the girls’ new status as young women. The development of Alternative Symbolic Rituals can become a platform for open debate and discussion amongst men and women within ethnic minority communities establishing in a new country. It ensures that the group does not feel challenged by society, but instead empowered to make necessary changes to harmful traditions

³⁰ Yuval-Davis, N. (1997) *Gender and Nation*. London: Sage.

³¹ El Dareer, A. (1983) ‘Complications of Female Circumcision in the Sudan’ in *Tropical Doctor*, 13, pp. 131-133. ²³ Rahman, A. and Toubia, N. (eds.) (2000) *Female Genital Mutilation: A Guide to Laws and Policies Worldwide*. London: Zed Books.

³² MYWO, (1993) *Harmful Practices that affect the Health Women and their Children*: MYWO

³³ Berg and Denison, (2011). *A Tradition in Transition: Factors Perpetuating and Hindering the Continuance of Female Genital Mutilation/Cutting (FGM/C)* <http://www.ncbi.nlm>

³⁴ *ibid*

c) as a form of Gender Based Violence

Gender based violence is a term used to denote harm inflicted upon individuals and groups that is connected in form of cultural understandings of their gender. Both institutional and structural forces may endorse violence along gender lines. Gender based violence can occur in all genders including male, female, children and gender diverse individual. In addition to physical and emotional consequences, FGM reflects severe gender discrimination. It violates a person's right to dignity, security and physical integrity. It conflicts with the right to be free from torture, cruel, inhuman and degrading treatment, and the right to life where the procedure results to death. It robs communities of the full contributions of women and girls and limits the full capacity and ability of women and girls to reach their potential. It therefore limits country development and efforts to reduce poverty.

Mary Wandia, an FGM Program Manager at Equality Now, in Nairobi notes with concern how the face of FGM has changed in Kenya with the performance of FGM by healthcare providers contributing to upholding the practice on the notion that the risks are 'minimized'.³⁵ Equality Now and partners are working hard to ensure that Kenya continues to lead the way on ending FGM. In Narok, the Tasaru Ntomonok Initiative (TNI) rescues girls who are then reconciled with their parents, after they pledge never to subject their daughters to this abuse. FGM was first recognized in the agenda of the United Nations in 1948 within the context of the Universal Declaration of Human Rights (UDHR).³⁶ It was seen as a harmful tradition practice in the 70s and 80s.

Efua Dorkenoo, a researcher, observes that female genital mutilation is a clear demonstration of gender-based human rights violation, which intends to control women's sexuality and freedom. Internationally the practice is recognized as a form of torture and violence against women and girls. International agencies such as WHO and UNICEF consider FGM as a violation of human rights and have thus intensified their fight against the practice. Likewise, in 1993 United Nation passed a declaration to support the use of the term "Female Genital Mutilation" to describe clitoridectomy, infibulations and other FGM related practices.

³⁵ Mary Wandia (2016) 'WANDIA: Kenya doing well in fighting FGM, but should do more', Citizen Digital, 4 February. Available at <http://citizentv.co.ke/news/wandi-kenya-doing-well-in-fightin-fgm-but-should-domore113636/>.

³⁶ Universal Declaration of Human Rights Article 5

Rahman and Toubia are of the opinion that though legal and political measures are fundamental to ending FGM/C, community based eradication and prevention initiatives in conjunction and consultation with NGOs should be a key component of campaigns worldwide. “While government action is necessary to create a political and legal environment that deters people from practicing FGM/C, it is ultimately the women, their families and their communities who must be convinced to abandon the practice”.²³

Lightfoot-Klein states that FGM is considered an integral part of a girl’s social development and is believed to be normal in communities where it is practised. Women fear that they will not find husbands for their daughters if the daughters have not been mutilated and these women believe that men prefer sex with a mutilated wife. In addition, the clitoris is thought to be the "masculine" part of the female genitalia, and there is a fear that it has the potential to grow as big and long as a male penis.³⁷ Genital mutilation was initially practised on female slaves to minimise their sexual pleasure and was intended to keep slaves from getting pregnant thus maximising their labour and efficiency.

d) Stereotypes against Uncircumcised Women

Lightfoot-Klein reports that there is discrimination against uncircumcised women in participating in cultural ceremonies. He examined that stereotypes were directed towards uncircumcised women. Some of the stereotypes included Egesagane (uncircumcised girl/woman), omogere (Luo), omogima (a whole woman not circumcised) and Omoisia (likened to uncircumcised male). Uncircumcised women were also referred to as culture breaker as they were regarded as going against the culture of the community which required girls to be circumcised. Among the Kisii community, circumcision is observed as a cultural tradition which differentiates them from other neighbouring communities. Uncircumcised women are regarded as unmarriageable as they were not preferred as fit for marriage. Circumcised women are more preferred for marriage more than uncircumcised women; less dowry paid for uncircumcised women compared to circumcised women.

³⁷ Lightfoot-Klein, H. (1989) ‘The Sexual Experience and Marital Adjustment of Genitally Circumcised and Infibulated Females in the Sudan’ in *The Journal of Sex Research*, 26 (3), pp. 375-392.

According to Wallerstein, Removal of the clitoris therefore reflects a social construct of female aesthetic beauty affirming women's femininity. Europe too had a history of controlling women's sexuality through FGM; for example, clitoridectomy was the surgical "remedy" for masturbation in Victorian England and in the United States.³⁸

Assaad reports that Muslims and academics in the West are at pains to insist that the practice is not rooted in the Islamic religion but rather in culture. Given that in Saudi Arabia, a Muslim country, FGM is not only not practised but it is also condemned it becomes clear that it is a false notion that it is an Islamic practice. In western society, genital mutilation is considered barbaric and cruel to those affected by it; however, there are historical and social contexts that need to be understood. Traditions constitute learned habits passed from generation to generation and are often guided by taboos and this makes traditions very difficult to change. People adhere to these patterns of behaviour, believing that this is "the right way". Most women from cultures practising FGM refer to the practice as both a tradition and a religious obligation. When asked why they subject their daughters to the FGM operation, many women respond, "it has always been like that," with the clitoris considered "dirty".³⁹

Nowa Omoigui, a Nigerian born cardiologist practicing in the United States, questioned the wisdom of mischaracterizing circumcision as mutilation, and, as a result, lumping together all forms of FGR under the pejorative umbrella: FGM.⁴⁰ "There is a huge difference between circumcision and mutilation." Omoigui argues.⁴¹ "To group all forms of age old religious circumcision into one large category under the guise of medical enlightenment and civilization' is very unfortunate." Omoigui attacks the idea that every genital ritual connotes the same horror or has the same consequences as clitoridectomy, excision, or infibulation.

Nahid Toubia seems to be the only one among leading commentators on the subject cognizant of this distinction.⁴² Referring to Edo women in Nigeria, for whom circumcision is limited to the

³⁸ Wallerstein, E. (1980). *Circumcision: An American Health Fallacy*. New York: Springer Publishing.

³⁹ Assaad MB. Female circumcision in Egypt: social implications, current research, and prospects for change. *Studies in Family Planning* .1981

⁴⁰ Nowa Omoigui, Protest Against Bill H22 Outlawing "FGM" in Nigeria, J.

⁴¹ Omoigui, supra note 40

⁴² NAHID TOUBIA, Female Genital Mutilation, in *WOMEN 'S RIGHTS, HUMAN RIGHTS: INTERNATIONAL FEMINIST PERSPECTIVES* 224, 226 (J. S. Peters & Andrea Wolper eds., 1995).

removal of the prepuce (preputium clitoridis)— the fold of skin that covers the clitoris and which has no sexual or reproductive value—Omoigui notes that, for these women, circumcision involves the mutilation of neither the clitoris nor any other part of the genitalia. “In fact, in many cases the removal is symbolic and part of a traditional marriage ceremony.”⁴³

Cook et al., although not explicitly stated, appears to appreciate the distinction between real cases of clitoridectomy and prepuce removal. This is evident from the fact that although they adopted WHO’s categorization of FGM, they carefully omitted the phraseology “excision of the prepuce as part of the class of prohibited procedures. In attempting to distinguish FGC from male circumcision, he points out that in the latter, only the prepuce is removed.”⁴⁴

1.10 Limitations

This research limits its study to the girl child situations and how culture affects radically the lives of our girls within the society and how the Kenyan legal system chips in to remedy the situation. It may encounter a number of limitations which might impede supporting the hypothesis these being;

- Feminism of the researcher; at the very least a feminist is a person who believes that women suffer discrimination because they are women and who believe that because of that discrimination they have a lot of their rights negated and they would like to see the situation of women changed and it is in this change that one may have radical moves. The researcher thus being such may slightly affect the preciseness of facts and may lead to biasness.
- Secrecy of the subject matter with victims shying off to disclose the information so as to avoid public ridicule. It will be problematic to identify and target the victims or the potential informers for interviewing due to the sensitivity of the subject matter and sexual matters are not discussed freely especially between male and females in the African societies like Kenya.

⁴³ To the contrary, it could be argued that not removing the prepuce is a hindrance to maximizing sexual rights of women. This follows from the fact that women whose prepuces have been removed enjoy greater sexual satisfaction—more intense and, in some cases, multiple orgasms.

⁴⁴ Cook, R.J. et al., (2002) ‘Female Genital Cutting (Mutilation/Circumcision): Ethical and Legal Dimensions’ in *International Journal of Gynaecology and Obstetrics*, 79, pp. 281-287.

- Time constraints which would not permit the researcher to carry out fieldwork studies which would have greatly contributed to the research findings.

1.11 Chapter Breakdown

Each chapter starts with an introduction to the issues covered and then describes the general objectives of the module, the essential skills to be acquired, and provides information on the reference materials to be used. Chapter one provides the foundation for the research. It introduces the practices involved in female genital mutilation, and explains how these are influenced by tradition.

Chapter two gives the sociological and philosophical framework under which theories and legal philosophies that underpin this study are reviewed. Philosophical framework will involve the systematic identification, location and analysis of documents containing information related to FGM and related projects that have been carried in the location of this study or elsewhere that shall be applicable. Sociological review provides an up to date information in the field of study to enable the researcher identify other people working on the area of study which leads to a wide knowledge base.

Chapter three will assess the conceptual aspects and how the research was conducted in general followed by a situation analysis of the legal regimes in relation to FGM and lastly the human rights perspectives on the topic of study while. It will also provide a complete account of the research process.

Chapter four purposes to analyse the prevalence of FGM in the Kenyan society today and the efforts made towards its elimination. The objective of this chapter is to present and explain in summary the findings of this study and then draw interpretations.

Chapter five is the last chapter and shall draw conclusions and make recommendations. It will also contain a section for further research

CHAPTER 2

SOCIOLOGICAL AND PHILOSOPHICAL UNDERPINNINGS

2.0 Introduction

This chapter reports on the sociological and philosophical background of FGM in our society today, Kenyan communities being the major focus and issues intertwined with the practice. A philosophical **background** is essentially the epistemology or the basis of knowledge or theory behind the study. In other words, it is a framework which is created after incorporating various theoretical positions in the area of study.⁴⁵ It involves the work done in that area, in the form of theory or practice which can be together used to formulate, develop, or back the research undertaken.⁴⁶ **Philosophy of law**, also called **jurisprudence**, is a branch of philosophy that investigates the nature of law, especially in its relation to human values, attitudes, practices, and political communities. Philosophy of law often aims to distinguish law from other systems of norms, such as morality or other social conventions. Study on the nature of law often depend upon, and occasionally have contributed to, answers to some of the most-fundamental philosophical questions—for example, regarding the foundations of morality, justice, and rights; the nature of human action and intention; the relations between social practices and values; the nature of knowledge and truth; and the justification of political rule.⁴⁷

2.1 Philosophical background

The philosophical proposal of this project is based on the Feminist **jurisprudence**. Joan Wallach Scott once wrote that the history of feminism had been ‘the history of the project of reducing diversities (of class, race, sexuality, ethnicity, politics, religion, and socio-economic status) among females to a common identity of women (usually in opposition to patriarchy, a system of male domination)’.⁴⁸ The Fourth World Conference on Women, held in Beijing in 1995, was a true turning point for feminism. It was then that the concerted feminist effort to challenge the historic male bias of international human rights law finally led to formal recognition, giving birth to the

⁴⁵ Rocky J, ‘What does the philosophical background of social studies mean?’ <https://www.quora.com/> accessed on 25th June 2019

⁴⁶ Kenneth E H, ‘Philosophy of Law’ Internet Encyclopedia of Philosophy and its authors <https://www.iep.utm/law> accessed on 7th July 2019

⁴⁷ The Editors of Encyclopaedia Britannica, ‘Philosophy’ <https://www.britannica.com/topic/philosophy> accessed on 7th July 2019

⁴⁸ J W Scott, ‘Introduction’ in J W Scott (ed) *Feminism and History* (Oxford University Press, Oxford, 1996) 1, 4.

global human rights strategy of gender mainstreaming. The importance of this strategy, which essentially means incorporating a gender perspective into all human rights action,⁴⁹ was subsequently restated in numerous UN resolutions,⁵⁰ as well as in the work of the UN General Assembly and Security Council.⁵¹ At least nominally, gender was accepted by the mainstream. The United Nations ('UN') Economic and Social Council ('ECOSOC') defines gender mainstreaming as 'the process of assessing the implications for women and men of any planned action, including legislation, policies and programmes, in all areas and at all levels, and as a strategy for making women's as well as men's concerns and experiences an integral dimension of the design, implementation, monitoring and evaluation of policies and programmes in all political, economic and social spheres so that women and men benefit equally and inequality is not perpetuated. The ultimate goal is to achieve gender equality.'

Since then, feminism has consistently targeted the very category of gender as it provides the basis for gender mainstreaming policies. It has done so by bringing the idea of intersectionality to the fore of its engagement with international human rights discourse. Intersectionality is about exploring how gender interacts with 'multiple social forces, such as race, class . . . age, sexuality, and culture'.⁵² It means that our experiences of gender are shaped by all those things, thus complicating simplistic, singular understandings of the nature of women's disadvantage.

The Beijing Platform for Action called on governments to intensify efforts to ensure equal enjoyment of all human rights and fundamental freedoms for all women and girls who face multiple barriers to their empowerment and advancement because of such factors as their race, age, language, ethnicity, culture, religion, or disability, or because they are indigenous people.⁵³ Subsequently, intersectionality has acquired considerable conceptual purchase in international

⁴⁹ Report of the Economic and Social Council for the year 1997, UN GAOR Official Records, 52nd Session Supplementary No 3, UN Doc A/52/3/Rev.1 (1999) Ch IV, [4].

⁵⁰ The most recent is Mainstreaming a gender perspective into all policies and programmes in the United Nations system, UN Doc E/Res/2006/36 (27 July 2006).

⁵¹ UN Women Watch, 'Eliminating Female Genital Mutilation: An Interagency statement (2008) <https://www.un.org/womenwatch/daw/csw/> accessed on 24th June 2019

⁵² M Deckha, 'Is Culture Taboo? Feminism, Intersectionality, and Culture Talk in Law' (2004) 16 Canadian Journal of Women and the Law 14, 16

⁵³ Report of the Fourth World Conference on Women, UN Doc A/Conf. 177/20 (17 October 1995) Annex I, [32]. ⁴⁸ HRC, General Comment 28: Equality of Rights between Men and Women (Article 3), UN Doc CCPR/C/21/Rev.1/Add.10 (29 March 2000) [30].

human rights law and activism. In 2000, the UN Human Rights Committee ('HRC') issued its General Comment 28 on Equality of Rights between Men and Women, in which it stated:

“Discrimination against women is often intertwined with discrimination on other grounds such as race, colour, language, religion, political or other opinion, national or social origin, property, birth or other status. States parties should address the ways in which any instances of discrimination on other grounds affect women in a particular way, and include information on the measures taken to counter these effects.”

Prominent critical and feminist theorists such as Judith Butler and Wendy Brown have insisted that it is misleading to think of gender in isolation from race, or of race as free of all inflection of gender or sexuality.⁶⁸ Various streams of subjectivity literature have highlighted the pointlessness of constructing the individual as an atomistic, detached, 'relentlessly self-interested' entity.⁵⁴ For Félix Guattari for example, 'the fundamentally pluralist, multi-centred, and heterogeneous character of contemporary subjectivity' means that 'an individual is already a “collective” of heterogeneous components'.⁴⁴ Feminist authors as diverse as Iris Marion Young, Toril Moi and Wendy Brown all agree, albeit in very different registers, that structural influences are always subsumed and internalised in the individual before individual identity components can be meaningfully articulated.⁵⁵ In addition, Brown has emphasized that the social powers constituting identity are not simply different powers, but different kinds of power, as gender, sexuality, race, religion and so on are not equivalent problematic.⁵⁶

2.2 Sociological Underpinnings

Sociology is the methodical study of society, including patterns of social relationships, social interaction, and culture.⁵⁷ A **society** is a group of individuals involved in persistent social interaction, or a large social group sharing the same geographical, political or social ties, subject to similar cultural expectations. All societies have culture which is the way of life shared by

⁵⁴ W Brown, *States of Injury: Power and Freedom in Late Modernity* (Princeton University Press, Princeton, 1995) ⁴⁴ F Guattari, 'Remaking of Social Practices' in G Genosko (ed) *The Guattari Reader* (Blackwell, Oxford, 1996) 266 (emphasis added).

⁵⁵ Young, above nn 65–6; T Moi, *What Is a Woman? And Other Essays* (Oxford University Press, Oxford, 1999); Brown, above n 69; Brown, above n 56; Brown, above n 68.

⁵⁶ Brown, above n 56. See also W Brown, *Regulating Aversion: Tolerance in the Age of Identity and Empire* (Princeton University Press, Princeton, 2006).

⁵⁷ Giddens, Anthony, *Sociology: A Brief but Critical Introduction.* (Stanford University Press 1987)

members of that society. The term "society" comes from the Latin word, *societas*, which, in turn, was derived from the noun, *socius* ("comrade, friend, ally"; adjectival form *socialis*), which is used to describe a bond or interaction between parties that are friendly, or at least civil.⁵⁸ The society is influenced by cultural components such as language, ways of thinking, feelings, acting, eating patterns, types and styles of communication and the rules which is defined by the societal beliefs and values.⁵⁹ Culture varies around the world and is modified over time; it is dependent on the ideas of the people and the social conditions that exist during a given period of time. The cultural components are passed down from generation to generation.

The social, economic and cultural conditions of any society determine the variety of laws that are created and implemented and new social conditions necessitate social change. For example, in the United States during the 1860s and 1870s, the idea that women could be admitted to the bar was unthinkable. Social ideas dominant at that time placed women in the home in domestic positions. This was challenged by Myra Bradwell in **Bradwell v. State of Illinois**, where the Supreme Court of the United States held that her rights as an individual were not denied. Bradwell had petitioned for the Illinois Supreme court to allow her admission to the bar as she met all the usual criteria, the Supreme Court predicated its decision on the law that precluded women from entering into contracts independent of their husbands. Though that was the legal rationale, the decision actually reflected the prevailing social ideas on gender roles.

H.L.A Hart defines Law as “social rule that is acceptable and usable in a given social group.”⁶⁰

For the Law to function in a society, it must incorporate a number of components. These include a system of societal norms; a legitimate system of enforcement; and a system of defining, clarifying and encoding them. Norms, based on the societal values define appropriate and inappropriate behavior. The sociology of law is the study of the reciprocal relationship of the law and all other factors that make up social condition. This interdependence is in a constantly evolving process of dialectical cause and effect. The underlying premise is that society cannot exist without the law, nor the law without the society. Law has become the common form in which most social

⁵⁸ Persell, Caroline Hodges, *Understanding Society: An Introduction to Sociology* (Third Edition, New York 1990)

⁵⁹ Grana, Sheryl J. & Ollenburger, Jane C, 'The Social Context of Law' (Pearson Publishers 1999) ⁵⁰ **Bradwell v. State of Illinois**, (1873) 83 U.S. (16 Wall.) 130

⁶⁰ H.L.A. Hart, 'The Concept of Law' (2nd edition, Oxford University Press 1961) p. 12.

relationships appear, whether economic, political, cultural or moral. Women's issues in law deal with the extent to which law gives rise to gender inequality, and the changes which are necessary in legal rules, institutions, procedures to end such inequalities. In the political legal sphere, issues concern the role played by women in the general decision making process: the extent to which women control instruments of state power in its different forms, access to legal institutions of redress and the extent to which the legal systems inhibits the enjoyment of rights in all spheres of life.

Some reasons that have been presented by communities to justify why many cultures in Kenya still practice this barbaric and dehumanizing practice not minding the wide condemnation by the World Health Organization are:

- a) Family autonomy: The general right of parents to choose what is best for their youngsters has existed for a long time and there is a desire that the State won't meddle in choices which are in the area of individual families. In other words, the "privacy" of the family has by and large been ensured by society.⁶¹
- b) The right to cultural integrity: The individuals who defend the privilege of parents to have their little girls "circumcised" allude to their customary values and their entitlement to cultural integrity without impedance from people who hold different customary values. Notwithstanding, there is a distinction between neo-colonialist endeavors to force western human rights norms on Third World nations and social practices which are the same as practices in the West through which ladies are respected less than men.
- c) Psychosexual argument: To this group, female genital cutting is encouraged as an activity or practice aimed at curbing women's sexual desires. According to this, if only the prepuce of the clitoris is removed, it automatically reduces the female's or woman's sexual desire and by this guarantees her chastity or staying or maintaining her virginity until she is married.⁶² Thus, female genital cutting or mutilation is to be sustained because it

⁶¹ Petronio, S, 'Welcome to the Journal of Family Communication Special Issue on Communication Privacy

Management Theory and Family Privacy Regulation. *Journal of Family Communication*' (2013). 13(1), 1. ⁵³ Regier, H. A, 'The notion of natural and cultural integrity. In *Ecological Integrity and the Management of Ecosystems* (1991) (pp. 3–18).

⁶² Duffy, John, 'Masturbation and Clitoridectomy: A Nineteenth-Century View' *JAMA: The Journal of the American Medical Association* 186.3 (1963): 246–248. Web

encourages fidelity as such as practice stops women from getting sexually aroused. But the question here is whether this heinous practice has successfully tamed women because experience has shown that woman who wish to be promiscuous have not stopped being so on excuse of genital mutilation. The psychosexual argument leaves us with little to be desired. And rather leaving us to think that chastity, fidelity or otherwise being promiscuous is related to human will and choice, rather than praised or blamed on the removal of the clitoris.⁶³

- d) Mythological argument: This argument hinges on superstitious beliefs surrounding the practice. There is a perceived belief that when the clitoris is not cut, it will harm the fetus when it touches it during child delivery. Also, there is the belief that if the clitoris is not cut, it will grow to the size of a penis.⁶⁴ But as we all know, superstitious beliefs have not been proven scientifically. Again, no established case of female infertility has been traced to not cutting of the genitalia. Hence, this argument is less satisfactory as built on superstition.
- e) Religious argument: Despite the serious campaigns against female genital cutting by activists and healthcare workers, this argument is one of the most potent one in support of the female genital cutting. In Kenya for instance, many practitioners of traditional religions see it as one of the rites of passage required by their religion. That is a necessary condition to be fulfilled by young girls who are about to pass from puberty to adulthood in preparation for marriage. According to this argument, this practice is done to reduce a women's libido, so as to help her resist illicit sexual act which is a taboo with the consequences of bringing the wrath of the gods against the community. According to this position when a virginal opening is covered or narrowed, the fear of pain of opening it, alongside the fear that this will be found out, is expected to further discourage illicit sexual intercourse among women with this type of female genital cutting. However, World Health Organization debunked this as lacking credibility, merely motivated by beliefs about what is considered proper sexual behavior related to premarital virginity and marital fidelity. Neither the Christian or

⁶³ Ogar, J. N and Asira E.A, 'Introduction to Philosophy of Medicine' (Vol 1 Calabar: Jochrisam Publishers 2011).

⁶⁴ Toubia Nahid, 'Female Genital Mutilation: A Call for Global Action' (Rainbo Publishers 1995) pages 35-37. ⁵⁷ Rushwan, Hamid, 'Female Genital Mutilation: A Tragedy for Women's Reproductive Health' African Journal of Urology (2013): 130-133.

Islamic religion has any doctrinal basis for female genital cutting. This scripture reference in Genesis 17; 10-12 is made specifically to the (male gender), and not (female gender).

‘This is my covenant with you and your descendants after you, the covenant you are to keep. Every male among you shall be circumcised on the 8th day of birth. There is no doctrinal basis for female genital cutting in Islam and Christianity, therefore, there is no substantive evidence that female genital cutting is a religious requirement.’⁶⁵

- f) Social argument: This argument is a result of wanting to work in conformity to the social behavior of peers. That is, being attune with the practices of the time and community. Female genital cutting in the Kenyan culture is a qualification or requirement for participation and enjoyment of full privileges and rights to the female folks in the community. In some communities, a woman whose genitalia are not cut, would be denied marrying any man in the community because they interpret uncut clitoris as a penis in a woman which must necessarily be cut to show that she is a woman.⁶⁶ This position is indeed abnormal because given an understanding between the function of penis in men and clitoris in women, no matter how big clitoris may be, it can never become penis and vice versa. So it is an unfounded position that lacks evidence.

Conclusion

The chapter, after a careful analysis and evaluation of the subject of female genital cutting with reasons to justify such practices such as religious, social, psychosexual, mythological and aesthetic, found all as lacking credibility in their arguments, leaving women with long and short terms consequences like excruciating pain, loss of blood resulting in anemia, hemorrhage, shock, infections, fibrous scar, shrinking of artificial opening in virginal, pelvic pain, sex phobia, depression and anxiety. This ugly trend has no medical support, neither has it any sustained social and scriptural justification for such cruelty against females. Conclusively, female genital cutting is unequivocally inhumane, hence a clarion call on activists to step up their effort and advocate its outright condemnation. It is in this regard that chapter three will be constructed through an analysis of the legal regimes in relation to FGM and the human rights perspectives on the topic of study.

⁶⁵ Gronnvoll, M, ‘Gender (In)Visibility at Abu Ghraib. Rhetoric & Public Affairs’ (2008) 10(3), 371–398.

⁶⁶ Bennett, Susan, ‘Female Genital Mutilation/cutting: Child Abuse and Neglect’ (2011) 134–141. Web.

CHAPTER 3

AN APPRAISAL OF THE ANTI-FEMALE GENITAL MUTILATION LEGISLATIONS

3.0 Introduction

This chapter entails an analysis of the legal regimes in relation to FGM nationally and internationally in addition to the human rights perspectives on the topic of study. There are various legal instruments that seek to eradicate the practice of FGM in Kenya and promote the human rights of girls and women. Equality, dignity and fairness are the core values of human rights instruments and protocols. Human rights are universal, unalienable and fundamental. It is equally important that human rights must be practical, real and give access to justice. The case of **M.N.N. v. Attorney General of Kenya** was brought on behalf of a woman who was mistreated, abused, and whose genitals were mutilated without her knowledge or consent in a private Kenyan hospital. This brought to light the severity of the harm suffered by women in Kenyan health facilities. M.N.N.'s story also reveals the weaknesses of the accountability mechanisms that are meant to protect women and the girl child from such abuse as well as provide remedies when violations of the rights occur.⁶⁷

INTERNATIONAL & REGIONAL TREATIES

Kenya has signed several international human rights conventions, which provide a strong basis for the characterization of FGM as a violation of international human rights. This include:

- Convention on the Elimination of Discrimination Against Women (CEDAW)
- Convention on the Rights of the Child (CRC)
- International Covenant on Economic, Social and Cultural Rights (ICESR)
- African Charter on the Rights and Welfare of the Child.
- Maputo Protocol to the African Charter on Human and Peoples' Rights on the Rights of the Women in Africa (the 'Maputo Protocol').
- African Charter on Human and People's Rights (the 'Banjul Charter').

⁶⁷ M.N.N. v. Attorney General of Kenya

The African Union declared the years from 2010 to 2020 to be the Decade for African Women and Kenya is expected to continue its commitment to promote and protect the rights of women. In December 2012, the UN passed a historic resolution, calling on countries to eliminate FGM, and in 2013 the 57th UN Convention on the Status of Women's agreed conclusions included a reference to the need of states to develop policies and programmes to eliminate FGM as well as other forms of violence against women.

The CEDAW and the CRC clearly prohibit traditional practices that discriminate against women and harm children. Article 2 of CEDAW directs 'State Parties...(f) To take all appropriate measures, customs and practices which constitute discrimination against women.' Additionally, Article 5 states, 'State Parties shall take all appropriate measures: (a) to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes...'. Article 24(3) of the CRC states that, 'State Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children'. In addition, Article 19(1) provides that 'State Parties shall take all appropriate legislative, administrative, social, and educational measures to protect the child from all forms of physical or mental violence, injury, or abuse'. Kenya therefore has a responsibility under CEDAW and CRC to prevent harmful practices such as FGM. Under the ICESCR, FGM is a violation of the right to health. Article 12(2) provides that 'the steps to be taken by State Parties to the present Covenant to achieve the full realization of the right to health shall include those necessary for: (a) The provision for...healthy development of the child'. 'Health' is defined so as to include 'maturity, reproductive and sexual health'. FGM thus violates the convention due to the numerous health consequences.

The African Charter on the Rights and Welfare of the Child requires member states of the African Union to abolish customs and practices harmful to the 'welfare, dignity, normal growth and development of the child and in particular: (a) those customs and practices discriminatory to the child on the grounds of sex or other status'. The Maputo Protocol explicitly refers to FGM. Under Article 5, 'state parties shall prohibit and condemn...through legislative measures backed by

sanctions, (b) all forms of female genital mutilation, scarification and para-medicalisation of female genital mutilation and all other practices in order to eradicate them’.

The Banjul Charter includes provisions related to the right to health under Article 16, right to physical integrity under Articles 4 and 5.

The Declaration on the Elimination of Violence against Women as proclaimed by General Assembly resolution 48/104 of 20 December 1993 recognized the urgent need for the universal application to women of the rights and principles with regard to equality, security, liberty, integrity and dignity of all human beings. The Declaration defines the term "violence against women" to mean any act of gender based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.

Article 2 of the declaration states that Violence against women shall be understood to encompass, but not be limited to, the following:

- Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, Female Genital Mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation;
- Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution;
- Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.

Discussion of respect for women’s rights often remains tethered to the notion of ‘balancing’ these rights with culture and custom rather than taking a more dynamic and process-oriented view of culture. On the one hand, deeply embedded attitudes are often linked to patterns of economic survival and ethnic, religious or social identity. Consequently, especially custom and religion based informal justice systems, are likely to uphold rather than to challenge the values of the society

around them, including attitudes and patterns of discrimination. On the other hand, the flexible and adaptable approach of customary law can allow it to change in ways that reflect changing values in society.

The Human Rights Committee is the body of independent experts that monitors the Implementation of the International Covenant On Civil and Political Rights by its state parties. All state parties are obliged to submit regular reports to the committee on how the rights are being implemented. The human rights committee notes that states should ensure that “traditional, historical, religious or cultural attitudes are not used to justify violations of women’s rights to equality before the law and to equal enjoyment of all covenant rights.” even if there is no clear state recognition of informal justice systems or other delegation of state functions to traditional chiefs, or enforcement or consideration of settlements reached through informal justice, the state remains obliged under article 2 of the CEDAW to extend protection.⁶⁸ The Human Rights Committee notes that inequality in the enjoyment of rights by women is often deeply embedded in tradition, culture and religion, so that many frequently occurring violations of women’s human rights originate from social custom, belief or practice rather than (or as well as) from state law, and are perpetrated by individuals and social groups rather than by the state.

3.1 CONCEPTUAL ANALYSIS OF THE LEGAL FRAMEWORK IN KENYA

Kenya has made significant strides in overhauling its legislation to better deal with gender discrimination. In Kenya, law historically reinforced gender inequality through legal rules that validated social injustices leading to the marginalisation of women. Customary laws and practices operated in personal law matters and were enforced by the courts so long as they were not repugnant to justice and morality. The repugnancy test was dependent on the opinion of the particular judge or judicial officer as to what they subjectively deemed as repugnant or offensive. Given that judicial officers are mostly products of the very patriarchal societies in which gender discrimination is normalised, a discriminatory practice could persist if the court failed to strike it down for invalidity. Such perceptions invariably resulted in the perpetuation of inequalities against women.

⁶⁸ Convention on the Elimination of All forms of Discrimination Against Women, art 2

Section 3 of the Judicature Act states that the court can only apply customary law in a dispute provided that it is not repugnant to justice. This gives the court the discretion to determine which customs are unjust and which are not. In doing so, the courts assess whether a certain practice is detrimental to the physical and emotional wellbeing of a person and also use laws from other states to determine what actions are repugnant to justice. In exercising this discretion, the courts may deem a custom as repugnant to justice and morality without fully evaluating the consequences of illegalising the custom. In **Katet Nchoe and Nalangu Sekut v R**, the High Court held that the Maasai custom of circumcising females was repugnant to justice and morality.⁶⁹ The courts disregarded the customs and practices of the Maasai and held that since female genital mutilation caused physical pain, it was repugnant to justice and morality based on the fact that this practice is harmful to the physical and social wellbeing of a citizen. The decision seems rational and wellinformed but a further analysis makes it fall to pieces. The decision is unjust to uncircumcised Maasai women who are shunned by their male counterparts because of being uncircumcised. It does not answer the question whether the courts will compel Maasai men to marry their uncircumcised women.⁷⁰

Article 159 (2) (c) of the Constitution of Kenya provides that courts are to be guided by the principles of traditional dispute resolution mechanisms. Article 159 (3) limits the application of traditional dispute resolution mechanisms by stating that they should not be used in a manner that contravenes the Bill of Rights, is inconsistent with the Constitution or other written laws or is repugnant to justice and morality or results in outcomes that are repugnant to justice and morality.

The Kenyan Constitution protects all minority classes in Kenya from discrimination and accords them equal benefit and equal protection of the law. This constitutional provision is paramount over all others as the constitution is the supreme law of the land. However, many women continue to suffer discrimination under customary systems that are favored by the rural population in Kenya. Instances of widows being dispossessed of their late spouses' property, wives being disadvantaged during divorce proceedings and women in cohabitation relationships not being recognised as legitimate spouses are not uncommon. In Kenya, there is an intricate link between customary laws,

⁶⁹ Criminal Appeal No. 115 of 2010 consolidated with Criminal Appeal No. 117 of 2010

⁷⁰ Kariuki F, Customary law jurisprudence from Kenyan courts: implications for traditional justice systems', 7. ⁶³ Article 27, Constitution of Kenya (2010).

customary practices and women's rights. Almost invariably, women occupy a disadvantaged position under customary law. This is because traditional African societies are governed on the basis of patriarchal structures where women's individual interests were subsumed under the interests of the group. Hence customary law contains aspects that often run counter to principles of gender equality and nondiscrimination espoused in both domestic and international human rights instruments.

The legal tapestry of Kenyan laws comprises of the Constitution as the supreme law of the land; statutory laws; international law; customary law; religious laws, norms from other norm generating and enforcing realms such as the community, clan and family, and the intersections between these normative orders. These laws conflict at times as they may provide differently on the subject of gender equality. This is largely because some laws, especially customary laws, which represent the norms and practices of communities, tend to be patriarchal.

Besides customary law, another legal system that deserves mention is Islam. Muslims constitute the second largest religious group in Kenya and are exempt from the application of the Constitution with respect to personal law issues. This means that if the parties in contest profess the Islamic faith, and submit to the jurisdiction of the Kadhi's courts, they are then governed by Shariah law, which does not recognise equality of the genders. Constitutional exemptions, which leave personal law issues within the domain of customary and religious laws, have implications for gender equality. In the first instance, most discrimination against women occurs within the family with respect to inheritance rights, succession rights and sharing of matrimonial property upon divorce. The family space – considered private – can be impervious to legal intervention, ensuring that injustices persist despite equality provisions in formal law.⁷¹

Notably, where courts mediate in instances of conflicts between women's rights and the application of discriminatory customary law norms, the assumption is that judicial officers are immune to influences by the gendered perceptions in their societies. This is not the case. Professor Ben Nwabueze states that:

⁷¹ Republic of Kenya, 'Religion' <http://www.republicofkenya.org/culture/religion/> accessed 2 August 2019. It indicates that up to 10% of Kenyans profess the Islamic religion.

‘The judge is not of course like an oracle bellowing out divine prescriptions from its deep recesses. He is simply a product of his society and its culture, an agent whose training and work have endowed him with wisdom and learning in the traditions, philosophy and ethics of his people...’

Admittedly then, it is not far-fetched to suggest that what a particular judicial officer is likely to pronounce as law, based on an interpretation of customary law or even formal law, is likely to be nuanced by their respective cultural and societal beliefs and attitudes or socialization. The upshot of this is that the courts may end up justifying and reinforcing patriarchal norms and attitudes, thus hamstringing efforts at gender equality.⁷²

Gender inequality was ingrained by the patriarchal ordering of society, under which political, economic, legal and social standards are either set by or fixed in the interests of men. Consequently, women have been systematically removed from fully participating in the development process, despite their active participation in the production processes alongside men. Even in instances where women’s legal rights have been provided for, ignorance of such rights exacerbated by illiteracy ensures that they do not benefit from such provision.

However, the legislative steps taken seemingly understate the environment of legal pluralism that characterises the Kenyan state where, for instance, customary law is still pervasive and operates side by side with formal laws. The traditional approach generally gives premium to formal laws while treating customary law with scepticism or altogether disdain in the hope that all individuals will ultimately transition to formal laws. Yet, this has not necessarily been the case. Customary law continues to survive and thrive. The paper argues for a more balanced approach that recognises that customary law has aspects that could be harnessed to foster gender equality and thus complement formal laws on gender equality. In rooting for an appreciation of the role and place of legal pluralism in promoting gender equality, the paper contends that formal laws in and of themselves are not enough to effectively deal with gender discrimination; the two must operate side by side, not necessarily one below the other, as has been the case.

⁷² P Kameri-Mbote, ‘Fallacies of Equality and Inequality: Multiple Exclusions in Law and Leg Discourses’

3.2 CHAPTER FOUR- THE BILL OF RIGHTS

Article 19 of the Kenyan Constitution on Rights and fundamental freedoms enumerates that (1) the Bill of Rights is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies. (2) The purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realization of the potential of human beings. (3) The rights and fundamental freedoms in the Bill of Rights (a) belong to each individual and are not granted by the state; (b) do not exclude other rights and fundamental freedoms not in the bill of rights, but recognized or conferred by law, except to the extent that they are inconsistent with this Chapter (Chapter 4); and (c) are subject only to the limitations contemplated in this constitution.

Article 20(2) on the Application of the Bill of Rights spells out that "every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom."

Article 20(4) also spells out that in interpreting the bill of rights, a court, tribunal or any other authority shall promote (a) the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and (b) the spirit, purport and objects of the Bill of Rights. This is further spelt out in other constitutional provisions, such as Article 21 (implementation of rights and fundamental freedoms), Article 22 (enforcement of Bill of Rights) and Article 23 (authority of the courts to uphold and enforce the Bill of Rights), and also articles 47 (fair administrative action), 48 (access to justice), 49 (rights of arrested persons), 50 (fair hearing) and article 51 (rights of persons detained, held in custody or imprisoned).

Article 21 on the Implementation of rights and fundamental freedoms specifically points out that- (1) it is the fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights; (3) all state organs and all public officers have the duty to address the needs of vulnerable groups within the society, including women , members of a particular cultural community, et cetera; and that (4) the State shall enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms.

Article 27 on the Equality and freedom from discrimination prescribes that- (1) every person is equal before the law and has the right to equal protection and equal benefit of the law. (2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms. (3) Women and men have the right to equal opportunities in political, economic, cultural and social spheres. Article 27(4) & (5) enumerates various grounds upon which the state and the person respectively, may not discriminate against another (the grounds include belief and culture). Article 27(6) spells out the mandate of the state to ensure “legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.” Articles 27(7) reinforces article 27(6).

Article 28 on Human dignity observes that “Every person has inherent dignity and the right to have that dignity respected and protected.”

Article 29 on the Freedom and security of the person also clearly states out that- every person has the right to freedom and security of the person, which includes the right not to be- (a) deprived of freedom arbitrarily or without just cause; (c) subjected to any form of violence from either public or private sources; (d) subjected to torture in any manner, whether physical or psychological; (f) treated or punished in a cruel, inhuman or degrading manner.

Article 32 on the Freedom of conscience, religion, belief and opinion specifies in section (4) that a person shall not be compelled to act or engage in any act, that is contrary to the person’s belief or religion.

Article 43 on Economic and social rights section (2) states that “A person may not be denied emergency medical treatment.”

Article 44 on Language and culture, especially section (3) hits the nail on the head with regard to Female Genital Mutilation in Kenya. Section (3) states that “A person shall not compel another person to perform, observe, or undergo any cultural practice or rite.”

Article 53 on Children declares that (1) every child has the right (d) to be protected from abuse, neglect, harmful cultural practices, and all forms of violence, inhumane treatment and punishment.

Article 55 on Youth compels the State to take measures, including affirmative action programs to ensure the youth- (d) are protected from harmful cultural practices and exploitation.

Finally, Article 59 on the Bill of Rights provides for the establishment of the Kenya National Human Rights and Equality Commission, with the functions of the Commission being enumerated in the same article. Its general functions include promoting gender equity, respect for human rights and redress for human rights violations, through affirmative action programmes (Such as receiving complaints and suggestions, monitoring and investigation, coordination and facilitation, protection and observance, compiling reports and undertaking remedial action, among other functions it is empowered to conduct by the relevant legislation). The powers of this commission are spelt out in Chapter Fifteen of the Kenyan Constitution (on Commissions and Independent Offices).

3.3 THE PROHIBITION OF FEMALE GENITAL MUTILATION ACT (No. 32 Of 2011)

This is an Act of Parliament meant to address Female Genital Mutilation in Kenya. It is meant “to prohibit the practice of female genital mutilation, to safeguard against violation of a person’s mental or physical integrity through the practice of female genital mutilation and for connected purposes.”

The Act was passed into law by the Kenyan parliament on 30th September 2011 and commenced on the 4th of October of the same year. The Act may also be cited as the Prohibition of Female Genital Mutilation Act, 2011.

The Act defines Female Genital Mutilation in Kenya as “comprising all procedures involving partial or total removal of the female genitalia or other injury to the female genital organs, or any harmful procedure to the female genitalia, for non- medical reasons, and includes- (a) Clitoridectomy, which is the partial or total removal of the clitoris or the prepuce; (b) Excision, which is the partial or total removal of the clitoris and the labia minora, with or without excision of the labia majora; and (c) Infibulation, which is the narrowing of the vaginal orifice with the creation of a covering seal by cutting and appositioning the labia minora or the labia majora, with or without excision of the clitoris.

The Act goes a step ahead to clarify that Female Genital Mutilation in Kenya “does not include a sexual reassignment procedure or a medical procedure that has a genuine therapeutic purpose; with

‘sexual reassignment procedure’ referring to any surgical procedure that is performed for the purposes of altering (whether wholly or partly) the genital appearance of a person to the genital appearance (as nearly as practicable) of a person of the opposite sex.”

3.3.1 The Anti-Female Genital Mutilation Board

The Act, under Part II, section 3(1) provides for the establishment of the Anti-Female Genital Mutilation Board, which is a ‘body corporate’ under section 3(2). The composition, powers, financial provisions and functions of the board are enumerated in the same Act, with the ability to delegate its powers under section 8 of the Act. The functions of the Board as spelt out under Section five of the Prohibition of Female Genital Mutilation Act, 2011, are as follows:

- Design, supervise and coordinate public awareness programmes against the practice of Female Genital Mutilation in Kenya;
- Generally, advise the Government on matters relating to Female Genital Mutilation in Kenya and the implementation of this Act;
- Design and formulate a policy on the planning, financing and coordinating of all activities relating to Female Genital Mutilation in Kenya;
- Provide technical and other support to institutions, agencies and other bodies engaged in the programmes aimed at eradication of Female Genital Mutilation in Kenya;
- Design programmes aimed at eradication of Female Genital Mutilation in Kenya;
- Facilitate resource mobilization for the programmes and activities aimed at eradicating Female Genital Mutilation in Kenya; and
- Perform such other functions as may be assigned by any written law.

Part III on Financial provisions; Section 14 of the Act provides for the funds and assets of the Board which consists of— (a) such gifts as may be given to the Board; and (b) all sums of money from any other lawful source provided, donated or lent to the Board.

The board has the power and mandate to draw its own budget for financing in order to facilitate its mandate under this Act, and also to present its books of accounts annually for audit purposes.

The Schedule of this Act, which is the last part of it, contains the provisions as to the conduct of business and affairs of the Board, which include the schedule for Board meetings, office span and removal of Board members.

3.3.2 Part IV: Offences (in Regard to Female Genital Mutilation in Kenya)

The offences and the grounds upon which such offences (as stipulated in Part IV of this Act) can occur include-

- A person (including a person undergoing a course of training while under supervision by a medical practitioner or midwife with a view to becoming a medical practitioner or midwife) who performs female genital mutilation on another person;
- Aiding and abetting Female Genital Mutilation in Kenya;
- Procuring a person to perform female genital mutilation in another country;
- Use of premises to perform female genital mutilation;
- Possession of equipment or tools for female genital mutilation;
- Failure to report the commission of the offence; and
- Use of derogatory or abusive language towards those who have not undergone female genital mutilation, or for a man marrying or otherwise supporting a woman who has not undergone female genital mutilation.

All these constitute offences under the Prohibition of Female Genital Mutilation Act, 2011.

Section 28 (1) of this Act also provides for extra-territorial jurisdiction, i.e. “A person who, while being a citizen of, or permanently residing in, Kenya, commits an act outside Kenya which act would constitute an offence under section 19 had it been committed in Kenya, is guilty of such an offence under this Act.” However, subsection (2) provides for non-conviction of such a person if they have been acquitted or convicted in the country where that offence was committed.

Section 26 of this Act “permits a law enforcement officer, without a warrant, to enter any premises for the purposes of ascertaining whether there is or has been, on or in connection with such premises any contravention of this Act.”

3.3.3 Punishment for Offences Committed Under the Prohibition of Female Genital Mutilation Act

Subsection (1) of section 19 states that- A person, including a person undergoing a course of training while under supervision by a medical practitioner or midwife with a view to becoming a medical practitioner or midwife, who performs female genital mutilation on another person commits an offence – a person causes the death of another, that person shall, on conviction, be liable to imprisonment for life.

Section 19(6), however, spells out that “It is no defence to a charge under this section that the person on whom the act involving female genital mutilation was performed consented to that act, or that the person charged believed that such consent had been given. “

Under section 25 of this Act, “Any person who uses derogatory or abusive language that is intended to ridicule, embarrass or otherwise harm a woman for having not undergone Female Genital Mutilation in Kenya, or a man for marrying or otherwise supporting a woman who has not undergone Female Genital Mutilation in Kenya, commits an offence and shall be liable, upon conviction, to imprisonment for a term not less than six months, or to a fine of not less than fifty thousand shillings, or both.”

Section 29 of this Act (under Part V: Miscellaneous) stipulates the penalty for the offences in this Act. “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.”

In conclusion, Section 27 of this Act mandates the Kenyan Government to take necessary steps within its available resources to—

- Protect women and girls from female genital mutilation;
- Provide support services to victims of female genital mutilation; and
- Undertake public education and sensitize the people of Kenya on the dangers and adverse effects of female genital mutilation

3.4 OTHER LEGISLATIONS ON FEMALE GENITAL MUTILATION IN KENYA

The Children's Act No.8 of 2001

Section 14 of this Act states 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.

The Protection Against Domestic Violence Act No. 2 Of 2015

In this Act, " violence" means abuse that includes: (i) child marriage; (ii) female genital mutilation; (iii) forced marriage; (iv) forced wife inheritance; (v) interference from in-laws; (vi) sexual violence within marriage; (vii) virginity testing; and (viii) widow cleansing. Section 2 defines Domestic violence in relation to any person, to mean violence against that person, or threat of violence or of imminent danger to that person, by any other person with whom that person is, or has been, in a domestic relationship. For the purposes of this Act, a person is deemed to be in a domestic relationship with another person if the person is married to that other person, has previously been married to that other person, is living in the same household with that person, has been in a marriage with the other person which has been dissolved or declared null, is a family member of that other person, is or has been engaged to get married to that person, has a child with that other person or has a close personal relationship with the other person.

The Medical Practitioners & Dentists Act

Sections 9(3), 20 and 21 of this Act provide for the cancellation of License for any medical practitioner who, according to section 20 “is convicted of an offence under this Act or under the Penal Code (Cap. 63), whether the offence was committed before or after the coming into operation of this Act, or if, after inquiry by the Board, is found to have been guilty of any infamous or disgraceful conduct in a professional respect, either before or after the coming into operation of this Act...”

The Nurses, Midwives and Health Visitors Act (1965)

Section 22 of this Act states that:

(1) If the Council (Nurses, Midwives and Health Visitors Council of Kenya, established under section 3 of this Act) is satisfied in respect of any person registered or enrolled under this Act that such person whether before or after she became registered-

- Has been convicted of any offence punishable by imprisonment the commission of which in the opinion of the Council has dishonoured her in the public estimation; or
- Has been guilty of negligence or malpractice in respect of her calling; or
- Has been guilty of impropriety or misconduct whether in respect of her calling or not;

it may, in its discretion, either cause that person's name to be removed from the appropriate register or roll or suspend her registration or enrollment for a period not exceeding twelve months: Provided that the Council may in its discretion cause the name of a person which has been removed from a register or roll to be restored to the appropriate register or roll.

(e) Persons with Disabilities Act, 2003.

According to section 26 (1), a person is guilty of an offence if he (or she); (e) on the ground of any ethnic, communal, cultural or religious custom or practice, discriminate against a person with a disability.

In November 1996, the Kenya Parliament defeated a motion to make the practice of Female Genital Mutilation in Kenya illegal. Previously in 1982 and 1989, the former President Moi had issued presidential decrees banning the practice.

3.5 CONCLUSION

The active public discussion on the eradication of female genital mutilation (FGM) in Kenya has been ongoing since the late 1990s. In 1999, the Ministry of Health launched a "National Plan of Action for the Elimination of Female Circumcision", particularizing the government's commitment to ending the practice; shortly after, president issued a decree banning FGM and prohibiting government hospitals from performing FGM (FIDA 2009). This was followed by the Children's Act, passed in 2001, coming into force in 2002, the first law in the fight to eradicate the practice. The Act made FGM illegal for girls under eighteen and imposed twelve months

imprisonment and/or a fine of up to Kenya shillings 50,000 for breach of the law. Again in 2011 another law the “Prohibition of Female Genital Mutilation Act 2011” came into force in October 2011.

The 2011 Act not only criminalized FGM for underage girls but for everyone and, in a bid to tackle social pressure, also banned the stigmatization of women who had not undergone FGM. The 2011 Act extended the powers of previous legislation, providing for the prosecution of those who perform FGM and anyone who aids such a person or who knowingly fails to report knowledge of such acts or pending acts in Kenya or abroad. The 2011 Act made the punishment more severe than the 2001 Act, making it three to seven years imprisonment or life imprisonment for causing death by performing FGM and a fine of Kes 200,000. In addition to the various national laws, Kenya is signatory to several international human rights conventions, denouncing FGM and requiring governments to have positive obligations towards victims.

It is meritorious on the part of the Kenyan government to conclude that there is a genuine and consistent commitment to eradicate FGM, given the various national and international laws now in place in the country. Many of the local and international organizations working to eradicate FGM in Kenya agree that the new laws are a great step forward. However, FGM continues to be practiced widely especially in the rural areas. It then begs the question of why the stringent legislation on the matter has not seen much success; if such success can indeed be measured in number of prosecutions. The next chapter purposes to analyse and summarize the qualitative data collected in the study with an objective to present and explain the data then draw interpretations.

CHAPTER 4

PREVALENCE OF FGM IN KENYA AND EFFORTS TOWARDS ITS ELIMINATION

4.0 INTRODUCTION

This chapter reports on the prevalence of FGM in our society today, Kenyan communities being the major focus and issues intertwined with the practice. The analysis of the efforts employed by the government and all entities involved in this battle shall also be outlined noting their capability, influences, and hindrances to their progress. In the later part of the chapter the women's experiences are discussed, addressing their experiences of FGM, as well as presenting their experiences across a range of health and legal issues.

4.1 PREVALENCE OF FGM IN KENYA AND EFFORTS TOWARDS ITS ELIMINATION

Historically, many cultures practicing FGM have belief that women are predisposed to promiscuous behaviour.⁷³ This is a particularly undesirable trait in cultures where a woman's virginity and fidelity are closely associated with parental and familial "honour".⁶⁸ Statistics on the prevalence of FGM are compiled through large scale household surveys in developing countries – the Demographic Health Survey (DHS). The estimated prevalence of FGM in girls and women (15-49 years) is 27.1%.⁷⁴ This has reduced from 37.6% in 1998⁷⁵ and 32.2% in 2003.⁷⁶ The prevalence of FGM varies greatly within ethnic groups. Ethnicity appears to be the most determining influence over FGM within a country.⁷⁷ For some ethnic groups, such as the Embu, Kalenjin, Maasai and Meru, FGM is considered a rite of passage and necessary for a girl to go through in order to become a responsible member of society. Girls who have not undergone FGM are often stigmatized. There is a strong link between FGM and marriageability, especially among the Maasai and Samburu, with ability to attract a higher bride price for a girl who has been cut being significant for the latter.

⁷³ Muteshi, J., & Sass, J. (2005). *Female Genital Mutilation in Africa: An Analysis of Current Abandonment Approaches*. Nairobi: PATH. ⁶⁸ Yuval-Davis, 1997

⁷⁴ Kenya National Bureau of Statistics & Macro International Inc. Calverton (2010). *Kenya DHS 2008-09*, <http://dhsprogram.com>

⁷⁵ National Council for Population and Development, Central Bureau of Statistics & Macro International Inc. Calverton. *Kenya DHS 1998*, <http://dhsprogram.com>

⁷⁶ Central Bureau of Statistics, Ministry of Health and Others (2004) *Kenya DHS 2004*, <http://dhsprogram.com>

⁷⁷ UNAIDS, UNICEF and USAID (2004) *Children on the Brink 2004*. USAID

Kenya has great ethnic and cultural diversity, as reflected in the differing rates of FGM across the ethnic groups, as well as the type of FGM performed and the underlying reasons for practicing it. Somalis who live predominantly in the North Eastern province practice FGM at a rate of 97.7%, with 75% having undergone the most severe Type III infibulation. The next highest prevalence is found among the Kisii (also known as the Abagussi or Gusii) at 96.1% and the Maasai at 73.2%. The Kisii and Maasai practice Type I clitoridectomy and Type II excision respectively. By contrast, the Luhya and Luo have the lowest rates of less than 1%.⁷⁸ The most common type of FGM is ‘flesh removed’ which accounts for 83% of women who have been cut. Infibulation accounts for 13%.⁷⁴

The average age of girls undergoing FGM in Kenya is twelve to eighteen. With the enactment of the 2001 and 2011 Acts, the average age has steadily dropped to seven, in an attempt to avoid detection. Some studies have shown that girls are now being cut earlier, between the ages of 7 and 12. It is thought that the decrease is to avoid detection as a response to legislation banning the practice. The proportion of women who have undergone FGM declines with age, indicating a decline in the popularity of the procedure in the older generations. FGM is a deeply rooted cultural practice, although the reasons vary between ethnic groups. The survivors and would be victims of FGM are disempowered girls with little voice, knowledge or social resources to make official complaints. They are unlikely to report their parents and other authority figures, including the circumcisers. They fear being ostracized and harassed by the community.

Statistics show that as of 2013, an estimated 27.1% of girls and women aged 15-49 years have undergone FGM. This figure has decreased from 37.6% in 1998 and 32.2% in 2003. There are various reasons attributed to the decrease. Organizations and stakeholders working on the eradication of FGM agree that while laws are an important step; it is not sufficient, although necessary; it requires a multi-faceted approach. To ensure that the law works, it has to be supported by educating and engaging with the community on the danger of FGM.

⁷⁸ Kenya National Bureau of Statistics & Macro International Inc. Calverton (2010). *Kenya DHS 2008-09*, page 246 ⁷⁴*Supra* 247

For some, such as the Meru, Embu and Maasai, it is an important rite of passage while in other communities such as the Maasai, it is closely tied to marriageability. For some ethnic groups such as the Samburu, FGM is linked to concepts of family honour and the need to preserve sexual purity. Among the Kisii, FGM is believed to be necessary to control women's sexual desires and distinguishes them from their neighbouring Luo ethnic group.

4.2 FGM AMONGST THE KENYAN ETHNIC GROUPS

Although legislation theoretically offers protection for girls and women and serves as a deterrent to families and circumcisers, the laws can be difficult to enforce and do not in themselves change beliefs and behavior.⁷⁹ It is most effective when accompanied by awareness raising and community dialogue. If anti-FGM laws are introduced before society has changed its attitudes and beliefs or is not accompanied by the requisite social support, it may drive the practice underground, encourage people to cross the border to undergo FGM in neighbouring countries⁸⁰ and prevent people seeking medical treatment for health complications. Commentaries on Kenya's first anti FGM law suggest that it forced the issue pertinent to the procedure underground.⁸¹

It has been clearly recognized that eradication of FGM is in line with the Kenyan Constitution 2010 which states under Article 53 that every child has the right be protected from abuse, neglect, harmful cultural practices, all forms of violence and inhuman treatment. There are a broad range of interventions and strategies which have been used by different types of organisations to eradicate FGM such as the health risk/harmful traditional practice approach where the society is taught to do away with FGM procedures as it is outdated. Addressing the health complications of FGM is also another strategy employed by organization. This is conceivable through offering education to traditional FGM practitioners and alternative sources of income. The practitioners are also encouraged to organize alternative rites of passage, and religious- Leaders commended to enhance the campaign in their encounter with persons in the society by discouraging it as being evil. The Legal approach involves use of legal sanctions against the perpetrators.

⁷⁹ Population Council (2007) *Female Genital Mutilation /Cutting*: Legacy series

⁸⁰ UNICEF, (2005). The State of the World's Children: UNICEF

⁸¹ FIDA KENYA ANNUAL REPORT (2009) Keeping The Flame Burning

It has also been found that scholars especially those involved in religion are instrumental as they command respect and are opinion leaders. They are crucial in correcting misconceptions surrounding the societal position on FGM and can then educate the community. Community members also may be more willing to listen to religious scholars who prescribed to a different view of FGM than what was commonly believed. Fortunately, most religious leaders, scholars and community members openly declared their opposition to FGM. It is thought this technique will be far more successful than other interventions (such as Alternative Rites of Passage (ARPs)). The Population Council recommends continuing with religious clarifications, mainstreaming FGM in other development programmes, strengthening partnerships especially with religious organisations, targeting the whole community, especially youths and use of mass media.⁸²

There is a strong link between FGM and early marriage among some ethnic groups, such as the Maasai. Girls are cut prior to getting married and often drop out of school following the circumcision procedure. Through this approach, girls should be encouraged to remain in education and speak out against FGM. Education is a central issue in the elimination of FGM. Illiteracy remains at a critical level in Kenya and the lack of basic education is a root cause for perpetuating social stigmas surrounding FGM as they relate to health, sexuality and women's rights.

It is quite knowledgeable that FGM hinders girls' ability to obtain basic education and prevents them from pursuing higher education and employment opportunities and in most cases leads to child marriages. This then greatly affects the economic stability and independence of the girl child in future for her basic needs required for self-sustenance. Anti-FGM programmes need to be focused on advocating for girl's education, but educating men and boys on FGM is equally crucial.

EMERGING TRENDS IN FGM

a) Medicalisation of FGM

FGM is increasingly performed by health-care providers at an alarming rate. The medicalisation of FGM in Kenya has been a trend that has been documented, particularly among the Kisii. In 2003, 46% of Kenyan daughters had FGM performed by a health professional (up from 34.4% in

⁸² Population Council, 2009. A Research Agenda to End Female Genital Mutilation/Cutting (FGM/C) in a Generation, www.popcouncil.org.

1998). However, the latest DHS puts the figure at 19.7% overall or 27.8% in urban areas.⁸³

Medical interventions have been attempted in various forms, ranging from promoting precautionary steps, such as the use of clean sterile razors on each woman and dispensing prophylactic antibiotics, to obtaining genital operations in clinics or hospitals by trained nurses and physicians. Medicalization of FGM is proposed by some health professionals to reduce the incidence of its complications. However, medicalization of FGM will not reduce the long term complications of FGM, has no benefit what so ever, has no medical indication, and thus its performance violates the code of medical ethics. Furthermore, its medicalization would result in a setback in the global efforts to eradicate this harmful practice, and will give the green light to its performance by non-health-care providers with subsequent increased incidence of complications. The World Health Organization has also released its first-ever guidelines on how medical professionals should treat victims of female genital mutilation. The Agency hopes to ease the terrible suffering caused by the widely condemned practice.⁸⁴

The continued popularity of the practice makes leaders reluctant to counter it since they may lose in the elections. Some even hire lawyers on behalf of those who are accused. In Narok County, a group of women supporting circumcision of girls lured activists opposed to the practice and attacked them at Enosaen Village in Transmara. The more than 500 Maasai women then held a demonstration demanding to be allowed to circumcise their daughters. They complained that the girls were not attracting suitors because they were not circumcised.⁸⁵ This could have been prevented by having the women educated, equipped with skills to counter harmful cultural practises and encouraged to participate in the anti FGM campaigns themselves. Some experts opine that physical presence should be developed in areas where the practice is rampant and NGOs and the police, among others, needed to work more closely together to identify the places where FGM has taken place and who was responsible.⁸⁶

⁸³ Ibid at page 264

⁸⁴ Jared Nyataya. (2016, May 16). WHO issues first guidelines on treating female genital mutilation victims. The Daily Nation.

⁸⁵ George Sayagie. (2015, January 16). Chaos as 500 women demand 'cut' for girls. The Daily Nation.

⁸⁶ **Dickson Mwitii**. (2016, March 30). Women in Igembe, Meru County on the spot for allegedly frustrating war on female cut. The Daily Nation. ⁸² *Kenya DHS 2008-09*, page 266

b) Cross- border cutting

This refers to girls being taken out of their home country to undergo FGM in another country. Girls in Kenya are being taken to countries such as Uganda, Tanzania, Somalia for Female Genital Mutilation to avoid a crackdown on the harmful traditional practice at home. Cross border cutting is seen among communities who live along the Kenyan west and south Western borders with Uganda and Tanzania. The same communities live on the either side of the border and have strong ancestral ties. As a result, the daily informally cross the porous border for cattle grazing, trade and visiting relatives enabling cross border FGM without suspicion. Governments need to show commitment to laws with adequately funded strategies to ensure communities understand why FGM is harmful and that ending the practice is the best interest of all members of society.

c) FGM at younger ages to avoid detection and reporting

There appears to be trend to circumcise girls at younger ages. For example, 45 percent of circumcised women age 15-19 were circumcised before they were ten years old compared with only 14 percent of circumcised women age 45-49. Circumcision of urban women generally occurs at younger ages than for rural women. Coast province has by far the highest proportion of female circumcision performed during infancy. Almost two-thirds of circumcised women in North Eastern province underwent the procedure when they were 3-7 years old. Almost 6 in 10 circumcised women in Rift Valley and Central provinces were circumcised when they were 14-18 years old.

The average age of girls undergoing FGM in Kenya is twelve to eighteen. With the enactment of the 2001 and 2011 Acts, the average age has steadily dropped to seven, in an attempt to avoid detection. Some studies have shown that girls are now being cut earlier, between the ages of 7 and 12. It is thought that the decrease is to avoid detection as a response to legislation banning the practice. The proportion of women who have undergone FGM declines with age, indicating a decline in the popularity of the procedure in the older generations. The survivors and would be victims of FGM are disempowered girls with little voice, knowledge or social resources to make official complaints. They are unlikely to report their parents and other authority figures, including the circumcisers. They fear being ostracized and harassed by the community.

4.3 REASONS FOR THE CONTINUED PRACTICE OF FGM

Firstly, there is a great deal of secrecy among those who want to continue the practice. The reaction has been to take the practice underground with the aim of avoiding detection and subsequent prosecution. They see the law as interfering with their traditional practices, and consider cultural concerns and religious beliefs as outweighing the illegality of FGM (FIDA 2009). To these communities, FGM represents an important part of a woman's identity and place in the community; it brings respect and acceptability. With such secrecy comes the difficulty of apprehending the perpetrators.

Second, there are prevalent reports of police and other law enforcement agents accepting bribes from offenders to evade detection and prosecution (Pambazuka 2013). Most law enforcement officers are untrained on the issues surrounding the practices, and prohibition, of FGM. Some consider it as an interference with private and/or family, as well as community, life and are reluctant to intervene. For others, it is an additional source of "income". The trend of viewing FGM as a second source of income has also been reported among health professionals with the increased medicalization of FGM.

4.4 SUMMARY ANALYSIS OF RESEARCH FINDINGS

This is yet another important consideration in eradication measures towards FGM. The Kenyan legal framework has made tremendous advances in respect to legislation through the enactment of the FGM act of 2011. However, despite of the law being in place, FGM continues to be practiced widely, particularly in rural areas.⁸⁷ In addition, the government in coordination with nongovernmental organisations has to some extent contributed to the fight against FGM. Under the National Policy for the Abandonment of FGM, nearly 800 police officers, probation officers, community leaders and others were trained to implement the new legislation. This was undertaken by the government in 2011.

Lack of evidence during prosecutions has been a major setback for the government during anti-FGM prosecution. Circumcisers have abandoned open ceremonies and adopted underground ones to avoid detection by police officers. The crackdown on female circumcision is facing setbacks

⁸⁷ Human Rights Report, (2011) *Country Reports on Human Rights Practices*, <http://www.state.gov>

even as statistics point towards a decline in the practice in recent years.⁸⁸ There were only three successful prosecutions under the 2011 Act by 2013.⁸⁹ It has also been cumbersome to bring offenders to justice due to reliance on young girls to report the crime who do not want to see their parents get in trouble, difficulties in gathering evidence, and the challenge of persuading witnesses to testify all hamper the process. Statistics from a 2014 report on FGM by Kenya's inspector general of police shows relatively few convictions. Between 2011 and 2014, a total of 71 cases were taken to court. Of those, only 16 resulted in convictions. There were 18 acquittals, four cases were withdrawn, and 33 were pending.

There are also media programmes carrying out sensitization on FGM in the area of study. Local organisations working to eradicate FGM have also to larger extent contributed to the process but their capabilities have been hampered by inadequate financing since most are heavily dependent on funding from international donors. Programmes have worked best in Kenya when they are cooperative and inclusive. The campaigns need to include topics on human rights violations and the harmful effects caused by FGM. There are still many challenges to overcome before FGM is eradicated in Kenya, but with current legislations and active anti-FGM programmes progress continues in a positive direction. Several campaigns by government and NGOs against the practice have not done much to stop FGM. Among the Kuria, female circumcision is a rite of passage that everyone is so passionate about that they just can't discard it.⁹⁰

It can thus be agreed that as a result of FGM, women and girls have greatly been subjected to several forms of sexual violence which thus necessitates that this practice should be stopped. The next chapter shall draw the conclusions of this study and make recommendations.

⁸⁸ **Pauline Kairua**. (2016, February 8). One in five women of reproductive age have undergone the cut. The Daily Nation.

⁸⁹ Office of the Attorney General, *Personal Communication* 2013

⁹⁰ Elisha Otieno. (2016, February 8) In Kuria, girls' education is secondary to FGM. Nation Media Group.

CHAPTER 5: SUMMARY CONCLUSIONS AND RECOMMENDATIONS

5.0 INTRODUCTION

This chapter draws conclusions and makes recommendations based on the findings of this study. It also proposes the key areas for further research as informed by the findings of the study. It also seeks to assess the possible steps that can be undertaken in effort to stop this harmful cultural practice in Kenya. This is in the expedition of providing a solution to the research problem which shall be done through the review of the critical questions raised in the study. The first question is whether the Kenyan legal framework has adequately addressed Female Genital Mutilation situations, its eradication and how medicalized FGM can be combated. The second question relates to how the persistence of certain cultural norms, traditions and stereotypes perpetuate violence against women and whether there is need to free the girl child from the violence. Finally, societal perceptions, attitudes and behavior regarding FGM and how it affects gender equality and societal development will also be examined.

5.1 FREEING THE GIRL CHILD FROM SHACKLES OF CULTURE AND TRADITION

As discussed in the previous chapters, the issue of FGM is not only harmful on the reproductive and sexual health of women, but also constitutes a violation of women and girls' fundamental human rights. The rights-based approach affirms that well-being, bodily integrity and health are influenced by the way a human being is valued, respected and given the choice to decide one's direction in life without discrimination, coercion or neglect. It is in contravention of the above values that the practice has been regarded as a violation against women. FGM has a strong cultural value in many contexts, it is imperative to initiate dialogue with communities on the preservation of positive cultural values, whilst a policy of abandonment is pursued.

5.2 RECOMMENDATIONS

1. There is need for greater coordination between the different agencies involved in the eradication processes. Community leaders should also be actively involved in the fight against FGM. The government should liaise with the police and come up with a prompt response wing for regions where FGM is rampant. Lack of prompt response may result to the escape of the circumcisers and the girls immediately across the border or to far-off places, and hence difficult to follow them up. This should be followed by close supervision as it has been discovered that the practice is carried out during the night by some FGM practitioners in order to escape prosecutions. More rescue centres need to be set up in areas where the practice is prevalent.⁹¹
2. The ‘medicalisation’ of female genital mutilation should be denounced on two counts. Firstly, it is usually anatomically more damaging and, secondly, it goes against the ethical basis of the medical profession. Medicine must also not be used for harmful practices. In 1994, the International Federation of Gynecology and Obstetrics passed a resolution that calls on all doctors to refuse to perform ‘female genital mutilation”, and was joined by many other major organizations. This should be done through enacting legislation on medical ethics with stiff sentence to the offenders.
3. Law alone cannot change behavior. Legal reform should be accompanied by other change efforts that address culturally mediated social, moral and religious norms that may uphold the practice.
4. There is need for provision of regular trainings to Health providers. This will equip them with skills necessary for countering the harmful effects of FGM on the health of the affected individuals who come to the hospitals for help They also need to be educated on the legal consequences of engaging in medicalized FGM. Following this, the authorities need to prosecute health providers carrying out FGM. Finally, more resources are needed for sexual and reproductive health education, and more research and funding is needed on the psychological consequences of FGM.

⁹¹ Ken Bett. (2016, March 22). Marsabit County government urged to build rescue centres for victims of child abuse. The Daily Nation

5. Training should also be given law enforcement officers and health professionals, not only on the negative impact of FGM, but also on their responsibility under the law, as well as on the consequences of neglecting those responsibilities. The government should also provide support for girls by funding more safe havens for girls in danger of being forced to undergo FGM. Most importantly, to stress the government's commitment to eradicating the practice and protecting would be victims, more prosecutions of perpetrators and collaborators of FGM must take place.
6. The media should also be actively involved in eradication measures through advertisement and monitoring of the anti- FGM laws by exposing those in breach. Girls should also be educated on the effects of FGM on their health through different media that they can easily access. This can go a long way in preventing situations where the girls themselves fight to have FGM done on them. As an example, a secondary school girl threatened to burn her parents' home in Kerio Valley if she was not circumcised despite a teenager dying and two others admitted to hospital in the same village.⁹² There is need for curriculum on FGM awareness, women's rights and the importance of girls' education in schools. There must be a strong and permanent presence of education and sensitizing materials, through pamphlets, videos, seminars and workshops, websites and blogs on the consequences of this practice.
7. Advocacy and lobbying is essential to ensure that recent legislative and policy changes introduced by the Kenyan government are properly implemented and that the momentum gained by such changes is sustained. Kenya now has more robust legislation against FGM and while its success has not yet been fully assessed, it is recommended that further prosecutions under the current law are necessary across a wide range of geographical regions. In an ironic twist of events, a government rally to educate locals on the dangers of female circumcision was met with an unusual defiance by residents of Kerio Valley in Elgeyo Marakwet County. Some 4 kilometers away from government anti-FGM rally, villagers celebrated the "graduation" of over 700 girls who faced the knife!⁹³ Therefore, more lobbying and education needs to be done to avoid such defiance.

⁹² Philemon Suter. (2015, December 15). Girl dies, two in hospital as FGM wave sweeps Kerio Valley

⁹³ Elisha Otieno (2016, February 8) In Kuria, girls' education is secondary to FGM

5.3 CONCLUSION

Despite some good results with respect to reduction of the practice among various ethnic groups in Kenya, there is a need to ensure that results are documented and sustained through joint concerted efforts of the government and other stakeholders at local and national level. After the study of issues entwined with FGM, it has been established that the battle for the abolition of FGM is definitely one that is too difficult to be left to individual crusaders. It has to be fought by all and particularly by government and by professionals such as Obstetricians, Gynecologists, Pediatricians, Nurses and Midwives who are the ones who have to deal with the serious complications caused by FGM.

One lesson learnt for UNICEF and UNFPA is to abandon the medical approach and go for humanrights based programming approach and other culturally sensitive approaches because they have found that too much focus on a medical approach leads to ‘medicalisation’ of FGM, implying that parents take their children to hospitals or have nurses and health workers performing the cut because it reduces the medical risks.

Mobilising the youth groups can be an important success criterion for the FGM project. Several active young boys and girls should be involved through the spreading of the anti-FGM message to their peers in schools and youth groups by using drama, poetry, and sketches. Further, for a project such as the FGM project, well-functioning boards at both national and branch level is important to integrate the project in the overall strategies of the organisation, and to contribute to a long-term sustainability of the FGM actions in Kenya. However, the main obstacles preventing the intended results in the projects undertaken is people’s inherent resistance to change age-old traditions and since FGM/C is illegal, the tradition continues underground with all the negative consequences of that (medicalisation) and difficulties in monitoring. Stand-alone FGM projects in poor communities have lower success rates if not integrated with basic needs provision and national lobbying and awareness-work.

5.4 SUGGESTIONS FOR FURTHER STUDIES

It would be important to replicate this study with a much larger sample size.

BIBLIOGRAPHY

1. Alice, W., & Pratibha, P. (1996). *Warrior Marks*. Mariner Books.
2. Anthony G, 'Sociology: A Brief but Critical Introduction' (Stanford University Press 1987)
3. Austin, J. (1995). *The Province of Jurisprudence Determined*. Ed. W.E. Rumble, Cambridge: Cambridge University Press.
4. Bennett S, 'Female Genital Mutilation/cutting' in Jenny C. (ed.), *Child Abuse and Neglect* (St Louis 2011) 134–141.
5. Berg and Denison, 'A Tradition in Transition: Factors Perpetuating and Hindering the Continuance of Female Genital Mutilation/Cutting (FGM/C) (2011) <http://www.ncbi.nlm> accessed on 25th June 2019
6. *Bradwell v State of Illinois* (1873) 83 U.S. (16 Wall.) 130
7. Brown W, 'States of Injury: Power and Freedom in Late Modernity' (Princeton University Press 1995) 25.
8. Caroline P H, 'Understanding Society' in Harper & Row (eds), *An Introduction to Sociology* (Third Edition. New York 1990)
9. Central Bureau of Statistics, Ministry of Health and Others, 'Kenya DHS 2004' (Report 2004) <http://dhsprogram.com> accessed on 3rd June 2019
10. Cook, R.J. et al., (2002) 'Female Genital Cutting (Mutilation/Circumcision): Ethical and Legal Dimensions' in *International Journal of Gynaecology and Obstetrics*, 79, pp. 281-287.
11. Dan, R., & Sarah, M. (2015). *Long term health consequences of Female Genital Mutilation (FGM)*. *Maturitas*, 80, 48–51.
12. Davis Y, 'Gender and Nation' (Sage Publishers 1997)
13. Deckha M, 'Is Culture Taboo? Feminism, Intersectionality, and Culture Talk in Law' (2004) *16 Canadian Journal of Women and the Law* 14, 16
14. Department of State and USAID (2011). *Human Rights Report*. Retrieved from: <http://www.state.gov>
15. Dorkenoo, E. (1995). *Cutting the Rose: Female Genital Mutilation, the Practice and its Prevention*. London: Minority Rights Group.

16. Duffy J, 'Masturbation and Clitoridectomy: A Nineteenth-Century View' JAMA: The Journal of the American Medical Association (1963): 246– 248.
17. El Dareer, A. (1983) 'Complications of Female Circumcision in the Sudan' in *Tropical Doctor*, 13, pp. 131-133.
18. Elchalal, U. et al., (1997) 'Ritualistic Female Genital Mutilation: current status and future outlook.' in *Obstetrical and Gynecological Survey* 52, pp. 643-651. , 52, pp. 643-651.
19. Elchalal, U., Ben-Ami, B., Gillis, R., & Brzezinski, A. (1997). *Ritualistic female genital mutilation: Current status and future outlook. Obstetrical & Gynecological Survey*, 52(10), 643-651.
20. FIDA KENYA, 'Keeping The Flame Burning' (REPORT 2009)
21. FIDA. (2009). *Keeping the Flame Burning. Kenya Annual Report*. Retrieved from: <http://fidakenya.org>
22. Golafshani, N. (2003). *Understanding Reliability and Validity in Qualitative Research: The Qualitative Report*, 8(4), 597-606.
23. Gronnvoll M, 'Gender (In)Visibility at Abu Ghraib. Rhetoric & Public Affairs' (Michigan State University Press 2008): 10(3), 371–398.
24. Guattari F, 'Remaking of Social Practices' in G Genosko (ed) *The Guattari Reader* (Blackwell, Oxford, 1996) 266
25. Hamid, R. (2013). *Country Reports on Human Rights Practices: African Journal of Urology*, 19(3), 130–133.
26. Hart H.L.A, 'The Concept of Law' (2nd edn, Oxford University Press 1961)
27. HRC, 'General Comment 28: Equality of Rights between Men and Women (Article 3), UN Doc CCPR/C/21/Rev.1/Add.10 (29 March 2000) [30].
28. Kenya National Bureau of Statistics & Macro International Inc. Calverton, 'Kenya DHS 2008-09' (Report, 2010) <http://dhsprogram.com> accessed on 3rd June 2019
29. Lightfoot-Klein, H. (1983). *Pharaonic circumcision of females in the Sudan. Journal of Medicine and Law*, 2, 354.
30. Lightfoot-Klein, H. (1989) *Children Genitals Under Knife*. Haworth Press, Page 180.

31. Lightfoot-Klein, H. (1989). *Prisoners of Ritual: An Odyssey into Female Genital Circumcision in Africa*. New York, NY: Haworth Press.
32. Mackie, G. (1996). *Ending Foot Binding and Infibulation: A Convention Account*. *American Sociological Review*, 61 (6), 999–1017.
33. Maendeleo Ya Wanawake Organization, (1993) *Harmful Practices that affect the Health Women and their Children*. Retrieved from: <http://www.mywokenya.org>
34. Maendeleo Ya Wanawake Organization, ‘Harmful Practices that affect the Health Women and their Children’ (MYWO 1993)
35. Momoh, C. (2005). *Female genital mutilation: Ed United Kingdom*: Radcliffe publishing Ltd.
36. Momoh, C. (2010). *Female genital mutilation. Trends Urology, Gynecology & Sexual Health*, 15(3), 11–14.
37. Muteshi, J, & Sass, J, ‘Female Genital Mutilation in Africa: An Analysis of Current Abandonment Approaches’ (Program for Appropriate Technology in Health Publishers 2005)
38. Muteshi, J., & Sass, J. (2005). *Female Genital Mutilation in Africa: An Analysis of Current Abandonment Approaches*. Nairobi: PATH.
39. Nahid, T. (1994). *Female Circumcision as a Public Health Issue*: *The New England Journal of Medicine*, 331(11), 712–716.
40. National Council for Population and Development, Central Bureau of Statistics & Macro International Inc. Calverton. (2010) *Kenya DHS 1998*. Retrieved from: <http://dhsprogram.com>
41. Nyataya, J. (2016, May 16). *WHO issues first guidelines on treating female genital mutilation victims*. *The Daily Nation*, 19.
42. Office of the Attorney General (2013). *Personal Communication*. Retrieved from: <http://www.attorney-general.go.ke>
43. Ogar J N and Asira E.A, ‘Introduction to Philosophy of Medicine’ (Vol 1 Calabar: Jochrisam Publishers 2011).
44. Oliner, P.M. (1992). *Embracing the Other: Philosophical, Psychological, and Historical Perspectives on Altruism*, New York: University Press.

45. Petronio S, 'Welcome to the Journal of Family Communication Special Issue on Communication Privacy Management Theory and Family Privacy Regulation: Journal of Family Communication (2013) Vol 13 pg 1
46. Population Council, 'A Research Agenda to End Female Genital Mutilation/Cutting (FGM/C) in a Generation' (Report 2009) www.popcouncil.org accessed on 5th June 2019
47. Population Council. (2007) *Female Genital Mutilation /Cutting*: Legacy series.
48. Population Council. (2009). *A Research Agenda to End Female Genital Mutilation / Cutting (FGM/C) in a Generation*. Retrieved from: www.popcouncil.org.
49. Rahman, A. and Toubia, N. (eds.) (2000) *Female Genital Mutilation: A Guide to Laws and Policies Worldwide*. London: Zed Books.
50. Regier, H. A, 'The notion of natural and cultural integrity: In Ecological Integrity and the Management of Ecosystems' (1991) (pp. 3–18).
51. Report of the Fourth World Conference on Women, UN Doc A/Conf. 177/20 (17 October 1995) Annex I, [32].
52. Rocky J, 'What does the philosophical background of social studies mean?' <https://www.quora.com/> accessed on 25th June 2019
53. Rushwan, H, 'Female Genital Mutilation: A Tragedy for Women's Reproductive Health' (*African Journal of Urology* 2013) 130–133.
54. Scott J W, 'Feminism and History' (Oxford University Press 1996) 1, 4.
55. Seidman, I. (1998). *Interviewing as Qualitative Research: A Guide for Researchers in Education and the Social Sciences*. Teachers College Press.
56. Sheryl G J. & Ollenburger J C, 'The Social Context of Law' (Pearson Publishers 1999)
57. Skaine, R. (2005) *Female Genital Mutilation: Legal, Cultural And Medical Issues*. McFarland.
58. The Fulda-Mosocho Project. (2006). *Female Genital Mutilation Can Be Overcome*. Retrieved from: www.fulda-mosocho-project.com
59. Tiilikainen, T. (2004). *Focusing on the Public Health Nurses in Helsinki*. Retrieved from: <http://www.irinnews.org>

60. Toubia N, 'Female Genital Mutilation: A Call for Global Action' (Rainbo Publishers 1995) pages 35-37.
61. UN General Assembly. (2012). *Resolution A/RES/67/146: Intensifying global efforts for the elimination of female genital mutilations*. Retrieved from: www.un.org
62. UN Women Watch, 'Eliminating Female Genital Mutilation: An Interagency statement (2008) <http://www.un.org/womenwatch/daw/csw/> accessed on 24th June 2019
63. UNAIDS, UNICEF & USAID. (2004). *Children on the Brink: A Joint Report of New Orphan Estimates and a Framework for Action*. New York. USAID. Retrieved from: <http://www.unicef.org>
64. UNAIDS, UNICEF and USAID, 'Children on the Brink' (Report 2004)
65. UNFPA-UNICEF. (2013). *Joint Programme on Female Genital Mutilation/Cutting: Annual Report 2012*. UNFPA.
66. UNFPA-UNICEF. (2014). *Joint Program on Female Genital Mutilation/Cutting: Accelerating Change*. Retrieved from: <http://www.unfpa.org>
67. UNICEF (2005). *The State of the World's Children: Child hood Under Threat*. Retrieved from: <http://www.unicef.org>
68. UNICEF, 'The State of the World's Children' (UNICEF 2005).
69. UNICEF. (2005). *Female Genital Mutilation/Cutting: A Statistical overview and exploration of the dynamics of change*. Retrieved from: <http://www.unicef.org/>
70. Walley, C. J. (1997) *Searching for 'Voices': Feminism, Anthropology, and the Global Debate over Female Genital Operations*. *Journal of Cultural Anthropology*, 12, 405-438
71. Wanyoro, C. (2016, February 4). *Embu elders claim some medics perpetrating female circumcision*. *The Daily Nation*, 27.
72. Wanyoro, C. (2016, July 12) *Governor raises alarm over FGM among girls*. *The Daily Nation*, 24.
73. World Health Organization. (1996) *Female Genital Mutilation: Report of a WHO Technical Working Group*, Geneva. World Health Organization Press.

74. World Health Organization. (2002). *Health Complications of Female Genital Mutilation including Sequelae in Childbirth: A Systematic Review*. Geneva. World Health Organisation Press.
75. World Health Organization. (2005). *Make every Mother and Child Count*. Geneva. World Health Organisation Press.
76. World Health Organization. (2008) *Eliminating female genital mutilation: An interagency statement* -OHCHR, UNAIDS, UNDP, UNECA, UNESCO, UNFPA, UNHCR, UNICEF, UNIFEM, WHO. Geneva. World Health Organisation Press.
77. Yuval-Davis, N. (1997). *Gender and Nation*. London: Sage.