

**University of the Western Cape
Faculty of Law**

**Female genital mutilation as a human rights issue: Examining the law against
female genital mutilation in Tanzania**

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**Mini-thesis submitted in partial fulfillment of the requirements for the degree of
Master of Laws (Legum Magister)**

WESTERN CAPE

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Declaration

I declare that *Female genital mutilation as a human rights issue: Examining the law against female genital mutilation in Tanzania* is my own work, that it has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.

Student: Camilla Yusuf

Signature:.....

Date :.....



Supervisor : Dr. Yonatan Fessha

Signature :.....

Date:.....

Dedication

I dedicate this work to my parents, Mr and Mrs Gulam Yusuf, my two brothers and my sister for their unconditional love and support in all my pursuits in life.



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All praise and thanks is due to God for his protection and grace throughout my studies.

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List of abbreviations

AFNET	Anti-Female Genital Mutilation Network
African Charter	African Charter on Human and Peoples' Rights
CAT	Convention against Torture
CCBRT	Comprehensive Community Based Rehabilitation in Tanzania
CCT	Christian Council of Tanzania
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CHRC	Commission for Human Rights and Good Governance
CIDT	Cruel, inhuman or degrading treatment or punishment
CRC	Convention of the Rights of the Child
DEVAW	Declaration on the Elimination of Violence against Women
FGM	Female genital mutilation
IAC	Inter African Committee on Harmful Traditional Practices Affecting the Health of Women
ICCPR	International Covenant on Civil and Political Rights
ICESC	International Covenant on Economic, Social and Cultural Rights
LHRC	Legal Human Rights Centre
LRCT	Law Reform Commission of Tanzania
Maputo Protocol	Protocol on the African Charter on Human and Peoples' Rights on the Rights of Women
NAFC	National Anti FGM Coalition
NAFGEM	Network against Female Genital Mutilation
NCEA	National Chapter for East Africa for Elimination of FGM and Harmful Traditional Practices
NCIAC	National Chapter for Inter- African Committee for the Elimination of harmful Cultural Practices
NGOs	Non-governmental organisations
NPA	National Plan of Action to accelerate the elimination of female genital mutilation and other harmful practices in Tanzania (2001- 2015).

SOSPA	Sexual Offences Special Provision Act of 1998
TAMWA	Tanzania Media Women Association
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCRPD	International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities
URT	Constitution of the United Republic of Tanzania of 1977
WHO	World Health Organization
WLAC	Women's Legal Aid Centre



Keywords

Female genital mutilation

Violence against women

Gender inequality

Women

Culture

Tradition

Patriarchy

Discrimination

Human rights

International law



TABLE OF CONTENT

Declaration	i
Dedication	ii
Acknowledgements	iii
List of abbreviations	v
Keywords	vii
1. Chapter one: Introduction	1
1.1 Background to the study	1
1.2 Problem statement	3
1.3 Significance of the study	4
1.4 Scope of the study	4
1.5 Methodology	4
1.6 Literature review	4
1.7 Structure	6
2. Chapter two: Female genital mutilation as a human rights issue	8
2.1 Introduction	8
2.2 The practice of FGM	9
2.3 The international human rights response to the practice of FGM	14
2.4 FGM as a violation of international human rights law	21
2.4.1 FGM and the right to equality	22
2.4.2 FGM and the right to be free from all forms of violence	28
2.4.3 The right to be free from torture and FGM	31
2.4.4 FGM and the right to life	35
2.4.5 The right to health and FGM	37
2.4.6 Protection against harmful practices and FGM	39
2.5 Conclusion	42
3. Chapter three: The law against female genital mutilation in Tanzania: A critical analysis ..	44
3.1 The practice of FGM in Tanzania	44
3.2 The status of international law in Tanzania	50
3.3 Legal measures	53
3.3.1 Constitutional protection	54
3.3.2 Legislative framework protecting the rights of women in Tanzania	57
3.3.2.1 The absence of definition	60

3.3.2.2 The issue around consent.....	61
3.3.2.3 Criminal Liability under Section 169.....	63
3.3.2.4 Punishment.....	65
3.3.2.5 Investigation and legal prosecution.....	66
3.4 Other measures supporting the legislative Framework against FGM.....	69
3.5 Conclusion.....	79
4. Chapter Four: Conclusion and recommendations.....	80
4.1 Conclusion.....	80
4.2 Recommendations.....	81
5. Bibliography.....	84



1. Chapter one

Introduction

1.1 Background to the study

Female genital mutilation (hereafter referred to as FGM) refers to all procedures ‘involving the partial or total removal of the external female genitalia or other injury to the female genital organ, whether for cultural or other non-therapeutic reasons’.¹ The procedure is usually carried out in unsanitary conditions using either a knife, razor blade or any sharp object and, in majority of the cases, in the absence of anaesthetics.²

FGM is predominantly practiced in Africa in 28 countries.³ Outside Africa, FGM is practiced in Indonesia, Malaysia and the Arabian Peninsula as well as by African immigrants living in the western part of the globe.⁴ Statistics by World Health Organization (hereafter referred to as WHO) indicate that almost 100 to 140 million women have undergone FGM worldwide to date, and 92 million of those women are from the African continent.⁵ According to Amnesty International, approximately 6000 women are at the risk of being subjected to FGM every day.⁶

¹ WHO *Eliminating female genital mutilation :An interagency statement by OHCHR,UNAIDS,UNDP,UNECA,UNESCO,UNFPA,UNHCR,UNICEF,UNIFEM,WHO* (2008) available at http://whqlibdoc.who.int/publications/2008/9789241596442_eng.pdf (accessed on 9/08/2011).

² Wood A ‘A Cultural rite of passage or a form of torture: Female genital mutilation from an international law perspective’ (2001) 12 *Hastings Women’s Law Journal* 352; Gibeau A ‘Female genital mutilation: when a cultural practice generates clinical and ethical dilemmas’ (1998) 27 *Journal of Obstetric, Gynaecologic, & Neonatal Nursing* 86.

³ WHO (2008) 4.

⁴ Duncan BS and Hernlund Y *Female circumcision in Africa: Culture, controversy and change* (2000) 9.

⁵ World Health Organization Fact Sheet no 241 on Female genital mutilation available at <http://www.who.int/mediacentre/factsheets/fs241/en/index.html> (accessed on 10/11/2011).

⁶ Amnesty International *What is Female genital mutilation?* Available at <http://www.amnesty.org/en/library/asset/ACT77/006/1997/en/373c3381-e984-11dd-8224-a709898295f2/act770061997en.pdf> (accessed on 10/11/2011). See also World Health Organisation Fact sheet no 241 on Female genital mutilation available at

Tanzania is among the 28 African countries practicing FGM with 18 percent prevalence among women between the ages of 15 to 49.⁷ FGM is mostly practiced in the northern and central regions of the country with high prevalence rates in Manyara and Dodoma.⁸

FGM has no health benefits but rather exposes women and girls to extreme pain and suffering, risks lives and imposes both long and short term negative effects on victims.⁹ More importantly, for the purpose of this study, FGM is deemed to violate fundamental human rights guaranteed in both international and regional human rights instruments. A reflection of the international community's stand towards the abolishment of FGM is evident through the development and interpretation of several human rights instruments pertaining to the protection of the rights of women. Due to the discriminatory nature of the practice, FGM is deemed to violate several rights that are protected in international human rights instruments, including the Convention on the Elimination of All Forms of Discrimination against Women (hereafter referred to as CEDAW).¹⁰ It is also often argued that, the right to be free from torture as guaranteed in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereafter referred to as CAT), is also infringed upon by the nature of the procedure and the manner in which FGM is performed as most victims experience severe pain and suffering.¹¹ FGM is also deemed to violate the rights enshrined

<http://www.who.int/mediacentre/factsheets/fs241/en/index.html> (accessed on 10/11/2011).

⁷ United Nations Children's Fund (2005) *Female genital cutting/mutilation: A statistical exploration* available at http://www.unicef.org/publications/files/FGM-C_final_10_October.pdf (accessed on 9/08/2011).

⁸ Tanzania has a total of 26 regions both in the main land and Zanzibar

⁹ Schott J and Henley A *Culture, religion and child bearing in a multi racial society: A handbook for health professionals* (1996) 213; Mekonnen D 'The abolition of female circumcision in Eritrea: Inadequacies of the new legislation' (2007) 7 *African Human Rights law Journal* 393; Eldin A S *Female genital mutilation* in Chandra P, Herman H, Kastrup M, Niaz U, Randon M, Okasha A and Fisher J (eds) *Contemporary topics in women mental health: Global perspective in a changing society* (2009) 486.

¹⁰ Alison P, Steiner H and Goodman R *International human rights in context: Law, politics, and morals*, 2nd ed (2000) 179.

¹¹ Bond J and Phillips R *Violence against women as a human rights violation: International institutional responses* in Renzetti MC, Edleson JL, and Bergen KR (eds) *Sourcebook in violence against women* (2001); Annas C 'Irreversible error: The power and prejudice of female genital mutilation' (1996) 12 *Journal of Contemporary Health Law and Policy* 2.

in the Convention of the Rights of the Child (hereafter referred to as CRC).¹² Under the African human rights system, FGM is deemed to violate women's rights protected under the African Charter on Human and Peoples' Rights (hereafter referred to as the African Charter). In addition, the practice is deemed to violate the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (hereafter referred to as Maputo Protocol) which advocates for the elimination of all forms of discrimination against women.¹³

Tanzania has ratified a number of international and regional human rights instruments that are relevant in protecting women against the practice of FGM. Although Tanzania is not a party to CAT, it has, however, ratified CEDAW in 1985, CRC in 1991, the African Charter in 1986, Maputo Protocol in 2007 and the ACRWC in 2003. This suggests that Tanzania has a legal obligation, derived from international and regional human rights instruments, to put in place measures to safeguard the rights of women against FGM.

1.2 Problem statement

The mere fact that the practice of FGM continues despite Tanzania's obligation under international and regional human rights treaties raises the question whether Tanzania has put in place adequate constitutional and legislative mechanisms to protect women against FGM. With the view to address this issue, the research will tackle the following questions:

- What is the protection provided by the international human rights instruments to safeguard women against FGM?
- What is the protection provided under the African human rights instruments to safeguard the rights of women against FGM?
- What is the place and status of international and regional treaties in the Tanzanian legal system?
- Does the constitutional and legal framework of Tanzania provide adequate protection to women against FGM, and thus, giving effect to its international and regional human rights obligations?

¹² Van Bueren G *The international law on the rights of the child* (1998) 307; Detrick S *The United Nation Convention on the Rights of the Child: A guide to the "travaux preoatoires"* (1992) 141.

¹³ Nowak M *Introduction to the international human rights regime* (2003) 206.

1.3 Significance of the study

The significance of this study is to provide, from a human rights perspective, a broader understanding and insight into the prohibition of FGM in Tanzania. By discussing international and regional human rights instruments, this study will assist in identifying and giving clarity about standards in terms of which the national legal framework can be evaluated. In addition, this research will give possible recommendations on how to strengthen the current legal framework in Tanzania to protect women against FGM, thereby, contributing to the scant body of legal jurisprudence on FGM that is currently available on Tanzania.

1.4 Scope of the study

The United Republic of Tanzania has a union government between Tanzania main land and Zanzibar. There are laws that are applicable to the main land and some only to Zanzibar. For the purpose of this research, the study will only be limited on the laws that are applicable to the main land. In addition, although Tanzania is the main focus, it is impossible to deal with the issue without discussing the international and regional human rights instruments that impact on the practice of FGM as well as the laws and practices of countries that are attempting to eradicate the practice. Thus, relevant international and regional human rights system will be discussed with the view to develop the standards against which the effectiveness of the Tanzanian legal framework in the protection of women against FGM can be evaluated.

1.5 Methodology

This study will involve a desktop review of the jurisprudence on FGM. Various primary sources, such as international and regional human rights instruments, will be used together with national laws of Tanzania. In addition, the study will also utilise secondary sources such as books, articles and reports that have been written on the topic.

1.6 Literature review

Over the years, a huge body of literature has developed dealing with FGM. Although a lot of literature has dealt with the topic, little has been written on the effectiveness of the Tanzanian legal framework in the protection of women against FGM.

A report produced by the Legal Human Rights Centre of Tanzania has observed that one of the main obstacles towards the effectiveness of current legal framework is societal views towards the practice. Strong support for the practice is still evident because communities consider FGM as a significant part of their culture.¹⁴ Related to this, Gamaya has established that anti-FGM campaigns are considered as a threat to culture by these communities.¹⁵

Focusing on the existing legislation criminalising FGM in Tanzania, Foss *et al* have stated that the adoption of the legislation itself was not an independent national strategy but rather an illustration of the international anti-FGM campaign. According to them, Tanzania relies extensively on financial aid from the west and the influence of international campaign on national system is reflected on the approach and language of the legislation criminalising FGM.¹⁶

Bisima *et al* have identified that there is a lack of awareness among communities about the effects of FGM on fundamental human rights of women.¹⁷ It was established that even women belonging to such communities and, who are exposed to a higher risk of being subjected to the practice, are unaware of the legal mechanisms in place safeguarding their rights. In addition to these observations, Basima *et al* held that law enforcement officers, such as police officials in those regions, who have a legal obligation to implement the legislation and prosecute offenders, lack the broader understanding of the practice itself and

¹⁴ Bisima K, Lee S and Dafa JW *Reports on the findings of research into the practice of female genital mutilation (FGM) in Tanzania* (2005) 38.

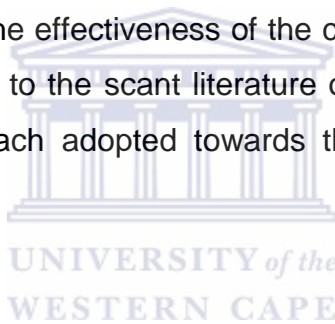
¹⁵ Gamaya K *The legal process, can it save girls from FGM? : A case of three maasai girls in Morogoro* (2004) 25.

¹⁶ Foss G *et al* (2001) 535.

¹⁷ Bisima K, Lee S and Dafa JW (2005) 39.

the legislation criminalising it.¹⁸ On the other hand, they held that the few who are aware of the legislation, have limited knowledge and understanding of its substantive provisions.¹⁹ Gamaya concluded that the current legal framework on its own is not sufficient to combat FGM in Tanzania if it is not supported by anti-FGM awareness campaigns.²⁰ These campaigns should be directed to the general public as whole with special focus given to regions where FGM is practiced. This view is supported by Boyle *et al* who argue that successful eradication of FGM is possible through a combination of legal mechanisms and education.²¹

From the foregoing, it is evident that not much has been written on the effectiveness of the current Tanzanian legal framework in protecting women against FGM. The literature available on the topic addresses the issue from a social science perspective and few works have been written to evaluate the effectiveness of the current legal framework. The objective of this research is to contribute to the scant literature on FGM, specifically in the context of Tanzania and the legal approach adopted towards the protection of women against the practice.



1.7 Structure

Chapter two traces both the international and regional development responding to the recognition of FGM as a human rights violation. This will involve a discussion of the development and position adopted by international and regional human rights instruments with regard to the protection of women against FGM.

¹⁸ Legal Human Rights Center (April 2001 – March 2002) *Final report for grass root activism Tanzania enforcement of the FGM law: A case of three Morogoro girls* 4; 6.

¹⁹ Bisima *et al* (2005)38.

²⁰ Gamaya (2004) 25 ;26.

²¹ Foss G ,Songora F and Boyle EH 'International discourse and local politics: Anti-female genital cutting laws in Egypt, Tanzania, and the United States' (2001) 48 (4) *Social Problems* 538.

Chapter three examines the current legal framework adopted by Tanzania in light of its international and regional human rights obligations with the view to determine its effectiveness in the protection of women against FGM.

Chapter four will conclude the study and offering few recommendations.



2 Chapter two

Female genital mutilation as a human rights issue

2.1 Introduction

FGM is an ancient practice that can be traced back to centuries.²² The practice has been in existence for a very long time that it is widely accepted as a “tradition” by many communities.²³ In fact, the origins of FGM are unknown. Different theories have been advanced by scholars to explain its origins.²⁴ Although the reasons that facilitated the spread of the practice remain unclear,²⁵ some argue that the practice has its origin in ancient Egypt and in southern Sudan.²⁶ It is widely believed that the practice spread from Egypt along the Nile valley to Sudan by Arab traders as a means of preserving the virginity of slave girls in order to guarantee a better price for them.²⁷ The view that attempts to limit the origins of FGM to a particular place is disputed by scholars, who argue that FGM, as a cultural practice, cannot be geographically defined.²⁸

The objective of this chapter is to examine the practice of FGM from the perspective of human rights law. The chapter will begin by briefly introducing the different types of FGM commonly practiced across the globe. In order to facilitate a broader understanding of FGM,

²² Barstow B ‘Female genital mutilation: The penultimate gender abuse’ (1999) 23 (5) *Child Abuse and Neglect* 502.

²³ Broussard P ‘The importation of female genital mutilation to the west: The cruelest cut of all’ (2010) 44 *University of San Francisco Law Review* 2.

²⁴ Abusharaf RM “Introduction: The custom in question” in Abusharaf RM (ed) *Female circumcision: Multicultural perspective* (2006) 2.

²⁵ Abusharaf RM (2006) 2

²⁶ Rahman A and Toubia N *Female Genital Mutilation: A guide to laws and policies worldwide* (2000) 7. See also Momoh C *Female genital mutilation* (2005) 5; Steele R ‘Silencing the deadly ritual: Efforts to end female genital mutilation’ (1995) 9 *Georgetown Immigration Law Journal* 6.

²⁷ Contrary arguments is however, assert that the reason behind the spread of FGM from Egypt to other places was purely as a result of cultural diffusion. Steele R (1995) 6.

²⁸ The argument that geographical borders between states do not necessarily define the ‘specificity’ of different cultural groups within them and the fact that cultural groups ‘straddle’ across borders. This, the argument goes, makes it difficult to ascertain the exact point of origin of the practice. Gibeau A (1998) 86.

the chapter will briefly discuss the reasons that are often used to justify the practice. The chapter then traces the historical development leading towards the recognition of FGM as a violation of international human rights law. Finally the chapter examines the position of human rights law, both at the level of international and the African human rights system on FGM.

2.2 The practice of FGM

FGM comes in different forms, depending on the manner and the degree of the cutting involved. The types of FGM practiced also differ from one region to the other and also among different ethnic groups.²⁹ The widely accepted classification of FGM, which was adopted by the United Nations (hereafter referred to as UN) and other international organizations, categorises FGM into four main types.³⁰ The first type of FGM is referred to as clitoridectomy. It involves 'the partial or the total removal of the clitoris' and is considered to be the least severe form of FGM.³¹ Infibulation is the second type of FGM, which involves the 'narrowing of the vaginal opening through the creation of a covering seal'. The covering seal is created 'by cutting and repositioning the inner or outer labia, with or without removal of the clitoris.'³² A small opening is left to allow the flow of urine and menstrual blood.³³ Once the procedure has been completed, the woman's legs are usually tied up together for forty days to ensure healing of the wound.³⁴

²⁹ World Health Organisation (2008) 4.

³⁰ Izette S and Toubia N 'Female circumcision/ female genital mutilation' in Hatch M and Goldman (eds) *Women and health* (2000) 404.

³¹ This, according to some muslims, is also referred to as Sunna, which is performed as religious obligation. See Wood A' (2001) 353.

³² World Health Organisation (2010) *Female genital mutilation fact sheet* available at World Health Organisation (2010) Female genital mutilation fact sheet <http://www.who.int/mediacentre/factsheets/fs241/en/index.html> (accessed on 29/10/2011).

³³ Lewis H 'Between irua and "female genital mutilation": Feminist human rights discourse and the culture divide' (1995)1 *Harvard Human Rights Journal* 5.

³⁴ Under this category, infibulations incorporates other procedures, usually known as defibulation and re-infibulation. Defibulation refers to the procedure where a woman, who has undergone infibulations, has to undergo 'vaginal opening' due to the physical barrier created after being infibulated. This is usually done by the husband or circumciser to enable her to have sexual intercourse after marriage and facilitate child birth.

Excision is considered to be the third type of FGM, involving the 'partial or total removal of the clitoris and the labia minora, with or without excision of the labia majora'.³⁵ This is the most common type of FGM and accounts for almost 80 percent of the cases on FGM.³⁶ The fourth category does not necessarily constitute a specific type of FGM but rather incorporates all other procedures performed on the female genitalia for non-medical purpose that are harmful to the natural functioning of the body. This includes a wide range of procedures such as 'pricking, piercing, incising, and scraping of the genital area.'³⁷ Due to its wide scope, this category is usually referred to as the unclassified type of FGM.

Irrespective of the particular form it takes, the continued practice of FGM is often attributed to various reasons. The reasons vary across regions and ethnic groups. For some communities, FGM is part of their tradition and culture. Yet for others, the practice represents an essential aspect of fulfilling their religious obligations. Some practice it as a result of myths. Generally speaking, the rationale behind the practice can be categorised into two main groups: those who practice FGM as a result of fulfilling their traditional and cultural beliefs, on one hand, and those, who do so, as a way of myths and religious obligations, on the other. For most societies who fall under the first category, FGM is regarded as a deeply rooted cultural practice.³⁸ For some of these societies, it is a practice through which a young

After child birth, an additional procedure is done to re-seal the vagina to restore it to the state it was before child birth. This is referred to as re-infibulation. The Afar in Eritrea is an example of an ethnic group that practices infibulation and defibulation on women upon marriage. The procedure is done by the husband who defibulates the new bride "who is held down during this usually painful defloration by two of his friends". It is only after having the third child that the process of infibulations and defibulation ceases for most women belonging to this particular ethnic group. Mekonnen D 'The abolition of female circumcision in Eritrea: Inadequacies of new legislation' (2007) 7 *The African Human Rights Law Journal* 392; Slack A 'Female circumcision: A critical appraisal' (1988) 10 *Human rights quarterly* 442.

³⁵ World Health Organisation (2010).

³⁶ Bowman K 'Bridging the gap in the hopes of ending female genital cutting' (2005) 3 *Santa Clara Journal of International Law* 2.

³⁷ World Health Organisation (2010).

³⁸ In Kenya, where FGM is practiced among the kikuyu tribe, it is considered to be an important part of their culture. The view is aptly captured by the remarks made by the first president of Kenya, the late Jomo Kenyatta,

girl is 'ushered' into womanhood.³⁹ It is only after this 'initiation' process that a young girl is considered to be "complete" or a "full-grown" woman.⁴⁰ She can then be given responsibilities and further engage in different tasks in her community.⁴¹ The practice is considered to be of a high cultural significance and any woman, who has not been subjected to FGM, is considered to be an outcast⁴² and retain the position of a young girl for the rest of her life.⁴³

In relation to this, it must be noted that the status of a woman, in most African cultures, is associated with her marital status. In this regard, FGM plays an important role in determining marriageability, as it is a criterion for a woman to be eligible for marriage. Women, who have

³⁹ FGM is usually performed at a stage where a girl is expected by her community to be 'aware of her social role as a woman'. However, it is worth noting that there are cases where FGM has been performed at any stage right after birth. In Somalia, FGM is an important cultural practice which 'cements the role of women within' the society. Gibeau A (1998) 87. Toubia, N 'Female genital mutilation' in Wolper A and Peters J (eds) *Women's rights, human rights: International feminist perspectives* 226; Mgbako C, Saxena M, Cave A, Farjad N and Shin N 'Penetrating the silence in Sierra Leone: a blue print for the eradication of female genital mutilation' (2010) 23 (1) *Harvard Human Rights Journal* 5.

⁴⁰ Steiner HJ, Alston P and Goodman R *International human rights law in context: Law, politics and morals* (2007) 549.

⁴¹ The outcome of the initiation process may not necessarily be the same for all communities. In North Sudan, for example, FGM only marks a transitional stage to womanhood and, even after the completion of the procedure, a woman would still maintain the same status prior to the practice. Her social status in her community only changes upon marriage. For such community, FGM plays a significant role in determining the criteria for marriage and enhances fertility. Boddy J 'Womb as oasis: The symbolic context of Pharaonic circumcision in rural Northern Sudan' (1982) 9 *American Ethnologist* 683.

⁴² Gamaya KL (2004) page 1. See also Foss *et al* (2001) *Social Problems* 532; Annas C 'Irreversible error: The power and prejudice of female genital mutilation' (1996) *Journal of Contemporary Health Law and Policy* 3.

⁴³ According to such communities (the Somali tribe, who practice FGM in Kenya, being a good example), an uncircumcised girl is described as "a rotten carcass in the center of the house" and a girl who has undergone FGM is like a "rose flower in a desert shrub." See Bamgbose O 'Legal and cultural approaches to sexual matters in Africa: The cry of an adolescence girl' (2002) 10 *University of Miami International and Comparative Law Review* 5; Fernandez-Romano C 'The banning of female circumcision: Cultural imperialism or a triumph for women's rights?' (1999) 137 *Temple International and Comparative Law Journal* 5.

not undergone the practice, cannot be considered suitable for marriage.⁴⁴ Furthermore, in societies where the family or clan honour is associated with a woman's virginity, FGM is also used to ensure the delivery of a 'closed bride' upon marriage.⁴⁵ In relation to this, the practice is also believed to contribute to the prevention of premarital sex, promotes 'chastity and reduces the chance of infidelity' after marriage.⁴⁶

In addition to culture, myths are also used to justify the practice of FGM. There have been several myths that have been advanced in favour of FGM. One such myth is that FGM enhances a woman's fertility and reduces the possibility of still births.⁴⁷ In order to promote the number of births, FGM is, therefore, deemed essential. The practice is also regarded a 'cleansing procedure' before marriage or child birth. This belief is attributed to the myth that a woman's body is naturally unclean and FGM, according to this myth, helps to 'purify a woman's body,⁴⁸ more specifically, a woman's womb⁴⁹ and prevent misfortune.⁵⁰ Another

⁴⁴ In most of these communities, marriage, as discussed above, plays an important role not only to determine a woman's status in her society but also serves as a means of survival because mostly marriage represents 'the only economic option for most women in these cultures', Gibeau A (1998) 86; Cassman R 'Fighting to make the cut: Female genital cutting studied within the context of cultural relativism' (2007) 6 *Journal of International Human Rights* 4; Broussard PA (2010) 3.

⁴⁵ Annas C (1996) 3; Rahman A & Toubia N (2000) 5.

⁴⁶ In Uganda, the practice of FGM is common among the Sabiny tribe. The practice is considered to be an important part of their culture to ensure that women remain faithful to their husband in marriage. Bamgbose O (2002) 5; Coello I 'Female genital mutilation: marked by tradition' (1999) Fall *Cardozo Journal of International and Comparative Law* 2.

⁴⁷ Slack A (1988) 447.

⁴⁸ The woman's external female genitalia, specifically the clitoris, is believed to be naturally dirty and have the capacity of growing bigger if not removed. In this context, FGM is used as a mechanism to "cleanse" the woman's body. This myth is considered 'ludicrous when juxtaposed with the fact that many females who undergo FGM are under the age of five. Just how dirty and ugly can a five-year-old girl's genitalia be?' This is also 'hypocritical' since FGM, in majority of the cases, is performed in the rural areas without medical care and, thus, has the capacity to spread diseases because of the manner in which it is performed. Broussard PA (2010) 3.

⁴⁹ Steele R (1995) 7.

⁵⁰ The clitoris is perceived to be 'a dangerous organ' that can harm the new born. For more see Slack A (1988) 447; Broussard PA (2010) 2.

myth has it that a woman's external genitalia, specifically the clitoris, is perceived to be a 'male organ' and, thus, need to be removed to embrace femininity.⁵¹

Religion has also been used to justify the continued practice of FGM in different communities.⁵² Although the practice is not one that can be attributed to religion, FGM is strongly associated with Islam, with claims being made that it is a religious practice.⁵³ Referring to the absence of any law in Islam on FGM, some scholars have asserted that FGM is not a religious practice.⁵⁴ 'In order to respond to this misconception, anti-FGM activists have gone as far as to contact respected Islamic religious figures in the Middle East to prove that the Koran does not mandate that FGM be performed on women'.⁵⁵ Many assert that the practice is not prescribed by any religion and that the practice, in fact, existed long before Christianity or Islam. After all, FGM, is practiced by persons belonging to different religious denominations, including Christians, Muslims, Jews and other indigenous religious groups, casting doubt on the alleged religious basis of the practice.⁵⁶

Despite the various reasons advanced for its continued practice. FGM, it has been established, has no health benefits. In fact, it 'interferes with the natural functioning of the body'⁵⁷ and, as a result, exposes women to both short and long-term effects.⁵⁸ The short-term effects include haemorrhage, shock, tetanus, septicaemia, over bleeding, damage to neighbouring organs and HIV.⁵⁹ In terms of the long-term effects, women, who have

⁵¹ Bamgbose O (2002) 5; Steele R (1995) 6.

⁵² Coello I (1999)1.

⁵³ Friedenthal N 'It's not all mutilation: Distinguishing between female genital mutilation and female circumcision' (2006) 19 *New York International law Review* 1.

⁵⁴ Rahman A and Toubia N (2000) 6; Steiner HJ, Alston P and Goodman R *International human rights in context: Law, politics and morals* (2007) 549.

⁵⁵ Mgbako C *et al* (2010) 3.

⁵⁶ Friedenthal N (2006) 1; Slack A (1988) 446; Rahman A and Toubia N (2000) 6.

⁵⁷ World Health Organisation <http://www.who.int/reproductivehealth/topics/fgm/overview/en/index.html> (accessed on 28/09/2012).

⁵⁸ World Health Organisation (2010).

⁵⁹ Tetanus and septicaemia are some of the most common short term effects that are caused as a result of bacterial infections, which are attributed largely to the manner in which the procedure is performed. For more,

undergone FGM, usually experience painful labour and are exposed to greater risks of infertility, fistula, and even death.⁶⁰ This, in turn, contributes to infant mortality among communities where the practice is common.⁶¹ Other long term effects include urinary and genital infections and cysts,⁶² which are likely to occur due to complications that may develop as a result of the nature of the procedure and the manner in terms of which it is performed.

2.3 The international human rights response to the practice of FGM

The negative effects of FGM on the health of women have triggered a wave of movements aimed at protecting women against the practice. Documented campaigns against FGM date back towards the beginning of the twentieth century.⁶³ Based on nature of the campaigns, the movements against FGM can be divided into two groups: those that followed the 'health frame' and those that campaign based on the 'rights frame'.⁶⁴ The difference between the two approaches is that the former focuses on the negative effects of FGM on the health of women while the latter focuses on the negative effects of the practice on the rights of women.

The initial campaigns against FGM predominately fell within the 'health frame'. The campaign was based on the assumption that successful eradication of FGM is possible through the promotion of awareness of the negative effects of the practice on the health of women.⁶⁵ It is worth noting that these campaigns were not only initiated by activist from the west, but also by those from Africa, where the practice has a high prevalence rate. An important part of the African movement against the practice was the 'indigenous African Activism against FGM' campaign, developed from the beginning of 1960's to 1970's.⁶⁶ This was the case, notably, in

see Dillon S 'Healing the scared yoni in the land of Isis: Female genital mutilation is banned (again) in Egypt' (2000) 22 *Houston Journal of International Law* 3.

⁶⁰ Steele R (1995) 2; Dillon S (2000) 3; World Health Organisation (2010); General Comment No 24 of CEDAW, paragraph 18.

⁶¹ Annas C (2000).

⁶² Coello I (1999) 1.

⁶³ Rahman A and Toubia N (2000) 9.

⁶⁴ Bob C *The international struggle for new human rights* (2009) 95.

⁶⁵ Bob C (2009) 95.

⁶⁶ Rahman A and Toubia N (2000) 10.

countries, such as Sudan, Somalia and Nigeria, where several women groups and medical professionals raised awareness within their local communities about the harmful effects of the FGM on the health of women.⁶⁷ From 1979 onwards, several conferences were held to discuss the way forward to curb the practice of FGM. An example of such conferences was the conference on Harmful Traditional Practices Affecting the Health of Women and Children, held in Sudan.⁶⁸ This was the first conference of its kind supported by the WHO in its efforts to protect women against FGM. Other similar initiatives involving the participation of African activists include the UN Mid-Decade Conference on Women and the NGO Forum.⁶⁹ However, most importantly in 1984, the Inter- African Committee on Traditional Practices Affecting the Health of women and Children was formed. This regional network was established to sensitise mostly African states and their citizens about the negative effects of FGM on the health of women.⁷⁰

Although the health frame approach contributed to the fight against the practice of FGM, it was not completely successful. Mgbako *et al* notes that '[w]hile FGM has serious health implications, and although health education is and must be an important component of any anti-FGM campaign, focusing exclusively on its health complication has not contributed significantly on the eradication of FGM, and has not properly addressed FGM as a violation of human rights'.⁷¹ The major drawback of the approach is that it didn't abolish the practice but rather opened up room for medicalisation. Medicalisation of FGM entails situations where FGM is performed by a health care provider of any level regardless of the place where it is carried out. In this case, 'parents take their daughters to be cut by medical professionals or medically trained cutters working with sterile and cleaner instruments'.⁷² FGM, if performed by a health official, is considered to be less harmful and, thus, creates 'legitimacy' despite its negative effects on the health of women. Medicalisation, thus, encouraged the practice,

⁶⁷ Rahman A and Toubia N (2000) 10.

⁶⁸ Rahman A and Toubia N (2000) 10.

⁶⁹ Rahman A and Toubia N (2000) 10.

⁷⁰ Rahman A and Toubia N (2000) 10.

⁷¹ Mgbako C et al (2010) 3.

⁷² Mgbako C et al (2010) 3.

accelerated its growth and encouraged health officials to continue performing FGM for financial gains.⁷³ Moreover, there was also a lack of cooperation from international organisations such as WHO, which were reluctant to address FGM at the international level. They considered FGM a cultural issue that should be left to the domestic authorities.⁷⁴

Eventually, medicalisation of FGM was also prohibited. In 1976, WHO was the first institution to prohibit health care providers from performing FGM.⁷⁵ This was followed by United Nations Commissions on Human Rights in 1982.⁷⁶ From 1982 onwards, there has been an increasing support from other international, nongovernmental organizations and states for the prohibition of medicalisation of FGM.⁷⁷ It is against the backdrop of this rejection of the medicalisation of FGM that the rights frame approach towards the elimination of FGM emerged.⁷⁸

The rights frame approach was driven by women rights activists that aimed at raising international awareness on the harmful effects of FGM on the rights of women.⁷⁹ They did so during the period of 1980's and 1990's, an era where 'women rights were beginning to be accepted as human rights', providing a good platform to address FGM as a human rights issue.⁸⁰ This wave of feminist movement 'questioned the lack of gender lens on the law and on human rights'.⁸¹ They argued in favour of the establishment of legal mechanisms to

⁷³ Apart from the financial reasoning, health officials, belonging to the communities where FGM is strongly supported or practiced, also relied on the same reasons to justify the practice. Research indicates that health care providers that are likely to engage in FGM are usually traditional birth attendants, midwives, nurses and physicians. This, of course, is not an exhaustive list of FGM practitioners. WHO *Global strategy to stop health-care providers performing female genital mutilation* (2010) available at http://whqlibdoc.who.int/hq/2010/WHO_RHR_10.9_eng.pdf (accessed on 10/02/2012) 8-9.

⁷⁴ Bob C (2009) 97.

⁷⁵ World Health Organisation (2010) 2; Bob C (2009) 97.

⁷⁶ Bob C (2009) 97.

⁷⁷ World Health Organisation (2010) 2.

⁷⁸ Bob C (2009) 98.

⁷⁹ Bob C (2009) 98.

⁸⁰ Rahman A and Toubia N (2000) 10-11; Bob C (2009) 98.

⁸¹ Rahman A and Toubia N (2000) 11.

protect women on the private sphere such as in a society or family level where most women are prone to abuse. According to them, states should be held accountable for human rights abuses such as FGM, which most women face in the private sphere. The absence of legal mechanism makes it difficult to attribute accountability for such human rights abuse to the state.⁸²

The rights-based approach brought a new dimension to the movement against FGM. The practice was not only considered harmful to the health of women but also one that violates their fundamental human rights. For them, FGM 'was a tool of patriarchy and a symbol of women subordination'.⁸³ The practice was renamed from female genital circumcision or cutting, which was considered a neutral term, to female genital mutilation.⁸⁴ It is against this background that the view that recognises FGM as a practice that violates human rights gained momentum.⁸⁵

Despite the fact that the rights frame approach contributed to the international consensus that FGM is a human rights violation, the campaigns against the practice thereafter were not done in total isolation of the health frame approach. Although the later approach had several shortcomings, it was still used to show the negative effects of FGM on the health of women. Therefore what emerged was a fusion between the two approaches, creating a new dimension on the campaigns against FGM.⁸⁶

⁸² This position was rectified by the adoption of the Convention on the Elimination of all forms of Discrimination against Women (here after referred to as CEDAW) that addressed the 'responsibility for violation of women's rights by both government actors and private individuals'. Scholars have held that the adoption of this international legal instrument at this period illustrated the international commitment towards the recognition of women's rights as part of human rights. Rahman A and Toubia N (2000) 10-11, Bob C (2009) 98.

⁸³ Bob C (2009) 97.

⁸⁴ Some scholars have argued that the change in terminology illustrate the intensity of the violation of the rights of women and, thus, enhanced national and international advocacy against the practice of FGM. See discussion by Windle S, Kamanu C, Anyanwu E and Ehiri J 'Harmful traditional practices and women's health: Female genital mutilation' in Ehiti J (ed) *Maternal and child health: Global challenges, programs and policies* (2009) 168. Bob C (2009) 98.

⁸⁵ Rahman A and Toubia N (2000) 11.

⁸⁶ Bob C (2009) 101.

As this research was being finalised, a major development occurred which will contribute positively to the movement against FGM. The UN General Assembly's 'so called third committee' which is responsible for social, humanitarian and cultural matters approved the 'first-ever draft resolution' to prohibit FGM.⁸⁷ This was approved by the UN members 'in a move hailed by Secretary-General Ban Ki-moon as a major step forward in protecting millions of women and girls'.⁸⁸ The resolution requires states to put in place all necessary measures to ensure that FGM is prohibited.⁸⁹

The campaigns against the practice of FGM have not been without controversy. One of the predominant debates that characterised the campaign against FGM came in the form of a clash between cultural relativism and universalism of human rights.⁹⁰ The main difference relates to the manner in which human rights should be interpreted and applied.⁹¹ According to those who favour universality of human rights, human rights are rights that every individual is entitled to by virtue of being human. These rights should enjoy universal application. Any cultural practice that would act as an obstacle towards the achievement of this, and, which may undermine human rights should be considered invalid.⁹² Supporters of this approach

⁸⁷ As explained above, this development occurred when this research was being finalised. Due to this, there wasn't enough time to discuss the resolution in detail. For more on this development, see United Nations news centre *UN committee approves first-ever text calling for end to female genital mutilation* (2012) available at <http://www.un.org/apps/news/story.asp?NewsID=43625&Cr=&Cr1=#.ULiVQKyP3vp>

(accessed on 30/11/2012).

⁸⁸ United Nations news centre (2012).

⁸⁹ United Nations news centre (2012).

⁹⁰ The clash between universalism of human rights and cultural relativism is believed to have been an ongoing debate from the beginning of the human rights movement. It took a 'renewed vigour' as a result of several developments of human rights. In societies where culture plays a central role in people's lives, as is the case in Africa, the tension between the two is even more evident. Steiner HJ, Alston P and Goodman R (2008) 516; Mollel A 'African culture versus human rights: The case of FGM among the Maasai society in East Africa' (2008) *Journal of African International Law* 29.

⁹¹ Steiner HJ, Alston P and Goodman R (2008) 516.

⁹² Steiner HJ, Alston P and Goodman R (2008) 516; Mollel A (2008)29.

consider FGM as a violation of fundamental human rights. The practice undermines fundamental human rights such as the right to equality and non-discrimination, the right to health, life and the freedom to be free from torture. This view is also supported by feminist, who favour the universality of human rights. According to them, FGM undermines the rights of women because it is performed to control women sexuality.⁹³ The practice denies women the freedom to make decisions over their own bodies, objectifies them and enhances their subordination.⁹⁴ Thus, the practice of FGM 'should be regarded as an act that violates women's rights and the right to participate in cultural life does not protect this practice'.⁹⁵

On the contrary, cultural relativist argue that every culture is valid and human rights cannot simply be said to be universal.⁹⁶ Cultures differ from one place to another and so should rights and moral rules derived from them. Therefore, depending on the cultural context, human rights ought to have a relative application.⁹⁷ They further argue that 'westerners' fail to understand other cultures because their reasoning is influenced by what they consider to be right or wrong.⁹⁸ They base their reasoning on a 'eurocentric formulation of human rights', which fails to consider African values.⁹⁹ The different arguments raised by the cultural relativist have often been the main grounds for the rejection of campaigns against FGM. According to them, these campaigns are "project[s] of white people" against African culture.¹⁰⁰ It suggests that parents, who subject their children to FGM, are 'incompetent and abusive' towards their children.¹⁰¹ It further limits the rights and liberty of parents to raise their

⁹³ Slack A (1988) 466.

⁹⁴ Slack A (1988) 466.

⁹⁵ Rahman A & Toubia N (2000) 32.

⁹⁶ The term culture is interpreted in a broader context to include not only cultural practices, but also ideologies derived from religion, politics and institutional structures. Steiner HJ, Alston P and Goodman R (2008) 518.

⁹⁷ Mollel A (2008)1.

⁹⁸ Cassman R (2007) 2.

⁹⁹ Mollel A (2008)29.

¹⁰⁰ "PLAN'S work on female genital mutilation in West Africa" as quoted in Steiner HJ, Alston P and Goodman R (2008) 551.

¹⁰¹ Miller Bk 'Female circumcision: Challenges to the practice as a human rights violation' (1985) 8 *Harvard Women's law Journal* 165.

children according to their own cultural and traditional beliefs.¹⁰² Moreover, these campaigns predominantly target the negative effects of the practice and disregard the positive aspect of the practice, such as social and economic benefits on women.¹⁰³ Supporters of cultural relativist argue that FGM in itself is not harmful to the health of women.¹⁰⁴ The practice of FGM is considered to be a 'celebration of womanhood' and does not enhance subordination.¹⁰⁵ The argument that supports the view that FGM is a product of 'patriarchal African politics' was contested even by African activist who were part of the campaigns against FGM.¹⁰⁶ They regarded the approach used by western FGM activist as 'confrontational' and sometimes not culturally sensitive.¹⁰⁷ As a result of this, several tensions arose between those who favour universality of human rights and culture relativism during the 1970's and 1980's, and this has since been considered by scholars as one of the shortcomings of the rights frame approach to FGM, which favours universality of human rights.¹⁰⁸

From the forgoing, it is clear that the classical debate between cultural relativism and universalism of human rights forms part of the debate on FGM as a human rights violation. Each view has an important implication for the protection of women against FGM. It is, however, at least clear that one has to be culturally sensitive when dealing with deeply rooted cultural practices such as FGM. Approaches that favour the ideology of "disclosure of the oppression" by portraying the practice as "ritualised child abuse" do not contribute positively to the campaigns against FGM, but rather only alienates the communities that favour the practice.¹⁰⁹ '[C]onfrontational programs that do not take into consideration the complexities and the context of FGM have had little success.'¹¹⁰ It is against this background that this

¹⁰² Miller Bk (1985) 165.

¹⁰³ Miller Bk (1985) 165.

¹⁰⁴ Bob C (2009) 97.

¹⁰⁵ Cassman R (2007) 6.

¹⁰⁶ Bob C (2009) 101.

¹⁰⁷ Rahman A and Toubia N (2000) 10.

¹⁰⁸ Bob C (2009) 101.

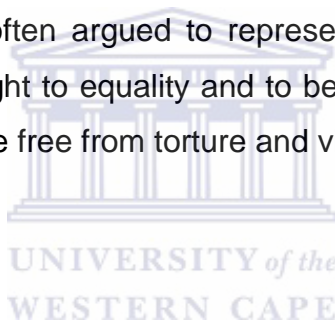
¹⁰⁹ Mgbako C et al (2010) 2.

¹¹⁰ Mgbako C et al (2010) 2.

chapter will examine the relevance of international and the African human rights system instruments in protecting women against FGM.

2.4 FGM as a violation of international human rights law

The campaigns against FGM have contributed to the interpretation and adoption of several international and regional human rights instruments to safeguard the rights of women against the practice. Many scholars have formulated a three prong approach when dealing with the human rights implications of FGM.¹¹¹ The first approach is based on a human rights perspective, looking at the general international human rights instruments like the ICCPR to challenge the practice of FGM. The second approach also challenges the practice of FGM based on human rights law but from a more specific angle of women's rights. The third approach looks at the practice of FGM from the perspective of the rights of the child. More commonly, however, FGM is often argued to represent a violation of a number of rights, including the right to life, the right to equality and to be free from all forms of discrimination, the right to health, the right to be free from torture and violence.¹¹²



¹¹¹ Mekonnen D (2007) 393.

¹¹² These rights are protected under different legal instruments and can be generally categorized to fall within the broader group of rights that are often referred to as reproductive rights. There are different approaches to the definition and content of reproductive rights. The International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities (hereafter referred to as UNCRPD) in article 23(1) (b) defines reproductive rights as rights attached to reproductive health and education. Although the content and scope of these rights remains unclear, two general approaches have been developed over time. The narrow approach supports the view that reproductive rights are limited to the 'recognition of reproductive choice'. This approach supports the view that these rights are limited to the sexual and reproductive rights of a family unit. It, however, does not disregard other rights such as the right to health that can be associated to reproductive rights too. In contrast to the narrow approach the broader approach encompasses under the rubric of reproductive rights, several other human rights protected both in international and regional human rights instruments. These are the right to equality and non-discrimination, the right to be free from violence, right to life, health, as well as the right to be free from 'practices and traditions that harm women and girls' reproductive rights'. Gebhard J and Trimino D 'Reproductive rights: International regulation' (2009)1. Available at http://www.mpepil.com/sample_article?id=epil/entries/law-9780199231690-e2070&recno=6& (accessed on 14/02/2012).

The remaining sections of this chapter look at whether the continued practice of FGM, indeed, violates any of the rights mentioned above. In order to achieve its objective, this chapter discusses on the nature, content and scope of these rights before deciding whether the practice of FGM violates human rights. It must, however, be noted that the discussion on the content of the rights is limited. The aim is not to give a detailed discussion of the rights. The objective is rather to show, first, whether engaging in FGM represents a violation of these rights and, second, identify the different obligations imposed on states to protect women and children against FGM. This is important as it is against these obligations and standards that the next chapter will evaluate the effectiveness of the legal measures that Tanzania has put in place to protect the rights of women against FGM.

2.4.1 FGM and the right to equality

As indicated above, the right to equality and non-discrimination are among some of the rights implicated by the practice of FGM. The question is whether FGM, indeed, violates the right to equality and the right to be free from all forms of discrimination.

The right to equality and non-discrimination are among the paramount principles of international human rights law.¹¹³ These two rights enjoy legal protection under several international and regional human rights instruments. The Universal Declaration of Human Rights (hereafter referred to as UDHR) provides that 'all human beings are born free and equal in dignity and rights'.¹¹⁴ Apart from the UDHR, the International Covenant on Civil and Political Rights (hereafter referred to as ICCPR) also gives effect to the right to equality.¹¹⁵ The International Covenant on Economic, Social and Cultural Rights (here after referred to as ICESCR) does the same in respect to economic, social and cultural rights.¹¹⁶ At the regional

¹¹³ Hunt P, Mesquita, J, Oldring L and Steward R Diseases: A Human Rights Analysis 16

http://apps.who.int/iris/bitstream/10665/43696/1/9789241563420_eng.pdf (accessed on 22/11/2012)

¹¹⁴ Article 1 the Universal Declaration of Human Rights (1948) General Assembly Resolution 217 A (III).

¹¹⁵ Article 3.

¹¹⁶ Article 3 International Covenant on Economic, Social and Cultural Rights (1966) General Assembly Resolution 2200A (XXI); International Covenant on Civil and Political Rights United Nations General Assembly resolution 2200A (XXI) (1966).

level,¹¹⁷ the African Charter protect the right to equality before the law and equal protection of the law for every individual.¹¹⁸ More specifically, for our purpose, the right to equality is also guaranteed for specific groups such as women and children. The protection in respect to women comes from the CEDAW.¹¹⁹ The Convention does so by promoting and protecting the right to equality of all women in the economic, political and social sphere of life.¹²⁰ At the regional level, the Maputo Protocol provides for the right to equality between men and women before the law and equal protection of the law.¹²¹ Children also enjoy specific protection when it comes to the right to equality.¹²²

¹¹⁷ The establishment of the African human rights system was marked by the adoption of the African Charter on Human and Peoples' Rights (hereafter referred to as the African Charter), which was adopted in 1981. Although the African Charter gives effect to other international human rights instruments, Chirwa argues that the African Charter is still considered to be very unique. This is owing to the fact that the Charter was drafted to cater specifically for the needs and values of Africa. Chirwa DN 'African regional human rights system: The promise of recent jurisprudence on social rights' in Langford M (ed) *Social rights jurisprudence: Emerging trends in international and comparative law* (2008) 323.

¹¹⁸ Article 3 the African Charter on Human and Peoples' Rights OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

¹¹⁹ Convention on the Elimination of all forms of Discrimination against Women (1979) General Assembly resolution 34/180.

¹²⁰ Article 7 and 8 of CEDAW give effect to the rights of all women to participate and engage equally in the public and political sphere at the domestic and international level. The right to equality includes the right to protect equal opportunities between men and women when it comes to education, employment, family law and health facilities (See Article 10, 11, 16 and 12 of CEDAW). Moreover, CEDAW protects the rights of all women to be equal before the law (see article 15). It also acknowledges the importance of equality between women and men and, in doing so, upholds the fundamental human rights of all women. Fasio A and Morgan M *Equity or equality for women? Understanding CEDAW Equality principles* available at http://www.iwraw-ap.org/publications/doc/OPS14_Web.pdf (accessed on 30/11/2012).

¹²¹ Furthermore, the Protocol protects the rights of women to participate equally in the public and political sphere by giving them the right to participate equally in political and decision-making process (see article 9); article 8 of the Protocol on the African Charter on Human and Peoples' Rights on the Rights of Women in Africa resolution AHG/Res.240 (XXXI).

¹²² The CRC protects under article 2, the right to equality of all children. The CRC defines a child, as anyone under the age of eighteen years unless the law provides that the age of majority is attained before this. Article 1, Convention on the Rights of the Child, United Nations General Assembly Resolution 44/25 (1989). At the regional level, the African Charter on the Rights and Welfare of the Child (hereafter referred to as ACRWC),

A corollary of the right to equality is the right to be free from all forms of discrimination, which enjoys equal legal protection both under the international and the African human rights instruments.¹²³ At the international level, the ICCPR article expressly prohibits all form of discrimination based on any of the listed grounds such as 'race, colour, language, religion, political or other opinion, national or social origin, property, birth' and, most importantly for our purpose, on the ground of sex.¹²⁴ Similarly, the same protection is provided under the African Charter which provides for the right not to be subjected to discrimination based on, among other things, gender.¹²⁵ Furthermore, article 21 (1) of the African Charter provides for the elimination of cultural and traditional practices such as FGM that are discriminatory on the grounds of gender.¹²⁶ The protection against discrimination is also provided for in respect of children in terms of the CRC and the ACRWC.¹²⁷

through article 3, ensures the right to equality of all children regardless of gender or any other form of differentiation. The ACRWC unlike the CRC defines a child as any person below the age of eighteen years. Article 2, the African Charter on the Rights and Welfare of the Child OAU Doc. CAB/LEG/24.9/49 (1990).

¹²³ It is worth noting the right to be free from all forms of discrimination is not to be considered in isolation from the right to equality. This is because discrimination undermines the principles attached to the right to equality, and, in most cases, these two rights usually complement each other. Therefore, in order to ensure that the right to equality is upheld, one should not be subjected to any form of discrimination. Further, the violation of the right to be free from all forms of discrimination could also be interpreted to be a violation of the right to equality. Fasio A and Morgan M (2009) 11; Byrnes A, Connors J, Bik L *Advancing the Human Rights of Women: Using International Human Rights standards in Domestic Litigation* (1996) 43.

¹²⁴ This, however, does not constitute a closed list. Article 26 ICCPR, Article 7 UDHR.

¹²⁵ These rights, guaranteed in article 2 and 3, are absolute. States are bound by their legal duty to the Charter and cannot 'derogate from the African Charter in any circumstances including state of emergency or civil war'. Manby B 'Civil and political rights in the African Charter on Human and Peoples' Rights: Articles 1-7' in Evans M and Murray R (eds) *The African Charter on Human and Peoples' Rights: The system in practice, 1986-2006* (2008) 176-7; The African Charter on human and Peoples' Rights OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

¹²⁶ The African Charter differs by imposing duties on individuals 'to respect and consider fellow beings' without any form of discrimination (article 1 (3)); Article 28 the African Charter on human and Peoples' Rights.

¹²⁷ The CRC prohibits all forms of discrimination on the grounds of 'race, colour, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth' and most importantly discrimination based on sex (see article 2). Similarly, the ACRWC prohibits all forms of discrimination against children and

Whether FGM constitutes discrimination depends on our understanding of what constitutes discrimination. The CEDAW was the first legal instrument to define discrimination against women.¹²⁸ Discrimination against women is defined under article 1 as ‘any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field’.¹²⁹ According to this definition, discrimination comes in different forms. It may come in the form of laws or practices that differentiate, exclude or restrict individuals based on sex. This, however, is not enough. The law or the practice in question must also have the effect of undermining the enjoyment of the rights of women.¹³⁰ The act of discrimination can be carried out either by the state itself or even by private individuals.¹³¹ The same elements are also evident in the Maputo Protocol, which defines discrimination against women as ‘any distinction, exclusion or restriction or any differential treatment based on sex and whose objectives or effects compromise or destroy the recognition, enjoyment or the exercise by women, regardless of their marital status, of human rights and fundamental freedoms in all spheres of life’.¹³²

ensures that every child has the right to enjoy his or her fundamental rights and freedom in the absence of any kind of discrimination (see article 3).

¹²⁸ The preamble CEDAW acknowledges the existence of discrimination against women and that it undermines the principles of equality and human dignity. Roseann R ‘CEDAW: A bill of rights of women’ in Auth J (ed) *To Beijing and beyond: Pittsburgh and the United Nations fourth world conference on women* (1998) 181; Preamble of CEDAW.

¹²⁹ Scholars have held that the absence of the express provision that prohibits discrimination ‘on the basis of equality of men and women’ as provided for in CEDAW, should not be considered as a lower or a different standard adopted on the Protocol. The Jurisprudence around the Protocol suggests that the definition still incorporates the prohibition of discrimination on the ground of gender as provided for in CEDAW. Article 1 CEDAW; Banda F (2008) 454.

¹³⁰ Fasio A and Morgan M (2009) 9; General Comment No. 19 of CEDAW.

¹³¹ Due to its wide scope in women’s rights, the CEDAW is also referred to as the international bill of rights of women. Byrnes A, Connors J, (1996) 43; Roseann R (1998) 181.

¹³² The objectives behind the adoption of a separate legal instruments on the rights of women was aimed to ‘address issues that impact upon women disproportionately, and forcing on existing mechanisms and states a

It is submitted that the practice of FGM violates the prohibition on discrimination against women. First, FGM is 'practiced exclusively on women and girls and, thus, only females suffer its harsh consequences.'¹³³ Second, it is a practice that creates distinction on the basis of sex. This is because it is, among other things, done to control women sexuality. It 'carries a strong message about the subordinate role of women and girls in the society'.¹³⁴ It portrays the image that the role of women in the society is only that of 'mother and spouse', further promoting the subordination of women in all spheres of life.¹³⁵ The effect of this is that the practice undermines the physical and mental integrity of women, hindering them from fully enjoying fundamental freedoms.¹³⁶ It is also widely held that 'any action that affects women's right to reproductive health' by limiting their ability to make decisions that concerns their own body is discriminatory. Of course some argue that FGM does not constitute discrimination against women as men are also subjected to circumcision.¹³⁷ Circumcision, the argument goes does not necessarily just target women, as it often claimed. The counter argument held among scholars is 'no form of FGM ... can be equated to male circumcision'.¹³⁸ The purpose behind both is different as the latter is not performed in order to control sexuality.¹³⁹

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Now that we have established that FGM violates the right to equality and non discrimination, the question is what are the measures that a state is required to take to protect individuals from discriminatory practices like FGM. The different international and regional instruments that provides for the right of non discrimination place legal duties on each member state to promote and protect this right within their jurisdiction. It includes the duty to take legislative

more gendered interpretation of rights so that human rights really do begin to be seen as women's rights', Banda F 'Protocol to the African Charter on the Rights of Women in Africa' in Evans M and Murray R (eds) (2008) 442; Article 1(f).

¹³³ Mgbako C et al (2010) 17.

¹³⁴ Rahman A & Toubia N (2000) 21.

¹³⁵ Rahman A & Toubia N (2000) 21

¹³⁶ Fasio A and Morgan M (2009) 9; General Comment No 19.

¹³⁷ Wood A (2001) 353.

¹³⁸ Wood A (2001) 353.

¹³⁹ Wood A (2001) 353.

measures to protect this right. This requires states, first, to incorporate these rights in their national Constitutions. It also requires them to enact legislation giving effect to the right to equality and non discrimination. In addition states are required to 'modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women'.¹⁴⁰ Such reforms need to be done in all areas of law, policy decisions, development plans and in all spheres of life in order to promote gender equality and the global initiative towards the prohibition of discrimination against women.¹⁴¹ The ACRWC requires its member states to adopt legislative or any other effective measure to prohibit discrimination against children.¹⁴²

More specifically, article 5 of CEDAW places a legal obligation on state parties to modify cultural practices, like FGM, that discriminate against women. This is to be achieved through educational awareness programmes to the public on the negative effects of cultural practices that discriminate and undermine equality of women.¹⁴³ Similarly article 2 of the Maputo Protocol provides that the duty is placed on every member state to take legislative measures to prohibit harmful practices that undermine the prohibition against discrimination and are harmful to the wellbeing of women. In addition, it also requires states to take regulatory measures by engaging other stakeholders such as health officials and Non- Governmental Organisations (hereafter referred to as NGOs) in ensuring the achievement of this.¹⁴⁴

¹⁴⁰ Article 2 (a), (e) and (f) CEDAW; article 2 (1) a Maputo Protocol.

¹⁴¹ Article 2 (1) c-e Maputo Protocol; article 3 CEDAW; Paragraph 11, General Comment 19 of CEDAW.

¹⁴² Article 1; Article 2 CRC.

¹⁴³ General Comment 3 CEDAW; Article 2 (2) Maputo Protocol.

¹⁴⁴ Article 2 (1) (b).

2.4.2 FGM and the right to be free from all forms of violence

Another right that often features in any discussion on FGM, from a human rights perspective, is the right to be free from all forms of violence. By subjecting women and children to FGM, the argument goes; one is violating the right to be free from all forms of violence. The point here is that FGM constitutes a form of violence. This requires us to determine the nature and scope of the right to be free from all forms of violence.

The right to be free from violence is protected in international and regional human rights instruments.¹⁴⁵ This right is also provided specifically in respect to children by the CRC and the ACRWC.¹⁴⁶ Both instruments protect the right of children to be free from all forms of psychological and physical violence. Although the CEDAW covers women's rights extensively, it unfortunately, does not expressly provide for the prohibition of violence against women.¹⁴⁷ In this regard, the adoption of General Comment Number 19 by the Committee on the Elimination of All Forms of Discrimination against Women (hereafter referred to as CEDAW Committee) in 1992 marks a positive step towards the protection of the right of women against violence.¹⁴⁸ The CEDAW Committee interpreted the prohibition against

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¹⁴⁵ Article 9(1) ICCPR; Article 5 the African Charter.

¹⁴⁶ Article 19 CRC; Article 16 ACRWC.

¹⁴⁷ The absence of express prohibition was an indication that violence against women was still considered to be a domestic issue which could not be addressed at the international level. It is argued, however that approximately six articles of CEDAW could be interpreted to protect women against violence (This list includes article 2, 3, 6, 11, 12, 16 of CEDAW). Fitzpatrick J 'The use of International Human Rights Norms to Combat Violence against Women' *Human rights of Women: National and International Perspectives* (1994) 533; Combrick H 'Positive State Duties to Protect Women from Violence: Recent South African Developments' (1998) *Human Rights Quarterly* 672; Shell-Duncan B 'From Health to Human Rights: Female Genital Cutting and the Politics of Intervention' (2008)110 *American Anthropologist* 227.

¹⁴⁸ The Committee on the Elimination of Discrimination against Women is the monitoring body to ensure member states compliance of the CEDWA composed of 23 experts. The Committee issues state reports, general recommendations and can also deal with individual communication through the Optional protocol to CEDAW adopted in 2000. For more, see also, Nowak M *Introduction to the international human rights regime* (2003) 87-88.

gender based discrimination to include the protection of the rights of women against violence.¹⁴⁹ Furthermore, the Committee defines violence against women as

'[v]iolence that is directed at a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty'.¹⁵⁰

The definition provided by the Committee was later codified, albeit in a form of a declaration, in, more or less a similar formulation. Article 1 of the Declaration on the Elimination of Violence against Women (hereafter referred to as DEVAW)¹⁵¹ expressly prohibits violence against women and defines violence against women as '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'.¹⁵² The Declaration goes further than prohibiting violence against women. It, under article 2, includes a list of prohibited acts regarded as violence against women. This includes '[p]hysical, sexual and psychological violence occurring in the family....'¹⁵³ More importantly, it explicitly declares FGM as a form of violence against women.¹⁵⁴

¹⁴⁹ General Comment 19.

¹⁵⁰ General Comment 19.

¹⁵¹ The Declaration on the Elimination of Violence against Women adopted by 48/104 of 1993.

¹⁵² Article 1.

¹⁵³ In a slightly different form, article 1 (j) of the Maputo Protocol defines violence against women to also include economic harm. According to the Protocol, violence against women includes 'all acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat to take such acts; or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace and during situations of armed conflicts or war'. Economic harm is 'the denial of income' or the prohibition of women to engage in an economic activity which can generate income. This extension of the definition of violence against women to include economic harm shows that violence against women can be manifested in different forms. Article 1 (j) of Maputo Protocol; See also The African Charter on human and Peoples' Rights; Banda F 'Protocol to the African Charter on the

As indicated earlier, FGM inflicts physical, sexual and mental harm to women. The practice 'is a traumatizing and painful surgical procedure, performed on young girls, without the aid of anaesthesia to temporarily dull the pain, or proper hygiene to prevent potential infection.'¹⁵⁵ This exposes women to severe pain and suffering, which has both physical and psychological effects.¹⁵⁶ Moreover, particular violence against women does not end at the completion of the procedure. A woman who has undergone FGM will continue to live with the irreversible negative consequences of the practice for the rest of her life. There is, therefore, no doubt that FGM is a form of violence that is directed at a woman because she is a woman or that affects women disproportionately.

The remaining question is, then, to identify the legal measures that a state has to take in order to protect women from practices like FGM that constitutes violence against women. Member states are required to take appropriate measures to protect women against violence. The DEVAW imposes legal obligations on states to condemn any form of violence against women.¹⁵⁷ States must use appropriate measures and policies to ensure that FGM is condemned and may not use any reasons derived from tradition, religion or custom to justify a practice like FGM that constitutes a form of violence against women.¹⁵⁸ They have a legal obligation to take legislative reforms, enactment of laws to protect the right of women against violence.¹⁵⁹ Condemnation of FGM is not, however, enough. States must '[e]xercise due diligence to prevent, investigate' and to punish perpetrators in line with their domestic legislations regardless of whether the perpetrator is the state or a non-state actor.¹⁶⁰ In

Rights of Women in Africa' in Evans M and Murray R (eds) (2008) 442-455; Jayawickrama N *The judicial application of human rights law: National, regional and international jurisprudence* (2002) 786.

¹⁵⁴ Article 2 (a) DEVAW.

¹⁵⁵ Wellerstein J 'In the name of tradition: Eradicating the harmful traditional practice of female genital mutilation' (1999) 22 *Loyola of Los Angeles International and Comparative Law Review* 8.

¹⁵⁶ Annas C (1996) 2.

¹⁵⁷ Article 4 DEVAW.

¹⁵⁸ Article 4 DEVAW; General comment 19 CEDAW.

¹⁵⁹ General Comment 19 CEDAW; Article 16 ACRWC; Article 19.

¹⁶⁰ Article 4 (c) DEVAW.

addition to legislative measure, states are required to put in place administrative, social and economic measures to prohibit gender based violence such as FGM.¹⁶¹ This does not only relate to the duty to condemn and prohibit violence against women but also requires states to modify cultural practices such as FGM.¹⁶² This can be done by developing a national plan of action to combat violence against women by prohibiting practices such as FGM.¹⁶³ States are encouraged to engage with other stakeholders such as NGOs in the campaigns against FGM to ensure that objectives of the national plan of action are achieved.¹⁶⁴

2.4.3 The right to be free from torture and FGM

Many argue that the practice of FGM constitutes torture. The practice must be outlawed, the argument goes, because it constitutes a violation of the prohibition of torture, a right recognised by many international instruments. The debate that FGM constitutes torture is far from settled. At the centre of this debate is what constitutes torture and whether FGM fulfils the elements that constitute torture.

Torture is considered to be one of the 'vilest acts' that one human being can do to another.¹⁶⁵ The UDHR, under article 5, protects everyone from torture or cruel, inhuman or degrading treatment or punishment (here after referred to as CIDT). The CAT exclusively prohibits all forms of torture and CIDT.¹⁶⁶ At the regional level, the African Charter upholds the principles attached to the inherent dignity of every human being by prohibiting torture and CIDT.¹⁶⁷ The Charter adopts a broader approach compared to that of international instruments by

¹⁶¹ General Comment 19 CEDAW; Article 16 ACRWC; Article 19.

¹⁶² Article 5 CEDAW; General comment 19 CEDAW.

¹⁶³ Article 4 (e) DEVAW.

¹⁶⁴ Article 4 (e) DEVAW.

¹⁶⁵ Factsheet No 4 on the Convention against Torture, 2 available at <http://www.ohchr.org/Documents/Publications/FactSheet4rev.1en.pdf> (accessed on 6/06/2012).

¹⁶⁶ Other legal instruments to this effect are the ICCPR which seeks to protect the dignity and physical and psychological integrity of every human being by prohibiting torture in terms of article 7. The Convention on the Elimination of all forms of Racial Discrimination (hereafter referred to as CERD) also gives effect to this right under article 5, see Castan M, Schultz J and Joseph S (2004) 195.

¹⁶⁷ Article 5.

incorporating other prohibited acts such as slavery and slave trade under the prohibition of torture.¹⁶⁸

Although CEDAW does not expressly provide for the prohibition against torture, its monitoring body (hereafter referred to as CEDAW Committee) has made it clear that the Convention protects women against torture. This is related to the fact that the definition of discrimination, as provided by article 1 of the same, is extended to include the prohibition of gender based violence.¹⁶⁹ As indicated earlier, the Committee specifically prohibits all gender based violence that 'impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under human rights conventions'.¹⁷⁰ It is well established that any act of torture or CIDT has the effect of impairing or nullifying the enjoyment by women of human rights. It is based on this understanding that CEDAW is deemed to protect the rights of women to be free from torture.¹⁷¹ In contrast to the position under CEDAW, the Maputo Protocol expressly protects the rights of all women against torture, CIDT and all forms of exploitation.¹⁷² The right of all children to be free from torture is also provided for under the international and the African human rights system.¹⁷³

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The prohibition against torture seeks to promote and protect the inherent dignity, physical and moral integrity of all human beings.¹⁷⁴ Any act of torture undermines fundamental human rights and it is considered to be a crime in terms of international law. The prohibition against torture is absolute and no derogation is permitted. It forms part of customary international law and, thus, binds all states irrespective of whether they are party to any international

¹⁶⁸ Mandy B (2008) 192

¹⁶⁹ General Comment 19.

¹⁷⁰ General comment 19 of CEDAW; Factsheet No 4 on the Convention against Torture.

¹⁷¹ General comment 19 of CEDAW; Factsheet No 4 on the Convention against Torture.

¹⁷² Article 4.

¹⁷³ CRC protects the rights of children to be free from torture (see article 37). The ACRWC specifically protects the right of all children under the guardianship of the parents or any other person to be free from torture and inhuman or degrading treatment as well as physical or mental abuse (see article 16).

¹⁷⁴ Jayawickrama N (2002) 300.

instruments prohibiting torture.¹⁷⁵ This is important considering that Tanzania is not a signatory to CAT.

What is, however, important for our purpose is whether FGM constitutes torture. This begs the question of what constitutes torture. The CAT provides a broad definition of torture. In terms of article 1, torture is defined as,

‘any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from inherent in or incidental to lawful sanctions’.¹⁷⁶

From the above definition, it is clear that for an act to be regarded as torture in terms of CAT, it has to satisfy three requirements. First, the act must involve a degree of pain and suffering, which can be either physical or psychological. Second, the act must be perpetrated by the state authorities, any person acting in such capacity or has been instigated by a state official. Third, it must be done with the intention of obtaining information, inflicting punishment or causing intimidation.

As indicated above, for an act to be regarded as torture the infliction of harm is not enough. The physical and mental harm must be inflicted intentionally. It is often argued that the prerequisite of intention, as prescribed in the definition of torture, does not reflect the true mental

¹⁷⁵ This duty extends even in special circumstances such as a war or an emergency. Castan M, Schultz J and Joseph S (2004) 195; General Comment No.2 of the Committee against Torture; Factsheet No 4 on the Convention against Torture, 3; Jayawickrama N (2002) 298; General Comment No 2 of the Convention against Torture; General Comment No 20 of the ICCPR

¹⁷⁶ Article 1 Convention against Torture and Other Cruel, Inhuman or degrading Treatment or Punishment (1984) General Assembly resolution 39/46.

state of practitioners of FGM or even parents that subject their children to FGM.¹⁷⁷ The rationale behind FGM is not to cause harm but rather to acquire 'acceptance in the society or meeting culturally defined obligations'.¹⁷⁸ Based on this, it is often argued that FGM does not constitute an act of torture as defined under CAT. It is, however, convincingly argued that FGM could be considered as CIDT under CAT. In the absence of the requirement of intention of perpetrator to cause harm, FGM could be argued to be CIDT.¹⁷⁹ This position finds support in observations of the United Nations Human Rights Committee, which, in a number of occasions, stated that FGM does constitute CIDT under CAT and the practice violates the general prohibition against torture.¹⁸⁰

The question is, then, what are the measures that a state has to take in order to protect women and children from CIDT like FGM. In order to strengthen the legal protection against CIDT, a member state has to take 'effective legislative, administrative, judicial or other measures to prevent CIDT in any territory under its jurisdiction'.¹⁸¹ This includes the duty to eradicate all laws and any other obstacle that may hinder the achievement of the prohibition against CIDT.¹⁸² This duty is absolute to every member state to CAT that they cannot deviate even in exceptional circumstances such as war, any kind of public emergency or political instability.¹⁸³ Any act of CIDT has to be recognised as criminal act under their respective domestic legal frameworks and appropriate penalties have to be imposed.¹⁸⁴ Member states

¹⁷⁷ Rahman A and Toubia N (2000) 26.

¹⁷⁸ Rahman A and Toubia N (2000) 26.

¹⁷⁹ Rahman A and Toubia N (2000) 26.

¹⁸⁰ Concluding Observations on Sudan, (1997) UN Doc. CCPR/C/76 ADD; Concluding Observation on Yemen (2002) UN Doc. CCPR/CO/75/YEM.

¹⁸¹ Article 2 (1) CAT; General Comment No.2 of the Committee against Torture; Article 1 of the African Charter.

¹⁸² General Comment No.2 of the Committee against Torture.

¹⁸³ Article 2 (2) CAT; General Comment No 2 of the Committee against Torture.

¹⁸⁴ Article 4 (1-2) CAT; General Comment No 2 of the Committee against Torture; article 16;(1) of the African Charter on the Rights and Welfare of the Child; Concluding Observations on Sudan , (1997) UN Doc. CCPR/C/76 ADD. The ICCPR also places similar legal duties on member states to the prohibition against torture on all acts perpetrated either by the state or private individuals to ensure the objectives of article 7 are upheld. General Comment No 2 of the Committee against Torture; Castan M, Schultz J and Joseph S (2004) 209.

are further required to provide remedies to victims, as well as an opportunity for victim's cases to be heard and be 'determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State.'¹⁸⁵ In addition, the Maputo Protocol imposes legal duties on member states to ensure that the perpetrators as well as victims are afforded the opportunity for rehabilitation.¹⁸⁶

The CAT imposes a duty on each member state to put in place legislative measures that promotes the prohibition of CIDT within their domestic legal framework in respect of children.¹⁸⁷ States have a legal obligation to adopt legislative and administrative and other measures to prohibit CIDT.¹⁸⁸ Article 16 of the ACRWC, imposes a legal duty on a state party to it to take legislative, social and economic measure in order to protect the rights of children from CIDT. These measures include the establishment of special monitoring units supporting children who have been subjected to CIDT together with their parents /guardian /custodian and preventative, reporting, investigative measures.

2.4.4 FGM and the right to life

One of the most important rights, the right to life, is another right that is often raised in topics dealing with FGM from a human rights perspective. Some argue that the campaigns against FGM must be intensified because the practice violates the source of all other rights, the right to life. The question is then under what circumstances and conditions can FGM violates the right to life.

The right to life is a supreme right and its protection guarantees the enjoyment of other human rights.¹⁸⁹ This right is protected under the UDHR in terms of article 3. Article 6 of the ICCPR protects the right to life of every individual and prohibits any arbitrary deprivation.

¹⁸⁵ Article 2 (a), (b) ICCPR; Article 4 Maputo Protocol.

¹⁸⁶ Article 4 (a), (b) and (e).

¹⁸⁷ Concluding Observations on Sudan, (1997) UN Doc. CCPR/C/76 ADD; Concluding Observation on Yemen (2002) UN Doc. CCPR/CO/75/YEM.

¹⁸⁸ Article 2.

¹⁸⁹ Jayawickrama N (2002) 243.

Similarly, the African Charter guarantees respect to the right to life and the integrity of every human being without any arbitrary deprivation of the right.¹⁹⁰ More specifically, this right is also protected in respect to women under the Maputo Protocol.¹⁹¹ The right to life in respect of children is also provided both by the ACRWC and the CRC.¹⁹²

The imperative nature of the right to life does not suggest that this right is absolute and cannot be limited. Owing to the fact that the right to life is considered to be *jus cogens*, it is only in exceptional circumstances that its limitation can be justified. The effect of the recognition is that all states have an obligation, under customary international law, to uphold the right to life regardless of whether they are party to international instruments that protect this right. In addition, no derogation is permitted even during public emergency.¹⁹³

Obviously, the right to life is implicated when FGM results in death.¹⁹⁴ Death is likely to occur as a result of the after-effects of the practice on a woman's body. Most women die of over-bleeding or fatal infections that could be attributed to the unsanitary conditions under which FGM is usually performed. Others have, however, held the view that death must not necessarily occur for FGM to violate the right to life. For them, FGM violates the right to life 'from the perspective of the right of reproduction'.¹⁹⁵ This is because the practice involves the mutilation of a reproductive organ and this alone violates the right to life.¹⁹⁶

States have a legal obligation to ensure that the right to life is protected and not undermined. Member states of the ICCPR have, for example, a legal obligation to take positive measures to give effect to the right to life and prohibit arbitrary deprivation of it by the state or non-state actors.¹⁹⁷ This includes taking legislative, administrative and other measures to give effect to

¹⁹⁰ Article 4.

¹⁹¹ Article 4.

¹⁹² Article 6 CRC; article 5 of ACRWC.

¹⁹³ Ramcharan GB *The right to life in international law: International studies in international law* (1985).

¹⁹⁴ Rahman A and Toubia N (2000) 23.

¹⁹⁵ Slack A (1988) 466.

¹⁹⁶ Slack A (1988) 466.

¹⁹⁷ General comment No. 6 of the ICCPR.

the right to life by prohibiting practices such as FGM that undermine enjoyment of this right.¹⁹⁸ In respect to the rights of children, these measure need to ensure that the child's survival and development is protected.¹⁹⁹ The ACRWC specifically imposes legal obligations on member states to take measures to prohibit and eliminate cultural practices like FGM that undermine the life, natural growth, welfare and development of a child.²⁰⁰

2.4.5 The right to health and FGM

Human rights activists that oppose the practice of FGM do not rest their case without making reference to adverse effects of the practice on the right to health. The argument is that FGM undermines the physical and mental health of women that is protected by the right to health. This argument requires us to briefly outline the scope and the nature of the right to health, as outlined in international and regional human rights instruments, and determine whether FGM, indeed, violates the right to health.

The right to health is protected under article 25 of the UDHR and article 12 of both the ICESCR and CEDAW. Article 12 of the ICESCR specifically provides that everyone has the 'right to the enjoyment of the highest attainable standard of physical and mental health'.²⁰¹ At the regional level, the African Charter provides for the 'best attainable state of physical and mental health'.²⁰² With specific reference to women, CEDAW guarantees the protection of the right to health of all women.²⁰³ In addition, the Maputo Protocol not only provides for the right to health of all women but also expressly provides for the promotion and respect of women's sexual and reproductive health.²⁰⁴ With specific reference to children, the same

¹⁹⁸ Article 4 Maputo Protocol.

¹⁹⁹ Article 6 of the CRC; article 5 (3) of the ACRWC.

²⁰⁰ Article 21.

²⁰¹ Article 12 ICESCR: Wood A (2001) 381;321.

²⁰² Article 16.

²⁰³ Article 12 CEDAW.

²⁰⁴ The Maputo Protocol is considered to be the first human rights instruments that provides extensively and recognises women's sexual and reproductive rights. This includes the right to make decisions on matters relating to fertility, contraceptives, and the liberty to decide on whether to have children, matters around HIV, and access to education relating to family planning (see article 14 (a-f). DurojageE 'Litigating the right to

right is protected both in the CRC and the ACRWC.²⁰⁵ It is important to note that the right to the highest attainable standard of physical and mental health does not only extend to the right to be healthy but also includes freedoms and entitlements for the right holder.²⁰⁶ Such freedom entitles the right holder ‘the right to control one’s health and body’.²⁰⁷ This includes ‘sexual and reproductive freedom’ without any interference.²⁰⁸

FGM, as indicated several times throughout this thesis, imposes both psychological and physical harm to the health of women. The risk of complications on the health of women is even greater due to the limited standards of medical care facilities in most countries where FGM prevails. Even in the absence of this, FGM still violates a woman’s right to health because it involves the removal of a healthy tissue for a non-medical purpose and this infringes the ‘the highest attainable standard of physical and mental health’.²⁰⁹ The violation of the right to health by the continued practice of FGM consequently undermines ‘the realisation of other fundamental human rights and freedoms’.²¹⁰ It is for these reasons that there is an agreement that FGM violates the right to health.

The protection of women and children from the infringement of the right to health by practice like FGM depends on states effectively discharging their obligations to ensure the realisation of the right to health. These obligations are provided in the international and regional instruments mentioned above.²¹¹ In discharging these duties, member states have to develop

health in Nigeria: Challenges and prospects’ in Killander M (ed) *International law and domestic human rights litigations in Africa* (2010) 150; article 14 Maputo Protocol.

²⁰⁵ The right to health is provided to every child to enjoy the highest attainable standard of health (see article 24 CRC). This includes the right to enjoy the ‘best attainable state of physical, mental and spiritual health’ (see article 14 ACRWC); Wood A (2001) 383.

²⁰⁶ Jayawickrama N (2002) 883.

²⁰⁷ Jayawickrama N (2002) 883.

²⁰⁸ General Comment 14 ICESCR; Jayawickrama N (2002) 883; Durojage E (2010) 150.

²⁰⁹ Rahman A & Toubia N (2000) 27; General comment No. 14 of CEDAW; Slack A (1988) 466.

²¹⁰ *Purohit and Another v The Gambia* (2003) AHRLR 96 (ACHPR 2003) 80, as discussed in Durojage E (2010) 153.

²¹¹ Article 12 ICESCR; article 12 CEDAW; Article 16 the African Charter; article 14 Maputo Protocol.

legislative measures such as enactment of legislation giving effect to the right to health within their jurisdictions.²¹² States are also required to put in place policies and plans in ensuring the realisation of every woman's right to health.²¹³ The CEDAW Committee expressly provide that in executing this duty, state have to ensure the prohibition of cultural practices, such as FGM, that undermine a woman's right to health.²¹⁴ They must also give particular attention to the needs of women who are at risk of being subjected to cultural practices, such as FGM, when crafting these laws and policies.²¹⁵ More specifically, the national policies and plans have to be drafted in a manner that ensures the eradication of FGM within the health sector and facilitates engagement with health officials in raising awareness on the negative effects of FGM on the health of women.²¹⁶ The same obligations are also included in terms of article 24 (3) of the CRC and article 21 of the ACRWC, according to which each member state has a legal duty to abolish cultural practices that are detrimental to the health and normal growth of a child.

2.4.6 Protection against harmful practices and FGM

As it is clear by now, many regard FGM as a harmful traditional practice. They, as, a result, rely on international and regional instruments that prohibit harmful practices and argue that FGM must be outlawed. Any person who engages in the practice of FGM or the failure of a state to prohibit the practice represents a violation of the rights of women against harmful practices.

The prohibition against harmful traditional practices that affect the rights of women and children is provided at the international and regional level.²¹⁷ The UDHR, ICCPR, ICESCR

²¹² General Comment 24 CEDAW.

²¹³ General Comment 14 of CEDAW.

²¹⁴ General Comment 24 of CEDAW.

²¹⁵ General Comment 24 of CEDWA; Wallace R *International human rights text and materials* (1997) 40.

²¹⁶ General Comment 14 of CEDAW

²¹⁷ Office of the Special Representative of the Secretary on Violence against Children *Protecting children from harmful practices in plural legal systems* (2012) 11 available at

http://srsg.violenceagainstchildren.org/sites/default/files/publications_final/SRSG_Plan_harmful_practices_report_final.pdf (accessed on 16/11/2012)

are among the international human rights instruments that provide for the right against harmful practices.²¹⁸ At the regional level, the right against harmful practices is protected by African Charter.²¹⁹ Furthermore, the ACRWC provides an extensive prohibition against harmful practices. According Article 21 of the ACRWC, all harmful social and cultural practices that are prejudicial to the 'welfare, dignity, normal growth and development of the child' are prohibited. The provision goes a step ahead by expressly prohibiting practices, and customs that negatively affect the health, and life of children and those that are discriminatory on the bases of gender or any other ground.²²⁰ The protection against harmful practices that negatively affect the rights of women is specifically contained under CEDAW and the Maputo Protocol.²²¹ CEDAW prohibits all social and cultural patterns that have the effect of enhancing gender inequality and the subordination of women in the society.²²² Similarly, the Maputo Protocol prohibits all harmful traditional practices that undermine international human rights standards.²²³

In order to benefit from the protections against harmful practices, one must first establish that FGM is a harmful practice. In relation to this, the point of departure would be the definition of harmful practices. Many international and regional instruments do not define harmful practices with the exception of the Maputo Protocol. According to the Protocol, harmful practices are defines them as 'all behaviours, attitudes and/ or practices which negatively affect the fundamental rights of women and girls, such as their right to life, health, dignity, education and physical integrity'.²²⁴ The Protocol elaborates the matter further by providing

²¹⁸ Article 3, 7 of UDHR, General Comment 7, General Comment 20, General Comment 28 of the ICCPR and General Comment 13 of ICESCR Other instruments are Convention on the Rights of People with Disabilities (hereafter referred to as CRPD); the Convention for the Protection of All Persons from Enforced Disappearance (hereafter referred to as CED). Office of the Special Representative of the Secretary on Violence against Children *Protecting children from harmful practices in plural legal systems* (2012) 11.

²¹⁹ Article 18.

²²⁰ Article 21 (1) (a) and (b).

²²¹ Article 5 Maputo Protocol; Article 5 CEDAW.

²²² Article 5 CEDAW; General Comment 14, 19, 21 and 24.

²²³ Article 5.

²²⁴ Article 1 Maputo Protocol.

for an illustrative list of harmful practices. More importantly, it is important to note that the Protocol explicitly regards FGM as a harmful practice.²²⁵

In the absence of clear statement that, like the Maputo Protocol, posits FGM as a harmful practice that undermines the fundamental rights, the mere fact that FGM is a harmful practice cannot be helpful. This is largely attributed to the fact that not all harmful traditional practices are prohibited. The CRC, for example, expressly prohibits only those traditional practices that negatively affect the health of children.²²⁶ As a result of this, and the absence of specific reference to the prohibited traditional practices, the position adopted by the CRC is arguably considered to be limited.²²⁷ Arguably however, it has been established that practices like FGM are preserved in order to enhance the patriarchy in most practicing communities.²²⁸ They are performed to control women sexuality, promote their subordination in all spheres of life. This, obviously, undermines human rights, making FGM a prohibited harmful practice that negatively affects the rights of women and children.²²⁹

The legal protection against harmful practices can only be strengthened by ensuring that states uphold the legal obligation imposed on them as a result of their international and regional commitments. These obligations include the duty to adopt legislative measures and impose sanctions to prohibit harmful traditional practices such as FGM.²³⁰ These measures need to be drafted in a manner that prohibits all forms of FGM, including medicalisation of FGM.²³¹ States further have to ensure that they provide support structures for women who have

²²⁵ Other practices considered as harmful practices under the Maputo Protocol include ‘forced feeding; early marriage; the various taboos or practices which prevent women from controlling their own fertility; nutritional taboos and traditional birth practices; son preference and its implications for the status of the girl child; female infanticide; early pregnancy; and dowry price’. Fact Sheet No.23, *Harmful Traditional Practices Affecting the Health of Women and Children*.

²²⁶ Article 24 (3); General Comment 24 and 4.

²²⁷ Article 24(3).

²²⁸ Fact Sheet No.23, *Harmful Traditional Practices Affecting the Health of Women and Children*.

²²⁹ Fact Sheet No.23, *Harmful Traditional Practices Affecting the Health of Women and Children*.

²³⁰ Article 5 (b) Maputo Protocol.

²³¹ Article 5 (b) Maputo Protocol.

undergone FGM through health, 'counselling, legal, judicial and vocational training' their empowerment.²³² Other duties include providing education to the public on the negative effects of FGM.²³³ This is to be achieved through awareness programmes done through formal or informal education and outreach programmes.²³⁴ In addition, member states also have a legal obligation to protect all women who have not undergone such practices but are at the risk of being subjected to the practice.²³⁵

Similar duties are imposed on states with regard to the protection of children from harmful traditional practices like FGM. This includes duty to take appropriate measures to protect children against harmful social and cultural practices. These measures include legislative measures that prohibit and abolish all harmful practices that negatively affect the health, normal growth and welfare of the child.²³⁶ States must also establish other measures such as awareness programmes to educate the public on effects of harmful practices on the rights of the child.²³⁷

2.5 Conclusion

This chapter has established that the change in the international perception towards the practice of FGM has contributed positively towards the protection of the rights of women and children against harmful practices such as FGM. This has broadened the awareness about the harmful effects of the practice not only on the health of women but also on their fundamental human rights and freedoms. FGM today is recognised as a practice that violates a number international human rights law. As a result, states, who are parties to these international human rights instruments, have a duty to fulfil, protect, and promote the fundamental rights of women within their jurisdiction.

²³² Article 5 (c) Maputo Protocol.

²³³ Article 5 (a) Maputo Protocol.

²³⁴ Article 5 (a) Maputo Protocol.

²³⁵ Article 5 (d) Maputo Protocol.

²³⁶ Article 21 ACRWC; Article 24(3) CRC.

²³⁷ Article 21 ACRWC; Article 24(3) CRC.

The duty to respect entails the duty to limit state intervention.²³⁸ As the practice of FGM is usually perpetrated by third parties, this aspect of state obligation is not relevant. More relevant to FGM is the duty to protect, which requires states to ensure that every individual's right is protected by limiting interference from third parties.²³⁹ In addition to this, the duty to fulfil human rights places a legal obligation on states to take legislative, judicial and other practical measures to ensure that the rights of women against FGM are upheld.²⁴⁰ This includes the duty to put in place legislative measures such as conducting legal reforms and enactment of legislation to protect the rights of women against FGM within their jurisdictions.²⁴¹ States also have a duty to put in place regulatory measures that prohibit health officials from performing FGM. In addition, they have to provide the necessary framework for Non-Governmental organisations (hereafter referred to as NGO's) which are active in the campaigns against the practice. Furthermore, they have to ensure that policy measures that support empowerment of women through different initiatives including education are in place.²⁴²

It is against this background that the next chapter will evaluate the legal measures that Tanzania has put in place. It examines whether Tanzania is complying with its international and regional human rights obligations to protect the rights of women against FGM.

²³⁸ Nowak M *Introduction to international human rights regime* (2003) 48.

²³⁹ Sepulveda M *et al The nature of state obligations under the International Covenant on Economic, Social and Cultural Rights* (2004) 165.

²⁴⁰ Nowak M (2003) 48.

²⁴¹ Centre for Reproductive Health *Female genital mutilation a matter of human rights: An advocate guide to action* (2006) 21.

²⁴² Centre for Reproductive Health (2006) 21.

3. Chapter three

The law against female genital mutilation in Tanzania: A critical analysis

Tanzania is one of the twenty eight African states where FGM is widely practiced. As the previous chapter has established, the practice of FGM violates human rights. Several legal obligations are also imposed on states to protect and promote the rights of women against FGM, both by international and regional human rights instruments. It is against this background that the current chapter will examine the effectiveness of the legal framework that Tanzania has put in place to protect the rights of women against the practice of FGM.

The chapter commences the discussion by identifying the types of FGM commonly practiced in Tanzania and the reasons that are often used to justify the practice. The discussion then shifts to the status of international law in Tanzania with the view to establish whether Tanzania has a legal obligation to protect women against FGM. This is followed by an examination of the effectiveness of the legal framework that Tanzania has put in place to protect the rights of women against the practice.

3.1 The practice of FGM in Tanzania

In Tanzania, FGM is a deeply entrenched cultural practice that is widely common among at least 20 of the country's 120 ethnic groups.²⁴³ Although the practice is reported to be carried out by different ethnic groups across the country, it is most commonly practiced among the Chagga, Pare, Maasaai, Iraque, Gogo, Nyaturu, Kurya, Ruri, Ikoma, Sweta and the Zanaki.²⁴⁴ In terms of geographic distribution, Arusha, Dodoma, Dar es Salaam, Kilimanjaro, Manyara, Mara, Morogoro, and Singida are some of the regions that are famously known for the practice of FGM.²⁴⁵

²⁴³ Female Genital Mutilation Practice in Tanzania available at <http://wgc.womensglobalconnection.org/conf06proceedings/Mwambalawa%20S.--Female%20Genital%20Mutilation.pdf> (accessed on 12/06/2011).

²⁴⁴ Gamaya K (2004) 2.

²⁴⁵ Gamaya K (2004) 2; Women's Legal Aid Centre *Annual report 2009* (2009) 10.

All types of FGM that were identified in chapter two are practiced in Tanzania, namely clitoridectomy, excision, infibulations, including the category of FGM that is commonly referred to as the unclassified type.²⁴⁶ Clitoridectomy, which involves the removal of the clitoris either partially or totally, is common mostly in the regions of Kilimanjaro, Arusha, Iringa, Mtwara, Kilosa and Tarime.²⁴⁷ Excision, involving the process where the clitoris is removed along with partial or total removal of the labia minora, is widely practiced and amounts to almost 80 percent of the reported cases of FGM in Tanzania.²⁴⁸ It is particularly common in Kilimanjaro, Arusha, Iringa and Mtwara. Infibulation, the most severe form of FGM, involving the 'removal of the external genitalia and stitching and/or narrowing of the vaginal opening', is common in Kilimanjaro and Arusha, and it is mostly practiced by immigrants from Somalia and those with Nubian origins.²⁴⁹

The 'unclassified' type, as indicated in the previous chapter, encompasses all procedures that cut, alter, and burn the female genitalia by using corrosive substances and herbs which are inserted into the vagina for the purpose of tightening it.²⁵⁰ One particular type of FGM that possibly falls under this category is the so called Kuvuta Matunya.²⁵¹ The name kuvuta Matunya is a word derived from the Kiswahili language.²⁵² It involves the act of pulling of the vagina banks to promote its elongation.²⁵³ The process is usually initiated from an early age by the mother of the child and the child gradually adapts and learns to do it by herself.²⁵⁴ Kuvuta Matunya is considered to enhance sexual pleasure for men and guards against

²⁴⁶ The United Republic of Tanzania combined 4th, 5th and 6th State report to the Committee on the Elimination of Discrimination against Women (2007) 23.

²⁴⁷ Bisimba H, Lee S and Daffa J(2005) 27.

²⁴⁸ Bisimba H, Lee S and Daffa J(2005) 27.

²⁴⁹ The United Republic of Tanzania combined 4th, 5th and 6th State report (2007) 23; Bisimba H, Lee S and Daffa (2005) 27; Basima H, Hierlmeier (eds) (2004) 3.

²⁵⁰ Gamaya K (2004) 29.

²⁵¹ Gamaya K (2004) 29, Legal Human Rights Centre *Female genital mutilation (FGM) "A human rights abuse veiled in customs and tradition": A report on the findings of the research into the practice of FGM in Tanzania* (2005) 27.

²⁵² Gamaya K (2004) 29; Legal Human Rights Centre (2005) 27.

²⁵³ Gamaya K (2004) 29; Legal Human Rights Centre (2005) 27.

²⁵⁴ Gamaya K (2004) 29; Legal Human Rights Centre (2005) 27.

rape.²⁵⁵ This is commonly practiced in Mtwara, and the Lake zone region.²⁵⁶ Another type of FGM that could also fall within this category is what is known as “ngoma za mbalamwezi/moon dances” or “singolyo”, as commonly referred to in Kimasaai language.²⁵⁷ This procedure involves the ‘[u]se of ghee to lubricate and widen the vaginal orifice of girls’ to facilitate sexual penetration.²⁵⁸ The whole process can last for five to six hours during which a girl could also be sexually penetrated.

The continued practice of FGM in Tanzania is attributed to various reasons that have and are still being used to justify its continued preservation. These reasons differ from one region to another depending on the cultures and beliefs of the different ethnic communities. Despite some of the differences, many of the motivations are common and cut across the different regional and ethnic divisions of the country. The reasons range from those that attach cultural significance to the practice and to those related to hygiene, myths and the desire to control women sexuality.

The role of culture and the desire to preserve one’s cultural identity is the most cited reasons for the continued practice of FGM in Tanzania.²⁵⁹ Most communities, the Chagga and Pare tribes in the Kilimanjaro region, in particular, consider FGM as an essential part of their culture and traditional beliefs.²⁶⁰ FGM is practiced as a cultural ritual to please the ancestors in order to obtain their ‘blessings’. The common belief is that these ‘blessings’ protect their families against any harm. It is because of this particular belief that FGM is largely supported

²⁵⁵ Gamaya K (2004) 29; Legal Human Rights Centre (2005) 27.

²⁵⁶ Gamaya K (2004) 29; Legal Human Rights (2005) 27.

²⁵⁷ The United Republic of Tanzania Ministry of Health and Ministry of Community Development, gender and Children *The National Plan of Action To Accelerate The Elimination of Female Genital Mutilation and Other harmful Practices in Tanzania 2001-2015* (2003) 7.

²⁵⁸ The United Republic of Tanzania Ministry of Health and Ministry of Community Development, gender and Children (2003) 7.

²⁵⁹ Gamaya K (2004) 29; Legal Human Rights Centre (2005) 27.

²⁶⁰ Gamaya K (2004) 29; Legal Human Rights Centre (2005) 27.

by the elders but also by members of the younger generation, who do so to gain acceptance of the elders and families.²⁶¹

For other communities, FGM is a practice that facilitates the transition of a young girl into adulthood.²⁶² It is only after the practice is performed that a young girl acquires new rights, obligations, and specific teaching, which can only be given to her after the initiation stage. This includes teachings needed to prepare a young girl for marriage, bearing of children and expected responsibilities as an adult member of her community.²⁶³ The Maasai, for example, consider FGM as one of the most important and respected cultural ritual.²⁶⁴ The practice is part and parcel of the initiation process where young Maasai girls are taught their culture and different traditional values attached to the Maasai. Such values include their heritage and beliefs, traditional medicines and preparation for marriage. It is only after this 'initiation process' that a young Masaai girl can be considered for marriage and earn respect and acceptance in her community as an adult. The same is true among the Kurya tribe for whom FGM facilitates 'a passage to adulthood'.²⁶⁵ The practice holds a high cultural significance so much so that anyone who refuses to submit herself to FGM is considered as outcast.²⁶⁶ These examples show that cultural justifications remain to be one of the contributing factors for the continued practice of FGM in Tanzania. This is more evident specifically in the regions of Kilimanjaro, Arusha, Dodoma, Singida, Tarime and Kilosa.²⁶⁷

The practice of FGM is also closely linked to marriage. For a number of communities in Tanzania, FGM is regarded as a prerequisite for marriage. In Kilimanjaro, Arusha, Dodoma and Singida, it is only after FGM is performed that a woman can be considered as an adult, and

²⁶¹ Gamaya K (2004) 29; Legal Human Rights Centre (2005) 27.

²⁶² Mirsalva P 'introducing alternative rites of passage' (2007) 53 *Africa Today* 26 (19-40), Basima H, Lee S and Daffa J (2005) 26 and 28.

²⁶³ Basima H, Lee S and Daffa J (2005) 26 and 28.

²⁶⁴ Gamaya K (2004) 22.

²⁶⁵ Children's Dignity Forum *The voices of the child brides and mothers in Tanzania: A peer report on child marriage* (2010) 12.

²⁶⁶ Children's Dignity Forum (2010) 12.

²⁶⁷ Basima H, Lee S and Daffa J (2005) 29.

most importantly, be eligible for marriage.²⁶⁸ It is only after that men, who are seeking wives, would usually engage with the girls' families with the hope of securing marriage.²⁶⁹ Similarly, in Tarime, it is believed that a woman who has not been subjected to FGM has a very limited chance of getting married. This is attributed to the common belief that 'a mutilated woman is better'.²⁷⁰ Research conducted in the region indicates that women, who have undergone FGM, are usually married off immediately after completion of the practice or within two years after it was performed. If a woman has failed to secure a husband thereafter, she is considered have 'bad luck'.²⁷¹ On the other hand, a woman, who have not undergone FGM, and still managed to get married, is considered to only have been done 'a favour' by the man who decides to marry her. Such women are prone to stigma in their communities and may not be accepted by their in laws. They may further be prohibited to cook or even refuse to associate with her in other activities, which women who have undergone FGM would engage in. This is to ensure that she does not pass over any 'bad luck' that she may have acquired as a result of not being subjected to FGM.²⁷²

Myths also contribute to the continued practice of FGM in Tanzania. The myths that the practice suppresses women's sexual desire, prohibits promiscuity and ensures a woman to be faithful to the husband upon marriage are also widely held among many communities in Tanzania.²⁷³ This is the case with the Maasai. According to a myth held by the Massai, FGM was used a long time ago as a 'cure' and punishment to Napei, a Masaai girl accused to have sexual relations with a man who was considered an enemy of her family. She was subjected to FGM to suppress her sexual desires, which was considered to be the driving force behind her sexual engagement with the enemy. The practice of FGM has since been

²⁶⁸ Basima H, Lee S and Daffa J (2005) 28;29.

²⁶⁹ Basima H, Lee S and Daffa J (2005) 28.

²⁷⁰ Children's Dignity Forum (2010) 13.

²⁷¹ Children's Dignity Forum (2010) 13.

²⁷² Children's Dignity Forum (2010) 13;14.

²⁷³ Gamaya K (2004) 30.

passed through generations among the Maasai and, according to them, it helps to maintain the honour of the girl and the family.²⁷⁴

FGM is also regarded by many communities as a means to promote personal hygiene. This is attributed to the belief that the female genitalia is naturally dirty.²⁷⁵ The practice is also considered to cure and prevent a genital disease, locally known as lawalawa, in Dodoma, Singida, Iringa and Mtwara.²⁷⁶ This is, however, a myth. According to medical experts, the condition believed to be lawalawa is a minor infection associated with poor hygiene referred to as thrush. This infection can be cured by improving one's hygiene and by taking medication.²⁷⁷

For a number of ethnic communities in Tanzania, the practice of FGM is also believed to help women embrace femininity and preserve gender identity. This myth is attributed to the misconception mentioned in the preceding chapter that a woman's external genital, specifically the clitoris, if not removed, will outgrow the male external genitalia. It is further believed that if it is not removed, it will cause harm to any man during sexual intercourse.²⁷⁸ This belief is common among the Kurya tribe in Tarime region. It is also believed that the clitoris, if not removed, may also harm a newborn upon contact during child birth.²⁷⁹ Moreover, it is believed that women, who have undergone FGM, are able to give birth easier

²⁷⁴ Equality Now *Protecting girls from undergoing female genital mutilation: The experience of working with the Maasai communities in Kenya and Tanzania* (2011) 12 (available at http://www.equalitynow.org/sites/default/files/Protecting%20Girls_FGM_Kenya_Tanzania.pdf (accessed on 29/11/2012))

²⁷⁵ Gamaya K (2004) 30.

²⁷⁶ Mwita S, FGM 'difficult to eliminate' (2010) available at <http://www.dailynews.co.tz/feature/?n=14913&cat=feature> (accessed on 28/08/2012), Bisimba H, Heirlmeier J (eds) (2004) 30.

²⁷⁷ Mwita S (2010)

²⁷⁸ Basima H, Lee S and Daffa J (2005) 28.

²⁷⁹ Gamaya K (2004) 30.

because of the absence of the labia.²⁸⁰ This belief is widespread among the Gogo and Nyaturu in Dodoma and Singida.

As established in the previous chapter, despite the reasons advanced for the practice, it is established that FGM has no health benefits. In fact, as established in the preceding chapter, the negative effects of FGM violates fundamental rights and freedoms of women as protected under various international and regional human rights instruments. This is concerning given the fact that Tanzania has ratified a number of international and regional human rights instruments that protect the rights of women against FGM. For example, it has, ratified the ICCPR and the ICESCR in 1976. Although Tanzania is not a party to CAT, it became a party to CEDAW in 1985 and the CRC in 1991. In so far as the African human rights system is concerned, Tanzania ratified the African Charter in 1984, the Maputo Protocol in 2007 and the ACRWC in 2003.

Even though ratification may be considered as a positive step towards ensuring that the rights of women are protected against FGM, it, alone, is not sufficient to safeguard these rights. The realization of human rights is dependent on the domestic legal framework of each state. With this in mind, the next section examines the status of international law in Tanzania. The objective is to ascertain whether Tanzania has adopted a dualistic or a monistic approach to international law. This, in turn, will help us determine the manner in which international law forms part of the Tanzanian law to ensure its enforceability through the national legal framework.

3.2 The status of international law in Tanzania

Treaties not only regulate the relationship between states but also play a crucial role in promoting human rights. Once a state becomes a member to a treaty, a 'contractual relationship' is created which requires each member to fulfil the objectives of the treaty within

²⁸⁰ Gamaya K (2004) 30.

its jurisdiction.²⁸¹ The manner in which international law forms part of national legal framework of a state depends on the municipal law of each state. The dualistic and the monistic approach are the two main theories used to determine the relationship between international and domestic law.²⁸²

States who subscribe to dualistic approach to international law consider international law different to national law.²⁸³ The former only forms part of the national legal framework only after domestication, which ensures enforceability. This is done either through the enactment of a separate legislation giving effects to the international treaty or amending laws to this effect. In contrary to dualistic approach, states who subscribe to the monistic approach do not consider international law different to municipal law. In fact, according to this approach 'international law and national law are manifestations of a single conception of law'.²⁸⁴ The effect of this is that international treaties form part of municipal law upon ratification.

Mapunda BT has established that the manner in which treaties are ratified and negotiated in Tanzania has undergone three stages.²⁸⁵ In the early years of independence, the power to enter into a treaty was vested in the Queen of England, the head of state, who could also consult the Prime Minister in his capacity as the head of government. 'Under this system, the queen, upon advice of the Prime Minister, concluded all treaties and there was no constitutional requirement for legislative ratification of the same'.²⁸⁶ This approach, which

²⁸¹ Mapunda BT 'Treaty making and incorporation in Tanzania' (2003) combined issue 28-30 *Eastern Africa law Review* 156.

²⁸² Killander M and Adjolohoun 'International law and domestic human rights litigation in Africa: An Introduction' in Killander M (ed) *International law and domestic litigation in Africa* (2010) 4.

²⁸³ Although international law is regarded to be different from domestic law under the dualistic approach, the two are still considered to be interconnected systems, Murungu C "The place of international law in human rights litigation in Tanzania" in Killander M (ed) *International law and domestic litigation in Africa* (2010) 60;61; the National Network of Organizations Working with Children (2005) 7; Killander M and Adjolohoun (2010) 11; 5; Mapunda BT(2003) 159; the National Network of Organizations Working with Children (2005) 7.

²⁸⁴ Killander M and Adjolohoun(2010) 5.

²⁸⁵ Mapunda BT(2003) 159.

²⁸⁶ Mapunda BT(2003) 159;160; 59.

was closely linked to the British West Minister system, only lasted for the duration of one year. This changed at the end of 1962 when Tanganyika adopted the Republican Constitution. This marked the end of the responsibilities of the Queen as the head of state and the powers to conclude treaties on behalf of the country were placed upon the president as the head of state. In other words, the executive was entrusted with the power to enter into treaties on behalf of the state. The President could either exercise these powers or could delegate them to anyone deemed fit. This system was maintained to a greater extent until 1992 when the Constitution was amended. The effect of the amendment was that the Constitution gave the Parliament the mandate to 'ratify treaties that by their nature require ratification'.²⁸⁷ This suggests that Tanzania, like many other common wealth countries, has adopted a dualistic approach to international law. This means that international law has no legal effect until it is domesticated.²⁸⁸

Currently, the process of ensuring the enforceability of international instruments at the national level is achieved through the domestication of international instruments by way of enactment of legislation referred to as 'Implementation Act'.²⁸⁹ This can be done in three ways: Firstly, a treaty can be domesticated by an Implementation Act that 'gives effect to the whole treaty as such'.²⁹⁰ In terms of this approach, the Implementation Act only contains provisions of the treaty it gives effect to, and not the substantive provision of it. The treaty will then be attached to as a schedule to the Act. The second way of domestication is by 'making an independent enactment with the treaty referred to being included as a schedule'.²⁹¹ This approach allows the incorporation of the treaty or certain provisions of the treaty to the Implementation Act. In addition, the treaty or certain provisions of it may also be included as a schedule to the Act. The third method is by enacting legislation that follows the model of

²⁸⁷ Mapunda BT(2003) 160; Article 63 (d) and (e) of the Constitution of the United Republic of Tanzania of 1977; National Assembly Act 20 of 1992.

²⁸⁸ Murungu C (2010) 60.

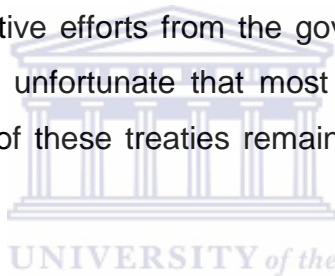
²⁸⁹ Mapunda BT(2003) 160;162.

²⁹⁰ Mapunda BT(2003) 162.

²⁹¹ Mapunda BT(2003) 162.

the treaty and incorporating either the whole treaty or just specific sections of it.²⁹² The process of domestication of treaties is completed once the treaty is given effect to under the domestic legal system through proclamation or by way of notice in the *Government Gazette*.²⁹³

An example of some of the domestic legislation that have been enacted to give effect to international human rights treaties ratified by Tanzania includes the Child Act No. 21 of 2009, which is applicable in the mainland, and the Children's Act No. 6 of 2011, applicable in Zanzibar.²⁹⁴ These two Acts discharges Tanzania's international and regional obligations in relation to rights of children by incorporating the CRC and the ACWRC. Another example is the Anti-Trafficking in Persons Act No. 6 of 2008 that domesticated the Protocol to Prevent, Suppress and Punish Trafficking in Persons especially Women and Children of 2000.²⁹⁵ Although there have been positive efforts from the government to ensure that international treaties are domesticated, it is unfortunate that most of them remain 'un-incorporated'.²⁹⁶ The effect of this is that most of these treaties remain unenforceable on the national legal framework.



Despite the problem of domestication, Tanzania still has a legal duty under international law. By virtue of ratification of these human rights instruments, it has the duty to respect, protect and fulfil the rights of women within its jurisdiction. This obligation requires Tanzania to put in place legal and institutional mechanisms to give effect to the rights of women and protect their infringement by the continued practice of FGM. The next section analyses the Tanzanian legal framework with the view to determine whether it has put in place adequate legal measures to protect the rights of women against FGM.

3.3 Legal measures

²⁹² Article 63 (d) and (e) of the Constitution of the United Republic of Tanzania of 1977; Murungu C (2010) 60; Mapunda (2003) 162; 163.

²⁹³ Murungu C (2010) 60.

²⁹⁴ Mapunda (2003) 164.

²⁹⁵ Mapunda (2003) 164; Murungu C (2010) 60.

²⁹⁶ Mapunda (2003) 164.

Incorporating international human rights treaties into the national legal system enhances the development of human rights.²⁹⁷ This also ensures that international standards are enforceable within the national legal system. The same is true with the protection of the rights of women against FGM. It is the domestic legal framework that plays an essential role in protecting the rights of women against FGM. As the following discussion reveals, Tanzania has put in place different legal measures to protect the rights of women against FGM. The measures include the Constitution of the United Republic of Tanzania of 1977 (hereafter referred to as the Constitution of URT) and other legislation complimenting the constitutional provisions protecting the rights of women against the practice of FGM.

3.3.1 Constitutional protection

The inclusion of constitutional provisions protecting the rights of women is, as mentioned earlier, one of the effective measures that can enhance the legal framework to curb against the violation of human rights by the continued practice of FGM. The constitutional provisions need to be drafted in manner that promotes gender equality, and prohibits harmful traditional practices, such as FGM, which are detrimental to the health of women. If the constitution does not specifically provide for these rights, then other general provisions can be interpreted to protect the rights of women against FGM.²⁹⁸

The Constitution of URT is founded on the principles of freedom, justice, fraternity and concord.²⁹⁹ It strives to build a united society where every citizen has an opportunity to exercise human rights and enjoy freedom, justice, fraternity and concord. The Constitution further places an obligation on the state and all its organs to respect human rights and promote equal opportunities without any differentiation in all government policies and

²⁹⁷ Center for reproductive health rights *Female genital mutilation a matter of human rights: An advocate guide to action* (2006) 11. Available at

http://reproductiverights.org/sites/crr.civicaactions.net/files/documents/FGM_final.pdf (accessed on 4/10/2012).

²⁹⁸ Center for reproductive health rights (2006) 22.

²⁹⁹ Article 9 The Constitution of the United Republic of Tanzania 1997. Lubuva D 'reflections on Tanzania's Bill of Rights' (1988) 14(2) *Commonwealth Law Bulletin* 835.

programmes.³⁰⁰ As the supreme law of the land, the Constitution is also referred to as the 'basic law', from which other laws are derived from.³⁰¹

The Constitution of URT protects the right to equality and non-discrimination,³⁰² one of the rights implicated by the continued practice of FGM. The right to equality ensures that every individual is treated equally in the social, political or economic sphere of life.³⁰³ The right to non-discrimination, on the other hand, protects women from all forms of discrimination. The general prohibition against discrimination alone is not, however, enough to protect women against FGM. The Constitution goes further by specifically providing for the prohibition of discrimination on the bases of sex. FGM, as established earlier, discriminates against women on the basis of sex as it is performed primarily to control women sexuality. The recognition of these two corollary rights by the Constitution contributes to the protection of women against FGM.

The Constitution of the URT, in article 14, protects the right to life, a right that, under certain circumstances, is threatened by the continued practice of FGM. The right to life encompasses the right to live and the right to have one's life protected in the society by the law.³⁰⁴ FGM, as indicated earlier, violates the right to life in extreme cases when the practice results to death. The state has to ensure that this right is upheld by providing legal mechanisms to prohibit practices such as FGM that undermines this fundamental human right. As established in the previous chapter, the practice of FGM also undermines the right to CIDT. The Constitution of URT protects the right of women to be free from CIDT.³⁰⁵

³⁰⁰ Article 9 of the Constitution of the United Republic of Tanzania.

³⁰¹ Some scholars refer to the Constitution as 'a social contract between the rulers and the ruled'. This is because the Constitution captures the wishes and aspirations of the country. Peter C (2000) 4; Preamble, Constitution of the United Republic of Tanzania of 1977, Shivji I, Majamba H, Makaramba R and Peter C *Constitutional and legal system of Tanzania: A civics sourcebook* (2004) 42.

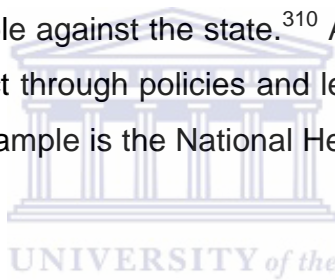
³⁰² Articles 12, 13 (5) and (6) 13 (5) of the Constitution of the URT.

³⁰³ Legal human Rights Centre (2011) 65.

³⁰⁴ Article 14 of the Constitution of URT.

³⁰⁵ Article 13(6) of the Constitution of the URT

Unfortunately, the right to health, an important right that can be used to defend women against FGM, is not provided in the bill of rights of Tanzania.³⁰⁶ The failure of the government to incorporate this right in the Constitution goes against Tanzania's international and regional human rights obligations. Despite the absence of explicit reference to the right to health by the Constitution, some scholars have held that article 11(1) of the Constitution can be interpreted to protect the right to health.³⁰⁷ This interpretation is, however, debatable because the provision, if read carefully, does not actually provide for the right to health. It rather places a legal obligation on the state to put in place measures 'for securing the right to work, to education, and to public assistance in the case of old age, sickness and disablement, and in other cases of undeserved want'.³⁰⁸ From this, it is clear that it is more welfare-related provision than the right to health. Even if it is regarded as the right to health, it does not help much in protecting women against FGM as it falls under the directive principles of state policy,³⁰⁹ making it unenforceable against the state.³¹⁰ As a directive principle of state policy, the right to health is given effect through policies and legislation that are aimed at improving health care facilities. A good example is the National Health Policy of 2007 and Public Health Act of 2009.³¹¹



The constitution of the URT does not also provide for the prohibition of harmful practices. As established in the previous chapter, FGM is a harmful practice that violates the fundamental rights of women. The absence of a constitutional provision against harmful practice is contrary to the Tanzanian human rights international and regional commitments. The only way that this right is given effect to is through the comprehensive Law of the Child Act that explicitly puts a prohibition against harmful cultural practices which have an effect of injuring the physical and mental well being of the child.³¹²

³⁰⁶ Legal Human Rights Centre *Tanzania human rights report* (2011) 83.

³⁰⁷ Shivji I *et al* *Constitutional and the legal system of Tanzania: A civil sourcebook* (2004) 179.

³⁰⁸ Shivji I *et al* (2004) 179.

³⁰⁹ The Constitution of URT.

³¹⁰ Shivji I *et al* (2004) 179.

³¹¹ Legal Human Rights Centre (2011) 83.

³¹² Section 13 (1) of the Law of the Child Law Act No 21 of 2009; UNICEF (2010) 10.

From the foregoing, it is clear that the constitution does provide protection to women against FGM. It however has failed to include important rights that could be used to protect women against FGM. In any case, the constitutional protection of the rights of women against FGM is not enough to ensure effective protection of women rights against the continued practice. States should complement these measures with other legislation to ensure that women are adequately protected against FGM. That is the focus on the next section.

3.3.2 Legislative framework protecting the rights of women in Tanzania

The efforts to eradicate FGM in Tanzania can be traced back to the colonial era where the British colonial government and Christian organisations worked together to prohibit the practice.³¹³ With little success record, these efforts made the British colonial government unpopular and were considered by local communities as mechanism to suppress and abolish their culture.³¹⁴ The movement to prohibit FGM continued even after independence. This was mostly driven by NGOs who raised awareness on the negative effects of FGM on the health of women with the view to eradicate the practice.³¹⁵ More importantly, they played a crucial role in advocacy and lobbying for the enactment of legislation criminalising FGM.

The efforts to eradicate FGM gained impetus with the growing concern to put in place adequate legal framework to curtail increasing violence against women. The alarming wave of violence against women in Tanzania raised valid concerns about the need to review the legal framework to protect the rights of women. These concerns were intensified by the increase of offences such as 'rape, defilement, incest' and also the manner in which these offences were regulated in terms of the law.³¹⁶ As a result of the increasing public outcry and the campaigns by several NGO movements, the government, through the Law Reform

³¹³ Mukama D *Female genital mutilation in Tanzania: A legal appraisal of the Sexual Offences Special Provisions Act 1998* (2002) Master of Laws thesis at the University of Dar Es Salaam 25 -27.

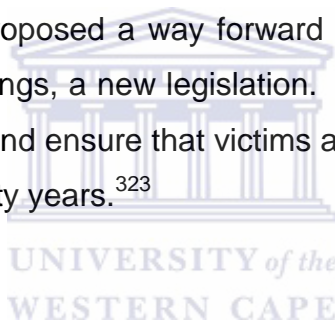
³¹⁴ Mukama D (2002) 27.

³¹⁵ Mukama D (2002) 29.

³¹⁶ Mukama D (2002) 77.

Commission of Tanzania (hereafter referred to as the LRCT), instituted an inquiry.³¹⁷ The study established that there are several shortcomings on the law and its enforcement measures.³¹⁸ It indicated that the law had failed to adequately protect the rights of women against sexual and domestic violence due to the problems associated with sentencing, evidentiary and procedural requirements relating to sexual offences.³¹⁹

For our purposes, it is important to note that the inquiry also contributed positively to the ongoing campaigns to eradicate FGM as the latter, for the first time, received specific attention as one of the contributing factors of gender based violence. Previously, FGM was not legally regulated under the Tanzanian legal framework.³²⁰ The only way that the practice could be addressed was when it results in death or grievous bodily harm to the victim.³²¹ In this case, the perpetrator will be dealt with in terms of the Penal Code.³²² The effect of this is that the rights of women against the practice of FGM were not adequately protected. Based on these findings, the LRCT proposed a way forward to improve the legal framework and recommended, among other things, a new legislation. The new legislation, according to the LRCT, would criminalise FGM and ensure that victims are compensated and perpetrators are imprisoned for not less than thirty years.³²³



³¹⁷ The Law Reform of Tanzania *Report on the criminal law as a vehicle for the protection of the right to personal integrity ,dignity and liberty of women* (1998) 32- 47; Buccina C et al *Gender based violence in Tanzania: An investigation on the effectiveness of the Sexual Offences Special Provision Act of 1998* (2009) 12.

³¹⁸ The Law Reform of Tanzania (1998) 32- 47; Buccina C et al (2009) 12.

³¹⁹ The Law Reform of Tanzania (1998) 32; Buccina C et al (2009) 12.

³²⁰ Kaniki A.O.J ‘ An overview of the law on fighting against female genital mutilation in Tanzania’ (on file with author) 22.

³²¹ Kaniki A .O.J 22

³²² Kaniki A. O.J 22; Mukama (2002) 79.

³²³ These recommendations were also supported by other government institutions such as the Ministry of Community Development Gender and Children, the Ministry of Culture and Education and Ministry of Health as this would put Tanzania in line with its international obligations in protecting the rights of women against FGM. There are those, however, that have held that the criminalisation of FGM in Tanzania was not an independent national strategy but rather an illustration of the international anti-FGM campaign. According to them, Tanzania relies extensively on financial aid from the west and the influence of international campaign on

In 1998, Tanzania joined the twenty one African countries or so that have outlawed FGM by imposing criminal sanctions.³²⁴ The practice of FGM was criminalised for the first time in the legal history of Tanzania by the Penal Code³²⁵ as amended by Sexual Offences Special Provision Act of 1998 (hereafter referred to as Penal Code) in terms of section 169 A.³²⁶ The Penal Code criminalises FGM under a new offence of cruelty to children.³²⁷ Section 169 A (1) provides that;

‘any person would be guilty of an offence of cruelty to children if such a person is in charge, has custody or care of any person who is below the age of eighteen years and mistreats, neglects, abandons, ‘causes female genital mutilation or procures that person to be assaulted, ill treated, neglected or abandoned in a manner likely to, cause him suffering or injury to health, including injury to, or loss, of sight or hearing, or limb or organ of the body or any mental derangement.’³²⁸

The use of punitive measures is an important aspect of laws that, in many countries designed to prohibit the practice of FGM.³²⁹ In these countries, a state can impose criminal sanctions against FGM by incorporating provisions prohibiting the practice in its Penal code.³³⁰ Criminalising FGM attempts to achieve the abandonment of the practice through the use of

national system is reflected on the approach and language of the legislation criminalising FGM. See Foss G *et al* (2001) 535; The Law Reform of Tanzania (1998) 66,67; Mukama D (2002) 77.

³²⁴ These states are Benin, Bukina Faso, Central African Republic, Chad, Cote d'Ivoire, Djibouti, Egypt, Eritrea, Ethiopia, Ghana, Guinea, Kenya, Mauritania, Niger, Nigeria, Senegal, Sudan, South Africa, Togo, Uganda and Kenya. Center for reproductive health rights (2006) 7.

³²⁵ Penal Code Chapter 16 of the Laws of Tanzania, revised edition 2002.

³²⁶ The Act amended different laws dealing with sexual and other offences. It addressed several offences such as sexual exploitation, incest, procurement of prostitution, child prostitution, and cruelty to children, rape, molestation, sodomy and indecent assault. It further changed the sentencing and evidentiary requirements in relation to sexual offences. Buccina C *et al* (2009) 12.

³²⁷ Section 169 A (1).

³²⁸ Section 169 A (1) of the Penal Code.

³²⁹ UNICEF (2010) 27.

³³⁰ UNICEF (2010) 28.

threat of the punitive measures against perpetrators.³³¹ States that have adopted this approach other than Tanzania to mention a few, are, Egypt, Ghana and Senegal.³³²

Research indicates that when states have put in place comprehensive criminal sanctions against FGM, it contributes positively to the prohibition against the practice.³³³ This is attributed to the fact that most people will reconsider engaging in the practice due to fear of criminal sanctions.³³⁴

In this regard, the amendment of the Penal Code in Tanzania represents a positive step towards ensuring that the legal framework protects the rights of women against the practice of FGM. It is also an important step towards fulfilling the country's international and regional human rights obligations. Notwithstanding this, the effectiveness of the Penal Code in protecting the rights of women against FGM is questionable. Several 'loopholes' in the provision criminalising FGM have limited the application of the amendment to realise the objective of the amendment. It is against this note that the following section will examine the effectiveness of the criminalisation of FGM in Tanzania in light of its international and regional human rights obligations.

3.3.2.1 The absence of definition

When a state chooses to use criminal sanctions to prohibit FGM, several factors need to be considered to ensure that the set objectives are achieved.³³⁵ To begin with, the law must

³³¹ UNICEF (2010) 27.

³³² The manner in which criminal sanctions can be utilized by states to prohibit FGM is not limited to this particular approach. Some countries may decide to use both the Penal Code and the Children's Act together to prohibit FGM. Kenya is a good example, where in addition to the enactment of the Children's Act, the Penal Code has been used several times to punish FGM perpetrators. In states that follow a federal form of government, a decision has to be made where legislation against FGM should be left to the national or sub national government. In Nigeria, for example, the matter is left to the states. Two states have adopted law to prohibit FGM. A state can also choose to enact a specific legislation prohibiting the practice. This has been done in Benin, Eritrea, Uganda, Sudan and Togo. UNICEF (2010) 28; 10. For an in depth discussion on the law against FGM in Uganda see Mujuzi J (2011) and on Eritrea see, Mekonnen D 'The abolition of female circumcision in Eritrea: Inadequacies of the new legislation' (2007) *African Human Rights law Journal*.

³³³ UNICEF (2010) 27.

³³⁴ UNICEF (2010) 27.

³³⁵ Center for reproductive health rights (2006) 23; 24.

provide for a clear definition of FGM followed by the different types that are prohibited.³³⁶ The law in Uganda, for example, defines FGM as ‘all procedures involving the partial or total removal of external female genitalia for non-therapeutic reasons’.³³⁷ The Kenyan approach goes further by not only defining the practice but also listing the types of FGM that are prohibited. The Children’s Act defines FGM as “the cutting and removal of part or all of the female genitalia and includes the practices of clitoridectomy, excision, infibulation or other practices involving the removal of part, or the entire clitoris or labia minora of a female person”.³³⁸ A more comprehensive approach comes from Eritrea. Article 2 of the Proclamation to Abolish Female Circumcision provides not only for the definition of the FGM, but also list and, more importantly, outlines, in reasonable detail, the different types of FGM and a reinstate that all types of FGM are prohibited.

The Penal Code of Tanzania criminalizes FGM without a clear definition. The Code does not also make reference to the different types of FGM that are prohibited. Section 169 A only makes reference to FGM in passing as one of the acts that, when performed to a person below that age of eighteen years, constitutes the offence of cruelty to children. The absence of a clear definition of FGM creates legal uncertainty about the acts that constitutes FGM. Furthermore, potentially undermines the effectiveness of the objectives of the amendment of Act in protecting the rights of women against FGM.

3.3.2.2 The issue around consent

The Penal Code criminalizes FGM if it is performed on a person below the age of eighteen years. Consent, albeit indirectly, seems to be an issue. The assumption behind the legislation seems to be that a person below the age of eighteen years cannot give valid

³³⁶ Center for reproductive health rights (2006) 24; UN Women *A supplement to the handbook for legislation on violence against women: “Harmful traditional Practices” against women* (2010) available at www.un.org/womenwatch/daw/handbook/Supplement-to-Handbook-English.pdf (accessed on 20/10/2012).

³³⁷ Section 1 of the Prohibition of female genital Mutilation Act 5 of 2010; Mujuzi J (2011) 9.

³³⁸ Section 18 of the Children’s Act No 8 of 2001; UNICEF *Legislative reform to support the abandonment of female genital mutilation/cutting* (2010) 16. Available at http://www.unicef.org/policyanalysis/files/UNICEFLRI_Legislative_Reform_to_support_the_Abandonment_of_F_GMC_August_2010.pdf (accessed on 20/10/2012).

consent. The effect of this is that women, who are above the age of eighteen years, fall outside the ambit of section 169 A of the Penal Code.³³⁹ This obviously is based on the idea that a person above eighteen can give valid consent and FGM practiced on adult person is not the business of the law.

The problem with the legislation, however, is that, it seems to assume that anyone above the age of eighteen years undergoes FGM voluntarily. This is, however, an assumption that is far from reality especially for women who belong to communities where the practice is strongly supported. Many women are as vulnerable as children due to social pressure and may still be subjected to the practice without their valid consent.³⁴⁰ In some communities in Tanzania, for example, 'adult women are sometimes genitally mutilated forcefully during delivery'.³⁴¹ It is argued that most women who may consent to FGM may not necessarily be aware of the consequences of their decision to engage in the practice.³⁴² They are often exposed to extreme social and economic pressure to undergo FGM. Furthermore the practice is strongly supported in rural areas where the level of education for most women is still very low. Most of them consent to FGM as a result of myths, social and economic pressure.

The failure of the Penal Code to outlaw FGM on a woman above the age of eighteen has created a platform for the continuation of practice. This is evident from the development of a 'new trend' in Tanzania where women voluntarily subject themselves to FGM for economic reasons. These women sell part of their external genitals to miners, which, in turn, use it for the purpose of witchcraft to enhance their chances of securing minerals.³⁴³ Obviously, this type of situation remains unregulated under section 169 A. This raises the question whether one's consent, even if it a valid and informed consent, is relevant for the purpose of criminal

³³⁹ Kaniki A.O.J 24.

³⁴⁰ Women's Legal aid centre *United Nations Convention on the Elimination of all Forms of Discrimination Against Women: Tanzania Non Governmental Organizations' shadow report to CEDAW: The implementation of the Convention on the Elimination of all Forms of Discrimination Against Women* 52. Available at http://www.iwraw-ap.org/resources/pdf/41_shadow_reports/Tanzania%20SR.pdf (accessed on 27/11/2012).

³⁴¹ Kaniki A.O.J 24.

³⁴² Slack A (1988) 471;472.

³⁴³ Legal Human Rights Centre *Tanzania human rights report 2008: Progress through human rights* (2009) 80.

liability. Some argue an adult that willingly goes through FGM should not be criminally liable.³⁴⁴ The legislation, it seems, does not have a problem with those who voluntarily subject themselves to FGM. The LRCT has, proposed that the scope of the law should be widened to prohibit FGM on anyone regardless of age.³⁴⁵

The law criminalising FGM in Uganda, for example, has adopted firm prohibition of FGM even in the presence of consent from the victim. In terms of the Act, consent does not constitute a valid defence against the prohibition of FGM.³⁴⁶ Therefore anyone who engages in FGM with or without consent will be criminally liable. The Act expressly provides that FGM is also criminalised even if it is performed on oneself.³⁴⁷ Two states in Nigeria has adopted a similar position where the person giving consent can also be held criminally liable for FGM.³⁴⁸ Consent, in this case, cannot be used as a justification to escape criminal liability for engaging in FGM. By reaffirming that consent does not constitute a valid justification for FGM, the legislation, it is submitted can protect women against all the social and cultural pressure that may influence their ability to give valid consent to FGM, fully aware of the negative consequences of the practice.³⁴⁹

3.3.2.3 Criminal Liability under Section 169

The law that seeks to prohibit FGM through criminal sanctions should expressly identify the persons that could potentially be held criminally liable.³⁵⁰ Criminal sanctions should be attributed to the primary offender and anyone else who assists the perpetrator as an accomplice.³⁵¹ In Eritrea and Uganda, the law attributes criminal liability to any person regardless of the relationship that the person shares with a child or a woman on whom FGM

³⁴⁴ Slack A (1988) 470.

³⁴⁵ The Law Reform Commission of Tanzania (2008) 3.

³⁴⁶ Mujuzi J (2011) 10.

³⁴⁷ Section 4 of the Prohibition of female Genital Mutilation Act 5 of 2010; Mujuzi J (2011) 10.

³⁴⁸ UNICEF (2010) 28.

³⁴⁹ Center for reproductive health rights (2005) 25.

³⁵⁰ Center for reproductive health rights (2006) 24.

³⁵¹ UNICEF (2010) 27;28.

is performed upon.³⁵² This means that any person who is responsible for the act can be held criminally liable for the offence.

Section 169 A Penal Code in Tanzania is structured in a manner that attributes criminal liability to only those that have guardianship or custody of a child and allows her to be subjected to FGM. This means a special relationship between the child and the perpetrator needs to exist for criminal liability under the Penal Code.³⁵³ Given that guardianship is the main criteria for liability, it also means that the child's parents could be potentially liable for criminal charges. This gives rise to the issue surrounding the problematic nature of prosecuting parents for causing FGM.³⁵⁴

The main issue against prosecuting parents is that any separation between the parent and the child may cause undue hardship on the child.³⁵⁵ Imposing criminal liability on parents may be detrimental to the child as a result of the hardship that may ensue from the child being separated from the parent. Prosecution of parents should, therefore, it is often argued, should be done with caution. Measure that would require the removal of the child from the parents 'or suspending parental authority need to be weighed against the child's best interest'.³⁵⁶ States are advised to consider alternative penalties whenever possible to limit any undue hardship on the child.³⁵⁷ Such measures are encouraged as they protect the best interest of the child. A good example comes from Bukina Faso.³⁵⁸ The judiciary treats parents differently from other perpetrators of FGM by imposing either a lower or suspended sentence on parents. The Tanzanian Penal Code, in this case, may have a 'reverse negative effect' on the child, undermining the interest to protect. Instead of protecting the child by promoting the

³⁵² Article 4 Proclamation to Abolish Female Circumcision No 158 of 2007; article 2 of Prohibition of female Genital Mutilation Act 5 of 2010.

³⁵³ Kaniki A.O.J 23.

³⁵⁴ It is argued that even without express provision on the legislation criminalising parents, they could still be held liable as an accomplice. UNICEF (2010) 28.

³⁵⁵ Center for reproductive health rights 24; UNICEF (2010) 28.

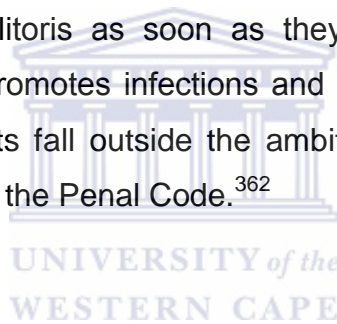
³⁵⁶ UNICEF (2010) 19.

³⁵⁷ Center for reproductive health rights 24; UNICEF (2010) 18.

³⁵⁸ UNICEF (2010) 18; 19.

child's best interests, the legislation would impose hardship on the child by sanctioning separation.

More problematically, the limitation of the application of the Penal Code to those with a special relationship with the child means that according to the Penal Code, such as FGM practitioners, commonly referred to as 'Ngariba', and medical personnel cannot be held criminally liable. This is because of the requirement of custody or guardianship for criminal liability. The effect of this is that parents and guardians try to circumvent criminal liability by avoiding direct engagement in the subjection of children to FGM. This is evident in regions like Dodoma and Singida where parents attempt to avoid detection and prosecution by arranging that FGM be performed on newborns.³⁵⁹ In these regions, FGM is now done with the assistance of some health attendants such as midwives who "poke their fingers, nails and incisive objects into infant's clitoris as soon as they are born".³⁶⁰ The practice causes damage the infant's bladder, promotes infections and can even cause death as a result of over bleeding.³⁶¹ Such incidents fall outside the ambit of section 169 A and may only be regulated by other provisions of the Penal Code.³⁶²



3.3.2.4 Punishment

³⁵⁹ This new trend has also been reported to be carried out in Karatu district in Arusha. Although in this region it has not yet been reported to be done with the assistance of health officials, it is done for the same purpose on infants to avoid prosecution. Mwakyusa A 'Karatu communities change strategy on FGM' *Daily News* 5 July 2012 9; Legal Human Rights Center (2008) 80.

³⁶⁰ Legal Human Rights Center (2008) 80.

³⁶¹ Legal Human Rights Center (2008) 80.

³⁶² It is, however, important to note that several measures have been instituted to guard against this practice. Such measures include a campaign by health officials where infants brought to the clinics are checked for any sign of FGM. The main objective behind this campaign is to hold the perpetrators accountable in line with section 169 A. 'Health workers now diagnose genitally mutilated infants' *The Guardian* (Tanzania) 15 December 2008; Legal Human Rights Centre (2008) 80.

One of the important elements of any law criminalising the practice FGM are the measures incorporated to punish perpetrators of the crime.³⁶³ The Penal code through article 169 A (2), attributes punishment in the form of imprisonment. A perpetrator, if found guilty, can be imprisoned for a minimum of five years but not exceeding thirteen years. The court in addition, imposes a fine of a maximum of three hundred thousand Tanzania shillings.³⁶⁴ The perpetrator can also be subjected to imprisonment and be required to pay a fine. In addition, the Penal Code also the perpetrator compensate the victim for the harm caused.

It seems that the Penal Code provides for a 'fixed standard' where the same form of punishment is applied across the board irrespective of the person responsible for the crime or the degree of the harm caused by the practice. That means even in the event that the act results in death, the punishment remains the same. This is problematic. In Uganda, for example, punishment is attributed to the perpetrators depending on the degree of harm caused.³⁶⁵ For example, a person that attempts to engage in FGM will be subjected to an imprisonment of a maximum of five years.³⁶⁶ Furthermore, if the practice causes death, disability, infects the victim with HIV, the perpetrator will be could be subjected to life imprisonment.

The manner in which punishment is attributed also varies depending on the person who committed the crime. If FGM is performed by a health official or by a person who shares a special relationship with a child, such as the guardian, such a person may be subjected to life imprisonment. In some jurisdictions like Bukina Faso, the government imposed strict punishment if the perpetrator is a health official. The person will not only be given the 'maximum punishment' but may also be suspended for five years from medical practice too.³⁶⁷

3.3.2.5 Investigation and legal prosecution

³⁶³ UNICEF (2010) 27.

³⁶⁴ Section 169 A (2) of the Penal Code.

³⁶⁵ Mujuzi J (2011) 9;10.

³⁶⁶ Mujuzi J (2011) 10.

³⁶⁷ Mgabako C et al (2010) 18.

FGM cases are predominantly criminal cases where the onus of proof is beyond reasonable doubt.³⁶⁸ This makes the investigation of FGM cases crucial in ensuring that the rights of women are protected against this practice. Research shows that one of the main challenges that law enforcers face in investigation and evidence gathering has to do with the nature of FGM cases themselves. This particularly relates to the fact that FGM is usually performed in the privacy of family and community members. Another problem is accessibility to the areas where FGM is carried out. Added to this is the problem of determining whether a woman has been already subjected to the practice. It is often held that even in cases where it is obvious that FGM has been carried out, it is still difficult to investigate or gather evidence due to the support of FGM by most practicing communities.

The situation in Tanzania around investigation and prosecution of FGM cases is not different from most African countries where the practice still prevails despite criminal sanctions against it. Research indicates that FGM is still supported in Tanzania, and is practiced in the privacy of family and community members to avoid detection by the law enforcers.³⁶⁹ This creates a problem in investigating cases as law enforcers, who are considered as 'outsiders', are left unaware of whether the practice has been performed.³⁷⁰ In order to ensure that the objectives of the legal measure are achieved, some states, such as Benin, have imposed a mandatory reporting duty on medical officials and all professionals work with children and women to report FGM cases to law enforcers. The rationale behind this duty is to ensure that FGM cases are reported and assist law enforcers in investigation and collection of evidence. In Egypt, for example, the government has established a helpline to facilitate the reporting procedure where people can report cases of FGM.³⁷¹ These cases are later on directed to the authorities where investigation and legal proceedings can be instituted against the perpetrators. In Bukina Faso, the government has established community patrols in the

³⁶⁸ UNICEF (2010) 29.

³⁶⁹ Kiwasila H (2007) 15.

³⁷⁰ UNICEF (2010) 29.

³⁷¹ UNICEF (2010) 30.

regions where FGM is supported.³⁷² The police collaborates with health care officials and informants within these communities to report cases of FGM.

Sometimes however, the problem could be the law enforcers themselves. The attitude of the law enforces and of the community is crucial in ensuring the effectiveness of the legal measures that are put in place to eradicate FGM.³⁷³ The experience in Tanzania has shown that the attitude of the community and the law enforcers towards the practice of FGM has a negative impact in the reporting of FGM cases. It has been established that the lack of co-operation from the law enforces in the region has limited efforts to curb the practice. The widely reported case of a girl who was subjected to FGM in Mnazi Moja in Morogoro is a good indication of the attitude of the law enforcers. The matter was reported to the local police but no charges were brought against the perpetrators. The girl died later on due to over bleeding. In Tarime, specifically in Sirari Township, FGM ceremonies were held in 2010.³⁷⁴ It was observed that women who had just undergone FGM were 'paraded like merchandise after they had just been mutilated and crowds of people joyously dancing behind them. These girls were seated under the shade with fresh blood dripping down their legs. It was shocking to notice that there was a police station a few meters from where the actual FGM was taking place but the police went on working like nothing was happening'.³⁷⁵ In 2010 alone, it was established that approximately 5000 girls were in line to be subjected to FGM in Tarime.³⁷⁶

These findings suggest that the law enforcers in Tarime have failed to effectively investigate, and prosecute perpetrators of FGM. Although the police are under a legal duty to protect women against FGM, most of them are reluctant to prohibit the practice in the region due to the fear of causing 'disarray between the police and FGM perpetrators'.³⁷⁷ In addition, most

³⁷² UNICEF (2010) 30.

³⁷³ UNICEF (2010) 29.

³⁷⁴ LHRC *Fact finding mission conducted at Tarime District November- December 2010* (2010)4;7.

³⁷⁵ LHRC (2010)4; 7.

³⁷⁶ Legal Human Rights Centre (2010) 4.

³⁷⁷ LHRC (2010) 12.

police stations lack proper documented records on FGM cases.³⁷⁸ The consequence of this is that the government initiatives to ensure that the rights of women are protected against FGM are undermined.

One of the main contributing factor is the social pressure that victims of FGM experiences either from the family, community, or both, when legal proceedings are instituted.³⁷⁹ This makes prosecution of cases difficult as some victims would withdraw the cases due to social pressure and lack of evidence. As a result, most cases are not prosecuted. Research undertaken in the District Registrar of Dodoma High Court has revealed that due to the 'family oriented nature' of the cases of FGM, cases take long to be decided due to lack of evidence.³⁸⁰ This is because, most of the times, the perpetrator is a parent or a close relative of the child. Obtaining evidence from the victim or another relative has proven to be a challenge.³⁸¹ For example, in the case of *R v Fatuma Iddi* and *R v V.Lucy Augustino*, the accused, in both cases, were acquitted due to lack of evidence and family pressure.

3.4 Other measures supporting the legislative Framework against FGM

The use of punitive measures to prohibit or regulate a particular behaviour or practice has its own limitations. This is especially true with FGM, a practice that is often culturally engrained. As a result, states are often advised to complement legislative measures with other supporting measures that promote social change, if the latter is to be effective to protect the rights of women against FGM.³⁸² Social change is important in order to achieve public consensus to abandon FGM. With measures that promote social change in place, the punitive measures against FGM only feature as 'positive force' towards the eradication of FGM.³⁸³ However, when a state fails to develop such measures, the punitive measures that

³⁷⁸ Lema E (ed) *20 year of Tanzania Media Women's Association (TAMWA); Moving the agenda for social transformation in Tanzania* (2008)139; LHRC (2010) 12.

³⁷⁹ UNICEF (2010) 30.

³⁸⁰ Mukama (2002) 98.

³⁸¹ Mukama (2002) 98.

³⁸² UNICEF (2010) 27.

³⁸³ UNICEF (2010) 7;8.

prohibit the practice will not have public support. What usually happens is that criminalisation simply pushes 'the practice underground, lower[s] the age of cutting, trigger[s] cross-border migration and result[s] in public resentment.'³⁸⁴ The net result is a less effective criminal sanction against FGM.³⁸⁵

The limitation of punitive measures calls for the need to put in place supporting measures that encourage change in social norm related to the practice of FGM.³⁸⁶ Broadly speaking, these measures are educational awareness programmes and those that are aimed to empower women in communities where FGM prevails.³⁸⁷ A state can complement its punitive measures with legislation or policies. Uganda, for example, has used legislation to give effect to these measures. Considering that the fight against FGM should target not only those who are involved in the act, the law that prohibits FGM targets members of the broader community that support or encourage the practice. It explicitly provides that '[a] person who discriminates against or stigmatizes a female who has not undergone female genital mutilation from engaging or participating in any economic, social, political or other activities in the community commits an offence and is liable on conviction to imprisonment not exceeding five years'.³⁸⁸



As mentioned above, states also can complement their punitive measures with supporting measures that come in the form of policies. Policies can be used to introduce supporting measures that contributes to the effectiveness of the punitive measures against FGM. Tanzania has opted for this approach. In 2001, Tanzania adopted the National Plan of Action to Accelerate the Elimination of Female Genital Mutilation and other Harmful Traditional Practices in Tanzania (2001- 2015) (hereafter referred to as NPA).³⁸⁹

³⁸⁴ UNICEF (2010) 27.

³⁸⁵ UNICEF (2010) 27.

³⁸⁶ Mekonnen D (2007) 398.

³⁸⁷ Center for reproductive health rights (2006) 21; 27.

³⁸⁸ Article 11 Prohibition of Female Genital Mutilation Act 5 of 2010.

³⁸⁹ The United Republic of Tanzania Ministry of Health and Ministry of Community Development, gender and Children *The National Plan of Action to Accelerate the Elimination of Female Genital Mutilation and other Harmful Traditional Practices in Tanzania (2001-2015)* (2003).

It should be noted that before the NPA was established, the criminalization of FGM was still supported by other departmental policies.³⁹⁰ The shortcoming of this position was, however, that, none of the policies expressly addressed FGM.³⁹¹ This created the need for a national policy that will specifically provide for FGM and effectively coordinate all efforts against the practice.³⁹² The adoption of the policy is also linked to the outcome of an international workshop that was held in Tanzania to sensitize medical practitioners on how to deal and manage harmful traditional practices. The workshops emphasised the need for a national policy that will support the criminal law prohibiting FGM.³⁹³ Others arguments emphasises that the rationale behind the adoption of the NPA is linked to Tanzania's international, regional and sub-regional human rights obligations to eradicate violence against women and children by 2015.³⁹⁴

The goal of the NPA's is 'to accelerate the elimination of Female Genital Mutilation and other Harmful Traditional Practices in order to improve the quality of health and general life of Tanzania women and girls in a coordinated manner'.³⁹⁵ This goal is reflected in the objectives of the policy. The NPA has a total of eight objectives. A close look at the objectives would

³⁹⁰ These policies are Health Policy of 1990, the Community Development Policy of 1996, Women and Gender Development Policy of 2001, Family development Policy of 1998, Children's Development Policy of 1996, Education Policy of 1995, Youth Development Policy of 1996 and the Population Policy of 1999. The United Republic of Tanzania Ministry of Health and Ministry of Community Development, gender and Children (2003) 13.

³⁹¹ The United Republic of Tanzania Ministry of Health and Ministry of Community Development, gender and Children (2003) 13.

³⁹² The United Republic of Tanzania Ministry of Health and Ministry of Community Development, gender and Children (2003) 13.

³⁹³ The United Republic of Tanzania Ministry of Health and Ministry of Community Development, gender and Children (2003) 7.

³⁹⁴ Section 27 of the SADC Declaration on Gender and Development available at <http://www.afrimap.org/english/images/treaty/SADC-Gender-Protocol.pdf> (accessed on 27/08/2012); the National Plan of Action for the Prevention and Eradication of Violence against Women and Children (2001-2015) 3.

³⁹⁵ The United Republic of Tanzania Ministry of Health and Ministry of Community Development, gender and Children (2003) 14.

reveal that some of the stated objectives are a mere re-statement of the main goal. This is the case, for example, with objective number one, which underscores the need '[t]o reduce the prevalence and proportion of girls and women who have undergone any type of FGM'.³⁹⁶ The same is true with objective number six, which aims at increasing 'the number of districts reporting a decrease in the number of girls and women who are mutilated'.³⁹⁷ The rest can be seen as a more of objectives embodying activities that need to be carried out in order to achieve the main goal of 'accelerating the eradication of the practice'. Some of these objectives aim to have a direct effect on the eradication of FGM. This is, for example, the case with objective number three that aims at increasing 'the proportion of communities supporting the elimination of FGM through positive changes in attitude, belief, behaviour and practice'.³⁹⁸ Others, on the other hand, attempt to contribute to towards the eradication of FGM indirectly. A good example is the objective that seeks '[t]o promote traditional practices that are beneficial to the well-being of women and children in Tanzania'.³⁹⁹

Some of the objectives aim at bringing about attitudinal change towards the practice. From the policy, it seems that the change in attitude is expected to happen in two fronts. On one hand, the policy aims at changing the attitude of members of the community. It seeks to '[t]o increase the proportion of communities supporting the elimination of FGM through positive changes in attitude, belief, behaviours and practice'.⁴⁰⁰ But the drafters of the policy are also cognisant of the important role that community leaders and other authorities can play in the eradication of FGM. Based on this understanding, Objective number seven of the policy aims at 'increas[ing] the understanding, support and ownership of leaders at all levels of the efforts

³⁹⁶ The United Republic of Tanzania Ministry of Health and Ministry of Community Development, gender and Children (2003) 14.

³⁹⁷ The United Republic of Tanzania Ministry of Health and Ministry of Community Development, gender and Children (2003) 14.

³⁹⁸ The United Republic of Tanzania Ministry of Health and Ministry of Community Development, gender and Children (2003) 14.

³⁹⁹ The United Republic of Tanzania Ministry of Health and Ministry of Community Development, gender and Children (2003) 14.

⁴⁰⁰ The United Republic of Tanzania Ministry of Health and Ministry of Community Development, gender and Children (2003) 14.

aimed at eliminating FGM.⁴⁰¹ Targeting community leaders is important especially in the African context as most of them enjoy a higher degree of acceptance in their respective communities. In short, these two objectives represent a call for social change.

The government of Tanzania has established different measures to promote social change to promote the eradication of FGM. It has established specific gender desk at the Commission for Human Rights and Good Governance (hereafter referred to as CHRC).⁴⁰² The objective of the desk is to promote public educational awareness programmes on human rights and issues affecting the rights of women such as FGM. The government has also supported the establishment of the Committee against Harmful Traditional Practices.⁴⁰³ The Committee is, among other things, responsible for raising awareness on effects of FGM on the health of women and works closely with NGO's like Tanzania Media Women's Association (hereafter referred to as TAMWA). Awareness programmes have been carried out at all levels in communities where FGM is supported. The objective was to educate people on the harmful effects of FGM, the legal measures in place and also encourage reporting of FGM cases.⁴⁰⁴ One good example is the "stop FGM campaign" established by TAMWA for a duration of two years.⁴⁰⁵ With the help of other media organisations, the campaign targeted Arusha, Kilombero, Dodoma and Singida.

It is important that the government and other stakeholders have given attention to public educational awareness programmes as education is a powerful tool that can be used to enhance facilitate social change and enhance the effectiveness of other government initiatives such as legislative measures to prohibit FGM. It has often been established that

⁴⁰¹ The United Republic of Tanzania Ministry of Health and Ministry of Community Development, gender and Children (2003) 14

⁴⁰² The United Republic of Tanzania combined 4th,5th and 6th State report to the Committee on the Elimination of Discrimination against Women (2007) 23;24.

⁴⁰³ The United Republic of Tanzania combined 2nd and 3rd State report to the Committee on the Elimination of Discrimination against Women (1996) 9.

⁴⁰⁴ Lema E (ed) *20 years of Tanzania Media Women's Association (TAMWA): Moving the agenda for social transformation in Tanzania* (2008) 139.

⁴⁰⁵ Lema E (ed) (2008) 138;140.

'[c]ommunity education workshops are the foundation of successful anti-FGM initiatives in Africa'.⁴⁰⁶ In Tanzania, the state similarly claims that the campaign was a success and has enabled people, who were responsible for carrying out FGM, to abandon it and join the campaign against the practice.⁴⁰⁷ TAMWA has also pointed out that the decline in the FGM prevalence rate from 18 percent in 1996 to 15 percent in 2010 is the fruitful result of the awareness campaigns against FGM by the different stake holders in line with the NPA.⁴⁰⁸

Promoting the 'capacity and the capability' of government institutions and the community in developing and implementing measures to prohibit and abolish FGM is the other objective of the NPA.⁴⁰⁹ The government has put in place different structures to enhance the capacity of its institutions to develop, implement and manage activities for the elimination of FGM. The National Chapter for Inter- African Committee for the Elimination of Harmful Cultural Practices (hereafter referred to as NCIAC) is an example of such structures.⁴¹⁰ The NCIAC falls under the Ministry of Health and Social Welfare and coordinates the different efforts to eradicate FGM through its regional committees. Furthermore, the National Chapter for East Africa for Elimination of FGM and Harmful Traditional Practices (hereafter referred to as NCEA) was also created under the Ministry of Community Development Gender, and Children. The NCEA has an FGM eradication secretariat that brings together different stakeholders from the government and NGO's to develop and determine measures to eradicate FGM.

⁴⁰⁶ Mgabako C et al (2010) 8.

⁴⁰⁷ The United Republic of Tanzania combined 4th,5th and 6th State report to the Committee on the Elimination of Discrimination against Women (2007) 23. Available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N07/264/84/PDF/N0726484.pdf?OpenElement> (accessed on 20/11/2012).

⁴⁰⁸ Kiwasila H *FGM interventions: Achievements, challenges and prospects in the light of the National Plan of Action to accelerate the elimination of FGM and other harmful traditional practices* (2007) (paper presented to the National Gender Group, REPOA Conference) 9; Tanzania health and demographic survey (2010) 295.

⁴⁰⁹ The United Republic of Tanzania Ministry of Health and Ministry of Community Development, gender and Children (2003) 14;15.

⁴¹⁰ Kiwasila H (2007) 7.

The government initiatives to enhance the capacity of the different stakeholders involved in the campaigns against the practice of FGM is also supported by the activities of local NGO's. National Anti FGM Coalition (hereafter referred to as NAFC) was formed in 1999.⁴¹¹ The NAFC brings together the government and those that are working together to eradicate FGM. Annually, the NAFC commemorates the FGM Zero Tolerance Day on 5th of February. This event brings together different stakeholders that are involved in the campaigns against FGM.⁴¹² The Women's Legal Aid Centre (hereafter referred to as WLAC) has also conducted workshops and training for police officers in Kitunda in Dar es Salam region.⁴¹³ The objective of these workshops was to enhance the police capacity and capability to deal with FGM cases.⁴¹⁴ Similarly, the LHRC also conducted training workshops for the police in Morogoro with a similar objective of ensuring the eradication of FGM in the region.⁴¹⁵

The NPA also emphasises the need to promote the capacity and capability of health care facilities and health officials.⁴¹⁶ The targeted goal is to increase the capacity and capability of health care facilities and officials by 40 percent by 2015.⁴¹⁷ The rationale behind this objective is to ensure that women, who have undergone FGM, are given the necessary medical assistance.⁴¹⁸ Furthermore, the objective is to provide psychological support, such



⁴¹¹ Anti FGM- Coalition http://www.humanrights.or.tz/?page_id=403 (accessed on 10/11/2012).

⁴¹² Anti FGM- Coalition http://www.humanrights.or.tz/?page_id=403 (accessed on 10/11/2012).

⁴¹³ FGM in Dar es Salaam is considered to be a product of urban migration of practicing communities. In Kitunda specifically where the practice prevails, the Kurya for example continue to practice their traditional practices which includes FGM. It is estimated that approximately 5.6 percent of women and girls have been subject to FGM in Dar es salaam Buccina C et al (2009) 53; Women's Legal Aid Centre (2009) 10.

⁴¹⁴ The outcome of this initiative was that the police officers thereafter managed to rescue three girls from undergoing the practice in the area. Women's Legal Aid Centre (2009) 10.

⁴¹⁵ Gamaya K (2004) 49.

⁴¹⁶ The United Republic of Tanzania Ministry of Health and Ministry of Community Development, gender and Children (2003) 14.

⁴¹⁷ The United Republic of Tanzania Ministry of Health and Ministry of Community Development, gender and Children (2003) 15.

⁴¹⁸ The United Republic of Tanzania Ministry of Health and Ministry of Community Development, gender and Children (2003) 14.

as counselling and care.⁴¹⁹ The Government works in close collaboration with NGO's such as Comprehensive Community Based Rehabilitation in Tanzania (hereafter referred to as CCBRT) and Women Dignity Project to support victims of FGM.⁴²⁰ This initiative is, however, limited because medical support is only provided for women, who have suffered physical effects of FGM and specifically those that have developed Vesico vaginal fistula and Rectal vesico fistula as a result of being subjected to FGM.⁴²¹

The remaining objectives of the NPA, as discussed previously, fall within the second category, namely objectives that indirectly contribute towards the eradication of FGM. One such objective is the promotion of other traditional practices that are beneficial to the health and wellbeing of women.⁴²² In Tanzania, such initiatives are associated with the activities of Save the Children Organisation.⁴²³ The organisation promotes alternative rite of passage as a means to discourage FGM in communities where the practice is supported. As a result of these measures, most communities where the organisation has been active has reconsidered alternative rite of passage. This is commonly referred to as 'Ki-CCM style' of FGM.⁴²⁴ In addition, in 2007, during the commemoration of the FGM Zero Tolerance day, 100 girls were rescued from being subjected from FGM by undergoing an alternative rite of passage that does not involve cutting.⁴²⁵

⁴¹⁹ The United Republic of Tanzania Ministry of Health and Ministry of Community Development, gender and Children (2003) 14.

⁴²⁰ Kiwasila H (2007) 8.

⁴²¹ Vesico vaginal Fistula and rectal vesico Fistula are medical condition where a women is 'not able to control urine or faeces or both at the same time dripping through the vagina'. Kiwasila H (2007) 8.

⁴²² The United Republic of Tanzania Ministry of Health and Ministry of Community Development, gender and Children (2003) 14; 15.

⁴²³ Kiwasila H (2007) 9.

⁴²⁴ 'Ki CCM' style is word derived from the name of the ruling party Chama Cha Mapinduzi commonly referred to as CCM and the campaigns to prohibit FGM in Tanzania. Although 'Ki CCM' style in most cases does not involve any cutting, in some regions it may involve a minor form of cutting for some communities. Mhoja M *Child- widows silenced and unheard: Human rights suffers in Tanzania* (2008) 64; Kiwasila H (2007) 9.

⁴²⁵ Anti FGM- Coalition http://www.humanrights.or.tz/?page_id=403 (accessed on 10/11/2012).

Research indicates that when a state encourages 'alternative rite of passage' in a community that favours FGM, the attitude of the society needs to be taken in to account.⁴²⁶ The success of such programmes is dependent on the support of the other measures that will encourage participatory education on the harmful effects of FGM on the health and rights of women.⁴²⁷ Such measures should encourage the cooperation of the whole community towards abandoning the practice of FGM. 'Initiatives that engaged only at-risk girls rather than the whole community [do] not promote collective reflection and changes in the social attitudes and norms'.⁴²⁸ Such resentment by the public results, in most cases, to the practice being performed in young girls without ceremonies that usually accompany FGM,⁴²⁹ as it is the case in Mikumi, where research indicates that, FGM is still supported and is now carried out in an 'in-house secret event'.⁴³⁰ Moreover, 'alternative rite of passage' still involves some degree of cutting in some regions such as Mara.⁴³¹

Another objective of the NPA that aims at indirectly contributing towards the eradication of FGM indirectly is 'need for an increase in the enrolment and completion of girls in formal education at primary and secondary schools and higher education institutions'.⁴³² The rationale behind this objective is to empower women by giving them equal access to education. This, in turn, will improve their social and economic position, which, in most cases, contributes to their vulnerability to FGM. The goal behind this objective is to increase the enrolment and completion of girls by 40 percent by 2015.⁴³³ The government of Tanzania has adopted various policies giving effect to the right to education and ensuring equal access to

⁴²⁶ UNICEF Innocenti Research Centre *The dynamics of social change towards the abandonment of Female genital Mutilation/Cutting in five African countries* (2010) 37.

⁴²⁷ UNICEF Innocenti Research Centre (2010) 37.

⁴²⁸ UNICEF Innocenti Research Centre(2010) 37.

⁴²⁹ UNICEF Innocenti Research Centre(2010) 37.

⁴³⁰ Kiwasila H (2007)15.

⁴³¹ Kiwasila H (2007) 9.

⁴³²The United Republic of Tanzania Ministry of Health and Ministry of Community Development, gender and Children (2003) 14.

⁴³³ The United Republic of Tanzania Ministry of Health and Ministry of Community Development, gender and Children (2003) 15.

education. The main objective is to promote 'equality and equity' in primary, secondary and tertiary education. The Education Sector Development Programme is an example of important initiative that aims to ensure the achievement of this goal.⁴³⁴ It further promotes enrolment of girls to primary schools through 'compulsory basic education'.⁴³⁵ The Girls' Secondary Education Support Programme was also developed to fund girls to pursue secondary education. Similarly, the Gender Dimension Programme, together with the Female Undergraduate Scholarship Programme, was created to enhance equal access and promote enrollment of girls to tertiary education.⁴³⁶ Despite these efforts, the main challenge is that most girls still drop out from schools due to social and economic reasons.⁴³⁷

The NPA has been in place since 2001. Research indicates that there have been positive outcomes towards the eradication of FGM that can be attributed to the policy. For example, the Network against Female Genital Mutilation (hereafter referred to as NAFGEM) has reported that, as result of these measures in the year 2000, 190 mutilators abandoned the practice in regions like Kilimanjaro.⁴³⁸ Similarly, Anti-Female Genital Mutilation Network (hereafter referred to as AFNET) reported that in Singida and Dodoma 250 Ngaribas have decided to abandon the practice together with others from Arusha.⁴³⁹ Despite these achievements, the decrease in the prevalence rate of the practice since the NPA has been operational is marginal. FGM is still supported in Tanzania. The LHRC has conducted research on FGM in different regions such as Morogoro and Tarime where the practice is

⁴³⁴ The United Republic of Tanzania combined 4th,5th and 6th State report to the Committee on the Elimination of Discrimination against Women (2007) 27.

⁴³⁵ The United Republic of Tanzania combined 4th,5th and 6th State report to the Committee on the Elimination of Discrimination against Women (2007) 28.

⁴³⁶ The United Republic of Tanzania combined 4th,5th and 6th State report to the Committee on the Elimination of Discrimination against Women (2007) 28;30.

⁴³⁷ The United Republic of Tanzania combined 4th,5th and 6th State report to the Committee on the Elimination of Discrimination against Women (2007) 28.

⁴³⁸ Kiwasila H (2007) 9.

⁴³⁹ Kiwasila H (2007) 10.

strongly supported. In 2010, they conducted a fact finding mission in Tarime.⁴⁴⁰ FGM is usually scheduled to be carried out every two years in the region. The findings of the inquiry established that despite the different awareness measures to facilitate social change in the country FGM is still strongly supported and performed openly in Tarime.⁴⁴¹ '[O]ne does not have to use any skills of observation to discover whether girls are being mutilated or not. It is just a matter of staying along roads and watching groups of mutilated girls passing along the roads bleeding'.⁴⁴²

3.5 Conclusion

This chapter has established the Tanzania has an international legal obligation to protect and promote the rights of women against FGM. In discharging this duty, the country has put in place legislative and other supportive measures, including a national policy, to ensure that the rights of women are promoted and protected against FGM. Despite the efforts employed by Tanzania, it can be established that the measures in place have not entirely been successful in prohibiting FGM. There are many factors that contribute to this, including the lack of a comprehensive law prohibiting FGM and problems associated with enforcement of the law.

The findings of this chapter will be used as basis for the discussion of the next chapter. The next chapter will provide the conclusion of this research, and offer few recommendations that hopefully will contribute to the effectiveness of the law prohibiting FGM.

⁴⁴⁰ Legal Human Rights Centre *Report on the fact finding mission conducted at Tarime District November-December 2010* (2010) 2.

⁴⁴¹ Legal Human Rights Centre (2010) 4.

⁴⁴² Legal Human Rights Centre (2010) 4.

4. Chapter Four

Conclusion and recommendations

4.1 Conclusion

This study examined the practice of FGM from a human rights perspective. It has established that the practice violates fundamental human rights protected under the international and regional human rights instruments. It has further established that there are various legal obligations imposed upon states to ensure that the rights of women are protected against FGM. It is against this background that, state obligations that the thesis proceeded to the main purpose of this thesis, which was to determine the effectiveness of the law against FGM in Tanzania.

The study established that Tanzania has a legal duty to protect women against FGM. In discharging this duty, it has put in place different measures to ensure that the rights of women are protected against the continued practice of FGM. Tanzania has amended the Penal Code to introduce the criminalisation of FGM. It further adopted the NPA to accelerate the eradication of the practice. Upon close scrutiny of these measures, however, it became clear that despite the slight decrease in the prevalence rate of FGM, the law has not been effective in prohibiting the practice. This is attributed to various factors, including the lack of a comprehensive law to prohibit FGM.

The Penal Code has several shortcomings that limit the objectives of its amendment, including the lack of a precise definition of acts that constitute FGM, the limited scope of criminal liability, issues around punishment and the failure to criminalise FGM performed on women above the age of eighteen. Other factors that hinder the effectiveness of the law against FGM include challenges related to the enforcement measures that are in place. Moreover, research indicates that although the NPA has been operational since 2001, many still believe that the practice cures genital diseases. The inadequacy of the medical facilities in rural areas where FGM is most prominent, together with poverty, further enhances this misconception. The combination of all these factors continue to hinder the effectiveness of the legal framework in protecting the rights of women against FGM in Tanzania.

4.2 Recommendations

Based on the findings of the study, few recommendations are suggested. The recommendations range from legislative reform to strengthening enforcement measures and putting in place additional measures that support the criminalisation of FGM.

The importance of a comprehensive law that prohibits FGM in ensuring that the rights of women are protected cannot be over emphasised. Clearly, there is a need to reform the law criminalising FGM in Tanzania. As it stands now, the Penal Code has several 'loopholes' that affects its effectiveness in prohibiting FGM. The shortcomings of the Penal Code can be overcome by legislative reform. The latter should be undertaken in a manner that will widen the scope of the Penal Code, first, by incorporating a comprehensive definition of FGM. Second, the definition should restate that the practice is a violation of human rights and thus it is prohibited. More importantly, it should expressly distinguish the types of FGM and provide that all forms of FGM are prohibited.

The issue around consent has often been raised as a factor that also hinders the effectiveness of the Penal code in Tanzania. As established earlier, the law is based on the assumption that a person above the age of eighteen can give valid consent. This is, not a correct assumption as a person above the age of eighteen can still be influenced by social and economic factors to undergo the FGM as established in last chapter. Furthermore, the Penal Code should criminalise FGM performed on anyone regardless of age. It should clearly provide that consent is not a justification to escape criminal liability for engaging in FGM.

The study also recommends that the requirement for criminal liability, under the provision criminalising FGM in the Penal code, should be amended.⁴⁴³ Due to the limited scope of this provision, liability, as discussed in the last chapter, is only attributed if the perpetrator shares a special relationship with the child.⁴⁴⁴ This is problematic as it has opened the room for parents or guardians to circumvent the law. It is, therefore, advised that the scope should be

⁴⁴³ Article 169 A of the Penal Code.

⁴⁴⁴ Article 169 A of the Penal Code.

broad enough to accommodate anyone who engages in FGM. The Penal code should attribute criminal liability to the primary offender and also accomplices to the crime.

The issue of punishment should also be revisited. The latter should be imposed taking into account the person involved and also the degree of the harm caused. The Penal Code should provide a greater degree of punishment for people who share a special relationship with the child, medical officials and Ngaribas in order to discourage them from engaging in the practice. Furthermore, it should vary the intensity of the punishment by taking into account the harm caused to the victim.

A comprehensive law in itself is not sufficient to ensure that FGM is eradicated. Its objectives will only be achieved if it is supported with measures that will facilitate the enforcement of the law. In this regard, one way to improve the enforcement of the legal measures against FGM is by providing mandatory reporting duty on any person who is aware of an FGM case on the Penal Code. It should also explicitly impose this duty on people who, for one or another reason, are close to children, such as medical officials, teachers and social workers. Furthermore, the law should also impose a legal obligation on the police to prosecute FGM cases.

In support of the above, the government should also provide a platform for the achievement of this by providing the law enforcers with the necessary resources to investigate and prosecute these cases. For example, this can include the establishment of a national helpline to facilitate reporting of FGM cases. The government can support the establishment of a patrol system in areas where FGM is supported to facilitate easy detection. It should also engage the police in awareness programmes of negative effects of FGM and the law prohibiting the practice.

The adoption of the NPA by Tanzania is a positive step towards the eradication of FGM. In the light of its objectives, this study recommends that the government should increase the 'capacity and capability' of health care facilities, especially in regions, where FGM is supported. The current position is medical support is only given to women who suffer serious

physical effects of FGM such as fistula. The study recommends that medical support should be given to all women who have undergone FGM, to curb the physical effects of the practice and also psychological support through counselling.

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