

**ANALYSING THE EFFICACY OF ARTICLE 44(3) OF THE NEW
CONSTITUTION OF KENYA (2010): A STUDY ON FEMALE GENITAL
MUTILATION IN KENYA**

Submitted in partial fulfilment of the requirements of the Bachelor of Laws Degree,
Strathmore University Law School

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April 2020
Word count (11, 696)

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ACKNOWLEDGEMENT

I would like to thank the Almighty God for giving me good health, strength and resilience throughout the course of writing this research paper.

I would also like to express my profound gratitude to my supervisor Mrs Purity Wangigi for her constant patience, commitment and guidance.

I also express special gratitude and appreciation towards my parents, siblings and friends for the constant prayers, encouragement and advice. I am indebted to them for their support.

DECLARATION

I, **YVONNE NEKESA OUMA**, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed: Yvonne Nekesa Ouma

Date: 17th April, 2020

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed:

Purity Wangigi

ABSTRACT

FGM is a malpractice in Kenya that continues to be the bane of the girl child's existence. The practice is believed to have originated from Ancient Egypt due to the discovery of circumcised female mummies from the 5th century BC. Other scholars theorise that FGM spread across slave trade routes and into Africa. In Kenya, FGM is vastly recognised as a rite of passage in some communities; however, the practice is a crime in Kenya. Article 44(3) of the Constitution of Kenya (2010) stipulates that no person shall compel another to undergo a cultural rite. Similarly, the Kenyan Parliament enacted the Prohibition of FGM Act in 2011 to abolish the practice. Like international human rights instruments which prohibit FGM, such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the UN Convention on the Rights of the Child, article 44(3) as read with the Prohibition of FGM Act must be applied *stricto sensu* by all citizens and the Government of Kenya. Notably, the Judicature Act of Kenya provides for the repugnancy clause under section 3(2) which stipulates that African customary laws shall be applicable provided they are not repugnant to justice and morality. This means that any customary laws within communities that advocate for FGM are void *ab initio*.

In Kenya, women and young girls continue to be coerced into undergoing FGM. This study seeks to explore the ongoing problem of FGM in Kenya. Ultimately, this dissertation shall provide sound recommendations on how to eradicate the malpractice.

LIST OF ABBREVIATIONS

ACHPR	African Charter on Human and People’s Rights
ARP	Alternative Rites of Passage
BC	Before Christ
CAT	Convention Against Torture
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CIDP	County Integrated Development Plan
CRC	Convention on the Rights of the Child
FGM	Female Genital Mutilation
FIDA	Federation of Women Lawyers Kenya
KLR	Kenya Law Resources
MYWO	Maendeleo Ya Wanawake Organisation
NGO	Non-governmental Organisation
No	Number
ODPP	Office of the Director of Public Prosecution
PATH	Program for Appropriate Technology in Health
UN	United Nations
UNFPA	United Nations Population Fund
UNICEF	United Nations Children Education Fund
UNTS	United Nations Treaty Series

LIST OF CASES

1. *Halima Mohamed v Republic* (2016) eKLR
2. *Jessica Magerer v Republic* (2016) eKLR
3. *Joan Bett v Republic* (2018) eKLR
4. *Mary Rono v Jane Rono & another* (2005) eKLR
5. *Nizareta Rwamba v Republic* (2019) eKLR
6. *Pauline Robi Ngariba v Republic* (2014) eKLR
7. *Tatu Kamau v Attorney General & 14 others* (2018) eKLR

LIST OF LEGAL INSTRUMENTS

1. African Charter on Human and People's Rights, 27 June 1981, 1520 UNTS 217
2. African Charter on the Rights and Welfare of the Child, 1 July 1990, CAB/LEG/24/9/49
3. Constitution of Kenya (2010)
4. Convention Against Torture, 10 December 1984, 1465 UNTS 84
5. Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, 1249 UNTS 13.
6. Prohibition of Female Genital Mutilation Act (Act No 32 of 2011)
7. Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (Maputo Protocol), 1 July 2003
8. UN Convention on the Rights of the Child, 20 November 1989, 1577 UNTS 3.
9. Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331

CHAPTER ONE: INTRODUCTION

1.0. BACKGROUND TO THE STUDY

In light of the Prohibition of FGM Act of Kenya (2011), female genital mutilation entails all procedures which involve partial or total removal of the female genitalia or other injury to the female genital organs for non-medical reasons, and includes clitoridectomy, excision and infibulation.¹

There lies much ambiguity as to the exact origin of FGM; while some scholars hold that FGM originated from Ancient Egypt following the discovery of circumcised female mummies from 5th century BC, others theorise that FGM spread across slave trade routes extending from the western to the southern shore of the Red Sea, western African regions, or spread through Arab traders from the Middle East to Africa.²

Before the FGM Act was enacted, Kenya lacked a regulatory legislative framework that specifically banned female circumcision. The new Constitution of Kenya (2010) incorporated the fundamental provision that no person shall compel another to perform, observe or undergo any cultural practice or rite.³ However, this provision proved to be rather general and therefore could not solve the problem of FGM. Thus, enacting the 2011 Act buttressed article 44(3) of the Kenyan Constitution and made it illegal to perform FGM.

To date, FGM is a prevalent practice in Kenya, especially in north-eastern Kenya, where most inhabitants are Somalis. The latter consider FGM as a measure of chastity of the girls and a means to lower their sexual desire.⁴

Currently, there exists different forces in Kenya at the forefront in battling for and against FGM. Such forces include radical doctors in favour of medicalisation⁵ and anti-FGM board respectively.

¹ Section 2, *Prohibition of Female Genital Mutilation Act* (Act No 32 of 2011).

² Llamas J, '*Female Circumcision: The History, the Current Prevalence and the Approach to a Patient*,' 2017.

³ Article 44(3), *Constitution of Kenya* (2010).

⁴ Jimale S, 'Public awareness best strategy in eradicating FGM' Daily Nation, 9 October 2018- <www.nation.co.ke/oped/letters/Public-awareness-best-strategy-in-eradicate-FGM-/440806-4797474-jn4p06/index.html>- on 11 December 2018.

⁵ Kimani S and Shell-Duncan B, 'Medicalized Female Genital Mutilation/Cutting: Contentious Practices and Persistent Debates' 10 *Current Sexual Health Reports* 1, 2018, 25.

Since 2011, a myriad of FGM cases have been presented before the Kenyan court as shall be later discussed in this study.

1.1. PROBLEM STATEMENT

FGM was banned in Kenya in 2011 upon the enactment of the Prohibition of FGM Act. However, to date, young girls and women continue to be compelled to undergo female circumcision therefore hindering their social, physiological and economic development in daily life.

To solve this problem, this research paper shall explore whether the existing national and international legal framework is operating effectively in Kenya; scrutinise the role of institutions such as the Government and the Anti-FGM Board of Kenya in combating FGM in the country; and suggest the implementation of ARP in place of FGM in Kenya.

1.2. STATEMENT OF OBJECTIVES

This study shall investigate the objectives that follow:

- To examine whether the existing domestic, regional and international legal framework prohibiting FGM is being strictly complied with by the citizens of Kenya
- To determine whether or not the provision of public education on FGM by relevant Kenyan institutions leads to decreased FGM practice in Kenya
- To examine whether the implementation of alternative rites of passage shall lead to the eradication of FGM

1.3. RESEARCH HYPOTHESES

This study hypothesizes that:

- The existing legal framework prohibiting FGM in Kenya is not being strictly complied with by Kenyan citizens therefore FGM is on the increase
- The provision of public education concerning FGM by relevant Kenyan institutions will lead to decreased FGM practice in Kenya
- The implementation of alternative rites of passage will result in the eradication FGM in Kenya

1.4. RESEARCH QUESTIONS

This study answers the research questions that follow:

- Is the current legal framework prohibiting FGM in Kenya being strictly adhered to by Kenyan citizens?

- Does the provision of public education on FGM by relevant Kenyan institutions lead to decreased FGM practice in Kenya?
- Can the implementation of alternative rites of passage result in the eradication of FGM in Kenya?

1.5. JUSTIFICATION OF THE STUDY

The existing literature on FGM elaborates on the theme of FGM in great length but does not adequately address the issue of women as perpetrators of the malpractice. This study is justified in that it shall attempt to fill this literature gap, in light of the Kenyan courts' jurisprudence on FGM.

1.6. LITERATURE REVIEW

This study is neither a pioneer in matters that fall within the realm of FGM nor does it intend to be the first to look into the theme of FGM. The practice of FGM has been elaborated from different perspectives by international organisations, scholars, feminists and human rights activists in their respective literary works, as well as the Kenyan courts' jurisprudence. This study shall seek to reconcile various authored works and publications with the required interpretation and application of article 44(3) of the Constitution of Kenya (2010) in Kenya, which stipulates that no person shall compel another to observe or undergo any cultural rite.⁶

At the outset, the study relies on the theory of legal moralism as propounded by Hart and Devlin which helps to explain the need to prohibit FGM as it is inherently immoral in nature. The research also focuses on Bentham and Mill's utilitarian theory in expounding on how FGM contravenes the concept of maximum pleasure⁷ for the maximum number of people in the society. The research also examines FGM from the feminist perspective and particularly in view of the African feminists' school of thought. For instance, Awa Thiam's feminist theory explains that FGM is a tool that aims to control women's sexuality and to 'discipline' their bodies.⁸ Furthermore, Gatwiri

⁶ Article 44(3), *Constitution of Kenya* (2010).

⁷ Bentham J, *An Introduction to the Principles of Morals and Legislation*, Clarendon Press, Oxford, 1907, 2.

⁸ Gatwiri G and McLaren, 'Discovering my Own African Feminism: Embarking on a Journey to Explore Kenyan Women's Oppression,' 17 *Journal of International Women's Studies* 4, 268.

and McLaren propose that women, who are the main victims of FGM, can also be the enablers of their own oppression.⁹

The study proceeds to examine the legislative and institutional framework governing the prohibition of FGM in Kenya. The study discusses the legal framework on the domestic, regional and international planes and highlights the relevant provisions that prohibit FGM in various conventions such as: The Prohibition of FGM Act, Children's Act, Maputo Protocol, CEDAW and UN Convention Against Torture.

Regarding the institutional framework, it follows that various institutions in Kenya are at the forefront in promoting public education to curb FGM. For instance, the National Government formulated policies such as the Policy Framework for Education and Training (2012) and the National Adolescent Sexual and Reproductive Health Policy (2015-2022), which outline the government's policy to support programs on harmful traditional practices such as FGM.¹⁰ On the other hand, the County Government have formulated County Integrated Development Plans (CIDPs) which have helped to create awareness by promoting alternative rites of passage.¹¹ Similarly, the Anti-FGM Board formulated the Communication and Media Strategy in 2016 to spread awareness on FGM.¹² The study also acknowledges international institutions such as UNICEF and UNFPA which have liaised with governmental departments such as the Ministry of Education to raise awareness on violence against children via the Kenya National Music Festival.¹³ Further, the research espouses the ideals of the Federation of Women Lawyers in Kenya (FIDA Kenya) who hold that there is need to utilize a paradigm shift which leads Kenyan communities that are still practising FGM to comprehend that it is not the only way to embrace African culture.¹⁴

⁹ Gatwiri G and McLaren, 'Discovering my Own African Feminism: Embarking on a Journey to Explore Kenyan Women's Oppression,' 268.

¹⁰ Ministry of Health in Kenya, *National Adolescent Sexual and Reproductive Health Policy*, 2015, 19.

¹¹ UNFPA AND UNICEF, *UNFPA-UNICEF Joint Programme on Female Genital Mutilation Annual Report*, 2016, 7.

¹² Ministry of Public Service, Youth and Gender Affairs in Kenya, *Communication and Media Strategy*, 2016-2018, 12.

¹³ UNFPA AND UNICEF, *UNFPA-UNICEF Joint Programme on Female Genital Mutilation Annual Report*, 2016, 12.

¹⁴ <https://www.fidakenya.org/news/eradicating-fgm/> on 3 February 2019.

In light of FIDA's opinions, the study posits that there is need to replace the malpractice of FGM with a safer and more dignified cultural practice; alternative rites of passage (ARP). The concept was introduced in 1995 by Maendeleo Ya Wanawake Organisation (MYWO) and Program for Appropriate Technology in Health (PATH) through a national seminar that they organised¹⁵; leaders from various districts (present-day counties) such as Tharaka Nithi, Kisii and Meru attended the seminar, and Tharaka Nithi became the first district to conduct an ARP in 1996.¹⁶

Concerning medicalisation of FGM, the research acknowledges UNFPA's assertion that even when FGM is performed in a sterile environment and by a health care professional, the practice remains illegitimate due to being an express infringement upon women's right to life, health and physical integrity hence poses a false sense of security.¹⁷ In *Tatu Kamau v Attorney General & 14 others*¹⁸ the petitioner (a doctor) vehemently advocated for the legalisation of FGM and that the Prohibition of FGM Act be outlawed.

Notably, the existing literature on FGM discusses the theme in detail but fails to adequately address the issue of women as perpetrators of the malpractice. Chapter three of the study shall attempt to fill this literature gap, in light of the Kenyan courts' jurisprudence on FGM.

Among other authored works, the opinions advanced by the authors and institutions above shall be the hallmark of the research on FGM practice in Kenya as the research attempts to address whether or not article 44(3) of the Kenyan Constitution as read with the Prohibition of FGM Act is being strictly complied with in Kenya.

¹⁵ Chege J, Askew I and Liku J, 'An Assessment of the Alternative Rites Approach for Encouraging Abandonment of Female Genital Mutilation in Kenya' *Frontiers in Reproductive Health*, Research Paper, 2001, 3—https://www.researchgate.net/publication/237312753_An_Assessment_of_the_Alternative_Rites_Approach_for_Encouraging_Abandonment_of_Female_Genital_Mutilation_in_Kenya on 17 November 2019.

¹⁶ Chege J, Askew I and Liku J, 'An Assessment of the Alternative Rites Approach for Encouraging Abandonment of Female Genital Mutilation in Kenya' *Frontiers in Reproductive Health*, Research Paper, 2001, 4—https://www.researchgate.net/publication/237312753_An_Assessment_of_the_Alternative_Rites_Approach_for_Encouraging_Abandonment_of_Female_Genital_Mutilation_in_Kenya on 17 November 2019.

¹⁷ —<<https://www.unfpa.org/female-genital-mutilation>> on 3 February 2019.

¹⁸ (2018) eKLR.

1.7. RESEARCH DESIGN

1.7.1. RESEARCH DESIGN AND METHODOLOGY

This study is primarily based on secondary sources to realise the objectives of the research. The study incorporates materials such as books, published open source articles, case law, statute law, journal articles and institutional publications among other authoritative texts.

1.7.2. SCOPE AND LIMITATIONS OF THE STUDY

The present study is strictly limited to examining the effectiveness of the prohibition of FGM in Kenya and no other national jurisdiction. Furthermore, the study is mostly reliant on desktop research.

1.8. CHAPTER SUMMARY

The study has the following structure:

Chapter two discusses the theoretical framework of the research in view of FGM as a malpractice in Kenya.

Chapter three elaborates on the existing legal framework prohibiting FGM. The chapter shall acknowledge the legislative framework on both the domestic and international levels. It shall further discuss the institutional framework governing FGM in Kenya and particularly analyses the government's role in enforcing reproductive health care education as a means to combat FGM.

Chapter four discusses the place of alternative rites of passage in Kenya. The chapter shall expound on the background to ARP in Kenya. It shall further elaborate the role of the Anti-FGM Board of Kenya in promoting the implementation of ARP in Kenya and provide a justification for ARP as a means to curb FGM.

Chapter five outlines the study's findings and offers recommendations to the problem statement of the research, in order to ensure the full realisation of article 44(3) of the Kenyan Constitution concerning the ban on FGM.

1.9. TIME LINE/DURATION

The time period for this research and its subsequent compilation is for a six-month period, beginning from June 2019 to November 2019, while paying due regard to the set deadlines for each chapter of the final dissertation.

CHAPTER TWO: THEORETICAL FRAMEWORK

“To cut off the sensitive sexual organ of a girl is directly against the honesty of nature, a distortion to her womanhood, and an abuse of her fundamental human right”¹⁹

-Joseph Osuigwe Chidiebere

2.0. INTRODUCTION

This chapter seeks to elucidate the different types of theories propounded by various philosophers, distinguished authors and scholars relevant to the topic on FGM. These are: the legal moralism theory, the utilitarianism theory and the theory of African feminism. The three theories provide a sound justification for the incorporation of article 44(3) in the Kenyan Constitution which prohibits the compulsion of persons to undergo cultural rites such as FGM.

The first part of this chapter focuses on the legal moralism theory which shall be discussed in light of HLA Hart and Patrick Devlin’s works. The second part shall highlight the theory of utilitarianism which shall focus on John Mill and Jeremy Bentham’s schools of thought. This chapter shall finally elaborate on the African feminist theory which shall be explained in view of the works of Karen Offen, Lilian Atanga, Gwendolyn Mikell and Glory Joy Gatwiri.

2.1. LEGAL MORALISM THEORY

There exists a myriad of ethical concerns regarding FGM ranging from the inherent bodily insult of the practice, which includes minor cuts and major procedures, to its known consequences including impaired urination, problematic menstruation and exposure to life-threatening diseases.²⁰ The incorporation of article 44(3) in the Kenyan Constitution which proscribes the compulsion of persons to undergo cultural rites and the enactment of the FGM Act is sufficient proof that FGM is an unethical practice. This necessitates an elaborate discussion of the theory of legal moralism. Legal moralism is one possible answer to the normative question, “What conduct ought to be made criminal in the realm of law?”²¹ One version of the legal moralists’ response to the latter question

¹⁹ <https://worldmapper.org/maps/female-genital-mutilation/> on 2 December 2019.

²⁰ Cook R, ‘Ethical concerns in female genital cutting’ *African Journal of Reproductive Health*, 2008, 8—
<<https://ssrn.com/abstract=1665057>> on 20 August 2019.

²¹ Cranor C, ‘Legal moralism reconsidered’ 89 *The University of Chicago Press Journals* 2, 1979, 147.

is that the immorality of certain conduct suffices to make that conduct criminal.²² On the other hand, other legal moralists hold that the immorality of certain conduct offers a reason, but not a sufficient reason for making it illegal.²³

Another understanding of this theory is that human-made laws not only ought to accord with the higher law of morality but also that all of what morality bids human beings to do must be transcribed into the legal code.²⁴

Morality plays an important role in advancing this theory in that it serves as a critical standard for assessing laws. Moral considerations are the ultimate “right-makers and wrong-makers.”²⁵ Stipulations of what is right and wrong at law therefore ought to correspond to the right-makers and wrong-makers of morality itself.²⁶

The origin of the term ‘legal moralism’ can be traced back to Herbert Lionel Adolphus Hart (HLA Hart).²⁷ In its plain meaning, the theory suggests that it is a legitimate function of criminal law to prohibit and impose sanctions against activities deemed to be immoral, regardless of whether or not these activities are privately conducted and are consensual between the ‘victim’ and the perpetrator.²⁸

To clearly comprehend Hart’s legal moralist theory, a comparison suffices between Hart and Devlin. Devlin holds that society should not always ban all immoral and unpopular practices.²⁹ He explains that there are some immoral practices that do not transcend the limits of tolerance hence need not be regulated by the law.³⁰ Devlin insists that it is only when a certain practice evokes in the reasonable man a real feeling of reprobation or of intolerance, indignation and disgust, that the bounds of tolerance are being reached.³¹ Hart reiterates the latter by stating that in addition to the

²² Cranor C, ‘Legal moralism reconsidered’, 147.

²³ Cranor C, ‘Legal moralism reconsidered’, 147.

²⁴ Kuflik A, ‘Liberalism, Legal Moralism and Moral Disagreement’ 22 *Journal of Applied Philosophy* 2, 2005, 185-186.

²⁵ Goodin R, ‘An epistemic case for legal moralism’ 30 *Oxford Journal of Legal Studies* 4, 2010, 616.

²⁶ Goodin R, ‘An epistemic case for legal moralism’ 30 *Oxford Journal of Legal Studies* 4, 2010, 616.

²⁷ Hart H, *Law Liberty and Morality*, 1 ed, Stanford University Press, California, 1963.

²⁸ Murphy J, ‘Another Look at Legal Moralism’ 77 *The University of Chicago Press Journals* 1, 1966, 50.

²⁹ Hayry H, ‘Liberalism and Legal Moralism: The Hart-Devlin Debate and Beyond’ 4 *Ratio Juris* 2, 1991, 8.

³⁰ Hayry H, ‘Liberalism and Legal Moralism: The Hart-Devlin Debate and Beyond’, 1991, 8.

³¹ Hayry H, ‘Liberalism and Legal Moralism: The Hart-Devlin Debate and Beyond’, 1991, 8.

disgust, an observable threat to society must exist before certain practices are legally banned.³² In such instances, the society is justified in regulating even private immorality.³³

The practice of FGM is one such instance. Regardless of whether or not FGM is conducted in private, the FGM Act which enforces morality must be strictly adhered to. Furthermore, female circumcision is an act of injustice that evokes intolerance and disgust in the eyes of a reasonable person hence its prohibition must be upheld.

Hart further posits that the only morality that can be enforced is what he terms “positive morality”, the morality which is actually accepted and shared by a given social group.³⁴ Cultivating positive morality by a social group or members of a given community is an obligation of the statesman, whose task is to invent the most effective means to discharge their duty accordingly.³⁵ Enacting the FGM Act in 2011 by the Parliament of Kenya was a discharge of their obligation to inculcate positive morality among Kenyan citizens by prohibiting FGM as an immoral and unsafe practice.

2.2. UTILITARIANISM THEORY

With reference to the works of Bentham, the term utilitarianism is used interchangeably with the phrase ‘principle of utility’. He defines utility to mean that property in any object, which produces benefit, pleasure or happiness and resultantly prevents mischief, pain or unhappiness to the party whose interest is considered.³⁶

Bentham posits that nature has placed mankind under the governance of two sovereign masters; pain and pleasure.³⁷ He affirms that pain and pleasure govern human beings in all that they do in their daily lives.³⁸ Put differently, an action conforms to the utility principle when its tendency to increase the happiness of the community supersedes its tendency to diminish it.³⁹ FGM has a tendency to diminish the happiness or pleasure of the girls and women that are subjected to it,

³² Hayry H, ‘Liberalism and Legal Moralism: The Hart-Devlin Debate and Beyond’, 1991, 9.

³³ Hayry H, ‘Liberalism and Legal Moralism: The Hart-Devlin Debate and Beyond’, 1991, 8.

³⁴ Goodin R, ‘An epistemic case for legal moralism’, 626.

³⁵ Kultgen J, ‘The Justification of Legal Moralism’ 13 *The Proceedings of the Forty-Third and Forty-Fourth: Annual Meetings of the South Western Philosophical Society* 2, 1985, 130.

³⁶ Bentham J, *An Introduction to the Principles of Morals and Legislation*, Clarendon Press, Oxford, 1907, 2.

³⁷ Bentham J, *An Introduction to the Principles of Morals and Legislation*, 1.

³⁸ Bentham J, *An Introduction to the Principles of Morals and Legislation*, 1.

³⁹ Bentham J, *An Introduction to the Principles of Morals and Legislation*, 2.

rather than to increase their happiness. The act of compelling women and girls to ‘undergo the ritual knife’ therefore defies the principle of utility and the theory of utilitarianism on the whole. Bentham acknowledged that problems of calculation concerning the pleasure associated with future actions needed to be addressed so that the theory of utilitarianism could be a workable moral theory.⁴⁰ He collectively terms these elements as the Hedonic or Felicific Calculus.⁴¹ The Hedonic Calculus is based on assessing possible pleasures in line with the following elements: intensity; certainty; duration; remoteness (how far into the future the pleasure is); fecundity (how likely it is that that pleasure will generate other related pleasures); purity (if any pain will be felt alongside that pleasure); and extent (how many people might be able to share in that pleasure).⁴²

In view of the Hedonic framework, the following conclusions can be drawn concerning FGM as a malpractice. First, compelling young girls and women to undergo female circumcision does not intensify any pleasure but increases pain. Second, female circumcision does not guarantee any pleasure for the victim therefore there lacks certainty of pleasure. Third, there is no duration of a pleasure that is enjoyed; rather, the victim is subjected to untold pain and suffering over a long period of time. Fourth, FGM does not lead to a pleasure in the future, let alone an immediate pleasure. Fifth, female circumcision does not create any pleasure on the part of the victim therefore it cannot generate subsequent pleasures. Sixth, FGM does not create pleasure but strictly pain thus the element of the purity of a pleasure fails in this respect. Finally, FGM does not generate a pleasure that can be enjoyed by female victims. In this way, the aforementioned parameters act as guidelines for persons who wish to perpetrate and advocate for FGM to refrain from doing so⁴³ in light of the Kenyan Constitution and the FGM Act.

Notably, Bentham’s theory of utilitarianism is also consequentialist. This is because the theory advances that the moral value of an action is wholly determined by the consequences of that event.⁴⁴ In relation to FGM, the physiological and psychological detriments that result from the practice automatically imply that female circumcision is unethical in nature.

⁴⁰ Dimmock M and Fisher A, *Ethics for A-Level*, Open Book Publishers, Cambridge, 2017, 9.

⁴¹ Dimmock M and Fisher A, *Ethics for A-Level*, 9.

⁴² Dimmock M and Fisher A, *Ethics for A-Level*, 9.

⁴³ Dimmock M and Fisher A, *Ethics for A-Level*, 9.

⁴⁴ Dimmock M and Fisher A, *Ethics for A-Level*, 7.

Bentham's theory is also maximising in that it requires that the greatest pleasure for the greatest number of people is secured. This implies that even though some actions lead to pleasure, they will not be regarded as morally good if another action that could have produced even more pleasure in that instance was evaded.⁴⁵ In a similar manner, the incorporation of article 44(3) into the Kenyan Constitution and the enactment of the FGM Act was intended by the legislators to ban FGM in Kenya so as to promote the greatest pleasure for the greatest number of girls and women who have been oppressed since time immemorial.

It is also crucial to discuss the utilitarian theory from the perspective of John Stuart Mill. Mill sought to embellish Bentham's theory so as to create a refined version of hedonistic utilitarianism.⁴⁶ Unlike Jeremy Bentham whose focal point in explaining utilitarianism is from a quantitative point of view (maximising the quantity of total pleasure), Mill propounds that the quality of pleasure is also vital in discerning between what is moral and immoral.⁴⁷

Mill also proposes that the meaning of happiness is not a continuum of highly pleasurable excitement.⁴⁸ It is evident that this is impossible to attain. Nonetheless, opponents of the utilitarian theory cannot solely rely on this fact to justify actions such as FGM that diminish pleasure. Inasmuch as constant happiness is unattainable, actions that bring about pain should be entirely shunned in the society.

Mill and Bentham can be distinguished in the sense that Bentham is an act-utilitarian whereas Mill is a rule-utilitarian. An act utilitarian envisions the results of individual actions when making moral judgments whereas a rule utilitarian adopts the belief that human beings should create a set of rules that, if adhered to, would produce the greatest amount of happiness.⁴⁹

Both act and rule utilitarianism are important in analysing FGM as a malpractice. In the case of act utilitarianism, FGM leads to dire consequences as has been highlighted earlier on, such as menstrual complications, sterility and exposure to life-threatening diseases.⁵⁰ These demerits

⁴⁵ Dimmock M and Fisher A, *Ethics for A-Level*, 8.

⁴⁶ Dimmock M and Fisher A, *Ethics for A-Level*, 13.

⁴⁷ Dimmock M and Fisher A, *Ethics for A-Level*, 14.

⁴⁸ Mill J, *Utilitarianism*, Parker, Son and Bourn, West Strand, 1863, 17.

⁴⁹ Dimmock M and Fisher A, *Ethics for A-Level*, 14.

⁵⁰ Cook R, 'Ethical concerns in female genital cutting' *African Journal of Reproductive Health*, 2008, 2—
<<https://ssrn.com/abstract=1665057>> on 20 August 2019.

justify the ban on female circumcision in Kenya. On the other hand, rule utilitarianism is evident within the Kenyan context in that the Parliament as the law-making arm of government in Kenya enacted the FGM Act to serve as a set of rules which when adhered to, will lead to the eventual eradication of FGM in the country. In conclusion, Bentham and Mill's contributions to the utilitarian theory provide a strong foundation upon which the justification of prohibiting FGM rests.

2.3. AFRICAN FEMINISM THEORY

The discussion on the theory of African feminism necessitates a prior understanding of the general theory of feminism.

The origin of the term "feminism" derives from the French word *féminisme* which was coined during the political upheavals of the late nineteenth century in Paris, France.⁵¹ Martha Easton cites the general meaning of feminism as the advocacy of the rights of women based on the theory of the equality of the sexes.⁵²

Karen Offen acknowledges that as the point of departure for the explanation of the theory, feminism posits the differential social construction of the behaviour of the sexes, based on their physiological differences as the primary category of analysis.⁵³ She further explains that feminism offers a frontal challenge to the mainstream of patriarchal thought and social organisation.⁵⁴ It seeks to destroy the masculinist hierarchy but not sexual dualism.⁵⁵

According to Offen, a feminist can be either a female or male whose ideas and actions meet three main criteria. First, they must recognise the validity of women's own interpretations of their lived experience and acknowledge the values that women publicly claim as their own in assessing their status in society relative to men.⁵⁶ Second, they depict discomfort at institutionalised injustice toward women by men in a given society.⁵⁷ Third, they advocate the elimination of that injustice by challenging prevailing ideas, social institutions and the coercive power that upholds male

⁵¹ Easton M, 'Feminism' *Studies in Iconography*, 2012, 2—<www.jstor.org/stable/23924276> on 3 August 2019.

⁵² Easton M, 'Feminism' *Studies in Iconography*, 2012, 2—<www.jstor.org/stable/23924276> on 3 August 2019.

⁵³ Scott J, 'Gender: A Useful Category of Historical Analysis' 91(5) *American Historical Review*, 1986, 1053.

⁵⁴ Offen K, 'Defining Feminism: A Comparative Historical Approach' 14 *Signs* 1, 1988, 151.

⁵⁵ Offen K, 'Defining Feminism: A Comparative Historical Approach,' 151.

⁵⁶ Offen K, 'Defining Feminism: A Comparative Historical Approach', 152.

⁵⁷ Offen K, 'Defining Feminism: A Comparative Historical Approach', 152.

prerogatives in that particular culture.⁵⁸ Offen concludes that to be a feminist is fundamentally to be at odds with a male-dominated culture.⁵⁹

At this juncture, it is vital to discuss African feminism. Contemporary African feminism involves rewriting the identities of African women not only as passive victims of male patriarchy or preoccupied with the concerns of their Western female counterparts, but as active social, economic and political agents in the development of their countries.⁶⁰

Notably, Lilian Atanga highlights that Western feminism has been criticised epistemologically for its hegemonic position of being ‘all-knowing’ and for its claims about African women.⁶¹ Most African feminists claim that such researchers do not experience the reality of African women living and working in Africa.⁶² Gwendolyn Mikell concurs with Atanga and proposes that African feminism owes its origin to different dynamics from Western feminism, which is predominantly shaped by women’s resistance to western hegemony and its legacy to African culture.⁶³

Gatwiri and McLaren emphasize that African feminists pay close attention not only to Africa’s past history following colonisation, but also the present struggles under neocolonialism, neoliberalism and globalisation.⁶⁴ This sets apart African feminists from other categories of feminists in that the former are able to relate to the challenges that directly or indirectly affect African women.

One such challenge in the Kenyan context is the continual perpetration of FGM. The African feminist theory is fundamental to the discussion of FGM in that it advocates for the championing of women’s rights and exposes the evils of relegating women to a lower position. Thiam’s feminist theory explains that FGM is a tool that aims to control women’s sexuality and to ‘discipline’ their

⁵⁸ Offen K, ‘Defining Feminism: A Comparative Historical Approach’, 152.

⁵⁹ Offen K, ‘Defining Feminism: A Comparative Historical Approach’, 152.

⁶⁰ ‘Gender and Language in Sub-Saharan Africa: A valid epistemology’ in Atanga L, Sibonile E, Litosseliti L and Sunderland J (eds), *Gender and Language in Sub-Saharan Africa: Tradition, struggle and change*, John Benjamins Publishing Company, 2013, 309.

⁶¹ ‘Gender and Language in Sub-Saharan Africa: A valid epistemology’, 302.

⁶² ‘Gender and Language in Sub-Saharan Africa: A valid epistemology’, 303.

⁶³ ‘Gender and Language in Sub-Saharan Africa: A valid epistemology’, 308.

⁶⁴ Gatwiri G and McLaren, ‘Discovering my Own African Feminism: Embarking on a Journey to Explore Kenyan Women’s Oppression,’ 265.

bodies.⁶⁵ Gatwiri and McLaren opine that in light of the African feminist theory, women who are the main victims of FGM can also be the strongest enablers of their own oppression.⁶⁶ For example, in the Kenyan context lies the example of Dr Tatu Kamau; she filed a petition in the Machakos High Court seeking to have FGM legalised and subsequently the anti-FGM board abolished⁶⁷ despite being a woman. This is proof of the intense patriarchal, structural and institutional power that subsumes women.⁶⁸

The discussion on the African feminist theory is not complete without highlighting the ill-informed reasoning behind the practice of FGM in Kenya. One factor is that female circumcision helps to quell ‘uncontrollable’ sexual urges experienced by women and a girl’s virginity. Second, female circumcision supposedly ensures better sexual pleasure for men especially when a woman is infibulated. In this instance, while the men’s needs are prioritised, the woman experiences harrowing pain during intercourse. This leads to psychological torture since sexual relations beget anxiety and emotional trauma for such women. Another reason why FGM is practised in Kenya is because women are considered unclean until the clitoris has been removed. The clitoris is perceived as a danger to men in terms of hygiene. Ironically, FGM poses health risks such as infections, formation of keloid scars and constant bouts of haemorrhaging.⁶⁹

All the aforementioned reasons in favour of FGM show how women in Kenya are viewed as mere sexual objects; an unfortunate reality which goes against the African feminist theory. The role of this theory is therefore to do away with such misinformed thinking and to promote equality between the two sexes in the Kenyan society.

⁶⁵ Gatwiri G and McLaren, ‘Discovering my Own African Feminism: Embarking on a Journey to Explore Kenyan Women’s Oppression,’ 268.

⁶⁶ Gatwiri G and McLaren, ‘Discovering my Own African Feminism: Embarking on a Journey to Explore Kenyan Women’s Oppression,’ 268.

⁶⁷ *Tatu Kamau v Attorney General & 14 others* (2018) eKLR.

⁶⁸ Gatwiri G and McLaren, ‘Discovering my Own African Feminism: Embarking on a Journey to Explore Kenyan Women’s Oppression,’ 268.

⁶⁹ Gordon N, ‘Tonguing the Body: Placing Female Circumcision within African Feminist Discourse’ 25 *A Journal of Opinion* 2, 1997, 25.

In conclusion, the African feminism theory justifies the need to look into the plight of FGM victims in Kenya not through the Western lens that pretends to be universal, but from a uniquely African perspective to accurately reflect the reality of the Kenyan woman.⁷⁰

2.4. CONCLUSION

In light of the theories of legal moralism, utilitarianism and African feminism, the fight against FGM and the promotion of the equality of the sexes has a strong theoretical justification. On the one hand, the legal moralist theory suggests that it is a legitimate function of criminal law to prohibit and impose sanctions against activities generally regarded as immoral, regardless of whether or not these activities are conducted privately and are consensual.⁷¹ FGM has been discussed in view of this theory as an immoral practice which has been banned by the Prohibition of FGM Act thus augmenting article 44(3) of the Kenyan Constitution which prohibits compelling of persons to undergo cultural rites. For the utilitarian theory, at its core lies the idea that anything which produces benefit or pleasure and prevents mischief or pain, evil or unhappiness should be sought.⁷² This study has emphasized that FGM is a practice which not only stirs up fear in young girls and women but also causes great pain and unhappiness; the Kenyan woman should therefore not be forced to endure the malpractice. Finally, the African feminist theory has established that FGM is founded on misogynistic thought, which undermines the Kenyan woman; the theory proposes balancing women's human rights alongside their male counterparts in the Kenyan society.

⁷⁰ Oyekan A, 'African Feminism: Some Critical Considerations' 15 *Lagos State University Journals* 1, 2014, 1-2.

⁷¹ Murphy J, 'Another Look at Legal Moralism', 50.

⁷² Bentham J, *An Introduction to the Principles of Morals and Legislation*, 2.

CHAPTER THREE: LEGISLATIVE AND INSTITUTIONAL FRAMEWORK GOVERNING THE PROHIBITION OF FGM IN KENYA

“No man is above the law and no man is below it; nor do we ask any man’s permission when we ask him to obey it”⁷³

-Theodore Roosevelt

3.0. INTRODUCTION

This chapter seeks to discuss both the legislative and institutional frameworks governing FGM. At the outset, the chapter examines the legislative framework that proscribes FGM in Kenya. The chapter then proceeds to discuss the existing laws on FGM from the regional perspective (African continent) and those within the international human rights legal framework and their impact on the Kenyan jurisprudence and the practice of FGM in Kenya. The study of the regional and international frameworks is backed by article 2(6) of the Kenyan Constitution which stipulates that any treaty or convention ratified by Kenya automatically forms part of the Kenyan law.⁷⁴ Therefore Kenya, being party to some of the African regional treaties and conventions that prohibit FGM, has adopted these treaties as part of the laws of the country.

The second part of the chapter delves into the institutional framework in Kenya that oversee the prohibition of FGM in Kenya. This section shall explore the role of some Kenyan institutions in promoting public education as a means of eradicating FGM.

3.1. LEGISLATIVE FRAMEWORK GOVERNING FGM IN KENYA

3.1.1. THE DOMESTIC LEGISLATIVE FRAMEWORK

As this study has already established, the Kenyan law on FGM is guided by: The Constitution of Kenya (2010), the Prohibition of FGM Act (Act No 32 of 2011) and the Children’s Act (Act No 8 of 2001).

⁷³ https://www.brainyquote.com/quotes/theodore_roosevelt_118459 on 2 December 2019.

⁷⁴ Article 2(6), *Constitution of Kenya* (2010).

3.1.1.1. CONSTITUTION OF KENYA (2010)

The Kenyan Constitution echoes that the circumcision of young girls and women is prohibited in Kenya. It provides that everyone has the right to participate in the cultural life of their choice.⁷⁵ However, this statutory provision has an exception; that no person shall compel another to perform, observe or undergo any cultural practice or rite.⁷⁶ This means that one choosing to identify with a particular community or ethnic group does not automatically mandate them to observe any traditions that bring discomfort, displeasure or lessens their human dignity. Female circumcision is the epitome of the latter; the practice not only causes displeasure and discomfort but also infringes upon the victim's constitutional right to human dignity which is inherent in every human being. FGM is a form of torture and cruel, inhuman and degrading treatment and therefore perpetrating the practice is tantamount to infringing upon a non-derogable right.⁷⁷

It should be understood that practising female circumcision is a flagrant violation of the Constitution since it is the supreme law of the Republic and thus binds all persons and all State organs.⁷⁸ The supremacy of the Constitution is reinforced by the provision which states that any customary law that is inconsistent with the Constitution is void.⁷⁹ To this end, the claim that FGM is a compulsory initiation rite among some Kenyan ethnic groups fails under the Constitution of Kenya (2010).

It follows that FGM is a form of gender-based discrimination of human rights of women contrary to the Constitution which dictates that every person is equal before the law⁸⁰ and that women and men are entitled to the right to equal treatment.⁸¹ There is an absurd myth that is prevalent across Kenyan communities which justifies the need to continue practising FGM; that FGM is a pre-condition for women to be mature and acquire full membership of the human race lest they be denied the right to interact with others and be subsequently socially isolated.⁸² Another common

⁷⁵ Article 44(1), *Constitution of Kenya* (2010).

⁷⁶ Article 44(3), *Constitution of Kenya* (2010).

⁷⁷ Article 25(a), *Constitution of Kenya* (2010).

⁷⁸ Article 2(1), *Constitution of Kenya* (2010).

⁷⁹ Article 2(3), *Constitution of Kenya* (2010).

⁸⁰ Article 27(1), *Constitution of Kenya* (2010).

⁸¹ Article 27(3), *Constitution of Kenya* (2010).

⁸² Fisaha K, Female Genital Mutilation: A Violation of Human Rights, *Journal of Political Sciences & Public Affairs*, 3—<<https://www.longdom.org/open-access/female-genital-mutilation-a-viol...>> on 3 September 2019.

belief is that FGM aims to control women and make them excessively willing to serve men's sexual and reproductive desire and interest. FGM is also believed to ensure the preservation of a girl's virginity which is a pre-requisite for marriage.⁸³ This confirms that FGM is therefore a manifestation of discrimination against women and young girls.

Other fundamental rights and freedoms that relate to the prohibition of FGM include: article 29(d) which guarantees the right to freedom and security of the person; article 53(1) (d) which guarantees the right to have children protected from harmful cultural practices; and article 55(d) which mandates the state to protect the youth from harmful cultural practices.

3.1.1.2. PROHIBITION OF FGM ACT (ACT NO 32 OF 2011)

As the name suggests, the FGM Act is the main form of legislation that governs the abolition of FGM in Kenya. It was passed into law by the Kenyan Parliament on 30th September 2011 and commenced on 4th October 2011.⁸⁴

A vital statutory provision in the Act is Part Four which outlines offences and the grounds upon which such offences can occur. They include: aiding and abetting FGM in Kenya⁸⁵, possession of equipment for FGM⁸⁶ and failure to report the commission of the offence.⁸⁷

Another important statutory provision is section 19(6) which outlines that it is no defence to a charge under this section that the person on whom the act involving female genital mutilation was performed consented to that act, or that the person charged believed that such consent had been given.⁸⁸ This expressly implies that consent is immaterial in the discussion on FGM.

The Prohibition of FGM Act has been and continues to be of prime importance to the Kenyan courts' decisions on questions relating to FGM. In *Pauline Robi Ngariba v Republic*,⁸⁹ the High Court meted out a seven years' imprisonment sentence upon the accused who was charged with performing FGM contrary to section 19(1) of the relevant Act. The High Court in *Jessica Magerer*

⁸³ Fisaha K, Female Genital Mutilation: A Violation of Human Rights, Journal of Political Sciences & Public Affairs, 3—<<https://www.longdom.org/open-access/female-genital-mutilation-a-viol...>> on 3 September 2019.

⁸⁴ <https://www.afrocave.com/laws-on-female-genital-mutilation-in-kenya/>> on 31 August 2019.

⁸⁵ Section 20, *Prohibition of FGM Act* (Act No 32 of 2011).

⁸⁶ Section 23, *Prohibition of FGM Act* (Act No 32 of 2011).

⁸⁷ Section 24, *Prohibition of FGM Act* (Act No 32 of 2011).

⁸⁸ Section 19(6), *Prohibition of FGM Act* (Act No 32 of 2011).

⁸⁹ (2014) eKLR.

*v Republic*⁹⁰ dismissed the accused's appeal. Despite pleading guilty to three counts, she claimed that the sentence to three-year imprisonment on each count was excessive; the three counts being aiding and failing to report FGM commission, and allowing her premises to be used to perform FGM. The Court held that the sentence was not excessive in that the Parliament's intention when drafting the provision outlining the minimum sentence on FGM offences must have been to endeavour to eradicate the culture of FGM.

Another decision that was guided by the Prohibition of FGM Act is *Halima Mohamed v Republic*.⁹¹ The Court declared the accused guilty of aiding FGM contrary to the Act. The appellant in this case allowed her twelve-year old daughter to undergo FGM and was subsequently punished with a fine of Kshs. 200,000. In *Joan Bett v Republic*⁹² the appellant allowed her premises to be used to perform FGM. Mumbi Ngugi J stated that the sentence imposed on the appellant was lawful and would act as a deterrence to other women who may offer their premises to facilitate FGM contrary to the law and to the detriment of those who undergo the rite. In *Nizareta Rwamba v Republic*⁹³ the appellant aged sixty nine years old was sentenced to seven years for, *inter alia*, aiding FGM. The striking facts of this decision is that FGM is so rooted in Kenya that persons of all age are seen to be perpetrating the malpractice.

From this analysis, it can be concluded that the enactment of the FGM Act has facilitated the conviction of persons guilty of committing and aiding the commission of FGM. It also proves that to date, Kenyan citizens continue to violate this legislation thus the Judiciary should continue to enforce stringent measures on such offenders in order to eradicate FGM.

3.1.1.3. CHILDREN'S ACT (ACT NO 8 OF 2001)

The Children's Act stipulates that no person shall subject a child to female circumcision, early marriage or other cultural rites, customs or traditional practices likely to negatively affect the child's life, health, social welfare, dignity or physical or psychological development.⁹⁴ This provision emphasizes that young girls should not be compelled to undergo FGM.

⁹⁰ (2016) eKLR.

⁹¹ (2016) eKLR.

⁹² (2018) eKLR.

⁹³ (2019) eKLR.

⁹⁴ Section 14, *Children's Act* (Act No 32 of 2001).

The irony that exists is that despite most victims of FGM being children, the Kenyan courts' jurisprudence does not make direct references to the Children's Act in its decisions on FGM. For example, in *Halima v Republic* which has been highlighted earlier on, the victim was a twelve-year old girl. However, only the Prohibition of FGM Act is expressly quoted throughout the entire decision and subsequently used in determining the appellant's conviction. This is a shortfall in the FGM court decisions in Kenya. Inasmuch as section 14 of the Children's Act can be synonymously read with the FGM Act, it is vital that section 14 still be independently quoted to breathe more life into the Children's Act.

It is noteworthy that there is inadequate research which addresses how women are at the forefront in promoting the continuity of FGM. As stated in chapter one, the discussions above particularly address this literature gap. In light of the Kenyan court decisions, it is clear that women are the most responsible persons that promote FGM to the detriment of fellow women and young girls. The courts, however, have duly exercised their mandate to condemn the practice by imposing punishment upon these offenders thus leading to their incarceration.

3.1.2. THE AFRICAN REGIONAL LEGISLATIVE FRAMEWORK

Some of the treaties that exist in the African regional legislative framework include: The African Charter on Human and People's Rights (ACHPR), the African Charter on the Rights and Welfare of the Child and the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (Maputo Protocol).

The ACHPR generally addresses the protection of the fundamental rights of women and girls.⁹⁵ Although the prohibition of FGM is not directly stipulated, it is implicitly stated through the rights enshrined in the Charter. Conversely, the African Charter on the Rights and Welfare of the Child mirrors the standard established by the Convention on the Rights of the Child (1989); that the primary consideration by an individual or authority in addressing issues related to children shall be the "best interests of the child".⁹⁶ In comparison to one another, the Maputo Protocol and the African Charter on the Rights and Welfare of the Child expressly outlines the prohibition of FGM.

⁹⁵ UN Women, *Sources of International Human Rights Law on Female Genital Mutilation*, 2011, 5.

⁹⁶ Article 4(1), *African Charter on the Rights and Welfare of the Child*, 1 July 1990, CAB/LEG/24/9/49.

Both treaties dictate that state parties ought to eliminate all forms of harmful social and cultural practices that negatively affect the welfare of women and children.⁹⁷

These treaties are somewhat similar in that they all provide for the protection of almost all the same rights and freedoms of women and girls. One of the common rights stipulated in these treaties is the right to have one's life, integrity and security of their person respected and that they may not be arbitrarily deprived of this right.⁹⁸ FGM is a violation of the integrity of one's person and under severe circumstances, it results in the loss of life. This provision is therefore paramount in the sense that it emphasizes the protection of one's integrity and life.

The right to the respect of the dignity which is inherent in a human being⁹⁹ is also another important right which is endorsed by the three regional instruments. This right is closely related to the right to freedom from all forms of degradation such as torture and cruel treatment.¹⁰⁰ FGM is an example of cruel treatment thus this statutory provision seeks to abolish the practice to safeguard the dignity of women and girls.

Another right which is threatened by the practice of FGM is the right to enjoy the best attainable state of physical and mental health.¹⁰¹ The circumstances around which FGM is carried out is hazardous to the female victim's health hence the importance of this right is clearly established.

The right to freedom from discrimination is also infringed upon when FGM is practised. To solve this, the ACHPR confers the mandate to ensure the elimination of discrimination against women upon the governments of the state parties to the ACHPR.¹⁰² Furthermore, the protection of this right is reiterated in the Maputo Protocol.¹⁰³ This research paper has established earlier on that FGM is a form of discrimination against women owing to the underlying reasons for its continued

⁹⁷ Article 21, *African Charter on the Rights and Welfare of the Child*; Article 5(b), *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa* (hereinafter *Maputo Protocol*), 1 July 2003.

⁹⁸ Article 4, *ACHPR*, 27 June 1981, 1520 UNTS 217; Article 4, *Maputo Protocol*, 1 July 2003.

⁹⁹ Article 5, *ACHPR* ; Article 3(1), *Maputo Protocol*.

¹⁰⁰ Article 5, *ACHPR*; Article 4(1), *Maputo Protocol*; Article 16, *African Charter on the Rights and Welfare of the Child*.

¹⁰¹ Article 16, *ACHPR*; Article 14, *African Charter on the Rights and Welfare of the Child*; Article 14, *Maputo Protocol*.

¹⁰² Article 18(3), *ACHPR*.

¹⁰³ Article 2(1), *Maputo Protocol*.

practice, such as the acceptance of women into the society. The right is therefore vital in this respect.

The Maputo Protocol endorses another unique right; the right to positive cultural context. It states that women are entitled to live in a positive cultural context and to take part in all levels in determining cultural policies.¹⁰⁴ This means that women must be accorded the benefit of leading comfortable lives within the cultural setting and in their different cultural or ethnic backgrounds. It also implies that women ought to be afforded an equal opportunity akin to their male counterparts when developing cultural policies, especially those which directly affect them. One example of such a policy is the substitution of FGM with other humane forms of initiation rites.

Generally, there is scarce application of regional FGM legislation in Kenya. Most of the Kenyan decisions on FGM do not refer to regional treaties to which Kenya is party, despite their relevance. A significant challenge is the lack of awareness and use of the African Charter and the Maputo Protocol by legal practitioners as well as the Kenyan courts. There is need for enhanced awareness on the regional human rights instruments that address FGM and its relation to our laws and its impact on human rights in Kenya.¹⁰⁵

3.1.3. THE INTERNATIONAL HUMAN RIGHTS LEGISLATIVE FRAMEWORK

The following conventions which address the abolition of FGM on the international plane shall be discussed: the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), the Convention on the Rights of the Child (CRC) and the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).

3.1.3.1. CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (1979)

FGM is a practice exclusively directed towards women and girls with the effect of nullifying their enjoyment of fundamental rights.¹⁰⁶ This paper has previously established that FGM is primarily founded on discrimination due to the justification that is often advanced in its favour. Such

¹⁰⁴ Article 17, *Maputo Protocol*.

¹⁰⁵ Ayeni V, *The impact of the African Charter and the Maputo Protocol in selected African states*, Pretoria University Law Press, Pretoria, 2016, 143.

¹⁰⁶ Toubia N and Rahman A, *Female Genital Mutilation: A Guide to Laws and Policies Worldwide*, 1 ed, Zed Books, London, 2000, 55.

justification includes the need to preserve a woman's virginity which is a pre-requisite for marriage and the belief that for a woman to belong to the society, she must undergo circumcision. In this way, discrimination is brought out.

CEDAW sets out the responsibility to be undertaken by state parties, namely, to modify the socio-cultural patterns of conduct so as to achieve the elimination of prejudices and customary and all other practices based on the inequality of the sexes.¹⁰⁷

Furthermore, General Recommendations 14, 19 and 24 formulated by the Committee on the Elimination of Discrimination against Women (CEDAW) note that the severe health and other consequences for women and girls subjected to FGM.¹⁰⁸

3.1.3.2. UN CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT (1984)

As the name suggests, CAT is primarily concerned with abolishing torturous practices. Torture is a jus cogens or peremptory norm; a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.¹⁰⁹

Article 2 of the convention mandates state parties to ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.¹¹⁰

3.1.3.3. CONVENTION ON THE RIGHTS OF THE CHILD (1989)

The CRC places in the governments of state parties the responsibility to ensure that the fundamental rights of children are recognized and protected. The guiding standard established by the CRC is "the best interest of the child".¹¹¹ The CRC mandates states parties to take all effective and appropriate measures to abolish traditional practices prejudicial to the health of children.¹¹²

¹⁰⁷ Article 2, CEDAW.

¹⁰⁸ UN Women, *Sources of International Human Rights Law on Female Genital Mutilation*, 2011, 5.

¹⁰⁹ Article 53, *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331.

¹¹⁰ Article 2, CAT, 10 December 1984, 1465 UNTS 84.

¹¹¹ Article 3, CRC, 20 November 1989, 1577 UNTS 3.

¹¹² Article 24(3), CRC.

Initially, Kenyan courts were reluctant to apply international law instruments directly to all relevant domestic matters.¹¹³ Currently, however, courts have softened their approach and are increasingly making direct reference to international human rights instruments to which Kenya is party.¹¹⁴ Unfortunately, the same is not true for FGM. As it has been elaborated under the section on regional human rights framework governing FGM, the Kenyan courts in its decisions on FGM matters do not expressly refer to these treaties. Most cases are primarily determined by applying the Prohibition of FGM Act. It is acknowledged that the latter is the main legislation that addresses FGM in Kenya. However, there is need for the courts to buttress the same in order to continue issuing sound judgments and ultimately ensure effective operation of the entire legislative framework governing FGM in Kenya.

3.2. THE ROLE OF THE INSTITUTIONAL FRAMEWORK IN PROMOTING PUBLIC SENSITISATION AS A MEANS TO COMBAT FGM IN KENYA

Institutions in Kenya generally occupy an influential position that empowers them to mobilise Kenya citizens and subsequently advocate for the eradication of FGM in Kenya. One way in which the relevant institutions can achieve the latter is through the use of public education, including health education. Recent studies reveal that health education interventions have been regarded as promising interventions for preventing FGM.¹¹⁵ These interventions should aim at long-term changes to the health behaviour and the norms that are attributed to a health problem.¹¹⁶ In this case, the norm or behaviour in issue is FGM. Essentially, this section critically analyses the role of both local and international institutions that are concerned with the fight against FGM.

The Kenyan legislative framework on FGM expressly confers the function of creating public awareness concerning FGM upon two major institutions; the Kenyan Government and the Anti-FGM Board of Kenya. The FGM Act stipulates that the Anti-FGM Board is tasked with designing, supervising and coordinating public awareness programmes against the practice of FGM¹¹⁷,

¹¹³ (1970) KLR.

¹¹⁴ *Mary Rono v Jane Rono & another* (2005) eKLR.

¹¹⁵ Waigwa S, Doos L, Bradbury-Jones C and Taylor J, 'Effectiveness of health education as an intervention designed to prevent female genital mutilation/cutting (FGM/C): a systematic review' 15 *Reproductive Health* 62, 2018, 1.

¹¹⁶ Waigwa *et al.*, 'Effectiveness of health education as an intervention designed to prevent female genital mutilation/cutting (FGM/C): a systematic review' 15 *Reproductive Health* 62, 2018, 3.

¹¹⁷ Section 5(a), *Prohibition of FGM Act* (Act No 32 of 2011).

whereas it further outlines that the National Government should utilise its available resources to undertake public education and sensitise Kenyans on the dangers and adverse effects of FGM.¹¹⁸ In light of these statutory provisions, both the Kenyan Government and Anti-FGM Board have expended their efforts to realise the role of promoting public education bestowed upon them. Notably, the two institutions have been able to perform this role effectively due to assistance from, *inter alia*, international organisations such as the United Nations Children Education Fund (UNICEF), United Nations Population Fund (UNFPA) and the Federation of Women Lawyers Kenya (FIDA).

3.2.1. THE GOVERNMENT OF KENYA

In liaison with UNFPA and UNICEF (hereinafter ‘UNFPA-UNICEF Joint Programme’), both the National and County Government of Kenya have mainstreamed the commitment to end FGM using educational policies as a tool.

At the National Government level, some of the educational platforms that have been used include: Policy Framework for Education and Training (2012), National Adolescent Sexual and Reproductive Health Policy (2015) and National Plan of Action for Children in Kenya (2015-2022).¹¹⁹ Through these policies and action plans, the National Government’s departments interact in order to systematically and coherently function together in preventing and responding to FGM. For instance, the National Adolescent Sexual and Reproductive Health Policy outlines the government’s policy to support programs on harmful traditional practices such as FGM and promotes appropriate evidence-based interventions.¹²⁰ Furthermore, in the Policy Framework for Education and Training, the Ministry of Education lists the following strategies as a means to spread public awareness especially in marginalised regions where FGM is prevalent: sensitisation of communities on the needs of marginalised children and boosting of wireless transmission to increase radio coverage and development of relevant radio content for marginalised children.¹²¹

The UNFPA-UNICEF Joint Programme also partnered with the Ministry of Education in 2016 during the Kenya National Music Festival to raise awareness on violence against children;

¹¹⁸ Section 27(c), *Prohibition of FGM Act* (Act No 32 of 2011).

¹¹⁹ UNFPA AND UNICEF, *UNFPA-UNICEF Joint Programme on Female Genital Mutilation*, 2016, 6.

¹²⁰ Ministry of Health in Kenya, *National Adolescent Sexual and Reproductive Health Policy*, 2015, 19.

¹²¹ Ministry of Education in Kenya, *A Policy Framework for Education: Aligning Education and Training to the Constitution of Kenya (2010) and Kenya Vision 2030 and beyond 2012*, 40.

approximately four hundred teachers and adjudicators were trained, and children and youth encouraged to formulate messages on ending harmful cultural practices through creative arts (songs, plays, dances and poems). Consequently, approximately 1.5 million children who directly took part in the festival were sensitised on the demerits of FGM and about nine million children and youth indirectly participated and benefited from the messages.¹²²

At the County Government level, there exists County Integrated Development Plans (CIDPs) for focus communities which have captured FGM as a developmental challenge to girl-child education. These CIDPs have thus helped to create awareness by educating Kenyan communities and promoting alternative rites of passage (ARP). In light of this, County first ladies convened a meeting in the recent past and agreed to boycott FGM ceremonies in order to discourage the practice and advocate for ARP.¹²³ The County Government has further propelled public sensitisation in that county assembly members especially in Garissa and West Pokot have taken part in village fora, including dialogue sessions and public gatherings, especially during the Zero Tolerance Day to end FGM and the Day of the African Child. As a result of the Joint Programme, West Pokot allocated a Kshs. 16 million budget in 2016/2017 for an FGM programme particularly working with councils of elders in accelerating the prohibition of FGM. This is in fact a breakthrough since the issue of FGM is not within the jurisdictional functions of the County Government of Kenya.¹²⁴

3.2.2. ANTI-FGM BOARD

Since its inception in December 2013, the Anti-FGM Board of Kenya has duly discharged its statutory mandate to design and coordinate public awareness programmes geared towards combating FGM in the country. In 2016, the Board formulated the Communication and Media Strategy (2016-2018) as a tool for creating knowledge and awareness to Kenyan citizens about

¹²² UNFPA AND UNICEF, *UNFPA-UNICEF Joint Programme on Female Genital Mutilation Annual Report*, 2016, 12.

¹²³ UNFPA AND UNICEF, *UNFPA-UNICEF Joint Programme on Female Genital Mutilation Annual Report*, 2016, 7.

¹²⁴ UNFPA AND UNICEF, *UNFPA-UNICEF Joint Programme on Female Genital Mutilation Annual Report*, 2016, 7.

FGM, and improving the coordination of campaigns against FGM.¹²⁵ In their Communication Strategy (2016-2018), the Board enumerated various media channels through which they would and continue to disseminate information about the dangers of FGM to the public. One example is through community media: the use of vernacular radio stations; folk songs that convey anti-FGM messages; story-telling; cultural festivals; church functions; and chiefs' or other forms of *barazas*. Other media channels include: print media (newspapers, magazines and newsletters), electronic channels (radio, television, mobile phones and social media platforms) and the Anti-FGM Board's official website.¹²⁶

3.2.3. FEDERATION OF WOMEN LAWYERS KENYA (FIDA)

In conjunction with the Office of the Director of Public Prosecution (ODPP), FIDA has continued to provide free legal aid and education in focus counties such as Garissa, Marsabit, Tana River, West Pokot and Baringo. Together, the two institutions have helped to increase media highlight on FGM cases in Kenya. Particularly, the ODPP deployed twenty one prosecution counsels in the respective focus counties in order to facilitate prosecution of FGM cases and working together with the communities via mobile courts.¹²⁷

3.2.4. ACADEMIC INSTITUTIONS IN KENYA

Schools afford the girl child a protective environment. Fundamentally, the school environment is a nest within which students are nurtured and knowledge on FGM is imparted. The Joint Programme acknowledges the vital role of teachers whose responsibility is to deliver information to pupils and students in primary and secondary schools respectively. As at 2016, the UNFPA-UNICEF Joint Programme Annual Report indicates that about 315 teachers were trained on the psychological and health consequences of FGM. These teachers were from Wajir, Garissa, West

¹²⁵ Ministry of Public Service, Youth and Gender Affairs in Kenya, *Communication and Media Strategy*, 2016-2018, 12.

¹²⁶ Ministry of Public Service, Youth and Gender Affairs in Kenya, *Communication and Media Strategy*, 2016-2018, 21-23.

¹²⁷ UNFPA AND UNICEF, *UNFPA-UNICEF Joint Programme on Female Genital Mutilation Annual Report*, 2016, 12.

Pokot, Samburu, Kisii, Marsabit, Kajiado and Tana River counties. They helped to train approximately 3900 school children on issues relating to FGM.¹²⁸

In light of the entire discussion on the role of Kenyan institutions in promoting public awareness, this research establishes that public education and sensitisation diminishes the practice of FGM. Therefore, the Kenyan Government and Anti-FGM Board in liaison with other relevant organisations such as UNICEF, FIDA and academic institutions must continue to exert themselves fully in imparting knowledge to the public on the consequences of FGM.

3.3. CONCLUSION

This chapter has examined the legislative framework governing FGM on the domestic, regional and international planes. Notably, there is a myriad of similarities across the board ranging from the language used in the crafting of the various forms of legislation to the rights which directly relate to the prohibition of FGM. Some of the rights that are common on all three levels include the rights to attain the highest standard of health, human dignity, equality and freedom from inhumane or degrading form of treatment. The chapter further discussed the mandate of various Kenyan institutions in using public education as a tool for combating FGM in the country.

With reference to the analysis of the legal framework, this research affirms that the existing framework prohibiting FGM is not being strictly adhered to by Kenyan citizens; this is evident from the FGM cases that are ongoing in the courts to date. Nonetheless, the present study acknowledges that the Kenyan courts have maintained their assertive nature in sanctioning those practising FGM, in line with the legal framework. This is promising that in the near future, more Kenyan citizens shall be dissuaded from the malpractice and it will be completely eradicated in the country. Regarding the institutional framework, it follows that reduction of FGM requires strategies that are multi-sectoral and involving stakeholders at different levels. In conclusion, this research demonstrates that the role of institutions in spreading awareness on FGM will contribute greatly to reduction of FGM in Kenya.

¹²⁸ UNFPA AND UNICEF, *UNFPA-UNICEF Joint Programme on Female Genital Mutilation Annual Report*, 2016,

CHAPTER FOUR: ALTERNATIVE RITES OF PASSAGE

“We are human beings; we make the traditions so we should have the right to change those traditions”¹²⁹

-Malala Yousafzai

4.0. INTRODUCTION

This chapter seeks to explore the implementation of alternative rites of passage (ARP) in Kenya as a relatively safe means to mark the transition of young girls into womanhood, in place of FGM. In the recent past, anti-FGM programmes which had been developed to encourage communities to abolish FGM mainly comprised awareness campaigns on sexual reproductive health and rights, and the enforcement of newly implemented laws.¹³⁰ Unfortunately, these forms of intervention proved to be only partially effective. Thus, the adoption of ARP is necessary to ensure the eradication of FGM since a core theme in most forms of ARP is the encouragement of positive culture and discouragement of negative culture.¹³¹ At the outset, this chapter shall provide a succinct background explaining the origin of ARP in Kenya. The second part of the chapter shall then elaborate on the anti-FGM board’s initiative in promoting ARP and expound on the justification of ARP in Kenya, as opposed to FGM.

4.1. BACKGROUND TO THE EMERGENCE OF ARP IN KENYA

The term ‘alternative rites of passage’, which is colloquially understood as rituals without cutting or circumcision by words, was developed by Non-Governmental Organisations (NGOs) as a strategy aimed at eradicating FGM.¹³² ARP aim to replicate traditional initiation rituals for

¹²⁹ <http://www.keepcalmtalklaw.co.uk/a-study-of-damaging-discourse-regulating-female-genital-cutting/> on 2 December 2019.

¹³⁰ Graamans E, Zolnikov T, Smet E, Nguura P, Leshore C and Have S, ‘Lessons learned from implementing alternative rites in the fight against female genital mutilation/cutting’ Pan African Medical Journal, 2019, 1—<http://www.panafrican-med-journal.com/content/article/32/59/full/> on 17 November 2019.

¹³¹ Droy L, Hughes L, Lamont M, Nguura P, Parsitau D and Ngare G, ‘Alternative Rites of Passage in FGM/C Abandonment Campaigns in Africa: A research opportunity’ University of Leicester, Lias Working Paper Number 1, 2018, 5—<https://www.researchgate.net/publication/326956650> on 17 November 2019.

¹³² Droy L *et al*, ‘Alternative Rites of Passage in FGM/C Abandonment Campaigns in Africa: A research opportunity’ University of Leicester, Working Paper Number 1, 2018, 4—<https://www.researchgate.net/publication/326956650> on 17 November 2019.

pubescent girls who are transitioning to womanhood, but are rituals which are devoid of cutting/mutilation.¹³³

Notably, the grievous effects of FGM such as the loss of lives necessitated the emergence of ARP in Kenya. In 1982, fourteen girls who had been subjected to FGM suffered an untimely demise. In light of this, the then President Daniel Moi issued a statement condemning the practice and penalised the persons liable for the death of the victims. Subsequently, the year 1989 saw the former President call for an end to the malpractice and a ban on FGM was formally announced in the country.¹³⁴

Fortunately, the ban on FGM paved the way for the inception of ARP in the country. In 1995, the Maendeleo Ya Wanawake Organisation (MYWO) and Program for Appropriate Technology in Health (PATH) jointly organised a national seminar to converge MYWO national and grass-root level elected leaders and staff from Tharaka Nithi, Kisii, Meru, Narok and Samburu among other districts (present-day counties) in Kenya.¹³⁵ The seminar inspired the leaders of Tharaka Nithi district to initiate discussions on formulating an ARP within their community. In liaison with MYWO and PATH, the leaders developed and introduced the first alternative ritual in Kenya in 1996. The first ARP was held in Tharaka Nithi and twenty nine girls underwent the ritual. By 1999, about 1600 girls had undergone the ritual from Meru, Narok and Samburu districts and as at 2001, approximately 3000 girls from these districts had gone through ARP ceremonies.¹³⁶ In 2004, the Abakuria community also adopted the implementation of ARP; during the season set for circumcision in January 2005, approximately 289 girls underwent an ARP ceremony for the first

¹³³ Droy L *et al*, 'Alternative Rites of Passage in FGM/C Abandonment Campaigns in Africa: A research opportunity' University of Leicester, Working Paper Number 1, 2018, 1—<https://www.researchgate.net/publication/326956650> on 17 November 2019.

¹³⁴ Prazak M, 'Introducing Alternative Rites of Passage' 53 *Africa Today* 4, 2007, 23.

¹³⁵ Chege J, Askew I and Liku J, 'An Assessment of the Alternative Rites Approach for Encouraging Abandonment of Female Genital Mutilation in Kenya' *Frontiers in Reproductive Health*, Research Paper, 2001, 3—<https://www.researchgate.net/publication/237312753> *An Assessment of the Alternative Rites Approach for Encouraging Abandonment of Female Genital Mutilation in Kenya* on 17 November 2019.

¹³⁶ Chege J, Askew I and Liku J, 'An Assessment of the Alternative Rites Approach for Encouraging Abandonment of Female Genital Mutilation in Kenya' *Frontiers in Reproductive Health*, Research Paper, 2001, 4—<https://www.researchgate.net/publication/237312753> *An Assessment of the Alternative Rites Approach for Encouraging Abandonment of Female Genital Mutilation in Kenya* on 17 November 2019.

time in the region.¹³⁷ The ritual entailed an induction process through workshops during which teachers, doctors and priests taught them crucial topics such as culture, FGM, adolescence, youth peer counselling and the reproductive system. Upon completion of the alternative rite process, the 289 girls were presented with certificates of attendance for anti-FGM.¹³⁸

Nonetheless, the positive effect of ARP were not precarious in that all except eighty out of all the girls were compelled by their relatives to undergo FGM following the ARP ceremony in Kuria district.¹³⁹ The latter is evidence that the implementation of ARP must overcome a major barrier; ambivalent perspectives in a given community.¹⁴⁰ Oboler opines that cultural continuity requires competing interests to arrive at a consensus and to distinguish between which cultural traditions to maintain from the harmful traditions to abandon. She proposes that an ideal approach to eradicate FGM would be to identify critics of FGM in a particular community and to mobilise them and work with them to formulate a program that draws on their insider perspectives.¹⁴¹ This approach will enhance the eventual abandonment of FGM and its subsequent substitution with ARP.

4.2. THE ARP GUIDELINE—AN ANTI-FGM BOARD INITIATIVE

In conjunction with the UNFPA and UNICEF¹⁴², the Anti-FGM Board of Kenya formulated the Guideline for Conducting an Alternative Rite of Passage as part of their legal mandate: to design a policy on the planning, financing and coordination of activities relating to FGM.¹⁴³ The ARP Guidelines comprise three main sections namely: objectives and guiding principles, mode of implementing ARP and the evaluation process of ARP. These sections shall be briefly discussed below.

¹³⁷ Prazak M, 'Introducing Alternative Rites of Passage' 53 *Africa Today* 4, 2007, 24.

¹³⁸ Prazak M, 'Introducing Alternative Rites of Passage' 53 *Africa Today* 4, 2007, 24.

¹³⁹ Prazak M, 'Introducing Alternative Rites of Passage' 53 *Africa Today* 4, 2007, 25.

¹⁴⁰ Prazak M, 'Introducing Alternative Rites of Passage' 53 *Africa Today* 4, 2007, 25.

¹⁴¹ Prazak M, 'Introducing Alternative Rites of Passage' 53 *Africa Today* 4, 2007, 25.

¹⁴² Ministry of Public Service, Youth and Gender Affairs (Anti-FGM Board), *Anti-FGM Board Progress Report, 2014-2017*, 35.

¹⁴³ Anti-FGM Board, *Guideline for conducting an alternative rite of passage*, 2018, iii.

4.2.1. OBJECTIVES AND PRINCIPLES GUIDING ARP

As stated earlier, the overarching principle of the ARP Guideline is to highlight the process through which organisations involved in campaigning against FGM conduct ARP. The other objectives set out by the Anti-FGM Board include: to harmonise and standardise the process for developing and implementing ARP; to improve coordination of ARP; to improve monitoring, evaluation, learning and reporting on ARP; to enhance development and implementation of sustainable ARP; to enable communities to own the ARP process; and to enhance the efficiency and impact of ARP in the campaign against FGM.¹⁴⁴

On the other hand, the guiding principles set out in the ARP Guideline create a foundation for the harmonisation of an ARP approach.¹⁴⁵ The adoption of these principles will help to promote the sustainability of ARP in Kenya. The first principle is that ARP ceremonies ought to be community-led: communities should invent alternatives to FGM which respect and uphold human rights. Second, ARP should be hinged on passion, honesty and integrity: the stakeholders involved must be driven by the interest of the common good and not personal interest. Third, ARP ought to be culture-sensitive in that they should be based on a well-informed understanding of the cultural practices associated with FGM as well as traditional ceremonies. Thereafter, communities should be empowered to formulate alternatives founded on their respective cultural understandings. Fourth, ARP should be inclusive; an ARP must involve all the segmented groups such as girls, boys, parents, traditional midwives, the government, religious leaders, civil society and the media. Finally, ARP should be hinged on the ‘do-no-harm’ principle so as to ensure that the ARP participants are shielded from subjection to cutting or mutilation.¹⁴⁶ The adherence to these objectives and principles will ensure the success of ARP in Kenya and promote the eradication of FGM.

4.2.2. MODE OF IMPLEMENTATION OF ARP

In order for an ARP to successfully take root in Kenya, Kenyan communities must commit themselves towards implementing certain measures.

¹⁴⁴ Anti-FGM Board, *Guideline for conducting an alternative rite of passage*, 2018, 3.

¹⁴⁵ Anti-FGM Board, *Guideline for conducting an alternative rite of passage*, 2018, 3.

¹⁴⁶ Anti-FGM Board, *Guideline for conducting an alternative rite of passage*, 2018, 4.

The preliminary measure for implementation is organising an ARP which entails five crucial steps. First, ARP facilitators must be trained through a programme in which they are taught how to successfully deliver, measure and execute an ARP in the community. Thereafter, a mapping exercise must be conducted in order to identify key stakeholders for the ARP process. Third, the ARP facilitators must either develop or use an existing ARP curriculum. The curriculum should address, inter alia, FGM issues and offer solutions which will ensure that the ARP process is sustainable. Consequently, the community in question ought to identify an appropriate venue for the target group best suited for the participants' comfort and personal safety. The final step is that the local community should select a convenient date and time for conducting the ARP within the community calendar of events.¹⁴⁷

The second measure to be undertaken encompasses two steps; community entry and community mobilisation.¹⁴⁸ Community entry involves the introduction of the concept of ARP by the guiding team to the custodians of culture or the community leaders for approval. On the other hand, community mobilisation requires that the whole community and the leaders be rallied to steer the ARP agenda. Some of the strategies through which mobilisation can be realised are through community dialogue, capacity building of stakeholders, school outreach programmes and cultural learning and exchange programmes.¹⁴⁹

The third measure for ARP implementation entails the identification of the target group. The ARP process is specifically tailored for uncircumcised girls. However, this does not automatically exclude FGM victims from undergoing the ARP process. Some of the requirements that the targeted girls should meet include the following: the girls should be aged between ten and eighteen years old; they should not have undergone FGM; their parents must have signed a consent form permitting them to undergo an ARP.¹⁵⁰

The fourth measure involves the selection of the steering team which is competent and sufficiently qualified to conduct the ARP.¹⁵¹ Fifth, there must be an advocacy approach to the ARP which

¹⁴⁷ Anti-FGM Board, *Guideline for conducting an alternative rite of passage*, 2018, 5.

¹⁴⁸ Anti-FGM Board, *Guideline for conducting an alternative rite of passage*, 2018, 5.

¹⁴⁹ Anti-FGM Board, *Guideline for conducting an alternative rite of passage*, 2018, 6.

¹⁵⁰ Anti-FGM Board, *Guideline for conducting an alternative rite of passage*, 2018, 6.

¹⁵¹ Anti-FGM Board, *Guideline for conducting an alternative rite of passage*, 2018, 7.

concerns the identification of key players at the community, county and national levels and which mainly focuses on policy influencers who spread advocacy messages on sexual reproductive health, FGM and ARP. Another measure is resource mobilisation whereby the community actively identifies and provides resources needed for conducting the ARP.¹⁵²

The final and most important measure is the conduction of the ARP ceremony. It is noteworthy that there is no single model of ARP and that it varies among different ethnic communities.¹⁵³ Nonetheless, most communities adhere to the following process for conducting an ARP ceremony: community sensitisation¹⁵⁴; identification of a symbol that will be significant to ARP within the community by the steering committee; seclusion of girls for sexual reproductive health re-orientation;¹⁵⁵ and a public graduation or declaration ceremony, whereby the ‘initiates’, parents, elders and leaders declare the abandonment of FGM, and the initiates receive blessings and awards.¹⁵⁶

Drawing from the Kenyan courts’ jurisprudence, there is significant evidence of the recognition and implementation of ARP in the country. In *Katet Nchoe & another v Republic*,¹⁵⁷ the appellants were sentenced to a two-year imprisonment on account of a charge of manslaughter, which resulted from their engagement in FGM. The court directed that the appellants attend campaigns for ARP for girls. Furthermore, in *Agnes Kiraithe v Attorney General & 2 others*¹⁵⁸, the court examined the protocol of a rescue centre for girls (Soila Maasai Girls Rescue Centre) which dictated that *inter alia* the girls at the centre would undergo the Christian ARP in lieu of FGM before joining class six.

¹⁵² Anti-FGM Board, *Guideline for conducting an alternative rite of passage*, 2018, 7.

¹⁵³ Droy L *et al*, ‘Alternative Rites of Passage in FGM/C Abandonment Campaigns in Africa: A research opportunity’ University of Leicester, Working Paper Number 1, 2018, 4—<https://www.researchgate.net/publication/326956650> on 17 November 2019.

¹⁵⁴ Droy L *et al*, ‘Alternative Rites of Passage in FGM/C Abandonment Campaigns in Africa: A research opportunity’ University of Leicester, Working Paper Number 1, 2018, 4—<https://www.researchgate.net/publication/326956650> on 17 November 2019.

¹⁵⁵ Anti-FGM Board, *Guideline for conducting an alternative rite of passage*, 2018, 7.

¹⁵⁶ Anti-FGM Board, *Guideline for conducting an alternative rite of passage*, 2018, 7.

¹⁵⁷ (2011) eKLR.

¹⁵⁸ (2014) eKLR.

4.3. JUSTIFICATION FOR ARP

There is a myriad of reasons advanced in favour of the adoption of ARP in place of FGM. Abusharaf proposes that ARP is a powerful approach to initiation since it upholds the celebration of the passage of a girl to adulthood by observing tradition without the act of mutilation.¹⁵⁹ This shows that ARP is compatible with the cultural traditions of Kenyan communities since ARP entail the aspect of transition into adulthood, deemed to be an important cultural element in Kenyan communities. Furthermore, implementing ARP affords girls an opportunity to pursue their education after the ARP ceremony as opposed to FGM, whereby girls are often married off at a tender age while their education is blatantly disregarded. Consequently, this empowers the girls to make sound decisions in their marriages in the future because they get married at a mature age and with adequate education. Additionally, ARP reduces the danger of maternal mortality and psychological trauma which excised girls normally undergo during FGM.¹⁶⁰ Other arguments in favour of ARP is that they empower girls to take part in development activities, encourage the promotion of girl's dignity and also facilitates the protection of their rights and well-being.¹⁶¹

It is vital to note that there has been a decline in the rate of FGM in Kenya. As at 2019, the national statistics reveal that the FGM rate was 20%.¹⁶² According to reports by the Kenya Demographic Health Survey, the FGM rate in Kenya was 37.6% in 1998, 32.3% in 2003, 27.1% between 2008 and 2009¹⁶³ and 21% in 2014.¹⁶⁴ By implication, the decline in FGM rate points to the possibility that some communities have embraced the concept of ARP and have substituted FGM with safe alternatives.

¹⁵⁹ Abusharaf R, *Female Circumcision: Multicultural Perspective*, 1 ed, University of Pennsylvania Press, Pennsylvania, 2007, 30.

¹⁶⁰ UNICEF, *Measuring child poverty: New league tables of child poverty in the world's rich countries*, 2012, 31.

¹⁶¹ Population Council, *Female Genital Mutilation/Cutting in Kenya: Is Change Taking Place?: Descriptive Statistics from Four Waves of Demographic and Health Surveys*, 2017, 15.

¹⁶² Nitta Bhalla: 'Kenya pledges to end FGM by 2022-ahead of global target' *Reuters*, 12 November 2019 <https://www.reuters.com/article/us-kenya-women-fgm-trfn/kenya-pledges-to-end-fgm-by-2022-ahead-of-global-target-idUSKBN1XM2GN> on 12 April 2020.

¹⁶³ 28 Too Many, *Country Profile: FGM in Kenya*, 2013, 13.

¹⁶⁴ <https://www.28toomany.org/country/kenya/> on 11 April 2020.

4.4. CONCLUSION

This chapter has discussed the background to ARP in Kenya and how MYWO and PATH were at the forefront in developing and introducing the first alternative ritual in the country in 1996. This development resulted from the demise of girls who had been subjected to FGM and sought to remedy an occurrence of the same in the future. Furthermore, the inception of ARP in Kenya in the Kuria society (present-day Kuria County) inspired other communities in Kenya to follow suit and conduct ARP ceremonies. The chapter has further looked into the mandate of the Anti-FGM Board of Kenya in promoting the systematic practice of ARP in the country by formulating the Guideline on ARP in Kenya. The latter sheds light on the proper procedure, requirements, principles and objectives to be adhered to in conducting ARP. The chapter finally concludes by providing a justification of ARP in place of FGM, for instance, that ARP maintains the sanctity of the culture of a given community while excluding the heinous act of mutilation.

In summary, this chapter acknowledges that there exists some challenges that hinder the success of ARP in Kenya. First, changing a culturally embedded practice such as FGM is inherently difficult.¹⁶⁵ Furthermore, there is a paucity in research by scholars and development practitioners concerning ARP in Kenya.¹⁶⁶ Once these constraints are overcome, the substitution of FGM with ARP will ensue. Ultimately, the research in the present chapter asserts the hypothesis that the implementing ARP may result in the reduction and eventual eradication of FGM in Kenya.

¹⁶⁵ Graamans E, Zolnikov T, Smet E, Nguura P, Leshore C and Have S, 'Lessons learned from implementing alternative rites in the fight against female genital mutilation/cutting' Pan African Medical Journal, 2019, 1—<http://www.panafrican-med-journal.com/content/article/32/59/full/> on 17 November 2019.

¹⁶⁶ Hughes L, 'Alternative Rites of Passage: Faith, rights and performance in FGM/C abandonment campaigns in Kenya' 77 *African Studies* 2, 2018, 277.

CHAPTER FIVE: FINDINGS, RECOMMENDATIONS AND CONCLUSION

5.0. INTRODUCTION

The sole purpose of this study was to analyse the efficacy of article 44(3) of the Constitution of Kenya (2010) which stipulates that no person shall compel another to undergo a cultural rite such as FGM.¹⁶⁷ This chapter concludes the study by giving due consideration to the key findings of the research which have been advanced in the preceding chapters and by providing a summary of recommendations to the problem at hand; the practice of FGM in Kenya.

5.1. FINDINGS OF THE STUDY

The crux of the research lies within the problem statement of the study; young girls and women continue to be compelled to undergo female circumcision in Kenya. This problem can be viewed in light of the three hypotheses formulated in this study. In confirming the hypotheses, the study sought to answer three research questions: (i) Is the current legal framework prohibiting FGM in Kenya being strictly adhered to by Kenyan citizens? (ii) Does the provision of public education on FGM by relevant Kenyan institutions lead to decreased FGM practice in Kenya? (iii) Can the implementation of alternative rites of passage result in the eradication of FGM in Kenya?

5.1.1. IS THE CURRENT LEGAL FRAMEWORK PROHIBITING FGM IN KENYA BEING STRICTLY ADHERED TO BY KENYAN CITIZENS?

Chapter three of the study addressed the above research question and answers it in the negative; the research concludes that the existing domestic, regional and international legal framework prohibiting FGM is not being strictly adhered to by Kenyan citizens. The latter is proven by the number of FGM cases that have been filed before courts. In spite of this shortcoming, the Kenyan courts have discharged their mandate by punishing persons who perpetrate FGM in Kenya. Therefore, this results in a deterrent effect that dissuades other citizens from engaging in the malpractice.

¹⁶⁷ Article 44(3), *Constitution of Kenya* (2010).

5.1.2. DOES THE PROVISION OF PUBLIC EDUCATION ON FGM BY RELEVANT KENYAN INSTITUTIONS LEAD TO DECREASED FGM PRACTICE IN KENYA?

Chapter three of the study discusses the above research question and answers it in the affirmative. The different institutions in Kenya at the forefront in promoting public sensitisation on matters relating to FGM include the Government, Anti-FGM Board of Kenya, FIDA, UNICEF and academic institutions. This multi-sectoral strategy to curb FGM is crucial in that the aforementioned institutions have mainstreamed the commitment to end FGM using educational policies. These institutions impart relevant knowledge on FGM and reproductive health to the common *mwananchi* who then benefits intellectually by learning about the demerits of FGM and consequently abstains from committing the malpractice.

5.1.3. CAN THE IMPLEMENTATION OF ALTERNATIVE RITES OF PASSAGE RESULT IN THE ERADICATION OF FGM IN KENYA?

This research question is addressed in chapter four of the study and is answered in the affirmative. The study concludes that there is need to substitute FGM with ARP because ARP maintain the dignity and well-being of women and young girls as opposed to FGM which exposes them to long-term problems such as psychological trauma and maternal mortality. The implementation of ARP ceremonies has been made possible in that the ARP Guideline canvasses the objectives and principles as well as the procedure to be complied with in conducting ARP.

5.2. RECOMMENDATIONS

In light of the legal theories and findings canvassed in this study, it is fair to recommend solutions that will promote the eradication of FGM in Kenya.

First, the study recommends that the Parliament amend the FGM Act to incorporate a statutory provision that legislates on ARP. The existence of the ARP Guideline does not suffice to encourage Kenyans to substitute FGM with ARP as it is primarily based on policy, which is prone to non-compliance. Therefore, the FGM Act should be revised in view of this in order to give impetus to the Kenyan citizenry to embrace the concept of ARP in their respective communities.

Second, section 4 of the Prohibition of FGM Act which outlines the composition of the Anti-FGM Board should be revised in view of inclusivity of all leaders of the Kenyan society. This means that the Board should not only comprise Government officials such as Principal Secretaries but

should also permit traditional community leaders to be eligible for appointment. This is because leaders at the community level are in direct contact with community members. Hence, they will be able to advocate for the ban on FGM within their respective communities.

5.3. CONCLUSION

The study has confirmed that: (i) Kenyan citizens are not entirely complying with the legal framework prohibiting FGM in Kenya; (ii) in promoting public sensitisation, relevant institutions will facilitate the decrease of FGM; and (iii) implementing and legislating on ARP will de-escalate and eventually eradicate FGM in the country.

Currently, there is little consensus on the ban on FGM in Kenya as is evident from emerging practices such as the medicalisation of FGM on the one hand, and the need to sustain the outlawing of FGM on the other. What is commendable, however, is that the Kenyan Government has come a long way in putting measures in place to shield women and young girls from FGM, such as the inclusion of article 44(3) in the Constitution and the subsequent enactment of the Prohibition of FGM Act. In summary, this study concludes that the main challenges which hinder the prohibition of FGM in Kenya can be solved in consideration of the recommendations herein. In this way, Kenya will be one step closer to fully curbing the malpractice.

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