



**Faculty of Law**

**Lund University**

**Master s Programme in Human Rights Law**

**Master thesis**

**By**

**Sarah Mwaipopo**

**The Law and Practice Relating to Female Genital Mutilation  
in Tanzania**

**Prof. Katarina Tomasevski**

**Fall 2004**

## **Acknowledgements**

I first and foremost, wish to express my profound gratitude to god, the almighty, who is the reason as to who I am today and who has always been the source of my strength. Secondly, I am very grateful to Raoul Wallenberg Institute –Lund University, together with the Swedish Institute who respectively admitted me and met my financial needs during my stay in Lund-Sweden, without whose financial help; this work would not have been the way it is now. The same appreciation goes to the Ministry of Justice and Constitutional Affairs Tanzania, my employer, who not only granted me study leave with pay, but also enabled my first travel to Sweden. I also appreciate the moral support and inspiration from my workmates in the Constitutional and Human Rights Affairs Department

I would like to thank, my supervisor, Prof.Katarina Tomasevsk, who guided and directed me from the beginning of my work till the end. She was always on time for advice, constant suggestions, and guidance whenever the need arose. I also thank her so much for supporting my application for summer study visit to Tanzania. I greatly attribute my success to her.

While in Tanzania, was assisted by a number of people, who I would like to thank; Mr M.A Muhungutwa, Assistant Director in the Ministry of Gender, and children, Dotto Justo, Harold Sungusia, Lulu and Kaleb all from the LHRC for having discussions and for providing me with the relevant reports and materials on the subject. Miss Matilda Philip, for giving me the initial reading material for this paper. Mr Komba, Librarian at the Faculty of law, University of Dar es salaam for his cooperation.

On a very personal note, would like to thank with all my heart, my husband Ben Ganga, for giving me personal deadlines, providing me with relevant materials, moral and financial support, inspiration, love, courage, strength and above all for tolerating my absence during my study period. My special thanks also go to my mother, sisters and brothers for their kindness and for always being there for me.

Much appreciation goes to my friends, Fulata and Raymond, on whose time I trespassed and offered to read and edit my work. I also thank Benjamin Okonko who accepted to read my work and be my opponent. Begench Ashrov for assisting with the computer technics. The same appreciation goes to all my classmates; Maganga, Nikodemus, Bamba, Tilde, etc, I say thanks for the time we had together. Lastly, My attribute goes to RWI professors and the staff in the Library who not only gave me excellent knowledge and ideas on International Human Rights law but also all other necessary support that the course required.

*This work is dedicated with love-to my late father, Duncan and my beloved mother Juliet who have been the driving force in my life.*

# CONTENTS

Acknowledgements	1
<b>CHAPTER ONE: INTRODUCTION</b>	<b>8</b>
1.1 Background to the Problem	8
1.2 Statement of the Problem	11
1.3 Aims and Objectives of the Study	11
1.4 Literature Review and The Need for Additional Study	12
1.5 Significance of the Study	18
1.6 Scope and Limitation of the Study	18
1.7 Hypothesis	18
1.8 Research Methodology.	19
<b>CHAPTER TWO: THE PRACTICE OF FEMALE GENITAL MUTILATION IN TANZANIA.</b>	<b>21</b>
2.1 Introduction	21
2.2 Definition of Female Genital Mutilation	22
2.2.1 Types of Female Genital Mutilations (General overview)	23
2.2.2. Comparison between Male circumcision and Female Genital Mutilation.	25
2.3 The History of Female Genital Mutilation in Tanzania	26
2.3.1 Introductory Remarks	26
2.3.2. The History of Female Genital Mutilation In Tanzania	27
2.3.3 Attempts to Eradicate Female Genital Mutilation in Tanzania	27
2.2 Prevalence of Female Genital Mutilation in Tanzania	32
2.4.1.Types of Female Genital Mutilations performed in Tanzania	36
2.4.2 Circumcisors or Mutilators.	37
2.4.3 Period of circumcision	38
2.4.4 Age For Undergoing The Ritual	39
2.4.5. Medication Applicable	41
2.4.6 Reasons For the Practice of Female Genital Mutilation	42
2.4.6.6.Beauty and or cleanliness	46
2.5 Assesment of the Reasons for the Practice of FGM	48
2.5.1 Myth And Facts Of FGM	49

<b>2.6 Effects of Female Genital Mutilation .</b>	<b>50</b>
2.6.1 Immediate Complicatios	50
2.6.2 Longtern complications	51

## **CHAPTER THREE: THE INTERNATIONAL LAW RELATING TO FEMALE GENITAL MUTILATION IN TANZANIA** **53**

<b>3.0 Introductory Remarks</b>	<b>53</b>
<b>3.2 Treaty practice in Tanzania</b>	<b>55</b>
<b>3.3 International Law Relating to Female Genital Mutilation in Tanzania.</b>	<b>59</b>
3.3.1 The Universal Declaration of Humanrights	61
3.3.2 The Internation Covenant on Economic social and Cultural Rights	61
3.3.3 The International Covenant on Civil and Political Rights ,1966	63
3.3.4 The United Nations Convention on the elimination of All Forms of Discrimination Against Women,1979	65
3.3.5 The united Nations Conventions on the Rights of the Child ,1989.	69
3.3.5.2 Protection from Harm	70
3.3.5.3 Protection of Privacy	70
3.3.6 The United Nations Declaration on the Elimination of violence Against Women ,1993.	72
3.3.7 United Nations Declaration on the Elimination of all Forms of Intolerance and Discrimination Based on Religion or Belief.	73
3.3.8 The United Nations Declaration on the Rights of Persons Belonging to National or Ethnic ,Religious or Linguistic Minorities.1993	73
3.3.9 The Beijing Declaration and Platform of Action	73
3.3.10. The United Nations Conference on Population and Development,1994	74
3.3.11 The Vienna Declaration and Program of Action ,1993	74
4.0 The African region Instruments	74
<b>4.1 The African Charter on Human and peoples Rights(1981)</b>	<b>74</b>
<b>4.2 The African Charter on the Rights and Welfare of the Child</b>	<b>76</b>
<b>5.0 Conflict Between Female Genital Mutilation culture and universal Human Rights</b>	<b>77</b>

## **CHAPTER FOUR: THE LAW AND PRACTICE OF FEMALE GENITAL MUTILATION IN TANZANIA** **79**

<b>4.1. Introductory Remarks</b>	<b>79</b>
4.1.1.Legal and Social Norms Distinguished	79
<b>4.2 National Legal Framework On the Practice of FGM</b>	<b>81</b>
4.2.1 The Constitution of the United Republic of Tanzania, 1977	81
<b>4.2.4.The Sexual Offences Special Provisions Act, 1998</b>	<b>84</b>
<b>4.3 Other Laws Relevant To The Practice Of FGM</b>	<b>94</b>
4.3.1. The Law Of Marriage Act,1971.	95
4.3.2. Health Practitioners Legislation	96

4.3.2.1 The Medical Practitioners and Dentist Ordinance, Cap, 407	97
4.3.2.2 The Nurses and Midwives Registration Act	97
<b>4.3.3.The Education Act,1978.</b>	<b>98</b>
<b>4.3.4 The media Laws:The Newspaper Act ,1976 and The Broadcasting Services Act,1993</b>	<b>98</b>
<b>4.3.5.Policies If Any</b>	<b>99</b>
<b>5.0 CHAPTER FIVE:CONCLUSIONS AND RECOMMENDATIONS</b>	<b>102</b>

## Abbreviations

FGM	Female Genital Mutilation
UNICEF	United Nations Children
UN	United Nations
WHO	World Health Organisation
ICCPR	International Covenant on Civil and Political Rights
CEDAW	Convention on the Elimination of Discrimination Against Women
UDHR	Universal Declaration of Human rights
ICESR	International Covenant on Economic Social and Cultural Rights
CRC	Convention On the Rights of The Child
SOSPA	Sexual Offences Special provisions Act
Vs	Versus
R	Republic
UNFPA	United Nations Fund for Population Agency
ACHPRs	African Charter on Human and Peoples Rights
TDHS	Tanzania Demographic and Health survey
CCT	Christian Council of Tanzania
NGOs	Non Governmental organisations
AFNET	Anti Female Genital Network
UNHCR	United Nations High Commissioner for Refugees
UNGAR	United Nations General Assembly Resolutions
LHRC	Legal and Human rights Centre
TAMWA	Tanzania Media Women Association
TAWLA	Tanzania Women Lawyers Association
IAC	Inter African Committee
PRSP	Poverty Reduction Strategy Paper
MDG	Millennium Development Goals
JANDO	Male Circumcision
UNYAGO	Initiation
TOHARA	Female Circumcision
TBA	Traditional Birth Attendants
NGARIBAS	Traditional Circumcisers or mutilators

## Summary

This study is an attempt to examine the law and practice relating to female genital mutilation in Tanzania. In the course of writing this work, attention is paid to the difference between enforcement of legal and social norms, as this is important in any fight against the deeply entrenched harmful traditional practice of Female Genital Mutilation. In dealing with this problem, the usefulness of using the law is addressed while bearing in mind the old adage which says that” *changing the law is easier than changing the society*”, as this saying is apposite in this subject. The regulatory role of the law has always been recognized, what is less clear is whether law is an appropriate tool to tackle practices that are deeply rooted in social, cultural or religious traditions .The answer to the conundrum has varied over time. Early colonial attempts to ban the practice have met with local resistance and generally failed to bring about an end to the practice. (See chapter two of this work) Post independence initiatives have had mixed results. The reasons for this are explored in this work. (See chapter two, four and five of this work)

Secondly, this work treats the subject from both national and international human rights perspectives. In addressing the above aspects, this work is divided into five chapters:

Chapter one is basically a research proposal, containing components such as background to the problem, statement of the problem, aims, objectives, scope and significance of the study. Literature review and the need for additional study are also included in this part.

Chapter two takes care of the practice of Female Genital Mutilation in Tanzania, providing some insights on the conceptual framework of the topic, Its historical origins worldwide and types practiced world wide and in Tanzania, the actual situation of the practice in the country including reasons for the practice and its effects on the victims.

Chapter three surveys into the international law instruments on FGM, attempting to look at the topic as a human rights issue. Examination and assessment of Tanzania’s obligations under international law also feature in this part.

Chapter four seeks to examine the law and practice relating to FGM in Tanzania, it analyses the national legal framework on the topic to see whether it is an appropriate tool for the eradication of the practice, whether laws are adequate or not in addressing the problem, both advantages and disadvantages of using the law will be assessed at the same time giving solutions for proper application of the law.

Recognizing that the law has a limited role to play in addressing the problem of FGM, chapter five provides for conclusions and recommendations towards effective eradication of the ritual and changing of

the societal attitudes by using the best and most cited tool i.e. education and other relevant strategies.



# CHAPTER ONE: Introduction

## 1.1 Background to the Problem

*“Female Genital Mutilation is not a disease per se  
But a complex social practice”<sup>1</sup>*

The customary practice of female circumcision or female genital mutilation hereinafter to be referred to as FGM has attracted much attention in the international and national policy arenas in the past decades. One of such issues that have been paid attention to is the role if any, of legislative action against a pervasive social practice that is strongly linked to cultural norms and beliefs. While history tells us that legislation alone cannot change social behaviour<sup>2</sup>, it remains to be seen whether the recently enacted anti FGM laws have arguably created a role for legislation.<sup>3</sup>

The practice is a long-standing one and deeply-rooted in the societies that have succumbed to it. It dates back hundreds of years and is still widely practised in many African countries. At one point in time, it was a sensitive issue that used to divide the world into two camps; the industrialised countries which tried to eradicate a tradition perceived as brutal, backward and inhuman (as it is portrayed in the boulevard press) and the African societies trying to defend and preserve a tradition which was perceived essential for their cultural identity and social cohesion<sup>4</sup>.

It is a ritual, which continues in certain cultures, due to the tradition and beliefs of the people in the cultural community. For example, various types of FGM are still practised in various countries of the world: Infibulation occurs in Sudan, Nigeria, Egypt and Somalia<sup>5</sup>. Excision is performed from the west coast of Africa, Mauritania and Guinea, to the east coast in Egypt Ethiopia and Tanzania. Indigenous groups in Mexico, Brazil, Peru and Colombia also practice it<sup>6</sup>. Moreover, through immigration, the practice of FGM has moved into countries where the practice is stringently opposed. There have been reports of circumcision in the United States, Canada Australia, England, France and Italy by African immigrant populations<sup>7</sup>.

---

<sup>1</sup> Dorkenoo, E, *Cutting the Rose: Female Genital Mutilation: The Practice and Its Prevention*, Minority Rights Group, London, 1994.

<sup>2</sup> See chapter one pg 15 and chapter two of this work

<sup>3</sup> See chapter four of this work

<sup>4</sup> [www.sdc.health.ch/priorities-in-health/reproductive-health-female-genital-mutilation..accessed](http://www.sdc.health.ch/priorities-in-health/reproductive-health-female-genital-mutilation..accessed) on the 30<sup>th</sup> September 2004, See also Ahlberg, B, *Female Genital Mutilation*, SIDA, Stockholm, Sweden, 1998, The author states that “*The conflict for example flared between western feminists and African women during the second UN conference on women in Copenhagen in 1980 can be understood in this context. When western feminists brought up the issue of FGM at the conference, there was a walk out by African women who insisted that their problem was not FGM or sexuality but rather lack of Development*”

<sup>5</sup> Dorkenoo, E op cit, pg, viii-x

<sup>6</sup> *ibid*

<sup>7</sup> *ibid*

The problem is not easily controlled, while reasons for practicing FGM vary; the outcomes are clear and well documented<sup>8</sup>. Despite all these, it remains to be one of the most protected cultural practice in Africa and Tanzania in particular.

Today, positions have opened up on both sides and FGM is rapidly becoming an issue to be addressed in several nations around the world, not just the countries where the practice is said to have originated. International law<sup>9</sup> and international organizations<sup>10</sup> consider FGM to be a violation of human rights of women and of the girl child. The same has also been recognized as a form of gender based persecution<sup>11</sup>. The rights violated include among others; the right to health, body integrity, right to life, right to education as the girls undergo FGM and marry soon. Being the case the UN and many other International bodies, governmental and non governmental bodies are actively calling for the eradication of the practice, For instance in 1990's the Convention on the Elimination of all forms Discrimination Against Women Committee issued General recommendations no 14 and 24 respectively, calling upon all states to take measures within their countries in order to eradicate traditional harmful practices like FGM which are prejudicial to the health of women and children<sup>12</sup>.

However, one of the hesitations on the international community in dealing with this issue, was the fact that the practice of FGM is so tied into deeply rooted cultural and social values and standards .The international community in struggling with the conflict between human rights and culture, reached to a conclusion that human rights are supreme.<sup>13</sup>

Having stated so, it is pertinent to note that; Tanzania is one among the countries where FGM is practiced and has also been actively calling for its eradication. Tanzania has ratified several international and regional conventions condemning FGM, in her effort to conform to international obligations and standards pertaining to the protection of women and

---

<sup>8</sup>WHO, Female Genital Mutilation: Report of a WHO Technical working group, Geneva, 1996, pp-2-3

<sup>9</sup> CEDAW, ICCPR, CRC, ESCRs, ACHPRs, Declaration on the elimination of violence against women, G.A.Res48/104,48,UNGAoRSupp (no 49 at 217.UN.Doc.A/48/49 1993,Beijing Declaration and Platform for Action Adopted by the fourth world conference on women: Action for equality, Development and peace, Beijing, 15 September 1995,Para 41 and 95.

<sup>10</sup> UN, WHO

<sup>11</sup> See Fauziya Kasinga's case I&N December no 3257 at 132 (B.I;A)June 13 1996,see also UNHCR documents on "*membership of a particular social group*" criteria at [www.unhcr.org](http://www.unhcr.org) ,

<sup>12</sup> See also The Implementation of the Human Rights of the Women: Traditional Practices Affecting the Health of Women and children,: follow up report of the Special Rapporteur on traditional practices affecting the health of women and children ,Mrs Halima Embarek Warzazi ,E/CN.4/sub.21/1997/10,25 June 1997

<sup>13</sup> Legal and Human rights centre Report on the Findings of the research into the practice of FGM in Tanzania, Dar Es salaam Tanzania, august 1999

children 's rights, it signified its political will by enacting the law that criminalises the practice of FGM. The relevant law is Sexual Offences Special Provisions Act<sup>14</sup> which is also the subject of assessment in this dissertation. The enactment of this law shows a commitment by the government to human rights principles embodied in the Constitution of the United republic of Tanzania<sup>15</sup> and the recognition that the practice of FGM is a violation of human rights. The intention of the government for enacting this law is spelt out in the objectives and the reasons of the law contained in the bill that was tabled to the parliament to be among others: that of enhancing the nation and protecting the rights of children and women to personal integrity, dignity and liberty.

These changes need to be appraised since previously FGM was not a criminal offence. A person causing FGM was charged under the offence of causing Grievous Bodily Harm<sup>16</sup>, this could mean anything from beating to any type of injury including FGM. It is clear that the Penal Code was not explicit in providing that FGM is a criminal offence.

Furthermore, under the Tanzania's Poverty Reduction Strategy Paper, the country is geared towards fully implementation of the said law, it being one of the activities to be undertaken for the 2015 period. Already some workshops on national plan of action for combating violence against women of which FGM is inclusive have been conducted under the auspicious of the PRSP Programme.<sup>17</sup> Moreover FGM, though not well mainstreamed in the Millennium Development Goals, the country has noted that FGM is one of the challenges that would undermine its attempts to meet such goals especially on the area of reducing the maternal mortality rate and increasing access to reproductive health services<sup>18</sup>.

It is however evident that, despite all these efforts, the changes in the law and its penalties being in force, FGM practices still continue in the country, there is evidence from several studies that the age for FGM has gone down to involve mutilation of children as young as a month old.<sup>19</sup>

---

<sup>14</sup>Also referred to as Act no 4, enacted in 1998, see section 21(1) and (2) for the wording of the provisions, this section is an addition to section 169 A of the penal code cap 16 of the laws

<sup>15</sup>Enacted in 1977, also referred to as Act no 15, for human rights principles see articles 12, 13 and 14. Under the bill of rights.

<sup>16</sup> Section 225 of the penal code cap 16 of the laws of Tanzania

<sup>17</sup> See the United Republic of Tanzania: Poverty reduction strategy, The Third Progress Report 2002/3 Dar es salaam, Tanzania March 2004, posted on the website: [www.Tanzania.go.tz/pdf](http://www.Tanzania.go.tz/pdf), accessed on the 30<sup>th</sup> of September 2004

<sup>18</sup> [www.Undp.org/mdg/Tanzania/pdf](http://www.Undp.org/mdg/Tanzania/pdf), accessed on the 30<sup>th</sup> of September 2004

<sup>19</sup> LHRC Report op cit pg 12

## **1.2 Statement of the Problem**

Despite the existence of the national legislation<sup>20</sup> and ratified international instruments<sup>21</sup> prohibiting FGM in Tanzania, the deeply seated cultural and traditional values and standards that support the practice are very strong and deeply entrenched in the societies practicing it. FGM is still attended by high incidence of medical and social implications for the communities that practice it. It is a harmful traditional practice which no individual should have to go through, It is an unnecessary, widespread practice embedded in social values, beliefs and culturally defined norms that violates women's rights, example those related to sexual and reproductive health. These beliefs have been found to be factually untrue.

From the foregoing statement, the issues under investigation are:

- i) Is the law adequate or inadequate?
- ii) If the law is adequate what are the factors that cause FGM to continue and make the law ineffective
- iii) If the law is inadequate what are the sources of the factors that make the law ineffective in eliminating FGM
- iv) What legal solutions are there to remedy the situation?
- v) Are there any other effective solutions other than legal solutions?

## **1.3 Aims and Objectives of the Study**

Relating to the statement of the problem, the study aims at ascertaining the nature of the problem of FGM in Tanzania. It treats the subject matter from both international and national viewpoints, by doing so much emphasis is put on:

- i) The problem and effects of FGM in Tanzania
- ii) Assessment of the effectiveness of the above-mentioned laws to prove whether they really protect women and children from FGM practices, the study will determine whether the law adequately addresses and benefits the intended victims of FGM
- iii) The study will investigate the ineffectiveness of the law and identify the causes for such ineffectiveness.

---

<sup>20</sup> Sexual offences special provisions act.1998

<sup>21</sup> CEDAW, CRC, ICCPR, CESR, ACHPRs

Therefore the main objectives of this study are as follows:

- i) To unearth measures other than the above-mentioned legal aspects which have been taken towards eradication of FGM.
- ii) To find out and understand reasons that have facilitated the continued practice of FGM despite various efforts aimed at its eradication.
- iii) To reveal the forms or types of FGM practiced in Tanzania and its effects thereto
- iv) To recommend new strategies which could facilitate the total eradication of FGM

#### **1.4 Literature Review and The Need for Additional Study**

The literature review will base or rather depend on the literature from Tanzania and outside Tanzania. The review will be sort of general and where possible it will be reviewed along the basis of pro legal, non-legal and medical schools of thought.

Having stated so, it is pertinent to note that a great number of scholars including those in Tanzania have written on the topic of FGM, however in their literature some concepts are either not addressed at all or not well addressed. They have for instance: mostly discussed on the nature of the problem of FGM, its effects on the victims, measures of eradicating the problem by different organizations as well as some other concepts regarding the same. In this work I have tried to review some of the available literature and considered the arguments made .It is my intention to fill the gaps found and hence be able to justify the need for an additional study on the topic in Tanzania.

As regards the schools of thought, **The non legal school of thought** favors the non legal measures such as education in eradicating FGM, **The pro legal school of thought** gives primacy to legal measures in the eradication of FGM and **The medical school of thought** insists on medicalization of the practice to reduce the harm caused. All schools of thought provide an important insight into the problems involved in understanding, combating and or maintaining the practice of FGM.Literatute in all schools of thought agree that the practice is associated with cultural and religious aspects though the latter aspect is a matter of debate.

Supporting non-legal school of thought, are the following authors: **The Legal and Human Rights Centre Report**<sup>22</sup>, provides for among other things the findings of FGM practice for about eight practicing regions in the

---

<sup>22</sup> LHRC report, op cit page 5 and pg 38

country, States in its report that most people in such regions are not aware of the law on FGM, commenting on the aspect of people's awareness and use of law in eradicating the problem, the report state that:

*“It is probably fair to say that in most regions more information is required about the law ...passing a law will not change the tradition and that the cultural basis for the practice is so strong in some areas that passing a law will have no effect unless they can be convinced through education that stopping FGM does not have to hurt the integrity of their culture”*

The report goes further to state on the use or rather importance of using education in order to eradicate the problem of FGM  
It sates that:

*“The mere passing of the law is not enough .The deep seated cultural and traditional values and standards that support the practice are very strong that the mere passing of a law to eradicate it will be ineffective unless combined with educational campaigns”*

The report apart from putting more emphasis on the use of education /sensitization rather than law, it never suggested ways through which such education will be conveyed, it is part of my research to suggest these ways. Secondly it completely left other legal aspects untouched, for instance it has only looked on the issue of the awareness of the law on the part of the public only, leaving out issues touching on the efficacy and or effectiveness of the law on FGM itself or other relevant laws .It is the intention of my study to fill this gap by highlighting those other aspects of the law.

Supporting the above non-legal school of thought are other authors such as:

**K.iwasila**<sup>23</sup> in her research, while asserting the importance of law, she insists that this law has to be supported by health education, education on human rights and legal awareness.

**The institute of adult education**<sup>24</sup> in its book the findings reveal that t about 84 million women in Africa including Tanzania are genitally mutilated. Several suggestions in addressing the problem were recommended but the most popular methodology proposed by the majority of respondents was popular education on FGM.However, the book does not in turn specify how the same should be conveyed or applied. It was written and edited by doctors and so they took a social -medical perspective in addressing the issue, legal aspects were not addressed at all. This study will supplement this book by addressing among other things legal issues on the matter since it is a combination of both social and legal work.

---

<sup>23</sup> Kiwasila, H, L, op cit, p.124\_125,she states that, In the absence of it, girls mutilated cannot sue their parents or relatives who subject them to the practice or parents whom their daughters are mutilated against their will cannot sue their elders or relatives due to the lack of legal basis.

<sup>24</sup>Madhara ya kutahiri wananwakeTaasisi ya Elimu ya Watu Wazima, Dar Es Salaam, 1990.

**Jessica Nkuuhe**<sup>25</sup> proposes that while legislation is one tool that could be used to fight FGM, it is not considered the best especially where it cannot be translated into firm commitment and action. Besides it may simply drive the practice underground making it even more difficult to eradicate .she comments that law should not be left alone to combat the practice it should work together with maternal and child health programs.

**Ogiamen** In his book states that: Education awareness on the evils of FGM is a prerequisite to formulation of any legal sanction to prohibit it. He insists On regulatory method rather than an outright ban, in order to avoid the experience of the past Kenya and Sudan, where upon the enactment of the law to ban the practice there was a mass outcry resisting the operation of the law .He sees that, such a regulatory scheme help to easy the tension over the customary practice of FGM, before prohibitory measures can be successfully implemented. Without educational regulatory scheme, the practice of FGM will remain to be a continuing source of flourishing debate<sup>26</sup> .

It is obvious that, although **Ogiamen** prefers a regulatory method, on the other hand he is suggesting that the law or legal measures are necessary in the eradication process of FGM; however, the initial policy of educating women, circumcisers and others involved at grassroots level remains at the forefront as prerequisite .Law will take care of its prohibitory function after the people have been educated and made aware of the essence and the need to eradicate FGM.

**The Anti Female Genital Mutilations Network Report** <sup>27</sup> is yet another work that falls on the non-legal school of thought. It contains research information on FGM in Tanzania for about five practicing regions that were studied. Among the reasons advanced in almost all regions for practicing FGM are; culture, social recognition, control of sexual desires, treatment of diseases such as lawalawa and assurance of marriage. Nowhere in the report these reasons have been argued to be whether factually true or untrue, it is the intention of this study to analyze the reasons for practicing FGM in Tanzania to see whether they have any scientific and or factual back up.

---

<sup>25</sup> Nkuuhe, J, Female Genital Mutilation: Legislation alone does not help #women's world "ISIS no 28,1995 pg 8-10

<sup>26</sup> Using the proposition of educational awareness, the legislators are required when enacting the law to combat FGM to take into consideration all actors in the process of mutilation and educate them from the family to other members outside the family. Since FGM is a mutual consent among the participants, there are no litigants and the issue cannot be resolved thru private law.

<sup>27</sup> Also referred to as AFNET, Report on the situation of FGM in Tanzania: A study of five regions published by AFNET Dodoma, Tanzania June 2004

**Gayle, B**<sup>28</sup> argues in his work that in practice genital mutilation of women is an attribute to culture. Under the principle of customs in many societies, women are to be circumcised not because they are interested, but simply to cope with culture. Generally they are seen as voluntary participants in this process but practically this is not ironical. It is the obligation of the respective governments to rid their societies out of this ritual. However, he does not suggest the proper ways in which governments can use to fulfil the argued task. In this study, the gap will be filled by giving the views on how the government can help in the eradication of this harmful practice or otherwise suggest some other alternative means of retaining peoples customs without prejudice to the laws of the land.

On the other hand the following authors support the **pro legal school of thought**:

Supporting this school of thought are first and foremost efforts of the colonial masters who enforced legal measures in eradicating FGM. The first attempt was by the Catholic Church in Egypt. **Sanderson** reporting on this attempt from Bruce's travels, describes that, the Roman catholic priests, forbade excision among the Coptic women, excision was forbidden to children of parents who had become Catholics. If they continued with the practice they were punished by not getting communion. The converts obeyed. But when a girl married, a man found by choosing a wife among the coptics, he subjected himself to a very disagreeable inconvenience and at the end the marriage broke down. For the church did not want to hurt the institution of marriage. They gave away the attempts hence the Catholics as well as coptics in Egypt continued to undergo excision.

In Kenya, there was an effort to eliminate the practice by the Church of Scotland Mission and the church missionary society (CMS) of the Anglican denomination. In 1926 the right to bring legal action against forced excision was passed. This led to a considerable opposition from the Kikuyu who associated Christianity and the campaign with imperialist control. The opposition was further supported by Kenyatta, the then president of Kenya. He maintained that tribal customs should be perceived in a way that recognized the practices that were crucial to the integrity of the Kikuyu society. They thought that the custom would die out gradually without using the law. Eventually the operation of abolishing the custom using the law in Kikuyu society failed.

In Sudan, attempts were made to abolish excision and infibulation. Teachings were made in both boys and girls schools. Trained women were sent to some outlying villages and towns to teach against the practice. Political, religious and legal leaders advised against mutilation, doctors reported medical results but there were no positive response from the people. In 1946, the government passed legislation against excision and infibulations

---

<sup>28</sup> A feminist perspective "A Human rights Quarterly Review, the Hopkin University press, 1985, vol 17, no3 pg 409



This was section 234 of the Sudanese penal code. Before the law was about to be passed people hurried their little daughters to be mutilated because they feared that the practice was going to be abolished before their daughters were mutilated, These measures were counteracted by local ethnic groups who to date pursue FGM as part of their culture.

**Ogiamen** suggests that, in order to achieve elimination of FGM, attention must be paid to the kind of law that affects or is likely to affect the practice, the circumcised, the operator or circumciser, the parents and other participants. According to him, eradication of female circumcision can be made possible if those who carry out the procedure are legally identified, officially recognized and given a quasi-professional status. I agree with him on this aspect and to go with his arguments are the provisions on the law on FGM in Tanzania<sup>29</sup> these were enacted as one of the legal measures in order to prohibit the practice in Tanzania, I argue in my study that though these sections were meant to outlaw FGM they are inadequate in several ways and need some review, as will be seen in chapter four of my work. There is a clear lesson here that legal measures or laws per se are necessary but not sufficient for behavioural change, other more factors have to be considered and taken care of.

Regarding the **medical school of thought**, **Shell-Duncan, B**<sup>30</sup> reviews the controversy surrounding medicalization of FGM through the lens of the new paradigm in the field of public health known as "harm reduction." This approach focuses on minimizing the dangers associated with unhealthy behaviours, such as intravenous drug use and high-risk sexual behaviours. Thus, although much of the damage inflicted by FGM is permanent, the author proposes using medicalization as a means to address the unsafe conditions under which FGM is typically performed.

This study departs from this school of thought because, the ultimate question is not which procedure should take place, but what kind of a medical system or public health policy condones the cutting away of part of the human body for no beneficial reason, this would serve to institutionalising circumcision of women and to introduce a monetary incentive. How can health professionals justify the risk that any kind of surgery entails, purely for the purpose of gender subjugation and perpetuation of social injustice?

Furthermore **on non-medicalization** of FGM, see the work of **Rebecca; Dickens and Mahmoud**<sup>31</sup>

---

<sup>29</sup> Sexual offences special provisions act, 1998,s.21 (1) and (2).

<sup>30</sup> Shell, Duncan, B, The medicalization of female "circumcision:" harm reduction or promotion of a dangerous practice? *Social Science and Medicine* 52(7): 1013–1028 (April 2001).

<sup>31</sup> R, Cook, C, Dickens, F, Mahmoud (eds), *Reproductive health and Human rights, Integrating medicine, ethics and law*, Clarendon Press, Oxford, 2003,267p,see also The International Federation of Gynaecology and Obstetrics' (FIGO) General assembly Resolution adopted in 1194 against FGM. The state interalia that: "*The profession remains unpersuaded by the fact that in some cultures the procedure is considered*

Lastly is the review of the following book along the lines of legal and human rights aspects.

**Rahima and Toubia,**<sup>32</sup> acknowledge that, law can play a positive role in efforts to change culture, more often however, their comments on the role of law in social change are peppered with reservations and concerns which at times clearly indicate the view that law does not always have a positive role to play. Their fundamental premise, that legislation alone can never be effective in ending FGM, has great merit, education and other outreach initiatives are an integral component of any successful strategy, Yet the critical role that law can and should play in such a strategy is somewhat discounted by the authors, though law is not enough to change the communities, it should be seen as an essential rather than optional component of any larger strategy. Law has a role to play, whether that role is limited, adequate or inadequate is another issue to be argued upon.

Furthermore, in their analysis of international law, the authors are similarly hesitant to employ a human rights framework to the fullest extent. In discussing FGM as an act of violence against women, for example, the authors dismiss the relevance of the Convention Against Torture and Other cruel Inhuman and Degrading Punishment by focusing on the word “intentionally” in the definition of torture in the convention, which provides that:

*“ Any act by which causes severe pain or suffering ...is intentionally inflicted on a person for purposes inter alia of discrimination”*

This would seem clearly applicable to FGM in cases where failure to criminalize or other government inaction could be said to give rise to official acquiescence. The authors argue that because the pain and suffering are not inflicted solely to cause harm, but rather by well meaning parents who want social acceptance for their daughters, the definition is not applicable. The practice of FGM is clearly intentional even if it is not done with intent to cause harm. The creation by the authors of an exception justifying a perceived greater good falls outside the human rights framework in which they are positioning FGM. It is my opinion that whether it be done by consent or without consent, the same should be outlawed completely because it can never be validated by the requirement of consent,

---

*beneficial and described as purification, perhaps because of this inference of this description that women and girls not subjected to it are in some ways impure. Accordingly the ethical opinion of organized medicine is that physicians and health facilities should not participate in this procedure since it implicates health care providers in a procedure of unrelieved harm.(underlining is mine)*

Furthermore performing any type of FGC is in fact an approval of the practice of societal control of women’s sexuality and an affront to women’s bodily integrity and dignity of the person”<sup>31</sup>.

<sup>32</sup> Rahima, A and Toubia, N, op cit p

even if consent is given it does not negate the fact that there has been a violation of human rights.

### **1.5 Significance of the Study**

Throughout this study, I hope to unveil the law and practice of FGM in Tanzania, various means of educating the society about the problem in question and the law governing the same will be suggested in the research, this will create awareness in the society on the topic .The work will also be a legal input for the welfare of children and women, it will supplement the available literature which had not focused on the law and had not looked at FGM as a human rights issue worth of promotion and protection .

Furthermore, since this thesis constitutes applied research, it will provide analysis and possible strategy for reform that can be applied as a blue print for future legal and non-legal reforms regarding FGM in Tanzania. Moreover being a legal research the study will be of great use to future researchers, scholars, the legal practitioners, legislators, as well as law enforcement officers and intellectuals in discharging the legal duties since it is intended to come up with some concrete and reasonable ideas about not only the enforcement of the law dealing with FGM but also what is to be done with regard to other relevant laws and non legal factors which are related to the topic.

### **1.6 Scope and Limitation of the Study**

The study limits itself to Tanzania mainland, it should be highly noted that the United Republic of Tanzania is a union of two countries i.e. Tanzania mainland and Zanzibar island<sup>33</sup> .For purposes of this study, this topic will be exclusively limited to Tanzania mainland for several reasons ranging from accessibility to sources of information and data and also due to the fact that Zanzibar has its own separate judiciary and legislature, these are also referred to as non union matters<sup>34</sup> . Therefore covering the two countries would have been another topical issue. The study is also limited to national and international laws that are relevant to the problem in Tanzania.

---

<sup>33</sup> See section 2 of the United Republic (Declaration of name) Act no 61 of 1964,see also Act no 22 of 1964 Cap 557,articles of the Union and Shivj, I (1990) The legal foundations of the Union in Tanzania's union and Zanzibar constitutions" being a professional Inaugural lecture delivered at the University of Dar es salaam, Dar es salaam University press, 1990

<sup>34</sup>The union was constituted by signing of a treat called the Articles of Union by the respective heads of state, Mwalimu Nyerere and Karume; it was ratified by the respective legislative bodies and became part of the municipal law called the Acts of the Union.

See also article 4 of the Constitution of the United Republic of Tanzania.

## 1.7 Hypothesis

The hypothesis is to assist the researcher in directing one's thinking towards the solution; therefore several assumptions have been formulated as follows:

i) That despite the existence of the law against FGM in the country, the practice still persists because people regard it as one of the cultural ethos of societies, therefore, understanding the difference between enforcement of legal and social norms is a prerequisite when dealing with the issue of eradicating a traditional harmful practice of FGM.

ii) That the use of legal sanctions alone though important, it is insufficient to curb the problem of FGM practice that is deeply rooted in social cultural fabrics

iii) That sexual offences special provisions act 1998 has weaknesses (lacuna) which may hinder the achievement of the intended goal of protecting both women and children from FGM practices

(iv) People in areas where FGM is practiced are unaware of the existence and or contents of the laws and state policy initiatives against FGM practices.

iv) Many people in areas where FGM is practiced do not know the possible side effects that the practice has on women and children

v) Most of the victims of FGM practices are children and therefore they cannot pursue their rights in court without the use of legal aid services

vi) That adherence by states to human rights obligations is a prerequisite towards effective protection and promotion of women and children's rights against the pervasive social practice of FGM

## 1.8 Research Methodology.

The essence of the methodology is to work as a matter of necessity to come up with valid and reliable findings. With the financial assistance (return air ticket) received from my sponsors the **Swedish Institute**, upon recommendation by my supervisor **Prof Katarina Tomasesvki**, the research work specifically data and information collection were conducted in Dar es Salaam Tanzania.

This was due to the fact that there are few written sources on FGM about Tanzania in Sweden; a number of written sources are available in

Tanzania.<sup>35</sup> Therefore going back to Tanzania was an opportunity for me to access various reports, books, papers, articles, journals, cases and other relevant information on the practice in the country. While in Tanzania i took fullest advantage of substantial written materials mentioned above. Thus visiting various libraries took substantial part of the time devoted to the study in Tanzania, in particular I managed to visit the University of Dar es salaam Faculty of Law Library, Tanzania Media Women Association .The Tanzania Gender Networking Program Library, The Legal and Human rights Centre Library, Tanzania Women Lawyers Association and The UNICEF Library -Tanzania Head office.

Furthermore I managed to have unstructured interviews and discussions with various officials within and outside the Government. Their names are as hereunder.

1. Mr A.M Muhungutwa- Assistant Director Family development Division from the Ministry of Gender children and Development

2.Harold Sungusia-

\* Dotto Justo-

\*. Lulu-

\*Kaleb Gamaye-

All legal Officers at The Legal and Human rights Centre (NGO)

3.Mr Steven Ngowi Regional crimes officer (Morogoro Region.)

4.Dr L.Steven Gynaecologist from the Muhimbili medical Centre

It was an opportune time for me because I managed to combine both desk and practical information on the subject, Secondly I was able to access most, if not all the relevant information and literature i needed for the study, without which my work would not have been the way it is now.

Lastly and most importantly, I have also taken advantage of the existing relevant information in the RaoulWallenberg Institute 's Library<sup>36</sup>. This is also where the biggest part of my work has been typed.

---

<sup>35</sup> The Most recent Report by AFNET on the Situation of FGM in Tanzania; A study of five regions which was just out in June 2004 at the time when I went home for my study, The Legal and Human rights centre Report on the Findings of the research into the practice of FGM in Tanzania, Dar Es salaam Tanzania, august 1999,<sup>35</sup>Madhara ya kutahiri wanawakeTaasisi ya Elimu ya Watu Wazima, Dar Es Salaam, 1990,<sup>35</sup> Nkuuhe, J, Female Genital Mutilation: Legislation alone does not help #women's world "ISIS no 28,1995 pg 8-10,<sup>35</sup> Report of Inter African Committee on traditional practices affecting the health of women and children : Report on follow up symposium for religious leaders on violence against women with emphasis On FGM 20-22 august, Arusha, Tanzania Information obtained at the UNICEF resource center in Dar es salaam, Sheikh\_hashim, Leila, Unyago\_Traditional Family Life Education Among the Muslim, go,Seguju,,Bondei,Sambaa and Zigua of Tanga Region,TAMWA funded by DANIDA,Dar es salaam ,Tanzania1989

<sup>36</sup> See the bibliography part of this work

## CHAPTER TWO: The practice of Female Genital Mutilation in Tanzania.

*"I was taken to a very dark room and undressed. I was blindfolded and stripped naked ...I was forced to lie flat on my back by four strong women, two holding tight each leg. Another woman sat on my chest to prevent my upper body from moving A piece of cloth was forced in my mouth to stop me screaming .I was then shaved. When it began I put a big fight .the pain was terrible and unbearable. During this fight I was badly cut and lost blood .all those who took part were.... half drunk with alcohol."*<sup>37</sup>

### 2.1 Introduction

This chapter seeks to unveil the actual problem of female genital mutilation in Tanzania; it is intended to give some insights on the conceptual framework of the topic at the outset in order to clarify the context within which the concept of female genital mutilation shall be used. Secondly, it will provide for its historical origins, the prevalence rate, reasons for the practice and its effects thereto.

The United Republic of Tanzania, a country of approximately thirty-three million inhabitants located in East Africa, was formed on the 26<sup>th</sup> of April 1964 by the adoption of an Act of Union between Tanganyika and Zanzibar.<sup>38</sup> The population consists of more than 130 ethnic groups, virtually all of who speak Bantu languages. It is a multicultural as well as multireligious society, and although predominantly rural, it has some modern sectors. Poverty is widespread and the bulk of society remains traditionalist when it comes to gender issues.<sup>39</sup>

Traditional cultural practices reflect values and beliefs held by members of a community for periods often spanning generations. Every social grouping in the world has specific traditional cultural practices and beliefs, some of which are beneficial to all members while others are harmful traditional practices. These include: *female genital mutilation*, nutritional taboos, and son preference and dowry practice. As one of the sub-Saharan countries, a number of its women and girls have been affected by the above-cited quotation on the traditional practice of FGM. More than 20 percent of the 130 ethnic groups practice FGM; the practice is almost non-existent in Zanzibar.

---

<sup>37</sup> [www.Amnesty.org](http://www.Amnesty.org), accessed on 20<sup>th</sup> of March 2004

<sup>38</sup> For legal provisions See chapter one page 15

<sup>39</sup> [www.frol.com/categories/women/profiles/Tanzania\\_women.htm](http://www.frol.com/categories/women/profiles/Tanzania_women.htm), visited on the 17<sup>th</sup> of September 2004. See also [www.state.gov/documents/organisation/9424.pdf](http://www.state.gov/documents/organisation/9424.pdf), Tanzania has a population of 32,844,350 Million, More than half constitutes women <sup>39</sup>

## 2.2 Definition of Female Genital Mutilation

Female genital mutilation, also referred to as female circumcision or female genital cutting, comprises of all procedures involving partial or total removal of the external female genitalia or other injury to the genital organs whether for cultural or other non-therapeutic reasons. The procedures are irreversible and their effects last a lifetime<sup>40</sup>. The female external genitalia are composed of the clitoris and clitoral prepuce, the labia majora (large lips of the vagina) and the labia minora (small lips of the vagina).<sup>41</sup> In the language of the UN<sup>42</sup> it is considered as one form of violence against women i.e. gender based violence.

The international community adopted the terminology FGM,<sup>43</sup> in the past decade because it clearly indicates the harm caused by the practice. Prior to its adoption the term female circumcision was used. In Tanzania, the Swahili term “TOHARA” meaning circumcision was used in the past but now the term “UKEKETAJI” (mutilation) is used to depict the practice. This change has come up because of the reason explained above. The latter sounds much more harmful and depicts better the practice than the former and that is why it is not even preferred by the practising communities. **Rahman** and **Toubia**<sup>44</sup> clarifies that, although the term female genital mutilation has been a very effective policy and advocacy tool, organisations working with communities that practice FGM have found that this term can be offensive or even shocking to women who never considered the practice a mutilation. Therefore out of respect and sensitivity, many organizations have opted to use local terminology or more neutral terms such as female circumcision or female genital cutting when working with these populations.

In this study, the term FGM has been adopted for the reasons stated above, except when quoting other documents or when trying to make clarifications resort will be made to other terminologies such as female circumcision.

---

<sup>40</sup> WHO fact sheet, female genital mutilation, April 1997

<sup>41</sup> Boulware-Miller, K? Female circumcision: challenges to the practice as a human rights violation “Harvard’s women law journal, 8, pp 1555-157, 1985

<sup>42</sup> See UN general Assembly Resolution adopted in 1993 on violence against women. The definition of violence against women includes FGM and other traditional practices harmful to women and children.

<sup>43</sup> For instance WHO, InterAfrican committee on Traditional practices affecting the health of women and children, several UN conferences documents use this term, eg, 1994 Cairo conference, 1995 World summit for social development in Copenhagen, Copenhagen Summit, Beijing conference, it has also been widely adopted by a number of women’s health and human rights activists.

<sup>44</sup> Rahman, A and Toubia, N, op cit

### **2.2.1 Types of Female Genital Mutilations (General overview)**

While procedures differ greatly according to such factors as ethnic groups and geographic regions, they can be grouped broadly into four categories, as established by the WHO<sup>45</sup>.

**TYPE 1**, Usually known as **Clitoridectom**; Involves Excision of the prepuce, with or without excision of part or the entire clitoris, it is also commonly referred to as **circumcision**. In Muslim countries, this type is also referred to as sunna which means tradition<sup>46</sup>. Dorkenoo,<sup>47</sup> comments on this type that it is the only type of mutilation which can at least equated to circumcision, as there is a tendency to group all kinds of mutilation under the misleading term of female circumcision. She further suggests that it is better to check precisely what people are referring to when they use the term sunna. However, for a comparison of these two practices see fore pages

**TYPE 2**, commonly referred to as **excision**, involves excision of the prepuce and clitoris together with partial or total excision of the labia minora. In some instances severe operation can involve the removal of all or parts of labia minora and majora (the inner folds of the labia or lips are removed.)

**TYPE 3**, commonly referred to as **“infibulation” or pharaonic circumcision**;<sup>48</sup> involves the excision of part or all of the external genitalia and stitching or narrowing of the vaginal opening. Larger parts of the genitals are removed and the vagina is closed only leaving a small opening for the passage of urine and menstrual blood.<sup>49</sup> The result is often areas of scar tissue. This practice of infibulation is thought to have spread from Egypt to Sudan but also it is thought in Egypt to have spread from Sudan and it is called Sudanese circumcision<sup>50</sup>. The two sides of the vulva are pinned together by silk or cut gut sutures or with thorns after excision. Thus obliterating the vaginal introitus except for a very small opening, preserved by the insertion of a tiny piece of wood or needle for the passage of urine or menstrual blood. The girls legs are then bound together from hip to ankle and she is kept immobile for about 40 days to permit the formation of the scar tissue.<sup>51</sup> Often women who undergo infibulation are also subjected to

---

<sup>45</sup> WHO, female genital mutilation: report of a WHO working group, Geneva, WHO, 1996, pg, 6

<sup>46</sup> Efu, D, opcit pg 4

<sup>47</sup> ibid

<sup>48</sup> The term infibulation is derived from the Latin word fibula, which means clasp, this fibula in form of a ring was put through the prepuce of the penis of Roman slaves to prevent them from having sexual intercourse<sup>48</sup>. Women slaves were infibulated by putting these rings through labia majora and fastening them and getting pregnant. However it did not affect sexuality or induce permanent mutilation<sup>48</sup>

<sup>49</sup> Sanderson, P, L, Against the mutilation of women: the struggle against unnecessary suffering, Ithaca press, London, pg 27

<sup>50</sup> Toubia, N, female Genital Mutilation: a call for global action, New York, 1994

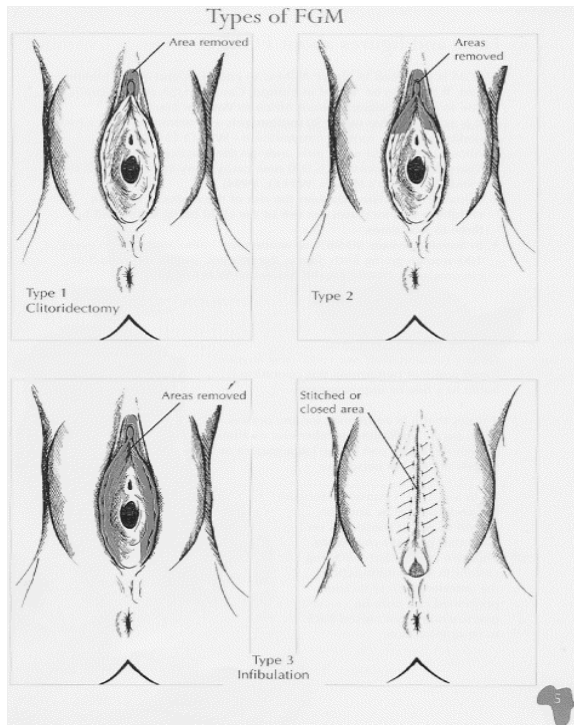
<sup>51</sup> Dorkenoo, E, female genital mutilation: proposals for change, minority rights group, London, 1992 pg 7



further torture in the form of deinfibulation immediately after marriage to allow consummation, and every time the husband returns home after long absence and reinfibulation to ensure fidelity by the wife during the absence of the husband.

**TYPE 4**, placed under the category of **unclassified** by the WHO, includes all other procedures that involve partial or total removal of the female external genitalia and or injury to the female genital organs for cultural or any other non-therapeutic reasons. Type 4 refers to numerous other procedures that have been documented such as pricking, piercing, stretching or burning of the clitoris and or surrounding tissues, scraping of the tissues surrounding the vagina orifice or cutting of the vagina, introduction of corrosive substances or herbs into the vagina to cause bleeding or for the purpose of tightening or narrowing it and other procedures that falls under the definition of FGM given above.<sup>52</sup>

**Figure 1** below describes the three types of FGM,i.e Clitoridectomy, Excision and Infibulation



**Figure 1**

**Source: Excepted from the book titled Female Genital Mutilation<sup>53</sup>**

<sup>52</sup> WHO fact sheet, female genital mutilation. April 1997,

<sup>53</sup> Rymer, J, Female Genital Mutilation, Elsevier science Ltd, 2003

Accessed on this website.[www.sciencedirect.com](http://www.sciencedirect.com), 30th of october2004.

### **2.2.2. Comparison between Male circumcision and Female Genital Mutilation.**

The term Female circumcision may seem to imply an analogy with male circumcision, but this is a misnomer. It should be clear that FGM bears no relationship to male circumcision. However, while some may argue that both practices are a violation of a child and women's right to physical integrity, in important ways the two practices are distinct.

Male circumcision is the cutting off of the fore skin from the tip of the penis without damaging the organ. The degree of cutting in female circumcision is anatomically much more extensive. The male circumcision equivalent of clitoridectomy, in which all or part of the clitoris is removed, would be the amputation of most of the penis. The male equivalent of infibulation which involves not only clitoridectomy, but the removal or closing off of the sensitive tissue around the vagina would be removal of all the penis, its roots of soft tissue and part of the scrotal skin.

In FGM on the other hand even in the mildest forms of these operations and even when the whole clitoris is not amputated, the most sexually sensitive part is removed. To go with this point, is the study conducted by W. Masters and Johnson<sup>54</sup>, which found no significant differences in sensitivity of thirty-five non circumcised and thirty five circumcised males of similar ages. This establishes the fact that circumcision does not diminish sensitivity of the male sexual glands.

Another important distinction is the social and sexual message associated with each practice. Male circumcision affirms manhood with its superior social status and associations to virility. Female circumcision is explicitly intended to show a woman her confined role in society and restrain her sexual desires.<sup>55</sup>

The practice of male circumcision is authorized by the Jewish and Islamic religions, Female genital cutting is neither supported by any religion nor bears any relationship to the geographical distribution of any religion.<sup>56</sup>

---

<sup>54</sup> Masters, and Johnson,(eds)1996,Human sexual Response as cited from Fitmat Nean-Adjeley Adjeley,1987.

<sup>55</sup> Rahman, A and Toubia, N, op cit pg 5-6

<sup>56</sup> Cook, Rebecca, et al, Op cit p 265, on the fact that FGM is not perpetuated by Islamic religion see also, Tomasevski, K,"*Men and Women, Sex and Gender*" in A, Gudmundur, J, Grimheden, B, Ramcharan, and A, Zayas (eds) Kluwer Law International, The Hague; The Netherlands, 2001 p 436

## 1.3 The History of Female Genital Mutilation in Tanzania

### 2.3.1 Introductory Remarks

Before venturing into the history of FGM in Tanzania, I find it pertinent to cast some light on the general history and origins of FGM (world wide and in Africa)

The origins of FGM have proved impossible to trace and it is not known when the practice first appeared<sup>57</sup>. Records show that the practice predates Christianity and Islam in today's practicing communities<sup>58</sup>. The practice however, is said to have existed for at least a couple of thousand of years, as a ritual of initiation into womanhood, to prepare the female child for marriage and prevent the death of a baby during delivery by touching the clitoris. It is argued that " An un circumcised woman is not respected and the sheep where she cuts the throat is not fit "<sup>59</sup>.

Some authors believe that, it began during the pharaonic era of Egypt. There is evidence from mummified bodies which reveals that in ancient Egypt, both Excision and infibulation were performed hence the term pharaonic circumcision. In ancient Rome, metal rings were passed through the labia minora of slaves to prevent procreation<sup>60</sup>. In medieval England, women to prevent promiscuity during their husband's absence wore metal chastity belts. Moreover, in Tsarist Russia as well as 19<sup>th</sup> century England, France and America, records indicate the practice of clitoridectomy .In England and America FGM was performed on women as a cure for numerous ailments<sup>61</sup>.

The one perhaps that is most crucial, is that FGM seems to be closely linked to men's control over women and their sexuality. As some observers believe that, the practice of FGM was originally a means of suppressing female sexuality in an attempt to ensure chaste or monogamous behaviour. An uncircumcised woman was likely to be promiscuous and unfaithful to her husband. This appears to be the context in which the present understanding of female sexuality is set in many African societies. Traditions prescribe that women must always submit to their husbands, sexual needs, never play an active role and never take any initiatives .To submit passively is considered of greatest value, and the removal of vital sexual organs is seen as a preventive measure for women not to loose control of themselves. From this point of view, FGM relates to power relations between genders and has to be understood and dealt with as such.<sup>62</sup>

---

<sup>57</sup> Silberschmit, M, opcit pg 17

<sup>58</sup> *ibid*,

<sup>59</sup> *ibid*

<sup>60</sup>UN Human rights fact sheet no 23,op cit pgt

<sup>61</sup> Nahid, T, opcit p...

<sup>62</sup>SilberSchmit, M, op cit page 18

### **2.3.2. The History of Female Genital Mutilation In Tanzania**

In Tanzania, population movements and cultural interchange brand the history of FGM. These movements were due to tribal wars, trade and search for green pastures for pastoral societies. This led to tribal interactions and acculturation between Bantu and non-Bantu speaking peoples .As a result of these movements there was a historical change in Tanzanian culture and traditions .For these, they involved in conflict with former societies. This finally resulted in give and take ideas between peoples in the course of forming new social and political groupings.<sup>63</sup> Furthermore as a result of the population movements, Tanzania is now a land of extreme ethnic diversities that includes the Khoisan, Cushtic, Nilotic and Bantu speaking populations. With these ethnic diversities there are also cultural diversities .One of these cultural diversity is the culture of FGM. This culture is practiced by both matrilineal and patrilineal societies.<sup>64</sup>

In these societies, the rite involves seclusion of girls for periods ranging from a few weeks to a year, during which they receive instructions in sexual role and the duties of the wife. They are circumcised upon the emergence and marry soon afterwards .The names of this rite, the period of seclusion, labiadectomy and emergence, the terminology of the rite vary a great deal from one area to another within the group of matrilineal people and also among the patrilineal people<sup>65</sup>. Thornton commenting on the essence of this practice feels that this ritual expressed male dominance and supposed a tendency to rebel among the women, especially in the matrilineal societies.<sup>66</sup>

### **2.3.3 Attempts to Eradicate Female Genital Mutilation in Tanzania**

These have been divided into two parts as can be seen hereunder.

#### **2.3.3.1 Efforts During the Colonial Era**

In Tanzania, the British government and the church were in the frontline to fight against FGM.

In the southern part of Tanzania, FGM was performed by the Wamwera, wayao and wamakua. According to Hokororo,<sup>67</sup> the objective of the practice was to control women's sexuality. Girls were cut the clitoris and in some

---

<sup>63</sup> Ehret, C"Between the coast and the Great lakes "in Niane, D, T"(ed) General history of Africa, 1v,Africa from the 12<sup>th</sup> to the 16<sup>th</sup> century, USA, University of California press, 1984 p494.

<sup>64</sup> Beidelman, T.O, The Matrilineal people of Eastern Tanzania, London, International African Institute, 1967.pg 9

<sup>65</sup> Beidelman,,ibid pg 10

<sup>66</sup> Thontorn, R,J space and culture among the Iraqw of Tanzania ,London ,Academic press ,inc.1980,p219.

<sup>67</sup> Hokororo, A, M.op cit pg 2

cases “kuvuta manyuta “ was applicable i.e. that is labia minora are pulled to various lengths usually between one and three inches depending on the physical nature of the labia minora of the candidate.

The church ‘s method to stop these practices had been that of adaptation and adoption. Although the church saw in these customs certain things that should be suppressed so long as they were contrary to the principles of Christian doctrine, it knew that any changes would disintegrate the people’s political and economic organizations.<sup>68</sup>The church knew that tribal customs like all other human institutions often tend to form the basic factors which control a whole human culture, as they do not develop as a series of spontaneous manifestations according to fixed laws in a regular sequence of successive stages. The conditions of their emergence are psychological and sociological, for they emerge out of the society.

According to Hokororo, examining the custom of unyago, the church saw in them local means by which it should impasse its doctrine by regarding the initiation ceremonies as sacred and thus winning the people’s confidence in itself and their loyalty to its doctrine. Just as in the sacrament of baptism, a person is born a second time spiritually, to be emancipated from the bondage of Satan and become once again a clear child of god, so also in circumcision or initiation, a boy or a girl is admitted to manhood and womanhood respectively .It is after these ceremonies that they cease to be children of Satan and so have the qualifications necessary for performing certain functions, which only men and women can perform. But at the same time the church saw that in it there were certain things, which were superstitious and immoral. People were offering sacrifices to the dead instead of god. Hence the church tactfully introduced the doctrine of existence of the ultimate, of whom all forms of sacrifices should be offered and tried to convince people that the dead were creatures of the being .It also tried to show the people how these sacrifices were uneconomical, in that they often threatened their own survival, owing to the shortage of food which they caused.

The activities of the missionaries in trying to modify these customs made them unpopular among the most strictly followers of tribal customs, who regarded them as intruders ought to bring about changes on institutions that they new nothing .The church realized this and as a result adopted an indirect policy. <sup>69</sup> The church appointed the most influential Christians in villages to act as middlemen between the clergy and community. It also chose the literate Christians and asked them to preach to people and make them see by the light of Christian doctrine, the inherent evils in the custom. These people came to be catechists. Their appointment was quiet a novel step in the church in imposing its doctrines .It was through these people that, changes occurred in “*Jando*” and “*unyago*”, places that were seen once as scenes of infliction of unnecessary cruelty. With the assistance of

---

<sup>68</sup> *ibid* 7

<sup>69</sup> *ibid* pg 9

these people, the church managed to systemize the whole system of circumcision and initiation<sup>70</sup>.

Another effort to abolish the practice of FGM was done by British colonial government among the Iraqw of Tanzania. This practice among the Iraqw is known as “Marmo”. The significance of it is reported by Thornton<sup>71</sup> to be necessary period of instruction and means of protecting young girls from the influence of the external harm (homa). The primary aim was to create a solidarity group by a symbolic act of enclosure \_like the creation of the solidarity grouping of the residents of the “aya”(age mate).

The rite was under the control of the ritual specialist of Hhya Manda. The coming out could not begin except upon the permission of the ritual specialists, who obtained this from divination. These specialists were paid a higher fee<sup>72</sup>. The rite was apparently abolished in 1930, as a result of political struggle, between the representative of ritual specialists and the colonial appointed chief by the name of Michael Ahho. He was a Christian and a reformer and he apparently felt some strong hostility towards the Manda ritual experts, whose power had been acknowledged formally by the British colonial government. Directly as a result of this conflict between him and Manda, Ahho abolished the women’s rite by decree. It is however, by no means clear that Marmo was immediately put to an end. Later it became a complete surprise to the British that, Marmo was being practiced secretly after Ahho decree<sup>73</sup>. Herein below is summary of conflict, which led to the abolition of the practice of Marmo by the chief of Mbulu, Ahho. The end of women initiation:

*“Nadea Bea (the most powerful ritual specialist of the Manda) was charging an unfair fee to the people before giving his permission and medicine for the ceremony (Marmo)...they came to take Ahho’s daughter to the Marmo. It was her turn to go in. He refused to pay the fee. He told the British. He took all the girls out of Marmo (with the help from the colonial Akida, or soldiers) and brought them before the people. They were less desirable in marriage and had less status among women. He decreed that there would be a very high fine for returning to Marmo and so the custom was stopped”<sup>74</sup>.*

### **2.3.3.2 Efforts After Independence (Post Independence Era)**

Tanzania got its independence in 1961 from the British. The post independence era witnessed a number of efforts being attempted to eradicate the practice of FGM. In 1970’s fungal infections (trichomonas vaginalis) that mostly affect female genital organs broke out in the central regions of Tanzania (Dodoma and Singida), the disease resulted in inflammation of

---

<sup>70</sup> ibid pg 10

<sup>71</sup> Thornton, R, Joplin, pg 119

<sup>72</sup> ibid pg, 120

<sup>73</sup> ibid.

<sup>74</sup> op cit pg 221

genital parts, labia minora and clitoris. The infection is locally called lawalawa, affecting young children and grown up women. It was and still believed that undergoing FGM could cure the disease, as a result many young girls were subjected to FGM, the consequences were catastrophic as many children died from over bleeding and infections resulting from the wounds since the operations were done in unhygienic conditions.

To stop the practice, the government intervened through the use of the Field Force Unit. For six months, many people were treated roughly, beaten and held in custody in police cells and ultimately sent to court were they were convicted and punished accordingly. These included, women circumcisers, parents and guardians of circumcised children. Instead of eradicating the practice once and for all, it went underground until today instead of being a public festival event it is still performed secretly.

Legally speaking, there was no law yet by then specifically prohibiting the practice,<sup>75</sup> the church and other institutions such as NGO's played a great role in educating the public about the effects of FGM.

In the central part of Tanzania, the church played an immense role in the campaign to abolish FGM. The Christian Council of Tanzania, hereinafter referred to as CCT, had been doing this work before the enactment of the **Sexual Offences Special Provisions Act, 1998**. It has been conducting seminars in all regions in which FGM is practiced, namely Dodoma, Singida, Arusha, Mara, and Morogoro. The central theme in all these seminars is to educate its followers on the effects of the practice, which includes physical, health and psychological effects. They also discourage it because it's going against god's creation<sup>76</sup>.

There is also the Inter African Committee on Harmful Practices Affecting the Health of Women and Children (IAC). The IAC has established Committees in all wards in the region, which conduct seminars and make a follow up in their area if there are people who are still circumcising their daughters. These ward Committees are answerable to IAC Dodoma. The Committees also report FGM incidences to police who in turn file them in Courts of law<sup>77</sup>

**The Anti \_Female Genital Mutilation Network (AFNET)** currently works in 8 regions practicing FGM.<sup>78</sup> Since its establishment, it has been educating and sensitizing the communities on the dangers and effects of FGM to the life and health of women. It also collaborates with the government, NGOs and the communities on the eradication of FGM.<sup>79</sup>

---

<sup>75</sup> SOSPA, was enacted in 1998, almost more than 30 years after independence

<sup>76</sup> Mukama, D, op cit pg 29

<sup>77</sup> ibid pg 30

<sup>78</sup> Dodoma, Singida, Manyara Arusha Morogoro, Iringa,, Dar es salaam , Kilimanjaro

<sup>79</sup> Information obtained from one of the local newspapers titled: Daily news, central zone special column: " Testimony of retired female circumciser," dated Monday, July 19<sup>th</sup> 2004,

**Tanzania Media Women Association (TAMWA)** is one of the NGOs dealing with women's issues in Tanzania. It has played a great role on the enactment of the law banning FGM. It has conducted research in Mara (Tarime) and Singida and revealed the negative effects which women are suffering from the practice. It has also used the mass media like radio, television and newspapers to educate the public about the practice, the extent and effects of the practice.<sup>80</sup>

**The Legal and Human rights Centre (LHRC)**, is yet another NGO which has been in the front line in addressing the issue of FGM in the country. It was also instrumental in the lobbying and advocacy on the law banning the practice. It has conducted a research in almost all the regions where the practice is prevalent.<sup>81</sup> Awareness as well as follow up programs have also been carried out. Moreover, it has conducted private prosecutions on cases concerning FGM where the government was not willing to proceed with the same.<sup>82</sup>

To go with this is the contribution also by **Tanzania Women Lawyers Association (TAWLA)** in the lobbying and advocacy of enactment of the law on FGM and also being instrumental in pursuing cases, which touch on women's lives, e.g. cases on gender violence or gender issues.

The Government, (**Ministry of Justice and Constitutional Affairs**) through the Parliament, enacted in 1998 Sexual Offences Special Provisions Act which has provisions prohibiting FGM, and making the same a punishable crime<sup>83</sup>. The Ministry of Health and National committee on Traditional practices are conducting a campaign against the practice of FGM bearing in mind its health effects which women suffer from it<sup>84</sup>. The **Ministry of Community Development gender and Children** in collaboration with the **Ministry of Health** has already made a plan of action for eradication of FGM in Tanzania. Through this plan all stakeholders can now pick issues and plan for United Nations Populations Fund Agency. Through UNPFA the Ministry has been able to work with Inter African Committee on Harmful Traditional practices chapters in Arusha, Dodoma and Kilimanjaro.<sup>85</sup> The Ministry has been able to launch the Eastern African Network for the elimination of FGM, Tanzania chapter, 2002.<sup>86</sup>

---

<sup>80</sup>Information obtained from TAMWA documentation center, Dar es salaam

<sup>81</sup> LHRC report, op cit

<sup>82</sup> See LHRC report on the enforcement of the law on FGM in Tanzania

<sup>83</sup> Section 21 and 22 of the act.

<sup>84</sup> Mukama,D,opcit pg 30

<sup>85</sup> Inter African Committee on traditional practices affecting the health of women and children: Report on follow up symposium for religious leaders on violence against women with emphasis

On FGM 20-22 august, Arusha, Information obtained at the UNICEF resource center in Dar es salaam

<sup>86</sup> I obtained this information thru the discussion I had with Mr. M,A

Muhungutwa,Assistant Director of the family development section within the ministry of gender .



There have been numerous efforts taken dating back from the colonial period, and yet people have not abandoned the practice; the ritual still prevails in many Tanzanian communities, as it has been recently reported in one of the local newspapers.<sup>87</sup>The history of FGM elimination is not different from other countries in Africa, which have tried to abolish the practice but they have failed. Through church influence, people who were committed to Christian teachings neglected the practice but the majority of them are still doing it secretly.

These attempts of abolishing the practice of FGM failed in Tanzania as in many countries because of various reasons. AFNET report<sup>88</sup> states that the campaign against FGM is hindered by three main reasons these are: conservatism on the part of the people, poor demonstration methods and the fear among individuals. Kenyatta in his book *FACING MOUNT KENYA*<sup>89</sup> records that the operation of abolishing the custom failed because of the emotional attitudes of both sides that is the Europeans and the Kikuyu society. There was no cooperation and each side tried to show the other side how powerful it was.

Kiwasila also comments that<sup>90</sup> the operation to prevent the practice failed due to the style of campaigning. The style was so over sensational that the Africans thought it was another racist crusade to undermine the Africans for the benefit of the westerners by trying to transform African women into western women. She suggest that no campaign on elimination of FGM can be effective without the active participation of the local elite and less educated group of women and men and those who are directly concerned with or affected by the practice.

Furthermore, in the beginning it was not a priority issue by the government until 1998 when it enacted a law, since it was regarded as a private issue. Secondly, most NGO's are located in urban areas where the problem is not so much there, therefore going to rural areas to sensitise is a financial burden and donors determine this. In some cases, FGM is not a priority issue as they have other things to do and lastly, lack of education on the part of rural dwellers which contributes to them believing to harmful cultural practices without reasoning.

## **2.2 Prevalence of Female Genital Mutilation in Tanzania**

It is estimated that 135 million of the world's girls and women have undergone genital mutilation and two million girls a year are at the risk of

---

<sup>87</sup> Daily news Newspaper, op cit cited above

<sup>88</sup> AFNET report on the situation of female genital mutilation in Tanzania: a study of five regions, published by AFNET-Dodoma Tanzania, June 2004

<sup>89</sup> Kenyatta,J,opcit

<sup>90</sup> kiwasila,H,opcit pg 43

mutilation, which is approximately 6000 per day.<sup>91</sup>Tanzania is one among the 28 African countries that substantially practice FGM.The extent of the practice in these countries varies from one country to another <sup>92</sup>.

According to the **Tanzania Demographic and Health Survey** carried out in 1996(which is the most recent survey containing current data on FGM in Tanzania), almost all regions<sup>93</sup> of Tanzania Mainland practice FGM, but the extent of the practice varies from one region to another .It is reported that, more than 18% of women in the country undergo FGM every year. The data further reveals that a total of 1,214,769 women, between the ages of 15 and 49 years, have been genitally mutilated. In Zanzibar Island, which also forms part of the United Republic of Tanzania, the rate is 0.9 percent i.e. Pemba 0.3 percent and Unguja 0.6<sup>94</sup>(this is according to the percent of women mutilated by background characteristics.

The following table shows the regions of Tanzania mainland that practice FGM and the percentage of affected women.

**Table 1**

S/No	Region	Percentage%	Rank
1	Arusha	81.4	1
2	Dodoma	67.19	2
3	Mara	43.7	3
4	Kilimanjaro	36.9	4
5	Iringa	27.0	5
6	Singida	25.4	6.5
7	Tanga	25.4	6.5
8	Morogoro	20.2	8
9	Dar es salaam	5.4	9
10	Mtwara	2.9	10
11	Lindi	1.9	11
12	Coast Region	1.8	12
13	Tabora	1.5	13
14	Rukwa	1.4	14
15	Mwanza	1.3	15
16	Kagera	1.1	16
17	Mbeya	1.0	17
18	Shinyanga	0.5	18
19	Ruvuma	0.4	19

<sup>91</sup> WHO fact sheet, op cit p

<sup>92</sup> Excepted from: Nahid, Toubia, op cit., Somalia and Djibouti 98%, Eritrea and Sierra Leone90%, North Sudan89%, Ethiopia 85%, Mali 75%, Burkina Faso70% Cote d'ivoire, Gambia and Liberia60%, Kenya, Nigeria and Togo50%, Ghana30%, Mauritania25%, Cameroon, Niger and Senegal 20%, Tanzania10%, Uganda and DRC 5%

<sup>93</sup> Tanzania mainland has currently 21 regions including the Manyara region which came up after the recent division of Arusha region, before that division there were only 20 regions

<sup>94</sup> Tanzania Demographic and Health survey 1996,see also LHRC report, op cit p 36

20	Kigoma	0.0	20
----	--------	-----	----

**Source: Tanzania Demographic and Health Survey, 1996.**

Note: Arusha region has been currently divided into two regions; that is, the former Arusha itself and Manyara region; therefore the percentage above reflects both regions, as it was then.

The table above shows that FGM in Tanzania appears to have the highest occurrence in the northern part i.e. Arusha, Mara and Kilimanjaro and in the central part in Dodoma and Singida. Arusha region tops the list of regions which practice FGM with 81.4% of its women undergoing the ritual followed by Dodoma region with 67.9%. Other regions are below 50% except Kigoma region that is not involved in this barbarous practice. These figures are alarming which indeed call for efforts to curb the practice. Hence the educational campaigns aimed at the elimination of the practice and the law, which has been enacted to curb the practice, must be given all the support they need and deserve.

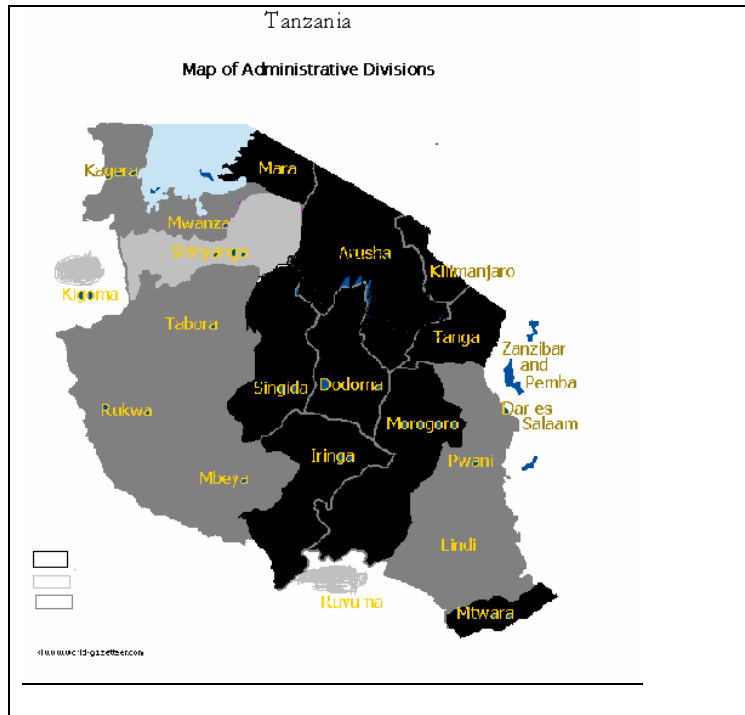
Kiwasila, in her research, makes an analysis on each region which practices FGM<sup>95</sup>. It is interesting to note that not all tribes in the said regions practice FGM. In Dodoma, it is among the sandawe, Rangi and Nyaturu. In Morogoro, it is among the Kaguru, Sagara, ruguru and the vidunda. In Kilimanjaro region, FGM is practiced by the chagga, kahe, gweno and the pare. In Arusha, it is common among the Maasai, barbaig, mbulu and meru. In Mara; it is among the kurya, ikoma, Basembeti, sizaki, and ikizu. And in Iringa, it is between the hehe and bena

**See Map 1 below:**

**Showing the areas or regions affected by the ritual of female genital mutilation in Tanzania**

---

<sup>95</sup> Kiwasila, H, L, opcitpg 26, cited also in Mukama, D, opcit pg 23



**KEY. Map 1**

- From 20 percent to 81 percent
- From 1 percent up to 5 percent
- From 0 percent to 1 percent

While Tanzania is to be commended for seeking information through a standard and nationally accepted instrument, conclusions regarding the national prevalence of FGM based on a sample of 15-49 year olds (women and children of child bearing age only) is inadequate in several ways:

First, many girls in Tanzania are subjected to FGM before they turn 18. The current trend in fact is “*towards early childhood circumcision*” sometimes even as early as when they are three months old. Available statistics show that 71 percent of the girls have undergone FGM by the time they are 15 years old.

Secondly, the current statistics indicate that, the problem is acute in eight of the twenty mainland regions (see the table). In Dar es salaam which the commercial city it is said to affect 5 percent of the females, while in other regions example Kigoma it is estimated to be less than 5 percent, this shows that FGM is not only more persistent in rural areas but also in urban areas. Anti FGM campaigners suspect that the practice exists in Zanzibar Island

among the immigrants from the mainland, but this is concealed, as people do not like to talk about it.

Thirdly, the **TDHS** data does not include information on type four of FGM, but there are indications that FGM might be practiced in the coast. In a research paper on the traditional institution of “UNYAGO”(initiation”) **Sheikh Hashim**<sup>96</sup> notes the insertion of traditional tampons as remedies for inverted uterus and blocked fallopian tubes, it is not clear whether these insertions constitute FGM or if FGM includes other practices that involve manipulation of the female genitals.

It is likely therefore, that the actual percentage of girls and women in the total population subjected to the brutal practice in Tanzania may have been underestimated. The source of the data is not clear, based on anecdotal information and in most cases on population projections, furthermore the current data is not human rights sensitive, there are no indicators yet on the subject. On the need of having indicators that are also human rights sensitive **Prof Tomasevski**<sup>97</sup> states that

*“There is a need to re analyse such information from the human Rights point of view and proceed to the creation of indicators Which would reflect human rights concepts”*

It is my opinion further that there is a need of having a new data survey and or indicators that will give a clear assessment and true picture of the situation in the country. It is also important to note that, WHO has reviewed and short listed seventeen reproductive health indicators for global monitoring that countries need to have when reporting on the progress of Millennium Development Goals, indicator number seventeen is on FGM. I.e. reported prevalence of women with FGM and percentage in a community survey reporting them to have undergone the ritual. Since Tanzania agreed to the **MDGs** terms, it is hoped that it will comply with this criteria in its progress reports.

#### **2.4.1.Types of Female Genital Mutilations performed in Tanzania**

The types vary from one region to another though there is an overlap of one type being practiced in more than one region. The most common types of FGM<sup>98</sup> performed in Tanzania are; clitoridectomy and excision; these types are common among the pastoral and agro pastoral groups starting from northeast and central Tanzania. Elongation by pulling and or deformation of labia minora and vagina cutting are common along the lakes and big rivers

---

<sup>96</sup> Sheikh\_hashim, Leila, Unyago\_Traditional Family Life Education Among the Muslim, Digo, Seguju,,Bondei,Sambaa and Zigua of Tanga Region,TAMWA funded by DANIDA,Dar es salaam ,Tanzania1989

<sup>97</sup> Tomasesvsk, K, *“Indicators”* in Economic Social and Cultural rights Edited by EIDE,A, KRAUSE,C AND AROSAS,A2ND REVISION, MARTNUS NIJHOFF PUBLISHERS BOSTON, LONDON2001

<sup>98</sup> The people of the Somali ethnic groups and those of the Nubian origins from Sudan perform infibulation

as well as Mtwara. Although no cutting is involved in the practice, it alters the genital organs of a woman and so is included as a form of FGM. The Kerewe of Ukerewe island practice elongation by pulling of labia minora. There are also some indications that type four of FGM might be practiced in the coastal areas.<sup>99</sup> The types practiced can be summarized in the following table as follows:

**Table 2**

Region	Type of FGM practiced
Kilimanjaro	Clitoridectomy, excision, infibulation and sunna
Arusha & Manyara	Clitoridectomy, excision, infibulations and sunna
Dodoma	Clitoridectomy, excision,
Singida	Clitoridectomy, excision
Iringa	Clitoridectomy
Mtwara	Pulling of labia minora
Tarime/Mara	Clitoridectomy and sunna
Morogoro (Kilosa district)	Excision

**Source: LHRC Researchers report on FGM in Tanzania**

From the table above, it can be seen that, those are the regions that extensively practice FGM in Tanzania and the types practiced thereto. As stated earlier, it should be noted that, not all tribes in the same regions practice FGM.<sup>100</sup>

**2.4.2 Circumcisors or Mutilators.**

These range from Traditional circumcisors also known as NGARIBAS in Swahili language, Traditional Birth Attendants (TBA), Parents, Midwives, Doctors, Grandparents and Aunts. Most of the people who constitute these categories are women, these are the ones who perform FGM in most cases,

<sup>99</sup> Sheikh Hashim; L, op cit

<sup>100</sup> The northern zone is comprised of Kilimanjaro, Arusha and Manyara regions, the types practiced are: Clitoridectomy, excision, infibulations and Sunna. Manyara region practice excision mostly than the rest, The Southern zone is represented by Iringa and Mtwara Regions which practice Clitoridectomy and pulling of labia minora respectively.

The eastern zone, which is represented by Morogoro region (Kilosa district) the relevant communities practice excision as one form of FGM. The western zone consists of Tarime region, it is common to find clitoridectomy and sunna types being practiced, the latter type has been recently applied because of the effect of the law banning FGM. The people who practice sunna, feel that it is less intrusive and so acceptable to the authorities and still allow them to retain their traditions<sup>100</sup>. Whether this argument holds water is a question of fact, because there is still a violation of human rights. The central zone consists of Dodoma and Singida regions, Clitoridectomy and excision are the commonest types practiced in this zone.

ironically, by doing so they help to maintain their lower gender status in the community, although in deciding as to whether it should be carried out or not men are the key actors in making such decisions. Also due to medicalisation of FGM they are involved in performing it in clinics.

### **2.4.3 Period of circumcision**

The period for carrying out the ritual is seasonal .It is not done throughout the year. According to the report of the Legal and Human rights centre, <sup>101</sup> in the northern zone of Tanzania,<sup>102</sup> the practice is done when a woman is either preparing for marriage <sup>103</sup> or after harvest season because there is food to feed invited guests and by this time there is less work to do in the farms.<sup>104</sup> It is also done during school holidays in December as the children are at home and it is not interfering with school timetables. In other districts<sup>105</sup> in the same zone, there is no specific time; the ritual is preferred after the harvest season. In Arusha District, there is no specific time but often the practice is done at the same time too. It is also done before marriage or when the girl has finished standard seven or primary school.

In the southern part, the practice is done in June and July during the cold season and during harvest, the cold is believed to accelerate healing and the harvest season enables the feeding of those attending the celebrations. <sup>106</sup>In Mtwara region the ritual is done during school holidays, as most of those being mutilated are primary school aged girls and during harvest season for the reasons stated above.

In the eastern part (Morogoro region, Kilosa district), the practice is done in June to July.It is also both a cold and harvesting season. The same applies to the western part though in different months;i.e. November to January.In the central part (Dodoma and Singida regions), it is done in cold season from June to October because the cold is believed to facilitate the healing, it can also be done at any time of the year.

From these findings, it is my personal view that, FGM performing period is determined by several factors as can be explained below;

Firstly, discretion, since it can be done at any time of the year, for instance it can be done to a baby when it is just born or at the time of giving birth or child delivery to a pregnant woman. This is normally done by the Traditional birth attendants (*TBA's*) or nurses. In the central region (Singida), it is done a few days after the birth of a baby.<sup>107</sup> This raises some

---

<sup>101</sup> LHRC report, ibid pg 19-20

<sup>102</sup> Kilimanjaro region,

<sup>103</sup>Rombo district

<sup>104</sup> Moshi rural district

<sup>105</sup> Same, Mwangi, Hai, Rundugai and Machame

<sup>106</sup> Iringa region

<sup>107</sup> LHRC report, opcit pg

concern as to whether under these circumstances; the right to decide among other things is fully taken into account

Secondly, during school holidays in order to conceal the number of mutilated girls for purposes of avoiding detection, since there is a law prohibiting the practice .It will not be easy for other students and teachers to know easily that a certain girl has been mutilated, unless the wounds don't heal during the holiday and she suffers severe side effects upon returning to school. Another reason for choosing this period, is because children will be at home even those living in urban areas are paying visits to their grandparents and other relatives in the villages.

Thirdly, after attainment of a certain level of education, as we have seen in some places it is done after a girl has completed standard seven so that she can be prepared not for further education but for the imposed/forced institution of marriage. In my study I argue that, this affect human rights of a girl child to education as well those related to marriage as will be seen in chapter three of my work.

Fourthly, is the cold season, it is believed that the cold season facilitates healing rather than the hot season which makes the wound wet. Whether this choice of season prevents a person from suffering either short term or long-term effects of the procedure is yet another question to be argued in this study.

Last but not least is during the harvest period, as at this time there is plenty of food to feed the guests and the girls who are circumcised. But this later on causes some economic problems for families, which must use considerably portions of their harvest in these celebrations; hence they run short of food while waiting for the next harvest season.

#### **2.4.4 Age For Undergoing The Ritual**

Just like the way the types of FGM vary from one society to another so is also the aspect of age, it varies from one area to another. Generally speaking, majority of young girls who are under 18 years of age have been subjected to undergo this ritual. According to the to the study done by AFNET,<sup>108</sup> the young girls of under 18 years are mainly subjected to the practice.<sup>109</sup> In previous cases, the tradition was when a girl reached puberty or when she was about to get married<sup>110</sup>. At this stage circumcision was necessary because it was considered as a rite of passage into womanhood. Girls were taught domestic chores and how to handle their husbands. Circumcision was necessary at that age also because it was believed that

---

<sup>108</sup> AFNET report, op cit pg 49

<sup>109</sup> 366 out of 403 participants who were interviewed reported this.

<sup>110</sup> Ulrike von Mitzlaff, *Maasai women: life in Patriarchal society*. Field research among the parakuyo Tanzania, Tanzania publishing house, 1988 pg 82-



uncircumcised girl could not give birth and the most important reason, it cleared out the phase of childhood<sup>111</sup>.

In one research<sup>112</sup>, it was revealed that the practice of FGM is done at younger age between 10-15 years, it could be done at a later age if a girl was delayed due to schooling, illness and disagreement among relatives, financial difficulties and if the girl is living far from her home village. For the time being, there is a tremendous change of the age for undergoing the ritual. The age at which FGM is carried out has changed, children are now mutilated when they are too young, sometimes at the age of 2 years or below to 5 years, according to AFNET report (supra) this age constitutes the majority of FGM victims, see the table below on the statistics of the age group:

**Table 3**

Age group	Respondents	Percent
5 years and below	205	50.9
6 years	40	10.0
11-17 years	121	30.0
18 and above	37	9.1
Total	403	100.0

**Source: AFNET Report, 2004**

From the table above it is my personal view that the first age group i.e. five years and below is the most affected one, currently, few girls undergo the ritual at the age of 18 years and above. However, this does not negate the fact that there is a violation of human rights, regardless of the age group to which it is performed.

To go with this information also is the report of the Legal and Human rights Centre<sup>113</sup>, which revealed different age groups at which girls are mutilated Below is a summary of the findings;

**In the northern zone**

The age is not uniform; it ranges from 2-16 years in Arusha region, and 3-20 years in Kilimanjaro region.

**In the southern zone**<sup>114</sup>

It is done at the age of 5 years below to 15 years; it is also done to pregnant women who conceived before circumcision.<sup>115</sup>

**In the western zone**

---

<sup>111</sup> ibid

<sup>112</sup> KiwasilaH, L, op citpg 116

<sup>113</sup> LHRC Report, opcit pg

<sup>114</sup> Includes Iringa and Mtwara region

<sup>115</sup> ibid pg 16

It is done at the age of 14-16 years.<sup>116</sup>

#### **In the central zone**

Formerly it used to be done at the age of 7-15 years. For the time being it is done at below 8 years. When there was an outbreak of the lawalawa disease (a disease attacking female genital parts of children) children were circumcised within the first months of their lives.

#### **In the eastern zone**

It ranges from 14-16 years

Conclusively, I can state that there has been a tremendous shift of the age group for undergoing the ritual. The perpetrators do not want to be detected so performing it on young girls is easy because they are defenceless and so cannot resist. This age is preferred also because it is easier to hide what has happened when the child is not attending school. Secondly, at that age they cannot make any decision about their bodies and life. Thirdly, as girls grow up and become more educated, they are refusing to undergo the ritual and the parents fearing the wrath of ancestors, are mutilating girls before they know what is happening.

#### **2.4.5. Medication Applicable**

Immediately after the cutting, traditional medicines are used to promote healing. These vary from one society to another. They include<sup>117</sup> chewed leaves, from trees or other species which are applied on the cutting areas, saliva spit onto the vulva openings, honey and salty water cleanser, butter, cow dung mixed with ghee, drinking oil as in some places they are not allowed to bath immediately after undergoing the practice<sup>118</sup>, boiled butter, cleaning of the wound every morning,<sup>119</sup> herbal paste from trees, black bandage tied on the waist across genitals to support the herbs<sup>120</sup> or in some instances a mother performs a ritual to promote healing and to protect the daughter. Finally, modern drugs and injections are applicable whenever the practice is done in clinics.

Whether these medicines are useful, effective and contribute to the healing of post FGM infections is yet another question to be explored and researched. Nevertheless, arguing from the complications of FGM, one would conclude that these traditional medicines are not really effective and they are just used for traditional purposes and have no any scientific bases. This explains why the side effects are severe and tremendous.

---

<sup>116</sup>Mara region

<sup>117</sup> LHRC Report, op cit 24-28

<sup>118</sup> Common in the northern zone

<sup>119</sup> Common in the central zone

<sup>120</sup> Common in the eastern zone

#### **2.4.6 Reasons For the Practice of Female Genital Mutilation**

The reasons for undergoing FGM ritual are complex, related to each other and woven into the beliefs and values communities uphold. Hence, it is extremely difficult to isolate explanations for the practice. The practice represents not a singular value, but a single way to demonstrate physically otherwise socially constructed concepts like gender and sexuality. Thus in explaining this problem, it should be understood that it is dependent not on a single factor but on entire belief system and values that support it. The purpose and importance of FGM varies from community to community and possibly from family to family. Proponents of the practice contend that FGM is justified because it is a part of socialization process into womanhood, has religious significance (especially among Muslims) curb female sexual desire and has some hygienic benefits. These reasons are many and can be summarized as follows:

##### **2.4.6.1 Social significance**

One of the main factors behind the persistence of FGM is its social significance for females. In most parts where it is practiced, a woman achieves social recognition mainly through marriage and childbearing. Men in such communities refuse to marry women who have not undergone circumcision as these render themselves unmarriageable. Therefore to be uncircumcised is to exclude oneself from social status and achievements in the social community. Furthermore the father of the circumcised girl is given a considerable amount in bride price payment.<sup>121</sup>

##### **2.4.6.2 Rite of passage**

Women in communities practicing FGM regard the practice as a social transformation or rather a rite of passage from childhood to adulthood. To them it is a training period where girls are initiated into womanhood and prepared for their subsequent roles as wives and mothers, being equipped with skills for handling marriage, husband and children. They are taught traditional values and norms of their society. Mutilation entitles them to participate in important events in the community, by conferring on a mutilated person a status not enjoyed previously. Such events include among other things marriage ceremonies. If girls are not mutilated, they are not allowed to participate in the mutilation and marriage ceremonies in their communities including those of their own children.

Among the parakuyo society in Arusha Region, circumcision takes place as a necessary preparation for marriage ceremonies, because it is believed that uncircumcised girl cannot give birth. In the past, an approximate date for circumcision was set when the menstruation of a girl started and the danger of her becoming pregnant were imminent. Conception before circumcision

---

<sup>121</sup> Population and development newsletter issued by the population planning unit, planning commission, Dar es salaam, issue no 1 January march 1998

was a severe violation of taboo and was punished at worst by expelling the girl to the neighbouring societies that do not have this taboo. Girls through circumcision, become women who can marry and bear children. The circumcision ritual for parakuyo girls contains indications of future marriage ritual.<sup>122</sup>

In central and northern zones of Tanzania, the act denotes transition to Womanhood. It is believed that the unresolved parts of woman genitalia obstruct the fetus during birth and causes its death or drive it out through the anus. Other reasons include hygiene; it is a custom that pleases ancestors. In the western part, the circumcision of girls is a rite of passage, which marks a change of status from the child to an adult with specific rights and obligations.

Rwezaura writes that, a girl's clitoridectomy, takes place at an earlier age than that of boys circumcision. It is usually done after girl's first menstrual period and it enables a girl to marry and bear children. Before this ritual, a girl must not have sexual relations. Should she become pregnant before she undergoes the rite, it is said that, she would be cast into the bush to be devoured by wild beasts.<sup>123</sup> In the western part of Tanzania, When a Kuria man by tribe marries another woman from another society where circumcision is not practiced, he is expected to arrange for excision before she delivers her first child. This arrangement allows intermarriage with Luo girls who live with close proximity to the Kuria.<sup>124</sup> In modern times such girls run away to town, both to spare parents shame, and to ensure their own safety<sup>125</sup>. A number of girls have been granted residence status in countries where the practice is condemned in recognition of the fact that it is a form of gender-based persecution<sup>126</sup>.

**For instance, in 2002, the Swedish Aliens Appeals Board decided that, a Tanzanian girl known only as Irene who fled from her native Tanzania, fearing excision in her home country had been granted a residence permit. The board granted her permission to stay in Sweden based "on the category of others in need of protection" in the aliens Act. This inter alia, covers persons risking cruel and inhuman punishment based on gender. Relevant information for this decision is that the Swedish Embassy in Dar es Salaam as well as Human right NGOs in-Tanzania confirmed that excision of young girls in Tanzania is extensively practiced<sup>127</sup>.**

---

<sup>122</sup> Ulrike von Mitzlaff, op cit

<sup>123</sup> Rwezaura, B, Traditional Family Law and change in Kuria family relations in Tanzania, Nomos Baden 1985, pg 13-15

<sup>124</sup> Rwezaura, B.A op cit

<sup>125</sup> Refer to Irene case and Kasinga's case.

<sup>126</sup> UN Convention Relating To The Status of Refugees, under its Article 1 (A) under article 1(a) (2) of the convention that provides for the definition of refugee, women from a particular country or ethnic group who are at risk of undergoing FGM can be properly construed as a particular social group. The fact that the particular social group may consist of large numbers of women and girls is irrelevant; other convention grounds such as nationality and political opinion are also characteristics shared by large numbers of people.

<sup>127</sup> Compiled by Gorlick, B, Regional Protection officer, UNHCR office for the Baltic and Nordic Countries, Stockholm, Sweden, for the Raoul Wallenberg institute of

The cases on this issue are few but they illustrate the fact that some countries like Tanzania have in a way failed to protect women and girls within their jurisdictions to the extent that they were obliged to seek it outside the country. Above all they illustrate that the ritual in all its forms is a gender based persecution and a violation of human rights of women and girls.

In the southern zone (Iringa Region), girls' initiation rituals including circumcision take place when parents judge that she is about to reach puberty. They must be accomplished before the first menstruation occurs. The rite is necessary to ensure fertility and to introduce the girl to an adult status. Sociologically, it is believed that, up to the time of initiation the girl is considered immature and she is supposed to have no thought of men. After the ritual, she is treated as an adult and she is immediately sought in marriage .So it is a social transformation from childhood to womanhood.

From the above observation, it is my opinion that in many societies the practice of FGM symbolizes a rite of passage from childhood to adulthood and or womanhood. However, once girls have undergone the procedure they are no longer sent to school, because from that point onward they are supposed to remain at home and wait to be married, this in all its ways encourages early and forced marriages, above all that the right to education is denied. In this situation the practice is an obstacle to girls reaching their full intellectual and employment potential in addition to the physical and harmful effects. Secondly one would wonder whether it could still be perceived or even justified as a rite of passage in the present times, since it is done to very young girls and infants, who are not taught such roles, even if they are taught, they are not matured enough to understand the roles going with the practice. In fact it is even questionable whether they are even taught such roles as it used to be in the past. It is my submission that this justification has completely lost its meaning, this is the point alternative traditions ought to be suggested.

---

Human rights and Humanitarian Law's materials for course participants: The refugee definition and

Gender issues, The equal status and Human rights of women course, held on the 20th September –15<sup>th</sup> of October, 2004 For FGM and asylum I also acknowledge the lecture by Prof Melander in December 2003 on the relationship between human rights, refugee law and Humanitarian law, Also the spring 2004 lectures by Prof Gregor Noll on the definition of refugee and gender: membership of a particular social group criteria, See also the case of Fauziya Kasinga who in 1996 had sought sanctuary in order to escape FGM in Togo was finally granted asylum by the US Authorities she had been held in harsh conditions in detention camps for more than a year .An immigration judge initially rejected her asylum claim ,saying that”This alien is not credible”His decision was overturned and Fauziya's claim for refugee status was granted. See Fauziya Kasinga's case I&N December no 3257 at 132 (B.I;A) June 13 1996, see also UNHCR documents on “*membership of a particular social group*” criteria at

[www.unhcr.org](http://www.unhcr.org)

<sup>127</sup> Rwezaura, B.A op cit

### 2.4.6.3 Religion

It is important to note that FGM is a cultural not a religious practice .The practice predates the arrival of Christianity and Islam in Africa and is not a requirement of either religion .In fact, FGM is practiced by Jews, Christians Muslims and indigenous religious groups in Africa. However, despite the fact that FGM is not known in many Muslim countries,<sup>128</sup> it is strongly identified with Islam in several African nations, and many members of the Muslim community advocate for the practice. Rahman and Toubia<sup>129</sup> state that;

*“While neither the qu’ran the primary source fro Islamic law, nor the hadith collections of the sayings of the prophet Mohamed, include a direct call for FGM, debate over interpretations of statements from one hadith to another continues.”*

Furthermore, the International Conference on Population and Reproductive Health in the Muslim world at Egypt ‘s Alhazar University, A traditional center for Islamic scholarship, reached a conclusion that certain harmful practices including FGM were the result of misunderstandings of Islamic provisions. Moreover, the UN policy has emphasized on the dominant role of religion as the source of societal norms, pleading for efforts to remove misconceptions in religious teachings, which reinforce the unequal status of women, **Prof Tomasevsk**<sup>130</sup>, gives an example of Sudan whose government aware of the fact that people were associating FGM with religious beliefs, organized a national seminar in 1993, attended by all religious leaders with a view to ending such an erroneous belief. In Tanzania, the Arusha Declaration on harmful traditional practices has confirmed that FGM is not a religious obligation.<sup>131</sup>

### 2.4.6.5 Prevention of diseases

In the central region, hygiene and prevention of the disease commonly known as lawalawa are the most cited reasons for the practice, though cultural identity has also lost its significance .It was believed that children contracted the said disease because of not undergoing the ritual. People in this zone believe that, lawalawa is unknown in modern hospital and that it has no medicine so the only treatment is to undergo FGM .The symptoms of this disease are itching of the vagina .To them circumcision reduces itching of the genitalia something which is not true as itching is a symptom of infection after the accumulation of dirt in the genitalia. Lawalawa is easily

---

<sup>128</sup> For instance it is not rampant in Zanzibar where majority of its people are Muslims

<sup>129</sup> Rahman, A and Toubia N, op cit

<sup>130</sup> Tomasevsk,,K,*Men and “Women,Sex and Gender* in Alfredsson,G and Jonas;G,(et al),Martinus Nijhoff Publishers International Human rights monitoring mechanisms: Essays in honor of Jacob th. Moller, 2000t, p 436.

<sup>131</sup> The Inter African committee on Traditional practices Affecting the health of women and children: Report on follow up symposium for religious and Traditional leaders on violence against women with emphasis on FGM 20-22 august200, Arusha, Tanzania

treated by ordinary medicine in hospitals and not through circumcision. This strong, but false belief being the case was as a cure for the disease. Lawalawa was a disease that attacked female genital parts of children. The truth revealed by health officials behind this disease is that, it is caused by dirt and improper cleanliness in the households. Curing of lawlawa caused loss of lives and permanent injuries .All these happened due to ignorance and commitment to the cultural heritage.<sup>132</sup>

#### **2.4.6.6.Beauty and or cleanliness**

It is argued that, secretions produced by the glands in the clitoris are unhygienic and can even cause contamination of food. Furthermore, female genitals are ugly and will grow to become unwieldy if not cut and that circumcision is the fashionable thing to do to become a real woman<sup>133</sup>. In the northern zone (Kilimanjaro region), it was noted that women still adhere to the practice because there is a perception that women's unmutated genitals are ugly and bulky. Also there is a belief that women's genitals can grow and become unwieldy, hanging down between her legs, unless the clitoris is excised.<sup>134</sup>Some groups believe that a woman 's clitoris is dangerous and that if it touches a man 's penis he will die. Moreover, if the baby 's head touches the clitoris during child birth, the baby will die .If this belief is true, then, we could have seen these effects in societies which don't practice FGM.But women in these societies are normal in their body morphologies and still bear children and no man has been head of dying because of having sexual intercourse with unmutated woman.

#### **2.4.6.7 Prevention of promiscuity and presravtion of virginity.**

It is believed that, if the clitoris is left intact, a woman will become oversexed, she may become too sexually demanding of her husband and even seek extra marital sex. Where infibulation is practiced, the woman 's scar is cut open only at the time of her marriage and sealed again when the husband is away to ensure fidelity.<sup>135</sup>.The motive behind circumcision is to kill sexual feelings amongst women and make them get satisfied easily by their spouses and avoid extra marital affairs. But the fact is that if a mutilated woman fails to achieve orgasm with the first partner, she is likely to find another partner to get sexual satisfaction than a normal woman who receives it in her encounter. It can be argued on the other side that, FGM increases promiscuity because a woman may be running from one man to another to look for sexual satisfaction.

---

<sup>132</sup> *ibid*, see also The Tanzania Media Women Association: A research on FGM in Singida region, 1997.pg 8

<sup>133</sup> Koso-Thomas op cit pg 7

<sup>134</sup> Mkwizu, V, A op cit pg 8

<sup>135</sup> Koso-Thomas op cit pg.8

#### **2.6.6.8 Improvement of male sexual pleasure**

In methods of genital mutilation which involve excision of the labia minora and majora and suturing of the vulva, the vagina opening is made very small which is believed to be more pleasurable to the male during sexual intercourse .It is argued that in sexual relations, the man's pleasure is most important and that the woman is acting as a facilitator.<sup>136</sup>

#### **2.4.6.9. Gender identity.**

It is argued that to belong to one's ethnic group, and be identified with that group carries with it certain obligations. This is to be done, in order to become a full member of that group. These obligations include; conforming to rules and regulations in force among the group and defending the group's cultural base. Leaders of ethnic groups firmly believe that, failure to fulfil these requirements means that any right to the privileges and benefits available to the group members cannot justly be claimed<sup>137</sup>. FGM marks the divergence of sexes in terms of their future roles in life and marriage .The removal of the clitoris and labia minora is thought to enhance the girl's femininity, the trauma experienced by the girl during mutilation is equated with the pains the woman experience during birth, something that does not happen to a man. So it increases a woman's courage at the time of giving birth. Since mutilation is part of initiation, it is accompanied by explicit teaching about the woman's role in her society.

#### **2.4.6.10 Cultural identity**

It is stated that. Cultural identity or belonging to a lineage groups is very important to most African families, which wish their children to grow as acceptable members of their society with full social rights.<sup>138</sup> In some communities, circumcision is the ritual that centres this full social acceptability and integration upon females. Without it they become estranged from their own kith and kin and may loose their right to contribute to or to participate in the community life of their homeland, to own property to vote or to be voted for. The loss of such rights and privileges may even extend to a male head of a family in which the daughters and wives are not circumcised. In Maasai societies it is taken as graduation ceremony when a girl matures<sup>139</sup>.

Cultural and social identity are also the most cited reasons for the continuation of the practice in Tanzania .The practice is seen as one that has been inherited from the ancestors hence they have to continue with it in order to be accepted by ancestors after death. Its non-adherence can result

---

<sup>136</sup> *ibid* pg 9

<sup>137</sup> *ibid* pg8

<sup>138</sup> *ibid* pg 8

<sup>139</sup> Discussion i had with the legal officers of the LHRC, specifically Harold Sungusia.



into ostracism: a person being seen as an outcast in that society. Kiwasila in her research, reveals that amongst the Vidunda ethnic group found in Kilosa (eastern part of Tanzania) FGM is accepted by the majority of women as well as men as a cultural tradition of ancestors or fore fathers hence cannot be stopped as people have to adhere to the cultural norm<sup>140</sup>. In supporting this assertion one elderly woman interviewed by her lamented that

*“It is only a stupid person who would stand forward to stop  
Other people from practising a tradition that has been  
Practiced by ancestors since time immemorial”<sup>141</sup>*

The Maasai sees the tradition as one that has been inherited from the ancestors and they have to continue with it .The gogo of Dodoma region adopted the tradition from the Maasai neighbours are now practicing the practice as their own .The tradition is so strong among these tribes that, even if information about the harmful effects of FGM are disclosed to them they don’t alter their position as this is part of their culture and should be preserved as a cultural right.<sup>142</sup>

#### **2.4.6.11 Economic Reason**

This is last but not least factor .It calls for the practice of FGM for economic gains. The mutilators are paid dearly for performing FGM in which case the practice becomes an important source of their income. Also during the FGM ceremonies the mutilated girls receive many presents from their parents and friends. On the other side, the parents of mutilated girls fetch a higher bride price than their counter parts un mutilated ones, the latter in certain if not most cases cannot be married, hence parents cannot get the bride price expected from them. So even parents encourage the practice because from it they expect to be paid a high bride price from their daughters when they get married.<sup>143</sup>

### **2.5 Assesment of the Reasons for the Practice of FGM**

In my opinion none of the reasons put forward in favour of FGM has any real scientific or logical basis. One of the concerns of which mutilation is expected to deal with is promiscuity .The fact is that, both mutilated and un mutilated women can be prostitutes .The more likely being the mutilated ones because they wander from one man to another to look for sexual satisfaction. Promiscuity and prostitution are an individual issue and has nothing to do with FGM.It can be seen that the operation that is intended to eliminate promiscuity could in fact have the opposite effect.

---

<sup>140</sup> Kiwasila, H, L op cit Pg 109

<sup>141</sup> ibid pg 110

<sup>142</sup> LHRC report op cit pg 10

<sup>143</sup> Koso-Thoma,op cit,kiwasilaH;L,op cit,sanderson,P;L,op cit,TAMWA and the LHRC report,op cit.

The argument that the practice marks a rite of passage is no longer relevant, because these days these days it is done to infants and girls who have not reached puberty and also to old women when giving birth who have past their rite of passage.

The myth that circumcision enhances fertility is groundless. In fact the opposite is true. Mutilation is one of the causes of infertility, due to infections and complications caused by it. The secretions that are claimed to have a toxic effect on the male spermatozoa are harmless in them and serve as lubricant mucus necessary to eliminate friction between highly sensitive parts of the genitalia. Moreover, the reason that death could result if during delivery the baby 's head touches the clitoris is ground less and has no scientific backing .The is no report of the death of the baby for the reason that the mother was not circumcised. Instead, unmutilated mothers deliver healthy babies without complications.

The argument that, circumcision enhances cleanliness and beauty is absurd, the scar that is seen where the clitoris should have been, presents an ugly and horrifying appearance. As for cleanliness, the appearance of the scar prevents urine and menstrual flow escaping by the normal channel. This may lead to acute retention of urine and menstrual blood, and to a condition known as haematocolpos, which is highly detrimental to the health of the girl or the woman concerned.

The following table presents a summary of myths and facts about FGM as discussed by different authors.<sup>144</sup>

**Table 5**

**2.5.1 Myth And Facts Of FGM**

Myths: Reasons for FGM.	Facts: Alternatives.
1.Right of passage to adulthood and training opportunities.	1.other ceremonies and training, which are good, should continue rather than cutting female genitals.
2.Increase marriage opportunities.	2.Only in the areas where the practice is prevalent, in FGM free

<sup>144</sup> Koso-Thomas, op cit, Kiwasila, H, L op cit, Sanderson, P, L etc

	areas many women are still married without having undergone the ritual.
3.Community peer group recognition and acceptability.	3.girls are recognized for educational achievements and their contribution to their development of the community.
4.Reduces sexual desire of girls and women.	4.Yes it does, but sexual desire is the right for both men and women.
5.Reduces promiscuity and prostitution.	5. Promiscuity and prostitution are an individual decision and has nothing to do with FGM.
6.Reduces itching of the genitalia.	6Itching of the genitalia is a symptom of infection.
7.It promotes the cleanliness of the genitalia.	7.The female genitalia are generally clean.
8.It enhances fertility.	8.It increases the chances of infertility due to FGM complications
9. It is a tradition.	9. It is a very harmful tradition.
10.It facilitates childbirth.	10.It actually makes childbirth difficulty.
11.It enhances the man's sexual desire and pleasure.	It makes penetration difficult and reduces sexual pleasure for both men and women.

## **2.6 Effects of Female Genital Mutilation .**

Female Genital Mutilation is neither a disease nor a reproductive risk. It is a deliberate procedure, which causes grave damage to children and women. Some documentation and studies are available on the short term and long-term complications as well as psychological and psychosexual effects<sup>145</sup>

Some of the women subjected to FGM suffer from health complications, which require special attention throughout their lives. Some of the complications like severe bleeding and infections occur immediately or shortly after the practice is performed. Other complications may occur after years of the event.

### **2.6.1 Immediate Complicatios**

Haemorrhage is a common and almost unavoidable immediate result. Amputation of the clitoris involves cutting across the high-pressure clitoral artery. Haemorrhage may also occur after the first week as a result of sloughing of the crust over the artery, usually because of infection. Cutting

---

<sup>145</sup> Koso-Thomas, op cit Kiwasila, H, L op cit, Sanderson, P, l op cit, Dorkenoo op cit etc

of the inner and outer labia further damages arteries and veins. As a result of severe bleeding, serious collapse or sudden death may occur in the case of massive haemorrhage. Major blood loss can result in long-term anaemia <sup>146</sup>

Other effects include shock due to bleeding and severe pain because most procedures are performed without anaesthesia, infections due to unhygienic conditions, urine retention due to pain and fear of passing on the raw wounds, tissue swelling, inflammation or injury to the urethra and injury to adjacent tissues. These tissues are injured as a result of using crude tools, poor light during the operation, careless techniques or from the struggle of the girl. Death can also result due to severe haemorrhage. In the western part of Tanzania people who have died because of FGM have been referred to as heroes and they are buried secretly <sup>147</sup>.

### **2.6.2 Longterm complications**

Long-term complications include keloid formation (hardening of the scar) which cause problems at the time of first intercourse or at delivery, haematocoplos due to retention of menstrual blood, infertility due to infections causing irreparable damage to the reproductive organs.

Other long-term complications are problems in pregnancy, childbirth and risk of HIV transmission, psychosexual and psychological problems. These problems are common to women who have undergone FGM .In the event of a miscarriage the fetus may be retained in the uterus or the birth canal. Tough scar tissue may prevent dilation of the canal and results in obstructed labour. Exhaustion due to prolonged labour may result in uterine inertia. Obstructed labour is hazardous and health consequences may be fatal for both mother and baby. The mother may suffer lacerations and the formation of fistulas as well as severe blood losses. The baby may suffer neonatal brain damage or death as the result of asphyxia.<sup>148</sup>

Risk of acquiring HIV, may increase for women with FGM due to scar tissue and the small vaginal opening prone to laceration during sexual intercourse or as result of canal intercourse due to difficulties of penetrating to the vagina. HIV may also be potentially transmitted when groups of children are simultaneous mutilated with the same unsterile instruments. <sup>149</sup>

Almost all types of FGM involve the removal of part or whole of the clitoris, which is the main female sexual organ, equivalent in its anatomy and physiology to the male organ, the penis. Sexual intercourse in both partners may be the result of painful intercourse and reduced sexual sensitivity following clitoridectomy and narrowing of the vagina opening <sup>150</sup>

---

<sup>146</sup> Dorkenoo, E and Elworth, S op cit pg 8

<sup>147</sup> Information obtained from the Discussion i had with the legal and human rights centre official, Harold Sungusia

<sup>148</sup> *ibid*

<sup>149</sup> Dorkenoo E and Elworth S op cit pg 9

<sup>150</sup> *ibid*

Female genital mutilation leaves a lasting mark on the life and mind of the woman who has undergone it. The psychological complications<sup>151</sup> of FGM may be submerged deeply in the child's subconscious mind and they may trigger the onset of behavioural disturbances. The possible loss of trust and confidence in those that are caregivers are the common serious long-term effects. Women may also suffer feelings of incompleteness, anxiety, depression chronic irritability, frigidity, marital conflicts, conversion reactions or even psychosis (severe mental illness that affects the whole personality)

---

<sup>151</sup> For psychological effects see UN fact sheet no 23, op cit

# CHAPTER THREE: The International Law Relating to Female Genital Mutilation in Tanzania

## 3.0 Introductory Remarks

*“We can no longer swath these traditional practices and Female genital mutilations in a chaste cloak of social values and standards .It is no longer a case simply of health but of human rights and the violations of those rights”<sup>152</sup>.*

This chapter deals with the law and practice of female genital mutilation in Tanzania from an international law perspective. The chapter surveys into different international human rights instruments, which condemn and outlaw female genital mutilation. It is not intended to provide a catalogue of human rights instruments but to lay a basis for the evolution of how Tanzania is bound to them and whether it complies with them.

International human rights treaties govern the actions of states that ratify them. The primary responsibility for the implementation of the international human rights standards rests with states.<sup>153</sup> They are free to choose methods to translate universal human rights standards into domestic norms so as to conform to their international obligations. However, the interpretation of these obligations is within the powers of the international community.<sup>154</sup> This focus on government action may at first appear to be a barrier to holding governments accountable for FGM, since the practice of FGM is typically done by private individuals, such as traditional practitioners and midwives, without the active participation of the government. Nonetheless, this lack of direct government involvement does not relieve states of accountability before international community for the practice of FGM.<sup>155</sup>

Under international law, the prevailing legal standard which is used to assess government action or inaction is the general one of due diligence. Governments are required to exercise due diligence in preventing, investigating, and punishing violations of human rights by both government actors and private persons<sup>156</sup>. Where governments fail to act to ensure

---

<sup>152</sup> Report of special rapporteur on traditional practices affecting health of women and children, op cit

<sup>153</sup> Alfredsson, G,” *The usefulness of human rights for Democracy and Good Governance*” In Sano Otto and Alfredsson, G (eds) *Human rights and good governance*, Martinus Nijhoff publishers, Hague, London, and New York, 2002

<sup>154</sup> Tomasevski, K, *Human rights in population policies: A study for SIDA*, Lund, Sweden, 1994

<sup>155</sup> Rahman, A and Toubia, N op cit pg 44-46

<sup>156</sup> *Velasquez Rodriguez case*, judgment of July 29, 1988, *Interamerican Court of human rights (ser.c No 4 1988)*. It was held in this case that “states must take reasonable steps to prevent and investigate human rights violations, identify and punish those responsible and compensate the victims of those violations The court emphasized that failure to prevent and successfully investigate a single human rights violation did not

protected rights, they themselves may be held responsible for violations of those rights by private actors. This was also affirmed in CEDAW's General Comment no19 on violence against women.<sup>157</sup> Nevertheless, it is important to note that this standard must be adapted to the right in question. In some cases placing greater emphasis on the prevention of violations is better than on investigation and punishment as these may not always be the most effective strategies for the elimination of the practice.

Having stated so, it is worth to note that, similar to other problems, traditional practices were first brought to the attention of the United Nations Human rights bodies by Non Governmental Organisations. It was until 1958, when the Economic and Social Council of the UN invited the WHO to undertake a study of the persistence of customs that subject girls to undergo ritual operations. From then a series of conferences and meetings followed.<sup>158</sup> Despite this, getting the WHO specialized agency; to address the genital mutilation of women was neither easy nor quick. Several factors prevented it from being seen as a human rights issue for many years. The first being that; it is encouraged by parents and family members who believe that it will have beneficial consequences for the child in later life. Secondly, violence against women in the home as in the community was seen as a private issue. The fact that perpetrators were private actors, rather than state officials precluded FGM from being seen as a legitimate human rights concern. An additional barrier was the fact that FGM is rooted in cultural tradition. Outside intervention in the name of universal human rights risked being perceived as cultural imperialism. Today however, the human rights implications of FGM are clearly and unequivocally recognized at an international level.

The period after Second World War witnessed the process of creation of a universal framework for Human rights. The Universal Declaration of Human rights was adopted at that time by the United Nations. Since then, a number of Declarations and Conventions have been made which embody rights principles. These include the International Covenant on Economic Social and Cultural Rights,<sup>159</sup> International Covenant on Civil and Political

---

*necessarily give rise to state responsibility for that violation. However, states must undertake efforts to address violations in a serious manner and not as a mere formality. Preordained to be ineffective. Governments that tolerate or condone a pattern of abuse may be deemed complicit in perpetuating that pattern, identify and punish those responsible, See also the SERAC case decided in the African commission.*

<sup>157</sup> In 1992 the treaty monitoring body of the women's convention, CEDAW endorsed the due diligence standard noting that:

*States may be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence and for providing compensation..*

<sup>158</sup> For a list of conferences and meetings Please see Tomasesvisk, K; Women and Human rights, UN/NGLS and Zed Books, 1993,Also atwww.who.org

<sup>159</sup> See ://www. [www.unhcr.org](http://www.unhcr.org) accessed on the 11th October 2004. It was adopted by the UN General Assembly in its resolution 2200 (XXI) of 16<sup>th</sup> December 1966 and entered into force on 3<sup>rd</sup> January 1976.. It is also referred to as ICESCRs

rights,<sup>160</sup> Convention on the Elimination of all Forms of Discrimination Against Women,<sup>161</sup> United Nations Declaration on the Elimination of All Forms of Discrimination against Women, United Nations Declaration on the Elimination of all forms of Intolerance and Discrimination Based on Religion or Belief, United Nations Declaration on the Elimination of Violence Against Women. These declarations<sup>162</sup> provide moral obligations to member state to adhere to what has been agreed.

Conventions<sup>163</sup> require state parties to adhere to them after ratification, as they are binding. State parties therefore, are responsible for bringing their domestic law and practice into conformity with the obligations under them to protect human rights. In other words, every state has the responsibility to remove any inconsistency between international human rights law binding on it and religious and customary law operating within the territory of that state.

The responsibility, seeks to ensure that under the principle of *pancta sunt servanda*, states effectively fulfil legal obligations that they have already assumed under international law. The rationale of binding agreements would apply when the state is a party to the relevant treaty, if not it would not be applicable. It will also not be applicable where a state has entered reservations or restrictions which exclude the obligation to change customary or religious laws, provided the latter is not contrary to the object and purpose of the convention.

### 3.2 Treaty practice in Tanzania

*“Obligations undertaken by states and consequently by the International community under international human rights Instruments shall be implemented in good faith”<sup>164</sup>*

Legally speaking, in countries following the common law tradition, the general principle of international law is that ratification of an international treaty by a state does not *ipso facto*, transform that instrument into a piece of domestic law.<sup>165</sup> The treaties have to be specifically adopted before they

---

<sup>160</sup>Supra, also referred to as ICCPR, it was adopted by the UN General Assembly in its resolution 2200 (XXI) of 16<sup>th</sup> December 1966 and entered into force on 23<sup>rd</sup> March, 1976.

<sup>161</sup> Supra, Also referred to as CEDAW, Was adopted by UN General Assembly on 18<sup>th</sup> December, 1979 by resolution 34/180

<sup>162</sup> Declarations are statements but not legal instruments and are not binding (soft laws) However these declarations or decisions may be considered as evidence of international custom or general principles of law .In addition they may be the basis for the formulation of a future treaty.

<sup>163</sup> These are the main sources of International law

<sup>164</sup> In so far as treaty obligations are concerned, this is expressly provided for by Article 26 of the Vienna Convention on the law of treaties of 1969:”Every Treaty in Force is binding upon the parties to the treaty and must be performed by them in good faith”

<sup>165</sup> Rwezaura, B; A” *Domestic Application of International Human rights Norms: Protecting the rights of the Girl-child in the Eastern and Southern Africa* “in Ncube,



become binding within the state. This is because multilateral treaties, that is, those that are capable of creating international rules are not self-executing. The mere ratification by a state does not therefore make the treaty automatically binding on the citizens within the state. That being the case, countries following the common law tradition have to enact a specific law adopting the provisions of the convention they have ratified. Such a law must be passed by the national legislature specifically adopting the convention in order to give it a force of law in the municipal setting. This process is known as incorporation, courts cannot directly enforce treaties unless their provisions are locally enacted or otherwise incorporated into domestic law<sup>166</sup>.

Tanzania being a common law country, the mere ratification of a convention does not in itself entitle its citizens any rights accruing under the convention until they are given effect by legislation.<sup>167</sup> According to the Constitution of the United Republic of Tanzania, it is the parliament that ratifies conventions and treaties. Article 63(3) of the Constitution states that:

*“For purpose of discharging its functions the National Assembly may deliberate upon and ratify all treaties and agreements to which the United Republic is a part and the provision of which require ratification”*

This position was also affirmed in the case of ***Transport Equipment and Another versus D,P Valambhia***<sup>168</sup> where the court of appeal held that:

*“Although Tanzania has ratified the international covenant on civil and political rights, admittedly, our legal position is that these instruments are not self executing. There has to be an act o parliament to make them operative.*

This is described as a dualist approach to international law whereby, Tanzania has to incorporate the provisions through the process of domestication; adopting the provisions of the conventions she has ratified. This process of incorporation follows the normal procedure for making any law.<sup>169</sup> It should be noted that, the above cited article mandates the parliament to only make laws to govern ratification, but it is silent on the status of the these treaties. However, when replying to this question on the status of international law instruments in Tanzania, the representative of the government had this to say before the Human rights committee<sup>170</sup>:

---

Wed law, Culture, Tradition and children Rights in Eastern and Southern Africa, Ash gate pub, Co ltd Dartmouth, USA, 1998 p 29

<sup>166</sup> Makaramba, R, Children Rights in Tanzania, Dar es salaam, Friedrich eben Stiftung, Tanzania, 199.P 9

<sup>167</sup> Seaton E, E and Maliti, S, T, Tanzania Treaty Practice, Nairobi Oxford University Press, 1973,p 107-110,Shivji, I, G: The legal foundation of the Union in Tanzania ‘s Union and Zanzibar constitution, Dar es salaam, University Press, 1990,PP 213-14

<sup>168</sup> Civil application no 19 of 1993 court of appeal, Dar es salaam

<sup>169</sup> Seaton and Maliti, op cit p110, In this case a bill has to be proposed by the cabinet, drafted by the parliamentary draftsman, published in the gazette before it can be enforced

<sup>170</sup> [www.bayefsky.com/htm/tanzania-4-ccpr.php](http://www.bayefsky.com/htm/tanzania-4-ccpr.php)

*“The new Constitution does not specify whether domestic law or international law prevailed in situations of conflict between the Constitution and one of the human rights instruments. In actual practice, the international human rights instruments are not self-executing but require implementing legislation. This would mean that in case of a conflict the Constitution would prevail.”*

This position was also affirmed in the case of ***East African Community*** versus ***R***<sup>171</sup> where the former court of Appeal for East Africa whose decisions are binding on Tanzania held that the provision of a treaty entered into by the government of Kenya does not become part of the municipal law of Kenya save in so far as they are made such by the law of Kenya. However, if the provisions of an incorporated treaty are inconsistent with the provisions of the Constitution then the treaty is void to the extent of that inconsistency<sup>172</sup>.

Furthermore commenting on the effect of lack of incorporation Ramadhan, J, A in the case of ***Transport Equipment*** (*supra*)<sup>173</sup>, held that:

*“The fact that an international convention to which Tanzania is a party is not incorporated into Tanzanian Law does not absolve the government of its duty to adhere to its undertakings in the agreement.”*

Therefore the government ought to implement its international obligations under national law. The case involved the applicability of the International Covenant on Civil and Political Rights. Tanzania has ratified this Covenant and yet no national law has been passed to incorporate the same.

Furthermore, some Tanzanian judges have adopted a different position concerning the effect on domestic law of unincorporated treaties. This stance departs from the general principle of law in common law jurisdiction. It draws its background from the Bangalore Principles. One of these principles is that, where a treaty has been ratified but not yet incorporated into domestic law it would still be taken into account by a court for deciding cases where the domestic law, whether the Constitution, statutory law or common law is ambiguous, uncertain or incomplete. Another Bangalore principle is that, in performing their judicial roles, judges must interpret statutes in such a way as to avoid the violation of international law<sup>174</sup>.

This is based on the presumption that legislatures do not intend to enact laws that violate state’s treaty obligations. Nevertheless, the Bangalore principles have no legal force, and they do not possess the status of a treaty under international law, though they stand for a new positive trend in the field of domestic application of international standards on human

---

<sup>171</sup> (1970) EALR, 457

<sup>172</sup> Ibid, see also the case of ***Okunda*** versus ***R*** (1970) EA 453

<sup>173</sup> Civil application no 19 of 1993 court of appeal, Dar es salaam

<sup>174</sup> Rwezaura, B, A op cit p29

rights<sup>175</sup> These principles were fully endorsed in 1989 at a judicial colloquium of senior African Commonwealth judges held in Zimbabwe<sup>176</sup>. Following these two colloquia, a number of judges in the Eastern and Southern Africa Region have demonstrated their readiness to draw on international human rights norms in interpreting local legislation including national constitutions<sup>177</sup>.

In Tanzania for instance, the High Court of Tanzania, relied on article 5(a) of the United Nations Convention on the Elimination of all forms of Discrimination against Women, of article 26 of the international covenant on civil and political rights and article 18 subsection 3 of the African charter on human and peoples rights in the celebrated case of *Ephraim versus pastory*<sup>178</sup>. The issue in this case was whether a woman heir under Haya customary law could sell clan land. Finding this customary law discriminatory **Mwalusanya, J** held that;

*“The Haya Customary Law on inheritance discriminates against women and therefore inconsistent with article 13(4) of the constitution of Tanzania that bars discrimination.”*

The holding intended to fulfill the legal obligations provided in the international and regional treaties ratified by Tanzania that prohibit gender discrimination. It was quite remarkable for a number of reasons; First, the fact that the term sex or gender was not by then specifically mentioned in the relevant provisions of the Tanzania constitution, did not deter the court from deciding that the bill of rights did prohibit gender discrimination. The reasons the judge gave to support his ruling included that; the socialist government of Tanzania by then had emphatically rejected gender discrimination, that the Universal Declaration had been incorporated into the Tanzania Constitution by virtue of article 9(1)(f) of the constitution and finally that Tanzania had ratified most of the major international and regional instruments prohibiting gender discrimination. In conclusion, Mwalusanya, J noted that:

*“The principles contained in the human rights instruments constitute a standard below which any civilized nation will be ashamed to fall”*

Also the court of Appeal of Tanzania relying on the ICCPR in the case of *Transport Equipment Ltd and another Vs D,P Valambhia* (supra) Ramadhani ,J observed that :

*“Since Tanzania has ratified the ICCPR in which article 11 Prohibits civil imprisonment, by denying the applicant*

---

<sup>175</sup> Kabudi, P, Human Rights Jurisprudence in East Africa: Comparative Study of fundamental Rights and Freedoms of the Individual in Tanzania, Kenya and Uganda, Nomos Baden-Baden, 1995,29

<sup>176</sup> Harare Declaration of Human Rights, The parliamentarian, October 1989,LXX, No, 4 P 218

<sup>177</sup> Rwezaura, B, A, op cit p 29

<sup>178</sup> (1990) TLR 106.

*an order for stay of execution of the order of arrest and detention will be a violation of that inherent right”.*

But since Tanzania has not incorporated this instrument into domestic law so as to be part of the Tanzanian law the judge applied the Constitution of the United Republic of Tanzania under article 15(1) to fill this gap so as to safeguard man’s freedom.

**Rwezaura, J** comments that this development in Tanzania and elsewhere in the Southern and Eastern Africa has come about on one hand because courts wish to comply with the state ‘s international obligations. But also more significantly because liberal judges in the region have begun to accept the principle that in construing a Constitution the court should adopt a generous and not a technical approach.<sup>179</sup>

Up to the time of writing this paper, there was no case law on the application of these human rights standards in relation to FGM issues under domestic courts, I believe the principles enunciated in the case of **Ephraim Vs pastory** (supra) could be useful in future. Alternatively more judges should adopt a more generous approach while taking into account the Bangalore principles in cases, which are currently referred to court on FGM issues. It is my personal view that, since all these treaties have not been incorporated into domestic law then it becomes difficult for the victims to access the courts of law in case of a violation. Therefore it is like having a right without a remedy hence making it no right at all, the beneficiary of a right should be able to ensure its efficacy in law and the easiest way for an individual to ensure his rights is before his own courts and not an international tribunal.<sup>180</sup>

Perhaps more crucial, the government should see to it that all these ratified treaties are domesticated and become part of municipal laws to ease the enforcement of such rights in both domestic and international bodies.

### **3.3 International Law Relating to Female Genital Mutilation in Tanzania.**

FGM is a graphic illustration of the indivisibility and interdependence of all human rights. This violation of the right to physical and mental integrity of women and girls cannot be addressed in isolation from the context of systematic deprivation of women’s civil, political, social, economic and cultural rights. Governments have clear obligations under international law to take appropriate and effective measures to eradicate and prevent FGM. In doing so they must address the human rights implications in a holistic

---

<sup>179</sup> Rwezaura, B,A op cit 38

<sup>180</sup>See Lord Denning ‘s Judgment in the case of Gouritt versus union of post office Workers AC (1978) 435. Benedetto Comforti & Francesco Francion (Eds) Enforcing International Human rights in Domestic Courts 49, Martinus Nijhoff Publishers, The Hague Boston /London 1997.P38

manner, recognizing that violence against women is indivisible from, and interdependent with gender based discrimination in all its forms.

Tanzania has ratified various international human rights instruments that condemn female genital mutilation. These instruments include the International Convention on the Elimination of All forms of Discrimination against women,<sup>181</sup> International Covenant on Economic Social and Cultural Rights,<sup>182</sup> the International Covenant Civil and Political Rights<sup>183</sup>, Convention on the Rights of the Child<sup>184</sup>, African Charter on the Rights and Welfare of Children<sup>185</sup>. The African Charter on Human and Peoples Rights. It has only signed the Optional Protocol to the Charter on women's rights<sup>186</sup>.

These international instruments provide international standards and open possibilities for international cooperation in combating FGM. They nevertheless, in most cases do not act in a direct way to the people involved in combating FGM. They contain only obligations for the states to adopt, improve or correct their own legislation, so to be more effective state parties have to adopt principles contained in the Conventions ratified into their domestic legislation so as to have a legal binding effect which is enforceable. Since Tanzania has not incorporated most if not all of the treaties into domestic law, the assessment of the same with regard to Tanzania's obligations will largely depend on state party reporting obligations. As this will give a clear picture on how Tanzania has tried to implement its obligations with regard to FGM issues and to what extent it has failed to deliver.

The international legal instruments that condemn FGM vary. Some of them do not expressly mention traditional practices such as FGM; hence the latter is placed within the context of human rights treaties through interpretation of the broadly termed right such as the right to life, liberty and security of the persons or the right to health. These include; the Civil and Political Rights Covenant and the Economic, Social and Cultural Rights Covenant. On the other hand some of the treaties such as the women 's convention and the children 's rights convention explicitly address harmful or discriminatory practices.

---

<sup>181</sup> Acceded on 20<sup>th</sup> August 1985.

<sup>182</sup> Acceded on 11<sup>th</sup> June 1976,

<sup>183</sup> Acceded on 11th June, 1976

<sup>184</sup> Acceded on 1990

<sup>185</sup> Signed in 1998 and ratified in 2003, Acceded on the website [www.achpr.org/english/\\_doc\\_target/documentation.html/ratifications/ratification\\_child\\_en.pdf](http://www.achpr.org/english/_doc_target/documentation.html/ratifications/ratification_child_en.pdf)

<sup>186</sup> Signed 2003

### **3.3.1 The Universal Declaration of Humanrights**

The universal Declaration of human rights, hereinafter to be referred to as UDHR, is the corner stone of the contemporary human rights system. **Alfredsson** and **Eide**<sup>187</sup>, have described it as a common standard of achievement for all peoples and nations .It provides for political, civil, social and cultural rights. In it, there are articles that together form a basis to condemn female genital mutilation<sup>188</sup>. The UDHR asserts that, all human beings are born free and equal in dignity and rights .It protects the right to security of persons and the right not to be subjected to cruel, inhuman or degrading treatment .The UDHR is incorporated in the Constitution of the United Republic of Tanzania, 1977<sup>189</sup> vide article 9(1)(f). This part two of the Constitution contains fundamental objectives and directive principles of state policy. It provides inter alia that;

*“The state authority and all its agencies are obliged to direct their policies and programmes towards ensuring that human dignity is preserved and upheld in accordance with the spirit of the universal declaration of human rights”*

The above cited provision, was also affirmed in the case of ***Ephraim*** versus ***pastory*** (supra)<sup>190</sup>, where the High court of Tanzania relied among other international instruments, on the Universal Declaration of Human Rights, in interpreting the bill of rights contained in the Constitution, with regard to protection of gender issues.

The practice of FGM goes against all the above stated rights in the UDHR and the Constitution of the URT, 1977.It is a question of torture inflicted not only on girl child but also on adult women for cultural reasons. Within UDHR there is no room for justification of female genital mutilation.

### **3.3.2 The Internation Covenant on Economic social and Cultural Rights**

The Covenant’s preamble derives from the inherent dignity of the human person. Article 2 (1) underscores the obligations of states to take various steps to the maximum extent of their available resources, to realize progressively the rights protected therein. Governments are obligated to respect, protect and fulfill economic, social and cultural rights. The duty to respect requires them to refrain from taking action that directly violates these rights. The duty to protect these rights obliges states to prevent violations of rights by private parties or organizations Finally the duty to

---

<sup>187</sup>Alfredsson, G, and Asborn, E (eds): The Universal Declaration of Human rights: A common standard of achievement, Martinus Nijhoff Publishers, The Hague, Boston, and London, 999,pg xxxii

<sup>188</sup> These are articles: 2,3,5,12,and 25

<sup>189</sup> As amended in 1984 by the fifth constitutional amendment which for the first time enacted a bill of rights in Tanzania as part of the constitution

<sup>190</sup> See page 57.of this work

fulfill these rights requires governments to take measures and in some cases, make expenditures.

The Convention is applicable to the issue of FGM through its various articles. Article 2(2) prohibits non-discrimination on the basis of among other things sex, religion and or other status, guarantees for equal rights for men and women are also provided under article 4. Of particular importance to the practice of FGM is article 12 of the Covenant which provides for the right of everyone to the highest attainable standard of physical and mental health, it enumerates various steps governments are obliged to take to achieve full realization of this right, including measures for reducing the infant mortality and still birth rates and for the healthy development of the child, as it has been shown in this study that FGM is accompanied with medical complications, which hinder health development of both the child and the mother<sup>191</sup>.

The WHO has defined health as a state of complete physical, mental and social well being, not merely the absence of diseases or infirmity. The practice of FGM is detrimental to the physical or mental health of the child and the mother; it results in grave permanent damage to health and underlying risks of death. During childbirth the health of the mother and the child are brought into danger due to complications caused by FGM ritual. Subjecting a person to such risks should be viewed as a violation of that person 's right to health. This should also be seen as such even in the absence of such complications. Further to this, the removal of the bodily tissue necessary for the enjoyment of a satisfying and safe sex life tantamount to a violation of a woman 's right to the highest attainable standard of physical and mental health. Governments are required to ensure health care and access to health information to enable individuals to realize their rights; they are also required to work towards creating conditions conducive to the enjoyment of good health. An example would be the need to enlighten women as the first step of achieving their right to health as in most instances this right is denied to them through the practice of FGM. Women in such societies still believe that the practice is to their advantage.

In an attempt to further have the right elaborated, the ECOSOC in 2000 developed general comment no 14 from the committee's experience, in examining state party reports over many years. The general comment has reaffirmed the principle of health being a fundamental human right, and recognized the fact that it contains both rights and entitlements. Rights such as; the right to control one's own body that encompasses sexual and reproductive health and the right to be free from interference such as torture or involuntary scientific experiments. It also entitles an individual to protection and a system of health care that is available, accessible and acceptable and of good quality .In terms of accessibility to health care, it is not limited to physical location but also to be economically affordable,

---

<sup>191</sup> See chapter two of this work

informative in matters relating to one's health and acceptable culturally and medically. All these are important especially for FGM victims who are not aware of the effects of undergoing the harmful practice of FGM and who are always suffering from the health complications associated with the practice.

With regard to Tanzania's obligations, it should be noted that, it is still among the developing countries in the world and therefore implementing this article to its fullest extent is still a pipe dream. The right to health in itself is not recognized in the bill of rights in the Constitution, like any other economic social and cultural right, it is still under the directive principles of state policy. As a directive principle, it merely provides guidelines to the government when formulating policies and is to be pursued when resources are available. Therefore, the right is not justifiable in court and its monitoring mechanism is done through state party reports that depend on the good will of the country. Further to this, there is also the cost sharing aspect before undergoing any treatment, this might be an obstacle to women and girls who are victims, as in most cases they are poor due to their socio economic position in the society hence will not be able to afford the costs.

Lastly, As far as the provisions of this covenant are concerned the first relates to the legal nature of the provisions themselves, it has been argued that they are a mere formulation of objectives, incapable of immediate enforceability as legal rights before the courts of law, this has had negative impact on the precise status of such rights inhibiting state parties from vigorously implementing them domestically.

Besides, it is unfortunate that the committee on Economic, social and cultural rights<sup>192</sup> can not deal with individual or collective complaints of abuses of protected rights, a procedure that would have given the committee better opportunity to develop and further elaborate the relevant articles dealing with FGM through its case law. To date, international supervision is confined to the system of state reporting, a procedure that is far from being effective by comparison because of failure of states to regularly report and the limited resource of the committee to get rid of its backlog in time a problem shared by other human rights committee as well.

### **3.3.3 The International Covenant on Civil and Political Rights ,1966**

This is one among the few Covenants that, although not domesticated have been referred to by national courts in its judgments<sup>193</sup>The covenant obligates states to ensure the rights guaranteed therein<sup>194</sup>, this language implies a duty to prevent violations of human rights at the hands of either government or

---

<sup>192</sup> Established in 1986 by ECOSOC resolution 1985/17, with a mandate of supervising the implementation of ICESCR provisions .A complaint mechanism has been under consideration in recent years.

<sup>193</sup> *Transport Equipment and Another versus D.P Valambhia* Civil application no 19 of 1993 court of appeal, Dar es salaam *see also p 53 of this paper*

<sup>194</sup> Article 2



private parties. Legally speaking, the Covenant's emphasis is laid on the personal individual freedom and although there is no explicit prohibition of FGM in the covenant, the interpretation of the same has to be resorted to from the more broadly termed rights as can be seen below. The relevant articles to the practice of FGM are among others: articles 3, 6,7 and 17 respectively.

Article 3 provides for the equality between men and women. In its general comment on the article and in its concluding observations on African countries in which the practice is prevalent, the Human rights Committee has regularly called on governments to take measures against FGM including legal measures to criminalize the practice and pursue social and educational campaigns for its elimination, noting that it violates article 7 and 24 on the rights of children.

Article 6 protects the inherent right to life; by virtue of this provision, states have an obligation to adopt a legal system for the protection of the individual. Female genital mutilation causes a number of health problems, however, the gravest of all is death that can be caused by the excessive bleeding or infection. Therefore states can be held liable where death results as a result of the failure of the state to provide adequate protection to the victims.

The Human Rights committee in its general comments no 28<sup>195</sup> recommended states when reporting on this article to report on measures taken to protect women from practices that violate their right to life, it is my opinion that FGM is included in this category. Furthermore with regard to article 7 of the covenant that prohibits torture, inhuman and degrading treatment and article 24 of the same that mandates special protection for children, the committee needs to be provided with information on national laws and practice with regard to domestic and other types of violence against women. In States parties where the practice of genital mutilation exists, information on its extent, and on measures to eliminate it should be provided. The information provided by States parties on all these issues should include measures of protection, including legal remedies for women whose rights under article 7 have been violated.

The 2003 country report<sup>196</sup> on human rights practices under the Convention states that,

*“10 to 18 percent of female population has undergone FGM in the country. That in the western and northern parts, the practice is defiantly practised before local authorities. The prevalence rate is 85 percent among rural females in each region; in addition approximately 100 percent of Arusha 's Maasai females have undergone the ritual. The report goes on to note that the law prohibits the same but to females of only under 18 years*

---

<sup>195</sup> ICCPR General Comment 28 (Sixty-eighth session, 2000): Article 3: Equality of Rights Between Men and Women, A/55/40 vol. I (2000) 133 at paras. 10, 11 and 17. [http://www.bayefsky.com/themes/aliens\\_general\\_general-comments.php](http://www.bayefsky.com/themes/aliens_general_general-comments.php)

<sup>196</sup>On Human Rights Practices, released by the Bureau of Democracy, Human Rights, and Labor February 25, 2004, Accessed at [w.state.gov/g/drl/rls/hrrpt/2003/27756.htm](http://w.state.gov/g/drl/rls/hrrpt/2003/27756.htm)

*of age, no legal protection is offered to adults. That a number of cases have been prosecuted but in some instances no action was taken, for instance in October 2002 following the death of a young girl in Dodoma. The report also notes the difficulties in reducing the practice because of lack of adequate resources to protect the victims and some regional government officials favour the ritual or fear speaking out against it because of the perceived political consequences of opposing FGM and the power of the traditional leaders who support it. That various seminars on the practice have been held under the sponsorship of the government and NGOs”*

From the information above, it can be noted that the ritual is still a problem in the country that needs to be addressed, secondly, the information provided by the government is in my opinion still inadequate, as it does not show the real picture of the situation in the countryside in terms of how many girls have been affected and what steps the government has taken towards assisting the victims. The seminars that have been mentioned are not elaborative as to when they were conducted, in which part of the country and who were the targets. This is important because in some cases the police fail to protect the victims not because of lack of adequate resources but rather willingness or because they are not aware of the problem or contents of the law and so they need enlightenment.

Furthermore, During the consideration of the third periodic report of Tanzania<sup>197</sup>, the committee on Human rights while appreciating the criminalisation of FGM in the country it was concerned that traditional customs inhibit complaints on these issues and it consequently recommended that information be promulgated about these remedies and that the state should take action to support women who are entitled to take advantage of them.<sup>198</sup>

It should be noted that, while the country has been trying to comply with the state party reporting requirement, it has not been able to supply adequate information on the issue of FGM as I have already explained above, furthermore there have been delays of up to five years in submitting its reports in some instances<sup>199</sup>, thirdly It should also be pointed out that that Tanzania has not even ratified the optional protocol that allows individuals to claim their rights set forth in the covenant. This in a way hampers the enforcement of such rights at the domestic level and in general.

### **3.3.4 The United Nations Convention on the elimination of All Forms of Discrimination Against Women, 1979**

*“To succeed in abolishing the practice of FGM  
Will demand fundamental attitudinal shifts in the*

<sup>197</sup> CCPR A/53/40(1998), CCPR/C/83/Add.2 at its 168<sup>th</sup> and 60<sup>th</sup> meetings, on 24<sup>th</sup> July, 1998 and its 1697<sup>th</sup> meeting on 30 July, 1998, Accessed at [www.bayefsky.com/html/tanzania-4-ccpr.php](http://www.bayefsky.com/html/tanzania-4-ccpr.php)

<sup>198</sup> [http://www.bayefsky.com/themes/aliens\\_general\\_general-comments.php](http://www.bayefsky.com/themes/aliens_general_general-comments.php)

<sup>199</sup> See comments of the committee on the second periodic report of the United Republic Tanzania, CCPR/C/40(1993) CCPR/C/42/Add.12 at its 1189<sup>th</sup> to 1191<sup>st</sup> meetings held on 27<sup>th</sup> and 28<sup>th</sup> of October 1992, CCPR/C/sr.1189-1191, Accessed at [www.bayefsky.com/htmltanzania\\_t4\\_ccpr.php](http://www.bayefsky.com/htmltanzania_t4_ccpr.php)

*Way that the society perceives the human rights  
Of women*"<sup>200</sup>

This is one of the most important documents on women's rights .It constitutes an international bill of rights for women .The main thrust of the women's convention is aimed at eliminating all forms of discrimination encountered by women in all areas affecting their lives. The problem the convention addresses is that of discrimination against women rather than discrimination based on sex,<sup>201</sup> It urges states parties to embody the principle of equality in their National Constitutions or other instruments and to adopt appropriate legislative measures prohibiting discrimination against women and even special temporary measures if necessary to ensure their full development and advancement in all the areas<sup>202</sup> . States parties are also enjoined to modify social and cultural patterns of conduct with a view to eliminating the prejudices and customary practices based on stereotyped roles for men and women<sup>203</sup> . To a large extent it codifies the existing gender specific and general human rights instruments containing guarantees of freedom from discrimination on the ground of sex, though it adds some significant new provisions as can be seen on the footnotes above.<sup>204</sup>

Since FGM controls female sexuality, it puts them in inferior position in sexual matters and in all angles of life. FGM is a practice imposed by society on women basically for the advantage of men .It is a practice that presupposes that women are promiscuous and their sexuality has to be regulated. But men's sexuality, even when they are promiscuous is not checked at all. According to CEDAW under article 5 (2) this practice should be done away in all the societies that practice it because it puts women in inferior position in not only sexual matters but also in economic, civil, political, social and cultural aspects. It is a graphic illustration of the indivisibility and interdependence of all human rights.

---

<sup>200</sup> Dorkenoo, E, op cit

<sup>201</sup> See article which defines discrimination as:

For purposes of the present convention, the term discrimination against women shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

<sup>202</sup> Article 2(f) provides that: State parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and to this end undertake to take all appropriate measures including legislation to modify or abolish existing laws, regulations, customs and practices which constitute discrimination  
Against women.

<sup>203</sup> Article 5 states that "All appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices, customary and all other practices which are based on the idea of the inferiority or superiority of either of the sexes or on stereotype roles for men and women"

<sup>204</sup> See footnote no 202 and 203

Furthermore, the Convention requires state parties to take appropriate measures including legislation to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against women. These two provisions<sup>205</sup> of the Conventions are against all traditional practices that are detrimental to women. They constitute two pronged attacks on customs and practices that discriminate against women. These suggest that state parties should seek to change attitudes by the educational process, particularly in the context of the family, having regard to article 5 (b) that emphasizes family education and parental responsibility.

The committee on the elimination of discrimination against women established in 1982 monitors the implementation of this convention.<sup>206</sup> The practice has developed within CEDAW when examining reports, of seeking information from states parties on traditional practices under article 12, which addresses the health concerns of women, since the effect of FGM ritual affect adversely the health of girls, adolescents and women. In 1990 CEDAW being gravely concerned that there are continuing cultural, traditional and economic pressures which help to perpetuate harmful practices such as FGM, adopted recommendation no 14<sup>207</sup> calling upon states to take appropriate and effective measures with a view to eradicate the practice of FGM. Measures suggested are among other things: collection and dissemination of data about FGM by various bodies, introduction of educational and training programs, etc. Reference is also made in the recommendation to article 10 of the Convention which addresses the educational needs of women, but more specifically to article 10(c) which exhorts states parties to take appropriate measures to eliminate any stereotyped concept of the roles of men and women at all levels and in all forms of education and it is in this regard that general comment no 14 recommends that states parties include in their reports under article 10 (1 and 2) information on measures taken to eliminate FGM. This is a recognition by CEDAW that the eradication of harmful traditional practices based on customary and cultural norms which give rise to gender role stereotyping can only be successfully achieved by a reformation of values, both in the formal and informal education system.

On the other hand, General recommendation no 19 draws a connection between traditional attitudes which subordinate women and violent practices such as FGM, stating that such prejudices and practices may justify gender based violence as a form of control of women. Hence contributing to the lower level of education, skills and work opportunity

---

<sup>205</sup> Article 2(f) and 5(a)

<sup>206</sup> This group of independent experts receives reports from governments that have ratified the convention, the measures they have adopted to comply with the convention, and gives recommendations.

<sup>207</sup> CEDAW, General recommendation no 14 (ninth session, 1990) Report of the committee on the elimination of discrimination against women, 1990 UN Doc, A/45/38 at 85 reprinted in the UN Doc Hri/ Gen/1 Rev.2 at 108-109 (1996)

Moreover in its general recommendation no 24<sup>208</sup> on women and health, the committee characterized governments obligation to provide health care as the duty to respect, protect and fulfill that right, it also requires states to prevent violations of the right by private parties. This was important since the immediate perpetrators of the ritual are private individuals. Furthermore it requires governments to address systematic barriers to health by taking appropriate legislative, judicial and administrative, budgetary, economic and other measures to the maximum extent of their available resources to ensure that women realize their rights to health care. That health policy should also take into account the needs of girls and adolescents who may be vulnerable to traditional practices such as FGM.

With regard to Tanzania's implementation under CEDAW, first and foremost it is noteworthy to start by stating that. Though not domesticated within the legal system, it has been relied on in one case by the High court of Tanzania along with other human rights instruments to interpret constitutional guarantees of equality between men and women<sup>209</sup>. Secondly, It is stated that, Tanzania's enactment of the law on FGM was in compliance with international standards but however the provisions fall short of that as will be explained in chapter four.

Thirdly,with regard to its reporting obligation under the convention, it submitted its first report in 1990<sup>210</sup> and combined second and third reports in 1998<sup>211</sup>. Like its counterpart ICCPR, the country never included measures other than legal steps which were taken to criminalize the practice pursuant to general recommendations no 14,19 or 24 respectively .The problem of inadequate information supplied by Tanzania with regard to FGM practice has been cited often by the committee, which led it to conclude at one point that the report lacked sufficient information and statistics and thus failed to deliver a complete picture of the progress made in the implementation of the convention since the submission of its initial report in 1990. There are no even human rights sensitive indicators on the subject in the country. Furthermore, the Committee while commending the fact that the state had not entered any reservations with regard to any provision of the convention, it was concerned that existing customary laws and traditional practices were

---

<sup>208</sup> CEDAW, women and health: General Recommendation no 24, twentieth session, 1999,

<sup>209</sup> *Ephraim versus Pastory, supra:* "The High court of Tanzania relied among other international instruments on the CEDAW in interpreting the bill of rights contained in the Tanzanian constitution .The court held that the guarantee of equality contained in the bill of rights overrode the customary law rules that prevented women from selling clan land, while permitting men to do so, subject to the condition that any other clan member could repurchase the land from a purchaser".

<sup>210</sup> CEDAW A/45/38(1990),Initial Report of the United Republic of Tanzania ,CEDAW/C/5ADD.57 AT ITS 153RD,154TH,157TH AND 158TH MEETINGS ON 23 AND 25 JANUARY 1990(CEDAW/SR.153,154,157 AND 158) Accessed at [www.bayefsky.com/html/tanzania-t4-cedaw.php,18th](http://www.bayefsky.com/html/tanzania-t4-cedaw.php,18th) of October 2004

<sup>211</sup> Pursuant to article 18,See also combine second and third reports of the United Republic of Tanzania (CEDAW7C/Tza/2-3) at its 394<sup>th</sup> and 395<sup>th</sup> meetings, on 1 July 1998, Accessed at [www.bayefsky.com/html/tanzania-t4-cedaw.php,18th](http://www.bayefsky.com/html/tanzania-t4-cedaw.php,18th) of October 2004

in contradiction to the stipulations of the Convention hence impeding its full realization. The committee was also concerned with loopholes in the Constitution that are not inline with the provisions of the Convention. For a discussion of this please see chapter four of this work.

More over, apart from such observations by the committee, it is my personal observation that the system of state reporting though important, it is far from being effective; they have always been delays in submission of its reports coupled with inadequate information. To make the matters worse, the Country has not signed the optional protocol to the women 's Convention, which could allow or entitle aggrieved individual or group of women to file complaints to the committee whenever they deemed so. It is my personal conviction that this fact also puts the rights of victims of FGM into a legal coma.

### **3.3.5 The united Nations Conventions on the Rights of the Child ,1989.**

Children are the most valuable in any society. This is because they ensure the continuity of that particular society. Other people determine the lives of children for various reasons and in varying degrees. These include their parents, guardians, teachers and other adult members of the society. These have the responsibility for the quality of the life of children.<sup>212</sup>

Given this dependency of children on adult members, the international community has accorded great importance the issue of the protection of the child and its welfare. There are multinational and regional legal instruments which address the issue of the child .One of these instruments is the UN Convention on the Rights of the Child .At the bedrock of the Convention lies the Best interest principle.<sup>213</sup> Governments are ultimately responsible for ensuring that all children's rights recognized in the Convention are protected, in so doing they should be guided by this overarching principle that "*the best interest of the child shall be a primary consideration* ". While this principle may be broadly interpreted to accommodate varying cultural views on what constitutes a child 's best interest such interpretations should be consistent with the Convention's other specific protections. In the name of this principle, states are called upon to intervene and prevent children from undergoing the ritual. Nevertheless, preventing girls from undergoing the practice may not always appear at a first glance to be in their best interests, this is because, girls who have not experienced the procedure suffer emotionally from social consequences within their own communities, for example, they are ostracized and shunned. Therefore, it is my opinion that this should be viewed in light of the negative health effects of the practice as well as implications of the procedure on a girl child's subordinate status. Given the overall detrimental effect of it for them, and

---

<sup>212</sup> Peter, C.M, and Human rights: Selected cases and materials, Rudiger Koppe Verlag, Koeln .1997,P33.

<sup>213</sup> Article 3(1)

their societal status, the best interest standard should be interpreted to support the call by the Children's Rights Committees for ending the ritual.

The convention covers all areas of other human rights that are relevant to this study on FGM and they are discussed in the succeeding parts below.

#### **3.3.5.1. The Right to Life and Female Genital Mutilation**

The recognition of the inherent right to life of every child and the obligation of the state to ensure the survival and development of the child is provided under article 6 of the convention. The practice of FGM violates this right. The operation often leads to medical complications, which can result in death. Also from the point of procreation, FGM can be seen as a violation of the right to life when the organs that give people the capacity to procreate are mutilated. This is a violation of one of the fundamental human rights. Article (6) 1 of the Convention states that: state parties recognize that every child has the inherent right to life.

#### **3.3.5.2 Protection from Harm**

The child's right to survival and development is implied and reinforced, within the child's right to protection, from various forms of harmful treatment and practices perpetuated either by the child's family, by the state officials or by private persons. Children require special protection and care primarily because of their physical and mental immaturity and their vulnerability to harm. Under article 6(2) states parties are required to ensure to the maximum extent possible the survival and development of the child. Local customs and certain cultural practices that are harmful to children's welfare present the most serious challenges to the children's right agenda. FGM is one of these cultural practices. Article 24(3) of the Convention on the Rights of the Child require state parties to take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children. In Tanzania, the sexual offences special provisions Act, 1998 has been enacted as required. It protects the health of children by abolishing harmful traditional practices such as the circumcision of females by criminalizing such practices. Chapter four of this work is discussing this piece of legislation into details. However, even with the enactment of the law, looking at the state part reports, the committee is still not impressed with prevalence of the practice, at one point it recommended the state party Tanzania to strengthen its sensitization efforts for practitioners and the public towards the eradication of the same.<sup>214</sup>

#### **3.3.5.3 Protection of Privacy**

Article 16 of the Convention on the Rights of the Child states that, children have the right to protection from interference with their privacy. Privacy is

---

<sup>214</sup> [www.bayefsky.com/html/Tanzania\\_t4\\_ur\\_crc.php](http://www.bayefsky.com/html/Tanzania_t4_ur_crc.php) accessed on the 18th of October 2004

defined to mean the state or quality of being apart from the company of observation of others, isolation, observation from unauthorized oversight or observation protected by law in the enjoyment<sup>215</sup>.

Furthermore, this right may be extended to provide protection from interference with their bodies without them giving their consent. Female genital mutilation is an example of such interference. It is carried out on their behalf, by parents, guardians or family members. Since these children have not reached majority age, their consent and views are not sought. Kabeberi Machacharia comments that, even where the child may want to object the invasion of her privacy, one has to remember that culturally the child may not be in a position to object to do something that adult members of her family have said is good and important for her<sup>216</sup>.

#### 3.3.5.4 The Right of Participation

The right provides that; children who are capable of forming their own views, have a right to express them and to have those views taken into account in any matter or decision affecting them. In cases of FGM girls are not consulted as to whether they want to be circumcised or not. Mothers or family members deal with all matters and the girl becomes a victim of the decision made by the family. The issue of the girl child having a right to decide whether or not she wants to undergo the operation or expressing her views about Female genital mutilation does not arise.<sup>217</sup>

The reasons for this also includes massive social pressure and peer pressure that are imposed upon those who are to undergo the ritual, with the result that no opportunity is provided for the girls to refuse. In other cases, the ritual is performed when the girl is too young to form an opinion in one way or the other. In such cases, a combination of social conditioning and parental authority removes any possibility of freedom of choice.<sup>218</sup> This concept of parental authority is just as strong and enables the adult's interests to prevail over the health and developmental needs of children. This situation is now changing in many parts of the world, in the landmark case of Gillick<sup>219</sup> the House of Lords was ready to hold that

*“ Parental rights are derived from the parental duty and exist  
Only so long as they are needed for the protection... of the child”.*

From the quotation of this case, I would define protection in this case to include measures for protection of a girl child against any harmful

---

<sup>215</sup> Webster's Third New International Dictionary, MeriamWebster Inc 1986,P.1084

<sup>216</sup> Kabeberi-Machacharia, female Genital Mutilation and the rights of the girl child in Kenya, in Ncube, W(ed), Law, Culture, Tradition and children's rights in Eastern and Southern Africa, Dartmouth, Ash gate Pub, Co Ltd, USA, 1998,P252

<sup>217</sup> *ibid*

<sup>218</sup> Rewzaura, B, A,” Law, Culture, and children Rights in Eastern and Southern Africa: Contemporary challenges and Present Day Dilemmas in Ncube, W,(ed)Law,Culture,Tradition and Children's Rights In Eastern and Southern Africa,op cit 1998P 297

<sup>219</sup> Gillick Versus Norfolk and Wisbech Area Health Authority, (1986) AC 112



traditional practices that are detrimental to her physical and mental health. Therefore, parents' rights over their children should exist towards furthering this aim.

Moreover, in 2001 the Committee on the Rights of a Child Convention, when examining state report submitted by Tanzania,<sup>220</sup> was concerned that traditional practices and attitudes still limit the full implementation of article 12 of the convention. It further urged the state to develop a systematic approach to increasing public awareness of the participatory rights of children, particularly at the local level and in traditional communities, and encourage respect for the views of the child in families, schools and judicial systems<sup>221</sup>.

To make matters worse, the Child Rights Convention is not domesticated in Tanzania yet, though there were efforts to enact a unified law i.e. Child Rights Act, 2000 there is no unified law which deals with the rights of the children at the moment. The rights are articulated in various pieces of legislation and even in these laws there is no consensus on the definition of the child according to the age. Therefore, the new law is intended to bring about such changes on the age factor, i.e. pushing it to 18 years pursuant to the CRC Convention.

In a nutshell, it can be said that the practice infringes upon a number of other internationally recognized rights, including the right to be free from gender discrimination, the right to health, and the right of the child to special protection.

### **3.3.6 The United Nations Declaration on the Elimination of violence Against Women ,1993.**

This declaration addresses gender based violence in both “public and private life “. Within its scope, FGM is included together with other traditional practices which are harmful to women .FGM is also considered as form of violence against women done at the family level. Paragraph 4 provides that:

*“States should not invoke any custom, tradition or religious consideration to avoid their obligation to eliminate violence against women”*

This declaration embarks on the reasons, which are used by the communities to substantiate their practices. For the case of FGM, almost all communities practicing it defend the practice as a tradition or religious requirement. According to this article any practice if it perpetuates violence against women, it should not be given custom, religious or tradition backing

---

<sup>220</sup> See the Revised initial Report of the United Republic of Tanzania,CRC/C/108,AT ITS 713 AND 714 MEETINGS ,crc/C/SR.713)Held on 1 st of june 2001,CRC/C/8/Add.14/Rev.1)

<sup>221</sup> CRC state party report 2001,1999,[www.bayefsky.com/html/Tanzania\\_t4\\_ur\\_crc\\_php](http://www.bayefsky.com/html/Tanzania_t4_ur_crc_php) accessed on the 18th of October 2004

instead it should be eliminated. Furthermore, the Declaration sets out an internationally recognized framework for action by governments. It details the measures states should adopt to prevent, punish, and eradicate such violence. These duties include due diligence in investigating and imposing penalties for violence and establishing effective protective measures.

### **3.3.7 United Nations Declaration on the Elimination of all Forms of Intolerance and Discrimination Based on Religion or Belief.**

This declaration protects the rights of the child against abuse carried out in the name of a particular belief or cultural tradition such as FGM. In most communities, the ritual is practiced for a religion or traditional requirement. This declaration forbids all religion or traditional requirements that are putting the child at risk. FGM is associated with many complications that hinder the full development of the child including infections and sometimes death may result out of it. As the practice is based on religion and belief, this declaration needs this practice to be eliminated<sup>222</sup>.

### **3.3.8 The United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities. 1993**

This document clarifies the resolution of the conflict between human rights and culture by stating that a guarantee of cultural integrity does not negate the basic human rights of all peoples. Article 4 and 8 of this declaration provides that, the guarantee to practice culture and carry out traditions and customs is subject to international human rights. No custom that violates an individual's human rights is covered by the protection in this declaration. The declaration reminds all states that any custom practiced should be in conformity with all human rights instruments. The function of culture is to provide a framework for human well being, cultural arguments can never be used to condone violence against women and children. Moreover, culture is not static but constantly changing and adapting. In this case FGM practice is not tolerated under any international instrument cited above. This declaration also calls for abolition of FGM as being incompatible with international human rights norms and standards.

### **3.3.9 The Beijing Declaration and Platform of Action**

During the Fourth world conference on women held in Beijing in 1995, female genital mutilation was cited as both a threat to women's reproductive health and a violation of their human rights<sup>223</sup>. In addition to making general recommendations, the platform specifically called on governments to enact and enforce legislation against the perpetrators of

---

<sup>222</sup> *Practices of a religion or belief in which a child is brought up must not be injurious to his physical or mental health or to his full development.*

<sup>223</sup> Paragraphs 41 and 95 recognized FGM as harmful practice and violation of the rights of the girl child.

practices and acts of violence against women such as FGM.Paragraph 233(h) of the Beijing Platform for action on FGM states that:

*“Prohibit FGM where it exists and give vigorous support to efforts among non governmental community organizations and religious institutions to eliminate such practices.*

### **3.3.10. The United Nations Conference on Population and Development,1994**

This Conference marked a critical development in the UN ‘s role on FGM.One of the achievements of the Conference was to highlight the intimate interconnections between women’s health and women’s human rights. FGM was connected with women’s health because of its complications, which results after the operation. If a girl survives after the operation she is still faced with other problems like stillbirth during delivery and many others. These problems hinder the full development of women and their children. The Cairo program of action states that:

*“Governments are encouraged to prohibit FGM wherever it exists and to give vigorous support to efforts among non governmental and community organizations and religious institutions to eliminate such practices.”*

### **3.3.11 The Vienna Declaration and Program of Action ,1993**

This expanded the international human rights agenda to include gender-based violence. The Declaration among other things urges Governments to intensify their efforts for the protection and promotion of human rights of women and the girl child, stressing that gender based violence including that resulting from cultural prejudice such as FGM is incompatible with the dignity and worthy of the human person must be eliminated. The declaration specifically calls for the elimination of harmful traditional or customary practices that harm the girl child<sup>224</sup>.

## **4.0 The African region Instruments**

Besides International Declarations and Conventions with a world wide range, there are also Regional Human Rights Instruments, which provide a legal basis for combating traditional practices such as female genital mutilation. Africa, like Europe and the America’s, also adopted a regional human rights instrument in the 1980’s. Africa has also been the first to adopt a regional Child Right’s Charter.

---

<sup>224</sup> Paragraph 38

#### 4.1 The African Charter on Human and Peoples Rights(1981)

The African charter provides for all aspects of human rights,<sup>225</sup> the rights provided include civil and political rights,<sup>226</sup> economic social and cultural rights<sup>227</sup> and the people's rights.<sup>228</sup> The duties of individuals and states are also enshrined in the charter<sup>229</sup>; these include among other things, the duty to respect the rights and freedoms contained in the charter. The above-mentioned articles of the charter create a society of people with equal rights without discrimination in any form whether civil, political, economic or cultural.

To go with the above paragraph, this is perhaps further distinct from other regional conventions for the protection of human rights, in that it has a specific provision that addresses the rights of women. This is apart from the commonplace provisions on the right to equality and freedom from discrimination (Articles 2 and 3) that adorn most international and regional instruments; these remain the starting premise of any discourse on gender relations and rights of women. For the purpose of this study, certain other articles are specifically important. They include article 4 that is on integrity of persons, article 5 on human dignity and protection against degradation of persons such as torture, cruel, inhuman and degrading treatment and article 16 on the right to health. With regard to specific human rights of women Article 18 of the charter provides that:

*"The state shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of woman and the child as stipulated in the international declarations and conventions."*<sup>230</sup>

Since FGM draws its legality from culture, the Charter require the people to be treated equally and to abandon any practice which is discriminatory, inhuman, degrading and any treatment which is harmful to the health of women and children. Though it is a starting point for the protection of women and children 's rights, Article 18 has been regarded as being too general, without any substantiation on the rights of women, with the most scathing attack being that the Banjul charter has placed the rights of women into legal coma.<sup>231</sup> Although the article does not have the specificity on women's rights contained in CEDAW, it can form the basis for having states account for the status of women in their national legal orders.

---

<sup>225</sup> Kabudi,PJ op cit pp 40-43, Shivji ,I;G The concept of human rights in Africa ,Dakar, CODESRIA,1989,p 99 Peter,C,M Human rights in Africa: A comparative study of the African charter on human rights,London,Greenwood Press,1990,p 20

<sup>226</sup> Article 1-12

<sup>227</sup> Article 15-18

<sup>228</sup> Article 19-24

<sup>229</sup> Article 25-28

<sup>230</sup> See the case of Ephraim supra in which this article was also affirmed.

<sup>231</sup> Honoria, H, Introduction to the African System of Protection of Human rights and the Draft Protocol, In Wolfgang, B, Kisaakye E (eds) Human rights of women: International Instruments and African Experiences, Zed Books, London, Newyork, 2002

Perhaps more problematic is the contextualization under article 18 (3) which is placed within the context of family and traditional values in Para 1 and 2, There may seem manifest a conflict in the perceived role of the state in this regard, which is to protect the family as the custodian of traditional values at the same time ensuring the protection of the rights of the woman, the operative word here is manifest given the fact that major violations of human rights occur within the private realm of family relations such as the practice of FGM or for that matter its wider forms of clan ,caste or tribe Furthermore, the suppression of women's rights often occurs under the cloud of tradition ,custom and cultural values of which the ritual under discussion is placed in all its angles.

Most recently, a Protocol to the Banjul Charter on women's rights has been adopted, which provides for greater articulation of articles 2 and 18 of the Charter and it is an impressive catalogue of various rights ranging from dignity and physical security, health and reproductive rights, prohibitions of harmful traditional practices such as FGM. Tanzania has neither ratified this protocol nor the one establishing the court, it has only signed both protocols.<sup>232</sup> Recently there were efforts under way to ratify the Maputo protocol<sup>233</sup> It is my submission that the ratification of these instruments is a matter of urgency, as it will place women 's rights in Tanzania in another forum, taking an example of the protocol on women 's rights, It comes up with specific guarantees on prohibitions of discrimination and cultural practices that are detrimental to the health of women and girls. The ratification of the protocols will enhance the rights of women in the region including Tanzania in particular. Through the African court women victims will be provided with an avenue to enforce their rights and also various rights will be interpreted much more broadly and hence removing any ambiguities and or absurdity. It will also place the government under strict obligation to ensure the protection and promotion of such rights.

#### **4.2 The African Charter on the Rights and Welfare of the Child**

The Organisation of African Unity adopted this Charter in 1990. Under article 1 of the Charter, African states are obliged to take specific legislative, administrative, social and educational measurement to protect the child from all forms of torture, inhuman or degrading treatment. The Charter prohibits any custom, tradition, culture or religious practice that is inconsistent with the rights of the child<sup>234</sup> .The Charter also require

---

<sup>232</sup> Protocol to the African Charter on Human and Peoples' Rights on the; Establishment of an African Court on human and people's rights and The protocol to the charter on Women's rights, Accessed on the website .  
[http://www.achpr.org/english/doc\\_target/documentation.html?../ratifications/ratification\\_women\\_en.pdf,1st](http://www.achpr.org/english/doc_target/documentation.html?../ratifications/ratification_women_en.pdf,1st) of November 2004

<sup>233</sup> www.humanrightscenter.co.tz

<sup>234</sup> Article 4 (1) in all actions concerning the child undertaken by any person or Authority the best interest of the child shall be the primary consideration. Article 5(2) states that: state parties... shall ensure to the maximum extent possible the survival,

governments to take all appropriate measures to eliminate social and cultural practices harmful to the welfare of normal growth and development of the child. In particular those prejudicial to the health, life of the child and those customs and practices discriminatory to the child on ground of sex or other status .The charter furthermore sets the minimum standards of protection for the survival of the health and education of the children.

## **5.0 Conflict Between Female Genital Mutilation culture and universal Human Rights**

Throughout this chapter I have attempted to highlight the human rights instruments that condemn and outlaw the harmful practice of FGM.Tanzania's obligations towards protecting and promoting the guaranteed rights have also been assessed.

Yet as, is often the case with cultural practices that discriminate against women, a question arises about how to respond to those who argue for the immunity of cultural norms from scrutiny under human rights law. While these human rights standards call for the end of FGM, there are other interests that support the practice on grounds of culture, tradition, minority rights and even religious freedom. The human rights framework provides for the rights of people to enjoy and practice their own culture and religion.

Starting with the right to culture, in examining the human rights associated with culture, it is critical to note that these important instruments are phrased to protect the right of people to take part in cultural life rather than to create a broad and indeterminate right to culture. Although this right is recognized internationally, it is limited by government's obligation to uphold other fundamental rights.<sup>235</sup> The critical inquiry for FGM is to assess whether this particular practice infringes upon other human rights. Given its adverse effects, it has been regarded by the international community as one form of gender discrimination and an act of violence against women, this procedure should be regarded as an act that violates women's and children's rights. The human right to participate in cultural life does not protect this practice<sup>236</sup>.

The right to religious freedom is an important human right. It is protected

---

protection and development of the child, article 10 states that no child shall be subject to arbitrary or unlawful interference with his personal privacy and article 14(1) states that: every child shall have the,0 right to enjoy the best attainable state of physical ,mental and spiritual health

<sup>235</sup> The UDHR thru article 27(1) and the ESCRs thru article 5(1) contain general clauses stating that none of the rights they recognize should be interpreted to destroy any other right, this also applies to the right of people to participate in their culture. Banjul charter under article 29(7) gives the individual the duty to preserve positive African cultural values. See also article 1(1) and (2) Declaration on principles of International Cultural cooperation.

<sup>236</sup> See article 5 of CEDAW

under various human rights instruments<sup>237</sup>. This right as defined in international instruments; it is limited by government's duty to protect public health, safety, morals and fundamental rights and freedoms of others. Furthermore, the right in question is restricted to such limitations as are prescribed by law. Hence these limitations may come into effect under two simultaneous conditions i.e. those that are prescribed by law and necessary to protect specified goals. The former has been interpreted to refer to legislative acts<sup>238</sup> I m discussing about this issue because more often it is argued that the communities that practice FGM, do that as a matter of religious conscience, though the religious books are silent on this. Therefore in such communities, state interference in the practice can be perceived as an infringement upon religious rights. Moreover, as noted above, under human rights law, religious rights are not absolute. The detrimental effects of the practice on victims can be a basis for restricting the right so long it is embodied in a legislative act. Women and girls whose religious convictions do not require them to undergo the ritual must be free to act consistently with their faith, abstaining from undergoing the procedure if they wish.

Conclusively, I can state that, the assertion that the right to practice FGM culture precludes government action against the practice is a fallacy that lacks support under international human rights law, these rights are not absolute and international law recognizes prescribed limitations. Furthermore, in the words of Kofi Annan, the Secretary General of UN "*The rights of women and girls are not something to be explained away by cultural specificity...achieving the empowerment of women is the advancement of all human kind*". Governments need to balance this set of rights against their duty to protect the fundamental rights of everyone. However, in devising means and strategies by which to stop the practice they need to be sensitive to the concerns related to religion, culture and the minority status of the affected community.

---

<sup>237</sup> Article 18 of UDHR, everyone has the right to freedom of, conscious and religion, ICCPR article 18(1) Every one shall have the right to freedom of thought, conscience and religion, Article 18(3) freedom to manifest one's religion or beliefs may be subject to only such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others. See also article 8 and 27 of Banjul Charter, Article 12 of American convention, Article 9 of European convention, declaration on religious intolerance.

<sup>238</sup> A,C kiss" Permissible limitation on rights in Henkin(ed)The national Bill of Rights ,p 304,See also pieces of legislation that prohibits the practice like the Tanzania's sexual offences special provisions act.1998

# CHAPTER FOUR: The Law and Practice of Female Genital Mutilation in Tanzania

## 4.1. Introductory Remarks

*“The medical miseries caused by FGM being well documented and the psychological impact beyond dispute, it might seem attractive to outlaw FGM altogether”<sup>239</sup>*

Initially, many people from the countries of origin were against the legal prohibition of FGM arguing that, such a ban would merely drive the customary practice underground and therefore increase health risks for women and children. Nowadays however, the prohibition by law is regarded as a key element in the fight against the practice of FGM.<sup>240</sup>

The introduction of legislation that criminalized FGM has been seen as an effective way of eradicating FGM at international and domestic levels. The proponents of this approach as we have seen earlier in chapter one, believe that, law can be used to bring about social, economic and political changes, hence the need for equality and development of both women and men. Laws prohibiting FGM are important in that they represent an ambiguous statement that the practice is not officially tolerated. However, it should be noted that while acknowledging this proposition I am fully aware of the limited role laws could play in changing human behaviour.

Having stated so, this chapter will give some insights on the law and practice of FGM in Tanzania, attempting to look at the perspective of both legal and social angles. It will start by giving the differences between legal and social norms as the two terms are crucial towards understanding the process of eradication of the deeply entrenched cultural practice of FGM, which is also regarded as one form of social norms. The analysis of the relevant pertinent national laws will follow thereafter to see whether the same are adequate or not in addressing the issue of FGM in the country, their impact on the public and their role if any on the eradication process and lastly some relevant case law will also be revisited.

### 4.1.1. Legal and Social Norms Distinguished

A norm or norms are defined as standards of behavior that are typical or accepted within a particular group or society; it could be a social, cultural or

---

<sup>239</sup> Silberschmidt, M, Female Genital Mutilation: A Harmful Act of Trust, Desk Study for Danida. June 1994

<sup>240</sup> Jackline, Smith: Visions and Discussions on Genital Mutilation of Girls, An International Survey, Defence for children international, the Netherlands, 1995.



a legal norm<sup>241</sup> It is generally considered as a broad term, broader even than a legal rule, it establishes acceptable and unacceptable standards of behavior addressed to everyone or to a particular group. Norms come in all forms<sup>242</sup>, it could result from an express agreement among the group members, that norm violations count as breaches of contract for which the violator must answer in a court of law, example; rules for private instructions etc. It could be inform of public enforcement example criminal laws or social conventions; example practicing FGM

**Legal norms** on the other hand imply a violation that is met with a coercive response from the state in form of damages, fines, imprisonment and the like, they have also been described as the power of enforcement by a third party, the government. This is also referred to as the use of an external agent.

The discussion of **social norms** is steeped in the language of custom and usage, culture and religion, common practice, social standards, implied rules of conduct. All of these are widely shared by and respected by group members, but do not rest on formal or explicit agreement. Violations are such as ostracism, bad luck, isolation from the group etc. Hence the terminologies; social conventions and public enforcement respectively are referred to these two terminologies.

In enforcing legal norms upon social norms and practices such as FGM, the Government must emphasize certain mainstream values in society and educate people, it cannot enforce those values through power since they are built in their internal minds. In other words legal norms, in order to be effective, need social acceptance by the people who are subject for behavioral change. When a social norm is transformed into the law then it becomes a part of the law, this applies for FGM in Tanzania as it is now regulated by the external enforcing power, the law. However, since the practice is deeply embedded in the cultural communities, the government, in order to be successfully in its enforcement power, it has to spend some money educating the public on the law so that people involved become aware that the same is punishable and that they start learning how to stop following the norm by their internal mind. This could also go with formulation of broader policies encompassing many strategies for change. Secondly, creation of incentives such as; economic empowerment for women and girls in order to emancipate them from subjecting to the harmful practice that might have a negative impact on their gender.

---

<sup>241</sup> Wehmer, Sally,(eds) Oxford advanced learners dictionary of current English, sixth edition, Oxford university press,2001

<sup>242</sup> See Epstein.,Richard,*Norms;Social and Legal* at [www.bsosumd.edu/pegs/winter\\_96/Epstaein\\_1htm](http://www.bsosumd.edu/pegs/winter_96/Epstaein_1htm) accessed on the 8th of October 2004

## 4.2 National Legal Framework On the Practice of FGM

### 4.2.1 The Constitution of the United Republic of Tanzania, 1977

The Constitution of the United Republic of Tanzania proclaims the equality of all human beings under its article 12; this equality is also extended to the law. According to Article 13 (1):

*All persons are equal before the law and are entitled without discrimination to protection and equality before the law.*

The most recent 2000 constitutional amendments included gender discrimination under article 13 (5) as one of the prohibited grounds of discrimination. It can be stated that, this has eased the process of the pursuit of justice based on this ground as it has made it firm and clear than when it was merely assumed without an unequivocal pronouncement. Before that, discrimination on the basis of gender or sex was not prohibited under the Constitution. However, that anomaly did not deter the court from ruling that discrimination on the basis of gender was prohibited. In the celebrated case of *Ephraim* versus *Pastory* (supra) the court was ready to hold that:

*A customary rule of the Bahaya people of Tanzania on matters of inheritance was discriminatory to women and was contrary to article 13 of the constitution of the united Republic of Tanzania.*

Although the term sex or gender was not specifically mentioned in article 13 of the Constitution, this did not deter the court from deciding that the bill of rights at that time prohibited gender discrimination.

Therefore, the above provisions on equality and non-discrimination prohibits the practice of FGM hence protecting women and girls from the same. It should be noted that, FGM ritual is carried out for among other things gender and sexual reasons, it is imposed on women because of their sex in order to perpetuate their gender inferiority and imposed societal roles. It is a practice imposed by society on women basically for the advantage of men, as it presupposes among other reasons that women are promiscuous and their sexuality has to be regulated. The practice goes against other provisions that are provided for under the Constitution such as: the right to life in cases where victims die, right to privacy where sexual pleasure is destroyed as a result of undergoing the ritual and the right of participation in forming opinion in cases where the same is done to babies, young girls and women upon delivery. It is a culture that violates the rights enshrined in the Constitution hence its eradication cannot be overemphasized.

Nevertheless, with such beautiful provisions for protecting every one including women and girls, the Constitution falls short of international standards, when it comes to protecting the victims from harmful traditional practices. The word gender, as one of the prohibited grounds of discrimination, is not explicitly defined in the Constitution; this makes it

difficult when it comes to enforcement of such rights, as it is not clear what exactly it encompasses, there is a need to define the term gender in order to remove any absurdity which might arise in the course of interpretation. Secondly, the definition of discrimination is not also in line with international standards. The CEDAW committee has recommended for the country to incorporate as a matter of priority, a definition of discrimination, in accordance with article 1 of the Convention as a ground of discrimination in the Constitution.<sup>243</sup>

Thirdly and most importantly is that the Constitution is full of limitations such as “*subject to law*”, which might impede its full realization especially where the provision is subjected to customary law. However, since most of the provisions prohibiting FGM are subject to law, one would argue that, the subjectivity to law might be interpreted to mean the Sexual offences special provisions Act, which prohibits and criminalises FGM. But in turn, the same law has a lot of lacuna as it can be seen below.

Fourthly, it is very disappointing that the right to the enjoyment of the highest attainable state of health does not form part of the Constitution’s bill of rights as the state withdrew from providing free health services. The national Health policy, provides for cost sharing. This has affected poor families, majority of them being women and children who cannot pay for their health services. More often, women and girls who undergo the ritual suffer mental and physical health consequences after the procedure<sup>244</sup>, it becomes difficult for them to realize this right in the absence of it being stipulated in the Constitution.

As a necessity to undergo the ritual, some girls are forced to both, quit education and undergo the same or after completion of only primary school education. This acts as an obstacle for them to pursue higher education to their fullest extent possible, to develop their intellectual potentials and become independent persons in the society. The right to education is provided under Part two of the Constitution that enshrines fundamental objectives and directives principles of state policy.<sup>245</sup> As a directive principle it merely provides guidelines to the government when formulating policies and are to be pursued when resources are available. Therefore the right is not justiciable in court<sup>246</sup> and its monitoring mechanism is done through state party reporting that depends on the good will of the country.

Unless these anomalies are rectified, Constitutional limitations or claw back clauses are removed, none of the rights enshrined in the Constitution will be real and meaningful to women and girls. There is a need for the Constitution

---

<sup>243</sup> CEDAW recommendation paragraph no 226 and 227

<sup>244</sup> See chapter two of this work

<sup>245</sup> Article 11 1 and 2 guarantees every citizen to pursue education in the field of his or her own choice and the government is obliged to ensure that everyone gets that right to education

<sup>246</sup> See Article 7(2) of the constitution which provides that; The provisions of this part of this chapter are not enforceable by any court

to explicitly prohibit harmful traditional practices like the constitution of Uganda. Otherwise it will remain to be a vehicle for women and girls' exposure to harmful traditional practices. Furthermore, the process of eradicating the ritual and consequently gender discrimination would remain to be compared to peeling an onion –once the first layer has been peeled off another one emerges below to reveal yet another underneath<sup>247</sup>. The provisions are enacted but yet its adequacy and interpretation remains to be a matter of debate.

#### **4.2.3 .The Basic Rights And Duties Enforcement Act,**

As it has been observed above, the country's Constitution incorporated a bill of rights in 1984 that provides for fundamental human rights. The legal enforcement mechanism in courts of law for any fundamental right violated is provided under section 4<sup>248</sup> of the Basic Rights and Duties Enforcement Act, 1994.

The law is not very sympathetically enacted to deal with victims of human rights violations in Tanzania. Although the Constitution of the United Republic of Tanzania provides for equality and equality before the law, in practice it is very hard to realize those rights.

To start with; there are two ways in which a victim of human rights violations in Tanzania can get a redress. First, is by instituting civil proceedings against the perpetrator of the violation. This process is complicated by the law .If the perpetrator is in the government, its organs or personnel, the victim is required to give a three months notice. Thereafter, if the case involves the Constitution or the rights provided under article 12-29, then the Basic rights and Duties Enforcement Act<sup>249</sup> requires a two-stage process. First, a single judge will sit to determine if the case has merit, if in his or her opinion the case has no merit it will be thrown out. If the court adopts the case for full hearing, then it requires a panel of three judges .It is not easy to get three judges everywhere in Tanzania. Taking the case of FGM, whereby majority of the victims are in rural areas where there are no even High Court registries, this would mean that human rights violations would go unpunished because of this strange requirement. Secondly, Some of the rights related to the practice at hand are not justifiable in court under this Act<sup>250</sup>, Thirdly, majority if not all Legal Aid clinics are urban centred, it becomes a day dream for an FGM rural victim to pursue the case in the High Court since she lacks all that it takes for the legal machinery to take its

---

<sup>247</sup> Tomasesvisk, K op cit page 433

<sup>248</sup> This provides that; "If any person alleges that any of the provisions of section 12-29 of the Constitution (which contains the bill of rights) has been, is being or is likely to be contravened in relation to him, he may, without prejudice to any other action with respect to the same matter that is lawfully available, apply to the High Court for redress"

<sup>249</sup> Act no 33 of 1994

<sup>250</sup> See page 85 on the discussion on the right to health and education

course<sup>251</sup>. The procedure itself is complicated<sup>252</sup> and cumbersome, unless it comes to the knowledge of the willing NGO's to pursue the case; the victim will be left without redress. Hence this procedure is a serious impediment against human rights.

It has been argued that, in recent times, a new way of combining criminal and civil remedies has been introduced through legislation. An example is the Sexual offences special provisions Act, 1998<sup>253</sup> that is the next subject for discussion under this chapter<sup>254</sup>.

#### **4.2.4. The Sexual Offences Special Provisions Act, 1998<sup>255</sup>**

The Sexual Offences Special Provisions Act, hereinafter to be referred to as SOSPA, was enacted by the parliament as response to the public outcry against the increase of the offences such as rape, defilement, incest and other offences of such nature. The public had views that the punishment for those offences were too low compared to the gravity of the offences and the injuries and sufferings the victim sustained as a result thereof. Therefore the act was enacted to increase the punishment for those offences and to further safeguard the person integrity, dignity, and liberty and security of women and children.

The provision that outlaws FGM in the SOSPA is provide under section 21(1 and 2). The section amends the Penal Code Cap 16 of the Laws, by adding a new section to section 169. The new section is section 169 A. It deals with an offence of cruelty to children such as neglect, ill treatment and abandonment. FGM is included in offences of cruelty to children, and the section reads in extenso as follows:

---

<sup>251</sup> In most cases she will be an illiterate with no legal knowledge, not even being able to identify that her rights have been violated, secondly she is in most cases without financial means to hire an advocate or seek legal representation.

<sup>252</sup> The person aggrieved is supposed to seek leave of the high court thru a chamber application supported by an affidavit and a statement setting out the grounds upon which the aggrieved person bases his or her claims.

<sup>253</sup> Act no 4 op cit

<sup>254</sup> Under this law the court may fine the suspect, imprison him and order to pay victim compensation. This makes life easier for the victim who is at liberty to institute civil proceedings. If not satisfied with the compensation ordered in the criminal case. See also Maina Peter and Dilip Das, Human rights and Law Enforcement, Lesson Plan for training of Police in Tanzania, January 1999

<sup>255</sup> The draft was sent to the Ministry of Community development, Gender and Children Affairs for comments, the Ministry gave its recommendation that a provision prohibiting FGM should also be included in the act. That is how the provision on FGM was included in the SOSPA. The Ministry saw it relevant to include the provision prohibiting FGM in the act so as to fulfil international obligations in safeguarding women and children rights. It was also enacted as a result of powerful women's Non Governmental Organisations 's lobbying and advocacy. See also Mkwizu, V, A opcit page 72-73, Maina, Peter op cit p

- (1) *“Any person who, having the custody, charge or care of any person under eighteen years of age, ill treats, neglects or abandons that person or causes FGM or procures that person to be assaulted, ill treated, neglected or abandoned in a manner likely to cause him suffering or injury to health, including injury to or loss of sight or hearing or limb or organ of the body or any mental derangement, commits the offence of cruelty to children “*
- (2) *Any person who commits the offence of cruelty to children is liable on conviction to imprisonment for a term of not less than five years and not exceeding fifteen years or to a fine not exceeding three hundred thousand shillings or to both fine and imprisonment, and shall be ordered to pay compensation of an amount determined by the court to the person in respect of whom the offence was committed for the injuries caused to that person.”*

The implication of this provision is that in Tanzania the practice of female genital mutilation is now a criminal offence. Previously there was no express provision in the penal code, which prohibited the practice .FGM was left to be regulated by the society concerned and it was an acceptable culture in such societies .If it happened that there was death or great injury resulting from the practice the perpetrator was charged under the offence of causing grievous bodily harm and not the offence of causing FGM <sup>256</sup>

#### **4.2.4.1 Analysis or Critique of the Act**

The law which bans FGM in Tanzania, has a number of lacunae which hinder its full realization of the intended goal of protecting women and children as can be seen below:

#### **4.2.4.2 Lack of definition and types of FGM in the Act**

Any government, which intends to prohibit FGM by using law, should make sure that the law is precise and clear in every part. It should make sure that the law clearly and expressly defines the prohibited act; lack of definition might be an obstacle in formulating and knowing the nature of the offence and hence leaving the suspects or criminals outside the ambit or purview of the relevant section of the law. Furthermore the law should make sure that all types of FGM performed in different societies are covered .My personal perusal of the Act was met with neither of these. It is my opinion that this could hinder the full realization of the protection afforded by the Act and hence making the whole exercise of the enforcement of the law difficult and or with no results.

#### **4.2.4.3 Actors or perpetrators in the process of FGM**

---

<sup>256</sup> section 225 of the penal code cap 16 of the laws

The provision in the SOSPA, 1998 does not cover all actors who inflict harm to the body of women and girls without medical ground<sup>257</sup>. The provision in the SOSPA concentrates mainly on family related members and leaves away other actors like circumcisers commonly referred to as *Ngariba* in Swahili language whether being traditional or professional health officers like doctors, nurses and midwives. These should have been included in the provision because it is them who actually carry out the said genital mutilation. The assumption of many people on this provision, especially on actors in the process of FGM is that apart from relatives and guardians the law is also supposed to deal with other people who are directly or indirectly involved in FGM operation. In this case circumcisers should also be involved.

These suggestions are made due the fact that, the provision criminalizes persons, who have custody, charge or care of a child. Suppose a girl is taken to health professionals or *Ngaribas (Traditional circumcisers)* to be mutilated. These persons under no circumstances have no relationship with the girl. They are not parents or guardians. Under any circumstances it is difficult to prosecute them because the law does not cover them. Another example, is when parents decide to take their daughters to be mutilated in hospitals by physicians probably to avoid some of the effects of female genital mutilation. In the Act, doctors are not covered as actors in the practice, the medical ethics are also silent on the issue. In this case, the doctor is left free because the law does not cover him. It is only parents or guardians of the child who will be sued for committing cruelty to children and not traditional circumcisers or doctors.

Any law enacted to combat FGM is supposed to deal with the following actors: doctors, nurses, midwives, and management of health centres, circumcisers, mothers, grandmothers, fathers, other family members and other people who are involved in the practice so as to be effective. The emphasis is to be laid on people who directly or indirectly are involved in FGM operation.

#### **4.2.4.4 Inadequate protection of girls and women**

Another problem of the provision is on the people whom the law is sought to protect. The provision covers only girls who are under 18 years. Unfortunately adults are not protected. The Act has assumed that, women of 18 years and above have the ability to consent or not to the practice. This assumption does not work, as women of 18 years and above in some communities are mutilated without their consent. The Maasai and the Kurya for example mutilate their girls as they turn 18 years. For this they argue they are not violating the law<sup>258</sup>. In Kilimanjaro region, if a woman was not

---

<sup>257</sup> section 21act no 4 of 1998

<sup>258</sup> Legal and human rights center, report on the findings of FGM practice in Tanzania, Dar es salaam 1999,p21

mutilated during her childhood, the traditional birth attendants will mutilate her, upon her first delivery. In Mara region, among the Kurya people, if a man marries a woman of another tribe where the practice is not done, then the woman is to be mutilated before she gives birth. To the Kurya society, this means that a woman is recruited into the Kurya society membership. In kondo district, it is contended that if the operation was not done to a woman at a young age due to certain problem or if the girl resisted at that age, they would wait for her until the delivery time. They believe that at this time the woman will not feel pains of the operation because she will be experiencing labour pains. Furthermore, the healing of the scar goes with the healing of labour problems. So to them it is like killing two birds with one stone.

Therefore this loophole left by the law leaving out women of over 18 years unprotected might be used in the sense that, some of the families might not mutilate their girls until they turn 18 years. This may lead to the continuance of the practice and consequently defeat the whole spirit of the Act in eradicating FGM in Tanzania.

#### **4.2.4.4.The impact of the law**

Since the law outlawing FGM was enacted in 1998, the general trend of the operation of the practice in all the societies where FGM is practiced has changed. The people who are campaigning against female circumcision do this discreetly so as to avoid detection. The sections below have attempted to show how the law has had an impact on the ritual in the country.

##### **4.2.4.4.a Age For Undergoing the Ritual**

Generally the average age for circumcision was between 7 and 15 years. For the Maasai it was when the girl turned 18 years. Because of the law the age now has changed<sup>259</sup>. The operation is done to young girls below six years. It may be even at the age of 2 years. The elderly women conducting the practice have changed the age so as to avoid detection<sup>260</sup>. Thus FGM has lost its former cultural meaning of symbolising the rite of passage. Initiation ritual meant an entrance into the world of an adult woman. The girl was instructed in duties of a girl and a mother. As now the ritual is performed to younger girls, it is no longer possessing its meaning of passage into adulthood as the social position of the child does not change immediately after operation. For girls who are in school, this age does not affect their attendance since when they start standard one they have already gone the ritual. For this reason, it is also difficult for teachers to help campaigning because when the girls start standard one it are already circumcised. Also since the age has changed, teachers cannot detect girls

---

<sup>259</sup> LHRC report, opcit .pg 12

<sup>260</sup> Mkwizu, VA opcit pg 52 and 85



who do not attend school for reasons of circumcision so as to sue their parents.

Moreover, at this age, the child is denied her right of participation as guaranteed by article 18 of the Constitution of the United Republic of Tanzania and article 12 of the United Nations Convention on the Rights of the Child .The ritual is performed when the girl is too young to form an informed opinion in one way or another .No opportunity is provided for the girls to refuse to under go the same. The parental authority removes any possibility on the part of the child of freedom of choice. One of the authors notes that:

*“A pre pubescent girl of seven years and below would not think that what was done to her was wrong especially when it is being carried out with the authority of a parent or relative whom she trusts “<sup>261</sup>*

#### **4.2.4.4.b. Period of circumcision**

The law banning FGM has also caused the period of which circumcision was used to be done to change. Though the time varies from one society to another, the law has affected each society. Normally, circumcision was carried out when the girl was prepared for marriage so that she could know women ‘s roles in advance. Some of the societies like the people of Dodoma and Singida, circumcision used to be done in the cold season from June to October because the cold season is believed to facilitate healing. After passing the law, the period has changed for now there is no specific time for the practice to be done. It is done at any time when the family thinks it is a ripe time to do so<sup>262</sup>

#### **4.2.4.4.c .Mode of celebration and FGM .**

For the time being there are no longer open ceremonies in most of the societies. This is because each family is doing the practice in its own to avoid detection .In the central part of Tanzania girls are not mutilated in their home villages. They are taken to another village to their own relatives under the pretext of visiting them. Then, they are operated secretly in the house and they are kept there until they recover and go back to their home villages afterwards. If the process goes on smoothly nobody would know about it but if complications results then it might come to knowledge of other people. Since the operation is carried out secretly, no celebration is performed to congratulate the girls.

The following table illustrates two cases form the central region, which supports the change of the FGM practice mode of celebration.

---

<sup>261</sup> Kabeberi –macharia,”female genital mutilation and the rights of the girl \_child in Kenya “in Ncube W(ed), Law, culture, tradition and children ‘s rights in eastern and Southern Africa, opcit pg 252.

<sup>262</sup> Report of Inter African Committee \_Dodoma on FGM incidences.

**Table 6**

<i>ERNESTA AGOSTINO:</i>
<i>From the village of Mpamantwa. Was taken to ibihwa village secretly to undergo female circumcision. Thereafter she developed complications and before she was brought back to her village she died. She was buried secretly at Ibihinwa village on the 30<sup>th</sup> June 2000. The circumcision took place on the 26th of June 2000. The people 's militia did not arrest the father of the girl. According to the report of the IAC –Dodoma, the father of the deceased girl AGOSTINO BOSCO MZIGO was too harsh and he used the traditional to threaten whoever tried to arrest him.</i>

**Source: Report of the Inter African Committee on traditional practices affecting women and girls- Dodoma: on FGM incidences. report of Bahi Sokoni Village committee on Traditional Practices, 1999.**

From these facts one may question what steps did the people's militia take after failing to arrest the suspect .Did they report the case to the police? Of course they did not. This presupposes that, even the law enforcers are not committed to fight this harmful practice because they themselves accept the culture and perhaps even themselves are victims of it. So they perceive it as a personal issue and not a public issue. That being the case they need training and mobilisation on the law so that they become effective in the eradication of the practice.

**Table 7**

<i>CHAUSIKU MGULU</i>
<i>She was circumcised secretly and later developed complication, she died soon afterwards and she was buried secretly at Bahi Makulu on the 27 July 2000. Before circumcision the girl was in standard two at Bahi Makulu Primary School. After the incidence the traditional committee took up the issue so that the responsible people could be arrested .The committee went to the said school to confirm whether the girl was studying there. The preliminary investigation indicated that the girl was studying there. When they went there for the second time in the attendance book there was no such a name .The village leaders also were asked if they knew a girl of that name. They also denied knowledge .The parents of the said girl also denied having a child of the said name. It was alleged that the parents, the village leaders and the school authority colluded so that they could serve the parents from being charged.</i>

**Source: Source: Report of the Inter African Committee on traditional practices affecting women and girls- Dodoma: on FGM incidences, Report of Bahi Sokoni Village committee on Traditional Practices, 1999**

From the table above one would ask why the people in that area decided not to reveal the parents. This indicates that the people of this area are aware that the law prohibits the practice of FGM, much as they might not be aware of the contents of the law on FGM. FGM is a cultural practice and the people of Bahai -Makulu belong to the same culture, which supports FGM.It becomes difficult for the same people to implicate their fellow who

practice their culture though they know it is an illegal practice. For them to abandon their culture is like someone to abandon his or her tribe.

These few examples cited above, indicate that the law has changed the general trend of the practice to be worse. This impact can be compared to what happened in Kenya and Sudan, where upon the application of the law people of these countries reacted against it by pursuing the practice underground<sup>263</sup>. In Kenya, the Kikuyu, when the law was passed, they reacted and as a result abandoned European schools and built their own cultural schools.<sup>264</sup> In Tanzania the same trend has also taken its way. People practising this practice did not react the same way as the people in Sudan and Kenya did. Instead they have changed the mode of doing the practice. Instead of being an open practice now it is done underground or secretly<sup>265</sup>.

If there are no complications developed from the practice, nobody can detect that circumcision is still carried on; the assumption might be that people have abandoned the practice, which in fact is a false assumption. In villages where communication is difficult, FGM is carried on as usual. They do not know that FGM practice is illegal since most of them do not listen to radios or read newspapers and even the government has not taken any efforts to distribute the said law in Swahili language. Legal awareness on anti FGM law is available only in urban areas and not in remote rural areas where in fact it is deeply rooted.

Nevertheless, to some extent the law has succeeded to reduce the practice if not to eradicate it. Some of the people in the central region (Dodoma) testified that they have abandoned the practice and some of the Ngariba (Traditional circumcisers) have abandoned their work<sup>266</sup>. They are now campaigning against the practice. However, this has been like a step forward and another one backward, because most of them when they stop perpetrating FGM, after sometime they start complaining that they do not have money to earn their living and hence they can resort back to the practice at any time.

The village committees established by IAC Central zone chapter are in front line to make follow ups in their Areas. If they discover any incidence they report it to the police and make sure that the people involved in the process of mutilation are taken to court. The following is an examination of the relevant cases on the practice.

In the case of ***R versus Mbwasa Madaru***<sup>267</sup>, a girl by the name of Mwajuma was circumcised secretly .She later developed complications and

---

<sup>263</sup> Sanderson, O, L op cit p 63- 69, In Sudan before the law was passed people rushed their daughters to be mutilated because they feared the coming of the new law

<sup>264</sup> Kenyatta, J, Facing mount Kenya: The traditional life of the Gikuyu, op cit p.136

<sup>265</sup> Report of the IAC Dodoma on FGM incidences.

<sup>266</sup> Daily Newspaper, op cit, cited in chapter one of this work

<sup>267</sup> Dodoma, criminal case no 261 of 1999.Dodoma District Court

she was taken to the hospital for treatment. The village committee of Bahi Sokoni Village, reported this incidence to the police station and the father of Mwajuma one Mbwana Madaru was arrested. The case was filed in Dodoma District court. The Accused was charged of causing female genital mutilation to her daughter contrary to section 169A of the penal code read together with section 21 of the SOSPA, but later on was discharged under proceedings of section 225(5) of the criminal procedure Act, 1985 for long adjournment exceeding sixty days without any reasonable grounds<sup>268</sup>.

Some of the cases were filed in courts but later on the parents or relatives of the victim decided to withdraw them from the court. This is done because of the pressure from other village mates and from the family itself. Once they decide to withdraw the case from the court, they settle the issues interfamily. This happened in one case of *R* versus *Fatuma idd*<sup>269</sup>, the accused was charged for causing female genital mutilation to one Francisca Daniel aged 7 years old at Mitunduru village in Singida rural. But the case was later withdrawn. The cause of the withdrawal of the case said to be pressure from within the family and other people around the victim's parents.

In the most recent case of *Republic versus Musa Daudi*<sup>270</sup> and others, the accused persons were charged of an offence of causing female genital mutilation as per section 169A of the penal code as amended by section 21 of the sexual offences special provisions act, 1998 to one girl Sofia Mussa, the accused admitted to have committed the offence, a local knife surrounded by beads used for mutilation was used as an exhibit, and the report from Kidoka dispensary and Kondoa Hospital confirmed the incidence. The accused were convicted of the offence. The trial Magistrate convicted and sentenced them as follows:

*“Because of the ignorance of the existence of this new act no 4 of 1998 The illiterate people in the rural areas are not at all conversant with the Law. The government and the parliament have to educate and sensitize the community on this. As these are the first offenders they are fined to Pay 10 thousand Tanzanian shillings each, in default of payment, each to Suffer 4 months in jail”.*

The accused paid the fine immediately.

From the holding of this case, a number of issues are raised, first and foremost, the Magistrate noted the problem of the ignorance of the law on the part of rural dwellers and that is where the problem is much more

---

<sup>268</sup> Act no 9 of 1985 which states that:

Where no certificate is filed under the provisions of subsection 4, the court shall proceed to hear the case or discharge the accused in the court where the prosecution is unable to proceed with the hearing.

<sup>269</sup> Criminal case no 123 of 1999 filed in Singida District court. see also the case of *R* versus Lucy Augustine where the state attorney entered nolle prosequi pursuant to article 91(1) of the criminal procedure act, 1985

<sup>270</sup> Criminal case no 257 of 2002

prevalent. Most people in those areas are aware that there is a law prohibiting FGM, BUT the problem is that, they do not have any knowledge of the contents of the law itself, therefore the magistrate is calling upon the government and the parliament to sensitize the community on the law.

Secondly, the sentence awarded to the accused by the magistrate was not deterrent or punitive, because ten thousand shillings fine was very low, it is like ten US dollars or even less depending on the exchange rate, it is low because the harm caused to the girl was grievous compared to the fine ordered, furthermore the alternative sentence of four months in jail in default of payment was also very minimal. Section 21(2) of SOSPA is providing for a minimum of not less than 5 years and not exceeding 15 years. The magistrate ought to have increased it. The magistrate also dispensed with the requirement of compensation despite the injuries caused by the accused to the victim pursuant to the above section.

Therefore from the above case law, it is my personal conviction that FGM cases take long time to be determined and their chances of effective success are very small. The cases are still to a greater extent family oriented, the victim, the accused and witnesses in most cases are related in one way or another. When the police are informed about the incidences of FGM, evidence is hard to obtain since nobody is ready to reveal any information against his or her relative, hence investigators get stuck along the road to justice. These problems affect much the prosecution side because the prosecutors fail to get witnesses who can help them to prove their cases. Therefore unless judges and magistrates apply a purposive approach in statute constructions, the chance of success of these cases is very minimal. The literal approach unlike purposive approach requires the court to interpret the law in a plain way though it may lead to absurdity. In other words the law should be interpreted with regard to each mischievous results<sup>271</sup>. The purposive approach promotes or gives effect to the general legislative purpose and removes the absurdity and discrimination that may arise from the literal construction of the law.<sup>272</sup>

As I have noted, the provision that bans FGM has a lot of lacunae. One of these lacunae is the inadequate coverage of perpetrators in the process of FGM The actors left out by the law are the mutilators, in order to include them in the offence the above mentioned methods of statutory interpretation are relevant. If the court decides to use the literal approach this would mean that these people will go Scot free, simply because the law does not cover them. In the case of *Warioba versus Stephen Wasira*,<sup>273</sup> The High Court trial judge in applying a literal approach, found that the respondent had committed an act of corrupt practices but he declined to certify the same to

---

<sup>271</sup> Granville Williams, Learning the law.11<sup>th</sup> edition, sweet and Maxwell, UK, 1982,p 102-103.This approaches requires the court to apply the word with nothing added and nothing taken away.

<sup>272</sup> Ibid-101-102 The judges generally divines the object of a statute merely from the perusal of its language, in the light of his knowledge of the previous law and general knowledge of social conditions.

<sup>273</sup> 1997.T.L.R 272

the Director of Election in terms of section 114 of the Election Act because corrupt practices were not made the subject matter for certifying to the Director of Elections, the finding under section 114 of the Election Act covered only illegal and not corrupt practices. In reversing the decision the court of appeal declining to use the literal approach, it held that:

*“We have decided to adopt the purposive approach in interpreting section 114 in order to promote the legislative object or purpose of restoring corrupt practice to the election act and to remove the absurdity and the discriminatory effect which would have arisen from the literal construction of that section. Underlying the need to remove the discriminatory effect is the need as demonstrated above to bring that section into conformity with the country’s constitution”*

Therefore the court of appeal looked at the object and reasons for the bill to enact the Election Act no 8 of 1985. This construction was more justified for the purpose of removing the absurdity.

In dealing with FGM cases, the court should apply the purposive approach which clears any gap left by the sexual offences special provisions Act, 1998. This method will help the court to discover the intention of the parliament when enacting such a law. The object and reasons for enacting the Sexual offences law is to enhance the national endeavour at protecting the rights of children and women to personal integrity, dignity and liberty. As this is the intention of the Act, the court should put into consideration this intention when dealing with FGM cases. In some cases, where the evidence is hard to obtain or to prove, the offence of FGM and the act of FGM is seen to have been done, the court should proceed to determine the case in a positive way so as to protect the rights provided for in the Act, which are violated by FGM.

The above-cited cases are few which are filed in courts. Most of the cases remain unreported or withdrawn when they are still in the hands of police. The accused are using all means to make sure that they are not taken to court. Some of them have gone to the extent of changing offences in trying to escape from being convicted under the new law as it was in the case of ***R versus Jumanne Joseph***<sup>274</sup>. So long as the police and magistrates also believe in the culture, it will be hard to enforce the law. There is a need to conduct training on every change that occurs in their societies. They need to be equipped with new ideas and how to handle FGM cases firmly.

Perhaps an example of lack of protection from the police as an agent of the state and consequently the state<sup>275</sup> can be explained by the case of ***Zakayo Katungo versus Selemani Mingoli***<sup>276</sup> also known as the case of ***three maasai girls*** which is the only one on FGM that has been privately

---

<sup>274</sup> criminal case no 123 of 1999, the accused was charged with an offence of cattle theft instead of causing FGM and managed to escape within the purview of section 21 of the sexual offences special provisions Act, the daughter was mutilated and died as a result of Hemorrhage.

<sup>275</sup> See also the case of Irene under chapter two page 43-44 of this work

<sup>276</sup> Miscellaneous criminal case no 1 of 2002, resident magistrates court Morogoro

prosecuted<sup>277</sup> so far. The state was unwilling to proceed with the case, the LHRC<sup>278</sup> an NGO, investigated the case in which the three girls aged 12,13 and 15 ran away from their father in the summer of 1999 in a desperate effort to save themselves from the practice of FGM, they fled to a local church for protection, and several pastors took them to the nearest police station, in Matombo. Rather than protecting the girls, the police however arrested one of the pastors by the name of Zakayo who was also the complainant in this case for having unlawfully taken custody of minor children. The pastor was beaten severely and asked to confess that he had raped the girls. The girls were then taken to the hospital for examination, where it was confirmed that they had not been raped. The police turned them over to their father, who had them mutilated the next day and married within a month. One of them was married to a man who had already 11 wives. The girls, upon an interview by the centre told how painful it was to them that even the police could not offer any sort of protection. When the issue was referred to court the girls subsequently changed their version of events and told the court that they were not mutilated and never wished to pursue the prosecution of their father. He was finally acquitted and left Scot free.

This case illustrates lack of action and knowledge of the law on the part of the law enforcement officers and also it is a clear example of lack of protection from the state through its agents from the FGM practice. The local church was willing to help but the government law enforcement officers were not up to it. It also shows the father's ignorance let alone the communities not to understand the effects of the ritual; though the prosecution was not successful the broader objective of the organisation of raising awareness to the public that FGM is a crime was to a certain extent met.

### **4.3 Other Laws Relevant To The Practice Of FGM**

Although Tanzania has enacted a law against FGM, it is only few areas of law that address the practice of FGM. This is the criminal law area. Since FGM involves many people who are working in different areas, other laws need also to be amended in order to supplement if not complement the criminal law in areas where there is still a lacuna. The different laws that can be involved are: family law, administrative law, as well as regulation and policies. Legal measures involved should be viewed broadly to include reforms necessary to promote women's rights as well as law specific to the practice. Legal measures should create penalties for participation in the

---

<sup>277</sup> As per section 99(1) and 3 of the Criminal procedure Act 1985 which allows for lodging of application to the director of public prosecutions seeking for an order to conduct private prosecution for a certain case

<sup>278</sup> The Center report reproduces full coverage of the case in its report on the Enforcement of FGM Law: The Legal Process, Can it save girls from the FGM: A case of Three Maasai Girls In Morogoro, Published by LHRC 2004

practice or provide protections for those who have undergone the procedure or at risk of doing so.<sup>279</sup>

Regulatory measures should be aimed at specific groups such as health professionals who may be in a position either to discourage FGM or promote it. Policies addressing FGM, which may encompass education and outreach programs, may be part of broader government initiatives aimed at promoting women 's empowerment<sup>280</sup>.

#### **4.3.1. The Law Of Marriage Act,1971.**

The family is the primary institution for the care and protection of the rights of the child .It has the responsibility for the care and upbringing of the child. But unfortunately most parents and communities have considered the child as merely their property rather than an individual having rights. Parents have assumed enormous power over their children in such a way that are they are the ones, who decide on all matters affecting the child .For the case of FGM a girl is neither consulted as to whether she agrees to undergo the ritual or not.

In order to save the child from being circumcised against her will, or even in the presence of her will, there should be a law, which will control the parent authority over the child .In this case family law should be invoked .The family law formulated should be relating to the role of parents and the possibility to suspend the parental authority and the placement of threatened children away from their home. Though the right of a child to live with both parents is provided under article 9 of the Convention on the Rights of the Child, this right may be terminated if family environment is incompatible with the child 's best interest.

In Tanzania, one of the laws that deal with family issues is the Law of Marriage Act 1971<sup>281</sup>,this reflects the principle of the best interest of the child <sup>282</sup>. In this provision, the court is empowered upon application by parties concerned, to make an order and place an infant in the custody of the mother or the father respectively .In exceptional cases where it is undesirable to entrust the infant to either of the parents, the infant is entrusted to any other relative .In deciding in whose custody the infant be placed the paramount consideration is the welfare of the infant .In the case of *Ruth Pemba Versus Daudi Mfaligund*<sup>283</sup>, it was held that the child could benefit greatly if living with a father where financial consideration will have effect of giving the child proper food and environment for education. The court again shall have regard to: wishes of the parents, the wishes of the infant and the customs of which the parties belong. Further

---

<sup>279</sup> Rahman, A and Toubia, N, opcit pg 57

<sup>280</sup> ibid

<sup>281</sup> Act no 5 of 1971

<sup>282</sup> Section 125 of the Law of marriage Act,1971

<sup>283</sup> 1975,LRT 54



more section 125(3) provides a rebuttable presumption that it is for the good of the infant below the age of seven years to be with his mother. In the case of *Anamaria Kasian versus Nyangali*,<sup>284</sup> it was held that the welfare of the child is best safeguarded in the custody of the mother rather than the father. In the case of *Ramesh Rajput versus Mrs S.Rajput*<sup>285</sup> it was held that the most important factor in custody is the welfare of the child and that an infant of two years should be with the mother unless there are very strong reasons to the contrary.

The law of marriage Act has overlooked a situation where a child is leaving with both parents but they are ill treating her. However, that is remedied by the penal code<sup>286</sup>, which provides for offences relating to marriage and domestic obligations. There should have been a provision in the law of marriage Act, 1971 that separates the child from leaving with her or his parents if the family environment is incompatible with child's best interests. For the case of FGM, a child may be protected by being separated from her parents if she is in danger of being circumcised or mutilated for a certain period until she reaches an age of forming an opinion.

This measure is highly recommended instead of imprisonment by different authors due to the fact that laws, which provide criminal sanctions for parents who procure FGM for their daughters may create undue hardship for the girls who have undergone the procedure. Long prison terms for parents of young children can have severe effects on the emotional lives of the children involved. Rahman and Toubia suggest that, Governments should consider either assigning criminal sanctions only to practitioners of FGM or assigning lighter penalties to parents than practitioners. Judges and magistrates may in their discretion elect to impose lighter penalty where laws provide for alternative punishment. For example, in Tanzania, the law against FGM provides alternative punishment to a person convicted for causing FGM, He may be convicted for a term of not less than five years and not exceeding fifteen years or to fine not exceeding three hundred thousand shillings (t.shs.300000) which is an equivalent of 300 USD or to both fine and imprisonment. So one may opt for the second punishment of paying fine instead of imprisonment so as to avoid effects that may be suffered by children for being without their parents for long time.

#### **4.3.2. Health Practitioners Legislation**

In most rural communities where female genital mutilation is the accepted norm, traditional birth attendants or traditional practitioners usually perform operations. However, with increasing awareness of the adverse health consequences, health workers have become involved in performing FGM. They are involved in the practice because their codes of conduct are silent on that issue.

---

<sup>284</sup> 1970 HCD No 105

<sup>285</sup> 1988TLR 96

<sup>286</sup> Cap 16 of the laws, section 166 and 167

#### **4.3.2.1 The Medical Practitioners and Dentist Ordinance, Cap, 407**

The Medical Practitioners and Dentist Ordinance<sup>287</sup> provides for the establishment of the medical council of Tanganyika, which has several functions including registration of medical practitioners and dentists, maintaining a register of such practitioners and their qualifications which is to be published<sup>288</sup>. Others are powers and procedures for taking disciplinary action against truant practitioners. The act does not prohibit doctors to perform FGM practices, its silence leaves a loophole for them to involve in the practice. The ordinance provides for the establishments of a monitoring mechanism that is the Council. It is there fore possible for it to set friendly standards on harmful traditional practices such as FGM for medical doctors, in the event of failure to adhere to them such truant practitioners should be liable for disiplinary action including deregistration from the practice.

#### **4.3.2.2 The Nurses and Midwives Registration Act**

The act provides for the education, training registration enrolment and practice of nursing and midwifery. Briefly it establishes the Nurses and Midwives council with the duty and powers to monitor and supervise the conduct of nurses and midwives in the country with representative from key health institutions. It is very unfortunate that the Act does not prohibit midwives or nurses to involve themselves in the practice of FGM. The silence of this statute leaves a loophole for them to act in such an illegal practice. It is my opinion that this statute should have a provision that declares that nurses and midwives who are known to be carrying out the practice of FGM be deregistered from practice and liable for disciplinary action. The council that has powers to monitor and supervise the proper conduct of nurses and midwives in the country is provided with an opportunity to set express pertinent standards relevant to FGM.

Moreover, The Act should be amended to enunciate education, training registration enrolment and practice of nursing and midwifery to impact Harmful traditional practices such as FGM preventive and care standards.

On the other hand the Ministry of Health should have formulated by laws to guide all health professionals in dealing with victims of FGM practice standards should make it clear that the practice of FGM upon women and girls violate professional standards. Medical Practitioners who engage in the practice should loose their license to work in their medical field<sup>289</sup>. For example in Egypt a Ministry of Health decree, upheld by the by the highest

---

<sup>287</sup> Cap 409

<sup>288</sup> Section 9(a-ö)

<sup>289</sup> In Sudan, Government health authorities have sanctioned TBA and village midwives who participate in FGM by confiscating their midwifery kits and placing them under close supervision .In Denmark, France and United Kingdom the medical licensing and disciplinary bodies have declared that physicians who practice FGM may loose their license to practice medicine.

administrative court had declared FGM an unlawful practice of medicine thereby making practitioners susceptible to criminal prosecution.

#### **4.3.3. The Education Act, 1978.**

This is an Act to repeal and replace the education Act, 1969 and to provide for the better development of the system of national education. Although the act does not refer to the right of the child concerning access to harmful traditional practices education, there is no indication that the child is barred from receiving the said education. The Act provides that subject to the national policy on national education and other national plans and priorities appropriately specified from time to time, every citizen of the United Republic shall be entitled to receive such category, nature and level of national education as his ability may permit him<sup>290</sup>. Currently there is no curricular in place that provides pupils with knowledge on harmful traditional practices. What is required of the law is to make clear provisions for the right of the child to access education in respect of traditional harmful practices such as FGM while respecting Tanzanian cultural values that are not harmful to health.

Since education is not an end in itself but a means to an end, there is a need to amend the act to make it compatible with the process of combating FGM in the country; throughout this work the role of education has been over emphasized, it is through education that girls can be able to know and understand the ill effects of the practice of FGM, that they can also be able to acquire knowledge of their rights and be able to resist such practices or even to educate their own parents and communities. Above all that it is through education that they can be able to develop as people with full potentials and skills and later on become economically and socially independent from their parents, husbands and the communities which would subject them to the practice.

#### **4.3.4 The media Laws: The Newspaper Act ,1976 and The Broadcasting Services Act,1993**

The media plays a vital role in disseminating information and education in Tanzania. In order to effectively fight the practice of FGM, information and education to the public is necessary. Equally important is the promotion of the rights of the women and girls who are prone to the practice of FGM, example: information on sexual and reproductive health and rights. There is an undisputable need to change the cultural attitudes related to FGM practices, stereotypes and gender discrimination. Whether media laws have set any standards for tackling harmful traditional practices is a question that needs to be debated and addressed.

---

<sup>290</sup> Section 56(1)

The Newspaper Act repeals and replaces the Newspaper ordinance. The Broadcasting Act, make provisions for the management and regulation of broadcasting and for other matters related to it. Whereas the latter emphasizes on accurate dissemination of information, education, communication, respect for cultural values, gender balance and the rights of the child, they both do not contain specific provisions that explicitly deal with dissemination of information on harmful traditional practices such as FGM. There is a need to set standards that will address and priorities these issues, as education is an indispensable requirement towards any fight against a deeply entrenched traditional practice. There is a pressing need to disseminate information on international and national laws pertaining to the practice in a coherent and coordinated way. In most rural communities, where most people do not only have access to Television stations but also do not own televisions, the radio stations and newspapers should disseminate such information. Issues touching upon effects of FGM, sexual and reproductive health and rights, reduction of maternal mortality rights and the nature and ill effects of FGM should be given priority and disseminated regularly.

#### **4.3.5.Policies If Any**

The government of Tanzania after having enacted the anti FGM law it still has the duty to provide information about the law and effects of the practice on women and girls to all communities especially those practising FGM. This should be done through education and mass media policies, Media outlets should be encouraged to discuss the rights of women and girls to be free from FGM. Moreover, groups or individuals advocating against FGM should not be denied access to the media. Policies formulated should be established to facilitate the media 's access to such advocates.

Since one of the reasons for undergoing FGM is the dependence of women to men after marriage, policies should be formulated to empower women to have access for raising their economic, social and political status. This will defeat the notion that a woman cannot survive alone without a man who is expected to supply everything at home. Without clear policies on these issues, FGM will continue in such societies, since men will continue to reject to marry uncircumcised women, and women on the other hand will subject themselves for circumcision so that they can be married and get persons whom they will be depending upon.

In concluding this chapter, I will direct my attention to the advantages and disadvantages of using the law in eradicating FGM. Having stated so, this work acknowledges the importance of law in eradicating the practice of FGM. This is because law is a key ingredient in the social construction of reality. In this case laws as engines for change have real consequences in fuelling eradication efforts regardless of whether local individuals are actually prosecuted under them or not. Secondly, Law enables individuals to have a reference point which the individual or group can seek protection and

redress through legal process. Laws are deterrent to the violators of the rights of groups or individual. Moreover, anti FGM Laws bolster the perception of an international consensus to eradicate the practice and are viewed as an invitation by international activists to work within countries to eradicate the practice <sup>291</sup>. Most importantly, laws can formulate a standard of social norm and value but however, the enforcement of such a law has very great limitations. The main difficulty is that FGM is being performed secretly and in this it remains hidden to police and investigators. Even in cases where the police are informed about violations of the law concerning FGM, evidence is hard to obtain. The communities where FGM is widely practised often remains close to officials. In other words the law sets a standard but formal enforcement is impossible. This is in fact where the distinction between legal and social norms lies. This is shown by the cases that are filed in courts for enforcement. When compared to the statistics showing the prevalence of the practice and cases brought to courts, those brought to courts are negligible. Even where many cases are filed in court, the positive outcome is far from being reached as it has been illustrated by the cases I have tried to revisit. This has implication for use of the law in eradicating the practice. The implication might be that people have abandoned the practice, which in fact is not true, as the law has just driven the practice underground. This implies that law alone is important but not adequate to eradicate FGM. The use of local tribal women as educators and animators to educate their fellow women on the effects of FGM cannot be overemphasized.

Furthermore the coercive force of law has worsened the situation as female genital mutilation is now performed to children when they are too young physically and not ready to understand the initiation or even apply such training. In the central region the practice is done to children of even two Months old.

From these observations it is true that FGM cannot be eradicated by the use of penal laws only. Other laws such as family law, medical ethics as already explained should be involved. Accordingly other non-legal intervention measures such as advocacy, public awareness and education so as to highlight the negative health implications of the practice should be undertaken.

With regard to the issue that the law banning female genital mutilation has left away women of 18 years and above unprotected, it is observed that this loophole is an advantage for the people who know that to mutilate the girl under 18 years is illegal. So they will be waiting until a girl turns 18 years old and then exercise the practice because by that time being, they will not be violating the law. For the Maasai, the lacunae seem to work on their side as they generally mutilate their girls when they turn 18 years. In some places as it has been noted people are mutilating newborn babies.

---

<sup>291</sup> See efforts taken by various organisations in the country under chapter two of this work

Another group that is at advantage are the people who perform FGM, traditionally known as Ngariba's. These people have not been interfered with in their work, as they are not included in the group of offenders by the law in the course of their work. According to law it is only parents, relatives, or guardians of girls who are held responsible for the crime .In the cases filed in court it is only two Ngaribas who were joined with the parents of the victims in the case. Most are left free to continue mutilating other girls. However since their cases in the central region (Dodoma) were still undetermined, one is not sure as to their outcome. If the court has to use literal approach as I have cited earlier, obviously the accused will be released, but if the purposive approach will be employed they may be convicted like parents. Therefore generally speaking the use of legal sanctions affects only some sections of the society if not some people. In the case of the practice at hand such a change needs to have an impact in all the societies concerned.

## 5.0 Chapter Five: Conclusions and Recommendations

### 5.1 Concluding Remarks.

*"It is unacceptable that the international community remains passive in the name of a distorted vision of multiculturalism. Human behaviour and cultural values, however senseless or destructive they may appear from the personal and cultural standpoints of others, have meaning and fulfil a function for those who practice them. However, culture is not static but is in constant flux, adapting and reforming. People will change their behaviour when they understand the hazards and indignity of harmful practices and when they realize that it is possible to give up harmful practices without giving up meaningful aspects of their culture"<sup>292</sup>*

Throughout this study, I have been able to prove that the practice of FGM is still widely practised among the various ethnic groups in Tanzania<sup>293</sup>. Although the types, extent of the procedure, practitioners and reasons for practising the same vary from one tribe to another. The study has also proved that there is no direct correlation between religious belief and the practice of FGM. Furthermore, the work has shown how this practice is a violation of human rights, it being an unnecessary operation which results in unnecessary complications. The natural body structure of the woman is changed for non-medical or non-therapeutic reasons.

In recognition of the fact that, governments are responsible for violations of human rights be it perpetrated by its own agents or by private individuals, the study has examined and assessed the relevant international standards to the practice in the country vis a vis the government efforts to protect and promote the same. Various state party reports under each international instruments were scrutinized to see how much the government has been or has not been able to deliver. The rights examined included among others; the right to health, education, the right not to be discriminated against and the right to life in circumstances where it leads to death. The operation can be conceived as form of cruel, inhuman or degrading treatment in view of the way it takes place and in view of the pains which accompany it. In view of all these consequences the international community has recognized the practice as one form of gender based human rights violence or gender based persecution which aims at controlling women's sexuality and autonomy.

The introduction of legislation which criminalizes FGM has been seen an important way of eradicating the practice both at international community and domestic levels. The supporters of this approach, as it can be seen under

---

<sup>292</sup> [www.amnestyinternationalusa.org](http://www.amnestyinternationalusa.org), Joint statement by WHO also found at [www.who.org](http://www.who.org)

<sup>293</sup> The work has also managed to trace the historical origins of the practice both at national and international level, also the efforts for eradicating the practice.

chapter one of my work believe that law is important in that represent unambiguous statement that the practice will not be officially tolerated .It also legitimizes the work of anti-FGM advocacy groups. Nevertheless, experience has shown that, this approach is ineffective in practice<sup>294</sup>.In several African countries where it exists, the law is not enforced for fear of alienating certain power or exacerbating tension between practicing and non-practicing communities. In Tanzania, politicians are questioned during elections time about how they will convince the government to legalize the practice and those who speak out against it should know that they would not be elected<sup>295</sup>. Therefore, in this way law drives the practice underground and becomes an obstacle to outreach and education.

In Tanzania, though there is a law which bans the practice and people are aware of its presence (Save for the contents of the law itself) people still prefer to adhere to their culture .The reasons for persistence of FGM include among others;(a) *social and economic factors*<sup>296</sup>, (b) *Lack or low level of education* in general and on the health effects of the practice which affect the efforts to eradicate the ritual. In areas where it is traditionally practiced, men will not marry a woman who has not been properly initiated as a member of the society<sup>297</sup>, (c) *Accessibility of justice delivery services*, perpetrators of FGM are close relatives of the victims thus it is not easy for the latter to report people like their parents because their lives depend on their parents. Furthermore, since most victims are children, they do not know whether the same constitute a violation of the law, they do not know where to report the matter, they don't even know where police stations or courts are. Even if they could know such places in most cases they are too far from their home villages, furthermore, the age at which mutilation used to be practiced has changed, the present age helps the perpetrators to hide the practice as it is done to little children of even two months to six years. The present age helps perpetrators to conceal the crime, therefore the practice is driven underground because nothing is reported and everything is hidden.

## 5.2 Recommendations.

Though it is clear that Tanzania has taken a legal action against the FGM practice in the country, its practical enforcement is still a matter of debate. The law is accumulated with other offences against children that it becomes

---

<sup>294</sup> For example in Kenya and Sudan being identified with earlier interventions under former colonial administration has undermined legislative efforts

<sup>295</sup> LHRC Report, op cit page 21-22.The report also states that in the western part of the country i.e. in Tarime and Mara district those who are practising the ritual do it openly before the authorities and say they will continue the practice whether the government say otherwise.

<sup>296</sup> See chapter two of my work

<sup>297</sup> For those who are matured enough to understand the nature and implications of FGM they easily concede to avoid the wrath and cursing of their parents and grandparents. There is a hidden fear of reprisal against anyone who openly condemns what the society 's leaders sanctify



difficult to apply. The section combines many offences including ill treatment, neglect and abandonment. The intended goal of this section is to protect children who are under 18 years and who are still cared by parents, relatives or guardian. This means that, once a person attains 18 years it is assumed that she is mature enough to understand what is good or bad and she will be able to earn living without depending on other persons. It is in this sense that I think FGM was not put in the proper section. FGM is a culture which does not end up when the girl attain 18 years, it is a living culture, it is not done only to girls who under 18 years. As, it has been shown under chapter two of my work; it is done even to adults so long as they did not attend the ritual during their childhood. For now, parents are mutilating young children less than two years. I think they are not aware of the loophole left by the law, had they known it they would have stopped mutilating these young girls and wait until they turn 18 since they will not be committing the offence. This illustrates the fact that, people in such communities only know that there is a law but they do not know its contents.

**(1)As far as the Sexual Offences Special Provisions Act, 1998, is concerned, I recommend that;**

- (i)The offence be separated from other offences and be given its own section and there should be no age limit. The current age limit narrows than the objective of the law; the new provision must reflect the spirit of the law.
- (ii) The actors in the process of mutilation should not end with parents, guardian or relatives only; the section should target the perpetrators whether being traditional or professional health workers, victims, and any person who willfully induce, demand, assist, escort, order etc.
- (ii) As regards compensation, the law should set the minimum amount that will be ordered for convicts, it should not leave it upon the discretion of the magistrates as these tend to misuse it.
- (iii) There should also be changes in the family. It is well known that the family is the basic unit of social organisation. The function of the family includes procreation of status, placement, socialization, protection and companionship. The fulfillment of this function keeps maintaining the smooth running of the family. However, there should be a clear distinction between parental rights over their children and state's obligation to protect children from harm. Parents in the family have assumed enormous power over their children, that they take decision for them regardless how harmful they are. In the UK for example, the anti FGM Act is supplemented by the Children's Act, 1989, that provides for investigation of suspected violations of the FGM, prohibition as well as removal of a child from her home in extreme cases where there is no better way to protect the child. The Act also enables the court to prohibit parents, from removing the child from the country to have the operation performed elsewhere. This is important because there was a time when parents were taking their children from Tanzania to Kenya escaping to be within the ambit of the law in the country.

It is my further suggestion that the law should be amended to provide for extraterritorial effects.

(iv) Apart from using criminal legislation against FGM another set of regulations may be pursued. These are civil law, guidelines governing the health profession, Ministry of Health regulations and ethical guidelines of health professionals. Family law also should be used to protect children from harmful practices or decisions made by the parents on behalf of them by removing a child from her home when she is in danger of being mutilated. The decision to undergo the operation, can be better postponed until the individual is able to make her own choice that is when an adult woman after having been informed of the consequences, decides to follow the tradition whether to under the operation or not.

### **(2)(i) Other Legal Measures**

With regard to other laws i.e. the Constitution, it should be amended as per my arguments under chapter four of this work, the loopholes under the provisions dealing with discrimination should be worked upon, the right to education and the right to health among others should be elevated to the status in which the victims will be able to rely upon and be made justiciable in courts of law, the best practice, could be the Constitution of South Africa. The government should consider adopting the provisions that are broad enough to protect women against the practice; it should consider adopting a Constitutional provision specifically addressing traditional harmful practices detrimental to women's health .At the very least, the Constitutional protections should represent a clear government commitment to protect the rights of girls, which could add to the legitimacy of a developing social movement. These protections will also enhance the possibility of engaging judicial bodies in these efforts. Amendments should also be effected in other pieces of legislation in order to be well read together with the law criminalizing FGM; these include the basic rights and duties Act, the Media laws, medical legislation, laws dealing with education et cetera.<sup>298</sup>

### **(ii) Public litigation**

This should be employed by both private lawyers and advocates, because majority of FGM victims are children and even if they are grown up women they are not aware of their laws and or their rights, secondly, the legal mechanisms can not be easily accessible by the victim, therefore it is easy to consider tentavely alternative means by which the legal system can be mobilized to protect the economically disadvantaged and the politically marginalized members of the community, public interest litigation offers a practical option and is most suitable ,given the social and economic circumstances of Africa and Tanzania in particular. Lawyers may use the court to attract publicity to the continued practice of FGM, to obtain compensation for the victim, enforce a law on FGM or challenge existing law which is detrimental to the struggle against FGM.To my knowledge, there is no any public litigation that has been conducted on FGM so far. I

---

<sup>298</sup> See the recommendations suggested under chapter four of my work

am aware of the private prosecution carried out the NGO, the Legal and Human Rights Centre in the *three Maasai girls case* cited under chapter four. Though the accused was acquitted in that case, it managed to raise awareness on the law on FGM.

## **(ii) Ratify and Implement International human rights Treaties**

Under chapter 3 of this work, I have attempted to discuss the human rights instruments to which Tanzania is a part in terms of ratification. Nevertheless, none of the treaties have been domesticated within the national legal system, therefore their interpretations to protect women and children depends on the dynamism of a particular judge<sup>299</sup>. It is stated that the law criminalizing the practice of FGM was enacted in order for the country to be in line with international standards protecting women and girls; however, throughout this study I have been able to demonstrate how the relevant provisions fall short of international standards. Also it is arguable whether enacting only a provision is adequate and or sufficient. Move towards incorporating the international standards within the country, it is my opinion that the most practical aspect of domesticating international standards will be passing of an enabling legislation by the state, this would then enable the aggrieved women and girls to rely on state obligations on national and other judicial organs or for the court to refer to such obligations in their decisions. Therefore Tanzanian government's ratification of treaties should not be seen as a matter of appearance but rather compliance, ratification should be seen as a first step towards social change and this should apply to all relevant treaties to the practice under discussion.

## **(3) Policy measures**

### **(i) Use of Education**

*"Education is seen as the cause and panacea for all the diseases of the society, this shows what capacious concept it is...."*<sup>300</sup>

In recognition of the fact that law alone cannot be employed to eradicate a deeply entrenched traditional practice of FGM, and aware of the fact that legal norms need social acceptance by the people who are needed to change their behavior. I highly recommend that Educational and awareness raising efforts on the nature and effects of the practice should be taken at any cost whatsoever. The government should take steps to the maximum of its available resources to see to it that this recommendation is implemented. The mass media should be used to impart knowledge and information on FGM. Local village leaders need to be educated on harmful effects of FGM so that they become agents of change within their communities, dispelling the belief about the practice as this would reduce the feeling that probably outsiders see the problem of FGM as a problem. Parents, excisors

---

<sup>299</sup> See the case of Ephraim vs. Pastory and Transport equipment vs. Valambia under chapter three of this study

<sup>300</sup> Tomasesvski, K, Education Denied, costs and remedies, Zed oks, London, & New York, 2003

(*ngaribas*), men, women and children should be given top priority. It is through education that women and children will be able to know and understand the effects of the practice on their mental and physical health, and hence being able to overcome the practice. Also through education they will be able to emancipate themselves and become socially, culturally, economically and politically independent people within their societies, as in most cases they are the victims because of their economic dependency, so they have to undergo the ritual because it will render them marriageable and assure them some sort of economic support from men, albeit in practice and in reality they are perpetuating their gender inferiority and their low status position in the communities in which they are in. Important in this category are also male chauvinists who perpetuate the practice in such communities by shunning and refusing to marry women, who have not undergone the ritual. I am more than fifty percent convinced that, if men in such communities change their cultural attitude, that they are no longer interested with mutilated women, the trend can change overnight, this is because it has been portrayed under chapter two of this study that the practice is perpetuated mainly for the benefit of men i.e. controlling female sexuality and perpetuating their gender roles in the society. Therefore for an equation to balance men and women should be involved in the change.

Other sections of the society that should be educated include; Law enforcement officers, as these are the people who enforce the law in one or another and who determine its role or effectiveness or ineffectiveness. Earlier under chapter four the work has attempted to show how both the policemen and magistrates have mishandled the cases either because of lack of the knowledge of the law prohibiting the offence or either because they believe in this harmful culture. Therefore the following people have to be educated; magistrates, policemen and women. Since the practice is also based on erroneous religious beliefs and interpretations, religious leaders should also be educated on the practice so that they become vehicles for change in their relevant institutions. Health professionals should be exposed to the nature and effects of the practice so that, instead of them carrying out the practice to the victims, they also impart the knowledge to girls and women who go to the clinics. Sensitization

Campaigns should leave no stone unturned. In furthering these efforts, the government should work hand in hand with NGOs, their activities should be complementing rather than supplementing each other.

Furthermore education should be directed towards making the provisions of the relevant laws dealing with the practice known to the public and especially the communities concerned, the law should be translated into local language Swahili that is easily understood by the majority of Tanzanians who can read and write. Throughout this study it has been shown how most people who practice FGM do not know the contents of the law though they know that there is a law prohibiting the same.

Moreover in countries like Tanzania where the subject on traditional harmful practices is not mainstreamed within the schools curricula, I

suggest that it be mainstreamed from the lower up to the higher levels of education, if the government has decided that it wants to do away with this traditional practice then it should look at it from all its angles.

Therefore in implementing this step various means should be employed such as; seminars, workshops, symposia, meetings, congregations, plays and drama in both at schools and through radios, television stations, leaflets be distributed free of charge in hospitals and in government offices, manuals should be developed incorporating various topics relevant to the practice for example human rights and gender. Publishing books, articles, manuals. Papers, newspapers The use of positive deviant approach i.e. involving people or role models who have abandoned the practice to encourage others to do so.

The government should prioritize this issue in its budgeting process to make sure that it is mainstreamed in every government plan and policies to be formulated to further this aim. For instance HIV AIDS in the country has been mainstreamed in all the activities of the government, when it comes to the media almost every TV station has this component in its activities let alone in every news broadcasted. Therefore the same can be the case for FGM.

#### **(ii) Participatory Educational Programs For women's Empowerment**

Women cannot abandon the practice of FGM until they have the means to participate in all the sectors of the society. In Tanzania, undergoing the ritual is among the prerequisite for marriage, women whose economic security depends upon their ability to be married are not able to make their own decisions about the procedure. Secondly, Economic factor on the part of women who are circumcisers contribute to them perpetuating the practice, therefore there is need to involve women in education programs and training them for alternative source of income that would make it possible for them to abandon the practice<sup>301</sup>, participatory education programs include literacy training, analytical skills and problem solving, health information and information about human rights principles. Furthermore the government should ensure participation in public office, access to credit, equal enjoyment in work place, earning an equal salary for an equal work as these are also among the root causes of economic dependency of women. With this approach, women will be empowered economically and at the same time will gain information on the practice and spread it to the society, as it is known that once you educate the woman you have educated the whole society. This will also give them an opportunity to be involved in decision making processes as more often women are not involved in the decisions affecting their own lives.

---

<sup>301</sup> In Tanzania the Anti FGM Network based in Dodoma has started carrying out such projects, with some ngaribas abandoning their work, at the same time reverting back to the business after a short while., One project in Ghana trains the circumcisers to become traditional birth attendants

### **(iii) Ensure access to reproductive health education and services**

The government should ensure appropriate access to reproductive health services, whether a woman has undergone FGM or not. Women and girls victims should have access to the information and health care they need as this can make them easier to understand the harmful consequences of FGM and also get treatment incase they have been affected by the practice .The government should see to it that the cost sharing phenomena does not apply to women and girls who are victims at least.

### **(3) Alternative rites of passage**

To go with the above recommendations, this work sees as a matter of importance, an urgent need to stop FGM. In communities where it is still carried out, the social mechanisms sustaining this practice needs to be studied and understood before any meaningful change can be made, this is important for various reasons; one being that female genital mutilation is not affected by religion or entirely by education attainment, secondly there is an imperative need to adopt an alternative rite of passage because this statement is no longer relevant in the communities where the ritual is practiced, under chapter two and chapter four of my work we have seen how the age for mutilating the girls has tremendously changed because of among other things the criminalization of the practice, currently the majority of victims are below ten years old, the same is carried out before the girls mature as it used to be done in the past after a girl reaches puberty, therefore, while illegal as it still was then , it at least symbolized the rite of passage. The current trend no longer supports that. There is a need to adopt alternative rite of passage that will still retain the important meaningful aspects of culture. For example in Kenya Maendeleo ya Wanawake organisation and PATH, in 1995, organized a national seminar followed by an assessment study<sup>302</sup> to introduce the idea of alternative ritual that excluded the genital cutting but maintained the other essential components such as education for the girls family life and women's roles, exchange of gifts, eating good food, and a public declaration for community recognition. The ritual is referred to as "*Ntanira na Mugambo*" in the local language of the ameru or "*cutting thru words*" Furthermore the alternative ritual refers to a structural programme of activities with community level sensitization first to gain support and recruit girls who will participate .The activities can be described in terms of the model of behavior change for FGM posited by Izett and Toubia, this proposes that for a change in a long running behavior to occur, individuals, families and communities need to pass thru several stages before there is a sustained behavioral change. Exposure to new information about the behavior, i.e. health risks, social psychological effects, violation of human rights can motivate individuals and families to begin to contemplate a behavioral change. Although this stage may lead to an intention to change

---

<sup>302</sup> ChegeNjeri (eds)Assesment of the alternative rites approach for encouraging abandonment of female genital mutilation in Kenya,september 2001 Kenya available on line at [www.womennews.org/article\\_cfm/dyn/aid/1284](http://www.womennews.org/article_cfm/dyn/aid/1284)

the behavior, there is normally a need to ensure that the decision can be fully supported so that the necessary action can be fulfilled. Consequently behavior change need also to prepare individuals prior to them being able to act on the decision.

While it is early to assess the success of this alternative, a number of Kenyan groups have already claimed success based on the increasing numbers of families enrolling in the ritual<sup>303</sup>.

Therefore this can be done in Tanzania too, but after a carefully study of the social mechanisms as it was done in Kenya. Also in some tribes in Tanzania, girls mark the rite of passage by just performing traditional dances or initiation rituals involving only seclusion of girls and training on adult roles, all these can be done in the societies practicing FGM without necessarily involving bodily harm and the effects accompanying with it.

#### **(4) Non Governmental Organizations' Lobbying and Advocacy**

Because they have unique experience and expertise, NGOs can play a crucial role in developing effective strategies in addressing the practice, for instance in Tanzania, the provisions on FGM came as a result of among others the efforts of NGOs. Now that the law is not effective, they can lobby for necessary amendments, budget increase in education and women and children's issues, ratification and domestication of international instruments, example protocol to the African charter on women's rights is not yet ratified also the protocol establishing the court and the ones on individual complaints mechanisms as can be seen under chapter four of my work, Furthermore they can also play a role in establishing coalitions, undertaking research, and outreach programmes, monitor government actions, establishing dialogue with government department dealing with the practice. Etc.

However undertaking national lobbying efforts to influence laws, policy and public opinion is along term goal that requires numerous resources, including financial resources, knowledge of the legislative process and access to governmental officials.

#### **(5) Data, surveys and indicators**

The problem of having inadequate data on FM in the country cannot be overemphasized, under chapter two of my work I criticized the National Demographic and Health Survey data for being outdated, human rights insensitive and inadequate in its samples. There is a need to conduct a new survey which will encompass all the age groups not only 15-49 as it was done, also one that will include information on all types of FGM in the country, above all one that will be human rights sensitive. The government also needs to conduct impact assessment on the surveys.

---

<sup>303</sup> Ibid

### **(6) Support From Donors**

In implementing the process of eradication of FGM, the country can also seek support from donors that are free from conditions, from UN agencies such as WHO; UNFPA, UNICEF, etc as these are committed towards supporting policies on FGM. They at least have declared their intention to work with NGOs in their efforts to eliminate the practice. The UNFPA has already worked with the Ministry of gender in laying down a plan of action for eliminating FGM in the country<sup>304</sup>.

Therefore, in concluding my work, I can say that criminal law is an important tool for creating social change in communities that practice traditional harmful practice of FGM, however it cannot stand-alone, the best intervention is still a multi disciplinary one involving other strategies such as policy measures on education, economic empowerment of women and girls, regulatory measures on health professionals, medical involvement, participation of NGOs as I have attempted to show above.

Although it is among the cultural norms of the people, it must be assessed in terms of promoting and protecting human rights of women and girls within such communities. Furthermore Since it is an offence it is repugnant to the law. The challenges associated with stopping the ritual should awaken the stakeholders to the profound social, economic, cultural and political change that must occur to eliminate discrimination against women and girls.

---

<sup>304</sup> Discussion i had with Mr. Muhungutwa, Assistant Director of the Ministry –family Division



## Selected Bibliography

<author >

<Title, edition, etc.>

### Published and unpublished books

Alfredsson, G, " *The usefulness of human rights for Democracy and Good Governance*"  
In Sano Otto and Alfredsson, G (eds) *Human rights and good governance*, Martinus  
Nijhoff publishers, Hague, London, and New York, 2002

Alfredsson, G, A, and Asbjorn, E, (eds): *The Universal Declaration of Human rights: A  
common standard of achievement*, Martinus Nijhoff Publishers, The Hague, Boston,  
and London, 1999, pg xxxiii

Beidelman, T.O, *The Matrilineal people of Eastern Tanzania*, London, International  
African Institute, 1967. pg 9

Chege Njeri (eds) *Assessment of the alternative rites approach for encouraging  
abandonment of female genital mutilation in Kenya*, September 2001 Kenya available  
on line at [www.womennews.org/article](http://www.womennews.org/article.cfm/dyn/aid/1284)  
cfm/dyn/aid/1284

Dorkenoo, E, *Cutting the Rose: Female Genital Mutilation: The Practice and Its  
Prevention*, Minority Rights Group, London, 1994

Dorkenoo, E, *female genital mutilation: proposals for change*, minority rights group,  
London, 1992 pg 7

Ehret, C "Between the coast and the Great lakes "in Niane, D,T" (ed) *General history of  
Africa, 1v, Africa from the 12<sup>th</sup> to the 16<sup>th</sup> century*, USA, University of California press  
, 1984 p494.

Granville Williams, *Learning the law*. 11<sup>th</sup> edition, Sweet and Maxwell, UK, 1982, p 102-

Honoraria, H, *Introduction to the African System of Protection of Human rights and the  
Draft Protocol*, In Wolfgang, B, Kisaakye E (eds) *Human rights of women:  
International Instruments and African Experiences*, Zed Books, London, New York,  
2002.

Kabudi, P, *Human Rights Jurisprudence in East Africa: Comparative Study of  
fundamental Rights and Freedoms of the Individual in Tanzania, Kenya and Uganda*,  
Nomos Baden-Baden, 1995, 29

Kabeberi-Machacharia, *female Genital Mutilation and the rights of the girl child in  
Kenya*, in Cube (ed), *Law, Culture, Tradition and children's rights in Eastern and  
Southern Africa*, Dartmouth, Ashgate Pub, Co Ltd, USA, 1998, P252

Koso, Thomas, *The circumcision of women: A strategy for Eradication*, London .Zed  
Books Ltd, 1987, p15 and Sanderson P,L, *opcit* pg 61 cited also in mukama domina  
*opcit*, pg 20

Kiwasila, H, L, *Traditional Practices Affecting Women's health: The case of female  
circumcision among the Wavidunda of Kidodi in Kilosa District, Morogoro Region*,  
Tanzania, Dare es salaam, WRDP, 1998

Madhara ya kutahiri wanawake Taasisi ya Elimu ya Watu Wazima, Dar Es Salaam,  
1990,

Sanderson, P, L, *against the mutilation of women: the struggle against unnecessary  
suffering*, Ithaca press, London, pg 27

Thornton, R, J *space and culture among the Iraqw of Tanzania*, London ,Academic  
press ,inc. 1980, p219.

Madhara ya kutahiri wanawake Taasisi ya Elimu ya Watu Wazima, Dar es Salaam,  
1990.

Nkuehe, J, *Female Genital Mutilation: Legislation alone does not help #women's  
world* "ISIS no 28, 1995 pg 8-10 A feminist perspective "A Human rights Quarterly  
Review, the Hopkin University press, 1985, vol 17, no3 pg 409

Peter, C, M *Human rights in Africa: A comparative study of the African charter on  
human rights*, London, Greenwood Press, 1990, p 20

R, Cook, C, Dickens, F, Mahmoud (eds), *Reproductive health and Human rights*,  
*Integrating medicine, ethics and law*, Clarendon Press, Oxford, 2003, 267p,

Rwezaura, B; A” *Domestic Application of International Human rights Norms: Rewz Protecting the rights of the Girl-child in the Eastern and Southern frica* “in Ncube, Wed law, Culture, Tradition and children Rights in Eastern and Southern Africa, Ash gate pub, Co ltd Dartmouth, USA, 1998 p 29

Rwezaura, B, A,” Law, Culture, and children Rights in Eastern and Southern Africa, Contemporary challenges and Present Day Dilemmas in Ncube,(ed)Law,Culture,Tradition and Children’s Rights In Eastern and Southern Africa,op cit 1998P 297

Seaton E, E and Maliti, S, T, Tanzania Treaty Practice, Nairobi Oxford University Press Peter, C.M, and Human rights: Selected cases and materials, Rudiger Koppe Verlag, Koeln .1997,P33.

Shivj, I (1990) The legal foundations of the Union in Tanzania’s union and Zanzibar constitutions” being a professional Inaugural lecture delivered at the University of Dar es salaam, Dar es salaam University press,1990

Shell, Duncan, B, The medicalization of female "circumcision:" harm reduction or promotion of a dangerous practice? *Social Science and Medicine* 52(7): 1013–1028 (April 2001).

Tomasesvisk, K; Women and Human rights, UN/NGLS and Zed Books, 1993

Tomasesviski, K, Education Denied, costs and remedies, Zed oks, London, &Newyork, 2003

Tomasesvsk, K, ”Indicators” in Economic Social and Cultural rights Edited by EIDE, A, KRAUSE,(EDS),2ND REVISION,MARTNUS NIJHOFF PUBLISHERS BOSTON,LONDON2001

Tomasevsk,,K,*Men and “Women,Sex and Gender* in Gudmundur,A and Jonas;G,(et al),Martinus Nijhoff PublishersInternational Human rights monitoring mechanisms: Essays in honor of Jacob the. Moller ,2000

Tomasevski, K, Human rights in population policies: A study for SIDA, Lund, Sweden, 1994

Toubia, N, female Genital Mutilation: a call for global action, New York, 1994.

### Reports utilized

The Tanzania Media Women Association: A research on FGM in Singida region, 1997.pg 8

Report of special rapporteur on traditional practices affecting health of women and children, op cit

The United Republic of Tanzania: Poverty reduction strategy, The Third Progress Report 2002/3 Dar es Salaam, Tanzania March 2004

The Legal and Human rights centre Report on the Findings of the research into the practice of FGM in Tanzania, Dar es Salaam Tanzania, august 1999,

Report of Inter African Committee on traditional practices affecting the health of women and children: Report on follow up symposium for religious leaders on violence against women with emphasis On FGM 20-22 august, Arusha,

The LHRC report on the enforcement of the law on FGM in Tanzania

Report of Inter African Committee \_Dodoma on FGM incidences.

WHO, female genital mutilation: report of a WHO working group, Geneva, WHO, 1996,PG, 6

WHO fact sheet, female genital mutilation. April 1997,

The UNHuman rights fact sheet no 23

AFNET report on the situation of female genital mutilation in Tanzania: a study of five regions, published by AFNET-Dodoma Tanzania, June 2004

CRC state party reports 2001,1999.ICCPR state party report, CEDAW,

The Implementation of the Human Rights of the Women: Traditional Practices Affecting the Health of Women and children,: follow up report of the Special Rapporteur on traditional practices affecting the health of women and children ,Mrs Halima Embarek Warzazi ,E/CN.4/sub.21/1997/10,25 June 1997

Tanzania Demographic and Health survey 1996,see also LHRC report, op cit p 36

## Websites visited

Www.bayefsky.com/htm/tanzania-4-ccpr.php

[www.unhcrhr.org](http://www.unhcrhr.org) accessed on the 11th October 2004.  
[www.Undp.org/mdg/Tanzania/pdf](http://www.Undp.org/mdg/Tanzania/pdf), accessed on the 30th of September 2004  
[www.sdc.health.ch/priorities-in-health/reproductive-health-female-genital-mutilation](http://www.sdc.health.ch/priorities-in-health/reproductive-health-female-genital-mutilation), accessed on the 30th September 2004  
[www.Amnesty international .org](http://www.Amnestyinternational.org), accessed on 20th of March 2004  
[www.frol.com/categories/women/profiles/Tanzania\\_women.htm](http://www.frol.com/categories/women/profiles/Tanzania_women.htm), visited on the 17th of September 2004. see also [www.state.gov/documents/organisation/9424.pdf](http://www.state.gov/documents/organisation/9424.pdf)

## Notes

Class notes from the lecture by Prof Melander in December 2003 on the relationship between human rights, refugee law and Humanitarian law.

Also the spring 2004 lectures by Prof Gregor Noll on the definition of refugee and gender: membership of a particular social group criterion

## International Law Instruments

The International Covenant on Economic social and Cultural Rights, 1966

The International Covenant on Civil and Political Rights, 1966

The United Nations Convention on the elimination of All Forms of Discrimination Against Women, 1979

**The united Nations Conventions on the Rights of the Child, 1989.**

UN Convention Relating To The Status of Refugees 1951  
Vienna Convention on the law of treaties of 1969.

The Universal Declaration of Human rights, 1948

The United Nations Declaration on the Elimination of violence Against Women ,1993.

United Nations Declaration on the Elimination of all Forms of Intolerance and Discrimination Based on Religion or Belief.

The United Nations Declaration on the Rights of Persons Belonging to National or Ethnic ,Religious or Linguistic Minorities.1993

The Beijing Declaration and Platform of Action

The United Nations Conference on Population and Development, 1994

The Vienna Declaration and Program of Action ,1993

UN general Assembly Resolution adopted in 1993 on violence against women.

UNHCR documents on “*membership of a particular social group*” criteria

## The African region Instruments

The African Charter on Human and peoples Rights(1981)

The African Charter on the Rights and Welfare of the Child

Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on human and people's rights  
The protocol to the charter on Women's rights.

Harare Declaration of Human Rights, The parliamentarian, October 1989,LXX, No, 4  
P 218

## General Comments and Recommendations

ICCPR General Comment 28 (Sixty-eighth session, 2000): Article 3: Equality of Rights Between Men and Women, A/55/40 vol. I (2000) 133 at paras. 10, 11 and 17.  
CEDAW, General recommendation no 14 (ninth session,1990) Report of the committee on the elimination of discrimination against women ,1990UN Doc,A/45/38 at 85 reprinted in the UN Doc Hri/ Gen/1 Rev.2 at 108-109 (1996)  
CEDAW, women and health: General Recommendation no 24, twentieth session, 1999,

## National pieces of legislation

The constitution of the United Republic of Tanzania, Act no 15 of 1977  
The sexual offences Special Provisions Act no 4, 1998  
The Penal code Cap 16 of the Laws  
The law of Marriage Act, 1971  
The Medical Practitioners and Dentist Ordinance, Cap 407  
The Nurses and Midwives Registration Act,  
The Education Act,  
United Republic (Declaration of name) Act no 61 of 1964  
Act no 22 of 1964 Cap 557  
Articles of the Union

## Table of Cases

<Case>

< Case>

### Cases

Fauziya Kasinga's case I&N December no 3257 at 132 (B.I;A)June 13 1996  
Irene case  
Velasquez Rodriguez case, judgment of July 29, 1988,*Interamerican Court of human rights*  
The SERAC case, 1985  
Transport Equipment and another V D, P Valambia, Civil application no 19 of 1993  
court of appeal, Dar es salaam, Tanzania  
*Okunda* versus *R* (1970) EA 453  
Gouritt versus union of post office Workers AC (1978) 435.  
*Ephraim* versus *Pastory*, (1990) TLR, 106  
Gillick Versus Norfolk and Wisbech Area Health Authority, (1986) AC 112  
R V Mbwasa Madaru criminal case no 261 of 1999,Dodoma district court, Tanzania  
R V Fatuma Iddi criminal case 123 of 1999  
R V Mussa daudi and others, criminal case no 257 of 2002  
Warioba V Steven Wasira, 1997.TLR 272  
Zakayo katungo Vselemani Mingoli misc.criminal case no 1 of 2002 Morogoro,  
Tanzania  
Ruth Pemba V Daudi Mfalingundi, 1975LRT 54