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

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Summary

In many African states, female genital mutilation (FGM) is a deeply-entrenched cultural practice. Tanzania is no exception. FGM persists despite the fact that the country has ratified a number of international and regional human rights instruments that protect women against the practice of FGM. The mere fact that the practice continues despite Tanzania's obligation under international and regional human rights treaties raises the question whether Tanzania has put in place adequate constitutional and legislative measures to protect women against FGM. It is this question that this article seeks to address. Against the backdrop of the emerging consensus that posits FGM as a human rights violation, the article examines the effectiveness of the constitutional and legal framework of Tanzania in protecting women against FGM.

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1 Introduction

Tanzania is one of 28 African countries in which female genital mutilation (FGM) is widely practised.¹ This is despite the fact that the country has ratified a number of international and regional human rights instruments that protect women against the practice of FGM.² The mere fact that the practice of FGM continues despite Tanzania's obligation under international and regional human rights treaties raises the question whether Tanzania has put in place adequate constitutional and legislative measures to protect women against FGM. It is this question that this article seeks to address

The article sets out to achieve its objective first by discussing the prevalence of FGM in Tanzania. This is followed by a discussion on the human rights implications of FGM, which traces the recognition of FGM as a human rights violation, indicates the different rights that are often implicated by the practice, and reiterates the legal duties that international and regional human rights instruments impose on states. The article then moves to its main business and examines the effectiveness of the constitutional and legal frameworks of Tanzania in protecting women against FGM. The article concludes the discussion by identifying some of the legal measures that need to be taken into account if Tanzania is to effectively protect women against FGM.

2 Practice of female genital mutilation in Tanzania

FGM is a deeply-entrenched cultural practice that is common among at least 20 of Tanzania's 120 ethnic groups.³ Although the practice is reported to be carried out by different ethnic groups across the country, it is most commonly practised among the Chagga, Pare, Maasaai, Iraque, Gogo, Nyaturu, Kurya, Ruri, Ikoma, Sweta and

1 According to the interagency statement of the United Nations, FGM involves 'the partial or total removal of the female external genitalia for cultural or non-therapeutic reasons'. WHO *Eliminating female genital mutilation: An interagency statement by OHCHR, UNAIDS, UNDP, UNECA, UNESCO, UNFPA, UNHCR, UNICEF, UNIFEM, WHO* (2008) http://whqlibdoc.who.int/publications/2008/9789241596442_eng.pdf (accessed 9 August 2011).

2 Although Tanzania is not a party to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, it did ratify the Convention on the Elimination of All Forms of Discrimination Against Women in 1985; the Convention on the Rights of the Child in 1991; the African Charter on Human and Peoples' Rights in 1984; the African Women's Protocol in 2007; and the African Charter on the Rights and Welfare of the Child in 2003. This suggests that Tanzania has a legal obligation, derived from international and regional human rights instruments, to put in place measures to safeguard the rights of women against FGM.

3 *Female genital mutilation practice in Tanzania* <http://wgc.womensglobalconnection.org/conf06proceedings/Mwambalawa%20S.--Female%20Genital%20Mutilation.pdf> (accessed 12 June 2011).

Zanaki.⁴ In terms of geographic distribution, Arusha, Dodoma, Dar es Salaam, Kilimanjaro, Manyara, Mara, Morogoro and Singida are some of the regions that are famously known for the practice of FGM.⁵

All types of FGM are practised in Tanzania.⁶ Clitoridectomy, which involves the removal of the clitoris either partially or totally, is common mostly in the regions of Kilimanjaro, Arusha, Iringa, Mtwara, Kilosa and Tarime.⁷ Excision, involving the process where the clitoris is removed along with partial or total removal of the *labia minora*, is widely practised and amounts to almost 80 per cent of the reported cases of FGM in Tanzania. It is particularly common in Kilimanjaro, Arusha, Iringa and Mtwara. Infibulation, the most severe form of FGM, involving the 'removal of the external genitalia and stitching and/or narrowing of the vaginal opening', is common in Kilimanjaro and Arusha, and it is mostly practised by immigrants from Somalia and those with Nubian origins.⁸ Finally, the so-called 'unclassified' type, which encompasses all procedures that cut, alter and burn the female genitalia by using corrosive substances and herbs, which are inserted into the vagina for the purpose of tightening it, is also widely practised.⁹ One particular type of FGM that possibly falls under this category is the so-called *Kuvuta Matunya*.¹⁰

The name *Kuvuta Matunya* is a word derived from the Kiswahili language.¹¹ It involves the act of pulling the vagina banks to promote its elongation.¹² The process is usually initiated from an early age by the mother of the child and the child gradually adapts and learns to do it by herself.¹³ The practice is considered to enhance sexual pleasure for men and guards women against rape. This is commonly practised in Mtwara, and the Lake zone region. Another type of FGM that could also fall within this category is what is known as *ngoma za mbalamwezi*/moon dances or *singolyo*, as commonly referred to in the Kimasaai language.¹⁴ This particular type of FGM involves the '[u]se of ghee to lubricate and widen the vaginal orifice of girls' to facilitate

4 K Gamaya *The legal process, can it save girls from FGM?: A case of three Maasai girls in Morogoro* (2004) 2.

5 Gamaya (n 4 above) 2; Women's Legal Aid Centre *Annual report 2009* (2009) 10.

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

7 K Bisima *et al Reports on the findings of research into the practice of female genital mutilation (FGM) in Tanzania* (2005) 27.

8 Combined state report (n 6 above) 27 3.

9 Gamaya (n 4 above) 29.

10 As above; Legal Human Rights Centre *Female genital mutilation (FGM) 'A human rights abuse veiled in customs and tradition': A report on the findings of the research into the practice of FGM in Tanzania* (2005) 27.

11 Gamaya (n 4 above) 29; Legal Human Rights Centre (n 10 above) 27.

12 As above.

13 As above.

14 United Republic of Tanzania Ministry of Health and Ministry of Community Development, Gender and Children *The national plan of action to accelerate the elimination of female genital mutilation and other harmful practices in Tanzania 2001-2015* (2003) 7.

sexual penetration.¹⁵ The whole process can last for five to six hours during which a girl might also be sexually penetrated.¹⁶

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

Culture and, in particular, the desire to preserve one's cultural identity, are the most cited reasons for the continued practice of FGM in Tanzania.¹⁷ Most communities, the Chagga and Pare tribes in the Kilimanjaro region in particular, consider FGM an essential part of their culture and traditional beliefs.¹⁸ FGM is practised as a cultural ritual to please the ancestors in order to obtain their 'blessings'. The common belief is that these 'blessings' protect their families against any harm. It is because of this particular belief that FGM is largely supported by the elders but also by members of the younger generation, who do so to gain acceptance of the elders and their families.

For other communities, FGM is a practice that facilitates the transition of a young girl into adulthood.¹⁹ It is only after the practice is performed that a young girl acquires new rights, obligations, and specific teaching that are deemed necessary to prepare a young girl for marriage, bearing of children and expected responsibilities as an adult member of her community.²⁰ The Maasai, for example, consider FGM as one of the most important and respected cultural rituals.²¹ The practice is part and parcel of the initiation process where young Maasai girls are taught their culture and different traditional values held dear by the Maasai.²² It is only after this 'initiation process' that a young Maasai girl can be considered for marriage and earn respect and acceptance in her community as an adult.²³ The same is true among the Kurya tribe for whom FGM facilitates 'a passage to adulthood'.²⁴ The practice holds such a high cultural significance that

15 As above.

16 As above.

17 Legal Human Rights Centre (n 10 above) 27.

18 As above.

19 M Prazak 'Introducing alternative rites of passage' (2007) 53 *Africa Today* 26; Bisima *et al* (n 7 above) 26 28.

20 Bisima *et al* (n 7 above) 26 28.

21 Gamaya (n 4 above) 22.

22 Such values include their heritage and beliefs, traditional medicines and preparation for marriage.

23 Gamaya (n 4 above) 22.

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

anyone who refuses to submit herself to FGM is considered as outcast.²⁵ These examples show that cultural justifications remain to be one of the contributing factors for the continued practice of FGM in Tanzania. This is evident specifically in the regions of Kilimanjaro, Arusha, Dodoma, Singida, Tarime and Kilosa.²⁶

The practice of FGM is also closely linked to marriage. In fact, for a number of communities in Tanzania, FGM is a prerequisite for marriage. In Kilimanjaro, Arusha, Dodoma and Singida, it is only after FGM is performed that a woman can be considered an adult and, most importantly, be eligible for marriage.²⁷ It is only after that that men who are seeking wives would usually engage with the girls' families with the hope of securing marriage.²⁸ Similarly, in Tarime, it is believed that a woman who has not been subjected to FGM has a very limited chance of getting married. This is attributed to the common belief that 'a mutilated woman is better'.²⁹ Research conducted in the region indicates that women who have undergone FGM are usually married off immediately after completion of the practice or within two years after it was performed. If a woman has failed to secure a husband thereafter, she is considered to have 'bad luck'.³⁰ On the other hand, a woman who has not undergone FGM and has still managed to get married is considered only to have been done 'a favour' by the man who decides to marry her. Such women are prone to stigma in their communities and may not be accepted by their in-laws. They may further be prohibited from cooking. Members of the community may even refuse to associate with her in other activities which women who have undergone FGM would engage in. This is to ensure that she does not pass over any 'bad luck' that she may have acquired as a result of not being subjected to FGM.³¹

Myths also contribute to the continued practice of FGM in Tanzania. The myths that the practice suppresses women's sexual desire, prohibits promiscuity and ensures that a woman is faithful to her husband upon marriage are widely held among communities in Tanzania.³² This is the case, for example, with the Maasai. According to a myth held by the Maasai, FGM was used a long time ago as a 'cure' and punishment to Napei, a Maasai girl accused of having had sexual relations with a man who was considered an enemy of her family. She was subjected to FGM to suppress her sexual desires, which was considered to be the driving force behind her sexual relationships with the enemy. The practice of FGM has since been

25 As above.

26 Bisima *et al* (n 7 above) 29.

27 As above.

28 As above.

29 Children's Dignity Forum (n 24 above) 13.

30 As above.

31 Children's Dignity Forum (n 24 above) 13 14.

32 Gamaya (n 4 above) 30.

passed through generations among the Maasai and, according to them, it helps to maintain the honour of the girl and the family.³³

FGM is also regarded by many communities as a means to promote personal hygiene. This is attributed to the belief that the female genitalia are naturally dirty.³⁴ The practice is also considered to cure and prevent a genital disease, locally known as *lawalawa*, in Dodoma, Singida, Iringa and Mtwara.³⁵ This is, however, a myth. According to medical experts, the condition believed to be *lawalawa* is, in fact, a minor infection associated with poor hygiene referred to as thrush. The infection can be cured by improving one's hygiene and taking medication.³⁶

For a number of ethnic communities in Tanzania, the practice of FGM is also believed to help women embrace femininity and preserve gender identity. This myth is attributed to the misconception that a woman's external genitalia, specifically the clitoris, if not removed, will outgrow the male external genitalia. It is further believed that if it is not removed, it will cause harm to a man during sexual intercourse.³⁷ This belief is common among the Kurya tribe in the Tarime region. It is also believed that the clitoris, if not removed, may harm a new-born upon contact during child birth.³⁸ Moreover, it is believed that women who have undergone FGM are able to give birth easier because of the absence of the labia. This belief is widespread among the Gogo and Nyaturu in Dodoma and Singida.

FGM has no health benefits but rather it exposes women and girls to extreme pain and suffering, risks lives and imposes both long and short-term negative effects on victims. The negative effects of FGM on the health of women have triggered a wave of movements aimed at eradicating the practice.³⁹ It is to this point that the article now turns.

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

34 Gamaya (n 4 above) 30.

35 S Mwita *FGM 'difficult to eliminate'* (2010) <http://www.dailynews.co.tz/feature/?n=14913&cat=feature> (accessed 28 August 2012).

36 As above.

37 Bisima *et al* (n 7 above) 28.

38 Gamaya (n 4 above) 30.

39 J Schott & A Henley *Culture, religion and child bearing in a multiracial society: A handbook for health professionals* (1996) 213; D Mekonnen 'The abolition of female circumcision in Eritrea: Inadequacies of the new legislation' (2007) 7 *African Human Rights law Journal* 393; AS Eldin 'Female genital mutilation' in P Chandra *et al* (eds) *Contemporary topics in women's mental health: Global perspective in a changing society* (2009) 486.

3 International human rights law and female genital mutilation

Documented campaigns against FGM date back towards the beginning of the twentieth century.⁴⁰ Based on the nature of the campaigns, the movements against FGM can be divided into two groups: those that followed the 'health frame' and those that campaign based on the 'rights frame'.⁴¹ The difference between the two approaches is that the former focuses on the negative effects of FGM on the health of women while the latter focuses on its adverse effects on the rights of women.

The initial campaigns against FGM predominately fell within the 'health frame'. The campaign was based on the assumption that the successful eradication of FGM is possible through the promotion of awareness of the negative effects of the practice on the health of women.⁴² Although the health frame approach contributed to the fight against the practice of FGM, it was not completely successful.⁴³ The major drawback of the approach is that it did not abolish the practice but rather opened up room for the medicalisation of FGM, a situation whereby FGM is performed by a health care provider of any level, regardless of the place where it is carried out. In this case, 'parents take their daughters to be cut by medical professionals or medically trained cutters working with sterile and cleaner instruments'.⁴⁴ Because it is performed by a health official, it is considered to be less harmful and, thus, creates 'legitimacy' despite its negative effects on the health of women. Medicalisation, thus, encouraged the practice, accelerated its growth and encouraged health officials to continue performing FGM for financial gain.⁴⁵ Eventually, the medicalisation of FGM was also prohibited.⁴⁶ It is against the backdrop of this rejection of the medicalisation of FGM

40 A Rahman & N Toubia *Female genital mutilation: A guide to laws and policies worldwide* (2000) 9.

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

42 As above.

43 Mgabako *et al* note that '[w]hile FGM has serious health implications, and although health education is and must be an important component of any anti-FGM campaign, focusing exclusively on its health consequences has not contributed significantly to the eradication of FGM, and has not properly addressed FGM as a violation of human rights'. C Mgabako *et al* 'Penetrating the silence in Sierra Leone: The blue print for the eradication of female genital mutilation' (2010) 23 *Harvard Human Rights Journal* 3.

44 As above.

45 World Health Organisation *Global strategy to stop health care providers performing female genital mutilation* (2010) http://whqlibdoc.who.int/hq/2010/WHO_RHR_10.9_eng.pdf (accessed 10 February 2012) 9.

46 In 1976, the WHO was the first institution to prohibit health care providers from performing FGM. This was followed by the United Nations Commission on Human Rights in 1982. From 1982 onwards, there has been increasing support from other international, non-governmental organisations and states for the prohibition of medicalisation of FGM. World Health Organisation (n 45 above) 2; Bob (n 41 above) 97.

that the rights frame approach towards the elimination of FGM started to emerge.⁴⁷

The rights frame approach was driven by women's rights activists that aimed at raising international awareness on the harmful effects of FGM on the rights of women.⁴⁸ They did so during the period of the 1980s and 1990s, an era where 'women's rights were beginning to be accepted as human rights', providing a good platform to address FGM as a human rights issue.⁴⁹ This brought a new dimension to the movement against FGM.⁵⁰ The practice was not only considered harmful to the health of women, but also one that violated their fundamental human rights. For them, FGM 'was a tool of patriarchy and a symbol of women's subordination'.⁵¹ The practice was renamed from female genital circumcision or cutting, which was considered a neutral term, to female genital mutilation.⁵² The rights frame approach contributed to the development of international consensus that FGM is a human rights violation. It must, however, be noted that the campaigns against the practice were not done in total isolation of the health frame approach. Although the latter approach had several shortcomings, it was still used to show the negative effects of FGM on the health of women. Therefore, what emerged was a fusion between the two approaches, creating a new dimension on the campaigns against FGM.⁵³

Although there are a number of international and regional human rights instruments whose provisions, as we shall see shortly, are interpreted to safeguard the rights of women against the practice, it is the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol) that has explicitly prohibited the practice of FGM. The Women's Protocol obliges states to ensure that legislative measures are in place prohibiting all forms of FGM and the medicalisation thereof. States are further required to impose sanctions against perpetrators, to promote awareness campaigns and to provide support to victims through health, legal and judicial services.

47 The failure of the health frame approach is partly attributed to the lack of co-operation from international organisations such as the WHO, that were reluctant to address FGM at the international level. They considered FGM a cultural issue that should be left to the domestic authorities. Bob (n 41 above) 98.

48 Bob (n 41 above) 98.

49 As above; Rahman & Toubia (n 40 above) 11.

50 Bob (n 41 above) 98.

51 Bob (n 41 above) 97.

52 Some scholars have argued that the change in terminology illustrates the intensity of the violation of the rights of women and, thus, enhanced national and international advocacy against the practice of FGM. See the discussion by S Windle *et al* 'Harmful traditional practices and women's health: Female genital mutilation' in J Ehti (ed) *Maternal and child health: Global challenges, programmes and policies* (2009) 168; Bob (n 41 above) 98.

53 Bob (n 41 above) 101.

In addition to the African Women's Protocol that explicitly prohibits FGM, the campaign against FGM has contributed towards the interpretation of international and regional human rights instruments to safeguard the rights of women against the practice. FGM is, for example, commonly linked to the rights to equality and to be free from all forms of discrimination.

Of course, whether FGM constitutes discrimination depends on our understanding of what constitutes discrimination. The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) was the first legal instrument to define discrimination against women. Discrimination against women is defined under article 1 of CEDAW as

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

According to this definition, discrimination may come in the form of laws or practices that differentiate, exclude or restrict individuals based on sex. This, however, is not enough. The law or the practice in question must also have the effect of undermining the enjoyment of the rights of women. The act of discrimination can be carried out either by the state itself or even by private individuals. The same elements are also evident in article 1 of the African Women's Protocol, which defines discrimination against women as

any distinction, exclusion or restriction or any differential treatment based on sex and whose objectives or effects compromise or destroy the recognition, enjoyment or the exercise by women, regardless of their marital status, of human rights and fundamental freedoms in all spheres of life.

As a practice that exclusively targets women and girls, FGM is deemed to create a distinction on the basis of sex and subjects females to 'harsh consequences'.⁵⁴ After all, the practice, among other things, is done to control women's sexuality. It 'carries a strong message about the subordinate role of women and girls in society'.⁵⁵ It portrays the image that the role of women in society is only that of 'mother and spouse', further promoting the subordination of women in all spheres of life.⁵⁶ The effect of this is that the practice undermines the physical and mental integrity of women, hindering them from fully enjoying fundamental freedoms.⁵⁷

54 Mgabako *et al* (n 43 above) 17.

55 Rahman & Toubia (n 40 above) 21.

56 As above.

57 A Fasio & MI Morgan *Equity or equality for women? Understanding CEDAW equality principles* http://www.iwraw-ap.org/publications/doc/OPS14_Web.pdf (accessed 30 November 2012) 9; CEDAW General Comment 19.

The continued practice of FGM is also deemed to violate the right to be free from violence. The right to be free from violence is protected in a number of international and regional human rights instruments. Both the Convention on the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child (African Children's Charter) specifically protect the right of children to be free from all forms of psychological and physical violence under articles 19 and 16 respectively. Unfortunately, although CEDAW covers women's rights extensively, it does not expressly provide for the prohibition of violence against women. The CEDAW Committee, in General Comment 19, has, however, interpreted the prohibition against gender-based discrimination to include the protection of the rights of women against violence. Furthermore, the CEDAW Committee defines violence against women as⁵⁸

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

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

As alluded to earlier, FGM 'is a traumatising and painful surgical procedure, performed on young girls, without the aid of anaesthesia to temporarily dull the pain, or proper hygiene to prevent potential infection'.⁵⁹ This exposes women to severe pain and suffering, which has both physical and psychological effects. The practice inflicts physical, sexual and mental harm to women. Moreover, the violence does not end at the completion of the procedure. A woman who has undergone FGM will continue to live with the irreversible negative consequences of the practice for the rest of her life. There is, therefore, no doubt that FGM is a form of violence that is directed at a woman because she is a woman or that affects women disproportionately.

The right to life is also often implicated by the continued practice of FGM. Obviously, this right is violated when FGM results in death.⁶⁰

58 General Comment 19 (n 57 above).

59 J Wellerstein 'In the name of tradition: Eradicating the harmful traditional practice of female genital mutilation' (1999) 22 *Loyola of Los Angeles International and Comparative Law Review* 9.

60 Rahman & Toubia (n 40 above) 23. Death is likely to occur as a result of the after-effects of the practice on a woman's body. Most women die of loss of blood or

Others have, however, held the view that death must not necessarily occur for FGM to violate the right to life. For them, FGM violates the right to life 'from the perspective of reproduction'.⁶¹ This is because the practice involves the mutilation of a reproductive organ and this alone violates the right to life. Related to this is the argument that FGM violates a woman's right to health. The right to health is protected under the different international and regional human rights instruments. Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) specifically provides that everyone has the 'right to the enjoyment of the highest attainable standard of physical and mental health'. At the regional level, article 16 of the African Charter on Human and Peoples' Rights (African Charter) provides for the 'best attainable state of physical and mental health'. With specific reference to women, CEDAW, under article 12, guarantees the protection of the right to health of all women. In addition, the African Women's Protocol not only provides for the right to health of all women, but also expressly provides for the promotion and respect of women's sexual and reproductive health. With specific reference to children, the same right is protected both in article 24 and article 14 of CRC and the African Children's Charter respectively. It is important to note that the right to the highest attainable standard of physical and mental health does not only extend to the right to be healthy, but also includes 'the right to control one's health and body'.

FGM, as indicated several times throughout this article, imposes both psychological and physical harm to the health of women. The risk of complications on the health of women is even greater due to the limited standards of medical care facilities in most countries where FGM prevails. Even in the absence of this, FGM still violates a woman's right to health because it involves the removal of healthy tissue for a non-medical purpose and this infringes the 'the highest attainable standard of physical and mental health'.⁶² The violation of the right to health by the continued practice of FGM consequently undermines 'the realisation of all the other fundamental human rights and freedoms'.⁶³

Many regard FGM as a harmful traditional practice that violates the rights of women and children. They, as a result, rely on international and regional instruments that prohibit harmful practices and argue that FGM must be outlawed. At the regional level, the right against harmful practices is protected by article 18 of the African Charter. Furthermore, according to article 21 of the African Children's Charter, all harmful social and cultural practices that are prejudicial to the

fatal infections that could be attributed to the unsanitary conditions under which FGM is usually performed.

61 A Slack 'Female circumcision: A critical appraisal' (1988) 10 *Human Rights Quarterly* 466.

62 Rahman & Toubia (n 40 above) 27; Wellerstein (n 59 above); Slack (n 61 above) 465.

63 *Purohit & Another v The Gambia* (2003) AHRLR 96 (ACHPR 2003) 80.

'welfare, dignity, normal growth and development of the child' are prohibited. The provision goes a step further by expressly prohibiting practices and customs that negatively affect the health and life of children and those that are discriminatory on the basis of gender or any other ground. With reference to women, article 5 of CEDAW prohibits all social and cultural patterns that have the effect of enhancing gender inequality and the subordination of women in society. Similarly, article 5 of the African Women's Protocol, as mentioned earlier, prohibits all harmful traditional practices that undermine international human rights standards.

In order to benefit from the protections against harmful practices, one must first establish that FGM is a harmful practice. In relation to this, the point of departure would be the definition of harmful practices. Many international and regional instruments do not define harmful practices, with the exception of the African Women's Protocol. According to article 1 of the Women's Protocol, harmful practices are defined as 'all behaviours, attitudes and/or practices which negatively affect the fundamental rights of women and girls, such as their right to life, health, dignity, education and physical integrity'. The African Women's Protocol elaborates the matter further by providing for an illustrative list of harmful practices. More importantly, it is important to note that the Women's Protocol explicitly regards FGM as a harmful practice.

In the absence of a clear statement that, like the African Women's Protocol, posits FGM as a harmful practice that undermines fundamental rights, the mere fact that FGM is a harmful practice cannot be helpful. This is largely attributed to the fact that not all harmful traditional practices are prohibited. Article 24(3) of CRC, for example, expressly prohibits only those traditional practices that negatively affect the health of women and children. It is, however, submitted that FGM is performed to preserve to enhance the patriarchy in most practising communities.⁶⁴ It is performed to control women's sexuality and this promotes their subordination in all spheres of life. Furthermore, it imposes both psychological and physical harm. This, obviously, undermines human rights, making FGM a prohibited harmful practice that negatively affects the rights and health of women and children. In fact, as mentioned earlier, the African Women's Protocol explicitly regards FGM as a harmful practice.⁶⁵ Similarly, the Women's Protocol prohibits all harmful traditional practices that undermine international human rights standards.⁶⁶

More controversial is the issue whether FGM violates the right against torture. A number of scholars argue that FGM amounts to

64 Fact Sheet 23, *Harmful traditional practices affecting the health of women and children*.

65 Art 5 African Women's Protocol.

66 As above.

torture. However, many are also quick to point out that the prerequisite of intention, as prescribed in the definition of torture, does not reflect the true mental state of practitioners of FGM or even parents that subject their children to FGM.⁶⁷ The rationale behind FGM is not to cause harm but rather to acquire 'acceptance in society or meeting culturally defined obligations'.⁶⁸ Based on this, it is often argued that FGM does not constitute an act of torture. It could rather be considered as cruel, inhumane or degrading treatment, the argument goes. This position finds support in observations of the United Nations Human Rights Committee which, in a number of concluding observations, stated that FGM constitutes cruel, inhumane or degrading treatment, thereby signalling that the practice violates the general prohibition against torture.⁶⁹

The position that the practice of FGM violates a number of rights has serious implications for state parties. One such important consequence is that it places a legal duty on the state to ensure that the rights of women are protected against FGM. This includes the legal obligation to put in place legislative measures to prohibit FGM. This duty requires states to provide constitutional protection for the rights of women, to enact legislation prohibiting the practice and to 'modify or abolish existing laws, regulations, customs and practices' such as FGM.⁷⁰ Furthermore, states are required to take other positive measures to ensure that the rights of women are protected against FGM. These include the duty to put in place administrative and regulatory measures to prohibit the practice and to raise awareness about the negative effects of FGM on the rights of women.⁷¹

Very recently, the rights-based approach against FGM gained a major boost with the UN's decision to adopt the 'first-ever draft resolution' that prohibits FGM. The objective of the resolution is to intensify global movements towards the eradication of FGM. The resolution seeks to promote awareness campaigns against FGM as one of the measures to prohibit the continued practice of FGM.⁷² These campaigns should be carried out through formal and informal education by engaging men and women and all the relevant stakeholders. In order to facilitate the general consensus towards the abandonment of FGM, these campaigns must also be used as a means

67 Rahman & Toubia (n 40 above) 26.

68 As above.

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

70 Arts 2(a), (e) & (f) CEDAW; Arts 2(1), 5 & 6 African Women's Protocol; arts 1, 5(3) & 16 African Children's Charter; arts 2 & 6 CRC; General Comments 19 & 24 of CEDAW; General Comment 2 CAT; art 2 CAT.

71 General Comment 3, 14, & 24 CEDAW; arts 2, 4 & 5 African Women's Protocol; art 3 CEDAW; art 4(c) Declaration on the Elimination of Violence Against Women; arts 16, 5(3) & 21 African Children's Charter; arts 16 & 24 CRC.

72 United Nations News Centre 'UN Committee approves first-ever text calling for end to female genital mutilation' <http://www.un.org/apps/news/story.asp?NewsID=43625&Cr=&Cr1=#.ULiVQKyP3vp> (accessed 30 November 2012).

to compliment punitive measures against the practice. When undertaking such campaigns, states are advised to use a 'comprehensive, culturally sensitive, systematic approach that incorporates a social perspective and is based on human rights and gender-equality principles'.⁷³

Noting the discriminatory effects of FGM, the General Assembly urges states to promote the empowerment of women. States are further required to 'promote gender-sensitive' educational programmes that will equip women with the necessary knowledge on the different policies and programmes on gender-based violence and discrimination.⁷⁴ The resolution also calls upon states to put in place comprehensive and multidisciplinary national action plans and strategies that support the abandonment of FGM. These measures should be crafted in a manner in which its objectives are clearly set out and should also incorporate 'effective monitoring, impact assessment and co-ordination of programmes among all stakeholders'.⁷⁵

From the foregoing, it is clear that the change in the international perception towards the practice of FGM has contributed positively towards the protection of the rights of women against FGM. It has broadened the awareness about the harmful effects of the practice not only on the health of women, but also on their fundamental human rights and freedoms. FGM today is recognised as a practice that violates a number of international human rights laws. As a result, states that are parties to these international human rights instruments have a duty to fulfil, protect and promote the fundamental rights of women within their jurisdiction against the practice. It is against this background that the remaining part of the article seeks to analyse the legal measures that Tanzania has put in place against its human rights obligations to protect the rights of women against FGM.

4 The law and female genital mutilation in Tanzania

Incorporating international human rights treaties into the national legal system enhances the development of human rights.⁷⁶ This also ensures that international standards are enforceable within the national legal system.⁷⁷ The same is true for the protection of the rights of women against FGM. It is the domestic legal framework that plays an essential role in protecting the rights of women against FGM.

73 United Nations General Assembly *Intensifying global efforts for the elimination of female genital mutilation* (2012) adopted by the United Nations General Assembly on 16 November 2012.

74 United Nations General Assembly (n 73 above) 4.

75 As above.

76 Centre for Reproductive Health Rights *Female genital mutilation a matter of human rights: An advocate's guide to action* (2006) 11 http://reproductiverights.org/sites/crr.civicaactions.net/files/documents/FGM_final.pdf (accessed 4 October 2012).

77 Centre for Reproductive Health Rights (n 76 above) 11.

As the following discussion reveals, Tanzania has put in place different legal measures to protect the rights of women against FGM. The measures include the Constitution of the United Republic of Tanzania of 1977 and other legislation complimenting the constitutional provisions protecting the rights of women against the practice.

4.1 Constitutional protection

The inclusion of constitutional provisions protecting the rights of women is, as mentioned earlier, one of the most effective measures that can enhance the legal framework to curb the violation of human rights by the continued practice of FGM. The constitutional provisions need to be drafted in manner that promotes gender equality, and prohibits harmful traditional practices, such as FGM, which are detrimental to the health of women. If the constitution does not specifically provide for these rights, then other general provisions can, of course, be interpreted to protect the rights of women against FGM.⁷⁸

The Tanzanian Constitution is founded on the principles of freedom, justice, fraternity and concord.⁷⁹ It strives to build a united society where every citizen has an opportunity to exercise human rights and enjoy freedom, justice, fraternity and concord. As the supreme law of the land, the Constitution is also referred to as the 'basic law', from which other laws are derived.⁸⁰ More specifically for our purpose, the Tanzanian Constitution protects the right to equality and non-discrimination,⁸¹ one of the rights implicated by the continued practice of FGM. The right to equality, as provided for in the Constitution, ensures that every individual is treated equally in the social, political or economic spheres of life.⁸² The right to non-discrimination, on the other hand, protects women from all forms of discrimination. Of course, the general prohibition against discrimination alone is not enough to protect women against FGM. The Constitution goes further by specifically providing for the prohibition of discrimination on the basis of sex. FGM, as established earlier, discriminates against women on the basis of sex as it is performed primarily to control women's sexuality. The recognition of these two corollary rights by the Constitution contributes to the protection of women against FGM.

In article 14, the Tanzanian Constitution protects the right to life, a right that, under certain circumstances, is threatened by the continued practice of FGM. The right to life encompasses the right to live and the right to have one's life protected in society by the law.⁸³

78 Centre for Reproductive Health Rights (n 76 above) 22.

79 Art 9 Tanzanian Constitution.

80 Preamble Tanzanian Constitution.

81 Arts 12 & 13(5) Tanzanian Constitution.

82 Legal Human Rights Centre *Tanzania human rights report* (2011) 65.

83 Art 14 Tanzanian Constitution.

FGM, as indicated earlier, violates the right to life in extreme cases when the practice results in death. The state has to ensure that this right is upheld by providing legal mechanisms to prohibit practices such as FGM that undermine this fundamental human right.⁸⁴ As established in the previous chapter, the practice of FGM also undermines the right against cruel, inhumane or degrading treatment. The Constitution of Tanzania protects the right of women to be free from cruel, inhumane or degrading treatment.⁸⁵

Unfortunately, the right to health, an important right that can be used to defend women against FGM, is not provided for in the Bill of Rights of Tanzania.⁸⁶ Despite the absence of explicit reference to the right to health by the Constitution, some scholars have held that article 11(1) of the Constitution can be interpreted to protect the right to health.⁸⁷ This interpretation is, however, debatable because the provision, if read carefully, does not actually provide for the right to health. It rather places a legal obligation on the state to put in place measures 'for securing the right to work, to education, and to public assistance in the case of old age, sickness and disablement, and in other cases of undeserved want'.⁸⁸ From this, it is clear that it is more of a welfare-related provision than the right to health. Even if it is regarded as the right to health, it does not help much in protecting women against FGM as it falls under the directive principles of state policy,⁸⁹ making it unenforceable against the state.⁹⁰ The failure of the government to incorporate this right in the Constitution goes against Tanzania's international and regional human rights obligations.

The Tanzanian Constitution also does not provide for the prohibition of harmful practices. As established earlier, FGM is a harmful practice that violates the fundamental rights of women. The absence of a constitutional provision against harmful practices is contrary to Tanzania's international and regional commitments in terms of human rights. The only way that this right is given effect to is through the Child Act that explicitly puts a prohibition against

84 As above.

85 Art 13(6) Tanzanian Constitution.

86 Legal Human Rights Centre (n 82 above) 83.

87 Art 11(1) Tanzanian Constitution: 'The state authority shall make appropriate provisions for the realisation of a person's right to work, to self-education and social welfare at times of old age, sickness or disability and in other cases of incapacity. Without prejudice to those rights, the state authority shall make provisions to ensure that every person earns his livelihood.'

88 IG Shivji *et al* (eds) *Constitutional and legal system of Tanzania: A civics sourcebook* (2004) 179.

89 As above.

90 As above. As a directive principle of state policy, the right to health is given effect through policies and legislation that are aimed at improving health care facilities. A good example is the National Health Policy of 2007 and Public Health Act of 2009. Legal Human Rights Centre (n 82 above) 83.

harmful cultural practices that adversely affect the physical and mental well-being of the child.⁹¹

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

4.2 Legislative measures

Although an attempt to eradicate FGM in Tanzania through legislative measures is a recent development, this does not mean that there has not been any attempt to deal with the negative effects of the practice. In fact, efforts to eradicate the practice can be traced back to the colonial era when the British colonial government and Christian organisations worked together to prohibit the continued practice of FGM.⁹² With little success, these efforts made the British colonial government unpopular and were considered by local communities as a mechanism to suppress and abolish their culture.⁹³ The movement to prohibit FGM continued even after independence. This was mostly driven by NGOs who raised awareness on the negative effects of FGM on the health of women.⁹⁴ More importantly, NGOs played a crucial role in advocacy and lobbying for the enactment of legislation criminalising FGM.

The efforts to eradicate FGM gained impetus with the growing concern to put in place an adequate legal framework to curtail increasing violence against women. The alarming wave of violence against women in Tanzania raised valid concerns about the need to review the legal framework to protect the rights of women. These concerns were intensified by the increase of offences such as 'rape, defilement, incest', and also the manner in which these offences were regulated in terms of the law.⁹⁵ As a result of the increasing public outcry and the campaigns by several NGOs, the government, through

91 Art 13(1) Law of the Child Law Act 21 of 2009; UNICEF *Legislative reform to support the abandonment of female genital mutilation/cutting* (2010) http://www.unicef.org/policyanalysis/files/UNICEF_LRI_Legislative_Reform_to_support_the_Abandonment_of_FGMC_August_2010.pdf (accessed 20 October 2012) 10.

92 D Mukama 'Female genital mutilation in Tanzania: A legal appraisal of the Sexual Offences Special Provisions Act 1998' LLM thesis, University of Dar es Salaam, 2002 27.

93 Mukama (n 92 above) 27.

94 Mukama 29.

95 Mukama 77.

the Law Reform Commission of Tanzania, instituted an inquiry.⁹⁶ The study established that there were several shortcomings on the law and its enforcement measures.⁹⁷ It indicated that the law had failed to adequately protect the rights of women against sexual and domestic violence due to the problems associated with sentencing as well as evidentiary and procedural requirements relating to sexual offences.

For our purposes, it is important to note that the inquiry also contributed positively to the on-going campaigns to eradicate FGM as the latter, for the first time, received specific attention as one of the contributing factors to gender-based violence. Previously, FGM was not legally regulated under the Tanzanian legal framework.⁹⁸ The only way that the practice could be addressed was when it resulted in death or grievous bodily harm to the victim.⁹⁹ The perpetrators were dealt with in terms of the Penal Code.¹⁰⁰ The effect of this is that the rights of women against the practice of FGM were not adequately protected. Based on these findings, the Law Reform Commission of Tanzania proposed a way forward to improve the legal framework and recommended, among other things, new legislation. The new legislation, according to the Law Reform Commission, would criminalise FGM and ensure that victims are compensated and perpetrators are imprisoned for not less than 30 years.¹⁰¹

In 1998, Tanzania joined the 21 or so African countries that have outlawed FGM by imposing criminal sanctions.¹⁰² The practice of FGM was criminalised for the first time in the legal history of Tanzania by the Penal Code,¹⁰³ as amended by the Sexual Offences Special

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

97 Law Reform of Tanzania (n 96 above) 32-47; Mukama (n 92 above) 12.

98 AOJ Kaniki 'An overview of the law on fighting against female genital mutilation in Tanzania' (on file with author) 22.

99 As above.

100 As above.

101 Some stress the point that the criminalisation of FGM in Tanzania was not an independent national strategy but rather an illustration of the international anti-FGM campaign. According to them, Tanzania relies extensively on financial aid from the West and the influence of international campaigns on the national system is reflected in the approach and language of the legislation criminalising FGM. See G Foss *et al* 'International discourse and local politics: Anti-female genital cutting laws in Egypt, Tanzania and the United States' (2001) 48 *Social Problems* 535; Law Reform of Tanzania (n 96 above) 66 67; Mukama (n 92 above) 77.

102 These states are Benin, Bukina Faso, Central African Republic, Chad, Côte d'Ivoire, Djibouti, Egypt, Eritrea, Ethiopia, Ghana, Guinea, Kenya, Mauritania, Niger, Nigeria, Senegal, Sudan, South Africa, Togo, Uganda and Kenya. Centre for Reproductive Health Rights (n 76 above) 7.

103 Penal Code ch 16 of the Laws of Tanzania, 2002.

Provision Act of 1998 in terms of section 169A.¹⁰⁴ The Penal Code criminalises FGM under a new offence of cruelty to children.¹⁰⁵ Section 169A(1) provides:¹⁰⁶

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 female genital mutilation or carries or causes to be carried out female genital mutilation or procures that person to be assaulted, ill-treated, neglected or abandoned in a manner likely to cause him suffering or injury to health, including injury to, or loss of, sight or hearing, or limb or organ of the body or any mental derangement, commits the offence of cruelty to children.

The use of punitive measures is an important aspect of law that is designed to prohibit the practice of FGM.¹⁰⁷ In a system that has taken the punitive route, a state can impose criminal sanctions against FGM by incorporating provisions prohibiting the practice in its Penal Code.¹⁰⁸ The criminalisation of FGM attempts to achieve the abandonment of the practice through the use of threats of punitive measures against perpetrators.¹⁰⁹ States that have adopted this approach include Egypt, Ghana and Senegal. The manner in which legal measures and criminal sanctions can be utilised by states to prohibit FGM is not, however, limited to this particular approach. Kenya, for example, uses both the Penal Code and the Children's Act to prohibit FGM. In states that follow a federal form of government, a decision has to be made whether legislation against FGM should be left to the national or sub-national government. In Nigeria, for example, the matter is left to the states. Two states have adopted laws to prohibit FGM. A state can also choose to enact specific legislation prohibiting the practice. This has been done in Benin, Eritrea, Uganda, Sudan and Togo.¹¹⁰

Research indicates that when states have put in place comprehensive criminal sanctions against FGM, it contributes positively to the prohibition of the practice.¹¹¹ However, this must not be exaggerated. It must be conceded from the outset that the use of punitive measures to prohibit or regulate a particular behaviour or practice has its limitations. This is especially true of FGM, a practice that is often culturally engrained. As a result, states often are advised

104 The Act amended different laws dealing with sexual and other offences. It further changed the sentencing and evidentiary requirements in relation to sexual offences. Law Reform of Tanzania (n 96 above) 12.

105 Penal Code ch 16 of the Laws of Tanzania (n 103 above), sec 169(A)(1).

106 As above.

107 Mukama (n 92 above) 27.

108 Mukama (n 92 above) 28.

109 Mukama (n 92 above) 27.

110 For an in-depth discussion on the law against FGM in Uganda, see J Mujuzi 'Female genital mutilation in Uganda: A glimpse at the abolition process' (2011) 1 *Journal of African Law*, and on Eritrea see D Mekonnen 'The abolition of female circumcision in Eritrea: Inadequacies of the new legislation' (2007) 7 *African Human Rights Law Journal* 389.

111 UNICEF (n 91 above) 7-27; Mukama (n 92 above) 27.

to complement legislative measures with other supporting measures such as educational awareness programmes that promote social change. These measures are important in order to achieve public consensus to abandon FGM. With measures that promote social change in place, the punitive measures against FGM only feature as a 'positive force' towards the eradication of FGM. However, when a state fails to develop such measures, what usually happens is that criminalisation simply pushes 'the practice underground, lower[s] the age of cutting, trigger[s] cross-border migration and result[s] in public resentment'.¹¹² The net result is a less effective criminal sanction against FGM.

Notwithstanding the limitations of legal measures to deal with the practice of FGM, the amendment of the Penal Code in Tanzania represents a positive step towards ensuring that the legal framework protects the rights of women against the practice of FGM. It is also an important step towards fulfilling the country's international and regional human rights obligations. Notwithstanding this, the effectiveness of the Penal Code in protecting the rights of women against FGM is questionable. As the discussion in the next section reveals, several loopholes in the provisions criminalising FGM have limited the amendment from realising its objectives.

4.2.1 Absence of definition

When a state chooses to use criminal sanctions to prohibit FGM, several factors need to be considered to ensure that the desired objectives are achieved. To begin with, the law must provide for a clear definition of FGM and clearly outline the different types of FGM that are prohibited.¹¹³ The law in Uganda, for example, defines FGM as 'all procedures involving the partial or total removal of external female genitalia for non-therapeutic reasons'.¹¹⁴ The Kenyan approach goes further by not only defining the practice, but also listing the types of FGM that are prohibited.¹¹⁵

A more comprehensive approach comes from Eritrea. Article 2 of the Proclamation to Abolish Female Circumcision provides not only for a definition of FGM, but also lists and, more importantly, outlines, in reasonable detail, the different types of FGM and reiterates that all types of FGM are prohibited.

The Penal Code of Tanzania criminalises FGM without a clear definition. The Code does not also make reference to the different

112 UNICEF (n 91 above) 8.

113 UNICEF (n 91 above) 24; UN Women *A supplement to the handbook for legislation on violence against women: 'Harmful traditional practices' against women* (2010) <http://www.un.org/womenwatch/daw/handbook/Supplement-to-Handbook-English.pdf> (accessed 20 October 2012).

114 Sec 1 Prohibition of Female Genital Mutilation Act 5 of 2010; see Mujuzi (n 110 above) 9.

115 Prohibition of Female Genital Mutilation Act, 2011.

types of FGM that are prohibited. In fact, section 169A only makes reference to FGM in passing as one of the acts that, when performed to a person below the age of 18 years, constitutes the offence of cruelty to children. The absence of a clear definition of FGM creates legal uncertainty about the acts that constitute FGM. Furthermore, it potentially undermines the effectiveness of the objectives of the amendment of the Act in protecting the rights of women against FGM.

4.2.2 Issues around consent

The Penal Code criminalises FGM if it is performed on a person below the age of 18 years. Consent, albeit indirectly, seems to be an issue. The assumption behind the legislation seems to be that a person below the age of 18 years cannot give valid consent. The effect of this is that women who are above the age of 18 years fall outside the ambit of section 169A of the Penal Code.¹¹⁶ This obviously is based on the idea that a person above 18 can give valid consent and FGM practised on an adult person is not the business of the law.

The problem with the legislation, however, is that it seems to assume that anyone above the age of 18 years undergoes FGM voluntarily. This is, however, an assumption that is far from reality, especially for women who belong to communities where the practice is strongly supported. Many women are as vulnerable as children due to social pressure and may still be subjected to the practice without their valid consent.¹¹⁷ In some communities in Tanzania, for example, 'adult women are sometimes genitally mutilated forcefully during delivery'.¹¹⁸ Most women who may consent to FGM may not also necessarily be aware of the consequences of their decision to engage in the practice.¹¹⁹ They are often exposed to extreme social and economic pressure to undergo FGM. Furthermore, the practice is strongly supported in rural areas where the level of education for most women is still very low. As mentioned earlier, most of them consent to FGM as a result of myths as well as social and economic pressure. That is why, for example, the law that prohibits FGM in Uganda targets not only those who are involved in the act, but also members of the broader community that support or encourage the practice. It explicitly provides that¹²⁰

[a] person who discriminates against or stigmatizes a female who has not undergone female genital mutilation from engaging or participating in any

116 Kaniki (n 98 above) 24.

117 Women's Legal Aid Centre *United Nations Convention on the Elimination of All Forms of Discrimination Against Women: Tanzania Non-Governmental Organisations' shadow report to CEDAW: The implementation of the Convention on the Elimination of All Forms of Discrimination Against Women 52* http://www.iwraw-ap.org/resources/pdf/41_shadow_reports/Tanzania%20_SR.pdf (accessed 27 November 2012).

118 Kaniki (n 98 above) 24.

119 Slack (n 61 above) 471 472.

120 Art 11 Prohibition of Female Genital Mutilation Act 5 of 2010.

economic, social, political or other activities in the community commits an offence and is liable on conviction to imprisonment not exceeding five years.

Furthermore, the failure of the Penal Code to outlaw FGM on a woman above the age of 18 has created a platform for the continuation of the practice. This is evident from the development of a 'new trend' in Tanzania where women voluntarily subject themselves to FGM for economic reasons. These women sell parts of their external genitals to miners who, in turn, use it for the purpose of witchcraft to enhance their chances of securing minerals.¹²¹ Obviously, this type of situation remains unregulated under section 169A as the legislation, it seems, does not have a problem with those who voluntarily subject themselves to FGM. This raises the question whether one's consent, even if it is valid and informed, is relevant for the purpose of criminal liability.

Some argue that an adult that willingly goes through FGM should not be criminally liable.¹²² On the other hand, the law criminalising FGM in Uganda, for example, has adopted a firm prohibition of FGM even in the presence of consent from the victim. In terms of the Act, consent does not constitute a valid defence against the prohibition of FGM.¹²³ Therefore, anyone who engages in FGM with or without consent will be criminally liable. The Act expressly provides that FGM is also criminalised even if it is performed on oneself.¹²⁴ Two states in Nigeria have adopted a similar position where the person giving consent can also be held criminally liable for FGM.¹²⁵ Consent, in this case, cannot be used as a justification to escape criminal liability for engaging in FGM.

In the case of Tanzania, the Law Reform Commission has proposed that the scope of the law should be widened to prohibit FGM on anyone regardless of age.¹²⁶ By reaffirming that consent does not constitute a valid justification for FGM, the legislation, it is submitted, can protect women against all the social and cultural pressure that may influence their ability to give valid consent to FGM.¹²⁷

4.2.3 Criminal liability

The law that seeks to prohibit FGM through criminal sanctions should expressly identify the persons that could potentially be held criminally liable.¹²⁸ It is believed that criminal sanctions should be attributed to

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

122 Slack (n 61 above) 470.

123 Mukama (n 92 above) 10.

124 Sec 4 of the Prohibition of Female Genital Mutilation Act 5 of 2010; Mukama (n 92 above) 10.

125 Mukama (n 92 above) 28.

126 Slack (n 61 above) 3.

127 Centre for Reproductive Health Rights (n 76 above) 25.

128 Centre for Reproductive Health Rights (n 76 above) 24.

the primary offender and anyone else who assists the perpetrator as an accomplice.¹²⁹ In Eritrea and Uganda, the law attributes criminal liability to any person regardless of the relationship that the person shares with a child or a woman on whom FGM is performed.¹³⁰ This means that any person who is responsible for the act can be held criminally liable for the offence.

The law in Tanzania is structured in a manner that attributes criminal liability to only those who have guardianship or custody of a child and allows her to be subjected to FGM. This means a special relationship between the child and the perpetrator needs to exist for criminal liability to ensue under the Penal Code.¹³¹ Given that guardianship is the main criterium for liability, it also means that the child's parents could be potentially liable for criminal charges. This gives rise to the issue surrounding the problematic nature of prosecuting parents for causing FGM.¹³²

The main issue against prosecuting parents is that any separation between the parent and the child may cause undue hardship on the child.¹³³ Imposing criminal liability on parents may be detrimental to the child as a result of the hardship that may ensue from the child being separated from the parent. The prosecution of parents, it is often argued, should be done with caution. Measures that would require the removal of the child from the parents 'or suspending parental authority need to be weighed against the child's best interests'.¹³⁴ States are advised to consider alternative penalties whenever possible to limit any undue hardship on the child.¹³⁵ Such measures are encouraged as they protect the best interests of the child.¹³⁶ A good example comes from Bukina Faso.¹³⁷ The judiciary treats parents differently from other perpetrators of FGM by imposing either a lower or suspended sentence on parents.¹³⁸ The Tanzanian Penal Code, in this case, may have a 'reverse negative effect' on the child, undermining the interest it seeks to protect. Instead of protecting the child by promoting the child's best interests, the legislation might impose hardship on the child by sanctioning separation.

More problematically, the limitation of the application of the Penal Code to those with a special relationship with the child means that

129 Mukama (n 92 above) 27 28.

130 Art 4 Proclamation to Abolish Female Circumcision 158 of 2007; art 2 Children's Act 8 of 2001.

131 Kaniki (n 98 above) 23.

132 It is argued that even without an express provision on the legislation criminalising parents, they could still be held liable as accomplices. Mukama (n 92 above) 28.

133 Centre for Reproductive Health Rights (n 76 above) 24; Mukama (n 92 above) 28.

134 Mukama (n 92 above) 19.

135 Centre for Reproductive Health Rights (n 76 above) 24.

136 As above; Mukama (n 92 above) 18.

137 Mukama (n 92 above) 18 19.

138 Mukama (n 92 above) 19.

FGM practitioners, commonly referred to as *Ngariba*, and medical personnel, cannot be held criminally liable. This is because of the requirement of custody or guardianship for criminal liability. The effect of this is that parents and guardians try to circumvent criminal liability by avoiding direct engagement in subjecting children to FGM. This is evident in regions like Dodoma and Singida where parents attempt to avoid detection and prosecution by arranging that FGM be performed on new-borns.¹³⁹ In these regions, FGM is now done with the assistance of some health attendants such as midwives who 'poke their fingers, nails and incisive objects into an infant's clitoris as soon as they are born'.¹⁴⁰ The practice causes damage to the infant's bladder, promotes infections and can even cause death as a result of over-bleeding.¹⁴¹ Such incidents fall outside the ambit of section 169A and may only be regulated by other provisions of the Penal Code.¹⁴²

4.2.4 Punishment

One of the important elements of any law criminalising the practice of FGM are the measures incorporated to punish perpetrators of the crime.¹⁴³ The Penal Code, through article 169A(2), attributes punishment in the form of imprisonment. A perpetrator, if found guilty, can be imprisoned for a minimum of five years but not exceeding 13 years. The court, in addition, can impose a fine of a maximum of 300 000 Tanzania shillings.¹⁴⁴ The perpetrator can also be subjected to imprisonment and be required to pay a fine. In addition, the Penal Code mandates the perpetrator to compensate the victim for the harm caused.

It seems that the Penal Code provides for a 'fixed standard'. That means that, even in the event that the act results in death, the punishment remains the same, although this might be regulated under other relevant provisions of the Penal Code. This is problematic. In Uganda, for example, punishment is attributed to the perpetrators depending on the degree of harm caused. For example, a person that attempts to engage in FGM will be subjected to imprisonment of a

139 This new trend has also been reported to be carried out in the Karatu district in Arusha. Although in this region it has not yet been reported to be done with the assistance of health officials, it is done for the same purpose on infants to avoid prosecution. A Mwakyausa 'Karatu communities change strategy on FGM' *Daily News* 5 July 2012 9; Slack (n 61 above) 80.

140 Slack (n 61 above) 80.

141 As above.

142 It is, however, important to note that several measures have been instituted to guard against this practice. Such measures include a campaign by health officials where infants brought to the clinics are checked for any sign of FGM. The main objective behind this campaign is to hold the perpetrators accountable in line with sec 169A. 'Health workers now diagnose genitally-mutilated infants' *The Guardian* (Tanzania) 15 December 2008; Slack (n 61 above) 80.

143 Mukama (n 92 above) 27.

144 Penal Code ch 16 of the Laws of Tanzania (n 103 above) sec 169(A)(2).

maximum of five years. Furthermore, if the practice causes death or disability or infects the victim with HIV, the perpetrator could be subjected to life imprisonment.

The manner in which punishment is attributed may also vary depending on the person who committed the crime. If FGM is performed by a health official or by a person who shares a special relationship with a child, such as the guardian, such a person may be subjected to life imprisonment.¹⁴⁵ In some jurisdictions, like Burkina Faso, the government imposes strict punishment if the perpetrator is a health official. The person will not only be given the 'maximum punishment', but may also be suspended for five years from medical practice.¹⁴⁶ In Tanzania, the fact that the Penal Code applies the same form of punishment across the board, irrespective of the person responsible for the crime or the degree of the harm caused by the practice, is problematic.

4.2.5 Investigation and legal prosecution

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

The situation in Tanzania around the investigation and prosecution of FGM cases is not different from most African countries where the practice still prevails, despite criminal sanctions against it. Research indicates that FGM is still supported in Tanzania, and is practised in the privacy of family and community members to avoid detection by law enforcers.¹⁴⁷ This creates a problem in investigating cases as law enforcers, who are considered as 'outsiders', are left unaware of whether the practice has been performed.¹⁴⁸ In order to ensure that the objectives of the legal measure are achieved, some states, such as Benin, have imposed a mandatory reporting duty on medical officials and all professionals who work with children and women to report

145 As above.

146 Mgabako *et al* (n 43 above)18.

147 H Kwasila 'FGM interventions: Achievements, challenges and prospects in the light of the National Plan of Action to accelerate the elimination of FGM and other harmful traditional practices' (2007) paper presented to the National Gender Group, REPOA Conference, 30 March 2007 15.

148 Mukama (n 92 above) 29.

FGM cases to law enforcers. The rationale behind this duty is to ensure that FGM cases are reported and to assist law enforcers in the investigation and collection of evidence. In Egypt, for example, the government has established a helpline to facilitate the reporting procedure where people can report cases of FGM. These cases are later on directed to the authorities where investigation and legal proceedings can be instituted against the perpetrators. In Burkina Faso, the government has established community patrols in the regions where FGM is supported. The police collaborate with health care officials and informants within these communities to report cases of FGM.

Sometimes, however, the problem could be the law enforcers themselves. The attitudes of the law enforcers and of the community is crucial in ensuring the effectiveness of the legal measures that are put in place to eradicate FGM. The experience in Tanzania has shown that the attitude of the community and the law enforcers towards the practice of FGM has a negative impact in the reporting of FGM cases. It has been established that the lack of co-operation from the law enforcers in the region has limited efforts to curb the practice.¹⁴⁹ The widely-reported case of a girl, who was subjected to FGM in Mnazi Moja in Morogoro, is a good indication of the attitude of the law enforcers. The matter was reported to the local police but no charges were brought against the perpetrators. The girl died later due to over-bleeding. In Tarime, specifically in Sirari Township, FGM ceremonies were held in 2010.¹⁵⁰ In 2010 alone, it was established that approximately 5 000 girls were in line to be subjected to FGM in Tarime. As one observer has put it, women who had just undergone FGM were¹⁵¹

paraded like merchandise after they had just been mutilated and crowds of people joyously dancing behind them. These girls were seated under the shade with fresh blood dripping down their legs. It was shocking to notice that there was a police station a few meters from where the actual FGM was taking place but the police went on working like nothing was happening.

Although the police are under a legal duty to protect women against FGM, most of them are reluctant to prohibit the practice in the region due to a fear of causing 'disarray between the police and FGM perpetrators'.¹⁵² In addition, most police stations lack proper documented records on FGM cases.¹⁵³ The consequence of this is

149 Gamaya (n 4 above) 34.

150 Legal Human Rights Centre *Fact-finding mission conducted at Tarime District November-December 2010* (2010) 4 7.

151 As above.

152 Legal Human Rights Centre (n 150 above) 12.

153 E Lema (ed) *20 years of Tanzania Media Women's Association (TAMWA): Moving the agenda for social transformation in Tanzania* (2008) 139; Legal Human Rights Centre (n 149 above) 12.

that the government initiatives to ensure that the rights of women are protected against FGM are significantly undermined.

One of the main contributing factors is the social pressure that victims of FGM experience either from the family, community, or both, when legal proceedings are instituted.¹⁵⁴ This makes prosecution of cases difficult as some victims would withdraw the cases due to social pressure and a lack of evidence. As a result, most cases are not prosecuted. Research undertaken in the District Registrar of Dodoma High Court has revealed that due to the 'family-oriented nature' of the cases of FGM, cases take a long time to be decided due to a lack of evidence.¹⁵⁵ This is because, most of the time, the perpetrator is a parent or a close relative of the child. Obtaining evidence from the victim or another relative has proven to be a challenge. For example, in *R v Fatuma Iddi* and *R v V Lucy Augustino*, the accused in both cases were acquitted due to a lack of evidence and family pressure.

5 Conclusion

The foregoing discussion has established that FGM violates fundamental human rights. It has further held that various legal obligations are imposed upon states to ensure that the rights of women are protected. Tanzania has a legal duty to protect women against the practice. In discharging this duty, Tanzania has amended the Penal Code to introduce the criminalisation of FGM. Upon close scrutiny of the legal measures, however, it became clear that despite the slight decrease in the prevalence rate of FGM, the law has not been effective in prohibiting the practice. This is attributed to various factors, including the lack of a comprehensive law to prohibit FGM.

The Penal Code has several shortcomings that limit the objectives of its amendment. This includes the lack of a precise definition of acts that constitute FGM, the limited scope of criminal liability, issues around punishment and the failure to criminalise FGM performed on women above the age of 18 years. Other contributing factors that hinder the effectiveness of the law against FGM include challenges related to the enforcement measures that are in place and societal views of the practice, as many still believe that the practice cures genital diseases. The inadequacy of the medical facilities in rural areas where FGM is most prominent, together with poverty, further enhances this misconception. The combination of all these factors continues to limit the effectiveness of the legal framework in protecting the rights of women against FGM in Tanzania.

¹⁵⁴ Mukama (n 92 above) 30.

¹⁵⁵ Mukama (n 92 above) 98.