Clash of Law, Social Norms and Cultural Beliefs

Challenges in Eradicating Female Genital Mutilation (FGM) in Kenya

by Maria Angela Wangui Maina*

Abstract
More than 200 million girls and women alive today have undergone FGM worldwide [1]. Kenya is one of the FGM-practicing countries and has 4 million girls and women as FGM victims [2]. The objective of this journal article is to show the link between the following issues as challenging factors hindering the complete eradication of FGM in Kenya: a. The ongoing underground FGM operations despite Kenya's anti-FGM law; and b. The harmful social norms, beliefs and misconceptions directly linked to FGM in Kenya. This study begins by dissecting these issues to show that laws alone cannot eradicate FGM, which has been a practice for centuries. The conclusion herein reveals that law, social norms and cultural beliefs truly clash, and there is no single remedy to eradicating FGM in Kenya. The Kenyan government must make more intentional and localized efforts to tackle these interlinked factors.

Keywords
Female genital mutilation, FGM, girls, women, Kenya, SDGs.

1. Introduction

Female genital mutilation (FGM) refers to a procedure that involves removing partial or whole of the external female genitalia or altering/injuring the female genitalia for cultural or other non-medical reasons [3]. The term FGM is a specific annotation of the fact that it is a procedure with no medical benefit in comparison with male circumcision – which medical experts encourage to reduce the transmission of HIV and sexually transmitted infections [4]. Thus, the international human rights community does not condone using the term "female circumcision" because FGM also leads to immediate health risks as well as long-term complications to physical, mental and sexual health, and overall well-being [5].

Despite the above, FGM is still an ongoing practice. The World Health Organization (WHO) reports that more than 200 million girls and women alive today have undergone FGM in 30 countries in Africa,

* LLB (Hons) Nairobi, Kenya. Legal Intern at Pavia e Ansaldo.

the Middle East and Asia [2]. Kenya is one of the FGM-practicing countries and has 4 million girls and women as FGM victims (21% who are aged 15 to 49 years) [1]. Fortunately, the prevalence of FGM has decreased in Kenya from 38% in 1998 to 15% in 2022 [6]. There is still more to do in FGM eradication. For instance, some identifiable factors challenging FGM eradication include:

a. The ongoing underground FGM operations despite Kenya's anti-FGM law.
b. The harmful social norms, beliefs and misconceptions directly linked to FGM in Kenya.

This journal article shows the link between the above issues as challenging factors hindering the complete eradication of FGM in Kenya. The author is a Kenyan, hence the focus on Kenya as the jurisdiction of focus.

This study begins by dissecting the two main factors to show that laws alone cannot eradicate FGM, which has been a practice for centuries. The conclusion is that the Kenyan government must make more intentional and localized efforts to tackle these factors – which are interlinked in the fight against FGM.

2. Anti-FGM Law in Kenya: Its Interconnection with the Status of Girls and Women, Challenging Beliefs and Misconceptions of FGM

FGM is currently an illegal practice in Kenya owing to the Prohibition of Female Genital Mutilation Act (2011) that has been in force since 4 October 2011. Notwithstanding, reports of FGM incidents often appear in the Kenyan news [7]. From a deeper perspective, it appears relatively difficult to eradicate FGM by this law alone, especially since there are underlying factors that are directly linked to its existence and perpetuation. These interconnected, underlying factors are analyzed herein within the Kenyan context.

2.1. *Prohibition of Female Genital Mutilation Act (2011): Key Provisions and Relating Statutes*

The Prohibition of Female Genital Mutilation Act (hereafter referred to as "the Act") criminalizes FGM in all its forms (mainly clitoridectomy, excision and infibulation). Furthermore, it identifies the parties who can be held criminally liable. The Act is a step towards achieving Sustainable Development Goal (SDG) 5 (gender equality) as it explicitly addresses Target 5.3 of the SDGs (to eliminate FGM) by imposing a life imprisonment penalty for those who directly perform FGM or undergo training to do so, notwithstanding consent given. The Act equally addresses Target 5.2 of the SDGs by acknowledging FGM as an act of physical violence against girls and women, similar to the United Nations (UN).

Section 2 of the Act distinguishes the acts of FGM from sexual reassignment procedures or medical procedures with a genuine therapeutic purpose. The definition of "sexual reassignment procedure" is provided "as any surgical procedure that is performed to alter (wholly or partially) the genital appearance of a person to the genital appearance (as nearly as practicable) of a person of the opposite sex" [8]. The provision intentionally and explicitly distinguishes this procedure from FGM.

Section 3 of the Act further establishes the Anti-Female Genital Mutilation Board as a body corporate with the duty

to conduct and design public-awareness programmes, and generally advise the government on FGM matters and implementing the Act, among other functions. So far, the Board is living up to its expectations and heavily works with local communities to achieve its objectives.

Most importantly, FGM is made an offence under Part IV of the Act, where the offences include:

1. Principal offence: "Any person who performs FGM (including persons undergoing training to become a midwife or medical practitioner (under the supervision of a midwife or medical practitioner) to perform FGM; and causing the death of another by FGM". This is an offence punishable by imprisonment for life upon conviction [9].
   There have been increasing instances of FGM medicalization – legitimizing FGM practice as safe and appropriate because it is conducted by a healthcare provider. As reinforced by the WHO, medicalized FGM is on the rise because these healthcare professionals believe in FGM social norms and may be given financial incentives to conduct the procedure [1]. The *2021 High Court Constitutional Petition case brought by Dr. Tatu Kamau* is proof that there are medical practitioners that conduct FGM based on perpetuating social norms and cultural beliefs. In the aforementioned case, the Petitioner (Dr. Tatu Kamau) challenged the constitutionality of the Prohibition of Female Genital Mutilation Act since FGM is a cultural practice and Article 11 (1) of the Constitution of Kenya recognizes culture as the foundation of the nation [10]. In this sense, the drafters of the Act had commendable foresight to combat ongoing and future medicalization of FGM practices, without the exclusion of the old traditional FGM "circumcisers".
2. Aiding and abetting offences: These have been included to punish additional persons who "procure or assist persons to conduct FGM on another in Kenya, take a person outside Kenya to conduct FGM, allow FGM to be knowingly conducted on their premises, possess tools for FGM, fails to report the commission of FGM and persons who use derogatory or abusive language towards FGM victims or shame a woman who has not undergone FGM" [11].
   Privatized FGM procedures are conducted in personal homes or premises, which have become common after the criminalization of FGM. In such instances, the Act puts great effort to capture each actor that may partake in encouraging FGM practices privately to circumvent legal punishment. For example, parents are well-known to collude with "circumcisers" to cut girls in private homes [12].

Indeed the greatest risk of implementing the Prohibition Against Female Genital Mutilation Act has been the rise of underground FGM operations by communities that refuse to eradicate this belief due to deep-seated traditions and beliefs passed down intergenerationally. Thus, it may take longer to achieve SDG 5 (Gender Equality) in Kenya. Inversely, the benefit of the Act is that it indicates a strong will to deconstruct these traditional

beliefs that have no place in modern society.

Additional legal instruments in Kenya work alongside the Prohibition of Female Genital Mutilation Act to eradicate FGM.

1. International legal instruments ratified by Kenya and forming part of national law by Article 2 of the Constitution of Kenya:
   - *Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW):* Ratified by Kenya in 1984, this convention addresses the rights of women and girls, including the elimination of harmful practices such as FGM.
   - *African Charter on Human and Peoples' Rights:* Kenya ratified this charter in 1992 to emphasize the protection of human rights, including the rights of women and children.
   - *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol):* Ratified by Kenya in 2010, this protocol specifically addresses women's rights in Africa and seeks to eliminate FGM and other harmful practices.
   - *United Nations Convention on the Rights of the Child (UNCRC):* Kenya ratified the UNCRC in 1990, which protects the rights of children, including protection from harmful practices like FGM.
   - *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (Palermo Protocol):* Kenya ratified this protocol in 2010, which addresses human trafficking, including trafficking for purposes of conducting FGM.
   - *International Covenant on Civil and Political Rights (ICCPR)*: Ratified by Kenya in 1972, this covenant promotes and protects civil and political rights, including the rights of women and girls to be free from harmful practices like FGM.
2. The Children Act (No. 29 of 2022): Section 23 makes it an offence to subject a child to harmful cultural practices, including FGM, forced male circumcision, and child marriage, *inter alia*.
3. Protection Against Domestic Violence Act (No. 2 of 2015): Section 3 classifies FGM as an act of domestic violence. Part II also provides protective order measures for survivors and victims of such domestic violence acts.

From the list of the above legal instruments and their objects, it is clear that FGM practice is linked to other acts of Gender Based Violence (GBV) acts such as early child marriage. Ergo, the transition into the succeeding sub-section.

2.2. *Harmful Social Norms, Beliefs and Misconceptions Directly Linked to FGM in Kenya*

From studies, the perception of the female gender and social norms greatly inform the beliefs and misconceptions that fuel FGM occurrences today. Occurrences of GBV will become more difficult to tackle as long as the root belief is that the female gender is the "weaker sex". The next few paragraphs explore the main harmful social norms, beliefs

and misconceptions present in FGM-practising communities in Kenya, citing testimonies and case studies conducted on the same.

The main aim of this sub-section is to show that while the law exists to protect us from ourselves, it does not directly do away with the harmful mentality and traditions that have permeated our society for centuries.

2.2.1. Child Marriage

The rationale for practising FGM varies from community to community in Kenya, but the foundational reasons seem to be marriageability and controlling girls'/women's sexual desires. The Defence Witness in the *2021 High Court Constitutional Petition case brought by Dr. Tatu Kamau* testified that FGM is usually performed on girls between ages 4 to 14 either as a rite of passage, to preserve virginity for marriage, upon being married, during the first pregnancy or labour [10]. According to UNICEF, FGM is performed at different ages around Kenya, including after the age of 15 in some ethnic groups [2], but other studies show it may be conducted as early as ages 7 to 12 [13]. Many different traditions exist, but the prevalent reason for FGM is a traditional rite of passage to mark a girl's coming of age and prepare her for marriage [13], as a sign of her marriageability [14], sexual chastity and other traditional beliefs [15]. As such, once a girl is subjected to FGM, she is expected to be subjected to marriage shortly after.

The correlation between FGM and child marriage is so strong that anecdotal evidence suggests that uncut girls are less likely to be desirable for marriage and often excluded from wider social events within a community [14]. Consequently, child marriage leads to teenage pregnancies, thus disrupting any ambitions to resume education in most cases [16].

2.2.2. Tribal Community Traditions, Parental Attitudes and Stigma

Parents come from a community with traditional practices and beliefs passed down from generation to generation. Parents then form an attitude that is difficult to deconstruct, passing it down to their children. This is often how FGM practice passes on trans-generationally.

A 2020 academic study concludes that there is an association between daughters' cutting and favourable parental opinions towards the practice [17]. As narrated by an FGM activist, parents still pass on the mentality that they should stigmatise those who refuse to undergo FGM as a rite of passage [16]. In other areas, where the link to traditional rites of passage does not exist or is in decline, girls are reported to be cut with little or no celebration; and the procedure is increasingly carried out by medical personnel [13].

2.2.3. Low Literacy Levels

Another main factor that leads to the continuation of FGM is the low literacy levels on its dangers, especially at the grassroots level, for both parents and children within the practising communities. Additionally, we have also explored the link between FGM practices and the ability of girls to continue their education – an ambition that appears impossible since girls are married off after FGM.

An FGM activist testify that many of their parents did not attend school, so they are not aware of the dangers of

FGM [16]. However, uncut girls are considered less likely to be subjected to early marriage (as they are considered unsuitable for marriage and sexually unchaste), thus are more likely to be able to stay in school [14]. Inversely, one can imply that protecting girls from FGM gives them a better chance to access school education.

A 2020 case study in Kenya concluded that providing FGM to communities, particularly young men coupled with keeping girls in school appeared to be an effective method [18]. Moreover, supporting education and targeted training are recommended to enable all stakeholders to sensitively and respectfully address FGM as a complex and long-standing practice [19].

2.2.4. Cross-Border Migration

In Kenya, FGM practice is relatively high in some communities, specifically among the Somali (94%), Samburu (86%), Kisii (84%) and Maasai (78%) [20]. Kenya ranks number 19 rank in the worldwide FGM index and Somalia ranks number 1 – a country with strong relations and presence in Kenya because of migration (forming approximately 2,780,502 of the total 47,564,296 Kenyan population) [21]. Therefore their traditions remain even after migration to Kenya, making it a little more different to eradicate as the FGM practice is also linked to the practice of Islam. A local religious leader in the North-Eastern Somali community tells UNICEF that "Islam is a religion of mercy but FGM is merciless to the girl child and therefore negates our belief. It is a harmful and unnecessary evil" [22].

3. Conclusion: Need for a More Localized FGM Eradication Regime

A more localized FGM eradication regime is necessary for Kenya to effectively address the cultural, social, and regional nuances that perpetuate the practice. By tailoring interventions to specific communities, engaging local stakeholders, and allocating resources strategically, we can make significant progress in eradicating FGM and safeguarding the rights and well-being of women and girls in Kenya. Such an approach is necessary to address the unique challenges and dynamics present at the regional and community levels.

One of the primary reasons for a localized approach is the significant cultural variation within Kenya. The country is home to various ethnic groups, each with its traditions and beliefs. These differences affect the prevalence and acceptance of FGM in different communities. Therefore, a blanket approach to eradication may not effectively tackle the issue across the entire nation. Instead, targeted interventions tailored to the specific cultural contexts and sensitivities of different regions are crucial.

A localized regime enables a more comprehensive understanding of the factors contributing to the persistence of FGM within specific communities. It allows for in-depth research into the underlying beliefs, social norms, and economic factors that perpetuate the practice. This knowledge is essential for designing effective interventions that challenge the misconceptions surrounding FGM and promote alternative, healthier rites of passage.

Furthermore, a localized approach encourages community ownership and participation in eradicating FGM. It recognizes the importance of engaging local leaders, religious institutions, and influential community members in promoting change. By involving these stakeholders,

interventions can be designed to respect and preserve cultural values while simultaneously challenging harmful practices. This participatory approach fosters a sense of empowerment and ownership within the community, leading to sustainable change and a greater likelihood of long-term success.

Additionally, a localized regime allows for the allocation of resources in a targeted and efficient manner. By focusing efforts on specific regions with higher prevalence rates, resources such as funding, healthcare services, education programs, and awareness campaigns can be concentrated where they are most needed. This approach maximizes the impact of limited resources, ensuring that interventions reach the most vulnerable populations and make a tangible difference.

However, while a localized approach is crucial, it is important to maintain a national framework that sets clear legal guidelines and standards for eradicating FGM. National legislation acts as a powerful tool to enforce prohibition, protect victims, and hold perpetrators accountable. Localized efforts should work in tandem with national policies to create a comprehensive and coordinated approach to eradicating FGM in Kenya. The 2010 UNICEF Innocenti report highlights local interventions and national programmes at different stages of implementation. Each, in different ways, provides evidence and insights that contribute in varying degrees to understanding the complex social dynamics of abandonment of FGM/C. Legislation is only part of a broader transformative process to complement and uplift local-level efforts [13].

References

1. WHO, *Female genital mutilation*, <https://www.who.int/news-room/fact-sheets/detail/female-genital-mutilation#:~:>, accessed 10 June 2023.
2. UNICEF (2020), *A profile of female genital mutilation in Kenya*, <https://data.unicef.org/resources/a-profile-of-female-genital-mutilation-in-kenya/>, accessed 10 June 2023.
3. UNICEF, *What is female genital mutilation?*, <https://www.unicef.org/stories/what-you-need-know-about-female-genital-mutilation#>, accessed 1 June 2023.
4. Pintye J., Baeten J.M. (2019), *Benefits of male circumcision for MSM: evidence for action*', «The Lancet», <https://www.thelancet.com/journals/langlo/article/PIIS2214-109X(19)30038-5/fulltext>, accessed 1 June 2023.
5. WHO, *Female genital mutilation*, <https://www.who.int/health-topics/female-genital-mutilation#>, accessed 1 June 2023.
6. Kenya National Bureau of Statistics (2022), *Demographic and Health Survey: Key Indicators Report 2022* (The DHS Program 2022), <https://dhsprogram.com/pubs/pdf/PR143/PR143.pdf>, accessed 10 June 2023.
7. Maina M.A. (2023), *Female genital mutilation in Kenya, despite criminalization*, «La Svolta», <https://www.lasvolta.it/6207/female-genital-mutilation-in-kenya-despite-criminalization>, accessed 20 June 2023.
8. Prohibition of Female Genital Mutilation Act, 2011, s 2.
9. Prohibition of Female Genital Mutilation Act, 2011, s 19 (1-6).
10. *Tatu Kamau v Attorney General & 2 others; Equality Now & 9 others (Interested Parties); Katiba Institute & another (Amicus Curiae)* (2021) eKLR (High Court).
11. Prohibition of Female Genital Mutilation Act, 2011, s 20-25.
12. Gichure N. (2022), *Police probe parents, FGM ring leaders colluding to cut girls*, «The Standard», <https://www.standardmedia.co.ke/counties/article/2001442501/police-probe-parents-fgm-ring-leaders-colluding-to-cut-girls>, accessed 21 June 2023.
13. UNICEF Innocenti Research Centre (2010), *The Dynamics of Social Change: Towards the Abandonment of Female Genital Mutilation/Cutting in Five African Countries*, <https://www.unicef-irc.org/publications/pdf/fgm_insight_eng.pdf>, accessed 20 June 2023.
14. UNICEF (2021), *Case Study on the End Female Genital Mutilation (FGM) programme in the Republic of Kenya*,

<https://www.unicef.org/esa/media/8926/file/Kenya-Case-Study-FGM-2021.pdf>, accessed 20 June 2023.

15. Obiora O.L., Maree J.E., Nkosi-Mafutha N. (2020), *Female genital mutilation in Africa: Scoping the landscape of evidence*, «International Journal of Africa Nursing Sciences», <https://www.sciencedirect.com/science/article/pii/S2214139119300617#b0110>, accessed 20 June 2023.

16. Plan International (2020), *Why FGM should be abolished*, <https://plan-international.org/case-studies/why-fgm-should-be-abolished/>, accessed 20 June 2023.

17. Cappa C., Thomson C., Murray C. (2020), *Understanding the association between parental attitudes and the practice of female genital mutilation among daughters*, «Plos One», <https://doi.org/10.1371/journal.pone.0233344>, accessed 23 June 2023.

18. Mwendwa P., Mutea N., Kaimuri M.J., De Brun A., Kroll T., (2020), *"Promote locally led initiatives to fight female genital mutilation/cutting (FGM/C)" lessons from anti-FGM/C advocates in rural Kenya*, «Reproductive Health», <https://reproductive-health-journal.biomedcentral.com/articles/10.1186/s12978-020-0884-5>, accessed 23 June 2023.

19. McCauley M., van den Broek N. (2018), *Challenges in the eradication of female genital mutilation/cutting*, «Oxford Academic», <https://doi.org/10.1093/inthealth/ihy082>, accessed 23 June 2023.

20. Kenya National Bureau of Statistics, Ministry of Health – Kenya, National AIDS Control Council – Kenya, Kenya Medical Research Institute, National Council for Population and Development – Kenya, and ICF International (2015), Kenya Demographic and Health Survey 2014, Rockville, MD, USA, Kenya National Bureau of Statistics, Ministry of Health – Kenya, National AIDS Control Council – Kenya, Kenya Medical Research Institute, National Council for Population and Development – Kenya, and ICF International, https://dhsprogram.com/pubs/pdf/FR308/FR308.pdf.

21. Nation Africa (2019), *Kenya's population census results at a glance*, <https://nation.africa/kenya/news/Kenya-population-census-results-at-glance/1056-5336378-f8qbvvz/index.html>, accessed 10 June 2023. Kenya National Bureau of Statistics (2019), *2019 Population and Housing Census*, <https://www.knbs.or.ke/download/2019-kenya-population-and-housing-census-volume-i-population-by-county-and-sub-county/>, accessed 10 June 2023.

22. UNICEF (2017), *In Kenya, a mother leads the movement to stop FGM in her community*, <https://www.unicef.org/stories/kenya-mother-leads-movement-stop-fgm-her-community#:~:>, accessed 23 June 2023.