

**THE PRACTISE OF FEMALE GENITAL CUTTING/MUTILATION: CULTURAL
PRACTISE OR VIOLATION OF HUMAN RIGHTS?**

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DECLARATION

I Durodola Olapeju Ifeoluwa declare that the thesis which I hereby submit for a Masters of Law (LLM) degree at the University of Pretoria is my own work and has not been previously submitted by me for any degree at this or any other institution.

Durodola Olapeju Ifeoluwa

Date

DEDICATION

Dedicated to my awesome family

Evangelist & Pastor (Mrs) Durodola

My amazing parents, who have stood by me through thick and thin

Adejoke Adebayo, Oludasola Olajojo, Olaide Durodola and Olukayode
Durodola

The best siblings anyone could ever ask for

Oyewole Jimoh

My better-half, my best friend and number one cheerleader and supporter.

Olufemi Olagboye

For being a true friend.

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CHAPTER ONE

INTRODUCTION

1.1 RESEARCH PROBLEM

The aim of this study is to argue for the cultural transformation of parties that practice Female Genital Cutting/Female Genital Mutilation in order to align it with principles of human rights. I will explore the health risks involved and address the link between the continuance of the practise and the need for cultural preservation. I will revisit the difference between the use of the term Female Genital Mutilation¹ and Female Genital Cutting². I consider if cultural transformation or modification might be an alternative to total eradication.

1.2 RESEARCH QUESTIONS

This study proposes to ask the following questions:

1. What is the meaning and origin of the two terms, FGC/FGM; what are the different types of FGC/FGM, and what are the health, physical and psychological consequences of this practise?
2. What are the justifications for the practice of FGC/FGM and why it is difficult to eradicate this practice?
3. What does the practice of FGC entail as a cultural practice?
4. What are the various human rights that the practice of FGM violates?

¹ Hereinafter referred to as FGM.

² Hereinafter referred to as FGC.

5. What measures can be put in place to create a co-existence between FGC/FGM and human rights?

1.3 MOTIVATION

1.3.1 BACKGROUND

Over the years, and prior to colonisation, different countries carried out different cultural practices and this evolved to become their tradition. During the colonial era, some of these cultural practises were said to be barbaric and some were eradicated. Some of these cultural practices are harmless to the health of those practising it and do not infringe the rights of the people upon which it is practised, as long as they gave their consent to it. While on the other hand some are dangerous to the health of the people and also infringe their rights.

An example of such cultural practice is FGC/FGM.

Female genital mutilation, also known as female genital cutting or female circumcision, can be described, as the traditional practice that involves the cutting of the female genitals.³ The World Health Organization (2010) describes it as the ‘partial or total removal of the external female genitalia or other injury to the female genital organs for non-medical reason.’⁴ This practice usually is done in a very cruel and crude manner. It is usually carried out by non-medical personnel, a ‘traditional circumciser’, with an unsterilized instrument (knife or scissors) which

³ Rahman A & Toubia N *Female Genital Mutilation: A Guide to Laws and Policies* (2000) 3. See also Toubia N *Female Genital Mutilation: A Call for Global Action* (1995) 9

⁴ Yusuf F ‘Curbing Female Genital Mutilation: The Role of Information and Libraries’ (2010)8 *Gender and Behaviour* 3089

is used on all the recipients.⁵ Most times, it is done without the use of anaesthesia.⁶

Over the years, no one has been able to clearly trace the origin of female circumcision, nor explain its growth. However, some European travellers spread the belief that the practice of FGC/FGM is an ancient 'Egyptian invention'.⁷ Specifically, it was said to have originated in southern Egypt and northern Sudan about 2000 years ago.⁸ It was said to be practised by many cultures including the Phoenicians, Hittites and the ancient Egyptians.⁹ On the alternative, Islam has been recognised as an 'incontestable' source of the practice.¹⁰ This stance was emphasised upon in the argument of David Gollaher, who stated that, 'In the world of Islam, female circumcision has long been acknowledged as a rightful counterpart to male circumcision.'¹¹ Research has however proved that Islam cannot be linked to female circumcision. If Islam is said to be the origin of female circumcision, how will one explain the practice of this act by people who are not Muslims as well as that a large majority of Islamic followers do not carry out the act of FGC/FGM?¹² One must also note that FGC/FGM is not a religious practice; rather it is a cultural practice that has been in existence even before the arrival of Christianity or Islam in Africa. The practice cuts across different religions and is practised by several people.

According to the research carried out by the World Health Organization (WHO), about 130 million women worldwide have undergone FGC/FGM, while about 2

⁵ Osifo DO & Evbuomwam I 'Female Genital Mutilation among Edo People: The Complications and Patterns of Presentation at a Pediatric Surgery Unit, Benin City' (2009) 13 *African Journal of Reproductive Health* 17-25

⁶ Yusuf (2010) *Gender and Behaviour* 3089

⁷ Rogaia MA *Female Circumcision: Multicultural Perspectives* (2006) 2

⁸ Iribemwangi PI *et al Human Rights, African values and Traditions: An Inter-disciplinary Approach* (2011) 51

⁹ Rahman A & Toubia N (2000) 6-7

¹⁰ Rahman A & Toubia N (2000) 6-7

¹¹ Rahman A & Toubia N (2000) 6-7

¹² Rogaia MA (2006) 2-3

million women worldwide are potentially likely to undergo the procedure annually.¹³ The practice is carried out in over 28 African countries and in some European countries such as Europe, Australia, New Zealand, Canada and the United States of America.¹⁴ The age at which the procedure of FGC/FGM is carried out varies between communities. Some communities carry out the procedure on new born babies, while others carry out the procedure on the girl child when she is about to enter into puberty and others on grown women.¹⁵

FGC/ FGM should be related to the reality of women playing a subservient role in the society. Over the years women have been considered as less than equals to their male counterparts. Religion in particular at times puts women in a lesser position as opposed to men. An example of this is the male primogeniture rule, where women are not allowed to inherit from their father upon his death. Another example is the case in Saudi Arabia, where women are not allowed to drive cars. The reason for this is not clear. However, from my point of view, it is a way of keeping women in that 'subservient' position so that they will always be dependent on men.

FGC/FGM is another way of keeping women in that subservient role. One of the major reasons why FGC/FGM is practised is to curb promiscuity among other reasons. This leads me to ask the question, 'are women the only gender that is promiscuous?' Women are mutilated so that they will have no sexual desires or feelings. It is presumed that this will ensure fidelity in the marriage and that the woman will not engage in extramarital affairs.

Also, marriages are said to subsist when a woman has been circumcised. Why must the success of a marriage be based on the mutilation of a woman? As we all

¹³ Iribemwangi P. I *et al* (2011) 51

¹⁴ Iribemwangi P. I *et al* (2011) 51

¹⁵ Iribemwangi P. I *et al* (2011) 51

know, there are a number of factors that ensure a successful marriage. Therefore the success or failure of a marriage should not be based on a woman being mutilated.

Lastly, according to Karim and Ammar FGC/FGM affects sexual desires adversely in women since orgasm relies on greater stimulation of all the sex organs, and that of the woman has been mutilated.¹⁶ On the other hand, men are said to enjoy sexual intercourse with circumcised women. In other words, FGC/FGM is presumed to be carried out solely for the selfish pleasure of man. This to me is another factor that portrays inequality between both parties.

Research has shown that the practice of FGC/FGM has many negative effects on girls and women and also limits a number of human rights. Some of these rights are as follows:

- The right to be free from all forms of discrimination against women¹⁷
- The right to life and physical integrity, including freedom from violence.¹⁸
- The right to health¹⁹
- The rights of the child²⁰

Despite all said the issue of culture must not be ignored. The practise of FGC/FGM is a valued cultural practice that is respected and justified in the communities

¹⁶ Karim M & Ammar R *Female Circumcision and Sexual Desires* (1965) as quoted by Rogaiia MA (2006) 3

¹⁷ Article 1 of the Convention on the Elimination of All Forms of Discrimination Against Women. Opened for signature on the 18th of Dec, 1979. Entered into force 3rd of Sept, 1981.

¹⁸ Article 3 of the Universal Declaration of Human Rights, adopted on the 10th of Dec, 1948. See also Article 9(1) of the International Covenant on Civil and Political Rights, opened for signature on the 16th of Dec, 1966. Entered into force on the 23rd of May, 1976. See also the preamble of the International Covenant on Economic, Social and Cultural Rights, opened for signature on the 16th of Dec, 1966. Entered into force on the 3rd of Jan, 1976. See also Article 4 and 5 of the African Charter on Human and Peoples' Rights, adopted on the 26th of June, 1981. Entered into force on the 21st of Oct, 1986.

¹⁹ Article 25 of the Universal Declaration of Human Rights . See also Article 12 of the International Covenant on Economic, Social and Cultural Rights. See also Article 16 of the African Charter on Human and Peoples' Rights

²⁰ Article 2(1), 3(1), 6(1), 6(2), 16(1), 19(1), 24(1), 24(3) of the Convention on the Rights of the Child, opened for signature on the 20th of Nov, 1989 entered into force on the 2nd of Sept, 1990. See also Articles, 4(1), 5(2), 10, 14(1), 21(1), of the African Charter on the Rights and Welfare of the Child, adopted in 1990 and entered into force in Dec 1999.

where it is practised.²¹ The procedure has different forms with different degrees of severity. It is also performed in different ways, and each act involved in the procedure carries its own significant meaning.²² It is a traditional practice that has been carried out from time immemorial with strong connotations. In most practicing communities, it 'is considered a rite of passage through which important cultural values and adult expectations are transmitted to the youth.'²³ This leads me to the assumption that respect for other people's culture is an aspect of respecting their human rights. Ascribing a term such as 'mutilation' to a respected culture of a community is infringing on their right to culture. I also associate the use of words such as 'mutilation' with the resistance put up against measures to curb the practice by proponents of FGC/FGM. The conflict that has surfaced as a result of these two opposing arguments is the conflict between culture and rights. I do not intend to support the negative effects of the procedure, but I intend to refocus the on-going debate from total eradication to ways of achieving cultural transformation and preservation. In curbing the excesses of FGC/FGM, its cultural significance and traditional values must not be trampled and buried.

I focus primarily on the practice of FGC/FGM and why it continues to be in existence, and consider how to reconcile the conflict between culture and rights.

1.4 LITERATURE REVIEW.

Several authors have written on the issue of FGC/FGM and why it is being practised as well as reasons why it is difficult to put an end to it. The reason why it is difficult to put an end to the practice of FGC/FGM is that the communities that practice it see a reason to continue practicing it despite the harms caused.

²¹ Iribemwangi P.I *et al* (2011) 55

²² Iribemwangi P.I *et al* (2011) 50

²³ Iribemwangi P.I *et al* (2011) 55

According to Banda, some cultures carry on with this practise to curb the growth of the female genitalia so that they do not grow to rival those of the male.²⁴ The clitoris here is described as being ‘analogous to a dysfunctional penis where women’s reproduction and (hereto) sexuality is concerned. Thus, excision can be interpreted metaphorically and physiologically as an eschewal of undeveloped, inhibiting, masculinity.’²⁵

According to Ahmadu, the practice of FGC/FGM among the Kono people of the north-eastern part of Sierra Leone, was believed to clear the ambiguity in terms of the sexes of the children.²⁶ The reason for this is that this particular tribe believes that children are born ‘androgynous’, therefore FGC/FGM helps distinguish one sex from another.²⁷

Babatunde also linked FGC/FGM with fertility among the Keti People of the western part of Nigeria.²⁸ He emphasized the fact that the practice of FGC/FGM is not for the purposes of control or power, but mainly to improve the fertility of women. He states:

The logic of the practice is couched in the anthropological term of prestation, a gift that you give under pain of sanction, for which you receive a greater gift in return. The logic of clitoridectomy is that by taking a tiny bit of the sacred instrument of fertility as an offering, the god of fertility will bless you with more children and easier childbirth.²⁹

²⁴ Banda F ‘*Women, Law and Human Rights’ An African Perspective* (2005) 210

²⁵ Banda (2005) 210, See also, Ahmadu F Rites and Wrongs: An Insider/Outsider Reflects on Power and Excision” In: Shell-Duncan B and Hernlund Y (eds) *Female “Circumcision” in Africa: Culture, Controversy and Change* (2001) 283

²⁶ Ahmadu (2001) 283

²⁷ Banda (2005) 210

²⁸ Babatunde E *Women’s Right versus Women’s Rites: A study of Circumcision among the Ketu-Yoruba of South Western Nigeria* (1998) 181

²⁹ Babatunde (1998) 181

Although a number of authors have condemned the practices of FGC/FGM, some have also written in support of the practice. Fran Hosken wrote in favour of the abolition of FGC/FGM as she described it as ‘gender-based violence and a local manifestation of the operation of patriarchy’.³⁰

Her write-up was however opposed by African feminists such as Abusharaf, who criticised her ‘approach of describing the African woman as a homogenous oppressed group.’³¹ This group of feminists saw Fran Hosken’s approach as ‘a new form of cultural imperialism’ to which they resisted strongly.³² They also referred to her tone as being, ‘imperious, hectoring and culturally insensitive’.³³

These African feminists also argued that contrary to Fran Hosken’s conclusion that FGC/FGM was only practised by African/Arab women, it is also practiced in Europe. Gunnings, in her research show that FGC/FGM is also practised by women in the United States of America, although she referred to it as Female Genital Surgery.³⁴

Another reason for the continuation of this practice has been linked to poverty and issues of exploitation. The statement by the Association of African Women for Research and Development condemned the practice of FGC/FGM and also mentioned poverty and the issue of exploitation of women as the reason for the continued practise of FGC/FGM.³⁵

³⁰ Hosken F *Stop Female Genital Mutilation: Women Speak Facts and Actions* (1995) 95

³¹ Banda (2005) 212-213

³² Banda (2005) 212-213

³³ Banda (2005) 212-213

³⁴ Banda (2005) 213, See also, Gunning ‘Arrogant Perception, World Travelling and Multi-Cultural Feminism: The Case of Female Genital Surgeries’ (1991) 23 *Human Rights Law Review*. 201, 205-211

³⁵ AAWORD (Association of African Women for Research and Development) ‘A Statement on Genital Mutilation reproduced in H Steiner and P Alston, ‘International Human Rights in Context, Law, Politics, Moral (Oxford, Clarendon Press, 2000) 418-419, See also Mutua (2001) 42 *Harvard International L J* 201 at 226-27, see also Banda (2005) 213

Germaine Greef, on the other hand expressed some doubts about condemning the practice of FGC/FGM.³⁶ Her reason was that if a female from the Western world has the right to have her genitals operated on, then the African woman should have the same rights.

This view of hers has however been criticised by several authors.³⁷ According to these authors, she is writing things she knows nothing about.

Fadwa El Guindi's view is also similar to the above mentioned view.³⁸ She argues that some of the arguments made by feminists advocating for the eradication of FGC/FGM, makes the issue of choice in the matter of FGC/FGM a central and important issue. She states that this leads to double standards. She based her reasons on the fact that, male children are also not offered any choices before they are circumcised. She makes reference to male children in America who undergo circumcision involuntarily. She also mentioned that male circumcision takes place in several parts of the world and the practice of this raises no eyebrows. She compares male circumcision to female circumcision and says that male circumcision is as severe as FGC/FGM.³⁹

She also argued that feminist activists who focus on the practise, in Africa and the Middle East makes it look like women from these areas are inferior, less advanced, or more oppressed than western women. She further states that, intervention from these activists, who are 'uninformed' about the culture of those that practice FGC leads to the assumption that women from the non-

³⁶ Greer G *The Whole Woman* (1999) 3-6

³⁷ Banda (2005) 214.

³⁸ Rogaia MA et al (2006) 42

³⁹ Rogaia MA et al (2006) 42

western societies are childlike and helpless.⁴⁰ Therefore according to her, condemning FGC is a very arrogant and ethnocentric stance.

Sami A. Adleeb Abu-Sahlieh also maintains the stance that FGC/FGM is not different from male circumcision and argues that if male circumcision is allowed then, FGC/FGM should be allowed as well.⁴¹ She goes on to list the different types of male circumcision and lists the different types of FGC/FGM. She compares FGC/FGM and male circumcision and points out that there are no differences between the two. She bases her argument on two aspects; health and religion. She strengthens her view by pointing out that medical evidences supporting the benefit of male circumcision are not authentic. She also states that, contrary to the belief of the school of thought that holds that male circumcision is justified by religious norms, religious norms have historically either condemned or legitimized both male and female circumcision.⁴²

She further went ahead to point out the social and cultural consequences of not practising FGC. She states that as it is a cultural thing, refusal to carry out this cultural practice has serious social consequences, such as the inability of the girl to get married, she is spoken of as a person with bad morals, sexually promiscuous or possessed by the devil. Reference here is made to an author El-Masry, who relates the words of an Egyptian mid-wife who has circumcised more than a 1000 girls. According to this mid-wife, a father who opposes the circumcision of his daughter should be lynched because in effect he is accepting that his daughter should become a prostitute; because she sees this as the only recourse for unmarriageable women.⁴³

⁴⁰ Rogaia MA *et al* (2006) 42

⁴¹ Rogaia MA *et al* (2006) 42

⁴² Rogaia MA *et al* (2006) 48

⁴³ Rogaia MA *et al* (2006) 59

On the contrary though, writers such as Asha Mohamud, Samson Radeny, and Karin Ringheim are all of the opinion that FGC/FGM is a violation of human rights and should be eradicated.⁴⁴ They carried out surveys and raised awareness programs in Kenya to eradicate FGC/FGM. During their awareness, they pointed out the differences between male circumcision and FGC/FGM. In their effort to eradicate the practice, they tried to correct the impression that male circumcision is the same as FGC/FGM or what is referred to as female circumcision.⁴⁵ They stated that, removal of healthy genital tissue is a violation of the human rights of the victims. They went about eradicating this practice by changing public attitudes and creating awareness of its health risks and complications.⁴⁶

From the above, one can tell that there are several views on the issue of FGC/FGM and several reasons for its continuation. One can also tell that while some authors are of the opinion that the practice should be eradicated, some are of the opinion that it should be continued.

The health risks involved, according to David Osarumwese Osifo and Iyekoretin Evbuomwan, range from clitoridal cyst, labial adhesion, bleeding, wound infection, vaginal discharge, difficulty with penetration, perineal tearing during delivery, urethral injury, tetanus and even death.⁴⁷ According to the research carried out by these two in Benin City, in Nigeria, the majority of children from rural areas had more complications because complete excision of clitoris, labia minora and inner layer of majora was the common procedure, and there was no proper medical attention.⁴⁸

⁴⁴ Rogaia MA *et al* (2006) 75

⁴⁵ Rogaia MA *et al* (2006) 80

⁴⁶ Rogaia MA *et al* (2006) 97

⁴⁷ Osifo (2009) 13 Afr Jnl Reprod Health 18

⁴⁸ Osifo (2009) 13 Afr Jnl Reprod Health 18

I argue in this dissertation that FGC/FGM is a practice that cannot be totally eradicated because of its firm root in the custom of its adherents. I do this by going into details on what a culture entails in relation to the practice of FGC.

I aim to refocus the debate from ways of eradicating the practice to a transformation of culture that respects women's rights, children's rights, but equally respects people's culture.

1.5 APPROACH AND METHOD

In achieving the above, scholarly articles, texts, write-ups on the concept of FGC/FGM are examined and used as a basis for this research. Various debates of authors on their views towards FGC/FGM are discussed. Different traditions of different countries that practice FGC/FGM are compared in order to establish the justification relied on for the practice of FGC/FGM as a tradition.

1.6 CHAPTER SUMMARY

The next chapter, chapter two, focuses on the historical origins, justifications and what the practise of FGC/FGM entails. It provides a general overview of the practice and what it signifies to its practitioners. The next chapter elaborates on how the proponents of the practice view it as a respected cultural practice. A short introduction of what the word 'culture' means will be looked at and then related to the issue of FGC. The reason for an introduction on the meaning of culture is essential in order to understand the meaning of culture and its importance in African communities as well as a thorough understanding of the mind-set of the people practicing FGC.

The negative effects accompanying the practice of FGC/FGM are what make it an issue of human rights concern. The various human rights limited by this practice are dealt with in the next chapter. The final chapter discusses various authors'

contribution to ways of resolving the conflict between culture and rights. This chapter ends with recommendations on how to transform or modify the cultural practice of FGC/FGM to align it with human rights principles.

CHAPTER TWO

THE HISTORICAL ORIGINS, JUSTIFICATIONS AND PRACTISE OF FEMALE GENITAL CUTTING/FEMALE GENITAL MUTILATION

2.1 Introduction

The main research problem of this study as aforementioned is to argue for the cultural transformation of the parties that practice Female Genital Cutting (FGC) or Female Genital Mutilation (FGM) in order to make the practice be in line with human rights. In achieving this, I examine and reflect on the use of the terms Female Genital Cutting (FGC) or Female Genital Mutilation (FGM) to describe the procedure of female circumcision, or the removal of the external female genitalia or other injury to the female genital organs. I investigate how the terms and the language that we use to describe this practice relate to viewing it as either a Cultural Practice or as a violation of Human Rights. Ardent followers of the practice view it as a cultural practice that needs to be preserved, while human rights activists view it as a mutilation of the female body that violates human rights. In this chapter the research question that will be addressed is what the historical origin of the practice of FGC/FGM is as well as its justifications and how this has led to the continuous practice of FGC/FGM

In every African society, there are cultural practices and these cultural practices have existed over a period of time to the extent that they have become part of the people. These cultural practises come with reasons or what can be referred to as justifications.

In addressing the research question, as mentioned above I analyse the definition of the practise of FGC/FGM. I give a historical background of the practice and where it originated from. I also unpack the term 'Female Genital Mutilation' and how it came about, in other words why there was a need to shift from using the term 'female circumcision' to using 'female genital mutilation'. In unpacking this shift, I will touch on the health consequences of the practice and the comparison with male circumcision. I round up the chapter with various feminists discussions on the need for change in the usage of the word 'mutilation'.

2.2 Origins and Meanings

Female Genital Mutilation (FGM), as defined in chapter one can be described as the traditional practice that involves the cutting of the female genitals¹. This procedure is usually performed on girls between the ages of four and twelve years of age as a rite of passage to womanhood. In some countries, it is performed on girls at an earlier stage, for example it could be performed a few days after birth and in some instances it is performed at a much later stage such as a few days before marriage or after the first pregnancy

This procedure is usually done to one girl at a time or to a group of girls who are of the same peer group. The circumciser, most times is an elderly woman who is a traditional practitioner. This traditional practitioner usually comes from a family or generation of women who have been traditional practitioners. In more recent times however, this procedure is being carried out by health personnel.

¹ Rahman A &Toubia N *Female Genital Mutilation: A Guide to Laws and Policies* (2000) 3. See also Toubia N *Female Genital Mutilation: A Call for Global Action* (1995) 9.

Tracing the origin of the practise of FGC/ FGM is a complex task because the ‘explanation of its genesis and growth remain highly speculative’.² According to history however, it can be said that FGC/FGM originated in Southern Egypt or Northern Sudan and it was practised by a number of cultures such as the Phoenicians, Hittites and the ancient Egyptians.³

Another school of thought has identified Islam as the incontestable source of the practice. This reasoning is however dubious because if Islam is seen as the origin or foundation of FGC/FGM, how come some non-Muslim people embrace this tradition, while on the other hand some adherents in Muslim societies do not carry out the practice.⁴ The reasoning that Islam is the origin of FGC/FGM has however been disputed over years. And according to Islamic jurist Jamal Badawi, ‘no mention of female circumcision is to be found in the Quran either directly or indirectly, there is no known Hadith which requires female circumcision’.⁵

One can say in actual fact that this practice preceded both Christianity and Islam.⁶ FGC/FGM can therefore be said not to be a requirement of any religion. Some Catholics practice it because they see it as a means of preserving women’s purity, ‘and many Coptic Christians, as well as Egyptian Falasha Jews now living in Israel’ also practice it.⁷ Although the practice is mostly associated with African countries it exists in non-African countries too such as India, Malaysia, Indonesia and the Arabian Peninsula. It is also practised in Europe, especially in Italy, France, Britain and the Scandinavian countries.⁸

² Rogaia MA *Female Circumcision: Multicultural Perspectives* (2006) 43.

³ Rahman A & Toubia N (2000) 6-7.

⁴ Rahman A & Toubia N (2000) 2.

⁵ Rahman A & Toubia N (2000) 2.

⁶ Rahman A & Toubia N (2000) 2.

⁷ Bowman CG & Kuenyehia A *Women and Law in Sub-Saharan Africa* (2003) 431.

⁸ Rogaia MA (2006) 43.

The origin of FGC/FGM is quite cryptic in the sense that, one cannot particularly state that this is where it originated from. Widstrand traced the origin of this practice to the second century B.C.E.⁹ A geographer named Agartharcides who gave a report on some of the tribes living in the western coast of the Red Sea, also wrote that one of the tribes has as one of their cultures, excision of women. He compared this excision to the way Egyptians excised their women. He also stated that another tribe had a culture of cutting of the whole portion that others circumcise from infancy.¹⁰ There is a belief that the practise started during the slave trade when the black slave women entered ancient Arab societies.¹¹ In accordance with this author, one can then deduce that it originated on the western coast of the Red Sea. This geographical location is seen as the place where FGC/FGM is most intense.¹² However, irrespective of where FGC/FGM originated, some authors believe that it has a strong link to slavery. Mackie Gerry wrote that in the days of old, 'the Egyptians raided and traded the Black south slaves from dynastic to Byzantine times, and Sudanic slaves were exported through the Red Sea to the Persian Gulf before the rise of Islam'.¹³ Browne in 1799, another author also reported that the Egyptians practiced infibulation on their women and the main reason was to prevent slaves from getting pregnant. Larrey and Burckhardt, in 1803 and 1819, respectively also confirmed Browne's report and stated that female captives were infibulated to prevent them from falling pregnant.¹⁴ Especially in ancient Rome, it was carried out on female slaves to oppress their sexual activities and increase the values placed on them.

⁹ Mackie G 'Ending Foot binding and Infibulation: A Convention Account' (1996) 61 *American Sociology Review* 999 at 1003.

¹⁰ Mackie (1996) 61 *American Soc Rev* 1003.

¹¹The origins of female genital mutilation. <http://www.apps.who.int/iris/bitstream>. Assessed on the 14th of May, 2014.

¹² Mackie (1996) 61 *American Soc Rev* 1003.

¹³ Mackie (1996) 61 *American Soc Rev* 1003.

¹⁴ Mackie (1996) 61 *American Soc Rev* 1003.

Herodotus, around 500 B.C spoke about the cutting of Egyptian women.¹⁵ It was also reported that in 1609, in Mogadishu (Somalia), a particular group practiced FGC/FGM where the women were sewn up, 'specially their slaves being young to make them unable for conception, which makes these slaves sell dearer, both for their chastity, and for better confidence which their masters put in them'.¹⁶ During this time, the practice was referred to as "Sudanese circumcision" by the Egyptians, and referred to as 'Pharaonic circumcision' (i.e. Egyptian) by the Sudanese'.¹⁷ As far back as this period, the use of the right term for this practice has been in contention. The use of the right terminology to coin this practice has been a bone of contention from time immemorial.

One other theory states that according to Pharaohs' beliefs, the gods were bisexual so, every human being automatically has male and female parts. The female part of the boy is said to be located in his prepuce and the male part of the woman is said to be located in her clitoris. Therefore in order for one to become a complete male or female, one needs to be circumcised.¹⁸

Comfort Momoh states that female genital mutilation is one of the oldest practices that is found among the Hittites, Ethiopians and Egyptians.¹⁹ She adds that in ancient Egypt traces of infibulations are still found on the Egyptian mummies. She further argues that in the 19th Century, FGC/FGM was practiced by gynaecologists in the UK and USA to cure insanity and masturbation.²⁰ Isaac Baker Brown, a gynaecologist and surgeon who published the results of his

¹⁵ Global Alliance against Female Genital Mutilation. <http://www.global-alliance-fgm.org/en-gb/portal/aboutfgm/historicalnote.aspx>. Assessed on the 14th of May, 2014.

¹⁶ Mackie (1996) 61 *American Soc Rev* 1003.

¹⁷ Mackie (1996) 61 *American Soc Rev* 1005.

¹⁸ Mackie (1996) 61 *American Soc Rev* 1005.

¹⁹ Momoh C *Female Genital Mutilation* (2005) 5.

²⁰ Momoh (2005) 5-6.

study on the curability of mental diseases in females in 1866, was certain that clitoridectomy was the best treatment of sexual related disorders²¹.

Another theory says that it was performed by the Pharaohs during war times to preserve their wives' cleanliness.²² Marie Assad is of the opinion that there is sufficient evidence to assume that FGC/FGM especially infibulation (one of the types of FGC/FGM) originated in ancient Egypt. Dorkenoo Efua, however concludes that FGC/FGM must have been introduced when the Nile Valley was invaded by militant pastoral nomads, and culturally transformed, around 3100 BC. Therefore FGC/FGM must have with time developed independently amongst certain ethnic groups in sub-Saharan Africa as part of their puberty rites²³.

From the above, it can be seen that the historical roots of FGC/FGM leads to a combination of beliefs, superstition, cultural and social values, all pointing to the fact that the origin of FGC/FGM remains a mystery as well as the right term to describe it. According to Boyle Elizabeth Heger, the dilemma of female genital mutilation is no more a matter for Africans only, it has taken a turn and is spreading greatly in other parts of the world due to immigration.²⁴ FGC/FGM has therefore undoubtedly become a cultural issue and something that holds a society together.²⁵ The following sub-topic will be discussing the various type of FGC/FGM as categorised by the World Health Organization.

²¹ Global Alliance against Female Genital Mutilation. <http://www.global-alliance-fgm.org/en-gb/portal/aboutfgm/historicalnote.aspx>. Assessed on the 14t of May, 2014.

²² Global Alliance against Female Genital Mutilation. <http://www.global-alliance-fgm.org/en-gb/portal/aboutfgm/historicalnote.aspx>. Assessed on the 14t of May, 2014.

²³ Dorkenoo E *Cutting the Rose: Female Genital Mutilation, The Practice and its Prevention* (1994) 33-34.

²⁴ Boyle EH *Female Genital Cutting; Cultural Conflicts in the global Community* (2002) 26.

²⁵ Boyle (2002) 26.

2.3 The Different Types of FGC/FGM

There are different types of FGC/FGM and they vary widely from one community to another. World Health Organization is currently working on reviewing the 1997 classification of types of FGC/FGM in collaboration with United Nations Children's Fund (UNICEF), the United Nations Population Fund (UNFPA) and the United Nations Development Fund for Women (UNIFEM). The new classification identifies five types of FGC/FGM and they are as follows;

- Type 1: This is commonly referred to as clitoridectomy. It can be described as the 'excision of the prepuce with or without excision of part or the entire clitoris'²⁶ it can also be referred to as circumcision. This type of FGC/FGM is the mildest form of mutilation and it affects only a small portion of the millions of women who undergo this procedure. It can be likened or said to be equivalent to male circumcision. There has however been a tendency to categorise all types of mutilations as female circumcision. When in actual sense, 'biologically, the male equivalent of mutilation beyond circumcision as described would be various degrees of penisectomy-removal of the male sexual organ'.²⁷ The traditional name used for it in Somalia is 'sunna' and in Kenya it is known as 'okwaroka'.²⁸
- Type 2: The second type is known as excision. This involves the 'excision of the prepuce and clitoris together with partial or total excision of the labia minora'.²⁹ It is the partial or total cutting of the labia minora, including the stitching or sealing of it, with or without the excision of part or all of the clitoris.³⁰ In some cases the labia majora are removed but with no stitching.

²⁶ Rahman A & Toubia N (2000) 7.

²⁷ Dorkenoo (1994) 5.

²⁸ Afro news 2006. (Afro news 2006. Prevalence of Female Genital Mutilation(FGM) in Africa. <http://www.afrol.com/categories/women/fgm/net.scapeindex.htm>. Assessed on the 14th May 2014.

²⁹ Rahman A & Toubia N (2000) 7-8.

³⁰ Rahman A & Toubia N (2000) 7-8.

It is the most widespread form of FGC/FGM. About eighty per cent of those that have undergone the procedure undergo excision.³¹

- Type 3: This is known as Infibulation and it involves excision of part or all of the external genitalia and stitching/narrowing of the vaginal opening.³² In other words, this involves ‘the cutting of the clitoris, labia minora, and at least the anterior two-thirds and often the whole of the medial part of the labia majora’.³³ ‘The two sides of the vulva are then pinned together by silk or catgut sutures, or thorns, thus obliterating the vaginal introitus except for a small opening, preserved by the insertion of a tiny piece of wood or reed for the passage of urine or menstrual blood’.³⁴ After this, the girl’s legs are then bound together from her hip region down to her ankles. She is not permitted to walk for up to forty days and this is done in order to allow the formation of scar tissue. In some other communities, in order to hasten healing, ‘the raw edges of the wound are brought together with substances such as eggs, sugar or acacia tar and the girl is kept immobile’.³⁵ The third type is what is known as Pharaonic circumcision. It is the most severe and drastic form of FGC/FGM. A small opening is then left for the woman to urinate with and through which menstrual blood can flow. A woman that has this third procedure carried out on her is cut open when she is ready to have intercourse with her new husband and during childbirth.
- Type 4: This refers to a range of miscellaneous or unclassified practices, including stretching of the clitoris and/or labia, cauterization by burning of the clitoris and surrounding tissues, scraping of the vaginal orifice (angurya cuts) or cutting of the vagina (gishiri cuts), and introduction of corrosive

³¹ Dorkenoo (1994) 5.

³² Dorkenoo (1994) 5.

³³ Dorkenoo (1994) 5.

³⁴ Dorkenoo (1994) 5.

³⁵ Dorkenoo (1994) 5.

substances or herbs into the vagina to cause bleeding or for the purposes of tightening or narrowing of the vagina.³⁶ In other words, 'it entails different forms of mutilation followed by variable degrees of stitching'.³⁷ For example, in one type, the 'clitoris is removed and the surface of the labia minora roughened to allow stitching'.³⁸ In another type, 'the clitoris left intact but the labia minora are removed. The insides of the labia majora are removed and stitched with the clitoris buried underneath'.³⁹

- Type 5: This 'refers to symbolic practices that involve the nicking or pricking of the clitoris to release a few drops of blood'.⁴⁰ In addition it includes the 'scarification of the clitoral prepuce, cuts into the clitoris and labia minora as well as into the vagina'.⁴¹

It must however be noted that not all communities practice all the different types listed above. In about twenty-eight countries that practice FGC/FGM in Africa, its prevalence and the type practiced is determined by the customs of the specific ethnic groups.⁴² For example, infibulation which is the most severe form is practised by some communities in Djibouti, Somalia, Eritrea and the Sudan.⁴³ Countries such as Benin, Burkina Faso, Egypt and Ethiopia, all practice the type II which is known as excision. While the mildest form of FGC/FGM which is the type 1 is practiced in countries such as Kenya, Nigeria, Yemen and

³⁶ Lewnes A *Changing a harmful Social Convention: Female Genital Mutilation/Cutting* (2005) 1.

³⁷ Dorkenoo (1994) 5.

³⁸ Dorkenoo (1994) 5.

³⁹ Dorkenoo (1994) 5.

⁴⁰ Lewnes (2005) 1-2.

⁴¹ Dorkenoo (1994) 8.

⁴² Lewis H 'Female Genital Mutilation and Female Genital Cutting' in *Encyclopedia of Human Rights* by David P. Forsythe (ed) (2009) 200 – 201.

⁴³ Lewis (2009) 201.

Mali.⁴⁴ These communities have various reasons for engaging in this cultural practice. These justifications will be discussed next.

2.4 The Justification of FGC/FGM

The entire global picture estimates that between one hundred to one hundred and forty million girls and women worldwide have undergone FGC/FGM, and at least two to three million girls a year are at risk of undergoing some form of this procedure.⁴⁵ This goes to prove that the practice of FGC/FGM is still at large irrespective of the physical harms and health consequences that have been made known to communities through awareness programs. In other words, if the practice of FGC/FGM has not been serving any purpose to those that champion it, it will not still be in existence. There are different reasons why it is still being practiced. Attempts to eradicate the practice have been constantly seen as efforts to ‘wipe out their culture’.⁴⁶ This is the justification or the reasons why communities ignore the harms caused and still carry out this procedure.

Irrespective of the physical harms and health consequences attached to this practice, it has not been entirely eradicated. This leads one to wonder why this is so. FGC/FGM is a practice that is performed in several communities and it has been performed for decades and passed down from one generation to another. In other words, families carry out this procedure on their girl children, not because they are not aware of its harms and dangers but because it is seen as tradition and deemed mandatory by their community for the ‘wellbeing’ and ‘social acceptability’ of the girl child. It is perceived as a practice that must

⁴⁴ Toubia N *Female Genital Mutilation: A Call for Global Action* (1995) 5-6.

⁴⁵ WHO 1997a: WHO 1997b: 3; WHO 2008b: 1; Momoh (2005) 5.

⁴⁶ Nyirinkindi L ‘Female Genital Mutilation as a Manifestation of gender-based violence in Africa’ In : *Gender-based violence in Africa: Perspectives from the Continent* (2008) 130.

be carried out to 'to protect the girl's honour and maintain the status of the entire family'.⁴⁷

The justifications for the practice of FGC/FGM are the reasons given for its continuance. These reasons are however complex, and are related to each other. They are closely linked to the beliefs and cultural values that the societies which practice them uphold.⁴⁸ These reasons when heard by people outside that particular belief system often sounds irrational and absurd. They however stem from 'a complex set of ideas which underpins a social system'.⁴⁹

About twenty-eight countries in Africa are said to be practising FGC/FGM. With regards to the Hosken Report that was published in 1978, countries like Somalia have an estimated prevalence of about ninety-eight percent, while countries like Uganda have an estimate prevalence of about five percent.⁵⁰

According to Momoh, in societies that practice FGC/FGM a number of cultural elements are always present. These include particular beliefs, behavioural norms, custom rituals, and social hierarchies, religious, political and economic systems.⁵¹ She further stated that culture is learnt and children learn cultures from adults. It can therefore be deduced that FGC/FGM has been supported by centuries of traditions, cultures and false beliefs and it has been promoted by poverty, illiteracy and the subservient perception of women.⁵²

Lightfoot-Klein also agrees that culture and tradition form a very strong justification for the practice of FGC/FGM. He states that when an individual decides not to follow the custom, the penalty is total ostracism and this makes up for the continued practice of genital mutilation. He however also refers to

⁴⁷ WHO 2008b: 5-6.

⁴⁸ Rahman A & Toubia N (2000) 5.

⁴⁹ Dorkenoo (1994) 34.

⁵⁰ Skaine R *Female Genital Mutilation. Legal Cultural and Medical Issue* (2005) 36-37.

⁵¹ Momoh (2005) 9-10.

⁵² Momoh (2005) 9-10.

other reasons such as myths, ignorance of biological and medical facts for the basis for the practice of FGC/FGM.⁵³

Sarkis also writes that some of the justifications for FGC/FGM are the protection of family honour, cleanliness, protection against spells, insurance of virginity and faithfulness to the husband.⁵⁴ Other scholars have however associated the justification for this practice with a manifestation of deep rooted gender inequality that assigns the female gender an inferior position in the society and has profound physical and social consequences on them.⁵⁵

Rahman and Toubia explains and gives the justifications of FGC/FGM under four categories, namely, customs and traditions, women's sexuality, religion and social pressure.⁵⁶ These four categories will be discussed in details below.

2.4.1 Custom and Traditions

One of the most used justifications for the practice of FGC/FGM is the tradition of rite of passage. In most communities, FGC/FGM is carried out as a rite of passage from childhood to adulthood. During this rite of passage, the girl is taught skills for handling her marriage and how to take care of her husband and children.⁵⁷ 'In communities that perform circumcision as an integral element of the rites of passage, one is not simply born a "woman". One becomes a respected person and an integrated female only after implementing the socially designated course to dignity and status'.⁵⁸

⁵³ Lightfoot-Klein H *Prisoners of ritual: An Odyssey into Female Genital Mutilation in Africa* (1991) 38.

⁵⁴ Sarkis, M. (2003): Female Genital Cutting (FGC): An Introduction, The FGC Education and Networking Project. <http://www.fgmnetwork.org/intro/fgmintro.html>. Accessed May 18, 2014.

⁵⁵ Yoder, P.S. et al *Female Genital Cutting in the Demographic and health Surveys; A Critical and Comparative analysis* (2004) 10-12.

⁵⁶ Rahman A & Toubia N (2000) 5-6.

⁵⁷ Rahman A & Toubia N (2000) 5-6.

⁵⁸ Bowman (2003) 438.

Therefore in this case, FGC/FGM represents, ‘an act of socialization into cultural values and a connection to family, community members and previous generations’.⁵⁹ In doing this, these communities believe they are maintaining the customs and preserving their cultural identities.⁶⁰ For example, the Mossi of Burkina Faso and the Bambara and the Dogon in Mali, believes that the clitoris would be dangerous during childbirth when it comes in contact with the baby’s head and it can lead to the death of the baby. Also in Ethiopia, it is believed that if a woman is not excised, the genitals will grow and dangle between the legs like the genitals of a man.⁶¹ These can be considered as myths, but they’ve grown to form a cultural pattern which is followed by these communities. From the above beliefs, it is seen that the clitoris is seen as a ‘rival to the male sexual organ and is, as such, intolerable to men’.⁶² Among the Bambara people in Mali, it is further believed that if a man has sexual intercourse with an un-excised woman, at the moment of contact with the clitoris the man could be killed by the secretion of a poison from the woman’s clitoris.⁶³

Another strongly held belief among the Dogon and the Bambara in Mali is that, both the male and female sex exists at birth within each person and can only be separated during circumcision.⁶⁴ This is also similar to Pharaoh’s belief that the gods were bisexual. That is they had both the male and female organs.⁶⁵ The clitoris is said to represent the masculine feature in a young girl’s body

⁵⁹ Bowman (2003) 438.

⁶⁰ Bowman (2003) 438.

⁶¹ Dorkenoo (1994) 34.

⁶² Dorkenoo (1994) 34.

⁶³ Dorkenoo (1994) 34.

⁶⁴ Dorkenoo (1994) 35.

⁶⁵ Global Alliance against Female Genital Mutilation. <http://www.globalalliance-fgm.org/en-gb/portal/aboutfgm/historicalnote.aspx>. Assessed on the 14th may 2014.

while the foreskin represents the feminine feature in a boy. Therefore they must both be circumcised to differentiate the sex of the person.

2.4.2 Women's Sexuality

Another justification given for the practice of FGC/FGM is the need to control women's sexuality. In many communities where FGC/FGM is practiced, the virginity of a girl is very important and the family's honour depends on it. For example, in countries like Egypt, Sudan and Somalia, FGC/FGM is seen as a way to keep the virginity of a girl and curtail premarital sex. In other countries such as Kenya and Uganda, FGC/FGM is seen to reduce a woman's sexual demands on her husband, 'thus allowing him to have several wives'.⁶⁶ FGC/FGM is also seen to reduce sexual desires thereby protecting marital fidelity, 'in the interest of male sexuality'.⁶⁷

This leads to the cutting of the clitoris as it is seen as the trigger for these emotions. Cutting it off will therefore protect a woman against her oversexed nature and save her from temptation, this in turn preserves her chastity.⁶⁸ In societies that have these beliefs, female virginity is very important and it is an 'absolute prerequisite' for marriage. FGC/FGM is also said to reduce the chances of women straying from their matrimonial home, especially in cases where the man is married to many wives. This helps the man to satisfy them all as they are not sexually too demanding.⁶⁹

2.4.3 Religion

It must be noted that FGC/FGM is not a religious practice, it is strictly cultural. The reason is because, it existed before Christianity or Islam, and 'it is not a

⁶⁶ Rahman A & Toubia N (2000) 6.

⁶⁷ Rahman A & Toubia N (2000) 6.

⁶⁸ Dorkenoo (1994) 35.

⁶⁹ Dorkenoo (1994) 35.

requirement of either religion'.⁷⁰ The practice of FGC/FGM cuts across different religions, because it is practiced by Jews, Christians, Muslims, 'and indigenous religious groups in Africa. It is also practiced by Catholics, Protestants, Copts, Animists and non-believers.⁷¹

Irrespective of the fact that FGC/FGM existed before both Islam and Christianity, it is usually associated with the Islamic religion in several African countries and many followers of the Islamic religion advocate for the practice of FGC/FGM, as they have the genuine belief that it is demanded of them by the Islamic faith.⁷² One must take cognisance of the fact that neither the Quran, which is the primary source for Islamic Law nor the 'hadith' which is the collections of the sayings of the prophet Mohammed enforces FGC/FGM.⁷³

Aldeeb Abu-Sahlieh states that the Muslim laws which govern the followers of Islam stems from two sources; and they are the Quran and the anthology of *sunna* (tradition which is words and actions) of the prophet Mohammed.⁷⁴ The *igtihad* (which is the tenets of the school of Muslim law through the centuries) should be added to the *sunna*. The opinions of Muslim religious scholars which are known as the fatwas come under the *igtihad*. It must be noted that the fatwas are not legally binding but are morally obligatory for the believer of Islam.⁷⁵ There are three sayings that relates to FGC/FGM under the anthology of the *sunna*. Therefore, although Islamic religious leaders unanimously agree that FGC/FGM is forbidden in Islam, 'their interpretations and positions regarding the excision of girls remain ambiguous'.⁷⁶ The following are the

⁷⁰ Dorkenoo (1994) 35.

⁷¹ Dorkenoo (1994) 36.

⁷² Dorkenoo (1994) 37.

⁷³ Dorkenoo (1994) 37.

⁷⁴ Dorkenoo (1994) 38.

⁷⁵ Dorkenoo (1994) 38.

⁷⁶ Dorkenoo (1994) 38.

interpretations of various Islamic scholars; ‘the scholars of the Shafeite sect believe that both circumcision of males and excision of females are obligatory’, ‘the scholars and jurists of the Hanifite and Malikite sects believe that circumcision of males is sunna (an act practised by the Prophet Ibrahim) and that excision of females is preferable’, the scholars of the Hanbelite sect believe that circumcision is a mandatory obligation for males and a good deed for girls’, while the modern contemporary scholars believe that, since Islamic legislation provides a general principle that if some issues prove harmful or immoral, then those issues should be stopped to put an end to the damage or immorality. Therefore since the damage caused by FGC/FGM has been established, FGC/FGM is therefore not regarded as a mandatory obligation nor is it a *sunna*.⁷⁷

On the other hand however, two more fatwas from the Egyptian Fatwa Committee are rigid in their position on FGC/FGM. The latest fatwa which is dated 29th January, 1981 and which was issued by the present Great Sheikh of Al Azhar opposed giving up excision. He is of the opinion that it will be irresponsible to abandon the teachings of the Prophet Mohammed because of medical science which according to him keeps evolving and is never constant. This view of his can be the reason why Muslims believe strongly in the practice of FGC/FGM. If their religious leaders do not take a firm stand to forbid this practice, it will be difficult to convince their followers to abandon the same practice.⁷⁸

⁷⁷ Dorkenoo (1994) 38.

⁷⁸ Dorkenoo (1994) 38.

2.4.4 Social Pressure

Social pressure is one of the major contributors to the continued practice of FGC/FGM. The reason is because, 'in a community where most women are circumcised, family friends and neighbours create an environment in which the practice of circumcision becomes a component of social conformity'.⁷⁹

FGC/FGM is therefore seen as criteria for acceptance into the society. In such a situation, not undergoing FGC/FGM is not an option because there is fear of community judgment, refusal of marriage proposal from men and general segregation.⁸⁰ In some areas, such as in the northern Sudan, among the Kikuyu in Kenya and the Bambara in Mali, it is celebrated with an elaborate ceremony. The circumcised girl is taught her new roles and duties through special songs and chants. The event is usually rich in culture and ritual and is symbolical of the girl's entry into adulthood.⁸¹ Due to the elaborate nature of these ceremonies, lots of young girls look forward to getting circumcised. This is a coercive technique of the society to encourage FGC/FGM.

2.4.5 Myths and Beliefs

There are different myths and beliefs which communities hang on to for the continued practice of FGC/FGM. For example, female genitals are said to be unhygienic and need to be cleaned. Female genitals are also said to be ugly 'and will grow to become unwieldy if they are not cut back'.⁸² For example in Egypt, the uncircumcised girl is called '*nigsa*' which means unclean. This also operates in Sudan and Somalia where the main purpose for carrying out FGC/FGM is to produce a smooth skin surface. When in reality, the opposite is

⁷⁹ Dorkenoo (1994) 38.

⁸⁰ Dorkenoo (1994) 38.

⁸¹ Dorkenoo (1994) 39.

⁸² Bowman (2003) 432.

the result of FGC/FGM. It actually prevents urine and menstrual blood from escaping naturally, thereby leading to odour, discomfort and infection.⁸³

Another belief is that FGC/FGM improves fertility and prevents maternal and infant mortality.⁸⁴ The Tagouna people of Ivory Coast believe strongly that a woman who has not undergone FGC/FGM cannot conceive. On the other hand, the Yoruba people of Western Nigeria believe that excision can be used as a form of contraception. It is believed by this group of people that sperm finds its way into a nursing mother's milk and this in turn has adverse effect on the child. Due to this, women are expected to live at least eighteen months without sex, and FGC/FGM makes this easier since they have no sexual urges after the procedure.⁸⁵

There is also the belief that FGC/FGM enhances the sexual pleasure of the husband and makes vaginal intercourse more desirable than clitoral stimulation.

The above justifications are the various reasons given for what led to the origin of the practice and also why there has been a failure to completely eradicate it. Various communities have different reasons for engaging in this cultural practice. The next sub-topic will deal with the health risks involved in this practice.

2.5 Health Hazards of FGC/FGM

Usually the health risks and consequences of FGC/FGM are dependent on the gravity or the type of FGC/FGM performed. The hygienic condition of the environment where the procedure is performed and the eyesight of the

⁸³ Dorkenoo (1994) 40.

⁸⁴ Dorkenoo (1994) 40.

⁸⁵ Dorkenoo (1994) 35.

operator are also factors that contribute to the health risks and complications of the procedure. Whether physical or psychological, the health consequences of FGC/FGM are usually very grave. According to Dr Mark Belsey of the Division of Family Health, World Health Organisation, Geneva, 'there is no single practice which has such a dramatic negative effect on health in the broadest sense as female genital mutilation'.⁸⁶ The health consequences of FGC/FGM can be divided into two parts; the physical complications and the psychological effects.⁸⁷ We will be examining the physical complications first. The physical complications can be further be broken down into two parts; the immediate complications and the long-term complications.

2.5.1 Immediate Complications

The immediate complications of FGC/FGM are severe pain and bleeding. This bleeding which can also be referred to as haemorrhage is caused from the rupture of the blood vessels of the clitoris.⁸⁸ If this bleeding does not stop, it can lead to anaemia. This can eventually affect the growth of the girl and may result in life-long weakness. As a result of the pain or trauma of the procedure, the girl might be in shock due to internal haemorrhage. If the bleeding cannot be controlled and is severe, it can result in death. This post-operative shock can also lead to death except blood transfusion is given or emergency resuscitation.⁸⁹ Sometimes due to the resistance of the child and the bad eyesight of the operator, severe damages are caused to some of the other organs around that area such as the urethra, the anal sphincter, vaginal walls

⁸⁶ Dorkenoo (1994) 13.

⁸⁷ Rahman A & Toubia N (2000) 8-9.

⁸⁸ Dorkenoo (1994) 1.

⁸⁹ Dorkenoo (1994) 14.

or Bartholin's glands. Also due to the forceful holding down of the child, the clavicle, femur and humerus can also be fractured.⁹⁰

Another immediate complication is the issue of infections such as tetanus which is caused by unsterilized needles and sharp equipment used in carrying out this procedure. Infection can also occur within a few days of the procedure if the genital area becomes contaminated with urine or faeces. This 'infection can also lead to septicaemia if the bacterium reaches the bloodstream. Acute urine retention can result from swelling and inflammation around the wound. Retention is usually irreversible and can lead to urinary tract infection'.⁹¹ HIV and hepatitis B can also be transmitted through the use of non-sterile instruments used to carry out this procedure. This is especially so in cases where the procedure is carried out on a group of girls simultaneously.⁹²

Sexual organs are damaged by infibulation, reopening of the vulva before marriage and closing them back worsens the damage. The reason is that, at every instance of closing and reopening, the chances of getting infected increases and the pain is still as severe as the first procedure. To categorically state the number of deaths caused by FGC/FGM is near impossible because this procedure takes place mostly in rural areas where they do not keep records of deaths. Also the community makes effort to conceal unsuccessful attempts from outsiders and health authorities therefore only limited cases are reported to the hospital.⁹³

According to Dr Rosemary Mburu, who is a Kenyan gynaecologist, an estimated 15% of all circumcised females die of bleeding or infections.⁹⁴ There have been

⁹⁰ Dorkenoo (1994) 14.

⁹¹ Rahman A & Toubia N (2000) 8.

⁹² Dorkenoo (1994) 14.

⁹³ Dorkenoo (1994) 14.

⁹⁴ Judy Mann, 'torturing Girls Is Not A Cultural Right', Washinton Post, 23 February, 1994.

other reports that show that out of one thousand females who undergo FGC/FGM, seventy of them die as a result of the procedure.⁹⁵ The death of a Somali girl was also reported by Dr Mohamed Warsame, a Somali gynaecologist at the Benadir Hospital, who died from haemorrhage after FGC/FGM, was performed on her.⁹⁶

Irrespective of the number of girls who have died from this procedure, the operators are spared and not prosecuted. The reason for this is that when death or infection occurs as a result of the procedure, it is attributed to witchcraft and the 'evil eye'.⁹⁷

2.5.2 Long Term Complications

Any type of FGC/FGM procedure can lead to long term problems. However the types that usually result in severe complications are type II and III. 'Common complications of infibulation include: repeated urinary tract infection; chronic pelvic infections' (these sometimes may cause irreparable damage to the reproductive organs and result in infertility); 'stones in the urethra or bladder; excessive growth of scar tissue or cysts at the site of the cutting; and fistulae (holes or tunnels) between the bladder and the vagina or between the rectum and vagina'.⁹⁸

Pain during sexual intercourse is another common long term effect of FGC/FGM. Problems during childbirth may also occur. The reason is because a woman who has been infibulated must be cut open during delivery, if she is

⁹⁵ Miriam Kahiga, 'One Rite, Too Many Wrongs', Daily Nation, 3 and 5 April 1994.

⁹⁶ Dorkenoo (1994) 15.

⁹⁷ Dorkenoo (1994) 15.

⁹⁸ Rahman A & Toubia N (2000) 8.

not cut open labour can be obstructed and this can cause life-threatening situations for both mother and child.⁹⁹

The most common complication or long term effect of FGC/FGM is lack of sensation during sexual intercourse and this is as a result of excision or removal of the clitoral gland and the labia minora. The vaginal opening becomes narrower as a result of shrinkage of scar tissues that were formed after the cuts that were accidentally made into the vaginal wall. This can firstly lead to dysmenorrhoea which is painful menstruation caused by the lack of free flow of menstrual blood. Secondly it can lead to painful sexual intercourse as the vaginal walls are too constricted. A serious complication that can arise as a result of excision is what is known as 'neuroma'. This is a tumour that is made up of nerve tissue, situated at the point of section of the dorsal nerve of the clitoris. This condition permanently renders the whole genitalia very sensitive and unbearable to touch. At the site where the clitoris is removed, what is known as chronic vulval abscesses can also develop. Scars open up during childbirth and in situations where the scar is extensive, a situation known as fistula can occur, which is an abnormal opening between the vagina and the bladder or between the vagina and the rectum and this usually happens when there is obstructed labour. Other medical conditions that can occur are, primary vaginal stone, vulval epidermoid cysts, and maternal septicaemia which results in death after excision. Maternal septicaemia is usually found in parts of Nigeria because excision here is performed at the seventh month of pregnancy.¹⁰⁰

With regards to infibulation, the girls upon whom this procedure has been performed are unable to completely empty their bladders this is due to the

⁹⁹ Rahman A & Toubia N (2000) 8.

¹⁰⁰ Dorkenoo (1994) 15.

fact that the opening left for urination is too small. The retention of urine then leads to recurrent urinary and kidney infections and the formation of bladder stones. The case of a sixteen year old girl was described by Dr Ollivier, who is a military doctor in Djibouti. The girl was said to have been brought to the hospital with unbearable pains. She had neither menstruated nor had sexual intercourse for several months, yet her abdomen was swollen and very sensitive. She had the signs of a uterus in labour and was in great distress. She had been infibulated and left with a tiny opening to pass urine. The doctor operated her and de-infibulated her and released 3.4 litres of blackish smelling blood.¹⁰¹ Chronic infections of the uterus and vagina are also very common consequences of FGC/FGM. Endometriosis and infertility are also consequences of the practice of FGC/FGM. Keloid scar formation on the vulvar wound can also occur and it can become so enlarged that it obstructs walking.¹⁰²

2.5.3 Psychological Effects

According to Ba'asher, who is the World Health Organisation Regional Adviser for the Eastern Mediterranean on Mental Health, 'it is quite obvious that the mere notion of surgical interference in the highly sensitive genital organs constitutes a serious threat to the child and that the painful operation is a source of major physical as well as psychological trauma.'¹⁰³ In other words, FGC/FGM has serious psychological effect on the girl child. The reason is that from the many personal accounts and research findings, there is constant reference to anxiety, fear, sense of humiliation, feeling of betrayal and disappointment prior to and after the procedure.

¹⁰¹ Dorkenoo (1994) 6.

¹⁰² Dorkenoo (1994) 6.

¹⁰³ Dorkenoo (1994) 24.

Studies have shown that girls, on which FGC/FGM was performed on, have disturbances in their sleeping, eating and mood due to the trauma of the procedure. Many of these girls or women ‘experience fear, submission or inhibition and suppressed feelings of anger, bitterness or betrayal’.¹⁰⁴ The self-esteem and self-identity of these women are also impaired.

2.6 Historical development of the origin of the terms Female Genital Cutting and Female Genital Mutilation

The term female circumcision was the first term that was used to describe the procedure and this was in the 1960s.¹⁰⁵ This term was universally accepted by various international organisations in the 1970s.¹⁰⁶ The term, ‘female circumcision’ was in use over a period of time, presumably from the seventies to the nineties and several regions are still using it till today. According to Laura Nyirinkindi, one can attribute its prolonged use to the need to mitigate the tension arising out of the North-South divide in the women’s movement around this issue of language.¹⁰⁷ She argues as follows: ‘It may also have been a compromise measure in light of the sensibilities of the community where this practice is considered the irreducible core of cultural identity.’¹⁰⁸ After a period of time however, some key international instruments were drafted and adopted in the period before 1993 and they made ‘allusions to “harmful traditional and cultural practices” and this was generally understood by antagonists of FGC/FGM to include’ female circumcision.¹⁰⁹ Examples of the international instrument are the Covenant on the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child (African Children’s

¹⁰⁴ Rahman A & Toubia N (2000) 8.

¹⁰⁵ Nyirinkindi (2008) 28.

¹⁰⁶ Nyirinkindi (2008) 28.

¹⁰⁷ Nyirinkindi (2008) 28.

¹⁰⁸ Nyirinkindi (2008) 28.

¹⁰⁹ Nyirinkindi (2008) 28.

Charter). The first international instrument that ‘directly incorporated the term FGM’ was the Declaration on the Elimination of Violence Against Women (DEVAW) and this was in 1993.¹¹⁰ Later on, in the year 1994, at the International Conference on Population and Development (ICPD) which took place in Cairo, the term ‘FGM’ was emphatically used while illustrating harmful practices against women. Further on, in 1995 the term ‘FGM’ was also used ‘in the Beijing Declaration and Platform for Action at the Fourth World Conference on Women. It was finally adopted in the year 1996 by the World Health Organisation (WHO), in classifying the procedure.¹¹¹ One must take cognisance of the fact that, with all the trends and development in human rights with regards to the language used in describing this term, the Committee on Elimination of Discrimination in the year 1999, considered the issue under General Recommendation 24 and still referred to the procedure as ‘female circumcision’.¹¹²

Female genital mutilation, female genital cutting, female circumcision, female genital surgery, ritual genital surgery, sexual mutilation are the various terms used in referring to the cutting or alteration of the female genitalia for social rather than medical reasons.¹¹³ The use of these various terms shows that over time, there has been a shift in the use of the terms adopted to describe the practice. When the practise started, it was referred to as circumcision. It can also be referred to as any practice which includes the removal or the alteration of the female genitalia.¹¹⁴ According to the World Health Organisation (WHO), it comprises of all methods involving partial or total removal of the external

¹¹⁰ Nyirinkindi (2008) 28.

¹¹¹ Nyirinkindi (2008) 129.

¹¹² Nyirinkindi (2008) 129.

¹¹³ Rahman A & Toubia N (2000) 4.

¹¹⁴ Sarkis, M. (2003): Female Genital Cutting (FGC): An Introduction, The FGC Education and Networking Project. <http://www.fgmnetwork.org/intro/fgmintro.html>. Accessed May 18, 2014.

female genitalia or other injury to the female genital organs whether for cultural, religious or other non-therapeutic reasons.¹¹⁵ The Inter-African Committee (IAC) also defined it as any interference with the natural appearance of the female external genitalia using a blade, knife or any sharp instruments in order to bring about either a reduction in size of the clitoris or a complete removal of the vulva.¹¹⁶

One must however ponder on how the shift occurred and how the WHO eventually came up with term Female Genital Mutilation (FGM). The term FGM has undergone quite a number of evolvments over time. Not so long ago, it was referred to as ‘female circumcision’ universally.¹¹⁷ This term however was with time discarded because it makes it synonymous with male circumcision and this leads to confusing one with the other. However they are two very distinct practices.¹¹⁸

The term FGM was adopted to adequately ‘capture the gruesome and harmful nature of the procedure. More importantly, the new term recasts the procedure more concretely as a human rights violation, thereby providing a more robust ground upon which to campaign for its abolition’.¹¹⁹ Around the late 1970s, the term FGM gained growing support from societies. The reason is that the word, ‘mutilation’ not only establishes a clear distinction from the term male circumcision, but also due to its strong meaning emphasises the severity of the act and shows the harm caused by this practice.¹²⁰ Although the

¹¹⁵ WHO, 2001:1. World Health Organisation (2000): Female Genital Mutilation, WHO Information Facts Sheet. No. 241 .

¹¹⁶ Inter-African Committee (IAC) (Nigeria) {1997}: Female Genital Mutilation in Nigeria. IAC Monograph Series on Harmful and Beneficial Traditional Practices in Nigeria. No.1.

¹¹⁷ Nnamuchi ‘Circumcision’ or ‘Mutilation’ ? Voluntary or Forced Excision? Extricating the Ethical and Legal Issues in Female Genital Ritual” 2012 (25) *Journal of Law and Health* 83 at 90.

¹¹⁸ Lewnes (2005) 1.

¹¹⁹ Mackie (2012) 91.

¹²⁰ Mackie (2012) 91.

terms female circumcision and male circumcision according to some authors are analogous, they are totally different.¹²¹ It is argued by some authors that both practices are a violation of a child's right to physical integrity. They are however very distinct in important ways, because male circumcision involves the cutting off of the foreskin from the tip of the penis without damaging the organ itself.¹²² While on the other hand, the degree of cutting in female circumcision is much more extensive. The equivalent of clitoridectomy, in which part or the entire clitoris is removed in male circumcision, will be the amputation of most of the penis.¹²³ On the other hand infibulation which involves not only the removal of the clitoris but the removal or closing of the sensitive tissue around the vagina is more severe than clitoridectomy has no comparison to male circumcision.¹²⁴

Naming the procedure FGM will totally remove the practice according to the WHO, from the umbrella of culture. In the year 1990, the term FGM was fully adopted at the third conference of the Inter-African Committee in Traditional Practices Affecting the Health of women and Children (IAC) in Addis Ababa.¹²⁵ In 1991, the WHO 'recommended that the United Nations adopt this terminology and subsequently, it has been widely used in United Nations documents'.¹²⁶ The use of the word, 'mutilation' as against 'circumcision' is essential because it reinforces the fact that the practice is a 'violation of girls and women's human rights, and thereby helps promote national and international advocacy towards its abandonment'.¹²⁷ The use of this term not only signifies the severity of the act but also affirms 'the notion that so long as

¹²¹ Rahman A & Toubia N (2000) 4.

¹²² Rahman A & Toubia N (2000) 4.

¹²³ Rahman A & Toubia N (2000) 4.

¹²⁴ Rahman A & Toubia N (2000) 4.

¹²⁵ Rahman A & Toubia N (2000) 4.

¹²⁶ Rahman A & Toubia N (2000) 4.

¹²⁷ Rahman A & Toubia N (2000) 5.

the purpose is non-therapeutic, excision of any part of external female genitalia is mutilation, regardless of the degree and size of the tissue removed'.¹²⁸ This broad definition has however become the cause of the extensive controversy surrounding this practice. The reason is that it 'erroneously' terms all forms of the practice, even those that cannot be defined as mutilation. The five types of FGC/FGM should not be placed under an umbrella name that signifies that they are the same.

At the community level, 'the need for a more subtle name for the practice is necessary.'¹²⁹ This is because the communities that practice it will prefer a less judgmental name for their practice such as 'female circumcision', 'female genital cutting', or 'female genital surgery'. For example, parents would resent the idea that they are indeed mutilating their daughters. Therefore in this same vein, the United Nations Special Rapporteur on Traditional Practices called for tact and patience regarding activities in this area and drew attention to the risk of 'demonizing' certain cultures, religion and communities.¹³⁰ As a result of this, some writers have adopted the term, 'female genital cutting'.¹³¹

In order to buttress my point in showing the importance of language in referring to the procedure and in showing the distinction between FGC and FGM, I make reference to a Nigerian-born cardiologist who wrote in opposition to a bill that would have outlawed FGC/FGM in Nigeria. He stated that there is a huge difference between circumcision and mutilation. He attacked 'the idea that every genital ritual connotes the same horror or has the same

¹²⁸ Mackie (2012) 91.

¹²⁹ Tamale S 'Eroticism, Sensuality and 'Women's Secrets' Among the Baganda" (2006) 37 *Institute of Development Studies Bulletin* 149.

¹³⁰ WHO 2008: 2-3.

¹³¹ WHO, 2008:2-3.

consequences as clitoridectomy, excision, or infibulation’.¹³² He further made reference to Edo women in Nigeria, and stated that to them circumcision means the removal of the prepuce (preputium clitoridis), which is the fold of skin that covers the clitoris and which has been proven not to have any sexual or reproductive value. He says this to this group of women circumcision is limited this and no form of mutilation occurs. To them, this ‘removal’ is very symbolic and it is an inherent part of a traditional marriage ceremony.¹³³ He also made reference to the Ibo women in Nigeria, whose circumcision only ‘involves the removal of only the prepuce’.¹³⁴

A professor of philosophy Martha Nussbaum was also careful not to use the word ‘mutilation’. She describes the procedure of circumcision as ‘amputation’ rather than mutilation, because according to her, a procedure that destroys nothing other than the prepuce, a tissue which can be said to serve no useful purpose should not be termed mutilation.¹³⁵ The use of the word ‘amputation’ is however of the same effect, because it still shows the severity of the procedure. Different countries use different terms when referring to FGC/FGM and these terms are often synonymous with purification or cleansing. For example in Egypt, it is referred to as ‘tahara’, in Sudan it is referred to as ‘Tahur’ and in Mali, it is known as ‘Bolakoti’.¹³⁶ In the French-speaking African countries, FGM is referred to as ‘excision’, while in English-speaking Africa, the term ‘circumcision’ is used.¹³⁷

¹³² Mackie (2012) 92, see also Nowa Omoigui, Protest Against Bill H22 Outlawing “FGM” in Nigeria, J. CULTURE & AFR. WOMEN STUD. 1 (2001). <http://www.africaknowledgeproject.org/index.php/jenda/article/view/38>.

¹³³ Mackie (2012) 92.

¹³⁴ Mackie (2012) 92.

¹³⁵ Mackie (2012) 92.

¹³⁶ Mackie (2012) 92.

¹³⁷ Mackie (2012) 92.

The use of words such as ‘mutilation’ or ‘amputation’ in describing FGC/FGM ‘serve no purpose other than to obfuscate the issues’ because they ‘convey extremely exaggerated meanings’.¹³⁸ The use of these words has actually led to a series of debates on the consideration of the practice as a cultural practice or as a violation of human rights.

The reason why there is a focus on the language and terminology used in the coinage of the term Female Genital Mutilation is because this can be held responsible for the rebellious stance put up against past efforts to curb the practice.

In consideration of the ongoing debates on the right term to use in describing the procedure, I choose to state my preference in using the term Female Genital Cutting (FGC). This is because this term does not offend the cultural integrity of the people who practice the tradition, neither does it underplay the severity of the practice. I am of the opinion that due to the fact that the culture has significant meaning to a group of people, it should be accorded its due respect. This does not mean that I am oblivious of the health consequences of the practices or the fact that it limits some human rights. It only means that I am striving to find a balance between respecting the cultural integrity of a group of people and at the same time making sure their human rights are not infringed.

This leads me to suggesting the need for a cross-cultural dialogue in reaching a common ground between culture and rights. Subsequent chapters will deal extensively with this concept of cross-culture dialogue.

¹³⁸ Mackie (2012) 93.

The issue of FGC/FGM has been extensively debated by feminists in the past thirty years. These debates fall under two major tenets; firstly there are those who argue about the way FGC/FGM is used to oppress women by not recognising the fact that women differ based on race, class and location, on the one hand and those who advocate for the solidarity among women through the cultural practice of FGC/FGM.¹³⁹ Feminist interest in FGC/FGM can be traced back to the year 1976 when Fran Hosken wrote about the practice in her newsletter known as the ‘Women’s International Network News’.¹⁴⁰ Here she was campaigning for the eradication of the practice of FGC/FGM and laid emphasis on patriarchy as the sole motive behind the practice and also noted patriarchy as an issue that binds women all over the world.¹⁴¹

Hosken is the one who coined the term, ‘female genital mutilation’ to replace the term ‘female circumcision’.¹⁴² She did this in an attempt to portray the procedure as an act that not only disfigures the genitals of a woman but also oppresses the African woman.¹⁴³ This same practice of FGC/FGM has been framed by some scholars as an example of ‘extreme violence against women signifying the essence of an especially barbaric form of patriarchy’.¹⁴⁴ The women in practising communities were also referred to as ‘ignorant’ or ‘helpless’.¹⁴⁵

However, in the early 1990s, feminist scholars began to critique the early literature on FGC/FGM. The attention here was no longer on the procedure itself, but on the various academic discourses on FGC/FGM and the use of

¹³⁹ Wade L The Evolution of Feminist Thought About Female Genital Cutting” (2009) *Sociologist for Women in Society Fact* 1.

¹⁴⁰ Wade (2009) 1.

¹⁴¹ Wade (2009) 1.

¹⁴² Boyle (2005) 25.

¹⁴³ Wade (2009) 1.

¹⁴⁴ Wade (2009) 1.

¹⁴⁵ Wade (2009) 1.

various terminologies in describing the procedure.¹⁴⁶ The post-colonial feminist scholars criticised the work of earlier western feminist that they ignored the ‘hierarchies among women and, therefore, reproducing racist and imperialist narratives’.¹⁴⁷ The argument put forward by post-colonial feminists was premised on the following; Firstly the use of the term ‘female genital mutilation’ as an umbrella word for describing all the types of FGC/FGM was found to be problematic in the sense that it is ‘insensitive’ and ‘counterproductive’.¹⁴⁸ This group of scholars then suggested the use of ‘female circumcision’ or ‘female genital cutting’ as more appropriate terms that should be used in describing the procedure as these terms are only descriptive in nature and not offensive.¹⁴⁹

Secondly the post-colonial scholars argued that, the western feminist ‘anti-FGM discourse’ actually ‘demonizes and infantilizes people in communities that practice FGC and, in doing so, affirms a false hierarchical binary between the west and the rest’.¹⁵⁰

Thirdly, this false hierarchical ‘binary also erases the autonomy of African women’.¹⁵¹ In other words, the African women are not seen as women who could fight for themselves, but are portrayed as victims who needed to be saved.¹⁵²

This group of feminists (the post-colonial scholars) are of the opinion that there should be an alliance between western and non-western women in solving the issue of FGC/FGM.

¹⁴⁶ Wade (2009) 2.

¹⁴⁷ Wade (2009) 2.

¹⁴⁸ Wade (2009) 2.

¹⁴⁹ Wade (2009) 2.

¹⁵⁰ Wade (2009) 2.

¹⁵¹ Wade (2009) 2.

¹⁵² Wade (2009) 2.

There was however, a counter-response by other scholars who argued that the post-colonial scholar's critique actually only supports the idea of 'cultural identities' over 'gender solidarity'.¹⁵³ FGC/FGM by this other group of scholars is viewed as an epidemic that is centred on gender oppression and an approach focussing on culture would not suffice in dealing with it. Culture is argued as being 'fractured, uneven, and negotiated' by these scholars.¹⁵⁴ Therefore the communities practicing FGC/FGM are expected to negotiate for changes in their cultures and traditions.

More recently, various scholars in advocating for a more sensitized approach in addressing the issue of FGC/FGM have compared the procedure with other genital surgeries. For example, Simone Davis argues that FGC/FGM can be compared to labiaplasty.¹⁵⁵ Labiaplasty is a procedure done to 'reduce the size or reduce the prominence of labia minora'.¹⁵⁶ It is a procedure carried out to help improve the outward appearance of the external genitalia of a female.¹⁵⁷ Davis further argues that both the practice of FGC/FGM and labiaplasty only goes to show that women respond to the societies or cultural expectations for their bodies. He affirms that most westerners undergo the procedure of labiaplasty, but this same group of women antagonise the cultural practice of FGC/FGM. His conclusion is that these two practices can be explained by their measurement with "entirely different yardsticks' infused with racial, national, and global hierarchies'.¹⁵⁸

Wairimu Njambi, another scholar argues that the use of the word, 'mutilation' is purely western in nature. She argues that FGC/FGM has a lot of similarities

¹⁵³ Wade (2009) 3.

¹⁵⁴ Wade (2009) 3.

¹⁵⁵ Davis SW 'Loose Lips Sink Ships' (2002) 28 *Feminist Studies* 7-35.

¹⁵⁶ Davis (2002) 28 *Fem Stud* 8.

¹⁵⁷ Davis (2002) 28 *Fem Stud* 8.

¹⁵⁸ Davis (2002) 28 *Fem Stud* 21.

with several practices in the United States.¹⁵⁹ She also opines that what is considered as a ‘natural’ or ‘normal’ body is ‘culturally’ and ‘historically’ contingent. In other words, culture goes a long way in framing what is considered as right or wrong.¹⁶⁰

2.7 Conclusion

The above mentioned debates, show the views of various scholars who advocate for a more sensitive way in approaching the issue of FGC/FGM. The use of the term, ‘mutilation’ and ‘eradication’ are not only offensive but judgemental. I opine that total eradication of the practice is near impossible, therefore a new approach which is cultural transformation or modification should be looked at in dealing with the negative effects of the practice. The term ‘mutilation’ not only ignores the right of a particular group of people to culture but also suggests maiming a limb or an organ. This can be further said to connote that parents intend to maim their children. This term I consider quite unproductive as the use of it results in strong resistance to ‘western’ interference with regards to eradication measures.

The practice of FGC/FGM is a culture that has been in existence for a number of years now, even though its origin has remained shrouded in mystery. Several justifications have been put forward as reasons why the practice came into existence and why it is still being practiced till this very day. This is despite its various health hazards and consequences. It is however, important to note as stated in this chapter that the most important justification is the need to preserve a culture that is firmly engraved in the custom of its adherents. Moreover the fact that the practice is still in existence goes to show that it is a

¹⁵⁹ Njambi WN ‘Dualisms and Female Bodies in Representations of African Female Circumcision. A Feminist Critique’ (2004) 5 *Feminist Theory* 283-284.

¹⁶⁰ Njambi (2004) 5 *Fem Theory* 284.

practice that cannot be eradicated over night or expected to vanish as a result of legislation or by merely terming it 'mutilation'. Hence the need to find another approach that is culturally sensitive in addressing the issue of the practice of FGC/FGM. The next chapter will examine and deal with what Female Genital Cutting (FGC) as a term entails as a cultural practice.

CHAPTER THREE

FEMALE GENITAL CUTTING AS A CULTURAL PRACTICE

3.1 Introduction

Female Genital Cutting (FGC) as a cultural practice has different meanings in different cultures. The research problem of this entire study is to argue for the cultural transformation of the parties that practice Female Genital Cutting (FGC) in order to make the practice be in line with human rights. In doing this I examine and reflect on the use of the terms Female Genital Cutting (FGC) or Female Genital Mutilation (FGM) to describe the procedure of female circumcision, or the removal of the external female genitalia or other injury to the female genital organs. I intend to probe the use of the terms Female Genital Cutting and Female Genital Mutilations as well as the language used in describing the practice and how it relates to viewing it as either a Cultural Practice or as a violation of Human Rights. I focus on the use of language in looking at the response and possible recommendations given to curb the practice. The research question focused on in this chapter is the preservation of FGC as a cultural practice as well as examining the intricacies of what the practice of FGC entails as cultural practice.

The culture of a group of people can literally be defined as their way of life, ranging from their arts, beliefs, custom, and type of food even to their style of

dressing.¹ Culture however like rights is dynamic and not static.² Culture has as one of its characteristics, the ability to evolve and be developed. African communities have a strong will to retain their cultural practices as it forms part of their identities.³ Arising from these, the following questions come to mind; how can culture be defined? What are the benefits and limitations of culture? What makes FGC a cultural practice and what does it entail as a cultural practice?

In responding to the above questions, I give a short introduction describing what a culture is or what culture means to a community. The next subsection deals with the benefits as well as the limitations of culture with regards to human rights. Following this is a discussion on how FGC can be categorised as a cultural practice. I conclude the chapter by discussing feminist perspectives that rely on rationality and the need to be part of a community.

3.2 What is Culture?

How can one define the concept of culture? According to the Oxford dictionary, it can be defined as the ideas, customs, and social behaviour of a particular people or society.⁴ It can further be described as ‘the attitudes and behaviour characteristics of a particular social group’.⁵ Culture can also be defined as the ‘sum total of ways of living built up by a group of human beings and transmitted from one generation to another’.⁶

¹ Kamwangamalu M, Ubuntu in South Africa: A Sociolinguistic perspective to a pan-African Concept, *Critical Arts; South-North Cultural and Media Studies*, 13:2, 24-41, DOI: 10.1080/02560049985310111. www.tandfonline.com/loi/rcrc20 (accessed on the 31 July 2015).

² Tamale S “The Right to Culture and the Culture of Rights: A Critical Perspective on Women’s Sexual Rights in Africa” (2008) 16 *Feminist Legal Studies* 50-51.

³ Tamale (2008) *Fem Leg Stud* 50-51.

⁴ Oxford Dictionary. 3rd (ed) 2010.

⁵ Oxford Dictionary. 3rd (ed) 2010.

⁶ www.thefreedictionary.com/culture. Accessed on the 17th of June, 2015.

Sylvia Tamale defines culture as the various ways that social business is conducted and mediated through language, symbols, rituals and traditions and influenced by issues such as race, ethnicity, religion, material base, and so forth.⁷ She affirms in her work that we all are cultural beings because ‘we are influenced by an infinite number of social forces that have shaped our mental outlook and perspectives on life’.⁸ These social experiences ‘constitutes the cultural context within which we operate’.⁹ Culture according to her is also ‘in many ways structured by and a reflection of the power dynamics of a given society’.¹⁰

As is seen in the following paragraphs, the concept of culture is very broad and cannot be strictly defined, therefore a series of definitions is examined in the following paragraphs. Culture as a concept is usually thought of as an African concept, hence it is ‘something that the western societies have not clearly understood or been able to grasp’.¹¹

The word culture was coined from the words ‘cult’ and ‘cultivate’, and from the latin verb ‘*culturare*’ (which means to cultivate).¹² ‘*Cultus*’ from which ‘cult’ was coined ‘refers to religious worship, which might be seen as a way of bringing up (cultivating) someone in a religious group’.¹³ Ultimately one can state that all the versions of the term ‘culture’ originated early from the Latin word ‘*colere*’, which translates to ‘to till’ or ‘cultivate the ground’.¹⁴

⁷ Tamale (2008) *Fem Leg Stud* 51-52.

⁸ Tamale (2008) *Fem Leg Stud* 51-52.

⁹ Tamale (2008) *Fem Leg Stud* 51-52.

¹⁰ Tamale (2008) *Fem Leg Stud* 48.

¹¹ Baldwin JR *Redefining Culture: Perspectives Across the Disciplines* (2006) 3.

¹² Baldwin (2006) 5-6.

¹³ Baldwin (2006) 6.

¹⁴ Baldwin (2006) 6.

According to Raymond Williams, the term culture can be traced to the German word, *'Kultur'*, which means agricultural development.¹⁵ He further uses this in defining culture and breaks this down to mean firstly, the 'cultivation of individuals and groups of people in terms of the 'general process of intellectual, spiritual, and aesthetic development'.¹⁶ Secondly he describes culture as 'a particular way of life, whether of a people, a period, a group, or humanity in general' and thirdly as 'the works and practices of intellectual and especially artistic activity'.¹⁷ This third meaning according to Williams is the 'most widely used, and relates to literature, art, music, sculpture, theatre, and other art forms'¹⁸. Kroeber and Kluckhohn, also describes culture as 'the characteristic mode of human existence'.¹⁹ Two competing factions of the definition of the term culture were provided for in *The Encyclopedia of Social and Cultural Anthropology* by Barnard & Spencer.²⁰ The first faction described culture as an 'abstract concept, something that 'everyone had, but which some people had more or less of', and equating it with civilization'²¹. Following this path, Francis Bacon also described 'culture as the manners and knowledge that an individual obtains'.²² The second faction described culture in the plural, in other words "'cultures' as groups of people".²³

Kluckhohn, however summarises it by defining culture as, 'the total way of life of a people', 'a way of thinking and believing', 'and a storehouse of pooled learning'.²⁴ He further notes that, there needs to be drawn a distinction

¹⁵ Williams R *Culture and Society* (1983) 90, as quoted by Baldwin (2006) 6.

¹⁶ Baldwin (2006) 6.

¹⁷ Baldwin (2006) 6.

¹⁸ Baldwin (2006) 6.

¹⁹ Kroeber AL and Kluckhohn C *Culture: A Critical Review of Concepts and Definitions*. (1952) 27 as quoted by Baldwin (2006) 7.

²⁰ Barnard A & Spencer J *Encyclopedia of Social and Cultural anthropology* (1996) 138.

²¹ Barnard A & Spencer J (1996) 138.

²² Baldwin (2006) 7.

²³ Baldwin (2006) 7.

²⁴ Baldwin (2006) 7.

between 'people who shared a social space and mutual interaction, but not a way of life'. The former group of people he referred to as a society, while he referred to the latter as culture.²⁵ Another author by the name Robert Winthrop also emphasizes this distinction by stating that, 'culture focuses attention on the products of social life (what individuals think and do), whereas social structure (the equivalent of society for Winthrop) stresses social life as such: individuals in their relations to others'.²⁶ In essence, each society's culture 'serves to provide an orientation towards the world and its problems, such as suffering and death'.²⁷ Kluckhohn also adds that, 'every culture is designed to perpetuate the group and its solidarity, to meet the demands for an orderly way of life and for satisfaction of biological needs'.²⁸ The need to clearly understand the meaning of the concept of culture is so we have a clear understanding of what female genital cutting means as a cultural practice. In other words, if female genital cutting is regarded as a cultural practice in some communities, it means all of the above and much more to them. It is therefore part of their way of life and it satisfies their social needs.

In breaking down what culture means to a community, it has to be put in mind, 'that the culture of the individual is dependent upon the culture of a group or class, and that the culture of the group or class is dependent upon the culture of the whole society to which that group or class belongs'.²⁹ In other words, the culture of an individual as a member of a bigger group (a society) cannot be detached from the culture of a group (a society); likewise the culture of a

²⁵ Baldwin (2006) 7.

²⁶ Winthrop RH *Dictionary of Concepts in Cultural Anthropology* (1991) 261 as quoted by Baldwin (2006) 7.

²⁷ Baldwin (2006) 7.

²⁸ Baldwin (2006) 7, See also Kluckhohn (1949) 24-25.

²⁹ Elliott C et al 'Adult recall of Childhood Female Genital Cutting and Perceptions of its Effect: A pilot Study for Service Improvement and Research Feasibility' (2013) 33 *Journal of Obstetrics and Gynaecology* 292.

group (society) cannot be separated from that of an entire community.³⁰ Therefore a single person cannot outrightly reject the practice of FGC due to personal reasons. The practice of FGC as an individual's cultural practice cannot be detached from that of the cultural practice of the society as a whole. In order to buttress this point, I will like to make mention of the concept of Ubuntu.

3.3 Ubuntu as a fulcrum for Female Genital Cutting

Ubuntu is an African concept and cannot be strictly defined. In other words, there is not only one definition for the concept of Ubuntu. It can however be described according to Mokgoro JY as,

a philosophy of life, which in its most fundamental sense represents personhood, humanity, humaneness and morality; a metaphor that describes group solidarity where such group solidarity is central to the survival of communities with a scarcity of resources, where the fundamental belief is that *motho ke motho ba batho ba bangwe/umuntu ngumuntu ngabantu* which literally translates to mean, 'a person can only be a person through others'³¹

In other words, the individual's whole existence is relative to that of the group. Nkonko M. Kamwangamalu in his article manages to break down the term, 'Ubuntu'. He stated that *Ubuntu* is a Nguni term which translates as 'personhood', 'humanness', and which consists of the augment prefix u-, the abstract noun prefix bu-, and the noun stem -ntu, meaning 'person' in Bantu

³⁰ Elliott (2013) 33 *Jnl of Obstetrics and Gynaecology* 292.

³¹ Mokgoro Y (1998) Ubuntu and the Law in South Africa. Pochefstroom electronic law Journal (PELJ).

www.nwu.ac.za/p-per/index.html (accessed on the 7 July 2015).

languages.³² According to him, this concept is a 'multidimensional concept which represents the core values of African ontologies; for human dignity and for human life, collective sharedness, obedience, humility, solidarity, caring, hospitality, interdependence, communalism...'.³³ Due to the fact that this concept is a very complex one, several other authors attempted to define it as, 'a process and philosophy which reflects the African heritage, traditions, culture, customs, beliefs, value systems and the extended family structures'³⁴. Mthembu also defines it as, 'the key to all African values and involves humanness, a good disposition towards others, and a moral nature. It describes the significance of group solidarity and interdependence in African culture'.³⁵ One thing all the above listed definitions of the concept of Ubuntu have in common amongst others are the values of communalism and interdependence, and these two are part of the important tenets of Ubuntu.³⁶

With regards to the issue of communalism, it is one of the most important values of the concept of Ubuntu. It means that the 'interest of the individual is subordinate to that of the group'.³⁷ In other words, the welfare of the group as a whole is considered first before that of the individual. In the African context, 'nobody lives for himself', meaning as individuals we all live for the community.³⁸ So when stating that Africa is communalistic in nature means that an individual cannot decide to organize his life or plan his life outside that of his family, village or clan.³⁹

³² Kamwangamalu (2007) 25.

³³ Kamwangamalu (2007) 25-26.

³⁴ Makhudu, N. (1993). *Cultivating a climate of co-operation through Ubuntu*. Enterprise Magazine. Pg 40, as quoted by Kamwangamalu (2007) 26.

³⁵ Mthembu, D. (1996). African values: Discovering the indigenous roots of management. In: R. Lessem and B. Nussbaum (Eds), p 216, as quoted by Kamwangamalu (2007) 26.

³⁶ Kamwangamalu (2007) 27.

³⁷ Kamwangamalu (2007) 27.

³⁸ Kamwangamalu (2007) 27.

³⁹ Kamwangamalu (2007) 27.

This means that in the African context, the concept of an individual as an entity on its own does not exist. An individual's existence is strongly linked to the existence of the whole community (group). Which if further interpreted mean, the wellness of the group (community) is the wellness of the individual. The social values of this concept are, 'group solidarity, conformity, compassion, respect, human dignity, humanistic orientation, collective unity... cooperation and communalism'.⁴⁰ To further explain this concept, one can say that a human being cannot claim to be 'a human being alone but in a community'.⁴¹ In other words, 'an African individual is a communal being, inseparable from and incomplete without others'.⁴² A member of a community needs the community in order to find fulfilment. In the African context, a community is not just made up of individuals but it is a

A group of persons linked by interpersonal bonds, biological and/or non biological, who considers themselves primarily as members of the group and who have a common interest, goals, and values. The notion of common interests and values is crucial to an adequate conception of community; the notion in fact defines the community. It is the notion of common interests, goals, and values that differentiates a community from a mere association of individual persons. Members of a community share goals and values. They have intellectual and ideological, as well as emotional, attachments to those goals and values; as long as they cherish them, they are ready to pursue and defend them.⁴³

Therefore the fact that members of an African community are brought up to see themselves as integral parts of the whole community makes it difficult to go against the culture of their respective community and risk being ostracized, as this is one of the consequences of failing to undergo FGC/FGM. This sense of

⁴⁰ Mokgoro (1998) 4.

⁴¹ Mnyaka & Motlhabi 'The African Concept of Ubuntu/Botho And Its Socio-Moral Significance (2005) 221.

⁴² Mnyaka & Motlhabi (2005) 221.

⁴³ Gabriel M. Setiloane, *African Theology: An Introduction* (Johannesburg: Skotaville Publishers, 1986) 10. As quoted by Mnyaka & Motlhabi (2005) 222.

communalism or belonging, not only gives the feeling of being complete, it also gives an individual 'a sense of identity and security'.⁴⁴ Therefore being a member of a community gives an individual a sense of belonging which will be forfeited if such an individual is asked or banned from carrying out their culture, in this case FGC/FGM.

Ubuntu as a concept, in all its complexities argues for the preservation of customs and traditions. It is a concept which represents group solidarity and communalism.⁴⁵ This concept of solidarity is strongly linked to FGC, in the sense that it is a cultural practice that binds the community together. The act of celebration after the procedure or initiation rites is a form of socialization that promotes unity, oneness and solidarity in the community.

Ubuntu is also described as a concept or philosophy that reflects the African heritage, traditions, culture, custom and beliefs.⁴⁶ In other words, Ubuntu serves as a support for the preservation of African heritage, culture and tradition of which, FGC can be categorized as forming part of. The practice of FGC as an African cultural practice can therefore rely on the concept of Ubuntu for support.

Furthermore the values of communalism and interdependence which are the core tenets of Ubuntu can be said to form part of the reasons why the practice of FGC is still in existence. FGC as a cultural practice promotes communalism and interdependence. For example, a mother who voluntarily takes her daughter for circumcision is not only thinking about the discomfort her daughter would go through but also the significance and importance of the procedure to the community and the entire village as a whole. The ideology

⁴⁴ Mnyaka & Motlhabi (2005) 222-223.

⁴⁵ Mokgoro (1998) 2.

⁴⁶ Makhudu (1993) 40.

that the interest of the community as a whole is considered first before that of the individual is in full display here. The concept of Ubuntu buttresses this ideology that in the African context, nobody lives for himself/herself. This means that an individual cannot decide to plan their life outside that of their families, clan or village. It is therefore not the decision of an individual to decide whether or not to carry out the rites of FGC. It is a decision that must be made by the entire family. An individual who decides to take decisions outside his/her family risks being ostracized or seen as an outcast. This is basically because FGC is a social norm held firmly in place by the entire community.⁴⁷

The above arguments do not in any way emphatically state that Ubuntu is in totally in support of FGC. Ubuntu, being the complex concept that it is, can also be argued to be against FGC. This is because the concept of Ubuntu is greatly concerned with the welfare of the group as a whole before that of the individual. In other words, the wellness of the individual is obliquely the wellness of the group.⁴⁸ Therefore if the welfare of the individual is not guaranteed due to medical conditions sustained as a result of FGC, then the welfare of the group is unattainable.

Another aspect of Ubuntu which is not in support of FGC is the aspect of respect and human dignity. Some scholars have argued that the practice of FGC violates the human body thereby infringing on the human dignity of the persons on whom the procedure is performed on. This point can however be debated because the meaning of 'dignity' is relative with regards to various communities. What some communities see as an infringement of human dignity can be seen as a promotion of human dignity by other communities. For instance, communities practicing FGC see it as a way of promoting the

⁴⁷ www.orchidproject.org . Accessed 8th July 2015.

⁴⁸ Mokgoro (1998) 4.

dignity of the woman being circumcised, because this when she is regarded as a fully grown woman eligible for marriage.⁴⁹

3.4 Margin of Appreciation

I see a need to introduce a new concept here. This concept is known as the margin of appreciation doctrine.

This doctrine was developed by the European Court of Human Rights and is used in deciding whether a member state is in contravention of a convention.⁵⁰

In other words, member states who are parties to a treaty or Convention are allowed 'a degree of discretion, subject to Strasbourg supervision, when it takes legislative, administrative or judicial action in the area of a Convention right'.⁵¹

The function of this doctrine is basically to allow courts take into consideration the fact that member states are allowed to interpret the Convention differently due to their 'legal and cultural traditions'.⁵² This means that each society based on its cultural practices and traditions is allowed a degree of discretion or leeway in interpreting Conventions.⁵³ In other words whenever conflicts arise between individual rights and national interests, communities are entitled to deal with such conflicts in their own way based on their cultural beliefs and traditions.⁵⁴

⁴⁹ Atoki M "Should Female Circumcision Continue to Be Banned?" (1995) 3 *Feminist Legal Studies* 225.

⁵⁰ ECHR REFORM, 'Margin of Appreciation. April 2012. www.opensocietyfoundations.org. Accessed 3rd Aug, 2015.

⁵¹ ECHR REFORM, 'Margin of Appreciation. April 2012. www.opensocietyfoundations.org. Accessed 3rd Aug, 2015.

⁵² ECHR REFORM, 'Margin of Appreciation. April 2012. www.opensocietyfoundations.org. Accessed 3rd Aug, 2015.

⁵³ Benvenisti E 'Margin of Appreciation, Consensus and Universal Standards' (1999) 31 *International Law and Politics* 843.

⁵⁴ Benvenisti (1999)3 *Intl Law and Pol* 843.

In essence there must be room for accommodating several other cultures such as FGC despite being signatories to Conventions that prohibit the practice. Reason is that 'it is impossible in practice to fully experience the world from the perspectives of another, it certainly seems plausible that women living within a culture that others consider defective from the standpoint of gender based equality would nonetheless choose to remain within that culture even if they could fully intuit all the benefits and drawbacks of all available alternatives'.⁵⁵ Waldron suggested that, 'cultural difference be given a voice in parliamentary democracy coupled with his suggestion that exceptions from laws and common practices be available for non-mainstream cultures'.⁵⁶

One of the features of the concept of culture is that it is seen 'as a process, developing and changing through actions and struggles over meaning, rather than as a static shared system of beliefs and values'.⁵⁷ According to Tamale, culture is in constant flux, adapting and reforming. In other words, culture is forever changing as it adapts to the socio-economic and political conditions around it.⁵⁸ One can then state categorically that culture as a concept 'is now understood as historically produced rather than static; unbounded rather than bounded'.⁵⁹ For example, Comaroff and Comaroff have described culture as 'the semantic space, the field of signs and practices, in which human beings construct and represent themselves and others, and hence their societies and histories. It is not merely an abstract order of signs, or relations among signs. Nor is it just the sum of habitual practices'.⁶⁰ From this, one can tell that the concept of culture is not a concept that can be grasped under one definition.

⁵⁵ Rosenfeld M *Law, Justice, Democracy, and the Clash of Cultures: A Pluralist Account* (2011) 88-89.

⁵⁶ Rosenfeld (2011) 90.

⁵⁷ Baldwin (2006) 39.

⁵⁸ Tamale (2008) *Fem Leg Stud* 47-50.

⁵⁹ Baldwin (2006) 41.

⁶⁰ Comaroff JL & Comaroff J *Ethnography and the Historical Imaginations* (1992) 27.

Culture however, has its own limitations. There are universal standards for the protection and promotion of human rights that are engraved in Conventions. Once states become signatories to these Conventions, they become bound by the Conventions. These limitations are dealt with in the next sub-topic.

3.5 Limitations and Benefits of Culture

The fact that culture is man-made makes it liable to be limited in a variety of ways. According to Fons Trompenaars and Charles Hampton-Turner, 'culture is man-made, confirmed by others, conventionalized and passed on for younger people or newcomers to learn; it provides people with a meaningful context in which to meet, to think about themselves and face the outer world'.⁶¹

Clifford Geertz in his book, *The Interpretation of Cultures* buttressed this point by stating that, 'culture is a means by which people communicate, perpetuate, and develop their knowledge about attitudes towards life. Culture is the fabric of meaning in terms of which human beings interpret their experience and guide their actions'.⁶² As stated above, belonging to a cultural group gives a sense of belonging, security and identity. An African without a culture is incomplete and cannot be regarded as a human being.⁶³ Traditional societies are said to be held together because of the shared beliefs they have, and this shared beliefs leads to a collective consciousness that governs their thoughts, attitudes, and practices.⁶⁴ This can be referred to as the benefit of culture. It serves as a binding element that keeps a community together.

Cultural practices are however weighed against universal standards of human rights and most times some cultural practices contravene human rights

⁶¹ Comaroff JL & Comaroff J (1992) 27.

⁶² Comaroff JL & Comaroff J (1992) 27.

⁶³ Mnyaka & Motlhabi (2005) 222-223.

⁶⁴ Griswold, W. (1994). *Cultures and societies in a changing world*. London: (Pine Forge Press.) 46. As quoted by Kamwangamalu (2007) 30 .

principles. The next chapter deals fully with the various human rights principles limiting the practice of FGC.

3.6 FGC as a Cultural Practice

FGC is a practice that has been in existence for over 2500 years and is still in existence in nearly over forty countries. To remind ourselves again what FGC/FGM stands for, I define it briefly. It is 'a traditional practice that involves the cutting away of part or all of the external female genitalia, composed of the clitoris, the labia minora or small lips, and the labia majora or large lips'.⁶⁵ As mentioned in the previous chapter, this procedure can be classified into five categories; firstly, the act of merely pricking the clitoris, the second type is what is referred to as *sunna* by the Muslims and it involves the removal of the clitoris. This outer layer of skin is sometimes referred to as the 'hood'. The third type is referred to as the 'excision' or 'clitoridectomy'. This class is referred to as the most common form and it includes 'the removal of the gland of the clitoris', in other words it is the removal of the entire clitoris and some 'parts of the labia minora as well'.⁶⁶ The fourth category is referred to as the most severe type of FGC/FGM and it is known as 'infibulation' or what is otherwise called 'pharaonic circumcision'. In this category, the entire female genitalia are removed and the woman stitched close.⁶⁷ The fifth and last category involves any other procedure done to the genitalia of a woman for non-medicinal purposes that has not been mentioned or described above.

FGC/FGM as a procedure is usually carried out to seal the transition process of a girl child into womanhood. The ages at which the procedure is performed on

⁶⁵ Alison TS 'Female Circumcision: A Critical Appraisal' (1988) 10 *Human Rights Quarterly*. 437-486.

⁶⁶ Alison (1988) 10 *Hum Rights Quart* 441.

⁶⁷ Alison (1988) 10 *Hum Rights Quart* 441.

girls varies from one geographical location and culture to another.⁶⁸ For instance, in countries such as ‘Mauritania, Nigeria and Ethiopia, the operation is performed on new-borns, or within the first few weeks following birth,’ while in countries such as ‘Kenya and Tanzania, young women are excised on their wedding night’.⁶⁹ In Mali, the operation may be performed on married women after they have had their first child’.⁷⁰

It is a practice that originated, just like male circumcision as a part of a cultural/traditional puberty rites. It was seen as a ‘rite of passage’ through which women were ushered into the adult world.⁷¹

In communities that perform circumcision as an integral element of the rites of passage, one is not simply born a “woman”. One becomes a respected person and an integrated female only after implementing the socially designated course to dignity and status. Initiates are removed from the common mass of humanity by a rite of separation that includes some form of circumcision. This rite automatically incorporates the initiates into a discrete community and facilitates adjustment into the necessary status and role. The rite also serves the multiple purposes of expressing, inculcating, and ensuring the maintenance of cultural values and identity.⁷²

One of the strong points that have been put forth as the origin and reason for the subsistence of the practice is the issue of culture/tradition, or the need to preserve a life-long culture/tradition. In other words, culture is put as one of the reasons why the practice was in existence in the first place and is being continued despite the several campaigns that have been going on to eradicate

⁶⁸ Alison (1988) 10 *Hum Rights Quart* 442.

⁶⁹ Alison (1988) 10 *Hum Rights Quart* 442-443.

⁷⁰ Alison (1988) 10 *Hum Rights Quart* 443.

⁷¹ Alison (1988) 10 *Hum Rights Quart* 443-444.

⁷² Obiora LA ‘Bridges and Barricades: Rethinking Polemics and Intransigence in the Campaign Against Female Circumcision’ (1997) 47 *Case Western Reserve Law Review* 295.

or put an end to it. In understanding this issue of culture, I revisit the various cultural reasons why FGC/FGM is being practiced.

The first is the issue of virginity. In most African cultures, the issue of virginity is of utmost importance. The reason is because virginity is strongly attached to marriage and is central to the issue of marriage, and marriage is a very important part of African culture. A woman's virginity is very essential as it determines a woman's social status in her community. Also the value of a prospective bride, in African communities where dowry (or what is known as bride price (an amount of money paid in exchange for the bride's hands in marriage) is paid, is based on her virginity.⁷³ Therefore FGC/FGM is seen as 'the most effective means to keep the girl's virginity intact'.⁷⁴ Basically speaking, FGC/FGM functions primarily to guarantee a woman's virginity.

The issue of FGC/FGM as a culture/tradition that should be continued has been raising eyebrows for quite a number of years now. In the year 1983, a researcher known as Asama El Dareer conducted an interview in Sudan, where he interviewed over 4500 adults. His questions were based on FGC/FGM and the first question was whether these people were in favour of FGC/FGM and secondly the reason for their respective responses. The result of this questionnaire 'found that 82.6 per cent of the females interviewed approved of female circumcision regardless of the persistence of the practice...' The main reasons for approval were 'tradition' and 'religion'.⁷⁵

As seen from the result of the interview conducted by Asama El Dareer, tradition is given by quite a number of people as the reason for engaging in and continuing with the practise of FGC/FGM.

⁷³ Alison (1988) 10 *Hum Rights Quart* 446.

⁷⁴ Alison (1988) 10 *Hum Rights Quart* 445.

⁷⁵ Alison (1988) 10 *Hum Rights Quart* 448.

Some of the advantages of engaging in a cultural practice such as FGC/FGM are that, it helps to serve ‘as a power that helps to bind the community together and provides a source of cultural identity that is often crucial in small rural communities’.⁷⁶

Also, FGC/FGM as a cultural practice is one that sometimes comes with ‘psychological benefits.’⁷⁷ Psychological benefits in the sense that, the procedure is most times ‘accompanied by elaborate ceremonies and joyous celebrations’.⁷⁸ Due to this, most young girls look forward in excitement to this rite of passage. The rite usually encompasses of several days of preparations, which in effect include ‘cleansing, praying, consuming special food and drink, and performing rituals, such as dancing and singing’.⁷⁹ The girls on whom this procedure is performed on are also showered with gifts and praises for ‘being brave’ and entering into womanhood.⁸⁰

Sterility of women is another example of a cultural belief why FGC/FGM must be continued. It is believed by this group of people ‘that women are naturally sterile, and that infibulation or clitoridectomies will make them fertile’.⁸¹ Some women are even said to request that this procedure be performed on them when they have difficulties in getting pregnant. The belief or view behind this culture is that, according to the Yoruba people of Nigeria, (Western part of Nigeria), the procedure of FGC/FGM is a way of appeasing the god of fertility.⁸² The removed clitoris is said to be sacrificed to ‘the gods, who in return, shower blessings of fertility to the victim’. Also among the Mandigo, Massai, and

⁷⁶ Alison (1988) 10 *Hum Rights Quart* 449.

⁷⁷ Alison (1988) 10 *Hum Rights Quart* 450.

⁷⁸ Alison (1988) 10 *Hum Rights Quart* 450.

⁷⁹ Alison (1988) 10 *Hum Rights Quart* 450.

⁸⁰ Alison (1988) 10 *Hum Rights Quart* 450.

⁸¹ Alison (1988) 10 *Hum Rights Quart* 459.

⁸² Dorkenoo (1994) 40.

Swahili, there is a strong belief that FGC/FGM makes the female body fertile. They also view it as 'a sacrifice to the fertility deity with the view that by sacrificing a part, the well-being of the whole is safeguarded and reproduction is ensured'.⁸³

Other cultural beliefs vary from morbidity, to reduced mortality rates, to purification to contraceptives methods. The culture that attaches FGC/FGM to morbidity and reduced mortality rates are the Bambara and Mossi groups, while the Bantu and Sudanese are examples of groups that engage in the practice for purification purposes. According to research, the Sudanese refer to circumcision as '*tahur*' which literally translates to mean 'purification'.⁸⁴ And finally the group that consider it a form of contraceptive method is the Yoruba people of Nigeria'.⁸⁵ Some authors have also written that FGC/FGM is performed as, 'a test of courage and endurance in simulation and preparation for birth labour pains'.⁸⁶ According to another write, Carol Hoffer, the mutual pains experienced in initiation rites, only 'helps to forge a cohesive bond and instil a strong spirit of solidarity and cooperative assistance in the initiates'.⁸⁷

Although the above mentioned reasons have been put forth as reasons for the continuation of this practice, there is still a strong counter resistance from human rights activists and several reasons have been put forth as to why the practice must be eradicated. However, irrespective of these reasons and efforts put forth by anti FGC/FGM crusaders, the practice is still in existence. This has led me to ask, 'why is there a strong need by followers of this culture

⁸³ Obiora (1997) 47 *Case West Res Law Rev* 296.

⁸⁴ Obiora (1997) 47 *Case West Res Law Rev* 297.

⁸⁵ Obiora (1997) 47 *Case West Res Law Rev* 297, See also Bertha C.A. Johnson, Seminar on Traditional Practices Affecting the Health of Women and Children in Nigeria.

⁸⁶ Obiora (1997) 47 *Case West Res Law Rev* 296.

⁸⁷ Obiora (1997) 47 *Case West Res Law Rev* 296, see also Carol P, Hoffer, *Mende and Sherbro Women in High Office*, 6 *Canadian J. Afr. STUD.* 151, 159(1972).

to continue with it irrespective of the number of hazards associated with this practice?’ This question leads to the discussion of cultural autonomy that will be dealt with in the next section.

3.7 Cultural Autonomy

Irrespective of the continuous efforts in the bid to eradicate or curb the practice of FGC/FGM, the practice has continued to thrive. The reason for this in my opinion is the inherent need in Africans to preserve their cultural heritage. It is an important phenomenon to Africans to preserve their culture/tradition. The argument here is that, ‘it is their right of cultural self-determination to carry on this tradition’.⁸⁸

Deriving from this is the fact that ‘the right to culture is an inalienable and universal human right that all persons are entitled to regardless of which part of the world they are from’.⁸⁹ Following from this therefore, it can be argued that ‘an attempt to eradicate FGC/FGM is, for those who practice it for cultural reasons, a cherished traditional norm of important cross-gender and cross-generational significance’.⁹⁰ It is therefore seen as one of the acts done in ‘fulfilment of traditional custom and must not be denigrated or criticised by those who do not subscribe to the culture’.⁹¹ Sometimes, authors who champion anti FGC/FGM campaigns are viewed as exercising features of ‘imperialism’ and ‘culture intolerance’. The issue right here is that, if the cultural practice of FGC/FGM is requested to come to an end, it would mean

⁸⁸ Alison (1988) 10 *Hum Rights Quart* 462.

⁸⁹ Nyirinkindi L “Female Genital Mutilation as a Manifestation of gender-based violence in Africa” In : *Gender-based violence in Africa: Perspectives from the Continent* (2008) 140 .

⁹⁰ Nyirinkindi (2008) 140.

⁹¹ Nyirinkindi (2008) 140.

that the people who practice this culture are asked to renounce their 'inalienable' right to culture.⁹²

Akin to the issue of cultural preservation is the dichotomy that exists between group rights and personal rights. The right to culture can be broadly categorised under group rights as opposed to human rights categorized under personal rights or individual rights. With regards to FGC/FGM, the need to fulfil cultural responsibilities in order to fit into the community and not become an outcast supersedes the individual or personal right to either consent or not, in other words, there is a drive 'for a personal undertaking to derogate from one's individual rights for the greater communal ideals'.⁹³

The advantageous characteristic of culture that is similar to that of rights is that it is 'subject to perpetual change, adaptations and reforms'.⁹⁴ It was stated at the African Parliamentary Declaration with regards to culture that, 'behaviour changes, when the dangers of harmful practices are understood'. In other words, if followers of a particular tradition see how harmful their culture/tradition is, there is a tendency for such culture/tradition to be abandoned or modified.

Sylvia Tamale affirms that although some African cultures infringe on human rights, some are 'rights-supportive, egalitarian and uplifting'.⁹⁵ In fact according to her quite a number of African cultures promote and reinforce women's rights. Meanwhile, she states that mainstream legal feminists within and outside Africa largely tend to view culture in negative terms and they also consider it an impediment to effective legal reform. Although in actual sense,

⁹² Nyirinkindi (2008) 141.

⁹³ Nyirinkindi (2008) 141.

⁹⁴ Nyirinkindi (2008) 141.

⁹⁵ Tamale (2008) *Fem Leg Stud* 49-50.

they are not entirely wrong, ‘these views have an effect of beclouding the potential that culture may possess as a liberating tool’.⁹⁶ Sometimes even, ‘feminine lawyers unconsciously pit culture against rights and inadvertently place customary in a subordinating position to statutory law’⁹⁷.

The root of this unconscious attitude can be traced to the ‘pluralist legal systems that African states inherited from colonialism which were based on a hierarchical paradigm that subjected the application of culture to the ‘repugnancy test’’.⁹⁸ The indigenous practices/culture that were not seen as being repugnant to natural justice, equity and good conscience (colonial), were said to pass the test.⁹⁹

One must however bear in mind that the right to culture is enshrined in the 1948 Universal Declaration of Human Rights and this right provides for everyone to freely participate in the cultural life of the community. ‘The right to culture is also an integral part of other fundamental rights enunciated in the UDHR such as freedom of conscience, expression and religion’.¹⁰⁰ The fact that the right to culture is enshrined however does not protect all cultures, because according to Karim and Wayland, ‘the right to culture has remained the least developed in terms of legal content and enforceability’.¹⁰¹ This can be attributed to the fact that culture is not written down, in other words it is not in any bounded document, and due to this fact it is in constant flux with new traditions, customs and experiences constantly emerging each and every day.

In relation to FGC/FGM, the most quoted article by the antagonists of the practice is the article 5 of the Universal Declaration of Human Rights, and this

⁹⁶ Tamale (2008) *Fem Leg Stud* 49-50.

⁹⁷ Tamale (2008) *Fem Leg Stud* 49-50.

⁹⁸ Tamale (2008) *Fem Leg Stud* 49-50.

⁹⁹ Tamale (2008) *Fem Leg Stud* 49-50.

¹⁰⁰ Tamale (2008) *Fem Leg Stud* 50-51.

¹⁰¹ Tamale (2008) *Fem Leg Stud* 50-51.

article provides that, 'No one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment'.¹⁰² Obiora argues that in breaking down this provision, one must take note that the meaning of torture or human dignity is relative¹⁰³. According to her, 'conceptions of human dignity tend to be indeterminate and contingent, and what may appeal to one school as torture may be absolved or approved of by another as culture'.¹⁰⁴ She goes on to state that, 'an act one may condemn as depreciative of human dignity may have been enacted by its practitioner as an enhancement of human dignity. The very act that one may construe as cruel and violative of Article 5 may be embraced in cultures where it is practised as a 'technology of the body'.¹⁰⁵ What Obiora is saying in the above quotation drives home the point that each culture is peculiar and must be given its respect. Every society is entitled to their respective cultures. What are the criteria or standard for evaluating the cultural systems of a community? In answering this question she opines that, what should be aimed at is how 'to develop a transcultural system of human rights that is sensitive to cultural ambiguities, respectful of empirical difference among cultures, and responsive to enforcement'.¹⁰⁶ This statement basically sums up the conclusion of my entire dissertation, which is the need to create a more sensitive approach in formulating international instruments used in defending various human rights. If other cultures are respected and International organizations become more sensitive to cultural ambiguities, the use of words such as 'mutilation' would not be used in describing a society's cultural practice. The use of language which is the golden thread that has been running through this entire work, not only goes a long way in showing the

¹⁰² Universal Declaration of Human Rights, art 5.

¹⁰³ Obiora (1997) 47 *Case West Res Law Rev* 277.

¹⁰⁴ Obiora (1997) 47 *Case West Res Law Rev* 277.

¹⁰⁵ Obiora (1997) 47 *Case West Res Law Rev* 277.

¹⁰⁶ Obiora (1997) 47 *Case West Res Law Rev* 278.

insensitivity of law makers in describing the procedure of FGC/FGM but also in my opinion serves as the reason why the practice is still very much in existence. The reason is because the use of violent words like ‘mutilation’ automatically sends the wrong message to practitioners of this culture and leaves them defensive of their culture.

Obiora in her work also referred to the issue of human rights falling under the umbrella of individual rights, in other words human rights regard the ‘legal subjects as an individual distinct from the community and endowed with inalienable rights.’¹⁰⁷ This is opposed to collective rights on which the right to culture is based. She opines that there is a dichotomy that is said to exist between individual rights and collective rights. She states that there is an assumption that, ‘each of these rights mutually defines the outer limits of the other, such that the right of cultural self-determination ends where individual human rights begin.’¹⁰⁸ She however states that this should not be the case. She affirms that, ‘individual and collective rights are not binary opposites. They do not merely function to threaten and reproduce each other; they can be convergent, interdependent, and mutually reinforcing.’¹⁰⁹ They should therefore not be seen as rights that are always at loggerheads. She gives the reason for this as the fact that an individual’s idea or ‘sense of humanity, self and identity’ is most times formed on the cultural background of that individual.¹¹⁰ Therefore, the respect for the human rights of an individual should include respect for their culture as well.

Therefore the focus here is to try ‘reconcile conflicting positions in the circumcision controversy by elaborating a middle course underscoring how an

¹⁰⁷ Obiora (1997) 47 *Case West Res Law Rev* 278.

¹⁰⁸ Obiora (1997) 47 *Case West Res Law Rev* 278.

¹⁰⁹ Obiora (1997) 47 *Case West Res Law Rev* 278-279.

¹¹⁰ Obiora (1997) 47 *Case West Res Law Rev* 279.

acute sensitivity to cultural context and indigenous hermeneutics balances efforts to protect the interest of women.’¹¹¹

The term ‘mutilation’ came about because critics were of the opinion that any procedure that involves, ‘any irreversible removal of a healthy organ or tissue is inherently mutilative, therefore “female genital mutilation” is the only appropriate characterization’ of such a procedure.¹¹²

This term ‘mutilation’, however over ‘emphasizes the extent of the operation and maximizes dramatic impact, while at the same time making a value judgment about the intent of those who carry it out.’¹¹³ The acronym ‘FGM’ also ‘telescopes the words, inevitably losing some of their meaning, and at the same time it objectifies the practice as if it were a rare or complicated syndrome.’¹¹⁴ While on the other hand, the use of the word ‘circumcision’ by some writes can be said to be an inaccurate way of describing the procedure. This is because ‘it implies that the surgery is equivalent to that which removes the prepuce of the penis, when it is in fact a good deal more extensive, removing as it does part or all of the clitoris, and in the case of infibulation, the totality of the external genitalia.’¹¹⁵ It is also said to give the impression that ‘any pain or harm involved is relatively minor and temporary.’¹¹⁶

The term ‘female genital mutilation’ can be said to have originated from the West. It was introduced by western observers and then some African authors who opposed the practice as well as international and regional organizations then imbibed the extensive use of the term. Prior to this as mentioned in

¹¹¹ Obiora (1997) 47 *Case West Res Law Rev* 286.

¹¹² Obiora (1997) 47 *Case West Res Law Rev* 278 289-290.

¹¹³ Obiora (1997) 47 *Case West Res Law Rev* 290.

¹¹⁴ Obermeyer CM ‘Female Genital Surgeries: The Known, The Unknown, and The Unknowable’ (1999) 13 *Medical Anthropology Quarterly* 79 at 84.

¹¹⁵ Obermeyer (1999) 13 *Med Anthro Quart* 79.

¹¹⁶ Lewis H (2009) “Female Genital Mutilation and Female Genital Cutting” in *Encyclopedia of Human Rights* by David P. Forsythe (ed) 204.

previous chapters, the procedure was first referred to as ‘female circumcision’ and this was in the 1960s. In the 1970s, the use of the term ‘female circumcision’ went viral and was even accepted by various international organizations. However, due to the above mentioned medical and health consequences of the procedure, the International Bill of Rights established a background framework against which the practice of FGC/FGM could be weighed against. This framework included the Universal Declaration of Human Rights (UDHR), The International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR). This framework provided a basis for categorizing the practice of FGC/FGM as a violation of human rights.¹¹⁷ From hence, allusions were made that FGC/FGM could be categorized as falling under the ‘harmful traditional and cultural practices’ that were mentioned in these international instruments.¹¹⁸ The term ‘female genital mutilation’ was incorporated for the first time in the year 1993 by the International instrument, Declaration on the Elimination of Violence Against Women (DEVAW). Following this, in the year 1994, the term was again directly used when referring to some harmful practices against women and this took place at the International Conference on Population and Development (ICPD) IN Cairo. In the year 1995 as well, at the Fourth World Conference on Women in the Beijing Declaration and Platform for Action, the term ‘female genital mutilation’ was once again used. Finally in the year 1996, the World Health Organization (WHO), adopted the term ‘female genital mutilation’ and used it in classifying the procedure.¹¹⁹

However, as earlier mentioned and supported by Obiora, ‘describing a vital aspect of African cultural identity as “mutilation” has proven offensive, if not

¹¹⁷ Lewis (2009) 206.

¹¹⁸ Nyirinkindi (2008) 128.

¹¹⁹ Nyirinkindi (2008) 129.

physically mutilating, to critical African constituencies like the Premier Group des Femmes D’Afrique who prefer to employ the term ‘female circumcision.’¹²⁰ Due to the many debates and controversy over the right term to use in describing the procedure, I came to the conclusion that there is a need to have a middle meeting point, hence the reference to the practice as ‘female genital cutting’ in this chapter.

3.8 Conclusion

This chapter has attempted to unpack the intricacies of cultural practices as well as unpack what FGC entails as a cultural practice. An in-depth examination of the practice of FGC does not only show what the practice means to its practitioners but also its significance. Showing its significance helps to understand the mind-set of the people engaged in this practice and the rationale behind the practice. Understanding this set of people allows one to see the need for reconciling the various conflicting positions on the issue of FGC/FGM and the need to make efforts at accommodating other cultures. The dichotomy of the terms, female genital cutting and female genital mutilation helps in seeing the need for a more sensitized approach in giving the practice a befitting name. Although, the fact that FGC is described as a cultural practice that should be respected does not mean that the practice does not limit a number of human rights. In other words, I do not support the brutality involved in the process of carrying out the practice of FGC/FGM, but opine that it should be respected as a cultural practice but carried out in a way that does not limit human rights. The next chapter will go into details in providing a detailed list of the various human rights violated by the procedure.

¹²⁰ Mary Daly, ‘Gynaecology: The Metaethics of Radical feminism. 1978, as quoted by Obiora (1997) 291.

CHAPTER FOUR

FEMALE GENITAL MUTILATION AS A HUMAN RIGHTS VIOLATION

4.1 Introduction

The main research problem that runs through the entire study is the proposition for a cultural transformation of the parties that practice Female Genital Cutting (FGC) or Female Genital Mutilation (FGM) in order to make the practice to be in line with human rights. In achieving this, the examination and reflection on the use of the terms Female Genital Cutting (FGC) or Female Genital Mutilation (FGM) to describe the procedure female circumcision, or the removal of the external female genitalia or other injury to the female genital organs has been dealt with. I investigate how the terms and the language that we use to describe this practice relate to viewing it as either a Cultural Practice or as a violation of Human Rights. I focus on the use of language and terminology in looking at the responses at the attempts made at eradicating the practice and possible recommendations. The research question I focus on in this chapter is why Female Genital Mutilation (FGM) could be considered as a violation of human rights as opposed to Female Genital Cutting as a form of cultural practice as well as reasons for its perpetual existence.

Human Rights can be described as an umbrella term that describes rights that are fundamental to all human beings, irrespective of where they are from or where they reside or their sex or religion. These rights are not static, but are dynamic and they are developed with time. Female Genital Mutilation as it was called by the World Health Organisation (WHO), from its definition violates

quite a number of human right, hence the reason why it is named a 'mutilation' and referred to as a harmful cultural practice. In order to reflect on the question of whether female circumcision should be seen as a cultural practice or a human rights violation this chapter addresses the following sub questions: what does human rights entail?; what are the benefits of having human rights? And what are the limitations of human rights in different societies? I consider also the question of what various human rights the practice violates. The 'language' of human rights and the extent to which it may have assisted in either eradicating the practice or creating a strong resistance to the eradication attempts on the practice of FGC/FGM is reflected on.

The chapter unfolds as follows: I start off with a brief introduction of rights. I then address the issue of human rights, starting with its origin followed by a discussion of its benefits and limitations. After which I discuss several human rights violated by the practise and explain why it is a harmful traditional practise according to the World Health Organisation. I end the chapter by discussing the various factors that have been put forward as reasons for the continued existence of the practice.

4.2 A Brief Discussion of Rights and Human Rights

In understanding how the practice of FGM violates human rights, a thorough understanding of what human rights means should be looked at. And before one can rightly delve into what human rights entails, one must firstly look at the definition of rights. Referring to FGM as a violation of human rights insinuates that the entire practice from its mildest form to its most extreme form is in contravention of human right provisions. I commence by describing

what the word 'right' means. The word 'right' is quite an ambiguous word which can be related to several things or which can be said to mean several things. One must however differentiate between the word being used as a noun or as an adjective, or a 'right' as 'something one has as well as a 'right' as a description of a moral act'¹. The word 'right' in English, can be said to have two meanings in the moral and political senses, which are "rectitude" and "entitlement" respectively.² 'Rectitude' can be explained as, 'the right thing to do' or of something being right (or wrong)'.³ With regards to entitlement, one speaks 'of someone having a right'⁴. The type of right that I focus on in this write-up is the 'idea of a right as a moral possession or as a 'normative property'.⁵ A right can be said to consist of five elements which are, "A right-holder (the subject of a right) has a claim to some substance (the object of a right), which he or she might assert, or demand, or enjoy, or enforce (exercising a right), against some individual or group (the bearer of the correlative duty), citing in support of his or her claim some particular ground (the justification of a right)."⁶

The five elements of a right is explained as follows: Firstly, the subject or the holder of the right might be an individual , a group, a family, a tribe, a company, a nation, a state, a region, a culture, or even the globe (the world). With recent development and research, it has been found out that not only human beings have rights, even animals, plants, rocks and buildings have rights.⁷ In other words, living and non-living things can be holders of rights. The second element which is the object of a right can be described as, 'what it is a

¹ Vincent RJ *Human Rights and International Relations* (1986) 6.

² Donnelly J *Universal Human Rights in Theory and Practice* (2013) 7.

³ Donnelly (2013) 7.

⁴ Donnelly (2013) 7.

⁵ Donnelly (2013) 7.

⁶ Vincent (1986) 6.

⁷ Vincent (1986) 6.

right to’, meaning the object of a right is ‘the object to be protected and is an interest whose great importance is marked by the attachment of the label right’.⁸ The third element which is exercising a right can be described as ‘the activity which connects a subject to an object’.⁹ This can be further broken down into four categories which are; firstly ‘claiming that the right exists in the sense of a claim as a call for the acceptability of something admittedly contestable’, secondly, this entails ‘confidently asserting or demanding a right’, the third category entails ‘claiming in the sense of cashing a right and lastly, the fourth category entails ‘merely enjoying a right’. The last one is a more relaxed form of exercising one’s right.¹⁰

Rights can also be ‘held against someone or something’. For example, ‘the right of a lender to the replacement of a debt is held against the borrower’. This is referred to as the ‘*right in personam*’. The reason why this term was coined is because it ‘correlates with a specific duty of a particular person’.¹¹ Likewise ‘the right of a property owner to exclusive enjoyment of his or her property is held against any person (this is sometimes called a *right in rem* because it correlates with the duty of no specific individual but with a general duty of non-interference)’.¹²

Deducing from the above, what then are human rights? The difference here is that the word, ‘human’ has been added to the word ‘right’ and this signifies that everybody (that is every human) has rights. Jack Donnelly also defines human rights as ‘the rights of man’ or literally as the rights that one has because one is human.¹³ Human rights are equal rights: one either is or is not

⁸ Vincent (1986) 6.

⁹ Vincent (1986) 6.

¹⁰ Vincent (1986) 8.

¹¹ Vincent (1986) 9.

¹² Vincent (1986) 9.

¹³ Donnelly (2013) 7.

a human being, and therefore has the same human rights as everyone else (or none at all).¹⁴ This is one of the many characteristics of human rights. Donnelly further reiterates that human rights are inalienable rights as it is simply impossible for one to stop being human. The bearers of these rights are all human beings irrespective of their society, background or nationality. In other words the bearers of human rights are the members of the ‘community of humankind’.¹⁵ Although not all members of the human race has full membership. For example, the underage and insane people (those who are mentally challenged) cannot be categorised as members with full membership. However, the main element that qualifies one for human rights is to ‘belong to the human race’.¹⁶ In further discussing human rights, it must be noted that the objects of human rights are of utmost importance. These are the group on whom human rights are exercised upon. Human rights can also be said to override mere rights. For instance, the ‘human rights to life may be judged to outrank, in a situation where there is a contest between them, a right under a particular civil law, say, to the use of land’.¹⁷ Human rights in this sense are referred to as absolute rights. Although, when we say absolute rights, we don’t mean that human rights are insurmountable, it only means that they are of ‘the greatest importance’.¹⁸

Another element of human rights is that they ‘have a more restricted range than that of civil rights’.¹⁹ Most times human rights are consulted when ‘the claims they encompass are not locally acknowledged in positive law.’ In other words, when a particular claim is not catered for locally in the laws of a

¹⁴ Donnelly (2013) 10.

¹⁵ Donnelly (2013) 10.

¹⁶ Donnelly (2013) 10.

¹⁷ Donnelly (2013) 10.

¹⁸ Vincent (1986) 10.

¹⁹ Vincent (1986) 10.

particular state, human rights is applied. One problem that has however plagued human rights for a while now is the issue of enforcement. I return to this issue in later paragraphs as ‘the limitation of human right’. The issue of lack of enforcement is very important because in the absence of enforcements, sceptics have doubted the true existence of human rights. The reason is because, this group of sceptics ‘take enforcement to be the mark of any rights’ What must however stay at the back of our minds in all of this is that it is quite possible ‘to have a right to something without the right being enforced’.²⁰ For example, Jack Donnelly gave an analogy that if a car was stolen, and the thief was not caught, the owner still has the right to the car even though the right could not be enforced at that moment.²¹ He went further by terming this the ‘possession-paradox’, where a person can be said to have the right to a thing but does not have the thing in the literal sense of enjoying the particular thing. This he claims ‘is the characteristic of human rights’.²²

It has also been argued with regards to human rights that it can be seen as a universal human right in a strong sense and universal human rights in a weak sense. Universal human rights ‘in the strong sense are held against everybody else, while universal human rights in the weak sense are held against a particular section of humanity’.²³ This means that when human rights are applied to only a section of the community, then it is referred to as universal human rights in the weak sense. For instance, with regards to FGM, if the right to bodily integrity only applies to men and leaves women and children out, then what is in operation is universal human rights in the weak sense.

²⁰ Vincent (1986) 10.

²¹ Vincent (1986) 10.

²² Vincent (1986) 10.

²³ Vincent (1986) 10.

Human rights as aforementioned, is an umbrella term that describes rights that are fundamental to all human beings. An important point that must be considered here is that culture and human rights are contingents; in other words they mean different things to different people and they are socially constructed by people. Rights and culture have similar elements and are intertwined. Human rights are seen as coming from the West and Culture is seen as an African concept.

With regards to FGM, this practice can be seen as violating one of the provisions of the Universal Declaration of Human Rights (UDHR), which is a compilation of various human rights principles. The UDHR has as one of its provisions the right to be free from torture or cruel inhuman or degrading treatment.²⁴ FGM is seen as a violation of this provision because the practice of FGM involves some degree of torture. The UDHR is expected to protect every human being including women and children as a result of them being 'human'. Human rights as earlier mentioned, accrues to every human by virtue of them being human. Human rights are equal rights and should not discriminate on the basis of sex.²⁵ Therefore a woman should not be expected to undergo FGM while her human rights are ignored just because she is female.

The fact that human rights are inalienable rights means that a human being is entitled to be a bearer of human rights as long as they remain human. This can be translated to mean, with regards to FGM, that a woman's right to bodily integrity should not be alienated in a bid to comply with the cultural practice of

²⁴ Universal Declaration of Human Rights art 5.

²⁵ Donnelly (2013) 10.

a community because as long as one belongs to a human race, he/she is entitled to human rights.²⁶

It can also be argued that since human rights are referred to as ‘absolute rights’ or ‘rights of the greatest importance’, they can over-ride ‘mere’ rights. For instance, human right to life and bodily integrity can be said to out-rank the right to a culture such as FGM. However, as earlier mentioned, since culture and rights are contingent, is there a way to link the two? Can there be a meeting point between culture and rights? The next chapter attempts to address these questions. However, the following sub-topic deals with the limitations of human rights and touch on some of its benefits.

4.3 Limitations of Human Rights

It is basic knowledge that for every law, there are limitations, likewise the human right laws that have been put in place to curb FGM. In the case of human rights, national law has the duty of not only implementing the many rights outlined in the various human rights instruments but also establishing limits to the scope of human rights. In other words, state parties have the discretion of interpreting the various covenants that they are members of. Several references are made to national law in the Universal Declaration of Human rights and various other Covenants. For example, these references appear ‘as demands that the competence of criminal courts be established by law that the law provide protection against certain interferences with some rights, or that restrictions on a particular right be only prescribed by law’²⁷

States, by way of clauses placed in the Universal Declaration of Human Rights and covenants are usually authorized to place restrictions upon human rights,

²⁶ Donnelly (2013) 10.

²⁷ Garibaldi OM ‘General Limitations on Human Rights: The Principle of Legality’ (1976) 17 *Harvard International Law Journal* 503 at 504-505 .

whether on a general or a particular basis. ‘In most of these clauses, national law is referred to by recourse to one of four distinguishable formulae: (i) “determined [or ‘provided’ or ‘prescribed’ or ‘required’ or ‘established’] by law;” (ii) “Lawfully;” (iii) “according to” [or ‘in accordance with’ or ‘in conformity with’] law;”²⁸ and (iv) “under law”.²⁹

The most frequently used phrase with regards to national law is the phrase “determined by law”. This phrase is seen to appear ‘in the general limitations clauses of both the Universal Declaration and the Covenant on Economic, Social and Cultural Rights, and in the majority of the particular limitation clauses contained in the Covenant on Civil and Political Rights’.³⁰ It will therefore be just to ‘employ this formula as the vehicle for introducing the concept of the principle of legality’.³¹ To buttress this point, art 29, paragraph 2 of the Universal Declaration of Human Rights states that,

[I]n the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are *determined by law* solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.³²

The fact that this clause exists, ‘determined by law’, means that any national law, irrespective of its nature will satisfy this requirement. The “principle of

²⁸ Universal Declaration of Human rights, art 11(1); in the Covenant on Economic, Social and Cultural Rights article 8(1)(d) and in the Covenant on Civil and Political Rights article 6(2), 13, 14(2), 7, 15(2), 21.

²⁹ Garibaldi (1976) *Harv Int L J* 504, See also, article 29(2) of the Universal Declaration; in the Covenant on Economic, Social and Cultural Rights, articles 4, 8(1)(a), 8(1)(c); and in the Covenant on Civil and Political Rights in articles 8(3)(c)(i), 9(4), 9(5), 12(1), 13, 17 of the third. The expression “under law” appears only in article 15(1) of the Covenant on Civil and Political Rights.

³⁰ Garibaldi (1976) *Harv Int L J* 505.

³¹ Garibaldi (1976) *Harv Int L J* 505.

³² Universal Declaration of Human Right, art 29(2).

legality” however comes to surface at this point. This expression can be described as ‘the requirement that an individual command (such as a court judgment or an administrative act) be so related to a higher law in the same system that the former would not be considered valid as to both origin and content were it not for the existence of the latter’.³³ In other words, ‘if legal systems have a hierarchical structure, if two logically inconsistent norms cannot both be valid, and if inconsistency between higher and lower norms should be resolved by appeal to the principle *lex superior derogat inferiori*, it seems inescapable that the principle of legality inheres in every legal system’.³⁴ Therefore following this reasoning would be that no undesirable law can encroach on human rights.

This reasoning could however be faulted in two important ways. Firstly, ‘it is highly doubtful that the principle of legality inheres in our notion of a legal system, because we can conceive of an order in which (i) only individuals norms would have substantive contents, that is, only judgments, administrative acts and perhaps also contracts would determine which actions are permitted, obligatory, or prohibited; or (ii) even though higher norms prescribe contents for individual commands, no procedure would be established for review and invalidation of those commands that do not conform to such higher rules.’³⁵

The second objection to the above reasoning would be that even if the above mentioned ‘principle of legality’ were seen in all legal orders that are in existence, one would still have to prove that it indeed exists and operates in all areas of existing laws. In other words, the fact that the principle is seen as a

³³ Garibaldi (1976) *Harv Int LJ* 506.

³⁴ Garibaldi (1976) *Harv Int LJ* 506.

³⁵ Garibaldi (1976) *Harv Int LJ* 506.

necessary or important condition for ‘the notion of a legal system’ does not automatically translate this ‘condition would govern the validity of every single particular command in the system’.³⁶

From the above, it is easy to deduce that, in as much as there are various human rights instruments that enforce human rights, these rights are not all together absolute. In other words, the mere fact that there are provisions declaring the practice of FGM as a violation of human rights does not absolutely mean the practice should be condemned and eradicated. State parties still have the discretion of deciding whether or not they view this cultural practice as a violation of human rights. Human rights are therefore limited by some other ‘laws’ and some societal factors (culture and traditions).

4.4 Benefits of Human Rights

Are human rights truly beneficial in any way? Can it be said that international law truly constrain State behaviour? On the international level, the United Nations which is the custodian of human rights seeks to ‘save generations from the scourge of war, to establish conditions under which justice can be maintained and to reaffirm faith in fundamental human rights’.³⁷ Human right treaties can therefore be said to be beneficial because they assist in preventing the creation of ‘victims’ and in doing this, they enable the state ‘to avoid depriving, to protect deprivation, and to aid the deprived’.³⁸ In relation to FGM, human rights can be said to be a form of protection ‘of the inherent dignity and worth of the potential victim’.³⁹ In other words, women who do not want to undergo the procedure can protest under human rights dictates

³⁶ Garibaldi (1976) *Harv Int LJ* 506.

³⁷ Mutua M *Human Rights: A Political & Cultural Critique* (2002) 28.

³⁸ Mutua (2002) 28.

³⁹ Mutua (2002) 28.

that they do not want to undergo FGM thereby safeguarding their dignity and self-worth.

According to Hathaway, treaties operate on more than one level simultaneously.⁴⁰ They create binding law that is intended to have particular effects, and they express the position of those countries that join them. She further affirms that this dual role of treaties is what leads to the ‘paradoxical patterns of interaction between human rights treaty ratification and human rights practices’.⁴¹

Usually when treaties that member states have entered into are not enforced, there is no prescribed penalty and no actual change in state practice.⁴² In Hathaway’s opinion, once a State ratifies a human rights treaty, ‘international actors (including states and non-governmental organizations) reward ratifying states by reducing political pressure to promote human rights standards; thereby actually increasing human rights violations’.⁴³

Human rights treaties have however not been of much benefit because they are, ‘minimally monitored and enforced’.⁴⁴ The reason is because, ‘there are little incentives for ratifying countries to make the costly changes in actual policy that would be necessary to meet their treaty commitments’.⁴⁵

The above deduction does not mean that human rights have no benefits whatsoever. Ratified treaties most times ‘lead to more aggressive enforcement by UN Charter-based bodies, which may take action against ratifiers and non-

⁴⁰ Hathaway OA ‘Do Human Rights Treaties Make a Difference?’ (2002)111 *The Yale Law Journal* 2020.

⁴¹ Hathaway (2002) 111 *The Yale L.J.* 1935 at 2019.

⁴² Hathaway (2002) 111 *The Yale L.J.* 1935 at 2019.

⁴³ Hathaway (2002) 111 *The Yale L.J.* 1935 at 2019.

⁴⁴ Hathaway (2002) 111 *The Yale L.J.* 1935 at 2021.

⁴⁵ Hathaway (2002) 111 *The Yale L.J.* 1935 at 2021.

ratifiers alike'.⁴⁶ Also member states of human rights treaties have a duty to maintain and uphold the treaties they have ratified. These treaties also help 'influence individual countries' perceptions of what constitute acceptable behaviour' with regards to the laws of these states.⁴⁷

With regards to FGC/FGM, the following subtopic lists the various rights infringed upon by the practice, as well as the various legislations that have been put in place.

4.5 Various Instruments put in place to curb FGC/FGM

Among the many practices and cultures that subjugate women or put them in a subservient role is the practice of FGM and it ranks as one of the extremes. Some of the other practices and cultures include the burning of Indian widows, the binding of the feet of Chinese female children, breast ironing in Cameroun and female infanticide.⁴⁸ Over the years, women have been seen to continuously submit themselves to these practices because they have come to believe that they belong to this subservient position they have been put in, in patriarchal societies.

FGM as a practice violates a number of human rights and children's rights. The aim of this chapter is firstly to focus on these violations. In 1979, the United Nations (UN) General Assembly adopted the Convention on the Elimination of All Forms of Discrimination Against Women. This Convention came into force in September 1981. The Convention 'calls for equal rights for women,

⁴⁶ Hathaway (2002) 111 *The Yale L.J.* 1935 at 2021-2022.

⁴⁷ Hathaway (2002) 111 *The Yale L.J.* 1935 at 2021-2022.

⁴⁸ Dorkenoo E *Cutting the Rose: Female Genital Mutilation, The Practice and its Prevention* (1994) 55. See also 'Harmful Practices'. www.en.wikipedia.org. Assessed on the 30th July, 2014.

regardless of their marital status, in all fields- political, economic, social, cultural and civil'.⁴⁹ Article 5 of the Convention states,

All appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or superiority of either of the Sexes or on stereotyped roles for men and women.⁵⁰

The UN World Human Rights Conference which took place in 1993, gave birth to the Vienna Declaration also laid emphasis on the rights of women and the girl-child, part two, paragraph 9,

The human rights of women and of a girl-child are an inalienable, integral and indivisible part of universal human rights.

Furthermore, the human rights of children especially those of the girl child are violated by the practice of FGM. This is as a result of the fact that FGM is mostly performed on infants and young children. An issue that is very disturbing is the fact that consent of these children are not gotten before the procedure is carried out on them. A female adult on the other hand can decide to submit herself for the procedure to be carried out on her. According to Van Buuren, if the procedure is done without the consent of the girl then the act can be said to constitute torture.⁵¹ The issue of consent is therefore very crucial, because the infant or young child who knows nothing about the procedure and who has 'no informed judgement' about the procedure is operated upon while she is vulnerable and this procedure which is irrevocable leaves a permanent damage and scar.⁵² Most of these children are even taken

⁴⁹ Dorkenoo (1994) 55.

⁵⁰ Art 5, Convention on the Elimination of All Forms of Discrimination Against Women 1981.

⁵¹ Banda F *Women, Law and Human Rights' An African Perspective* (2005) 220.

⁵² Dorkenoo (1994) 56.

by surprise. They are lied to and then held down against their will. As described by several authors, the reactions of the children vary from panic and shock to the extreme pain they are experiencing, to biting through their tongues, to convulsion, to death.⁵³ Usually, it takes up to six to eight adults to hold down an eight year old girl. Sometimes, the girl suffers injuries such as fractures of the clavicle, femur or humerus as a result of her struggling with those holding her during the procedure.⁵⁴

Article 5 of the Universal Declaration of Human Rights is violated by the practice of FGM. It provides that, 'no one shall be subjected to torture or cruel, inhuman or degrading treatment'.⁵⁵ This article is obviously violated as severe torture is at the centre of this practice. The practice of FGM can also be said to be cruel, inhuman and very degrading especially if some of the reasons given for its continued existence are put into consideration.

Article 21 of the African Charter on the Rights and Welfare of the Child also stipulates that,

States parties to the present Charter shall take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child and in particular:

- a) Those customs and practices prejudicial to the health or life of the child; and
- b) Those customs and practices discriminatory to the child on the grounds of sex or other status.⁵⁶

⁵³ Olomola O 'Unending Harmful Tradition Shrouded In Secrecy; Female Genital Mutilation' in Nwagwu HO *et al* (ed) *Women Issues in Nigeria*. Nigeria (2009) 71.

⁵⁴ Olomola (2009) 72-73.

⁵⁵ Olomola (2009) 72-73.

⁵⁶ African Charter on the Rights and Welfare of the Child.

From the above, one can tell that FGM violates quite a number of women and children's rights. These rights will be dealt with under the following categories;

- The Right to health
- The Right to be free from cruel and degrading practices
- The Right to sexual and corporal integrity, and
- The Right to reproduce⁵⁷

FGM as a practice is not only a violation of human rights, but it is torturous and deadly. In order to prevent or eradicate the practice, one has to look closely at the reason for its continued existence, because simply condemning the practice cannot be effective. The use of laws to outright condemn the practice can in a way lead to strong defensive actions from the apostles of this practice. Several times, the referral to the practice by those against the practice as, 'barbaric' and 'backward' has led to strong reactions from those who are in support and those practicing FGM.⁵⁸ This has made them to vehemently defend their tradition against those condemning it. The reason is that followers of this tradition deem the antagonists of this practice, especially those from the western world, as colonial criticism and a form of cultural imperialism. An anthropologist known as Jomo Kenyatta, who later became president of Kenya argued in his book, *Facing Mount Kenya* published in 1938 in favour of FGM and categorically referred to British Colonial criticism of FGM as a form of imperialism.⁵⁹

Also at the 1975 International conference in Denmark, which was sponsored by the United Nations for the International Decade for Women, the issue of FGM was one of the main issues dealt with and it became a big controversy when

⁵⁷ Female Genital Mutilation: Policy and Guidelines for nurses and midwives. World Health Organization. (2001) 39.

⁵⁸ Banda (2005) 212-213.

⁵⁹ Gruenbaum E *The Female Circumcision Debate; An Anthropological Perspective*. (2001) 25.

some of the African women present at the Conference became outraged at the way some antagonists of the practice such as Frans Hosken condemned the practice of FGC/FGM. Frans Hosken who is a non-African political activist was 'accused of inappropriate cultural interference'.⁶⁰

After considering the conventions put in place to curb the practice of FGM, I reflect on some of the human rights infringed on by the practice as well as reasons why this tradition is still in existence.

4.6 FGM as an Infringement of rights.

4.6.1 The Right to Health

The procedure as explained in the chapter above and the consequences (both immediate and long term) of this practise are life threatening. Its inherent nature is in itself life threatening and risky. It can lead to death and several times it has led to death.⁶¹ In Sudan for example, doctors have estimated that about one third of the girls that undergo the procedure do not survive it. It usually results in death. The reason is because due to the poor condition and unhygienic surroundings under which the procedure is performed, it can lead to haemorrhage, infection, shock and other severe complications. In fact it has been found out that infant mortality rates highest in the countries that practice FGM.⁶² FGM is also said to increase the risk of contracting HIV. The reason for this is the use of the unsterilized instrument that is used on several girls at the same time. This increases the chance of spreading this grave disease and other communicable diseases.⁶³

⁶⁰ Gruenbaum (2001) 25.

⁶¹ Alison TS 'Female Circumcision: A Critical Appraisal' (1988) 10 *Human Rights Quarterly* 451.

⁶² Alison (1988) 10 *Hum Rights Quart* 451.

⁶³ Olomola (2009) 73.

According to Dr Mark Belsey of the division of family health, World Health Organization, Geneva, 'there is no single practice which has such a dramatic negative effect on health in the broadest sense as female genital mutilation'⁶⁴. In other words, whether immediate, long-term or short term, the consequences of FGM are usually very grave.⁶⁵

The Universal Declaration of Human Rights (1948) provides for the right for all human beings to live in a condition that enables them to enjoy good health and health care. Article 3 specifically provides for the right to life, right to liberty and right to security of person.

The United Nations Convention on the Right of the Child 1989 protects children from female genital mutilation. Article 24(1) state that parties should recognise the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. Also state parties have the duty to take appropriate measures to reduce infant and child mortality. Article 2(f) further requires parties to develop preventative health care, guidance for parents and family planning education and services. Article 24(3) makes it even clearer by stating that, 'state parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children'.

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) which was adopted in 1979 by the UN General Assembly is often times described as 'an international bill of rights for women'.⁶⁶ Article 12(1) of this Convention stipulates that state parties 'eliminate discriminations

⁶⁴ Dorkenoo (1994) 13.

⁶⁵ Dorkenoo (1994) 13.

⁶⁶ www.un.org/womenwatch/daw/cedaw.

against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.⁶⁷

The African Charter on the Rights and Welfare of the Child, adopted in 1990 by the Organization of African Unity (OAU) gives the protection to the rights of children stipulated in the Convention.⁶⁸ The Charter also protects the child against FGM. Article 14(1) of the ACRWC states that, ‘every child shall have the right to enjoy the best attainable state of physical, mental and spiritual health.’⁶⁹

Article 21 of the ACRWC also states that State parties ‘shall take all appropriate measures to eliminate harmful, social and cultural practices affecting the welfare, dignity, normal growth and development of the child and in particular (a) those customs and practices prejudicial to the health or life of the child; and (b) those customs and practices discriminatory to the child on the grounds of sex or other status.

FGM is in absolute violation of this right, because not only is it prejudicial to the health of the girl child, it is also discriminatory to the child on the grounds of sex.

The African Charter on Human and People’s Right (also known as the Banjul Charter) states in article 16 that, ‘every individual shall have the right to enjoy the best attainable state of physical and mental health’. Every individual in this stance includes men, women and children. Furthermore article 18(3) stipulates that ‘the State shall ensure the elimination of every discrimination against

⁶⁷ Convention on the Elimination of All Forms of Discrimination Against Women 1979.

⁶⁸ Hereinafter referred to as ACRWC.

⁶⁹ Art 14 (2)(a).

women and also ensure the protection of the rights of women and the child as stipulated in international declarations and conventions'.⁷⁰

4.6.2 The Right to be Free of Cruel and Degrading Practices

FGM as a practice infringes on the dignity of women and metes out degrading treatments to girls and women. Quite a number of the United Nations instruments provide that States should protect the rights of women and girls and to ensure freedom from degrading and cruel treatment.

The Universal Declaration of Human Rights states in article 5 that, 'no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'. Article 22 further states that 'everyone, as a member of society, has the right to... social and cultural rights indispensable for his dignity and the free development of his personality'. The practice of FGM can be said to violate these provisions in the sense that, the practice involves to an extent a level of torturous and inhuman treatment. Torture can be literally defined as the 'the act of inflicting excruciating pain'.⁷¹ The procedure of FGM inflicts pain that sometimes leads to his recipients passing out.⁷² Article 1 and 3 of the Universal Declaration of Human Rights also protect the right to physical integrity. The right to physical integrity includes the following rights; the right to freedom from torture, inherent dignity of the person, the right to liberty and security of person and the right to privacy. FGM due to its nature interferes with a woman's right to physical integrity, privacy and dignity.

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1989) defines in Article 1 the meaning of the word,

⁷⁰ The African Charter on Human and People's Rights.

⁷¹ www.dictionary.reference.com.

⁷² Iribemwangi PI *Human Rights, African values and Traditions: An Inter-disciplinary Approach*. (2011) 57.

‘torture’. Torture here is described as ‘any act which causes severe pain or suffering, whether physical or mental’, that is intentionally inflicted on a person, ‘for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity...’.⁷³ FGM from its definition can be said to fall into this category as it causes severe pain and suffering, both physically and mentally. It is an invasive procedure that does not require the consent of the involved party.⁷⁴

In line with the protection of children, article 37(a) of the Convention on the Rights of the Child (1989) also provides that State parties have the responsibility of ensuring that ‘no child is subjected to torture or other cruel, inhuman or degrading treatment or punishment’.⁷⁵ This section is of utmost importance because FGM is predominantly carried out on children under the age of 18, therefore the protection of children’s rights have gained more awareness.⁷⁶ The Convention on the Rights of the Child (1989), in article 5 places the responsibility of protecting the child in the hands of the government, although parents are seen as having the sole duty of making decisions for their children. Article 3 of the same Convention provides for considering the ‘best interests of the child’ when taking decisions on behalf of the child.⁷⁷

Article 5 of the African Charter on Human and People’s Rights also protects the rights of girls and women with regards to torture, cruel and inhuman treatment. The Charter states that, ‘every individual shall have the right to the

⁷³ The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1989.

⁷⁴ www.endawnow.org/en/articles ‘Sources of International Human Rights law on Female Genital Mutilation’

⁷⁵ The United Nations Convention on The Rights of the Child.

⁷⁶ www.endawnow.org/en/articles ‘Sources of International Human Rights law on Female Genital Mutilation’

⁷⁷ Article 3 of the Convention on the Rights of the Child, 1989.

respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited'.⁷⁸

4.6.3 The Right to Sexual and Corporal Integrity

The right to sexual and corporal integrity includes the right to life, right to liberty and security of person. The practice of FGM contravenes these rights. Sometimes this procedure leads to death, thereby infringing on the right to life. FGM is a practice that is 'seen as a form of castration that removes the women's organ of sexual pleasure and in so doing violates their fundamental rights'.⁷⁹ The practice of FGM is said to curb the sexual gratification of women.⁸⁰ This infringes on the woman's right to sexual integrity.

The right to liberty is also infringed upon, as most times these girls are deceived or caught unawares and the procedure is performed on them without their consent. The Universal Declaration of Human Rights under article 3 provides that 'everyone has the right to life, liberty and security of person'⁸¹.

Article 1 of the Convention on the Elimination of All Forms of Discrimination against Women 1979 defines the term discrimination as meaning, '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,

⁷⁸ African Charter on Human and People's Rights.

⁷⁹ Rogaia MA *Female Circumcision: Multicultural Perspectives* (2006) 11.

⁸⁰ Rogaia (2006) 11.

⁸¹ The Universal Declaration of Human Rights. www.un.org/en/documents/udhr.

economic, social, cultural, civil or any other field'.⁸² The procedure of FGM falls into this category in the sense that it is a practice that is directed at women and female children. It is a practice that also permeates the notion of women's subordinating role to men. The fact that this tradition is a prerequisite for marriage that only affects women, confirms its discriminatory characteristic.⁸³

Article 16(1) of the Convention on the Elimination of All Forms of Discrimination Against Women stipulates that 'States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure , on a basis of equality of men and women'. In other words it is a violation of this right if a woman is not considered suitable for marriage because she has not undergone FGM. While on the other hand if she refuses to undergo the procedure she is most likely to face more discrimination and the pains of being ostracised.⁸⁴

The African Charter on Human and People's Rights (1981/1986) also protects the rights to sexual and corporal integrity of women and girls. In its article 4, it stipulates that, '...Every human being shall be entitled to respect for his life and the integrity of his person...'. Article 6 further states that, 'every individual shall have the right, to liberty and to the security of his person.'

The burden is upon each state to protect its women and children against the infringements of their rights. Article 18 of the African Charter on Human and People's Rights states that, 'the state shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of

⁸² Article 1 of the Convention on the Elimination of All Forms of Discrimination Against Women. 1979.

⁸³ www.endvawnow.org/en/articles 'Sources of International Human Rights law on Female Genital Mutilation'.

⁸⁴ www.endvawnow.org/en/articles 'Sources of International Human Rights law on Female Genital Mutilation'.

the women and the child as stipulated in International declarations and conventions'.⁸⁵

4.6.4 The Right to Reproduction

Upon a critical look at the effects of FGM, especially the long term effects, it has been discovered that FGM in particular, infibulation (which is the most severe form of FGM) causes infertility. In other words infibulation violates the right of women to reproduce.

A general recommendation was adopted by the Convention on the Elimination of All Forms of Discrimination Against Women in 1994 and this recommendation was on equality in marriage and family relations. It entitled women to have equal rights in marriage and in deciding on the number of and spacing of their children.⁸⁶ The organs that are responsible for reproduction or that can be said to aid reproduction are affected during FGM.⁸⁷ For example in Sudan, a survey was carried out and it was found that 'thirty percent of the circumcised women that were questioned had experienced fertility problems.'⁸⁸ Also during childbirth, it sometimes leads to the death of the child and mother.⁸⁹ The reason is that during birth, the woman has to be 'deinfibulated' prior to delivery. This means that, women who have had the most severe form of FGM (infibulation) performed on them needs to be 'opened up'. Therefore if an experienced attendant or midwife is not available to 'de-infibulate' the woman, obstructed labour can occur which can lead to severe

⁸⁵ Heyns and Killander *Compendium of Key Human Rights Documents of the African Union* (2013) 33.

⁸⁶ Art 16 (1) of the Convention on the Elimination of All Forms of Discrimination Against Women. See also WHO;2001:33.

⁸⁷ Alison (1988) 10 *Hum Rights Quart* 466.

⁸⁸ Alison (1988) 10 *Hum Rights Quart* 452.

⁸⁹ Alison (1988) 10 *Hum Rights Quart* 453.

complications for mother and child. This can further lead to the woman having a still birth or even losing her life in the process.⁹⁰

4.7 Limits of the above Documents in protecting women against FGM

Laws put in place to curb FGM often fail as this practice is still in existence. In other words despite the increasing awareness of the harmful and negative consequences of this practice, the culture of FGM is still being practiced in several communities.⁹¹ According to Lightfoot-Klein, the reason is because many parents are unaware of the harmful physical and psychological consequences of the custom. This is either the case or several of these parents believe that irrespective of the 'so-called' harmful effects of the practice, the culture helps to promote a female child's integration into the society.⁹²

4.8 Reasons for the continued existence of FGM despite laid down laws

There are several factors that can be held responsible for the continued existence of the practice of FGM such as economic factors, social and family pressure, religion and the patriarchal repression of female sexuality. These factors will be dealt with as follows.

4.8.1 Economic Factors

Amongst other factors that contribute to the continuation of FGM, the economy of the practising community is a very strong factor. The reason is because in most of the African countries where FGM is practiced, 'marriage is

⁹⁰ Boyle EH *Female Genital Cutting; Cultural Conflicts in the global Community* (2002) 34.

⁹¹ Osinowo HO & Taiwo AO 'Impact of Female Genital Mutilation on Sexual Functioning, Self-esteem and Marital Instability of Women in Ajegunle' (2003) 11 *An International Journal of Psychology in Africa* 124.

⁹² Osinowo HO & Taiwo AO (2003) 11 *Afr Jnl of Repr Heath* 123 at 124.

the only hope that women have for social and economic survival'.⁹³ The economic situation of these African countries in addition to poverty, illiteracy, hunger, ill-health and low status of women compound the situation in which the woman finds herself.⁹⁴ To be qualified for marriage in these communities, the woman must have undergone FGM. A woman who has not undergone FGM is not sought after in marriage due to her 'non-circumcised' status. She is left to wallow in poverty. She is neglected by the same society that is supposed to be responsible for her survival.⁹⁵ Also in many of these communities, women can only have access to land and property through the male members of the family. In other words, they cannot directly inherit land or property. The male primogeniture rule is in existence in most African states. A woman is not entitled to inherit from her father's house. She can only be entitled to property through marriage. Marriage in these places is strongly linked to chastity, virginity and fidelity. Therefore the only way to ensure that this requirement of marriage is fulfilled is through FGM as far as these communities are concerned.⁹⁶ For example in Nigeria, a bride price cannot be obtained if the bride is not 'pure'. Therefore FGM helps the potential mother-in-law to discover whether or not her daughter-in-law to be is a virgin. If it is found out that she is not a virgin, the husband-to-be has the right to reject her and claim a refund of the bride price that has been paid. According to the narration of a Somali woman,

Women from the groom's family visit and examine the bride. They check to ensure that infibulation has been done and that she is a virgin. The genital area should be as smooth as the palm of one's hand. To make intercourse

⁹³ Alison (1988) 10 *Hum Rights Quart* 472.

⁹⁴ Alison (1988) 10 *Hum Rights Quart* 472.

⁹⁵ Dorkenoo (1994) 47-50.

⁹⁶ Dorkenoo (1994) 47.

easier, the vulva may be cut open slightly. Otherwise, the groom widens the opening with his penis which is painful for both the bride and the groom⁹⁷

This goes to show the importance of FGM and its link to marriage. A woman's status is raised when she gets married and she can have a share of her husband's property. This goes to show that a woman who does not get married remains poor indefinitely.

On the other hand, the circumcisers are usually paid heavily for performing FGM. This is why most times, the perpetrators of this act find it hard to give up because it is an income-generating venture for them.⁹⁸ One must put in mind that the circumcisers are usually older women who have no other job or source of income. 'The role of circumcisers varies within the different ethnic groups who practice FGM'.⁹⁹ For example in places like Somalia, they are really not respected. However in places in West Africa, they command a lot of respect. They are very powerful and have a high ranking in the traditional setting. They are mostly feared and respected by other women in the community. They are what you can call the, 'the gate-keeper' of tradition or the 'custodian' of FGM. Therefore it is difficult to attack them and remove this power from them as they are being protected by the society.¹⁰⁰ To buttress this point, an incident that occurred in Tanzania will be referred to. The Network against Female Genital Mutilation promised to give loans to circumcisers to start their own businesses if they in turn promise to stop performing FGM. Seventy three of them readily surrendered all their equipment to the District commissioner. However, when after a period of time

⁹⁷ Dorkenoo (1994) 48.

⁹⁸ Boyle (2002) 29.

⁹⁹ Dorkenoo (1994) 50-51.

¹⁰⁰ Dorkenoo (1994) 50-51.

the promise was not fulfilled, these circumcisers threatened to go back to their initial job of performing FGM.¹⁰¹

In all of these, one important point is the issue of economic survival. When women do not have a choice or another means of survival, they tend to succumb to the pressures of undergoing FGM, either as a means to gain economic freedom or as a source of income.

4.8.2 Social and Family Pressure

Social pressure can also be termed as peer pressure. For fear of being an outcast or being ostracised most women undergo FGM, despite being aware of its consequences. It was recently discovered that in Myabe, a town in Southern Chad, near the border of the Central African Republic, some girls decided to give themselves up for FGM, even though their mothers were not circumcised and no one forced them into undergoing the procedure. The reason given by these girls was that the other girls, who have undergone the procedure, 'won't let them dance with them'.¹⁰² One can tell from this that, due to the desire of wanting to belong to a social group or for fear of being called an outcast, these girls voluntarily gave themselves up for FGM.¹⁰³ A study carried out in Nigeria also revealed that some educated women who initially were against the practice of FGM eventually gave in to undergo the procedure because of family and social pressure.¹⁰⁴

According to Melissa Parker, a medical researcher who lived with a tribe in Sudan while conducting her research, 'an uncircumcised girl is unmarriageable and would bring undying shame to her and her family. People would call her

¹⁰¹ Boyle (2002) 29.

¹⁰² Boyle (2002) 31.

¹⁰³ Boyle (2002) 31.

¹⁰⁴ Dorkenoo (1994) 50.

kaaba (bad), *waskhan* (dirty) and *nigsa* (unclean). Her life would be intolerable, as she would be taunted by friends and relatives wherever she went'.¹⁰⁵

4.8.3 Religion

Religion also plays a very important role in the continued practice of FGM despite the awareness that has been going on for its eradication. Although it has been mentioned in previous chapters that neither Christianity nor Islam makes FGM a requirement, its continued practice in some countries is still indirectly linked to Islam. The reason is that Islam as a moral code places emphasis and importance on a girl's virginity and chastity, while FGM on the other hand is believed to protect a girl's virginity and uphold her chastity.¹⁰⁶ For example in Egypt, after conducting a recent survey, it was found out that seventy-two per cent of the married women are of the belief that FGM is a religious requirement.¹⁰⁷

4.8.4 Patriarchal Repression of female Sexuality

Another factor that contributes to the continued practice of FGM is a continuum of the patriarchal repression of female sexuality. Based on my research, I contend that patriarchal subordination of women is the main reason why this practice began in the first place. Men have tried in various ways to keep women permanently in that subservient role. According to Elizabeth Heger Boyle FGM originated as a way devised by men to control women's sexuality. Infibulation, which is known to be the most severe form of FGM was a means devised by men of controlling women's desire for sex and preventing pre-marital sex. To them, after marriage, it was the only way of

¹⁰⁵ Boyle (2002) 47.

¹⁰⁶ Boyle (2002) 30.

¹⁰⁷ Boyle (2002) 30.

ensuring fidelity and making sure their wives stayed faithful to them. According to her, FGM 'made men masters over female sexual function'.¹⁰⁸ 'It historically reinforced the idea that wives are their husband's property'.¹⁰⁹ This line of argument is however rebuffed in the next chapter.

Also during the slave trade, reports from the fifteenth and sixteenth centuries suggested that female slaves were selling for a higher price if they had had FGM performed on them. FGM was performed on these slaves in order to prevent them from getting pregnant. Other ways of subjugating women can be seen as follows: In ancient Rome, in order to prevent female slaves from having sexual intercourse and to keep them from conceiving, rings were put through their labia majora. In Europe as well, chastity belts were used during the twelfth century in order to ensure that the women were faithful. These chastity belts were made of iron contraptions that could be locked. So when the husbands were going away to fight in wars, they 'locked up' the genitals of their wives to ensure faithfulness.¹¹⁰

The practice of foot binding in Chinese women is another example. Here beginning at about the age of six to eight, 'the female child's four smaller toes were bent under the foot, the sole was forced to the heel, and then the foot was wrapped in a tight bandage day and night in order to mold a bowed and pointed four-inch-long appendage'.¹¹¹ This act leads to ulcerations, paralysis, gangrene and mortification of the lower limbs.¹¹² The reason given for this practice was to restrict the movement of women and to make them

¹⁰⁸ Boyle (2002) 27.

¹⁰⁹ Boyle (2002) 27.

¹¹⁰ Dorkenoo (1994) 29.

¹¹¹ Mackie G 'Ending Footbinding and Infibulation: A Convention Account' (1996)61 *American Sociological Review* 1000.

¹¹² Mackie (1996) 61 *Amr Soc Rev* 1000.

dependent on their male counterparts. It was invented to make women hobble, which in turn promotes their seclusion and fidelity.¹¹³

These are only a few of the ways in which men have devised mechanisms to pressurize women into conforming to their societal expectations which is of a patriarchal nature.¹¹⁴ In Africa, most societies are patrilineal, that is they are male-dominated. According to Dorkenoo,

Patriarchy is based upon the principle of the dominance of the father over the mother with respect to the parentage of the children and by extension, the primacy of the male in human society, which implies the subordination of the female. Furthermore paternity itself can only be established with any degree of certainty in individual cases by the very strict control of the females that men mate with, in the absence of which only maternity is sure. Thus the only way in which a father can establish his fatherhood is by firstly ensuring that his mate has no relationship with any other man, and then by recognising the offspring as his own by a process of adoption and naming.¹¹⁵

Despite the strong argument linking FGC/FGM to patriarchy, argument has been put forth to show that this is not entirely true. This is thoroughly dealt with in the next chapter.

4.8.5 The Language of Human Rights

Not only are the above listed factors contributors to the failure of completely eradicating the practice of FGC/FGM, the use of language, in human rights instruments strongly contributes to it as well. In other words, the diction used in most human rights instruments in describing the violations of some practices is often times than not, responsible for the lack of compliance in

¹¹³ Mackie (1996) 61 *Amr Soc Rev* 1002.

¹¹⁴ Dorkenoo (1994) 31.

¹¹⁵ Dorkenoo (1994) 45.

member states. The language of human rights usually suggests the need for help and depicts the victims (member-states) as being helpless and savage, in need of external (western) intervention.¹¹⁶

With regards to FGM, World Health Organization employed the use of the word ‘mutilation’ in describing procedure, thereby ignoring the fact that it is a cultural practice of some groups of people. Reference to the cultural practice of a tribe as a form of ‘mutilation’ automatically sends the wrong message and leads to the controversy between culture and rights. The word ‘mutilation’ according to Makau Mutua ‘implies the wilful, sadistic infliction of pain on a hapless victim, and stigmatises the practitioners and their cultures as barbaric savages’.¹¹⁷ Describing this cultural practice in this way is so ‘searing’ that it inadvertently leads to the dichotomy between ‘western’ and ‘non-western’ ideas of what is right and what is wrong with regards to the practice. According to Maleiha Malik, this argument has been converted into a clash between the positive values, that ‘the western world have (e.g. freedom and choice) as opposed to the more negative values that’ non-western world are committed to such as tradition, culture and religion.¹¹⁸

Culture and Rights however, do not have to be at loggerheads. In the following chapter, the overlapping relationship that exists between culture and rights is explored and an attempt to reconcile the two concepts is made.

¹¹⁶ Mutua (2002) 28-29.

¹¹⁷ Mutua (2002) 26.

¹¹⁸ Maleiha M ‘Feminism and its “Other”’: Female Autonomy in an Age of Difference” (2009) 30 *Cardozo Law Review* 101.

4.9 Measures and Recommendations to prevent and curb FGM

Over the years, different States have implemented a couple of laws to prevent and curb FGM. In the year 2001, 'the European Parliament adopted a Resolution on Female Genital Mutilation' and this resolution condemns the practice of FGM.¹¹⁹ It declared the practice a violation of fundamental human rights. It also encouraged State parties to find means of eradicating this practice.¹²⁰ The Committee on the Elimination of all Forms of Discrimination Against Women¹²¹ also condemned this practice in a series of General Recommendations. The first attempt made by the CEDAW committee was the General Recommendations 14 on Female Circumcision. Here the Committee stated its concerns about the fact that the practice of FGM was still taking place under the umbrella of tradition and culture. It also made mention of the role of women in tackling the practice. It then made several recommendations that the government of each party state should work in conjunction with NGOs in fighting this practice. It also harped on the importance of education, both to women and health officials.

The second attempt they made was the General Recommendation 19 on violence against women. Here the General Recommendation addressed the issue of the subordinate role accorded to women by men in the society. The General Recommendation pointed out that this subordinate role accorded women was the reason for the 'perpetuation of widespread practices involving violence or coercion, such as family violence and abuse, forced marriage...and female circumcision'.¹²² The suggestions that were put forward to tackle this

¹¹⁹ Banda (2005) 220.

¹²⁰ Banda (2005) 220.

¹²¹ Hereinafter referred to as CEDAW.

¹²² Banda (2005) 220.

violence against women amongst others were education, campaigns against violence, law reforms and attempts at cultural change.¹²³

The committee in its General Recommendation on Health changed the terminology from female circumcision to female genital mutilation. It further associated the practice of FGM with ‘a high risk of death and disability’, which in other words is a violation of the right to life.¹²⁴ The General Recommendation also pushed for ‘enactment and effective enforcement of laws that prohibit FGM and marriage of girl children’.¹²⁵

The United Nations General Assembly Declaration on the Elimination of Violence against Women 1993¹²⁶ also condemned the practice of FGM and tagged it as an act that constitutes violence against women.¹²⁷ FGM here is referred to as a violation of fundamental human rights as stated in the International Bill of Rights.¹²⁸ The Declaration suggests some strategies that could be used to deal with violence against women and they are, ‘education, counselling and law reforms, coupled with adequate enforcement and co-operative relations between agencies’.¹²⁹

The profile of FGM was raised by the appointment of the Special Rapporteur on violence against Women in 1994 and the need to work towards eradicating the practice was also mentioned. The Special Rapporteur upon consideration of the definition of gender-based violence as found in the UN General Assembly Declaration in 1993, ‘identifies FGM as a manifestation of gender-

¹²³ Banda (2005) 221.

¹²⁴ CEDAW General Recommendation No 19 on Violence Against Women UN Doc A/47/38. See also Banda (2005) 221.

¹²⁵ CEDAW General Recommendation No 19 on Violence Against Women UN Doc A/47/38. See also Banda (2005) 221.

¹²⁶ Hereinafter referred to as DEVAW.

¹²⁷ Art 2(a) of DEVAW.

¹²⁸ Art 3 of DEVAW.

¹²⁹ Art 4 of DEVAW. see also Banda (2005) 221.

based violence.’¹³⁰ The Special Rapporteur buttresses its point by stating clearly that, ‘those practices that constitute definite forms of violence against women cannot be over-looked nor justified on the grounds of traditions, culture or social conformity’.¹³¹ ‘The Special Rapporteur on Violence against Women also identified FGM as having negative health consequences and as constituting a violation of the reproductive rights of women and girls’.¹³² It also urged government of State parties ‘to engage in education and community outreach efforts aimed at addressing the deeply ingrained cultural attitudes that continue to foster the practice’.¹³³ The fact that the medicalization of the practice is on the rise was also highlighted. The Special Rapporteur therefore admonished the government to take note of this and also the fact that health professionals are helping to perpetuate this act should be looked into.¹³⁴

The World Health Organisation¹³⁵ on the other hand was initially reluctant to engage with FGM.¹³⁶ The reason for this was that the WHO referred to ‘the ritual operation in question as being based on social and cultural backgrounds, the study of which is outside the competence of the World Health Organisation’.¹³⁷ However after a couple of years, during the United Nations Decade for Women (1975-85), international interest in FGM was revived.¹³⁸

¹³⁰ Special Rapporteur on Violence against Women 1996. See also Report of the Secretary-General on Traditional or Customary Practices Affecting the Health of Women and Girls.(18 July 2003) UN GA A/58/169 paras 22-24. See also Banda (2005) 222.

¹³¹ Special Rapporteur on violence against women. See also Banda (2005) 221.

¹³² Special Rapporteur on Violence Against Women Policies and Practices that Impact Women’s Reproductive Rights and Contributes to, or Cause Violence Against Women (21 January 1999) EICN.4/1999/68.

¹³³ Special Rapporteur on Violence Against Women Policies and Practices that Impact Women’s Reproductive Rights and Contributes to, or Cause Violence Against Women (21 January 1999) EICN.4/1999/68.

¹³⁴ Special Rapporteur on Violence Against Women Policies and Practices that Impact Women’s Reproductive Rights and Contributes to, or Cause Violence Against Women (21 January 1999) EICN.4/1999/68, see also Banda (2005) 222.

¹³⁵ Hereinafter referred to as WHO.

¹³⁶ Boyle (2002) 48.

¹³⁷ Dorkenoo (1994) 61. See also Scilla Mclean, Female Circumcision, Excision and Infibulations: the facts and proposals for change, MRG Report No. 47, 1980.

¹³⁸ Dorkenoo (1994) 61.

And since then, the WHO 'has been a major player in the global FGM debates, furnishing statistics, evaluating strategies for change and generally coordinating the efforts to tackle FGM within the United Nations'.¹³⁹ In accordance with this, a Special Rapporteur on Harmful Traditional Practices Affecting the Health of Women and Children together with a Special Working Group on Traditional Practices was appointed.¹⁴⁰

All these efforts to eradicate FGM were taking place alongside other initiatives such as the Cairo Programme of Action. The Cairo Programme of Action encouraged governments 'to prohibit female genital mutilation wherever it exists and to give vigorous support to efforts among non-governmental and community organizations and religious institutions to eliminate such practices'.¹⁴¹

In 1995, the fourth Women's Conference was held in Beijing and at its follow up conference, the issue of FGM was declared to be a violation of the rights of the women and the girl child.¹⁴² A meeting of the Afro-Arab on FGM and the Law was held in June 2003 in Cairo and it was sponsored by the United Nations. The resultant effect of the meeting was the adoption of the Cairo Declaration for the Elimination of FGM 2003. The preamble to the Declaration gives clarity on the issue of religion as the reason for the continued practice of FGM. The preamble clearly states that neither Christianity nor Islam makes FGM a religious requirement and neither religion supports it. The Declaration

¹³⁹ Banda (2005) 221.

¹⁴⁰ Eight Report on the Situation Regarding the Elimination of Traditional Practices Affecting the Health of Women and Girls Proposed by Ms Halima Embarek-Warzazi E/CN.4/Sub. 2/2004/41. See also Banda (2005) 222

¹⁴¹ Programme of Action of the ICPD 1994 para 4.22. see also Banda (2005) 222.

¹⁴² Banda (2005) 223. See also the Report of the Secretary-General Traditional or Customary Practices Affecting the Health of Women and Girls. 2003.

also stated that FGM as a practice should be eradicated as it is a violation of the rights of women and girls.¹⁴³

Among all the agencies dealing with FGM, the most recognised is the Inter-African Committee on Traditional Practices Affecting the Health of Women and Children (IAC).¹⁴⁴ The IAC in conjunction with the women's unit of the (former) Organizations of African Unity drafted a Convention on the Elimination of All Forms of Harmful Practices Affecting the Fundamental Human Rights of Women and Girls 2000.¹⁴⁵ In time, this Convention was incorporated into the draft of the African Protocol on Women's Right. Article one of the Convention, gives the definition of harmful practices and article two requests State parties 'to enact legislation to prohibit harmful practices and to guarantee equality between men and women, as well as demanding that States ratify the relevant human rights instruments'.¹⁴⁶ State parties were also urged to focus more on education and information campaigns. Article 3 admonishes States parties to work together with religious leaders and social and traditional leaders in eradicating FGM.¹⁴⁷ The medicalization of the procedure was prohibited in article 4, while article 5 proposes rehabilitation of the victims that have undergone FGM.

In spite of the above recommendations, the practice of FGM is still very much at large. This leads to the conclusion that a new approach must be considered in curbing the practice of FGM. Article 2(1)(b) of the African Protocol on Women's Rights (2003) urges State parties to 'enact and implement legislative

¹⁴³ Banda (2005) 223. See also Special Rapporteur on Traditional Practices (2004) para 67. See also Cairo Declaration for the Elimination of Female Genital Mutilation, 2003. Preamble.

¹⁴⁴ Banda (2005) 223, The Inter-African Committee on Traditional Practices Affecting the Health of Women and Children (IAC) was formed by a group of African Women meeting in Dakar Senegal.

¹⁴⁵ Dorkenoo (1994) 61.

¹⁴⁶ Draft Convention on the Elimination of Harmful Practices 2000. Preamble. See also Banda (2005) 224.

¹⁴⁷ Article 3(2) of the Draft Convention on the Elimination of Harmful Practices 2000., See also Banda (2005) 224.

or regulatory measures to curb discrimination’. Curbing discrimination in this sense protects women who do not want to undergo the procedure of FGM. ‘Article 2 on State obligations also requires states to “modify social and cultural patterns of conducts of women and men...with a view to achieving the elimination of harmful cultural and traditional practices”’.¹⁴⁸ This section corroborates the view that a cultural transformation is needed in order to modify cultural practices so they can be in alignment with human rights.

4.10 Conclusion

The practice of FGM, according to the World Health Organization, violates quite a number of human rights. These rights vary from the right to life, right to bodily integrity, right to health and the right to sexual and corporal integrity among others.¹⁴⁹ A brief introduction into what rights entail was examined in order to have an in-depth knowledge of what human rights mean. The exposition on human rights is done so as to appreciate the gravity of the various human rights violated by the practice of FGM. An examination the defect in human right language as it relates to FGM shows the hazardous effect the terminology of the practice has on its practitioners and their cultural beliefs. I found out that the use of language in addition to various other factors such as economic factors and family pressure are contributors to the perpetual existence of the practice of FGC/FGM despite the efforts of human rights activists to eradicate the practice over the years. Although several instruments have been put in place to curb the practice they have failed, because the practice is very much in existence and this proves that there is a need for a different approach. Therefore the suggested new approach will be a modified or transformed culture that will be in line with the principles of human rights.

¹⁴⁸ African Protocol on Women’s Right. Article 2(2).

¹⁴⁹ Female Genital Mutilation: Policy and Guidelines for nurses and midwives.

The next chapter analyses this new approach and shows the need why culture and rights need to have a meeting point in achieving a cultural transformation.

CHAPTER FIVE

TOWARDS THE CO-EXISTENCE OF FEMALE GENITAL CUTTING AND HUMAN RIGHTS

5.1 Introduction

The conflict between culture and rights has been in existence over a long period of time. The reason for this is that these two concepts are often times viewed under different lights and seen as being ‘antagonistic’ to each other.¹ The main research problem that runs through the entire study is the proposition for a cultural transformation of the parties that practice Female Genital Cutting (FGC) or Female Genital Mutilation (FGM) in order to make the practice to be in line with human rights. The terms and the language that is used to describe this practice that relates to viewing it as either a Cultural Practice or as a violation of Human Rights has been investigated in the course of the study. The reasons why the practice is viewed as a cultural practice that needs to be preserved has been dealt with as well as, why human rights activists view it as a mutilation of the female body that violates human rights. This chapter tackles the research question of the inherent conflict between culture and rights that has been on-going for centuries as well as making recommendations on how this conflict can be resolved and how best to curb the practice of FGC/FGM.

A number of scholars amongst other feminist theorists coming from a certain perspective have presented the concepts of ‘culture’ and ‘rights’ as two

¹ Wilson RA *Human Rights, Culture & Context. Anthropological Perspectives* (1997) 2-9.

opposing views and not as concepts that are in actual fact intertwined based on the assumption that the two concepts can never meet each other. Cultural practices are mostly viewed as practices that infringe on our rights as individuals.² This chapter addresses the following research questions: What is cultural preservation and how is culture viewed in the African jurisprudence? What are the arguments put forward in the defence of FGC/FGM? Can culture be improved or modified most especially FGC/FGM with regards to the use of language? What impact does the use of words in coining the practice have on the efforts to curb the practise? Can culture and rights be reconciled in other words can there be a meeting point between the two concepts?

This chapter responds to the above mentioned questions firstly by introducing how FGC as a cultural practice is formulated. This is followed by an expose on the two opposing views with regards to FGC. The issue of culture preservation is dealt with next and why there is a need to preserve FGC as a cultural practice. Finally, ways of reconciling the conflict between culture and rights are suggested.

5.2 FGC as a cultural practice

FGC, as a practice has been an issue of utmost concern over the years. It has raised several debates all over the world with some advocating for its continuance whilst others advocating for its eradication. As mentioned in earlier chapters it is a practice that many authors believe originated from ancient Egypt, although, its origin cannot really be traced. Some are of the opinion that it has an Islamic background but research has proven that it is not a religious practice and has no Islamic roots.³ Irrespective of the fact that

² Tamale S 'Eroticism, Sensuality and 'Women's Secrets' Among the Baganda' (2006) 37 *Institute of Development Studies Bulletin* 149.

³ Rahman A & Toubia N *Female Genital Mutilation: A Guide to Laws And Policies* (2000) 6-9.

various countries have passed legislation to ban the practice, and several organizations are creating awareness for its eradication, one must wonder why the practice is still in existence.⁴ Various reasons have been given for its continued practice. This practice is carried out on girls between the ages of two to sixteen. Most cultures see this practice as a rite of passage for crossing over from childhood into adulthood. The practice not only carries with it dangerous and grievous health and psychological consequences but, it sometimes leads to death.⁵

In this chapter, the focus shifts from the eradication movements and deals with the contextualization of female circumcision as an expression of the right to culture and ways of achieving a co-existence between culture and rights.

5.3 The Two Opposing Views

Two main responses has been identified regarding debates on FGC, on the one hand is the group that proposes that female circumcision should be totally eradicated, abolished and criminalized. To this group of scholars, female circumcision is a life-threatening form of subjugating women and also a form of child abuse.⁶ Furthermore it is believed by this school of thought that there is no medical benefit derived from this practice and the main purpose for carrying out this procedure is to control the sexuality of females and keep them in a subservient and dependent position. On the other hand, we have women who are mainly from African countries who have in one way or the other been affected by the practice and are in support of the continued practice of female circumcision. According to this group, the campaign against female circumcision is regarded as 'a disguised attempt by western feminists to

⁴ Alison TS 'Female Circumcision: A Critical Appraisal' (1988) 10 *Human Rights Quarterly* 483-485.

⁵ Rahman A & Toubia N (2000) 6-9.

⁶ Atoki M 'Should Female Circumcision Continue to Be Banned?' (1995) 3 *Feminist Legal Studies* 223-224.

impose their values and jurisprudence on non-western women'.⁷ They strongly advocate for the sustenance of their right to cultural determination and also believe in the promotion and guidance of their traditional values. They regard the campaign against female circumcision as 'interference from outside quarters in respect of a well-worn and tested cultural practice'.⁸ This group attempts to provide legitimacy for female circumcision. In order to understand the viewpoint of this group, one must examine a couple of things.

African Custom

Firstly it must be noted that female circumcision is an African practice and only certain African societies practice it. There are several societies and subcultures in African states and these societies practice various cultures and have various customs. These cultures differ in a variety of ways, for example in societies where female circumcision is practiced.⁹ It is because the culture demands that it be practiced. While on the other hand, those societies that don't practice female circumcision don't practice it because it is not their culture, not because of some advice given on the 'ills of female circumcision'. Although in some societies where the practice has been eradicated, it is probably due to external influences changing their beliefs.

The reason why cultural practices differ in societies is because of the nature of their custom. The cultural practice of female circumcision itself is rooted in African custom 'where the female genitalia is perceived as a symbolic organ that connotes purity and fecundity.'¹⁰ In African custom, the female genitalia represent two important factors and they are 'virginity' and 'fertility'. These two concepts form the foundational blocks of contracts of marriage and

⁷ Atoki (1995) 3 *Fem Leg.Stud.* 224.

⁸ Atoki (1995) 3 *Fem Leg.Stud.* 223-224.

⁹ Atoki (1995) 3 *Fem Leg.Stud.* 223-224.

¹⁰ Atoki (1995) 3 *Fem Leg.Stud.* 225.

family.¹¹ In such communities, traditionally, a good marriage is defined as one that includes a virgin bride. A bride who is a virgin does not only portray purity, but also represents a high economic value. In other words, a bride who is still a virgin attracts a high dowry given by the groom. The virginity of the bride is the 'standard' upon which the marriage is contracted or established. If the bride has any blemishes, in that her virginity is no longer intact, not only does her dowry reduce, her chances of ever getting married are also very slim. From this one can see the importance attached to the female genitalia in these societies and how important it is in the marriage negotiations.

Little wonder, why there is so much attention paid to the appearance of the female genitalia in these African societies. The idea is to recreate the female genitalia in a way that indicates purity. 'Excision of the parts was the procedure adopted to remove those areas of the female genitalia considered inimical to purity and this eventually evolved as a cultural practice'.¹² The practice of female circumcision is opposed for a number of reasons. These reasons have been mentioned in earlier chapters. They are discussed as follows to show the counter debates raised by several authors.

Firstly, the practice of female circumcision is regarded as a barbaric act which entails a lot of pain and carries with it a high risk of infection and diseases and death if care is not taken. Female circumcision is performed by traditional circumcisers and it is done without the use of anaesthesia and under very unhygienic conditions. In response to this, Atoki Morayo argues that, all the complications associated with female circumcision are complications associated with any procedure that is done in such situations and it is nothing

¹¹ Atoki (1995) 3 *Fem Leg.Stud.* 225.

¹² Atoki (1995) 3 *Fem Leg.Stud.* 225.

peculiar to female circumcision. According to Atoki irrespective of the surgery, any procedure performed in such conditions will result in those complications.¹³ She therefore attributes the complications associated to female circumcision to the way it is done and the instruments used. She relates this to the regular use of anaesthetics in surgery in England. She states that this did not start until the 1840's and according to her antiseptic was not widely accepted until the late 1860's. She further states that it was the combination and application of anaesthetics and antiseptics that gave surgical operations its scientific legitimacy and removed it from the list of barbaric practices. She compares this with female circumcision and argues that if the procedure is performed using anaesthesia and done in antiseptic conditions, it will be removed from the list of barbaric practises. According to her, it is time for the traditional circumcisers to apply modern science while carrying out this procedure.¹⁴ In order to reduce death rates and diseases as a result of FGC, Atoki suggests that circumcision clinics be created. In her opinion, circumcision services should be created as a separate branch of medical services, the same way there are dental services, chiropody, opticians, fertility clinics, and plastic surgery clinics. Obiora Amede also discussed the health hazards known to occur as a result of the procedure. According to Obiora, the health hazards associated with FGC/FGM have been divided into two and they are immediate and long-term consequences. The immediate consequences are the ones that occur immediately after the procedure is done and they include, 'excruciating pain, shock, gangrene, local infection and septicaemia, haemorrhage and anaemia in cases of unchecked loss of blood, bladder incontinence or urine retention due to actual pain or a reflex spasm from fear of pain, rupture of the vaginal walls, accidental damage to the urethra and anus and

¹³ Atoki (1995) 3 *Fem Leg.Stud* 226.

¹⁴ Atoki (1995) 3 *Fem Leg.Stud* 226.

haematocolopos'.¹⁵ With regards to the long-term consequences, the health hazards include 'scarring, keloid and calculus formation, abscess and cysts, chronic pelvic infection, dyspareunia, dysmenorrhea, infertility, urinary tract infection and coital difficulty'.¹⁶ Obiora, states that he does not dispute that these health hazards could occur as a result of the procedure, but he argues that usually surgeries are delicate procedures and if not properly carried out with the right equipment under the right environment, they may result in any of the conditions mentioned above. In other words, these health hazards are not peculiar to FGC/FGM alone. They could result from 'any' form of surgery. He also adds to this point by saying that, the clitoris is a very sensitive organ and is said to be in a 'neurovascular area' where there are sensory tissues, therefore its removal if not carefully done is encumbered with lots of risks.¹⁷ With regards to FGC/FGM and the traditional way in which it is carried out, because it is done without the use of anaesthesia, and the instruments not sterilised, any of the above consequences occur, can be expected. Obiora further argues that if any surgery that is of the same nature with FGC/FGM is carried out without anaesthesia or the use of sterilized instrument, it can also result in any of the above mentioned conditions. Therefore these health consequences are not peculiar to FGC/FGM only.

The abolitionists also raised another point in response to Atoki's suggestion of circumcision clinics. They argue that if one applies modern science to the practice, it will be encouraging the continuation of the practice within the hospital setting and to them this is regarded as a waste of scarce resources.

¹⁵ World Health Organisation, *Female Genital Mutilation: World Health Assembly Calls for the Elimination of Harmful Traditional Practices* (Geneva: WHO Office of Information, Press Release WHA/10, May 12, 1993) as quoted by Obiora LA "Bridges and Barricades: Rethinking Polemics and Intransigence in the Campaign Against Female Circumcision" (1997) 47 *Case Western Reserve Law Review* 290.

¹⁶ Toubia N *Female Genital Mutilation: A Call for Global Action* (1993) 41, see also Obiora (1996-1997) 47 *Case West Res L R* 275 at 291.

¹⁷ Obiora (1996-1997) 47 *Case West Res L R* 290.

In response to this, Atoki believes if separate clinics are created, the hospitals will not be burdened with providing circumcision services. Also she opined that if the surgery or circumcision is carried out by specially trained people in the art of genital surgery, it will solve the problem of untrained personnel performing the surgery leading to reduction in the number of casualties as a result of mistakes made. She further adds that having these specialist services will enable the State to monitor the practice and ensure that practitioners act within the dictates of the law.¹⁸

Secondly, the abolitionists put forward the fact that it has no medical or health benefits unlike male circumcision which has been proven over the years to have useful medical purposes. Atoki countered this argument by stating that the fact that no useful medical purposes have been associated with female circumcision is not enough reason to ban the practice. She states that there are a number of surgeries that are carried out, that do not have useful medical purposes. She made use of cosmetic surgeries such as those done on the nose, breast, and face, to mention a few as examples to show that not all surgeries performed have useful medical purposes. She states that the reason why these surgeries are performed mostly is to improve the body image as seen by that particular person. She says the same way the above mentioned procedures are done legitimately, female circumcision should also be performed legitimately as a form of cosmetic surgery done to enhance the woman's sexuality.¹⁹ To this school of thought, excision gives the clitoris an aesthetic effect. They are of the

¹⁸ Atoki (1995) 3 *Fem Leg.Stud* 227.

¹⁹ Atoki (1995) 3 *Fem Leg.Stud* 228.

opinion that when a vulva is made flat and smooth, it becomes more pleasurable to the eyes and pleasing to touch.²⁰

In reply to this, certain western feminists argued that there is no basis for comparison between the two procedures. According to this school of thought, the former procedure is carried out by women who are merely conforming to what men find attractive and appealing.²¹ In buttressing this point, one can further state that cosmetic surgery done to the face, breast and nose is not done for any cultural purposes. It is not mandatory and failure to carry out these procedures will not lead to segregation in the community. Moreover it is a personal choice which carries no penalty if it is not carried out.

Furthermore, this group reiterates that female circumcision is carried out for one basic purpose and that is to 'deny women sexual pleasure and satisfaction'.²² Atoki, however nullifies these points by stating that these points are biased as they mainly based on the experience or viewpoints of certain western feminists. Obiora argues here that similar procedures to FGC/FGM are carried out to heighten sexual pleasures, how is it then possible to argue that FGC/FGM on the other hand inhibits sexual pleasures thereby leading to patriarchal control? In order words, sexual pleasure according to him depends on the individual's anatomy and has nothing to do with FGC.

On the issue of patriarchy, Obiora states that it as a term 'used to explain a purportedly universal devaluation of women's status in societies'.²³ He adds that 'in polygamous societies it is physically impossible for a man to satisfy his numerous wives; therefore he resorts to drastic mutilation of the genitals to

²⁰ Atoki (1995) 3 *Fem Leg.Stud* 228.

²¹ Atoki (1995) 3 *Fem Leg.Stud* 229.

²² Atoki (1995) 3 *Fem Leg.Stud* 229.

²³ Obiora (1996-1997) 47 *Case West Res L R* 301.

stymie their sexual appetites'.²⁴ Following this argument is the assumption that this action of 'mutilation', ensures that every child born by this woman is a legitimate child of her husband as she has undergone FGC/FGM. In response to this, Obiora, first stated that this stance does not ring true, as there are 'polyandrous and matrilineal societies' that perform FGC/FGM.²⁵ He also shot down the issue of legitimacy with the argument that 'in most communities, the rights of a person are not predicated on or jeopardized by the marital status of the mother'.²⁶ In other words, there are some cultures whereby having children out of wedlock is celebrated and not regarded as a taboo. Since these cultures practice FGC/FGM, this therefore nullifies the issue of legitimacy and its association to the practice of FGC/FGM.²⁷ Therefore, he rejects the idea that FGC is a form of subjugating women.

Obiora also mentions that in line with the patriarchal line of argument regarding FGC/FGM, the practice is said to keep women in this perpetual state of subordination. According to him, this state is strongly linked with the role of women as wives and mothers. He claims that although in Africa, it is a key role for women, it does not necessarily mean it is a subordinate role. He stated that in the African context, the role, contrary to western beliefs has actually led to 'a strong self-concept among many of the women; it has been a source of strength and impetus'.²⁸ He argues that in even societies where women find themselves in a male-dominated homestead system', their 'enculturated qualities of initiatives and self-reliance motivate them to play vital roles in

²⁴ Obiora (1996-1997) 47 *Case West Res L R* 301.

²⁵ Obiora (1996-1997) 47 *Case West Res L R* 302.

²⁶ Obiora (1996-1997) 47 *Case West Res L R* 302.

²⁷ Obiora (1996-1997) 47 *Case West Res L R* 302.

²⁸ Obiora (1996-1997) 47 *Case West Res L R* 304.

politics, production, accumulation, and in the many exchanges that constitute social relations'.²⁹

Leacock Eleanor also supports this view of Obiora by contesting the 'myth of male dominance'. She argues that this myth, distorts 'the nature of women's position in societies'.³⁰ According to her, women through their roles as wives and mothers maintain the 'household economy'.³¹ And through this, the 'power, authority and influence' exercised by these women 'within the female domestic sphere permeate, mediate and compliment certain levels within the public sphere'.³² Obiora adds that if insinuations continue to be made that the practice is an abuse of women's rights and a way of subjugating women or leaving them in a subordinated role, it will only lead to 'righteous indignation and thwart reformatory endeavours'.³³

A little digression must be made to consider the idea some western feminists have on female circumcision. In the late 18th century, a medical doctor by the name Dr Baker Brown came up with a solution to curing emotional disorders and 'mental diseases'. These medical conditions were seen as a result of the nature of female reproductive organs. Women who masturbated were said to be mentally unstable. Their sexual organs, most especially their clitoris had to be mended. The medical theory behind this was that, 'if exciting the clitoris caused insanity, its removal would cure neurosis'.³⁴ The solution to this was a radical surgery known as clitoridectomy. In 1867 however, 'the operation fell into disrepute and clitoridectomy was considered evil and is no longer

²⁹ Kamene Okonjo, *The Dual-Sex Political System in operation: Women and Communtiy Politics in MidWESTERN Nigeria*, in 'Women in Africa: Studies in Soical and Economic Change 45 as quoted by Obiora (1996-1997) 47 *Case West Res L R* 304.

³⁰ Obiora (1996-1997) 47 *Case West Res L R* 305.

³¹ Obiora (1996-1997) 47 *Case West Res L R* 305.

³² Obiora (1996-1997) 47 *Case West Res L R* 305.

³³ Obiora (1996-1997) 47 *Case West Res L R* 306.

³⁴ Atoki (1995) 3 *Fem Leg.Stud* 229.

considered as a cure for female psycho-sexual disorders.’³⁵ According to Obiora, this answers the question on whether FGC is used as a way of controlling women. Obiora challenges the argument that FGC/FGM is a way of exercising, ‘patriarchal control over female sexuality’ with this line of argument.³⁶ He reiterates that this practice not only happens in African countries but also happens in the western countries as a cure for masturbation which is believed to lead to insanity.³⁷ His view is that if it is used to cure masturbation then it is for the benefit of women and not men’s way of exercising control.

In comparison to African societies, this is totally different from how female circumcision is perceived. It is done in these societies not to deter sexual activities but to prepare the women for sexual activities. Atoki stated that female circumcision is a ritual that symbolises the onset of adulthood. According to Atoki, the severity of the circumcision is an indication of different aspects of preparation for sexual intercourse. In contrast to the belief that female circumcision reduces female pleasure during sexual intercourse, she states that when the prepuce or hood of the clitoris is removed, the clitoris itself is exposed and this makes it more sensitive thereby heightening the pleasure of the woman during sexual intercourse. Atoki further stated that total removal of the clitoris is done to enhance the woman’s femininity. Atoki’s reason for this is that in some African communities, there is the belief that one must differentiate between the sexes and cutting off the clitoris was one of the ways in establishing this difference. Total removal of the clitoris also suggested purity of the sexual organs.

³⁵ Atoki (1995) 3 *Fem Leg.Stud* 229.

³⁶ Obiora (1996-1997) 47 *Case West Res L R* 298.

³⁷ Obiora (1996-1997) 47 *Case West Res L R* 298.

Furthermore she states that the reason why the most severe form of female circumcision is carried out is to ensure that sexual intercourse does not take place before marriage thereby ensuring the chastity of the bride. This is mostly done in societies where the virginity of the bride is of utmost importance. The writer agreed here that this is a crude method but affirms that it is an effective way of ensuring or guaranteeing the chastity of the bride.³⁸

Thirdly, the issue of lack of sexual pleasure is raised as a reason to eradicate the practice of FGC. Scholars who are against the continuation of the practice of female circumcision express their concern about the pain the woman goes through during intercourse as well as the fact that 'the woman is denied any sexual pleasure' due to the fact that the clitoris that is the 'most erogenous zone is removed'. Atoki counters this argument by stating that although the clitoris is an erogenous zone, it is not the only one. She goes further to state that there are other four erogenous zones and lists them as the mouth, the neck, the breast and the ears. She also argues that orgasm is not a biological experience but a psychological one that is stimulated or aroused by feelings for one's partner. She states that this is the reason why it is not all women whether circumcised or uncircumcised that achieves an orgasm.³⁹ She goes on to say that the reason why most circumcised women do not experience orgasm has nothing to do with them being circumcised; it is because their culture often times 'discourages an outward display of emotions related to sexuality.'⁴⁰ The tradition in most African countries, require that a young girl from a very early age is taught to suppress any feelings that may arise as a result of male attention. She gives this as the reason why most of these women fail to orgasm because they suppress orgasms as they have been

³⁸ Atoki (1995) 3 *Fem Leg.Stud* 231.

³⁹ Atoki (1995) 3 *Fem Leg.Stud* 231.

⁴⁰ Atoki (1995) 3 *Fem Leg.Stud* 231.

taught to suppress their feelings. She then states that the main aim of sexual intercourse in African societies is for fertility and not for orgasm. According to her it is the 'fecundity of a woman which gives her sexuality.'⁴¹ A woman who is barren is regarded as 'lacking sexuality' and in these societies, barrenness is a ground for dissolution of marriage. Therefore there is utmost importance placed on virginity and fertility. A woman in these societies is expected to go into a marriage and engage in sexual relations not to enjoy it but to produce offspring. In other words conception is the only reason why a woman should engage in sexual intercourse and her organs are meant only for this purpose and not for pleasure. Western feminism on the other hand, focuses mainly on the woman's need to derive pleasure from sexual intercourse. And according to Atoki, reproduction as such is seen as a form of oppression of women to certain western feminists. She states that the basis for this is that, western feminist observed that it is difficult for women to 'detach themselves from their unpaid jobs as housewives and mothers, and participate in exchange-value production'.⁴² Therefore the sexuality of women is not centred on reproduction and fertility. 'Female sexuality was no longer represented in the prolific mother and housewife but in the slim, erotic and sterile woman'.⁴³ Obiora corroborates this by arguing that FGC/FGM does not in all cases guarantee '... inhibit the sexual pleasure of women'.⁴⁴ He proceeds to give several reasons for lack of sensation to male sexual overtures. Firstly he argues that most of the women who undergo the procedure have already passed through some form of 'womanhood training' prior to the procedure being carried out on them. These 'womanhood trainings' emphasizes communal

⁴¹ Atoki (1995) 3 *Fem Leg.Stud* 231 .

⁴² Atoki (1995) 3 *Fem Leg.Stud* 231.

⁴³ Atoki (1995) 3 *Fem Leg.Stud* 234.

⁴⁴ Obiora (1996-1997) 47 *Case West Res L R* 307.

living and conditions women to suppress certain feelings.⁴⁵ Therefore, Obiora blames lack of sexual drive or lack of sensations to male sexual advances on the effects of these ‘womanhood trainings’. Usually, according to him, the average African woman is brought up to ‘downplay sexual ecstasy’.⁴⁶ So he assumes that most of the women who claimed that after undergoing FGC/FGM had no sensation nor achieved orgasm during sexual intercourse, most likely said so in order to downplay the sexual ecstasy they experienced during sexual intercourse as they were taught during their ‘womanhood trainings’.⁴⁷

Secondly he argues that clitoral stimulation is not the only way to achieve sexual gratification. He states that ‘libido and orgasm are subject to psychological, physiological, and socio-cultural variables’, not just clitoral stimulations.⁴⁸ In other words, ‘mental and emotional factors’ have a major role in helping a woman who has undergone FGC/FGM achieve orgasm and sexual fulfilment. He also makes reference to other human parts such as the breast, lips, neck and belly as areas apart from the clitoris that can help or assist a woman achieve orgasmic pleasure during intercourse.⁴⁹

Finally, a number of human rights are violated by the practice of female circumcision. This is most likely the most important point that abolitionists base their eradication argument on. The issue of human right is however relative as discussed in chapter four. According to Hosken, ‘genital operations performed on young girls are human rights’ violations since they do not make a free choice to be circumcised but conform due to social pressure’.⁵⁰ Her reasons for this statement are that firstly, these children are minors and are

⁴⁵ Obiora (1996-1997) 47 *Case West Res L R* 308.

⁴⁶ Obiora (1996-1997) 47 *Case West Res L R* 310.

⁴⁷ Obiora (1996-1997) 47 *Case West Res L R* 310.

⁴⁸ Obiora (1996-1997) 47 *Case West Res L R* 308-310.

⁴⁹ Obiora (1996-1997) 47 *Case West Res L R* 308-310.

⁵⁰ Atoki (1995) 3 *Fem Leg.Stud* 234.

not capable of making legal decisions or giving consent. The choices to circumcise them are therefore made by their parents. Secondly, she states that these girls are not given the choice of an alternative. In other words, they cannot decide not to get circumcised for fear of being ostracised.

In response to this, Atoki states that although the availability of choice is fundamental to human rights, the freedom of choice must be enforced within the perimeters of the law. To her, it is the individual concerned that usually makes the choice, but if this individual is incapable of making these choices then it can be made on their behalf by his or her parent or guardian or by the court.⁵¹ According to Atoki, 'Any violation of the nature of the human person, for any reason at all, without the informed consent of the person involved, is a violation of human rights'.⁵² Therefore with regards to FGC, the integrity of adults who give their informed consent before undergoing FGC are not violated.

She buttresses her point by stating that, with regards to infants all over the world, important decisions are being made on behalf of infants, minors and the mentally ill. Therefore infants that undergo FGC also have their rights protected as their parents have made the decisions on their behalf. She draws a parallel line between female circumcision, ear piercing and male circumcision. She states that if one cannot oppose ear piercing and male circumcision on the basis of parental interference and lack of consent then FGC should not be opposed on those grounds as well since they all involve violation of the human body.⁵³ She goes ahead to mention that, traditionally circumcision was carried out on male and females that were entering into

⁵¹ Atoki (1995) 3 *Fem Leg.Stud* 235.

⁵² Atoki (1995) 3 *Fem Leg.Stud* 234.

⁵³ Atoki (1995) 3 *Fem Leg.Stud* 233.

puberty and not babies. She opines that it is a recent development to carry out circumcision on babies and young children and this infringes on the right of the child. In light of this she states that it can then be agreed upon that any surgery that violates the human body such as female circumcision, tribal marks, ear piercing or neck stretching done on the body of a person that is not old enough to consent amounts to an abuse.⁵⁴

She is however of the opinion that this 'vulnerable' group should not be reason enough why the entire practice of female circumcision should be banned. She argues that, doing so will be infringing on the rights of the adults who are legally capable of making their decisions and who have decided to be circumcised. She further states that if the practice is abolished, the freedom of choice of these individuals will be denied and infringed upon. Her suggestion is that the female circumcision should be permitted but regulated properly.⁵⁵

She defines law as 'a social phenomenon and its primary function is to create order in the society'.⁵⁶ Every traditional society has its own established system and these systems are preserved by conventions and cultures that are usually encompassed in the law. One of the many characteristics of law is its flexibility and its ability to change. As a society evolves, the law has a need to evolve with it and adapt to the growing interests and needs of the people its governing. The law bears the burden of balancing the various demands from the various groups within its population.

Therefore, any law that that is put in place regarding female circumcision must, 'on the one hand, prevent the infringement of the rights of the individual to

⁵⁴ Atoki (1995) 3 *Fem Leg.Stud* 233.

⁵⁵ Atoki (1995) 3 *Fem Leg.Stud* 234.

⁵⁶ Atoki (1995) 3 *Fem Leg.Stud* 234.

cultural determination'. 'It must protect those who wish to freely exercise their right to be circumcised and ensure that the practice is carried out within the law'.⁵⁷ Such law according to her must also on the other hand protect and guard the child against abuse, 'protect the freedom of those who elect not to be circumcised and guarantee the right to proper information concerning circumcision'.⁵⁸ Also with regards to those who carry out the procedure, the law should limit this to only trained experts and it should be carried out only in an approved environment. She also suggests that the procedure should be carried out only on people who have given their informed and expressed consent.⁵⁹

She concludes by stating that a total ban on the practice will only drive it underground, but a law that allows it but regulates it will efficiently curb death rates.⁶⁰ In creating this law that will efficiently curb death rates with regards to FGC as well as preserve this cultural practice, there needs to be a co-existence between culture and rights. The following sub-heading will deal with why there is a need for co-existence.

5.4 Why is there a need for Co-Existence?

5.4.1 Multiculturalism and Cultural Pluralism

Henriette Dahan Kalev is another writer who brings to the fore several views regarding female circumcision.⁶¹ According to him, from a certain western feminist perspective, female circumcision is no doubt a violation of women's rights and the fact that it is still in existence is a confirmation of the male-

⁵⁷ Atoki (1995) 3 *Fem Leg.Stud* 235.

⁵⁸ Atoki (1995) 3 *Fem Leg.Stud* 235.

⁵⁹ Atoki (1995) 3 *Fem Leg.Stud* 235.

⁶⁰ Atoki (1995) 3 *Fem Leg.Stud* 235.

⁶¹ Kalev HD 'Cultural Rights or Human Rights: The Case of Female Genital Mutilation' (2004) 51 *Sex Roles* 340.

dominating nature of men in these traditional communities. To these western feminists, the practice must be totally outlawed.

On the other hand, he states that there are a group of writers who defend this practice and they defend their views from two very rational standpoints.⁶² Firstly is the concept of group rights for minority cultures. The defence of female circumcision here is related 'to the larger question of how a liberal state, whose politics are based upon the importance of individual rights, can allow special group rights, as part of a multicultural policy'.⁶³ The second standpoint comes from those who support what is known as 'feminism of colour' or 'feminism of difference'. The reason why their argument is interesting is because it is brought forward by 'women members of cultural groups performing the practice'.⁶⁴ Their claim is that 'cultural relativism rather than universalism be used as the primary basis for establishing moral norms and legislation'.⁶⁵

In western countries, there have been an increased number of migrations of people who are of various ethnic minority groups. Due to this their political power continues to rise. Therefore the policies of 'multiculturalism' and 'cultural pluralism' that put into consideration the concerns of these minority groups have become highly necessary and popular.⁶⁶

Before going on, the definition of multiculturalism must be looked into.

Multiculturalism is a policy that occurs when many subcultures exist within the same jurisdictional framework, where there is both a comprehensive policy that allows room for a variety of cultural norms. Policies of

⁶² Kalev (2004) 51 *Sex Roles* 340.

⁶³ Kalev (2004) 51 *Sex Roles* 340.

⁶⁴ Kalev (2004) 51 *Sex Roles* 340.

⁶⁵ Kalev (2004) 51 *Sex Roles* 340.

⁶⁶ Kalev (2004) 51 *Sex Roles* 340.

multiculturalism have been enacted in various ways, and have focused upon such factors as the protection and preservation of minority cultures, or on the establishment of special group rights for a cultural minority.⁶⁷

Examples of these rights are, 'guaranteed political representation, affirmative actions in selected areas, exemptions from laws that interfere with cultural practices; recognition of the minority group's traditional legal code within the dominant legal system, and assistance in doing those things that the majority can do unassisted'.⁶⁸ The group in support of multiculturalism usually base their arguments on liberal ideals. These liberal ideals are however a bit of an extension from the strict liberal views. With regard to these liberal idealists, the right of cultural groups does not restrict the rights of the individual. Kukathas Chandran concurred with their argument that 'the less traditional liberal view' should encourage greater "toleration" of cultural practices.⁶⁹ This suggests that cultural minorities be permitted to determine their own norms without state interference'.⁷⁰ This view put forward by Kukathas is often used as a basis for the defence of the continuation of the female circumcision culture among cultural minority groups.

Another view point on the issue of group rights also comes from Kymlicka Will, who opined that, 'the rights of groups within liberal societies themselves derive from individual rights to autonomy'.⁷¹ This view was expanded by Kalev, who stated that there is a need in every human being to belong to a 'rich and secure cultural structure in order to develop self-respect, a strong identity, and

⁶⁷ Kalev (2004) 51 *Sex Roles* 340.

⁶⁸ Kalev (2004) 51 *Sex Roles* 340.

⁶⁹ Kukathas C "Liberalism, Communitarianism and Political Community" (1996) 13 *Social Philosophy and Policy*. 80-105 as quoted by Kalev (2004) 51 *Sex Roles* 341.

⁷⁰ Kalev (2004) 51 *Sex Roles* 341.

⁷¹ Kymlicka W *Liberalism, Community and Culture* (1991) 169 as quoted by Kalev (2004) 51 *Sex Roles* 341.

a capacity to make independent choices'.⁷² Kalev brings to the fore the notion that some minority groups feel the need to have special group rights to enable them preserve their special culture, which to them would help facilitate the development of their individual cultural identity.

5.4.2 Margin of Appreciation

This doctrine was developed by the European Court of Human Rights and is used when deciding whether a member state is in contravention of a convention. The term, 'margin of appreciation' appeared for the first time in 1958 in the European Commission of Human Right's report. During the case brought forward against the United Kingdom by Greece over alleged human rights violations in Cyprus.⁷³ This doctrine allows room for manoeuvre in fulfilling obligations under human rights instruments. In other words, member states who are signatories to a convention are allowed a 'degree of discretion, subject to Strasbourg supervision, when it takes legislative, administrative or judicial action in the area of a Convention right'.⁷⁴

The function of this doctrine is to allow courts take into consideration the fact that member states are allowed to interpret the convention differently due to 'their legal and cultural traditions'.⁷⁵ This means that each society based on its cultural practices and traditions is allowed a degree of discretion in interpreting Conventions.⁷⁶ In other words, whenever conflicts arise between individual rights and national interests, communities have the option of dealing with such conflicts based on their cultural beliefs and traditions. Therefore

⁷² Kalev (2004) 51 *Sex Roles* 341.

⁷³ *Greece v The United Kingdom* (1958-59) 2 Yearbook of the European Convention on Human Rights. 172-197.

⁷⁴ ECHR REFORM, Margin of Appreciation. April 2012. www.opensocietyfoundations.org. Accessed 3 August 2015.

⁷⁵ ECHR REFORM, Margin of Appreciation. April 2012. www.opensocietyfoundations.org. Accessed 3 August 2015.

⁷⁶ Bevenisti Benvenisti E "Margin of Appreciation, Consensus and Universal Standards" (1999) 31 *International Law and Politics* 843.

communities that practice FGC/FGM can handle human rights cases resulting from engaging in this cultural practice by relying on the doctrine of margin of appreciation. In other words, in interpreting Conventions that criminalise the practice of FGC/FGM, communities can take into account their tradition and apply their discretion in judging these cases. In cases where a state is bent of passing legislation to eradicate FGC, this doctrine can be relied on to support the continual existence of the practice.

Therefore if consideration is not given to the cultural interest of members of a community, and only human right principles are focused on, it could lead to utter chaos and rebellious attitude from the community. In order to achieve a peaceful society, there needs to be a form of co-existence between cultural practices such as FGC and human rights. Ways of achieving this co-existence is through cultural transformation or modification of FGC/FGM. This concept of cultural transformation or modification will be dealt with in following sub-heading.

5.5 Cultural Transformation as a means to Co-existence

Tamale Sylvia likens the conflict between culture and rights to a conflict between gender, rights and culture. The reason for her coming to this conclusion is that, according to her, African women are viewed ‘as the custodian of morals and traditional values’.⁷⁷ She further explained that, ‘if in Africa culture is synonymous to women, and the concept of “rights” and “culture” continue to be viewed as being at odds, it means that African women would have to first strip themselves of culture before enjoying their rights’.⁷⁸ This position she insists is ‘untenable and runs contrary to the logic of cultural

⁷⁷ Tamale S “The Right to Culture and the Culture of Rights: a Critical Perspective on Women’s Sexual Rights in Africa” (2008) 16 *Feminist Legal Studies* 55.

⁷⁸ Tamale (2008) 16 *Fem Leg Stud* 55-56.

rights’ as provided for in art 29.7 of the African Charter on Human and People’s Rights (Banjul Charter).⁷⁹ The reason she gives for this statement is that most Africans, men and women, tend to relate more easily to and appreciate cultural systems of their respective communities more than the considerations they give to the list of rights that is provided for in the Bill of Rights and various international instruments.

An-Na’im Abdullahi and Hammond Jeffrey argue that ‘cultural transformation’ is the key to enforcing human rights in most African societies.⁸⁰ They affirm the fact that culture and rights cannot be said to be totally exclusive and that, ‘culture has a significant impact on human rights paradigms around the world and as such culture is the best –suited vehicle for protecting rights’.⁸¹ An-Na’im has also challenged the cultural and religious obstacles to women’s rights through a reconceptualization of the opposition of culture and rights in theory and bridging their difference in practice’.⁸² He began by stating that, ‘State-centric efforts to protect human rights need to be supported by broader strategies for social and cultural transformation’.⁸³ He then went further by affirming the notion that ‘women’s rights are human rights and emphasized the fact that rights are not divisible and they are interrelated and that culture as indivisible part of right has the power to fortify rights. This point he buttressed by making reference to the United Nations conference on Human Rights that was held in Vienna (1993).⁸⁴ According to An-Na’im, ‘the most

⁷⁹ Tamale (2008) 16 *Fem Leg Stud* 55-56.

⁸⁰ Abdullahi A. An-Na’im and Jeffrey Hammond, *Cultural Transformation and Human Rights in African Societies*, Chapter One in Abdullahi A. An-Na’im (Ed), *Cultural Transformation and Human Rights in Africa*, London. Zed Books (2002) as quoted by Tamale (2008) 16 *Fem Leg Stud* 55.

⁸¹ Abdullahi A. An-Na’im and Jeffrey Hammond, ‘Cultural Transformation and Human Rights in African Societies’ in Abdullahi A. An-Na’im (Ed), *Cultural Transformation and Human Rights in Africa*, London. Zed Books (2002) as quoted by Tamale (2008) 16 *Fem Leg Stud* 55.

⁸² Tamale (2008) 16 *Fem Leg Stud* 55-56.

⁸³ Tamale (2008) 16 *Fem Leg Stud* 55-56.

⁸⁴ Tamale (2008) 16 *Fem Leg Stud* 55-56.

practical guarantee of entrenching human rights in African societies' is through cultural transformation.⁸⁵ He further argues that culture on its own has a very significant impact on human rights paradigms and due to this, the best way for protecting and enforcing human rights is through culture. An-Na'im further states that, the various states efforts that have been carried out to protect human rights should be supported 'by broader strategies for social and cultural transformation'.⁸⁶

Tamale also makes reference to the African Charter on Human and People's Rights (Banjul Charter) and notes that the underlying principles of this charter were 'inspired by African traditions and values'.⁸⁷ In Africa, women are said to be the custodian of culture and tradition, therefore article 18.2 of the Banjul Charter which states that, 'The state shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the community' has been translated by scholars such as Kois to mean that the article 'is a progressive and liberating mechanism in the struggle for women's human rights'.⁸⁸

Article 29.7 of the same charter also enshrines the right to culture by encouraging Africans to 'preserve and strengthen positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral wellbeing of the society'.⁸⁹

Tamale states that the reason why it is absurd to consider 'culture' and 'rights' as conflicting parallel lines that do not meet, is because, if according to the

⁸⁵ Tamale (2008) 16 *Fem Leg Stud* 55-56.

⁸⁶ Tamale (2008) 16 *Fem Leg Stud* 55-56.

⁸⁷ Tamale (2008) 16 *Fem Leg Stud* 55-56.

⁸⁸ Tamale (2008) 16 *Fem Leg Stud* 54-56.

⁸⁹ Tamale (2008) 16 *Fem Leg Stud* 55-56.

above argument by Kois, that women are seen as the custodian of culture rings true, this means women and rights are at loggerheads. In other words, 'African women would first have to strip themselves of culture before enjoying their rights'.⁹⁰

Tamale further uses the example of the reservations made to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), to show or prove that there is an underlying conflict between culture and rights and that efforts are in place to end this conflict. The above mentioned treaty has been ratified by 183 countries, and out of these countries, 73 made reservations to this treaty. Out of the 73 countries that made reservations to this treaty, 11 arose from the African continent. Malawi is one of the countries that made reservations to this treaty and they submitted the following as reason for its reservations to article 2:

Owing to the deep-rooted nature of some traditional customs and practices of Malawians, the Government of the Republic of Malawi shall not, for the time being, consider itself bound by such of the provisions of the Convention as require immediate eradication of such traditional customs and practices.⁹¹

This reservation was later withdrawn two years later by the government of Malawi in October 1991. This reservation that was made and its withdrawal go on to shed some more light on the existing conflict between culture and rights. According to Tamale, 'the act of withdrawal symbolized concession on the part of the Malawian authorities that the deep rooted nature of some traditional customs and practices is not necessarily in conflict with the notion of rights'.⁹²

⁹⁰ Tamale (2008) 16 *Fem Leg Stud* 55-56.

⁹¹ Tamale (2008) 16 *Fem Leg Stud* 56-57.

⁹² Tamale (2008) 16 *Fem Leg Stud* 56-57.

In other words, this means ‘that cultural and social structures are not cast in stone. They are in constant flux’.⁹³

Tamale also makes reference to the Protocol to the African Charter on the Rights of Women in Africa (the Maputo Protocol), which she referred to as the African equivalent of the CEDAW. Article 17(1) of the Maputo Protocol provides that, ‘Women shall have the right to live in a positive cultural context and to participate at all levels in the determination of cultural practices’.⁹⁴ She states that this provision not only proves that the Protocol continued in the same spirit of the Banjul Charter but also elevates ‘the positive aspect of culture’, and also affirms and reinforces the language of CEDAW.

It further recognizes and validates African women’s agency in challenging culture as a concept of power/authority and reshaping it so it connects with rights. Rather than condemning culture, the provision recognizes its positive potential, and underlines the necessity for the full and equal participation of women in determining what these should be.⁹⁵

The research problem in this chapter has to do with finding a way of reconciling the conflict between culture and rights and making them complement each other instead of being in conflict. The intention here is ‘to understand the social basis of these cultural traditions and how they may be adapted to or integrated with national legislation to promote human rights’.⁹⁶ One must however be careful in ensuring that the adaptation and integration mentioned above does not in any way ‘compromise the cultural integrity of

⁹³ Tamale (2008) 16 *Fem Leg Stud* 57.

⁹⁴ Tamale (2008) 16 *Fem Leg Stud* 57.

⁹⁵ Tamale (2008) 16 *Fem Leg Stud* 57-58.

⁹⁶ Ibhawoh B ‘Between Culture and Constitution: Evaluating the Cultural Legitimacy of Human Rights in the African State’ (2000)22 *Human Rights Quarterly* 839.

people'.⁹⁷ In so doing, human rights can derive its 'legitimacy not only from state authority but also from the force of cultural traditions'.⁹⁸

According to Ibhawoh Bonny, what should be looked at is the cultural legitimacy of human rights. And he made reference to a scholar named Lindholm who suggested that there are two possibilities to inquire into the cultural legitimacy of human rights. Firstly, 'the inquiry may study a particular culture and ask what difference that culture makes to its carriers regarding the promotion of human rights.'⁹⁹ Secondly, 'the inquiry may focus on the doctrinal components of manifestations of cultures in order to elicit their roles and potential, whether as resources or barriers, in the fulfilment of human rights.'¹⁰⁰ He presents the assumption that certain cultural traditions that are said to be in conflict with some human rights tenets may actually have the potential of being influenced through the aforementioned process of change and adaptation in order to meet the standards of human rights.¹⁰¹

In searching for a way to merge the concepts of culture and rights, Weeramantry Christopher 'draws attention to the fact that, upon attainment of independence, newly emerged nations often need to take a considered decision whether, and to what extent, they would wish to preserve their traditional values and cultural system'.¹⁰² Ibhawoh traces the need to preserve culture and cultural rights to colonial times. He opined that once a nation is being released from the 'bondage of colonialism', the country is faced immediately 'with the challenge of maintaining cultural values while forging

⁹⁷ Ibhawoh (2000) 22 *Human Rights Quart* 839.

⁹⁸ Ibhawoh (2000) 22 *Human Rights Quart* 839.

⁹⁹ Ibhawoh (2000) 22 *Human Rights Quart* 838.

¹⁰⁰ Ibhawoh (2000) 22 *Human Rights Quart* 838.

¹⁰¹ Ibhawoh (2000) 22 *Human Rights Quart* 855.

¹⁰² Weeramantry CG *Justice Without Frontiers: Furthering Human Rights* (1997) 36 as quoted by Ibhawoh (2000) 22 *Human Rights Quart* 842-843.

new institutions of nationhood'.¹⁰³ These new nations go to quite an extent in compromising 'universal social and legal standards in the quest to uphold certain cultural traditions'.¹⁰⁴

To buttress this point, at the Ninth World Congress on Contemporary conceptions of Law in 1979, Dorsey gave an inaugural address in which he stated that:

People that have recently regained political independence have a special opportunity with respect to organising and maintaining societies and legal system. It would be a tragedy if they should choose a philosophy of society and law because of a claim of universal validity, or in order to avoid being called backward or underdeveloped.¹⁰⁵

Ibhawoh further argues that the practice of specific cultures is needed to complement and strengthen the principles of human rights. According to Makau Wa Mutua, 'the contents of human rights, though founded on universal principles has to near the African cultural fingerprints', which can be summarised as, 'group, duties, social cohesion and communal solidarity as opposed to rigid individualism'.¹⁰⁶ In other words, 'this is a reflection of growing calls for non-western societies to develop national human rights regimes founded on basic universal human rights standards but also enriched by African, Asian, or other cultural experiences'.¹⁰⁷

The problem however remains, about how this union of culture and human rights can be achieved. In other words, 'how best to strike the delicate balance between the individual human rights standards, guaranteed by the state and

¹⁰³ Ibhawoh (2000) 22 *Human Rights Quart* 838.

¹⁰⁴ Ibhawoh (2000) 22 *Human Rights Quart* 838.

¹⁰⁵ Weeramantry (1997) 36 as quoted by Ibhawoh (2000) 22 *Human Rights Quart* 838 at 843.

¹⁰⁶ Ibhawoh (2000) 22 *Human Rights Quart* 843.

¹⁰⁷ Ibhawoh (2000) 22 *Human Rights Quart* 838.

the collective cultural rights claimed by groups'.¹⁰⁸ Inherent in this line of questioning is the underlying tension between culture and rights. With regards to this dissertation, an example of this tension or conflict is the conflict between the constitutional guarantees of children's rights and the cultural tradition of FGC/FGM. Ibhawoh reaffirms however that it is of utmost importance for there to be a 'congruence' of culture and rights 'if national human rights regimes are to gain grassroots acceptance'.¹⁰⁹ The reason why it is essential for these human rights regimes to gain acceptance, is so that there can be effective enforcement of these rights. In other words, if these rights are not accepted in the communities, they would not be enforced effectively.

This line of thinking shows or proves one of the reasons why the practice of FGC/FGM has not been totally eradicated despite the several or various attempts made to this effect. The laws put in place have not gained acceptance in the communities where the practice is still in existence. The reason for this according to Ibhawoh is that 'cultural practices persist that have great limitations on constitutional human rights guarantees'.¹¹⁰ And he gave as reason for this the fact that 'the developments of national human rights regimes in Africa have not often been grounded on cultural traditions'.¹¹¹ He further states that in order to understand the social and political dynamics of the human rights experience in Africa, one must begin in the colonial setting. According to him, the idea of legal rights emerged during the colonial times. Immediately after most African states gained their freedom, 'legal recognition and protection of rights' were inadequate and constitutions were created in haste. As a result of this, 'specific provisions dealing with human rights tended

¹⁰⁸ Ibhawoh (2000) 22 *Human Rights Quart* 844.

¹⁰⁹ Ibhawoh (2000) 22 *Human Rights Quart* 844.

¹¹⁰ Ibhawoh (2000) 22 *Human Rights Quart* 845.

¹¹¹ Ibhawoh (2000) 22 *Human Rights Quart* 845.

more or less to be an importation of Western European models with scant attention paid to the need to focus on local initiatives and input'.¹¹² In other words, many African states simply drew their constitution in the same pattern or form as that of 'the departing colonial power'.¹¹³ The provision of their constitution was therefore similar to those of the country from which they just gained independence. Due to this, some of these constitutions or laws lacked internal support or what is otherwise known as grass-root acceptance.

In addition, Ibhawoh opine that the 'framework of law and rights brought by colonialism reflected western liberal assumptions that often conflicted with traditional cultural orientations...'¹¹⁴ And he note that since independence, many African countries have put on themselves the burden of reversing these trends. In doing this, several constitutions have been revised and amended and in some cases, the countries have simply come up with new constitution all-together.

He makes suggestions on ways in which, the tension between culture and human rights can be addressed. The first approach has been adopted by many African countries and it is a process by which African countries inculcate in their constitution express provisions that guarantee 'collective cultural and family rights alongside basic individual rights'.¹¹⁵ For example, as mentioned above, article 17 of the Banjul Charter exemplifies this approach. The Charter enshrines the right of people to culture and cultural development. The Charter provides that 'individuals have a duty to preserve and strengthen African cultural values in their relations with other members of the society'.¹¹⁶ Several

¹¹² Ibhawoh (2000) 22 *Human Rights Quart* 846.

¹¹³ Ibhawoh (2000) 22 *Human Rights Quart* 846.

¹¹⁴ Ibhawoh (2000) 22 *Human Rights Quart* 846.

¹¹⁵ Ibhawoh (2000) 22 *Human Rights Quart* 847.

¹¹⁶ Ibhawoh (2000) 22 *Human Rights Quart* 847.

African countries' constitutions have this provision enshrined in them. For example, the Ethiopian Constitution 'declares that the state has a responsibility to preserve the nation's cultural legacies and to support "cultures and traditions that are compatible with ... democratic norms"'.¹¹⁷ The constitution of Ghana and Uganda also, 'guarantee that every person is entitled to enjoy, practice, profess, maintain, and promote any culture subject to the provisions of the Constitution'.¹¹⁸ It must be however noted that apart from guaranteeing cultural rights and duties, most African constitutions also aim to prohibit those cultural practices that are in conflict with 'national or applicable international human rights standards'.¹¹⁹ For instance, in the Ghanaian constitution, there is a proviso that 'guarantees the right of individuals to profess and promote their culture, that 'all customary practices which dehumanise or are injurious to the physical and mental well-being of a person are prohibited'.¹²⁰ The above shows how most African states have sought to balance out the tension between culture and rights. They managed 'to find a balance between protecting collective rights while still upholding national human rights standards'.¹²¹

The issue of the use of language in describing the procedure of FGC/FGM is problematic and Obiora highlights this issue and argues that, several critics have insisted that it is a 'misnomer' to refer to the procedure of FGC/FGM as 'female circumcision' because it does not fully describe the practice and all its extensive forms including 'clitoridectomy' and 'infibulation'.¹²² He affirms that it is equally a 'misnomer' to refer to the practice as 'mutilation' because, firstly

¹¹⁷ Ethiopian. Const. arts. 41 (9), 91 (1) as quoted by Ibhawoh (2000) 22 *Human Rights Quart* 848.

¹¹⁸ Ghana. Const. chp 5, s 26(1); Uganda. Const. chp 4, s37, as quoted by Ibhawoh (2000)22 *Human Rights Quart* 848.

¹¹⁹ Ibhawoh (2000) 22 *Human Rights Quart* 848.

¹²⁰ Ghana. Const. chp 5 s26, cl. 2. As quoted by Ibhawoh (2000) 22 *Human Rights Quart* 848.

¹²¹ Ibhawoh (2000) 22 *Human Rights Quart* 848.

¹²² Obiora (1996-1997) 47 *Case West Res L R* 289.

to describe a 'vital aspect of African cultural identity as "mutilation" has proven offensive, if not physically mutilating' to the people who carry out this cultural practice.¹²³ Secondly he argues that the use of the word 'mutilation' arose as a result of the 'misunderstandings that surround the practice'.¹²⁴ He also opines that the word, 'mutilation' has a western influence and can also be seen as a 'misnomer' because not all forms of the procedure are impairing.¹²⁵

He also adds that sometimes the consequences of the practice of FGC are overstated or exaggerated. According to Badri Amna Elsadik, there was a suggestion that most of the reports of gynaecologists with regards to FGC/FGM 'overstate the prevalence of complications, because their views reflect their experiences in treating complicated cases'.¹²⁶ Obiora also states that with regards to mortality rate, it is difficult to give a specific value as there is no information or data on the number of deaths as a result of FGC/FGM. He also adds that there are no records of 'infections nor fatalities in childbirth due to obstructed labour, haemorrhage or infections' resulting from the procedure of FGC.¹²⁷

The language 'mutilation' used in describing this procedure not only is offensive but has managed to 'thwart' the efforts of previous antagonists of the practice. The reason is because the language portrays the procedure and its followers in a very derogatory manner and looks down on their culture. Due to this, there is an outright resistance to efforts put in place to curb the practice. I however do not support the brutality involved in the extreme types

¹²³ Obiora (1996-1997) 47 *Case West Res L R* 290.

¹²⁴ Obiora (1996-1997) 47 *Case West Res L R* 290.

¹²⁵ Obiora (1996-1997) 47 *Case West Res L R* 290.

¹²⁶ Amna Elsadik Badri, *Female Circumcision in The Sudan* (1984) 9, as quoted by Obiora (1996-1997) 47 *Case West L R* 275 at 291.

¹²⁷ Obiora (1996-1997) 47 *Case West Res L R* 290.

of FGC/FGM, even though I am of the opinion that cultural practices of African societies should be respected.

5.6 Recommendations

The first step in achieving the much needed cultural transformation would be a thorough understanding of the cultural practice as well as the justification for the continuation of the practice. Secondly, ways of modifying this practice and formulating initiatives, bearing in mind the justifications and cultural significance of the practice and thirdly; the involvement of both the government and community in implementing these initiatives for transformation.

Also alternative rituals are initiatives that could be recommended that will not only uphold human right values but also affirm community identity and promote aspects of culture which boosts the image of the community as well as prevent or protect women and girls from physical and psychological harm. These alternative rituals give the communities a feeling of ownership or power over the transformation process of their culture. It also creates a sense of belonging in the women who undergo these alternative rituals.

It is suggested that, in order for legislation to be effective in the bid to curb FGC/FGM and its negative effects, 'it must be accompanied by a broad and inclusive strategy for community-based education and awareness-raising'.¹²⁸ In other words, the need for dialogue is essential as well as a 'hands-on' community effort. In addition to this, as earlier mentioned, the required change must come from within and not be initiated by western ideas. This suggestion according to Ibhawoh seemed to have worked well in Kenya, where some of the local communities have already successfully come up with and

¹²⁸ Ibhawoh (2000) 22 *Human Rights Quart* 857.

implemented 'alternative circumcision rites' to replace the old existing forms of FGC/FGM.¹²⁹ This new alternative circumcision rites was 'arrived at through communal dialogue and consensus', the people in this community arrived at a decision whereby they agreed to totally do away with the physical cutting of any part of the woman's body during FGC/FGM, they however retained every other aspect of the circumcision rites that did not involve and harm to the physical body.¹³⁰ This new circumcision is briefly summarised as follows:

The new rite of passage is known as *Ntanira na Mugambo*, or 'circumcision through words'. It uses a week-long program of counselling capped by community celebration and affirmation in place of the former practice. During the celebrations, which still include the traditional period of seclusion, the adolescent girls are taught the basic concepts of sexual and reproductive health and are counselled on gender issues and other customary norms. As a way of legitimizing the new procedure, the girls receive certificates, certifying that they have undergone the traditional rites into womanhood.¹³¹

This newly introduced alternative that was arrived at through collaborations between rural families and the Kenyan national women's group, known as the *Maendeleo ya Wanawake* (MYWO) has been said to produce positive results in that in a community where it was introduced, about 95% of the girls who were supposed to undergo FGC/FGM was reduced to 70%.¹³² Uganda as mentioned earlier also adopted a similar practice and is producing positive responses as well. The above example goes further to prove or show the effectiveness of using 'cross-paradigmatic dialogue' in resolving the conflicts between culture and rights. This does not mean that these 'alternative rites' are not faced with oppositions, but 'it is an example of the process of community involvement in

¹²⁹ Ibhawoh (2000) 22 *Human Rights Quart* 857.

¹³⁰ Ibhawoh (2000) 22 *Human Rights Quart* 858.

¹³¹ Ibhawoh (2000) 22 *Human Rights Quart* 858.

¹³² Ibhawoh (2000) 22 *Human Rights Quart* 859.

advocacy, information, education, legislation and policy formulation.’¹³³ In other words, the best way in resolving the issue of FGC/FGM is through community involvement and a high sense of sensitivity in dealing with human related issues as it relates with this traditional practice.

In essence, the exercise of merging culture and right, as they are already in a way interwoven, would begin with having a thorough understanding of the culture and traditional beliefs of the community involved, and then a sensitive approach in engaging in a dialogue with representatives of the people involved in the culture.¹³⁴ Every culture is known to not only include norms and values that seem to be in conflict with principles of human rights, but these values and norms are also supportive of human rights and its values. Therefore the need to promote human rights should be done with sensitivity and due respect to cultural values and traditions. ‘In this way, the gap between national human rights provisions and cultural orientations can be narrowed down and constitutional rights can derive their legitimacy not only from state authority but also from the force of cultural traditions’.¹³⁵

5.7 Conclusion

The arguments between proponents (cultural relativists) and opponents (human rights activists) of FGC/FGM that has been discussed in this chapter show that there is still a need to find ways of protecting the cultural legitimacy of human rights. According to Ibhawoh, cultural transformation is the only way to effectively curb cultural practices that are ‘supposedly’ in conflict with human rights.¹³⁶ In my opinion, one of the ways in achieving this is to develop techniques for internal cultural discourse and cross-cultural dialogue. In

¹³³ Ibhawoh (2000) 22 *Human Rights Quart* 859.

¹³⁴ Alison (1988) 10 *Hum Rights Quart* 483.

¹³⁵ Ibhawoh (2000) 22 *Human Rights Quart* 860.

¹³⁶ Ibhawoh (2000) 22 *Human Rights Quart* 855.

support of this, Ibhawoh states that we ‘must work towards establishing general conditions conducive to constructive discourse and dialogue’.¹³⁷ In other words, there needs to be a dialogue between law makers and traditional law makers in each state in prescribing what culture can be continued or developed. Tamale also suggests the same approach in attempting to curb the practice of FGC/FGM. According to her, due to its strong symbolic connotations, it cannot be entirely eradicated but can be modified. This idea of hers is very promising as it relates to the fact that culture, just like rights can be modified and developed. She used the case in Uganda as an example where the Ugandan government first attempted to entirely ban the cultural practice of FGC/FGM. There was a ‘severe backlash’, and this led to the Ugandan government retreating and then coming up with a better solution whereby the communities that engaged in this practice came into dialogue with the government. At the end of this dialogue, an alternative means of preserving the essence of the culture while at the same time avoiding the harmful nature of the practice was provided.¹³⁸

The above cited example by Tamale is what Ibhawoh referred to as ‘cross-paradigmatic dialogue’.¹³⁹ Ibhawoh further affirms that ‘women and minority groups must be able to dialogue over interpretations of cultural values with politicians, officials, traditional leaders, and family heads in both the rural and urban areas’.¹⁴⁰ He goes further to state that,

If respect for human rights is to be achieved and made sustainable, human rights must reside not only in law but in the living and practiced culture of the people. There is a need, therefore, for dialogue among groups with different

¹³⁷ Ibhawoh (2000) 22 *Human Rights Quart* 855.

¹³⁸ Tamale (2008) 16 *Fem Leg Stud* 62-63.

¹³⁹ Ibhawoh (2000) 22 *Human Rights Quart* 855.

¹⁴⁰ Ibhawoh (2000) 22 *Human Rights Quart* 855.

paradigms of cultural legitimacy on what role culture should play in legitimizing national human rights regimes within African states.¹⁴¹

According to Ibhawoh, the aim of such a dialogue ‘would be to agree on a range of cultural support for national human rights, in spite of disagreements on the justification of those beliefs’.¹⁴² One must however put in mind that there will not always be total agreements on ‘cultural interpretation and application to human rights’, but it is always of utmost importance to endeavour to keep the ‘avenues for dialogue open’.¹⁴³ In other words, in coining national human rights provisions, there should be room for cultural expression. This means that, communities should be given a lee-way in interpreting and implementing human rights provisions. This is where the doctrine of margin of appreciation comes into play. For example with regards to FGC/FGM, there should be a margin of cultural interpretation of what constitutes ‘harmful cultural practice’ or what constitutes ‘mutilation’. The language and its underpinnings must not be forced on communities that engage in and believe in the symbolic connotations of this cultural practice. The point being made here is that, in order for human rights provisions, such as those against the practice of FGC/FGM to be effective, there must be allowance ‘for some form of cultural expression and initiative’.¹⁴⁴ The visible challenge here is how can ‘culture through change, adaptation, and modification be made to serve as a complement rather than a constraint to specific national human rights aspirations’.¹⁴⁵ This does not imply that, one should just ‘identify the cultural barriers and limitations to modern domestic and international human rights standards and to reject them wholesale or just

¹⁴¹ Ibhawoh (2000) 22 *Human Rights Quart* 855.

¹⁴² Ibhawoh (2000) 22 *Human Rights Quart* 855.

¹⁴³ Ibhawoh (2000) 22 *Human Rights Quart*. 855.

¹⁴⁴ Ibhawoh (2000) 22 *Human Rights Quart*. 856.

¹⁴⁵ Ibhawoh (2000) 22 *Human Rights Quart*. 856.

uphold these human rights standards over cultural traditions'.¹⁴⁶ The solution is to, 'adopt a holistic and sensitive approach that seeks to understand the social basis of these cultural traditions and how cultural attitudes may be changed and adapted to complement human rights'.¹⁴⁷

In other words, there is a need for 'sensitivity' or a sensitive approach in modifying and adapting cultural practices that are seen to be in conflict with human rights. Simply terming a cultural practice 'mutilation' is not a so-sensitive approach in tackling the practice of FGC/FGM and this can be said to be one of the basic reasons why the practice is still very much in existence. In order to create this proposed modification and adaptation, there must be local initiatives and involvement of the people involved and 'said' modification and adaptation must not in any way compromise the culture and integrity of the people. Also, the people involved in this cultural practice 'must feel a sense of ownership of the process of change and adaptation'.¹⁴⁸ In other words, change, modification or adaptation suggestions must not come from external sources or influence, but must come from inside these communities for it to be effective.

The main research problem of this study was to investigate the possibilities for a cultural transformation of the practice of FGC in order to align the practice with human rights. The first chapter focused on the general meaning of the term. The second chapter traced the origin and explained the several justifications offered for the continued existence of the practice. The preservation of culture which is the most important justification was not only

¹⁴⁶ Ibhawoh (2000) 22 *Human Rights Quart.* 856.

¹⁴⁷ Ibhawoh (2000) 22 *Human Rights Quart.* 856.

¹⁴⁸ Ibhawoh (2000) 22 *Human Rights Quart.* 856.

put forth as a reason for its origin but also as a reason for its continued existence.

The need for a cultural transformation in dealing with the issue of FGC/FGM is expedient because law reforms and other measures such as awareness projects have seemed to fail in the past. It is my tentative conclusion that the best way to curb this practice is to seek a form of cultural modification or transformation that enables the culture to be in line with the core values of human rights as well as maintaining its significant features.

The practice of female genital cutting/female genital mutilation has been in existence for a long period of time. Although its origin remains a mystery, it is a practice that is firmly embedded in the culture of many African countries. The communities practising FGC/FGM and those in favour of the practice view it as a form of cultural identity and a sacred ritual that is an essential part of the rite of passage. This practice is protected by cultural beliefs and myths. This cultural practice is however of a controversial nature because of its health hazards.

Internationally, female genital cutting/female genital mutilation is viewed as a violation of human rights due to its coercive and forceful features. However human rights arguments have produced little or no result when used as an argument in putting an end to FGC/FGM. This is because it is difficult to attempt to protect the rights of an individual who does not know about these rights or believe in these rights.

The understanding of the motive behind this cultural practice is essential because it helps in understanding the mind-set of the people who strongly believe in and uphold this practice. Different cultures come with their own

values, therefore attempting to eradicate a culture without understanding its meaning and significance leads to strong resistance from its adherents. However, culture is always in constant flux, adapting and reforming with time due its non-static characteristics. Therefore even though the practice of FGC/FGM is firmly rooted in culture, it has the ability to be reformed.

The reason why there is a need for reformation is because the practice of FGC/FGM violates a number of human rights such as the right to life, the right to bodily integrity and the right to sexual and corporal integrity to mention a few. The concept of human rights was introduced in order to protect people from government that was violating their rights. Human rights can also be applied to protect human beings from themselves. Research has shown that the human rights approach in curbing FGC/FGM has not been successful because practice is still very much at large. In an attempt to trace the reason for this, I find that the use of language of the language 'mutilation' in describing the procedure which shows insensitivity towards the respected practice of a group of people, hence the need for finding a more sensitive approach in dealing with the excesses of the practice of FGC/FGM.

There is a need for community involvement or participation in any effort at cultural transformation. Culture and rights do not always have to be war; there can be a meeting point between these two concepts. The cultural practice of FGC/FGM can be modified or transformed to fall in line with human rights and at the same time maintain its significant attributes .This is because research has shown that complete eradication is near impossible because of its deep rootedness. Therefore the most effective way of curbing this practice would be to have a dialogue with members of the practising communities and reach an

agreement on how best to modify or transform this cultural practice in order to align it with human rights values.

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