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Between universalism and cultural relativism: The dilemma of consent to female genital mutilation in the *Tatu Kamau* case

Caroline Omari Lichuma*

Abstract

To date, almost 74 years since the adoption of the Universal Declaration of Human Rights (the UDHR), the tensions between universalism and cultural relativism in the field of human rights, whose provenance can be traced back to the debates surrounding the drafting and adoption of the UDHR, still linger on, playing out on the national stage in countries such as Kenya. At its core, universalism argues that all human rights inhere in all individuals without distinction, and that they must stand even when in when in opposition to established cultural practices. In contrast, cultural relativism holds that no particular culture is superior to another, and centers on the need for forbearance and respect towards each culture to avoid imperialist tendencies of imposing beliefs. This paper argues that these binary ideological viewpoints are magnified in the context of female genital mutilation. Through an analysis of the case of Tatu Kamau v Attorney General & 2 others; Equality Now & 9 others (Interested Parties); Katiba Institute & another (amicus curiae) [2021] eKLR, it is proposed that a cultural approach is needed in addition to legal measures in place to combat the practice.

Keywords: female genital mutilation (FGM), right to health, right to human dignity, right to culture, consent, Kenya

* LLB (University of Nairobi); LLM (New York University); PhD Candidate (University of Göttingen).

1. Introduction

The term ‘female genital mutilation’ (FGM), sometimes referred to as female genital cutting (FGC), or less commonly now as female circumcision, is the collective name given to several different traditional procedures involving partial or total removal of the external female genitalia, as well as injury to the female genital organs for non-medical reasons.¹ Kenya outlawed FGM in 2011 when the Prohibition of Female Genital Mutilation Act was passed.² However, this practice still persists in some communities. While the enactment of legislation alone is never enough to change undesirable social behaviour, it is certainly an important starting point in the journey to reduce and eventually eliminate harmful traditional practices such as FGM.

On the 17th March 2021 the High Court of Kenya sitting in Nairobi handed down its much-awaited judgment in the *Tatu Kamau Case*.³ The case involved an adult female who challenged the constitutionality of the Prohibition of FGM Act as well as the Anti-Female Genital Mutilation Board created by the Act. The petitioner averred that certain provisions of this Act were unconstitutional primarily because they limited the right of adult women to exercise free choice or to give consent, and to enjoy their cultural rights.⁴ It is an interesting case to ponder. How should the law (and the courts) deal with the situation of an adult woman (a doctor no less!) who, with full knowledge of the health risks and negative effects accompanying FGM, nevertheless demands the right to freely choose whether or not to undergo the practice, arguing that it holds importance to her cultural and personal identity as was the case here?

¹ Anika Rahman and Nahid Toubia (eds) *Female genital mutilation: A practical guide to worldwide law*, Zed Books, 2000, 3.

² Prohibition of Female Genital Mutilation (FGM) Act (No 32 of 2011).

³ *Tatu Kamau v Attorney General & 2 others; Equality Now & 9 others (Interested Parties); Katiba Institute & another (Amicus Curiae)*, Constitutional Petition 244 of 2019, Judgment of the High Court (2021) eKLR.

⁴ *Tatu Kamau v Attorney General & 2 others*, Judgment of the High Court, para 1.

This first of its kind case raises novel questions about what consent truly means in the context of harmful traditional practices, and how far consent should, as a normative matter, be allowed to go. In other words, whose consent should hold sway in cases such as these? Should it be the consent of the adult woman, who wants the freedom to choose whether or not to undergo FGM? Or rather should it be the consent (or lack thereof) of other actors such as lawmakers and judges, who will make decisions that impact the autonomy of such an adult woman? As the nuanced analysis in this paper will show, these are difficult questions that have no straightforward answers.

Nevertheless, despite these difficulties, and using this seminal judgment as a foundation, this paper will analyse the inherent tension between the right to participate in and enjoy one's cultural life,⁵ on the one hand, and the right to health,⁶ on the other, in the context of a harmful traditional practice such as FGM. As regards the former, this will involve an interrogation of the complex mix of cultural, religious, social, and other factors that underpin the desire by a woman, such as the petitioner, to undergo FGM. For 'outsiders,' FGM holds no value for the women who undergo it, but for 'insiders,' FGM may be seen as an important rite of passage that 'holds meaning not only for the woman who receives it, but also for the woman who performs it'.⁷ As regards the latter, subsequent sections of this paper will show that FGM has clear right to health implications for those who undergo it. Ultimately, the paper will seek to identify what role, if any, consent should be allowed to play in the mediation of this tension between right to culture and right to health.

In navigating these concerns the paper is divided into six sections including this introduction. Section II sets the stage for the discussion by briefly explaining what FGM is and why it is considered to be a harmful traditional practice. Section III summarises the pertinent facts of the

⁵ Constitution of Kenya (2010), Article 44.

⁶ Constitution of Kenya (2010), Article 43.

⁷ Anne Gibeau, 'Female genital mutilation: When a cultural practice generates clinical and ethical dilemmas' 27(1) *JOGNN Clinical Issues* (1998) 87.

Tatu Kamau case as well as the High Court's judgement. Section IV focuses on the right to health, and the right to human dignity as well as their implications for consent in the context of FGM. The penultimate section analyses the interplay of cultural rights and human rights more generally, paying particular attention to the questions of cultural relativism and universalism. A brief conclusion will complete the article in Section VI.

2. Setting the stage: Explaining FGM

2.1 What's in a name: Female genital mutilation, female genital cutting or female circumcision?

To foreshadow this paper's position on FGM as a harmful traditional practice that should not be countenanced by either law or society, a small caveat on the choice of terminology is necessary to begin with. The importance of terminology cannot be overstated. This paper deliberately makes sole utilisation of the term FGM, rather than female genital cutting (FGC) or female circumcision.

For a long time, the term female circumcision was acceptable in the international discourse, as an analogous term to male circumcision, even though the two practices are not the same in both definition and effect as will be elaborated upon in section 1.2 below. This use of the term 'female circumcision' rather than FGM may have been mistakenly prompted by the desire to be sensitive to and respectful of the practices of the communities which carry out FGM, since the use of the term FGM was found to be 'offensive or even shocking to women who have never considered the practice a mutilation.'⁸ As the argument goes, 'although FGM is a more scientifically correct term, the implications of the word profoundly confer a moralising tone that hastily concluded negative implications before an explanation is offered.'⁹ As is already apparent,

⁸ Rahman and Toubia (eds), *Female genital mutilation*, 5.

⁹ Sandra Danial 'Cultural relativism vs. universalism: Female genital mutilation, pragmatic remedies' 2(1) *Prandium - The Journal of Historical Studies* (Spring, 2013), 4.

the tension between universalism and cultural relativism arises even in the context of the choice of terminology. Arguably, a cultural relativist approach, with its insistence on respect and tolerance of other cultures, would foreseeably prefer a morally neutral term such as FGC, or even circumcision. But are all cultural practices deserving of such respect and tolerance? This paper takes the position that FGM is a harmful cultural practice.¹⁰

However, the use of the term female circumcision was for the most part abandoned when numerous feminist activists and international bodies started opting for the terms FGM and FGC instead. Given this migration of the apprehensions surrounding FGM from the national sphere to the international one, 'the local has become a global concern, "female circumcision" has become "female genital mutilation" and a "traditional practice" has become a "human rights violation"'.¹¹ Consequently in light of this internationalised concern against the practice, the term FGM was formally adopted in 1990 at the third conference of the Inter-African Committee on Traditional Practices Affecting the Health of Women and Children. In 1991, the WHO recommended that the United Nations adopt this terminology as well, which it did, and since then FGM and FGC rather than female circumcision have become the acceptable way to frame this harmful cultural practice.¹² The less loaded term FGC is 'intended to reflect the importance of using non-judgmental terminology with practicing communities'¹³ and is used to avoid alienating and 'demonising cultures under cover of condemning practices harmful to women and the girl child.'¹⁴ The then Special Rapporteur on tradi-

¹⁰ Yasmin Rifaat, 'Sugar-coating female genital mutilation in United Nations documents in English and Arabic: A diachronic study of lexical variations' 2 *International Journal of Linguistics, Literature and Translation* (2019) 5.

¹¹ Bettina Shell-Duncan and Ylva Hernlund (eds), *'Female "circumcision" in Africa: Culture, controversy, and change'*, Lynne Rienner Publishers, 2001, 1.

¹² UNICEF, *Changing a harmful social convention: Female genital mutilation/cutting*, 2005, 2.

¹³ UNICEF, *Changing a harmful social convention*.

¹⁴ Halima Embarek Warzazi, UN Special Rapporteur on traditional practices affecting the health of women and the girl child, *Third report on the situation regarding the elimination of traditional practices affecting the health of women and the girl child* (July 1999) E.CN.4/Sub.2/199/14, 78.

tional practices affecting the health of women and the girl child justified this preference for the use of the term FGC as opposed to the more judgmental FGM arguing that 'it is easy for the media, particularly in the West, and even when they believe they are defending the victims, to resort to racist imagery and demonise cultures, religions and entire communities.'¹⁵

The terminological choice currently rests between either FGM or FGC. It is noteworthy that the impugned Prohibition of FGM Act makes use of the term FGM. This could be seen as a testament to the gravity with which this practice is regarded in the Kenyan legal order. In light of the above background, this paper deliberately uses the term FGM for two reasons. Firstly, the more legalistic reason. The term FGM is relied upon in order to be consistent with the formulation adopted in both the Act, as well as in the *Tatu Kamau Case*, both of which reference FGM rather than FGC. Secondly, on a more personal level, this is a choice justified by the author's intention to emphasise the deleterious health effects, mutilation as it were, of FGM on the victims upon whom it is inflicted.

2.2 The question of definition: What is FGM?

Cases of FGM have been reported all over the world, but this practice is most prevalent in 'the western, eastern, and north-eastern regions of Africa, some countries in Asia and the Middle East and among certain immigrant communities in North America and Europe.'¹⁶ Globally, it is estimated that at least 200 million girls and women alive today have undergone FGM in 30 countries, including in Kenya, Ethiopia, Somalia, Tanzania and Uganda.¹⁷ It is even more troubling that in all of these countries, FGM will usually be carried out on young girls rather than

¹⁵ Warzazi, *Third report on the situation regarding the elimination of traditional practices affecting the health of women and the girl child*, 78.

¹⁶ WHO, *Eliminating female genital mutilation: An interagency statement - OHCHR, UNAIDS, UNDP, UNECA, UNESCO, UNFPA, UNHCR, UNICEF, UNIFEM, WHO*, 2008, 1

¹⁷ UNPF, *Beyond the crossing: Female genital mutilation across borders, Ethiopia, Kenya, Somalia, Tanzania and Uganda*, 2019, 4.

on consenting adult women. In Kenya for example, victims 'are less exposed to FGM before age 7 and most of them are subjected to FGM at the beginning of their adolescence between the ages of 8 to 15 years of age.'¹⁸ FGM is likely to be performed by traditional practitioners, although in some cases and to a much lesser extent medical personnel may also be responsible for the practice.¹⁹ This latter practice is referred to as medicalisation of FGM and is rationalised on the false premise that health care providers are more likely to be more cautious, hygienic and knowledgeable. However, 'medicalized FGM is not necessarily safer and still ignores the long-term sexual, psychological and obstetrical complications of the practice.'²⁰

Within the East African region Kenya has been lauded for being one of the champions in the fight against FGM, especially considering the enactment of the Prohibition of FGM Act in 2011. Article 2 of this Act provides an insightful definition of FGM as comprising:

[a]ll procedures involving partial or total removal of the female genitalia or other injury to the female genital organs, or any harmful procedure to the female genitalia, for non-medical reasons, and includes – (a) clitoridectomy, which is the partial or total removal of the clitoris or the prepuce; (b) excision, which is the partial or total removal of the clitoris and the labia minora, with or without excision of the labia majora; (c) infibulation, which is the narrowing of the vaginal orifice with the creation of a covering seal by cutting and appositioning the labia minora or the labia majora, with or without excision of the clitoris, but does not include a sexual reassignment procedure or a medical procedure that has a genuine therapeutic purpose.

With the exception of its failure to include Type 4 FGM (as explained below), the definition in the Prohibition of FGM Act is broadly similar to and modelled upon the WHO's 2008 definition which classifies FGM into four major types as follows:²¹

¹⁸ UNPF, *Beyond the crossing: Female genital mutilation across borders*, 12.

¹⁹ UNICEF, *A profile of female genital mutilation in Kenya*, 2020, 9.

²⁰ UNPF, *Beyond the crossing: Female genital mutilation across borders*, 24.

²¹ WHO, *Female genital mutilation factsheet* (January 2018); WHO, *Eliminating female genital mutilation: An interagency statement*, 4.

- I. Type 1: Often referred to as clitoridectomy, this is the partial or total removal of the clitoris – a small, sensitive and erectile part of the female genitals, and in very rare cases, only the prepuce – the fold of skin surrounding the clitoris.
- II. Type 2: Often referred to as excision, this is the partial or total removal of the clitoris and the labia minora – the inner folds of the vulva, with or without excision of the labia majora – the outer folds of skin of the vulva.
- III. Type 3: Often referred to as infibulation, this is the narrowing of the vaginal opening through the creation of a covering seal. The seal is formed by cutting and repositioning the labia minora, or labia majora, sometimes through stitching, with or without removal of the clitoris.
- IV. Type 4: This includes all other harmful procedures to the female genitalia for non-medical purposes, for instance, pricking, piercing, incising, scraping and cauterising the genital area.

This failure to include Type 4 FGM within the ambit of the definition found in the FGM Act can be argued to be deliberate rather than accidental. Unlike the other 3 categories which are fairly specific, Type 4 is an ‘umbrella term’²² for all other harmful procedures to the female genitalia for non-medical purposes. This potentially encompasses such a wide range of procedures, that for the sake of legislative clarity and legal certainty, the drafters of the FGM law felt it would be better to exclude it.²³

The above definitions already give an indication of the pain and harm that accompanies FGM, hence its description as a harmful cultural practice that infringes the rights of women and girls, and that deserves the strictest censure not just nationally, but internationally as well. In the

²² Anna Wahlberg and others, ‘Factors associated with the support of pricking (female genital cutting Type IV) among Somali immigrants – A cross sectional study in Sweden’ 14 *Reproductive Health* (2017) 94.

²³ *Tatu Kamau v Attorney General & 2 others*, Judgment of the High Court, para 105.

communities where it persists, it is a 'manifestation of gender inequality that is deeply entrenched in social, economic and political structures.'²⁴ For instance, in certain highly unequal societies, girls and women must remain virgins to be considered as marriageable or even socially acceptable. FGM is one of the ways to achieve this goal.²⁵ In addition, FGM is carried out to, *inter alia*, ensure 'women's chastity and monogamy in marriage.' In contrast, no such expectations of chastity or monogamy are placed on men. In fact, this kind of 'monogamy power' has been argued to be 'the most eloquent expression of patriarchy,' privileging men while subjugating women.²⁶

To be clear, FGM is not the same as male circumcision. The latter is a minor intervention that might even confer health benefits, whereas FGM is a drastic intervention with no health benefits,²⁷ and that only causes harm as will be elaborated upon more fully in Section 2 below. To further contextualise this distinction between FGM and male circumcision, it is indicative of the health benefits of male circumcision (as compared to the non-existent health benefits of FGM) that while the WHO calls for elimination of FGM, it strongly advocates for male circumcision because male circumcision is thought to help prevent the spread of HIV/AIDS.²⁸ As one study observes in this regard, 'it is absurd to equate the simple removal of the male foreskin for health reasons to the barbaric amputation of the female clitoris for the sole purpose of preventing the woman from experiencing pleasure during sex.'²⁹ While I agree with the senti-

²⁴ WHO, *Eliminating female genital mutilation: An interagency statement*, 1.

²⁵ Rajat Khosla and others, 'Gender equality and human rights approaches to female genital mutilation: A review of international human rights norms and standards' 13 *Reproductive Health* (2017) 61.

²⁶ Roseline K Njogu, 'Decolonizing sex: Fifty shades of rape' 3 *South African Journal of Policy and Development* (2016) 20.

²⁷ WHO, 'Female Genital Mutilation' 2014; Alexandra Abott, 'An analysis of male vs. female circumcision' 2 *Kwantlen Psychology Student Journal* (2020) 1.

²⁸ WHO, 'Information package on male circumcision and HIV prevention: Insert 4' (2007) <www.who.int/hiv/pub/malecircumcision/infopack/en/index.html> on 24 April 2021; Helen A Weiss 1, Kim E Dickson, Kawango Agot and Catherine A Hankins, 'Male circumcision for HIV prevention: Research and programmatic issues' 24 *AIDS* (2010) 1.

²⁹ Elizabeth A Piontek and Justin M Albani, 'Male circumcision: The clinical implications are more than skin deep' 116 *Missouri Medicine* (2019) 35.

ment expressed in this study, about the severe harm that FGM causes to women as compared to the minimal harm that male circumcision causes to men, a note of caution is necessary. It is one thing to critique a cultural practice such as FGM on the ground that it causes unacceptable harm to women and girls, and quite another to invoke terms such as 'barbaric' and 'uncivilised' when critiquing such practices.

These latter modes of framing fan the flames of the very concerns than animate cultural relativism ideologies, by using a western gaze to pass moral judgement on non-western cultural traditions. Seen in this light, such critiques may seem to come from a 'saviour' – the white knight, relying upon universal human rights; to save 'the victim' – the women and girls who are forced to undergo practices such as FGM; from the clutches of the 'savage' – which evokes images of barbarism.³⁰ This is problematic, given the fundamentally eurocentric bias of a supposedly universal human rights corpus, and even more damning, for its consideration of the communities who practice FGM as savages and victims, in total disregard of their agency and autonomy. Consequently, even while critiquing FGM from a right to health perspective, this paper nevertheless straddles a delicate balance, by acknowledging (though ultimately disagreeing with), the agency of women such as the petitioner in this case, who want the right to choose whether or not to undergo the practice in light of the deep cultural connections that the practice holds for them.

2.3 FGM is a harmful cultural practice

Traditional cultural practices are an embodiment of the values and beliefs held by members of a particular community for periods often spanning generations. Every social grouping in the world has its own specific traditional cultural practices and beliefs, some of which are beneficial to all members, while others are harmful to a specific group, such as women. Not all cultural practices are harmful and should be done

³⁰ Makau Mutua, 'Savages, victims and saviors: The metaphor of human rights' 42 *Harvard International Law Journal* (2001) 202-204.

away with. Only harmful cultural practices deserve this kind of scrutiny, censure and eradication. This begs the question; how do we determine what a harmful cultural practice is?

I opine that harmful cultural practices are enduring traditions that are grounded in a historically discriminatory social and patriarchal structure that discriminates on the basis of, *inter alia*, sex, gender and age, and are often justified by invoking socio-cultural and religious customs and values. The Maputo Protocol defines harmful practices as, 'all behaviour, attitudes and/or practices which negatively affect the fundamental rights of women and girls, such as their right to life, health, dignity, education and physical integrity.'³¹As both the Committee on the Elimination of Discrimination against Women (CEDAW) and the United Nations Committee on the Rights of the Child (UNCRC) have noted, 'harmful practices are often associated with serious forms of violence or are themselves a form of violence against women and children.'³² Examples of such harmful practices include FGM, forced feeding of women, early marriage, the various taboos or practices which prevent women from controlling their own fertility, nutritional taboos and traditional birth practices, son preference and its implications for the status of the girl child, female infanticide, early pregnancy and dowry. Despite their harmful nature such practices persist in certain communities to date.³³

More specifically, the following criteria are useful for the determination of what constitutes a harmful practice:

- a) They constitute a denial of the dignity and/or integrity of the individual and a violation of the human rights and fundamental freedoms enshrined in the two Conventions;

³¹ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 11 July 2000 (Maputo Protocol), Article 1(g).

³² CEDAW and UNCRC, Joint General Recommendation/General Comment No 31 of the Committee on the Elimination of Discrimination against Women and No 18 of the Committee on the Rights of the Child on Harmful Practices, para 6.

³³ OHCHR, Fact Sheet No 23: Harmful traditional practices affecting the health of women and children', August 1995, para 1.

- b) They constitute discrimination against women or children and are harmful insofar as they result in negative consequences for them as individuals or groups, including physical, psychological, economic and social harm and/or violence and limitations on their capacity to participate fully in society or develop and reach their full potential;
- c) They are traditional, re-emerging or emerging practices that are prescribed and/or kept in place by social norms that perpetuate male dominance and inequality of women and children, on the basis of sex, gender, age and other intersecting factors;
- d) They are imposed on women and children by family members, community members or society at large, regardless of *whether the victim provides, or is able to provide, full, free and informed consent*.³⁴

It is germane that FGM is acknowledged to be a harmful cultural practice.³⁵ This harmful-cultural duality manifests itself in two ways. On the one hand, those who continue to practice FGM do so out of a complex mix of socio-cultural factors, associated with traditional understandings of gender, sexuality and religion. For these adherents FGM may be perceived as necessary for 'spiritual cleanliness, for family honour and to maintain premarital virginity and marital fidelity [...] FGM may also be a rite of passage, a transition from childhood to womanhood.'³⁶ Thus, FGM may be seen to be intricately tied to the cultural beliefs of the communities that practice it. On the other hand, and as section 3 of this paper will more fully highlight, FGM causes both severe

³⁴ CEDAW and UNCRC, Joint General Recommendation/General Comment No 31, para 15. [emphasis added]

³⁵ CEDAW and UNCRC, Joint General Recommendation/General Comment No 31, para 16; Camilla Yusuf, 'Female genital mutilation as a human rights issue: Examining the effectiveness of the law against female genital mutilation in Tanzania' *African Human Rights Law Journal* (2013) 13.

³⁶ Nesrin Varol and Others, 'Female genital mutilation/cutting: Towards abandonment of a harmful cultural practice' 54 *Australian and New Zealand Journal of Obstetrics and Gynaecology* (2014) 402.

physical as well as mental harm to its victims. As one scholar observes in this regard:

FGM procedures are mutilation because they intentionally alter or injure the female genital organs for non-medical reasons. FGM has no health benefits for girls and women. It involves removing and damaging healthy and normal female genital tissue, and interferes with the natural functions of girls' and women's bodies [...] No good can come of this procedure as it only entails substantial health complications and risks.³⁷

Ultimately, even while acknowledging the cultural implications that are one side of the harmful-cultural duality of FGM, this paper ultimately centres the harm dimension in support of the case against FGM.

3. The case: *Tatu Kamau v Attorney General and 2 Others*

2.1 The main arguments raised by the petitioner

The petitioner took issue with sections 2 (the interpretation section which defines *inter alia* FGM), 5 (which outlines the functions of the Anti-FGM Board), 19 (which defines the offence of FGM), 20 (which describes the offence of aiding and abetting FGM) and 21 (which defines the offence of procuring a person to perform FGM in another country) of the Prohibition of FGM Act arguing that they contravened certain provisions of the Constitution.

More specifically, she founded her claim on Articles 19 (on rights and fundamental freedoms in the Bill of Rights), 27 (on equality and freedom from discrimination), 32 (on freedom of conscience, religion, belief and opinion) and 44 (on the right to culture) of the Constitution of Kenya. She also argued that by forbidding qualified medical practitioners from performing 'female circumcision', adult women were consequently denied access to the highest attainable standard of health and healthcare as provided for under Article 43(1)(a) of the Constitution.

³⁷ Danial, 'Cultural relativism vs universalism', 5.

Rehashing the arguments raised by cultural relativists, she also opined that the FGM Act is an 'imperialist imposition from another culture that holds a different set of beliefs or norms.'³⁸ One key contention stressed by the petitioner was the alleged unconstitutionality of prohibiting adult woman from exercising their right to choose to undergo the practice³⁹ thus diminishing their agency and personal autonomy in the cultural and religious spheres of their lives.⁴⁰ Related to this was the argument that the impugned Act mistakenly conflates the rights of adult women with those of the girl child.

This issue of consent by an adult woman was the crux of the petitioner's argument and will be discussed at length in Section 3 of this article.

3.2 Pertinent sections of the High Court's decision

The Court identified a number of issues for determination.⁴¹ Relevant to the present discussion were the questions whether FGM is a harmful cultural practice and whether the rights of women to uphold and respect their culture and identity were violated by the Act.

Acknowledging the importance of balancing competing rights,⁴² the Court stressed that fundamental rights may be limited where the limitation is reasonable and justifiable. The Court noted that FGM is harmful to girls and women due to the removal of healthy genital parts, and results into numerous adverse physical and psychological effects both in the short term as well as in the long term.⁴³ As a result, it was held that the constitutional rights claimed by the petitioner 'can be limited due to the nature of the harm resulting from FGM/C to the individual's health and well-being.'⁴⁴

³⁸ *Tatu Kamau v Attorney General & 2 others*, Judgment of the High Court, para 3.

³⁹ *Tatu Kamau v Attorney General & 2 others*, Judgment of the High Court, para 12.

⁴⁰ *Tatu Kamau v Attorney General & 2 others*, Judgment of the High Court, para 51.

⁴¹ *Tatu Kamau v Attorney General & 2 others*, Judgment of the High Court, para 71.

⁴² *Tatu Kamau v Attorney General & 2 others*, Judgment of the High Court, para 148.

⁴³ *Tatu Kamau v Attorney General & 2 others*, Judgment of the High Court, para 145 and 149.

⁴⁴ *Tatu Kamau v Attorney General & 2 others*, Judgment of the High Court, para 153.

On the question of culture, the Court reiterated that while the Constitution grants rights holders the freedom to exercise one's culture, this exercise must be in line with other constitutional provisions. Thus, despite the fact that FGM used to be central to the culture of some communities in Kenya, it is reasonable to limit this right in light of the negative short-term and long-term effects of FGM/C on women's health.⁴⁵

On the issue of consent, the Court was emphatic that no one can choose to undergo a harmful practice. Even though 'our Constitution has a general underlying value of freedom, this value of freedom is subject to limitation which is reasonable and justifiable.' There is thus no 'freedom to inflict harm on one's self in the exercise of these [constitutional] freedoms.'⁴⁶ The Court further stressed that the petitioner's argument made it seem as though any woman above the age of 18 would undergo FGM voluntarily. However, this is not the case in reality:

... especially for women who belong to communities where the practice is strongly supported. The context within which FGM/C is practiced is relevant as there is social pressure and punitive sanctions. From the evidence, it is clear that those who undergo the cut are involved in a cycle of social pressure from the family, clan and community... Women are thus as vulnerable as children due to social pressure and may still be subjected to the practice without their valid consent.⁴⁷

In conclusion, the Court ruled against the petitioner on all counts, although it asked the Attorney General to forward proposals to the National Assembly to consider amending Article 19 of the Prohibition of FGM Act in order to include Type IV FGM as defined by the WHO. While I agree with the Court's decision in this case, it is necessary to point out that the judgement could be seen as giving with one hand and taking with the other. While the Court rules against the petitioner on the grounds of, *inter alia*, the harmful effects of FGM, the language used in this regard that characterises women as being as vulnerable as children, is problematic because this kind of infantilisation of women is a gendered practice linked to patriarchal structures that situate men

⁴⁵ *Tatu Kamau v Attorney General & 2 others*, Judgment of the High Court, para 215.

⁴⁶ *Tatu Kamau v Attorney General & 2 others*, Judgment of the High Court, para 211.

⁴⁷ *Tatu Kamau v Attorney General & 2 others*, Judgment of the High Court, para 135.

in the default position of power, while reinforcing the subordination of women, alongside children.⁴⁸ Thus, a proper recognition of the dignity and autonomy of women as human beings with social agency and authority, just like men, necessitates avoidance of such infantilising characterisations, even where the intentions of doing so are avowedly good.

4. A right to health and a right to human dignity analysis of FGM: Arguments against 'the cut'

4.1 The true cost of FGM: How does FGM infringe upon the right to health?

Article 43 of the Constitution catalogues several economic and social rights (ESRs) such as, 'the right to the highest attainable standard of health, which includes the right to health care services, including reproductive health care.'⁴⁹ The petitioner tried to rely on this provision arguing that by forbidding qualified medical practitioners from performing the practice, Section 19(1) of the FGM Act affected the right of adult women to access health care services. In contrast, this paper takes the position that even if carried out by qualified medical practitioners, FGM is still an unjustifiable infringement of women's right to health. In this regard, the WHO has stressed that this kind of 'medicalisation' is never acceptable because it 'violates medical ethics since (i) FGM is a harmful practice; (ii) medicalisation perpetuates FGM; and (iii) the risks of the procedure outweigh any perceived benefit.'⁵⁰

As section 1.3. highlighted, any attempt to properly understand FGM must be situated within the broader context of its harmful-cultural duality. This is to say, on the one hand, FGM causes harm to the women and girls who undergo it, as will be expounded upon in detail in this

⁴⁸ Sophie Namy and others, 'Towards a feminist understanding of intersecting violence against women and children in the family' 184 *Social Science and Medicine* (2017) 40.

⁴⁹ Constitution of Kenya (2010), Article 43(1)(b).

⁵⁰ WHO, 'Guidelines on the management of health complications from female genital mutilation' 2016.

section, but on the other hand, FGM has strong cultural implications both for the communities that practice it. A nuanced analysis of FGM requires an acknowledgement of this duality.

FGM is deeply embedded in the culture and traditions of those who practice it. For the women and girls who choose to undergo it, the practice is likely to have both a socio-cultural as well as religious dimensions. It is considered to be a rite of passage that prepares girls for the transition into womanhood, and subsequently into marriage and motherhood.⁵¹ In addition, FGM is argued to maintain and promote chastity while simultaneously preventing promiscuity, which allegedly enhances the suitability of girls and women for marriage.⁵² Consequently, for women who would choose to undergo FGM, this choice may be driven by the desire to be seen as suitable in the eyes of their communities to which they belong, which has ramifications for their sense of belonging as well as the safety, security and even resources that would follow such acceptance.⁵³ Relatedly, parents who allow their girls to go through FGM in such communities 'do not believe that it is harmful, rather they are ensuring a safe and dignified place in society for their daughters by following cultural norms. Additionally, they believe that individuals outside of the culture are dictating changes in their customs, which, at the very least is insulting to them, and at the very worst, seeks to annihilate their cultural norms and values.'⁵⁴ The picture painted by this brief discussion has elucidated upon one aspect of the harmful-cultural duality of FGM. The rest of this section will now devote its attention to the other side of the coin, that is, an exposition of the harm dimension of FGM.

FGM is an egregious violation of women and girls' rights that results in severe health complications, including but not limited to death, disability, miscarriage, stillbirth, shock, haemorrhage, sepsis, sexual

⁵¹ Giles Clark, 'Changing culture to end FGM' *The Lancet* (2018) 401.

⁵² Kathleen Monahan, 'Cultural beliefs, human rights violations, and female genital cutting' 5(3) *Journal of Immigrant & Refugee Studies* (2007), 24-25.

⁵³ Monahan, 'Cultural beliefs, human rights violations, and female genital cutting', 27.

⁵⁴ Monahan, 'Cultural beliefs, human rights violations, and female genital cutting', 27.

dysfunction and post-traumatic stress disorder.⁵⁵ The WHO has catalogued a number of short-term and long-term effects of FGM on the victims.⁵⁶ These are briefly outlined below and include both physical and psychological effects.

In the short term, the immediate complications of FGM include the following: severe pain because of the cutting of nerve ends and sensitive genital tissue; excessive bleeding or haemorrhaging which can result if the clitoral artery or other blood vessel is cut during the procedure; shock which can be caused by a combination of factors including pain, infection and/or excessive bleeding; genital tissue swelling as a result of inflammation or infections; infections which may be caused by the use of contaminated instruments; human immunodeficiency virus (HIV) which may occur through the cutting of genital tissues with the same surgical instrument used on a HIV positive person without sterilisation; urination problems including urinary retention and pain passing urine; impaired wound healing which can lead to pain, infections and abnormal scarring. In some cases, death may occur as a result of a combination of factors; the psychological consequences of FGM cannot be understated. The pain, shock and the use of physical force by those performing the procedure have a traumatic effect on the victims.⁵⁷

Over the longer term, the consequences of FGM could include the following: chronic pain as a result of tissue damage and scarring; chronic genital and urinary tract infections, vaginal discharge and itching; painful urination due to obstruction of the urethra and recurrent urinary tract infections; menstrual problems resulting from the obstruction of the vaginal opening leading to painful menstruation (dysmenorrhea), irregular menses and difficulty in passing menstrual blood, particularly among women with Type III FGM; compromised female sexual health

⁵⁵ Rajat Khosla and others, 'Gender equality and human rights approaches to female genital mutilation: A review of international human rights norms and standards' 14 *Reproductive Health* 59 (2017), 1.

⁵⁶ WHO, 'Health risks of female genital mutilation' <<https://www.who.int/teams/sexual-and-reproductive-health-and-research/areas-of-work/female-genital-mutilation/health-risks-of-female-genital-mutilation>> on 27 April 2021.

⁵⁷ WHO, 'Health risks of female genital mutilation'.

and sexual problems such as decreased sexual desire and pleasure, pain during sex, difficulty during penetration, decreased lubrication during intercourse, reduced frequency or absence of orgasm (anorgasmia); complications during childbirth are also likely to occur which also increases the risks of infant mortality as a result of complications; psychological consequences such as post-traumatic stress disorder (PTSD), anxiety disorders and depression may also be experienced.⁵⁸

As the above examples show, there is no doubt that FGM has serious negative effects on the health of the women and girls who are subjected to it, regardless of whether they consent or not. In fact, even the Committee on Economic, Social and Cultural Rights (CESCR) has acknowledged that the realisation of the right to health requires states to '...undertake preventive, promotive and remedial action to shield women from the impact of harmful traditional cultural practices and norms...'⁵⁹ The High Court agreed with this wide interpretation of the right to health together with the corresponding obligations on the state.⁶⁰

A particularly interesting, and less obvious, dimension of the impact of FGM to the right to health is its fiscal or budgetary consequences. FGM increases the cost of healthcare provision in several ways, which could in turn make it more onerous for the state to meet its obligations as regards access to health facilities. Caring for girls and women living with FGM requires knowledgeable health-care providers, adequately trained to identify, treat or refer clients who may present with a range of health complications due to different types of FGM. One noteworthy study showed that 83% of women who had undergone FGM would require medical attention at some point in their lives for a condition or complication resulting from the procedure.⁶¹ This implies an increase in costs of healthcare provision, an additional fiscal burden on countries

⁵⁸ WHO, 'Health risks of female genital mutilation'.

⁵⁹ UNCESCR, General Comment No 14: The right to the highest attainable standard of health (Art. 12), 11 August 2000, E/C.12/2000/4, para 21.

⁶⁰ *Tatu Kamau v Attorney General & 2 others*, Judgment of the High Court, para 175.

⁶¹ Fran Hosken, *The Hosken report: Genital and sexual mutilation of females*, Lexington, 1994, 48.

like Kenya which are already struggling to provide basic healthcare to their citizenry.

A study carried out in a number of countries including Kenya, revealed that as much as 1% of government expenditure is spent on the health of women in the reproductive age group as a result of FGM related obstetric complications annually.⁶² When the financial burden that FGM imposes on the health system is measured, it becomes obvious that caring for women who have undergone this procedure imposes an even greater economic burden and that the cost of efforts to prevent FGM can be wholly or partially offset by the savings generated when complications are prevented.⁶³

From the foregoing, it is apparent that FGM is a costly practice that affects the physical and psychological health of its victims and that has the potential of negatively impacting the financial health of the state as well. As outlined above, both in the short-term as well as in the long-term, there are very grave physical and psychological costs borne by women and girls who are subjected to FGM. In addition, there are also budgetary implications for states that do not try to minimise and eliminate this harmful cultural practice.

4.2 The dilemma of choice: Can one consent to a practice that harms their health?

The arguments raised by the petitioner and rejected by the Court on the issue of consent by an adult woman to the practice of FGM provide some food for further thought. To begin with, it is necessary to understand what consent means. 'Consent is defined in *Black's Law Dictionary* as the agreement, approval, or permission as to some act or purpose

⁶² David Bishai, Yung-Ting Bonnenfant, Manal Darwish, Taghreed Adam, Heli Bathija, Elise Johansen and Dale Huntington for the FGM cost study group of the World Health Organization, 'Estimating the obstetric costs of female genital mutilation in six African countries' 88(4) *World Health Organization Bulletin* (2010) 281, 282.

⁶³ Bishai and others, 'Estimating the obstetric costs of female genital mutilation,' 283.

especially given voluntarily by a competent person.’⁶⁴ Unfortunately, the Prohibition of FGM Act does not define the term consent. However, recourse can be had to the Sexual Offences Act which defines consent in the following terms. ‘A person consents if he or she agrees by choice, and has the freedom and capacity to make that choice.’⁶⁵

Section 19 (6) of the Prohibition of FGM Act places this discussion on the potential role of consent in sharp focus. It provides that it ‘... is no defence to a charge under this section that the person on whom the act involving female genital mutilation was performed consented to that act, or that the person charged believed that such consent had been given.’ For the petitioner, this provision amounts to an unconstitutional violation of an adult woman’s right to personal autonomy and freedom to exercise free choice. This contention raises some serious concerns. Is the right to personal autonomy an absolute right? How do we reconcile the tension between the exercise of this right by an adult woman and other fundamental rights such as the right to health, or the right to dignity within the context of FGM?

To begin with, it is important to acknowledge that the law is not completely blind to the possibility of consent playing a role in certain limited instances in order to distribute liability between parties in a dispute, or even to absolve one party from liability entirely. For instance, every bright eyed first-year law student is familiar with the *volenti non fit injuria* principle – voluntary assumption of risk, a common law doctrine which provides that where someone willingly places themselves in a position where harm might result, knowing that some degree of harm might result but nevertheless accepting this risk, they are not able to bring a claim against the other party in tort.⁶⁶ However, this is not to say that such a principle of consent can or even more importantly, should, be capable of traveling from the realm of tort to that of criminal law,

⁶⁴ Winifred Kamau, ‘Legal treatment of consent in sexual offenses in Kenya’ (2013) University of Nairobi <<http://theequalityeffect.org/pdfs/ConsentPaperKenya.pdf>> on 27 April 2021.

⁶⁵ Sexual Offences Act (No 3 of 2006), Section 42.

⁶⁶ AJE Jaffey, ‘*Volenti non fit injuria*’ 44(1) *Cambridge Law Journal* (1985) 1.

or that of fundamental rights – specifically, the prohibition of practices such as FGM. This begs the question, why does consent negate criminal harm in some but not all cases? When should consensual injury be legitimate? Numerous scholars have argued that in answering these difficult questions we must resort to a balancing between consent and human dignity. In this regard, one such scholar observes:

making legal rights and duties contingent on consent usually serves human dignity. This is not to say, however, that the two concepts are coextensive. A consenting person, after all, gets what she happens to want. But there are persuasive arguments that legal doctrines should not invariably or uncritically serve a person's subjective desires. Human dignity is the more fundamental value.⁶⁷

Considering this subliminal tension between human dignity and consent, and the special significance of human dignity as a fundamental right and ideal, 'in any cases of conflict between legally valid consent and dignity, the former ought to yield.'⁶⁸ This implies that there are two normative consequences to the giving of consent. In the first paradigm, consent could be a defence (whether partial or full) in cases of violation of rights. For instance, in the *volenti non fit injuria* defence I referenced above. However, in the second paradigm consent alone should not be capable of justifying bodily harm. To qualify as an acceptable defence the consenting party would have to show that the act consented to did not impinge upon the human dignity of the consentor.⁶⁹ Given the normative reality that fundamental rights and freedoms 'belong to each individual and are not granted by the State'⁷⁰ and are 'subject only to the limitations contemplated in this Constitution.'⁷¹ Consent is not one of the acceptable limitations in this regard. When a cultural practice such as FGM is prohibited and punished under law, this means that the practice is of concern to the state or to society in general. 'In other words, it

⁶⁷ R George Wright, 'Consenting adults: The problem of enhancing human dignity non-coercively' 75 *Boston University Law Review* (1995) 1398.

⁶⁸ Wright, 'Consenting adults', 1399.

⁶⁹ Vera Bergelson, 'The right to be hurt: Testing the boundaries of consent', *Rutgers Law School Faculty Papers*, Paper No 37, 2007, 7.

⁷⁰ Constitution of Kenya (2010), Article 19(3)(a).

⁷¹ Constitution of Kenya (2010), Article 19(3)(c).

is against public policy.⁷² In such instances, it is doubtful whether the victim's consent is (as a descriptive matter) or ought to be (as a normative matter) enough to render such a frowned upon practice acceptable or lawful, thus cloaking it with the shield of legitimacy.

One could argue that by leaving no room for the exercise of personal autonomy by adult women, the FGM Act is similar to other legal frameworks that limit the agency of women, such as laws prohibiting abortion. In turn, this would raise serious concerns about the patriarchal ideologies and paternalistic power structures that underlie such legal regimes, causing women's bodies to become a critical site for power struggles.⁷³ While these concerns are cogent and persuasive, they are beyond this paper's scope of analysis, given its already articulated focus on the harm dimension of FGM, and its overriding of any such consent. Nevertheless, a limited rebuttal to these concerns will suffice for the purposes of the present discussion. Whereas legalising abortion would allow women to exercise their agency to get safe abortions that do not threaten their lives, the converse cannot be said to be true for FGM. Its legalisation and/or medicalisation would still result into severe health consequences, even for consenting adult women.⁷⁴ Thus, even while acknowledging the insidiousness of patriarchal laws, and agreeing with the clarion calls to infiltrate and reconstruct such laws in order to more properly reflect women's experiences,⁷⁵ ultimately these arguments have limited purchase in the very different context of a harmful practice such as FGM.

In addressing this issue of consent, the High Court emphatically observed that 'FGM/C cannot be rendered lawful because the person

⁷² Jean-Gabriel Castel, 'Nature and effects of consent with respect to the right to life and the right to physical and medical integrity in the medical field: Criminal and private law aspects' 16 *Alberta Law Review* (1978) 293.

⁷³ Tamara Braam and Leila Hessini, 'The power dynamics perpetuating unsafe abortion in Africa: A feminist perspective' 8(1) *African Journal of Reproductive Health* (2004) 44.

⁷⁴ Els Leye and Others, 'Debating medicalization of female genital mutilation/cutting (FGM/C): Learning from (policy) experiences across countries', 6 *Reproductive Health* (2019) 158, 162-163.

⁷⁵ Njogu, 'Decolonizing sex: Fifty shades of rape', 24.

on whom the act was performed consented to that act. No person can license another to perform a crime. The consent or lack thereof of the person on whom the act is performed has no bearing on a charge under the Act.⁷⁶ In addition, the Court emphasised that as regards the practice of FGM, the consent of an adult woman *in this specific context*, was incapable of being valid consent for two reasons. Firstly, the Court expressed scepticism about whether victims of FGM can really consent to the practice considering the extreme societal pressure to undergo the practice in the communities that practice it.⁷⁷

Secondly, the Court was not persuaded that one can consent to undergoing a harmful practice. This paper finds the court's conclusion in this regard persuasive. The harmful effects of FGM on women and girls who undergo the practice, whether willingly or unwillingly, completely outweigh any arguments that could be made about the importance of personal agency and autonomy in this instance. There would be a profound philosophical incoherence in arguing for FGM in terms of the rights of women to control their own bodies, while simultaneously critiquing FGM for being a traditional practice steeped in patriarchy, which it is. An adult woman's consent to a patriarchal practice does not negate the need to dismantle these harmful cultural practices that contribute to the subjugation of women.

A useful way to reframe this decision in order to bolster our understanding is to consider the role played by the right to human dignity in the Court's analysis, and to balance this right to human dignity against the right to consent or to exercise personal autonomy and agency. The Court noted that 'Article 28 provides for the right to inherent dignity and the right to have that dignity respected and protected.'⁷⁸ Whereas the Constitution does not define the word 'dignity' the role and importance of human dignity as a foundational constitutional and human rights value is uncontested in both national and international discourse. However, this begs the question, doesn't the right to human dignity

⁷⁶ *Tatu Kamau v Attorney General & 2 others*, Judgment of the High Court, para 161.

⁷⁷ *Tatu Kamau v Attorney General & 2 others*, Judgment of the High Court, para 167.

⁷⁸ *Tatu Kamau v Attorney General & 2 others*, Judgment of the High Court, para 199.

necessarily imply allowing an adult woman to make decisions about her own body without state interference? This paper argues that no, this is not the case. The issue of consent relates to personal autonomy, rather than human dignity. It is therefore necessary to understand the exercise of such personal autonomy within this proper context, and analysing whether personal autonomy trumps human dignity.

The argument made by the petitioner sought to allow adult women to consent to the harmful practice that is FGM. However, this argument does not pass constitutional muster because the right to consent is not absolute. 'Consent protects personal autonomy, but it does not allow a person to degrade or destroy the human dignity of the consenting party.'⁷⁹ Consequently, while theoretically speaking, an adult woman may exercise her personal autonomy to consent to a harmful practice, the exercise of this personal autonomy must necessarily be limited in order to protect the inherent human dignity of the consenting woman. Personal autonomy must therefore give way to human dignity. Framed in another sense, one cannot consent to actions that would violate the very core of what it means to be human. 'A person can forfeit or alienate her personal autonomy, but she cannot alienate her human dignity.'⁸⁰

In summary, this article agrees that there are instances where an adult individual may exercise their personal autonomy to forfeit certain rights, or to undergo certain practices (the example of getting a tattoo comes to mind here), without state interference. However, an individual cannot exercise this right to personal autonomy in instances where the result would be a serious loss of their human dignity, which is precisely the case with FGM. This is therefore a threshold question, and as a result 'consent is a valid defence unless the harm crosses the threshold of degrading the human dignity of the consenter to a serious degree.'⁸¹

⁷⁹ Dennis J Baker, 'The moral limits of consent as a defense in the criminal law', 12(1) *New Criminal Law Review: An International and Interdisciplinary Journal* (2009) 98.

⁸⁰ Baker, 'The moral limits of consent as a defense in the criminal law', 98.

⁸¹ Baker, 'The moral limits of consent as a defense in the criminal law', 99.

5. Burying the past: Balancing cultural rights against other fundamental freedoms

5.1 Limiting rights: A right to culture but not to suffer harmful cultural practices

The Constitution recognises the importance of culture 'as the foundation of the nation and as the cumulative civilisation of the Kenyan people and nation'⁸² and mandates the state to promote all forms of national and cultural expression through inter alia traditional celebrations.⁸³ Additionally, Article 44 confers upon each person the right to participate in the cultural life of that person's choice. Specifically, 'a person belonging to a cultural or linguistic community has the right, with other members of that community (a) to enjoy the person's culture and use the person's language'⁸⁴ with the caveat that 'a person shall not compel another person to perform, observe or undergo any cultural practice or rite.'⁸⁵ Despite these mostly positive references to culture, the Constitution also recognises that some cultural practices may be harmful. However, it confers a right only on children,⁸⁶ and on youth,⁸⁷ (and not on adult women) to be protected from such practices.

As the Court pointed out, 'the petitioner's case is that there is a clash of cultures, and that circumcising communities are discriminated upon and forced to adopt the culture of non-circumcising communities.'⁸⁸ The Court disagreed with this argument however and instead framed the matter as one involving 'the balancing of competing rights'⁸⁹ since 'the right to enjoy one's culture, religion and belief as envisaged in

⁸² Constitution of Kenya (2010), Article 11(1).

⁸³ Constitution of Kenya (2010), Article 11(2)(a).

⁸⁴ Constitution of Kenya (2010), Article 44(2)(a).

⁸⁵ Constitution of Kenya (2010), Article 44(3).

⁸⁶ Constitution of Kenya (2010), Article 44(3).

⁸⁷ Constitution of Kenya (2010), Article 55(d).

⁸⁸ *Tatu Kamau v Attorney General & 2 others*, Judgment of the High Court, para 108.

⁸⁹ *Tatu Kamau v Attorney General & 2 others*, Judgment of the High Court, para 148.

Articles 11, 32 and 44 are derogable.⁹⁰ Consequently, the Court found that the right to culture 'can be limited due to the nature of the harm resulting from FMG/C to the individual's health and well-being.'⁹¹

Seen in this light, 'traditional cultural practice is not a disease to be eradicated. Indeed, many forms of cultural distinctiveness offer valuable contributions that preserve the very essence of humanity. Cultural practices are not the target - harmful practices are.'⁹² Thus, the struggle that exists is finding a way to balance the right to culture against the need to protect vulnerable persons in the society from harmful cultural practices.

5.2 A clash of cultures: The tension between universalism and cultural relativism in the area of FGM

It is an undeniable fact that cultural rites and practices vary across the different ethnic communities that make up a diverse country such as Kenya. For the communities that practice FGM, this practice is seen as a part of their cultural heritage. For many other communities both within Kenya and even outside of Kenya for that matter, which do not share a similar cultural view, the practice may seem confounding and completely unacceptable as being a violation of women's human rights. On the one hand therefore, there are cultural practices that are limited in their acceptance and application to the communities that believe in them, while on the other hand however, there are fundamental human rights that inhere in all human beings without distinction on the basis of which community they hail from.

When the international spotlight was first shined on FGM in the late 1970s,⁹³ 'the revelation that girls have their genitals excised as part

⁹⁰ *Tatu Kamau v Attorney General & 2 others*, Judgment of the High Court, para 149.

⁹¹ *Tatu Kamau v Attorney General & 2 others*, Judgment of the High Court, para 153 and 210.

⁹² Brittany Kühn, 'Universal human rights vs. traditional rights', *Topical Review Digest: Human rights in Sub-Saharan Africa* (2009) 15.

⁹³ Rhoda Howard, 'Women's rights in English speaking Sub-Saharan Africa' in Claude Welch and Ronald Meltzer (eds) *Human rights and development in Africa* SUNY Press, 1984, 44.

of an ancient cultural practice shocked and angered many in the West who learned about this practice for the first time.⁹⁴ Subsequent efforts at the international level to combat FGM sparked an extensive debate about the appropriateness of using human rights and the United Nations treaty system to criticise the long-standing cultural practices of certain communities when these practices conflict with established human rights. Clearly, as evinced by the arguments made by the petitioner in the *Tatu Kamau case*, these concerns have not been laid to rest.

As already alluded to in preceding parts of this paper, in seeking to reconcile such contested cultural practices with human rights more generally, there are two distinctly separate positions that could inform the debate, 'the universal human rights argument backed strongly by universal feminists to eradicate FGM on the one hand, and the cultural relativism narrative which argues that all cultures are valid and thus FGM should be lent cultural validity.'⁹⁵ What is the difference between cultural relativists and universalists in this regard?

Cultural relativists would criticise the international human rights system because, in labelling certain practices as potential human rights violations, this system looks at (and even more troubling – exercises a moral judgement over) cultural practices which have been accepted as a way of life for centuries by the communities which engage in them. For such cultural relativists, these kinds of cultural practices have a legitimate function indigenous to the culture and judging these practices according to international norms imposes outside values upon the community involved.

In response to this critique the human rights proponents, the universalists, would in turn argue that their evaluation of such contested cultural practices is based on universally accepted norms and, therefore, does not impose the views of outsiders. After all, for these universalists

⁹⁴ Katherine Brennan, 'The influence of cultural relativism on international human rights law: Female circumcision as a case study' 7 *Law and Inequality* (1988) 367.

⁹⁵ Foluke I Ipinyomi, 'Where the rubber hits the road: The limitations of the universalism vs cultural relativism debate impacting FGM control in Nigeria' *NIALS Journal of Law and Gender* (2015) 3.

‘the function of human rights norms, with respect to cultural practices, is to propose a set of values to guide behaviour in all societies.’⁹⁶ Universalism in this context ‘which draws from the natural law tradition in Western jurisprudence, is the theory that there exists some set of standards which all cultures espouse. These universal principles transcend cultural differences and serve as the authority for adopting international human rights.’⁹⁷

Is there a right or wrong side in this debate? How would cultural relativists reconcile their support for the validity of different cultural practices with the injuries occasioned by some harmful cultural practices such as FGM? For the universalists, how are these universal human rights principles determined or identified? Do we have consensus on which norms are universal and which ones are not? Whose consensus is relied upon for these purposes? As these questions illustrate, this discussion is not black or white – there are numerous shades of grey. The question is how to navigate all these valid concerns in order to begin to resolve the tensions raised.

Perhaps a useful alternative to the highlighted critiques against universalism here would be the ‘positivist’ response. ‘Human rights are guaranteed by numerous acts of positive law – constitutions, covenants, acts of parliament, international declarations.’⁹⁸ These international human rights norms which eventually make their way into the national domain whether through constitutionalisation or even legislation represent a certain level of agreement by ratifying states to work towards certain common goals. This means that since states have accepted to be bound by certain human rights norms, their agreement justifies to some extent the application of these norms within their territories. Within the national context an additional dimension in this regard would be the fact that in Kenya just like in most other countries, the Constitution is the supreme law, and any disputed act must be measured against the Consti-

⁹⁶ Brennan, ‘The influence of cultural relativism on international human rights law, 369.

⁹⁷ Brennan, ‘The influence of cultural relativism on international human rights law, 369.

⁹⁸ Kalikst Nagel, ‘Human rights and the law of human rights: A positive legal regulation of an ontic reality’ *Adam Mickiewicz University Law Review* (2014) 213.

tution for (in)consistency. As Article 2(4) provides, 'Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.' In assessing contested customary practices such as FGM therefore, a positivist inquiry would take us right to the Constitution, and such harmful customary practices found wanting by dint of their violation of fundamental rights as already elaborated upon more fully in Section 2 above.

Ultimately therefore, this paper argues that in resolving complex questions such as the present question of the role of consent in the potential legitimization of harmful cultural practices, in addition to the right to health as well as right to dignity arguments already elucidated upon in preceding parts of this paper, we should also resort to a positivist constitutional inquiry in order to attenuate the tension between universalism and cultural relativism as it relates to FGM.

6. The way forward: Some final thoughts

Despite the progress made in the quest to eradicate FGM in the communities that practice it, the battle is clearly far from won. Even though in general there has been a national decline in prevalence, '[FGM] is still high in such communities as the Somali at 94 per cent, Samburu at 86 per cent, Kisii at 84 per cent and Maasai at 78 per cent.'⁹⁹ The law may have changed, but not all the practicing communities have changed in tune. Some of these communities proudly continue to carry out the practice despite the existing legal prohibition and moral condemnation. For instance, just last year, almost 2,800 girls from the Kuria community in south-western Kenya underwent FGM and were subsequently paraded in the region's main urban areas and showered with gifts to

⁹⁹ Government of Kenya, 'Sessional Paper No 3 of 2019: On national policy for the eradication of female genital mutilation' (2019) 4.

'congratulate them for this milestone.'¹⁰⁰ Admittedly therefore, the law is not a panacea.

As this paper has endeavoured to illuminate, the reasons for the continued practice of FGM vary from community to community with punitive measures for non-conformance. To recap, some of the drivers of FGM include its designation by practicing communities as a rite to passage from childhood to womanhood, that prepares girls for marriage. For other communities FGM is carried out for family pride, prestige and community acceptance. Sometimes FGM brings monetary gains for the circumcisers and elders as well as bride price for the victims.¹⁰¹ For those who undergo the practice, continuation of FGM is thus motivated by a complex mix of socio-cultural factors, of social acceptance, peer pressure, fear of exclusion from resources and opportunities as a young woman and marriageability.¹⁰²

In this regard, it may therefore be necessary to combine legal approaches to dealing with FGM, with other locally led approaches geared towards addressing the underlying root factors contributing to the prevalence of this practice. The combination of alternative ritualistic practices (ARPs) in tandem with intensive sensitisation of the health effects of FGM could be one such avenue with the potential to help achieve the necessary attitudinal and behavioural changes that need to accompany the law outlawing FGM, if things are really to change not just in the books, but in action as well. For instance, one example of an ARP that has shown promise within the context of the Meru community is '*ntan-ira na migambo*' or 'circumcision through words,' which involve training of girls organised during school holidays and geared towards eliminating the need for FGM.¹⁰³

¹⁰⁰ Peter Muiruri, 'Kenyan efforts to end FGM suffer blow as victims paraded in "open defiance"' *The Guardian*, September 2020.

¹⁰¹ Government of Kenya, 'Sessional Paper No 3 of 2019', 13.

¹⁰² Nesrin Varol and others, 'Female genital mutilation/cutting: Towards abandonment of a harmful cultural practice' 54 *Australian and New Zealand Journal of Obstetrics and Gynaecology* (2014) 5, para 405.

¹⁰³ Purity Mwendwa and others, 'Promote locally led initiatives to fight female genital mutilation/cutting (FGM/C): Lessons from anti-FGM/C advocates in rural Kenya' 17 *Reproductive Health* (2020) 30, para 11.

Clearly this is not a practice that can be expected to disappear overnight. Nonetheless, this article concludes on a rather optimistic note. Decisions such as the one in the *Tatu Kamau case* paint a rather positive picture. FGM and other harmful practices will one day – hopefully soon, – be buried in the past.



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