

THE PRACTICE OF FEMALE GENITAL MUTILATION AND THE LIMITS OF CRIMINALIZATION UNDER ETHIOPIAN LAWS

Behaylu Girma*

ABSTRACT

The practice of Female Genital Mutilation (FGM) is a cultural practice that is carried out by more than 30 African and Middle East Countries. It is labeled as one of the harmful traditional practices and crime against women and girls. FGM is highly prevalent in Ethiopia. In order to address the problem, the government has criminalized the practice under the 2004 Criminal Code. Instead of using words that indicate the gravity of the practice such as female genital cutting or mutilation, the law, however, has used ‘circumcision’ which is a less condemning word. Besides, the law has not criminalized the full scale of FGM. These shortcomings have undermined the effectiveness of the law to criminalize and deter the practice. Consequently, the practice is unabated to date and continued to be practiced in different parts of the country with different magnitude and justifications. Through reviewing and analyzing the pertinent international human rights instruments and literature, this study has identified the limits of criminalization of FGM in Ethiopia.

Key words: Female Genital Mutilation; Criminalization; Culture; Justification

I. INTRODUCTION

Culture is the system of shared beliefs, traditions, values, behaviors and artifacts that the society practices and transfers from generation to generation.¹ Every social group in the world has a specific cultural traditions and beliefs.² In order to advance and protect these cultural traditions, the government has a responsibility to enact different laws to enable the society to exercise and

* LL B (Mekelle University), Post Graduate Diploma in Police Science (Ethiopian Police University College), LL M (Bahir Dar University), PhD Student at Addis Ababa University Center for Human Rights. The author is grateful for the constructive comments of the anonymous reviewers..

¹ Mark Goodale, “*An anthropology of human rights surrendering to utopia*”, Stanford University Press, 2009, p.63

² Fact Sheet No.23, Harmful Traditional Practices Affecting the Health of Women and Children based on convention on the elimination of all forms of discrimination against women (art. 5 (a)), adopted by General Assembly resolution 34/180 of 18 December 1979

promote such traditions. Historically, culture precedes law; however, on the relationship between law and culture, there are different views.

The historical school is one of the jurisprudence that arose in the first half of the nineteenth century in Germany.³ This approach considered law as the product of a nation's culture embedded in the daily practice of its people.⁴ The laws of governments are a reflection and mirror of the existing socio-cultural practices of the society. The government enacts laws to advance and protect the existing cultural norms and traditions of the society.⁵ Thus, despite the cultures of the society have harmful traditional practices and ritual activities, the statute of the government recognizes and protects these cultural practices.⁶

The second is the constitutive approach which was developed from the American jurisprudence in the 1980's.⁷ This approach views law as an instrument the government uses to define the societal culture.⁸ Different from the historical school, this approach affirmed that government enacts laws in order to change people's minds, practices, social relations and to create new culture and practices. Particularly, the government will use laws as an instrument to change the harmful and discriminatory traditions of the society.⁹ To realize this, it will enact different laws that criminalize harmful traditional practices and redefine the culture of the society.

The third approach is related to the common law legal system of Anglo-American jurisprudence. According to this approach, the relationship between law and culture is dependent on the thinking, argument and justification of the legal practitioners.¹⁰ It is the legal practitioner such as a lawyer and judge who will determine the nexus between law and societal culture. Depending on the interpretation, law can be used as a promotion and protection or denunciation and modification of the existing cultural practices of the society. .¹¹

³ Menachem Mautner, "*Three Approaches to Law and Culture*", 96CornellL.Rev. 839 (2011) Available at: <http://scholarship.law.cornell.edu/clr/vol96/iss4/25> , p. 841

⁴ Ibid

⁵ Post, Robert C., "*Law and Cultural Conflict*" (2003).Faculty Scholarship Series. 180. Available at: https://digitalcommons.law.yale.edu/fss_papers/180 , p.484

⁶ Supra note 3

⁷ Ibid

⁸ Supra note 5, p.488

⁹ Supra note 3,p.841

¹⁰Naomi Mezey, "*Law As Culture*" (2001). Georgetown University Law Center Georgetown University Law Center Scholarship @ Georgetown Law, p.55

¹¹Supra note 3, p.841

Throughout this writing, the writer will rely on the third approach and argue that laws can be an instrument used to advance and protect the existing cultural traditions and/or it can be used as an instrument to revise and shape the existing culture.

Globally there are different international treaties and declarations that dealt with the protection and development of cultural tradition of the society.¹² The instruments denounce some cultural traditions as harmful practices. FGM is one of the cultural traditions that different international, regional and national laws recognized as a harmful traditional practice that violates the rights of women and children.¹³ At the national level, different countries, including Ethiopia have criminalized FGM as a crime against women and children. Irrespective of this measure, however, FGM has continued to be practiced in the different parts of the country and the society considers it as one of the ritual traditions which transfers from generation to generation.¹⁴ This study attempts to examine the limits of criminalization of FGM under Ethiopian laws.

II. GENERAL OVERVIEW OF FEMALE GENITAL MUTILATION

Female circumcision, female genital mutilation or cutting (FGM/C) is a commonly used terminology for harmful traditional practices committed against women and children.¹⁵ Until recent years, the term ‘female circumcision’ was used in medical literatures, including the World Health Organization.¹⁶ However, the term was considered as less descriptive of the severity of the act and associated with male circumcision, which is considered as normal.¹⁷ Later, different organizations, including the UN began to use the term FGM/C instead of circumcision.¹⁸ The

¹² See Article 15 of International Covenant on Economic, Social and Cultural Rights, Article 27 of International Covenant on Civil and Political Rights, Article 12 and 13 of the American Convention on Human Rights, Article 29 of African Charter on Human and Peoples Rights, Article 2 of International Labor Organization Convention, Article 22 and 27 of Universal Declaration of Human Rights, Convention Concerning the Protection of the World Cultural and Natural Heritage, Universal Declaration on Cultural Diversity

¹³ Convention on the Elimination of all Form of Discrimination Against Women, Convention on the Rights of Child, Protocol to the African Charter on Human and Peoples’ Rights the Rights of Women in Africa are some of the documents that has prohibited harmful traditional practice against women and child

¹⁴ Dani waldada Nabudere, “*Human right and cultural diversity in Africa*”, available at http://www.justice.gov.za/alraesa/conferences/2005uganda/ent_s4_nabudere.pdf, 2005, p.6

¹⁵ Masresha Yazew Andarge, “*The difficulty of ending female genital mutilation; the case of Afar Pastoralist communities in Ethiopia*”, 2014, p. 24

¹⁶ Obiajulu Nnamuchi, “*Circumcision or Mutilation - Voluntary or Forced Excision - Extricating the Ethical and Legal Issues in Female Genital Ritual*”, 25 J.L. & Health 85 (2012) available at <http://engagedscholarship.csuohio.edu/jlh/vol25/iss1/5>, p.90

¹⁷ Ibid

¹⁸ World Health Organization, *Eliminating Female Genital Mutilation : An interagency statement*, 2008

usage of this word was chosen aptly to describe the gravity, harmful nature and inhuman treatment of the practice.¹⁹ FGM/C is defined as a harmful traditional practice that deals with the removal of all or parts of the female genitalia, not for medical reasons, that would result in a devastating short and long term impact on the lives of girls and women.²⁰

On the historical background, there is no clear and precise reference on when and how FGM began, but the practice most likely dates back thousands of years.²¹ Besides, there is inadequate literature that reveals the tradition of FGM. The practice of FGM was observed in ancient Egypt during the fifth century B.C. The Romans and Arabs also adopted the practice.²²

Today, despite the global efforts to abandon it, FGM is widespread and continues in some countries. Every year, around 3 million girls and women are victim of FGM and an approximate 200 million have already undergone the practice.²³ Statistics show that most women and girls who are at risk of FGM live in 30 countries in Africa, the Middle East and Asia.²⁴ These countries conduct different types of practices and generally there are four types of FGM.²⁵ The first type is known as *Clitoridectomy*. It is an excision of the prepuce with or without excision of part of or the entire clitoris.²⁶ The second type is excision of the clitoris with partial or total excision of the labia minora and normally known as *Excision*.²⁷ The third type is known by its severity which excises part or all of the external genitalia and the stitching/narrowing of the vaginal opening commonly referred as *Infibulations*.²⁸ All other harmful practices to the female genitalia for non-medical purposes are categorized as type four FGM.. This includes, for example: pricking, piercing, incising, scraping and cauterization.²⁹

¹⁹ Ibid

²⁰ World Health Organization Information on Female Genital Mutilation, 31 January 2018 available at <http://www.who.int/news-room/fact-sheets/detail/female-genital-mutilation> retrieved 7/6/2018

²¹ Angela Wasunna, "Towards Redirecting the Female Circumcision Debate: Legal, Ethical and Cultural Considerations", *Crossroad: where medicine and the humanities meet*, vol. 5, no. 2, 2000, p. 104

²² Ibid

²³ Supra note 21

²⁴ Ibid

²⁵ Pan African Parliament Women's Caucus, *Abandoning Female Genital Mutilation/Cutting, A Guide for Parliamentarian*, 2006 Nairobi Kenya

²⁶ Supra not 21

²⁷ Ibid

²⁸ Ibid

²⁹ Types four of FGM are any harmful tradition practices that are conducted on the sexual organ of girls and women's. These practices includes, pricking, piercing, incising, scraping and cauterization

III. THE CAUSES OF FEMALE GENITAL MUTILATION

Law plays dual role in the promotion and protection of the culture of the society and it is an instrument to redefine the cultural traditions which are harmful and discriminatory to a specific group of individuals. The cultural practices that are harmful and undermine the human flourishing of women and girls cannot be preserved; rather, challenged as a violation of women's human rights.³⁰ .

However, there is no consensus on what harmful traditional practices are and international and regional human right instruments fail to define it.³¹ Some harmful traditional practices considered as a blessed tradition by the community who practiced it and the international community failed to give a precise definition of such practices.³² Instead of defining it, the UN has also preferred to mention a list of harmful traditional practices.³³ Exceptionally, it is the African Women's Protocol that has clearly defined it.³⁴

The protocol defined harmful traditional practices as all behaviors, attitudes and/or practices that negatively affect the fundamental rights of women. FGM is one of the harmful traditional practices prohibited by the protocol.³⁵ However, Africa is one of the continents where FGM is high prevalent. FGM has continued to be practiced for different reasons some of which are myths and oral traditions.

Sociological justification is one reason which is commonly raised by different societies.³⁶ This justification explains FGM as the practice and process of transformation from girlhood into womanhood and it is a way of social integration and the maintenance of social cohesion.³⁷ Besides, it is considered as one developmental stage that makes girls ready for marriage and motherhood.

³⁰ Lisa Fishbayn, "*Recent thinking and practical strategies*", Gender and human right in common wealth, p. 40

³¹ Camilla Yusuf and Yonatan Fissaha, "*Female Genital Mutilation as a Human Right issue: Examining the effectiveness of law against female genital mutilation in Tanzania*", African Human Right Law Journal, vol. 13, no.2, 2013, p.367

³² Ibid

³³ Supra note 21

³⁴ Article 4(g) definition of harmful traditional practices, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2003, adopted by the 2nd ordinary session, CAB/LEG/66.6 (2003), Maputo, Mozambique

³⁵ Ibid article 5(b)

³⁶ Supra note 21, p. 106

³⁷ Ibid

The practice is supported by different ritual activities and carried out during teenage. Those girls and women who did not pass through these traditional practices are considered as incapable to be a mother and FGM is considered as a prerequisite for marriage and motherhood.³⁸

Different societies raised sexual control and reduction or psychosexual factor as another justification of FGM.³⁹ Those societies who raise this justification explain that the clitoris is the focus of sexual desire. They believe that FGM is vital to protect the woman against her over-sexed nature.⁴⁰ It is also a way of saving her from temptation, suspicion and disgrace while preserving her chastity.⁴¹ Sometimes this justification is supported by different myths.⁴²

Protection of hygiene and aesthetics are another explanation for FGM.⁴³ Female genitalia are considered as unpleasant to sight and touch. Mutilation would result aesthetic and beauty.⁴⁴ The practice of FGM is considered as a means to protect the hygiene of the girl and the women.⁴⁵ Health is another justification and FGM considered as enhancing fertility and child survival.⁴⁶

In western countries FGM began as a means to cure the vexing mental disorders of women.⁴⁷ Accordingly, the treatment of clitoral excision was given in a mental hospital and it was supposed to cure lesbian practices, hyper-sexuality and hysteria problem.⁴⁸

Religious belief also considered as another justification to practice FGM.⁴⁹ Religious justification mostly raised by Muslim communities.⁵⁰ However, there is no clear evidence that shows FGM is

³⁸ Ibid

³⁹ Ibid, p.105

⁴⁰ Ibid

⁴¹ Ibid

⁴² According to the Maasai community who live in Kenya, FGM began to be used a long time ago as a 'cure' and punishment to Napei, a Maasai girl accused of having sexual relations with a man who was considered an enemy of her family. The society perceived that it was her clitoris that has derived her to have sexual relation to the enemy and she was subjected to FGM.

⁴³ Patricia A. Broussard, "*Female genital mutilation: Exploring strategies for ending ritualized torture; shaming blaming and utilizing the convention against torture*", Duke journal of gender law and policy, vol.15:19,2008 p.34

⁴⁴ Ibid

⁴⁵ Ibid

⁴⁶ Evidence to end Female genital mutilation/cutting, Female genital mutilation/cutting in Nigeria, A scoping Review, 2017, p.22

⁴⁷ Vanessa Ortiz, "*Culture Shock: Expanding the Current Federal Law Against Female Genital Mutilation*", 3 FIU L. Rev. 423 (2008), Available at: <http://collections.law.fiu.edu/lawreview/vol3/iss2/10>, p. 433

⁴⁸ Ibid

⁴⁹ Supra note 21, p. 105

⁵⁰ Beth A. Gillia, "*Female Genital Mutilation: A Form of Persecution*", 27 N.M. L. Rev. 579 (1997), available at: <http://digitalrepository.unm.edu/nmlr/vol27/iss3/6>, p. 825

a Muslim traditional practice; rather, it is a means to control the girl and women's sexual desires.⁵¹ Besides, neither the Christian nor the Islamic faith requires FGM.⁵²

Therefore, all the above different justifications and myths perceived FGM as healthy blessed cultural and religious rituals. Even, women who know the harmful nature of such traditions become unwilling to give up the practice and they assume responsibility to transfer it from generation to generation.⁵³

Ethiopia is one of the three African States where there is high prevalence of FGM.⁵⁴ The practice has deeply entered the society and is supported by different cultural practices and religious justifications.⁵⁵

Psychosexual factor is one justification for FGM. The society expresses FGM as a means to control or reduces the female sexual behavior.⁵⁶ For example, in Tigray, Amhara and some parts of a southern nation circumcised girls were thought of as humble, obedient and decent.⁵⁷ Accordingly, the tradition of FGM believed to prevent bad behavior like being emotional, out of control, restless and developing sexual need at an early age.⁵⁸ As a result the society encourages such traditional practices by using different proverbs like *yaltegarzech lej kil tisebralech*, *gulcka tisebralech*, *eka tisebralech*, *koma tikeralech* which implied that women who have not undergone the procedure are reckless and clumsy in the home that will break different things.⁵⁹ Thus, in most cases the society carried out type one and type two FGM which are clitoris dichotomy and excision and the practice conducted at early stage soon after birth.⁶⁰

In the Oromia region and some parts of Southern Ethiopia, FGM has sociological justification and it is a process of transformation of womanhood which is accompanied by different

⁵¹ Supra note 47, p. 432

⁵² Ibid

⁵³ Dani waldada Nabudere, "*Human right and cultural diversity in Africa*", available at http://www.justice.gov.za/alraesa/conferences/2005uganda/ent_s4_nabudere.pdf, 2005, p.6

⁵⁴ Supra note 15, p. 15

⁵⁵ Supra note 21, p. 106

⁵⁶ Ibid

⁵⁷ Jo Boyden, "*Why are current efforts to eliminate female circumcision in Ethiopia misplaced?*", *Culture, Health & Sexuality*, 2012, p.10

⁵⁸ Ibid

⁵⁹ Ibid, p.11

⁶⁰ Ibid

ceremonies.⁶¹ This practice carried out when the girls were deemed old enough for betrothal or marriage. A feast would be held on the day, attended by relatives, neighbors, and friends and the girl would be given different gifts.⁶²

Religious justification is mostly raised by the Muslim society and highly practiced in Afar, Somali and Hariri.⁶³ In this area the sever type of FGM, infibulations, is carried out.⁶⁴ The main reason for such type of mutilation is to protect the girl not to have any sexual relation before marriage and to increase men's sexual pleasure during marriage through creating narrower genital organ ignoring the feelings of the women.⁶⁵ Surprisingly, elders who conduct this practice honored by making the infibulations narrower and difficult for men to penetrate, which will have pain for women.⁶⁶

Therefore, in Ethiopia the practice of FGM conducted having diverse justifications and reasons. The source of these justifications can be cultural or religious, but international, regional and national laws considered such practices as contrary to the human rights of women and children.

IV. FEMALE GENITAL MUTILATION AS A HUMAN RIGHTS VIOLATION

Different international and regional human right instruments denounced FGM as one of harmful traditional practice that violates the human rights of girls and women.⁶⁷ The United Nations and different UN agency considered such practices as harmful cultural tradition and it is a threat to the health and human rights of women and children.⁶⁸

The practice of FGM raises a number of human rights issues, like the right to physical and mental integrity, the right to the highest attainable standard of health, freedom from discrimination on the basis of sex, violence against women, rights of the child, freedom from

⁶¹ Ibid, p.15

⁶² Ibid, p.8

⁶³ Supra note 15, p.31

⁶⁴ Ibid

⁶⁵ Ibid, p. 33

⁶⁶ Ibid

⁶⁷ UNFPA, Driving force in outlawing the practice of female genital mutilation/cutting in Kenya, Uganda and Guinea Bissau, available at <https://www.unfpa.org/sites/default/files/resource-pdf/Legislation%20and%20FGMC.pdf> retrieved 7/6/2018

⁶⁸ World Health Organization Africa, <http://www.afro.who.int/news/ethiopia-bans-medicalization-female-genital-mutilation-fgm> retrieved on 7/3/2018

torture, cruel, inhuman and degrading treatments and when the practice result in death it violates the right to life of the victims.⁶⁹

Thus, different international and regional human right instruments prohibit the practice of FGM. The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention on the Right of the Child (CRC) are the main documents that have clearly condemned social and cultural practices that discriminate women and children.⁷⁰ Besides, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the United Nations General Assembly Declaration on the Elimination of Violence against Women prohibits harmful tradition practices against women and girls.⁷¹

At the regional level, the African Charter on Human and Peoples' Rights is known by giving protection for positive African culture.⁷² The charter does not tolerate harmful traditional practices.⁷³ The charter specifically prohibited torture, cruel, inhuman and degrading treatment and calls for nondiscrimination against women and children.⁷⁴ In addition, the Nairobi world conference for the first time addressed violence against women as a human rights issue and recognized protection of women sexual desires, bodily autonomy, and individuality as a means to eradicate FGM.⁷⁵

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) is the most important document that has clearly defined harmful

⁶⁹ A Strategy for the European Union Institutions, ending female genital mutilation, available at http://www.endfgm.eu/editor/files/2016/04/END_FGM_Strategy_EN.pdf, accessed 7/6/2018

⁷⁰ See Article 5 of Convention on the Rights of Child, it deals with the best interest of the child and article 3 recognized FGM as a violation of the best interest principle and violation of children rights. Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women also requires states to “take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women”.

⁷¹ Sudan Working Paper, Weak law forbidding female genital mutilation in Red Sea State Sudan, no.1 2017, p.5

⁷² Article 29 of the African Charter on Human and Peoples' Rights, 27 June 1981, Nairobi

⁷³ Ibid, article 18

⁷⁴ Ibid, article 2 and the preamble

⁷⁵ World Conference to review and appraise the achievements of the United Nations Decade for Women: Equality, Development and Peace Nairobi (15 to 26 July 1985)

traditional practices and advances the elimination of such practices including FGM.⁷⁶ Furthermore, the African Charter on the Rights and Welfare of the Child prohibits the practice of custom, tradition, culture or religion that violates the rights of Children.⁷⁷

In 2011, the AU called on the UN General Assembly to adopt a resolution at its sixty-sixth session to eliminate the practice of FGM. As a result, the UN General Assembly in 2012 adopted a ground breaking resolution calling for universal elimination of the practice of FGM.⁷⁸

V. THE LIMITS OF CRIMINALIZATION OF FEMALE GENITAL MUTILATION UNDER ETHIOPIAN LAWS

In Ethiopia there is no clear law that precisely defines harmful traditional practices; however, the Ethiopian National Harmful Traditional Practices strategy has tried to define it as ‘traditional practices which violets and affects the physical, sexual or psychological well-being, human rights and socio-economic participation of a human being in a society’.⁷⁹

The government criminalized harmful traditional practices and denounced FGM as a violation of the health and human right of girls and women.⁸⁰ It has given special attention and refreshed its commitments to end FGM and child marriage by 2025.⁸¹ Statically the prevalence of FGM has decreased over the past 16 years, dropping from 80% in 2000 to 74% in 2005 and to 65% in the 2016.⁸² The statistics has revealed that women in rural areas are more likely to be mutilated than women in urban areas and the prevalence is highest and severe in Somali at 99% followed by Afar 91%.⁸³ On the other hand Tigray has the lowest prevalence 24% and Gambela 33%.⁸⁴

⁷⁶ Supra note 31

⁷⁷ Supra note 16, p.113

⁷⁸ UNFPA, Driving force in outlawing the practice of female genital mutilation/cutting in Kenya, Uganda and Guinea Bissau, available at <https://www.unfpa.org/sites/default/files/resource-pdf/Legislation%20and%20FGMC.pdf> retrieved 7/6/2018, p.7

⁷⁹ Federal Democratic Republic of Ethiopia Ministry of Women, Children and Youth Affairs, National Strategy and Action Plan on Harmful Traditional Practices (HTPs) against Women and Children in Ethiopia retrieved 12/24/2019 from

https://www.africanchildinfo.net/clr/policy%20per%20country/2015%20Update/Ethiopia/ethiopia_htp_2013_en.pdf

⁸⁰ Federal Democratic Republic of Ethiopia, Demographic and Health Survey, Central Statistics Agency, Addis Ababa, Ethiopia, 2016, p. 315

⁸¹ Ibid

⁸² Ibid, p.317

⁸³ Ibid

⁸⁴ Ibid

A. The 1995 Ethiopian Constitution and Female Genital Mutilation

Constitutional provisions are a base for the enactment of the subsequent legislations. These provisions need to be enacted in a manner that promote gender equality and prohibit harmful traditional practices.⁸⁵

Chapter three of the Constitution of the Federal Democratic Republic of Ethiopia (FDRE Constitution) deals with fundamental human rights and freedoms.⁸⁶ Accordingly, article 15 and 16 specified the right to life and security of a person. Every person has the right to life and protection against bodily harm.⁸⁷ FGM is one of harmful traditional practice that has short and long term impacts on the physical and mental integrity of women and girls.⁸⁸ When the practice results in the death of the victim, it violates the right to life of individuals. Article 18 of the constitution clearly prohibits inhuman and degrading treatment and the process of FGM is harmful, inhuman and degrading. Moreover, the practice is against the right to equality and the principle of non-discrimination.⁸⁹

Article 35 of the constitution deals with the rights of women and it has clearly stated that women have equal rights with men. The government has a responsibility to protect girls and women against those laws, customs and practices that oppress or cause bodily or mental harm on to them. Article 36 of the constitution also specified that children have the right not to be subjected to cruel and inhuman treatment. Furthermore, article 9 of the constitution has specified that all international instruments ratified by Ethiopia considered as an integral part of the law of the land. Hence, Ethiopia is bound by the ratified international and regional human rights instrument that condemned FGM.

A number of international and regional human right instruments including the CEDAW, the CRC and the Protocol to the African Charter on Human and People's Rights (Maputo Protocol)

⁸⁵ Supra note 31, p.370

⁸⁶ From article 13 to article 44 of the Ethiopian Constitution deals with human and democratic rights and freedoms

⁸⁷ Article 15 and 16 of Federal Democratic Republic of Ethiopia Constitution, 1995

⁸⁸ Supra note 57, p. 6

⁸⁹ Article 25 of the Federal Democratic Republic of Ethiopia Constitution, 1995

have application in Ethiopia.⁹⁰ Besides, article 13 (2) of the FDRE constitution has clearly specified that in case of interpretation of chapter three of the constitution, it must be in conformity with international human right instruments. This indicates that the constitution advocates the universal application of human rights and has tried to redefine and shape harmful traditional practices of the society.

The FDRE constitution also clearly articulated in article 92 that the government has a duty to support those cultures and traditions that are compatible with the fundamental rights, human dignity and democratic norm and ideals of the society. Therefore, the constitution gives emphasis for human and democratic rights and simultaneously protects and preserves those historical and cultural traditions which are friendly to human rights.

B. The 2004 Criminal Code

More than twenty-six countries in Africa and Middle East have criminalized FGM by law and constitutional decree.⁹¹ The legislations vary in scope and the penalties ranging from a minimum of three months to life imprisonment. Most of these countries used the word FGM/C which is recommended by the WHO and the UN. Because ‘Mutilation’ emphasizes the gravity of the act and ‘Cutting’ reflects the practice of non-judgmental and non-medical reasons.⁹²

The 1957 Ethiopian first penal code does not have any provision that deals with harmful traditional practices and that criminalize female circumcision. It is the 2004 Ethiopian Criminal Code that has clearly criminalized female circumcision for the first time.⁹³ Chapter three of the Criminal Code deals with harmful traditional practice against life, person and health of individuals. Specifically, article 565 of the code criminalizes female circumcision as a crime

⁹⁰ See the United Nations Human Rights Office of the High Commissioner, UN Treaty Bodies Database available at https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=59&Lang=EN and List of Countries which have Signed, Ratified/Acceded to Maputo Protocol available at <https://au.int/sites/default/files/treaties/37077-sl-PROTOCOL%20TO%20THE%20AFRICAN%20CHARTER%20ON%20HUMAN%20AND%20PEOPLE%27S%20RIGHTS%20ON%20THE%20RIGHTS%20OF%20WOMEN%20IN%20AFRICA.pdf>

⁹¹ United Nation Children Fund (UNICEF), Female genital mutilation/ cutting, A statistical overview and exploration of the dynamics of change, 2013, available at https://www.unicef.org/cbsc/files/UNICEF_FGM_report_July_2013_Hi_res.pdf retrieved 7/28/2018

⁹² Fatouma Idrissa, “*Female genital mutilation: A matter that must be stopped!*”, 2015, Honors project 407, Grand Valley state university

⁹³ የኢትዮጵያ ፌዴራላዊ ዲሞክራሲያዊ ሪፐብሊክ የተሻሻለው የወንጀል ህግ ሁተታ ዘምክንያት፣ ገፅ፡271

against the rights of women and girls. The law intentionally or negligently preferred the word circumcision rather than mutilation or cutting.⁹⁴ The word circumcision refers less condemning practice and sometimes associated with male circumcision.⁹⁵ It did not amplify the gravity, nonjudgmental and nonmedical reason of the act.

Further, the code failed to define and illustrate different types of female circumcision. The Ugandan law defines FGM.⁹⁶ Besides, the Kenyan law and Eritrean proclamation 158/2007, a proclamation to abolish Female Circumcision, define it and list out different types of FGM.⁹⁷ Contrary to these laws, the Ethiopian Criminal Code is more general and failed to define and list out different types of FGM.⁹⁸ This seems that the code is loath to deeply engage in the cultural practices of the society and define female circumcision.

On the other hand, article 566 of the code has tried to specify infibulation as one type of female circumcision and imposed a rigorous imprisonment from three years to five years. This implies that the punishment will increase based on the severity of the practice. However, the code has failed to define infibulation and specify different types of circumcisions.

Article 565 of the code begins with the provision of “whoever circumcises a woman of any age...” But what if the girl or a woman circumcised herself? Who will be criminally liable? The code is silent and there is no clear provision on the liability of such women. Besides, the code has criminalized female circumcision at any age.

It should be noted that women who are above majority may circumcise themselves or give consent to be circumcised. For example, *Fuambai S. Ahmadu* a Sierra Leonean-American anthropologist performed this traditional practice in Sierra Leon for research purpose.⁹⁹ Differently, *Maimouna* because of peer pressure and her parent’s refusal traveled in a remote

⁹⁴ There is no any justification on የኢትዮጵያ ፌዴራላዊ ዲሞክራሲያዊ ሪፐብሊክ የተሻሻለው የወንጀል ህግ ሁተታ ዘምክንያት, why the legislature preferred Circumcision than Mutilation or Cutting

⁹⁵ Jewel Llamas, Female Circumcision: The History, the Current Prevalence and the Approach to a Patient, retrieved 12/24/2019 from <https://med.virginia.edu/family-medicine/wp-content/uploads/sites/285/2017/01/Llamas-Paper.pdf>

⁹⁶ Supra note 31, p. 375

⁹⁷ Ibid

⁹⁸ See article 565 of the 2004 Ethiopian Revised Criminal Code

⁹⁹ Richard A. Shwhas Eder, Disputing The Myth of the Sexual Dysfunction of Circumcised Women, An interview conducted with Fuambai S. Ahmadu, *Anthropology today*, vol.25, No.6, 2009

village of her home country, Mali, and carried out such practice.¹⁰⁰ In these cases, it is difficult to punish them and make them criminally liable because, they have performed the practice intentionally and imposing punishment is against their right to freedom of choice, liberty and bodily integrity.¹⁰¹ However, the 2004 Ethiopian Criminal Code specified a total ban of female circumcision at any age and with/out consent. Thus, age and consent are not a justification and a defense for female circumcision in Ethiopia.

In the degree of participation and criminal liability, the code has specified the same type of punishment. Article 569 imposed the same punishment for parents, relatives and co offenders without considering the degree of their participation. Additionally, the code does not specify different penalties if the circumciser is a health officer. Though on 4 January 2017, the Ethiopian Ministry of Health has passed circular that bans medicalization of FGM, it failed to clearly specify the punishment.¹⁰² In countries like Burkina Faso, the government imposes strict punishment on health official and the practitioners are also suspended from medical practices.¹⁰³ The 2004 Criminal Code of Ethiopia does not have any provision in this regard. What if the circumciser is a health officer and the victim dies as a result of the circumcision? Article 566 (2) of the code merely deals with injury to body or health and article 568 deals with cases when the victim has contracted a communicable disease, in which case the punishment will increase.

It is, however, possible to note that as opposed to the earlier Penal Law, the 2004 Criminal Code has attempted to address the issue of harmful traditional practices and criminalizes female circumcision as crimes against women. However; the code has failed to fully criminalize FGM.

VI. CONCLUSION

The FDRE constitution and the Ethiopian national harmful traditional strategy have prohibited and denounced harmful traditional practices. The Criminal Code is the first document that has clearly specified female circumcision as crimes against women and girls. The law has imposed different types of punishments to the practice depending on the gravity of the circumcision.

¹⁰⁰ Supra note 94, p. 11

¹⁰¹ Ibid

¹⁰² World Health Organization Africa, <http://www.afro.who.int/news/ethiopia-bans-medicalization-female-genital-mutilation-fgm> retrieved on 7/3/2018

¹⁰³ Supra note 31, p.380

However, the code has different limitations. At the beginning, it failed to define female circumcision and list out the different types of circumcisions. Besides, it criminalized female circumcision without age restriction. Furthermore, there is no clear provision on self-harm and the consent of mature women. All these gaps would imply that the code has failed to deeply enter in the cultural traditions of the societies and criminalize female circumcision in a comprehensive manner. This has created challenge for law enforcement officials.

Adopting a clear provision that criminalizes FGM will have a deterrent effect. Nonetheless, criminalization is not enough to end female circumcision in Ethiopia. The practice is deeply entrenched in to the society and carried out by close relatives of the victims for different reasons. Thus, beyond criminalizing FGM, the government must use other alternatives like education and awareness raising campaigns. The government should also establish institutions that give support for victims of the practice. This will reduce the FGM and enable the government to achieve its objectives of eliminating it by 2025.

BIBLIOGRAPHY

Books and Articles

1. Yazew Masresha, The difficulty of ending female genital mutilation case of Afar Pastoralist communities in Ethiopia, 2014, International Institute of Social Science
2. Wasunna Angela , Towards Redirecting the Female Circumcision Debate: Legal, Ethical and Cultural Considerations, Crossroad: where medicine and the humanities meet, 2000, McGill Journal of Medicine, vol. 5, no. 2
3. Y Camilla. and F. Yonatan, Female Genital Mutilation as a Human Right issue: Examining the effectiveness of law against female genital mutilation in Tanzania, 2013, African Human Right Law Journal, vol. 13, no.2
4. Idrissa Fatouma, Female genital mutilation: A mater that must be stopped!, 2015, Honors project 407, Grand Valley state university
5. Beth G. Ann, Female Genital Mutilation: A Form of Persecution, 1997, New Mexico Law Review, 579
6. Llamas Jewel, Female Circumcision: The History, the Current Prevalence and the Approach to a Patient, 2017
7. Boyden Jo, Why are current efforts to eliminate female circumcision in Ethiopia misplaced?, 2012, Culture, Health & Sexuality
8. Goodale Mark, An Anthropology of Human Rights Surrendering to utopia, 2009, Stanford University Press
9. Mautner Menachem, Three approach on law and culture, 2011, Cornell law review, vol.96,
10. Waldada N. Dani, Human Rights and Cultural Diversity in Africa, 2005, Paper written for the Association of Law Reform Agencies of Eastern and Southern Africa (ALRAESA) Conference on the Fusion of Legal Systems and Concepts in Africa, Entebbe.
11. Mezey Naomi, Law As Culture, 2001, Georgetown University Law Center Scholarship @ Georgetown Law, Georgetown Law Faculty Publications
12. Nnamuch Obiajulu i, Circumcision or Mutilation - Voluntary or Forced Excision - Extricating the Ethical and Legal Issues in Female Genital Ritual, 2012, Journal of Law and Health, Cleveland State University, Vol. 25:85

13. A Patricia. Broussard, Female Genital Mutilation: Exploring strategies for ending ritualized torture; shaming blaming and utilizing the convention against torture, 2008, Duke journal of gender law and policy, vol.15:19
14. C Robert Post,., Law and Cultural Conflict, 2003, Yale Law School Legal Scholarship Repository, Chicago-Kent Law Review, Vol. 78
15. Ortiz Vanessa, Culture Shock: Expanding the Current Federal Law Against Female Genital Mutilation, 2008, 3 FIU L. Rev. 423

Internet Sources

1. A Strategy for the European Union Institutions, ending female genital mutilation, available at http://www.endfgm.eu/editor/files/2016/04/END_FGM_Strategy_EN.pdf , accessed 7/6/2018
2. An interview with Fuambai S. Ahmadu by Richard A. Shweder Disputing the myth of the sexual dysfunction of circumcised women, Anthropology today, vol.25, No.6, 2009
3. Black's Law Dictionary Second edition, available at <https://thelawdictionary.org/law/>
4. Evidence to end Female genital mutilation/cutting, Female genital mutilation/cutting in Nigeria, A scoping Review, 2017
5. Fact Sheet No.23, Harmful Traditional Practices Affecting the Health of Women and Children based on convention on the elimination of all forms of discrimination against women (art. 5 (a)), adopted by General Assembly resolution 34/180 of 18 December 1979
6. Federal Democratic Republic of Ethiopia, Demographic and Health Survey, Central Statistics Agency, Addis Ababa, Ethiopia, 2016
7. Sudan Working Paper, Weak law forbidding female genital mutilation in Red Sea State Sudan, no.1 2017
8. UNFPA, Driving force in outlawing the practice of female genital mutilation/cutting in Kenya, Uganda and Guinea Bissau, available at <https://www.unfpa.org/sites/default/files/resource-pdf/Legislation%20and%20FGMC.pdf> retrieved 7/6/2018
9. UNFPA, Driving force in outlawing the practice of female genital mutilation/cutting in Kenya, Uganda and Guinea Bissau, available at

<https://www.unfpa.org/sites/default/files/resource-pdf/Legislation%20and%20FGMC.pdf>
retrieved 7/6/2018

10. United Nations Human Rights Office of the High Commissioner, UN Treaty Bodies Database available at https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=59&Lang=EN and List of Countries which have Signed, Ratified/Acceded to Maputo Protocol available at <https://au.int/sites/default/files/treaties/37077-sl-PROTOCOL%20TO%20THE%20AFRICAN%20CHARTER%20ON%20HUMAN%20AND%20PEOPLE%27S%20RIGHTS%20ON%20THE%20RIGHTS%20OF%20WOMEN%20IN%20AFRICA.pdf>
11. United Nations Women, Preliminary Gender Profile of Ethiopia, Addis Ababa, Ethiopia, 2014
12. World Health Organization Africa, <http://www.afro.who.int/news/ethiopia-bans-medicalization-female-genital-mutilation-fgm> retrieved on 7/3/2018
13. World Health Organization Information on Female Genital Mutilation, 31 January 2018 available at <http://www.who.int/news-room/fact-sheets/detail/female-genital-mutilation> retrieved 7/6/2018
14. World Health Organization, Eliminating female genital mutilation: An interagency statement, 2008

Laws and Human Right instruments

1. African Charter on Human and Peoples' Rights, 27 June 1981, Nairobi
2. African Charter on the Right and Welfare of the Child, 1979
3. African Union General Assembly, Maputo Protocol, Adopted by the 2nd ordinary session, CAB/LEG/66.6 (2003), Maputo, Mozambique, 2005
4. United Nations, General Assembly Resolution 34/180, Convention on the Elimination of All Forms of Discrimination against Women, 1979
5. የኢትዮጵያ ፌዴራላዊ ዲሞክራሲያዊ ሪፐብሊክ የተሻሻለው የወንጀል ህግ ሁተታ ዘምክንያት