



**FEMALE GENITAL MUTILATION IN LESOTHO: A CULTURAL HAZARD TO  
WOMEN'S RIGHT TO HEALTH AND DIGNITY**

**BY**

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## DECLARATION

I **MPHUNYETSANE ALBERT KOETLISI**, solemnly declare that this mini dissertation has not been submitted for a qualification in any other institution of higher learning, nor published in any journal, textbook, or other media. The contents of this dissertation entirely reflect my original research, save for where the work or contributions of others have been accordingly acknowledged.

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## **DEDICATION**

This work is dedicated to all women how have experienced health problems as a result of the practice of Female Genital Mutilation in Lesotho, and to my parents for their unwavering support.

## ACKNOWLEDGEMENTS

Praise and honour be to God the Most High! I thank the almighty God for having given His graces along this journey. It is also with grateful attitude that I acknowledge all the people who helped me in compiling this research paper. My special gratitude goes to **Dr Carol Chi NGANG**, my supervisor, for his edifying comments, dedication, guidance and prompt response to my communications towards the compilation and completion of this dissertation. Thank you very much Dr.

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## ABSTRACT

Female genital mutilation (FGM) is a harmful practice that needs to be eliminated in a free and democratic society. The practice of FGM violates a considerable number of women's rights, including the right to health in particular. For women to fully enjoy their human rights for governments to see to it that their legal policy framework caters for the protection and promotion of women's rights. The state's obligation to domesticate international treaties that deal with the elimination and eradication of harmful practices needs to be taken seriously and timeously implemented.

It is common knowledge that there are cultural practices such as FGM that are conventionally deemed to be harmful, discriminatory, inhumane as well as degrading and as a result, such practices must be abandoned. For every person to enjoy human rights, there is a need for enactment and enforcement of laws guaranteeing such rights for all individuals, without discrimination.

This study aims to investigate how the practice of FGM violates women's and girls' right to health, and physical and psychological integrity in Lesotho. It also seeks to urge the government of Lesotho to domesticate international instruments that deal with the eradication of the practice of FGM.

Keywords: Female genital mutilation, human rights, right to health, violation, elimination and eradication.

## ACRONYMS

ACHPR:	African Charter on Human and Peoples' Rights
AFCRWC:	African Charter on the Rights and Welfare of the Child
CAT:	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW:	Convention on the Elimination of All Forms of Discrimination against Women
CGPU:	Child and Gender Protection Unit
CRC:	Convention on the Rights of the Child
FGM:	Female Genital Mutilation
HIV/AIDS:	Human Immunodeficiency Virus/ Acquired Immunodeficiency Syndrome
ICESCR:	International Covenant on Economic, Social, and Cultural Rights
LMPS:	Lesotho Mounted Police Service
MHTWG:	Mental Health Technical Working Group
N. D.:	No Date
PIH:	Partners in Health
PRWA:	Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa
SDGs:	Sustainable Development Goals
UDHR:	Universal Declaration of Human Rights
UHC:	Universal Health Coverage
UN:	United Nations
UNFPA:	United Nations Population Fund
UNFPA WCARO:	United Nations Population Fund's West and Central Africa Regional Office
UNICEF:	United Nations International Children's Emergency Fund
WHO:	World Health Organisation

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# CHAPTER ONE

## INTRODUCTION AND BACKGROUND

### 1.1 Background

Female genital mutilation (FGM) consists of several forms ranging from the partial or total cutting of the exterior female genitalia, or some other harm to the female genital parts, without any medical motives.<sup>1</sup> This practice is characteristically executed by traditional doctors on girls between infancy and the age of fifteen, even though in Lesotho one can observe that married women also undergo traditional circumcision. Amongst various peoples, FGM is appreciated as a pre-requisite for entry into marriage and is alleged to be an effective technique for monitoring the sexuality of women and girls.<sup>2</sup> There is a myth in Lesotho that FGM enhances women's sexuality.

FGM is a reproductive health worry as well as a human rights violation that has overwhelming short- and long-term bearings on the lives of women and girls.<sup>3</sup> Human rights are rights people possess just by the mere fact of their existence as human beings - they need not to be granted by any state. These rights are inherent to all persons, irrespective of their nationality, language, national or ethnic origin, sex, religion, colour, or any other status. They stem from the most basic – the right to life – to those that make life enjoyable, such as the rights to work, food, health, education, and liberty.<sup>4</sup> Moreover, since FGM involves cutting, which causes pain, it violates Article 5 of the Universal Declaration of Human Rights (UDHR),<sup>5</sup> which provides that “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” The effects of FGM include severe pain, shock, infections and complications during childbirth (likely to affect both the mother and the new-born child), long-term reproductive problems (such as fistula), psychosomatic effects, and ultimately death.<sup>6</sup> FGM is a cultural phenomenon, and as a result, there are substantial variances in terms of the

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<sup>1</sup> WHO, “What is FGM” <<https://www.endfgm.eu/female-genital-mutilation/what-is-fgm>> accessed 12 February 2024.

<sup>2</sup> United Nations Population Fund's West and Central Africa Regional Office, “Analysis of Legal Frameworks on Female Genital Mutilation in Selected Countries in West Africa” (2018) 11.

<sup>3</sup> WHO “Health risks of female genital mutilation (FGM)” <[https://www.who.int/teams/sexual-and-reproductive-health-and-research-\(srh\)/areas-of-work](https://www.who.int/teams/sexual-and-reproductive-health-and-research-(srh)/areas-of-work)> accessed 12 February 2024.

<sup>4</sup> UN, “What are Human Rights?” <<https://www.ohchr.org/en/what-are-human-rights>> accessed 12 February 2024.

<sup>5</sup> 1948.

<sup>6</sup> Ibid.

age of qualification for the cutting, the magnitude or the manner of cutting, the setting in which the practice is carried out, and the rituals accompanying its execution.<sup>7</sup>

Lesotho is one of the countries wherein FGM is still practiced. Even though Lesotho is counted amongst the countries that have ratified international and regional human rights instruments (The Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment – CAT, the Convention on the Elimination of all forms of Discrimination Against Women – CEDAW, and the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa) that aim at protecting women against harmful practices such as FGM. Yet, there still seems to be no clear governmental policy for combating the practice in the country. The fact that Lesotho has ratified the above-mentioned instruments obliges it under international law, to see to it that they are domesticated to protect women against FGM.

Due to ongoing traditional practices such as women’s traditional initiation (circumcision), which involves FGM, women tend to willingly or unwillingly undergo FGM in Lesotho for different reasons. In Lesotho, the form of FGM in common practice is that of clitoridectomy,<sup>8</sup> which involves partial or total removal of the clitoris and/or the prepuce.<sup>9</sup> It is held that young girls are required to pull out the foreskin surrounding the clitoris up until it is stretched out; once stretched out, the FGM practitioner cuts off the foreskin.<sup>10</sup> Moreover, it is the responsibility of the mother to show young girls how to stretch out their clitoris for the procedure.<sup>11</sup> The exact reason why women intentionally or unwillingly subjected themselves to this practice are not clear or anyhow credible. Comfort Momoh notes that “FGM is supported by centuries of tradition, culture, and false beliefs and is perpetuated by poverty, illiteracy, low status of women and inadequate healthcare facilities.”<sup>12</sup>

FGM is mostly associated with cultural beliefs relating to identity, gender, sexuality, power, and prestige.<sup>13</sup> It must be appreciated that most of the highly upheld appealing factors that prevail in practicing communities weigh heavily on women. Such factors include the prospect of becoming a social outcast, rejection by peers and family, and loss of security and

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<sup>7</sup> Ibid, 11.

<sup>8</sup> Shayla McGee, “Female Circumcision in Africa: Procedures, Rationales, Solutions, and the Road to Recovery” (2005) 11 *Wash. & Lee Race & Ethnic Anc. L. J* 1, 135.

<sup>9</sup> UNFPA, “Female genital mutilation (FGM) frequently asked questions” February 2022 <<https://www.unfpa.org/resources>> Accessed 25 January 2024.

<sup>10</sup> McGee (n 8) 135.

<sup>11</sup> Ibid, 135.

<sup>12</sup> Comfort Momoh, *Female Genital Mutilation* (Radcliffe Publishing Ltd 2005) 1.

<sup>13</sup> Ibid, 1.

support.<sup>14</sup> In areas where FGM is practiced, those perpetrating it refute the allegation that they are abusers, claiming that the day of circumcision is one of accomplishment and acknowledgment of a girl's ritual ceremony of transition into womanhood.<sup>15</sup>

There are in fact, various reasons for the practice of FGM. Some societies in Africa have established very firm controls over the sexual behaviour of their women and come up with the inhumane methods to control female sexual desire and reaction. Even though FGM is considered to be an old-fashioned cultural practice, it is still strongly defended and protected by those who hold tight to it. One would imagine that men are the ones at the forefront of the practice of FGM on women. That is, however, not the case. In most instances, women are the ones who advocate for FGM since they believe that this practice grants a person the esteemed status of "Africanness" or that of being a "real Mosotho woman".<sup>16</sup> Consequently, FGM is regarded as essential due to the opinion that it offers a voice to gender and communal ethnic distinctiveness.

One of the disturbing factors associated with FGM is the fact that everything is clothed with a blanket of such secrecy that not a single person is in any way permitted to reveal any information relating to FGM. To this effect, Shirley Du Plooy makes the following observation:

In Lesotho, the right procedure to follow when wishing to host an initiation school for aeons has been to consult and inform the chief (*morena*), as well as district headmen and ward heads, of one's intention. To the chief, it would be said *ke kopa lengope* (I ask for the use of the "ditches").<sup>17</sup> Moitse explains the significance of asking permission to use the "ditches" or gully, as it is within the seclusion of these that "the secret activities of the school, *koma*, take place".<sup>18</sup>

The practice is accompanied by festive celebrations by both male and female practitioners, while those who have not gone through it are left in the dark as well as the obligation to keep whatever happens to girls or women at that moment a secret as "the ritual itself is a source of joyful celebration and elaborates festivals for males, while for females it is concealed in secrecy."<sup>19</sup>

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<sup>14</sup> Ibid, 1.

<sup>15</sup> Ibid, 1.

<sup>16</sup> Abusharaf Rogaiya Mustafa, "Virtual Cuts: Female Genital Circumcision in an African Ontology" (2001) 12 *Journal of Feminist Cultural Studies* 1, 113.

<sup>17</sup> Shirley Du Plooy, "Female Initiation: Becoming a Woman among the Basotho" (2006) *University of the Free State* 66.

<sup>18</sup> Sindile Adelgisa Moitse, "The Ethnomusicology of the Basotho" (1994) *Institute of Southern African Studies* 50.

<sup>19</sup> Mustafa (n 16) 120.

## 1.2 Problem Statement

To accept the plurality of values and the variety of substantial moral positions, as well as acknowledge the difficulty of holding an objectively shared universal perspective about FGM, recourse must be had to a model that gives priority to the individual evaluation of what may be regarded as that which constitutes the good of the individual human person. In the same vein, irrespective of the awareness of cultural diversity and a need to respect every culture, there still arises an unwavering need to protect individual's rights from being violated under the guise of culture. Arguably, "a human rights-based evaluation of rights to cultural identity cannot rely entirely upon the principle that an individual's lack of overt opposition to key defining and binding relationships provides a secure basis for a right-based response to cultural identity."<sup>20</sup> Moreover, Article 5 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa<sup>21</sup> prohibits all forms of harmful practices, including female genital mutilation.

Human rights cannot fully be enjoyed if any one of them is violated. FGM exposes women and girls to sexual health complications. "After the area heals, victims suffer the long-term consequences of the abuse through both physiological and psychological complications and substantial complications during childbirth."<sup>22</sup> Moreover, it is a practice that is by its nature degrading and undignified. The right to physical and mental health<sup>23</sup> needs to be enjoyed by all, and any cultural practice that hinders this needs to be done away with.

## 1.3 Research Question

This study will endeavour to answer the following research questions:

- i) What is FGM and how does it affect women's right to physical and mental health?
- ii) What are the legal instruments that guarantee protection to women against FGM?
- iii) What measures has Lesotho adopted in domesticating the international instruments that prohibit FGM?
- iv) What are the suggestions that can be put forward to eradicate FGM in Lesotho?

## 1.4 Aim of the Study

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<sup>20</sup> Andrew Fagan, "Cultural Harm and Engaging the Limits of a Right to Cultural Identity" (2017) 39 *Human Rights Quarterly* 320.

<sup>21</sup> 2005.

<sup>22</sup> Enrique Hernandez, "Female Genital Mutilation: Health Consequences and Complications—A Short Literature Review" (2018) *Obstetrics and Gynecology International* 4.

<sup>23</sup> Office of the High Commissioner for Human Rights, "International standards on the right to physical and mental health: Special Rapporteur on the right to health" 1996-2024.

This study aims to investigate how the practice of FGM violates women and girls' right to health, and physical and psychological integrity. Moreover, this treatise will endeavour to illustrate that in as much as culture is recognized as one of those human rights components to be respected, it is however imperative that cultural practices are not harmful. Furthermore, the study seeks to urge Lesotho, as a state party to the international treaties that aim at eliminating FGM, to adopt all obligatory legislative and other measures in preventing and ultimately eliminating FGM practices through public awareness, and criminalization of FGM.

### 1.5 Hypothesis

- i) The practice of FGM violates women's rights in Lesotho.
- ii) There is a lack of concern by the state, which is manifested by the silence and deficiency in legislative measures by the government of Lesotho in dealing with the issue of FGM.
- iii) Women suffer a considerable number of health complications as a result of FGM.

### 1.6 Literature Review

The practice of FGM is considered internationally as a violation of the human rights of girls and women.<sup>24</sup> It replicates deep-rooted discrimination between the sexes and creates an extreme system of discrimination against girls and women.<sup>25</sup> FGM is for the most part performed by traditional practitioners on girls and women and is a violation of the rights of these people. The World Health Organisation points out that "The practice also violates a person's rights to health, security, and physical integrity; the right to be free from torture and cruel, inhuman or degrading treatment; and the right to life, in instances when the procedure results in death."<sup>26</sup>

Human rights, both in theory and in practice, are entrenched in the specifics of particular societies and civilizations so much so that, while they have attained universality in the "International Bill of Human Rights," their significance – and consequently their content – is substantially at variance amongst states. Historical experiences, political order, sociocultural practices, ideological conceptions, socioeconomic arrangements, and enunciated goals, their interrelations and interactions, are the background within which human rights are conveyed

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<sup>24</sup> WHO, "Female genital mutilation" (2014) <[https://iris.who.int/bitstream/handle/10665/112328/WHO\\_RHR\\_14.12\\_eng.pdf](https://iris.who.int/bitstream/handle/10665/112328/WHO_RHR_14.12_eng.pdf)> accessed 10 January 2024.

<sup>25</sup> Ibid.

<sup>26</sup> Ibid.

and within which they function. Investigating different conceptions of human rights and scrutinizing their interconnections with other societal ideals and structures are at the centre of any determination truly to understand human rights in their real sense.<sup>27</sup> The background within which FGM is practiced is very important to take into consideration to be able to deal with it effectively.

Human rights are not just theoretical. Any discourse about them, irrespective of the circumstances under which it may arise, is sure to demand reasons for action, certain attitudes, or decisions. For example, to say that a human right such as the right to health, will be or is violated by action *y* is to express a reason for abstaining from action *y*, an attitude of denunciation of action *y*, or a resolution to do something that will inhibit action *y*. Thus, propositions about human rights are not normally theoretical but have a practical orientation. They demand the involvement of a call to action.<sup>28</sup> In the same way, the idea that women's rights are violated through the practice of FGM requires an action to stop such a violation.

An intelligent approach to protect and promote human rights is most importantly bound to address the fundamental causes of violations of these rights. These violations are caused by an extensive and multifaceted variety of factors and forces, ranging from structural social factors, economic conditions, and political expediency as already alluded to above. For the most part, nonetheless, human rights violations occur because of human action or inaction – they come to exist because individual persons act or fail to act in certain ways. People are or may be motivated by selfish reasons of greed for wealth and power, or by some erroneous opinion of the public good. Even when driven by selfish ends, human rights violators usually seek to rationalize their behaviour as conducive to, or consistent with, some morally approved purpose.<sup>29</sup> FGM practitioners normally give ill-conceived reasons for engaging in this act.

The state is the vehicle for the transformation of society. However, the difficulty arises in the fact that it is not the state itself that is the instrument of women's oppression or violation of their rights, but other institutions such as the family, which are regulated by the state. Therefore, unlike with conventional human rights where the objective is usually to restrict the control of the state over the private lives of individuals when considering the problem of FGM, there is a need to venture into those very private lives to protect women's rights. On the other hand, international legal mechanisms as well as domestic legal instruments and policy have

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<sup>27</sup> Richard Pierre Claude and Burns H. Westom, *Human Rights in the World Community: Issues and Action* (2nd edn, University of Pennsylvania Press 1992) 146.

<sup>28</sup> Carlos Santiago Nino, *The Ethics of Human Rights* (Clarendon Press 1991) 16.

<sup>29</sup> Abdullahi An-Na'im, *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus* (University of Pennsylvania Press 1992) 19.

inadequate effectiveness in regulating spheres outside that of state policy.<sup>30</sup> Albeit all these, the state still has a responsibility to see to it that women's rights are protected.

The provisions of Article 5 (b) of the Maputo Protocol,<sup>31</sup> which provides that state parties must prevent and condemn all forms of harmful practices that negatively affect the human rights of women and are contrary to acknowledged international standards. In terms of this provision of the Maputo Protocol, states parties are expected to take all necessary legislative and other measures to eliminate such practices, including for instance, prohibition, through legislative measures backed by sanctions of all forms of FGM, scarification, medicalization and para-medicalization of FGM and all other practices to do away with them. As a state party to the Maputo Protocol, Lesotho is bound to oblige.

Because of protecting women against all forms of discrimination and harmful practices, Lesotho has ratified some treaties such as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment which states in Article 16 that each State Party is expected to prevent any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article I.<sup>32</sup> Moreover, Article II (1) (b) of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (PRWA) provides that:-

States Parties shall combat all forms of discrimination against women through appropriate legislative, institutional, and other measures. In this regard, they shall: enact and effectively implement appropriate legislative or regulatory measures, including those prohibiting and curbing all forms of discrimination, particularly those harmful practices that endanger the health and general well-being of women.<sup>33</sup>

The issue is whether such instruments are implemented at the domestic level, especially concerning FGM. The lack of criminalization or any other alternative aimed at eliminating FGM in Lesotho casts doubt on the state's readiness to implement its responsibility at the international level to see to it that women and girls are protected against harmful practices. Criminalization of FGM may not be the only way to eliminate FGM in Lesotho. However, the silence, or rather the disregard of its prevalence by stakeholders makes it difficult to explore possible ways to eradicate the phenomenon.

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<sup>30</sup> Pearson Nherere and Marina d'Engelbronner-Kolff, *The Institutionalisation of Human Rights in Southern Africa* (Nordic Human Rights Publications 1993) 55.

<sup>31</sup> Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2003.

<sup>32</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 16.

<sup>33</sup> Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, Article II (1) (b)

Furthermore, one needs to remember that we are dealing with a cultural practice and as such cannot be taken lightly. Lesotho, like any other country, keeps on enacting new laws, oftentimes, to curb cultural practices that violate people's rights. This being the case, culture, and law will inevitably find themselves at odds on many levels, and these contrasts will be explored throughout this paper. The argument of a cultural defence is frequently brought up where there seems to be a law that seeks to uphold certain human rights. It is safe then to submit that the right to freely participate in the cultural life of the community and to share in the benefits of scientific advancement<sup>34</sup> and its application does not fashion a right to have a legal system based on culture or tradition recognized in terms of Section 35 (1) of the Constitution.<sup>35</sup>

### **1.7 Methodology**

The methodology applied in this research paper is the qualitative method. In conducting the research, both national and international instruments were explored. Since the research is desktop-based, books, journal articles, reports, and theses on human rights were referenced. Because the research deals with FGM, the concepts of women's health, discrimination, and harmful practices will be dealt with extensively. In the end, suggestions are made as to how Lesotho can best combat the issue of FGM. Lastly, the OSCOLA 4th Edition referencing guide was used concerning to citations and referencing.

### **1.8 Chapter outline**

- i) After the first introductory part (chapter one) the study proceeds to deal with FGM as a harmful practice against women.
- ii) The third chapter explores the legal framework for the protection of women against FGM.
- iii) The fourth chapter dwells on whether the current Lesotho legal framework takes into consideration concerns about FGM.
- iv) The fifth chapter provides suggestions that Lesotho could engage in, because of eradicating FGM.

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<sup>34</sup> Article 27 (1) of the Universal Declaration of Human Rights 1948.

<sup>35</sup> The Constitution of Lesotho 1993.



## CHAPTER TWO

### FEMALE GENITAL MUTILATION (FGM) AND WOMEN'S RIGHTS

#### 2.1 FGM as a Harmful Practice Against Women's Health

Traditionally in Lesotho, sex-related education, counselling, and the orientation of young girls because of womanhood and marriage are performed by older sisters and aunts under the supervision of grandmothers.<sup>36</sup> It is the responsibility of older women to pass on sexual knowledge and other acceptable sexual practices to young girls. Sexual preparation of the female body predominantly involves girls being educated as to how to elongate their inner labia as a rite of passage into womanhood.<sup>37</sup>

It is important to note that practices that are meant to reduce, enlarge, or beautify the external female genitalia are very controversial, with the World Health Organization (WHO) having classified inner labia elongation as a Type IV FGM,<sup>38</sup> and the United Nations classified it under "harmful traditional practices".<sup>39</sup> However, the law mustn't differentiate between the four different classifications of FGM, to guarantee that all types of FGM are included and responded to with the equivalent degree of seriousness.<sup>40</sup>

Section 27 (1) of the Constitution of Lesotho provides that "Lesotho shall adopt policies aimed at ensuring the highest attainable standard of physical and mental health for its citizens." At the regional level, this right is also provided for by Article 16 (1) of the African Charter on Human and People's Rights,<sup>41</sup> which equally provides that "Every individual shall have the right to enjoy the best attainable state of physical and mental health."

Furthermore, at the international level, Article 12 (1) of the International Covenant on Economic, Social, and Cultural Rights<sup>42</sup> provides that "The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health." It is worth noting that Lesotho became a party to this international convention in 1992 by way of accession and ratification.<sup>43</sup> Consequently, Lesotho

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<sup>36</sup> Mathabo Khau, "Exploring sexual customs: Girls and the politics of elongating the inner labia" (2009) 79 *Agenda: Empowering Women for Gender Equity, Girlhood in Southern Africa* 30.

<sup>37</sup> *Ibid*, 30.

<sup>38</sup> WHO, "Female Genital Mutilation" (2000) <<https://www.who.int>> Accessed 18 March 2024.

<sup>39</sup> UN, *Supplement to the Handbook for Legislation on Violence against Women: Harmful Practices against Women* (UN publication 2011) 16.

<sup>40</sup> *Ibid*, 17.

<sup>41</sup> 1987.

<sup>42</sup> 1966.

<sup>43</sup> Food Agricultural Organization, "The Right to Food around the Globe" <<https://www.fao.org>> accessed 17 March 2024.

is duty-bound to see to it that women's health is not only promoted but protected as well. Tony Evans observes that "Under international law, the duty to promote and protect health as a human right is assumed to lie with the state, although the liberal expectation is that this duty can only be fulfilled progressively."<sup>44</sup>

The right to health establishes the basis for much of the work in health and human rights and unanimity has been reached on the importance of health as a basic human right.<sup>45</sup> This being the case any practices that violate the health of the human person need to be eliminated. The distinctive features of the right to health must not be ignored or applied on some occasions but not on others.<sup>46</sup> Therefore, the practice of FGM cannot be ignored while it has been identified as a violation of women's right to health and others.

For Sharma et al, FGM is regarded as a breach of an individual's right to health because it involves an invasive procedure on otherwise, living tissue without a valid medical reason and since it may cause significant physical and mental harm.<sup>47</sup> The International Covenant on Economic, Social, and Cultural Rights provides in Article 12 that everyone is entitled to the "highest feasible standard of physical and mental health." According to the WHO, the concept of health involves physical, intellectual, and cultural well-being in addition to not merely the absence of disease or disability.<sup>48</sup>

Before delving into details as to how FGM brings about harmful health repercussions to women, it is crucial to first define the many types of practices. The WHO notes that approaches for carrying out FGM may be categorized into four types irrespective of the fact that they vary greatly due to factors such as ethnicities and geographic places throughout the world.<sup>49</sup>

i) Category I (sometimes referred to as a clitoridectomy): The fold of skin surrounding the clitoris may be removed in addition to or instead of the complete clitoris.<sup>50</sup>

ii) Category II, sometimes referred to as excision, involves the removal of the external genitalia, genitals, and a portion or all of the labia minora.<sup>51</sup>

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<sup>44</sup> Tony Evans, "A human right to health?" (2002) 23 *Third World Quarterly* 2, 209.

<sup>45</sup> Paul Hunt, "Interpreting the International Right to Health in a Human Rights-Based Approach to Health" (2016) 18 *Health and Human Rights Journal* 2, 117.

<sup>46</sup> *Ibid*, 117.

<sup>47</sup> Bhavya Sharma et al, "Rampant Germination of Female Genital Mutilation: An Apprehension on Human Rights" (2022) 6 *Indian J Integrated Rsch L* 2, 8.

<sup>48</sup> UNFPA, "Implementation of the international and regional human rights framework for the elimination of female genital mutilation" (2014) <<https://unfpa.org/sites/default>> accessed 07 March 2024.

<sup>49</sup> Sharma (n 46) 5.

<sup>50</sup> *Ibid*, 5.

<sup>51</sup> *Ibid*, 5.

iii) Category III, sometimes referred to as infibulation, involves partial or total removal of the external genitalia as well as stitching or limiting the vaginal opening.<sup>52</sup> “The infibulated woman may have to undergo gradual dilatation by her husband for days, weeks, or months to allow for penetrative intercourse. This painful process does not always result in successful vaginal penetration and the opening may have to be recut.”<sup>53</sup>

iv) Category IV (unclassified): This includes other medical interventions that damage the female genital system or amputate the female sexual organs partially or entirely for socio-cultural or other non-curing motives.<sup>54</sup> The Type IV group includes a great deal more documented procedures such as jabbing, cutting, extending, or heating the genitals and/or adjacent tissues.

From the above description of different types of FGM, it is understandable that FGM may have harmful consequences on the health of women and girls. There might be significant psychological and physical negative effects, among others.<sup>55</sup> Short-term health risks include haemorrhage, severe pain, infection, and in the worst cases, death, whereas long-term complications involve keloids, the formation of cysts, chronic pelvic infection, sexual dysfunction, and obstetric problems.<sup>56</sup>

The practice of FGM can be criticized on multiple grounds. It is usually performed under unsanitary, painful, and violent conditions. Often the woman is forcibly restrained by several people while the operation is performed. The women are normally not sedated, and they are not given post-operative treatment to deal with the physical, emotional, and psychological problems associated with the procedure.<sup>57</sup> The WHO points out that “In the case of women living with FGM, they have experienced a practice that damages anatomical structures that are directly involved in the female sexual response. This can affect a woman’s sexual health and well-being.”<sup>58</sup>

The fact that some types of FGM involve the cutting of or injury to sexually sensitive parts, such as the clitoral glans and or part of the labia minora, some women complain of a

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<sup>52</sup> Ibid, 5.

<sup>53</sup> Ibid, 5.

<sup>54</sup> Ibid, 5

<sup>55</sup> Ibid, 5.

<sup>56</sup> WHO and Others, “Female genital mutilation: A joint WHO/UNICEF/UNFPA statement” (1997) *WHO* 7.

<sup>57</sup> Obiajulu Nnamuchi, “Circumcision or Mutilation – Voluntary or Forced Excision – Extricating the Ethical and Legal Issues in Female Genital Ritual” (2012) 25 *JL & Health* 98.

<sup>58</sup> WHO, *Care of Girls & Women Living with Female Genital Mutilation: A Clinical Handbook* (WHO Publication 2018) 323.

decline in sexual response and reduced sexual satisfaction.<sup>59</sup> Other discoveries from the study carried out by the WHO confirm that most women who have undergone FGM turn out to be at a significantly higher risk of adverse and unwarranted events at the time of giving birth.<sup>60</sup> These women are also likely to experience a greater rate of having to go under Caesarean section and may suffer a post-partum haemorrhage in contrast to those who have not undergone the FGM procedure, and the risk increases with the severity of the procedure.<sup>61</sup>

The consideration that a large majority of practitioners who perform the surgery are illiterate, and lack basic medical training, is a danger in itself. Their instrument of choice is a razor blade or a knife of which, some are with dull edges and ordinarily unsterilized.<sup>62</sup> Not surprisingly, the procedure has been linked to immediate and long-term physical and psychological health problems, the severity of which is dependent on the type of procedure performed.

It is noted that “The genital injury or scar can cause pain and discomfort during sexual intercourse.”<sup>63</sup> Infibulated women suffer the most severe consequences. The following health complications are common; pain, trauma, haemorrhage, difficulty urinating, painful menstruation, painful sexual intercourse (dyspareunia), sexual dysfunction, infections resulting from contaminated instruments, an increased risk of HIV/AIDS transmission due to the use of unsterilized instruments, unintended labia fusion, the proliferation of scar tissue at the site (keloid), and infertility.<sup>64</sup> Moreover, an increased need for blood transfusion due to haemorrhage when the procedure is performed can be one way in which HIV/AIDS may be transmitted.<sup>65</sup>

The higher frequency of obstetric interventions among women with FGM is also reflected in higher caesarean deliveries performed among primiparous women with FGM.<sup>66</sup> The effects of FGM will depend on a variety of factors, as Efua Dorkenoo points out, “The health effects of FGM depend on the extent of cutting, the skill of the operator, the cleanliness of the tools and the environment, and the physical and psychological state of the girl or

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<sup>59</sup> Beth D. Williams-Breault, “Eradicating Female Genital Mutilation/Cutting: Human Rights-Based Approaches of Legislation, Education, and Community Empowerment” (2018) 20 *Health & Hum Rts J* 226.

<sup>60</sup> WHO, *WHO guidelines on the management of health complications from female genital mutilation: Policy brief* (WHO 2016) 5.

<sup>61</sup> *Ibid*, 5.

<sup>62</sup> WHO (n 57) 99.

<sup>63</sup> *Ibid*, 336.

<sup>64</sup> *Ibid*, 99.

<sup>65</sup> Flora Alohan Onomrerhinor, “Female Genital Mutilation in Nigeria: Causes, Consequences and Legal Intervention” (2021) 6 *AFJCLJ* 131.

<sup>66</sup> Sylla Fatoumata et-al, “A systematic review and meta-analysis of the consequences of female genital mutilation on maternal and perinatal health outcomes in European and African countries” (2020) 5 *BMJ Global Health*, 8.

woman.”<sup>67</sup> Furthermore, “if the vaginal region gets soiled with faeces and urine within a few days after starting treatment, an infestation might also develop and septicemia can result from infections if the pathogen enters the bloodstream.”<sup>68</sup>

## 2.2 FGM and Women’s Exposure to HIV/AIDS

Studies conducted in Nigeria demonstrate that circumcised women have 4 times chance of having genital ulcer disease in contrast with uncircumcised women.<sup>69</sup> Therefore, there seems to be an increased risk of HIV/AIDS transmission during sexual intercourse due to a breach in the vaginal mucosa for circumcised women. Further, it is held that there is a greater risk of bacterial vaginosis and Herpes simplex type 2 infections in circumcised women. “These two are recognized factors of HIV transmission.”<sup>70</sup>

According to the WHO, on the other hand, the direct connection between FGM and HIV/AIDS is still unconfirmed, however, the cutting of genital parts with the same surgical instrument without sterilization could increase the risk for transmission of HIV between women who undergo female genital mutilation together.<sup>71</sup> Many people are conscious of FGM’s potentially harmful effects on women’s health. “HIV/AIDS education efforts, which oppose the use of septic instruments, also may have encouraged the medicalization of the procedure.”<sup>72</sup>

From the above, it is clear that direct transmission may happen in cases where FGM is collectively practiced with septic tools. This supposition draws on findings showing that HIV can be transmitted via contaminated needles amongst drug abusers and that cases of HIV transmission usually occurred among sexually inexperienced, communally circumcised women. Therefore, the direct transmission of HIV by communal FGC and exposure to contaminated tools may be a less salient path of association.<sup>73</sup>

FGM is a controversial practice that may contribute to the spread of HIV in some several ways. In addition to the danger of exposure associated with the unsterilized instruments

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<sup>67</sup> Efua Dorkenoo, “Combating Female Genital Mutilation: An Agenda for the Next Decade” (1999) *Women’s Quarterly* 1 & 2, 89.

<sup>68</sup> Sharma (n 46) 6.

<sup>69</sup> Abimbola A. Olaniran, “The Relationship between Female Genital Mutilation and Transmission in Sub-Saharan Africa” (2013) 17 *African Journal of Reproductive Health* 4, 158.

<sup>70</sup> Ibid 158.

<sup>71</sup> WHO, “Health risks of female genital mutilation (FGM)” (2024) <<https://www.who.int>> accessed 03 March 2024.

<sup>72</sup> Kathryn M. Yount and Bisrat K. Abraham, “Female Genital Cutting and HIV/AIDS among Kenyan Women” (2007) 28 *Studies in Family Planning* 2, 74.

<sup>73</sup> Ibid, 75.

used for the practice, the wounding and anomalous shape of the vagina as a result of this procedure may increase the chances of trauma during sexual intercourse, thus further exposing the woman's blood to a man's HIV-infected semen, especially where the male partner happens to be HIV positive.<sup>74</sup> During intercourse penetration, there are difficulties that often result in tissue damage, lesions and post-coital bleeding which tends to make the squamous vaginal epithelium similar in permeability to the columnar mucosa of the rectum, thus facilitating the possible transmission of HIV/AIDS.<sup>75</sup>

Other unorthodox methods that may lead to health complications are used to stop the bleeding during the FGM procedure. To stop stopping the bleeding during the procedure, "mixtures of local herbs, earth, cow dung, ash, or butter" are sometimes rubbed onto the wound, which also leads to infections, tetanus, and general septicemia.<sup>76</sup>

### **2.3 FGM and Women's Mental Health**

When dealing with mental health, Lesotho has to comply with relevant international instruments such as the International Covenant on Civil and Political Rights,<sup>77</sup> the United Nations Principles on Mental Illness,<sup>78</sup> and the Declaration on the Rights of Disabled Persons.<sup>79</sup> Lesotho has enacted the Mental Health Law Act.<sup>80</sup> However, this legislation only governs the creation and administration of mental health facilities and observation units, as well as voluntary status, admission and release procedures, length of stay, and other aspects of hospital rules and regulations.<sup>81</sup>

The year 2020 saw the invitation from Lesotho's Ministry of Health for Partners in Health (IPH) to take the lead role in co-creating the nation's first mental health policy and plan.<sup>82</sup> This offered the Mental Health Technical Working Group (MHTWG) a significant

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<sup>74</sup> Kenneth J. Bartschi, "Legislative Responses to HIV/AIDS in Africa" (1995) 11 *Conn J Int'l L* 178.

<sup>75</sup> Charles Hardy, "Cultural Practices Contributing to the Transmission of Human Immunodeficiency Virus in Africa" (1987) 6 *Rev Infect Dis* 109.

<sup>76</sup> Carrie Acus Love, "Unrepeatable Harms: Female Genital Mutilation and Involuntary Sterilization in U.S. Asylum Law" (2008) 40 *Colum Hum Rts L Rev* 182.

<sup>77</sup> General Assembly resolution 2200A (XXI) of 16 December 1966.

<sup>78</sup> General Assembly resolution 46/119 of 17 December 1991.

<sup>79</sup> General Assembly resolution 3447 (XXX) of 09 December 1975.

<sup>80</sup> No. 7 of 1964.

<sup>81</sup> WHO, "Lesotho: Mental Health Legislation, Regulations and Implementation Guides" <[https://extranet.who.int/mindbank/collection/country/lesotho/mental\\_health\\_legislation\\_regulations\\_and\\_implementation\\_guides](https://extranet.who.int/mindbank/collection/country/lesotho/mental_health_legislation_regulations_and_implementation_guides)> accessed 28 March 2024.

<sup>82</sup> PIH, Putting the PIH Mental Health Service Planning Matrix in Action: PIH cross-site development and co-authorship of Lesotho's first national mental health policy and strategic plan (2021-2027) 1.

opportunity to collaborate on the development of this policy with Universal Health Coverage (UHC) Planning and Financing staff, global mental health clinical teams, and partnerships.<sup>83</sup>

FGM is associated with a range of mental health problems, such as flashbacks and nightmares, some of which may be normal reactions to traumatic events.<sup>84</sup> The other challenges include: fear and frustration (especially, where it was done by physical force), feelings of low self-esteem, irritability, paranoid thoughts (for example, a false belief that someone is out hound or is trying to harm you), sleep problems, relationship problems, and psychosexual, obsessive-compulsive tendencies.<sup>85</sup>

There are common symptoms that may recur due to FGM. For example, the commonly known symptoms of infibulation which are most likely to recur include cysts at the location of the cutting, chronic neuropathic infections (that can perpetually damage reproductive organs and consequently result in fertility problems), bladder infections, boulders in the urinary tract and in the rectum, increased damaged tissue development, and fistulae (holes or tunnels) inside of the rectum and vagina or between the vagina or the urethra.<sup>86</sup> Androl Urol observes that “Another common long-term effect is pain during sexual activity.”<sup>87</sup>

On the other hand, it must be appreciated that not all girls and women who have experienced FGM may have psychological problems. Their reaction may be affected by several factors such as:

- The acceptability of the practice in the community and society where she is living;
- Sociodemographic characteristics (that is, socioeconomic background, culture, ethnicity, age, education);
- The attitudes of health-care providers;
- Whether the patient is living in her community of origin or is a migrant; and
- The legality of FGM in the place where she is living.<sup>88</sup>

The above being the case, the gravity of the harm will differ from person to person. Other health complications may present themselves as more severe or take the form of mental disorders, such as depression, anxiety, and post-traumatic stress disorder.<sup>89</sup> This is confirmed

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<sup>83</sup> Ibid.

<sup>84</sup> WHO (n 57) 239.

<sup>85</sup> Ibid, 239.

<sup>86</sup> Sharma (n 46) 6.

<sup>87</sup> Transl Androl Urol, *Female Genital Mutilation/Cutting in Africa* (Volume 6, National Library of Medicine 2017) 138.

<sup>88</sup> WHO (n 57) 240.

<sup>89</sup> Ibid, 274.

by Efua when he states “In the longer term, women may suffer anxiety, depression, chronic irritability, frigidity, and marital conflicts.”<sup>90</sup>

Furthermore, FGM is said to portray the image that the role of women in society is only that of “mother and spouse”, thus further encouraging the subordination of women in all spheres of life. The result of this will inevitably be that the practice continues undermining the physical and mental integrity of women, preventing them from fully enjoying fundamental freedoms.<sup>91</sup>

#### **2.4 FGM and the Violation of Other Human Rights for Women**

Besides the FGM practice being detrimental to women’s health and their well-being, it is also perceived by some as a ritualized form of child abuse (where the victim is a minor), violence against women, and as such a violation of human rights.<sup>92</sup> The practice of FGM violates a large number of firmly set human rights principles, norms, and standards, such as the principles of the right to life (should the procedure result in death), equality, and non-discrimination based on sex (where the procedure is aimed at establishing male dominance or superiority over women), the right to freedom from torture and cruel, inhuman, or degrading treatment or punishment, and the rights of the child in case of the victim being a minor.<sup>93</sup>

Moreover, Article 2 (a) of the Declaration on the Elimination of Violence against Women,<sup>94</sup> provides that “Violence against women shall be understood to encompass, but not be limited to, the following: physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation.” This provision guarantees the protection of a person’s right to security.

Women’s security is protected by Article 7 of the International Covenant on Civil and Political Rights,<sup>95</sup> which provides that “No one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.” It cannot be denied that every human person enjoys a positive right to make decisions about what should happen to their body.

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<sup>90</sup> Dorkenoo (n 66) 90.

<sup>91</sup> Camilla Yusuf and Tonatan Fessha, “Female Genital Mutilation as a Human Rights Issue: Examining the Effectiveness of the Law against Female Genital Mutilation in Tanzania” (2013) 13 *Afr Hum Rts LJ* 364.

<sup>92</sup> Williams-Breault (n 58) 227.

<sup>93</sup> *Ibid*, 228.

<sup>94</sup> 1993.

<sup>95</sup> 1966.



The practice of FGM is an invasive procedure to the woman's body and private life irrespective of whether the woman has given her consent due to whatever cultural misconception or social pressure. In a similar vein, regardless of the victim's or survivor's age, consent must not be recognized as a legitimate defence against a charge of FGM.<sup>96</sup> Invasiveness is even worse where some cutting is involved. In *R v Kalam*,<sup>97</sup> a punch in the face was labelled by the Court of Appeal as "a gross intrusion into the victim's privacy and bodily integrity", thus creating an implication that physically hurting someone constitutes an intrusion in their privacy and bodily integrity. Bhavya Sharma believes that "The right to bodily integrity, which also includes the absence of violence, today encompasses the intrinsic dignity of the individual, the rights to liberty and protection of the individual, as well as the right to privacy."<sup>98</sup>

Minors or children still have to be heard too in those things that directly affect them in terms of article 12.<sup>99</sup> Article 5 further shows that the constantly developing capacity of a child to make his or her own decisions concerning matters that directly affect him or her is one that the Convention on the Rights of the Child advocates for.<sup>100</sup> Nevertheless, in terms of FGM, even in cases where there seems to be an apparent consent by girls or women to undergo the procedure, such a decision may prove to be a direct consequence of social pressure brought about by community expectations.<sup>101</sup> Thus a woman's decision to undergo FGM cannot be considered free, well informed, or devoid of coercion.

## **2.5 The right to freedom from torture and cruel, inhuman, or degrading treatment or punishment**

There appears to be in existence a serious debate surrounding Western feminists' criticism of FGM. The controversy is inclined to focus on the idea that Western feminists and human rights activists who condemn the practice of FGM are somehow trying to impose their own established set of moral principles on others and that they use international law instruments to achieve this. It is of paramount importance to appreciate the diversity of cultures and not to impose foreign values on another culture; nonetheless, this does not prohibit change from being brought about.<sup>102</sup>

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<sup>96</sup> UN, "Good Practices in Legislation on Harmful Practices against Women" (2009) United Nations, 16.

<sup>97</sup> [2013] EWCA Crim 452.

<sup>98</sup> Sharma (n 46) 8.

<sup>99</sup> Convention on the Rights of the Child 1989.

<sup>100</sup> Ibid.

<sup>101</sup> Williams-Breault (n 58) 228.

<sup>102</sup> Alexi Nicole Wood, "A Cultural Rite of Passage or a Form of Torture: Female Genital Mutilation from an International Law Perspective" (2001) 12 *Hastings Women's Law Journal* 2, 351-352.

The concept of torture is defined in Article 1(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT),<sup>103</sup> thus:

For this Convention, the term torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in, or incidental to lawful sanctions.

The above definition may seem not to include practices such as FGM whose purpose is not to obtain information or a confession, or punishment for having committed certain acts, and with the involvement of a public official. However, FGM is a violation of human rights since it can make sexual intercourse unpleasant and may hinder a person from performing fundamental physiological processes like urinating.<sup>104</sup> This does not amount to torture as per the above definition. Nonetheless, FGM is conventionally accepted as a violation of the human rights of women and as a result appropriate and effective measures to eradicate the practice have to be devised.<sup>105</sup>

Every girl and woman ought to enjoy the right to live a life free of violence and pain. By inflicting pain on women, FGM is considered a severe violation of human rights and women's physical integrity, as it not only inflicts pain but also alters the structure of the woman's genitalia.<sup>106</sup> It is a practice that amounts to torture and a degrading treatment that cannot be justified. Neither based on custom, tradition, culture, or religion can FGM be tolerated.<sup>107</sup> Tony Evans opines that "All that is sometimes necessary is to protect the persons whose subsistence is threatened from the individuals and institutions that will otherwise intentionally or unintentionally harm them."<sup>108</sup>

## **2.6 The Right not to be discriminated against**

Section 18 (3) of the Constitution of Lesotho,<sup>109</sup> reads as follows:-

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<sup>103</sup> 1984.

<sup>104</sup> Sharma (n 46) 12.

<sup>105</sup> WHO, *Eliminating Female Genital Mutilation: An Interagency Statement* (WHO Publication 2008) 40.

<sup>106</sup> European Union External Action, "Female Genital Mutilation...EU resolute to end this torture!" (2019) <[https://www.eeas.europa.eu/node/57697\\_en](https://www.eeas.europa.eu/node/57697_en)> accessed 14 March 2024.

<sup>107</sup> Ibid.

<sup>108</sup> Evans (n 43) 204.

<sup>109</sup> 1993.

In this section, the expression ‘discriminatory’ means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, colour, sex, language, religion, political or other opinions, national or social origin, property, birth or another status whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

Discrimination can present itself in many different forms. It may come in the form of laws or practices that discriminate, exclude, or restrict individuals based on sex.<sup>110</sup> This, however, does not prove adequate. The practice or the law in question must also possess some effect of undermining the enjoyment of the rights of women. Camilla Yusuf and Tonatan Fessha hold the view that “The act of discrimination can be carried out either by the state itself or even by private individuals.”<sup>111</sup>

Additionally, unlike involuntary sterilization which can affect both men and women, FGM’s victims are only women. And while sterilization affects procreation – an ability highly valued by men – FGM “affects only women’s sexual pleasure and autonomy.”<sup>112</sup> This and all that has been said above about FGM violating the principle of non-discrimination only serves to confirm that FGM practice is indeed discriminating against women.

As an aspect in defining societal values, FGM robs girls and women of the possibility of making independent decisions concerning an intervention that has a lifelong effect on their bodies and which in a way oversteps their autonomy and control over their lives.<sup>113</sup> Culture and/or any set of traditional practices do not automatically make a practice lawful, right, or desirable. Joan Tarpley opines that “FGM should be seen as torture, cruel, inhuman and degrading treatment or child abuse.”<sup>114</sup>

No matter how old the practice has been in place, once it is found to be harmful it needs to be stopped. As a traditional practice, FGM limits women’s autonomy and freedom regarding their bodies since it is antiquated and adheres to societal standards.<sup>115</sup> Even though this action is practiced under the guise of tradition as just being acceptable or even said to be beneficial to women, it is crucial to understand the harm it causes, and the myths associated with it. Myths need to be dispelled, and rights-holders and duty-bearers will be able to better understand that

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<sup>110</sup> Yusuf (n 90) 364.

<sup>111</sup> Ibid, 364.

<sup>112</sup> Love (n 75) 214.

<sup>113</sup> WHO, *Eliminating Female Genital Mutilation: An Interagency Statement* (WHO Publication 2008) 35.

<sup>114</sup> Joan R. Tarpley, “Bad Witches: A Cut on the Clitoris with the Instruments of Institutional Power and Politics” (1997) 100 *W. Va. L. Rev* 316.

<sup>115</sup> Sharma (n 46) 13.

the human right to health is not just exhortatory or rhetorical. On the contrary, it can help to improve the health and well-being of individuals, communities, and populations.<sup>116</sup>

## 2.7 Conclusion

The term FGM commonly designates three different forms of genital mutilation. The most common form is female circumcision, in which the clitoris is partially or completely cut away, often with razor blades or broken glass, and rarely with anaesthesia.<sup>117</sup> The most extreme procedure of FGM is infibulation, through which the whole genital part and external tissues are cut away. The outer parts of the vagina are then stitched together using a thread or thorns, leaving only a small opening for the passage of urine and menstruation. The method often carried out by female family members, is done in non-sterile conditions, and in most cases results in serious and sometimes fatal infections.<sup>118</sup>

It has been observed that in some cases, dirt, ashes, or pulverized animal faeces are applied to the wound to stop the bleeding and that this may contribute to more chances for infection, shock, and uncontrolled haemorrhaging.<sup>119</sup> Doriane Lambelet Coleman holds that “Following the procedure, the girl’s legs are bound together for as long as 40 days, during which time, (if she survives), her wound heals and scars.”<sup>120</sup>

The long-term effects of FGM include pain and complications with urination, menstruation, sexual intercourse, and childbirth.<sup>121</sup> The scarring and other problems associated with the FGM procedure often result in obstructed and delayed labour, tearing, and haemorrhaging. Thus, it is no surprise that the highest maternal and infant mortality rates in the world are found in counties in which FGM is practiced.<sup>122</sup> Unassisted childbirth is deemed impossible following infibulation where many women and infants are known to end up dying during childbirth as a result of the procedure.<sup>123</sup>

Moreover, concerning the difficulties concerning the health of the child during childbirth, a woman who has undergone the process of FGM may also have a miscarriage, a

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<sup>116</sup> Ibid, 13.

<sup>117</sup> Doriane Lambelet Coleman, “The Seattle Compromise: Multicultural Sensitivity and Americanization” (1998) 47 *Duke Law Journal* 4, 728.

<sup>118</sup> WHO and United UNFPA and UNICEF, “Female genital mutilation: A joint WHO/UNICEF/UNFPA statement” (1997) *WHO* 4.

<sup>119</sup> Coleman (n 115) 728.

<sup>120</sup> Ibid, 728.

<sup>121</sup> Urol (86) 138.

<sup>122</sup> Onomrerhinor (n 64) 131.

<sup>123</sup> Coleman (n 115) 728.

need for resuscitation, neonatal distress or mortality, cerebral palsy, failure to thrive, death or a serious incapacity of mothering, as well as bring about high risk to the child.<sup>124</sup>

The unambiguous details of the FGM practice are disturbing. Even stated simply, as they are here, without the subjective descriptions of the pain and suffering the women experienced during and after this procedure, it is a dreadful description. Consequently, it is difficult to understand why a woman or a mother would choose to subject herself or her daughter to such a painful procedure, especially for mothers who have undergone the procedure themselves.<sup>125</sup> Social pressure may be one reason that pushes women into choosing to indulge in FGM.

The most common type of FGM in Lesotho is the elongating of the inner labia. The women and young girls are usually warned that they would not get married without elongated labia because their husbands would find them to be “cold”.<sup>126</sup> It is argued that a woman who has not elongated her inner labia was (and is still) considered a “cold woman”. There is also a common warning that upon finding a woman who did not have her inner labia elongated, a Mosotho man would complain by saying “*kobo li nyane kea hatsela...*”, meaning “I am feeling cold because the blankets are too small...”, a figurative language of saying the woman is cold because she does not have elongated inner labia, and he would be justified in finding himself another woman who is not “cold”.<sup>127</sup>

It is understandable from the above discussion that social pressures can lead women to submit to the practice of FGM. The shame of being told and the risk of losing one’s husband to another woman as a result of not being hot enough to sexually satisfy one’s husband is something every woman would not want to experience, and hence women will do the pulling.<sup>128</sup> Women and young girls are normally given stern warnings that if they do not pull their inner labia, they are likely either to be unable to give birth or prone to experiencing complications during delivery.<sup>129</sup>

Moreover, most of the reasons why the FGM practice is put in place are not necessarily for the good of the woman, but for the satisfaction of a man. Doriane Lambelet Coleman opines that “Specifically, opponents of FGM have noted that girls are subjected to this practice, *inter*

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<sup>124</sup> Neelam Rai, “Female Genital Mutilation – A Hindrance to Women’s Rights and Freedom” (2018) 9 *Indian JL & Just* 84.

<sup>125</sup> Robin Maher, “Female Genital Mutilation: The Struggle to Eradicate this Rite of Passage” (1996) 23 *Human Rights* 4, 13.

<sup>126</sup> Khau (n 35) 33.

<sup>127</sup> *Ibid*, 33.

<sup>128</sup> *Ibid*, 33.

<sup>129</sup> *Ibid*, 33.

*alia*, to prevent promiscuity and to assure that they will remain chaste for their future husbands.”<sup>130</sup> To prove the point that FGM perpetrates discrimination against women, females are viewed as subservient and thus inferior to men. Women have to sacrifice their wellbeing just to please men. Mathabo Khau observes that “If preparing Basotho girls for womanhood centers around labial elongation, the specific aim of which is enhancing male sexual pleasure and reducing female sexual pleasure, it means female sexuality is constructed as not needing pleasure.”<sup>131</sup>

The increasingly contested practice of FGM is not only a kind of violence on women in this patriarchal-orientated society but also infringes on women’s rights over their bodies. It is not only an injurious practice that infringes on the rights of women but also a procedure that tears apart a woman’s right over her body and subjects her to various forms of health complications associated with it.<sup>132</sup> FGM can result in serious health hazards to women and girls who go through this procedure. It has been observed that its impact can further be categorized into two, long-term and short-term impacts.<sup>133</sup>

The practice of FGM infringes the women’s right to health in that it is conducted in very unhygienic conditions that expose women or girls to the risk of getting infections and various other life-threatening dangers.<sup>134</sup> Furthermore, FGM does not only affect the physical health of the women who undergo it but also imposes great psychological disorder, especially, when it is performed without the consent of the woman. Understandably, the act of placing the health of an individual at risk in the absence of proper medical supervision is a violation of that person’s right to health.<sup>135</sup>

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<sup>130</sup> Coleman (n 115) 728.

<sup>131</sup> Khau (n 35) 34.

<sup>132</sup> Rai (n 122) 79

<sup>133</sup> Ibid, 83.

<sup>134</sup> Ibid, 85.

<sup>135</sup> Ibid, 85.

## CHAPTER THREE

### THE PROTECTION OF WOMEN AGAINST FGM IN LESOTHO

#### 3.1 Bifurcation of Human Rights in Lesotho

Female genital (FGM) is found to be a severe violation of human rights and of women's physical integrity and it is a practice deemed to amount to torture and degrading treatment.<sup>136</sup> Moreover, every person in Lesotho is entitled, whatever his/her race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status to fundamental human rights and freedoms.<sup>137</sup> This means every person is entitled to each and all of the following:- (a) the right to life; (d) freedom from inhuman treatment; (g) the right to respect for private and family life; (n) freedom from discrimination.<sup>138</sup>

It needs to be appreciated that the practice of FGM is not aimed at causing death to the victim. However, the possibility of death being its result is not ruled out since in extreme cases death may occur.<sup>139</sup> Where death has occurred, the practice of FGM would have violated Section 5 (1) of the Constitution, which provides that "Every human being has an inherent right to life. No one shall be arbitrarily deprived of his life."<sup>140</sup> Practitioners of FGM thus, need to be informed that the practice violates both domestic constitutional and international human principles.

More pertinent to this treatise is the right to health. It is worth mentioning that the Constitution of Lesotho maintains a bifurcated human rights framework. That is, human rights are embodied in two distinct chapters – chapter II and chapter III – with different legal implications in terms of justiciability. Chapter II encompasses civil and political rights titled 'Fundamental human rights and freedoms' while chapter III contains socio-economic rights styled "principles of state policy". The right to life is found under chapter II, while the right to health is under chapter III.<sup>141</sup>

The above having been said, only when death has resulted can an FGM practitioner be tried for having committed a crime. When it comes to the practitioner having brought about health complications to the victim, it becomes a challenge since the right to health is not

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<sup>136</sup> European Union External Action, "Female Genital Mutilation... EU resolute to end this torture!" <[https://www.eeas.europa.eu/node/57697\\_en](https://www.eeas.europa.eu/node/57697_en)> accessed 21 March 2024.

<sup>137</sup> Constitution of Lesotho 1993, Section 4.

<sup>138</sup> Ibid, (a) (d) (g) (n).

<sup>139</sup> National FGM Centre, "The Law & FGM" (n. d.) <<https://nationalfgmcentre.org.uk/fgm-e-learning-course/the-law-fgm/>> accessed 21 March 2024.

<sup>140</sup> 1993.

<sup>141</sup> Hoolo 'Nyane, "The interface between the right to life and the right to health in Lesotho: Can the right to health be enforced through the right to life?" (2022) 22 *African Human Rights Law Journal* 266.

justiciable in Lesotho, for it is just a mere state policy. Chapter II of the Constitution of Lesotho contains those rights that are considered as negative rights, for they prevent the state or any other person from doing something. On the other hand, Chapter III of the Constitution of Lesotho contains positive rights since they impose positive obligations on states.<sup>142</sup>

The right to health belongs to the second generation rights together with other rights, such as the rights to work, housing, water, a livelihood and education.<sup>143</sup> Like most liberal constitutions, the Constitution of Lesotho has classified human rights into two main categories, being civil and political rights as well as social and economic rights. This is confirmed by Hoolo Nyane when he avers, “The former category is judicially enforceable, while the latter category is not.”<sup>144</sup>

The practice of FGM as a violation of women’s health is not mentioned in any domestic legislation in Lesotho, not even in annual reports of the country. According to the Inter-Parliamentary Union, “Female genital mutilation is reportedly not practised in Lesotho. However, the Inter-Parliamentary Union has no first-hand official information on this subject.”<sup>145</sup> This statement is not tenable on the basis that inner labia elongation is said to be a normal practice in Lesotho,<sup>146</sup> and the World Health Organization (WHO) has categorised it under Type IV of FGM.<sup>147</sup> It affirms that FGM is indeed practiced in Lesotho.

As stated earlier, the Constitution of Lesotho recognizes the right to health under the section on principles of state policy, but not under the section on fundamental human rights and freedoms. The Constitution states that while state policy ideas are incorporated into Lesotho’s public policy, no court can enforce them. Section 25, however, stipulates that the State may direct the nation’s authorities and agencies, including public authorities, in the course of their duties to assist the state in gradually achieving, by legislation or other means, the full realization of the principles of state policy, subject to the constraints of Lesotho’s economic capacity and development.<sup>148</sup>

Health protection is covered under Section 25 which guarantees that Lesotho must implement policies that guarantee the best possible level of physical and mental health for its

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<sup>142</sup> Philip Alston, “A third generation of solidarity rights: Progressive development or obfuscation of international human rights law?” (1982) 29 *Netherlands International Law Review* 307.

<sup>143</sup> *Ibid.*, 307.

<sup>144</sup> Nyane (n 139) 269.

<sup>145</sup> Inter-Parliamentary Union, “Parliamentary Campaign ‘Stop Violence Against Women’: Female Genital Mutilation” <<http://archive.ipu.org/wmn-e/fgm-prov-i.htm>> accessed 22 March 2024.

<sup>146</sup> Khau (n 35) 30.

<sup>147</sup> WHO (n 37).

<sup>148</sup> Moses Mulumba et al, “Constitutional provisions for the right to health in east and southern Africa” (2010) 81 *CEHURD* 8.



people. These policies must include measures to lower the rate of stillbirths and infant deaths and support a child's healthy development, enhance industrial and environmental hygiene, provide for the prevention, treatment, and control of epidemic, endemic, occupational, and other diseases, establish systems to guarantee that everyone has access to healthcare when ill, and enhance public health.<sup>149</sup>

Irrespective of the above being the case, Lesotho has adopted a some international instruments such as the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Banjul Charter, and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, that require State parties to take legislative and other domestic measures to do eliminate the practice of FGM and any other harmful practices. For example, Lesotho has ratified the CEDAW which in following Article 2(f) and Article 5, obligates state parties to take action in ensuring that detrimental practices are stopped and eradicated. By creating legal frameworks to guarantee that detrimental activities are swiftly, impartially, and independently investigated, that law enforcement is effective, and that individuals who have been harmed by such practices receive effective remedies, the state commits to safeguard the rights of women and girls.<sup>150</sup>

Moreover, state parties are expected to enact laws that expressly forbid harmful practices, and thereby also sufficiently punish or criminalize such practices in light of the seriousness of the offense and the harm done, provide for the prevention, protection, rehabilitation, reintegration, and redress of victims, and also work to end harmful practices that are committed with impunity. Aiming to eradicate harmful practices, legislation must incorporate proper funding, implementation, oversight, and enforcement strategies.<sup>151</sup>

In addition, state parties have a duty of care to stop actions that hinder women and girls from recognizing, exercising, or enjoying their rights, and to make sure that private actors refrain from discriminating against women and girls, including through gender-based violence. Together with other harmful practices such as rape, domestic abuse, and other form of violence against women, FGM is considered to be torture or cruel, inhuman, or degrading treatment.<sup>152</sup>

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<sup>149</sup> Ibid, 8.

<sup>150</sup> Committee on the Elimination of All Forms of Discrimination against Women, Harmful Practices as Gender-based Violence against Women and Girls, CEDAW Convention, General Recommendations (Nos 12, 14, 19, 31 and 35) and Practice of the Committee with Recommendations and Guidance to State Parties to the Convention' 3.

<sup>151</sup> Ibid, 3.

<sup>152</sup> General Recommendation No. 35 on gender-based violence against women, CEDAW/C/GC/35 (2017), para. 16.

Lesotho's failure to implement its international obligation to incorporate the provisions of CEDAW was noticed by the Committee on the Elimination of All Forms of Discrimination against Women.<sup>153</sup> The Committee noted that Lesotho's commitment was expressed during the dialogue to the principles of gender equality and non-discrimination embodied in the Convention. However, the Committee was concerned that though the Convention was ratified in 1995, it had not yet been incorporated into domestic legislation of the country, and as a result, has no direct domestic application.<sup>154</sup> Itumeleng Shale also observes that "While the massive adoption of international human rights instruments is highly commendable, for these instruments to benefit the individuals for whom they are intended, the norms contained therein must be made to matter nationally."<sup>155</sup>

At the national level, the Constitution of Lesotho already guarantees freedom from inhuman treatment (Section 8) and the right to life (Section 5) under the section on fundamental rights and freedoms. These are crucial in guaranteeing that actions, such as the practice of FGM, which is harmful to the right to health are prohibited. The Constitution makes it abundantly evident that certain liberties and rights may be restricted to forbid actions that endanger one's health.<sup>156</sup>

### **3.2 The Place of International Law on FGM in Lesotho**

Lesotho has historically been classified as a dualist nation.<sup>157</sup> It can be argued that Lesotho's dualist approach to international law is implied by the country's section 2 constitutional supremacy clause and by the fact that other laws specifically refer to the international instruments they aim to implement. Nevertheless, in terms of human rights protection, there has been a paradigm shift in which the courts have directly applied the provisions of international instruments without looking into their domestication or otherwise, though it is unclear whether this was intentional or not.<sup>158</sup>

There is a contrary holding to what Shale has averred to. In *Mothetjoa Metsing and Another v The DPP and Others*,<sup>159</sup> the court held that Lesotho is typically a dualist State, thus suggesting that international law will only assume a status of law upon its being domesticated

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<sup>153</sup> Committee on the Elimination of All Forms of Discrimination against Women, *Concluding observations of the Committee on the Elimination of Discrimination against Women* (CEDAW/C/LSO/CO/1-4, 2011) para. 10, 4.

<sup>154</sup> *Ibid*, 4.

<sup>155</sup> Itumeleng Shale, "Historical perspective on the place of international human rights treaties in the legal system of Lesotho: Moving beyond the monist-dualist dichotomy" (2019) 19 *African Human Rights Law Journal* 194.

<sup>156</sup> Mulumba (n 146) 8.

<sup>157</sup> Shale (n 153) 194.

<sup>158</sup> *Ibid*, 195.

<sup>159</sup> Constitutional case No/27& 28/2018 at para. 110.

through an Act of Parliament. Understandably, a pre-condition is that the law concerned must be an international one and recognized as such.

The question of whether Lesotho is a dualist or monist state does not cancel the fact that it is duty-bound to domesticate the international instruments that it has ratified. There are instances where the courts have completely disregarded international instruments and declared that they cannot supersede Sesotho customary law or statutes if they have not been domesticated into national laws due to the absence of a clear constitutional provision on how the courts must treat such instruments. This discrepancy indicates that the classification needs to be changed because it is no longer useful.<sup>160</sup>

In the case of *Molefi Ts 'epe v The Independent Electoral Commission and Others*,<sup>161</sup> the court held that “Lesotho, it may be noted, has filed a reservation to the Convention to the effect that it shall not take any legislative measures under CEDAW if those measures would conflict with the Lesotho Constitution”. It means that all that Lesotho needs to do is to avoid any measures that would contradict the provisions of the Constitution while implementing the requirements of CEDAW. However, to date, there are no such legislative measures, especially concerning harmful practices such as the practice of FGM.

Although evidence suggests legislation has not influenced the decline in the practice of FGM in the majority of countries,<sup>162</sup> legal frameworks are nevertheless key components of a comprehensive response to the elimination and abandonment of the practice. The legal framework needs to be complemented by measures that address the underlying socio-cultural causes that are at the root of the practice.<sup>163</sup> Even in the absence of a national human rights institution, the state party has an institutional framework for the protection of human rights. The Office of the Ombudsman was mandated to deal with issues of maladministration, injustice, and abuse of human rights.<sup>164</sup> The practice of FGM, having been declared a human rights violation, would also feature in the observation regarding abuse of human rights.

Another important element that can be taken into consideration is that of education. Education on the psychological and physiological health hazards of FGM may prove effective, for even though many women experience these complications, they may not understand the

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<sup>160</sup> Shale (n 153) 195.

<sup>161</sup> C of A (Civ) No. 11/05.

<sup>162</sup> Jane Muthumbi et al “Female Genital Mutilation: A Literature Review of the Current Status of Legislation and Policies in 27 African Countries and Yemen” (2015) 19 *Afr J Reprod Health* 3, 32.

<sup>163</sup> *Ibid*, 32.

<sup>164</sup> Office of the High Commissioner for Human Rights, “In Dialogue with Lesotho, Experts of the Human Rights Committee Commend Measures to Combat Domestic and Gender-Based Violence, Raise Issues Concerning the Death Penalty and Attacks on Journalists” (2023) <<https://www.ohchr.org/en/news/2023/07/dialogue-lesotho-experts-human-rights-committee-commend-measures-combat-domestic-and>> accessed 25 March 2024.

seriousness of their problems or the problems of the circumcised woman.<sup>165</sup> There is, however, nothing to show even in this regard, as Lesotho's domestic legislation is silent on the practice of FGM. There is a need for a policy that identifies key issues and recommends high-impact mechanisms to address FGM in key sectors such as health, education, security, access to justice, and public information while emphasizing participation as a human rights approach to empowering girls and women.<sup>166</sup>

Lesotho has endorsed the Sustainable Development Goals (SDGs) established in the 2030 Agenda for Sustainable Development, adopted by all United Nations (UN) members in 2015.<sup>167</sup> Goal 5 of the Agenda provides for gender equality and among others, the elimination of all harmful practices, such as child, early and forced marriages, and FGM. Most of the elements are dealt with in the 2016 UN Report,<sup>168</sup> There is, however, no mention of FGM in the UN Report, except if it is implied in the phrase "all other harmful practices."<sup>169</sup> Thus, one can conclude that in Lesotho no policy conforms with the prohibition of the practice of FGM.

Despite the practice of FGM in Lesotho as has been illustrated earlier, there is no domestic legal framework that criminalises the practice. Considering that the eradication of FGM requires a multi-sectoral and deliberate effort by all state and non-state actors, the key concerns for the country should be the inclusion and mobilization of all the relevant stake holders in combatting the practice. It entails seeing to it that international legal instruments such as CEDAW and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, that advocate for the elimination and eradication of the practice of FGM are domesticated.

### **3.3 The International Instruments to be Implemented by Lesotho**

Article 3 of the Universal Declaration of Human Rights,<sup>170</sup> states that "Everyone has the right to life, liberty, and security of person." This means everyone is expected to have control of their lives. However, due to many factors, including social pressures and the need for acceptance in a practicing community, women find themselves pressured into the practice of FGM. However, one needs to bear in mind that a declaration can only be more persuasive than legally binding and so, the Universal Declaration of Human Rights imposes no binding but

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<sup>165</sup> McGee (n 8) 150.

<sup>166</sup> Republic of Kenya, "National Policy for the Eradication of Female Genital Mutilation: Towards a Society Free from Harmful Cultural Practices" (2019) Sessional Paper No. 3, 2.

<sup>167</sup> UN, "Kingdom of Lesotho Sustainable Development Goals: Indicator Baseline Summary Report" (2016).

<sup>168</sup> Ibid.

<sup>169</sup> Ibid, 32.

<sup>170</sup> 1948.

rather just a persuasive obligation on states for the realization of the provisions enshrined therein.

Article 24 (1) of the International Covenant on Civil and Political Rights,<sup>171</sup> provides that “Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.” Since FGM is a violation of women’s rights, not only the family or society must protect children against it, but the State does too. The Committee on Economic, Social, and Cultural Rights rightly observes that “Violations of the obligation to protect occur when a State fails to take effective steps to prevent third parties from undermining the enjoyment of the right to sexual and reproductive health.”<sup>172</sup>

Article 12 (1) of the International Covenant on Economic, Social, and Cultural Rights, (ICESCR)<sup>173</sup> states that “The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.” The practice of FGM has been identified as harmful since it can lead to severe consequences for a woman’s physical and mental health. Consequently, the practice of FGM is a violation of a person’s right to the highest attainable standard of health, physical and mental.<sup>174</sup>

Marriageability is one of the factors that influence women to engage in the practice of FGM. Moges observes that “FGM as an initiation rite emphasizes the transition in age status from girlhood to womanhood and marriageable age.”<sup>175</sup> Article 16 (a) of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),<sup>176</sup> provides that “States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular, shall ensure, on a basis of equality of men and women: (a) The same right to enter into marriage.” The fact that women have to go through the practice of FGM to be marriageable discriminates against them and has to be eliminated.

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<sup>171</sup> 1966.

<sup>172</sup> The Committee on Economic, Social and Cultural Rights, “General comment No. 22 (2016) on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights)” (2016).

<sup>173</sup> 1966.

<sup>174</sup> Science for Democracy, “NGO Joint Parallel Report on the Government of Sierra Leone’s First Report on the Implementation of the International Covenant on Economic, Social and Cultural Rights” (2024) *Loyola Law School* 10.

<sup>175</sup> Ashenafi Moges, “What is Behind the Tradition of FGM?” (2003) *African Women’s Organization against Female Genital Mutilation* 5.

<sup>176</sup> 1979.

The Convention Against Torture and Other Cruel and Inhuman or Degrading Treatment or Punishment (CAT),<sup>177</sup> prohibits torture in any form. In clarifying State responsibility for torture by non-state actors, the Committee against Torture explicitly cited “States parties’ failure to prevent and protect victims from gender-based violence, such as rape, domestic violence, female genital mutilation, and trafficking” as a violation of the CAT.<sup>178</sup>

Article 19 (1) of the United Nations Convention on the Rights of the Child (CRC),<sup>179</sup> provides that, “States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.” Women who have gone through the practice of FGM are prone to experiencing negative emotions towards the cutting experience and this gets worse during gynaecological and obstetric examinations as well as during childbirth when the physical and mental adverse effects of the procedure get more prominent and a source of great discomfort to the women in question.<sup>180</sup>

Article 16 (1) of the African Charter on Human and Peoples’ Rights (Banjul Charter),<sup>181</sup> repeats *ad verbatim* the provision in Article 12 of the ICESCR, which enjoins State Parties to recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. In this regard UNICEF observes that the practice of FGM violates the right to the highest attainable standard of health, the right to physical integrity, and the rights of the child. In the worst cases, it even violates the right to life.<sup>182</sup>

The African Charter on the Rights and Welfare of the Child,<sup>183</sup> speaks to the principle of the best interests of the child. It follows that this principle overrides any other competing factors, such as religious, cultural, or social norms, which means that they cannot be used to justify the practice of FGM, which is harmful to children.<sup>184</sup> Article 5 of the Protocol to the

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<sup>177</sup> 1984.

<sup>178</sup> Committee against Torture, General Comment No. 2, 18, UN Doc. CAT/C/GC/2 (Jan. 24, 2008) para 18, 5.

<sup>179</sup> 1989.

<sup>180</sup> Esho Tammary and Kumar Manasi, “Mental and sexual health outcomes associated with FGM/C in Africa: A Systematic Narrative Synthesis” (2023) 56 *eClinical Medicine* 6.

<sup>181</sup> 1981.

<sup>182</sup> UNICEF, “What is Female Genital Mutilation?: Everything You Need to Know about FGM and What UNICEF is Doing to Stop It” <<https://www.unicef.org>> accessed 12 April 2024.

<sup>183</sup> 1990.

<sup>184</sup> Equality Now, “As We Advocate for Zero Tolerance for FGM, Let’s Not Ignore this Important Accountability Tool: The ACHPR-ACERWC Joint General Comment on FGM” (2024) <<https://equalitynow.org>> accessed 12 April 2024.

African Charter on Human and Peoples' Rights on the Rights of Women in Africa,<sup>185</sup> provides thus:

States Parties shall prohibit and condemn all forms of harmful practices which negatively affect the human rights of women and which are contrary to recognized international standards. States Parties shall take all necessary legislative and other measures to eliminate such practices, including a) creation of public awareness in all sectors of society regarding harmful practices through information, formal and informal education, and outreach programs; b) prohibition, through legislative measures backed by sanctions, of all forms of female genital mutilation, scarification, medicalization and para-medicalization of female genital mutilation and all other practices to eradicate them; c) provision of necessary support to victims of harmful practices through basic services such as health services, legal and judicial support, emotional and psychological counseling as well as vocational training to make them self-supporting; d) protection of women who are at risk of being subjected to harmful practices or all other forms of violence, abuse, and intolerance.

This is the first instrument that deals directly with the practice of FGM, unlike the other instruments from which the subject of FGM would be sub-intended in their provisions. Lesotho ratified the African Charter in 1992 and the Maputo Protocol in 2004. Nevertheless, Lesotho is said to have submitted only one report to the African Commission under the African Charter in 2000 which covered the period from 1991 to 2000, and has not complied with its reporting obligations thereafter.<sup>186</sup> Lesotho is reported to have also not submitted any report under the Maputo Protocol according to Article 62 of the African Charter and Article 26 (1) of the Maputo Protocol.<sup>187</sup> This shows that Lesotho is lagging in fulfilling its obligations to implement the treaties that it has ratified.

### **3.4 Conclusion**

The practice of FGM violates the right to health, freedom from torture, inhuman or degrading treatment, and freedom from discrimination enshrined in the Constitution of Lesotho 1993, just to mention but few.<sup>188</sup> Inhuman treatment is treatment that causes intense physical or mental suffering, and since the practice of FGM causes pain and physical injury, it can qualify as inhuman treatment. It is also a degrading treatment because it is extremely humiliating and

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<sup>185</sup> 2003.

<sup>186</sup> Centre for Human Rights, "The Centre for Human Rights coordinates African Charter and Maputo Protocol drafting workshop in Lesotho" (2017) <<https://www.chr.up.ac.za/womens-rights-unit-blog/55-news-wru/565>> accessed 12 April 2024.

<sup>187</sup> Ibid.

<sup>188</sup> Sections, 27, 8 and 18.

undignified considering the unsterilized instruments used to perform the procedure, as this concept is based on the principle of dignity – the innate value of all human beings.<sup>189</sup>

Moreover, Lesotho has thus far, ratified a considerable number of international instruments. There is no clear tangible roadmap set by the government given for implementing the said treaty instruments, especially concerning the practice of FGM. The United Nations Population Fund (UNFPA) rightly observes that in a context such as this, having laws alone – even ones that are effectively enforced – is not enough to eliminate the deeply rooted traditional practice of FGM. Furthermore, strong law enforcement deprived of some efforts to promote social change is surely going to lack a positive effect and can even drive the practice underground. For laws to have a significant positive impression, they need to be extensively understood, discussed, and owned by the people that are affected by them.<sup>190</sup>

It follows from the above that, having a constitution that has clear provisions on the protection of human rights as well as having ratified international instruments that protect and promote certain rights does not help where there is no will to implement them. It is a well-appreciated fact that a law or good practice from one country cannot always be applied to another country as a blueprint, but it can serve as inspiration. One can observe that eliminating the practice of FGM requires a global undertaking. This being the case, it is safe to hold that the rules concerning the practice of FGM are *erga omnes* obligations and as such ought to be promoted and respected, and thus, must be domesticated.

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<sup>189</sup> Equality and Human Rights Commission, “Freedom from torture and inhuman or degrading treatment” (2016).

<sup>190</sup> UNFPA, “Analysis of Legal Frameworks on Female Genital Mutilation in Selected Countries in West Africa” (2020) *UNFPA Regional Office for West and Central Africa* 6.



## CHAPTER FOUR

### LESOTHO'S CURRENT LEGAL FRAMEWORK AND FEMALE GENITAL MUTILATION (FGM)

#### 4.1 The Constitution of Lesotho and FGM

It is highly conceivable that formal laws making female genital mutilation (FGM) illegal can be effective when they support the already existing opposition to the practice at the local level. This is because formal laws will have a corroborative effect when they codify existing practices and beliefs, for once formal rules concerning the practice of FGM are aligned with informal practices, social groups will not feel like their identity is being threatened.<sup>191</sup>

The Constitution of Lesotho<sup>192</sup> does not contain any provision that directly deals with the issue of FGM. However, recourse may be made to some provisions which may indirectly have to do with the practice of FGM as a violation of women's rights. Nonetheless, Section 5 (1) of the Constitution,<sup>193</sup> provides that "Every human being has an inherent right to life. No one shall be arbitrarily deprived of his life." The right to life is violated in an instant whereby death occurs because of the practice of FGM.<sup>194</sup> Jungari also opines that the practice of FGM damages arteries and veins and that primary haemorrhaging during the operation is unavoidable while secondary haemorrhaging may appear later if, for instance, the wound becomes infected. Thus, too much bleeding may lead to shock and even death.<sup>195</sup>

Moreover, an infection may spread inward, spreading through the vagina and passing into the uterus and ovaries, causing chronic pelvic infection and infertility. This may cause tetanus to develop, and that may cost the victim her life. Septicaemia, also potentially fatal, is a potential complication that may arise from a serious infection.<sup>196</sup> The UNFPA notes that "The procedure is risky and life-threatening for the girl both during the procedure and throughout her life."<sup>197</sup>

Furthermore, the practice of FGM does not threaten the life of women alone but that of the newborn too. The WHO observes that the FGM procedure can cause complications in

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<sup>191</sup> Christopher J. Coyne and Rachel L. Coyne, "The Identity Economics of Female Genital Mutilation" (2014) 48 *The Journal of Developing Areas* 2, 148.

<sup>192</sup> 1993.

<sup>193</sup> Ibid.

<sup>194</sup> Williams-Breault (n 58) 226.

<sup>195</sup> Suresh Banaya Jungari, "Female Genital Mutilation is a Violation of Reproductive Rights of Women: Implications for Health Workers" (2016) 41 *Health & Social Work* 1, 28.

<sup>196</sup> Ibid, 28.

<sup>197</sup> UNFPA, "Implementation of the international and regional human rights framework for the elimination of female genital mutilation" (2014) <<https://unfpa.org/sites/default>> accessed 12 April 2024.

childbirth and an increased risk of newborn deaths.<sup>198</sup> As compared to women who have not undergone the practice of FGM, those who have been subjected to this procedure face a significantly greater risk of requiring a Caesarean section, an episiotomy, and an extended hospital stay in the hospital, and also of suffering a post-partum haemorrhage, beyond the risk of losing their child.<sup>199</sup> Therefore, the practice of FGM is capable of violating the right to life of both the mother and the newborn.

Additionally, Frances Althaus opines that since the practice of FGM is in most cases performed without aesthetic under unhealthy conditions by lay practitioners with little or no knowledge of medicine or human anatomy, FGM can cause pain, permanent health problems, or death in extreme cases.<sup>200</sup> This is corroborated by Efua Dorkenoo who avers that “Prolonged and obstructed labour can lead to tearing of the perineum, haemorrhage, fistula formation, and uterine inertia, rupture, or prolapse. These complications cause neonatal harm (including stillbirth) and even maternal death.”<sup>201</sup>

The practice of FGM is also found to violate women’s rights to health, security, and physical integrity. The principle of security and physical integrity denotes autonomy, which is a long-standing principle of medical law.<sup>202</sup> The word autonomy originates from the Greek words *autos*, denoting self, and *nomos*, signifying to rule or govern. Thus, the principle of self-rule is a right bequeathed to all persons.<sup>203</sup> Unfortunately, this right is nowhere to be located in the Constitution of Lesotho.

It is generally acknowledged that there are two facets to the principle of an individual’s autonomy, namely the ability to act independently without being influenced by third parties and the ability to act purposefully. What this means is that a person must be able to decide on his or her own body without undue interference, from a societal leader, family member, medical practitioner, or any other source. It also presupposes that limitations, such as a lack of understanding of the procedure, its consequences, treatment, prognosis, or any other factor, are absent. Then, and only then, can a person be said to act autonomously.<sup>204</sup>

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<sup>198</sup> WHO, “Female Genital Mutilation: Evidence Brief” (2019) *WHO* 2.

<sup>199</sup> United Nations Population Fund, “Female genital mutilation (FGM) frequently asked questions” (2004) <<https://www.unfpa.org>> accessed 14 April 2024.

<sup>200</sup> Frances A. Althaus, “Female Circumcision: Rite of Passage or Violation of Rights?” (1997) 23 *International Family Planning Perspectives* 3, 130.

<sup>201</sup> Dorkenoo (n 66) 89.

<sup>202</sup> A. Nienaber and K. N. Bailey, “The Right to Physical Integrity and Informed Refusal: Just How Far Does a Patient’s Right to Refuse Medical Treatment Go?” (2016) 9 *SAJBL* 2, 73.

<sup>203</sup> *Ibid*, 37.

<sup>204</sup> *Ibid*, 38.

About the right to health, and health as a state of complete physical, mental, and social well-being and not merely the absence of disease or infirmity,<sup>205</sup> Every state has an obligation and a duty both to promote health, social, and related services, and to prevent or remove barriers to the realization and maintenance of women's physical, mental, and social well-being.<sup>206</sup> This being the case, Lesotho, like any other State is bound in law to fulfil this obligation.

The right to health is a fundamental human right that has been mentioned in a considerable number of international and regional documents and national laws. From the beginning of the codification of human rights instruments, there have been some challenges regarding the justiciability of Economic, Social, and Cultural rights including the right to health as one of the most important components of these rights. This gave rise to the ignorance of these rights by many States and the issue turned into a means for justifying the violation of human rights of people.<sup>207</sup>

Section 27 (1) of the Constitution, provides that “Lesotho shall adopt policies aimed at ensuring the highest attainable standard of physical and mental health for its citizens.” However, it should be appreciated that this falls under the third chapter on State Principles. in terms of Section 25 of the Constitution, these principles are not enforceable by any court but subject to the limits of the economic capacity and development of Lesotho, shall guide the authorities and agencies of Lesotho, and other public authorities, in the performance of their functions with a view to achieving progressively, by legislation or otherwise, the full realisation of these principles.

The practice of FGM is generally recognised as a violation of women's right to health. Beyond the Constitution, there are no other instruments, be they policies or legislative acts on the practice of FGM in Lesotho. However, due to having ratified some international instruments that oblige it to domesticate them, Lesotho is still expected to fulfil this duty by whichever means it may choose. Rebecca Cook rightly opines that “The emerging international imperative is that the means chosen by States should lead to the promotion and protection of women's health and should enhance the dignity of women and their capacity for self-determination.”<sup>208</sup>

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<sup>205</sup> The Constitution of the World Health Organization (WHO) (1) 1946.

<sup>206</sup> Rebecca J. Cook, “Women's Health and Human Rights: The Promotion and Protection of Women's Health through International Human Rights Law” (1994) *WHO* 1.

<sup>207</sup> Fatemeh Kokabisaghi, “Justiciability of the Right to Health in International Legal System” (2016) *Iranian Journal of Medical Law* 1.

<sup>208</sup> Cook (203) 1.

Rights to the removal of practices, stereotypes, and prejudices that impair women's well-being are rights that are relevant to women's health. In a State so silent as Lesotho about harmful practices, especially concerning women's right to health it is hard to find tangible or practical undertakings adopted to enhance women's right to health. Thus, Lesotho fails both in its negative and positive duty respectively.

A State's negative duty is a duty not to intervene in the exercise of individuals' rights. Breach of a negative duty is shown when a State has used an organ of government to intervene in or obstruct an individual's free pursuit of an entitlement. A positive duty requires a State to provide the means for individuals to achieve personal goals. A State's violation of a positive right may be shown in the State's failure to make an effort in good faith to provide the necessary resources to satisfy the right in question.<sup>209</sup> Consequently, Lesotho's failure to put into place positive measures to promote and protect women's right to health manifests its violation of the positive right in this respect.

It follows from the above that Lesotho ought to conform to standards of observance of both positive and negative duties in a way that satisfies the dynamic legal principle of progressive development towards the implementation of human rights as per its resolution under Section 25 of the Constitution.

#### **4.2 Human Rights-Based Approach to the Elimination of FGM**

It is common knowledge that laws alone cannot change social behaviour. Therefore, there is a need for other measures that may help speed up the process of change towards the practice of FGM. UNFPA observes that "A human rights-based approach to FGM places the practice within a broader social justice agenda – one that emphasizes the responsibilities of governments to ensure the realization of the full spectrum of women's and girls' human rights."<sup>210</sup>

States are urged to prevent FGM and to adopt and enforce measures to eliminate it. These would include strong community outreach programs involving village and religious leaders; education and counselling about the impact of FGM on girls and women's health; offering suitable treatment and rehabilitation for girls and women who have suffered FGM; and services should also include counselling for women and men to discourage the practice of FGM.<sup>211</sup>

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<sup>209</sup> Ibid, 17.

<sup>210</sup> UNFPA, "Implementation of the International and Regional Human Rights Framework for the Elimination of Female Genital Mutilation" (2014) *United Nations Population Fund* 1.

<sup>211</sup> Vienna Declaration on Human Rights, adopted by the World Conference on Human Rights, 1993 (UN Doc. A/CONF.157/24 (Part I)).

Moreover, the recognition that community-level leaders (such as chiefs) play critical normative roles and have great influence on local values, attitudes, and beliefs makes it imperative to include them in advocating for the abandonment of the practice of FGM. Participatory, qualitative, community-driven research is an essential mechanism to increase understanding of FGC issues, as well as to begin a productive community dialogue around the subject.<sup>212</sup>

In its 2018 Report, the U. S. Department of State shows that there is criminalizes FGM in Lesotho. It was stated further that there are no statistics that reflect its prevalence and that this is attributed to several factors including that firstly, female initiation schools are very scarce in Lesotho; secondly, there is no proof that rituals performed in female initiation schools involve any of the acts which have been categorized by World Health Organisation (WHO) as FGM. However, the government averred to have embarked on public awareness campaigns on the dangers of FGM and that it constitutes a human rights violation.<sup>213</sup> Conversely, one may wonder why the government would embark on public campaigns on the dangers of something that does not exist in its jurisdiction.

Regarding to the 2022 Report on Lesotho, advocacy and awareness programs by the LMPS Child and Gender Protection Unit (CGPU), ministries, and NGOs were carried out as a way of public outreach to combat societal acceptance of violence against women and children.<sup>214</sup> Surprisingly, the 2022 Report on Lesotho states that one form of FGM (labia elongation) is legal. It holds that Labia elongation, the act of enlarging the labia minora (the inner lips of female genitals) through manual manipulation (pulling) or physical equipment (such as weights) was practiced. Labia elongation is legal; but, according to the NGO Federation of Women Lawyers, it was not a common practice.<sup>215</sup> The 2023 Report repeats ad verbatim what has been said in the 2022 Report on Lesotho.<sup>216</sup>

One can immediately notice how FGM is given just a small spotlight under other forms of gender-based violence in the Report referenced above. Even so, the surprising issue is the holding that labia elongation is legal. This is contrary to the generally held perception that labia elongation falls under Type IV of FGM. Mathobo Khau correctly observes that it is worth

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<sup>212</sup> Susan Igras et al, “Integrating Rights-Based Approaches into Community-Based Health Projects: Experiences from the Prevention of Female Genital Cutting Project in East Africa” (2004) 7 *Health and Human Rights*, 2, 258.

<sup>213</sup> The Kingdom of Lesotho, *Combined Second to Eighth Periodic Report under the African Charter on Human and Peoples’ Rights and Initial Report under the Protocol to the African Charter on the Rights of Women in Africa* (2018) 127.

<sup>214</sup> U.S. Department of State, “2022 Country Reports on Human Rights Practices: Lesotho” (2022) *Bureau of Democracy, Human Rights, and Labor* 13.

<sup>215</sup> *Ibid*, 14.

<sup>216</sup> U.S. Department of State, “2023 Country Reports on Human Rights Practices: Lesotho” (2022) *Bureau of Democracy, Human Rights, and Labor* 14-15.

taking into consideration that practices aiming to reduce, enlarge or beautify the external female genitalia are highly controversial, with the WHO classifying inner labia elongation as a Type IV FGM, and the United Nations classified it under harmful traditional practices, while some scholars prefer ‘ethnic genital modification’.<sup>217</sup>

It could be argued that indeed labia elongation is legal in Lesotho, for there is no law labelling it as an illegal practice. One would also wonder if it would be inappropriate to adopt the ‘International Law Harmonization Theory’ that seeks to initiate a practical solution that emphasizes more on addressing the challenges of mankind internationally than from a perception of sovereign States.<sup>218</sup> Thus the possibility of labia elongation being deemed illegal no matter how it is dealt with at the national level may hold.

The fact that a national report can state that a type of FGM is legal shows how the matter is not taken seriously by the government. Mathabo further opines thus, “I am, however, troubled by the apparent silence on labial elongation and its effects on female sexual desire and pleasure, in the context of Lesotho, and this has forced me to question the legitimacy of the practice.”<sup>219</sup> Even though she employs her concentration on the effects of female sexual desire and pleasure, and not its harmful effects, what can be cherished is that she notices the silence on this matter.

Lastly, the idea that the NGO Federation of Women Lawyers held that labia elongation was not a common practice proves questionable. This is because it is said to form part of becoming a Mosotho woman and as such an integral part of sexual identity formation.<sup>220</sup> Furthermore, sexual preparation of the female body is said to mainly involve girls being taught how to elongate their inner labia as a rite of passage into womanhood.<sup>221</sup>

The above being the case, the first step toward preventing the practice of FGM would be through informed campaigns. Such preventive campaigns should also help determine the incidence and spread of the procedures, and the basic statistics of mortality and morbidity if any. Fran P. Hosken reasonably opines that “Until the dangers to health become publicly known, the claims that these practices no longer exist and circumcision only continues in a few isolated rural areas cannot be refuted”.

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<sup>217</sup> Khau (n 35) 31.

<sup>218</sup> Dalma M. Demeter and Zebo Nasirova, “International legal harmonisation in theory and practice” (2018) *Spiru Haret University* 66.

<sup>219</sup> Khau (n 35) 32.

<sup>220</sup> *Ibid*, 36.

<sup>221</sup> *Ibid*, 30.

### 4.3 Women's Control over Their Bodies

The idea of women's right to bodily integrity has increasingly been defended in bioethical, philosophical, and legal scholarship. This right is premised on the value of genital and sexual autonomy for all individuals. However, Kate Goldie Townsend opines that once a person has attained the status of maturity and is deemed competent to make well-thought-out decisions about practices that involve surgical risk and typically permanently alter their sexual anatomy, the state should not seek to prevent them from pursuing such operations.<sup>222</sup>

The idea that adults are free to subject themselves to harmful practices and that the State needs not to intervene appears to be ill-conceived. This is because the State holds the prerogative of legislating on what is licit and what is illicit, irrespective of how individuals may feel about it. For example, where prostitution has been illegalized, it does not matter how certain women feel about it, it is illegal and that is all. Similarly, the practice of FGM cannot be left in the hands of individuals while it is a harmful practice. For instance, the Female Genital Mutilation Act,<sup>223</sup> criminalises the cutting of adult female genitals for cultural reasons even if the woman has made it clear that she wants to be cut or sewn.<sup>224</sup>

Tracing its policy from some regional instruments, Lesotho can refer to Article 4 of the African Charter,<sup>225</sup> which provides that "Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person," while Article 16 (1) states "Every individual shall have the right to enjoy the best attainable state of physical and mental health." Failure to domesticate instruments such as these makes one doubt the strength of the legal framework of the State in question.

Last but not least, the practice of FGM has been conventionally identified as a form of violence against women. A legal framework that guarantees every woman the right to be free from violence in both the public and private spheres needs to be adopted, and in that way, Lesotho's obligation to condemn all forms of violence against women would be achieved. The resolution to pursue, by all appropriate means and without delay, policies to prevent, punish, and eradicate violent practices such as FGM against women need not be deferred.

### 4.4 Conclusion

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<sup>222</sup> Kate Goldie Townsend, "Defending an inclusive right to genital and bodily integrity for children" (2023) 35 *Int J Impot Res* 1, 27.

<sup>223</sup> 2023 (UK).

<sup>224</sup> Townsend (218) 28.

<sup>225</sup> 1981.

Adopting a policy based on the Universal Declaration of Human Rights<sup>226</sup> that has five provisions relating to FGM that might serve as a foundation for protecting women against the practice. The five provisions are, Article 2 on discrimination, Article 3 concerning the right to security of person, Article 5 on cruel, inhuman, and degrading treatment, Article 12 on privacy, and Article 25 on the right to a minimum standard of living and protection of motherhood.

Most pertinently, if only Lesotho can implement the relevant provisions of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol),<sup>227</sup> such as Article 2 (1) (b) which provides that "States Parties shall combat all forms of discrimination against women through appropriate legislative, institutional and other measures. In this regard, they shall: enact and effectively implement appropriate legislative or regulatory measures, including those prohibiting and curbing all forms of discrimination, particularly those harmful practices which endanger the health and general well-being of women."

Another provision that has to be taken into consideration is Article 5 (b) of the Maputo Protocol, which provides that "States Parties shall prohibit and condemn all forms of harmful practices which negatively affect the human rights of women and which are contrary to recognized international standards. States Parties shall take all necessary legislative and other measures to eliminate such practices, including prohibition, through legislative measures backed by sanctions, of all forms of female genital mutilation, scarification, medicalization, and para-medicalization of female genital mutilation and all other practices to eradicate them."

Furthermore, an effort to enforce the rights of persons embodied in the Constitution through relevant policies may prove helpful. Even though the right to health is already deemed a state policy, it is necessary to strengthen mechanisms aimed at its promotion and protection. Lucia and Katrina rightly opine that constitutions are the most vital expressions of government responsibility and individual entitlements, and consequently one of the means best suited to endorsing states' commitments to human rights. Constitutional law offers a frame for subsequent policies, programs, and services to be implemented.<sup>228</sup>

Lesotho's current legal framework regarding the elimination and eradication of the practice of FGM is very poor and can be said to be non-existent. It has been shown that the

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<sup>226</sup> 1948.

<sup>227</sup> 2003.

<sup>228</sup> Lucia Berro Pizzarossa and Katrina Pehudoff, "Global Survey of National Constitutions: Mapping Constitutional Commitments to Sexual and Reproductive Health and Rights" (2017) 19 *Health and Human Rights Journal* 2, 281.



practice of FGM is present in Lesotho, in the form of inner labia elongation.<sup>229</sup> However, the government of Lesotho holds that Lesotho does not practice FGM. In the 2011 Report,<sup>230</sup> The Minister of Gender, Sports, Youth, and Recreation averred she had been personally involved in a lobbying group to lobby some countries practicing FGM. She further said that Lesotho was only allowed to be part of the lobbying delegation because they did not practice FGM.

The Committee on the Elimination of Discrimination against Women states that “Lesotho did not only reject the recommendations, they rejected the allegation. If immigrants practicing female genital mutilation became an issue, then the Government would legislate for it.”<sup>231</sup> These affirmations show that Lesotho is not making any reasonable efforts to deal with the practice of FGM. Therefore, there is still a lot of research on the presence and dangers of the practice of FGM in Lesotho, especially when women’s traditional initiation is still practiced, even though no one knows what exactly happens to the initiates.<sup>232</sup>

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<sup>229</sup> Khau (n 35) 31.

<sup>230</sup> Office of the High Commissioner for Human Rights, “Committee on the Elimination of Discrimination against Women considers report of Lesotho” (2011).

<sup>231</sup> Ibid.

<sup>232</sup> Du Plooy (n 17) 84.

**CHAPTER FIVE**  
**CONCLUSION AND RECOMMENDATIONS THAT LESOTHO COULD ADOPT**  
**GIVEN OF ERADICATING FEMALE GENITAL MUTILATION (FGM)**

**5.1 Conclusion**

Openness and readiness to implement international law at the domestic level are essential for the elimination of the practice of female genital (FGM). Shayla McGee observes that some African feminists advocate the rejection of Western approaches, and instead pursue their self-determination for eradication of female circumcision.<sup>233</sup> It is through the creation of such resistance that African feminist theory avoids what may be viewed as the recolonization of Western society through its anti-FGM campaign. Through the integration of the value system of African women with Western feminists and activists' methods for human rights, an Afrocentric individual rights system may be born, whether in the long run, it ends up protecting or promoting the right to health, bodily integrity, and/or sexuality.<sup>234</sup>

To achieve an effective approach to eradicating the practice of FGM, it is important that not only women but all stakeholders be informed about the health hazards resulting from the practice. Therefore, education concerning the practice of FGM is inevitable once a step towards eliminating it has been taken. Shayla McGee rightly opines that "education of the physiological and psychological health hazards is effective, for even though many African women experience these complications, they may not understand the depth of their problems or the problems of the circumcised African woman community."<sup>235</sup>

Through education and open discussions, people would be able to get correct information concerning the practice of FGM. Moreover, even those who advocate for the practice of FGM would be informed that no custom, tradition, or religious consideration may be invoked to justify "harmful practices" against women.<sup>236</sup> Therefore, when enacting legislation banning FGM and taking the necessary steps to end the practice, the government needs to include awareness-raising campaigns, prevention, and detection measures and also outline punishment for perpetrators.

The government is duty-bound to establish a legal framework that contains legal measures meant for the advancement and safeguarding of women's full enjoyment of all human

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<sup>233</sup> McGee (n 8) 149.

<sup>234</sup> Ibid, 150.

<sup>235</sup> Ibid, 150.

<sup>236</sup> UN (n 38) 12.

rights and the eradication of all forms of violence against women and girls, including harmful traditional and customary practices such as the practice of FGM. A liberal approach to the interpretation of the right to life is recommended, whereby the right to life is not conceived only as prohibiting arbitrary deprivation of life, but also creating a conducive environment for life to be lived and enjoyed adequately.

While a national policy on the elimination and eradication of the practice of FGM is necessary, care must be taken to ensure its consistency with the constitutional provisions. This is to avoid the risk of the policy being found to be null and void, should it be inconsistent with the Constitution of Lesotho.<sup>237</sup> Section 2 of the Constitution, provides that “This Constitution is the supreme law of Lesotho and if any other law is inconsistent with this Constitution, that other law shall, to the extent of the inconsistency, be void.”<sup>238</sup> Other pertinent legislative instruments as well as the relevant Sustainable Development Goals (SDGs) have to be taken into account for consistency and relevance. The laws have to be backed by sanctions such as fines to be paid by transgressors.

The government can also launch programs throughout the country to create awareness and sensitivity concerning the practice of FGM in local communities, as well as to empower women. Collecting copies of the United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) handbooks and translating them into Sesotho language and disseminating such copies in different communities is recommended. People should be made aware that the practice of FGM is a violation of women’s rights, which should be avoided.

## **5.2 Recommendations for the Eradication of FGM in Lesotho**

Countless determinations must be made to counteract the practice of FGM. This could be achieved through research, anti-FGM works and activities within communities, and the creation of a public policy legal framework. Lesotho must establish a program at the national level that includes a wider national involvement to stop FGM, the creation of national monitoring bodies and resolutions that condemn the practice of FGM, the creation of legal frameworks, and enhanced political support to end FGM.

The elimination and eradication of FGM requires wide-ranging and multi-sectoral programs, based on human rights and gender approaches, involving communities while

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<sup>237</sup> 1993.

<sup>238</sup> Ibid.

respecting their cultural sensitivity, to counteract a practice rooted in traditional social dynamics.<sup>239</sup> The mere denial of the existence of FGM is not enough to prevent the government from finding what exactly happens to women during their traditional initiation (women's traditional circumcision) and to curb harmful practices that may be involved.

Even if it can be found that in fact, FGM is not practiced in Lesotho as the government claimed in the 2011 Report,<sup>240</sup> UNICEF has rightly opined that "It is an important mechanism to increase awareness of the dangers of FGM and of groups that do not practice it."<sup>241</sup> This does not mean the government's claim is acceptable, but only a precautionary measure adopted because of not being left behind as the world fights against the practice of FGM. Lesotho cannot stand by and watch as the world rallies to accelerate progress against FGM, for understanding what drives change in how people think about the practice and act is key to its elimination.<sup>242</sup>

There is a need for national efforts aimed at addressing the elimination and eradication of FGM in Lesotho. The focus ought to be primarily directed towards preventing the practice of FGM, with equal attention to treating associated health complications, caring for survivors, and engaging traditional practitioners as well as health care providers as key stakeholders who can help in the abandonment of the practice.

A proper approach to the elimination and eradication of the practice of FGM is to find those parties within the relevant cultural communities that possess a strong interest in eliminating the practice and working diligently with them to devise a program that draws upon their insider perspectives. Such a program will be most effective if the major impetus for change comes from within the community rather than from without.<sup>243</sup>

Acknowledging the fact that human rights are indivisible and hence, interconnected, FGM violates multiple human rights such as the rights to health, freedom from discrimination, and many more, as reflected in the discussion in the previous chapters. It is imperative to create some guidelines at the national level that are meant to prevent the practice of FGM.

Developing a set of guidelines for the elimination and eradication of FGM will prove useful to women and the practitioners of FGM. Developing some guidelines is essential to ensure that FGM practitioners together with women and the entire nation understand the international policy and the human rights basis for upholding women and children's human

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<sup>239</sup> Rajat Khosla et al, "Gender Equality and Human Rights Approaches to Female Genital Mutilation: A Review of International Human Rights Norms and Standards" (2017) *Reproductive Health* 5.

<sup>240</sup> UN, "Committee on the Elimination of Discrimination against Women considers report of Lesotho" (2011).

<sup>241</sup> UNICEF, "The Power of Education to End Female Genital Mutilation" (2022) *UNICEF*, 1.

<sup>242</sup> *Ibid*, 1.

<sup>243</sup> Regina Smith Oboler, "Law and Persuasion in the Elimination of Female Genital Modification" (2001) 6 *Winte*, 4, 313.

rights relating to FGM. It entails especially, their duty to never perform the procedure, to refuse requests to re-perform the procedure after childbirth, to prevent it from continuing, and to safeguard the rights of women and girls living with FGM.<sup>244</sup>

### **5.2.1. Education as One Mechanism to Eliminate FGM**

Education is an important tool for raising awareness of the dangers of FGM even to groups that do not practice it to dissuade them from indulging in the practice. Moreover, education fosters interrogative thinking and opens a floor for discussion, thus providing opportunities for individuals to assume social roles without having to stress whether such roles are dependent on the practice of FGM for acceptance or not.

Educational rights-based methods to eliminate the practice of FGM will surely present people with several learning opportunities. Nonetheless, such methods may sometimes be conceived by some people as an unwelcome top-down intervention. Consequently, it is important to conscientize communities before the implementation of the approaches can be adopted. This would help increase community approval of an intervention, leading to its success. Beth opines that “Education is often favored over other rights-based approaches, such as legislation because it is less repressive.”<sup>245</sup>

There is a need to educate both young and older women about sexual health and sexuality, along with making them aware of the dangers of the practice of FGM. This can be achieved through the organization of grassroots outreach campaigns targeting women from rural communities where female traditional initiation is still prevalent. It would be a shortcoming to leave out men in these campaigns since they can also play an important role in eradicating the practice of FGM once they have been made aware of its dangers to women’s health. Kevin rightly opines that “Working with males, particularly young men, and formalizing a place for them to politicize their role in ending FGM is critical. Males must likewise speak out against this practice and explain why it must be banned. The practice will never be completely eradicated until there is widespread support for it.”<sup>246</sup>

The principal focus of efforts to eliminate FGM adopted by the Lesotho government should be public health education and attitude- and behaviour-change programmes rather than baseless claims that the practice of FGM is not present in the country. The relationship between

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<sup>244</sup> Khosla (n 234) 2.

<sup>245</sup> Williams-Breault (n 192) 229.

<sup>246</sup> Kevin Thomas Jose, “Female Genital Mutilation: Problems and Solutions” (2021) 3. *Indian JL & Legal Rsch* 11.

FGM and the education of women and young girls is premised on the supposition that educated women, in contrast to those with little or no education at all, will be less likely to have their daughters or themselves subjected to the practice of FGM. The UNICEF opines that “In high- and low-prevalence countries alike, opposition to FGM is highest among girls and women who are educated. Furthermore, opposition tends to increase substantially as educational levels rise.”<sup>247</sup>

Education may prove to be capable of playing an important role in shifting normative expectations surrounding the practice of FGM. FGM is said to be generally more common among daughters of women without education, and it tends to be substantially less prevalent as a mother’s educational level rises.<sup>248</sup> It is therefore, apparent that education is a powerful lever that can be used to shift attitudes concerning FGM, and ultimately change behaviour since it can influence not only attitudes but behaviour too.

It is important to find the real reason why FGM is practiced in Lesotho. Knowing the reasons behind the practice would help bring about relevant observations and educative measures. Regina correctly opines that “Education that will be effective in convincing people to abandon a course of action must address the actual beliefs people have about why they pursue this course of action in the first place. Basing education campaigns on mistaken notions of people’s motives will miss the mark.”<sup>249</sup> Thus, for education to be relevant, extensive research has to be carried out on the practice of FGM in Lesotho.

Substantial preparedness to engage in arguments for and against the practice of FGM may prove necessary to be able to discover the most persuasive arguments against it. The correct identification of motives for FGM may appear to be complicated because people often raise diverse validations for the practice, and consequently it becomes difficult to determine which justification is central. Regina Smith rightly observes that “It will be important to disarm successive rationales, while at the same time seeking latent forces keeping the custom in place.”<sup>250</sup>

Last but not least, education can be made effective through a consistent distribution of leaflets containing information about the health dangers of FGM. Flyers or leaflets may prove effective since people sometimes pay more attention to what they see than what they hear about.

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<sup>247</sup> UNICEF (n 236) 2.

<sup>248</sup> Ibid, 7.

<sup>249</sup> Oboler (n 238) 313.

<sup>250</sup> Ibid, 314.

The use of leaflets and flyers is a proactive means of dissuading prospective practitioners of FGM from further engaging in the practice in the future.

### **5.2.2 Legislation as a Deterrent against FGM**

Legal measures are necessary for eradicating the practice of FGM. The government is duty-bound to create a legal environment that can dissuade people from engaging in the practice of FGM. This duty arises from the fact that Lesotho has ratified the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),<sup>251</sup> whose Article 2 obliges state parties to undertake:

(b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women; (e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise; (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.

Lesotho ratified the CEDAW in 1995. It however, made a reservation that it was not going to take any legislative measures under the Convention that are incompatible with the provisions of Lesotho Constitution, 1993. Kenneth Acheampong opines that “An analysis of the ramifications therefor indicates that the reservation entrenches, rather than eliminates, all forms of discrimination against women subject to customary law in Lesotho.”<sup>252</sup> On the other hand, one can observe that ‘no legislation or customary law deals’ with the practice of FGM, and as such it would be a misconception to hold that Lesotho condones the practice of FGM through legislation or custom.

Irrespective of Lesotho’s reservation towards implementing the CEDAW, of which the reservation does not mean that Lesotho does not commit to implementing the CEDAW treaty as a whole, it only applies to Article 2 of the CEDAW to the extent that it conflicts with Lesotho’s constitutional stipulations relative to succession to the throne and law relating to succession to chieftainship, it can still domesticate the provisions of the convention, leaving out those that contradict the country’s constitution or any other law.

The practice of FGM is found to be discriminatory and cannot be condoned. To this effect, the Committee on the Elimination of Discrimination against Women opines that Article 2 of the CEDAW is not confined to the prohibition of discrimination against women instigated

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<sup>251</sup> 1979.

<sup>252</sup> Acheampong Kenneth A, “The ramifications of Lesotho’s ratification of the Convention on the Elimination of all Forms of Discrimination against Women” (1993) 9 *Lesotho Law Journal: A Journal of Law and Development*, 1, 79.

directly or indirectly by states parties. The Article further imposes a due diligence obligation on States parties to prevent discrimination by private actors. Under certain circumstances, a private actor's actions or omissions may be ascribed to the State under international law.<sup>253</sup>

Moreover, the Committee on the Elimination of Discrimination against Women (CEDAW) held that:

The obligation to protect rights relating to women's health requires states parties, their agents, and officials to take action to prevent and impose sanctions for violations of rights by private persons and organizations. Since gender-based violence is a critical health issue for women, states parties should ensure: (d) The enactment and effective enforcement of laws that prohibit female genital mutilation and marriage of girl children.<sup>254</sup>

Since the practice of FGM is deemed to violate the rights of women, such as the right to health among others, it is recommendable that Lesotho, like any other State, enact and enforce laws aimed at eliminating and eradicating the practice of FGM.

Furthermore, Article 5 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol),<sup>255</sup> obliges states parties to adopt all necessary legislative and other measures to eliminate such practices, including, prohibition, through legislative measures backed by sanctions, of all forms of FGM, scarification, medicalization and para-medicalization of female genital mutilation and all other practices in to eradicate them. Lesotho ratified the Maputo Protocol in 2004, without any reservations and is thus obliged to domesticate the Protocol.<sup>256</sup>

Through national legal frameworks such as legislation, constitutional amendments or any other proper legislative measures, the challenge of FGM could be overcome. It is through appropriate legislation that women's right to health and many other rights violated through the practice of FGM may be protected and promoted. In cases where these rights are already enshrined in domestic law, they need to be clothed with an overriding and enforceable policy and programmatic framework. There is a need for clear provisions against the practice of FGM backed by sanctions for offenders.

It is important to domesticate the relevant international treaties that Lesotho has ratified to make them applicable and enforceable by Lesotho courts because the courts oftentimes

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<sup>253</sup> Committee on the Elimination of Discrimination against Women, "General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women" (2010) CEDAW/C/GC/28, 3.

<sup>254</sup> The Committee on the Elimination of Discrimination against Women (CEDAW), "CEDAW General Recommendation No. 24: Article 12 of the Convention (Women and Health)" (1999) *Document A/54/38/Rev.1, chap. I*, para. 15 (d).

<sup>255</sup> 2003.

<sup>256</sup> Itumeleng Shale, "The Impact of the Maputo Protocol in Lesotho" (2016) *Pretoria University Law Press* 174.



refuse to apply international law in their decisions because such law has not been domesticated. In *Basotho National Party and Another v Government of Lesotho and Others*,<sup>257</sup> wherein the applicant pleaded for an order directing the government of Lesotho to “adopt such legislative and other measures necessary to give effect to the rights recognized in international conventions”. The Court held that the Conventions could form part of our law in Lesotho until and unless they are incorporated into municipal law by legislative enactment. The court held further that cannot usurp the powers vested in the executive and the legislature under the Constitution and, it cannot even indirectly require the executive to reproduce a particular legislation or the legislature to pass it or assume itself a supervisory function over the law-making activities of the executive and the legislature.

It can easily be accepted that legislation is one important and necessary tool for the eradication of the practice of FGM since it can challenge the traditional status quo by providing legitimacy to new behaviours. However, it can prove to be effective only if it is complemented with other measures directed towards influencing cultural expectations and traditions.<sup>258</sup> Even though criminalizing harmful cultural practices such as FGM is essential, this may on the other hand create rebellion directed towards circumventing or resisting the law.

It is common knowledge that everybody is equal before the law. Therefore, those who may be found to have violated the laws that criminalize the practice of FGM have to face the consequences for their actions without regard to whatever motivating reasons they may raise, except for medical ones. Selda Dagistanli rightly observes that “While deviant actions are attributed to culture, the possibility that this may serve as mitigation for criminal behaviour often results in calls for cultural others to be treated like ‘everyone else’ and punished with the full weight of the law.”<sup>259</sup>

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<sup>257</sup> [2003] LSHC 65.

<sup>258</sup> Williams-Breault (n 192) 228.

<sup>259</sup> Selda Dagistanli, “In Defence of Culture? Racialised Sexual Violence and Agency in Legal and Judicial Narratives” (2015) 4 *Int’l J Crim Just Soc Dem* 3, 63.

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