REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CONSTITUTIONAL PETITION NO. 8 OF 2017

IN THE MATTER OF ARTICLES 19, 27, 32 AND 44 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF SECTIONS 5,19, 20 and 21 OF THE PROHIBITION OF FEMALE GENITAL MUTILATION ACT (NO 32 OF 2011)

AND

IN THE MATTER OF THE EQUALITY AND FREEDOM FROM DISCRIMINATION

AND

IN THE MATTER OF THE RIGHT TO PARTICIPATE IN THE CULTURAL LIFE OF THE PERSON'S CHOICE

BETWEEN

DR. TATU KAMAU..... PETITIONER

AND

THE HON. ATTORNEY GENERAL.....1ST RESPONDENT

ANTI-FEMALE GENITAL MUTILATION BOARD.....2ND RESPONDENT

18.04.18
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Dr T. Kamau

2nd JOINT AMICUS CURIAE BRIEF

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I INTRODUCTION

Brief background of the Amicus Curiae

1. Kenya Legal & Ethical Issues Network on HIV and AIDS (KELIN) and The Initiative for Strategic Litigation in Africa (ISLA) (together the Organisations) submit this brief in accordance with leave granted by the High Court of Kenya at Machakos (Honorable Court) on 17 January 2018.

2. KELIN is an independent Kenyan civil society organization working to protect and promote health-related human rights in Kenya. It does this by undertaking strategic interest litigation, advocating for integration of human rights principles in laws, policies and administrative framework, facilitating access to justice in respect to violation of health related rights, training professionals and communities on rights-based approaches and initiating and participating in strategic partnerships to realize the right to health, nationally, regionally and globally. One of KELIN's thematic area focuses on sexual and reproductive health rights (SRHR). In line with its mandate and outcome two, SRHR thematic area has facilitated access to justice in respect of human rights violations on sexual violence and reproductive health rights trough this thematic area, KELIN has gathered considerable expertise in the area of health rights and in particular SRHR.

3. ISLA is a feminist Pan-African organisation focused on the strategic litigation of women's human rights and sexual rights both at national levels and within the African human rights system. ISLA aims to develop jurisprudence on women's human rights and sexual rights on the African continent before domestic courts and regional and international human rights systems. One of ISLA'S thematic areas of focus is violence against women. ISLA has experience of women's human rights litigation, including in the fields of equality and non-discrimination.

4. This matter raises critical questions as to the nature and extent of the state's positive human rights obligations under domestic, regional and international law to protect women from harmful practices such as FGM and the violation by third parties of women's right to health and non-discrimination.

Scope of the brief

5. This case raises questions about the scope of the State's obligation to protect women from violence and FGM in particular. Our submission focuses on the substance of the laws that the State enacts in fulfillment of this obligation.

6. The two Organisations make this joint submission to assist this Honorable Court, with reference to relevant comparative domestic, regional and international law and standards, to outline:

    6.1.1 Contextual information on FGM;

    6.1.2 The positive obligation requiring the state to enact laws to protect women from violence; and

    6.1.3 By reference to comparative practice, minimum legislative and operational measures necessary to give effect to this obligation.

II BACKGROUND: CONTEXT OF FGM

7. An analysis of the nature and content of the positive obligation imposed on states to protect individuals from human rights violations in respect of FGM must commence with an understanding of the realities of the phenomenon that the state is obliged to address. This is so because the obligation on the state requires measures that will be effective in the particular context, taking into account the unique and complex characteristics of the violation in question in order for the response to be practical and effective. This section of the brief puts before the Honourable Court contextual information on the

problem of FGM as it is experienced in our societies. This includes the social problems and the health-related problems arising from the practice.

8. The African continent has a rich cultural heritage, with rich traditional values. However, there are also cultural practices that are harmful to specific groups of people. FGM has been described as one of those harmful cultural practices.

9. FGM is the collective name given to several different traditions and practices that involve the cutting of female genitals.[1] In the international community the term "female circumcision" was used for many years to describe the practice. Other expressions such as "female genital cutting", "female genital surgery" have also been used. However, in the past decade, the term "female genital mutilation" has been adopted by the World Health Organization (WHO). Similarly, in 1990, at a meeting in Addis Ababa, Ethiopia, the Inter-African Committee on Traditional Practices Affecting the Health of Women and Children formally adopted this term. Subsequently, the international community has used the term in several United Nations conference documents.[2]

10. Under Section 2 of the Female Genital Mutilation Act (the Act), there are three types of FGM. These are:

    10.1.1.1 clitoridectomy, which is the partial or total removal of the clitoris or the prepuce;

    10.1.1.2 excision, which is the partial or total removal of the clitoris and the labia minora, with or without excision of the labia majora;

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[1] N. Toubia, *Female Genital Mutilation: A call for Global Action* 2nd ed (1995) 9.

[2] United Nations Conference on Population and Development in Cairo, the 1995 World Summit for Social Development in Copenhagen and the 1995 Fourth World Conference on Women in Beijing.

10.1.1.3 infibulation, which is the narrowing of the vaginal orifice with the creation of a covering seal by cutting and appositioning the labia minora or the labia majora, with or without excision of the clitoris.[3]

11. Worldwide, an estimated 130 million girls and women have undergone FGM.[4] Each year, three million girls undergo FGM on the African continent alone.[5] FGM has been documented in 29 countries in Africa, a few countries in Asia and the Middle East, and to a lesser extent in some immigrant communities in Europe, Australia, Canada, New Zealand and the United States. The prevalence of FGM varies considerably, both between and within regions and countries, with ethnicity as the most decisive factor. In the north-eastern part of Africa, prevalence ranges from 91% in Egypt to 74% in Ethiopia. In the west, 89% of women in Mali and 76% in Burkina Faso have been cut. In Kenya prevalence rates are capped at 27%.[6] Although these statistics demonstrate a high prevalence of FGM, the sample states highlighted here have recognized that the continuing prevalence of FGM is a societal problem to be addressed with appropriate measures.

12. The reasons for FGM are complex, related to each other and woven into the beliefs and values communities hold. FGM must therefore be understood to be dependent not on a single factor, but on an entire belief system and values that support it. For instance, in many communities, FGM is performed as a

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[3] See section 2 of the Act.

[4] United Nations Population Fund (UNFPA) *The State of the World Population: 6 Billion, A Time for Choices, New* York: UNFPA, (1999) 2.

[5] Pan-African Conference on Celebrating Courage and Overcoming Harmful Traditional Practices in Africa, Report, 5-7 October 2011, AU Conference Centre, Addis Ababa, Ethiopia, Department of Social Affairs, October 2011, 1- 4.

[6] WHO, Fact sheet N°241, Female Genital Mutilation, updated February 2013, available at http://www.who.int/mediacentre/factsheets/fs241/en/.

rite of passage from childhood to adulthood, during which time a girl is equipped with skills for handling marriage, a husband and children.[7] Another fundamental reason advanced for FGM is the need to control women's sexuality. In some communities in Egypt, Sudan and Somalia, where a family's honor depends on a girl's virginity, FGM is performed to curtail premarital sex. In other contexts, such as Kenya and Uganda, FGM is performed to reduce a woman's sexual demands on her husband, thus allowing him to have several wives.[8]

13. FGM is also as a result of social pressure. In a community where most women have undergone FGM, family, friends and neighbours create an environment in which the practice of FGM becomes a component of social conformity.[9] FGM also affects the social well-being of women and girls who may undergo FGM to be more socially acceptable despite the health risks. Women who have not undergone FGM are ostracized from the community and undergo considerable pressure that influences their decision towards FGM.[10]

Health risks associated with FGM

14. There is vast documentation of the health risks associated with undergoing FGM. There are physical, psychological and social effects which all risk the

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[7] A. Rahman and N. Toubia in *Female Genital mutilation; A guide to Laws and Policies Worldwide* (2000) Explain that the process of becoming a woman contributes to the maintenance of custom and tradition by linking the girl to the lifestyle and roles played by other women.

[8] Ibid 5.

[9] Note 3 above, 6. It is explained that fear of community judgment, such as men's refusal to marry uncircumcised women, contributes to this pressure.

[10] AD Abatun, J Sundby, AA Gele, "Attitude towards female genital mutilation among Somali and Harari people, Eastern Ethiopia" (, 2016) 8 *International Journal on Women's Health,* 557-559; and E Batha, "Female genital mutilation is a man's issue too – Kenyan Maasai activist" Reuters available at https://www.reuters.com/article/us-kenya-fgm-maasai/female-genital-mutilation-is-a-mans-issue-too-kenyan-maasai-activist-idUSKBN1FQ2QY.

health of women.[11] FGM results in severe physical and mental harm. Because it constitutes an invasive procedure on otherwise healthy tissue without any medical necessity, it is seen as a violation of the right to health as recognised in the International Covenant on Economic, Social and Cultural Rights [12]

15. The short-term health risks of FGM include: severe pain, excessive bleeding, shock, genital tissue swelling, infections, urination problems, impaired wound healing and psychological consequences. Long-term health risks, usually associated with the first three types of FGM, and may occur anytime during life include: pain, chronic genital infections, chronic reproductive tract infections, unitary tract infection, pain in urination, menstrual problems, female sexual health problems, obstetric complications, obstetric fistulae, perinatal risks, post-traumatic stress disorder, anxiety disorders and depression among others.[13]

16. There is documentation of reproductive health complications occasioned by FGM. A study found that women who have undergone FGM have adverse sexual effects and are more likely to experience a lack of sexual desire.[14] The World Health Organization includes physical, mental and social well-being in its definition of health and recognizes that health is "not merely the absence of disease or infirmity." The 1994 Programme of Action of the International Conference on Population and Development in Cairo, Egypt,

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[11] WHO, Health Risks of Female Genital Mutilation (FGM), available at http://www.who.int/reproductivehealth/topics/fgm/health_consequences_fgm/en/.

[12] Article 12(1) states; "States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health".

[13] Ibid.

[14] M Mahmoud, "Effect of female genital mutilation on female sexual function, Alexandria, Egypt" (2016) 52 *Alexandria Journal of Medicine*, 55-59.

includes "sexual health, the purpose of which is the enhancement of life and personal relations" in its discussion of reproductive health. [15]

17. A number of issues have been identified in the practice of FGM that may render women and girls susceptible to HIV infection. These include:

17.1.1.1 The cutting of genital tissue with the same instrument without sterilization could increase the risk of transmission of HIV.

17.1.1.2 Serious hemorrhaging immediately after the intervention but also during and after childbirth is a very common complication of FGM, which can make blood transfusions necessary. The lack of safe blood for transfusions in sub-Saharan Africa, in particular outside larger towns and cities, can also increase the risk of HIV infection.[16]

17.1.1.3 Studies reveal a higher rate of genital herpes among women subjected to FGM. This can increase the risk of HIV infection since genital herpes is known to facilitate transmission of HIV.[17]

17.1.1.4 The practice of FGM predisposes women to HIV infection by reinforcing patriarchal structures and unequal power in relationships.[18]

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[15] United Nations, Report of the International Conference on Population and Development Cairo, Egypt, 5-13 September 1994. United Nations Doc. N.Y. A/Conf. 171/13 Rev.1, U.N para 7.2.

[16] WHO, UNAIDS: New Data on Male Circumcision and HIV Prevention: Policy and Programme Implications, 2007. WHO: Eliminating female genital mutilation: An interagency statement, OHCHR, UNAIDS, UNDP, et. al., 2008

[17] Ibid.

[18] M Brady, "Female Genital Mutilation: Complications and Risk of HIV Transmission", *AIDS Patient and STDS* (1999), Vo. 13, No. 10, 709-716.

18. There are benefits of male circumcision within the context of HIV, as circumcised men are up to 60% less likely to be infected with HIV than uncircumcised men.[19] Voluntary, safe male circumcision has been used as part of HIV prevention programmes. However, the same cannot be said for FGM which not only does not offer any health benefits but also includes considerable risk to the sexual and reproductive health of women.[20]

Historical attempts to end FGM

19. The first documented actions to bring attention to the practice of FGM dates back to the turn of the twentieth century. Attempts to address the problem with a legal framework date back to the early 1900s when colonial administrators and missionaries in the Burkina Faso, Kenya and Sudan attempted to stop the practice by enacting laws and church rules. Later, attempts were made by the governments of Sudan and Egypt to pass laws on FGM in the 1940s and 1950s. These were ineffective, largely because of the lack of prior awareness campaigns against the practice. [21]

20. From the 1960s and 1970s, indigenous African activism started against FGM. In many countries, women groups led campaigns to educate the population about the harmful effects of the practice.

21. In 1979, WHO sponsored the first seminar on 'Harmful Traditional Practices Affecting the Health of Women and Children', in Khartoum, Sudan. At the conference, women from several African countries lead a vote to end all forms

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[19] Supra note 15.

[20] Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) (January, 2011) "Female Genital Mutilation and HIV", Ending Female Genital Mutilation, available at https://www.giz.de/fachexpertise/downloads/giz2011-en-fgm-hiv.pdf

[21] See ibid n 4 p. 10.

of the practice. The recommendation made included the establishment of national commissions for the coordination of activities against FGM.

22. In the 1980s, African women continued to organize to address the practice of FGM. Four African women activists attended the UN Mid-Decade Conference on Women in Copenhagen to present a panel discussion on FGM. As a result of this conference, an informal African network was established to address the practice.

23. In 1984, a group of African women organized a meeting of African NGOs in Dakar, Senegal which resulted on the formation of the Inter-African Committee on Traditional Practices Affecting the Health of Women and Children. Over the 15 years subsequent to the Dakar seminar, IAC affiliates were founded in over 26 African countries. This regional network has since worked to educate national governments as well as the general public about the harmful effects of FGM. Notably, a significant development during the 1980s that was critical later in efforts to frame FGM as a human rights violation was the growing scholarship and thinking of international feminist legal scholars and advocates. They began increasingly questioning the lack of gender lens on the law and on human rights. [22]

24. In 1981, recognition of government's responsibility to address violations of women's rights by both government actors and private parties was made explicit in the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). In addition, in the same year, the United Nations Special Rapporteur on Traditional Practices Affecting Women

[22] A. Rahma and N. Toubia n. 4 p 10, explain that little attention was paid to the 'private' domain of the family in the society despite the fact that the most frequent violations of women's rights occurred in private spheres. Some of these were in the form of domestic violence, dowry and FGM deaths. Yet, these were not viewed as human rights violations for which governments could not be held accountable.

and Children was appointed. She produced reports documenting national and international level action to address FGM. [23]

25. It was not until the 1990s that FGM featured seriously on the agenda of the international community. FGM was featured prominently in the global movement on violence against women. Strong African leadership on FGM led to growing international awareness, which resulted in the recognition of FGM as a fundamental violation of women's rights. In 1990, CEDAW Committee released a General Recommendation pertaining specifically to FGM.[24] In 1993, CEDAW included FGM within its definition of the phrases 'violence against women."[25]

26. The international community again addressed the human rights implications of harmful practices such as FGM at a series of international conferences.[26] It is now widely acceptable under international law that FGM is not only a health issue, but also a matter of compliance with human rights standards.

III POSITIVE OBLIGATIONS ON THE STATE TO ENACT LAWS AGAINST FGM

27. It is universally acknowledged under international law, that states have obligations towards potential and actual victims before and after human rights abuses are perpetrated against them by non-state actors. This derives from the principle of due diligence, which requires states to prevent

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[23] United Nations General Assembly, "Traditional or Customary Practices Affecting the Health of Women," Report of the Secretary General, 53rd Session, Sept 10, 1998, A/53/354.

[24] General Recommendation No. 14 (Ninth Session, 1990): Female Circumcision, A/45/38 (General Comments).

[25] United Nations General Assembly, Declaration on the Elimination of Violence against Women, Article 2(a). 85th Plenary Meeting, 1993), A/RES/48/104.

[26] The World Conference on Human Rights, Vienna 1993, The International Conference on Population and Development, Cairo 1994 and the Fourth World Conference on Women, Beijing 1995.

violations by non-state actors, protect victims, investigate and prosecute such violations, and provide reparation to victims.

28. The Prohibition of Female Genital Mutilation Act (The Act) is an instrument Kenya has put in place to meet its international positive obligation to act against violence against women. We will now elaborate on why the Act and the special mechanisms created therein are instruments available to states in responding to violence against women. We consider the practical measures that are required of states in order for them to avoid potential liability arising from the principle of due diligence.

29. The sub-sections hereunder provide guidance to this Honourable Court on the standards to be met by the state in order for it to meet its positive obligation to enact legislation to protect women from violence against women by making specific reference to laws in other African countries.

Violence Against Women as a form of gender based discrimination

30. Laws put in place to address FGM must inter alia:

30.1.1 Acknowledge that violence against women is a form of discrimination, a manifestation of historically unequal power relations between men and women, and a violation of women's human rights; and

30.1.2 Provide that no custom, tradition or religious consideration may be invoked to justify violence against women.

31. FGM is a definite form of violence against women and girls and a serious form of violation of their human rights.[27] FGM is a form of violence against women that requires concerted international and national action for its eradication.[28]

32. The CEDAW Committee[29] stated that violence against women is a form of discrimination against women. In its General Recommendation No. 19 the CEDAW Committee laid the international law basis establishing the link between violence against women and equality, stating that:

> "[g]ender-based violence is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men".[30]

33. A variety of harmful practices exist, including FGM, child and/or forced marriage, polygamy, crimes committed in the name of so-called honour and dowry-related violence. Some contend that the condemnation of FGM as a harmful cultural practice is an imposition on Africa of western norms. This submission cannot be sustained in the case of FGM. Compared to other harmful cultural practices, as defined in the international domain, FGM is universally acknowledged as one that must be eradicated from our societies. There is no comparative universal consensus on for instance, the eradication of polygamy from all societies as there is in the case of FGM. At an

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[27] Resolution adopted by the General Assembly 53/117. Traditional or customary practices affecting the health of women and girls on 9 December 1998 53/117; Resolution adopted by the General Assembly [on the report of the Third Committee (A/56/576)]. 56/128 Traditional or customary practices affecting the health of women and girls on 30 January 2002.

[28] UN Commission on Human Rights, Report of the Special Rapporteur on violence against women, its causes and consequences, Radhika Coomaraswamy., 21 January 1999, E/CN.4/1999/68/Add.3, available at: http://www.refworld.org/docid/3ae6b0fb4.html. page 11, para. 18.

[29] CEDAW, General Recommendation No. 19, para. 6.

[30] CEDAW, General Recommendation No. 19, para. 1.

international level, there have been calls for polygamy to be eradicated. The, the Human Rights Committee stated that:[31]

> *"...It should also be noted that equality of treatment with regard to the right to marry implies that polygamy is incompatible with this principle. Polygamy violates the dignity of women. It is an inadmissible discrimination against women. Consequently, it should be definitely abolished wherever it continues to exist."*

34. Despite the call for the eradication of polygamy from the international community, it remains a cultural practice that is still accepted within African states. While the Maputo Protocol, a reflection of the African human rights normative framework, calls on the eradication of FGM in clear and certain terms, it tolerates the continuation of polygamy, albeit subject to better regulation by State parties to ensure that the rights of women in all marriages, including polygamous marriages are protected.[32]

35. It cannot therefore be accepted that the consensus to eradicate FGM as a harmful practice is a western norm imposed on African states. As demonstrated in AU member states' refusal to adopt the same norm on polygamy in the Maputo Protocol as that taken at the international level, certain forms of harmful practices are universally accepted as having no place in our societies, despite the cultural beliefs of the people.

Gender sensitive legislation

36. Laws put in place by the state to meet its international law obligation to eliminate violence against women must be gender sensitive. This means that

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[31] Human Rights Committee, General Comment 28, Equality of rights between men and women (article 3), U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000), at paragraph 24

[32] Article 6(c) of the Maputo Protocol.

they should recognize the inequalities between women and men, as well as the specific needs of women and men and acknowledge that violence against women is a manifestation of historically unequal power relations between men and women and discrimination against women.

37. In this regard, the recommendation as adopted by two treaty interpretive bodies notes that harmful practices are imposed on women and children by family, community members, or society at large, regardless of whether the victim provides consent, or is able to provide, full, free and informed consent.[33]

38. This position discounts a woman's capacity to give her full, free and informed consent to FGM and acknowledges the continuing cultural, traditional and economic pressures which help to perpetuate harmful practices, such as FGM. These external pressures have been noted by the CEDAW Committee in General Recommendation No 14.[34] The cultural and traditional pressures referred to here can include fear of social exclusion and discrimination against women who do not conform to the culture or tradition by refusing to undergo FGM. Where fear of the continuing cultural, traditional and economic pressures which help to perpetuate FGM is an acknowledged factor that affects the power to consent to FGM in international law, states must take this into account in meeting their international law obligations to eliminate FGM.

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[33] Committee on the Elimination of Discrimination against Women Committee on the Rights of the Child Joint general recommendation/general comment No. 31 of the Committee on the Elimination of Discrimination against Women and No. 18 of the Committee on the Rights of the Child on harmful practices CEDAW/C/GC/31-CRC/C/GC/18 4 November 2014 at para 15.

[34] CEDAW General Recommendation No.14: Female Circumcision Adopted at the Ninth Session of the Committee on the Elimination of Discrimination Against Women, in 1990 A/45/38.

The laws put in place in compliance with this obligation must reflect this gendered perspective of FGM.

39. The tendency towards medicalization of FGM neither makes the practice more acceptable, nor does it address the need for a gender sensitive approach to legislative interventions.[35] Medicalization, even when legally regulated to ensure that FGM is performed in hygienic conditions by a medically qualified practitioner fails to address the assumptions about female nature and women's appropriate role in society that calls on the female body to be altered in order to secure women's economic and social survival. The Human Rights Counsel has urged member states:

> *"to condemn all harmful practices that affect women and girls, in particular female genital mutilation, whether committed within or outside a medical institution."*[36]

40. In Bukina Faso, Law no. 43/96/ADP imposes the maximum punishment for persons in the medical and paramedical field who carry out FGM. In Côte d'Ivoire, if the guilty person belongs to the medical or paramedical profession, the sentence is doubled, and, in addition, he or she is prohibited from practicing his or her profession for a maximum of five years. Niger has a similar provision. These legislative measures are in line with international law standards requiring a gender sensitive approach to the medicalisation of FGM.

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[35] Report of the Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment Juan e Mendez A/HRC/31/57 5 January 2016 at para 62. See also Summary Report on the high-level panel discussion on the identification of good practices in combating female genital mutilation A/HRC/27/36 at para 23.

[36] Resolution 27/22 adopted by the General Assembly on 20 December 2012
[on the report of the Third Committee (A/67/450 and Corr.1) Intensifying global efforts for the elimination of female genital mutilations].

Comprehensive legislative approach that provides adequate protective measures in law and practice

41. Kenya is one of 27 African countries that have enacted specific laws that prohibit FGM. Having the Act and other similar laws in place follows years of advocacy and deliberation on FGM in domestic, regional and international platforms on harmful practices, including FGM.[37]

42. The due diligence test requires that the adoption of effective measures should be enshrined in law and implemented in practice.[38]

43. The criminalization of FGM through legislation is an important and positive step towards the abandonment of the practice. The adoption and effective enforcement of laws and policy measures are required to ensure access to justice for girls and women who have been subjected to FGM and provide them the appropriate redress. They also demonstrate the lack of acceptance of the practice on the part of society and send a clear message that those responsible will be held to account.[39]

44. The laws in place must however be broader than the limited approach of criminalization. The laws in place should be comprehensive and multidisciplinary, criminalizing all forms of violence against women, and encompassing issues of prevention, protection, survivor empowerment and

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[37] The countries that have enacted a law on FGM are; Benin, Burkina Faso, Cameroon, Central Africa Republic, Chad, Congo, Cote d'Ivoire, Djibouti, Egypt, Eritrea, Gambia, Guinea, Guinea Bissau, Ethiopia, Ghana, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone, South Africa, Sudan, Somalia, Tanzania, Togo, Uganda, Zambia and Zimbabwe.

[38] General Recommendation No 19 provides that "appropriate protective and supportive services should be provided for victims" at para 24(b).

[39] Report of the Secretary-General for the elimination of female genital mutilations 26 July 2016 A/71/209 at para 36.

support, as well as adequate punishment of perpetrators and availability of remedies for survivors.[40] In the case of FGM, this comprehensive and multidisciplinary approach to practically tackling violence against women further calls for the state to put in place policies that address the violation of health rights, particularly, sexual and reproductive health rights that arise where FGM is practices. The Committee on the Elimination of Discrimination against Women (CEDAW), General Recommendation No. 24 (20th Session, 1999) has specifically recommended that governments devise health policies that take into account the needs of girls and adolescents who may be vulnerable to traditional practices such as FGM.

45. This multidisciplinary approach to enacting legislation to address violence against women was captured in 2010 in a resolution adopted by the Commission on the Status of Women entitled Ending Female Genital Mutilation. This resolution recognizes that FGM constitutes a serious threat to the health of women and girls and sets forth specific multi-level State recommendations in order to eliminate FGM. The resolution calls on States to condemn the practice, enact and enforce legislation prohibiting FGM as well as penalties for violations of prohibitions. More importantly, the resolution also emphasizes the need for education and training of families, community and religious leaders, and members of all professions relevant to the protection and empowerment of women and girls, including health-care providers, social workers, police officers, legal and judicial personnel and prosecutors.[41]

[40] Handbook for Legislation in Violence Against Women UN Publications 2010 at 14.
[41] Commission on the Status of Women, Report on the fifty-sixth session (14 March 2011, 27 February-9 March and 15 March 2012).

46. The competent implementation of laws is an effective prevention strategy, particularly if perpetrators are certain that their actions will be punished. Laws can also create specific institutional mechanisms, systems, programmes and measures to prevent violence against women, protect victims, investigate, prosecute and punish perpetrators, and provide redress for victims/survivors. While changing mindsets and tackling underlying causes of violence against women may take a long time, the presence of laws prohibiting violence against women and backed by a range of sanctions could transform mindsets and attitudes.[42]

Eradicate FGM in the Public Interest: the question of an individual's consent to FGM

47. The grave impact of FGM on individuals and society broadly renders it a matter of public interest and it should be investigated and prosecuted as such. Law and practice must take account of the realities of FGM, including the pressures that the victims are subjected to. The responsibility for protecting human rights and ensuring accountability is an obligation on the state, not the victim.

48. Adult women, who may consent to FGM, cannot be assumed to constitute a homogenous group of women acting as free agents who do not behave under severe patriarchal traditional and economic constrains described in this brief.

49. FGM can in many ways be compared to other forms of violence against women. In considering the need to eradicate FGM, regardless of individual consent to the practice, we use domestic violence to draw some comparison in

[42] Due Diligence Framework State Accountability Framework for Eliminating Violence against Women Zarizana Abdul Aziz & Janine Moussa at 24

developing this line of argument. The hidden site of the violence and the intimate relationship between the perpetrator and victim are traditionally protected by private rights in cases of FGM as well as domestic violence.

50. The victim of domestic violence is often financially and emotionally dependent on the perpetrator, with a shared home, economy and family life complicating the response to the abuse. Victims of FGM as similarly dependent on the family and social support structures that are responsible for perpetuating the violation. Victims of domestic violence are notoriously reluctant to report it, and women who complain of domestic violence frequently face intimidation, reprisals and ostracism, and often ultimately withdraw the complaint. Fear of the same intimidation, reprisals and ostracism from their community informs the decision of victims of FGM to consent to FGM.

51. We submit that allowing adult women to consent to FGM would relegate FGM to the private sphere where the state would have no control contrary to the required exercise of its due diligence obligation to protect against violence against women. Hence, in FGM consent is immaterial.

52. In ***R v Donovan,*** [43] a case where the appellant beat a girl of seventeen years in private for purposes of sexual gratification, with her consent, the House of Lords held that:

> *'... it is an unlawful act to beat another person with such a degree of violence that the infliction of bodily harm is a probable consequence, and when such an act is proved, consent is immaterial.'*

[43] [1934] 2 KB 498, [1934] All ER.

53. In *R v Coney* [44] the 11 judges of the House of Lords who heard the case held that a prize-fight was unlawful, that all persons aiding and abetting therein were guilty of assault and that consent of the persons actually engaged in fighting to the interchange of blows did not afford any answer to the criminal charge of common assault. The appellants were spectators at an organised fight between two men near a public road. Stephen J said (at 549):

> *'The principle as to consent seems to me to be this: When one person is indicted for inflicting personal injury upon another, the consent of the person who sustains the injury is no defence to the person who inflicts the injury, if the injury is of such a nature, or is inflicted under such circumstances, that its infliction is injurious to the public as well as to the person injured. But the injuries given and received in prize-fights are injurious to the public, both because it is against the public interest that the lives and the health of the combatants should be endangered by blows, and because prize-fights are disorderly exhibitions, mischievous on many obvious grounds. Therefore, the consent of the parties to the blows which they mutually received does not prevent those blows from being assaults.'*

54. These two English decisions demonstrate that public interest limits the extent to which an individual may consent to infliction of harm on herself. Allowing adult women to consent to FGM, in the light of all the evidence of the contextual realities that influence the perpetuation of FGM in our society will drastically increase the likelihood that the phenomenon will go unchecked and perpetrators of FGM will continue to enjoy impunity.

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[44] (1882) 8 QBD 534.

55. International and comparative practice has developed in recognition of these realities by for example creating mechanisms in legislation to support the ability of a broader range of interested persons to report FGM, such as medical personnel, family members, neighbours or associates. This takes away the need for the individual victim to be a willing complainant in the prosecution of FGM. Article 9 of Law No. 2003-03 on the Repression of the Practice of FGM in the Republic of Benin states that persons who refuse to report the occurrence of FGM will receive the same penalty for 'refusing to report the crime'. Persons are supposed to report any occurrence of FGM to the Public Prosecutors Office and failure to do so amount to a fine of 50,000-100,000 francs.

56. The notion of state responsibility to prosecute cases of violence against women despite the consent of the victim is better developed within the context of domestic violence. We submit that the applicable principles in the development of investigations and prosecutions in the public interest in the sphere of domestic violence ought to be taken into account by this court in considering the states' obligation with respect to FGM.

57. National practice indicates a trend in enabling states to proceed with domestic violence investigations and prosecutions despite withdrawal of the complaint by the victim. In other words, the state must proceed with enforcement of the law despite the consent of the victim of the violation to the violence.

58. In the United Kingdom and Germany, for example, the prosecution may proceed without the support of the complainant where there is sufficient

evidence and it is in the "public interest" to do so.[45] In several other States, such as Australia,[46] Canada,[47] the United States,[48] Fiji[49] and South Africa a 'no drop' policy has been adopted whereby all reports of domestic violence are to be investigated and where appropriate prosecuted, whether or not the victim seeks to pursue the matter. These developments appear to indicate a trend away from requiring victim participation towards placing authority for effective prosecution squarely with the state.

59. An approach by this Honourable Court that would endorse a view that the authority for effective prosecution sits squarely with the state is in line with the international, regional and domestic provisions cited in this brief that indicate the state's obligation to eradicate violence against women.

Equal application of legislation to all women and measures to address multiple discrimination

60. The laws in place to address FGM must protect women without discrimination and must recognize that women's experience of violence is shaped by factors such as their race, national or social origin, property, marital status etc.[50]

61. FGM, a harmful practice, has been condemned as cruel, discriminatory and degrading by a long series of international instruments, declarations,

[45] U.K.: CPS Policy 6.4; Germany: Guidelines for Criminal and Fine Proceedings of 1 January 1977, amended and in force as of 1 August 2006, s. 87

[46] Northern Territory, Serial 178, Domestic Violence Amendment Act 1999, s. 3B

[47] Nova Scotia Public Prosecution Service, Spousal/Partner Violence: DPP Directive, issued June 7, 1996

[48] "No-Drop Prosecution of Domestic Violence", Stanford Law Review, 205, 1999-2000, 205 at 206

[49] Fiji Family Law Act of 2003

[50] Handbook for Legislation in Violence Against Women UN Publications 2010 at 14.

resolutions, pronouncements and recommendations.[51] Some of these contain general rules of international law and include treaties or conventions ratified by Kenya, which form part of the law of Kenya as per Article 2(5) and 2(6) of the Constitution.[52]

62. Harmful practices are persistent practices and behaviors that are grounded on discrimination on the basis of sex, gender, age and other grounds as well as multiple and/or intersecting forms of discrimination that often involve violence and cause physical and/or psychological harm or suffering.[53]

63. The UN Secretary General has reported on research suggesting that rural girls and those whose mothers did not receive education are more vulnerable to FGM.[54] This submission speaks to the intersectionality of the discrimination

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[51] Resolution 27/22 adopted by the General Assembly on 20 December 2012 [on the report of the Third Committee (A/67/450 and Corr.1) Intensifying global efforts for the elimination of female genital mutilations]; Resolution adopted by the human Rights Council on 24 September 2014 Intensifying global efforts and sharing good practices to effectively eliminate female genital mutilation A/HRC/27/L.12; Resolution adopted by the Human Rights Counsel on 1 July 2016 Elimination of female genital mutilation A/HRC/RES/32/21; Resolution adopted by the General Assembly 67/146 Intensifying global efforts for the elimination of female genital mutilations A/RES/67/146 5 March 2013; Resolution adopted by the General Assembly 53/117. Traditional or customary practices affecting the health of women and girls on 9 December 1998 53/117; Resolution adopted by the General Assembly [on the report of the Third Committee (A/56/576)] 56/128 Traditional or customary practices affecting the health of women and girls on 30 January 2002. African Union Assembly Decision on the support of a draft resolution at the sixty sixth ordinary session of the General Assembly of the United Nations to ban female genital mutilation in the world doc. Assembly/AU/12(XVII) Add.5.

[52] C.K. et al v the Commissioner of Police/Inspector General of the National Police Service in Kenya et al Petition 8 of 2010.

[53] Committee on the Elimination of Discrimination against Women Committee on the Rights of the Child Joint general recommendation/general comment No. 31 of the Committee on the Elimination of Discrimination against Women and No. 18 of the Committee on the Rights of the Child on harmful practices CEDAW/C/GC/31-CRC/C/GC/18 4 November 2014 at para 14.

[54] Report of the Secretary-General for the elimination of female genital mutilations 26 July 2016 A/71/209 at para 69.

that victims of FGM are faced with. In addition to the differential treatment meted upon them by society on the basis of their gender, they face discrimination on the basis of inter alia their financial status and education. In this sense the gender inequality and health rights violations that they experience are exacerbated by the other forms of inequality that is their contextual reality.

64. UN member states are encouraged to approach all forms of violence against women as a continuum and intersectional with other forms of inequality and to ensure that diverse women's voices within specific communities are heard and that their claim for a right to a life free of violence is not sacrificed in the name of culture.[55]

Broader societal measures of protection

65. Legislation put in place as a preventive measure must be aimed at changing mindsets and modifying behaviour to reject violence against women, its justifications and excuses, which are embedded in gender inequality, gender discrimination and negative socio-cultural and religious perceptions of women.[56]

66. Preventive programmes must challenge negative socio-cultural norms that support male authority and control over women and sanction or condone violence against women.

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[55] Report of the Special Rapporteur on Violence Against Women, its causes and consequences, Yakin Ertürk, Intersections between culture and violence against women A/HRC/4/34 17 January 2007 at page 26-7.

[56] Due Diligence Framework State Accountability Framework for Eliminating Violence against Women Zarizana Abdul Aziz & Janine Moussa at 14

The elimination of discriminatory sociocultural attitudes and economic inequalities that reinforce women's subordinate place is society has proved a challenge in eradicating violence against women.[57] While this is a challenge, states are bound by international and regional law obligations to take measures necessary to do so and failure in this regard results in these states incurring liability.

IV CONCLUSION

67. This brief demonstrates the contextual realities that a state's positive obligation to enact laws to prevent individuals violating the human rights of third parties ought to be analyzed. In considering state obligations, we have demonstrated examples of measures that states are required to have in place for them to avoid being held accountable for a failure to protect individuals from human rights violations arising from FGM. These measures include the adoption and implementation of appropriate legislation and other measures that help to eradicate violence against women in the public interest. The brief has elaborated on the standards that would render any legislation adopted to tackle violence against women as being appropriate legislation.

68. In summary, the Act serves a legitimate government purpose that has its origins in the state's international law obligations to individuals founded on the principle of due diligence. It is irrelevant whether individuals that the state has a responsibility to protect from human rights violations consent to the protection so afforded by the state to them through the Act. Should the state fail to take appropriate measures to meet this obligation, it may be held liable for this failure.

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[57] Report of the Secretary General: In depth-study on all forms of violence against women A61/122/Add.1 at para 57.

DATED at NAIROBI this 16th day of April 2018.

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