

LITIGATION AND ADVOCACY TOOL

Litigating cases of harmful practices with a focus on
female genital mutilation and child marriages

This tool is intended to guide litigation and advocacy aimed at ending harmful practices in Africa.

The manual is focused on two harmful practices in particular: child marriage and female genital mutilation (FGM), both of which are practiced extensively in Africa and which have especially harmful and long term effects. The manual is focused on child marriage and FGM in West and Southern Africa although our hope is that it will also be used to inform advocacy and litigation aimed at ending other harmful practices in countries outside of West and Southern Africa.



SOLIDARITY FOR
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DES FEMMES AFRICAINES

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2016

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This manual was developed by the Centre for Human Rights and Equality Now, in collaboration with the Solidarity for African Women's Rights coalition. The tool was written and researched by Dr. Tarisai Mutangi with input from Jane Serwanga, Mariam Kamunyu and Ashwanee Budoo. Editorial support was provided by Kate Painting and the design and layout was done by Daniël du Plessis.

Electronic copies of the tool are available for download at www.chr.up.ac.za.



Equality Now is an international human rights organization dedicated to ending violence and discrimination against women and promoting the use of the law to advance the rights of women and girls globally. Equality Now supports the work of grassroots groups to end FGM and in particular focuses on the enactment and effective implementation of legislation against FGM in relevant countries. Equality Now has also been working to end the violent and abusive practice of child marriage since 1995.



The **Solidarity for African Women's Rights (SOAWR) coalition** is a regional network comprised of 44 national, regional and international civil society organizations based in 24 countries, working towards the promotion and protection of women's human rights in Africa. Since its inauguration in 2004, SOAWR's main area of focus has been to compel African states to urgently sign, ratify, domesticate and implement the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.



The **Centre for Human Rights at the University of Pretoria** is both an academic department and a non-governmental organisation, and works towards human rights education in Africa, greater awareness of human rights, the wide dissemination of publications on human rights in Africa and the improvement of the rights of women, people living with HIV, indigenous peoples, sexual minorities and other disadvantaged or marginalised persons and groups across the continent. Over the years, it has positioned itself in an unmatched network of practising and academic lawyers, national and international civil servants and human rights practitioners across the continent, with a specific focus on human rights law in Africa and international development law in general.

LIST OF ACRONYMS AND ABBREVIATIONS

ACERWC:	African Committee of Experts on the Rights and Welfare of the Child
ACHPR:	African Commission on Human and Peoples' Rights
ACrHPR:	African Court on Human and Peoples' Rights
ACRWC:	African Charter on the Rights and Welfare of the Child
AHRLR:	African Human Rights Law Reports
AU:	African Union
CEDAW:	Convention on the Elimination of all Forms of Discrimination Against Women
CERD:	Convention on the Elimination of All Forms of Racial Discrimination
CRC:	Convention on the Rights of the Child
EAS:	East African Community
ECOWAS:	Economic Community of West African States
FGM:	Female genital mutilation
IACHR:	Inter-American Commission on Human Rights
IACrTHR:	Inter-American Court of Human Rights
ICCPR:	International Covenant on Civil and Political Rights
ICESCR:	International Covenant on Economic, Social and Cultural Rights
ICJ:	International Court of Justice
Maputo Protocol:	Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa
OHCHR:	Office of the High Commissioner of Human Rights
PCIJ:	Permanent Court of International Justice
SADC:	Southern African Development Community
UDHR:	Universal Declaration of Human Rights
UN:	United Nations
UNFPA:	United Nations Population Fund
UNICEF:	United Nations Children's Fund
WHO:	World Health Organisation

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CHAPTER 1: INTRODUCTION AND SITUATIONAL ANALYSIS



CHAPTER 1: INTRODUCTION AND SITUATIONAL ANALYSIS

1.1 Objectives of this manual

This manual is intended to guide litigation and advocacy aimed at ending harmful practices in Africa. The manual is focused on two harmful practices in particular: child marriage and female genital mutilation (FGM), both of which are practiced extensively in Africa and which have especially harmful and long term effects. The manual is focused on child marriage and FGM in West and Southern Africa although our hope is that it will also be used to inform advocacy and litigation aimed at ending other harmful practices in countries outside of West and Southern Africa. The manual aims to:

- provide a situational analysis of FGM and child marriage, particularly in West and Southern Africa;
- assess the legal and policy frameworks adopted to curb harmful practices;
- help lawyers identify opportunities for strategic litigation and build cases around harmful practices; and
- help lawyers identify advocacy opportunities at both the national and regional level to ensure protection against harmful practices.

In this manual, we have used the term ‘harmful practices’ deliberately instead of terms that designate harmful practices as religious, social, cultural or traditional. This is consistent with terminology in the Maputo Protocol¹ and acknowledges not only that some harmful practices are neither cultural nor religious but also that positive cultural contexts should be promoted.

The degree of harm associated with FGM and child marriage and the alarming prevalence of both practices justifies an acceleration of national, regional and international efforts to bring them to an end. We hope this manual will be used to scale up and support ongoing advocacy and litigation interventions at both the regional and national level to curb the practices and ameliorate their effects.

1.2 Background

FGM and child marriage have been classified as harmful practices under international law. Criteria for determining whether or not a practice is harmful

¹ African Union *Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa* 11 July 2003 (Maputo Protocol).

were laid down in a *Joint General Recommendation* issued by the CRC and CEDAW Committees in 2014.² The Committees described harmful practices as:

[P]ersistent practices and behaviours that are grounded in discrimination on the basis of, among other things, sex, gender, age, in addition to multiple and/or intersecting forms of discrimination that often involve violence and cause physical and/or psychological harm or suffering. The harm that these practices cause to the victims surpass the immediate physical and mental consequences and often has the purpose or effect of impairing the recognition, enjoyment and exercise of the human rights and fundamental freedoms of women and children. There is also a negative impact on their dignity, physical, psychosocial and moral integrity and development, participation, health, educational, economic and social status.³

Harmful practices have the following characteristics:

- They constitute a denial of the dignity and/or integrity of the individual and violate human rights and fundamental freedoms of women and children as recognised under international law.
- They constitute discrimination against women or children and are harmful because they result in violence, negative physical, psychological, economic or social harm or limit the capacity of a woman or a child to participate fully in society.
- They are traditional, emerging or re-emerging practices that are kept in place through social norms that perpetuate male dominance and the inequality of women and children based on their sex, gender, age and other intersecting factors.
- They are imposed on women and children by families, community members or society at large, regardless of whether the victim provides or is able to provide full, free and informed consent.

FGM and child marriage meet these criteria and have been determined as harmful practices by the CEDAW and CRC Committees.

FGM and child marriage have also been recognised as harmful practices under the African regional human rights system. Article 21 of the ACRWC, which provides for protection against harmful social and cultural practices, contains a specific reference to child marriage in article 21(2). Similarly, article 5 of the Maputo Protocol, which mandates the elimination of harmful practices, contains an explicit reference to FGM in article 5(b).

2 *Joint General Recommendation 31 of the CEDAW and General Comment 18 of the CRC on harmful practices* UN Doc CEDAW/C/GC/31/CRC/C/GC/18 (2014).

3 *Joint General Recommendation* (n 2 above) para 15.

1.3 FGM

FGM, female circumcision and female genital cutting are terms that are often used interchangeably to refer to the practice of removing, in whole or in part, the external female genitalia or otherwise injuring the female genital organs for non-medical reasons. FGM results in the intentional alteration of the female genital organs and is often carried out as a cultural or religious procedure. FGM is practiced widely in patriarchal societies, often to exert control over the sexuality of women and girls.

According to the WHO, the practice of FGM manifests in a number of ways, including:

Clitoridectomy: partial or total removal of the clitoris (the small, sensitive and erectile part of the female genitals) or, less frequently, only the prepuce (the fold of skin surrounding the clitoris).

Excision: partial or total removal of the clitoris and the labia minora, with or without excision of the labia majora.

Infibulation: narrowing of the vaginal opening through the creation of a covering seal. The seal is formed by cutting and repositioning the inner or outer labia, with or without removal of the clitoris.

Other: all other harmful procedures which alter the female genitalia for non-medical purposes, such as pricking, piercing, incising, scraping and cauterising the genital area.⁴

FGM does not offer health or medical benefits and it harms girls and women in numerous ways. It entails removing and damaging healthy and normal female genital tissue, and interferes with the natural functions of girls' and women's bodies.⁵

FGM violates a number of human rights protected by national constitutions and regional and international instruments. In particular, it violates: the right to equality and non-discrimination; the right to life; the right to bodily integrity; reproductive health rights; the right to dignity; freedom from torture and cruel, inhuman or degrading treatment and punishment; and the right to health.

The causes of FGM include a combination of cultural, religious and social factors but social pressure to conform is amongst the strongest motivation which perpetuates the practice. Although no religious scripts directly prescribe the practice of FGM, those who practice FGM sometimes claim that it has religious support.

4 WHO 'Female Genital Mutilation Fact Sheet' (No 241) <http://www.who.int/mediacentre/factsheets/fs241/en/> (accessed 11 May 2016).

5 As above.

1.3.1 FGM prevalence, statistics and trends in West and Southern Africa

FGM is practiced throughout the world. The practice is prevalent in Africa, the Middle East, Asia, and in some communities in Latin America. To a much lesser extent, FGM is sometimes practiced in Europe, Australia and North America, typically among communities that originate from countries where it is more prevalent. The WHO reports that more than 125 million girls and women alive today have been subjected to FGM in 29 countries in Africa and the Middle East, where FGM is concentrated.⁶ It is estimated that three million girls risk undergoing FGM in Africa every year.⁷ Country level data on FGM is obtained mainly from Demographic and Health Surveys (DHS) and Multiple Indicator Cluster Surveys (MICS) conducted at the national level. Lawyers and other advocates should consult DHS and MICS data to ensure accurate and up to date information about FGM in countries where these are Mali, Guinea and Sierra Leone are countries with the highest concentrations of FGM in the world, with an estimated prevalence rate of over 80 per cent. Prevalence in Burkina Faso, Liberia and The Gambia is more moderate, at between 51 and 80 per cent. Guinea Bissau, Nigeria, Ivory Coast and Senegal see moderate to low prevalence of FGM, of between 26 and 50 per cent. The Central African Republic, the United Republic of Tanzania and Benin have low rates of FGM prevalence, at between ten and 25 per cent. The prevalence of FGM in Ghana, Togo, Niger and Cameroon ranges from one to nine per cent.

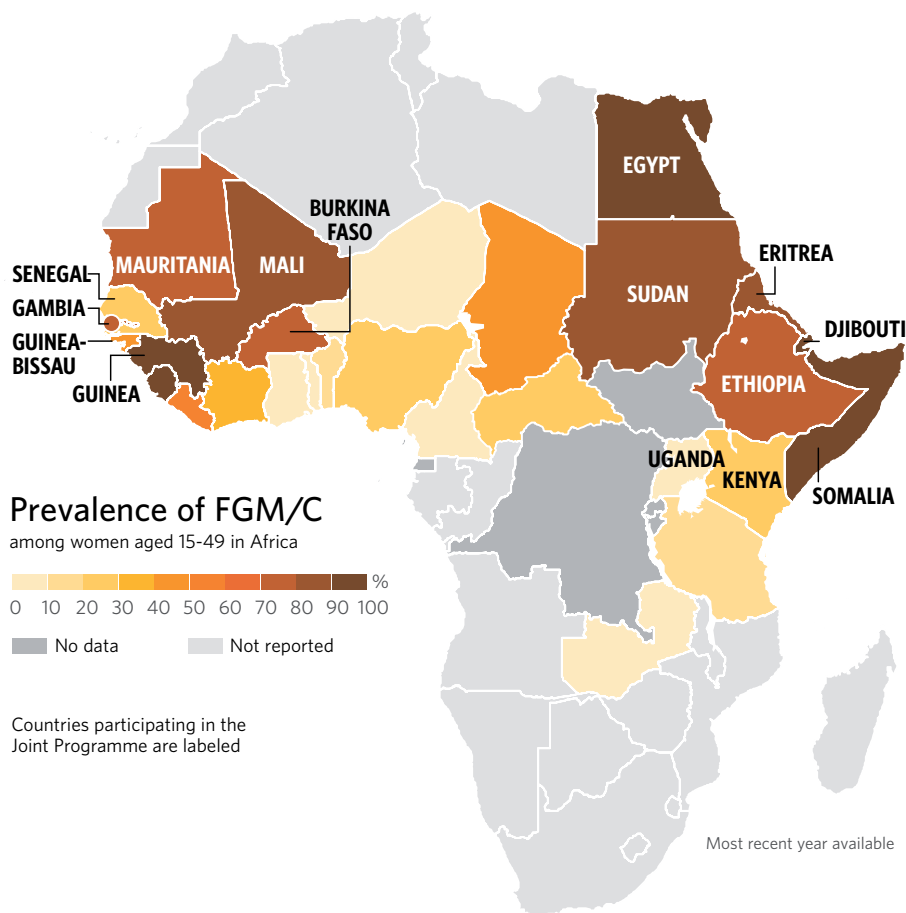
As these trends suggest, FGM is more extensive in West Africa and with the exception of Tanzania, where 15 per cent of women and girls undergo FGM, FGM prevalence is very low in Southern Africa.

Demographic representation of FGM prevalence in Africa

Below is a map of African demonstrating the prevalence of FGM including geographical patterns.

6 As above.

7 PS Yoder, N Abderrahim & A Zhuzhuni 'Female genital cutting in the Demographic and Health Surveys: A critical and comparative analysis' (2004).



Map 2.2: Prevalence of FGM in Africa

Source: UNFPA

1.4 Child marriage

A child marriage is a marriage in which at least one of the parties to the marriage is under 18 years of age at the time of the marriage. Under both international and regional law, children are regarded as incapable of giving their full and free consent to marriage and the marriage of children is therefore widely prohibited. Article 6(b) of the Maputo Protocol and article 21(2) of the ACRWC both specify that the minimum age of marriage shall be 18 years of age.

The term child marriage is often used interchangeably with the terms forced marriage and early marriage. To a certain extent all child marriages are also forced marriages, as the term forced marriage implies that either or both of the parties have not personally expressed their full and free consent to marry. However, forced marriages also include marriages that are not child marriages, for example

where a widow is forced to marry a relative of her deceased husband. The term early marriage refers to a marriage in which even though one of the parties to the marriage may not have reached the minimum marriageable age, majority status is nevertheless conferred at marriage through a legal process of emancipation.⁸ For purposes of this manual we have used the term child marriage, as it is the term used in our codified regional law.

The overwhelming majority of child marriages involve the marriage of girls under 18 years of age, although at times boys under the age of 18 are also forced into marriage.

1.4.1 Prevalence of child marriages

The overall prevalence of child marriage in Africa is higher than the global average and if current trends continue, Africa will become the region with the largest number and global share of child marriages by 2050.⁹ Prevalence is greatest in West and Central Africa where it is estimated that four out of ten women aged 20 to 24 were married before age 18.¹⁰ In some individual countries, the reported prevalence is even higher. For instance, Mali, which is one of the countries under study, reported a child marriage prevalence rate of 71 per cent in 2006 and 55 per cent in 2010.

Although trends have shown a slow and uneven decline in the overall prevalence of child marriage in Africa, the continent is home to a young and rapidly growing population and without economic growth and social development and increased efforts to end child marriage, the number of girls married by age 18 is expected to rise.¹¹ This trend is most pronounced among poorer households and in rural areas, where child marriage is twice as prevalent as in urban areas and showing little sign of decline.¹²

There are a number of interrelated factors that cause child marriage and many of these factors are both a cause and consequence of child marriage. As an example, family poverty places girls at risk of child marriage, but being married young also tends to limit educational and economic opportunity for girls, which in turn perpetuates poverty.

8 Report of the Office of the United Nations High Commissioner for Human Rights 'Preventing and eliminating early, child and forced marriages' (2014) 3.

9 UNICEF 'A profile of child marriage in Africa' (2015) [http://www.unicef.org/wcaro/english/UNICEF-Child-Marriage-Brochure-low-Single\(1\).pdf](http://www.unicef.org/wcaro/english/UNICEF-Child-Marriage-Brochure-low-Single(1).pdf) (accessed 26 January 2016).

10 As above.

11 As above.

12 As above.

Child marriage is overwhelmingly a phenomenon of younger girls being married to older men and as such, none of the social, cultural and economic factors that cause child marriage can be understood without reference to gender inequality which is a cause, a result and an exacerbating factor of child marriage. Differentiated gender roles and family relations between men and women across Africa tend to disadvantage women. These beliefs may have origins in traditional practices, in colonial-era laws and customs, and in the two most widespread religions in the region, Islam and Christianity.

Discriminatory formal and informal laws, social norms and cultural and religious practices directly and indirectly influence women's social and economic roles, making girls more vulnerable to child marriage than boys. Greater social value is generally ascribed to boys, resulting in broad underinvestment of girls' health, education and development. These social inequalities systematically render girls subservient and vulnerable and put them at risk of child marriage and other social harms.

A woman or girl who is married as a child is exposed to a continuum of violations, particularly in relation to reproductive health and the increased risk of sexual violence within marriage and education. Child marriage involves the most vulnerable of girls, who often live in poor, rural, or conflict affected areas with limited access to health care and education. These situational contexts compound girls' already heightened risk of poor reproductive health, sexual violence and low educational attainment. Girls are often forced into sex and typically continue to experience non-consensual sex throughout their marriages. Married girls face physical, sexual and psychological abuse by their husbands and others in their families.

The sexual and reproductive violence inflicted on girls who marry young results in severe sexual and reproductive health consequences, including early and unintended pregnancy, unsafe abortion, and higher risk of contracting sexually transmitted infections, including HIV.¹³ Child marriage is often accompanied by early and frequent pregnancies and childbirth, resulting in higher than average maternal morbidity and mortality rates and medical conditions such as obstetric fistula.¹⁴

Child marriage contributes to higher rates of school dropout among girls and lower rates of educational attainment. Once a girl is married, there is a much lower possibility that she will continue her education as she will generally be

13 Centre for Reproductive Rights 'Child marriage in South Asia: International and constitutional legal standards and jurisprudence for promoting accountability and change' (2009).

14 See *Girls not Brides* 'Ending child marriage in Africa' 4.

expected to take up household, conjugal and parenting responsibilities. Illiteracy levels are high among girls who marry young and over 60 per cent of child brides in developing countries are believed to have had no formal education.¹⁵ In Malawi, nearly two-thirds of women with no formal education were married by age 18, compared to only 5 per cent of women who attended secondary school or higher levels of education.¹⁶

In many cases, girls face increased risk of domestic violence when they marry young. Unable to negotiate as equal partners in the marriage, child marriages often result in trauma, suicide or the escape of young girls who are forced into marriages they do not want.

15 UNFPA *Marrying too young: End child marriage* (2012) 44.

16 UNICEF 'Ending child marriage: Progress and prospects' (2014) 4.

CHAPTER 2: THE NORMATIVE FRAMEWORK FOR ELIMINATING HARMFUL PRACTICES



CHAPTER 2: THE NORMATIVE FRAMEWORK FOR ELIMINATING HARMFUL PRACTICES

There are provisions under national, regional and international law that prohibit harmful practices and oblige states to take measures to eliminate both harmful practices and their root causes. This chapter sets out the obligations to end harmful practices and identifies the legal frameworks and mechanisms for the protection of women and children from harmful practices.

2.1 The national legal framework

National legal frameworks across Africa generally recognise various sources of law and lawyers can generally base their litigation on one or a combination of the following sources of national law:

- The Constitution;
- Legislation;
- Case law; and
- Customary law.

2.2 The international legal framework

A number of UN sponsored human rights instruments protect the rights of women and children and some of these instruments contain specific provisions sanctioning harmful practices. The most instructive instruments that seek to curb harmful practices are CEDAW and the CRC and some of their key provisions are set out below.¹

2.2.1 *The Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW)*

CEDAW entered into force in 1981 and is the premier binding instrument for the protection of women's rights under the UN human rights system. Its purpose is, to ensure 'elimination of such discrimination in all its forms and manifestations'.²

1 For an exhaustive list of provisions in international and regional instruments on child marriage compiled by the African Child Policy Forum, see <http://www.girlsnotbrides.org/wp-content/uploads/2015/03/Intl-and-Reg-Standards-for-Protection-from-Child-Marriage-By-ACPF-May-2013.pdf>; and international instruments on FGM, see UN Women 'Sources of international human rights law on femal genital mutilation' <http://www.endvawnow.org/en/articles/645-sources-of-international-human-rights-law-on-female-genital-mutilation.html> (both accessed 12 May 2016).

2 UN General Assembly *Convention on the Elimination of All Forms of Discrimination Against Women* 18 December 1979, United Nations, Treaty Series, vol 1249, Preamble.

In article 1, CEDAW defines discrimination as any

distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

CEDAW requires states parties to take all appropriate measures:

[t]o modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and *customary and all other practices* which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women³ (Emphasis added).

State parties are also required to ‘take all appropriate measures, including legislation, *to modify or abolish existing laws, regulations, customs and practices* which constitute discrimination against women’⁴ (Emphasis added).

On account of the fact that FGM is administered on women based on sex and gendered discrimination, it is a violation of the principle of ‘equality between men and women’ that resonates throughout CEDAW. FGM is a violation of the right to health as enshrined in article 12 of CEDAW. Further, the extreme physical and psychological pain which FGM victims endure violates their freedom from ‘degrading treatment’ in violation of article 7 of the International Covenant on Civil and Political Rights.

Child marriages violate article 16(2) of CEDAW, which states that ‘[t]he betrothal and the marriage of a child shall have no legal effect ...’ and that necessary action should be taken to specify a minimum marriage age and to make the registration of marriages in an official registry compulsory.

The nature of state obligations under CEDAW

Article 2 of CEDAW as read with other provisions sheds light on the measures state parties have to adopt in order to eliminate the various manifestations of discrimination against women including through harmful practices.

Readers are referred to *General Recommendation 28 on the Core Obligations of States Parties under Article 2 of the CEDAW*, which aims to clarify the scope and meaning of article 2.⁵

3 Article 5(a).

4 Article 2(f).

5 <http://www2.ohchr.org/english/bodies/cedaw/docs/CEDAW-C-2010-47-GC2.pdf> (accessed 19 May 2016).

2.2.2 *The Convention on the Rights of the Child (CRC)*

The CRC was adopted in November 1989 and entered into force in September 1990. While the CRC covers a wide range of rights and freedoms which must be afforded to children, the focus of this Manual is on the obligations of state parties to end child marriages and FGM as well as responsibility of the state over violations of other rights as a result of harmful practices. The following is a summary of the legal framework for litigating against harmful practices under the CRC.

Right to protection from abuse

Article 19 of the CRC imposes the obligation to protect children 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.

Forced marriage or child marriage is regarded as a form of violence against the child while subjecting a child to the rigors of motherhood before her body is ready for sexual activity and pregnancy. Perpetrators include parents who give away their girls too early or force them into marriage as well as men who take child brides and subject them to sexual activity as spouses.

Right to health

Article 24 provides for the right to health. State parties have the obligation to ‘diminish infant and child mortality’.⁶ Article 24(3) obliges state parties to take ‘all effective and appropriate measures with a view to *abolishing traditional practices prejudicial* to the health of children’ (Emphasis added). Pregnancy, birth complications and medical conditions such as fistula reinforce child marriages as a ‘traditional practice’ harmful to the health of children. Where child marriage is religion-based, lawyers must argue for the religion as having ‘analogous’ effect similar to tradition and argue that ‘traditional’ be interpreted to include ‘religious’ and equally placed practices. As regards FGM, the absence of medical benefits in the procedure as well as non-consensual modifications to female genital organs violates women’s right to health and bodily integrity. FGM must be interpreted to fit the bill of ‘traditional practices’ prejudicial to the health of the child.

Right to education

The primary duty of state parties embodied in article 28 of the CRC is to ensure provision of equal education to children. One of the specific elements of the right

⁶ Article 24(2)(a) of the CRC.

to education is that it must be compulsory. Another element is that measures must be taken to ‘encourage regular attendance at schools and the reduction of drop-out rates’.⁷ Both elements above cannot be achieved where communities practice child marriage because it is not feasible for a child to take care of family responsibilities and attend school at the same time.

Freedom from all forms of exploitation

Article 36 of the CRC requires states to protect the child from all forms of exploitation prejudicial to any aspects of the welfare of the child. This provision strengthens the argument that child marriage is a form of exploitation and in this case it is sexual exploitation.

Right to state support after exploitation

Article 39 provides as follows:

States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment.

State parties are required to put in place recovery interventions in order to realign children’s lives. State parties must rescue children from harmful practices and then put them through a recovery process.

2.3 The regional legal framework for litigating harmful practices

This refers to the legal instruments adopted in the African human rights system. These are the African Charter, the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (Maputo Protocol) and the African Charter on the Rights and Welfare of the Child (ACRWC).

2.3.1 The Maputo Protocol

The Maputo Protocol was adopted in July 2003 and entered into force on 25 November 2005. It is a supplementary protocol and an elaboration of article 18 of the African Charter on Human and Peoples’ Rights. In support of its adoption the AU Assembly noted the inadequacies of preceding instruments in addressing harmful practices. The Maputo Protocol is celebrated for its focus on the uniqueness of African women’s circumstances. It mandates explicit protection of women’s rights in areas not expressly covered by existing treaties.

⁷ Article 28(1)(e) of the CRC.

The Maputo Protocol and harmful practices

The Maputo Protocol starts off by defining harmful practices as ‘all behavior, attitudes and/or practices which negatively affect the fundamental rights of women and girls, such as their right to life, health, dignity, education and physical integrity’.⁸ Article 2(2) of the Maputo Protocol requires states to ‘modify the social and cultural patterns of conduct of women and men ... with a view to achieving the elimination of harmful cultural and traditional practices and all other practices ...’ This must be achieved through education and other strategies of disseminating information at the initiative of states.

Right to physical or bodily integrity

FGM results in permanent disfigurement of female genitalia and has the effect of violating the victims’ bodily integrity protected by the right to the security of the person as provided in article 4 of the Maputo Protocol.

The provision requires states to take cognisance of the fact that harmful practices are a form of violence against women. Accordingly, all practices that encourage violence against women such as FGM must be eradicated.⁹ States must also punish acts of violence against women.¹⁰ Rehabilitation and reparation for victims of violence is contemplated.

Duty to eliminate harmful practices

Article 5 reaffirms the obligation of state parties to eliminate harmful practices in their territories. States must ‘prohibit and condemn’ such practices. More importantly in guiding lawyers in the litigation process is the list of measures that states need to take to give effect to this provision. First, state parties must create awareness regarding harmful practices by conducting outreach programmes among other things. States must adopt legislation to eliminate harmful practices such as FGM, which is specifically mentioned. Third, states must adopt recovery measures to provide ‘necessary support’ to victims of harmful practices such as psycho-social support, legal, judicial and vocational training to make them self-supporting. Fourth, state parties must provide ‘protection of women who are at risk of being subjected to harmful practices or all other forms of violence, abuse and intolerance’.¹¹

8 Article 1(g).

9 Article 4(d).

10 Article 4(e).

11 Article 5(d).

Marriage

The Maputo Protocol in article 6, declares that the minimum age for marriage is 18 years. State parties are required not to recognise a marriage unless there is full consent by both parties. This provision implicates those marriages where one of the parties is a child. By fixing the legal age of marriage at 18 years, any marriage where any of the parties is below 18 years is a child marriage.

Right to a positive cultural context

Article 17 recognises the right of women to fully participate in cultural life in community with others. However, state parties must ensure that the cultural context is positive rather than one that violates women's rights for example due to harmful practices. This provision is strategic in that it dispels any defence that seeks to justify harmful practices as part of the culture practiced in the communities.

Remedies for violations of rights

State parties to the Maputo Protocol are required by article 25 to provide 'appropriate remedies' to women whose rights have been violated. The cue to lawyers is that every remedy must be appropriate in the sense of addressing the adverse consequences suffered by the victim as a result of harmful practices. The nature of the violation demands a specific remedy.

In providing appropriate remedies, states are required to establish institutions to ensure that such 'remedies are determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by law'.¹²

Enforcement of the Maputo Protocol

Article 27 provides that 'the African Court on Human and Peoples' Rights shall be seized with matters of interpretation arising from the application or implementation of this Protocol' while state reports on the implementation of the Maputo Protocol lie with the African Commission. It was envisaged that the African Commission would be vested with temporary jurisdiction of the interpretation of the Maputo Protocol pending the establishment of the ACrHPR.¹³ Notwithstanding its establishment, the restrictive access to the Court means that the African Commission is still seized with interpretation of the Protocol in respect of those states that have not recognised the competence of individuals and non-governmental organisations to lodge complaints with the ACrHPR.

12 Article 25(b).

13 Article 32.

2.3.2 The African Charter on the Rights and Welfare of the Child (ACRWC)

The ACRWC is the regional initiative for the protection of the rights of children in Africa. It came into force on 29 November 1999. While the ACRWC is fairly similar to the CRC, it appears from the Preamble that there was a pressing need to address the unique factors that the African child often finds himself or herself in such as socio-economic, cultural, traditional factors as well as developmental circumstances, natural disasters, armed conflicts, exploitation and hunger.¹⁴

Article 1(3) of the ACRWC makes an early reference to ‘any custom, tradition, cultural or religious practice that is inconsistent with the rights, duties and obligations contained in the present Charter shall to the extent of such inconsistency be discouraged’. Article 2 defines a child as any person under the age of 18 years.

Duty to eliminate harmful practices

Article 21 of the ACRWC provides as follows:

1. States Parties to the present Charter shall take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child and in particular:
 - (a) those customs and practices prejudicial to the health or life of the child; and
 - (b) those customs and practices discriminatory to the child on the grounds of sex or other status.
2. Child marriage and the betrothal of girls and boys shall be prohibited and effective action, including legislation, shall be taken to specify the minimum age of marriage to be 18 years and make registration of all marriages in an official registry compulsory.

Child abuse and exploitation

As argued under the CRC, child marriages are motivated by sexual abuse and exploitation of children who cannot give legal consent to sexual intercourse even if adults consent on their behalf. Articles 16 and 27 of the ACRWC prohibit child abuse and sexual exploitation, respectively. Lawyers must in their pleadings allege that the very essence of child marriages is for the sexual gratification of those male adults who accept child brides notwithstanding poverty motivating a family to practice betrothal of girls.

Right to education

Once a child is given away in marriage that often marks the end of her education, in violation of article 11 of the ACRWC which requires states to ensure that children are kept in school through regular attendances and reduction in drop-outs.

14 Preamble to the ACRWC.

2.4 Conclusion

The ACRWC offers better protection of child rights of African children as compared with the international child rights framework in two ways: first, it imposes the obligation on states to make 18 the minimum age of marriage unlike the CRC; second, the instrument specifically deals with harmful practices in the form of child marriage; and third, it provides for an individual communication procedure for the consideration of communications including those on harmful practices.

CHAPTER 3: MECHANISMS FOR LITIGATING AND ADVOCATING AGAINST HARMFUL PRACTICES



CHAPTER 3: MECHANISMS FOR LITIGATING AND ADVOCATING AGAINST HARMFUL PRACTICES

This chapter will identify opportunities for litigating harmful practice cases as well as the mechanisms for litigation and advocacy at the regional and international levels.

3.1 Introduction

It is not desirable to treat national and international litigation in isolation of each other. The natural relationship between the two systems of law is that national mechanisms for the protection of human rights are primary and international mechanisms are only used when the national mechanisms are inadequate.

The African regional human rights system as well as the UN global system provide for institutions and procedures to facilitate access to justice by or on behalf of all those who allege violation of rights and freedoms as a result of harmful practices. These institutions and procedures are discussed below.

3.2 Treaty monitoring bodies

Treaty monitoring bodies are institutions established by international human rights treaties, conventions or protocols with a common mandate of primarily promoting and protecting human rights in territories of member states that have ratified the treaty in question. Every human rights treaty has a treaty monitoring body responsible for monitoring the implementation of that treaty although there are cases where a treaty monitoring body could be responsible for more than one treaty. Treaty monitoring bodies execute their mandate in various ways, for example, through state reporting and another by way of the individual complaints procedure.

3.2.1 *The state reporting procedure*

Articles 26 and 18 of the Maputo Protocol and the CEDAW, respectively, require states to submit periodic reports to treaty monitoring bodies indicating measures taken to 'give effect to' or 'for the full realisation of' the rights contained in the instruments. Articles 43 and 44 of the African Children's Charter and CRC respectively provide for the state reporting procedure in respect of children's rights.

The general procedure is that once reports are submitted, the respective treaty monitoring body considers the report in the presence of a delegation from the member state. The ‘constructive dialogue’ between the state and the treaty monitoring body will culminate in the treaty monitoring body providing recommendations known as concluding observations. When submitting the report, the state is required to provide information on measures taken to implement the concluding observations (recommendations) issued during the previous reporting cycle.

Before the treaty monitoring body adopts concluding observations, other stakeholders such as civil society organisations would have had a chance to provide the treaty monitoring body with additional information (shadow reports) in order to challenge the balance in the state report. Shadow reports are submitted to the treaty monitoring body before the report is considered so that the treaty monitoring body is able to seek clarification from the state on matters arising from the additional information. Information contained in the state report and shadow reports is critical in guiding lawyers preparing cases on the harmful practice trends in countries of focus.

3.2.2 *Laying down principles on protection and promotion of human rights*

Treaty monitoring bodies execute their promotional and protective mandates by laying down principles to inspire states to conform to the provisions of the respective treaties. These principles have assumed different names or references depending on the human rights system or treaty monitoring body in question. The Committee on CRC as well as the ACERWC makes references to their principles as ‘General Comments’ while the Committee on CEDAW labels them ‘General Recommendations’. These principles are authoritative interpretations of treaty provisions hence a critical source of law. General comments or principles explain the nature of state obligations. The importance to a lawyer of appreciating the parameters of state responsibility when preparing a case cannot be overemphasised. By explaining the nature of state obligations through statutory interpretation, the treaty monitoring body is also defining the parameters of the individual’s right or freedom. For instance, the *Joint General Recommendation*¹ explains both state obligations regarding harmful practices as well as explaining

1 *Joint General Recommendation/General Comment 31 of the Committee on the Elimination of Discrimination against Women and 18 of the Committee on the Rights of the Child on harmful practices*. On 4 November 2014, the United Nations Committee on the Elimination of Discrimination Against Women and the Committee on the Rights of the Child released a joint recommendation/comment on the obligation of states ‘to prevent, respond to and eliminate harmful practices, wherever and in whichever form they occur’, that affect ‘women and children, primarily girls’. See 5.4.1 below for more detail.

circumstances and indicators of violations for the benefit of individuals affected by the practices. Accordingly, the lawyer benefits from both perspectives of the jurisprudence.

Some national courts have accepted the jurisprudence of treaty monitoring bodies as persuasive. In *Grootboom* the Constitutional Court of South Africa relied on jurisprudence of the Committee on Economic, Social and Cultural Rights on the meaning of ‘minimum core obligation’.² National courts are becoming increasingly receptive to the findings of the African Commission as persuasive when interpreting treaty provisions. In *Kachingwe*,³ the Supreme Court of Zimbabwe ‘agreed’ with the applicants that findings of the African Commission on the universal proscription of torture were ‘persuasive’ in determining a case of inhuman or degrading treatment.

3.2.3 *The communications procedure*

This is a litigation process. Under this procedure, victims of harmful practices or their representatives depending on the treaty monitoring body or tribunal in question, lodge complaints alleging violation of their respective rights and freedoms under treaties of focus in this Manual. However, while all treaty monitoring bodies have state reporting procedure, not all of them have a communications procedure. In respect of those treaty monitoring bodies with competence, each has a checklist of requirements to be satisfied in order for one to file a communication with the treaty monitoring body. The CEDAW Committee, the African Commission and the ACERWC all have competence to receive and consider communications. Each treaty also provides for unique requirements for *locus standi*.

The exhaustion of local remedies rule

This rule requires an applicant to exhaust avenues of redress available at the national level before lodging the complaint before an international forum for adjudication. The rationale for this rule has been widely discussed hence its universal recognition. In *Jawara*, the African Commission held that:

[T]he rationale of the local remedies rule is to ensure that before proceedings are brought before an international body, the state concerned must have had the opportunity to remedy matters through its own local system.⁴

2 *Government of the Republic of South Africa & others v Grootboom & others* 2001 (1) SA 46 (CC).

3 *Kachingwe & others v The Minister of Home Affairs & others* (2005) AHRLR 228 (ZwSC 2005).

4 *Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000).

Only remedies of judicial nature that are ‘available, effective and sufficient’ to redress the wrong are required to be exhausted.⁵

The effect of failure to exhaust local remedies is that the international body would declare the communication inadmissible thereby declining to consider it on merits.

3.3 Committee on the Elimination of Discrimination against Women (CEDAW Committee)

This is the body responsible for considering the progress made in implementation of the CEDAW. The CEDAW Committee oversees implementation through state reporting and individual communications procedure. While state reporting is established in the CEDAW, individual communication procedure was only introduced through the Optional Protocol to CEDAW, which must be individually ratified by states thereby recognising the competence of the CEDAW Committee. The CEDAW Committee has adopted Rules of Procedure (CEDAW Committee Rules), which guide the communication procedure before this body.⁶ Just like court rules at national level, lawyers must base their complaints on the CEDAW Committee Rules whenever filing cases before this Committee.

Filing a communication at the CEDAW Committee:

1. Communications are sent to the Secretary-General who may seek clarification and will also guide the author on ensuing procedures.
2. At the instance of the Committee or the authors and before a determination on merits has been reached, interim measures may be required of the state concerned to avoid irreparable damage to the victims concerned.
3. Upon receipt of the communication, the state is required to make submissions on admissibility and merits. The Committee may deal with these issues separately. The state has six months to make its objection citing reasons such as non-exhaustion of local remedies. The Committee will transmit to each party the submissions made.
4. The Committee renders ‘views’ and not judgments in the sense of a court of law. These must be implemented in good faith as part of the measures that the state undertook to give effect to the rights and freedoms in the CEDAW.
5. The state is required within six months to appraise the Committee on the measures taken to give effect to the views issued against it. Alternatively, the report on the measures could be required to make part of the state’s periodic state report. This ensures that implementation is, to a certain extent, monitored.

5 *Jawara* para 31. For exceptions to the rule, see Equality Now ‘A guide to using the Protocol on the Rights of Women in Africa for legal action’ (2011) 36.

6 Document A/56/38 (SUPP), as amended by A/62/38 (SUPP).

Referral documents:

- CEDAW treaty; and
- Rules of Procedure of the Committee on the Elimination of Discrimination Against Women <http://www2.ohchr.org/english/bodies/cedaw/rules.htm>

3.4 The African Commission on Human and Peoples' Rights (African Commission)

Communications alleging violations of rights may be brought to the African Commission for any alleged breaches of the provisions of the African Charter, the Maputo Protocol and other relevant human rights instruments that may be invoked, based on articles 18(3), 60 and 61 of the African Charter. The communication procedure consists of four steps: seizure; admissibility; merits; and remedies.⁷

Once a communication has been submitted to the Secretariat of the African Commission, it will be registered and receipt will be acknowledged. The African Commission has to be 'seized' of a communication, which means that a simple majority of the members of the Commission have decided to consider it. After the African Commission has been seized of a communication, the complainant and the state party are informed, and have three months to comment on the communication and its admissibility.⁸

A decision will then be taken as to the admissibility of the complaint at its next session. After a complaint has been declared admissible, the African Commission will either attempt to obtain a friendly settlement, or decide the merits of the case.

In an urgent situation, the African Commission can grant interim relief or provisional measures to avoid irreparable harm to the victim, either on its own initiative or at the request of a party to the communication.

If a friendly settlement is achieved, a report containing the terms of the settlement is presented to the African Commission at its session. This will automatically bring consideration of the case to an end. If there is no friendly settlement, the Secretariat of the African Commission prepares a draft decision on the merits taking into account all the facts at its disposal. During the session of the African Commission, the parties are at liberty to make written or oral presentations. However, written submissions are sufficient.

Finally, the African Commission will decide whether there has indeed been a violation of rights. If a violation is found, the Commission will make recommendations to the state concerned, which will include the required action to be taken by the state party to remedy the same.

7 See Equality Now (n 5 above) 37ff, for a full discussion on the procedure.

8 For admissibility requirements, see Equality Now (n 5 above) 34ff.

3.5 African Committee of Experts on the Rights and Welfare of the Child (ACERWC)

The ACERWC is the principal treaty monitoring body for promotion and protection of children's rights in Africa. It was established by the ACRWC with a promotional and protective mandate along the lines of the African Commission.⁹ It is targeted in this Manual on account of its focus on children's rights when dealing with both FGM and child marriages. Membership of the Committee of Experts is a gathering of 11 members selected for their high moral standards, integrity and competence in matters of the rights and welfare of the child. They serve in their personal capacity once elected by member states into office.¹⁰

Referral documents:

- ACRWC;
- Guidelines for the Consideration of Communications (Guidelines);
- African Charter; and
- CRC;

3.5.1 Taking a case to the Committee of Experts

A case can be brought by any person, group or NGO and relates to a matter covered by the ACRWC. The admissibility criteria as stated in the Committee of Expert's Guidelines for the Consideration of Communications are a restatement of article 56 of the African Charter. The Committee deals with the admissibility of the communication before it is transmitted to the state for its comments. However, the admissibility decision is subject to review upon consideration of the comments by the state, while the Committee on obtaining additional information from the complainant may overturn a declaration of inadmissibility.¹¹

3.5.2 Deliberations and findings

The Committee may order provisional measures 'to prevent any other harm to the child or children who would be victims of violations'.¹² Deliberations on communications are held in camera although parties may be invited to make an appearance especially to clarify on the validity of a particular communication.¹³ The same applies to the presence of children in the hearing should the Committee

9 Part II of the ACRWC.

10 Article 33(1) & (2) of the ACRWC.

11 Chapter 2, art 1 of the Guidelines.

12 Chapter 2, art 2(iv) of the Guidelines.

13 Chapter 3, art 2(3) of the Guidelines.

decide to hear them to ensure ‘effective and meaningful participation of the child or children’ in the communication affecting them.¹⁴

Article 4 of Chapter 3 of the Guidelines anticipates monitoring of decisions by a working group of the Committee. Decisions are also submitted to the AU Assembly for consideration after which they will be published and the state is expected to publish them widely in their territories in accordance with provisions of article 45(4) of the ACRWC.

3.6 Summary of the general communication procedure before the African Commission and the Committee of Experts

Communication procedure

1. Registration of communication at the Secretariat of the Commission:
 - Submission of communication.
 - Allocation of file number.
 - Acknowledgment of communication by the Secretariat.
2. Seizure of communication by the Commission:
 - Secretariat prepares a list and summary of all submitted communications.
 - The list and summary is distributed to all Commissioners.
 - Approval of communication from not less than seven Commissioners.
 - Where the Secretariat does not receive the minimum approval, the communication is presented to the Commission at its next session and it may by a simple majority approve the communication.
3. The state party concerned is notified of the communication.
4. Invitation for comments from state party and author of communication (within three months).
5. Commission makes a decision on admissibility.
6. If communication is admissible, parties are requested to send their observations on the merits.
7. If parties are willing, the Commission appoints a rapporteur for amicable resolution of the complaint.
8. If amicable resolution could not be attained, the Commission decides the communication on the merits.
9. The Commission makes its final recommendations that are not legally binding on the state.
10. If the Commission has found a violation, the Secretariat sends follow-up letter(s) enquiring about the implementation of the recommendations.

14 Chapter 3, art 3(1) of the Guidelines.

3.7 The African Court on Human and Peoples' Rights (ACrthPR)

The ACrthPR was established by the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights (African Human Rights Court Protocol). The African Human Rights Court Protocol came into force in 2004 and its seat is in Arusha, Tanzania.

3.7.1 *Taking harmful practices cases to the ACrthPR*

Under article 5 of the African Human Rights Court Protocol the following have competence to bring cases before the Court:

- The African Commission.
- The state party that lodged a complaint to the African Commission.
- The state party against which a complaint has been lodged with the African Commission.
- The state party whose citizen is a victim of human rights violation.
- African inter-governmental organisations.
- Individuals.
- NGOs with observer status with the African Commission.

While individuals and NGOs with observer status before the African Commission can submit cases to the ACrthPR, this is only possible when the respondent state party has made a declaration under article 34(6) of the African Court Protocol accepting the competence of the Court to receive cases under article 5(3). Article 34(6) vests state parties with the prerogative to accept access to the Court by individuals and NGOs with observer status. However, given that as of September 2015, only seven states had lodged the declaration, it is likely that most harmful practices cases will continue to be brought before the African Commission and the African Committee of Experts.

The procedure for consideration of cases is more rigorous before the ACrthPR as opposed to treaty monitoring bodies as discussed earlier. The ACrthPR adopted Rules of Procedure in 2010 (Court Rules).

3.7.2 *Jurisdiction of the ACrthPR*

The jurisdiction of the ACrthPR is set out in article 3 of the African Human Rights Court Protocol. This extends to all cases and disputes, on human rights issues, concerning the interpretation and application of the African Charter, the Maputo Protocol and other relevant human rights instruments ratified by the state concerned.¹⁵

15 *Mkandawire v Malawi* Application 003/2011 para 34.

In *Tanganyika Law Society*,¹⁶ the Court acknowledged its competence to interpret and apply the ICCPR; the door is thus opened for the Court to adjudicate on UN human rights treaties to which AU members are party. This leeway allows lawyers to bolster their submissions not only with provisions from CEDAW and CRC on harmful practices, but also to rely on the jurisprudence (decisions and general comments) of the CRC and CEDAW Committees on their conclusions that FGM and child marriages violate interpretations of the rights of women and children.

3.7.3 Filing a case

The rules of procedure of the ACrHPR allow for the possibility that cases are decided entirely on the papers submitted when an application is filed, although applicants can make representations during the court's hearing if they wish to. For this reason, when filing a case, all relevant facts or documentary evidence must be included in the submissions at the time the case is filed. All relevant laws and legal authority upon which the Court must refer is made part of the record right from the start as there are limited chances to submit such once the consideration process has commenced.

For requirements or form of application before the ACrHPR, see rule 33.

Applications filed before the Court must:

- Be a single copy sent to Court registry.
- Be in writing – in any one official language of the Court (English, French or Arabic).
- Be signed by the Applicant or representative.
- Contain a summary of facts upon which it is based.
- Contain a summary of evidence intended to be adduced.
- Give clear particulars of the Applicant.
- Provide clear particulars of the Respondent state(s).
- Specify the alleged violation.
- Provide evidence of exhaustion of local remedies.
- If filed by individuals or NGOs, demonstrate that the state has lodged an art 34(6) declaration.
- Specify remedy being sought such as reparation.

Admissibility:

The grounds for admissibility in rule 40 are similar to those described under the

16 *Tanganyika Law Society & another v Tanzania* Application No 009/2011 and 011/2011.

communications procedure before the African Commission. Upon referral, cases deemed admissible by the African Commission will be viewed as admissible by the ACrtHPR.

Hearings:

All proceedings are conducted in public though there is also provision for hearings to be conducted in camera.

Production of evidence:

Apart from the evidence included as part of the application, the Court may request for specific information. This may be by requiring oral evidence from any person whose testimony is deemed relevant in the resolution of the dispute or conducting site visits for purposes of gathering evidence.

***Amici* or friends of the court:**

The Court accepts the contribution of *amici* in providing critical evidence that is otherwise unavailable to the parties. The complexity of FGM and child marriage may need the involvement of *amici* in assisting the Court to appreciate the harmfulness of the practices.

Provisional measures:

The Court pursuant to art 27(2) of the African Human Rights Protocol, is vested with competence to adopt provisional measures as it deems necessary ‘in cases of extreme gravity and urgency, and when necessary to avoid irreparable harm to persons’.

3.8 Sub-regional legal and institutional framework

The sub-regional human rights systems are a growing level of protection emerging within regional economic communities (RECs), established primarily to facilitate the regional economic integration among states which share geographical and or ideological commonalities through trade and free movement of goods, services and labour. Perhaps on account of the relationship between good governance and economic stability, there has been increasing appeal to involve these inter-governmental structures in promoting and protecting human rights. Of relevance to this Manual are two RECs namely, the Economic Community of West African States (ECOWAS) and the Southern Africa Development Community (SADC).

3.8.1 The ECOWAS sub-regional framework

The ECOWAS was established by the adoption of the Treaty of ECOWAS in

1975. At the time human rights issues were not recognised or reflected anywhere including in the text of statutes adopted at this level.¹⁷ The human rights language gathered pace as from 1979 when the Community adopted a Protocol relating to the free movement, residence and establishment. However, by 1985 human rights were publicly acknowledged but understood as those provided for in the UDHR. That marked the watershed time for the recognition and protection of human rights in ECOWAS. Now the revised ECOWAS Treaty of 1993 contains an undertaking by member states to co-operate for the purpose of realising the objects of the African Charter.¹⁸

The ECOWAS Court of Justice

ECOWAS has a judicial organ in the form of a court known as the ECOWAS Court of Justice (ECJ). Established by the 1991 Protocol on the Community Court of Justice, the ECJ is equipped to deal with economic disputes arising from the economic integration as opposed to human rights.

Jurisdiction and accessing the ECJ:

In terms of art 9(4) of the ECJ Court Protocol, 'the court has jurisdiction to determine cases involving violation of human rights that occur in any member state'. The Court may also issue advisory opinions upon request. The ECJ has competence not only over protocols adopted at ECOWAS level, but also over some of the protocols to the African Charter which are mentioned in ECOWAS statutes. The practice of the Court, however, has been to make pronouncements on other instruments such as the UDHR, ICCPR, CEDAW, CESC.

Procedure

The ECJ has Rules of Procedure adopted in 2003. Any ECOWAS citizen can access the Court. There is no requirement for an applicant to exhaust local remedies before engaging the ECJ. However, for the reasons that the decisions of the ECJ are final and not subject to appeal, once an applicant approaches the ECJ, they have no possibility of having the same issue heard by another court including national courts. The ECJ is not a court of appeal against an adverse decision by a national court.

In terms of rule 32, proceedings are commenced an application is filed with the Court Registry. Rule 33 provides guidance as to what should be contained in the application. Within 30 days of receipt of the application, the respondent may respond to the

17 ST Eborah 'Critical Issues in the human rights mandate of the ECOWAS Court of Justice' (2010) 1 *Journal of African Law* 1.

18 Eborah (n 17 above) 10-11.

application. The response takes a similar form as that of the application in terms of the required information and structure. Once an application has been properly filed with the Court registry, the registry invariably guides the parties in terms of deadlines for filing of any further papers, providing clarification on points required by the Court, hearing dates, manner of production of evidence, calling of expert and regular witnesses etc.

Referral documents:

- ECJ Court Protocol;
- ECJ Rules of Procedure 2003;
- African Charter; and
- Relevant international treaty.

CHAPTER 4: PROVING HARMFUL PRACTICES BEFORE JUDICIAL AND QUASI-JUDICIAL INSTITUTIONS



CHAPTER 4: PROVING HARMFUL PRACTICES BEFORE JUDICIAL AND QUASI-JUDICIAL INSTITUTIONS

4.1 Introduction

There are two primary entry points in litigating cases of harmful practices. First, lawyers must argue that there exists a specific obligation on states to eradicate harmful practices in their territories. Second, they must also argue that FGM and child marriage are in fact harmful practices to the extent that they violate rights and freedoms provided for in national legislation as well as international instruments ratified by the states in whose territories they continue to be practiced.

‘Harmful Practices’ is defined by the Maputo Protocol as follows: ‘All behavior, attitudes and/or practices which negatively affect the fundamental rights of women and girls, such as their right to life, health, dignity, education and physical integrity.’¹

The following is a list of human rights and freedoms violated when FGM and child marriage are carried out on women and girls.

FGM	Child Marriage
• Freedom from discrimination • Right to equality • Right to the highest attainable standard of health • Freedom from violence against women • Right to bodily integrity • Right to education • Sexual and reproductive health rights	• Freedom from sexual and physical abuse • Right to found a family • Right to equality in marriage • Right to health • Right to education • Right to survival and development • Freedom from servile slavery

Human rights and freedoms violated by FGM and child marriages

4.2 Human rights and freedoms impacted by FGM

4.2.1 *Right to highest attainable standard of health*

The right to health is provided for in many international treaties. Article 12(1) of

1 Article 1(g).

the ICESCR, provides for ‘the right of everyone to the enjoyment of the highest attainable standard of physical and mental health’, and so does article 25(1) of the UDHR, article 14 of Maputo Protocol, article 12 of CEDAW and article 16 of the African Charter.

In *General Comment 12*, the Committee on ICESCR dissects the normative content of the right to health by clarifying state obligations, instances of violation by states and or non-state actors. As to the normative content, it is stated that:

The right to health contains both freedoms and entitlements. The freedoms include the right to control one’s health and body, *including sexual and reproductive freedom, and the right to be free from interference, such as the right to be free from torture, non-consensual medical treatment and experimentation*. By contrast, the entitlements include the right to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health.²

CESCR *General Comment 14* also makes reference to the link between right to health and harmful practices when the Committee noted:

It is also important to undertake preventive, promotive and remedial action to shield women from the impact of harmful traditional cultural practices and norms that deny them their full reproductive rights.³

States are required to take preventive, promotional and remedial measures to alleviate the impact on women of harmful practices that violate their reproductive rights. This pronouncement locates harmful practices within the context of the right to health. It is not farfetched to argue for the responsibility of states over harmful practices. The obligation to *protect* requires states to take measures that prevent third parties from interfering with article 12 guarantees. This is the essence of state responsibility over harmful practices.

States are required to ‘prevent third parties from coercing women to undergo traditional practices’ such as ‘female genital mutilation’.⁴ Violations in relation to protection occur where there is ‘failure to regulate the activities of individuals, groups or corporations so as to prevent them from violating the right to health of others’ or ‘the failure to protect women against violence or to prosecute perpetrators; the failure to discourage the continued observance of harmful traditional medical or cultural practices’.⁵

² CESCR *General Comment 14* para 8.

³ CESCR *General Comment 14* para 21.

⁴ CESCR *General Comment 14* para 35.

⁵ CESCR *General Comment 14* para 51.

The practice of FGM is recorded to have potential to result in a variety of immediate and long-term health consequences, including ‘severe pain, shock, infections and complications during childbirth affecting both the mother and child, long-term gynaecological problems such as fistula as well as psychological consequences and death’.⁶ In final analysis, the right to health is violated in the context of harmful practices such as FGM in that women are pressured, often by physical and social coercion, to undergo FGM thereby being unable to control their own health, body and sexual reproductive health.

Further, studies have proved that the procedure has no immediate or long term health benefits.⁷ Research has also revealed the extent of risk that FGM victims face in the future in the form of complications in child birth. The WHO *Study on Female Genital Mutilation and Obstetric Outcome, 2006* established that a higher percentage of women who went through FGM are more likely to have birth-related complications than their counter-parts. These statistics must be used to persuade courts and international bodies that FGM victims are also victims of violation of the right to health.⁸

States are in violation of the right to health of FGM victims on account of unwillingness to adopt legislation and other policies aimed at ending the practice. Liability will also arise where states fail to protect women and girls from being coerced into taking part in FGM.

4.2.2 Freedom from torture or cruel, inhuman or degrading treatment

This freedom is provided for in a number of human rights treaties such as the UDHR (article 5); Maputo Protocol (article 4); ICCPR (article 7); ACRWC (article 16); and CRC (article 37). This freedom has acquired universal acceptance to the extent that it is now a non-derogable freedom under international and national law.⁹

Torture is defined in article 1 of the UN Convention against Torture (CAT) as 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

6 *Joint General Recommendation* para 18.

7 WHO ‘Female genital mutilation fact sheet’ <http://www.who.int/mediacentre/factsheets/fs241/en/> (accessed 13 May 2016); WHO ‘Eliminating female genital mutilation: An interagency statement’ 1.

8 Interagency statement (n 7 above) 11.

9 UNHCR *General Comment 20* para 3.

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.

According to Novak, there are essential elements an act must meet for it to qualify as torture.¹⁰ These are 'active undertaking, intent and purposefulness'.¹¹ If severe pain is inflicted for the sole reason of 'discrimination', then that amounts to torture. In that context, all three essential elements would have been present.

The UNHRC further held that one of the aims of freedom from torture 'is to protect both the dignity and the physical and mental integrity of the individual'.¹² Whether or not an act constitutes 'cruel or inhuman treatment' is a matter of the intensity of pain so inflicted and or the absence of any one of the essential elements of torture.¹³ Invariably, most acts of pain and suffering fall short of torture and are classified as 'cruel or inhuman treatment'.

As to remedies, in *Rodriguez*,¹⁴ the UNHRC found that the adoption of a law by Uruguay to extend amnesty to perpetrators of torture and other crimes during the military regime had the effect of preventing the victim from accessing justice. Yet the victim was entitled to a proper investigation of the circumstances of torture and perpetrators being brought to justice.

4.2.3 FGM as violation of freedom from torture

Studies and oral testimony concur that the administration of FGM is marked by infliction of severe pain. As already discussed, FGM is a practice imbedded in gender stereotyping and discrimination as provided for in the definition of torture. There is active undertaking by the administrators who intentionally administer the procedure in an environment where pain cannot be medically managed. Those who administer it have a specific purpose of controlling sexuality of women by virtue of being women.

4.2.4 FGM as constituting degrading treatment

Once it has been established that victims of FGM feel a sense of humiliation, it can be argued that their right to be freed from degrading treatment has been violated.

10 M Novak *UN Covenant on Civil & Political Rights: CCPR Commentary* (2nd ed, 2005) 161-163.

11 As above.

12 UNHRC *General Comment 20* para 3.

13 Novak (n 10 above) 163.

14 *Rodríguez v Uruguay* Communication No 322/1988.

4.2.5 *Appropriate remedies*

In seeking remedies for violations arising out of FGM, one must take into account the motive behind litigation advocacy or impact advocacy as opposed to individual-centric litigation. The former is premised on achieving cross-cutting impact on a group or section of the population rather than merely achieving an isolated victory for one applicant.

Therefore, remedies requiring states to launch a genuine investigation into the practice of FGM to identify the carriers and stewards of the practice must be conducted. The final outcome must be one where such perpetrators of torture and degrading treatment must be brought to justice in countries where criminalisation of FGM exists. However, further remedies could be provided to victims of FGM who have proved violation of their rights and freedoms such as recovery and support services required by CEDAW and Maputo Protocol.

4.2.6 *Right to bodily integrity*

The right to bodily integrity is often inferred in the right to security of the person. It involves the inviolability of the physical body and emphasises the importance of personal autonomy and the self-determination of human beings over their own bodies. It considers the violation of bodily integrity as intrusive and possibly criminal.

In its *General Comment 20*, the UNHRC held that article 7 of the ICCPR has the effect of protecting ‘both the dignity and the physical and mental integrity of the individual’. The physical integrity of the individual is often violated through external actions that have the effect of altering the physical form of that body. Violation is presumed where there was no consent to such alteration.

4.2.7 *Freedom from discrimination and the right to equality*

FGM and to an extent child marriage, are based on, among others, cultural and in other cases religious beliefs premised on and or designed to reinforce stereotypes of gender roles between women and men. Articles 5 of CEDAW and 2(2) of the Maputo Protocol require state parties to adopt legislative and other measures to ‘modify the social and cultural patterns of conduct of men and women ... with a view to achieving the elimination of harmful cultural and religious practices ...’

‘Discrimination against women’ is defined as

any distinction, exclusion or restriction or any differential treatment based on sex and whose objectives or effects compromise or destroy the recognition, enjoyment or the exercise by women, regardless of their marital status, of human rights and fundamental freedoms in all spheres of life.¹⁵

15 Articles 1 & 1(f) of CEDAW and the Maputo Protocol, respectively.

In a claim of discrimination against women as a result of FGM, it must be demonstrated that the practice leads to any of the effects contained in the definition above. Lawyers must specifically plead that FGM compromises and or destroys the ‘recognition, enjoyment or exercise by women’ of the right to equality as provided by law, among other violations to be discussed below. This is confirmed by the fact that FGM does not have any medical or health benefit.

In societies where FGM is required as a way to control women’s sexuality, it must be possible to argue and prove that women are again discriminated against as their freedom to determine their sexuality is ‘compromised’ when society demands that their sexuality be controlled yet men are endowed with sexual dominance and independence.

Within the context of harmful practices, states have a
 due diligence obligation to prevent acts that impair the recognition, enjoyment or
 exercise of rights by women and children and ensure that private actors do not engage
 in discrimination against women and girls, including gender-based violence ...¹⁶

Hence the fact that administrators of FGM are cultural and community leaders is no defence once the due diligence obligations have been invoked.

4.3 Linking child marriages to human rights violations

The practices of child marriages, which in a way are presumed forced marriages, affect a wide range of the rights of children as enshrined by the leading instruments discussed in Chapter 3.

4.3.1 *Best interest of the child principle*

The best interests of the child is the underlying principle in the CRC and ACRWC.¹⁷ In *General comment 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art 3, para 1)*, the CRC Committee noted that:

The concept of the child’s best interests is aimed at ensuring both the full and effective enjoyment of all the rights recognized in the Convention and the holistic development of the child. The Committee has already pointed out that ‘an adult’s judgment of a child’s best interests cannot override the obligation to respect all the child’s rights under the Convention.’ It recalls that there is no hierarchy of rights in the Convention; all the rights provided for therein are in the ‘child’s best interests’ and no right could be compromised by a negative interpretation of the child’s best interests.¹⁸

16 *Joint General Recommendation* para 11.

17 Articles 3 & 4 of the CRC & ACRWC, respectively.

18 1(A)(3) (footnotes omitted).

The best interests of the child principle in the context of harmful practices must be read together with article 21 of the ACRWC which clearly requires state parties to eliminate child marriages. In *General Comment 17* and the *Joint General Recommendation*, child marriages have been identified by the CRC Committee as examples of harmful practices that is also a reflection of violence against children.¹⁹ The best interests principle is a general principle of law that finds expression even in domestic law due to its importance in applying the child rights-based approach to issues affecting children.

4.3.2 *Right to survival and development*

The preambular provisions of both the CRC and ACRWC make reference to the survival and development of the child as one of the drivers behind the adoption of the instruments by the UN and AU. In articles 6(1) and 5(2) of the CRC and ACRWC, respectively, state parties 'shall ensure, to the maximum extent possible, the survival, protection and development of the child'.

Expanding on 'development', the CRC Committee explained in *General Comment 5 (2003): General Measures of Implementation of the Convention on the Rights of the Child*, that:

The Committee expects States to interpret 'development' in its broadest sense as a holistic concept, embracing the child's physical, mental, spiritual, moral, psychological and social development. Implementation measures should be aimed at achieving the optimal development for all children.

A case must be made that the betrothal of girls or boys into an early marriage works in clear contrast to the right to survival and development of the child. On demonstrating the effects of child marriage on a girl child, OHCHR *Fact Sheet 23, Harmful Traditional Practices Affecting the Health of Women and Children* observed as follows:

Child marriage robs a girl of her childhood-time necessary to develop physically, emotionally and psychologically. In fact, early marriage inflicts great emotional stress as the young woman is removed from her parents' home to that of her husband and in-laws. Her husband, who will invariably be many years her senior, will have little in common with a young teenager. It is with this strange man that she has to develop an intimate emotional and physical relationship. She is obliged to have intercourse, although physically she might not be fully developed.²⁰

¹⁹ CRC Committee *General Comment 17* para 29.

²⁰ Section D.

4.3.3 Requirement to consent to marriage

Articles 12(2) and 4(2) of the CRC and ACRWC, respectively, enjoin state parties to ensure that the views of the child are taken into account in matters affecting them.

According to the CRC Committee making reference to article 12(2) of the CRC on the right of the child to be heard,

this principle, which highlights the role of the child as an active participant in the promotion, protection and monitoring of his or her rights, applies equally to all measures adopted by States to implement the Convention.²¹

When the decision to marry away a child lies solely with adults, the result is a clear violation of the child's right (as a person) to consent freely to marriage in terms of article 16(2) of the UDHR, article 16(1)(b) of the CEDAW, and article 6(a) of the Maputo Protocol which provides that 'no marriage shall take place without the free and full consent of both parties'. Although restrictively applicable, article 8(2) of the SADC Gender Protocol reiterates the same position. Accordingly, child marriages are a violation of the universally acknowledged right to choose and consent to marriage freely and fully. The parent's guardian's consent cannot replace that of the prospective spouse.

4.3.4 Right to education

The practice of child marriages is ruthless in that the possibility of a girl commencing or continuing with school is permanently foreclosed. Once married, the expectation is that she commences marital responsibilities including child-bearing.

Articles 28 and 11 of the CRC and ACRWC, respectively, generally provide for the right of every child to education without discrimination. In particular the provisions require it to be 'free and compulsory' and to ensure 'regular attendance in school'. These two state obligations are clearly violated by the practice of child marriages.

In *General Comment 1 (Aims of Education)*, the CRC Committee reiterated that the aims of education are:

designed to provide the child with life skills, to strengthen the child's capacity to enjoy the full range of human rights and to promote a culture which is infused by appropriate human rights values. The goal is to empower the child by developing his or her skills, learning and other capacities, human dignity, self-esteem and self-confidence.²²

21 CRC Committee *General Comment 5 (2003): General Measures of the Convention on the Rights of the Child* 4.

22 CRC Committee *General comment 1 (2001), Article 29 (1), The aims of education* 17 April 2001, CRC/GC/2001/1, Appendix, para 2.

Accordingly, a state that tolerates child marriages violates a child's right to be prepared for life by being equipped with critical skills for participating in national and personal development.

4.3.5 *Slavery and servitude*

Freedom from slavery and servitude is a human right that cannot be limited, and this approach has been embedded in national bills of rights.²³ The International Court of Justice has identified protection from slavery as one of two examples of 'obligations *erga omnes* arising out of human rights law', or obligations owed by a state to the international community as a whole.

The *Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery* of 1956 adopted under the auspices of the UN has elaborated on the principle of 'servile' slavery by providing that any institution or practice whereby a woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any person or group, has been recognised as a form of slavery.²⁴

Key elements of slavery include

- (i) the degree of restriction of the individual's inherent right to freedom of movement; (ii) the degree of control of the individual's personal belongings; and (iii) the existence of informed consent and a full understanding of the nature of the relationship between the parties.²⁵

A child marriage epitomises an arrangement where the three above elements are present. The age difference between the adult husband and the child results in the ultimate control of the child by the husband including restrictions on movement to limit contact between the child and other people. In the circumstances, depending on each situation, a child marriage could very well qualify as servile servitude.

4.3.6 *Freedom from sexual abuse*

Child abuse takes different forms. Articles 34 and 16 of the CRC and ACRWC, respectively, require states 'to protect the child from all forms of sexual exploitation and sexual abuse'. In *General Comment 13*, the CRC Committee has identified

23 Constitution of Mauritius (1984) art 6; Constitution of Malawi, art 27.

24 OHCHR *Abolishing slavery and its contemporary forms* (2002) para 16.

25 As above.

‘forced marriage’ as an example of sexual abuse.²⁶ Further, from the perspective of the marrying adult, sex is at the centre of the child marriages enterprise. That is the benefit the marrying adult man gets from the ‘transaction’ – sexual relations with a virgin child. But due to the obviously early and premature induction of the girl child into married life, a case could be made that the child is being sexually abused.

4.3.7 Sexual and reproductive rights

Almost all of the reports on child marriages around the world have revealed that once married a child loses, any form of control over her life including in matters such as sexual intercourse, family wealth, and freedom of movement. This is as a result of the striking inequality of rights in the marriage on account of age difference.

Article 14(1)(b) of the Maputo Protocol confers upon women the ‘right to decide whether to have children, the number of children and the spacing of children’. This is one of the areas severely affected by the bias of marital power. This is the embodiment of the sexual and reproductive health right (SRHR) of women.²⁷

In its *General Comment 2*²⁸ the ACHPR states Women’s rights to sexual and reproductive health include: the right to control their fertility, the right to decide the number of children and the spacing of children, the right to choose any method of contraception, and the right to have family planning education.

The ACHPR further stated that the components of the rights stated in the above quotation are ‘inextricably linked, interdependent and indivisible’.²⁹

4.4 Conclusion

The next Chapter provides a summary of prevailing jurisprudence on FGM/child marriages. The approach is selective in that the comparative jurisprudence is that which focussed on harmful practices in the form of FGM/child marriages or any other type of harmful practices. The jurisprudence also covers leading literature on the subject such as general comments.

26 CRC Committee *General Comment 13 (2011): The right of the child to freedom from all forms of violence* 18 April 2011, CRC/C/GC/13 para 26.

27 In total about 12 rights are associated with SRHR.

28 ACHPR *General Comment 2 on Article 14.1(a), (b), (c) and (f) and Article 14. 2(a) and (c) of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa* Preface.

29 Para 23.

CHAPTER 5: CASE LAW AND JURISPRUDENCE RELEVANT TO HARMFUL PRACTICES



CHAPTER 5: CASE LAW AND JURISPRUDENCE RELEVANT TO HARMFUL PRACTICES

5.1 Introduction

Jurisprudence, including international case law, is persuasive, binding or interpretative depending on the jurisdiction it comes from and the status of international law in the particular state. Domestic courts are generally protective of their jurisdiction to the extent of launching scathing resistance to international case law that may be viewed as seeking to bind them especially in cases of competing jurisdiction.¹ National law defines the procedure for the reception of international and foreign law including judgments.

5.2 International jurisprudence on harmful practices

This includes jurisprudence produced at the UN level, case law from international tribunals such as the ICJ and ad hoc criminal tribunals and decisions by treaty monitoring bodies especially the CRC Committee, CEDAW Committee.

5.2.1 Slavery or servitude

Prosecutor v Kunarac (Defining Enslavement)

In *Kunarac*,² the defendants were charged with enslavement for acts that included keeping two girls in a house for several months and treating them as personal property. The girls were required to do all household chores and comply with all sexual demands.

Elements of control and ownership: the restriction or control of an individual's autonomy, freedom of choice or freedom of movement; and the accruing of some gain to the perpetrator. The consent or free will of the victim is absent. It is often rendered impossible or irrelevant by, for example: the threat or use of force or other forms of coercion; the fear of violence, deception or false promises; the abuse of power; the victim's position of vulnerability; detention or captivity; psychological oppression; or socio-economic conditions. Further indications of enslavement include: exploitation; the exaction of forced or compulsory labour or service, often without remuneration and often, though not necessarily, involving physical hardship, sex, prostitution and human trafficking.

1 Y Shany *The competing jurisdiction of international courts and tribunals* (2008), generally.

2 Case no IT-96-23 (22 February 2001) and Case no IT-96-A (12 June 2002).

*Koraou v Niger*³

Ms Koraou was sold into sexual slavery at age 12 years and worked for about 9 years, doing unpaid household chores and agricultural labour as a religious practice of 'wahiya'.⁴ She was also used as a concubine (sex slave) and eventually bore four of her master's children, of which two survived. When she sought to leave the service of her 'master' she was denied the right to do so. She contested the arrangement before the ECOWAS Court of Justice, which reiterated the principle that exhaustion of local remedies is not required when approaching the Court.

The issues in this case could fall under articles 2(2) (commitment to modify social and cultural patterns of conduct), 3 (right to dignity) and 4 (right to life, integrity and security of the person) of the Maputo Protocol and articles 27 of ACRWC and articles 19 and 34 of the CRC.

*5.2.2 State responsibility for acts of non-state actors**Velásquez Rodríguez v State of Honduras*⁵

This case involved a student who was allegedly detained without warrant, tortured by police and disappeared. The case is notable for a comprehensive statement by the Court on states' human rights obligations. The Inter-American Court confirmed that:

[T]he State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and ensure the victim adequate compensation.⁶

This case is the leading authority on the principle of state responsibility for acts of non-state actors that violate the rights of girls and women.

*5.2.3 Discrimination on the basis of custom**Mojekwu & others v Ejikeme & others*⁷

A man died intestate in 1996 without any surviving children. The appellants were the deceased's two great grandsons, and his granddaughter. The granddaughter

3 (2008) AHRLR 182 (ECOWAS 2008).

4 'A practice obtaining in the Republic of Niger, which consists of acquiring a young girl, generally under the conditions of servitude, for her to serve both as domestic servant and concubine. A woman slave who is bought under such conditions is called a sadaka, or "the fifth wife", that is to say, a woman outside those legally married (the number of which cannot exceed four, in accordance with the recommendations of Islam)' para 9.

5 Judgment of July 29, 1988, Inter-AmCtHR (Ser C) No 4 (1988).

6 Para 174.

7 (2000) 5 NWLR 402.

was born to the deceased's daughter and the great grandsons were born to her two daughters. The appellants claimed that the *Nnewi* custom of *Nrachi*⁸ had been performed for the daughter and accordingly the appellants were entitled to inherit the deceased's property.

Applying article 2 and 5 of the CEDAW, the Court held that article 5 of CEDAW calls on states parties to modify social and cultural patterns of conduct in order to eliminate prejudices, customs and practices based on the inferiority or superiority of either sex. The Court held that the *Nrachi* custom, which is designed to oppress and cheat women and compromises the basic tenets of family life, was inequitable and judicially unenforceable. Accordingly, a female child does not need the performance of *Nrachi* in order to inherit her deceased father's estate.

Bhe v Magistrate, Khayelitsha & others⁹

The applicant approached the Court on behalf of her two minor daughters for an order declaring the rule of primogeniture unconstitutional in order to enable the daughters to inherit. The applicant further challenged this rule in the public interest, in the interest of female descendants, descendants other than the eldest descendants and extra-marital children. The Court stated that to the extent that the primogeniture rule prevents all female children from inheriting, it was discriminatory. The Court held as follows:

The exclusion of women from inheritance on the grounds of gender is a clear violation of section 9(3) of the Constitution. It is a form of discrimination that entrenches past patterns of disadvantage among a vulnerable group, exacerbated by old notions of patriarchy and male domination incompatible with the guarantee of equality under this constitutional order.¹⁰

Mmusi & others v Ramantele & others¹¹

The Court had to determine whether the *Ngwaketse* customary law, to the extent that it denies the applicants the right to inherit the family residence intestate, solely on the basis of their sex, violates their constitutional right to equality under section 3(a) of the Constitution of Botswana.

After reviewing the provisions of the ICCPR, African Charter, CEDAW, CERD

8 'The *Nrachi* custom enabled a man to keep one of his daughters perpetually unmarried under his roof in order to raise children, especially males, to succeed him. Any such daughter took the position of a man in the father's house and was entitled to inherit her father's property, and any children born to the woman would automatically be part of the father's household and accordingly entitled to inherit' para 2.

9 2005 (1) SA 580 (CC).

10 Para 91.

11 MAHLB 000836/2010.

and comparative decisions of foreign courts, the Court ruled that discrimination based on customary law cannot be allowed to hinder the constitutional agenda of non-discrimination and equality before the law.

This decision is critical as it touches on the role of ratified international treaties in interpreting national legislation, the ideal approach to constitutional interpretation and acceptance of General Comments and UN agencies reports as part of the body of law and evidence a national court may rely on when determining issues.

*Ms X v Argentina*¹²

The IACHR declared the practice of mandatory vaginal exams of women by prison officials a violation of articles 5 (humane treatment and respect for personal integrity), 11 (right to privacy), 17 (protection of the family) and 19 (rights of the child) of the American Convention. It also constituted a form of discrimination against women, since men were not subjected to a similar search. Prisons in Argentina required women and girls who wished to visit inmates to undergo a physical check which included a vaginal inspection. In this case the petitioner and her daughter, a minor, were forced to undergo this intrusive search every time they wished to visit the petitioner's husband in prison. This decision is particularly significant for establishing a close connection between the right to privacy and the right to physical and psychological integrity.

This case is relevant to articles 4 (right to life and integrity of the person), 5 (right to dignity), 6 (right to liberty and security of the person) and 18(3) (elimination of discrimination against women as stipulated in international declarations and conventions) of the African Charter, and articles 2 (elimination of discrimination), 3 (right to dignity) and 4 (right to life, integrity and security of the person) of the Women's Rights Protocol, though neither the African Charter nor the Women's Rights Protocol refers to privacy explicitly.

5.2.4 Criminalisation of FGM

*Law & Advocacy for women in Uganda v Attorney General*¹³

The Applicants sought a declaration that the custom and practice of FGM as practiced by several tribes in Uganda is inconsistent with the Constitution of the Republic of Uganda, 1995 to the extent that it violates articles 2(2) 21(1), 24, 27(2), 32(2) and 33 thereof. As a result of this violation, the custom and practice of FGM should be declared null and void and unconstitutional.

12 Case 10.506, IACHR, 15 October 1996.

13 Constitutional Petition 8 of 2007 [2010] UGCC 4.

The application was granted uncontested declaring FGM as inconsistent with the 1995 Constitution. A law has since been enacted known as The Prevention of Female Genital Mutilation Act 5 of 2010. It punishes carrying out of FGM for up to 10 years, and up to life imprisonment for aggravated FGM.

5.2.5 Enforcement of national law to prevent harmful practices

*Sapana Malla v Office of Prime Minister*¹⁴

Notwithstanding the existence of a Nepalese law fixing the minimum age of marriage at 18 years and 20 years for girls and boys respectively, the practice of child marriages continued with little intervention by the state in terms of enforcing the law criminalising the same. The petition was for an order declaring certain provisions of the law unconstitutional and one forcing the state to enforce the law on child marriages as the practice continued unabated.

Relying on international human rights instruments such as the UDHR, the ICCPR, CRC, and CEDAW, the Court made a finding that these instruments were applicable to the extent that they obligated states to eradicate all forms of discrimination and that marriage must be entered into with full consent of the parties. The Court held that

child marriage is taking place and the Government needs to pay urgent attention towards its prevention, a directive order is hereby issued to the respondents to introduce amendments to the relevant laws with a view to acquiring consistency and uniformity between them and to implement and cause to be implemented effectively the relevant laws.¹⁵

This case is useful when lawyers require the state to either adopt legislation or effective enforcement of the law in order to bring an end to a harmful practice that continues to be

5.2.6 FGM recognised as ‘persecution’ for granting asylum

*Faustina Annan v Minister of Citizenship and Immigration of Canada*¹⁶

The applicant, a 23 year old Roman Catholic woman from Ghana, fled her country when a Muslim religious leader decided that excision should be carried out to ‘purify’ her.

The religious leader was acting at the instigation of a local Muslim police inspector’s son who, having failed to convince her to marry him, had kidnapped

¹⁴ WPN 98 of 2062 BS (13 July 2006).

¹⁵ At 45.

¹⁶ IMM-215-95 Canada Federal Court (6 July 1995).

the applicant and, with a few friends, gang-raped her. The Refugee Division rejected the applicant's claim to Convention refugee status on the basis that Ghana was not a Muslim country, that the practice of clitoral excision occurred only in certain parts of the north, that the government did not approve of the practice and that it was about to declare it illegal.

This was an application for judicial review of the latter decision. The facts clearly demonstrated that the applicant's fear was valid. Since it was established that the practice, while officially condemned, was still tolerated in Ghana, there was no basis upon which to conclude that if the applicant returned to her country, she could expect protection from the state.

The Court accepted FGM as a form of persecution for purposes of providing international protection.

The case law supports the view that FGM is a custom that adversely affects rights to the extent of qualifying as a form of persecution. It is also authority that states must protect their citizens from harmful practices such as FGM, failing the protection entitles victims to seek international protection. practiced despite existing law.

5.2.7 Annulment of a child marriage

*Advocate Prakash Mani Sharma for Pro Public vs His Majesty Government Cabinet Secretariat & others*¹⁷

The Supreme Court of Nepal directed the government to strictly implement the penal provisions under the Country Code to control the widespread practice of child marriages. The Supreme Court also nullified a law that only required a woman to approach the Court for annulment of marriage when she attains 18 years of age. The Court also ordered the government to launch awareness and other programmes to prevent child marriages across the whole country.

5.3 General Comments/Recommendations

General Comments are statements that provide authoritative interpretation of treaties. They give a succinct and precise elaboration of rights for the benefit of the duty and right holder. The General Comments to be summarised here are those with a bearing on the theme of harmful practices and or related rights.

17 WP 2991/1995 (Nepal Supreme Court, Joint Bench, 1997.06.09).

5.3.1 Joint General Recommendation/General Comment 31 of the Committee on the Elimination of Discrimination against Women and 18 of the Committee on the Rights of the Child on harmful practices (Joint General Recommendation)

Introduction and Rationale for the Joint General Recommendation

The CEDAW and the CRC contain legally binding obligations that relate both in general and specifically to the elimination of harmful practices.

Harmful practices are deeply rooted in societal attitudes according to which women and girls are regarded as inferior to men and boys based on stereotyped roles. These practices are used to justify gender-based violence as a form of 'protection' or control of women.¹⁸

Harmful practices are therefore grounded in discrimination based on sex, gender, age and other grounds and have often been justified by invoking socio-cultural and religious customs and values as well as misconceptions related to some disadvantaged groups of women and children.

Many other practices have been identified as harmful practices which are all strongly connected to and reinforce socially constructed gender roles and systems of patriarchal power relations and sometimes reflect negative perceptions or discriminatory beliefs towards certain disadvantaged groups of women and children, including individuals with disabilities and albinism. These practices include violent initiation rites.¹⁹ Harmful practices also include body modifications that are performed for the purpose of beauty or marriageability of girls and women.²⁰

The criteria for determining harmful practices are discussed in Chapter 1 above at 1.2.

5.3.2 CEDAW Committee General Comment No 14: Female Genital Mutilation

Adopted in 1990, this GC addresses the harmful practice of FGM by making specific recommendations to states. It is not a normative interpretation of any of the CEDAW provisions addressing harmful practices. It acknowledges the concerted efforts of different stakeholders in accelerating efforts to end the practice.

It is useful in litigation and advocacy work in that specific recommendations have been given to states, many of which are critical to understanding the nature

18 CEDAW General Recommendation 19 (11th session, 1992): *Violence against women* para 11; CRC General Comment 9 (2006): *The rights of children with disabilities* paras 8, 10 & 79; CRC General comment 15 (2013) *on the right of the child to the enjoyment of the highest attainable standard of health* (art. 24) paras 8 & 9.

19 CEDAW General Recommendation 19 para 11; CRC General Comment 13 (2011): *The right of the child to freedom from all forms of violence* para 29.

20 UN Secretary General's *Study on violence against children* A/61/299 (2006) para 46.

and impact of FGM on the rights of women and girls. It largely addresses the need of awareness about FGM at national level involving educational institutions, government institutions, traditional leadership and political leadership. It is a multi-stakeholder approach to disseminating information on the practice.

Relevant to their international obligations, the CEDAW Committee recommended that states include in their periodic reports information on measures adopted towards ending FGM in their territories.

5.3.3 General Recommendation 19: Violence against women

This General Comment is dedicated to dealing with violence against women including all manifestations of gender-based violence perpetrated by the state or private individuals.

It notes that there are traditional attitudes of regarding men as superior to women manifested in

forced marriage, and female circumcision. Such prejudices and practices may justify gender-based violence as a form of protection or control of women. The effect of such violence on the physical and mental integrity of women is to deprive them the equal enjoyment, exercise and knowledge of human rights and fundamental freedoms.²¹

The General Recommendation concludes by proposing a wide range of measures to be adopted in order to eliminate violence against women in general as well as reporting on such measures periodically.

5.3.4 HRC, General Comment 18: Non-discrimination

This General Comment is important in so far as it explains in great detail the principle of non-discrimination and equality between men and women. It clarifies instances of discrimination against women and measures states must take to bring about equality. It is related to CEDAW in that it borrows from its definitions of discrimination that do not appear in the ICCPR. It considers the approach and test to be taken whenever there are claims of discrimination while making a point that not all differentiation amounts to discrimination. This General Comment is critical in supporting arguments that harmful practices are based on discrimination and to demonstrate the differential treatment between men and women which serves no legitimate, legislative or governmental purpose under the Covenant on even national law.

21 Para 6 (Emphasis added).

5.3.5 CRC Committee General Comment 1: Education

This General Comment is an elaboration of article 29 of the CRC on the right and aims of education. It makes the points that the child's right to education is not only a matter of access (article 28) but also of content. An education with its contents firmly rooted in the values of article 29(1) is an indispensable tool for every child's efforts to achieve in the course of his or her life a balanced, human rights-friendly response to the challenges that accompany a period of fundamental change driven by globalisation, new technologies and related phenomena.

Germane to the current discussion is the notion that children who are married away early in life are deprived of education essentially pointing to the skills that education must establish in children. The argument is that without education such skills are never acquired thereby making the girl child completely irrelevant to society in case of abandonment by adult husbands. Therefore, this General Comment goes at length to explain the opportunity costs of child marriages.

CHAPTER 6: LITIGATING HARMFUL PRACTICES – BUILDING YOUR CASE



CHAPTER 6: LITIGATING HARMFUL PRACTICES – BUILDING YOUR CASE

This Chapter builds on previous chapters and provides practical considerations to inform building a case. A hypothetical case will be used to demonstrate the litigation process.

6.1 State responsibility for actions of private actors

Knowledge of the principle of state responsibility over acts of non-state actors in international human rights law is essential in litigating harmful practice cases. Harmful practices are practices attributed to private actors such as community, traditional and religious leaders as opposed to state practice or policy. Clarity must appear in submissions before courts that while harmful practices are attributed to non-state actors, state liability must arise where state complicity can be shown.

‘Non-state actors’ is a term adopted by the international community to refer to individuals, organisations, institutions and other bodies acting outside the state and its organs. The term is not limited to individuals since some perpetrators of human rights abuses are organisations, corporations or other structures of business and finance.¹

6.1.1 Proving state responsibility before national versus international judicial institutions

Depending on the national constitutional framework, the state may be cited together with a non-state actor for violating rights through practicing a harmful practice. However, some constitutions such as that of South Africa and Zimbabwe have bills of rights with horizontal application. Non-state actors or private parties may be cited as respondents and held accountable for violating the bill of rights without necessarily involving the state or government unless the relief being sought would need governmental intervention for implementation.

Once a party seeks international recourse, the state, having ratified a particular treaty, becomes the default respondent in allegations of violations taking place within its territory with no possibility of citing non-state actors. As a matter of fact, acts of non-state actors could be attributed to states if certain conditions are met.

1 Zimbabwe Human Rights NGO Forum v Zimbabwe (2006) AHRLR 128 (ACHPR 2006) para 136.

6.1.2 When a state assumes responsibility

The responsibility of states over acts of non-state actors was articulated by the Inter-American Court in *Velasquez Rodriguez v Honduras*,² a case on alleged enforced disappearances of political activists by non-state actors. The Court introduced the 'due diligence' test to human rights litigation when it held as follows:

An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.³

The African Commission also pronounced on the principle in *Zimbabwe Human Rights NGO Forum v Zimbabwe*⁴ where the applicants alleged that Zimbabwe ought to have been held responsible for actions of a political party that resulted in violations of human rights. The African Commission stated that

Any impairment of those rights [in the African Charter] which can be attributed under the rules of international law to the action or omission of any public authority constitutes an act imputable to the State, which assumes responsibility in the terms provided by the African Charter.⁵

A state would have failed to comply with its duty where it allows private persons or groups to act freely and with impunity to the detriment of the rights recognised by a treaty. This could be as a result of failure to adopt criminal legislation to punish acts of harmful practices or simply lack of enforceability of penal laws against perpetrators of harmful practices in their territories.⁶

In praying for relief, lawyers must identify the measures the state ought to have taken to prevent FGM and child marriages from being practiced in their territories. Further, submissions must include the measures taken by states after reports of harmful practices being practiced in communities. This will be the basis for holding states accountable and responsible for the acts of perpetrators of harmful practices.

2 Judgment of 29 July 1988, Inter-AmCtHR (Ser C) No 4 (1988)

3 Para 172.

4 (2006) AHRLR 128 (ACHPR 2006).

5 Para 142.

6 It is important to note that the 'due diligence' test has been adopted into UN human rights monitoring mechanisms.

The key inquiry into state responsibility is summarised in the following checklist.

Checklist in the state responsibility inquiry

- Was there an act or conduct amounting to violations of human rights?
- Was the act or conduct attributed to state or its agents or private persons?
- Was the conduct in question criminalised or otherwise prohibited by law?
- Did the state become aware of the conduct/act at the time of its commission?
- What did the state do to deal with perpetrator of the conduct in question?
- Did state intervention result in the termination of violation or holding private persons responsible for their actions?
- Were the measures taken by the state against the perpetrators able to bring relief to the victim(s) of their conduct?

6.2 The obligation to eliminate harmful practices

International law requires states to take all measures necessary to eliminate cultural, traditional, customary and religious practices that are based ‘on the idea of inferiority or superiority of either of the sexes or on stereotyped roles of men and women’.⁷ When ratifying CEDAW, states undertake in article 2(f) to ‘take appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs, and practices which constitute discrimination against women’.

In article 2, the Maputo Protocol specifically mentions ‘harmful practices’ when it provides that states shall:

[E]nact 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.

Article 1(3) of the ACRWC reiterates that ‘any custom, tradition, cultural or religious practice that is inconsistent with the rights, duties and obligations ...’ must be eliminated. Yet article 24(3) of the CRC requires states to take appropriate measures with a view to ‘abolishing traditional practices ...’

In its *General Recommendation 14 on Female Circumcision*, the CEDAW Committee recommended to states to ‘take appropriate and effective measures with a view to eradicating the practice of female circumcision’.

⁷ Article 5(a) of CEDAW.

6.2.1 *Obligation allows no reservation*

The obligation to eliminate harmful practices is a core obligation of states⁸ to the extent that any reservations that may be entered against this obligation are ‘incompatible’ with the cited treaties and invalid under international law. The obligation to eliminate harmful practices must be viewed and taken as the starting point in making submissions against harmful practices.

While adoption of measures to give effect to international obligations is always a prerogative of states in international litigation, lawyers have freedom to point out specific actions the state must take when litigating at national level. Adoption of legislation to deal with harmful practices is one specific measure anticipated by all treaties cited hence, in states where such law does not yet exist.

6.2.2 *Remedies for victims of harmful practices*

The success of the lawyers’ efforts in litigating against harmful practices will be partly measured or assessed on the degree of change brought about by the decisions they will obtain. This change is largely dependent on the particularity of the remedies being sought in the cases in as much as the quality of submissions would be equally important. Ending harmful practices through litigation will be achieved by a pursuit for remedial orders targeted at addressing the root drivers of harmful practices as opposed to generalised ones such as declarations of rights.

6.3 The remedial philosophy in harmful practice cases

The grund-objective in litigating against HPs is to seek their elimination. It is not so much about obtaining remedies for a single person, but seeking to dismantle the structural causes imbedded in customary, religious and social practices so as to achieve remedies impacting on a wide range of people especially potential victims of harmful practices.

Human rights remedies following violation of an international human rights treaty must achieve the principle in the *Chorzów Factory* case.⁹ The ICJ held that ‘reparations must, as far as possible, wipe out all consequences of the illegal act and re-establish the situation which would, in all probability have existed if that act had not been committed’.¹⁰

In the case of harmful practices, while situations of FGM and child marriages may be regarded as irreversible harm to the victims, the remedies to be sought must require states to adopt recovery/rehabilitation measures to rehabilitate

8 *Joint General Recommendation* para 13.

9 *Case concerning the Factory at Chorzów* 1928 PCIJ (ser A) No 17.

10 At 47.

victims in tandem with articles 29 and 39 of the CRC, for example. That way, remedies would have attempted to address harmful consequences of violation.

As to guaranteeing non-recurrence, a remedy may require the state to adopt legislation to prohibit the practice of any harmful practice backed up by a criminal sanction. Non-recurrence of violation could only be guaranteed where state parties heed the call and ‘modify’ certain attitudes and practices that perpetuate inequalities based on sex and gender. The eradication of harmful practices from practicing communities is the only way of guaranteeing non-recurrence of violation of rights through harmful practices.

6.4 Hypothetical Case Study: Building a harmful practice case before a national/international forum

In this part, practical issues in relation to the litigation of harmful practice cases are discussed. Peremptory considerations as well as stages involved in litigating harmful practice cases are noted alongside common mistakes made when litigating contentious issues.

Mookie, a 14 year old girl comes from a minority ethnic tribe of the Hoolas in an African state of the Democratic Peoples’ Republic of Zumba (Zumba). The state of Zumba consists largely of tropical forests with vast agricultural potential but limited to zero extractive mineral resources. With a population of 25 million, Zumba is one of Africa’s largest countries in size and population. Zumba obtained independence from colonial rule in 2010, whereupon it acceded to various international treaties including those on human rights such as the ACHPR, the ACRWC as well as the Maputo Protocol, CEDAW, the CRC, the two International Covenants on Civil and Political Rights and Economic – Social and Cultural Rights, and the Protocol to the African Court on the Establishment of the African Court on Human and Peoples’ Rights. All these instruments were acceded to *en masse* on 30 June 2010 so that Zumba could receive financial aid from international partners.

The Hoolas are known for the pride in observing their customs and traditions. Among others, they regard land as critical to their livelihood. The mountain Mora, which is hidden deep in the Morana tropical forest, is revered for its religious/traditional significance. The Hoolas regard the mountain as sacred and it is only visited by Chief Gago, a priest who is also part of traditional leadership and a local government official, to undertake atonements. He is also the leader of the community who is claimed to be the steward and custodian of the Hoolas traditions and customs.

In keeping with their traditions that favour male children over females, Mookie has never been in school although her two male siblings are just about to complete primary education at a boarding school in the nearest town which is 100 miles away.

It has emerged that a few weeks ago Mookie's parents betrothed her to Chief Gago the priest. This is done once every year when Chief Gago goes for atonement that he is given a new and virgin girl to represent the new life following atonement of sins for the previous year. Having been a priest for the past 15 years, Chief Gago now has 15 wives and several children. Chief Gago has not been able to look after his wives due to their number nor to provide sexual needs. As a result many of them have become idle but cannot leave the village as such behavior is punished by death.

It is part of the Hoolas' religious tradition that when a new religious leader assumes office, he should marry a virgin girl. The requirement for virginity meant that Mookie had to undergo virginity testing before she could be betrothed to Gago.

At the time of testing for virginity, it was discovered that from a young age, Mookie had her genitals cut as a tribal tradition to ensure that every girl does not grow up to become promiscuous but remain chaste until she gets married. The 'cutting ceremonies' are conducted in a secret place in the Morana forest. No one except Chief Gago and a few elderly women know the location where the ceremonies are held. It is believed that, due to harsh conditions in the forest, half of the girls between the ages of five and ten never make it back alive. Those who die are buried there and their parents are simply informed and never question it.

Mookie's mom has always been opposed to some cultural and religious traditions of the Hoolas in spite of the fact that she is also a Hoola. Perhaps this is because she comes from a modernised family which has been enlightened through urban education. Mookie's mother approaches you for advice on behalf of her daughter; the remedies available to her daughter as reported to the nearest police base that is 80 miles away have not yielded any results. It is known that the Constitution of Zumba provides for a modern bill of rights justiciable in the Court of Cassation in the capital city – 250 miles away from the village.

Zumba, as a modern state, also has a law known as the Punishment of Undesirable Practices Act of 2011, which punishes undesirable practices defined in article 20 as 'all acts or attitudes in contravention of international human rights law to which Zumba is state party'. This law has retrospective effect spanning 20 years back.

Advise on how best to assist Mookie's mother in the circumstances guided by the following issues:

6.5 Case selection

This refers to the very first thought process towards taking a harmful practice case to initiate the litigation process. The priorities or focus of this Manual are clear – litigating harmful practice cases in the form of FGM and child marriages with the primary objective to eliminate these two practices. Guided by the prevalence patterns and statistics as discussed in Chapter 1 and more, lawyers are advised to take cases on the basis of good evidence and prospects of success. Case selection for litigation at national level is dependent on a number of factors that also affect the choice of forum at the national level. These factors are discussed in the following headings:

Step 1 – Identification of a community practicing harmful practices

Lawyers will do well by identifying a community, be it ethnic, tribal or religious, that is known to practice FGM or child marriages. This is crucial as isolated cases of harmful practices may not garner the evidence required to move a national court to confront a harmful practice whereas litigating for group community interest would.

A community also guarantees availability of leaders to be cited as parties to the suit in order to impute acts of third parties or non-state actors on the state. Evidence of the use of the harmful practice in question will also be sourced and can be presented by way of affidavit evidence. Working with those in the community will inform availability of witnesses to testify as to the practice and prevalence of harmful practices, its causes and effects on victims.

Step 2 – Existence of a law prohibiting harmful practices

It should be fairly easy for national lawyers to verify whether or not a law exists that prohibits or penalises the practice of any of the harmful practices in question. Once that law exists then an obligation to end harmful practices through enforcement of the law exists in respect of the state. There must be a legal basis to seek the enforcement of that law as a measure to end harmful practices. It is also important to check the constitutional provisions to see the extent to which they protect certain human rights impacted upon by harmful practices.

Step 3 – the impact of the remedies being sought

This manual makes a case for impact litigation as the preferred approach as opposed to individual-centric remedies. Remedies with a far-reaching impact on

the rights of the affected people must be chosen. The lawyer must agree with the client on the remedial approach bearing in mind the approach by domestic courts that orders must be particular and must only apply to the parties to the dispute. In some cases, it would be prudent to cite all available applicants rather than waiting for an outcome that may not have the effect of general measures to address the structural issues leading to violations.

6.6 Gathering evidence

Lawyers must realise that international fora for litigation such as treaty monitoring bodies and the ACrtHPR are far removed from the scene of violations of human rights hence they entirely depend on information or evidence provided by the parties to determine disputes before them. Due to the margin of appreciation, they are more inclined to exercise deference to state if evidence is provided at the level of balance of probability. Accordingly, data must be methodically, thoroughly and systematically collected and presented. In *Guinea v Democratic Republic of Congo*,¹¹ the ICJ held that

The determination of the burden of proof is in reality dependent on the subject-matter and the nature of each dispute brought before the Court; it varies according to the type of facts which it is necessary to establish for the purposes of the decision of the case.

Although the general rule is for the party which alleges a fact in support of its claims to prove the existence of that fact (*onus probandi incumbit actori*).¹²

6.6.1 All-in approach to evidence

All the necessary evidence must be gathered in full right from the onset. There is no need to file a petition before the required evidence has been obtained. It is highly undesirable to gather evidence congruent to litigation stages such as admissibility (preliminary objections in national litigation) and then on the merits of the case.

Lawyers must be aware of the different dynamics at play when gathering evidence for litigation at national and international levels. Key to this process is the realisation that while evidence for ordinary litigation is often sourced by clients themselves, evidence to prove a violation of human rights is highly technical in nature to the extent of requiring the involvement of lawyers and often other experts from diverse fields.

¹¹ (2010) AHRLR 3 (ICJ 2010) para 54.

¹² As above.

6.6.2 Fact-finding/baseline surveys

To avoid the risk of relying almost exclusively on information on harmful practices disseminated through mass-media, an approach disfavored in international litigation,¹³ it could be necessary to carry out baseline surveys or fact-finding missions for the purpose of establishing a factual foundation regarding harmful practices. When conducting onsite visits, lawyers and or research missions must be equipped with proper research instruments prepared by people with an understanding of the nature of information and the purpose for which it is required.

While onsite visits are critical, lawyers must acquaint themselves with the risk that gathering information in another country may require prior clearance by local authorities such as research boards, unless they have a local contact under whose name all research could be conducted.

It is also necessary to abide by cardinal research ethics such as protection of respondents by practicing anonymity when same has been requested during field missions. In some cases, reprisals could be carried out on informants in the form of arrests or simply being shunned by community members for giving away 'sacred' information regarding certain traditional, cultural or religious information.

6.6.3 Reports by credible organisations

In Chapter 1, this Manual criticised the absence of consistent and aggregated data on the prevalence and pattern of harmful practices in Africa. Even the *African Common Position on the AU Campaign to End Child Marriages in Africa* encourages states to 'establish data systems reflecting age and gender disaggregated data on the nature and magnitude of CM'.¹⁴ As such reliance must be placed on findings from research conducted by credible organisations using acceptable research methodology. As was done in *Law & Advocacy for Women in Uganda v Attorney General*,¹⁵ which a national court readily accepted in evidence.

6.6.4 Affidavits and other documentary evidence

Affidavits from people knowledgeable about the practice of any of the harmful practices in question are mandatory because by their nature international courts and treaty monitoring bodies are 'paper courts'. Litigation outcomes are dependent on the persuasion carried by the evidence all of which needs to be attached to the petition. Anything left out has no possibility of inclusion once

13 Article 56(4) of the African Charter.

14 First meeting of the Specialised Technical Committee on Social Development, Labour and Employment (Stc-Sdle-1) Addis Ababa, Ethiopia 20-24 April 2015, para 15.

15 [2010] UGCC 4.

the proceedings have commenced. A sample affidavit is attached as **Annex B**. The affidavits must not only confirm the practice but also relay in detail how the harmful practices in question are carried out in order to leave the court or forum in no doubt as to the ‘harmful nature’ of harmful practices.

Medical affidavits and reports on FGM and child marriages must be captured in documentary evidence and used appropriately.

6.6.5 Photographic or film-based evidence

The IACrTHR in *Mayagna (Sumo) Awas Tingni Community v Nicaragua*,¹⁶ dealt with a case that involved refusal by the respondent state to recognise the historical land ownership of the Awas Tingni, a community that exclusively survived on working the land. Documentaries were played to the IACrTHR and accepted as proof of the community’s cultural way of life. Such ingenuity is required where the burden of proof is heavily placed on the applicant to prove certain facts.

In the *Awas Tingni* case, newspaper cuttings were accepted in evidence especially because the other party did not object to their admission. It may be useful to produce video evidence of how FGM is undertaken. The idea is to move a court, especially an international court, to appreciate the basis of the claim and the harmful effects associated with harmful practices. Rules of evidence and procedure applicable to that court or forum must be strictly adhered to.

6.6.6 Witness identification and preparation

Identification, summoning and right to cross-examine witnesses called by the other party to proceedings (both criminal and civil) is a practice rooted in the right to a fair trial. National lawyers are aware of the procedure and rule of admissibility of evidence at that level.

However, supra-national litigation is sensitive to the calling of witnesses because such forums are predominantly paper-based. However, and as discussed, the ACrHPR and the ECJ accept in their Rules of Procedures the possibility of allowing witnesses to testify to the court.¹⁷ This means lawyers may find value in calling witnesses before these forums to add weight to allegations taking into account the probative value of the evidence ascribed under civil and common law jurisdictions. In *Chacha*, the ACrHPR, without stating reasons, decided against hearing expert testimony on Tanzanian criminal procedure and preferred to rely on evidence filed as well as other witnesses called by the parties.¹⁸

16 Judgment of August 31, 2001 (Merits, Reparations and Costs) paras 92-99.

17 See *Manneh v The Gambia* (2008) AHRLR 171 (ECOWAS 2008) paras 7-9. The ACrHPR heard oral evidence in *Chacha v Tanzania* Application No 003/2012.

18 *Chacha* (n 16 above) para 50.

6.6.7 *Amicus curiae*

National and international tribunals are amenable to this procedure provided that the court remains in control of the process. By their nature, harmful practices are grounded in tradition. A few individuals and or experts are the ones who may be custodians of the customs. There is a need to involve such persons. One way to do that is through the amicus procedure. In *Hoffmann v South African Airways*,¹⁹ an *amicus* was described as follows:

Amicus curiae assist the court by furnishing information or argument regarding questions of law or fact. An *amicus* is not a party to litigation, but believes that the court's decision may affect its interest. The *amicus* differs from an intervening party, who has a direct interest in the outcome of the litigation and is therefore permitted to participate as a party to the matter. An *amicus* joins proceedings, as its name suggests, as a friend of the court ... It joins in the proceedings to assist the court because of its expertise on or interest in the matter before the court.

6.7 Choice of forum

Choosing the proper forum is imperative for lawyers. Again a number of factors are taken into account. National law invariably provides for jurisdiction of each court. On their part statutory offences such as FGM and child marriages are usually allocated to a court that deals with them while petitions for orders such as those requiring the state to adopt laws to prohibit FGM or seeking effective enforcement of existing laws is usually an issue dealt with by superior courts. In this regard, the Manual again reiterates that national lawyers are masters of their court systems.

6.7.1 *Legal and institutional framework*

At international level, lawyers must be guided by the legislative and institutional framework discussion in Chapters 3 and 4 of this Manual. It is reiterated that child marriage cases could easily be taken to the ACERWC, the CRC Committee (once Third Optional Protocol enters into force and the state concerned has ratified both the CRC and the Protocol), and the ACrtHPR. FGM cases should ideally be filed before the forums that focus on women's rights. These include the CEDAW Committee, the African Commission and the ACrtHPR/ACJHR as the case maybe.

6.7.2 *Ratification status*

Imperatives such as the ratification status of the instruments establishing these forums override all other considerations. For instance, while the practice of FGM

19 2001 (1) SA 1 (CC) para 63.

in West Africa could best be addressed by the African Commission, the states concerned may not be state parties to the Maputo Protocol thereby foreclosing that possibility. It is important to verify at all times the treaty monitoring bodies' records for latest updates on ratification status of respective instruments that regulate contentious jurisdiction of that body.

6.7.3 Remedies being sought

Knowledge of the remedial competence of a forum is critical and national lawyers' knowledge of this is presumed. On their part, international forums have wide remedial competence. For instance, article 27(1) of the ACtHPR Protocol vests the Court with powers to make 'appropriate orders to remedy the situation'.

In *Guinea v DRC*,²⁰ the ICJ held that once a forum has jurisdiction to decide a dispute, there is no expectation that another basis for remedial competence (the power to render a remedy in those proceedings) must be conferred separately. It ordinarily follows that the forum that decides a dispute has competence to award specific remedies if violation is established.

6.8 Comprehensive breakdown of rights violations

It is the applicant's duty to prove violation of a right before a court. This process is facilitated by a strong body of evidence. It remains the duty of the applicant to apply the law to the facts in order to particularise and demonstrate the violation.

It is necessary to demonstrate to the court how the right or freedom in question has been interpreted by other courts or other authoritative interpreters of human rights instruments. For instance, treaty monitoring bodies have produced general comments on various rights and freedoms as they are provided for in international instruments. It is critical for the lawyer to consult such comments for a better understanding of the normative content of the right. CEDAW Committee *General Comment 14 on Female Genital Mutilation* and the *Joint General Recommendation* are critical in facilitating the comprehensive breakdown of rights and freedoms.

Equally important are general comments on individual rights and freedoms that are impacted by harmful practices such as violence against women, right to health, education, development and survival, birth registration, bodily integrity, human dignity, sexual and reproductive rights, freedom from slavery and so on. The lawyer must never assume that the court has the means to appraise itself on how harmful practices impact on other human rights of women and children.

²⁰ Note 11 above.

6.8.1 Relevant law and jurisprudence

The breakdown and articulation of rights by the lawyer is almost devoid of merit unless the process is punctuated by relevant law and jurisprudence. At national level the relevant law is either legislation adopted to prevent, prohibit and address harmful practices in a given state, or provisions of the national constitution. At international level it is relevant treaties. In general terms a treaty monitoring body or tribunal could draw inspiration from any other human rights treaty ratified by the state concerned.

The principle of 'compatibility' of communications enjoins petitions to be grounded in the provisions of the treaty which is relied upon.

6.8.2 Persuasive authority

Lawyers are presumed to be familiar with the distinction between binding and persuasive authority. At national level, especially in common law jurisdictions, decisions of superior courts are binding on all subordinate courts and tribunals under the judicial precedent (*stare decisis*) principle. Yet civil law jurisdictions, do not subscribe to the *stare decisis* principle. Therefore, at national level, foreign and international jurisprudence is only persuasive in nature. It only persuades a tribunal or court to accept the interpretation adopted in another case to the extent that it is applicable. International jurisprudence does not bind national courts and vice-versa. Nevertheless, each system must be willing to draw inspiration from the other in as much as general principles of law applicable at national level are regarded as legitimate sources of international law.²¹

6.9 Anticipated defences/justifications for harmful practices

Both lawyers and other advocates campaigning for the elimination of harmful practices should anticipate resistance from practicing communities, including individuals they would consider to be victims of the practice.

6.9.1 Harmful practices are a way of cultural/religious expression

It is anticipated that those who make use of harmful practices will very unlikely deny the existence of the practices. Rather they will justify the practices as forms of cultural and or religious expression. The practice of culture individually or in community of others is a right recognised in various treaties and national constitutions. Some would plead socio-economic factors such as poverty to justify child marriages, in the sense that the child is married to a person with the financial ability to look after her while the girl's family gets some monetary

21 Article 38(1) of the Statute of the International Court of Justice recognises general principles of law applicable at national level as a source of international law.

benefit as a once-off payment or regular piece-meal handouts.

In countries where FGM is administered in medical institutions, those who defend it will raise the fact that FGM has been widely attacked on the basis of the traditional way it is administered, but will now find justification in it being administered by medical practitioners.

Others will justify the type of cutting as falling far lower than the 'mutilation' threshold in the WHO FGM typology discussed in Chapter 1.

6.9.2 FGM and child marriages as a religious ritual

National courts tend to approach religion with caution as freedom of religion is considered by many states to be a fundamental human right. In *R v Big M Drug Mart*,²² it was held that the 'essence of religion' includes

the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination.

However, the religious justification cannot escape constitutional limitations placed on it. For example, the South African Constitution subjects the right to religion to other provisions of the Constitution.²³

The three key limitations placed on right to religion are that, first, it is in the inherent power of the courts to question the 'sincerity of a belief'.²⁴ The courts test whether a belief is part of a doctrine by evaluating its 'acceptability, logic, consistency, or comprehensibility'.²⁵ Courts would evaluate the sincerity of FGM or child marriage as a belief and subject it to other rights of women and children impacted by the belief. Second, the court would require the one who claims a belief to show 'substantial burden' (being prevented from practicing FGM/child marriage) on the exercise of the right or that the harmful practice is a 'central tenet' of the religion. Third, courts will not offer constitutional protection of practices that are excluded elsewhere in the Constitution. For instance, in the *Christian Education* case,²⁶ a belief that is considered contrary to children's basic education was regarded as not protected under the Constitution.

²² [1985] 1 SCR 295 336.

²³ Section 15(3)(b).

²⁴ *Christian Education SA v Minister of Education of the Government of the RSA* 1999 (9) BCLR 951 (SE).

²⁵ *Christian Education* 952.

²⁶ Note 45 above.

CHAPTER 7: ADVOCACY INITIATIVES TO ADDRESS HARMFUL PRACTICES



CHAPTER 7: **ADVOCACY INITIATIVES TO ADDRESS HARMFUL PRACTICES**

Advocacy is a helpful complement to impact litigation and it is important to be aware of campaigns relevant to your case. Familiarity with the latest research outcomes and changing trends in the practice of harmful practices is also very important.

7.1 Strategies aimed to end FGM/child marriages

The strategic areas are those situations that have been identified as either constituting structural flaws leading to the perpetuation of the practice of harmful practices, or key result areas that if exploited have the effect of striking at the core of harmful practices. This Manual makes a deliberate synergy between advocacy and litigation in a bid to achieve the same outcome – elimination of harmful practices, specifically FGM and child marriages. Lawyers must seek remedies in those particular areas while leveraging on advocacy of other stakeholders for the implementation of remedial orders so obtaine

7.1.1 Adoption of law to prevent, prohibit and punish harmful practices

One of the key result areas is the adoption by states of legislation to prevent, prohibit and punish the practice of harmful practices in their territories. By so doing, states would be giving effect to the provisions of international human rights instruments. The CEDAW requires states to

take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.¹

In resolutions adopted by different stakeholders, the call for legislative measures has been reiterated. The United Nations High Commissioner for Human Rights in a report to the Human Rights Council has noted a correlation between existence of legislation and reduction in FGM prevalence.² The Report established that

Burkina Faso has witnessed a reduction in the practice among young women and

1 Article 2(f).

2 'Good practices and major challenges in preventing and eliminating female genital mutilation' Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the

High Commissioner and the Secretary-General, 29th session, 27 March 2015.

has recorded at least seven convictions for practicing or abetting female genital mutilation ... Eritrea has convicted and fined at least 155 female genital mutilation practitioners, as well as parents of girls who underwent the practice, while Ethiopia has undertaken 13 prosecutions ... In Uganda, following the adoption of the Female Genital Mutilations Act in 2010, 15 cases were brought before courts and, in November 2014, five people were convicted for performing the practice.³

Legislative measures have also been reiterated by the AU; in its *African common position on AU campaign to end child marriage in Africa* reference is made to adoption of legislation to prevent, prohibit and punish child marriages in paragraphs 5 and 6 thereof.

States are encouraged to adopt legislation setting the minimum age for marriage at 18, as required by article 6(b) of the Maputo Protocol as well as article 8(2) of the SADC Gender Protocol. Such proscription is consistent with the definition of the child in article 2 of the ACRWC.

A number of states have responded by setting a minimum age of marriage, usually 18 years. However, many countries provide exceptions to the minimum age of marriage, on the basis of parental consent, judicial authorisation and exceptions based on customary or religious laws.

Litigation and advocacy strategies must be partly directed towards achieving consistency in national laws regarding the minimum age of marriage as well as that of consenting to sexual intercourse.

7.1.2 Keeping of marriage registers

Keeping accurate marriage registers at national level and committee implementation of marriage laws is one of the key strategies to monitoring prevalence of child marriages and informing intervention to eliminate child marriages. Through registers states monitor and ensure that those who seek to have their marriages recognised by law subject themselves to the imperatives such as ensuring they are of a marriageable age of 18 years.

As to the normative framework, article 21(2) of the ACRWC and article 6(d) impose the obligation on states to ensure that 'every marriage shall be recorded in writing and registered in accordance with national laws, in order to be legally recognised'. Countries such as Zimbabwe and Malawi that recognise an 'unregistered customary law marriage' must take measures to cease recognition of the latter, which is conducive to child marriages being practiced, disguised and justified.

3 Para 12.

7.1.3 Enforcement of laws prohibiting harmful practices

Much as legislative measures are important, they need to be implemented with commitment. The *Joint General Recommendation* observed the shortcomings of law and stated:

The enactment of legislation alone is, however, insufficient to effectively combat harmful practices. In accordance with requirements of due diligence, legislation must therefore be supplemented with a comprehensive set of measures to facilitate its implementation, enforcement, follow-up, monitoring and evaluation of the results achieved.⁴

7.2 International advocacy initiatives

In this case reference is made to such initiatives taking a global outlook as opposed to being confined to a specific geographical location. Notable initiatives underway include:

Girls not brides: The global partnership to end child marriage, hundreds of NGOs across Africa and beyond share experiences on what works to end child marriage and work together on joint programmes and advocacy initiatives to address the practice.

7.3 Regional (African) advocacy initiatives

The African Union (May 2014), launched the first-ever *AU Campaign to End Child Marriage in Africa*. The two-year campaign focuses on accelerating change across the continent by encouraging AU member states to develop strategies to raise awareness of and address the harmful impact of child marriage. The appointment by the African Union of a Special Rapporteur and a Goodwill Ambassador with a mandate exclusively focused on child marriage is also a promising sign of African commitment.

The African Committee of Experts on the Rights and Welfare of the Child (April 2014), adopted a declaration urging AU member states to set the minimum age for marriage at 18 years for both girls and boys without exception and to develop and implement holistic strategies to end child marriage.

African Union's Agenda 2063 is a 50-year vision and development agenda and includes a commitment to 'mobilise a concerted drive towards immediately ending child marriages, female genital mutilation and other harmful cultural practices that discriminate against women'.⁵ The need to end child marriage and other harmful practices affecting women and girls is imbedded in the Agenda.

⁴ Para 40.

⁵ Para 67(j).

ANNEX A: West and Southern Africa Ratification Status of Key Instruments

Key: CEDAW= Convention on the Elimination of all forms of Discrimination Against Women
CRC= Convention on the Rights of the Child
CCPR= Covenant on Civil & Political Rights
ACHPR= African Charter on Human and Peoples' Rights
ACRWC= African Charter on the Rights and Welfare of the Child
Maputo= Protocol on the Rights of Women in Africa
CRT 1= Protocol on the African Court on Human and Peoples' Rights
CRT 2= Protocol on the Statute of the African Court of Justice and Human Rights

ANNEX A: West and Southern Africa Ratification Status of Key Instruments

State	CEDAW	CRC	CCPR	ACHPR	ACRWC	MAPUTO	CRT 1	CRT 2
Angola	✓	✓	✓	✓	✓	✓	—	—
B. Faso	✓	✓	✓	✓	✓	✓	✓	✓
Benin	✓	✓	✓	✓	✓	✓	—	✓
Botswana	✓	✓	✓	✓	✓	✓	—	—
C.Verde	✓	✓	✓	✓	✓	✓	—	—
G.Bissau	✓	✓	✓	✓	✓	✓	—	—
Gambia	✓	✓	✓	✓	✓	✓	✓	—
Ghana	✓	✓	✓	✓	✓	✓	✓	—
Guinea	✓	✓	✓	✓	✓	✓	—	—
Lesotho	✓	✓	✓	✓	✓	✓	✓	—
Liberia	✓	✓	✓	✓	✓	✓	—	—
Madagascar	✓	✓	✓	✓	✓	✓	—	—
Mali	✓	✓	✓	✓	✓	✓	✓	—
Mauritius	✓	✓	✓	✓	✓	—	✓	—
Namibia	✓	✓	✓	✓	✓	✓	—	—
Niger	✓	✓	✓	✓	✓	—	✓	—
Nigeria	✓	✓	✓	✓	✓	✓	✓	—
S. Africa	✓	✓	✓	✓	✓	✓	✓	—
S. Leone	✓	✓	✓	✓	✓	—	—	—
Senegal	✓	✓	✓	✓	✓	✓	—	—
Seychelles	✓	✓	✓	✓	✓	✓	—	—
Malawi	✓	✓	✓	✓	✓	✓	✓	—
Mozambique	✓	✓	✓	✓	✓	✓	✓	—
Swaziland	✓	✓	✓	✓	✓	✓	—	—
Togo	✓	✓	✓	✓	✓	✓	✓	—
Zambia	✓	✓	✓	✓	✓	✓	—	—
Zimbabwe	✓	✓	✓	✓	✓	✓	—	—

ANNEX B: Sample expert affidavit

IN THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS HELD AT ARUSHA

In the Matter Between:

MOOKIE ZONGOZA

APPLICANT

And

**DEMOCRATIC PEOPLES' REPUBLIC OF ZUMBA
RESPONDENT**

AFFIDAVIT IN SUPPORT OF THE PETITION

I, [INSERT FULL NAMES] a female adult [INSERT FULL CONTACT ADDRESS INCLUDING COUNTRY] for purposes of this petition, do solemnly swear and state as follows:

1. THAT I was born in [INSERT COMMUNITY] located in the [INSERT EXACT LOCATION IN THE COUNTRY] where I know that [INSERT NAME OF TRIBE OR ETHNIC GROUP PRACTICING FGM] among other people, practice the custom of [FGM/CHILD MARRIAGE]. It is understood by this community that girls who are not 'cut' are unclean and not honorable. It is perceived that such girls will attract very little bride price as they will not be considered virgins at the time of marriage. All these considerations are taken seriously in my community to the extent that girls look forward to being cut in order to fit into society.
2. THAT I have been involved in community activities, including research into the practice of Female Genital Mutilation and I have therefore a wealth of knowledge about its practical and potential adverse effects to girls and women on whom it is practiced.
3. THAT I know that Female Genital Mutilation is carried out crudely and without anaesthesia which makes victims suffer excruciating pain. A girl or woman being cut is in fact tied up with ropes and in some cases pinned to the ground by more than three women while the procedure is being administered.
4. THAT invariably, victims of FGM go through excessive bleeding which may lead to death. I have no doubt that the process leaves many victims traumatised, and in many cases maimed for life depending on the type of procedure each one of them receives from the 'surgeons'. These 'surgeons' are known in the community and I can identify them by names if needs be.
5. THAT the practice is carried out crudely by female traditional so called 'surgeons' who cut girls' and women's genitalia wantonly since the victim has no right to choose how to be cut.

ANNEX B: Sample expert affidavit

6. THAT I am aware of the adverse effects of FGM on account of observation of victims who went through the procedure in my community. The procedure deforms and materially alters the genitalia of the victims thereby permanently altering the bodily integrity of a woman.
7. THAT often times, the procedure results in victims suffering from urinary incontinence (the failure to contain urine), which results in continued urinary odour thus rendering such victim a social outcast.
8. THAT I have also personally known of deaths of girls and women to have directly resulted from FGM.
9. THAT I have known of some cases where girls and women have lost their senses due to the trauma associated with FGM; and other girls and women have suffered paralysis and lost their capacity to walk as a direct result of FGM, thus being rendered disabled.
10. THAT use of same cutting implements on different victims endangers lives of FGM victims because it exposes the victims to acquire HIV/AIDS.
11. THAT I believe that the cultural practice of Female Genital Mutilation has no medical and social benefits and violates human rights provided for under the Constitution [INSERT NAME OF STATE] and international human rights Covenants such as The Convention on rights of the Child, the International Covenant on Economic, Social and Cultural Rights (ICESCR) and is not justifiable in a democratic society.
12. THAT I swear this affidavit in support of the petition to the Honourable Court to declare the practice of FGM unconstitutional for the reasons given above.
13. THAT the facts I have stated herein is true to the best of my knowledge, belief and information.

THUS DONE AND SWORN TO AT [INSERT PLACE INCLUDING CITY AND COUNTRY]
ON THE [INSERT DAY, MONTH AND YEAR]

SIGNED BY THE DEPONENT:

.....

[INSERT NAME OF DEPONENT]

BEFORE ME:

.....

NOTARY PUBLIC