

To cite: M Lasseko-Phooko 'Legislating against adult women's consent to female genital mutilation: A feminist analysis of state practice in light of the Joint General Comment on Female Genital Mutilation by the African Commission and the African Children's Committee' (2024) 24 *African Human Rights Law Journal* 533-558
<http://dx.doi.org/10.17159/1996-2096/2024/v24n2a6>

Legislating against adult women's consent to female genital mutilation: A feminist analysis of state practice in light of the Joint General Comment on Female Genital Mutilation by the African Commission and the African Children's Committee

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Summary: *This contribution is concerned with women who opt to undergo female genital mutilation in adulthood. While contentious, the idea that a woman can consent to FGM is condoned in certain African countries in law and in practice. There is an uneven treatment of consent in relevant FGM laws on the continent. States have an obligation to eradicate the practice of FGM, including ensuring that consenting to FGM is impermissible in law. This contribution scrutinises an equality*

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argument in support of consent to FGM for adult women, investigates states' legislative approaches to consent as adopted by select member states that are party to the African Women's Protocol and whether their laws adopt a wholistic approach to eradicating FGM. These approaches are considered from a feminist perspective taking account of the historical place of feminist analysis in the formulation of FGM as a human rights issue under international law. It includes a consideration of state obligations in the African Women's Protocol and the recent Joint General Comment on FGM adopted by the African Commission and the African Children's Committee. It aims to recommend legislative standards that can be applied on the continent to increase the effectiveness of laws criminalising FGM in order to eradicate the practice.

Key words: *female genital mutilation; legislating FGM; anti-rights discourse; bodily autonomy; violence against women*

1 Introduction

On 10 November 2023 the African Commission on Human and Peoples' Rights (African Commission) and the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) launched a Joint General Comment on the Eradication of Female Genital Mutilation (FGM) (Joint General Comment on FGM).¹ The Joint General Comment on FGM aims to clarify the obligation to eliminate FGM as set out for state parties to the African Charter on Human and Peoples' Rights (African Charter), the African Charter on the Rights and Welfare of the Child (African Children's Charter) and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol).²

FGM results in the violation of several human rights. It is a violation of the right to freedom from violence, the right to the highest attainable standard of physical and mental health, and where it results in death, the right to life is violated.³ It also violates the right to security and physical integrity and the right to be free from torture and cruel,

1 African Children's Committee 'Launch of the General Comment in Female Genital Mutilation' 10 November 2023, <https://www.acerwc.africa/en/article/activity/launch-joint-general-comment-female-genital-mutilation> (accessed 20 November 2023).

2 As above.

3 C Yusuf & Y Fessha 'Female genital mutilation as a human rights issue: Examining the effectiveness of the law against female genital mutilation in Tanzania' (2013) 13 *African Human Rights Law Journal* 362.

inhuman or degrading treatment.⁴ At its core, FGM is a violation of gender equality.⁵ The primary treaty relating to the eradication of gender discrimination for women in all its forms and manifestations, in Africa, is the African Women's Protocol. The General Comment on FGM seeks to clarify the scope and nature of state obligations to eliminate FGM in line with the African Women's Protocol.⁶ Noting it as an issue relevant to girls' rights, the Joint General Comment seeks to delineate state obligations set out in article 5(b) of the African Women's Protocol, article 21(1) of the African Children's Charter, and other relevant provisions under both Instruments.⁷ Hailed as the most inventive and exciting development in women's rights protection since the formation of the African Union (AU), the African Women's Protocol lays down essential human rights standards for African women.⁸ The Women's Protocol outlines an obligation on member states to eliminate all forms of gender discrimination, including violence against women, generally, and harmful cultural practices such as FGM, in particular.⁹ The African Women's Protocol suggests to member states measures that they can put in place to prevent and respond to instances of FGM, including legislation criminalising FGM. Several AU member states that have ratified the Women's Protocol have put in place a variety of direct and indirect laws aimed at the eradication of FGM.¹⁰ Twenty-eight countries have laws that prohibit or criminalise FGM on the continent.¹¹

- 4 World Health Organisation 'Female genital mutilation' 5 February 2024, <https://www.who.int/news-room/fact-sheets/detail/female-genital-mutilation#:~:text=The%20practice%20also%20violates%20a,the%20procedure%20results%20in%20death> (accessed 10 July 2024).
- 5 World Health Organisation 'Eliminating female genital mutilation: An interagency statement UNAIDS, UNDP, UNECA, UNESCO, UNHCR, UNICEF, UNIFEM, WHO' 16 June 2008, <https://www.who.int/publications/i/item/9789241596442> (accessed 2 June 2022).
- 6 Joint General Comment on Female Genital Mutilation, adopted by the African Commission and the African Children's Committee June 2023 (Joint General Comment on FGM) paras 4-5, https://www.acerwc.africa/sites/default/files/2023-11/joint%20General%20Comment_ACHPR-ACERWC_on%20FGM%20%282%29.pdf (accessed 10 July 2024).
- 7 As above.
- 8 L Sithole & C Dziva 'Eliminating harmful practices against women in Zimbabwe: Implementing article 5 of the African Women's Protocol' (2019) 19 *African Human Rights Law Journal* 570.
- 9 The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol entered into force on 25 November 2005).
- 10 Saleema Initiative Africa Union Initiative on Eliminating Female Genital Mutilation Programme and Plan of Action 2019-2023 (Saleema Initiative) 6, https://au.int/sites/default/files/newsevents/workingdocuments/41106-wd-Saleema_Initiative_Programme_and_Plan_of_Action-ENGLISH.pdf (accessed 9 January 2024).
- 11 As above. African states that criminalise or prohibit FGM in their laws, including as part of their constitutions, are Benin, Burkina Faso, Cameroon, Central African Republic, Côte d'Ivoire, Djibouti, DRC, Egypt, Eritrea, Ethiopia, Ghana, Guinea Bissau, Kenya, Liberia, Mauritania, Niger, Senegal, Somalia, South Africa, South Sudan, Sudan, Tanzania, Togo, Uganda, Zambia, Zimbabwe and The Gambia. The Gambian Parliament is set to vote on a proposal to decriminalise FGM in the

From a feminist perspective, the persistence of FGM is about maintaining gender norms on sexual relations and controlling women's sexuality before, during and after their marriage.¹² Marriage – belonging – is prioritised as a source of benefit for women and their families.¹³ This perspective puts into question the ability to consent to the practice in a social and economic context where the choice so exercised by women may not be free and informed. The negative consequences of FGM for women are documented. However, from the perspective of some women's life experiences, FGM may enable access to livelihoods and social and economic security.¹⁴

The question of permitting adult women to consent to FGM in the African context has been mooted in some African countries.¹⁵ This article surveys legislative measures enacted by state parties to the African Women's Protocol, with a higher prevalence of FGM, to consider the extent to which legislative measures adopted by these states address the question of consent to FGM. The laws are to be applied in a specific societal setting and not in a vacuum. A law targeted at the practice of FGM as its mischief must also consider the context within which the mischief arises and aim to eradicate the factors that make consent to FGM relevant. As such, this article further interrogates the extent to which the legislative measures recognise the realities of women's lives that demand compliance with the cultural or traditional practice of FGM, and thereby legislate measures to address the discrimination that, in their context, informs women's acceptance of FGM as a means to survive in an otherwise

country through the Women's (Amendment) Bill 2024 that is currently before Parliament for voting on 24 July 2024. See Equality Now 'What's happening with the FGM law In The Gambia?' 8 July 2024, https://equalitynow.org/news_and_insights/whats-happening-with-fgm-law-in-the-gambia/ (accessed 10 July 2024).

- 12 P Akweongo and others 'It's a woman's thing: Gender roles sustaining the practice of female genital mutilation among the Kassena-Nankana of Northern Ghana' (2021) 18 *Reproductive Health* 2, <https://reproductive-health-journal.biomedcentral.com/articles/10.1186/s12978-021-01085-z> (accessed 10 July 2024).
- 13 C Packer 'Understanding the socio-cultural and traditional context of female circumcision and the impact of human rights discourse' in O Nnaemeka & J Ezeilo (eds) *Engendering human rights: Cultural and socio-economic realities in Africa* (2011) 224.
- 14 As above.
- 15 See *Kamau v Attorney General & 2 Others; Equality Now & 9 Others (Interested Parties); Katiba Institute & Another (Amicus Curiae)* Constitutional Petition 244 of 2019 [2021] KEHC 450 (KLR) (Constitutional and Human Rights) (17 March 2021) in Kenya through a case challenging the constitutionality of the law criminalising adult women who consent to FGM. See also AR Thomas 'Sierra Leone respects the right of consenting adults to choose – says Minister Blyden' 11 July 2016, <https://www.thesierraleonetelegraph.com/sierra-leone-respects-the-right-of-consenting-adults-to-choose-says-minister-blyden/> (accessed 20 December 2023); AR Thomas 'Female circumcision – Women must have the right to choose – says Dr Fuambai Sia Ahmadu' 8 February 2016, <https://www.thesierraleonetelegraph.com/female-circumcision-women-must-have-the-right-to-choose-says-dr-fuambai-sia-ahmadu/> (accessed 20 December 2023).

hostile community. It questions how free such consent can be under the circumstances in which many women in these FGM-practising communities are.

First, the article will elaborate on the formulation of FGM as a human rights issue and how this informed its criminalisation at the national level. In this part, the influence of historical essentialist feminist activism on FGM in the adoption and elaboration of the international human rights norms on FGM will be considered. This is due to the documented influence of this movement on the legislative mechanisms criminalising FGM that were adopted by states in response to their international law obligations.¹⁶ Thereafter, it considers the context within which the human rights standards and the laws criminalising FGM are to operate. This part sets out the contextual reality within which African women are purported to be able to exercise consent to FGM.

Second, the article considers the equality rights-based arguments for adult women to consent to FGM. It interrogates the vilification of feminist essentialist approaches to the questions of bodily autonomy and equality as it applies to adult women consenting to FGM. Thereafter, the article investigates the existence of definitive legal text indicating that consent is irrelevant to FGM. It considers the African Women's Protocol and the Joint General Comment on FGM and whether these clarify an obligation on member states to nullify consent to FGM through legislation. The article then considers the existing laws in select member states party to the Women's Protocol that have laws prohibiting FGM and whether the laws in place, first, nullify consent to FGM and, second, adopt other measures to address the root causes of FGM discussed as influencing the ability of women to freely exercise consent in FGM-practising communities.

Finally, the article concludes on minimum aspects that can inform the reformulation or formulation of legislation on FGM in order to ensure that the law criminalising FGM can more adequately address the question of consent to FGM and the factors that are the root causes of FGM.

16 H van Bavel 'Is anti-FGM legislation cultural imperialism? Interrogating Kenya's Prohibition of Female Genital Mutilation Act' (2023) 32 *Social and Legal Studies* 1.

2 Human rights norms on female genital mutilation under international law and domestication into national law: Law versus reality in the African context

The World Health Organisation (WHO) notes that there are four types of FGM. Type 1 FGM, termed as sunna circumcision, involves the excision of the clitoris prepuce and of the clitoris or parts thereof. Type 2 involves the excision of the clitoris prepuce, the clitoris and the inner lips or parts thereof. Type 3 FGM, termed as infibulation, is the most severe form of FGM. It involves the excision of part of or all of the external genitals. Thereafter, the remaining parts of the outer lips are sewn together leaving an opening for urine and menstrual flow.¹⁷ The scar needs to be opened before intercourse or giving birth, which causes additional pain.¹⁸ Type 4 FGM involves pricking, piercing, cutting or stretching of the clitoris or the labia, also burning or scarring the genitals as well as ripping of the vaginal opening or the introduction of corrosive substances or herbs into the vagina in order to tighten it, and any other procedure, which injures or circumcises the female genitalia.¹⁹ Type 4 FGM is considered the mildest form of FGM.²⁰ FGM has negative physical and psychological effects on the women who undergo this procedure.²¹ However, various forms of Type 1, Type 2 and Type 3 FGM are the focus of the anti-FGM activism.²²

This part sets out the role of anti-FGM feminist activists in formulating FGM as a human rights issue through the years, and the various strategies used to advance this cause through regional and international treaties and eventually into national laws. It then considers the ways in which African women experience human rights violations in the context of the practice. This serves to identify the mischief targeted by the human rights norms relating to FGM and the national laws criminalising the practice.

17 M Kevane *Women and development in Africa: How gender works* (2014) 213.

18 As above.

19 VC Madu 'Socio-cultural practices harmful on female reproductive health: A case against female genital mutilation' (2020) 100 *Journal of Law, Policy and Globalisation* 74.

20 N Ehrenreich & M Barr 'Intersex surgery, female genital cutting, and the selective condemnation of "cultural practices"' (2005) 40 *Harvard Civil Rights Civil Liberties Law Review* 80, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2926589 (accessed 20 December 2023).

21 K Nadessen 'A profile of female genital mutilation and human rights: Towards outlawing the practice' (2000) 7 *Alternation* 170, 174.

22 Ehrenreich & Barr (n 20) 80.

2.1 Influence of feminist discourse in formulating female genital mutilation as an international human rights issue

There are several varieties of feminist legal theory, some of which overlap.²³ All feminist theories, however, share an observation that the world is shaped by men who, for this reason, possess larger shares of power and privileges, and a belief that men and women should have political, social and economic equality.²⁴ While feminists share the goal of achieving gender equality, they disagree on the meaning of and the manner in which to attain this.²⁵ Elaborating that FGM is grounded on misogynistic views on women and maintaining socially-constructed gender roles, the feminist movement has significantly informed the formulation of FGM as a violation of the right to equality at the African regional and international level.²⁶ Feminist advocates argued that the practice is used to enforce patriarchal power by enforcing virginity and fidelity and instituting its status as a prerequisite to marriageability, stigmatising female sexual organs as 'dangerous and dirty', and reducing women's capacity for sexual pleasure.²⁷

The term 'FGM' is said to have been first coined in 1979 by Fran Hosken, an American writer, feminist and author of *The Hosken report: Genital and sexual mutilation of females*.²⁸ In terming it as mutilation, Hosken made a distinction between this description and 'female circumcision'. Referring to the practice as female circumcision draws a comparison between female circumcision and male circumcision. Terming it as mutilation emphasises the gravity of the act and the negative physical and mental health consequences of the cut for women as opposed to the procedure men undergo as circumcision.²⁹ However, of note is that in 1980 African women boycotted a session featuring Hosken at an international women's conference, calling her perspective of FGM as racist, 'ethnocentric' and 'insensitive to African women'.³⁰ Some researchers and the United Nations (UN) agencies, the United Nations Children's Fund (UNICEF) and the United Nations Population Fund (UNFPA) have

23 N Levit & RRM Verchick *A primer: Feminist legal theory* (2006) 12.

24 As above.

25 M Lasseko-Phooko 'Challenges to gender equality in the legal profession in South Africa: A case for putting gender on the transformation agenda' Master's dissertation, University of South Africa, 2019 52, <https://uir.unisa.ac.za/handle/10500/25608> (accessed 20 December 2023).

26 Ehrenreich & Barr (n 20) 85.

27 As above.

28 L Muzima 'Towards a sensitive approach to ending female genital mutilation/cutting in Africa' (2016) 3 *SOAS Law Journal* 79.

29 WHO (n 5) 22.

30 EH Boyle and others 'Local conformity to international norms: The case of female genital cutting' (2002) 17 *International Sociology* 8.

adopted the use of the term 'female genital mutilation/cutting'.³¹ The term 'cutting' is to indicate non-judgmental terminology when engaging with communities that practise FGM.³² In 2005 the Inter-African Committee on Traditional Practices (IAC) issued a Declaration on the Terminology FGM at its General Assembly (Declaration on Terminology). The IAC reiterated the need to retain the term FGM. The Declaration on Terminology rejects the developments towards replacing the term FGM with less threatening descriptions of the practice, such as 'female circumcision', 'female genital alteration', 'female genital excision', 'female genital surgery' or 'female genital cutting'. The IAC stated that this would not only undermine the years of activism by African women against FGM and the role they played in defining the term and campaigning against the practice regionally and internationally, but also trivialises the recognition of the term as a medical one that accounts for the extensive physical and mental harm to women resulting from the practice.³³ The term FGM remains the internationally-accepted terminology for the practice and the term adopted in the African regional treaties and soft laws and national legislation relating to the practice.³⁴ It is the term used in the Joint General Comment on FGM.

Activism against FGM was not initially couched as a human rights issue.³⁵ Campaigns for the eradication of FGM were based on arguments against the negative health implications of the practice for women.³⁶ At that point in time, international health organisations such as the World Health Organisation (WHO) refused to adopt a position on the practice at the international level.³⁷ WHO determined that FGM was a cultural issue to be dealt with in country-specific ways by the member states.³⁸ The campaigns based on the health implications of FGM were for some time preferred. This approach offered what was perceived as more neutral, less normative, and did not require an assessment of or reflection on the values underlying the practice, including an assessment of gender relations.³⁹ It did not require that any African people's culture is questioned or pre-

31 WHO (n 5) 22.

32 As above.

33 Inter-African Committee on Traditional Practices 'Declaration: On the terminology FGM' 6th IAC General Assembly, 4-7 April 2005, Bamako/Mali 6 April 2005, <https://www.fgmcri.org/thematic/terminology-and-fgm/> (accessed 11 July 2024).

34 As above.

35 Yusuf & Fessha (n 3) 362.

36 As above.

37 Yusuf & Fessha (n 3) 363.

38 As above.

39 M van den Brink & J Tigchelaar 'Shaping genitals, shaping perceptions: Frame analysis of male and female circumcision' (2012) 30 *Netherlands Quarterly of Human Rights* 430.

judged as being good or bad and did not outrightly condemn FGM.⁴⁰ Rather, it informed people of the medical consequences of FGM in the hope that once aware of the facts, they would stop the practice.⁴¹ This approach to campaigning for the eradication of FGM was not entirely successful. By focusing on the negative medical consequences as the basis of the campaign for eradication, the campaign strengthened proposals to medicalise the practice rather than eradicate it. In other words, to address the problem identified by the campaign, a solution would be to ensure that the practice is undertaken by qualified medical practitioners rather than traditional practitioners.⁴² While there is evidence that the approach resulted in a reduction in the number of girls undergoing the cut in some FGM-practising communities, there was also an increase in the number of medicalised procedures being undertaken as a consequence of the campaign.⁴³ Anti-FGM activists needed a way to make abuses that arise in the context of FGM a violation of internationally-binding and enforceable legal obligations on states, rather than requiring country-specific solutions.⁴⁴

By the 1980s, global non-governmental organisations (NGOs) were increasingly pushing for the inclusion of violence against women as a human rights issue.⁴⁵ By the 1993 UN Conference on Human Rights in Vienna, global activism by women's NGOs had succeeded in highlighting the issue of violence against women.⁴⁶ The Vienna Declaration specifically called for the drafting of a new declaration on the elimination of violence against women and the appointment of a Special Rapporteur on Violence against Women.⁴⁷ The Commission on the Status of Women developed the Declaration on the Elimination of Violence Against Women in 1993. It was unanimously adopted by the UN General Assembly. At this early stage the issue of violence against women was framed in terms of gender inequality.⁴⁸

For example, the Declaration on the Elimination of Violence Against Women (and later the Beijing Platform) begins with: Recognizing

40 Boyle and others (n 30) 8.

41 As above.

42 A Raafat 'Medicalization of female genital cutting in Egypt' (2009) 15 *Eastern Mediterranean Health Journal* 1380, <https://www.emro.who.int/emhj-volume-15-2009/volume-15-issue-6/medicalization-of-female-genital-cutting-in-egypt.html> (accessed 11 July 2024).

43 As above.

44 Boyle and others (n 30) 8.

45 AM Tripp & B Bardi 'African influences on global women's rights: An overview' in AM Tripp & B Bardi (eds) *Women's activism in Africa* (2017) 2.

46 As above.

47 T Urs 'Coercive feminism' (2014) 46 *Columbia Human Rights Law Review* (2014) 101.

48 As above.

that violence against women is a manifestation of historically unequal power relations between men and women, which have led to domination over and discrimination against women by men and to the prevention of the full advancement of women, and that violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men. By rooting the cause of domestic violence in gender inequality and male power, the international treatment of the issue largely echoed the Western feminist conceptualization.⁴⁹

By 1995 FGM had been reframed as a form of violence against women. Beginning in earnest in the 1990s, a post-colonial critique of the early academic discourse about FGM critiqued Western feminist 'anti-FGM discourse' for ignoring hierarchies among women and, therefore, reproducing racist and imperialist narratives.⁵⁰ This notwithstanding, on the African continent, the women's human rights movement led the adoption of the African Women's Protocol in 2005 by the AU incorporating the international approach to the normative standard on FGM.⁵¹

The persistence of FGM in many African countries is about maintaining gender norms on sexual relations and controlling women's sexuality.⁵² With the aim of uprooting the patriarchal root cause of FGM, the feminist movement has historically had a dominant role in the development of the existing international law framing of FGM as a human rights violation.⁵³ FGM currently undoubtedly is established within the confines of human rights violations, creating legally-binding obligations on states to prevent, protect from and respond to violations when they occur. FGM is recognised as a violation of a plethora of human rights. This includes the right to equality and non-discrimination; the right to the highest attainable standard of health; the right to freedom from torture, cruel and inhuman treatment; the right to physical and mental integrity; and, in case of death, the right to life.⁵⁴ To meet their obligations, states targeted eradication through, among others, legislative measures.⁵⁵ Member states' approaches to achieving this through legislation, including their treatment of consent, will be assessed in detail later in the article.

49 As above.

50 Boyle and others (n 30) 10.

51 As above.

52 WHO (n 5).

53 Ehrenreich & Barr (n 20) 85.

54 LR Avalos 'Female genital mutilation and designer vaginas in Britain: Crafting an effective legal and policy framework' (2021) 48 *Vanderbilt Law Review* 628, <https://scholarship.law.vanderbilt.edu/vjtl/vol48/iss3/2> (accessed 11 July 2024).

55 Saleema Initiative (n 10) 6.

2.2 Gendering the concept of 'consent to female genital mutilation': Recognition of social conformity and the role of female genital mutilation in controlling women in their reproductive life stages

FGM has been shown to be a manifestation of gender discrimination.⁵⁶ This is because the primary aim of the practice is to maintain and reinforce the differential treatment that women experience on the basis of their perceived gender roles in society.⁵⁷ Research in different African countries supports this thesis. On the whole, the practice of FGM looks to regulate women's sexuality and sexual activities whether before, within or outside of marriage.⁵⁸ Various socially-constructed narratives relating to women's sexuality and their reproductive role are used to justify the practice. Instances of this are found in the examples detailed hereunder.

In Nigeria, the Yoruba believe that if an infant's head touches the tip of the mother's clitoris during birth, the child will die. The Bambara and Dogon in Mali hold a similar belief on the clitoris and child birth.⁵⁹ The Akamba in Kenya hold the belief that a woman who is not cut will have difficulties in childbirth.⁶⁰ Therefore, clitoridectomy must be performed in order for a daughter to be marriageable. If parents were to neglect circumcising their daughters, the daughters would be regarded as 'abnormal or even monstrous', and the parents and their daughters would be social outcasts.⁶¹

To justify the need to control women's sexuality, some cultures in Northern and Eastern Africa believe that women are 'naturally promiscuous, and if left to their own devices will, like Eve, seduce men'.⁶² For instance, in Egypt, it is believed that the practice is key to maintaining female chastity.⁶³ In Eritrea, the attitude is that one who

56 Avalos (n 54) 651.

57 G Kail 'Access to justice: Accelerating the abandonment of FGM/C' (2018) 19 *Cardozo Journal of Conflict Resolution* 764.

58 Muzima (n 28) 87.

59 US Department of State 'Mali: Report on female genital mutilation (FGM) or female genital cutting (FGC)' 2009, <https://2001-2009.state.gov/g/wi/rls/rep/crfgm/10105.htm> (accessed 11 July 2024).

60 US Department of State: Kenya: Report on female genital mutilation (FGM) or female genital cutting (FGC)' 2009, <https://2001-2009.state.gov/g/wi/rls/rep/crfgm/10103.htm> (accessed 11 July 2024).

61 Kail (n 57) 764.

62 KY McChesney 'Successful approaches to ending female genital cutting' (2015) 42 *Journal of Sociology and Social Welfare* 6.

63 US Department of State 'Egypt: Report on female genital mutilation (FGM) or Female genital cutting (FGC)' 2009, <https://2001-2009.state.gov/g/wi/rls/rep/crfgm/10096.htm> (accessed 11 July 2024).

is not cut will be promiscuous.⁶⁴ Female circumcision is often part of the rites of passage, marking the coming of age of children, but it also serves to control female sexuality, by reducing sexual desire, and to help girls to remain virgin or chaste. In Britain, Canada and the United States of America, it was practised in the eighteenth to nineteenth centuries to prevent masturbation and cure hysteria and some psychiatric conditions.⁶⁵

In Mali, the belief is that failing to control women's sexuality will result in an oversexed woman who, if un-married, will lose her virginity, thereby disgracing her family and losing her chance for marriage.⁶⁶ Although not required of any religion, some religious leaders and individuals, particularly within Islam, believe that FGM improves the spirituality of women and in this way is used as a threshold for identifying 'good' women, in other words, marriageable women.⁶⁷

From the instances recorded in the research sampled in this part, the concern seems to be primarily for women of a childbearing age acting in a manner that will affect how they are viewed or valued as being good women, respectable women, marriageable women capable of bearing healthy children. If this is the case, the main issue is marriage for young women and access to the social, economic and cultural benefits that accrue from matrimonial ties for her and her family.⁶⁸ In answering the question of whether in these social contexts, a woman can consent to FGM, the Kenyan Court in *Kamau* held:⁶⁹

The assumption was that anyone above the age of 18 years underwent FGM voluntarily. However, that hypothesis was far from reality, especially for women who belonged to communities where the practice was strongly supported. The context within which FGM/C was practiced was relevant as there was social pressure and punitive sanctions. Those who underwent the cut were involved in a cycle of social pressure from the family, clan and community. They also suffered serious health complications while those who refused to undergo it suffered the consequences of stigma. Women were thus as vulnerable as children due to social pressure and could be subjected to the practice without their valid consent.

64 US Department of State 'Eritrea: Report on female genital mutilation (FGM) or female genital cutting (FGC)', <https://2001-2009.state.gov/g/wi/rls/rep/crfgm/10097.htm> (accessed 11 July 2024).

65 Van den Brink & Tigchelaar (n 39) 425.

66 M Fotheringham 'Culture clashes: Balancing local and international interests in ending female genital cutting practices' (2004) 16 *Appunti di Scienza Politica* 74.

67 As above.

68 Packer (n 13) 224.

69 *Kamau* (n 15) para 20.

The traditional gender roles that are primarily determined with reference to women's sexual and reproductive capacity result in women remaining in inferior power positions and dependent upon men for status and resources.⁷⁰ Women themselves may uphold the same norms that harm them because the social costs of doing otherwise would be too high to bear.⁷¹ Even though a social norm may be harmful, it may give women status in their communities, and some women may tolerate a loss of control and agency in return for the benefit that will be gained in terms of social acceptance and economic support.⁷²

The principle of autonomy recognises social, economic and political barriers to the exercise of genuine autonomy and attempts to maximise women's power within those realities.⁷³ It aims to ensure that women are able to make genuine choices in their everyday lives.⁷⁴ Applying this premise to the case of FGM, genuine pursuit of the principle of autonomy in consenting to FGM would imply removing aspects in society that prevent women from being able to genuinely make decisions about their lives. Several social, economic and political barriers undermine the autonomy of women in FGM-practising communities. These include a lack of education and skills, a general increase in the number of poor women and an increase in the level of poverty of women in these communities over time. Women with access to and who enjoy the benefits of education, employment and economic opportunity are better able to take control of their lives generally and their sexual and reproductive health rights in particular.⁷⁵ However, for many women in FGM-practising communities, several barriers hinder their access to social, economic and political opportunities. Some of these barriers are considered here.

For many of the women in rural communities that practise FGM, land tenure for women is a system that determines women's access to

70 C. Albertyn 'The stubborn persistence of patriarchy: Gender equality and cultural diversity in South Africa' (2009) 5 *Constitutional Court Review* 171.

71 Kevane (n 17) 215.

72 UNFPA 'Against my will: Defying the practices that harm women and girls and undermine equality' (2020) 84, https://www.unfpa.org/sites/default/files/pub-pdf/UNFPA_PUB_2020_EN_State_of_World_Population.pdf (accessed 9 January 2024).

73 R Coomaraswamy 'Identity within: Cultural relativism, minority rights and the empowerment of women' (2002-2003) 34 *George Washington International Law Review* 509.

74 Coomaraswamy (n 73) 510.

75 O Nneameka & J Ezeiolo 'Introductions: Context(ure)s of human rights – Local realities, global contexts' in O Nneameka & J Ezeiolo *Engendering human rights: Cultural and socio-economic realities in Africa: Cultural and socio-economic realities in Africa* (2011) 6.

land through social ties to kin and husbands.⁷⁶ For many in rural Africa, women remain at the margins of both formal tenure programmes and local change.⁷⁷ Strong norms in many African societies proscribe women from working outside the home.⁷⁸ This contributes to the prevalence of a gendered labour market and the feminisation of poverty experienced in many rural areas in Africa. Boys are more likely than girls to receive an education up to secondary school in many African countries. Although it is accepted that literacy enables the realisation of one's capabilities, gender trade-offs associated with schooling are reinforced by social norms that encourage the preference for educating boys over girls.⁷⁹

Addressing the factors that influence women's capacity to consent to FGM calls on the state to adopt an intersectional approach to the enactment of and implementation of laws and policies targeted at enhancing the social and economic prospects of women in these communities. An intersectionality approach calls on one to consider how to enhance the ability of laws and policies to respond to inequalities that are the product of more than one ground of discrimination.⁸⁰ Poverty, unemployment and a lack of economic opportunity, low education and skills levels, class, religion and sexual orientation are identities that create a meaningful difference in the manner in which African women may elect to exercise their bodily autonomy in FGM-practising communities.

3 Scrutinising an equality-based argument in favour of adult women consenting to female genital mutilation

The role of the feminist movement in the recognition of FGM as a harmful cultural practice has been discussed above. However, with the development of feminist theories over the years, the essentialist approach adopted in the time of bringing FGM into the international law framework continues to face criticism.⁸¹ The essentialist feminist approaches that informed the earlier era, in the times of Fran Hosken,

76 Kevane (n 17) 90.

77 Kevane (n 17) 114.

78 Kevane (n 17) 22.

79 Kevane (n 17) 208.

80 J Conaghan 'Intersectionality and UK equality initiatives' (2007) 23 *South African Journal on Human Rights* 322.

81 FS Ahmadu & T Kamau 'Dr Tatu Kamau v The Attorney General and Others: Problems and prospects in Kenya's 2021 High Court ruling to uphold the Prohibition of Female Genital Mutilation Act 2011 – A reply to "The prosecution of Dawoodi Bohra women" by Richard Shweder' (2022) 12 *Global Discourse* 44, <https://bristoluniversitypressdigital.com/view/journals/gd/12/1/article-p29.xml> (accessed 3 January 2024).

have since been challenged, and new theories of understanding women's experiences of subordination that are more reflective of women's diverse identities have developed both within the feminist movement in the Global North and regionally.⁸²

Relevant, as a theoretical frame of analysis, to the claims of those seeking to justify adult women's choice to undergo FGM is the transnational feminist approach. Transnational feminist perspectives focus on the diverse experiences of women who live within, between and at the margins or boundaries of nation states around the globe; they transcend nation state boundaries and speak to a wide range of interacting forces that have an impact on gendered relationships and experiences in a geopolitical context that may occur in global, regional and local contexts.⁸³ Transnational feminist approaches determine that requests for nuance, anti-essentialism, and even cultural or religious sensitivity, are not merely a defence of culture or religion, but a call to attend to the express desires of women and their articulations of freedom and thriving, even if one may disagree with their interpretation and application of their agency.⁸⁴ It calls on feminists to refrain from imposing a version of gender equality that does not resonate with or belittling or demonising women who wish to live differently from the dominant view.⁸⁵

Transnational feminism is carried out by talking to one another, listening to one another, learning from, supporting, and working with one another around topics that affect women in different areas of the globe, but with deep sensitivity to the importance of differing contexts.⁸⁶ If applied to the context of adult women consenting to FGM, it would be argued that women in the FGM-practising communities in consenting to the practice are exercising their agency and autonomy.⁸⁷ Nnamuchi has argued that treaties and laws that purport to punish adult women consenting to FGM violate

82 CA Choudhury 'Beyond culture: Human rights universalisms versus religious and cultural relativism in the activism for gender justice' (2015) 30 *Berkeley Journal of Gender, Law and Justice* 226-267. See also Ehrenreich & Barr (n 20) 80; Van Bavel (n 16) 1; S Kalantry 'The French veil ban: A transnational legal feminist approach' (2017) 46 *University of Baltimore Law Review* 208.

83 CZ Enns, LC Díaz & T Bryant-Davis 'Transnational feminist theory and practice: An introduction, women and therapy' (2021), DOI: 10.1080/02703149.2020.1774997 (accessed 17 July 2022).

84 Choudhury (n 82) 232.

85 Choudhury (n 82) 233.

86 CG Bowman 'Transnational feminism in the context of intimate partner violence in Ghana' (2019) 1 *Cornell International Law Journal* 3.

87 Arguments in this line have gained traction and were submitted by the petitioner in the case challenging the constitutionality of the anti-FGM law in Kenya. Also see O Nnamuchi 'Circumcision or mutilation – Voluntary or forced excision – Extricating the ethical and legal issues in female genital ritual' (2012) 25 *Journal of Law and Health* 85-122, https://www.researchgate.net/publication/228195308_‘Circumcision’_or_‘Mutilation’_Voluntary_or_Forced_

the 'human right of rational adults to effectuate autonomous choices regarding their most prized possession: their bodies'.⁸⁸

In these circumstances, calls for contextual analysis made by or on behalf of minority women embedded in an anti-FGM majority-dominant culture can be said to be articulating that there may be different ways of being a modern African woman; that there is a group of women who may want different things that make no sense to feminists situated differently in the anti-FGM discourse. If this view is presented within the parameters of transnational feminist lens, the continued endorsement of FGM by adult women who opt to undergo the practice requires a critical consideration of how principles central to feminist politics, such as respect for autonomy, serve this group of women. Respect for autonomy, no matter how problematic the concept, requires feminists to consider these demands seriously on their own terms and not as forms of false consciousness. Even so, the recognition of the structural inequalities that sustain in the context of African societies where FGM is practised, requires that one question whether valid and informed consent is at all relevant.

On the question of consent and the exercise of autonomy, the transnational method postulates that the essentialist feminist approach has to date offered a representation of the helpless African woman victim subjected to FGM in male power-dominant societies. This is because the essentialist feminist perception of agency was attached to individual agentive action and rationale.⁸⁹ Decisions taken to endorse a group or community benefit by an adult woman to her individual detriment, in one way or another, were not recognised as the exercise of agency or autonomy, rather as expressions of false consciousness.⁹⁰ Requests for nuance, anti-essentialism, and even cultural or religious sensitivity, then, are not merely a defence of culture, but also a call to attend to the express desires of women and their articulations of freedom and thriving even if one disagrees with the interpretation.⁹¹

Feminist strategies that informed the formulation of FGM as a human right internationally and regionally remains relevant to the development of new strategies to eradicate FGM. These essentialist historical approaches recognise the need to dismantle the power relations that determine the systematic, social and cultural realities

Excision_Extricating_the_Ethical_and_Legal_Issues_in_Female_Genital_Ritual (accessed 3 October 2023).

88 Nnamuchi (n 87) 116.

89 Choudhury (n 82) 114.

90 As above.

91 As above.

that underpin FGM as a practice and the choices that the women can make.⁹² Were the agenda of attaining equality and social and economic freedom for women in FGM-practising communities to be successful, there would be no need for women to contemplate undergoing FGM in adulthood for whatever reason.⁹³ FGM and its consequences are harmful, dangerous and life-threatening any which way one looks at it. Understanding and addressing the structural violence that sustains adult women's choices on FGM is the key to dismantling the power domination of women in these communities.

Although there are a variety of purported justifications for FGM, it comes down to it being a determinative factor in how a woman will be treated as well as what will be expected of her during the reproductive stage in her life cycle.⁹⁴ The cost of not conforming to what society had determined as the threshold for access to communal social and cultural benefits becomes too high for one to endure.⁹⁵ Under these circumstances, it is an obligation on member states required to eradicate FGM to seek to attain gender equality for women in this context. Muzima has noted that the continuation of FGM is fuelled by the reality that many women who undergo the cut have to balance the negative consequences of FGM against the socio-cultural benefits they mistakenly perceive themselves to be gaining.⁹⁶

This view is partly endorsed in this article; however, not wholly embraced in that the benefits for the women in these communities are not merely a perception or seen as beneficial in error. Looking at the dynamics that are at play with regard to the question of adult women consenting to FGM requires an appreciation that from the consenting woman's perspective, the benefits are not perceived but rather factual and real; as real, in fact, as the negative consequences that they will endure in their lifetime for undergoing the cut. It is from this perspective that the notion of consent should be considered by member states looking to eradicate FGM.

92 Coomaraswamy (n 73) 513.

93 C Byaruhanga 'Uganda FGM ban: "Why I broke the law to be circumcised aged 26"' 6 February 2019, <https://www.bbc.com/news/world-africa-47133941> (accessed 20 December 2023).

94 JR Hess 'United States and Africa on FGM: Cultural comparatives, resolutions, and rights' (2004) 3 *ILSA Journal of International and Comparative Law* (2004) 584.

95 Byaruhanga (n 93). See reports of a cultural curse imposed on those who are not circumcised as a factor in driving FGM within the Samburu community of Kenya in K Mauchuhia 'The bold fight against FGM: Practice no longer "fashionable"' 30 June 2023, <https://nation.africa/kenya/news/gender/the-bold-fight-against-fgm-practice-no-longer-fashionable--4288046> (accessed 3 January 2024).

96 S Tamale 'The right to culture and the culture of rights: A critical perspective on women's sexual rights in Africa' (2007) *Urgent Action Fund Sex Matters* 163; Muzima (n 28) 90.

4 Joint General Comment on Female Genital Mutilation: State obligation to address female genital mutilation using legislation and the question of consent

Legislative measures adopted by member states to meet their obligation to eradicate FGM should recognise that consent to a harmful cultural practice cannot be informed consent and is irrelevant in the enforcement of the law. This is so despite the contrary cultural norms that may be applicable and raised as justification for the practice. Further, legislative measures should also have clear provisions targeting the social and cultural factors that inform a woman's decision to consent to FGM. Failing to have such wholistic legislation in place amounts to a violation of women's rights to equality and gender discrimination. The African Court on Human and Peoples' Rights (African Court) has held that where a member state maintains legislation that does not protect women from harmful cultural practices, they violate the right to gender discrimination.⁹⁷

There has been no definitive international law text indicating that consent is irrelevant to FGM. This part considers the extent to which the Joint General Comment on FGM definitively clarifies an obligation on member states to nullify consent to FGM through legislation and what other measures it requires of member states to include in legislation to address the gendered notion of consent to FGM. Thereafter, it considers the existing laws in state parties to the African Women's Protocol that have enacted laws prohibiting FGM and whether they nullify consent to FGM and adopt a wholistic approach to eradicating FGM.

4.1 Obligation to enact wholistic laws on female genital mutilation and treatment of consent in the African Women's Protocol

The African Women's Protocol is the first international treaty to categorically prohibit FGM.⁹⁸ Article 5(b) of the Women's Protocol requires that member states

97 *APDF & IHRDA v Republic of Mali* Application 46/2016 para 128, <https://www.african-court.org/cpmt/details-case/0462016> (accessed 20 December 2023).

98 S Nabaneh 'Article 5: Elimination of harmful practices' in A Rudman, CN Musembi & TM Makunya (eds) *The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: A commentary* (2023) 117.

take all necessary legislative and other measures to eliminate such practices, including:

- ...
- (b) prohibition, through legislative measures *backed by sanctions*, of all forms of female genital mutilation, scarification, medicalisation and para-medicalisation of female genital mutilation and all other practices in order to eradicate them.⁹⁹

Article 5 of the African Women's Protocol is to be read with other relevant provisions in the Women's Protocol, including article 2 which imposes an obligation on member states to eliminate all forms of discriminatory practices against women.¹⁰⁰ Article 2(2) of the Women's Protocol requires that member states eliminate FGM by modifying the social and cultural patterns of conduct of women and men through public education, information, education and communication strategies. It also requires that member state use the same methods to end any other practices that are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men. The African Women's Protocol clearly notes the importance of addressing the underlying causes of FGM in order to eradicate the practice.

Further, all provisions in the African Women's Protocol that require measures that are targeted at enhancing the social and economic prospects of women in FGM-practising communities are also relevant to state obligations to address FGM. The discussion under part 2.2 above underscored the link between marriageability in a community and access to social and economic resources. Therefore, it is necessary to consider state obligations that require measures that enable women to have genuine social, economic and political choices in life. Articles 4, 8 and 17 have been specifically outlined in the Joint General Comment on FGM as being relevant.¹⁰¹ These include, for instance, article 6 of the African Women's Protocol that seeks to modify gender stereotypes in the context of marriage.¹⁰²

99 Art 5(b) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa adopted by the 2nd ordinary session of the Assembly of the Union, https://au.int/sites/default/files/treaties/37077-treaty-charter_on_rights_of_women_in_africa.pdf (accessed 21 November 2023) (my emphasis).

100 Nabaneh (n 98) 125.

101 Joint General Comment (n 6) paras 29-31.

102 M Lasseko-Phooko & S Mohamed 'The challenges to gender equality in the legal profession in South Africa: A case for substantive equality as a means for achieving gender transformation' (2021) 21 *African Human Rights Law Journal* 506.

4.2 Clarity in the Joint General Comment for member states of the African Women's Protocol on a wholistic approach to eradicating female genital mutilation and addressing consent

General Comments are prepared by international treaty bodies, such as the African Commission and the African Children's Committee, to address important issues and provide detailed guidance to state parties on how to meet their obligations under the treaties more effectively.¹⁰³ The African Women's Protocol mandates member states to enact legislation criminalising FGM and to put in place measures aimed at addressing the social and economic factors that underly FGM. They are required by law to do so by enacting FGM laws that not only criminalise FGM but also encompass wholistic provisions to address the social and cultural patterns of conduct of women and men and gender stereotypes through public education, information, education and communication strategies. As a document aimed at providing further guidance on how member states bound by this obligation by the Maputo Protocol can do this, the part that follows considers what additional guidance is contained in the Joint General Comment on FGM specific to these two aspects. Additionally, it will consider whether the point on consent has at all been raised in the Joint General Comment, given the absence of this detail in the provisions of the African Women's Protocol.

4.2.1 *Legislation that prohibits all forms of female genital mutilation*

The Joint General Comment on FGM clarifies that the requirement for states to enact legislative measures set out in article 5 of the African Women's Protocol is prescriptive in nature.¹⁰⁴ Further, the state obligation to enact legislative measures also requires the enactment of a specific law prohibiting FGM, rather than a general law that categorises FGM as any other crime such as assault or grievous bodily harm.¹⁰⁵ States are also guided that, in accordance with the African Children's Committee's General Comment 5, laws enacted on FGM must specify that any religious, cultural or social justifications for FGM are impermissible.¹⁰⁶

¹⁰³ RD Nanima 'The ACHPR and ACERWC on ending child marriage: Revisiting the prohibition as a legislative measure' (2019) 20 *ESR Review* 9.

¹⁰⁴ Joint General Comment (n 6) para 37.

¹⁰⁵ As above.

¹⁰⁶ Joint General Comment (n 6) para 38.

4.2.2 *Wholistic law that requires education and other socio-economic measures to address gender inequality and stereotypes*

The Joint General Comment on FGM emphasises the overall state duty to ensure that gender equality is protected in state constitutions, as an ideal, is reflected in other legislation and ensure that the laws on advancing gender equality are effectively implemented.¹⁰⁷

Beyond this, the Joint General Comment categorises the other educational and socio-economic measures to be adopted by member states as 'other measures for the elimination of FGM'.¹⁰⁸ Under this heading, the factors that were discussed in this article as informing the decision of adult women to consent to FGM are dealt with. Member states are guided to target these factors by way of political empowerment, education, sensitisation, outreach, public awareness and resource allocation.¹⁰⁹

The details on these other measures as set out in the Joint General Comment on FGM suggest that these measures are to be outlined by member states as additional to or besides any legislative or administrative measures put in place to eliminate FGM. In a sense, the way that legislative measures are covered in the Joint General Comment on FGM in relation to the other measures for the elimination of FGM suggests that criminalisation and prosecution of FGM is the only function of legislative measures on the subject. While this approach may work for some member states, particularly where there is no prohibition on FGM at all in place, a better approach would have been to encourage that these additional measures be enacted as part of legislation to eliminate FGM. Grounding the measures in legislative prescripts would make their enforcement and actualisation more probable.

4.2.3 *Consent by adults to female genital mutilation is addressed*

The Joint General Comment on FGM indicates that consent to FGM is not relevant with respect to girls.¹¹⁰ The reason for this is elaborated therein as being the contextual vulnerability of children that heightens their risk of violation, thereby vitiating consent. The Joint General Comment takes note of the contextual factors that make women particularly vulnerable to FGM and the extent

¹⁰⁷ As above.

¹⁰⁸ Joint General Comment para 22.

¹⁰⁹ Joint General Comment para 55.

¹¹⁰ Joint General Comment para 19.

to which patriarchal norms take away their autonomy and agency in the context of FGM-practising communities.¹¹¹ However, the Joint General Comment stops short of indicating that consent by adult women to FGM should similarly be vitiated by the contextual vulnerabilities of which it so clearly took note in that section of the document. This is a gap in the guidance provided to member states, particularly given the ongoing discourse in certain member states on the issue.¹¹²

5 Survey of laws adopted by selected states that have ratified the African Women's Protocol on consent to female genital mutilation and a wholistic legislative approach to eradicating female genital mutilation

Consensus on the efficacy of laws to eradicate FGM is that laws alone are not enough.¹¹³ Engagement with the law can bear some fruits to achieve transformation of a gender-biased community, but these cannot guarantee the achievement of actual social and economic equality that is at the root of the practice.¹¹⁴ In this part the article set out to determine what the overall approach is on the continent to the question of consent to FGM as a starting point that is indicative of efforts at ending FGM. Thereafter, it aims to consider whether the legislation addressing consent to FGM addresses the state obligations to address the factors that influence the ability or women to give free and informed consent.

The table below illustrates the legislative approach taken by select AU member states that have ratified the African Women's Protocol to declare FGM a crime.

111 Joint General Comment para 20.

112 The current discourse on FGM and the role of culture, religion and the family are to be considered in the context of a global growing anti-rights movement. On this, see A Khan 'Lessons on backlash from Women Deliver: Tackling the enemy in the room' 14 August 2023, <https://odi.org/en/insights/lessons-on-backlash-from-women-deliver-tackling-the-enemy-in-the-room/> (accessed 18 October 2024).

113 P Wheeler 'Eliminating FGM: The role of the law' (2004) 3 *International Journal of Children's Rights* 264.

114 F Kaganas & C Murray 'Law and women's rights in South Africa: An overview' (1994) 1 *Acta Juridica* 36.

Country party to the African Women's Protocol with FGM prevalence % ¹¹⁵	Wholistic law: Criminalise FGM, require education and other measures by relevant government authority	Criminal sanctions for FGM against girls and adult women in other general penal laws	Consent by adult to FGM is addressed specifically	Criminalise cross-border FGM
Benin 9%		X ¹¹⁶		
Burkina Faso 76%		X ¹¹⁷		X
Cameroon 1%		X ¹¹⁸		
Côte d'Ivoire 37%		X ¹¹⁹		
Djibouti 94%		X ¹²⁰		
Ethiopia 65%		X ¹²¹		X
The Gambia 76%		X ¹²²		
Ghana 6%		X ¹²³		X
Guinea-Bissau 45%	X ¹²⁴		X – not relevant	X

115 UNFPA '2020 State of the World Population' (2020), https://www.unfpa.org/publications/state-world-population-2020_pg_73 (accessed 9 January 2024).

116 Law 2003-03 on the Suppression of Female Genital Mutilation in the Republic of Benin, issued on 3 March 2003; Law 2015-08 of the Children's Code in the Republic of Benin sec IX arts 185-188.

117 Law 043/96/ADP to amend the Penal Code (Penal Code) to prohibit and punish the practice of FGM.

118 Law 2016/007 of 12 July 2016 Penal Code and Section 350 ('Assault on Children') of the Penal Code.

119 Law 98-757 of 23 December 1998 (Law 98-757) on the punishment of certain forms of violence against women.

120 The Penal Code of Djibouti (Penal Code) 2 came into effect in 1995 and was the first principal legislation criminalising and punishing FGM in Djibouti. It was further complemented by Law 55 of 2009 (Law 55) 3 relating to violence against women, including FGM. The Criminal Procedure Code of Djibouti 1995 (Criminal Procedure Code).

121 Proclamation 414/2004, also known as the Criminal Code of the Federal Democratic Republic of Ethiopia 2004 (Criminal Code).

122 Women's (Amendment) Act 2015, which introduced secs 32A and 32B into the Women's Act of 2010, the Children's Act 2005 and Criminal Code 1933.

123 Criminal and Other Offences Act 1960 (Act 29) sec 69A (Female Gender Mutilation) (COA 1960).

124 Federal Law to Prevent, Fight and Suppress Female Genital Mutilation passed in 2011 (Law 14/2011).

Guinea 95%		X ¹²⁵		
Kenya 21%	X ¹²⁶		X – not relevant	X
Liberia 44%		X ¹²⁷	X – relevant	
Mali 89%				
Mauritania 67%		X ¹²⁸ – only girls		
Nigeria 19%		X ¹²⁹		
Senegal 24%		X ¹³⁰		
Sierra Leone 86%				
Tanzania 10%		X ¹³¹		
Togo 3%	X ¹³²	X ¹³³		

5.1 Analysis

Laws that criminalise FGM in many African states are ill-suited for the purpose of addressing any underlying social and economic factors that hinder women's true participation in exercising their agency in consenting to FGM. These laws are weak in many respects in terms of the elaboration of the gendered approach captured in the African Women's Protocol and the Joint General Comment that requires states to consider a contextual understanding in order to address the social and economic push and pull factors that drive FGM in practising communities.

Some states only criminalise FGM committed against a child. This means that in those jurisdictions, an adult woman's consent to FGM is valid consent given that it is not a crime. Of a sample of 19 states, only Kenya, Togo and Guinea-Bissau have laws that not

125 Law 2016/059/AN (the Criminal Code 2016) 2, in which arts 258-261 prohibit FGM whether performed by traditional or modern methods. In addition, Law L/2008/011/AN (Children's Code 2008) 3 criminalised violence against children and explicitly addressed FGM under arts 405-410.

126 Prohibition of Female Genital Mutilation Act 32 of 2011.

127 Executive Order 92 on Domestic Violence.

128 Law 2005-015 on the Criminal Protection of the Child (2005) (Law 2005-015) is the main law.

129 Violence Against Persons Prohibition Act 2015.

130 Art 299*bis* introduced in January 1999 into the 1965 Penal Code 2 (art 299*bis*).

131 Sexual Offences Special Provisions Act provides for amendment to sec 169 of the Penal Code to add sec 169A to prohibit FGM against children (under 18 years).

132 Law 98-016, dated 17 November 1998, on the prohibition of female genital mutilation (Law 98-016).

133 In addition to Law 98-016, FGM is also prohibited in Togo under Law 2015-010 Penal Code of Togo (Penal Code) dated 24 November 2015.

only criminalise FGM but also prescribe more targeted measures that aim to address some of the push and pull factors that inform adult women's pressure to conform to social expectations. While these laws are specific, they are neither comprehensive nor wholistic.

The majority of the 19 states criminalise FGM as part of a general criminal law prohibition making it a crime against women and children. This is not in line with the Joint General Comment on FGM. Mauritania only defines it as a crime in relation to children. In this case, it is not prohibited against women as an offence and, therefore, consent of an adult would not arise as a defence. This is also contrary to the Joint General Comment on FGM and the African Women's Protocol that call for the eradication of FGM against women and girls. Of the 19 states sampled, three categorically mention the question of consent. In Guinea-Bissau and Kenya, a woman cannot consent to FGM.¹³⁴ In Liberia, the law allows for the defense of consent.

Domestic legislation may be an expression of states' accountability and commitment to the realisation and advancement of women's rights norms established at regional and international levels. However, an assessment of the legislation and the impact they may have on the question of how women experience violations is critical to determine whether a state has indeed met its commitment to protect them from discrimination, exclusion, deprivation and violence, including harmful practices.¹³⁵ The laws should have provisions that aim to dismantle the social and economic conditions that sustain FGM as a practice and force adult consenting women to undergo the cut as a result of the need to meet their economic and social survival needs. From this assessment, this is yet to be adequately implemented through binding legislation in all the countries sampled. In this assessment these laws are inadequate interventions and will in all probability fail in their attempt to serve as tools to eradicate FGM in the member states.

6 Conclusion

AU member states need to be critical in assessing the legislative interventions that exist in their territories to determine whether they genuinely target the root causes of the continuation of FGM as a traditional or cultural practice. This requires that there is a sensitive

¹³⁴ See *Kamau* (n 15) para 29 where the Court held that '[n]o person could licence another to perform a crime. The consent or lack thereof of the person on whom the act was performed had no bearing on a charge under the Act.'

¹³⁵ *Sithole & Dziva* (n 8) 578.

and critical consultation with the women who consent to FGM in adulthood with the aim of understanding what the drivers are for them wishing to exercise this choice. Any social and economic vulnerabilities that they possess will need to be the targets of any state intervention that is to definitively dismantle the practice. The Joint General Comment on FGM has emphasised the importance of sound and credible research and data in decision making on interventions for a particular context.¹³⁶ In light of this, it is important to consult with women who articulate their right to make a choice in adulthood on what the motivations are for them and structure interventions to eliminate FGM in the community accordingly.

Criminalising FGM is not enough as a proposed legislative intervention to meet state obligations under international law. A comprehensive, FGM-specific law that both provides criminal sanctions for the offence but also requires other measures that go towards behavioural and social changes and economic empowerment of women is needed. These other measures will necessarily be geared towards empowering women in their own communities. These laws can only be enacted after engaging African women in their own discourse to reflect upon their personal realities and what types of measures would empower them based on their diverse identities and experiences of gender inequality.¹³⁷ The Joint General Comment on FGM specifically has called on member states to ensure the participation of women and girls in the process of determining, adopting and implementing legislative and other measures aimed at eradicating FGM.¹³⁸

Measures that will go to the social and economic disadvantages that are barriers to women's economic emancipation in many rural areas where FGM is practised require a commitment to allocate financial and other resources to stimulate their empowerment.¹³⁹ This requires those advocating these reforms to call for the necessary measures to address the political will from the government to source and allocate adequate resources to eradicate the traditional practice.¹⁴⁰ Failing to do so sustains the inequality that is a root cause of the practice and is a reason for the failure of the laws criminalising FGM to eradicate the practice.

¹³⁶ Joint General Comment (n 6) para 63.

¹³⁷ Hess (n 94) 600.

¹³⁸ Joint General Comment (n 6) para 69.

¹³⁹ Joint General Comment para 68.

¹⁴⁰ Joint General Comment paras 66-77. See also Sithole & Dziva (n 8) 589.