

BEADING: THE UNDEFINED OFFENCE IN KENYA

By

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DEDICATION

I dedicate this work to my loving family who have been extremely patient and offered me invaluable and unconditional support throughout the period.

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To Elvis and Felix, only God knows how I appreciate you!

DECLARATION

I declare this research to be my original work and the same has not been submitted in any other institution for the award of any degree.

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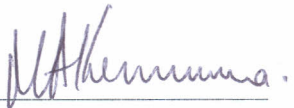
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1. Constitution of Kenya
2. Age of Majority Act, Chapter 33 Laws of Kenya
3. Children Act, Chapter 141 Laws of Kenya
4. Marriage Act No. 4 of 2014
5. Penal code, Chapter 63 Laws of Kenya
6. Prohibition of Female Genital Mutilation Act, No. 23 of 2011
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LIST OF CONVENTIONS & PROTOCOLS

1. Universal Declaration on Human Rights
2. Convention on the Rights of Children
3. Convention on the Elimination of All Forms of Discrimination Against Women
4. Protocol to the African Charter on Humans and People's Rights of Women in Africa

LIST OF ACCRONYMS

- 1. CEDAW-** Convention on the Elimination of All forms of Discrimination Against Women
- 2. FGM-** Female Genital Mutilation
- 3. FIDA-KENYA** – Federation of Women Lawyers – Kenya
- 4. SWT-** Samburu Women Trust
- 5. UK-** United Kingdom

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CHAPTER ONE

INTRODUCTION

1.0 BACKGROUND

Beading is one of the many harmful cultural practices that have been sidelined by the Kenyan legislation. However, before delving in to the practice itself, it is important to understand what harmful practices are, and why beading fits into the definition of harmful practices.

"Harmful Practices" means all behaviour, 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 integrity¹

In addition to the above definition It can now be seen that these harmful practices also directly or indirectly affect boys and men making them both the culprits and victims of the harmful practices. By this it is meant that sometimes it is taken for granted that men do also get affected by harmful cultural practices in one way or another. For instance, research has shown that men who have intercourse with women who have undergone Female Genital Mutilation also suffer health complications.²

Another illustration can be seen in beading cultural practice where, the young males are denied the right to marry for a period of around 15 years after circumcision.³ This makes

¹ Protocol to the African Charter on Humans and Peoples' Rights on the Rights of Women in Africa. (Herein referred to as, The Maputo Protocol) Article I (g)

² End FGM European Network <<http://www.endfgm.eu/en/female-genital-mutilation/what-is-fgm/effects-of-fgm/>> accessed 30 September 2015. See also Stop FGM Middle East, 'New Study From Iran: Female Genital Mutilation Impedes Men's Well Being' <<http://www.stopfgmmideast.org/new-study-from-iran-female-genital-mutilation-impedes-mens-well-being/>> accessed 8 October 2016

³Samburu Women Trust. A research and Human Rights Report: Silent Sacrifice: Girl-Child beading in the Samburu Community of Kenya. 2012, 3-4 <www.iwgja.org/publications/search_pubs?publication_id=6077> accessed on 7 November 2014.

them feel discriminated upon as they are considered men, but are not allowed to engage in marital affairs. This will be demonstrated later in this study.

In Kenya harmful cultural practices take various forms and include: Female Genital Mutilation (hereinafter referred to as FGM); forced marriages; early child marriages; wife inheritance; and beading among others. This study focuses on beading as a harmful cultural practice as opposed to the ornamental physical appearance of the beads on the Samburu girl child.

Beading also known in Samburu language as (*Aishontoyie Saen*), can be defined as a sexual relationship between a man in the “warrior” age group and an uncircumcised girl child, who is not eligible for marriage in the Samburu community.⁴ The men in this age group are called the morans. Both the girl and moran are of the same clan.⁵ The girl is usually endowed with gifts, as a sign of love by the moran. However, that relationship does not lead to marriage and the girl is forbidden to conceive. If she conceives the girl has to abort through traditional means, or give birth and give up the child for it to be killed, or to be adopted by the neighbouring community.⁶ It is a cultural practice that is most common in the pastoralist communities of northern Kenya and especially in the Samburu community⁷. In beading, negotiations are done by the mother of the girl and the moran who wants to bead her daughter. Thereafter, the mother builds a manyatta (these are the samburu houses and this type is called Singira) outside the home, where the moran gets sexual access to the girl.

The Samburu are a pastoral community living in the arid Northern part of Kenya. They are popularly known for their resilience in upholding their cultural practices some of which are

⁴Ibid, see also, ‘Village where men are banned.’ <www.theguardian.com/global-development/2015/aug/16/village-where-men-are-banned-womens-rights-kenya> accessed 1 April 2016

⁵Samburu Women Trust (n 3)

⁶Samburu Women Trust (n 3) 8

⁷Pauline Nasesia Wanyoike. The Perceptions Of Rural Samburu Women In Kenya With Regard To Hiv/Aids: Towards Developing A Communication Strategy. (University Of South Africa. June 2011)192

harmful.⁸ In terms of authority the community is ruled mainly by the male elders of the community who dictate the culture and behaviours of the individuals.⁹ This informs the patriarchal norms existing in the community. The practice of beading is engaged by girl children and morans which takes the form of a “temporary marriage”.

Marriage under the Samburu culture is not dependent on the consent of the girl involved but rather the choice of the girl’s father and the prospective husband who is usually much older than the girl.¹⁰ However, this is the marriage that is supposed to be permanent and is not between a moran and the girl but an old man. In beading, which by analogy, operates like a “temporary marriage”, it is a moran and the mother of the girl who agree on the beading relationship and the consent of the girl is also immaterial. The main distinction here is that for beading the mother of the girl is mostly involved and it occurs with the moran, while marriage mainly involves the father of the girl and the husband is usually an old man of the father’s choice.

Under the Marriage Act,¹¹ section 3 provides for the definition of marriage. It states, “*Marriage is the voluntary union of a man and a woman whether in a monogamous or polygamous union and registered in accordance with this Act.*” Section 4¹² further provides, “*A person shall not marry unless that person has attained the age of eighteen years.*”

⁸ Naomi Keeru Kithure, Erick Mwenda E.G, Martha Wanjiru Muraya and Job Mulati, ‘The Impact of Samburu Culture on the Development of Western Education in Samburu Community during The Colonial Period in Kenya’, (2013) Vol. 3, No. 21, 128- 133. See also Male Engagement for the Elimination of the Beading Practice in Samburu Communities; Community Mobilization Report. 11 <www.coexistkenya.com/files/Reports/samburu-beading-project-study.pdf> accessed 1 April 2016

⁹ Samburu Women Trust (n 3) 3, see also Spencer, *The Samburu: A study in Gerontocracy* 1956, 2004 (London: Routledge) 133

¹⁰ Paul Spencer, *The Samburu: A study in Gerontocracy* (London: Routledge 1956, 2004) 153

¹¹ No. 4 of 2014 Laws of Kenya

¹² *ibid*

According to the foregoing definition of marriage, the Samburu cultural temporary marriages are not legal despite the laws providing for customary marriages. This as Young¹³ notes is because the Samburu subscribe more to their cultural rules than the national laws. This is not to suggest that the former is loathed by the latter, but the laws provide that no person should be forced into cultural practices that they do not want,¹⁴ leave alone the harmful which are proscribed.¹⁵

Another feature of the Samburu culture is the delayed right to marriage for almost 15 years after circumcision of the morans. Delayed right in this context means, that the morans are considered men after going through their circumcision but have to wait until 15 years later to be able to marry. This is in contravention of Article 45,¹⁶ which entitles an adult to be married after the attainment of 18 years of age. This, Spencer attributes to the jealously guarded monopoly of political power and marriage.¹⁷ According to Spencer, this is the reason behind the tensions of the two age groups.¹⁸ As a way of reducing this intergenerational tension beading was introduced, rendering uncircumcised children as objects for the fulfilment of the morans' sexual desires as they await to be eligible to marry.

This practice has also led to discrimination of the Samburu girl in the family unit in that she is taken as an asset that is meant to ultimately benefit the family financially, by getting a moran who then brings gifts to the home. Later when this girl child has undergone FGM she gets married off to a wealthy man as long as he can bring as many cows as requested by the girl's family. In the national context, the Samburu are a community considered to be

¹³ Laura Young, 'Report on the Challenges at the intersection of gender and ethnic identity in Kenya'. [2012] Minority Rights International

¹⁴ Constitution of Kenya Article 44 (3)

¹⁵ Ibid Article 53 (1) (d)

¹⁶ Constitution of Kenya

¹⁷ Spencer(n 10) 133

¹⁸ ibid

marginalised.¹⁹ This puts the Samburu girl in a position of facing discrimination at various levels including the family unit itself, considering the barriers that she has to overcome to enjoy certain benefits that may easily be acquired by Samburu men including higher education.²⁰

As stated above harmful cultural practices are “...all behavioural 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.”²¹ To see how beading is a harmful cultural practice one needs to pore over its definition to realise the true impact of the cultural practice to the Samburu girl child. The adverse implications of beading as a harmful cultural practice are manifest in the various offences and constitutional human rights infringements that are committed, or have a high probability of being committed, during the period in which a girl is beaded. These include among others: Incest;²² Defilement;²³ Indecent act with a child;²⁴ murder;²⁵ the infringement of the children’s rights under the Constitution of Kenya ;²⁶ and the Children’s Act.²⁷ Other fundamental rights and freedoms infringed include: the right to life;²⁸ the right to human dignity;²⁹ the right to equality and freedom from discrimination³⁰ and the right to marry upon becoming an adult.³¹ The foregoing offences and breach of fundamental rights and freedoms, will be illustrated in different parts of this study.

¹⁹ Constitution of Kenya, Article 260

²⁰ Male Engagement for the Elimination of the Beading Practice in Samburu Communities; Community Mobilization Report. 12 <www.coexistkenya.com/files/Reports/samburu-beading-project-study.pdf> accessed 1 April 2016

²¹ Maputo Protocol, Article 1

²² Sexual Offences Act No. 3 of 2006 , section 20(1)

²³ Ibid, section 8

²⁴ Ibid section 11

²⁵ The Penal Code, Chapter 63 Laws of Kenya, section 203

²⁶ Article 53 (1)(b),(d) and (2)

²⁷ Chapter 141 Laws of Kenya. Part II

²⁸ Constitution of Kenya , Article 26

²⁹ Ibid Article 28

³⁰ Ibid Article 47

³¹ Ibid Article 45(2)

Incest involves having a sexual relationship with a relative including uncles and aunts among others. The fact that both the girl and the moran come from the same clan makes it highly probable that the accruing relationship will be incestuous. Defilement on the other hand entails an adult male engaging sexually with a girl below the age of 18 years, who in Kenya is considered a minor.³² For this offence to occur, actual penetration of the girl's genitals must have occurred. This can be difficult to prove as those who could easily report the crime are parents of the victim but who are also in the same camp as the perpetrators. This can be illustrated by the act of the mother in building the *singira* to allow free access by the moran to the girl for sexual purposes.

Indecent acts with a child, involves behaviour that is not acceptable for a man to engage with a child for example touching her private parts even without penetration. Murder, occurs where the child conceived from a beading relationship is killed after birth. The reason I choose to call it murder and not infanticide is because, it is not the mother who kills the baby but other people who believe that the child is an abomination and therefore, should not live. The difference is that in infanticide the mother is normally the one who wilfully kills the newborn child.³³ The murder of the newly born child, degrades the child's mother's dignity, and also denies the child a right to life.

The discrimination referred to in this study is in multiple forms and since the Samburu are a marginalised community the same is felt more by the girls than the boys who end up benefiting from the patriarchal structure of the community. The girls suffer more as the barriers they have to overcome to for instance, enjoy the benefit of education are so high since they are subjected to many harmful practices in their lifetime. The moran not being allowed to marry the beaded girl on the attainment of the age of 18 years also infringes on his

³²section 2 Age of Majority Act, Chapter 33 Laws of Kenya

³³Section 210, Penal Code, Chapter 63 Laws of Kenya

rights to marry an adult of the opposite sex as provided under the Constitution of Kenya. Beading, according to a report by the Samburu Women Trust, originated some centuries ago when it was introduced as a means of conflict resolution between the morans and the elders.³⁴ This conflict arose as a result of the morans engaging in sexual relationships with the elders' wives.³⁵

Relationships between morans and elders' wives arise due to the age disparity of the elders' wives who are mostly between the ages of 10-12, and their husbands who may be over 60 years.³⁶ The main difference between these relationships and beading is that, here the girls have already gone through FGM and have been married off to old men. Therefore, this kind of relationships are considered extra-marital and adulterous. Another reason is that morans are not allowed to marry for about 10- 15 years after their circumcision.³⁷ They therefore sexually engage with the elders' wives since they cannot marry in their capacity as morans.

From the above, one is able to decipher that the morans engage in beading relationships not merely because they wish to, but as a consequence of another cultural practice that deters them to marry at the earliest time stipulated in law, that is 18 years. Ironically the morans are not barred from engaging in sexual activities as can be seen from the beading relationships which, relegates the uncircumcised girls to sexual fulfilment objects for the morans. This then renders the morans victims, as well as perpetrators of the harmful cultural practices of their community. Although the practice has decreased, it is probably manifesting itself in ways which are equally harmful. For instance, parents not wishing to bead their girls will take them for FGM, which will signify their status as women ready for marriage. This means, the girls

³⁴ Samburu Women Trust (n 3)5

³⁵ See Wanyoike(n 11)183

³⁶ *ibid.*, 182-183. See also Spencer. *The Samburu: A study in Gerontocracy* (London: Routledge 1956, 2004) 153

³⁷ *ibid*

are quickly married off.³⁸ Thus, the beading practice indirectly encourages FGM.³⁹ This is because circumcised girls cannot be beaded as they are considered to be women ready for marriage.⁴⁰

This section has offered a brief background on the harmful cultural practice of beading, what it entails, how it comes to be, the various components that make it complicated and the rights that continue to be infringed by this single harmful cultural practice. The introduction of the Constitution of Kenya enhanced the respect for communities' cultures to be upheld, but with the condition that the same should not interfere with the rights as embodied in chapter four.⁴¹ However, much as the Constitution may have addressed the issues of women and children the reality on the ground is still far from what the Constitution envisages. The various Constitutional guarantees are still being breached.⁴² From independence women have struggled to have their rights specifically recognised in Kenyan laws. Although progress has been made, there has been a challenge just as with the Constitution, in terms of implementation.⁴³ The next section provides a clear picture of the problem that this study strives to arrive at its probable solution.

1.1 PROBLEM STATEMENT

Beading is a harmful cultural practice that violates individual rights and freedoms as provided in the Constitution of Kenya. This practice which mostly affects women and children is a violation of the following constitutional guarantees: right to life, equality and freedom from discrimination, human dignity and protection of children from abuse and harmful cultural

³⁸Samburu Women Trust (n 3) 8

³⁹ Prohibition of Female Genital Mutilation Act No. 23 of 2011, see part IV

⁴⁰ (n 10)

⁴¹ Article 159 (3)

⁴² Constitution of Kenya . Articles: 26, 27, 28,29 (c) (d) (f), 44 (3), and 53(1) (d)

⁴³See Prof. Ben Sihanya, 'Constitutional Implementation in Kenya -2015: Challenges and Prospects', Friedrich Ebert Foundation, October 2011 revised December 2012 <library.fes.de/pdf-files/bueros/kenia/09857.pdf> accessed 10 June 2015

practices among others.⁴⁴ There is lack of a comprehensive statute that addresses harmful cultural practices in Kenya and this makes it difficult to pin down the perpetrators of all such practices, that not only harm individuals but also the economy of our country. This presents a gap in the implementation of the Constitution which in turn acts as a barrier to the realization of the benefits to women and children as provided therein.

Failure to address this problem will lead to the non-realisation of constitutional benefits and thus making no difference in the lives of those who have been historically discriminated. This research will seek to address this problem by exploring the practical legislative and other alternative means to bridge that gap and eliminate the barriers that hinder the capabilities of women and children in the Samburu community.

1.2 RESEARCH JUSTIFICATION

Beading is a breach of the children rights⁴⁵ and, is harmful not only to the girls, but the society as a whole. As elucidated in the sections above, beading also arises from another cultural practice that causes morans a lot of emotional distress as they are regarded as men but, are not allowed to enjoy sexual relations in the context of marriage until the lapse of more than a decade. In effect, the same contravenes Article 45 of the constitution which entitles an adult to consensually marry another adult of the opposite sex. If the same is not addressed women in the Samburu community and generally the pastoral community will not enjoy the rights secured in the Constitution of Kenya.

This will result into the continued marginalization and historical injustices of the community which the Constitution seeks to fight against.⁴⁶ Marginalisation in this context is felt more by the girls and women than the men. This is because apart from the ethnic marginalisation that

⁴⁴ Constitution of Kenya (n 40)

⁴⁵ Children Act Chapter 141 Laws of Kenya Part II

⁴⁶ Article 260 Constitution of Kenya, interpretation of 'Affirmative Action'. See also Article 56 and 100.

the Samburu generally face as a community, the women and girls further face gender discrimination and marginalisation within the community. This can be illustrated by the non-consultation of the girls when issues relating to their personal lives are concerned whether as minors or at the attainment of adulthood, that is at 18 years old.

That Kenya is bound by international Conventions on the protection of women and children and that the country is embracing affirmative action also justifies this research. There is also a gap in legal knowledge in regard to this type of harmful cultural practice which this study seeks to bridge. It is also hoped that this study will trigger policies towards eliminating harmful cultural practices adopting a holistic approach.

1.3 HYPOTHESIS

This research will proceed based on the following hypothesis

1. Beading persists due to a gap in the implementation of the Constitution of Kenya .
2. The implementation gap further causes a barrier to the realisation of the benefits, for children and women under the Constitution of Kenya.

1.4 RESEARCH OBJECTIVES

1. To investigate the gaps in implementation of the Constitution regarding harmful cultural practices with specific reference to beading.
2. To explore how beading should specifically be captured in legislation.
3. To explore the possible ways in which beading can be eliminated.

1.5 RESEARCH QUESTIONS

1. What are the gaps in the relevant legal framework that deal with harmful cultural practices?
2. Why do we have these gaps despite the willingness to deal with harmful effects of culture in the lives of women and girls?
3. How can beading be eliminated through legal mechanisms?

1.6 LITERATURE REVIEW

This part looks at available literature on beading as a harmful cultural practice. I have identified three themes that this research will revolve around. These are; the cultural rationale of beading; multiple discrimination resulting from beading; and the inadequacy of law in dealing with beading, as a harmful cultural practice. The choice of these themes was informed by the need to understand first, the reasons behind this harmful cultural practice, second, the discrimination that emanates from the practice and finally what measures the Legislature has taken to deal with this problem. From this review I hope to bring out the adverse impacts of beading which lead to its classification as a harmful cultural practice and the lack of proper legal framework to curtail the same. I will then point out the weaknesses in the current legal framework and possibly give recommendations for law reform in this area.

1.6.1 The Cultural Rationale of beading

A report by the Samburu Women Trust gives a clear insight of the cultural rationale of beading.⁴⁷ In the Samburu community it serves three main functions. First, is the preparation of the uncircumcised girl for marriage life. To the Samburu a girl who has been beaded is attractive and has a higher probability of getting a husband. Second, is the promotion of fidelity especially among the morans. It is believed that, once a moran beads a girl, he is less

⁴⁷Samburu Women Trust (n 3)

likely to have many girlfriends which at times results in fights amongst them. Third, is maintenance of peace. This is achieved by providing the morans with a means of sexual satisfaction, and thus they avoid seducing the elders' wives. As mentioned in the previous sections, this is because morans, after circumcision, can only marry after the lapse of 15 years.

The report indicates that there is a change in perspective of the elders in terms of abandoning the practice. However, it does not indicate what practice they are willing to adopt instead. Another report by The Coexist initiative shows the contrary, in some interviews conducted by the organisation, 90% of the respondents supported the continuance of beading in the community.⁴⁸ Spencer notes that, the age set grouping of the pastoralist communities which is directly linked to this practice; is a measure to guard the privileges enjoyed by elders for example, marriage.⁴⁹

Wanyoike on the other hand, notes the negative impacts of the practice including the spread of sexually transmitted diseases.⁵⁰ This results from the promiscuity that arises from the practice of beading, where women have more than one sexual partner.⁵¹

Miriam Kahiga notes that these harmful cultural practices enhance the subordination of women to men and states that for this reason these practices must be eliminated to avoid discrimination.⁵² Kahiga does not expressly provide how the practices can be eliminated and

⁴⁸ Male Engagement for the Elimination of the Beading Practice in Samburu Communities; Community Mobilization Report.36 <www.coexistkenya.com/files/Reports/samburu-beading_project-study.pdf> accessed 1 April 2016

⁴⁹ Paul Spencer, *The Samburu: A study in Gerontocracy* (London: Routledge 1965, 2004) 133

⁵⁰ Pauline Nasesia Wanyoike, *The Perceptions of Rural Samburu Women In Kenya With Regard To Hiv/Aids: Towards Developing A Communication Strategy*. June 2011. University Of South Africa. 185

⁵¹, *ibid* 185

⁵² Miriam Kahiga, 'Socio-cultural Obstacles to the Participation of Women in the Democratization Process'. In Kivutha Kibwana (ed), *Readings in Constitutional Law and Politics in Africa: A case study of Kenya* (Nairobi: ClariPress Ltd 1998) 380

that forms one of the aims of this research that will hopefully inform policymakers and Legislators of the existing problem.

A report by World Vision UK, explores the link between FGM and early marriage. Although beading was not discussed in relation to FGM and early marriage, the report gives an insight of the key drivers of FGM and early marriage which are inevitably shared as key drivers of beading in the Samburu community. The identified ones were: Gender inequality and social norms; control of female sexuality; and limited economic opportunities for women and girls.⁵³

From all the literature reviewed above, none was keen to explore how the Samburu community could abandon the harmful practice of beading. They have also not shown any legal implications that flow from this harmful cultural practice.

It is the concern of this research to investigate the ways and means through which this harmful cultural practice can be peacefully abandoned by the community, without conflicting with their values and noting the importance of cooperation with various stakeholders including community leaders and the victims.⁵⁴ This study will also demonstrate how beading infringes on the rights of both the girl children and morans and how the same is an impediment to the general development of the community.

⁵³ World Vision UK, Exploring the links: Female Genital Mutilation/ Cutting and Early Marriage. May 2014. Available at http://9bb63f6dda0f744fa4449471a7fca5768cc513a2e3c4a260910b.r43.cf3.rackcdn.com/files/4814/0068/7160/Exploring_the_links_FGM_cutting_and_early_marriage.pdf 9 accessed 5 September 2015

⁵⁴ Lauren Hersh, 'Giving Up Harmful Practices, Not Culture' February 1998 <www.advocatesforyouth.org/publications/publications-a-z/521-giving-up-harmful-practices-not-culture> accessed 10 July 2015

1.6.2 Multiple discrimination arising from the harmful practice of beading

*“Multiple discrimination involves unequal treatment based on various socially constructed categories, such as gender, race...ethnicity, religion, disability status and sexual orientation.”*⁵⁵

For instance the Samburu girl child is discriminated in the family when the boys are going to school and getting education while she gets beaded and is required to submit to the wishes of the moran which denies her education⁵⁶, dignity and freedom to express herself.

Once this girl approaches teenage hood, she is then forced into practices like FGM which do not happen with their consent and if they do, then it is because she has psychologically adapted to the idea that the procedure is mandatory for her if she is to be considered part of the community. Sen notes this and argues that women do certain things because they adapt to their situations and not because they really consent.⁵⁷ Under the Kenyan law children do not have the capacity to consent and this worsens the situation. Nationally the Samburu community is among the marginalised groups in Kenya in terms of ethnicity. Therefore a Samburu girl child faces various forms in discrimination the main ones being due to her gender and ethnicity.

Laura Young, argues that the harmful cultural practices directed against women at the family and community level plays a major role, in further discrimination of women at the national level. She further identifies a challenge. According to her, women especially in the minority

⁵⁵Kimberle Crenshaw, 1989 as cited in Eva Schomer, 'Multiple discrimination: a smokescreen over differences'.

<[https://www.jur.lu.se/WEB.nsf/\(MenuItemByDocId\)/ID25C9F793A5E653AFC1257D8600290301/\\$FILE/Multiple%20discrimination.pdf](https://www.jur.lu.se/WEB.nsf/(MenuItemByDocId)/ID25C9F793A5E653AFC1257D8600290301/$FILE/Multiple%20discrimination.pdf)> accessed 12 May 2016

⁵⁶Priscilla Lanyasunya, 'Socio-cultural Analysis of factors leading to girl child school drop-out in Samburu District. Master's thesis University of Nairobi (abstract).

⁵⁷ Martha Nussbaum, 'Capabilities as Fundamental Entitlements: Sen and Social Justice (2003) 9 Feminist Economics 34

groups, tend to abide firstly to customary laws before submitting to state laws.⁵⁸ This makes it hard for the women in that community to enjoy the rights afforded by the formal laws.

This research demonstrates how multiple-discrimination manifests itself in the case of the samburu women and children, who face discrimination both under their cultural practices and the formal laws due to lack of proper implementation of the Constitution. This study further seeks to propose awareness creation programmes that will ensure women and children are able to differentiate between constructive cultural practices and harmful ones, to ensure elimination of barriers in their individual as well as community development.

1.6.3 Inadequacy of law in dealing with beading

There hardly exists any literature that exhaustively discusses the adequacy or inadequacy of the laws. However Laura Young⁵⁹ comments on the relationship between customary laws and formal laws in Kenya. She recognises a tension between the two and states that this poses a challenge in the realization of women's rights for most minority women in Kenya.

She says, *'The daily lives of most minority and indigenous women in Kenya are governed by customary rules and community-based justice systems. On issues such as **cultural practices**, marriage, family, land-holding and political participation, minority and indigenous women first interact with their community governance systems, before they encounter formal governance systems imposed by the Kenyan state.'*⁶⁰

Kadesa⁶¹ in her dissertation states that the Children Act outlaws the beading practice but has failed to demonstrate specifically which section does the same. Further she recommends

⁵⁸Young (n 13)

⁵⁹ Ibid

⁶⁰ ibid 9

⁶¹Tracy Kadesa Adolwa, 'A study into the Samburu cultural Beading Practice and its effects on the Samburu girl child rights. Dissertation, University of Nairobi, School of Law 2013

another statute to be enacted specifically for the purpose of curbing the practice of beading.⁶² This is impractical as Kenya has a wealth of cultural diversity and if all harmful cultural practices are to be accorded an Act of parliament proscribing them, then many Acts will be passed causing unnecessary expenditure. The report by the Coexist Initiative claims that there is enough legislation to fight against beading as a harmful cultural practice. However, the report does not cite these laws and only quotes the Constitution to the extent that it prohibits harmful cultural practices.⁶³ This research tries to find a holistic approach towards the fight against harmful cultural practices generally and beading specifically.

This study unearths the inadequacy of the law in curbing beading, and how the same can be framed to stop the harmful cultural practice. As seen from above, little literature exists on the adequacy or otherwise, of the laws to curb the harmful practice of beading. In all the literature analysed none identified the gaps in the law and the challenges that arise when perpetrators of this harmful practice need to be prosecuted. There has been little scholarly research in this area and this is essentially the main contribution of this study.

1.7 THEORETICAL FRAMEWORK

This part seeks to explore the theories that underpin this research. These are discussed below.

1.7.1 Upendra Baxi's Theory of Human Rights

Beading is a violation of human rights which are entitled to every individual. These rights are enjoyed by virtue of one being a human. They occur naturally and are thus inherent.

⁶² Ibid

⁶³ Male Engagement for the Elimination of the Beading Practice in Samburu Communities: Community Mobilization Report.19 <www.coexistkenya.com/files/Reports/samburu-beading.project-study.pdf> accessed 1 April 2016

Precisely, the notion of human rights envisaged here is, the 'contemporary' human rights, as espoused by Baxi.⁶⁴ He says:

*'Contemporary' human rights dynamics have produced a heterogeneous array of documents specifying the rights of marginalised humans, the 'others' of the modern paradigm- the human rights, for example, of 'the girl child, migrant labour, indigenous peoples, gays and lesbians (...), prisoners and those in custodial institutional regimes, refugees, and asylum-seekers' children.*⁶⁵

However, he problematizes this human rights paradigm. According to Baxi there is a gap between the theory and practice of human rights and this threatens its future which seems to be susceptible to use by powerful people to further entrench human suffering.⁶⁶ Further, he demonstrates the two distinctions between 'politics of human rights' and 'politics for human rights'. The former being ascribed to the use of human rights to attain power, while the latter being the use of human rights engagements to enhance ethics, accountability and progressive governance in states.⁶⁷ In essence, Baxi's work seeks to bridge the gap between the theory and practice of human rights.

To ameliorate the current state of human rights he suggests the Hegelian approach and identifies the three steps which need to be fused to achieve the proper universality of human rights. These are: 'abstract universality' and 'abstract particularity which then lead to

⁶⁴Upendra Baxi *Future of Human Rights* (OUP, Oxford 2006)

⁶⁵ Ibid, 32 as quoted in Anna Grear, *Human Rights, Property and the Search for 'World's Other'*. [2012] 3 Journal Of Human Rights And The Environment.180

⁶⁶Euan MacDonald, 'Review Essay- The Future of Human Rights? Theory and Practice in International Context: Review of Upendra Baxi's *The Future of Human Rights*' German Law Journal 05 No 8, 970 <http://www.law.ed.ac.uk/includes/remote_people_profile/remote_staff_profile?sq_content_src=%2BdXJsPWh0dHAIM0EIMkYIMkZ3d3cyLmXhdY5lZC5hYy51ayUyRmZpbGVfZG93bmXvYWQIMkZwdWJsaWNhdGlvbnMIMkYwXzIzODZlcmV2aWV3ZXNzYXl0aGVmdXRlcmVvZmhlbWVucmlnaHRzdGhIb3J5S5wZGYmYWxsPTE%3D> accessed 15 May 2016

⁶⁷ Ibid at 972

'concrete universality'.⁶⁸ He explains that the first step occurs when rights are pronounced generally to all persons as humans, the next step then involves the different particular rights such as the women and children rights. Finally the last step is achieved with the contextualisation of these rights to the point of a personal level. In his words as quoted by MacDonald he says:

*"...where rights come home, as it were, in the lived and embodied circumstance of being human in time and place under the mark of finitude of individual existence"*⁶⁹

In the context of this research, this theory is used to demonstrate how children and women rights, just as any other human rights are given primacy on the one hand while the same are still vulnerable due to the gaps in the theory and practice of human rights.

Although some scholars strive to move away from the traditional rights language, to a more realistic one of entitlements, our laws still embody a rights language. It is therefore necessary to begin with this theory for a clear understanding of the rights language in our laws which seem problematic and which have not achieved much in terms of reflecting the realities on the ground.

This explains why the enunciation of rights seems to be on study only. However, there is a connection between this approach and the more realistic approaches in that they all seek to try and find ways of eliminating human suffering.

⁶⁸Upendra Baxi, *The Future of Human Rights*. (Oxford University Press 2002) 94 as quoted in Euan MacDonald (n 66)

⁶⁹ibid

1.7.2 Jack Donnelly's Theory of Human Rights

Jack Donnelly is a defender of human rights as universal and compatible to its particularity. He seems to agree with Baxi on the issue of modern and contemporary human rights but focuses more on the "inherent dignity" of individuals which also justifies human rights.⁷⁰

Donnelly, in his 1989 version of his book says, "*We have human rights not to the requisites for health but to those things 'needed' for a life of dignity, for a life worthy of a human being, a life that cannot be enjoyed without these rights*"⁷¹ This has been captured in our Constitution.⁷² Article 28 provides that every person has inherent dignity. For this Article to be fully realised there is need for further provisions in the legislation which may make it easy for everyone to invoke the same. Donnelly's work seems to tilt to the contemporary notion of human rights which is more inclusive but also problematized by Baxi since according to him it does not have a terminus.⁷³

Donnelly just like Baxi notes some disparity between human rights theory and practice and strives to improve the status of human rights practice through his theory in emphasizing on the dignity of individuals. This to him is an imperative towards the achievement of universality of human rights. Although Baxi endorses the Hegelian three step approach he does not bring out the specific particularity that is important to understand the predicament of the Samburu girl child as in the context of this research. Donnelly's work aids my argument by bringing out the compatibility of universal human rights and particularity of human rights with the illustration of inherent human dignity, which the Samburu girl child is deprived of by the litany of human rights violations caused by the practice of beading.

⁷⁰Jack Donnelly, *Universal Human Rights in Theory and Practice*, 3rdedn(Ithaca & London: Cornell University Press 2013)1-2 <<http://www.amazon.com/Universal-Human-Rights-Theory-Practice/dp/0801477700>> accessed 8th June 2016

⁷¹ Jack Donnelly, *Universal Human Rights in Theory and Practice*, (Ithaca: Cornell University Press, 1989)17

⁷² (n 18) Article 28

⁷³See Euan MacDonald(n 64)

This study seeks to explore how this particularity can be achieved through enactment of, or amendment of various laws. This study also takes advantage of the change of perceptions that is currently witnessed from the elders⁷⁴ and the morans,⁷⁵ in the Samburu community. Donnelly further acknowledges the notion of human capabilities and the links between rights and capabilities.⁷⁶ He understands capabilities as "...a way to operationalize the enjoyment of human rights, not ground their substance."⁷⁷ His main contention seems to be that the notion of capabilities does not offer a probable solution to the challenge of furnishing a 'source for human rights'. In that regard he quotes Sen when he says:

*"human rights and human capabilities have something of a common motivation, but they differ in many distinct ways...they go well with each other, so long as we do not try to subsume either entirely with the other"*⁷⁸

The capability approach is discussed below and an extraction of a link from the three theories is attempted with the hope that these theories though seemingly divergent, converge at one point to demonstrate the contextual need for reform in our laws proscribing harmful cultural practices in general and beading specifically.

1.7.3 The Capabilities Approach

The major proponent under this theory is Amartya Sen. It was further espoused by Martha C. Nussbaum who took a further step in elaborating the specific. This is a social justice theory which seeks to enhance the welfare of individuals and especially women by eliminating factors that limit what they can do or what they can be.⁷⁹ Nussbaum says, "*if we ask what*

⁷⁴Samburu Women Trust (n 2)

⁷⁵ Boaz Kipngeno and Michael Saitoti. 'Morans differ with elders over female circumcision'. The Standard [27th January 2015]

⁷⁶See Donnelly (n 68) 14

⁷⁷ibid

⁷⁸Amartya Sen, 'Human Rights and Capabilities' Journal of Human Development (2005) 6 no.2 (Routledge) 151

⁷⁹ Martha Nussbaum, 'Capabilities as Fundamental Entitlements: Sen and Social Justice' (2003) 9 Feminist Economics 33

people are actually able to do and to be, we come much closer to understanding the barriers societies have erected against full justice for women."⁸⁰ This theory disapproves of theories that gauge well-being in terms of utility. This, as Sen argues is because women mostly adapt to their situations and that what they do results from their circumstances rather than their choices.⁸¹

Although Sen posits that freedom is crucial in the well-being of individuals, he does not prioritise the freedoms to come up with specific entitlements that are requisite in any society. It is at this point that Nussbaum makes her contribution and specifies ten capabilities which she considers the core of human entitlements.⁸² Of these, three suffice at this point; Life, Bodily Health and Bodily Integrity. The denial of say, bodily integrity which is currently a reality to the Samburu women causes "unfreedom" and thus creates a barrier to the attainment of a quality life. From the above it is important to address the harmful cultural practices that hinder these women from living a dignified quality life. This will also enhance social justice as well as reduce poverty by eliminating the barriers to development.

These three theories build on each other.(even though they seem divergent at the cursory level) Baxi's problematization of contemporary human rights shows us that indeed children rights are currently understood as human rights, but the gap between the theory and praxis of human rights threatens the paradigm and if not dealt with human suffering may be entrenched further.⁸³

Donnelly's theory also shows us that human dignity should be enjoyed by everyone including children. His emphasis on 'inherent human dignity' expounds the *abstract particularity* as

⁸⁰ *ibid* 33

⁸¹ *ibid* 34

⁸² *ibid* 40

⁸³ Upendra Baxi, *The Future of Human Rights*, (Oxford University Press 2002) 94 as quoted in Euan MacDonald (n 64)

described by Baxi and which is essential to the achievement of the universality of human rights (*abstract universality* as Baxi puts it) Our Kenyan Constitution further demonstrates that infringement of the entitlement to dignity, amounts to an infringement of human rights.⁸⁴ Finally the capability approach demonstrates how one cannot enjoy these inherent rights unless, they are freed from the impediments that cause barriers to their full capabilities.

Sen just like Baxi, sees the fragility of the human rights paradigm⁸⁵ and his account seems to be an attempt to resolve the predicament by taking a perspective of social justice that enables all people to exploit their potentials regardless of their economic, physical or social status. Criticisms notwithstanding, the capabilities approach as posited by Sen and further espoused by Nussbaum has to some extent enabled a more practical approach towards the enjoyment of human rights, despite the fact that Sen is reluctant to completely synthesise human rights and capabilities saying that they “..have something of a common motivation, but they differ in many distinct ways....they go well with each other, so long as we do not try to subsume either entirely within the territory of each other.”⁸⁶

For the purposes of this research, I use Baxi’s theory with Nussbaum’s capability approach to demonstrate how one can therefore enjoy a quality dignified life. This is because human rights and capabilities are distinctly linked and despite the divergent views of the respective theorists, both have one thing in common, they in their own different ways seek to eliminate human suffering by affording all an opportunity to be what they want to be.

To some extent Donnelly’s observation resonates when he states that, “Capabilities in other words, are a way to operationalize the enjoyment of human right...”⁸⁷ it is only after identifying a right that one acquires an entitlement which then imposes a positive duty to the

⁸⁴Article 28, Constitution of Kenya

⁸⁵Amartya Sen, ‘Human Rights and Capabilities’ *Journal of Human development* (2005) 6 No. 2 (Routledge)

⁸⁶Sen (n78)

⁸⁷Donnelly (n 68) 14

relevant agencies (here the Government), to eliminate all impediments to the realisation of the said right. This then leads to enhanced capabilities coupled with choices to enable one live a dignified quality life as Donnelly observes. This study analyses the barriers that face the children and women in the Samburu community, and the duty of the Government of Kenya in eliminating the same. This will enable the emancipation of the girl children and women and enable them exploit their full potentials, so as to be capable of being the best that they can be while also enabling them to make informed choices even in participation towards development projects.

The capabilities approach is also used to bring out the realities and eliminate the barriers through practical proposals for legal reform. The legal reform will hopefully give rise to legislation and other alternative mechanisms which will then foster the proper implementation of the Constitution of Kenya, in terms of women and children rights. Nussbaum's capability approach as a feminist approach also informs the methodology taken in this study. This is explained in the next section.

1.8 METHODOLOGY

This study adopts a qualitative research method as the data required was meant to answer analytical questions alluded in the previous sections. The data collected was mainly through desktop research and observation. The main sources of information were books, articles, newspapers, published reports and statutes.

Feminist methodology is also employed in this research in order to bring out many aspects of the law that are overlooked by the traditional research methods. Feminist methods are unique and important because they view issues with a keen interest of trying to bring out weaknesses that undermine women's interests in the power structures currently in place.⁸⁸ Criticising the

⁸⁸ Katharine T Barlett, 'Feminist Legal Methods' (1990) 4 Harvard L.R 829

current power structures using the traditional methods would be to “*Recreate the illegitimate power structures, [that they are] trying to identify and undermine.*”⁸⁹

This observation was done prior to the study in 2014 after visiting Laikipia County for a week and seeing the impacts of harmful cultural practices. Specifically, I was hosted by Ms Hellen Gathogo, the Executive Director of One More Day for Children (OMDC). She took me through their work and I later visited the safe house in Doldol, where children rescued from various forms of harmful cultural practices were housed and kept safe.

These harmful practices included beading, early marriages and FGM. However, beading was the most problematic because unlike FGM and early marriages there is lack of a proper legal framework covering the heinous act of beading which is also closely related and in some instances directly connected to other harmful practices which have been already proscribed in statutes.

The specific method used is the consciousness raising feminist methodology. This method is an awareness creation kind of tool, that seeks to unearth the common struggles that women face and empower them to take action in terms of law reform in this context. It involves the sharing of experiences and identifying the common struggles that individual women face.⁹⁰

This research entails an analysis of the critical theories that underpin the laws meant to protect the fundamental rights enshrined in the Constitution of Kenya and the current legal framework dealing with harmful cultural practices and tries to problematize the same. It also seeks to propose recommendations as to the legislative framework and other possible measures that may be adopted.

⁸⁹ Singer, *Should Lawyers Care About Philosophy?* (Book Review) 1989 Duke L.J as quoted in ibid 831

⁹⁰CollenMacQuarrie, ‘Consciousness Raising’ Sage Research methods <<https://srmo.sagepub.com/view/ency-of-case-study-research/n81.xml>> accessed 25 September 2015

1.9 THESIS STRUCTURE

Chapter one introduces beading as a harmful cultural practice. It then gives a brief description of the Samburu community and the context within which beading occurs. It proceeds to explain the problem caused by the perpetration of the practice and the lack of legislation to curb it. It also gives an elucidation of the subtle connections that exist between beading and other harmful cultural practices. A human rights theoretical framework is used to show the breaches that arise due to the gap existing in implementation of the Constitution. Finally the methodology section provides the means through which the data used for the study was collected and analysed.

Chapter Two pores over the legal framework on harmful cultural practices and specifically beading. It begins from the international level, regional level and the national level while critically looking at the specific provisions of the laws and conventions meant to protect women and children. It further problematizes these provisions and poses questions as to why some harmful cultural practices have been more legal and scholarly attention than others. The chapter ends by identifying the legal gaps that exist in eliminating harmful cultural practices.

Chapter Three proceeds by posing the question: why is the law inadequate in protecting girls from beading? It therefore looks at several factors that are thought to be the main factors behind the continuance of this harmful practice despite the clear provisions in the Constitution against harmful cultural practice.

Chapter Four sums up the findings of the study and gives recommendations that once implemented, harmful cultural practices, including beading will then be fought holistically and in context.

1.10 Summary

This chapter demonstrated how beading fits into the definition of a harmful cultural practice. A qualitative approach was taken in analysing the data collected and human rights theories underpinning this study were explored. The chapter winds up by giving a thesis structure introducing the proceeding chapters.

CHAPTER TWO

ANALYSIS OF THE LEGAL FRAMEWORK PROVIDING FOR HARMFUL CULTURAL PRACTICES, AND SPECIFICALLY BEADING

2.0 INTRODUCTION

This chapter seeks to analyse and problematize the legal provisions dealing with harmful cultural practices. The analysis will begin by examining international conventions all the way to national legislation.

2.1 INTERNATIONAL LEGAL FRAMEWORK

2.1.1 Universal Declaration on Human Rights

Harmful cultural practices are recognised and condemned even at the international level. The Universal Declaration of Human Rights addresses some of these issues. Though not direct in its wording, the Declaration hints that any harmful act on human beings is not permissible. It provides that no person should be "...subjected to any torture, inhuman or degrading treatment..."⁹¹ It further provides that "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted to him by the Constitution or by law."⁹²

By 1948, women had not yet been very vocal about their rights and therefore it is inevitable that this Declaration would not specify anything regarding women. However, its provisions as stated above have been reflected in our Kenyan Constitution.⁹³ The Constitution is also a framework document which requires further details of rights and offences to be specified in

⁹¹The Universal Declaration of Human Rights 1948. Article 5

⁹² Ibid Article 8

⁹³ Article 22

statutes for example the Penal Code.⁹⁴ The lack of a specific law or section of law that deals with beading leads to injustice to the victims of the harmful cultural practice of beading.

Regarding marriage the Declaration provides that this must only be with the free and full consent of the intended spouses.⁹⁵ This has been entrenched under our Constitution.⁹⁶ Much as this provision is in place it is hardly invoked by the Samburus who firstly abide by their culture before submitting to the national laws. This can be appreciated in light of the fact that the community has been marginalised and is not fully participating in the development of the country thus lagging behind. The deliberate delay of the Morans' right to marry for about 15 years amounts to a denial of this right. This is one of the cultural practices that also contribute to beading as seen in the previous chapter. The fact that the Samburus adhere more to their culture than the laws is a sign that the rule of law is not really at play in equal measure in the various regions of this country.

2.1.2 Convention Rights of the Child

The Convention on the Rights of the Child elaborates the rights of the child and the duties placed on the State Parties in its implementation. For the purpose of this study some Articles stand out in addressing the problem of harmful cultural practices for instance beading. Article 9⁹⁷ is clear that no child should be separated from their parents against their will, unless the same has been rightly considered in a judicial process and the same was deemed necessary, in the best interest of the child. This provision is clearly infringed when the baby is taken from a mother in a beaded relationship and is killed. By virtue of Article 5 and 6 of the Constitution the same applies to Kenya and therefore it should be implemented.

Article 19 further provides:

⁹⁴ Chapter 63 Laws of Kenya

⁹⁵ (n 52) Article 16 (2)

⁹⁶ Article 45

⁹⁷ The 1989 Convention on the Rights of the Child

1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

This provision is a clear indication that there is no excuse for providing a one size fits all legal provision to curb harmful cultural practices in Kenya. The above article also encourages the adoption of other measures other than law to eliminate such practices and enhance the protection of children in this country. Instead what is seen in Kenya is the campaign against FGM which aired in radio and television stations in either English or Swahili language. This is problematic as the same is mostly done by people who either do not even watch television or if they listen to radio they only listen to their vernacular stations. Thus the message is not passed to the intended persons.

The Constitution of Kenya has provided for the protection of children under Article 53. However, the fact that this Convention is binding upon Kenya means more needs to be done in protecting women and children from harmful cultural practices. This includes specifically providing for criminal penalties for all harmful cultural practices including beading.

2.1.3 Convention on the Elimination of All Forms of Discrimination Against Women

The Convention on the Elimination of All Forms of Discrimination Against Women (herein referred to as CEDAW), stipulates that countries should take *“all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;”*⁹⁸

The phrase “including legislation” connotes that law is not the end in itself but one of the means to the end. Kenya has reacted positively to this requirement although there is still a lot more to be done. For instance illiteracy is still an impediment to women reporting incidents of violence against them whether cultural or otherwise. Further the enactment of the FGM Act also provides a minimalist approach towards curbing harmful and discriminatory practices in Kenya. The Act for instance does not even define what a harmful cultural practice is. This actually limits its application to FGM alone.

2.2 REGIONAL LEGAL FRAMEWORK

2.2.1 Protocol to The African Charter on Human and People’s Rights on The Rights of Women in Africa

Under this Protocol, (herein referred to as the Maputo Protocol), it is provided that, *“State Parties shall combat all forms of discrimination against women through appropriate legislative, institutional and other measures. In this regard they shall:*

Enact and effectively implement appropriate legislative and regulatory measures, including those prohibiting and curbing all forms of discrimination particularly those harmful

⁹⁸Article 2 (f)

*practices which endanger the health and general well being of women.*⁹⁹The definition of women in this Protocol includes girls.¹⁰⁰

Article 5 of the Maputo Protocol provides for elimination of harmful cultural practices. The Article states:

States Parties shall prohibit and condemn all forms of harmful practices which negatively affect the human rights of women and which are contrary to recognised international standards. States Parties shall take all necessary legislative and other measures to eliminate such practices, including:

a) Creation of public awareness in all sectors of society regarding harmful practices through information, formal and informal education and outreach programmes;

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;

c) Provision of necessary support to victims of harmful practices through basic services such as health services, legal and judicial support, emotional and psychological

⁹⁹ Article 2 (1) (b)

¹⁰⁰ Article 1 (k)

counselling as well as vocational training to make them self-supporting; and

d) Protection of women who are at risk of being subjected to harmful practices or all other forms of violence, abuse and intolerance.¹⁰¹

The specific reference to FGM under Article 5 (b) of the Protocol is problematic and creates a misconceived perception that FGM may be the only serious harmful cultural practice against women and girl children. However, this is not the case and the same is normally practiced in context and in relation to other harmful cultural practices. This justifies the phrase ‘*and all other practices...*’

The mention of harmful cultural practices in the foregoing Conventions depicts that it is not a single practice that is harmful. This means that, State Parties were left to further specify and curb all the harmful cultural practices that may exist in their countries. However the mention of FGM only in this convention has had the effect of narrowly influencing Kenya’s legislature to enact a statute that narrowly deals with harmful cultural practices giving paramount consideration to FGM.

I appreciate that there is a wealth of statistics on FGM indicating that women really suffer from the practice. However, the same would have been very helpful if it was equally done for other harmful cultural practices and have something to compare before passing the legislation solely on FGM.

¹⁰¹ Article 5, Maputo Protocol

The East African Community Strategic Plan¹⁰² acknowledges that harmful cultural practices have been a contributor to child mortality. However, the plan adopts a broad approach in ensuring the protection of their wellbeing. An indicator of such an achievement would be the transformation of the lives of children. Since the plan has a deadline of the year 2016 it is yet to be seen how this plan will have worked out.¹⁰³ The only concern is that harmful cultural practices do not seem to have been prioritised and the plan mentions specific practices like albino children being sacrificed. This might end up sidelining other practices which are very much alive today and continue causing health and social problems to children and women.

2.3 NATIONAL LEGAL FRAMEWORK

2.3.1 The Constitution of Kenya

The Constitution of Kenya has enshrined the provisions in the aforementioned Conventions. Article 2(4) states, *“Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.”*

The Conventions are also applicable in Kenya by virtue of Article 2(6).¹⁰⁴ This provides that, *“Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.”*

Article 44(3) states. *“A person shall not compel another person to perform, observe or undergo any cultural practice or rite.”* A closer scrutiny of this Article reveals that it may not

¹⁰² EAC Strategic Plan for Gender, Youth, Children, Persons With Disability, Social Protection And Community Development (2012-2016) <www.ilo.org/dyn/natlex/docs/MONOGRAPH/94021/110206/F705470476/INT-94021.pdf> accessed 14 October 2015

¹⁰³ Ibid 49

¹⁰⁴ Constitution of Kenya

be really helpful in protecting women and girls from undergoing certain cultural practices because, as Amartya Sen says, women tend to adapt to their social conditions where they do not have informed choices. The same is worse where stigma befalls those who do not agree to partake in the cultural practices of that particular community. Therefore, much as one may dislike a certain practice, he or she may still engage in it because of societal pressure to conform to the norms.

Article 53 (1) (d) provides, “*Every child has the right to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labour.*” This article depicts a scenario where only children are subjected to harmful cultural practices. However, the definition of a child in the Samburu culture differs from the statutory definition. Under statute the definition provides that any person below the age of eighteen years is a child.¹⁰⁵ In the Samburu culture any girl who has not been circumcised is regarded as a child and therefore can be subjected to beading.

It is only upon the circumcision of a girl that the beading relationship ceases. This is because circumcised girls cannot be beaded as they are considered to be women ready for marriage. Although beading occurs mainly to children between the ages of 9-12, there is a possibility that an 18 year old lady may be in a beading relationship if indeed she has not gone through circumcision. This then leads to a conclusion that harmful cultural practices, which beading is one of, do not occur to children only. Other harmful cultural practices like FGM also occur to both minors and people who have attained the age of 18 years.

In addition to the above mentioned provisions in the Constitution of Kenya, a closer scrutiny reveals another gap in the Fifth Schedule where required legislations are specified and given a specific time period to be enacted in order to implement the various provisions in the

¹⁰⁵ The Constitution of Kenya . Article 260. See also section 2 of The Children Act, Chapter 141 Laws of Kenya

Constitution. Culture is first on the list with a specified duration of five years. However, the same is meant to cater for the positive cultural activities under Article 11 of the Constitution. This leaves out harmful cultural activities which are a clear impediment to the development of this country, as they end up denying women and children, equal access to education and other opportunities.¹⁰⁶This was reiterated by United States President Barack Obama during his recent visit to Kenya.¹⁰⁷

I acknowledge at this point that indeed there was an urgent need to protect traditional knowledge and all the positive aspects of culture. I also acknowledge that the list in the Fifth Schedule of the Constitution is not exhaustive. However, my argument is that even with the formal legal protection of the indigenous rights, the same would be an exercise in futility if the women and children are not aware of this protection because they are entangled in harmful cultural practices that deny them access to quality education and life generally. It would cause no harm if the Constitutional drafters had added in the culture bracket, Article 44 and 53 (1) (d). This would have encouraged a holistic approach of providing for culture past the year, considering that circumstances have changed since the enactment of say, the Children Act in 2001.

2.3.2 The Children Act

Under the Children Act section 14 has been titled, "*Protection from harmful cultural rites etc.*" this phrase is same as stated in the Conventions as well as the Constitution of Kenya . The section provides," *No person shall subject a child to female circumcision, early marriage or other cultural rites, customs or traditional practices that are likely to negatively affect the child's life, health, social welfare, dignity or physical or psychological development.*

¹⁰⁶WanjalaWafula, 'Spotlight On Harmful Traditional Practices and Customs In Kenya', <www.wordpress.com> accessed 28 July 2015

¹⁰⁷<www.capitalfm.co.ke> accessed 27 July 2015

The penalty is provided under section 20 thereof and it states," *Notwithstanding penalties contained in any other law, where any person wilfully or as a consequence of culpable negligence infringes any of the rights of a child as specified in sections 5 to 19 such person shall be liable upon summary conviction to a term of imprisonment of not exceeding 12 months or a fine of fifty thousand shillings or to both such imprisonment and fine.*" This is wanting because the penalty is a one size fits all. Apart from FGM which has now been specifically dealt with under another Act,¹⁰⁸ other harmful cultural practices are given the same penalty under section 20.

Beading, as demonstrated in the previous chapter entails a myriad of other offences and is heavily connected with early marriage and FGM. This illustrates the gravity of such a practice and the possibility of curbing the related cultural practice if we succeed in curbing it. Therefore the provision of one penalty for the various harmful cultural practices connotes a deficiency in the law. This is because; these practices have different implications on the victims as well as the society in general. Beading specifically should be afforded a stricter penalty owing to its complexity and the same should be provided in a criminal legislation in addition to the Children Act.

Critics may argue on this point that placing harsh penalties will be punishing mostly the parents and therefore endangering the most basic and fundamental unit of society as described in Article 45¹⁰⁹ that is, the family. However, my approach is taking advantage of the changing societal perspectives to harmful cultural practices, which will legitimise the legal measures taken. It is now well accepted that most sexual abuses occur at home as Miriam

¹⁰⁸ Prohibition of female Genital Mutilation Act No. 23 of 2011

¹⁰⁹ Constitution of Kenya

Kahiga notes, "*Sexual abuse of children occurs at home in the hands of fathers and male relatives...*"¹¹⁰

2.3.3 The Prohibition of Female Genital Mutilation Act

The FGM Act¹¹¹ has singled out FGM but has not captured other harmful cultural practices like beading which it is closely related to. The relation is brought about by the fact that beading stops when a girl child has undergone FGM. The specification of FGM in a statute literally means that the Kenyan Government chose to put emphasis on the same as provided by the Maputo Protocol and left other harmful practices under the Children Act of 2001. The omission of beading specifically in any legislation then undermines the spirit of the Constitution which has provided a framework for proper legislation to curb all harmful cultural practices. The inclusion of Articles 2(5) and (6)¹¹² further necessitates the provision of laws that cover all aspects of harmful cultural practices.

The various harmful cultural practices have their specific nature and extent of adversity in terms of health, social and psychological implications. Therefore, the approach under the Children Act, is not sufficient, nor proper to curb such practices which definitely have long term effects on the individual girl child. A close examination of the beading practice reveals a couple of offences which can be found in different statutes and thus not easily invoked. For instance, the moran being a member of the same clan as the girl means their relationship could amount to the offence of incest.¹¹³ The sexual relationship with a minor means that, there is defilement.¹¹⁴ As the girl is not allowed to conceive, there occurs forced abortion. If the abortion fails and the girl gives birth, the child is immediately killed or given away to

¹¹⁰ See Kahiga (n37) 383

¹¹¹ (n 59)

¹¹² Constitution of Kenya

¹¹³ (n 12)

¹¹⁴ (n 13)

another community. The killing of the newborn child then raises the offence of murder.¹¹⁵ This practice also denies the new born child its rights under Article 53¹¹⁶ and the Children Act.

As the foregoing explains beading is a unique type of harmful cultural practice which deserves proper and separate definition and penalty. It cannot be compared to early marriages or any attempt of the same as it is a mixture of several offences. On the other hand, proof of the specific offences under beading might be a tedious affair as the parents who ought to be cooperating with the police officers are part of the culprits. For instance, it is hard to prove beyond reasonable doubt that defilement actually occurred where no evidence on the same is tendered in court. Generally, the lack of specific definitions of the various harmful cultural practices in the recent statutes is a huge gap in the implementation of the Constitution as proper protection of women and children rights cannot be fully realised. Even within beading another harmful cultural practice can be seen. This is the delayed right to marry for the morans.

As earlier alluded to in this study, morans have to wait for a period of about 15 years before they can be allowed to marry. This is clearly against the spirit of Article 45(2),¹¹⁷ which provides that, " *Every adult has the right to marry a person of the opposite sex, based on the free consent of the parties.* "An adult in Kenya is anyone above the age of eighteen years, which is also recognised as the age of majority.¹¹⁸The Age of Majority Act of Kenya provides,¹¹⁹" *A person shall be of full age and cease to be under any disability by reason of age on attaining the age of eighteen years.* "

¹¹⁵ (n 15)

¹¹⁶ (n 30)

¹¹⁷ Ibid

¹¹⁸Age of Majority Act, Chapter 33 Laws of Kenya section 2

¹¹⁹ ibid

This particular denial has brought about so much tension between the elders and the morans. Spencer states that this delay is a tactic by the elders to jealously guard their rights and privileges in the community, including that of marriage. Owing to the consequences of this denial, one of which was the introduction of beading, and the other being promiscuity among elders wives, this can also be termed as a harmful cultural practice. As such, legislation needs to cater for the same as there is definitely a link between some of these harmful cultural practices but, each of them have peculiar characteristics.

2.3.4 The Protection Against Domestic Violence Act 2015

This is a new piece of legislation which became operational in June this year (2015). The preamble of the Act states:

An Act of parliament to provide for the protection and relief of victims of domestic violence; to provide for the protection of a spouse and any children or other dependent persons, and to provide for matters connected therewith or incidental thereto.

This law has brought some relief to domestic violence victims who can now proceed to court to seek protection orders. The Act defines violence and this includes wife inheritance, widow cleansing, virginity tests, FGM, child marriages among others. This is provided under section three of the Act.

A closer look at these acts defined as violence provides a clear background of harmful cultural practices. However, beading is again left out in this definition. This then raises questions as to why the same was left out considering that it has not been catered for by any other Act. This comes to my attention mainly because the Act recognises other harmful cultural practices that have been expressly captured in other pieces of legislation for instance FGM. Although most women and children would celebrate this law the Samburu girl child

undergoing beading will still have to find a way of reporting beading which has various other offences in it. The probability of this Samburu girl being further marginalised still remains high.

2.4 Summary

After an analysis of the above legal frameworks it is now evident that there is no legal provision towards curbing the harmful cultural practice of beading. This is despite the promulgation of the Constitution, five years ago.

CHAPTER THREE

QUESTIONING THE INADEQUACY OF LAW IN PROTECTING GIRLS FROM BEADING

1.0 INTRODUCTION

This study has discussed the various laws in place which are meant to protect women and girls from harmful cultural practices. Further, it has been shown that no provision of all the laws specifically provides for beading leading to inefficiency. It has also been demonstrated in the previous chapters that beading has adverse implications which if left unaddressed, will deny Samburu girls an opportunity to exploit their capabilities and hinder them from effectively participating in the development of their community and the country in general.

3.1 THE CHALLENGES

This chapter seeks to interrogate why the law is not effectively addressing beading as a harmful cultural practice. In so doing it tries to unearth some of the challenges that may lead to such inadequacies in our laws. These challenges may either be directly or indirectly influencing the laws. First, the chapter addresses the process of constitutional implementation. This is important considering that the constitution of Kenya generally provides that children ought to be protected from all harmful cultural practices¹²⁰ but the statutes in place do not address the same.

Second, this chapter looks at the enforcement of the already existing law and tries to examine its efficiency in terms of practice and mechanisms put in place to protect girls against harmful cultural practices. This will include a jurisprudential evaluation towards the approach taken by authorities in handling cases involving sexual violations against women and children.

¹²⁰ Constitution of Kenya Article 53

Third, the chapter examines the level of research that may or may not have been done by legislative drafters while drafting statutes aimed at curbing harmful cultural practices. This is important to understand why the law does not capture beading despite it being featured in various media platforms including a national television station.¹²¹

Fourth, the perpetration of harmful cultural practices by women is addressed. This will demystify the rationale of the strong conviction to their culture despite scientific and social proof that some of the cultural practices are demeaning and unhealthy.

Fifth, the availability or otherwise of resources is discussed. This is critical because the implementation of any law requires putting in place certain mechanisms and measures that would not be possible without resources. These resources include both financial and non financial ones including human resource.

Sixth, corruption is discussed and contextualised in relation to it being an impediment towards efforts to curb harmful cultural practices generally and beading specifically. The discussion of corruption is informed by the fact that the adverse impacts of harmful cultural practices do not only affect the victims but also the society in terms of human and economic development.

Seventh, a general attitude of popularizing a few harmful cultural practices will also be discussed and its impact on the legislations being passed to curb harmful practices against women and girls.

¹²¹ National Television Network (NTV)

3.1.1 Challenges in general Implementation of the Constitution

The constitutional implementation process is generally challenging. This has been noted by Prof. K.C. Wheare¹²² who admits that what may be in the Constitution is not what actually occurs in reality. It suffices to acknowledge at this point that the implementation of the Constitution in other areas has also encountered challenges for instance, the one-third gender rule provided for under Article 81¹²³ is yet to be implemented.

However, taking the general argument above sidelines the importance of prioritising the implementation of constitutional provisions that protect women and children from harmful cultural practices. As stated previously in this study, I am using the consciousness raising kind of approach in order to highlight the critical gaps that exists in the implementation of the Constitution, which in turn has ripple adverse effects especially by maintaining the barriers faced by women and children in exploiting their full capabilities. Therefore, this generalisation of challenges in constitutional implementation can also be termed as one of the reasons for the inadequacy of the law.

From the foregoing it can be said that implementation of laws that deal with women and children especially girls, need to be conducted using feminist methodologies applying the specific methods in feminism where applicable. This is because lack of the same ends up in oversight of the crucial components that would otherwise be easily identified using feminist methodologies. Another justification for this argument is that while feminist approaches might have a keen concern on women and girls, the same takes an inclusive approach and appreciates both men and women and their contribution in society.

¹²² K.C Wheare, *Modern Constitutions* (London: Oxford University, 1966) 4

¹²³ Constitution of Kenya

3.1.2 Laxity in Enforcement and Development of Jurisprudence by the courts

Enforcement of the existing law is another challenge that is essentially a drawback in ensuring the protection of women and children under the law. Meroka¹²⁴ in reviewing the decision of the High Court of Kenya in the case of the 160 girls, notes that the High Court took a narrow approach in deciding the case and failed to develop jurisprudence in terms of women and girls' sexual violations in Kenya.

This decision coupled with the various Kenyan legislations examined above, indicate that the Kenyan government is yet to be more vigilant in combating harmful cultural practices through a holistic approach. Notably, it is seen that the judicial officer took a positivist approach in applying the laws resulting in inadequate protection of women and girls from any further violation. This also affirms a weakness in the human rights theories which only focus on the duty bearer and does not consider the victim of the rights infringed. This approach is very limiting as it seeks only to interpret what is specifically in the law and would therefore not cater for any novel instances of sexual violations like beading.

It is in such instances that the capabilities approach steps in to inform us that if we directed our minds to what exactly a person could be if they are free then, we could easily identify the barriers and address them. This social justice theory then enables the judicial officer to go further and make orders that will not only be just, but also orders that will seek to curb any further violations from occurring. This could for instance be made by the judge asking the legislature in obiter, to consider revising the laws in order for them to be in tandem with the current realities.

¹²⁴ Agnes Meroka, 'The 160 Girls Decision: Development as the Freedom from Sexual Violence and the Limits of the Law in Attaining that freedom' East Africa Law Journal [2015] 1 (University of Nairobi)

3.1.3 Lack of Proper Research by Legislative Drafters

Research into harmful cultural practices is a prerequisite to the establishment of any policy or enactment of any legislation seeking to curb any of those practices. This is because culture is sensitive and to some extent dynamic in the sense that a community may abandon or adopt a harmful cultural practice for reasons which can only be explained by them. For instance beading is a practice that has been going on for quite some time but the same was only brought to the public's attention after its media coverage..

In terms of documentation, in the year 2011 the Samburu Women's Trust, which is an organisation striving to fight harmful cultural practices in Samburu, had already published a report on beading.¹²⁵ It is sad that the recent legislation on protection against domestic violence did not include beading yet it duplicated a practice like FGM which already has a whole statute proscribing it. The lack of a proscription of beading in this statute signifies two things, either the methods used in the research were the conventional ones as opposed to feminist methods or that there was just lack of proper research in the contemporary issues and contexts surrounding harmful cultural practices. Further this signals the importance of a clear policy study regarding harmful cultural practices which would then inform the legislative drafters of what they are required to cater for in the statutes seeking to protect women and girls from harmful cultural practices.

3.1.4 Involuntary Perpetration of the Practices by Women

Although it is a sad reality, women also seem to contribute to the persistence of harmful cultural practices. I choose to call it involuntary because their decisions are mostly not properly informed, due to illiteracy and subjugation by their men. For, those who are informed of the ramification of such practices also do not abide by their culture willingly but

¹²⁵ See(n 3)

because they have adapted to the fact that patriarchy as a system is deep rooted and instead of fighting it, they submit to the system.

In most incidents of FGM for example the male always absolve themselves of liability, stating that they were not involved in the whole process and that it is normally women who force their girl children to undergo such harmful practices.¹²⁶ This therefore is a connotation of how women have fully submitted to patriarchy and they are now the perpetrators of these harmful cultural practices themselves.

As Amartya Sen notes women end up adapting to their circumstances and can fail to realise that their capabilities are restrained. The World Vision research on the links between FGM and early marriage reveals that mothers take their daughters for the cut because of fear of them not getting husbands to marry. This is because it is a norm for girls to undergo the harmful cultural practices in communities where the same exercised.¹²⁷

This, of all the challenges that we have, is the most dangerous and needs to be addressed urgently. The reason is that women's actions in society always have ripple effects in all ways that one can think of including transmission of values to future generations. If patriarchy prevails and women continue to adapt to such a system then all efforts to curb these harmful practices will be in futility. This is because the law would be protecting the perpetrators and eventually no reports of harmful cultural practice would be brought to the attention of the relevant authorities making it difficult to fight the vice.

¹²⁶ The Daily Nation, Dickson Mwiti 26th August 2015, 'Police arrest couple over girls cut' 26

¹²⁷ World Vision UK, Exploring the links: Female Genital Mutilation/ Cutting and Early Marriage, May 2014. Available at http://9bb63f6dda0f744fa4449471a7fca5768cc513a2e3c4a260910b.r43.cf3.rackcdn.com/files/4814/0068/7160/Exploring_the_links_FGM_cutting_and_early_marriage.pdf 9 Accessed 05 September 2015

3.1.5 Lack of Resources

Lack of adequate resources to fight harmful cultural practices also becomes an impediment towards achieving a just society free of these degrading practices. In one forum which I had attended the Chairperson of the Anti-FGM Board stated that the board is financially strained and sometimes meetings are difficult to organise due to lack of proper remuneration of the members of the Board.¹²⁸

This kind of position would then make it very difficult to conduct research relating to harmful cultural practices across the country, which is crucial if a holistic approach is to be adopted. Kadessa also notes that in Samburu for instance the chief who is far away from the villages is not well equipped to fight the harmful cultural practices around the wide area under his or her jurisdiction. She further notes that with the poor infrastructure it takes time to rescue victim children or those susceptible to such practices.¹²⁹

3.1.6 Corruption

Corruption in Kenya is a major impediment to development generally. However, more specifically the police have been pointed out as the most corrupt government agency in the country.¹³⁰ The failure of the police officers to investigate the sexual violation claims by the girls in the 160 decision also implies some extent of corruption whether through financial or other kind of corruption. Corruption here is taken to mean any act done illegally to obtain a favourable situation to someone not lawfully entitled to the same.

¹²⁸ The Consultative and Planning Meeting on The Multi Sectoral Approach to the Implementation of Article 5 of the African Union (AU) Women's Rights Protocol And Anti-FGM Laws in Kenya. Held on 22nd-23rd April 2015 at Fairview Hotel Nairobi Kenya.

¹²⁹ Tracy KadesaAdolwa, 'A study into the Samburu cultural Beading Practice and its effects on the Samburu girl child rights. Dissertation, University of Nairobi, School of Law 2013

¹³⁰ Kenya National Commission on Human Rights, 'Are We Under Siege? The State of Security in Kenya (An Occasional Report -2014) 10

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¹³⁰ Kenya National Commission on Human Rights. 'Are We Under Siege? The State of Security in Kenya (An Occasional Report -2014) 10

As demonstrated by the 160 Girls decision, the police failed to investigate offences that are clearly stipulated in the law. At this point one can only imagine what could happen in the case of a report of an offence that is not specifically provided for in law. Since the constitution provides for protection against harmful cultural practices it is possible to file a petition in High Court but the same might not be convenient in the case of beading considering the literacy levels and the geographical location of the Samburu community which hinders their quick access to the courts.

Further allegations have been levelled against the Anti-FGM board by a lobby group accusing it of corrupt practices in conjunction with some unspecified NGOs.¹³¹ Corruption therefore not only limits the possibility of addressing harmful cultural practices, but also maintains the status quo of the current inefficiency of the law.

3.1.7 Popularisation of one type of harmful cultural practice

Utterances of prominent people in this country also demonstrate the narrow kind of approach taken in handling harmful cultural practices.¹³² This can be illustrated by how the main example given in relation to the harmful cultural practices is FGM. The popularisation of FGM only including in television campaigns against it have rendered the other harmful cultural practices silent and only known to a few who research about the same.¹³³ Harmful cultural practices are mostly related as is the case of beading, FGM, early marriage and

¹³¹ Dissolve 'Failing' Anti-FGM Board, State Urged <<http://allafrica.com/stories/201502120308.html>> Accessed 05 September 2015

¹³² See Margaret Kenyatta, 'Discard Harmful Cultural Practices' <<http://www.president.go.ke/2015/05/13/discard-harmful-cultural-practices-first-lady/>> Accessed 03 September 2015 :See also Obama in Kenya: Female Genital Mutilation Not Defensible As Cultural Tradition, by Eleanor Goldberg <http://www.huffingtonpost.com/entry/obama-to-kenya-treating-women-as-second-class-citizens-is-a-bad-tradition_55b7ecc9e4b0074ba5a6a193> Accessed 03 September 2015

¹³³ Radio and television stations in Kenya especially during news hours. Funded by UNICEF and Anti-FGM Board Kenya.

forced marriage, which a single Samburu girl child has high chances of going through all of them in her lifetime.

Further, from a perusal of the various policies in place in Kenya it can be said that there is no specific policy dealing with harmful cultural practices. The same seems to have been subsumed in the policies that deal with violence against women. This is also a laudable effort but time has come when there is need to specifically deal with harmful cultural practices as they differ from the general violence against women as not all violence is informed by cultural reasons.

The popularisation of some harmful cultural practices has also contributed to the lack of a clear holistic policy on harmful cultural practices. This is evident from the current legislations in place which point out some harmful practices leaving out others which are related to. One problem is that our political leaders fail to appreciate that harmful cultural practices cannot be dealt with singly and the same need to be contextualised. This should be adopted in all campaigns against harmful cultural practices so that the policy makers can also fully appreciate the relationship and interconnections of these practices.

3.2 Summary

This chapter has explored on some the background reasons why the harmful practice of beading is still in existence. It is hoped that with further research, probably more reasons might be unveiled and this will give policy makers a starting point in establishing the mechanisms through which the law may eliminate beading.

CHAPTER FOUR

CONCLUSIONS AND RECOMMENDATIONS

4.0 Introduction

This chapter seeks to review the findings of this study as well as summarise it and point out my contribution to knowledge in this area. I must admit that more research into harmful cultural practices in Kenya, should be enhanced in order for us to properly discard the barriers that culture seems to impose on both men and women, limiting capabilities and impeding human development. In summary this chapter looks at the lessons learnt in this research and the recommendations.

4.1 Conclusions

From this research it was realised that the beading practice was introduced as a measure to avoid conflict between morans and the elders who are keen to guard their pride and authority in matters of marriage. The research then illustrated the legal problem that exists by lack of specific laws to curb the practice. An analysis of the law further proved that the same is true including a recent legislation meant to curb domestic violence which also left out beading.¹³⁴ It has been established that the law is also problematic in terms of proscribing harmful cultural practices. For instance the Children Act generalises the penalty for all harmful practices to an imprisonment of not more than 12 months or a fine of Ksh 50,000 which is inadequate in recent times. The constitution on the other hand framed the protection against harmful cultural practices as if the same was only a problem to children.¹³⁵ In doing so the

¹³⁴ The Protection Against Domestic Violence Act 2015

¹³⁵ See Constitution of Kenya, Article 53

drafters overlooked the possibility of an adult that is a woman of 18 years and above being forced to submit to harmful cultural practices by the elders in the community.

The methodology used was a strand of feminist methodology namely consciousness raising method where it seeks to bring out the issues that are overlooked once the general research methods are used. Another reason why this methodology was used is because beading is a harmful cultural practice that only received much attention after the year 2011. This explains the scarcity of articles and books on the topic. However, the Kenyan media have been instrumental in trying to expose the practice and bringing to light the silent killer cultural practice that has and is still causing Samburu girl children a lot of pain and trauma.

In the process of this research some useful lessons have been learnt. One of them is that harmful cultural practices are connected in ways that may not easily be evident. For instance this study showed how a girl in the Samburu culture experiences at least three harmful cultural practices. This is because as a child she will be beaded and after the age of 11-12 they then undergo FGM and what follows is early marriage that is mostly than not forced upon her. Therefore, the fight against any of the aforementioned practices cannot be done in isolation.

It was also established that beading encourages FGM. The women who do not wish their girls to be beaded would take the girls straight to FGM which then makes them “eligible” for marriage under the Samburu customs. It was also learnt that these harmful practices also persist due to high illiteracy levels which render the women ignorant of the legal options they have to avoid perpetration of the harmful practices. It has also learnt that though the report by Samburu Women Trust indicates that the practice is on the decrease, it is still being practiced as late as 27th August this year (2015). This was through a post by the founder of the organisation who lamented that while the Constitution was marking its fifth anniversary small

girls in Samburu continued to suffer from harmful practices. In the post was a photo of a young girl having been rescued by the organisation from a beading relationship.¹³⁶

The establishment of the 'Girls Beads No More' Foundation also signifies that the practice is still existent and the fight against it is being taken seriously by the community. Therefore the government needs to support such courses by offering an enabling legal environment to curb the practice. Another recent report by the Coexist Initiative also shows that beading is still being practiced and the community members still support it. Another report by the Samburu Women Trust in 2016 also shows that beading is still practiced and now another community the Rendile have also embraced it.¹³⁷ My hypothesis was proved right by this research in that the barriers that limit the potential of the Samburu girl child are occasioned by the various harmful cultural practices that they undergo at a very young age.

4.2 Recommendations

From this research the main recommendations that can be made are as follows:

1. The commissioning of extensive research in harmful cultural practices all over Kenya. This will enable the discovery of any other practices that may not have come to the attention of the public. Thereafter, it would be easier to create a list of these practices showing the extent of their adverse impacts on the victims whether directly or indirectly;
2. Adoption of a holistic approach in legislating against harmful cultural practices. This way there will be more certainty as to the relevant statute to refer when a report is made on a harmful cultural practice. It then follows that specific penalties should be

¹³⁶ See Jane Meriwas facebook post on the 27th August 2015.

¹³⁷ Samburu Women Trust, Research Report, 'The Unspoken Vice in Samburu Community' April 2016. <www.samburuwomentrust.org> accessed 31 July 2016

accorded to specific offences in the Act considering the extent of harm caused to the victim. This could be by amendment of existing laws to incorporate beading and other harmful practices or the enactment of a new comprehensive statute ;

3. Advocacy and sensitization campaigns leading to public interest litigation, thus triggering the development of jurisprudence in this area.

4. The media also needs to get involved in campaigning against harmful cultural practices and take a holistic approach since most if not all people have access to radios. This will encourage those who have the means, financial or otherwise, to assist in the fight against this predicament, enabling the emancipation of Samburu women and children.

4.3 Summary

This chapter sought to shed light on how harmful cultural practices can be eliminated through legal mechanisms. This was informed by the conclusions in this research and the realities that face the Samburus even as they embark on the serious journey of eliminating beading among other harmful cultural practices.

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