

THE ABRASION FEMALE CIRCUMCISION: A LEGAL COVERAGE

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ABSTRACT: *It would seem that the legal abrasion and subjugation faced by females in Africa knows no bounds or age. The international Covenant on Economic, Social and Cultural Rights provides that “everybody has the right to attain the highest possible standard of health” and this includes the right to reproductive health for all. In relation to females this includes the ability to have a satisfying and safe sex life. Unfortunately in the area of satisfying and safe sex life to say the least, culture has introduced a stricture for women in the form of Female Genital Mutilation. This practice is rife among many cultural groups in Nigeria and indeed some other African communities. This paper will explore the practice in Nigerian communities and x-ray the legal abrasions attendant in this practice. Recommendations as to the way forward shall also be proffered.*

KEYWORDS: Abrasion, Female Circumcision, Legal Coverage

INTRODUCTION

The Court cannot regulate by its processes the internal affairs of the home. Disputes between parents, when it does not involve anything immoral or harmful to the welfare of the child is beyond the reach of the law. The vast majority of matters concerning the upbringing of children must be left to the conscience, patience and self-restraint of the father and mother. No end of difficulties would arise should Judges try to tell parents how to bring up their children. Only when moral, mental and physical conditions are so bad as seriously affect the health or moral of the children should the Courts be called upon to act (people Rel. Sisson 245 AD).

This position was explicitly stated by the New York Court in People Ex. Rel. Sisson. The import of this assertion is that where there is likely to be a significant potential harm to the child the law should abridge the parental rights in the exercise of its *parent's patria* interest in the protection of the child. While parents may be free to make martyrs themselves, they are not free to make martyrs of the children before they have reached the age of full and legal discretion, when they can make that choice for themselves (*Prince vs. Massachusetts* 1944).

Nigeria is a ratifying nation to the International Covenant on Economic; social and Cultural right's which guarantees the right to attain the highest possible standard of health to everyone. Nigeria has also gone further to extend this provision in its Constitution (Nigerian Constitution 1999) in S. 17 (3) (c) (d) thus;

The State shall direct its policy towards ensuring that;

- (c) The health, safety and welfare of all persons in employment are safe guarded and not endangered or abused.
- (d) There are adequate medical and health facilities for all persons.

Surely, this enhances even reproductive health of all. In relation to females, this includes not only the ability to have a satisfying and safe sex life, but also the capacity to reproduce, and the freedom to decide without coercion the number spacing and timing of their children (The Cairo Consensus 1995). Female circumcisions has a way of directly or indirectly affecting all the above negatively. Female circumcision may be a very old form of surgery, but it is medically, legally and even culturally unwarranted. It has no significant physiological benefit. It is performed without anesthesia even though it is unbearably painful. It also leaves a wound in which urinary salts burn and carries significant risk of complications or even death. This is child abuse amounting to nothing short of mutilation and disfigurement of the female genitalia. This in turn amounts to moral, physical and mental condition bad enough to seriously affect the health or moral of the child and calls for action by the Court as expressed in People Ex. Rel. Sission cited earlier. The practice also goes contrary to the provisions of the constitution of Nigeria.

What is Female Genital Mutilation (Circumcision?)

This is a cultural practice of the removal of part, or all of the female external genitalia. It consists of all procedures that involve cutting of the female sex organ for non-medical reason. This has been likened by its adherents to the male circumcision but the male circumcision is performed for aesthetic purpose and does not pose as much health hazard, legal abrasion or culturally construed inequality as the female circumcision.

Female Genital Mutilation (Circumcision) could take any of the following forms:

- Excision of the clitoral hood which is commonly practiced in Igbo land of South Eastern Nigeria.
- Excision of part or all of the clitoris.
- Removal of part or all of the external genitalia and stitching.

The third type is known as infibulation and is carried out in Northern Nigeria (Minority Rights Group Report 1980). The lesions caused by healing have the effect of narrowing the vaginal opening and especially in the third type called infibulation, only an aperture for the passage of urine and menstrual flows may be left behind the whole experience. This old time surgery is performed on infants from four days to one week. In some areas in Nigeria like the Ibibios of cross River State, it is performed on young women just about to get married. While the practice may not be so literally un-dignifying for the new born, it certainly is for a grown up woman about to get married.

Medico/Cultural Irrelevance of the Practice:

The practice is never performed by qualified medical doctors or Health Workers. The traditional practitioners, who are majorly used for this purpose, hardly sterilize their instruments such as razors, scissors and needles. Considering the unhygienic methods used by traditional practitioners, any form of genital operation poses health hazard. The health implications include haemorrhage which could lead to death if not managed quickly and properly too, and recurrent urinary and vaginal infections and persistent tears at delivery. The victim is also left open to other reproductive tract infections, pelvic inflammatory disease and even HIV/AIDS as one sharp object moves unsterilized from one victim to another. In some areas in Nigeria, this is performed on adult females at the time when the skin is fully developed and tough, and this makes it more painful. People have different threshold for pain. When

pain becomes unbearable, other medical complications may follow. The excision of the clitoris and other parts of the external genitalia ensures reduction of sexual excitement in the female. The cultural reason advanced for female Genital mutilation is to make the act of sexual intercourse less pleasurable for the female, thereby curbing promiscuity in women. It is humbly submitted that this presents the female as an entity without control and who requires measures to curb her sexual excesses. An uninformed victim may blame her inability to attain sexual satisfaction on the inadequacy of her partner or an anomaly within her own system. The tendency is for her to go from one man to another in search of the excitement and to prove to herself that she has no problem. She now ends up having multiple sexual partners and the effect is that the same reason advanced for the practice is re-enforced.

Legal Exposure:

Rights issues in Nigeria are enshrined in the 1999 Constitution of Nigeria (C₂₃ LFN). The practice of Female circumcision offends several sections of Chapter IV of this Constitution which guarantees Fundamental Human Rights to all.

Right to Life:

S. 33 of the Constitution guarantees all, the right to life and stipulates that

(1) Every person has a right to life, and no one shall be deprived intentionally of his/her life save in execution of the sentence of a Court in respect of a criminal offence of which he has been found guilty in Nigeria. A victim of the practice of female circumcision could bleed to death. Many of the practitioners are aware of this and the fact that the law forbids the practice. Continual practice of it in the face of all this is an infringement on the right to life of the victim even if it is not specifically according to the dictates of the Constitution. The possible contraction of HIV/AIDS from their unsterilized instruments used on all the victims could eventually lead to death if the HIV status of the victim is not detected on time. This is a legal abrasion which is actionable under the right to life by the Human rights enforcement Procedure.

Right to Dignity of the Human person

S. 34 of the Constitution provides;

- (1) Every individual is entitled to respect for the dignity of the human person and accordingly
 - (a) No person shall be subjected to torture or to inhuman or degrading treatment.

The local and traditional women who perform this operation know nothing about anesthetics and do so without any anesthetics. This is tortuous for both the newborn and the grown up woman within the ambit of constitutional Provision on the right to dignity (S. 34). Women who are circumcised tend to have tears at child-birth. At the best the health workers may give her a cut (episiotomy). Not only are the tears and the cuttings tortuous in themselves, the stitching of the episiotomy if not performed under anesthetics, which has sometimes been the case (1981, 1986) is tortuous and against the law.

Especially for those with the infibulation type of female circumcision, sexual experience becomes an ordeal. This may mean the partner adopting a more violent approach or for him to

resort to anal intercourse which may also place her at increased risk of contracting HIV/AIDS infection. While it may not be degrading for a newborn or an infant, it is certainly degrading for a young woman about to get married to have her legs clamped wide open, while the traditional surgeon cuts off her outer genitalia at the full glare of some other women.

Right to Private and Family Life;

Non-consummation of marriage or inability of it is a ground for divorce in Nigeria (LFN 2004). For those with the infibulation the aperture might be so small that sexual experience becomes impossible with a man who does not want to adopt any violent means. The legal connotation of the inability to consummate marriage is that, the marriage could be annulled at the instance of the spouse (S. 36), unless she is willing to submit herself to a surgical operation to dilate the vaginal tract. This is a violation of her right to marry and found a family which includes inter-alia, the right to a satisfying sex life.

Right to Freedom from Discrimination:

S. 42 of the 1999 Constitution prohibits discrimination on account of sex. The cultural reason for the practice of female circumcision is to curb promiscuity on the part of the female, by making sexual experience less pleasurable to her. For culture promiscuity only exists if women are allowed to have satisfying sex life. The sexual act is meant to be satisfying for both partners (male and female). Curbing the sexuality of one partner is discriminatory against the partner. It presents an assumption that the male has the exclusive right to sexual satisfaction and at the expense of the female. It further subjugates the female to the position of an object of sexual pleasure for the male, and who herself has no right to sexual satisfaction or the expression of it. This is discriminatory and against the spirit of both the 1999 Constitution of Nigeria (C₂₃ 2004) and CEDAW (UN 1979) which Nigeria is a signatory to, and ratified in 1985. Reference has been made here that S. 42 of the Constitution is authoritative for the proposition that the practice of female circumcision is discriminatory. The literal interpretation of the section would seem to suggest that the section envisages discrimination as between one community in Nigeria and another community in Nigeria, the criteria for which is similar, that is, sex, ethnic group etc. It is the contention of this paper as against the opinion that section 42 is inapposite as being authoritative for discrimination of the nature posed by female circumcision in relation to satisfying and safe sex, that the section be interpreted as encompassing and contemplative of the female circumcision incidents. This presentation is also aware that S. 42 of the Constitution prohibits discrimination "by or in the practical application of any law in force in Nigeria" this formulation is often misconstrued to exclude customary laws and deeply entrenched practices in its terms. To specifically address the needs of women in this regard, a Constitution provision banning the application of discriminatory customary laws, and customary practices with discriminatory results becomes imminent just like many other African countries have done. For example the Constitution of the Republic of Uganda (Constitution 1995) provides that

Laws, cultures, customs or traditions which are against the dignity, welfare or interest of women which undermine their status are prohibited by this constitution.

It is highly recommended therefore, that Nigeria makes such an addendum to Section 42 of its constitution.

Nigeria's Legal Response:

Many of these discriminatory cultural practices and traditions exist because of the long standing discrimination against women and the perception of a woman in the African society, Nigeria inclusive. Internationally, since the Declaration on Human Rights in 1948 Nigeria has not been left out in being a signatory to or ratifying the Conventions, Covenants or Charters that were born out of this Declaration. Although the declaration on Human Rights (1948) was non-binding, it opened up the emergence of other binding instruments protective of the human rights of women. These include;

- The Convention on the Political rights of Women (UN 1953).
- International Women's Year.
- United Nations Decade for Women.
- International Covenant on Civil and Political Rights (UN 1966).
- International Covenant on Economic, Social and Cultural Rights (UN 1976).
- The African Charter on Human and People's rights (AU 1981).

The African Charter on Human and People's Rights was like a message of the Universal Declaration brought home to Africans by the then Organisation of African Unity. The Preamble states inter-alia;

Freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples.

The Charter also made specific provisions of elimination of discrimination against women, just as it reaffirmed its allegiance to the principles of human and people's rights and freedoms contained in the declarations, conventions and other instruments adopted by it. Perhaps the best fall out of the Universal Declaration 1948 for Women worldwide is the Convention on the Elimination of All forms of Discrimination against Women (CEDAW) and the subsequent optional Protocol (UN 1979). Among all the international instruments, CEDAW most specifically addresses the interests of women and could be described as a handbook on women. Nigeria is a signatory to, and has ratified all the international instruments protective of women enumerated above.

As a nation, this act shows that Nigeria has submitted herself to the obligations contained in the international Human Rights Instruments.

Sequel to this, the 1999 Constitution of Nigeria contains a Chapter on Human Rights Protection (C₂₃ 2004). The provisions very relevant to this discourse are the Right to life, Right to dignity of human person, Right to freedom from discrimination and right to private and family life (Constitution 1999) earlier discussed.

In addition, Nigeria has ratified the African charter on Human and People's Right via the African Charter on Human and Peoples' Rights (Ratification and Enforcement Act) chapter A9 Chapter 10 LFN 1990).

Female circumcision (also called Female Genital Mutilation) is highly practiced in Nigeria and with a population of well over 150 million; Nigeria has the highest number of female Genital Mutilation cases. The South-South ranks the highest with 77%, South East follows with 68% and the South West 65%. Female circumcision only occurs in the North at a small scale but with the extreme type (Infibulation) (UNICEF 2001). Nigeria has no national law specifically

banning female circumcision but States like Ebonyi, Cross River, Ogun, Abia, Bayelsa, Osun, Rivers and Edo have outlawed it through their State Legislations (UN 2009). These eight states represent only 22% of the 36 states that make up Nigeria. In other words while Nigeria as a nation has not made any specific legislation prohibiting FGM, only 22% of the states have done so. It is probably expected that victims (at least the adults) would use sections of the constitution. This is not easy. The Child's Rights Act 2003 which protects children specifically does not apply to all parts of Nigeria. The issue of children falls within the residual list in the Constitution, so only states that desire it will adopt the partial domestication by Nigeria of the Convention on the Rights of the Child (UN 1989) which came via the Child's Rights Act 2003. Laws are made indiscriminately in Nigeria and sometimes the lack of harmonization makes enforcement very difficult. Due to constraints and challenges, even the states that have made specific legislations against female circumcision are not able to enforce the laws effectively.

CHALLENGES, CONSTRAINTS AND RECOMMENDATIONS

Modus Operandi of Practitioners

Where this practice persists, it is done in the private enclave of the practitioners, most of the time in the villages. It is therefore difficult to track them down. This is where active monitoring becomes necessary.

Domestication

International instruments cannot have the force of law in Nigeria unless they are legislated into law in Nigeria. At the best they may be persuasive authorities. This is by virtue of the Constitution (1999) which stipulates in its section 12 that;

- (1) No treaty between the federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly.
- (2) The National Assembly may make laws for the Federation or any part thereof with respect to matters not included in the Exclusive Legislative list for the purpose of implementing a treaty.
- (3) A bill for an Act of the National Assembly passed pursuant to the provisions of sub-section (2) of this section shall not be presented to the President for assent, and shall not be enacted unless it is ratified by a majority of all the Houses of Assembly in the Federation.

The import of this provision is that no Treaty, Convention, Covenant as they come shall have the force of law in Nigeria unless it is made to form part of Nigerian Legislation. This can only be achieved if a majority of $\frac{2}{3}$ of all the houses of assembly ratifies it. With the multiplicity of ethnic groups, complicated by religious beliefs and myriads of cultural acceptances, this seems to be a tall order. It is little wonder then that an important instrument like CEDAW has not been domesticated in Nigeria, even though it has informed some decisions in Nigerian Courts by some activist judges. But for CEDAW and the awareness it has created in objective minds, cases like *Mojekwu vs. Mojekwu* (1997), *Mojekwu vs. Ejikeme* (2000) and *Okonkwo vs. Okagbue* (1994) may have been decided differently. It takes an activist judge to make

pronouncements based on the precepts of an international instrument which has not been domesticated. It should be noted that Nigeria is usually among the first to be signatory to, and ratify these instruments at the international level and one wonders the need for ratification by Houses of Assembly. It is humbly submitted that S. 12 of the Constitution be expunged.

General Apathy

There seems to be a general apathy on issues concerning the welfare of women in the Nigerian Society. Men who are usually at the helm of affairs and are in a better position to cause the changes do not take the issue of women seriously. There is also the general attitude in most communities that anyone who reports you to the police in quest of justice is your enemy for life. People are therefore not quick at reporting others, much less in female circumcision cases that take place in enclave predominantly occupied by natives. Massive awareness campaign of the ills of the practice is required here.

Harmonization of Laws

There seems to be a plethora of laws on almost every aspect of life in Nigeria. Some of the laws conflict each other and sometimes law officers are at a lost on which law to use for different occasions. There is need for harmonization of laws so that for each occasion, there is a solid law which will apply to all the classes of the people.

Conclusion

This short paper has tried to explain what female Circumcision (also called Female Genital Mutilation) is. It has also tried to explain the adverse effects of the practice in all its ramifications. The practice is medically dangerous, legally offensive and culturally irrelevant. It is hoped that with these facts as our background, an advocacy for its eradication will be quickly embraced. This practice can be legislated out of existence of course with adequate enforcement mechanism. While legislation and the accompanying punishment forms a basic legal guarantee for its eradication, it should go along with educational and advocacy campaign that highlight the dangers of the practice. While the states that have specifically legislated against it deserve our commendations, other states in Nigeria should emulate this giant stride in the positive direction to cause positive change in our communities.

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