

THE UNDERMINED SOCIAL PAIN: FEMALE GENITAL MUTILATION IN BROKEN LENS OF ETHIOPIAN CRIMINAL LAW

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*Kaleessa dhaqna qabadhe, har'a huuba muradhee. Ani qunxuramee dhumdhe jette intalti jedhan – Oromo proverb.*¹

*We are going to perform salot [FGM] even though we are dying. Our mother and our grandmother did it, we did it and our daughters will do it – Ethiopian women.*²

ABSTRACT

The target of this article is to appraise the (un)suitability of Ethiopian criminal law design to halt the prevalence of Female Genital Mutilation (FGM) in Ethiopia. Since practicing FGM has no any health benefit, plethora of international as well as regional treaties, and also domestic legislations of different jurisdictions years ago framed it as a gender based human rights violation. Ethiopia is one of those jurisdictions which have attempted to eliminate the prevalence of FGM by outlawing its practice. It criminalized FGM as one of crimes against person and health under penal code of 1957 whilst as one of crimes of harmful traditional practices (HTPs) under criminal code of 2004. Regarding its punishment, per the latter code, the punishment of FGM crime, as one crime of HTPs, goes up to a maximum five year rigorous imprisonment, while had it been one of crimes against person and health, its punishment should have gone up to a maximum of 15 years rigorous imprisonment. All the same, either failure to treat FGM as one of crimes against person and health or making it a more severe crime, compared to crimes against person and health, represents the fallacy of treating female genital as it is not part of human body. Moreover, attaching less lenient punishment to FGM crime, compared to crimes against person and health, does not serve the very purpose of criminalizing it. Consequently, the author argues practicing FGM should not be one of crimes of HTPs rather one of crimes against person and health in Ethiopian law. In so doing, doctrinal research method is employed to attain the target of this article.

Key Words: *Crimes against Person and Health; Crimes committed through Harmful Traditional Practices (HTPs); Criminal Law; Female Genital Mutilation (FGM)*

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¹ It is to say, yesterday I was circumcised; today I cut my uvula. This I'm wind up bit by bit said the girl.

² Sass J. Mutashi J, Female Genital Mutilation in Africa: An Analysis of Current Approaches, December (2005) P.15. In 'Afarigna', official language of Afar regional state of Ethiopia, the term 'salot' represents FGM

1. INTRODUCTION

The term FGM, also known as female genital cutting or female circumcision, refers to all procedures involving partial or total removal of female genitalia or any other injury to female genital organ for non-medical reason.³ Years ago, WHO estimated that 100 to 140 million women and girls worldwide had undergone one or more types of FGM, with about 3 million girls each year undergoing the procedure.⁴ Since it has no any health benefits, plethora of international as well as regional treaties, consensus documents and domestic legislations of different jurisdictions years ago framed the act of practicing FGM as a gender based human rights violation. Nonetheless, bulks of studies have shown the practice of FGM is continued in different jurisdiction in a threatening manner.

In 2005 the estimated prevalence of FGM practices in Ethiopia in girls and women whose age are between 15 – 49 years was 74.3%, while it was estimated in 2020 that its prevalence is reduced to 65%.⁵ In 2013, moreover, some evidence reveals, even though the practices of FGM is a criminal act, still FGM remains a serious concerns in Ethiopia and has affected 23.8 million girls and women; and it also makes Ethiopia, surpassed only with Egypt, the second highest country in Africa by the affected numbers of women and girls.⁶

Globally, an estimated 90% of FGM involves clitoridectomy [type I] or excision [type II] and around 10% involves infibulation [type III].⁷ In the case of Ethiopia, some researchers have found that the most prevalently practiced type of FGM in Ethiopia is type I.⁸ In the same token, other survey had also

³ World Health Organization (WHO), Eliminating Female Genital Mutilation, An Interagency Statement, Geneva (2008), P.1.

⁴ Ibid.

⁵United Nation Children's Fund, A Profile of Female Genital Mutilation in Ethiopia, UNICEF, New York, 2020, P.3.

⁶Too many, Country Profile: Female Genital Mutilation in Ethiopia (2013), P.5 <https://www.refworld.org/pdfid/54bce29e4.pdf> <accessed on 15 February 2023>

⁷WHO, Pan American Health Organization, Understanding and Addressing Violence Against Women, Female Genital Mutilation (2012), P.2.

⁸ Jewel Llamas (2017), Female Circumcision: History, The Current Prevalence and The Approach to the Patient, P4. <https://med.virginia.edu/family-medicine/wp-content/uploads/sites/285/2017/01/Jewel-Llamas-Paper-KT3.pdf> <accessed on 15 February 2023>

shown that 92% have experienced either type I or II, whilst 8% have experienced type III.⁹

Against the backdrop of this prevalence, it is generally accepted veracity that for close to a century, observational studies, supported by biological theory, have found that there is a negative correlation between FGM and various health outcomes.¹⁰ Thus, since it has no any type of health benefit, halting the practice is not a discretionary matter rather it is mandatory issue for all communities across the globe.

Practically, however, FGM is almost treated as a social convention governed by rewards and punishments which are powerful force for continuing the practice.¹¹ It is maintained that delegitimization of the practice and attitudinal changes among large parts of society are the essential steps in the abolishment of the practice.¹² Needless to state, one of those essential steps in delegitimization of practicing FGM is criminalizing the act of practicing FGM. This is mainly for the reason that criminal law is considered as the most intrusive state coercive action into the private life of the individual and one of the most effective social controlling mechanism discovered yet.¹³

Nonetheless, even though it might not be always, it is opined that there are no acts intrinsically criminal in its very nature, no deeds that constitute offences at all times and in all places; [. . . rather] by being made [any act] punishable,

⁹ 28Toomany, supra note 6, P10. The typology of FGM will be discussed in – depth in section one.

¹⁰ Rigmor C. Berg *et al*, Effect of Female Genital Cutting on Physical Health Outcomes: A Systematic Review and Meta – Analysis, BJM Open Access, 2014, P.2.

¹¹ Rossem V. *et al.* (2015). Women’s Position and Attitude Towards Female Genital Mutilation in Egypt: A Secondary Analysis of the Egypt Demographic and Health Survey, 1995 -2014, BMC Public Health, 15, P. 2

¹²Ibid. Moreover, since FGM is one of traditionally ingrained HTPs and that violates girls’ and women’s rights, different strategies have been sought to eliminate it. One of many strategies that have been advised and designed to curve the prevalence FGM is delegitimization of practicing it. To attain this goal, plethora of international as well as regional treaties, and consensus documents were signed and national laws were enacted in different jurisdictions to curtail the act of practicing FGM. Ethiopia, the signatory of those treaties, has vowed to eliminate those HTPs and outlawed them through its constitution of 1995 and criminalized, by the name of FGM, in its criminal code of 2004.

¹³ Simeneh Kiros and Cherinet Hordofa, "Over-Criminalization": A Review of Special Penal Legislation and Administrative Penal Provisions in Ethiopia, Journal of Ethiopian Law (2017), Vol. XXIX, P.51, 55.

any course of conduct is converted into a crime.¹⁴ Thus, since practicing FGM contradicts with the right to bodily integrity of women and girls, it is an act that deserves criminalization and should fall in real crimes category.

On the other hand, in criminalizing a particular conduct whether it is a threat to or in violation of an important legal interest is determined by, among others things, whether such interest has a constitutional protection.¹⁵ Regarding HTPs, it has maintained that legal instruments for the protection of children's [and women's] rights specifically call for the abolition of traditional practices prejudicial to their health and lives.¹⁶ In line with this argument, Ethiopia through its FDRE constitution of 1995¹⁷, particularly at its article 14, 15, 16, 18, 25, 35, 36, and so on committed to preserve gender equality and vowed to outlaw gender based HTPs.

In a view to implement these constitutionally recognized rights to bodily integrity and human dignity, through its criminal code of 2004, Ethiopia has criminalized act against bodily integrity by bifurcating it into crimes against person and health in one hand and crimes committed against life, person and health through HTPs on the other hand in chapter II and III of book V respectively.

¹⁴ Heinrich Oppenheimer, 'The Rationale of Punishment' (PhD Thesis, University of London, 1913), P.2. At this juncture, discussing the category of crimes in general is worthwhile. Scholars categorize crimes into real and regulatory crimes. Real crime is a *mala in se* (sin with legal definition). It covers acts that the public generally assume as being criminal, while regulatory crimes is what generally termed as *mala prohibita* (conduct constitutes an unlawful act only by virtue of statutes) (see Peter Cartwright, *Consumer Protection and the Criminal Law: Law, Theory and Policy in UK*, Cambridge University Press, 2001, P.83). Furthermore, regulatory crimes are sometimes termed as public welfare or crimeless crime; see Michael E. Tigar, *It Does the Crime But Not the Time: Corporate Criminal Liability In Federal Law*, *American Journal of Criminal Law* (1990), Vol. 17, P.214. From this categorization, one could draw a conclusion that while real crime is the act of criminalizing evil conduct based upon the morality of a society, regulatory crime is the act of criminalizing a conduct which is not an evil conduct in real sense but conducts which are criminalized to preserve public interests. Moreover, this indicates that some conducts might not be always a criminal conducts across different jurisdictions.

¹⁵ Simeneh and Cherinet, *supra* note 13, P.61-2.

¹⁶ WHO, *supra* note 2, P.9.

¹⁷ The Constitution of the Federal Democratic Republic of Ethiopia, Proclamation No.1/ 1995, Year 1.

Pursuant to article 565 and 566 of the criminal code of 2004, one of those crimes christened as crimes committed against life, person and health through HTPs in chapter III of book V is crime of practicing FGM. Put otherwise, the act of practicing FGM is not recognized as one of crimes against person and health, which include mainly grave willful injury crime and common willful injury crime, rather it is considered as one of crimes committed against life, person and health through HTPs. Thus, the act of practicing FGM is specifically criminalized under Ethiopian criminal code of 2004 as one of HTPs.

All the same, compared to crimes against person and health, particularly grave willful injury and common willful injury crime, article 555 – 556 of criminal code of 2004, lenient criminal punishment is attached to guilty act of practicing FGM.

However, the author argues that making the act of practicing FGM as one of crimes committed against life, person and health through HTPs, but not as one of crimes against person and health plus providing lenient criminal punishment for crime of practicing FGM in one hand, and vowing to preserve gender equality on the other hand is a paradox. This paradox refuted the main purpose of criminalizing the guilty act of practicing FGM – to halt the act of practicing FGM by employing criminal law.¹⁸ To demonstrate the paradox of Ethiopian criminal law design to halt the act of practicing FGM in Ethiopia, this article is outlined into eight sections.

The following section focuses on conceptualization of FGM. Thus, it discusses the etymology and typology of FGM, its prevalence and the alleged reason for its continuity, while there is a plethora of international as well as regional treaties, consensus document and domestic laws are designed to combat it in different jurisdiction including Ethiopia.

¹⁸ At this juncture, one may inquire whether raising awareness about FGM or criminalizing its practices amount to putting the horse before the cart. Obviously, even though one could not substitute the other, both raising awareness about FGM and criminalizing its practices could contribute their own in attempt to tackle its prevalence. Thus, in this article the author is not arguing that criminalizing FGM practicing conduct is the only method that could halt the prevalence of FGM practicing conduct rather he targets only assessing whether Ethiopian criminal code of 2004 is crafted appropriately to contribute in attempt to tackle the prevalence of FGM practicing in Ethiopia.

Section three appraises the nexus between FGM and bodily injury. It argues that act of FGM is not only one of a simple HTPs rather it is one of crimes against person and health. Section four assesses the nexus between FGM and bodily injury crimes in Ethiopian criminal law's – criminal code of 2004 – context. It opines that even though chapter II of book V of this code covers crime of practicing FGM, it has criminalized with lenient punishment compared to crime of bodily injury. Moreover, it enquires the reasons why lenient punishment attached to the FGM crime even though it satisfies the ingredient of crimes against person and health. Is it because the victim could only be 'Female'? Section five appreciates pre and post 2004 status of FGM in Ethiopian criminal law system. This section contends that in pre – 2004 practicing FGM was one of crimes against person and health, and also it was serious crime in Ethiopia, while in post – 2004 it is relegated only to one of crimes committed against person, life and health through HTPs. Section six appraises the paradox of FGM crime under Ethiopian Criminal Code of 2004. The penultimate section provides a proposal for legislative amendment of crime of practicing FGM in Ethiopia while the final section is devoted to epilogue and forwarding some recommendations as a way out.

2. FEMALE GENITAL MUTILATION (FGM)

If it is not laboring of the point, Black's Law Dictionary defines FGM as it refers to Female circumcision [or] the act of cutting, or cutting off, one or more Female genital organs¹⁹ while scholarly it is described as all intervention involving partial or total cutting of [girls' or] women's external genitalia, or any other injury done on female genital organ for no therapeutic processes.²⁰ Besides, it is also defined as it refers to the practice of piercing, cutting, removing, sewing closed all or parts of woman's or girl's external genital for no medical reason.²¹ Furthermore, according to WHO, the guiding definition, the term FGM refers all procedures involving partial or total cutting of

¹⁹ Black's Law Dictionary, (9th edition, West Publishing Co), P.694.

²⁰ Morissanda Kouyate, Harmful Traditional Practices Against Women and Legislation, UN Expert Group Meeting on Good Practices in Legislation to Address Harmful Practices Against Woman, UN Conference Center Addis Ababa, Ethiopia, 25 to 28 May 2009, P.2.

²¹ WHO, Office On Woman's Health, Female Genital Mutilation/Cutting, <https://www.women-health.gov/a-z-topics/female-genital-cutting> < accessed on October 3, 2020>

women's external genitalia or other injury to female genital organs for non – medical reasons.²²

The outline of this description reveals FGM simply means the act of intentionally ‘inflicting bodily injury’ either by cutting or sewing of the outer part of female genital organ for non – medical reasons rather only for traditionally entrenched myths. That is why some author described it as a form of gender based torture²³ and the manifestation of entrenched gender inequality with devastating consequences.²⁴ Nonetheless, even though in legal jurisprudence it is the act of torture and the manifestation of gender based human right violations that consummated by cutting or sewing of the outer parts of female genitals, mysteriously it is understood as the act of removing waste²⁵ and making it clean and beautiful, eliminating masculine parts²⁶ from female's genital.

Glimpsing the history of FGM, albeit locating the exact origin of FGM and setting the exact date of its commencement are not a simple task, some documents and research has pointed out that FGM occurred in ancient Egypt along Nile Valley at the time of pharaohs and, thus, Egypt is considered as the source country.²⁷ Regarding its time of commencement, it is estimated that

²²WHO, *supra* note 3, P.1.

²³Akinsulure –Smith AM, Chu T, Exploring Female Genital Cutting Among the Survivors Torture, J Immigr Minor Health 2017; 19:769-73 Cited in Odukogbe AA et al., Female Genital Mutilation/Cutting in Africa, Transnational Andrology and Urology (2017), Vol. 6, No 2, P138.

²⁴UN Children's Fund, *supra* note 4, P.2. Nonetheless, some argue that since males have circumcised, practicing FGM could be considered as it harms gender equality. In view of the author, this group has missed to appraise the issue from the consequences of FGM and males' circumcision perspective. Scientifically, it has proved that FGM has no health benefits while males' circumcision has health benefits. As far as the health benefits of FGM and males' circumcision is different, these two acts are not comparable. Consequently, the mistake is not describing FGM as gender based human right violation, rather putting FGM and males' circumcision on equal footing.

²⁵ Jo Boyden *et al.*, Harmful Traditional Practices and Child Protection: The Contested Understandings and Practices of Female Child Marriage and Female Circumcision in Ethiopia, Long Live International Study of Child Poverty, Working Paper 93, February 2013, P.18. (This research found that as a woman who is not circumcised is considered as a woman who carries waste materials on her own body).

²⁶ WHO, *supra* note 3, P.6.

²⁷ Kouba LJ, Mausher J, Female Circumcision in Africa: An Overview, African Study Review, 1985; 28:95, Cited in Odukogbe AA et al., *supra* note 21, P.138.

FGM was routinely practiced some 5000 years ago.²⁸ However, some shorten its age by maintaining that FGM has been in existence for over 2000 years, and it is also regarded as customary rule of behavior by the practicing communities which often regarded as social norm.²⁹

Leaving the past eras' history as it is, in this era, according to the report and estimation of WHO, 100 – 140 million women in the world have been mutilated, two million girls [and women] are estimated to be mutilated every year³⁰, whilst other estimates three million girls [and women] are estimated to be at risk of undergoing the procedure every year.³¹

Regarding its prevalence in Ethiopia, studies have found that 25 million girls and women undergo FGM³² in which the urban rate is 15% which is far lower than rural rate of 24%, and regionally, it also varies from under 10% in Addis Ababa, South Nation and Nationalities and People, and Gambella Regional state to almost 60% in Afar Regional state.³³ Despite of these variations within different parts of the country, research puts Ethiopia as one of the five countries with moderately high prevalence of FGM.³⁴

On the other hand, based on the degree and/or parts of female genital organ that will be cut or undergone the procedures, in the past, there were three commonly recognized types of FGM. These were (1) Sunna (clitoridectomy), in which the hood of clitoris is cut off, (2) excision, in which the entire clitoris

²⁸ Elchalal, U, Ben –Ami, B, Gillis R, and Brzezinski, A (1997) Ritualistic Femal Genital Mutilation,,: Present Status and Feature Outlook, *Obset Gynecol Surv*, 52 (10),Pp.643-51 cited in International Planned Parenthood Federation(IPPF), *Female Genital Mutilation*, UK, December 2008, P.2.

²⁹28 Too Many, *supra* note 6, P.5.

³⁰ WHO, *supra* note 3, P.1.

³¹ Jo Boyden et al., *supra* note 23, P.12.

³² UN Children's Fund, *supra* note 4, P.3.

³³ WHO, *supra* note 3, P.1.

³⁴ The degree of prevalence is classified as the national or universal prevalence is more than 85%; high prevalence is 60-85%; medium prevalence is 30-40% and low prevalence 0.6% to 28.2%. UN Children's Fund, *supra* note 32, P27; see also WHO, *Interagency Statement*, *supra* note 3, P.4.

is cut off, and (3) infibulations, also known as Pharaonic circumcision³⁵, in which the clitoris, the labia minor and the much of labia major are cut off.³⁶ Nonetheless, currently these typologies are modified and one additional type of FGM was typified. This added FGM type is known as type (4) – the unclassified one. It is FGM type that embraces all other harmful procedures to female genital for non – medical purpose.³⁷ Consequently, currently the act of practicing FGM is commonly classified into type I, II, III, and IV.³⁸ Moreover, the extent of genital cutting generally increases from type I to III.³⁹ As a result, type III FGM is considered as the severest type of all types of FGM classification.

On the flip side, incontrovertibly the act of practicing FGM is one of HTPs that deliberately committed against girls and women, mainly against girls. HTPs generally refer to those practices common to ethnic culture [in Ethiopia context] adversely affecting the health of people, goal of equality, political and social rights, and economic development.⁴⁰ Almost similarly but broadly, in Kouyate's words, HTPs refers to all practices done by human beings on body or psyche of human beings for no therapeutic purpose, but rather for culture or

³⁵28 Too Many, *supra* note 6, P.15.

³⁶ Black's Law Dictionary, *supra* note 19, P.694. However, WHO's classification FGM has some variation to this classification. A classification of FGM was first drawn up at a technical consultation in 1995 and modified in 2007. According to this modified typology of FGM, type I represents Partial or total removal of the clitoris and/or the prepuce; type II represents Partial or total removal of the clitoris and the labia minora, with or without excision of the labia majora, type III represents narrowing of the vaginal orifice with creation of a covering seal by cutting and appositioning the labia minora and/or the labia majora, with or without excision of the clitoris and type IV represents all other harmful procedures to the female genitalia for non-medical purposes, for example, pricking, piercing, incising, scraping and cauterization. See WHO, *supra* note 2, Pp.23 – 28.

³⁷ Akin Tuned *et al.*, *Female Genital Mutilation/Cutting in Africa*, Transnational Andrology and Urology (2017), Vol. 6, No. 2, P.139; see also IPPF, *supra* note 26, P.1.

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³⁹ WHO, *supra* note 3, P.4, 23.

⁴⁰ Belayneh Dessiye, *The Impacts of Harmful Traditional Practices on Women's Socio – Economic and Political Activities: The Case of Pastoral Women in Hamer Woreda, South Omo Zone*, SNNPRS (MA Thesis, Indira Gandhi National Open University, 2012), P.25.

socio – conventional motives and which have harmful consequences on the health and the rights of the victim.⁴¹

Consequently, practicing FGM with the name of culture and the prevailing patriarchal attitude against girls and women, if not the only, are the main reasons for its continuity.

3. FEMALE GENITAL MUTILATION *VIS -A-VIS* BODILY INJURY

Conceptually, injuries are divided into real and verbal injury while bodily injury, one of real injuries, refers to physical damage to person's body⁴² and characterized by tearing, cutting, piercing or breaking of tissue.⁴³ In addition, it is maintained that post-trauma stress disorder alone, with no other physical manifestations, could constitute bodily injury.⁴⁴ Consequently, bodily injury constitutes not only actual bodily injury but also psychological injury.

Furthermore, bodily injury could be categorized into simple and grave bodily injury. Model Penal Code of America, section 211.1, for instance, defines simple bodily injury as (a) attempts to cause or purposely, knowingly or recklessly causes bodily injury to another; or (b) negligently causes bodily injury to another with a deadly weapon; or (c) attempts by physical menace to put another in fear of imminent serious bodily injury. Similarly, in U.S sentencing guidelines, body injury is defined as any significant injury, for instance, an injury that is painful and obvious, or is of a type for which medical attention ordinarily would be sought.⁴⁵

Clinically, a wound [injury] is produced when there is breach of anatomical continuity of skin or mucous membrane with or without underlying tissue while forensically it is a wound when there is damage of any tissue or organ

⁴¹ Kouyate, *supra* note 18, P.2.

⁴² Black's Law Dictionary, *supra* note 19, P.856.

⁴³ The American Heritage Medical Dictionary, 2007 Cited in Kuwanpura R, *The Mechanics of Injury Production and Wounding Forces in Judicial Context*, International Journal of Medical Toxicology and Forensic Medicine (2015), Vol. 5, No.2, P.78.

⁴⁴ Francis X. Shen, *Mind, Body and the Criminal Law*, Minnesota Law Review (2013), Vol. 97, P.2038.

⁴⁵ U.S Sentencing Guidelines Manual, Section 2B1.1 cited in Id, P.2047.

irrespective of breach of the continuity of skin or mucous membrane.⁴⁶ This is what is generally termed as actual body harm that rules out psychological injury not to be treated as bodily injury.

On the other side, actual bodily harm is defined as any hurt or injury calculated to interfere with the health or comfort of the victim [and] such hurt or injury need not be permanent but must, no doubt, be more than merely transient or trifling.⁴⁷

Again from physical point of view, an injury is a bodily damage or disruption of anatomical integrity of living tissue due to the application of physical forces.⁴⁸ Furthermore, it refers to any damage to any part of the body or bodily harm caused by application of violence.⁴⁹ This discussion suggests any part of human body, including genitals, is susceptible to physical injury and the disruption of any genitals is treated as bodily injury. Thus, the upshot of this discussion shows that bodily injury includes not only physical injury but also psychological injury. In buttressing this argument, some authors also opined that even to think psychological torture is not an assault on the body is a conceptual error from the outset.⁵⁰ This indicates that since practicing FGM is an act that emphatically and palpably causes both physical and psychological injury, it is purely the act of actual bodily harm.

Then, the answer for the issue whether FGM is bodily injury or it is only one of the simple HTPs variant is an uncomplicated issue. This is for the reason that the forgoing discussion clearly demonstrates that FGM is not only one of simple HTPs rather it is actual bodily harm which is accompanied by psychological injury that committed willfully on female's genital.

⁴⁶ Abdul Berek and Syed Mohammed Tanjilul Haque, Medico-logical Aspect of Hurt, Injury and Wound, AKMMC J. (2013), Vol.4, No.2, P.37.

⁴⁷ Jonathan Herring, Criminal Law, Palgrave Macmillan, 5th edition, 2008, P.136

⁴⁸ Kuwanpura R, *supra* note 42, P.79.

⁴⁹ Berek and Tanjilul Haque, *supra* note 45, P.37.

⁵⁰ Shen, *supra* note 43, P.2039.

4. FEMALE GENITAL MUTILATION AND BODILY INJURY CRIMES IN ETHIOPIAN CRIMINAL LAW CONTEXT

As was indicated, the act of inflicting bodily injury has been clearly criminalized under article 537 – 544 of penal code of 1957. Even though FGM was not specifically named and criminalized by this penal code, the close reading of this penal code's provisions reveals that the act of practicing FGM was treated as one of crimes against person and health. Unlike the penal code of 1957, nowadays FGM is criminalized in black letter approach under article 565 and 566 of criminal code of 2004.

Regarding crimes of bodily injury these two codes sense crimes against person and health more or less in the same approach. The pertinent and catch – all provision of these two codes – article 537 of Penal Code 1957 and Article 553 of Criminal Code 2004 – reads;

Whoever intentionally or by negligence causes body injury to other or impairs his health, by whatever means or in any manner, is punishable [. . .]. it also adds, these provisions embraces all manner of body assaults, blows, wounds, maims, injuries or harms, and all damage to physical and mental health of an individual.

Moreover, these codes have classified crimes of bodily injury into two; viz., grave willful injury and common willful injury. Nonetheless, these codes make bruises, swelling, and transient ache and pain out of the domain of bodily injury but crimes of assaults – article 544 of Penal Code of 1957 and article 560 of criminal code of 2004.

As a result, there is no iota of doubt, pursuant to chapter II of book V of these codes, that whoever inflicting any kind of body injury on other for whatever purposes, unless it is done for medical reason, bears the burden of bodily injury's or assault's criminal responsibility.

Now, the crux issue is whether FGM could fall within the definition of crimes against person and health of chapter II of book V of these codes or it is only falls within a simple acts of HTPs as well as the act of practicing FGM was not criminalized prior to the promulgation of the criminal code of 2004.

Pursuant to the hereinabove analysis, FGM comprises all procedures that involve total or partial removal of the external female genital, or other injuries to female genital organ. Here, the act of cutting or removing or sewing of the addressed part, in normal circumstance, is purely the act of actual bodily harm. Moreover, mostly it is consummated by using a sharp object that can cause grave body injury and/or even a death.

In Ethiopia, causing bodily harm via instrument that could cause grave bodily injury and/or death, pursuant to article 556(2) (A) of criminal code of 2004, is considered as an aggravated crime of common willful (simple) injury. Even though identifying and limiting the scope of the definition of instrument that can cause grave bodily injury and/or death is somehow argumentative, it is commonly understood as it embraces any things and means used for shooting, stabbing, or cutting or any instrument used as weapon of offence and is likely to cause death or any means of fire or any heated substance, any poison, any substance deleterious to human body to inhale, swallow or to receive into blood or any animal for causing offence.⁵¹ Besides, some argue even the parts of body of offender like teeth, nails, feet, palm, hand fist, fingers, elbows and knees as far as it is used to inflict bodily injury are considered as an instrument that can cause grave bodily injury or death.⁵² In strengthening this line of argument, in Indiana, for instance in *Treadway v. state* case, it was held that brick is a deadly weapon sufficient to support conviction for serious body injury.⁵³

Leaving that as it is, in case of FGM, instrument used to perform it is not as such perplexing in locating whether it is an instrument that could cause grave bodily injury or death. This is because conventionally the instruments used in performing FGM, among other things, include razor blade, unsterilized sharpen kitchen knives, scissors, glasses, sharpen rocks and finger nails.⁵⁴ Needless to state, these instruments are among those instruments that can cause grave bodily injury or death – they are considered as dangerous

⁵¹ Barek and Haque, *supra* note 45, P.37.

⁵² Y.Srinivasa Rao, *The Theory of 'Hurt' and 'Grievous Hurt'* <https://articlesonlaw.files.wordpress.com/2015/09/ebook-ysrao.pdf> < accessed on August 30, 2021 >

⁵³ Indiana Case, Law Defining Body and Serious Body Injury, 2004, <https://law.justia.com/cases/indiana/court-of-appeals/2004/11170401-pdm.html> < accessed on August 30, 2021 >

⁵⁴ Akin Tuned et al., *supra* note 35, P.141.

weapons.⁵⁵ In nutshell, these objects are sharp objects that can cause, among others, incised wounds, stab wounds, chop wounds, diagnostic/therapeutic wounds [. . .]⁵⁶ and at extreme death.

As a result, as all things stand now, in Ethiopia crime of practicing FGM is the crime that could fall within the ambit of crimes against person and health that have been defined in chapter II of book V of criminal code of 2004. Simply put, it is a crime of bodily injury that fall within the domain of either aggravated common willful injury crime or grave willful injury crime covered under article 556 (2) and 555 of criminal code of 2004 respectively. In fitting this argument, some evidence shows that some jurisdictions employ the existing general provisions of criminal code to handle the act of practicing FGM. These provisions that applied to FGM crime include, among others, 'intentional wounds or strikes', 'assault occasioning grievous harm', 'attacks on corporal and mental integrity' or 'violent acts that result in mutilation or permanent disability'.⁵⁷

This helps one to argue, regarding the nexus between FGM and bodily injury, that the argumentative issue is not whether or not FGM falls within the domain of crimes against person and health in Ethiopian criminal law context, rather whether it falls within the ambit of grave willful injury crime or common willful (simple) injury crime.

Nonetheless, due to the generality nature of Ethiopian criminal law in categorizing injuries into grave willful injury and common willful injury crime, two arguments have evolved. In one hand, some group argue that only injurious act that causes permanent health complication should be considered as grave willful injury crime and that cause non – permanent health difficulty should be treated as common willful injury crime. On the other hand, in contrariwise to this argument, some argue that causing permanent health complication is not the only ingredient to categorize crimes of bodily injury into grave willful injury or common willful (simple) injury crime rather the

⁵⁵ Odukugbe et al., *supra* note 21, P.141.

⁵⁶ I G Brouwer and Lené Burger, Medico-Legal Importance of the Correct Interpretation of Traumatic Skin Injuries, https://www.researchgate.net/publication/43297494_Medicolegal_importance_of_the_correct_interpretation_of_traumatic_skin_injuries?enrichId=rgreq <accessed on July17, 2018>

⁵⁷ WHO, *supra* note 3, P.18.

issue of permanency rule⁵⁸ is only a single parameter to classify bodily injury crime into grave willful injury crime and common willful injury crime. Per this group's argument, even curable bodily injury, the argument to which the author is a partisan, may fall within the domain of grave willful injury crime.

The experience of some jurisdictions also affirms that to be crimes of grave willful bodily injury; the injurious act will never be expected to cause permanent health complication. According to Sri Lanka criminal law, for instance, fracture of bone, cartilage or tooth, dislocation or subluxations of bones, joint and tooth and so on are considered as grave hurt⁵⁹ - grave bodily injury. Similarly, in Indiana, in William v. state case, it was held that evidence of laceration to head and face requiring stitches is ample to show that there is serious bodily injury.⁶⁰

Following this line of argument, one could conclude that to be grave willful injury crime the injurious act is not expected to cause permanent health complication rather what matter is the degree of injury at the time of inflicting or sustaining injury. Injury that might endanger life, cause permanent health complication, prolonged health difficulty to nurse back, particularly which causes grave health complication had not antiseptic treatment been sought should be considered as crime of grave bodily injury. Almost similarly, on the issue whether it should be considered as grave willful injury where the perpetrator caused bodily injury by stabbing on the buttock of the victim by stiletto, the Federal Supreme Court Cassation Division of Ethiopia held that the perpetrator should be treated as he caused grave willful injury crime that falls within the domain of grave bodily injury crime – article 555(A) of criminal code of 2004.⁶¹

⁵⁸ See generally Fesseha Negash, Permanency Rule Dilemma to Designate Grave Willful Injury Crime of Ethiopian Criminal Code of 2004: The Practice in Oromia Regional State <https://www.amazon.in/Permanency-Ethiopian-Criminal-Consequences-Defintion/dp/3346370712>

⁵⁹ Penal Code of Sri Lanka, Section 311 Cited in Senanayake S. M. H. M. K., *Where Is the Legal Concept of Injuries Likely to Cause Death Is Found in Sri Lanka Medico – Legal Classification of Injuries*, Sri Lanka Journal of Forensic Medicine, Science And Law (2015), Vol.6, No.2, P.9.

⁶⁰ Indiana Case, *supra* note 52.

⁶¹ Abera Wakjira Vs. Justice Office of Benishangul Gumuz Regional State, (Federal Supreme Court, 2017, Cassation Criminal Case No. 127505), Federal Supreme Court Cassation Division Decisions, Vol.22, Pp.174-177.

If so, one could safely maintain that the guilty act that falls within the ambit of grave willful injury crime is not only injury that cause permanent health complication rather all those injurious acts those could be classified as grave injury using the degree of injury measuring standard set by different jurisdictions' criminal law.

Consequently, the foregoing discussion demonstrates, pursuant to chapter II of book V definition of Ethiopian criminal code of 2004, the act of practicing FGM satisfies the element of crimes against person and health. Nonetheless, is the act of practicing FGM a grave willful injury crime or common willful injury crime in Ethiopia?

As was discussed, all types of FGM save type IV involve the imposed incisions, or incisions and sewing of female genital for socio-cultural myths as opposed to medical reasons. This indicates that in type I, II and III FGM procedures either some inch of outer parts of female genital will be cut off or sewed while it generally confirms that the risks and complications associated with types I, II and III are similar. All the same, they tend to be significantly more severe and prevalent the more extensive the procedure and the extent of genital tissue cutting generally increase from type I to III.⁶²

In blank ink, article 555 (B) of Ethiopian criminal code of 2004 has written as '*whosoever maims his [victim's] body or one of his [victim's] essential limbs or organs, or disabled them, gravely or conspicuously disfigure [. . .] commits grave willful injury crime*'.⁶³

Thus, syllogistically, it could be reasoned as,

- 1) Type I, II and III of FGM involves either the incision of some inch from outer part of female genitals or sewing;
- 2) The incision of any essential limbs or organs or sewing it is grave willful injury crime as per article 555 of the criminal code of 2004;
- 3) Therefore, type I, II and III of FGM is grave willful injury crime.

⁶² WHO, *supra* note 3, P.11, 23.

⁶³ At this point, one may inquire whether the requisite mental element to cause bodily injury and practicing FGM is one and the same.

Put simply, pursuant to article 555(B) of Ethiopian criminal code of 2004, type I, II and III FGM is grave willful injury crime.

Besides, it is generally accepted truth that FGM causes immediate and long – term health consequences. One of its long – term health consequences is that babies born to women who have undergone FGM suffer a higher rate of neonatal death compared with babies born to women who have not undergone the procedure.⁶⁴ Thus, even closing eyes to else argument, sticking only to principle of permanency rule – injury that causes permanent health consequence – reveals practicing type I, II and III of FGM undoubtedly falls within the domain of article 555 of Ethiopian criminal code of 2004.

On the flip side, as it was discussed, type IV of FGM is an unclassified type of FGM and it subsumes all other harmful, or potentially harmful, that is performed on women's and girls' genital.⁶⁵ Wording it differently, it is an open ended type of practicing FGM that could not be subsumed under type I, II and II FGM. Besides, some practices those were listed as an illustration of type IV FGM practices are prinking, piercing, incising and scrapping, and it was granted that these lists may be shortened or elongated with the increasing knowledge of the act of practicing FGM.⁶⁶ Furthermore, some kind of injury against female genital that falls within type IV of FGM, like pricking or nicking, also known as symbolic circumcision [FGM], for instance, does not involves removal of tissue and permanent alteration of female genital but it involves cutting only to draw blood.⁶⁷

Consequently, the degree of bodily injury that girls and women sustain due to type IV FGM practices is not what could be horizontally predetermined rather what will be determined case by case approach. Thus, if the injury that girls or women will sustain due to type IV FGM practices could not be absolutely predetermined, then based on the degree of injury it may fall within the

⁶⁴ Most seriously, it is estimated that death rates among babies during and immediately after birth were higher for those born to mothers who had undergone genital mutilation compared to those who had not; 15% higher for those whose mothers had Type I, 32% higher for those with Type II and 55% higher for those with type III genital mutilation. See WHO, *supra* note 3, P.611.

⁶⁵Id, P.26.

⁶⁶ Ibid

⁶⁷ UN Children's Fund, *supra* note 32, P.7.

domain of either grave willful injury crime or aggravated common willful injury crime.

Furthermore, appraising the requisite mental element to practice FGM is worthwhile to add some rigors to the argument that practicing FGM constitutes crime of bodily injury. Accordingly, reading article 553 in conjunction with article 555 or 556 of Ethiopian criminal code of 2004 reveals that intentionally causing bodily injury to other person by whatever means [instruments] or in any manner [tactic] constitutes crime of bodily injury. On the other hand, as was discussed, the act of practicing FGM is for non – medical reason rather for socio – cultural myths.

Then, as far as these provisions – article 555 and 556 of the criminal code of 2004 – focus on the result but not on the purposes of causing bodily injury, in Ethiopian criminal law context, the mental state of causing bodily injury as well as practicing FGM is one and the same. This crystallizes the argument that practicing FGM fails in the domain of crime of bodily injury.

In sum, as all things stands now, while type I, II and III of FGM satisfy all ingredients of grave willful injury crime as per Ethiopian criminal code of 2004, type IV is what will be determined case by case in which it may be either grave willful injury crime or aggravated common willful injury crime pursuant to article 555 or 556(2(A)) of this code respectively.

5. PRE AND POST 2005 STATUS OF FEMALE GENITAL MUTILATION IN ETHIOPIAN CRIMINAL LAW

The Ethiopian Penal Code of 1957 was repealed and replaced with the FDRE Criminal Code of 2004 on 9th May 2005 after half a century. On the ‘whereas clause’ of the new code, it is stated that one among other reasons that necessitated the repeal of the old Penal Code of 1957 and promulgation of new criminal code of 2004 was the failure of the old Code to acknowledge grave injuries and suffering caused to women and children in the name of HTPs. As was indicated previously, one of those grave injuries and suffering caused to women and children in the name of HTPs is the act of practicing FGM.

In all honesty, the Ethiopian Penal Code of 1957 did not clearly use the term HTPs, particularly FGM. Noticing this failure, chapter III of book V entitled

crimes committed against life, person and health through HTPs was added to Ethiopian criminal code of 2004. Even though it employed the term Female circumcision, one of those criminal acts listed as HTPs in this chapter was practicing FGM. Parenthetically, the term employed implies that the drafting processes were perfunctory. This because using the term Female circumcision, as was argued, is believed as act of euthanizing and normalizing the practices, making it comparable to male circumcision⁶⁸ an act which is scientifically recommended.

Moreover, the drafter of Ethiopian criminal code of 2004, on its legislative history, stated that *since female circumcision is one of HTPs and to deter society from practicing it, the practices of female circumcision was made a criminal act.*⁶⁹ This indicates that FGM was criminalized as one of HTPS under Criminal Code of 2004 with the view that practicing FGM was not criminalized previously by penal code of 1957. In nutshell, this legislative history demonstrates that legislature of Criminal Code of 2004 criminalized the practice of FGM as if it was not a guilty act under the old penal code. Like echoing this position, some authors also boldly argue that the 1957 Ethiopian penal code does not have any provisions that deal with HTPs that criminalize FGM.⁷⁰

In view of this author, nonetheless, dealing with FGM was not the problem of the penal code of 1957 rather the problem of those who read the code. This because, since criminal law is not expected to name and criminalize every and each minor acts specifically⁷¹, failure to name and criminalize FGM by penal

⁶⁸ Llamas, *supra* note 8, P.4.

⁶⁹ Federal Democratic Republic of Ethiopia, The Minute of Ethiopian Criminal Code of 2004, P.268 (Amharic Version, Unpublished).

⁷⁰Behaylu Girma, *The Practice of Female Genital Mutilation and The Limits of Criminalization under Ethiopian Criminal Law*, Jimma University Journal of Law (2018), Vol.10, No. 1, P.97.

⁷¹Halley, for instance, argues that criminal norm must be general both for modern society's commitment to equality among all individuals and for broad examination of all relevant consideration in order to define a policy up on which criminal norm based (. . .). See Gabriel Halley, *A Modern Treatise on the Principle of Legality in Criminal Law*, Springer-Verlag Berlin Heidelberg, 2010, P135. Regarding Criminal Code of 2004, moreover, Nirmala blames Ethiopian legislature for committing bad draftsmanship of overelaboration in relation to crime of family violence against women; see Glory Nirmala k, *Family Violence against Women: How Does Ethiopian Law Compare with International Definition*, Haramaya Law Review, and Vol. 1. P.79. Thus, the essence of these scholars' argument imply that criminal law is not

code of 1957 does not suggest that FGM was not criminalized by penal code of 1957.

Consequently, as was discussed, the author argues FGM has been criminalized in Ethiopia since 23 July 1957 with the promulgation of Ethiopian penal code of 1957, and it becomes improperly an undermined societal pain through the promulgation of the criminal code of 2004. To read this argument from the code itself, article 537 of Ethiopian penal code of 1957 states '*whosoever intentionally or by negligence, causes body injury to others or impairs his health, by any means, is punishable in accordance of the provisions of this chapter [chapter 2 of book V]*'. This chapter of the code embraces all type of crimes against person and health that range from crimes of assault to crimes of grave willful injury. The punishments of these crimes also range from punishment of fine to ten years rigorous imprisonment. Save the boosting of punishment, these provisions were verbatimly copied and included in the criminal code of 2004.

On the other hand, to reason out that FGM is crimes against person and health, again, using the syllogistic reasoning seems more convincing and simple. When FGM is reasoned out syllogistically, it reads

- a) Women's and girls' genital is part of human body,
- b) Inflicting any type of injury on human body '*for whatever purpose*' save for medical reason is crimes against person and health that includes any types of crimes of bodily injury,
- c) Therefore, a crime of practicing FGM is one of crimes against person and health for non – medical reason that fall within the ambit of either grave willful injury crime or common willful injury crime.

Furthermore, as aforementioned, since type I to III FGM practices involves women's and girls' clitoris or/and labia cutting or/and sewing, pursuant to Ethiopia Penal Code of 1957 and Criminal Code of 2004 stance, type I to III FGM practices satisfies the ingredient of grave willful injury crimes and it

expected to name and criminalize every and each minor acts while it could be covered in generic approach. See for detail Fesseha Negash, Life Expectancy Status of Ethiopian Laws (2019), <https://www.amazon.sa/-/en/Life-Expectancy-Status-Ethiopian-Laws/dp/3346462455>

falls within the ambit of grave willful injury crime. In addition, type IV FGM is what will be decided case by case according to the degree of injuries sustained. Consequently, based on the degree of injury sustained type IV FGM could either be grave willful injury or common willful injury crime.

Regarding the degree of punishment, grave willful injury crime, per the penal code of 1957, is punishable within the range of simple imprisonment not less than one year to rigorous imprisonment not exceeding ten years, whilst it ranges from simple imprisonment not less than one year to rigorous imprisonment not exceeding fifteen years as per criminal code of 2004. Thus, pursuant to article 538 (B) of Ethiopian Penal Code of 1957, crime of practicing type I to III FGM was crime punishable with at minimum simple imprisonment of one year and at maximum with ten years rigorous imprisonment.

On the other hand, even though not in line of WHO classification of FGM types, Ethiopian criminal code of 2004 classifies FGM into female circumcision and infibulations of female genital as per article 565 and 566 respectively. Thus, crime of practicing type I, II and IV of FGM is punishable under article 565 while crime of practicing type III FGM is punishable under article 566 of Ethiopian criminal code of 2004. May be unbecoming, pursuant to the much – talked –about Ethiopian criminal code of 2004, FGM as one of HTPs, practicing type I, II and IV FGM is punishable only with simple imprisonment not less than three months, or fine five hundred to one thousand birr, while crime of practicing type III FGM is punishable with rigorous imprisonment from three years to five years.

Thus, in contrariwise to the postulation of drafters of Ethiopian criminal code of 2004 and those authors who echoing their postulation, this narration articulates practicing FGM in pre criminal code of 2004 was one of crime against person and health that falls either within the domain of article 538 or 539 of Ethiopian penal code of 1957, while it is one of crimes committed against person, life and health through HTPs as per article 565 or 566 of Ethiopian criminal code 2004. Put simply, in pre 2004 period practicing FGM was one of bodily injury crimes that carry severe punishment, while in post 2004 eon it is only one of crimes of HTPs that carry lenient punishment. Then, the question is why? From the forgoing discussion, one could deduce that

practicing FGM was one of serious crimes in pre – 2004, while it is a less serious crime in post 2004. In criminal law jurisprudence, the severe punishment implies the absolute desire of the communities to avoid the commission or omission of those crimes. Thus, one could argue that Ethiopia had more appropriate criminal law that could halt the practice of FGM in pre – 2004 but not in post 2004.

6. THE PARADOX OF FGM CRIME IN ETHIOPIAN CRIMINAL CODE OF 2004

The first and foremost unbecomingness in the criminalization of the act of practicing FGM processes under Ethiopian criminal code of 2004 is the drafters and lawmaker failure to treat FGM as crime of actual bodily harm.⁷² Failure to treat FGM as one of bodily injury crimes implies female genital is not human body. This stemmed from traditionally entrenched oblivion understanding of the obvious fact that FGM is real bodily injury crime. As a result, it is not a hyperbole to argue that the approach in which FGM is criminalized under Ethiopian criminal code of 2004 is the result of the continued patriarchal uneven attitude toward Females.

In addition, one of the root causes for this ramification was excessive/over-elaboration in criminalizing the act of practicing FGM. In normative principle, as was discussed, criminal legislation's provision ought to be as clear and precise as needed to preserve certainty as well as to pass the necessary message that needs to shape the societal changes without overelaboration.

⁷² Regarding the author's suggestion that practising FGM should be one of bodily injury crimes, some inquire whether lawmaker have other policy reasons, like affordability to brought all perpetrators to justice, to provide lenient criminal punishment to the act of practicing FGM compared to other bodily injury crimes. The policy reasons behind criminalizing the act of practicing FGM is clearly provided on the 'whereas clause' of FDRE Criminal Code of 2004. Accordingly, the lawmaker have made know on whereas clause of this code that the policy reasons to criminalize FGM is to eliminate FGM which is one of grave injuries and sufferings causing to women and children by reason of HTPs. It also adds that the reason to criminalize the act of FGM is to educate and guide the public to dissociate itself from HTPs per the philosophy of criminal law. Then, as far as the policy reasons behind criminalizing FGM is clearly provided in this approach, there is no reason convincing to think that lawmaker had other policy reasons to criminalize practicing FGM. Consequently, the policy reasons provided on the where clause the code suffices to argue that the lawmaker have no other policy reasons to criminalize the act of practicing FGM than attaining the basic goal of criminal legislation.

It has argued that over-elaboration may defeat the very purpose of enacting a given legislation. Linked to this, Sir David Renton smartly wrote that a demand for immediate certainty of legal effect lead to too much detail to over – elaboration and complexity. He also adds, it may therefore be self – defeating or counter – productive, because the more the detail the greater the risk of obscurity and therefore uncertainty.⁷³ This clearly explains the situation of FGM criminalization under Ethiopian criminal code of 2004.

On the other hand, regarding the feature of criminal law, Halley asserts that criminal norm must be general both for modern society's commitment to equality among all individuals and for broad examination of all relevant consideration in order to define a policy up on which criminal norm based.⁷⁴ In similar fashion, Barak wrote that *[. . .] statute is part of life and life changes, [. . .] while the language of statute remains as it was but the meaning changes along with changing life condition; in his words this what is called an old statute speaks to the modern person in which the statutes always speaks.*⁷⁵

This is mainly for normativity of the law. Normativity of law refers to the fact that legal regulations are uncertain about who they extend the action, what are their duration and the number of times they are used, and no association with any legal relationship.⁷⁶

These scholars' arguments generally suggest that law should not be enacted to solve or appease the problem of present generation but also for inter-generational purpose. Thus, the provisions of Ethiopian penal code of 1957 should have been perceived in line with this assertion. Then, had it not been the practice of FGM specifically criminalized as one crime of HTPs, it would have been a crime against person and health pursuant to Ethiopian criminal code of 2004.

⁷³ See generally David Renton, *The Legislative Habits of the British Parliament*, Journal of Legislation (1978), Vol. 5, Issue 1, Pp.7-13.

⁷⁴ Halley G., *A Modern Treatise on the Principle of Legality in Criminal Law* (Springer-Verlag Berlin Heidelberg, Germany, 2010)

⁷⁵ Aharon Barak, *The Judge in a Democracy* (Princeton University Press, 2006), P.7.

⁷⁶ See Svetlana Boshno, *Proposition of Law: Its Concept, Properties, Classification and Structure Law and Modern States* (2015), Pp.69-79.

As was discussed, however, making the practice of FGM a simple HTPs but not crimes against person and health creates some distortions. The first distortion emanated from a shallow understanding of the Ethiopian penal code of 1957 in relation to FGM. The drafters and legislature of Ethiopian criminal code of 2004 criminalized the act of practicing FGM with the mindset that FGM was not criminalized previously through the Ethiopian penal code of 1957, while actually it was one of crimes against person and health under this old penal code.

Thus, in pre – 2004, the act of practicing FGM was either grave willful injury crime or common willful injury crime as per Ethiopian penal code of 1957. Nonetheless, this truth has misunderstood by the drafters and lawmaker of the criminal code of 2004. This misunderstanding leads them to perfunctory criminalization of practicing FGM as only one of crimes of HTPs but not one of crimes against person and health.

As it was appraised, the second distortion is failure to treat female genital as part of human body but something accessory to human body. This is explicated through making mutilating other part of human body a grave willful injury crime punishable, at maximum, with fifteen years rigorous imprisonment while mutilation of female genital a simple HTPs' crime punishable, at maximum, with five years rigorous imprisonment per the criminal code of 2004. However, from anatomical view point this bifurcation conveys nothing but the doggedness of patriarchal attitude against constitutionally acknowledged equality rights of human being – men and women – in Ethiopia.

All the same, criminalizing the act of practicing FGM separately, but not as one of crimes against person and health, is not so much problematic. The epicenter of the problem is, in one hand, treating FGM crime leniently and, on the other hand, treating bodily injury crime more severely. Had practicing FGM been treated severely or equally as crime of bodily injury, criminalizing it separately wouldn't have been so much problematic rather it would have been appreciable act.

Furthermore, providing lenient punishment for act that has vowed to curb it in the constitution as well as on the preamble of the criminal code of 2004

creates a negative punishment discrepancy between experience and expectation of criminal punishment. Scholars argue that if the expectations are harsher than the actual experience, there is a negative punishment gap, whereas a positive punishment gap exists when the experience is harsher than the expectation.⁷⁷

Per these scholars, discrepancy between experience and expectation of criminal punishment has either positive or negative impact on the effectiveness of a given criminal legislations. Accordingly, it is argued that a positive punishment gap is more preventive than a negative punishment gap.⁷⁸ This is because a sanction disproportionately light is, as Hobbes remarks, rather the price or redemption than the punishment of a crime.⁷⁹ However, the main function of criminal law is prevention of crime either through imposing temporarily or permanently incapacitating, rehabilitating, or deterring punishment.

In case of Ethiopia, the ‘whereas clause’ of its Criminal Code of 2004 states it [criminal law] protects society by preventing the commission of crimes, one of the major means of preventing the commission of crime is punishment, and the code stretched its means of prevention progressively to death penalty – the severest penalty.

This implies that the severity of criminal punishment increases parallel to dangerous disposition of an offender, severity of dangerous act, interest at risk, the scope of vulnerable group, [. . .] and almost setting the same criminal punishment for those who commit similar guilty act.

In contrariwise to this reality, in case under discussion, even though those who practice FGM and those who inflict bodily injury commit similar act, the lenient punishment is provided to those who commit the former act than those who commit the latter act. This is a distortion. This distortion even invites one to ask why lenient punishment for crime of bodily injury when the potential victim could only be women?

⁷⁷ Esther F.J.C.Van Ginneken, *The Pain and Purpose of Punishment: A Subjective Perspective*, Howard League What is Justice? Working Papers 22/2016, The Howard League for Penal Reform (2016), P5.

⁷⁸ Ibid

⁷⁹ Heinrich Oppenheimer, *supra* note 13, P.284.

Moreover, this distortion argument, for a fortiori, could be reinforced from the legislature's reluctance to use even the term FGM in the criminal code of 2004. As was discussed, this Criminal Code employed the term '*female circumcision*' under its article 565. However, the expression 'female genital mutilation' gained growing support and approval from the late 1970s. Moreover, the word '*female genitalmutilation*', instead '*female circumcision*', has been developed to establish a clear linguistic distinction from male circumcision, and to emphasize the gravity and harm of the act, and also the use of the word '*mutilation*' is to reinforce the fact that the practice is a violation of girls' and women's in born rights.⁸⁰ Then, why the lawmaker of Ethiopian criminal code of 2004 opted to use '*female circumcision*' instead of '*female genital mutilation*'?

Thus, lack of enthusiasm to use the term 'mutilation' while criminalize the act of practicing FGM through Ethiopian criminal code of 2004 undeniably implies the legislature criminalized practicing FGM apathetically. As a result, criminalization approach of FGM in Ethiopian criminal code of 2004 seems as it was intended to make believe that Ethiopia entirely and enthusiastically pledged to get rid of traditionally ingrained practicing FGM for the outsiders.

May be more distress, failure to acknowledge FGM as bodily injury crimes or more severely is the act of expressing the traditional and mysterious attitude of Female in else jurisdictions as well as in Ethiopia at criminal law level in contradiction with the actuality that FGM has no known health benefits. Moreover, it is also the act of defying that FGM is not a crime against physical integrity and human dignity. The traditional myths of practicing FGM, among others, are that female genital in their natural form are ugly and that cutting – particularly infibulations – makes presentable and beautiful;⁸¹ circumcision is the act of defining masculinity and femininity because the foreskin of penis symbolizes femininity, while clitoris represents penis;⁸² it is act of removing waste⁸³ for cleanliness or hygiene⁸⁴ purpose.

⁸⁰ WHO, *supra* note 3, P.22.

⁸¹ Sass J., *supra* note 2, Pp.14-5.

⁸²Richard A. Shweder, Disputing the Myth of the Sexual Dysfunction of Circumcised Women, An Interview with Fuambai S. Ahmadu, *Anthropology Today* (2009), Vol.25, No.6, P.14.

⁸³ Boyden et al., *supra* note 23, P.18.

⁸⁴ UN Children's Fund, *supra* note 32, P.63.

Moreover, some try to justify FGM by arguing that it increases a woman's probability of conception and improve women's and their fetus' health;⁸⁵ it preserves virginity and prevent promiscuity.⁸⁶ In addition, pro FGM practices attitude advocators argue that FGM serves only as aesthetic enhancement and definitely it is not mutilation.⁸⁷ Besides, it is opined as female genital mutilation represents society's control over women ⁸⁸ and girls but not a violation of women's and girls' rights. Nonetheless, all arguments those narrated to justify FGM is only the cover of men's need to control the sexual behavior of women and girls.⁸⁹

Thus, in view of this author, failure to treat FGM as one of crimes against person and health or failure to provide severe punishment for the act of practicing FGM in Ethiopia represents the admission of the aforementioned traditional myths which could contribute for its continuity in Ethiopia. As well, the actual practice also affirms the myth that was in the mind of drafters of criminal code of 2004 during the process of criminalizing FGM under Ethiopian criminal code of 2004. As was discussed, some commentators argue that albeit FGM is a guilty act in Ethiopia, the government does not actively enforcing this prohibition or punish those who participate in the act of practice FGM.⁹⁰ This reinforces the abovementioned patriarchal attitude against gender equality in Ethiopia.

Nonetheless, in contradiction with this patriarchal attitude against gender equality, bulk of studies evidences the act of practicing FGM entails harm to women's and girls' physical [and psychological] health throughout their life

⁸⁵ Llamas, *supra* note, P.3.

⁸⁶ 28toomay, *supra* note 6, P.13.

⁸⁷ Carlos David Londono Sulkin, *Fuambai's Strength*, Journal of Ethnographic Theory (2016), Vol.6, No.3, P.108.

⁸⁸ WHO, *supra* note 3, P.5.

⁸⁹ The traditional myths for the continuity of FGM in Ethiopia are almost the same with the listed factors. For detail about these myths in Ethiopia see generally አሼቱ ድባቡ፣ተባታይ ኣገዛዝ በኢትዮጵያ፡ችግር እና የመፍትሄዉ መገንደ፡ (ኣድስ ጥራት ማተሚያ ቤት፣አዲስአበባ፣ 1997)

⁹⁰ European Union, Combating Female Genital Mutilation and Other Harmful Traditional Practices(2013), http://www.ceas.europa.eu/archives/delegations/ethiopia/documents/eidhr/eidhr_ethiopia_2013.pdf <accessed on October 13, 2020>

from the moment of cutting as infant or childhood to sexuality and childbirth in adulthood.⁹¹

The other paradox of Ethiopian criminal code of 2004 in relation of criminalizing the act of practicing FGM is that it fails to consider World Health Organization's classification (types) of FGM practices. Classification of FGM was first drawn up in 1995 while it was modified in 2007. This classification of FGM practices was mainly for the research purpose, to estimate prevalence and trends in change, gynecological examination and management of health consequences and for '*legal cases*'.⁹²

Ethiopian Criminal Code of 2004 was promulgated almost a decade after this classification of practicing FGM was done by WHO. However, disregarding WHO classification, Ethiopian criminal code of 2004 classifies FGM practices only into two categories; viz., type I, II and IV in one category and type III in another category. Nonetheless, there is no convincing and visible reason why the code creates its own classification by disregarding WHO's classification. Furthermore, it disregards the scientifically proved fact that the severity of practicing FGM increase from type I to III and practicing FGM includes any transient act committed on female genital for non – medical reasons – symbolic FGM. Similar punishment was designed for type I, II, and IV of FGM. This Ethiopian Criminal Code of 2004's classification of FGM which provides similar penalty to scientifically proved different degree injuries completely contradicts with the proportionality principle of criminal liability.

The third absurdity of criminalization of FGM in Ethiopian criminal code of 2004 is overlooking the act of practicing FGM by the name of not to overlook it. As it was discussed, the legislature of Ethiopian criminal code of 2004 vowed not to overlook HTPs to protect women and children rights that are recognized by Ethiopian constitution of 1995 and ratified international and regional treaties as well as to criminalize HTPs to distance the community from practicing them⁹³.

⁹¹ Rigmor C. Berg et al, Effect Of Female Genital Cutting on Physical Health Outcomes: A Systematic Review and Meta-Analysis, *BJM Open* (2014), P.9.

⁹² WHO, *supra* note 3, P.23-4.

⁹³ Paragraph 3 of Criminal Code of 2004 it reads [. . .] another point that should not be overlooked is the penal Code's failure to acknowledge the grave injuries and sufferings caused to women and children by reason of harmful traditional practices. Surely, the constitution

However, even though on its preface this loaded word – grave injuries and sufferings caused to women and children by reason of HTPs – was used and vowed to curb it, providing non –preventive lenient punishment in special part of the code reveals the overlooking of the act of practicing FGM by the name of not to overlook it. The argument of overlooking the act of practicing FGM by the name of not to overlook it could also be corroborated simply via comparing the criminal punishment attached to practicing FGM with that of bodily injury crimes, particularly grave willful injury crime. This comparison always bids one to ask why lenient punishment to grave bodily injury when the potential victim could only be women, while severe punishment to grave bodily injury when the potential victim could also include men?

7. A PROPOSAL FOR LEGISLATIVE AMENDMENT OF FGM CRIME

As aforementioned, practicing FGM in Ethiopia is not punishable neither pursuant to article 555 nor 556 of criminal code of 2004 only because article 565 or 566 of criminal code of 2004 has been specifically designed to govern the guilty act of FGM. Put otherwise, hadn't article 565 or 566 of criminal code of 2004 been specifically designed to govern the guilty act of FGM, practicing FGM would have been punishable either as per article 555 or 556 of criminal code of 2004. This is because the mental element and the act that falls within the domain of article 555 or 556 of criminal code of 2004, and that of article 565 or 566 is one and the same – intentionally inflicting bodily injury.

As well, even though actually it is not the case, sticking to material element of FGM crime may imply practicing FGM is a provisional concurrence crime that could fall under article 555 or 556 and article 565 or 566 of criminal code based on the degree of injury.

This is because crime that consists of behavior which also an ingredient of other crime or a combination of acts some of which are also material elements

guarantees respect for the cultures of peoples, but it does not buttress up those practices scientifically proven to be harmful. It is also futile to issue a law that does not have the trust and support of the people for it usually remains impracticable. But it is well recognized in the philosophy of criminal legislation that the legislature should, by adopting progressive laws at times, educate and guide the public to dissociate itself from harmful traditional practices

of other crime sometimes known as imperfect concurrence.⁹⁴ It is imperfect only because there is actually one legal provision that applies to this behavior or combination, in case under discussion, article 565 or 566 of criminal code. If it is not labouring the point, practicing FGM becomes imperfect concurrence only due to the poor drafting of the code, specifically in criminalization of the act of practicing FGM. Thus, in view of this author, these poorly drafted provisions of the code or guilty act of FGM ought to be redefined.

Consequently, Ethiopian lawmaker – House of Peoples’ Representative – has two alternatives to make this poorly criminalized act of practicing FGM well. The uncomplicated and the undaunted alternative is simply repealing article 565 and 566 of criminal code of 2004 without any further rationalization or research. As already discussed, simply repealing article 565 and 566 of criminal code of 2004 without any further rationalization makes practicing FGM either grave willful injury crime or common willful injury crime as per article 555 or 556 of criminal code of 2004 respectively. Moreover, simply repealing article 565 and 566 of criminal code of 2004 protects women’s and girls’ rights to physical integrity and human dignity more than the inclusion of these articles in criminal code of 2004.⁹⁵ On top that, making the FGM one of crimes against person and health is in light with the basic criminal jurisprudence of providing similar punishment for those who has done similar guilty act.

The other recommendable option is adding limb ‘D’ under article 555 of criminal code of 2004 mainly for two purposes. First, taking health complication that follows practicing FGM, the side of vulnerable group, rights at stake etc. into consideration, and also to give message to community that practicing FGM is a taboo, the lawmaker must increase the punishment attached to the act of practicing FGM in line with what had been promised in

⁹⁴ Philippe Graven, *An Introduction to Ethiopian Penal Law* (Faculty of Law of Haile Sellassie I University in Association with Oxford University Press, 1965), P163.

⁹⁵ Taking the mechanical application of law by law enforcing machinery in Ethiopian, some may fear this amendment model could create the risk of decriminalization of FGM. In view of the author, nonetheless, this could take place if and only if female genital organ is considered as not part of human being. As far as inflicting bodily injury on other for whatever purpose is a guilty act, it could not be logical to argue that practicing FGM will not be a guilty act. Consequently, amending the criminal code of 2004 following this amendment model could not cause the risk of decriminalization of FGM.

whereas clause of criminal code; viz. a promise not to overlook the penal Code's failure to acknowledge the grave injuries and sufferings caused to women and children by reason of HTPs. The Second reason is to avoid the persisting dilemma to designate crimes against person and health into grave willful injury crime or common willful injury crime. This is because, as all thing stands today, the act of practicing FGM could fall either in the domain of article 555 or 556 of criminal code of 2004 – if article 655 and 656 of this code are repealed.

In view of this author, even though the lawmaker could rectify the hereinabove discussed flaws following one of these two options flawlessly, the second option is more recommendable. Thus, it is the author's argument that limb 'D' ought to be added to article 555 of criminal code of 2004. Consequently, it should be designed in an approach it reads '*if the injury is the result of practicing FGM (or HTPs), it shall be punished with . . . rigorous imprisonment*'. Nevertheless, if limb 'D' is added to article 555 of Ethiopian criminal code of 2004, its punishment ought to exceed the punishment of limb 'A', 'B' and 'C' of the same provision.

Designing Ethiopian criminal law per this conclusion has multifold benefits to control the act of practicing FGM. To begin with, in addition to those discussed previously, two points deserve discussion at this juncture. First, reading the preamble of FDRE criminal code of 2004, particularly paragraph 3, in conjunction with the minute of article 565 of the same code reveals that the lawmaker had considered as if practicing FGM was not criminalized by penal code of 1957. In view of the author, the defect of designing crime of practicing FGM under FDRE criminal code emanates from this form of understanding the fact of the penal code of 1957. Had they had rightly understood the penal code of 1957; even if the criminalization of the act of practicing FGM as one HTPs, they would have criminalize it more seriously than crime of grave body injury or, at minimum, as serious as crime of grave bodily injury. This could be deduced by reading across provisions of FDRE criminal code of 2004.

Reading across FDRE Criminal Code of 2004 indicates serious punishment is provided to punish the one who commits serious crime. This method of designing punishment suggests serious punishment warns and deters potential

criminals not to commit serious crimes. Besides, reading article 1 of this criminal code also buttresses this line of argument. Hence, analyzing act of practicing FGM from this general truth shows that it was designed in an approach it contradicts with the general framework of designing serious punishment for serious crime and/or similar punishment for similar criminal acts.

Besides, attaching lenient punishment to the crime of practicing FGM contradicts with the right of equality recognized by the FDRE constitution of 1995 and criminal code of 2004 while attaching more serious punishment to crimes of bodily injury. Inherently crime of practicing FGM is a crime committed against female only because they are female. Inflicting similar injury on other parts of human body including female's body is designed as punishable with more serious punishment. Then, why lenient punishment when the victim could only be female?

On the other hand, the benefits of designing crime of practicing FGM per the foregoing recommendation fits with the general punishment design framework and article 1 of FDRE criminal code which helps to warn and deter potential offenders of crime of practicing FGM by providing severe punishment for serious crimes. Moreover, it also helps to reform the discriminatory sense of designing crime of practicing FGM. That to say, it avoids providing lenient punishment for serious crime when the victim could only be women.

8. CONCLUSION AND RECOMMENDATIONS

This article assessed the (un) suitability of Ethiopian criminal law design to halt the prevalence of FGM in Ethiopia. Pursuant to the assessment, FGM, also known as female genital cutting or female circumcision refers to all procedures involving partial or total removal of female genitalia or any other injury to female genital organ for non-medical reason. Moreover, through the assessment four typologies of FGM; viz., type I, II, III, and IV is identified. It is also submitted that the risks and health complications associated with type I, II and III are similar, but they tend to be significantly more severe and prevalent the more extensive the procedure, and the extent of genital tissue cutting generally increases from type I to III.

Moreover, since FGM is one of traditionally ingrained HTPs and that violates girls' and women's rights, different strategies have been sought by different jurisdictions to eliminate it. One of those strategies is delegitimization of the act of practicing FGM. Like other jurisdictions, Ethiopia also vowed to eliminate it and halt its practices in FDRE constitution of 1995. Per this constitution, it has criminalized this guilty act in criminal code of 2004.

Nonetheless, in criminalizing the act of practicing FGM, as one of HTPs, the drafter of Ethiopian criminal code of 2004 and lawmaker committed some anomalies. One of those anomalies is failure to treat female genital as part of human body. This emanates from patriarchal attitude against gender equality. As a result of this uneven attitude toward girls' and women's rights, while the similar act committed against other parts of human body is a guilty act punishable with severe rigorous imprisonment, practicing FGM becomes crime punishable with lenient punishment. This is against what had been vowed to curbe in FDRE constitution as well as the basic principle of criminal law, protecting a common good.

Thus, it is this author's argument that the approach in which practicing FGM was criminalized refuted the very purpose of criminalizing it – preventing the act of practicing FGM. As a result, this article recommends the amendment of the crime of practicing FGM design in two alternatives. The first and simple alternative is simply repealing article 565 and 566 of Ethiopian criminal code. This alternative makes the crime of practicing FGM one of crimes against person and health that punishable, based on the type of FGM, at minimum with six months simple imprisonment as per article 556 (2) (A) and at maximum with fifteen years rigorous imprisonment as per article 555 of the code of 2004.

The second and plausible alternative is, taking the consequences of FGM and size of vulnerable group into consideration, adding limb 'D' to article 555 of Ethiopian criminal code. Nonetheless, if this alternative will be chosen, this limb must carry severe punishment than limb 'A', 'B', and 'C' of article 555 of Ethiopian criminal code of 2004. All the same, the author recommends this, second, alternative.
