



Strathmore University

Law School

**THE ROLE OF CUSTOMARY LAW IN COMBATING FGM: AN ANALYSIS OF THE
INTERPRETATION AND IMPLEMENTATION OF BOTH CUSTOMARY AND
STATUTORY LAWS IN COMMUNITIES WHERE FGM IS PRACTICED**

Submitted in partial fulfilment of the requirements of the Bachelor of Laws Degree,

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Dedication

To the resilient women and girls around the world who have bravely stood against the practice of Female Genital Mutilation, and to the advocates and allies working tirelessly to eradicate this harmful tradition. May our collective efforts pave the way for a future where every individual is free from the threat of FGM, and where their rights and dignity are upheld without compromise.


Declaration

I, **MICHELLE NDEGWA**, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed:MNN.....

Date: 31/03/2024

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed:.....

Supervisor Name: **Eva Nyambura Maina**

Abstract

List of Cases
Court of Appeal in Kenya

ANA v NA & Another

Kimani v Gikanga

The High Court of Kenya

Joan Bett v Republic

Jessica Magerer v Republic

Virginia Edith Wambui v Joash Ochieng' Ougo and Omolo Siranga

CHAPTER 1

1.1 BACKGROUND

The place of customary law in Kenya has been explicitly provided for by legal statute. According to section 3(2) of the Judicature Act, Kenyan courts must adhere to African Customary law in civil cases involving one or more parties if subject to or affected by it, provided it is relevant and aligns with the principles of justice and morality, without conflicting any existing legislation. In addition, article 2(4) of the Constitution of Kenya provides that ‘any law, including customary law that is inconsistent with this constitution is void to the extent of the inconsistency, and any act or omission in contravention of this constitution is invalid.’¹ In the case of *ASA v NA & another*, the Court of Appeal said that African customary law forms part of the law of the land.²

Customary law originates from the customs and practices of a community. Female Genital Mutilation (FGM), which will form the basis of this study, is a practice which is considered to be a necessary cultural rite of passage in many communities, and has been prevalent in Kenya for several decades.³ Not only is it a practice that is detrimental to the wellbeing of females, but it is also one that violates their human rights,⁴ as well as infringing upon their dignity and worth.⁵ Nonetheless, many people consider FGM as ‘a cultural right’, and proceed to use customary law as the basis of this custom. This brings a conflict in the minds of the public between the statutory laws in place against FGM and people’s beliefs in customary law regarding FGM-related matters.

¹ Article 2(4), *Constitution of Kenya*, 2010.

² 2020 eKLR.

³ Zaman M, ‘Let’s work together to end FGM in Kenya’ *The Standard*, 6 February 2021 <<https://www.unicef.org/kenya/stories/lets-work-together-end-fgm-kenya>>on 6 February 2021.

⁴ Wendoh S ‘FGM is a Human Rights Violation’ IPPF, 2018 <[https://www.ippf.org/blogs/female-genital-mutilation-fgm-human-rights-violation#:~:text=Female%20genital%20mutilation%20\(FGM\)%20comprises,rights%20of%20girls%20and%20women](https://www.ippf.org/blogs/female-genital-mutilation-fgm-human-rights-violation#:~:text=Female%20genital%20mutilation%20(FGM)%20comprises,rights%20of%20girls%20and%20women)>on 5 February 2018.

⁵ Bhalla N, ‘Kenya’s High Court Upholds Crucial Ban on FGM in Much-Needed ‘Boost’ for Activists’ *Global Citizen*, 18 March 2021 <<https://www.globalcitizen.org/en/content/kenya-high-court-upholds-ban-on-fgm/>>on 18 March 2021.

There have been numerous efforts placed in order to prevent the practice from being done, one of the ways being through criminalizing it.⁶ FGM is forbidden under The Prohibition of Female Genital Mutilation Act⁷, the Constitution of Kenya⁸, the Penal Code⁹ and the Children Act.¹⁰ The Kenyan Courts rely on these statutory laws when handling FGM cases. In the case of Joan Bett v Republic, the High Court used the Prohibition of Female Genital Mutilation Act as its point of reference while convicting the accused.¹¹ This was also the case in Jessica Magerer v Republic, where the court made a reference to statutory provisions against FGM.¹²

As FGM is considered a cultural practice, it would be safe to assume that customary law would be used as a guide in the court, as is the case with other matters regarding practices such as burials. As was the case in Virginia Edith Wambui v Joash Ochieng’ Ougo and Omolo Siranga, the court made several references to the customary law of the Luo community, and used that law to decide the case.¹³ No mention of customary law is utilized in the FGM related cases mentioned above, and this is possibly due to the fact that customary law does not prohibit FGM and therefore cannot be used in court to prevent this practice. But what if this was not the case?

Despite plenty of laws criminalizing FGM being present and being enforced in courts of law, curbing the practice has proven to be inefficacious as many still practice the ritual and are highly likely to continue practicing it for years to come. Statutory laws could be reformed in order to get rid of this practice, but changing customary law is not worth considering as it is intrinsic and has been present since time immemorial. However, has anyone ever thought about what would happen if judges handled FGM cases using both statutory law and customary law, while having the latter specifically interpreted -not changed- to pass FGM as unacceptable?

⁶ 28 Too Many, ‘Kenya: The Law and FGM’ Thomson Reuters Foundation’, 2018, 2 - [https://www.28toomany.org/media/uploads/Law%20Reports/kenya_law_report_v1_\(may_2018\).pdf](https://www.28toomany.org/media/uploads/Law%20Reports/kenya_law_report_v1_(may_2018).pdf) on May 2018.

⁷ Prohibition of Female Genital Mutilation Act, 2011.

⁸ Article 44(3), *Constitution of Kenya*, 2010.

⁹ Section 4, *Penal Code*, revised 2014.

¹⁰ Section 23(1)(b), *Children’s Act*, revised 2022.

¹¹ 2018 eKLR.

¹² 2015 eKLR.

¹³ 1986 eKLR.

1.2 STATEMENT OF PROBLEM

FGM is still a rampant practice. Many communities tend to deliberately ignore anti-FGM laws, mostly because this is a practice they have gotten used to and has been accepted by the communities. Customary law is not used with anti-FGM statutes to determine FGM-related court cases as it neither explicitly illegalizes the practice, nor has it been interpreted to do the same. Large scores have refused to obey the legal statutes, but will they abide by customary law if it was interpreted to outlaw FGM? This study therefore aims at assessing whether there is a certain way customary law can be interpreted which renders FGM unacceptable, in an attempt to prevent further futility of the statutory law.

1.3 RESEARCH OBJECTIVES

1. To assess customary law and its place in society, including if there is a way customary law can be interpreted to consider FGM as a crime against women's rights.
2. To review existing literature and legal frameworks that relate to FGM, and discover how they can be integrated into customary law.
3. To identify key challenges and limitations of existing statutory laws that criminalize FGM, and to discover the degree to which customary law and beliefs may have played a role in undermining their effectiveness.

1.4 RESEARCH QUESTIONS

1. a. What is the history of customary law and what influences its interpretation and application?
 - b. Is there a way customary law can be interpreted to consider FGM as a crime that is against women's rights?
2. How can existing literature and legal frameworks related to FGM be integrated into customary law?
3. What are the key challenges and limitations of existing statutory laws that criminalize FGM and to what extent do customary law and beliefs play a role in undermining their effectiveness?

1.5 HYPOTHESIS

Customary law encompasses a set of customs and traditions that govern different interactions among members of a community.¹⁴ My hypothesis is that it can be developed so that it complies with human rights principles and aids in the advancement of gender equality.¹⁵ The Bill of Rights relates to all law¹⁶ and despite the fact that customary law relates to indigenous and local communities, it must uphold chapter 4 of the Constitution. As of today, customary law does not explicitly criminalize FGM, although it should. This brings about a potential mystery and contradiction in the association between customary law and statutory law. Should customary law become similar to statutory law, in this situation the Bill of Rights, local communities will hopefully abide by it as it is originating from their very own law.

1.6 JUSTIFICATION

The main focus regarding the eradication of FGM has always been on passing statutory legislation that will outlaw the practice and, raising awareness among other methods. These means have proven to be ineffective and there is still a false belief that the former is only way to end FGM.¹⁷ This study will be useful as it provides a different and hopeful approach to this practice that has been undefeatable for decades. I am proposing using customary law as a possible back door that has not been thought of so far, owing to the fact that it directly influences the local communities and how they carry out their activities.¹⁸

¹⁴ Kariuki W, 'Application of African Customary Law in Kenya' The Catholic University of Eastern Africa, 2011 <<https://www.bartleby.com/essay/Application-of-African-Customary-Law-in-Kenya-P3MMYNL36ZZS#:~:text=Customary%20law%20is%20a%20body,or%20any%20other%20written%20law>> on 18 October 2011.

¹⁵ Ndulo M, 'African Customary Laws, Customs, and Women's Rights' 18 *Human Rights and Legal Systems* 1, 2011, 92.

¹⁶ Article 20(1), *Constitution of Kenya* (2010).

¹⁷ '7 Ways to End FGM' Plan International- <https://plan-international.org/case-studies/7-ways-to-end-fgm/> on 19 January 2018.

¹⁸ Kumar M, 'Customary Law: Meaning & Significance' Tutorials Point <<https://www.tutorialspoint.com/customary-law-meaning-and>

The audience affected will be girls and women who were subjected to this practice, as well as those who are yet to be subjected to it, and the local and indigenous communities. Supposing the proposed technique works, girls and women who have been exposed to this practice can seek justice without fear. The ones who are yet to be subjected to the practice will benefit as they will not have to undergo this gruesome practice since it will optimistically be eradicated once and for all. The local and indigenous communities will benefit from this study as their ways of life are fundamentally influenced by customary law¹⁹ and this will alter their mindsets towards FGM. Moreover, this will be positive for customary law as it will be more aligned with the safeguarding of human rights.

1.7 CONCEPTUAL FRAMEWORK: THE NEED TO INCORPORATE ‘FORMAL’/MODERN CRIMINAL LAW INTO CUSTOMARY CRIMINAL LAW WHEN DEALING WITH FGM-RELATED MATTERS.

Customary law has given priority to the idea of curative justice which involves the renewal of the social balance that has been affected negatively by criminal activities. This has resulted in the promotion of responsibility among the offenders, compensation to the victim, and the involvement of all members of the affected community.²⁰ What is of interest here is who or what gives the final determination of those ‘criminal’ activities. The answer to this is simple. Statutory law. This is why there is a need to incorporate statutory law into customary criminal law –not the reverse- in order to pass FGM as a criminal activity against both laws. For purposes of this paper, the meaning of the word incorporate is to work into something already existent, so as to form an indistinguishable whole.

[significance#:~:text=Indigenous%20peoples%20and%20local%20communities,fundamentally%20influenced%20by%20customary%20law](https://www.tutorialspoint.com/customary-law-meaning-and-significance#:~:text=Indigenous%20peoples%20and%20local%20communities,fundamentally%20influenced%20by%20customary%20law)> on 16 January 2023.

¹⁹Kumar M, ‘Customary Law: Meaning & Significance’ Tutorials Point

<[https://www.tutorialspoint.com/customary-law-meaning-and-](https://www.tutorialspoint.com/customary-law-meaning-and-significance#:~:text=Indigenous%20peoples%20and%20local%20communities,fundamentally%20influenced%20by%20customary%20law)

[significance#:~:text=Indigenous%20peoples%20and%20local%20communities,fundamentally%20influenced%20by%20customary%20law](https://www.tutorialspoint.com/customary-law-meaning-and-significance#:~:text=Indigenous%20peoples%20and%20local%20communities,fundamentally%20influenced%20by%20customary%20law)>on 16 January 2023.

²⁰ Bwire B, Integration of African Customary Legal Concepts into Modern Law: Restorative Justice: A Kenyan Example, MDPI, 2019.

FGM as been stated has a crime in statutory laws. The Prohibition of Female Genital Mutilation Act of 2011²¹, the Penal Code²², the Constitution of Kenya²³ and the Children Act²⁴ all criminalize this practice. This is law that applies to all members of the public, including those of local and indigenous communities. The ‘formal’/modern law has proven to be vain in the suppression of FGM, and this is not a surprise given that customary criminal law has not criminalized the practice. The two systems of laws should work hand in hand in reversing this. Efforts to abolish FGM are nugatory as it is accepted by the community and its elders –implying that it is not against any customary law- despite being prohibited by several statutory laws.

Incorporating some of tenants of statutory law into customary criminal law would be beneficial in that it will cause the two to align with other, forming a greater force against FGM. One of the ways to assist this incorporation would be understanding why FGM is a crime in accordance with statutory law, and not in customary law. It is common knowledge that all laws must strive at protecting the rights of individuals. The government is obliged to protect persons and groups against exploitation.²⁵ FGM is a practice which infringes on the rights of a person, and therefore the state criminalizes the practice.

Why should this be any different when it comes to FGM and customary law? If statutory criminal law seeks to protect human rights, customary criminal law ought to see this through. With the understanding of why FGM is illegal as per statutory law, it can be incorporated into customary criminal law. Rights of women and girls in local and indigenous communities should be protected by customary criminal law, otherwise it beats the purpose of being law. Despite customary law being deeply ingrained in the life and traditions or native peoples and indigenous communities, it should still ensure that all interactions, practices and customs align with the laws provided by formal statutes.

²¹ Prohibition of Female Genital Mutilation Act, 2011.

²² Article 4, *Penal Code*, revised 2014

²³ Article 44(3), *Constitution of Kenya*, 2010.

²⁴ Article 14, *Children Act*, revised 2016.

²⁵ ‘What are Human Rights’ Kenya National Commission on Human Rights

Another method of achieving this integration is by recognizing that the Constitution of Kenya holds the highest authority in the country,²⁶ and acknowledging that customary law has been considered subordinate to statutory laws by the courts for many years now.²⁷ This can be interpreted to mean that statutory laws are superior to customary laws, and it would be merely impossible for customary law to accept something that has been banned by written law. Community elders will be forced to comprehend that they must abide by the superior laws and insert it into their own.

The last way of incorporating modern law into customary law is by ensuring that the former is one of the sources of the latter. In many cases, traditions and customs are viewed as sources of formal law. The reverse should be attempted in the trials of abolishing FGM. Customary law should look up to statutory law as a source as it is being established. This ensures that what is being respected by statutory law is also being respected by customary law.

1.8 LITERATURE REVIEW

There have been a number of discourses on the role and application of customary law in Kenya, as well as the rising action of FGM. In her research paper, Wendy Kariuki states that customary law is a body of procedures establishing its legality in in tradition.²⁸ Claude Kamau Mwangi, in his article '*Traditional knowledge and inclusive subordination of African Customary Law in Kenya: Lessons from Personal law*', stated that judges have discretion on whether to permit a firm rule of customary law to function or not, and this decision should be a judicial one which should be exercised on clear and satisfactory principles.²⁹ If tradition can be reversed or interpreted in a

²⁶ Article 2(1), *Constitution of Kenya*, 2010.

²⁷ Kariuki F, 'Customary Law Jurisprudence from Kenyan Courts: Implications for Traditional Justice Systems'.

²⁸ Kariuki W, 'Application of Customary Law in Kenya' The Catholic University of Eastern Africa, 2011 - <https://www.bartleby.com/essay/Application-of-African-Customary-Law-in-Kenya-P3MMYNL36ZZS#:~:text=Customary%20law%20is%20a%20body,or%20any%20other%20written%20law> on 18 October 2011.

²⁹ Mwangi C, 'Traditional knowledge and inclusive subordination of African Customary Law in Kenya: Lessons from Personal law' 66 *Journal of African Law* 1, 2021.

way that makes an act illegal, customary law will be affected and it could be applied in a court of law when FGM cases are being handled.

Studies have also shown that the anti-FGM laws are futile in eradicating the practice. It is thought that the empowerment of women cannot happen without the law being enhanced or reformed³⁰, since current legislation against FGM has been ineffective in its curbing. Laws have not reached their anticipated effect of distinguishing FGM from intrinsic cultural and spiritual norms.³¹ This is mostly due to the fact that some men and women still believe that it is a obligation by the community.³²

1.8.1 On whether FGM can be considered a legitimate custom by the society and used as a source of customary law

Many communities in Kenya believe that Female circumcision is an essential tradition ensuring a girl's acceptance within the community and her eligibility for marriage.³³ This may lead to the false credence that because it is a custom, it is a practice that can be protected by customary law, or can be a source for the same. However, this is far from the truth. One of the ways to define a custom is 'it is a tradition and widely accepted behavior and it is specific to a particular society.' To be considered legitimate, a custom must have existed for a very long time, be established and logical, mandatory and not in conflict with any statutory law.³⁴ Law based on custom is what we refer to as customary law³⁵, and customary law relies on customs as one of its sources.

³⁰ Touzenis K, 'Female Genital Mutilation: A Case for showing how Socio-Cultural Obstacles hinder the Enforcement of Women's Human Rights' *Jura Gentium*, paragraph23, 2005.

³¹ Luseno S, Obere S, Nafula N, 'Culture, Religion, Legislation and FGM in Kenya' Kippra, 2020, paragraph 17 <<https://kippra.or.ke/culture-religion-legislation-and-fgm-in-kenya/>>on 6 February 2020.

³² Luseno S, Obere S, Nafula N, 'Culture, Religion, Legislation and FGM in Kenya' Kippra, 2020, paragraph 14 <<https://kippra.or.ke/culture-religion-legislation-and-fgm-in-kenya/>>on 6 February 2020.

³³'Developing Excellence in Response to FGM and Other Harmful Practices' National FGM Centre.

³⁴ 'Customary Law, Traditional Knowledge and Intellectual Property: An Outline of the Issues' World Intellectual Property Organization, 2013.

³⁵ Bhattacharyya B, 'Customs or Customary Laws: A Source of Modern English Laws' 2020.

FGM is a practice that has existed for time immemorial.³⁶ Communities have grown to frequently expose girls and women to this practice, even though it is harmful in nature. Any person who refers to FGM as a legitimate custom that is accepted by society and can be used as a source of customary law is mistaken. A custom of such nature cannot be considered as legitimate in that it is inconsistent with not one, but several written laws. Moreover, a custom is a widely accepted behavior.³⁷ As the years go by, it is no longer accurate to say FGM is widely accepted, in that there are very many girls and women who are against it. In 1963, a journal was published and it stated that one of the offences existing in customary law at that time was ‘circumcising a person without consent’.³⁸ Unfortunately, this is not the case as of today, and it is something that needs to be revisited.

1.8.2 On whether customary law adjusts with the demands of human rights law

Claims assert that African customary law struggles to adapt to the requirements of the global human rights regime.³⁹ These assertions imply that African Customary Law is unchanging and therefore will not develop alongside the advancement and acknowledgement of distinct rights and freedoms provided by contemporary constitutional instruments.⁴⁰ According to activists, some customary law norms degrade the worth of women and are utilized as a basis for treating them as inferior members of the society.⁴¹

There are some indications that customary norms and practices have undergone changes over time to adjust to new truths.⁴² However, these norms have missed out on one important reality, which is the fact that FGM is now forbidden by written laws as it undermines women’s rights. They have failed to adjust to the actualities of today. Considering that many people have changed their views

³⁷ ‘Custom as a Source of Law’ <<http://law.uok.edu.in/Files/5ce6c765-c013-446c-b6ac-b9de496f8751/Custom/Uni-5.pdf>>

³⁸ ‘Journal of African Law’ 7(1), 1963, 2. <<https://www.jstor.org/stable/745275?seq=1>>

³⁹Juma, L. Reconciling African Customary Law and Human Rights in Kenya: Making a Case for Institutional Reformation and Revitalization of Customary Adjudication Processes. *14 St. Thomas Law Rev.* **2002**, 459, 459–512.

⁴⁰Bwire B, *Integration of African Customary Legal Concepts into Modern Law: Restorative Justice: A Kenyan Example*, MDPI, 2019.

⁴¹ Ndulo M, ‘African Customary Law, Customs and Women’s Rights’ 18(1), 2011.

⁴² Dr Kamau W, ‘Customary Law and Women’s Rights in Kenya’ *Equality Effect*, 7.

on FGM, one can think that the society as a whole has passed it as unacceptable behavior. Even so, it is still considered acceptable and customary law has done not a thing to change this, thus showing its lack of adjustment with the demands of human rights law.

It almost seems as though customary law somewhat permits the violation of human rights, as it is not necessarily against it. This is the case in other matters as well, such as inheritance, ownership and possession, as customary laws largely exclude women from partaking in those activities.⁴³ These are just but a few examples of ways in which customary law has not adjusted and does not abide by the laws that have been put in place to protect human rights, including the Constitution which is the highest law of the land.

1.8.3: On whether the laws against FGM are oppressive to the indigenous communities and their beliefs

Individuals may be aware of the anti-FGM laws that are present but once they think the law is oppressive, they will option to measures that evade the law while still practicing FGM.⁴⁴ This feeling of oppression comes from the fact that people believe FGM is part of their culture and the law should not rid them from this. To boot, communities rebel the laws against FGM as they view it as a top-down approach delivered without their contribution.⁴⁵

When one goes truly deeper into figuring out whether the law is unfair to those communities, they will comprehend that the law is in fact attempting to prevent the oppression of women's rights. It is extremely peculiar as to how it would seem oppressive in one way but not in another way.

A female medical doctor, Dr. Tatu Kamau, claims that the Prohibition of FGM Act invades the women's rights to culture, the greatest achievable health and gender equality.⁴⁶ Her point on 'the

⁴³ 'Kenyan Laws and Harmful Customs Curtail Women's Equal Enjoyment of ICESCR Rights', 2008, 2.

⁴⁴ Agnes K, Mutua M, Mwanga D, Olungah C, 'Assessing the role of law in reducing the practice of FGM/C in Kenya' *Evidence to End FGM/C: Research to Help Girls and Women Thrive*, 2020, 20 - https://knowledgecommons.popcouncil.org/cgi/viewcontent.cgi?article=2153&context=departments_sbsr-rh on 28 February 2020.

⁴⁵ Luseno S, Obere S, Nafula N, 'Culture, Religion, Legislation and FGM in Kenya' Kippra, 2020, paragraph 15- <https://kippra.or.ke/culture-religion-legislation-and-fgm-in-kenya/> on 6 February 2020.

⁴⁶ Van Bavel H, 'Is Anti-FGM Legislation Cultural Imperialism? Interrogating Kenya's Prohibition of Female Genital Mutilation Act- <https://journals.sagepub.com/doi/full/10.1177/09646639221118862> - on August 15 2022.

best attainable health’ can be avoided if the practice is not carried out in the first place. Women receiving good medical care after undergoing FGM does not alter the fact that the practice is still a harmful one. The Prohibition of FGM Act does not infringe on or oppress any member of the community, but rather seeks to ensure that the protection of women rights is upheld.

CONTRIBUTION

The contribution of this study would be to provide insight into the potential role of customary law in preventing the constant and continuous occurrence of FGM and complementing statutory law. My study will be unique in that it will assess whether there is a certain way customary law can be interpreted to consider FGM unacceptable. It will prove that notion of ‘passing legislation is the only way to put an end to FGM’⁴⁷ is fallacious, by provide new strategies for preventing the practice and promoting legal compliance. This could have important implications for policy and practice in the local and indigenous communities where customary law plays a prominent role.

It will highlight the potential of customary law to prevent FGM, and also give a broader understanding of the complex factors that perpetuate the practice and help to inform more effective and culturally sensitive interventions. In general, this study’s contribution lies in its potential to generate new insights and knowledge that can support efforts to curb and destroy FGM, and protect the rights and interests of girls and women in society.

1.9 METHODOLOGY

This study will generally rely on both primary sources including case law, the Constitution, The Prohibition of FGM Act as well as statutes protecting human rights, and secondary sources like books, journals, articles and scholarly writings. It will also rely on statistics from surveys and interviews, thus making it both qualitative and quantitative research. This study will utilize a deductive approach, as a main claim will deduced from the premises in the first few chapters of the study. It will be desk-based research.

⁴⁷ ‘7 Ways to End FGM’ Plan International <<https://plan-international.org/case-studies/7-ways-to-end-fgm/>> on 19 January 2018.

To tackle my assessment of the interpretation, scope and place of customary law, I shall conduct a thorough review of existing literature –secondary sources- of the same. This will help in the identification of gaps in potential areas of focus for my research. Furthermore, I shall analyze data collected from surveys and interviews conducted by different people in order to identify patterns, trends and themes. In relation to the interpretation of customary law to render FGM unacceptable, I shall rely on scholarly work as well as laws that protect the human rights of individuals to go about this matter.

In the reviewing of existing literature and the legal frameworks relating to FGM, I shall rely on both primary sources and secondary sources, as stated in the first paragraph of this section. Finally, I shall derive main claims from all my preliminary work so as to identify the key challenges and limitations of anti-FGM statutory laws and how customary laws play a role in undermining their effectiveness. I shall also rely on interviews and surveys carried out on local and indigenous communities to understand their attitudes towards existing anti-FGM statutory laws as well as their own customary law.

1.10 CHAPTER BREAKDOWN

The initial part of this study will be Chapter 1, which lays the preliminaries for the successive chapters. It outlines various aspects, such as the research aims, conceptual framework and rationale for the study. Chapter 2 will assess customary law, its scope and place in today's society, what influences its interpretation, and whether there is a way it can be interpreted to consider FGM as a crime unacceptable by society.

Chapter 3 will give a comprehensive review of existing literature and legal frameworks that relates to FGM, and this includes national statutes, scholarly articles and case law, and discover how they can be integrated into customary law. It will also identify potential strategies for this integration and discuss the results and their relevance for policy and practice.

Chapter 4 will identify key challenges and limitations of existing statutory laws that criminalize FGM, and the importance of these identifications. It will also explore the extent to which customary law may have played a role in undermining their effectiveness. It will also provide and interpretation and discussion of the results. Chapter 5 will provide the recommendations and conclusion of this study as a whole.

CHAPTER 2: THE APPLICATION OF CUSTOMARY LAW, AND ITS INTERPRETATION IN RELATION TO HUMAN RIGHTS AND FGM

2.1 Introduction

Black's Law dictionary defines customary law as 'customs that are accepted as legal requirements or obligatory rules of conduct; practices and beliefs that are so vital and intrinsic a part of a social and economic system that they are treated as if they were laws.'⁴⁸ A legitimate custom must be ancient, clear, and rational. It should impose an obligation and should not contradict statutory law, although it can differ from common law.⁴⁹ Customary law undergoes incremental evolution as societal practices shift over time. It is frequently unwritten, as it relies on the shared understanding within a community regarding typical practices and norms.⁵⁰ The oral component of customary law represents its principal strength, rendering it a dynamic and flexible system capable of evolving and adjusting to shifting circumstances, all without necessitating the protracted, costly, and at times politically sensitive procedures associated with amending formal legal codes.⁵¹ It is, however, treated as an inferior system of law compared to statutory laws, as it cannot be repugnant to any law that is written.

In most African nations, the vast majority of individuals carry out their personal affairs in compliance with and under the jurisdiction of customary law.⁵² The main concern of customary law is the preservation of the cohesiveness of the community and kinship rights.⁵³ Customary law rules are binding over a certain length of time, and can thereafter be altered or changed, depending on changing circumstances in the communities' day-to-day lives. As situations

⁴⁸ Black's Law Dictionary, 8th edition, 2004.

⁴⁹ World Intellectual Property Organization, *Customary Law, Traditional Knowledge and Intellectual Property: An Outline of the Issues*, 4.

⁵⁰ My Democracy Tree Namibia, *Customary Law*, Factsheet Series No. 5 of 6.

⁵¹ Banda T, 'Sub-Saharan African Legal Traditions' International Encyclopedia of the Social & Behavioral Sciences (Second Edition), 2015.

⁵² Ndulo M, 'African Customary Law, Customs, and Women's Rights' 18 *Indiana Journal of Global Legal Studies* 1, 2011, 87.

⁵³ Banda T, 'Sub-Saharan African Legal Traditions' International Encyclopedia of the Social & Behavioral Sciences (Second Edition), 2015.

change, so do practices, given that they are accepted by the society. These practices then become part of the norm in the society and over time, become part of customary law.

2.2 The application of customary law

The role of African customary law in African legal systems can be separated into three different approaches. The original approach, known as the historical approach, was established during colonial rule. The subsequent approach came about with the creation of new constitutions after independence, and the third approach represents the period following democratization.⁵⁴ Kenya has a pluralistic legal system, meaning that two or more legal structures can co-occur in the same social field.⁵⁵ The legal dualism in Kenya is the conjunction of written law –modern law- and other systems such as customary law.⁵⁶ The latter holds a recognized status as a legitimate legal source within the legal framework of Kenya.

Customary law is only obligatory to the level that any state wishes to identify it.⁵⁷ The incorporation of African customary legal principles in Kenyan courts is constrained to civil cases subject to the constitution, and even in those instances, it is contingent upon one or more of the parties being subject to or influenced by it. Additionally, this incorporation is only acceptable if it does not lead to injustice for any of the parties involved and aligns with the entirety of Kenyan legal statutes.⁵⁸ Customary law is not employed within Kenya's criminal justice system; however, this does not diminish its significance in such affairs. Traditional communities continue to employ customary law to address and resolve criminal matters, albeit outside the formal court system.

⁵⁴ Ndulo M, 'African Customary Law, Customs, and Women's Rights' 18 *Indiana Journal of Global Legal Studies* 1, 2011, 92.

⁵⁵ Merry S E, 'Legal Pluralism' 22 *Law and Society Review* 5, 1988.

⁵⁶ Musiga T, 'Intergration of Customary Law Concepts onto Kenya's Criminal Justice System: A Commentary on Lenchura and Mohomed Abdow Cases' 12 *The Law Society of Kenya Journal* 2, 2016, 145.

⁵⁷ D'Amato A, 'Human Rights as Part of Customary International Law: A Plea for Change of Paragms' Northwestern University School of Law Scholarly Commons, 2010, 10.

⁵⁸ Bwire B, 'Integration of African Customary Legal Concepts into Modern Law: Restorative Justice: A Kenyan Example' 9 *Societies Journal* 1, 2019.

In the case of *Kimani v Gikanga*, it was held that customary law is part of the law in Kenya. The same case answered the question on how customary laws are to be established as facts before the courts. In certain instances, the court may exercise judicial notice of these customs without requiring additional evidence. This is particularly applicable when the specific customary law has been the focal point of a preceding judicial ruling or is delineated in a recognized book or reference document. However, in most cases, especially in the High Court or a magistrate's court, the pertinent customary law must, as a customary practice and for expediency, be substantiated through witnesses presented by the party invoking said customary law in support of their case.⁵⁹

Traditional practices and customs which are governed by customary law should be balanced with universally familiar human rights principles, and the United Nations Declaration of Human Rights.⁶⁰ Furthermore, customary law should play a vital role in regulating and shaping the conduct of individuals within a community. However, this is not always the case, and a reform of customary law should be considered. Some customs and practices neither align with universal human rights standards, nor promote principles such as dignity, equality and individual freedom. It is then safe to say that, on occasion, customary law refuses to evolve and adapt to changing times and changing legal rules. This adaptation is important so as to address and resolve issues related to gender discrimination, protection of minorities and other human rights infringements.

A significant discourse exists amid human rights advocates and traditionalists, revolving around the compatibility of customary norms with the human rights standards articulated in international agreements and national bills of rights within national constitutions. Traditionalists contend that by upholding traditional morals, customary law positively contributes to the advancement of human rights. Conversely, protestors posit that specific customary law norms not only compromise the dignity of women but are also invoked to substantiate the handling of women as second-class citizens.⁶¹ This conflict certainly exists, and it has not yet been resolved.

⁵⁹ 'Kinyanjui Kimani v Muiro Gikanga and Anor' 10 *Journal of African Law* 1, 1966, 47.

⁶⁰ Universal Declaration of Human Rights <<https://www.un.org/en/about-us/universal-declaration-of-human-rights>>

⁶¹ Ndulo M, 'African Customary Law, Customs, and Women's Rights' 18 *Indiana Journal of Global Legal Studies* 1, 2011, 89.

Customary law should seek to promote peace and restore justice. Moreover, it should not infringe on human rights, and must always guide in their protection. Despite the fact that it deals with traditional and cultural matters, it must still aim to achieve all the functions of a legal system, fairly and consistently. This is not to mean that cultural practices should be wiped away, but there is a need to encourage legal reform to ensure that customary laws protect human rights while also respecting cultural identities. This discussion leads us to one of the main questions of this paper, which will be evaluated below: does customary law always protect human rights and freedoms, and does it foster gender equality?

2.3 The interpretation of customary law in relation to human rights and freedoms while dealing with FGM

Real customary law is that which knows and accepts the modifications which frequently take place.⁶² Legislation, as well as the courts, hold a significant responsibility in the process of reforming and advancing customary law to align with human rights standards and foster gender equality. The fundamental premise should be that customary law is dynamic and not rigid. It should be interpreted in a manner that considers the real-life experiences of the individuals it serves.⁶³ Nonetheless, there is an aspect in which customary law has failed to be dynamic. This is in respect to the practice of Female Genital Mutilation (FGM). FGM has been a practice that communities have partaken in since time immemorial. Suppose customary law was dynamic in that aspect- that would mean that FGM would be unacceptable as per the rules of customary law today.

As discussed earlier, FGM is a destructive practice that is detrimental to the wellbeing of females, but it is also one that violates their human rights,⁶⁴ as well as infringing upon their

⁶² <https://www.sciencedirect.com/topics/social-sciences/customary-law#:~:text=It%20is%20subject%20to%20change,in%20response%20to%20international%20law.>

⁶³ Ndulo M, 'African Customary Law, Customs, and Women's Rights' 18 *Indiana Journal of Global Legal Studies* 1, 2011, 87.

⁶⁴ Wendoh S 'FGM is a Human Rights Violation' IPPF, 2018 < [https://www.ippf.org/blogs/female-genital-mutilation-fgm-human-rights-violation#:~:text=Female%20genital%20mutilation%20\(FGM\)%20comprises,rights%20of%20girls%20and%20women](https://www.ippf.org/blogs/female-genital-mutilation-fgm-human-rights-violation#:~:text=Female%20genital%20mutilation%20(FGM)%20comprises,rights%20of%20girls%20and%20women) >on 5 February 2018.

worth and dignity.⁶⁵ It is my contention that during the initial emergence of Female Genital Mutilation, perspectives deeming it as harm to human rights were either entirely absent or not prevalent. The advocacy for human rights was not as pronounced during that period as it is in contemporary times. The practice was consequently widespread across various communities and attracted minimal concern. As societal actions and legal frameworks for the safeguarding of human rights gained momentum, a segment of the public commenced advocating for women's rights. It became increasingly apparent to many that FGM constituted a deleterious practice contrary to the rights and freedoms of women. This realization prompted numerous discussions, movements, and endeavors aimed at discontinuing the practice in order to uphold women's rights.

The interpretation of customary law ought to prioritize the safeguarding of the rights of women and children while also endeavoring to adapt to evolving legal frameworks and societal conditions. Considering its non-codified nature, communities should aim to harmonize customary law with contemporary realities through its interpretation, thereby ensuring its relevance and effectiveness in addressing contemporary challenges.

Customary law, which governs customs for traditional and indigenous communities, seems to be silent when it comes to FGM related matters, and that is quite strange. The aforementioned discourse distinctly illustrates that certain customary law precepts diverge from the principles of human rights and freedoms. Had there been alignment between customary law and human rights, practices such as FGM would be deemed unacceptable within the community according to customary law. Much to our dismay, such an alignment does not exist. In my opinion, this is closely tied to the fact that customary law is not as dynamic as it deems to be.

⁶⁵ Bhalla N, 'Kenya's High Court Upholds Crucial Ban on FGM in Much-Needed 'Boost' for Activists' Global Citizen, 18 March 2021 < <https://www.globalcitizen.org/en/content/kenya-high-court-upholds-ban-on-fgm/> > on 18 March 2021.

CHAPTER 3: A REVIEW OF EXISTING LITERATURE AND LEGAL FRAMEWORKS THAT RELATE TO FGM, AND HOW THEY CAN BE INTEGRATED INTO CUSTOMARY LAW.

3.1 Introduction

In this pivotal chapter, we board an inclusive survey of the complicated tapestry woven by existing literature and legal frameworks concerning FGM. I will take a close look at diverse perspectives, critically assess empirical studies, and examine the evolving narratives that have shaped the discourse on FGM. I will also scrutinize the legal frameworks at both national and international levels, evaluating their effectiveness in addressing the deeply rooted cultural and social dynamics associated with FGM. Through this interdisciplinary lens, I aim to shed light on the interplay between established legal norms and the deeply ingrained practices of customary law, seeking avenues for their harmonious integration.

It is a complex journey that goes beyond just comparing legal provisions, as we delve into the nuanced intersections of cultural traditions and legal norms. By contemplating the integration of these diverse strands into customary law, I hope to offer nuanced insights that transcend the conventional boundaries of legal analysis. My goal is to understand the existing literature and legal frameworks while also providing an interesting perspective on how these elements can come together within the intricate framework of customary law, fostering a comprehensive and culturally sensitive approach to addressing the profound challenges posed by FGM.

3.2 Literary landscape: A critical review of existing scholarly works on FGM

FGM is widely practiced in various parts of the world. Despite its prevalence, it is a harmful and damaging practice, as it is often linked to physical, sexual, psychological and social consequences.⁶⁶ There was an era where women's rights were beginning to be accepted as human rights, providing a good stand to address FGM as a human rights issue.⁶⁷ This was the period of time between 1980 and 1990, also known as the Women's Decade. During those years,

⁶⁶ Whitehorn J, Ayonrinde O, Mainguy S, 'Female Genital Mutilation: Cultural and Psychological Implications' 17 *Sexual and Relationship Therapy* 2, 2002, 161.

⁶⁷ Yusuf C, Fessha Y, 'Female Genital Mutilation as a Human Rights Issue: Examining the Effectiveness of the Law Against Female Genital Mutilation in Tanzania' 13 *African Human Rights Law Journal*, 2013, 363.

attention was brought to issues of gender injustices and their effects on women's health. By the 1990s, the concept of women's rights as human rights was introduced, and there was an acceptance of gender-based violence as a violation of human rights at the 1993 World Conference on Human Rights in Vienna. This led to the development of approaches that emphasized women's and children's rights.⁶⁸ As the years go by, as a result, the realization that FGM is a substantial threat to the rights of women and children is rising. Many papers, articles, books and journals have been written regarding the issue of FGM, in an effort to increase the awareness of its harsh effects and its violation of some human rights.

FGM is considered a dire defilement of human rights- mainly women and children's rights- and results in severe health complications.⁶⁹ Treaty Monitoring Bodies (TMBs) consistently emphasize that harmful practices constitute a violation of women and girls' human rights and are a form of discrimination based on sex, gender, age, and other grounds.⁷⁰ FGM is regarded as an urgent and severe issue, particularly concerning the right to health, human dignity and in cases where it leads to loss of life, the right to life. TMBs consist of experts. Their assessment that FGM constitutes a breach of the human rights of women and girls, as well as a manifestation of discrimination carries substantial weight. This pronouncement is noteworthy due to the experts' profound understanding of international legal frameworks, contributing to an informed and authoritative interpretation of FGM as a multifaceted violation.

In their book, *International Human Rights in Context: Law, Politics, Morals*, Henry J. Steiner and Philip Alston write: 'The issue of the consistency of this culturally imbedded practice with human rights norms has become a matter of intense, often angry public debate, both in the West and in . . . Africa',⁷¹ the practice in question being FGM. The statement effectively captures a heated debate about FGM as a cultural practice and its compatibility with human rights. It is

⁶⁸ Toubia N, Sharief E, 'Female Genital Mutilation: Have We Made Progress?' 82 *International Journal of Gynecology & Obstetrics* 3, 2003.

⁶⁹ Khosla R, Banerjee J, Chou D, Say, Fried S, 'Gender Equality and Human Rights Approaches to Female Genital Mutilation: A Review of International Human Rights Norms and Standards' BioMed central, 2017, 1.

⁷⁰ Khosla R, Banerjee J, Chou D, Say, Fried S, 'Gender Equality and Human Rights Approaches to Female Genital Mutilation: A Review of International Human Rights Norms and Standards' BioMed Central, 2017, 3.

⁷¹ Levin T, 'Female Genital Mutilation and Human Rights' *Comparative American Studies An International Journal*, 2013, 306- <https://www.tandfonline.com/doi/pdf/10.1177/14775700030013003> on 29 November 2013.

discussed widely both in the West and in Africa. The passionate nature of the discussions is conveyed through emotive language. It is reasonable to infer that this topic involves diverse and strongly held opinions and views.

In his book, *Female Genital Mutilation and Human Rights*, Tobe Levin states that governments are signatories to Article 5 of the Universal Declaration of Human Rights, which prohibits torture, violate that clause when they fail to prevent third parties from excising girls.⁷² There is a connection between the failure to prevent harm on girls and the violation of the anti-torture clause- this emphasizes the responsibility of signatory governments to protect girls from such harmful practices. Levin also quotes once-spoken words by Nahid Toubia, ‘We are all responsible for ensuring that no minor girl is subjected to this practice’.⁷³ There exists a collective responsibility to prevent the practice of FGM on girls; a unified effort of some kind.

In their article, *Female Genital Mutilation as a Human Rights Issue: Examining the Effectiveness of the Law against Female Genital Mutilation in Tanzania*, Camilla Yusuf and Yonatan Fessha state that FGM is a practice that violates the fundamental human rights of women. They also express that FGM is commonly linked to the rights to equality and to be free from all forms of discrimination. In addition, they claim that FGM serves, among other purposes, as a means to regulate women's sexuality and conveys a powerful message about their subordinate status in society. This practice reinforces the perception that women's roles are confined to being mothers and spouses, contributing to their subordination across various aspects of life. Consequently, the impact of FGM extends to compromising the physical and mental well-being of women, impeding their ability to fully exercise fundamental freedoms.⁷⁴ The authors have asserted that FGM violates human rights, particularly the rights to equality and freedom from discrimination. The practice perpetuates societal norms that pose a limit to women, constraining their ability to

⁷²Levin T, ‘Female Genital Mutilation and Human Rights’ *Comparative American Studies An International Journal*, 2013, - <https://www.tandfonline.com/doi/pdf/10.1177/14775700030013003> on 29 November 2013.

⁷³ Levin T, ‘Female Genital Mutilation and Human Rights’ *Comparative American Studies An International Journal*, 2013, - <https://www.tandfonline.com/doi/pdf/10.1177/14775700030013003> on 29 November 2013.

⁷⁴ Yusuf C, Fessha Y, ‘Female Genital Mutilation as a Human Rights Issue: Examining the Effectiveness of the Law Against Female Genital Mutilation in Tanzania’ 13 *African Human Rights Law Journal*, 2013, 364.

enjoy essential freedoms. I endorse this perspective and recognize FGM as a profound violation of women's rights.

This review of some existing scholarly works on FGM has illuminated some key insights within the literary landscape. This section has highlighted a common theme fundamental to this research paper, ie the violation of human rights. It is, however, evident that while progress has been made in comprehending the multifaceted aspects of FGM, there still remains a need for nuanced examination and continued exploration.

3.3 Legal frameworks: Mapping national and international legal responses to FGM

Anti-FGM legislation exists at both a national and international level. In Kenya, the constitution acts as the most important form of legislation, and it is the supreme law. Article 44(3) of the Constitution provides that a person shall not compel another person to perform, observe or undergo any cultural practice or rite.⁷⁵ Article 53(1)(d) further states that every child has the right to be protected from harmful cultural practices.⁷⁶ The Prohibition of Female Genital Mutilation Act, which prohibits the practice of FGM in Kenya, was enacted in 2011.⁷⁷ Section 23(1)(b) of the Children's Act provides that no person shall subject a child to female genital mutilation.⁷⁸

Looking at the issue of female genital mutilation at an international level, we see attempts at handling the matter through a wide variety of ways. The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) was the first legal tool to describe discrimination against women. Discrimination against women is defined under article 1 of CEDAW as any distinction, omission or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

⁷⁵ Article 44(3), *Constitution of Kenya*, 2010.

⁷⁶ Article 53(1)(d), *Constitution of Kenya*, 2010.

⁷⁷ Prohibition of Female Genital Mutilation Act, 2011.

⁷⁸ Section 23(1)(b), *The Children Act*, 2022.

According to this definition, discrimination may come in the form of laws or practices that differentiate, exclude or restrict individuals based on sex.⁷⁹

Various conventions and declarations that make provision for the promotion and protection of the health of girls and women, including the elimination of female genital mutilation.⁸⁰ Article 24(3) of the Convention on the Rights of the Child necessitates states to take all effective and suitable procedures to abolish traditional practices prejudicial to the health of children.⁸¹ The Vienna Declaration and the Programme of Action of the World Conference on Human Rights expanded the international human rights plan to include gender-based violations which include female genital mutilation.⁸² The United Nations is committed to upholding, promoting and protecting the human rights of every individual' (Declaration 4), then Article 3, assuring 'Everyone . . . the right to life, liberty and security of person', and Article 5, stating that 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'.⁸³

International instruments require governments to ensure care and access to health information, i.e. provisions in the Economic, Social and Cultural Rights Covenant, Article 12 (2); The Women's Convention, Article 12; The Children's Rights Convention, Article 24 (1) and the Banjul Charter, Article 16 (2). In addition, Article 25 (2) of the Universal Declaration of Human Rights ensures that 'Motherhood and childhood are entitled to special care and assistance.' All this clearly means freedom from debilitating, medically unnecessary surgery. Muting this point, journalists sustain the operations' advocates.⁸⁴

Tobe Levin quoted Obasi Okafor-Obas who says, 'The discourse on protection of women in Africa is based largely on achieving conformity between national legislation and human rights

⁷⁹ Yusuf C, Fessha Y, 'Female Genital Mutilation as a Human Rights Issue: Examining the Effectiveness of the Law Against Female Genital Mutilation in Tanzania' 13 *African Human Rights Law Journal*, 2013, 364.

⁸⁰ Female Genital Mutilation, World Health Organization, 1997.

⁸¹ Article 24(3), *The Convention on the Rights of the Child*, 1990.

⁸² Female Genital Mutilation, World Health Organization, 1997.

⁸³ Levin T, 'Female Genital Mutilation and Human Rights' *Comparative American Studies An International Journal*, 2013, - <https://www.tandfonline.com/doi/pdf/10.1177/14775700030013003> on 29 November 2013.

⁸⁴ Levin T, 'Female Genital Mutilation and Human Rights' *Comparative American Studies An International Journal*, 2013, - on 29 November 2013.

pronouncements such as CEDAW (Charter for the Elimination of All Forms of Discrimination against Women) and the Banjul Charter – the documents most often cited in discussions of African women’s rights’.⁸⁵ The Women’s Protocol obliges states to ensure that legislative measures are in place prohibiting all forms of FGM and the medicalization thereof. States are further required to impose sanctions against perpetrators, to promote awareness campaigns and to provide support to victims through health, legal and judicial services.⁸⁶

3.4 Integration challenges: Navigating the intersection of existing legal norms and customary law in the context of FGM

The existence of multiple legal systems, where customary and statutory/common laws are recognized at the same time, gives rise to choice of law dilemmas. Legal systems do not function independently within isolated compartments; instead, they engage with one another through diverse interactions. Individuals frequently cross over the boundaries separating these legal systems, and in numerous instances, these demarcations lack clear distinctions, resulting in blurred lines between them.⁸⁷

As a result, there are several challenges at the intersection of existing anti-FGM legal norms and customary law. There are claims that anti-FGM statutes infringe on the right to culture. It needs to be understood that while the constitution gives freedom to practice one’s culture, it also stipulates that this freedom has to be carried out in line with other constitutional provisions. Any cultural expression that causes harm to a person or by one person to another, would be limited- FGM falls into this category.⁸⁸ There is a crucial need to harmonize legal frameworks with deeply ingrained customary practices, and ensure that these two coexist in a manner which may assist the nation to

⁸⁵ Levin T, ‘Female Genital Mutilation and Human Rights’ *Comparative American Studies An International Journal*, 2013, - <https://www.tandfonline.com/doi/pdf/10.1177/14775700030013003> on 29 November 2013.

⁸⁶ Yusuf C, Fessha Y, ‘Female Genital Mutilation as a Human Rights Issue: Examining the Effectiveness of the Law Against Female Genital Mutilation in Tanzania’ 13 *African Human Rights Law Journal*, 2013, 363.

⁸⁷ Dr Kamau W, ‘Customary Law and Woman’s Right in Kenya’ *Equality Effect*, 8.

⁸⁸ Rickard C, ‘A Women’s Month Win in Kenya- Court finds Ban on Female Genital Mutilation Constitutional’ *Open Law Africa*, 2021 - <https://africanlii.org/articles/2021-03-19/carmel-rickard/a-womens-month-win-in-kenya-court-finds-ban-on-female-genital-mutilation-constitutional#:~:text=While%20the%20constitution%20gave%20freedom,FGM%20fell%20into%20this%20category.ry>.

curb FGM. What are the hurdles encountered when attempting to reconcile the protection of women's and children's rights with the preservation of cultural traditions that have persisted since time immemorial? Focusing particularly on the intersection between legal statutes and customary law, ideally, how can this intersection bring about a perfectly desired outcome and balance in relation to the abolishment of FGM?

Customary law has been integrated into statutory law, and in Kenya's case, it is through our constitution.⁸⁹ However, this integration has a threshold. Customary law must abide to the supremacy of the constitution as well as other written laws. This represents a straightforward mechanism wherein indigenous communities are afforded the liberty to engage in and perpetuate cultural practices; however, such activities must be conducted within the parameters delineated by written law. This delineation forms the basis for the intersection between the two legal systems. Written law, on the other hand, acknowledges and affirms the validity of customary practices, contingent upon the condition that customary law remains congruent with, and does not contradict, the stipulations outlined in the formal legal framework.

While traditional leaders still oversee customary law at present, they are, in nearly all instances, subject to regulation by statutory provisions.⁹⁰ Their actions and authority are governed by legal rules established by statutory provisions, which act as limits and guidelines for the traditional leaders. This legal oversight purposes to ensure that traditional practices align with broader legal principles, governmental policies and human rights, preventing any potential abuses or conflicts. Therefore, traditional leaders should ensure that every member of traditional communities carry out their activities as they please, but within the limits of statutory law. The interpretation of this leads to the understanding that if a cultural practice is not within the written legally-accepted practices, it automatically becomes a practice that is against the law, hence a crime.

In Kenyan courts, customary law is not applicable to criminal cases⁹¹, which means, it cannot be used in the case of FGM. This does not imply an absolute prohibition on customary law's capacity to proscribe certain practices, such as FGM. Rather, it restricts its admissibility within a judicial

⁸⁹ Section 3(2), *Judicature Act*, 1967.

⁹⁰Banda T, Sub-Saharan African Legal Traditions, Science Direct, 2015.

⁹¹ Section 3(2), *Judicature Act*, 1967.

context to civil cases exclusively. Nevertheless, there exists an imperative for customary law to strike a harmonious balance with statutory law, aligning itself in a manner that facilitates the criminalization of FGM.

Creating such a balance can be done in a number of ways, and I shall give them in chronological order of the process of achieving this balance. Firstly, take a look at customary law as a legal system. A valid and fair legal system should aim at protecting the rights and interests of all members of the society. Customary law should be revisited and reviewed, so as to put an end to its acceptance of FGM because if not, it poses a potential risk of ceasing being a system of law. This revisit and review should lead to the conclusion that some customs stand out of line with written law, and therefore should be eradicated. This way, customary law would ensure that cultural practices stand in line with the law, and as a result, would prevent the infringement of women's and children's rights.

The next way to ensure this balance is achieved the codification and ascertainment of customary law. Customary law often lacks precise definitions of the legal rights or obligations it establishes. The inherent ambiguity in these rights and obligations can give rise to disputes or result in coordination failures. Such disputes, in turn, impose significant costs on states, prompting them to seek clarification regarding the requirements of the law.⁹² Given its dynamic nature, is it possible to reduce customary law into written form? The answer to this is the affirmative- customary law can be codified.⁹³

It is believed that whatever solution was adopted to the matter of customary law has often been tied to some form of codification of part or all of the legal systems, and this correlation is not surprising as legislation is a mean through which reforms may be put into practice⁹⁴ Codifying customary law comes with a number of advantages such as clarity, accessibility, consistency, preservation of culture, incentive for compliance and most importantly, integration with statutory law as well as legal recognition. I hold the belief that if customary law is reviewed then further codified, the possibility of FGM persisting is close to nil, but problems and objections may arise

⁹² Meyer T, 'Codifying Custom' 160 *University of Pennsylvania Law Review* 995, 2012, 1011.

⁹³ Pogucki R, 'A Note on the Codification of Customary Land Law on the Gold Coast' 8 *Public Administration and Development* 4, 1956, 192.

⁹⁴ Bennett T, 'Vermeulen T, Codification of Customary Law', 24 *Journal of African Law* 2, 1980, 207.

due to cultural beliefs. Despite this, if such a review is carried out by legal professionals who are well conversant with their cultures, and it still leads to no abolition of FGM, that would be a lack of legal professionalism and skill as well as a contradictory legal move, and would thus pose several questions on the entire existence of customary law as a legal system.

Through codification, customary law has a chance to be accepted in a court of law while handling criminal matters. This would involve an amendment of section 3(2) of the Judicature Act, which is not the focus of this paper and therefore I shall not touch on it in depth. It would, however, be good to point out that if at all this act goes through an amendment process, the application of customary law in criminal cases in court would be deemed lawful. However, this would only be made possible if customary law is first codified.

In this chapter, I have looked at various scholarly works and the legal framework against FGM. I have also done a review of what the intersection between customary law and statutory law looks like, as well as what can be done in order to improve that intersection. This improvement could potentially provide a massive assist in the reduction of FGM in Kenya, and hence should be considered.

CHAPTER 4: EXAMINING THE IMPEDIMENTS TO THE EFFECTIVENESS OF STATUTORY LAWS CRIMINALIZING FGM: UNVEILING THE INFLUENCE OF CUSTOMARY LAW AND BELIEFS.

4.1 Introduction

In the fight against FGM, statutory laws have been established to criminalize and deter this harmful practice. However, the effectiveness of these laws faces challenges and limitations that require careful examination. This research aims to comprehensively assess the existing statutory laws that aim to criminalize FGM, with a primary focus on identifying the key challenges and limitations in their application. By understanding the complex interplay between these laws and prevailing customary norms, I can shed light on how cultural beliefs may undermine the effectiveness of statutory regulations. This analysis will contribute to informed recommendations and potential legal reforms that can strengthen the fight against FGM and protect the rights and well-being of affected individuals.

A crucial aspect of this examination involves investigating how customary law and prevailing beliefs influence the implementation and enforcement of statutory measures against FGM. It is essential to understand the role played by cultural norms and traditional beliefs in order to comprehend the challenges faced by statutory laws in combating this deeply rooted practice. By identifying these challenges and exploring the intricate dynamics between statutory regulations and customary influences, we aim to pave the way for well-founded proposals and legislative enhancements that can bolster efforts to combat FGM and secure the safeguarding of the rights and welfare of those impacted.

4.2 Challenges in Implementation: Assessing Hurdles Faced by Statutory Laws Against FGM

Criminalization as a solution to prevent FGM stems from the prevalent belief in the developed world known as legal centralism, which assumes that in the majority of places, most individuals adhere to most laws. Consequently, there is an expectation that the law serves as the most effective means for instigating societal transformation and minimizing social harms. However, it's crucial to recognize that global adherence to laws is not uniform, and legal measures do not consistently

represent the optimal approach for driving social change.⁹⁵ ‘Feeling that the biggest achievement is having a law and automatically FGM will disappear is a completely wrong assumption’, says Gianna Grun in her report ‘*Why laws (alone) won’t end FGM*’.⁹⁶ Despite the several laws in place criminalizing FGM, the practice has never been fully eradicated. A UNICEF report on changing laws related to FGM emphasizes the importance of considering how much social support there is for this practice. In places where certain groups believe FGM is wrong, laws can be useful in supporting efforts against it. However, in communities where many people still support FGM, the results are not the same.⁹⁷ My discussion on the ineffectiveness of anti-FGM norms will be aided by Josephine Wouango, Susan L. Ostermann and Daniel Mwanga’s article ‘*When and how does law effectively reduce the practice of FGM.*’

The first reason why FGM criminalization may not be effective in countries where this practice is high is limited state capacity. The government has the legal authority to enforce laws within their country. However, this authority is often limited. In sub-Saharan Africa, several institutions are weak and there are insufficient resources to tackle complex issues such as FGM.⁹⁸ While there is an international expectation for governments to outlaw and enforce penalties for FGM, the reality is that the weak state capacity hampers the implementation of such laws. Limited resources, manpower, and infrastructure make it difficult for authorities to effectively monitor, investigate, and prosecute cases related to FGM. As a result, even when FGM is criminalized, the actual enforcement remains inadequate, leading to a gap between legal prohibition and practical prevention.

⁹⁵ Wouangao J, Ostermann S, Mwanga D, ‘When and How Does Law Effectively Reduce the Practice of Female Genital Mutilation/Cutting?’ Population Council, 2020, 4.

⁹⁶ Grun G, ‘Why Laws (Alone) Won’t End FGM’ DW, <https://www.dw.com/en/why-laws-alone-wont-endfgm/a-18670516> on 9 April 2015.

⁹⁷ Wouangao J, Ostermann S, Mwanga D, ‘When and How Does Law Effectively Reduce the Practice of Female Genital Mutilation/Cutting?’ Population Council, 2020, 4.

⁹⁸ Wouangao J, Ostermann S, Mwanga D, ‘When and How Does Law Effectively Reduce the Practice of Female Genital Mutilation/Cutting?’ Population Council, 2020, 5.

The second reason why criminalization of FGM may be ineffective is opposing moral and social motivations.⁹⁹ In certain communities, cultural norms may outweigh legal prohibitions, leading to the continuation of the practice. Even with legal consequences, tradition, cultural identity, and societal expectations can influence individuals and communities. The clash between these motivations and the legal framework creates a complex situation where criminalization alone may struggle to bring about change. Effectively addressing FGM requires understanding cultural dynamics, engaging communities, challenging harmful beliefs, and promoting alternative practices that respect both individual rights and cultural heritage.

Moreover, there is the dilemma of ineffective sanctions. Threats of punishment do not necessitate compliance. “Legal punishment either reduces, increases, or has no effect on future crimes, depending on the type of offenders, offenses, social settings, and levels of analysis.¹⁰⁰ In many instances, the sanctions prescribed by anti-FGM laws lack the necessary teeth to deter individuals and communities from engaging in the practice. This inadequacy can arise from factors such as limited resources for law enforcement, inconsistent application of penalties, or a lack of awareness about the legal consequences. Consequently, the potential impact of criminalization becomes compromised, highlighting the need for a comprehensive approach that not only establishes legal prohibitions but also ensures the practical, consistent, and meaningful enforcement of sanctions to address the persistence of FGM.

Another reason why FGM criminalization may not be effective is widespread acceptance of the practice.¹⁰¹ In places where FGM is deeply rooted as a cultural tradition, it has become widely accepted as a social norm. Despite efforts to discourage FGM, the practice often continues due to strong adherence to traditional beliefs and societal expectations. In these contexts, individuals and communities may resist change, viewing FGM as a customary and acceptable practice. Anti-FGM norms face challenges because they conflict with deeply ingrained cultural values, making it

⁹⁹ Wouangao J, Ostermann S, Mwanga D, ‘When and How Does Law Effectively Reduce the Practice of Female Genital Mutilation/Cutting?’ Population Council, 2020, 5.

¹⁰⁰ Wouangao J, Ostermann S, Mwanga D, ‘When and How Does Law Effectively Reduce the Practice of Female Genital Mutilation/Cutting?’ Population Council, 2020, 5.

¹⁰¹ Wouangao J, Ostermann S, Mwanga D, ‘When and How Does Law Effectively Reduce the Practice of Female Genital Mutilation/Cutting?’ Population Council, 2020, 5.

difficult to influence behavior and promote abandonment of the practice. To address this, a comprehensive approach is needed that includes legal measures, community engagement, education, and a shift in cultural attitudes towards accepting alternative practices.

Lastly, there is the challenge of legal pluralism. In more advanced countries, legal systems usually follow a single set of laws governed by one authority. However, in developing regions like sub-Saharan Africa, legal systems often involve multiple authorities, resulting in what is known as legal pluralism. This means that statutory laws created by the government coexist with customary laws that are based on local customs and traditions. Legal pluralism is the coexistence of multiple legal systems with diverse characteristics. This creates uncertainty as different systems may have conflicting authority and norms. In the past, formal legal systems replaced customs in European states, while colonies had foreign laws imposed on them. Even after independence, both traditional and statutory systems persist in many developing countries. To address this complexity, change agents should consider the impact on women's rights and harmonize authorities based on moral objectives.¹⁰²

4.3 Customary Law and Belief's Influence on FGM Legislation: Unraveling Belief Systems and Undermining Dynamics

Despite legislation and activities targeting changing attitudes, knowledge and community perceptions around FGM, 7.6% of women and 10.6% of men still believe it is a requirement by the community. Some scholars argue that the persistence of FGM can be attributed to a failure to manage the social process of change, leading to a disconnect between cultural practices, law, and medicine. Legislation alone can sometimes provoke resistance within communities, especially when they perceive the law as an external imposition lacking their input.¹⁰³ Although the faith in legal authority and the threat of penalties can modify behavior related to the implementation of FGM/C, it holds minimal sway over fervent advocates of the practice, especially those who perceive legislation as an intrusion and a cultural assault on their traditions and principles. This

¹⁰² Wouangao J, Ostermann S, Mwanga D, 'When and How Does Law Effectively Reduce the Practice of Female Genital Mutilation/Cutting?' Population Council, 2020, 5.

¹⁰³ Luseno S, Obere S, Nafula N, Culture, Religion, Legislation and FGM in Kenya, Kippra - <https://kippra.or.ke/culture-religion-legislation-and-fgm-in-kenya/> on 6 February 2020.

suggests that within communities where unanimous support for FGM exists, legal measures are likely to be ineffective.¹⁰⁴

FGM involves concepts of culture, which plays a crucial role in prolonging the practice. During a study undertaken by Masresha Yazew Andarge, participants were queried about the primary factors driving the persistence of FGM in the community. The frequently cited rationale is the desire to maintain and safeguard the cultural practices ingrained in the community for generations, passed down from their forebears.¹⁰⁵ Many Kenyans, despite the existence of laws, are hesitant to report instances of its occurrence in their communities. This reluctance complicates the process of making arrests and carrying out prosecutions, as law enforcement and government authorities often refrain from intervening in cultural practices.¹⁰⁶ In essence, the disobedience of FGM laws stems from a prioritization of preserving cultural traditions over adhering to legal mandates.

Additionally, there is the predicament of social norms. The perpetuation and prevalence of FGM are sustained by the societal norms that endorse this practice. These norms are ingrained rules of conduct within a community, which individuals adhere to because they perceive them as expected and commonly practiced by others.¹⁰⁷ Societal norms hold greater influence than legal regulations and according to UNICEF's assessment of FGM, the report highlights that individuals often prioritize avoiding social exclusion for breaking a long-standing tradition over the fear of facing legal consequences.¹⁰⁸

¹⁰⁴ Driving Forces in Outlawing the Practice of Female Genital Mutilation/ Cutting in Kenya, Uganda and Guinea-Bissau, UNFPA.

¹⁰⁵ Andarge M, 'The Difficulties of Ending Female Genital Mutilation (FGM): Case of Afar Pastoralist Communities in Ethiopia' International Institute of Social Studies, 2014, - <https://www.ohchr.org/sites/default/files/Documents/Issues/Women/WRGS/FGM/NGOs/ActionForIntegratedSustainableDevelopmentAssociation.pdf> in December 2014.

¹⁰⁶ Grun G, 'Why Laws (Alone) Won't End FGM' DW, <https://www.dw.com/en/why-laws-alone-wont-endfgm/a-18670516> on 9 April 2015.

¹⁰⁷ Veen S, Verkade A, Muriithi M, 'Breaking a Culture of Silence: Social Norms that Perpetuate Violence Against Women and Girls in Nigeria' Oxfam, 2018, 3.

¹⁰⁸ Grun G, 'Why Laws (Alone) Won't End FGM' DW, <https://www.dw.com/en/why-laws-alone-wont-endfgm/a-18670516> on 9 April 2015.

Customary law, which is guided by culture and customs, brings upon several of the reasons why anti-FGM legislation is not largely effective in Kenya, as seen in the discussion above. Exploring the integration of customary law as a complementary mechanism to statutory law in addressing practices like FGM within indigenous communities is a nuanced strategy. Acknowledging the inherent resistance to change in customs and beliefs, adapting customary law to explicitly criminalize harmful practices provides an opportunity to align legal frameworks more closely with community values. By fostering a dialogue within the cultural and legal context of indigenous communities, this approach seeks to enhance the efficacy of anti-FGM measures by ensuring a sense of ownership and compliance, potentially facilitating a smoother transition away from entrenched customs.

This approach brings back the discussion of the codification of customary law. In the previous chapter, I suggested the idea of codifying customary law particularly to deal with the eradication of harmful practices. The idea is established in this chapter again because it is imperative to note the influence customary law has on statutory law, and what needs to be done to reduce the negative outcomes of such influences. Codification is the only way customary law can criminalize harmful practices such as FGM effectively, as opposed to laws enforced through habitual practices and the cultural norms. The process will serve to clarify the boundaries between acceptable traditions and beliefs and those deemed detrimental, providing a comprehensive basis for criminalizing FGM and shall hopefully foster a sense of accountability within the community. This approach recognizes the significance of customary law in shaping societal norms while simultaneously leveraging its potential to protect individuals from harmful cultural practices, thereby contributing to a more effective and culturally sensitive means of eradicating FGM.

CHAPTER 5: CONCLUSION

This dissertation was inspired by a profound curiosity surrounding the persistence of FGM as a rampant practice. Prior to commencing my research proposal, I was startled to discover the existence of several laws criminalizing FGM in Kenya and around the world, which stood in stark contrast to its continued prevalence. This dissonance fueled my desire to delve deeper into the fundamental aspects contributing to the continuation of this harmful practice, as well as what could potentially assist aside from the legislation in place. The previous chapters have extensively explored the theoretical framework surrounding FGM within both historical contexts and contemporary perspectives. Consequently, this chapter aims to consolidate the entirety of this research by aligning the initial study objectives with its findings. Additionally, it will encapsulate the earlier proposed reforms and suggestions, culminating in the presentation of recommendations.

5.1 Summary of findings

This section shall present key discoveries and insights derived from my research. It shall offer a comprehensive overview of the central themes, trends and implications unearthed throughout the dissertation. It serves as the capstone of the study, providing clarity, coherence and significance to the research outcomes while laying the groundwork for further inquiry and application in the practical world.

The main objective of this study was to assess whether there is a certain way customary law can be interpreted or enhanced which renders FGM unacceptable, in an attempt to prevent further futility of the statutory law. Through this assessment, a deeper understanding of customary law was brought to light, as well as a discovery of its heavy influence on the persistence of FGM. Some of the key points brought up in this research shall be summarized in this section, alongside a brief analysis of their contribution to the objectives of this study.

Based on my research, FGM cannot be considered a legitimate custom protected by customary law. It is noted that for a custom to be considered legitimate, it must have existed for a very long time, be established and logical, mandatory and not in conflict with any statutory law.¹⁰⁹ FGM

¹⁰⁹ ‘Customary Law, Traditional Knowledge and Intellectual Property: An Outline of the Issues’ World Intellectual Property Organization, 2013.

fails to meet the requirement of being consistent with statutory law, as there are several laws prohibiting the practice as stated in the earlier chapters of this paper. Moreover, to be enforceable, rules of behavior such customs must fulfil the modern requirements laid down by law as a form of their acknowledgement.¹¹⁰ By establishing this, a clear-cut defense as to why FGM should be considered illegitimate, even by indigenous communities, is provided. Customary law guides the way of life of members of the community, as well as protects and promotes custom. Would it then be wrong to assume that if FGM is not a legitimate custom, it cannot be protected by customary law? The answer to this is negative. This study has proven that customary law should not protect FGM on the grounds that it is an illegitimate custom.

This research paper has provided evidence showing that customary law does not adjust to align with human rights law, despite it being dynamic nature. Customary law is believed to be dynamic, open to adjustments and capable of acclimatizing in the face of changing realities, without extended, costly and sometimes politically charges process of altering authorized law.¹¹¹ However, in the context of human rights law, customary law seems to remain rigid. The evidence of this is in the fact that cultural practices that infringe on certain human rights such as the right to be sheltered from harmful cultural practices and the right to health are still in play and customary law is silent about it. One would expect that if customary law adapts to align with human rights law, it would criminalize practices like FGM. Unfortunately, this is not the case, thus why it is safe to say that it does not adapt in such circumstances.

Furthermore, this paper also discussed the role which customs and customary law play in undermining the effectiveness of anti-FGM legislation. From my research, it was clear to see that customs and customary law have a negative influence on the statutory laws that criminalize FGM, in that several members of indigenous communities have held their cultures tightly, and not even statutory law can reverse this. Local customs and practices that have been present from time

¹¹⁰https://heinonline.org/HOL/Page?collection=journals&handle=hein.journals/unghan3&id=21&men_tab=srchresults

¹¹¹ Banda T, 'Sub-Saharan African Legal Traditions' International Encyclopedia of the Social & Behavioral Sciences (Second Edition), 2015.

immemorial and are a source of customary law¹¹² are one of the main reasons leading to the futility of statutory law. Reaching the comprehension that statutory law only no matter how strong, cannot curb FGM, led to the realization that the government should consider more direct actions, which shall be discussed in the next section.

Linking the issues discussed, it is evident that customary law needs to undergo certain alterations in order to boost the success of statutory law, as a more direct method of abolishing the practice. It is important to consider the fact that FGM is carried out by indigenous communities-communities that are controlled and guided heavily by culture, and therefore the same methods of criminalizing acts such as murder and theft cannot be the same methods used to criminalize FGM. The entire situation must be analyzed, with the main focus being on the community and what truly guides its practices.

5.2 Recommendations

In this section, the focus shifts towards translating the insights garnered from the preceding analysis into actionable recommendations. The recommendations provided in this chapter aim to offer practical guidance for addressing the issue of FGM, filling identified gaps and enhancing future research endeavors in the field. A vital bridge between theory and application shall be provided, offering tangible pathways for advancing the understanding and implementation of relevant policies, interventions and strategies. Through a systematic examination of the research implications, this section seeks to catalyze positive change and foster continuous improvement within the subject area.

The first recommendation is the codification of customary law. Codification of customary law may be cumbersome given that it is dynamic and has been present for several decades, however, it may be the best chance the government has to curb FGM, and other aspects of custom that infringe on particular human rights. In their article '*Codification of Customary Law*', T. W. Bennett and T Vermeulen claim that solutions adopted to the problems of customary law have nearly always been narrowly related with some forms of codification of the law, and that it is not surprising since

¹¹² Ndulo M, 'African Customary Laws, Customs, and Women's Rights' 18 *Human Rights and Legal Systems* 1, 2011, 88.

legislation is a useful standard through which improvements may be applied.¹¹³ This is a process that should be considered, so as to create and more consistent, enforced but still traditional law that criminalizes FGM.

The second recommendation is the review of customary law as a legal system. Based on the research in this paper, the persistence of FGM is brought about largely by customs and customary law. Therefore, it would be safe to say that the issue here is with customary law, and thus it needs to be reviewed, to ensure it protects the rights and interests of individuals, as well as ensuring that it aligns with written law, by criminalizing FGM.

The third recommendation is the call for a more ‘culturally-sensitive’ anti-FGM legislative approach. The Prohibition of Female Genital Mutilation Act does not involve any traditionalist views or opinions of the matter neither does it provide for the role of traditional leaders and elders in curbing FGM. A review of the act ought to be carried out, where the legislators focus more on the culture of the people, in an attempt to prove that it is not a top-down approach, but an approach which considers the indigenous communities, their culture and their traditional methods of dealing with people who still partake in the practice.

The fourth and final recommendation follows the above recommendations, and should happen once they are met. This is the amendment of section 3(2) of the Judicature Act, which mandates that Kenyan courts shall be guided by African Customary law in civil cases involving one or more parties is subject to it or affected by it, provided it applicable and is not repugnant to justice or morality or inconsistent with any written law.¹¹⁴ This section should be amended to allow Kenyan courts to be guided by African Customary law not only in civil cases, but also criminal cases, and it should happen after customary law is codified and revised to criminalize FGM. This modification is sure to be supportive in the complex journey of abolishing FGM.

¹¹³ Bennett T, ‘Vermeulen T, Codification of Customary Law’, 24 *Journal of African Law* 2, 1980, 207.

¹¹⁴ Section 3(2), *Judicature Act*, 1967.

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