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INTERNATIONAL HUMAN RIGHTS LAW AND THE TYRANNY OF HARMFUL CUSTOMARY AND TRADITIONAL PRACTICES ON WOMEN IN AFRICA

JOHN MUKUM MBAKU*

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INTRODUCTION

During the last several decades, researchers have sought to uncover the “status of women and the conditions under which they live.”¹ These researchers have determined that “[t]hroughout their entire life cycle, women’s daily existence and long-term aspirations are restricted by discriminatory attitudes, unjust social and economic structures, and a lack of resources in most countries that prevent their full and equal participation.”² Additionally, “[i]n [many] countries, the practice of prenatal sex selection, high rates of mortality among very young girls and lower rates of school enrollment for girls as compared with boys suggest that son preference is curtailing the

*John Mukum Mbaku is an Attorney and Counselor at Law (licensed in the State of Utah) and Brady Presidential Distinguished Professor of Economics and John S. Hinckley Research Fellow at Weber State University (Ogden, Utah, USA). He is a Nonresident Senior Fellow at the Brookings Institution, Washington, D.C. He received his Juris Doctorate and Graduate Certificate in Environmental and Natural Resources Law from the S.J. Quinney College of Law, University of Utah, where he was Managing Editor of the *Utah Environmental Law Review*. He received a Ph.D. (economics) from the University of Georgia. This article reflects only the present considerations and views of the author, which should not be attributed to either Weber State University or the Brookings Institution.

1. U.N. Women, *Beijing Declaration and Platform for Action*, ¶ 28, U.N. Doc. A/CONF. 177/20/Rev.1 (Sept. 1995).

2. *Id.*

access of girl children to food, education, health care, and even life itself.”³

“Discrimination against women begins at the earliest stages of life” and hence, “must be addressed from then onwards.”⁴ How girls are treated today will have a significant impact on the women of the future. For example, “[t]he skills, ideas and energy of the girl child are vital for full attainment of the goals of equality, development, and peace.”⁵ If girls cannot attend school, they will not acquire the necessary skills to participate fully and effectively in society. Specifically, they will not be able to participate fully and effectively in providing, nurturing, and safeguarding the institutional environment within which all citizens, particularly women, can achieve self-actualization, enjoy equal rights, and have their spiritual, intellectual, and material needs met.⁶

Girls are also more likely to be “subjected to various forms of sexual and economic exploitation, pedophilia, forced prostitution and possibly the sale of their organs and tissues, violence and harmful practices such as female infanticide and prenatal sex selection, incest, female genital mutilation and early marriage, including child marriage.”⁷ Countries must work to create a world in which “every child is free from injustice, oppression and inequality and free to develop her/his own potential”⁸ and where customs and traditions are no longer the source of tyranny directed at women and girls.

Customary and traditional practices, which usually reflect community values, include female genital mutilation (“FGM”), child marriage, son preference, early pregnancy, nutritional taboos, denial of inheritance, and the prohibition of women to own real property.⁹ These practices are detrimental to women’s health and violate their

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.* ¶ 29. See also John Mukum Mbaku, *International Law and Child Marriage in Africa*, 7 *INDONESIAN J. INT’L & COMP. L.* 103 (2020) (examining child marriage and how to fight it in African countries).

8. U.N. Women, *Beijing Declaration and Platform for Action*, ¶ 29, U.N. Doc. A/CONF. 177/20/Rev.1 (Sept. 1995).

9. See Office of the UN High Commissioner for Human Rights [OHCHR], *Fact Sheet No. 23: Harmful Traditional Practices Affecting the Health of Women and Children* (Aug. 1995) [hereinafter *Fact Sheet No. 23*].

fundamental rights and freedoms. Yet, they persist because they have become widely accepted under the guise of morality.¹⁰ Eradicating them will require deliberate and strategic efforts by the international community, regional organizations, and national governments, with significant input from civil societies and their organizations within each African country.

Since the 1950s, the international community has argued for the implementation of national legislation that supports gender equality.¹¹ FGM has been a specific area of concern in the international community, as it is viewed to be an extreme form of violence against women.¹² For many years, however, “[t]he international community remained wary about treating . . . traditional practices detrimental to the health and status of women as a deserving subject for international and national scrutiny and action” and believed that harmful practices, such as FGM, “were considered sensitive cultural issues falling within the spheres of women and the family.”¹³

Nevertheless, the concerted efforts of international, regional, and national human rights organizations have pushed harmful customary and traditional practices to the fore of global efforts to eliminate discrimination against women, ensure the recognition and protection of human rights, and advance the welfare of women.¹⁴ Consequently, these efforts have increased awareness of harmful practices such as FGM that affect the status and human rights of young girls and women.¹⁵

An important milestone in the global protection of women’s rights was achieved with the adoption of the Convention on the Elimination of all Forms of Discrimination Against Women (“CEDAW”) in 1979.¹⁶ The CEDAW obligates states to “take all appropriate measures” to achieve gender equality and to eliminate prejudices and

10. *Id.*

11. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, at pmb. (Dec. 10, 1948).

12. World Health Organization [WHO], *Eliminating Female Genital Mutilation: An Interagency Statement*, at 10 (Jan. 1, 2008), http://apps.who.int/iris/bitstream/handle/10665/43839/9789241596442_eng.pdf?sequence=1.

13. *Fact Sheet No.23*, *supra* note 9, at 2.

14. *Id.* at 15.

15. *Id.* at 20.

16. *See* G.A. Res. 34/180 (Dec. 18, 1979).

“customary and other practices” that discriminate against women.¹⁷ Throughout Africa, women are vulnerable to gender-based violence and exploitation by state and non-state actors. For example, a study conducted by Alexis Arieff for the United States Congressional Research Service (“CRS”) on “Sexual Violence in African Conflicts,” determined that “[c]ivilians in Africa’s conflict zones—particularly women and children— . . . are often vulnerable to sexual violence, including rape, mutilation, and sexual slavery. This violence is carried out by government security forces and non-state actors, including, rebel groups, militias, and criminal organizations.”¹⁸

It has been argued that by virtue of “the lesser status ascribed to them by tradition and custom, or as a result of overt or covert discrimination,” African women “are denied the equal enjoyment of their human rights.”¹⁹ Manisuli Ssenyonjo, an expert on international and human rights law, argues that many African women suffer or experience “distinct forms of discrimination due to the intersection of sex with such factors as race, language, religion, political and other opinion, national or social origin, property, birth, or other factors, such as age, disability, marital, refugee or migrant status, resulting in compounded disadvantage.”²⁰

The equal enjoyment of human rights by both women and men is a universally accepted principle, reaffirmed by the Vienna Declaration, adopted by 171 states in 1993.²¹ According to the Vienna Declaration, states must recognize that “the human rights of women and of the girl-child” are an “integral and indivisible part of universal human rights” and that the “full and equal participation of women in political, civil, economic, social and cultural life, at the national, regional and international levels,” is a key objective of the international community.²²

Traditional institutions and customs significantly enhance governance in many countries and communities throughout Africa. In

17. *Id.* art. 5.

18. See ALEXIS ARIEFF, CONGRESSIONAL RESEARCH SERVICE, SEXUAL VIOLENCE IN AFRICAN CONFLICTS (2010).

19. Manisuli Ssenyonjo, *Culture and the Human Rights of Women in Africa: Between Light and Shadow*, 51 J. AFR. L. 39, 39 (2007).

20. *Id.*

21. World Conference on Human Rights, *Vienna Declaration and Programme of Action*, U.N. Doc. A/CONF. 157/23 (June 25, 1993).

22. *Id.* at I(18).

fact, “[a] number of studies have affirmed the resiliency, legitimacy, and relevance of African traditional institutions in the socio-cultural, economic and political life of Africans, particularly in the rural areas.”²³ Although some traditional institutions in African countries may provide a viable foundation for effective governance, others such as FGM have historically contributed to the abuse and exploitation of women and continue to do so today.²⁴ Hence, the next section of this article will examine the various customary and traditional practices that are harmful to African women.

I. THE TYRANNY OF HARMFUL TRADITIONAL PRACTICES ON WOMEN IN AFRICA

A. Introduction

The United Nations (“UN”) was created in the aftermath of World War II to:

[R]eaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom.”²⁵

One of the purposes of the UN is “[t]o achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in *promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.*”²⁶ In 1948, the UN’s dedication to human rights was further consolidated with the adoption

23. UN Economic Commission for Africa [UNECA/ECA], *Relevance of African Traditional Institutions of Governance*, at iii, (Jan. 2007), <https://repository.uneca.org/handle/10855/3086>.

24. See, e.g., Nelly Lukale, *Harmful Traditional Practices: A Great Barrier to Women’s Empowerment*, GIRLS GLOBE (Feb. 24, 2014), https://www.girlsglobe.org/2014/02/24/harmful-traditional-practices-a-great-barrier-to-womens-empowerment/?doing_wp_cron=1636336237.0356450080871582031250.

25. U.N. Charter pmbl. (emphasis added).

26. *Id.* art. 1, ¶ 3 (emphasis added).

by the General Assembly of the Universal Declaration of Human Rights (“UDHR”).²⁷ The UDHR has served as the foundation and guide for human rights and fundamental freedoms in the governance architectures of many member States of the UN.²⁸ The UDHR prohibits gender discrimination,²⁹ ensures the right to life, liberty, security, and equality before the law,³⁰ and mandates that all are entitled to equal protection against discrimination in violation of the UDHR.³¹

In most African countries, populations are divided into several ethnocultural groups with unique customs that “reflect values and beliefs held by members of [the subculture],” which often span several generations.³² While some practices are beneficial to one subculture, they can also be harmful to other groups within the society. For example, though FGM is imbedded in many African cultures, it subjects women and girls to life-long trauma and health risks.³³

Several studies have concluded that traditional African institutions and practices serve as effective tools to peacefully resolve conflicts, including those that arise from socio-political interaction.³⁴ According to many scholars, these institutions and practices, at the very least, have three broad governance functions. First, they provide important advice to the modern State “in its efforts to serve the people, protect their rights, and provide them with public goods and services.”³⁵ Second, traditional African institutions can help governments promote development and the alleviation of poverty.³⁶ Third, they can provide

27. G.A. Res. 217 (III) A, *supra* note 11, at 71.

28. *Fact Sheet No. 23*, *supra* note 9.

29. G.A. Res. 217 (III) A, *supra* note 11, art. 2.

30. *Id.* art. 3.

31. *Id.* art. 7.

32. *Fact Sheet No. 23*, *supra* note 9.

33. *See generally* John Mukum Mbaku, *International Law, African Customary Law, and the Protection of the Rights of Children*, 28 MICH. ST. INT’L L. REV. 535 (2020) (examining, *inter alia*, the impact of traditional harmful practices on girls and women in Africa).

34. John Mukum Mbaku, *The Rule of Law and the Exploitation of Children in Africa*, 42 HASTINGS INT’L & COMP. L. REV. 287, 392 (2019).

35. *Id.* at 393.

36. For example, in Cameroon, the traditional rotating saving and credit associations called *tontines* or *djanggi*, provide financial services to as many as eighty percent of adults in the country. *See* Maurice Tankou & Dale W. Adams,

a forum for the peaceful resolution of conflict. For example, after the 1994 Genocide, the Rwandan government lacked the judicial capacity and legislation to address crimes of genocide.³⁷ It also lacked “the capacity to enforce the Constitution and other laws, honor the rights of the accused, or even process cases within a reasonable time frame.”³⁸ The Rwandan judiciary remained pervaded by corruption, executive influence, and inefficiency coupled with mounting tasks and inadequate resources.³⁹ Consequently, Rwanda’s participatory justice system of ‘Gacaca’ came to the rescue.⁴⁰

As recommended by the National Unity and Reconciliation Commission, Rwanda adopted the Gacaca system, which “preserves the basic arrangement of offenders and the procedures for confessions and guilty pleas established by the Genocide Law, which formed the basis for domestic genocide trials.”⁴¹ The main objectives of “the Gacaca court was to ensure social harmony between lineages and social order throughout the Rwandan tribal affiliations.”⁴² Although certain aspects of the traditional Gacaca process were influenced by colonialism, the Gacaca remained an effective tool for the resolution of conflict at the community level.⁴³

Some researchers have argued that a vital component of effective governance and the protection of the rights of the people in Africa is knowing how to integrate both modern and traditional systems to produce a governing system that achieves justice and enhances human development throughout the continent.⁴⁴ Moreover, there is a common belief that “traditional institutions can provide the moral structure for raising children and helping them develop into responsible adults.”⁴⁵

Sophisticated Rotating Saving and Credit Association in Cameroon, 1/2 AFR. REV. OF MONEY FIN. & BANK. 81, 84 (1995).

37. Abe Oyeniyi, *Conflict Resolution in the Extractives: A Consideration of Traditional Conflict Resolution Paradigms in Post-Colonial Africa*, 25 WILLAMETTE J. INT’L L. & DISP. RES. 56, 67 (2017).

38. *Id.* at 67.

39. *Id.*

40. *Id.* at 68.

41. *Id.* at 68-69.

42. *Id.* at 69.

43. *Id.*

44. Mbaku, *supra* note 34, at 393.

45. *Id.*

Although some traditional African institutions can positively contribute to conflict resolution, social cohesion, and economic and human development, other traditions and customs have contributed to the exploitation, abuse, and violation of women. Accordingly, in order for any integration of traditional and modern systems to provide African countries with an effective governing process, one that protects human rights, framers must recognize that the “resulting laws and institutions must be those that reflect and align with provisions of international human rights instruments.”⁴⁶ Practices that violate human rights and fundamental freedoms, as reflected in international human rights instruments, must not be incorporated into a country’s laws or should be modified to comply with human rights laws.⁴⁷

The Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (“Maputo Protocol”) imposes an obligation on States Parties “to modify the social and cultural patterns of conduct of women and men” through public education and communication strategies, with a view to eliminating harmful cultural and traditional practices which are influenced by “the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men.”⁴⁸

In its study of traditions and their relationship with individual liberties, Human Rights Watch has argued that “[t]raditional values need not be at odds with human rights” and that “they may even bolster” the recognition and protection of human rights.⁴⁹ Oftentimes, however, these customary and traditional practices “have been invoked to justify continuing female genital mutilation (FGM) from one generation to the next.”⁵⁰

Several African customs and traditions, including FGM, forced child marriage, sex trafficking, bloodletting, breast flattening,

46. *Id.*

47. *Id.*

48. African Union, *Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa*, art. II(2) (July 11, 2003), <https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-rights-women-africa> [hereinafter Maputo Protocol].

49. Graeme Reid, *The Trouble With Tradition: When “Values” Trample Over Rights*, HUM. RTS. WATCH, <https://www.hrw.org/node/259925> (last visited Nov. 7, 2021).

50. *Id.* Other examples include customary laws in some ethnic communities that prevent women from owning property or obtaining inheritance.

cosmetic mutilation, child slavery, witchcraft, and preference for boys, contribute to the tyrannous treatment of women and girls throughout the continent. This article will focus only on FGM to illustrate how these institutions exploit women's rights. In addition, the article will also discuss how African countries can eliminate FGM and safeguard women's rights, which are guaranteed by national constitutions and international human rights instruments.

B. Female Genital Mutilation

Female genital mutilation ("FGM") involves "procedures that intentionally alter or cause injury to the female genital organs for non-medical reasons."⁵¹ The World Health Organization ("WHO") classifies FGM as a human rights violation and "an extreme form of gender discrimination" with significant economic costs.⁵² The WHO also notes that FGM is internationally recognized as violating a woman's right to health, security, physical integrity, "and the right to be free from torture and cruel, inhuman or degrading treatment."⁵³ Data from the WHO demonstrates that more than "200 million girls and women alive today have been cut in 30 countries in Africa, the Middle East and Asia where FGM is concentrated."⁵⁴

In arguing that FGM "exact[s] a crippling economic as well as human cost" on its victims, the WHO states that the practice "is not only a catastrophic abuse of human rights that significantly harms the physical and mental health of millions of girls and women; it is also a drain on a country's vital economic resources."⁵⁵ The WHO has determined that "the total costs of treating the health impacts of FGM would amount to 1.4 billion dollars globally per year, if all resulting

51. *The Economic Cost of Female Genital Mutilation*, WORLD HEALTH ORG. (WHO) (Feb. 6, 2020), <https://www.who.int/news/item/06-02-2020-economic-cost-of-female-genital-mutilation>. See also E. Edouard et al., *International Efforts on Abandoning Female Genital Mutilation*, 19 AFR. J. UROLOGY 150, 150 (2013) (noting that FGM "is not affiliated with any particular religion and specifically, it is not mentioned in either the Koran or the Bible.").

52. *Id.*

53. *Id.*

54. *Id.*

55. *Female Genital Mutilation Hurts Women and Economies*, WORLD HEALTH ORG. (WHO) (Feb. 6, 2020), <https://www.who.int/news/item/06-02-2020-female-genital-mutilation-hurts-women-and-economies>.

medical needs were addressed.”⁵⁶ From the perspective of individual countries, the costs of treating FGM-induced health issues would cost about ten percent of each country’s “entire expenditure on health on average” and in some countries, the figure is likely to rise “to as much as 30%.”⁵⁷

FGM poses severe health risks to women and girls, including infections, bleeding, psychological trauma, and other chronic health conditions that can develop throughout life.⁵⁸ Additionally, women who have undergone FGM are prone to life-threatening complications during childbirth and may experience pain during menstruation, urination, or sexual intercourse.⁵⁹ FGM also “strains the healthcare systems that need to treat them.”⁶⁰

Abolishing and preventing FGM can significantly and positively impact human rights protections for African girls and women. This can also improve the economy of the communities in which they live. For example, research in “27 high-prevalence countries” demonstrates that if FGM were abandoned today, “the associated savings in health costs would be more than 60% by 2050.”⁶¹ Of course, these estimates do not include the lost productivity associated with girls and women whose health has been compromised by FGM.

Globally, FGM is an “aged-old practice which is perpetuated in many communities . . . simply because it is customary.”⁶² FGM “has been practiced for centuries in parts of Africa, generally as one element of a rite of passage preparing young girls for womanhood and marriage.”⁶³ Supporters of FGM believe that FGM promotes chastity and ensures a woman’s virginity before marriage.⁶⁴ As research has determined, FGM imposes on girls and women a “catalogue of health complications and untold psychological problems.”⁶⁵

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Fact Sheet No. 23*, *supra* note 9, at ¶ I.A.

63. Frances A. Althaus, *Female Circumcision: Rite of Passage or Violation of Rights?*, 23 INT’L FAM. PLAN. PERSPECTIVES 130, 130 (1997).

64. *Fact Sheet No. 23*, *supra* note 9, at ¶ I.A.

65. *Id.*

The age at which FGM is carried out varies from area to area.⁶⁶ In places where FGM is prevalent, it is often performed “on infants as young as a few days old, on children from 7 to 10 years old, and on adolescents.”⁶⁷ The UN notes that “[s]ince FGM is performed on infants as well as adults, it can no longer be seen as marking the rites of passage into adulthood, or as ensuring virginity.”⁶⁸

But what exactly is FGM? In 2008, several UN agencies issued *Eliminating Female Genital Mutilation: An Interagency Statement* (“Interagency Statement”) to address FGM and its elimination.⁶⁹ The Interagency Statement notes that FGM “comprises all procedures involving partial or total removal of the external female genitalia or other injury to the female genital organs for non-medical reasons”⁷⁰ and classifies FGM into four types:

Type I: Partial or total removal of the clitoris and/or the prepuce (clitoridectomy).

Type II: Partial or total removal of the clitoris and the labia minora, with or without excision of the labia majora (excision).

Type III: 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 (infibulation).

Type IV: All other harmful procedures to the female genitalia for non-medical purposes, for example: pricking, piercing, incising, scraping and cauterization.⁷¹

66. *Id.*

67. *Id.*

68. *Id.*

69. The participating UN agencies are the WHO, Office of the High Commissioner for Human Rights (OHCHR), UN AIDS, UN Development Program, UN Economic Commission for Africa, UNESCO, UN Population Fund (UNFPA), UN High Commissioner for Refugees (UNHCR), UNICEF, and the UN Development Fund for Women (UNFEM). See World Health Organization [WHO], *Eliminating Female Genital Mutilation: An Interagency Statement* (2008), <https://www.who.int/reproductivehealth/publications/fgm/9789241596442/en/> [hereinafter WHO, *Eliminating FGM*].

70. *Id.* at 1.

71. *Id.* at 4.

According to WHO, “between 100 and 140 million girls and women worldwide have been subjected to one of the first three types of female genital mutilation,” which includes the “91.5 million girls and women above 9 years old in Africa [who] are currently living with the consequences of female genital mutilation.”⁷² In 2018, ten years after the Interagency Statement was released, FGM had “dropped drastically among African children.”⁷³ Despite this, anti-FGM campaigners argue that “teenagers and young women remained at risk of the harmful practice.”⁷⁴

According to the Interagency Statement, “Types I, II and III female genital mutilation have been documented in 28 countries in Africa and in a few countries in Asia and the Middle East.”⁷⁵ As a result of the increase in international migration, “the number of girls and women living outside their country of origin who have undergone female genital mutilation . . . or who may be at risk of being subjected to the practice” has increased tremendously.⁷⁶ In 2019, for example, a Ugandan woman became “the first person to be found guilty of female genital mutilation (FGM) in the UK in a landmark case [that was] welcomed by campaigners” against the practice.⁷⁷

Despite arguments to the contrary, FGM is an oppressive practice designed to enable society to control women and girls. FGM is “a manifestation of gender inequality that is deeply entrenched in social, economic and political structures.”⁷⁸ These practices, WHO argues, “have the effect of perpetuating normative gender roles that are unequal and harm women.”⁷⁹ In fact, FGM “is a social convention governed by rewards and punishments which are a powerful force for

72. *Id.*

73. See Lin Taylor, *FGM Rates Drop for African Girls but Teens Still at Risk*, REUTERS (Nov. 7, 2018, 7:30 AM), <https://www.reuters.com/article/us-africa-women-fgm/fgm-rates-drop-for-african-girls-but-teens-still-at-risk-idUSKCN1NC26Z>.

74. *Id.*

75. WHO, *Eliminating FGM*, *supra* note 69, at 4.

76. *Id.*

77. Hannah Summers & Rebecca Ratcliffe, *Mother of Three-Year-Old is First Person Convicted of FGM in UK*, THE GUARDIAN (Feb. 1, 2019, 14:38 EST), <https://www.theguardian.com/society/2019/feb/01/fgm-mother-of-three-year-old-first-person-convicted-in-uk>.

78. WHO, *Eliminating FGM*, *supra* note 69, at 5.

79. *Id.*

continuing the practice.”⁸⁰ Thus, eliminating FGM must involve support from the wider community. For instance, where FGM is part of the culture and customs of an ethnocultural group, eradication requires support from the majority of the members of the group, especially its elders.

The obligation imposed on a family by their ethnocultural group to perform FGM “can be understood as a social convention to which parents conform, even if the practice inflicts harm. From this perspective, not conforming would bring greater harm [to the family] since it would lead to shame and social exclusion.”⁸¹ In African communities, social convention can be so powerful that it can pressure girls into wanting to be cut due to fear of rejection by their own communities.⁸²

1. FGM as a Violation of Human Rights

FGM as a customary or traditional practice is addressed under two important legally binding international human rights instruments: the Convention on the Elimination of All Forms of Discrimination Against Women (1979) (“CEDAW”) and the Convention on the Rights of the Child (1989) (“CRC”). CEDAW implicitly addresses FGM and other cultural and customary practices “in the context of unequal gender relations”⁸³ and calls upon States Parties to take all appropriate measures:

- (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women;
- (b) To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being

80. *Id.*

81. *Changing a Harmful Social Convention: Female Genital Mutilation/Cutting*, UNICEF INNOCENTI DIGEST, at 11.

82. *Id.*

83. *Id.* at 15.

understood that the interest of the children is the primordial consideration in all cases.⁸⁴

The CRC, on the other hand, makes reference to “harmful traditional practices” in the “context of the child’s right to the higher attainable standard of health.”⁸⁵ The WHO notes that “this broad category includes, among others, FGM/C, early marriage . . . and preferential care of male children.”⁸⁶ Specifically, Article 24(3) of the CRC requires States Parties to “take all effective and appropriate measures with a view to abolishing practices prejudicial to the health of children.”⁸⁷ Additionally, according to Article 19 of the CRC, States Parties are required to “take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.”⁸⁸

International human rights instruments, such as the International Bill of Human Rights, “promote the right of an individual to participate in cultural life, but they do not uphold traditional practices that violate individual rights.”⁸⁹ This means that countries or the subcultures within them cannot evoke social and cultural claims to justify FGM.⁹⁰ In fact, as argued by the WHO, “[i]n deciding to abandon FGM/C, a community is not rejecting their cultural values, but rather a practice that causes harm to girls and women and reinforces gender inequalities.”⁹¹

FGM compromises and interferes with the ability of girls and women to enjoy their human rights, including the right to life, physical integrity, sexual and reproductive autonomy, and freedom from mental or physical violence.⁹² FGM also violates African

84. G.A. Res. 34/180, art. 5 (Dec. 18, 1979).

85. *Changing a Harmful Social Convention*, *supra* note 81, at 15.

86. *Id.*

87. G.A. Res. 44/25, art. 23(3) (Sept. 2, 1990).

88. *Id.* art. 19(1).

89. *Changing a Harmful Social Convention*, *supra* note 81, at 15.

90. *Id.*

91. *Id.*

92. *Id.*

children's rights of "development, protection and participation" and it has been "raised as a matter of concern by the Committee on the Rights of the Child, which, in the light of the CRC, has called upon States Parties to "take all effective and appropriate measures" with a view to abolishing such practices."⁹³

FGM is especially detrimental to the health of young girls. It subjects them to a life full of various health risks, especially when they marry and form a family (e.g., obstetric fistula, spousal abuse, various sexually transmitted infections, including, for example, HIV/AIDS). With their health compromised by FGM, these girls are likely to face life-long economic and social challenges. The CRC recognizes "the best interests of the child" as the guiding principle for the treatment of children. According to Article 3, "[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, *the best interests of the child shall be a primary consideration.*"⁹⁴ Arguably, parents who subject their daughters to FGM "perceive this procedure to be in the child's best interests."⁹⁵ Thus, an interpretation of the "best interests of the child" must align with human rights standards and promote the abandonment of FGM.⁹⁶

2. *Eliminating FGM Through Community-based Strategies*

Since FGM is an entrenched part of the cultures and customs of various ethnocultural groups, fully eliminating it would require cultural modifications that may be difficult to accomplish. However, cultures are not a static phenomena. Cultures can change as a result of inside or outside influences. For example, modern communication technologies, such as cellphones and the Internet have drastically changed the way people interact with each other in communities around the world.⁹⁷

The attitudes of members of an ethnocultural group "can shift in a matter of decades or years (e.g., attitudes toward gay marriage in

93. *Id.*

94. G.A. Res. 44/25, *supra* note 87, art. 3(1) (emphasis added).

95. *Changing a Harmful Social Convention*, *supra* note 81, at 16.

96. *Id.*

97. Michael E. W. Varnum & Igor Grossmann, *Cultural Change: The How and the Why*, 12 ASS'N FOR PERSP. ON PSYCH. SCI. 956, 956 (2017).

Western societies, views on immigration in developed countries, and more broadly norms regarding corporal punishment of children).”⁹⁸ Sometimes, political and economic institutions can change “fairly quickly” in response to external and/or internal stimuli.⁹⁹ During the last several decades, there have been significant cultural shifts, especially regarding gender inequality. Before the dawn of the 20th century, women did not have the right to vote in many countries; however, by the beginning of the 20th century, support for gender equality had increased in many countries and was considered a global phenomenon.¹⁰⁰

How, specifically, do cultures shift or change? There are two significant ways through which a culture changes: local invention and cultural diffusion. An example of local invention is the development of technology. For instance, the social media network, Facebook, was invented in the United States and has significantly transformed American culture.¹⁰¹

Culture can also change through cultural diffusion, which is defined as “the transmission of cultural elements from one society or cultural group to another.”¹⁰² For example, the transmission of American musical genres, such as Jazz, to other parts of the world, as well as Cameroon’s Soul Makossa to the United States.¹⁰³ Cultural diffusion can also take place “when subcultural influences enter the dominant group.”¹⁰⁴ Throughout many countries, “[d]ominant cultures are regularly enriched by minority cultures” as evidenced by the

98. *Id.*

99. *Id.* See also ARYE L. HILLMAN, *THE TRANSITION FROM SOCIALISM IN EASTERN EUROPE* (Branko Milanovic eds., 1992) (presenting a series of essays that examines the collapse of socialism and transition to democratic- and market-based institutions in Eastern Europe).

100. Varnum & Grossmann, *supra* note 97, at 959.

101. See, e.g., Marco della Cava, *How Facebook Changed Our Lives*, USA TODAY (Feb. 2, 2014, 10:19 AM), <https://www.usatoday.com/story/tech/2014/02/02/facebook-turns-10-cultural-impact/5063979/>.

102. MARGARET L. ANDERSEN ET AL., *SOCIOLOGY: THE ESSENTIALS* 408 (9th ed. 2017).

103. Reebee Garofalo, *Whose World, What Beat: The Transnational Music Industry, Identity, and Cultural Imperialism*, 35 *THE WORLD OF MUSIC* 16, 16 (1993).

104. ANDERSEN ET AL., *supra* note 102, at 53.

“influence of Black and Latino music on other musical forms” in the United States.¹⁰⁵

While it has been argued that eliminating FGM may be difficult given its entrenchment in local African cultures, it is important to note that other culturally entrenched practices have been abolished.¹⁰⁶ For example, the cultural practice of killing twin-children, which was widespread among various subcultures in Nigeria’s Old Calabar, was abolished through the joint efforts of European missionaries and Calabar monarchs.¹⁰⁷ Today, evidence demonstrates that cooperation between international, regional, national, and local actors has significantly contributed to the reduction of FGM activities in many African countries.¹⁰⁸ The human rights-based program created by Tostan to eliminate FGM is an example of this.¹⁰⁹

Tostan is an international non-governmental organization that specializes in non-formal education and “works to empower rural and remote African communities to bring about positive social transformation and sustainable development through a holistic nonformal education program based on human rights.”¹¹⁰ In 1991, Tostan developed a human rights-based program to eliminate FGM.¹¹¹ The Tostan Community Empowerment Program (“TCEP”) embodied “key elements necessary to change a social convention at the community level, including collective action, public declaration and

105. *Id.*

106. *See, e.g.,* David Lishilinimle Imbua, *Robbing Others to Pay Mary Slessor: Unearthing the Authentic Heroes and Heroines of the Abolition of Twin-Killing in Calabar*, 41 AFR. ECON. HIST. 139 (2013) (examining the eradication of twin-killings in Calabar, Nigeria).

107. *Id.* at 139-140.

108. *See* E. Edouard, O. Olutanbosun & L. Edouard, *International Efforts on Abandoning Female Genital Mutilation*, 19 AFR. J. UROLOGY 150, 150 (noting that “[w]hile major challenges remain and millions of girls and women are still at risk of being subjected to FGM, there is growing evidence that interventions that take into account the social dynamics that perpetuate FGM are yielding positive results toward its reduction.”).

109. *Changing a Harmful Social Convention*, *supra* note 81, at 23.

110. *The Tostan Community Empowerment Program, Senegal*, UNESCO (Mar. 3, 2016), <https://uil.unesco.org/case-study/effective-practices-database-litbase-0/tostan-community-empowerment-program-senegal>.

111. *Changing a Harmful Social Convention*, *supra* note 81, at 23.

organized diffusion.”¹¹² The 30-month program is participatory, non-formal, and is implemented with the support of UNICEF and with the collaboration of national and local institutions in each country.¹¹³

The Population Council independently evaluated the TCEP and determined that the program increased awareness of human rights, gender-based violence, and the health risks associated with FGM.¹¹⁴ The evaluation also determined that “[t]here was also a notable decrease in approval of FGM/C among both women and men living in the intervention villages, although 16 percent of the women who participated in the program did not change their attitude,” and that “[o]f those women who voiced their disapproval of FGM/C, 85 percent said that they had come to this position since participating in the Tostan program.”¹¹⁵ More importantly, “[i]mmEDIATELY before the program began, seven out of ten women stated that they wished to have their daughters cut. At the end of the program, this proportion had fallen to approximately one in ten among women who had participated in the program, and two in ten among women who had not participated directly but lived in the same village.”¹¹⁶

The TCEP has now been implemented in Burkina Faso, Guinea, Sudan, and Egypt and has proven to be successful in educating people about FGM and its negative impact on girls and women.¹¹⁷ The TCEP has enhanced the ability of communities to openly discuss the health risks associated with FGM and the need to finally abandon it.

3. Eliminating FGM Through National Legislation

While community-based programs, such as those promoted by Tostan, are critical to the elimination of FGM, a uniform set of laws, particularly those that conform with the provisions of international human rights instruments, is also important. Enacting national legislation that prohibits FGM can provide the enabling institutional

112. Joan Namulondo, *Female Genital Mutilation: A Case of the Sabinu in Kapchowra District, Uganda* (2009) (unpublished dissertation submitted in partial fulfillment for the degree of Master in Human Rights Practice, University of Tromsø).

113. *Changing a Harmful Social Convention*, *supra* note 81, at 24.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

environment for the functioning of human rights-based abandonment programs. Generally, legislation serves as a message to the world that “a process of societal change is already under way” and that “citizens are sensitized to the issue.”¹¹⁸

UNICEF researchers have noted that “[l]egislation has at least three clear purposes: to make explicit a State’s disapproval of FGM/C; to send out a clear message of support to those who renounced, or would wish to renounce the practice; and to act as a deterrent to the practice.”¹¹⁹ Noting that imposing sanctions alone against FGM could be counterproductive and risk “driving the practice [of FGM] underground and having very limited impact on behavior change,” UNICEF notes that any legislation introduced must be accompanied or “complemented by appropriate child protection measures, and information and awareness-raising campaigns, which are *dissuasive rather than punitive*.”¹²⁰

In 2018, the UK-based international non-governmental organization (“NGO”), *28 Too Many*, released the results of a study focusing on laws against FGM in twenty-eight African countries.¹²¹ The study determined that of these twenty-eight countries, twenty-two of them had national legislation criminalizing FGM, and five did not have such legislation, implying that victims in those countries had no way of seeking justice through domestic law.¹²² Unfortunately, in the majority of the countries that did have explicit legislation criminalizing FGM, enforcement was lacking or relatively ineffective, with perpetrators not being brought to justice.¹²³ The study also revealed that “of the 55 million girls (aged 0–14) who have experienced or are at risk of FGM across the 28 countries, 50% of them are in three countries that have anti-FGM laws (Egypt, Ethiopia and Nigeria); and 30% of them are in the five countries without anti-FGM laws (Chad, Liberia, Mali, Sierra Leone, and Somalia).”¹²⁴

118. *Id.* at 29.

119. *Id.*

120. *Id.* (emphasis added).

121. See *28 Too Many, The Law and FGM: An Overview of 28 African Countries* (Sept. 2018), [https://www.28toomany.org/static/media/uploads/Law%20Reports/the_law_and_fgm_v1_\(september_2018\).pdf](https://www.28toomany.org/static/media/uploads/Law%20Reports/the_law_and_fgm_v1_(september_2018).pdf).

122. *Id.* at 11.

123. *Id.*

124. *Id.*

Some other African countries have addressed FGM and other harmful traditional practices through changes in their national constitutions. For example, the 1994 Constitution of the Federal Democratic Republic of Ethiopia explicitly prohibits “[l]aws, customs and practices that oppress or cause bodily or mental harm to women.”¹²⁵ Ghana’s Constitution empowers the National House of Chiefs to “undertake an evaluation of traditional customs and usages with a view to eliminating those customs and usages that are outmoded and socially harmful.”¹²⁶

Of the twenty-eight countries studied by *28 Too Many*, only three of them have constitutions that prohibit FGM: Côte d’Ivoire, Somalia, and Senegal. Article 5 of the Constitution of Côte d’Ivoire states:

Slavery, human trafficking, forced labor, physical or moral torture, inhumane, cruel, degrading and humiliating treatment, physical violence, *female genital mutilation* as well as all other forms of degradation of a human being are prohibited.

Any medical or scientific experimentation on a person without their informed consent as well as organ trafficking for commercial or ulterior motives are also prohibited. However, everyone has the right to donate their organs, under the conditions prescribed by law.¹²⁷

The Provisional Constitution of the Federal Republic of Somalia does not explicitly refer to FGM. Instead, the Constitution lists several practices that are detrimental to the liberty and security of the person, including non-consensual medical or scientific experiments, torture, or inhumane treatment.¹²⁸ Article 15(4) states that “[c]ircumcision of girls is a cruel and degrading customary practice, and is tantamount to torture. *The circumcision of girls is prohibited.*”¹²⁹

125. CONST. OF THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA 1994, art. 35(4).

126. CONST. OF THE FOURTH REPUBLIC OF GHANA (PROMULGATION) LAW 1992, art. 272(c).

127. CONST. OF CÔTE D’IVOIRE 2016, art. 5 (emphasis added).

128. PROVISIONAL CONST. OF THE FEDERAL REPUBLIC OF SOMALIA 2012, art. 15.

129. *Id.* (emphasis added).

The Constitution of Senegal includes FGM in the broad category of harmful practices referred to as “physical mutilations.”¹³⁰ It states that “[e]very individual has the right to life, to liberty, to security, to the free development of his personality, to corporeal integrity, *notably to protection against all physical mutilations.*”¹³¹

Since their constitutions specifically prohibit FGM, girls and women in Côte d’Ivoire, Somalia, and Senegal, who are subjected to this practice can seek justice in their domestic courts. The next step in the effort to eliminate these harmful practices and protect the rights of girls and women, is for these countries to provide a judiciary that is independent enough and has the capacity to enforce these laws and bring to justice those who violate them. This must be accomplished without interference by religious, political, and traditional elites.

Benin is one of the twenty-eight countries in Africa where FGM is currently practiced. Although Benin does not specifically prohibit FGM, its Constitution guarantees equality for men and women before the law and imposes an obligation on the State to “protect the family and particularly the mother and child.”¹³² Additionally, the Constitution makes reference to Benin’s obligations under international law and affirms the people’s “attachment to the principles of democracy and human rights” as enshrined in the Charter of the United Nations and the Universal Declaration of Human Rights.¹³³ This affirmation does not make the rights enshrined in these international instruments part of national law that “can . . . be invoked on this basis alone in the interpretation of the constitution.”¹³⁴ However, Article 7 of the Constitution renders the provisions of the African Charter on Human and Peoples’ Rights (“Banjul Charter”) an integral part of the law of the Benin Republic. It states as follows: “The rights and duties proclaimed and guaranteed by the African Charter on Human and Peoples’ Rights adopted in 1981 by the Organization of African Unity and ratified by Bénin on January 20,

130. CONST. OF SENEGAL 2001, art. 7.

131. *Id.* art. 7 (emphasis added).

132. CONST. OF BENIN 1990, Title II, art. 26.

133. *Id.* at pmbl.

134. Charles Manga Fombad, *Internationalization of Constitutional Law and Constitutionalism in Africa*, 60 AM. J. COMPAR. L. 439, 445 (2012).

1986 *shall be an integral part of the present Constitution and of Béninese law.*"¹³⁵

Since the provisions of the Banjul Charter have been made an integral part of Béninese law by the country's Constitution, the rights guaranteed by the Banjul Charter are now directly justiciable in Beninese courts.

One can argue, then, that Benin's full domestication of the provisions of the Banjul Charter implies that the practice of FGM in Benin is a violation of the country's obligations under the Banjul Charter. Since Article 16(2) of the Banjul Charter directs States Parties to "take the necessary measures to protect the health of their people,"¹³⁶ Benin need only make certain that its courts are independent enough and have the capacity to prosecute anyone who violates the rights of girls and women by subjecting them to FGM.

Article 5 of the Maputo Protocol classifies FGM as a harmful practice and specifically prohibits it.¹³⁷ Benin signed the Maputo Protocol on February 11, 2004 and ratified it on September 30, 2005.¹³⁸ According to Article 147 of the Constitution of Benin, which deals with the legal status of treaties, "[t]reaties or agreements lawfully ratified shall have, upon their publication, an authority superior to that of laws, without prejudice for each agreement or treaty in its application by the other party."¹³⁹

Thus, since the Maputo Protocol has been "lawfully ratified" by Benin and has been published, it is arguably now part of the laws of Benin as indicated in Article 147 of the Constitution. In abiding with the Maputo Protocol, Benin enacted "Act No. 2011–26 of January 9, 2012 on the Prevention of and Repression of Violence Against Women, which protects women from such violations, including domestic violence, FGM, forced marriages and other traditional harmful practices against women."¹⁴⁰

135. CONST. OF BENIN 1990, art. 7 (emphasis added).

136. Maputo Protocol, *supra* note 48, art. 16(2).

137. *Id.* art. 5(b).

138. Maputo Protocol, *supra* note 48.

139. CONST. OF BENIN 1990, art. 147.

140. Justice Lucy Asuagbor & African Union, *Status of Implementation of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*, art. 5 (Mar. 18, 2016), <https://reliefweb.int/sites/reliefweb.int/files/resources/special-rapporteur-on-rights-of-women-in-africa-presentation-for-csw-implementation.pdf>.

II. ELIMINATING FMG AND OTHER HARMFUL PRACTICES
IN AFRICAN COUNTRIES: THE “BEST PRACTICES”
APPROACH

A. Introduction

During the last several years, many countries in Africa have ratified international human rights instruments that outlaw FGM and other traditional and customary practices that are harmful to girls and women. Additionally, some of these countries have enacted legislation that explicitly prohibits FGM and other harmful traditional and customary practices. For example, in 2015, the Government of The Gambia, a country in which FGM is seen as “a deeply rooted and entrenched cultural practice,”¹⁴¹ amended the Women’s Act No. 12 of 2010 (“WA”), through the Women’s Amendment Act 2015 (“WAA”), to prohibit FGM.¹⁴² Accordingly, Section 32 was amended to include “§32A Prohibition of female circumcision,” which states that “. . . a person shall not engage in female circumcision. . . .”¹⁴³ Because Section 32A(1) of The Gambia’s WAA explicitly prohibits FGM, engaging in or practicing FGM is illegal in The Gambia and is, therefore, a criminal offense.¹⁴⁴

The punishment for violating Section 32A is imprisonment for a term of three years, a fine of 50,000 Gambian dalasis (GD), or both imprisonment and a fine.¹⁴⁵ The Act also defines “female circumcision” as:

- (a) the excision of the prepuce with partial or total excision of the clitoris (clitoridectomy);
- (b) the partial or total excision of the labia minora;
- (c) the partial or total excision of the external genitalia (of the labia minora and the labia majora), including stitching;

141. Awa Gai, *Women’s Rights: FGM and the Law*, LAW HUB GAMBIA (Dec. 4, 2020), <https://www.lawhubgambia.com/lawhug-net/2020/12/3-fgm-and-the-law>.

142. Women’s (Amendment) Act, 2015 (Act No. 11/2015) (Gam.) (amending Women’s Act 2010 to prohibit female circumcision and for connected matters).

143. *Id.* § 32A ¶¶ (a,b).

144. *Id.* § 32A(1).

145. *Id.* § 32A(2).

- (d) the stitching with thorns, straw, thread or by other means in order to connect the excision of the labia and the cutting of the vagina and the introduction of corrosive substances or herbs into the vagina for the purpose of narrowing it;
- (e) symbolic practices that involve the nicking and pricking of the clitoris to release drops of blood; or
- (f) engaging in any form of female genital mutilation or cutting.¹⁴⁶

The Gambia's WAA distinguishes between what it calls "female circumcision" and FGM. Thus, what is prohibited by this law are FGM and other well-defined acts of interference with the natural state of a girl's or a woman's genital organs. Section 32B is devoted to defining who is an accomplice to the crime of female circumcision.¹⁴⁷ A person may be an accomplice to this crime if that person "requests, incites or promotes female circumcision" and such a person can do so "by providing tools or by any other means."¹⁴⁸ If convicted, such an accomplice can be sentenced to prison "for a term of three years or a fine of fifty thousand Dalasis or to both."¹⁴⁹

The WAA also imposes an obligation on anyone with knowledge of an impending female circumcision or one that has already taken place to warn or inform the proper authorities.¹⁵⁰ Thus, "[a] person who knows that female circumcision is about to take place or has taken place, and fails, without good cause, to warn or inform, as the case may be, the proper authorities promptly, commits an offence and is liable on conviction to a fine of ten thousand Dalasis."¹⁵¹ The Act does not define "good cause" or "promptly," leaving its interpretation to the courts.

Some observers and advocates against FGM have noted that while The Gambia's new law is a step in the right direction, it falls short of

146. *Id.* § 32A(3).

147. Women's (Amendment) Act, 2015 (Act No. 11/2015) (Gam.) (amending Women's Act 2010 to prohibit female circumcision and for connected matters).

148. *Id.* § 32B(1).

149. *Id.* § 32B(2) (noting that the punishment for the accomplice is the same as that for the person who commits the principal offense).

150. *Id.*

151. *Id.*

their expectations. They note that the new law does not address the issue of *cross-border cutting*—that is, what happens if perpetrators of FGM take their daughters to neighboring countries to have the procedure performed on them.¹⁵² Additionally, they argue that The Gambia’s Amendment Act of 2015 fails to provide mechanisms to compensate victims for the physical and psychological harm they suffer.¹⁵³

Taking its cue from the CEDAW General Recommendation No. 14, Ghana, a State Party to CEDAW, took steps to eliminate FGM. In General Recommendation No. 14, adopted by the Committee on the Elimination of Discrimination Against Women in 1990 (“CEDAW Committee”), the latter recommended that States Parties should “take appropriate and effective measures with a view to eradicating the practice of female circumcision.”¹⁵⁴ In 1989, then Ghanaian President, Jerry John Rawlings, issued a proclamation against female genital mutilation (FGM) and other harmful traditional practices.¹⁵⁵

In 1994, the Parliament of Ghana amended Ghana’s Criminal Code, 1960 (Act 29) through the Criminal Code (Amendment) Act, 2003 (Act 646) through the insertion after §69 of §69A:¹⁵⁶

- (1) Whoever excises, infibulates or otherwise mutilates the whole or any part of the labia minora, labia majora and the clitoris of another person commits an offence and shall be guilty of a second-degree felony and liable on conviction to imprisonment of not less than three years.
- (2) For the purposes of this section “excise” means to remove the prepuce, the clitoris and all or part of the labia minora;

152. See Gai, *supra* note 141.

153. *Id.*

154. UN Committee on the Elimination of Discrimination Against Women, *CEDAW Recommendation No. 14: Female Circumcision*, A/45/38 and Corrigendum (1990), <https://www.refworld.org/docid/453882a30.html>.

155. See Matilda Aberese Ako & Patricia Akweongo, *The Limited Effectiveness of Legislation Against Female Genital Mutilation and the Role of Community Beliefs in Upper East Region, Ghana*, 17 REP. HEALTH MATTERS 47 (2009) (providing a qualitative study in the Upper East Region of Ghana, which examined the role of the state in stopping the practice of FGM through legal means).

156. The Criminal Code (Amendment) Act, 2003 (Act No. 646) (Ghana).

“infibulate” includes excision and the additional removal of the labia majora.¹⁵⁷

In 2007, the Parliament of Ghana amended the country’s Criminal Code, 1960 (Act 29) again to change the expression “female circumcision” to “female genital mutilation” in order “to reflect the actual nature of the offence, widen the scope of responsibility in relation to the offence and to provide for related matters.”¹⁵⁸

International and regional human rights instruments have recognized FGM as one of the most insidious forms of violence against women and girls and have instructed States Parties to take measures to criminalize it.¹⁵⁹ Many African countries (e.g., Ghana, The Gambia) have either enacted new laws or amended existing ones to criminalize and/or prohibit FGM and other harmful practices. Others (e.g., Côte d’Ivoire, Senegal and Somalia) have constitutional provisions that outlaw or prohibit FGM. Despite this, FGM remains a “pervasive harmful cultural and traditional practice” in these and other African countries.¹⁶⁰ Evidently, FGM cannot be effectively eliminated from African countries through legislative efforts alone.

According to *Equality Now*, an NGO dedicated to making all laws gender equal, “[e]nding FGM requires a multi-sectoral approach that brings together law enforcement agencies, child protection professionals, educators, physicians, traditional and religious leaders, government agencies, advocates, and survivors.”¹⁶¹ Eliminating FGM requires a holistic approach, as evidenced by the significant achievements of civil society organizations, such as the Dakar-based NGO, Tostan.¹⁶² In the section that follows, this article will outline and discuss what could form the minimum general principles for designing and implementing such a best practices approach to eliminating FGM.

157. *Id.* § 69A.

158. The Criminal Code (Amendment) Act, 2007 (Act No. 741) (Ghana).

159. *See, e.g.*, Maputo Protocol, *supra* note 48, at art. 5.

160. Satang Nabaneh & Adamson S. Muula, *Female Genital Mutilation/Cutting in Africa: A Complex Legal and Ethical Landscape*, 145 INT’L J. GYNAECOL. OBSTET. 253, 253 (2019).

161. *FGM and the Law Around the World*, EQUALITY NOW (June 19, 2019), https://www.equalitynow.org/the_law_and_fgm.

162. UNESCO, *supra* note 110.

B. Best Practices Approach to Ending FGM in African Countries

Eliminating FGM and other harmful practices, whether based on custom, tradition, or religion, requires purposeful action by all levels of government, civil society, and members of the various communities in which FGM and other harmful practices are entrenched. While the government must provide the leadership, especially when it comes to the criminalization of these practices, civil society and its organizations must be considered key participants. FGM is part of a series of culturally and traditionally entrenched practices, whose elimination requires changes to national laws and to the cultures and customs of many ethnocultural groups on the continent. Successfully doing so requires a bottom-up, participatory, and inclusive process. It is unlikely that these harmful practices will be fully eliminated without the participation of the relevant ethnocultural groups.

As evident from the elimination of the cultural practice of killing twins among various ethnic groups in southeastern Nigeria's Old Calabar, the effort was successful only because it was bottom-up, inclusive, and participatory with significant input and participation from local leaders.¹⁶³ Thus, any effort to abolish FGM and other harmful practices must not be top-down, elite-driven, and non-participatory. Instead, it should emphasize and enhance participation at the local level, where FGM is a part of daily life.

1. Domestication of International Human Rights Instruments and Other Reforms

How can permanent changes be made? The first step is for each African country to re-examine its national laws (both customary and statutory), including its constitution, to ensure its laws conform to international human rights instruments, with specific emphasis on those that deal with the rights of girls and women.¹⁶⁴ If necessary, the constitution should be amended to include a Bill of Rights, which

163. See generally David Lishilinimle Imbua, *Robbing Others to Pay Mary Slessor: Unearthing the Authentic Heroes and Heroines of the Abolition of Twin-Killing in Calabar*, 41 AFRI. ECON. HIST. 139 (2013) (examining the contributions of local communities in the abolition of twin-killings in Old Calabar).

164. These include, for example, CEDAW, the Maputo Protocol, CRC, and African Charter on the Rights and Welfare of the Child.

specifically deals with: equality before the law; the role of the State in recognizing, respecting, promoting, and protecting the people's fundamental rights and freedoms; application of the Bill of Rights; the inherent dignity of the individual; the right of everyone to life and to freedom and security of the person; and prohibitions against harmful practices, such as slavery, indentured servitude, forced labor, *female genital mutilation*, and others.

If the constitution already contains a Bill of Rights, the latter should be reviewed to ensure it has provisions that guarantee the right of all citizens "to bodily integrity." Today, FGM remains one of the most virulent forms of violence against women and girls in Africa. Thus, the right to be free from this practice should be considered a fundamental right and inserted into the Bill of Rights.¹⁶⁵

Second, each country should use legislation to criminalize FGM and other harmful practices. The country can enact a new Criminal Code or amend an existing one to prohibit harmful practices, including FGM. The Criminal Code should, at the minimum, criminalize the following acts:

- the performance of FGM;
- requesting, inciting, promoting, procuring, arranging and/or assisting in and advancing the performance of FGM;
- the participation of medical and other health professionals in FGM;
- the failure to warn or inform the appropriate authorities either about a completed incident of FGM or one that is about to take place; and
- the practice of cross-border FGM.

The Criminal Code should also provide a clear and legally binding definition of FGM and what constitutes the crime of FGM. Cross-border and/or "vacation" FGM is increasingly becoming very pervasive in many regions around Africa as national governments intensify their efforts to enforce anti-FGM laws.¹⁶⁶ One resolution is

165. Each Bill of Rights must conform to the provisions of international human rights instruments.

166. In recent years, the Government of Kenya has significantly increased its enforcement of anti-FGM laws. Consequently, many girls in Kenya are being taken across the border to countries such as Uganda, Tanzania, Somalia, and Ethiopia for FGM. The Government of Kenya criminalized FGM in 2011 and set a minimum of

to adopt a regional or even continental approach that calls for the harmonization of anti-FGM laws throughout the region or continent, allowing perpetrators to be prosecuted in the country in which the crime is committed. The African Union can lead the effort to criminalize FGM across the continent.

Third, each African country should ensure it has signed and ratified all the major international and regional human rights treaties and conventions. For African countries, these include especially, CEDAW, CRC, the ICCPR (and its two protocols), the ICESCR, the Banjul Charter, the African Charter on the Rights and Welfare of the Child, and the Maputo Protocol.¹⁶⁷

Fourth, once each African country has signed and ratified all the necessary international and regional human rights instruments, the next step is to domesticate these instruments and create rights that are justiciable in domestic or national courts. Several African countries have, through their national constitutions, *affirmed* their attachment to the various international human rights instruments.¹⁶⁸ These affirmations, however, do not create rights that are directly justiciable in domestic courts. To make the rights contained in international human rights instruments directly justiciable in its domestic courts, a country can make reference to these instruments in its national constitution and specifically include a statement to the effect that “these instruments form part of this constitution” or that they are “an integral part of this constitution and of national law.”

For example, in 2010, Kenya adopted a new constitution, which deals directly with the applicability of international law within the country and in its national courts. In Article 2(5) of the Constitution, it is stated as follows: “The general rules of international law shall form

three years in prison and a fine of \$2,000 (USD) for anyone convicted of the crime. According to Agnes Kola, women’s rights coordinator for the Nairobi-based ActionAid Kenya, “[c]ross-border FGM is becoming an increasing trend in the areas we work along Kenya’s border with Uganda and Tanzania, especially in December during the school holidays.” Nita Bhalla, *Girls Taken to Uganda, Tanzania for ‘Vacation Cutting’ as Kenya Cracks Down on FGM*, REUTERS (Dec. 17, 2018, 7:54 AM), <https://www.reuters.com/article/us-kenya-women-fgm/girls-taken-to-uganda-tanzania-for-vacation-cutting-as-kenya-cracks-down-on-fgm-idUSKBN1OG1T6>.

167. While many of these human rights instruments do not specifically address FGM, they do seek to eliminate various harmful practices, including those which interfere with the physical integrity of a girl or woman.

168. CONSTITUTION OF THE REPUBLIC OF CAMEROON 1996, pmbl. (emphasis added).

part of the law of Kenya.”¹⁶⁹ This provision effectively renders the “general rules of international law” justiciable in Kenya’s domestic courts. Additionally, the Constitution provides an avenue to domesticate international treaties and conventions to which Kenya is a State Party. According to Article 2(6), “[a]ny treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.”¹⁷⁰ Thus, each African country can, “through its constitution, put to rest any doubts as to whether international law, including customary international law, is law within its national jurisdiction.”¹⁷¹

Fifth, there must be a systematic and purposeful review of the traditions and customs of ethnocultural groups in order to modify or abolish those practices, which are harmful to girls and women. It is important for each country to understand that its laws, whether based on statute, custom, or the constitution, must conform with and reflect provisions of international human rights instruments.

Sixth, prohibitions against practices, whether based on tradition, custom, religion or other ascriptive factors, that harm girls and women or interfere with their physical integrity, must be entrenched in the Constitution. This will make it difficult for subsequent governments to abrogate these prohibitions through ordinary legislation. Hence, to ensure that the rights guaranteed to women and girls are not easily abrogated by government in response to lobbying (which may include bribery) by special-interest groups (which include the various ethnocultural groups), these rights must be constitutionally entrenched.¹⁷²

Finally, governments must not be able to engage in opportunistic constitutional changes that can threaten the rights guaranteed to its citizens. Since the early 1990s, many African countries have undertaken reforms to introduce new constitutions or amend existing

169. CONST. art. 2(5) (Kenya).

170. CONST. art. 2(6) (2010) (Kenya).

171. John Mukum Mbaku, *International Law and Limits on the Sovereignty of African States*, 30 FLA. J. INT’L L. 43, 72 (2018).

172. See generally JOHN M. MBAKU, CORRUPTION IN AFRICA: CAUSES, CONSEQUENCES, AND CLEANUPS (2007) (noting that if rights are guaranteed through ordinary legislation, they are likely to be abrogated by subsequent governments through ordinary legislation).

ones.¹⁷³ These new or amended constitutions introduced separation of powers regimes with checks and balances as well as term limits for presidents.¹⁷⁴ While the presidents of some of these countries (e.g., Kenya, Liberia, and Ghana) have abided by their countries' two-term limit, "others have used legislatures subservient to the president to change their constitutions to allow them to stay in power beyond those two terms and in some cases indefinitely."¹⁷⁵

Constitutional design is the key to ensuring that the constitution is not easily and opportunistically amended, either to help a president stay in power indefinitely or to enhance his ability to abrogate the rights guaranteed to all citizens or groups within the population.¹⁷⁶ The practice of constitutionalism and constitutional government requires "that constitutional designers provide appropriate mechanisms for amending or revising the constitution."¹⁷⁷ Such mechanisms for amending the constitution must be those that cannot be "easily manipulated by opportunistic political elites to extend their mandates and stay in power indefinitely" or at the request of special-interest groups to maximize interests that are unique to them.¹⁷⁸

Constitutional expert, Professor Jon Elster, argues that it is necessary to strike a balance between "rigidity and flexibility."¹⁷⁹ First, the Constituent or Constitutional Assembly "can mandate that

173. *See generally* CONST. (2010) (Kenya); CONST. OF THE REPUBLIC OF CAMEROON 1996; CONST. OF THE FEDERAL REPUBLIC OF NIGERIA 1999; S. AFR. CONST., 1996.

174. For example, the Constitution of the Republic of Cameroon limited the president to two seven-year terms. Article 6(2) stated as follows: "The President of the Republic shall be elected for a term of office of 7 (seven) years. He shall be eligible for re-election once." The constitution was amended in 2008 to remove the word "once," effectively eliminating the two-term limit for presidents. CONST. OF THE REPUBLIC OF CAMEROON 1996, art. 6(2).

175. John Mukum Mbaku, *Threats to Democracy in Africa: The Rise of the Constitutional Coup*, BROOKINGS INSTITUTION (Oct. 30, 2020), <https://www.brookings.edu/blog/africa-in-focus/2020/10/30/threats-to-democracy-in-africa-the-rise-of-the-constitutional-coup/>.

176. *See, e.g.*, John Mukum Mbaku, *Constitutional Coups as a Threat to Democratic Governance in Africa*, 2 INT'L COMP., POL'Y & ETHICS L. REV. 77, 180 (2018).

177. *Id.*

178. *Id.*

179. Jon Elster, *Constitutionalism in Eastern Europe: An Introduction*, 58 U. CHI. L. REV. 447, 470 (1991).

the constitution can only be changed or revised by a given qualified majority—one that would reflect the country’s diversity.”¹⁸⁰ For example, South Africa’s post-apartheid Constitution mandates that a bill to amend the Constitution can only be successful if it is supported by at least seventy-five percent of the National Assembly and at least six of the country’s nine provinces.¹⁸¹ The key is that the Constitution must strike a balance between empowering the government so that it can properly perform its functions but, at the same time, adequately constrain the government so that it does not engage in opportunistic amendments.

In addition to legislative and constitutional changes, each African country should adopt measures to help empower women and girls, enhance the ability of local communities to eliminate FGM and other harmful practices, and offer alternatives to those communities that use FGM as a rite of passage for young girls.¹⁸² Below, this article will discuss some of these alternative measures.

2. Placing Emphasis on the Links Between FGM and Women’s and Girls’ Health

The health approach to the study and eradication of FGM is based on the scientific link between FGM and health problems encountered by women and girls throughout their lives. In a 2018 study, Dr. Elliot Klein, a pediatrician at the State University of New York Downstate Medical Center and an expert on girls’ and women’s health, noted that “[t]he ramifications of FGM affect the girl for the rest of her life and result in many health problems (for example, extended bleeding, problems with urination, cysts, infections, and complications during childbirth).”¹⁸³

Dr. Klein and her colleagues also determined that “[t]he method in which the procedure is performed may determine the extent of the

180. Mbaku, *supra* note 176, at 180.

181. S. AFR. CONST., 1996, § 74(1)(a)-(b).

182. See generally Frances A. Althaus, *Female Circumcision: Rite of Passage or Violation of Rights?*, 23 INT’L FAM. PLANNING PERSP. 130 (1997) (noting that FGM is considered by various subcultures in Africa as a rite of passage).

183. Elliot Klein et al., *Female Genital Mutilation: Health Consequences and Complications—A Short Literature Review*, 16 OBSTETRICS & GYNECOL. INT’L 1, 2 (2018).

short-term complications.”¹⁸⁴ If FGM is undertaken “using unsterile equipment, no antiseptics, and no antibiotics, the victim may have increased risk of complications.”¹⁸⁵ The primary infections from such a procedure include “staphylococcus infections, urinary tract infections, excessive and uncontrollable pain, and hemorrhaging.”¹⁸⁶ It has also been determined that “[i]nfections such as human immunodeficiency virus (HIV), *Chlamydia trachomatis*, *Clostridium tetani*, herpes simplex virus (HSV) 2 are significantly more common among women who underwent Type 3 mutilations compared with other categories.”¹⁸⁷

Due to the lack of accessible health care in many African communities that practice FGM, the health complications from the procedure often subject the victims to a higher risk of death. Although “data on the mortality of girls who underwent FGM are unknown and hard to procure, it is estimated that 1 in every 500 circumcisions results in death.”¹⁸⁸ Although some proponents of FGM argue to the contrary, FGM does *not* protect against sexually transmitted infections and victims usually “suffer the long-term consequences of the abuse through both physiological and psychological complications and substantial complications during childbirth.”¹⁸⁹

One of the most common long-term complications from FGM is “the development of keloid scar tissue over the area that has been cut.”¹⁹⁰ In addition to the fact that the disfiguring to the girl’s most intimate parts “can be a source of anxiety and shame,” there is a significant possibility that “[n]euromas may develop because of entrapped nerves within the scar leading to severe pain especially during intercourse.”¹⁹¹ A girl is likely to carry these FGM-related problems for the rest of her life.

Dr. Kenza Aden, a general medical practitioner in Djibouti, who mostly treats girls subjected to FGM, noted that she had personally “seen women [bleed] to death” during labor and that is why, as a

184. *Id.* at 4.

185. *Id.*

186. *Id.*

187. *Id.* (emphasis in original).

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

survivor of FGM herself, she is “scared of getting married and having children.”¹⁹² Rhobi Samwelly, a human rights activist in Tanzania, was brutalized at age thirteen; she bled so much that almost everyone thought she was dead: “I was unconscious for three hours” and “I heard a woman say, ‘I’m not sure her brain will wake up properly.’”¹⁹³

Evidence from many African communities has revealed that “[w]omen who have undergone FGM face heightened risks of serious childbirth complications that can threaten the life of both mother and newborn.”¹⁹⁴ Research has determined that “[s]car tissue may not stretch enough to accommodate a newborn, making delivery more painful than is usual” and that “[t]he risk of prolonged, obstructed labor is heightened for women who have undergone FGM.”¹⁹⁵ If “timely medical intervention” is not provided, “obstructed labor can cause debilitating obstetric fistula and also puts mother and baby at risk of dying.”¹⁹⁶ Additionally, “[w]omen who experienced infibulation—whose scars [from the FGM procedure] had to be cut open to enable sexual intercourse, and now again for them to give birth—face the greatest risks of prolonged and obstructed labor.”¹⁹⁷

The effects are not just physical. FGM can have long-lasting effects on the mental health of girls and women who have undergone the procedure. In a pilot study, researchers from the University Hospital Hamburg-Eppendorf (Germany) and the Clinical Neuropsychology Unit, Hospital for Psychiatry (Germany), investigated the mental status of women who had undergone FGM.¹⁹⁸ Alice Behrendt and Steffen Moritz carried out the study on 23 Dakar-

192. *5 Ways Female Genital Mutilation Undermines the Health of Women and Girls*, UNITED NATIONS POPULATION FUND (May 20, 2019), <https://www.unfpa.org/news/5-ways-female-genital-mutilation-undermines-health-women-and-girls>.

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.* See also Andrew Browning et. al., *The Relationship Between Female Genital Cutting and Obstetric Fistulas*, 115 OSTET GYNECOL 578 (2010) (examining the relationship between FGM procedures and the development of obstetric fistulas).

198. Alice Behrendt & Steffen Moritz, *Posttraumatic Stress Disorder and Memory Problems After Female Genital Mutilation*, 162 AM. J. PSYCHIATRY 1000, 1000 (2005).

based Senegalese women who had undergone FGM. The study also included 24 Senegalese women who had not undergone FGM as “comparison subjects.”¹⁹⁹ All subjects were between the ages of 15 and 40 years and the “two groups of circumcised and uncircumcised women did not differ significantly in terms of age, education, marital status, or traumatic life experiences.”²⁰⁰ Specifically, “[e]xclusion criteria were neurological disorders, psychotic disorders, current substance dependencies, circumcision before the age of five, and a lack of language skills (French).”²⁰¹

The study determined that “[a]ll but one circumcised participant remembered the day of her circumcision as extremely appalling and traumatizing.”²⁰² Additionally, “[o]ver 90% of the women described feelings of intense fear, helplessness, horror, and severe pain, and over 80% were still suffering from intrusive re-experiences of their circumcision.”²⁰³ As many as 78% of the subjects told the researchers that “the event was performed unexpectedly and without any preliminary explanation.”²⁰⁴ The results indicated that “[t]he circumcised women showed a significantly higher prevalence of PTSD (30.4%) and other psychiatric syndromes (47.9%) than the uncircumcised women. PTSD was accompanied by memory problems.”²⁰⁵ The researchers concluded that “[w]ithin the circumcised group, a mental health problem exists that may furnish the first evidence of the severe psychological consequences of female genital mutilation.”²⁰⁶

The health approach to examining the impact of FGM on Africa’s girls and women is designed to “appeal to the moral conscience of the public and has won the support of traditional and religious leaders in some African countries.”²⁰⁷ This approach “has necessitated the

199. *Id.*

200. *Female Genital Mutilation and Other Harmful Practices*, WORLD HEALTH ORG., https://www.who.int/reproductivehealth/topics/fgm/mental_problems_and_fgm/en/ (last visited Jan. 7, 2021).

201. Bechrendt & Moritz, *supra* note 198, at 1001.

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. Nabaneh & Muula, *supra* note 160, at 255.

issuance of Fatwas (authoritative legal opinions) by Islamic clerics against FGM/C in countries such as Egypt, Mauritania, and some West African countries where the practice is linked to Islam.”²⁰⁸ In a joint evaluation report of FGM issued by the UNFPA and UNICEF, it was noted that “[t]he fact that respected experts shared graphic details about the practice [of FGM] contributed to religious leaders (from Mauritania, Egypt and Sudan) supporting the adoption of a sub-regional fatwa (pronouncement) condemning FGM/C.”²⁰⁹

While this approach to abolishing FGM is helpful in that it exposes some of the most important consequences of FGM for women and girls in Africa, “it unintentionally leads to numerous parents and relatives seeking safer procedures, rather than abandoning the practice totally in countries such as Egypt, Kenya, Mali, Nigeria and Sudan.”²¹⁰ The result of the health approach to FGM is the increasing “medicalization of FGM/C: an attempt to minimize the health risks of the procedure by having it performed by a healthcare provider either within or outside a health facility.”²¹¹ In addition, “reinfibulation following childbirth of previously mutilated or circumcised women is still performed in various countries around the world.”²¹²

Medicalization procedures “can address short-term risks, such as infection and pain;” however, “[m]edicalization can also create the illusion of ‘legitimacy’ despite the adverse effects on women and girls.”²¹³ This is why many human rights advocates, including non-governmental and international organizations, “have increased their calls for the prohibition of medicalization of FGM/C.”²¹⁴ For example, “[b]oth the UN and WHO condemn the practice of FGM/C

208. *Id.*

209. United Nations Population Fund (UNFPA) and United Nations Children’s Emergency Fund (UNICEF), *UNFPA-UNICEF Joint Program on Female Genital Mutilation/Cutting: Accelerating Change*, at 1, Vol. 1 (Jan. 1, 2014), <https://www.unfpa.org/publications/unfpa-unicef-joint-programme-female-genital-mutilationcutting-accelerating-change>.

210. Nabaneh & Muula, *supra* note 160. *See also* Bettina Shell-Duncan et al, *The Medicalization of Female Genital Mutilation/Cutting: What Do the Data Reveal?*, THE POPULATION COUNCIL (Feb. 2017), https://www.popcouncil.org/uploads/pdfs/2017RH_MedicalizationFGMC.pdf.

211. Nabaneh & Muula, *supra* note 160, at 255.

212. *Id.*

213. *Id.*

214. *Id.*

by medical professionals in any setting, including hospitals and other health establishments.”²¹⁵ The International Federation of Gynecology and Obstetrics (“FIGO”) also condemned the practice, in view of the ethic to “do no harm,” which obligates obstetricians and gynecologists to oppose performing acts that are deemed to be contrary to medical principles.”²¹⁶ Within Africa, several of the continent’s “prominent medical bodies” have “also issued similar public statements.”²¹⁷ Other observers have argued that “[t]he duty to not conduct medicalized FGM/C incumbent on healthcare professionals is also premised on ethical issues surrounding patients’ autonomy and consent, since FGM/C is often practiced at ages when girls are unable to give consent. When FGM/C is imposed by medical personnel, the practice reinforces social control of women’s sexuality and violates their bodily integrity and dignity.”²¹⁸

Given the human rights implications of FGM/C and the fact that the medicalization of the procedure might eventually entrench it, medicalization should not be considered or viewed as “a harm reduction strategy.”²¹⁹ Some of the guiding principles of the WHO on the management of health complications from FGM include the fact that “[m]edicalization of FGM (i.e., performance of FGM by healthcare providers) is never acceptable because this violates medical ethics since: (i) FGM is a harmful practice; (ii) medicalization perpetuates FGM; and (iii) the risks of the procedure outweigh any perceived benefit.”²²⁰ Researchers have concluded that the training of physicians and other healthcare professionals should include lessons on all the complications associated with FGM and that they should be provided with tools to counsel parents against this insidious practice.²²¹ As argued by WHO, under no circumstances must FGM

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

220. WORLD HEALTH ORGANIZATION (WHO), WHO GUIDELINES ON THE MANAGEMENT OF HEALTH COMPLICATIONS FROM FEMALE GENITAL MUTILATION 16 (2016).

221. Nabaneh & Muula, *supra* note 160, at 255.

be performed on any girl or woman, even if the procedure is being undertaken by modern medicine.²²²

3. *The Rite of Passage Approach*

In some African communities, FGM is considered part of a rite of passage ceremony—a way for young girls to transition into puberty or maturity.²²³ Consequently, a girl who has not undergone FGM is often “viewed as an ‘outcast,’ ‘unsuitable for marriage,’ or ‘impure.’”²²⁴ Throughout these communities, “[t]he shame and stigma often associated with a girl who does not undergo the ceremony is usually unbearable and many parents understandably want to avoid this stigma for their children.”²²⁵

Many NGOs and various female rights activists have suggested that these communities adopt alternative rites of passage ceremonies that do not involve FGM. For example, some NGOs have organized “mock ceremonies” that bear the “semblance of the [FGM] ritual without the actual cutting.”²²⁶ Such a ceremony “usually takes the form of a lavish ceremony to initiate girls into puberty, thereby preserving the positive sociocultural aspects of the ritual” but without subjecting the girl to the actual FGM procedure.²²⁷ This alternative rites of passage approach “has been spearheaded by civil society groups in conjunction with other stakeholders, such as community members, families, political leaders, and ritual and religious leaders” and “is intended to show respect for the cultural practice of the people while also ensuring that girls involved in the mock ceremony are socially accepted within the communities where FGM/C is practiced.”²²⁸

For example, the Kenya-based NGO, *Maendeleo ya Wanawake*, organized and carried out “a pilot project in the Meru district of Kenya in 1996 to develop an alternative initiation ritual.”²²⁹ As many as “25

222. WHO, *supra* note 200, at 16.

223. Nabaneh & Muula, *supra* note 160, at 255.

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

229. Althaus, *supra* note 63, at 132.

mother-daughter pairs participated in a six-day training session that included information on the consequences of female genital mutilation and how to defend the decision not to be cut.”²³⁰ The training session was concluded by “a coming-of-age celebration planned by the community, excluding circumcision but including gifts and special T-shirts for initiates, skits, and ‘books of wisdom’ prepared by the parents of each girl.”²³¹

An important objective of the alternative rites of passage model, as advanced by many human rights advocates in Africa, is to intertwine in one social space “the girls’ human rights (mainly to life, health, education, protection) and cultural rights (manifested in teachings and ritual elements that aim to mimic the cultural traditions of the community concerned).”²³² Many African countries have introduced the concept of “cultural rights” into their constitutions and outlawed harmful cultural practices.²³³ For example, the 2010 Constitution of Kenya, guarantees citizens the right to practice their cultures and for citizens to be “protected from . . . harmful cultural practices.”²³⁴ Accordingly, alternative rights-of-passage programs function as a mechanism to protect the human rights of girls and women, while simultaneously allowing various subcultures to retain aspects of their customs, traditions, and cultures that do not violate the national constitution or international human rights instruments.

However, it must be understood that FGM is a violation of the human rights and fundamental freedoms of girls and women. Recognizing and protecting these rights is an essential function of the

230. *Id.*

231. *Id.* at 132. See also Lotte Hughes, *Alternative Rites of Passage: Faith, Rights, and Performance in FGM/C Abandonment Campaigns in Kenya*, 77 AFR. STUD. 274 (2018) (examining alternative rites of passage to eliminate FGM in Kenyan communities).

232. Lotte Hughes, *Alternative Rites of Passage: Faith, Rights, and Performance in FGM/C Abandonment Campaigns in Kenya*, 77 AFR. STUD. 274, 274 (2018).

233. For example, Article 44 of the Constitution of Kenya states as follows: “(1) Every person has the right to use the language, and to participate in the cultural life, of a person’s choice. (2) A person belonging to a cultural or linguistic community has the right, with other members of that community—(a) to enjoy the person’s culture and use the person’s language; or (b) to form, join and maintain cultural and linguistic associations and other organs of civil society.” CONST. art. 44 (2010) (Kenya).

234. CONST. art. 53(1)(d) (2010) (Kenya).

government and should not be outsourced to domestic and international NGOs, which are voluntary institutions that have their own interests and biases. In fact, researchers have questioned whether an alternative rites of passage (“ARP”) approach, which “is dependent . . . on unsustainable and quirky external intervention, geared to donor-led objectives, which offers financial incentives to some (for example, paid participants in ARP), is entirely positive for the recipients.”²³⁵ Given the pervasiveness of poverty in many communities where FGM is practiced, financial incentives could persuade girls and their families to participate in ARP just for the money. The ARP’s only objective should be to eliminate FGM as an element in any rite of passage ceremony in African communities through changing “the minds and practices of individuals, families and communities.”²³⁶ Using financial incentives to recruit families to participate in the program could take the focus away from FGM’s harm to girls and women and place it on ARP as a way to subsidize family income. Additionally, external intervention—since most ARP programs are funded, and often directed, by foreign donors—may generate some benefits in the short run, but may not be an effective way to secure long-term positive transformations in customary and cultural practices.

Finally, ARP models may fail to appreciate the fact that FGM is a gross violation of female human rights and fundamental freedoms, and hence, must be abolished and extricated from all traditional, customary, and cultural practices. While seeking an alternative to FGM, ARP ceremonies may actually reinforce other outmoded and anachronistic gender roles that force women to remain subservient to their husbands. In the 21st century, the emphasis should be on empowering women, through education and training, to develop the skills and competences that they need to evolve into productive and free adults.

4. Empowering Girls and Women to Resist FGM

Many scholars have argued that one way to permanently eliminate FGM is to empower girls and women so they can claim and fight for their rights and ensure their communities do not violate those rights.

235. Hughes, *supra* note 232, at 285.

236. *Id.*

In addition to imposing an obligation on Member States to promote national policies of “zero tolerance for violence against girls, including female genital mutilation,” the UN General Assembly (“UNGA”) has also stressed its belief that “the empowerment of women and girls is key to breaking the cycle of discrimination and violence and for the promotion of human rights, including the right to the highest attainable standard of mental and physical health, including sexual and reproductive health.”²³⁷

As part of the empowerment of girls and women, the UNGA has also urged Member States to protect this vulnerable group and provide those who are susceptible or subject to, or are at risk of, FGM, all the support that they need.²³⁸ Such support and protection, argues the UNGA, should be made “an integral part of policies and programs that address the practice [of FGM].”²³⁹ Additionally, girls and women should be provided “coordinated, specialized, accessible and quality multisectoral prevention and response, including education, as well as legal, psychological, health-care and social services, provided by qualified personnel, consistent with the guidelines of medical ethics.”²⁴⁰

The UNGA has also instructed Member States “to pursue a comprehensive, culturally sensitive, systematic approach that incorporates a social perspective and is based on human rights and gender-equality principles in providing education and training to families, local community leaders, and members of all professions relevant to the protection and empowerment of women and girls in order to increase awareness of and commitment to the elimination of female genital mutilations.”²⁴¹ Although empowerment is supposed to put girls and women in a position to take an active part in safeguarding their rights, it is not likely that they will be able to stand up to Africa’s patriarchal societies, where traditions and customs assign girls and women to roles that are subservient to their male counterparts, especially their parents and husbands. Hence, successful empowerment must include the following:

237. G.A. Res. 69/150, ¶ 1 (Dec. 18, 2014).

238. *Id.* ¶ 7.

239. *Id.*

240. *Id.*

241. *Id.* ¶ 11.

- (1) “changes in social norms and structures that will enable women and girls to understand and realize their sexual and reproductive rights”;
- (2) an increase in the capacity of women and girls “to make decisions about their bodies through education, combined with social and economic empowerment”;
- (3) a government capable of fully investigating and prosecuting perpetrators, accomplices, and enablers, of FGM, including traditional or modern health care practitioners; and
- (4) the internationalization of national laws to ensure that all laws, including customary laws, reflect the provisions of international human rights instruments.²⁴²

5. Enforcing Anti-FGM Laws

Many African countries have laws that can be used to deter FGM or to prosecute its perpetrators, performers, and accomplices. This also applies to countries whose laws do not specifically prohibit FGM. For example, until the 2015 Violence Against Persons (Prohibition) Act was enacted in Nigeria, most of the country’s “lawyers, NGOs, and anti-FGM campaigners were relying on the Nigerian Constitution . . . to help speak out against FGM/C in the country.”²⁴³ Section 34 of the 1999 Constitution of Nigeria states that “no person shall be subject to torture and to inhuman and degrading treatment.”²⁴⁴ Legal scholars and practitioners in Nigeria have argued that the perpetrators of FGM can be prosecuted and punished under this provision by framing the crime as a form of “torture” and “inhuman and degrading treatment.”²⁴⁵

Section 11(b) of Nigeria’s 2003 Child Rights Act (“CRA”) states that “no child shall be subjected to any form of torture, inhuman or

242. Nabaneh & Muula, *supra* note 160, at 255–56.

243. Ugwu Somtochukwu Nnamdi, *FGM in Nigeria: Combative Legislation and the Issue’s Impact on the Economic Growth of Women*, IMPARKTER (Dec. 4, 2020), <https://impakter.com/female-genital-mutilation-in-nigeria-combative-legislation-and-the-issues-impact-on-the-economic-growth-of-women/>. See also Violence Against Persons (Prohibition) Act (2015) (Nigeria).

244. CONST. OF NIGERIA (1999), §34(1)(a).

245. *Id.*

degrading treatment or punishment.”²⁴⁶ Both the Constitution of Nigeria and the country’s CRA can be interpreted as criminalizing FGM, despite the practice not being explicitly mentioned in any of these legal instruments. However, in 2015, Nigeria passed the Violence Against Persons Act (“VAPA”), which specifically criminalizes FGM and other forms of gender-based violence.²⁴⁷ According to section 6(1) of the Act, “[t]he *circumcision of or genital mutilation of the girl child or woman* is hereby prohibited.”²⁴⁸ This section also provides penalties for anyone convicted of performing FGM or engaging another to perform the act.²⁴⁹ The VAPA also criminalizes *attempts* to commit FGM, including inciting, aiding, abetting, or counseling another person to commit the crime of FGM as defined in the Act.²⁵⁰

While domestic courts may be able to prosecute perpetrators of FGM under constitutional provisions or laws that prohibit “any form of torture, inhuman or degrading punishment,” FGM should be explicitly prohibited in the constitution and criminalized through a legislative act. In doing so, each African country must bear in mind that the primary purpose of legal prohibitions against FGM is not just prosecution, but to prevent and eliminate it from the customs, traditions, and cultures of the various communities within the country.

The government in each African country, particularly the legislative branch, must take the initiative to develop and implement legislation and policies to eliminate FGM. The legislature’s work must be supported by the other branches of government. It has been argued that what is required for effective elimination of FGM is “[a] tripartite approach” which involves “consultation and engagement by all relevant government authorities (including the police and judiciary) with civil society and the media to ensure that the message that FGM is both harmful and illegal reaches *all* practicing communities.”²⁵¹ Thus, in addition to enacting legislation that specifically criminalizes FGM and other harmful practices, each African country must ensure

246. Child’s Right Act (2003) (A452), §11b (Nigeria).

247. Violence Against Persons (Prohibition) Act (2015) § 6(1) (Nigeria).

248. *Id.* (emphasis added).

249. *Id.* § 6(2).

250. *Id.* § 6(3)-(4). (emphasis added).

251. 28 TOO MANY, THE LAW AND FGM: AN OVERVIEW OF 28 AFRICAN COUNTRIES 58 (Danica Issell et al. eds., 2018).

that the law is enforced, perpetrators are brought to justice, and FGM victims are compensated and supported as much as possible.²⁵²

To streamline the process of designing and implementing anti-FGM programs, national governments should include, among State institutions that support constitutional democracy, an institution specifically dedicated to the eradication of FGM and other harmful practices.²⁵³ Such an institution must be “independent, and subject only to the Constitution and the law, and [it] must be impartial and must exercise [its] powers and perform [its] functions without fear, favor or prejudice.”²⁵⁴

In 2011, Kenya enacted The Prohibition of Female Genital Mutilation Act²⁵⁵ (“PFHM Act”), which defines the offences of FGM as “aiding and abetting female genital mutilation;”²⁵⁶ “procuring a person to perform female genital mutilation in another country;”²⁵⁷ “use of premises to perform female genital mutilation;”²⁵⁸ “possession of tools” or “equipment for a purpose connected with the performance of female genital mutilation;”²⁵⁹ “failure to report commission of [the] offence” of FGM;²⁶⁰ and use of language intended to “ridicule, embarrass or otherwise harm a woman for having not undergone female genital mutilation, or a man for marrying or otherwise supporting a woman who has not undergone female genital mutilation.”²⁶¹ The PFGM Act also created the Anti-Female Genital Mutilation Board (“Anti-FGM Board”) and empowers it to “prohibit

252. See, e.g., Soraya Sarhaddi Nelson, *Berlin Clinic Aims to Make Genital Cutting Survivors Feel Whole*, NPR NEWS (Jan. 2, 2014, 4:11 PM), <https://www.npr.org/2014/01/02/259121408/berlin-clinic-aims-to-make-genital-cutting-survivors-feel-whole> (examining the efforts of Berlin-based Desert Flower Center, to help victims of FGM).

253. For example, under South Africa’s post-apartheid Constitution, these institutions are referred to as Chapter 9 Institutions. See S. AFR. CONST. 1996, c. 9.

254. See *id.* art. 181(2).

255. The Prohibition of Female Genital Mutilation Act, No. 32 (2011) § 19 (Kenya).

256. *Id.* § 20.

257. *Id.* § 21.

258. *Id.* § 22.

259. *Id.* § 23.

260. The Prohibition of Female Genital Mutilation Act, No. 32 (2011) § 24 (Kenya).

261. *Id.* § 25.

the practice of female genital mutilation, to safeguard against violation of a person's mental or physical integrity through the practice of female genital mutilation and for connected purposes."²⁶²

Unfortunately, Kenya's Anti-FGM Board is not a constitutional institution and its constitutive act does not guarantee its independence. Kenya's President has significant influence over the Board since the PFGM Act empowers the president to appoint the Chairperson of the Board. The financial independence of the Board is also not guaranteed. The PFGM Act's "financial provisions" are vague and fail to guarantee the type of financial and institutional independence that the Board needs to function without undue political influence.²⁶³

The full eradication of FGM must be seen as part of the effort to entrench constitutional democracy and promote the recognition and protection of human rights. Thus, an institution designed to prohibit FGM and other harmful practices must be a constitutional institution; one that is designed to support democracy and is independent and subject only to the constitution and the law.

6. *Civil Society: Its Organizations and FGM*

Civil society and its organizations are essential to eradicate FGM. Civil society includes "international and national NGOs and community and faith-based organizations."²⁶⁴ For example, the Independent Press, a civil society organization, can help disseminate information about the harmful impact of FGM on girls and women; the laws criminalizing FGM; how victims of FGM can help bring those who violate them to justice; how potential victims of FGM can protect themselves against impending subjection to this cruel and insidious practice, and how communities can work together to eradicate the practice.

As evidenced by the work of the U.S.-registered Tostan International, NGOs can empower African girls and women, as well as the communities in which they live, to promote the elimination of FGM. Tostan International has supported more than 3,000 communities in their efforts to eradicate FGM. Since its founding, its

262. *Id.* § pmb1.

263. *Id.* § 14.

264. 28 TOO MANY, *supra* note 251, at 62.

“human rights-based education program has reached more than five million people across eight African countries.”²⁶⁵

During the last several decades, many anti-FGM campaigns across Africa have relied heavily on various media platforms, especially independent media, to inform communities about FGM and help eradicate it. In these efforts, social media and online news platforms have been very critical.²⁶⁶ As reported by UNESCO, “[l]ocal radio is at the forefront of the fight to end female genital mutilation (FGM) and forced marriage” in various African communities, including, for example, “the Ngorongoro District of Tanzania.”²⁶⁷ The Chief of Media Development at UNESCO, Mirta Lourenço, has noted that “[r]adio is often the only way to reach many of the communities where FGM and forced marriage continue to prevail”²⁶⁸ and that “[r]adio campaigns can reach the women and girls at risk. It can change the perceptions of women and men and inform women on their basic human rights.”²⁶⁹

According to a recent study by UNICEF and UNFPA, “[a] growing body of evidence underscores the utility of theater in education and advocacy.”²⁷⁰ Additionally, “[t]heater provides a powerful tool for social change, especially with young people” and, it “can strengthen the emotional and psychological appeal of messages, and provide[] a believable and interesting way to explore sensitive issues.”²⁷¹ Further, “[u]sing theater as a creative educational tool provides an opportunity to debunk myths, present a balanced view, influence behavior and address sensitive topics not usually discussed

265. TOSTAN INTERNATIONAL, <https://www.tostan.org/> (last visited Jan. 12, 2021).

266. See, e.g., CHRISTINA JULIOS, *FEMALE GENITAL MUTILATION AND SOCIAL MEDIA* (2019) (examining the role that social media plays in the anti-FGM movement).

267. *Confronting Dogmas: Local Radio in the Campaign Against FGM and Forced Marriage in Tanzania*, UNESCO (Jul. 10, 2018), <https://en.unesco.org/news/confronting-dogmas-local-radio-campaign-against-fgm-and-forced-marriage-tanzania>.

268. *Id.*

269. *Id.*

270. UNICEF & UNFPA, *17 WAYS TO END FGM/C: LESSONS FROM THE FIELD* 28 (2017), <https://www.unfpa.org/sites/default/files/pub-pdf/17ways-web.pdf>.

271. *Id.*

in public.”²⁷² Governments that are committed to ending FGM must reform their laws to provide the media with the independence they need to function effectively as tools for the eradication of this extremely dangerous and pernicious practice. Governments should strengthen civil society and their organizations and provide an enabling environment for the effective and full eradication of FGM.

For laws against FGM and other harmful practices to be effective, they need to be promoted, especially in the communities where FGM is pervasive. Thus, it is important that these laws and other information about FGM be made available in the languages of the various subcultures. In Cameroon, for instance, the official languages are French and English, but 28.8% of the population speaks neither.²⁷³ In Nigeria, the official language is English, but it is home to more than 520 other languages.²⁷⁴ To make anti-FGM laws more accessible, information on these laws must be provided in a language that the people can understand. This can significantly enhance the ability of people from each subculture to understand and appreciate the law.

III. AFRICAN COURTS AND FGM ADJUDICATION

A. Introduction

The judiciary and the police are vital institutions in the effort to eradicate FGM and other harmful practices and improve the welfare of girls and women. Together, the police and the judiciary can enforce anti-FGM laws and create an environment where girls and women can freely engage in self-actualization. The police must be well-trained and imbued with the professionalism that they need to function effectively as enforcers of the law. Their training should familiarize them with the law, customs, cultures, and traditions of the communities they serve so that they can effectively identify the practices that are harmful to women and girls. For example, while a police officer may understand what constitutes FGM as defined by the

272. *Id.*

273. Oishimaya Sen Nag, *What Languages Are Spoken In Cameroon?*, WORLD ATLAS (Apr. 25, 2017), <https://www.worldatlas.com/articles/what-languages-are-spoken-in-cameroon.html>.

274. Joyce Chepkemoi, *What Languages Are Spoken In Nigeria?*, WORLD ATLAS (Aug. 1, 2019), <https://www.worldatlas.com/articles/what-languages-are-spoken-in-nigeria.html>.

country's Criminal Code, members of the communities where the practice is prevalent may use different terms to designate this practice.

The police investigative branch is critical in gathering the information needed to bring FGM perpetrators to justice. Familiarity with the various communities will enhance the police officers' ability to recognize and investigate the practice of FGM in order to bring the perpetrators to justice. In addition to familiarizing themselves with the cultures and customs of the various communities in which they serve, the police must also be able to communicate with the people, especially the victims, in their own language. This will allow the police to fully and thoroughly investigate FGM situations and collect the necessary information for successful prosecution.

The police must be properly "equipped with the knowledge and training [that] they need to efficiently put anti-FGM laws into practice."²⁷⁵ In many African countries, "cases of FGM are [often] dealt with under local judicial arrangements, with village elders and local leaders settling disputes in their own communities (for example, Ethiopia) and families who support FGM commonly putting immense pressure on the local judiciary (for example, in Guinea)."²⁷⁶ It has been determined, for example, that in Côte d'Ivoire, "out-of-court arrangements between village leaders and local police commissioners are commonplace."²⁷⁷ Additionally, "[w]omen and girls are often unaware of their rights and the meaning of laws. They do not have access to the official judicial system and have no means of protection if they choose to seek help from public authorities."²⁷⁸

It is incumbent upon the government of each African country to ensure that, first, ad hoc adjudications and out-of-court settlements, such as those found in Côte d'Ivoire, do not become an integral part of the process of prosecuting perpetrators of FGM. All FGM cases must be resolved through a duly constituted criminal tribunal staffed by lawyers and judicial officers who are trained in the criminal law. Second, individuals, including community leaders, who support FGM, as well as corrupt police and judicial officers, must not be allowed to interfere with the adjudication of FGM and related criminal offenses.

275. 28 TOO MANY, *supra* note 251, at 61.

276. *Id.* at 62.

277. *Id.*

278. *Id.*

Third, every tribunal charged with prosecuting FGM cases must be free of interference from political and traditional elites.

Fourth, all victims of FGM must be provided with adequate access to justice. These victims should be provided with legal counsel to ensure that their rights are protected and that they are treated with fairness, dignity sensitivity, and respect during judicial proceedings. Such treatment must be forthcoming, not just from judicial officers, but also from every person present in the courtroom. Fifth, the police and judicial officers of each African country must “work closely with their counterparts in neighboring countries to tackle cross-border FGM.”²⁷⁹ Finally, governments must provide adequate protection and support to victims and witnesses in all FGM cases by, for instance, establishing a confidential system to monitor and report these cases.

Research has determined that “the number of prosecutions for FGM has historically been low, and sentences to date have been lenient (at the lower end of the scale) and often suspended.”²⁸⁰ Unless perpetrators are fully prosecuted and appropriate sentences are imposed on them, the law will eventually lose its deterrence effect. As part of the process to help eliminate FGM, all courts must record and report all cases so that interested parties (e.g., anti-FGM and human rights NGOs) can “track whether prosecutions are followed through and sentences carried out.”²⁸¹ Each country must ensure that there are “publicly available data on court cases,” particularly those involving FGM. These data must be readily accessible to those who want to monitor the functioning and efficacy of anti-FGM laws in the country.

Some anti-FGM activists have noted that unless inflation is considered when fines are imposed on those convicted of FGM, the fines are likely to be reduced over time, seriously undermining their deterrence effect. Hence, each African country where FGM is practiced must review and monitor its sentencing laws to ensure fines remain an effective deterrent. Activists have also noted that “the use of prison sentences generally has a greater impact on perpetrators than a monetary fine” and that since there is usually “a huge stigma in many communities attached to spending time in prison, . . . the possibility of imprisonment is considered the most effective

279. *Id.*

280. *Id.* at 57.

281. *Id.*

deterrent.”²⁸² However, it is also the case that “the fear of parents or elders (such as grandmothers) being imprisoned also means that girls at risk of FGM” may be unwilling to contact the authorities if they have been subjected to FGM or urged to do so by their relatives.²⁸³ Education programs can inform girls at risk of FGM about the importance of not letting anyone, regardless of who they are, perform any type of cutting on their bodies. Perhaps, more importantly, if anyone does perform FGM on these girls or plans to do so, girls should not be afraid to report these crimes to the authorities.

Additionally, local police officers may be reluctant to arrest elderly women—who, quite often, are the “cutters.” They are called upon to perform FGM due to their age, vulnerable health conditions, and the fact that prisons may be ill-equipped to accommodate such aged-prisoners. While these issues are important, they must not interfere with efforts to eradicate this extremely harmful practice. Police officers must be trained to function according to the law, while maintaining a high level of professionalism. Thus, they should not allow sympathy for aged offenders to interfere with their ability to perform their jobs.

B. Implementing Laws Against FGM

Although many of the twenty-eight countries in Africa where FGM is regularly practiced have enacted some form of legislation criminalizing FGM, serious enforcement challenges remain. While some of these challenges are “systemic” (e.g., the absence of trained police officers and other government agents in remote or rural areas of the country, where FGM is usually prevalent), “[t]here are also cultural challenges and conflicts of interest where police and local political leaders continue to support the practice [of FGM] (for reasons of ‘tradition’, and/or financial gain).”²⁸⁴

All stakeholders must understand that “[t]he primary purpose of a national law should be to prosecute; ultimately, it is a tool for the prevention of FGM.”²⁸⁵ The following section discusses several cases,

282. *Id.*

283. *Id.*

284. *Id.* at 58.

285. *Id.*

which demonstrate the experiences of a few African countries in enforcing laws against FGM.

1. Joan Bett v. Republic (High Court of Kenya)

This case was an appeal against a conviction and sentence in the Kericho Chief Magistrate's Court (Kenya) on July 28, 2017.²⁸⁶ The appellant was charged "with the offense of knowingly allowing premises to be used for the purpose of performing female genital mutilation contrary to section 22 as read with section 29 of the Prohibition of Female Genital Mutilation Act, No. 32 of 2011, Laws of Kenya" (Mungania SRM, presiding).²⁸⁷

Section 22 of the Prohibition of Female Genital Mutilation Act ("PFGMA") states as follows: "A person who knowingly allows any premises, for which that person is in control of, or responsible for, to be used for purposes of performing female genital mutilation commits an offense."²⁸⁸ Section 29 of the PFGMA elaborates the punishment for individuals convicted of an offense under the Act: "A person who commits an offense under this Act is liable, on conviction, to imprisonment for a term of not less than three years, or to a fine of not less than two hundred thousand shillings, or both."²⁸⁹

In the Kericho Chief Magistrate's Court, the appellant pleaded not guilty to the offense of "knowingly allowing premises to be used for the purpose of performing [FGM]" and was "tried before Hon. C. K. Mungania . . . and was found guilty as charged" and was subsequently "sentenced to pay a fine of Kshs. 200,000/- and in default 3 years imprisonment."²⁹⁰ She then appealed her conviction to the High Court of Kenya at Kericho, raising six grounds of appeal.²⁹¹

Justice Ngugi, noting that the High Court was the first appellate court, proceeded to "re-evaluate the evidence" in order to reach her "own conclusion" and in doing so, she noted that she had "neither seen nor heard the witness, which the trial court had the advantage of

286. *Joan Bett v. Republic* (2018) eKLR (Kenya). Kericho Magistrate Court is in Kericho, capital city of Kericho County, Kenya.

287. *Id.* ¶ 1.

288. Prohibition of Female Genital Mutilation Act (2011) Cap. 32 § 32 (Kenya).

289. *Id.* § 29.

290. *Joan Bett v. Republic* (2018) eKLR (Kenya), at ¶¶ 2, 3.

291. *Id.* ¶ 16.

doing.”²⁹² After reviewing the evidence, she then considered the six grounds of appeal that she had identified earlier in the judgment and the “issues that they [had raised] against the evidence before the trial court.”²⁹³ Ultimately, she held that she “was satisfied that the sentence imposed on the appellant is lawful and not excessive in the circumstances” and that “[h]opefully, it will act as a deterrence to other women who, regrettably, may offer their premises to facilitate the perpetration of FGM against the express provisions of the law, and to the detriment of those who undergo the rite.”²⁹⁴ Justice Ngugi found the appeal to be without merit and dismissed it, upholding the conviction and the sentence imposed by the Kericho Chief Magistrate’s Court.²⁹⁵

2. Law and Advocacy for Women in Uganda v. Attorney General (Constitutional Court of Uganda)

The Law and Advocacy for Women in Uganda, a non-governmental organization incorporated under §§137(1)(3)(a) and (d) of the Constitution of Uganda and Rule 3 of the Constitutional Court (Petition and Reference) Rules, filed this petition.²⁹⁶ The petitioner prayed for the following declarations:

- (a) That the custom and practice of Female Genital Mutilation as practiced by several tribes in Uganda is inconsistent with the Constitution of the Republic of Uganda, 1995 to the extent that it violates Articles 2(2)[,] 21(1), 14, 27(2)[,] 32(2) and 33 thereof.
- (b) As a result of this violation, the custom and practice of Female Genital Mutilation should be declared null and void, and unconstitutional.
- (c) No order is made as to costs in any event.

292. *Id.* ¶ 17.

293. *Id.* ¶ 32.

294. *Joan Bett v. Republic* (2018) eKLR (Kenya), at ¶ 45.

295. *Id.* ¶ 46.

296. *Law and Advocacy for Women in Uganda v. The Attorney General* (2007) (Constitutional Petition No. 08 of 2007) (2010) UGCC 4 (Uganda).

- (d) Any other further declaration that this Honorable Court may deem fit to grant.²⁹⁷

Justice Twinomujuni, writing for the Constitutional Court of Uganda (“CC–U”), summarized the essence of the cause of action as follows: “[t]hat the custom and practice of Female Genital Mutilation practiced by several tribes in Uganda, including but not limited to the Sabiny (found in Eastern Uganda—which includes the Districts of Kapchorwa, Bukwo, Bugiri); Pokot (found in Nakapiripirit District); and Tepeth found on Moroto District) is inconsistent with the Constitution.”²⁹⁸

Five affidavits sworn by five witnesses, supported the petition.²⁹⁹ The evidence provided by all the five witnesses was similar; Justice Twinomujuni focused on the affidavit of Mrs. Gertrude Chelangat Kulany, a resident of Kapchorwa District located in the eastern part of Uganda.³⁰⁰ Her petition indicated that she was aware that various subcultures in Kapchorwa District, notably, the Sabiny, Pokot, and Tepeth, practiced FGM.³⁰¹ Mrs. Kulany elaborated on the research that she had done over the years on FGM, noting that she had “personally known of deaths of girls and women to have directly resulted from Female Genital Mutilation.”³⁰² She also noted that “the cultural practice of [FGM] has no medical and social benefits and [that it] violates human rights provided for under the Constitution of Uganda and international human rights [c]ovenants such as [t]he Convention on [the] [R]ights of the Child, the International Covenant on Economic, Social and Cultural Rights (ICESCR) and is not justifiable in a democratic society.”³⁰³

In what Justice Twinomujuni described as a “short answer to the petition,” the respondent, the Attorney General of Uganda (“A-G”), denied “all the contents of the petition as if the same were set forth and traversed seriatim.”³⁰⁴ In the respondent’s answer to the petition,

297. *Id.* at 2.

298. *Id.*

299. *Id.* at 4.

300. *Id.*

301. *Law and Advocacy for Women in Uganda v. The Attorney General* (2007) (Constitutional Petition No. 08 of 2007) (2010) UGCC 4, at 4 (Uganda).

302. *Id.* at 5.

303. *Id.*

304. *Id.* at 6.

it was further stated that “the petition is misconceived and does not raise any matter for constitutional interpretation under article 137 of the Constitution”³⁰⁵ and that “the petitioner is not entitled to any of the declarations, orders sought in petition.”³⁰⁶ The respondent’s answer was supported by an affidavit from a Geoffrey Atwine, who was said to be a “State Attorney in the respondent’s [law] chambers.”³⁰⁷

Justice Twinomujuni then examined two documents, including one that was “compiled and published in the year 2000 by the World Health Organization [WHO],” which was “presented as an authoritative document on the subject of Female Genital Mutilation.”³⁰⁸ The document was made available to the CC–U by Mr. L. Rwakafunzi, the petitioner’s lawyer.³⁰⁹ The authors included some of the most important international agencies concerned with the protection of human rights and enhancing human development—Office of the High Commissioner for Human Rights; Joint UN Program for HIV/AIDS; UN Economic Commission for Africa; UN Development Program; UNESCO; UN Population Fund; UN High Commissioner for Refugees; UNICEF; UN Development Fund for Women; and the WHO.³¹⁰

Another document presented by the learned counsel for the petitioner to the CC–U was *Female Genital Mutilation in Uganda* and “was compiled by Hon. Dora C. Kanabahita Byamukama on behalf of the [Petitioner] Law and Advocacy for Women in Uganda (Law-Uganda).”³¹¹ This document sought to “create more awareness on the torturous practice of [FGM] and hopefully spur more partners into action.”³¹²

Justice Twinomujuni then noted that he intended to utilize the two documents “sparingly only for the purpose of enlightening the reader and answering unfamiliar questions such as: ‘What is ‘FGM]?’’, ‘Why

305. *Id.* See CONST. OF UGANDA Sept. 22, 1995, art. 137 (for a discussion on the “interpretation of the Constitution.”).

306. *Law and Advocacy for Women in Uganda v. The Attorney General* (2007) (Constitutional Petition No. 08 of 2007) (2010) UGCC 4, at 6 (Uganda).

307. *Id.* at 6-7.

308. *Id.* at 8.

309. *Id.*

310. *Id.* at 8.

311. *Law and Advocacy for Women in Uganda v. The Attorney General* (2007) (Constitutional Petition No. 08 of 2007) (2010) UGCC 4, at 9 (Uganda).

312. *Id.*

is it practiced?’, ‘Where in Uganda is it practiced?’, ‘What is involved in the practice of [FGM]?’, and ‘What are the consequences of [FGM]?’”³¹³ The honorable justice answered these questions and listed five reasons commonly used to justify the practice of FGM.

Reasons offered to justify the practice of FGM include:

- (1) maintaining and preserving a community’s cultural identity and continuing its traditions;
- (2) controlling women’s sexuality by reducing their sexual desire and fulfillment;
- (3) social pressure—in communities in which FGM is widely practiced, pressure from “family and friends can create an environment in which the practice [of FGM] becomes a requirement of social acceptability”;³¹⁴
- (4) economic gain—the traditional “surgeons” who perform FGM were, at the time of this case, earning “fifty thousand shillings per girl circumcised” and, in addition, these “cutters” gain a lot of respect in their communities for what they do;³¹⁵ and
- (5) religion—although FGM is a cultural and not a religious practice, some practitioners use religion to reinforce its practice.³¹⁶

Justice Twinomujuni noted that according to *Female Genital Mutilation in Uganda*, most communities in Uganda where FGM is practiced believe that “when a woman/girl fails to undergo FGM,” she will not be able to bear children, she will exhibit childish behavior throughout her life causing her to be unable to reason, and she will be possessed by demons, preventing her from participating in her community’s social and cultural life.³¹⁷ Quoting from *Female Genital Mutilation in Uganda*, the honorable justice addressed some significant consequences of FGM, including long-term psychosexual

313. *Id.* at 9-10.

314. *Id.* at 11.

315. *Law and Advocacy for Women in Uganda v. The Attorney General* (2007) (Constitutional Petition No. 08 of 2007) (2010) UGCC 4, at 11 (Uganda).

316. *Id.*

317. *Id.*

consequences and immediate physical and health consequences.³¹⁸ Specifically, FGM can result in hemorrhage, extreme pain and shock, sexual dysfunction, and significantly increased risk of maternal morbidity and maternal mortality.³¹⁹

Justice Twinomujuni then ruled on the issues raised in the petition. One issue was whether the petition raises any matter for constitutional interpretation. After examination, the honorable justice concluded that the petition does raise “serious questions for constitutional interpretation” and answered the question in the affirmative.³²⁰ Another issue was “whether the custom and practice of female genital mutilation [FGM] is unconstitutional and should be declared null and void.”³²¹ Specifically, the petition alleged that the practice of FGM contravenes or violates articles 2(2), 21(1), 24, 27, 33(2) and 33 of the Constitution of Uganda.³²² After stating and discussing the issues before the Court, Justice Twinomujuni then took a look at the “evidence adduced by the petitioners to support their case.”³²³ Then, he cited to the relevant sections of the Constitution of Uganda.

According to Article 37 of the Constitutions of Uganda, “[e]very person has a right as applicable to belong to, enjoy, practice, profess, maintain and promote any culture, cultural institutions, language, tradition, creed or religion in community with others.”³²⁴ Justice Twinomujuni then asked the following question: “Does this constitutional provision permit such communities to continue such custom and tradition?” The honorable justice answered in the negative, supporting his answer with a citation to Article 44 of the Constitution: “Notwithstanding anything in this Constitution, there shall be no derogation from the enjoyment of the following rights and

318. *Id.* at 11-13.

319. *Id.* at 13.

320. *Law and Advocacy for Women in Uganda v. The Attorney General* (2007) (Constitutional Petition No. 08 of 2007) (2010) UGCC 4, at 14 (Uganda).

321. *Id.*

322. *Id.* at 2.

323. *Id.* at 14.

324. *Id.* at 16. (quoting CONST. OF UGANDA Sept. 22, 1995, art. 37).

freedoms: (a) Freedom from torture and cruel, inhuman or degrading treatment or punishment.”³²⁵

Justice Twinomujuni then noted that Article 24 of the Constitution of Uganda enshrines respect for human dignity and protection from inhuman treatment. According to Article 24, “[n]o person shall be subjected to any form of torture, cruel, inhuman or degrading treatment or punishment.”³²⁶ Additionally, Article 32(2) of the Constitution states that “Laws, cultures, customs and traditions which are against the dignity, welfare or interest of women or any other marginalized group . . . are prohibited.”³²⁷ Finally, with respect to women’s rights, Article 33 of the Constitution provides: “Women shall be accorded full and equal dignity of the person with men” and that “[t]he state shall protect women and their rights, taking into account their unique status and natural maternal functions in society.”³²⁸

Justice Twinomujuni then argued that “[a]ny person is free to practice any culture, tradition or religion as long as such practice does not constitute disrespect for human dignity of any person, or subject any person to any form of torture or cruel, inhuman or degrading treatment or punishment.”³²⁹ Next, he noted that the “evidence adduced to support [the petition] . . . clearly show[s] that the practice of [FGM] does exist in Uganda[,] especially in Eastern and North Eastern Uganda tribes.”³³⁰ Also, FGM has “very harmful consequences to the health and dignity of women and girls.”³³¹

Justice Twinomujuni then cited to the legal literature on the harmful impact of FGM on (1) the health of girls and women and (2) childbirth. For example, Justice Twinomujuni cited to Chalmers and

325. *Law and Advocacy for Women in Uganda v. The Attorney General* (2007) (Constitutional Petition No. 08 of 2007) (2010) UGCC 4, at 16 (Uganda). *See also* CONSTITUTION OF UGANDA Sept. 22, 1995, art. 44(a).

326. CONST. OF UGANDA Sept. 22, 1995, art. 24.

327. *Id.* art. 32(2).

328. *Id.* art. 32(3).

329. *Law and Advocacy for Women in Uganda v. The Attorney General* (2007) (Constitutional Petition No. 08 of 2007) (2010) UGCC 4, at 17 (Uganda).

330. *Id.*

331. *Id.*

Hashi,³³² who studied the birth experiences of 432 Somali women living in Canada and who had been subjected to FGM before they migrated to Canada.³³³ According to Chalmers and Hashi, “[h]ealth complications after female genital mutilation can be severe.”³³⁴ Women in the Chalmers and Hashi study sample “reported a number of immediate health consequences, including severe pain, bleeding, vaginal or urinary fluid retention, bodily edema or swelling, and infection.”³³⁵ The study also determined that “[l]ong-term health consequences included various genital and sexual difficulties”³³⁶ and that “[s]exual intercourse after circumcision can be traumatic. Opening the circumcision is difficult and painful, and the wedding night, justifiably, was feared by three-fourths of the participants.”³³⁷

The honorable justice next cited to statements by various international organizations, including the WHO and the UN. For example, Justice Twinomujuni cites to the UN Interagency Statement on Eliminating Female Genital Mutilation, which states as follows:

Female genital mutilation violates a series of well-established human rights principles, norms and standards, including the principles of equality and non-discrimination on the basis of sex, the right to life when the procedure results in death, and the right to freedom from torture or cruel, inhuman or degrading treatment or punishment as well as the rights identified below. As it interferes with healthy genital tissue in the absence of medical necessity and can lead to severe consequences for a woman’s physical and mental health, female genital mutilation is a violation of a person’s right to the highest attainable standard of health.³³⁸

Justice Twinomujuni then concluded that FGM violates “the rights of women as enshrined in articles 21, 24, 32(2), 33 and 44 of the Constitution” of Uganda and that “[t]o the extent that girls and

332. BEVERLEY CHALMERS & KOWSER OMER HASHI, 432 SOMALI WOMEN’S BIRTH EXPERIENCES IN CANADA AFTER EARLIER FEMALE GENITAL MUTILATION 227 (2000).

333. *Id.* at 341.

334. *Id.* at 231.

335. *Id.*

336. *Id.*

337. *Id.*

338. WHO, *Eliminating FGM*, *supra* note 69 at 9.

women are known to die as a direct consequence of [FGM], it contravenes article 22 which provides protection to the right of life.”³³⁹ Specifically, the honorable justice held that “it is clear beyond any doubt that the practice of [FGM] is condemned by both the Constitution of Uganda and International Law [The treaties, covenants, conventions and protocols to which Uganda is a party].”³⁴⁰

Justice Twinomujuni then noted that Article 2 of the Constitution of Uganda provides as follows:

- (1) This Constitution is the supreme law of Uganda and shall have binding force on all authorities and persons throughout Uganda.
- (2) If any other law or any custom is inconsistent with any of the provisions of this Constitution, the Constitution shall prevail, and that other law or custom shall, to the extent of the inconsistency, be void.³⁴¹

Finally, the honorable justice ruled:

The practice of [FGM] is a custom which is wholly inconsistent with the above mentioned provision and it is now the duty of this court to declare the custom void . . . I am aware that during the pendency of this petition in this court, the Government of Uganda tabled a bill to outlaw the practice of [FGM]. I have read from the press that the law has now been passed and assented to. If that is true, then it is a very welcome move but more importantly, it is consistent with my findings and declaration that [FGM] must be outlawed for being inconsistent with the Constitution of Uganda.³⁴²

3. Tatu Kamau v. Attorney General & Fourteen Others
(High Court of Kenya at Machakos)

In 2017, a Kenyan doctor filed a petition to legalize FGM, arguing that “a ban on the internationally condemned practice is

339. *Law and Advocacy for Women in Uganda v. The Attorney General* (2007) (Constitutional Petition No. 08 of 2007) (2010) UGCC 4, at 19 (Uganda).

340. *Id.* at 20.

341. CONST. OF UGANDA Sept. 22, 1995, art. 2.

342. *Law and Advocacy for Women in Uganda v. The Attorney General* (2007) (Constitutional Petition No. 08 of 2007) (2010) UGCC 4, at 21 (Uganda).

unconstitutional and that adult women should be allowed to do what they want with their bodies.”³⁴³ Dr. Tatu Kamau, who brought the petition before the Kenya High Court, argued that a woman can decide whether to undergo FGM and once her decision has been made, “she should be able to access the best medical care to have it done.”³⁴⁴

Dr. Kamau filed the petition in the High Court of Kenya on July 18, 2017, pursuant to the provisions of Articles 19, 27, 32, and 44 of the 2010 Constitution of Kenya.³⁴⁵ The petition also sought to “rope in Sections 5, 19, 20 and 21 of the Prohibition of Female Genital Mutilation Act No. 32 of 2011 (Kenya).”³⁴⁶ The petition was brought against the Attorney General of Kenya, the Anti-Genital Mutilation Board, and the Director of Public Prosecution as Respondents, among others.³⁴⁷

After Dr. Kamau filed the petition, her actions were “met with contempt by local and international FGM activists.”³⁴⁸ However, “some tribal elders from Kenya’s Marakwet district . . . welcomed the move, claiming that they had been ‘hunted and punished for engaging in our cultural right.’”³⁴⁹ Agnes Pareyio, Maasai FGM activist and FGM survivor, contended that she knows quite well “the extent of the pain that women go through with FGM” and that FGM constitutes a

343. Nita Bhalla, *Kenyan Doctor Goes to Court to Legalize Female Genital Mutilation*, REUTERS (Jan. 19, 2018), <https://www.reuters.com/article/us-kenya-women-fgm/kenyan-doctor-goes-to-court-to-legalize-female-genital-mutilation-idUSKBN1F8296>.

344. *Id.*

345. *See* Tatu Kamau v. The Attorney General (Constitutional Petition No. 8 of 2017) (2018) eKLR (Kenya) (Article 19 discusses rights and fundamental freedoms; Article 27 discusses equality and freedom from discrimination; Article 32 guarantees freedom of conscience, religion, belief and opinion; and Article 44 guarantees rights to language and culture).

346. *Id.* *See also* The Prohibition of Female Genital Mutilation Act, (2011) Cap. 32 (Kenya) (Section 5 outlines the functions of the Anti-Female Genital Mutilation Board; Sections 19, 20, and 21 define the offences of FGM, aiding and abetting FGM, and procuring a person to perform FGM in another country, respectively).

347. Tatu Kamau v. The Attorney General (Constitutional Petition No. 8 of 2017) (2018) eKLR ¶ 1 (Kenya).

348. Kate Hodal, ‘*She clearly has no idea*’: *Kenyan doctor condemned over bid to legalise FGM*, THE GUARDIAN (Fri. Jan. 26, 2018, 08:45 EST), <https://www.theguardian.com/global-development/2018/jan/26/kenyan-doctor-condemned-over-bid-to-legalise-fgm>.

349. *Id.*

violation of human rights of the girls and women subjected to it.”³⁵⁰ Pareyio “was cut at 14 against her will and has since founded the Tasaru Ntomonok Initiative to educate women and girls about the practice.”³⁵¹ Pareyio “said Kamau’s petition . . . was an insult to women as it proved the doctor did not understand the brutality behind the practice.”³⁵²

Another observer, Brendan Wynne of Donor Direct Action, an international NGO that “runs an FGM fund for frontline activists, said it was potentially dangerous for a female doctor of such high standing in Kenyan society to take such legal action.”³⁵³ Wynne said that “[t]he fact that a doctor is calling for an extremely harmful human rights abuse to be made legal is incredible. She clearly has no idea about the implications for women and girls.”³⁵⁴

The questions presented to the High Court were:

- (a) Whether or not the Enactment and coming into force of the Prohibition of Female Genital Mutilation Act was in contravention of Articles 19, 27, 32 and 44 of the Constitution.
- (b) Whether or not the rights of women to uphold and respect their culture has been violated in enacting the prohibition of Genital Mutilation Act.
- (c) Whether or not the prohibition of Female Genital Mutilation Act is constitutional.
- (d) Whether or not the 2nd Respondent [Anti-FGM Board] was legally created and serves to infringe the rights of women as enshrined in the Constitution.³⁵⁵

The petitioner then prayed the High Court to grant the following reliefs:

350. *Id.*

351. *Id.*

352. *Id.*

353. *Id.*

354. *Id.*

355. Tatu Kamau v. The Attorney General (Constitutional Petition No. 8 of 2017) (2018) eKLR ¶ 1 (Kenya) (the second respondent is the Anti-Female Genital Mutilation Board, which was created by The Prohibition of Female Genital Mutilation Act 2011 (Act No. 32) (Kenya)).

- (a) A declaration that the legislature contravened the provisions of Articles 19, 28, 32 and 44 of the Constitution in enacting the Prohibition of Female Genital Mutilation Act.
- (b) A declaration that the Prohibition of Female Genital Mutilation Act is unconstitutional and thus invalid.
- (c) A declaration that the numerous provisions of the Act that violate the Constitution cumulatively render the entirety of the Act untenable and therefore constitutionally ab initio.
- (d) A declaration that the 2 Respondent purportedly established by this Act is illegal as it was created without the authority of the law.
- (e) Any other relief that the court deems fit and just to grant.
- (f) Costs of the suit.³⁵⁶

Judge Kemei, writing for the High Court of Kenya at Machakos, noted that after the petition was filed and made public, several parties sought to be enjoined into these proceedings.³⁵⁷ The Court allowed them to come on board.³⁵⁸ Judge Kemei noted:

Ten interested parties [and] [t]wo amici . . . filed and exchanged replying affidavits as well as various documents and briefs and once this task was accomplished, the parties herein agreed to team up as clusters and thereafter filed written submissions on whether this matter ought to be certified as raising substantial question of law and therefore ought to be heard by an uneven number of judges in accordance with the provisions of Article 165(4) of the Constitution of Kenya.³⁵⁹

Counsel Machogu, filed submissions on behalf of the Respondents arguing that:

356. Tatu Kamau v. The Attorney General (Constitutional Petition No. 8 of 2017) (2018) eKLR ¶ 2 (Kenya).

357. *Id.* ¶ 3.

358. *Id.*

359. *Id.*

[The] petition raises a substantial question of law as there are constitutional issues implicating the rights under Articles 19, 27, 32 and 44 of the Constitution as well as Sections 5, 19, 20 & 21 of the Prohibition of Female Genital Mutilation Act which deal with rights of a person to enjoy the highest attainable standard of health including reproductive health which issues have not yet been dealt with by any superior court and therefore its pronouncement will not only affect the women but also young girls who are below the age of maturity.³⁶⁰

Respondents explained that the matter before the High Court “is of great public importance because the fight against [F]emale Genital Mutilation presently occup[ies] a big part of national discourse” and the rights of girls and women will be greatly impacted by the outcome of the substantive issues raised in the petition.³⁶¹ According to them, the decision could impact policy and statutory implications regarding the right to health, culture, and non-discrimination, generally.³⁶² Respondents also noted that “the issues raised in the petition qualify as substantial questions of law as contemplated in Article 165(4) of the Constitution [of Kenya] read in conjunction with Article 165(3) (b) or (d) and hence the matter should be referred to the Chief Justice to constitute a bench of judges under Article 165(4) to hear and determine the issues in contest.”³⁶³

Counsel Kungu filed submissions for the interested parties (1st-9th) and “submitted that the Petition raises a substantial question of law to be referred to the Chief Justice to constitute an uneven bench of judges.”³⁶⁴ The petition relied on *Katiba Institute v. IEBC* [2017] eKLR, which defined a “substantial question of law”. . . “as one that . . . has not been fully settled and has a significant impact to the public

360. *Id.* ¶ 4. (There were three respondents: the Attorney General of the Republic of Kenya, the Anti-Female Genital Mutilation Board, and the Office of the Director of Prosecution).

361. *Id.*

362. Tatu Kamau v. The Attorney General (Constitutional Petition No. 8 of 2017) (2018) eKLR ¶ 4 (Kenya).

363. *Id.* ¶ 4.

364. *Id.* ¶ 5 (The nine interested parties were Equality Now, National Gender & Equality Commission, Federation of Women Lawyers, Samburu Girls Foundation, Msichana Empowerment, Kenya Women Parliamentary Association, Center for Rights Education & Awareness, Men for Equality of Men & Women, and Amref.).

and is likely to persist if not fully and finally settled.”³⁶⁵ Counsel Kungu argued that “the issues are complex and will have a bearing on rights of women and girls as well as regional and international instruments that Kenya has ratified in the context of the Constitution and again it raises a novel question of law which has never been tackled by other courts in Kenya.”³⁶⁶

Judge Kemei noted that in addition to the fact that the petition:

[R]aises a matter of general public importance affecting the rights of [the] parties and other individuals in that it seeks an interpretation whether the existence of the Act directly violates the Petitioner and women at large which are fundamental rights under the Constitution[,] [i]t also affects the balance between cultural practices and rights and freedoms of individuals.”³⁶⁷

The honorable judge also noted that the petition raised “a complex and novel question which has not been determined by another court and which requires a final adjudication.”³⁶⁸ The Court relied on *Law Society of Kenya v. The Attorney General & 10 Others* [2016] eKLR, which ruled that the court exercises discretion in deciding whether or not to refer a matter.³⁶⁹ In doing so, the court should consider the level of public interest, the complexity and novelty of the matter, and whether it requires a substantial amount of time to be disposed of.³⁷⁰

Judge Kemei began the analysis by noting that the issue before the Court was “whether the petition discloses a substantial question of law to merit a certification to the effect that the same qualifies to be heard by an uneven number of judges as may be determined by the Honorable the Chief Justice.”³⁷¹ According to Judge Kemei:

[T]he certification sought is pursuant to Article 165(4) of the Constitution which provides as follows: Any matter certified by the court as raising a substantial question of law under clause (3)(b) or

365. *Id.*

366. *Id.*

367. *Id.*

368. *Tatu Kamau v. The Attorney General* (Constitutional Petition No. 8 of 2017) (2018) eKLR ¶ 5 (Kenya).

369. *Id.*

370. *Id.*

371. *Id.* ¶ 6.

(d) shall be heard by an uneven number of judges being not less than three, assigned by the Chief Justice.³⁷²

Judge Kemei then stated that “[a] substantial question of law must be one which is set apart and weighty and which directly and substantially affects the rights of the parties.”³⁷³ The honorable judge went on to note that:

[I]t is the duty of every single judge to interpret the Constitution under Article 165 thereof and therefore it is at the discretion of the Judge to decide whether or not a matter placed before him or her for determination by parties raises a substantial question of law to deserve the matter being referred to the Chief Justice.³⁷⁴

Judge Kemei cited to *Sir Chunibal V. Mehta & Sons, Ltd. v. The Century Spinning and Manufacturing Company, Ltd.*,³⁷⁵ which “laid down the test/guidelines in assessing whether a matter raises substantial question of law.”³⁷⁶

In *National Gender and Equality Commission v. Cabinet Secretary, Minister of Interior and Coordination of National Government & 2 Others*, the High Court of Kenya at Nairobi (Milimani Law Courts) set forth the factors to determine what constitutes a substantial question of law to warrant the constitution of an uneven number of judges to adjudicate the matter.³⁷⁷ There, the Court detailed the following factors:

- (1) Whether, directly or indirectly, it affects the substantial rights of the parties; or
- (2) Whether the question is of general public importance; or

372. *Id.* See also CONST. art. 165(4) (2010) (Kenya).

373. Tatu Kamau v. The Attorney General (Constitutional Petition No. 8 of 2017) (2018) eKLR ¶ 6 (Kenya).

374. *Id.* ¶ 6.

375. *Sir Chunibal V. Mehta & Sons, Ltd. v. The Century Spinning and Manufacturing Co.*, 1962 AIR 1314 (India).

376. Tatu Kamau v. The Attorney General (Constitutional Petition No. 8 of 2017) (2018) eKLR ¶ 6 (Kenya).

377. *Nat’l Gender and Equality Commission v. Cabinet Secretary, Minister of Interior and Coordination of Nat’l Gov’t & 2 Others* (2016) eKLR (Kenya).

- (3) Whether it is an open question in the sense that the issue has not been settled by pronouncements of the Supreme Court; or
- (4) The issue is not free from difficulty; or
- (5) It calls for a discussion of an alternative view.³⁷⁸

After examining the questions raised by the Petitioner, Judge Kemei noted “that there are important constitutional issues impacting the rights of the parties herein under Articles 19, 27, 32 & 44 of [the] Constitution vis-à-vis Sections 5, 19, 20 & 21 of the Prohibition of [FGM] Act.”³⁷⁹ Judge Kemei concluded that “[t]here is . . . need to have this matter heard by an uneven number of judges as the issues raised relate to substantial questions of law in which the rights and interests of the parties herein and a larger section of the public require a final adjudication over the same.”³⁸⁰ Judge Kemei then declared that he was satisfied that “the issues raised in this petition qualify as substantial questions of law as contemplated under Article 165(4) of the Constitution read in conjunction with Article 165(3)(b) or (d).”³⁸¹

The honorable justice held as follows: “I hereby exercise my discretion and refer the matter to the Honorable Chief Justice to constitute a bench of judges under Article 165(4) of the Constitution to hear and determine the issues raised in the petition.”³⁸²

Although *Tatu Kamau v. Attorney General and Fourteen Others* did not resolve the issue of the constitutionality of The Prohibition of Female Genital Mutilation Act, 2011, it revealed the important role of the judiciary in the anti-FGM movement in Kenya. Specifically, it serves as an important example for other African countries that are seeking ways to fight this insidious and extremely violent tradition. If the constitution grants the judiciary the financial and institutional independence to perform its functions effectively and without political interference, the judiciary can become an important mechanism to eradicate FGM and other customary and traditional practices that are harmful to girls and women.

378. *Id.* ¶ 40.

379. *Tatu Kamau v. The Attorney General* (Constitutional Petition No. 8 of 2017) (2018) eKLR ¶ 7 (Kenya).

380. *Id.*

381. *Id.*

382. *Id.*

IV. INTERNATIONAL HUMAN RIGHTS LAW AND FGM: THE WAY FORWARD

A. Introduction

To effectively eliminate FGM and other harmful customary and traditional practices from Africa requires the harmonization of international law with national constitutional law as well as the improvement of cooperation between international (e.g., the United Nations) and regional (e.g., the African Union) organizations and national governments in the African countries. International law, particularly international human rights law, and national constitutional law, represent the important legal mechanisms that must be used to fully tackle this insidious form of violence against women.

The International Committee of the Red Cross (“ICRC”) defines international human rights law as “a set of international rules, established treaty or custom, on the basis of which individuals and groups can expect and/or claim certain rights that must be respected and protected by their States.”³⁸³ International human rights law also includes “[t]he body of international human rights standards [that] contain[] numerous non-treaty-based principles and guidelines (‘soft law’).”³⁸⁴ International human rights law, however, is “based primarily upon human rights treaties at the international and regional levels, supplemented by United Nations declarations and other instruments.”³⁸⁵ These instruments “are supervised by human rights bodies, such as the Human Rights Committee for the International Covenant on Civil and Political Rights and the European Court for Human Rights for the European Convention on Human Rights.”³⁸⁶

Additionally, there is international humanitarian law (“IHL”), which is the branch of international law that provides a set of rules which seek to limit the effects of armed conflict.³⁸⁷ IHL, which is also referred to as “the law of war or the law of armed conflict,” also

383. *What is the Difference between IHL and Human Rights Law?*, INT’L COMM. OF THE RED CROSS (Jan. 22, 2015), <https://www.icrc.org/en/document/what-difference-between-ihl-and-human-rights-law> [hereinafter ICRC].

384. *Id.*

385. RAINBO, FEMALE GENITAL MUTILATION: A GUIDE TO LAWS AND POLICIES WORLDWIDE 18 (Anika Rahman & Nahid Toubia eds., 2000).

386. ICRC, *supra* note 383.

387. *Id.*

“protects persons who are not or are no longer participating in the hostilities and restricts the means and methods of warfare.”³⁸⁸ IHL and international human rights law are complementary bodies of international law that share some of the same aims. Both IHL and human rights law strive to protect the lives, the health, and the dignity of individuals, albeit from different angles.³⁸⁹ For example, both IHL and international human rights law “prohibit torture or cruel treatment, contain provisions for the protection of women and children, and regulate aspects of the right to food and health.”³⁹⁰

Among “the earliest and most authoritative human rights instruments are the [UDHR], the [ICCPR] and the [ICESCR].”³⁹¹ Although the UDHR contains only “hortatory or recommendatory provisions,”³⁹² it is considered “one of the most influential legal and political instruments of the twentieth century.”³⁹³ Many international human rights treaties, including the international covenants, “which are legally binding upon [the] nations that have ratified them, elaborate upon the rights contained in the Universal Declaration.”³⁹⁴ Additionally, many States “have incorporated a number of [the rights contained in the UDHR] into their constitutions and [domestic] laws.”³⁹⁵

International human rights law recognizes FGM is a violation of human rights and an extreme form of torture and violence against women and girl children. In addition to the fact that it does not have any health benefits, FGM violates numerous human rights, including the rights of women and girl children “to equality, life, security of the person, and dignity, as well as freedom from discrimination[,] torture,

388. *Id.*

389. *Id.*

390. *Id.*

391. RAINBO, *supra* note 385, at 18.

392. OBED Y. ASAMOAH, THE LEGAL SIGNIFICANCE OF THE DECLARATIONS OF THE GENERAL ASSEMBLY OF THE UNITED NATIONS 244 (1966). *See also* HENRY J. STEINER ET AL., INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS: TEXTS AND MATERIALS, 152 (3rd ed. 2008) (noting that the UDHR is “hortatory and aspirational, recommendatory rather than, in a formal sense, binding”).

393. RAINBO, *supra* note 385, at 18.

394. *Id.*

395. *Id.*

cruel, inhuman or degrading treatment.”³⁹⁶ Recent international and regional human rights instruments have provided strong legal support for action against FGM. These instruments impose legal obligations on States Parties “[t]o take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.”³⁹⁷

The Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (“Maputo Protocol”) is among the key regional instruments that explicitly condemn FGM as a human rights violation. Article 5 of the Maputo Protocol requires States Parties to “prohibit and condemn all forms of harmful practices which negatively affect the human rights of women and which are contrary to recognized international standards.”³⁹⁸ Article 5 also instructs States Parties to “take all necessary legislative and other measures to eliminate practices, including: prohibition, through legislative measures backed by sanctions, of all forms of female genital mutilation, scarification, medicalization and para-medicalization of female genital mutilation and all other practices in order to eradicate them.”³⁹⁹

B. Enforcing FGM: International Human Rights Law and National Law

It has been argued that although “the international norms of international human rights law are under-enforced [or] imperfectly enforced[,] . . . they *are* enforced through a complex, little-understood legal process that [can be called] *transnational legal process*[,]”⁴⁰⁰ which consists of three phases: interaction, interpretation, and internalization.⁴⁰¹ Specifically, international human rights law is

396. *What International Human Rights Law Says About Female Genital Mutilation*, EQUALITY NOW, https://d3n8a8pro7vhm.cloudfront.net/equalitynow/pages/265/attachments/original/1527182447/FGM_Under_International_Law_EN.pdf?1527182447 (last visited Jan. 24, 2021).

397. G.A. Res 34/180, at art. 2(f) (Dec. 18, 1979).

398. Maputo Protocol, *supra* note 48, at art. 5.

399. *Id.* at art. 5(b).

400. Harold Hongju Koh, *How is International Human Rights Law Enforced?*, 74 IND. L. REV. 1397, 1399 (1999) (emphasis in original).

401. Harold Hongju Koh, *Review Essay: Why Do Nations Obey International Law?*, 106 YALE L. J. 2599, 2602 (1996-1997).

enforced through “a transnational legal process of institutional *interaction, interpretation* of legal norms, and attempts to *internalize* those norms into domestic legal systems.”⁴⁰²

Professor Koh has identified five explanations for why nations obey international law: (i) power, (ii) self-interest, (iii) liberal theories, (iv) communitarian theories, and (v) legal process explanations.⁴⁰³ Koh distinguishes between “international legal process” or “horizontal reasons for compliance, which tend to function at a government-to-government level” and the so-called ‘vertical’ explanation, which focuses on the relationship between the international and the domestic legal systems.”⁴⁰⁴ For example, when two States have a mutual problem that implicates human rights (e.g., one State wants to convince the other to join an international or regional human rights treaty), the governments of these States can “engage in government-to-government discussions at the ‘horizontal’ nation-state-level within an intergovernmental process organized by the United Nations.”⁴⁰⁵

There is also a “‘vertical,’ transnational process whereby governments, inter-governmental organizations, nongovernmental organizations, and private citizens argue together about why nations should obey international human rights law.”⁴⁰⁶ Professor Koh argues that through this process “international rules that are developed at a government-to-government level gradually work their way down and become internalized into domestic legal structure.”⁴⁰⁷ International human rights treaties can provide the minimum legal standards, which if adopted and internalized by domestic legal systems in the African countries, can significantly enhance the eradication of FGM and other traditional and customary practices that violate the rights of women and girls. However, it is important to note that these “international

402. Koh, *supra* note 400, at 1399 (emphasis in original).

403. *Id.* at 1406. Professor Harold Hongju Koh was the legal adviser in the Department of State under the presidency of Barack Obama from June 25, 2009 to January 22, 2013. He left his government position in January 2013 to return to Yale University as Sterling Professor of International Law.

404. Koh, *supra* note 400, at 1406.

405. *Id.*

406. *Id.*

407. *Id.*

human rights instruments do not automatically confer justiciable rights in national courts.”⁴⁰⁸

Consequently, to effectively eradicate FGM and other harmful traditional and customary practices, each African country must internationalize their national constitutions and create rights that are justiciable in domestic courts. Some African countries have already undertaken this process of internationalization and have created or adopted constitutions that specifically incorporate provisions of various international and regional human rights instruments.⁴⁰⁹

Kenya adopted a new constitution in 2010 and through this basic law, the people gave effect to international law, including international human rights law. According to Article 2(5), “[t]he general rules of international law shall form part of the law of Kenya.”⁴¹⁰ Additionally, the new constitution clarified the role of international treaties in the country’s legal system. As stated in Article 2(6), “[a]ny treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.”⁴¹¹ Thus, when Kenya ratified the Maputo Protocol on October 6, 2010, provisions of the Maputo Protocol became part of the law of Kenya and hence, the rights guaranteed by the Maputo Protocol became directly justiciable in Kenyan courts. In addition to the constitutional provisions pertaining to FGM, Kenya has enacted legislation that prohibits and/or criminalizes FGM.⁴¹²

Once an African country has internationalized its national constitutional law, it must ensure “its courts have the capacity to enforce the laws and that there is no political interference in the ability of the courts to do so.”⁴¹³ It is important that a country’s judiciary is granted the necessary independence so it can effectively prosecute anyone who engages in FGM or other practices that harm girls and

408. Mirna E. Adjami, *African Courts, International Law, and Comparative Case Law: Chimera or Emerging Human Rights Jurisprudence?*, 24 MICH. J. INT’L L. 103, 108 (2002).

409. CONST. OF THE PEOPLE’S REPUBLIC OF BENIN Dec. 2, 1990, art. 7.

410. CONST. art. 2(5) (2010) (Kenya).

411. *Id.* art. 2(6).

412. The Prohibition of Female Genital Mutilation Act, No. 32 (2011) § 19 (Kenya).

413. John Mukum Mbaku, *International Law, African Customary Law, and the Protection of the Rights of Children*, 28 MICH. ST. INT’L L. REV. 535, 616 (2020).

women. In *De Lange v. Smuts*, South Africa’s Constitutional Court held that “judicial independence . . . is foundational to and indispensable for the discharge of the judicial function in a constitutional democracy based on the rule of law.”⁴¹⁴

Judicial independence is a complex and multifaceted concept. Generally, judicial independence involves two dimensions: individual and institutional.⁴¹⁵ Through individual independence, judges make decisions without interference.⁴¹⁶ Similarly, “institutional independence means that courts are independent from other branches of government.”⁴¹⁷ Judicial independence requires “security of tenure, financial security, and administrative independence.”⁴¹⁸ Thus, unless an African country has a truly independent judiciary, it is unlikely to be able to enforce laws against FGM, especially because FGM stems from the customs, cultures, and traditions of various ethnocultural groups—the latter can significantly pressure national courts to overlook FGM and other harmful practices.

Even if a country has not yet internationalized its national constitution, its domestic courts can cite to the provisions of international human rights instruments in adjudicating human rights cases. In doing so, courts can declare unconstitutional legislative, customary, and traditional laws that violate the provisions of international human rights instruments. In *Naidoo v. Minister of Police*, the Supreme Court of Appeal of South Africa examined the failure of the police to adequately respond to a complaint of domestic violence.⁴¹⁹

In *Naidoo*, the appellant, Ms. Charmaine Naidoo, was assaulted, injured, and rendered unconscious by her former husband.⁴²⁰ After she received medical treatment, Ms. Naidoo “went to the Lenasia South Police Station to lay a charge of assault against [Mr.] Naidoo under

414. *De Lange v. Smuts & Others* 1998 (7) BCLR (CC) at 779 para. 59 (S. Afr.).

415. Judicial Independence, CTR. FOR CONST. STUD., https://www.constitutionalstudies.ca/2019/07/judicial-independence/#_ednref2 (last visited Oct. 15, 2021).

416. *Id.*

417. *Id.*

418. *Id.*

419. *Naidoo v. Minister of Police* 2015 4 All SA (SCA) (S. Afr.).

420. *Id.* ¶ 1.

the Domestic Violence Act 116 of 1998.”⁴²¹ The police officer stated that charges would not be filed unless she obtained a protection order from the magistrates’ court.⁴²² Ms. Naidoo then went to the magistrates’ court to obtain a protection order but was advised that “a protection order was not a prerequisite for a charge being laid.”⁴²³ Once again, she returned to the police station for assistance. However, “[w]hat followed thereafter was a dreadful series of traumatic, humiliating, dehumanizing and flagrant violations of the appellant’s right to dignity, freedom, security of her person and bodily integrity.”⁴²⁴

After suffering significant injuries resulting from the assault at the police station, Ms. Naidoo filed a claim against the Minister of Police and several members of the South African Police Service (“SAPS”) in the Gauteng Local Division of the High Court, Johannesburg.⁴²⁵ She claimed that “members of the SAPS had wrongfully and negligently failed to comply with the legal duties they owed to her in terms of the Domestic Violence Act 116 of 1998.”⁴²⁶ On appeal, the Supreme Court of Appeal upheld the appeal and awarded the appellant damages of R280,000.⁴²⁷

Of importance is the fact that in rendering its decision in *Naidoo*, the Supreme Court of Appeal referred to the Maputo Protocol and CEDAW. Judge Petse noted that the CEDAW and the Maputo Protocol “have as their particular focus the protection of the right to human dignity and the protection of women against all forms of violence that member states are obliged to enforce by legislative measures.”⁴²⁸ Judge Petse also informed the Court that both South Africa’s Constitutional Court and the High Court “have reaffirmed the principle that the State is obliged under international law to protect women against violent crime and gender discrimination inherent in violence against women.”⁴²⁹

421. *Id.* ¶ 2.

422. *Id.*

423. *Id.*

424. *Naidoo v. Minister of Police* 2015 4 All SA (SCA) at para. 2 (S. Afr.).

425. *Id.* ¶ 3.

426. *Id.*

427. *Id.* ¶ 58.

428. *Id.* ¶ 27.

429. *Naidoo v. Minister of Police* 2015 4 All SA (SCA) at para. 27 (S. Afr.).

Although the issues in *Naidoo* did not concern FGM, the case nonetheless provides an example of how courts can enforce laws that protect the rights of women and girls. Additionally, *Naidoo* demonstrates how domestic courts can use international law to interpret national constitutional law and ensure that domestic standards for the protection of women's and girls' rights conform to those set by international human rights instruments.⁴³⁰

A case that specifically deals with FGM is *Law and Advocacy for Women in Uganda v. The Attorney General*, a case of the Constitutional Court of Uganda, which was examined earlier.⁴³¹ There, the Law and Advocacy for Women in Uganda prayed Uganda's Constitutional Court to grant the following orders: "(a) That the custom and practice of [FGM] as practiced by several tribes in Uganda is inconsistent with the Constitution of the Republic of Uganda, 1995" and "(b) [a]s a result of the violation, the custom and practice of [FGM] should be declared null and void and unconstitutional."⁴³²

The Court held that while "[a]ny person is free to practice any culture, tradition, or religion," they must only do so "as long as such practice does not constitute disrespect for human dignity of any person, or subject any person to any form of torture or cruel, inhuman or degrading treatment or punishment."⁴³³ The Court held that FGM "grossly violates the rights of women" and it is condemned by "both the Constitution of Uganda and International Law," and finally that it specifically "contravenes the provisions of articles 21(1), 22(1), 24, 32(2), 33(1) and 44(a) of the Constitution [of Uganda]."⁴³⁴

In making its decision, Uganda's Constitutional Court referred to both comparative and international law. Although the Court did not specifically cite to the Maputo Protocol, it made references to "treaties, covenants, conventions and *protocols* to which Uganda is a party."⁴³⁵ Some legal scholars have noted that this observation "is in

430. See Scholastica Omondi et al., *Breathing Life into the Maputo Protocol: Jurisprudence on the Rights of Woman and Girls in Africa*, EQUALITY NOW (Nov. 28, 2018), https://www.equalitynow.org/maputo_protocol_case_digest.

431. *Law and Advocacy for Women in Uganda v. The Attorney Gen.* (2007) (Const. Petition No. 08 of 2007) (2010) UGCC 4 (Uganda).

432. *Id.* at 2.

433. *Id.* at 17.

434. *Id.* at 20.

435. *Id.* at 20 (emphasis added).

line with Article 5 of the Maputo Protocol that requires States Parties to ‘prohibit and condemn all forms of harmful practices which negatively affect the human rights of women and which are contrary to recognized international standards.’⁴³⁶ After noting that FGM is very harmful to the health and dignity of girls and women, the Court declared the practice void.⁴³⁷

The few cases examined in this Article show the critical role played by domestic courts in the enforcement of laws that violate the rights of women in general and those that prohibit and criminalize FGM in particular. African judiciaries are important, not just to prosecute and bring to justice any person who engages in acts that violate the rights of women and girls, as guaranteed by international and regional human rights instruments, as well as national constitutions, but they can help bring national laws into conformity with international law, particularly international human rights law.

CONCLUSION

Throughout Africa, discrimination against women and girls generally, and their economic, social, and political exploitation, in particular, remain pervasive. In fact, the oppression of African women begins at the cradle and follows them throughout their lives. Hence, it is important that discrimination against women and their marginalization be addressed without delay. Given the fact that the girl of today is the woman of tomorrow, it is important that practices that harm girls—whether based on positive law,⁴³⁸ tradition, or custom—be eradicated. Girls should be nurtured and be provided with the facilities to attend school so that they can develop the necessary skills and competencies to evolve into productive members of their communities.

Among the basic principles of the United Nations is a desire to achieve international cooperation “in solving international problems

436. Omondi et al., *supra* note 430, at 38-39.

437. *Law and Advocacy for Women in Uganda v. The Attorney Gen.* (2007) (Const. Petition No. 08 of 2007) (2010) UGCC 4, at 21 (Uganda).

438. The term “positive law” generally refers to law that has been enacted by a duly authorized legislature (i.e., statutes). In contrast, “natural law” refers to a set of universal principles that govern moral human conduct. *See The Term “Positive Law”*, U.S.C., https://uscode.house.gov/codification/term_positive_law.htm (last visited Oct. 15, 2021).

of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.”⁴³⁹ Three years after the UN Charter was adopted, the UN General Assembly adopted the UDHR, “which has served as guiding principles on human rights and fundamental freedoms in the constitutions and laws of many of the Member States of the United Nations.”⁴⁴⁰ The UDHR specifically prohibits all forms of discrimination based on sex and declares that “[a]ll human beings are born free and equal in dignity and rights,”⁴⁴¹ and everyone “has the right to life, liberty and the security of person.”⁴⁴² Finally, the UDHR declares that “[a]ll are equal before the law and are entitled without any discrimination to equal protection of the law”⁴⁴³ and that “[a]ll are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.”⁴⁴⁴

Many international and regional human rights instruments expressly prohibit discrimination against specific groups, including women and girls. The Maputo Protocol, for example, instructs States Parties to “combat all forms of discrimination against women through appropriate legislative, institutional and other measures”⁴⁴⁵ and “commit themselves to modify the social and cultural patterns of conduct of women and men through public education, information, education and communication strategies, with a view to achieving the elimination of harmful cultural and traditional practices and all other practices which are based on the idea of the inferiority or superiority of either of the sexes, or on stereotyped roles for women and men.”⁴⁴⁶ Additionally, the Maputo Protocol requires that States Parties “take all necessary legislative and other measures” to prohibit, “through legislative measures backed by sanctions, of all forms of female

439. U.N. Charter art. 1, ¶ 3.

440. *Fact Sheet No. 23*, *supra* note 9.

441. G.A. Res. 217 (III) A at art. 1, Universal Declaration of Human Rights (Dec. 10, 1948).

442. *Id.* art. 3.

443. *Id.* art. 7.

444. *Id.* art. 7.

445. Maputo Protocol, *supra* note 48, at art. 2.

446. *Id.* art. 2(2).

genital mutilation, scarification, medicalization and para-medicalization of female genital mutilation and all other practices in order to eradicate them.”⁴⁴⁷

Throughout many African communities, customary and traditional practices are often a reflection of the values that have been held by that community for many generations. Oftentimes, ethnocultural groups defend the continuation of these practices because they believe that they are part of their cultural identity.⁴⁴⁸ While some cultural practices are beneficial to members of a community or ethnocultural group, other practices can be extremely harmful to a specific group (e.g., women and girls) within that community. Some of these harmful practices include child marriage; acid attacks; birth superstitions; blood-letting; breast flattening or ironing; corporal punishment; cosmetic mutilation; cursing; dowry and bride price; FGM; initiation rites; food taboos; ritual sexual slavery; witchcraft; and customary child slavery.⁴⁴⁹

This article focused on FGM, which is one of the most insidious forms of violence against women. This form of violence exists in many African countries, cuts across culture, class, education, income, and ethnocultural origin.⁴⁵⁰ As evidenced by recent actions by Dr. Tatu Kamau, the Kenyan doctor who filed a petition with the Machakos High Court to legalize FGM, belief in this form of violence against girls and women is not limited to poorly educated and ill-informed individuals.⁴⁵¹

Many African countries, cognizant of their obligations under international and regional human rights law, have passed legislation criminalizing FGM.⁴⁵² Some have included prohibitions against FGM

447. *Id.* art. 5(b).

448. *See, e.g.,* Bilkis Vissandjée et al., *Female Genital Cutting (FGC) and the Ethics of Care: Community Engagement and Cultural Sensitivity at the Interface of Migration Experiences*, 14 BMC INT’L HEALTH & HUM. RTS. 7 (2014) (noting that FGM is “anchored in a complex socio-cultural context”).

449. *See* John Mukum Mbaku, *The Rule of Law and the Exploitation of Children in Africa*, 42 HASTINGS INT’L & COMPAR. L. REV. 287, 398-410 (2019) (examining traditional cultural practices that harm girls and women).

450. *See generally Id.*

451. Bhalla, *supra* note 343.

452. *See* The Prohibition of Female Genital Mutilation Act, No. 32 (2011) § 19 (Kenya) and Violence Against Persons (Prohibition) Act, (2015) (Nigeria).

in their constitutional texts.⁴⁵³ Unfortunately, enforcing these laws has been a significant problem in several African countries. Recent studies have determined that “[m]illions of girls in Africa are at risk of [FGM] because their governments are failing to enforce laws banning the internationally condemned practice.”⁴⁵⁴ Such failure to enforce laws against FGM is due to push-back from communities that consider FGM an essential part of their cultural identity; lack of judicial and police capacity; lack of political will; corruption; and the absence of independent judiciaries.

Some observers argue that “a law alone is not sufficient to end the practice, which in many countries is enmeshed with cultural and religious beliefs, considered a pillar of tradition and marriage, and supported by women as well as men.”⁴⁵⁵ Others argue, however, that laws against FGM will not only “help protect girls from this barbaric practice and enable them to live in dignity,” they will also “help mothers who didn’t want to cut their girls, but felt they had no choice, to say ‘no’”.⁴⁵⁶

Educational programs organized by national governments, with the cooperation of NGOs, such as the UK-based *28 Too Many* and the Senegal-based Tostan, have begun to yield positive results as many communities are gradually recognizing that FGM is no longer a necessary part of their cultural practices.⁴⁵⁷ Despite this, national judicial systems in Africa remain very important in the fight against FGM. It is important that any person who engages in violent acts against women and girls—and FGM is a form of violence—must be

453. African countries whose constitutional texts include prohibitions against FGM include Côte d’Ivoire, Senegal, and Somalia.

454. Emma Batha, *African Countries Urged to Toughen Laws on Female Genital Mutilation*, REUTERS (Sept. 13, 2018), <https://www.reuters.com/article/us-africa-fgm-lawmaking/african-countries-urged-to-toughen-laws-on-female-genital-mutilation-idUSKCN1LT2OQ>.

455. Declan Walsh, *In a Victory for Women in Sudan, Female Genital Mutilation is Outlawed*, N.Y. TIMES (Apr. 30, 2020), <https://www.nytimes.com/2020/04/30/world/africa/sudan-outlaws-female-genital-mutilation.html>.

456. *Id.*

457. For example, Tostan’s human rights-based approach to the eradication of FGM has led to the abandonment of FGM and child/forced marriage in 8,830 communities in eight African countries. See *Community Empowerment Program: Our Success*, TOSTAN, <https://www.tostan.org/programs/community-empowerment-program/#success> (last visited Jan. 26, 2021).

fully prosecuted and brought to justice. Thus, the way forward must not only include educational programs that can help communities within African countries extricate this insidious practice from their cultures and traditions, there must exist within each country, judicial institutions that are independent enough and have the capacity to fully enforce laws against FGM and other harmful practices.

More specifically, the way forward should include, at the very least, the following steps: First, the international community, particularly the international human rights community, should make certain that those of its legal instruments, which have not yet done so, should criminalize FGM and other practices that are harmful to girls and women, as well as discriminate against this important group of people. Second, the international community should encourage all Member States of the United Nations to sign, ratify and domesticate these instruments, to create rights that are justiciable in their domestic courts.

Third, where and when necessary, the international community should assist countries in their efforts to develop and implement anti-FGM educational programs. Such aid can come in the extension of grants to NGOs working at the community level to educate citizens on the harmful effects of FGM and the need to eradicate the practice. Fourth, the international community should also help countries that are working to either enact new legislation or amend existing legislation to criminalize FGM and other harmful practices. Finally, the international community, through, for example, the UN Committees that monitor the various international human rights treaties and conventions (e.g., Committee on the Elimination of Discrimination Against Women; Committee on the Rights of the Child), should monitor the progress that African countries are making to eradicate FGM and prosecute those individuals who are engaged in FGM and related activities or practices.

At the national level, governments should take all necessary measures to ensure that:

- (1) customary and traditional practices are not used as an excuse to undermine the rights of girls and women;
- (2) customary and traditional practices that oppress women, violate their human rights and fundamental freedoms, endanger their health, and interfere with their ability to live a healthy and productive life, are either modified to remove the elements that

discriminate against them or harm them or, in the case of FGM, are fully eradicated;

- (3) customary and traditional practices conform with provisions of international and regional human rights instruments; and
- (4) all laws, including the national constitution, as well as legislative enactments and customary laws, conform with international human rights norms and standards.

In the end, the effective and full enforcement of anti-FGM laws by the police and the judiciary is critical to any program to eradicate FGM in African countries. Hence, it is very important that each African country provide itself with a judicial system that has the institutional and financial independence to be able to perform its functions well, especially in respect of the prosecution of persons engaged in FGM. Additionally, the judiciary should employ international human rights law as a tool of interpretation to eliminate from positive and customary laws, provisions that offend international human rights law.

Most importantly, each African government must provide citizens with a clear expression—possibly in languages that the people can understand—of “political will and an undertaking to put an end to traditional practices affecting the health of women and girl children, particularly female genital mutilation.”⁴⁵⁸ African governments must also make sure that their countries ratify and effectively implement international instruments, including especially those that relate to the protection of women and girl children.

Other measures that national governments should take to fight FGM and other harmful practices include (a) specifically criminalizing all practices that are harmful to girls and women, including especially FGM; (b) creating constitutional bodies dedicated to implementing the government’s official policy on harmful practices (including FGM) and ensuring that these practices are eradicated; (c) revising and restructuring of the curriculums of medical and nursing schools to include courses on the negative effects of FGM and other traditional practices; (d) making sure that courses on sex education in primary and secondary schools include information on the harmful effects of FGM; (e) helping civil society use its organizations (e.g., the

458. *Fact Sheet No. 23*, *supra* note 9.

free press; theater) to educate the public about traditional cultural practices that harm women and girl children; (f) initiating and sustaining cooperation between the government and religious and ethnocultural groups in an effort to extricate these harmful practices from the activities of these groups—part of the interaction between the government and traditional and religious groups should include efforts to help parents and the communities in which they reside appreciate the value and worth of girl children, and efforts to eliminate harmful practices, such as son preference; (g) introducing free and compulsory universal primary and secondary education in order to significantly increase girl children’s access to opportunities for self-actualization (e.g., the development of the skills that they need to function as productive adults), as well as educate them and their male counterparts on practices that discriminate against and harm girls and women; (h) enacting legislation to abolish child and forced marriage and establishing the age of marriage for boys and girls at 18 years; and (i) improving the access of women to economic resources (e.g., credit, land, employment opportunities, and other facilities to enhance the ability of women to participate fully and effectively in their communities).

Violence against girls and women, including FGM, is “a human rights violation and not only a moral issue.”⁴⁵⁹ Such violence must be abolished in every African country. Perhaps, more important, is that governments should regularly condemn any practices that discriminate against and harm women and girls and where these practices have been criminalized, prosecute those who engage in them, and where they have not yet been criminalized, enact legislation to do so.

Regardless of whether they are justified by religion or tradition, harmful practices, such as FGM, do not belong in a modern democratic State or any society of free persons. Certain institutional characteristics and values must be present in order for there to be a modern constitutional State. These include, at the very least, justice, fairness, respect for the rights of others, recognition and protection of human rights and fundamental freedoms, especially those of historically marginalized groups, such as women and girl children. FGM is not one of those values that belongs in a modern constitutional State.

459. *Id.*