International Imposition vs. Domestic Assimilation: The Criminalization of Female Genital Cutting in Ghana

By

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ABSTRACT

The unassailable continuity of female genital cutting (FGC) despite its criminalization and the salience wielded over the past few decades stokes thoughts about what is missing—signifying the need to examine present legal mechanisms pertinent to FGC critically. The current research fails to consider the full breadth of the entanglement of law and culture relating to FGC, which is important because where the change of behavior is the objective of the law, social and legal norms must interact. By relying on the basis that FGC is not a normative crime but a deeply rooted cultural practice, I argue that international law gravitates towards setting standards molded by a Western framework, which is diametrically opposed to the social norms and culture of communities practicing FGC.

This thesis utilizes a bidirectional doctrinal methodology to evaluate the evolution, substance, limitations, and mode of integration of Western international law by domestic states, particularly Ghana, to show how these elements contribute to the sustenance of FGC. Due to the homogenization of legal culture due to globalization, my research demonstrates that the insidious seeping of the Western cultural framework causes a corresponding replicated integration and application in domestic law. The criminalization of FGC in Ghana, similarly to other developing countries, birthed from these Western values and standards do not coincide with the nature of FGC. Hence, when laws are antithetical to a social group's norms, its powers to effectuate social change are limited. To relieve this tension caused by legal pluralism, I explore vernacularization as a viable solution to assimilate international law into domestic law.

DEDICATION

I dedicate this thesis to my parents, Mr. and Mrs. Kojo Sallah. Without your invaluable support and sacrifices, the completion of this LLM would not have been possible.

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Firstly, I would like to thank God for the peace, joy, and grace He has showered me with during these past two years. I would not be here without Him.

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I am very grateful to my parents, siblings, and Windsor family for all the support, prayers, and love. Ek, I am thankful for your sympathetic ear. You have been the therapist and backbone I did not know I needed. You listened every time I shared how my research was going and offered your advice without being imposing. Last but not least, Uncle Bari, I am grateful for your wise counsel and support throughout my degree.

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CHAPTER 1

Introduction

The ubiquity and contentiousness surrounding the topic of Female Genital Cutting (FGC) has caused it to make waves in a plethora of forms—ranging from the politics of who has the ultimate right to intervene to the subsequent criminalization through international law and its adoption by many states, including Ghana.[1] Despite the waves being made, there appears to be a limitation of the law concerning the eradication of FGC. Through the analysis of prevalence trends, it has been proven that there has been an unsatisfactory material decline in the practice despite its criminalization in many states.[2]

FGC is a procedure that has been established as an abuse of human rights by the international community and several states. It has been characterized as such due to the physical harm that ensues as an after-effect, such as keloid growths, blood loss, pain, infection, complications in urinating or menstruating, and death.[3] The fatality rate of FGC is increased due to the procedure being performed in low-income societies where there is little health care.[4] Effects of the practice go beyond the scope of physical harm and verge into mental harm, causing depression and other mental health issues.[5]

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[1] Lwamwe Muzima, "Towards a Sensitive Approach to Ending Female Genital Mutilation /Cutting in Africa" (2016) 3:1 SOAS LJ 73 at 80; Shayla McGee, "Female Circumcision in Africa: Procedures, Rationales, Solutions, and the Road to Recovery" (2005) 11 Wash & Lee Race & Ethnic Anc LJ 133 at 133. I chose the term cutting rather than mutilation as I convey a message of sensitivity, even if the practice is wrong. I also use the term cutting instead of mutilation because FGM is a term used to denote "horror and disgust" which instigates the insensitivity towards communities that practice FGC. The word circumcision also does not convey the seriousness of harmful effect of the practice. The intent behind female circumcision differs from the intent behind male circumcision.

[2] Elliot Klein et al "Female Genital Mutilation: Health Consequences and Complications—A Short Literature Review" (2018) Hindawi Obstetrics and Gynecology International 1 at 3. doi: 10.1155/2018/7365715

[3] Maureen Mswela, "Female Genital Mutilation: Medico-Legal Issues" (2010) 29:4 Med & L 523 at 524.

[4] Klein et al, *supra* note 2 at 4.

[5] Theodora A Christou & Sam Fowles, "Failure to Protect Girls from Female Genital Mutilation" (2015) 79:5 J Crim L 344 at 346.

FGC involves removing the clitoral prepuce or removing the clitoris and all or part of the labia minora.[6] Infibulation has the most adverse effects due to the severity of the process involving removing the clitoris, the whole of the labia minora, and usually ends up in the removal of the medial part of the labia majora.[7] The two ends of the vulva are sewn together with silk, and a small piece of wood is inserted to maintain an opening for urine and menstrual blood.[8] These procedures reduce the quality of life of the girls it is performed on, and hence, due to the extreme nature of infibulation, surgical corrections, labeled as deinfibulation are occasionally performed to support childbirth and sexual intercourse.[9]

The unsterilized and unwashed knives used during most procedures, without the use of anesthesia coupled with the lack of any medical qualification of the circumcisers, intensifies the worry of the public and the international community.[10] Another aspect of the practice that gives rise to intense criticism is the lack of capacity to consent to the procedure.[11] FGC is mainly carried out on girls between infancy and the age of 15, below the age of capacity to act in many countries.[12]

WHO presents staggering FGC figures showing that over 200 million girls and women have undergone the procedure.[13] Projecting into the future, 3 million girls are at risk for circumcision in Africa, with 85% of them experiencing medical complications at some point in

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[6] Joseph Adesoji Oluyemi, Joseph Adijaat Adejoke & Deborah Adekeye, "Female Genital Mutilation and Girl-Child Dilemma: The Nigeria Experience" (2019) 2019:2 Rev Universitara Sociologie 10 at 11.
[7] *Ibid.*
[8] Hope Lewis, "Between Irua and Female Genital Mutilation: Feminist Human Rights Discourse and the Cultural Divide" (1995) 8 Harv Hum Rts J 1 at 5; *Ibid.*
[9] Babasola O. Okusanya et al "Deinfibulation for preventing or treating complications in women living with type III female genital mutilation: A systematic review and meta- analysis" (2017) 2017:136 Int J Gynecol Obstet 13 at 14.
[10] Mswela, *supra* note 3 at 524; Oluyemi et al *supra* note 6 at 14.
[11] "Female Genital Mutilation" (3 February 2020) online: World Health Organization https://www.who.int/news-room/fact-sheets/detail/female-genital-mutilation
[12] *Ibid.*
[13] *Ibid.*

their lives.[14] Although a higher percentage of these figures arise from developing countries in Africa, the Middle East, and Asia, this issue is not exclusive to these developing countries and has wielded attention due to people practicing it in Western countries.[15] Hence, due to it being a worldwide concern, combined with the homogenization of legal culture, international law poses solutions to eradicate FGC. These solutions revolve around criminalization and its associated normative mode of enforcement.

While many studies focus on the limitations of law (both international and domestic) and the need for education and other measures, the full breadth of the relationship between law and culture has not been explored to consider FGC. The discussions across decades about FGC related to culture have resulted in a paralysis of analysis and deadlocks between different schools of thought.[16]

The principal question this thesis seeks to answer is: how does the substance and mode of integration and implementation of international law by domestic states, particularly Ghana, sustain the continuance of FGC despite its illegality? Considering this question, I explore the limitations of criminalization and the normative mode of enforcement advanced by international law. To understand the limitations of international law, I examine the substance of international law and its criminalizing standard. I do this by investigating its history as a method advanced by Third World Approaches to International Law (TWAIL). I also argue that western frameworks do not consider the depth and nature of FGC, and therefore advance normative criminal standards that do

[14] Klein et al, *supra* note 2 at 3.
[15] McGee, *supra* note 1 at 133. Female Genital Mutilation occurs in regions in east, west and central Africa. In countries such as Kenya, Cote d'Ivoire and Ghana, where the best predictor of circumcision is ethnicity or cultural groups, there are relatively lower rates at 50%, 43% and 30%, respectively. FGC also occurs in Indonesia, Malaysia, India, Pakistan, South Yemen.
[16] Eva Brems, "Enemies or Allies - Feminism and Cultural Relativism as Dissident Voices in Human Rights Discourse" (1997) 19:1 Hum Rts Q 136 at 144.

not have a positive correlating effect. I also explore how these western criminal standards are embedded in Ghana's domestic law and do not positively correlate to curbing FGC.

Research Questions

Born of the gap between the current legal and social fabric and the ideal state of affairs are the questions:

1. How does the substance and mode of integration and implementation of international law by domestic states, particularly Ghana, sustain the continuance of FGC despite its illegality?
2. How can law attempt to change the social and cultural fabric which perpetuates FGC in northern Ghana?

Significance of the Research

I experienced the inefficient management of policies first-hand in Ghana. Distinctly not an abstract concept but reality, it stirred a plethora of questions and curiosity of issues pertinent to women's rights, which has birthed this thesis. As noted in the introduction, there are three (3), million girls, at risk for circumcision in Africa, with 85% of them experiencing medical complications at some point in their lives. The significance of this research is to constitute a foundation to prompt tailoring of the law to suit social norms and practices within communities that practice FGC to end the practice. This research also seeks to bridge the divergent theories of universalism and cultural relativism through vernacularization. Vernacularization is "the process of appropriation and local adoption of globally generated ideas and strategies."[17] I advance the

[17] Sally Engle Merry and Peggy Levitt "The Vernacularization of Women's Rights" in *Human_Rights Futures* (Cambridge: Cambridge University Press, 2017) at 213; Also, in Sally Engle Merry and Peggy Levitt "Vernacularization on the Ground: Local Uses of Global Women's Rights in Peru, China, India and the United States"

process of vernacularization as international law and culture both have positive and significant aspects that shape the day-to-day lives of persons practicing FGC.

Thesis Structure

This thesis is divided into five chapters. Chapter one is an introduction to the subject matter and research questions. Chapter one also presents a review of the literature. The first section of the literature review discusses the power culture wields to understand the basis of FGC. This section examines the need to understand the perspective of communities that practice FGC without a condemnatory lens. Based on the cultural schism that exists due to culture, the second section discusses universalism and cultural relativism. The final section of chapter one explains vernacularization as legal practices adapted to fit local practices, as this constitutes my proposed solution in Chapter five.

Chapter two provides the methods and legal tools I will use to conduct the thesis. The second section of chapter two discusses the theoretical framework I will use to support the thesis. The first theory, the deterrence theory, and theories of law and society show the limits of deterrence in curbing FGC when certain social factors arise. The second section on feminist legal theory, based on the concept of differences between societies, goes into more detail about the differences between human beings and the need to consider intersectionality. Finally, (TWAIL) is discussed as a basis to delve into the history and substance of international law in chapter three.

In Chapter three, I utilize a TWAIL approach, focusing on the history and substance of international law, which represents an imposed European legal culture opposed to cultures practicing FGC. The first section traces the European nature of international law to show how it

Global Networks 9: 4 (2009), 441 at 447. Their work, in exploring the tensions between international and national rights ideas, focuses on conundrums in the mode of appropriation, usage and dissemination of human rights.

developed from Roman antiquity. The second section shows how shared values emanated through civilization. This final section takes the reader through present-day international law and how international law gravitates towards criminalization as the unrivaled legal measure based on the foundation of European law.

Chapter four shows how due to colonization and the need to homogenize the legal culture of the world, domestic law, rather than integrating international law according to the culture of Ghana, has duplicated international and European law and legal culture.

Finally, in chapter five, I conduct a brief interpretation of the constitution to determine if vernacularization through incorporating customary norms is a workable option in eradicating FGC.

Literature Review

Female Genital Cutting and the Conundrum of Culture

Renteln insightfully points out the dissimilar nature of culture, stating: "culture is so powerful in the way it shapes individuals' perceptions that understanding the way of life in other societies depends on gaining insight into what might be called the inner cultural logic."[18] Muzima also labels this "inner cultural logic" as a "synoptic account of the inside point of view."[19] The compendium of literature on FGC may plausibly be described as the embodiment of how those of a particular culture may not understand a different community's beliefs.[20] Due to the grim nature of the custom, communities that practice FGC have been characterized as "primitive" and

[18] Renteln, Alison Dundes. "Relativism and the Search for Human Rights." (1988) 90:1 American Anthropologist 56 at 57.
[19] Muzima, *supra* note 1 at 75.
[20] Vanessa Ortiz, "Culture Shock: Expanding the Current Federal Law against Female Genital Circumcision " (2008) 3:2 FIU L Rev 423. In the title, Ortiz aptly characterizes the experience of those who are from different cultures trying to understand FGC as "culture shock"; Sussman, "Contending with Culture: An Analysis of the Female Genital Circumcision Act of 1996" (1998) 31:1 Cornell Int'l LJ 193 at 208.

"barbaric."[21] The other half of the academic debate argues, similarly to Renteln, that this condemnatory lens stems from having little to no understanding of the reasoning and motives of those who practice it.[22]

Engaging in a quest to grasp the social and cultural fabric of communities in northern Ghana is what emanates from the research by Sakeah et al.[23] The authors seek to answer what seems to be the inexplicable question of why up to 61% of women are still undergoing FGC despite its pronounced illegality.[24] In utilizing grounded theory, qualitative design data was gathered from 18 face-to-face in-depth discussions and 12 focus group discussions, including circumcised women.[25] According to the authors' findings, the entire practice circles around historical traditions, coupled with the moral high ground that girls must uphold to be good enough for men.[26] It is believed that as sex will be painful and undesirable, they will have no desire to "break their virginity."[27] Beyond that, even in marriage, it is believed that the clitoris can make a woman demand uncontrollable sexual desires the husband cannot satisfy, causing her to engage in extra-

[21] Nancy Ehrenreich & Mark Barr, "Intersex Surgery, Female Genital Cutting, and the Selective Condemnation of Cultural Practices" (2005) 40:1 Harv CR-CL L Rev 71 at 71. The practice has been presented as primitive and wildly unreasonable, despite the cultural underpinning; Muzima, *supra* note 1 at 75. Muzima argues that the world becoming a global village and the awareness of different cultures "may lead to the inevitable tendency to make ethnocentric value judgments;" See also "What's Culture Got to Do with It - Excising the Harmful Tradition of Female Circumcision " (1993) 106:8 Harv L Rev 1944 at 1944. The harmful nature of FGC is usually brought to light through a storytelling lens; hence, the average person can grasp the wounding and unfavourable characteristics of the practice.
[22] Megan Fotheringham, "Culture Clashes: Balancing Local and International Interests in Ending Female Genital Cutting Practices" (2004) 16:2 LBJ J Pub Aff 72 at 78.
[23] Evelyn, Sakeah et al, "Persistent female genital Mutilation despite its illegality: Narratives from women and men in northern Ghana." (2019) 14:4 PLos One 1 at at 1. Although 4% of women who have been circumcised live in Ghana, there is a high concentration of these numbers in the northern part of Ghana. Bawku and Pusiga are two districts with a very high prevalence of FGC, which is 61%.
[24] *Ibid.*
[25] *Ibid* at 4. Also included are traditional leaders, elders, women leaders, community volunteers, fathers, mothers, assembly men, and men and women of productive age. The value interviews from the lived experiences of these people cannot be understated. It reputes assumptions and gives out their truth, from different perspectives of men and women, old and young.
[26] What's Culture Got to Do with it? *supra* note 21 at 1 and 9; Vivian Chukwudumebi Madu, "Socio-Cultural Practices Harmful on Female Reproductive Health: A Case against Female Genital Circumcision" (2020) 100 JL Pol'y & Globalization 72 at 73.
[27] *Ibid.*

marital affairs.[28] This finding expands on Ortiz's postulation that the role of FGC is to ensure the safeguarding of virginity and is used as a metric for decency.[29] To people from Pusiga and Bawku, virginity is perceived as the symbolic gateway to the role of being a wife and mother.[30] The implied sole purpose of a girl is marriage and the servitude associated with being married.[31] Owing to the significance of the practice to these communities, rite of passage ceremonies are occasionally held to mark the important stage of transitioning to womanhood.[32]

A considerable percentage of the literature that speaks to the role of culture also notes its inextricable linkage to history.[33] To the people in northern Ghana, as many scholars assert, history is essential. During a focus group in Bawku, a man highlights the historical value of FGC, noting, "*the practice started a very long time ago*."[34] The literature demonstrates the practice stretching far back before migration into Ghana, grasping how deep the procedure runs as there were imports from Togo and Burkina Faso. Some of the participants even believe it started from Adam and Eve.[35] Similarly, when explaining the reason for the practice, a woman in Pusiga stated. *"…it was handed over to us from our forefathers so we will also hand it over to the next generation*."[36]

The findings by Sakeah et al show that even though culture is primarily referred to as a reason for FGC, this runs parallel to the refusal of the people to disengage with this cultural

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[28] *Ibid.*
[29] What's Culture Got to Do with it? *supra* note 21 at 1951-1952; Muzima, *supra* note 1 at 82; Abdulmumini A Oba, "Female Circumcision as Female Genital Mutilation: Human Rights or Cultural Imperialism" (2008) 8:3 Global Jurist [i] at 5.
[30] Camilla Yusuf & Tonatan Fessha, "Female Genital Mutilation as a Human Rights Issue: Examining the Effectiveness of the Law against Female Genital Mutilation in Tanzania" (2013) 13:2 Afr Hum Rts LJ 356 at 360; Mswela, *supra* note 3 at 528.
[31] *Ibid.* The implied sole purpose of a girl is marriage and the servitude associated with being married.
[32] *Ibid.*
[33] Fotheringham, *supra* note 22 at 74; Katie Clayton-Greene, "Female Genital Cutting: A New Way Forward" (2015) 23 Waikato L Rev 168 at 174.
[34] Sakeah et al, *supra* note 23 at 5.
[35] *Ibid.*
[36] *Ibid* at 6; Yusuf & Fessha, *supra* note 30 at 359.

practice.[37] Drawing from the people's reasoning, the stirring combination of culture and history is entrenched into a sense of identity. The practice represents a personal identity, which operates within a group identity and determines one's status.[38] Hence, culture impedes a sense of autonomy, as identity is not only a personal conviction but is solidified through a collective stamp of authenticity.[39] This is reflected in who is considered a 'woman'—their individual and collective idea is that a person does not simply become a woman but transitions into one after FGC.[40]

Consequently, the power culture wields is reinforced by the need to belong.[41] In some communities, including Pusiga and Bawku, FGC represents social acceptance and integration.[42] Sussman observes that the ability to associate oneself with other members of a particular tribe and be identified as a member of that group with a claim to its social advantages is of paramount importance to many communities. Sussman's observation reflects the social fabric of the people in northern Ghana.[43] The influence of culture on the people extends beyond the practice itself—it is socially binding.

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[37] What's Culture Got to Do with it? *supra* note 21 at 1949. Tradition has been described as "the reluctance to break with age-old practices that symbolize the shared heritage of a particular ethnic group"; Muzima, *supra* note 1 at 82. For many, their reason is "the continuation of their tradition." Ortiz, *supra* note 20 at 431. Culture is ultimately the reason cited for the continuance of the practice; See also Yusuf & Fessha, *supra* note 30 at 356.

[38] Sussman, *supra* note 20 at 209. This practice forms an identity like those of their ancestors and others in the community.

[39] Solomon Masho Atomsa & MVR Raju, "Female Genital Mutilation in Ethiopia: Health and Human Right Issue" (2014) 30 JL Pol'y & Globalization 97 at 103. There is hardly a choice, but an interviewee noted that even if there was a choice, "how can one be different from the mass?" She states that the pain from FGC is better than not being selected for marriage; Mswela *supra* note 3 at 527. The very young adolescent girls subjected to the practice are hardly "free" to make an objective decision in this regard."

[40] Sussman, *supra* note 20 at 209; Clayton-Greene *supra* note 33 at 175.

[41] Muzima, *supra* note 1 at 83. Although all roads lead to patriarchy and there is little doubt, in my opinion, that FGC is but one of the many manifestations of a system of male privilege, it still gives them a sense of belonging to them.

[42] What has culture got to do with it, *supra* note 21 at 1949-1950. In Akwa Ibom [State] and in villages in the Calabar area of Cross River State, uncircumcised women face disgrace when they quarrel with circumcised women, who outnumber them. A woman will make a particular clicking sound with her tongue during a disagreement, implying that the woman she is arguing with is uncircumcised; Muzima, *supra* note 1 at 75-77 and 82. They regard it as mandatory for reasons defined by their society and do not see themselves as "victims."

[43] What has culture got to do with it? *supra* note 21 at 1949; Yusuf & Fessha, *supra* note 30 at 359.

As there is no room for dissent in these communities, an uncircumcised girl is ridiculed by her peers.[44] The effects of not being circumcised also affect the entire family. In some communities, the father of an uncircumcised girl is not permitted to speak at community meetings, and the mother is ridiculed.[45] The social price of not being circumcised is, as Fotheringham describes, costly.[46]

Many scholars such as Atomsa, Masho, and Raju put forward the tenable argument that despite the sway it holds, culture cannot be a defense against human rights violations.[47] This is in response to the inescapable question: Is female genital circumcision crime or culture?"[48] Muzima, in agreement, notes that though it is unfair to criticize what has been entrenched as their normalcy, the legitimacy of a custom or cultural practice must be hinged on the promotion and protection of universal human rights.[49] Ultimately, in the case of culture versus human rights, human rights should irrefutably be the winning party as FGC should not be the price to pay for belonging.

Although it is a stark fact that the practice of FGC is harmful, the essence of the contentious issue of culture is how FGC is addressed. Many assertions made by the media and western literature reflect a skewed vilifying lens that has been widely labeled as "insensitive" and "imperialistic."[50] This characterization feeds into the rhetoric of most developing countries being

[44] Bettina Shell-Duncan et al, "Legislating Change: Responses to Criminalizing Female Genital Cutting in Senegal" (2013) 47:4 Law & Soc'y Rev 803 at 817. Uncircumcised girls are labelled "solema" which is "rude, ignorant, immature, uncivilized and unclean."
[45] Sussman *supra* note 20 at 211-12.
[46] Fotheringham *supra* note 22 at 79.
[47] Oba *supra* note 29 at 2; Masho Atomsa & Raju *supra* note 39 at 98.
[48] Shell-Duncan, *supra* note 44 at 805.
[49] Muzima, *supra* note 1 at 76-77 and 82-83. Also, they believe it has a positive effect, which is beauty. Shwedar warns that the West should not see their perception of beauty as universal and impose that standard. They do it as a symbol of love for their daughters and their intent is pure; What's culture got to do with it page *supra* note 21 at 1946 and 1957-1959.
[50] Oba *supra* note 29 at 26.

barbaric and uncivilized, implicitly categorizing those from these communities as "others."[51] Fotheringham describes the international community's involvement as a "double-edged sword," as it has been both a "blessing and a curse."[52]

According to Ehrenreich and Barr, this insensitive tone amounts to "reductionism" as FGC is used as a term indicative of "African" "culture."[53] It is further argued that this characterization dismisses the different meanings attached to FGC by those who practice it and assumes that African culture is nothing more than FGC.[54] Sussman argues that no matter how harmful a cultural practice is, that is not a justifiable ground to refute the validity of arguments calling for cultural sensitivity.[55]

Engle classifies legal scholars exploring the topic of FGC as "doctrinalists," criticizing their non-engagement in trying to understand the "traditionalist female."[56] Sussman similarly states that it is necessary to assess the basis of cultural arguments, and not doing so is an imperialist attempt to save these "barbaric" people from their "peculiar" ways.[57] Coleman, who typifies this concept of saving the "barbaric" people, has been criticized for asserting that FGC interferes with

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[51] Obiajulu Nnamuchi, "Harm or Benefit - Hate or Affection - Is Parental Consent to Female Genital Ritual Ever Defensible" (2013) 8:3 J Health & Biomedical L 377 at 440. Nnamuchi describes the meaningful nature of this characterization, stating, "Remaining resolute in the face of failed "we" (civilized) and "them" (primitive) sociocultural dynamics is counterproductive."; Ekaterina Yahyaoui Krivenko, "Rethinking Human Rights and Culture through Female Genital Surgeries" (2015) 37:1 Waikato L. Hum Rts Q 107 at 109; *Ibid.* Oba asserts that The West is quick to condemn practices in other cultures that it considers unacceptable; Ehrenreich & Barr, *supra* note 21 at 76; Fotheringham, *supra* note 22 at 72; Clayton-Greene *supra* note 33 at 23. This labelling of people who are different as others has been described as hegemonizing and racializing. Also, the "barbaric" imagery attached to communities that practice FGC was further exacerbated by sensationalizing media such as the CNN footage of an Egyptian girl being circumcised.

[52] Fotheringham, *supra* note 22 at 72.

[53] *Ibid* at 77.

[54] *Ibid* at 77

[55] Sussman, *supra* note 20 at 208; Muzima *supra* note 1 at 75.

[56] Karen Engle, "Female Subjects of Public International Law: Human Rights and the Exotic Other Female" (1992) 26:4 New Eng L Rev 1509 at 1515.

[57] Sussman, *supra* note 20 at 211; Fotheringham, *supra* note 22 at 78; Patricia A Broussard, "Repair versus Rejuvenation: The Condition of Vaginas as a Proxy for the Societal Status of Women" (2011) 9:2 Seattle J Soc Just 935 at 957.

the "Americanization" of immigrant girls.[58] Seemingly, ethnocentric efforts to halt FGC, which diminish the "intelligence and cultural integrity" of practicing communities, will trigger an opposition to change as these *bona fide* intentions are merged with misguided support.[59]

Explicit insensitivity has been criticized within feminist legal theory as essentialist. As the interests of white women and women of colour differ, this has caused a sharp divide between them.[60] The essentialist point of view stems from the essentialist women not understanding or even attempting to understand the struggle those from different cultures face in grappling with the cultural underpinnings of FGC.[61] Due to this dichotomy, Black and African feminists have taken a detour from the conventional path of universalism as they believe that Western women do not consider these communities' worth, culture, and socio-economic context and have concluded that FGC is a barbaric practice. Many third-world women deem the issue of FGC as one deserving sensitive attention.[62] The essentialist point of view reflects a heterosexual, white, middle-class point of view and is usually particularly insensitive.[63]

The legal, institutional design that tackles FGC has been brought to the forefront of the cultural discourse. *The Female Genital Mutilation Act* in the United States reintroduced two difficult questions in international law. (i) how can "outsiders" work to put an end to a deeply entrenched practice such as FGC? (ii) what role should law play in eradicating the practice of

[58] Oba, *supra* note 29 at 27.
[59] Sussman, *supra* note 20 at 213; Fotheringham, *supra* note 22 at 76; Nnamuchi, *supra* note 51 at 440.
[60] Emily Snyder, "Indigenous Feminist Legal Theory" (2014) 26:2 Can J Women & L 365 at 372; Lewis *supra* note 8 at 3.
[61] Sussman, *supra* note 20 at 208. Also, Beth Ann Gillia, "Female Genital Mutilation: A Form of Persecution" (1997) 27:3 NML Rev 579 at 585.
[62]Robbie D Steele, "Silencing the Deadly Ritual: Efforts to End Female Genital Mutilation" (1995) 9:1 Geo Immigr LJ 105 at 130; Beth Ann Gillia, "Female Genital Mutilation: A Form of Persecution" (1997) 27:3 NML Rev 579 at 583.
[63] Snyder, *supra* note 60 at 371.

FGC?[64] The international community has promoted legislation as an important tool for the eradication of FGC. However, the legitimacy of legislative mechanisms—both internationally and domestically—has been questioned as the practice still ensues.[65] While some believe in criminalization's deterring effects, others also argue that it can be regarded as "coercive," fruitless, and counterproductive, raising the debate of cultural relativism and universalism.[66]

Scholars considering the continuance of FGC have debated the purpose and effect of the law. Although the law can effectively eliminate a social practice, according to Mezey, it can also inadvertently work contrary to its objectives.[67] Yussuf and Fessha argue that criminalization pushes it underground when the law does not develop measures for social change.[68] Shell-Duncan, similarly to Oba, highlights the adverse effects of criminalization as fines and imprisonment of the mothers may prove futile.[69] Muzima proposes a solution to the problem identified by Shell-Duncan and Oba, suggesting that criminalization should be abandoned, as the intent of these mothers is not *mala fide*, but they are, in fact, victims.[70]

Although these scholars delve into the purpose and shortfalls of the legal system, and advance solutions, they fail to account for the full breadth of the entanglement of law and conflicting cultures.[71] The roots of law can usually be found in the culture or social fabric of the

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[64] Sussman, *supra* note 20 at 195; *The Female Genital Mutilation Act* 18 USC § 116 (1996).
[65] Isabelle R Gunning, "Arrogant Perception, World-Travelling and Multicultural Feminism: The Case of Female Genital Surgeries" (1992) 23:2 Colum Hum Rts L Rev 189 at 227-229; Yusuf & Fessha *supra* note 30 at 382. Fessha questions the legal measures put in place in Tanzania due to the continuance of the practice; Shell-Duncan, *supra* note 44 at 806; Fotheringham, *supra* note 22 at 80. In Senegal, the law has been described as a "hinderance" as it unenforceable.
[66] Shell-Duncan, *supra* note 44 at 805. The top-down fashion in which legislation is implemented is seen as coercive which stunts local attempts to end the practice.; Muzima, *supra* note 1 at 73.
[67] Naomi Mezey, "Law as Culture" (2001) 13:1 Yale JL & Human 35 at 58.
[68] Yusuf & Fessha, *supra* note 30 at 375.
[69] Oba *supra* note 29 at 37; Gunning, supra note 65 at 229 "If a government arrested parents whose young girls had been circumcised, one would suspect that the likelihood that these young girls will feel the full negative psychological impact of the surgery would be increased."; Shell-Duncan *supra* note 44 at 813.
[70] Muzima, *supra* note 1 at pp 73, 82 and 86.
[71] Mezey, *supra* note 67 at 36.

geographical area from which it emanates.[72] Likewise, the law reflects a particular way of life or culture which molds the people.[73] For example, the law can aim to promote or prevent a system based on queer culture.[74] When laws are antithetical to the norms of a social group, Shell-Duncan posits that it has limited powers.[75] This thesis argues that the prevailing legal culture is opposed to the conceptions of those in northern Ghana, rendering it ineffective.

The prevailing culture described earlier in the international community is characterized by insensitivity and reductionism. Hence, subsequently, this legal culture is translated into international law. This international legal system can be said to be mirrored in universalism, which Muzima describes as culture.[76] According to Magtogo, the law should be sensitive and give regard to cultural relativism principles and the pluralistic underpinnings of these communities.

The following section will focus on two clashing theoretical tenets, universalism, and cultural relativism, that influence legal culture and fuel the chasm between these tenets.

The Rise of Universalism and the Stagnancy of Cultural Relativism

Based on the literature, there appears to be a spectrum of antithetical ideologies that constitute justifying frameworks for implementing human rights interventions where researchers are positioned. At one end of the spectrum is the radical universalist, and at the other is the absolute cultural relativist standpoint. With the stumbling block of international legal mechanisms not fully merging fluidly into the culturally pluralistic legal systems of countries practicing FGC, and despite these extreme ideologies, this question begs to ask: Can cultural differences qualify

[72] *Ibid.*
[73] *Ibid.*
[74] *Ibid.*
[75] Shell-Duncan, *supra* note 44 at 814 and 831. In some communities, there is a deep resentment for the "criminalization of culture."
[76] Muzima, *supra* note 1 at 76.

universality, or is it an unqualified structural ideology? Conversely, can a society's cultural framework be deemed an absolute mechanism for assessing human rights abuses without considering exogenous factors? The answers to these questions are fundamental to the issue of FGC, which Harris-Short posits as a 'classic example of the conflict between universalism and cultural relativism.[77]

Many scholars have delved into possible answers for these uncompromising ideologies, which have unfortunate latent effects for people in the crosshairs of human rights abuses if misapplied. Kajit describes cultural relativism as "the notion that a practice, value, norm and law of a society should be understood and appraised by people outside of that society 'only' in that society's terms and standards."[78] Criticism revolving around cultural relativism likewise seems to suggest that the restricted bounds that hinge on terms such as only, as reflected in Kajit's definition, offer a one choice solution: Cultural relativism is the only lens or conduit through which opinions, terms, standards, or solutions relevant to FGC should emanate as the validity of human rights depends "entirely" on culture.[79] This further instigates the chasm between cultural relativists and universalists on the extreme ends of the spectrum.

[77] Sonia Harris-Short, "International Human Rights Law: Imperialist, Inept and Ineffective - Cultural Relativism and the UN Convention on the Rights of the Child" (2003) 25:1 Hum Rts Q 130 at 136.
[78] Kajit John Bagu, "Ideological Refuge v Jurisprudence of Insurgency: Cultural Relativism and Universalism in the Human Rights Discourse" (2011) 1 Warwick Student L Rev 1 at 3.
[79] Yash Ghai, "Universalism and Relativism: Human Rights as a Framework for Negotiating Interethnic Claims" (2000) 21:4 Cardozo L Rev 1095 at 1097; See also, Ortiz, *supra* note 20 at 451 "For all its positive elements, ethical relativism has a problem with allowing for a tolerance that objects to nothing, not even crimes against humanity ...." Lewis, *supra* note 8 at 17; See also, Leon Calleja, "Universalism, Relativism and the Concept of Law" (2014) 5:1 J of the Philosophy of Intl L 59 at 59. "First, the cultural relativist argues that since any conception of human rights is contingent on one's society or culture, no objective conception of universal human rights is possible."

Fueling the disapproval of cultural relativism is the prevalence of human rights abuses in nations and communities that assert the need for cultural relativism.[80] In particular, developing countries have a history and a reputation for the concentration of human rights abuses, including FGC.[81] This reputation, along with the claim by some cultural relativists that "rights violations in one culture may be viewed as morally just in another culture,"[82] lead many to believe and assert that cultural relativism is exploited as a 'smoke screen' to advance human rights abuses in these countries[83] deemed to be politically corrupt cesspools. This has caused Bagu to label cultural relativism as an "ideological refuge,"[84] as this is the reflection it exudes based on reading between the lines of the current human rights status and the non-meddling core of cultural relativism.

On the other side of the ideological table, the stance of universalists differs across the board similarly to cultural relativists, with some researchers holding milder viewpoints and others with vehemently antagonistic perspectives.[85] Otiz labels those at the far-reaching universalist end of the spectrum as "hard universalists."[86] The assertion of hard universalists stems from the belief that

[80] Bhabani Shankar Nayak, "Challenges of Cultural Relativism and the Future of Feminist Universalism" (2013) 6:2 J Politics & L 83 at 84-85 it has been observed by feminists that when claims are made in favour of cultural relativism, it is often to defend customs which oppress women."

[81] Isabel Coello, "Female Genital Mutilation: Marked by Tradition" (1999) 7:2 Cardozo J Intl & Comp L 213 at 213 Infibulation is practiced in Somaliland, Djibouti, the septentrional region of Sudan, and in parts of Ethiopia, Egypt, and Mali. Excision and circumcision are practiced in Gambia, Ghana, Nigeria, Liberia, Senegal, Sierra Leone, Guinea, Guinea-Bissau, Burkina Faso, Benin, Cote d'Ivoire, Tanzania, Togo, Uganda, Kenya, Chad, the Central African Republic, Cameroon, and Mauritania. Female Genital Circumcision is practiced outside Africa in Indonesia, Malaysia, and Yemen"; See also Jon M Van Dyke, "Promoting Accountability for Human Rights Abuses" (2005) 8 Chapman L Rev 153 at 168-173. The gross human rights abuse in Africa ranges from war crimes and crimes against humanity encompassing rape, murder, sexual slavery, conscription of children into militias in Syria Leone, Uganda, South Sudan among other countries in numbers occasionally exceeding 100,000.

[82] "What's Culture Got To Do with It?" *supra* note 21 at 1957.

[83] Lewis, *supra* note 8 at 9. This smokescreen has also been described as 'casting a shadow', 'a shabby ideological cloak', 'refuge for the suppression and abuse of human rights;' See also Harris-Short, *supra* note 77 at 132. Cultural relativism does not only ignore violations; it legitimizes them;" What's Culture Got To Do with It supra note 21 at 1957.

[84] Bagu, *supra* note 78 at 1.

[85] Ghai, *supra* note 79 at 1097.

[86] Ortiz, *supra* note 20 at 452.

the universal code is "unalterable."[87] Ultimately, these assertions, similarly to the exclusive terms such as 'only' utilized by cultural relativists, operate as a vehicle of qualification of human rights, causing an absolute exclusion of cultural relativism.

According to Leons, the unresolved nature of the debate between universalism and cultural relativism is because "neither side is willing to grant the other its central assumption."[88] This presumption aligns with the limiting terms used by advocates of both theories, which excludes any other approach that deviates from the premise being advanced.

Despite the army of scholars behind each theory and how rife each stance is with criticisms, proponents of the universalist end of the spectrum are deemed to possess a stamp of popularity where it matters most.[89] This popularity is reflected in the manifestations of universalism practically in conventions and agreements implemented worldwide. The Universal Declaration of Human Rights title grants this legitimacy to universalism through the word "universal" in the title adopted by the United Nations General Assembly.[90] Bajit, grappling with the merits and demerits of each ideology, asserts that "the universalist ideology has, however, enjoyed greater favour, and would seem a step short of an absolute cry."[91] Likewise, Sibian explains the criticism faced by the universalist standpoint, albeit prefaced by acknowledging the momentum it has gained worldwide.[92]

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[87] *Ibid*. According to Ortiz, "This belief opposes the principles of cultural relativism, which advocates that there is no universal code of morality, but instead, that each culture defines its own morals and no one else has the right to intervene." Bagu, *supra* note 78 at 2. Bagu states that these tensions/contests have grown to a point where there is a need to examine the merits of both universalism and cultural relativism, if there are any left, often found in "mutually scathing criticisms."
[88] Cajella *supra* note 79 page 60.
[89] Clayton-Greene *supra* note 33 at 181.
[90] Clayton-Greene *supra* note 33 at 181.
[91] Bagu, *supra* note 78 at 3.
[92] Christina Sibian, "Female Genital Mutilation/Circumcision: Reconciling the Ongoing Universalist/ Cultural Relativist Debate to Promote a Cross-Cultural Dialogue" (2013) 33:1 Windsor Rev Legal & Soc Issues 72 at 75 to 81.

According to cultural relativists, this popularity is deemed to exist with universalism because of the stratified nature of Western culture and politics in comparison to the outliers, which includes countries with ardent cultural relativists. Nonetheless, culture, which has been established as the plausible originator of FGC, is hoisted with a broad inference that universalists are 'Westerners' and relativists are from developing countries when universalism and cultural relativism are discussed, evident through the nomenclature of these ideologies.[93] In speaking to the nature of these ideologies, Ghai describes culture as a linkage and intertwining of history, language, religion, values, cuisine, and the way people generally live.[94] This indicates the 'universality of culture; it is not idiosyncratic but applies to all communities and countries, including Western countries. In this vein, Ghai also states, "the current debate is essentially between states advancing different views of culture for reasons only tangentially connected with culture."[95] Ghai's postulation throws out the notion that culture is typical of only developing countries and implicitly puts forward the tenable angle that universalism is based on Western culture.

Hence, in other words, there are two standpoints—individually launched on the back of culture—though the one with the stamp of popularity is granted the universal title. The other cultural standpoint is sidelined and excluded due to countries executing it having less bargaining power. Ultimately, the assertion by hard universalists is that culture cannot be a determining factor in establishing international human rights law. However, this is a contradictory assertion by Ghai's

[93] Ghai, *supra* note 79 at 1097.
[94] Ghai, *supra* note 79 at 1100.
[95] *Ibid*. Patricia Liola Tona Katto, "A Critical Comparative Law Analysis on Challenging Anti-Homosexual Legislation in Uganda" (2018) 7:1 UCL J of L & Jurisprudence 82 at 83. "In many cases, the legal rules that are promoted by international organisations merely universalise the social norms of Western countries, as comparative law tends to take a Western bias."

postulation as universalism advances culture, albeit predominantly the culture of the West, which is imposed as the standard for the eradication of FGC.

Hence, criticism has been launched because of this Western culture in which Bagu states: "To extend this particular ideology to the rest of the world is thus logically faulty at best and maliciously imperial at worst."[96] Critics of the UDHR also state, "Ascribing a 'legal face' to what is primarily a particular culture and further declaring it universal, they contend, is logically dubious, ideologically imperialistic and positively subversive of the nature of law…."[97] By the same token, Bagu's assertion rests on the opinion that universalism "merely reflects a particular ethnocentric perspective, and, in this case, the Euro-American perspective," which reflects values foreign to non-Western cultures.[98] These assertions of ethnocentrism embed the West in the scope of culture and depict an actualization of cultural superiority, possibly bolstered by the political power wielded by the West.

Globalization, which is not only present in free-market principles but evident in the scope of human rights,[99] is inferred by scholars as the catalyst for the need to homogenize the legal culture of states.[100] This globalization is viewed as the factor causing domination and adoption of Western culture, as Western countries leverage the power they possess to cause a shift in the legal culture of 'weaker' states. Katto notes this shift in legal systems due to globalization, stating, "the

[96] Bagu, *supra* note 78 at 4.
[97] Nayak, *supra* note 54 at 86, Nayak emphasizes how this reflects the values of a "select few."
[98] *Ibid.* Bagu, *supra* note 78 at 6. There is an assertion that although Western culture is imposed through universalism, Western culture also condones practices which contradict universal values; Lewis, *supra* note 8 at 19.
[99] Alex Y Seita, "Globalization and the Convergence of Values" (1997) 30:2 Cornell Intl U 429 at 429 and 438. The development of the United Nations, the IMF, the World Bank, and the GATT were significant moments in globalization.
[100] James D Wilets, "Unified Theory of International Law, the State, and the Individual: Transnational Legal Harmonization in the Context of Economic and Legal Globalization" (2010) 31:3 U Pa J Int'l L 753-755. Wilets coins the term 'Transnational Legal Harmonization' to describe this process of non-state actors wielding power in the emanation of legal norms that are globalized.

pressures towards a convergence of legal culture brought on by globalization have seen an encouragement in the movement of legal regimes."[101]

Globalization is a concept with various definitions that signify how systems and ideas cut across international arenas.[102] However, McCorquodale and Fairbrother regard globalization as a rather contradictory concept, as described by this definition by Robertson: "we may best consider contemporary globalization in its most general sense as a form of institutionalization of the two-fold process involving the universalization of particularism and the particularization of universalism."[103] Kinley concurs with this particularism being globalized, stating that what is universalized now began as a local concept.[104] Merry asserts that anthropologists have steered clear of human rights movements because "human rights are historically an artifact of Western cultural traditions raised to the status of global normativity."[105] Mazrui goes to the extent of positing homogenization, as well as hegemonization as a consequence of globalization.[106] This concept of universalizing particularism is evident in universalists' assertion that fundamental human rights must apply across all borders and cultures to have significant influence and effect.[107] The concept of rights universalists have, is immediately deemed to carry peremptory weight, which means that this particularism 'must' be applied universally. Cultural relativists claim that

[101] Katto, *supra* note 95 at 82.
[102] Mojisola Eseyin, "Women's Rights' Protection: Globalization or Localization" (2011) 2:1 Intl J of Advanced Leg Studies & Governance 126 at. 128.
[103] Robert McCorquodale & Richard Fairbrother, "Globalization and Human Rights" (1999) 21:3 Hum Rts Q 735 at 736.
[104] David Kinley, "Human Rights, Globalization and the Rule of Law: Friends, Foes or Family" (2002) 7:2 UCLA J Int'l L & Foreign Aff 239 at 243.
[105] Sally Engle Merry, "Legal Vernacularization and Ka Ho'okolokolonui Kanaka Maoli, The People's International Tribunal, Hawai'i 1993" (1996) 19:1 Polar 67 at 67.
[106] *Ibid*. Merry asserts, "As anthropologists, must we abandon cultural relativism and embrace the Western imperialism masquerading as universalism inherent in human rights discourse?"; Ali Mazrui "Pretender to Universalism: Western Culture in a Globalising Age" (2001) Global Dialogue; Nicosia 3:1 at 13."
[107] Lewis, *supra* note 8 at 19.

globalization, formed through these rights ideas, is a "mere reflection of the actors' flow of thought and activities."[108]—these actors being Western countries.

In this regard, it is commonplace for developing countries to embody Western rights ideas by molding their legal system to fit the Western framework.[109] As delved into by scholars, the reason for this can be encapsulated in the term 'bargaining power.' In answering this question, Benda Beckmann speaks of how financial support is granted based on the acceptance of conditions, usually the 'acceptance and implementation of human rights.[110] Universal rights become universal through being assimilated in countries without bargaining power. Wilets confirms this method of transnational legal harmonization occurring through the release of aid or trade benefits only if certain conditions are agreed to by states without bargaining power, which include human rights conditions.[111]

Fotheringham observes that legislators have admitted that the FGC law was passed for the sole purpose of pacifying Western demands and also because of the United States offering foreign aid on the condition that anti-FGC policies are put in place.[112] Economic institutions such as the International Monetary Fund insisting on these conditions are heavily influenced by the West as their actions are controlled by their shareholders and chief members, including the USA government and citizens.[113] The World Bank's conditionality practice often goes beyond

[108] Mojisola, *supra* note 77 at 128.
[109] Seita, *supra* note 99 at 465.
[110] Bagu *supra* note 78 at 6. Also, rights have often been used as a political tool to gain Western approval, meaning countries seeking to further their economic standing with the West often change their laws surrounding human rights; Mary C Tsai, "Globalization and Conditionality: Two Sides of the Sovereignty Coin" (2000) 31:4 Law & Pol'y Int'l Bus 1317 at 1312.
[111] Wilets. *supra* note 100 at 800.
[112] Fotheringham, *supra* note 22 at 77.
[113] Devran Unlu, "Is Conditionality for Loans from International Financial Institutions a Legitimate Way to Influence National Policies" (2013) 6:2 Ankara B Rev 187 at 191; McCorquodale & Fairbrother, supra note 103 at 752. It cannot be denied that these conditions which are meant to be *bona fide* usually do not have a positive impact. An example is major donor states halting investments in Malawi in 1992 until President Banda sorted out the gross human rights

macroeconomic corrections prescribed by the IMF as its lending has evolved to include and require detailed reforms affecting the public administration of states, which affects governance issues. [114] Restrictions are then placed on the credit of states that do not comply with these requirements. Credit is only released upon the performance of criteria outlined in the credit agreement."[115]

This reasserts the position by cultural relativists and scholars that the West controls the shift of the legal culture of developing countries. According to Risse and Sikkink, this assimilation is not an abrupt process but occurs in stages and involves coercion and persuasion.[116] There is the concession that even though economic globalization and these '*bona fide*' contingencies create order by advancing human rights and the rule of law, the opposite can be bred instead.[117]

Consequently, though it is asserted that globalization "is a table where values converge,"[118] not everyone at the table has the same bargaining power, rendering the "negotiations meaningless,"[119] and this gives rise to globalization ripening into universalism. This partially explains the arc of human rights turning towards universalism as opposed to cultural relativism.[120] This shift materializes the worry cultural relativists expressed that the human rights system

occurring in the country; See also, Seita, *supra* note 99 at 464. Although these efforts can be attributable to "self interest," they have also been due to the empathy that the industrialized democracies have had for other countries;" Tsai, *supra* note 110 at 1321.

[114] *Ibid.*

[115] *Ibid.*

[116] Johanna Kalb, "Human Rights Proxy Wars" (2017) 13:1 Stanford J of Civ Rights & Civ Liberties 53 at 58.

[117] McCorquodale & Richard Fairbrother, *supra* note 103 at 763.

[118] Eseyin, *supra* note 102 at 128.

[119] Tsai, *supra* note 110 at 1321 at 1327. Economic coercion and cannot be characterized as voluntary.

[120] Kinley, *supra* note 104 at 253; Clayton-Greene *supra* note 33 at. In this regard, Clayton-Greene advances the notion of intentional suppression and willful ignorance. Lewis, *supra* note 8 at 18; Nayak, *supra* note 54 at 86 and 184. Nayak asserts that cultural differences are intentionally buried by advancing universalism only. She further cautions that "any attempt to talk about all women in terms of something we have in common undermines attempts to talk about the differences amongst us." Kinley, *supra* note 104 at 251. Civil and political rights are believed to be "first generation" rights. Cultural rights are however considered to be "second generation" rights. McCorquodale & Fairbrother *supra* note 103 at 765. Transnational corporations have a minimal interest in the social and cultural welfare or the human rights of people in developing states.

cultivated by the United Nations would be used as a tool to force Western cultural values on societies.[121]

However, setting extremities and disparate collisions aside, there are moderate cultural relativists and universalists found in varying degrees in the middle of this universalism and cultural relativism spectrum, which I refer to as middle-grounders. Nayak, quoting Coomaraswami puts forward the question, "how can human rights be authorized in radically different societies without succumbing either to homogenizing universalism or the paralysis of cultural relativism?"[122] which appears to be the question middle-grounders seek to answer by finding some balance.

Ultimately, these middle grounders attempt to bridge these clashing theoretical tenets on the premise of an actual working theory.[123] "However, it should be noted that not all cultural relativists reject outright the entire concept of human rights; rather, many cultural relativists reject specific human rights claims or the specific context and interpretation of a rights claim."[124] They believe that "all people share some common morals," as advanced by soft universalists.[125] A recognized cultural relativist view is that, as a foundation, "some human rights standards are universal and must be respected by all."[126] However, middle grounders go beyond this foundation and insist on the inclusion of cultural relativism to some extent.[127] Donnelly argues that "it may

[121] Lewis, *supra* note 8 at 17.
[122] Nayak, *supra* note 54 at 83.
[123] Bagu, *supra* note 78 at 1-2. Considerations of middle grounders "often highlight the possibility of a middle path that neither qualifies as universalism nor relativism as conceived and advocated in many of the ensuing contestations." Furthermore, "the contests have grown to a point where there is a need to incisively examine the merits, if any, which may be left with these ideologies, often in mutually scathing criticisms." Nayak, *supra* note 54 at 84.
[124] *Ibid.*
[125] Ortiz, *supra* note 20 at 452.
[126] Ghai, *supra* note 79 at 1098.
[127] Nayak, *supra* note 54 at 87.

be necessary to allow limited cultural variations in the form and interpretation of particular human rights, but we must insist on their fundamental moral universality."[128]

In the literature, discussions about these theories and discourses are eminently hinged on either the aberrant and gruesome nature of FGC, the dichotomy between ideological facets in international spheres, or how a middle ground should be reached.[129] "Admittedly, difficulties abound in determining where the lines of universality should be drawn."[130]

As some middle grounders describe cultural relativism as "tolerance for difference,"[131] the next section extends the responsibility of tolerating difference from an international responsibility to state responsibility through the concept of vernacularization.

Vernacularization at the Crossroad of Pluralism?

Owing to legal pluralism, people live at the crossroads of their cultural group, national values, and global standards. Hence, the viewpoint of many incorporates local and global values.[132] In this regard, many layers of law operate on each level—international, national, and customary law, which "exist in parallel regimes."[133] Legal systems incorporating international law are automatically pluralistic because they "contain and interact with a multitude of coexisting, competing and overlapping legal systems at many levels."[134]

According to Clayton-Greene, and the discussion on the homogenization of legal culture in the previous section, cultural values from international law are imposed.[135] As a corollary, the

[128] *Ibid.*
[129] Bagu, *supra* note 78 at 10.
[130] *Ibid.*
[131] Merry, *supra* note 80 at 67.
[132] Muzima, *supra* note 1 at 75. Nayak, *supra* note 54 at 84.
[133] Sally Engle Merry, "McGill Convocation Address: Legal Pluralism in Practice" (2013) 59:1 McGill L J 1 at 2.
[134] Brian Z Tamanaha, "Understanding Legal Pluralism: Past to Present, Local to Global" (2008) 30:3 Sydney L Rev 375 at 389.
[135] Clayton-Greene, *supra* note 33 at 181.

enactment of legislation explicitly outlawing FGC has been described by Fotheringham as a consequence of external pressure.[136] Consequently, Merry observes the "fragmented," "inconsistent," and "contradictory" nature of different layers of international, national, and customary laws.[137] This imposition of international cultural values further heightens the tension caused by legal pluralism.[138] This reinforces Gunning's argument that "at this stage of a multicultural evolution of shared values, national laws are likely to be ineffective."[139]

In discussing the power that law commands, Mezey submits that the law is coercive and can "order and reorder" meanings.[140] Other scholars, such as Shell-Duncan and Mswela posit that, through this power that law commands, its intended purpose is to "catalyze social change" as it can influence thinking.[141] However, Ehrlich and supporters of his theory direct attention to the limitations of the power of the law in influencing social change, asserting that societal norms and customs are so pervasive that they can be more influential than the law. Hence, the law cannot exist in isolation from societal norms and customs.[142] Gunnings lends credence to this theory by highlighting the unsuccessful use of domestic law to eradicate FGC to show that externally imposed laws may cause problems in reducing the occurrence of the practice.[143] This speaks to the importance of the different layers of international and state laws sticking close to the people's

[136] Fotheringham, *supra* note 22 at 77 and 82; Muzima, *supra* note 1 at 90. Commentators in Ghana and Senegal have argued that criminalization will just run it underground. Following the zero-tolerance policy adopted by the international community, 24 countries in Africa have prohibited FGC by law.
[137] Merry, *supra* note 133 at 2.
[138] Merry, *supra* note 105 at 2; Katto supra note 95 at 89.
[139] Gunning *supra* note 65 at 194.
[140] Mezey *supra* note 67 at 45.
[141] Shell-Duncan, *supra* note 44 at 812. Many issues abound pertaining to the enforcement of the law. In some cases, police officers did not know the law and "victims" were often reluctant to testify against their own family members; bribes, in some instances, were purportedly given to leaders to assure freedom from prosecution; Mswela, *supra* note 11 at 534.
[142] Katto, *supra* note at 95 at 89.
[143] Gunning *supra* note 65 at 227.

norms at the local level, rather than straying far from them, losing their power to cause social change and influence collective thinking.

Although these significant hurdles exist in the impact of the law in local spaces, critics of the western, imperialistic, and imposing nature of human rights still emphasize the irrefutable need for human rights.[144] This need for human rights, coupled with its western legal culture that is opposed to the people's powerful norms and customs, gives rise to a significant drawback. These forced imposed values should be balanced with ensuring that the law against FGC is interpreted in "cultural terms" as advocated for by Mezey.[145]

For proponents of vernacularization such as Merry and Levitt, legal practices can be adapted to fit local practices rather than implementing international law, which is considered remote.[146] The term "vernacular" emanates from the Roman term "native to a place."[147] Merry and Levitt describe vernacularization as "the process of appropriation and local adoption of globally generated ideas and strategies."[148] The need to "interpret law in cultural terms"[149] which has been advocated for by Mezey, can be described as synonymous to vernacularization as both terms describe the process whereby ideas, norms, and practices that are originated at a global level are expressed to local contexts in a way that resonates with local perspectives.[150]

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[144] Sally Engle Merry, "Transnational Human Rights and Local Activism: Mapping the Middle" (2006) 2 World Bank Legal Rev 185 at 186; Tom Ginsburg, "Lawrence M. Friedman's Comparative Law, with Notes on Japan" (2010) 5:2 J Comp L 92 at 99.
[145] Mezey, *supra* note 67 at 36.
[146] Merry, *supra* note 105 at 2.
[147] Harold McDougall, "Humans, Hierarchy, and Human Rights" (2017) 74:3 Nat'l Law Guild Rev 129 at 140.
[148] Sally Engle Merry and Peggy Levitt "The Vernacularization of Women's Rights" *supra* note 17 at 213; Engle & Levitt "Vernacularization on the Ground: Local Uses of Global Women's Rights in Peru, China, India and the United States" *supra* note 17 at 447. Their work, in exploring the tensions between international and national rights ideas, focuses on conundrums in the mode of appropriation, usage and dissemination of human rights.
[149] Mezey, *supra* note 67 at 36.
[150] Mezey, *supra* note 67 at 45; George J Andreopoulos, "Challenges and Opportunities in Advancing Human Protection: Rethinking the Global-Local Nexus" (2010) 29:2 Crim Just Ethics 142 at 143.

Rights are fundamentally between the state and its citizens.[151] Flowing from this duty, international law prescribes obligations that bind States. This includes the obligation to protect, which "requires States to protect individuals and groups against human rights abuses."[152] Due to its immense importance, the state's duty in protecting citizens from human rights abuses arises in different forms in international law, ranging from state responsibility to the responsibility to protect.[153]

Culture is undoubtedly a contentious topic, and hence, a practice flowing from culture is difficult for the formulaic confines of law to navigate. This is further intensified by the chasm between cultural relativism and universalism, of which universalism has the upper hand. Unfortunately, if this chasm is not resolved and is reflected in law, the issue of FGC will continue to be a Gordian knot, mitigated by slipshod legal responses. However, the total eradication of FGC will be an unattainable ambition. Although rights are fundamentally between states and their citizens, [154] the research does not encompass the full scope of vernacularization. That is, focusing on the state's capacity to be actors in ensuring that human rights approaches and laws move across the cultural gap between international law and the communities that practice FGC. This research seeks to answer how this culture and norm of the west and its integration in Ghana contribute to the continuance of FGC due to the diametrically opposed nature of these social and legal cultures.

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[151] Ghai, *supra* note 79 at 1101.

[152] United Nations, "The Foundation of International Human Rights Law" online: United Nations <https://www.un.org/en/about-us/udhr/foundation-of-international-human-rights-law>

[153] Melinda Negron-Gonzalez & Michael Contarino, "Local Norms Matter: Understanding National Responses to the Responsibility to Protect" (2014) 20:2 Global Governance 255; Tomasz A Lewandowski, "Responsibility to Protect. Balancing National Interests and International Obligations through Multilateralism" (2017) 3:1 ICJ 93 at 93. The Responsibility to Protect adopted by the UN General Assembly in 2005, requires States to prevent human rights violation within their borders, focusing on atrocity crimes such as genocide, war crimes, ethnic cleansing, and crimes against humanity; Rebecca J Cook, "State Responsibility for Violations of Women's Human Rights " (1994) 7 Harv Hum Rts J 125 at pp 127-137, Cook focuses on the responsibility of states for breaches of international obligations pertinent to women, legal protection exists in theory, but enforcement of these are weak.

[154] Ghai, *supra* note 79 at 101.

Chapter two focuses on the contextual framework for this thesis. I outline which sources I will use to conduct the research and to unearth the cultural conflicts present in the law, which subsequently affects FGC. I also outline the theoretical frameworks that support the theory of this research, which are (i) Deterrence Theory and theories of law and society (ii) Feminist legal theory (iii) TWAIL.

CHAPTER 2

Methodology and Theoretical Framework

Regarding the conceptual framework and research methodology employed, this thesis, flowing from the nature of the research, primarily utilizes a bidirectional doctrinal methodology to evaluate the substance and limitations of both international law and domestic law in Ghana. International law considered authoritative by virtue of Article 38 of the *Statute of the International Court of Justice* will be reviewed in this thesis.[155] Sources include international treaties and conventions, customary international law, and general legal principles.[156] Domestic law relevant to this thesis is the Constitution of Ghana as the Supreme Law of the Land, the *Criminal Offences Act 1960*, and case law.[157] A documentary analysis through secondary sources will be completed to explain the relevance, application, and limitations of the laws pertaining to FGC.

As this research is substantially based on socio-legal and doctrinal analysis, a feminist legal theory and TWAIL lens will be adopted to understand and explain the genealogy and developments regarding FGC and international law and juxtapose these with socio-economic developments which run parallel to FGC while exacerbating its persistence.

The following sections of this chapter focus on the theoretical frameworks that support the theory of this thesis. The limitations of deterrence theory in curbing FGC, which rests on the assumption that the advanced punishment will deter people from committing the crime, is explained. The limitations of the deterrence theory are applied to posit FGC as a non-normative crime, questioning the efficacy of the current substance and mode of enforcement of the domestic

[155] Statute of the International Court of Justice, 26 June 1945, Can. T.S. 1945 No. 7 (entered into force 24 October 1945), art. 38.
[156] *Ibid.*
[157] *The Constitution of the Republic of Ghana,* 1992. (Ghana)

laws against FGC. The feminist theory, and particularly intersectionality, is also explained. Finally, TWAIL is presented to show the limitations of international law in chapter three.

The Deterrence Theory & Theories of Law and Society

Deterrence is built on the belief of persons balancing the benefit-costs before the execution of a crime. Hence, the rationale is that if the cost or punitive measure outweighs the benefit by a distant stretch, people are deterred from committing the crime and risking severe punishment.[158] The reasoning behind the criminalization and the normative mode of enforcement of a perpetrator of FGC is argued to be deterrence. This benefit-cost theory of the rational actor relies on the approach that severity of punishment influences behavior if potential offenders weigh the consequences of their actions and conclude that the risk of punishment is too severe.[159]

However, normative criminalization and the traditional mode of enforcement, which takes place through prosecution resulting in incarceration, cannot be solely relied on to eradicate the FGC. There appears to be only a tenuous link between peoples' compliance and the risk associated with law-breaking behaviour.[160] Additionally, evidence from developing countries mainly indicates that domestic legislative interventions executed in a 'top-down fashion' seeking to change certain cultural norms rarely work,[161] and these solutions are not materially deterring the practice of FGC.

Webb puts forth a thought-provoking statement regarding how investigations have been focused on "if in fact deviance is inversely related to the celerity, certainty, or severity of

[158] Kevin C Kennedy, "A Critical Appraisal of Criminal Deterrence Theory" (1983) 88:1 Penn St L Rev 1 at 2.
[159] *Ibid.*
[160] Tom R Tyler & John M Darley, "Building a Law-Abiding Society: Taking Public Views about Morality and the Legitimacy of Legal Authorities into Account When Formulating Substantive Law" (2000) 28:3 Hofstra L Rev 707 at 713.
[161] Cristina Bicchieri "Tools for Change" *Norms in the Wild: How to Diagnose, Measure, and Change Social Norms* (Oxford: Oxford University Press, 2017) at 3.

punishment."[162] He postulates that whether a person contravenes the law depends on three elements: (i) whether the person has internalized the law as a norm, (ii) whether the person is merely respecting the fact that it is the law, and (iii) if the person has different criminal standards which they obey.[163] Furthermore, Stuntz's notion of internalization complements Webb's postulation, "the mass of the population avoids seriously bad behavior not because they know it can be found in the codes, but because they know the behavior is thought to be seriously bad."[164] Empirical evidence suggests that people who practice FGC in northern Ghana have conflicting internalized standards to the law against it. They believe FGC to be an acceptable practice, embedded in the responsibility of grooming their daughters for adulthood and marriage.[165] This shows that, contrary to the government prescribing legislation against the practice, the people of northern Ghana have not internalized FGC to be horrible behaviour, warranting criminal punitive measures. Hence, criminalization and the fear of incarceration may be known, but since this norm against FGC has not been internalized, there is a high probability of those in northern Ghana being persistent with their practice, as they believe it is a good practice.

The relevant internal motivation to not commit a crime, which is the feeling of responsibility to act appropriately, is achieved through two channels according to Tyler and Darley: (i) the belief that the law is morally appropriate, and; (ii) the belief that the rules are legitimate.[166] Juxtaposing these internal factors with the reasoning behind FGC reveals that these factors are not reflective of the people of northern Ghana—as they deem the law to be the

[162] Stephen D Webb, "Deterrence theory: A Reconceptualization" (1980) 22:1 Can J Corr 23 at 25.
[163] *Ibid.*
[164] W.J. Stuntz, "Self-Defeating Crimes" (2000), Virginia L Rev, 86:8 1871 at 1871.
[165] Yusuf & Fessha, *supra* note 30 at 360; Mswela, *supra* note 3 at 528.
[166] Tyler & Darley, *supra* note 160 at 713.

culmination of a misconstrued ideology, particularly a Western ideology.[167] The fear of criminal sanctions imposed does not stimulate a law-abiding society. A law-abiding society desires to act in ethical, socially suitable ways, and this is what the people of northern Ghana believe they are doing by curbing promiscuity.[168] The second factor of rules being legitimate is automatically negated, as to them, this law will promote promiscuous behaviour.[169]

As asserted by proponents of the limitations of the deterrence method, the traditional deterrence method manifested through criminalization that employs a narrow form of enforcement, not legitimate to perpetrators, results in the unfortunate result of limited effectiveness in eradicating FGC. According to Webb, this traditional deterrence method "has not been and needs to be sensitive to the different pressures to break the law and how these different pressures or norms must be deterred in different ways."[170] Webb's postulation indicates that one method of preventing crime would not deter all crime, especially when the offense is a social norm and is not deemed to be a crime by the perpetrators.

In light of norms being differentially deterrable, the terms "gentle nudges" and "harsh shoves"[171] are brought into play by Kahan to draw a picture depicting the fact that when laws impose harsh penalties against an accepted norm, the probability of the police enforcing the norm, or prosecutors charging will be low.[172] This is evident in Ghana, where the number of prosecutions related to FGC are very few, which reinforces the social norms the State seeks to prevent. A similar

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[167] Aisha Nicole Davis (25 January 2012) "Female Genital Circumcision : The Pressures of Culture, International Attention, and Domestic Law on the Role of African Women" online (blog: Columbia Law School Gender and Sexuality Law Blog)<http://blogs.law.columbia.edu/gslonline/files/2012/01/Davis-Female-Genital-Circumcision.pdf>
[168] Sakeah et al, *supra* note 23 at 9.
[169] *Ibid.*
[170] Webb, *supra* note 162 at 25.
[171] Dan M Kahan, "Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem" (2000) 67:3 U Chicago L Rev 607 at 607-608.
[172] *Ibid.*

ideology is accepted by academics who believe that radical approaches such as long sentences, which strongly depart from preferred customs, are self-defeating. They do nothing to reduce the incidence substantially and lose credibility.[173] If the law is to have any value at all, it needs to "stick close to the norms."[174] Stuntz, speaking on the immense wielding power of social norms which breed practices such as FGC, notes that "if the law strays too far from the norms, the public will not respect the law, and hence will not stigmatize those who violate it,"[175] losing an essential principle of the criminal justice system, which is deterrence.[176] Even so, normative criminalization is deemed to stray far from the norm of FGC as those who practice it consider it to be ethical and normal.

Drawing from the postulation by Stuntz, since they deem the law to be far from their norm because it opposes it, normative criminalization winds up being a futile means of eradicating FGC, as people in that community will not chastise each other for doing the right thing.[177] Societal pressures are exerted via influential peers to convince a girl to undergo the practice; they exert this pressure by portraying the girl as a shunned outcast.[178] This stems from the immense wielding power social norms hold—people's actions can be said to be in conformance with their perceptions of the thoughts of others.[179] In this regard, Sunstein defends laws that attempt to change social norms because where the change of behavior is the objective of the law, social and legal norms must interact.[180]

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[173] *Ibid;* See also Gani Aldashev, Imane Chaara, Jean-Philippe Platteau and Zaki Wahhaj "Using the law to change the custom" (2012) 9:7 J Development Economics 182 at 192; Bicchieri *supra* note 161 at 4.
[174] Stuntz, *supra* note 164 at 1872.
[175] *Ibid.*
[176] *Ibid.*
[177] *Ibid.*
[178] Sakeah et al, *supra* note 23 at 8.
[179] *Ibid.*
[180] Cass R Sunstein, "On the Expressive Function of Law" (1996) 144:5 U Pa L Rev 2021 at 2025 and 2027.

The relationship between law and the differences between people in society is also highlighted by the feminist legal theory, which I discuss in the next section. These differences exist between men and women. Feminist groups have also unfolded the differences between women based on race and culture, as discussed in the next section.

Feminist Legal Theory

The Essence of the Feminist Legal Theory

At a conference at the Harvard Law School in 1978, the first recorded use of the term "feminist jurisprudence" [181] was noted. Ann Scales intended to question the "completeness of a jurisprudence that is not responsive to specifically female concerns."[182] Since then, the general aim of feminist legal theory has been focused on critiquing existing patriarchal jurisprudence and exposing the male bias in the existing legal system and has done so vis-à-vis labour law and human rights.[183] According to Lawson, "feminist legal theory is the study of the relationship between women and the law."[184] The essence of the feminist legal theory is captured aptly by MDA Freeman, who describes it as "to analyze the contribution of law in constructing, maintaining, reinforcing and perpetuating patriarchy, and it looks at ways in which this patriarchy can be undermined and ultimately eliminated."[185]

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[181] Patricia A. Cain "Feminist Jurisprudence: Grounding the Theories" (1989) 4:2 Berkeley Journal of Gender, Law & Justice 193.
[182] *Ibid.*
[183] Katharine T Bartlett, "Feminist Legal Scholarship: A History through the Lens of the California Law Review" (2012) 100:2 Cal L Rev 381 at 384.
[184] Gary Lawson, "What Is Feminist Legal Theory: Panel I--Feminist Legal Theories" (1995) 18:2 Harv J L & Pub Pol'y 325 at 327. Martha Albertson Fineman, "Feminist Legal Theory" (2005) 13:1 Am U J Gender Soc Pol'y & L 13 at 14. "It presents a theory of gender and challenges the assertions and assumptions of gender-neutrality and objectivity in received disciplinary knowledge."
[185]Rob McLaughlin, "Feminism, Culture and Law: Female Genital Mutilation as a Resolvable Legislative Issue" (1997) 19:2 UQLJ 248.

The focal point of this theory is women, as it is a legal theory formed by people whose primary political identification is feminist.[186] Being a feminist, according to Bartlett, "is a political choice about one's positions on a variety of contestable social issues," of which FGC is a case in point.[187] Feminist jurisprudence aims to reconstruct legal practices that have disregarded, undervalued, or undermined women's concerns.[188] As the law has not accorded the issue of FGC the level of attention it requires to be eradicated, feminist theories, including the feminist legal theory, continue to be the most cited theories supporting the eradication of FGC.

The tactical angle of the feminist legal theory developed by women to focus on women stems from the normalcy of a male point of view in law which contributes to entrenching power relations in society.[189] Menkel-Meadow explains the reason for the male-dominated substance of the law as "in the beginning, law was male."[190] Law, in the past, explicitly facilitated women's exclusion from society.[191] The exclusion of women in the making of the law caused it to be predisposed to male tendencies.[192] Men, in the making of the law, positioned it to suit their priorities and concerns.[193] Feminist legal theory aims to "expose biases, and inequality reflected in this male-created law.[194] Evidently the furthest statement from a hyperbole, women were barred from practicing law in 1873 by the Supreme Court of the United States of America.[195] Justice Bradley was in full support, stating, "the natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life."[196] Justice Bradley's

[186] Angela P Harris, "What Ever Happened to Feminist Legal Theory" (2011) 9:2 Issues Legal Scholarship [i] at 4.
[187] Bartlett, *supra* note 183 at 833.
[188] Deborah L Rhode, "Feminist Critical Theories" (1990) 42:3 Stan L Rev 617 at 619.
[189] Nicola Lacey, "Feminist Legal Theory" (1989) 9:3 Oxford J Legal Stud 383 at 385.
[190] Carrie Menkel-Meadow, "Mainstreaming Feminist Legal Theory" (1992) 23:4 Pac L J 1493 at 1493.
[191] Martha L A Fineman, "Feminist Theory and Law" (1995) 18:2 Harv J L & Pub Pol'y 349 at 350.
[192] Lacey, *supra* note 189 at 389.
[193] *Ibid.*
[194] *Ibid* at 386.
[195] Christine A Littleton, "Equality and Feminist Legal Theory" (1987) 48:4 U Pitt L Rev 1043 at 1044.
[196] *Ibid.*

sentiments bear a noticeable similitude to the rationale behind FGC—the marriageability of a woman is the sole determinant of her purpose and status.[197] If both the law and people who practice FGC have a deep-seated patriarchal backdrop—albeit it may not be explicitly stated—FGC eradication is a distant achievement. To cut through the web of patriarchy formed across law and society over decades, feminist theories offer a lens to identify and dismantle patriarchal systems.

Patriarchy is the epochal focus of the feminist theory. Patriarchy, which feminists argue to be dominant in law and many other spheres, is a powerful system the feminist movement uses to describe the roots of marginalization. This revolving conduit of abuse of reproductive, political, and economic rights has been attributed as a leading factor in the causation of FGC, as it is performed to make a woman marriage worthy.[198] Though FGC has been argued to be instigated by patriarchy, it is sustained by laws that do not have the capacity to produce the desired effect of eradication—this is what the feminist legal theory seeks to modify.[199]

As patriarchal notions are uncovered, there has been a realization of the fallacy that law is an "uncontested body of posited rules and principles" and a "perfect science."[200] Conventional law is now expressed alongside feminist dissenting views.[201] However, these dissenting views are expressed as peripheral to actual law.[202] In many instances, feminist perspectives in conventional law are acknowledged with merely a footnote.[203] Feminist theories thus aim to criticize parts of the law unfavourable to women and exacerbating FGC by veering away from orthodox law, as

[197] McGee *supra* note 1 at 142.
[198] Mame Kani Diop "A Black African Feminist Theory To Examine Female Genital Circumcision (FGC) Within African Immigrant Families In The United States" (Paper delivered at the Theory Construction and Research Methodology Workshop (TCRM) National Council on Family Relations Orlando, Florida Fall 2017 at 12.
[199] Lynne Henderson, "Law's Patriarchy" (1991) 25:2 Law & Soc'y Rev 411 at 412.
[200] Ngaire Naffine, "Assimilating Feminist Jurisprudence" (1993) 11:1 Law Context: A Socio-Legal J 78 at 78.
[201] *Ibid.*
[202] *Ibid.*
[203] Naffine, *supra* note 200 at 79.

"the master's tools will never dismantle the master's house."[204] Social and legal structures cannot be extensively reformed by working with the tools that facilitate that patriarchal system.[205] Feminist theories are tools to dismantle legal structures and social structures such as FGC that oppress women.

Patriarchy is apparent in both law and society, which causes a need to analyze patriarchy in the entanglement of how law and culture affect each other from a feminist perspective. Legal theory feminists such as MacKinnon are attentive towards the need to improve the social position of women.[206] Feminist legal theory shines a light on how the law affects society as "unjust social conditions are bred by the existing legal ideology and rules."[207] Snyder expands on this postulation, stating, "law is a part of every day in terms of how it shapes experiences, knowledges, and perceptions of subjects. While law can be enabling, particularly for legal subjects whose social locations are privileged and normalized, it can also be extremely constraining, especially for people who are already marginalized."[208] Girls on whom FGC is performed are marginalized, and the law can be highly constraining instead of enabling for these girls.

The prevalent debate in early feminism was the sameness/difference debate.[209] The vexed question was: are men and women the same? This question originated from the exclusionary basis of law to women hinged on differences.[210] Based on this exclusion, early feminists geared all their energies towards showing that women and men were the same and should be treated the same

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[204] Kathryn M Stanchi, "Feminist Legal Writing" (2002) 39:2 San Diego L Rev 387 at 387; Audre Lorde, *The Master's Tools Will Never Dismantle the Master's House, in THIS BRIDGE CALLED MY BACK: WRITINGS BY RADICAL WOMEN OF COLOR*, 2nd ed (Albany: Kitchen Table: Women of Color Press, 1983) at 98, 99.
[205] Stanchi, *supra* note 204 at 387.
[206] Lacey, *supra* note at 189 at 392.
[207] Rhode, *supra* note 188 at 619.
[208] Snyder, *supra* note 60 at 370.
[209] Jenny Morgan, "Feminist Theory as Legal Theory" (1988) 16:4 Melb U L Rev 743 at 743. Martha L A Fineman, "Feminist Theory and Law" (1995) 18:2 Harv J L & Pub Pol'y 349 at 349.
[210] Fineman, "Feminist Theory and Law" *supra* note 191 at 349.

way.[211] This argument in favour of sameness ceased to gain momentum when it came to the issue of pregnancy. Should women be treated like men even when pregnant?[212] Based on the sameness argument, the answer will be a yes as formal equality implies "sameness of treatment regardless of one's background and falls short of creating solutions to societal issues peculiar to women."[213]

As urgently required, the differences between men and women, biologically and socially, necessitated the law addressing the unique position of women.[214] For example, there was a need for the law to legitimize sex-specific rules based on the biological difference between women and pregnancy.[215] In favour of the theory of difference, Menkel-Meadow notes that "law must be responsive to the specificity of women's particular needs."[216] Historically, women have not been accounted for when it comes to the law.[217] For example, rape was defined in male terms.[218] The redefinition of the law concerning crimes included the reconceptualization of consent in rape defense.[219] In the same way, the law must be responsive to the specificity of women's needs with regard to the issue of FGC as a deeply rooted cultural phenomenon and not a normative crime.

Within the male/female difference also exists a subcategory of difference. Women are also different from women as factors such as race, class, and sexuality cause a further categorization within the broader categorization of women. The next section addresses how these differences have been highlighted within the feminist legal theory to show a need to take an intersectional approach in eradicating FGC.

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[211] Fineman, "Feminist Legal Theory" *supra* note 184 at 15.
[212] Fineman, "Feminist Theory and Law" *supra* note 191 at 353.
[213] Fineman, "Feminist Theory and Law" *supra* note 191 at 354.
[214] Fineman, "Feminist Legal Theory" *supra* note 184 at 17.
[215] Fineman, "Feminist Theory and Law" *supra* note 191 at 354.
[216] Menkel-Meadow, *supra* note 190 at 1517.
[217] *Ibid* at 1519.
[218] *Ibid.*
[219] Menkel-Meadow, *supra* note 190 at 1534.

Addressing Differences: Essentialism and Intersectionality

Feminist theories, in light of the differences between women, have subsequently proliferated into many "sister groups,"[220] as Price calls them, or "ruptures" as Menkel-Meadow labels them.[221] These proliferations have developed a rich range of theories that seek to wipe out "methods of social control whereby half the human race has been sacrificed to the interests of the other half."[222] Angela Harris, for instance, breaks away from and criticizes the off-kilter element of the feminist legal theory, which she labels essentialism.[223] Essentialism does not consider that all women are not the same; claims about women tend to assume they are all white, non-disabled, not immigrants, economically privileged, educated, and heterosexual—this is the essential women's experience.[224] In her book, Women, Race and Class, Davis notes, "not all women are white, and not all women enjoyed the comfort of the middle-class life" as essentialism focuses on problems exclusive to this category of women.[225]

Along with many other feminist women of colour, Kline and Thornhill acknowledge the overt racism reflected in conventional feminism.[226] Expanding on Thornhill's perspective, Kline considers the "diversity of women's experiences of oppression."[227] According to her, there should be an analysis of the different perspectives based on class and other characteristics that differentiate women, such as ethnic traditions.[228] This consideration emanates from the criticism that

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[220] Lisa Price, Feminist Frameworks**:** Building Theory on Violence Against Women (Nova Scotia: Fernwood Publishing, 2005) at 8.
[221] *Ibid* at 8; Menkel-Meadow, *supra* note 190 at 1501-1502.
[222] Littleton, *supra* note 195 at 1044; Fineman, "Feminist Legal Theory" *supra* note 184 at 13. These proliferations differ in their approach and objectives.
[223] Angela P Harris, "Race and Essentialism in Feminist Legal Theory" (1990) 42:3 Stan L Rev 581 at 585.
[224] *Ibid*; Devon W Carbado & Cheryl I Harris, "Intersectionality at 30: Mapping the Margins of Anti-Essentialism, Intersectionality, and Dominance Theory" (2019) 132:8 Harv L Rev 2193 at 2199.
[225] Susanne Hochreiter, "Race, Class, Gender - Intersectionality Troubles" (2014) 4:2 J Res Gender Stud 401 at 402; Marlee Kline, "Race, Racism, and Feminist Legal Theory" (1989) 12 Harv Women's LJ 115 at 129.
[226] *Ibid* at 117; Esmeralda Thornhill, "Focus on Black Women" (1985) 1:1 Can J Women & L 153 at 153-155.
[227] *Ibid* at 117.
[228] *Ibid* at 118.

MacKinnon's work did not sufficiently include black and indigenous perspectives. Instead, she categorized an essentialist experience as the women's experience.[229]

Along with intersectionality kicked off by Kimberly Crenshaw, essentialism has been characterized as the "most significant challenge" to feminism.[230] Intersectionality, which is anti-essentialism, reflects a transdisciplinary theory to capture how multiple complex interconnected, overlapping dimensions of social identities intertwine and exacerbate inequalities.[231] Women who have undergone FGC are the epitome of this intersectionality. Most significantly, a woman who has fled her home country due to the practice stands at the crossroads of many identities: culture, immigrant status, race, ethnicity, and gender.[232] Intersectionality also recognizes and traces all these compounded and simultaneous inequalities that "get lost in traditional categorical analysis."[233] These identities individually carry a burden that the essentialist woman may not experience, explaining the essence of Harris's postulation—there is a need to regard difference.

Anti-discrimination laws, according to Crenshaw, create "exclusionary frames" and operate on a "single-axis" analysis excluding other important identities of discrimination.[234] This takes the form of focusing on how being a woman is the reason why a person goes through FGC

[229] *Ibid* at 134.
[230] Snyder, *supra* note 60 at 369; Kimberle Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics" [1989] 1989 U Chi Legal F 139 at 140.
[231] Sirma Bilge "Recent Feminist Outlooks on Intersectionality" (2010) 57:1 Diogenes 58 at 58; Jonathan Ow, "Getting Emotional at the InterSections of Intersectionality, A Review of Intersectionality: Traumatic Impressions, by Emily Grabham" (2015) 3:1 Birkbeck L Rev 157 at 159; Hochreiter, *supra* note 225 at 401. Intersectional International Human Rights" (2004) 5:3 Geo J Gender & L 857 at 858; Bartlett, *supra* note 183 at 834.
[232] Annemarie Middelburg & Alina Balta, "Female Genital Circumcision /Circumcision as a Ground for Asylum in Europe" (2016) 28:3 Int'l J Refugee L 416 at 449.
[233] Ow, *supra* note 231 at 157-158; Kline, *supra* note 225 at 121; Fiona Argenta, "Towards Contextual Intersectionality: An Analysis of the Common European Asylum System" (2020) 23 Trinity CL Rev 284 at 284.
[234] Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics" *supra* note 230 at 140; *Ibid* at 286.

without acknowledging how this combines with ethnicity to cause a girl to be mutilated.[235] According to Crenshaw, this single-axis perception of identities used in legal doctrine, feminist and anti-racist theories and practices have their limits and do not encompass the totality of experiences of many women.[236] Single-axis analyses such as these ignore the "synergistic and convergence effect that the interaction of two or more axes of power may have."[237] Bond observes that "critical race feminism has taught us about the danger of relying on a unified, monolithic description of women's experience, and it is time now to extend those lessons into the arena of international women's human rights."[238] Intersectionality offers a different way of reading and understanding multiple identities coalescing to cause inequality. [239]

Bond highlights an occurrence that included intersectionality based on ethnicity.[240] In 1988, Chinese women were raped in Indonesia by the Indonesian ethnic majority, where the Chinese women were the ethnic minority.[241] Due to them being the minority, they received death threats coupled with the trauma of rape.[242] The international community, however, did not address this issue as an intersectional one. As noted by Bond, they failed to recognize this situation as a result of both racism and sexism."[243] Agreeing with the intersectional gap that exists, the United Nations High Commissioner for Human Rights noted that "the United Nations intergovernmental

[235] Kline, *supra* note 225 at123; "[H]ow do they combine with and/or cut across one another? How does racism divide gender identity and experience? How is gender experienced through racism? How is class shaped by gender and' race?"' There are varying dissenting voices."
[236] Robert S Chang & Jerome McCristal Culp Jr, "After Intersectionality" (2002) 71:2 UMKC L Rev 485 at 485; Menkel-Meadow, *supra* note 190 at 1511; Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics" *supra* note 230 at 140.
[237] Argenta, *supra* note 233 at 286; Hadar Dancig-Rosenberg & Noa Yosef, "Crime Victimhood and Intersectionality" (2019) 47:1 Fordham Urb LJ 85 at 89.
[238] Intersectional International Human Rights" (2004) 5:3 Geo J Gender & L 857 at 858.
[239] Dancig-Rosenberg & Yosef, *supra* note 238 at 403.
[240] "Intersectional International Human Rights," *supra* note 239 at 858.
[241] *Ibid.*
[242] *Ibid.*
[243] *Ibid.*

organizations and non-governmental organizations have too often addressed racial and gender discrimination as two separate problems, leaving women faced by multiple forms of discrimination unsure where to turn to redress."[244]

Like Indigenous feminist legal theory, black feminist legal theory should take into account feminist legal theory that "generates an intersectional, multi-juridical, anti-colonial, anti-essentialist reading of the law that is crucial to a multitude of fields."[245] In Indigenous legal theory, gender-neutral approaches usually depend on the "universal male subject."[246] These approaches are deemed to apply to everyone.[247] As the sameness/difference debate ensued, men were the infallible "standard of analysis.[248] Littleton questions the source of women being determined as the different gender, away from the normalcy. In response to this, she states, "men are just as different from women as women are from men."[249]

As FGC is caught in the centre of ethnicity, race, and gender, these sister group lenses help answer how we can cater to the cultural practice of FGC as there is a need for a "holistic and culturally relevant approach"[250] that could bring a nuanced understanding of FGC and cause international and domestic change beneficial to those going through it.[251] Ow questioned whether unique identities are represented in the law, which then begs the question: Are the unique identities of those practicing FGC adequately represented in the law?[252] This thesis is situated within the

[244] *Ibid.*
[245] Snyder, *supra* note 60 at 365.
[246] *Ibid* at 366.
[247] *Ibid.*
[248] Rhode, *supra* note 188 at 618.
[249] Littleton, *supra* note 195 at 1048.
[250] Diop, *supra* note 198 at 4.
[251] Diop, *supra* note 198 at 4.
[252] Ow, *supra* note 231 at 157.

feminist legal scholarly movement for these reasons. There exists in international human rights, missed opportunities for an intersectional approach,[253] including with FGC.

It is a stark fact that the practice of FGC is harmful and needs to be eradicated. However, legal measures need to consider ethnicity, race, gender, and other factors peculiar to individuals and groups. In light of these differences, particularly race and ethnicity, in the next section, I discuss TWAIL, a theory that concentrates on the point of view of people from developing countries. TWAIL, considering the background of inhabitants of developing countries—primarily Black, Indigenous, and other people of color—reacts to international law's western and imperialistic nature, which does not consider race, ethnicity, and culture.

Third World Approaches to International Law (TWAIL)

TWAIL is a reactive intellectual movement in the sense that it responds to international law as an imperial project, as it stems from "European thought, history, culture and experience."[254] History is put forward as a significant problem in international law, and as noted by TWAIL, legal systems cannot be acknowledged as distinct from the history responsible for the inception of these systems.[255] From the 1997 TWAIL Vision Statement vision, TWAIL has been cognizant of and has revolved around the need to assess history.[256] TWAILs Vision Statement is as follows: "We understand the historical scope and agenda of the dominant voice of international law scholarship

[253] Intersectional International Human Rights," *supra* note 239 at 861.
[254] Makau Mutua, "What is TWAIL" [2000] 94 American Society of Intl L Proceedings 31 at 34.
[255] Seth Gordon, "Indigenous Rights in Modern International Law from a Critical Third World Perspective" (2007) 31:2 Am Indian L Rev 401 at 414; Mosope Fagbongbe "The Future of Women's Rights from a TWAIL Perspective" (2008) 10:4 *International Community Law Review* 401 at 402. Mosope highlights the "common history third world countries share through colonialism/imperialism with "consequence of remaining marginalised/ oppressed within the international (economic) order."
[256] Karin Mickelson, "Taking Stock of TWAIL Histories" (2008) 10:4 Int'l Comm L Rev 355 at 357; James Thuo Gathii, "TWAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography" (2011) 3:1 Trade L & Dev 26 at 26.

as having participated in, and legitimated global processes of marginalization and domination that impact the lives and struggles of third world peoples."[257]

According to Okafor, this history of colonial subordination and the imposition of European power on the world is taken very seriously by TWAIL.[258] This is because the history of international law was molded to suit its primary beneficiaries.[259] Hence, TWAIL does not evade tackling colonialism and the complexity that comes with it.[260] Instead, TWAIL creates avenues to thoroughly engage in discussions concerning colonial systems to overcome this historical legacy.[261] To TWAIL, colonial history should not be treated as a dead letter, as its effects are still ongoing.[262]

As a historical analytical theory, this thesis utilizes TWAIL as a tool to attempt to grasp the history of international law from the perspective of third-world states, particularly concerning FGC.[263] TWAIL is a group concerned about those in the third world, coupled with the keen interest to show how international law has affected the third world. This thesis analyzes how the history of international law has impacted its efficacy to curb FGC effectively. Gathii notes that some issues in third world countries "can best be understood by re-examining the relationship between international law and colonialism."[264] In the same way, Ramina notes that the validity of legal

[257] *Ibid* at 357.
[258] Obiora Chinedu Okafor, "Newness, Imperialism, and International Legal Reform in Our Time: A Twail Perspective" (2005) 43:1 & 2 Osgoode Hall LJ 171 at 178; George R B Galindo, "Splitting TWAIL" (2016) 33:3 Windsor YB Access Just 37 at 42. Galindo also highlights the need for the analysis of the history of international law.
[259] Vasuki Nesiab, "Decolonial CIL: TWAIL, Feminism, and an Insurgent Jurisprudence" (2018) 112 AJIL Unbound 313 at 315.
[260] James Gathii, Obiora Okafor & Antony Anghie, "Africa and Twail" (2010) 18 Afr YB Int'l L 9 at 11.
[261] Gathii, Okafor & Anghie, *supra* note 261 at 11.
[262] Gathii, "TWAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography" *supra* note 256 at 30.
[263] Fagbongbe, *supra* note 256 at 401.
[264] Gathii, "TWAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography" *supra* note 256 at 31.

doctrines that affect the third world can be re-examined through the history of these doctrines, which this thesis seeks to do in its focus on FGC.[265] Although international law is not the only system responsible for enabling certain practices in the third world, TWAIL draws attention to how international law is a part of the problem, and in this thesis, how international law has failed to curb FGC effectively.[266]

TWAIL shows how the colonial system was a result of Eurocentric rules of international law. TWAILs aim extends beyond the past and looks at the present. TWAIL demonstrates these Eurocentric systems are still ongoing in the post-colonial period.[267] Gathii notes that "whereas Nkrumah may have spoken in the language of neo-colonialism, TWAILERs speak in the language of colonial continuities and discontinuities."[268] TWAIL seeks to dismantle existing hierarchical power structures because "equality or equity cannot be attained under existing ideological and institutional structures."[269] Shetty has emphasized that the post in postcolonial does not signify an end to colonization, but rather the "continuation of colonialism in the consciousness of formerly colonized peoples, and in institutions imposed in the process of colonization."[270] In light of this, this thesis traces what has occurred in the history of international law. It also outlines how there is a continuation of colonialism through legal systems.

Additionally, TWAIL is also forward-looking as it "signifies the emergence of distinctive ways of engaging with what international law is or should be" and providing a new way of

[265] Larissa Ramina, "Framing the Concept of TWAIL: Third World Approaches to International Law" (2018) 32:1 Rev Just Direito 5 at 5.
[266] Usha Natarajan et al, "Third World Approaches to International Law Review: A Journal for a Community" (2020) 1:1 TWAIL Rev 7 at 7-8.
[267] Gathii, Okafor & Anghie, *supra* note 261 at 11.
[268] *Ibid.*
[269] Rhode, *supra* note 188 at 619.
[270] Vikrant Dayanand Shetty, "Why TWAIL Must Not Fail: Origins and Applications of Third World Approaches to International Law" (2012) 3:2 King's Student L Rev 68 at 71.

understanding and practicing international law.[271] Makau, in envisaging solutions and new ways of practicing international law, states, "the human rights movement must be moored in the cultures of all peoples."[272] Sibian postulates that "the eradication of FGC as a cultural practice is much more complicated than simply formulating discriminatory laws that may not reach into such clandestine settings" [273] This statement legitimizes the claims of TWAIL, as it signifies a need to reframe human rights to reach such clandestine settings.[274] TWAIL provides an alternative to conventional international law.[275] This thesis proposes vernacularization as an alternative to conventional international law to address the issue of FGC. As TWAIL is against the western venture that international criminal law is and criticizes western assumptions as a yardstick to evaluate legal mechanisms, vernacularization offers a system that merges international law and moores it in the culture of the people.[276]

TWAIL scholarship is against the "universalization of specific cultures under the guise of promoting global order, peace, and security."[277] Criticism that erupts against instruments such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) are often geared at how they are "insensitive to the nuanced and culture-specific perspectives that they target."[278] Although human rights have been established by international mechanisms as universal, there are limits to how far these universal rights can go when addressing issues such as FGC, as these universal rights do not recognize the cultural basis of the practice, but simply deem the

[271] Appiagei-Attua, Kwadwo, "Ethical Dimensions of Third-World Approaches to International Law (TWAIL): A Critical Review" (2015) 8 Africa Journal of Legal Studies 209 at 209.
[272] Makau Mutua, "Savages, Victims, and Saviors: The Metaphor of Human Rights" (2001) 42:1 Harv Int'l L J 201 at 208.
[273] Sibian *supra* note 92 at 80
[274] Sibian *supra* note 92 at 80
[275] Fagbongbe, *supra* note 256 at 401.
[276] James Thuo Gathii, "Africa and the Radical Origins of the Right to Development" (2020) 1:1 TWAIL Rev 28 at 37. John Reynolds & Sujith Xavier, "The Dark Corners of the World" (2016) 14:4 J Int'l Crim Just 959 at 962.
[277] Makau, "What is TWAIL?" *supra* note 255 at 36.
[278] Sibian *supra* note 92 at 77.

practice as a crime.[279] Instruments such as the Universal Declaration of Human Rights,[280] have also been criticized for not implementing a "holistic approach and has been conceived by some critics as a form of cultural imperialism."[281] Legal scholars have attributed the "disregard by reformists of local legal reality" [282] as the reason for the failure of the law to curb practices such as FGC. To an extent, TWAIL advocates for cultural relativism as it calls for sensitivity, inclusion, and "tolerance for difference."[283] To them, universalism represents the first world.[284] According to Mutua, Western liberalism has been masked as universalism—essentially false universalism produced by Western colonial powers from their historical context.[285]

In the pursuit of dismantling ineffective structures, TWAIL refuses to "treat as sacred any norm, process, or institution of either domestic or international law if they birth, legitimize, and maintain harmful hierarchies and injustice."[286] This means that if the domestic law of Ghana for instance, is fostering harmful hierarchies and remnants of an imperialist regime, TWAIL can be used as a tool for reform in that regard as well.

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[279] *Ibid* at 78.
[280] Universal Declaration of Human Rights, 10 December 1948, UNGA Res 217A (III), art 15.
[281] Sibian *supra* note 92 at 75.
[282] Gani Aldashev, Jean-Philippe Platteau and Zaki Wahhaj "Legal reform in the presence of a living custom: An economic approach" (2011) Proceedings of the National Academy of Sciences of the United States of America, December 27, 2011, Vol. 108, Supplement 4: Dynamics of Social, Political, and Economic Institutions, pp. 21320-21325.
[283] Sally Engle Merry, "Human Rights Law and the Demonization of Culture (and Anthropology along the Way)" (2003) 26:1 PoLAR; Gathii, "TWAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography," *supra* note 256 at 56.
[284] Feminism & Leg Theory Conversation: Comparative & Intl L, May 11 & 12, 2001, Cornell L School (Ithaca: Cornell University., 2001) at 24.
[285] Makau Wa Mutua, "Politics and Human Rights: An Essential Symbiosis" in Michael Byers (ed.), *The Role of Law in International Politics* (Oxford: Oxford University Press, 2000) 149. Ratna Kapur, "Gender, Sovereignty and the Rise of Sexual Security Regime in International Law and Postcolonial India" (2013) 14:2 Melb J Int'l L 317 at 323. Michael Fakhri, "Questioning TWAIL's Agenda" (2012) 14:1 Or Rev Int'l L 1 at 11. H Patrick Wells, "A Leap of Faith: TWAIL Meets Caribbean Queer Rights Jurisprudence - InterSections with International Human Rights Law" (2020) 43:1 Dalhousie LJ 397 at 407.
[286] Makau, "What is TWAIL?" *supra* note 255 at 38.

Political Movements at an Intersection: Feminism and TWAIL

As two critical theories that focus on marginalization, pseudo-equality, and respect and justice,[287] there is a striking similitude between feminist theories and TWAIL. [288] Law, and international law more specifically, was formed when women and third world nations were systematically prevented from partaking in the law.[289] Both TWAIL and feminist legal theorists argue that the substance of law would have been developed differently if feminists and third-world people contributed to it.[290] This is particularly important for the laws against FGC as it affects women from third-world counties. The valuable contribution of feminists and persons from third world countries would have made a mark on the law—a female and third world mark.[291]

In international law, there are the mainstays—white, able-bodied, middle-class, Christian, heterosexual—while there are the others which in this context is third world people of colour. Specifically, women of colour who are at the crossroads of TWAIL and feminist theories. Minow, observes this and states, "the legal treatment contains "an assumed point of comparison: women are compared to the unstated norm of men, minority races to whites, handicapped persons to the able-bodied, and minority religions to majorities."[292] Laws are therefore shaped for the needs of these mainstay groups. Feminists observe how the law's intended beneficiaries are male, and similarly, TWAIL analyzes how the intended beneficiaries of international law are white.[293]

[287] Menkel-Meadow, *supra* note 190 at 1497.
[288] Okafor, "Newness, Imperialism, and International Legal Reform in Our Time: A Twail Perspective," *supra* note 259 at 176. Some women who stand at the intersection of feminism and TWAIL are Celestine Nyamu, Sylvia Tamale, and Nesiah.
[289] Fineman, "Feminist Theory and Law" *supra* note 191 at 350.
[290] Linda L Berger, Bridget J Crawford & Kathryn M Stanchi, "Using Feminist Theory to Advance Equal Justice under Law" (2017) 17:3 Nev LJ 539 at 545.
[291] Margaret Davies, "Feminist Judgments" [2012] 2012 Jotwell: J Things We Like [160] at 160.
[292] Hadar Dancig-Rosenberg & Noa Yosef, "Crime Victimhood and Intersectionality" (2019) 47:1 Fordham Urb LJ 85 at 92.
[293] Snyder, *supra* note 60 at 369.

However, feminists and TWAIL move beyond identifying and challenge the aspects of the existing legal system that exclude or disadvantage women and those from the third world.[294]

It has also been argued that the law's proclivity to classify all people under one category stems from the white woman's influence on the law.[295] White women have been engaging with state law since the first wave of feminism and are still the "centre of legal advocacy."[296] Although white women were marginalized within patriarchy, they played a vital role in the enslavement of African women.[297] As a result, there is still a need for feminist legal theorists to "examine how they were a part of, and involved in colonization."[298] Flowing from this postulation, there is also a need to understand the interrelation between race, gender, and colonialism in theorizing.[299] This analysis falls at the intersection of TWAIL and feminist legal theory.

As an influential group, there is a tendency for white people from western countries to reflect their perspectives as the singular universal voice due to the power they wield.[300] Therefore, law purports to speak for all with a universal positivistic language but fails to include the perspectives of the third world and women.[301] A universal language is usually opposed because it excludes many voices, and cannot be labeled as universal.[302] Feminism and third-world issues cannot be neatly tucked and unified under a singular universal perspective.[303] Assuming all persons from third-world countries are a monolith causes the west to overlook the complexities that exist,

[294] Bartlett, *supra* note 183 at 831.
[295] Ow, *supra* note 231 at 157.
[296] Snyder, *supra* note 60 at 373.
[297] *Ibid* at 372.
[298] *Ibid* at 373.
[299] *Ibid* at 376.
[300] Kline, *supra* note 225 at 116.
[301] Naffine, *supra* note 200 at 78.
[302] Margaret Thornton, "Postscript: Feminist Legal Theory in the 21st Century" (2020) 9:3 Laws 1 at 1.
[303] Lacey, *supra* note 189 at 384-385.

which is essentialist.[304] According to Bond, universalism "thrives of generalizations" and has "become an easy way to dismiss charges of cultural imperialism."[305]

Similar to the feminist legal theory, TWAIL's logic is revealed through the lived history of people from third-world countries, as these lived histories cannot be ignored.[306] An analysis of the history of international law must include the lens of those who experienced colonialism, imperialism, and subjugation by Western states.[307] The voices that were omitted from conventional world history must be accounted for. [308] As intersectionality goes beyond gender, there must be an analysis of the lived experiences of women from third world countries, focusing on how different forms of oppression have coalesced to affect their day to day lives.[309]

Both TWAIL and feminist theories have evolved into methodologies.[310] Arising from understanding the lived experiences of women is the feminist or woman question: what does this law or opinion mean for the woman? [311] This includes all women everywhere, and in the context of this thesis, the third-world woman.[312] This method of questioning has subsequently become a methodology and a primary process of critique.[313] According to Bartlett, when a question is asked frequently, it evolves into a methodology.[314] Methods "organizes the apprehension of truth; it

[304] Snyder, *supra* note 60 at 382; Feminism & Leg Theory Conversation: Comparative & Intl L, May 11 & 12, 2001, Cornell L School (Ithaca: Cornell University., 2001) at 24; Ow, *supra* note 231 at 157.
[305] Intersectional International Human Rights" (2004) 5:3 Geo J Gender & L 857 at 860.
[306] Ramina, *supra* note 266 at 14.
[307] Pae Keun Park, "Korea and TWAIL: Does She Fit into the Picture" (2013) 1:1 Korean J Int'l & Comp L 49 at 52.
[308] *Ibid.*
[309] Snyder, *supra* note 60 at 371. Lori Watson, "Toward a Feminist Theory of Justice: Political liberalism and Feminist Method" (2010) 46:1 Tulsa L Rev 35 at 35.
[310] Obiora Chinedu Okafor, "Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both" (2008) 10:4 Int'l Comm L Rev 371 at 377-379. Berger, Crawford & Stanchi, *supra* note 290 at 542; Bartlett, *supra* note 183 at 837.
[311] Bartlett, *supra* note 183 at 837.
[312] Berger, Crawford & Stanchi, *supra* note 290 at 544; Menkel-Meadow, *supra* note 290 at 1501.
[313] Berger, Crawford & Stanchi, *supra* note 290 at 542; Bartlett, *supra* note 183 at 837.
[314] Bartlett, *supra* note 183 at 837.

determines what counts as evidence and defines what is taken as verification."[315] The woman question asks about the gender implications of a social practice or rule. What difference would it make to do so? "Asking the woman question involves examining how the law fails to take into account the experiences and values that seem more typical of women than of men, for whatever reason, or how existing legal standards and concepts might disadvantage women."[316]

Similarly, TWAIL has been described by Okafor as a methodology.[317] Okafor compares the meaning of methodology in the Oxford dictionary to the TWAILs approaches to arrive at this conclusion.[318] Methodology as a "science of method" or a "body of methods used in an activity" juxtaposed with the activity of international legal analysis by TWAIL qualifies it as a methodology, similarly to the feminist legal theory.[319] This international legal analysis is compromised of the methodological determination of TWAIL to analyze the history of international law, characterize the continuities that still exist from this historical analysis, and re-construct the image of international law that has dominated for centuries.[320]

These theoretical frameworks show how different societies require tailoring of the law to suit their social needs. The theoretical frameworks exist as a basis to (i) analyze the history of international law in chapter three (ii) To work towards an intersectional framework to solve FGC in chapter five. In the next section, I use TWAIL's historical methodology to demonstrate how the development of international law was Eurocentric and how international law, based on this

[315] *Ibid* at 830.
[316] *Ibid* at 837.
[317] Okafor, "Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both" *supra* note 310 at 377-379.
[318] *Ibid* at 376.
[319] *Ibid* at 377.
[320] *Ibid.*

development, gravitates towards a specific international standard which is opposed to the culture of communities practicing FGC, as described in chapter one.

CHAPTER 3

International Law: The Seeping of European Legal Culture

As it is today, international law cannot be separated from its history as its present-day system is, to a high extent, a continuation of its core values. Watertight principles, such as *pacta sunt servanda* that emanated from legal customs and agreements centuries ago, are still in force. Hence the historical conditions surrounding these agreements are relevant.[321] These historical surroundings create an avenue to reconcile present international happenings to their source. The relevance of the history of international law is intensified by the claim that its roots are predisposed to ethnocentric tendencies.[322] Hence, the history of international law cannot be taken at face value but must be explored to understand this criticism and the indignation that emanates. Face value in this scenario is the entrenched narrow point of view which reflects a beneficial European and Western history of international law without exploring the imposition of European legal culture and its effects.[323] This point of view does not account for varying perspectives of the Global South.[324] This gives rise to the significant need to assess international law and its history through

[321] A. Arthur Schiller, Texts & Commentary for the Study of Roman L: Mechanisms of Development (New York: Columbia University School of Law., 1936) at 171. *Pacta sunt servanada* is Latin for agreements must be kept. This system of honouring contractual agreements was expressed in many ways by the Romans and also the Greeks. The Greeks and Romans reinforced this concept by verbally asking the party "Do you solemnly promise", and the response was "I solemnly promise."

[322] Outi Korhonen, "The Role of History in International Law" [2000] 94 Am Soc'y Int'l L Proc 45 at 45. R P Anand, "Attitude of the Asian-African States toward Certain Problems of International Law" (1966) 15:1 Int'l & Comp LQ 55 at 56.

[323] The term "the West" or "Western" in this thesis does not imply that these nations are a monolith. Also, European nations were also violent against one another. Brett Bowden, "The Colonial Origins of International Law - European Expansion and the Classical Standard of Civilization" (2005) 7:1 J Hist Int'l L 1 at 3. However, they began to coalesce in the seventeenth and eighteenth century, having similar core values.

[324] 11 J. Hist. INT'l L. 357 (2009) 358 at 358. 25 COLUM. J. Transnat'l L. 755 (1987) at 758-759. Anand puts forward the tenable angle that some authors do not address non-Western perspectives of the history of international law because international law, and its universal nature does not envisage such a thing as non-Western perspectives of international law. Anand further notes that "The influence of the Asian practices of inter-state conduct on the early development of European international law by classical jurists has been lost in the pages of political history written in the colonial period or ignored because of later political developments when all the Asian states lost their international personality, identity, and political influence." Onuma Yasuaki, "When Was the Law of International Society Born - An Inquiry of the History of International Law from an Intercivilizational Perspective" (2000) 2:1 J

a different lens—a non-Eurocentric lens. This chapter gives expression to lost perspectives such as the obscured angle of colonialism and imperialism, which underscores the culture of international law and its status quo.[325] The idealistic projection of international law is the universalized product of a myriad of past societies, causing the law not to be distinctly antithetical to the culture of one society over another. However, this chapter traces the development of European law as international law and explores how European international law and legal culture, which is opposed to the culture of Ghanaians, was both imposed and seeped into the culture of Ghana. The Ghanaian culture here enables FGC.[326]

Reflecting on these historical accounts, this chapter illustrates how some of these occurrences are still present today, and most importantly, how it causes the values of international law to be incompatible with the values of the Global South, and in this study, Ghana. This European legal culture that permeates international law causes it to be inadequate to curb FGC.

The Influence of Roman Antiquity

Geographically, the model system of international law, which developed exponentially in the 19th – 20th century, materialized almost entirely in Europe.[327] Almost without exception, the nascent stages of international law embody the Greek and Roman civilizations of antiquity. Other European states adopted the Roman legal system fused inextricably with canon law. The Romans

Hist Int'l L 1 at 6. There is a need to investigate the thousands of cultures that existed prior to the domination of the West. There are over a billion Muslims, over 800 million Hindus, and many other cultures and religions that do not subscribe to the normative Eurocentric way. Their perspectives cannot be lost in Eurocentric ways.

[325] Upendra Baxi, "New Approaches to the History of International Law" (2006) 19:2 LJIL 555 at 557-558. 25 COLUM. J. Transnat'l L. 755 (1987). It is argued that the Western frame approach of international law, this problem has created a situation where this issue can only be rectified by analyzing it in terms of Western culture. Hence, even though I am looking at international law through a different angle, there is a high likelihood that my methods may constitute Western methods because of the structure of the system.

[326] Philip Allott, "International Law and the Idea of History" (1999) 1:1 J Hist Int'l L 1 at 1.

[327] Gustavo Gozzi, "History of International Law and Western Civilization" (2007) 9:4 Int'l Comm L Rev 353 at 353.

were deemed the premier jurists and political architects, and the Greeks were seen as veering away from a legally myopic system, looking towards the development of an international approach.[328]

Ius gentium, of ancient Roman origin, is credited as the source of international law which represented the law of nations.[329] As one of the earliest accounts of legal pluralism, dating back to 242 B.C., *ius gentium* was valid amongst all as it was the prevailing law when a conflict of laws erupted, warranting its classification as the "third system of law."[330] *Ius gentium* was a compendium of intertribal law that represented common elements and customs of all nations the Romans had come into contact with.[331] However, because this system emanated in Rome, coupled with the fact that a praetor peregrinus of Rome established it, *ius gentium* was heavily influenced

[328] Nicholas Onuf, "Eurocentrism and Civilization " (2004) 6:1 J Hist Int'l L 37 at 41. Coleman Phillipson, Intl L & Custom of Ancient Greece & Rome (London: Macmillan and Co., 1911) at 67. Dominique de Courcelles "Managing the World: The Development of 'Jus Gentium' by the Theologians of Salamanca in the Sixteenth Century" (2005) 38:1 Penn State Philosophy and Rhetoric 1 at 2-4. Gordon E Sherman, "Jus Gentium and International Law " (1918) 12:1 Am J Int'l L 56 at 59. Christianity was the doctrinal basis of Roman law since the conversion of the Roman emperor Constantine at the start of the fourth century and could not be removed from the essence of most principles. Most principles, such as the *ius gentium* is said to be a derivative of natural law, which has roots in Christianity. Additionally, Ius gestium is born of out the principles of good faith and justice.

[329] Ibid at 56; Olga V Butkevych, "History of Ancient International Law: Challenges and Prospects" (2003) 5:2 J Hist Int'l L 189 at 193, 211. The law of nations, which was adopted as a translation of jus gentium, was the expression used until it was abrogated by disuse by the term 'international law.'

[330] Schiller, *supra* note 321 at 164, 171, 173, 174. It was concerned with commercial transaction, customs and usages. The origin of *jus gentium* is concerned with banning injuring another for one's advantage, by the order of nature which is the divine and human law. It is of natural reason, for all mankind. The law which all nations use. Similarity to universalism, the law that everyone uses. Francisco Suarez, Selections from Three Works of Francisco Suarez (Oxford: Clarendon Press; London: Humphrey Milford., 1944) at 341. James Brown Scott, L, the State, & the Intl Community (New York: Columbia University Press., 1939) at Chapter 4 page 107. It bears a striking resemblance to today's international law as it was the first account of "universal law of the ancient, civilized world." It also bears a resemblance to my assertion that the world was brought under the direction of European law, as the people with whom there was commerce in Rome were brought "under the Roman sway." Henry C Clark, "Jus Gentium Its Origin and History " (1919-1920) 14:4 Ill L R 243 at 244. *Ius gentium* was responsible for the expansion and solidification of Roman law as world law. F S Ruddy, "The Origin and Development of the Concept of International Law" (1968) 7:2 Colum J Transnat'l L 235 at 235.

[331] Phillipson, *supra* note 329 at 91. They observed common practices between a large number of territories and included them in this all encompassing ius gentium. A similar trait to European countries centuries after is that it was that the creation of this system emanated from the need to expand the Roman territory. Their territorial expansion to Italy, Gaul and Spain which were all under the Roman empire*; Ibid* at 247; Sherman, *supra* note 329 at 58. The praetor, who was in charge of foreigners and interactions with them, studied the laws of all territories, cities and tribes the Roman came into contact with, seeking to coalesce the common, best and universal principles amongst them.

by Roman law.[332] Intensely imbued within the Roman legal system, there was an interaction, and invariably, an influence of Roman municipal law on *ius gentium* and vice versa.[333] Bearing a striking similarity to universalism which is reflected in modern-day international law, *ius gentium* reflected the essence of the religious *ius naturale*. *Ius naturale* is the necessary divine and superior law which applies to all living beings.[334] In this light, *ius gentium* was established as a legitimate body of rules among all men—Romans and foreigners.[335] Distinctly carrying a Roman and European religious universalizing ethos, this system was the beginning of European international law, which influenced modern international law.[336]

Rome was deemed to be the birthplace of European civilization, which eventually birthed modern international law. Subsequently, states such as Britain and Germany, which continued this trajectory of European civilization, adopted Roman principles. It cannot be disputed that Roman law and British law were linked as there was a conquest of large parts of Great Britain by the Romans, giving rise to territories of Great Britain being under Roman dominion.[337] This created a Romanised province of Britain for almost one-hundred and twenty years.[338] English

[332] Rene Albert Wormser, the law: The Story of Lawmakers, & the Law We Have Lived by, from the Earliest Times to the Present Day (New York: Simon and Schuster., 1949) at 123. A praetor peregrinus was quite different from an urban magistrate who administered civil law. This praetor specifically dealt with foreigners when the civil law could not be used.
[333] Phillipson *supra* note 13 at 91.
[334] Janos Erdody, "Understanding the Concept of Ius Naturale in Ancient Roman Law" (2018) 9:1 JEHL 178 at 182. Chester James Antieau, Higher Ls: Origins of Modern Constitutional L (Buffalo, N.Y.: W.S. Hein & Co., 1994) at 1-3. Anton-Hermann Chroust, "Ius Gentium in the Philosophy of Law of St. Thomas Aquinas" (1941) 17:1 Notre Dame Law 22 at 26. Ius gentium according to Anton-Hermann as being secondary natural law under St. Thomas classified. Amos S Hershey, "History of International Law Since the Peace of Westphalia" (1912) 6:1 Am J Int'l L 30 at 32; Gozzi, *supra* note 327 at 362. "The European view from the 16th to the 18th century was that their jus gentium (the law of peoples) carried universal meaning and application."
[335] Schiller, *supra* note 321 at
[336] Phillipson *supra* note 13 at 94. *Ius gentium* is one of the first, if not the first account of private international law and public international law.
[337] John Lingard, History of England, from the First Invasion by the Romans (London: Baldwin and Cradock., 4) at 1.
[338] Henry Smith Williams, Historians' History of the World (New York: The Outlook Company., 1904) at 17. English historians such as Gibbon, Lappenberg and Lingard accepted and utilized this.

jurisprudence, due to this protracted entanglement, was influenced by Roman law.[339] On practically every front pertinent to law, there was a permeation of Christianity. England had ecclesiastical courts that solely administered Canon law, and running parallel to this, English equity was slowly infused with *ius gentium*.[340]

In examining the influence of Rome on Germany, the constitution of the German Imperial Chamber of Justice in 1495 is a case in point. Sixteen justices were needed for this institution to take form.[341] The German Emperor Maximilian instructed that half of the sixteen justices must be doctors of Roman Law and that the court should "adjudicate in accordance with the Common Law of the Empire"—the Empire being the Roman Empire.[342] Another mirroring of Roman law in Germany is the *Buirgerlihes Gesetzbuch* (civil code of Germany).[343] Codified by the German Pandectists, this comprehensive civil code reflects Roman law. The system of law manifested in the civil code was *gemeines Recht*, which translated, is the Roman *ius commune* brought into force by Roman Emperor Justinian.[344] The influence of Roman law on both Germany and Britain collectively comes to light, primarily through canon law. In England, before the reign of William the Conqueror, the sheriff and the bishop sat together in the Anglo-Saxon County Courts, signifying the inseparable nature of law and religion, which became an integral component of

[339] Roscoe JC Dorsey, "Roman Sources of Some English Principles of Equity and Common Law Rules" (1938) 8:12 Am L Sch Rev 1233 at 1233. John Hill Burton, History of Scotland from Agricola's Invasion to the Revolution of 1688 (Edinburgh: W. Blackwood., 1867) at 41.
[340] *Ibid* at 1234-1236.
[341] *Ibid* at 1234.
[342] *Ibid* at 1234.
[343] "The Teaching of Roman Law" [1914] 13: Part 2 J Soc Comp Legis ns 171 at 173.
[344] *Ibid*; Maurice Sheldon Amos, "The Common Law and the Civil Law in the British Commonwealth of Nations" (1937) 50:8 Harv L Rev 1249 at 1252-1254.

German and British adjudication.[345] The influence of canon law surpassed the confines of religious matters and transcended public and private law.[346]

European civilization, influenced by Roman legal culture, evolved into international law as it is today.[347] A rationale for this claim stems from the spatial concentration of international agreements, treaties, and binding documents generally concluded in these regions during the embryonic stages of international law.[348] Some of the early accounts of international agreements concluded in Europe range from treaties that united and brought peace, such as the Peace of Westphalia, to ones that created legal institutions that molded the trajectory of adjudication, such as the Permanent Court of Arbitration.

The foundations of the law of war dating to the 19th century were also moulded by European civilization. Following the first international convention on the law of war in Geneva in 1864, the codification of the law of war was set in motion on the European continent[349] The Institute of International Law, a private institution that codifies international law, created the Oxford Manual on the law of war on land."[350] Johann Casper Blutschli, a professor at the University of Heidelberg, in 1866 also drafted a comprehensive private draft on the law of war. This was followed by The Declaration of St. Petersburg in 1868 and the draft international agreement concerning the laws and customs of war drafted by delegates of 15 European states in Brussels in 1874, upon the initiative of Czar Alexander II of Russia.[351] Although this agreement

[345] Dorsey, *supra* note 339 at 1234.
[346] *Ibid.* This infiltration of Roman law into European countries such as England and Germany are accredited to the ingenuity of the Romans as other laws such as Teutonic law did not possess the same richness Roman law possessed
[347] Leo Gross, "The Peace of Westphalia, 1648-1948" (1948) 42:1 Am J Int'l L 20 at 21. Not exactly in the same form, but have undergone significant changes over time, of which many are still European and Western in essence.
[348] Yasuaki, *supra* note 324 at 54.
[349] "Law of War" [1995] 68 Int'l L Stud Ser US Naval War Col 465 at 465.
[350] Dietrich Schindler, "International Humanitarian Law: Its Remarkable Development and Its Persistent Violation" (2003) 5:2 J Hist Int'l L 165 at 166.
[351] *Ibid* at 167.

was never ratified, it served as a blueprint for the Hague Conventions of 1899 and 1907 on the laws and customs of war on land.[352] These conventions, built on the drafts of European jurists and major European powers, constitute a comprehensive codification for international law of war customs.[353]

The more inclusive Hague Convention of 1949 and the Additional Protocols of 1977 that ensued decades later supplemented the main conventions but did not replace previous conventions.[354] Protocol I supplemented rules governing international armed conflicts and reiterated the principle of unnecessary suffering. Protocol I also extended other elements of the Protocol affording protection to medical aircraft flying over areas not controlled by an adverse party.[355] Protocol II extended the protections of the Conventions as they relate to internal armed conflicts.[356] On the other hand, principles such as those governing the meter-and-a-half horizontal green hull band prescribed for hospital ships from the Hague Convention X of 1907 were deleted from the provisions of the 1949 Geneva Convention for the Wounded and Sick.

Additionally, principles such as privateering, which is the carrying of hostilities on vessels owned by private persons, were banned by the Declaration of Paris 1856.[357] Sections were added and deleted from the foundational Conventions; however, they were not replaced and are still in force to a great extent. Hence, currently, the international law of war, barring some exceptions of

[352] *Ibid*
[353] "Law of War" [1995] 68 Int'l L Stud Ser US Naval War Col 465 at 465. Eugene Allen; Wermuth, William Charles Gilmore, Modern American L (Chicago:Blackstone Institute., 1921) at 65. Including the one in 1949.
[354] *Ibid* at 469. Craig N Murphy, "The Last Two Centuries of Global Governance" (2015) 21:2 Global Governance 189 at 190.
[355] *Ibid* at 469-474.
[356] Brian J. Bill, Editor, L of War Deskbook (Charlottesville, Va: International and Operational Law Dept., The U.S. Army Judge Advocate General's Legal Center and School., 2010) at 13.
[357] Allen, *supra* note 353 at 69.

supplementation and deletions, was formed by the Europeans and bore the hallmarks of European civilization.[358]

However, these momentous international developments extended beyond the scope of geography, and due to the European diplomatic and spatial concentration of these treaties and agreements, veered into the development of a shared culture and belief system. This shared culture and belief system was codified in agreements such as the Peace of Westphalia and Hague Conventions related to the law of war, a system born of the similitude of interests of its members.[359] The Peace of Westphalia is the name of the treaties of Munster and Osnabriick signed in 1648 between the Holy Roman Emperor and the King of France and their respective Allies to end Thirty Years of War after five years of negotiation.[360]

Legal agreements do not automatically emanate; they reflect recognized shared viewpoints regarding the appropriate way of administering justice.[361] As a starting point, states involved in the signing of the Peace of Westphalia shared similar recognized perspectives of the ideal composition of a government or state. This ideal composition of states was evidenced by the sameness of the titles and corresponding roles of state representatives and heads of states, which enabled compatibility in coordinating the Peace of Westphalia. This European Assembly was

[358] University of the Pacific McGeorge School of Law, "Best Written Memorial (Applicant)" [1982] 1982 Philip C Jessup Int'l L Moot Ct Comp [i] at 7. Georg Schwarzenberger, "An Evolving Economic World Order" (1969) 1:2 Rutgers-Cam LJ 243 at 262-263.These shared beliefs which evolve into rules potentially qualify as jus cogens which form the basic foundations of international order." Objectives discussed at Congresses such as the Congress of Vienna and the Hague Conventions constitute an indispensable part of the standard of civilization; Bill, *supra* 356 at 13. How the law of war is considered customary international law from 1864… AWG Raath & HA Strydom, "Hague Convention and the Anglo-Boer War, The" (1999) 24 S Afr YB Int'l L 149 at 157. These laws and principles reflected customary governing land warfare.

[359] Bowden, *supra* note 324 at 16.

[360] Hershey, *supra* note 334 at 31.

[361] Charles H Kinnane, "Roman Law as a Civilizing Influence" (1952) 2:1 DePaul L Rev 28 at 28. Legal agreements also emanate from a similar past and finding a way forward. Bill, *supra* 356 at 12. The Austro-Sardinian war which was one of the bloodiest wars was the driving force for the First Geneva Convention in 1984. These treaties that influence IL were created because of circumstances peculiar to them.

represented by plenipotentiaries including the Counts of Trautmansdorf and Weinsberg, Nassau, Catzenellebogen, Vianden, and Dietz, Duke of Longueville, and Estouteville, Lord Arch-Duke Ferdinand Charles. Among other delegates was the Baron of Gleichenberg, Neustadt, Negan, Burgau, and Torzenbach, Lord of Teinitz. There were also many Knights, Commanders, Superintendents, Governors, Lieutenant Generals, Princes, and Lords.

This special composition of states shared by territories involved in the signing of Westphalia sprouted seeds of European civilization and its necessary corollary, sovereignty. The concept of sovereignty first came to light in 1577 through the work of Bodin in his treatise "Republics."[362] However, tracing the history of sovereignty and its interconnectivity to peace has often led scholars to the Peace of Westphalia with good reason.[363] Although the treaty did not have explicit statements of the declaration of sovereignty, and although the concept of sovereignty developed before 1648, the Peace of Westphalia is recognized for the evolution of sovereignty. This is first because each territory recognized other territories as the ultimate authority in their respective territories. This was an implicit legitimation of sovereignty, although these states were not, in practice, wholly sovereign.[364] Hence, the Peace of Westphalia's contribution to sovereignty was its implicit recognition through the references to the legitimate powers that territorial heads and representatives possessed and also, the proclamation of the equality of the German *Stände*. (estates)[365] While not a full-blown organized system of sovereignty, the treaty developed an

[362] Ezequiel Padilla, "Sovereignty and Peace" (1942) 21:1 Foreign Aff 1 at 2.
[363] Derek Croxton, "The Peace of Westphalia of 1648 and the Origins of Sovereignty" (1999) 21:3 The Intl Hist Rev 569 at 569; Anna Spain, "Sovereignty and the Promotion of Peace in Non-International Armed Conflict" [2012] 106:1 Am Soc'y Int'l L Proc 78 at 79.
[364] Randall Lesaffer The Westphalia Peace Treaties and the Development of the Tradition of Great European Peace Settlements Prior to 1648" 18 Grotiana (ns) 71 at 72. The estates continued after 1648. They recognized the emperor as their actual or nominal overlord, sent representatives to die Diet, paid common taxes, and even raised a joint army.
[365] *Ibid.*

inceptive form of sovereignty flowing from European civilization. One of the qualifying parameters which prevented these territories from being entirely sovereign is that they had limitations to adhere to and did not have absolute power.[366]

Sovereign states determine the pathway of their existence in collaboration with other states through mutual respect and agreements.[367] This definition of sovereignty materialized during the Peace of Westphalia. The *Stände* were recognized to partake in making decisions regarding the Empire and form alliances with each other and foreign powers.[368] This recognition granted a form of autonomy akin to the establishment of the principle of sovereignty and the development of a federative Empire.[369]

Another reason why The Peace of Westphalia is recognized as the source of civilization and sovereignty is that it represented the large-scale and widely documented landmark for European political and legal history. All the major European powers took part in this treaty.[370] This gave a unique legitimacy to the Peace of Westphalia as the legal expression of the valid order of Europe. The magnitude of the treaties signed caused the Peace of Westphalia to be seen as the implied recognition of a *Société des nations* among them as sovereign states.[371]

Notions of Christianity were rife in principles of the Peace of Westphalia. The notion of sovereignty in its budding state by Hobbes and Bodin is linked to the existence of the divine and natural law.[372] Their aim was towards the building of a hierarchical power that solely administered

[366] Padilla, *supra* note 363 at 2. Arguably, that is how sovereignty works currently, as sovereignty is not entirely unrestricted. Treaties constitute limitations to sovereignty, as states willingly sign away prerogatives they possessed.
[367] *Ibid* at 1.
[368] Lesaffer, *supra* note 365 at 71-72.
[369] Lesaffer, *supra* note 365 at 71-72.
[370] *Ibid.*
[371] *Ibid.*
[372] *Ibid.*

domestic law.[373] Additionally, Paragraph I of the Treaty of Westphalia begins with "There shall be a Christian and Universal Peace…." The end of the preamble ends with "…to the Glory of God, and the Benefit of the Christian World, the following Articles have been agreed on and consented to, and the same run thus."[374] Likewise, many references in the treaty have religious connotations which are solely Christian. Christianity permeated the development and implementation of legal principles, signifying the inextricable link between Christianity and European law. The continuous reification of these European shared beliefs of civilization, sovereignty, and religion were documented as international law through agreements such as the Peace of Westphalia.[375]

The influence of civilization and religion was evidenced in agreements such as the Peace of Westphalia and the Congress of Vienna in concert with Grotius' De lure Belli ac Pacis libri tres (1625). All of European essence, these documents have been recognized as the origin of *ius publicum Europaeum* which extended to the rest of the world as international law.[376] The European ethos eminent during Congress and evident in other agreements was affirmed at the Congress of Berlin by the delegate of France, M. Waddington. He noted that Serbia which wanted to join the European family, must "recognize the principles which are the basis of social organization in all states of Europe and accept them as a necessary condition of the favor which she asks for."[377] Decades prior to this, Alexander the Great, Ceasar, and Napolean believed that

[373] *Ibid.*
[374] *Peace of Westphalia,* Peace Treaty between the Holy Roman Emperor and the King of France and their respective Allies, 24th Day of October 1648. < https://avalon.law.yale.edu/17th_century/westphal.asp >
[375] Lesaffer, *supra* note 365 at 79. As a hallmark of sovereignty birthing peace, this quasi-sovereignty created a basis for one of the earliest, most collaborative obligations for parties of a treaty to make the effort to solve all their problems amicably without resorting to war.
[376] Lesaffer, *supra* note 365 at 72; Gross, *supra* note at 26; Hershey, *supra* note 334 at 32. The underlying principles of the Grotian system which are legal equality and territorial equality are the fundamental principles of international law.
[377] *Ibid.*

the Mediterranean civilization of Greece, Rome, and Paris formed of the Graeco-Latin evolution should be the concept of civilization for the universe.[378]

These European states used civilization as a tool to displace traditional practices and systems that run contrary to European values of civilization and, parallel to this, as a tool for the universalization of European international law.

The Qualifying Parameter: Civilization

While the formulation of mechanisms for interacting with other states ensued between European states, there was a continuous unveiling of different cultures which did not fall within this umbrella of similitude—this similitude being European civilization and legal culture.[379] This difference rendered them inferior and caused other territories to be characterized as 'barbaric' and 'uncivilized.'[380] Due to the differences in belief systems, the European legal and political culture did not coalesce harmoniously with the culture of other states.[381] The confidence European states had in their systems and beliefs, coupled with the doubt they had for the legal personality of states outside this sphere, ripened into a sense of superiority.[382] Refusing to offer equal status to 'uncivilized barbarians,' which included those from Africa, was the corollary of this inflamed self-proclaimed superiority based mainly on religion and civilization.[383]

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[378] Padilla, *supra* note 363 at pp 4-5.
[379] Bowden, *supra* note 324 at 3. James Brown Scott, *supra* note 330 at 107. If not for having to interact with other nations, the ius gentium would not have come to be. There would have only been the single Roman law.
[380] *Ibid.* If not for having to interact with other nations, the *ius gentium* would not have come to be. There would have only been the single Roman law. Anand, "Attitude of the Asian-African States toward Certain Problems of International Law" *supra* note 323 at 59.
[381] *Ibid.*
[382] *Ibid.* Ward states that ""If we look to the Mahometan and Turkish nations…their ignorance and barbarity repel all examination, and if they have received any improvement since the days when they first set foot in Europe, it is probably from their connection with people professing the very religion which they most hate and despise."
[383] Yasuaki, *supra* note 324 at 21; Bowden, *supra* note 324 at 2.

In the 1800s, the standard of civilization was a precursor for the family of nations.[384] The main criterion for participating in this global society was civilization. A civilized state was a legal and political entity governing a defined territory under sovereign state power.[385] Requirements imposed included "minimum of efficiency in running the State machinery, a modicum of independence of the judiciary from the executive, and adequate protection of the safety, life, liberty, dignity, and property of foreigners."[386] These requirements, as Gong implies, were to prevent conflicts between different customs and traditions of other civilizations.[387]

Ultimately, the aim of the standard of civilization was legal harmonization revolving around European legal culture, causing a single legal culture.[388] The trait attributed to societies deemed primitive was the non-existence of proper law—that is, the system for enacting, enforcing, and administering the law as the Europeans knew it.[389] If a state or territory did not fit in this qualifying parameter or was disinclined to accept European civilization's legal rules and moral values, they were deemed unfit to be members of the family of nations.[390] Essentially, the standard of civilization was measured against European civilization.[391] Hence, civilization was an imperative term utilized by Europeans to displace traditional practices and systems that run contrary to European values of civilization.[392]

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[384] Bowden, *supra* note 324 at 1.
[385] *Ibid.*
[386] David P Fidler, "A Kinder, Gentler System of Capitulations--International Law, Structural Adjustment Policies, and the Standard of Liberal, Globalized Civilization" (2000) 35:3 Tex Int'l L J 387 at 393. Heinhard Steiger, "From the International Law of Christianity to the International Law of the World Citizen - Reflections on the Formation of the Epochs of the History of International Law" (2001) 3:2 J Hist Int'l L 180 at 189. Once deemed uncivilized, how organized their rulers were deemed irrelevant if it did not conform to European standards.
[387] Fidler, *supra* note 387 at 393.
[388] *Ibid.*
[389] Bowden, *supra* note 324 at 13.
[390] Harald Kleinschmidt, "The Family of Nations as an Element of the Ideology of Colonialism" (2016) 18: Issues 2-3 J Hist Int'l L 278 at 281.
[391] Onuf, *supra* note 328 at 38; Fidler, *supra* note 387 at pp 392-393.
[392] Onuf, *supra* note 328 at 38.

The standards and ruling committees responsible for determining the standard of civilization were entirely composed of European countries with a similar characterization of civilization. This exclusionist society conceived of European civilization assumed the ultimate authority to determine the qualifying parameters of civilization and membership into the family of nations.[393] In essence, the family of nations was what had been authorized by civilized European states and caused a sharp divide in the legal order between Europeanized civilized states and uncivilized states.[394]

The formation of an exclusive society responsible for determining the standard of civilization was manifested during the Congress of Vienna in 1815.[395] The Congress of Vienna is one of the constitutional moments defining the bedrock of European diplomacy and formed the foundation of European public law stretching decades.[396] Therefore, 1815 is often highlighted as the date "for the beginning of the contemporary system of global governance."[397] At this

[393] Anand, "Attitude of the Asian-African States toward Certain Problems of International Law" *supra* note 323 at 58-60. European countries were the 'powerful countries. However, as with the formulation of many other rules such as rules of war, this society of European states and members determined what constituted 'civilization. These do not have the same meanings today. Thus, the terms " civilisation " or " civilised nations," still used in Articles 9 and 88 (1) (c) of the Statute of the World Court or in Article 8 of the Statute of the International Law Commission; Kleinschmidt, *supra* note 391 at pp 280-283; Paulina Starski & Jorn Axel Kammerer, "Imperial Colonialism in the Genesis of International Law - Anomaly or Time of Transition" (2017) 19:1 J Hist Int'l L 50 at 50; Douglas Howland, "Japan's Civilized War: International Law as Diplomacy in the Sino-Japanese War (1894-1895)" (2007) 9:2 J Hist Int'l L 179. "The family of nations is originally of European origin as the idea of a family or society of nations dates back to the late sixteenth and early seventeenth centuries, with the writings of Francisco de Vitoria, Francisco Suarez, Albericus Gentilis, and Hugo Grotius."

[394] Li-ann Thio, "Cross-Cultural Exchange of Human Rights: Crossing Divides or Crossing Swords" (2015) 14:1 J Hum Rts 60 at 61; Bowden, *supra* note 324 at 15; Mikael F Nabati, "Gerry Simpson Great Powers and Outlaw State: Unequal Sovereigns in the International Legal Order, (Cambridge, Cambridge University Press, 2004)" (2003) 16:2 Rev quebecoise de droit int'l 383 at 383.

[395] Anand, "Attitude of the Asian-African States toward Certain Problems of International Law" *supra* note 323 at 58; James Harvey, Beard Robinson, Charles Austin, Development of Modern Europe (Boston: Ginn., 1929) The Congress of Vienna in 1815 also marked the coalescing of many agreements in Europe into a "Final Act."; Murphy, *supra* note 354 at pp 189-190. The Congress of Vienna imposed a peace on France and Napoleon's allies.

[396] Harry Pratt Judson, Europe in the Nineteenth Century (Meadville, Pa: Flood and Vincent., 1898) at 72 and 76; Nabati, *supra* note 395 at 383. "The two Hague Peace Conferences of 1899 and 1907; the 1945 San Francisco Conference, which "reconciled the requirements of the Great Powers for legalized hegemony and the demands of the middle and smaller powers for some form of sovereign equality"

[397] Murphy, *supra* note 354 at 189.

conference, there was a reconstruction of Europe, causing a balance of power during which a few great powers officially appointed themselves as the authority to admit new states into the European society.[398] As the European society was the only society encompassed of civilized states, it was equated to an international society.[399] The Congress of Vienna legitimized an extension of the authority of the great powers to other nations beyond Europe and granted the authority of the great powers to admit or refuse entry into the family of nations.[400] These great powers initiated a "sacred trust of civilization" [401] to teach territories that had not accepted the western standard of civilization.[402] Accordingly, the great powers initiated a system that guaranteed rule over the continent and the legalization of hegemony extending centuries.[403]

Like the Peace of Westphalia, the Congress of Vienna was essentially European in its composition as all European nations except Turkey were represented, causing the Congress to build into a system born of common interests of European countries.[404] Particular to the family is

[398] Anand, "Attitude of the Asian-African States toward Certain Problems of International Law" *supra* note 323 at 58. Judson, *supra* note 397 at 79. "Europe was treated as if it were a blank map which might be divided into arbitrary districts of so many square miles and so many inhabitants." "Congress of Vienna met for the purpose of reconstructing Europe. The treaties made by it formed the public law of Europe for fifty years. The object of the congress was to put Europe back where it was in 1789. All important questions were settled by private negotiations of the five leading powers. Talleyrand opposed Russian annexation of Poland and Prussian annexation of Saxony and formed a coalition against both projects. The attempt to form a German federation was a failure. Austria and Prussia were practically restored to what they were in 1789. Russia acquired Poland, England got Malta and various colonial possessions, Sweden received Norway, Switzerland was reorganized and enlarged, the pope recovered his dominions, and the new kingdom of the Netherlands was formed. Shi Yinhong, "Chinese and Western Ethical Traditions and International Intervention" (2008) 6:1 Regent J Int'l L 69 at 76.
[399] Yutaka Arai-Takahashi, "Preoccupied with occupation: critical examinations of the historical development of the law of occupation" (2012) 94:885 Int'l Rev Red Cross 51 at 78.
[400] *Ibid;* Anand, "Attitude of the Asian-African States toward Certain Problems of International Law" *supra* note 323 at 58. Great powers refer to the states with great influence at particular points in time.
[401] Thio, *supra* note 395 at 61.
[402] Thio, *supra* note 395 at 61.
[403] Judson, *supra* note 397 at 76. Nabati, *supra* note 395 at 383. "The two Hague Peace Conferences of 1899 and 1907; the 1945 San Francisco Conference, which "reconciled the requirements of the Great Powers for legalized hegemony and the demands of the middle and smaller powers for some form of sovereign equality."; Murphy, *supra* note 354 at pp 189-190. The congress itself was the first of a series of nineteenth-century multilateral conferences of the great powers called to deal with European and interimperial conflicts."
[404] Judson, *supra* note 397 at 72.

a common system of civilization and "stock of moral ideas."[405] Although the European legal culture was veering away from a system based on Christendom, there was a common shared belief still particular to Europeans based on civilization.[406] There are key differences in civilizations, ranging from moral practices to normative judgments, and the Congress of Vienna is a significant example of how the moral practices and shared beliefs of Europe differed from Africa.[407]

During the Congress, decisions were made regarding common interests such as the slave trade and the division of African territories, as Europeans controlled these regions.[408] In concordance with their common evolving value prohibiting slave trade under international law, prepositions were discussed during the Congress.[409] These shared principles constituting European legal culture affected other territories such as Africa, once again solidifying international relations and law as an extension of European legal culture.[410]

One meaning of civilization to Europe that equated European power was military power.[411] Europe was aware of the type of territory they would like to welcome into the family of nations, and hence, exercised their admitting power arbitrarily. The West accepted Ottoman Turkey and Japan as full or almost complete members (as they were on probation) of the international society or family of nations in the 1850s to the 1890s, as they had attained the required 'standard of civilization.'[412] Japan was also accepted into the family of nations after conducting commercial

[405] T E Holland, "International Law in the War between Japan and China" (1895) 3:9 Am Law 387 at 387.
[406] *Ibid.*
[407] Yinhong, *supra* note 399 at 70.
[408] Schwarzenberger, *supra* note 359 at 256.
[409] *Ibid.*
[410] Kleinschmidt, *supra* note 391 at pp 282-284. Hedley Bull asserted "the nineteenth century had witnessed the triumph of the establishment of some 'international society' as a group of states, conscious of certain common interests and common values."
[411] Jorg Fisch, "Power or Weakness - On the Causes of the Worldwide Expansion of European International Law" (2004) 6:1 J Hist Int'l L 21 at 21. Civilization, however, also inferred their level of legal development and sophistication.
[412] Yinhong, *supra* note 399 at 78; Gozzi, *supra* note 327 at 361; Holland, *supra* note 406 at 387.

relations with the Great Powers for over 30 years.[413] Japan had not only effectively adopted European civilization but also had robust military power.[414] Japan conquered China (1894-1895) and Russia (1904-1905), seized Taiwan (1895) and Korea (1910).[415]

The family of nations diminished the status of African and Asian states. They became states competing to be recognized, although they had their legal systems.[416] If other states met these implicit and explicit criteria, this offered a ticket to the close circle. If not, the uncivilized tag continued to hang over territories not included in the family of nations.[417] The standard of civilization reinforced the need for a European system, as states had to conform to the political and legal status quo of enacting, enforcing, and administering the law of European states to be incorporated into the League of Nations.[418] This caused a universalization of European civilization, causing the standard of civilization to be a valuable tool to disseminate European culture.[419] It was a system to create a globally uniform legal system based on similar values and norms, classified as universalism today.[420]

Europeans imposed their version of what an appropriate legal system should be.[421] This vicious way of social marginalization is embedded in imperialism and colonialism.[422] In managing

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[413] Charles G.; Gray, Louis H. Fenwick, Versailles Peace Conference (Washington, D.C.: U.S. G.P.O., 1918-1919) at 29; R P Anand, "Family of Civilized States and Japan: A Story of Humiliation, Assimilation, Defiance and Confrontation" (2003) 5:1 J Hist Int'l L 1 at 26.

[414]Arnulf Becker Lorca, "Sovereignty beyond the West: The End of Classical International Law" (2011) 13:1 J Hist Int'l L 7 at 35.

[415] *Ibid.*

[416] Anand, "Attitude of the Asian-African States toward Certain Problems of International Law" *supra* note 323 at 58; Yasuaki, *supra* note 324 at 22. 25 COLUM. J. Transnat'l L. 755 (1987) at 759.

[417] Bowden, *supra* note 324 at 1.

[418] Bowden, *supra* note 324 at 18.

[419] Jean Allain, "Slavery and the League of Nations: Ethiopia as a Civilised Nation" (2006) 8:2 J Hist Int'l L 213 at 214.

[420] Bowden, *supra* note 324 at 1; Padilla, *supra* note 363 at 2. None of this to say civilization, culture of states and sovereignty were homogenous. To show that there was a degree of similarity and shared values that was not shared with the Global South which international law, which is in fact, not international but European.

[421] Bowden, *supra* note 324 at 2.

[422] Baxi, *supra* note 326 at 557.

the opposed ethos' with non-civilized territories, international law was, in essence, an imposed system of European law in its beliefs, structure, and implementation through colonialism.[423]

Colonization was used to conquer states such as Ghana, catalyzing a full legal incorporation of these states into the European legal system.

Colonialism as a Tool of Imposition and Assimilation of European Legal Culture

To advance the European standard of civilization and assist territories teetering on the brink of crisis, colonialism was initiated as a solution.[424] To European states, developments made in material systems rendered them civilized and superior to other territories.[425] As international law metamorphosed into a global society, it becomes strikingly more apparent that European states never wanted equality to be the cornerstone of international law. They wanted the full incorporation of non-European states under their authority.[426] The aim was never to coordinate with other nations but to subjugate them.[427] As described by the Oxford Dictionary of African Politics, colonialism is, in essence, "The political takeover and domination of one country by another, such that it becomes a colony governed by a foreign administration and is integrated into the empire of the metropole."[428]

[423] Gozzi, *supra* note 327 at 354.
[424] Kleinschmidt, *supra* note 391 at 278. This is how they viewed non-European states. Even though they were fine on their own, they were assumed to be very far from well-off. The Oxford Dictionary of Cultural Anthropology – "Colonialism is typically rooted in claims of possession and ideologies of cultural superiority of the colonizer."
[425] Onuf, *supra* note 328 at 38.
[426] Fisch, *supra* note 412 at 22 ; Dominique de Courcelles, *supra* note 329 at 11. As established that Roman principles birthed many European principles, it is important to note than Roman principles justified because of natural law of nature to intervene and conquer other states, liberating them from failures before natural law such as tyranny, human sacrifices, among others.
[427] Fisch, *supra* note 412 at 22.
[428] Nic Cheeseman, Eloïse Bertrand & Sa'eed Husaini, *A Dictionary of African Politics* (Oxford: Oxford University Press, 2019) sub verbo "colonialism."

Colonialism emerged as a new market as there was a need to replace slavery with the semi-slavery system of colonialism.[429] The development of colonialism and the force that underpins colonialism presents an unequivocal acknowledgment of the aggressiveness underlying the expansion of European legal culture.[430] Owing to European states, as of 1949, three-fourths of the world were at the same place their ancestors were during the slave trade.[431]

Definitions of colonialism expressed by Oxford dictionaries lend credence to the exploitive imposing means by which the expansion of European legal culture and legacies to non-European states occurred. The Oxford Dictionary of Cultural Anthropology describes colonialism as "The political, economic, and social domination of one society (colonizer) over another (colonized), to the degree that the ways of life of the colonized are marginalized, disrupted, or eliminated by the colonizer...."[432] In describing the process by which colonialism materialized, the Oxford Dictionary of African Politics states, "Colonial takeover in Africa relied on a combination of coercion and co-optation and in most cases was sustained by high levels of repression and political exclusion. Colonial regimes were also typically economically exploitative, focusing on the export of raw materials with little investment in schools and healthcare." [433]

Although the definition of colonialism by the Oxford Dictionary of African Politics unearths the exploitive measures utilized, some European states, individuals and groups beg to differ.[434] Justifications for the imposition of colonialism include it being a civilization mission to

[429] U O Umozurike, "International Law and Colonialism in Africa: A Critique" (1971) 3: Issues 1-2 Zam LJ 95 at 95 and 98. Those in the Congo were made semi-slaves under the reign of King Leopold II, and natives were killed casually when from unmanageable villages; Onuf, *supra* note 328 at 38. They needed these naturally endowed states as they were dependent on them for resources; Fisch, *supra* note 412 at 22. Colonialism and the need for resources on the African continent, and Ghana caused an extension of European law to these states.
[430] Bowden, *supra* note 324 at 2.
[431] Rupert Emerson, "Problems of Colonialism" (1949) 1:4 World Pol 533 at 534.
[432] James Thuo Gathii, "Imperialism, Colonialism, and International Law" (2007) 54:4 Buff L Rev 1013 at 1014.
[433] Cheeseman, Bertrand & Husaini, *supra* note 429, sub verbo "colonialism.
[434] *Ibid.*

enlighten states in the periphery of "the body of corporate nations."[435] Rather than describing colonialism as a tool of imperial expansion, Pella defines colonialism as "a shared practice of an international society's member states wherein new subject-states are established in an area previously outside the bounds of that international society for social and political reasons."[436] This definition ignores all the atrocities that colonialism came with reflects colonialism as a regular justifiable occurrence.

It has been asserted that European states were reluctant to engage in colonization as formal civilization, and bringing Africans into the "commercial republic of the world" was deemed an expensive venture.[437] This assertion once again underplays the tactical planning that went into colonialism by shrewd leaders. There were many processes involved in colonizing non-European states, from the initial Geographical Conference by King Leopold to discuss the civilization of Africa in 1879 to the convincing of the British to occupy the Congo area by Livingstone after his exploration to the Berlin Conference that distributed Africa.[438]

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[435] John L Comaroff, "Colonialism, Culture, and the Law: A Foreword" (2001) 26:2 Law & Soc Inquiry 305 at 307. Onuf, *supra* note 328 at 37. Had own systems before. The Sinocentric world of East Asia, the Muslim world, the Eurocentric world and the African world all deemed their regions to be the normal. African territories, like many others had their own legal systems before colonialism; Yasuaki, *supra* note 324 at 7. There was a time when their domination was limited to Europe, and the universal nature of their law held no weight. 25 COLUM. J. Transnat'l L. 755 (1987). Anand The Asian system of international relations`` that they formed and managed on their own, allowed Europeans to trade and settle there until the ultimate control over their system by the Europeans.

[436] John Anthony Pella Jr, "World society, international society and the colonization of Africa" (2015) 28:2 Cambridge Rev Intl Aff 210 at 214; Gathii, "Imperialism, Colonialism, and International Law" *supra* note 433 at pp 1016-1017. Brailsford, explained imperialism as the extension of capitalism which brought industrial and commercial development to non-European states, rather than what it really was.

[437] *Ibid* at 220. This however runs parallel to the assertion that they recognized the economic benefit of engaging in the enterprise of colonization.

[438] *Ibid* at pp 217-219. "With the representatives of 14 nations in attendance, the central players being England, France, Germany, Belgium, Portugal, Spain and the United States, the Berlin Conference began on 15 November 1884. Similarly, to the Peace of Westphalia, among many European treaties, this Conference which determined the future of Africa had no Africans as participants and was based on the shared history, culture and geography of Western states. Umozurike, *supra* note 430 at 97. The reactions of Africans to this treaty were hostile antagonistic but were disregarded. In this regard, the Lagos Observer wrote ""The world has, perhaps, never witnessed a robbery on so large a scale. Africa is helpless to prevent it **....** It is on the cards that this 'Christian' business can only end, at no distant date, in the annihilation of the natives."

In an attempt to characterize colonialism as an acceptable occurrence, the French parliament, as recently as 2005, adopted a law that imposes the obligation to recognize the positive contribution of colonialism.[439] In an effort to mask the true intention behind colonialism, the French government asserts that it invested heavily into the infrastructure, health, and education systems of French West Africa.[440] Although it has been argued multiple times that colonialism was meant for good as it was costly to European states, Huillery engaged in an analysis to determine the cost of colonialism to France, which serves as an example of the painstaking exercise of colonialism.[441] The collection of data was gathered from colonial budgets from 1844 to 1957.[442] The data included metropolis, federation, loan, auxiliary, and colony budgets.[443] According to this analysis, French West Africa's colonization took only 0.29 percent of French annual expenditures.[444] This almost negligible contribution of colonial governments has been proposed as the justification for colonialism, ignoring one of the most significant investments of colonialism—the imposition of European legal culture.

The imposition of European legal culture did not occur by accident but through calculated and deceitful means. Treaties signed during colonialism surrendered power, territory, and authority to European states.[445] Territories that were colonized, although generally deemed nonsovereign and uncivilized, were deemed sovereign for the purpose of treaties surrendering power.[446] Hence, treaties signed with representatives of these colonized states were deemed lawful.[447] However,

[439] Elsie Huillery, "The Black Man's Burden: The Cost of Colonization of French West Africa" (2013) 74:1 Cambridge University Press (CUP) 1 at 1.
[440] *Ibid.*
[441] *Ibid.*
[442] *Ibid* at 10.
[443] *Ibid* at 10.
[444] *Ibid* at pp 1-4. including 0.24 percent for military and central administration and 0.05 percent for French West Africa's development. On the other hand, the profit France made exceeded 3.2 billion 1914 francs.
[445] Yasuaki, *supra* note 324 at 3.
[446] *Ibid.*
[447] *Ibid.*

this ran contrary to international law, as these colonized states were not recognized as sovereign and were not subjects of international law.[448] How then could European states lawfully acquire these territories?[449] Although many years after these treaties took place, the Vienna Convention on the Law of Treaties of 1969 entrenches treaties' long-standing principles.[450] These principles include *pacta sunt servanda*, good faith, and equal rights.[451] According to positivist jurisprudence, there was no involvement of sovereignty in colonialism, as there was no agreement between two sovereign states but between a sovereign European state and a nonsovereign non-European state.[452]

The Masai of East Africa, for instance, claimed that they did not have sovereignty because the British had full control over the criminal, civil, legislative, and judicial systems. On the other hand, however, it was argued that the Masai were sovereign on behalf of the British crown. In the same way, European states acknowledged Africans Kings as sovereign to conclude treaties.[453] By European standards, African nations were deemed primitive, but loopholes were created in the law when it benefited them, and non-sovereign territories were accorded sovereignty status to sign treaties.[454] Once again, international law was used as a tool of diplomacy to rationalize actions that did not comply with international law.

[448] Yasuaki, *supra* note 324 at 3. Yasuaki argues that there was no shared consciousness rendering these treating questionable as to if they are binding.
[449] *Ibid.* Yasuaki argues that there was no shared consciousness rendering these treating questionable as to if they are binding.
[450] Umozurike, *supra* note 430 at 99.
[451] *Ibid.* These do not exhaust the principles but highlight the ones that were broken European states. These principles are also argued to develop from European origin.
[452] Gathii, "Imperialism, Colonialism, and International Law" *supra* note 433 at 1016. "Dominating, Restructuring, and having authority" over colonial peoples, both by European and other invaders, as well as by these outsiders in conjunction with local ruling elite" Kleinschmidt, *supra* note 391 at 294. Non-European states were Almost automatically deemed un-sovereign.
[453] *Ibid* at 1034; Umozurike, *supra* note 430 at 99.
[454] *Ibid* at 96. Kleinschmidt, *supra* note 391 at 296.

Positivists reasoned that if international law was, in fact, law, the colonized people had no credible capacity to conclude treaties.[455] European states ignored the fact that depriving these states of actual sovereignty but occasionally granting this quasi-sovereignty in their favour was antagonistic to the very nature of international law they created.[456] Instead, the law was developed and interpreted in any manner, even if contradictory, to suit their demands to impose on colonized states, European law.[457]

Apart from the mutually incompatible nature of the treaties imposed, many questions arise based on European countries' actions that do not reflect international law principles. Parties to these treaties allowing colonialism were initially ignorant of each others language, but treaties were drafted in the language of the European states.[458] Therefore, colonizing states had acted mala fide in signing treaties where the other party did not understand the nature and effect of the contract.[459] Also missing in these treaties was the principle of *pacta sunt servanda*. If the colonizing state did not want to be bound by the treaties due to its inconvenience, they simply found it null and void.[460]

Colonialism was established by Europeans for Europeans, and colonies were incorporated via European law.[461] Before colonialism, European public international law was developed

[455] Umozurike, *supra* note 430 at 96. They were objects of the law and not subjects according to European public international law.
[456] *Ibid* at 95-96
[457] *Ibid.* Beyond the illegal underlying nature of these treaties, other elements of these agreements constituted *mala fide* actions. Raw materials such as were exchanged for items such as padlocks, pocket knifes, handkerchiefs, and shirts.
[458] *Ibid* at 99.
[459] *Ibid* at 99.
[460] Umozurike, *supra* note 430 at 100.
[461] Gathii, "Imperialism, Colonialism, and International Law" *supra* note 433 at 1014. Gathii, also describes colonialism as "the territorial annexation and occupation of non-European territories by European states." Primarily between Europeans and non-Europeans. Fisch, *supra* note 412 at 23.

through shared borders, history, and religion and was used as the governing law for colonialism.[462] In essence, European states assumed a right to dominate the world, based on their legal order of *droit public de l'Europe* or *ius publicum europaeum*.[463] There was a further drastic evolution and expansion of public international law through colonialism controlled by European states.[464]

As colonialism was funneled through the law, specifically European law, the law is described by Chanock as being on the "cutting edge of colonialism…."[465] Just as law was the central driving force of civilization, modern international law, was without a doubt, strongly implicated in the creation of contemporary African states, which principally occurred through colonialism.[466] By 1949, there was an infiltration of European international law to three-fourths of the world, causing a universalized spread of European public international law.[467] The original nomenclature also evolved to public international law, dropping the qualifying adjective 'European'—signifying its universalized nature.[468] Colonized territories were faced with colonial law which was foreign to them.[469] This was rampant in Africa, where they were deemed unfit to

[462] Jorn Axel Kammerer, "Imprints of Colonialism in Public International Law: On the Paradoxes of Transition" (2016) 18:Issues 2-3 J Hist Int'l L 239 at 241.
[463] *Ibid* at 240.
[464] *Ibid* at 239.
[465] Gathii, "Imperialism, Colonialism, and International Law" *supra* note 433 at 1014. Far from an overstatement, Chanock's assertion is evidenced by the imposition of British law in colonized states such as Ghana, ranging from British law of property to contracts.
[466] Bowden, *supra* note 324 at 3. As colonialism was seen as a civilizing escapade. Robert J Miller, "The Doctrine of Discovery: The International Law of Colonialism" (2019) 5 Indigenous Peoples' J L Culture & Resistance 35 at 35-39; Umozurike, *supra* note 430 at 97. International law of colonialism also known as the Doctrine of Discovery started all this. It was used as a justification to exploit non-European or Western states. The first European state to discover a non-European state had full rights to take over the entire system of that state, which created a race of discovery for European states. Africa was a *terra nullis* open to European states to dominate. Gathii, "Imperialism, Colonialism, and International Law" *supra* note 433 at 1066; Antony Anghie, "Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law" (1999) 40:1 Harv Int'l L J 1 at 5. Anghie, in trying to understand the relationship between international law and colonialism, observed "colonial confrontation is central to an understanding of the character and nature of international law."
[467] Jorn Axel Kammerer, "Imprints of Colonialism in Public International Law: On the Paradoxes of Transition" (2016) 18: Issues 2-3 J Hist Int'l L 239 at 242; Emerson, *supra* note 432 at 534.
[468] Ibid.
[469] Steiger, *supra* note 387 at 189.

rule themselves without European law.[470] Colonialism was the beginning of the etching of European legal culture into the legal system of colonized states, including Africa, and specifically, Ghana.

Steeped in influence spanning centuries, the great powers successfully halted the suggestion of trusteeship at the 1945 San Francisco Conference and many other initiatives to end colonialism.[471] The delegations at the San Francisco Conference sat on the fence between "advancing the internationalization of imperial governance" and "refusing to take a definitive stand on the colonial question altogether."[472] Due to the influence of these great powers, ending colonialism was not a simple linear route. Measures based on the trusteeship system in Chapters XII and XIII and all other non-self-governing territories in Chapter XI of the UN Charter and the 1960 Declaration on the Granting of Colonial Independence were constantly interrupted and rejected.[473] In response to measures proposed, colonial powers refused to implement resolutions.[474] The Fourth Committee of the General Assembly deliberated the first eight

[470] *Ibid. Comaroff, supra note 434 at 305; Kleinschmidt, supra note 391 at 293. The international legal concept* 'protectorate' legitimized colonial rule after the Berlin Conference from 1884-1885. Law was such a vital tool in *colonialism and was used as a tool of imposition to control African territories*

[471] Jessica Lynn Pearson "Defending Empire at the United Nations: The Politics of International Colonial Oversight in the Era of Decolonisation" (2017) 45:3 The J Of Imperial and Commonwealth Hist 525 at 525; Yasuaki, *supra* note 324 at 40; Kenneth Twitchett, "The Colonial Powers and the United Nations" (1969) 4:1 J Contemporary Hist 167 at 177; Daniel Gorman "Britain, India, and the United Nations: colonialism and the development of international governance, 1945–1960" (2014) 9:3 Journal of Global Hist 471 at pp 477-481.

[472] Pearson, *supra* note 472 at 529.

[473] Emerson, *supra* note 432 at 767; Pearson, *supra* note 472 at 527. Even though under oversight as with the League of Nations Permanent Mandates Commission (PMC), there was no actual stopping of colonialism, just how to make it more manageable Even though they served as a forum to discuss the rights and responsibilities of European governments in relation to the colonial territories, many representatives of these forums were pro-colonialism and imperialism. Twitchett, *supra* note 472 at 167. The United Nations Declaration on the Granting of Independence to Colonial Countries and Peoples stated, - "The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations, and is an impediment to the promotion of world peace and co-operation. All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social, and cultural development. Inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence."

[474] Twitchett, *supra* note 472 at pp 183-184. "Portugal was the most obdurate, refusing to supply any information under Article 3(e) on the ground that her overseas territories were not colonies but overseas provinces."

trusteeship agreements, out of which the anti-colonialists proposed 229 amendments; the European Powers, together as an alliance, accepted none of them.[475]

Colonial representatives consistently fought each step of the way. They succeeded in preventing the establishment of a permanent committee of colonial oversight.[476] Just as the eight great powers during the Congress of Vienna decided that "the subject of the relations of civilized states with backward peoples be determined by all the Powers collectively,"[477] European powers continued to make collective decisions and defend colonialism.[478] This defense, capitalizing on contradictions in U.N. policy, was that states under their formal empires were in a better position than states living in independent territories.[479]

However, at the end of colonialism, which seemed to be the end of an imperialist era, there was an entrenchment of European legal culture through decolonization.[480] The widespread dependence on European law, and the protracted entanglement with this law, caused states to be decolonized by this law.[481] As decolonization declined, colonial territories, were now sovereign states as recognized and developed by European law, allowing them to be full members of the international society. [482] The move from European law to worldwide law was then solidified.[483]

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[475] *Ibid* at 179.
[476] Pearson, *supra* note 472 at 533.
[477] Twitchett, *supra* note 472 at 168.
[478] Pearson, *supra* note 472 at 525. Instead, Great Britain, France, and Belgium; Twitchett, *supra* note 472 at 182.
[479] *Ibid* at 525-526. Just as justified by the French as a system to help third world nations, the British representative to the United Nations Trusteeship Council, Alan Burns (who had served 42 years in the British Colonial Service) chastised the UN stating that the negative press colonial empires had received was due to the lack of understanding of conditions in colonized territories as opposed to independent countries in the developing world. Belgium;s ambassador to the UN, Fernand van Langenhove also made note of the discriminatory nature of the UN towards colonial territories.
[480] Pearson, *supra* note 472 at 541; Twitchett, *supra* note 472 at 179. Public opinion and liberal sentiment.
[481] Fisch, *supra* note 412 at 23.
[482] *Ibid* at pp 23-24.
[483] *Ibid* at 24.

International law, for centuries, had been a "legal monopoly."[484] This legal monopoly was controlled by states which established colonial regimes, including Great Britain, France, Portugal, and Belgium—of which some were great powers.[485] The new international order consisting of the United Nations, the International Monetary Fund, and the World Bank (was then International Bank for Reconstruction and Development) was controlled by great or big powers.[486] Through the breakdown of colonial systems, many states became a part of these institutions as the Europeans had access to many nations through colonialism.[487] There was a substantial development of international law that ran parallel to and influenced colonialism and its breakdown.[488]

In hindsight, colonialism was a globalizing project, advancing the homogenization of legal culture.[489] A conduit of this legal homogenization was criminal law. Nine-tenths of the world practices common or civil law, in which both have their histories tied to European civilization.[490] Civil law can be traced to Roman antiquity, where laws were written, codified, and imposed on

[484] Jorn Axel Kammerer, "Imprints of Colonialism in Public International Law: On the Paradoxes of Transition" (2016) 18: Issues 2-3 J Hist Int'l L 239 at 240.
[485] Cheeseman, Bertrand & Husaini, *supra* note 429, sub verbo "colonialism.
[486] For a discussion on the link to neocolonialism see Anthony P Greco, "ADR and a Smile: Neocolonialism and the West's Newest Export in Africa" (2010) 10:3 Pepp Disp Resol LJ 649 at 652-656.That the adoption of efficient and proven laws set up in other economic systems will more quickly integrate societies into the global marketplace and allow for their own development and growth." world legal culture, which adjusts the conditions and composition of legal structures in the Third World to fit a "modernized" norm created by Western powers from which they are the primary beneficiaries, falls in line with the general understanding of a system neocolonialist.
[487] Gorman, *supra* note 472 at 472.
[488] Gustavo, *supra* note 327 at 359. The evolution of the United Nations revolved around colonialism. Due to the acclaimed intention of international law to manage relations between colonial powers and the indigenous people of colonized states with its humanitarian purpose, the United Nations gained a reputation for being a decolonizing agent; Antony Anghie, "Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law" (1999) 40:1 Harv Int'l L J 1 at 3. The concern of international lawyers was the role international law should play in decolonization."
[489] Merry, "From Law and Colonialism to Law and Globalization" *supra* note 495 at 578-583. Understanding law and colonialism paints a better picture of how legal regimes intersect and the implications of law and colonialism for globalization.
[490] Neil C. Chamelin & Andrew Thomas Essentials of Criminal Law 10th ed (New Jersey: Prentice Hall, 2009) at 5.

the people.[491] Common law, prevalent in England was developed through the customs of the people.[492] Although exclusive to the customs and legal culture of the British, common law was imposed on colonized states, including African states, and was also transplanted by English colonists who settled in the United States.[493] Through the distinctly European penal code system, there was an institutionalization of the criminal justice system.[494] The following section explains selected international legal instruments against FGC and their emphasis on legislation, specifically criminalization and sanctions against FGC.

Current International Law Mechanisms Against FGC

The protection of women from FGC by the international community has revolved mainly around legislative measures. Due to the homogenization of legal culture over centuries, international law has progressed towards criminalization and criminal responsibility more recently, and this criminalization, as noted earlier, developed from European legal culture.[495] The international community advocates for the constitutional recognition of the rights of girls and women. However, the focus is on criminal laws and the sanctions that come with these laws.[496]

When it is stated that advancements have been made in international and domestic law, this advancement is centered around criminalization and the normative enforcement mode.[497] Research has proven that advancements have been made in Africa towards curbing FGC.[498] These

[491] *Ibid.*
[492] *Ibid.*
[493] Stacey Hynd, Criminal Law (online) Privy Council Papers <http://privycouncilpapers.exeter.ac.uk/contexts/law-and-the-british-empire/the-laws/criminal-law/
[494] Vivianne Saleh-Hanna *Colonialism, Crime and Social Control* (Oxford: Oxford University Press, 2020) at 1.
[495] T, Meron" Is International Law Moving Towards Criminalization?" (1998) 9:1 Eur J Intl L 18 at 20.
[496] "An update on WHO's work on female genital mutilation (FGM) Progress report" (2011) at pp 2-5, online (pdf) <https://apps.who.int/iris/bitstream/handle/10665/70638/WHO_RHR_11.18_eng.pdf >
[497]"Female Genital Mutilation (FGM): Legal Prohibitions Worldwide" (12 November 2008) online: Center For Reproductive Rights < https://reproductiverights.org/female-genital-mutilation-fgm-legal-prohibitions-worldwide/ >
[498] *Ibid.*

advancements focus on the fact that 26 of the 29 states in Africa where FGC is practiced have laws prohibiting the practice, with punitive sanctions attached.[499] These penalties are either in the form of monetary fines or sentences ranging from three months to life in prison.[500] As discussed in the previous section, African states have been deeply imbued in European law for centuries. As a corollary of this European legal culture, merged with international law's advocacy of criminalization is the criminalization of FGC as the unparalleled solution.

The United Nations Population Fund has stated, "We know that a legal framework that clearly outlaws FGM can support its abandonment. When a government criminalizes FGM, it sends a clear signal that the practice will no longer be tolerated."[501] The criminalization of FGC sends a clear message and shows that a state has taken measures to eradicate this practice. However, criminalization has its limitations, which will be discussed in chapter five.

The move towards legislation, criminalization, and sanctions against FGC in international law and agreements can be observed in the following:

Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)[502]

As the most extensive international legal instrument for women, CEDAW is often cited as it seeks to end discrimination against women.[503] Based on article 1 of CEDAW, two main

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[499] *Ibid.*
[500] *Ibid.*
[501] United Nations Population Fund "Analysis of Legal Frameworks on Female Genital Mutilation in Selected Countries in West Africa" (2018) at 6, online (pdf) <https://wcaro.unfpa.org/sites/default/files/pub-pdf/EN-UNFPA-ANALYSIS-ON-FGM.pdf >
[502] *Convention on the Elimination of All Forms of Discrimination Against Women* 18 December 1979, 1249, UNTS (entered into force 3 September 1981) [CEDAW]
[503] Mswela, *supra* note 3 at 534; Neelam Rai, "Female Genital Mutilation - A Hindrance to Women's Rights and Freedom" (2018) 9:1 Indian JL & Just 79 at 87; Binaifer A Davar, "Women: Female Genital Mutilation " (1997) 6:2 Tex J Women & L 257 at 265.

requirements are necessary to qualify FGC under CEDAW.[504] Firstly, the discrimination must be against women. Secondly, the distinction must be detrimental to the equal enjoyment of rights by women.[505]

> **Article 1 -** "For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."[506]

According to the definition in article one, FGC meets the test to be recognized under CEDAW. Firstly, FGC is primarily performed on women, mostly young girls below the age of fifteen who do not have the capacity to act.[507] Secondly, FGC is detrimental to the equal enjoyment of sexual rights by women as it is believed that as sex will be painful and undesirable, young girls will have no desire to "break their virginity." [508] Considering this discrimination, CEDAW recommends states take effective measures towards the eradication of discrimination. These include:

> **Article (2) (b)** - "To adopt appropriate **legislative and other measures, including sanctions** where appropriate, prohibiting all discrimination against women."

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[504] *Ibid* at 528.
[505] *Ibid* at 528.
[506] [CEDAW], *supra* note 503 art 1
[507] "Female Genital Mutilation" (3 February 2020) online: World Health Organization https://www.who.int/news-room/fact-sheets/detail/female-genital-mutilation
[508] *Ibid.*

Article (2) (f) - It also requires states to "take all appropriate measures**, including legislation, to modify or abolish** existing laws, regulations, customs and practices which constitute discrimination against women."

International law instruments on human rights that came into force prior to the international outroar against FGC, such as CEDAW, do not specifically prohibit FGC practice. However, there have been subsequent developments to address this gap, including:

CEDAW General Recommendation No. 14 deals specifically with FGC:[509]

(a) That States parties take appropriate and effective measures with a view to eradicating the practice of female circumcision. Such measures could include: The collection and dissemination by universities, medical or nursing associations, national women's organizations or other bodies of basic data about such traditional practices; The support of women's organizations at the national and local levels working for the elimination of female circumcision and other practices harmful to women; The encouragement of politicians, professionals, religious and community leaders at all levels including the media and the arts to cooperate in influencing attitudes towards the eradication of female circumcision; The introduction of appropriate educational and training programmes and seminars based on research findings about the problems arising from female circumcision…"

[509] UN Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendation No. 14: Female Circumcision*,1990) UN Doc A/45/38.

General recommendation No. 35 on gender-based violence against women, updating General recommendation No. 19:[510]

29. The Committee recommends that States parties implement the following **legislative** measures:

(a) Ensure that all forms of gender-based violence against women in all spheres, which amount to a violation of their physical, sexual, or psychological integrity, **are criminalized and introduce, without delay, or strengthen, legal sanctions commensurate with the gravity of the offence,** as well as civil remedies.

30. The Committee recommends that States parties implement the following preventive measures:

(a) **Adopt and implement effective legislative and other appropriate preventive measures** to address the underlying causes of gender-based violence against women, including patriarchal attitudes and stereotypes, inequality in the family and the neglect or denial of women's civil, political, economic, social and cultural rights, and to promote the empowerment, agency and voices of women.

CEDAW primarily highlights legislation and sanctions in the elimination of FGC. Any other measure that is applicable is encompassed under other measures or "take all appropriate measures."[511] Further developments to CEDAW have highlighted some of these other measures towards the eradication of FGC. However, General Recommendation 35, similarly to CEDAW's

[510] UN Committee on the Elimination of Discrimination Against Women, *Launch of CEDAW General Recommendation No. 35 on gender-based violence against women, updating General Recommendation No. 19*, 11TH Sess, OHCHR, (2017)
[511] *Convention on the Elimination of All Forms of Discrimination Against Women* 18 December 1979, 1249, UNTS arts 2 (entered into force 3 September 1981) [CEDAW]

main provisions, focuses primarily on legislation—criminalization and punitive measures against FGC. This focus on legislation with sanctions reemphasizes criminalization as a measure second to none. General Recommendation 14 highlights measures that could fit the social fabric of communities practicing FGC. It is my suggestion that these measures be developed and merged with legal measures in other recommendations and international legal instruments, rather than in passing under the umbrella of other measures. As it has been recognized that culture is the primary cause of FGC, remedies related to the said culture which influences the people should be explored. This offers a viable solution as opposed to only normative criminalization measures that have not been entirely successful in eradicating FGC.

Convention on the Rights of the Child (CRC)[512]

The main purpose of the CRC revolves around the "best interests of the child."[513] FGC is acknowledged as a practice that primarily affects children as it is disproportionately performed on girls between infancy and the age of 15.[514] Although FGC is not explicitly stated as the primary focus of the convention, it was a focal point during discussions leading to the CRC's finalization.[515]

> **Article 19 (1):** States Parties shall take all appropriate **legislative**, administrative, social, and educational measures to protect the child from all forms of physical or mental.

[512] Convention on the Rights of the Child, 20 November 1989, 1577, UNTS 3, (entered into force 2 September 1990) [CRC]
[513] Article 3.
[514] *Ibid.*
[515] Ruby Crews, "Female Genital Mutilation in International Law: Approaches of International and Regional Legal Frameworks" (2020) 48:1 Denv J Int'l L & Pol'y 91 at 95.

Committee on the Rights of the Child. General Comment No. 4 on Adolescent health and development under the Convention on the Rights of the Child. 19 May-6 June 2003:

> (39) …States parties must take all appropriate **legislative,** administrative and other measures for the realization and monitoring of the rights of adolescents to health and development as recognized in the Convention. To this end, States parties must notably fulfil the following obligations: … (g) To protect adolescents from all harmful traditional practices, such as early marriages, honour killings and female genital mutilation.

Measures highlighted for the realization of the rights of children and adolescents include legislative and social measures. However, the committee on the Rights of the Child, General Comment 4, mainly highlighted legislative and administrative, and similarly to other international instruments, captured all other measures under the umbrella of other measures. This diminishes the value of social and cultural measures in the eradication of FGC and demonstrates the progression towards legislative measures, and specifically criminalization by the international community, which has not materially deterred the practice of FGC.

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)[516]

The Convention against torture focuses on the right not to be subjected to torture, as the title explains. The title of this convention has raised the issue of whether FGC is torture, as the intent behind FGC is not torture but full acceptance into a society.[517] However, the United Nations

[516] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465, UNTS 85 (entered into force 26 June 1987) [CAT]
[517] Camilla Yusuf & Tonatan Fessha, "Female Genital Mutilation as a Human Rights Issue: Examining the Effectiveness of the Law against Female Genital Mutilation in Tanzania" (2013) 13:2 Afr Hum Rts LJ 356 at 367.

describes FGC as cruel, inhumane, or degrading treatment, which infers torture.[518] Secondly, the definition of CAT involves the consent or acquiescence of a public official. In this regard, the inaction, lack of enforcement of laws, and sometimes, the total disregard by police officers to stop people from practicing FGC shows that government officials have implicitly condoned the practice.[519] Torture is defined in the convention as:

> **Article 1:** [A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain and suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.
>
> **Article 2 (1):** Each State Party shall take effective **legislative**, administrative, **judicial,** or other measures to prevent acts of torture in any territory under its jurisdiction.
>
> **Article 4 (1):** Each State Party shall ensure that all **acts of torture are offences under its criminal law.** The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.
>
> (2) Each State Party shall make these offences **punishable by appropriate penalties** which take into account their grave nature.

[518] Concluding Observations on Sudan, **(**1997) UN Doc CCPR/C/76**;** Concluding Observation on Yemen (2002) **UN** Doc CCPR/CO/75/YEM.

[519] Andrea L Courtney, "Addressing the Horror Stories: How the Convention against Torture Offers a Promising Answer to U.S. Asylum Seekers Fleeing Female Genital Mutilation" (2000) 1:3 Geo J Gender & L 887 at pp 902-903.

The penalty in CAT against all torture is, again, criminal law. This demonstrates the pull towards criminalization instigated by the international community. Specifically, focusing on FGC, social factors may cause police officers to ignore persons practicing FGC. Kahan shows how police rarely enforce harsh penalties against an accepted norm.[520] Instead, he suggests "gentle nudges" in changing a social norm.[521] I hold vernacularization, which considers the social fabric of the people as a measure qualifying under gentle nudges. FGC is not a quintessential example of crime because of culture and intent, and hence, legal measures must consider these factors.

Universal Declaration of Human Rights[522]

The UDHR is not a convention but a codification of all human rights by the Geneva Assembly.[523] Codified in 1948, it is the earliest comprehensive document outlining the rights of a human being and is referred to as the "international bill of rights."[524] Therefore, all rights against torture or related to health outlined in CEDAW, CRC, and CAT flow from the UDHR. Therefore, FGC is under the scope of the UDHR.

> **Article 5:** No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

> **Article 15**: Universal Declaration of Human Rights (UDHR) states that "everyone has the right to standard of living adequate for the health and well-being of himself.

[520] *Ibid.*
[521] Kahan, *supra* note 171 at 607-608.
[522] Universal Declaration of Human Rights, GA Res 217A (III) UN GAOR, 3rd Sess, Supp 13, UN Doc A/811 (1948).
[523] Elizabeth Heger Boyle & Sharon E Preves, "National Politics as International Process: The Case of Anti-Female-Genital-Cutting Laws" (2000) 34:3 Law & Soc'y Rev 703 at 710.
[524] Timothy F Yerima & Daniel F Atidoga, "Eradicating the Practice of Female Circumcision/Female Genital Mutilation in Nigeria within the Context of Human Rights" (2014) 28 JL Pol'y & Globalization 129 at 132; *Ibid* at 711.

This chapter shows how European civilization, coupled with colonialism, was a tool for perpetual sidelining and pseudo-equality. Decolonization, on the other hand, rather than causing states to move away from a European legal system, solidified the position of European law as international law. The widespread dependence on European international law caused states to be decolonized by this law and retain it to continue to be members of an international community.

Modern international law has made efforts towards eradicating FGC. The main consequence of the international agreements discussed in this chapter is enacting national legislation to ban FGC in many states.[525] However, as noted by Davar, "the force of custom remains stronger than the force of law,"[526] and therefore, legislation has not been effective in totally eradicating the practice of FGC. International law occasionally refers to the term other measures but merely parenthetically. These international instruments have not considered intersectionality as they should. As FGC is caught at the intersection of ethnicity, race, and gender, legal measures towards its eradication must focus on social and cultural factors that will influence the people from these communities. More recently, the United Nations has started calling for "culturally sensitive measures" [527] that incorporate a social perspective. As there exists in international human rights, missed opportunities for an intersectional approach, international measures must place more focus on "culturally sensitive measures."[528]

[525] Kay Young McChesney, "Successful Approaches to Ending Female Genital Cutting" (2015) 42:1 J Soc & Soc Welfare 3 at 11.
[526] Binaifer A Davar, "Women: Female Genital Mutilation " (1997) 6:2 Tex J Women & L 257 at 266.
[527] UN General Assembly. "Intensifying global efforts for the elimination of female genital mutilations," UN GA, A/C.3/67/L.21/Rev.1, (16 November 2012)
[528] Intersectional International Human Rights," *supra* note 239 at 861.

The following chapter demonstrates how European civilization, colonialism, and the pull towards criminalization in the international community have been reflected in Ghana's domestic law.

CHAPTER 4

Relics of Colonialism as a Tool of Assimilation

This chapter shows how due to colonization and the need to homogenize the legal culture of the world, domestic law, rather than integrating international law according to the culture of Ghana, has duplicated international and European law and legal culture. Colonialism has had a long-lasting effect as there were cultural legacies arising from the European colonial expansion.[529] Colonialism has been described as socio-legal experimentation as it veers beyond law and affects society over time.[530] As discussed in chapter three, the homogeneity of criminal law and procedure in Africa is currently entrenched due to colonialism.

With over 412 million people under British rule at its zenith of influence, it is plausible that the transplantation of European laws in territories caused the globalization of European law.[531] There was a large-scale transfer of laws and legal institutions.[532] Codes of criminal law and procedure, which found their origin in English law were introduced into British colonies, which included Ghana.[533] Through colonialism, there was a standard body of criminal law and procedure in most places around the globe.[534] Long-term consequences of the imposition and transplanting of criminal legal systems continue to be revealed centuries later.[535] As noted by Merry, "In Africa, criminal law was very much a product of the imperial project."[536]

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[529] Cheeseman, Bertrand & Husaini, *supra* note 429, sub verbo "colonialism.
[530] Comaroff, *supra* note 434 at 312.
[531] Bonny Ibhawo "Historical globalization and colonial legal culture: African assessors, customary law, and criminal justice in British Africa" (2009) Journal of Global History 429 at 429 doi:10.1017/S1740022809990155; Maryam Kanna, "Furthering Decolonization: Judicial Review of Colonial Criminal Laws" (2020) 70:2 Duke LJ 411 at 416.
[532] *Ibid.*
[533] *Ibid.*
[534] *Ibid.*
[535] Merry, "From Law and Colonialism to Law and Globalization" (2003) 495 at 583.
[536] Hynd, *supra* note 594.

The legal system of Ghana, previously the Gold Coast, can be traced to 1821, when the British Crown assumed territorial jurisdiction.[537] The Bond of 1944 solidified this take over when it was proclaimed that "the first objects of law are the protection of individuals and property."[538] It was agreed by the colonial office of the Gold Coast that substantive criminal law should be English common law, the rules of equity, and the statutes of general application.[539]

One of the earliest traces of English criminalization in Ghana was the declaration that customary practices such as human sacrifices, panyarring, or the kidnapping of hostages for debt and other similar customs were barbarous and abominable and against the law.[540] The criminal codes imposed in many territories, including Ghana, remain intact in domestic law to a high degree.[541]

Even after independence, the modern Republic of Ghana was exposed to English law and criminal law, which was an extension of the British imperial administration.[542] As of 1972, fifteen years after independence, sources of Ghanaian law included received law.[543] Received law incorporated English common law, the doctrines of equity, and general application statutes passed in England, which were in force on July 24, 1874.[544] From 1983-1986, twenty-six to twenty-nine years after independence, English common law and English doctrines of equity were still embedded in Ghanaian law.[545] Undoubtedly, the foundation of criminal law and criminal

[537] C Ogwurike, "A Functional Analysis of Ghanaian Legal Sources" (1967) 4:2 U Ghana LJ 122 at 122.
[538] *Ibid.*
[539] Morris 7.
[540] Ogwurike, *supra* note 538 at 122.
[541] Kanna, *supra* note 532 at 411.
[542] A. K., Editor Mensah-Brown, African Intl Leg History (New York: United Nations Institute for Training and Research., -) at 124. William Burnett Harvey, "The Evolution of Ghana Law Since Independence" (1962) 27:4 Law & Contemp Probs 581 at 581. Ghana became an independent state on March 6, 1957.
[543] Ogwurike, *supra* note 538 at 125.
[544] Ogwurike, *supra* note 538 at 125.
[545] S Y Bimbong-Buta, "Sources of Law in Ghana" (1983-1986) 15 Rev Ghana L 129 at 138.

procedure in Ghana is based on the essential concepts and principles of English criminal law and criminal procedure.[546] As a result of this foundation, even though there has been post-independence legislation to cater to new situations, the Ghana Criminal Code of 1960[547] can be considered reformed versions of provisions under English law.[548]

In 1962, based on the hierarchical ordering, the sources of law in Ghana were:

(a) The Constitution[549]

(b) enactments made by or under the authority of the Parliament established by the Constitution,

(c) enactments other than the Constitution made by or under the authority of the Constituent Assembly,

(d) enactments in force immediately before the coming into operation of the Constitution,

(e) the common law, and

(f) customary law.[550]

[546] N A Ollennu, "Changing Law and Law Reform in Ghana" (1971) 15:2 J Afr L 132 at 174. There are, however, a few significant differences; for example, in cases where English law uses *mens rea* and malice aforethought, the Ghanaian law uses "intent" with which a crime is committed."
[547] *Criminal Code*, Act 29 of 1960
[548] Ollennu, *supra* note 547 at 175; William Burnett Harvey, "The Evolution of Ghana Law Since Independence" (1962) 27:4 Law & Contemp Probs 581at 587. Victor Essien "Sources of Law in Ghana" 246 at 2526.
[549] *Constitution of the Republic of Ghana*, 1992.
[550] William Burnett Harvey, "The Evolution of Ghana Law Since Independence" (1962) 27:4 Law & Contemp Probs 581 at 594.

Over 30 years after the 1962 hierarchical ordering of the sources of law, there was no significant change, signifying the entrenched nature of English common law. The constitution of Ghana 1992 states:[551]

The laws of Ghana shall comprise—

(a) this Constitution.

(b) enactments made by or under the authority of the Parliament established by this Constitution.

(c) any Orders, Rules, and Regulations made by any person or authority under a power conferred by this Constitution.

(d) the existing law; and

(e) the common law.

The 1992 Constitution[552] describes this common law as "the rules of law generally known as the common law, the rules generally known as the doctrines of equity, and the rules of customary law including those determined by the Supreme Court of Judicature."[553]

The unequivocal acknowledgment of English law as a source of law was not exclusive to the Constitution. Aprah noted in 1970 that the sources of statutory law in Ghana consisted of:

Statutory law in Ghana, as noted by Apreh (1970), comprises:

1. The received British statutes;

[551] *Constitution of the Republic of Ghana*, 1992.
[552] *Ibid* at art 11(1).
[553] *Ibid* at art 11(2).

2. British statutes and Orders in Council that were made to apply in these countries before the attainment of independence;

3. Local enactments made by the Legislative Councils and Parliaments before independence;

4. Post-independence legislation passed by the legislative bodies or constitutional organs charged with legislative powers, including military councils.[554]

The following section describes Ghana's method of incorporation of international conventions explained in chapter three into its domestic law.

The Incorporation of International Law into Domestic Law

A state is not bound to a treaty or convention until expressly acknowledging its consent to be bound by "signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed."[555] Ratification is described by Article 2 of the Vienna Convention as "the international act so named whereby a State establishes on the international plane its consent to be bound by treaty"[556] In Ghana, constitutional ratification of a treaty requires a procedure of authorization from parliament.[557] Article 75(2) of the 1992 Constitution requires Parliament to ratify treaties "executed by or under the authority of the President."[558]

[554] Victor Essien "Sources of Law in Ghana" 246 at 252
[555] Vienna Convention on the Law of Treaties, May 23, 1963, 500 UNTS 95, art 11 (entered into force 27 January 1980)
[556] *Ibid* at art 2.
[557] Emmanuel Yaw Benneh, "The Sources of Public International Law and Their Applicability to the Domestic Law in Ghana" (2013) 26 U Ghana LJ 67 at 70.
[558] *Constitution of the Republic of Ghana*, 1992 art 75(2).

The Constitution of 1992[559] acknowledges the role of international law in Article 40, Chapter six, stating:

> In its dealings with other nations, the Government shall-
>
> (a) promote and protect the interests of Ghana;
>
> (b) seek the establishment of a just and equitable international and social order;
>
> (c) promote respect for international law, treaty obligations and the settlement of international disputes by peaceful means;
>
> (d) adhere to the principles enshrined in or as the case may be, the aims and ideals of-
>
> (i) the Charter of the United Nations;
>
> (ii) the Charter of the Organisation of African Unity;
>
> (iii) the Commonwealth;
>
> (iv) the Treaty of the Economic Community of West African States; and
>
> (v) any other international organisation of which Ghana is a member.

Also, according to Article 75, a dualist approach based on the balance of power between the Executive and the Legislature as adopted from English law:[560]

> 1. The President may execute or cause to be executed treaties, agreements, and conventions in the name of Ghana.
>
> 2. A treaty, agreement or convention executed by or under the authority of the President shall be subject to ratification by
>
> (a) Act of Parliament; or

[559] *Constitution of the Republic of Ghana*, 1992, art 40.
[560] Emmanuel Yaw Benneh, "The Sources of Public International Law and Their Applicability to the Domestic Law in Ghana" (2013) 26 U Ghana LJ 67 at 91; *Constitution of the Republic of Ghana*, 1992, art 75.

(b) A resolution of Parliament supported by the votes or more than one-half of all the members of Parliament.

Based on these provisions, Ghana has ratified treaties related to FGC, Convention on the Elimination of All Forms of Discrimination Against Women (1979) (CEDAW),[561] Convention Against Torture & Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) (CAT),[562] and the Convention on the Rights of the Child (1989) (CRC)[563] explained in chapter three.

Ratifying and incorporating these conventions that emphasize criminalization, and sanctions against practices such as FGC, causes states to focus on criminalization and sanctions as the primary method of eradicating FGC. Ghana's representatives presenting on progress made in accordance with CEDAW noted that the *Criminal Code of 1960* had been amended to criminalize harmful practices, including FGC.[564] This submission offers a case in point regarding the ripple effects of the focus on criminalization and sanctions as the unparalleled means of combatting FGC. Additionally, Nana Oye Lithur, Minister for Gender, Children and Social Protection of Ghana, presented the third to the fifth periodic report of Ghana on its application of the stipulations of the CRC.[565] This presentation was made before the Committee on the Rights of the Child.[566] Ghana's efforts to eliminate FGC was once again highlighted as criminalization with a minimum

[561] [CEDAW], *supra* note 503 art 1.
[562] [CAT], *supra* note 517.
[563] [CRC], *supra* note 513.
[564] "CEDAW Statement Ghana" UN Women: United Nations Entity for Gender Equality and the Empowerment of Women, online (pdf) <https://www.un.org/womenwatch/daw/cedaw/cedaw36/statements/CEDAW%20STATEMENT%20Ghana.pdf>
[565]"Committee on the Rights of the Child examines the report of Ghana" (21 May 2015) online: United Nations Human Rights Office of the High Commissioner <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=15987&LangID=E>
[566] *Ibid.*

punishment of five years.[567] The Committee Experts praised Ghana for its legislative efforts, which included criminalizing FGC.[568]

Although Ghana had noted its progress in criminalizing FGC and had been congratulated, Committee Experts expressed concern about why the practice still ensues although progress had been made. This is further evidence that criminalization is not sufficient in eradicating FGC. The following section expands on Ghana's criminalization of FGC.

The Normative Mode of Criminalization in Domestic Law

In Ghana, the laws drafted on FGC have been in force for twenty-seven (27 years)[569], with a few successful prosecutions.[570] These measures fulfill the requirements of criminalization. However, the limitations of criminalization, seemingly ameliorated by implementation, reflect the force of culture. Even when criminalization has fully been fulfilled, it is not enough as the normative mode of enforcement that is punitive through the courts is not a one-size-fits-all measure. As noted by Webb, this traditional deterrence method "has not been and needs to be sensitive to the different pressures to break the law and how these different pressures or norms must be deterred in different ways."[571] The prevalence in particular regions in the North, such as the Bawku municipality, is still as high as 82%.[572]

Based on the criminal laws of Ghana and the laws regulating the assimilation of international law, both based on English law, is Ghana's criminalization of FGC. The *Criminal*

[567] *Ibid.*
[568] *Ibid.*
[569] Act (484 of 1994) to amend the *Criminal Code*, 1960 (Act 29) to include in the Code the offence of female circumcisions and for connected purposes.
[570] 28 Too Many, Thomson Reuters Foundation "Ghana: The Law and FGC" (September 2018) online: <https://www.28toomany.org/static/media/uploads/Law%20Reports/ghana_law_report_v1_(september_2018).pdf>
[571] Webb, *supra* note 162 at 25.
[572] Sakeah et al, *supra* note 23 at 1.

Code Amendment Act 1994 inserted Section 69A to specifically illegalize FGC, among other things, which modified the *Criminal Code Act* of 1960. The section reads:

> (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 offense 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; "infibulate" includes excision and the additional removal of the labia majora.[573]

In 2007, the Act was amended, increasing the minimum incarceration period if found guilty by two years.

> "Whoever carries out female genital mutilation and excises, infibulates or otherwise mutilates the whole or any part of the labia minora, labia majora and the clitoris of another person commits an offense, and is liable on summary conviction to imprisonment for a term of not less than **five years** and not more than ten years."[574]

The imposition of an increment in the period of incarceration as a sanction, not materially deterring the practice of FGC, further acts as evidence that criminalization can only go so far in ending a practice deemed to exude positivity in the eyes of the perpetrators. The reasoning behind the two-year increase in the sentencing of a perpetrator of FGC is argued to be deterrence, albeit other factors may be included. This benefit-cost theory of the economic model of the rational actor is relied upon in the hopes that the severity of punishment may influence behavior if potential

[573] *Criminal Code Amendment Act*, (484 of 1994) to amend the Criminal Code, 1960 (Act 29) s69A (Ghana)
[574] *The Criminal Code Amendment Act*, (Act 741 of 2007) Protection of Women and Children's Rights.

offenders weigh the consequences of their actions and conclude that the risk of five years in prison is severe.[575]

Some policymakers and practitioners believe that an increase in the severity of imprisonment enhances the "chastening" effect, which reduces the chances of committing another offense.[576] Nagin, Cullen, and Jonson in their review of the effect of imprisonment in offending, prove that the length of a sentence has less of a bearing on deterrence.[577] Although criminalization and the traditional mode of enforcement, which is prosecution resulting in incarceration, have their benefits, it cannot be solely relied on to eradicate the practice, as there appears to be a tenuous link between people's compliance and the risk associated with law-breaking behaviour.[578] Ghana has been imbued in western legal culture for centuries, along with significant developments in the law. However, there are aspects of the social fabric of Ghanaians (FGC) that have not changed.[579] Hence, the law needs to consider the social fabric in the implementation of legal measures.

In the following chapter, I focus on interpreting the constitution to determine if vernacularization through incorporating customary norms is a workable option in eradicating FGC according to the Constitution of Ghana.

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[575] *Ibid.*
[576] National Institute of Justice(US) "Five Things About Deterrence" (June 5 2016) online: <https://nij.ojp.gov/topics/articles/five- things-about-deterrence#note4>
[577] Daniel S Nagin, Francis T Cullen & Cheryl Lero Jonson, "Imprisonment and Reoffending" (2009) 38 Crime & Justice: A Rev of Research 115.
[578] Tom R Tyler & John M Darley, *supra* note 160 at 713.
[579] S K B Asante, "Law and Society in Ghana" (1966) 1966:4 Wis L Rev 1113 at 1124.

CHAPTER 5

Conclusion and Suggestions

Extensive Enforcement beyond the Normative Approach- Constitutional Mandate and Allowance

As established in previous chapters, human rights and the majority of the law in Ghana and many other countries are a Western construct.[580] As the criminalization of FGC appropriates a Western framework, I propose vernacularization as a tool in translating human rights instruments, including conventions described in chapter three, into the social fabric of the people of Ghana.[581] The process of vernacularization localizes international measures and adapts these measures for local implementation.[582] Vernacularization involves translating the law into a familiar framework that resonates with the people and their way of life.[583] To them, customs are the law. These customs are law enough to disregard criminalization and still practice FGC.[584] As an intersectional approach, vernacularization exists at the intersection of law and society's social fabric.[585] Vernacularization also originates from the feminist theory and considers the well-being of women.[586] I propose that vernacularization is funneled through the unrefined customary law practiced by communities practicing FGC. Considering this solution, I explore interpretations of the constitutional mandate to determine if vernacularization is indeed a viable solution.

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[580] Merry, "Legal Vernacularization and Ka Ho'okolokolonui Kanaka Maoli, The People's International Tribunal, Hawai'i 1993," *supra* note 105 at 68.
[581] *Ibid* at 69; Chua, *supra* note 582 at 299.
[582] Merry, "Legal Vernacularization and Ka Ho'okolokolonui Kanaka Maoli, The People's International Tribunal, Hawai'i 1993," *supra* note 105 at 80; Lynette J Chua, "The Vernacular Mobilization of Human Rights in Myanmar's Sexual Orientation and Gender Identity Movement" (2015) 49:2 Law & Soc'y Rev 299 at 300.
[583] Sami Thamir Alrashidi, "Challenging Cultural Backgrounds and Vernacularizing Human Rights" 180 at 191; Andrew Wolman, "National Human Rights Commissions and Asian Human Rights Norms" (2013) 3:1 AsianJIL 77 at 81; McDougall, *supra* note 147 at 140.
[584] Merry, "Legal Vernacularization and Ka Ho'okolokolonui Kanaka Maoli, The People's International Tribunal, Hawai'i 1993," *supra* note 105 at 80.
[585] Chua, *supra* note 582 at 300.
[586] McDougall, *supra* note 147 at 140.

In Ghana, the constitution does not expressly make mention of violence against women and children or FGC. However, Article 15 makes mention of torture generally, emphasizing the inviolability of dignity.[587] This can be read with Article 28(3), which prohibits cruel, inhuman, or degrading treatment or punishment of children. However, particularly applicable to FGC, Article 26(2) states, "All customary practices which dehumanise or are injurious to the physical and mental well-being of a person are prohibited." Section 39(2) places the heavy onus on the State to ensure that "…traditional practices which are injurious to the health and well-being of the person are abolished."[588]

In the case of *Mami v. Paulina*, which addressed the issue of the disinheritance of a woman due to culture, the courts stated, among other things, that although the tradition was undoubtedly against the well-being of the women in the Krobo area, the courts did not have the power to abolish customs.[589] The reason is that in Article 39(2) of the Constitution, the abolition of a customary act may only be done via (i) Parliament, (ii) The President, and (iii) Those who practice the custom.[590] In the case of FGC, there has already been an abolition by Parliament through section 69A of the *Criminal Code Amendment Act*. The weighty onus placed on the State has been partially fulfilled through criminalization and minimum enforcement. However, the constitution does not expressly state the method through which these harmful practices may be eradicated.

In the quest to determine the meaning of a text in the constitution to determine the extent of its provisions, rigorous arguments have circled literal versus purposive interpretation. Asare cites Justice Date-Bah's epitaph in *Asare v Attorney General*, "What interpretation is to be given

[587] *The Constitution of the Republic of Ghana*, 1992 (Ghana) Article 15 states, "Article 15 states that 'the dignity of all persons shall be inviolable' and that no person shall be subjected to torture, cruel, inhuman, or degrading treatment or any other condition that 'detracts or is likely to detract from his dignity and worth as a human being'.
[588] Ibid at Article 28 and 39.
[589] *Mami v. Paulina*, 2006 [2005-6] SCGLR 1116 at paras 1-3.
[590] *Mami v. Paulina*, 2006 [2005-6] SCGLR 1116 at paras 1-3.

the words should depend upon the court's perception of the purpose of the provision and the context of the words, rather than on their dictionary meaning."[591] He cites it to prove that the purposive approach used, as in the case of Asare v Attorney General could lead to absurdities and incompatibility with the democratic state of affairs.[592] He strongly expresses his sentiment, stating, "Let us be ruled by the framers' expressed words, not their unexpressed intent."[593] Similarly, Gyandoh, in his analysis of Bennion's formal principles governing Ghana's republican constitution, states, "…this determinate meaning is discoverable from the plain or ordinary meaning of the words used."[594]

Given the back-and-forth contention on the best mode of interpretation, and judges' preference for the literal approach, this portion of the thesis looks through the lens of the literal meaning of Article 39(1), read with Article 39(2). This is to ascertain if an approach that goes beyond the standard process of criminalization and considers the archetype of the people is legitimized by the Constitution. Considering the literal approach, the word abolish signifies putting an end to, or completely doing away with, usually used officially. The origin of the word is to destroy.[595] To completely do away with or destroy the act of FGC requires more than criminalization. The Constitution is focused on the harm being done to people, and if the criminalization of FGC and minimal prosecutions is not adequate, the onus remains on the State to prevent harm.

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[591] S K Asare, "Plain Meaning v Purposive Interpretation: Ghana's Constitutional Jurisprudence at a Crossroad" (2006) 3 U of Botswana LJ 93.
[592] *Ibid* at 96.
[593] *Ibid* at 105.
[594] S O Jnr Gyandoh, "Principles of Judicial Interpretation of the Republican Constitution of Ghana" (1966) 3:1 UGLJ 37 at 38.
[595] Oxford Dictionary, online: < https://www.oxfordlearnersdictionaries.com/definition/english/abolish>The Oxford dictionary's synonym to abolish is "to end the observance or effect of (something, such as a law): to completely do away with (something)". Merriam Webster Dictionary, online: < https://www.merriam webster.com/dictionary/abolish>

In expressing his stance, Gyandoh recommends that the totality of words be recognized, "forming an organic whole,"[596] while also noting the relevant features of the context, featuring the Interpretation Act.[597] In assessing the features of the context, The Interpretation Act indicates as to statutory duties in Section 10, stating:

> (1) Where an enactment confers a power or imposes a duty the power may be exercised, and the duty shall be performed from time to time as occasion requires. (2) Where an enactment confers a power, or imposes a duty, to do any act or thing all such powers shall be deemed to be also given as are reasonably necessary to enable that act or thing to be done or are incidental to the doing thereof. [As amended by the Interpretation (Amendment) Act, 1961, (Act 92) s.3][598]

The enactment in this context is the Constitution. Section 10 creates an invocation, whereby duties are conferred when the occasion requires it. It is evident from the prevalence of FGC that there is an activation of an occasion as there is a situation whereby people's well-being and health are being harmed, contrary to Article 39(2). Section 27 of the *Interpretation Act* further states that the use of the word shall renders a provision imperative while may is permissive or empowering.[599]

A reading of Section 10 with Section 27 of the Interpretation Act affirms the weighty onus Article 39 places on the State. When the occasion requires it, "The State shall ensure that… and in particular that traditional practices which are injurious to the health and well-being of the person are abolished." Shall is imperative, meaning that it is vitally mandatory to ensure that a practice such as FGC comes to a halt. The Constitution does not state how abolition should be accomplished

[596] Gyandoh, *supra* note 595 at 47-48.
[597] *Ibid* at 45
[598] *The Interpretation Act,* 1960 (c.a.4) [As amended by the Interpretation (Amendment) Act, 1961, (Act 92) s.3] (Ghana) s10.
[599] *Ibid* at s 27.

but places a duty on the State to abolish harmful cultural practices. Per section 10(2) of the *Interpretation Act*, all powers necessary to fulfill the eradication task are conferred upon the State. Therefore, the State can utilize culture as a means to abolish FGC, and as seen below, the State is encouraged by the Constitution to use culture, when possible,

Although section 39(2) places the onus on the State to eradicate harmful cultural practices, Article 39 (1) and (2) of the Constitution, which mainly focus on the customs and culture, states:

> (1) ... The State shall take steps to encourage the integration of appropriate customary values into the fabric of national life through formal and informal education and the conscious introduction of cultural dimensions to relevant aspects of national planning.
>
> (2) The State shall ensure that appropriate customary and cultural values are adapted and developed as an integral part of the growing needs of the society as a whole...
>
> (3) The State shall foster the development of Ghanaian languages and pride in Ghanaian culture.[600]

Article 39(1), read in conjunction with Article 39(2) and (3), also places an onus on the State to consciously introduce cultural dimensions to relevant aspects of national planning. What better way than for culture to rectify culture? As noted previously, the people do not believe in criminalization and are not deterred by it. However, as Davar states, the people have a love and dedication for culture stronger than the force of law.[601] According to the case of *Mami v Paulina* stated above, the people who practice the custom have the power to abolish it. Acting with traditional leaders to abolish this practice in their uncodified laws will have a ripple effect downwards, as the custom is woven into their social fabric and is influenced by each others'

[600] *The Constitution of the Republic of Ghana*, 1992 art 39.
[601] Binaifer A Davar, "Women: Female Genital Mutilation " (1997) 6:2 Tex J Women & L 257 at 266.

perceptions. In addition, vernacularizing the law in educational and implementation measures,[602] expanding it beyond the urban, literate society creates more knowledge and access to justice for girls in communities that practice FGC.

Customs, in integration with legislative measures, poses a viable solution. According to Tyler and Darley, the authority should be legitimate in the people's eyes for the people to act appropriately.[603] The law the people deem appropriate is their pure customary law conducted through traditional leaders informed by customs they revere. Customary law merged with legislative measures is an institutional design that reflects the social fabric of the community. This design is hinged on creating eradication projects steeped in the community's core values and frameworks to encourage local interest, involvement, and volunteerism. Culture is significant in a community; thus, legal measures against FGC programs must align with Ghana's constitutional mandate to ensure that suitable customary and cultural values are adapted as an essential element of society's needs. Local leaders and stakeholders possess legitimacy in their community's eyes as they are the gatekeepers to history, culture, customary law, values, and growth. Therefore, they wield power to act as agents of receptivity for FGC policies. As Merry, based on her observation of vernacularization processes, notes, "moreover, we found that the social position of the messenger is key."[604]

Although there may be difficulties implementing this vernacularized system, as with all legal systems, if this process is successful, it will cause a ripple effect as the people hold their customs in high regard.[605] As criminalization with minimal prosecutions is not enough, the duty

[602] Levitt & Merry "Vernacularization on the ground: Local uses of global women's rights in Peru, China, India and the United States" *supra* note 17 at 441.
[603] Tyler & Darley, *supra* note 160 at 713.
[604] Levitt & Merry "Vernacularization on the ground: Local uses of global women's rights in Peru, China, India and the United States" *supra* note 17 at 441
[605] Merry "From Law and Colonialism to Law and Globalization" *supra* note 495 at 572.

is on the State to find solutions based on the growing needs of the society. Through the reading of the Constitution (the applicable sections), it is evident that the State may use implementation measures such as vernacularization through customary law. Rather than being subsumed as an ancillary measure, integrating unrefined customary law with existing legal mechanisms will yield more significant results.

Conclusion

Dissimilarity in people, persona, and cultures is the world's status quo and has been moulded into the truism of diversity. This dissimilarity in people is evident in the practice of FGC, as those affected by it are at the intersection of race, gender, ethnicity, and class. Therefore, feminist legal perspectives and TWAIL appraisals of the law must be considered. Given that this diversity exists, there are key differences in ideologies that the law should account for while improving the normative mode of legal enforcement. Diversity does not allow room for a perfect correlation between deterrence and the criminal act, as many internalized variables come into play, which in this case, is the cultural fabric of the people of Ghana.

Criminalization and the evolution of human rights are a step in the right direction as they undoubtedly have their benefits. However, the current legislative measures in the international and domestic law system stem from a Western framework. Ranging from Roman civilization to the forceful assimilation of Ghanaian legal culture under European legal culture, developing countries, including Ghana, have been thrust into legal pluralism. This thrust, as opposed to a conscious progression towards legal pluralism, has caused a "fragmented and inconsistent"[606] legal system as Merry describes it. The homogenization of legal culture is also based on Western systems as they have evolved and spread over centuries. However, despite the seeping of

[606] Merry, *supra* note 133 at 2.

Western law into the legal system of Ghana, the people of Ghana still hold their values and customs in high esteem. Therefore, enforcement of the law against FGC must be tailored to address the reasons for the crime, evident in the cultural and social fabric.

Criminalization is often used as a generic means of abolition, serving as an umbrella under which FGC would find applicability. International instruments and domestic law against FGC can be essentialist, mainly reflecting solutions based on a white, middle-class point of view.[607] This was the point of view reflected in the European legal system, which is the foundation of most laws. Logical connections tie the abolition of FGC to extra measures of enforcement, including vernacularization which involves an intersectional approach. It is not unreasonable to project that the practice of FGC will continue to ensue if the international community and States continue to charge forward in this narrow, myopic view of criminalization and normative enforcement. A worthy evolution is born of necessity, and alternate modes of application involving vernacularization would be beneficial in the quest for the total eradication of FGC.

[607] Snyder, *supra* note 60 at 371.

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