

**A Critical Re-Appraisal of Vernacularisation in the Emergence
and Conceptualisation of Community Bylaws on Child Marriage
and Other Harmful Practices in Rural Malawi**

By

Tinyade Kachika

Supervisors:

Professor Danwood Chirwa

Professor Dee Smythe

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DECLARATION

I, Tinyade Kachika, do hereby declare that this PhD thesis entitled 'A Critical Re-Appraisal of Vernacularisation in the Emergence and Conceptualisation of Community Bylaws for Addressing Child Marriage and Other Harmful Practices in Rural Malawi' is my own independent work, save for that which is properly acknowledged.

It is being submitted for the degree of Doctor of Philosophy at the University of Cape Town. It has not been submitted before for any degree or examination in any other University.

Signed:

Signed by candidate

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ABSTRACT

The thesis addresses the question: *how have international human rights norms for protecting women and girls from harmful practices influenced and shaped the emergence and conceptualisation of community bylaws for addressing child marriage and other harmful practices affecting women in rural Malawi?*

‘Community bylaws’ is a label for Chief-led community ‘rules’ aimed at combating harmful practices, which mostly affect women and girls. This thesis contributes to the theoretical discourse on norm diffusion by critically assessing and appraising the way in which scholars have conceptualised how international human rights norms are internalised, and, particularly, how vernacularisation operates, through a case study of the community bylaws.

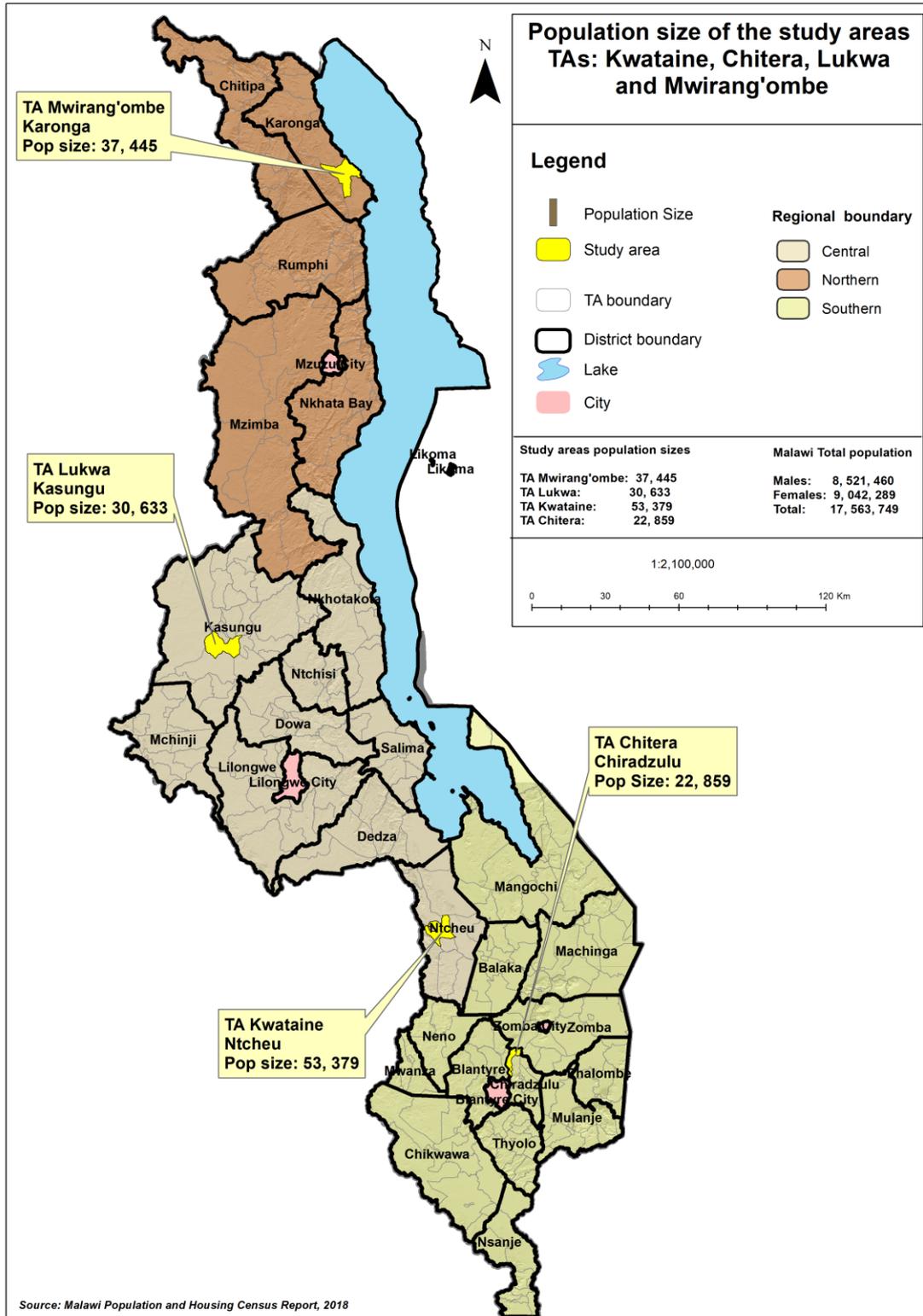
Drawing from qualitative empirical data following a study conducted in four districts covering the three regions of Malawi, the study focused on the territories of four Senior Chiefs. Data was gathered through semi-structured interviews with Senior Chiefs and government officials, NGOs, and donors; and through focus group discussions with Group Village Heads, Village Heads, groups that formulated or monitor the implementation of community bylaws, and women living under these bylaws.

The thesis shows that while scholars have sought to explain how international human rights norms are appropriated in local communities using the concept of vernacularisation, existing conceptualisations do not adequately represent what is happening with the community bylaws phenomenon. Vernacularisation is a unicameral concept that sees human rights ideas and programmes as being purposefully introduced in local communities by epistemic outsiders. Based on empirical data, this thesis argues that the concept of ‘horizontal vernacularisation’ better describes the processes occurring in respect of community bylaws in Malawi. This concept has regard to vernacularisation as a bicameral act, whereby the local can also trigger

vernacularisation, whether knowingly or not. Thus, horizontal vernacularisation acknowledges that human rights appropriation and translation through community bylaws unfolds within a predominantly local-local dialogue, and is not usually structured, since the bylaws sprout in a continuum of intuitive, interlocking, convoluted, and iterative processes.

As such, this thesis contributes to a deeper understanding of community bylaws in rural and cultural settings, and their role in reconceptualising the internalisation of international human rights norms for protecting women and girls from harmful practices.

MAP: STUDY SITES



ACRONYMS

ACHPR	African Commission on Human and Peoples' Rights
ACRWC	African Charter on the Rights and Welfare of the Child
ACERWC	African Committee of Experts on the Rights and Welfare of the Child
ADC	Area Development Committee
ADR	Alternative Dispute Resolution
AHRLR	African Human Rights Law Reports
AIDS	Acquired Immuno-Deficiency Syndrome
AU	African Union
BBC	British Broadcasting Corporation
CCAM	Chitukuko Cha Amai m'Malawi
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CEDAW Committee	Committee on the Elimination of All Forms of Discrimination Against Women
CESCR	Committee on Economic, Social and Cultural Rights
CMI	Chr. Michelsen Institute
CoP	Clerk of Parliament
CRC	Convention on the Rights of the Child
CRC Committee	Committee on the Convention on the Rights of the Child
CRECCOM	Creative Centre for Community Mobilisation
CSO	Civil Society Organisations
DC	District Commissioner
DEM	District Education Manager
DEVPOL	Development Policies
DPP	Democratic People's Party
DRC	Democratic Republic of Congo

DRCM	Dutch Reformed Church Mission
EU	European Union
EVAWG	Ending Violence Against Women and Girls
FGDs	Focus group discussions
FGM	Female genital mutilation
FOCUS	Foundation for Community Support Services
GABLE	Girls Attainment in Basic Literacy and Education
GBV	Gender-based violence
GENET	Girls Empowerment Network
GEWE	Gender Equality and Women Empowerment
HIV	Human Immuno-deficiency Virus
HRC	Human Rights Commission
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICTs	Information Communication and Technologies
MDGs	Millennium Development Goals
MGDS	Malawi Growth and Development Strategy
MIAA	Malawi Interfaith AIDS Association
MLC	Malawi Law Commission
MLR	Malawi Law Report
MLGRD	Ministry of Local Government and Rural Development
MoGCDSW	Ministry of Gender, Children, Disability and Social Welfare
MP	Member of Parliament
MSCA	Malawi Supreme Court of Appeal
NAP GBV	National Action Plan to Combat GBV in Malawi
NCWID	National Commission on Women in Development
NGOs	Non-governmental organisations
NGP	National Gender Policy

SALC	Southern Africa Litigation Centre
SDGs	Sustainable Development Goals
SRH	Sexual and reproductive health
TA	Traditional Authority
UDF	United Democratic Front
UCT	University of Cape Town
UN	United Nations
UNICEF	United Nations Children's Fund
UNFPA	United Nations Population Fund
USAID	United States Agency for International Development
VAC	Violence against children
VDC	Village Development Committee
VAW	Violence against women
VSU	Victim Support Unit
WAYO	Wanangwa Youth Organisation
WFP	World Food Organisation
WLSA	Women and Law in Southern Africa
WOLREC	Women's Legal Resource Centre
YONECO	Youth Net Counselling

GLOSSARY OF CHICHEWA TERMS

<i>Amai a chinsinsi</i>	Secret mothers
<i>Anankungwi</i>	Initiation counselors
<i>Bulangete l mfumu</i>	'Chief's blanket' – a way of making a male visiting Chief feel welcome and respected by giving him a young woman to sleep while away from home.
<i>Chiharo or chokolo</i>	Wife inheritance/levirate marriage.
<i>Chimwanamayo/ chimwanamaye</i>	Wife swapping, also known as 'swinging' – two couples that are very good family friends agree that the men can have sex with each other's wife whenever the men feel like it.
<i>Chinamwali</i>	Initiation ceremonies.
<i>Chindapusa</i>	'A fine' is generally seen as the best English approximation of this term. However, this word connotes more than the English translation suggests. The word's literal translation connotes someone who is being humbled to make the payment as an acceptance that he/she acted 'stupidly.' <i>Chindapusa</i> is usually payable in the form of goats and chickens, and sometimes their monetary equivalents.
<i>Chiramu</i>	Having sex with a sister-in-law.
<i>Chitayo</i>	<i>Chitayo</i> (losing') demands that if a pregnant woman miscarries, a hired man should sexually cleanse her by having unprotected sex with her.
<i>Fisi</i>	<i>Fisi</i> means hyena, connoting a mystery man who comes under the cover of darkness. On the one hand, the <i>fisi</i> entails hiring a man to impregnate a wife whose husband is impotent to enable the family to have children. On the other hand, a <i>fisi</i> is hired when a widow has prospects of remarrying. The <i>fisi</i> is identified by her clan elders to have sex with her to cleanse her womb, since it is assumed that she may not have had sex for a long time.
<i>Gule wamkulu</i>	<i>Gule Wamkulu</i> is a cult and sacred ritual dance of the Chewa tribe.

<i>Gwamula</i>	A practice whereby young men storm into a girls' hut at night, and (forcibly) grab a girl each, have sexual intercourse and run away.
<i>Hlazi or mbiligha</i>	Bonus wife.
<i>Kuchotsa fumbi or kusasa fumbi</i>	Coerced experimental sex for initiated girls.
<i>Kulowa bzyade or kuika mwana ku malo</i>	A mother of a three to six months-old baby is required to have ritual unprotected sexual intercourse in order to 'strengthen' the child to grow healthily. If the mother is married, the ritual is performed with her husband. If unmarried, a hired man is used.
<i>Kujura nthowa</i>	'To open the way' – having sex with a virgin.
<i>Kulowa or kupita kufa</i>	This practice symbolises 'removing death', and demands that the spouse of a deceased person (in most societies the widow, but in some societies the widower too) should have unprotected sex with a hired 'cleanser' to chase away evil spirits that caused the death.
<i>Kulowa ngalawa</i>	The owner of a new boat (<i>ngalawa</i>) is required to have sex with a woman – whether his wife or not – to protect the boat from evil spirits that could make it capsize.
<i>Kupimbira or kupawila</i>	Whereby a girl is given as a wife to a creditor as payment for a debt.
<i>Kupita moto</i>	<i>Kupita moto</i> ('removing fire') is practiced when people are firing bricks, or when a house catches fire. During the firing of bricks, the one who lit the kiln fire is sexually cleansed so that the bricks should burn well, and that he should not swell up and die. When a house catches fire, a woman in the family is sexually cleansed to avoid similar accidents in future.
<i>Kupita ngozi</i>	Sexual cleansing that is done to chase evil spirits in any other accident.
<i>Kusamala mlendo</i>	Taking care of a visitor by giving him a woman to sleep with him.

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CHAPTER 1

UNMASKING COMMUNITY BYLAWS

1.1 THE RESEARCH QUESTION AND RATIONALE

This thesis explores the question: how have international human rights norms for protecting women and girls from harmful practices influenced and shaped the emergence and conceptualisation of community bylaws for addressing child marriage and other harmful practices affecting women in rural Malawi? For clarity, the thesis is neither examining the effectiveness of community bylaws, nor the challenges of codifying customary law.

This thesis is important on two related grounds. First, it contributes to a deeper understanding of community bylaws in rural and cultural settings, and their role in reconceptualising the internalisation of international human rights norms for protecting women and girls from harmful practices. Secondly, the potential of rural and other resource-constrained communities to protect women and girls from harmful practices, including child marriage, through the use of bylaws can best be appreciated through a nuanced understanding of what the phenomenon of community bylaws practically means in those communities.

The thesis' preoccupation with community bylaws is inspired by the challenge of harmful practices, including child marriage, that Malawi faces. Generally, harmful (traditional) practices obstruct women's development potential and are 'probably the most severe menace to women's rights' in Africa.¹ Since appearing on the international agenda in 1958,² harmful

¹ Kenneth Omeje, 'Sexual Exploitation of Cult Women: The Challenges of Problematising Harmful Traditional Practices from a Doctrinalist Approach,' *Social & Legal Studies* (10)1 (2001), 45-60 45.

traditional practices (as a category of coercive practices that constitute human rights abuses, are discriminatory and traditionally anchored³) have become a growing global policy concern.⁴ They are considered discriminatory and a form of violence against women (VAW).⁵

In Malawi, harmful practices contribute to poor development indicators for women and girls.⁶ Child marriage is, particularly, a key development challenge because domestic statistics show that 47 percent of girls get married before their 18th birthday.⁷ The 2019 State of the World's Children Report projects that between 2012 and 2018, 42 percent of girls in Malawi were married before their 18th birthday, which is the 11th and 10th highest rate of child marriage globally and in Africa, respectively.⁸ Meanwhile, Malawi is gaining a global reputation as a model country that is utilising traditional leadership and community bylaws to address child marriage and other

² Back then, the focus was on harmful practices affecting the health of girls and women—Jane Cottingham and Eszter Kismodi, 'Protecting Girls and Women from Harmful Practices Affecting Their Health: Are We Making Progress?,' *International Journal of Gynecology & Obstetrics* (106)2 (2009), 128-131 128.

³ See section 4.3.1.2 of the thesis.

⁴ Judith-Ann Walker, 'Early Marriage in Africa—Trends, Harmful Effects and Interventions,' *African Journal of Reproductive Health* (16)2 (2012), 231-240 237; Bronwyn Winter, Denise Thompson, and Sheila Jeffreys, 'The UN Approach to Harmful Practices: Some Conceptual Problems,' *International Feminist Journal of Politics* (4)1 (2002), 72 .

⁵ Newman Wadesango, Symphorosa Rembe, and Owence Chabaya, 'Violation of Women's Rights by Harmful Traditional Practices,' *The Anthropologist* (13)2 (2012), 121-129 121; Kenneth Omeje, 'Sexual Exploitation of Cult Women: The Challenges of Problematising Harmful Traditional Practices from a Doctrinalist Approach,' (2001), 46.

⁶ The opportunity and financial costs of child marriage on good governance, population and demography, health and nutrition, education, labour force participation, earnings, public and private social spending, household growth potential are huge. At 137 births per 1,000 girls, Malawi's adolescent birth rate is the 3rd highest in the SADC region. Survival rates for Std 8 for both girls and boys are poor, though girls are faring the worst at 28 percent compared to 35 percent for boys. The HIV prevalence for adult women is 10.8 percent, and 6.4 percent for adult men—Government of Malawi, *Malawi Growth and Development Strategy II Review and Country Situation Analysis Report* (2016), xvii & 39; National Statistical Office (NSO) Malawi and ICF, *Malawi Demographic and Health Survey 2015-16* (Zomba, Malawi and Rockville, Maryland, USA: NSO and ICF, 2017), 229.

⁷ National Statistical Office (NSO) Malawi and ICF, *Malawi Demographic and Health Survey 2015-16*, *ibid*, 57.

⁸ UNICEF, *The State of the World's Children 2019: Children, Food and Nutrition* (2019), 223-235. Available at <https://www.unicef.org/media/61356/file/SOWC-2019.pdf>, accessed on 30 October 2019.

harmful practices.⁹ Addressing these practices is an imperative under the United Nations Sustainable Development Goals (SDGs).¹⁰ Particularly, SDG 5 (to achieve gender equality and empower all women and girls) firmly targets the elimination of ‘all harmful practices such as child, early and forced marriage and female genital mutilation by 2030’.¹¹

1.2 OBJECTIVES AND RELEVANCE OF THE THESIS

In view of the above, the thesis has the following four objectives:

1. To explain the factors influencing the emergence and use of community bylaws to ensure the protection of the right of women to be free from harmful practices.
2. To examine the relationship between the community bylaws and African customary law within the broader context of legal pluralism.
3. To understand how the community bylaws and harmful practices (within the bylaws) are being conceptualised, and the extent to which such conceptualisation is consistent with and/or influenced by domestic and international human rights law.
4. To contribute to the theoretical discourse on norm internalisation by assessing and testing if the phenomenon of community bylaws is revealing other vernacularisation concepts that are at play when culture/custom is the action ground.

⁹ For example, Senior Chief Kachindamoto of Dedza district has received international attention for her stiff stance against child marriage in her area. On 21 March 2016, at a jam-packed side event of the 60th session of the United Nations Commission on the Status of Women, she explained how she had decided to use her influential position as custodian of culture to promote peace, social economic development and reduce poverty – Janet Karim, ‘Praise to Cultural Leaders for Ending Child Marriages,’ *The Nation*, 25 March 2016.

¹⁰ Adopted by the United Nations in 2015 to replace the Millennium Development Goals.

¹¹ Target 5.3.

The first strand of the thesis proceeds from the premise that one has to appreciate that the use of these community bylaws is a relatively new phenomenon that needs careful study. As Chapter 2 illustrates, so far, community bylaws for addressing harmful practices are an absent topic in scholarship. There is also a dearth of scholarship on the role of traditional leaders as women's rights activists. As a result, the relationship between the community bylaws and African (living) customary law or indeed other laws remains to be understood.

Thus, the second arm of the thesis focuses on the legal nature of community bylaws on child marriage and other harmful practices in Malawi: are the bylaws seen as customary law, living customary law, or formal law? In addressing this question, the thesis seeks to shed some light on the debates about African customary law and legal pluralism in order to establish whether or not the community bylaws can be located within this discourse; and if so, to understand the role of customary or legal pluralism regimes in internalising international human rights. This discussion makes room for a critical examination of the conceptual discourse on norm internalisation in human rights jurisprudence.

While addressing harmful practices affecting women and girls remains a key international women's rights agenda, we lack an understanding of how community bylaws relate to international human rights and legislative norms on the one hand, and customary law and practices on the other hand. At first impression, one could be tempted to conclude that the community bylaws are an example of the diffusion of international human rights norms into Malawian local culture and practices.¹² After all, international human rights

¹² Indeed, my Malawian gender activist experience attests that our gender circle has tended to casually read the recent spread of the community bylaws in Malawi as a sign that human rights and gender equality laws are being operationalised in grassroots settings.

binoculars habitually zoom in on customs and tradition.¹³ However, currently there is no evidence to support or reject the claim that the community bylaws are emerging because Malawian rural communities have finally seen the ‘human rights light’, resulting in the internalisation of human rights/gender equality norms in traditional spaces.

The third part of the thesis seeks to use empirical evidence to understand the complementarity or mismatch between international and domestic legal measures and local practice/approaches to addressing harmful practices. In clarifying how human rights and legislative measures on gender equality influence and shape the emergence and conceptualisation of the community bylaws, the thesis uses community bylaws as a case study for critiquing the conventional approach to norm internalisation of international law and practice, especially from the angle of vernacularisation.

The norm internalisation/vernacularisation paradox is this: to claim that a human rights norm has been internalised, efforts from the onset must be

¹³ For example, the Committee on Economic, Social and Cultural Rights (CESCR) has, through its General Comment No. 14, emphasised that states have a legal obligation to adopt effective and appropriate measures to abolish harmful traditional practices affecting the health of children, particularly girls, including early marriage, female genital mutilation, preferential feeding and care of male children—Paragraph 22, *CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health* (Article 12), U.N Doc. E/C.12/2000/4. Under CEDAW, legislation is needed to modify or abolish customs and practices that discriminate against women (Article 2(f)). Through General Recommendation No. 19, the CEDAW Committee urges States Parties to take effective legal measures, including penal sanctions, civil remedies and compensatory provisions to protect women against all kinds of violence—Paragraph 24(r)(i), UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General Recommendation No. 19: Violence against women*, 1992, U.N Doc. A/47/38. General Recommendation No. 24 calls on states parties to enact and effectively enforce laws that prohibit female genital mutilation and marriage of girl children—Paragraph 15(d), UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General Recommendation No. 24: Article 12 of the Convention (Women and Health)*, 1999, U.N Doc.A/54/38/Rev.1. The CRC mandates States Parties to take all effective and appropriate measures to abolish traditional practices affecting the health of children (Article 24(3)). General Comment No. 4 of the Committee on the Rights of the Child recommends that State Parties should implement legislation aimed at changing attitudes and addressing gender roles and stereotypes that contribute to harmful traditional practices—Paragraph 20 UN Committee on the Rights of the Child (CRC), *General Comment No. 4 (2003): Adolescent Health and Development in the Context of the Convention on the Rights of the Child*, 1 July 2003, U.N Doc. CRC/GC/2003/4.

purposefully geared towards having a specific norm appropriated and translated locally (mostly through externally driven efforts). However, what if a valid claim cannot be made that the community bylaws are an exclusive byproduct of current understandings of vernacularisation, although their contents may perhaps *prima facie* reflect human rights internalisation? How does such a misfit fit into vernacularisation discourse anyway (or does it)?

1.3 COMMUNITY BYLAWS: PROBLEMATISATION

Some rural communities in Malawi have taken concrete steps to combat harmful practices, which mostly adversely affect women and girls, through what has come to be popularly known as ‘community bylaws’. Generally, the phenomenon of community bylaws is not a preserve for the gender sector. For example, in the health sector, ever since the Government of Malawi banned traditional birth attendants in 2008, women who do not deliver at health facilities can be fined through bylaws set by some traditional leaders.¹⁴

The Child Health Programme¹⁵ also targets the implementation/enforcement of local bylaws as a strategy to reduce the number of illnesses and deaths amongst children under age five.¹⁶ In the water and sanitation sectors, some bylaws were set by Water Point Committees and local leaders under the Community Water, Sanitation and Health (COMWASH) project ‘to govern the care and management of boreholes, taps and wells’.¹⁷ In 2013, WaterAid

¹⁴ The Health Foundation, ‘Improving Maternal and Newborn Health in Malawi: Lessons from a Landmark Programme Addressing Maternal and Newborn Health in Malawi.’ Available at <http://www.health.org.uk/sites/default/files/ImprovingMaternalNewbornHealthMalawi.pdf>, accessed on 18 June 2016.

¹⁵ A joint program for Inter Aide, the Ministry of Health and Traditional Authorities, launched in 2014.

¹⁶ Inter Aide. Available at <http://interaide.org/health/malawi/about-us/>, accessed 21 June 2016.

¹⁷ Community Water Sanitation and Health Project (COMWASH) Malawi, ‘Operational Research Report on Water Ownership and Access Rights in Malawi: Customs, Practice and Statutory Laws’ (2003). Available at https://sarpn.org/documents/d0001327/P1588-Water_ownership_access_Malawi.pdf, accessed on 29 April 2019.

announced that bylaws that had been adopted by local Chiefs had resulted in access to improved latrines for over 20,000 people in Rumphu and Karonga.¹⁸

In the gender sector, community bylaws to counter harmful practices and assorted forms of gender inequalities have been adopted in several rural localities. Analysed in detail in Chapters 7, 8 and 9, these community bylaws impose sanctions on issues such as: forcing a girl or boy to marry before completing secondary education;¹⁹ preventing access to quality education for girls and boys;²⁰ and combating child marriages and harmful initiation rituals.²¹ Including the community bylaws in the four study sites, this thesis has referenced about 30 community bylaws across Malawi, which indicates the spread use of such laws.

Senior Chief Teresa Kachindamoto of Dedza²² has particularly received international acclaim for her firm stance against child marriage in her area

¹⁸ WaterAid, 'Malawi: Latest News A Round-up of WaterAid's Recent Activities and Achievements in Malawi.' Available at <http://www.wateraid.org/news/news/malawi-latest-news>. <http://www.wateraid.org/news/news/malawi-latest-news>, accessed on 18 June 2016.

¹⁹ For example, Plan Malawi has reported that in Karonga, bylaws that were adopted in Traditional Authority (TA) Mwakaboko's area in 2013 impose a fine of K60,000 (equivalent to USD 81) for forced marriage.

²⁰ For example, community bylaws developed in World Vision's impact area of TA Mankhambira in Nkhata Bay district in 2015 tackle twenty factors, namely: absenteeism from school; early marriages; drug and substance abuse; absconding from classes; child abuse; school dropouts; failure by Chiefs and their subjects to participate in school development; laziness by teachers; keeping the girl child indoors when she reaches puberty; causing violence in the community; teachers impregnating school girls; teachers and learners found drunk during school hours; corporal punishment; film shows and conducting traditional dances during school hours; learners' poor mode of dressing; domestic animals destroying crops; mismanaging project materials; immoral behaviour by some community members; insulting teachers in schools; learners not attending classes due to lack of school uniform—Government of Malawi, UNFPA, and EU, 'Mapping of Community Bylaws under the Gender Equality and Women Empowerment (GEWE) Programme' (2016), 19.

²¹ For example, the Girls Empowerment Network (GENET) has supported local leaders and community members in Chiradzulu district to formulate and strengthen community bylaws in this area. Similar bylaws have also been formulated between 2012 and 2016 in 26 TA areas covered by the GEWE Programme in Chitipa, Karonga, Mzimba and Nkhata Bay (Northern Region); Dedza, Dowa, Mchinji and Salima (Central Region); and Chikhwawa, Chiradzulu, Machinga, Mangochi and Nsanje (Southern Region) – *ibid*, 67-92.

²² Who is also World Vision Malawi's End Child Marriages Brand Ambassador since December 2017—Chikondi Chimala, 'Kachindamoto Unveiled as World Vision "End Child Marriage" Brand Ambassador,' *Mana Online*, 17 December 2017.

through the use of community bylaws. She is on record as 'having resolved to use her influential position as custodian of culture to promote peace, social economic development and reduce poverty'.²³ To demonstrate her resolve, Chief Kachindamoto once suspended four village headmen who had contravened the community bylaws by consenting to child marriages.²⁴ The suspension happened before the new marriage law in Malawi was enacted.²⁵ In April 2016, Chief Kalipula of Karonga²⁶ heralded Kachindamoto as 'a superwoman, a no nonsense leader who has reclaimed hundreds of boys and girls, sending them back to school and who is building a new chapter of child protection by working together with her subjects'.²⁷

Efforts of another female Chief, Traditional Authority (TA) Mwanza of Salima district, have also received wide international publicity. On 21 June 2014, TA Mwanza attracted a high-level delegation of Chiefs and government officials led by Her Royal Highness Queen Best Olimi of Toro Kingdom of Uganda. Their mission was to learn how cultural leaders were advancing positive social change in Malawi, particularly through girl education.²⁸ In questioning whether the community bylaws are in fact working well in practice, the foregoing examples suggest that the bylaws are being regarded as a strategic weapon for dealing with negative traditions that reinforce and reproduce gender inequality and disempower women and girls.

²³ Janet Karim, 'Praise to Cultural Leaders for Ending Child Marriages,' (2016).

²⁴ UN Women, 'Malawi Chief Annuls 330 Child Marriages.' Available at <http://www.unwomen.org/en/news/stories/2015/9/malawi-chief-annuls-330-child-marriages>, accessed on 21 April 2016. She only reinstated these village headmen after the chiefs ended the marriages— 'Malawi Fearsome Chief Terminator of Child Marriages.' Available at http://africanchildinfo.net/index.php?option=com_k2&view=item&id=7299:malawis-fearsome-chief-terminator-of-child-marriages&Itemid=67&lang=en, accessed on 22 April 2016.

²⁵ Parliament passed the new Marriage, Divorce and Family Relations Act in April 2015.

²⁶ Who had led a busload of village heads, clergy and government officials to Chief Kachindamoto's base on a learning tour—James Chavula, 'Kachindamoto Inspires Karonga Chief,' *The Nation*, 20 April 2016. Available at <http://mw-nation.com/kachindamoto-inspires-karonga-chief/>, accessed on 21 April 2016.

²⁷ Ibid.

²⁸ Ibid.

One of the mysteries around community bylaws lies in the use of the term 'bylaws'. This is ordinarily a term of art, with legal insinuations. The Malawi Local Government Act No. 42 of 1998,²⁹ for example, provides that only a District, Town or City Assembly can make bylaws for the good governance of a local government area: the Council or Assembly cannot delegate its powers to make bylaws.³⁰ Section 102 of the Act accepts District Council bylaws to be made at area/Traditional Authority level to respond to contextual matters, so long as legal procedures are followed.

Yet, the community bylaws under study have emerged as an unstable body of law adopted outside the established law-making processes understood by lawyers in Malawi. These bylaws are neither made under the auspices of District Councils, nor do they comply with other legal prescriptions for making bylaws. Nevertheless, they are branded 'community bylaws' because in some instances, Non-governmental organisations (NGOs) have made communities to understand that this is what their community rules are.³¹ Therefore, through the circulation of ideas relating to the phenomenon, 'community bylaws' has become customarily accepted as the name for the efforts of rural people to proactively self-regulate and impose socio-cultural behavioural boundaries for members within. This is why the thesis maintains the terminology.

1.4 PROBLEM STATEMENT

In the light of the discussion above, community bylaws raise several pertinent problems. First, the community bylaws are emerging against a backdrop of poorly implemented gender equality statutes, including legal provisions that criminalise harmful practices in Malawi. The Constitution of the Republic of Malawi, adopted in 1994, guarantees the right to gender equality and calls for

²⁹ As amended by Local Government (Amendment) Act No. 10 of 2017.

³⁰ Section 5(1) as read with sections 6(1)(f) and 15(1)(b) of the Local Government Act No. 42 of 1998, as amended by Local Government (Amendment) Act No. 10 of 2017.

³¹ See section 7.3.2.3 of the thesis.

the enactment of gender equality legislation.³² Yet, one of the biggest concerns for gender activists in Malawi has been the weak implementation of the spate of gender equality laws that Parliament has passed since 2006. There are six gender-related laws in total:

1. the 2006 Prevention of Domestic Violence Act;³³
2. the Child Care, Protection and Justice Act No 22 of 2010;
3. the Deceased Estates (Wills, Inheritance and Protection) Act No 14 of 2011;
4. the Gender Equality Act No 3 of 2013;
5. the Trafficking in Persons Act No 3 of 2015; and
6. the Marriage, Divorce and Family Relations Act.³⁴

There is generally a poor record of implementing these gender equality laws. One of the reasons for the poor implementation is inadequate funding. For example, a gender analysis of the national budget by the United Nations Entity for Gender Equality and the Empowerment of Women (UN Women) in 2015 found that over five financial cycles, budgets for the Ministry of Gender, Children, Disability and Social Welfare (MoGCDSW) did not reflect government allocation for the specific implementation of gender-related laws.³⁵ There was a similar finding in respect of 17 other votes in the 2015/16 national budget.³⁶

Given these implementation problems, it has been argued that community bylaws have the potential to make a difference. Kouyate³⁷ has submitted, for

³² Sections 20(2) and 24(2)(b) of the Constitution.

³³ Chapter 7:05 of the Laws of Malawi.

³⁴ Chapter 25:02 of the Laws of Malawi.

³⁵ Ministry of Gender Children Disability and Social Welfare and UN Women Malawi, 'Gender Analysis of Ministry of Gender, Children, Disability and Social Welfare's Budget 2010-2015,' (2015). On file with author.

³⁶ UN Women Malawi, 'Gender Analysis of 17 Votes in the 2015/16 Budget ' (2015). On file with author.

³⁷ Morisanda Kouyate, 'Harmful Traditional Practices against Women and Legislation,' (Expert paper presented at the United Nations Division for the Advancement of Women and

example, that 'socio-communal legislation is usually more appropriate, easily accepted and more respected than legislation that is handed down by national parliaments'.³⁸ However, despite their emergence and growing prominence, the concept of chief-led community bylaws is not grounded in Malawi's formal law. Gender equality legislation, more especially the Gender Equality Act and the child protection law, do not mention community bylaws as part of their implementation scheme.

This raises the issue of the legal validity and authority of these bylaws. First, there is the question of how 'community laws' sit with the formal law on the one hand, and African (living) customary law on the other hand. As regards statutory law, apart from the broad question of their legal mandate, one of the contentious issues is that the sanctions imposed by the community bylaws stand in stark contrast to the statutory ones.³⁹ Feminists, who usually indict norms and customs as being the main barriers to women's substantive equality,⁴⁰ could argue that community bylaws have the potential to reverse legislative gains that have been made by dramatically diluting sanctions for

United Nations Economic Commission for Africa Expert Group Meeting on Good Practices in Legislation on Harmful Practices Against Women, 25-28 May, Addis Ababa, Ethiopia, 2009).

³⁸ Ibid.

³⁹ Under Section 5 of the Gender Equality Act, any person who commits a harmful practice offence is liable to a fine of one million Kwacha (K1,000,000.00) [equivalent to USD 1,347] and to imprisonment for five (5) years. Under Section 83 of the Child Care, Protection and Justice Act, the penalty for harmful practices perpetrated against children is imprisonment for ten (10) years. To the contrary, community bylaws impose traditional fines such as chickens and goats (or equivalent monetary value).

⁴⁰ For example, Tove Stang Dahl, *Women's Law: An Introduction to Feminist Jurisprudence* (Oslo: Norwegian University Press 1987); and Carol Pateman, *The Sexual Contract* (Oxford, England: Polity Press 1988) cited in Anne Hellum, 'Human Rights and Gender Relations in Postcolonial Africa: Options and Limits for the Subjects of Legal Pluralism,' *Law & Social Inquiry* (25)2 (2001), 635-655 635. Also see section 2.3 of the thesis and Chapter 4 respectively.

harms that principally affect women.⁴¹ Besides, the enforcement mechanism of the community bylaws (often different tiers of chieftaincy) is isolated from the formal justice system.

A third related difficulty lies in the very fact that community bylaws could be disconnected from formal systems of law, raising questions of their democratic legitimacy and constitutionality. It can be deduced from the general tone of international women's rights frameworks that the preferred measure for combating harmful practices against women is statutory law reform, and not necessarily traditional legal schemes.⁴² In Malawi, this obligation has already been achieved in large measure by the enactment of the Gender Equality Act and the child protection law. Nevertheless, rural communities have still found it necessary to adopt community bylaws. This provokes the broader question of whether community bylaws are even internalising the spirit of these laws.

Another pertinent issue concerns the position of Chiefs as custodians of culture/customary law, and yet they are pioneering the community bylaws. One would argue that their immersion in the phenomenon of community bylaws potentially puts them in a position of conflict considering that the bylaws are directly opposing harmful traditions and practices. The whole

⁴¹ This argument would be analogous to MacKinnon's feminist concern, that states have left areas traditionally considered private to be governed by customary legal systems, thereby increasing women's vulnerability to discrimination—Catharine A MacKinnon, 'Sex Equality Under the Constitution of India: Problems, Prospects, and "Personal Laws",' *International Journal of Constitutional Law* (4)2 (2006) cited in Johanna Bond, 'Gender, Discourse and Customary Law in Africa,' *Southern California Law Review* (83) (2010), 509-574 510. Though the argument could arguably also fit within the concept of Sanders's norm spoiling, one should be mindful that unlike the intended outcome of norm spoiling (whereby 'actors directly challenge existing norms with the aim of weakening their influence') section 9.4.1 of the thesis illustrates that community bylaws are seen as buttressing gender equality legislation—Rebecca Sanders, 'Norm Spoiling: Undermining the International Women's Rights Agenda' *International Affairs* (94)(2) (2018), 271-291 272.

⁴² See section 4.4 of the thesis..

movement of international human rights has been to push against customs and traditions that are harmful to women and children.⁴³

Lastly, the notion of community bylaws raises the problem of ownership of these 'laws'. Some community bylaws are arising in areas where donors or local/international NGOs have operations. This prompts the questions: to what extent are these laws authentic community laws? Are these external agencies supporting already existing community initiatives or introducing new norms under the guise of community bylaws? From a gender perspective, the character of 'drivers or actors' could have implications on the agenda of the community bylaws, as well as the level of receptivity or opposition of local stakeholders to the bylaws.

1.5 THEORETICAL FRAMEWORKS FOR THE THESIS

The exploration of the thesis' four objectives will be anchored in the concept of norm internalisation and African customary law theoretical frameworks,

⁴³ For example, the Committee on Economic, Social and Cultural Rights has, through its General Comment No. 14, emphasised that states have a legal obligation to adopt effective and appropriate measures to abolish harmful traditional practices affecting the health of children, particularly girls, including early marriage, female genital mutilation, preferential feeding and care of male children (paragraph 22, UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, 11 August 2000, E/C.12/2000/4). Under CEDAW, legislation is needed to modify or abolish customs and practices that discriminate against women (article 2(f), UN General Assembly, *Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979, A/RES/34/180). CEDAW Committee's General Recommendation No. 24 calls on states parties to enact and effectively enforce laws that prohibit female genital mutilation and marriage of girl children (paragraph 15(d), *CEDAW General Recommendation No. 24: Article 12 of the Convention (Women and Health)*, 1999, A/54/38/Rev.1, ch). The CRC mandates states parties to take all effective and appropriate measures to abolish traditional practices affecting the health of children (article 24(3), UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3). General Comment No. 4 of the Committee on the Rights of the Child recommends that state parties should implement legislation aimed at changing attitudes and addressing gender roles and stereotypes that contribute to harmful traditional practices (paragraph 20, UN Committee on the Rights of the Child (CRC), *General Comment No. 4 (2003): Adolescent Health and Development in the Context of the Convention on the Rights of the Child*, 1 July 2003, CRC/GC/2003/4). Also see Chapter 4.

which are analysed in Chapter 3. The theory of 'norm internalisation' serves to achieve three of the objectives of the thesis, namely:

- Explaining the factors influencing the emergence and use of community bylaws to ensure the protection of the right of women to be free from harmful practices.
- Understanding how the community bylaws (and harmful practices) are being conceptualised and whether such understanding is consistent with domestic and international human rights law norms.
- Contributing to the theoretical discourse on norm internalisation by assessing and testing if the phenomenon of community bylaws is revealing other concepts that are at play when culture/custom is the action ground.

Norm internalisation falls under the broader discourse of norm diffusion – an international relations theory that has mostly been used to understand how international (human rights) norms filter into domestic settings.⁴⁴ However, since the concept of norm internalisation mostly relates to the institutionalisation of human rights norms in formal systems and structures of the state, this thesis uses an analytical concept that explains how human rights norms penetrate local levels, namely, vernacularisation (developed in anthropology).⁴⁵

⁴⁴ Martha Finnemore and Kathryn Sikkink, 'International Norm Dynamics and Political Change,' *International Organisation* (52)4 (1998); Martha Finnemore and Kathryn Sikkink, 'Taking Stock: The Constructivist Research Program in International Relations and Comparative Politics,' *Annual Review of Political Science* (4) (2001); Susanne Zwingel, 'How Do International Women's Rights Norms Become Effective In Domestic Contexts? An Analysis of the Convention on the Elimination of all Forms of Discrimination against Women' (Doctoral Thesis, Universität Bochum, 2005); Susanne Zwingel, 'How Do Norms Travel? Theorising International Women's Rights in Transnational Perspective,' *International Studies Quarterly* (56) (2012).

⁴⁵ By Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (Chicago University Press, 2006a).

Merry's vernacularisation involves appropriation and translation. Activists replicate human rights programmes, interventions and ideas developed elsewhere (i.e. a local transnational setting) in another locality (appropriation). Merry argues that in the process, they 'adjust the rhetoric and structure of these programmes, interventions and ideas to local circumstances' (translation).⁴⁶ This thesis categorises vernacularisation as a norm internalisation mechanism in order to take a closer look at how the community bylaws are unfolding and whether what is transpiring could be seen as an example of vernacularisation as we know it or not.

The thesis scrutinises vernacularisation through empirical evidence in order to test whether the way the phenomenon of community bylaws to eliminate harmful practices is playing out in Malawi begs for a reconceptualisation of the convention conception of vernacularisation. Therefore, the thesis will demonstrate that there are contexts in which vernacularisation amorphously unfolds horizontally as well. This will contribute to a deeper understanding of community bylaws in rural and cultural settings, and their role in reconceptualising the internalisation of international human rights norms protecting women from harmful practices.

Legal pluralism, particularly in relation to African (living) customary law, is relevant to this thesis.⁴⁷ The concept of 'strong, deep or new legal pluralism'⁴⁸ as advanced by Banakar and Travers⁴⁹ posit that informal plural normative orderings permeate most societies.⁵⁰ While some scholars are more cynical about African customary law, given its distortions by colonialists,⁵¹ this thesis

⁴⁶ Ibid., 135.

⁴⁷ One of the thesis' objectives is to examine the relationship between the community bylaws and African customary law.

⁴⁸ Reza Banakar and Max Travers, *An Introduction to Law and Social Theory* (Hart Publishing 2002), 302.

⁴⁹ Ibid.

⁵⁰ Ibid., 302.

⁵¹ For example Martin Chanock, as cited in Rachel Sieder and John-Andrew McNeish, *Gender Justice and Legal Pluralities: Latin America and African Perspectives* (Routledge, 2013), 5.

is more interested in uncodified customary law. Ndulo⁵² describes African customary law as ‘the indigenous law of various ethnic groups that constitutes pluralist legal systems in Africa’.⁵³ Himonga⁵⁴ observes that while scholars have carved the two categories of official customary law and living customary law, there is no linear distinction between the two, and that the two concepts simply represent ‘accepted dominant forms of customary law’.⁵⁵

In this thesis, the concept of living customary law is particularly useful in scrutinising the extent to which communities are using the bylaws as homegrown ‘law’ or rules to adapt to socio-economic changes around them. While different definitions of customary living law abound, Diala⁵⁶ presents a more streamlined definition, that ‘living customary law is law that emerges from people’s adaptation of customs to socio-economic changes’.⁵⁷ African customary living law scholars have noted that the dynamic changes in the practices and customs in people’s daily lives may be influenced by multiple factors (including state law and international human rights).⁵⁸

Himonga and Bosch⁵⁹ recognise that the common denominator in Ehrlich’s⁶⁰ pioneering living law theory and Moore’s⁶¹ semi-autonomous social fields

⁵² Muna Ndulo, ‘African Customary Law, Customs, and Women's Rights,’ *Indiana Journal of Global Legal Studies* (18) (2011), 87-120.

⁵³ *Ibid.*, 88-89.

⁵⁴ Chuma N. Himonga, ‘Family and Succession Laws in Zambia: Developments Since Independence,’ *Lit Verlag* (7) (1995).

⁵⁵ *Ibid.*, cited in Chuma Himonga and Craig Bosch, ‘The Application of African Customary Law Under the Constitution of South Africa: Problems Solved or Just Beginning,’ *South African Law Journal* (117) (2000), 306-341 318.

⁵⁶ Anthony C. Diala, ‘The Concept of Living Customary Law: A Critique’ *The Journal of Legal Pluralism and Unofficial Law* (49)2 (2017), 143-165.

⁵⁷ *Ibid.*, 155.

⁵⁸ For example Chuma Himonga and Craig Bosch, ‘The Application of African Customary Law Under the Constitution of South Africa: Problems Solved or Just Beginning,’ (2000), 318; Anthony C. Diala, ‘The Concept of Living Customary Law: A Critique’ (2017), 155.

⁵⁹ Chuma Himonga and Craig Bosch, ‘The Application of African Customary Law Under the Constitution of South Africa: Problems Solved or Just Beginning,’ (2000).

⁶⁰ Kurt A. Ziegert, *Introduction to Eugen Ehrlich, Fundamental Principles of Sociology of Law* 19 (Transaction Publishers 2001, 1936).

⁶¹ Sally Falk Moore, ‘Law and Social Change: The Semi Autonomous Social Field as an Appropriate Subject of Study,’ *Law and Society Review* (7) (1973).

theory is that both do not consider the state as the singular source of law, but acknowledge that law can also emerge from people's lived reality.⁶² Thus 'the force of living law may even not be grounded in external authority, but rather from the relationship amongst the people concerned themselves'.⁶³

A discussion on legal pluralism, especially living customary law, is important for the thesis on two main grounds. First, African (living) customary law literature will help to establish the variants and parallels between customary law and community bylaws because there is no clarity about how the community bylaws theoretically compare with the characteristics of customary law. Second, for the thesis to be relevant, it will have to make a case about the validity of these so-called bylaws in a context where the legal architecture of bylaws in Malawi would not treat them as legally defensible laws.

Therefore, from a legal pluralism standpoint, the fact that the community bylaws can be questioned for their democratic legitimacy, constitutionality and coherence with the rule of law (and even for their correlation with customary law for that matter) does not mean they should be downrightly cast off. While legal pluralism at times has been criticised for its open-ended approach, others have commended it precisely because the open-ended approach embraces those normative orders that impinge on women's lives.⁶⁴ Indeed in the case of the community bylaws for purging harmful practices, such normative orders could be a positive turning point against the cultural suppression of women and girls.

1.6 CONCLUSION AND THESIS OUTLINE

This chapter has shown that the thesis will examine how international human

⁶² Chuma Himonga and Craig Bosch, 'The Application of African Customary Law Under the Constitution of South Africa: Problems Solved or Just Beginning,' (2000), 318.

⁶³ *Ibid.*, 320.

⁶⁴ Reza Banakar and Max Travers, *An Introduction to Law and Social Theory* (2002), 302.

rights norms for protecting women and girls from harmful practices have influenced and shaped the emergence and conceptualisation of community bylaws on child marriage and other harmful practices affecting women in rural Malawi.

By demonstrating that the vernacularisation of international human rights norms in the community bylaws phenomenon has taken the new dimension of 'horizontal vernacularisation', the thesis contributes to an in-depth understanding of community bylaws on child marriage and other harmful practices, and provides an alternative understanding of vernacularisation as a norm internalisation channel.

The rest of the thesis is set out as follows:

Chapter 2 describes existing scholarship and makes a case for the relevance of the thesis by exposing literature gaps.

Chapter 3 analyses theories of norm diffusion/internalisation. This discussion is relevant in exposing gaps in norm internalisation theory, particularly the concept of vernacularisation, which fail to adequately explain the emergence of and conceptualisation of community bylaws - calling for reliance on the concept of horizontal vernacularisation instead. The chapter also discusses theoretical perspectives to African customary law, living customary law and legal pluralism. This discussion lays the foundation for bridging vernacularisation with human rights theory, and probing the relationship between community bylaws and African (living) customary law.

Chapter 4 examines international human rights law and jurisprudence on harmful practices. Particular attention is given to the jurisprudence of the Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW Committee), the Committee on the Convention on the Rights of the Child (CRC Committee), and the African Commission on

Human and Peoples' Rights (ACHPR) and the African Committee of Experts on the Rights and Welfare of the Child (ACERWC), with two aims. The first aim is to understand the practices that are regarded as harmful in the jurisprudence in order to compare them with the practices on which community bylaws are focusing. The second aim is to expose the treaty-monitoring bodies' understanding of norm internalisation. Particularly, the discussion seeks to reveal whether the treaty-monitoring bodies see community and informal mechanisms, including horizontal vernacularisation as a norm internalisation mechanism.

Chapter 5 focuses on the Malawian domestic context, especially the 'formal' or 'state' level. First, it explains how harmful practices have historically been addressed. Second, it examines how the formal is internalising international human rights norms by focusing on the Constitution and government policy: how the Constitution envisages the place of international law in the domestic sphere and what this means for norm internalisation; the place of informal systems in the constitutional order; and how the Constitution has been translated into gender equality policy and legislation. Third, the Chapter analyses the extent to which the law and policy (including the implementation scheme for laws addressing harmful practices) makes itself relevant to rural settings, acknowledges the role of horizontal vernacularisation in localising human rights, or whether there are gaps that explain the emergence of community bylaws.

Chapter 6 discusses the methodology that was applied for the empirical part of the thesis, including information on the study sites.

Chapter 7 provides a history of these community bylaws. It then unpacks the notion of 'community bylaw' as the communities that use the bylaws understand it, and explains the processes by which they are adopted. Using empirical data, the chapter also explores the factors that have influenced the emergence and the use of the bylaws as a means of protecting women from

harmful practices. In addressing these issues, the chapter lays bare how the community bylaws are exposing features of horizontal vernacularisation.

Chapter 8 examines the legal character of the community bylaws. It does this by first scrutinising where the community bylaws fit in the constitutional or formal legal architecture, and in living (customary) law discourse. Then it analyses how the community bylaws and their conceptualisation reflect human rights and statutory norms protecting women from harmful practices.

Chapter 9 demonstrates how the community bylaws phenomenon exhibit horizontal vernacularisation through its conceptualisation of penalties, the strategies utilised for translating human rights norms in local contexts, and the types of vernacularisers that are involved.

Chapter 10 concludes the thesis and makes some recommendations for policy and future research.

CHAPTER 2

LITERATURE REVIEW: COMMUNITY BYLAWS 'NOT TRENDING'

2.1 INTRODUCTION

As indicated in Chapter 1, this thesis interrogates how international human rights norms for protecting women and girls from harmful practices have influenced and shaped the emergence and conceptualisation of community bylaws for addressing child marriage and other harmful practices affecting women in rural Malawi. This chapter shows that academic scholarship has neither paid attention to how human rights are vernacularised in cultural phenomena, such as community bylaws; nor to community bylaws in general, and those addressing harmful practices in particular. There is some scholarship on the phenomenon of 'village bylaws' or 'village laws', but these carry distinct characteristics from the community bylaws under study: they are formulated outside the framework of chieftaincy mechanisms⁶⁵ and are usually part of formal state systems.⁶⁶

⁶⁵ For example, some Village Bylaws in Northern Ethiopia have been formulated to manage communal grazing lands and enclosures. They are set up at a public meeting and enforced by village committees— Yami Mastewal, Wolde Mekuria, and Michael Hauser, 'The Effectiveness of Village Bylaws in Sustainable Management of Community-managed Enclosures in Northern Ethiopia,' *Sustainability Science* (8)1 (2013), 73-86.

⁶⁶ For example, natural resources management village bylaws in Uganda have been formulated at lower levels of decentralisation under formal processes of enacting village bylaws—Pascal C. Sanginga, Rick N. Kamugisha, and Adrienne M. Martin, 'Strengthening Social Capital for Adaptive Governance of Natural Resources: A Participatory Learning and Action Research for Bylaws Reforms in Uganda,' *Society and Natural Resources* (23)8 (2010), 695-710. Village bylaws to regulate the Marine industry in Western Samoa begun as village initiatives in the mid 1980's, but by 1999 they were integrated into the formal system and are formulated in accordance with the national fisheries legislation—U Fa'asili and I Kelekolio, 'The Use of Village By-laws in Marine Conservation and Fisheries Management' (Information Paper 17 presented at the First SPC Heads of Fisheries Meeting Pacific Community, 9-13 August, Noumea, New Caledonia, 1999). In Indonesia, Village Laws are also enacted under Law 6/2014 on Villages in order to address decentralisation related weaknesses—See Hans Antlöv, Anna Wetterberg, and Leni Dharmawan, 'Village Governance, Community Life, and the 2014 Village Law in Indonesia,' *Bulletin of Indonesian Economic Studies* (52)2 (2016), 161-

Through reliance on empirical data, this thesis fills these literature gaps by making three theoretical contributions:

- a) empirically positioning community bylaws and the activist role of Chiefs regarding harmful practices, as well as the legal pluralism discourse;
- b) applying norm internalisation theories to grassroots and Chief-led community bylaws; and
- c) proposing a new approach/concept of vernacularisation that explains events in community bylaws that cannot be clarified by existing understandings of 'vernacularisation.'

Due to the absence of specific scholarly literature on the topic, the thesis draws from the following literature in order to make its case: unpublished Malawian studies on community bylaws; Malawian and other literature related to Chiefs and women's rights; and harmful practices in the African context. Apart from women's rights literature, academic literature is particularly drawn from fields of democracy/political science, multiculturalism and anthropology.

While appearing relevant, some literature has deliberately not been reviewed. For example, literature on 'social norms,' has been excluded because the phenomenon of community bylaws is different from these social norms, which are fluid. As Elster⁶⁷ puts it, 'social norms are emotional and behavioural propensities of individuals'.⁶⁸

The body of 'top-down' and 'bottom-up' literature would not take us to where the gap is. This literature is preoccupied with a broad range of issues

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⁶⁷ Jon Elster, 'Social Norms and Economic Theory,' *Journal of Economic Perspectives* (3)4 (1989), 99-117.

⁶⁸ *Ibid.*, 102.

surrounding global norms, regulations and institutions (top-down) and bottom-up mechanisms that usually depart from the premise of formal/elitist institutions at state level (e.g. lawyers, NGOs, law reform, government policies, state regulations, etc.) trying to pursue people-centred and participatory approaches in their programmes.⁶⁹

The thesis recognises that scholars have paid considerable attention to female genital mutilation (FGM) as a harmful practice affecting women's and girls' health. However, because FGM is not generally practised in Malawi, the analysis deliberately minimally engages with FGM literature just to demonstrate that community bylaws have not been given attention in that context either.

2.2 EXISTING LOCAL NARRATIVES ON COMMUNITY BYLAWS AND CHIEFS

This section seeks to expose research gaps in studies on community bylaws conducted as projects in Malawi, as well as other local studies that have engaged the issue of community bylaws more broadly.

2.2.1 Malawian Studies on Community Bylaws Focus on Project Assessments

In the Malawi context, other than some media articles,⁷⁰ two studies on

⁶⁹ For example, see Gita Gopal, 'Gender Related Legal Reform and Access to Economic Resources in Eastern Africa,' (1999); Steven D. Jamar, 'A Lawyering Approach to Law and Development,' *North Carolina Journal of International Law and Commercial Regulation* (27) 31 (2001); Meena Jagannath, Nicole Phillips, and Jeena Shah, 'A Right-Based Approach to Lawyering: Legal Empowerment as an Alternative to Legal Aid in Post-Disaster Haiti,' *Northwestern Journal of International Human Rights* (10)7 (2011); Patricio Navia, 'Top-Down and Bottom-Up Democracy in Latin America: The Case of Bachelet in Chile,' *Stockholm Review of Latin American Studies* 3 (2008); Oliver Edward Walton, Thomas Davies, Erla Thrandardottir, and Vincent Charles Keating, 'Understanding Contemporary Challenges to INGO Legitimacy: Integrating Top-Down and Bottom-Up Perspectives,' *ISTR Voluntas* (27) (2016); Stacy Laira Lozner, 'Diffusion of Local Regulatory Innovations: The San Francisco CEDAW Ordinance and the New York City Human Rights Initiative,' *Columbia Law Review* (104) (2004).

⁷⁰ For example, see The Times Reporter 'TA Mwanza Leads Fight for Girls, Women Emancipation' *The Times* 8 August 2015. Available at <http://www.times.mw/ta-mwanza->

community bylaws have been conducted as different projects. The first study was conducted in 2015 as a joint UN project to promote girls education implemented by the United Nations Population Fund (UNFPA), United Nations Children's Fund (UNICEF) and World Food Organisation (WFP) in Mangochi, Salima and Dedza.⁷¹ The study assessed the validity and effectiveness of community bylaws that emerged from the project, and explored some legal challenges posed by the community bylaws. It concluded that the community bylaws fail the constitutional 'legality test,' since Chiefs have no statutory authority to make any law.⁷² In this thesis, the latter analysis is useful in engaging the legal character of the community bylaws, as well as in exploring their legal pluralism dynamic.

This thesis takes up this issue further by interrogating the legal character of the community bylaws against the backdrop of legal pluralism. Does the fact that community bylaws lack democratic and constitutional legitimacy mean that they should be rejected offhand? This question is important, considering that CEDAW's recent jurisprudence (General Recommendation No. 33, 2015) has imported 'community laws' into the legal pluralism discourse. Indeed, as seen in section 1.2, one thread of this thesis is to establish whether community bylaws can be credibly positioned within the legal pluralism discourse.

leads-fight-for-girls-women-emancipation/, accessed on 21 April 2016; Rabeca Chimjeka 'Snatched from the Jaws: Malawi Abolishes 600,000 Child Marriages,' *The Nation* 2 January 2016. Available at <https://mwnation.com/snatched-from-the-jaws-malawi-abolishes-600-000-child-marriages/>, accessed on 12 January 2017; Janet Karim 'Praise to Cultural Leaders for Ending Child Marriages,' *The Nation* 25 March 2016; James Chavula 'Kachindamoto Inspires Karonga Chief,' *The Nation* 20 April 2016. Available at <http://mwnation.com/kachindamoto-inspires-karonga-chief/>, accessed on 21 April 2016; Norway Official Site in Malawi 'Chief Kachindamoto Has Stopped 850 Child Marriages and Sent the Girls Back to School,' 14 April 2016. Available at http://www.norway_malawi/News-from-Malawi/News/Chief-Kachindamoto-has-stopped-850-child-marriages-and-sent-the-girls-back-to-school/#.Vxj9OyN94T, accessed on 21 April 2016. Incidentally this media visibility was prominent during the implementation of the GEWE programme.; Penelope Paliani-Kamanga 'Malawi: A Chief's Fight against Child Marriages,' *Gender Links News* 15 April 2019. Available at <http://genderlinks.org.za/news/malawi-one-womans-fight-against-child-marriages/>, accessed on 4 May 2019.

⁷¹ United Nations Malawi, 'Mapping of the Existing Bylaws in Three Project Districts,' (Draft, 2015). On file with author.

⁷² *Ibid*, 35.

A more comprehensive study was conducted in 2016 to ‘map’ community bylaws that address harmful practices and gender equalities developed under the GEWE Programme (2012-2016), funded by European Union (EU).⁷³ The study findings describe the contents and processes of formulating community bylaws in 20 traditional authority areas.

While the study analysed how some bylaws were linked to the provisions of several gender equality statutes and international human rights law, it did not establish whether this consistency was a result of deliberate effort on the part of communities to internalise gender equality norms or coincidental. Neither have more recent efforts by MoGCDSW and UN Women to produce a unified community bylaws framework.⁷⁴ A 2017 ‘learners’ pregnancy management’ report quoted the mapping study, and acknowledged that sensitised traditional leaders are pivotal to preventing harmful cultural practices that result in unintended pregnancies in Malawi through community bylaws that do not infringe on child rights.⁷⁵

This thesis brings much more to the academic comprehension of community bylaws for addressing harmful practices. Empirical data will offer a better understanding of what exactly is a ‘community bylaw’ in the first place. This perspective is necessary in order to give meaning to ways in which community bylaws fall within or outside the ambit of norm internalisation theories. The understanding of processes of making community bylaws, as

⁷³ Government of Malawi, UNFPA, and EU, 'Mapping of Community Bylaws under the Gender Equality and Women Empowerment (GEWE) Programme' (2016). The GEWE Programme was worth 12 million Euros. It was funded by EU, and coordinated by Ministry of Gender with technical support from UNFPA Malawi. It was implemented in 13 districts – see note 21.

⁷⁴ UN Women commissioned work to develop this framework as it views the framework as being necessary for traditional leaders and their subjects on the content of the bylaws as well as minimum penalties – Yakuwawa William Msika, 'Preliminary Report on the Consultancy to Facilitate the Finalisation of the Community Bylaw Framework, Submitted to The Ministry of Gender, Children, Disability and Social Welfare ' 2019, 6. On file with author.

⁷⁵ Malawi Human Rights Commission and Southern Africa Litigation Centre, *Towards a Human Rights-Based Approach to Learner Pregnancy Management in Malawi* (MHRC and SALC, 2017), 52-53. Available at <https://www.southernafricalitigationcentre.org/2017/07/31/salc->

well as the various issues that communities are grappling with in their bylaws will enhance scholarly knowledge about the strengths and challenges in the way international human rights jurisprudence theorises norm internalisation.

2.2.2 Literature on Chiefs in Malawi does not Closely Focus on Community Bylaws

A review of academic literature, research reports and papers that allude to Chiefs and/or community bylaws in Malawi revealed that none of them has engaged community bylaws robustly, let alone in a norm internalisation setting. Englund⁷⁶ has claimed that villagers in one Malawian community exceeded vernacularisation by transforming the very meaning of human rights as they opposed the state's reluctance to recognise their preferred Village Head.⁷⁷ However, neither community bylaws nor the concept of norm internalisation are engaged.

A 2018 AU sponsored report of child marriage in Africa⁷⁸ focusing on ten countries, including Malawi, mentions chieftaincy institutions.⁷⁹ The report investigated the root causes and prevalence of child marriage and the practices, customs and beliefs that perpetuate child marriage, and assessed the level of state compliance with international and regional obligations to prevent child marriage.⁸⁰ In acknowledging that bylaws are helping to eliminate child marriage in Malawi and Uganda,⁸¹ the report attributes the

⁷⁶ Harri Englund, 'Human Rights and Village Headmen in Malawi: Translation Beyond Vernacularisation' cited in *Law Against the State: Ethnographic Forays Into Law's Transformations*, ed. Julia Eckert, Brian Donahoe, Christian Strümpell, and Özlem Biner (Cambridge University Press, 2012).

⁷⁷ *Ibid.*, 70-71.

⁷⁸ Produced by the joint collaboration of the Centre for Human Rights, University of Pretoria and the African Union (in particular the African Commission on Human and People's Rights and the mechanism of the Special Rapporteur of the Rights of Women in Africa) – Centre for Human Rights, *A Report on Child Marriage in Africa*, (2018).

⁷⁹ The rest are Cameroon, the DRC, the Gambia, Kenya, Mali, Mauritania, Mozambique, South Africa and Uganda – *ibid.*

⁸⁰ *Ibid.*, 12. It further analyses legislative and policy frameworks and selected efforts to address child marriage.

⁸¹ *Ibid.*, 61-62.

formulation of the bylaws in some parts of Malawi to the ‘training’ of local Chiefs (presumably by human rights activists or state actors) on the need to create stringent bylaws.⁸² This claim is not substantiated in the report, and is a key focus of this thesis. Furthermore, the report fails to position community bylaws in its strategic recommendations for addressing child marriage, which are predominantly ‘formal’ and human rights focused.

A number of other papers and studies take the role of Chiefs and the use of community bylaws for granted as important means of combating child marriage in Malawi. For example, a 2017 working paper by the Programme on Governance and Local Government (University of Gothenburg) highlights the experiences of Senior Chief Kachindamoto in ending child marriage in Dedza. The paper investigates how ‘traditional and state authority messages (or those from male or female sources)—affect public support for human rights issues.’⁸³ Chiweza’s 2014 workshop paper on chieftaincy and gender equality advocates for Chiefs and community members to develop and implement local bylaws against child marriage and other harmful sexual-related cultural practices.⁸⁴

However, some reports do not recognise the role of Chiefs in community bylaws. The Malawi Government’s and UNICEF report on the assessment of the national child protection system (2012) does not go beyond labelling Chiefs as ‘local child protection gate-keepers’ and cursorily recognising their

⁸² Ibid.

⁸³ Ragnhild Muriaas, Vibeke Wang, Lindsay J. Benstead, Boniface Dulani, and Lise Rakner, ‘It Takes a Female Chief: Gender and Effective Policy Advocacy in Malawi’ *Programme on Governance and Local Development at University of Gothenburg* (Working Paper No. 17) (2017).

⁸⁴ Asiyati Lorraine Chiweza, ‘CSOs, Chiefs and Governance: Experiences from Malawi and Southern Africa on Chieftaincy and Gender Equality,’ (paper presented at a Workshop on Gender and Human Rights Based Approach to Development: The Role of Traditional Chiefs, (undated), Lilongwe, Malawi, 2014) cited in United Nations Malawi, ‘Mapping of the Existing Bylaws in Three Project Districts,’ (Draft, 2015), 12-13—on file with author.

role in presiding over village courts.⁸⁵ Although the 2009 study on 'Town Chiefs' in Malawi lists some gender-related disputes⁸⁶ as falling within the purview of the Chiefs' responsibility to preserve justice and order,⁸⁷ it does not pay attention to gender or community bylaws.

This thesis differs from the approaches taken in the literature discussed above in that it firmly locates Malawian chiefs in the harmful practices discourse, particularly regarding the extent to which Chiefs grapple with the tension between tradition and human rights pertaining to harmful practices.

2.3 NARRATIVES OF CHIEFS AS WOMEN'S RIGHTS SPOILERS

While there is considerable scholarship on culture and the women's rights discourse (discussed in Chapter 3), not much has been written on the role that traditional leaders themselves are playing in advancing gender equality and women's rights. Indeed, Becker⁸⁸ notes that traditional authorities are a neglected topic in political gender analyses because of their reputation as 'immutable patriarchal institutions and traditions'.⁸⁹ Moreover, the literature usually situates Chiefs and women's rights on binary opposing sides, often viewing traditional leaders as the 'problematic other' when it comes to women's rights.

⁸⁵ Government of Malawi and UNICEF 'Protecting Children in Malawi: A Report of the Major Findings of the Mapping and Assessment of the National Child Protection System' (2012). Available at

<http://www.socialserviceworkforce.org/system/files/resource/files/Protecting%20Children%20in%20Malawi%20-%20A%20report%20on%20the%20major%20findings%20of%20the%20mapping%20and%20assessment%20of%20the%20NCPS.pdf>, accessed on 23 May 2019.

⁸⁶ For example inheritance, domestic violence and family problems.

⁸⁷ Diana Cammack, Edge Kanyongolo, and Tam O'niel, 'Town Chiefs' in Malawi' *Africa Power and Politics Programme by the Overseas Development Institute* (Working Paper No. 3) (2009), 28.

⁸⁸ Heike Becker, 'New Things after Independence': Gender and Traditional Authorities in Postcolonial Namibia,' *Journal of Southern African Studies* (32)1 (2006), 29-48.

⁸⁹ *Ibid.*, 29.

Of course, some scholars have acknowledged the relevance of traditional leaders to the implementation of women's rights. For example, Becker⁹⁰ contends that traditional authorities are not at all stuck in old tradition, but are a changing and modern institution that, together with rural people, produces local modernities as the institution interacts with global social forces.⁹¹ Bennet⁹² also acknowledges instances when Chiefs' courts in Zambia modified customary law in order to improve women's status, only to have such decisions overturned by subordinate courts on the ground that the Chiefs were negating customary law.⁹³ Sieder and McNeish⁹⁴ identify traditional and community structures for dispute resolution as potential means of making quick gains in justice projects.⁹⁵

With these few exceptions, literature, including some feminist scholarship, presents traditional leaders as being antagonistic to women's rights. This suspicion of traditional leaders is not exactly unfounded.⁹⁶ For example, Bond⁹⁷ observes that 'traditional leaders may be hostile to equality based cultural change'.⁹⁸ Williams⁹⁹ argues that customary law systems (of which traditional leaders are custodians), 'legitimise and enforce' gender discrimination and threaten women's status, including in areas of marriage,

⁹⁰ Ibid.

⁹¹ Ibid., 31.

⁹² Tom W. Bennett, *A Sourcebook of African Customary Law for Southern Africa* (Juta, 1991).

⁹³ Ibid., cited in Wayne Van Der Meide, 'Gender Equality v. Right to Culture – Debunking the Perceived Conflicts Preventing the Reform of the Marital Property Regime of the Official Version of Customary Law,' *South African Law Journal* (116) (1999), 100-112 108.

⁹⁴ Rachel Sieder and John-Andrew McNeish, *Gender Justice and Legal Pluralities: Latin America and African Perspectives*, (2013).

⁹⁵ Ibid., 12.

⁹⁶ For example, Bond captures how, during the drafting of the new South African Constitution, traditional leaders in South Africa lobbied to exclude personal and customary law from the purview of the non-discrimination clause in the Constitution. A strong and organised women's lobby defeated the effort—Johanna Bond, 'Gender, Discourse and Customary Law in Africa,' (2010), 559.

⁹⁷ Ibid.

⁹⁸ Ibid., 567.

⁹⁹ Susan H. Williams, 'Democracy, Gender Equality, and Customary Law: Constitutionalising Internal Cultural Disruption,' *Indiana Journal of Global Legal Studies* (18)1 (2011), 65-85.

divorce and property.¹⁰⁰ Doho¹⁰¹ asserts that in the Zimbabwean context, traditional leadership systems were, and indeed continue to be partly responsible for ‘women’s pathetic conditions’,¹⁰² arguing among other things that the traditions that traditional leaders have condoned have been without women’s consent.¹⁰³ Ewelukwa¹⁰⁴ observes that, often, Nigerian local rulers resist efforts to reform customary practices that disadvantage women, and they suppress women’s voices by undermining democratic processes at village levels.¹⁰⁵

Much of this literature is tainted by the tendency to overgeneralise, which in turn, invisibilises ‘positive’ Chief-led initiatives such as the community bylaws under study. Furthermore, while some of the literature accepts the potential of traditional leaders as agents of positive change, it assumes without more ado that such change only happens under the influence of the state, and sometimes NGOs.¹⁰⁶ This thesis tests this assumption using empirical data from Malawi.

Additionally, while the field of multiculturalism is more concerned with the moral and political claims/rights of individuals within a minority group and/or a wide range of marginalised groups,¹⁰⁷ its feminist debates surrounding women and culture (e.g. in relation to female circumcision, polygamy, marriage and sex equality in general) support the traditional

¹⁰⁰ Ibid., 65.

¹⁰¹ Obediah Dodo, ‘Traditional Leadership Systems and Gender Recognition: Zimbabwe,’ *International Journal of Gender and Women’s Studies* (1)1 (2013), 29-44.

¹⁰² Ibid., 38-39.

¹⁰³ Such as forced marriages, levirate marriages, polygamy, FGM and inheritance inequalities – ibid.

¹⁰⁴ Uche U. Ewelukwa, ‘Post-Colonialism, Gender, Customary Injustice: Widows in African Societies,’ *Human Rights Quarterly* (24) (2002), 424-486.

¹⁰⁵ Ibid., 472-473.

¹⁰⁶ For example ibid.; Senorina Wendoh and Tina Wallace, ‘Re-thinking Gender Mainstreaming in African NGOs and Communities,’ *Gender and Development* (13)2 (2005), 70-79 78 .

¹⁰⁷ Seyla Benhabib, *The Claims of Culture: Equality and Diversity in the Global Era* (Princeton University Press, 2002); Sarah Song, ‘Multiculturalism,’ in *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta (2017) cited in Susan H. Williams, ‘Democracy, Gender Equality, and Customary Law: Constitutionalising Internal Cultural Disruption,’ (2011), 71.

authorities *versus* women's rights chasm. By default, traditional authorities are positioned as defenders of negative culture. This has resulted in perceptions that the cultural stand of traditional authorities is sometimes legally accommodated at the expense of positions held by marginalised groups, including women.¹⁰⁸

The literature on feminist multiculturalism advances the view that women are critical to 'cultural policy production/reformulation,'¹⁰⁹ and should therefore be supported to challenge cultural systems and embedded problematic cultural practices.¹¹⁰ According to this scholarship, women should not only be supported to pursue various dialogue models with 'divergent' traditional leaders, and challenge the traditions that their leaders are promoting without the fear of a backlash.

Various democratic dialogue models that incorporate women's voices (and preferably brokered by NGOs and the state) should also be deployed to resolve problematic cultural practices.¹¹¹ In other words, women are or should be the ones 'pushing back' against their traditional leaders' retrogressive cultural positions. Bond¹¹² vouches for the Protocol to the African Charter on Human and People's Rights in Africa as a tool for strengthening women's agency in engaging with traditional leaders in localised dialogue in order to shift the latter's position regarding the value of

¹⁰⁸ Anne Phillips, *Multiculturalism Without Culture*, vol. 8 (Princeton University Press, 2007), 163 cited in Susan H. Williams, 'Democracy, Gender Equality, and Customary Law: Constitutionalising Internal Cultural Disruption,' (2011), 70.

¹⁰⁹ Johanna Bond, 'Gender, Discourse and Customary Law in Africa,' (2010), 511.

¹¹⁰ Sarah Song, *Justice, Gender and the Politics of Multiculturalism* (Cambridge University Press, 2007); Judith Squires, *Culture, Equality and Diversity* (Polity Press, 2002); Monique Deveaux, *Cultural Pluralism and Dilemmas of Justice* (Cornell University Press, 2000); Seyla Benhabib, *The Claims of Culture: Equality and Diversity in the Global Era*, (2002) cited in Susan H. Williams, 'Democracy, Gender Equality, and Customary Law: Constitutionalising Internal Cultural Disruption,' (2011).

¹¹¹ Seyla Benhabib, *The Claims of Culture: Equality and Diversity in the Global Era*, (2002); Judith Squires, *Culture, Equality and Diversity*, (2002); Monique Deveaux, *Cultural Pluralism and Dilemmas of Justice*, (2000); Seyla Benhabib, *The Claims of Culture: Equality and Diversity in the Global Era*, (2002); Sarah Song, *Justice, Gender and the Politics of Multiculturalism*, (2007).

¹¹² Johanna Bond, 'Gender, Discourse and Customary Law in Africa,' (2010).

advancing women's rights (and finding a win-win solution for human rights and tradition in the process).¹¹³ The 'dialogue model,' is certainly different from the phenomenon of community bylaws, although one could argue that dialogue can create the space for community bylaws dialogue – and this has not been exploited so far in literature.

It has been argued that the idea that the mindsets of traditional leaders are typically inclined towards reinforcing culturally-driven women's rights abuses has led to programmatic top-down responses that 'target' traditional leaders.¹¹⁴ For example, Wendon and Wallace¹¹⁵ have reported that some African NGOs have opened paths for gender equality by forging alliances with traditional leaders, who in turn have created opportunities for mainstreaming gender equality in village systems.¹¹⁶ The harmful practices literature analysed below makes a similar claim. In seeking to study in detail the activism of Chiefs in the area of harmful practices, this thesis provides a better understanding of the role of traditional leaders as 'change targets' in their own right.

2.4 THE LITERATURE ON LEGISLATIVE AND OTHER MEASURES ON HARMFUL PRACTICES

This section engages the literature on harmful practices to unveil the type of issues that have occupied this literature so far, and to demonstrate its deficiencies. Two main gaps are noted: the absence of community bylaws in the literature on harmful practices; and bias towards top-down interventions in dealing with harmful practices in academic literature.

¹¹³ Ibid., 550.

¹¹⁴ Chapter 4 demonstrates that this approach is heavily bolstered by international human rights jurisprudence.

¹¹⁵ Senorina Wendoh and Tina Wallace, 'Re-thinking Gender Mainstreaming in African NGOs and Communities,' (2005).

¹¹⁶ Ibid., 78.

Research reports on harmful practices in Malawi have mostly investigated various forms of harmful practices from a health perspective. Several researches have focused on the HIV and AIDS,¹¹⁷ while a 2015 study examined the impact of traditional practices on young people's sexual and reproductive health rights.¹¹⁸ As for academic literature, Kaime¹¹⁹ provides anecdotal evidence on how the harmful practice of initiation *fisi*¹²⁰ has been eliminated in some Malawian communities by village elders who have advised women who manage the initiation ceremonies that the practice was no longer necessary.¹²¹ In relying on anecdotes, Kaime does not provide contextual information of where these changes have occurred, but it does not seem that the changes by 'village elders' (who may or may not be Chiefs) were prompted by anything more than dialogue between them and outsiders.¹²²

¹¹⁷ Malawi Human Rights Commission, *Harmful Practices in Malawi* (2006); Olivia M'chaju Liwewe and Priscilla Upasani Matinga, 'Socio-Cultural Gender-Based Factors that Contribute to Women and Girls Vulnerability to HIV/AIDS Infection in Mulanje and Thyolo Districts' (2005); WLSA Malawi, 'Women, HIV and AIDS in Six Districts in Malawi: Balancing the Equation Between Women's Grounded Realities and the Appropriateness of the Response,' (2009).

¹¹⁸ Government of Malawi and UNFPA, *Cultural Practices Study Report: Safeguarding Young People* (UNFPA, 2015).

¹¹⁹ Thoko Kaime, 'The Convention on the Rights of the Child and the Cultural Legitimacy of Children's Rights in Africa: Some Reflections,' *African Human Rights Law Journal* (5)2 (2005), 221-238.

¹²⁰ *Fisi* means hyena, connoting a man who comes under the cover of darkness. The word has two meanings. The first one relates to girls' initiation, whereby a *fisi*, whose identity is hidden from the initiated girls will have sexual intercourse with the initiates as an initiation ritual. The second meaning relates to a practice whereby a *fisi* is hired by a family to impregnate a wife whose husband is impotent.

¹²¹ Thoko Kaime, 'The Convention on the Rights of the Child and the Cultural Legitimacy of Children's Rights in Africa: Some Reflections,' (2005), 235-236.

¹²² Kaime asserts that the village elders were approached (it is not clear by who, but presumably by HIV and AIDS advocates/NGOs) and advised to do away with the practice because it was putting many people at risk of HIV. At first, the elders resisted and justified the practice, but later relented when the issue was reframed from being about the CRC, to an issue of ensuring that girls were not dying early due to HIV (thus depriving the community of potential wives) or growing up as sickly and unhealthy women as they went into marriage (resulting in their possible death and that of husbands soon after marriage) – *ibid.*

Page's¹²³ doctoral study analysed the relationship between the practice of *fisi*¹²⁴ in the HIV context in Malawi, but without paying attention to community 'legal' orderings to address the practice.¹²⁵ Lee-Rife et al.'s¹²⁶ review of 23 child marriage prevention programmes in Malawi and other low-income countries only evaluates a cash transfer intervention that was implemented in Zomba district as an incentive for girls education.¹²⁷ None of the other interventions reviewed identify community bylaws as a programmatic approach that has been used to respond to the harmful practice of child marriage whether in Malawi or elsewhere.¹²⁸

As for the broader academic literature, Longman and Bradley's¹²⁹ recent edited volume titled *Interrogating Harmful Cultural Practices: Gender, Culture and Coercion* seeks to address the gap of the scarce application of the term 'harmful cultural practices' in research reports and academic literature despite its common usage by activists and policy makers. Drawing on an impressive line-up of multi-disciplinary scholars, the volume critically engages with the concept of and approaches towards harmful cultural practices from diverse perspectives.¹³⁰ However, none of its chapters

¹²³ Samantha Page, 'Narratives of Blame HIV/AIDS and Harmful Cultural Practices in Malawi: Implications for Policies and Programmes' (Doctoral Thesis, University of Portsmouth, 2014). Now published as Samantha Page, *Development, Sexual Cultural Practices and HIV/AIDS in Africa* (Palgrave Macmillan, 2019).

¹²⁴ See note 120 and the Glossary of Chichewa Terms.

¹²⁵ Samantha Page, 'Narratives of Blame HIV/AIDS and Harmful Cultural Practices in Malawi: Implications for Policies and Programmes' (2014).

¹²⁶ Susan Lee-Rife, Anju Malhotra, Ann Warner, and Allison McGonagle Gliniski, 'What Works to Prevent Child Marriage: A Review of the Evidence,' *Studies in Family Planning* (43)4 (2012).

¹²⁷ *Ibid.*, 287-303.

¹²⁸ *Ibid.*

¹²⁹ Chia Longman and Tamsin Bradley, 'Interrogating the Concept of "Harmful Cultural Practices",' in *Interrogating Harmful Cultural Practices: Gender, Culture and Coercion*, ed. Chia Longman and Tamsin Bradley (Routledge, 2016).

¹³⁰ Including: strategies for documenting and monitoring persistent harmful cultural practices, including attitudinal change towards such practices; the political underpinnings of harmful cultural practices interventions; tensions between the regulation of, and discourses on certain practices affecting minority women; the practical meanings of concepts such as 'tradition' and 'harmful' in the context of civil and religious laws; challenges of programmes targeting the eradication of FGM; lived experiences of FGM victims and implications of the complexities of the practice in relation to eradication interventions; the paradox of 'harm' in

addresses community bylaws. Even Page's chapter, which draws on her doctoral study on the harmful cultural practice of *fisi*,¹³¹ referred to earlier, does not discuss community bylaws.¹³²

Ewelukwa¹³³ has alluded to something that is faintly similar to community bylaws. Noting in the context of Nigerian widowhood practices that 'customs have changed only when a traditional ruler was insistent on change',¹³⁴ Ewelukwa's article shows how the willingness of traditional rulers and village elders to accept change in some communities has enabled local women (inspired by NGOs and influences from neighbouring communities) to successfully influence changes in some practices.¹³⁵ The article provides information on the concrete efforts communities had taken to eradicate harmful widowhood practices such as establishing committees to investigate the plight of widows, setting new shorter timelines for conducting widowhood rites¹³⁶ and mourning rites,¹³⁷ and creating offences for exceeding these timelines.¹³⁸ Some communities had even discarded the practice of shaving a widow's hair, labeling it 'unnecessary and humiliating.'¹³⁹ According to Ewelukwa, these changes usually resulted from periods of

circumcision dialogue, particularly where the 'harmed' contest the existence of harm; the relevance of in-depth contextual and intersectional analysis in preventing harmful vaginal practices; the conflict between developmental progress and indicators of the reduction of violence against women in dowry harassment terms; and the challenges of arguing for the eradication of the practice of lip-plates on the basis of the discomfort of outsider 'others,' despite the comfort of the women 'inside' – Chia Longman and Tamsin Bradley, eds., *Interrogating Harmful Cultural Practices: Gender, Culture and Coercion* (Routledge, 2016).

¹³¹ See note 120 and the Glossary of Chichewa Terms.

¹³² Samantha Page, "'Narratives of Blame' Surrounding HIV and AIDS Eradication Policies and Sexual Cultural Practices in Malawi,' in *Interrogating Harmful Cultural Practices: Gender, Culture and Coercion*, ed. Chia Longman and Tamsin Bradley (Routledge, 2016), 67-80.

¹³³ Uche U. Ewelukwa, 'Post-Colonialism, Gender, Customary Injustice: Widows in African Societies,' (2002).

¹³⁴ *Ibid.*, 473.

¹³⁵ *Ibid.*, 472.

¹³⁶ In Illah, from three months to one month (with hopes to further reduce it to seven days).

¹³⁷ In Enugwu-Ukwu, the mourning period of twenty-eight days had been reduced to twelve days, with further talks by the traditional ruler to have it reduced to seven days. The mourning period was reduced to four days in Abua.

¹³⁸ Uche U. Ewelukwa, 'Post-Colonialism, Gender, Customary Injustice: Widows in African Societies,' (2002), 472-473.

¹³⁹ *Ibid.*, 472.

deliberations, negotiations, and consensus building. Sometimes, the traditional ruler and his advisers would make the final decision after listening to community members.¹⁴⁰

Ewelukwa's insights are important as they provide a fleeting taste of how, outside legislative weaponry, the political will of traditional leaders is pivotal to the renegotiation and reformulation of local rules on cultural practices. However, Ewelukwa still is pessimistic about the traditional rulers, arguing that left to their own devices (without state guidelines), traditional leaders' support for patriarchal ideologies present an obstacle to reform.¹⁴¹ He makes this argument even though he has not studied the 'local rules' in detail to fully comprehend their dynamics, how they relate to international human rights norms, and their potential in addressing harmful practices.

While some scholars have contended that harmful practices would be prevented by legal and policy measures,¹⁴² others have criticised this approach. Omeje¹⁴³ has criticised the emphasis that intellectuals and social activists have laid on the legislative prohibition and elimination of harmful tradition practices.¹⁴⁴ Other scholars have questioned assumptions behind the reliance on legislative measures in addressing harmful practices generally¹⁴⁵

¹⁴⁰ Ibid.

¹⁴¹ Ibid., 473.

¹⁴² Judith-Ann Walker, 'Early Marriage in Africa—Trends, Harmful Effects and Interventions,' (2012), 231-240 231; John Tobin, 'The International Obligation to Abolish Traditional Practices Harmful to Children's Health: What Does it Mean and Require of States?,' *Human Rights Law Review* (9)3 (2009), 373-396 389.

¹⁴³ Kenneth Omeje, 'Sexual Exploitation of Cult Women: The Challenges of Problematising Harmful Traditional Practices from a Doctrinalist Approach,' (2001).

¹⁴⁴ Ibid., 45.

¹⁴⁵ For example John Cantius Mubangizi, 'An assessment of the Constitutional, Legislative and Judicial Measures against Harmful Cultural Practices that Violate Sexual and Reproductive Rights of Women in South Africa,' *Journal of International Women's Studies* (16)3 (2015), 158-173 171; John Cantius Mubangizi, 'A South African Perspective on the Clash between Culture and Human Rights, with Particular Reference to Gender-Related Cultural Practices and Traditions,' *Journal of International Women's Studies* (13)3 (2012), 33-48 45; Thoko Kaime, 'The Convention on the Rights of the Child and the Cultural Legitimacy of Children's Rights in Africa: Some Reflections,' (2005), 237.

and FGM.¹⁴⁶ Legislation alone cannot accomplish the task of uprooting practices that run generations deep.¹⁴⁷ In some cases, legislation has failed to respond to specific contexts (including to guarantee equality),¹⁴⁸ and has enjoyed little practical implementation on the ground,¹⁴⁹ especially in remote villages.¹⁵⁰

As a result, scholars have recommended extra measures, mostly top-down too, such as public education and sensitisation. Ssenyonjo¹⁵¹ contends that it is possible to transform deep-rooted practices through public education at global, regional, national and local levels.¹⁵² Similarly, in their analysis of harmful traditional practices that limit women's rights, Durojaye et al.¹⁵³ press for education and awareness campaigns and the adoption of affirmative action in political and socio-economic spheres over and above legal reforms.¹⁵⁴ For his part, Mubangizi¹⁵⁵ recommends a 'holistic approach that includes advocacy, human rights education, change of patriarchal mindsets

¹⁴⁶ For example Jo Boyden, Alula Pankhurst, and Yisak Tafere, 'Child Protection and Harmful Traditional Practices: Female Early Marriage and Genital Modification in Ethiopia,' *Development in Practice* (22)4 (2012), 510-522 517; John Tobin, 'The International Obligation to Abolish Traditional Practices Harmful to Children's Health: What Does it Mean and Require of States?,' (2009), 396.

¹⁴⁷ John Cantius Mubangizi, 'An assessment of the Constitutional, Legislative and Judicial Measures against Harmful Cultural Practices that Violate Sexual and Reproductive Rights of Women in South Africa,' (2015); John Cantius Mubangizi, 'A South African Perspective on the Clash between Culture and Human Rights, with Particular Reference to Gender-Related Cultural Practices and Traditions,' (2012); Thoko Kaime, 'The Convention on the Rights of the Child and the Cultural Legitimacy of Children's Rights in Africa: Some Reflections,' (2005).

¹⁴⁸ Manisuli Ssenyonjo, 'Culture and the Human Rights of Women in Africa: Between Light and Shadow,' *Journal of African Law* (51)1 (2007), 39-67 66.

¹⁴⁹ John Tobin, 'The International Obligation to Abolish Traditional Practices Harmful to Children's Health: What Does it Mean and Require of States?,' (2009), 390.

¹⁵⁰ Kenneth Omeje, 'Sexual Exploitation of Cult Women: The Challenges of Problematising Harmful Traditional Practices from a Doctrinalist Approach,' (2001), 48.

¹⁵¹ Manisuli Ssenyonjo, 'Culture and the Human Rights of Women in Africa: Between Light and Shadow,' (2007).

¹⁵² *Ibid.*, 66.

¹⁵³ Ebenezer Durojaye, Bridget Okoye, and Adetoun Adebajo, 'Harmful Cultural Practices and Gender Equality in Nigeria,' *Gender and Behaviour* (12)1 (2014), 6169-6181.

¹⁵⁴ *Ibid.*, 6178-6180.

¹⁵⁵ John Cantius Mubangizi, 'An assessment of the Constitutional, Legislative and Judicial Measures against Harmful Cultural Practices that Violate Sexual and Reproductive Rights of Women in South Africa,' (2015).

and political will'.¹⁵⁶ Key players in this regard are women, men, civil society organisations (CSOs), the judiciary and the state.¹⁵⁷ In another article, Mubangizi¹⁵⁸ highlights the crucial role that women's rights NGOs play in devising solutions to the problems of harmful cultural practices.¹⁵⁹ Walker¹⁶⁰ argues for a sub-regional strategy to address child marriage, and observes that programmes that have complemented legal measures for preventing child marriage have included those providing educational and economic support (through donor funds).¹⁶¹ All these scholarly contributions have not examined the potential role of community bylaws in eliminating harmful practices.

In the context of FGM, Cottingham and Kismodi¹⁶² recommend that legislative measures should be bolstered by outreach efforts conducted by CSOs, government and other players.¹⁶³ While recognising that community-led action is essential to addressing the social stigma around those who shun FGM, and that community leaders can help to achieve accelerated progress on the elimination of FGM, community bylaws have not yet been considered as an option.¹⁶⁴ Tobin¹⁶⁵ also promotes education as a complementary measure, noting that awareness raising and sensitisation campaigns have to be anchored in dialogue and community participation.¹⁶⁶ While Tobin is wary of the emphasis on 'expert driven solutions' that do not sufficiently engage

¹⁵⁶ Ibid., 171.

¹⁵⁷ Ibid.

¹⁵⁸ John Cantius Mubangizi, 'A South African Perspective on the Clash between Culture and Human Rights, with Particular Reference to Gender-Related Cultural Practices and Traditions,' (2012).

¹⁵⁹ Ibid., 46.

¹⁶⁰ Judith-Ann Walker, 'Early Marriage in Africa—Trends, Harmful Effects and Interventions,' (2012).

¹⁶¹ Ibid., 231.

¹⁶² Jane Cottingham and Eszter Kismodi, 'Protecting Girls and Women from Harmful Practices Affecting Their Health: Are We Making Progress?,' (2009), 128-131.

¹⁶³ Ibid., 130.

¹⁶⁴ Ibid.

¹⁶⁵ John Tobin, 'The International Obligation to Abolish Traditional Practices Harmful to Children's Health: What Does it Mean and Require of States?,' (2009).

¹⁶⁶ Ibid., 391.

concerned communities,¹⁶⁷ his proposed 'community campaigns' still imply the involvement of outside knowers who come and educate grassroots communities. Unlike this approach, Mackie and LeJeune¹⁶⁸ call for transformative human rights education strategies that pursue the promotion of international human rights norms without necessarily trivialising local values and practices.¹⁶⁹

Other scholars have suggested dealing with harmful traditional practices through legal reforms to African customary law systems. This approach represents another top-down standpoint. For example, Mubangizi¹⁷⁰ is convinced that courts and the legislature are most competent to reform and develop customary law systems that can protect women from harmful cultural practices.¹⁷¹ In their review of harmful traditional practices that violate women's rights in the Southern African Development Community (SADC) region, Wadesango et al.¹⁷² recommend that SADC states should use legal and policy measures to 'address the experience of the dual legal system and unyielding patriarchal cultural attitudes',¹⁷³ without further elaboration.

It is clear that customary law and formal state systems alone cannot fully eliminate harmful cultural practices. Neither can the reform of such systems. In fact, the emergence of community bylaws in Malawi suggests that recent legal reforms and measures on harmful practices have not succeeded in eliminating these practices.

¹⁶⁷ Ibid.

¹⁶⁸ Gerry Mackie and John LeJeune, 'Social Dynamics of Abandonment of Harmful Practices: A New Look at the Theory', Special Series on Social Norms and Harmful Practices (UNICEF Innocenti Research Centre, 2009).

¹⁶⁹ Ibid.

¹⁷⁰ John Cantius Mubangizi, 'A South African Perspective on the Clash between Culture and Human Rights, with Particular Reference to Gender-Related Cultural Practices and Traditions,' (2012).

¹⁷¹ Ibid., 46. In relation to the role of courts and the legislature respectively, Mubangizi argues that courts can strike down customary law aspects offensive to the Bill of Rights; and the legislature can pass laws that reform customary law.

¹⁷² Newman Wadesango, Symphorosa Rembe, and Owence Chabaya, 'Violation of Women's Rights by Harmful Traditional Practices,' (2012).

¹⁷³ Ibid., 122.

This thesis cautions against drawing the hasty conclusion that the community bylaws are deliberately vernacularising state law and human rights norms. However, the thesis is not the first to adopt such a cautious approach. Kaime¹⁷⁴ for example, has rejected simplistic and elitist legislative solutions that seek to replace harmful traditional norms with human rights norms, urging governments and CSOs to design interventions that are 'culturally legitimate, grounded and localised'.¹⁷⁵ Such interventions, he argues, have a higher potential of promoting child rights successfully in Africa.¹⁷⁶

Though this thesis argues that such a starting point is still top-down, Kaime's application of An-Naim's¹⁷⁷ concept of 'internal criteria of legitimacy'¹⁷⁸ is of interest to this study. The underlying philosophy is that the procedures used to challenge negative culture must be acceptable to members of the culture (procedural legitimacy); and that the proposed alternatives must speak to the needs and expectations of the members (substantive legitimacy).¹⁷⁹ According to An-Na'im, cultural change can best be sustainably gained and managed if internally driven by insiders and their own debates about their situation.¹⁸⁰

While both Kaime and An-Na'im engage the concept of 'internal criteria of legitimacy' from perspectives of children's rights and related interventions, the empirical chapters of this thesis explore whether processes similar to the concept are manifesting in the way community bylaws are emerging and being conceptualised in rural Malawi. This will help to uncover new forms and strategies of vernacularising human rights ideas that are missing from the

¹⁷⁴ Thoko Kaime, 'The Convention on the Rights of the Child and the Cultural Legitimacy of Children's Rights in Africa: Some Reflections,' (2005).

¹⁷⁵ *Ibid.*, 233.

¹⁷⁶ *Ibid.*

¹⁷⁷ Abdullahi An-Na'im, 'Cultural Transformation and Normative Consensus on the Best Interests of the Child,' *International Journal of Law, Policy and the Family* (8)1 (1994), 62-81.

¹⁷⁸ *Ibid.*, 67; Thoko Kaime, 'The Convention on the Rights of the Child and the Cultural Legitimacy of Children's Rights in Africa: Some Reflections,' (2005), 234.

¹⁷⁹ Thoko Kaime, *ibid.*

¹⁸⁰ Abdullahi An-Na'im, 'Cultural Transformation and Normative Consensus on the Best Interests of the Child,' (1994), 67.

existing vernacularisation discourse.

2.5 NORM INTERNALISATION AND VERNACULARISATION SCHOLARSHIP

Chapter 3 discusses norm internalisation and vernacularisation literature from a conceptual point. Illustrative examples from this literature show that scholars have not engaged the concepts of norm internalisation and vernacularisation from the context of community bylaws and harmful practices. Therefore, unique ways in which vernacularisation plays out in the phenomenon of community bylaws on harmful practices are not understood. Merry's¹⁸¹ work builds understanding about how transnational human rights approaches to VAW are adopted in local contexts. However, her 'local' is not local 'legal' orders such as community bylaws. Sarfaty¹⁸² only engages norm internalisation and vernacularisation in the context of indigenous people seeking self-determination. Using South Korea as case study, Cheng¹⁸³ traces how international human rights norms on trafficking in persons and women's rights become appropriated and translated into anti-prostitution polices.¹⁸⁴

Several scholars recognise relevance of local mechanisms in norm internalisation, but not in the context of phenomenon such as community bylaws. Zwingel¹⁸⁵ appreciates that 'the label of norm internalisation' fails to expose diverse processes that unfold domestically after the state's treaty ratification.¹⁸⁶ However, she does not allude to harmful practices or local

¹⁸¹ Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (2006a); Sally Engle Merry, 'Transnational Human Rights and Local Activism: Mapping the Middle,' *American Anthropologist* (108)1 (2006b); Sally Engle Merry, 'Rights, Religion, and Community: Approaches to Violence against Women in the Context of Globalisation,' *Law and Society Review* (35) (2001).

¹⁸² Galit A. Sarfaty, 'International Norm Diffusion in the Pimicikamak Cree Nation: A Model of Legal Mediation' *Harvard International Law Journal* (48)2 (2007), 441-487.

¹⁸³ Sealing Cheng, 'The Paradox of Vernacularisation: Women's Human Rights and the Gendering of Nationhood,' *Anthropological Quarterly* (84)2 (2011), 475-505.

¹⁸⁴ *Ibid.*, 478.

¹⁸⁵ Susanne Zwingel, 'How Do Norms Travel? Theorising International Women's Rights in Transnational Perspective,' (2012), 115-129.

¹⁸⁶ *Ibid.*, 118.

processes such as community bylaws. Rajam and Zararia¹⁸⁷ acknowledge that textbook rights must translate into lived rights in local communities;¹⁸⁸ and that villagers may consciously or unconsciously translate global human rights discourses to local contexts.¹⁸⁹ However, the authors were not studying community bylaws or harmful practices; nor did they conceptualise the micro-processes of vernacularisation as performed by this thesis. Zwart¹⁹⁰ argues that local institutions are essential to the full implementation of international human rights¹⁹¹ without an examination of the mechanisms of local 'laws' or even the institution of Chiefs.

Furthermore, it is assumed that a human rights culture has to be developed in local communities by epistemic outsiders. It is presumed that NGO human rights projects in local communities work towards change by reframing communities' psychology.¹⁹² Other authors have argued that communities should be supported to change towards increased respect for the human dignity of women and other societal members.¹⁹³ In other words, human rights would hardly permeate local communities without the intervention of epistemic intermediaries.¹⁹⁴ The prospect that NGOs'/external interventions may only be complementary to already existing locally/traditionally driven

¹⁸⁷ N. Rajaram and Vaishali Zararia, 'Translating Women's Human Rights in a Globalising World: The Spiral Process in Reducing Gender Injustice in Baroda, India,' *Global Networks* (9)4 (2009), 462-484.

¹⁸⁸ *Ibid.*, 465.

¹⁸⁹ *Ibid.*, 469.

¹⁹⁰ Tom Zwart, 'Using Local Culture to Further the Implementation of International Human Rights: The Receptor Approach,' *Human Rights Quarterly* (34) (2012), 546-567.

¹⁹¹ *Ibid.*, 547.

¹⁹² Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (2006a), 136; Sally Engle Merry, 'Transnational Human Rights and Local Activism: Mapping the Middle,' (2006b) 38-51 41 & 49.

¹⁹³ Rachel Sieder and John-Andrew McNeish, *Gender Justice and Legal Pluralities: Latin America and African Perspectives*, (2013), 14-15.

¹⁹⁴ Peggy Levitt and Sally Merry, 'Vernacularisation on the Ground: Local Uses of Global Women's Rights in Peru, China, India and the United States,' *Global networks* (9)4 (2009); Benjamin Gregg, 'Translating Human Rights into Muslim Vernaculars,' *Comparative Sociology* (7)4 (2008); Lynette J. Chua, 'The Vernacular Mobilisation of Human Rights in Myanmar's Sexual Orientation and Gender Identity Movement,' *Law & Society Review* (49)2 (2015); David M. Engel, 'Vertical and Horizontal Perspectives on Rights Consciousness,' *Indiana Journal of Global Legal Studies* (19)2 (2012); Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (2006a).

efforts that are challenging negative (cultural) practices from within is not considered.

All this scholarship demonstrates that vernacularisation is centred on unicameral programming in which the knowledgeable 'outsider' conceptualises, transfers and adapts human rights ideas to the local. It is not seen as a bicameral exercise, whereby the conceptualisation, transfer and adaptation of human rights ideas may, consciously or unconsciously, also be sparked locally.

2.6 CONCLUSION

There is clearly a dearth of academic scholarship on community bylaws and their role in eliminating harmful cultural practices and promoting women's rights. The little that alludes to these bylaws lacks a full understanding of these initiatives, and do not address harmful practices in general or analyse the extent to which these initiatives represent instances of human rights norm internalisation/vernacularisation. While some literature acknowledges that rural interventions may not necessarily be motivated by human rights norms and related legislative developments,¹⁹⁵ this has not been made after studying community bylaws on harmful practices and promoting gender equality. Even multi-disciplinary literature has not yet given attention to these bylaws or offered an explanation of how (and why) African communities such as those under study are mobilising themselves to protect women and girls from harmful practices.

A few reports of a non-academic nature have focused on community bylaws in the Malawian context, but these have been largely descriptive and centred on specific projects, and have not asked the question whether these bylaws represent a form of norm internalisation and how they can be explained

¹⁹⁵ Lucia Michelutti, 'The Vernacularisation of Democracy, Political Participation and Popular Politics in North India,' *Journal of the Royal Anthropological Institute* (13) (2007), 639-656 654.

within the context of legal pluralism. Other reports on harmful practices in Malawi have neglected community bylaws altogether or the role of Chiefs in promoting and protecting women's rights.

The empirical chapters of this thesis (Chapters 7 to 9) will contribute to this literature by firmly locating community bylaws and the activist role of Chiefs in relation to harmful practices, as well as the legal pluralism discourse; applying norm internalisation theories to grassroots and Chief-led community bylaws; and reconceptualising vernacularisation in order to show that human rights ideas do not only get appropriated and translated through externally driven programming, but also horizontally through locally-driven activism. The next chapter discusses how, from a women's rights perspective, existing scholarship conceptualises norm internalisation and vernacularisation.

CHAPTER 3

INTERNALISATION OF INTERNATIONAL NORMS IN THE CONTEXT OF WOMEN'S RIGHTS AND AFRICAN CUSTOMARY LAW

3.1 INTRODUCTION

Demonstrating that international human rights norms for protecting women and girls from harmful practices have shaped and influenced the emergence and conceptualisation of community bylaws on child marriage and other harmful practices in rural Malawi in unanticipated ways draws attention to two conceptual issues. The first issue is how scholars have conceptualised norm internalisation generally, and vernacularisation particularly. This analysis is critical to the thesis objective of contributing to the theoretical discourse on norm internalisation by assessing and testing if the phenomenon of community bylaws reveals other concepts that are at play when culture/custom is the action ground.

The second issue is to understand debates about culture, customary law and human rights, given that vernacularisation connects culture and human rights, which are at times seen as incompatible. This discussion contributes to another objective of the thesis: to examine the relationship between the community bylaws and African (living) customary law within the broader context of legal pluralism.

The analysis departs from the premise that norm internalisation, anchored in international relations theory, helps to account for the presence and practice

of international human rights norms on domestic scenes.¹⁹⁶ While the thesis is multi-disciplinary, it is located in constructivist norm diffusion scholarship since the thesis considers vernacularisation¹⁹⁷ (to be an essential conceptual and process tool for the internalisation of international human rights norms protecting women from harmful practices at local level).¹⁹⁸

Vernacularisation identifies with the 'second wave' of norm diffusion scholarship focusing on domestic political structures and the agency of norm recipients (as opposed to the 'first wave', interested in international systems and moral cosmopolitanism).¹⁹⁹ Some scholars have called this 'a second wave of normative change scholarship'²⁰⁰ or 'cross-cultural dynamics of norm diffusion',²⁰¹ which focuses on how non-Western norm recipients contest and

¹⁹⁶ Thomas Risse, 'International Norms and Domestic Change: Arguing and Communicative Behaviour in the Human Rights Area,' *Politics & Society* (27)4 (1999), 529-559 529 & 530; Martha Finnemore and Kathryn Sikkink, 'International Norm Dynamics and Political Change,' (1998), 887-917 895; Andrew P. Cortell and James W Davis Jr, 'Understanding the Impact of International Norms: A Research Agenda,' *International Studies Review* (2)1 (2000), 65-87 66.

¹⁹⁷ Sally Engle Merry, 'Transnational Human Rights and Local Activism: Mapping the Middle,' (2006b); Peggy Levitt and Sally Merry, 'Vernacularisation on the Ground: Local Uses of Global Women's Rights in Peru, China, India and the United States,' (2009); Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (2006a).

¹⁹⁸ Indeed, although developed in anthropology, Merry explains that her analysis of vernacularisation expands on work of international relations scholars focusing on the interaction between transnational social movement activists and governments—Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (2006a), 222.

¹⁹⁹ Amitav Acharya, 'How Ideas Spread: Whose Norms Matter? Norm Localisation and Institutional Change in Asian Regionalism,' *International Organisation* (58) (2004), 239-275 242; Susanne Zwingel, 'Women's Rights Norms as Content-in-motion and Incomplete Practice,' *Third World Thematics: A TWQ Journal* (2)5 (2017), 675-690 675. Zwingel adds that 'the first wave of norm diffusion literature blocked out several dimensions, among them the multi-directional spread of norms, which led to an a priori assumption of the international core sending norms towards domestic receiving ends' – *ibid.*, 675.

²⁰⁰ Zeynep Atalay, 'Vernacularisation of Liberal Civil Society by Transnational Islamist NGO Networks,' *Global networks* (16)3 (2016), 391-411 395.

²⁰¹ Gregorio Bettiza and Filippo Dionigi, 'How Do Religious Norms Diffuse? Institutional Translation and International Change in a Post-Secular World Society,' *European Journal of International Relations* (21)3 (2015), 621-646 623.

reinterpret (Western) norms.²⁰² An emerging 'third wave' scholarship is portraying non-Westerners as norm makers too.²⁰³

Vernacularisation²⁰⁴ is the preferred conceptual model of analysis to localisation.²⁰⁵ Localisation depicts 'how universal human rights norms are translated and adapted to local contexts'.²⁰⁶ Although some of the ideas in localisation and vernacularisation connect (e.g. framing, cultural fit), world politics scholarship has mostly positioned the 'local' sphere under the concept of localisation at macro level (regional, sub-regional or state).²⁰⁷ Therefore, the limitation of localisation is that it 'focuses on macro level processes with no explanation of how they affect micro level undertakings and vice versa'.²⁰⁸ On its part, vernacularisation engages how international human rights ideas and practices seep deeper into and are made resonant with lived realities of small(er) communities.²⁰⁹ Thus the vernacularisation discourse has 'produced

²⁰² Ibid., 623; Zeynep Atalay, 'Vernacularisation of Liberal Civil Society by Transnational Islamist NGO Networks,' (2016), 395.

²⁰³ Gregorio Bettiza and Filippo Dionigi, 'How Do Religious Norms Diffuse? Institutional Translation and International Change in a Post-Secular World Society,' (2015), 623.

²⁰⁴ I am mindful that apart from 'localisation' in note 205 below, similar occurrences have been called by other terms, for example 'domestication' (Mihaela Serban Rosen and Diana H. Yoon, 'Bringing Coals to New Castle? Human Rights, Civil Rights and Social Movements in New York City' *Global Networks* (9)4 (2009)); 'indigenisation' (Benjamin Gregg, 'Translating Human Rights into Muslim Vernaculars' (2008)); 'glocalisation' (Roland Robertson, 'Glocalisation: Time-Space and Homogeneity/Heterogeneity,' in *Global Modernities*, ed. Featherstone, M., S. Lash, & R. Robertson (Sage, 1995) cited in Zvika Orr, 'The Adaptation of Human Rights Norms in Local Settings: Intersections of Local and Bureaucratic Knowledge in an Israeli NGO,' *Journal of Human Rights* (11)2 (2012), 243-262 244 .

²⁰⁵ The concept of 'localisation' was developed by Acharya in international relations – Amitav Acharya, 'How Ideas Spread: Whose Norms Matter? Norm Localisation and Institutional Change in Asian Regionalism,' (2004).

²⁰⁶ Zvika Orr, 'The Adaptation of Human Rights Norms in Local Settings: Intersections of Local and Bureaucratic Knowledge in an Israeli NGO,' *Journal of Human Rights* (11)2 (2012), 243-262 244.

²⁰⁷ Amitav Acharya, 'How Ideas Spread: Whose Norms Matter? Norm Localisation and Institutional Change in Asian Regionalism' (2004); Amitav Acharya, 'Norm Subsidiarity and Regional Orders: Sovereignty, Regionalism, and Rule Making in the Third World' *International Studies Quarterly* (55)1 (2011); Amitav Acharya, 'The R2P and Norm Diffusion: Towards a Framework of Norm Circulation,' *Global Responsibility to Protect* (5) (2013).

²⁰⁸ Peggy Levitt and Sally Merry, 'Vernacularisation on the Ground: Local Uses of Global Women's Rights in Peru, China, India and the United States,' (2009) 443.

²⁰⁹ Sally Engle Merry and Peggy Levitt, 'The Vernacularisation of Women's Human Rights,' in *Human Rights Futures*, ed. Stephen Hopgood, Jack Snyder, and Leslie Vinjamuri (Cambridge University Press, 2017), 213-236.

more nuanced terminology²¹⁰ that, one might add, accommodates an equally nuanced explanation of the emergence of community bylaws for addressing harmful practices in Malawi, and the factors/actors that have influenced their emergence and content.

The next section starts with a definition of norms. This is followed by an analysis of the models of norm internalisation, and vernacularisation. Then, an examination of culture and human rights, as well as customary law and living customary law is conducted in order to offer a conceptual basis for analysing the relationship between the community bylaws and African (living) customary law.

The chapter ends with a conclusion that demonstrates that vernacularisation is an important analytical framework for this study. Therefore, vernacularisation will be empirically tested in Chapters 7 to 9 in order to establish whether the community bylaws in rural Malawi are displaying all predicted facets of vernacularisation, or whether they are introducing new lenses of understanding vernacularisation. The conclusion also isolates key issues in debates surrounding African (living) customary law, which too are empirically analysed in Chapter 8, order to establish the legal character of community bylaws within legal pluralism discourse.

3.2 WHAT ARE NORMS?

Different definitions of norms abound. Finnemore and Sikkink,²¹¹ pioneers of the 'norm life cycle model' discussed in section 3.3, define a norm as 'a standard of appropriate behaviour of actors with a given identity'.²¹²

²¹⁰ Zeynep Atalay, 'Vernacularisation of Liberal Civil Society by Transnational Islamist NGO Networks,' (2016), 396.

²¹¹ Martha Finnemore and Kathryn Sikkink, 'International Norm Dynamics and Political Change,' (1998).

²¹² *Ibid.*, 891.

Kardam²¹³ and Cortell et al.²¹⁴ adopt Krasner's²¹⁵ description that norms are 'standards of behaviour defined in terms of rights and obligations'.²¹⁶ This definition resonates with the human rights inclination of this thesis as it directly invokes the expectation that norms should yield the obligation (if not action) to conform to certain standards of protecting, promoting and fulfilling specific rights. According to Kardam, gender equality norms provide benchmarks for addressing discrimination.²¹⁷ An international norm develops when appropriated by many states.²¹⁸ Liebowitz and Zwingel²¹⁹ flag that norms are never cast in stone, but are being 'constantly re-negotiated'.²²⁰

The various descriptions of norms are important to the thesis because, on the one hand, the community bylaws for addressing harmful practices are hinged on normative shifts within cultural norms and identities. On the other hand, these shifts are occurring amidst the state's aspirations to adhere to international human rights norms. Notably, the descriptions portray that norms exist at both international (the source) and domestic levels (the destination). However, Zwingel²²¹ argues that gender-related norms cannot

²¹³ Nükhet Kardam, 'The Emerging Global Gender Equality Regime from Neoliberal and Constructivist Perspectives in International Relations,' *International Feminist Journal of Politics* (6)1 (2004), 85-109 187.

²¹⁴ Andrew P. Cortell and James W. Davis Jr, 'How Do international Institutions Matter? The Domestic Impact of International Rules and Norms,' *International Studies Quarterly* (40)4 (1996), 451-478 452.

²¹⁵ Stephen D Krasner, ed. *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, International Regimes (Cornell University Press, 1982), 2.

²¹⁶ Ibid.

²¹⁷ Nükhet Kardam, 'The Emerging Global Gender Equality Regime from Neoliberal and Constructivist Perspectives in International Relations,' (2004), 88. For example, Kardam posits that the 1985 Nairobi Forward-looking Strategies for the Advancement of Women and the 1995 Beijing Declaration and Platform of Action (United Nations frameworks from which specific women's human rights/gender equality norms stem) both define rights and obligations of governments, international and regional organisations based on principles of equality and non-discrimination.

²¹⁸ Martha Finnemore and Kathryn Sikkink, 'International Norm Dynamics and Political Change,' (1998), 893.

²¹⁹ Debra J. Liebowitz and Susanne Zwingel, 'Gender Equality Oversimplified: Using CEDAW to Counter the Measurement Obsession,' *International Studies Review* (16)3 (2014), 362-389.

²²⁰ Ibid., 366.

²²¹ Susanne Zwingel, 'Women's Rights Norms as Content-in-motion and Incomplete Practice,' (2017).

be sorted in the 'global versus local order', as global, regional, national, and local contexts are unified.²²² This view resonates with the thesis, which is visibilising 'the local' as a key player, not only in receiving norms protecting women and girls from child marriage and other harmful practices, but also in positively reconstructing its cultural norms, sometimes without the 'help' and tools of orthodox 'translating actors'.²²³

That the protection of women from harmful practices is irrefutably an international human rights norm, will be established in Chapter 4. Since the thesis is interested in how such norms are internalised in the emergence and conceptualisation of community bylaws in Malawi, it is worthwhile to understand what norm internalisation implies.

3.3 SOCIALISATION: THE PATH TOWARDS NORM INTERNALISATION

Socialisation allows the domestic establishment of international norms to occur.²²⁴ According to early norm diffusion scholarship, the diffusion of international norms into local practices is explained by the 'socialisation process' - 'an induction of new members into ways of behaviour that are preferred in society'.²²⁵ Socialisation of a norm implies that global norms have been accepted and applied in a national context to facilitate change.²²⁶

²²² Ibid., 676.

²²³ For Zwingel, translating actors include international institutions, states, and NGOs – *ibid.*

²²⁴ Andrew P. Cortell and James W Davis Jr, 'Understanding the Impact of International Norms: A Research Agenda,' (2000), 81; Henry Kissinger, *A World Restored: Metternich, Castile and the Problems of Peace 1812–22* (Houghton Mifflin, 1957), 332; John G. Ikenberry and Charles A. Kupchan, 'Socialisation and Hegemonic Power,' *International Organisation* (44)3 (1990), 283–315 292.

²²⁵ Thomas Risse, 'International Norms and Domestic Change: Arguing and Communicative Behaviour in the Human Rights Area,' (1999), 529; Thomas Risse and Kathryn Sikkink, 'The Socialisation of International Human Rights Norms into Domestic Practices: Introduction,' in *The Power of Human Rights: International Human Rights Norms and Domestic Change*, ed. Thomas Risse, Stephen C. Ropp, and Kathryn Sikkink (Cambridge University Press, 1999), 5.

²²⁶ Susanne Zwingel, 'How Do International Women's Rights Norms Become Effective In Domestic Contexts? An Analysis of the Convention on the Elimination of all Forms of Discrimination against Women' (2005).

Risse²²⁷ advances five stages of a spiral model through which the socialisation of international human rights norms into domestic practices happens. The first is repression, whereby an international community, which has enough information about a norm-violating state, decides to hold it accountable, especially if there is no domestic opposition to the violations.²²⁸ The second stage is denial, when the norm-violating state asserts its autonomy and rejects the norms being advanced by the international community.²²⁹ The third stage is tactical concession, when escalating international pressure prompts the norm-violating state to make appeasement cosmetic changes.²³⁰ The fourth stage is prescriptive status, and occurs when the norm-violating state ratifies and domesticates relevant treaties. The last stage is rule consistent behaviour, whereby international norms are fully institutionalised domestically, are enforced by law, and are consistently observed.²³¹

Thus, norm internalisation is the term given to the domestic aspect of the socialisation theory, under the seminal 'norm life cycle' model of Finnemore and Sikkink.²³² The 'norm life cycle' explains how international norms develop and impact on the domestic arena. The first step is norm emergence, whereby so-called 'norm entrepreneurs' intensely advocate for states to spearhead the adoption of new norms. This folds into the second step of the norm cascade, where states socialise each other to turn from 'norm breakers into norm followers'.²³³ In the third and last stage, called norm internalisation, the norms become routinely accepted in official domestic systems.²³⁴

²²⁷ Thomas Risse, 'International Norms and Domestic Change: Arguing and Communicative Behaviour in the Human Rights Area,' (1999), 538.

²²⁸ Ibid.

²²⁹ Ibid.

²³⁰ This step usually opens up space for the mobilisation domestic pressure, and decreases the political options of the norm-violating state through internal and external pressure – *ibid.*

²³¹ Ibid.

²³² Martha Finnemore and Kathryn Sikkink, 'International Norm Dynamics and Political Change,' (1998), 895.

²³³ Ibid.

²³⁴ Ibid.

Since the first and second stages of Finnemore and Sikkink's norm life cycle model²³⁵ are transnational episodes, this thesis is interested in the norm internalisation stage.²³⁶ The concept of norm internalisation also directly applies to the stages of prescriptive status and rule consistent behaviour in the spiral model of Risse, and provides a good starting point for unpacking what norm diffusion means in the domestic arena. However, one should be mindful that across states, there may be enabling and impeding factors to the internalisation of some norms compared to others.²³⁷

As the empirical chapters will show, one has to be conscious of the fact that the phenomenon of community bylaws on child marriage and other harmful practices does not tidily fit into the 'international to domestic' flow of events predicted by the models discussed above. However, the existing scholarship still inspires some questions for the empirical chapters. For example, in what ways does the community bylaws narrative influence how we should look at socialisation beyond the transnational market, i.e. when the socialiser and the socialised may share local quarters?

The stage of norm internalisation in Finnemore and Sikkink's norm life cycle raises three main issues. It is believed that socialisation results in a) the alteration of domestic beliefs and attitudes in conformity with the imported norms; b) the consistent following of the norms, and c) the routine acceptance of the norms in daily life.²³⁸ These are all profound tangible normative shifts

²³⁵ Norm emergence and norm cascade respectively.

²³⁶ The concept of norm internalisation also directly applies to the stages of prescriptive status and rule consistent behavior in the spiral model discussed earlier – see Part 3.3.

²³⁷ Lynn Savery, 'Engendering the State: The International Diffusion of Women's Human Rights' (Draft paper presented at the The International Association for Critical Realism Conference, August (undated), Cambridge, United Kingdom, 2004), 3-4, now published in Lynn Savery, *Engendering the State: The International Diffusion of Women's Human Rights* (Routledge, 2012); Heinz Klug and Sally Engle Merry, eds., *The New Legal Realism: Volume 2: Studying Law Globally* (Cambridge University Press, 2016), 32; Susanne Zwingel, 'Women's Rights Norms as Content-in-motion and Incomplete Practice,' (2017), 684.

²³⁸ Martha Finnemore and Kathryn Sikkink, 'International Norm Dynamics and Political Change,' (1998), 895; Louis Henkin, *How Nations Behave: Law and Foreign Policy* (Columbia University Press, 1979), 60.

attributed to socialisation. However, such changes cannot just be assumed or generalised by sketchily looking at institutional changes.

This thesis concurs with the view that it is one thing to suggest that (seeds of) legal ideas, institutions and practices produced in the global North have been planted in recipient societies elsewhere; it is quite another thing to conclude that once planted, the legal ideas and institutions tend to predominate over the legal order that they encounter.²³⁹ A cautious appraisal of norm internalisation is necessary to expose the intricacies of the theory, and demonstrate where vernacularisation plays a role in engineering substantive norm diffusion at local levels.

3.4 NORM INTERNALISATION AT DOMESTIC LEVEL

Understanding norm internalisation (as a broader concept) is helpful because the practicalities behind the phenomenon of community bylaws on child marriage and other harmful practices in Malawi are challenging norm internalisation in general, and vernacularisation in particular, as currently theorised. As it has been observed, 'translation of international norms to national and local levels remains elusive, and there are many gaps between global norms and local responses when it comes to implementation'.²⁴⁰

3.4.1 The Broad Conceptualisation of Norm Internalisation

The internalisation of international norms has been defined as 'a process by which states incorporate international law concepts into domestic practice'.²⁴¹ Indicators of norm internalisation include the integration of the norms into

²³⁹ David M. Engel, 'Vertical and Horizontal Perspectives on Rights Consciousness,' (2012), 442.

²⁴⁰ Nükhet Kardam, 'The Emerging Global Gender Equality Regime from Neoliberal and Constructivist Perspectives in International Relations,' (2004), 97.

²⁴¹ Sarah H Cleveland, 'Norm Internalisation and U.S Economic Sanctions' *Yale Journal of International Law* (26)1 (2001), 6 cited in Allison D Kent, 'Custody, Maintenance and Succession: The Internalisation of Women's and Children's Rights under Customary Law in Africa,' *Michigan Journal of International Law* (28) (2006-2007), 507-538 510.

domestic formal legal systems and into domestic administrative arrangements.²⁴² In agreement, Cortell and Davis²⁴³ provide two indicators of an international norm that has been domesticated – action towards shifting a domestic policy agenda; and changes in national institutions to suit the norm.²⁴⁴

To the extent that norm internalisation entails that gender equality measures created in domestic settings have a direct correlation with international norms,²⁴⁵ there is no dispute in Malawi about the ‘internalisation status’ of the international human rights norms protecting women from harmful practices.²⁴⁶ Therefore, Malawi has surpassed the first three stages of the spiral model (repression, denial and tactical concession), and is now perched somewhere within the band of internalisation, as defined by Finnemore and Sikkink’s norm life cycle model.

Henkin’s²⁴⁷ asserts that the acceptance of an international norm will be evident in formal state mechanisms and people’s lives.²⁴⁸ While Henkin’s view, as well as Finnemore and Sikkink’s norm life cycle model discussed above only consider the ‘international to local’ movement of norms, it is pragmatic to view this top-down approach as being unavoidable since states have given prominence to international human rights law in the last few decades. Besides, the whole notion of norm internalisation departs from the premise that there is a ‘higher standard’ (international norm) that should be obeyed.

²⁴² Sandra Sofia Englund, ‘Transnational Norm Diffusion and Norm Localisation: A Case Study of Gender Equality in the Republic of Chile and the Bolivarian Republic of Venezuela’ (MS Thesis, Leiden University, 2013), 9. Available at <http://openaccess.leidenuniv.nl/handle/1887/23358>, accessed on 2 October 2016.

²⁴³ Andrew P Cortell and James W Davis Jr, ‘Understanding the Impact of International Norms: A Research Agenda,’ (2000).

²⁴⁴ *Ibid.*, 70.

²⁴⁵ Susanne Zwingel, ‘How Do Norms Travel? Theorising International Women’s Rights in Transnational Perspective,’ (2012), 118.

²⁴⁶ As Chapter 5 shows, these norms are part of Malawi’s legislative framework.

²⁴⁷ Louis Henkin, *How Nations Behave: Law and Foreign Policy*, (1979).

²⁴⁸ *Ibid.*, 50.

Of course this is not to accept the moral cosmopolitan view that ‘universal norms are good, and norms that are situated in local beliefs and practices should be maligned’.²⁴⁹ Rather, the challenge lies in that there is a blurred conceptualisation of how norm internalisation percolates beyond formal domestication of international norms and formal institutional changes to reach rural settings dominated by customary law, tradition and practices in the African context (such as the community bylaws under study).

On the other hand, the top-down presumption ignores the existence of active engagement between global and local spheres, which can result in the local’s acceptance or refusal to appropriate transnational norms.²⁵⁰ As Goodman and Jinks²⁵¹ noted, the fact that a state has publicly subscribed to global norms does not automatically translate into their private acceptance.²⁵² Thus the analysis of vernacularisation below illustrates that it is problematic to regard norm internalisation as a strict one-lane process (international to local).²⁵³ Indeed, the empirical chapters challenge assumptions that efforts by rural societies in Malawi to address harmful practices through community bylaws are exclusively about the desire to internalise human rights.

Of course, in arguing for the two-way interactive process, one should not underestimate the significance that the norm internationalisation model propounded by Finnmore and Sikkink gives to institutional changes, especially because of the security that such institutional changes promise –

²⁴⁹ Amitav Acharya, ‘Local and Transnational Civil Society as Agents of Norm Diffusion’ (paper presented at the The Global Governance Workshop, 1-3 June, University of Oxford, United Kingdom, 2012). Available at

<http://amitavacharya.com/sites/default/files/Local%20and%20Transnational%20Civil%20Society%20as%20Agents%20of%20Norm%20Diffusion.pdf>, accessed on 29 September 2016.

²⁵⁰ Susanne Zwingel, ‘From Intergovernmental Negotiations to (Sub)national Change,’ *International Feminist Journal of Politics* (7)3 (2005), 400-424 414.

²⁵¹ Ryan Goodman and Derek Jinks, ‘Incomplete Internalisation and Compliance with Human Rights Law,’ *The European Journal of International Law* (19)4 (2008), 725-748.

²⁵² *Ibid.*, 726.

²⁵³ Zwingel also makes similar observations in her writings within international relations discourse—Susanne Zwingel, ‘From Intergovernmental Negotiations to (Sub)national Change,’ (2005); Susanne Zwingel, ‘How Do Norms Travel? Theorising International Women’s Rights in Transnational Perspective,’ (2012).

namely, that the internalisation is meaningful, concrete and durable. In short, norm internalisation is not linear, but multifaceted.²⁵⁴ It is a complex notion that is realised in widely differing domestic processes.²⁵⁵ It is therefore important, as Berman²⁵⁶ contends, to understand 'how norm internalisation actually takes place outside of official organs of government'.²⁵⁷ Particularly, there is a need to understand how norms become real for ordinary people,²⁵⁸ and how informal norms affect the acceptance of international norms in local communities.²⁵⁹

Norms only have influence when they are actively interpreted and appropriated nationally and locally.²⁶⁰ This is why vernacularisation is key to appreciating how norm internalisation pervades local spaces.

3.4.2 Norm Internalisation through Vernacularisation

3.4.2.1 Definition

In the human rights discourse, vernacularisation is closely associated with anthropologist Sally Engle Merry, whose seminal work initially defined the vernacularisation process as 'one of appropriation and translation'.²⁶¹ Merry defines appropriation as 'taking the programmes, interventions and ideas developed by activists in one local transnational setting and implementing

²⁵⁴ On this account Zwingel has argued that the label 'norm internalisation' itself is deficient as it fails to pay adequate attention to the complex and diverse domestic processes that may occur once a state accepts an international norm – Susanne Zwingel, 'How Do Norms Travel? Theorising International Women's Rights in Transnational Perspective,' (2012), 118.

²⁵⁵ Ibid.

²⁵⁶ Paul Schiffman Berman, 'From International Law to Law and Globalisation,' *Columbia Journal of Transnational Law* (43) (2005), 485-556.

²⁵⁷ Ibid., 545.

²⁵⁸ Ibid., 546.

²⁵⁹ Ibid., 539.

²⁶⁰ Susanne Zwingel, 'From Intergovernmental Negotiations to (Sub)national Change,' (2005), 400.

²⁶¹ Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (2006a).

them in another'.²⁶² She further defines translation as 'the process of adjusting the rhetoric and structure of these interventions to local environments'.²⁶³

Notably, the concept of translation has been perceived slightly differently in other definitions of vernacularisation by Merry (and collaborators). For example, Levitt et al.²⁶⁴ delinked translation from the meaning of vernacularisation, contending that the two terms are somewhat distinct.²⁶⁵ Their argument was that in translation, translators simply communicate something to make it comprehensible and build awareness. But in vernacularisation, apart from awareness, vernacularisers adapt and reinterpret an idea with intent to assimilate it into local norms.²⁶⁶ Therefore, they defined vernacularisation as 'the process of appropriation and customisation'.²⁶⁷

In another collaborative work, Levitt and Merry²⁶⁸ defined vernacularisation as 'the process of appropriation and local adoption of globally generated ideas and strategies'.²⁶⁹ Their subsequent work more elaborately defined vernacularisation as the multi-faceted process of meaning making that happens at the local sites where human rights discourse and other local social justice discourses meet.²⁷⁰ Then Merry and Levitt's²⁷¹ recent work embraces translation again in the definition of vernacularisation, saying 'the

²⁶² Ibid.,135.

²⁶³ Ibid.

²⁶⁴ Peggy Levitt, Sally Merry, N. Rajaram, and Vaishali Zararia, 'Culture in Motion: The Vernacularisation of Women's Human Rights in India,' (2009). *Unpublished Manuscript*.

²⁶⁵ Ibid., 13.

²⁶⁶ Ibid.

²⁶⁷ Ibid.

²⁶⁸ Peggy Levitt and Sally Merry, 'Vernacularisation on the Ground: Local Uses of Global Women's Rights in Peru, China, India and the United States,' (2009).

²⁶⁹ Ibid., 441.

²⁷⁰ Peggy Levitt and Sally Engle Merry, 'Making Women's Human Rights in the Vernacular: Navigating the Culture/Rights Divide,' *Gender and Culture at the Limit of Rights* (2011), 81-100 91. This definition is also reflected in Peggy Levitt, Sally Merry, N. Rajaram, and Vaishali Zararia, 'Culture in Motion: The Vernacularisation of Women's Human Rights in India' (2009), 9-10.

²⁷¹ Sally Engle Merry and Peggy Levitt, 'The Vernacularisation of Women's Human Rights,' (2017).

vernacularisation process involves the extraction of ideas and practices from the universal sphere of international organisations and their translation into ideas and practices that resonate with the values and ways of doing things in local contexts'.²⁷² Thus women's rights vernacularisation involves contextual translation, with NGOs strategically adapting the rights to local meanings.²⁷³

Indeed, translation features as a vernacularisation modality in other scholarship. For instance, Rajam and Zararia²⁷⁴ illustrate that if translation is broken down into specific meaning processes, it is inseparable from vernacularisation itself. Such meaning-making processes of translation include recuperation (done through presentations that adapt historical concepts and traditionally respected symbols/figures to promote a new human rights idea); hybridisation (integrating formal language/processes into local meanings and processes); simplification (e.g. using communication means relatable to both literate and illiterate consumers); and compartmentalisation (process of sieving and purposively selecting ideas).²⁷⁵

New kinds of translation are also being introduced, e.g. Golan and Orr's²⁷⁶ 'triangular translation',²⁷⁷ and Bettiza and Dionigi's²⁷⁸ 'institutional translation'.²⁷⁹ The empirical chapters demonstrate that other new forms of translation are evident within the community bylaws discourse. Therefore, the thesis prefers to use definitions that regard translation as key to

²⁷² Ibid., 213.

²⁷³ Ibid., 215.

²⁷⁴ N. Rajaram and Vaishali Zararia, 'Translating Women's Human Rights in a Globalising World: The Spiral Process in Reducing Gender Injustice in Baroda, India,' (2009).

²⁷⁵ Ibid., 476-477.

²⁷⁶ Daphna Golan and Zvika Orr, 'Translating Human Rights of the "Enemy": The Case of Israeli NGOs Defending Palestinian Rights,' *Law & Society Review* (46)4 (2012), 781-814.

²⁷⁷ 'Triangular translation of human rights is whereby human rights NGOs translate international human rights norms on the one hand, and the suffering of victims on the other hand, into conceptions and legal language commonly employed by the state that violates these rights' – *ibid.*, 781.

²⁷⁸ Gregorio Bettiza and Filippo Dionigi, 'How Do Religious Norms Diffuse? Institutional Translation and International Change in a Post-Secular World Society,' (2015).

²⁷⁹ Whereby non-Western agents become norm makers by attempting to institutionalise cross-cultural norms beyond their own cultural and local contexts – *ibid.*, 623-624.

vernacularisation. Attaching translation to the definition of vernacularisation eliminates ambiguities about the task of making sense of, and changing global human rights ideas into local form.

According to Merry,²⁸⁰ translation happens in three moves. First, translation is achieved through the use of frames (images, symbols and stories) that communicate the programme using locally contextualised 'narratives and conceptions'.²⁸¹ Second, translation occurs by adapting the appropriated programme to the new locality and its systems.²⁸² Thirdly, translation occurs by selecting an appropriate target group for the translated programme.²⁸³

Translation happens in three ways:

- a) Transnational human rights ideas and practices circulate to small communities through deliberate and active 'transplant' processes, with the goal of having them assimilated and accepted locally.²⁸⁴
- b) These human rights ideas and practices are not casually transferred to micro settings, but are purposively adapted, reinterpreted, reframed and presented in ways that resonate with the local cultural norms, values and practices.²⁸⁵ The purpose is to make human rights meaningful in local contexts.²⁸⁶

²⁸⁰ Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (2006a).

²⁸¹ *Ibid.*, 136.

²⁸² *Ibid.*

²⁸³ *Ibid.*, 135.

²⁸⁴ Peggy Levitt and Sally Engle Merry, 'Making Women's Human Rights in the Vernacular: Navigating the Culture/Rights Divide,' (2011), 91; Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (2006a), 135; Sally Engle Merry, 'Transnational Human Rights and Local Activism: Mapping the Middle,' (2006b), 39.

²⁸⁵ Peggy Levitt and Sally Engle Merry, 'Making Women's Human Rights in the Vernacular: Navigating the Culture/Rights Divide,' (2011), 91; Benjamin Gregg, 'Translating Human Rights into Muslim Vernaculars,' (2008), 465; Sally Engle Merry, 'Transnational Human Rights and Local Activism: Mapping the Middle,' (2006b), 39; N. Rajaram and Vaishali Zararia, 'Translating Women's Human Rights in a Globalising World: The Spiral Process in Reducing Gender Injustice in Baroda, India,' (2009), 462; Peggy Levitt and Sally Merry,

- c) Vernacularisation has some trade-offs: while women's human rights ideas do not utterly lose their original sense when interpreted locally, they also inevitably tangle with local ideologies.²⁸⁷ Chua²⁸⁸ calls this 'the imbuelement of human rights with local sensitivities'.²⁸⁹ Debates about this dilemma are discussed in section 3.4.2.4.

The emphasis on vernacularisation as an active local process is captured finely by Elliot's²⁹⁰ description, that 'vernacularisation is an action-oriented approach that moves human rights from an abstract idea, to a resource for human interaction and progress'.²⁹¹ Thus strengthened by community-development approaches, vernacularisation enables 'human rights to work at a human scale'.²⁹² In the words of Merry and Levitt,²⁹³ 'vernacularisation converts universal human rights into local understandings of social justice'.²⁹⁴

According to Sarfaty,²⁹⁵ vernacularisation happens when norms affect people's informal communications and ordinary routines. Therefore, for

'Vernacularisation on the Ground: Local Uses of Global Women's Rights in Peru, China, India and the United States,' (2009), 441.

²⁸⁶ Jim Ife and Lucy Fiske, 'Human Rights and Community Work: Contemporary Theories and Practices,' *International Social Work* (49)3 (2006), 297-308 cited in Iris Elizabeth Elliott, 'Progressing Counter-hegemonies of Women's Human Rights in Ireland: Feminist Activists' Vernacularisation Practices' (Doctoral Thesis, National University of Ireland Galway, 2014), 8.

²⁸⁷ Peggy Levitt and Sally Merry, 'Vernacularisation on the Ground: Local Uses of Global Women's Rights in Peru, China, India and the United States,' (2009); Benjamin Gregg, 'Translating Human Rights into Muslim Vernaculars,' (2008).

²⁸⁸ Lynette J. Chua, 'The Vernacular Mobilisation of Human Rights in Myanmar's Sexual Orientation and Gender Identity Movement,' (2015).

²⁸⁹ *Ibid.*, 302.

²⁹⁰ Iris Elizabeth Elliott, 'Progressing Counter-hegemonies of Women's Human Rights in Ireland: Feminist Activists' Vernacularisation Practices,' (2014).

²⁹¹ *Ibid.*, 8.

²⁹² *Ibid.*

²⁹³ Sally Engle Merry and Peggy Levitt, 'The Vernacularisation of Women's Human Rights,' (2017), 213.

²⁹⁴ *Ibid.*

²⁹⁵ Galit A. Sarfaty, 'International Norm Diffusion in the Pimicikamak Cree Nation: A Model of Legal Mediation' (2007). For Sarfaty, the important issue was whether an indigenous community fighting for self-determination from Canada (and using international human rights language in its negotiations/demands and associated local activities) had begun to think of their internal local grievances as rights violations, and whether they would continue to use human rights language within their community if their conflict with Canada was

Safety, vernacularisation is the outcome after 'all is said and done', i.e., the socio-cultural norm shifts that can actually be witnessed as a result of 'embracing' human rights culture at local level.²⁹⁶ Despite being skewed towards process, as evident in the ensuing analysis, Merry in a way still accepts that results have room in vernacularisation discourse. She recognises that human rights gain impact when they are 'lived' by ordinary people; and that law becomes meaningful to people not just through sanctions, but when it guides their lived realities.²⁹⁷ Similarly, Rajam and Zararia²⁹⁸ contend that women's human rights become lived reality when they shift from 'state law' to 'local norms'.²⁹⁹

Chapter 9 demonstrates how vernacularisation is empirically evident in the community bylaws phenomenon in rural Malawi in order to answer the research question about how international human rights norms are influencing and shaping the community bylaws. Thus, the notion of 'appropriation' begs scrutiny of whether outside (transnational) programmes, interventions and ideas have anything to do with the bylaws. If there is appropriation, the concept of 'translation' is key to giving meaning to the form(s) of vernacularisation that the community bylaws are manifesting.

3.4.2.2 Framing: a key component of translation

'Framing' originates from Goffman's³⁰⁰ conceptualisation of 'frame' as 'schemata of interpretation'³⁰¹. Ferree³⁰² defines a frame as 'an interpretive

resolved. It was only if the answer was in the affirmative that one could claim that transnational norms were truly vernacularised.

²⁹⁶ Ibid., 477.

²⁹⁷ Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (2006a), 3.

²⁹⁸ N. Rajaram and Vaishali Zararia, 'Translating Women's Human Rights in a Globalising World: The Spiral Process in Reducing Gender Injustice in Baroda, India,' (2009).

²⁹⁹ Ibid., 466.

³⁰⁰ Erving Goffman, *Frame Analysis* (Harvard University Press, 1974) cited in David A. Snow, E. Burke Rochford Jr, Steven K. Worden, and Robert D. Benford, 'Frame Alignment Processes, Micromobilisation, and Movement Participation,' *American Sociological Review* (1986).

package surrounding a core idea'.³⁰³ This 'interpretive package' is better comprehended through the description of frames as the use of images, symbols and stories anchored in local cultural narratives and conceptions in order to simplify the understanding of a human rights intervention in a new locality.³⁰⁴ Therefore, frames are the means for presenting foreign ideas in ways that capture local resonance and motivate local interest in such ideas – culminating in the identification of strategic actions.³⁰⁵ Frames are, in short, a medium of social change³⁰⁶ that streamline the task of establishing resonance between global norms and local norms.³⁰⁷ Framing gives a global norm a local façade.³⁰⁸

Framing is a requisite translation tool, and determines the success or failure of vernacularisation.³⁰⁹ Merry³¹⁰ considers framing to be one of the three dimensions of translation.³¹¹ Thus, through framing, activists adjust human rights interventions, developed elsewhere, to the circumstances of another local community.³¹² Through meaning making, human rights ideas from a

³⁰¹ Erving Goffman, *Frame Analysis*, (1974), 21 cited in David A. Snow, E. Burke Rochford Jr, Steven K. Worden, and Robert D. Benford, 'Frame Alignment Processes, Micromobilisation, and Movement Participation,' (1986), 464.

³⁰² Myra Marx Ferree, 'Resonance and Radicalism Feminist Framing in the Abortion Debates of the United States and German,' *American Journal of Sociology* (109)2 (2003), 304-344.

³⁰³ *Ibid.*, 308.

³⁰⁴ Peggy Levitt and Sally Merry, 'Vernacularisation on the Ground: Local Uses of Global Women's Rights in Peru, China, India and the United States,' (2009), 452.

³⁰⁵ Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (2006a), 136.

³⁰⁶ Benjamin Gregg, 'Translating Human Rights into Muslim Vernaculars,' (2008), 470.

³⁰⁷ Martha Finnemore and Kathryn Sikkink, 'International Norm Dynamics and Political Change,' (1998), 897; Amitav Acharya, 'How Ideas Spread: Whose Norms Matter? Norm Localisation and Institutional Change in Asian Regionalism,' (2004), 243.

³⁰⁸ Amitav Acharya, 'How Ideas Spread: Whose Norms Matter? Norm Localisation and Institutional Change in Asian Regionalism,' (2004), 243.

³⁰⁹ Peggy Levitt and Sally Merry, 'Vernacularisation on the Ground: Local Uses of Global Women's Rights in Peru, China, India and the United States,' (2009), 452.

³¹⁰ Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (2006a), 137.

³¹¹ *Ibid.*

³¹² *Ibid.*, 135.

(transnational) local community are operationalised at another small locality.³¹³ Frames have several functions for women's human rights:

- a) They affect how women's problems are defined and understood.³¹⁴
- b) They affect how causes of women's problems and their solutions are conceptualised and which perspectives are embraced or rejected.³¹⁵
- c) They stifle perceptions that the rights being promoted are alien, as the (re)interpretation of global norms in localised terms connects the norm with grounded reality.³¹⁶

In view of the above, 'framing' is important to this study thesis because it helps to explain whether (and how) human rights ideas have influenced the emergence of community bylaws in Malawi; the ways in which the bylaws are adopted, conceptualise harmful practices, and connect local practices with international and national laws promoting women's rights, if at all. And since translation processes become meaningful when the target group 'adopts ideas, meanings, processes and mechanisms that translators utilise',³¹⁷ the next section examines translators/vernacularisers.

3.4.2.3 *The vernaculariser*

As Chapter 9 demonstrates, knowing the 'actors' involved in community bylaws efforts, as well as their strategies (and their motives) is important in accounting for the emergence of the community bylaws in Malawi.

³¹³ N. Rajaram and Vaishali Zararia, 'Translating Women's Human Rights in a Globalising World: The Spiral Process in Reducing Gender Injustice in Baroda, India,' (2009), 481.

³¹⁴ Peggy Levitt and Sally Merry, 'Vernacularisation on the Ground: Local Uses of Global Women's Rights in Peru, China, India and the United States,' (2009), 452.

³¹⁵ Ibid.

³¹⁶ Nükhet Kardam, 'The Emerging Global Gender Equality Regime from Neoliberal and Constructivist Perspectives in International Relations,' (2004), 97.

³¹⁷ Mihaela Serban Rosen and Diana H. Yoon, 'Bringing Coals to New Castle? Human Rights, Civil Rights and Social Movements in New York City ' *Global networks* (9)4 (2009), 507-528 514.

Furthermore, it clarifies the type of vernacularisation, as well as translation modes unfolding in the phenomenon of community bylaws.

Vernacularisation scholarship has several names for the actors who facilitate the local transmission of human rights ideas: 'translators';³¹⁸ 'vernacularisers';³¹⁹ 'converters, adaptors, transformers, generators';³²⁰ 'norm adaptors';³²¹ 'human rights intermediaries'³²² or just 'intermediaries'.³²³ This thesis uses the term 'vernacularisers' in order to answer the following questions: Who are these vernacularisers? What do they do? What vernacularisation paths do they use?

Levitt and Merry³²⁴ define vernacularisers as 'people-in-between'.³²⁵ These vernacularisers seem to exist in two hierarchical groups - the elite and the local. The elite (first level) category includes skilled social movement activists and (women's rights) NGO staff who simultaneously navigate the local-

³¹⁸ N. Rajaram and Vaishali Zararia, 'Translating Women's Human Rights in a Globalising World: The Spiral Process in Reducing Gender Injustice in Baroda, India,' (2009); Daphna Golan and Zvika Orr, 'Translating Human Rights of the "Enemy": The Case of Israeli NGOs Defending Palestinian Rights,' (2012); Frank Munger, 'Culture, Power, and Law: Thinking about the Anthropology of Rights in Thailand in an Era of Globalisation,' *New York Law School Law Review* (51) (2006), 817-838.

³¹⁹ Peggy Levitt and Sally Engle Merry, 'Making Women's Human Rights in the Vernacular: Navigating the Culture/Rights Divide,' (2011); Peggy Levitt and Sally Merry, 'Vernacularisation on the Ground: Local Uses of Global Women's Rights in Peru, China, India and the United States,' (2009); Zeynep Atalay, 'Vernacularisation of Liberal Civil Society by Transnational Islamist NGO Networks,' (2016); Sealing Cheng, 'The Paradox of Vernacularisation: Women's Human Rights and the Gendering of Nationhood,' (2011); Mihaela Serban Rosen and Diana H. Yoon, 'Bringing Coals to New Castle? Human Rights, Civil Rights and Social Movements in New York City' (2009).

³²⁰ N. Rajaram and Vaishali Zararia, 'Translating Women's Human Rights in a Globalising World: The Spiral Process in Reducing Gender Injustice in Baroda, India,' (2009).

³²¹ Aaron P. Boesenecker and Leslie Vinjamuri, 'Lost in Translation? Civil Society, Faith-Based Organisations and the Negotiation of International Norms,' *International Journal of Transitional Justice* (5)3 (2011), 345-365.

³²² Benjamin Gregg, 'Translating Human Rights into Muslim Vernaculars,' (2008).

³²³ Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (2006a).

³²⁴ Peggy Levitt and Sally Merry, 'Vernacularisation on the Ground: Local Uses of Global Women's Rights in Peru, China, India and the United States,' (2009).

³²⁵ Same as intermediaries. *ibid.*, 449.

international interface.³²⁶ Using Asia-Pacific case studies, Merry³²⁷ observed that vernacularisers were 'transnational activists, national elites and middle tier educated leaders'.³²⁸ Rajam and Zararia³²⁹ noted that leaders of one organisation in their study in India belonged to the upper caste and middle class,³³⁰ and their ground staff was lower- to middle-class young women living near the project office.³³¹ Referring to the same study, Levitt et al.³³² said another organisation had leaders who were 'ideological outsiders', with educated and well-travelled trustees.³³³ Levitt and Merry³³⁴ noted that 'a powerful board of directors, some high ranking', led a Chinese NGO engaged in vernacularisation efforts.³³⁵

In Chua's³³⁶ scenario, human rights/movement activists were facilitating the 'vernacular mobilisation of human rights'.³³⁷ Orr³³⁸ recognised NGOs as central actors in translating global norms locally.³³⁹ Cheng³⁴⁰ mentioned lawyers and middle-level to elite activists, academics and funders.³⁴¹ From

³²⁶ Aaron P. Boesenecker and Leslie Vinjamuri, 'Lost in Translation? Civil Society, Faith-Based Organisations and the Negotiation of International Norms,' (2011), 355; Peggy Levitt and Sally Merry, 'Vernacularisation on the Ground: Local Uses of Global Women's Rights in Peru, China, India and the United States,' (2009), 449.

³²⁷ Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (2006a).

³²⁸ *Ibid.*, 134.

³²⁹ N. Rajaram and Vaishali Zararia, 'Translating Women's Human Rights in a Globalising World: The Spiral Process in Reducing Gender Injustice in Baroda, India,' (2009).

³³⁰ *Ibid.*, 446.

³³¹ Peggy Levitt, Sally Merry, N. Rajaram, and Vaishali Zararia, 'Culture in Motion: The Vernacularisation of Women's Human Rights in India' (2009), 16.

³³² *Ibid.*

³³³ *Ibid.*, 18.

³³⁴ Peggy Levitt and Sally Engle Merry, 'Making Women's Human Rights in the Vernacular: Navigating the Culture/Rights Divide,' (2011).

³³⁵ *Ibid.*, 96.

³³⁶ Lynette J. Chua, 'The Vernacular Mobilisation of Human Rights in Myanmar's Sexual Orientation and Gender Identity Movement,' (2015).

³³⁷ *Ibid.* Chua was writing about the vernacular mobilisation of human rights as a movement strategy that was used in the context of Myanmar.

³³⁸ Zvika Orr, 'The Adaptation of Human Rights Norms in Local Settings: Intersections of Local and Bureaucratic Knowledge in an Israeli NGO,' (2012).

³³⁹ *Ibid.*, 244.

³⁴⁰ Sealing Cheng, 'The Paradox of Vernacularisation: Women's Human Rights and the Gendering of Nationhood,' (2011).

³⁴¹ *Ibid.*, 479, 513 & 514.

these descriptions, the elite vernacularisers programme their interventions in advance and vernacularise them in targeted communities.

Some scholars have identified 'second level'³⁴² vernacularisers – locals. According to Levitt and Merry,³⁴³ this is a 'relatively untravelled' and 'locally based' group of vernacularisers. They promote the vernacularised norms and ideas that are imparted to them by fellow staff members³⁴⁴ and movement activists.³⁴⁵ These vernacularisers could be 'women that have attended training programmes, staff in legal clinics, and domestic violence survivors turned advocates'.³⁴⁶ Levitt et al.³⁴⁷ observed the case of female leaders of traditional women's courts in India who, having learnt about global human rights from their middle-class sponsors, would in turn vernacularise these ideas to village women.³⁴⁸

Chua³⁴⁹ noted that in a vernacularisation project seeking to create a social movement, vernacularisers used framing processes to recruit and coach new activists/locals. These locals expanded the movement by returning home and mobilising a local movement through disseminating and further adapting the human rights norms they had learnt – thereby becoming vernacularisers too.³⁵⁰ Notably, even in this local mode, vernacularisers do not grow themselves, but are disciplined by and equipped by elites to implement 'second-level' translation. Indeed, Boesenecker and Vinjamuri³⁵¹ observed

³⁴² Peggy Levitt and Sally Merry, 'Vernacularisation on the Ground: Local Uses of Global Women's Rights in Peru, China, India and the United States,' (2009), 449-450.

³⁴³ Ibid.

³⁴⁴ Likely their 'well travelled' colleagues from the NGO's 'town' offices.

³⁴⁵ Peggy Levitt and Sally Merry, 'Vernacularisation on the Ground: Local Uses of Global Women's Rights in Peru, China, India and the United States,' (2009), 449-450.

³⁴⁶ Ibid.

³⁴⁷ Peggy Levitt, Sally Merry, N. Rajaram, and Vaishali Zararia, 'Culture in Motion: The Vernacularisation of Women's Human Rights in India' (2009).

³⁴⁸ Ibid., 27-28.

³⁴⁹ Lynette J. Chua, 'The Vernacular Mobilisation of Human Rights in Myanmar's Sexual Orientation and Gender Identity Movement,' (2015).

³⁵⁰ Ibid., 306. Instead of 'vernacularisers,' Chua uses the term 'translators.'

³⁵¹ Aaron P. Boesenecker and Leslie Vinjamuri, 'Lost in Translation? Civil Society, Faith-Based Organisations and the Negotiation of International Norms,' (2011).

that sometimes, anti-FGM Western activists would only succeed when they enlisted Islamic authorities to vernacularise FGM in Koranic terms.³⁵²

In terms of roles, vernacularisers appropriate and modify international human rights norms by framing them to make cultural sense.³⁵³ Thus vernacularisers have to balance the act of fitting transnational ideas into local culture on the one hand, and that of challenging existing injustices on the other hand.³⁵⁴ The concepts of 'double consciousness'³⁵⁵ or 'dual consciousness'³⁵⁶ have been used to describe how vernacularisers hold both transnational human rights and native perspectives.³⁵⁷ Horizontally, vernacularisers challenge local injustices through culturally digestible communication.³⁵⁸ Vertically, vernacularisers reframe local injustices in human rights violations terms to suit national and international audiences/agendas.³⁵⁹

Vernacularisers use different avenues. However, as Chua³⁶⁰ asserted, activities can only amount to vernacularisation if they are intended to vernacularise.³⁶¹ She noted that local activists in Myanmar used several vernacularisation activities to mobilise a social movement: workshops, rallies and movement strategy meetings.³⁶² Rajam and Zararia³⁶³ documented how

³⁵² Ibid., 351.

³⁵³ Sally Engle Merry, 'Transnational Human Rights and Local Activism: Mapping the Middle,' (2006b), 42; Lynette J. Chua, 'The Vernacular Mobilisation of Human Rights in Myanmar's Sexual Orientation and Gender Identity Movement,' (2015), 303.

³⁵⁴ Benjamin Gregg, 'Translating Human Rights into Muslim Vernaculars,' (2008), 465-467.

³⁵⁵ Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (2006a), 3.

³⁵⁶ Benjamin Gregg, 'Translating Human Rights into Muslim Vernaculars,' (2008), 457.

³⁵⁷ Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (2006a), 3.

³⁵⁸ Benjamin Gregg, 'Translating Human Rights into Muslim Vernaculars,' (2008), 457.

³⁵⁹ Ibid., 473; Peggy Levitt, Sally Merry, N. Rajaram, and Vaishali Zararia, 'Culture in Motion: The Vernacularisation of Women's Human Rights in India' (2009), 22.

³⁶⁰ Lynette J. Chua, 'The Vernacular Mobilisation of Human Rights in Myanmar's Sexual Orientation and Gender Identity Movement,' (2015).

³⁶¹ Ibid., 304.

³⁶² Ibid.

³⁶³ N. Rajaram and Vaishali Zararia, 'Translating Women's Human Rights in a Globalising World: The Spiral Process in Reducing Gender Injustice in Baroda, India,' (2009).

Baroda NGOs used advisory services to clients; local courts run by women for women; and flyers/kites to frame global human rights ideology in cultural terms.³⁶⁴ Merry³⁶⁵ discovered that some vernacularisers transplanted mechanisms/programmes, such as 'gender training programmes, domestic violence laws, counseling centres for battered women or human rights commissions' into different settings.³⁶⁶

For the empirical chapters, the issue of vernacularisers inspires a multilayered analysis. The hierarchical conceptualisation of vernacularisers above informs the analysis of actors that are engineering norm change in rural areas through community bylaws, and whether they mirror existing descriptions of vernacularisers. Where there are departures, instead of implying that vernacularisation is not occurring, the community bylaws challenge us to broaden the current view of vernacularisers when it comes to horizontal vernacularisation. Furthermore, the role of vernacularisers demands an exploration of how various vernacularisers are translating human rights ideas, and the implications for how horizontal vernacularisation should be understood.

3.4.2.4 Concerns about vernacularisation

This thesis is mindful of three concerns about vernacularisation. The first concern is the dilemma of framing using soft *versus* deep vernacularisation. Generally, the concept of 'resonance'³⁶⁷ of international norms with domestic/cultural norms is punctuated by its own frictions. In terms of soft

³⁶⁴ Ibid., 466, 468 & 473.

³⁶⁵ Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (2006a).

³⁶⁶ Ibid., 134.

³⁶⁷ As a significant part of framing acknowledged by scholars. See Jeffrey T. Checkel, 'Norms, Institutions, and National Identity in Contemporary Europe,' *International Studies Quarterly* (43)1 (1999); Andrew P. Cortell and James W Davis Jr, 'Understanding the Impact of International Norms: A Research Agenda,' (2000); Amitav Acharya, 'How Ideas Spread: Whose Norms Matter? Norm Localisation and Institutional Change in Asian Regionalism,' (2004); Sally Engle Merry, 'Transnational Human Rights and Local Activism: Mapping the Middle,' (2006b).

vernacularisation, Chanock³⁶⁸ has cautioned that change will hardly result where activists 'over' sugarcoat human rights in local thinking terms. This is because human rights can best confront systemic challenges by being radical.³⁶⁹ Scholars concede that human rights ideas that are vernacularised softly may be locally resisted³⁷⁰ Yet, deeply vernacularised human rights ideas may be welcomed, but lose their potential to effect change as the superior big brother to local norms.³⁷¹ Thus it is abnormal for human rights to blend smoothly with patriarchy/injustice.³⁷²

Scholars argue that while human rights ideas have to be translated in ways that resonate with local cultural frameworks, it is important that human rights universal principles should not be diluted in the process.³⁷³ Merry³⁷⁴ is quick to observe that vernacularisation is not indigenisation—the complete transformation of human rights principles in translated programmes.³⁷⁵ Gregg's³⁷⁶ distinctive perspective is that 'to indigenise is not to transform a human rights culture'.³⁷⁷ Rather it is to transform the local culture, since

³⁶⁸ Martin Leon Chanock, 'Culture' and Human Rights orientalisng, occidentalising and authenticity,' in *Beyond Rights Talk and Culture Talk : Comparative Essays on the Politics of Rights and Culture* (Cape Town David Philip, 2000) cited in Sally Engle Merry, 'Transnational Human Rights and Local Activism: Mapping the Middle,' (2006b).

³⁶⁹ Martin Leon Chanock, 'Culture' and Human Rights orientalisng, occidentalising and authenticity,' (2000) cited in Sally Engle Merry, 'Transnational Human Rights and Local Activism: Mapping the Middle,' (2006b), 41.

³⁷⁰ Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (2006a), 221; Benjamin Gregg, 'Translating Human Rights into Muslim Vernaculars,' (2008), 466.

³⁷¹ Benjamin Gregg, 'Translating Human Rights into Muslim Vernaculars,' (2008), 471; David M. Engel, 'Vertical and Horizontal Perspectives on Rights Consciousness,' (2012), 445.

³⁷² Benjamin Gregg, 'Translating Human Rights into Muslim Vernaculars,' (2008), 471.

³⁷³ Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (2006a), 220; Benjamin Gregg, 'Translating Human Rights into Muslim Vernaculars,' (2008), 465; Peggy Levitt and Sally Merry, 'Vernacularisation on the Ground: Local Uses of Global Women's Rights in Peru, China, India and the United States,' (2009), 457.

³⁷⁴ Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (2006a).

³⁷⁵ *Ibid.*, 137 & 221.

³⁷⁶ Benjamin Gregg, 'Translating Human Rights into Muslim Vernaculars,' (2008).

³⁷⁷ *Ibid.*, 465.

indigenised human rights change aspects of local culture and challenge patriarchy.³⁷⁸

Realistically though, both human rights and the cultural framework have to sacrifice something for indigenisation (and thus vernacularisation) to materialise – with culture likely foregoing more.³⁷⁹ Of course Orr³⁸⁰ argues that the compromises vernacularisers make as they adapt human rights norms is not necessarily a constraint. This is because the dynamic vernacularisation process encounters the diverse interests and values of different actors.³⁸¹

Human rights sacrifices, which may at times have to be made, relate to the language deployed during vernacularisation, which is the second framing challenge. Levitt and Merry³⁸² submit that framing human rights ideas may entail forsaking the rights language at local level.³⁸³ This in itself is a double bind. On the one hand, it means vernacularisers have to be highly adaptable and creative so as to still convey human rights ideas without familiar vocabulary. On the other hand, there is a risk that such creativity could stray from the original intent of the human rights framework being articulated, thereby diluting its impact.³⁸⁴ Run-away interpretations are also a reality given that ‘manifold interpretations (at times contradictory) and contestations of the meaning of women’s rights co-exist, both internationally and

³⁷⁸ Ibid.

³⁷⁹ Indeed Merry observes that international perspectives are translated ‘down’ more than grassroots perspectives are translated ‘up’ – Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (2006a), 216.

³⁸⁰ Zvika Orr, ‘The Adaptation of Human Rights Norms in Local Settings: Intersections of Local and Bureaucratic Knowledge in an Israeli NGO,’ (2012).

³⁸¹ Ibid., 244.

³⁸² Peggy Levitt and Sally Merry, ‘Vernacularisation on the Ground: Local Uses of Global Women's Rights in Peru, China, India and the United States,’ (2009).

³⁸³ Ibid., 448.

³⁸⁴ Ibid., 448-449.

domestically'.³⁸⁵

While these language-related framing concerns are valid, the empirical chapters attest that it is shrewd to accept that overt human rights language may not always work to achieve human rights-related goals at grassroots level. If vernacularisation stands for the idea that human rights have to be reinterpreted and repackaged to make sense to local people and provoke change, then vernacularisation indeed has to envisage circumstances where substitute language has to be strategically used to make human rights gains. One has to be savvy, especially in local communities that have 'innate' suspicion of the notion of human rights, to use alternative language that inflames interest in dialogue about problematic social norms (that are in a real sense human rights violations) if there is likelihood that such dialogue could be resisted at the first mention of 'human rights.'³⁸⁶

Indeed, Levitt and Merry³⁸⁷ portray a form of vernacularisation whereby NGO staff did not directly apply human rights language, but instead relied on the 'imaginative space created by women's human rights' in repackaging local women's issues.³⁸⁸ Furthermore, Gregg³⁸⁹ recognises that an oppressed group can relate to their plight in human rights terms without talking human rights.³⁹⁰ This thesis broadens the scope of Gregg's thinking, because the community bylaws being studied are not resulting from the cry of 'oppressed groups,' (in the sense of there being a human oppressor and victim on

³⁸⁵ Susanne Zwingel, 'Women's Rights Norms as Content-in-motion and Incomplete Practice,' (2017), 685.

³⁸⁶ For example, local communities may not immediately get it if they are told that they have to end child marriage because it is a right of a child not to be forced into marriage. But the opposite may be the case if local frames are utilised to illustrate that they have to end child marriage because young women are dying early from child birth; or because poverty in the community is being entrenched by early school drop outs; or because child mortality and morbidity is high since their immature mothers cannot comprehend how to provide care etc.

³⁸⁷ Peggy Levitt and Sally Engle Merry, 'Making Women's Human Rights in the Vernacular: Navigating the Culture/Rights Divide,' (2011).

³⁸⁸ *Ibid.*, 91.

³⁸⁹ Benjamin Gregg, 'Translating Human Rights into Muslim Vernaculars,' (2008).

³⁹⁰ *Ibid.*, 474.

opposing sides). But rather, the community bylaws depict communities as ‘an oppressed whole’ because negative cultural beliefs and customs (while affecting individuals such as women) have, by implication, trapped entire communities developmentally.

The third vernacularisation concern relates to the possibility that one may be presumptuous about the results of vernacularisation. I use Munger’s³⁹¹ case study of legal/rights consciousness in Thailand, including Engel’s³⁹² analysis of the same, to illustrate this point. Munger describes a Thai social movement of poor villagers, in collaboration with NGO activists, attempting to protect themselves from negative environmental and socio-economic impacts of a dam construction project.³⁹³ The peak of this campaign coincided with the final drafting stage of the new Thai Constitution; and the 1997 Constitution guarantees ‘special protections for environmental rights and public participation in decision making’.³⁹⁴

Engel illustrates how scholars can have varied interpretations of such results. For example, in ‘Merriam’ terms, the fact that rights-based grassroots (and NGO) driven action gave prominence to environmental rights in a constitution could illustrate that rights concepts were successfully translated to have local meaning. Consequently, villagers used this consciousness to affect changes to formal law.³⁹⁵ However, Munger’s observation about the community action she studied was that ‘social justice among the rural poor was grounded in the unique importance of the environment, rather than a

³⁹¹ Frank Munger, ‘Culture, Power, and Law: Thinking about the Anthropology of Rights in Thailand in an Era of Globalisation,’ (2006).

³⁹² David M. Engel, ‘Vertical and Horizontal Perspectives on Rights Consciousness,’ (2012).

³⁹³ Frank Munger, ‘Culture, Power, and Law: Thinking about the Anthropology of Rights in Thailand in an Era of Globalisation,’ (2006), 834.

³⁹⁴ *Ibid.*, 837.

³⁹⁵ David M. Engel, ‘Vertical and Horizontal Perspectives on Rights Consciousness,’ (2012), 447.

general belief in rights and democracy'.³⁹⁶ This validates Michelutti's inference that 'ideology is not the only explanation of what moves people to action'.³⁹⁷ Of course one may argue that vernacularisation provides a win-win situation for both interpretive repertoires – the vernaculariser achieves the result of the successful translation of a human rights idea; while the community opportunistically rides on this process to promote and strengthen its own pre-existing beliefs that align with the vernaculariser's agenda.

Nevertheless, Engel's and Michelutti's perspectives above are significant to this thesis. To get to the bottom of what is influencing the emergence of the community bylaws for addressing harmful practices, the thesis asked several broad questions³⁹⁸ whose answers provide important insights in establishing whether the bylaws are being adopted because of belief in the importance of women's human rights or because of some other reason the community deems more important. This inquiry helped to make the case for horizontal vernacularisation, which consciously and unconsciously, results in the interface between communities' own motives and human rights ideals – discussed in the empirical chapters.

The subsequent discussion recognises that vernacularisation bridges the perceived divide between culture and human rights (or universalism and relativism).³⁹⁹ Indeed, the broader inquiry into how community bylaws are operating as a site of norm internalisation in Malawi stands in a vacuum without ascertaining how the bylaws are situated within African customary law and legal pluralism discourse.

³⁹⁶ Frank Munger, 'Culture, Power, and Law: Thinking about the Anthropology of Rights in Thailand in an Era of Globalisation,' (2006), 838; David M. Engel, 'Vertical and Horizontal Perspectives on Rights Consciousness,' (2012), 447.

³⁹⁷ Lucia Michelutti, 'The Vernacularisation of Democracy, Political Participation and Popular Politics in North India,' (2007), 654.

³⁹⁸ For example: what is moving community members to adopt these bylaws? Why is it important for them to eliminate child marriage and other harmful practices?

³⁹⁹ Sally Engle Merry and Peggy Levitt, 'The Vernacularisation of Women's Human Rights,' (2017), 213-214; Peggy Levitt and Sally Engle Merry, 'Making Women's Human Rights in the Vernacular: Navigating the Culture/Rights Divide,' (2011), 83-84.

3.5 NORM INTERNALISATION AND CUSTOMARY LAW/LEGAL PLURALISM PERSPECTIVES

One aim for this thesis is to make a connection between the community bylaws on child marriage and other harmful practices in rural Malawi and African customary law. Currently, differences and similarities between characteristics of the community bylaws and those of African customary/living customary law are unknown. Therefore, this part illuminates the debates about culture and human rights, as well as African customary/living customary law in the broader context of legal pluralism. This discussion is important because should one argue that the community bylaws are not a recognisable norm internalisation method under formal law, the empirical chapters have to establish whether the bylaws could still be considered law within the scope of living customary law and legal pluralism (and therefore capable of internalising human rights norms).

However, the scope of the thesis does not allow an exhaustive analysis of the expansive body of literature related to African customary law. As such, this section only illustratively covers debates that would guide the analysis of community bylaws (within the context of African customary law) in the empirical chapters. As the thesis is concerned with (harmful) 'cultural' practices, it is vital to first examine the link between culture as a concept and human rights.

3.5.1 Culture and Human Rights

Culture is a 'macro concept'⁴⁰⁰ and an 'extremely indeterminate word'.⁴⁰¹ Bennet⁴⁰² asserts that culture comprises 'the languages, beliefs and laws that

⁴⁰⁰ Manisuli Ssenyonjo, 'Culture and the Human Rights of Women in Africa: Between Light and Shadow,' (2007), 50. Also citing Frances Raday, 'Culture, Religion, and Gender,' *International Journal of Constitutional Law* (1)4 (2003), 663-715 665.

⁴⁰¹ Tom W. Bennett, *Human Rights and African Customary Law* (Juta and Co. Ltd, 1995), 23.

⁴⁰² Tom W. Bennett, *Human Rights and African Customary Law* (Juta and Co. Ltd, 1995).

give social groups their unique identity'.⁴⁰³ According to Phiri,⁴⁰⁴ people express their culture through religious belief systems and practices, symbols, language, customs, art, music, etc. Thus culture dynamically evolves as various cultures hybridise each other, and as people's living realities change.⁴⁰⁵ Merry⁴⁰⁶ concurs that culture is not static, 'but it is a shared system of beliefs and values that is ever evolving'.⁴⁰⁷ Positively, culture benefits its members; and negatively, some cultural practices can be harmful.⁴⁰⁸

Human rights debates have sometimes depicted cultural practices/orderings and human rights as reciprocally disruptive towards each other.⁴⁰⁹ This fraught history of the relationship between culture and human rights is not foreign to Malawi's own experience. When the government of Malawi was ratifying CEDAW, it entered the reservation that 'owing to the deep-rooted nature of some traditional customs and practices of Malawians, the Government of the Republic of Malawi shall not, for the time being, consider itself bound by such of the provisions of the Convention as require immediate eradication of such traditional customs and practices'.⁴¹⁰ In this instance,

⁴⁰³ Ibid., 23.

⁴⁰⁴ Isabel Apawo Phiri, *Women, Presbyterianism and Patriarchy: Religious Experience of Chewa Women in Central Malawi*, Kachere Monograph No 4 (Christian Literature Association of Malawi, 2001)—Updated by Isabel Apawo Phiri, *Women, Presbyterianism and Patriarchy: Religious Experience of Chewa women in Central Malawi* (African Books Collective, 2007).

⁴⁰⁵ Isabel Apawo Phiri, *Women, Presbyterianism and Patriarchy: Religious Experience of Chewa Women in Central Malawi*, (2001), 13.

⁴⁰⁶ Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (2006a); Sally Engle Merry, 'Changing Rights, Changing Culture,' in *Culture and Rights: Anthropological Perspectives*, ed. Jane K. Cowan, Marie-Bénédicte Dembour, and Richard A. Wilson (Cambridge University Press, 2001).

⁴⁰⁷ Sally Engle Merry, 'Changing Rights, Changing Culture,' (2001), 39; Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (2006a), 228

⁴⁰⁸ Newman Wadesango, Symphorosa Rembe, and Owence Chabaya, 'Violation of Women's Rights by Harmful Traditional Practices,' *Anthropologist* (13)2 (2011), 121.

⁴⁰⁹ Jane K. Cowan, Marie-Bénédicte Dembour, and Richard A. Wilson, eds., *Culture and Rights: Anthropological Perspectives* (Cambridge University Press, 2001), 4; Peggy Levitt and Sally Engle Merry, 'Making Women's Human Rights in the Vernacular: Navigating the Culture/Rights Divide,' (2011), 81; Jane K. Cowan, 'Culture and Rights after Culture and Rights,' *American Anthropologist* (108)1 (2006), 9.

⁴¹⁰ Available at

<http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm#N40>, accessed on 8 April 2017. Malawi ratified CEDAW on 12 March 1987. The reservation was withdrawn on 24 October 1991.

Malawi recognised the divergence between the norms contained in CEDAW, and those propagated by the cultural practices prevalent in Malawi.

Anthropology scholars have observed that treating rights and culture as a binary opposition between *universalism* (within the European concept of rights, which is globally accepted) and *cultural relativism* (deference to local cultural disparities) is both unwarranted and unreasonable.⁴¹¹ First, because human rights themselves are a cultural phenomenon that is continuously developing and changing as social, economic, political and cultural developments demand from time to time.⁴¹² Second, because culture itself does not necessarily have fixed meanings that are discordant with human rights as it is 'a field of creative exchange and contestation, often around mutual symbols, propositions, practices and continual transformation'.⁴¹³ Third, because even law (which usually embodies human rights norms) and culture are intertwined – law is an expression of cultural principles, while culture is constructed by legal procedures and practices.⁴¹⁴

Therefore, it is no longer necessary for one to side with either culture or human rights, as one can stand for both.⁴¹⁵ This is because universalism and cultural relativism both symbolise 'the on-going negotiation of evolving and inter-connected global and local norms'.⁴¹⁶ Thus, instead of viewing culture as the change resistor where local practices are concerned, it should be seen as 'a medium of innovation, appropriation and creation'.⁴¹⁷ The subsequent

⁴¹¹ Sally Engle Merry, 'Changing Rights, Changing Culture,' (2001); Jane K. Cowan, 'Culture and Rights after Culture and Rights,' (2006), 32.

⁴¹² Sally Engle Merry, 'Changing Rights, Changing Culture,' (2001), 38; Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (2006a).

⁴¹³ Sally Engle Merry, 'Changing Rights, Changing Culture,' (2001), 39-41.

⁴¹⁴ Heinz Klug and Sally Engle Merry, *The New Legal Realism: Volume 2: Studying Law Globally*, (2016).

⁴¹⁵ Jane K. Cowan, 'Culture and Rights after Culture and Rights,' (2006), 9; Sally Engle Merry, 'Changing Rights, Changing Culture,' (2001), 42.

⁴¹⁶ Jane K. Cowan, Marie-Bénédicte Dembour, and Richard A. Wilson, *Culture and Rights: Anthropological Perspectives*, (2001), 6.

⁴¹⁷ Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (2006a), 228.

sections illustrate that the thinking relating to the evolving transformative nature of culture similarly applies to debates concerning customary law and living customary law.

3.5.2 Debates about African Customary Law

Like culture, Moore and Himonga⁴¹⁸ submit that customary law is located in the present and not the past, since rules of customary law respond to socio-economic developments.⁴¹⁹ According to Chanock,⁴²⁰ arguments that custom can only be valid if it has existed for a longtime without changing are 'outdated and blind to the general context within which legal change takes place'.⁴²¹

Of course a distinction has to be made between 'custom' and '(living) customary law,' because unlike customary law, some customs are mere non-obligatory social habits and practices that do not attract pressure for conformity and/or criticism/consequences if breached.⁴²² For Kolajo,⁴²³ customary law means those 'rules of conduct that persons living in a particular locality have come to recognise as governing them in their relationships between one another and between themselves and things'.⁴²⁴ Bennet⁴²⁵ argues that the validity of all forms of customary law is anchored in

⁴¹⁸ Elena Moore and Chuma Himonga, 'Living Customary Law and Families in South Africa,' *South African Child Gauge* (2018).

⁴¹⁹ *Ibid.*, 62.

⁴²⁰ Martin Chanock, *Law, Custom and Social Order: The Colonial Experience in Malawi and Zambia* (Cambridge University Press, 1985).

⁴²¹ *Ibid.*, 3.

⁴²² John Hund, "'Customary Law is What the People Say it is" – HLA Hart's Contribution to Legal Anthropology,' *ARSP: Archiv für Rechts-und Sozialphilosophie/Archives for Philosophy of Law and Social Philosophy* (1998), 423; Peter Onyango, *African Customary Law: An Introduction* (African Books Collective, 2013), 131; Anthony C. Diala, 'The Concept of Living Customary Law: A Critique' (2017), 151.

⁴²³ Adegoke Amao Kolajo, *Customary Law in Nigeria Through the Cases* (Spectrum Books Limited, 2000).

⁴²⁴ *Ibid.*, 1 cited in Allison D Kent, 'Custody, Maintenance and Succession: The Internalisation of Women's and Children's Rights under Customary Law in Africa,' (2006-2007), 513.

⁴²⁵ Tom W. Bennett, *Human Rights and African Customary Law*, (1995).

accepted social practice that a community sees as obligatory.⁴²⁶ The scope of customary law in South Africa ('all matters regulating personal and family life, marriage, the consequences of marriage, succession, land tenure and traditional leaders') presented by Moore and Himonga⁴²⁷ can also apply to many African societies. Indeed, Ndulo⁴²⁸ and Kolajo⁴²⁹ describe African customary law as part of the pluralist legal systems of various ethnic/indigenous groups in many African countries.⁴³⁰

Customary law has historically been undermined and mistrusted, and two examples illustrate this. First, Rozoemana and Hansungule⁴³¹ observe that common law generally dismissed customary law because 'it envisaged customary law as incapable of delivering gender equity and justice'.⁴³² However, the authors argue that, to the contrary, gender justice has long existed in customary law through African customs and practices allowing women to lead communities and justice forums. Further, they assert that the evolving character of customary practices means that gender justice within customary law will be unavoidable as the customary system interfaces with global gender justice ideals.⁴³³ The latter perspective is connected with the notion of living customary law, discussed in the next section. Onyango⁴³⁴ and Rautenbach⁴³⁵ submit that attitudes that marginalise African customary law

⁴²⁶ Ibid., 60.

⁴²⁷ Elena Moore and Chuma Himonga, 'Living Customary Law and Families in South Africa,' (2018), 62.

⁴²⁸ Muna Ndulo, 'African Customary Law, Customs, and Women's Rights,' (2011).

⁴²⁹ Adegoke Amao Kolajo, *Customary Law in Nigeria Through the Cases*, (2000).

⁴³⁰ Muna Ndulo, 'African Customary Law, Customs, and Women's Rights,' (2011), 88-89; Adegoke Amao Kolajo, *Customary Law in Nigeria Through the Cases*, (2000), 1 cited in Allison D Kent, 'Custody, Maintenance and Succession: The Internalisation of Women's and Children's Rights under Customary Law in Africa,' (2006-2007), 514.

⁴³¹ Rita Nkiruka Ozoemena and Michelo Hansungule, 'Re-envisioning Gender Justice in African Customary Law through Traditional Institutions,' *Centre for Policy Studies* (Policy Brief 63) (2009).

⁴³² Ibid., 2.

⁴³³ Ibid.

⁴³⁴ Peter Onyango, *African Customary Law: An Introduction*, (2013).

⁴³⁵ Christa Rautenbach, 'Therapeutic Jurisprudence in the Customary Courts of South Africa: Traditional Authority Courts as Therapeutic Agents,' *South African Journal on Human Rights* (21)2 (2005), 323-335.

and customs promote sentiments of colonialists that African customs and usages were uncivilised.⁴³⁶

A second example that customary law is mistrusted is the fact that some scholars are cynical about African customary law, which they view to be deceptive in its current form.⁴³⁷ For instance, Himonga and Manjoo⁴³⁸ contend that the version of African customary law applied by South African courts before 1994 was distorted, based on precedents and texts, and remote from people's living law.⁴³⁹ Claassens'⁴⁴⁰ analysis of the South African Constitutional Court case, *Bhe & others v Magistrate Khayelitsha & others*,⁴⁴¹ makes a similar observation. For Odinkalu,⁴⁴² 'expressions such as customary/traditional law are convenient labels for a very complex set of rules that, in certain localities, have with time, acquired force of habit, backed by mechanisms of coercion and state power'.⁴⁴³

⁴³⁶ Ibid., 325; Peter Onyango, *African Customary Law: An Introduction*, (2013), 76.

⁴³⁷ Tom W. Bennett, 'The Compatibility of African Customary Law and Human Rights,' *Acta Juridica* (18) (1991), 18; Thandabantu R. Nhlapo, 'African Customary Law in the Interim Constitution,' in *The Constitution of South Africa from a Gender Perspective*, ed. Sandra Liebenberg (Cape Town: David Philip, 1995), 156-166; AJGM Sanders, 'How Customary is African Customary Law,' *Comparative and International Law Journal for Southern Africa* (40) (1987), 406; Muna Ndulo, 'African Customary Law, Customs, and Women's Rights,' (2011), 204.

⁴³⁸ Chuma Himonga and Rashida Manjoo, 'What's in a Name? The Identity and Reform of Customary Law in South Africa's Constitutional Dispensation,' in *The Shade of New Leaves: Governance in Traditional Authority: A Southern African Perspective*, ed. Manfred O. Hinz in collaboration with Helgard K. Patemann (Lit Verlag, 2006).

⁴³⁹ Ibid., cited in Rita Nkiruka Ozoemena, 'Emerging Values from the African Traditional System and Institutions in a Democratic South Africa,' *Ubuntu: Journal of Conflict Transformation* (4)1 (2015), 14.

⁴⁴⁰ Aninka Claassens, 'Entrenching Distortion and Closing Down Spaces for Change: Contestations Over Land and Custom in South Africa' (Doctoral Thesis, Roskilde University, 2012).

⁴⁴¹ *Bhe & others v Magistrate Khayelitsha & others* 2005 (1) SA 580 (CC). She notes that the Constitutional Court established that the body of customary law in use was distorted, discriminatory and out of step with people's lived realities cited in *ibid.*, 34.

⁴⁴² Chidi Anselm Odinkalu, 'Poor Justice or Justice for the Poor? A Policy Framework for Reform of Customary and Informal Justice Systems in Africa,' *The World Bank Legal Review* (2) (2006).

⁴⁴³ Ibid., 144.

Snyder⁴⁴⁴ notes that scholars such as Chanock and Hobsbawn have branded African customary law 'invented tradition that is derived from specific economic, institutional and socio-cultural conditions of colonial rule, and that does not necessarily embody wisdom from ancestors'.⁴⁴⁵ Thus Sieder and McNeish⁴⁴⁶ argue that colonial powers secured domination by exploiting legal pluralism and reformulating customary law.⁴⁴⁷ Through the example of South Africa's Communal Land Rights Act, Claassens⁴⁴⁸ illustrates that distortions of customs and traditions regarding women's land rights that were rife during colonialism and apartheid have simply been entrenched.⁴⁴⁹

The above concerns show that the mistrust of customary law (mostly unwritten⁴⁵⁰) deepens when customary law is codified. For example, Ozoeman⁴⁵¹ argues that codification has reinforced the rigidity of South Africa's customary law.⁴⁵² Several scholars present the codification of customary law as a panic project by colonial and apartheid governments, who lacked knowledge of the customary laws they were supposed to apply.⁴⁵³ In this process, customary law was fabricated from the 'preconceptions and biases of its translators', and not from 'genuine pre-colonial traditions' or

⁴⁴⁴ Francis Snyder, 'Rethinking Customary Law, Custom and Social Order: The Colonial Experience in Malawi and Zambia by Martin Chanock,' *Modern Law Review* (51)2 (1988), 252-258.

⁴⁴⁵ *Ibid.*, 253.

⁴⁴⁶ Rachel Sieder and John-Andrew McNeish, *Gender Justice and Legal Pluralities: Latin America and African Perspectives*, (2013).

⁴⁴⁷ *Ibid.*, 5.

⁴⁴⁸ Aninka Claassens, 'Women, Customary Law and Discrimination: The Impact of the Communal Land Rights Act,' *Acta Juridica* (1) (2005), 42-81.

⁴⁴⁹ *Ibid.*, 43.

⁴⁵⁰ Peter Onyango, *African Customary Law: An Introduction*, (2013), 32; Elena Moore and Chuma Himonga, 'Living Customary Law and Families in South Africa,' (2018), 62.

⁴⁵¹ Rita Ozoemena, 'Living Customary Law: a Truly Transformative Tool,' *Constitutional Court Review* (6) (2013), 147-164.

⁴⁵² *Ibid.*, 147.

⁴⁵³ Chuma N. Himonga and Elena Moore, *Reform of Customary Marriage, Divorce and Succession in South Africa: Living Customary Law and Social Realities* (Juta, 2015), 8; Tom W. Bennett, 'The Compatibility of African Customary Law and Human Rights,' (1991), 23; AJGM Sanders, 'How Customary is African Customary Law,' (1987), 405-406.

evolving social norms of African societies.⁴⁵⁴

According to Sieder and McNeish,⁴⁵⁵ codification faces multiple snags, including: the risk that the process may be driven by international agencies; limiting the flexible, dynamic and negotiable appeal of custom; making legal pluralism redundant; and 'reducing rich community based forms of law to simple lists of norms and procedures'.⁴⁵⁶ In Bennet's⁴⁵⁷ opinion, 'an authentic customary law will lack the precision and conceptual order achieved by writing'.⁴⁵⁸ Therefore, Kent⁴⁵⁹ claims that the plasticity of customary law is advantageous to human rights internalisation processes at rural level.⁴⁶⁰

While customary law in Malawi is uncodified, the emergence of written community bylaws for addressing harmful practices (while not concluding here that the bylaws are customary law) still draws attention to the concerns about confining to paper 'law' any semblances of law at customary level. Notably, one difference between the bylaws in rural Malawi and the codification of customary law in countries such as South Africa is that the latter have been state law projects; whereas the community bylaws are loose community endeavours. Indeed, the emergence of these community bylaws invites scrutiny into the whole concept of living customary law. Ozoemena⁴⁶¹ contends that social change determines the character of customary rules and practices, also called 'living customary law'⁴⁶² – analysed next.

⁴⁵⁴ Tom W. Bennett, 'The Compatibility of African Customary Law and Human Rights,' (1991), 19.

⁴⁵⁵ Rachel Sieder and John-Andrew McNeish, *Gender Justice and Legal Pluralities: Latin America and African Perspectives*, (2013).

⁴⁵⁶ *Ibid.*, 13.

⁴⁵⁷ Tom W. Bennett, *Human Rights and African Customary Law*, (1995).

⁴⁵⁸ *Ibid.*, 23.

⁴⁵⁹ Allison D Kent, 'Custody, Maintenance and Succession: The Internalisation of Women's and Children's Rights under Customary Law in Africa,' (2006-2007).

⁴⁶⁰ *Ibid.*, 514.

⁴⁶¹ Rita Ozoemena, 'Living Customary Law: a Truly Transformative Tool,' (2013).

⁴⁶² *Ibid.*, 147.

3.5.3 Living Customary Law as the Preferred Concept to 'Tainted' Customary Law

The concept of living customary law arises from the broad concept of living law. Himonga and Bosch⁴⁶³ recognise that the common denominator in Ehrlich's⁴⁶⁴ pioneering living law theory and Moore's⁴⁶⁵ semi-autonomous social fields theory is that both do not consider the state as the singular source of law, but acknowledge that law can also emerge from people's lived reality (living law).⁴⁶⁶ Thus 'the force of living law may even not be grounded in external authority, but rather from the relationship amongst the people concerned themselves'.⁴⁶⁷

Some scholars do not automatically associate living law with customary law. Claassens⁴⁶⁸ has discussed the theory of living law in the context of land-related reforms in South Africa. She questions whether living law is a separate strand of customary law alongside other law, or a buffet of multiple sources of law applicable to people's lives.⁴⁶⁹ By examining case law and different scholarship, she establishes that the phrase 'living law' is taken for granted and applied loosely by South African courts. For example, the Constitutional Court refers to 'living indigenous law' in various judgments. While not dismissing the concept of living indigenous/customary law, Claassens observes that the scope of living law extends beyond the 'customary framework'⁴⁷⁰ since living law manifests itself more as a 'mixing

⁴⁶³ Chuma Himonga and Craig Bosch, 'The Application of African Customary Law Under the Constitution of South Africa: Problems Solved or Just Beginning,' (2000), 318.

⁴⁶⁴ Kurt A. Ziegert, *Introduction to Eugen Ehrlich, Fundamental Principles of Sociology of Law 19*, (1936) cited in David Nelken, 'Eugen Ehrlich, Living Law and Plural Legalities,' *Theoretical Inquiries in Law* (9)2 (2008).

⁴⁶⁵ Sally Falk Moore, 'Law and Social Change: The Semi Autonomous Social Field as an Appropriate Subject of Study,' (1973).

⁴⁶⁶ Chuma Himonga and Craig Bosch, 'The Application of African Customary Law Under the Constitution of South Africa: Problems Solved or Just Beginning,' (2000), 318.

⁴⁶⁷ *Ibid.*, 320.

⁴⁶⁸ Aninka Claassens, 'Entrenching Distortion and Closing Down Spaces for Change: Contestations Over Land and Custom in South Africa,' (2012).

⁴⁶⁹ *Ibid.*, 3.

⁴⁷⁰ *Ibid.*, 33.

and matching of vernacular law, constitutional law or statutory law'.⁴⁷¹

This observation squares with Anne Hellum's⁴⁷² definition of living law as 'the outcome of the interplay between international law, state law, and local norms that takes place through human interaction in different historical, social and legal contexts'.⁴⁷³ Oomen⁴⁷⁴ rejects attaching the term 'customary' in descriptions of living law. She argues that 'customary' means a return to the past and therefore is not consonant with the living and changing character of living law.⁴⁷⁵ For this thesis, the broader concept of 'living law' is relevant because community bylaws could be challenged as not being 'customary' (law) but they cannot be easily challenged if considered as 'living' law.

Various scholars agree that since what is branded 'customary law' is of suspect origin, the term 'living customary law' is preferable. Himonga⁴⁷⁶ notes that 'official customary law' and 'living customary law,' cannot be neatly categorised, but that 'the two are the accepted dominant forms of customary law'.⁴⁷⁷ Bennet⁴⁷⁸ asserts that people are usually governed not by 'official customary law,' but by a living form of customary law, usually oral, that flows from social practice and that is subtly and continually changing.⁴⁷⁹ Sanders⁴⁸⁰ calls living customary law 'automatic customary law', which is

⁴⁷¹ Ibid., 31-32.

⁴⁷² Anne Hellum, *Women's Human Rights and Legal Pluralism in Africa: Mixed Norms and Identities in Infertility Management in Zimbabwe, North-South Legal Perspectives* (Mond Books, 1999).

⁴⁷³ Ibid., cited in Aninka Claassens, 'Entrenching Distortion and Closing Down Spaces for Change: Contestations Over Land and Custom in South Africa,' (2012), 33.

⁴⁷⁴ Barbara Oomen, *Chiefs in South Africa: Law, Culture, and Power in the Post-Apartheid Era*, Springer (James Currey, 2005).

⁴⁷⁵ Ibid., 203 cited in Martin Chanock, 'Africa Constitutionalism from the Bottom Up,' in *The New Legal Realism: Volume 2: Studying Law Globally*, ed. Heinz Klug and Sally Engle Merry (2016), 26.

⁴⁷⁶ Chuma N. Himonga, 'Family and Succession Laws in Zambia: Developments Since Independence,' (1995), 16-32.

⁴⁷⁷ Ibid., cited in Chuma Himonga and Craig Bosch, 'The Application of African Customary Law Under the Constitution of South Africa: Problems Solved or Just Beginning,' (2000), 318.

⁴⁷⁸ Tom W. Bennett, *Human Rights and African Customary Law*, (1995).

⁴⁷⁹ Ibid., 60.

⁴⁸⁰ AJGM Sanders, 'How Customary is African Customary Law,' (1987).

self-generated, self-regulating, fluid, unconfined to a fixed written form, and adaptable to ever-changing external influences, while retaining its traditional communal spirit.⁴⁸¹ Concurring, Himonga and Moore⁴⁸² contend that living customary law 'is grounded in social practice and which is actually observed by (black South African) communities'.⁴⁸³ Living customary law evolves by adapting to on-going changes in its operational environment.⁴⁸⁴

Indeed Diala ⁴⁸⁵ has recently offered a streamlined definition: 'living customary law is law that emerges from people's adaptation of customs to socio-economic changes'.⁴⁸⁶ State law and international human rights can even influence these changes.⁴⁸⁷ As the other scholars, Diala's definition of living customary law accentuates the role of community agency. Diala recognises that as people adapt living customary law to prevailing socio-economic changes around them, this may happen in a 'single social field' where state law and customary law are interacting. Thus, state law and customary law do not always exist as 'semi-autonomous social fields'.⁴⁸⁸

Some scholars have made similar claims that challenge Sally Falk Moore's⁴⁸⁹ concept of the semi-autonomous social field.⁴⁹⁰ For example, Sieder and

⁴⁸¹ Ibid., 409.

⁴⁸² Chuma N. Himonga and Elena Moore, *Reform of Customary Marriage, Divorce and Succession in South Africa: Living Customary Law and Social Realities*, (2015).

⁴⁸³ Ibid., 10 citing AJGM Sanders, 'How Customary is African Customary Law,' (1987), 405.

⁴⁸⁴ Chuma N. Himonga and Elena Moore, *Reform of Customary Marriage, Divorce and Succession in South Africa: Living Customary Law and Social Realities*, (2015), 10.

⁴⁸⁵ Anthony C. Diala, 'The Concept of Living Customary Law: A Critique' (2017).

⁴⁸⁶ Ibid., 143-165 155.

⁴⁸⁷ Chuma Himonga and Craig Bosch, 'The Application of African Customary Law Under the Constitution of South Africa: Problems Solved or Just Beginning,' (2000), 318; Anthony C. Diala, 'The Concept of Living Customary Law: A Critique' (2017), 155.

⁴⁸⁸ Anthony C. Diala, 'The Concept of Living Customary Law: A Critique' (2017), 151.

⁴⁸⁹ Sally Falk Moore, 'Law and Social Change: The Semi Autonomous Social Field as an Appropriate Subject of Study,' (1973).

⁴⁹⁰ Sally Falk Moore, *Law as a Process: An Anthropological Approach* (LIT Verlag Münster, 2000), 58; Sally Falk Moore, 'Law and Social Change: The Semi Autonomous Social Field as an Appropriate Subject of Study,' (1973), 232. Moore argues that while semi-autonomous social fields have their own rules and customs, they are influenced by rules and decisions and other forces from their environment. Semi-autonomous social fields emphasise autonomy and isolation.

McNeish⁴⁹¹ recognise that '20th century old legal pluralism' (that saw state law and customary law as existing in relation to one another in multiple systems or semi-autonomous spheres) has been replaced by a 'new wave of legal pluralism', which treats 'different legal orders as hybrid, fluid and mutually constituted'.⁴⁹² De Sousa Santos's⁴⁹³ concept of 'inter-legality', which stresses 'the role of human agency on the constitution of constantly evolving hybrids',⁴⁹⁴ is recognised as influencing the new thinking.

This thesis is aware of the opposition by scholars such as Brian Tamanaha⁴⁹⁵ to give the label of law to 'negotiated orders'. For Tamanaha, the term 'living law' betrays analytical clarity and drags 'non-law' materials into the law field. This process, he argues, eclipses the true nature of such negotiated orders.⁴⁹⁶ Nevertheless, there is merit in Claassen's argument that:

The rejection of living law as law, on whatever basis, carries with it the implication that people-made law cannot be law as such. Such rejection implies that, to qualify as law, a practice must be made by authorised 'experts', such as lawyers, judges, governments and traditional leaders.⁴⁹⁷

Yet, legal pluralism accepts different laws and mechanisms that draw legitimacy from international, state, local or non-official systems.⁴⁹⁸ In fact, legal pluralities develop from multiple laws operating in the same social

⁴⁹¹ Rachel Sieder and John-Andrew McNeish, *Gender Justice and Legal Pluralities: Latin America and African Perspectives*, (2013).

⁴⁹² *Ibid.*, 8.

⁴⁹³ Baoventura de Sousa Santos, 'Law: A Map of Misreading. Towards a Postmodern Conception of Law' *Journal of Law and Society* (14)3 (1987), 279-302.

⁴⁹⁴ *Ibid.*; cited in Rachel Sieder and John-Andrew McNeish, *Gender Justice and Legal Pluralities: Latin America and African Perspectives*, (2013), 8.

⁴⁹⁵ Brian Z. Tamanaha, 'A Vision of Social-Legal Change: Rescuing Ehrlich from "Living Law"', *Law and Social Inquiry* (36)1 (2011), 297-318.

⁴⁹⁶ *Ibid.*, cited in Aninka Claassens, 'Entrenching Distortion and Closing Down Spaces for Change: Contestations Over Land and Custom in South Africa,' (2012), 33.

⁴⁹⁷ Aninka Claassens, 'Entrenching Distortion and Closing Down Spaces for Change: Contestations Over Land and Custom in South Africa,' (2012), 34.

⁴⁹⁸ David M. Engel, 'Vertical and Horizontal Perspectives on Rights Consciousness,' (2012), 428.

field,⁴⁹⁹ since ‘law and rights are not just about enforceable rules’.⁵⁰⁰ As section 4.4.4 shows, legal pluralism is even embraced by international human rights jurisprudence.⁵⁰¹ However, discomfort with legal pluralism arises when the ‘modern’ (statutes/human rights norms) is seen in opposition to the ‘traditional’ – the two being seen as anchors of gender equality and gender inequalities, respectively.⁵⁰² Indeed, the foregoing has shown that gender justice and customary law have been viewed as contradictory.⁵⁰³

A discussion on legal pluralism, especially living law and living customary law, is important for the thesis on two grounds. First, African (living) customary law literature aids in clarifying the comparative characteristics of (living) customary law and the community bylaws, which are currently hazy. Second, despite the critique that legal pluralism is too open ended,⁵⁰⁴ it assists the thesis to make a case about the validity of the community bylaws where the bylaws are seen as exceeding the scope of official law. As living law or living customary law, flexible ‘legal’ orders such as community bylaws could be an entry point for making ‘plural systems more permeable to international human rights discourses and more equitable practices’.⁵⁰⁵

3.6 CONCLUSION

This chapter started with providing methodological insights into how international norms are appropriated and absorbed by formal state systems and local communities. With regards to norm internalisation and

⁴⁹⁹ Rachel Sieder and John-Andrew McNeish, *Gender Justice and Legal Pluralities: Latin America and African Perspectives*, (2013), 7.

⁵⁰⁰ Martin Chanock, ‘Africa Constitutionalism from the Bottom Up,’ (2016),’ 29.

⁵⁰¹ For example, under CEDAW Committee *General Recommendation No. 33 on Women’s Access to Justice*, 23 July 2015, UN Doc. CEDAW/C/GC/33.

⁵⁰² Martin Chanock, ‘Africa Constitutionalism from the Bottom Up,’ (2016),’ 27.

⁵⁰³ Rita Nkiruka Ozoemena and Michelo Hansungule, ‘Re-envisioning Gender Justice in African Customary Law through Traditional Institutions,’ (2009), 2.

⁵⁰⁴ Reza Banakar and Max Travers, *An Introduction to Law and Social Theory* (2002), 302.

⁵⁰⁵ UN Women, ‘Progress of the World’s Women’ (2011) cited in Rachel Sieder and John-Andrew McNeish, *Gender Justice and Legal Pluralities: Latin America and African Perspectives*, (2013), 11.

vernacularisation, the chapter has unveiled five areas that will be used as a framework of analysis in the empirical chapters. First, socialisation is a conduit for norm internalisation, whereby a state is socialised to adopt international norms. In this thesis, socialisation raises the issue of whether this is only an international-to-domestic' occurrence, or whether the community bylaws are exposing the presence of intra-domestic socialisation. Establishing such layer of socialisation in Chapter 9 contributes to the strengthening of norm internalisation theory.

Second, while Chapter 5 shows that Malawi has internalised the international human rights norm protecting women from harmful practices, there is blurred understanding of how norm internalisation filters to rural contexts dominated by customary law, tradition and practices. This is where 'vernacularisation' helps to explain the aspects of norm internalisation that transpire in smaller communities. Thus, in Chapter 9, the range of vernacularisation processes of 'translation' offered by scholars provides a pedestal for validating that the vernacularisation of human rights norms, protecting women and girls from harmful practices, through the community bylaws is occurring differently; and that unique forms of translation are manifesting in the community bylaws context.

Third, the centrality of the vernaculariser to the whole vernacularisation journey is pivotal to accounting for the emergence and conceptualisation of the community bylaws in rural Malawi. The conceptualisation of the vernaculariser in this chapter instructs the empirical chapters to draw parallels and distinctions with what is occurring under the community bylaws; and to reconceptualise vernacularisation, as well as the vernaculariser, in the context of 'horizontal vernacularisation'.

Fourth, the chapter has raised three concerns about vernacularisation: the dilemma of framing, using 'soft *versus* deep vernacularisation; language

compromises that sometimes have to be made exchanging explicit human rights language with using local meanings; and interpretation – the possibility that the vernaculariser and norm recipients engaged in the vernacularisation may actually be driven by different motives. The empirical chapters illuminate whether any of these three concerns is visible in the community bylaws phenomenon, and the implications for how horizontal vernacularisation should be understood in the community bylaws context.

Lastly, the chapter has shown that vernacularisation is currently conceptualised as a unicameral concept, whose singular and deliberate mission is for a viable transnational human rights idea, invented in one place to be funded, localised, and absorbed in another locality. However, the empirical chapters should demonstrate whether the community bylaws are displaying a different reality that calls for reconceptualising vernacularisation.

In respect of the customary law content of the thesis, the objective is to understand the relationship between the community bylaws and African customary law. The internalisation of international norms protecting women from harmful practices through community bylaws cannot have much effect unless the bylaws have some validity. Where such legitimacy cannot be derived from state law, the field of legal pluralism becomes the oyster. Therefore, scholarship related to customary law awakens two main issues that are explored in the empirical chapters. The first issue is to understand where the community bylaws are positioned in the human rights universalism and relativism debates. The second related issue is that as a category of legal pluralism, the concepts of *living law* and living customary law allow for the recognition of people's lived law beyond state law. Thus, the empirical chapters ought to elucidate whether the community bylaws on child marriage and other harmful practices in rural Malawi are law in the sense of living law, or African (living) customary law, or formal state laws.

The next chapter further engages the concept of norm internalisation by examining what international human rights law and jurisprudence on harmful practices expects states to do, including in relation to their informal justice mechanisms.

CHAPTER 4

NORM INTERNALISATION IN INTERNATIONAL HUMAN RIGHTS LAW
AND JURISPRUDENCE ON HARMFUL PRACTICES

4.1 INTRODUCTION

Chapter 3 has demonstrated that in norm diffusion scholarship, socialisation is completed with norm internalisation, when international norms infiltrate domestic practice.⁵⁰⁶ Therefore, it is important to have an in-depth understanding of international human rights norms for protecting women and girls from harmful practices in order to meaningfully analyse how the vernacularisation of such norms has influenced and shaped the emergence and conceptualisation of community bylaws on child marriage and other harmful practices in Malawi.

One objective of this thesis is to understand how harmful practices are being conceptualised in the community bylaws on child marriage and other harmful practices in rural Malawi; and the extent to which such conceptualisation conforms to or is influenced by international human rights law. Thus, this chapter engages the international human rights discourse that protects women's right to be free from harmful practices in two ways. First, it explains the universal norms on harmful practices. This exposes the type of practices that international law and jurisprudence regards as harmful. Chapter 8 compares these practices and their conceptual basis with those harmful practices covered by the community bylaws.

Second, the chapter interrogates whether treaty-monitoring bodies perceive

⁵⁰⁶ Thomas Risse, 'International Norms and Domestic Change: Arguing and Communicative Behaviour in the Human Rights Area,' (1999), 529; Martha Finnemore and Kathryn Sikkink, 'International Norm Dynamics and Political Change,' (1998), 891.

community or informal mechanisms as vehicles of norm internalisation. This involves scrutinising the route that jurisprudence requires states to pursue for international human rights norms to reach rural sites where state law application is weak. Furthermore, it entails examining changes that have occurred in the jurisprudence regarding the role of community and informal justice mechanisms in addressing harmful practices.

The chapter concludes by highlighting conceptual issues that are further analysed in Chapter 8, extrapolated from the empirical evidence. The conclusion reveals that despite some shifts, the jurisprudence lacks a more nuanced approach to norm internalisation, since its principal top-down agenda is for states to adjust formal laws and mechanisms and comply with international law. In turn, this approach is reflected in current vernacularisation approaches that focus on programming which ‘outsiders’ drive in order to facilitate the appropriation of human rights norms in local communities, with little recognition of vernacularisation that happens horizontally when it is driven by local communities themselves – whether independently, or in collaboration with the ‘outsiders’.

4.2 THE TREATY BASIS OF THE INTERNATIONAL HUMAN RIGHTS NORMS PROTECTING WOMEN FROM HARMFUL PRACTICES

Ever since harmful practices first received the UN’s attention in 1954,⁵⁰⁷ there has been increased recognition of their gravity and impact on women’s health

⁵⁰⁷ United Nations Division for the Advancement of Women and United Nations Economic Commission for Africa, ‘Background Paper for the Meeting on Good Practices in Legislation to Address Harmful Practices Against Women’ (paper presented at the Expert Group Meeting on Good Practices in Legislation on Harmful Practices against Women, 25-28 May, Addis Ababa, Ethiopia, 2009) . The paper reports that harmful practices were recognised in the UN through the adoption of the first resolution of the UN General Assembly on harmful practices 843 (IX) that highlighted customs, ancient laws and practices relating to marriage and the family inconsistent with UDHR principles – cited in EGM/GPLVAW/2009/BP. Available at [http://www.un.org/womenwatch/daw/egm/vaw_legislation_2009/Background%20paper%20EGM%20\(10.06.09\)%20FINAL.pdf](http://www.un.org/womenwatch/daw/egm/vaw_legislation_2009/Background%20paper%20EGM%20(10.06.09)%20FINAL.pdf), accessed on 28 September 2016.

and status.⁵⁰⁸ While other non-binding frameworks have contributed to establishing norms protecting women and girls from harmful practices,⁵⁰⁹ this section examines sources of international human rights law that codify the norms within UN and AU human rights systems– CEDAW and CRC (UN treaties); and the Maputo Protocol, African Children’s Charter and the African Youth Charter (AU treaties). Although sub-regional protocols have not been analysed, the thesis is mindful that the SADC Protocol on Gender and Development (revised in 2016), which adheres to the regional and international protocols, is a key binding instrument for addressing child marriage and other harmful practices in Malawi and the SADC region.

4.2.1 Codification of Norms Protecting Women from Harmful Practices in UN Human Rights Law

CRC⁵¹⁰ and CEDAW⁵¹¹, the UN conventions that advance children’s and women’s rights respectively, legally establish the norm that women and girls

⁵⁰⁸ Jane Cottingham and Eszter Kismodi, ‘Protecting Girls and Women from Harmful Practices Affecting Their Health: Are We Making Progress?’, (2009), 128.

⁵⁰⁹ For example, the *Declaration on the Elimination of Violence Against Women* calls for the elimination of customary practices and all other practices that perpetuate the inferiority, superiority and stereotyping of either men or women (Paragraph 4(j)). The *Beijing Declaration and the Platform for Action* presses governments to refrain from invoking any custom, tradition or religious consideration to avoid their obligations to eliminate VAW (paragraph 124(a)). The 1998 *United Nations General Assembly resolution 52/99* on the issue of traditional or customary practices affecting the health of women and girls urges states to adopt legislation and/or measures prohibiting harmful traditional or customary practices. In 1999 and 2000 respectively, *United Nations General Assembly resolutions 53/117* called upon member states to develop and implement legislation and policies prohibiting traditional or customary practices affecting the health of women and girls through appropriate measures against those responsible, and to establish a concrete national mechanism for the implementation and monitoring. It is recognised that the African Union has in recent years also adopted positions that cement the norm protecting women and girls from harmful practices, particularly child marriage. For example, in May 2014, the AU launched a campaign to end child marriage in Africa. The AU Goodwill Ambassador on ending child marriage and the AU Special Rapporteur on child marriage were also appointed the same year. In 2015, AU Heads formally adopted the African Common Position on the AU Campaign to end child marriage – Paragraph 1, *Joint General Comment of the African Commission on Human and Peoples’ Rights (ACHPR) and the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) on ending Child Marriage*, 2017.

⁵¹⁰ UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3.

should be free and protected from harmful practices. Four principles underpin the CRC: non-discrimination; the best interests of the child; the right to life, survival and development; and respect for a child's views.⁵¹² These principles 'frame children's protection from violence and harmful practices'.⁵¹³ CRC's Article 19 proscribes all forms of violence against children (VAC), while Article 24 (3) requires States Parties to abolish traditional practices prejudicial to children's health. The child marriage prohibition is implicit in several CRC provisions,⁵¹⁴ including Article 1, which defines 'child' as a person less than 18 years.⁵¹⁵ CEDAW, which explicitly denounces child marriage,⁵¹⁶ uses the broad term 'harmful practices' not 'harmful traditional practices.' CEDAW's approach to harmful practices is inspired by the convention's key principles: non-discrimination against women and gender equality. Zwingel⁵¹⁷ further observes that 'state responsibility' is the third key principle of CEDAW.⁵¹⁸

CEDAW's mission is to achieve women's formal and substantive equality

⁵¹¹ UN General Assembly, *Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979, A/RES/34/180.

⁵¹² UNICEF, *20 Years: The Convention on the Rights of the Child*, vol. 2019. Available at https://www.unicef.org/rightsite/237_202.htm, accessed on 1 June 2019. These principles draw much from Articles 2, 3, 6 and 12 of the CRC.

⁵¹³ Plan International, *In-depth Review of Legal and Regulatory Frameworks on Child Marriages in Malawi*, (Plan International, 2016), 7.

⁵¹⁴ Article 2: non-discrimination; Article 3: primacy of the child's best interests; Article 6: child's right to life, survival and development; Article 12: right to participation; Article 17: right to access information and materials; Article 19: prohibition of violence against children; Article 28: right of the child to education; Article 31: child's right to rest, leisure and recreation; Article 34: protection against sexual exploitation and sexual abuse; Article 35: protection from abduction, sale of or trafficking; Article 39: support for child victims of all forms of neglect, exploitation or abuse. UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3.

⁵¹⁵ Article 1: 'a child is every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier'. UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3.

⁵¹⁶ Article 16(2) says the betrothal and the marriage of a child shall have no legal effect. UN General Assembly, *Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979, A/RES/34/180.

⁵¹⁷ Susanne Zwingel, 'Women's Rights Norms as Content-in-motion and Incomplete Practice,' (2017).

⁵¹⁸ *Ibid.*, 678.

with men in the enjoyment of their human rights.⁵¹⁹ Achieving substantive equality between women and men means addressing social inequalities that marginalise and malign ‘the identity, culture, values and behaviours’ of women and girls (resulting in increased vulnerability to violence), while privileging those of men and boys.⁵²⁰ It also entails confronting economic inequalities that adversely impact on women’s ‘access to, and distribution of, basic needs, opportunities and material resources’.⁵²¹ Further, substantive equality aspires to achieve equality of outcome, improved power relations, and the distribution of resources between men and women.⁵²² Transformative substantive equality engages and dismantles the very systems and structures that propel women’s disadvantage, replacing them with norms and values that uplift women’s status.⁵²³

CEDAW robustly facilitates the promotion of women’s empowerment and gender equality at multiple tiers – legally, in activism, and public policy development and analysis.⁵²⁴ Still, Bond⁵²⁵ notes some of CEDAW’s flaws, i.e. its limited focus on ‘multiple sites of oppression in women’s lives’, and its failure to project African women’s diversity as both community members and

⁵¹⁹ Simone Cusack and Lisa Pusey, ‘CEDAW and the Rights to Non-Discrimination and Equality,’ *Melbourne Journal of International Law* (14) (2013), 54-92 57. The authors cite Paragraph 4, *General Recommendation No. 25, on Article 4, Paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on Temporary Special Measures*, 2004, A/59/38 Annex I [4] 2.

⁵²⁰ Catherine Albertyn, ‘Substantive Equality and Transformation in South Africa,’ *South African Journal on Human Rights* (23)2 (2007), 253-276 255.

⁵²¹ *Ibid.*, 255.

⁵²² Rachel Rebouche, ‘The Substance of Substantive Equality: Gender Equality and Turkey’s Headscarf Debate,’ *American University International Law Review* (24), 711-738 725.

⁵²³ Catherine Albertyn, ‘Substantive Equality and Transformation in South Africa,’ (2007), 256

⁵²⁴ Andrew Byrnes, ‘Convention on the Elimination of All Forms of Discrimination Against Women and the Committee on the Elimination of Discrimination Against Women: Reflections on their Role in the Development of International Human Rights Law and as a Catalyst for National Legislative and Policy Reform (2016),’ 2 (revised version of a paper presented at the Interactive Expert Panel, Commemorating 30 Years of CEDAW, 1-12 March, United Nations Commission on the Status of Women, Fifty-fourth session, New York, 2010). Available at http://www.un.org/womenwatch/daw/beijing15/interactive_panel_III/Byrnes%20paper.pdf, accessed on 20 October 2017.

⁵²⁵ Johanna Bond, ‘Gender, Discourse and Customary Law in Africa,’ (2010).

gender equality advocates within those communities.⁵²⁶

Undeniably though, CEDAW has given traction to the concept of harmful practices.⁵²⁷ In striving to eliminate harmful practices, CEDAW's Article 2(f) obliges states 'to pursue a policy of eliminating discrimination against women by undertaking all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against women'. Article 5 (a) commits States Parties 'to take all appropriate measures to modify the social and cultural patterns of conduct of men and women so as to eliminate prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women'. Cusack and Pusey⁵²⁸ rightly note that these two provisions are buttressed by the principle of transformative equality, desiring States Parties to intervene and eliminate obstinate gender stereotypes.⁵²⁹

Bond⁵³⁰ contends that CEDAW's Articles 2(f) and 5(a) portray culture negatively⁵³¹ and thus 'CEDAW promotes the perceived conflict between gender equality and cultural norms'.⁵³² Merry⁵³³ similarly notes that CEDAW associates culture with harmful traditional practices and primitive violations of women's rights.⁵³⁴ She surmises that the transnational elites and human rights lawyers who produce documents such as CEDAW are suspicious of culture because in their 'legal rationality' minds, cultural differences can

⁵²⁶ Ibid., 519 & 525.

⁵²⁷ Chia Longman and Tamsin Bradley, 'Interrogating the Concept of "Harmful Cultural Practices"', (2016), 12.

⁵²⁸ Simone Cusack and Lisa Pusey, 'CEDAW and the Rights to Non-Discrimination and Equality,' (2013).

⁵²⁹ Ibid., 63.

⁵³⁰ Johanna E. Bond, 'CEDAW in Sub-Saharan Africa: Lessons in Implementation,' *Michigan State Law Review* (2014), 241-262.

⁵³¹ Ibid., 260.

⁵³² Johanna Bond, 'Gender, Discourse and Customary Law in Africa,' (2010), 520.

⁵³³ Sally Engle Merry, 'Human Rights Law and the Demonisation of Culture (And Anthropology Along the Way),' *Political and Legal Anthropology Review* (26)1 (2003), 55-76.

⁵³⁴ Ibid., 71.

obstruct the universal application of human rights if unchecked.⁵³⁵ However, Byrnes⁵³⁶ argues that since CEDAW targets violations of women's human rights, it would naturally focus on negative facets of culture and tradition.⁵³⁷

But is CEDAW really unconstructive about culture and tradition? CEDAW's language⁵³⁸ certainly does not hint that the convention is undiscerningly wary of all customs and traditions. As Newman et al.⁵³⁹ have asserted, culture has both benefits and drawbacks – the latter because some practices it engrains are harmful to other societal members.⁵⁴⁰ For example, the community bylaws being studied only frown upon social and customary practices that threaten gender equality, gender equality being 'a key norm underlying CEDAW'.⁵⁴¹

Any cultural elements that do not fit the CEDAW bill are unacceptable where the interest is to advance gender equality. According to Brennan,⁵⁴² the agenda to dismantle oppressive practices makes all culture practices subservient to human rights norms.⁵⁴³ Therefore, where cultural values and

⁵³⁵ Sally Engle Merry, 'Human Rights Law and the Demonisation of Culture (And Anthropology Along the Way),' (2003), 60 & 71; Sally Engle Merry, 'Human Rights and Transnational Culture: Regulating Gender Violence Through Global Law' *Osgoode Hall Law Journal* (44) (2006c), 53-75 53 & 56.

⁵³⁶ Andrew Byrnes, 'The Committee on the Elimination of All Forms of Discrimination Against Women,' in Anne Hellum and Henriette Sinding Aasen, eds., *Women's Human Rights: CEDAW in International, Regional and National Law*. Vol. 3. (Cambridge University Press, 2013).

⁵³⁷ *Ibid.*, 465.

⁵³⁸ Article 2(f): 'modify or abolish existing laws . . . customs and practices that constitute discrimination against women;' Article 5(a): 'take . . . measures to modify . . . with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes . . .'. UN General Assembly, *Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979, A/RES/34/180.

⁵³⁹ Newman Wadesango, Symphorosa Rembe, and Owence Chabaya, 'Violation of Women's Rights by Harmful Traditional Practices,' (2011).

⁵⁴⁰ *Ibid.*, 121. This was also acknowledged in United Nations, 'UN Fact Sheet No 23 Harmful Traditional Practices Affecting the Health of Women and Children,' (1995) 1-2.

⁵⁴¹ Angela M. Banks, 'CEDAW, Compliance, and Custom: Human Rights Enforcement in Sub-Saharan Africa,' *32 Fordham International Law Journal* (2009), 781-845 796.

⁵⁴² Katherine Brennan, 'The Influence of Cultural Relativism on International Human Rights Law: Female Circumcision as a Case Study,' *Law & Inequality: A Journal of Theory and Practice* (7) (1988-1989), 367-398.

⁵⁴³ *Ibid.*, 369.

gender equality norms clash, CEDAW says the latter should prevail.⁵⁴⁴ This is not to suggest that the approaches for addressing harmful practices that the CEDAW Committee (and other treaty monitoring bodies) promote are flawless, but that is a different topic discussed under section 4.4.

4.2.2 Codification of norms protecting women from harmful practices in African human rights law

Since the community bylaws on child marriage and other harmful practices in Malawi are situated in Africa,⁵⁴⁵ we will examine how the AU human rights system has established the elimination of harmful practices as a legal normative standard.⁵⁴⁶ For starters, the African Charter on Human and Peoples' Rights⁵⁴⁷ (Banjul Charter),⁵⁴⁸ does not openly proscribe harmful practices. The Charter only obliges states to eliminate all forms of discrimination against women, and protect women's and children's rights according to international standards.⁵⁴⁹

The Banjul Charter proclaims the duty of every individual to 'preserve and strengthen positive African cultural values in his relations with other members of the society'.⁵⁵⁰ Ibhawoh⁵⁵¹ argues that by acknowledging the right of peoples to their cultural development, the Charter reconciles cultural traditions and states human rights aspirations.⁵⁵² However, Gawayia and

⁵⁴⁴ Frances Raday, 'Gender and Democratic Citizenship: The Impact of CEDAW' *International Journal of Constitutional Law* (2012), 512-530 520.

⁵⁴⁵ Southern Africa in particular.

⁵⁴⁶ It is recognised that the Southern African Development Community (SADC), to which Malawi is a member state, also legally addresses harmful practices and child marriage under the revised its Protocol on Gender and Development adopted on 23rd June 2016 (Articles 2(2), 8(2)(a), 11(c), 20(1)(b) and 27(2)). But this study is attentive to the more globally comparable continental human rights system.

⁵⁴⁷ Organisation of African Unity (OAU), *African Charter on Human and Peoples' Rights* ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

⁵⁴⁸ The 'mother' human rights treaty on the continent.

⁵⁴⁹ Article 18 (3), CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

⁵⁵⁰ Article 27(7), CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

⁵⁵¹ Bonny Ibhawoh, 'Between Culture and Constitution: Evaluating the Cultural Legitimacy of Human Rights in the African State,' *Human Rights Quarterly* (22)3 (2000), 838-860.

⁵⁵² *Ibid.*, 847.

Mukasa⁵⁵³ submit that the Banjul Charter overlooks the reality that some practices within African traditions harm and discriminate against women.⁵⁵⁴ Bond⁵⁵⁵ argues that the Charter fails to as jealously safeguard gender equality as it does cultural rights.⁵⁵⁶

Several protocols to the Banjul Charter⁵⁵⁷ address harmful practices and child marriage more rigorously. The Maputo Protocol⁵⁵⁸ is lauded for taking a ‘more nuanced approach to culture and tradition’ when compared with CEDAW and the Banjul Charter⁵⁵⁹ and for balancing appreciation of positive cultural values and women’s rights to equality.⁵⁶⁰ The Protocol outlaws both VAW⁵⁶¹ (under which harmful practices usually fall⁵⁶²), and harmful practices. According to Banda,⁵⁶³ the Protocol unequivocally rejects harmful practices through its expansive definition of ‘harmful practices’⁵⁶⁴ – defined as ‘all behaviour, attitudes and/or practices which negatively affect the fundamental rights of women and girls, such as their right to life, health,

⁵⁵³ Rose Gawayia and Rosemary Mukasa, ‘The African Women's Protocol: A New Dimension for Women's Rights in Africa,’ *Gender & Development* (3) (2005), 42-50.

⁵⁵⁴ *Ibid.*, 44.

⁵⁵⁵ Johanna Bond, ‘Gender, Discourse and Customary Law in Africa,’ (2010).

⁵⁵⁶ *Ibid.*, 537.

⁵⁵⁷ Article 66 of the Charter allows state parties to the Charter to make special protocols or agreements where necessary to supplement the provisions of the Charter – CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

⁵⁵⁸ Adopted by the 2nd Ordinary Session of the Assembly of the African Union Maputo, 11 July 2003, CAB/LEG/66.6 (Sept. 13, 2000). Entered into force November 25, 2005.

⁵⁵⁹ Johanna E. Bond, ‘CEDAW in Sub-Saharan Africa: Lessons in Implementation,’ (2014), 261.

⁵⁶⁰ *Ibid.*, 261-262; Johanna Bond, ‘Gender, Discourse and Customary Law in Africa,’ (2010), 543.

⁵⁶¹ Article 1(j): Violence against women means all acts perpetrated against women which cause or could cause them physical, sexual, psychological and economic harm, including the threat to take such acts; or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace time and during situations of armed conflicts or of war – CAB/LEG/66.6 (Sept. 13, 2000).

⁵⁶² For example, Kelly has documented that ‘[b]y the end of the 20th century, women’s movements across the board concurred that a range of harmful traditional practices should be placed within the violence against women framework – Liz Kelly, ‘Inside Outsiders: Mainstreaming Violence Against Women into Human Rights Discourse and Practice,’ *International Feminist Journal of Politics* (7)4 (2005), 471-495 475.

⁵⁶³ Fareda Banda, ‘Blazing the Trail: The African Protocol on Women’s Rights Comes in Force,’ *Journal of African Law* (50)1 (2006), 72-84.

⁵⁶⁴ *Ibid.*, 80.

dignity, education and physical integrity'.⁵⁶⁵ Thus the Protocol owns women's rights violations through harmful practices as African problems, thereby discrediting views that such issues are driven by Western agendas.⁵⁶⁶

Besides Article 5, which decrees legislative and other measures that states should take to eliminate harmful practices,⁵⁶⁷ several provisions of the Maputo Protocol mandate states to address harmful practices. Article 2(2) of the Protocol has developed Articles 2(f) and 5(a) of CEDAW⁵⁶⁸ by committing states to eliminate harmful tradition practices through public outreach strategies.⁵⁶⁹ Article 4(d) obliges states to use educational measures in eradicating traditional and cultural beliefs, practices and stereotypes that stimulate VAW. However, Article 6(c) of the Protocol is soft on polygamy, since it only 'encourages monogamy as the preferred form of marriage'.

Commenting on Article 17, Bond⁵⁷⁰ contends that the Maputo Protocol has higher potential⁵⁷¹ to facilitate the local internalisation of human rights norms since it guarantees women the right to enjoy positive culture and to be key actors in the formulation of cultural policies.⁵⁷² Furthermore, this right

⁵⁶⁵ Article 1(g) – CAB/LEG/66.6 (Sept. 13, 2000).

⁵⁶⁶ Rosemary Semufumu Mukasa, 'The African Women's Protocol: Harnessing a Potential Force for Positive Change' *Jacana Media* (2008), 7 cited in Johanna Bond, 'Gender, Discourse and Customary Law in Africa,' (2010), 519.

⁵⁶⁷ States parties shall take all necessary legislative and other measures to eliminate such practices, including: a) creation of public awareness in all sectors of society regarding harmful practices through information, formal and informal education and outreach programmes; b) prohibition, through legislative measures backed by sanctions, of all forms of FGM, scarification, medicalisation and para-medicalisation of FGM and all other practices in order to eradicate them; c) provision of necessary support to victims of harmful practices through basic services such as health services, legal and judicial support, emotional and psychological counselling as well as vocational training to make them self-supporting; d) protection of women who are at risk of being subjected to harmful practices or all other forms of violence, abuse and intolerance – CAB/LEG/66.6 (Sept. 13, 2000).

⁵⁶⁸ Fareda Banda, 'Blazing the Trail: The African Protocol on Women's Rights Comes in Force,' (2006), 80.

⁵⁶⁹ Article 2(2) – CAB/LEG/66.6 (Sept. 13, 2000).

⁵⁷⁰ Johanna Bond, 'Gender, Discourse and Customary Law in Africa,' (2010).

⁵⁷¹ Than CEDAW or the Banjul Charter.

⁵⁷² Johanna Bond, 'Gender, Discourse and Customary Law in Africa,' (2010), 541.

guarantees that women can dialogue with traditional leaders to ensure that women's rights and positive cultural practices are localised.⁵⁷³

The African Children's Charter⁵⁷⁴ similarly disapproves harmful practices. Article 1(3) discourages customs, traditions, cultural or religious practices that are inconsistent with the provisions of the Charter. Notably, 'discourage' is rather cautious language.⁵⁷⁵ However, Article 21(1) plainly requires states to pursue 'all appropriate measures to eliminate discriminatory social and cultural practices that harm the welfare, dignity, growth and health of the child'. For its part, the African Youth Charter⁵⁷⁶ directs that young people's education should preserve and strengthen positive traditional values and cultures; and that life skills education curricula should address cultural practices harmful to young girls' health.⁵⁷⁷ The Maputo Protocol⁵⁷⁸ and African Children's Charter⁵⁷⁹ also expressly proscribe child marriage.

4.2.3 Conclusion on Harmful Practices in UN and AU codes

Unquestionably, UN and AU human rights laws display consternation about harmful practices, resulting in the norm protecting women from such practices. While CEDAW does not explicitly cover 'harmful practices,' these practices are implied in CEDAW's provisions that prohibit child marriage and

⁵⁷³ Ibid., 547.

⁵⁷⁴ Adopted by the 26th Assembly of Heads of State and Governments of the Organisation of African Unity (now African Union) Addis Ababa, 11 July 1990, CAB/LEG/24.9/49 (1990). Entered into force November 29, 1999.

⁵⁷⁵ Nevertheless, the fact that the African Children's Charter asserts superiority over any custom, tradition, cultural or religious practice that contradict it has been marked as a strength of the Charter—Danwood Mzikenge Chirwa, 'The Merits and Demerits of the African Charter on the Rights and Welfare of the Child,' *The International Journal of Children's Rights* (10)2 (2002), 157-177 158.

⁵⁷⁶ African Union, *African Youth Charter*, 2 July 2006. Entered into force on 8 August 2009.

⁵⁷⁷ Article 13(3)(d), *ibid.*

⁵⁷⁸ Article 6: States parties have the obligation to enact appropriate national legislation to guarantee that no marriage shall take place without the free and full consent of both parties, and that the minimum age of marriage for women shall be 18 years—CAB/LEG/66.6 (Sept. 13, 2000).

⁵⁷⁹ Article 21(2) prohibits child marriage and the betrothal of girls and boys and mandates state parties to take effective action, including legislation, to place the minimum age of marriage at 18 years—CAB/LEG/24.9/49 (1990).

betrothal and those requiring states to modify or abolish existing customs and practices that constitute discrimination against women and perpetuate gender inequality.

The Maputo Protocol's definition of harmful practices as 'all behaviour, attitudes and/or practices . . .'⁵⁸⁰ does not *prima facie* declare primary interest in cultural or traditional practices. But still, the elimination of child marriage and harmful cultural and traditional practices and the promotion of positive cultural values are its clear agenda.

Though argued that the concept of harmful traditional practices is affixed on harms towards women (e.g. gender discrimination and VAW), and that only recently have attempts been made to address harms against children,⁵⁸¹ the UN's attention to FGM since the 1950s and CRC provisions (demanding the abolition of traditional practices harmful to children's health) speak otherwise. However, the scope of harm inflicted by negative cultural practices obviously transcends health concerns. The African Children's Charter more holistically targets the elimination of social and cultural practices harmful to the welfare, dignity, growth and health of children.

Chapter 8 demonstrates whether the key principles of CEDAW and the Maputo Protocol on the one hand, and CRC and the African Children's Charter on the other hand, are discernible in the community bylaws. The next discussion provides a picture of how harmful practices are conceptualised by international human rights jurisprudence.

⁵⁸⁰ For full definition, see Article 1(g) in note 565.

⁵⁸¹ Chia Longman and Tamsin Bradley, 'Interrogating the Concept of "Harmful Cultural Practices",' (2016), 11.

4.3 CONCEPTUALISATION OF HARMFUL PRACTICES IN INTERNATIONAL HUMAN RIGHTS JURISPRUDENCE

To appreciate how treaty-monitoring bodies understand harmful practices, jurisprudence under the UN and AU human rights systems is analysed in turn.

4.3.1 UN treaty bodies' conceptualisation of harmful practices

Within the UN human rights system, the CEDAW and CRC committees monitor how states are implementing the CEDAW and CRC respectively. Thus CEDAW and CRC jurisprudence derives from the respective committees' interpretive statements of the rights enshrined in CEDAW and CRC respectively as captured in general recommendations (for CEDAW) or general comments (for CRC),⁵⁸² concluding observations⁵⁸³ and individual communications and reports on inquiries under the Optional Protocols to the two Conventions.⁵⁸⁴

However, since neither the CEDAW nor CRC committee has determined individual communications related to harmful practices, attention is on

⁵⁸² General comments and general recommendations are very helpful in elaborating states parties' obligations when these are not mentioned or are mentioned broadly or are explained insufficiently in a treaty—Sally Engle Merry, 'Constructing a Global Law: Violence against Women and the Human Rights System,' *Law & Social Inquiry* (28)4 (2003), 941-977 952; Rebecca J. Cook, 'Women's International Human Rights Law: The Way Forward,' *Human Rights Quarterly* (15)2 (1993), 230-261 232.

⁵⁸³ Andrew Byrnes, 'Convention on the Elimination of All Forms of Discrimination Against Women and the Committee on the Elimination of Discrimination Against Women: Reflections on their Role in the Development of International Human Rights Law and as a Catalyst for National Legislative and Policy Reform (2016),' 6. Byrnes explains that concluding comments/observations of the CEDAW Committee are particularly important in their application to specific countries, they can also be relevant to understanding the committee's general stance on a range of issues, especially where there is no general recommendation or case law on the subject. On the other hand, Kelly adds that the committee's conclusions have a kind of moral force, providing a basis for subsequent activism and lobbying at national level—Liz Kelly, 'Inside Outsiders: Mainstreaming Violence Against Women into Human Rights Discourse and Practice,' (2005), 482.

⁵⁸⁴ For example with respect to the CEDAW Option Protocol, UN Women notes by ratifying the Optional Protocol, a state recognises the competence of the CEDAW Committee to receive and consider complaints from individuals or groups within its jurisdiction. Available at <http://www.un.org/womenwatch/daw/cedaw/protocol/>, accessed on 26 September 2017.

general recommendations and general comments. Though CEDAW committee and CRC committee jurisprudence is the primary topic,⁵⁸⁵ where applicable, the jurisprudence of the Committee on Economic, Social and Cultural Rights (CESCR),⁵⁸⁶ is included. Where further illumination on the CEDAW Committee's stance is necessary, illustrative examples are provided from recommendations related to harmful practices from 20 CEDAW Concluding Observations on African State Party reports issued between 2012 and 2016.⁵⁸⁷ The subsequent analysis first examines how CEDAW, CRC and CESCR jurisprudence autonomously defines harmful practices, before scrutinising the definition under the joint CEDAW General Recommendation/CRC General Comment on harmful practices.

4.3.1.1 Conceptualisation of harmful practices in 'independent' UN jurisprudence

Originally, the concept of harmful practices popularly referred to FGM, but has since expanded to cultural practices harmful to women.⁵⁸⁸ CEDAW General Recommendation No. 12 was the first to address VAW as a broad concern (1989).⁵⁸⁹ CEDAW General Recommendation No. 14 (female circumcision and other harmful practices, 1989) concentrated on FGM despite purporting to cover other harmful practices. This General Recommendation has been updated by the joint CEDAW General Recommendation No. 31

⁵⁸⁵ The work of the CEDAW Committee is the major subject because (a) CEDAW is a legal framework dedicated to promoting women's rights; (b) the CEDAW Committee has a more thriving body of general recommendations (and related concluding observations on State Party reports) overtly touching on harmful practices.

⁵⁸⁶ Monitoring body of the International Covenant on Economic Social and Cultural Rights (ICESCR).

⁵⁸⁷ The number of reports as well as the reports themselves were randomly selected (no particular scientific method was applied), and the interest was to examine the CEDAW Committee's concluding observations made from 2014 – given that the CEDAW/CRC Joint Recommendation/Comment was adopted in 2014.

⁵⁸⁸ Sally Engle Merry, 'Human Rights Law and the Demonisation of Culture (And Anthropology Along the Way),' (2003), 63; Jane Cottingham and Eszter Kismodi, 'Protecting Girls and Women from Harmful Practices Affecting Their Health: Are We Making Progress?,' (2009) 128.

⁵⁸⁹ Paragraph 1, UN Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendation No. 12: Violence against women*, 1989.

/CRC General Comment No. 18 (2014).

CEDAW General Recommendation No. 19 (1992) dived deep into VAW, particularly family violence and other forms of gender-based violence (GBV). It has since been updated by CEDAW General Recommendation No. 35 (2017),⁵⁹⁰ under which ‘gender-based VAW’⁵⁹¹ occurring through harmful practices is termed ‘inhuman or degrading treatment’.⁵⁹² Thus over time, the CEDAW Committee has endeavoured to capture the multifaceted nature of discrimination against women by addressing VAW and GBV, originally omitted in CEDAW.⁵⁹³

CEDAW General Recommendation No. 24 on women and health (1999) also covers FGM and child marriage.⁵⁹⁴ CEDAW General Recommendation No. 36 on the right of girls and women to education (2017) labels child and/or forced marriage a discriminatory and harmful practice that demonstrates states’ failure to provide girls and boys equal access to education.⁵⁹⁵

⁵⁹⁰ Committee on the Elimination of Discrimination Against Women (CEDAW), *General Recommendation No. 35 on Gender-Based Violence Against Women, Updating General Recommendation No. 19*, 26 July 2017, CEDAW/C/GC/35.

⁵⁹¹ The CEDAW Committee chooses to use this term instead of just ‘violence against women’ because: ‘the concept of “violence against women”, as defined in General Recommendation No. 19 and other international instruments and documents, has placed an emphasis on the fact that such violence is gender-based. Accordingly, in the present recommendation, the term "gender-based violence against women" is used as a more precise term that makes explicit the gendered causes and impacts of the violence. The term further strengthens the understanding of the violence as a social rather than an individual problem, requiring comprehensive responses, beyond those to specific events, individual perpetrators and victims/survivors’ – Paragraph 9, CEDAW/C/GC/35.

⁵⁹² Paragraph 16, CEDAW/C/GC/35.

⁵⁹³ United Nations Division for the Advancement of Women and United Nations Economic Commission for Africa, ‘Background Paper for the Expert Group Meeting on Good Practices in Legislation to Address Harmful Practices Against Women,’ (2009).

⁵⁹⁴ Paragraph 15(d), CEDAW Committee, *CEDAW General Recommendation No. 24: Article 12 of the Convention (Women and Health)*, 1999, A/54/38/Rev.1, chap. I.

⁵⁹⁵ Paragraph 52, Committee on the Elimination of Discrimination against Women, *General Recommendation No. 36 (2017) on the Right of Girls and Women to Education*, 16 November 2017 (advance unedited version) CEDAW/C/GC/36. The committee adds that negative impacts of child and/or forced marriage and pregnancy include: forced exclusion from school, social

As for the CRC Committee, its General Comment No. 4 on adolescent's health and development (2003)⁵⁹⁶ urges states to implement legislation towards changing attitudes and addressing gender roles and stereotypes that contribute to harmful traditional practices.⁵⁹⁷ CRC General Comment No. 13 related to VAC (2011)⁵⁹⁸ recommends measures for protecting children from all forms of violence. The General Comment contains a litany of harmful practices against the child,⁵⁹⁹ and gender-based ones include: FGM; violent and degrading initiation rites; force-feeding of girls; fattening; virginity testing; forced marriage and early marriage; 'honour' crimes; and dowry-related death and violence.⁶⁰⁰

The CESCR weighs in on harmful practices through two general comments. General Comment No. 14 on the right to the highest attainable standard of health (2000)⁶⁰¹ emphasises the legal obligation of states to adopt effective and appropriate measures to abolish harmful traditional practices affecting the health of children, particularly girls, including early marriage, FGM, preferential feeding and care of male children.⁶⁰² General Comment No. 22

norms confining girls to the home, or stigma; increased risk of domestic violence, reproductive health risks and limitations to the right to freedom of movement.

⁵⁹⁶ UN Committee on the Rights of the Child (CRC), *General Comment No. 4 (2003): Adolescent Health and Development in the Context of the Convention on the Rights of the Child*, 1 July 2003, CRC/GC/2003/4.

⁵⁹⁷ Paragraph 20, CRC/GC/2003/4.

⁵⁹⁸ UN Committee on the Rights of the Child, *General Comment No. 13: The Right of the Child to Freedom from All Forms of Violence*, 18 April 2011, CRC/C/GC/13.

⁵⁹⁹ Paragraph 29: harmful practices include, but are not limited to: corporal punishment and other cruel or degrading forms of punishment; FGM; amputations, binding, scarring, burning and branding; violent and degrading initiation rites; force-feeding of girls; fattening; virginity testing (inspecting girls' genitalia); forced marriage and early marriage; 'honour' crimes; 'retribution' acts of violence (where disputes between different groups are taken out on children of the parties involved); dowry-related death and violence; accusations of 'witchcraft' and related harmful practices such as 'exorcism'; vulectomy and teeth extraction— CRC/C/GC/13.

⁶⁰⁰ Paragraph 29, CRC/C/GC/13.

⁶⁰¹ UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, 11 August 2000, E/C.12/2000/4.

⁶⁰² Paragraph 22, E/C.12/2000/4.

on the right to sexual and reproductive health (2016)⁶⁰³ requests states to undertake preventive, promotional and remedial action to shield all individuals from harmful practices and GBV norms that violate their sexual and reproductive health, including: FGM, child and forced marriage, domestic and sexual violence.⁶⁰⁴

The above descriptions of harmful practices show that before the 2014 joint CEDAW General Recommendation/CRC General Comment (discussed below), UN jurisprudence evolved around several harmful practices related to health and VAW,⁶⁰⁵ without a nuanced engagement of the concept of harmful practices itself.⁶⁰⁶ This conceptual gap could have prompted views that the UN is biased towards 'non-Western' harmful practices.⁶⁰⁷ The UN has since captured 'Western' harmful practices in the 2014 CEDAW General Recommendation/CRC General Comment on harmful practices⁶⁰⁸ without necessarily watering down the impact of 'non-Western' harms. However, this all-harms approach can potentially obscure harmful practices that have severe developmental impacts, as those addressed by the community bylaws.⁶⁰⁹

⁶⁰³ Committee on Economic, Social and Cultural Rights, General Comment No. 22 (2016) on the Right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights), 2 May 2016, E/C.12/GC/22.

⁶⁰⁴ Paragraphs 29 and 49(d), E/C.12/GC/22.

⁶⁰⁵ Chia Longman and Tamsin Bradley, 'Interrogating the Concept of "Harmful Cultural Practices"', (2016), 12.

⁶⁰⁶ But notably outside the jurisprudence, the 1995 UN Fact Sheet No. 23, inspired by Article 5(a) of CEDAW, engaged more deeply on the following harmful practices affecting women's and girls' health: FGM, son preference and its implications for the status of girls, female infanticide, early marriage and dowry, early pregnancy, nutritional taboos and practices related to child delivery and VAW—United Nations, 'UN Fact Sheet No 23 Harmful Traditional Practices Affecting the Health of Women and Children' (1995).

⁶⁰⁷ Bronwyn Winter, Denise Thompson, and Sheila Jeffreys, 'The UN Approach to Harmful Practices: Some Conceptual Problems,' (2002), 72-94 72.

⁶⁰⁸ Paragraph 9: In addition, many women and children increasingly undergo medical treatment and/or plastic surgery to comply with social norms of the body, rather than for medical or health reasons, and many are also pressured to be fashionably thin, which has resulted in an epidemic of eating and health disorders—CEDAW/C/GC/31-CRC/C/GC/18, see note 610 below.

⁶⁰⁹ Furthermore, Longman and Bradley observe that 'recent tendencies to broaden the concept of harmful cultural practices to include harm against children and LGBTIQI individuals and Western 'traditions' potentially threaten to render the concept meaningless'—Chia Longman

4.3.1.2 *Conceptualisation of harmful practices under joint CEDAW/CRC jurisprudence*

The 2014 joint General Recommendation No. 31 of the CEDAW Committee and General Comment No. 18 of the CRC Committee (joint General Recommendation/General Comment) on harmful practices⁶¹⁰ is a historic effort to conceptually consolidate and interpret international human rights norms protecting women and girls from harmful practices. Recognising that both CEDAW and CRC embrace legally binding obligations for states to eliminate harmful practices, the joint General Recommendation/General Comment provides extensive authoritative guidance on this obligation.⁶¹¹

The joint General Recommendation/General Comment underscores the due-diligence obligation of states to prevent acts that infringe on rights of women and children, and ensures that ‘private actors do not perpetuate discrimination against women and girls, GBV, and any form of VAC’.⁶¹² Indeed, *Velasquez Rodriguez v. Honduras*⁶¹³ demonstrates that this due-diligence obligation of states applies to harmful practices against children⁶¹⁴ (and women).

and Tamsin Bradley, ‘Interrogating the Concept of “Harmful Cultural Practices”’, (2016), 11. However, the position of this thesis on harmful practices affecting children is that these have been recognised since the UN became concerned about FGM in the 1950’s.

⁶¹⁰ Committee on the Elimination of Discrimination against Women, *Joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/general comment No. 18 of the Committee on the Rights of the Child on harmful practices* (59th session, 2014), CEDAW/C/GC/31-CRC/C/GC/18.

⁶¹¹ Paragraph 1, CEDAW/C/GC/31-CRC/C/GC/18.

⁶¹² Paragraph 11, CEDAW/C/GC/31-CRC/C/GC/18.

⁶¹³ This case was reviewed by the Inter-American Court of Human Rights (IACHR) in 1988, concerning state responsibility for enforced disappearances. The due diligence concept establishes that an illegal act, which violates human rights and is initially not directly attributable to a state can lead to the international responsibility of the state if there was lack of due diligence by the state to prevent the violation or to respond to the violation as required by the relevant human rights treaty – cited in United Nations Special Representative of the Secretary General on Violence against Children, *Protecting Children from Harmful Practices in Plural Legal Systems with a Special Emphasis on Africa 2014 Report*, (United Nations, 2016) 8.

⁶¹⁴ *Ibid.*

The joint General Recommendation/General Comment first lists broad examples of harmful practices,⁶¹⁵ some of which were also identified in the UN's effort to conceptualise selected harmful practices affecting women's and girls' health in 1995.⁶¹⁶ Thereafter, it illustratively interprets four harmful practices: FGM,⁶¹⁷ child marriage/forced marriages (including dowry/bride price payments),⁶¹⁸ polygamy,⁶¹⁹ and 'honour' crimes.⁶²⁰ Child marriage, servile marriages and levirate marriages are considered forms of forced marriage, amongst others.⁶²¹ However, while recognising that child marriage involves any party aged below 18 years, the joint General Recommendation/General Comment has dropped the bar to 16 years in exceptional circumstances.⁶²² Nevertheless, states are tasked to address harmful effects of child marriage.⁶²³

⁶¹⁵ Paragraph 9 provides the following examples of harmful practices besides the 'Western ones' cited in note 608: neglect of girls (linked to the preferential care and treatment of boys), extreme dietary restrictions, including during pregnancy (force-feeding, food taboos), virginity testing and related practices, binding, scarring, branding/infliction of tribal marks, corporal punishment, stoning, violent initiation rites, widowhood practices, accusations of witchcraft, infanticide and incest. They also include body modifications performed for the purpose of beauty or marriageability of girls and women (e.g. fattening, isolation, the use of lip discs and neck elongation with neck rings) or in order to protect girls from early pregnancy or from being subjected to sexual harassment and violence (e.g. breast ironing) – CEDAW/C/GC/31-CRC/C/GC/18.

⁶¹⁶ See note 606.

⁶¹⁷ Paragraph 19, CEDAW/C/GC/31-CRC/C/GC/18.

⁶¹⁸ Paragraphs 20-23, CEDAW/C/GC/31-CRC/C/GC/18.

⁶¹⁹ Paragraphs 25-28, CEDAW/C/GC/31-CRC/C/GC/18.

⁶²⁰ Paragraphs 29-30, CEDAW/C/GC/31-CRC/C/GC/18.

⁶²¹ Paragraph 23: Other types of forced marriage are trade-off marriages (i.e. baad and baadal); allowing a rapist to escape criminal sanctions by marrying the victim; forcefully marrying off an immigrant girl within the family's community of origin or to provide extended family members or others with documents to migrate to and/or live in a particular destination country; the forcing of girls into marriage by armed groups during conflict; forcing a girl into marriage in order to escape post-conflict poverty; not allowing one of the parties to end or leave a marriage – CEDAW/C/GC/31-CRC/C/GC/18.

⁶²² Paragraph 20 provides that in exceptional circumstances, one can get married at 16 years so long as a judge approves 'based on legitimate exceptional grounds defined by law and on the evidence of maturity without deference to cultures and traditions' – CEDAW/C/GC/31-CRC/C/GC/18.

⁶²³ i.e. early and frequent pregnancies and childbirth, resulting in higher than average maternal morbidity and mortality rates; pregnancy-related deaths as the leading cause of mortality for 15-19 year old girls (married and unmarried) worldwide; high infant mortality among the children of very young mothers; limited decision-making power by girls in relation to their own lives, particularly in cases where the husband is significantly older and

The joint General Recommendation/General Comment defines harmful practices as:

Practices and behaviour that are grounded in discrimination on the basis of, among others, sex, gender and age in addition to multiple and/or intersecting forms of discrimination that often involve violence and cause physical and/or psychological harm or suffering. The harm that these practices cause to victims surpasses the immediate physical and mental consequences and often has the purpose or effect of impairing the recognition, enjoyment and exercise of the human rights and fundamental freedoms of women and children. There is also a negative impact on their dignity, physical, psychosocial and moral integrity and development, participation, health, education and economic and social status.⁶²⁴

Thus, the joint General Recommendation/General Comment pronounces that practices should meet four criteria to pass the 'harmful test':

- a) *Indignity and human rights abuse*: the practices should constitute a denial of the dignity and/or integrity of the individual and a violation of the human rights and fundamental freedoms enshrined in the CEDAW and CRC.⁶²⁵
- b) *Discrimination, with adverse impacts*: the practices should be discriminatory against women/children and result in negative physical, psychological, economic and social effects on individuals/groups and limitations on one's capacity to participate fully in society or develop to their full potential.⁶²⁶

where girls have limited education; higher rates of school dropout, particularly among girls, forced exclusion from school; increased risk of domestic violence; limited enjoyment of the right to freedom of movement; girls' lack of personal and economic autonomy; girls' attempts to flee or commit self-immolation or suicide to avoid or escape the marriage – Paragraph 22, CEDAW/C/GC/31-CRC/C/GC/18.

⁶²⁴ Paragraph 15, CEDAW/C/GC/31-CRC/C/GC/18.

⁶²⁵ Paragraph 16(a), CEDAW/C/GC/31-CRC/C/GC/18.

⁶²⁶ Paragraph 16(b), CEDAW/C/GC/31-CRC/C/GC/18.

- c) *A traditional root*: the practices should be traditional, re-emerging or emerging practices that are set and/or nurtured by social norms that perpetuate male dominance and the inequality of women and children, on the basis of sex, gender, age and other intersecting factors.⁶²⁷
- d) *Imposition*: the practices should be imposed on women and children by family members, community members or society at large, regardless of whether the victim provides, or is able to provide full, free and informed consent.⁶²⁸

As demonstrated by the empirical chapters, the advent of these criteria, as well as the joint General Recommendation/General Comment's description of harmful practices is instructive in identifying resemblances and variances between what community bylaws are stamping as harmful practices, and the parameters of the joint General Recommendation/General Comment on this matter. Such pollination clarifies how the community bylaws in rural Malawi are internalising international human rights norms when assessed from the perspective of the joint General Recommendation/General Comment's conceptual framework. The empirical chapters also consider how AU jurisprudence conceptualises harmful practices, discussed next.

4.3.2 Conceptualisation of Harmful Practices in AU jurisprudence

The maiden joint general comment of the African Commission on Human and Peoples' Rights (ACHPR) and the African Committee of Experts on the Rights and Welfare of the Child is on ending child marriage (ACERWC).⁶²⁹ Adopted in 2017, this joint General Comment interprets the obligation of States Parties to the Maputo Protocol and the African Children's Charter to take legislative,

⁶²⁷ Paragraph 16(c), CEDAW/C/GC/31-CRC/C/GC/18.

⁶²⁸ Paragraph 16(d), CEDAW/C/GC/31-CRC/C/GC/18.

⁶²⁹ The ACHPR oversees states parties' execution of the Banjul Charter and associated protocols, e.g. the Maputo Protocol (in accordance with Article 62 of the African Charter on Human and Peoples' Rights). The ACERWC enforces the African Children's Charter (Article 32 of the Charter).

institutional and other measures to prevent marriage of persons below 18 years.⁶³⁰ The joint General Comment recognises child marriage as a harmful practice the pervasiveness and negative impacts of which are ignited by other harmful practices.⁶³¹

Mirroring the Maputo Protocol,⁶³² the joint General Comment defines harmful practices as ‘all behaviour, attitudes and/or practices that negatively affect the fundamental rights of women and girls, such as their right to life, health, dignity, education and physical integrity.’⁶³³ While it includes attitudes,⁶³⁴ this definition does not explicitly emphasise the discriminatory element of harmful practices as does the joint CEDAW General Recommendation/CRC General Comment. While discrimination could be implied in the definition,⁶³⁵ Chapter 8 demonstrates that omitting the terminology from the definition works well for some conceptualisations of harmful practices in the community bylaws. The joint General Comment has understandably not laboured to determine criteria for establishing harmful practices⁶³⁶ since it is confined to child marriage.

The joint General Comment covers children who are married, children who are at risk of child marriage, and women who were married before their 18th

⁶³⁰ Paragraphs 1 & 2, joint ACHPR/ACERWC General Comment. Furthermore, Paragraph 16 of the joint General Comment asserts that obligations of the state to eliminate the harmful practice of child marriage are informed by Article 21 and Article 1(3) of the African Children’s Charter (CAB/LEG/24.9/49 (1990)), as well as Article 6 of the Maputo Protocol (CAB/LEG/66.6 (Sept. 13, 2000)), which proscribe harmful social and cultural practices, child marriage and betrothal – joint ACHPR/ACERWC General Comment.

⁶³¹ Paragraph 49. For example, such other harmful practices, which should be prohibited, are: abduction, kidnapping for marriage purposes, FGM, virginity testing, breast ironing, forced feeding, forced marriage, tourist marriage, and payment of dowry – joint ACHPR/ACERWC General Comment.

⁶³² Particularly Article 1(g), CAB/LEG/66.6 (Sept. 13, 2000).

⁶³³ Paragraph 6, joint ACHPR/ACERWC General Comment.

⁶³⁴ ‘Attitudes’ are not specifically mentioned in the joint CEDAW General Recommendation/CRC General Comment.

⁶³⁵ To the extent that harmful practices negatively affect all fundamental rights of women and girls.

⁶³⁶ Like the joint CEDAW General Recommendation/CRC General Comment (CEDAW/C/GC/31-CRC/C/GC/18) has done.

birthday.⁶³⁷ It also purportedly includes boys vulnerable to or affected by child marriage,⁶³⁸ although the definition of harmful practices is limited to women and girls. Unlike the joint CEDAW General Recommendation/CRC General Comment, the joint General Comment totally prohibits anyone aged below 18 years to get married.⁶³⁹

The joint General Comment's interpretive guidance on child marriage and embedded harms is founded on the general principles underpinning the protection of children's rights under the African Children's Charter (best interest of the child; children's right to freedom from discrimination; children's right to survival, development and protection; and children's right to participate in matters affecting them⁶⁴⁰) and the Maputo Protocol (equality and non-discrimination⁶⁴¹). These are similar principles underpinning the CRC⁶⁴² and CEDAW, respectively.⁶⁴³

The joint ACHPR/ACERWC General Comment interprets these key principles from a child marriage perspective. First, it stipulates that since child marriage has negative physical, psychological, economic and social consequences, the best interests of the child principle⁶⁴⁴ restrains states from condoning child marriage on any ground⁶⁴⁵ (or invoking the principle to

⁶³⁷ Paragraph 5, joint ACHPR/ACERWC General Comment.

⁶³⁸ Paragraphs 5 & 18, joint ACHPR/ACERWC General Comment.

⁶³⁹ Paragraphs 6, 9 & 10, joint ACHPR/ACERWC General Comment.

⁶⁴⁰ Paragraph 7, joint ACHPR/ACERWC General Comment.

⁶⁴¹ Paragraph 7, joint ACHPR/ACERWC General Comment.

⁶⁴² Except that joint General Comment opts for a child's right to 'survival, development and protection' instead of the child's right 'to life, survival and development' under the CRC. But Chirwa observes that 'in respect of the best interests of the child principle, the African Children's Charter goes a step ahead of the CRC by stating that the best interests of the child must be 'the primary consideration' in all actions concerning the child. This offers better protection for children since the best interests principle under the Charter is the overriding consideration – Danwood Mzikenge Chirwa, 'The Merits and Demerits of the African Charter on the Rights and Welfare of the Child,' (2002), 160.

⁶⁴³ See section 4.2.1 of the thesis.

⁶⁴⁴ Under Article 4(1) of the African Children's Charter, CAB/LEG/24.9/49 (1990).

⁶⁴⁵ Paragraph 8, joint ACHPR/ACERWC General Comment. Thus parents, traditional leaders and community representatives must act in the best interests of the child by not perpetrating, perpetuating or supporting child marriage – joint ACHPR/ACERWC General Comment.

justify child marriage⁶⁴⁶). It also calls on stakeholders, such as parents, traditional leaders and community representatives to, in the best interests of the child, not perpetrate, perpetuate or support child marriage.⁶⁴⁷

Second, in relation to the right of individuals to be free from discrimination,⁶⁴⁸ the joint General Comment clarifies that child marriage is a manifestation of gender inequalities and sex discrimination because it mostly affects girls and women and entrenches harmful constructions of gender and patriarchy.⁶⁴⁹ Third, the joint General Comment notes that the adverse impacts of child marriage threaten children's right to survival, development and protection.⁶⁵⁰ In respect of prohibiting child marriage, ACHPR/ACERWC jurisprudence specifically expounds that child marriage violates girls' right to survival and development because of its high contribution to maternal mortality and morbidity; and because children entering such marriages usually drop out of school, and cannot (effectively) participate in economic, political, social and other life spheres.⁶⁵¹ Chirwa⁶⁵² has also demonstrated how the African Children's Charter promotes children's right to survival and development through the rights to education and health.⁶⁵³ Also, the right of children to protection comes with the responsibility to protect children from economic exploitation,⁶⁵⁴ and from sexual exploitation and abuse.⁶⁵⁵ Lastly, the joint

⁶⁴⁶ Paragraph 10, joint ACHPR/ACERWC General Comment.

⁶⁴⁷ Paragraph 8, joint ACHPR/ACERWC General Comment.

⁶⁴⁸ Under Article 2 of the African Children's Charter and Article 3 of the Maputo Protocol.

⁶⁴⁹ Paragraph 11, joint ACHPR/ACERWC General Comment.

⁶⁵⁰ Paragraph 12 observes that this right is anchored by Article 5(2) of the African Children's Charter, as well as the condemnation of practices that obstruct the physical development of women and girls in the Maputo Protocol's preamble—joint ACHPR/ACERWC General Comment.

⁶⁵¹ Furthermore, Paragraph 12 outlines that child marriage heightens girls' exposure to domestic violence—joint ACHPR/ACERWC General Comment.

⁶⁵² Danwood Mzikenge Chirwa, 'The Merits and Demerits of the African Charter on the Rights and Welfare of the Child,' (2002).

⁶⁵³ Protected under Articles 11 and 14 of the African Children's Charter respectively—*ibid.*, 162-164.

⁶⁵⁴ Article 32 of the CRC (UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3); and Article 15 of the African Children's Charter (CAB/LEG/24.9/49 (1990)).

General Comment considers child marriage⁶⁵⁶ to be a hindrance to a child's right to participation/giving free and informed.⁶⁵⁷

The joint General Comment is important to this thesis since community bylaws in rural Malawi are heavily invested in eliminating child marriages. Therefore, the joint General Comment's expanded scope of victims requiring protection from child marriage is useful in engaging the community bylaws.⁶⁵⁸ Additionally, the joint General Comment's application of the four general principles governing the African Children's Charter and the two principles underlying the Maputo Protocol expands the analytical framework of the joint CEDAW General Recommendation/CRC General Comment in assessing how community bylaws are conceptualising harmful practices and internalising norms protecting women from such practices.

Having established what human rights jurisprudence says about the norm protecting women and girls from harmful practices, the next section examines how the jurisprudence expects states to domesticate the norm, including the envisaged role of community and informal mechanisms in this endeavour.

⁶⁵⁵ Article 34 of the CRC (UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3); and Article 27 of the African Children's Charter (CAB/LEG/24.9/49 (1990)).

⁶⁵⁶ Especially betrothal, parental consent for child marriages, marriage of rape victims by rapists, and forcing children to stay married.

⁶⁵⁷ Paragraph 14, joint ACHPR/ACERWC General Comment.

⁶⁵⁸ Unlike UN jurisprudence, the joint General Comment specifically embraces women who were married before the age of 18 years under its wings. The joint General Comment also isolates children who are particularly vulnerable to child marriage, including those with disabilities, in child headed households, and in conflict/post-conflict scenarios—joint ACHPR/ACERWC General Comment.

4.4 REQUIREMENTS ON HOW STATES SHOULD INTERNALISE NORMS PROTECTING WOMEN FROM HARMFUL PRACTICES

Beyond treaty ratification, domestic processes of norm appropriation spur social change.⁶⁵⁹ Various scholars assert that international norms become fully institutionalised nationally as states integrate the norms into formal sources of national law, policy and practice; as the norms become accepted and enforced by law; and as the norms become local practice.⁶⁶⁰ This norm internalisation model centres on formal institutional changes,⁶⁶¹ and not informal community-level changes, as the community bylaws. The ensuing narrative confirms that international human rights jurisprudence on harmful practices prioritises this ‘institutionalisation’ approach to norm internalisation, pestering states to chiefly address harmful practices through legal and administrative exploits.

4.4.1 Norm Internalisation Through Legal Measures

The use of the formal domestic legal system and instruments in domesticating global human rights norms is preferred as ‘more proficient and programmatic’.⁶⁶² Out of the jurisprudence analysed in this thesis, only CEDAW General Recommendation No. 14 on female circumcision and other harmful practices (before being updated) did not explicitly demand legal measures for addressing FGM and other harmful

⁶⁵⁹ Susanne Zwingel, ‘How Do Norms Travel? Theorising International Women’s Rights in Transnational Perspective,’ (2012), 120.

⁶⁶⁰ Martha Finnemore and Kathryn Sikkink, ‘International Norm Dynamics and Political Change,’ (1998); Thomas Risse, ‘International Norms and Domestic Change: Arguing and Communicative Behaviour in the Human Rights Area,’ (1999); Sarah H Cleveland, ‘Norm Internalisation and U.S Economic Sanctions ’ (2001); Sandra Sofia Englund, ‘Transnational Norm Diffusion and Norm Localisation: A Case Study of Gender Equality in the Republic of Chile and the Bolivarian Republic of Venezuela,’ (2013); Trine Flockhart, ed. *Socialising Democratic Norms: The Role of International Organisations for the Construction of Europe* (Springer, 2005).

⁶⁶¹ Susanne Alldén, ‘How Do International Norms Travel? Women’s Political Rights in Cambodia and Timor-Leste ’ (Doctoral Thesis, Umeå University, 2009).

⁶⁶² Angela M. Banks, ‘CEDAW, Compliance, and Custom: Human Rights Enforcement in Sub-Saharan Africa,’ (2009), 783; Zvika Orr, ‘The Adaptation of Human Rights Norms in Local Settings: Intersections of Local and Bureaucratic Knowledge in an Israeli NGO,’ (2012), 243.

practices.⁶⁶³ Jurisprudence related to legal measures calls for a) the enactment and review of legislation; b) criminalisation and enforcement of criminal sanctions.

4.4.1.1 Enactment and review of legislation

Despite recent position shifts, both UN and AU jurisprudence mostly presses states to purge harmful practices through formal laws. CEDAW General Recommendation No. 12 on VAW starts with inviting states to report on legislation they have enacted to protect women from all kinds of violence.⁶⁶⁴ CEDAW General Recommendation No. 24 on women and health agitates for laws prohibiting FGM and child marriage.⁶⁶⁵

CEDAW General Recommendation No. 35,⁶⁶⁶ which updates General Recommendation No. 19, regrets that states breach their due diligence obligation to address gender-based VAW through inadequate or deficient implementation of legislation.⁶⁶⁷ It recommends the prioritisation of functioning laws, institutions, and systems to address VAW.⁶⁶⁸ The CEDAW Committee's macro delineation of arrangements that states should make in implementing General Recommendation No. 35 at legislative, executive and judicial levels exposes overt attentiveness to formal legal measures.⁶⁶⁹

⁶⁶³ As observed prior, this general recommendation has since been updated by the joint CEDAW General Recommendation/CRC General Comment.

⁶⁶⁴ Paragraph 1, UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General Recommendation No. 12: Violence against Women*, 1989.

⁶⁶⁵ Paragraph 15(d), UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General Recommendation No. 24: Article 12 of the Convention (Women and Health)*, 1999, A/54/38/Rev.1, chap. I.

⁶⁶⁶ UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General Recommendation No. 35 on Gender-Based Violence Against Women, Updating General Recommendation No. 19*, 26 July 2017, UN. Doc. CEDAW/C/GC/35.

⁶⁶⁷ Paragraph 7, CEDAW/C/GC/35.

⁶⁶⁸ Paragraph 25, CEDAW/C/GC/35.

⁶⁶⁹ Under General Recommendation No. 35, the CEDAW Committee has interest to see that: a) legislation prohibiting all forms of gender-based violence against women is adopted and

CEDAW General Recommendation No. 33 on women's access to justice also trumpets state-level mechanisms as the arsenal for resolving justice-related challenges affecting women. It recommends measures that states should implement in six areas that are considered pertinent to guaranteeing women access to justice.⁶⁷⁰ These measures are mostly judicial/quasi-judicial, and within the formal justice machinery.⁶⁷¹ Although the Committee positively recognises alternative dispute resolution (ADR) processes⁶⁷² and plural justice systems,⁶⁷³ its pitch that 'VAW cases should never undergo ADR processes'⁶⁷⁴ divulges discomfort with these systems.⁶⁷⁵

The joint CEDAW General Recommendation/CRC General Comment declares that states should prioritise developing, enacting, implementing and monitoring relevant legislation as 'a key element of any holistic strategy to address harmful practices'.⁶⁷⁶ Legislation aimed at eliminating harmful practices must include befitting measures for budgeting, implementing,

that all national laws are harmonised with CEDAW. This includes repealing, including in customary, religious and indigenous laws, all legal provisions that are discriminatory against women and thereby enshrine, encourage, facilitate, justify or tolerate any form of gender-based violence. Also in particular, repealing provisions that allow, tolerate or condone forms of gender-based violence against women, including child or forced marriage and other harmful practices (Paragraphs 26 (a) and 29 (c)); b) public authorities are investigated and sanctioned for their inefficiency, complicity and negligence in dealing with complaints (Paragraph 26 (b)); and c) all legal procedures involving allegations of gender-based violence against women should meet international law standards (Paragraphs 26 (c))—CEDAW/C/GC/35.

⁶⁷⁰ The six areas are justiciability, availability, accessibility, good quality, provision of remedies for victims and accountability of justice systems—CEDAW Committee, *General Recommendation No. 33 on Women's Access to Justice*, 23 July 2015, UN. Doc. CEDAW/C/GC/33.

⁶⁷¹ Paragraphs 15-19, CEDAW/C/GC/33.

⁶⁷² Paragraphs 57 & 58, CEDAW/C/GC/33.

⁶⁷³ Paragraphs 61-64, CEDAW/C/GC/33.

⁶⁷⁴ Paragraph 58(c), CEDAW/C/GC/33. Incidentally, such recommendation is also echoed in the 2016 CEDAW concluding observations on Mali's State Party report – Committee on the Elimination of all Forms of Discrimination Against Women, *Concluding Observations on the combined Sixth and Seventh Periodic Reports of Mali*, 25 July 2016, CEDAW/C/MLI/CO/6-7 (Paragraph 20(a)).

⁶⁷⁵ These informal systems are discussed under section 4.4.4 of the thesis.

⁶⁷⁶ Paragraph 40, CEDAW/C/GC/31-CRC/C/GC/18.

monitoring and effective enforcement;⁶⁷⁷ and provide victims of harmful practices redress.⁶⁷⁸ Moreover, the joint General Recommendation/General Comment provides guidance on legislative considerations that states should make in order to effectively address harmful practices.⁶⁷⁹ CEDAW General Recommendation No. 36 supports measures that are prescribed by the joint General Recommendation/General Comment, including that legislation should outlaw child marriage.⁶⁸⁰

CRC General Comment No. 13 similarly urges states to pursue comprehensive legislative measures (including budgetary, implementation and enforcement) against all forms of VAC.⁶⁸¹ Furthermore, CRC General Comment No. 4⁶⁸² invites states to take all appropriate legislative measures and protect adolescents from all harmful practices.⁶⁸³ CEDAW Committee's concluding observations on African State Party reports also demonstrate a relentless push for the illegalisation of cultural practices harmful to women. For instance, the Committee recommends legal measures in all but three⁶⁸⁴ of the 20 concluding observations reviewed in this thesis. Sometimes, the Committee mentions specific areas requiring legislation. For instance, the

⁶⁷⁷ Paragraph 12, CEDAW/C/GC/31-CRC/C/GC/18. Here, the joint General Recommendation/General Comment is making direct reference to what the CEDAW Committee has prescribed under Paragraph 38(a) of CEDAW General Recommendation No. 28 (2010), CEDAW/C/GC/28; and what the CRC Committee has recommended under Paragraph 40 of CRC General Comment No. 13 (2011), CRC/C/GC/13.

⁶⁷⁸ Paragraph 52, CEDAW/C/GC/31-CRC/C/GC/18.

⁶⁷⁹ Paragraph 55, CEDAW/C/GC/31-CRC/C/GC/18.

⁶⁸⁰ Paragraph 55, which particularly recommends that legislation should impose 18 years as the minimum marriage age – CEDAW/C/GC/36.

⁶⁸¹ Paragraph 40: Legislative measures comprise national, provincial and municipal laws and all relevant regulations defining the systems, mechanisms and the roles and responsibilities of concerned agencies and competent officers – CRC/C/GC/13.

⁶⁸² CRC General Comment No. 4 on *Adolescent Health and Development in the Context of the Convention on the Rights of the Child*, 1 July 2003, CRC/GC/2003/4.

⁶⁸³ Paragraph 39(g), CRC/GC/2003/4.

⁶⁸⁴ Committee on the Elimination of all Forms of Discrimination Against Women, *Concluding Observations on the combined Second, Third, Fourth and Fifth Periodic Reports of Zimbabwe*, 23 March 2012, CEDAW/C/ZWE/CO/2-5; Committee on the Elimination of all Forms of Discrimination Against Women, *Concluding Observations on the Sixth Periodic Report of Equatorial Guinea*, 9 November 2012, CEDAW/C/GNQ/CO/6; and Paragraph 19(c), Committee on the Elimination of all Forms of Discrimination Against Women, *Concluding Observations on Sixth Periodic Report of Sierra Leone*, 10 March 2014, CEDAW/C/SLE/CO/6.

concluding observations on Swaziland's State Party report advocated for 'effective legal measures' to address child/forced marriage and polygamy.⁶⁸⁵

In the AU jurisprudence, the first call made by the joint ACHPR/ACERWC General Comment is for states to 'enact, amend, repeal or supplement legislation,' to prohibit child marriage, and set the minimum marriage age at 18 years. States are asked to make such legislation superior to customary, religious, traditional or sub-national laws.⁶⁸⁶ Standards that should be observed in constitutional reforms related to child marriage are also articulated.⁶⁸⁷ The emphasis on legislative reforms and the supremacy of legislation over other laws entails that formal legal structures are presumed to be the centres of human rights engineering, appropriation and internalisation, with the community/local structures being the recipients. Notably, some jurisprudence calls for criminal measures too.

4.4.1.2 Criminalisation and enforcement of sanctions

Some jurisprudence recommends the criminalisation and/or imposition of penalties for harmful practices and/or VAW. For example, CEDAW Recommendation No. 19 advises states to protect women from all kinds of violence through penal sanctions.⁶⁸⁸ Even the updated CEDAW General Recommendation on Gender-Based VAW (No. 35) exhibits a punitive inclination, urging states to prosecute and punish gender-based VAW through courts and tribunals.⁶⁸⁹ Additionally, it urges that all judicial bodies are to *strictly* apply all penal provisions punishing gender-based VAW.⁶⁹⁰ States will become complicit in promoting gender-based

⁶⁸⁵ Paragraph 19(c), Committee on the Elimination of all Forms of Discrimination Against Women, *Concluding Observations on the combined Initial and Second Periodic Reports of Swaziland*, 24 July 2014, CEDAW/C/SWZ/CO/1-2.

⁶⁸⁶ Paragraphs 18 & 19, joint ACHPR/ACERWC General Comment.

⁶⁸⁷ Paragraphs 24, joint ACHPR/ACERWC General Comment.

⁶⁸⁸ Paragraph 24(t)(i), U.N Doc. A/47/38 (now updated by General Recommendation No. 35).

⁶⁸⁹ Paragraph 32 (b), CEDAW/C/GC/35.

⁶⁹⁰ Paragraph 26 (c), CEDAW/C/GC/35.

VAW when they fail to investigate, prosecute, and punish perpetrators and to compensate victims.⁶⁹¹

The CEDAW Committee's concluding observations on African State Party reports suggest that criminal measures prove a state's tenacity to eliminate harmful practices. In its 2015 concluding observations on Malawi's State Party report, the Committee prompted the state to effectively implement the Gender Equality Act by punishing *all* perpetrators of harmful practices.⁶⁹² The Committee made similar recommendations in concluding observations for Guinea⁶⁹³ and Madagascar,⁶⁹⁴ and recommended criminal measures to eliminate harmful practices and/or all forms of VAW in 11 other concluding observations.⁶⁹⁵

⁶⁹¹ Paragraph 25, CEDAW/C/GC/35.

⁶⁹² Paragraph 21, Committee on the Elimination of all Forms of Discrimination Against Women, *Concluding Observations on the Seventh Periodic Report of Malawi*, 24 November 2015, CEDAW/C/MWI/CO/7.

⁶⁹³ Paragraph 29(a), Committee on the Elimination of all Forms of Discrimination Against Women, *Concluding Observations on the Combined Seventh and Eighth Periodic Report of Guinea*, 14 November 2014, CEDAW/C/GI/CO/7-8.

⁶⁹⁴ Paragraph 19(b), Committee on the Elimination of All Forms of Discrimination Against Women, *Concluding Observations on the Combined Sixth and Seventh Periodic Reports of Madagascar*, 9 March 2016, CEDAW/C/MDG/CO/6-7.

⁶⁹⁵ Paragraph 49, Committee on the Elimination of all Forms of Discrimination Against Women, *Concluding Observations on the Combined Seventh and Eighth Periodic Reports of the United Republic of Tanzania*, 9 March 2016, CEDAW/C/TZA/CO/7-8; Paragraph 21(a), Committee on the Elimination of all Forms of Discrimination Against Women, *Concluding Observations on the Sixth Periodic Report of Gabon*, 11 March 2015, CEDAW/C/GAB/CO/6; Paragraph 26(a), Committee on the Elimination of all Forms of Discrimination Against Women, *Concluding Observations on the Combined Initial and Second to Fifth Periodic Reports of the Central African Republic*, 24 July 2014, CEDAW/C/CAF/CO/1-5; Paragraph 17(c), Committee on the Elimination of all Forms of Discrimination Against Women, *Concluding Observations on the Combined Fourth and Fifth Periodic Reports of Cameroon*, 28 February 2014, CEDAW/C/CMR/CO/4-5; Paragraph 20(c), Committee on the Elimination of all Forms of Discrimination Against Women, *Concluding Observations on the Sixth and Seventh Periodic Reports of Democratic Republic of Congo*, 30 July 2013, CEDAW/C/COD/CO/6-7; Paragraph 25(a), Committee on the Elimination of all Forms of Discrimination Against Women, *Concluding Observations on the combined Second and Third Periodic Reports of Mauritania*, 24 July 2014, CEDAW/C/MRT/CO/2-3; Paragraph 18(a) & (b), Committee on the Elimination of all Forms of Discrimination Against Women, *Concluding Observations on the Sixth Periodic Report of Angola*, 27 March 2013, CEDAW/C/AGO/CO/6; Paragraph 21(c), Committee on the Elimination of all Forms of Discrimination Against Women, *Concluding Observations on the*

UN and AU jurisprudence has similar and different positions on punishment targets. The joint CEDAW General Recommendation/CRC General Comment expects states to consistently enforce criminal sanctions, while being mindful of ‘potential threats to and negative impact on victims, including acts of retaliation’.⁶⁹⁶ Thus no perpetrator is exempted from punishment. The joint ACHPR/ACERWC General Comment asserts that states should not penalise/sanction children involved in child marriages. But where they do, ‘states must carefully avoid any risk of retaliation against a child’.⁶⁹⁷ Chapter 8 analyses the implications of how jurisprudence conceptualises child marriage victim versus the approach in the community bylaws.

Unlike the joint General Recommendation/General Comment, which nets all perpetrators, the joint ACHPR/ACERWC General Comment is hesitant about the sanctioning of parents ‘to avoid clandestine child marriages’.⁶⁹⁸ Instead, it targets punishment towards those registering child marriages without conducting checks; those officiating child marriages; and ‘any person who actively encourages and facilitates a child marriage’.⁶⁹⁹ However, it is inconceivable how parents could be divorced from the latter category, or how children could be consistently protected if reprobate parents face no consequences.

Combined Sixth and Seventh Periodic Report of Togo, 8 November 2012, CEDAW/C/TGO/CO/6-7; Paragraph 24(a), Committee on the Elimination of all Forms of Discrimination Against Women, *Concluding Observations on the Initial to Fourth Periodic Reports of Comoros*, 8 November 2012, CEDAW/C/COM/CO/1-4; Paragraph 20(b), Committee on the Elimination of all Forms of Discrimination Against Women, *Concluding Observations of the Committee on the Elimination of Discrimination against Women on the Sixth and Seventh Periodic Reports of Democratic Republic of Congo*, 30 July 2013, CEDAW/C/COG/CO/6.

⁶⁹⁶ Paragraph 51. Furthermore, in respect of perpetrators, Paragraph 50 of the joint CEDAW General Recommendation/CRC General Comment also says medical professionals, government employees, or civil servants and professionals involved or complicit in conducting harmful practices should face stiff criminal sanctions—CEDAW/C/GC/31-CRC/C/GC/18. It seems that these provisions had FGM highly in mind.

⁶⁹⁷ Paragraph 19, joint ACHPR/ACERWC General Comment.

⁶⁹⁸ *Ibid.*

⁶⁹⁹ Paragraphs 18 & 19, joint ACHPR/ACERWC General Comment.

Generally, the issue of applying punitive measures to harm affecting women, as well as the deterrent effect of such measures, is controversial. For example, there is concern that ‘an abolitionist approach, backed by punitive measures like imprisonment and fines’ hardly works well for complicated challenges such child marriage and FGM, as penalties mostly lead to camouflaging the practices and driving them underground’.⁷⁰⁰ Even rape discourse demonstrates that some early feminists were hesitant to support harsh penalties for rapists, arguing that such penalties would result in fewer convictions (and therefore less deterrence), unlike light punishments.⁷⁰¹

These conversations attest that in dealing with harmful practices, a ‘one-size-fits-all’ punitive approach that is encouraged by international jurisprudence (and that has been massaged into legislative approaches as seen in Chapter 5) may not always work. While the jurisprudence has focused on the formal justice system, this thesis is mindful that penalties are also employed in the community bylaws being studied. As such, Chapter 8 provides insight into how such penalties are conforming to human rights jurisprudence; and, indeed, how horizontal vernacularisation is being partly shaped by community punishment schemes that are culturally practical, and yet ‘pushing back’ on legislative penalties. The next section illustrates that the jurisprudence also heralds formal administrative measures as important in tackling harmful practices.

4.4.2 Norm Internalisation through administrative measures

Human rights jurisprudence recommends administrative measures that states ought to implement to address harmful practices in several

⁷⁰⁰ Jo Boyden, Alula Pankhurst, and Yisak Tafere, ‘Child Protection and Harmful Traditional Practices: Female Early Marriage and Genital Modification in Ethiopia,’ (2012), 517.

⁷⁰¹ Discussed in Michael Davis, ‘Setting Penalties: What Does Rape Deserve,’ *Law and Philosophy* (3)1 (1984), 61-110 162.

categories: policy and other institutional frameworks, services for victims, budgetary resources, and capacity building/awareness raising.

4.4.2.1 Policies and other institutional frameworks

The jurisprudence bids states to undertake policy and other institutional measures at national and sector levels. CEDAW General Recommendation No. 14 on female circumcision charge states to review their national health policies;⁷⁰² while CEDAW General Recommendation No. 24⁷⁰³ requires states to protect women's health by formulating policies, health care protocols and hospital procedures to address VAW.⁷⁰⁴ CEDAW General Recommendation No. 28⁷⁰⁵ prompts states to design women-tailored public policies and to ensure that women are developing on the same level with men.⁷⁰⁶ CRC General Comment No. 13 further expects administrative measures to involve policy establishment.⁷⁰⁷ CRC General Comment No. 4 stresses that states should regularly review and revise policies and strategies, and take all appropriate administrative and other measures to protect adolescents from all harmful practices.⁷⁰⁸

The duty of states' to exigently develop and operationalise 'comprehensive national strategies' to eliminate gender stereotypes and/or harmful practices is topical in CEDAW concluding observations of African State Party reports. Between 2012 and 2016, the CEDAW Committee recommended the development and implementation of such strategies (at times termed 'comprehensive strategy with result-oriented

⁷⁰² Updated by the joint CEDAW General Recommendation/CRC General Comment (CEDAW/C/GC/31-CRC/C/GC/18).

⁷⁰³ CEDAW General Recommendation No. 24: *Article 12 of the Convention (Women and Health)*, 1999, U.N Doc.A/54/38/Rev.1.

⁷⁰⁴ Paragraph 15(a), *ibid.*

⁷⁰⁵ CEDAW General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the CEDAW (2010), CEDAW/C/GC/28.

⁷⁰⁶ Paragraph 9, *ibid.*

⁷⁰⁷ Paragraph 42, CRC/C/GC/13.

⁷⁰⁸ Paragraphs 2 & 39(g), CRC/GC/2003/4.

approach'⁷⁰⁹ or 'national plans'⁷¹⁰) to eliminate gender stereotypes and/or harmful practices in 17⁷¹¹ out of the 20 reviewed concluding observations of African State Party reports.

⁷⁰⁹ For example in the 2012 concluding observations for Togo and Congo State Party reports – Paragraph 21(a), Committee on the Elimination of all Forms of Discrimination Against Women, *Concluding Observations on the combined Sixth and Seventh Periodic Report of Togo*, 8 November 2012, CEDAW/C/TGO/CO/6-7; Paragraph 22(a), Committee on the Elimination of all Forms of Discrimination Against Women, *Concluding Observations of the Committee on the Elimination of Discrimination against Women on the Sixth Periodic Report of the Republic of the Congo*, 1 March 2012, CEDAW/C/COG/CO/6.

⁷¹⁰ For example, 2014 CEDAW Committee's concluding observations for Central African Republic's State Party report recommend the effective implementation of a 'national plan addressing traditional practices harmful to women's health and GBV' – Paragraph 26(b), Committee on the Elimination of all Forms of Discrimination Against Women, *Concluding Observations on the Combined Initial and Second to Fifth Periodic Reports of the Central African Republic*, 24 July 2014, CEDAW/C/CAF/CO/1-5.

⁷¹¹ Paragraph 19(a), Committee on the Elimination of all Forms of Discrimination Against Women, *Concluding Observations on the Combined Seventh and Eighth Periodic Reports of the United Republic of Tanzania*, 9 March 2016, CEDAW/C/TZA/CO/7-8; Paragraph 21(c), Committee on the Elimination of all Forms of Discrimination Against Women, *Concluding Observations on the Sixth Periodic Report of Gabon*, 11 March 2015, CEDAW/C/GAB/CO/6; Paragraph 21, Committee on the Elimination of all Forms of Discrimination Against Women, *Concluding Observations on the Seventh Periodic Report of Malawi*, 24 November 2015, CEDAW/C/MWI/CO/7; Paragraph 23(a), Committee on the Elimination of all Forms of Discrimination Against Women, *Concluding Observations on the combined Sixth and Seventh Periodic Report of Ghana*, 14 November 2014, CEDAW/C/GHA/CO/6-7; Paragraph 19(a), Committee on the Elimination of all Forms of Discrimination Against Women, *Concluding Observations on Sixth Periodic Report of Sierra Leone*, 10 March 2014, CEDAW/C/SLE/CO/6; Paragraph 17(a), Committee on the Elimination of all Forms of Discrimination Against Women, *Concluding Observations on the Combined Fourth and Fifth Periodic Reports of Cameroon*, 28 February 2014, CEDAW/C/CMR/CO/4-5; Paragraph 20(a), Committee on the Elimination of all Forms of Discrimination Against Women, *Concluding Observations on the Sixth and Seventh Periodic Reports of Democratic Republic of Congo*, 30 July 2013, CEDAW/C/COD/CO/6-7; Paragraph 18(a), Committee on the Elimination of all Forms of Discrimination Against Women, *Concluding Observations on the Sixth Periodic Report of Angola*, 27 March 2013, CEDAW/C/AGO/CO/6; Paragraph 17(a), Committee on the Elimination of all Forms of Discrimination Against Women, *Concluding Observations on the Fourth Periodic Report of Benin*, 28 October 2013, CEDAW/C/BEN/CO/4; Paragraph 21(a), Committee on the Elimination of all Forms of Discrimination Against Women, *Concluding Observations on the Combined Sixth and Seventh Periodic Report of Togo*, 8 November 2012, CEDAW/C/TGO/CO/6-7; Paragraph 22(a), Committee on the Elimination of all Forms of Discrimination Against Women, *Concluding Observations on the Initial to Fourth Periodic Reports of Comoros*, 8 November 2012, CEDAW/C/COM/CO/1-4; Paragraph 24(a), Committee on the Elimination of all Forms of Discrimination Against Women, *Concluding Observations on the Sixth Periodic Report of Equatorial Guinea*, 9 November 2012, CEDAW/C/GNQ/CO/6; Paragraph 22(a), Committee on the Elimination of all Forms of Discrimination Against Women, *Concluding Observations on the combined Second, Third, Fourth and Fifth Periodic Reports of Zimbabwe*, 23 March 2012, CEDAW/C/ZWE/CO/2-5; Paragraph 22(a), Committee on the Elimination of all Forms of Discrimination Against Women, *Concluding Observations on the*

While each country has to determine the nature of ‘appropriate measures’ for its comprehensive strategies or action plans for dealing with harmful practices, the joint CEDAW General Recommendation/CRC General Comment elucidates that such measures should target ‘specific obstacles, barriers and resistance to the elimination of discrimination that fuel harmful practices and VAW’.⁷¹² Similarly, Ibhawol⁷¹³ has observed that cultural barriers to human rights should be identified, not for purposes of rejecting cultural traditions wholesale, but in order to understand their social bases so that apt human rights-based transformative solutions can be found.⁷¹⁴

The intervention models that the jurisprudence recommend for states to adopt in their national strategies or action plans on harmful practices reveals preference for programmes targeting the state machinery or that are state led, as opposed to community (led) programmes. For example, the CRC General Comment No. 13 advises states to introduce elaborate programmes, and monitoring and oversight systems to address all forms of VAC within national and sub-national governments,⁷¹⁵ and within governmental, professional and civil society institutions.⁷¹⁶ The joint ACHPR/ACERWC

Sixth Periodic Report of the Government of the Republic of the Congo, 1 March 2012, CEDAW/C/COG/CO/6.

⁷¹² Paragraph 30, CEDAW/C/GC/31-CRC/C/GC/18.

⁷¹³ Bonny Ibhawoh, ‘Between Culture and Constitution: Evaluating the Cultural Legitimacy of Human Rights in the African State,’ (2000).

⁷¹⁴ *Ibid.*, 856.

⁷¹⁵ By establishing a government focal point to coordinate child protection strategies and services; defining the roles, responsibilities and relationships between stakeholders on inter-agency steering committees with a view to their effectively managing, monitoring and holding accountable the implementing bodies at national and subnational levels; ensuring that the process of decentralising services safeguards their quality, accountability and equitable distribution; implementing systematic and transparent budgeting processes in order to make the best use of allocated resources for child protection, including prevention; providing independent national human rights institutions with support and promoting the establishment of specific child rights mandates such as child rights ombudsmen where these do not yet exist – Paragraph 42(a), CRC/C/GC/13.

⁷¹⁶ This includes adopting intra- and inter-agency child protection policies; professional ethics codes, protocols, memoranda of understanding and standards of care for all childcare services and settings (including daycare centres, schools, hospitals, sport clubs and residential institutions etc.); and involving academic teaching and training institutions with regard to child protection initiatives; promoting good research programmes – Paragraph 42(b), CRC/C/GC/13.

General Comment promotes the establishment and improvement of official births and marriages registration systems.⁷¹⁷

The joint General Recommendation/General Comment recommends that a special 'high-level entity should facilitate the vertical coordination of local, regional, and national level actors with traditional and religious leaders'.⁷¹⁸ This suggests intent that a national-level structure should be in control. Even the joint ACHPR/ACERWC General Comment expects 'competent judicial, administrative and legislative authority, or any competent authority provided by law' to provide institutional remedies related to access to justice.⁷¹⁹

The jurisprudence also primarily situates the establishment of administrative monitoring mechanisms for harmful practices/all forms of VAW and VAC at state level. CEDAW General Recommendation No. 33 recommends states to take measures that strengthen the accountability of formal justice systems.⁷²⁰ Similarly, the recommended 'independent monitoring mechanism' to track how women and girls are being protected from harmful practices under the joint General Recommendation/General Comment's holistic strategy⁷²¹ is likely to function at national/state level too. CRC General Comment No. 13 promotes the national statistical system as an important tool in eliminating all forms of VAC,⁷²² and 'strongly recommends' formal mechanisms for reporting VAC that are entwined with the state's justice machinery.⁷²³

⁷¹⁷ Paragraphs 26-28, joint ACHPR/ACERWC General Comment.

⁷¹⁸ Paragraph 33, CEDAW/C/GC/31-CRC/C/GC/18.

⁷¹⁹ Paragraph 41, joint ACHPR/ACERWC General Comment.

⁷²⁰ This includes (a) monitoring to guarantee that justice systems function in harmony with the principles of justiciability, availability, accessibility, good quality and the provision of remedies; (b) monitoring the actions of justice system professionals—Paragraph 14(f), CEDAW/C/GC/33.

⁷²¹ Paragraph 34, CEDAW/C/GC/31-CRC/C/GC/18.

⁷²² It urges the establishment of a comprehensive and reliable national data collection system in order for states to have systematic monitoring and evaluation of systems (impact analyses), services, programmes and outcomes based on indicators aligned with universal standards, and adjusted for and guided by locally established goals and objectives—Paragraph 42(a)(v), CRC/C/GC/13.

⁷²³ These recommended reporting mechanisms include the use of 24-hour toll-free hotlines and other information, communication and technologies (ICTs). Appropriate reporting

Furthermore, CEDAW Committee's concluding observations on Africa State Party reports urge states to have functional monitoring measures to address harmful practices.⁷²⁴ The monitoring measures mostly involve service provision to victims, which is another administrative measure that the jurisprudence pursues.

4.4.2.2 *Services for victims*

The CEDAW, CRC and ACHPR/ACERWC jurisprudence stress that the state should ensure that victims of harmful practices access effective remedies and adequate protection. The joint General Recommendation/General Comment enjoins states to provide prevention, protection, recovery, reintegration, and redress measures to victims.⁷²⁵ Particularly, victims should access legal remedies, victim support and rehabilitation services and socio-economic opportunities.⁷²⁶

According to CEDAW concluding observations on Malawi's State Party Report (2015), making justice accessible to women is part of the state's duty to investigate, prosecute and adequately punish perpetrators of all harmful

mechanisms will be established by: (a) providing appropriate information to facilitate the making of complaints; (b) participation in investigations and court proceedings; (c) developing protocols which are appropriate for different circumstances and made widely known to children and the general public; (d) establishing related support services for children and families; and (e) training and providing ongoing support for personnel to receive and advance the information received through reporting systems—Paragraph 49, CRC/C/GC/13.

⁷²⁴ For example, in concluding observations of State Party reports from Equatorial Guinea, Togo, Comoros, Zimbabwe and Congo—Paragraph 24(b), *Concluding Observations on the Sixth Periodic Report of Equatorial Guinea*, 9 November 2012, CEDAW/C/GNQ/CO/6; Paragraph 21(c), *Concluding Observations on the combined Sixth and Seventh Periodic Report of Togo*, 8 November 2012, CEDAW/C/TGO/CO/6-7; Paragraph 22(b), *Concluding Observations on the Initial to Fourth Periodic Reports of Comoros*, 8 November 2012, CEDAW/C/COM/CO/1-4; Paragraph 22(d), *Concluding Observations on the combined Second, Third, Fourth and Fifth Periodic Reports of Zimbabwe*, 23 March 2012, CEDAW/C/ZWE/CO/2-5; Paragraph 22, *Concluding Observations on the Sixth Periodic Report of the the Republic of the Congo*, 30 July 2013, CEDAW/C/COG/CO/6.

⁷²⁵ Paragraph 13, CEDAW/C/GC/31-CRC/C/GC/18.

⁷²⁶ Paragraph 52, CEDAW/C/GC/31-CRC/C/GC/18.

practices.⁷²⁷ CEDAW General Recommendation No. 33 stipulates that justice accessibility necessitates establishing justice access centres (such as one-stop centres)⁷²⁸ and the ‘creation, maintenance and development of courts, tribunals and other entities’.⁷²⁹ Legal remedies should include rehabilitation.⁷³⁰ The joint CEDAW General Recommendation/CRC General Comment considers medical, psychological and legal services as urgent support services for harmful practices victims.⁷³¹ Even for women in rural and remote areas, the CEDAW Committee still promotes formal systems/mobile courts.⁷³² Markedly, the Committee’s imagination regarding making justice systems accessible to women concentrates on judicial and quasi-judicial systems and technologies.⁷³³

The joint ACHPR/ACERWC General Comment proposes legal, health and education services for victims as well as those at risk of child marriage. Legally, it recommends that states should establish women’s and children’s police units.⁷³⁴ Health services should include providing age-appropriate comprehensive sexual and reproductive health (SRH) school curricula;⁷³⁵ and comprehensive SRH services to girls, including married ones.⁷³⁶ Educational services should include provision of sanitary facilities for girls and bursary programmes targeting girls at risk.⁷³⁷ Chapter 8 exposes the extent to which

⁷²⁷ Paragraph 21, *Concluding Observations on the Seventh Periodic Report of Malawi*, 24 November 2015, CEDAW/C/MWI/CO/7.

⁷²⁸ These should be devoted to the provision of legal advice and aid, commencing legal proceedings and coordinating necessary support services for women, including poor and rural women—Paragraph 17 (f), CEDAW/C/GC/33.

⁷²⁹ Paragraph 16(a), CEDAW/C/GC/33.

⁷³⁰ Particularly medical and psychological care and other social services—Paragraph 17(f), CEDAW/C/GC/33.

⁷³¹ Paragraph 82, CEDAW/C/GC/31-CRC/C/GC/18.

⁷³² Paragraph 16(a), CEDAW/C/GC/33.

⁷³³ E.g. the removal of economic barriers to justice (filing fees and other court costs) and linguistic barriers in judicial & quasi-judicial processes (Paragraph 17(a)); videoconferencing of court hearings (Paragraph 17(d)); and ensuring a conducive physical environment for judicial and quasi-judicial processes (Paragraph 17(e))—CEDAW/C/GC/33.

⁷³⁴ Paragraph 40, joint ACHPR/ACERWC General Comment.

⁷³⁵ Paragraph 36, joint ACHPR/ACERWC General Comment.

⁷³⁶ Paragraphs 34 & 37, joint ACHPR/ACERWC General Comment.

⁷³⁷ Paragraph 32, joint ACHPR/ACERWC General Comment.

the community bylaws support these services.

The joint ACHPR/ACERWC General Comment recommends that states should provide support for boys and girls who are already in marriage. Such support includes comprehensive social protection and health services, education assistance, legal assistance, and parenting support.⁷³⁸ This way, the joint General Comment seeks to reduce the harsh impacts of child marriage on and further victimisation of those who married as children.⁷³⁹ The 'already married' category is not clearly covered in the support meant for 'children and women who are, or are at high risk of becoming victims of harmful practices'⁷⁴⁰ under the joint CEDAW General Recommendation/CRC General Comment.

The various services require money, and the jurisprudence regards budgets as essential in internalising norms protecting women from harmful practices.

4.4.2.3 Budget and resource allocation

Under the jurisprudence, successfully addressing harmful practices cannot be achieved without central and local government budgets. The joint CEDAW General Recommendation/CRC General Comment and CRC General Comment No. 13 uphold the budget as one key strategy for implementing legislation to address harmful practices and VAC respectively.⁷⁴¹ CEDAW General Recommendation No. 35 expects the executive to coordinate with relevant state agencies and commit adequate budgetary resources for the implementation of specific institutional measures.⁷⁴² The joint

⁷³⁸ Paragraph 42, joint ACHPR/ACERWC General Comment.

⁷³⁹ Paragraph 25, joint ACHPR/ACERWC General Comment.

⁷⁴⁰ Paragraph 87(a), CEDAW/C/GC/31-CRC/C/GC/18.

⁷⁴¹ Paragraph 12, CEDAW/C/GC/31-CRC/C/GC/18; Paragraphs 40 & 41, CRC/C/GC/13. The latter urges laxing states parties to provide adequate budget allocations for the implementation of legislation and all other measures adopted to end VAC (Paragraph 41(e)).

⁷⁴² i.e. design of focused public policies, development and implementation of monitoring mechanisms and the establishment and/or funding of competent national tribunals - Paragraph 26 (b), joint ACHPR/ACERWC General Comment.

ACHPR/ACERWC General Comment anticipates that states would meet their obligations under the General Comment by ‘allocating sufficient budgetary and other resources’ towards ending child marriage.⁷⁴³

Thus, the availability of budgets and resource allocation towards the implementation of institutional laws, policies and programmes targeting the elimination of harmful practices is an important indicator of whether states have internalised the norm protecting women from harmful practices. Relatedly, budgets are also vital for capacity-building interventions related to harmful practices.

4.4.3 Norm Internalisation through Capacity Building and Awareness Raising

The CEDAW, CRC and ACHPR/ACERWC jurisprudence on harmful practices is unrelenting about the need to immerse wide categories of people in the human rights discourse if socio-cultural transformation leading to the abandonment of harmful practices is to happen. This should be achieved through (top-down) ‘capacity building,’ ‘trainings,’ ‘awareness raising’- and often the difference between these terminologies is vague. The subsequent analysis examines the targeted audience for these programmes; and the anticipated designers and facilitators of the programmes. This discussion also unveils where the jurisprudence has located traditional leaders, who are championing the community bylaws under study.

4.4.3.1 The targets of capacity-building and awareness-raising interventions

‘A comprehensive, holistic and effective approach to capacity building’

⁷⁴³ Paragraph 45. Generally, Paragraph 17 explains that the normative framework of the joint ACERWC/ACHPR General Comment is also guided by Article 26 of the Maputo Protocol (CAB/LEG/66.6 (Sept. 13, 2000)), which urges states parties to adopt measures and provide budgetary and other resources towards the full and effective implementation of the protocol—joint ACHPR/ACERWC General Comment..

should focus on attitudinal and behavioural transformations towards harmful practices amongst targeted groups and the wider community.⁷⁴⁴ The jurisprudence recommends capacity-building measures for purposes of empowering various cadres of duty bearers to know human rights norms and apply them to their services domains. UN jurisprudence shows that for the activities branded as ‘capacity building/training,’ the CEDAW Committee has at times been engrossed with professional groups. For example, CEDAW General Recommendation No. 24 on women and health requires states to train health workers to spot and manage the health impacts of GBV.⁷⁴⁵ In the justice sector, CEDAW General Recommendation No. 33 instructs states to arrange ‘capacity-building programmes for judges, prosecutors, lawyers and law enforcement officials’.⁷⁴⁶

On the other hand, the joint CEDAW General Recommendation/CRC General Comment accommodates both formal and informal structures in the ‘comprehensive, holistic and effective approach to capacity building’ that states should implement at all levels in order to eliminate harmful practices.⁷⁴⁷ It observes that a key preventative measure is to develop the capacity of all relevant professionals who are in regular contact with victims, potential victims and perpetrators of harmful practices.⁷⁴⁸ Police, public prosecutors, judges and other law enforcement officials should be trained to implement legislation criminalising harmful practices and equip them with knowledge

⁷⁴⁴ Paragraph 70, CEDAW/C/GC/31-CRC/C/GC/18.

⁷⁴⁵ Paragraph 15(b), U.N Doc.A/54/38/Rev.1.

⁷⁴⁶ Paragraph 29(f) provides that the training should be about the application of: international legal instruments relating to human rights, including the convention and the jurisprudence of the Committee; and of legislation prohibiting discrimination against women – CEDAW/C/GC/33.

⁷⁴⁷ Paragraphs 69-72: These include influential leaders (such as traditional and religious leaders), as many relevant professional groups as possible (including health, education and social workers, child care professionals, asylum and immigration authorities, the police, public prosecutors, other law enforcement officials, judges and politicians at all levels). They need to be provided with accurate information about the practice and applicable human rights norms and standards with a view to promoting a change in attitudes and behaviours of their group and the wider community – CEDAW/C/GC/31-CRC/C/GC/18.

⁷⁴⁸ Paragraph 56, CEDAW/C/GC/31-CRC/C/GC/18.

and skills about women's and children's rights, as well as victim handling.⁷⁴⁹ Additionally, the joint General Recommendation/General Comment prompts states to include those serving in ADR and traditional justice systems in human rights training programmes.⁷⁵⁰

CRC General Comment No. 13 also supports building the capacity of personnel in both formal and informal structures. It requires states to provide initial and in-service general and role-specific training to all professionals and non-professionals working with, and for children, including traditional and religious leaders – so that they can protect children from all forms of physical or mental violence.⁷⁵¹ The CRC Committee prefers that educational measures towards addressing attitudes, traditions, customs and behavioural practices that condone and promote VAC should be implemented under the state's responsibility.⁷⁵²

The joint ACHPR/ACERWC General Comment recommends that training programmes should be implemented for prosecutors, court personnel, national human rights institutions, civil society organisations (CSOs) supporting child marriage victims, and statutory bodies.⁷⁵³ Additionally, states should 'conduct trainings and capacity building workshops for marriage and birth registration officials, teachers, health providers, judicial officers, and religious, community and traditional leaders' – to enlighten them

⁷⁴⁹ Paragraphs 70-72(c), CEDAW/C/GC/31-CRC/C/GC/18.

⁷⁵⁰ The training should be on human rights and the appropriate application of key human rights principles. Traditional and religious leaders and professional groups should receive with accurate information about harmful practices and applicable human rights norms and standards – Paragraph 69, CEDAW/C/GC/31-CRC/C/GC/18.

⁷⁵¹ Paragraph 44(d), CRC/C/GC/13.

⁷⁵² Such measures should encompass well-programmed training/education undertakings targeted at a wide range of government and civil society professionals and institutions – Paragraph 44, CRC/C/GC/13.

⁷⁵³ Paragraph 40, joint ACHPR/ACERWC General Comment.

of laws proscribing child marriage and rights of children to be protected from child marriage.⁷⁵⁴

When it comes to interventions coined ‘awareness raising,’ CEDAW General Recommendation No. 35 proposes that these programmes should target women and men at all societal levels; education, health, social services and law enforcement personnel and other professionals and agencies involved in prevention and protection responses; traditional and religious leaders; and perpetrators of any form of GBV.⁷⁵⁵ The joint CEDAW General Recommendation/CRC General Comment stipulates that traditional and religious leaders, should be given accurate information about applicable human rights norms in order to renew their thinking.⁷⁵⁶

Furthermore, the joint CEDAW General Recommendation/CRC General Comment advises states to raise awareness of the causes and consequences of harmful practices through dialogue with relevant stakeholders.⁷⁵⁷ Awareness-raising programmes targeting state structures should engage decision-makers, relevant programmatic staff and key professionals working within local and national government agencies.⁷⁵⁸ Personnel within national human rights institutions should also be awakened to the human rights implications of harmful practices so that they can focus on eliminating these practices.⁷⁵⁹

CEDAW concluding observations of *all* the 20 reviewed African State Party reports are crammed with suggestions regarding using widespread and targeted awareness-raising (especially for traditional leaders, who are custodians of culture) to substantively tackle harmful practices. Even the 2015 CEDAW concluding observations on Malawi’s State Party Report

⁷⁵⁴ Paragraph 43, joint ACHPR/ACERWC General Comment.

⁷⁵⁵ Paragraph 30(b)(ii), CEDAW/C/GC/35.

⁷⁵⁶ Paragraph 69, CEDAW/C/GC/31-CRC/C/GC/18.

⁷⁵⁷ Paragraph 56, CEDAW/C/GC/31-CRC/C/GC/18.

⁷⁵⁸ Paragraphs 80(b), CEDAW/C/GC/31-CRC/C/GC/18.

⁷⁵⁹ Paragraphs 80(e), CEDAW/C/GC/31-CRC/C/GC/18.

recommended 'comprehensive education and awareness raising programmes targeting women and men at all levels of society, with a particular focus on traditional leaders'.⁷⁶⁰

The above demonstrates that international human rights jurisprudence on harmful practices considers human rights education and awareness raising, including of traditional leaders, as a key step in creating an enabling environment for transforming traditional practices harmful to women and children.⁷⁶¹ This begs the question: who is the jurisprudence expecting to be responsible for designing and facilitating education and awareness-raising interventions?

4.4.3.2 Conceptualisers of education and awareness-raising interventions: Positions of the state, CSOs and traditional leaders

The CEDAW, CRC and ACHPR/ACERWC jurisprudence on harmful practices recommends that states should design and implement awareness-raising and education/capacity-building programmes. The jurisprudence is partially noncommittal about the need for the state to partner with CSOs and other local allies (norm translators/vernacularisers) in developing relevant programmes. For example, CRC General Comment No. 4 places on 'State Parties' the onus of developing and implementing awareness-raising campaigns and education programmes to overcome harmful traditional practices.⁷⁶² The joint ACHPR/ACERWC General Comment asserts that enforcement and awareness will only occur if states train all relevant stakeholders,

⁷⁶⁰ Paragraph 21(a), *Concluding Observations on the Seventh Periodic Report of Malawi*, 24 November 2015, CEDAW/C/MWI/CO/7.

⁷⁶¹ Paragraph 24(t)(ii), U.N. Doc. A/47/38 (CEDAW General Recommendation No. 19); Paragraph 20, CRC/GC/2003/4; Paragraph 44, CRC/C/GC/13; Angela M. Banks, 'CEDAW, Compliance, and Custom: Human Rights Enforcement in Sub-Saharan Africa,' (2009), 834.

⁷⁶² Paragraph 20, CRC/GC/2003/4.

especially government officials, police and the judiciary to protect girls and boys from child marriage and its effects.⁷⁶³

Even CEDAW concluding observations on African State Party reports demonstrate that states are rarely encouraged to engage (other) vernacularisers⁷⁶⁴ in the developmental stages of national strategies or plans for the elimination of harmful practices. Out of the 20 concluding observations reviewed, only Madagascar was specifically tasked to design public education programmes in collaboration with civil society.⁷⁶⁵ For countries such as Angola, Comoros, Democratic Republic of Congo (DRC), Ghana, Equatorial Guinea, Togo and Zimbabwe,⁷⁶⁶ vernacularisers were not acknowledged at the level of formulating awareness-raising programmes, but only during programme implementation. This approach locates the development of awareness raising and education interventions primarily on the state dais. Though, in reality the state cannot be a 'unitary actor',⁷⁶⁷ vernacularisers can proficiently advocate for and influence the vernacularisation of human rights norms if they participate in the conceptualisation of national programmes.

⁷⁶³ Paragraph 63, joint ACHPR/ACERWC General Comment.

⁷⁶⁴ Chapter 3 has featured 'vernacularisers/translators' as the domestic actors who facilitate the transmission of human rights ideas to local stages. These can be national elites, local activists, mid-level social activists, human rights lawyers, feminist NGO leaders, academics, funders etc – see section 3.4.2.3 of the thesis.

⁷⁶⁵ Paragraph 19(c), *Concluding Observations on the Combined Sixth and Seventh Periodic Reports of Madagascar*, 9 March 2016, CEDAW/C/MDG/CO/6-7.

⁷⁶⁶ *Concluding Observations on the Sixth Periodic Report of Angola*, 27 March 2013, CEDAW/C/AGO/CO/6; *Concluding Observations on the Initial to Fourth Periodic Reports of Comoros*, 8 November 2012, CEDAW/C/COM/CO/1-4; *Concluding Observations on the Sixth and Seventh Periodic Reports of Democratic Republic of Congo*, 30 July 2013, CEDAW/C/COD/CO/6-7; *Concluding Observations on the combined Sixth and Seventh Periodic Report of Ghana*, 14 November 2014, CEDAW/C/GHA/CO/6-7; *Concluding Observations on the Sixth Periodic Report of Equatorial Guinea*, 9 November 2012, CEDAW/C/GNQ/CO/6; *Concluding Observations on the combined Sixth and Seventh Periodic Report of Togo*, 8 November 2012, CEDAW/C/TGO/CO/6-7; *Concluding Observations on the combined Second, Third, Fourth and Fifth Periodic Reports of Zimbabwe*, 23 March 2012, CEDAW/C/ZWE/CO/2-5.

⁷⁶⁷ Andrew P Cortell and James W Davis Jr, 'Understanding the Impact of International Norms: A Research Agenda,' (2000), 454; Jeffrey T. Checkel, 'Norms, Institutions, and National Identity in Contemporary Europe,' (1999), 96.

Part of the jurisprudence draws in archetypal vernacularisers by explicitly mandating states to design awareness-raising campaigns and education programmes together with CSOs. For example, CEDAW General Recommendation No. 35 requires states to develop and implement effective awareness and education measures⁷⁶⁸ with the active participation of women's organisations and marginalised groups of women and girls.⁷⁶⁹ Similarly, the 'ethnicity and minority sensitive' targeted outreach activities under CEDAW General Recommendation No. 33 are to be designed in close cooperation with women's and other relevant organisations.⁷⁷⁰ Additionally, states are to cooperate with non-state actors in capacity-building and training programmes for justice system personnel.⁷⁷¹

Also, CRC General Comment No. 13 stipulates that both state and CSOs should facilitate educational measures, though the state is given overall responsibility.⁷⁷² As seen in Chapter 3, the involvement of CSOs at programme development stage is crucial because as vernacularisers, they have 'double consciousness' – which enables them to engage in issues from both human rights and local perspectives and contexts.⁷⁷³

Besides trusting state actors and CSOs, jurisprudence developed in 2014, 2016 and 2017 respectively has pushed the frontiers and embraced local/traditional leaders in the pipeline that designs programmes, and transports human rights norms to the ground. The joint CEDAW General Recommendation/CRC General Comment promotes the

⁷⁶⁸ To address and eradicate the stereotypes, prejudices, customs and practices that condone or promote gender-based VAW and underpin the structural inequality of women with men.

⁷⁶⁹ Paragraph 30 (b), CEDAW/C/GC/35.

⁷⁷⁰ Paragraph 17 (c), CEDAW/C/GC/33.

⁷⁷¹ To ensure that religious, customary, indigenous and community justice systems harmonise their norms, procedures and practices with the human rights standards – Paragraph 64 (a), CEDAW/C/GC/33.

⁷⁷² Paragraph 44, CRC/C/GC/13.

⁷⁷³ See note 355.

engagement of all relevant stakeholders (including ‘local leaders,’ practitioners, grassroots organisations and religious communities) in preparing and implementing public discussion activities for eliminating harmful practices.⁷⁷⁴ Similarly, CEDAW General Recommendation No. 34 invites states to adopt outreach and support programmes, awareness-raising and media campaigns to eliminate harmful practices and stereotypes in collaboration with ‘traditional leaders’ and CSOs.⁷⁷⁵

The language of ‘collaboration’ is also found in the joint ACHPR/ACERWC General Comment, which urges states ‘to facilitate dialogue, and promote collaboration between all stakeholders and particularly traditional, community and religious leaders, in preventing child marriage’.⁷⁷⁶ However, unlike CEDAW General Recommendation No. 34 that specifies collaboration with traditional leaders when the state is ‘adopting’ awareness programmes, the nature of collaboration in the joint General Comment could be variedly interpreted. It could either mean that traditional, community and religious leaders should be involved in ‘implementing’ child marriage preventative strategies or that they should in fact also participate in ‘developing’ such strategies.

But whatever the case, the fact that the above jurisprudence is not co-opting traditional leaders as ‘mere targets’ (of awareness and education) is certainly a paradigm shift. It addresses Bank’s⁷⁷⁷ concern that CEDAW jurisprudence fails to guide states to collaborate with providers of customary justice as meaning-making institutions and actors.⁷⁷⁸ By conscripting traditional leaders in both the formulation and facilitation of human rights-based awareness

⁷⁷⁴ Paragraph 81(f), CEDAW/C/GC/31-CRC/C/GC/18.

⁷⁷⁵ Paragraph 23, UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General Recommendation No. 34 on the Rights of Rural Women* (2016), CEDAW/C/GC/34.

⁷⁷⁶ Paragraph 62, joint ACHPR/ACERWC General Comment.

⁷⁷⁷ Angela M. Banks, ‘CEDAW, Compliance, and Custom: Human Rights Enforcement in Sub-Saharan Africa,’ (2009).

⁷⁷⁸ *Ibid.*, 784.

programmes against harmful practices, traditional leaders are effectively being endorsed as the contemporary vernaculariser too.

One would argue that it is unsurprising that traditional leaders have weight in CEDAW General Recommendation No. 34, the joint CEDAW General Recommendation/CRC General Comment and the joint ACHPR/ACERWC General Comment (which primarily about 'rural dealings'⁷⁷⁹) since this is the best opportunity to capitalise on the territorial influence of traditional leaders. Nevertheless, the development is a fresh twist given the circumspect attitude that the same jurisprudence holds towards plural justice mechanisms, as the next section demonstrates.

Therefore, Chapter 9 analyses how this new curve in the jurisprudence, together with the reality of how traditional leaders are translating human rights norms through community bylaws in Malawi, is challenging two well-accepted imageries of the vernaculariser. First, that the vernaculariser is the 'outsider' who comes into a community to frame/vernacularise human rights norms for the benefit of local community members.⁷⁸⁰ Second, that the vernaculariser is both transnationally and locally cultured and able to readily convert human rights issues from transnational and local perspectives (and vice versa) depending on the podium.⁷⁸¹

Still, one should be mindful that the positive shifts notwithstanding, section 4.4.3.1 has illustrated that the extent to which traditional leaders are entrusted with the responsibility to facilitate norm internalisation pales compared to the high demand in the jurisprudence that they should be 'targets' of awareness-

⁷⁷⁹ CEDAW General Recommendation No. 34 is about the rights of rural women; the joint CEDAW General Recommendation/ CRC General Comments is exclusively about harmful practices; and the joint ACHPR/ACERW General Comment is exclusively on ending child marriage.

⁷⁸⁰ See section 3.4.2.3 of the thesis.

⁷⁸¹ Ibid.

raising and capacity-building programmes. In fact, out of the reviewed 20 CEDAW Committee concluding observations on African State Party reports, the Committee recognised traditional leaders as collaborators in awareness-raising efforts only in seven concluding observations (for Gabon,⁷⁸² Guinea,⁷⁸³ Cameroon,⁷⁸⁴ DRC,⁷⁸⁵ Angola,⁷⁸⁶ Togo,⁷⁸⁷ and Zimbabwe⁷⁸⁸). Clearly, the very responsibility of traditional leaders to culturally sanitise ‘the other’ comes with the duty to first subject ‘the self’ to the internalisation dosage.

4.4.4 The Position of Plural and Community Law in the Jurisprudence

Jurisprudence regarding alternative dispute resolution (ADR) and plural legal systems is relevant because the community bylaws under study could fall under either. CEDAW General Recommendation No. 33 describes ADR processes as mandatory or optional systems that many jurisdictions have adopted for mediation, conciliation, arbitration and collaborative resolutions of disputes. ADR is mainly applied in issues of family law, domestic violence, amongst others.⁷⁸⁹ Informal ADR processes include ‘non-formal indigenous courts and chieftaincy-based ADR, where Chiefs and other community leaders resolve interpersonal disputes’.⁷⁹⁰ Community bylaws could operate as a ‘chieftaincy-based ADR’ mechanism.

⁷⁸² Paragraph 21(c), *Concluding Observations on the Sixth Periodic Report of Gabon*, 11 March 2015, CEDAW/C/GAB/CO/6.

⁷⁸³ Paragraph 31(a), *Concluding Observations on the Combined Seventh and Eight Periodic Report of Guinea*, 14 November 2014, CEDAW/C/GI/CO/7-8.

⁷⁸⁴ Paragraph 17(a), *Concluding Observations on the Combined Fourth and Fifth Periodic Reports of Cameroon*, 28 February 2014, CEDAW/C/CMR/CO/4-5.

⁷⁸⁵ Paragraph 20(a), *Concluding Observations on the Sixth and Seventh Periodic Reports of Democratic Republic of Congo*, 30 July 2013, CEDAW/C/COD/CO/6-7.

⁷⁸⁶ Paragraph 18(a), *Concluding Observations on the Sixth Periodic Report of Angola*, 27 March 2013, CEDAW/C/AGO/CO/6.

⁷⁸⁷ Paragraph 21(a), *Concluding Observations on the combined Sixth and Seventh Periodic Report of Togo*, 8 November 2012, CEDAW/C/TGO/CO/6-7.

⁷⁸⁸ Paragraph 22(a), *Concluding Observations on the combined Second, Third, Fourth and Fifth Periodic Reports of Zimbabwe*, 23 March 2012, CEDAW/C/ZWE/CO/2-5.

⁷⁸⁹ Paragraph 57, CEDAW/C/GC/33.

⁷⁹⁰ Paragraph 57, CEDAW/C/GC/33.

Relatedly, CEDAW General Recommendation No. 33 defines plural legal systems as ‘religious, customary, and indigenous or community laws and practices that sometimes legally coexist with state laws, regulations, procedures and decisions’.⁷⁹¹ By individually mentioning customary law and community law, the CEDAW Committee contradicts Onyango’s⁷⁹² assertion that customary law is community law.⁷⁹³ Therefore, the community bylaws would fit under the jurisprudence’s ‘community law’ label, especially as the jurisprudence considers it immaterial ‘whether or not such laws have categorical legal basis’.⁷⁹⁴

Examined chronologically, the jurisprudence on harmful practices has been unstable in its endorsement of ADR and legal pluralism systems as potential mechanisms for addressing harmful practices. The joint CEDAW General Recommendation/CRC General Comment concedes that ADR or traditional justice systems could sometimes be deployed to respond to harmful practices.⁷⁹⁵ However, the joint General Recommendation/General Comment affirms that states’ obligations under CEDAW and the CRC⁷⁹⁶ prohibiting harmful practices supersede customary, traditional, or religious laws.⁷⁹⁷ Thus the joint General Recommendation/General Comment recommends the instant repeal of *all* legislation, traditional, customary or religious laws that condone, allow, or stimulate harmful practices.⁷⁹⁸

Then, while acknowledging the relevance of ADR and pluralist processes, CEDAW General Recommendation No. 33 (2015) cautions that these flexible and cheaper processes may harbour patriarchal values that embolden

⁷⁹¹ Paragraph 61, CEDAW/C/GC/33.

⁷⁹² Peter Onyango, *African Customary Law: An Introduction*, (2013).

⁷⁹³ *Ibid.*, 134.

⁷⁹⁴ Paragraph 61, CEDAW/C/GC/33.

⁷⁹⁵ Paragraph 71, CEDAW/C/GC/31-CRC/C/GC/18.

⁷⁹⁶ And other international human rights standards.

⁷⁹⁷ Paragraph 54(b), CEDAW/C/GC/31-CRC/C/GC/18.

⁷⁹⁸ Paragraph 54(c), CEDAW/C/GC/31-CRC/C/GC/18.

perpetrators, violate women's rights, and hinder women's access to justice.⁷⁹⁹ Therefore, it utterly disapproves subjecting any case of VAW to ADR processes.⁸⁰⁰ And, like the joint General Recommendation/General Comment, General Recommendation No. 33, expects multiple sources of law (notwithstanding their legal viability⁸⁰¹) within states to respect and protect women's rights according to CEDAW and other human rights principles.⁸⁰² Thereafter, CEDAW General Recommendation No. 35 (2017) reverts to the position accommodating ADR, only disputing the 'mandatory' reference of violence cases to ADR procedures; and calling for ADR procedures to be strictly regulated.⁸⁰³ It further urges plural legal systems to protect victims of gender-based VAW and guarantee them access to justice and effective remedies.⁸⁰⁴

The fact that the jurisprudence between 2014 and 2017 exhibits fluctuating positions on whether VAW (which includes harmful practices) should be subjected to ADR, including within traditional mechanisms, reveals that the jurisprudence on harmful practices itself is a living negotiation site.⁸⁰⁵ Indeed, Krook and True⁸⁰⁶ have observed that norms evolve as their content is subjected to continuous scrutiny or affected by emerging developments.⁸⁰⁷ Zwingel⁸⁰⁸ has also called norms 'never finished products/content-in-

⁷⁹⁹ Paragraphs 57&62, CEDAW/C/GC/33.

⁸⁰⁰ Paragraph 58(c), CEDAW/C/GC/33. See also note 674, which mentions the similarity between this recommendation and that made in CEDAW concluding observations on Mali's State Party report.

⁸⁰¹ From a formal law point of view.

⁸⁰² Paragraph 61, CEDAW/C/GC/33.

⁸⁰³ Paragraph 32(b), CEDAW/C/GC/35.

⁸⁰⁴ Paragraph 29(b), CEDAW/C/GC/35.

⁸⁰⁵ As seen above, the jurisprudence went from a guarded acknowledgement of ADR as a possible avenue for such cases in 2014; to 'absolutely not' in 2015; and back to a cautious 'yes' in 2017.

⁸⁰⁶ Mona Lena Krook and Jacqui True, 'Rethinking the Life Cycles of International Norms "The United Nations and the Global Promotion of Gender Equality" ' *European Relations* (18) (2012)

⁸⁰⁷ *Ibid.*, 117.

⁸⁰⁸ Susanne Zwingel, 'Women's Rights Norms as Content-in-motion and Incomplete Practice,' (2017).

motion'.⁸⁰⁹

In recognising both the risk and the potential of plural justice systems to women's access to justice and women's rights generally, the jurisprudence draws attention to debates about living customary law, cultural relativism *and* universalism. CEDAW General Recommendation No. 33 expects states to reconcile existing plural justice systems with CEDAW by, among others, formally recognising and codifying religious, customary, indigenous, community and other systems.⁸¹⁰ As discussed in Chapter 3, the codification of customary law or equivalent is contested by living customary law scholars. Furthermore, the pre-eminence of education and awareness-raising measures to promote norms protecting women from harmful practices in the jurisprudence⁸¹¹ betrays the commitment of the jurisprudence to universalism (the notion that all societies must protect certain minimum standards of human dignity⁸¹²) and not cultural relativism.

This bias towards universalism is underlined by the jurisprudence's rejection of any form of harmful practices and VAW and VAC, both in law and in practice. Rejection of cultural relativism is evident in the various instances when the jurisprudence denotes that culture and tradition directly incite harmful practices against women and girls.⁸¹³ This universalistic approach has been justified by concerns that 'the respect of cultural differences' may eventually translate into women's rights invasions.⁸¹⁴

The implication of the jurisprudence's positivist approach to human rights is that the CEDAW and CRC are not seen as 'legal codes amongst the several

⁸⁰⁹ Ibid., 676.

⁸¹⁰ Paragraph 62, CEDAW/C/GC/33.

⁸¹¹ See section 4.4.3 of the thesis.

⁸¹² Sally Engle Merry, 'Constructing a Global Law: Violence against Women and the Human Rights System,' (2003), 944.

⁸¹³ See Paragraph 14, CEDAW/C/GC/35; Paragraphs 5, 6 & 8, CEDAW/C/GC/31-CRC/C/GC/18; Paragraph 12, CRC/C/GC/13.

⁸¹⁴ Susan Moller Okin, 'Feminism, Women's Human Rights and Cultural Differences,' *Hypatia* (13)2 (1998), 32-52 36.

alternatives that exist in a plural legal field'.⁸¹⁵ Yet, it has been proven that in plural legal systems, the enthusiasm by a treaty-monitoring body to universalise could lead to the misunderstanding of local 'legal' arrangements that communities find functional.⁸¹⁶ This is a risk that orderings, such as the community bylaws on child marriage and harmful practices in rural Malawi face, especially when they come across as potentially diluting statutory law and human rights standards. Indeed, the jurisprudence suggests that the internalisation of the norms protecting women from harmful practices either within ADR or other traditional processes would be incomplete if international human rights standards are shortchanged.

4.5 CONCLUSION

This chapter has analysed international human rights law and jurisprudence on harmful practices relevant to the objective of this thesis 'to understand how community bylaws and harmful practices are being conceptualised and whether such understanding is consistent with domestic and international human rights law norms'. UN and AU human rights law has established international human rights norms protecting women from harmful practices. Jurisprudence has moved from the absence of, to a concrete definition and conceptualisation of harmful practices under the Maputo Protocol and the joint CEDAW General Recommendation/CRC General Comment (and under the joint ACHPR/ACERWC General Comment in respect of child marriage).

The chapter has shown that an inquiry into how community bylaws on child marriage and other harmful practices are internalising international human

⁸¹⁵ Sally Engle Merry, 'Human Rights and Transnational Culture: Regulating Gender Violence Through Global Law' (2006c), 53-76 74.

⁸¹⁶ *Ibid.*, 59 & 72. Merry provides an example regarding how the CEDAW Committee, in deliberations of a Fiji State Party report and ensuing concluding observations, instinctively rushed to demand the scraping of a useful and entrenched reconciliatory local mechanism called *bulubulu*. The committee was reacting to a concern expressed by the State Party delegation that *bulubulu* was sometimes being misused to handle rape cases. And instead of condemning this element of abuse, the committee insisted that *bulubulu* be abolished, which according to the Fiji delegation, is a nonstarter as it is a Fiji way of life.

rights norms cannot overlook assessing how the bylaws reflect key principles of CEDAW and the Maputo Protocol (gender equality and non-discrimination); and the core principles of the CRC and the African Children's Charter (especially the best interest of the child; non-discrimination; and children's right to survival; development and protection/life).

A key aspect of the international human rights law and jurisprudence on harmful practices are measures that states are expected to pursue to eliminate harmful practices. This chapter has demonstrated that international law and jurisprudence suggests that internalisation of norms protecting women from harmful practices should address three programmatic areas, predominantly at the formal/macro level. First, there is a resounding call for states to prioritise legislative measures to eliminate harmful practices. The jurisprudence recommends criminalising harmful practices, and enforcing criminal sanctions. Chapter 8 exposes that penalties are central to the community bylaws in rural Malawi. Therefore, examining how international human rights norms are influencing the community bylaws entails understanding the bylaws' punishment schemes and how they also shape the course of horizontal vernacularisation at local level.

Notably, community bylaws (community laws) are not a legislative measure under the jurisprudence. Rather, CEDAW jurisprudence suggests that community laws fall under ADR and plural justice systems and recommends that plural justice systems should be harmonised with CEDAW through codification. Over the years, the jurisprudence seems unstable about whether to subject VAW to ADR. This inconclusiveness confirms that international human rights norm negotiation is on-going business.

Second, apart from legal measures, the jurisprudence promotes state-level/led administrative measures in addressing harmful practices. It expects states to adopt policy and other institutional frameworks

(including comprehensive national strategies/action plans), institute services for victims and provide budgetary resources. Services for victims are a closer intervention to the community bylaws. Chapter 8 assesses whether any of the recommended services are part of the community bylaws regime.

Third, jurisprudence on harmful practices stresses the need for human rights capacity building, training, awareness raising as a strategy for ensuring that different duty bearers are internalising international standards on harmful practices and applying them to their core business. Apart from professional groups, traditional leaders are a notable target of such interventions under both general comments/general recommendations, and CEDAW concluding observations of African State Party reports.

Some of the jurisprudence tasks the state to design and implement awareness-raising and education/capacity-building programmes singularly, while some jurisprudence requires this to be done in collaboration with CSOs and traditional leaders. The recognition of traditional leaders is novel considering that the jurisprudence is generally nervous about plural justice mechanisms. The new curve begs Chapter 9 to ponder how traditional leaders are involved in translating human rights norms through community bylaws in Malawi, and the implications of this activism on how norm internalisation scholarship ordinarily conceptualises the vernaculariser.

CHAPTER 5

**THE INFLUENCE OF INTERNATIONAL HUMAN RIGHTS NORMS
PROTECTING WOMEN FROM HARMFUL PRACTICES ON THE LEGAL
AND INSTITUTIONAL CULTURE IN MALAWI**

5.1 INTRODUCTION

In striving to understand whether and how international human rights norms are shaping and influencing the emergence and conceptualisation community bylaws on child marriage and other harmful practices in rural Malawi, Chapter 4 has established that legislation and other formal measures are highly valued norm internalisation entry points within states. Thus this chapter explores how formal law and policy in Malawi is internalising and interacting with international human rights norms.

The chapter first examines the history of policy and legislation on gender equality and harmful practices in Malawi, covering the colonial, independence and post-independence periods. Particularly critical for purposes of this thesis is the post-independence period, which saw the adoption of the current Constitution of the Republic of Malawi. Thereafter, the chapter analyses how the Constitution entrenches women's rights in the context of harmful practices and how it positions informal systems, customary law and Chiefs. It then examines the Constitutional vision of how international law should be domesticated and assesses how the vision has translated into policy and legislative reforms on harmful practices.

The chapter demonstrates that, to a large extent, Malawi has achieved first-level norm internalisation by adopting laws and policies that assimilate and domesticate international law. However, first-level norm internalisation has

not had much impact on the ground, as existing legislation and other formal measures for addressing harmful practices remain largely detached from rural people. Available strategies for second-level norm internalisation fall short of embracing the reality that human rights appropriation does not always formally flow from the top to rural communities, but that human rights appropriation and translation could be a horizontal exercise too in which Chiefs, in collaboration with their communities, are central players.

5.2 A HISTORY OF GENDER EQUALITY AND HARMFUL PRACTICES IN MALAWI

Efforts by the state and Christian missionaries provide a good historical impression of legal and extra-legal strategies that were engaged to address harmful practices affecting women and girls in the colonial and independence epochs. The ensuing narrative first interrogates developments after Malawi (then Nyasaland) was declared as a British Protectorate on 14 May 1891.⁸¹⁷ Thereafter, it discusses legal and policy strategies towards addressing harmful practices during Kamuzu Banda's autocratic rule after Malawi attained independence on 5 July 1964.

5.2.1 The Colonial Age

Discussing harmful practices in the context of the colonial period is important to this study because it completes the understanding of where Malawi has come from in addressing harmful practices to reach this current age where community bylaws (besides international jurisprudence and legislation) have entered the scene as means of addressing harmful practices.

During Malawi's 70 years under colonial rule, gender inequality was institutionalised through the introduction of the cash economy, which devalued women's labour, excluded women from land ownership, and

⁸¹⁷ It was renamed 'British Central Africa' in 1893 and 'Nyasaland Protectorate' in 1907.

increased male labour migration.⁸¹⁸ African women did not participate in policy or law related initiatives of the Executive and Legislative Councils.⁸¹⁹ The first policy shift that acknowledged women as active participants in politics was implemented in 1958⁸²⁰ at a party level when Kamuzu Banda, then a new leader of the Nyasaland African Congress, created women's and youth wings of the party.⁸²¹

Colonial legislative history demonstrates some effort to address harmful practices affecting women and girls. For example, Article 15(2) of the British Central Africa Order in Council (1902) contained a reception clause for English law in Malawi while Article 20 recognised the applicability of customary law to Africans provided that it passed the repugnancy test.⁸²² However, polygamy and discriminatory inheritance practices were not declared repugnant.⁸²³

5.2.1.1 *Child marriage in colonial times*

The colonial period witnessed both ecclesiastical and state action against child marriage. Ecclesiastically, while literature mostly covers missionary efforts to address child marriage, there was also indigenous activism by a local reverend, John Chilembwe, who founded the Providence Industrial Mission in Chiradzulu.⁸²⁴ In 1900, Chilembwe agonised over the cultural acceptance

⁸¹⁸ Francis B. Nyamnjoh, *Rights and the Politics of Recognition in Africa* (Zed Books, 2004), 72-73.

⁸¹⁹ UN Women Malawi, 'The Gender Journey: A Historical Perspective 1891-2015 (Draft)', (2016), 7. The report further explains that and because all government structures at the central, provincial and district level were male dominated, even careers for white women were limited to secretaries or nurses.

⁸²⁰ Six years before independence.

⁸²¹ UN Women Malawi, 'The Gender Journey: A Historical Perspective 1891-2015 (Draft)', 75.

⁸²² Franz von Benda-Beckman, *Legal Pluralism in Malawi: Historical Development 1858-1970 and Emerging Issues* (2007), 37. However, African customary law was applicable on the conditions that: (a) it was not repugnant to justice, equity, or good morality and (b) it was neither in its terms nor by necessary implication in conflict with any written law - Antony Allott, *New Essays in African Law* (1970) cited in Muna Ndulo, 'African Customary Law, Customs, and Women's Rights,' (2011), 96.

⁸²³ Muna Ndulo, 'African Customary Law, Customs, and Women's Rights,' (2011), 96.

⁸²⁴ Also a leading martyr.

and prevalence of child marriage and early pregnancy in Chiradzulu.⁸²⁵ Referring to his wife's role in empowering women,⁸²⁶ Chilembwe wrote, 'Mrs Chilembwe . . . is seeking to prevent early marriage amongst girls'.⁸²⁷

Between 1898 to 1931, the Nkhoma Synod of the Church of Central African Presbyterians in Malawi (then under the Dutch Reformed Church Mission, DRCM),⁸²⁸ grappled with setting the minimum age of marriage for African converts, over time shifting between puberty and the ages of 15, 18 and 17 for women; and 21 and 19 for men.⁸²⁹ While the unsteady age could be seen as a tussle between Christianity against tradition, or Western⁸³⁰ and African culture, underlying the church's motives was the desire to protect women.⁸³¹

As for state measures, efforts to regulate child marriage came through the enactment of the Marriage Act 1903, modeled after the English common law, which prohibited marriage involving persons aged below 21 years unless written consent was obtained from designed persons.⁸³² In 1945, collaboration between churches and the state resulted in the adoption of anti-child marriage language in the African marriages ordinance law prohibiting the celebration

⁸²⁵ UN Women Malawi, 'The Gender Journey: A Historical Perspective 1891–2015 (Draft)', 13.

⁸²⁶ Through sewing and other enterprises.

⁸²⁷ UN Women Malawi, 'The Gender Journey: A Historical Perspective 1891–2015 (Draft)', 13.

⁸²⁸ Isabel Apawo Phiri, *Women, Presbyterianism and Patriarchy: Religious Experience of Chewa Women in Central Malawi*, (2001).

⁸²⁹ *Ibid.*, 72-73. Phiri documents that in 1898, the DRMC issued an executive ruling that the minimum age of marriage should be either puberty or 15 years. In 1903, the Mission Council pronounced that a man who married a girl who had not reached puberty could not join baptismal classes. An extension of this ruling in 1907 prohibited Christians from giving their pre-puberty children and sisters in marriage. In 1908, the church forbade the betrothal of children before puberty. In 1930, it revised the minimum age of marriage to 18 years for women and 21 years for men, only to adjust to 17 years for women and 19 years for men respectively in 1931. Any Christian who allowed his or her child to marry before the recommended age would be suspended from taking Holy Communion for 18 months.

⁸³⁰ That is, the desire for missionaries to align the minimum age of marriage in Malawi with that in their home countries.

⁸³¹ Isabel Apawo Phiri, *Women, Presbyterianism and Patriarchy: Religious Experience of Chewa Women in Central Malawi*, (2001), 72.

⁸³² Section 11 (b) Marriage Act (Chapter 25:01).

of marriage where the female party was below puberty age.⁸³³ Even back then, as is today, victims of child marriage were predominantly girls.⁸³⁴

These efforts show that anti-child marriage advocacy has a historical basis in Malawi that predates the prevailing international human rights norms. ‘Vernacularisation’ was at play even in colonial times, as proven by the fact that ‘natives’ were not appropriating missionaries’ anti-marriage proclamations blindly, but were involved in negotiation and deliberation with the missionaries resulting, for instance, in the DCRM’s shifting positions on the minimum marriage age.⁸³⁵

5.2.1.2 *Polygamy in the colonial era*

During colonial rule, Christian missionaries in Malawi attempted to impose monogamous marriages upon their converts,⁸³⁶ although the statutory position on polygamy in Christian marriages was unclear. As evident through doctrines of the DCRM in Central Malawi and the Livingstonia Mission in Northern Malawi, the anti-polygamy stance of the missionaries preceded legislative steps. In 1899, Elmslie,⁸³⁷ a missionary in Northern Malawi, described polygamy ‘as an evil institution that allowed old men to bid for young girls without the latter’s consent.’⁸³⁸ In 1903, the DCRM banned polygamy amongst African Christians, requiring polygamists to leave their

⁸³³ Isabel Apawo Phiri, *Women, Presbyterianism and Patriarchy: Religious Experience of Chewa Women in Central Malawi*, (2001), 73.

⁸³⁴ For example, according to the Malawi Demographic Health Survey child marriage is at 47 per cent for girls compared to 8 percent for boys – National Statistical Office (NSO) Malawi and ICF, *Malawi Demographic and Health Survey 2015-16*, *ibid*, 57.

⁸³⁵ Isabel Apawo Phiri, *Women, Presbyterianism and Patriarchy: Religious Experience of Chewa Women in Central Malawi*, (2001), 64.

⁸³⁶ Simon Roberts, ‘A Revolution in the Law of Succession of Malawi,’ *Journal of African Law* (1966), 21-32 21.

⁸³⁷ Walter Angus Elmslie is the first missionary in Northern Malawi to write a major work about the people in the Livingstonia Mission area in his book ‘Among the Wild Ngoni’s 1899) –cited in Peter G Forster, ‘Missionaries and Anthropology: The Case of the Scots in Northern Malawi,’ *Journal of Religion in Africa* (16) (1986), 101-120 104.

⁸³⁸ *Ibid.*, 105.

wives except the first one.⁸³⁹ In the Livingstonia Mission, while the ban of polygamy was uncontested amongst missionaries, conservative theologians insisted that all but the first wife should be divorced, while liberal theologians were flexible on which wife a polygamist could keep.⁸⁴⁰

State legislation prohibiting polygamy was introduced in 1912, but only polygamy among Christian Africans was forbidden.⁸⁴¹ However, the 1923 African Marriage (Christian Rites) Registration Act⁸⁴² did not ban polygamy if a person getting married under the Act had existing marriages at customary law.⁸⁴³ In 1948, Holmes of Zambezi Mission urged the government to legislate against polygamy for all Africans.⁸⁴⁴ The government rejected this call, reiterating that it could not impose a 'Christian law' in a secular state.⁸⁴⁵

To this day, the state is yet to absolutely ban polygamy despite that the international human rights framework has increasingly framed polygamy as a human rights issue.

⁸³⁹ Isabel Apawo Phiri, *Women, Presbyterianism and Patriarchy: Religious Experience of Chewa Women in Central Malawi*, (2001), 74. Phiri reports that in 1903, DMRC issued a ruling that a polygamous man should not be allowed into the baptismal class. He would only be accepted if he divorced the rest of his wives, except the first one. The ruling was extended in 1905 to prevent Christians from giving their sisters and daughters in marriage to a polygamous man.

⁸⁴⁰ Peter G Forster, 'Missionaries and Anthropology: The Case of the Scots in Northern Malawi,' (1986), 107. Phiri acknowledges that this position utterly disadvantaged the divorced women (see *ibid*), but this issue is outside the scope of this thesis.

⁸⁴¹ Isabel Apawo Phiri, *Women, Presbyterianism and Patriarchy: Religious Experience of Chewa Women in Central Malawi*, (2001), 75.

⁸⁴² That was enacted in 1923 to provide for the registration of African marriages celebrated according to Christian rites.

⁸⁴³ This law (Chapter 25:02 of the Laws of Malawi), was only repealed with the enactment of a comprehensive marriage law in 2015. Section 3 of the old Act provided that 'notwithstanding anything contained in the Marriage Act it shall be permissible for any minister and at any place to celebrate marriage according to the rites of the Church, Denomination or Body to which he belongs between any two Africans: Provided that the celebration of marriage under this Act shall not as regards the parties thereto alter or affect their status or the consequences of any prior marriage entered into by either party according to customary law or involve any other legal consequences whatever.'

⁸⁴⁴ L.M. Holmes, 'How to Combat Temptation to Gross Sin' (paper presented at the first Women Missionary Conference, (undated and location unspecified) 1949) cited in Isabel Apawo Phiri, *Women, Presbyterianism and Patriarchy: Religious Experience of Chewa Women in Central Malawi*, (2001), 76.

⁸⁴⁵ Isabel Apawo Phiri, *Women, Presbyterianism and Patriarchy: Religious Experience of Chewa Women in Central Malawi*, (2001), 76.

5.2.1.3 Colonial attitude towards initiation ceremonies

During colonial times, initiation rites were only challenged by missionaries and not within legislation. Initially, missionaries and mission education⁸⁴⁶ indiscriminately condemned traditional practices such as initiation ceremonies (*chinamwali*).⁸⁴⁷ They overlooked that while customary practices that harm women must certainly be eliminated, other aspects of such customs may be beneficial to women.⁸⁴⁸

The DRMC's executive decisions from 1903 exemplify a deliberate, albeit futile, effort by the church to eliminate initiation ceremonies.⁸⁴⁹ Recognising the ineffectiveness of this attempt, around 1928, the colonial government urged the church to introduce alternative rites.⁸⁵⁰ The DRMC ruled that all children of church members had to attend Christian initiation rites, termed *chilangizo*⁸⁵¹ instead. Having found it impossible to eradicate *chinamwali*, the Roman Catholic Church started implementing Christian *chinamwali* ceremonies in Central Malawi around 1939 by modifying and suppressing

⁸⁴⁶ Mission education was supported by the Protectorate Government through grants. Mission education institutions included Overton Institute under Livingstonia Mission; St. Michael's of the Universities Missions of Central Africa; the Henry Henderson Institute of the Blantyre Mission and the William Murray Teacher Training College of Nkhoma Mission. While boys' education provided them with technical skills girls were channelled through courses in domestic sciences that preserved their reproductive and community roles. The first woman to pass "O" Level Cambridge was Rosemary Kazembe in 1953 – UN Women Malawi, 'The Gender Journey: A Historical Perspective 1891–2015 (Draft)', 20.

⁸⁴⁷ Ibid.

⁸⁴⁸ Johanna E. Bond, 'CEDAW in Sub-Saharan Africa: Lessons in Implementation,' (2014), 261.

⁸⁴⁹ Isabel Apawo Phiri, *Women, Presbyterianism and Patriarchy: Religious Experience of Chewa Women in Central Malawi*, (2001), 62. In 1903, the DRMC made it a condition that members who were eligible for the baptismal class should not attend the initiation ceremony (called *chinamwali* among the Chewa) in order to liberate women from oppressive practices associated with the ceremony. There was belief that the initiation of the pagan girl was accompanied by much cruelty and degradation; the *chinamwali* was associated with *nyau* (a secret cult and ritual dance practiced among the Chewa people); the association of *chinamwali* with low attendance of girls at school; the belief that *chinamwali* was sinful, including from the perspective that it involved sexual initiation by the *fisi* (hyena – see note 120 and Glossary of Chichewa terms).

⁸⁵⁰ Ibid., 63.

⁸⁵¹ Known as 'girls or boys instructions' in English, and these still happen today.

immodesty in the ceremonies.⁸⁵² However, 'pagan' initiation ceremonies were not banned by the state.

5.2.1.4 Conclusion

The colonial efforts to address harmful practices affecting women and girls were a combination of legal and religious frames. While the state interventions were mainly *de jure*, Christian missionaries pursued *de facto* changes although their constituency was limited to African converts. Embedded in the missionaries' desire to address manifestations of sin within the church were interests to safeguard the dignity and welfare of women and girls (analogous to today's human rights motivations).

The ways in which missionaries wrestled with different doctrinal models to address harmful practices depict a striking semblance to the grounded manifestations of vernacularisation of human rights norms today. African Christians were not entirely submissive, but were dynamically engaged in re-interpreting church doctrine in culturally resonant ways. This is evident in the shifting positions the DMRC held on the minimum age of marriage and the adoption, through modification, of Christianised initiation rituals by several Christian denominations.

5.2.2 Harmful Practices During Independence

What follows tracks the existence of gender equality policy and legislative action to address harmful practices during Dr Kamuzu Banda's autocratic rule in Malawi (1964 to 1994).

⁸⁵² Phiri quotes Ian Linden with Jane Lindedn 'Catholics, Peasants and Chewa Resistance in Nyasaland 1889-1939' – Isabel Apawo Phiri, *Women, Presbyterianism and Patriarchy: Religious Experience of Chewa Women in Central Malawi*, (2001), 64.

5.2.2.1 Gender equality policy

After attaining self-government in 1963 and independence in 1964, Malawi became a Republic in 1966 under a new Constitution that did not have Bill of Rights.⁸⁵³ As a result, this Constitution did not guarantee gender equality.⁸⁵⁴ However, Forster⁸⁵⁵ observes that, generally, Banda had a personal concern for Malawian women and instituted broader policies that improved women's conditions.⁸⁵⁶

As to broader development policy, Malawi's first Statement of Development Policies (DEVPOL) of 1971 – 1976 made no mention of any specific policy regarding women.⁸⁵⁷ Things started to change in 1984 when the government formed the National Commission on Women in Development (NCWID).⁸⁵⁸

⁸⁵³ Danwood Mzikenge Chirwa, 'A Full Loaf is Better than Half: The Constitutional Protection of Economic and Social Rights in Malawi,' *Journal of African Law* (2005), 207-241 208 (Chirwa notes that this Constitution moved two steps backwards from its 1964 predecessor by not only failing to recognise socio-economic rights, but civil and political rights too.); Msaiwale Chigawa, 'Concept Paper One: The Fundamental Values of the Republic of Malawi Constitution of 1994' (paper presented at the The Law Commission Constitutional Review Conference, 28-31 March, Lilongwe, Malawi, 2006); Sarai Chisala-Templehoff and Seun Solomon Bakare, 'The Impact of the African Charter and the Maputo Protocol in Malawi,' in *The Impact of the African Charter and Maputo Protocol on Selected African States*, ed. Victoria Oluwasina Ayeni (Pretoria University Press, 2016), 146.

⁸⁵⁴ Linda Semu, 'Kamuzu's Mbumba: Malawi Women's Embeddedness to Culture in the Face of International Political Pressure and Internal Legal Change,' *Africa Today* (49)2 (2002), 77-99 84; UN Women Malawi, 'The Gender Journey: A Historical Perspective 1891–2015 (Draft),' 77.

⁸⁵⁵ Peter G Forster, 'Missionaries and Anthropology: The Case of the Scots in Northern Malawi,' (1986).

⁸⁵⁶ *Ibid.*, 49. However, Semu argues that Banda's concern for women was inherently patriarchal and politically driven because he created a 'Mbumba' culture in which he appropriated the traditional relationship between women who form a sorority ('mbumba' in Chichewa) and their male guardian ('nkhoswe'). Kamuzu branded himself 'Nkhoswe No.1.' Through the 'Nkhoswe' role he created the image of a community benefactor by providing special benefits to some of his active female supporters—Linda Semu, 'Kamuzu's Mbumba: Malawi Women's Embeddedness to Culture in the Face of International Political Pressure and Internal Legal Change,' (2002), 82.

⁸⁵⁷ However, for a long time the broad policy on gender during the single party regime focused on improving the position of women in Malawi through the party and the League of Malawi Women (a party structure)—UN Women Malawi, 'The Gender Journey: A Historical Perspective 1891–2015 (Draft),' 78.

⁸⁵⁸ The NCWID's mandate was to examine and review the situation of women in all sectors of development and propose programmes and strategies to be implemented. The functions of the NCWID were complementary to those of Chitukuko Cha Amai m'Malawi (CCAM), a political structure that was founded in August 1985 and it was located in the office of the President and Cabinet. The CCAM was responsible for mobilising women to participate in

Through the NCWID's efforts, Malawi ratified CEDAW on 8 March 1987,⁸⁵⁹ although initially with reservations to the provisions on harmful traditional practices.⁸⁶⁰ This was followed by the ratification of the CRC on 2 January 1991. Other treaties relevant to gender equality were ratified after Malawi embraced multiparty democracy in 1993.⁸⁶¹

5.2.2.2 *Legislation on harmful practices*

The ratification of the CEDAW and CRC did not immediately translate into legislative changes during Banda's rule. In fact, Malawi's initial reservations to CEDAW reveal that 'traditional customs and practices' were used as a defence to violations of women's rights.⁸⁶² Despite this and the retention of colonial legal positions on child marriage and polygamy, Malawi's legislative history during Banda's rule reveal attempts to change inheritance law.

a) *Harmful inheritance practices*

In 1964, legislative efforts were made to address 'property grabbing' or 'property dispossession' as a harmful practice. In April 1964, the Wills and

development activities in their areas, and its national advisor was the then Malawi's Official Hostess, Mama C. Tamanda Kadzamira—*ibid.* According to Semu, the NCWID was established as a response to the call during the UN Women's Decade (1976–1985) for governments to establish and strengthen focal points to coordinate issues relating to women's needs—Linda Semu, 'Kamuzu's Mbumba: Malawi Women's Embeddedness to Culture in the Face of International Political Pressure and Internal Legal Change,' (2002), 88.

⁸⁵⁹ UN Women Malawi, 'The Gender Journey: A Historical Perspective 1891–2015 (Draft),' 98.

⁸⁶⁰ The reservation stated that 'Owing to the deep-rooted nature of some traditional customs and practices of Malawians, the Government of the Republic of Malawi shall not, for the time being, consider itself bound by such of the provisions of the Convention as require immediate eradication of such traditional customs and practices.' The reservation was withdrawn on 24 October 1991. Available on http://www.bayefsky.com/html/malawi_t2_cedaw.php, accessed on 30 June 2016.

⁸⁶¹ The International Covenant on Economic, Social and Cultural Rights and International Covenant on Civil and Political Rights were ratified on 22 December 1993. The Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa was ratified on 20 May 2005.

⁸⁶² Tam O'Neil, Ngeyi Kanyongolo, Joseph Wales, and Moir Walita Mkandawire, *Women and Power: Representation and Influence in Malawi's Parliament*, (Overseas Development Institute, 2016) 16.

Inheritance (Kamuzu's Mbumba's Protection) Bill was published.⁸⁶³ Kamuzu himself presented this Bill in Parliament,⁸⁶⁴ and declared his discontent with the traditional practice in both matrilineal and patrilineal systems that totally excluded married women from inheriting their deceased husbands' property in their own right.⁸⁶⁵ The Bill sought to revolutionise tradition by providing that, regardless of lineage pattern, every wife and child had the right to inherit four-fifths of the property of a husband or father who died intestate.⁸⁶⁶

The fate of the Bill remains a mystery. Some scholars have claimed that although the Bill was well publicised and received by many MPs, it failed to pass;⁸⁶⁷ and that no Parliamentary records exist to explain why.⁸⁶⁸ Others, citing the repeal of the 'Wills and Inheritance (Kamuzu's Mbumba's Protection) Ordinance' by the 1967 Wills and Inheritance Act⁸⁶⁹ and relevant

⁸⁶³ Phillip Durand, 'New Provisions for the Making of Wills and Inheritance by Intestate Succession in Malawi,' *Journal of African Law* (2) (1964), 109-113 109; Simon Roberts, 'A Revolution in the Law of Succession of Malawi,' (1966), 21; Thierry Verhelst, 'Safeguarding African Customary Law: Judicial and Legislative Processes for its Adaptation and Integration,' (1968), 30.

⁸⁶⁴ This time as Prime Minister since he only became president after Malawi was declared a Republic in 1966. Kamuzu's expressed his concern as follows: 'I want to make it quite clear that whatever anyone else may think about this Bill, whatever anyone else may feel, for me, the main purpose of this Bill is to protect married women in this country from their avaricious brothers-in-law, avaricious sisters-in-law, avaricious nephews-in-law, and avaricious nieces-in-law . . . the inheritance system leaves a married woman in the cold. This to me Mr Speaker is unfair. Most unfair. Grossly unfair to the woman, to the mother' – Nyasaland Protectorate, 'Legislative Assembly Proceedings 76th Session,' (1963-64), 35, 35.

⁸⁶⁵ Linda Semu, 'Kamuzu's Mbumba: Malawi Women's Embeddedness to Culture in the Face of International Political Pressure and Internal Legal Change,' (2002), 82.

⁸⁶⁶ *Ibid.*

⁸⁶⁷ Louis Joseph Chimango, 'Wills and Inheritance: An Examination of Gender and Related Concerns in the Malawi Wills and Inheritance Act, 1967 and the Wills and Inheritance Amendment Bill, 1997' (paper presented at a Workshop Organised by the Ministry of Gender, Youth and Community Services, April (undated), Lilongwe, Malawi, 1998) cited in Linda Semu, 'Kamuzu's Mbumba: Malawi Women's Embeddedness to Culture in the Face of International Political Pressure and Internal Legal Change,' (2002), 82-83. Also reiterated in Sarai Chisala-Templehoff and Seun Solomon Bakare, 'The Impact of the African Charter and the Maputo Protocol in Malawi,' (2016), 2.

⁸⁶⁸ Linda Semu, 'Kamuzu's Mbumba: Malawi Women's Embeddedness to Culture in the Face of International Political Pressure and Internal Legal Change,' (2002), 82. Semu states that the debates of the subsequent 1967 Wills and Inheritance Act do not even refer to the earlier Bill.

⁸⁶⁹ Section 88(1).

Hansard,⁸⁷⁰ maintain that the Bill was passed in early April 1964, but was never brought into force.⁸⁷¹

If the Bill was passed, the question arises why Banda did not sign it into law given his enthusiastic support of it. Semu⁸⁷² reckons that both patrilineal and matrilineal groups may have resisted the standardisation of inheritance rules in Malawi.⁸⁷³ According to Forster,⁸⁷⁴ Banda was not yet powerful enough to bulldoze his way in Malawi's political and social affairs. After the 1964 Cabinet crisis, in particular, the success of Banda's authoritarianism depended on support from Chiefs. This could explain why he may have sacrificed his support for this law for political support from the Chiefs.⁸⁷⁵

In addition to this setback, the content of the Wills and Inheritance Act enacted in 1967 was radically different from that of the Kamuzu's Mbumba's Ordinance. In Parliament, the Bill was touted as 'aiming at ensuring fair distribution of property and remedying past injustices whereby most or all property would be grabbed from a wife and children'.⁸⁷⁶ However, some MPs felt 'fairness' was not good enough. One Mr Blackwood⁸⁷⁷ identified himself as a 'devout traditionalist who goes for wives and children and leaves the nephews to fend for themselves'.⁸⁷⁸

⁸⁷⁰ Nyasaland Protectorate, 'Legislative Assembly Proceedings 76th Session,' 54.

⁸⁷¹ Simon Roberts, 'A Revolution in the Law of Succession of Malawi,' (1966), 32.

⁸⁷² In reference to the supposedly 'failed Bill.'

⁸⁷³ Linda Semu, 'Kamuzu's Mbumba: Malawi Women's Embeddedness to Culture in the Face of International Political Pressure and Internal Legal Change,' (2002), 82.

⁸⁷⁴ Peter G Forster, 'Missionaries and Anthropology: The Case of the Scots in Northern Malawi,' (1986), 490.

⁸⁷⁵ Ibid.

⁸⁷⁶ Speech by Ministry of Transport and Communications, Works and Supplies (Mr Msonthi) in 'Malawi Government, 'Proceedings of Parliament 5th Session,' (1967-68), 44.

⁸⁷⁷ Leader of nominated MPs.

⁸⁷⁸ Malawi Government, 'Proceedings of Parliament 5th Session,' 44. Mr Blackwood expressed optimism that with time, Malawi's inheritance practice would change from old traditions to new ways more inclined towards a husband and wife as a family unit as opposed to the larger grouping.

In reality, the 1967 law largely codified the prevailing customary inheritance patterns,⁸⁷⁹ reducing women's inheritance portion (as spouses) and co-opting all manner of customary heirs (including remote descendants), thereby essentially enabling property dispossession.⁸⁸⁰ The 1967 Wills and Inheritance Act applied even during democracy until its repeal in 2011.

b) Child marriage and polygamy

During the Banda era, the Marriage Act (Chapter 25:01) continued to uphold 21 years as the minimum age of marriage for persons married under civil law, with the proviso that those aged below that age required appropriate consent to be obtained.⁸⁸¹ Polygamy was only outlawed for parties married under the Act too and not for those married under customary law.⁸⁸² Like the inheritance law, the Marriage Act continued to apply its repeal in 2015.

5.2.2.3 Conclusion

During the independence era, the one pronounced effort to address harmful practices is visible through the 1964 Kamuzu's Mbumba Protection Bill. While not successful, either because the ordinance never became operational, or because it was never passed, this law could have facilitated substantive gender equality at a time when gender equality was not prominent on the global agenda.

The developments on gender equality that took place in this period resemble parts of the Finnemore and Sikkink's 'norm life cycle' model and Risse et al.'s five stages of the spiral model through which the socialisation of human

⁸⁷⁹ It stipulated that half (in patrilineal areas) and three fifth (in matrilineal areas) if the state shall be distributed to heirs at customary law and the remained to a widow, children and dependants.

⁸⁸⁰ Seodi White, Dorothy Kamanga, Tinyade Kachika, Asiyati Chiweza, and Flossie Chidyaonga, *Dispossessing the Widow: Gender Based Violence in Malawi* (WLSA Malawi/Kachere, Text No. 14, 2002), 36-38.

⁸⁸¹ Section 11(b).

⁸⁸² Section 11(d) and Section 36.

rights into domestic practices happen.⁸⁸³ These developments arguably constitute the ‘norm cascade’ step of the norm life cycle, which section 3.3 describes as a process that socialises norm breakers to become norm followers.⁸⁸⁴ The characteristics of a norm breaker were evident in Malawi’s lack of a Bill of Rights in its Constitution and a specific policy on gender equality. Malawi launched into the norm cascade mode for the first time when it took steps to participate in the 1985 UN Women’s Conference,⁸⁸⁵ setting up the National Commission on Women in Development, and ratifying the CEDAW.

However, as the Constitution did not anchor this change, Malawi could not have yet stepped into the third and last stage of the norm life cycle – *norm internalisation*. As shown in Chapter 3, norm internalisation is displayed when norms become visible in domestic culture and practice.⁸⁸⁶ It was only after Malawi embraced democracy in 1993 and adopted the new Constitution in 1994 that a more concrete display of norm internalisation of human rights norms protecting women from harmful practices became apparent.

5.3 POST-INDEPENDENCE PERIOD AND HARMFUL PRACTICES

As shown in Chapter 4, the first level of norm internalisation that focuses on official state behaviour is a significant (if not the most significant) piece of the norm diffusion equation.⁸⁸⁷ Therefore, this section analyses how the Constitution, Malawi’s supreme law, has transported the country into a phase where norm internalisation of human rights, particularly those affecting women and gender equality, has become tangible. The discussion centres on how the Constitution addresses the challenge of harmful practices by examining women’s rights guarantees under the Constitution; how the

⁸⁸³ See section 3.3 of this thesis for the description of the respective steps and stages.

⁸⁸⁴ See note 233.

⁸⁸⁵ Through the ‘temporary’ appointment of 23 women MPs by the Head of State.

⁸⁸⁶ See section 3.4.1 of the thesis.

⁸⁸⁷ See sections 4.4.1 & 4.4.2 of the thesis.

Constitution pitches customary law, culture and the role of Chiefs/informal systems; how the Constitution envisages the domestication of international law; and how international law has been domesticated through domestic policy and law.

This discussion demonstrates that while the Constitution has created an enabling environment for promoting women's rights and addressing harmful practices, it entrusts that this will be achieved through measures spearheaded by the state, including policy and legislative measures. Rural constituents would mostly be human rights 'recipients' and beneficiaries (not architects) of such measures.

5.3.1 The Constitution and Harmful Practices

5.3.1.1 Women's constitutional rights

Women's rights directly relevant to this thesis are promoted under the Constitutional principles of national policy, the non-discrimination clause, the women's rights clause, and the right to development clause. In its principles of national policy, the Constitution requires the state to implement gender equality policies to address social issues, such as domestic violence, security of the person and rights to property.⁸⁸⁸ As will be seen in later chapters, harmful cultural practices constitute violations of the right to security of the person and the right to property, which community bylaws seek to protect.

The Bill of Rights entrenches 'rights of women' under Section 24. The provisions of this section are important because they particularise women's rights and have potential to facilitate the realisation of substantive gender equality. Section 24(1) guarantees women 'the right to full and equal protection by the law, and the right not to be discriminated against on the

⁸⁸⁸ Section 13(a)(iii).

basis of their gender or marital status'.⁸⁸⁹ The state is to realise this right by ensuring that women have the same rights as men in civil law, including in respect to contractual capacity;⁸⁹⁰ the acquisition and maintenance of rights in property independently or in association with others regardless of their marital status;⁸⁹¹ the custody, guardianship and care of children (including decision making on children's upbringing);⁸⁹² and the acquisition and retention of citizenship and nationality.⁸⁹³ Women's right to enjoy the same custody and guardianship rights as men is particularly vital for women under the *lobola* marriage system, which, upon divorce, bestows legal custody of children on their father divorce.⁸⁹⁴

Closer to this study, Section 24(2) declares that any law that discriminates against women is unconstitutional, and calls for legislation to eliminate customs and practices that discriminate against women, particularly, sexual abuse, harassment and violence;⁸⁹⁵ discrimination in work, business and public affairs;⁸⁹⁶ and deprivation of property, including that obtained by inheritance.⁸⁹⁷ This section creates a basis for enacting legislation to uproot harmful practices that constitute sex discrimination, sexual abuse and violence and property deprivation. Of course, such legislation can only be beneficial to rural women if enforcement mechanisms are available and accessible to them. In Malawi, access to justice is a major challenge for rural

⁸⁸⁹ Section 24(1).

⁸⁹⁰ Section 24(1)(a)(i).

⁸⁹¹ Section 24(1)(a)(ii).

⁸⁹² Section 24(1)(a)(iii).

⁸⁹³ Section 24(1)(a)(iv).

⁸⁹⁴ Boyce P. Wanda, 'Customary Family Law in Malawi: Adherence to Tradition and Adaptability to Change,' *Journal of Legal Pluralism and Unofficial Law* (27) (1988), 117-134 128. Mwambene has further noted that 'in the patrilineal system children of the family belong to the man and his kinsmen' – Lea Mwambene, 'Marriage under African Customary Law in the Face of the Bill of Rights and International Human Rights Standards in Malawi,' *African Human Rights Law Journal* (10)1 (2010), 78-104 90.

⁸⁹⁵ Section 24(2)(a).

⁸⁹⁶ Section 24(2)(b).

⁸⁹⁷ Section 24(2)(c).

women.⁸⁹⁸ As seen in this chapter, the role of community bylaws in improving access to justice and human rights on the ground is invisible.

Section 24 can be seen as facilitating the internalisation of the international norms protecting women from harmful practices. It transcends 'formal gender equality,' which merely advocates that laws and policies should apply to everyone uniformly⁸⁹⁹ and embraces substantive equality. In doing so, it recognises that equal treatment laws alone cannot address entrenched drivers of inequality.⁹⁰⁰ According to CEDAW General Recommendation No. 25, substantive gender equality pursues strategies that can practically transform prevailing gender norms and power imbalances,⁹⁰¹ and ensures that women are free from violence.⁹⁰² Moreover, substantive equality promotes non-discrimination and equitable opportunities for women within customary laws and practices.⁹⁰³

However, Section 24 is not without some flaws. For example, in respect of women's rights upon marriage dissolution, it has been argued that the concepts of 'fair distribution' and 'jointly held' property under Section 24(1)(b) have significant loopholes that can shortchange women during property

⁸⁹⁸ National Statistics Office, UNFPA, and UN Women, *Gender Based Violence Survey: A Baseline Report of 17 Districts in Malawi* (NSO, UNFPA and UN Women, 2012), 26.

⁸⁹⁹ Paragraph 6, CEDAW General Recommendation No 25, on Article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on Temporary Special Measures; Section 20(1) of the Constitution – all persons are equal under any law...; Section 24(1) of the Constitution – women have the right to full and equal protection by the law. Also see Sandra Fredman, 'Beyond the Dichotomy of Formal and Substantive Measures: Accelerating De Facto Equality of Women under Article 4(1) UN Convention on the Elimination of Discrimination against Women,' (2003) 112 cited in Rachel Rebouche, 'The Substance of Substantive Equality: Gender Equality and Turkey's Headscarf Debate,' 711-738 712.

⁹⁰⁰ Silvia Walby, 'The EU and Gender Equality: Emergent Varieties of Gender Regime,' *Social Politics* (1)1 (2004), 4-29 6.

⁹⁰¹ Paragraph 8, *General Recommendation No. 25, on Article 4, Paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on Temporary Special Measures*, 2004, A/59/38 Annex I [4] 2.

⁹⁰² Paragraph 9, *ibid.*

⁹⁰³ Sandra Fredman, 'Beyond the Dichotomy of Formal and Substantive Measures: Accelerating De Facto Equality of Women under Article 4(1) UN Convention on the Elimination of Discrimination against Women,' (2003) 114 cited in Rachel Rebouche, 'The Substance of Substantive Equality: Gender Equality and Turkey's Headscarf Debate,' 712.

distribution upon divorce.⁹⁰⁴ Furthermore, Chirwa⁹⁰⁵ observes that Section 24 does not deeply advance the rights of women;⁹⁰⁶ it falls short of according women special rights, merely expanding the right to non-discrimination guaranteed under Section 20 of the Constitution.⁹⁰⁷

One could argue that Section 24 is not pursuing 'special' rights, but is proclaiming 'specific' rights that aim to facilitate equality between women and men in consonance with Section 20 guarantees.⁹⁰⁸ Under Section 20(2), the state has a threefold duty to (a) pass legislation addressing inequalities in society; (b) prohibit discriminatory practices and the propagation of such practices; and (c) criminalise such practices, where necessary.

Thus, read with Section 20(2), Section 24(2) has been particularly useful for gender advocates calling for legislation advantageous to rural women to address issues such as domestic violence,⁹⁰⁹ property dispossession⁹¹⁰ and gender inequalities.⁹¹¹ So has the guarantee of special protection to women in the promotion of the right to development under Section 30.⁹¹² This right

⁹⁰⁴ Seodi White, Dorothy Kamanga, Tinyade Kachika, Asiyati Chiweza, and Flossie Chidyaonga, *Dispossessing the Widow: Gender Based Violence in Malawi*, (2002), 34-35 & 103. Chirwa also notes that the fact that Malawi Malawian family law is not governed by property regimes of 'marriage in community of property' or 'marriage out of community of property' means that a man or woman can exclusively own property during a marriage. Therefore, it is possible that jointly held property may at times minimally or not exist – Danwood Mzikenge Chirwa, 'A Full Loaf is Better than Half: The Constitutional Protection of Economic and Social Rights in Malawi,' (2005), 227-228.

⁹⁰⁵ Danwood Mzikenge Chirwa, 'A Full Loaf is Better than Half: The Constitutional Protection of Economic and Social Rights in Malawi,' (2005).

⁹⁰⁶ *Ibid.*, 227.

⁹⁰⁷ *Ibid.*, 226-227. Section 20 (1) guarantees the right to equality by prohibiting discrimination of persons in any form, including on the ground of sex.

⁹⁰⁸ Indeed the title of the section in the Constitution of the Republic of Malawi (as amended up to Act No. 11 of 2010) simply reads 'Rights of Women'.

⁹⁰⁹ WLSA Malawi, 'Discussing the Prevention of Domestic Violence Act: Discussion Paper,' (2003).

⁹¹⁰ Seodi White, Dorothy Kamanga, Tinyade Kachika, Asiyati Chiweza, and Flossie Chidyaonga, *Dispossessing the Widow: Gender Based Violence in Malawi*, (2002), 104.

⁹¹¹ Malawi Law Commission, 'Report of the Law Commission on the Development of the Gender Equality Act, No. 23,' (2011).

⁹¹² Section 30(1) provides that 'all persons and peoples have the right to development and therefore to the enjoyment of economic, social, cultural and political development and

implies that state measures to 'eradicate social justices and inequalities'⁹¹³ should perforate traditions injurious to women's development.⁹¹⁴ However, being focused on first-level norm internalisation (legislative) efforts, gender advocates have not effectively ensured that such legislation adequately facilitates second-level norm internalisation, including through community-level horizontal efforts that are internally initiated/led.

The Constitution not only visibly supports women's rights norms, it also recognises the application of customary law as a source of Malawian law.

5.3.1.2 Constitutional position on customary law and culture

Since the Constitution expressly provides for the applicability of customary law alongside Acts of Parliament and the common law,⁹¹⁵ customary law is caught in constitutional provisions that allude to 'any law,'⁹¹⁶ and 'all laws.'⁹¹⁷ Customary law mostly governs the rural masses, and the Constitution safeguards human rights in that realm by declaring as invalid aspects of 'any law' that are inconsistent with constitutional provisions.⁹¹⁸

Under the Bill of Rights, the Constitution specifically addresses custom and

women, children and the disabled in particular shall be given special consideration in the application of this right.'

⁹¹³ Section 30(3).

⁹¹⁴ Tinyade Jimusole Kachika, 'The Matrilineal Tradition and its Harms on Women's Development in Rural Malawi: A Right to Development Perspective' (Masters Degree paper, Georgetown University Law Centre, 2008), 39.

⁹¹⁵ Section 10(2) provides that in the application and formulation of any Act of Parliament and in the application and development of common law and customary law, the relevant organs of the state shall have regard to the principles of the Constitution. Section 200 states that in so far as they are inconsistent with this Constitution, all Acts of Parliament, common law and customary law in force on the appointed day shall continue to have the force of law as if they had been made pursuant to this Constitution.

⁹¹⁶ For example, Section 5 (any law that is inconsistent with the provisions of the Constitution shall to the extent of such inconsistency be invalid; Section 20(1) (discrimination of persons in any form is prohibited and all persons are, under any law, guaranteed equal and effective protection. . .); Section 24(2) (any law that discriminates against women on the ground of gender and marital status shall be invalid . . .).

⁹¹⁷ For example, Section 9 (the judiciary shall have the responsibility of interpreting, protecting and enforcing . . . all laws in accordance with the Constitution . . .).

⁹¹⁸ Section 5.

culture – the former from the angle of anti-discrimination⁹¹⁹ and through the provisions on marriages by custom,⁹²⁰ and the latter within the context of the right to participate in cultural life of one's choice.⁹²¹ Admittedly, the 'right to culture' is controversial especially in respect of harmful practices, since such practices are considered 'cultural' and open to women's participation. Whether such participation is free or not is hotly contested.⁹²² In practice then, 'choice' may be laced with subtle coercion or a sense of obligation.

Mwambene⁹²³ argues that Section 26 does not express internal limitations, and that this may seemingly give the right to culture equal weight to other rights.⁹²⁴ However, since Section 44(1) places limitations on all rights under the Bill of Rights⁹²⁵ such limitations apply to Section 26 as well. And as Mwambene⁹²⁶ observes, Sections 20(2) and 24(2) give the right to equality a higher hierarchy than the right to culture.⁹²⁷ Indeed, the constitutional test for the validity of culture and/or customary law is whether it is consistent with constitutional provisions and principles.⁹²⁸

⁹¹⁹ Section 24(2) ([l]egislation may be passed to eliminate customs and practices that discriminate against women . . .).

⁹²⁰ Section 22(5).

⁹²¹ Section 26.

⁹²² Malawi Law Commission, *Report of the Law Commission on the Development of the HIV and AIDS Legislation*, (2008), 33.

⁹²³ Lea Mwambene, 'Reconciling African Customary Law with Women's Rights in Malawi: The Proposed Marriage Divorce and Family Relations Bill' *Malawi Law Journal* (1)1 (2007), 113-122.

⁹²⁴ *Ibid.*, 114.

⁹²⁵ Danwood Mzikenge Chirwa, 'Upholding the Sanctity of Rights: A Principles Approach to Limitations and Derogations under the Malawian Constitution,' *Malawi Law Journal* (1)1 (2007), 3-32 11. Mwambene also agrees with this position in Lea Mwambene, 'Marriage under African Customary Law in the Face of the Bill of Rights and International Human Rights Standards in Malawi,' (2010), 86.

⁹²⁶ Lea Mwambene, 'Marriage under African Customary Law in the Face of the Bill of Rights and International Human Rights Standards in Malawi,' (2010).

⁹²⁷ *Ibid.*, 85.

⁹²⁸ Sections 5, 10(2), 20 (1), 24(2) & 200.

By allowing human rights to supersede culture,⁹²⁹ the Constitution partly aligns with the international jurisprudence on harmful practices.⁹³⁰ However, some of ‘the constitutional standards and principles’ have contradicted international standards. For example, until 2017, Section 22 (7)-(8) of the Constitution tolerated children aged between 15 and 18 years getting married with the consent of parents or guardians and simply ‘discouraged’ marriages of persons below 15 years. This notwithstanding the clear international prohibitions of marriages of children aged below 18 years. It took the case of *Institute for Human Rights and Development in Africa vs The Government of Malawi*⁹³¹ before the ACERWC⁹³² in 2014 for Parliament to change the constitutional definition of the child from a person aged under 16 years to one aged under 18 years; and to repeal Sections 22(7)-(8) from the Constitution on 14 February 2017.⁹³³

In general, however, the Constitution has reduced international human rights norms protecting women from harmful practices to constitutional status,

⁹²⁹ Lea Mwambene, ‘Reconciling African Customary Law with Women’s Rights in Malawi: The Proposed Marriage Divorce and Family Relations Bill ’ (2007), 115; Lea Mwambene, ‘Marriage under African Customary Law in the Face of the Bill of Rights and International Human Rights Standards in Malawi,’ (2010), 82; Lea Mwambene, ‘Custody Disputes under African Customary Family Law in Malawi: Adaptability to Change,’ *International Journal of Law, Policy and the Family* (26)2 (2012), 127-142 134.

⁹³⁰ Which expects the implementation of human rights frameworks at domestic level to be accomplished through national legal and institutional frameworks that conform with human rights standards, including ensuring that human rights canons are infused into the official organs of the state.

⁹³¹ ACERWC Communication No. 004/Com/001/2014 – The African Committee of Experts on the Rights and Welfare of the Child ‘Report on Consideration of an Amicable Settlement under the Auspices of the Committee: *Institute for Human Rights and Development in Africa vs The Government of Malawi*’ (October 2016).

⁹³² The Institute for Human Rights and Development in Africa submitted a communication to the ACERWC dated 29 October 2014 in which it complained that contrary to what is provided in Article 2 of the ACRWC, which defines a child as a person below the age of 18 years, Section 23(5) of the Malawi Constitutions excludes children in Malawi between ages 16 and 18 years from the protections accorded to them under the ACRWC.

⁹³³ The Amendment was assented to by the State President on 2 April 2017 and was gazetted on 7 April 2017 – Republic of Malawi ‘2nd Report to the African Committee of Experts on the Rights and Welfare of the Child’ (27 April 2017).

making them justiciable in Malawian courts.⁹³⁴ Just as any other law that is applicable in Malawi, the force of customary law and culture is subjected to close human rights scrutiny. Himonga⁹³⁵ submits that ‘international norms for the protection of cultural rights anticipate the incorporation of harmless practices into domestic laws for the promotion and protection of children’s rights.’⁹³⁶ Consequently, customary practices that violate constitutional standards are objectionable. Yet, discriminatory customary laws continue to dominate lives of most Malawians’.⁹³⁷ This is where Chiefs become important actors, although their role in norm appropriation is legally marginalised.

5.3.1.3 *Constitutional and legal position on Chiefs and community bylaws*

The Constitution recognises Chiefs who administer customary law as part of local government authorities.⁹³⁸ The Chiefs Act⁹³⁹ specifies the functions of Chiefs. Though Malawi has a pluralist legal system, Parliament has exclusive legislative powers,⁹⁴⁰ and an Act of Parliament is supreme over other forms of law.⁹⁴¹ Constitutionally recognised sources of law do not expressly include community bylaws.⁹⁴² Under the Local Government Act⁹⁴³ only a District

⁹³⁴ Lea Mwambene, ‘Marriage under African Customary Law in the Face of the Bill of Rights and International Human Rights Standards in Malawi,’ (2010), 80. For instance, non-discrimination as a key principle of CEDAW is enshrined in the Constitution.

⁹³⁵ Chuma Himonga, ‘African Customary Law and Human Rights: Intersections and Domains in a New Era,’ in *Children’s Rights in Africa: A Legal Perspective*, ed. Julie Sloth Nielsen (Ashgate Publishing Ltd, 2016).

⁹³⁶ *Ibid.*, 76 cited in Lea Mwambene, ‘Custody Disputes under African Customary Family Law in Malawi: Adaptability to Change,’ (2012), 133.

⁹³⁷ Ngeyi Kanyongolo, ‘Economic Empowerment of Women: Law and Policy Review,’ (2011) cited in Tam O’Neil, Ngeyi Kanyongolo, Joseph Wales, and Moir Walita Mkandawire, *Women and Power: Representation and Influence in Malawi’s Parliament* (2016) 16.

⁹³⁸ Section 146.

⁹³⁹ Chapter 22:03 of the Laws of Malawi.

⁹⁴⁰ Section 48(1) of the Republican Constitution.

⁹⁴¹ Section 48(2) of the Republican Constitution. But any Act of Parliament is subject to the Constitution.

⁹⁴² Kapindu J. has clearly described constitutionally recognised sources of law as being: the Constitution (Section 199, supported by Sections 5, 10(1) and 11(3)); legislation (Acts of Parliament and their subsidiary legislation) (Sections 48(2) and 58); common law/body of case law (Section 200, supported by Section 10(2)); customary law (Section 200, supported by Section 10(2)); and international law (Section 211) – Redson Kapindu, ‘Malawi’s Legal Systems and Research Sources.’ Available at <http://www.nyulawglobal.org/globalex/malawi1.html>, accessed on 1 July 2016.

Council, and Town or City Assembly can make bylaws for governing a local government area. The Council cannot delegate its powers to make bylaws.⁹⁴⁴

Meanwhile, Parliament has not deliberated on the status of community bylaws. Parliamentary debates preceding the adoption of the statutes discussed in section 5.3.3.1 reveals that only one MP referred to community bylaws. During debates on the Marriage, Divorce and Family Relations Act, Honourable Lilian Patel said: 'I would like to thank Chiefs in my constituency, led by TA Bwananyambi herself. They are trying to tackle child marriages by putting bylaws and punishing people who are marrying off their children'.⁹⁴⁵

Notable is the fact that this statement did not spark any debate on 'these bylaws'. Whether Parliament's silence on the legal status of community bylaws indicates its acceptance of these laws or its uncertainty on how to react to the bylaws remains an open question. Parliament's opinion on the bylaws is important because the phenomenon of community bylaws lends itself to legal pitfalls when questions of democratic legitimacy, constitutionality and rule of law are raised.

5.3.1.4 The internalisation of international norms under the Constitution

The Constitution's relevance to rural masses in Malawi depends in part on how it weaves together the local and the international. One area where this relationship is explicit lies in its provisions on the applicability of international law in Malawi.

The Constitution prescribes two ways of domesticating international norms under Section 211. First, international agreements ratified by Malawi after the

⁹⁴³Act No. 42 of 1998, as amended by Local Government (Amendment) Act No. 10 of 2017.

⁹⁴⁴Section 5(1) as read with Sections 6(1)(f) and 15(1)(b).

⁹⁴⁵Hon Lilian Patel, UDF Spokesperson on Gender Issues –Parliament of Malawi, 'Daily Debates (Hansard) Third Meeting–Forty Fifth Session–Seventh Day Thursday, 12 February 2015 (unrevised edition)' (2015), 288.

commencement of the Constitution form part of domestic laws *only* if so declared by legislation.⁹⁴⁶ Second, international agreements entered into before the Constitution⁹⁴⁷ became operational are automatically binding unless otherwise provided.⁹⁴⁸ Thus, the Constitution establishes a two-step system of incorporating international human rights in Malawi ratified after 1994: first, the Executive ratifies and thereafter Parliament domesticates. Despite the clarity of Section 211(2) discussed above, Malawian courts have adopted shifting positions on the question of whether they can directly apply human rights treaties that Malawi has ratified.⁹⁴⁹

Nevertheless, the Constitution's two-step process of norm internalisation (as opposed to a strict one-step process whereby international law is automatically domesticated upon executive ratification) provides room for localising international human rights norms. Thus Parliament can pass legislation modifying international treaties as has been witnessed in the case of the Child Care, Justice and Protection Act and various other laws promoting women's rights and gender equality - which modify and supplement the CRC, CEDAW, African Children's Charter and the Maputo Protocol.

Constitutional interpretation provides another avenue of localising international human rights norms in Malawi. Section 11(2)(c) of the Constitution stipulates that 'in interpreting the provisions of the Constitution, the court of law shall, where applicable, have regard to current norms of public international law and comparable foreign state law'. In a recent

⁹⁴⁶ Section 211(1). Also cited in Siri Gloppen and Fidelis Edge Kanyongolo, 'Courts and the Poor in Malawi: Economic Marginalisation, Vulnerability and the Law,' *International Journal of Constitutional Law* (5) (2007), 258-293 266.

⁹⁴⁷ Lea Mwambene, 'Marriage under African Customary Law in the Face of the Bill of Rights and International Human Rights Standards in Malawi,' (2010), 80.

⁹⁴⁸ Section 211(2).

⁹⁴⁹ Malawi Law Commission, *Discussion Paper: Review of Abortion Law*, (MLC, 2013), 16-21.

Constitutional Court case, *Mayeso Gwanda vs The State*,⁹⁵⁰ the court chose to lean on the earlier judgment of Nyirenda J, (as he then was) in *In the Matter of David Banda (a male infant)*,⁹⁵¹ and agreed that having consciously committed itself to uphold treaty obligations, the state is duty bound to comply with treaty provisions. In particular, the leading judgment of Mtambo J⁹⁵² applied the ICCPR to expand the constitutional right guaranteeing freedom from inhuman and degrading treatment and punishment under Section 19(3) of the Constitution. The court also relied on communications of the African Commission on Human and Peoples' Rights⁹⁵³ and the Human Rights Committee⁹⁵⁴ respectively as well as a wide range of comparable decisions of foreign courts⁹⁵⁵ in arriving at its decision to declare rogue and vagabond laws unconstitutional.

Therefore, though not yet tested in the context of harmful practices,⁹⁵⁶ as seen above, international jurisprudence is useful in the courts' task of interpreting the Constitution and domestic law, thereby internalising international human rights norms protecting women from harmful practices. In applying international jurisprudence, the court could also tap on the general recommendations and general comments on harmful practices issued by the

⁹⁵⁰ Constitutional Cause No. 5 of 2015 (being Criminal Case No. 444 of 2015). Delivered by the Constitutional Court on 10 January 2017. The accused was charged with the offence of being rogue and vagabond contrary to Section 184(1)(c) of the Penal Code.

⁹⁵¹ (2008) MLR 1.

⁹⁵² In *Mayeso Gwanda and The State*, Constitutional Cause No. 5 of 2015 (being Criminal Case No. 444 of 2015).

⁹⁵³ Mtambo J cited *Huri-Laws vs Nigeria* (2008) AHRLR 273 (ACHPR 2000) to reinforce the constitutional right guaranteeing freedom from inhuman and degrading treatment and punishment under Section 19(3) of the Constitution; while the concurring opinion of Kalembera J cited *Purohit and Another vs The Gambia* (2003) AHRLC 96 (ACHPR) to stress that the rights to life and integrity of the person were inviolable.

⁹⁵⁴ Mtambo J cited the HRC individual complaint of *Mukong v Cameroon* Communication No 541 of 1991 to interpret the right to freedom and security of the person under Section 19(6) of the Constitution.

⁹⁵⁵ Comparable foreign cases were cited in the opinions all the three judges: Mtambo J, Kalembera J and Ntaba J.

⁹⁵⁶ The one case on harmful practices (involving the practice of sexual cleansing) that has come before Malawian courts (*The Republic vs Eric Aniva, In the Principal Resident Magistrate Court sitting at Nsanje* Criminal Case No. 87 of 2016) did not apply international law, presumably because the court found the provisions of the Gender Equality Act sufficient for the task at hand.

CEDAW, CRC and ACHPR/ACERWC (discussed under section 4.3) since these elaborate on States Parties' obligations under a treaty.⁹⁵⁷ Furthermore, section 4.2 has highlighted several sources of soft law that buttress the establishment of the norms protecting women from harmful practices,⁹⁵⁸ which, though not necessarily part of Malawian law, could be used by courts for interpretation.

5.3.2 Gender Equality Policy Frameworks

This section discusses how the Constitution has been translated into policy measures for promoting gender equality and addressing harmful practices. It first presents the state structure coordinating this mandate, and then discusses the various policies adopted to realise constitutional aspirations.

5.3.2.1 *The coordinating entity for gender equality policies*

Established pursuant to the Women's World Conference held in Beijing in 1995,⁹⁵⁹ the Ministry of Gender, Children, Disability and Social Welfare (MoGCDSW) has become a focal point for the internalisation of institutional norms for advancing women's rights.⁹⁶⁰ MoGCDSW is the lead agency and policyholder in gender mainstreaming in Malawi,⁹⁶¹ and coordinates the national gender machinery, which is mandated to spearhead the formulation,

⁹⁵⁷ See note 582.

⁹⁵⁸ See note 509.

⁹⁵⁹ Salephera Consulting Ltd and Prime Health and Consulting Services, 'Appraisal of Management Systems of the Ministry of Gender,' (2013) 12. On file with author.

⁹⁶⁰ Paragraph 201 of the Beijing Platform for Action (BPfA) promotes the operationalisation of an effective and functioning national machinery for the advancement of women as the central policy-coordinating unit inside government. Its main task is to support government-wide mainstreaming of a gender equality perspective in all policy areas. Strategic objective H.1. of the BPfA particularly calls for the creation or strengthening of national machineries and other governmental bodies.

⁹⁶¹ Ministry of Gender Children Disability and Social Welfare and UN Women Malawi, 'Gender Analysis of the Ministry of Gender, Children, Disability and Social Welfare Budgets, 2009-2015: A Call for Equal and Meaningful Distribution of the National Cake,' (Policy Brief) (2015), 1.

implementation, coordination, monitoring and evaluation of national gender policy, programmes, projects and activities at all levels.⁹⁶²

The fact that MoGCDSW has offices in all districts and at community level in many areas⁹⁶³ is significant for norm internalisation. On the one hand, the Ministry's programmes/presence potentially influence the vernacularisation of norms protecting women's rights in rural communities. On the other hand, Chapter 9 demonstrates that community-led, horizontal interventions protecting these rights in grassroots settings (as is the case with the community bylaws) have also impacted on the Ministry's work – although this horizontal activity currently remains obscure in vernacularisation debates.

While MoGCDSW's stated focus is on (marginalised) 'men and women; boys and girls,'⁹⁶⁴ concerns have been expressed over the 'feminisation of the Ministry.'⁹⁶⁵ A female minister has always headed the Ministry, and its projects, which are heavily donor funded, are predominantly about women.⁹⁶⁶ This is somewhat due to lack of resources, as shown in part by the analysis of the Ministry's budgets between 2010 and 2015, which showed the Ministry received less than one percent of the annual national budgets.⁹⁶⁷ In

⁹⁶² Salephera Consulting Ltd and Prime Health and Consulting Services, 'Appraisal of Management Systems of the Ministry of Gender' (2013) 12; Michael Chasukwa, 'The Gender Machinery: Women in Malawi's Central Government Administration,' *CMI BRIEF* (15)11 (2016), 1.

⁹⁶³ Michael Chasukwa, 'The Gender Machinery: Women in Malawi's Central Government Administration,' (2016), 1.

⁹⁶⁴ Both the 2000 and 2015 National Gender Policies have specified that this is their scope of coverage.

⁹⁶⁵ Michael Chasukwa, 'The Gender Machinery: Women in Malawi's Central Government Administration,' (2016), 2.

⁹⁶⁶ *Ibid.*

⁹⁶⁷ For example, it has been established that the Ministry faces the following challenges: very low operational expenses; high dependency on donors; little investments in economic empowerment and youth development; lack of resources and coherency to effectively implement gender-related laws; negligible funding for gender at district level; lack of resources for meaningful coordination of sectoral gender mainstreaming; non-compliance with budgeting guidelines that mandate gender-responsive budgeting; routine cuts in budget allocations; and funding disbursement that misalign with planning – Ministry of Gender, Children, Disability and Social Welfare and UN Women Malawi, 'Gender Analysis of the

2015/16, the Ministry received only 0.35 percent of the total national budget.⁹⁶⁸

Needless to say that underfunding adversely affects service delivery to the masses, including the implementation of the gender equality laws for addressing harmful practices that are discussed in section 5.3.3.1. Furthermore, the various gaps reflect the inadequate internalisation of the norm promoting the establishment of strong national machineries (that have authority, capacity and sufficient resources) for the advancement of women.⁹⁶⁹

5.3.2.2 *Gender equality policies*

If the populace is to benefit from international human rights norms beyond rhetoric, the internalisation of such norms in domestic policy is necessary. Thus Malawi's excursions towards the development of gender equality laws that address harmful practices would be incomplete without a peek at the policy frameworks that have directed law formulation. The purpose of this section is not to provide a critical analysis of Malawi's gender equality policy, but to demonstrate how, in democratic Malawi, first-level norm internalisation has happened through policy frameworks.

Malawi intensified its gender and development efforts in the mid-1990s after the 1995 Fourth International Conference on Women in Beijing, China. Following Malawi's adoption of the Beijing Platform for Action (1995), the government, through MoGCDSW, expressed its commitment to gender equality by launching its National Platform for Action in 1997.⁹⁷⁰ These

Ministry of Gender, Children, Disability and Social Welfare Budgets, 2009-2015 : A Call for Equal and Meaningful Distribution of the National Cake,' (2015) 1.

⁹⁶⁸ Ibid., 2.

⁹⁶⁹ Paragraphs 196 & 203, Beijing Platform for Action.

⁹⁷⁰ Government of Malawi, *National Gender Programme: Priorities for Gender Mainstreaming for Equality and Empowerment December 2004–December 2009*, (Ministry of Gender, Child Welfare and Community Services, 2004), iv.

developments culminated in Malawi's first National Gender Policy (2000-2005),⁹⁷¹ and one of the policy intentions was to harmonise different UN conventions and declarations relevant to gender equality with national policies and laws.⁹⁷² The National Gender Programme (2004-2009) later became the implementation framework of the policy.⁹⁷³

Malawi's overarching development policy framework, the Malawi Growth and Development Strategy, has also been attentive to gender equality, though at times feebly and theoretically. The first Malawi Growth and Development Strategy (MGDS, 2006-2011) had the agenda of accelerating the attainment of the Millennium Development Goals. Despite some conceptual gaps,⁹⁷⁴ the MGDS acknowledged under its theme of *social development* that 'gender issues were an integral part of the national agenda, and that the main challenges to gender mainstreaming included social and cultural factors'.⁹⁷⁵

The MGDS II (2011-2016) carried a specific thematic area of 'gender and capacity development', which expressed the desire for gender mainstreaming to permeate all levels. However, implementation gaps still prevailed.⁹⁷⁶ It is

⁹⁷¹ Ibid.

⁹⁷² Government of Malawi, *National Gender Policy 2000-2005* (Ministry of Gender, Youth and Community Services, 2000), 2-3.

⁹⁷³ Government of Malawi, *National Gender Programme: Priorities for Gender Mainstreaming for Equality and Empowerment December 2004 - December 2009*, (2004) iv.

⁹⁷⁴ 'The MGDS has major conceptual deficiencies in using the terms gender mainstreaming and dealing with gender as a cross-cutting issue because this tends to result in gender evaporation. These terms are just thrown in the document as magical words that do not require specific attention and effort in all the thematic areas. A gender section in a national policy document such as the MGDS should set standards, guidelines and targets for the sectors in a concise manner. The MGDS has failed to achieve this because the section lacks conceptual clarity of the vital role gender plays in the thematic areas. Only one woman professional in the Ministry of Economic Planning and Development fully participated and gender experts were not consulted' – Olivia M'chaju Liwewe, Naomi Ngwira, and Bright Sibale, 'Gender Needs Assessment of the Malawi Growth and Development Strategy,' (2006) 11. On file with author.

⁹⁷⁵ Government of Malawi, *Malawi Growth and Development Strategy, from Poverty to Prosperity 2006-2011*, (Ministry of Finance, Economic Planning and Development, 2006), 51.

⁹⁷⁶ The MGDS II gender mainstreaming goals were not matched by planning and designing that recognised that the pursuit for gender equality in all sectors is a development goal, just as it is smart economics. In a nation where the majority of the population (52 percent women) has poor development indicators that are in turn dragging down overall national

worth noting that except for the HIV and AIDS (Prevention and Management Act), all statutes addressing harmful practices⁹⁷⁷ were enacted during the implementation of the Millennium Development Goals and MGDS II. However, implementation of these laws has been weak because Parliament does not deliberately budget for them once they are enacted.⁹⁷⁸ This has largely left norm internalisation stuck at institutional level without filtering down to the masses.

The current MGDS III (2017–2022) intends to facilitate the implementation of the Sustainable Development Goals (2015–2030). Its thematic area of ‘gender, youth development, persons with disability and social welfare’ seeks to enforce legislation against harmful practices affecting children; and to promote positions of social and political influence for women and address power inequalities.⁹⁷⁹ Unlike the MGDS and MGDS II (which were implemented after the first National Gender Policy expired), the implementation of MGDS III and related gender equality commitments align with the implementation phase of the revised National Gender Policy.

The National Gender Policy (NGP) embraces the unfinished business of all gender related Millennium Development Goals.⁹⁸⁰ The implementation of the NGP is meant to contribute to the accelerated attainment of the Sustainable

development, MGDS II did not view gender mainstreaming as the asset that it is, resulting in the marginalisation of gender mainstreaming during implementation. The planning and implementation of MGDS II lacked gender policy anchorage, and was more focused on activities and not structural coordination issues that make gender mainstreaming efforts so fragmented in Malawi—Government of Malawi, *Malawi Growth and Development Strategy II Review and Country Situation Analysis Report* (Ministry of Finance, Economic Planning and Development, 2016).

⁹⁷⁷ The thesis discusses these in section 5.3.3.1.

⁹⁷⁸ Ministry of Gender Children Disability and Social Welfare and UN Women Malawi, ‘Gender Analysis of the Ministry of Gender, Children, Disability and Social Welfare Budgets, 2009-2015: A Call for Equal and Meaningful Distribution of the National Cake,’ (2015), 5.

⁹⁷⁹ Government of Malawi, *The Malawi Growth and Development Strategy (MGDS) III (2017–2022): Building a Productive, Competitive and Resilient Nation* (Ministry of Finance, Economic Planning and Development, 2017), 57-58.

⁹⁸⁰ Goals 1, 2, 3 and 5—eradicating extreme poverty and hunger; achieving universal primary education; promoting gender equity and the empowerment of women; and improving maternal health.

Development Goals and other key women's rights frameworks.⁹⁸¹ The NGP squarely targets addressing harmful practices through several strategies:

- advocating for modification and elimination of traditional and cultural practices that have negative effects on girls' and boys' education;⁹⁸²
- advocating for the enactment, popularisation and implementation of laws on elimination of harmful cultural practices that promote women's susceptibility and vulnerability to HIV and AIDS;⁹⁸³
- promoting community leaders' involvement in modifying harmful cultural practices that promote the spread of HIV and AIDS;⁹⁸⁴ and
- advocating for the modification and elimination of harmful cultural and traditional practices that perpetuate GBV and discrimination against women and girls.⁹⁸⁵

Strategies for addressing GBV under the NGP are being comprehensively implemented through the National Action Plan to Combat GBV in Malawi (NAP GBV, 2016–2022); and the National Strategy on Ending Child Marriage (2018–2023). The NAP GBV recognises that harmful practices exacerbate GBV and prevent women's participation in socio-economic development.⁹⁸⁶ Therefore, the NAP GBV intends to engage in efforts towards modifying harmful cultural practices through participatory engagement with target

⁹⁸¹ The Republic of Malawi, *National Gender Policy*, (Ministry of Gender, Children, Disability and Social Welfare, 2015).

⁹⁸² Strategy 8 under Objective 1 aimed at increasing access to, retention and completion of quality education for girls and women.

⁹⁸³ Strategy 5 under Objective 2 aimed at mainstreaming gender issues in all HIV and AIDS programming.

⁹⁸⁴ Strategy 8 under Objective 2 aimed at mainstreaming gender issues in all HIV and AIDS programming.

⁹⁸⁵ Strategy 3 under Objective 1 aimed at reducing GBV and human trafficking incidences.

⁹⁸⁶ Government of Malawi, *National Action Plan to Combat Gender Based Violence in Malawi, 2016–2022*, (Ministry of Gender, Children and Disability and Social Welfare, 2016), 30.

groups;⁹⁸⁷ supporting traditional leaders in ending harmful traditional practices including child marriage;⁹⁸⁸ and strengthening the accountability of traditional leaders to implement gender-related laws and policies.⁹⁸⁹

While the recognition of community/traditional leaders makes strategies for tackling harmful practices more grounded, recommended interventions in the GBV NAP adopt the vernacularisation approach of relying on epistemic outsiders, thereby ignoring on-going, horizontal efforts at community level. The GBV NAP only recognises elite vernacularisers (government institutions, faith-based organisations and CSOs/NGOs) as responsible partners for taking interventions to traditional leaders/communities.⁹⁹⁰ Thus traditional leaders as actors that are already internally spearheading vernacularisation efforts in their own communities through community bylaws are obscure in the strategies – and so are community bylaws as a possible strategy for addressing GBV or harmful practices.

For its part, the National Strategy on Ending Child Marriage continues the presumption that traditional leaders and communities have to be ‘educated’ from the top while recognising community bylaws as a strategy for fighting child marriage. One of the objectives of the strategy is to facilitate positive change in the cultural norms, attitudes, behaviours, beliefs and practices that support and promote child marriage.⁹⁹¹ This will be achieved through capacity building, empowerment, and engagement of communities. The strategy targets raising awareness on child protection amongst cultural gatekeepers, religious and opinion leaders,⁹⁹² and promoting the

⁹⁸⁷ Paragraph 1.2, NAP GBV, 2016–2022.

⁹⁸⁸ Paragraph 14.10, NAP GBV, 2016–2022.

⁹⁸⁹ Paragraph 1.4.1, NAP GBV, 2016–2022.

⁹⁹⁰ See the NAP GBV's operational matrix: Government of Malawi, *National Action Plan to Combat Gender Based Violence in Malawi, 2016–2022*, (2016), 47-54.

⁹⁹¹ Government of Malawi, *National Strategy on Ending Child Marriage, 2018-2023*, (2018), 27.

⁹⁹² *Ibid.*, 33.

development and use of community bylaws aimed at ending child marriage in 300 TA areas.⁹⁹³

Since the policy frameworks repeatedly allude to legislation, the next section examines how the Constitution has inspired legislative reforms in order to realise the mandate to address harmful practices.

5.3.3 Legislative Reforms: Norm Internalisation in Legislation Addressing Harmful Practices

The Malawi Law Commission⁹⁹⁴ has been the state's major⁹⁹⁵ channel of responding to the new constitutional order and facilitating the interaction between the local context and international human rights commitments on gender equality and women empowerment.⁹⁹⁶ Seven gender-related laws have been enacted in Malawi between 2006 and 2017.⁹⁹⁷ Three of these laws specifically capture the term 'harmful practices': the Child Care, Protection and Justice Act;⁹⁹⁸ the Gender Equality Act;⁹⁹⁹ and the HIV and AIDS (Prevention and Management) Act.¹⁰⁰⁰ Two laws, the Deceased Estates (Wills,

⁹⁹³ Ibid., 34.

⁹⁹⁴ Created under Section 132 of the Constitution to review and make recommendations regarding the repeal and amendment of laws. Bills produced by the Law Commission as part of its reports are submitted to the Ministry of Justice, which reviews and later submits the same to Parliament.

⁹⁹⁵ Major (not exclusive) because in the case of the Prevention of Domestic Violence Act, the law was developed by Women and Law in Southern Africa Research and Education Trust (WLSA Malawi Office) in collaboration with other NGOs and the Ministry responsible for Gender, which submitted the law to Parliament as a Government Bill. And as seen in section 5.3.1.2 of the thesis, the case of *Institute for Human Rights and Development in Africa vs The Government of Malawi* (ACERWC Communication No. 004/Com/001/2014) also triggered a constitutional amendment outlawing child marriage in 2017.

⁹⁹⁶ Malawi Law Commission, *Report of the Law Commission on the Development of the Gender Equality Act, Report* (MLC, 2011), 9.

⁹⁹⁷ The 2006 Prevention of Domestic Violence Act (Chapter 7:05 of the Laws of Malawi); the Child Care, Protection and Justice Act No. 22 of 2010; the Deceased Estates (Wills, Inheritance and Protection) Act No. 14 of 2011; the Gender Equality Act No. 3 of 2013; the Trafficking in Persons Act No. 3 of 2015; the Marriage, Divorce and Family Relations Act (Chapter 25: 01 of the Laws of Malawi) and the HIV and AIDS (Prevention and Management) Act No. 12 of 2017.

⁹⁹⁸ No. 22 of 2010.

⁹⁹⁹ No. 3 of 2013.

¹⁰⁰⁰ No. 12 of 2017.

Inheritance and Protection) Act¹⁰⁰¹ and the Marriage, Divorce and Family Relations Act¹⁰⁰² proscribe particular forms of harmful practices.¹⁰⁰³

Three questions are of interest: to that extent have the laws addressing harmful practices internalised international law? Is the implementation scheme of these laws comprehensible to the rural masses? Are there any legal gaps that explain the emergence of community bylaws in rural Malawi? Chapter 4 has shown that international human rights jurisprudence¹⁰⁰⁴ proposes qualities that legislation should exhibit as part of state's obligations to effectively deal with harmful practices. Therefore, this section assesses Malawi's legislation against the prescribed qualities in order to assess the depth of norm internalisation that the state is pursuing.

5.3.3.1 Supremacy of international law standards

Section 4.4.1 has illustrated that international jurisprudence calls for legislation addressing harmful practices to fully comply with obligations outlined in the CEDAW, the CRC and other international human rights norms prohibiting harmful practices. At the most basic and within Malawian practicalities, this means that legislation should outlaw two (child marriage/forced marriages, including dowry/bride price payments and polygamy) of the four main harmful practices¹⁰⁰⁵ identified/ interpreted by the General Recommendation/General Comment.

As section 5.3.3 shows, Malawian legislation outlaws child marriage and

¹⁰⁰¹ No. 14 of 2011.

¹⁰⁰² Chapter 25:01 of the Laws of Malawi.

¹⁰⁰³ The Prevention of Domestic Violence Act (Chapter 7:05 of the Laws of Malawi) and the Trafficking in Persons Act No. 3 of 2015 could be relevant too, but this thesis purposefully focuses on the five laws above because they are directly related to widely recognised harmful practices in Malawi.

¹⁰⁰⁴ See section 4.4.1 of the thesis.

¹⁰⁰⁵ The four practices in respect of which state obligation is expounded in the joint CEDAW General Recommendation/CRC General Comment (CEDAW/C/GC/31-CRC/C/GC/18) are FGM, child marriage/forced marriages (including dowry/bride price payments), polygamy, and 'honour' crimes.

forced marriage. However, although the special Law Commission on child rights-related law reforms had intended to prohibit 'subjecting a child to any dowry transaction' in its proposed law,¹⁰⁰⁶ the Child Care, Justice and Protection Act omitted this provision. Banning dowry or *lobola* is seen as a tough call, since *lobola* validates a patrilineal customary marriage; and creates reciprocal rights and duties between two family and kinship groups.¹⁰⁰⁷

As for polygamy, the special Law Commission on the review of marriage and divorce laws intended that the new marriage law should ban polygamy.¹⁰⁰⁸ This was a higher standard than that of the Maputo Protocol's provision, which merely 'discourages' polygamy,¹⁰⁰⁹ and is compatible with the mandate to abolish polygamy under CEDAW jurisprudence.¹⁰¹⁰ However, the provisions in the Bill submitted to Parliament, which sought to ban polygamy 'entirely' was replaced with one 'banning polygamy in civil marriages only'. The following Parliamentary exchange explains the distinction:

Honourable Mpaweni, UDF Balaka Central East: '[S]ection 18 provides that a person who contracts a civil marriage shall be married to one spouse only, and yet as Moslems, we are allowed in the Koran to marry up to four wives.'

Honourable Kaliati, Minister of Gender: 'Polygamy is under customary marriages and my fathers who are in different faith

¹⁰⁰⁶ Malawi Law Commission, *Law Commission Report on the Review of the Children and Young Persons Act* (MLC, 2005), 109.

¹⁰⁰⁷ Lea Mwambene, 'Marriage under African Customary Law in the Face of the Bill of Rights and International Human Rights Standards in Malawi,' (2010), 97.

¹⁰⁰⁸ Malawi Law Commission, *Report of the Law Commission on Review of Laws on Marriage and Divorce* (MLC, 2006), 29. Section 17 of the Bill that was proposed by the Law Commission as part of its report to the Ministry of Justice stipulated that 'no person shall be married to more than one spouse.' Similar language was in Section 18 of the draft Bill that was submitted by the Ministry of Justice to Cabinet—Ministry of Justice Ref. No. D. 25:01 Draft: Marriage, Divorce and Family Relations Bill, 2015 (Cabinet) (Subject to Change) 30th December, 2014.

¹⁰⁰⁹ Article 6(c) of the Maputo Protocol invites states to enact legislation to guarantee that 'monogamy is encouraged as the preferred form of marriage and that the rights of women in marriage and family, including in polygamous marital relationships are promoted and protected'.

¹⁰¹⁰ See section 4.2.1 of the thesis.

organisations and follow customary marriages can do it [polygamy] the way you want.’¹⁰¹¹

Therefore, Section 18 of the new marriage law¹⁰¹² sustains the old position that Malawian customary marriages are potentially polygamous.¹⁰¹³ The opportunity to entirely ban polygamy was also missed by the special Law Commission on the development of HIV and AIDS legislation, which agreed that ‘polygamy should not be prohibited, but should be regulated by requiring parties to undergo HIV testing’.¹⁰¹⁴

The way law reform debates have conceptualised specific harmful practices also reveals limitations that compromise the full internalisation of international human rights norms. For instance, when formulating the Gender Equality Act, the special Law Commission considered the practice of ‘*fisi* for procreation’¹⁰¹⁵ to be harmless, and excluded it from the scope of this law.¹⁰¹⁶ Contrary to international human rights jurisprudence,¹⁰¹⁷ this stance was taken without exception to situations where sociocultural values may pressure/coerce one to submit to such practice. This also contradicted with the special Law Commission’s concession that ‘harmful practices involve coerced sexual relations’.¹⁰¹⁸ In recent developments, because of its interests to

¹⁰¹¹ Parliament of Malawi, ‘Daily Debates (Hansard) Third Meeting–Forty Fifth Session–Seventh Day Thursday, 12 February 2015 (unrevised edition)’ 295.

¹⁰¹² Marriage, Divorce and Family Relations Act.

¹⁰¹³ Lea Mwambene, ‘Reconciling African Customary Law with Women’s Rights in Malawi: The Proposed Marriage Divorce and Family Relations Bill,’ (2007), 116; Lea Mwambene, ‘Marriage under African Customary Law in the Face of the Bill of Rights and International Human Rights Standards in Malawi,’ (2010), 94.

¹⁰¹⁴ Malawi Law Commission, *Report on the Development of HIV and AIDS Legislation*, (MLC, 2008), 34.

¹⁰¹⁵ *Fisi* (hyena) represents a man who comes under the cover of darkness. In this regard, where a husband is suspected to be barren, a clan elders arrange that a (paid) man should ‘secretly’ come and have sexual relations with a wife just for purposes of impregnating her.

¹⁰¹⁶ Malawi Law Commission, *Report of the Law Commission on the Development of the Gender Equality Act*, (2011), 30.

¹⁰¹⁷ See section 4.3.1.2 of the thesis.

¹⁰¹⁸ Malawi Law Commission, *Report of the Law Commission on the Development of the Gender Equality Act*, (2011), 26. Furthermore, the special Law Commission on the development of HIV and AIDS legislation noted that in most cases, women participate ‘in a culture of their choice’ without giving free consent; and that such cultures do not only spread HIV but are

address HIV and AIDS, the HIV and AIDS (Prevention and Management) Act¹⁰¹⁹ prohibits the practice of *fisi* without any exceptions,¹⁰²⁰ implying that in the spirit of preventing HIV transmission, ‘procreation *fisi*’ no longer enjoys the Gender Equality Act immunity.

The failure by Malawian legislation to strictly uphold universal norms exposes a struggle between localising international human rights norms and the sovereignty of such norms when it comes to ‘sensitive’ local practices.

5.3.3.2 *Repeal of ‘offensive’ laws*

International human rights jurisprudence urges states to immediately repeal all laws (including traditional, customary or religious) that condone, allow or lead to harmful practices, including the betrothal and marriage of children aged below 18 years.¹⁰²¹

In relation to inheritance, the Malawian Parliament repealed the Wills and Inheritance Act (1967) in 2011, replacing it with the Deceased Estate (Wills, Inheritance and Protection) Act¹⁰²² (Wills and Inheritance law) which has a provision criminalising property grabbing, a harmful practice.¹⁰²³ In fact, this criminal provision was first introduced as an amendment to the Wills and Inheritance Act in 1998¹⁰²⁴ following submissions by the Women’s Caucus to the Malawi Law Commission (in 1996) to punish property grabbing by law.¹⁰²⁵ The old statute was effectively facilitating the grabbing of property

also discriminatory against women—*Malawi Law Commission, Report on the Development of HIV and AIDS Legislation*, (2008) 33.

¹⁰¹⁹ No. 12 of 2017.

¹⁰²⁰ Section 4(1) as read with the First Schedule.

¹⁰²¹ See section 4.2 of the thesis.

¹⁰²² No. 14 of 2011.

¹⁰²³ Section 84A.

¹⁰²⁴ Through the Wills and Inheritance (Amendment) Act No. 22 of 1998, which introduced Section 84A.

¹⁰²⁵ Malawi Law Commission, *Report of the Law Commission on the Review of Wills and Inheritance Act*, (MLC, 2004), 72. Semu suggests that the Women’s Caucus could have proposed more comprehensive amendments to the inheritance law in the Bill that was presented to Parliament. However, the Bill was ridiculed by male MPs who largely snubbed

from widows through its discriminatory formulas for distributing intestate property.¹⁰²⁶ The Deceased Estates (Wills, Inheritance and Protection) Act now prioritises a deceased person's immediate family and dependants¹⁰²⁷ in the distribution of intestate estates.¹⁰²⁸

As for child marriage, previously, the Marriage Act,¹⁰²⁹ now repealed, was amended in 1997 to place the minimum marriage age for those marrying under civil law at 18 years, unless parents consented to a marriage involving their minor child.¹⁰³⁰ This position left the minimum age in other forms of marriage vulnerable to customary or religious dictates. Further, child marriage was not expressly prohibited in both civil and customary marriages because until 2017, the Constitution only 'discouraged' marriages for children aged 15 years and below,¹⁰³¹ and allowed parental consent for those getting married under 18 years.¹⁰³²

The new marriage law,¹⁰³³ adopted in 2015, repealed the Marriage Act and sets the minimum age of marriage at 18 years for all marriages.¹⁰³⁴ According to the Law Commission, this legal measure was introduced to make Malawi compliant with the CEDAW and CRC.¹⁰³⁵ In 2017, pursuant to the new

the substance of the Bill, and dwelt on the fact that the Women's Caucus had presented it – insinuating that women would be killing their husbands if their inheritance portion increased. Consequently, the only amendment that was passed was the property grabbing provision – Linda Semu, 'Kamuzu's Mbumba: Malawi Women's Embeddedness to Culture in the Face of International Political Pressure and Internal Legal Change,' (2002), 90.

¹⁰²⁶ Seodi White, Dorothy Kamanga, Tinyade Kachika, Asiyati Chiweza, and Flossie Chidyaonga, *Dispossessing the Widow: Gender Based Violence in Malawi*, (2002), 35-40.

¹⁰²⁷ Section 3(1): 'Immediate family in relation to any person' means that person's spouse and children. Dependant means a deceased person's parent; or a minor whose education was being provided for by that deceased person, who is not capable, wholly or in part, of maintaining himself or herself.

¹⁰²⁸ Section 17.

¹⁰²⁹ Chapter 25:01.

¹⁰³⁰ Section 19, now repealed.

¹⁰³¹ Section 22(8), now repealed.

¹⁰³² Section 22(7), now repealed.

¹⁰³³ The Marriage, Divorce and Family Relations Act No. 4 of 2015.

¹⁰³⁴ Section 18.

¹⁰³⁵ Malawi Law Commission, *Report of the Law Commission on Review of Laws on Marriage and Divorce*, (2006), 26.

marriage law¹⁰³⁶ and the decision in *Institute for Human Rights and Development in Africa vs The Government of Malawi*,¹⁰³⁷ a constitutional amendment was made domesticating the international human rights norm prohibiting anyone aged 18 years and below to enter marriage.¹⁰³⁸ Related to the call for states to repeal laws is the recommendation to enact specific laws.

5.3.3.3 *Enact legislation*

The international mandate is that states should enact legislation prohibiting betrothal, forced marriage and setting the minimum marriage age at 18 years (and 16 years in exceptional cases¹⁰³⁹). Guided by CRC principles,¹⁰⁴⁰ the child protection law¹⁰⁴¹ was the first statute in Malawi to unambiguously proscribe harmful practices. The Act bans forced marriage and child betrothal¹⁰⁴² in compliance with CEDAW¹⁰⁴³ and the African Children's Charter.¹⁰⁴⁴ However, child marriage is not mentioned despite that when the special Law Commission on child rights-related law reforms was deliberating on child marriage, it expressed concern of both *forced* and *early* marriages.¹⁰⁴⁵

¹⁰³⁶ In presenting the Constitution (Amendment) Bill No. 36 of 2016 to Parliament, the Ministry of Justice noted that Section 22 (which allowed minors to marry with parental consent) had overshadowed the gains made under Section 14 of the Marriage, Divorce and Family Relations Act, and that by passing the Bill, the girl child would be protected from child marriage—Parliament of Malawi, 'First Reading Bill No. 36 of 2016: Constitution (Amendment), Daily Debates (Hansard) Fifth Meeting—Forty Sixth Session, 14 February 2017,' (2017), 305.

¹⁰³⁷ ACERWC Communication No. 004/Com/001/2014. Also see note 932.

¹⁰³⁸ Furthermore, the constitutional definition of child was changed from a person below 16 years to one below 18 years.

¹⁰³⁹ Only provided for in the joint CEDAW General Recommendation/CRC General Comment—CEDAW/C/GC/31-CRC/C/GC/18.

¹⁰⁴⁰ Malawi Law Commission, *Law Commission Report on the Review of the Children and Young Persons Act*, (2005), 108.

¹⁰⁴¹ Act No. 22 of 2010.

¹⁰⁴² Section 81.

¹⁰⁴³ Article 16(2).

¹⁰⁴⁴ Article 21(2).

¹⁰⁴⁵ Malawi Law Commission, *Law Commission Report on the Review of the Children and Young Persons Act*, (2005), 109.

Yet, the proposed Bill produced by the special Law Commission,¹⁰⁴⁶ and the child protection law itself only addressed *forced* marriage. The joint CEDAW General Recommendation/CRC General Comment clarifies that child and forced marriage are not distinct, and that child marriage is a form of forced marriage since children cannot express their full, free and informed consent.¹⁰⁴⁷ Nevertheless, even from this perspective, the child protection law still lacks specifics on the minimum marriage age by which forced marriage would be measured, including the criteria for establishing a forced marriage.

ACERWC/ACHPR jurisprudence stipulates that legislation should proscribe marriage induced abduction and kidnapping.¹⁰⁴⁸ The child protection law outlaws child abduction¹⁰⁴⁹ and child trafficking.¹⁰⁵⁰ Furthermore, it prohibits the selling of a child, or using a child as a pledge to obtain credit; using a child as surety for a debt or mortgage; or forcing a child into providing labour for the income of a parent, guardian or any other person.¹⁰⁵¹ These practices have been known to fuel child marriage in parts of Northern Malawi.¹⁰⁵² However, one important issue is whether the law is consistent and comprehensive.

5.3.3.4 Adopt consistent and comprehensive legislation

The thorny issue in Malawi is the comprehensiveness of the legislation as required by international human rights jurisprudence.¹⁰⁵³ While the legislation is surely preventative and protective, it certainly lacks 'detailed guidance', including mechanisms for supporting and assisting victims.

¹⁰⁴⁶ Section 173 of the proposed law, cited in *ibid.*, 251.

¹⁰⁴⁷ Paragraph 23.

¹⁰⁴⁸ See note 631.

¹⁰⁴⁹ 'A person who, unlawfully takes, retains or conceals a child without the consent of the parent or without the consent of any other person who has lawful custody of the child commits an offence and shall be liable to imprisonment for ten years.'

¹⁰⁵⁰ Sections 78(1) and 79(1) respectively.

¹⁰⁵¹ Section 82.

¹⁰⁵² Malawi Human Rights Commission, *Harmful Practices in Malawi* (MHRC, 2006).

¹⁰⁵³ See section 4.4.1 of the thesis.

Definitions of harmful practices, the penalties and the implementation procedures set under the respective laws on harmful practices to be realised are used illustratively:

a) Definitions of harmful practices

The child protection law does not specifically define harmful practices, but stipulates that ‘no person shall subject a child to a social or customary practice that is harmful to the health or general development of the child’.¹⁰⁵⁴ This provision is broad enough to catch all harmful practices described in international jurisprudence.¹⁰⁵⁵ However, harmful religious practices may arguably escape by virtue of the fact that only social and customary practices are specified.

Positively, the Gender Equality Act and the HIV and AIDS (Prevention and Management) Act, which specifically mention religious practices, address the gap in the Child Care, Justice and Protection Act. The Gender Equality Act defines a harmful practice as ‘a social, cultural or religious practice, which, on account of sex, gender or marital status, does or is likely to undermine the dignity, health or liberty of any person; or result in physical, sexual, emotional or psychological harm to any person’.¹⁰⁵⁶ Despite preceding the joint CEDAW General Recommendation/CRC General Comment on harmful practices, the definition has elements that meet the views of the CEDAW and CRC Committees regarding the criteria for ascertaining ‘harmful practices’. These elements are: the violation of dignity, integrity and human rights; discrimination against women or children; traditional practices that occur due to gender inequality; practices that are influenced/imposed by others (family members, community members or society).¹⁰⁵⁷ The definition under the HIV and AIDS (Prevention and Management) Act limits harmful practices to ‘any

¹⁰⁵⁴ Section 80.

¹⁰⁵⁵ See sections 4.3.1.1 and 4.3.1.2 of the thesis.

¹⁰⁵⁶ Section 3.

¹⁰⁵⁷ See section 4.3.1.2 of the thesis.

social, religious or cultural practice that puts a person at risk of HIV infection and reinfection; or may catalyse progression of HIV to AIDS'.¹⁰⁵⁸

On first impression, the words 'social, cultural or religious practice' in both the Gender Equality Act and HIV and AIDS (Prevention and Management) Act would comprehensively cover all harmful practices. However, as seen in section 5.3.3.1, framers of the Gender Equality Act intended to exclude the practice of '*fisi* for procreation'¹⁰⁵⁹ from the law's scope although coerced sex may be involved. Yet, international jurisprudence states that 'harmful practices' include coercive practices.¹⁰⁶⁰ For its part, the HIV and AIDS (Prevention and Management) Act prohibits 18 practices,¹⁰⁶¹ implying that other practices that potentially perpetuate HIV and AIDS may be excluded.¹⁰⁶² Thus this Act may only pass the comprehensiveness test if read together with the broader definition of the Gender Equality Act.

Defining harmful practices comprehensively has been challenging. For example, when debating the Child Care, Justice and Protection Act, some legislators cautioned against the wholesale internalisation of human rights norms protecting children, arguing that culture too needed protection.¹⁰⁶³ They contended that the proposed law would suddenly make illegal certain

¹⁰⁵⁸ Section 2.

¹⁰⁵⁹ See note 1015 and Glossary of Chichewa terms for definition.

¹⁰⁶⁰ Of course note 1020 has explained that on the other hand, the HIV and AIDS (Prevention and Management) Act prohibits the practice of *fisi* without any exceptions.

¹⁰⁶¹ *Chinamwaye, fisi, hlazi, chijura mphinga, kuchotsa fumbi, chiharo, kuika mwana ku malo, kujura nthowa, kulowa or kupita kufa, kulowa or kupita ngozi, kupimbira, kupondera guwa, kusamala mlendo, kutsuka mwana, mbirigha, gwamula, mwana akule, bulangete la mfumu* – see Glossary of Chichewa terms for definitions. Notably, the Act does not give English definitions of the various terms. Whereas the thesis has drawn from various sources to interpret the terms, the author could not find English interpretations for practices such as *chijura mphinga* and *kupondera guwa*. Therefore, these have been excluded from the Glossary of Chichewa terms.

¹⁰⁶² For example polygamy. Also, a WLSA Malawi research report mentions additional practices such as *kulowa ngalawa and chitayo* (see Glossary of Chichewa terms for definitions) – WLSA Malawi, 'Women, HIV and AIDS in Six Districts in Malawi: Balancing the Equation Between Women's Grounded Realities and the Appropriateness of the Response' (2009).

¹⁰⁶³ Hon Mwechumu UDF Mangochi North East Malawi National Assembly Malawi National Assembly, 'Daily Debates (Hansard) Second Meeting Forty Session Twenty Eight Day Monday 23 June 2010' (2010), 1145.

traditions and norms that Malawian parents routinely practice to raise their children well.¹⁰⁶⁴ These arguments support the cultural relativist perspective that ‘international human rights norms should not disturb cultural practices that are valued by societal groups’.¹⁰⁶⁵ However, evaluating cultural practices by human rights standards remains a legitimate exercise.¹⁰⁶⁶ As some MPs observed, omissions to critically examine parts of culture that promote undesirable practices can make culture a tool of perpetuating abuses.¹⁰⁶⁷

The similarities and variations in the definitions of harmful practices between international jurisprudence and local law, show that norms do not flow one dimensionally from the international shore, to the domestic and to the rural. International law definitions are domestically negotiated and reinterpreted to make them locally viable. This determines the extent to which international norms are appropriated in statutory definitions of harmful practices. And since the definitions are in statutes, the norms may hardly filter down formally to the rural when law implementation is weak. However, as the community bylaws show (Chapter 8), this does not mean that the rural is dormant and not internalising/vernacularising international human rights norms on harmful practices in its own ways.

b) Penalties

The Child Care, Justice and Protection Act, Gender Equality Act and the HIV and AIDS (Prevention and Management) Act criminalise harmful practices¹⁰⁶⁸ as recommended by international human rights jurisprudence.¹⁰⁶⁹ The Marriage, Divorce and Family Relations Act does not prescribe specific

¹⁰⁶⁴ Hon Phoya DPP Blantyre Rural East – *ibid.*

¹⁰⁶⁵ Katherine Brennan, ‘The Influence of Cultural Relativism on International Human Rights Law: Female Circumcision as a Case Study,’ *Law and Inequality* (1988 – 89), 367-398 369.

¹⁰⁶⁶ *Ibid.*

¹⁰⁶⁷ Hon Kaliati Minister of Gender, Children and Community Development; Hon Kalinde DPP Thyolo North – Malawi National Assembly, ‘Daily Debates (Hansard) Second Meeting Forty Session Twenty Eight Day Monday 23 June 2010’ 1149 & 1123.

¹⁰⁶⁸ And the Deceased Estates (Wills, Inheritance and Protection) Act criminalises property grabbing.

¹⁰⁶⁹ See section 4.4.1.2 of the thesis.

punishment for child marriage,¹⁰⁷⁰ which can be seen as a gap.¹⁰⁷¹ Under the Child Care, Justice and Protection Act, except for the offence of child trafficking, which is punishable by life imprisonment,¹⁰⁷² the rest of the offences it creates are punishable by ten years' imprisonment.¹⁰⁷³ There is no option of a fine, which may portray the law as unreasonably harsh with regards to some harmful practices. For example, one could argue that making a child miss school to attend an initiation ceremony, and forcing an initiated child to undergo sexual cleansing cannot both strictly attract imprisonment.

The Gender Equality Act punishes a person *who commits, engages in, subjects* another person to or *encourages* the commission of any harmful practice with a fine of one million Kwacha¹⁰⁷⁴ and five years' imprisonment.¹⁰⁷⁵ The HIV and AIDS (Prevention and Management) Act punishes *committing* a harmful practice or *subjecting, permitting* or *encouraging* another person to indulge in a harmful practice with five million Kwacha¹⁰⁷⁶ and five years' imprisonment.¹⁰⁷⁷ Since many harmful practices under the Gender Equality Act would likely have HIV traces, it is unclear when one may or may not invoke the lesser monetary punishment under this law to escape the higher penalty under the HIV and AIDS (Prevention and Management) Act. Furthermore, harmful practices such as *gwamula*¹⁰⁷⁸ and initiation *fisi*¹⁰⁷⁹ can be synonymous with rape or defilement, and the punishments under the

¹⁰⁷⁰ It just declares it as an invalid marriage.

¹⁰⁷¹ Although arguably one can draw on the Gender Equality Act or the Child Care, Justice and Protection Act (if one proves that forced marriage includes child marriage) for penalties.

¹⁰⁷² Section 79(1).

¹⁰⁷³ Sections 78(1) & 83 respectively.

¹⁰⁷⁴ Equivalent to USD 1,347.

¹⁰⁷⁵ Section 5.

¹⁰⁷⁶ Equivalent to USD 6,736.

¹⁰⁷⁷ Sections 4 & 5.

¹⁰⁷⁸ A practice whereby young men invade a girls' hut at night and force the girls to have sex with them.

¹⁰⁷⁹ See note 1015 and Glossary of Chichewa terms. In this instance, the *fisi* comes under the cover of darkness to have sex with new female initiates.

Gender Equality Act and HIV and AIDS (Prevention and Management) Act pale compared to those prescribed under the Penal Code.¹⁰⁸⁰

In respect of the offence of property grabbing, the Deceased Estates (Wills, Inheritance and Protection) Act imposes a punishment of one million Kwacha¹⁰⁸¹ fine, and imprisonment for ten years.¹⁰⁸² Additionally, a guilty party is required to restore the property or the equivalent monetary value.¹⁰⁸³ Unlike the other laws, the Deceased Estates (Wills, Inheritance and Protection) Act allows the court to pay the full or such part of the fine to the person or persons entitled or into the estate of the deceased person.¹⁰⁸⁴ This arguably complies with the recommendation of international jurisprudence that victims of violations should access appropriate reparations.¹⁰⁸⁵

The inconsistent punishments laid down by different laws for harmful practices are at best confusing. In respect of the ten-year punishment for harmful practices against children under the Child Care, Justice and Protection Act, one may assume that the Act deliberately imposes a higher penalty as a deterrent for crimes against children as other laws have sought to do.¹⁰⁸⁶ The logical explanation for the lesser monetary fine under the Gender Equality Act compared to that under the HIV and AIDS (Prevention and Management) Act would be currency fluctuations that have occurred in between the enactment of the two statutes. In any event, given evidence in Chapter 8 that livestock is a common currency in rural areas,¹⁰⁸⁷ the internalisation of international human rights norms on harmful practices

¹⁰⁸⁰ Punishable by life imprisonment under Section 133 and 138 of the Penal Code respectively.

¹⁰⁸¹ See note 1074.

¹⁰⁸² Section 84(1).

¹⁰⁸³ Section 84(1)(a).

¹⁰⁸⁴ Section 84(1)(b).

¹⁰⁸⁵ For example see Paragraph 55(q), CEDAW/C/GC/31-CRC/C/GC/18.

¹⁰⁸⁶ For instance the Trafficking in Persons Act has a higher penalty for child trafficking.

¹⁰⁸⁷ See section 8.4.7 of the thesis.

through punitive legal measures becomes a cosmetic exercise that only distances formal laws from people's lived realities.

Besides, one should be mindful that the Law Commission illegalised harmful practices in the Gender Equality Act despite traditional leaders' resistance that legislation was not a strategic tool for tackling harmful practices since they happen among people with close ties.¹⁰⁸⁸ As the empirical chapters demonstrate, the community bylaws under study therefore demonstrate that the internalisation of international human rights norms in rural settings can occur in unconventional ways, apart from being a purely externally driven exercise. Such alternative is particularly realistic where the implementation of gender-related laws is weak, as is the case with Malawi.

c) Implementation mechanisms and procedures

The Acts discussed above have very weak implementation schemes, which make the laws remote from rural people. Apart from creating offences and punishments, the laws do not address issues of access justice in respect of harmful practices. Neither do they make provision for support and follow-up services and assistance for victims of harmful practices as required by international human rights jurisprudence.

In respect of the criminalisation of property grabbing, the Law Commission reported, when it was reviewing the old Wills and Inheritance Act in 2004, that the provision had not been enforced five years after its enactment.¹⁰⁸⁹

¹⁰⁸⁸ While sympathising with the wide occurrence of harmful practices, participants, particularly traditional leaders, in the consultative workshops that the Law Commission held in the three regions of Malawi 'were reluctant to subscribe to the statutory regulation of harmful practices' because they feared that such a move would only drive the practices underground. They recommended that harmful practices would best be dealt with through civic education—Malawi Law Commission, *Report of the Law Commission on the Development of the Gender Equality Act*, (2011), 27.

¹⁰⁸⁹ Malawi Law Commission, *Report of the Law Commission on the Review of Wills and Inheritance Act*, (2004), 72. The Director of Public Prosecution's (DPP's) excuse was that those grabbing property were persons who were ordinarily (one way or the other) entitled to the

This situation remains to date. Police officers opt to use informal mediation and ‘counselling’ to resolve property-grabbing matters.¹⁰⁹⁰

The use of informal mechanisms despite existence of legislation displays complexities of norm internalisation. In addition to challenges related to norm internalisation expressed in Chapter 4,¹⁰⁹¹ Allden¹⁰⁹² has argued that even when a norm is seemingly institutionalised through state law, the lack of ‘capability to function’ (operationalising the right in practice) can hinder internalisation.¹⁰⁹³ For the property grabbing law, the lack of capability to function goes beyond lack of state resources, but rises from perceptions that criminal/state law should not intrude into relational matters that can be solved ‘relationally’.

The Marriage, Divorce and Family Relations Act has clearer implementation mechanisms regarding marriage registration but not child marriage. In compliance with international jurisprudence,¹⁰⁹⁴ the law calls for compulsory registration of civil, religious and customary marriages. Traditional Authorities (TAs) have been designated ‘registrars’ with authority to perform the functions of the Registrar of Marriages.¹⁰⁹⁵ Not all TAs are physically accessible to their subjects though. Additionally, the law does not provide for training to develop full competence of TAs, nor does it impose an obligation to raise awareness and educate the public about marriage registration.¹⁰⁹⁶

property, and were therefore not caught in the statutory definition of ‘property grabber’ (as being someone ‘not entitled to the property).’ The DPP had also not yet appointed private prosecutors to prosecute property grabbing cases as required by the law. On their part, the police conceded that there had been no prosecution ‘because property grabbing cases are treated as family matters.

¹⁰⁹⁰ Interview with Patricia Njawili, National Police Victim Support Unit Coordinator, 4 June 2018.

¹⁰⁹¹ See section 4.4 of the thesis.

¹⁰⁹² Susanne Allden, ‘How Do International Norms Travel? Women’s Political Rights in Cambodia and Timor-Leste’ (2009).

¹⁰⁹³ *Ibid.*, 10 & 11.

¹⁰⁹⁴ See note 717.

¹⁰⁹⁵ Section 4, Marriage, Divorce and Family Relations Act.

¹⁰⁹⁶ Plan International, *In-depth Review of Legal and Regulatory Frameworks on Child Marriages in Malawi*, (2016) 39-40.

Besides, the state is yet to operationalise the registration mechanisms.

Unlike the Gender Equality Act and the HIV and AIDS (Prevention and Management) Act, the Child Care, Justice and Protection Act has outlined some procedure in respect of harmful practices. It provides that when a Social Welfare Officer has reasonable grounds to believe that a child has experienced a harmful cultural practice,¹⁰⁹⁷ he/she will temporarily remove and place the child in a safe place. The child should be brought before a Child Justice Court within 48 hours (if practicable). The court may commit the child to a foster home or place her/him under a Social Welfare Officer's supervision until the Social Welfare Officer conducts an appropriate inquiry. Should the inquiry reveal that the child needs protection and rehabilitation, the court may commit the child to a foster home; and order that the child be placed under the supervision of a Social Welfare Officer for a specific period.¹⁰⁹⁸

Although these mechanisms are worthwhile, rehabilitation options are not provided for. Nor are any budgetary provisions made for such mechanisms to be functional. Besides, foster homes are a foreign concept to most Malawians, and the country hardly has basic shelters for victims of GBV.¹⁰⁹⁹ If the fact that Social Welfare Officers have so far not processed cases of harmful practices is anything to go by,¹¹⁰⁰ the recommended legal procedures are impractical on

¹⁰⁹⁷ Or any practice prohibited under Sections 81 and 82, see notes 1042 and 1051 respectively.

¹⁰⁹⁸ Section 84, Child Care, Justice and Protection Act.

¹⁰⁹⁹ National Statistics Office, UNFPA, and UN Women, *Gender Based Violence Survey: A Baseline Report of 17 Districts in Malawi*, (2013), 26.

¹¹⁰⁰ For instance, it is the BBC that ignited the case of *The Republic vs Eric Aniva* (In the Principal Resident Magistrate Court sitting at Nsanje Criminal Case No. 87 of 2016). The accused was charged with two offences of: engaging in harmful practices (puberty and widow sexual cleansing) and attempting to engage in a harmful practice (kulowa kufa – widow sexual cleansing) contrary to Section 5 of the Gender Equality Act. It was alleged that between 2013 and June 2016, the accused had carnal knowledge of women under the name of kulowa kufa (widow sexual cleansing) in villages in Nsanje district in Malawi. His conduct came into the public limelight when he admitted to the BBC in July 2016 that he had been having sexual intercourse (without disclosing his HIV positive status) as a 'hyena' with more than 100 women and girls. President Peter Mutharika ordered his arrest. Although the charges focused on widow cleansing, BBC reports suggest that Aniva had also admitted to

the ground. The lack of operational resources also smothers the effectiveness of Social Welfare Officers. This thesis found that instead of focusing on their core mandates, district Social Welfare Officers mainly implement donor projects due to lack of government funds. Furthermore, the law does not anticipate support for those who were previously married as children as recommended by ACERWC/ACHPR jurisprudence.¹¹⁰¹

Public awareness raising, as a law implementation measure, is mentioned under the Gender Equality Act and Deceased Estates (Wills, Inheritance and Protection) Act. Both Acts mandate the Minister of Gender to design and implement programmes for the public awareness of the respective laws.¹¹⁰² For the Gender Equality Act, this includes developing programmes aimed at promoting gender equality in all spheres of life;¹¹⁰³ and developing programmes that create awareness of fundamental human rights, equality and mutual understanding and respect.¹¹⁰⁴ Both statutes mandate the Minister to ‘enlist the services of traditional leadership and NGOs in disseminating information and in the conduct of any other activities connected with such programmes’.¹¹⁰⁵

Recognising the role of NGOs and Chiefs is important, since they interact with the spaces where harmful practices happen. Notably, the two stakeholders are not involved during programme design, but during

sexually cleansing teenage girls after their first menstruation as per customary requirements and it is believed that if the girls refused, disease or some fatal misfortune could befall their families or the village as a whole. The accused would also sexually cleanse women who had procured an abortion. Although President Mutharika had wanted Aniva tried for defiling young girls, but none came forward to testify against him—Ed Butler, ‘The Man Hired to Have Sex With Children,’ BBC News Magazine 21 July 2016. Available at <http://www.bbc.com/news/magazine-36843769>, accessed on 24 May 2018; BBC News, ‘Malawi “Hyena Man” Eric Aniva Sentenced to Two Years Hard Labour’ 22 November 2016. Available at <http://www.bbc.com/news/world-africa-38063345>, accessed on 24 May 2018.

¹¹⁰¹ See note 738.

¹¹⁰² Section 85, Deceased Estate (Wills, Inheritance and Protection) Act and Section 21(1), Gender Equality Act.

¹¹⁰³ Section 21(1)(a).

¹¹⁰⁴ Section 21(1)(b).

¹¹⁰⁵ Section 85 (a), Deceased Estate (Wills, Inheritance and Protection) Act and Section 21(1)(d), Gender Equality Act.

implementation only. Chapter 4 has criticised the prospect that the state should singularly design programmes since the state may fail to benefit from the ‘double consciousness’¹¹⁰⁶ of NGOs, and unrealistically expects traditional leaders to sponge state prescriptions. Yet, international jurisprudence expects the involvement of both NGOs and traditional leaders, both during preparation and implementation of programmes on harmful practices.¹¹⁰⁷

In respect of traditional leaders, the view that they are only relevant in helping the state to implement its public awareness interventions exposes both the state’s bias towards first-level norm internalisation and the state’s limited appreciation of how human rights also horizontally permeate rural territories (that are governed by Chiefs) beyond structured and externally pushed programmes. As seen in Chapter 3, the latter limitation is also reflected in current understandings of vernacularisation.

5.4 CONCLUSION

The chapter has shown that harmful practices have evolved from being framed as a religious problem in the colonial times, to a developmental and legal problem currently. From a difficult past, Malawi has trekked remarkably. The Constitution has a Bill of Rights that entrenches women’s rights and that anchors the internalisation of human rights norms protecting women from harmful practices. The Constitution has birthed several statutes that have been vehicles for institutionalising a culture to eliminate harmful practices in Malawi. While international human rights norms have been a big influence, occasionally the statutes have re-interpreted the norms to suit the local context, even when such re-interpretation may depart from standard human rights principles.

¹¹⁰⁶ See note 355.

¹¹⁰⁷ See section 4.4.4 See section 4.3.1.2 of the thesis..

While several important legislative measures on harmful practices have been taken, there are significant implementation gaps that make them ineffective and inaccessible to the masses. Of particular concern is that the legislation is not being utilised by victims of harmful practices especially in rural areas. This suggests that first-level norm internalisation is inadequate, and that outsiders' unicameral processes and/or programmes expected to facilitate the appropriation of 'higher law' do not always trickle all the way down.

This is not to say communities are stubborn about harmful practices. It is rather to say that legislation has not offered much to trigger second-level norm internalisation, which would reach the masses. For this to happen, much more would need to be done to raise public awareness and create effective structures to enforce state law. Meanwhile, the next chapters demonstrate how rural communities in Malawi have taken charge of 'second-level norm internalisation' through formulating their own community bylaws on child marriage and other harmful practices. These efforts provide an alternative understanding of how human rights norms on harmful practices are also horizontally vernacularised. However, this discussion is preceded by an explanation of the fieldwork methodology in Chapter 6.

CHAPTER 6

METHODOLOGY FOR FIELD RESEARCH

6.1 INTRODUCTION

As noted in Chapter 1, the central question examined in this thesis is how community bylaws in rural Malawi have been developing, in order to obtain a more nuanced understanding of how they are being influenced and shaped by international human rights norms addressing child marriage and other harmful practices affecting women.

The thesis has aimed to: explain the factors influencing the emergence and use of community bylaws to ensure the protection of the right of women to be free from harmful practices; understand how the community bylaws (and harmful practices) are being conceptualised and whether such understanding is consistent with domestic and international human rights law norms; examine the relationship between the way the community bylaws are being broadly conceptualised and African customary law within the broader context of legal pluralism; and to contribute to the theoretical discourse on norm diffusion by assessing and testing if the phenomenon of community bylaws is revealing other facets of norm internalisation at play when culture is the action ground. These objectives were realised by collecting primary data,¹¹⁰⁸ the rationale and process of which is described in detail in this chapter.

¹¹⁰⁸ It should be noted that the objectives of study were also realised through a desk-based conceptual research as presented in Chapters 3-5. This desk-research shaped the focus of the field research. First, it was important to engage theoretical discourses underpinning the study. These were helpful in directing the formulation of questions that would reveal whether or not the way community bylaws are unfolding in Malawi calls for the

6.2 PLANNING

In preparation for fieldwork and ethics application, I developed a 'data wish list.' This was a matrix with columns for the data that I needed, level of importance of the data, where the data would be obtained, level of difficulty to obtain the data, what I would lose if I failed to get the data, and strategies I would use to address limitations in data availability. This wish list exposed the scope of fieldwork the thesis demanded, which interviewees to focus on, and how to achieve the thesis' objectives. In preparation for my ethics clearance application, I formulated 'interview matrices' for each interview category. For each question I was intending to ask each interviewee, the matrix helped me to deliberately reflect on why I was asking the question, and the conceptual interests behind the question.

6.3 ETHICS

Ethical clearance was given for this study by the UCT Faculty of Law's Research Ethics Committee.¹¹⁰⁹

Participants were specifically asked whether their names and words could be used in this dissertation. Only one participant did not want their name to be quoted in the thesis. Most community participants expressed delight at the prospect of having their experiences and voices documented, '*mulembe kuti*

reconceptualisation of norm internalisation theory (in particular how *vernacularisation* is perceived). Second, Chapter 4 (which assesses how international jurisprudence approaches norm internalisation and vernacularisation) as read with Chapter 5 (which examines the extent to which domestic approaches to norm internalisation are reflecting tenets of *vernacularisation*, as well as the aspirations of international human rights law and jurisprudence on harmful practices) further sharpened the development of questions that would provide a clear picture about what is happening in the community bylaws phenomenon when the bylaws are matched with human rights and statutory approaches. This too would help in clarifying how the community bylaws should be understood in the context of vernacularisation.

¹¹⁰⁹ See Clearance Process Report for REF:L0065-2017. On file with author.

*tanena kuti eya mutitchule!*¹¹¹⁰ Therefore, except for data pertaining to the one participant, the thesis uses actual names or, in the case of focus groups, categories of interviewees and their study sites. Through the consent form, participants were also assured of the confidentiality of the research.¹¹¹¹ The research anticipated minimal risk of harm to the participants,¹¹¹² and the fieldwork did not reveal any such risks. No minors or vulnerable groups were involved in the research.

6.4 FIELDWORK

6.4.1 Study Sites

At first, I intended to collect data from three districts – one district in each of Malawi’s three regions¹¹¹³ - but later expanded the study to one more district in the Central Region for reasons to be explained. The districts represented the top five highly populated tribes and Malawi’s two lineage patterns namely, patrilineal¹¹¹⁴ and matrilineal.¹¹¹⁵ The two subsets of matrilineality – *chikamwini*¹¹¹⁶ and *chitengwa*¹¹¹⁷ were also represented.

The four sites were chosen based on the prominence of their community bylaws and the activism of their Chiefs. In the Southern Region, the study focused on the matrilineal area of Senior Chief Chitera in Chiradzulu

¹¹¹⁰ Best English approximation would be 'write in your notes that we have said yes, mention us/our identities'.

¹¹¹¹ The consent forms indicated that the research information gathered in the study would remain confidential, and only the researcher and UCT would have access to the study data and information. The participants’ names would not be available to anyone. Participants were also assured that my computer is password protected and no one has access to the password. No, deception was applied in the study.

¹¹¹² In case a participant's testimony would contradict his/her institution’s agenda for the community bylaws, there was a small chance of social risk should the testimony be revealed. In order to mitigate this risk, I put in place strict procedures to ensure that the participant's confidentiality was maintained.

¹¹¹³ Northern, Central and Southern.

¹¹¹⁴ The lineage follows the male line.

¹¹¹⁵ The lineage follows the female line.

¹¹¹⁶ Where a husband resides in a wife’s village.

¹¹¹⁷ Where a wife resides in a husband village.

district,¹¹¹⁸ which has a mixture of Lomwe and Yao tribes (who are predominant in the area). Lomwes are the second largest ethnic group constituting 18 percent of the total population in Malawi. The Yao are the third largest group, making up 14 percent of the total population.

In the Central Region, two sites were studied. The initial choice was the Ngoni tribe of Senior Chief Kwataine of Ntcheu district. This tribe has a confluence of both matrilineal and patrilineal traits. The Ngonis constitute 12 percent of the total population of Malawi. I later added the matrilineal Chewa tribe of Senior Chief Lukwa's area in Kasungu district,¹¹¹⁹ after realising that the study could not have a nationally inclusive spread without the representation of this largest ethnic group in Malawi, which accounts for 36 percent of the total population. In the Northern Region, the research was in the patrilineal Tumbuka area of Senior Chief Mwirang'ombe in Karonga. The Tumbukas form 9 percent of the total population in Malawi.¹¹²⁰

6.4.2 Interviews

There were seven subsets of interviewees at national, district and community levels (see interview Protocols in the Annexure).¹¹²¹ A total of 51 interviews, covering 183 respondents, were conducted between January and April 2018 (see Table 1 for sex disaggregated data and Table 2 for interviewee categories). For the interviews in my four study sites, the Programme Officer

¹¹¹⁸ The area practices a matrilineal system called *chikamwini*, where a man resides in his wife's village.

¹¹¹⁹ The area practices a matrilineal system called *chitengwa*, where a woman resides in her husband's village.

¹¹²⁰ WorldAtlas, 'Ethnic Groups of Malawi.' Available at <https://www.worldatlas.com/articles/ethnic-groups-of-malawi.html>, accessed on 18 January 2019.

¹¹²¹ I had initially targeted eight groups, including committees that formulated the respective community bylaws. This plan was based on my prior knowledge that a 'Community Parliament' had formulated bylaws in one area in Malawi.' Therefore, I had expected to find and interview particular groups/committees that had formulated bylaws in the research sites. However, I discovered that in all sites, 'committees' comprising mostly of Chiefs had formulated the community bylaws. Therefore the 'committees' group became redundant as the Chiefs provided all the required information.

at the Ministry of Gender helpfully suggested that I should use Social Welfare Offices in the respective research districts to organise my proposed interview groups before my arrival.¹¹²² The involvement of Social Welfare Offices made the research orderly, and helped me to be taken seriously by all district/community interviewees.

Table 1: Sex disaggregated data of research participants

Category	Men	Women	Total
Senior Chiefs	3	1	4
Group Village Heads	23	6	29
Village Heads	33	14	47
GENET Committee	0	13	13
Ordinary Women	-	51	51
Government & law-making institutions	21	7	28
NGOs	7	2	9
Donors	0	2	2
Total	87	96	183

All interviews were audio recorded with the consent of the interviewees. For individual/key informant interviews, the participant was given time to read the consent form prior to the interview, and sign the form if they agreed. For focus group discussions at community level, I read out the consent form in Chichewa translation, and asked for the participants' agreement/disagreement.

In each site, the study concentrated on the three tiers of chieftaincy in Malawi: Traditional Authorities, Group Village Heads and Village Heads. Further interviews were held with groups that were monitoring the bylaws (the GENET Committee in Chiradzulu¹¹²³ and Mother Groups¹¹²⁴) and with

¹¹²² He gave me required contact details, and the district Social Welfare Offices gladly supported me since I was 'sent' by their parent Ministry.

¹¹²³ This is a structure comprising local women that has been integrated into the primary education system in Malawi in order to support girls and encourage them to stay in school.

¹¹²⁴ The committee was selected at village level and comprises six women and four men to monitor the efforts of promoting girls education on the ground, including directly engaging girls. The committee members were selected at a community meeting, whereby each village was asked to nominate dedicated persons. The committee was still operating (to monitor and

ordinary women. These were women resident around the central place where I was conducting my interviews in each study site.

6.4.2.1 Interviews with Traditional Authorities/Senior Chiefs

First was an individual interview with the high tier, the Traditional Authority (TA) (in the study areas all TAs have been elevated to Senior Chiefs). These were of interest because TAs are the ones mostly championing community bylaws in Malawi. Therefore, their views were critical in understanding the politics surrounding the emergence and conceptualisation of the community bylaws.

Particularly, the interviews explored: the Chiefs' understanding of community bylaws as a model for addressing various community challenges; approaches that their communities pursued to address harmful practices affecting women and girls under customary law before the advent of the community bylaws; the Chiefs' knowledge about community bylaws as a means to address harmful practices in their area (how the bylaws have emerged, how they are formulated, and who participates in the formulation process); the Chiefs' perspectives about how the community bylaws are sitting with customary law and state law respectively; and the Chiefs' general opinion about the practicality of the community bylaws as a measure for addressing harmful practices affecting women and girls in Malawi.

6.3.4.2 Interviews with Group Village Heads and Village Heads

Focus Group Discussions (FGDs) of between three to ten participants in each site were also conducted with the two tiers below the TA – Group Village Heads and Village Heads. The two groups were met separately, but were asked similar questions. In total, 29 Group Village Heads and 47 Village

enforce the implementation of the bylaws) at the time of this study although the GENET project has since expired.

Heads were interviewed.¹¹²⁵

The interviews sought to capture how the Group Village Heads and Village Heads understood: community bylaws in general, and issues that community bylaws in their area cover; harmful practices against women and girls in their area; how such practices were in the past; community bylaws to eliminate harmful practices in their area and how/why they have emerged; the goal of the community bylaws; how the bylaws are sitting with customary law; how communities perceive the bylaws; whether they saw the bylaws as real law, and who owned the bylaws.

Thus Group Village Heads and Village Heads were important in making sense of what/who is really influencing the emergence of these community bylaws, as well as the implications. These interviews helped to build a narrative of how Chiefs are facilitating the community bylaws, as well as an understanding of Chiefs' actual roles and perspectives on the whole phenomenon. Furthermore, their data was significant in unpacking the relationship between how community bylaws are being broadly conceptualised and African customary law.

6.4.2.3 Interviews with women

Since women are central to the community bylaws being studied, it was important to capture their perspectives regarding the 'legitimacy'¹¹²⁶ of the bylaws. Therefore, one FGD of ten women was conducted in each site. These women were randomly selected and drawn from houses around the central place where I was conducting my interviews in each study site. The Social Welfare officials who helped with convening all interviewed community

¹¹²⁵ See Table 2.

¹¹²⁶ Here legitimacy means whether the women recognise these as their laws, whether they participated in their formulation, and whether the women think the conceptualisation of the bylaws is addressing their concerns.

participants by collaborating with Chiefs also organised the participation of the women.

Furthermore, I discovered that some sites were depending on Mother Groups¹¹²⁷ (and in Chiradzulu there was the 'GENET Committee'¹¹²⁸) to monitor the community bylaws, and interviewed these too. These groups provided insight into the role they played in formulating the bylaws, as well how the bylaws are given community meaning through monitoring.

The women were asked about: their knowledge of harmful practices in the area and best ways of dealing with them; whether they knew about the community bylaws for addressing harmful practices affecting women and children that exist in their area (and how they participated in the process); whether the community bylaws represent women's concerns and values as women regarding harmful practices; whether women accept the community bylaws as real law; and whether the women are bothered by the risk that community bylaws may replace tougher state law seeking to protect women from harmful practices.

The women's voices also helped in building a comprehensive picture of the community bylaws on the ground, and in triangulating data from Chiefs, NGOs and other district level interviewees. A total of 51 women were interviewed as ordinary community members and Mother Group members.

6.4.2.4 Interviews with government sector and law-making institutions

These interviews were conducted at national and district levels. At national level, attention was on government sectors that are directly involved with community bylaws; and state 'law making' institutions. In total, 28 people were interviewed. My main interest in these interviews was to understand the work that has been going on at national level to promote community bylaws

¹¹²⁷ See note 1123.

¹¹²⁸ See note 1124.

as a means of addressing harmful practices affecting women and girls, and the official's opinion about these efforts; reasons that have triggered national interest in the community bylaws at this point in time; the role of the respective sectors/institutions in the community bylaws phenomenon; the official's perspectives regarding whether government could be seen as imposing/driving foreign solutions and norms that are remote to the rural people; the official's perceptions on how the community bylaws relate to the constitution and statutory law.

Therefore, for government sectors, the research targeted the Ministries responsible for gender and local government, who are working with Traditional Authorities to adopt the community bylaws. In the Ministry responsible for gender, three interviews were conducted with the Director of Gender Affairs, the Director of Social Welfare, and a Gender Programme Officer. Within Local Government, the Chief Local Government Services Officer was interviewed.

In law-making institutions, interviews were held with the Law Commissioner; the Chief State Advocate from the Ministry of Justice; the Clerk of Parliament; and Parliamentary Chairpersons for the Women's Caucus, Legal Affairs Committee and Social and Community Affairs Committee). These interviews provided an in-depth understanding of whether and/or how the community bylaws fit into domestic and international human rights norms, and the implications on norm internalisation theory.

Then in each district, interviews were held with district officials that are relevant to the community bylaws initiatives, namely Police Officers from Victim Support Units (VSUs); Magistrates; Social Welfare officials; District Commissioners; and NGO personnel. VSUs were relevant on two fronts. First, the research sought to understand the extent to which the police are enforcing

legislative provisions that criminalise harmful practices, including child marriage. Second, I wanted to establish the level of involvement of VSU officers in formulating or supporting the enforcement of community bylaws.

This information was important in order to understand whether, perhaps, community bylaws are emerging to fill law enforcement or legislative gaps; and, indeed whether the bylaws are given any legal weight on the ground. A total of eight VSU officers were interviewed. Similarly, Magistrates, four in total,¹¹²⁹ were interviewed in order to appreciate their involvement in community bylaw formulation processes, as well as their views on the legal character of these bylaws.

District Commissioners (DCs),¹¹³⁰ were pertinent to the study because, depending on one's viewpoint, community bylaws either clash with or support on-going decentralisation efforts in Malawi. Therefore, the study was interested in appreciating how the DCs regard the community bylaws phenomenon in general, and whether the bylaws are within or outside the respective districts' decentralisation agendas. The DC for Karonga was absent when I visited the district, so the study only covered three DCs Social Welfare offices because they have been the face of government in community bylaws efforts, especially through their Child Protection Officers, who work at TA level. The Social Welfare office is also responsible for facilitating the submission of community bylaws to the District Council, if the community so wishes. Five Social Welfare officials¹¹³¹ were interviewed.

6.4.2.5 Interviews with NGOs

In respect of NGOs, the study involved both district and national NGOs. The NGOs were key to understanding the work that has been going on at national level to promote community bylaws as a means of addressing harmful

¹¹²⁹ One in each research site.

¹¹³⁰ Being the administrative heads of each district in Malawi.

¹¹³¹ One each in Ntcheu, Karonga and Kasungu; and two officials in Chiradzulu.

practices affecting women and girls. I was interested in their opinion about these efforts; how harmful practices have been regulated in the past in the NGOs' project areas; the type of projects in which the NGOs have been using community bylaws as a means of addressing harmful practices; the project strategies that the NGOs implement when working on community bylaws in an area; the role that NGOs play in the selection of content and/or language for the community bylaws; their perception about how the bylaws are sitting with gender equality laws and the Constitution; and their opinion on whether the bylaws are taken seriously as 'law' on the ground.

For district NGOs, I initially assumed that the development of community bylaws in all the study sites had been supported by NGOs domiciled in the districts. The plan was therefore to interview these NGOs. However, it turned out that bylaws in the areas of Senior Chiefs Kwataine, Ntcheu, and Lukwa, Kasungu, were neither grown nor trellised by NGO projects. Only Senior Chiefs Chitera, Chiradzulu, and Mwirang'ombe, Karonga, had the involvement of NGOs such as Girls Empowerment Network (GENET) and Foundation for Community Support Services (FOCUS) respectively. Therefore, in Ntcheu and Kasungu, I interviewed NGOs who had community bylaws projects in other areas within the district (Youth Net Counselling – YONECO and World Vision respectively) because their perspectives were still important in constructing a picture of how and why NGOs are involved in bylaw initiatives on the ground.

In Chiradzulu, GENET had left Senior Chief Chitera's area by the time of the study. However, the Executive Director of the NGO still promised to grant me an interview at another venue. This never materialised, despite several attempts to schedule the interview. This means that the study only covered three-district level NGOs. Data on GENET's involvement was therefore

identified from various written sources.¹¹³²

Five NGOs were interviewed at national level, namely: Creative Centre for Community Mobilisation (CRECCOM), Malawi Interfaith AIDS Association (MIAA), Plan Malawi, Women's Legal Resource Centre (WOLREC) and Youth Net and Counselling (YONECO). Coupled with the community-level data, these interviews helped to reveal other conceptual questions that are emerging from the community bylaws phenomenon beyond norm internalisation. In total, eight people were interviewed.

6.4.2.6 Interviews with UN agencies

These were relevant in order to understand the involvement of transnational actors in the community bylaws phenomenon. I focused on UN Women and UNFPA because they have played a prominent role in the community bylaws phenomenon.¹¹³³ I interviewed the UN Women Programme Specialist for Ending Violence Against Women and Girls (EVAWG); and the UNFPA Gender Programme Officer.

I sought to understand, through these interviews, how donors have been involved in national-level efforts to promote community bylaws as a means of addressing harmful practices; the type of community bylaws projects that they have funded over the years and the objectives, including how they have worked with different stakeholders/structures); whether they perceived the bylaw as a community-driven effort to address harmful practices affecting women and girls; their opinion regarding the relationship between the bylaws, the Constitution and gender equality laws; and their perception about whether the bylaws are taken seriously as 'law' on the ground.

¹¹³² One of them being a community bylaws mapping study that I authored in 2016 – Government of Malawi, UNFPA, and EU, 'Mapping of Community Bylaws under the Gender Equality and Women Empowerment (GEWE) Programme,' (2016).

¹¹³³ See Chapter 9.

Table 2: Interviewees at a glance

Category	Interviewees	Interviews
<i>Government sectors</i>	<i>Central level:</i> <ul style="list-style-type: none"> • Department of Gender Affairs • Social Welfare Department • Ministry of Local Government 	4
	<i>District level:</i> <ul style="list-style-type: none"> • District Commissioner • District Social Welfare Officer • Police VSU • Magistrate 	15 ¹¹³⁴
<i>Law-making institutions</i>	<ul style="list-style-type: none"> • Solicitor General • Law Commissioner • Clerk of Parliament • Chairperson, Women's Parliamentary Caucus • Chairperson, Parliamentary Committee on Social and Community Affairs. • Chairperson, Parliamentary Committee on Legal Affairs. 	6
<i>Donors</i>	<ul style="list-style-type: none"> • UNFPA • UN Women 	2
<i>NGOs</i>	<i>National level:</i> <ul style="list-style-type: none"> • Plan Malawi • WOLREC • MIAA • CRECCOM • YONECO 	5
	<i>District level:</i> <ul style="list-style-type: none"> • World Vision, Kasungu • YONECO, Ntcheu • FOCUS, Karonga 	3
<i>Senior Chiefs</i>	<ul style="list-style-type: none"> • Chief Chitera (female), Chiradzulu • Senior Chief Kwataine (male), Ntcheu • Senior Chief Lukwa (male), Kasungu • Senior Chief Mwirang'ombe (male), Karonga 	4
<i>Group Village Heads</i>	<ul style="list-style-type: none"> • Senior Chief Chitera area, 1 FGD of 8 GVHs • Senior Chief Kwataine area, 1 FGD of 11 GVHs • Senior Chief Lukwa area, 1 FGD of 9 GVHs • Senior Chief Mwirang'ombe area, 1 FGD of 3 GVHs 	4 FGDs, 29 people
<i>Village Heads</i>	<ul style="list-style-type: none"> • Senior Chief Chitera area, 1 FGD of 12 VHs • Senior Chief Kwataine area, 1 FGD of 12 VHs • Senior Chief Lukwa area, 1 FGD of 13 VHs • Senior Chief Mwirang'ombe area, 1 FGD of 10 VHs 	4 FGDs, 47 people
<i>Groups that monitor bylaws</i>	<ul style="list-style-type: none"> • Senior Chief Chitera area, 1 FGD of 13 people • Senior Chief Kwataine area, 1 FGD of 8 people • Senior Chief Lukwa area, 1 FGD of 6 people 	4 FGDs, 37 people
<i>Ordinary women</i>	<ul style="list-style-type: none"> • Senior Chief Chitera area, 1 FGD of 10 people • Senior Chief Kwataine area, 1 FGD of 10 people • Senior Chief Lukwa area, 1 FGD of 10 people • Senior Chief Mwirang'ombe area, 1 FGD of 10 people 	4 FGDs, 40 people

¹¹³⁴ Three interviews held in Karonga (DC was not interviewed), and four each in the other districts.

Category	Interviewees	Interviews
Number of interview sessions: 51		
Total number of participants: 183		

6.4 DATA ANALYSIS

After transcribing the audio files, I translated most Chichewa transcripts¹¹³⁵ into English before analysing all the data. Data analysis was done by first coding broad themes from the research questions using Nvivo.¹¹³⁶ The coded data was used to synthesise responses that were most relevant to the research question. This process produced two data sets: one relevant to the emergence of community bylaws (processes); and the other relevant to the conceptualisation of the bylaws. The thesis question was later refined to resonate with the data.¹¹³⁷

In summary, my data analysis sought to identify the actors that are prominent in the community bylaws phenomenon, and to capture their views about the emergence and conceptualisation of the bylaws. I was cautious to note opinions that should be quoted verbatim, or paraphrased. My goal was that the voices of people would not be lost in my description and analysis of the community bylaws story. Therefore, my empirical chapters regularly use participants' voices (translated into English) as evidence to support my arguments about how community bylaws work in the context of norm internalisation. Where translation cannot do justice to terms or phrases, these are quoted verbatim, and their best English approximation provided as footnotes.

¹¹³⁵ 'Most' because in the end, I decided to code some Chichewa transcripts directly and translate as needed during the writing process. This seemed sensible to me because I was translating the transcripts for my own needs anyway.

¹¹³⁶ A data analysis software package.

¹¹³⁷ I decided that I would not present it district-by-district, or actor-by-actor since this was not a comparative study. The narrative would flow better and build a coherent picture by using overarching themes that would reflect perceptions of different research participants under such theme.

6.5 RESEARCH LIMITATIONS

The main limitation of this research is that there was no control group. One might therefore argue that the thesis focuses only on areas where community bylaws have worked, without comparing them with areas where they have not worked. The fact that the four study sites were chosen based on the prominence of their community bylaws and the activism of certain chiefs certainly introduces a strong bias towards those areas where bylaws have worked, ignoring the possibility that initiatives in other parts of Malawi may have been weak or have failed. Nonetheless, this was a conscious choice because the thesis is not about the effectiveness of community bylaws. Rather, the choice reflects the thesis' interest to study the community bylaws from a (human rights) norm internalisation/vernacularisation angle, and to use the community bylaws to test current theories of norm internalisation. Executing such a thesis depended on the presence of some, if not strong, semblance of 'community bylaws at work' in the study areas.

CHAPTER 7

EMERGENCE OF COMMUNITY BYLAWS: ORIGIN AND NATURE

7.1 INTRODUCTION

As illustrated by Chapter 2, scholarship on harmful practices in Africa has not engaged the phenomenon of community bylaws for addressing harmful practices, including child marriage. Furthermore, scholarship on vernacularisation (a model of local level norm internalisation) has largely focused on human rights interventions that are neatly introduced to communities from 'outside,' expecting local settings to appropriate and translate international human rights norms. Chapter 4 has demonstrated that this unicameral approach is reflected in international law and jurisprudence, which emphasises the universalism of human rights, and predominantly expects rural citizenry to be mere recipients of programmes promoting international human rights standards.

As a result, vernacularisation that manifests horizontally when grassroots actors are actively engaged in norm appropriation and translation (at times haphazardly, consciously or unconsciously), as is the case with community bylaws in rural Malawi, remains to be understood. As seen in Chapter 5, these community bylaws are alien even to Malawi's constitutional legislative framework. While Malawi's formal legal framework largely mirrors the prescriptions of international law on harmful practices,¹¹³⁸ rural areas seem to prefer the community bylaws instead.

This chapter traces the history of the emergence of community bylaws, before

¹¹³⁸ And where there are gaps, frameworks such as CEDAW and CRC can directly apply to complement statutory law.

examining the nuances of a 'community bylaw'. This will entail defining the level at which the community bylaws are made, and characteristics of these bylaws (including the range of issues that are addressed the bylaws). The chapter also highlights processes followed in developing the bylaws. This discussion lays the foundation for explaining the factors influencing the emergence and use of community bylaws aimed at protecting women from harmful practices and for understanding how facets of horizontal vernacularisation are manifesting as the bylaws emerge.

7.2 COMMUNITY BYLAWS IN A HISTORICAL TIMELINE

Community bylaws in Malawi cannot be easily located in a neat historical timeline. Community bylaws of sorts have existed since the mid-1990s. According to the Executive Director of CRECCOM,¹¹³⁹ community bylaws addressing harmful practices became topical from 1994 under the 'Girls Attainment in Basic Literacy and Education (GABLE) programme':¹¹⁴⁰ 'GABLE involved social mobilisation campaigns that raised communities' consciousness about problematic cultural practices. Some Chiefs started to invent oral 'bylaws' or 'village based initiatives' [to counter long-standing practices]'.¹¹⁴¹ Senior Chief Kwataine, Ntcheu, recounts that he initially heard about community bylaws in 1995: 'when I was a teacher,¹¹⁴² the TA came to hear a case concerning people who had plucked mangoes from school trees

¹¹³⁹ An organisation founded in 1999 to take over the social mobilisation work of the GABLE Programme.

¹¹⁴⁰ Implemented between 1991 and 2003, GABLE was a USAID funded sector reform programme aimed at promoting system wide changes in the education sector while at the same time addressing gender disparities in education by introducing interventions specifically aimed at promoting girls education.

¹¹⁴¹ The CRECCOM Executive Director further explained that 'for example in some communities girls were rarely monitored at night because they slept in separate huts (*Gowelo*). This resulted in teenage pregnancies. With GABLE interventions, we saw different communities led by Chiefs on different levels abandoning bad practices and encouraging girls go to school through oral bylaws'.

¹¹⁴² He was a primary school teacher in TA Ganya's area, Ntcheu, before being coronated TA in 1999.

without permission. The culprits were fined chicken as *chindapusa*.¹¹⁴³ I gathered then that the area had '*malamulo ena apadera*'.¹¹⁴⁴

The emergence of oral community bylaws in Senior Chief Mwirang'ombe's area, Karonga, can be traced to between 2002 and 2004, and written ones in 2014. Group Village Heads in the area recalled: 'around 2002, we formulated bylaws on many topics.¹¹⁴⁵ So bylaws existed in the past, but they were unwritten and only used by chiefs and not the whole community'. The Senior Chief said he initially introduced community bylaws around 2003/04 to protect girls following his pain after his school-going daughter was impregnated by a teacher: 'we had a team which would visit schools, advising that any girl who gets pregnant should return to school after delivery. Communities were told that punishment awaited the concerned man and girl'. The community adopted written bylaws to protect girls from early marriages in April 2014 with support from FOCUS.¹¹⁴⁶

Senior Chief Kachindamoto of Dedza,¹¹⁴⁷ who has received international attention for her stiff stance against child marriage in her Mtakatika area, started bylaw initiatives around 2005/6. As she was passing by a village

¹¹⁴³ While 'fine' is generally seen as the best English approximation of this term, 'fine' may not capture that in literal translation, the word connotes someone who is being humbled to make the payment as an acceptance that he/she acted 'stupidly'.

¹¹⁴⁴ Best English approximation would be 'other extra laws'.

¹¹⁴⁵ 'Amongst the many issues, the bylaws prevented people from letting their livestock eat on free-range. We were taken to court by an owner of livestock that had been killed after destroying crops as prescribed by our bylaws. The Magistrate said such bylaws were bad.'

¹¹⁴⁶ The bylaws were adopted as a joint initiative with TA Wansambo. FOCUS said that they have worked in Senior Chief Mwirang'ombe's area for over a decade on two projects that culminated into developing the community bylaws—a HIVOs funded project to deal with HIV and AIDS amongst the youth and community sex workers; and a project funded by the Scottish Government, which engaged Chiefs on safe motherhood and other harmful practices.

¹¹⁴⁷ Chief Kachindamoto's area was not part of the research sites, but her public zero tolerance of pioneering child marriage would help to understand the history of community bylaws better. Previously, Chief Kachindamoto worked as an administrative assistant (Secretary) for 27 years, before she took over as Senior Chief in 2003 after her father died—Norway Official Site in Malawi, 'Chief Kachindamoto Has Stopped 850 Child Marriages and Sent the Girls Back to School.' Available at http://www.norway.mw/norway_malawi/News-from-Malawi/News/Chief-Kachindamoto-has-stopped-850-child-marriages-and-sent-the-girls-back-to-school/#.Vxj9OyN94t, accessed on 21 April 2016; Janet Karim, 'Praise to Cultural Leaders for Ending Child Marriages,' (2016).

football match, she observed a young girl (watching the match) with a baby who was crying uncontrollably. When she asked the girl to take the baby to its mother,¹¹⁴⁸ she was shaken when the girl responded that she was the mother and married. Asked about her husband, the girl pointed to a boy on the football pitch.¹¹⁴⁹

Chief Kachindamoto resorted to 'community bylaws' when she saw that many parents ignored her pleas to keep their girls in school.¹¹⁵⁰ Through her Area Development Committee (ADC), she got her 50 sub-Chiefs to sign an agreement in 2006 not to permit marriages of children. However, seeing that clerics continued officiating child marriages, in 2009 she decided to engage all faith leaders in her area, an effort that resulted in the conclusion of an agreement in terms of which all clerics committed to stop officiating child marriages under the pain of being chased away from the area.¹¹⁵¹ Between 2012 and 2016, WOLREC¹¹⁵² developed a project¹¹⁵³ that helped to strengthen and organise the agreements into community bylaws.¹¹⁵⁴

In Senior Chief Kwataine's area, community bylaws were also visible from 2005/6. Group Village Heads approximated that safe motherhood bylaws have existed 'since early 2000'. Village Heads said estimated that 10 years had elapsed since these bylaws were introduced. However, Senior Chief Kwataine explained that when his area was implementing a Women, Girls, HIV and AIDS Project around 2005/6,¹¹⁵⁵ his ADC decided to fix the age of marriage at

¹¹⁴⁸ For breastfeeding.

¹¹⁴⁹ Chief Kachindamoto explained this background to her areas' bylaws to the author in another interview in 2016 when the author was commissioned by UNFPA to map community bylaws.

¹¹⁵⁰ The common response was that she had no right to overturn tradition, nor, as the mother of five boys, to lecture others on the upbringing of girls.

¹¹⁵¹ Information based on interview with author and also see 'The African Child Information Hub, 'Malawi's Fearsome Chief, Terminator of Child Marriages,' 31 March 2016.

¹¹⁵² Local NGO.

¹¹⁵³ Under the Gender Equality and Women Empowerment Programme, see note 21.

¹¹⁵⁴ Government of Malawi, UNFPA, and EU, 'Mapping of Community Bylaws under the Gender Equality and Women Empowerment (GEWE) Programme,' (2016), 16.

¹¹⁵⁵ Funded by National AIDS Commission and coordinated by the Ministry of Gender.

21 years in order to guarantee girls' education, at least up to secondary school.¹¹⁵⁶ Senior Chief Kwataine's area is celebrated for safe motherhood bylaws, of which he said: 'in 2006, all TAs in Ntcheu visited TA Mkanda's area, Mchinji to learn how to reduce maternal deaths. I was inspired and upon return, my area started formulating safe motherhood bylaws between 2007 and 2009'.

Indeed in 2008, the health sector generally noted that safe motherhood bylaws were gaining traction following government's ban of traditional birth attendants.¹¹⁵⁷ Having been appointed the Chairperson of the Presidential initiative on Maternal and Safe Motherhood since April 2012, Senior Chief Kwataine¹¹⁵⁸ began rallying Chiefs across Malawi to formulate bylaws to force pregnant women to deliver in health facilities to prevent maternal and neonatal deaths.¹¹⁵⁹ In respect of his areas' bylaws, Senior Chief Kwataine added: 'because of the strong enforcement of our safe motherhood bylaws,¹¹⁶⁰ around 2009, we linked these bylaws to girl education since many pregnant girls were dying early or developing fistula during delivery. In 2012, we formulated stronger bylaws on girls' protection'.¹¹⁶¹ While women interviewees in Senior Chief Kwataine's area doubted whether a long time had passed since the bylaws emerged, they were referring to 2012 written

¹¹⁵⁶ Government of Malawi, UNFPA, and EU, 'Mapping of Community Bylaws under the Gender Equality and Women Empowerment (GEWE) Programme,' (2016), 18.

¹¹⁵⁷ 'Ever since the government banned traditional birth attendants in 2007, women who do not deliver at health facilities can be fined through bylaws set by some traditional leaders' — The Health Foundation, 'Improving Maternal and Newborn Health in Malawi: Lessons from a Landmark Programme Addressing Maternal and Newborn Health in Malawi,' (2013). Available at <http://www.health.org.uk/sites/default/files/ImprovingMaternalNewbornHealthMalawi.pdf>, accessed on 18 June 2016.

¹¹⁵⁸ He was appointed by the then State President Dr Joyce Banda.

¹¹⁵⁹ Martin Chiwanda, 'Malawi: Senior Chief Kwataine Blames Local Leaders on Maternal Deaths,' *AllAfrica*, 27 February 2014. Available at <http://allafrica.com/stories/201402271315.html>, accessed on 18 June 2016.

¹¹⁶⁰ Such that Chief Kwataine said he received a Women Deliver Safemotherhood Award in 2009.

¹¹⁶¹ Best English approximation for the Chichewa title of the bylaws document would be— 'bylaws protecting girls from different forms of violence'. Their objective is to 'support the protection of girls from forms of violence emanating from unacceptable marriages in the area of Senior Chief Kwataine in Ntcheu district'.

community bylaws on girls' protection in the area as their first encounter with these bylaws.

In Senior Chief Chitera's area, Chiradzulu, oral community bylaws emerged before 2011 and written ones in 2012. While Senior Chief Chitera could not remember the exact year, she could remember that oral initiatives to curb child marriage before GENET¹¹⁶² appeared in 2011 to help them 'formalise' their efforts:¹¹⁶³ 'before GENET came, we had a committee led by Group Village Heads, bent ensuring that girls below 21 years should not get married. People went door to door to meet and plead with parents of a child about to get married that the child should continue schooling'.¹¹⁶⁴

The rest of the respondents in Senior Chief Chitera's area only made reference to the current written community bylaws, adopted with GENET's support in August 2012. Group Village Heads and Village Heads said, 'the bylaws came five to six years ago'. A women's FGD said, 'we started hearing of bylaws here in 2015 - Chiefs brought these laws because with democracy, *'anthu atailira kwambiri'*¹¹⁶⁵'. In Senior Chief Lukwa's area, Kasungu, oral bylaws were placed between 2004 and 2007, and written ones in 2014/15. Village Heads stated, 'we started having bylaws between 2004 and 2007. We Chiefs met and noted that *'chibwana chachuluka ndipo ndikofunika kuchitapo kanthu'*.¹¹⁶⁶ However, these bylaws were loosely applied, not well known and undocumented.'

Referring to their current written community bylaws, the Senior Chief and Group Village Heads said the bylaws were launched in April 2015. Senior

¹¹⁶² A local NGO.

¹¹⁶³ According to Chief Chitera, GENET came after they heard of the community's oral bylaws initiatives.

¹¹⁶⁴ At times as young as 13 years.

¹¹⁶⁵ Best English approximation would be – 'people are misbehaving recklessly a lot'.

¹¹⁶⁶ Best English approximation could be 'there was a lot of childishness/carelessness [in the way the villagers were conducting themselves] and we need to do something'.

Chief Lukwa shared the background: ‘we¹¹⁶⁷ went TA Mwanza’s area in Salima in 2014. We were impressed with what they have achieved through community bylaws. We decided that we could do the same. So some of the punishments in our bylaws, such as the payment of goats as fines, are modelled after those bylaws’. Senior Chief Lukwa’s act symbolises socialisation – a strategy of translation in horizontal vernacularisation discussed in Chapter 9.

Whereas Chapter 5 has shown that legal and extra-legal strategies to address child marriage and some harmful practices date back to colonial and pre-democracy eras, the use of community bylaws for this agenda appears to be a post-democracy development. These community bylaws are broadly traceable to 1994, though in the study communities they have materialised between 2002 and 2015. Notably, pre-2010 community bylaws were typically oral.

Post-2010, written community bylaws to address practices that enflame gender inequalities are prominent. For example, the Gender Equality and Women Empowerment (GEWE) Programme (2012-2016) robustly documented the use of community bylaws for eliminating harmful practices driving gender-based violence and HIV in Malawi.¹¹⁶⁸ Some of the ‘GEWE’ bylaws are used illustratively in this chapter.

Establishing that written community bylaws have become conspicuous post-2010 is noteworthy because this phase is associated with the growth of a ‘human rights culture’ and advocacy for the enactment of gender equality statutes.¹¹⁶⁹ However, the empirical data discussed up to Chapter 9 demonstrates that one cannot just superficially conclude that the community bylaws are budding as a mode of diffusing legislation and related human

¹¹⁶⁷ The Senior Chief as part of a national delegation.

¹¹⁶⁸ Government of Malawi, UNFPA, and EU, ‘Mapping of Community Bylaws under the Gender Equality and Women Empowerment (GEWE) Programme,’ (2016).

¹¹⁶⁹ See section 5.3.3 of the thesis.

rights norms to rural communities since horizontal vernacularisation usually happens in unpredictable patterns.

7.3 DEFINING A 'COMMUNITY BYLAW'

This part presents data that defines a community bylaw by examining three issues: for something to be called a community bylaw, at what level is it made? Under what processes are community bylaws formed? What are the characteristics of community bylaws?

7.3.1 Level at which Community Bylaws are Made

Chapter 4 has established that CEDAW, CRC and AU jurisprudence presumes that norm internalisation is mostly credible within state or formal institutions and systems. Yet, the findings show that the community bylaws that are internalising the norm protecting women from harmful practices are emerging at the level of Chiefs and their subjects/territories. As the VSU Police Officer at Karonga Police Station remarked, 'community bylaws are laws that Chiefs have – to be followed by their villages/communities'.

But at which level of Chiefs, amongst the three tiers of chieftaincy in Malawi, do the community bylaws rest? The bylaws are popularly being adopted at TA level; indeed, this is where the bylaws for all the study sites, and those cited expositively, are located. Sometimes, such bylaws are made under the auspices of the Area Development Committee (of which the TA or Senior Chief is head), or directly under the TA.¹¹⁷⁰

¹¹⁷⁰ Some areas (for example Dedza and Mangochi) have developed bylaws for addressing gender inequalities at District Council level, so that these can apply to each TA in the district. I am wary to call these 'community' bylaws because generalising that the district is a 'community' could be stretching matters. In Dedza, the bylaws were developed as 'district education bylaws'. They evolved from community bylaws to address child marriage in Chief Kachindamoto's area, resulting in consensus by all TAs (who are part of the District Council) in the district that they would adopt a similar approach. In Mangochi, YONECO facilitated

There is particular rationale for resting community bylaws at TA level. According to the Social Welfare Assistant in Chiradzulu, 'community bylaws are TA specific since they address contextual problems affecting an area. For example, a problem in Senior Chief Chitera may not be the same as in TA Nkalo, though both are in Chiradzulu district'. Furthermore, where the TA is zealous about the community bylaws (as were the Senior Chiefs in the study sites), TA level bylaws are tidier because they make both Village Heads and Group Village Heads accountable to the TA for the implementation of the bylaws. Also, it is more realistic for the TA to administer the implementation of one overarching bylaw than manifold bylaws of lower Chiefs.

This is not to say the community bylaws cannot exist at the level of lower Chiefs, but this has proven problematic. For example, Senior Chief Kwataine, Ntcheu, illustrated difficulties posed by community bylaws that used to sit at Group Village Head level in his area:

Before 2012, our bylaws gave Group Village Heads wide discretion to address obstacles to girl education in their villages. However, we were not cohesively arresting the problem. My Chiefs would respond to cases differently - some would impose '*chindapusa*'¹¹⁷¹ of goats, some chickens, and some would forgive perpetrators. To bring sanity and unity, in 2012 we developed TA-wide community bylaws protecting girls from violence.

Senior Chief Kwataine also recalled a similar challenge in the maiden years of promoting safe motherhood in his area: 'some Chiefs would set good 'laws' in their village, but other Chiefs would not. If a compliant village would try to counsel subjects in a neighbouring village on good maternal health practices, they would be rebuffed: those are your laws not ours'. These findings contradict intimations made by the Child Protection Manager for Plan Malawi

the development of TA specific bylaws first in TAs Ngokwe and Nyambi, and also supported the process of generating gender related District Council Bylaws.

¹¹⁷¹ See note 1143.

that 'bylaws at Group Village Head level work the best because the constituency is smaller unlike bylaws at TA level which may not apply well in certain villages'. Section 7.3.3 shows that the TA bylaws in the study areas were formulated consultatively, thus making it unlikely that they would not suit some villages.

Chapter 4 has demonstrated that international human rights jurisprudence expects states to harmonise mechanisms of plural systems with international human rights frameworks that promote the rights of women and girls.¹¹⁷² Though the presence of community bylaws at TA level may appear like the state is achieving this task, the process of developing community bylaws articulated below shows that what the TAs are doing in their communities is primarily their own initiative that may somehow (or indeed may not) involve the state along the way – thus departing from the usual way of vernacularising human rights.

7.3.2 Characteristics of a Community Bylaw

There are four main characteristics of a community bylaw: leadership of local Chiefs, including the signature of (or verbal proclamation by) the TA; focus on resolving specific community problems; and the use of local fines for their violation.

7.3.2.1 *Community bylaws are anchored in Chiefs' leadership*

As Section 7.3.1 shows, the leadership of Chiefs, particularly the TAs or Senior Chiefs, is requisite to the establishment of community bylaws. Chiefs also play a crucial role in the implementation of bylaws. NGOs have reported that a key factor that hinders the functionality of some bylaws adopted without a TA's involvement or commitment to make the bylaws work.¹¹⁷³ As

¹¹⁷² See section 4.4.4 of the thesis.

¹¹⁷³ Government of Malawi, UNFPA, and EU, 'Mapping of Community Bylaws under the Gender Equality and Women Empowerment (GEWE) Programme,' (2016).

discussed more under Chapter 9, by championing community bylaws, Chiefs are establishing themselves as important vernacularisers, a role that has not been recognised in vernacularisation discourse. This role of Chiefs has been obscured by the skewed attention paid to 'elite' driven vernacularisation at the expense of vernacularisation that horizontally occurs amongst local actors.

7.3.2.2 *Community bylaws are problem driven*

Communities introspectively identify their problem, and direct community bylaws at such a problem. The titles of the community bylaws in the four study sites actually point to the overall interests of the bylaws.¹¹⁷⁴ Group Village Heads in Senior Chief Chitera's area, Chiradzulu, remarked, 'because we have particular problems affecting us, we are developing our own laws so that our community can move smoothly'. A women's FGD in Senior Chief Kwataine's area, Ntcheu, said, 'the bylaws are addressing the problems that we used to face'. A police officer at Ntcheu Police Station VSU, said, 'bylaws help to regulate internal problems in a community'. A police officer at Chiradzulu Police Station VSU, noted, 'bylaws are formulated to reduce harmful practices that communities are recognising as problematic'.

¹¹⁷⁴ The first set of bylaws originally developed in Senior Chief Lukwa's area is titled 'HeforShe: Lukwa Girl Child Abuse Back to School Campaign Bylaws.' Thus the provisions mostly focus on promoting the education of children, particularly the girl child. The complementary set of bylaws in the area has a Chichewa title: '*Malamulo A M'dera pa Nkhani Yolimikitsa Umoyo Wabwino Polimbikitsa Maphunziro, Uchembere Wabwino ndi Pothetsa Nkhanza za M'banja, Miyambo ndi Zikhulupiliro Zina Zimene Zimathandizira Kufala kwa Ka Chilombo ka HIV*' (best English approximation would be 'Bylaws on the Topic of Strengthening Healthy Living Through Strengthening Education, Safe Motherhood, and Eliminating Domestic Violence, Cultural Practices and Beliefs that Promote the Spread of HIV'). These bylaws focus on education, safe motherhood, domestic violence and other harmful practices that predispose community members to HIV infection. The community bylaws in Senior Chief Mwirang'ombe's area are titled 'Bylaws for Prevention of Maternal, Neonatal and Child Mortality and Morbidity in TA Mwirang'ombe.' Child marriage is covered in this context. The community bylaws in Chief Kwataine's area are titled '*Malamulo Oteteza Atsikana ku Nkhanza Zosiyanasiyana*' (best English approximation would be—'Bylaws protecting girls from different forms of violence'). Their objective is to support the protection of girls from forms of violence emanating from unacceptable marriages in the area of Senior Chief Kwataine in Ntcheu district.

Table 3 displays examples of internal problems that the community bylaws are seeking to address. While the emphasis is on the bylaws in the four study areas, further examples are tapped from other bylaws developed across Malawi.

Table 3: Summary of issues covered by community bylaws

Bylaw field	Summary of bylaw prescriptions
Child marriage	Some bylaws prohibit children to marry before 18 years, ¹¹⁷⁵ forced marriage, ¹¹⁷⁶ child betrothal, ¹¹⁷⁷ solemnisation of child marriages by clergy and Sheikhs, ¹¹⁷⁸ approval of child marriage by Chiefs, ¹¹⁷⁹ and negotiating child marriages. ¹¹⁸⁰ Some treat child marriage as criminal. ¹¹⁸¹
Pregnancy of schoolgirls	Some bylaws fine the man responsible, ¹¹⁸² pregnant girl, ¹¹⁸³ and duty bearers protecting the man responsible; ¹¹⁸⁴ require the return any educational support received by the girl, ¹¹⁸⁵ and perpetrator to be taken to court; ¹¹⁸⁶ task grandparents to care for grandchild after mother returns to school; ¹¹⁸⁷ forbid abortion of the pregnancy; ¹¹⁸⁸ allow adolescents to access sexual and reproductive health services to prevent pregnancies. ¹¹⁸⁹
Child support	Some bylaws task the child's father, ¹¹⁹⁰ or parents of the father if he is a schoolboy ¹¹⁹¹ to pay maintenance.
School gender-based violence	Some bylaws prohibit schoolteacher/schoolboy to sexually touch, insult, and demean a schoolgirl; ¹¹⁹² a teacher to be with a schoolgirl at an inappropriate place or ¹¹⁹³ to propose love to a schoolgirl. ¹¹⁹⁴

¹¹⁷⁵ All reviewed community bylaws.

¹¹⁷⁶ Areas of Senior Chief Lukwa (Kasungu) and Mwirang'ombe (Karonga); TA Ngokwe (Machinga); TAs Nthalire and Kameme (Chitipa).

¹¹⁷⁷ Areas of Senior Chief Kwataine (Ntcheu) and Mwirang'ombe; TA Ngokwe.

¹¹⁷⁸ Bylaws in the areas of Senior Chiefs Lukwa and Chitera (Chiradzulu); TAs Mwanza and Makanjila (Salima), Ngokwe.

¹¹⁷⁹ Areas Senior Chiefs Chitera, Kwataine, Lukwa, and Kachindamoto (Dedza), TA Ngokwe.

¹¹⁸⁰ Area of Senior Mwirang'ombe.

¹¹⁸¹ The bylaws in Chief Mwirang'ombe area say that a person who marries a child below 16 years should be reported to the police.

¹¹⁸² Areas of Senior Chiefs Lukwa and Kwataine.

¹¹⁸³ Areas of Senior Chief Mwirang'ombe; TA Mankhambira (Nkhata Bay).

¹¹⁸⁴ Areas of Senior Chief Lukwa; TAs Mwanza and Makanjila.

¹¹⁸⁵ Areas of Senior Chiefs Lukwa and Senior Chief Chitera's area (Chiradzulu). Such support can include school fees, uniform and bicycles given as education incentives to girls under some projects. The man responsible or the girl should return such support.

¹¹⁸⁶ Areas of Senior Chief Lukwa; TAs Mwanza and Makanjila.

¹¹⁸⁷ Area of Senior Chief Kwataine.

¹¹⁸⁸ Area TA Mwansambo (Nkhotakota).

¹¹⁸⁹ Area of Senior Chief Kwataine.

¹¹⁹⁰ Area of Senior Chief Lukwa (Kasungu).

¹¹⁹¹ Areas of TA Kapondo and Dambe (Mchinji).

¹¹⁹² Area of TA Chimombo (Nsanje).

¹¹⁹³ Areas of Senior Chief Lukwa; TAs Mwanza and Makanjila.

Bylaw field	Summary of bylaw prescriptions
Education: girl sanitation	Some bylaws require the presence of girls' latrines to encourage girls' education. ¹¹⁹⁵
Education: teachers' conduct	Some bylaws cover teachers who either marry, or impregnate or have an affair with a schoolgirl; ¹¹⁹⁶ lazy and drunken teachers; ¹¹⁹⁷ teachers who administer corporal ¹¹⁹⁸ or extreme ¹¹⁹⁹ punishment, teachers who send students to buy beer or cigarettes, ¹²⁰⁰ or to work at their homes during class time. ¹²⁰¹
Education: learners' conduct	Some bylaws cover children who refuse to attend school, ¹²⁰² rebellious girls, ¹²⁰³ those absconding classes; ¹²⁰⁴ learners who have affairs with each other, ¹²⁰⁵ and learners wearing tight and/or short or sagging ¹²⁰⁶ clothes. ¹²⁰⁷
Education: conduct of other third parties	Some bylaws punish men who have sex/affairs with schoolgirls, ¹²⁰⁸ anybody who encourages children to drop out of school, ¹²⁰⁹ parents who consent to ¹²¹⁰ or initiation counsellors who perform ¹²¹¹ or traditional leaders who permit ¹²¹² initiation during schooldays; prohibit performance of initiation ceremonies during education calendar, and harassment of learners as they go to school ¹²¹³ (including banning <i>Gule Wamkulu</i> ¹²¹⁴ performance during school time). ¹²¹⁵
Sexual violence	Some bylaws cover rape; ¹²¹⁶ rape of a schoolgirl; ¹²¹⁷ <i>kusasa fumbi</i> ; ¹²¹⁸ 'ritual sex' during initiation; ¹²¹⁹ child marriage; ¹²²⁰ and defilement of young girls by fathers or stepfathers. ¹²²¹

¹¹⁹⁴ Area of TA Chimombo.

¹¹⁹⁵ Areas of Senior Chiefs Lukwa and Kwataine; and TAs Mwanza and Makanjila – such bylaws hold accountable School Management Committees, Parent Teacher Associations, and Mother Groups.

¹¹⁹⁶ Area of Senior Chiefs Lukwa and Kwataine and TAs Chimombo, Nyambi (Machinga), Mwanza and Makanjila, Ntchema and Kadewere (Chiradzulu).

¹¹⁹⁷ Area of TA Mankhambira.

¹¹⁹⁸ Area of TAs Mwansambo; Kabunduli (Nkhata Bay).

¹¹⁹⁹ Area of TAs Nthalire and Kameme.

¹²⁰⁰ Area of TA Kabunduli.

¹²⁰¹ Area of TAs Kabunduli; Mwanza and Makanjila.

¹²⁰² Areas of TAs Mwanza and Makanjila and Ngokwe; Senior Chief Lukwa.

¹²⁰³ Area of Senior Chief Lukwa.

¹²⁰⁴ Area of Senior Chief Chitera.

¹²⁰⁵ Area of Senior Chief Chitera TA Mwansambo.

¹²⁰⁶ Locally termed '*kukhwefula*'.

¹²⁰⁷ Area of TA Mwansambo.

¹²⁰⁸ Area of Senior Chief Kwataine; TAs Nyambi, Mwansambo.

¹²⁰⁹ Area of TA Nyambi.

¹²¹⁰ Areas of Senior Chiefs Kachindamoto and Chitera; TAs Makhuwira and Ngabu.

¹²¹¹ Areas of Senior Chief Chitera; TAs Mwansambo; Makhuwira and Ngabu.

¹²¹² Areas of Bylaws in the area of Senior Chiefs Kachindamoto and Lukwa; TAs Makhuwira and Ngabu; and Bwananyambi and Chowe (Mangochi).

¹²¹³ Area of TA Mankhambira.

¹²¹⁴ See Glossary of Chichewa terms.

¹²¹⁵ Area of Senior Chief Lukwa.

¹²¹⁶ Area of TA Mwansambo.

Bylaw field	Summary of bylaw prescriptions
Domestic violence	Some bylaws prohibit spousal battery, ¹²²² wife battery, neglecting to dress and feed a wife and children, economic abuse, divorce without justifiable cause, ¹²²³ beating a pregnant wife, marital rape, ¹²²⁴ verbal abuse, extramarital affairs, ¹²²⁵ preventing a wife to do business or participate in social groups; and failure of polygamous man to financially/emotionally take care of wife and children or failure by a migrant husband to support his family for more than five years. ¹²²⁶
Inheritance	Some bylaws encourage community members to write a Will; ¹²²⁷ prohibit grabbing of property from orphans and/or widows; ¹²²⁸ entitle the surviving wife and children to household property; ¹²²⁹ recognise the DC's mandate to determine the distribution of non-household property; ¹²³⁰ impose a formula for distributing property where there is no Will; ¹²³¹ some consider property grabbing as a criminal offence; ¹²³² and some treat state intervention as last resort. ¹²³³
Widowhood rites	Some bylaws ban <i>chokolo</i> , ¹²³⁴ require the disbandment of the <i>chokolo</i> family, ¹²³⁵ prescribe HIV testing as a precondition for <i>chokolo</i> , ¹²³⁶ prohibit sexual cleansing of a widow, ¹²³⁷ and subjecting a widow to inhumane practices. ¹²³⁸
Social misconduct	Some bylaws disallow the use of profane language against other community members, women and Chiefs; ¹²³⁹ and playing music loudly in one's home at night. ¹²⁴⁰

¹²¹⁷ Areas of Senior Chief Lukwa; TAs Mwanza and Makanjila.

¹²¹⁸ Initiation sexual cleansing—Areas of Senior Chief Lukwa's area; TAs Mwanza and Makanjila.

¹²¹⁹ Areas of TAs Mwanza and Makanjila (Salima) have banned Gule Wamkulu namely Kankwanya and Kamano, which used to beat and have sex with newly initiated girls.

¹²²⁰ Area of Senior Chief Mwirang'ombe—16 years and below.

¹²²¹ Area of TAs Kadewere and Mwansambo— including concealment of the act by a mother.

¹²²² Bylaws in the area of TA Mwansambo.

¹²²³ Bylaws in the area of Senior Chief Lukwa (Kasungu); TAs Mwanza and Makanjila.

¹²²⁴ Bylaws in the areas of TA Kabunduli and Mkumbila.

¹²²⁵ Bylaws in the area of TA Mwansambo.

¹²²⁶ Bylaws in the areas of TA Kabunduli and Mkumbila.

¹²²⁷ Areas of Senior Chief Lukwa; TAs Mwanza, Makanjila and Ntchema.

¹²²⁸ Areas of TAs Mwanza, Makanjila and Ntchema.

¹²²⁹ Areas of Senior Chief Lukwa; TAs Mwanza and Makanjila.

¹²³⁰ Areas of Senior Chief Lukwa; TAs Mwanza and Makanjila.

¹²³¹ Area of TA Mwansambo.

¹²³² Areas of Senior Chief Lukwa; TAs Mwanza and Makanjila.

¹²³³ Areas of TA Mwansambo.

¹²³⁴ Wife inheritance—Areas of TAs Kapondo, Dambe, Kabunduli, Mkumbila, Nthalire and Kameme.

¹²³⁵ Areas of TAs Kapondo and Dambe.

¹²³⁶ Area of TA Mwansambo.

¹²³⁷ Area of TA Chimombo.

¹²³⁸ Area of TA Kabunduli— e.g. requiring her to cover her face or to wear rags.

¹²³⁹ i.e. when one is drunk—Areas of Senior Chief Lukwa; TAs Kabunduli and Mkumbila.

¹²⁴⁰ Areas of Senior Chief Lukwa; TA Mwanza and Makanjila.

Bylaw field	Summary of bylaw prescriptions
Amusement and entertainment	Other bylaws require proprietors of video showrooms not to admit children during school time; ¹²⁴¹ prohibit the screening of pornographic films ¹²⁴² or admission of children into such shows; ¹²⁴³ selling of beer to children; ¹²⁴⁴ admitting children to beer joints; ¹²⁴⁵ playing loud music at beer joints, ¹²⁴⁶ especially during school time ¹²⁴⁷ and running a beer joint near a school or health facility; ¹²⁴⁸ and impose a curfew for beer joints ¹²⁴⁹ and video shows. ¹²⁵⁰
Community celebrations	Some bylaws prohibit overnight community celebrations ¹²⁵¹ ; impose curfews for such celebrations – usually up to 7 pm ¹²⁵² or 10 pm; ¹²⁵³ and forbid young people from attending overnight choir events and/or sleeping at a funeral. ¹²⁵⁴
Safe motherhood ¹²⁵⁵	Some bylaws address issues of: late attendance at antenatal clinics; not giving birth at hospital; practicing as traditional birth attendant; ¹²⁵⁶ giving pregnant women traditional herbs to assist with labour; ¹²⁵⁷ being pregnant at 35 years and above, inadequate child spacing; ¹²⁵⁸ having more than six children; husband’s failure to provide nutritious food to pregnant wife; overworking a pregnant wife; ¹²⁵⁹ not allowing a pregnant woman to eat eggs and drink milk, sending a pregnant wife to her parents’ home till she gives birth; ¹²⁶⁰ husband’s neglect to buy necessary supplies for birth; ¹²⁶¹ husband’s neglect to escort expectant wife to the hospital. ¹²⁶²

¹²⁴¹ Area of Senior Chief Lukwa’s area; TAs Mwanza and Makanjila.

¹²⁴² Areas of Senior Chief Lukwa’s area; TAs Mwanza and Makanjila, Kapondo and Dambe.

¹²⁴³ Area of TAs Nthalire and Kameme.

¹²⁴⁴ Area of TAs Kabunduli and Mkumbila.

¹²⁴⁵ Area of TAs Nthalire and Kameme; Makhuwira and Ngabu.

¹²⁴⁶ Area of TAs Makhuwira and Ngabu.

¹²⁴⁷ Areas of Senior Chief Lukwa; TAs Mwanza and Makanjila.

¹²⁴⁸ Area of TAs Kapondo and Dambe.

¹²⁴⁹ Area of TAs Kapondo and Dambe say all beer halls should close at 10:00 pm.

¹²⁵⁰ Area of Senior Chief Lukwa say video shows should run up to 9 pm.

¹²⁵¹ Commonly known as *zisangala* or *michezo* in order to control the spread of HIV. These celebrations occur during coronation of Chiefs, weddings, initiation graduation, traditional dance events and religious festivals.

¹²⁵² Areas of Senior Chiefs Kwataine and Chitera.

¹²⁵³ Areas of Senior Chief Lukwa; TAs Mwansambo, Mwanza and Makanjila.

¹²⁵⁴ Areas of Senior Chief Mwirang’ombe; TAs Mwanza and Makanjila.

¹²⁵⁵ The safe motherhood topic cuts across most bylaws.

¹²⁵⁶ Areas of Senior Chiefs Mwirang’ombe, Lukwa and Kwataine; TAs Mwansambo, Kabunduli, Mkumbila, Kapondo, Dambe, Mwanza, Makanjila, Mponela, Chakhaza, Chimombo, Nthalire and Kameme.

¹²⁵⁷ Areas of Senior Chief Mwirang’ombe ; TAs Kabunduli and Mkumbila.

¹²⁵⁸ Area of Senior Chiefs Mwirang’ombe and Kwataine Ntcheu.

¹²⁵⁹ Area of Senior Chief Mwirang’ombe.

¹²⁶⁰ Areas of TAs Kabunduli and Mkumbila.

¹²⁶¹ Areas of Senior Chief Mwirang’ombe; TAs Kabunduli, Mkumbila and Mwansambo.

¹²⁶² Areas of Senior Chiefs Mwirang’ombe, and Lukwa; TAs Ntchema, Mwanza and Makanjila.

Bylaw field	Summary of bylaw prescriptions
Child labour and trafficking	Some bylaws prohibit sending children to herd cattle during education calendar, including as employees, ¹²⁶³ allowing school-going children to be employed as domestic or other workers; ¹²⁶⁴ employing children in hazardous work ¹²⁶⁵ including bars; ¹²⁶⁶ sending children to trade during school time. ¹²⁶⁷
Other cultural practices	Other bylaws prohibit: <i>bulangete la mfumu</i> , ¹²⁶⁸ <i>fisi</i> , ¹²⁶⁹ <i>chimwanamaye</i> , ¹²⁷⁰ <i>mbiligha</i> (bonus wife), ¹²⁷¹ and locking a girl indoors upon reaching puberty. ¹²⁷²
Miscellaneous issues	Other bylaws cover: community security, funeral ceremonies, agriculture and businesses, water management and environmental and natural resource management, ¹²⁷³ hospital-based male circumcision. ¹²⁷⁴ Others ban <i>njuga</i> . ¹²⁷⁵ To encourage education amongst boys, some communities that commonly export unskilled labour to South Africa have imposed travel restrictions. ¹²⁷⁶

Source: Government of Malawi, UNFPA, EU (2016)

Thus notwithstanding the involvement of external actors in the development of some community bylaws as shown in this chapter, the communities are first and foremost persuaded that they have a problem before them. In all the four study sites, respondents primarily mentioned that they were moved to

¹²⁶³ Area of TAs Kabunduli, Mkumbila and Ngokwe.

¹²⁶⁴ Area of Senior Chief Kwataine.

¹²⁶⁵ Areas of TAs Kapondo and Dambe.

¹²⁶⁶ Areas of TAs Kabunduli, Mkumbila, Bwananyambi and Chowe.

¹²⁶⁷ Areas of Senior Chief Lukwa; TAs Kapondo and Dambe.

¹²⁶⁸ A way of making a male visiting Chief feel welcome and respected by giving him a young woman to sleep while away from home. – Area of TA Mwansambo.

¹²⁶⁹ Apart from the other two types of *fisi* explained in the Glossary of Chichewa terms, by bylaws in TA Mwansambo prohibit parents from arranging for the *fisi* to have sex with the widow (who wants to remarry) to cleanse her womb, since it is assumed that she may not have had sex for a long time.

¹²⁷⁰ Also known as 'swinging,' two couples that are very good family friends, find it acceptable that the men can have sex with each other's wife whenever they agree – Area of TA Mwansambo.

¹²⁷¹ Areas of Senior Chief Mwirang'ombe; TAs Kabunduli and Mkumbila.

¹²⁷² In some areas known as '*kuchidzika ana atsikana*' – Areas of Senior Chief Lukwa; TAs Kabunduli, Mkumbila, Mwanza and Makanjila.

¹²⁷³ Area of TA Mwansambo.

¹²⁷⁴ Areas of Senior Chief Lukwa TAs Mwanza and Makanjila – in order to combat HIV transmission. Also, circumcision should be conducted during school holidays.

¹²⁷⁵ A local form of gambling – Areas of Senior Chief Lukwa; TAs Mwanza and Makanjila.

¹²⁷⁶ Areas of Senior Chief Lukwa and TA Nyambi – the latter bylaws prohibit Chiefs from giving boys clearance letters to apply for passports. The former says such clearance letters should only be issued to holders of at least a Junior Certificate of Education, and/or those that dropped out of school at least two years before applying for a passport and are 18 years or older.

act by the problem of child marriage, amongst others. Senior Chief Lukwa plainly illustrated problem consciousness by explaining that ‘we had to accept that we have a problem when many schoolgirls were dropping out of secondary school to get married though they were on bursaries’.¹²⁷⁷ Senior Chief Lukwa responded with a hint of frustration to further probing about whether his (lower) Chiefs could be promoting the bylaws just because they fear him: ‘I would like to believe that rural people are aware and tired of their problems and they would like to find solutions that can work for them somehow’.

The element of ‘taking charge of internal problems’ was picked by the Clerk of Parliament (CoP), who, while acknowledging her deficient familiarity with community bylaws, reckoned that ‘bylaws are programmes or initiatives that are providing opportunities for traditional leaders to take charge of social challenges within their communities’. This is an important observation since indeed, traditional leaders are key to bylaws. Notably, the CoP identified the problems bylaws are trying to solve as social challenges. Responses of the Child Protection Manager, Plan Malawi, had the same tone: ‘different communities have had social norms that encourage certain practices. To change these norms, one would want to apply a social, not a legal perspective. Communities have to realise for themselves that their existing norms are problematic, and introduce new ones’.

From a legal perspective, the tag of ‘social problem’ above could be troubling because the fact that legislation already outlaws many of the challenges that the bylaws are addressing means that these are legal challenges and not just social challenges. However, the findings suggest that as far as the community bylaws are concerned, legislation could be playing ‘catch up’ with addressing social norms that communities are already questioning. Therefore, legislation cannot erase the ‘social problem’ label because as communities formulate the

¹²⁷⁷ See section 7.2 of the thesis.

bylaws, their initial concern may not be what legislation says (though section 7.3.3.5 shows that this issue eventually comes in), but their concern is how their way of life is problematic in the contemporary age.

Therefore, the 'problem' basis of the community bylaws calls for acknowledgement that the horizontal appropriation and translation of human rights could occur deliberately or intuitively at different stages of a local community's project to fix its internal problems. Chapter 8 further examines how this horizontal vernacularisation reflects resonance between international human rights or state law norms and community bylaws.

7.3.2.3 Community bylaws are grassroots owned

This section uses the concept of 'grassroots ownership' of the bylaws to describe respondents' perceptions about whether or not the bylaws 'belong' to their communities, and not to mean a unanimous acceptance of or zeal towards the bylaws by community members. This distinction is important because section 7.3.4 illustrates that at times, the adoption of bylaws in the study sites has not been without contestations.

In all study sites, respondents were asked 'who is really pushing for these bylaws and why? Do you really believe in these bylaws?' These questions were posed to establish whether the communities own the bylaws or whether communities see them as foreign driven (being imposed on them by government or NGOs). This question was essential because community ownership (or lack thereof) of the bylaws would say a lot about the nature of norm internalisation that is taking place.

Ordinary women, whose opinion could be regarded more credibly than that of their Chiefs, fully claimed the community bylaws as their own, and their law. In Senior Chief Chitera's area, the women asserted, 'these are our own laws because we made them right here with the involvement of the Senior Chief, Group Village Heads, Village Heads, and all the people. They [bylaws]

are like a child whom everyone in the village has seen growing up'. Women in Senior Chief Mwirang'ombe's area, Karonga, said, 'we made these laws ourselves. All in all, as women we accept these laws as our laws'. Women in Senior Chief Kwataine's area remarked, 'we see these bylaws as our own laws because we want them to address our problems through them'. In Senior Chief Lukwa's area, the women stated, 'we see the bylaws as our law because now you cannot find a girl who is pregnant or in a marriage here'.

Chiefs said that because the bylaws are directly linked to their communities' problems, they could not be said to be externally driven. Group Village Heads in Senior Chief Mwirang'ombe's area indicated, 'we decided on our own to come up with bylaws and no one influenced us'. Recalling his experience when a teacher impregnated his primary school daughter, Senior Chief Mwirang'ombe said: 'from this painful event, we decided to protect girls from harmful and predatory behaviour, including that a girl who gets pregnant should return to school after delivery'. Section 7.3.3 discusses how Senior Chief Mwirang'ombe later worked with FOCUS to formally adopt written by laws.

Group Village Heads in Senior Chief Lukwa's area in Kasungu also explained that they came up with bylaws following their own acknowledgement that the community had power to reverse some cultural problems. Senior Chief Chitera, Chiradzulu, opined:

It is us who are saying through these rules that our children should get educated so that this community can develop and change. Previously, our community was not prioritising education and was ignorant of the aim of education. People thought education is not for villagers - now they know better.

Her Group Village Heads added that they own the bylaws because they are the ones that were investigating/consulting in their communities, 'resulting in an understanding that these are laws that should govern us'. Senior Chief

Kwataine in Ntcheu responded that his community owned the bylaws because ‘they were developed based on a consensus. *Ngati anthu ambiri agwirizana nacho chinthucho timachitenga chimenecho.*¹²⁷⁸ Therefore people accept the bylaws because they represent majority opinion.’ Senior Chief Kwataine added that the downside of this approach is that the majority has ended up shooting down some grave issues (e.g. polygamy, popular among the Ngonis). The Chief said he could not do much about the rejection because ‘it is people who make their own bylaws’.

Among all interviewed Chiefs, it is only Senior Chief Lukwa who made a direct connection between the community owned bylaws in his area and cosmopolitan discourse. He described his area’s community bylaws as an expression of the community’s desire to localise the HeforShe Campaign,¹²⁷⁹ by promoting girl education:

We made our community bylaws ourselves with the purpose of sending girls back to school. We sat down as community leaders, keen to translate ‘HeforShe’ at local level after the Head of State committed himself to the campaign. We decided that we would make our own commitments and punishments to ensure that girls return to school.

For Senior Chief Lukwa, the essence of ownership of the bylaws by his community lies in the extra mile (transcending the HeforShe obligations) taken by Chiefs in setting fines for the obstruction of girl education. Indeed, this was not the only instance Senior Chief Lukwa spiced our conversation with international parlance. Despite drawing from international discourse to

¹²⁷⁸ The best English approximation would be – ‘if the majority agrees with the thing (idea) we take it’.

¹²⁷⁹ Himself a UN Women Malawi ‘HeforShe’ model, Chief Lukwa was referring to the HeforShe Campaign created by UN Women in 2014, the United Nations entity for gender equality and the empowerment of women, the HeforShe solidarity movement for gender equality provides a systematic approach and targeted platform on which men and boys can engage and become change agents towards the achievement of gender equality –UN Women HeforShe IMPACT 10x10x10. Available at <http://www.heforshe.org/en/impact>, accessed on 20 August 2018.

internalise norms protecting women from harmful practices in his community Senior Chief Lukwa's sentiments suggest that community bylaws in his area have not emerged because of the 'international.' Rather, the Chief's international outlook is only flavouring prevailing interests of his community to self-regulate. Senior Chief Lukwa has high national visibility,¹²⁸⁰ and therefore has the advantage of being frequently invited to forums discussing trending women's issues.¹²⁸¹

It would not have been a surprise if all NGOs and government officials working at local level had claimed that the grassroots communities own the bylaws. After all, these are the national level players whom scholars call 'human rights intermediaries'¹²⁸² or 'intermediaries'¹²⁸³ that visibly advance the adoption of the bylaws at local levels. Thus they could eagerly paint the picture that norm internalisation (through the bylaws) is happening because 'the norms have become locally accepted'¹²⁸⁴ and 'absorbed in the life of the people'.¹²⁸⁵

What came as a surprise (because in a way I expected communities to primarily point at outside influences¹²⁸⁶) was the almost adamant insistence by community respondents that the bylaws are their very initiative, and therefore they own them. It quickly became clear that a distinction should be made between two types of inventions - 'the paperwork' or 'packaging' (bylaws reduced to writing, which has indeed mostly been engineered by 'the outsider') and the substantive spirit of the bylaws (seen as a community's

¹²⁸⁰ Compared to most of the interviewed Chiefs.

¹²⁸¹ Supposedly due to his interest in promoting women's human rights.

¹²⁸² See note 322.

¹²⁸³ See note 323.

¹²⁸⁴ Martha Finnemore and Kathryn Sikkink, 'International Norm Dynamics and Political Change,' (1998), 895. Also broadly see section 3.3 of the thesis.

¹²⁸⁵ Louis Henkin, *How Nations Behave: Law and Foreign Policy*, (1979), 50. Also broadly see section 3.4.1 of the thesis.

¹²⁸⁶ Mostly NGOs and government (Departments of Social Welfare/Gender) because until the research, my interaction with community bylaws had been limited to discussions with these entities.

brainchild). For example, Senior Chief Chitera explained how an NGO called Girls Empowerment Network (GENET) got involved, which was a curious point for me since literature celebrates GENET for the successful bylaw initiatives in Senior Chief Chitera's area:¹²⁸⁷

In 2011, GENET heard about what we were doing and started helping us to have an organised way of preventing child marriage. In fact, it is GENET who made us aware that what we were already doing was 'bylaws.' I first heard about the term 'bylaws' when GENET came with its project because being educated and conversant with legal issues, they were repeatedly using the term 'bylaws.'¹²⁸⁸

Senior Chief Chitera stated that she happily welcomed GENET's intervention since *'iwowo anapita ku sukulu ndiye anabwera kuno kuti atithandize kuti tisamangopanga zinthu mu chimbulimbuli poti ndife anthu osaphunzira.'*¹²⁸⁹ To her, GENET came in as the 'processing plant' to enhance existing 'raw materials,' and not to originate new ideas:

GENET advised us to formulate our 'laws' properly so that we should be in line with what the government is doing/promoting. They made us aware that the legal minimum age of marriage should 18 years so that we should conform to the country's laws – though we would have loved it to stay at 21 years for the girls to get well educated first.

¹²⁸⁷ For instance, the United Nations Human Rights Office of the High Commissioner has published a GENET brief on its website saying 'GENET's Stop Child Marriage project in the area of Traditional Authority Chitera targeted traditional leaders at three levels – village heads, group village heads and the traditional authority, together with parents in the community to come up with viable strategies to fighting the crisis of child marriage. All agreed to mobilise themselves and establish local laws that would stop child marriages by imposing penalties such as chickens and goats to offenders' – GENET Information on GENET Malawi's Work in the Fight Against Child Marriage. Available at <https://www.ohchr.org/Documents/Issues/Women/WRGS/ForcedMarriage/NGO/GENETMalawi>, accessed on 15 January 2019.

¹²⁸⁸ Also see section 1.3 of the thesis, suggesting that in some communities NGOs have influenced the common usage of the term 'community bylaws'.

¹²⁸⁹ The best English approximate would be – 'they [GENET officers] went to school, and they came to help us so that we [through our original 'bylaw' initiative] should not do things ignorantly since we are uneducated'.

This part shows that the community bylaws are embracing horizontal vernacularisation and departing from the perception that vernacularisation is exclusively introduced by external actors in several ways. The cycle of vested interests between Chiefs/communities and external players such as NGOs does not dilute the community ownership of the community bylaws. In fact, Chapter 9 shows that these vested interests introduce new versions of translation (augmentation, customisation) and adapt others (simplification, hybridisation). Furthermore, they shape the roles that Chiefs are playing as vernacularisers (e.g. crusaders, adaptors) and those that NGOs are playing (e.g. converters, adaptors). The approach taken by Senior Chief Lukwa in translating 'HeforShe' also reveals that in horizontal vernacularisation, the local may flirt with international human rights discourse as is convenient – so long as this reinforces the local's vision to improve its status quo.

Additionally, in Senior Chief Kwataine's areas, we see a 'give and take' approach that excludes polygamy from the community bylaws. This is a mark of grassroots ownership of the bylaws, and exhibits contestations that also exist in state law.¹²⁹⁰ Chapter 8 takes this discussion further in the context of how the community bylaws reflect international standards.

7.3.2.4 Community bylaws mostly prescribe village-based penalties

Restoring or encouraging good behaviour through village fines and penalties is an essential feature of the community bylaws. According to Senior Chief Lukwa: 'we decided that if there would be challenges towards achieving our commitment to have girls in school, we would impose village-based penalties against guilty teachers, parents, children and Chiefs'.

The penalties mainly take the form of *chindapusa* – a fine involving payment of money or goats and chickens. The beneficiary of the *chindapusa* varies from area to area. In Senior Chief Chitera's area in Chiradzulu, Chiefs receive the

¹²⁹⁰ See section 5.3.3.1 of the thesis.

chindapusa for their own use.¹²⁹¹ In the other study areas, the fine goes to either to the health centre or to be utilised for meeting the school needs of destitute girls. The bylaws in TA Mwasambo's area in Nkhotakota say *chindapusa* should go into a special ADC fund and be transparently used for development activities.¹²⁹² Victims do not personally benefit from the *chindapusa*.

The payment of *chindapusa* in the village usually settles the matter. However, there are some instances when the penalty involves both *chindapusa*, and prosecution by the police. For example, bylaws in the areas of Senior Chief Lukwa, Kasungu, and TA Mwanza, Salima, respectively require that a perpetrator of property grabbing should first pay *chindapusa* of three goats to the TA before being taken to the police.

In some instances, the community bylaws require that a matter be out rightly reported to the state machinery. For instance, in Senior Chief Mwirang'ombe's area, anyone who marries a girl of 16 years and below should immediately be taken to the police. Most bylaws treat rape as a criminal offence outside their scope. However, what is culturally considered rape varies. For instance, the bylaws in areas of Senior Chief Lukwa and TA Mwanza consider *kusasa fumbi* (initiation sexual cleansing) as rape, while others do not. And unlike in Senior Chief Mwirang'ombe's area, the marriage of someone aged 16 years and below is also not typically seen as defilement.

Chapter 8, which examines the community bylaws sanctions in detail, illustrates how *chindapusa* and other penalties in the community bylaws relate

¹²⁹¹ One could argue that the fact that Chiefs personally benefit from the *chindapusa* defeats the claim that the community bylaws are 'community owned and driven.' However, the Chiefs in Chitera's area explained that the main purpose of the community bylaws is the prevention of mischief, and not the payment/collection of fines. Therefore, Chiefs stand to hardly 'benefit' financially if there is full compliance of the bylaws. In this case, the major benefit the Chiefs would gain is the development of their communities, which is also a communal benefit.

¹²⁹² Mwasambo Area Development Committee, 'Malamulo Oyendetsera Ntchito Zosiyanasiyana M'dera la TA Mwasambo,' (2015).

to the internalisation of human rights norms. Furthermore, Later, it will be argued that harmful practices (which is a major human rights challenge) through *chindapusa* amounts to 'deflective translation', a key and unique form of translation in horizontal vernacularisation.

7.3.3 The Process of Developing Community Bylaws

While there is no standard script for developing community bylaws, the way communities are developing their bylaws exposes six main steps: problem identification; training of community stakeholders; consultation; processing and consolidating ideas; drafting the bylaws; and adoption.

7.3.3.1 Step 1: Problem identification

The first step in developing community bylaws involves a TA's own conviction about a problem demanding a response through the community bylaws, followed by a TA-led 'community leaders' dialogue that results in a shared understanding of the problem and a decision to adopt the community bylaws. Although TAs can delegate the facilitation of the dialogue to others, they remain the agenda setter. This stage usually culminates in a decision to adopt bylaws and the general vision, and not necessarily what should form the exact content of the bylaws.

The TA can become convinced of a problem by existing evidence. Thus, sometimes NGOs, lower Chiefs and subjects, who may have concerns about a local situation, can approach a TA with evidence of a problem. For example, Senior Chief Lukwa in Kasungu said, 'when Plan Malawi gave me data on the high number of girls that were dropping out from our Lunyangwa Secondary School to get married despite that they were receiving bursaries,¹²⁹³ I understood the depth of our problem, and that we needed to deal with it ourselves.' Outside the study sites, TA Mwanza in Salima admitted that:

¹²⁹³ Plan Malawi was giving the girls bursaries as part of their project of promoting girl education.

‘when MIAA came with their project and helped us to vividly see how gender inequalities were negatively impacting development in my area, as TA, I decided that we should create bylaws to ban practices that prevent women and girls from achieving their highest potential’.¹²⁹⁴ Apart from confronting a problem through NGO efforts, the TAs also said lower Chiefs and subjects that have concerns about a local situation could approach them to act.

Personal experiences can also convince the TA that there is a problem necessitating community bylaws. After suffering the impregnation of his daughter by her teacher, Senior Chief Mwirang’ombe in Karonga said he decided to do something to protect girls in his area. Senior Chief Chitera in Chiradzulu confessed that she had been haunted by the fact that as a young girl, her father denied her to go to school and study for her dream career, medicine:¹²⁹⁵ ‘thus as a Chief, I have a fiery desire to have educated subjects, and I was concerned that girls were getting married too early and leaving school’.

Furthermore, a TA learns from others or exposure. Senior Chief Mwirang’ombe said he got the ‘bylaws idea’ from TA Chikulamayembe’s area, Rumphu. Section 7.2 has shown that Senior Chief Lukwa borrowed the idea from TA Mwanza’s area in Salima; and that Senior Chief Kwataine was inspired to develop bylaws on maternal health after visiting TA Mkanda’s area in Mchinji. Referring to his attendance at an international meeting, Senior Chief Kwataine also admitted, ‘we discussed at length how cultural practices were fuelling HIV and AIDS, and the meeting agreed on the idea of developing bylaws. When I returned, I brought that suggestion to my community by engaging my Group Village Heads’.

¹²⁹⁴ Government of Malawi, UNFPA, and EU, ‘Mapping of Community Bylaws under the Gender Equality and Women Empowerment (GEWE) Programme,’ (2016), 14.

¹²⁹⁵ Her father believed that ‘girls fit in the kitchen and the forest’ (fetching firewood).

If a TA is persuaded that there is a problem that needs resolution, the next step is to officially initiate 'high-level' community dialogue. Thus, the formulation of community bylaws is at times political because the Senior Chief or TA needs to convince his lower Chiefs¹²⁹⁶ (to appreciate that there is a problem) and galvanise support for the idea to develop community bylaws. Senior Chief Lukwa in Kasungu said he initially invited his sub-TAs, Senior Group Village Heads and the District Commissioner to discuss the issue of abnormal school dropout rates amongst girls. This meeting endorsed adopting bylaws as a solution. In the other three study sites, the Senior Chiefs first engaged Group Village Heads, also culminating in decisions to develop community bylaws to promote girl education and arrest specific harmful practices.¹²⁹⁷

Senior Chiefs/TAs that have some exposure can personally handle the community leaders' dialogue, while some rely on NGOs. Senior Chiefs Lukwa and Kwataine facilitated the problem identification themselves. For example, Senior Chief Lukwa said, 'I had to make my Chiefs understand how 'HeforShe'¹²⁹⁸ is about us'. Senior Chief Kwataine explained, 'I had to break down issues such as death audits, maternal mortality through language familiar to my Chiefs'.

With regard to NGOs as dialogue facilitators, these are NGOs that have come into a community either to strengthen existing bylaws efforts or to support the community to address social challenges. Executive Directors for WOLREC, MIAA and FOCUS stated that after engaging the TA, they held

¹²⁹⁶ And other decision makers if necessary.

¹²⁹⁷ Senior Chief Mwilang'ombe, Karonga, said he first sat down with Group Village Heads, and they agreed to develop community bylaws to curb child marriage and encourage girl education. Senior Chief Kwataine's area, Ntcheu, explained that he first agreed with his Group Village Heads that local regulation could strengthen girls' education and protect them from child marriage and all forms of violence; and that the ADC should develop the bylaws. Chief Chitera, Chiradzulu, stated that she engaged Group Village Heads even before the arrival of GENET who formed a committee to block child marriages.

¹²⁹⁸ See note 1279.

initial dialogue meetings with community leaders ¹²⁹⁹ to help them problematise their way of life. MIAA's Executive Director explained, 'by interrogating what could be done to resolve identified challenges, community leaders proposed that girls should access education, and that community 'laws' should be formulated to enforce compliance'.¹³⁰⁰ FOCUS's Executive Director said, 'we first met the TA and all area stakeholders to brainstorm challenges related to child marriages and safe motherhood'.¹³⁰¹ GENET worked with the TA, Group Village Heads, and Village Heads in arriving at the initial consensus to establish local laws on child marriage and other harmful cultural practices.¹³⁰²

As Chapter 9 argues, this phase of problem identification demonstrates that human rights vernacularisation via community bylaws is treading new grounds. First, Chapter 3 has discussed the vernacularisation concept of 'vernaculariser'¹³⁰³ – an outsider with both international and local knowledge who comes into a community to frame human rights norms for local community members' consumption.¹³⁰⁴ However, the Senior Chiefs Lukwa and Kwataine are 'insiders,' and yet their facilitation role is synonymous to the vernaculariser. Chapter 9 uses these examples to reconceptualise 'vernacularisers,' and to further show that the role being played by TAs is that of intuitive converters and crusaders. Additionally, apart from fitting into the translation strategy of simplification,¹³⁰⁵ the TAs' role in the bylaws is revealing two new translation strategies – socialisation and customarisation.

¹²⁹⁹ For example, traditional leaders, village Chiefs, religious leaders.

¹³⁰⁰ This was in reference to community bylaws efforts in the area of T.A. Mwanza, Salima.

¹³⁰¹ This was in reference to community bylaws efforts in the area of Senior Chief Mwirang'ombe, Karonga.

¹³⁰² This was in reference to community bylaws efforts in the area of Senior Chief Chitera, Chiradzulu – Government of Malawi, UNFPA, and EU, 'Mapping of Community Bylaws under the Gender Equality and Women Empowerment (GEWE) Programme,' (2016), 19.

¹³⁰³ Also known as 'translator'.

¹³⁰⁴ See section 3.4.2.3 of the thesis.

¹³⁰⁵ See note 275.

Second, unlike the straightforward NGO-to-community interface in vernacularisation,¹³⁰⁶ the community bylaws are showing that such interface is not as clear-cut. Some Chiefs seem to have become conscious about the developmental impacts of negative practices in their territories through NGO projects, and then decided to deal with such practices by producing community bylaws (the decision allegedly being made independent of the NGOs influence). In other instances, NGOs projects simply stepped in to facilitate the strengthening of on-going community efforts on community bylaws and not necessarily initiate them.

The role of NGOs as facilitators is not surprising because they are seen as having double-consciousness, enabling them to sell human rights ideas at the grassroots.¹³⁰⁷ Indeed, CEDAW and CRC jurisprudence promotes the involvement of these 'conventional' vernacularisers in designing and implementing interventions to address harmful practices.¹³⁰⁸ Chapter 9 argues that the role being played by the NGOs symbolises a new version of translation, 'augmentation', manifesting when NGOs are not master conceptualisers of the community bylaws, but still support the appropriation of human rights along the way.

7.3.3.2 Step 2: Orientation or training of community stakeholders

The training or awareness raising of communities that are formulating community bylaws only happens when opportune, and its absence may not affect the bylaws formulation process. The process involves the deliberate organisation of meetings by NGOs and other partners to orient/train people on human rights issues.

The meetings target a particular category of people. MIAA's Executive Director said, 'in TA Mwanza's area, Salima, we trained a 'Community

¹³⁰⁶ Section 3.4.2.3 of the thesis.

¹³⁰⁷ See note 355.

¹³⁰⁸ See section 4.4.3 of the thesis.

Parliament'¹³⁰⁹ for five days to build their legal and human rights knowledge'. WOLREC's paralegal also confirmed, 'we wanted human rights issues to be included in the bylaws, so we taught those involved in formulating the bylaws about human rights frameworks at the onset of the process. The Executive Director of YONECO explained that in Machinga¹³¹⁰ YONECO trained community educators¹³¹¹ on legal and human rights frameworks. In turn, these educators were raising human rights awareness during the process of formulating bylaws.

Women's FGD in Senior Chief Mwirang'ombe's area, Karonga, who had a Women's Forum seminar that educated them about many human rights issues commented: 'at our first meeting in 2014, a team from Mzimba taught us how to lobby Chiefs. We used this skill to lobby for specific fines to be applied in the bylaws'. Chiefs in Senior Chief Kwataine's area, Ntcheu, mentioned that UNFPA together with Ministry of Gender once educated Chiefs on diverse human rights issues. The Mother Group in the area said they were previously educated by YONECO on different human rights issues and gender – 'especially that when we are at community meetings, we should boldly contribute our views and that men should accept women's views'.

Notably, this stage of human rights training/orientation shows that unlike in the vernacularisation model where human rights appropriation and translation is the foremost thing,¹³¹² in horizontal vernacularisation the training/orientation follows a community's commitment to adopt community bylaws in order to solve internal challenges.¹³¹³ Thus communities may initially care little about the human rights connotations of such challenges until given human rights lenses by external actors. Still, the appropriation of

¹³⁰⁹ The group that developed the bylaws—comprising selected subjects, Chiefs, religious leaders, law enforcers, health workers, teachers and a Magistrate.

¹³¹⁰ Where YONECO has facilitated the formulation of bylaws in TAs Nyambi and Ngokwe.

¹³¹¹ Groups of 8-10 people that operate at Group Village Head level.

¹³¹² See section 3.4.2 of the thesis.

¹³¹³ See section 7.3.3.1 of the thesis.

human rights ideas follows as the community is steered towards the 'human rights way' as the community bylaws are formulated. Chapter 9 illustrates that as NGOs jump on the community bylaws bandwagon, they influence the horizontal vernacularisation of human rights norms through simplification, augmentation and hybridisation; and they wear the vernacularisers' hats of converters, grafters and connectors.

Furthermore, this step of human rights training/orientation exposes that the community bylaws have gone ahead of the type of human awareness that is expected by both international human rights jurisprudence and statutory law.¹³¹⁴ The formal frameworks present training and awareness raising as measures for facilitating attitudinal change so that duty bearers can start upholding human rights. However, in the development of community bylaws, human rights are not always being applied as a lobbying mechanism to discard harmful practices, but usually to reinforce already changed community values prompted by local-local dialogue.

7.3.3.3 Step 3: Consultation

Occurring after the TA and his rather senior Chiefs (sub-TAs and Group Village Heads) have taken the decision to establish community bylaws, consultations are not a process whereby Chiefs' subjects are just asked to endorse bylaws. Rather, subjects are expected to buy into the idea of formulating the community bylaws, and propose and debate the substantive contents of the bylaws. This step involves two levels of dialogue: between Group Village Heads and Village Heads; and between these Chiefs and subjects.

The dialogue between Group Village Heads and Village Heads is a first step of the consultations because the Village Heads do not form part of the TA's 'high-level' dialogue that takes the decision to formulate community bylaws.

¹³¹⁴ See sections 4.4.3 and 5.3.3.1 of the thesis.

Therefore, it is necessary that the Group Village Heads should inform their Village Heads of the decision, explain the rationale, and task them to hold consultations. In Senior Chief Lukwa's area in Kasungu, the 'high-level' dialogue was attended by Senior Group Village Heads, thus they had to meet both Group Village Heads and Village Heads 'so that they should know what we have discussed and make contributions'. Group Village Heads in Senior Chief Mwirang'ombe's area in Karonga said, 'we proceeded to disseminate the bylaws vision to Village Heads so that they could consult subjects'. Similarly, Group Village Heads in Senior Chief Kwataine's area in Ntcheu asserted, 'we sat down with Village Heads to discuss why we need the bylaws; the Village Heads went to inform and consult their subjects'.

In turn, Village Heads organise meetings with their subjects to advocate for the bylaws and mobilise ideas. Village Heads in Senior Chief Mwirang'ombe's area explained their role, 'we did the main job of consultations to solicit subjects' proposals for the bylaws. We had to mobilise people through village meetings. We even took advantage of funeral ceremonies to inform people that we needed their ideas. It was a tiresome job'.

Some Group Village Heads also attend the meetings being facilitated by Village Heads to provide guidance to Village Heads or to co-facilitate the consultations. For example, according to a women's FGD, Group Village Heads in Senior Chief Kwataine's area in Ntcheu, 'the main issue in community discussions was: 'if this act is committed, what should be the fine?' Group Village Heads would provide guidance to Village Heads on how to facilitate the production of good ideas. In Senior Chief Chitera's area in Chiradzulu, Group Village Heads were as involved as co-facilitators: 'we were the ones consulting in our communities. We could go to a school and ask the school leadership and committee to discuss how best we could protect

children. The result was bylaws that ensured that school dropouts would return to school’.

Beyond Village Heads, some communities involved ADC members and taskforces as facilitators of consultations. ADC members participated in Senior Chief Kwataine’s area, Ntcheu. Senior Chief Chitera’s area constituted ‘the GENET Committee’.¹³¹⁵ Interviewed committee members explained:

Each one of us here went from village to village, spreading the message that bylaws are being formulated, and collecting ideas from people. Sometimes, the whole committee would visit one village in order to assure people that the exercise was credible, thus encouraging them to contribute ideas towards dismantling negative cultural practices.

While the consultations do not generally involve a cost, it is also possible that they could be supported by external funding. For example, Senior Chief Lukwa, Kasungu, wrote UN Women asking for funding to hold detailed consultations. UN Women provided MK700,000.00,¹³¹⁶ which the Chief used for meetings in his four ADCs to generate ideas for the bylaws.¹³¹⁷ Since the bylaws centred on schoolgirls, the process also involved Village Heads, Mother Groups and School Management Committees.

Chapter 9 demonstrates that the step of consultation has several conceptual implications. First, consultations involve framing,¹³¹⁸ so that subjects can appreciate the conversation and contribute to it productively. For example, in Karonga, apart from using funerals, Wanangwa Youth Organisation (WAYO)¹³¹⁹ supported Village Heads in breaking down the issues through drama in order to creatively reach both literate and illiterate audiences. Thus framing should not merely be seen as an act performed by erudite outsiders

¹³¹⁵ See note 1124 of the thesis.

¹³¹⁶ Equivalent to USD 943.

¹³¹⁷ ADCs in TA Kaphaizi, Sub TA Mangwazu, Sub TA Mawawa, and Sub TA Simdemba.

¹³¹⁸ See section 3.4.2.2 of the thesis.

¹³¹⁹ A local Community Based Organisation.

with both global and local knowledge.¹³²⁰ Second, consultations imply that community subjects are not merely appropriating already conceptualised (human rights) ideas, but are actually conceptualising what to them are harmful practices and negotiating new norms that have social transformation potential.

Though not always (as seen in Chapter 8), mostly such conceptualisation is in line with human rights standards, whether the subjects are aware of it or not. This means the vernacularisation of human rights is not always deliberate and externally driven as is currently perceived by both vernacularisation scholarship and international jurisprudence.¹³²¹ Third, Chapter 9 shows that the consultation stage reveals more crusaders (a form of vernacularisers) who, though not explicitly talking human rights language, facilitate the establishment of cultural values that protect women from harmful practices. These crusaders and their subjects ‘customarise women’s protection’ as one strategy for translating women’s rights norms in horizontal vernacularisation.

7.3.3.4 Step 4: Processing and consolidating ideas

Since community bylaws formulation process is a heavily negotiated site, this step requires Group Village Heads, ADCs (sometimes with the support of NGOs¹³²²) or some appointed committee to sit down and sieve the interchange of ideas from the community. In Senior Chief Chitera’s area, Chiradzulu, a special group¹³²³ applied its diverse expertise to embrace, discard or refashion proposed ideas.

Group Village Heads in Senior Chief Lukwa’s area, Kasungu, reflected, ‘this process [of synthesising ideas] is where the work was – because people were

¹³²⁰ See section 3.4.2.2 of the thesis.

¹³²¹ See sections 3.4.2 and 4.4.3 of the thesis respectively.

¹³²² In community bylaw initiatives that are being facilitated by NGOs.

¹³²³ Comprising the Chiefs, GENET committee members, police, health, and social work personnel etc. and mandated to formulate the bylaws to prohibit people from pursuing the harmful practices.

contributing varied ideas. After receiving all ideas, we convened a Group Village Heads forum to deliberate them.’ Group Village Heads in Senior Chief Kwataine’s area, Ntcheu, explained that they had to bring the ideas from their Village Heads to an ADC forum.¹³²⁴ Senior Chief Kwataine, who facilitated the ADC forum, expounded: ‘the ADC met on several occasions, pondering each proposed idea. During the discussions, ADC members would decide to adopt or discard an idea based on majority opinion. It was a process of intense discussion, whereby people would state reasons for supporting or rebuffing an idea’.

The processing of ideas means dropping arbitrary proposals. Group Village Heads in Senior Chief Mwirang’ombe’s area, Karonga, explained, ‘from the villages’ submissions, we rejected proposed bylaws that could potentially infringe peoples’ rights – some villages proposed the unaffordable fine of K200,000.00¹³²⁵ for impregnating a schoolgirl; others proposed corporal punishment for wrongdoers’. Group Village Heads in Senior Chief Lukwa’s area added, ‘some villages said those who rape schoolgirls should be castrated. This could not go into the bylaws because it is an emotional and ferocious punishment; and rape is a police matter’.

At times, discarded ideas may be genuine gender concerns, but that do not resonate with local (decision makers’) meanings of power and value. In response to my question whether the bylaws are satisfying women’s needs, women in Senior Chief Chitera’s area felt the bylaws are falling short on initiation: ‘initiations give children bad advice and are the major cause for school dropouts and adolescent pregnancies. We wanted initiations to stop altogether so that we should just counsel children at home’. However, Senior Chief Chitera argued that initiation (minus bad teachings) form the cultural fabric of the community. Women in Senior Chief Kwataine’s area confided,

¹³²⁴ Of which the Group Village Heads were part.

¹³²⁵ Equivalent of USD 269.

'the bylaws have not included our concerns about men's polygamy and adultery. This conduct is cruel and emotionally oppressive because even your own marriage counsellor dismissively tells you *banja ndi kupilira*'.¹³²⁶ Group Village Chiefs rejected banning polygamy even before the community consultations because polygamy is 'Ngoni culture'.¹³²⁷

International jurisprudence expects all domestic laws, including in plural systems, to comprehensively adhere to human rights standards.¹³²⁸ Opting-out of some international human rights norms have some implications on norm internalisation/vernacularisation that are analysed in Chapter 8.

7.3.3.5 Step 5: Drafting the bylaws

The process of drafting the community bylaws usually co-opts 'outsiders'¹³²⁹ who have 'expert knowledge.' Some communities involve these experts directly during the drafting of the bylaws, while some only require the experts to vet what the community has produced. Senior Chief Lukwa, Kasungu, who explained that the process of developing the bylaws in his area happened over six meetings,¹³³⁰ said:

At our final meeting, we saw it wise to involve the police, Magistrate, and other experts who are conversant with state law to help us to develop the bylaws. We invited the police and Magistrate because we were afraid that the bylaws could oppose or interfere with state law – *timaopa kuti nafenso ngati tasokoneza titha kuzayimbidwa mlandu*.¹³³¹

Group Village Heads in Senior Chief Mwirang'ombe's area, Karonga, said:

¹³²⁶ Best English approximate would be 'marriage is perserverance, so just persevere'.

¹³²⁷ Section 7.3.2.3 of the thesis has reported that Chief Kwataine also wanted polygamy to be banned, but the majority of Chiefs rejected the proposal during the internal Chiefs' discussions that made the decision to have the bylaws.

¹³²⁸ Section 4.4.4 of the thesis.

¹³²⁹ Usually district level officials.

¹³³⁰ Five at sub TA level and the sixth one to finalise the bylaws at his headquarters.

¹³³¹ Best English approximation would be 'we were afraid that if we mess up we would find ourselves sued in a court of law'.

With technical advice from FOCUS, who hired external facilitators, we developed draft bylaws in close consultations with the Chiefs' Council¹³³² advisers, and education, health and police personnel. Then we sent the draft bylaws to the Chiefs Council for their scrutiny, who then sent the draft bylaws to the Magistrate. After the Magistrate's input, the bylaws returned to the Chiefs Council, which gave us the final version for community announcement.

In Senior Chief Chitera's area, Chiradzulu, it is at this stage when GENET facilitated meetings with a group comprising the Senior Chief, Group Village Heads, selected Village Heads, representatives from the police and health centre and members of the GENET Committee to formulate the bylaws.¹³³³ Through Chiefs, draft bylaws were first shared with the community for review and approval. Then the final draft was sent to the DC for vetting. Senior Chief Kwataine, Ntcheu, narrated: 'the ADC developed draft bylaws from the ideas that the majority of their members found acceptable. They sent the draft copy to the DC and Magistrate for comments – who made changes, especially reducing punishments perceived as hefty'.

Beyond the study sites, TA Mwanza, Salima, mobilised selected subjects, religious leaders, law enforcers, health workers, teachers and a Magistrate to conduct a 'Community Parliament' to make her area's bylaws. She expounded:

I delegated my Group Village Head Mwanza to be 'Speaker' of the Community Parliament. I knew the bylaws would eventually come to me for adoption, so I did not join but left the group to discuss freely. The Magistrate guided the group so that the bylaws would not conflict with state laws. When the Community Parliament was satisfied, it brought its draft bylaws to me. I convened a stakeholder's meeting to fine-tune the bylaws. I sent the final bylaws to the DC for him to know what we had done. Myself, the

¹³³² Comprising the Senior Chief, advisors and Senior Group Village Heads.

¹³³³ Government of Malawi, UNFPA, and EU, 'Mapping of Community Bylaws under the Gender Equality and Women Empowerment (GEWE) Programme,' (2016), 19.

DC and Magistrate signed the bylaws.¹³³⁴

This stage of engaging outside ‘experts’ seals some level of appropriation of human rights and state law ideas into community bylaws for communities where stage two¹³³⁵ did not occur. Furthermore, in translation terms, it facilitates augmentation (whereby the community drafts the bylaws first and then ‘experts’ come in to test the bylaws for congruence with state law/human rights). It also enables the emergence of ‘grafters’ as a group of vernacularisers – further discussed in Chapter 9.

7.3.3.6 Step 6: Adopting the bylaws

For written community bylaws, it is usually the TA/Senior Chief’s signature that operationalises the community bylaws.¹³³⁶ However, having a written community bylaw is not a precondition for the bylaw to be accepted as law within a community. A Chief’s announcement is authority enough.¹³³⁷ A good example of such oral pronouncements are the prohibitions of child marriage, initiation sexual cleansing and other negative cultural practices among the Chewas made by Kalonga Gawa Undi¹³³⁸ at several events in 2018.¹³³⁹

¹³³⁴ Ibid., 14. For MIAA, the Executive Director's perception was that the DC's and Magistrate's signatures give the bylaws legal authority.

¹³³⁵ Stakeholder training or orientation.

¹³³⁶ However, with variations from area to area, the TA usually signs the bylaws along with other officials such as the Group Village Heads (or their representative), representative of Village Heads, DC, Magistrate, Area Development Committee (ADC) Chairperson, ADC Secretary, Police Officer-In-Charge, District Health Officer or Health Facility In-Charge.

¹³³⁷ Therefore, the TA would first reaffirm the bylaw with his Chiefs, and they would in turn trickle down the message through various avenues such as community meetings and funeral gatherings.

¹³³⁸ King of the Chewa people of Malawi, Mozambique and Zambia. Of these, 138 Chiefs are in Malawi, 40 are in Mozambique while 36 Chiefs are in Zambia. Senior Chief Lukwa of Kasungu is one of the King's advisors.

¹³³⁹ At the annual Chewa *Kulamba* ceremony, and during his tour of duty to Malawi, 'the King outlawed the *fisi* Concept (employing a mystery man to test the skills of a young girl who has just come of age) or sexual cleansing in Chewa culture with immediate effect. Girls attending those initiations must be supervised by cultured elders who should be monitored in their deeds and content administered to the initiates. He also outlawed spouse inheritance and early marriages. Furthermore, only willing boys above 16 years should be initiated into *Gule Wamkulu* with their consent. Initiates who are attending school should only be taken in during school holidays and allowed to attend school programmes when asked to by school authorities. Parents who deliberately ignore to take their children to school would be

Furthermore, the bylaws may be publicly launched, though this is not essential for the operationalisation of the bylaws. NGOs such as MIAA, FOCUS and GENET have sponsored public launches of the bylaws in their impact areas. Community bylaws in Senior Chief Lukwa's area were launched with the support from UN Women, and the UN Women Country Representative even attended the event.

The adoption of bylaws is further symbolised by the application of community bylaws in their ordinary life. This may involve framing messages in the vernacular, as seen in Senior Chief Kwataine's area where people have embellished the outer walls of their houses with different bylaws. Moreover, it may see the rise of 'troopers' (a category of vernacularisers) who ensure that the bylaws are not rhetorical but are actually lived. Chapter 9 examines these issues more.

7.3.4 Implementing the Community Bylaws

Although a detailed discussion of the implementation of community bylaws is beyond the scope of this thesis, it is worth briefly recognising it as an important part of the bylaws formulation. Group Village Heads and Village Heads play a pivotal role in this stage.

punished. Early marriages, where no girl below 16 years should be married off, are also prohibited. He also banned *chokolo* (forcing wife or husband to marry a family member after losing their legal spouses often for selfish motives), *chidyerano* (a practice where men forcibly exchange their wives for sexual variety against the women's will) – Steve Pembamoyo, 'Chewa King against Early Marriages,' *Nation Online*, 27 August 2018. Available at <https://mwnation.com/chewa-king-against-early-marriages>, accessed on 15 January 2019; Christopher Miti, 'Gawa Undi Outlaws Spouse Inheritance,' *Themast Online*, 7 November 2018. Available at <https://www.themastonline.com/2018/11/07/gawa-undi-outlaws-spouse-inheritance/>, accessed on 15 January 2019; 'Gawa Undi Bans *Chidyerano* (Wife Swapping) among the Chewa,' *Zambia Observer*, 8 November 2018. Available at <https://www.zambianobserver.com/gawa-undi-bans-chidyerano-wife-swapping-among-the-chewa/>, accessed on 15 January 2019.

7.3.4.1 Role of Group Village Heads

Group Village Heads play the role of enforcer on three altitudes – first by penalising slack and/or dissident Village Heads; second by reacting to bylaw noncompliance by subjects; and third by dealing with community resistance.

With regards to punishing Village Heads, Group Village Heads in Senior Chief Kwataine's area, Ntcheu, explained, 'a violation of bylaws starts in the village, which is under the Village Head. Violations may happen because the Village Head was either passive towards the bylaw or has clandestinely approved child marriage. So we have to punish such Chief too'. In Senior Chief Lukwa's zone, Kasungu, a Village Head will first pay a fine to the Group Village Head and another to the TA. However, when child marriage occurs, the bylaws punish Group Village Heads and Village Heads uniformly by fining both a goat.¹³⁴⁰ The logic is that the Village Head's carelessness to let child marriage happen under his/her watch suggests lack of vigilance by the Group Village Head to monitor his Chiefs.

In respect to violations by subjects, Group Village Heads in Senior Chief Kwataine's area shared the view that if parents defy a Village Head's refusal to endorse a child marriage, the latter can refer the matter to the Group Village Head. This move serves as a deterrent because the fine increases at each tier of chieftaincy. As Group Village Heads in Senior Chief Mwirang'ombe's area, Karonga, observed, 'an insolent subject may find himself/herself concurrently paying two chickens to the Village Head, five chickens to the Group Village Head, and a goat to the TA for affronting a bylaw'.

Group Village Heads also enforce community bylaws by vetoing and dissolving child marriages. A Group Village Head in Senior Chief Chitera's area, Chiradzulu, claimed that, 'I always refuse to allow marriages of those

¹³⁴⁰ Payable to the TA/Senior Chief.

who are below the age of 18 years'. Group Village Heads in Senior Chief Kwataine's area reported, 'of late we withdrew some children from marriages because the bylaws give us the authority to dissolve child marriages'. Parents/guardians of the child(ren) involved simultaneously pay *chindapusa* for violating bylaws.

A third role of Group Village Heads as enforcers is to deal with community resistance. It became apparent during community interviews that the bylaws are not a unanimously accepted ideology by community subjects. Group Village Heads in Senior Chief Chitera's area confided, 'it was a battle to arrive at and institute these bylaws. People [who have a wedding or initiation events] would still come and demand, *anfumu ife tikufuna tichezere pano*'.¹³⁴¹ In Senior Chief Mwirang'ombe's area, Group Village Heads shared, 'we really struggled with parents who felt that the bylaws would make them lose bride price'. In all study sites Chiefs generally lamented that they would get insulted by parents who argued that they had every right to do anything with their children because they, not the Chiefs, gave birth to the children.

The responsibility of countering resistance mainly rests with the Group Village Heads, who have to ensure compliance with bylaws. Section 9.5.4 demonstrates that such strategies mostly rely on organised groups of women within the community. In Senior Chief Chitera's area, the Group Village Heads explained how they have coped with resistance after banning overnight celebrations that were fuelling HIV transmission:

We would defeat them¹³⁴² by telling them that you can go ahead so long as you have five goats as your combined fines to the Village Head, the Group Village Head, and the Senior Chief. Hearing this, they would just say 'we will come back to you after we conduct clan discussions (about the goats),' and they would not return.

¹³⁴¹ Best English approximation would be 'Chief, we want to have an overnight celebration for this event'.

¹³⁴² Referring to those who would come asking that they should be allowed to have an overnight celebration.

This is a good example of how even those who feel inconvenienced may still respect the bylaws as living law, discussed further in Chapter 8.

7.3.4.2 *Role of Village Heads*

The role of Village Heads in implementing bylaws includes imposing fines; refusing permission for child marriages; ensuring that mechanisms for each child to be in school are being enforced; ensuring that pregnant mothers go to hospital on time; and confronting facilitators of harmful rituals.

Village Heads dispelled doubts as to whether they have the power to implement and enforce the bylaws. Village Heads in Senior Chief Kwataine's area said, 'we are each other's eyes'. If 'it seems that a child has gotten married in X village' we ask ourselves: 'what happened? We ask in a way that the concerned Chief should know that we know. Next, we hear that the Chief has gone to end the marriage'. Village Heads are compelled to take bylaws seriously because the Village Heads are policed by special groups who sniff what is happening in their community: Back to School Committee (Senior Chief Lukwa's area); GENET Committee (Senior Chief Chitera's area); Mother Groups (Senior Chief Mwirang'ombe area) and *Amai Achinsisi*¹³⁴³ (Senior Chief Kwataine area).¹³⁴⁴

Generally, the evidence above suggests that interviewed Chiefs implement the community bylaws because their Senior Chiefs take the bylaws seriously, and also because the Group Village Heads and Village Heads themselves believe in the potential of the bylaws to address cultural challenges, which further attests to the Chief/community driven nature of horizontal vernacularisation.

¹³⁴³ Secret Mothers.

¹³⁴⁴ See section 8.3.2.2 of the thesis.

7.4 CONCLUSION

This Chapter has presented empirical evidence data on the emergence and character of community bylaws addressing harmful practices affecting women and girls in rural Malawi. Oral bylaws to address harmful practices seem to have emerged from around 1994 under the GABLE project, although some communities said that they started making oral bylaws from the early 2000s. Written bylaws have been mainly prominent after 2010. What is clear though is that the bylaws cannot be divorced from when government began to strengthen safe motherhood and girl education initiatives, as well as gender equality laws. This is not to say that the community bylaws are government initiatives either, because the evidence shows that by their very nature, they are Chiefs' initiatives.

In terms of their characteristics, community bylaws are Chief-led, (community) problem driven, grassroots owned and mostly prescribe village-based punishment. In fact, community bylaws cannot exist without punishments, known as *chindapusa*. The issues generally addressed in various bylaws have been highlighted, and Chapter 8 further analyses the gender specific prohibitions to examine how international human rights norms are influencing the bylaws.

Community bylaws are mainly formulated at TA level, and indeed all the community bylaws studied have been spearheaded by TAs (all of whom are promoted to Senior Chiefs). While the process of making community bylaws is peculiar to different areas, the process typically involves six main steps: problem identification, mainly involving Group Village Heads; orientation or training of community stakeholders by Chiefs, mainly the TA and Group Village Heads, at times with support from NGO partners; consultations by Chiefs, mainly Village Heads and Group Village Heads; processing and consolidating ideas mainly by Group Village Heads, at times with support

from NGO partners/government district stakeholders; drafting the bylaws (at times facilitated by TAs, at times by NGO partners); and adoption of the bylaws (particularly marked by the TAs signature).

The chapter has shown that the emergence of community bylaws constitutes a process of horizontal vernacularisation. As the bylaws emerge, the appropriation and translation of human rights is not always purposeful and unicamerally driven by external programmes. Additionally, human rights norms are not being conventionally used to challenge communities to abandon harmful practices, but are only reinforcing decisions of communities to pursue positive cultural values.

As will be shown further in Chapter 9, the different stages of community bylaw making demonstrate the emergence of both new forms of vernacularisers (crusaders, grafters, troopers) and already recognised vernacularisers (converters, adapters), except that the community bylaws are adding other actors that play these conventional roles. Also visible are new strategies of translating human rights, such as deflective translation, socialising, customarising women's protection and augmentation. Furthermore, the emergence of community bylaws is illuminating new perspectives to existing translation strategies such as simplification and hybridisation (including the overall strategy of framing).

The next chapter discusses in greater detail the legal character of the community bylaws. How do bylaws reflect international human rights? What are the human rights implications of the *chindapusa* model of enforcing the bylaws?

CHAPTER 8

LEGAL CHARACTER OF COMMUNITY BYLAWS

8.1 INTRODUCTION

Having seen, in Chapter 7, how community bylaws have emerged to date and what they say, this chapter discusses the legal character of the bylaws in order to achieve two of the study's objectives: to establish whether there is a relationship between the community bylaws and African customary law; and to assess the extent to which the community bylaws address international and domestically recognised human rights standards, including how they reflect key principles of leading women's rights protocols such as CEDAW and the Maputo Protocol.

The chapter commences with a discussion of people's general perceptions of the legal character of community bylaws, the legal status of the bylaws within Malawi's constitutional framework, and the status of the bylaws as African customary law. By establishing that the community bylaws are a rupture of both customary and formal law, this discussion helps to properly characterise and contextualise these laws within the discourse of horizontal vernacularisation.

The discussion then proceeds to consider the question of how, if at all, the emerging practice of community bylaws resonates with human rights standards. This will involve interrogating the similarities and contrasts between gender-specific harmful practices that are articulated in the community bylaws and those pronounced in international/legislative norms and how the community bylaws conceptualise harmful practices.

The chapter demonstrates that while community bylaws have questionable status as formal law, they represent a form of horizontal vernacularisation, and a means of brigading the gap between the international and national and the local.

8.2 PERCEPTIONS ON COMMUNITY BYLAWS AS LOCALISED LAW

Discussing communities' perception of the legal character of the community bylaws is important because it reveals how people see themselves in relation to their bylaws. Respondents were asked the question: 'do you see these community bylaws as real laws?'

At community level, one perception portrayed the bylaws as 'context-specific law' or laws of localised, instead of general, application. Common sentiments were '*awa ndi malamulo kwathu kuno*'¹³⁴⁵ or '*ndi malamulo, koma akudera*.'¹³⁴⁶ Several reasons were given for this perspective: the bylaws are routinely applied when any case happens;¹³⁴⁷ the bylaws govern every primary school in the area;¹³⁴⁸ the bylaws are taken seriously and people are afraid to contravene them (e.g. clerics rejecting to solemnise child marriages;¹³⁴⁹ women obliging to pay *chindapusa* when they give birth at home;¹³⁵⁰ child marriages being annulled;¹³⁵¹ people refraining from violence and other harmful practices;¹³⁵² girls returning to school after giving birth instead of staying home, waiting for marriage¹³⁵³).

¹³⁴⁵ Best English approximation could be 'here in our area, these [bylaws] are laws'.

¹³⁴⁶ 'They are law, but only for the community'.

¹³⁴⁷ Senior Chief Lukwa and Village Heads in his area, Kasungu; Group Village Heads, Senior Chief Chitera's area, Chiradzulu.

¹³⁴⁸ Senior Chief Lukwa, Kasungu.

¹³⁴⁹ Group Village Heads, Senior Chief Kwataine's area, Ntcheu.

¹³⁵⁰ Group Village Heads, Senior Chief Chitera's area, Chiradzulu.

¹³⁵¹ Senior Chief Chitera, Chiradzulu.

¹³⁵² Women's FGD, Senior Chief Kwataine's area, Ntcheu.

¹³⁵³ Women's FGDs in areas of Senior Chiefs Mwirangombe, Karonga, and Kwataine, Ntcheu.

Two Chiefs shied away from calling the community bylaws ‘laws,’ on technical reasons. Senior Chief Chitera’s perspective was: ‘we know state law is the law. Our bylaws are not – they are simply a mechanism we have identified to protect our children’. Senior Chief Kwataine remarked: ‘No, these bylaws are not law. However, they are helping us to respond to socio-cultural issues that were unproblematic before either because their consequences were not felt as harshly as now, or people lacked knowledge’. Notably, despite their restraint to name them ‘law,’ the two Chiefs were devoted to the application of the bylaws ‘because of their positive results’. In fact, Senior Chief Kwataine divulged that when an incident arises in his community, the bylaws are the first recourse.

Interviewed parliamentarians and local government officials also perceived the bylaws as locality-based law. The Chairperson, Parliamentary Legal Affairs Committee said: ‘when offenders pay the imposed punishment, it is in obedience to their law.’ Similarly, the Chairperson, Social and Community Affairs Committee rationalised: ‘in their culture these are laws because if someone is told pay three goats, and they bring three goats, it means the offender is accepting the bylaws’ authority.’ The Chairperson, Women’s Caucus termed the bylaws ‘laws of the people, expressed in vernacular.’ The DCs in Ntcheu and Kasungu also accepted that at the level they are, the bylaws are considered law.

There were different opinions from police and court respondents regarding whether the community bylaws are valid law. The VSU Coordinator at Malawi Police Headquarters, who mistakenly thought Chiefs are empowered by legislation to make community bylaws said, ‘the bylaws are law because both the Chiefs Act and the Local Government Act give power to Chiefs to make laws. The bylaws should even be enforceable in court’.¹³⁵⁴ However,

¹³⁵⁴ Of course, this is inaccurate because as seen in section 5.3.1.3 of the thesis, there is prescribed procedure for making bylaws under the Local Government Act, which the

police officers at district levels had contrary views. A VSU Officer at Chiradzulu Police Station, said:

These are *malamulo akumudzi*¹³⁵⁵ made to reduce problems being faced in the village. They are meant to dissuade villagers from conduct that has been declared bad because it can harm others. In short these are village 'do' or 'don'ts' – they are unstable and easily changeable since their relevance depends on the prevailing conditions. But as police, we follow state law.

Interviewed VSU officers at Karonga Police Station also referred to the temporal nature of the bylaws, 'bylaws are not law because some of them are meant to address a particular problem and they change after the problem vanishes'. VSU police officers at Ntcheu Police Station called the bylaws 'part of efforts to end VAW and other harmful practices as grassroots levels'. They explained that because these are strictly laws for a given area, you would see that bylaws vary from area to area depending on their challenges.

However, most of the interviewed Magistrates saw the community bylaws as being valid law both in the community and the courtroom. The 3rd Grade Magistrate at Nyungwe Court, Karonga, asserted that the bylaws are valid because people there obey them, and they are binding because the Magistrate signed them. Magistrates in Ntcheu and Kasungu were all about preserving the dignity and authority of the community bylaws: 'unless excessive, courts should enforce punishments in the bylaws if they receive complaints of community bylaw non-compliance – otherwise if the court dismisses them, then the community bylaws would be rendered impotent in their very communities'. It was only the Magistrate in Chiradzulu who said the bylaws have limited validity: 'the bylaws are law so long as they are within a

community bylaws are not following. The Chiefs Act (Chapter 22:03) simply says one of the functions of a Chief is 'to carry out the traditional functions of his office under customary law so long as the discharge of such functions is not contrary to the Constitution or any written law and is not repugnant to natural justice and morality'(Section 7(b)).

¹³⁵⁵ Best English approximation would be 'laws for the village'.

community. Once we exit that community, bylaws cannot stand as law since courts have to apply state law instead’.

The above findings are intriguing because apart from the opinion of some Magistrates, the state of ‘community bylaws as law’ is seen as incapable of enduring beyond community boundaries, because ‘higher’ law usurps the bylaws – and yet such law is distant from the communities. Nevertheless, communities have confidence in this insecure law because they relate to its ‘customarised’ way of protecting various groups, and they see its tangible normative effects. This gives the bylaws inner force. As a Programme Officer at World Vision’s Kasungu office observed, ‘communities understand that these bylaws are only for their area, but they fear them more than state law because the bylaws and the punishments they prescribe are closer to them’. However, the question remains, what is the legal validity of the bylaws, according to the existing body of Malawian law?

8.3 LEGAL VALIDITY OF COMMUNITY BYLAWS IN MALAWI’S CONSTITUTIONAL FRAMEWORK

Chapter 1 has mentioned that one conundrum created by community bylaws is their legal validity and authority. There are two main questions: how the community bylaws sit with the formal law on the one hand; and how they sit with African (living) customary law on the other hand.

8.3.1 Community Bylaws and the Statutory Framework

Chapter 5 has shown that although the Constitution recognises Chiefs as part of local government authorities, Chiefs do not have independent powers to make subsidiary legislation. Rather, under the Local Government Act, a

District Council, and Town or City Assembly have non-delegatable powers to make bylaws for governing a local government area.¹³⁵⁶

Indeed, several local government respondents that are conversant with the making of legal bylaws stressed that the community bylaws are not formal law. Kasungu's District Commissioner enlightened, 'notwithstanding a Magistrate's signature, what should happen for community bylaws to gain legal validity is that after completing its bylaws, a community should send them to the Ministry of Local Government.' The Chief Local Government Services Officer in the Ministry of Local Government expressed concern that 'the community bylaws have no legal basis because they do not follow the procedure for promulgating bylaws under the Local Government Act whereby the District Council is supposed to send us its bylaws for vetting before we can approve them as subsidiary legislation'. As seen in section 1.3, District Council bylaws can even be made at Traditional Authority level.¹³⁵⁷

Therefore, because community bylaws are not constitutionally recognised as a source of law in Malawi, the label 'bylaws' weakens the legal force of the community bylaws, as legal positivists or centralists would contend that they are detached from formal systems of law and are therefore legally invalid. It has been argued elsewhere that '[case] law that lacks any grounding in constitutional text or tradition represents a judicial usurpation of law-making power incompatible with the rule of law'.¹³⁵⁸ By analogy, this sentiment could apply to the community bylaws.

¹³⁵⁶ See section 5.3.1.3 of the thesis.

¹³⁵⁷ Particularly referencing to Section 102 of the Local Government Act No. 42 of 1998, as amended by Local Government (Amendment) Act No. 10 of 2017.

¹³⁵⁸ Jr. Richard H. Fallon, 'The Rule of Law as a Concept in Constitutional Discourse,' *Columbia Law Review* (97)1 (1997), 1-56 25. Fallon explains that in the United States case of *Planned Parenthood v. Casey* (505 U.S. 833 (1992) at 874-76), a mere five-to-four Supreme Court purported to uphold the central abortion right, first recognised in *Roe v. Wade* 2. (410 U.S. 113 (1973)), even though they were reducing the scope of that right by permitting 'incidental' restrictions on abortions that do not amount to 'undue burdens'. The dissenting opinion of Justice Scalia maintained that the earlier case of *Roe* lacked any grounding in constitutional

Chapter 5 has shown that no gender-related law in Malawi marks community bylaws as subsidiary legislation – meaning that as far as formal law is concerned, the community bylaws are legally invalid. The fact that national frameworks such as the National Strategy on Ending Child Marriage (2018-2023) have planned for the formulation of community bylaws to address child marriage across Malawi¹³⁵⁹ does not cure the situation, since Parliament has exclusive legislative powers in Malawi.¹³⁶⁰ In fact, the validity of efforts by the Ministry of Gender to harmonise the community bylaws by producing a ‘one bylaw framework’, as will be outlined in Chapter 9, would depend on action by District Councils to appropriate and apply the framework as required by law, and not on Chiefs’ usage of the framework (to produce their community bylaws) alone.

The fact that the community bylaws cannot be used as formal law in courtrooms is both unproblematic and problematic. On the one hand, it should be immaterial that the community bylaws are not enforceable as formal law because that is not their aim anyway. On the other hand, the lack of judicial force should be cause of concern because a community bylaw that is judicially quashed would suddenly lose its power to enforce anticipated protection for women and girls (unless the community returns to the drawing board to produce ‘legal’ bylaws).

Using the broader term community ‘laws’ would have been less contentious than community ‘bylaws,’ since the Constitution accepts ‘any law,’ (including customary law,)¹³⁶¹ so long as it is consistent with constitutional principles. And as seen in Chapter 4, CEDAW jurisprudence now recognises community law as legal pluralist law.¹³⁶² Nevertheless, the next part argues that there is

text or tradition, and therefore represented a judicial usurpation of lawmaking power incompatible with the rule of law.

¹³⁵⁹ See note 993 of the thesis.

¹³⁶⁰ See note 941 of the thesis.

¹³⁶¹ See section 5.3.1.2 of the thesis.

¹³⁶² See section 4.4.4 of the thesis.

scope to argue that community bylaws can be recognised as valid law in a pluralistic legal system such as that of Malawi. This begs an understanding of how the community bylaws are perceived within the context of culture and (living) customary law particularly.

8.3.2 Community Bylaws, Culture and Living Customary Law

Since 'custom' and 'law' form part of cultural systems,¹³⁶³ interrogating the legal status of community bylaws as living customary law has to start with appreciating whether the bylaws are positively impacting on communities' cultural beliefs and value systems (which systems are embedded in customary law) before delving into the living customary law dimension.

8.3.2.1 *Community bylaws and cultural beliefs and value systems*

The findings below are presented with the recognition that it has long been established that 'not all cultural practices are indigenous law and vice versa'.¹³⁶⁴ Changing beliefs and values regarding education and health in the study communities are used as two examples to demonstrate how the community bylaws are positively impacting on cultural belief systems and values.

¹³⁶³ Clifford Geertz, *Interpretation of Cultures: Selected Essays* (New York Basic Books, Inc, 1973) cited in Ebenezer Durojaye, Bridget Okoye, and Adetoun Adebajo, 'Harmful Cultural Practices and Gender Equality in Nigeria,' (2014), 6170; Isabel Apawo Phiri, *Women, Presbyterianism and Patriarchy: Religious Experience of Chewa Women in Central Malawi*, (2001), 13; Bronwyn Winter, Denise Thompson, and Sheila Jeffreys, 'The UN Approach to Harmful Practices: Some Conceptual Problems,' (2002), 77; Sally Engle Merry, 'Changing Rights, Changing Culture,' (2001), 39.

¹³⁶⁴ *Hlope v Mahlalela* 1998 (1) SA 449 (T) at 457 H - I, cited in Chuma Himonga and Craig Bosch, 'The Application of African Customary Law Under the Constitution of South Africa: Problems Solved or Just Beginning,' (2000), 321. To be (living) customary law, a social rule should not only involve conduct or behaviour that recurs within a social group, but should create a sense of obligation to conform—John Hund, "'Customary Law is What the People Say it is"—HLA Hart's Contribution to Legal Anthropology,' (1998), 420; Ian Hamnett, *Chieftainship and Legitimacy: An Anthropological Study of Executive Law in Lesotho* (1975), 10. Both cited in Chuma Himonga and Craig Bosch, 'The Application of African Customary Law Under the Constitution of South Africa: Problems Solved or Just Beginning,' (2000), 321.

The first example demonstrates that values attached to (girl) education have shifted, resulting in discarding prior beliefs and practices. Senior Chief Mwirang'ombe, Karonga, explained, 'some customary values were bad and allowed parents to exploit children through marriage. They regarded the education of a boy as more important than a girl's. The bylaws are disconnecting us from these bad beliefs'. Indeed, it is undeniable from the empirical data in Chapter 7 that child marriage bylaws are signaling attitudinal transformation towards girl education – thus swapping the beliefs and values that viewed girls as (potential) dependent wives and carers, with the value of educating both the girl and the boy child.¹³⁶⁵

The second example illustrates that changing values attached to health (from HIV and safe motherhood perspectives) have resulted in banning practices that were ordinarily condoned at customary law. Group Village Heads in Senior Chief Kwataine's area, Ntcheu, noted: '*chokolo*¹³⁶⁶ was valued in the past because it secured a reliable provider for the widow and her children. However, *chokolo* is problematic now due to AIDS, so we have banned it'. Village Heads in Senior Chief Mwirang'ombe's area disclosed that 'we used to believe in the practice of *kuchotsa mzimu*,¹³⁶⁷ which the widow would go through while a dead body was still in the house'. Though this belief was also meant to protect clan health, HIV has compelled the community to re-evaluate its values.

As shown in Table 3, some of the community bylaws address safe motherhood, and the value of maternal health has replaced old beliefs in traditional births. In Senior Chief Kwataine's area, the increased respect for

¹³⁶⁵ Indeed, communities seem to be attaching greater value towards education generally – for example by banning *Gule Wankulu* inductions for boys (Lukwa area) and initiation ceremonies (Chitera area) from being conducted during the school calendar as shown in Chapter 7.

¹³⁶⁶ Wife inheritance.

¹³⁶⁷ Best English approximation could be 'removing dead spirits' – for fear that the dead man's spirit would linger around and cause some calamities. Therefore, if a man has died, a male relative would go and have sex with his in-law to remove the dead spirits.

maternal health has been accompanied by a growing interest to reduce fistula cases.¹³⁶⁸ The seriousness attached to the value of maternal health in Senior Chief Mwirang'ombe's area was displayed when women said they do not find it problematic that as a way of enforcing the area's community bylaws, a mother and a new born baby can be detained at a health facility if the mother fails to pay *chindapusa* after violating bylaws that prohibit women from giving birth at home or on the way to the hospital.¹³⁶⁹ The women did not see this as a violation of human rights, but as a measure for protecting women's health so that they do not die due to avoidable birth delivery complications.

A combination of the increased value attached to health and general (economic) wellbeing was visible in community bylaws that prohibit property grabbing. Village Heads in Senior Chief Mwirang'ombe's area explained that in the past they would grab property whenever a father died, but the bylaws have banned the practice in order to safeguard children's future. Village Heads in Senior Chief Chitera's area, Chiradzulu, added:

We practiced property grabbing because under our inheritance customs and beliefs, the ones who 'owned' the deceased man were his natal family, and they deserved to inherit his property. Currently, the bylaws have completely eradicated the practice after we realised that due to the many HIV deaths, the practice was only promoting poverty as well as HIV itself.¹³⁷⁰

Therefore, the community bylaws are 'shaking' customary beliefs and values, with communities abandoning long-standing beliefs and values that inflicted harm and installing renewed protective values to cure such harms. The

¹³⁶⁸ The community came to appreciate that if girls stay longer in school, they would be protected from fistula as they would get married at a mature age.

¹³⁶⁹ Discussed further under Chapter 9.

¹³⁷⁰ For example, the widow would be desperate to have a husband again, or would be having multiple transactional sexual relationships. Impoverished female orphans would also quickly get married. Besides, the government now says property belongs to the wife and children of a deceased man.

reference to 'government' in the above quote is what Phiri¹³⁷¹ has been described as 'interaction with other cultures'.¹³⁷² Thus, formal legal culture and the influence of changing socio-economic conditions may interact with people's lived realities to generate living law.¹³⁷³

Customary values like those examined above are considered important to living law discourse. It has been argued that in determining what is truly living law, one may have to focus on the values (of a customary law) than being fixated with the rules – because the rules that seek to translate and implement such values may change, whereas values are more durable.¹³⁷⁴ Even without the inference that the community bylaws are living law, one can appreciate that the bylaws are a manifestation of the argument that although values can be resilient, they can also be the very subject of, if not cause, for change – or both.

In this context, a values-oriented approach helps one to tread carefully with postulations that the community bylaws could be all about vernacularising human rights or legislation. Rather, horizontal vernacularisation assists to grasp that the rural communities that are formulating community bylaws have suffered unpleasant backlashes from their very cultures, leading them to voluntarily transform their 'interior' by questioning their values, while inevitably interacting with complementary modern (human rights) agendas.

8.3.2.2 *Community bylaws within the context of living customary law*

Chapter 3 has illustrated that commentators have differentiated customary

¹³⁷¹ Isabel Apawo Phiri, *Women, Presbyterianism and Patriarchy: Religious Experience of Chewa Women in Central Malawi*, (2001).

¹³⁷² *Ibid.*, 13.

¹³⁷³ Anthony C. Diala, 'The Concept of Living Customary Law: A Critique' (2017), 151; Chuma Himonga and Craig Bosch, 'The Application of African Customary Law Under the Constitution of South Africa: Problems Solved or Just Beginning,' (2000), 318.

¹³⁷⁴ See section 3.5.3 of the thesis, and particularly Chuma Himonga and Craig Bosch, 'The Application of African Customary Law Under the Constitution of South Africa: Problems Solved or Just Beginning,' (2000), 326.

law from living customary law, with the validity of the former being mistrusted due to rigidity and distortions.¹³⁷⁵ On the other hand, 'living customary law' is more accepted, since it flows with societal socio-economic changes, circumstances and patterns affecting those practicing it.¹³⁷⁶

It has been argued that attaching the term 'customary' in descriptions of living law is an oxymoron (because 'customary' means digging up the past and therefore contradicts the living nature of living law).¹³⁷⁷ However, this thesis maintains the term living customary law because the reality is that living law does not work from nothing. In the case of the community bylaws, returning to the past (customary) is necessary in order to sift practices that should respond to modern socio-economic realities.

Do Chiefs understand community bylaws as living customary law?¹³⁷⁸ Chiefs commonly felt that the community bylaws on child marriage and harmful practices are reconstructing customary law, and therefore cannot be separated from it. Senior Chief Lukwa, Kasungu, argued that community bylaws are just an improved form of customary law because in the past punishments were orally prescribed, but were still the same as in the bylaws (goats, chickens). Senior Chief Kwataine, Ntcheu, had a similar opinion, which was generally echoed by other Chiefs¹³⁷⁹:

¹³⁷⁵ See sections 3.5.2 and 3.5.3 of the thesis respectively.

¹³⁷⁶ See section 3.5.3 of the thesis.

¹³⁷⁷ See note 475.

¹³⁷⁸ The focus is on perspectives of Chiefs given that they would best know what is or is not customary, and therefore place the bylaws in appropriate context.

¹³⁷⁹ In Kasungu, Group Village Heads in Chief Lukwa's area said, 'we are only pruning disturbing elements of customary law so that we only enforce good customary law'. Village Heads in Chief Chitera's area, Chiradzulu explained, 'the establishment of bylaws means people are abandoning old bad practices for new useful ones. The bad laws of the past may have pleased our ancestors, but our generation has to replace them because they are dangerous today.' Group Village Heads too in the area conceded: 'bylaws are sieving unpalatable parts of customary law. So the new lifestyle we are adopting through the bylaws will gradually replace whatever is bad under customary law'. Village Heads in Chief Mwirang'ombe's area asserted, 'the community bylaws will continue working, replacing bad customary laws that lowered people's living standards—for instance laws that permitted property grabbing as part of culture'.

Community bylaws and customary law move together because the bylaws are ending some aspects of customary law that were damaging to girls and boys. Thus bylaws are slowly changing or abolishing customary laws that were violating human rights, and in the process adapting customary law to modern life.

The fact that the Chiefs were not shielding 'bad customary law' and had no reservations about its substitution raised the question of whether, by backing community bylaws,¹³⁸⁰ the Chiefs are not contradicting their own role as custodians of culture. The Chiefs were unapologetic about transforming culture and customary law. Senior Chief Kwataine summed up their attitude by remarking, 'we cannot deodorise bad customs'. The reasons that were provided demonstrate the pursuit of intertwined agendas (local/traditional and state), whose success hinges on deconstructing customs and customary law. Group Village Heads in Senior Chief Chitera's area, Chiradzulu, clarified: 'our role to safeguard culture remains, but we are focused on good culture. Chiefs now know that some customs have simply been destructive. Having witnessed deaths of our subjects daily due to AIDS, our perspectives have changed too'. Senior Chief Chitera also underlined Chiefs' cooperation with government:

We are supposed to change so that our local customs and laws should support government's interests.¹³⁸¹ Every day, the world is changing and we should use all tools necessary - whether state law or our own bylaws- to protect people. This is not the time to defend/protect harmful practices, but to drop them.

According to Chiefs, outdated values and beliefs cannot be sustained when Chiefs now know better, including that they have to cooperate with government to promote development.¹³⁸² Group Village Heads in Senior

¹³⁸⁰ Which are challenging culture.

¹³⁸¹ For example, promoting child education.

¹³⁸² For example, Senior Chief Mwirang'ombe noted, 'you just cannot insist on bad things because you are a Chief. Even Chiefs have to learn and work with government to promote education for both girls and boys and advance the country'.

Chief Lukwa's area observed that some customs are being uprooted because they had troubling ideals, when compared to the modern world and its changes. Senior Chief Lukwa, who remarked that Chiefs have been accused of violating women's rights by approving child marriage so that they can 'eat' cows, goats and chickens, declared passionately:

Some traditional practices just have to change. What our ancestors used to do cannot be instinctively preserved 100 percent today because they were perpetuating some practices *mu nthawi yakusadziwa*.¹³⁸³ Now *zinthu zapenya*¹³⁸⁴ and we cannot accept a 12-year old to leave school to get married or continue promoting *fisi*,¹³⁸⁵ *bulangete la mfumu*,¹³⁸⁶ polygamy . . . Today many Chiefs are educated or have been exposed to issues and are not blind anymore. Practices of our ancestors are unbeneficial to people and should change for our country to develop.

Thus, a three-fold perspective on why Chiefs should change customs and customary law was advanced, regardless of whether Chiefs personally benefit from the harmful practices:¹³⁸⁷ a) the need to respond to contemporary problems;¹³⁸⁸ b) the demand that customs have to change to conform to the state's development goals means that bad customary laws¹³⁸⁹ have to be replaced with laws that promote everyone's development; and c) the reality that negative aspects of culture that contravene state law have to change to correspond with legislation.

¹³⁸³ Best English approximation would be 'during an era of ignorance'.

¹³⁸⁴ Best English approximation would be 'we know better; we can see with our own eyes'.

¹³⁸⁵ See Glossary of Chichewa terms.

¹³⁸⁶ 'Chief's blanket' – see Glossary of Chichewa terms.

¹³⁸⁷ While the three perspectives summarise what other Chiefs were articulating, these perspectives were particularly shared by Chiefs in Senior Chief Mwirang'ombe's area. In respect of practices that benefit Chiefs, they cited the practice of *bulangete la mfumu* (Chief's blanket, see Glossary of Chichewa terms) which they felt was very bad and had to be banned because Chiefs would infect their wives and create problems for their families.

¹³⁸⁸ 'We have experienced and witnessed high population growth not only in this area but the entire Malawi'.

¹³⁸⁹ 'E.g. marrying of girl children'.

While communities are self-motivated to eradicate harmful practices for the sake of their own development, the relevance of 'state benchmarks' to redefining customary law and practices through the community bylaws is also unmistakable in the above findings. This reveals the iterative nature of horizontal vernacularisation – whereby one cannot pin down human rights influences as being fully external, although one also cannot reject the relevance of such influences as local communities reconstruct their beliefs and values. No wonder the scholarship on living customary law discussed in Chapter 3 has noted that the powerful influences of state and international law (and their human rights groundings) unite with other socio-economic changes and compel people to change negative customary laws and practices by embracing new norms.¹³⁹⁰ However, instead of expecting customary law to totally submit to state law ideals, horizontal vernacularisation in the context of community bylaws exposes that the relationship between customary law on the one hand, and state law on the other is one of mutual submission.

Although the above findings would tempt one to conclude that the community bylaws are a form of living customary law (as their tenor certainly imposes rights and obligations in the vernacular, with 'people adapting their customs to socio-economic changes'¹³⁹¹), scholarship notes one main feature of living customary law that poses a challenge to such a conclusion. It is taken for granted that unlike customary law, which is written down (has been codified) in countries such as South Africa,¹³⁹² living customary law has to be oral.¹³⁹³ On the other hand, the community bylaws studied are all written, although it has been shown that the initial bylaws were oral in nature. Before hastily disqualifying them from customary living law, several findings

¹³⁹⁰ See section 3.5.3. Particularly also see Anthony C. Diala, 'The Concept of Living Customary Law: A Critique' (2017), 155 & 159.

¹³⁹¹ *Ibid.*, 155.

¹³⁹² For example, the Natal Code of Zulu Law; the Kwazulu Act on the Code of Zulu Law Chuma Himonga and Craig Bosch, 'The Application of African Customary Law Under the Constitution of South Africa: Problems Solved or Just Beginning,' (2000), 328-329.

¹³⁹³ See section 3.5.3 as read with section 3.5.2 of this thesis.

illuminate the value that the communities attach to these bylaw documents. Chiefs were asked: where are these bylaws – in your heads or you have written documents that you make reference to cases arise? In all study sites, Group Village Heads and Village Heads said they know the bylaws orally – the TA has a copy, but they do not have copies of the bylaws.¹³⁹⁴ This prompted a follow up question: ‘how can you ever hope that your successors will know these bylaws and act as you do if they cannot inherit a document?’ Most Chiefs explained that while human nature is unpredictable, it was unlikely that future Chiefs could reverse the new values that communities had collectively agreed upon.

What looked like a gap later started to make sense from the perspective that Chiefs may not be troubled by not having reference documents (bylaws) because that is the way their law has always existed – in their heads. Indeed, during the interviews none of the Chiefs was reciting from any bylaw document.¹³⁹⁵ In fact, Chapter 7 has shown that the idea of reducing bylaws to writing (and indeed the very term bylaws as seen in Senior Chief Chitera’s area) came from NGOs. It really seems the communities would not stop rejecting child marriage and other harmful practices even if their bylaws were unwritten.

Indeed, section 7.3.3.6 has shown that writing the bylaws down is not a crucial step, and that consensus is reached first before reducing the rules into writing; and that in 2018, the Chewa King, Gawa Undi, made serious oral decrees against harmful practices. Practically, communities are not operating based on written documents, but based on a conviction for the need to change their cultural values. As seen above, a focus on values brings sustainable

¹³⁹⁴ They explained that they do not have resources to print the community bylaws for every Chief, but that the bylaws are known by Chiefs anyway.

¹³⁹⁵ Getting the typed bylaws was a feat, even for me, and some Senior Chiefs did not have them at hand. Chief Chitera referred me to the NGO, GENET; I later sourced bylaws for Chief Mwirang'ombe's area from the Social Welfare Office; and Chief Kwataine had to search for area's bylaws as an email attachment (after hotspotting my phone to get internet access) in order to give me a soft copy because he does not have a hard copy.

change than just rules.¹³⁹⁶ Indeed, one wonders whether the insistence of NGOs/projects for a written community bylaws document to be produced is for the good of the community, or it is just something to wave about as evidence of project success.¹³⁹⁷

There are good grounds, therefore, for arguing that community bylaws still fall under the broader concept of *living law* – viewed by Claassens¹³⁹⁸ as blended law and experiences (i.e. from vernacular, constitutional or statutory sources);¹³⁹⁹ and what Hellum¹⁴⁰⁰ labels as ‘the outcome of the interplay between international law, state law, and local norms that takes place through human interaction in different historical, social and legal contexts’.¹⁴⁰¹ This means that even if they may not have the status of formal law or customary law, the community bylaws have legal status as living law in the context pluralistic legal system.

In other words, the community bylaws are neither formal law, nor do they sit easily with customary law. By simply tagging them as ‘living law’, the community bylaws can be seen as a rupture of both formal and customary law to address current pressing problems in Malawian society, especially harmful practices. The vertical approach of international jurisprudence that mostly expects states to take legal and other formal measures seems to not have achieved much by way of curbing harmful practices. Customary law is itself too patriarchal and stale to resolve this problem. Therefore, the bylaws represent a disruption of both an entirely new innovation from the bottom up, involving multiple players both local and non-local.

¹³⁹⁶ See section 8.3.2.2 of the thesis.

¹³⁹⁷ Of course one would also argue that if it was the former, the same projects ensure that they print enough bylaws for every existing Chief in the jurisdiction.

¹³⁹⁸ Aninka Claassens, ‘Entrenching Distortion and Closing Down Spaces for Change: Contestations Over Land and Custom in South Africa,’ (2012), 1-62.

¹³⁹⁹ *Ibid.*, 31-32.

¹⁴⁰⁰ Anne Hellum, *Women’s Human Rights and Legal Pluralism in Africa: Mixed Norms and Identities in Infertility Management in Zimbabwe, North-South Legal Perspectives*, (1999).

¹⁴⁰¹ *Ibid.*, cited in Aninka Claassens, ‘Entrenching Distortion and Closing Down Spaces for Change: Contestations Over Land and Custom in South Africa,’ (2012), 32-33.

The next section considers the question of the congruence of these community bylaws with international human rights standards. This question is relevant to the discussion of the nature of vernacularisation at play in the context of the bylaws vis-a-vis international human rights law.

8.4 CONCEPTUALISATION OF COMMUNITY BYLAWS AND HARMFUL PRACTICES UNDER INTERNATIONAL HUMAN RIGHTS LAW

Three issues are of interest: a) comparing the conceptualisation of harmful practices under community bylaws with that in international human rights law and jurisprudence (and state law); b) 'sizing' the community bylaws against key principles underpinning women's and children's rights conventions; and c) contrasting how community bylaws are conceptualising punishments (*chindapusa*) with international human rights and state law approaches. First, the key conceptual issues guiding the analysis are presented.

8.4.1 Overview of Key Conceptual Issues

Chapter 4¹⁴⁰² necessitates an examination of how community bylaws for addressing harmful practices affecting women and girls are internalising international human rights norms in five areas:

- how the type of harmful practices under the community bylaws compare with examples of harmful practices in the jurisprudence, particularly those that are specifically developed by international jurisprudence¹⁴⁰³ (and that apply to Malawi's context);

¹⁴⁰² Analysing international human rights law and jurisprudence on harmful practices.

¹⁴⁰³ Child marriage is also particularly elaborated by the joint ACHPR/ACERWC General Comment, see section 4.3.2 of the thesis.

- how the bylaws are reflecting key principles of CEDAW and the Maputo Protocol,¹⁴⁰⁴ as well as core principles of the CRC and the African Children's Charter;
- the extent to which community bylaws satisfy the 'harmful test' criteria proposed by CEDAW and CRC jurisprudence,¹⁴⁰⁵ and challenges regarding the criteria;
- whether the recommended services for victims of child marriages and under international jurisprudence are embraced in community bylaws, and the approaches that the bylaws pursue in reinforcing access to the services; and
- how the punishment schemes of the community bylaws are designed given that international jurisprudence is concerned about negative impacts of some sanctions on victims of harmful practices. This also exposes how communities in rural Malawi are conceptualising 'victim,' and how this challenges perspectives of international human rights jurisprudence.

8.4.2 Harmful Practices under Community Bylaws and in International Jurisprudence

Table 4 analyses how gender-specific harmful practices covered in community bylaws¹⁴⁰⁶ are reflecting harmful practices that are recognised in international jurisprudence (and state law). However, internationally recognised harmful practices that are invisible in Malawian communities are omitted.¹⁴⁰⁷ Table 4 is simply illustrative of the range of internationally

¹⁴⁰⁴ Which also underpin provisions promoting women's rights under the Republican Constitution.

¹⁴⁰⁵ See section 4.3.1.2 of the thesis.

¹⁴⁰⁶ These are drawn from Table 1, which captures all the harmful practices covered in the studied community bylaws.

¹⁴⁰⁷ FGM, forced-feeding of girls; fattening; virginity testing; 'honour' crimes dowry-related death and violence, breast ironing – CRC/C/GC/13; CEDAW/C/GC/31-CRC/C/GC/18; also see section 4.31.1 of the thesis.

recognised harms covered/not covered by the bylaws, and areas marked 'yes' should not be read as representing the common position of all community bylaws reviewed for this thesis. For issues that are specifically covered by certain bylaws, reference should be made to Table 3.¹⁴⁰⁸

Table 4: Analysis of how bylaws reflect 'international' harmful practices

Human rights prohibition	Human rights source	Coverage in bylaws		Explanation/community bylaws content
		Yes	No	
Forced marriage, child betrothal and child marriage	CEDAW; CRC; African Children's Charter; CRC General Comment No. 13; joint CEDAW General Recommendation/ CRC General Comment; CESCRC General Comments 14&22; joint ACHPR/ ACERWC General Comment. Constitution; Marriage, Divorce and Family Relations Act; Child Care, Justice and Protection Act.	✓		Girls and boys should not enter marriage before 18 years; forced marriage and child betrothal prohibited; Clergy and Sheikhs should not solemnise a child marriage; Chiefs should not approve a child marriage; those undertaking cultural negotiations relating to child marriage should be punished; child marriage should be regarded a criminal offence.
Marriage dowry/ bride price	Joint CEDAW General Recommendation/ CRC General Comment.		✓	Issue is not addressed in <i>lobola</i> paying areas.
Polygamy	Joint CEDAW General Recommendation/ CRC General Comment; Maputo Protocol. Marriage, Divorce and Family Relations Act.		✓	Though sometimes debated, polygamy not banned or discouraged.
Violent and degrading initiation rites	CRC General Comment No. 13; joint CEDAW General Recommendation/ CRC General Comment. HIV and AIDS (Prevention and Management) Act; Gender Equality Act.	✓		A girl should not be: locked indoors upon reaching puberty; subjected to initiation sexual cleansing; given sex instructions during initiation. Initiation ceremonies should not be conducted during schooldays.

¹⁴⁰⁸ In Chapter 7.

Human rights	Human rights source	Coverage in bylaws		Explanation/community bylaws content
Preferential care and treatment of boys	Joint CEDAW General Recommendation/ CRC General Comment; CESCR General Comment No 14. Gender Equality Act.	✓		Girls should be given equal opportunities with boys regarding education, employment, businesses, and household responsibilities/chores.
Widowhood practices	Joint CEDAW General Recommendation/ CRC General Comment. HIV and AIDS (Prevention and Management) Act; Gender Equality Act.	✓		Widows should not be subjected to <i>chokolo</i> (wife inheritance), sexual cleansing, and any inhumane practices; property should not be grabbed from orphans and/or widows; surviving wife and children should have all household property; property grabbing is a criminal offence.
			✓	<i>Chokolo</i> 'candidates' should undergo HIV testing.
Incest	Joint CEDAW General Recommendation/ CRC General Comment.	✓		Defilement of girls by fathers or stepfathers will be sanctioned, including as a crime.
(GBV) norms violating sexual and reproductive health	CESCR General Comment No 22; joint ACHPR/ ACERWC General Comment. Gender Equality Act.	✓		Pregnant women should: timeously attend antenatal clinics; deliver at hospital; be escorted by husbands to hospital; not take traditional herbs to assist with labour; not be overworked by husband; be provided nutritious food by husband; not be denied eggs and milk; not be sent to wait for delivery at their parents' home. Adolescent girls should access contraceptives and anyone restricting them will be fined.
			✓	A girl who has fallen pregnant should not abort the pregnancy.
Other harmful practices and forms of VAW	CEDAW; CRC; joint CEDAW General Recommendation/ CRC General Comment; Maputo Protocol; African Children's	✓		Other prohibited practices are: <i>bulangete la mfumu</i> (Chief's blanket), <i>fisi</i> , <i>chimwanamaye</i> (wife swapping), <i>mbiligha</i> (bonus wife); <i>chiramu</i> (sleeping with a sister-in-law).

Human rights	Human rights source	Coverage in bylaws		Explanation/community bylaws content
	Charter. Constitution; Gender Equality Act; Child Care, Justice and Protection Act; HIV and AIDS (Prevention and Management) Act; Prevention of Domestic Violence Act ¹⁴⁰⁹ .			Prohibited domestic violence acts include: spousal/wife battery; neglecting to clothe and feed a wife and children; economic abuse, including by migrant husband; divorce without justifiable cause, beating a pregnant wife, marital rape, verbal abuse, extramarital affairs, preventing a wife to do business or participate in social groups; financial/emotional neglect of wife and children by polygamous man.
Other forms of VAC	Joint CEDAW General Recommendation/ CRC General Comment; CRC General Comment No 13; African Children's Charter Constitution; Child Care, Justice and Protection Act.	✓		Violence against girls of following nature is prohibited: a schoolteacher/schoolboy to sexually touch, insult, and demean a schoolgirl; a teacher to be with a schoolgirl at an inappropriate place or to propose love to a schoolgirl; other men having sex/affairs with schoolgirls.

The following discussion draws from Table 4 to interpret the findings from the context of whether the conceptualisation of harmful practices in the community bylaws: is reinforcing patriarchy; complying with international human rights standards; and displaying different understandings of harm by rural people in Malawi.

8.4.3 Patriarchal Conceptualisation of Harmful Practices

According to Table 4, the patriarchy argument arises in respect of *lobola*/bride price, polygamy and some approaches to levirate marriages since these are inconsistent with practices regarded as harmful under international human rights jurisprudence. Section 5.3.3.1 has shown that issues of *lobola*/bride

¹⁴⁰⁹ However, note 1003 has mentioned that the Prevention of Domestic Violence Act has not been analysed in this thesis since the focus is on statutes that directly address harmful practices.

price, polygamy are equally evaded in legislation.¹⁴¹⁰ Therefore, their absence in the community bylaws (particularly for polygamy) may not signal widespread acceptance,¹⁴¹¹ but rather that they are unresolved controversies. Though one could contend that community bylaws are taking a cue from legislation, the fact that some bylaws banned child marriage ahead of legislative bans would rebut such an argument.

From a patriarchy perspective, the CEDAW and CRC jurisprudence argues that bride price payments predispose women and girls to violence and other harmful practices.¹⁴¹² As shown in section 5.3.1.1, the dilemma is that *lobola* is the bedrock of a valid marriage in Malawian patrilineal societies.¹⁴¹³ In so far as violence against girls is concerned, this risk is arguably dissolved by the unqualified child marriage prohibitions in the reviewed bylaws. Nonetheless, this does not resolve the risk of VAW. As for polygamy, CEDAW and CRC jurisprudence regards the practice as a human rights violation that affects women's and girls' dignity, and that has negative physical, mental, economic and social implications.¹⁴¹⁴ Therefore, merely cushioning the impacts of polygamy by punishing a polygamous man who neglects his wife and children, as one bylaw stipulates, is insufficient.

As regards levirate marriages/*chokolo*,¹⁴¹⁵ patriarchy is reinforced where the practice is conditionally upheld, and where it is outlawed on health and not on gender grounds. While most bylaws completely ban the practice, one community bylaw makes HIV testing a precondition of *chokolo*, thus still

¹⁴¹⁰ Section 5.3.3.1 of the thesis has noted that the new marriage law only proscribes polygamy in civil marriages. Furthermore, it is noted that the two issues have been excluded in legislation despite debates by special Law Commission affirming the need to legislate regarding them.

¹⁴¹¹ Indeed section 7.3.2.3 of the thesis shows that Chief Kwataine and women proposed that community bylaws in their area should ban polygamy but the community failed to reach a consensus.

¹⁴¹² E.g. see Paragraph 24, CEDAW/C/GC/31-CRC/C/GC/18/.

¹⁴¹³ See note 1007.

¹⁴¹⁴ E.g. see Paragraph 25, CEDAW/C/GC/31-CRC/C/GC/18.

¹⁴¹⁵ Also known as *chiharo*.

sustaining *chokolo*. For the community in question, the bylaw's objective is to prevent HIV transmission (therefore, so long as the practice is 'modified' to ensure that concerned parties are certified HIV free, the hazard vanishes). Even bylaws that completely ban *chokolo* are motivated by the HIV epidemic, and not gender concerns.¹⁴¹⁶ Arguably, such communities could reinstate the practice in the absence of existing HIV risks. This reveals limitations of a one-dimensional approach to modifying traditional practices because, from the gender equality lens of CEDAW and CRC jurisprudence, levirate marriages should be entirely prohibited since they are a form of forced marriage.¹⁴¹⁷ Any law that falls short of this standard, flouts international human rights standards.

However, the subsequent section shows that the three gaps are not a catastrophic failure, as the bylaws still substantively protect women.

8.4.4 Compliant Conceptualisation of Harmful Practices

Table 4 reveals high consistency between harmful practices in the community bylaws and most of the harmful practices under international human rights jurisprudence and state law discussed in Chapters 4 and 5 respectively. Read together, the bylaws cover issues of forced marriage, child betrothal and child marriage; violent and degrading initiation rites; preferential care and treatment of boys; widowhood practices; GBV norms violating sexual and reproductive health; and other harmful practices, including various forms of VAW and VAC.

In respect of child marriage, although the respective bylaws were formulated before the new marriage law was enacted in Malawi (2015),¹⁴¹⁸ they all set 18 years as the minimum marriage age at customary law for both girls and boys.

¹⁴¹⁶ See illustrative explanations by Chiefs in section 8.3.2.1 of the thesis.

¹⁴¹⁷ E.g. see Paragraph 23, CEDAW/C/GC/31-CRC/C/GC/18.

¹⁴¹⁸ See section 7.2 regarding the history of the community bylaws, particularly in the four study areas.

The bylaws did this when child marriage, including at custom, was constitutionally permitted.¹⁴¹⁹ The Chiefs' stance to reject marriages of those below 18 years even contrasts with the acceptance by CEDAW and CRC jurisprudence that persons under 16 years can get married in exceptional circumstances.¹⁴²⁰ In some bylaws, serious intent to eliminate child marriages and other harmful practices is expressed by banning specific duty bearers from performing roles that would facilitate child marriages;¹⁴²¹ as well as practices that 'benefit' Chiefs.¹⁴²² This aligns with calls for comprehensive approaches to address harmful practices/child marriage under jurisprudence generated by the CEDAW and CRC committees, as well as by ACHPR/ACERWC.¹⁴²³ But the broader question is: how are community bylaws conceptualising harmful practices?

8.4.5 Conceptualisation of Harms

The community bylaws do not typically carry definitions of harmful practices, but their list of proscribed practices suggests that their interests are not too remote from those of legislation and international jurisprudence.¹⁴²⁴ According to Table 4, the community bylaws reviewed mostly ban cultural and social practices, which is not surprising since communities want to deal with their internal socio-cultural harms that hinder the development of girls and women. Indeed, in line with legislation, the harmful practices specified in both Tables 3 and 4 can potentially have physical, sexual, emotional or psychological [and even economic and social] impacts.¹⁴²⁵

¹⁴¹⁹ See section 5.3.1.2 of the thesis.

¹⁴²⁰ See section 4.3.1.2 of the thesis.

¹⁴²¹ For example Clergy, Sheikhs and Chiefs.

¹⁴²² *Bulangete la mfumu*/Chief's blanket – see Glossary of Chichewa terms.

¹⁴²³ See sections 4.3.1.2 and 4.3.2 of the thesis respectively.

¹⁴²⁴ See sections 4.3 and 5.3.3.1 of the thesis respectively.

¹⁴²⁵ Chapter 5 has shown that the Gender Equality Act defines a harmful practice as 'a social, cultural or religious practice, which, on account of sex, gender or marital status, does or is likely to undermine the dignity, health or liberty of any person; or result in physical, sexual, emotional or psychological harm to any person. On the other hand, the HIV and AIDS

Malawian statutes do not comprehensively conceptualise harmful practices,¹⁴²⁶ and thus the conceptualisation of harmful practices under the community bylaws can be most meaningfully tested against the ‘harmful practices’ criteria under CEDAW and CRC jurisprudence. Moreover, the conceptualisation of child marriage under ACHPR/ACERWC jurisprudence provides a comparative basis with how the community bylaws conceptualise ‘victimhood’ in the context of child marriage.

First, the ‘harmful practices’ criteria under CEDAW and CRC jurisprudence expose conceptual gaps when certain harmful practices banned by the community bylaws are applied. For example, respondents commonly stated that their safe motherhood bylaws are addressing harmful practices. Upon seeking explanation about why unsafe ‘motherhood’ practices are being linked with common harmful practices, women gave several examples that make certain, traditionally anchored, maternal practices harmful: Traditional Birth Attendants using traditional maize grinding mortars to press a pregnant woman’s stomach so that she can deliver quickly during labour;¹⁴²⁷ denying a pregnant woman nutritious food and/or medical care during the pregnancy and delivery;¹⁴²⁸ insisting on traditional births even during obstructed labour and pumping the pregnant woman with herbal medicine ‘to release witchcraft spells’ (instead of rushing her to hospital).¹⁴²⁹

This conceptualisation of harmful practices challenges the emphasis of CEDAW and CRC jurisprudence on ‘practices and behaviour grounded in **discrimination** on the basis of sex, gender, age and **other intersecting forms of discrimination that often involve violence and** cause physical and/or

(Prevention and Management) Act defines harmful practices as ‘any social, religious or cultural practice that puts a person at risk of HIV infection and reinfection; or may catalyse progression of HIV to AIDS’ – See section 5.3.3.1 of the thesis.

¹⁴²⁶ See section 5.3.3.1 of the thesis.

¹⁴²⁷ Women’s FGD, Chief Lukwa’s area, Kasungu.

¹⁴²⁸ Women’s FGD, Chief Mwirang’ombe’s area, Karonga.

¹⁴²⁹ Women’s FGD, Chief Kwataine’s area, Ntcheu.

psychological harm or suffering . . . ¹⁴³⁰ (emphasis added). Arguably, the above maternal health harmful practices do not neatly meet the discrimination and violence components of this definition.¹⁴³¹

The findings show that one should not be limited to defining harmful practices against women from the lens of overt discrimination or violence, but should be more alert to concealed forms of the same. Therefore, for the safe motherhood bylaws, one would contend that since only women can be pregnant, the lack of measures to avert harmful effects of some traditional practices on pregnant women (their dignity, health, right to life) is discriminatory.

In this regard, the safe motherhood bylaws are directly addressing three of the four criteria of determining a harmful practice under CEDAW and CRC jurisprudence.¹⁴³² First, they are averting the indignity and human rights abuses that occur when the health and life of a woman is risked by traditional maternal health practices. Second, they are addressing the adverse impacts suffered by pregnant women physically (resultant maternal mortality or morbidity), psychologically (birth/delivery trauma), economically (financial losses incurred by a family due to death or morbidity of a woman), and socially (due to prolonged recovery and morbidity, e.g. fistula). Third, the bylaws are removing the element of imposition, whereby a pregnant woman may be expected to comply with harmful traditional birth delivery methods.

Conversely, it is difficult for the harmful 'motherhood' practices to satisfy the third criteria, which stresses that the practice should be 'traditional, set

¹⁴³⁰ See note 624.

¹⁴³¹ One could argue that the conceptualisation of harms related to maternal health is best suited for CESCR jurisprudence. However, in the absence of detailed conceptual elaboration of harmful practices by the CESCR, and to the extent that women were clearly linking maternal issues to how we should understand harmful practices against women, the issue deserves an analysis under the harmful practices criteria provided by the joint CEDAW General Recommendation/CRC General Comment (CEDAW/C/GC/31-CRC/C/GC/18), at least in the context of this thesis.

¹⁴³² See section 4.3.1.2 of the thesis.

and/or nurtured by social norms that perpetuate male dominance and the inequality of women and children on the bases of sex, gender, age and other intersecting factors'.¹⁴³³ While the mischief the community bylaws seek to address are certainly traditional, the bylaws may not be inspired by 'social norms aimed perpetuating male dominance and the inequality of women'. In fact, in ages when health facilities were severely limited, the practices were more responsive to pregnant women, who were seen as 'having one foot in the grave.'¹⁴³⁴ Therefore, the harmful 'motherhood' practices are challenging the conceptualisation of the 'traditional root criteria', which would apply more elastically by not only focusing inward (on the patriarchal causes of traditional practices), but also outward (on discriminatory/violence-related results of traditional practices, albeit unintended).

On another note, while totally embracing child marriage as a harmful practice, the community bylaws project a different understanding of child marriage victim, thus questioning the common stance in international jurisprudence that child marriages automatically equate with forced marriages.¹⁴³⁵ Section 8.4.7, which discusses the human rights implications of *chindapusa* in detail, shows that some bylaws give the Chief discretion to fine a girl child who rushes into marriage.¹⁴³⁶ This bylaw responds to a resounding concern expressed across the study sites, 'today's children are so undisciplined and they have a fast life. Some girls are rebellious, will reject all counsel, and run away to cohabit with a man and get married'.¹⁴³⁷ Also, communities are reconceptualising the 'victim' of child marriage, saying that, on some occasions, a girl is not really a victim, but is actually insubordinate to

¹⁴³³ See note 627.

¹⁴³⁴ This is a long held belief/saying in many Malawian (and African) communities. For example, see Women in the World Media LLC, 'A Solvable Problem: Pregnant Women Have "One Foot in the Grave": Four Women Reducing Maternal Mortality.' Available at <https://womenintheworld.com/2016/04/08/pregnant-women-have-one-foot-in-the-grave-four-women-reducing-maternal-mortality/>, accessed on 23 July 2019.

¹⁴³⁵ See sections 4.3.1.2 and 4.3.2 of the thesis particularly.

¹⁴³⁶ In addition to ordering the disbandment of the marriage.

¹⁴³⁷ One would ask why the sanctions concentrate on the girl. Table 5 also displays sanctions directed at male culprits.

new cultural norms against child marriage and deserves being sanctioned as any other violator. These issues draw attention to how the community bylaws are projecting key principles of women's and child rights treaties.

8.4.6 Community Bylaws and Key Principles of Women's and Children's Rights

First, this part assesses how the bylaws are mirroring cardinal principles of CEDAW and the Maputo Protocol: gender equality and non-discrimination; and three of the core principles of the CRC and the African Children's Charter: best interests of the child; non-discrimination; children's right to survival, development and protection/life; and children's right to participation.

8.4.6.1 Gender equality and non-discrimination

Gender equality and non-discrimination as key principles of the CEDAW and Maputo Protocol¹⁴³⁸ also underlie the protections of women's rights under the Republican Constitution.¹⁴³⁹ Also, non-discrimination is a core principle of the CRC and African Children's Charter.¹⁴⁴⁰ Community bylaws exhibiting principles of gender equality and non-discrimination would challenge patriarchy by, among others, pursuing substantive equality between women and men. This means addressing 'social and economic inequalities that fuel VAW, including access to opportunities and resources'.¹⁴⁴¹

Some community bylaws could move communities closer to social and economic equality if implemented faithfully. For example, community bylaws

¹⁴³⁸ See sections 4.2.1 and 4.2.2 of the thesis respectively.

¹⁴³⁹ See section 5.3.1.1 of the thesis.

¹⁴⁴⁰ See sections 4.2.1 and 4.2.2 of the thesis respectively. Apart from providing that every child should enjoy the rights and freedoms guaranteed in the Charter without discrimination, the grounds of discrimination that are prohibited by the African Children's Charter include discriminating the child in his/her own right, but also by virtue of the situation of his/her parents or legal guardians—Danwood Mzikenge Chirwa, 'The Merits and Demerits of the African Charter on the Rights and Welfare of the Child,' (2002), 158-159.

¹⁴⁴¹ See note 521.

in Senior Chief Kwataine's area, Ntcheu, have a specific 'gender equality clause': 'girls should be given equal opportunities with boys regarding education, employment, businesses, household responsibilities/chores'. Additionally, Chiefs' responses to the question 'what do you want to achieve through your bylaws' revealed transformative desires: that both boys and girls should finish education up to college level, pregnant women should deliver safely, and practices that mainly oppress girls/women should stop;¹⁴⁴² that the community should safeguard girl education and be steered towards development;¹⁴⁴³ that cultural issues that were handled wrongly, resulting in poverty and poor health be reversed;¹⁴⁴⁴ and that the new generation of boys and girls should be given a good foundation for them to develop their community/country in future.¹⁴⁴⁵

As seen in Chapter 4,¹⁴⁴⁶ apparent in the respective Chiefs' motivations is the notion of transformative substantive equality. The fact that eliminating child marriage is the main objective of the respective community bylaws suggests that the bylaws are addressing a form of sex and gender-based discrimination, which, according to ACHPR/ACERWC jurisprudence, 'reinforces harmful social constructions of gender, supports systems of patriarchy, and entrenches patterns of discrimination'.¹⁴⁴⁷

Table 4 provides examples of community bylaws that can potentially achieve gender transformation. One bylaw boldly proscribes marital rape in accordance with CEDAW jurisprudence.¹⁴⁴⁸ The Marriage, Divorce and

¹⁴⁴² Senior Chief Chitera, Chiradzulu.

¹⁴⁴³ Senior Chief Lukwa, Kasungu.

¹⁴⁴⁴ Senior Chief Mwirang'ombe, Karonga.

¹⁴⁴⁵ Senior Chief Kwataine, Ntcheu.

¹⁴⁴⁶ See section 4.2.1 of the thesis, especially note 523.

¹⁴⁴⁷ Paragraph 11, joint ACHPR/ACERWC General Comment. The joint general comment interprets the right to freedom from non discrimination based on sex and gender in the light of Article 2 the Maputo Protocol (CAB/LEG/66.6 (Sept. 13, 2000)) and Article 3 of the African Children's Charter (CAB/LEG/24.9/49 (1990)).

¹⁴⁴⁸ For example, while this is an issue that the CEDAW General Recommendation/CRC General Comment (CEDAW/C/GC/31-CRC/C/GC/18) has not confronted, CEDAW

Family Relations Act acknowledges rape during judicial separation of spouses.¹⁴⁴⁹ Other bylaws have overturned the practice of dispossessing widows and children of inheritance property; most bylaws on safe motherhood are transforming gender roles by demanding that husbands escort their wives to ante-natal clinics and to deliver there; some bylaws require maintenance for a child born out of wedlock, a responsibility which Malawian men are traditionally not held accountable for routinely. The remaining principles of the CRC/African Children's Charter are discussed next.

8.4.6.2 The best interests of the child

In Malawi, 'the best interests of the child' is domesticated as a constitutional principle.¹⁴⁵⁰ A majority of community bylaws promote the best interests of the child by banning destructive initiation practices;¹⁴⁵¹ protecting children from financial and emotional neglect and abuse; protecting girls from sexual abuses by school boys, teachers and other men; requiring young mothers to return to school; and requiring the payment of child maintenance.

8.4.6.3 Children's right to survival, development and protection/life

Community bylaws protect children's right to survival, development and protection or life in several aspects. The concern by international jurisprudence that child marriage hinders children's economic, political, social growth¹⁴⁵² is similarly visible in Chiefs' passion to eliminate child marriages, because uneducated girls in turn contribute to the retrogression of communities' development. However, the studied bylaws do not specifically

General Recommendation No. 35 recognises marital rape as a sexual crime (Paragraph 33, CEDAW/C/GC/35 (advance unedited version)).

¹⁴⁴⁹ Section 62.

¹⁴⁵⁰ Section 23 (1) provides that 'all children, regardless of the circumstances of their birth, are entitled to equal treatment before the law, and the best interests and welfare of children shall be a primary consideration in all decisions affecting them'.

¹⁴⁵¹ And generally banning the performance of initiation during school calendar.

¹⁴⁵² See sections 4.3.1.2 and 4.3.2 of the thesis respectively.

protect the other vulnerable groups listed in the ACHPR/ACERWC jurisprudence¹⁴⁵³ from child marriage.

While scholars that have argued that children's right to survival and development is promoted through upholding the rights to education and health,¹⁴⁵⁴ community bylaws safeguard the right to education more strongly than the right to health. All reviewed community bylaws promote compulsory primary education and keeping girls in school.¹⁴⁵⁵ Though not (expressly) striving for technical and vocational education as provided by the CRC,¹⁴⁵⁶ community bylaws apply to community-based primary and secondary schools operating in the territory of the interviewed Chiefs.¹⁴⁵⁷

With regard to the gender aspects of children's right to health, most of the community bylaws do not expressly promote the right of children (girls) to enjoy the best attainable state of physical, mental or spiritual health as espoused under the African Children's Charter.¹⁴⁵⁸ As seen in Table 3,¹⁴⁵⁹ only the bylaws in Senior Chief Kwataine's area directly protect girls' sexual and reproductive health rights. However, most bylaws expressly prohibit girls from aborting a pregnancy. The bylaws call for the elimination of customs and practices that are prejudicial to the health and life of a child in accordance

¹⁴⁵³ Paragraph 12, joint ACHPR/ACERWC General Comment. From this list, categories applicable to Malawi would be children with disabilities and children in child-headed households.

¹⁴⁵⁴ See note 653.

¹⁴⁵⁵ E.g. through prohibitions of child marriage and school GBV and ensuring the return to school of girls who dropped out on pregnancy grounds. Thus the bylaws are informally enforcing the compulsory primary education provision under Section 13 of the Education Act.

¹⁴⁵⁶ Article 28(1)(d) – UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3. Of course section 8.4.6.1 of the thesis has captured the desire of some Chiefs that the bylaws should result in the education of girls and boys up to college level.

¹⁴⁵⁷ Chiefs Lukwa, Ntcheu and Chitera, Chiradzulu mentioned the involvement of Mother Groups and school committees in the development of their areas' bylaws. Chief Lukwa added, 'if you go to the District Education Manager, you will find a copy of our bylaws so that the office should cooperate with us when it comes to sanctioning teachers'.

¹⁴⁵⁸ Article 14(1), CAB/LEG/24.9/49 (1990).

¹⁴⁵⁹ See note 1189.

with the African Children's Charter.¹⁴⁶⁰ These include prohibited harmful practices that pose a risk to HIV transmission, such as initiation sexual cleansing, child marriage, defilement of girls by stepfathers and other forms of sexual violence, as set out in Table 4.

Community bylaws also promote children's right to be protected from economic exploitation and hazardous work.¹⁴⁶¹ They mainly protect girls in patrilineal areas from economic exploitation by shielding them from being commodified through marriage so that parents can get *lobola*. Community bylaws in Senior Chief Kwataine's area, for example, prohibit parents from sending girls to sell merchandise after 7 pm; and punish a Chief who allows a girl child to migrate as a domestic worker.

With regard to sexual exploitation, bylaws ban initiation cleansing or the coercion of initiated girls to have experimental sex (*kusasa fumbi*). These provisions mirror the African Children's Charter call for children not to be induced, coerced or encouraged to engage in any sexual activity.¹⁴⁶² Prohibitions of practices such as *bulangete la mfumu*¹⁴⁶³ protect children from being used in 'other sexual practices', as articulated by the Charter.¹⁴⁶⁴

8.4.7 *Chindapusa*: Community Bylaws and Conceptualisation of Sanctions

Chindapusa, which should be understood as a civil form of traditional 'punishment', is the main sanction and enforcement mechanism for the community bylaws. However, through *chindapusa* community bylaws do not mean to undercut formal mechanisms of addressing harmful cultural

¹⁴⁶⁰ Article 21(1)(a), CAB/LEG/24.9/49 (1990).

¹⁴⁶¹ For example, through prohibiting child labour, exposing children to alcohol selling premises and sending children to sell merchandise at night or during school time – see Table 3 for general examples.

¹⁴⁶² Article 27(1)(a), CAB/LEG/24.9/49 (1990).

¹⁴⁶³ 'Chief's blanket,' see Glossary of Chichewa terms.

¹⁴⁶⁴ Article 27(1)(b), CAB/LEG/24.9/49 (1990).

practices, but to complement them. Apart from the term *chindapusa*, this thesis uses the terms ‘sanctions’ and ‘penalties’ interchangeably in reference to the contents of the bylaws.

The main enforcers of community bylaws are Chiefs, and they do this task at several levels. As seen in section 7.3.4, Group Village Heads and Village Heads shoulder the responsibility to ensure that their subjects respect the bylaws; and Group Village Heads also hold Village Heads accountable for the implementation of the bylaws in villages under the responsibility of the Village Heads. The TA is the final enforcer, and has the power to sanction Group Village Heads, Village Heads and rebellious/stubborn subjects where matters have not been resolved at Village Head and Group Village Head levels. At times, police may also be approached to enforce community bylaws when the wrong under the bylaws constitutes a crime under formal law or when the bylaws ‘criminalise’ a wrong that is not necessarily a criminal act under statutory law. The latter has legal implications that higher courts are yet to resolve.

The issue of sanctions for particular gender-specific harmful practices is analysed from two angles: what type of sanctions are available under the bylaws, and how do they meet or interrupt the vision of punishments for harmful practices under international human rights jurisprudence and state law? How are the remedies under community bylaws connecting victims to services?

8.4.7.1 Overview of sanctions

Tables 5 and 6 illustrate the diversity of sanctions in community bylaws, and should not be read as exhausting or representing the exact sanctions in all the

reviewed bylaws.¹⁴⁶⁵ Remedies for child marriage (Table 5) are separated from those for other harmful practices (Table 6) since child marriage has layers of penalties across the reviewed bylaws.

a) *Sanctions for child marriage*

Table 5 elucidates that sanctions related to child marriage generally target the following culprits: Chiefs; religious leaders; parents/guardians/clan leaders; teachers; ‘husband’ of a girl child; and stubborn children.¹⁴⁶⁶

Table 5: Diversity of sanctions for child marriage

<p><i>Penalties against for Chiefs and religious leaders¹⁴⁶⁷</i></p> <ul style="list-style-type: none"> • Any Chief who allows marriage of child of school-going age will be fined one to two goats. • A Village Head has to report to police if he is aware of any child marriage in his village. Failure to report will be punished by K100,000.00¹⁴⁶⁸ and imprisonment for 24 months. • A Chief who is involved in a child marriage will be fined a goat or be dethroned. • Chiefs should protect children from early marriages by refusing to register them in village registers. The penalty for non-adherence is three goats and demotion.
<p><i>Penalties against religious leaders¹⁴⁶⁹</i></p> <ul style="list-style-type: none"> • Religious leaders have the obligation to protect children from early marriages by refusing to bless such marriages. The penalty for non-adherence is three goats. In addition, the religious leader will be banished from the community. • All Sheikh, Pastors should not solemnise marriages of children below 18 years. Anyone not following this will be arrested and prosecuted.
<p><i>Penalties against parents/guardians¹⁴⁷⁰</i></p> <ul style="list-style-type: none"> • Parents and clan leaders who decide/agree that a girl should drop out of school and get married or be betrothed before the age of 18 years will be fined a goat.

¹⁴⁶⁵ For example, the fine of a goat for child marriage is simply an example in one bylaw to show that goats are part of the fines. Different bylaws may specify different quantities of goats as punishment for child marriage—some may say two, three etc.

¹⁴⁶⁶ Those adamant about getting married.

¹⁴⁶⁷ These penalties are usually enforced by the TA since 'Chief' in this instance means Group Village Heads and Village Heads. Where 'prosecution' is involved, the TA is expected to collaborate with the Police.

¹⁴⁶⁸ Equivalent to USD 135.

¹⁴⁶⁹ These penalties are usually enforced by the TA. Where 'prosecution' is involved, the TA is expected to collaborate with the police.

¹⁴⁷⁰ These will initially be enforced by the Village Head. The Group Village Head and TA become involved where the Village Head is complicit in the violation, or where the subject does not respect the penalty prescribed by the Village Head.

<ul style="list-style-type: none"> • Regardless of a child's consent, parents who allow school-going children to marry or be married will pay a fine of five goats (or the market value). • If a girl marries before 18 years parents of both the girl and man shall be fined K25,000.00¹⁴⁷¹ each, and there shall be no marriage. And anyone who facilitates cultural arrangements relating to such marriage will be fined K50,000.00.¹⁴⁷² • Arranging early marriage or forcing a girl (under 18 years or while the girl is still at school) into marriage attracts a fine of two goats or K40, 000.00.¹⁴⁷³ • A parent who secretly marries off their school-going daughter will be locked in a police cell until the girl is back at school. • Any parent who forces a child into marriage will be punished by moulding 2,500 bricks or more, or through a fine of five chickens or one goat. • Parents who allow child marriage may also be penalised with community service such as three months of janitorial work in the local community health centre or school.
<p><i>Penalties against teachers</i>¹⁴⁷⁴</p> <ul style="list-style-type: none"> • A teacher who marries a schoolgirl will be reported to the Chief, school committee, Mother Groups, ADC, VDC, child protection worker, District Education Manager (DEM), police. • A teacher who impregnates or marries a girl aged below 18 years old will be fined two goats, and be chased from the village through the DEM.
<p><i>Penalties against a man marrying a girl child</i>¹⁴⁷⁵</p> <ul style="list-style-type: none"> • Any man who marries a young girl will be denied land and be chased out of the village. • If the 'married' girl is below 16 years old, the 'husband' should be reported to the police. • Any man who marries a girl aged below 18 years will be fined between one and three goats, and the marriage will be disbanded.
<p><i>Penalties when children enter 'marriage' 'voluntarily'</i>¹⁴⁷⁶</p> <ul style="list-style-type: none"> • A girl child who rushes into marriage will be forced out of the marriage and punished. • If two children (stubbornly) elope, their parents will be fined K25,000.00.¹⁴⁷⁷

Sources: Government of Malawi, UNFPA, EU (2016); Thesis data

¹⁴⁷¹ Equivalent to USD 34.

¹⁴⁷² Equivalent to USD 68.

¹⁴⁷³ Equivalent to USD 54.

¹⁴⁷⁴ While the Village Head and Group Village Head are first line points of contact when such violation happens, these sanctions are enforced by the TA.

¹⁴⁷⁵ These sanctions will initially be enforced by the Village Head. The Group Village Head and TA will get involved where the Village Head is complicit in the violation, or where the subject does not respect the penalty prescribed by the Village Head.

¹⁴⁷⁶ These sanctions will initially be enforced by the Village Head. The Group Village Head and TA will get involved where the subject does not respect the penalty prescribed by the Village Head.

¹⁴⁷⁷ Equivalent to USD 34.

To note from Table 5 is the fact that beyond fines, some penalties include temporary ‘detention’ in police custody;¹⁴⁷⁸ or community service.¹⁴⁷⁹ Furthermore, sanctions for child marriage are accompanied by the automatic dissolution of the ‘marriage’. Before examining the implications of these sanctions, it is also necessary to appreciate examples of remedies for the other harmful practices presented in Table 6 as there are similarities and contrasts.

b) *Sanctions for other gender-specific harmful practices*

Penalties for the other harmful practices, set out in Table 6 target Chiefs, teachers, schoolboys or their parents, pregnant girls and their lovers, rapists (including perpetrators of *kusasa fumbi*¹⁴⁸⁰), procreation *fisi*¹⁴⁸¹ initiation counsellors, Traditional Birth Attendants, clan leaders and relatives and men who marry young girls. Again, all the tiers of Chiefs¹⁴⁸² are involved in enforcing these penalties depending on the gravity of the incident. Village Heads and Group Village Heads remain the primary enforcers.

Table 6: Examples of sanctions for other harmful practices

Bylaw field	Penalty
Child support	The man responsible, or parents of the responsible schoolboy will have to pay maintenance for the pregnancy, delivery and the child.
School GBV	<ul style="list-style-type: none"> • A teacher who mocks a learner who has returned to school after giving birth will be fined a minimum of a goat and a maximum of two goats. • A teacher or schoolboy who touches any private part of a schoolgirl will be reported to be police. • A teacher or schoolboy who verbally abuses a schoolgirl will be fined two chickens by the Village Head; three chickens by the Group Village Head if he persists; and a goat by the TA if he still persists. If he continues, he should be reported to police.

¹⁴⁷⁸ Until the girl leaves the marriage and returns to school.

¹⁴⁷⁹ E.g. moulding bricks and janitor/development work.

¹⁴⁸⁰ See Glossary of Chichewa terms.

¹⁴⁸¹ See Glossary of Chichewa terms.

¹⁴⁸² Village Heads, Group Village Heads and TAs.

Bylaw field	Penalty
Pregnancy of/having affairs with schoolgirls	<ul style="list-style-type: none"> • The pregnant girl and the man responsible will be fined K25,000.00¹⁴⁸³ each. • The pregnant girl will be asked to pay back any materials that she received from projects promoting girl education. (Some bylaws say the man responsible should pay back.) • Any man who has a love affair with a schoolgirl will be fined a goat.
Harmful initiation practices	<ul style="list-style-type: none"> • An initiation counsellor who encourages a girl to have experimental sex (<i>kusasa fumbi</i>) will be fined three goats; will no longer be allowed to practice as counsellor; and will be banished from the village. • The practice of <i>kusasa fumbi</i> is similar to rape and any man practicing it must be arrested by <i>Inkhata</i> [local vigilante group] and taken to police. • Parents/guardians and initiation organisers who facilitate initiation ceremonies during school time will be fined four goats each. • A female initiation counsellor who gives sex instructions to any girl under 18 years will be fined either five chickens or a goat. • If a child who has reached puberty is given harmful instructions, the Village Head will answer to the Group Village Head. If the Group Village Head has allowed this practice, he/will shall be summoned to the TA. • Parents who lock up a girl who has reached puberty will be fined four chickens.
Rape	<ul style="list-style-type: none"> • Parents/anyone found stopping a girl from reporting a rape case to the police will be fined two goats. • Parents whose child has been raped/defiled must immediately report at the One Stop Centre, police VSU and community policing. • Any person who rapes another will be fined three chickens or one goat before being taken to the police. • If a schoolgirl is raped, the issue should not be concealed but should be taken to the police.
Domestic violence	<ul style="list-style-type: none"> • A man who abandons his family without reasonable excuse should be reported to the court. • Anyone found committing prohibited acts of domestic violence will be fined three chickens by the Village Head; and four chickens by the Group Village Head if the violence continues; and a goat by the TA if there is no change (in addition to reporting him/her to the police VSU).
Inheritance	<ul style="list-style-type: none"> • A victim of property grabbing should report it to the police and court. • A Chief or anyone facilitating property grabbing will be fined three goats by the TA and then be reported to the police.

¹⁴⁸³ Equivalent to USD 34.

Bylaw field	Penalty
Widowhood rites	<ul style="list-style-type: none"> • A widow must not be forced to be sexually cleansed. If her in-laws insist on this practice, they must find or pay a married couple to do it instead. A violation will attract a fine five goats or MK50,000.00.¹⁴⁸⁴ • Subjecting a widow to inhumane practices attracts a fine of a chicken. • A new marriage by <i>chokolo</i> will be disbanded.
Safe motherhood	<ul style="list-style-type: none"> • A woman who delivers on the way to hospital or at home will pay five chickens to the Village Head, ten chickens to the Group Village Head, and two goats to the TA. (Some bylaws impose a monetary fine e.g. K10,000.00.¹⁴⁸⁵) • Any Traditional Birth Attendant who is found practising will pay three chickens to the Village Head and five chickens to the Group Village Head. If she still continues, she will be fined one goat by the TA. (Some bylaws impose a monetary fine e.g. K10,000.00.¹⁴⁸⁶) • A man who does not escort his wife to antenatal clinic will be fined five chickens by the Village Head. If he is uncooperative, he will be fined 10 chickens by the Group Village Head. If he remains uncooperative, he will be fined a goat by the TA. (Some bylaws impose a monetary fine e.g. K6,000.00.¹⁴⁸⁷) • A man who fails to provide basic necessities for child delivery will be fined K10,000.00.¹⁴⁸⁸ • A man who overburdens his pregnant with chores will be fined K5,000.00.¹⁴⁸⁹ • Anyone who prevents an adolescent girl from accessing contraceptives will be fined 2-10 chickens.
Other harmful cultural practices	<ul style="list-style-type: none"> • Any community members who participate in wife selling, wife hijacking, <i>chiramu</i>¹⁴⁹⁰ will be fined four goats. • A man who practices <i>mbiligha</i>, as well as the girl's father should pay K20,000.00¹⁴⁹¹ each. (Some bylaws prescribe a fine of K40,000.00¹⁴⁹²). • Hiring <i>fisi</i>¹⁴⁹³ to impregnate a wife will attract a fine of three chickens or K9,000.00¹⁴⁹⁴.

Sources: Government of Malawi, UNFPA, EU (2016); Thesis data

¹⁴⁸⁴ Equivalent to USD 68.

¹⁴⁸⁵ Equivalent to USD 13.50.

¹⁴⁸⁶ Equivalent to USD 13.50.

¹⁴⁸⁷ Equivalent to USD 8.

¹⁴⁸⁸ Equivalent to USD 13.50.

¹⁴⁸⁹ Equivalent to USD 6.75.

¹⁴⁹⁰ See Glossary of Chichewa terms.

¹⁴⁹¹ Equivalent to USD 27.

¹⁴⁹² Equivalent to USD 54.

¹⁴⁹³ See Glossary of Chichewa terms.

¹⁴⁹⁴ Equivalent to USD 12.

Just as in Table 5, the sanctions in Table 6 demonstrate that in some cases, *chindapusa* is solely livestock or money. Some community bylaws make livestock or money optional. The few cases where some community bylaws suggest arrests/reporting to the police include touching a girl's private parts;¹⁴⁹⁵ habitual verbal abuse of schoolgirl;¹⁴⁹⁶ performing *kusasa fumbi*,¹⁴⁹⁷ rape; habitual domestic violence; property grabbing. The following examines the sanctions under Tables 5 and 6 from a human rights perspective.

8.4.7.2 'Chindapusa' and international human rights norms

The provisions of community bylaws and their enforcement mechanisms are assessed on how they adhere to international human rights standards. While this section presents *chindapusa* as the central enforcement tool, one should be mindful that communities are also deploying other broad implementation strategies, including services, monitoring, self-help, counselling and investigations.¹⁴⁹⁸

a) Community bylaw provisions on remedies

There are two issues that raise human rights questions: the targets of the prescribed penalties; and the nature of some of the penalties. Chapter 4 demonstrates that with regards targets of punishments, ACHPR/ACERWC jurisprudence supports the sanctioning of 'marriage officers'.¹⁴⁹⁹ Statutory law has achieved this,¹⁵⁰⁰ and most community bylaws have also not spared those that have authority over marriage approval/celebration – Chiefs and religious leaders. Chiefs¹⁵⁰¹ may even be demoted or dethroned as

¹⁴⁹⁵ By a teacher or schoolboy.

¹⁴⁹⁶ By a teacher or schoolboy

¹⁴⁹⁷ See Glossary of Chichewa terms. The person who is penalised is the man who offers these services.

¹⁴⁹⁸ Discussed under sections 8.4.8 and 9.5.4 of the thesis respectively.

¹⁴⁹⁹ See section 4.3.2 of the thesis.

¹⁵⁰⁰ Sections 54-56, Marriage, Divorce and Family Relations Act.

¹⁵⁰¹ Group Village Heads in the case of demotion and dethronement; and Village Heads in the case of dethronement only.

punishment, while some clerics are threatened with banishment or arrests (Table 5).

It has been noted that international jurisprudence cautions against penalising and sanctioning children involved in a child marriage.¹⁵⁰² To the extent that adolescent pregnancies fuel child marriages, Table 5 demonstrates that some community bylaws impose a fine on both a pregnant girl and her lover. Some require either the pregnant girl or her lover to repay any project donated resources that the girl received at school to support her education. Where an underage schoolgirl and boy elope, some bylaws impose *chindapusa* on their parents. The rationale of these bylaws is deterrence, as well as disciplining disobedient school-going children, though in reality the burden of paying *chindapusa* falls on their parents/clans. This is where the risk of retaliation feared by international jurisprudence could materialise¹⁵⁰³ (except that in the bylaws context, the offending children are not considered as ‘victims.’)

Section 8.4.5 has also noted that the community bylaws diverge from the principle that a child involved in child marriage should not be sanctioned since some bylaws give the Chief discretion to fine a girl child who rushes into marriage and withdraws her or him from such marriage. In the spirit of deterrence, these bylaws target disobedient children who have eloped to marry. Thus, it is naïve for jurisprudence to ignore the realities and blindly exempt all children involved in a child marriage from penalties and sanctions. Of course, the nature of sanctions and penalties would have to be human rights sensitive. These bylaws align with the position of international jurisprudence that the right to participation does not bestow on children the right to make decisions to get married.¹⁵⁰⁴

¹⁵⁰² See sections 4.3.1.2 and 4.3.2 of the thesis.

¹⁵⁰³ See *ibid.*

¹⁵⁰⁴ See section 4.3.2 of the thesis.

Although the ACHPR/ACERWC jurisprudence does not recommend the sanctioning/penalising of parents, fearing that this could fuel clandestine marriages,¹⁵⁰⁵ parents are consistently sanctioned under community bylaws.¹⁵⁰⁶ Section 7.3.4.1 has uncovered that some parents resisted Chiefs who were advocating against child marriage.¹⁵⁰⁷ Therefore, the preventative effect of child marriage bylaws would best materialise if such parents fear punishment, and not when they are protected from punishment. Getting away with clandestine child marriages, in the study communities, would be difficult, because villages in Malawi are closely knit and Chiefs are feared. Furthermore, section 7.3.4.2 has indicated that the communities are implementing their bylaws through internal watchdogs that monitor actions of both Chiefs and subjects.¹⁵⁰⁸ Understandably, the jurisprudence was considering the risks of legislatively penalising parents, while child marriages 'secretly' flourish in remote villages. This position reveals jurisprudential gaps arising from the ignored role of functional grassroots mechanisms for addressing child marriage, such as the community bylaws.

The legality of punishments that some community bylaws stipulate, as noted in Table 5, is another concern. For example, imprisonment and/or 'pressure' arrests are prescribed for actions where detention is not a statutory punishment (e.g. 'a Village Head who fails to report a known child marriage to the police will be imprisoned for 24 months'; 'a parent who secretly marries off their school-going daughter will be locked in a police cell until the girl is back at school')¹⁵⁰⁹. Such bylaws are clearly *ultra vires*.

¹⁵⁰⁵ See note 698.

¹⁵⁰⁶ E.g. for child marriage, initiating a child during school time, locking up a girl who has reached puberty; and obstructing the reporting of the rape of a child.

¹⁵⁰⁷ Also discussed further in Chapter 9.

¹⁵⁰⁸ Others have noted that 'community bylaws promote a sense of ownership and ensure easy monitoring by the community itself as a means of ensuring compliance'—Malawi Human Rights Commission and Southern Africa Litigation Centre, *Towards a Human Rights-Based Approach to Learner Pregnancy Management in Malawi*, (2017), 53.

¹⁵⁰⁹ As Table 5 notes, these punishments were sourced from various community bylaws documents that were reviewed for this thesis. The community bylaws were analysed under

On the other hand, the commission of some harmful practices that have criminal connotations is handled informally. For example, while few bylaws under Table 5 progressively specify that *kusasa fumbi*¹⁵¹⁰ is rape deserving police response, most bylaws punish the practice with *chindapusa*, payable to the Chief.¹⁵¹¹ The same applies to practices such as *mbiligha*¹⁵¹² and *kulowa kufa*.¹⁵¹³ Even teachers who impregnate schoolgirls escape criminal liability in many bylaws.¹⁵¹⁴ Therefore, while most of the bylaws keenly regard ordinary rape as a serious crime beyond a Chief's jurisdiction, their conceptualisation of culturally entrenched human rights violations of a sexual nature remains soft.

Arguably, some community bylaws are also oblivious to the double jeopardy principle,¹⁵¹⁵ as they punish some violations locally before taking a person to the police.¹⁵¹⁶ Explaining why this is so, Senior Chief Lukwa said, 'considering that any matter that happens in the village is first brought to the Chief's attention, we punish the perpetrator first for violating the bylaws that the community agreed on, and then let the state do its part'. Community respondents lamented how hard it is for a common villager to find chickens, let alone goats, to pay as *chindapusa*. Adding this punishment to prosecution (and possible imprisonment) therefore seems excessive.

three themes: a) the type of issues they address (Table 3); their contents on sanctions for child marriage (Table 4); and their contents regarding sanctions for other harmful practices (Table 5).

¹⁵¹⁰ Coerced experimental sex for initiated girls.

¹⁵¹¹ In most cases, the man practicing the *kusasa fumbi* is not even sanctioned along with the initiation counsellors that facilitated the practice.

¹⁵¹² Bonus wife.

¹⁵¹³ Widow sexual cleansing.

¹⁵¹⁴ If the girl is 16 years and below, since that is defilement.

¹⁵¹⁵ The subjecting of a person to a second trial or punishment for the same offense for which the person has already been tried or punished (Thesaurus.com).

¹⁵¹⁶ For example some bylaws say: 'a Chief or anyone facilitating property grabbing will be fined three goats by the TA and then reported to the police'; 'anyone who continues to perpetrate domestic violence will be fined a goat by the TA in addition to reporting him/her to the police VSU' (see Table 5).

Other community bylaws violate human rights. These include those demanding the eviction of a native subject, as well as denying him/her land for farming.¹⁵¹⁷ Though made in good faith, these punishments can potentially render perpetrators (and by association their families) homeless, as well as jeopardising their means of livelihood, as in the case of land deprivation. Comprehensively addressing harmful practices without violating human rights could be realised through the triangular state-NGOs-Chiefs collaboration (in implementing education and awareness raising and design of interventions) that international human rights jurisprudence promotes.¹⁵¹⁸ Not only should community bylaw provisions on punishments adhere to international human rights standards, but so should enforcement strategies for such punishments.¹⁵¹⁹

b) *Strategies for realising 'chindapusa'*

For the community bylaws to work, people have to actually pay the *chindapusa* (fine) charged by Chiefs. So, what strategies do Chiefs/communities deploy to ensure that the fines are paid, and how do these strategies align with international human rights standards? To a large extent, people pay the fines without 'complications.'

However, the findings reveal three problematic mechanisms that are sometimes used to compel the payment of fines. First, enforcement may be done by the 'offender's' imprisonment, until he/she pays the fine. In 2017, it was reported that 14 teenagers were imprisoned by a lay Magistrate for

¹⁵¹⁷ For example, some bylaws provide that 'a religious leader who solemnises child marriage will be banished from the community'; 'any man who marries a young girl will be denied land and be chased out of the village'; 'an initiation counsellor who instructs a girl to experiment with sex (*kusasa fumbi*) will be evicted from the village'.

¹⁵¹⁸ See section 4.4.3 of the thesis.

¹⁵¹⁹ It is acknowledged that some may find the notion of violation of human rights that the thesis has just presented as odd. For example, they could argue that human rights are not absolute, and are often in tension with each other; and that any sanction at all would violate an individual's human rights in some manner.

failing to pay a community bylaw penalty of K10,000.00¹⁵²⁰ each for becoming pregnant while in school.¹⁵²¹ Section 8.2 has exposed that some Magistrates feel duty bound to enforce community bylaws, lest the bylaws lose their bite. However, the imprisonment of the pregnant teenagers shows that enthusiasm to implement bylaws can also lead to violations of fundamental human rights for social omissions that are otherwise non-arrestable.¹⁵²²

Second, enforcement may be achieved by curtailing rights of a woman and her baby. A woman who has given birth en route to hospital can be detained at a health facility together with her newborn baby until she/her family pays the prescribed *chindapusa*.¹⁵²³ A radio news bulletin in 2016 also reported that in a community in Machinga, babies of women that had not paid *chindapusa* were being denied vaccines until the *chindapusa* was paid. While women have no problems with the detention of a new mother,¹⁵²⁴ from a human rights perspective, these measures harshly intrude on basic human rights and victimise women who may themselves be victims of circumstances.¹⁵²⁵ However, community respondents rejected this view of human rights, arguing, 'since the detention is meant to be a deterrent against home births so that a pregnant woman and child do not die, it is in fact helping to protect their human rights and not infringe them'.

Lastly, some possible enforcement measures reflect retaliation, although of a different type from the retaliation against victims of harmful practices that is

¹⁵²⁰ Equivalent to USD 13.50.

¹⁵²¹ Malawi Human Rights Commission and Southern Africa Litigation Centre, *Towards a Human Rights-Based Approach to Learner Pregnancy Management in Malawi*, (2017), 53. At the time of publishing the report, the case was under review at the Mzuzu High Court (but the report does not provide particulars of the case).

¹⁵²² Ibid.

¹⁵²³ Such mother and baby would have been taken to the health facility for a medical check-up/help and may not be discharged unless they have paid the fine prescribed in the bylaws. The bylaws states that an expectant mother should wait at the hospital two to three months before expected delivery day.

¹⁵²⁴ See section 8.3.2.1 of the thesis.

¹⁵²⁵ For example, the woman may have delayed going to hospital or to pay the fine because she lacks resources, or has an unsupportive husband/family.

envisaged in international human rights jurisprudence. For example, asked what a Chief would do if a perpetrator overturns a bylaw verdict in court, or just refuses to pay by asserting his/her rights, one Chief's response was, 'every subject needs the Chief. For example, no one can bury the dead until a Chief opens the graveyard. So if a person thinks he can do without Chiefs' bylaws, the Chief can simply sit back when such person has a funeral in his/her own home'. Therefore, people may coercively abide by community bylaws penalties just because respecting the Chief is social currency. Indeed, the interviewed Programme Officer in the Ministry of Gender admitted that anxiety over 'run-away' penalties and enforcement mechanisms is behind the Ministry's push for the 'one bylaws framework', so that no community penalty or its enforcement should undermine human rights.

The subsequent section examines how community bylaws are doing in the area of service provision for victims, an issue that international human rights jurisprudence values.

8.4.8 Community Bylaws and Services for Victims

Although the *chindapusa* that is payable in respect of the violation of community bylaws is not paid as compensation to particular victims of harmful practices, some community bylaws integrate a component of 'services' for communal benefit. Such services are part of the implementation scheme of community bylaws.

International human rights jurisprudence calls for the provision of prevention, protection, recovery, reintegration and redress measures for victims of harmful practices. While most of the measures specified by jurisprudence are located in formal machineries, some community bylaws are, albeit feebly, providing informal service-related measures (especially education and health services) for child marriage victims as proposed by

ACHPR/ACERWC jurisprudence.¹⁵²⁶ Notably, these measures are not recommended in legislation. Overall, the reviewed community bylaws do not cover girls and boys who are already in marriage as urged by the jurisprudence¹⁵²⁷ but this is understandably beyond their focus since the bylaws' main aim is prevention.

In terms of education, community-based education-related services are offered through Mother Groups, who mostly offer psychological/advisory support to keep girls in school and prevent child marriages/pregnancies. To communicate the seriousness of this service, community bylaws in Senior Chief Kwataine's area, Ntcheu, sanction 'slack' Mother Group members: 'if more than two girls fall pregnant and drop out of school within the tenure of a Mother Group committee, each committee member will be fined three chickens'. Otherwise, the common redress for a child who was forced into marriage is to withdraw her from the marriage and return her to school.

*Chindapusa*¹⁵²⁸ also helps significantly in relation to supporting educational requirements of needy girls who are withdrawn from child marriages and those who dropped out of school because of pregnancies in order to reintegrate them into the education system. Senior Chief Lukwa, Kasungu, explained that where *chindapusa* proceeds are insufficient to cover demand, he personally approaches Social Welfare Offices to seek bursaries for such girls. Senior Chief Kwataine said he mobilises 'well wishers'¹⁵²⁹ to help. Beyond the study sites, Chief Kachindamoto¹⁵³⁰ said she uses her money to pay school fees for girls that have returned to school.¹⁵³¹ These efforts attempt to minimise the hardship when parents/guardians of girls withdrawn from

¹⁵²⁶ See section 4.4.2.2 of the thesis.

¹⁵²⁷ As urged by ACHPR/ACERWC jurisprudence, see section 4.3.2 of the thesis.

¹⁵²⁸ This means that if a person has been fined a chicken or goat, this is sold, and the money handed over to a dedicated committee.

¹⁵²⁹ Usually educated people in town who come from Ntcheu district.

¹⁵³⁰ Of Dedza.

¹⁵³¹ She explained that when she goes to any workshop/sponsored trip, she keeps the allowance she receives, and channels it towards the educational needs of these girls.

marriage or being compelled to leave babies at home and return to school are themselves poor. It appears that the bylaws do not just rely on Chiefs for enforcement, which makes them quite unique.

In respect of health, several preventative and protection measures for potential victims of harmful practices are pursued. Table 3 has noted that bylaws of Senior Chief Kwataine's area specify that adolescent girls should have access to contraceptives. Senior Chief Kwataine's safe motherhood work¹⁵³² influenced this stance in a country where publicly 'condoning' adolescent sex is culturally taboo. Senior Chief Kwataine also depends on *Amai achinsisi*¹⁵³³ to counsel girls and women (particularly those pregnant) on health issues. In Senior Chief Mwirang'ombe's area, Karonga, the *chindapusa* proceeds are given to the local health centre to pay for a guard at the maternity wing to guarantee pregnant women and new mothers' security. In respect of other harmful practices, redress in some community bylaws is provided for property grabbing victims by directing them to the police.

How *chindapusa* is used does not only have a bearing on issues of education and health, but also on the transparency, accountability and credibility of Chiefs with regards to why they are introducing bylaws in the first place – since community bylaws have the potential to be abused as a means of wealth creation if Chiefs are personally gaining from *chindapusa*.¹⁵³⁴ The next chapter demonstrates that the *chindapusa* model creates a unique strategy of translation that is used in horizontal vernacularisation.

¹⁵³² See section 7.2 of the thesis.

¹⁵³³ Secret mothers.

¹⁵³⁴ See section 7.3.2.4 of the thesis to note how the fines are used in different communities. Also see note 1291 which explains some Chiefs' perceptions regarding their 'gain' from *chindapusa*.

8.5 CONCLUSION

While community bylaws are a relatively new and a fluid locally-grown phenomenon, they have clear human rights footprints. Yet, while close, the relationship between community bylaws and international norms on child marriage and other harmful cultural practices is not scripted by the expectation of human rights jurisprudence and vernacularisation theory, that epistemic outsiders should lead interventions.

With local vernacularising horizontally, the community bylaws are taken seriously as valid localised law by the communities that adopt them, even though they have questionable status under state law. There is tangible evidence that the community bylaws are positively changing cultural beliefs and value systems, resulting in transformation of generations-old cultural beliefs that affect women. By changing their values to suit modern socio-economic realities, communities are seen as gradually constructing new customary law in so far as harmful practices are concerned. While grey areas remain to unequivocally call the bylaws living customary law, given their written nature, one could argue that they constitute valid law from the broad context of living law. In fact, by horizontally negotiating positive cultural norms and values, the local is creating living law that mitigates the inability of both formal law and customary law to practically deal with harmful practices.

The chapter has demonstrated that to a small extent, the reviewed community bylaws are yet to comply with some human rights standards. For example, when it comes to challenging patriarchy, the bylaws have not confronted issues of polygamy and *lobola*, which are frowned upon by international jurisprudence. The chapter has argued that this gap, coupled with how levirate marriages are usually banned on HIV and not gender grounds, in a way reinforce patriarchy in the bylaws. Other areas where some bylaws fall

short of human rights and legislative standards are: their soft stance towards some cultural practices that are potentially rape and thus criminal in nature (i.e. *kusasa fumbi, kulowa kufa*), and enforcement measures that violate human rights (i.e. the arrest of people for non-arrestable offences, banishment from a community, denial of land). Indeed, these are the teething challenges of community bylaws and their horizontally engineered nature that may take time to resolve.

Nevertheless, to a large extent, the reviewed community bylaws address the substance of the international human rights law protecting women from harmful practices, though they are also reinterpreting, expanding, adapting, and innovating. The community bylaws are reinforcing key principles underlying protections of women's rights under international law and the Constitution (gender equality and non-discrimination), and the rights of the child. Yet, the community bylaws are not merely copying what human rights jurisprudence or legislation set out. Apart from pursuing the *chindapusa* model,¹⁵³⁵ there is also no doubt that the community bylaws have broken new conceptual paths in human rights discourse. They have re-conceptualised 'harmful practices' when it comes to harmful 'motherhood' practices, as well as victims of child marriages. Additionally, they do not exempt some groups from their application as international jurisprudence recommends. This approach has exposed some gaps in the 'harmful practices' criteria under CEDAW and CRC jurisprudence, as well as how international jurisprudence views the issue (and targets) of punishment when grounded phenomenon such as community bylaws are applied.

While the use of criminal punishment is a questionable aspect of community bylaws, some of their localised enforcement or implementation mechanisms are innovative and commendable, and underscore the need to develop

¹⁵³⁵ Which, this chapter has shown, is complementary to formal mechanisms of addressing harmful cultural practices.

multiple complementary mechanisms of protecting women and children from harmful cultural practices. For example, community bylaws make provision for counseling and education as well as for support for victims of harmful practices. With Chiefs taking the lead, they draw upon traditional mechanisms of dispute resolution, NGOs and other agencies, formal courts such magistrates' courts, the police and other actors. The convergence of these players in implementing and enforcing the community bylaws adds to the twisted and unique character of horizontal vernacularisation. Chapter 9 provides a conceptual understanding of the exact facets of horizontal vernacularisation in the community bylaws phenomenon.

CHAPTER 9**COMMUNITY BYLAWS, HORIZONTAL VERNACULARISATION AND
NEW SHADES OF TRANSLATION****9.1 INTRODUCTION**

Chapter 7 has argued that the factors influencing the emergence and use of the community bylaws on child marriage and other harmful practices affecting women in rural Malawi reflect a process of 'horizontal vernacularisation' rather than conventional 'vernacularisation'. This view has been buttressed by Chapter 8, which has shown that community bylaws do not form part of formal state law by which international human rights norms are internalised, but have instead gained the character of living law that draws on and disrupts the existing customary laws and traditions and its institutions, formal institutions, such as policy, and a variety of social forces, including development agencies and NGOs.

This chapter consolidates the thesis by substantively conceptualising 'horizontal vernacularisation' and its features. It commences with discussing the concept of 'horizontal vernacularisation' itself, and then exposes how community bylaws are manifesting horizontal vernacularisation through different strategies of translating human rights/statutory norms to local settings. Thereafter, the chapter demonstrates how horizontal vernacularisation has reconceptualised the notion of the 'vernaculariser'. This is done by analysing the various actors involved this process.

9.2 SUMMARY OF ACTORS OF COMMUNITY BYLAWS

Each category of actors in Table 7 helps to shape the theory of norm internalisation/vernacularisation as it applies to community bylaws. Table 7

explains how the actors play several roles in the formulation and conceptualisation of community bylaws: mobilisation, facilitation, actual drafting of the bylaws, coordination with other actors, implementation and enforcement, and women's participation. These roles are further discussed in the rest of the chapter.

Twelve actors are highlighted: Senior Chiefs, Group Village Heads/ADCs, Village Heads, Women (groups), Department of Gender Affairs, Department of Social Welfare, Local Government, Magistrates, Police VSUs, NGOs, UN Women and UNFPA. Table 7 combines the roles of actors that have been used to explain processes of formulating community bylaws, set out in Chapter 7, as well as other roles that may or may not be the mainstream part of formulating bylaws, but are crucial to the existence of the bylaws.

Table 7: Actors and their roles

	Local-level mobilisation	Facilitation	Actual drafting of bylaws	Coordination with other actors	Adoption & implementation	Women participation
Senior Chiefs/TAs	Mobilising 'high-level' local decision makers (Group Village Heads, ADCs) to identify problem and take decision for community to formulate bylaws.	-Facilitating problem identification dialogues with local decision makers. -Facilitating bylaws formulation exercise.	Sitting in bylaws formulation processes (as facilitators or mere participants).	-Fundraising (e.g. Senior Chief Lukwa). -Taking international ideas to local communities. -Engaging with NGOs and/or government officials to give bylaws human rights/statutory perspectives.	-Signing bylaws. -Handling defiant perpetrators. -Overall enforcer of bylaws (e.g. by setting up relevant mechanisms and also sanctioning lower Chiefs for bylaw violations in their villages).	Appointing women's groups as chieftaincy arm to support bylaws 'at work'.

	Local-level mobilisation	Facilitation	Actual drafting of bylaws	Coordination with other actors	Adoption & implementation	Women participation
Group Village Heads/ ADC	Mobilising village heads to make bylaws.	-Co-facilitating village level consultations on contents of bylaws. -Guiding Village Heads on how to conduct consultation.	-Sieving and consolidating proposals on contents of bylaws from villages. -Formulating bylaws document.	Organising all their Village Heads in bylaws formulation process, sometimes in collaboration with NGOs.	-Penalising slack Village Heads & other perpetrators -Refusing the celebration of/dissolving child marriages -Dealing with resistance to bylaws -Propagating the bylaws (e.g. at funerals).	Purposely including women in consultations.
Village Heads	Mobilising subjects to attend consultative meetings for formulating bylaws.	Leading facilitations of village level consultations on contents of bylaws.	Submitting village level proposals on contents of bylaws to Group Village Heads.	Where applicable, collaborating with NGOs and other groups/committees in consultation processes.	-Imposing fines on perpetrators -Reporting perpetrators to police, where applicable -Refusing to grant permission for child marriage. -Enforcing set mechanisms to keep children in school. -Propagating the bylaws (e.g. at funerals). -Being each other's 'eyes and ears'.	-Purposely including women in consultations. -Seriously considering women's suggestions on suitable sanctions.
Women groups	-Mobilising other women to promote 'girl education.' -Establishing committees for chiefs' wives at ADC and VDC levels (e.g. Senior Lukwa area).	-Obtaining women's opinion on how bylaws work		-Attending human rights training/awareness forums organised by NGOs -Working with NGOs on how to disband child marriages	-'Counselling' girls to proceed with education. -Reporting potential or actual perpetrators to chiefs. -Confronting chiefs that are violating bylaws. -Submitting regular reports to chiefs.	-Participating in consultations and sometimes in the formulation of the bylaws. -Proposing suitable sanctions for the bylaws.

	Local-level mobilisation	Facilitation	Actual drafting of bylaws	Coordination with other actors	Adoption & implementation	Women participation
Department of Gender Affairs		-Facilitating trainings/awareness on human rights and statutes, where invited (especially district officials).	Facilitating bylaws formulation processes as 'experts,' where invited (especially district officials).	-Leading the development of the 'one bylaw framework' at national level to standardise all bylaws and align them to gender statutes. -Co-convening (with UN agencies) Chiefs' meetings at national levels. -Engaging MLGRD to support and own 'one bylaws framework.'	-Attending launches. -Overseeing monitoring framework of one bylaws framework when adopted (prospective role).	
Department of Social Welfare		-Facilitating sessions on developing bylaws where invited.	-Has mandated District Social Welfare officials mandated to ensure that each TA has bylaws. -District Social Welfare officials provide technical support to communities that are drafting bylaws.	-Co-spearheading the development of the 'one bylaw framework' at national level. -Mobilising other district government officials to provide expertise during bylaws formulation where necessary. -Managing implementation of National Strategy on Ending Child Marriage (of which bylaws are one strategy). -Engaging MLGRD to support and own 'one bylaws framework'. -Reporting on the use of bylaws to State	-Submitting bylaws to District Councils for 'endorsement.' -Overseeing monitoring framework of one National Strategy on Ending Child Marriage (which includes activities on development/use of community bylaws.	

	Local-level mobilisation	Facilitation	Actual drafting of bylaws	Coordination with other actors	Adoption & implementation	Women participation
				Party reporting mechanisms.		
Local Government				-Processing bylaws to become legally valid. -Making presentations at key meetings for chiefs organised by Ministry of Gender.	-Attending launches of community bylaws (DCs). -'Endorsing' or signing bylaws (DCs).	
Magistrates		-Facilitating bylaws formulation processes as experts, when invited. -Making presentations on gender statutes during bylaws formulation processes as experts, when invited.	-Vetting bylaws to ensure 'legal compliance' before adoption, and making/proposing necessary corrections.		-Signing bylaws (DCs). -Attending launches of bylaws. -Sometimes upholding the sanctions prescribed by bylaws in court.	
Police VSU		-Making presentations on gender statutes & human rights during bylaws formulation processes as experts, when invited. -Generally giving talks on legislation and human rights at community level.			-'Counselling' perpetrators who are refusing to pay fines. -Arresting defiant perpetrators. -Arresting perpetrators of rape and defilement.	

	Local-level mobilisation	Facilitation	Actual drafting of bylaws	Coordination with other actors	Adoption & implementation	Women participation
NGOs	Mobilising special groups at community level to support project implementation (e.g. GENET Committee, community educators).	-Facilitating problem identification dialogues. - Facilitating trainings of bylaw formulation teams in order to ensure human rights/statutory compliance.	-Facilitating the process of formulating bylaws, sometimes by recruiting 'experts' to facilitate.	-Bringing in other players and experts (e.g. lawyers or Magistrates to vet/strengthen draft bylaws). -Supporting the Departments of Gender and Social Welfare on community bylaws initiatives. -Sponsoring learning visits for Chiefs to visit other Chiefs.	-Supporting public launches. -Printing bylaws. -Coordinating with community groups to withdraw children from marriage.	Training women's groups (e.g. Mother Groups, Women's Forum).
UN Women	-Mobilising male Chiefs as HeforShe Champions. -Mobilising selected Senior Chiefs, TAs and Paramount Chiefs to address harmful practices. -Hosting high-level Chiefs' forums and learning visits.	-Facilitating and/or giving speeches at relevant forums convened for Chiefs.	-Financially supporting formulation of the one bylaws framework.	-Cooperating with UNFPA, UNAIDS and Ministry of Gender on the 'one bylaw framework' and providing financial support. -Cooperating with the Ministry of Gender to host conferences (e.g. such as those previously held on: child marriage and other harmful practices for traditional leaders from Eastern and Southern Africa; and for female TAs and spouses of Paramount Chiefs. -Providing funding (e.g. to Senior Chief Lukwa).	-Attending community bylaw launches (e.g. in Senior Chief Lukwa's area).	-Directly working with selected female chiefs and supporting their attendance at international meetings. -Holding a conference of female chiefs and spouses of paramount chiefs (2017).

	Local-level mobilisation	Facilitation	Actual drafting of bylaws	Coordination with other actors	Adoption & implementation	Women participation
UNHFA	-Mobilising NGOs and supporting their projects on bylaws. -Mobilising Chiefs through meetings under the GEWE Programme.			-Supporting the Ministry of Gender with technical in projects involving bylaws under the GEWE Programme. -Supporting the Ministry of Gender to document/ map 'GEWE' and other selected community bylaws.		-Supporting the work of Mother Groups through NGOs (e.g. under the GEWE Programme).

9.3 CONCEPTUALISING HORIZONTAL VERNACULARISATION

The conceptualisation of community bylaws on addressing child marriage and other harmful practices in Malawi does not neatly fit into how vernacularisation is currently understood, because vernacularisation is a unicameral concept that is linked to externally-driven efforts aimed at localising, in a small community, human rights ideas developed from elsewhere. Rather, the phenomenon of community bylaws awakens us to bicameral manifestations of vernacularisation, whereby the local is also a source of vernacularisation. In this context, vernacularisation heavily unfolds horizontally, thus the use of the term 'horizontal vernacularisation'. Horizontal vernacularisation should not be misunderstood as arguing that a local community is not engaged in norm contestation, because Chapter 8 shows that it is. Rather, the focus of horizontal vernacularisation is: how does the 'local' too (whether independently or in convoluted relationships with epistemic outsiders) activate the vernacularisation *process*?

Horizontal vernacularisation does not usually have the deliberateness that

'interventions have to be initially organised for purposes of vernacularisation in order for them to amount to vernacularisation'.¹⁵³⁶ Indeed, section 7.3.2 has shown that the communities developing the community bylaws are not often moved by the primary need to appropriate and translate human rights ideas/programmes brought from elsewhere by an epistemic community.

Yet, one cannot ignore that vernacularisation can happen indirectly through appropriation, such as the instance of a chief that is inspired by 'educated' women she has met and her desire that girls from her community achieve such success.¹⁵³⁷ Indeed, it has been shown that chiefs are motivated to initiate the adoption of bylaws by a wide range of factors, including a growing consciousness about the value and benefits of educating girls, the need to protect girls from sexual abuse, and peer influence. However, chiefs hear different human rights messages through the media, attend different meetings, and interact with other chiefs, NGOs and state players and in the process gain human rights perspectives that they later apply to solve challenges in their own communities. As 'increasingly knowledgeable' community members engage with each other (and at times with NGOs and state officials) to question their own development and cultural practices from the viewpoint of 'modern (development) realities'; and as government and NGOs (with the support of donors), they are motivated to develop interventions to use community bylaws as a channel for addressing harmful practices affecting women and girls.

Horizontal vernacularisation acknowledges that human rights appropriation

¹⁵³⁶ See note 361.

¹⁵³⁷ For example, Chief Chitera talked a lot about how she is inspired when educated women make presentations. Chief Kwataine shared his experience that his first experience of boarding a plane was when he was part of a presidential delegation. He was so impressed to see Malawian young ladies confidently speaking English and serving as air hostesses on Air Malawi. His interest led him enter into conversations with the air hostesses, and none of them came from Ntcheu. When they returned from the trip, he was lodged at a guest house in town so that he could proceed to his village the next day. The female guard at the guest house saluted him as her Chief and said she originated from his area. Chief Kwataine says it greatly pained and shamed him that his village could not produce an air hostess, but a guard instead.

and translation in community bylaws is blurry and unconventional. This is true of the bylaws, which sprout in a continuum of intuitive, interlocking, convoluted, iterative processes within a predominantly local-local dialogue. The fact that other human rights programmes are jumping on board to 'perfect' or 'strengthen' or opportunistically ride on what the local is doing does not reduce the local anchorage of this form of vernacularisation.

The evidence discussed in this thesis shows that community bylaws do not emanate exclusively from elite vernacularisers or communities' captivation with diffusing international human rights and legislative norms on harmful practices. Because the formulation of community bylaws is fraught with overlapping layers, the appropriation and translation of women's rights ideas at local levels is not neatly patterned. At the initial stages, there is sometimes 'implied appropriation' whereby human rights norms and values are unconsciously integrated as communities discuss and conceptualise the contents of the bylaws. Such appropriation can become 'explicit' as the process of making the community bylaws ripens.

However, the totality of the process manifests a process of horizontal vernacularisation. The local is heavily invested in translating women's rights ideas in its setting, notwithstanding that other external actors are involved along the way. The local continues to make meaning of the new gender justice norms and values being introduced by the community bylaws beyond the conceptual stages of bylaw making as it strives to make the bylaws local practice. Thus, horizontal vernacularisation is both about the process of appropriating and translating human rights ideas, and about the communities' efforts to ensure that the human rights values enshrined in the community bylaws actually start to govern local people's daily lives.

Admittedly, horizontal vernacularisation has pros and cons from a human rights perspective. On the one hand, it creates an enabling environment for

Figure 1 illustrates that deflective translation/deflection is the cross-cutting piece of horizontal vernacularisation that influences how five¹⁵³⁹ of the other translation strategies play out.

The fact that out of the seven translation strategies, existing vernacularisation theory only accommodates hybridisation and simplification demonstrates that horizontal vernacularisation has its own unique features of translation.

9.4.1 *Chindapusa*: Protecting Women's Rights Through 'Deflective Translation'

Chapter 5 discussed Malawian legislation that criminalises harmful practices.¹⁵⁴⁰ The fact that community bylaws are introducing parallel village-based sanctions for most of the same harmful practices would spark presumptions that the bylaws are diluting the legislative gains. The findings portray the sanctions in the bylaws as 'deflective translation/deflection' – meaning that communities are consciously or unconsciously using legislative human rights ideologies to create positive meanings of their cultural practices through 'rules,' and yet deflecting the punishments imposed in such legislation by drawing on culturally resonant penalties. For most respondents, this is not a digression from or a watering down of the legislative or human rights intents, but it is an acceptable, practical, and locality-based model of complementing the women's rights agenda.

Thus, deflective translation is based on the following justifications that *chindapusa* is the preferred option to legislative penalties and sanctions:

9.4.1.1 '*Chindapusa*' is a primary solution

It is common belief across the study communities that rights of women and girls will be firmly protected with home-grown penalties first, before rushing to state measures. Respondents expressed this using different local analogy:

¹⁵³⁹ Customarisation, simplification, socialisation, augmentation and hybridisation.

¹⁵⁴⁰ See section 5.3.3.1 of the thesis.

'when you build a house, you put *msanamira*¹⁵⁴¹ to prevent cracks and strengthen it. These bylaws are our *msanamira* – warning people not to engage in certain harmful practices banned by state law'.¹⁵⁴² Some said 'the bylaws are our primary justice – culturally, each rural community has primary justice at village level that warns the community to refrain from wrong conduct'¹⁵⁴³. Others explained that, 'the bylaws are *poyambira*,¹⁵⁴⁴ like primary health care. If a patient does not recover, we send him to *chipatala china chachikulu*¹⁵⁴⁵ for advanced assistance'.¹⁵⁴⁶ Some women said, 'bylaws are like first aid. If it does not work, you go for state help'.¹⁵⁴⁷ One Magistrate's description was that, 'bylaws are similar to community policing – those involved are not police officers yet they play a big role in curbing crime'.¹⁵⁴⁸

The above views give room for the application of legislation, but not before attempting to deflect state punishment¹⁵⁴⁹ through cultural solutions. This way, deflective translation (presumably) quickly corrects mischief and encourages good practices, and is seen as preventive. In any event, the proceedings for imposing *chindapusa* are swifter compared to criminal trials, and they are more accessible than formal dispute resolution mechanisms.

¹⁵⁴¹ Best English approximation would be 'pillar'.

¹⁵⁴² Group Village Heads, Chief Mwirang'ombe's area, Karonga.

¹⁵⁴³ Chief Lukwa, Kasungu.

¹⁵⁴⁴ In this context the respondents were saying the bylaws are like 'primary health care'.

¹⁵⁴⁵ The best English approximation would be 'secondary/tertiary hospital'.

¹⁵⁴⁶ Village Heads, Chief Lukwa's area, Kasungu.

¹⁵⁴⁷ Mother Group, Chief Kwataine's area, Ntcheu.

¹⁵⁴⁸ Third Grade Magistrate Nyungwe Court, Karonga.

¹⁵⁴⁹ As seen in section 5.3.3.1 of the thesis, the Gender Equality Act defines a harmful practice as 'a social, cultural or religious practice, which, on account of sex, gender or marital status, does or is likely to undermine the dignity, health or liberty of any person; or result in physical, sexual, emotional or psychological harm to any person'. The punishment for committing a harmful practice is a fine of one million kwacha and imprisonment for five years. The HIV and AIDS (Prevention and Management) Act defines harmful practices as 'any social, religious or cultural practice that puts a person at risk of HIV infection and reinfection; or may catalyse progression of HIV to AIDS'. The punishment for committing a harmful practice is a fine of five million kwacha and imprisonment for five years. The Child Care, Justice and Protection Act does not define harmful practices, but criminalises and except for the offence of child trafficking, which is punishable by life imprisonment, prohibits any person from subjecting a child to a social or customary practice that is harmful to the health or general development of the child. It also particularly proscribes forced marriage, child betrothal. Violation is punishable by ten years imprisonment.

9.4.1.2 'Chindapusa' is inherently deterrent

Deflective translation is justified because, while both state sanctions and *chindapusa* have deterrent effects, legislation is relatively unknown.¹⁵⁵⁰ Thus *chindapusa* triggers palpable fear, which is seen as a more efficient way to deter women's rights abuses. This element was expressed as follows: 'the essence of imposing *chindapusa* is to inculcate fear so that child marriages should not occur';¹⁵⁵¹ 'people obey the bylaws for fear of paying a goat, which to us is unaffordable';¹⁵⁵² 'the bylaws for reducing school drop-outs and marriages amongst girls because people fear *chindapusa*'.¹⁵⁵³

Even state officials agreed that since legislation is weakly implemented on the ground, *chindapusa* is a more efficient and tangible way of deterring the commission of culture-specific harmful practices, and thus cannot be indicted of contradicting legislation.¹⁵⁵⁴ This is analogous to acknowledgements made by early feminists in the context of rape – that if a severe penalty would mean fewer convictions (and therefore less deterrence), it is better to have a light punishment that would result in many convictions and be deterrent.¹⁵⁵⁵

9.4.1.3 'Chindapusa' allows a second chance and transformation

Deflective translation through *chindapusa* is preferred because it deliberately gives chance for character reform. Thus it was argued that: 'because legislation is inflexible, *chindapusa* helps people to discontinue harmful practices that would otherwise get them imprisoned, suffer in our bad

¹⁵⁵⁰ For example, in our interview, the Law Commissioner commented that during the Malawi Law Commission's consultations on the review of the Prison's Act, commissioners found several young men who were imprisoned on child marriage charges in Nkhata Bay prison who claimed not to have known that child marriage is a criminal offence (let alone the meaning of child marriage itself).

¹⁵⁵¹ Group Village Heads in Chief Chitera's area.

¹⁵⁵² Women's FGD in Chief Mwirang'ombe's area.

¹⁵⁵³ Women's FGD in Chief Lukwa's area.

¹⁵⁵⁴ E.g. interviews with the Director of Gender, Clerk of Parliament, Law Commissioner, 3rd Grade Magistrate, Nyungwe Court (Karonga) and VSU Officer, Kasungu Police.

¹⁵⁵⁵ Discussed in Michael Davis, 'Setting Penalties: What Does Rape Deserve,' (1984), 61-110 162.

prisons'.¹⁵⁵⁶ Thus community bylaws are perceived as having higher impact on behavioural change than legislation: 'though *chindapusa* is seen as lenient,¹⁵⁵⁷ the perpetrator becomes the talk of the village and gets highly humiliated and this forces him/her to change behaviour'.¹⁵⁵⁸ Therefore, it was argued, '*chindapusa* cannot be adulterating legislation, but, to the contrary, it is fixing societal menaces, making people transform from old beliefs and practices.'¹⁵⁵⁹

The 'second chance' aspect of deflection was also justified from a social relations perspective, thus further demonstrating that the fines that are payable as *chindapusa* are not criminal in nature, but have a restorative justice foundation. For example, it was contended that the community bylaws are the first resort because the state gives stiff penalties. However, the bylaws strike a balance, and both parties (mostly '*anthu odziwana*'¹⁵⁶⁰) are satisfied that they have been helped. Only when a person is defiant is he/she reported to the state.¹⁵⁶¹ This is why, even from a criminal justice context, the *chindapusa* model was appreciated by some interviewed police officers, except for rape cases.¹⁵⁶²

¹⁵⁵⁶ For example, Village Heads in Chief Lukwa's area.

¹⁵⁵⁷ Compared to statutory punishment.

¹⁵⁵⁸ Senior Chief Kwataine.

¹⁵⁵⁹ Village Heads, Senior Chief Kwataine's area.

¹⁵⁶⁰ Best English approximation would be 'people who know each other'. This attitude also contributes to people's mistrust of state criminal sanctions, as pointed out in Chapter 5.

¹⁵⁶¹ These views were shared by Senior Chief Kwataine. He was speaking in the context of cases of property grabbing and child marriage, and not sexual offences (rape), which are treated as criminal matters.

¹⁵⁶² For example, agreeing that state channels should be a last resort, VSU Police Officers at Karonga Police Station said, 'if a person is declining to pay *chindapusa* in accordance with bylaws, he/she has to be brought to the police station, and be warned about how the state would otherwise deal with the case.' VSU Police Officers at Ntcheu Police Station asserted, 'if we hear that bylaws were bypassed, we send the people back to apply their bylaws. We only prosecute if the person declines to pay *chindapusa*'.

The fact that both communities and police have confidence in community bylaws also validates the challenges regarding the enforcement of legislation articulated in Chapter 5.¹⁵⁶³

9.4.1.4 'Chindapusa' is filling legal gaps

Chapter 5 has alluded to the fact that legislation on harmful practices fails to connect with rural communities. Thus, deflective translation was justified on the ground that *chindapusa* is filling legal gaps. For example, it was contended that 'if legislation has not defined a punishment for child marriage, non-school attendance, or harmful initiation rites, it is acceptable for the community to determine its own punishments'.¹⁵⁶⁴ Section 9.4.1.2 has highlighted examples of sanctions that the state offers to curb harmful practices.¹⁵⁶⁵ The previous chapters have indeed shown that for most of the acts that constitute harmful practices, there is no sanction of the kind the community bylaws have. Community bylaws also promote certain things for which formal law does not really prescribe sanctions. For example, apart from well-known harmful practices and acts of violence, Table 3¹⁵⁶⁶ has a catalogue of practices that communities deem to be harmful,¹⁵⁶⁷ most of which, one could argue, cannot be reasonably policed by the state.

However, it can also be contended that the scope of harmful practices being targeted by legislation (particularly the Gender Equality Act) is broad enough and that it is difficult to comprehend how community bylaws, say to address child marriage, could work together with legislation – unless it is to prevent the mischief in the first place. If the starting point is to acknowledge that child marriage is a statutory offence, then it means the court should be left to apply

¹⁵⁶³ See section 5.3.3.1.

¹⁵⁶⁴ According to the Assistant District Social Welfare Officer in Chiradzulu.

¹⁵⁶⁵ See note 1549.

¹⁵⁶⁶ Section 7.3.2.2 of the thesis.

¹⁵⁶⁷ For example, these practices relate to issues of: pregnancy of schoolgirls; girl sanitation; teachers' conduct; learners' conduct; third parties conduct towards school-going children; social misconduct; amusement and entertainment; community celebrations; and safe motherhood.

a suitable statutory punishment, and not for a community's bylaw to take over. Though the Marriage, Divorce and Family Relations Act does not penalise child marriage, this omission is not calamitous since the general penalty for harmful practices would apply to child marriage as well.¹⁵⁶⁸ The same goes for the 18 harmful practices that are specifically prohibited under the HIV and AIDS (Prevention and Management) Act,¹⁵⁶⁹ meaning that any harmful practice falling outside the scope of the Act could as well be covered by the Gender Equality Act so long as the element of harm is proven.

Communities' inclination to nevertheless regulate these harms their way betrays that deflective translation is also purposefully selective. The commission of (recently criminalised) entrenched harmful practices is regarded more sympathetically compared to harms that have routinely been abhorred by generations, such as rape. Thus, vernacularisation scholarship rightly argues that 'selective exposure and selective appropriation' are marks of translation.¹⁵⁷⁰ Despite being selective, deflective translation is seen as not injurious to the principle behind legislation of harmful practices (the modification and elimination such practices), and as a relatively acceptable 'middle-ground' of appropriating human rights in cultural settings. In fact, deflective translation is a vivid example of how the universal measures that are promoted by human rights jurisprudence may be blind to more practical cultural solutions in legal plural systems.¹⁵⁷¹

Deflection permeates the other strategies of translating human rights ideas in horizontal vernacularisation discussed below.

¹⁵⁶⁸ For example, the five years imprisonment and one million Kwacha [equivalent to USD 1,347] fine for all harmful practices under the Gender Equality Act.

¹⁵⁶⁹ See note 1061.

¹⁵⁷⁰ See section 3.4.2.1 of the thesis in reference to Rajam and Zararia's translation concept of compartmentalisation.

¹⁵⁷¹ See section 4.4.4 of the thesis.

9.4.2 Other Translation Strategies

9.4.2.1 Customarisation

The community bylaws have a strong chief-centred and protectionist flair since they are a story about rural chiefs and their communities rising up to protect women and girls through customary treatment (whether or not such protection is directly influenced by human rights and formal legal norms or not). The fact that ‘law-like’ actions of ‘protection’ (which incidentally is also human rights language) are manifesting at customary base under the captaincy of chiefs (who are custodians of customs and customary law) symbolises that different communities are ‘customarising’ women’s protection as their settings, experiences and ideals of modern society demand.

Therefore, this thesis uses the concept of customarisation of women’s protection to denote chief-led rural community’s introspective and negotiated retracing and filtering of its customary norms, beliefs and values in order to strengthen the protection of women and girls in cultural spaces. Thus, when it comes to women’s protection in grassroots circles, the ‘customary’ is engaged in activism on its terms. Instead of being recipients of ‘handed down’ traditions, chiefs and rural communities in the study areas are no longer ‘innocently’ protecting harmful practices and are troubleshooting their own culture by infusing it with values that resonate with human rights and legislative standards.

Through their unique customary characteristics, community bylaws are customarising women’s protection by reconceptualising statutory punishments through deflective translation.¹⁵⁷² This is authentically empowering communities to protect those vulnerable to harmful practices (including the community itself, from a development perspective) when legislation is remote to the people. Thus, community bylaws have even

¹⁵⁷² See section 9.4.1 of the thesis.

customarised the way of dealing with defiant perpetrators. For example, if a perpetrator is defying a Village Head's refusal to endorse a child marriage, the latter refers the matter to the Group Village Head. If the perpetrator still resists, the matter goes to the TA. This approach is also deterrent because the fine increases at each tier of chieftaincy.¹⁵⁷³

As seen in section 7.3.4, chiefs may use the threat of fines to address resistance to the community bylaws since the bylaws may not be a unanimously accepted ideology among subjects.¹⁵⁷⁴ In Senior Chief Chitera's area, Chiradzulu, Group Village Heads said 'we coped with resistance by granting conditional permissions (i.e. to hold overnight celebrations) so long as the subjects had five goats¹⁵⁷⁵ to pay as a fine, which they would not have'.

The community bylaws are further customarising women's protection by looking internally to unlock customary bottlenecks to the protection of women, particularly Chiefs themselves. As Group Village Heads in Chief Kwataine's area (Ntcheu) explained, 'a violation of bylaws starts in the village, which is under the Village Head. So if a Village Head is passive or non-committal and a harmful practice happens, we sanction such Chief too'. In many areas, both the Village Head and Group Village Head are sanctioned by the Senior Chief/TA.¹⁵⁷⁶

Customarisation of women's protection is also apparent in the way women's protection has been institutionalised within the chieftaincy. Some Senior Chiefs have established groups of women as a specific arm of the chieftaincy for purposes of monitoring adherence to community bylaws. Some of these

¹⁵⁷³ As Group Village Heads in Chief Mwirang'ombe's area, Karonga, observed: 'an insolent subject may find himself/herself concurrently paying two chickens to the Village Head, five chickens to the Group Village Head, and a goat to the TA for affronting a bylaw'.

¹⁵⁷⁴ Generally see section 7.3.4.1 of the thesis regarding the types of resistance some Chiefs encountered.

¹⁵⁷⁵ Being combined fines to the Village Head, the Group Village Head, and the Senior Chief.

¹⁵⁷⁶ As seen in section 7.3.4.1 of the thesis, the logic is that the Village Head's carelessness to allow child marriage to happen under his/her watch, suggests lack of vigilance by the Group Village Head to monitor his Chiefs.

women have been exposed to information so that they can support the implementation of community bylaws successfully, and they have been organised to be the Chiefs 'ears and eyes' on the ground regarding the monitoring of the bylaws. With a self-teasing but proud demeanour, Senior Chief Kwataine explained that *poti nkhani ya uchembele wabwino anaimvera pa mgong'o*,¹⁵⁷⁷ in 2007 he took twelve women from his community (known as '*amai a chinsinsi*'¹⁵⁷⁸) to a safe motherhood meeting in South Africa. When they returned, the women were so motivated and proud of their role of monitoring the bylaws because they were officially '*chiwalo chimodzi cha a mfumu*'.¹⁵⁷⁹

Senior Chief Lukwa has also created a structure headed by his wife. He narrated that he is counting on a 'Back to School Committee,' established in 2016, to be his 'ears and eyes'. He said he advised his wife to form and head a 'Back to School Committee' for wives of Chiefs. His wife facilitated the mobilisation of wives of Group Village Heads so that they could set-up committees for Chiefs' wives at ADC and VDC levels.¹⁵⁸⁰ The Chiefs' wives meet to discuss and they also investigate why certain girls are not in school.¹⁵⁸¹ They are expected to provide counselling to such girls in collaboration with Mother Groups. They compile a report, which Senior Chief Lukwa's wife submits at a Chiefs' meeting. In turn, she reports the Chiefs' feedback to her committee members.

Thus, customisation is not just a matter of the software (bylaws), but also the chieftaincy as an engine of the customary justice machinery. This way, the chieftaincy structure has the potential to facilitate transformative substantive

¹⁵⁷⁷ Best English approximation would be—'since they have received the safe motherhood message over-enthusiastically'.

¹⁵⁷⁸ Secret Mothers.

¹⁵⁷⁹ Best English approximation would be—as 'one limb of the Senior Chief'.

¹⁵⁸⁰ The ADC committee is the higher committee led by Chief Lukwa's wife; and wives of Group Village Heads head VDC level committees.

¹⁵⁸¹ When the Committee sees that a child needs school fees, the goats that people paid as fines are sold to obtain the required amount. If there is no goat to sell, Chief Lukwa said 'we contribute from our own pockets'.

equality, which, as observed in Chapter 4, is achieved when women's rights are internalised in the very centres of patriarchy.¹⁵⁸²

9.4.2.2 *Simplification*

Communication strategies, particularly the use of '*Gule Wamkulu*' (masked dancers)¹⁵⁸³ drama, subjects' real stories and 'house bill boards') used in the community bylaws reflect elements of Rajam and Zararia's¹⁵⁸⁴ 'simplification', which is achieved through communicating a development/human rights idea in ways that both literate and illiterate audiences can understand.¹⁵⁸⁵

Gule Wamkulu is a respected yet scary Chewa cult, and is accountable to Chiefs. Whereas in the past *Gule Wamkulu* would limit children's right to education by randomly ambushing and beating up children on their way to and from school (with girls being more vulnerable because they are not cult members), community bylaws are using the scariness of *Gule Wamkulu* positively. For example, in some areas, *Gule Wamkulu* is deployed every morning to mobilise children out of their homes to attend school. Others are using *Gule Wamkulu* dances as a medium of communicating messages promoting children's access to education, including for girls. Thus, though not headlined 'human rights,' the transformed spoken and non-spoken language of *Gule Wamkulu* is practically reflecting and influencing the diffusion of a human rights culture.

Some communities have used drama groups to simplify messages. In Karonga, Wanabgwa Youth Organisation (WAYO) has tactically used a popular drama group, *Tiyanjane*¹⁵⁸⁶ Drama Group, which uses male and female characters to appeal to people's conscious by portraying hidden

¹⁵⁸² See note 523.

¹⁵⁸³ See Glossary of Chichewa terms.

¹⁵⁸⁴ N. Rajaram and Vaishali Zararia, 'Translating Women's Human Rights in a Globalising World: The Spiral Process in Reducing Gender Injustice in Baroda, India,' (2009) – See section 3.4.2.1 of the thesis.

¹⁵⁸⁵ *Ibid.*, 476-477.

¹⁵⁸⁶ The best English approximation would be 'let us unite'.

injustices and impacts of common harmful practices in their plays. Because the group is a crowd puller, a lot of people have turned up to listen to its messages, giving a platform for WAYO to facilitate public discussions and awareness about harmful practices that should be addressed. WAYO has used this model both in supporting Chiefs to conduct consultations about impeding community bylaws, and to disseminate the bylaws.

Simplification is also evident in the ways Chiefs have used actual tragic stories/case studies to make connections between human rights and local realities. Section 7.3.3.1 has stated that in his area, Senior Chief Kwataine was the one facilitating the community bylaws formulation process. He said he gave different vivid stories of what led to deaths of specific women that Chiefs/the community knew had died from child birth or had ended up with fistula. In this process, without using human rights language, people's mind-sets changed from seeing the tragedies as 'witchcraft at work,' to recognising that the community could avoid such deaths by changing their practices. The simplification of human rights issues by appealing to practical local examples is also seen in Senior Chief Lukwa's use of community research data to highlight worrying rates of school dropouts amongst girls despite a girls' bursary project in the area.¹⁵⁸⁷

Simplification has further happened through 'house bill boarding'. This was peculiar to Senior Chief Kwataine's area, who explained that he has encouraged his subjects to write, in their own words, messages regarding how they have understood the area's community bylaws on the outer walls of their houses or pit latrines.¹⁵⁸⁸ In this community, many houses/pit latrines have bylaws captured in short sentences such as: *'mwana wa mkazi asakwatiwe'*; *'mwana aliyense asajombe ku sukulu'*; *mzimayi wapakati ayambe sikelo pokwana*

¹⁵⁸⁷ See section 7.3.3.1 of the thesis.

¹⁵⁸⁸ Chief Kwataine explained that this idea originated from him when he was the National Chairman on Safe Motherhood. Some subjects would tell him that they may forget his message, so he proposed that they could try writing outside the walls of their houses or pit latrines to keep the message alive.

mwezi wachitatu; mzimayi wapakati aliyense akachilire ku chipatala'.¹⁵⁸⁹ Senior Chief Kwataine clarified that 'no person was forced, but in the past three to four years, almost every house here carries a message about our bylaws'. He equated this style of framing bylaws messages with 'the way others use billboards to disseminate information'.

The simplification transactions that are unfolding in the community bylaws phenomenon above provide further evidence of the use made of both tradition (*Gule wamkulu*, which is very traditional among Chewa speaking communities) and received cultures (drama and 'bill boarding'). Furthermore, they reveal that horizontal vernacularisation has similarities with and differences from how vernacularisation scholarship perceives framing (a package used to interpret human rights ideas to make them understandable in new settings and connect the ideas with local audiences, e.g. by using locally decipherable images, symbols and stories¹⁵⁹⁰). In horizontal vernacularisation, framing is 'done by locals for locals'¹⁵⁹¹ - thus strengthening the ownership of local problems and solutions. This trait is similar to what has been noted in vernacularisation: that framing affects how women's problems are defined and understood; how causes of women's problems and their solutions are conceptualised and locally embraced; and how human rights are owned as addressing local problems.¹⁵⁹²

However, the internal character of simplification in horizontal vernacularisation means that framing is not a mere conceptual need. As some scholars have argued, vernacularisation is not simply about the process, but also the outcome ('the so-what').¹⁵⁹³ Thus, in horizontal vernacularisation, framing establishes human rights (whether consciously or unconsciously) as

¹⁵⁸⁹ Best English approximations could be 'a girl child should not get married'; 'every child should be in school'; 'a pregnant woman should start antenatal clinics by the 3rd month'; 'every pregnant woman should give birth at the hospital'.

¹⁵⁹⁰ See section 3.4.2.2 of the thesis.

¹⁵⁹¹ Unlike in vernacularisation, where framing is an 'outside' act - see *ibid*.

¹⁵⁹² See section 3.4.2.2 of the thesis.

¹⁵⁹³ See note 296.

local practice as communities strive to practically deal with their challenges. This happens when new ideals are simplified and communicated continuously by strategic framing insiders and fixed frames (e.g. *Gule Wamkulu and individual households*). Such locally bred simplification/framing approaches ensure that genuine appropriation of human rights ideas should occur, since ‘vernacularisation only results if ideas are well framed’.¹⁵⁹⁴ Notably, most vernacularisers,¹⁵⁹⁵ whom vernacularisation scholarship expects to be responsible for framing, are not the framers at this stage.

9.4.2.3 *Socialising*

Derived from the ‘socialisation process’ in norm internalisation (an induction of new members into ways of behaviour that are preferred in society),¹⁵⁹⁶ translation of human rights norms to grassroots settings through ‘socialising’ is occurring in the community bylaws context through Chief-to-Chief interaction. Chiefs interact with other Chiefs from other areas, thereby borrowing ideas about community bylaws as a tool for addressing child marriage and other harms. For example, section 7.2 shows that Senior Chief Lukwa, Kasungu, borrowed the idea of developing community bylaws after visiting TA Mwanza’s area in Salima, and witnessing community bylaws in action. Senior Chief Kwataine, Ntcheu, was inspired to develop safe motherhood bylaws after visiting TA Nkanda’s area, Mchinji. Senior Chief Mwirang’ombe, Karonga, initially got the idea from Chief Chikulamayembe’s area, Rumphu.

Sometimes, external players that have a specific women’s rights interest facilitate socialising. For example, external actors arranged the visits of Senior Chiefs Lukwa and Kwataine respectively. Socialising happens even outside

¹⁵⁹⁴ See note 309 and section 3.4.2.2 of the thesis generally.

¹⁵⁹⁵ See section 9.5 for the vernacularisers that are involved in horizontal vernacularisation.

¹⁵⁹⁶ See note 225 and section 3.3 of the thesis generally.

the study areas. For example, FOCUS¹⁵⁹⁷ arranged for a group of Chiefs from Karonga to learn from community bylaws in the areas of Senior Chief Kachindamoto, Dedza, Senior Chief Kwataine, Ntcheu, and TA Sawale, Balaka. Being highly impressed by Kachindamoto, the Karonga Chiefs ended up adopting 'contracts' that would guide the fight against harmful practices that result in child marriage and pregnancies in their areas.¹⁵⁹⁸ These findings show that the 'socialiser' and 'socialisee' can both be local/grassroots players, and that the 'socialiser' does not have to be sophisticated or transnational.¹⁵⁹⁹

The uniqueness of how socialising plays out in the community bylaws lies in the fact that it is experiential, whereby the socialising Chiefs are not merely sharing rhetoric, but their communities' real lives. Consequently, the socialised Chiefs are confronted with their own communities' reality, and they return with conviction to usher their own change, as opposed to merely adopting bylaws instrumentally.

Socialisation also happens at sectoral level. The Ministry of Gender roped in the Ministry of Local Government and Rural Development (MLGRD) after the work of developing the 'one bylaw framework' had begun. The Programme Officer in the Ministry of Gender said: 'we realised that we had left out an important player who needed to understand the significance of the bylaws, the District Commissioners. Therefore, we had to co-opt the Ministry of Local Government in this work.' The Ministry of Gender appreciates that until they have buy-in from MLGRD, they are unlikely to succeed in ensuring that District Councils facilitate the formulation of gender-related bylaws in their respective districts.

The Ministry of Gender was socialising MLGRD by involving it in important forums that were discussing harmful practices, including community bylaws.

¹⁵⁹⁷ As part of their maternal health/safe motherhood project.

¹⁵⁹⁸ James Chavula, 'Kachindamoto Inspires Karonga Chief ' (2016). Also see some remarks from Chief Kilipula, leader of delegation, in note 27.

¹⁵⁹⁹ See section 3.3 of the thesis about socialisation being a state-state affair.

For example, in July 2017, MLGRD was invited to give opening remarks at a consultative meeting on strategies for abolishing harmful practices. The meeting targeted female TAs, wives of all Paramount Chiefs and representatives of mother groups.¹⁶⁰⁰ In October 2018, the Minister of LGRD shared the podium with the Minister of Gender to open a conference on child marriage, FGM¹⁶⁰¹ and other harmful practices for traditional and cultural leaders and institutions from the East and Southern Africa.¹⁶⁰² The conference, which was sponsored by UN Women culminated in ‘The Blantyre Commitment to Action’, which, among other things, called on the participants to ‘scale up or establish necessary gender sensitive and community bylaws regulations and sanctions as an enforcement measure of national legislation or policies prohibiting child marriage, FGM and other harmful practices’.¹⁶⁰³

However, socialisation is not a smooth path because the ‘socialiser’ and the ‘socialisee’ can have different priorities. In the case of Ministry of Gender and MLGRD, the Social Welfare Director expressed the concern that ‘because community bylaws [do] not generate revenue for councils, our colleagues in local government are dragging their feet to ensure that one bylaws framework is finalised and applied’. MLGRD’s behaviour resembles ‘tactical concession’, discussed in Chapter 3,¹⁶⁰⁴ whereby MLGRD was seemingly supportive of the one bylaws framework initiative, and yet not taking decisive policy action. This dilemma is deepened by the fact that neither the community bylaws nor the local government linkage is mandated by legislation.

¹⁶⁰⁰ Remarks by the Ministry of Local Government and Rural Development at a consultative meeting on strategies for abolishing harmful practices, made by Darwin Pangani, 27 July 2017. On file with author.

¹⁶⁰¹ Though this is not a Malawian challenge, the scope of the conference covered issues affecting Eastern and Southern African cultures.

¹⁶⁰² Speech by the Minister of Local Government and Rural Development, Mr Kondwani Nankhumwa, MP. On file with author.

¹⁶⁰³ East and Southern Africa Commitment of Traditional Leaders, Cultural Authorities and Religious, Leaders. Adopted at Blantyre, Malawi on November 2, 2018. On file with author.

¹⁶⁰⁴ Whereby escalating a norm violating state makes appeasement cosmetic changes due to pressure – section 3.3 of the thesis, especially note 230.

9.4.2.4 *Augmentation*

Augmentation provides evidence that community bylaws facilitate the appropriation and translation of human rights. Translation was happening through augmentation especially where NGOs and other 'experts' become involved in the process of formulating community bylaws. These players can become involved at any stage of the bylaws formulation process.

Augmentation influences the language of the community bylaws by making the people who draft community bylaws appreciate how the problems the bylaws are seeking to solve amount to human rights violations. NGOs and other experts have augmented the bylaws through technical support. While several NGOs denied directly proposing language for the community bylaws,¹⁶⁰⁵ WOLREC's paralegal admitted that during the development of the bylaws, WORLEC facilitators helped to make the bylaws consistent with statutory and human rights frameworks: 'we also repeatedly emphasised ... [the] child's right to education in order to maintain people's focus on the motive of the discussions - child protection'. He added that WOLREC even educated drafters of the bylaws about human rights frameworks at the onset of the process so that human rights should influence the spirit of the bylaws.

Some of the NGOs that claimed to have had nothing to do with the language ended up disclosing a similar role to that described by WOLREC. For instance, MIAA's Executive Director said, 'certainly, legally correct or human rights language was important to the whole process. This is why we needed people from Ministry of Gender and ourselves, who are conversant in human rights programming, to be there so that human rights are protected in the bylaws'. Even before starting to develop the bylaws, MIAA said they

¹⁶⁰⁵ 'We never prescribed the type of bylaws or penalties to be adopted. We only facilitated a consensus' (MIAA); 'They decided on their own to include whatever language that could make sense to them' (FOCUS); 'No, we cannot guide them on what they should include as each and every community has its own problems' (YONECO).

conducted five days of training of the 'Community Parliament'¹⁶⁰⁶ to equip them with legal and human rights knowledge: 'throughout the engagement of developing the bylaws, we made sure that we were the facilitators'. FOCUS said a Magistrate was one of the facilitator's so that the Chiefs would be well guided. YONECO also made sure that the people were trained in human rights and legal issues as part of the drafting process.

There is therefore a basis for saying that NGOs and other experts augment community bylaws by expressly examining them through human rights/legislation lenses, though the language of the bylaws is not couched in human rights terms. In Senior Chief Lukwa's area, the process of drafting the bylaws was internally facilitated, but when it reached advanced stages, 'experts' from the police, court and social welfare were invited to help them fine-tune the bylaws. Social Welfare officials also acknowledged that they offer technical support during the formulation of community bylaws when invited and resources permit.

Augmentation influences the language of the community bylaws. This happens when 'experts' from outside the community are asked to comment on the legal soundness of the bylaws and recommend changes. Indeed, taking draft community bylaws to 'experts' who can examine the bylaws critically before they are adopted is common practice. YONECO's Executive Director asserted, 'our role was to ensure that the bylaws did not conflict with national laws. So we engaged a lawyer to advise us'.

Usually, Magistrates are regarded as the legal experts who advise on the scope of the bylaws. FOCUS said: 'a Magistrate helped us in drafting and scrutinising the bylaws in Mwirangombe's area'. MIAA, WOLREC and GENET also involved Magistrates to vet the bylaws in their impact areas. Furthermore, though the bylaws in Senior Chief Kwataine's area were

¹⁶⁰⁶ See section 7.3.3.5 of the thesis.

exclusively drafted by the community, a Magistrate vetted the bylaws and advised them to reduce some of the fines.

Thus the vetting of bylaws by Magistrates is meant to ensure that they are fair and consistent with statutory law. The First Grade Magistrate at Kasungu district expounded, 'when vetting bylaws, I look at their fairness because every law should be fair to people of different economic backgrounds. For instance, bylaws imposing a fine of ten goats would disadvantage someone who has nothing. Two goats would be more lenient'. Referring to his prior experience of adopting bylaws in Chief Kachindamoto's area as Dedza District Council Bylaws,¹⁶⁰⁷ Kasungu's DC also shared, 'the draft bylaws said a Group Village Head who violates the bylaws should be fined a cow. However, the Magistrate advised us that even his court would not charge a cow for the offense, and we had to adjust the fine to a goat'.

By suggesting amendments, the 'experts' influence how community-bred ideas are (re)packaged in order to resonate with legislative and human rights norms. However, the so-called 'resonance' is partial, as Magistrates still defer to the traditional conceptions of justice within which bylaws are rooted. The advice they give is not binding. In any case, this advisory function performed by Magistrates does not form part of their official duties. Magistrates are apparently still grappling with what formal status they should give to the community bylaws. At the date of writing, the Chief Justice was yet to give directions on this question.

Augmentation has some opportunistic elements. The Director of Social Welfare admitted that his Department is riding on the initiatives by Chiefs to make human rights gains.¹⁶⁰⁸ He stated that community bylaws have been

¹⁶⁰⁷ See note 1170.

¹⁶⁰⁸ For example, he said that the Department of Social Welfare therefore took advantage of the GEWE Programme (2012-2016) to ensure that in the districts where the programme was being implemented, Social Welfare Officers were working with project communities to develop or strengthen community bylaws. The Director stated that, currently, each Social

included in State Party reports to the CRC as well as to the Universal Periodic Review mechanism, and that 'there has been recognition from international bodies that here in Malawi we now use bylaws for child protection.'

On the one hand, Chiefs have appreciated the strengthening of their bylaws by NGOs, magistrates and other external actors, viewing this as a safeguard against bylaws violating state norms because 'experts and the educated know better.' On the other hand, section 7.3.2.3 illustrates that Chiefs and their communities are quick to claim exclusive ownership of the community bylaws despite that other agents are involved in the process of drafting the bylaws. For their part, NGOs and the state¹⁶⁰⁹ have used augmentation opportunistically to meet their own human rights agendas by riding on communities' commitments 'to do better'. Section 7.3.2.3 has shown that GENET has claimed that it brought the community bylaws to Senior Chief Chitera's area,¹⁶¹⁰ while the Chief illustrated how oral bylaws existed before GENET's arrival.

The fact that communities and NGOs may have different agendas in implementing the same initiative has long been noted in social movements.¹⁶¹¹ In the community bylaws' context, several Chiefs clarified that while the intent behind the community bylaws is not different from the human rights agenda¹⁶¹² they are not primarily motivated to act by the simple desire to implement human rights laws. The Chiefs claimed that the principle of *kuteteza* (protection) underlies the bylaws. According to the Chiefs, rural communities are wounded and weary of their culturally induced problems;

Welfare Officer across Malawi has an official mandate to ensure that each TA should have community bylaws to protect children.

¹⁶⁰⁹ For example, section 9.4.2.5 of the thesis below reports an admission by the Director of Social Welfare that they took advantage of some Chiefs' disclosure that they were using community bylaws and started implementing the government's child protection agenda through the bylaws.

¹⁶¹⁰ See note 1287.

¹⁶¹¹ See section 3.4.2.4 of the thesis.

¹⁶¹² Which is about protection, empowerment of girls and enhancement of human capabilities for flourishing socio-economic development.

all they want is for women and girls to have a chance too, be protected, and for their villages to improve socio-economically.

9.4.2.5 *Reverse augmentation*

Reverse augmentation is occurring as Chiefs and their community bylaw initiatives ended up influencing and strengthening national level human rights programming. An example is the Ministry of Gender's recognition of the need to adopt the community bylaw model as a strategy for addressing harmful practices after interacting with chiefs. The Director of Social Welfare disclosed that they initially were unaware that bylaws were being used as a tool for addressing child marriage until they heard of it from chiefs at the initial child marriages symposium in 2013:

Some chiefs who attended the symposium divulged that they are contributing to ending child marriage and other harmful practices by developing bylaws. We later followed up with Chiefs such as TA Dzoole in Dowa to get the bylaws they were talking about. We took this information as an opportunity, and started promoting the bylaws as part of our child protection strategy because our chiefs are custodian of culture, and have a greater say on all harmful practices.

Given that Malawi has not managed to eliminate child marriage with formal strategies, the government is refining its strategies and practices, learning from the local/Chiefs. The Director of Social Welfare said that their aspiration is that all District Councils will eventually adopt child protection bylaws. Chapter 5 made clear that the new National Strategy on Ending Child Marriage has formally earmarked the formulation of community bylaws in 300 TA areas,¹⁶¹³ implying that the reverse augmentation may even impact on strengthening the Ministry of Gender's budget. NGOs also suggested that they were borrowing a lot from community bylaws in one area, and pursuing similar projects in other sites.

¹⁶¹³ See section 5.2.2.1 of the thesis.

9.4.2.6 *Hybridisation*

Rajam and Zararia¹⁶¹⁴ have also proposed that translation happens through hybridisation, which connotes mixing the 'local' and the 'exotic' in a vernacularisation project.¹⁶¹⁵ Community bylaws mainly display traces of hybridisation through their written texts (just as legislation is on paper). Section 7.2 has shown that this was not always so, and that early community bylaws (pre 2010) were mostly oral. The documentation culture is happening despite chiefs' claims that they store the bylaws in their heads. The urge to write seems to emerge from interests by others (e.g. donors, NGOs, government) to see the text as evidence that bylaws have been formulated.

Other communities are also hinging the 'legal validity' of their bylaws on Magistrates' signatures - thus mimicking affidavits that are signed under a Magistrate's oath. The fact that some chiefs make the effort to distribute community bylaws to key institutions¹⁶¹⁶ further imitates the style of formal laws, whose copies are physically available in different venues.

Some locally-used concepts are also consonant with 'borrowed' terminologies. Section 7.3.3.6 demonstrated that, beyond the study communities, TA Mwanza's area in Salima borrowed a state term by using the concept of 'Community Parliament' in reference to the team that developed draft community bylaws. TA Mwanza also designated Group Village Head Mwanza as 'Speaker' for this Community Parliament. The use

¹⁶¹⁴ N. Rajaram and Vaishali Zararia, 'Translating Women's Human Rights in a Globalising World: The Spiral Process in Reducing Gender Injustice in Baroda, India,' (2009).

¹⁶¹⁵ See section 3.4.2.1 of the thesis, especially note 275. For example, the authors show how a local women's court was modelling the formal legal process through the use of legal papers, stamps and other symbols of law.

¹⁶¹⁶ For example, in Senior Chief Mwirang'ombe's area, Karonga, FOCUS facilitated the printing of the community bylaws, which have been distributed to relevant government institutions at local and district levels.

of 'household billboards' in Senior Chief Kwataine's area is a further example.¹⁶¹⁷ Even the term 'bylaw' itself is borrowed from formal law.

9.5 RECONCEPTUALISING THE VERNACULARISER

Chapter 3 uses the term vernaculariser to also mean 'translator'. The different actors engaged in processes of formulating community bylaws in Table 7 reveal that horizontal vernacularisation demands the broadening of the current conceptualisation of vernacularisers.¹⁶¹⁸ Section 3.4.2.3 sets out several types of vernacularisers, one of which (converters) is visible in the community bylaws context (converters). However, unique types of vernacularisers that have a heavy local/community façade have arisen from the community bylaws phenomenon (crusaders, grafters, troopers and connectors). The connection between the roles of these vernacularisers and the translation strategies discussed above is illustrated in Figure 2.

9.5.1 Converters

With reference to NGOs, Rajam and Zararia,¹⁶¹⁹ argue that 'converters' use human rights discourse so that their clients can start appreciating their challenges from a human rights context.¹⁶²⁰ They use various frames (speeches, plays, campaigns etc.) to achieve their goal.

In the community bylaws context, converters are mainly NGOs and state officials. To the extent that UN Women and UNFPA are working with selected chiefs, they are also playing a role of converter though not robustly on the ground. Some NGOs that have facilitated community problem identification exercises (and also the development of the community bylaws)

¹⁶¹⁷ See section 9.4.2.2 of the thesis.

¹⁶¹⁸ See section 3.4.2.3 of the thesis for different types of vernacularisers recognised in vernacularisation scholarship.

¹⁶¹⁹ N. Rajaram and Vaishali Zararia, 'Translating Women's Human Rights in a Globalising World: The Spiral Process in Reducing Gender Injustice in Baroda, India,' (2009).

¹⁶²⁰ *Ibid.*, 479.

have leaned on human rights and state law frameworks to demonstrate the impact of harmful practices and wider state/global human rights and development objectives.¹⁶²¹ Section 9.4.2.2 also illustrates that WAYO has utilised drama to convey human rights implications of harmful practices.

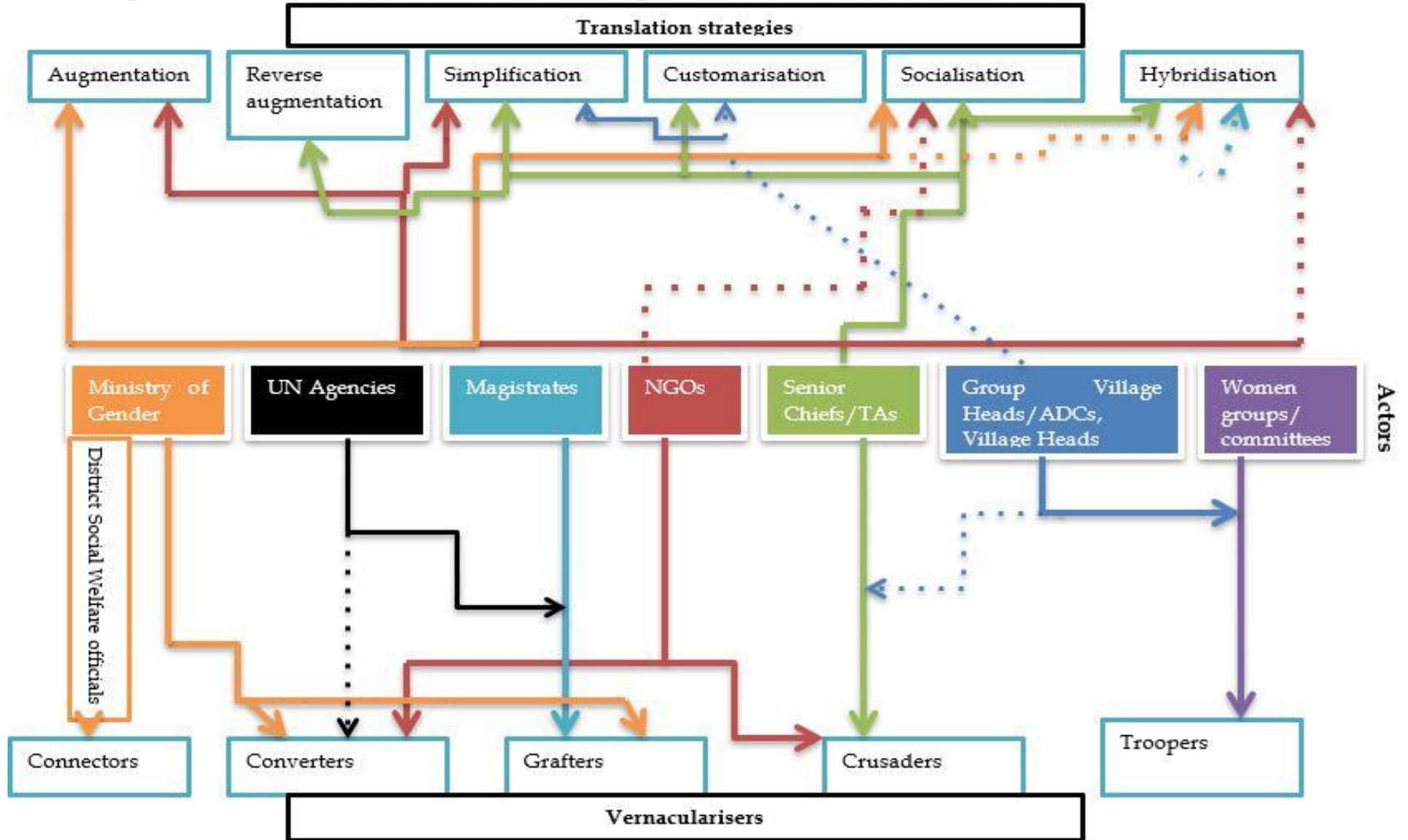
Other Chiefs have, in the course of developing community bylaws, invited state officials (such as police VSU personnel, Magistrates and Social Welfare officials) to make presentations on gender-related frameworks and human rights norms that have assisted community members to understand their internal challenges as legal and human rights violations.¹⁶²²

UN Women's Programme Specialist for the elimination of violence against women and girls (EVAW) stated that UN Women is directly implementing some projects involving chiefs. For instance, it has particularly utilised its HeforShe campaign to work with male chiefs as HeforShe role models. Furthermore, UN Women has mobilised selected TAs and Paramount Chiefs in the fight against child marriage and other harmful practices with the specific agenda of ensuring that chieftaincy mechanisms are protecting human rights, including promoting the use of community bylaws.

¹⁶²¹ See section 7.3.3.1.

¹⁶²² See section 7.3.5.5 of the thesis.

Figure 2: Interaction Between Translation Strategies & Vernacularisers in Horizontal Vernacularisation



UNFPA's Gender Programme Officer also shared that UNFPA has been promoting community bylaws since 2014, and this started under a safe motherhood programme whereby the organisation engaged Chiefs to champion the establishment of community rules to ensure that expectant women were delivering at hospital.

The role of converters is certainly important, but as this chapter has shown, is not decisive to the formulation of community bylaws. Rather, converters are mostly relevant in augmenting the community bylaws so that they should have a human rights handle, though unseen in the actual text.

9.5.2 Crusaders

Crusaders initiate and lead efforts that persuade others about the viability of paradigm shifts in local culture through community bylaws. There are two tiers of crusaders: those at community and national levels respectively. At community level, Senior Chiefs/TAs are the main crusaders who are working at different levels to translate the protections they are seeking for women and girls into community bylaws. Thus, it is befitting that international jurisprudence is starting to recognise traditional leaders as vernacularisers.¹⁶²³

After they themselves are challenged through different experiences (including attending meetings and socialising with other Chiefs), Senior Chiefs/TAs persuade other chiefs and the community at large to problematise their culture and find solutions that resonate with human rights ideals.

Section 7.3.3.1 has shown how TAs/Senior Chiefs are crucial to mobilising other 'local decision makers' (lower cadres of chiefs and the ADC) behind the crusade to address cultural problems through community bylaws. For example, Senior Chief Lukwa, Ntcheu, said, 'I personally went from one sub-

¹⁶²³ See section 4.4.3.2 of the thesis.

TA area to the other, mobilising all the chiefs, and facilitating discussions'. Senior Chief Chitera, Chiradzulu, explained how, before GENET's arrival, she ensured that through her Group Village Heads, various villages should appoint '*ma komiti oteteza ana*'.¹⁶²⁴ In Senior Chief Kwataine's area (Ntcheu), the TA mobilised Group Village Heads as part of the ADC. About his role, he said: 'we met as ADC to discuss for several days and I was facilitating the discussions as the TA. We did not collaborate with any NGO; we were just doing it ourselves'.

As crusaders, the TAs/Senior Chiefs are sometimes vendors of international ideas, convincing fellow Chiefs and their communities to adopt (international) ideas/perspectives to which they themselves have been persuaded. This role was peculiar to Senior Chiefs Kwataine, Ntcheu, and Lukwa, Kasungu. Senior Chief Kwataine recounted that when his area was implementing the Women, Girls, HIV and AIDS Project between 2005 and 2006,¹⁶²⁵ he attended four meetings in Namibia:¹⁶²⁶

At one meeting, I was asked to speak about how I can advise community members to prevent HIV transmission through cultural practices. This awakened me to challenges such as polygamy, commonly practiced by Ngonis. So I asked at the meeting, 'if we continue to sustain this practice, will we indeed conquer HIV?' This is when the meeting agreed on the idea of developing community rules against polygamy. When I returned, I engaged my Chiefs, and we conceded that '*mitala ndi dyera chabe ndipo akazi amazuzika*'.¹⁶²⁷ Unfortunately community members disputed banning polygamy. Still, we developed bylaws to promote girl education.

¹⁶²⁴ Best English approximation would be 'child protection committees'. These committees conducted door-to-door advocacy, and reported incidents of child marriage to Chief Chitera for termination. However, Chief Chitera's role of actively mobilising Chiefs ended when GENET took over the process of formulating written community bylaws.

¹⁶²⁵ See note 1155.

¹⁶²⁶ Sponsored by the Ministry of Gender. The meetings were hosted in Namibia because the wife of Namibian President Pohamba was leading a Women and Girls HIV Taskforce in Southern Africa.

¹⁶²⁷ Best English approximation would be—'polygamy is just greed on the part of men; women get abused'.

Senior Chief Kwataine epitomises a Chief's interest to implement the recommendations of an international conference directly at grassroots, without relying on the NGO or government interlocutor. The fact that he won a Women Deliver award in 2009 intensified his resolve. He led the crusade for his community to ban marriages of those below the age of 21 years¹⁶²⁸ under the area's safe motherhood bylaws in 2009, long before child marriage was legislatively proscribed in 2015.

Senior Chief Lukwa's vending of international ideas is seen both in the adoption of 'HeforShe Bylaws on Girl Child Abuse' in his area, and in his claim that one of the two sets of bylaws in his area¹⁶²⁹ domesticates commitments that Chiefs made at an international conference in Kigali, Rwanda:

We sat down as community leaders, motivated to translate HeforShe at local level.¹⁶³⁰ So through our 2014 'HeforShe' bylaws, we decided to make our own commitments to ensure that girls return to school and we decided to impose village-based punishments against guilty teachers, parents, children and Chiefs. As for the 2015 bylaws, leaders who met in Kigali, Rwanda,¹⁶³¹ committed each leader (political, religious or traditional) to ensure that girls are in school regardless of the reason for dropping out, and that cultural obstacles to girl education are eliminated. We have domesticated these Kigali commitments.

While the 'domesticated Kigali commitments' are a verbatim version of the community bylaws in TA Mwanza's area in Salima, the Chief's purported self-drive to 'domesticate' and his impulsive use of the terms 'international law' and 'protocol' in our discussion reveals that his crusade for the bylaws to address cultural obstacles to the enjoyment of women's rights is also

¹⁶²⁸ This was later adjusted to 18 years in the community's 2012 bylaws to align with the internationally recommended age.

¹⁶²⁹ Dated 10 April 2015 and 15 June 2015 respectively.

¹⁶³⁰ 'Since HeforShe does not have sanctions', he explained.

¹⁶³¹ He quickly added that he did not attend the conference personally but that it was adopted at a Commonwealth Summit in 2014.

internationally inspired. Thus, in the process of crusading, Senior Chiefs/TAs raise legal consciousness, and recruit other crusaders (junior Chiefs and community groups, e.g. the GENET Committee in Senior Chief Chitera's area), who conduct advocacy-based consultations at village levels so that subjects can support and contribute to the development of community bylaws.

NGOs, the Ministry of Gender and donors are a national set of crusaders that have seized the opportunity provided by community bylaws to localise the implementation of gender equality statutes. As seen in this chapter, the Director, Ministry of Gender (with support from UN Agencies) convened national meetings targeting Chiefs and/or their spouses with the aim of lobbying for community bylaws to embrace human rights/legislative perspectives. They have also been urging the Ministry of Local Government to support the 'one bylaw framework' and to be an ally in promoting Chiefs' adherence to gender equality norms through District Councils. UN Women is even working directly with selected Chiefs. Plan Malawi has supported the Ministry of Gender to develop the National Strategy on Ending Child Marriage (2018-2023), which aspires to see 300 TAs adopt community bylaws prohibiting child marriage. This national category of crusaders has what vernacularisation scholarships calls 'double consciousness',¹⁶³² navigating between local, national and international platforms with different hats.

9.5.3 Grafters

Grafters identify local perspectives that should be dropped so that another perspective can be grafted onto community bylaws in order to strengthen the protection of women's rights. The main grafters in the context of the bylaws are state officials - the Magistrates/'experts' engaged by NGOs and the Ministry of Gender (as supported by donors). 'Experts' that have been

¹⁶³² See note 355.

engaged by NGOs to facilitate the vetting of community bylaws have ended up dropping bylaw provisions and fines deemed inappropriate, and grafting on ones that ‘align’ with legislation and human rights standards.

The Ministry of Gender and donors are also potential grafters, as they are currently working towards the adoption of a ‘one bylaws framework,’ which, if approved, would graft onto community bylaws the state’s multi-layered gender agenda.¹⁶³³ The Director of Social Welfare noted that through the framework, the Ministry intends to avoid conflicts that might arise between community bylaws and state law. The Programme Officer in the Department of Gender Affairs explained that, since 2016, the Ministry of Gender has been working with UN agencies (UN Women, UNFPA and UNAIDS) to develop the framework, trying to resolve weaknesses in community bylaws by proposing guidelines:

This framework is meant to guide traditional leaders and their subjects on the content and minimum penalties of community bylaws. We are also trying to address some of the challenges that have been observed in the implementation of the bylaws because we are aware that some of the penalties in the bylaws were violating human rights. For example, some would prescribe imprisonment for failure to send a child to school. Furthermore, where some of the challenges being addressed by the bylaws are already addressed in legislation, we want to ensure that the penalties that the Chiefs give will be related to legislation. So we are working through a task force¹⁶³⁴ to develop the framework.

¹⁶³³ The framework is addressing the following issues: early childhood development; primary and secondary school education; adult literacy; maternal, child and general health; child and forced marriages; GBV; harmful cultural practices; inheritance; land rights; child labour; human trafficking and humanitarian issues—‘Framework for the District Council Bylaws’ (Draft, 2017). On file with author.

¹⁶³⁴ Comprising key partners, namely: Ministry of Gender, Children Disability and Social Welfare, Ministry of Justice and Constitutional Affairs, Ministry of Civic Education and Community Development, Ministry of Local Government and Rural Development, representatives of both female and male traditional leaders, UN family (UNFPA, UN Women, UNAIDS), and representative of civil society. With time, some members representing the academia and other UN agencies were incorporated into the Task Force.

However, the development of the 'one bylaw framework' exposes several risks associated with grafting. First, the grafters may lose sight of the fact that the respect, power and authority of community bylaws is derived from the fact that they originate from communities seeking to take control of their pressing socio-cultural struggles. Section 9.4.1 suggests that through deflective translation, the community bylaws are subtly sidestepping state law because it is not relatable to how they would want to earnestly, but informally, uproot socio-cultural harms. It is doubtful that the prescriptive 'one bylaw framework' would be viewed in the same light. It could even muzzle the current zeal of communities to face their problems head-on, their way.

The second related risk is that the grafters may weaken legal pluralism, as they imbue the informal justice system with philosophies of the formal justice system. The consultant commissioned to finalise the framework validates these concerns, his opinion being that the effort 'is not a good idea since it may result in formalising the informal justice system'.¹⁶³⁵ The interviewed Programme Officer in the Department of Gender Affairs acknowledged that some District Commissioners are also uncertain about the framework, and their argument is 'that communities themselves should suggest principles that they would abide by. If the government imposes a framework on them, it would be difficult to enforce adherence'.

Thus, grafters could negatively impact on both norm internalisation and legal pluralism. For instance, grafters may bulldoze the style of norm

¹⁶³⁵ In his preliminary recommendations, he says 'the development of community by-law framework may not be a good idea as it may result in formalising the informal justice system and also that most of the issues covered by the draft community bylaw framework are comprehensively and substantively covered by the relevant pieces of legislation. Instead, there is a need to develop a booklet on all pieces of legislation dealing with matters highlighted in the draft community by-law framework' – William Yakuwawa Msiska, 'Preliminary Report on the Consultancy to Facilitate the Finalisation of the Community By-Law Framework, Submitted to The Ministry of Gender, Children, Disability and Social Welfare' (2019), 11.

internalisation that resembles the model of legal rationality, whereby there is an insistence that universal laws/models should apply to all cultures without minding cultural differences.¹⁶³⁶ Furthermore, they may sabotage the ‘open-endedness’ of legal pluralism, which allows informal mechanisms that promote women’s rights to work at a legal scale despite being outside the scope of formal law.¹⁶³⁷

9.5.4 Troopers

Since message framing in horizontal vernacularisation is on-going, troopers are those who conduct continuous purposeful investigations and awareness-raising, helping others to translate community bylaws into lived experience. Troopers in the study areas are special groups that support the ‘hands-on’ implementation of the bylaws (e.g. lower cadres of Chiefs, Mother Groups,¹⁶³⁸ GENET Committee,¹⁶³⁹ *Amai a chinsinsi*,¹⁶⁴⁰ and Back to School Committee¹⁶⁴¹). Troopers take the message to different sites and visit the sites where harmful practices are likely to be committed in order to promote bylaws compliance.

Regarding Chiefs as troopers, one of their roles is to sustain communication about the bylaws so that people do not slip up. They use various forums, particularly funerals:

At every funeral, the Chief has a slot to speak, and *mfumu imalakhula zonse zaku khosi kwake*¹⁶⁴². Therefore, we announce that nowadays, the village has a law prohibiting a child below the age of 18 years to get married and that anyone violating this law will answer at the Chief’s court. We do this to publicly declare both the problem and the consequences of fostering it.

¹⁶³⁶ See note 535.

¹⁶³⁷ See section 1.5 of the thesis.

¹⁶³⁸ Available in all study areas.

¹⁶³⁹ Chief Chitera’s area.

¹⁶⁴⁰ Chief Kwataine’s area, Ntcheu.

¹⁶⁴¹ Chief Lukwa’s area, Kasungu.

¹⁶⁴² Best English approximation would be ‘the Chief speaks everything on his/her mind’ [concerning the community].

Furthermore, Chiefs can visit the sites where harmful practices are typically committed to conduct dialogues. For instance, Chiefs have also been known to challenge clandestine practices at initiation camps. For example, Village Heads in Senior Chief Chitera's area said: 'we go to the initiation camp to talk to *anankungwi*¹⁶⁴³ to advise them of initiation instructions that are harmful to children and that should be changed. Sometimes *anankungwi* used to seriously beat up rude children – we have also stopped this'. Apart from educating counsellors on new norms, the Chiefs also regularly monitor whether initiation practices are aligned with community bylaws. YONECO's Executive Director reported that Chiefs in Machinga once burnt initiation camps that were secretly running during school time.

Troopers include women groups that help to enforce the community bylaws. For example, each study site had an organised group of women to ensure adherence to the bylaws. The women's 'Back to School Committee' in Senior Chief Lukwa's area said their main role was '*kusokola ana*'.¹⁶⁴⁴ they visit homes of girls who have dropped out of school. If the child drops out because of lack of school fees, they refer the case to the Chief, who requests the DC to provide a bursary. But if a parent says the child should stay home because she is troublesome, the women visit the home to counsel the child. If the child still stays home, the Senior Chief punishes both the Village Head and the Group Village Head for failing to make their subjects adhere to bylaws'. *Amai a chinsinsi* in Senior Chief Kwataine's area use one-on-one dialogues with girls and/or women to continue breaking down the community bylaws and supporting adherence. Mother Groups in all study areas also counsel and support girls in school environments. The Mother Group in Senior Chief Kwataine's area mentioned that they do undercover investigations and work with NGOs:

¹⁶⁴³ Best English approximation would be 'initiation counsellors'.

¹⁶⁴⁴ Best English approximation is 'hunting down children who dropped out of school and sending them back to school'.

We found out that a Chief's daughter was getting married. Our investigations revealed that she was between 16 and 17 years and pregnant and we confronted the Chief. Consequently, the marriage didn't take place and the girl returned to school after delivery. In another case, there was a 13-year-old girl who eloped to Mulanje with her boyfriend. We did our investigations and reported the matter to YONECO, who brought her back and returned her to school.

Troopers also physically withdraw children from marriages, stop the celebration of child marriages, and/or alert the Chiefs about impeding child marriages. The GENET Committee in Senior Chief Chitera's area reported, 'when a child who wants to get married is refusing our counsel, we take the case to the Village Head; if the parents/child are unbending, the case goes to the Group Village Head or even Senior Chief.' Though most troopers said they had not received structured human rights trainings, they draw from their appetite for change, the language of the community bylaws, and ad hoc human rights information obtained from community sensitisations conducted by NGOs or provided through various media sources.

9.5.5 Connectors

Connectors have strategic interests. They play the role of connecting different players that have sectoral or other expertise to the process of formulating community bylaws so that they can improve the quality of the bylaws from developmental, legal and human rights perspectives. The connector needs to be aware of community bylaws development processes in order to play his/her role.

Social welfare officials at district level are the key connectors of the government sector. The District Social Welfare Office is well positioned to play this role since it has Child Protection Officers in most TA areas or at least one at community level. These work closely with TAs, and are aware of

efforts that are being taken in different communities to develop community bylaws. Social welfare officials mobilise other district-level sectors with relevant expertise to help communities meet the objectives of the bylaws they are formulating. For example, an Assistant Social Welfare Officer in Chiradzulu explained: 'if people are making bylaws related to health/safe motherhood, we link them to a district health official to support them to make good bylaws'.

NGOs are also connectors since they bring external facilitators and other experts to the process. Section 9.4.2.4 has shown that NGOs can connect communities with lawyers, magistrates, and other relevant government officials at community and district levels.

Connectors sometimes deliberately cast the net wide so that strategic players involved in the formulation of the bylaws continue to support the implementation of the community bylaws after they are formulated. For example, a Third Grade Magistrate at Nyungwe Court in Karonga said that a group of stakeholders from the court, police, health, social welfare, community development, and NGOs operating in Senior Chief Mwirang'ombe's territory meet periodically with Chiefs to review the implementation of community bylaws because they were involved in their development. This not only ensures that the community bylaws have local authority and respect from community members and official stakeholders alike, but also that translation is on-going through collective reflections on how the bylaws are protecting human rights.

9.6 CONCLUSION

This chapter has shown that drivers of the community bylaws include Chiefs, government agencies, NGOs, donors and local women. It demonstrates the bicameral character of horizontal vernacularisation in that, in many ways, the

'local' is driving its own efforts to deal with harmful practices. The community bylaws originate locally, with Chiefs playing the roles of: mobilising other local decision makers and facilitating dialogues, selling international ideas to their communities, facilitating the empowerment of women to monitor the implementation bylaws, propagating the established community bylaws, enforcing/implementing the community bylaws, and fundraising, at times. Chiefs are depending on women within their communities as a resource to contribute to the contents of the bylaws, as well as monitor their implementation. Meanwhile, some communities are also working with NGOs, who are mainly playing the roles of facilitating community dialogues (problem identification), providing technical support to those formulating bylaws, influencing the language of the bylaws, and printing/launching the community bylaws. All this is mostly happening intuitively, interlocking, convolutedly, and iteratively - but still resulting in human rights appropriation and translation, whether consciously or unconsciously.

The chapter further displays that in some ways, there is also interaction between local and external players in the formulation (and at times the implementation) of the community bylaws. This is influencing and/or strengthening the appropriation and translation of human rights norms protecting women and girls from harmful practices. Five government agencies are involved in community bylaws. The Ministry of Gender (MoGCDSW), through its Departments of Gender Affairs and Social Welfare are the main players that have mobilised the Local Government to take the community bylaws agenda seriously since Chiefs fall under its mandate. MoGCDSW is particularly pushing for the 'one bylaw framework' to be implemented by District Councils (Local Government). For their part, Magistrates have found themselves as the legal experts in the communities where the community bylaws are being made, being relied upon to vet draft bylaws for their 'legal validity'.

Police VSUs' main roles have been to make presentations of state law/human rights at meetings and attending community bylaw launches. Unless it is a rape or defilement case, police generally give precedence to community bylaws over applying state law. Donors such as UN Women and UNFPA are also supporting community bylaws to complement government efforts to address harmful practices. UN Women has particularly been directly involved through its HeforShe campaign and its project involving selected TAs and Paramount Chiefs. Furthermore, together with UNFPA and UNAIDS, UN Women is technically supporting the development of the 'one bylaws framework'.

The nature of the respective roles being played by various drivers is introducing new understandings, translation patterns, as well as the type of vernacularisers that are involved in horizontal vernacularisation. In this regard the chapter makes several theoretical contributions to the thesis: 1) conceptualising horizontal vernacularisation, 2) illustrating that the concept recognises the local as another form of vernacularisation, and 3) illustrating that the concept departs from vernacularisation as a structured and unicameral concept, where there is a clear 'outside' programme to vernacularise human rights in a local community, with the locals being mere recipients.

The chapter further introduces five strategies for translating human rights and statutory norms that are being exhibited by the community bylaws. Out of these, deflective translation/deflection, socialisation,¹⁶⁴⁵ customarisation, augmentation and reverse augmentation are unique to the bylaws phenomenon, while simplification, and hybridisation are adapted from vernacularisation. Through deflection (which cuts across the other strategies), community bylaws are deliberately, or at times not, borrowing from human

¹⁶⁴⁵ Although the concept itself is used in a different context in norm diffusion scholarship. However, it has not yet been applied in vernacularisation scholarship.

rights and legislative norms, while deflecting statutory punishments and opting for locally familiar punishments (*chindapusa*). Customarisation is sparked by the Chief-led and protection basis of the community bylaws. This has seen legislation and the notion of 'women's protection' being customarised so that cultural sites can be safe for women and girls, and truly facilitate their development.

During simplification, communities are innovatively using local images and symbols through the use of *Gule Wamkulu*, drama, actual stories, and 'house billboards'. Thus, simplification is transcending community bylaw making, and moulding local practice. Socialisation is happening experientially, through 'Chief to Chief', and 'Chief to Government' interactions. Thus, socialisation can unfold locally beyond the 'state-to-state' engagement described in norm diffusion scholarship. Augmentation is providing a direct entry point for human rights appropriation and translation, and being facilitated by outside 'experts' with the intention of strengthening bylaws from statutory and human rights perspectives. Lastly, hybridisation is exposed when the community bylaws embrace features that are present in formal state mechanisms.

The chapter ends with an exposition of conceptualising who vernacularisers are in the context of the community bylaws and horizontal vernacularisation. There are five types of vernacularisers: converters (NGOs and Government Officials); crusaders (the main ones of which are Senior Chiefs/TAs, followed by national level crusaders (Ministry of Gender and NGOs); grafters (the 'experts' that amplify community bylaws, but also the Ministry of Gender and who are formulating the 'one bylaw framework' and UN agencies supporting the work); troopers (lower cadres of Chiefs and special community/women's groups that physically move across cultural sites to ensure compliance); and connectors (District Social Welfare officials who connect different government sectors to bylaws formulation processes; but also NGOs who bring to the

process other players as facilitators and experts).

These (re)conceptualisations, as summarised in Figure 2 above, attest to the fact that horizontal vernacularisation is not as structured as other vernacularisation programmes and is multidimensional. The local is very involved along with external actors in horizontal vernacularisation, with Senior Chiefs/TAs, being particularly engaged at several translation points compared to the rest of the actors.

CHAPTER 10

CONCLUSION AND RECOMMENDATIONS

10.1 THESIS QUESTION AND OBJECTIVES

This thesis set out to examine how international human rights norms for protecting women and girls from harmful practices have influenced and shaped the emergence and conceptualisation of community bylaws on child marriage and other harmful practices in rural Malawi. There is a dearth of scholarship on the topic of community bylaws on harmful practices. This thesis fills this gap by providing an understanding of the role that these bylaws play in internalising international human rights norms for protecting women and girls from harmful practices and how they relate to the existing theories of norm diffusion of international human rights. The thesis has drawn on empirical data from four study sites: the areas of Senior Chiefs Chitera in Chiradzulu, Kwataine in Ntcheu, Lukwa in Kasungu and Mwirang'ombe in Karonga, where community bylaws have been adopted and implemented for some time.

The thesis had four objectives:

- a) to explain the factors influencing the emergence and use of community bylaws to ensure the protection of the right of women to be free from harmful practices;
- b) to examine the relationship between the community bylaws and African customary law within the broader context of legal pluralism;
- c) to understand how the community bylaws and harmful practices (within the bylaws) are being conceptualised, and the extent to which

such conceptualisation is consistent with and/or influenced by domestic and international human rights law; and

- d) to contribute to the theoretical discourse on norm internalisation by assessing and testing if the phenomenon of community bylaws is revealing other vernacularisation concepts that are at play when culture/custom is the action ground.

10.2 KEY FINDINGS

10.2.1 Factors Influencing the Emergence and Use of Community Bylaws

a) Community bylaws have existed orally in the past

The thesis has established that community bylaws on harmful practices in Malawi have existed in oral form from around 1994, while written community bylaws have gained traction since around 2010, coinciding with the period when government enacted several gender statutes.

b) The community is the main source and author of community bylaws

One of the essential features of community bylaws is that they are developed under the leadership of Senior Chiefs or TAs in collaboration with lower tiers of Chiefs (Group Village Heads and Village Heads) in order to address harmful practices that a community has itself found to be problematic. Thus, despite the involvement of external actors in later stages of their adoption, community bylaws are owned, used and primarily enforced by rural communities: the communities adopt them out of their own conviction that there are internal cultural problems worth solving through their own initiative.

The community bylaws rely on a wide range of enforcement mechanisms including social pressure, community investigations and self-help, traditional penalties, community education and, sometimes, formal justice mechanisms,

such as the police and magistrates courts, all of which renders them more relatable and accessible and therefore more enforceable than formal laws. Through these bylaws, Chiefs and community members are engaging in the reconstruction of their cultures in a fashion strongly resembling human rights appropriation, though they may initially do this unconsciously (implied appropriation), but in more innovative and engaged ways than is assumed by proponents of norm diffusion of international law.

c) The processes of formulating community bylaws are laden with layers of horizontal vernacularisation

The thesis has shown that processes for formulating community bylaws have heavy community footprints, although some collaboration between Chiefs, their subjects and external (human rights) actors also occurs. Thus, horizontal vernacularisation is manifested in the fact that the decision to formulate community bylaws is not primarily moved by the desire to implement externally developed/funded projects, or to promote state and human rights norms regarding harmful practices/gender equality, though the latter becomes a significant secondary consideration eventually. Furthermore, as noted below, the various stages of formulating community bylaws reveal that horizontal vernacularisation deploys unique strategies of translating human rights ideas and vernacularisers.

10.2.2 Relationship Between the Community Bylaws and African Customary Law

- *The community bylaws are living law*

The thesis has interrogated the legal character of the community bylaws in order to appreciate the relationship between the community bylaws and African (living) customary law and other laws. It has established that although respondents generally consider community bylaws to be valid law, community bylaws do not easily form part of Malawi's formal legal scheme,

at least at the constitutional level. However, the community bylaws can become formal law if they are formulated under the auspices of District Councils in accordance with the Local Government Act. Without this process, in their current state, the term community 'bylaws' itself is unstable.

Nevertheless, in the context of legal pluralism, the community bylaws can be said to have some legal effect. The findings demonstrate that the community bylaws are uprooting harmful customary laws and practices and establishing cultural values that protect women and girls, as communities intuitively respond to socio-economic and legal changes. They are a rupture of patriarchal customary law, and 'remote' formal law. The communities accept them as legally binding laws and enforce them as such. Oral community bylaws, which are mostly known by Chiefs and their subjects, bear the hallmarks of living customary law. It could be argued that written community bylaws do not form part of 'living customary law', but the form they take makes little difference in practice. The communities make no distinction between oral and written bylaws and the practice of reducing these laws to writing is more recent and externally driven than it is a requirement for valid community bylaws. The unwritten and written forms of community bylaws operate side by side and interrelate in ways that do not permit easy separation.

10.2.3 Conformity Between the Conceptualisation of Community Bylaws and Domestic/International Human Rights Law

As part of understanding the legal character of the community bylaws, the thesis has examined international human rights law and jurisprudence, as well as domestic policies and laws on harmful practices and applied these to how community bylaws generally, and harmful practices particularly, are being conceptualised. The conclusions are as follows:

a) International law and jurisprudence show preference for formal interventions to informal mechanisms

Despite that community bylaws are being relied upon to eliminate child marriage and other harmful practices in rural Malawi, informal measures are at the margins of the strategies that international and domestic frameworks recommend for states to take in order to internalise human rights norms. As a result, the recommended measures are mostly legislative and administrative, and do not easily facilitate the localisation of human rights norms to grassroots settings. Notably, international jurisprudence has generally been mistrustful of informal and customary justice systems. Although some recent jurisprudence now recognises that plural and informal mechanisms (including customary law) have a role to play in promoting women's rights, this recognition is still guarded, and the expectation is that plural systems should merely codify CEDAW standards.

The jurisprudence also promotes the impression that vernacularisation only proceeds from without, and that 'the local' is only a mere recipient of human rights interventions that are conceptualised elsewhere by 'elite' outsiders. The bulk of the jurisprudence positions traditional leaders as targets of human rights awareness and education. In turn, traditional leaders are expected to adapt traditional norms to fully comply with international norms. This conventional approach to norm diffusion of international human rights reflects the notion of vertical vernacularisation, which denies rural communities' agency to think for themselves and take part in the construction and implementation of human rights. This thesis has shown that 'the local' is also engaged in the reinterpretation of human rights norms in ways that enriches the discourse and expands the possibilities for the implementation and enforcement of human rights.

Even though some jurisprudence is starting to recognise the role of traditional leaders in conceptualising and implementing women's rights programmes, it

remains to be acknowledged that traditional leaders and ‘the local’ are in themselves a cradle of horizontal vernacularisation as seen in the community bylaws phenomenon.

b) There is gulf between legislation and rural people

The 1994 Constitution, through its Bill of Rights, has specifically internalised the norms protecting women women’s rights and from harmful practices, culminating in the enactment of legislation on child protection, domestic violence, inheritance, gender equality, marriage, human trafficking, and HIV, between 2006 and 2017. These statutes have, to a large extent, appropriated international human rights standards, although they have at times also re-interpreted some of them.

However, the thesis has observed that the internalisation of human rights norms through legislation has been inadequate, since legislation has not had any impact on rural areas. To a large extent, domestic policy and legislation mirrors the unicameral view that vernacularisation is facilitated by epistemic outsiders who have human rights programmes that target the ‘local’. This approach does not position ‘the local’ as a source of its own interventions to address harmful practices. Through community bylaws, rural people spark second-level norm internalisation, thus launching the concept of ‘horizontal vernacularisation’. This pursuit is coinciding with government’s priorities to promote girls’ education (including by eliminating child marriage), safe motherhood, and to address various drivers of gender inequalities.

c) The community bylaws display the appropriation of and division from human rights norms

- *Conceptualisation of harmful practices*

Most of the harmful practices identified by international jurisprudence are addressed by the range of community bylaws reviewed in this thesis.

Marriage before the age of 18 years is outlawed without the exception allowed by CEDAW and CRC jurisprudence. Some community bylaws also impose sanctions on those who traditionally approve or officiate child marriages in accordance with requirements of international jurisprudence.

However, in some respects, the community bylaws fail to shake off the yoke of patriarchy and thus fail to prohibit some internationally recognised harmful practices. As with state law, they fail to recognise *lobola*/bride price and polygamy as harmful practices, contrary to what international jurisprudence expects. Community bylaws accept levirate marriages/*chokolo* on condition that the parties involved should undergo HIV testing, despite international jurisprudence calling for the complete elimination of levirate marriages. The conditional acceptance of *chokolo* (and even the general ban of *chokolo* in some bylaws) purely on HIV grounds remains an affront to gender equality. It could also be argued that some of the enforcement mechanisms and remedies compromise human rights standards. In addition, some forms of rape/defilement (e.g. *kusasa fumbi*, *kulowa kufa*, *mbiligha*, *kupimbira*) are still permitted by some bylaws.

Some sanctions such as *chindapusa*, forcing a married child to return home by detaining parents, banishing a perpetrator from the community, denying a perpetrator farming land, and submitting violators of bylaws to community sanctions and criminal prosecution, can be harsh, disproportionate and inconsistent with some key rights.

Despite these shortcomings, as dynamic and living laws, community bylaws reflect a mix of the old and new, a revaluation of traditional practices and values as communities interact with other communities, cultures and received norms. In some respect, the thesis has shown, the community bylaws have been quite radical and more ambitious than formal law.

- *General conceptualisation of community bylaws*

There is no doubt that community bylaws generally incorporate international human rights norms. First, the community bylaws are transforming entrenched cultural beliefs and values that have had negative impacts on community development, and replacing them with values that express greater respect for girls' education, community health and safe motherhood, and for women's/girls' dignity and equality with men in general. Thus, the community bylaws being adopted are meant to address obstacles to these human rights inclined new values.

Second, to a large extent, most community bylaws are advancing key principles of women's and children's rights under both the Republican Constitution and international law, namely gender equality and non-discrimination (women's rights); and non-discrimination, the best interests of the child, children's right to survival, development and protection/life (children's rights). Upholding principles of gender equality and non-discrimination is evident since some of the community bylaws are gender transformative, and have high potential to substantively address social inequalities by: specifically promoting equality between girls and boys (in education, employment, businesses, household chores); utterly uprooting child marriages; ensuring that both girl and boys, including those that dropped out, are in school; prohibiting marital rape and property dispossession of widows and children; and promoting male involvement in safe motherhood efforts.

In upholding the cardinal principles of children's rights, all reviewed community bylaws are promoting 'the best interests of the child 'by not allowing child marriage in any circumstance (and requiring young mothers to return to school); treating rape/defilement as criminal matters; and banning harmful initiation practices (few bylaws even treat entrenched harmful practices such as *kusasa fumbi* as rape). Some community bylaws also sanction

GBV in schools, as well as fathers who financially and emotionally neglect their children.

The principle of children's right to survival, development and protection/life is being promoted by the emphasis that the community bylaws are placing on eliminating harmful practices broadly (most of which are detrimental to children's health); as well as promoting children's education in general, and girls' education in particular. Additionally, the bylaws barring cultural practices such as *kupimbira* and child marriage in *lobola* paying areas are protecting girls from economic exploitation. Girls are further protected from sexual exploitation by community bylaws proscribing entrenched practices such as *kusasa fumbi* and *bulangete la mfumu*. However, most bylaws do not promote sexual and reproductive health rights of girls.

d) The community bylaws are critiquing some international approaches

When measured against the criteria for 'harmful practices' under CEDAW and CRC jurisprudence, maternal health practices that are regarded harmful practices in the study communities do not meet those stringent criteria. The community bylaws are challenging the way that the jurisprudence narrowly conceptualises the 'traditional root criteria' in establishing harmful practices, and calling for a broader perspective that does not only focus on the patriarchal causes of traditional practices but also focus on unintended discriminatory or violence-related consequences of some seemingly 'innocent' traditional practices.

Second, the thesis has established that the community bylaws are reconceptualising 'child marriage victim' and challenging the position of international jurisprudence that 'child marriages are automatically forced marriages'. By punishing 'girls who rush into marriage' (beyond punishing the man involved) some study communities recognise the reality of the 'stubborn and rebellious girl' who throws herself into marriage, and who

does not deserve the victim label. These communities insist that, depending on her age, such a girl not only has to be withdrawn from such marriage but also deserves to be sanctioned as a deterrent.

10.2.4 Theoretical Contributions to Norm Internalisation Theory

Additional to what has been noted under section 10.2.2, the thesis has shown that a valid claim cannot be made that the practice of community bylaws merely reflects the traditional understanding of vernacularisation, whereby the *process* of transmitting norms to local destinations is triggered by epistemic outsiders. Horizontal vernacularisation does not mean that a local community is not engaged in norm contestation. Rather, it is process-focused, and demonstrates that local communities and their chiefs too (whether alone or in intricate relationships with epistemic outsiders) can also actively initiate vernacularisation. This is because in the process of appropriating (and even re-negotiating) international and statutory norms, there is significant locally initiated horizontal engagement among local peers and across peer communities; as well as vertical engagement with outsiders. It is therefore more accurate to speak of both vertical and horizontal vernacularisation in describing the relationship between international human rights norms on harmful practices and community bylaws. This bicameral understanding of vernacularisation recognises that the catalyst for appropriation and translation of human rights norms can arise from both outside and within a local community. This bicameral process of vernacularisation makes use of multiple translation strategies and vernacularisers.

a) Translation strategies

While the thesis has demonstrated that the strategies of simplification and hybridisation have been utilised in vernacularisation, it has also demonstrated that the rest of the strategies are peculiar to horizontal vernacularisation.

- *Deflective translation/deflection*

Through deflection, communities are consciously or unconsciously applying legislative human rights ideologies to create positive meanings of their cultural practices through ‘rules’ that promote women’s rights, and yet deflecting legislative punishments by opting for culturally resonant penalties. Deflective sanctions in rural areas such as *chindapusa* are valued as being: ‘a primary solution’ that nips socio-cultural practices in the bud, which the state is finding problematic; ‘inherently deterrent’ because subjects hardly oppose Chiefs and poor people would rather comply with bylaws than face local sanctions; ‘transformative’ because perpetrators would rather take a second chance and reform locally than eventually face harsh legislative penalties; and ‘filling legal gaps’ where some harmful practices are not clearly penalised by legislation.

- *Customarisation (of women’s protection)*

Through ‘customarisation’, Chiefs lead their rural communities in a process of introspective and negotiated retracing and filtering of their customary norms, beliefs and values in order to strengthen the protection of women and girls in cultural spaces. Thus, by rejecting ‘handed down’ traditions, the ‘customary’ is troubleshooting its own culture by customising tradition and adopting values that reflect human rights and legislative norms. This is being done through village-based sanctions; establishing mechanisms of dealing with defiant perpetrators or potential resistance to the bylaws; and institutionalising women’s protection mechanisms within the structure of Senior Chief/TA.

- *Simplification*

In horizontal vernacularisation, simplification as a strategy of framing human rights ideas is ‘done by locals for locals’. The community bylaws use local frames such as *Gule Wamkulu*, drama, real community stories and ‘house bill

boards' to simplify and communicate human rights and development ideas in ways that are persuasive to both literate and illiterate subjects without necessarily using human rights language. The study communities have not only used simplification to conceptualise their bylaws, they have also knowingly or reflexively established human rights as local practice.

- *Socialising*

There is a dual occurrence of translation of human rights norms in the practice of community bylaws: through Chief-to-Chief interaction, and at sectoral level (e.g. between Ministries of Gender and Local Government). Thus, in horizontal vernacularisation, the 'socialiser' and 'socialisee' are local/grassroots players, and the 'socialiser' does not have to be transnationally savvy. Chief-to-Chief socialisation is experiential, whereby the socialisers (Chiefs) showcase vivid changes that community bylaws have triggered in their areas, in turn inspiring socialised Chiefs to lead cultural changes in their own communities. However, at sectoral level, the thesis has shown that the 'socialiser' and the 'socialisee' may have different priorities and this could delay the pace of appropriation of human rights interventions by the 'socialisee'.

- *Augmentation*

Augmentation concretises the appropriation and translation of human rights in community bylaws. This is seen when NGOs and other 'experts' (from the police, court and social welfare) visibly participate in the process of formulating community bylaws, and influence legislative/human rights considerations in the bylaws, e.g. by providing human rights training to those who are involved in formulating the community bylaws; and/or by making human rights presentations that help to fine-tune bylaws.

Augmentation also influences the language of the community bylaws when 'experts' (e.g. Magistrates and lawyers) are invited to comment on the 'the

legal soundness' of draft bylaws, and suggest changes. One challenge with augmentation is that NGOs may claim credit for the formulation of bylaws in an area, say for funding purposes.

- *Reverse augmentation*

Reverse augmentation has occurred when Chiefs and their community bylaws have influenced/strengthened national level human rights programming within the Ministry of Gender. For example, the Ministry has officially adopted the community bylaw model as a strategy for addressing harmful practices. This is most evident in the National Strategy on Ending Child Marriage (2018-2023). Some NGOs have promoted the community bylaws concept in their project areas.

- *Hybridisation*

Hybridisation (mixing the 'local' and the 'exotic') is visible through the written texts of the community bylaws; adding signatures of Magistrates to bylaws (to symbolise 'legal validity'); distributing copies of bylaws to various formal institutions; and using concepts that are found in formal law such as 'Community Parliament', 'Community Speaker', and 'bylaws'.

b) The vernacularisers

Unlike in conventional vernacularisation discourse, whereby first-level vernacularisers are epistemic outsiders, and second-level vernacularisers are sometimes locals who have been trained by first-level vernacularisers (to fulfill a vernacularisation agenda in a local community), horizontal vernacularisation exhibits a strong presence of 'inside'/community first-level vernacularisers. These may act alone or interact with other human rights players/platforms. Thus, in horizontal vernacularisation, vernacularisers are both native insiders and epistemic outsiders. Second, the thesis has established that only 'converters', out of the six types of vernacularisers

discussed below, are also identifiable in 'vernacularisation' discourse, while the rest are unique to 'horizontal vernacularisation'.

- *Converters*

The thesis has shown that vernacularisation scholarship describes 'converters' as those who persuade their clients to start appreciating their challenges from a human rights context. NGOs and state officials play this role in the community bylaws phenomenon when they are involved in some stages of formulating community bylaws. Agencies such as UN Women are softly playing the role of converter by working with selected Chiefs. Though important, converters do not determine whether or not community bylaws should be adopted, but they mostly help to spice the community bylaws with human rights flavor (augmentation).

- *Crusaders*

Senior Chiefs are the first set and primary crusaders that imagine, initiate and lead efforts that convince other local decision makers about the need for paradigm shifts in local culture. They rope in lower cadres of Chiefs/ADCs as secondary crusaders in the crusade to address harmful cultural practices through community bylaws. As crusaders, the Senior Chiefs can also be vendors of international ideas, taking good ideas they have encountered from human rights platforms to their communities.

The second set of crusaders is NGOs, the Ministry of Gender and donors who, operating at national level, have seen the community bylaws momentum as an opportunity for localising the implementation of gender-related statutes. These actors convene high-level meetings for Chiefs; agitate for the adoption of a 'one bylaw framework' to be used by Chiefs and District Councils in formulating bylaws that promote specific gender equality standards; and promote the National Strategy on Ending Child Marriage among TAs.

- *Grafters*

Magistrates and sometimes lawyers (as 'experts' engaged by NGOs) and the Ministry of Gender (supported by donors) serve as grafters who identify local perspectives that should be dropped in order for other perspectives to be grafted onto community bylaws in order to 'align' the bylaws with legislation and human rights standards. At community level, 'experts' vet draft versions of community bylaws and make changes as appropriate. As noted above, the Ministry of Gender and donors are (controversially) promoting a 'one bylaws framework', which, if approved, would graft onto community bylaws various pieces of legislation aimed at promoting women's and children's rights. The thesis has noted that national grafters can negatively affect norm internalisation and legal pluralism by imposing universal provisions, thereby diluting the contextual and problem-driven character of community bylaws.

- *Troopers*

The thesis has argued that troopers conduct continuous purposeful investigations and awareness-raising and quicken others, particularly in sites where harmful practices are likely to be committed, to follow the community bylaws. Troopers are lower cadres of Chiefs who take information to initiation camps and community gatherings, such as funerals. Troopers are also special women/community groups who are designated to physically withdraw children from marriages, stop the celebration of child marriages, alert the Chiefs about impending child marriages, and conduct one-on-one sensitisations with perpetrators/potential perpetrators.

- *Connectors*

The thesis has shown that connectors strategically play the role of connecting communities that are formulating bylaws to different players that have sectoral or other expertise in order to improve the quality of the community bylaws. The main connectors are district level Social Welfare officials, who

bring in government officials from other sectors that are relevant to the objectives of the bylaws. NGOs also connect lawyers, Magistrates, and other relevant government officials to the process. Some of these players, particularly those at area level, may continue to support the implementation of the community bylaws after adoption. This makes translation continuous, as there is regular reflection about how the bylaws are promoting human rights.

c) From vertical to horizontal vernacularisation

Therefore, applying the model of vernacularisation as the analytical framework, the thesis has demonstrated that the appropriation and translation of international human rights norms in the community bylaws phenomenon is not simply occurring as ‘vernacularisation’, but as ‘horizontal vernacularisation’. This is because human rights appropriation and translation in the community bylaws phenomenon is blurry and unconventional as the bylaws sprout in a continuum of interlocking, convoluted, iterative, and intuitive processes within a predominantly local-local dialogue (although other human rights programmes or actors may get involved at some point). Thus, horizontal vernacularisation acknowledges that vernacularisation happens bicamerally, whereby ‘the local’ can be one source of vernacularisation in addition to the other typically known source whereby vernacularisation is driven by external programmes and actors.

10.3 RECOMMENDATIONS

10.3.1 Policy Recommendations

The thesis has demonstrated that the first thing that needs to be clarified is whether these community rules should be called ‘bylaws.’ The use of this legal term of art poses technical challenges for efforts to address child marriage and other harmful practices in rural areas. The broader term

'community laws' is less controversial and could better describe the status of these laws in the context of a plural legal system. The Ministry of Local Government and Rural Development could promote the use of this less controversial legal term through its work with Chiefs. Alternatively, since the community bylaws could easily translate into valid formal law by processing them under the Local Government Act, NGOs should support Chiefs that are keen to take this route in order to protect their bylaws from potential legal challenges.

Malawi has no clear policy on the use of community bylaws in rural communities. Instead of loosely welcoming the use of these bylaws, government officials and lawmakers need to engage in a discussion regarding how they should utilise the community bylaws to measure national gender equality indicators, especially through decentralisation structures. This would make the bylaws relevant not only as a cultural mechanism, but also as a device for achieving overarching policies such as the MGDS III and its successors. By the same token, since the thesis has exposed the power that Senior Chiefs hold in concretely supporting the government's socio-economic objectives, government could capitalise on this local asset by supporting Chiefs with information and problem identification skills, and letting them drive community laws even in other sectors (e.g. issues of population control, and environment).

While some oversight of the bylaws is necessary to reinforce transparency and human rights compliance, the state's oversight strategies should not stifle the autonomy and agency of the communities in responding to their most pressing cultural challenges. This means that universal frameworks such as the 'one bylaw framework' should not be imposed on communities since the community bylaws derive their usefulness from having grassroots legitimacy. Government should be mindful that a District Council book of bylaws that has been generated from the 'one bylaw framework' would smother the

rationale behind, and the usability of community bylaws, and should tread strategically if it is adamant to introduce the framework.

The thesis accepts that within the discourse of horizontal vernacularisation, some Chiefs have been persuaded to adopt community bylaws after being exposed to various human rights platforms and learning visits where they have socialised with other Chiefs who are advanced in implementing community bylaws. National strategies that are seeking to utilise community bylaws as a mechanism for addressing child marriage and other gender inequalities should capitalise on these strategies, particularly ensuring that Chiefs who are illiterate or have basic literacy are not left behind.

10.3.2 Recommendations for Future Research

a) Research on community bylaws

The thesis has contributed to academic scholarship by: empirically positioning community bylaws and highlighting the activist role of Chiefs in harmful practices; applying norm internalisation/vernacularisation theories to grassroots and Chief-led community bylaws; and proposing 'horizontal vernacularisation' as a new concept that explains events in community bylaws that cannot be clarified by existing understandings of 'vernacularisation'. However, since community bylaws for promoting women's rights are an acutely understudied area, the findings of the thesis call for further studies to strengthen scholarship.

The thesis has only accounted for the 'emergence and conceptualisation' of community bylaws on child marriage and harmful practices. There is need for further interrogation of the effectiveness of these bylaws in order to have tangible evidence of the potential that the community bylaws have in eliminating child marriage and other harmful practices. Second, beyond the topics of child marriage and harmful practices, community bylaws address

many other issues (such as transport, education, health, sanitation, disability, and environment). The way these other bylaws are emerging and being conceptualised need to be understood too, particularly from a gender perspective.

While the thesis has argued that horizontal vernacularisation is at play in the practice of community bylaws, there is the need for another study to test if the same conclusion would apply to communities where their bylaws are not working well. These could be areas where they have bylaws that were adopted due to NGO projects and initiatives, and yet TAs or Senior Chiefs are not seriously championing the implementation of such bylaws.

Districts such as Mangochi and Dedza have adopted District Council bylaws related to gender equality that apply universally to the whole district. A study could be conducted to understand how these community bylaws are working in different TA areas. The implementation of these District Council bylaws could also be compared to community bylaws that are purely driven by Senior Chiefs/TAs outside District Council mechanisms.

Recognising that community bylaws on child marriage and other harmful practices are not only mushrooming in rural Malawi, there is a need to understand how similar community laws work in other countries in the SADC region. Lastly, further studies could apply other analytical frameworks in order to better understand the phenomenon of community bylaws. Such other models include legal pluralism, modernity, restorative justice, governance, dispute resolution, cultural movement and gender theories.

b) Other research

The thesis provokes the question: if communities are relying on their own bylaws to address child marriage and other harmful practices despite the existence of legislation on these issues, what has legislation achieved in

practice? Therefore, there is need for more research to understand how the measures prescribed by each piece of gender-related legislation in Malawi has worked in practice, and use the findings to shape policy and legislation.

For those interested in studying the agency of chiefs in greater detail, they could explore questions such as: what happens to chiefs if they do not sanction violence against women? Does the chieftdom suffer? What about questions of counter hegemony?

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ANNEX: DATA COLLECTION PROTOCOLS

Annexure 1: Interview Protocol: Traditional Authorities

[To be administered in Chichewa]

1. Explain to me about community bylaws in general in this area: what issues do community bylaws cover? What form are they in? How are they negotiated, how are they adopted?
2. I am interested in harmful practices:
 - Are you aware of any harmful practices?
 - What kind of practices may be harmful here?
 - What is the best way to deal with harmful practices?
 - Why is it necessary to deal with harmful practices anyway, if at all?
3. How have you regulated harmful practices before?

Probe: Considering how you and your Chiefs have ordinarily used customary laws to resolve problems, where would you say the community bylaws fit? If they are not embedded in any 'legal' ordering, can they have impact?

4. Tell me about the first time you ever heard about the phenomenon of the community bylaws to address harmful practices, and what has been your approach for your TA area to have these community bylaws?

Probe: What necessitated the introduction of the community bylaws despite the existing practices? Who is really pushing for these community bylaws and why? Did the enactment of national legislation have anything to do with your community bylaws? What about human rights consciousness? Does each Group Village Head (GVH) have community bylaws – are they uniform across GVHs or not?

5. Reflecting on your earlier account of how the community makes its community bylaws in general, how are you personally involved? Who has been involved? At what stage? And why?

Probe: How have women been involved? How are women's voices given serious consideration? How are the community bylaws adopted? How are they communicated to the community?

6. What are your expectations regarding what goes into the community bylaws?

Probe: Do you have any expectations about the type of language that should be used and the issues that should be included in the community bylaws? How do you ensure that your expectations are met? Who has a final say about the content and language in the community bylaws? Is adherence to human rights language or legally correct language important in this process? Why?

7. What is the goal of the community bylaws – is it (a) to simply modify some practices (which ones and why?) or to (b) completely eliminated practices (which ones and why?). Why is the community taking these different approaches?

Probe: Are there any other practices that are harmful but have not gone into the community bylaws? Why? How should such practices be addressed?

8. Tell me how the bylaws are sitting with gender equality laws and the Constitution. For example, the Gender Equality Act (GEA) says ‘outlaw all harmful practices and fine/arrest perpetrators.’ The inheritance law says the same about property dispossession. With the community bylaws, how will the GEA, for example, have teeth in practice? (or aren’t the community bylaws sabotaging the intents of state laws in practice?).

Probe: What are the risks that community bylaws will grow apart from the gender equality laws and the Constitution? Can a victim obtain a remedy? What takes precedence between state law and the community bylaws (for example in the community, are the community bylaws regarded as laws of first instance before a victim has recourse to state law)?

9. What do you think the communities feel about these community bylaws? Do they obey/support them?
10. Some people may say: ‘projects/government are just pushing TAs to adopt these community bylaws but it is doubtful if the TAs really believe in these community bylaws, and whether the community bylaws will endure beyond projects; most Chiefs, especially Group Village Heads and Group Village Heads are just being compelled to go along with the community bylaws; and the community bylaws are not even being taken seriously as law on the ground...’ **Where are such sentiments wrong or right?**

Annexure 2: Interview Protocol: Group Village Headpersons and Village Headpersons

[To be administered in Chichewa]

1. Explain to me about community bylaws in general in this area: what issues do community bylaws cover? What form are they in? How are they negotiated, how are they adopted?
2. I am interested in harmful practices against women and girls:
 - Are you aware of any harmful practices?
 - What kind of practices may be harmful here?
 - What is the best way to deal with harmful practices?
 - Why is it necessary to deal with harmful practices anyway, if at all?
3. How did you regulate these harmful practices before?

Probe: What are these community bylaws superseding? If you had rules in place why didn't you develop them further instead of introducing the community bylaws?

4. What do you know/understand about the community bylaws to eliminate harmful practices in this area and how/why they have emerged?

Probe: When did they emerge? Are these Group Village Head specific community bylaws or for the whole TA? Did the enactment of national legislation have anything to do with the community bylaws? What about human rights consciousness? What role have you played/do you have relating to these community bylaws? Who else has been involved at what stage and why? How have women been involved? How are women's voices given serious consideration? How are the community bylaws adopted? How are they communicated to the community?

5. What are your expectations regarding what goes into the community bylaws?

Probe: Do you have any expectations about the type of language that should be used and the issues that should be included in the community bylaws? How do you ensure that your expectations are met? Who has a final say about the content and language in the community bylaws? Is adherence to human rights language or legally correct language important in this process? Why?

6. What is the goal of the community bylaws – is it (a) to simply modify some practices (which ones and why?) or (b) to completely eliminate practices (which ones and why?). Why is the community taking these different approaches?

Probe: Are there any other practices that are harmful but have not gone into the community bylaws? Why? How should such practices be addressed?

7. Tell me how the bylaws are sitting with gender equality laws and the Constitution. For example, the Gender Equality Act (GEA) says 'outlaw all harmful practices and fine/arrest perpetrators.' The inheritance law says the same about property dispossession. With the community bylaws, how will the GEA, for example, have teeth in practice? (or aren't the community bylaws sabotaging the intents of state laws in practice?)

Probe: What are the risks that community bylaws will grow apart from the gender equality laws and the Constitution? Can a victim obtain a remedy? What takes precedence between state law and the Community bylaws (for example in the community, are the community bylaws regarded as laws of first instance before a victim has recourse to state law)?

8. What do you think the communities feel about these community bylaws? Do they obey/support them?
9. Considering how you have ordinarily used customary laws to resolve problems, what is your opinion on how the community bylaws sit with customary law?

Probe: have the community bylaws made things easy or difficult?

10. Some people may be sceptical about whether this is real law, or about the whole notion of community bylaws. What is your opinion?

Probe: do you really believe in these community bylaws? Are they even seen as real law here? Do you think there is shared enthusiasm towards the community bylaws amongst Chiefs in the area (or community members)? What do you think about what the TA is doing? Who is really pushing for these community bylaws – insiders or outsiders?

Annexure 3: Interview Protocol: Local Women

[To be administered in Chichewa]

1. I am interested in harmful practices:
 - Are you aware of any harmful practices?
 - What kind of practices may be harmful here?
 - What is the best way to deal with harmful practices?
 - Why is it necessary to deal with harmful practices anyway, if at all?
2. Do you know about the community bylaws for addressing harmful practices affecting women and children that exist in your area?

Probe: How did you know about the community bylaws? How are women involved in the formulation processes? Are women involved in commenting on any drafts? Are they involved in the implementation process? Which groups of women?

3. Do the community bylaws represent women's concerns about harmful practices?

Probe: Are there any other practices that are harmful but have not gone into the community bylaws? Why? How should such practices be addressed? Did you/women have any expectations about language and issues that should go into the community bylaws when they were being formulated? How did you/women identify this language or the issues? Were you/women exposed to the Constitution, gender equality laws or human rights laws in order to inform your ideas – if yes, how did this process unfold and at what stage?

4. Do the community bylaws represent your values regarding how harmful practices should be addressed?

Probe: How do the community bylaws sit with customary law in general, and your opinion of how customary issues should be handled in particular?

5. Do women accept the community bylaws as real law?

Probe: Are women keen to use the community bylaws? Do you have examples of women that have used the community bylaws? Do you really believe in these community bylaws? Are they generally seen as real law here? Do you think there is shared enthusiasm towards the community bylaws amongst Chiefs in the area (or community members)? What do you think about what the TA is doing? Who is really pushing for these community bylaws?

6. Does it bother you that there is a risk that the community bylaws, may replace state law seeking to protect women from harmful practices (when the intention of the latter was to offer stiff punishment for harmful practices)?

7. In practice, do you think the community bylaws protecting women? What are the opportunities and obstacles of the community bylaws?

Annexure 4: Interview Protocol: Government Sectors & District Level Officials

1. Tell me about work that has been going on at national level to promote community bylaws as a means of addressing harmful practices affecting women and girls, and your opinion about these efforts.
2. Why do you think there is national interest in the community bylaws at this point in time? Who is leading this work at national level? What is your sector's role?
3. Since when has your sector been involved in pushing for the community bylaws? What you are trying to achieve?

Probe: What exact role are you playing; who are your main allies? What kind of harmful practices have you been particularly interested in? Why these practices and not others? What has motivated you to support community bylaws initiatives – e.g. have any legislative/human rights developments got anything to do with your interest?

4. Is there a chance that through these community bylaws, the government is/may be seen as imposing/driving foreign solutions/norms that are remote to the rural people?

Probe: How are the community bylaws expected to work/working in these rural communities considering that the communities already have their own customary laws? How is the government pitching human rights and gender equality issues in these community bylaws? How are the human rights issues that the sector is interested in being unpacked so as to make sense to the people as 'community problem?'

5. What types of efforts have you taken to facilitate stakeholder 'buy-in' whether at district or national levels?

Probe: Which structures have you worked with? What methods have you used to engage them? How do you facilitate/get involved in the process?

6. As government, you are supposed to be enforcing state law. Tell me how these community bylaws relate to state law (the Constitution and gender statutes), if at all, especially considering that state law has more stringent measures than most of the community bylaws?

Probe: Are the community bylaws valid law? Are they enforceable in a court of law – if yes under what frameworks (state vs customary law)? What are the chances that the community bylaws are promoting principles/ideas that are inconsistent with state law and/or human rights norms?

7. Tell me your opinion about these community bylaws: One would look at these community bylaws projects and think: *'community bylaws have just become a rhetorical buzz word for many donor projects and there's a slim chance that community bylaws will endure beyond projects; communities are just adopting community bylaws because they are being told/lobbied to do so by outsiders; most Chiefs, especially Group Village Heads and Village Heads are just being compelled to go along with the community bylaws but have little interest to implement them; the community bylaws may not even being taken seriously as 'law' on the ground; ...'* **Where are these sentiments wrong or right?**
8. Is government considering introducing (a) enabling legal measures for the community bylaws or (b) legal controls for the community bylaws?

Annexure 5: Interview Protocol: Law Making Institutions

1. I am interested in harmful practices:
 - Are you aware of any harmful practices?
 - What is the best way to deal with harmful practices?
2. Tell me what you know about what is going on to promote community bylaws as a means of addressing harmful practices affecting women and girls.¹⁶⁴⁶

Probe: why do you think there's national interest in the community bylaws at this point in time? Have the community bylaws (as a potential legal solutions) ever come up in any discussions/context during your law-making functions?
3. With the existence of statutory law to address harmful practices, why do you think some actors/communities are resorting to the community bylaws instead?

Probe: Is this an indicator that statutory law is working well/not working well or something else? Do you think the community bylaws have higher potential to address harmful practices compared to state law?
4. What do you think is the impact of the community bylaws on the aspirations of the state to promote human rights and gender equality norms according to international human rights standards?

Probe: Do you think the community bylaws are upholding or lowering these standards?
5. What is your opinion about how the community bylaws fit into the rule of law scheme in Malawi?

Probe: How do you think that the community bylaws are interacting with customary law? Do you think the community bylaws are law – if not in the context of state law, then

¹⁶⁴⁶ Or if the interviewee has no knowledge, I may have to introduce the community bylaws by saying that 'several communities in rural Malawi are formulating the so called 'community bylaws' as a means of eliminating harmful practices. In these community bylaws, the communities generate a list of prohibited harmful practices and sanctions for perpetrators. Chiefs have the mandate to enforce these 'laws.' Mostly, the community bylaws are being formulated under the auspices of NGO projects.

in the context of legal pluralism? What are the challenges and opportunities that the community bylaws have for the rule of law? Is there room for community bylaws to neatly fit into the rule of law?

For Parliament only:

6. How does Parliament view these community bylaws? *Probe: Is Parliament considering introducing legal controls? Or is it considering introducing enabling legal measures for the community bylaws?*

Annexure 6: Interview Protocol: NGOs

1. Tell me about work that has been going on at national level to promote community bylaws as a means of addressing harmful practices affecting women and girls, and your opinion about these efforts.

Probe: why do you think there's national interest in the community bylaws at this point in time? Who is leading this work at national level? What is your organisation's role?

2. In the areas where you work, what existing practices were there to regulate/address harmful practices before the community bylaws came in?

Probe: If something existed already, why is it that you couldn't just work with it or build on it instead of introducing the community bylaws?

3. Please explain the projects in which your organisation has been using community bylaws as a means of addressing harmful practices.

Probe: What kind of harmful practices have you been addressing in your project areas and why? What has influenced your attention on some harmful practices and not others? What is the main objective of the community bylaws in your project area, i.e. is it to (a) modify, (b) completely eliminate harmful practices? What determines the approach that you take? What has influenced the choice of community bylaws as an intervention compared to other interventions you may have tried? i.e. have any legislative/human rights development got anything to do with your interest?

4. When you work in an area that is adopting community bylaws, what is your project strategy/the process of adopting the community bylaws like from the start to finish?

Probe: which structures do you use as the entry point? how do you engage them? how do you facilitate/get involved in the formulation process? How do women participate? Have you encountered stakeholders or community members who have expressed reservations to the community bylaws? How exactly are the three tiers of Chiefs (TA, Group Village Head and Village Head) involved, and at what stages? During and after formulation, what ways are used to communicate the community bylaws ideas to the community? How are the community bylaws implemented? How are women involved in the implementation?

5. What role do you play in the selection of content and/or language for the community bylaws?

Probe: Do you have any expectations about language issues and how the community bylaws should be generally framed? How do you ensure that your expectations are met? Is human rights/legal knowledge imparted to the framers (and how)? Is adherence to human rights language or legally correct language important in this process (why)?

6. Tell me how the bylaws are sitting with gender equality laws and the Constitution. For example, the Gender Equality Act (GEA) says 'outlaw all harmful practices and fine/arrest perpetrators.' The inheritance law says the same about property dispossession. With the community bylaws, how will the GEA, for example, have teeth in practice? (Or aren't the community bylaws sabotaging the intents of state laws in practice?)

Probe: What are the risks that community bylaws will grow apart from the gender equality laws and the Constitution? Can a victim obtain a remedy? What takes precedence between state law and the community bylaws (for example in the community, are the community bylaws regarded as laws of first instance before a victim has recourse to state law)?

7. What is your opinion on how the community bylaws sit with customary law?
8. Tell me your opinion about these community bylaws: One would look at these community bylaws projects and think: '*community bylaws have just become a rhetorical buzz word for many donor projects and there is a slim chance that community bylaws will endure beyond projects; communities are just adopting community bylaws because they are being told/lobbied to do so by outsiders; most Chiefs, especially Group Village Heads and Village Heads are just being compelled to go along with the community bylaws but have little interest to implement them; the community bylaws may not even being taken seriously as 'law' on the ground...*' **Where are these sentiments wrong or right?**

Annexure 7: Interview Protocol: Donors

1. Tell me about work that has been going on at national level to promote community bylaws as a means of addressing harmful practices and your opinion about these efforts.

Probe: why do you think there's national interest in the community bylaws at this point in time? Who is leading this work at national level? What is your organisation's role?

2. Tell me about the community bylaws projects that you have funded over the years and what you are trying to achieve.

Probe: What kind of harmful practices have the projects been addressing? Why these practices and not others? What has motivated you to support community bylaws initiatives – e.g. have any legislative/human rights developments got anything to do with your interest?

3. Do you see the community bylaws as a community driven effort to address harmful practices affecting women and girls?

Probe: Is there a chance that through these community bylaws, the donors are/may be seen as imposing/driving foreign solutions/norms that are remote to the rural people? How are the community bylaws expected to work/ or are working in these rural communities considering that the communities already have their own customary laws? How are human rights and gender equality issues being promoted as 'community problems' in ways that make sense to the people?

4. Give me examples of community bylaws projects that you have funded that have (a) successfully and (b) unsuccessfully implemented community bylaws? Why have these different results come about?

Probe: how do you measure the success of your community bylaws projects? How have various actors played a role in the success/lack of success?

5. What types of efforts have you taken to facilitate stakeholder 'buy-in' into your community bylaws projects whether at district or national levels?

Probe: which structures have you worked with? What methods have you used to engage them? How do you facilitate/get involved in the process?

6. Tell me how the bylaws are sitting with gender equality laws and the Constitution. For example, the Gender Equality Act (GEA) says 'outlaw all harmful practices and fine/arrest perpetrators.' The inheritance law says the same about property dispossession. With the community bylaws, how will the GEA, for example, have teeth in practice? (Or aren't the community bylaws sabotaging the intents of state laws in practice?)

Probe: What are the risks that community bylaws will grow apart from the gender equality laws and the Constitution? Can a victim obtain a remedy? What takes precedence between state law and the community bylaws (for example in the community, are the community bylaws regarded as laws of first instance before a victim has recourse to state law)?

7. What is your opinion on how the community bylaws sit with customary law?
8. Tell me your opinion about these community bylaws: One would look at these community bylaws projects and think: '*community bylaws have just become a rhetorical buzz word for many donor projects and there is a slim chance that community bylaws will endure beyond projects; communities are just adopting community bylaws because they are being told/lobbied to do so by outsiders; most Chiefs, especially Group Village Heads and Village Heads are just being compelled to go along with the community bylaws but have little interest to implement them; the community bylaws have a weak legal basis and I'm not sure they are even being taken seriously as law on the ground; ...*' **Where are such sentiments wrong or right?**

