

**CULTURAL TRANSFORMATION: AN ANALYSIS OF THE  
COMMUNITY BYLAWS AND LEGAL MECHANISMS IN  
COMBATING THE PRACTICE OF *KUSASA FUMBI* IN MALAWI**

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Research dissertation presented for the approval of the Senate in fulfilment of part of the requirements for the degree of Master of Laws (LLM) in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

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## **DEDICATION**

First and foremost, this dissertation is dedicated to God, whose grace and guidance made everything possible and opened doors for me that I never imagined.

To my parents, Oliver and Margaret Kumbambe, who have nurtured my love for the pursuit of knowledge. Your unwavering support and belief in my dreams, even before I believed in them myself, have been the foundation of my achievements. Thank you for instilling in me the values of perseverance and curiosity.

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Finally, to my supervisor and mentors, your guidance, wisdom, and patience have been instrumental in shaping this work. Your dedication to my growth and success has been deeply appreciated.

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## ABSTRACT

This dissertation critically examines the intricate relationship between cultural practices, Malawi's legal framework, and the emergent role of community bylaws in combating the persistent issue of *Kusasa Fumbi*, a harmful cultural practice affecting the girl child in Malawi. The study addresses fundamental questions regarding the efficacy of community bylaws, the role of domestic and international laws, the prevalence of *Kusasa Fumbi* in rural regions, and the adverse impacts on girls.

The dissertation begins by acknowledging the severity of the issue, noting that sexual initiation rites involving minors infringe upon their human rights, pose health risks, and have enduring adverse effects on their socioeconomic status, access to education and physical and mental well-being. Despite such risks, the practice of *Kusasa Fumbi* is shielded by cultural beliefs, rarely reported to authorities, and perpetrators often escape prosecution. The limited enforcement of existing laws relating to *Kusasa Fumbi* is cited as a significant obstacle.

The dissertation explores the emergence of community bylaws, primarily led by traditional authorities, as an attempt to address harmful practices in rural Malawi. The study examines these community bylaws and their potential contribute to shielding women and girls from harmful cultural practices. It explores how the community bylaws offer a bridge between formal law and on-the-ground cultural practices.

Central to the research is the examination of Malawi's legal framework and its alignment with international and regional standards for protecting girls from harmful rites of passage. The study critically examines the persistence of this harmful cultural practice, deeply entrenched within communities under the guise of tradition and culture. Two key questions are posed: Can community bylaws contribute to combating *Kusasa Fumbi*? What roles can domestic and international law play in eradicating such oppressive and dehumanising practices? The research aims to highlight the significance of addressing harmful cultural practices, as gender disparities persist due to deeply entrenched cultural attitudes. The study emphasizes the vulnerability of underage girls to such harmful traditions and attitudes, hindering their educational opportunities.

## **LIST OF ABBREVIATIONS**

ACHPR	African Charter on Human and Peoples' Rights
ACRWC	African Charter on the Rights and Welfare of the Child
CEDAW	Convention on the Elimination of all Forms of Discrimination Against Women
CRC	Convention on the Rights of the Child
HCP(s)	Harmful Cultural Practice(s)
ICCPR	International Covenant on Civil and Political Rights
ICESR	International Convention on Economic and Social Rights
MHRC	Malawi Human Rights Commission
NGO	Non-Governmental Organisation
SADC	Southern African Development Community
TA	Traditional Authority
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNICEF	United Nations International Children's Emergency Fund

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## CHAPTER 1

### I. INTRODUCTION

This dissertation examines the practice of *Kusasa Fumbi* its contributing factors and its regulation by the current legal framework. The topic of *Kusasa Fumbi* will be the focus of this dissertation as it concerns the sexual abuse and harm to young girls. There is a particular concern about the continued prevalence of this harmful practice, despite it being outlawed.<sup>1</sup> Although cases are often neglected and underreported due to the associated stigma and secrecy, research highlights that after their initiation experiences, many girls continue to report being instructed to engage in unprotected sexual relations with a *Fisi*.<sup>2</sup> This practice, recognised as a form of sexual abuse, not only violates national and international human rights laws but also perpetuates misplaced beliefs about sexual health.<sup>3</sup> The exploration of this topic is driven by the imperative to understand the factors sustaining *Kusasa Fumbi* and to advocate for more effective measures to address and eradicate the practice. Against this backdrop, the study aims to critically evaluate the existing legal framework for safeguarding against the *Kusasa Fumbi* practice.

Malawi is characterised by its pluralistic society and stands out as one of the more densely populated nations in southern Africa.<sup>4</sup> Due to its pluralistic nature, Malawian courts utilise customary law, religious law<sup>5</sup> and common law.<sup>6</sup> Both customary and common law are recognised and protected by Malawi's supreme Constitution ('the Constitution').<sup>7</sup> One constitutional provision exemplifies the protection mentioned in section 12. This section mandates that the state must "recognise and protect fundamental human rights and afford the fullest protection to the rights and views of all individuals, groups, and minorities".<sup>8</sup> Scholars

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<sup>1</sup> African Child Trust. "Fighting Sexual Cleansings." African Child Trust, 2018. Web. [africanchildtrust.org.uk/fighting-sexual-cleansings/](http://africanchildtrust.org.uk/fighting-sexual-cleansings/). Accessed 23 November 2023.

<sup>2</sup> UNFPA. "The Impact of Rites of Passage and Cultural Practices on Adolescents' and Young People's Sexual and Reproductive Health in East and Southern Africa - A Review of the Literature." 2020. United Nations Population Fund. [esaro.unfpa.org/sites/default/files/pub-pdf/j7651-8\\_unfpa\\_literature\\_review\\_-\\_rites\\_of\\_passage\\_electronic.pdf](http://esaro.unfpa.org/sites/default/files/pub-pdf/j7651-8_unfpa_literature_review_-_rites_of_passage_electronic.pdf).

<sup>3</sup> Ibid

<sup>4</sup> "Exploring Malawi Culture." malawigulf.com, 2019. Web. <https://malawigulf.com/malawi-people-culture/>. Accessed 08 November 2023.

<sup>5</sup> For instance, Kapindu points out that the Asiatics (Marriage, Divorce, and Succession) Act permits individuals of Asian origin to solemnize their marriages in accordance with Hindu or Islamic norms, irrespective of their residency status in Malawi.

<sup>6</sup> Kapindu, Redson. "Update: Malawi Legal System and Research Resources." Malawi: Legal System and Research Resources - GlobaLex, 2019, [www.nyulawglobal.org/globalex/Malawi1.html](http://www.nyulawglobal.org/globalex/Malawi1.html).

<sup>7</sup> The Constitution of the Republic of Malawi was adopted in 1994, (hereafter 'the Constitution, 1994'). The Constitution is Malawi's supreme law, and section 199 is the primary provision that designates its supreme status.

<sup>8</sup> Section 12 of the Constitution 1994.

such as Nyirenda, Hansen, and Kaunda argue that, based on this provision, the Constitution places considerable significance on African customary law and traditional values.<sup>9</sup> Additionally, section 200 of the Constitution addresses the continued utilisation of customary law. It states that “subject to section 1, the application of customary law shall continue in force in Malawi”.<sup>10</sup> This provision allows for the continued relevance and application of customary law within the legal system of Malawi. The Constitution recognises and acknowledges legal pluralism.

In contrast to customary law, religious law operates within the realm of personal beliefs.<sup>11</sup> Although religious law is constitutionally protected, it doesn't have the same formal legal standing as common law.<sup>12</sup>

Customary law holds significant importance in Malawi as it governs the majority of its population. As a result of Malawi's status as a nation with one of the lowest Gross Domestic Product (GDP) per capita globally,<sup>13</sup> the majority of the nation's population resides in rural areas, predominantly in traditional villages where customary law tends to carry more influence than state law.<sup>14</sup> As a consequence of this fact, the governance of state law often extends inadequately in predominantly rural communities.<sup>15</sup> The limited reach and enforcement capabilities of state law in rural areas, foster an environment where harmful practices can operate with relative impunity.<sup>16</sup> As the Malawi Human Rights Commission (MHRC) stated, this is a significant issue as some cultural practices negatively impact the rights and freedoms of women and children.<sup>17</sup> In their research, the MHRC identified harmful cultural practices that hinder the effective realisation of human rights and freedoms for women and girls.<sup>18</sup> These include practices that limit girls from reaching their full potential and making independent life

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<sup>9</sup> Kapindu, Redson. “Update: Malawi Legal System and Research Resources.” *Malawi: Legal System and Research Resources - GlobaLex*, 2019, [www.nyulawglobal.org/globalex/Malawi1.html](http://www.nyulawglobal.org/globalex/Malawi1.html).

<sup>10</sup> Section 200 of the Constitution 1994.

<sup>11</sup> Kapindu, Redson. “Update: Malawi Legal System and Research Resources.” *Malawi: Legal System and Research Resources - GlobaLex*, 2019, [www.nyulawglobal.org/globalex/Malawi1.html](http://www.nyulawglobal.org/globalex/Malawi1.html).

<sup>12</sup> Ibid

<sup>13</sup> *Malawi* (2018) *LandLinks*. Available at: <https://www.land-links.org/country-profile/malawi/> (Accessed: 24 December 2023).

<sup>14</sup> Ibid

<sup>15</sup> Wicomb, Wilmiën, and Henk Smith. “Customary communities as ‘peoples’ and their customary tenure as ‘culture’: What we can do with the Endorois decision.” *African Human Rights Law Journal*, vol. 11, pp. 422–446.

<sup>16</sup> Ibid

<sup>17</sup> UNFPA. “The Impact of Rites of Passage and Cultural Practices on Adolescents’ and Young People’s Sexual and Reproductive Health in East and Southern Africa - A Review of the Literature.” 2020. United Nations Population Fund. [esaro.unfpa.org/sites/default/files/pub-pdf/j7651-8\\_unfpa\\_literature\\_review\\_-\\_rites\\_of\\_passage\\_electronic.pdf](http://esaro.unfpa.org/sites/default/files/pub-pdf/j7651-8_unfpa_literature_review_-_rites_of_passage_electronic.pdf).

<sup>18</sup> Ibid

choices, exposing women and children to prolonged experiences of exploitation, violence, injury, and even premature death.<sup>19</sup>

Furthermore, the MHRC's research also highlights practices that subject women and girls to humiliation, reducing them to sexual objects.<sup>20</sup> Instances of such practices include involuntary child marriages, incestuous relationships where fathers and grandfathers exploit their daughters and granddaughters, marriages conducted through proxies, wife inheritance, sexual rituals linked to initiation ceremonies, initiation-related sexual acts, and sexual rites during funerals.<sup>21</sup> The practice of *Kusasa Fumbi* falls within the category of 'harmful practices' identified by MHRC.<sup>22</sup> It is a sexual cleansing ritual that falls under the category of *Fisi* practices.<sup>23</sup> *Kusasa Fumbi*<sup>24</sup> is a practice that is most commonly observed by the rural ethnic groups located in southern Malawi<sup>25</sup> such as the *Yao*, *Chewa*, and *Lomwe* people.<sup>26</sup> This initiation ceremony is a compulsory experience for adolescent girls to make the transition from childhood to adulthood.<sup>27</sup> Unsurprisingly, the prevalence of such initiation ceremonies is notably concentrated in rural communities.<sup>28</sup>

## II. PROBLEM STATEMENT

Section 138 of the Malawi Penal Code dictates that having sexual intercourse with a minor is an offence.<sup>29</sup> It criminalises sexual contact with a female below the age of 16 as the offence of 'defilement'.<sup>30</sup> It states that "any person who unlawfully and carnally knows any girl under the age of sixteen years shall be guilty of a felony and shall be liable to imprisonment for life".<sup>31</sup>

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<sup>19</sup> Malawi Human Rights Commission, *Harmful Practices in Malawi* (2006).

<sup>20</sup> *Ibid*

<sup>21</sup> *Ibid*

<sup>22</sup> *Ibid*

<sup>23</sup> In Chichewa, "Fisi" translates to "hyena" in English. It's a term used in Malawi to refer to the adolescent sexual cleansing ritual or the adult man who is paid to have sex with young girls after completing the ritual. Additionally, a "Fisi" may be hired for other rites across the life cycle, always involving a male having sex with a girl or woman (Warria, 2018).

<sup>24</sup> This will be discussed in further detail in chapter 2.

<sup>25</sup> Ahmed, Beenish. "Confronting a Sexual Rite of Passage in Malawi." *The Atlantic*, Atlantic Media Company, 15 July 2021, [www.theatlantic.com/international/archive/2014/01/Confronting-a-sexual-rite-of-passage-in-malawi/283196](https://www.theatlantic.com/international/archive/2014/01/Confronting-a-sexual-rite-of-passage-in-malawi/283196).

<sup>26</sup> Glynn, Judith R., et al. "Age at menarche, schooling, and sexual debut in northern Malawi." *PLoS ONE*, vol. 5, no. 12, e15334, <https://doi.org/10.1371/journal.pone.0015334>.

<sup>27</sup> Mallasasime, Belinda. (2023) *Where they rape adolescent girls-as a rite of passage*, *Medium*. Available at: <https://medium.com/the-story-in-history/where-they-rape-adolescent-girls-as-a-rite-of-passage-1be52abcd5> (Accessed: 18 December 2024).

<sup>28</sup> *Ibid*

<sup>29</sup> Malawi Penal Code Chapter 7:01, Act 8 of 1999.

<sup>30</sup> *Ibid*

<sup>31</sup> Section 138 Malawi Penal Code Act 8 of 1999.

This law applies to both men and adolescents and is valid regardless of the consent of the girl.<sup>32</sup> Moreover, according to Malawi statutory rape law, a violation occurs when “an individual has consensual sexual contact with a person under the age of 14”.<sup>33</sup> Additionally, the Penal Code sets the age of consent for females at 14 years.<sup>34</sup> Although the practice of *Kusasa Fumbi* seemingly falls under the definition of statutory rape, it is rarely prosecuted as such.<sup>35</sup>

Overall, the safeguarding of cultural practices within the Constitution of Malawi does not extend protection to cultural practices that are deemed to be harmful. This is despite arguments from proponents that defend harmful practices on the grounds of culture, religion, and tradition.<sup>36</sup> These aspects, however, do not curtail the essential right to equality and non-discrimination.<sup>37</sup> In response, community bylaws addressing harmful practices in rural Malawi have emerged, led by traditional authorities (chiefs).<sup>38</sup> Despite their community-driven nature, these bylaws harbour the potential to contribute to shielding women and girls from harmful practices.

### III. CHAPTER PREVIEW

The Current statistics on the issue of *Kusasa Fumbi* in Malawi are particularly difficult to locate or access. While national human rights groups and organisations like the MHRC have expressed intentions to publish new studies in the future, the timeframe for such releases remains uncertain.<sup>39</sup> This dissertation aims to contribute to the ongoing discourse and legal reforms needed to safeguard the rights of Malawian girls against harmful cultural practices like *Kusasa Fumbi*.

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<sup>32</sup> Ibid

<sup>33</sup> Ibid

<sup>34</sup> Ibid section 4

<sup>35</sup> Kamlongera, Alinane. “What Becomes of ‘Her’?: A Look at the Malawian Fisi Culture and Its Effects on Young Girls.” *Agenda: Empowering Women for Gender Equity*, no. 74, pp. 81–87, <http://www.jstor.org/stable/27739346>. Accessed 18 November 2023.

<sup>36</sup> Shaheed, Farida. “Cultural Rights: What Are These and Why Are They Important ...” Ohchr.Org, 2011, [www.ohchr.org/sites/default/files/Documents/Issues/CulturalRights/Culturalrightsofwomen/ASEANwomenconsultation2011-FSstatement.pdf](http://www.ohchr.org/sites/default/files/Documents/Issues/CulturalRights/Culturalrightsofwomen/ASEANwomenconsultation2011-FSstatement.pdf).

<sup>37</sup> Ibid

<sup>38</sup> Kachika, Tinyade. “A critical re-appraisal of vernacularisation in the emergence and conceptualisation of community bylaws on child marriage and other harmful practices in rural Malawi.” University of Cape Town, 2020. Thesis.

<sup>39</sup> I communicated with the Child Rights Directorate of MHRC through a phone call to seek information regarding contemporary studies or statistical data pertaining to sexual initiation ceremonies and *Kusasa Fumbi*. Their most recent publication on this subject dates back to 2006, and they communicated the absence of a definitive timeline for the release of subsequent updates.

The research done in this dissertation has the following objectives. Firstly, it aims to illuminate the international and regional legal framework tackling harmful cultural practices. Secondly, it analyses Malawi's legal framework, scrutinising its adherence to international and regional standards for safeguarding girls against *Kusasa Fumbi*. Thirdly, the study seeks to understand the persistent prevalence of the traditional practice of *Kusasa Fumbi* in rural parts of southern Malawi. Additionally, it endeavours to shed light on the negative impact that the *Kusasa Fumbi* practice inflicts on young Malawian girls. Finally, the research aims to contribute to existing research by providing recommendations for the current legal framework and suggesting effective strategies to address the issue of *Kusasa Fumbi* in Malawi.

This dissertation contains six chapters, Chapter 1 is the introduction and provides background information on the topic of *Kusasa Fumbi*. It establishes the problem statement, outlines the rationale behind choosing this topic, and sets a point of departure for the subsequent chapters. Chapter 2 provides an overview and historical context, examining the prevalence of the traditional cultural practice of *Kusasa Fumbi* in Malawi.

This chapter critically analyses notable cases and elucidates their implications in the broader context. Chapter 3 explores domestic and international frameworks aimed at safeguarding women and girls from harmful cultural practices. It considers the historical evolution of Malawi's court systems and the workings of customary law. Additionally, it examines the domestic legal framework relevant to the subject of *Kusasa Fumbi*. Furthermore, Chapter 4 addresses legal pluralism, African customary law, and their connections to harmful cultural practices. It examines the coexistence of various legal systems within Malawi, highlighting contradictions and challenges arising from the interplay of modern statutory laws and traditional customary laws. Chapter 5 focuses on community by-laws and highlights the culture of secrecy surrounding sexual initiation ceremonies. It investigates the emergence of community-driven laws and their potential to address harmful practices, particularly in rural Malawi. Finally, Chapter 6 serves as the conclusion. It synthesises key observations, findings, and takeaways from the preceding chapters, offering recommendations and a way forward surrounding the issue of *Kusasa Fumbi*.

## CHAPTER 2

### I. UNDERSTANDING *KUSASA FUMBI* IN THE CONTEXT OF CULTURE AND HARMFUL PRACTICES

This chapter examines the practice of *Kusasa Fumbi* in Malawi, offering both contextualisation and analysis. It presents an outline of the practice, encompassing its procedural aspects, distinctive characteristics, and historical roots. Through an exploration, the chapter examines the diverse approaches through which *Kusasa Fumbi* is observed within the nation, drawing insights from recent empirical research to illuminate prevailing societal perceptions of the practice. This explanatory discussion of *Kusasa Fumbi* serves as a crucial foundation for the subsequent assessment of its alignment with Malawi's legal commitments.<sup>40</sup> To understand the *Kusasa Fumbi* practice, culture must be understood.

#### a) *Defining culture*

Malawi is a culturally diverse nation with twelve major cultural groups, cultural identity holds immense significance.<sup>41</sup> The prevailing characterisation is that Malawians, generally perceived as socially and culturally conservative, exhibit a robust attachment to specific cultural practices.<sup>42</sup> To understand culture, it must be defined. However, defining 'culture' both socially and culturally is an elusive task.<sup>43</sup> This is because the concept of culture is vast and is subject to a multitude of definitions, often contingent on the definer's intentions and viewpoint.<sup>44</sup> A definition cited both internationally and by Malawi's Ministry of Tourism, Wildlife and Culture is provided by the United Nations Educational, Scientific and Cultural Organisation (UNESCO).<sup>45</sup> According to the definition by UNESCO, culture is:

The whole complex of distinctive, spiritual, material, intellectual and emotional features that characterise a society or a social group. Culture includes arts, letters, modes of life, the fundamental rights of the human being, value systems, traditions and beliefs.<sup>46</sup>

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<sup>40</sup> To be discussed in chapter 3.

<sup>41</sup> "Exploring Malawi Culture." malawigulf.com, 2019. Web. <https://malawigulf.com/malawi-people-culture/>. Accessed 08 November 2023.

<sup>42</sup> Ibid

<sup>43</sup> Bande, Lewis. "Criminalising Harmful Cultural Practices: Lessons from Malawi." *Southern African Public Law*, 2022, doi.org/10.25159/2522-6800/10661.

<sup>44</sup> Ibid

<sup>45</sup> UNESCO, 'Mexico City Declaration on Cultural Policies' (1982) <[https://culturalrights.net/descargas/drets\\_culturals401.pdf](https://culturalrights.net/descargas/drets_culturals401.pdf)> accessed 15 October 2023.

<sup>46</sup> Chimombo, Callista. "Malawi's Cultural Policy." fr.unesco.org, 2005. Web. [https://fr.unesco.org/creativity/sites/creativity/files/activities/conv2005\\_eu\\_docs\\_malawi\\_policy.pdf](https://fr.unesco.org/creativity/sites/creativity/files/activities/conv2005_eu_docs_malawi_policy.pdf). Accessed 18 December 2023.

As per UNESCO's definition, culture suggests that a community's way of life is reflective of its customs and traditions. This encapsulates its diverse creations, achievements, and aspirations.<sup>47</sup> It serves as a comprehensive framework encompassing the intricate confluence of unique spiritual, religious, material, academic, and emotional elements that define a society or community.<sup>48</sup> This expansive interpretation of culture transcends the realms of arts and literature, extending to encompass various dimensions such as lifestyle, fundamental human rights, value systems, traditions, and belief systems.<sup>49</sup> UNESCO acknowledges that culture, among other components, entails thoughts, language, customs, beliefs, and habits gained, all integral aspects gained through the process of learning.<sup>50</sup> Additionally, it incorporates the tangible objects fashioned by individuals from their local environment and the techniques employed in their creation.<sup>51</sup> In alignment with this definition, Malawi comprehensively conceives culture, embracing these multifaceted elements.<sup>52</sup> This dissertation will utilise UNESCO's definition of culture. Accordingly, an initiation rite such as *Kusasa Fumbi* would be considered part of the culture of those who practice it.

Culture serves as the primary reference frame in various aspects of life including sex, marriage, family relations, gender roles, faith systems, lifestyle, agriculture, health, and even politics.<sup>53</sup> In the context of Malawi, detrimental customs play a role in diminishing developmental outcomes for women and girls.<sup>54</sup> The Constitution explicitly assures everyone the right "to participate in the cultural life of [one's] choice".<sup>55</sup> This aligns closely with Article 27(1) of the Universal Declaration of Human Rights (UDHR).<sup>56</sup> The UDHR is a foundational instrument in the field of international human rights. The United Nations General Assembly adopted the UDHR in 1948. Article 27(1) of the UDHR states that "Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in

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<sup>47</sup> Ibid

<sup>48</sup> Ibid

<sup>49</sup> Ibid

<sup>50</sup> UNESCO, 'Mexico City Declaration on Cultural Policies' (1982)  
<[https://culturalrights.net/descargas/drets\\_culturals401.pdf](https://culturalrights.net/descargas/drets_culturals401.pdf)> accessed 15 October 2023.

<sup>51</sup> Ibid

<sup>52</sup> Chimombo, Callista. "Malawi's Cultural Policy." fr.unesco.org, 2005. Web.  
[https://fr.unesco.org/creativity/sites/creativity/files/activities/conv2005\\_eu\\_docs\\_malawi\\_policy.pdf](https://fr.unesco.org/creativity/sites/creativity/files/activities/conv2005_eu_docs_malawi_policy.pdf). Accessed 18 December 2023.

<sup>53</sup> Ibid

<sup>54</sup> Kachika, Tinyade. "A critical re-appraisal of vernacularisation in the emergence and conceptualisation of community bylaws on child marriage and other harmful practices in rural Malawi." University of Cape Town, 2020. Thesis.

<sup>55</sup> Section 26 of the Constitution 1994.

<sup>56</sup> Article 27(1) of the Universal Declaration of Human Rights (UDHR).

scientific advancement and its benefits”.<sup>57</sup> Article 27(1) emphasises the universal right of individuals to engage in cultural life without coercion and is part of the broader framework of human rights that the UDHR outlines.<sup>58</sup> The right to engage in cultural life encompasses the right to refrain from participating in specific traditions, customs, and practices that breach the principles of human dignity and individual rights.<sup>59</sup> In addition, the International Convention on Economic and Social Rights (ICESR) reiterates “the right to participate in cultural life”.<sup>60</sup> The phrase ‘cultural life’ details three key facets of the fundamental right to engage in cultural life. These aspects encompass “the right to access cultural life”, the right “to participate in cultural life, and the right to contribute to cultural life”.<sup>61</sup>

The entitlement to cultural identity, delineated in international law, notably in Article 1 of the International Covenant on Civil and Political Rights (ICCPR), holds a profound connection to the right to self-determination.<sup>62</sup> This implies that individuals are generally afforded the right to cultivate and express their unique cultural identities under international legal frameworks.<sup>63</sup> The ICCPR, a pivotal instrument in the realm of human rights, underscores the significance of acknowledging and preserving the diverse cultural fabric that constitutes the global community.<sup>64</sup> By intertwining the right to possess a cultural identity with the broader concept of self-determination, this legal provision implies that individuals have the autonomy to determine their cultural affiliations and participate in cultural practices of their choosing.<sup>65</sup> This recognition underscores a fundamental principle within international law that respects and protects the richness of human cultural expressions, fostering a global environment that cherishes diversity and individual agency.<sup>66</sup>

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<sup>57</sup> Ibid

<sup>58</sup> Ibid

<sup>59</sup> Shaheed, Farida. “Cultural Rights: What Are These and Why Are They Important ...” Ohchr.Org, 2011, [www.ohchr.org/sites/default/files/Documents/Issues/CulturalRights/Culturalrightsofwomen/ASEANwomenconsultation2011-FSstatement.pdf](http://www.ohchr.org/sites/default/files/Documents/Issues/CulturalRights/Culturalrightsofwomen/ASEANwomenconsultation2011-FSstatement.pdf).

<sup>60</sup> Article 15 of the International Convention on Economic and Social Rights (ICESR).

<sup>61</sup> General Comment 21 of the Committee on Economic, Social and Cultural Rights.

<sup>62</sup> Article 1 of the International Covenant on Civil and Political Rights (ICCPR).

<sup>63</sup> Warria, Ajwang. "Girls' innocence and futures stolen: The cultural practice of sexual cleansing in Malawi." *Children and Youth Services Review*, vol. 91, pp. 298-303, <https://doi.org/10.1016/j.chilyouth.2018.06.011>. Accessed 27 December 2023.

<sup>64</sup> Ibid

<sup>65</sup> Ibid

<sup>66</sup> Ibid

Furthermore, this right to culture implies that individuals should have the freedom to choose their participation in a particular cultural life, and no one should be coerced or barred from participating.<sup>67</sup>

Saukila highlights the significance of a supreme Constitution that safeguards fundamental rights including the right to engage in cultural life, human dignity, and personal freedom.<sup>68</sup> Culture must be safeguarded because it is an important part of life. According to Ahmed An-Na'im, culture serves as the wellspring of both individual and collective worldviews, guiding pursuits in life with designated values and legitimate means.<sup>69</sup> Culture establishes norms and values influencing self-interest perceptions and delineates the principles and methods of singular and collective societal struggles for power.<sup>70</sup> As a result, culture plays a pivotal role in socialising individuals, significantly impacting community consciousness and experiences.<sup>71</sup> Therefore, culture stands out as an influential motivator, moulding conscious and subconscious individual and collective behaviours.<sup>72</sup>

Moreover, the right to culture acknowledges the multicultural character of Malawian society, recognising the existence of multiple cultural lives one can opt to engage with or abstain from.<sup>73</sup> Importantly, the right to culture is not absolute. The State can limit the right under specific circumstances, provided such limitations adhere to constitutional prerequisites.<sup>74</sup> Grounds for limitation include the perseveration of intrinsic rights and freedoms of others, especially when negative practices stemming from customs and traditions contravene human rights.<sup>75</sup> For such conditions on the right to culture to be effective, the Constitution must strike a delicate balance between preserving cultural diversity and protecting fundamental human rights. It should provide clear and comprehensive guidelines on the permissible bounds of cultural practices, particularly when they pose a threat to the well-being and rights of

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<sup>67</sup> Caust, Josephine. "Cultural rights as human rights and the impact on the expression of art practices." *Journal of Citizenship and Globalisation Studies*, vol. 3, no. 1, pp. 17-30, <https://doi.org/10.21153/jcgs2019vol3no1art1051>. Accessed 23 December 2023.

<sup>68</sup> Saukila, Tonthozo. "The Regulation of Ukuthwala in South Africa: Lessons from Malawi." University of Cape Town, 2021. Dissertation.

<sup>69</sup> Bande, Lewis. "Criminalising Harmful Cultural Practices: Lessons from Malawi." *Southern African Public Law*, 2022, [doi.org/10.25159/2522-6800/10661](https://doi.org/10.25159/2522-6800/10661).

<sup>70</sup> Ibid

<sup>71</sup> Ibid

<sup>72</sup> Ibid

<sup>73</sup> "Exploring Malawi Culture." *malawigulf.com*, 2019. Web. <https://malawigulf.com/malawi-people-culture/>. Accessed 08 November 2023.

<sup>74</sup> Bande, Lewis. "Criminalising Harmful Cultural Practices: Lessons from Malawi." *Southern African Public Law*, 2022, [doi.org/10.25159/2522-6800/10661](https://doi.org/10.25159/2522-6800/10661).

<sup>75</sup> Ibid

individuals. This balance is crucial to prevent cultural relativism from being a shield for practices that perpetuate harm or violate the principles of equality and non-discrimination.

In the preceding sections of this chapter, it was elucidated that the practice of *Kusasa Fumbi* falls within the purview of culture in Malawi. While the right to culture and engagement in cultural practices is safeguarded in Malawi, exceptions exist, particularly concerning harmful cultural practices, which are not protected. The query arises: Does *Kusasa Fumbi* align with the classification of harmful cultural practices?

*b) Defining harmful cultural practices*

As mentioned above, cultural practices are a reflection of the principles and ideology held by members of a people group passed down from one generation to the next.<sup>76</sup> The prevalence of harmful cultural practices in various rural communities in Malawi poses a significant dilemma. This predicament centres on the potential violation of constitutionally protected human rights and various international and regional agreements. These agreements include, among others, the Convention on the Rights of the Child (CRC), the Convention for the Elimination of Discrimination Against Women (CEDAW), and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol). This ongoing challenge raises critical questions about the compatibility of these cultural practices with established legal frameworks and the broader principles of human rights.<sup>77</sup> Enacting legal prohibitions on social and cultural practices presents inherent challenges due to the constantly evolving dynamics of societies and cultures.

Among the nations adopting a criminal law strategy, Malawi has embraced this approach to combat harmful social, spiritual, traditional, and religious practices.<sup>78</sup> Through its Gender Equality Act, Malawi has instituted criminal penalties for practices deemed 'harmful' within the realms of social, cultural, and religious contexts.<sup>79</sup> Similarly, the Child Care, Protection and Justices Act has been instrumental in criminalising practices that are considered 'harmful', particularly when they impact the well-being of children.<sup>80</sup>

Furthermore, the African Women's Protocol defines harmful cultural practices as; any actions, beliefs, or customs that have a detrimental impact on the basic rights of women and

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<sup>76</sup> Bande, Lewis. "Criminalising Harmful Cultural Practices: Lessons from Malawi." *Southern African Public Law*, 2022, doi.org/10.25159/2522-6800/10661.

<sup>77</sup> Ibid

<sup>78</sup> Ibid

<sup>79</sup> Domestic laws will be discussed in Chapter 4.

<sup>80</sup> Ibid

girls, including their rights to life, health, respect, education, and physical well-being.<sup>81</sup> Adolescent initiation rites are a global phenomenon, their cultural, spiritual, and religious associations often make them an intrinsic and fundamental part of an individual's journey towards growth, development, and socialisation. Individuals going through such rites use it as a marker for transitioning to full membership through a ritual process.<sup>82</sup> These rites of passage take a different shape and form depending on the purpose and the people group.<sup>83</sup>

In many parts of rural sub-Saharan Africa, it is very common for parents to subject their children to certain cultural practices before they reach adulthood.<sup>84</sup> Initiation ceremonies are a rite of passage deemed a necessary part of the journey towards becoming a full member of their society.<sup>85</sup> It should be emphasised that not all traditional customs and cultural practices are harmful. Initiation ceremonies such as *Kusasa Fumbi* are categorised as harmful cultural practices because they negatively impact the enjoyment of human rights, perpetuate gender inequalities and gender-based violence, infringe on women's rights and have detrimental physical and psychological consequences for women and girls.

c) *What is Kusasa Fumbi?*

*Kusasa Fumbi* is a Chichewa term that means to 'brush off the dust' when it is translated into English.<sup>86</sup> *Kusasa Fumbi* is a sexual cleansing initiation ceremony that is a compulsory experience for adolescent girls to make the transition from childhood to adulthood.<sup>87</sup> A girl is deemed ready for *Kusasa Fumbi* when she begins to menstruate. She and other girls menstruating for the first time are taken to a secluded location where they are instructed in the nuances of human sexuality including diverse facets of sexual behaviour, relationships, intercourse, development, and cultivating qualities of a conscientious partner.<sup>88</sup> Furthermore, within these initiation camps, young female participants undergo instruction in various life

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<sup>81</sup> Article 1 African Women's Charter.

<sup>82</sup> UNFPA. "The Impact of Rites of Passage and Cultural Practices on Adolescents' and Young People's Sexual and Reproductive Health in East and Southern Africa - A Review of the Literature." 2020. United Nations Population Fund. [esaro.unfpa.org/sites/default/files/pub-pdf/j7651-8\\_unfpa\\_literature\\_review\\_-\\_rites\\_of\\_passage\\_electronic.pdf](https://esaro.unfpa.org/sites/default/files/pub-pdf/j7651-8_unfpa_literature_review_-_rites_of_passage_electronic.pdf).

<sup>83</sup> Ibid

<sup>84</sup> Ibid

<sup>85</sup> Ibid

<sup>86</sup> Mallasasime, Bellinda. (2022) *The culture that rapes adolescent girls - as rites of passage*, Medium. Available at: <https://medium.com/the-story-in-history/the-culture-that-rapes-adolescent-girls-as-rites-of-passage-19ea92c4577f> (Accessed: 04 August 2023).

<sup>87</sup> See Chapter 1.

<sup>88</sup> Mallasasime, Bellinda. (2022) *The culture that rapes adolescent girls - as rites of passage*, Medium. Available at: <https://medium.com/the-story-in-history/the-culture-that-rapes-adolescent-girls-as-rites-of-passage-19ea92c4577f> (Accessed: 04 August 2023).

skills, including cooking, cleaning, demonstrating respect for elders, cultivating good manners, observing decency, understanding proper sexual behaviour, and acquiring knowledge about fertility.<sup>89</sup> These girls then receive the said guidance from seasoned mentors, known as *Nankungwi* (female counsellors).<sup>90</sup> The *Nankungwi* coach and guide the girls on how to embrace the new phase of life that they are about to enter.<sup>91</sup> This instruction is conveyed through mediums such as songs, dance, and practical demonstrations such as plays, facilitated by these older and more experienced women.<sup>92</sup> According to reports by the MHRC,<sup>93</sup> girls as young as 6 years old undertake the *Kusasa Fumbi* initiation rites.<sup>94</sup> After the initiates have finished their lessons, they must undergo the sexual cleansing ritual with a *Fisi* for 3 days.<sup>95</sup> *Kusasa Fumbi* is done with the premise of brushing off the dust accumulated from sexual inexperience during childhood by having sexual intercourse with a *Fisi* (hyena man). It is the job of the *Fisi* to ascertain whether the girls have grown up by having sexual intercourse with them.<sup>96</sup> Notably, the ritual is not categorised as rape by its proponents and practitioners.<sup>97</sup>

A *Fisi* is a traditional position held by a man who is selected by their community for their good reputation and demonstration of moral character.<sup>98</sup> However, *Fisi* are not screened for Sexually transmitted diseases (STDs) such as HIV/AIDS as they are believed to be incapable of contracting and transmitting such diseases.<sup>99</sup> Consequently, the *Fisi* do not wear

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<sup>89</sup> Skinner, Joanna, et al. "Transitions to adulthood: Examining the influence of initiation rites on the HIV risk of adolescent girls in Mangochi and Thyolo districts of Malawi." *AIDS Care- Psychological and Socio-Medical Aspects of AIDS/HIV*, vol. 25, no. 3, pp. 296–301, <https://doi.org/10.1080/09540121.2012.701721>.

<sup>90</sup> MhizSarahUnoke (2021) *Rituals: See the tribe in Malawi that deflowers their teenage girls after their first period*, *Rituals: See the tribe in Malawi that Deflowers their Teenage Girls after their first Period - Opera News*. Available at: <https://ng.opera.news/ng/en/crime/031c2159d1874b27b3b2df173ffbad11> (Accessed: 04 August 2023).

<sup>91</sup> Ibid

<sup>92</sup> Mallasasime, B. (2022) *The culture that rapes adolescent girls- as rites of passage*, *Medium*. Available at: <https://medium.com/the-story-in-history/the-culture-that-rapes-adolescent-girls-as-rites-of-passage-19ea92c4577f> (Accessed: 04 August 2023).

<sup>93</sup> A Malawi government agency

<sup>94</sup> Park, M. (2014) *A rite of passage that pushes girls into sex*, *CNN*. Available at: <https://edition.cnn.com/2014/02/04/health/malawi-girls-initiation/index.html> (Accessed: 13 August 2023).

<sup>95</sup> Butler, Ed. "The man hired to have sex with children." *BBC News*, 2016. Web. <https://www.bbc.com/news/magazine-36843769>. Accessed 09 August 2023.

<sup>96</sup> Park, M. (2014) *A rite of passage that pushes girls into sex*, *CNN*. Available at: <https://edition.cnn.com/2014/02/04/health/malawi-girls-initiation/index.html> (Accessed: 13 August 2023).

<sup>97</sup> Butler, Ed. "The man hired to have sex with children." *BBC News*, 2016. Web. <https://www.bbc.com/news/magazine-36843769>. Accessed 09 August 2023.

<sup>98</sup> Park, M. (2014) *A rite of passage that pushes girls into sex*, *CNN*. Available at: <https://edition.cnn.com/2014/02/04/health/malawi-girls-initiation/index.html> (Accessed: 13 August 2023).

<sup>99</sup> Ibid

protection or use any kind of contraception, exposing the *Kusasa Fumbi* initiates to STDs. Many girls have reportedly contracted HIV from *Fisi*.<sup>100</sup>

*Kusasa Fumbi* is a socially and culturally sanctioned practice. This long-standing tradition dictates that the girl undertakes this initiation ritual to give honour to both herself and her family. Initiates report that they feel that they have no choice but to comply and partake in the initiation ceremony as it is encouraged by their guardians.<sup>101</sup> Under the influence of parental figures, adolescents are coerced into participating in these rituals, carrying the weight of societal expectations. The *Kusasa Fumbi* candidates who resist this imposition risk severe social consequences such as ostracisation and isolation from the community, as prevailing peer dynamics exert substantial influence.<sup>102</sup> Furthermore, those who refuse to participate are made to believe that they will invoke divine retribution through affliction with incurable ailments and severe skin desiccation.<sup>103</sup>

The MHRC reports that initiation ceremonies such as *Kusasa Fumbi* influence young girls towards becoming child brides.<sup>104</sup> This is significant as Malawi holds the 10<sup>th</sup> position globally for its alarmingly high prevalence of child marriages, with half of its children being wedded before reaching the age of 18, as reported by the World Health Organisation.<sup>105</sup> It hinders Malawi's efforts to curb the issue of child marriage.

Moreover, according to UNICEF, the nation has one of the highest rates of maternal mortality rates in the world.<sup>106</sup> This predicament is exacerbated by the fact that approximately 35 per cent of pregnancies in Malawi are attributed to teenage mothers.<sup>107</sup> These statistics support the MHRC's report that argues that initiation ceremonies such as *Kusasa Fumbi* influence young girls towards entering into child marriages.<sup>108</sup> This is because the majority of

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<sup>100</sup> Skinner, Joanna, et al. "Transitions to adulthood: Examining the influence of initiation rites on the HIV risk of adolescent girls in Mangochi and Thyolo districts of Malawi." *AIDS Care- Psychological and Socio-Medical Aspects of AIDS/HIV*, vol. 25, no. 3, pp. 296–301, <https://doi.org/10.1080/09540121.2012.701721>.

<sup>101</sup> Park, M. (2014) *A rite of passage that pushes girls into sex*, CNN. Available at: <https://edition.cnn.com/2014/02/04/health/malawi-girls-initiation/index.html> (Accessed: 13 August 2023).

<sup>102</sup> Skinner, Joanna, et al. "Transitions to adulthood: Examining the influence of initiation rites on the HIV risk of adolescent girls in Mangochi and Thyolo districts of Malawi." *AIDS Care- Psychological and Socio-Medical Aspects of AIDS/HIV*, vol. 25, no. 3, pp. 296–301, <https://doi.org/10.1080/09540121.2012.701721>.

<sup>103</sup> Ibid

<sup>104</sup> Mawodza, Obdiah. "An Assessment Of The Legal Framework On The Protection Of Girls From Child Marriages In Malawi." University of the Western Cape, 2015. Thesis.

<sup>105</sup> Ibid

<sup>106</sup> UNICEF

<sup>107</sup> Ibid

<sup>108</sup> Mawodza, Obdiah. "An Assessment Of The Legal Framework On The Protection Of Girls From Child Marriages In Malawi." University of the Western Cape, 2015. Thesis.

the girls who are *Kusasa Fumbi* initiates are thereafter forced into early marriages and cease their studies at school.<sup>109</sup> The problem of secondary school dropout rates is closely linked to child marriage, as around 65 per cent of women who lack formal education are involved in child marriage. Moreover, the overall pervasiveness of child marriage has persistently exceeded 40 per cent over the last decade.<sup>110</sup> The statistics indicate that 43 per cent of girls' dropouts attribute their discontinuation of pursuing an education to either pregnancy or marriage.<sup>111</sup>

Furthermore, initiates who have completed the sexual cleansing rites are encouraged by the *Namkungwi* to practice what they have learned and have sexual intercourse.<sup>112</sup> Chanza suggests that parents of some initiates aim for their daughters to fall pregnant at a young age, the purpose of this is to find justification to marry her off and shift the responsibility and cost of raising her to that of her husband and his family.<sup>113</sup> The younger the age of the girl, the more she is susceptible to pregnancy-related complications, including fistulas, a distressing ailment causing involuntary discharge of urine and faeces, in addition to severe bleeding and other associated adversities.<sup>114</sup> Remarkably scarce in society, the discourse surrounding the activities conducted at these camps is marked by its enigmatic nature, concealed by longstanding traditions of secrecy.<sup>115</sup> There is usually no discussion about the risks of pregnancy, sexually transmitted diseases or how to protect themselves.<sup>116</sup>

Despite the concerted efforts of Malawian authorities to eradicate this longstanding tradition, its clandestine continuation persists. Overall, the initiation can have lifelong

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<sup>109</sup> Dunning, Denise., and Mkandawire, Joyce. "Have you heard of the disvirgining ceremony Kusasa Fumbi in Malawi?" ATQ News, 2014. Web. <https://atqnews.com/have-you-heard-of-the-disvirgining-ceremony-kusasa-fumbi-in-malawi/>. Accessed 08 August 2023.

<sup>110</sup> National Planning Commission (Malawi). "Malawi Priorities: Girls' Secondary Education & Child Marriage." Copenhagen Consensus, 2017, [copenhagenconsensus.com/publication/malawi-priorities-girls-secondary-education-child-marriage](https://copenhagenconsensus.com/publication/malawi-priorities-girls-secondary-education-child-marriage).

<sup>111</sup> Phiri, Angella. "Child Marriage Continues Contributing to School Dropout." *The Nation Online*, 21 June 2022, [mwnation.com/child-marriage-continues-contributing-to-school-dropouts/](https://www.nation.com/child-marriage-continues-contributing-to-school-dropouts/).

<sup>112</sup> Ahmed, Beenish. "Confronting a Sexual Rite of Passage in Malawi." *The Atlantic*, Atlantic Media Company, 15 July 2021, [www.theatlantic.com/international/archive/2014/01/Confronting-a-sexual-rite-of-passage-in-malawi/283196](https://www.theatlantic.com/international/archive/2014/01/Confronting-a-sexual-rite-of-passage-in-malawi/283196).

<sup>113</sup> Ibid

<sup>114</sup> Skinner, Joanna, et al. "Transitions to adulthood: Examining the influence of initiation rites on the HIV risk of adolescent girls in Mangochi and Thyolo districts of Malawi." *AIDS Care- Psychological and Socio-Medical Aspects of AIDS/HIV*, vol. 25, no. 3, pp. 296–301, <https://doi.org/10.1080/09540121.2012.701721>.

<sup>115</sup> Ibid

<sup>116</sup> Ibid

traumatic effects on the mental health of the girls who undertook the rites. The MHRC notes that sexual cleansing initiations limit girls' "rights to education, health, liberty, and dignity".<sup>117</sup>

Furthermore, Rasing, an anthropologist who is a specialist in girls' initiation ceremonies in Zambia, explains that the veil of secrecy around these rituals was heightened during the era of colonialism.<sup>118</sup> Boucher, another anthropologist, claims that sexual cleansing rituals like *Kusasa Fumbi* date back centuries.<sup>119</sup> Additionally, Boucher asserts that efforts to eradicate the practice are facing resistance from remote southern areas of Malawi despite over a century of Christianity and three decades of the AIDS epidemic, 'sexual cleansing' is seldomly, if ever, performed in many parts of the nation, especially in areas near the major cities of Blantyre and Lilongwe.<sup>120</sup> Resistance to changing this cultural practice has also been attributed to preventing missionaries and churches from attempting to exert control and convert these practices to Christianity.<sup>121</sup> As mentioned above, some reasons for practising *Kusasa Fumbi* are religious and spiritual.<sup>122</sup> This is notable because Malawi is a majority-Christian country, over 87 per cent of the population identify as Christian.<sup>123</sup> This practice goes against the puritanical preaching that most branches of Christianity preach. Notably, only 8 per cent of Malawians identify with traditional African religions.<sup>124</sup>

However, the prevalence of HCPs like *Kusasa Fumbi* suggests that more people prescribe traditional African beliefs than is reported. Further investigation is needed to better understand the root contributing factors of the practice. Despite the seemingly objectionable nature of such traditions, Rasing points out that many women associate initiations with honour.<sup>125</sup> These ceremonies impact a woman's ability to effect change and attain empowerment, which stems from her success in embodying the ideals of womanhood.<sup>126</sup> This

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<sup>117</sup> Ahmed, Beenish. "Confronting a Sexual Rite of Passage in Malawi." The Atlantic, Atlantic Media Company, 15 July 2021, [www.theatlantic.com/international/archive/2014/01/Confronting-a-sexual-rite-of-passage-in-malawi/283196](http://www.theatlantic.com/international/archive/2014/01/Confronting-a-sexual-rite-of-passage-in-malawi/283196).

<sup>118</sup> Ibid

<sup>119</sup> Butler, Ed. "The man hired to have sex with children." BBC News, 2016. Web. <https://www.bbc.com/news/magazine-36843769>. Accessed 09 August 2023.

<sup>120</sup> Ibid

<sup>121</sup> Ahmed, Beenish. "Confronting a Sexual Rite of Passage in Malawi." The Atlantic, Atlantic Media Company, 15 July 2021, [www.theatlantic.com/international/archive/2014/01/Confronting-a-sexual-rite-of-passage-in-malawi/283196](http://www.theatlantic.com/international/archive/2014/01/Confronting-a-sexual-rite-of-passage-in-malawi/283196).

<sup>122</sup> See the contributing factors and consequences section in Chapter 2.

<sup>123</sup> "The 2015-16 Malawi Demographic and Health Survey (2015-16 MDHS)." 2016. Bootstrap Example. [http://www.nsomalawi.mw/index.php?option=com\\_content&view=article&id=222&Itemid=108](http://www.nsomalawi.mw/index.php?option=com_content&view=article&id=222&Itemid=108). Accessed 19 December 2023.

<sup>124</sup> Adams, Jimi, and Trinitapoli, Jenny. "The Malawi Religion Project: Data Collection and Selected Analyses." Demographic Research, vol. 21, 2009, pp. 255-288. DOI: 10.4054/DemRes.2009.21.10.

<sup>125</sup> Ibid

<sup>126</sup> Ibid

achievement leads to earning respect from her spouse and his family, and it establishes her as a moral figure in her community.<sup>127</sup>

*d) Contributing factors*

This portion of the chapter will address the factors contributing to the persistent occurrence of *Kusasa Fumbi*. While adequate legislation and policies exist, the public and NGO sector responses have experienced difficulties in eradicating discriminatory cultural practices and ideas to improve women's rights.<sup>128</sup>

Firstly, several NGOs identify culture as a reason why harmful practices toward women endure unabated in Malawi.<sup>129</sup> These cultural attitudes are deeply entrenched, they stem from cultural, religious, and social norms that perpetuate unequal gender power dynamics.<sup>130</sup> HCPs serve as a means of societal control, regulating women's sexuality and reproductive functions.<sup>131</sup> In doing so, they contribute to the reinforcement of gender power hierarchies, often relegating girls to subordinate positions within the societal framework.<sup>132</sup> Because of these practices women and girls continue to be subjected to marginalisation and discrimination that negatively impact their development, health, socioeconomic status and overall ability to contribute to society.<sup>133</sup>

Furthermore, certain aspects of Malawian culture are deeply entrenched in myths and stereotypes related to sexual relations. For instance, there exists a tendency to disregard a woman's refusal to a proposition of intercourse. Even though scholars like Kanyongolo and Malunga clarify that these myths aren't part of Malawian customary law, they hold substantial influence.<sup>134</sup> Courts have dismissed cases based on such misconceptions.<sup>135</sup> Notably, the words of former Minister of Justice and Attorney General of Malawi, Ralph Kasambara, reveal a troubling aspect where the justice system, instead of safeguarding the rights of the girl child,

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<sup>127</sup> Ibid

<sup>128</sup> "Harmful Practices." 2018. International Planned Parenthood Federation, Africa Region. <https://africa.ippf.org/sites/africa/files/2018-09/SOAW-Report-Chapter-6-Harmful-Practices.pdf>. Accessed 28 December 2023.

<sup>129</sup> Ibid

<sup>130</sup> Ibid

<sup>131</sup> Ibid

<sup>132</sup> Ibid

<sup>133</sup> Ibid

<sup>134</sup> Kanyongolo, Ngeyi, and Bernadette Malunga. "The Treatment of Consent in Sexual Assault Law in Malawi." *Theequalityeffect.Org*, 2011, [theequalityeffect.org/wp-content/uploads/2013/04/consent-paper-Malawi-NK.pdf](http://theequalityeffect.org/wp-content/uploads/2013/04/consent-paper-Malawi-NK.pdf).

<sup>135</sup> Ibid

sometimes perpetuates sexual violence by dismissing resistance as a mere pretence. In a case, he stated:

“[I] do not wish to be duped by talk that she was forced down, who does not know that women are generally difficult and pretentious when sex demands are in force? She may have wanted it at the house, and in meeting that resistance, he applied pressure”.<sup>136</sup>

This highlights a distressing reality where those entrusted with upholding justice contribute to the plight of the girl child in Malawi. In addition, another of the reasons that *Kusasa Fumbi* continues is because of a lack of enforcement by local authorities.<sup>137</sup> The UN in Malawi claims that “perpetrators are not prosecuted due to limited enforcement of the existing laws by the authorities”.<sup>138</sup>

Secrecy is another reason, *Kusasa Fumbi* prevails. The secrecy surrounding sexual cleansing practices in the culture makes it challenging for affected girls to express their emotions. Many Malawians avoid discussing situations deemed embarrassing, such as instances involving adults engaging in sexual acts with children. Bringing up such matters is often met with social stigma, perpetuating a tradition that condones sexual violence against girls. The Ntchisi Organisation for Youth and Development, a non-governmental organisation (NGO) dedicated to ending HCPS, surveyed Ntchisi, a district in Malawi.<sup>139</sup>

The survey discovered that sexual cleansing rituals like *Kusasa Fumbi* are still prevalent but are under-reported.<sup>140</sup> As many as 80 per cent of the people in the southern region of Malawi said their daughters had been initiated into womanhood through the *Kusasa Fumbi* practice.<sup>141</sup> In comparison, the central and northern regions reported a 31 per cent occurrence respectively.<sup>142</sup> A reason for this underreporting might stem from these practices not being

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<sup>136</sup> Abankwah, R.M. (1970) The plight of an African girl child: Traditional cultural practices in Malawi. Available at: <https://repository.unam.edu.na/handle/11070/2072> (Accessed: 17 November 2023).

<sup>137</sup> *United Nations in Malawi calls for renewed, concerted action to eliminate harmful cultural practices affecting women and girls - malawi* (2016) *ReliefWeb*. Available at: [https://reliefweb.int/report/malawi/united-nations-malawi-calls-renewed-concerted-action-eliminate-harmful-cultural?gclid=Cj0KCQjw7PCjBhDwARIsANo7Cgn-nDWhiu4kFWnE9Jx9uB1FgNbJr3\\_2ifFfiqjPnHqdXSc00rW-mr8aAt07EALw\\_wcB](https://reliefweb.int/report/malawi/united-nations-malawi-calls-renewed-concerted-action-eliminate-harmful-cultural?gclid=Cj0KCQjw7PCjBhDwARIsANo7Cgn-nDWhiu4kFWnE9Jx9uB1FgNbJr3_2ifFfiqjPnHqdXSc00rW-mr8aAt07EALw_wcB) Accessed: 05 March 2023.

<sup>138</sup> *Ibid*

<sup>139</sup> *Sexual Cleansing Practices Rage On* (2021), 5 September. Available at: <https://mwnation.com/sexual-cleansing-practices-rage-on/> (Accessed: 2023).

<sup>140</sup> *Ibid*

<sup>141</sup> *Ibid*

<sup>142</sup> *Ibid*

questioned or challenged, thereby acquiring a semblance of morality in the eyes of those engaged in them.<sup>143</sup>

Furthermore, another cause of *Kusasa Fumbi* is the perception of childhood in some communities in Malawi. Kangaude highlights that the interdisciplinary field of childhood studies has been shaped by the notion that childhood is not a natural classification but a historically and culturally manufactured concept.<sup>144</sup> This perspective, emphasising the social construction of childhood, suggests diverse conceptions across cultures and even within them, with meanings evolving. The prevailing meanings of childhood have largely been influenced by developmental approaches linked to the European modernity era.<sup>145</sup> In Malawi, social practices governing children's sexual conduct predate the introduction of Western concepts like the age of consent.<sup>146</sup> Traditional Malawian views on adulthood, primarily marked by puberty and initiation rites in some cultural groups, underscore the transition from childhood to adulthood.<sup>147</sup> Puberty signals the recognition of a child's capability for adult sexual conduct, as marked by initiation rites.<sup>148</sup> This perspective on childhood highlights a cultural context where harmful practices like *Kusasa Fumbi* might be perceived differently, raising questions about its acceptability. "Many of the victims of the tradition are girls from rural areas, who may have little knowledge about sexual abuse".<sup>149</sup>

Unfortunately, such acts are not reported to the police or the media. Abankwah argues that the scarcity of Malawian social workers is one of the reasons why the *Kusasa Fumbi* practice prevails. I echo this sentiment, studies have shown that in the majority of instances, vulnerable children find themselves in a state of helplessness due to the limited presence of social support systems and the overall insufficiency of basic social services.<sup>150</sup> This means that girls are psychologically and emotionally scarred, and take this distorted self-image into adulthood, where the male perpetrators continue to benefit.

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<sup>143</sup> Bande, Lewis. "Criminalising Harmful Cultural Practices: Lessons from Malawi." *Southern African Public Law*, 2022, doi.org/10.25159/2522-6800/10661.

<sup>144</sup> Kangaude, Godfrey. "Adolescent sex and 'defilement' in Malawi law and society." *African Human Rights Law Journal*, vol. 17, no. 2, pp. 527–549, doi:https://doi.org/10.17159/1996-2096/2017/v17n2a8.

<sup>145</sup> Ibid

<sup>146</sup> Ibid

<sup>147</sup> Ibid

<sup>148</sup> Ibid

<sup>149</sup> Ibid

<sup>150</sup> Tembo, Memory Jayne, and Siv Oltedal. "Social Work and Families in Child Welfare in Malawi: Social Workers Considerations When Placing a Child Outside the Home." *Journal of Comparative Social Work*, 2015, journals.uis.no/index.php/JCSW/article/view/122.

Another reason for the prevalence of the practice is plural legal systems, where customary or religious laws may stipulate distinct ages of maturity and impose varying conditions for consent.<sup>151</sup> Challenges arise in enforcing formal legal standards, particularly in regions and communities where formal institutions lack strength, and traditional or religious systems play a dominant role in societal affairs.<sup>152</sup> The coexistence of these divergent legal frameworks introduces complexities, leading to discrepancies in age requirements and consent protocols, thereby contributing to the persistence of child marriage within such contexts.<sup>153</sup>

Overall, as mentioned in Chapter 1, Malawi is a pluralistic nation. The presence of plural legal systems significantly impacts HCPs. In many African countries, including Malawi, a multitude of laws exists, and conflicts between these and national laws can negatively affect people's rights.<sup>154</sup> When formal law and customary laws intersect or conflict without clear regulation, the consequences can be adverse.<sup>155</sup> Harmful practices rooted in cultural, religious, or customary norms create a critical concern regarding how formal laws, like constitutions and international treaties, recognise and relate to customary law.<sup>156</sup> Enforcement of formal laws, especially those related to non-discrimination and age of marriage, becomes challenging where formal institutions are weak or absent, and customary or religious laws dictate behaviour, particularly in rural areas.<sup>157</sup> Challenges intensify when these matters are perceived as private and outside the domain of the law, leading people to prefer internal resolution with relatives or familiar institutions like customary or religious authorities.<sup>158</sup>

Respect for human rights, equality before the law, and the prohibition of discrimination require constitutional provisions that limit the right to practice culture and traditional practices when they infringe on other constitutional rights.<sup>159</sup> Malawi, in its Constitution, has taken steps in this direction, emphasising that the right to culture does not override other fundamental rights.<sup>160</sup>

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<sup>151</sup> “Harmful Practices.” 2018. International Planned Parenthood Federation, Africa Region. <https://africa.ippf.org/sites/africa/files/2018-09/SOAW-Report-Chapter-6-Harmful-Practices.pdf>. Accessed 28 December 2023.

<sup>152</sup> Ibid

<sup>153</sup> Ibid

<sup>154</sup> “Harmful Practices.” 2018. International Planned Parenthood Federation, Africa Region. <https://africa.ippf.org/sites/africa/files/2018-09/SOAW-Report-Chapter-6-Harmful-Practices.pdf>. Accessed 28 December 2023.

<sup>155</sup> Ibid

<sup>156</sup> Ibid

<sup>157</sup> Ibid

<sup>158</sup> Ibid

<sup>159</sup> Ibid

<sup>160</sup> Ibid

Abankwah argues that the prevalence of the *Kusasa Fumbi* practice is partly due to the absence of social workers. Unfortunately, the lack of social workers in Malawi contributes to barriers to accessing assistance and rehabilitation for victims of sexual cleansing.<sup>161</sup> Religion is another contributor to *Kusasa Fumbi*. The secrecy is often tied to the spiritual dimensions of the practice. Traditional beliefs and rituals in Malawi frequently involve connections with ancestral spirits, and secrecy is perceived as a means to protect the sacredness of these spiritual interactions.<sup>162</sup> Moreover, *Kusasa Fumbi* is believed to hold spiritual significance amongst the people groups that practice it.<sup>163</sup> Its proponents believe that it facilitates the attainment of lifelong immunity against diseases for the initiates, ensuring the effectiveness of this ritual mandates engaging in unprotected intercourse.<sup>164</sup> This is due to the exchange of bodily fluids with the male participant, which serves as the conduit for transferring immunity to the girl.<sup>165</sup>

Moreover, gender discrimination, poverty, lack of access to education for girls, and entrenched social, religious, and cultural norms contribute to a complex cycle exacerbating the vulnerability of girls and women to prejudice and violence.<sup>166</sup> Malawi's societal structure is predominantly patriarchal and chauvinistic, maintaining the subordination of women and girls to men. The concept of masculinity is inherently connected to cultural expectations. According to Kistner, sexual violence could include unwanted touching or fondling, and any other acts that threaten the sexual integrity and autonomy of women. Kathewera-banda, Gomile-Chidyaonga, and Hendriks take it further by stating that sexual violence is the utilisation of sex as a weapon of domination and power.<sup>167</sup> “Therefore, sexual violence is a gender-based issue which reflects social, cultural and economic inequalities between men and women”.<sup>168</sup> In regions like Nkhotakota<sup>169</sup>, cultural expectations link the concept of masculinity to sexual dominance. Sexual violence, including unwanted touching or fondling, becomes a manifestation of power dynamics between genders, reflecting broader social, cultural, and economic inequalities.

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<sup>161</sup> Abankwah, R.M. (1970) The plight of an African girl child: Traditional cultural practices in Malawi. Available at: <https://repository.unam.edu.na/handle/11070/2072> (Accessed: 17 November 2023).

<sup>162</sup> Ibid

<sup>163</sup> Ibid

<sup>164</sup> MhizSarahUnoke (2021) Rituals: See the tribe in Malawi that deflowers their teenage girls after their first period, Rituals: See the tribe in Malawi that Deflowers their Teenage Girls after their first Period - Opera News. Available at: <https://ng.opera.news/ng/en/crime/031c2159d1874b27b3b2df173ffbad11> (Accessed: 04 August 2023).

<sup>165</sup> Ibid

<sup>166</sup> Ibid

<sup>167</sup> Ibid

<sup>168</sup> Ibid

<sup>169</sup> Nkhotakota is a district in Malawi

Young girls who have experienced HCPs may not have the same opportunities to learn and compete in school as boys.<sup>170</sup> It is crucial to note that young girls below the age of 18 are especially susceptible to these harmful traditions and attitudes, which contribute to the lack of investment in their education.<sup>171</sup>

## CHAPTER 3

### I. INTERNATIONAL AND REGIONAL FRAMEWORKS FOR SAFEGUARDING WOMEN AND GIRLS FROM HARMFUL CULTURAL PRACTICES

The previous chapter provided a discussion of the practice of *Kusasa Fumbi*. This chapter considers international, regional, and domestic legal frameworks employed by Malawi to combat harmful cultural practices, with the focal point being safeguarding women and girls from HCPs. This chapter examines the contribution of international legal instruments such as the Maputo Protocol, CEDAW, CRC, African Charter on the Rights and Welfare of the Child (ACRWC), African Charter on Human and Peoples' Rights (ACHPR) and the SADC Protocol on Gender and Development in addressing the nuanced challenges posed by harmful cultural practices in Malawi. It critically assesses the existing gaps in these instruments and explores potential avenues for improvement.

As Saukila argues, progress has been made in the international community towards empowering women.<sup>172</sup> This can be evidenced by the increased importance and prominence gender equality has gained in human rights law.<sup>173</sup>

Moreover, other binding instruments have been guided by the UDHR since its inception, despite its lack of legal binding.<sup>174</sup> This significance lies in the UDHR's foundational role in shaping subsequent legal frameworks, fostering a global commitment to promoting

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<sup>170</sup> Banda, Joyce., and Atansah, Priscilla. "An agenda for harmful cultural practices and girls' empowerment." Center For Global Development | Ideas to Action, 2016. Web. <https://www.cgdev.org/publication/agenda-harmful-cultural-practices-and-girls-empowerment>. Accessed 05 April 2023.

<sup>171</sup> UNICEF Malawi. "Traditional Practices in Malawi." 2019. UNICEF Malawi. <https://www.unicef.org/malawi/reports/traditional-practices-malawi>. Accessed 19 December 2023.

<sup>172</sup> Saukila, Tonthozo. "The Regulation of Ukuthwala in South Africa: Lessons from Malawi." University of Cape Town, 2021. Dissertation.

<sup>173</sup> Ibid

<sup>174</sup> The Universal Declaration of Human Rights, 1948 Article 16(2).

gender equality and guaranteeing that future legally enforceable instruments incorporate and uphold these principles.<sup>175</sup>

Malawi utilises both domestic, regional and international human rights instruments to combat the issue of *Kusassa Fumbi*. Beyond domestic legislation, the country is party to various international and regional conventions, including but not limited to the CRC<sup>176</sup> and the Maputo Protocol.<sup>177</sup> These instruments contribute to a broader contextual framework. Addressing harmful practices is a reaction to calls from international and regional human rights instruments. These efforts aim to eliminate harmful practices.<sup>178</sup> Malawi has ratified the CRC, CEDAW,<sup>179</sup> the ACRWC,<sup>180</sup> the ACHPR,<sup>181</sup> and the Maputo Protocol. The standards prescribed by these legal instruments aid in the protection of girls by holding signatory states to a certain standard.

a) *Convention on the Elimination of All Forms of Discrimination Against Women*

CEDAW advocates for the cessation of gender-based discrimination, encompassing protection against such discrimination targeting girls.<sup>182</sup> It defines any form of violence directed at women and girls as a manifestation of discrimination.<sup>183</sup> The underlying principle of CEDAW is that “discrimination against women infringes upon the principles of equal rights and respect for human dignity”.<sup>184</sup> Thus CEDAW presents that discrimination is a hindrance to the complete realisation of women's capabilities.<sup>185</sup> Moreover, CEDAW’s Committee stated that Article 2(f) mandates states to enact suitable measures, typically in the form of legislation, to eradicate HCPs that adversely impact the health of girls.<sup>186</sup> This means that CEDAW imposes a duty on

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<sup>175</sup> Ibid

<sup>176</sup> UN Convention on the Rights of the Child (CRC) was acceded to in 1991.

<sup>177</sup> Protocol to the African Charter on Human and peoples rights relating to the Rights of Women in Africa (Maputo Protocol), was ratified by Malawi in 2005.

<sup>178</sup> Bande, Lewis. “Criminalising Harmful Cultural Practices: Lessons from Malawi.” *Southern African Public Law*, 2022, doi.org/10.25159/2522-6800/10661.

<sup>179</sup> Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) was ratified by Malawi in 1987.

<sup>180</sup> The African Charter on the Rights and Welfare of the Child (ACRWC) was ratified by Malawi in 1999.

<sup>181</sup> The African Charter on Human and People’s Rights was ratified by Malawi in 1989.

<sup>182</sup> United Nations. “Protecting Children from Harmful Practices in Plural Legal Systems with a Special Emphasis on Africa.” 2016. [violenceagainstchildren.un.org](https://violenceagainstchildren.un.org/sites/violenceagainstchildren.un.org/files/2021/vnr_analytical_report/vnr_analytical_review_2021.pdf).  
[https://violenceagainstchildren.un.org/sites/violenceagainstchildren.un.org/files/2021/vnr\\_analytical\\_report/vnr\\_analytical\\_review\\_2021.pdf](https://violenceagainstchildren.un.org/sites/violenceagainstchildren.un.org/files/2021/vnr_analytical_report/vnr_analytical_review_2021.pdf). Accessed 29 December 2023.

<sup>183</sup> Ibid

<sup>184</sup> Ibid

<sup>185</sup> Ibid

<sup>186</sup> Article 2(f) of CEDAW.

State parties to draft and enact legislation that safeguards girls from HCPs.<sup>187</sup> CEDAW General Recommendation No.19, compels States to take all necessary steps towards the eradication of gender-based discrimination against women in all aspects related to marriage and family, aiming to dismantle attitudes that foster harmful cultural practices.<sup>188</sup>

As previously mentioned in Chapter 2, *Kusasa Fumbi*, can occur within the framework of marriage and family through practices like early and forced marriages. In some instances, young girls are subjected to *Kusasa Fumbi* as part of initiation ceremonies associated with their entry into marriage. The cultural belief systems embedded in certain communities may perpetuate this harmful practice within the familial and marital contexts. Therefore, CEDAW's emphasis on eliminating discrimination in matters related to marriage and family is crucial in addressing the root causes and manifestations of the practice.

Further, CEDAW mandates that State Parties should “modify the social and cultural patterns of conduct of men and women” to eradicate all practices grounded in the notion of sex-based inferiority or superiority, as well as stereotypical gender roles.<sup>189</sup> Sepper notes that Article 5(a) serves a dual purpose, functioning both as an “interpretive tool” and a “substance-giver,” ensuring substantive equality for women.<sup>190</sup> The discourse on protecting women and girls inherently involves ending discrimination and promoting gender equality, given that harmful cultural practices disproportionately affect them.<sup>191</sup> As discussed in Chapter 2, where *Kusasa Fumbi* was identified as a product of gender stereotyping and the undervaluation of females and their sexuality, it's essential to note that the CEDAW Committee's General Recommendation No. 28 of 2010 stresses the need to transform the social and cultural construction of gender.<sup>192</sup> This perspective resonates with the idea that the measures outlined in General Recommendation No. 28 are practical tools for eliminating cultural practices that

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<sup>187</sup> The UN Committee on the Elimination of Discrimination Against Women (CEDAW), through its General Recommendation No. 19, calls upon States Parties to implement robust legal measures to safeguard women from various forms of violence. This includes the imposition of legal sanctions, civil remedies, and compensation provisions. (Reference: Paragraph 24(r)(i), General Recommendation No. 19: Violence against women, 1992, U.N Doc.).

<sup>188</sup> Ibid

<sup>189</sup> Article 5(a) of CEDAW.

<sup>190</sup> Mwambene, L. and Mawodza, O. (2017). Children's Rights Standards and Child Marriage in Malawi. *African Studies Quarterly*, 17(3).

<sup>191</sup> United Nations. “Protecting Children from Harmful Practices in Plural Legal Systems with a Special Emphasis on Africa.” 2016. [violenceagainstchildren.un.org](https://violenceagainstchildren.un.org/sites/violenceagainstchildren.un.org/files/2021/vnr_analytical_report/vnr_analytical_review_2021.pdf).  
[https://violenceagainstchildren.un.org/sites/violenceagainstchildren.un.org/files/2021/vnr\\_analytical\\_report/vnr\\_analytical\\_review\\_2021.pdf](https://violenceagainstchildren.un.org/sites/violenceagainstchildren.un.org/files/2021/vnr_analytical_report/vnr_analytical_review_2021.pdf). Accessed 29 December 2023.

<sup>192</sup> CEDAW Committee's General Comment No. 28 of 2010.

particularly affect girls.<sup>193</sup> These measures play a crucial role in dismantling stereotypes and cultural biases against girls.<sup>194</sup>

Article 16(1)(a) of CEDAW specifically requests the elimination of discrimination against women in “all matters relating to marriage and family relations”.<sup>195</sup> It stipulates that the elimination of discrimination between men and women and mandates that both spouses must give consent for a marriage to be considered valid.<sup>196</sup> This could be relevant in the context of *Kusasa Fumbi* as it usually leads to young girls being forced into marriage by their parents and guardians.<sup>197</sup>

In addition, CEDAW illuminates the root causes of HCPs. Numerous HCPs find justification among practitioners through appeals to tradition, religion, and societal norms.<sup>198</sup> Neubauer emphasises that in addressing this challenge, the General Recommendation in CEDAW unequivocally asserts that no tradition, religion, faith, custom, or any other basis should serve as a justification for any form of discrimination against women.<sup>199</sup> Particularly in the context of specific harmful practices, religion is frequently manipulated to rationalise their continuation.<sup>200</sup>

#### *b) Convention on the Rights of the Child*

The protection of children from violence and harmful practices is framed by four cardinal principles in the CRC: “non-discrimination, the best interests of the child, the right to life, survival, and development, and respect for the views of the child”.<sup>201</sup> States are mandated by Article 19 to prohibit all forms of violence against children.<sup>202</sup> Article (3) stipulates that “States Parties shall take all effective and appropriate measures with a view to abolishing traditional

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<sup>193</sup> Ibid

<sup>194</sup> Mwambene, L. and Mawodza, O. (2017). Children’s Rights Standards and Child Marriage in Malawi. *African Studies Quarterly*, 17(3).

<sup>195</sup> Article 16(1)(a) of CEDAW.

<sup>196</sup> Ibid

<sup>197</sup> Saukila, Tonthozo. “The Regulation of Ukuthwala in South Africa: Lessons from Malawi.” University of Cape Town, 2021. Dissertation.

<sup>198</sup> *Eradicating harmful practices against women and girls* (2014) OHCHR. Available at: <https://web.dev.ohchr.un-icc.cloud/en/stories/2014/11/eradicating-harmful-practices-against-women-and-girls> (Accessed: 30 December 2023).

<sup>199</sup> Ibid

<sup>200</sup> Ibid

<sup>201</sup> United Nations. “Protecting Children from Harmful Practices in Plural Legal Systems with a Special Emphasis on Africa.” 2016. [violenceagainstchildren.un.org](https://violenceagainstchildren.un.org). [https://violenceagainstchildren.un.org/sites/violenceagainstchildren.un.org/files/2021/vnr\\_analytical\\_report/vnr\\_analytical\\_review\\_2021.pdf](https://violenceagainstchildren.un.org/sites/violenceagainstchildren.un.org/files/2021/vnr_analytical_report/vnr_analytical_review_2021.pdf). Accessed 29 December 2023.

<sup>202</sup> Article 19 UN CRC.

practices prejudicial to the health of children”.<sup>203</sup> Therefore, *Kusasa Fumbi* is implicitly barred by the CRC which defines a child as a “person below the age of 18” and obliges state parties to take all “effective and appropriate measures” to abolish cultural practices that are detrimental to the health of a child.<sup>204</sup>

Chapter Two defined *Kusasa Fumbi* and identified it as a sexual initiation rite of passage. This thesis notes that though *Kusasa Fumbi* is not marriage as such, it often triggers pregnancy which in turn leads to child marriage. This correlation was observed by the MHRC. Consequently, this means that where a girl below the age of 18 is initiated into adulthood through *Kusasa Fumbi* and it results in child marriage, it becomes a HCP. This argument is supported by Van Bueren who contends that Article 24(3) enhances children's rights by prohibiting various HCPs, even those “not explicitly defined”.<sup>205</sup> Given our earlier acknowledgment of *Kusasa Fumbi* as a HCP, one can interpret Article 24(3) as advocating for the elimination of *Kusasa Fumbi*.

Furthermore, Article 19 of the CRC prohibits all forms of violence against children,<sup>206</sup> while Article 24(3) mandates states to eliminate traditional practices that endanger children's health.<sup>207</sup>

## II. AFRICAN REGIONAL STANDARDS

When tackling violence against children in Africa, key legal frameworks include the ACHPR, particularly the Maputo Protocol, the SADC Protocol on Gender and Development and the ACRWC.<sup>208</sup> The ACHPR safeguards women’s and children’s rights, with Article 18 urging State Parties to eliminate discrimination against women and protect the rights of women and children in accordance with international law.<sup>209</sup>

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<sup>203</sup> Article 3 UN CRC.

<sup>204</sup> Article 24(3) UN CRC.

<sup>205</sup> Mwambene, L. and Mawodza, O. (2017). Children’s Rights Standards and Child Marriage in Malawi. *African Studies Quarterly*, 17(3).

<sup>206</sup> Article 19 UN CRC.

<sup>207</sup> Article 24(3) UN CRC.

<sup>208</sup> United Nations. “Protecting Children from Harmful Practices in Plural Legal Systems with a Special Emphasis on Africa.” 2016. [violenceagainstchildren.un.org](https://violenceagainstchildren.un.org).

[https://violenceagainstchildren.un.org/sites/violenceagainstchildren.un.org/files/2021/vnr\\_analytical\\_report/vnr\\_analytical\\_review\\_2021.pdf](https://violenceagainstchildren.un.org/sites/violenceagainstchildren.un.org/files/2021/vnr_analytical_report/vnr_analytical_review_2021.pdf). Accessed 29 December 2023.

<sup>209</sup> Article 18 of the ACHPR

On the other hand, the Maputo Protocol strengthens these protections by mandating states to enact laws against violence against women, implement preventive measures, eradicate harmful practices, and ensure that marriages require the free and full consent of both parties, setting the minimum age for women's marriage at 18 years.<sup>210</sup> This Article is in line with the age limit outlined by the aforementioned legislation. This Protocol specifically promotes equality in marriage and family law and upholds women's involvement in shaping cultural policies.<sup>211</sup> Involving women in policy-making decisions is inclusive and can result in better policies being made. This opinion is shared by advocates for gender equality contend that women, being intimately familiar with their circumstances, should actively engage alongside men to ensure that their viewpoints are comprehensively acknowledged and implemented.<sup>212</sup>

Although culture has been identified as a factor that contributes to misalignment between human rights standards and the people's will, not all 'culture' is bad. The ACRWC recognises the significance of African cultural heritage in children's lives.<sup>213</sup> While valuing cultural virtues, it discourages any custom inconsistent with the rights outlined in the Charter.<sup>214</sup> Article 21 emphasises states' duty to eliminate HCPs affecting children, demonstrating a balanced approach to culture within the legal framework and ensuring the enactment of national laws stipulating that marriages should only occur with the voluntary and full consent of both parties, setting the minimum age for women's marriage at 18 years.<sup>215</sup>

The Protocol emphasises gender equality in marriage and family laws and maintains women's involvement in shaping cultural policies. African countries lacking legislation against harmful practices are urged to adopt and enforce laws prohibiting practices like Female Genital Mutilation (FGM), and child marriages, including *Kusasa Fumbi*.<sup>216</sup> The ACRWC acknowledges the significance of African cultural heritage but discourages customs conflicting with the rights outlined in the Charter, stressing the obligation of states to eliminate harmful practices affecting children, such as *Kusasa Fumbi*.<sup>217</sup> Protecting children's rights is culturally

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<sup>210</sup> Maputo protocol.

<sup>211</sup> Ibid

<sup>212</sup> Miranda, R. (2005) *Impact of women's participation and leadership on outcomes*, UN.org. Available at: [https://www.un.org/womenwatch/daw/egm/eql-men/docs/EP.7\\_rev.pdf](https://www.un.org/womenwatch/daw/egm/eql-men/docs/EP.7_rev.pdf) (Accessed: 30 December 2023).

<sup>213</sup> United Nations. "Protecting Children from Harmful Practices in Plural Legal Systems with a Special Emphasis on Africa." 2016. [violenceagainstchildren.un.org](https://violenceagainstchildren.un.org/sites/violenceagainstchildren.un.org/files/2021/vnr_analytical_report/vnr_analytical_review_2021.pdf). [https://violenceagainstchildren.un.org/sites/violenceagainstchildren.un.org/files/2021/vnr\\_analytical\\_report/vnr\\_analytical\\_review\\_2021.pdf](https://violenceagainstchildren.un.org/sites/violenceagainstchildren.un.org/files/2021/vnr_analytical_report/vnr_analytical_review_2021.pdf). Accessed 29 December 2023.

<sup>214</sup> ACRWC.

<sup>215</sup> Article 21 of the ACRWC.

<sup>216</sup> Ibid

<sup>217</sup> Ibid

valid in Africa, endorsed by Article 12 recognises a child's right to engage in cultural life.<sup>218</sup> Article 16(1) calls on states to enact measures safeguarding children from various abuses, including those inflicted during harmful cultural practices like *Kusasa Fumbi*.<sup>219</sup> As noted above, *Kusasa Fumbi* negatively impacts the mental and physical well-being of girls. Notably, both the CRC and the ACRWC prioritise provisions that better realise children's rights, reinforcing their protection against violence from harmful practices.<sup>220</sup> This mutual reinforcement strengthens the safeguarding of children's rights in Africa, emphasising freedom from violence resulting from such practices.<sup>221</sup>

a) *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*

The Maputo Protocol is a pioneering instrument that articulates a comprehensive set of rights for women.<sup>222</sup> Although it is grounded in international human rights agreements, it is deemed pioneering because it introduces progressive measures to comprehensively combat violence against women and girls, addressing the unique challenges faced by them in Africa.<sup>223</sup> Article 2 of the Protocol mandates State Parties to combat discrimination by implementing legislative and institutional measures to address gender biases, echoing the principles of the CEDAW.<sup>224</sup> It goes further and implores States to “take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women”.<sup>225</sup>

Additionally, it upholds the dignity and human rights of women and girls, compelling State Parties to protect them from violence and prevent acts that exploit or degrade them.<sup>226</sup> The protocol ensures the rights to life, integrity, and security of the person for girls and women, denouncing all forms of exploitation, cruel treatment, and degrading punishment.<sup>227</sup>

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<sup>218</sup> Article 12 of the ACRWC.

<sup>219</sup> Article 16(1) of the ACRWC.

<sup>220</sup> Chirwa Danwood. “The merits and demerits of the African Charter on the Rights and Welfare of the Child.” *International Journal of Children’s Rights*, vol. 10, pp. 157-177, DOI:10.1163/157181802401005421.. See also Lloyd, Amanda. “A theoretical analysis of the reality of children’s rights in Africa: An introduction to the African Charter on the Rights and Welfare of the Child.” *African Human Rights Law Journal*, vol. 2, no. 1, pp. 11-32, <https://www.ahrlj.up.ac.za/lloyd-a>.

<sup>221</sup> Ibid

<sup>222</sup> Equality Now. “19 reasons why the Maputo Protocol is beneficial to women and girls in Africa.” 2022. Web. [https://equalitynow.org/news\\_and\\_insights/19-reasons-why-the-maputo-protocol-is-beneficial-to-women-and-girls-in-africa/](https://equalitynow.org/news_and_insights/19-reasons-why-the-maputo-protocol-is-beneficial-to-women-and-girls-in-africa/). Accessed 29 December 2023.

<sup>223</sup> Ibid

<sup>224</sup> Article 2 of the Maputo Protocol.

<sup>225</sup> Ibid

<sup>226</sup> Article 3 of the Maputo Protocol.

<sup>227</sup> Article 4 of the Maputo Protocol.

Specifically, Article 5 outlaws harmful practices, including female genital mutilation, advocating for the protection of women vulnerable to such practices or other forms of violence.<sup>228</sup> It goes into detail about providing “necessary support to victims of harmful practices through basic services such as health services, legal and judicial support, emotional and psychological counselling”.<sup>229</sup> It also sets the minimum age of marriage for girls at 18, it mandates that all marriages require the full consent of both parties, introducing provisions to ensure equality throughout the marriage, from entry to dissolution.<sup>230</sup> By emphasising effective access to judicial and legal services, the Maputo Protocol is relevant to eliminating HCPs like *Kusasa Fumbi* by providing a legal framework that prohibits harmful practices, safeguards the rights of women and girls, and establishes the conditions for respectful and consensual marriages.

b) *SADC Protocol on Gender and Development*

The SADC Protocol on Gender and Development is relevant to combating *Kusasa Fumbi* in Malawi, especially in the context of the SADC Protocol's Girl Child Policy. The policy obligates member states to “promote and protect the rights of the girl child to ensure the full achievement of her social, cultural and economic development as an important resource to SADC regional integration”.<sup>231</sup>

This aligns with the broader goals of eliminating HCPs that negatively impact the development and well-being of young girls, including *Kusasa Fumbi*. The Protocol seeks to “harmonise international, continental, and regional gender equality instruments, providing a comprehensive framework to address issues outlined in CEDAW, the Maputo Protocol, and the Sustainable Development Goals”.<sup>232</sup> This consolidation of commitments enhances the region's capacity to plan, implement, and monitor gender-related agendas effectively.

In 2016, the protocol underwent revisions to align with the post-2015 Sustainable Development Goals.<sup>233</sup> However, Malawi has not endorsed the amendment to the SADC Protocol on Gender and Development.<sup>234</sup> Consequently, Malawi needs to consider the potential benefits of aligning with regional protocols to strengthen efforts against practices like *Kusasa*

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<sup>228</sup> Article 5 of the Maputo Protocol.

<sup>229</sup> Article 5(c) of the Maputo protocol.

<sup>230</sup> Article 6 of the Maputo Protocol.

<sup>231</sup> SADC Protocol's Girl Child Policy.

<sup>232</sup> SADC Protocol on Gender and Development.

<sup>233</sup> SADC. “*Gender Equality & Women Empowerment.*” 2022. Web. <https://www.sadc.int/pillars/gender-equality-women-empowerment>. Accessed 28 January 2024.

<sup>234</sup> Ibid

*Fumbi*, ensuring comprehensive regional collaboration to address common issues effectively. Although Malawi has not signed the agreement amending the SADC Protocol on Gender and Development, engagement with this regional instrument could contribute significantly to addressing harmful cultural practices like *Kusasa Fumbi*. It provides a platform for collaboration and the exchange of best practices among SADC member states, offering opportunities for shared strategies to combat practices that negatively impact the rights and well-being of the girl child.

## CHAPTER 4

### I. DOMESTIC LAW

The previous chapter covered international laws against HCPs like *Kusasa Fumbi*. This chapter focuses on Malawi's domestic laws regarding harmful cultural practices and explores how well Malawi has implemented the international laws and treaties it has ratified. The key question is whether Malawi's laws meet international standards by being clear and adaptable to cultural changes. In essence, examining how well Malawi's legal framework addresses cultural practices like *Kusasa Fumbi*.

#### a) *The Constitution of the Republic of Malawi*

The Constitution of the Republic of Malawi (the Constitution) incorporates a comprehensive Bill of Rights, ensuring that every Malawian is endowed with fundamental human rights.<sup>235</sup> The purpose of the rights outlined in the Bill of Rights is to establish the groundwork for the dignified living of all individuals in Malawi.<sup>236</sup> It aims to provide the freedoms essential for leading lives that are not only dignified but also meaningful, fostering an environment where individuals can realise their full potential.<sup>237</sup>

As provided by section 20 of the Constitution, there are guarantees of the right to equality. It stipulates that:

“(1) Discrimination of persons in any form is prohibited and all persons are, under any law, guaranteed equal and effective protection against discrimination on grounds of race, colour,

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<sup>235</sup> Constitution of the Republic of Malawi 1994.

<sup>236</sup> Akboob, Rumuna. A Guide to Your rights - The Malawi Bill of Rights, Centre for Human Rights, University of Pretoria. South Africa, 2021. Web. Retrieved from <https://policycommons.net/artifacts/3677784/a-guide-to-your-rights/4483626/> on 24 Nov 2023. Accessed 15 Oct 2023.

<sup>237</sup> Ibid

sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, property, birth or other status.

(2) Legislation may be passed addressing inequalities in society and prohibiting discriminatory practices and the propagation of such practices and may render such practices criminally punishable by the Courts”.<sup>238</sup>

The mention of one's sex as a ground for discrimination is relevant to sexual cleansing rituals. Chirwa delineates that section 20(1) of the Constitution encompasses three dimensions of equality; “non-discrimination,” “equal protection before the law,” and “positive measures to combat and eliminate inequality”.<sup>239</sup> Moreover, Nyirenda interprets section 20(1) as a prohibition against all forms of discrimination.<sup>240</sup> In the specific context of HCPs such as *Kusasa Fumbi*, this discrimination is evident in its targeting of girls, thereby infringing on their right to education and exacerbating early marriage by compelling them into unsafe and illegal sexual activities. This premature transition into adulthood hampers the natural developmental stages of the girls. According to Abankwah, *Kusasa Fumbi* is not only a discriminatory practice, but it is also a type of sexual violence.<sup>241</sup> Nonetheless, a significant deficiency lies in the fact that the Constitution does not provision explicit definitions for either ‘equality’ or ‘discrimination’.<sup>242</sup> To address the lack of definite definitions of both terms in the Constitution, some legal scholars recommend that Malawian courts assume the definition provided in the United Nations Human Rights Committee General Comment No. 18 rather than General Comment No. 20, citing the latter's broader scope.<sup>243</sup> The argument posits that General Comment No. 18, unlike No. 20, predated the Constitution's negotiation and adoption.<sup>244</sup> Consequently, it is asserted that the drafter of the Constitution considered the definition in General Comment No. 18 over that in General Comment No. 20.<sup>245</sup>

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<sup>238</sup> Section 20 (1-2) of the Constitution 1994.

<sup>239</sup> An assessment of the legislation ... pg 31

<sup>240</sup> Nyirenda, K. (2017). *AN ANALYSIS OF MALAWI'S CONSTITUTION AND CASE LAW ON THE RIGHT TO EQUALITY I*. [online] *southernafiralitigationcentre.org*. Available at: <https://www.southernafiralitigationcentre.org/wp-content/uploads/2017/08/13KNyirenda.pdf> [Accessed 30 Dec. 2023].

<sup>241</sup> Abankwah, R.M. (1970) The plight of an African girl child: Traditional cultural practices in Malawi. Available at: <https://repository.unam.edu.na/handle/11070/2072> (Accessed: 17 November 2023).

<sup>242</sup> See Malawi Constitution 1994.

<sup>243</sup> Nyirenda, K. (2017). *AN ANALYSIS OF MALAWI'S CONSTITUTION AND CASE LAW ON THE RIGHT TO EQUALITY I*. [online] *southernafiralitigationcentre.org*. Available at: <https://www.southernafiralitigationcentre.org/wp-content/uploads/2017/08/13KNyirenda.pdf> [Accessed 30 Dec. 2023].

<sup>244</sup> Ibid

<sup>245</sup> General Comment No. 20 from the United Nations Human Rights Committee underscores the dynamic nature of discrimination and advocates for a flexible interpretation of the 'other status' ground. This flexibility is

Moreover, the court in *Malawi Congress Party & Others v Attorney General & Another* emphasises that non-discrimination under section 20(1) forbids any classification that could arbitrarily burden individuals or groups.<sup>246</sup> Given that HCPs disproportionately affect girls, this legal observation becomes pertinent. Chirwa further posits that the element of “equal protection before the law” is grounded in the notion of formal equality.<sup>247</sup> This interpretation suggests that by prohibiting all forms of sex-based discrimination, section 20(1) of the Constitution ensures a form of formal equality aimed at protecting girls from practices like *Kusasa Fumbi*.<sup>248</sup> The third element, “positive measures to combat and eliminate inequality,” establishes substantive equality.<sup>249</sup>

Unlike formal equality, substantive equality acknowledges gender differences but affirms equality by instituting laws, policies, and programs addressing societal inequalities, employing measures like equity and affirmative action.<sup>250</sup> According to Fredman, substantive equality ought to be conceptualised as a multifaceted notion encompassing four dimensions: recognition, redistribution, participation, and transformation.<sup>251</sup> Fredman’s argument suggests that substantive equality seeks to rectify stereotyping, promote the equal dignity of all individuals, including girls, affirm identity, and facilitate full societal participation.<sup>252</sup> When applying this definition to the Malawian context, substantive equality becomes a tool for protecting the rights of the girl child, disrupting the cycle of disadvantage and limited opportunities associated with girls.<sup>253</sup>

This perspective aligns with the stance of the Malawi Law Commission, which, while interpreting section 20 of the Constitution,<sup>254</sup> recognises the vulnerability of women and children, reinforcing section 20(1) with section 20 (2).<sup>255</sup> The latter obliges Malawi to enact

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crucial to encompass forms of differential treatment that lack reasonable justification but are akin to explicitly recognised grounds in Article 2, paragraph 2. The Committee delineates several factors constituting 'other status,' including disability, age, nationality, marital and family status, sexual orientation and gender identity, health status, place of residence, and economic and social situation. These additional factors are recognised particularly when they mirror the experiences of marginalised social groups, emphasising the need for their inclusion in anti-discrimination measures.

<sup>246</sup> *Malawi Congress Party & Others v Attorney General & Another* [1996] MLR 244, 299-300 (HC).

<sup>247</sup> Chirwa DM Human Rights under the Malawian Constitution (2011), hereinafter, Chirwa DM (2011) 201.

<sup>248</sup> *Ibid*

<sup>249</sup> *Ibid*

<sup>250</sup> *Ibid*

<sup>251</sup> Fredman, Sandra. “Emerging from The shadows: Substantive equality and article 14 of the European Convention on Human Rights.” *International Journal of Constitutional Law*, vol. 14, no. 3, pp. 712-738, <https://academic.oup.com/hrlr/article-abstract/16/2/273/2356204>. Accessed 31 December 2023.

<sup>252</sup> *Ibid*

<sup>253</sup> *Ibid*

<sup>254</sup> Section 2 of the Constitution 1994.

<sup>255</sup> Malawi Law Commission

legislation combating HCPs supporting discrimination. As observed in the case of *Republic v Chinthiti & Others*, both formal and substantive equality are deemed indispensable tools in the fight against discrimination.<sup>256</sup> This underscores the constitutional strength and efficacy in addressing issues related to harmful practices such as sex discrimination.<sup>257</sup> The right to equality and the prohibition of discrimination articulated here mirror the provisions found in the UDHR.<sup>258</sup>

Section 23(6) of the Constitution defines a child as “a person below the age of 18 years”, this is in alignment with international legal mechanisms such as CEDAW and the CRC.<sup>259</sup> Furthermore, section 23(1) of the Constitution asserts the entitlement of all children to equal treatment under the law.<sup>260</sup> This provision must be considered alongside section 20(1), which explicitly forbids all types of discrimination and ensures equal and adequate safeguards for all individuals against discrimination based on specified grounds.<sup>261</sup> To ascertain the scope of section 23, reference is made to the CRC.<sup>262</sup> The convention mirrors the protection of children's rights, encompassing the right to life, safety from any form of harm and abuse, and freedom from torment or atrocious, inhumane, or degrading treatment.<sup>263</sup> Article 2(2) of the CRC further mandates the application of all necessary measures to safeguard the child from any discriminatory actions or punishments based on the child's parents, guardians, or family member's ideologies.<sup>264</sup> This contextualises the constitutional provisions within the broader international framework for safeguarding children's rights.<sup>265</sup>

Additionally, the legal provisions discussed, particularly those aligned with the UDHR, emphasise the right to seek redress or file complaints when someone's rights have been violated. For example, the UDHR in Article 8 states that everyone has the “right to an effective

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<sup>256</sup> *Republic v Chinthiti & Others* [1997] 1 MLR 59, 65 (HC).

<sup>257</sup> Schabas, William. *The Customary International Law of Human Rights*. Oxford University Press, 2021, pp. 161–190.

<sup>258</sup> *Ibid*

<sup>259</sup> Section 23(6) of the Constitution 1994.

<sup>260</sup> Section 23(1) of the Constitution 1994.

<sup>261</sup> Section 20(1) of the Constitution 1994.

<sup>262</sup> Nyirenda, K. (2017). *AN ANALYSIS OF MALAWI'S CONSTITUTION AND CASE LAW ON THE RIGHT TO EQUALITY I*. [online] *southernafiralitigationcentre.org*. Available at: <https://www.southernafiralitigationcentre.org/wp-content/uploads/2017/08/13KNyirenda.pdf> [Accessed 30 Dec. 2023].

<sup>263</sup> *Ibid*

<sup>264</sup> Article 2(2) CRC

<sup>265</sup> Nyirenda, K. (2017). *AN ANALYSIS OF MALAWI'S CONSTITUTION AND CASE LAW ON THE RIGHT TO EQUALITY I*. [online] *southernafiralitigationcentre.org*. Available at: <https://www.southernafiralitigationcentre.org/wp-content/uploads/2017/08/13KNyirenda.pdf> [Accessed 30 Dec. 2023].

remedy by the competent national tribunals for acts violating the fundamental rights granted him by the Constitution or by law”.<sup>266</sup> This underscores the significance of having accessible and effective mechanisms for addressing human rights violations. Malawi complies with this directive because it has established the Ombudsman’s office, the MHRC, and the courts of law.<sup>267</sup> Importantly, the courts operate independently of the Executive and Legislature, ensuring an impartial and fair adjudication process. Access to these legal avenues is open to all citizens, and recognising economic disparities, the government has established a Legal Aid Bureau.<sup>268</sup> This institution facilitates the access of the poor and marginalised to justice, removing financial barriers that might impede their pursuit of legal remedies.<sup>269</sup> Article 7 of the ACHPR guarantees the right to have one's cause heard, and it establishes the right to appeal to competent national organs when one's human rights are infringed upon.<sup>270</sup> The establishment of accessible and affordable legal services to Malawian citizens complies with Article 7 of the ACHPR.

Furthermore, the Constitution explicitly requires that legislation be passed to eradicate “customs and practices that discriminate against women, and practices that involve sexual abuse, harassment, and violence against women”.<sup>271</sup>

Moreover, the Constitution provides that “any law that discriminates against women based on gender or marital status shall be invalid”.<sup>272</sup> It also obligates the state to take legislative measures that eradicate social conduct that discriminates against women. Section 10(2) of the Constitution further provides that “in the application and development of...customary law, the relevant organs of state shall have due regard to based on the principles and provisions of this Constitution”.<sup>273</sup> This implies that the Malawian government is obligated to repeal laws that promote or perpetuate HCPs.

The Maputo Protocol explicitly urges State Parties to combat harmful practices affecting women and girls.<sup>274</sup> It mandates the enactment and enforcement of laws prohibiting discrimination against women and girls, as well as HCPs.<sup>275</sup> In adherence to its commitment to

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<sup>266</sup> Article 8 UDHR.

<sup>267</sup> Msosa, C. (2014) The government and people of Malawi Cherish the rule of law partly due ..., United Nations. Available at: [https://www.un.org/en/ga/sixth/69/pdfs/statements/rule\\_of\\_law/malawi.pdf](https://www.un.org/en/ga/sixth/69/pdfs/statements/rule_of_law/malawi.pdf) (Accessed: 12 November 2023).

<sup>268</sup> Ibid

<sup>269</sup> Ibid

<sup>270</sup> Article 7 ACHPR.

<sup>271</sup> Section 24(2) of the Constitution 1994.

<sup>272</sup> Ibid

<sup>273</sup> Section 10(2) of the Constitution 1994.

<sup>274</sup> Article 2 of the Maputo Protocol.

<sup>275</sup> Article 2(1)(b) Maputo Protocol.

the Maputo Protocol, Malawi has established a legislative framework to address HCPs.<sup>276</sup> This segment of the chapter centres on domestic laws falling within this classification. These legal instruments include the Child Care, Protection and Justice Act 2010,<sup>277</sup> the Gender Equality Act, the Marriage, Divorce, and Family Relations Act 2015 and finally the Penal Code and the HIV and AIDS (Prevention and Management) Act.

*b) Gender Equality Act 2013*

The Gender Equality Act (GEA),<sup>278</sup> expressly forbids certain HCPs. It stipulates that “a person shall not commit, engage in, subject another person to, or encourage the commission of any harmful practice”.<sup>279</sup>

Furthermore, section 3 of the GEA defines “harmful practices” as:

“A social, cultural, or religious practice which, on account of sex, gender or marital status, does or is likely to–

(a) undermine the dignity, health or liberty of any person; or

(b) result in physical, sexual, emotional, or psychological harm to any person”.<sup>280</sup>

Explicitly mentioning harmful practices and providing a definition gives the courts clarity. Although this is positive, the GEA lacks a detailed schedule enumerating specific practices falling under this category.<sup>281</sup>

Beyond the provisions of sections 3 and 4 of the GEA, which specifically prohibit gender-based discrimination, these sections can also serve as tools to address practices like *Kusasa Fumbi*. section 4 aligns with sections 20(1) and 23(1) of the Constitution and Article 16 of the ACRWC, respectively, ensuring the right to equality.<sup>282</sup>

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<sup>276</sup> Bande, Lewis. “Criminalising Harmful Cultural Practices: Lessons from Malawi.” *Southern African Public Law*, 2022, doi.org/10.25159/2522-6800/10661.

<sup>277</sup> Child Care, Protection and Justice Act 2010.

<sup>278</sup> Gender Equality Act No. 3 of 2013.

<sup>279</sup> Section 5 Gender Equality Act No. 3 of 2013.

<sup>280</sup> Ibid Sections 5 (a – b) Gender Equality Act No. 3 of 2013.

<sup>281</sup> Gender Equality Act No. 3 of 2013.

<sup>282</sup> Section 20 of the Constitution prohibits unfair discrimination of persons in any form. Section 23 of the Constitution outlines that “all children, regardless of the circumstances of their birth, are entitled to equal treatment before the law, and the best interest and welfare of the child shall be a primary consideration in all decisions affecting them. Article 16 of ACRWC states that “state parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of torture, inhuman or degrading treatment and especially physical or mental injury or abuse, neglect or maltreatment including sexual abuse, while in the care of [parent(s), legal guardian(s) or any other person who has the care of the child”. The

Moreover, section 5 of the GEA provides that:

“(1) A person shall not commit, engage in, subject another person to, or encourage the commission of any harmful practice.

(2) Any person who contravenes this commits an offence and is liable to a fine of K1,000,000 and a term of imprisonment of five years”.<sup>283</sup>

This section not only condemns harmful practices but also imposes significant penalties, including a fine of one million kwacha (approximately 1,225 USD) and a prison term of five years. Section 5 is in line with various international protocols, including Arts 16, 5, and 12 of the CEDAW, Maputo Protocol, and SADC Gender Protocol, respectively, which denounce harmful practices negatively affecting the rights of women and children. Therefore, Malawi has instituted crucial measures to eliminate practices associated with HCPs.

Additionally, section 14 of the GEA, which safeguards the right to access education, can be instrumental in addressing cultural practices that exacerbate school dropout rates.<sup>284</sup> This provision is consistent with section 25(1) of the Constitution<sup>285</sup> and Article 13 of the ICESCR.<sup>286</sup> Education is highlighted as an essential tool for achieving gender equality in Malawi, breaking the cycle of poverty linked to cultural, religious, and economic factors.<sup>287</sup> The ICESCR Committee emphasises education as an empowerment tool for women and girls, protecting them from abuse and contributing to financial independence.<sup>288</sup> In essence, education serves as a means to challenge societal stereotypes, break generational poverty, and combat discrimination against the girl child.<sup>289</sup>

*c) Marriage, Divorce, and Family Relations Act 2015*

The Marriage, Divorce, and Family Relations Act (the Marriage Act), imposes criminal liability on persons who discriminate against women and girls.<sup>290</sup> The Act is grounded in the principle of equality as prescribed in section 20 of the Malawi Constitution. It promotes equality by ensuring equal treatment concerning the rights and responsibilities of the parties under this Act.

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United Nations Declaration of the Rights of the Child principle 7 states that “The best interests of the child shall be the guiding principle of those responsible for his education and guidance”.

<sup>283</sup> Ibid

<sup>284</sup> Section 14 Gender Equality Act No. 3 of 2013.

<sup>285</sup> Section 25(1) of the Constitution 1994.

<sup>286</sup> Article 13 ICESCR.

<sup>287</sup> ICESCR.

<sup>288</sup> ICESCR.

<sup>289</sup> ICESCR.

<sup>290</sup> Marriage, Divorce, and Family Relations Act 4 of 2015.

Moreover, the Marriage Act includes provisions capable of addressing Harmful Cultural Practices (HCPs) associated with child marriages, such as *Kusasa Fumbi*. Firstly, in contrast to both the Malawi Constitution and CCPJA, section 14 establishes the minimum marriage age as 18. Section 14, therefore, ensures that girls have the opportunity to fully exercise their rights, including the right to education, which has been demonstrated to deter girls from early marriages, on an equal basis with boys. It stipulates that:

“Subject to section 22 of the Malawi Constitution, two persons of the opposite sex who are both not under the age of eighteen years and are of sound mind, may enter into marriage with each other”.<sup>291</sup>

According to the Act, a “child” is defined as an individual below 18 years, implying an unambiguous prohibition on their capacity to consent. In 2017, a constitutional amendment unanimously passed, raising the minimum marriage age from 15 years to 18 years for both genders, aligning Malawian law with international and regional standards.<sup>292</sup>

Moreover, the Marriage Act, combined with the Penal Code, criminalises engaging in sexual intercourse with a female minor, considering it a felony with possible life imprisonment.<sup>293</sup> The Penal Code was amended to raise the age of majority from 16 to 18, with the consequences of this amendment yet to be fully understood.<sup>294</sup>

In the context of *Kusasa Fumbi*, where girls are typically below 16 years, consent is precluded as per the Marriage Act, categorising them as “children”. Consequently, adults involved could be liable for defilement, particularly with the ongoing adjustments to raise the age of consent to 18. The Penal Code specifically defines the offence of defilement, stipulating that any person who “unlawfully and carnally knows any girl under the age of 16 years is guilty of a felony”.<sup>295</sup> This offence is punishable by imprisonment for life, irrespective of whether consent was given.<sup>296</sup>

#### d) *Child Care, Protection and Justice Act 2010*

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<sup>291</sup> Section 14 of the Marriage, Divorce, and Family Relations Act 4 of 2015.

<sup>292</sup> Malawi Penal Code Act 8 of 1999.

<sup>293</sup> Kangaude, Godfrey. “Adolescent sex and ‘defilement’ in Malawi law and society.” *African Human Rights Law Journal*, vol. 17, no. 2, pp. 527–549, doi:<https://doi.org/10.17159/1996-2096/2017/v17n2a8>.

“The Malawi Parliament passed Bill 36 of 2016: Constitution (Amendment) raising the age of minority from 16 to 18 years. The Bill was signed into law in April 2017”.

<sup>294</sup> Ibid

<sup>295</sup> Section 138 of the Malawi Penal Code Act 8 of 1999.

<sup>296</sup> Ibid

As Chirwa states, the Child Care, Protection and Justice Act (CCPJA) is the main piece of domestic legislation governing children.<sup>297</sup> This prohibition is outlined in section 80 of the legislation. It states 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”.<sup>298</sup> Section 80 of the CCPJA penalises subjecting a child to a harmful social or customary practice detrimental to the child's health or general development.<sup>299</sup> Both sections prohibit parents, guardians, and public or private agents from engaging in customs that adversely impact children's health, education, and overall development.<sup>300</sup> The CCPJA is seemingly a direct response to Malawi's commitment to combat HCPs involving children.

Section 80 can be employed to address cases of HCPs in which parents are implicated and those that have proven to be detrimental to the health and development of children.<sup>301</sup> Section 80 states that “no person shall subject a child to a social or customary practice that is harmful to the health of general development of the child”.<sup>302</sup> This provision aligns with Article 24(3) of the CRC which directs state parties to “take all effective and appropriate measures to abolish traditional practices prejudicial to the health of children”,<sup>303</sup> and Article 21(1(a)) of the ACRWC prohibits customs that are “prejudicial to the health or life of the child”.<sup>304</sup> Finally, it also aligns with Article 14(1(d-e)) of the Maputo Protocol which states that “the right to self-protection and to be protected against sexually transmitted infections, including HIV/AIDS” and which provides the right to be informed “on the health status of one’s partner, particularly if infected with sexually transmitted infections, including HIV/AIDS”.<sup>305</sup>

Specifically, section 80 of the CCPJA can be invoked to prosecute instances of sexual cleansing rituals like *Kusasa Fumbi*, as such practices jeopardize the health of the girl, leading to early pregnancies and the risk of sexually transmitted diseases, including HIV/AIDS. This provision also adheres to the Joint General Recommendations/Comments of the CRC/CEDAW Committees, emphasising that “children have a right to be protected from practices that have absolutely no health or medical benefits but which can have long-term negative effects on their

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<sup>297</sup> Mawodza, Obdiah. “An Assessment Of The Legal Framework On The Protection Of Girls From Child Marriages In Malawi.” University of the Western Cape, 2015. Thesis. pg. 36.

<sup>298</sup> Section 80 of the Child Care, Protection and Justice Act No. 22 of 2010.

<sup>299</sup> Ibid

<sup>300</sup> Section 23(4) of the Constitution 1994.

<sup>301</sup> Section 80 of the Child Care, Protection and Justice Act No. 22 of 2010.

<sup>302</sup> Ibid

<sup>303</sup> Article 24(3) of the CRC.

<sup>304</sup> Article 21(1(a)) of the ACRWC.

<sup>305</sup> Article 14(1(d-e)) of the Maputo Protocol.

physical or mental well-being”.<sup>306</sup> Furthermore, section 83 reinforces sections 80, 81, and 82 by stipulating that a person contravening these sections commits an offence and is subject to a 10-year imprisonment.<sup>307</sup> This legislative position underscores that, within the Malawian context, any cultural practice classified as harmful cannot be deemed to be in the best interest of the child. Conversely, the CCPJA allows harmless customary practices aligned with the best interests of the child.

*e) Malawi Penal Code*

In 1930, Malawi enacted its current Penal Code, modelled after the Colonial Office code crafted by Albert Ehrhardt.<sup>308</sup> A pivotal element of this code is section 138, known as the ‘defilement provision’, which explicitly prohibits boys and men from engaging in sexual activities with girls under a specified age.<sup>309</sup> Section 138(1) of the penal code defines the offence of defilement. The section states that:

“Any person who unlawfully and carnally knows any girl under the age of sixteen years shall be guilty of a felony and shall be liable to imprisonment for life, with or without corporal punishment”.<sup>310</sup>

This provision falls under the broader category of 'age of consent' laws, specifically regulating the age at which individuals can engage in sexual intercourse.<sup>311</sup> Initially, the age of consent for females was set at 13 years.<sup>312</sup> Setting the age of consent at 13 years was too low. Subsequently, in 2000, following recommendations from the Malawi Law Commission, there was a proposal to raise it to 16 years.<sup>313</sup> In 2010, the parliament passed a Bill to enact these recommendations, leading to amendments in the Penal Code in 2011.<sup>314</sup> Section 160B was introduced, making it an offence to engage in sexual activity with a child below 16 years of age.<sup>315</sup> This was a good development as girls who were above the age of 13 up to 16 were now

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<sup>306</sup> Joint General Recommendation/General Comment No.13 of the Committee on the Elimination of Discrimination against Women and No.18 of the Committee on the Rights of the Child on harmful Practices 2014.

<sup>307</sup> Ss 80 – 83 of the Child Care, Protection and Justice Act 2010.

<sup>308</sup> Kangaude, Godfrey. “Adolescent sex and ‘defilement’ in Malawi law and society.” *African Human Rights Law Journal*, vol. 17, no. 2, pp. 527–549, doi:<https://doi.org/10.17159/1996-2096/2017/v17n2a8>.

<sup>309</sup> *Ibid*

<sup>310</sup> Section 138(1) of the Malawi Penal Code Act 8 of 1999.

<sup>311</sup> Kangaude, Godfrey. “Adolescent sex and ‘defilement’ in Malawi law and society.” *African Human Rights Law Journal*, vol. 17, no. 2, pp. 527–549, doi:<https://doi.org/10.17159/1996-2096/2017/v17n2a8>.

<sup>312</sup> *Ibid*

<sup>313</sup> *Ibid*

<sup>314</sup> *Ibid*

<sup>315</sup> *Ibid*

protected by the law and rightly treated as children. although this change was positive, the Penal Code was still not aligned with the international legal standards of setting the age at 18.

In 2021 the Malawi Police recorded 2,387 instances of defilement compared to 2,343 in 2020.<sup>316</sup> Proposed amendments to the Penal Code aim to raise the age of consent from 16 to 18, addressing the prevalent issue of defilement in Malawi.<sup>317</sup> Key amendments pertain to redefining a child and establishing the minimum age for marriage, intending to create coherence among various child-related legislations.<sup>318</sup> Aligning with international standards, particularly CEDAW, which designates individuals below 18 as children, the proposed Bill reflects a harmonisation effort. Gender activist Barbara Banda emphasises that this alignment would bring the Penal Code in line with the Constitution and other crucial legislations.<sup>319</sup> The significance lies in extending protection to constitutional minors aged 16 and 17 years, who were previously inadequately covered by the current Penal Code provisions on the age of defilement.

These legislative changes could play a vital role in addressing and preventing such sexual offences against young girls. This amendment is very crucial to prosecuting cases of *Kusasa Fumbi*. It is my opinion that *Kusasa Fumbi*, as a cultural practice, essentially facilitates defilement, as it entails men engaging in sexual intercourse with girls under the age of 18. This initiation ceremony typically involves girls ranging from approximately 6 to 18 years old.<sup>320</sup> It is noteworthy that a significant majority of girls undergoing this rite of passage fall below the legal age of consent. This highlights a critical concern regarding the vulnerability of underage girls subjected to a practice that not only contradicts legal standards but also poses serious risks to their physical and psychological well-being.

Regardless of whether the girl under the age of 18 consented to the sexual intercourse, the accused is still at fault in such instances.<sup>321</sup> This principle is highlighted in the case of *Republic vs. Goliati and Jonasi*, two defendants engaged in sexual intercourse with a 10-year-old girl. The girl consented to the act in exchange for money, and upon completion of the

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<sup>316</sup> Ibid

<sup>317</sup> Ibid

<sup>318</sup> Ibid

<sup>319</sup> Ibid

<sup>320</sup> Munthali, A., Kok, M. and Kakal, T. (2018). *YES I DO. Initiation ceremonies in Traditional Authority Liwonde in Machinga District in Southern Malawi: What do they look like now and before; and do they influence young people's behaviour regarding sex and relationships?* [online] Available at: <https://www.kit.nl/wp-content/uploads/2019/03/Study-report-initiation-ceremonies-YID-FINAL.pdf> [Accessed 31 Dec. 2023].

<sup>321</sup> *The Republic v Goliati and Jonasi* 1971-72 ALR (Mal.) 251.

arrangement, she received payment.<sup>322</sup> The defendants contended that the young girl had voluntarily consented to the sexual intercourse, thereby asserting their innocence.<sup>323</sup> The court held as follows “The consent of the complainant provides no defence to a charge of defilement. A girl who is under the age of 13 is not capable of giving that consent”.<sup>324</sup>

Likewise, in the case of *Republic v William John*, the defendant faced a conviction for defilement, the facts of the case raised questions concerning consent.<sup>325</sup> The defendant argued that his actions were prompted by the fact that the 11-year-old girl he had intercourse with intentionally approached the place where he was resting.<sup>326</sup> The Court followed precedent and ruled that, in cases of defilement, the consent or willingness of the underaged girl to engage in sexual intercourse is irrelevant.<sup>327</sup> In cases of defilement, the court's ruling establishes that the consent or willingness of the girl to engage in sexual intercourse is considered irrelevant. This court's position underscores a broader legal perspective on the protection of minors from sexual exploitation, emphasising that even if a girl ostensibly consents, the law recognises the power imbalance and vulnerability inherent in such situations. This legal stance aligns with the need to safeguard the rights and well-being of young girls who may be subjected to HCPs like *Kusasa Fumbi*. Girls consenting to the sexual cleansing ceremony does not absolve *Fisi* from guilt.

Moreover, in the case *Luwishi vs. R*, the court ruled that consent given by a girl's sister on behalf of the 13-year-old girl holds no sway in determining the offender's guilt.<sup>328</sup> While consent does not affect the accused's culpability, the courts recognised its potential relevance during sentencing.<sup>329</sup> Additionally, if the girl herself provided consent, the court cannot issue an order for compensation.<sup>330</sup> The ruling stated:

“Be that as it may consent may be taken into account when considering sentence. It is not proper to make a compensation order following a conviction for defilement where it is established that the complainant consented to the sexual intercourse, since it may act as an inducement to her to

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<sup>322</sup> Ibid

<sup>323</sup> Ibid

<sup>324</sup> Ibid

<sup>325</sup> *The Republic v William John* Criminal Case No.13 of 2009.

<sup>326</sup> Ibid

<sup>327</sup> Ibid

<sup>328</sup> *Luwishi v R* 1923-60 ALR (Mal) 982.

<sup>329</sup> Ibid

<sup>330</sup> Ibid

encourage others to commit similar offences with the hope of obtaining other compensation orders”.<sup>331</sup>

This is relevant to *Kusasa Fumbi* because parents and guardians are usually the ones giving consent on behalf of the initiates who are mostly minors. This aligns with the precedents established in the cases of *Republic v William John* and *Republic vs. Goliati and Jonasi*, which determined that engaging in sexual activity with a minor female is unlawful, irrespective of any consent provided by her.

*f) HIV and AIDS (Prevention and Management) Act*

The HIV and AIDS (Prevention and Management) Act (HAPMA) establishes the criminalisation of HCPs that pose a risk of HIV infection or may contribute to the progression of an HIV infection into AIDS.<sup>332</sup> This piece of legislation is especially relevant to *Kusasa Fumbi* because it involves subjecting girls to high-risk unprotected sexual intercourse. Disallowing the use of contraceptives like condoms exposes the *Kusasa Fumbi* initiates to HIV/AIDS and other sexually transmitted diseases. According to the HAPMA, individuals can be penalised for engaging in a ‘harmful practice’ or for enabling, facilitating, allowing or encouraging people to partake in HCPs. The Act defines a ‘harmful practice’ as any social, religious, or traditional practice that either puts a person at risk of HIV infection or re-infection or has the potential to accelerate the progression of HIV infection to AIDS.<sup>333</sup>

Section 2(a) defines harmful practices as “and social, religious or cultural practice that puts a person at risk of HIV infection or re-infection”.<sup>334</sup> The *Kusasa Fumbi* practice undoubtedly aligns with this definition. Subsequently, section 4(1) of HAPMA expressly prohibits harmful practices.<sup>335</sup> Section 4(2) specifies that engaging in a harmful practice constitutes an offence, punishable by a fine of K5,000,000 and imprisonment for five years upon conviction.<sup>336</sup> Furthermore, section 5 can apply to *Namkungwi*, parents and guardians that facilitate the girls in their care to participate in the sexual component of the *Kusasa Fumbi* rites. Section 5 states that any individual who subjects, allows, or emboldens another individual to partake in a

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<sup>331</sup> Abankwah, R.M. (1970) The plight of an African girl child: Traditional cultural practices in Malawi. Available at: <https://repository.unam.edu.na/handle/11070/2072> (Accessed: 17 November 2023).

<sup>332</sup> The HIV and AIDS (Prevention and Management) Act, 2017 Act 9 of 2018.

<sup>333</sup> Bande, Lewis. “Criminalising Harmful Cultural Practices: Lessons from Malawi.” *Southern African Public Law*, 2022, doi.org/10.25159/2522-6800/10661.

<sup>334</sup> Section 2(a) of the HIV and AIDS (Prevention and Management Act, 2017 Act 9 of 2018.

<sup>335</sup> Section 4(1) of the HIV and AIDS (Prevention and Management Act, 2017 Act 9 of 2018.

<sup>336</sup> Section 4(2) of the HIV and AIDS (Prevention and Management Act, 2017 Act 9 of 2018.

harmful practice also commits an offence, carrying the same penalties upon conviction.<sup>337</sup> These severe legal consequences may deter some individuals from participating in or promoting *Kusasa Fumbi*.

g) *Conclusion*

The explicit mention of *Kusasa Fumbi* or any specific HCP in Malawian legislation is arguably not strictly necessary for their effectiveness. However, specificity is paramount in the context of legal instruments addressing HCPs for a multitude of reasons. Firstly, it could play a crucial role in recognising and acknowledging the existence of particular harmful practices, ensuring that the concerns of those affected are not overlooked or generalised.<sup>338</sup> Moreover, specificity would allow legal instruments to be more culturally sensitive by recognising the diversity of traditions and customs while targeting practices that cause harm. This tailored approach enables the creation of legislation that directly addresses identified harmful practices, leading to more effective enforcement and implementation of laws.<sup>339</sup> Specific mentions may stimulate intergroup dialogue and engagement within communities, encouraging reflection on cultural norms and fostering positive change.<sup>340</sup> The Malawi governments and organisations can develop more targeted policies and strategies to combat specific harmful practices, including educational programs and awareness campaigns.<sup>341</sup>

Additionally, specificity facilitates better monitoring and evaluation of the impact of law, contributing to accountability at both national and international levels.<sup>342</sup> By explicitly mentioning certain practices, legal instruments reinforce the commitment to protecting individuals from culturally entrenched forms of abuse, insisting that certain practices are not condoned, irrespective of cultural contexts.<sup>343</sup> Finally, while general provisions calling for the protection of girls from sexual abuse, harm, or exploitation under the age of 18 are crucial, they may not capture the distinct features of every harmful cultural practice. Mentioning specific

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<sup>337</sup> Section 5 of the HIV and AIDS (Prevention and Management Act, 2017 Act 9 of 2018.

<sup>338</sup> Adrienne Dessel, Mary E. Rogge and Sarah B. Garlington. "Using intergroup dialogue to promote social justice and change." *Social Work*, vol. 51, no. 4, [https://www.jstor.org/stable/pdf/23721215.pdf?ab\\_segments=0%2Fbasic\\_search\\_gsv2%2Fcontrol&initiator=](https://www.jstor.org/stable/pdf/23721215.pdf?ab_segments=0%2Fbasic_search_gsv2%2Fcontrol&initiator=). Accessed 27 December 2023.

<sup>339</sup> *Ibid*

<sup>340</sup> *Ibid*

<sup>341</sup> Fon Vincy, and Francesco Parisi. "On the optimal specificity of legal rules." *Journal of institutional economics*, Cambridge Core, <https://doi.org/10.1017/S1744137407000653>. Accessed 30 December 2023.

<sup>342</sup> UNICEF. "*Country-led monitoring and evaluation systems Better evidence, better policies, better development results, MICS UNICEF*." 2009. Available at: <https://mics.unicef.org/files?job=W1siZiIsIjIwMTUvMDEvMzAvMDMvMjUvNTUvNTAwL0NvdW50cnlfBgVkX01FX3N5c3RlbXMucGRmIl1d&sha=cdec92ec34d8448b> (Accessed: 27 December 2023).

<sup>343</sup> *Ibid*

practices helps to contextualise the broader principles within the lived experiences of affected communities.<sup>344</sup>

In the case of *Kusasa Fumbi*, explicit mention could assist in tailoring interventions to address the specific challenges associated with this practice.<sup>345</sup> It doesn't undermine the importance of broader provisions but rather complements them for a more targeted and effective approach.

## CHAPTER 5

### I. CASE LAW

This chapter assesses how the laws mentioned in sections 4 and 3 perform in cases of harmful cultural practices. This will be done by discussing cases of HCPs involving sexual initiation ceremonies.

#### a) *Eric Aniva*

Eric Aniva was a prominent *Fisi* in his village in Nsanje, a district in southern Malawi.<sup>346</sup> He claimed that his village had 10 *Fisi* and they are paid from \$4 to \$7 (£3 to £5) for their services. Aniva admitted to having unprotected sexual intercourse with girls as young as 12.<sup>347</sup> In 2012 he claimed to have slept with 104 women and girls to a local newspaper. Aniva admitted that he was HIV-positive during his time as an active *Fisi* and that he did not disclose this to the families of the girls he had intercourse with. As a result of his admissions in a BBC interview, he was arrested on July 25, 2016.<sup>348</sup> His revelations to the media led to a campaign spearheaded by the country's then-State President Peter Mutharika to publicly condemn the practice of

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<sup>344</sup> Ibid

<sup>345</sup> Fon Vincy, and Francesco Parisi. "On the optimal specificity of legal rules." *Journal of institutional economics*, Cambridge Core, <https://doi.org/10.1017/S1744137407000653>. Accessed 30 December 2023.

<sup>346</sup> Butler, Ed. "The man hired to have sex with children." *BBC News*, 2016. Web. <https://www.bbc.com/news/magazine-36843769>. Accessed 09 August 2023.

<sup>347</sup> Andrews, Travis. "Malawi police arrest HIV positive man paid by parents to have sex with scores of young girls." *Washington Post*, 2016. Web. <https://link-gale-com.ezproxy.uct.ac.za/apps/doc/A459285959/AONE?u=unict&sid=bookmark-AONE&xid=82964fa6>. Accessed 18 Aug 2023.

<sup>348</sup> Faiti, Osman. "Malawi 'hyena man' aniva out of prison: Served his sentence for ritual sex, stalled appeal withdrawn." *Malawi Nyasa Times - News from Malawi about Malawi*, 2018. Web. <https://www.nyasatimes.com/malawi-hyena-man-aniva-prison-served-sentence-ritual-sex-stalled-appeal-withdrawn/>. Accessed 16 August 2023.

*Kusasa Fumbi*. Notably, no village elders, *Namkungwi* or parents and guardians of girls subjected to *Kusasa Fumbi* and other collaborators were arrested in this case.<sup>349</sup>

In November 2016, Aniva was initially charged with defilement. Among the approximately 104 women and girls who had Aniva as their *Fisi*, the majority were below the age of 16.<sup>350</sup> Which means that they were below the age of legal consent. In the case, the Court cited treaties such as CEDAW, the Maputo Protocol, and CRC.<sup>351</sup> The Court emphasised that Malawi is legally obligated, both nationally and internationally, to eradicate harmful social and traditional customs that infringe on the rights of vulnerable groups like children and women.<sup>352</sup> This obligation, as established by the Court, entails Malawi taking steps to prevent private individuals from engaging in harmful practices and necessitates judicial intervention to prevent and eliminate such practices.<sup>353</sup>

Aniva was eventually convicted by the Blantyre magistrate court and was subsequently sentenced to 2 years of imprisonment with hard labour on the grounds of engaging in “harmful cultural practices” and attempting to commit the same offence, in violation of section 5(1-2) of the Gender Equality Act of 2013.<sup>354</sup> Aniva served his full sentence and was released from prison in December 2017.<sup>355</sup>

However, in 2020 Aniva expressed that he was going to sue the Malawi government for unfair imprisonment.<sup>356</sup> He claimed that sexual cleansing was a normal cultural practice and not a harmful cultural practice. After his release from prison, he stated that he had been unfairly targeted because the chiefs and those who paid for his services were not imprisoned like he was.<sup>357</sup>

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<sup>349</sup> Ibid

<sup>350</sup> Andrews, Travis. “Malawi police arrest HIV positive man paid by parents to have sex with scores of young girls.” Washington Post, 2016. Web. <https://link-gale-com.ezproxy.uct.ac.za/apps/doc/A459285959/AONE?u=unict&sid=bookmark-AONE&xid=82964fa6>. Accessed 18 Aug 2023.

<sup>351</sup> Nkhata, Mwiza. Taking One for the Team? Some Reflections on the Trial of Malawi's Hyena-man. 2023. *Journal of African Law*. 67. 1-17. 10.1017/S0021855323000220.

<sup>352</sup> Ibid

<sup>353</sup> Ibid

<sup>354</sup> Faiti, Osman. “Malawi ‘hyena man’ aniva out of prison: Served his sentence for ritual sex, stalled appeal withdrawn.” *Malawi Nyasa Times - News from Malawi about Malawi*, 2018. Web. <https://www.nyasatimes.com/malawi-hyena-man-aniva-prison-served-sentence-ritual-sex-stalled-appeal-withdrawn/>. Accessed 16 August 2023.

<sup>355</sup> Ibid

<sup>356</sup> Khamula, Owen. “Malawi ‘hyena man’ aniva drags Govt to court over cultural sex conviction, *Malawi Nyasa Times - News from Malawi about Malawi*.” 2020. Available at: <https://www.nyasatimes.com/malawi-hyena-man-aniva-drags-govt-to-court-over-cultural-sex-conviction/> (Accessed: 15 August 2023).

<sup>357</sup> Ibid

Activists advocating for women's rights expressed varied concerns regarding Aniva's conviction. They argued that the leniency of the sentence did not align with the scope of his actions and the gravity of the consequences, particularly in terms of knowingly spreading life-threatening diseases such as HIV/AIDS.<sup>358</sup> To overlook the fact that *Kusasa Fumbi* is recognised as a cultural practice contributing to the spread of HIV/AIDS and the violation of women's rights would be a mistake.<sup>359</sup> Although section 192 of the Malawi Penal Code states that it is illegal to recklessly perform an action that is “likely to spread the infection of any disease which is dangerous to life, shall be guilty of a misdemeanour”,<sup>360</sup> Malawi does not have any HIV criminalisation legislation. It is one of the few countries in sub-Saharan Africa to not have any.<sup>361</sup> The landmark judgement in the case of *E.L. v The State 2016* overturned the only conviction based on section 192 of the penal code.<sup>362</sup>

E.L. was an HIV-positive 26-year-old who was charged under section 192 of the Malawian Penal Code. With “negligent act likely to spread disease dangerous to life.”<sup>363</sup> The prosecution asserted that E.L., while on Anti Retro Treatment (ART), negligently and unlawfully breastfed the complainant's baby while it was under her care<sup>364</sup> She pleaded guilty during the trial, resulting in a nine-month imprisonment with hard labour.<sup>365</sup> Subsequently, E.L. appealed her conviction and sentence on constitutional grounds, arguing that section 192 is vague and overbroad.<sup>366</sup> She also contended that the charge sheet was unclear, and the prosecution failed to prove the elements of a valid offence.<sup>367</sup> The appellant further claimed that her custodial sentence did not consider mitigating factors, presenting expert testimony indicating a less than one per cent transmission risk for women on ART.<sup>368</sup> She emphasised no evidence of actual HIV transmission to the infant.<sup>369</sup> The High Court, recognising the charge's

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<sup>358</sup> Faiti, Osman. “Malawi ‘hyena man’ aniva out of prison: Served his sentence for ritual sex, stalled appeal withdrawn.” Malawi Nyasa Times - News from Malawi about Malawi, 2018. Web. <https://www.nyasatimes.com/malawi-hyena-man-aniva-prison-served-sentence-ritual-sex-stalled-appeal-withdrawn/>. Accessed 16 August 2023.

<sup>359</sup> Nkhata, Mwiza. Taking One for the Team? Some Reflections on the Trial of Malawi's Hyena-man. 2023. *Journal of African Law*. 67. 1-17. 10.1017/S0021855323000220.

<sup>360</sup> Section 192 Malawi Penal Code 1999.

<sup>361</sup> Malawi () HIV Justice network Malawi Country. Available at: [https://www.hivjustice.net/country/mw/#:~:text=Overview,\(Prevention%20and20Management\)%20Bill.\(Accessed:21August2023\).](https://www.hivjustice.net/country/mw/#:~:text=Overview,(Prevention%20and20Management)%20Bill.(Accessed:21August2023).)

<sup>362</sup> *E.L v R* [2016] MWHC 656 Criminal Case No.36 of 2016.

<sup>363</sup> Ibid

<sup>364</sup> Ibid

<sup>365</sup> Ibid

<sup>366</sup> Ibid

<sup>367</sup> Ibid

<sup>368</sup> Ibid

<sup>369</sup> Ibid

ambiguity, concluded that the prosecution were not able to establish the elements of either criminal offence.<sup>370</sup>

Importantly, the judgment rejects the broad application of criminal law to HIV-related cases and emphasises grounding judicial analysis in scientific evidence and human rights principles. This approach is notable due to the international context of widespread criminalisation of HIV-related acts, aligning with the UN's stance against broad criminalisation, emphasising public health recommendations and human rights principles.

The E.L. case is relevant to discussions about the Eric Aniva case, particularly in considering the criminalisation of HIV-related acts. In both cases, individuals faced legal consequences for actions related to HIV. Eric Aniva, who knew he was HIV positive, was charged for engaging in unprotected sexual intercourse without disclosing his status, while E.L. faced charges related to breastfeeding. Arguably, the E.L. case can be seen as a positive development, especially in situations involving victims who are at risk of contracting HIV/AIDS. The High Court's rejection of the overly broad application of criminal law to HIV-related acts indicates a nuanced approach that takes into account specific circumstances, scientific evidence, and human rights considerations. In cases where individuals living with HIV are prosecuted, it's crucial to assess whether the legal response aligns with public health recommendations and human rights principles. The E.L. case emphasises the need for clarity in legal charges and a thorough examination of evidence before conviction. This approach helps avoid unjust criminalisation and ensures that legal measures are both effective and fair.

However, it's important to note that each case is unique, and legal outcomes should be analysed within their specific contexts. Overall, the E.L. case contributes to the ongoing discourse on the intersection of criminal law, HIV, and human rights, fostering a more informed and rights-based approach to such cases.

#### *b) Alubi Kasale Case*

While distinct from a *Kusasa Fumbi* case like the Eric Aniva incident, the Alubi Kasale case stands out as one of the rare instances where convictions were secured based on HCPs. In the legal proceedings of *State v Alubi Kasale and 7 others*, the defendants—"Alubi Kasale, Pias Elliotti, Patuma Amadu, Patuma James, Jika M'bawa, Jawadu James, and Hawa Alick"—were found guilty of engaging in HCPs, a violation of section 80 as read with section 83 of the

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<sup>370</sup> Ibid

CCPJA.<sup>371</sup> They were subsequently sentenced to 2 years of imprisonment with hard labour.<sup>372</sup> This group faced charges related to HCPs due to their involvement in confining children for initiation rituals.<sup>373</sup> Notably, the accused encompassed parents who, while sending their children to initiation camps, were not active participants in the initiation process.<sup>374</sup> The list of accused also included the village headman where the initiation camp was established and the initiation doctor (Ngaliba) responsible for initiating the boys involved.<sup>375</sup>

Crucially, the specific details of the ritual for which the children were confined were not thoroughly outlined. The confinement occurred not during holiday time but within the school calendar, precisely during exam season.<sup>376</sup> In this instance, the children were meant to be in school, writing exams during the period of their confinement.<sup>377</sup> Despite obtaining parental consent for the children's confinement, this did not absolve the accused individuals of their offence.<sup>378</sup> The judgment underscored a pivotal point: even though the Constitution guarantees the right to education under section 26, the exercise of such a right should not be enforced upon children and should not come at the detriment of other rights, such as the right to education.<sup>379</sup>

The court in the Alubi Kasale case appears to have set a valuable precedent and applied sound logical reasoning in addressing HCPs. The judgment establishes a principle that challenges harmful practices, even deeply rooted in cultural traditions, by emphasising legal accountability. The focus on children's rights, particularly the right to education, sets a crucial standard. The case suggests that parental consent does not absolve individuals from legal consequences when cultural practices infringe upon fundamental rights. This principle is significant not only for cases directly involving HCPs like confining children for initiation rituals but also for similar matters, creating a test that weighs cultural practices against constitutional rights. The court's careful consideration of the specific context, such as the impact on education and the timing of the confinement, suggests a thoughtful and principled approach that could indeed serve as a valuable guide in addressing similar matters in the future.

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<sup>371</sup> *The State v Alubi and 7 Others Criminal Case No.589 of 2021.*

<sup>372</sup> Ibid

<sup>373</sup> Ibid

<sup>374</sup> Ibid

<sup>375</sup> Ibid

<sup>376</sup> Ibid

<sup>377</sup> Ibid

<sup>378</sup> Ibid

<sup>379</sup> Ibid

## II. AFRICAN CUSTOMARY LAW

As previously discussed, Malawi operates as a pluralistic society, wherein formal recognition of African customary law is lacking but remains active. This part aims to explore how legal pluralism, particularly the application of African customary law, influences the regulation of HCPs, with a specific lens on practices like *Kusasa Fumbi*. The central argument posits that African customary law may contribute to the exacerbation of HCPs marking a departure from both state law and international legal standards. The discussion on legal pluralism serves a crucial purpose in shedding light on the complexities and divergences within the legal landscape, especially in the context of cultural practices in Malawi. By examining how African customary law interacts with the regulation of harmful practices, the aim is to illuminate potential gaps or conflicts in the legal framework. This exploration aims to underscore the challenges that might hinder effective legal responses to HCPs.

### *a) Legal Pluralism in Malawi*

Legal pluralism is the coexistence of various legal systems within a particular geographical area.<sup>380</sup> This phenomenon is especially prevalent in former African colonies, where the legal framework established by the former colonial authority coexists with traditional legal systems that are known as African customary law.<sup>381</sup> Initially, the intention of acknowledging customary law was to allocate certain matters, such as commercial transactions, to colonial law, while issues related to personal law, like family and marriage, would be governed by traditional law.<sup>382</sup> However, over time, these distinctions have blurred, and individuals often opt for the legal system they believe would provide them with the most favourable outcome when presenting their legal claims.<sup>383</sup> Furthermore, Malawi, formerly known as Nyasaland, was under British protectorate from 1891 to 1964.<sup>384</sup> Upon colonisation in 1891, the legal system of the Protectorate was established based on the British Central Africa Order in Council, 1902.<sup>385</sup> The jurisdiction of courts is often determined by the nature of cases and the identities of the parties involved. Religious courts, predominantly Islamic, preside over cases influenced

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<sup>380</sup> Ige, Rhoda. "Legal Pluralism in Africa: Challenges, Conflicts and Adaptation in a Global Village." *Journal of Law, Policy and Globalization*, vol. 34, ISSN 2224-3259.

<sup>381</sup> *Ibid*

<sup>382</sup> *Ibid*

<sup>383</sup> *Ibid*

<sup>384</sup> Kalinga, Owen, and John G. Pike. "'A Pre-Colonial History of Malawi' (The Nyasaland Journal, Volume 18, No. 1, 1965, Pp. 22-54)." *The Society of Malawi Journal*, vol. 53, no. 1/2, pp. 76–107, <http://www.jstor.org/stable/29779048>. Accessed 10 May 2023.

<sup>385</sup> *Ibid*

by religion. Customary courts handle matters grounded in tradition, while statutory courts operate within the framework of enacted laws.<sup>386</sup>

Furthermore, African customary law takes diverse forms, with traditional justice systems rooted in oral traditions commonly referred to as “living customary law”.<sup>387</sup> This form is considered dynamic and flexible, shaped by the circumstances of specific cases and evolving social norms.<sup>388</sup> In contrast, written customary law, often associated with colonial attempts to codify customary practices, has faced criticism for its perceived rigidity and failure to adapt over time.<sup>389</sup> However, Ubink argues that in the postcolonial era, written customary law can offer predictability regarding legal requirements while still maintaining a degree of flexibility and adaptability.<sup>390</sup> This complexity presents a challenge in determining applicable laws, particularly in the realm of private law matters within the domestic sphere.

#### *b) African Customary Law and Harmful Cultural Practices*

An analysis of how customary law functions within the legal pluralism framework is paramount. African Customary law, as defined by Ndulo, constitutes the indigenous legal system inherent in the diverse ethnic groups of the continent.<sup>391</sup> Atuguba states that customary law stands as one of humanity's oldest existing legal systems.<sup>392</sup> Customary law, often unwritten and informally applied, can be a source of contradictions and challenges.<sup>393</sup> Despite being predominantly unwritten, customary law remains a fundamental guiding principle regulating the lives of a vast majority of Africans.<sup>394</sup>

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<sup>386</sup> Miles, John. “Customary and Islamic Law and its Development in Africa.” *African Development Bank Law for Development Review*, vol. 1, 81. 2006. SSRN, <https://ssrn.com/abstract=1015783>.

<sup>387</sup> United Nations (2016) *Human rights and traditional justice systems in Africa*, OHCHR. Available at: [https://www.ohchr.org/sites/default/files/Documents/Publications/HR\\_PUB\\_16\\_2\\_HR\\_and\\_Traditional\\_Justice\\_Systems\\_in\\_Africa.pdf](https://www.ohchr.org/sites/default/files/Documents/Publications/HR_PUB_16_2_HR_and_Traditional_Justice_Systems_in_Africa.pdf) (Accessed: 30 December 2023).

<sup>388</sup> Ibid

<sup>389</sup> Ibid

<sup>390</sup> Ibid

<sup>391</sup> Ndulo, Muna. “African customary law, customs, and women’s rights.” *Indiana Journal of Global Legal Studies*, vol. 87, <https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1186&context=facpub>. Accessed 11 November 2023.

<sup>392</sup> Raymond Atuguba. “Customary Law Revivalism: Seven Phases in the Evolution of Customary Law in Sub-Saharan Africa.” *Inter Gentes Journal of International Law & Legal Pluralism*, <https://intergentes.com/seven-phases-in-the-evolution-of-customary-law-in-sub-saharan-africa/>. Accessed 30 December 2023.

<sup>393</sup> Ibid

<sup>394</sup> Ibid

In Malawi, democratically elected local government structures coexist with the traditional chieftaincy system.<sup>395</sup> Local authorities such as chiefs command considerable respect and influence within their communities.<sup>396</sup> The hierarchy of Malawi's traditional leadership consists of four ranks: the highest authority is the Paramount Chief, this is followed by the Traditional Authority (TA), the Group Village Head (GVH) and finally the Village Head.<sup>397</sup> Despite their limited official power, traditional leaders play a crucial role in upholding social norms and promoting community mobilisation.<sup>398</sup> Serving as custodians of culture, tradition, local customary laws, and community bylaws, they are regarded as primary authority figures by the majority of Malawians.<sup>399</sup> This underscores their significant impact on community life and governance.

In the context of an average African nation, the populace largely conducts their personal affairs in adherence to and within the framework of customary law.<sup>400</sup> This suggests that the majority of Malawians live their lives in adherence to customary law as opposed to state law. It's crucial to note that there is not a singular, uniform set of customs applicable across any given country; instead, customary law serves as a broad term encompassing diverse legal systems.<sup>401</sup>

Historically, customary law, deeply rooted in the practices and traditions of various ethnic groups, formed the indigenous legal system across Africa, especially in the pre-colonial era.<sup>402</sup> Various ethnic groups in Malawi have devised a set of guidelines governing sexual relationships between men and women, a system rooted in traditional laws crafted before the 20th century.<sup>403</sup> These regulations are aimed at overseeing sexual interactions and addressing religious violations that might result in harm or disrupt public peace. These systems, primarily

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<sup>395</sup> Kok, Maryse, et al. "Community bylaws concerning sexual and reproductive health and rights in Machinga District, Malawi: to what extent are they responsive to young people's needs?" *International Journal for Equity in Health*, vol. 22, no. 1, doi: <https://doi.org/10.1186/s12939-023-02054-7>.

<sup>396</sup> Ibid

<sup>397</sup> Ibid

<sup>398</sup> Ibid

<sup>399</sup> Ibid

<sup>400</sup> Ndulo, Muna. "African customary law, customs, and women's rights." *Indiana Journal of Global Legal Studies*, vol. 87, <https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1186&context=facpub>. Accessed 11 November 2023.

<sup>401</sup> Raymond Atuguba. "Customary Law Revivalism: Seven Phases in the Evolution of Customary Law in Sub-Saharan Africa." *Inter Gentes Journal of International Law & Legal Pluralism*, <https://intergentes.com/seven-phases-in-the-evolution-of-customary-law-in-sub-saharan-africa/>. Accessed 30 December 2023.

<sup>402</sup> Ige, Rhoda. "Legal Pluralism in Africa: Challenges, Conflicts and Adaptation in a Global Village." *Journal of Law, Policy and Globalization*, vol. 34, ISSN 2224-3259.

<sup>403</sup> Raymond Atuguba. "Customary Law Revivalism: Seven Phases in the Evolution of Customary Law in Sub-Saharan Africa." *Inter Gentes Journal of International Law & Legal Pluralism*, <https://intergentes.com/seven-phases-in-the-evolution-of-customary-law-in-sub-saharan-africa/>. Accessed 30 December 2023.

operating within specific ethnic territories, handle disputes involving at least one party affiliated with the ethnic group.<sup>404</sup> While variations exist within local areas, the overarching principles remain consistent across diverse systems.<sup>405</sup> Customary law significantly influences the personal aspects of Africans' lives, notably in matters such as marriage, inheritance, and traditional authority.<sup>406</sup> However, it tends to perceive women as appendages to the groups they belong to, like clans or tribes, rather than as equals.

In the realm of customary law in Malawi, engaging in sexual intercourse with a girl or woman without her explicit consent is deemed illegal.<sup>407</sup> Nevertheless, certain customary laws permit such interactions without direct consent from the women or girls involved.<sup>408</sup> Instead, consent in these situations is typically granted by individuals responsible for the care of the girl or woman.<sup>409</sup> This legal interpretation inherently suggests a perspective where women and girls are viewed as possessions of men. Notably, initiation ceremonies, including the practice of *Kusasa Fumbi*, fall under these exceptions.<sup>410</sup> This custom gives cause to argue that customary law encroaches upon the rights of women and girls to make autonomous decisions regarding matters that impact their sexuality. The girls participating in these ceremonies are not consulted to obtain their explicit opinions on the matter. Parents and guardians should not be given the authority to make such unlawful harmful decisions on behalf of their underage charges. Such customary laws do not uphold the principles of the best interest of the child outlined in Article 3 of the CRC. It states that “the best interests of the child shall be a primary consideration in all actions concerning children”.<sup>411</sup> Hence, individuals such as parents, immediate and extended family members, guardians, and other legal caregivers who consent to subjecting girls to *Kusasa Fumbi* violate the CRC's mandate to safeguard and promote the best interests of the child.

Moreover, some customary laws sustain gender disparities, exemplified by the Chewa tradition's distinctive view on sexual consent, which contrasts with Western cultural norms.<sup>412</sup>

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<sup>404</sup> Ibid

<sup>405</sup> Ndulo, Muna. “African customary law, customs, and women’s rights.” *Indiana Journal of Global Legal Studies*, vol. 87, <https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1186&context=facpub>. Accessed 11 November 2023.

<sup>406</sup> Ibid

<sup>407</sup> Kanyongolo, Ngeyi, and Bernadette Malunga. “The Treatment of Consent in Sexual Assault Law in Malawi.” *Theequalityeffect.Org*, 2011, [theequalityeffect.org/wp-content/uploads/2013/04/consent-paper-Malawi-NK.pdf](http://theequalityeffect.org/wp-content/uploads/2013/04/consent-paper-Malawi-NK.pdf).

<sup>408</sup> Ibid

<sup>409</sup> Ibid

<sup>410</sup> Ibid

<sup>411</sup> Article 3 CRC.

<sup>412</sup> Abankwah, R.M. (1970) *The plight of an African girl child: Traditional cultural practices in Malawi*. Available at: <https://repository.unam.edu.na/handle/11070/2072> (Accessed: 17 November 2023).

According to Chewa's customary law, the rape of an unmarried or nubile girl is considered insolence, and the perpetrator could be compelled to marry the girl.<sup>413</sup> This perspective has permeated Malawi's legal framework. Notably, the Malawi Penal Code lacks a comprehensive definition of consent in sexual offences. Consequently, courts are tasked with determining consent based on the circumstances of individual cases, often relying on evidence of a physical struggle between the complainant and the assailant.<sup>414</sup> However, this approach, centred on physical signs of resistance, can be problematic and fails to consider the complexities of rape, burdening the prosecution and subjecting the victim to indignity. Moreover, instances of consensual sex with a minor become contentious, especially during customary practices like initiation and ritual cleansing ceremonies like *Kusasa Fumbi*. While customary law permits sexual intercourse with the caretaker's consent, it simultaneously prohibits such acts without the girl's explicit consent.

A significant point of contention arises in the ongoing debate between human rights activists and traditionalists regarding the compatibility of customary norms with international human rights treaties and domestic bills of rights.<sup>415</sup> In agreement with Mwambene, I posit that African customary law, in its essence, is not inherently incompatible with human rights standards. The dynamism and diversity within African customary law, varying across communities and moral standards, suggest that it can align with human rights principles. Traditionalists assert that customary law, by upholding traditional values, positively contributes to the promotion of human rights.<sup>416</sup>

In contrast, activists such as Mubangizi and Tlale contend there are particular customary norms that undermine the dignity of women and perpetuate their treatment as second-class citizens.<sup>417</sup> The constitutions of various African nations, including that of Malawi, have a Bill of Rights guaranteeing equality and human dignity while disallowing gender-based discrimination.<sup>418</sup> Paradoxically, these same constitutions recognise the application of African

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<sup>413</sup> Ibid

<sup>414</sup> Kanyongolo, Ngeyi, and Bernadette Malunga. "The Treatment of Consent in Sexual Assault Law in Malawi." *Theequalityeffect.Org*, 2011, [theequalityeffect.org/wp-content/uploads/2013/04/consent-paper-Malawi-NK.pdf](https://www.theequalityeffect.org/wp-content/uploads/2013/04/consent-paper-Malawi-NK.pdf).

<sup>415</sup> Mwambene, Leah. "The Impact of the Bill of Rights on African Customary Family Laws: A Study of the Rights of Women in Malawi with some Reference to Developments in South Africa." University of the Western Cape, 2008. Dissertation.

<sup>416</sup> Ibid

<sup>417</sup> (2023) How gender-based cultural practices violate women's property rights and inhibit property ownership: A South African perspective. Web. <https://doi.org/10.1016/j.wsif.2023.102678>. Accessed 05 July 2023.

<sup>418</sup> Mwambene, Leah. "The Impact of the Bill of Rights on African Customary Family Laws: A Study of the Rights of Women in Malawi with some Reference to Developments in South Africa." University of the Western Cape, 2008. Dissertation.

customary law and neglect to offer clear resolutions for the clashes between African customary norms and human rights provisions.<sup>419</sup> The debate underscores the need for nuanced approaches that respect cultural diversity while safeguarding the dignity and rights of all individuals, irrespective of gender.

*c) Customary Law and Human Rights*

Customary norms play a crucial role in shaping societal and cultural standards, providing a framework for communal expectations.<sup>420</sup> African customary law, rooted in the context of community and family, accentuates the rights and duties of individuals within their communities.<sup>421</sup> However, as argued before, it tends to diverge from international human rights norms, which primarily focus on state parties adhering to treaties, eliminating discrimination against women, and ensuring the enjoyment of human rights and intrinsic freedoms, particularly within families and society.

The essence of customary law lies in community cohesion and the interconnectedness of individuals with their cultural roots. In contrast, human rights norms, while recognising the importance of family, emphasise the protection of individual rights within familial structures, challenging any justifications for restricting these rights under the umbrella of protecting the family unit. This variance in approach has led to conflicts between customary law norms, deeply ingrained in local traditions, and globally safeguarded human rights norms, often enshrined in national bills of rights inspired by international standards.<sup>422</sup> As mentioned in Chapter 3, there is resistance to changing African customs that infringe on the rights of women. Notably, Rwezaura points out that resistance to change stems from an ideological stance that views efforts to reform customary law as inconsistent with African traditions and culture.<sup>423</sup> There's a fear that such efforts might be interpreted as Westernization of African society.<sup>424</sup> The incorporation of culture into the realm of human rights has sparked a contentious debate between proponents of human rights universalism and those advocating for cultural

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<sup>419</sup> Ibid

<sup>420</sup> Ibid

<sup>421</sup> Raymond Atuguba. "Customary Law Revivalism: Seven Phases in the Evolution of Customary Law in Sub-Saharan Africa." *Inter Gentes Journal of International Law & Legal Pluralism*, <https://intergentes.com/seven-phases-in-the-evolution-of-customary-law-in-sub-saharan-africa/>. Accessed 30 December 2023.

<sup>422</sup> See Bill of Rights in Constitution 1994.

<sup>423</sup> Ndulo, Muna. "African customary law, customs, and women's rights." *Indiana Journal of Global Legal Studies*, vol. 87, <https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1186&context=facpub>. Accessed 11 November 2023.

<sup>424</sup> Ibid

relativism.<sup>425</sup> This debate has intensified to the point where societies and individuals perceive human rights as an imposition of a foreign way of life.

As Rwezaura highlighted, there is a fear of Westernisation in African societies.<sup>426</sup> In Malawian society, there is a perception that the promotion of human rights is synonymous with imposing foreign values, disrupting established cultural norms, and eroding traditional identities.<sup>427</sup> This sentiment can fuel resistance to human rights initiatives, as communities may view them as an external imposition rather than an inclusive framework for protecting the rights and dignity of individuals.<sup>428</sup> Mwambene emphasises the crucial significance of this, particularly concerning women's rights, as the challenges faced by women globally are deeply entrenched in their respective cultural contexts.<sup>429</sup> This clash of ideologies underscores a significant tension between preserving cultural heritage and adapting legal systems to align with evolving human rights principles. Navigating this delicate balance necessitates careful consideration of both the cultural context and the imperative of safeguarding the rights and dignity of individuals, particularly women, within these cultural frameworks. Efforts to bridge this gap require acknowledging the legitimacy of customary norms while striving for a harmonious coexistence with human rights principles.

*d) Vulnerable Groups and Customary Law*

Several scholars including Mwambene and Himonga<sup>430</sup> place a particular focus on the impact of legal pluralism on vulnerable groups, especially women and children as they suffer the most from HCPs.<sup>431</sup> In my view, legal pluralism, coupled with the informal application of customary laws, poses a substantial risk of perpetuating HCPs.<sup>432</sup> The theoretical literature, exemplified by works such as those by Bennet and Banda, generally concur that certain African customary family laws present conflicts with women's rights.<sup>433</sup> However, there appears to be a lack of

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<sup>425</sup> Ibid

<sup>426</sup> Ibid

<sup>427</sup> Mwambene, Leah. "The Impact of the Bill of Rights on African Customary Family Laws: A Study of the Rights of Women in Malawi with some Reference to Developments in South Africa." University of the Western Cape, 2008. Dissertation.

<sup>428</sup> Ibid

<sup>429</sup> Ibid

<sup>430</sup> See Himonga, Chuma. *Family Law in Zambia*. Alphen Van Der Rijn: Kluwer Law International, 2011.; Chanock, Martin. *Law, Custom and Social Order: The Colonial Experience in Malawi and Zambia*. Portsmouth NH: Heinemann, 1998.

<sup>431</sup> Mwambene, Leah. "The Impact of the Bill of Rights on African Customary Family Laws: A Study of the Rights of Women in Malawi with some Reference to Developments in South Africa." University of the Western Cape, 2008. Dissertation.

<sup>432</sup> Ibid

<sup>433</sup> Ibid

consensus on the preferred approach to address these conflicts arising from the application of African customary family laws and their impact on women's rights.<sup>434</sup>

The absence of a unified legal framework to address practices like *Kusasa Fumbi* allows them to persist under the shield of tradition.<sup>435</sup> This is despite there being explicit legislation preventing this from happening. While respecting cultural diversity is essential, it is imperative to evaluate these practices through the lens of human rights.

Various scholars advocate diverse strategies for resolving this conflict. One perspective posits that should African customary family laws lead to unjust discrimination, common law should supersede it.<sup>436</sup> Bennett argues that a values-conscious approach to the conflict of laws is necessary due to the transcendent nature of the Bill of Rights.<sup>437</sup> However, critics argue that this stance elevates common law above customary laws, aligning with cultural relativism arguments.<sup>438</sup> Another viewpoint proposes applying a human rights filter to cultural norms.<sup>439</sup> If these norms are recognised as discriminatory against women, human rights standards should prevail over cultural practices.<sup>440</sup> Bennett and Beyani adopt a revolutionary approach, strongly influenced by universalism, challenging the conventional methods of resolving legal conflicts.<sup>441</sup>

This perspective urges a nuanced approach, eschewing the outright dismissal of customary laws that seemingly clash with women's rights.<sup>442</sup> Instead, proponents of this viewpoint advocate for a thorough examination of local cultures, discerning elements that can be harnessed to fulfil human rights goals.<sup>443</sup> I suggest a nuanced approach that doesn't call for complete abolition but advocates for a deliberate amendment of customs to align with human rights standards. A case in point is the *Kusasa Fumbi* practice, deeply ingrained in Malawian

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<sup>434</sup> Ibid

<sup>435</sup> Ibid

<sup>436</sup> Ibid

<sup>437</sup> Ibid

<sup>438</sup> Beyani, Chaloka. "Towards a More Effective Guarantee of Women's Rights in the African Human Rights System." In *Human Rights of Women: National and International Perspectives*, edited by Rebecca J. Cook, 285-292. 1994.

<sup>439</sup> An Na'im who incorporates the two arguments in presenting his methodological model for the mediation of culture and human rights in a transformative process for both as cited by Banda.

<sup>440</sup> Mwambene, Leah. "The Impact of the Bill of Rights on African Customary Family Laws: A Study of the Rights of Women in Malawi with some Reference to Developments in South Africa." University of the Western Cape, 2008. Dissertation.

<sup>441</sup> Ibid

<sup>442</sup> Ibid

<sup>443</sup> Ibid

customary law.<sup>444</sup> Although it is undeniably harmful, the traditional ritual also imparts valuable lessons to young girls about self-care, cooking, and respecting elders.<sup>445</sup> However, it is the inclusion of sexual elements and the deployment of harmful practices like *Fisi* that draw criticism.

Additionally, in advocating for a middle ground, I propose retaining the essence of the *Kusasa Fumbi* rite while excising its deleterious aspects. The essence of such initiation ceremonies is to instil discipline and provide comprehensive guidance to boys and girls about various aspects of life, with a particular emphasis on fostering respect for their parents.<sup>446</sup> Interviews carried out by Muntali, Kok and Kakal consistently highlighted a significant benefit of attending these ceremonies—namely, the positive influence on the behaviour of initiates.<sup>447</sup> The ceremonies play a crucial role in imparting lessons on respect, the significance of treating others well, and appropriate social behaviour.<sup>448</sup> Thus, the overarching objective of initiation ceremonies is the transformation of the behaviours of both girls and boys through these educational processes.<sup>449</sup>

By preserving the initiation ceremony's instructive nature and removing elements that infringe upon human rights, a compromise is struck. This not only acknowledges the cultural significance of such rites in aiding children to learn how to become responsible adults<sup>450</sup> but also ensures they evolve to align with contemporary human rights standards. The crux of this argument lies in recognising the dynamic nature of cultures.<sup>451</sup> Instead of outright rejection, a discerning approach allows for the preservation of valuable cultural practices while discarding elements that are incompatible with the principles of equality, dignity, and freedom. It's a call for a careful, context-specific examination and a willingness to reform traditions, not as a

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<sup>444</sup> Park, M. (2014) *A rite of passage that pushes girls into sex*, CNN. Available at: <https://edition.cnn.com/2014/02/04/health/malawi-girls-initiation/index.html> (Accessed: 13 August 2023).

<sup>445</sup> Dunning, Denise., and Mkandawire, Joyce. "Have you heard of the disvirgining ceremony Kusasa Fumbi in Malawi?" ATQ News, 2014. Web. <https://atqnews.com/have-you-heard-of-the-disvirgining-ceremony-kusasa-fumbi-in-malawi/>. Accessed 08 August 2023.

<sup>446</sup> Munthali, A., Kok, M. and Kakal, T. (2018). *YES I DO. Initiation ceremonies in Traditional Authority Liwonde in Machinga District in Southern Malawi: What do they look like now and before; and do they influence young people's behaviour regarding sex and relationships?* [online] Available at: <https://www.kit.nl/wp-content/uploads/2019/03/Study-report-initiation-ceremonies-YID-FINAL.pdf> [Accessed 31 Dec. 2023].

<sup>447</sup> Ibid

<sup>448</sup> Ibid

<sup>449</sup> Ibid

<sup>450</sup> Ibid

<sup>451</sup> Beyani, Chaloka. "Towards a More Effective Guarantee of Women's Rights in the African Human Rights System." In *Human Rights of Women: National and International Perspectives*, edited by Rebecca J. Cook, 285-292. 1994.

negation of culture but as an evolution towards a more inclusive and rights-respecting societal framework.<sup>452</sup>

Overall, while legal pluralism may outwardly seem accessible, fair, and reflective of a country's historical and legal developments, it can, in reality, allow the justification of harmful practices on cultural, religious, or traditional grounds.<sup>453</sup> Customary law, often comprising unwritten rules, may be informally applied by traditional leaders or, alternatively in some instances, by formal courts.<sup>454</sup> These customary laws, initially designed to preserve indigenous customs and satisfy traditional leaders, have occasionally endangered vulnerable groups, particularly women and children, exposing them to harmful practices.<sup>455</sup> Eweluka contends that these underlying contradictions in the legal system, marked by the contemporary statutory laws and traditional customary laws, result in a complex and confusing legal regime.<sup>456</sup> Many challenges faced in Africa today, according to Eweluka, stem from the attempt to hastily reconcile fundamentally different legal systems and societal conceptions.<sup>457</sup> State law and international treaties have succeeded in aligning to human rights standards that combat harmful cultural practices like *Kusasa Fumbi*. As discussed in Chapter 1, community bylaws are a proposed sound solution.

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<sup>452</sup> Maputo Protocol

<sup>453</sup> Mwambene, Leah. "The Impact of the Bill of Rights on African Customary Family Laws: A Study of the Rights of Women in Malawi with some Reference to Developments in South Africa." University of the Western Cape, 2008. Dissertation.

<sup>454</sup> Ibid

<sup>455</sup> Ibid

<sup>456</sup> Ewelukwa, Uche. "Post-Colonialism, Gender, Customary Injustice: Widows in African Societies." *Human Rights Quarterly*, vol. 24, no. 2, pp. 424–486, <https://www.jstor.org/stable/20069610>. Accessed 31 December 2023.

<sup>457</sup> Ibid

## CHAPTER 6

### I. COMMUNITY BYLAWS AS A SOLUTION

As previously stated, Malawi has made an effort to try and combat the practice of *Kusasa Fumbi*. Addressing HCPs must go beyond the use of legislative measures. They are not enough to eradicate HCPs by themselves. Himonga argues that the conventional approach, often relying on legislative interventions, is weak because of its emphasis on official customary law as opposed to living customary law that reflects the actual context of affected individuals, especially girls subjected to HCPs in Africa.<sup>458</sup> In the context of *Kusasa Fumbi* in Malawi, innovative strategies within local communities, such as the implementation of community bylaws, have emerged. This measure aims to address harmful traditions more practically by considering the context in which they persist.

Community Bylaws are defined as “regulations to govern community life and impose penalties for non-compliance”.<sup>459</sup> Bylaws Kok argues that community bylaws are “commonly accepted mechanisms to influence behaviour change to achieve better health and development outcomes”.<sup>460</sup> According to Kachika, the rise in community bylaws reflects a growing trend where local communities take the initiative in crafting regulations. This occurs when international and national laws prove ineffective in driving change at the grassroots level due to their lack of contextual specificity or inadequate implementation.<sup>461</sup> Notably, these emerging community bylaws include those that address “harmful initiation rituals and practices and harmful puberty rituals for girls”.<sup>462</sup> Community bylaws fall under the jurisdiction of the District Council according to the 1998 Local Government Act of Malawi.<sup>463</sup> The Act empowers the District Council to create community bylaws for the practical governance of the entire or specific parts of the local government area, and this authority is non-delegable.<sup>464</sup> This is evidence that the Malawi Government is aware of the power of community bylaws. For district-

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<sup>458</sup> Himonga Feminist Constitutionalism 325-326.

<sup>459</sup> Kok, Maryse, et al. “Community bylaws concerning sexual and reproductive health and rights in Machinga District, Malawi: to what extent are they responsive to young people’s needs?” *International Journal for Equity in Health*, vol. 22, no. 1, doi: <https://doi.org/10.1186/s12939-023-02054-7>.

<sup>460</sup> Community bylaws concerning the regulation of sexual behaviour and customs.

<sup>461</sup> Kachika, Tinyade. “A critical re-appraisal of vernacularisation in the emergence and conceptualisation of community bylaws on child marriage and other harmful practices in rural Malawi.” University of Cape Town, 2020. Thesis.

<sup>462</sup> Kachika, Tinyade. ‘Juxtaposing emerging community bylaws and international human rights jurisprudence on the protection of women and girls from harmful practices in Malawi’ 2023 *African Human Rights Law Journal* 126-155. <https://dx.doi.org/10.17159/1996-2096/2023/v23n1a6>.

<sup>463</sup> Local Government Act 1998.

<sup>464</sup> Ibid

level community bylaws to take effect, they require approval from the Ministry of Local Government.<sup>465</sup> Notably, community bylaws, initiated by traditional leaders at the community level often in collaboration with non-governmental organisations (NGOs), lack official enforcement through the Local Government Act.<sup>466</sup> Despite this, the prevalence of community bylaws in Malawi has risen, driven partly by the limitations of international and national laws, which may lack context specificity or face poor implementation, thus often falling short of producing meaningful changes at the community level.<sup>467</sup>

Although traditional leaders (chiefs) hold minimal formal authority, they play a significant role in upholding societal norms and fostering community mobilisation.<sup>468</sup> Frequently, they serve as guardians of cultural heritage, local customary laws, and community bylaws.<sup>469</sup> Kachika emphasises the essential role played by traditional leaders in community bylaw implementation. NGOs have reported that community bylaws adopted without the involvement or commitment of a Traditional Authority (TA) face hindrances in functionality.<sup>470</sup> Communities engage in self-reflection to identify issues and then formulate community bylaws to address those problems.<sup>471</sup> This practice of self-identifying issues may potentially make the process of eliminating *Kusasa Fumbi* from communities that support it problematic. As previously mentioned in Chapter 2, one of the perpetrators of *Kusasa Fumbi* is the culture of secrecy surrounding the practice. The persistence of HCPs happens often due to encounters with resistance from rural people who practice HCPs.<sup>472</sup> Local government officials grapple with the delicate balance between intervening to protect young girls and preserving the long-standing customs that form an integral part of their communities.<sup>473</sup> The reluctance to address these issues head-on is driven by what is often referred to as “cultural sensitivities”.<sup>474</sup> This term has become a shield behind which certain harmful practices, such as sexual cleansing

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<sup>465</sup> Kok, Maryse, et al. “Community bylaws concerning sexual and reproductive health and rights in Machinga District, Malawi: to what extent are they responsive to young people’s needs?” *International Journal for Equity in Health*, vol. 22, no. 1, doi: <https://doi.org/10.1186/s12939-023-02054-7>.

<sup>466</sup> Ibid

<sup>467</sup> Ibid

<sup>468</sup> Ibid

<sup>469</sup> Ibid

<sup>470</sup> Kachika, Tinyade. “A critical re-appraisal of vernacularisation in the emergence and conceptualisation of community bylaws on child marriage and other harmful practices in rural Malawi.” University of Cape Town, 2020. Thesis.

<sup>471</sup> Ibid

<sup>472</sup> Ahmed, Beenish. “*Confronting a Sexual Rite of Passage in Malawi*.” The Atlantic, Atlantic Media Company, 15 July 2021, [www.theatlantic.com/international/archive/2014/01/Confronting-a-sexual-rite-of-passage-in-malawi/283196](http://www.theatlantic.com/international/archive/2014/01/Confronting-a-sexual-rite-of-passage-in-malawi/283196).

<sup>473</sup> Ibid

<sup>474</sup> Ibid

ceremonies, thrive in the shadows. Jean Mwandira sheds light on the complexity of the situation. Mwandira notes that even in villages where chiefs claim to have introduced community bylaws prohibiting sexual cleansing initiations, these ceremonies persist quietly.<sup>475</sup> This resistance to change is fuelled by a confluence of factors, including the financial incentives tied to the continuation of these practices. Mwandira's evaluation illustrates the intricate web of interests that perpetuate these customs. The initiation ceremonies have evolved into a lucrative industry, with those involved receiving compensation in cash or kind.<sup>476</sup> Even village chiefs themselves gain monetary and social benefits by permitting these HCPs in their communities.<sup>477</sup>

Yet, as public scrutiny of HCPs grows, proponents of the tradition have adapted by becoming more covert in their practices.<sup>478</sup> Initiation camps are strategically held outside villages, constructed temporarily and then destroyed to erase any trace of their existence.<sup>479</sup> This secrecy is further exacerbated by the reluctance of the girls themselves to speak up about their experiences.<sup>480</sup> A Girls Empowerment Network, under the leadership of Mkandawire, works to change proponents' perspectives of HCPs by advocating for new community bylaws and collaborating with local headmasters to break the cycle of early marriages and lost educational opportunities.<sup>481</sup> This approach could be amended to include other HCPs such as *Kusasa Fumbi*. Mkandawire's approach is focused on empowerment through education, aiming to shift the focus away from HCPs.<sup>482</sup>

Moreover, in Kachika's study, a focus group discussion with women in Senior Chief Kwataine's area, Ntcheu, revealed, "The bylaws are addressing the problems that we used to face".<sup>483</sup> Supporting this perspective, a police officer at Ntcheu Police Station affirmed, "Bylaws help to regulate internal problems in a community".<sup>484</sup> Similarly, an officer at Chiradzulu Police Station emphasised that "bylaws are formulated to reduce harmful practices that communities recognise as problematic",<sup>485</sup> including instances like *Kusasa Fumbi*. Kachika's research substantiates this by identifying specific bylaws in areas under Senior Chief

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<sup>475</sup> Ibid

<sup>476</sup> Ibid

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<sup>482</sup> Ibid

<sup>483</sup> Ibid

<sup>484</sup> Ibid

<sup>485</sup> Ibid

Lukwa, TAs Mwanza, and Makanjila aimed at outlawing *Kusasa Fumbi* in those communities.<sup>486</sup> This is a positive development.

Traditional Authority Kachindamoto, from the Dedza district, underscores the imperative of collaborative endeavours among custodians of culture to eradicate detrimental cultural practices afflicting children in the nation.<sup>487</sup> Reflecting on the ongoing 19 days of activism for the prevention of abuse and violence against children, Kachindamoto acknowledges the impact of diverse initiatives targeting the cessation of these vices.<sup>488</sup> In an interview with YFM radio station, she notes that despite existing laws and the implementation of various initiatives, the country confronts protracted challenges and witnesses sluggish progress.<sup>489</sup> *Kusasa Fumbi* and initiation ceremonies persist in transmitting adverse messages to children in certain regions.<sup>490</sup> Kachindamoto expresses reservations about the efficacy of law enforcement, citing reluctance among duty-bearers.<sup>491</sup> Stressing the necessity for unified action, she advocates for collaborative efforts among traditional leaders and culture custodians, emphasising mutual learning and support as pivotal to effectively curbing malpractices.<sup>492</sup>

According to Kachika's interviews, community members were more likely to accept community bylaws that they were involved in creating. One interviewee stated, “These are our laws because we made them right here with the involvement of the Senior Chief, Group Village Heads, Village Heads, and all the people”.<sup>493</sup> Therefore, it can be said that community bylaws are used to remedy the insufficient access to justice. A study was conducted to assess the efficacy of community bylaws pertaining to sexual and reproductive rights in Malawi.<sup>494</sup>

Saukila echoes this sentiment:

“This top-down approach to addressing harmful cultural practices may not be the most effective in African societies. While theoretically beneficial, these interventions may fall short of

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<sup>486</sup> Ibid

<sup>487</sup> Nyasulu, A. (2019) *Kachindamoto hints on ending harmful cultural practices*, Yoneco FM. Available at: <https://www.yonecofm.com/index.php/2019/11/13/kachindamoto-hints-on-ending-harmful-cultural-practices/> (Accessed: 15 December 2024).

<sup>488</sup> Ibid

<sup>489</sup> Ibid

<sup>490</sup> Ibid

<sup>491</sup> Ibid

<sup>492</sup> Ibid

<sup>493</sup> Kachika, Tinyade. “A critical re-appraisal of vernacularisation in the emergence and conceptualisation of community bylaws on child marriage and other harmful practices in rural Malawi.” University of Cape Town, 2020. Thesis.

<sup>494</sup> Kok, Maryse, et al. “Community bylaws concerning sexual and reproductive health and rights in Machinga District, Malawi: to what extent are they responsive to young people’s needs?” *International Journal for Equity in Health*, vol. 22, no. 1, doi: <https://doi.org/10.1186/s12939-023-02054-7>.

achieving practical change, exposing a potential disconnect between legal measures and on-the-ground realities. Community bylaws can be used to bridge the gap between the law and cultural practices on the ground”.<sup>495</sup>

As Kachika highlights, both customary law and formal state systems in isolation cannot entirely eradicate HCPs, nor can the reform of such systems achieve this goal.<sup>496</sup> Community bylaws, while a potential mechanism for change, face challenges in contexts where secrecy, taboo, and deep cultural roots protect harmful practices. Recommendations for addressing *Kusasa Fumbi* should involve a multi-pronged approach. Community engagement and education are paramount, dispelling myths and fostering awareness. Legal reforms need to address the disparity between customary and statutory laws to ensure that protection is in line with global norms. Collaboration between government ministries, local authorities, and traditional leaders is essential to devising a new strategy for crafting community bylaws.<sup>497</sup> This strategy should accommodate the preferences of traditional authorities and communities while upholding the rectitude of the technical review process.<sup>498</sup> Ministries should offer comprehensive instruction and assistance to traditional leaders in crafting and enforcing community bylaws that adhere to Malawian laws, policies, and strategies.<sup>499</sup> This assistance should include community outreach, formulation, documentation, and dissemination, as well as criteria for imposing penalties and offering incentives.<sup>500</sup> A study was conducted to assess the efficacy of community bylaws about sexual and reproductive rights in Malawi.<sup>501</sup>

The advent of community bylaws in Malawi indicates that the latest legal reforms aimed at addressing harmful practices have not effectively eradicated HCPs. However, the global landscape is evolving, with recent jurisprudence from the United Nations and the African Union tentatively recognising the role of plural justice systems. In contrast to the historical emphasis on formal and macro-level measures in international human rights law, there is a

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<sup>495</sup> Saukila, Tonthozo. “The Regulation of Ukuthwala in South Africa: Lessons from Malawi.” University of Cape Town, 2021. Dissertation.

<sup>496</sup> Kachika, Tinyade. “A critical re-appraisal of vernacularisation in the emergence and conceptualisation of community bylaws on child marriage and other harmful practices in rural Malawi.” University of Cape Town, 2020. Thesis.

<sup>497</sup> Assessment of Community-level bylaws related to maternal, child, and reproductive health in Malawi

<sup>498</sup> Ibid

<sup>499</sup> Ibid

<sup>500</sup> Ibid

<sup>501</sup> Kok, Maryse, et al. “Community bylaws concerning sexual and reproductive health and rights in Machinga District, Malawi: to what extent are they responsive to young people’s needs?” *International Journal for Equity in Health*, vol. 22, no. 1, doi: <https://doi.org/10.1186/s12939-023-02054-7>.

growing acknowledgement of the significance of community bylaws.<sup>502</sup> These local regulations serve to internalise norms against harmful practices and are emerging within chief jurisdictions. This should be encouraged and supported accordingly.<sup>503</sup>

Consequently, there is a call for human rights treaty-monitoring bodies to reconsider the prevailing emphasis on formal measures.<sup>504</sup> The future solution involves community-level approaches such as the use of community bylaws. Kachika emphasises that this shift is occurring because community bylaws which also incorporate norms aimed at safeguarding women from HCPs, are evident within the chief's jurisdictions.<sup>505</sup> Collaboration with traditional authorities, law enforcement, religious institutions, and local influencers is crucial for meaningful change.

## II. CONCLUSION AND WAY FORWARD

This thesis examined how Malawi regulates the HCP of *Kusasa Fumbi* through various domestic and international laws. Two key questions were posed: Can community bylaws contribute to combating *Kusasa Fumbi*? What roles can domestic and international law play in eradicating such oppressive and dehumanising practices? The primary objective of this concluding chapter is to encapsulate the key discoveries outlined in this thesis and subsequently offer a conclusion.

While there are provisions within Malawian laws that ostensibly align with international standards, their practical implementation and enforcement often fall short. The lack of formal recognition of African customary law contributes to this dissonance, creating a legal pluralism that complicates the regulation of practices like *Kusasa Fumbi*. The effectiveness of international and domestic legal frameworks in addressing HCPs is constrained by several factors. Firstly, the coexistence of plural legal systems, blending customary and statutory laws, poses challenges in enforcement. There's a discernible gap between legal standards and the lived reality, especially in rural regions where the traditional practice of *Kusasa Fumbi* persists.

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<sup>502</sup> Kachika, Tinyade. 'Juxtaposing emerging community bylaws and international human rights jurisprudence on the protection of women and girls from harmful practices in Malawi' 2023 *African Human Rights Law Journal* 126-155. <https://dx.doi.org/10.17159/1996-2096/202/v23n1a6>.

<sup>503</sup> Ibid

<sup>504</sup> Ibid

<sup>505</sup> Ibid

One of the approaches being taken by the government is to facilitate the collaboration between organisations promoting the rights of women and girls and village leaders to change the content of the initiation camp's teachings.<sup>506</sup> These camps, which once imparted harmful teachings such as how to please husbands in bed at a young age, are being reimagined as platforms for empowering young girls with essential life skills.<sup>507</sup> Although done on a limited scale, such collaborations are evidence of the potential for aligning positive aspects of cultural traditions with modern values, steering away from practices that perpetuate gender inequality and harm.<sup>508</sup> Cultural practices do not need to be completely eradicated, they must be adjusted.

In line with this argument, Malawi's Ministry of Health acknowledges that not all cultural practices need to be completely eradicated.<sup>509</sup> Instead, they argue that the focus should be on modifying practices that can be changed to accommodate modern human rights standards and health practices.<sup>510</sup> Such an approach underpins the importance of cultural inclusivity and sensitivity while simultaneously advocating for the protection and advancement of the rights of girls in the communities.

Furthermore, the Ministry of Health also issued a cultural practices manual that aims to eliminate HCPs by encouraging collaboration with local leaders.<sup>511</sup> The establishment of outreach programs to enhance educational access and healthcare for children further underscores their commitment. While the connection between these efforts and the improvements in indicators such as reduced early pregnancies and sexually transmitted infections is not definitively established, the progress is undeniable. However, the context of Malawi's social structure, where traditional authorities hold significant power and are guardians of local culture. Advocates for girls' rights have attempted to persuade local tribal leaders to modify the practices within initiation camps, where harmful cultural practices often manifest.<sup>512</sup> The success in Chiradzulu (a district in Malawi), where initiation camps were reviewed and sexual content was removed, represents a step forward.<sup>513</sup> Still, it is important to

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<sup>506</sup> Dunning, Denise., and Mkandawire, Joyce. "Have you heard of the disvirgining ceremony Kusasa Fumbi in Malawi?" ATQ News, 2014. Web. <https://atqnews.com/have-you-heard-of-the-disvirgining-ceremony-kusasa-fumbi-in-malawi/>. Accessed 08 August 2023.

<sup>507</sup> Ibid

<sup>508</sup> Ibid

<sup>509</sup> Park, M. (2014) *A rite of passage that pushes girls into sex*, CNN. Available at: <https://edition.cnn.com/2014/02/04/health/malawi-girls-initiation/index.html> (Accessed: 13 August 2023).

<sup>510</sup> Ibid

<sup>511</sup> Ibid

<sup>512</sup> Kachika, Tinyade. "A critical re-appraisal of vernacularisation in the emergence and conceptualisation of community bylaws on child marriage and other harmful practices in rural Malawi." University of Cape Town, 2020. Thesis.

<sup>513</sup> Ibid

acknowledge that reaching just one community is merely a small fraction of the larger challenge at hand. Such grassroots initiatives that empower women and girls, by providing alternatives to HCPs can be instrumental.<sup>514</sup>

Ultimately, a holistic strategy, acknowledging and respecting local cultures while promoting human rights, is imperative for sustainable change in the landscape of HCPs in Malawi. Malawi's legal framework is robust, but its impact depends on a nuanced, culturally sensitive approach. The use of community bylaws is a very practical and useful mechanism for eliminating HCPs such as *Kusasa Fumbi*. However, more young women and girls who are affected by the practice must be consulted in the community bylaw-making process. This multifaceted approach is key to combating harmful practices and safeguarding the rights of vulnerable individuals, especially girls, against the shadows of entrenched traditions.

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<sup>514</sup> Ibid

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