THE REGULATION OF *UKUTHWALA* IN SOUTH AFRICA: LESSONS FROM MALAWI

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DEDICATION

To Patricia, Nasinuku and Walhalha.

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…Yet not I, but the grace of God that was with me. – 1 Corinthians 15:10

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ABSTRACT

South Africa is a pluralistic society whose supreme constitution protects the right to culture and other fundamental human rights, such as the right to equality and human dignity. South Africa is also party to a number of international and regional human rights instruments which aim to protect women and children from discrimination and harmful practices. It is important to consider these instruments as they create the normative standards to which South Africa is bound.

Today, the continued practice of certain cultural practices, which are seen as inherently cultural, risk the violation of the Constitution and international and regional instruments. This thesis examines the tension between the right to culture and, *inter alia*, the right to dignity and equality, through the practice of *ukuthwala. Ukuthwala*, also known as bridal abduction, is mainly prevalent in the Eastern Cape and Kwazulu Natal provinces of South Africa, though it is also practiced in other provinces of the country. It aims to address the question: *how can south Africa regulate ukuthwala*?

In coming to an answer, this thesis examines how Malawi has regulated the harmful cultural practice (HCP) of child marriage. Like South Africa, Malawi is a pluralistic society with a supreme constitution which protects, *inter alia*, the right to participate in the cultural life and the right to human dignity and personal freedoms. In line with its international and regional human rights obligations, Malawi has promulgated legislation to formally regulate HCPs. However, such "top-down" interventions are not always the best approach in African societies, as they are often theoretically beneficial to those they aim to help, but practically do not help. As such, there is a need for a "bottom-up" approach, one that involves the community, in creating solutions that regulate the HCPs affecting them. In this regard, various communities in Malawian districts have employed community "by-laws", which are community made rules and sanctions that are not legally binding, to combat HCPs. The thesis argues that such by-laws, though non-binding, are effective because they provide a community owned and oriented solution, which inspires adherence. As such, they have contributed to reducing the prevalence of child marriage in the country. It argues that such a "bottom-up" approach is best suited to address HCPs in rural communities, as it is a home-grown solution.

This thesis proposes an adapted form of community "by-laws" be employed in the context of *ukuthwala,* as it counters the alienation sometimes caused by the "top-down" approach. In including the community in creating a solution, they are involved in creating solutions which address the problems specific to them, and they are given ownership of the solution.

LIST OF ACRONYMS

CEDAW	Convention on the Elimination of all Forms of Discrimination Against Women
HCP(s)	Harmful cultural practice(s)
CRC	Committee on the Rights of the Child
NGO(s)	Non-Governmental Organisation(s)
TA	Traditional Authority
ACD	Area Development Committee
UN	United Nations
AU	African Union
UDHR	Universal Declaration of Human Rights
RCMA	Recognition of Customary Marriages Act
UNICEF	United Nations International Children's Emergency Fund

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CHAPTER ONE

INTRODUCTION

"This business of womanhood is a heavy burden' she said...these things are not easy you have to start learning them from a very early age. The earlier the better so that it is easy later on."[1]

I. INTRODUCTION

Upon becoming a constitutional democracy, South Africa adopted a supreme Constitution ('the Constitution') with extensive entrenched and justiciable human rights.[2] South Africa's Constitution has a broad equality provision, indicating its commitment to preventing any form of discrimination based on any of the listed grounds, which include *inter alia* race, culture and gender.[3] Further, the Constitution is founded on the principle of human dignity, which is inherent to all human beings.[4]

South Africa is a pluralistic society where the Constitution recognises and protects the common law and customary law.[5] Customary law is further protected in the individual and group right to culture and the constitutional obligation to apply customary law, subject to legislation dealing therewith and the Constitution.[6] This means that customary law is not immune to constitutional scrutiny but must comply with constitutional rights and values. The result is a pluralistic legal system in which customary law and the common law apply subject to the Constitution.

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[1] Tsitsi Dangarembga *Nervous Conditions* (1988) 16.

[2] The Constitution of the Republic of South Africa, 1996 (hereafter 'the Constitution, 1996) section 2. South Africa adopted the interim Constitution in 1994, followed by the adoption of the final Constitution in 1996. The final Constitution provides the right to dignity (s10), the right to equality (s9), the right to practice culture (s31) and the right to freedom and security of the person (s12).

[3] The Constitution, 1996 section 9(3). For a discussion of this, see Pius Langa 'Equality Provisions of the South African Constitution' (2001) 54 *SMU Law Review* 2101 at 2101; The Promotion of Equality and Prevention of Unfair Discrimination (Equality Act) Act 4 of 2000 has been enacted to give effect to the provision.

[4] The Constitution, 1996 Preamble and section 9(1).

[5] The Constitution, 1996 ss 211(3) and 39(3).

[6] The Constitution, 1996 ss 30 and 31; Kathleen Rice 'Understanding *ukuthwala*: Bride abduction in the rural Eastern Cape, South Africa' (2018) 77 *African Studies* 394 at 395.

Today, the continued practice of certain cultural practices, which are seen as inherent to many South African indigenous communities,[7] risks the violation of human rights protected in the Constitution and international and regional instruments such as, *inter alia*, the Convention on the rights of the Child (hereafter 'the CRC'),[8] the Convention for the Elimination of Discrimination Against Women (hereafter 'the CEDAW')[9] and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (hereafter 'the Maputo Protocol').[10] This raises the question of whether or not the practices can continue to exist, in their original form, in a constitutional dispensation where human rights are supreme.

This thesis examines the practice and regulation of *ukuthwala* in the current constitutional framework. *Ukuthwala*, also referred to as marriage by abduction, is where a girl is carried away by a man for the purposes of initiating a customary marriage.[11] The accuracy of the term "abduction" depends on the level of consent by the girl, as there are some instances where the girl is a willing participant.[12] Where she does not consent, however, she is left vulnerable to an infringement of her human rights, and thus the need for regulation of the practice.

South Africa may consider how other African countries have balanced the implicated rights. In this regard, Malawi has promulgated legislation regulating "harmful practices" in general,[13] similar to South Africa's Equality Act. Although Malawi adopted

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[7] Lea Mwambene and Helen Kruuse 'The thin edge of the wedge: ukuthwala, alienation and consent' (2017) *SAJHR* 1 at 5.

[8] Convention on the Rights of the Child (CRC), adopted by the United Nations General Assembly on 20 November 1989, entered into force on 2 September (1990), 1577 UNTS 3. Ratified by South Africa on 16 June 1995.

[9] Convention on the Elimination of all forms of Discrimination against Women (CEDAW), adopted by the United Nations General Assembly on 18 December 1979, entered into force on 3 September (1981), 1249 UNTS 13. Ratified by South Africa on 15 December 1995.

[10] The Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (Maputo Protocol), adopted by the African Union on 11 July 2003, entered into force on 25 November (2005). Ratified by South African on 25 November 2005.

[11] Mwambene and Kruuse *SAJHR* 1; Lea Mwambene and Julia Sloth-Nielsen 'Benign Accommodation? Ukuthwala, "Forced Marriage" and the South African Children's Act' (2011) *African Human Rights Law Journal* 3.

[12] John Mubangizi 'Building South African human rights culture in the face of cultural diversity: Context and conflict' (2012) 5 *African Journal of Legal Studies* 1 at 15; Digby Sqhelo Koyana and Bekker JC 'The Indomitable *Ukuthwala* custom' (2007) *De Jure* 139 at 143.

[13] Gender Equality Act (No. 3 of 2013) for Malawi.

a legislative framework to regulate harmful cultural practices (hereafter 'HCP') such as child marriage, there is still a gap between the framework and the lived experiences of those it has been enacted to protect. In view of this, some Malawian communities have enacted community by-laws, which are not legally binding but have inner force in the community, to regulate HCPs.[14] When the by-laws concern criminal matters, such as underage marriage, the by-law states that the offender must be surrendered to the legal authorities.[15] Such an approach is cognisant of the fact that in order for any regulation to be effective and long-lasting, community views need to be respected and included in the regulation making process.

In view of this, it is my submission that South Africa should adopt a similar holistic and collaborative approach in balancing the competing interests of cultural and individual rights, as this is the best way to ensure sustainable protection of these rights.

II. PROBLEM STATEMENT

In 2021, the Committee on the CEDAW found that domestic violence and gender-based violence rates in South Africa are "alarmingly high".[16] The Committee attributed the high rates of gender-based violence to the continued use of HCPs, such as child marriage and *ukuthwala.*[17]

The practice of *ukuthwala* has gained prominence over the years and attracted much attention from the media, human rights organizations and scholars.[18] Its continued

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[14] Tinyade Kachika *A Critical Re-Appraisal of Vernacularisation in the Emergence and Conceptualisation of Community By-laws on Child Marriage and Other Harmful Cultural Practices in Malawi* (LLD thesis, University of Cape Town, 2020) 260.
[15] T Kachika *A Critical Re-Appraisal of Vernacularisation* 235.
[16] United Nations Human Rights Office of the High Commissioner "South Africa: Failure to tackle domestic violence a violation of women's rights – women experts" https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=27098&LangID=E accessed on 20 June 2021.
[17] United Nations Human Rights Office of the High Commissioner "South Africa: Failure to tackle domestic violence a violation of women's rights – women experts".
[18] For example, see Mwambene and Sloth-Niesen *Journal of Family Law and Practice* 5; Mwambene and Kruuse *SAJHR* 25; Nyasha Karimakwenda 'Today It Would Be Called Rape: A Historical and Contextual Examination of Forced Marriage and Violence in the Eastern Cape' (2013) *Acta Juridica* 339; MJ Maluleke 'Culture, Tradition, Custom, Law and Gender Equality' (2012) *PER* 428; Rudolf Nkgadima "91 000 girls aged between 12 and 17 in SA married" *IOL* 8 December 2020 available at

practice in the post-constitutional era has placed it in the eye of the hurricane of the clash between culture, and the right to practice it, and the need to protect the girl child and her rights. *Ukuthwala* is regulated in general in terms of the Equality Act which prohibits discrimination on the basis of gender, including through traditional, customary or religious practice which impairs the dignity of women and the girl child and undermines their equality with men.[19] However, there is no specific legislation criminalising the practice which leaves it to be dealt with under the common law crimes of, *inter alia* kidnapping, assault and rape.

Ukuthwala was spotlighted in the Western Cape judgment of *S v Jezile* and the subsequent appeal against the charges of rape, human trafficking, assault with intention to commit grievous bodily harm and common assault.[20] The defendant argued that he was in a customary marriage with the complainant as a result of *ukuthwala* and was therefore protected by his right to practice his culture.[21] The full bench of the Western Cape regional court confirmed that cultural practice, in this case *ukuthwala,* is not a defence for common law crimes, which confirms the constitutional provision that cultural practices must conform to the values of the constitution.[22] The court *a quo's* conviction and sentence of 22 years was confirmed.[23]

The *Jezile* cases illustrate some of the nuances that need to be accounted for when balancing culture and human rights and regulating cultural practices. During interviews conducted after the conclusion of the case, Mwambene and Kruuse discovered that members of Jezile's community opposed the judgments.[24] The community members argued that the case being heard in the Western Cape with a non-Xhosa judge and legal representative, meant that they could not understand nor appreciate the custom and its nuances as practiced in the Eastern Cape.[25] Further, they argued that since the proceedings

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https://www.iol.co.za/news/91-000-girls-aged-between-12-and-17-in-sa-married-96f554c4-ecc3-4997-852d-972eefb60955 accessed 10 May 2021.

[19] Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, section 8 (d).

[20] *Jezile v S* 2016 (2) SA 62 (WCC).

[21] 2016 (2) SA 62 (WCC) para 40.

[22] 2016 (2) SA 62 (WCC) para 95.

[23] 2016 (2) SA 62 (WCC) para 95.

[24] Mwambene and Kruuse *SAJHR* 8.

[25] *Ibid.*

were in English, the accused was unable to fully comprehend and follow the proceedings, which disadvantaged him.[26] The community viewed the judgments as an affront to their culture as *ukuthwala* always involves some form of abduction and coercion of the woman, which is the very thing Jezile was convicted for.[27] The general community belief was that Jezile was wrongly and unfairly convicted, as he was merely practicing his culture. One interviewee argued that since the elders had consented to the *thwala* and "marriage", they should also have been arrested and convicted and not just the accused.[28] This view illuminates the disjuncture between what Jezile was charged and convicted for, namely the common law crimes of human trafficking and rape, and what the community believed he was charged and convicted for, being the practice of his culture.

III. SIGNIFICANCE OF THE STUDY

Ukuthwala is most prevalent amongst the isiXhosa and isiZulu tribes in the Eastern Cape and Kwazululu Natal, but variations of the practice exist amongst other tribes, such as the isiNdebele and isiPedi people.[29] It has become synonymous with child marriages, a HCP, as it can involve girls as young as 11, yet there exists no national legislation which specifically regulates it.[30] The South African Law Reform Commission's (hereafter 'the SALRC') discussion papers noted that *ukuthwala* has resurfaced and requires regulation.[31] The said discussion papers culminated in the Prohibition of Forced Marriages and Child Marriages Bill,[32] which is yet to be enacted.

Scholars, such as Rice, have noted that it is vital that the actual lived experiences of those who partake in HCP must be considered when addressing these practices, to respect the culture of individuals while simultaneously protecting human rights.[33]

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[26] *Ibid.*
[27] Mwambene and Kruuse *SAJHR* 8-9.
[28] Mwambene and Kruuse *SAJHR* 8-9.
[29] Nyasha Karimakwenda *Where rape does not exist: tracing the unsettled position of marital rape in South Africa through women's recourse-seeking journeys* (LLD thesis, UCT, 2018) 121.
[30] N Karimakwenda *Where rape does not exist* 121.
[31] SALRC Revised Discussion Paper 138 (Project 138) *The Practice of ukuthwala* 20.
[32] Prohibition of Forced and Child Marriages Bill in SALRC Revised Discussion Paper 138 (Project 138) *The Practice of ukuthwala* (2015) 57.
[33] Kate Rice 'Ukuthwala in Rural South Africa: Abduction Marriage as a Site of Negotiation about Gender, Rights and Generational Authority Among the Xhosa' (2014) *Journal of Southern African Studies* 381 at 399.

Himonga emphasises this point by stating that when a "bottom-up" approach is used, that is including the community and customary law in human rights discourse rather than villainising it, the changes are likely to have long-term implementation.[34] It is therefore important to include the communities when reconciling the gap between cultural practice and human rights to create a society where they can both be robustly enjoyed.

The comparative analysis with Malawi recognises that the human rights project is not an individual, but rather a collaborative process, where countries can learn from one another. Malawi is a pluralist society which applies English common law and codified laws, while also recognising African customary law. Moreover, cultural rites are practiced in a constitutional dispensation, just like South Africa. Malawi has taken great strides towards combatting HCPs by implementing a holistic approach which combines civic education, community driven campaigns and the law, to combat HCPs and their effects.[35] This approach may be adapted and adopted in a South African context.

IV. RESEARCH QUESTIONS

The main purpose of this research is: to investigate the regulation of the harmful cultural practice of *ukuthwala* in South Africa.

The research questions are therefore:

1. Is *ukuthwala* a harmful practice?
2. How does the South African state regulate HCPs?
   2.1 Are HCPs regulated specifically or are they left to be dealt with generally through the common law?
   2.2 How does the South African state regulate *ukuthwala*?
3. Does the creation of a legal framework curb the prevalence of harmful cultural practices and protect the girl child?

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[34] Chuma Himonga "Rights of Women under Customary Law in Southern Africa" in Beverly Baines *et al.*, (eds) *Feminist Constitutionalism* (2012) 328.

[35] Charles Pensulo "Malawi Traditional Leader Orders Chiefs to Dissolve Child Marriages From COVID-19 Lockdown" *Global Citizen* 26 August 2020 available at https://www.globalcitizen.org/en/content/malawi-leader-dissolves-child-marriages-covid-19/ accessed 17 May 2021.

3.1 How have other states regulated HCPs?

4. In view of the comparative analysis, what is the best approach to dealing with HCPs in a pluralistic society, such as South Africa?

V. LITERATURE REVIEW

In many African cultures, a marriage is not merely between the bride and groom, but rather involves the merging of two clans. The normal marriage process involves a series of negotiations and agreements between the representatives of the families, which culminates in the successful proposal and marriage.[36] Bennett posits that where negotiations are unsuccessful and the normal process cannot be carried out, the parties must resort to an "irregular process", the most common being a form of *thwala*.[37]

(a) Ukuthwala

Ukuthwala is where a girl is carried away by a man for the purposes of initiating negotiations for a customary marriage.[38] The SALRC's discussion paper on *ukuthwala* noted that the practice can be placed into two categories: first where the bride consents and is a party to the procedure, and secondly where she is coerced.[39] In the first form, the perspective bride and groom, who are in a courtship, conspire to carry out the *thwala* for various reasons, such as the families disapproving of the union or to avoid wedding costs.[40] In such an instance, the abduction and resistance therein is feigned.[41] More commonly, however, *ukuthwala* takes the second form and is carried out without the consent of the girl. Mwambene and Sloth-Nielsen further subdivide this category into instances where the girl's family consents to a *thwala* without her foreknowledge, and this normally occurs where she would not agree to their choice of suitor,[42] or instances where the *thwala* takes place without the consent of the bride nor her family. Here, there is no initial consent from either the girl nor her guardians and she is abducted by force and often

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[36] T. W. Bennett 'The Cultural Defence and the Custom of Thwala in South African Law' (2010) 10 *U. Botswana L.J.* 3 at 6.
[37] Bennett *U. Botswana L.J* 7.
[38] Mwambene and Kruuse *SAHRJ* 1; Jaco Smit 'Rights, violence and the marriage of confusion: re-emerging bride abduction in South Africa' (2017) 40 *Anthropology Southern Africa* 56 at 56.
[39] SALRC Revised Discussion Paper 138 (Project 138) *The Practice of ukuthwala* 4-5.
[40] Mwambene and Sloth-Nielsen *African Human Rights Law Journal* 5.
[41] Koyana and Bekker *De Jure* 139.
[42] Mwambene and Sloth-Nielsen *African Human Rights Law Journal* 7.

raped and beaten into accepting the "marriage".[43] Sadly, violence is not only limited to the last category, and may occur where her guardians consented to the marriage.[44] The most troubling aspect of the practice is that it has been perpetrated against girls as young as 12 years old, due to some believing that sex with virgins cures HIV,[45] or ensuring that she will easily conceive,[46] which has made it synonymous with child marriage, thus making it a HCP.[47]

HCPs are defined as practices carried out for cultural or "socio-conventional" motives,[48] which have a detrimental impact on the health, and physical and mental well-being of those involved.[49] These include child marriages, female genital mutilation (hereafter 'FGM') and sexual cleansings,[50] all of which involve young girls and violate a variety of their human rights, including their fundamental rights of dignity and equality. In this regard, HCPs are often gendered, with women and girls being the victims.[51]

In recent years, scholars such as Bennett and Bekker,[52] place sex and the violence associated with *ukuthawala*, as a new distortion of the traditional procedure. They argue that *ukuthwala* in its original form rarely involved sex, forced or otherwise, or violence against the girl by her "groom".[53] This is disputed by Karimakwenda, who argues that sexual intercourse and the violent means used to acquire it, has always been part and parcel

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[43] Mwambene and Sloth-Nielsen *ibid*; Mubangizi *African Journal of Legal Studies* 9.
[44]Mwambene and Kruuse *SAJHR* 4.
[45] SALRC Revised Discussion Paper 138 (Project 138) *The Practice of ukuthwala* 20.
[46] 2016 (2) SA 62 (WCC) para 5.
[47] SALRC Revised Discussion Paper 138 (Project 138) *The Practice of ukuthwala* 1.
[48] Morissanda Konyate, "Harmful Traditional Practices against Women and Legislation", Paper prepared for the United Nations Division for the Advancement of Women. Available from: http://www.un.org/womenwatch/daw/egm/vaw_legislation_2009/Expert%20Paper%20EGMGPLHP%20_Morissan da%20Kouyate_.pdf.
[49] John Cantius Mubangizi 'An Assessment of the Constitutional, Legislative and Judicial Measures against Harmful Cultural Practices that Violate Sexual and Reproductive Rights of Women in South Africa' (2015) 16 *Journal of International Women's Studies* 158 at 158-159.
[50] Fagan and Fridlund 'Relative universality, harmful cultural practices and the united nations' human rights council' (2016) *Nordic Journal of Human Rights* 34; C Himonga "African Customary Law and Children's Rights: Intersections and Domains in a New Era" in J Sloth-Nielsen (ed) *Children's Rights in Africa: A Legal Perspective* (2008) 84.
[51] Mubangizi *Journal of International Women's Studies* 158.
[52] TW Bennett *Customary Law in South Africa* (2004) 212; see also Mwambene and Sloth-Nielsen *African Human Rights Law Journal* 5.
[53] Karimakwenda *Acta Juridica* 340-341.

of *ukuthwala.*[54] However, the violence has been ignored because violence has been viewed as a part of African culture.[55] This, she argues, has rendered the violence that occurs so normal and mundane, that obvious violence in *ukuthwala* is viewed as a distortion of a charming practice.[56]

The pressing question is then: how does South Africa regulate the practice of *ukuthwala*? Rice argues that the point of departure is determining the purpose of the practice, and its importance and place within the community. She argues against focussing on the "sensationalist" aspects of the practice, as this does not provide the full picture.[57] Understanding the reasons for the practice is important because it acknowledges that these practices are not merely theoretical academic discussions, but rather reflective of one's lived experience. Smit's findings provide a similar picture, in that the community members were against the violent aspects of *ukuthawla,* but wanted to maintain it, as it served the purpose of building families.[58] Acknowledging different experiences is important in pluralistic societies, to ensure that there is no perception that one system is dictating norms to another. This is supported by Kruuse and Mwambene's approach, which was to interview the members of Jezile's community to understand their views on the practice and judgment. Jezile's community members expressed frustration with the way the case was handled, citing the courts' misunderstanding of their culture, the language of the proceedings and the geographical location of the proceedings as reasons for why the conviction was incorrect.[59]

Though the conviction was a win for the protection of women's rights considering HCPs, violent forms of *ukuthwala* still occur, thus showing judgments as ineffective. In this regard, Himonga argues that judicial interventions do not benefit the majority of women who live in places governed by customary law, as judgments do not translate into a real-life change for the women it affects, thus requiring a different approach to regulating

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[54] *Ibid*.
[55] *Ibid*.
[56] N Karimakwenda *Where rape does not exist* 27.
[57] Rice *Journal of Southern African Studies* 381 at 382.
[58] Smit *Anthropology Southern Africa* 62.
[59] Mwambene and Kruuse *SAJHR* 32, 19-20.

HCP.[60] Much like Rice, and Mwambene and Kruuse and Himonga argue that community involvement in the regulation making process is essential for long-lasting change.[61]

(b) Legal framework

(i) South African framework

The SALRC's attempt to regulate the practice through the Prohibition of Forced Marriages and Child Marriages Bill shows an awareness of the harmful effects of child marriage on children. The Bill aims to make forced and child marriages an offence by expanding the meaning of "forced marriage" and criminalizing both child and forced marriages, including those resulting from *ukuthwala*.[62] It proposes making it an offence to use "violence, threats or any other form of coercion" to make a person enter into a marriage.[63] The Bill highlights the importance of consent of both parties in the marriage process by stating that it is an offence to make a person marry another if it is against their "full and free" consent.[64] Despite these progressive and necessary provisions, the legislation has not been promulgated, perhaps because the legislature considers the common law and existing legislation to be adequate to govern the matter. The Children's Act acknowledges some of the harmful effects of cultural practices on children, but it fails to mention *ukuthwala* by name, which still leaves it unregulated.[65]

(ii) International and regional instruments

The CEDAW and the CRC are the primary international law instruments which promote gender equality and protect women and children from HCPs. At a regional level, the African Charter on Human Rights (hereafter 'the Charter') and the Maputo Protocol fulfil this mandate. These instruments require the States that are party to them to ensure the consent of both women and men when entering into marriages, promote non-discrimination in all matters, including customary and traditional practices, as well as the implementation of legislative measures for the protection of the rights.

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[60] Himonga *Constitutional feminism* 325.
[61] Himonga *Constitutional feminism* 325.
[62] Prohibition of Forced Marriages and Child Marriages Bill (Prohibition Bill) Preamble.
[63] The Prohibition Bill, s3(1)(a).
[64] The Prohibition Bill, s3(1)(b).
[65] Act 38 of 2005.

(iii) Malawian legal framework

Like South Africa, Malawi is a constitutional democracy which protects both the right to practice one's culture and rights such as equality and dignity,[66] which are implicated in cultural practices.

Malawi has one of the highest child marriage prevalence rates in the world, with 41.53% of girls getting married before the age of 18.[67] Child marriage is common place in rural Malawi due to abject poverty and young girls viewing it as their only way out.[68] Although it takes place in all three regions of Malawi, it has a higher prevalence in the Southern and Northern regions.[69] Many of those who practice these rites view them as necessary parts of their culture, and advocate for their continuation. However, these practices raise issues regarding consent, sexual health and right to practice culture. The key pieces of legislation governing harmful cultural practices are the Gender Equality Act,[70] the Child Care, Protection and Justice Act,[71] the Marriage, Divorce and Family Relations Act,[72] and the Penal Code, as well as the Constitution, which guarantees gender equality generally.[73] These legislative enactment collectively work, *inter alia*, to define, prohibit and create sanctions for HCPs;[74] prevent marriage underage and forced marriages;[75] and makes it an offence punishable by life imprisonment for anyone to "unlawfully and carnally" know a girl under the age of sixteen and such a person is liable to a life in prison.[76]

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[66] The Constitution of the Republic of Malawi, 1994 sections 26, 13(a) and 19(1).
[67] Medson Makwemba *et al.* Survey Report: Traditional Practices in Malawi *University of Zurich* March 2019 53; Malawi has the fourth highest child marriage rate in Southern and Eastern Africa as cited in Unicef Malawi "Budget Scoping on Programmes and interventions to end child marriage in Malawi" https://www.unicef.org/esa/reports/budget-scoping-programmes-interventions-end-child-marriage-malawi accessed 15 October 2021.
[68] Human Rights Watch "I've Never Experienced Happiness" Child Marriage in Malawi Human rights watch https://www.hrw.org/report/2014/03/06/ive-never-experienced-happiness/child-marriage-malawi accessed 18 October 2021.
[69] Makwemba Survey Report 53.
[70] Act No.3 of 2013.
[71] Act 22 of 2010.
[72] Act No.4 of 2015.
[73] The Constitution of the Republic of Malawi section 20.
[74] Act No. 3 of 2013 section 5(1) and 5(2).
[75]Act No. 4 of 2015 section 14 and section 22(4).
[76] Act 8 of 1998 section 138(1).

Despite the above legislative framework, these practices remain prevalent in some parts of modern Malawi. As of 2021, only one case involving child marriage has been tried and only one case involving sexual cleansing has been tried in terms of the Gender Equality Act.[77] In response to this, several traditional leaders in, *inter alia*, Ntcheu and Dedza have created community by-laws to create a grassroots solution to address child marriage. According to Kachika, a by-law in this context is a form of "soft law" that has no legal force but has binding force within the community, due to general consensus and consent among the community members.[78] It is a community developed rule, supported by Chiefs and Traditional authorities, that addresses a particular HCP in the community and is sanctioned through a local fine called a *chindapusa.*[79] This has worked because the community members are involved at all stages of creating the by-laws, which creates ownership that inspires adherence.[80] Where the practice involves an infringement of the law, such as sex with a child below the legal age, the by-laws require that the offender be surrendered to law enforcement.[81] This shows collaboration between the state and traditional systems, which work together for the benefit of the girl child. Since the advent of the by-laws concerning child marriage, statistics show that many girls are being rescued from marriages and returning to school, which indicates that they have been successful.[82]

Malawi has a robust legislative framework aimed regulating harmful cultural practices, but lack of access to justice makes them ineffectual. As such, Malawi, through traditional leaders and community members, has created its own bylaws which work at a community level to combat HCPs and their effects.

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[77] *The Republic v Eric Aniva* Criminal Case No. 87 of 2016.
[78] T Kachika *A Critical Re-Appraisal of Vernacularisation* 260.
[79]T Kachika *A Critical Re-Appraisal of Vernacularisation* 221.
[80] T Kachika *A Critical Re-Appraisal of Vernacularisation* 229-230.
[81] T Kachika *A Critical Re-Appraisal of Vernacularisation* 242 and 247.
[82] Ministry of Gender/UNFPA/EU, Accounts of the Human Impacts of the Gender Equality and Women's Empowerment (GEWE) Programme (May 2015); Plan International "In-depth review of legal and regulatory frameworks on child marriage in Malawi" https://ams3.digitaloceanspaces.com/girlsnotbrides-org/www/documents/PLAN_18_country_report_malawi_final.pdf accessed 24 October 2021.

VI. CHAPTER OUTLINE

This thesis has six chapters.

Chapter one is this introductory chapter, which introduces the topic, provides the problem statement and literature review, and poses the research questions.

Chapter two contextualises and analyses the practice of *ukuthwala* in South Africa. It outlines the various forms of the practice in the country, as well as the social attitudes towards the practice.

Chapter three outlines and discusses the current legal framework, the core regional and international human rights instruments to which South Africa is party to. This reflects South Africa's responsibilities and their commitments to the protection of the rights contained therein.

Chapter four is a comparative analysis of how Malawi has tackled the problem of child marriage in the country. It outlines its social and legal contexts, the chosen strategies to combat HCPs and evaluates their efficacy.

Chapter five is a recommendations chapter. It analyses *ukuthwala* against South Africa's current human rights obligations and recommends an approach for the regulation of *ukuthwala* based on the evaluation of the strategies implemented by Malawi.

Chapter six provides a summary of the findings of this thesis, answers the research questions and concludes this thesis.

CHAPTER TWO

A SURVEY OF *UKUTHWALA*

"Today, *it would be called rape"*[83]

I. INTRODUCTION

This chapter contextualises and analyses the practice of *ukuthwala* in South Africa. It provides a brief overview of the practice, including the procedure, key features and historical origins of the practice. The chapter provides a comprehensive discussion of the various ways in which *ukuthwala* is practiced in the country and uses recent empirical research to shed light on societal attitudes towards the practice. This comprehensive understanding of *ukuthawala* is essential for the evaluation of the practice against South Africa's legal obligations done in Chapter three.

II. *UKUTHWALA* OVERVIEW

Ukuthwala is the isiXhosa and isiZulu word for the practice of abducting or carrying off a girl or woman for purposes of marriage.[84] Though most commonly practiced in the Eastern Cape and Kwazulu Natal provinces of South Africa, various forms of the practice occur amongst, *inter alia,* the tshiVenda, siSwati, xiTsonga, sePedi and IsiNdebele people.[85] In normal circumstances, a customary marriage is preceded by *lobola* negotiations between the representatives of the bride and groom's family's and concluded with payment of some heads of cattle, to demonstrate the groom's intention to proceed with the marriage.[86] Where the conventional avenues for proposing a marriage have failed, however, the groom can resort to what Bekker refers to as an "irregular process",[87] one such process being *ukuthwala. Ukuthwala* takes place with the aim of forcing the bride and / or her representatives to the negotiation table for the conclusion of the engagement

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[83] Karimakwenda *Acta Juridica* 350.
[84] Karimakwenda *Acta Juridica* 342; South African Law Reform Commission (SALRC) "Revised Discussion Paper 138: Project 138 The Practice of Ukuthwala" (2015) 1 at 5.
[85] *Ibid.*
[86] Bekker *Customary Law in Southern Africa* 97; See also Koyana *De Jure* 139.
[87] Bekker *ibid*.

and subsequent customary marriage.[88] As such, *ukuthwala* is not itself a customary marriage, but rather a catalyst for its conclusion.

(a) Forms

Ukuthwala can be divided into the following three categories:

1) The first form is *ukugcagca*, which Karimakwenda likens to elopement and is the least problematic form of the practice, as it involves consent from the girl.[89] This is where the man and woman agree to marry without obtaining their parents' prior consent. Bekker and Koyana assert that even though the woman puts up a resistance to being carried away, it is almost always for dramatic effect, and she is actually a willing participant in the process.[90] They further argue that the scream is to protect her "maidenly dignity",[91] and is done to show her parents that she will miss them as she goes to her marital home.[92] In this instance, the *thwala* is an expression of the woman's autonomy to choose her own partner, particularly where the guardians disagree with her chosen partner or where he cannot pay the *lobola*.[93]

2) The second form is where the suitor and the girl's family agree for the *thwala* to take place. Such a *thwala* would normally take place where the girl would otherwise have refused to marry that particular suitor. After the *thwala* takes place, she is taken to the man's home and guarded by his family until she gets used to the idea of the marriage.[94]

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[88] Mwambene and Sloth-Nielsen *AHRLJ* 4.

[89] Karimakwenda *Acta Juridica* 344; Monyane, drawing from Mfono, argues that the girl's participation is an indication of the girl's consent, which implies her knowledge and appreciation of the consequences and gives her the option to say "no". This consent later adds some legitimacy to the subsequent marriage negotiations as seen in Chelete Monyane "Is Ukuthwala another form of forced marriage?" *South African Review of Sociology* (2013) 64 at 69.

[90] Bekker and Koyana *De Jure* 97.

[91] Bekker and Koyanna *De Jure* 98; Monyane *South African Review of Sociology* 69.

[92] Monyane *ibid.*

[93]Bekker and Koyana *De Jure* 97; Karimakwenda *Acta Juridica* 342,344 and 351.

[94] Mwambene and Sloth-Nielsen *AHRLJ* 7*;* SALRC Revised Discussion Paper 138 (Project 138) *The Practice of ukuthwala* 8.

3) The last category of *ukuthwala,* where the procedure takes place against the will of the girl, is the most violent and objectionable.[95] In this case, the girl is forcibly taken, without her consent or that of her guardian, and a representative of the man goes to her home to commence *lobola* negotiations. I submit that this is a clear violation of her right to human dignity, as her free will is disregarded, and she is reduced to an object that can be violently uprooted at the whim of a man.

(b) Procedure and features

Bekker describes the *ukuthwala* procedure for all three forms as follows:

> "The intending bridegroom, with one or two friends, will waylay the intended bride in the neighbourhood of her own home, quite often late in the day, towards sunset or at early dusk, and they will "forcibly" take her to the young man's home. Sometimes the girl is caught unawares, but in many instances, she is "caught" according to plan and agreement. In either case, she will put up a show of resistance to suggest to onlookers that it is all against her will when, in fact, it is hardly ever so".[96]

While acting as an expert witness *S v Jezile,* Nhlope set out the following as the requirements for a valid *thwala:*

> "the woman must be of marriageable age, which in customary law is usually considered to be child-bearing age; consent of both parties to perform *ukuthwala*; parties arrange a mock abduction; woman would be abducted and placed in the custody of women folk to safeguard her person and reputation; sexual intercourse between parties is prohibited during this period; a family would then send an invitation to the woman's family of the mock abduction which would be a signal that the man's family wished to commence negotiations for their marriage; and that the woman's family consent is pivotal to a customary marriage".[97]

After the *thwala,* the girl is taken to the groom's home and his representative reports the *thwala* on the day to her male family members, normally her father or uncle and cattle. Cattle is given as a sign of good faith to begin the *lobola* negotiations.[98] Where

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[95] Karimakwenda *Acta Juridica* 343; Mwambene and Kruuse *SAJHR* 13 and 14.
[96] Bekker *Customary Law in Southern Africa* 97.
[97] Mwambene and Kruuse *SAJHR* 13.
[98] Koyana *De Jure* 141; Kate Wood 'Contextualizing group rape in post-apartheid South Africa' (2005) *Culture, Health and Sexuality* 303 at 314.

the cattle is accepted by the girl's family, this is seen as tacit consent to the *thwala* and negotiations begin. Where the parties fail to reach an agreement during negotiations, however, a fine is paid by the man's representative to the girl's male representative in the form of cattle.[99] According to Koyana sex between the girl and the potential groom, consensual or otherwise, is explicitly forbidden during the time that the girl has been *thwalad.*[100] This view positions sex in the *thwala* process, and the violence it sometimes involves, as a deviant and incorrect form of the "romantic" procedure.[101] This is in line with some of the modern discourse surrounding *ukuthwala*, which often brushes aside the consistent violence involved the practice as a "new" phenomenon, which has tainted an otherwise joyful process.[102]

Karimakwenda, however, argues that the above narrative only serves to diminish and erase the real violence faced by women in *thwala* process.[103] She argues that it was commonplace for women and girls to be coerced through violence, during *ukuthwala* or otherwise, into marriages that they did not consent to, so long as it led to the "legitimate end" of marriage.[104] In her research, Karimakwenda draws on interviews with two women in their late fifties and early sixties respectively, Anele and Asanda, whose marriages were a result of *ukuthwala.*[105] One of the interviewees, Anele, who was *thwalad* at the age of 14 recounted the violence involved in the *thwala* leading to her marriage. She noted that it was her mother, who herself had a marriage through *ukuthwala,* who had arranged for the *thwala* to take place, as a continuation of tradition.[106] Karimakwenda writes:

> "Anele was in standard four when the abduction took place. It was late in the evening and she was cleaning her feet to sleep and go to school in the morning. While she was bathing

[99] Koyana *De Jure* 141.
[100] Bekker and Koyana *De Jure* 141.
[101] Hl Choma *'Ukuthwala* practice in South Africa: A Constitutional Test*' US-China Law Review* (2011) 874 at 874-875.
[102] Karimakwenda *where rape does not exist* 121 cites South African Law Reform Commission (SALRC) Report 138 researching *ukuthwala* and their propose Draft Bill to address *ukuthwala* and academic articles as examples of responses to the "re-emergence" of the practice in a violent form. See also TW Bennet *Customary Law in South Africa* (2004) 212; See also Mwambene and Sloth-Nielsen *AHRLJ* 5.
[103] Karimakwenda *Acta Juridica* 342; Karimakwenda *Where rape does not exist* 228.
[104] Karimakwenda *Acta Juridica* 342 and 349-350; Mwambene and Kruuse *SAJHR* 5.
[105] N Karimakwenda *Where rape does not exist* 208.
[106] N Karimakwenda *Where rape does not exist* 212.

> in the *waskom* (silver wash tub) the men arrived. One man grabbed her and raised her legs high in the air for the other men to grab them".[107]

During the abduction, Anele cried and pleaded for her capturers, to no avail. Instead of helping her, they brutally beat her when she attempted to escape and throughout the journey.[108] She was taken to her husband's homestead, where she was not allowed to leave the room she was kept in for the week. On her first night, her husband raped her while people stood outside the room and listened to the act, bearing witness to the "consummation" of the marriage. Karimakwenda describes it as follows:

> "Those waiting outside had heard her screams. She was crying since she was a virgin. Yet, she could not fight him for being exhausted from the running and beatings during the journey. Her husband raised her legs high to his chest to ensure that she was defenceless when she tried to fight the pain of his penetrating her. He did not let go of her legs until he penetrated her."[109]

Following this, the husband took a blood-stained cloth to prove to the elders that she was a virgin. It is particularly poignant that even while Anele screamed and cried during her rape, adults stood by and ensured that she could not escape until her husband had finished having his way with her. Though the witnesses clearly heard her, a 14-year-old child, in distress, they did nothing because her rape needed to occur in order to legitimize the marriage. This speaks to the earlier point of violence against women being condoned, and even encouraged, if it is for a "legitimate" end of marriage. I submit that this shows a culture of violence against women that is not only present in the community, but also moves from generation to generation. As Asanda noted in her interview, when she, at 15-years-old, escaped her husband after the first time he had raped her, she was met with no sympathy: "She went home and told her family that she could not sleep with her husband but they refused to welcome her back and told her to persevere."[110]

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[107] N Karimakwenda *Where rape does not exist* 212.
[108] *Ibid.*
[109] N Karimakwenda *Where rape does not exist* 213.
[110] N Karimakwenda *Where rape does not exist* 210.

Anele and Asanda are only two of the women non-profit organizations like Masimanyane work with,[111] there are many more with similar stories.[112] Wood's research in the Eastern Cape revealed similar stories from *ukuthwala* survivors. When speaking of the consummation of her marriage after a *thwalad,* an interviewee stated the following:

> "Some guys would hold you down for your husband-to-be. If a girl has strength, the men would turn out the light, holding your legs open for the guy to sleep with you. Whatever you may try to do, they are holding you down. Even if you cry, old people wouldn't care, they knew what was going on."[113]

Research by scholars such as Karimakwenda and Wood reveal the motif of violence against women that is present in the marriage process. Such research reveals that rape is often condoned by the community in the context of marriage and merely considered "part of the process".[114] Girls who undergo *ukuthwala* often lack support from their families to escape their violence marriages and that the most important thing is making the girl into a "wife", no matter how much harm she must endure. Karimakwenda eloquently summarizes "… in the past, as in the present, violence, including sexual violence, was not uncommonly an integral part of making a woman into a wife."[115] I submit that this is an important observation that the other narratives fail to acknowledge fully, by treating violence as if it is a rare and new phenomenon in *ukuthwala.* This is a defect in the discourse, as it does not give enough weight to the violence women like the interviewees endure during the *thwala* process. Further, the fact that violence occurred in the *thwalas* of these women almost 40 years ago, shows that it is not a new phenomenon.

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[111] Masimanyane Women's Rights International was established in 1996 to address patriarchy "embedded in every system within African society" and fight violence against women. They provide community development training in line with the aims of international human rights treaties, in particular, CEDAW Masimanyane Women's Rights International "About Us" https://www.masimanyane.org.za/aboutus accessed 29 October 2021.
[112] N Karimakwenda *Where rape does not exist* 214.
[113] K Wood 'Group rape in post-apartheid South Africa' (2005) 7(4) *Culture, Health & Sexuality* 303 at 313; Karimakwenda *Acta Juridica* 350.
[114] Wood *Culture, Health and Sexuality* 303, 313; Mwambene and Kruuse *SAJHR* 8.
[115] Karimakwenda *Acta Juridica* 350.

As cited elsewhere in this chapter, modern discourse on *ukuthwala* emphasises that consent and no sexual contact between the parties are key components of the practice and if they occur, the practice is invalid. Regarding consent, I submit that the interplay of power dynamics, respect of culture and the rarity with which the *thwala* takes place as expression of the girl's actual desire, make discerning consent ambiguous. This is a motif present in the interviews Karimakwenda conducted in her research, where one interviewee cited not wanting to bring shame and mockery to her family as reasons for not escaping, while the other noted that when she did escape, her parents returned her and told her to endure.[116] For this reason, I submit that Karimakwenda's depiction of *ukuthwala* provides a more holistic picture of the practice, and importantly, provides a voice to the women who endured great violence during the process. I submit that romanticising *ukuthwala,* the way Bekker and others do, erases and trivialises the real trauma faced by these women, which can serve as a revictimization. In the past and present, violence against women has been involved in the marriage process and categorizing it as a rare and incorrect occurrence in *ukuthwala,* does not accurately represent the situation. In view of this, I submit that Karimakwenda's, and others like hers, portrayal is the more accurate and persuasive version.

III. SOCIAL ATTITUDES

The case of *S v Jezile* and subsequent empirical research thereon provides excellent insights into a community's views on the practice of *ukuthwala*.

In *S v Jezile*, Jezile, a 28-year-old man from Engcobo (Eastern Cape province), was convicted of human trafficking, rape, one count of assault with intent to cause grievous bodily harm and one count of common assault of his 14-year-old-wife.[117] Jezile's family arranged the abduction with the girl's uncle and grandmother without the girl's consent.[118] The parties agreed on R8,000 as *lobola* and he subsequently took her to Cape Town.[119] While in Cape Town, Jezile raped and beat his wife for months until she finally managed

[116] N Karimakwenda *Where rape does not exist* 210 and 213.
[117] 2016 (2) SA 62 (WCC).
[118] 2016 (2) SA 62 (WCC) 8-9.
[119] 2016 (2) SA 62 (WCC) 9.

to escape and report the matter to the police, who arrested Jezile.[120] Jezile was convicted of three counts of rape, two counts of assault and one count of human trafficking for sexual purposes and was sentenced to 22 years imprisonment.[121]

On appeal, Jezile argued that the court *a quo* failed to view his actions through the context of the cultural practice of *ukuthwala,* thus resulting in a misinterpretation of said actions.[122] Had the court done this, Jezile argued, they would have held that the complainant had consented to the travelling and sexual intercourse within the context of *ukuthwala.*[123] The appellant submitted that an integral part of the *ukuthwala* practice is that the bride must resist the man and enter into the marriage through coercion, which plays a part in the "abduction" phase of the *ukuthwala*.[124] Jezile argued that the "living customary" law of *ukuthwala* that he had carried out did not require the girl to consent, nor adhere to the age requirements in the Recognition of Customary Marriages Act (hereafter 'RCMA').[125]

As with the court *a quo,* the full bench held that the charges laid against the accused were not for practicing his culture, but rather for the common law crimes which he committed while he was carrying out his cultural practice.[126] The court viewed this version of *ukuthwala* as "aberrant" and not worthy of protection under the current constitutional dispensation.[127] In view of this, the appeal was dismissed.[128] While the judgment is commendable for upholding the State's commitment to the protection of children, its categorization of the use of violence in this instance as deviating from the actual practice, serves to further erase the fact that violence is almost always the rule and not the exception.

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[120] 2016 (2) SA 62 (WCC) para 11.
[121] 2016 (2) SA 62 (WCC para 2, 106.
[122] 2016 (2) SA 62 (WCC) para 52.
[123] 2016 (2) SA 62 (WCC) para 40 and 51.
[124] 2016 (2) SA 62 (WCC) para 52 and 87.
[125] Section 3(1) of the RCMA sets the age requirement for a valid marriage at 18 for both men and women Act 120 of 1998; 2016 (2) SA 62 (WCC) para 93-94.
[126] 2016 (2) SA 62 (WCC) para 90.
[127] 2016 (2) SA 62 (WCC) paras 85, 90, 95 and 103.
[128] 2016 (2) SA 62 (WCC) para 95.

(a) Consent

The *Jezile* case highlights some of the issues with the notion of consent. One of the main issues that arose after the conviction was that of marital rape and on-going consent, as evidenced by the fact that both Jezile and his community members did not understand "how a husband could rape his wife" as she had consented to the marriage, and therefore any subsequent sexual intercourse.[129] The community members maintained that rape is only a criminal offence when it is committed by a stranger, while rape committed by someone known to the victim is not a crime, but rather a "civil matter" resolved through payment of customary damages.[130] Some of these attitudes can be attributed to the belief that men are innately sexually abusive, thus rendering women powerless to fight back;[131] that women must endure what is thrown their way, so as to respect their elders and culture;[132] and that violence is so commonplace, that is has become a mundane occurrence which renders counter action useless.[133] Supporting the view that wives owe their husbands continuous sexual access without on-going consent, was the fact that Jezile and members of his community argue that by accepting *lobolo*, the complainant and her family had consented to the marriage and therefore sex between the two.[134] This is in line with the view that wives are subordinate to men and exist for the sexual pleasure of their husbands.

In reference to the community's views on marital rape, Mwambene and Kruuse opine that, as Karimakwenda and Wood observe, sexual violence is often condoned where it serves the "moral" purpose of preserving or leading to a marriage.[135] Mwambene and Kruuse's interviews with members of Jezile's community revealed that they believed that

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[129] Mwambene and Kruuse *SAJHR* 8; 2016 (2) SA 62 (WCC) para 40 and 51.
[130] Karimakwenda *Acta Juridica* 355.
[131] Karimakwenda *Acta Juridica* 354; K Wood and R Jewkes '''Love is a dangerous thing'': micro-dynamics of violence in sexual relationships of young people in Umtata' 1998 *Medical Research Council of South Africa* at 38; K Wood, F Maforah and R Jewkes 'Sex, violence and constructions of love among Xhosa adolescents: putting violence on the sexuality education agenda' 1996 *Medical Research Council of South Africa* 1 at 6.
[132] Mwambene and Kruuse *SAJHR* 7.
[133] N Karimakwenda *Where rape does not exist* 128 and 321.
[134] 2016 (2) SA 62 (WCC) para 41; Mwambene and Kruuse *SAJHR* 9.
[135] Mwambene and Kruuse *SAJHR* 8 quoting Karimakwenda 349 and K Wood 'Contextualising Group Rape in Post-apartheid South Africa' 7 (2005) *Culture, Health & Sexuality* 303 at 313; Smith *Anthropology Southern Africa* 62.

since the complainant had shared a bed with Jezile for two weeks before being taken to Cape Town, this was a demonstration of her consent, therefore denying her the recourse of claiming that she had been raped.[136] This serves to perpetuate the patriarchal and stereotypical view that "wives owed their husband's unqualified sexual access, and that rape in marriage was a trivial matter".[137] This is damaging because it negates the trauma faced by the victims and contributes to their silencing. It further dehumanizes and strips the woman of her dignity, as she is not given a choice in exercising her sexual autonomy.

Further, Smit's interviews with the Mpondo people living in the town of Lusikisiki and its surrounding areas in the Eastern Cape province revealed that to some, consent of the parent is more important than the consent of the girl herself: "If the girl don't agree, but the parents have agreement, she can go there, get *thwala*-ed [to the homestead of the abductor]."[138] The views of some of the Mpondo people were that agreement of the parents was vital to a correct *thwala* and where that was absent, what occurred was not *ukuthwala,* but rather an abduction.[139]

Mwambene and Kruuse emphasise that it is important to understand the complexities and nuances that are involved in understanding consent from the perspective of the law and the lived experiences of the community.[140] The prevailing view of the communities in both Smit's interviews and Kruuse and Mwambene's was that while the law values the consent of the girl, the consent of the family takes precedence.[141] This demonstrates the tension between the Western individualised conception of rights and the African concept of communitarianism. The African conception of rights embodies the concept of *ubuntu,* which places the good of the community as a whole as paramount.[142] As the decision to accept the *thwala* and *lobolo* was made by the family as a whole, the girl must accept it for the good of the community. Community ties are also emphasised by the idea that marriage is not merely between the bride and groom, but rather between

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[136] Mwambene and Kruuse *SAJHR* 9.
[137] N Karimakwenda *Where rape does not exist* 90.
[138] Smit *Anthropology Southern Africa* 58.
[139] *Ibid.*
[140] Mwambenene and Kruuse *SAJHR* 19-20; Rice *Journal of Southern African Studies* 399.
[141] Mwambenene and Kruuse *SAJHR* 19-20; Rice *ibid.*
[142] *S v Makwanyane and Another* [1995] ZACC 3 para 225.

two families. Indeed, many community members in the *Jezile* case wondered why only Jezile had been arrested, when both families were involved in the negotiation and *ukuthwala* process.[143]

IV. CONCLUSION

This chapter outlined the practice of *ukuthwala* in South Africa. It provided an overview of the procedure and features of the practice, as well some of the academic discourse. It argued that the narrative provided by scholars such as Karimakwenda, which argues that violence has always been part of the marriage process for women, provides a more holistic image of *ukuthwala* than modern discourse. This modern discourse that relegates violent forms of *ukuthwala* to new and distorted forms of the practice diminishes and erases the violence faced by the women in the *thwala* process. It also revealed that community members' views on rape and consent in the context of marriage, also contribute to the continuation of the practice. As such, violence unfortunately remains a condoned part of *ukuthwala.*

In view of violence women face during this process and South Africa's commitment to protecting women against the same, Chapter three discuss the legal framework in place to achieve this. It explores South Africa's current legal framework, as well as the core regional and international human rights instruments to which South Africa is party.

[143] Focus group with Girl's family member, 28 April 2016 Mwambene and Kruuse *SAJHR* 12.

CHAPTER THREE

INTERNATIONAL AND REGIONAL NORMATIVE FRAMEWORKS PROTECTING WOMEN AND GIRLS FROM HARMFUL CULTURAL PRACTICES

"*The point of departure for the human rights discourse that engages customary law is the acknowledgement that customary law can be used to advance women's rights".*[144]

I. INTRODUCTION

The previous chapter provided a comprehensive discussion on *ukuthwala*. This chapter examines the applicable international, regional and national legal instruments. It does this by discussing the United Nations instruments including, *inter alia*, the Convention on the Elimination of all forms of Discrimination against Women (hereafter 'the CEDAW')[145] and the Convention on the Rights of the Child (hereafter 'the CRC').[146] Furthermore, it examines, South Africa's regional obligations in terms of the African Charter on Human and Peoples' Rights (hereafter 'the Charter')[147] and the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (hereafter 'the Maputo Protocol').[148] Finally, it looks at the South African legal framework which regulates the practice of *ukuthawala*.

The chapter concludes by summarising the instruments and their efficacy in achieving their aims of protecting women and children from harmful cultural practices globally and in South Africa specifically.

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[144]Himonga *Feminist Constitutionalism* 328.
[145] CEDAW 1249 UNTS 13.
[146] CRC 1577 UNTS 3.
[147] CAB/LEG/67/3 rev. 5 (1982).
[148] The Maputo Protocol 2003.

II. CONTEXTUALISING THE NORMATIVE FRAMEWORK

Ukuthwala is harmful to the girl child as it can often implicate girls as young as 11 (eleven) years old, which is, *inter alia*, against the best interests of the child.[149] This harmful cultural practice has been condemned for seemingly legitimizing and perpetuating patriarchal views that contribute to violence against women and girls.[150] In view of such practices, international human rights law has taken steps to protect and guard against gender-based violence, with particular reference to marriage, through the promulgation of various binding and non-binding international and regional instruments.[151]

III. INTERNATIONAL AND REGIONAL NORMATIVE FRAMEWORKS PROTECTING WOMEN AND CHILDREN FROM HARMFUL CULTURAL PRACTICES

South Africa is party to a number of international instruments which are pertinent to the practice of *ukuthwala*. This section examines the most important of them being the CEDAW which South Africa ratified in 1995 and domesticated in some provisions of the Equality Act and the CRC, which was ratified in 1995. At a regional level, The Charter and The Maputo Protocol fulfil this mandate, with both being legally binding and imposing obligations to ensure that all marriages, cultural or otherwise, are entered into with the free and full consent of both parties and that both parties are of the requisite age of consent. These instruments aim to curtail all forms of discrimination against women and girls by obliging State Parties to promulgate legislation which abolishes harmful cultural practices that negatively impact the health, development and dignity of children.

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[149] The Constitution, 1996 s28(2).

[150] Karimakwenda *Acta Juridica* 351; South African Law Reform Commission (SALRC) "Revised Discussion Paper 138: Project 138 The Practice of Ukuthwala" (2015) 1 at 36.

[151] Such as Universal Declaration of Human Rights, 1948, Convention on Consent to Marriage, Minimum age for Marriage and Registration of Marriages, 1962, International Covenant on Civil and Political Right, 1966 , International Covenant on Economic, Social and Cultural Rights, 1966, Convention on the Elimination of All Forms of Discrimination Against Women, 1979, Convention on the Rights of the Child, 1989, UN Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime, 2000, African Charter on the Rights and Welfare of the Child, 1990, Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, 2003, African Youth Charter, 2006.

(a) International legal framework

(i) Marriage

Gender equality has gained increased importance and prominence in human rights law since the advent of the Universal Declaration of Human Rights (hereafter 'UDHR'), which though not legally binding, guides other binding instruments.[152] The UDHR requires that marriages, cultural or civil, be entered into with the full and free consent of both parties.[153] To this effect, the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriage (hereafter 'the Marriage Convention')[154] prohibits marriages that are not entered into with the full and free consent of both parties, which must be explicitly expressed, in person, by both the bride and groom.[155] Parties to a marriage must be over 18 years and this can only be circumvented if the relevant authority has granted permission which will only be given if they deem it to be in the best interests of the intending spouses and for serious reasons.[156] This is domesticated through South Africa's Marriage Act.[157]

Thus, CEDAW's Committee stated that the treaty obliges States to adopt effective and appropriate measures, in the form of legislation, to abolish harmful traditional practices affecting the health of girls, including early marriage.[158] In order to dismantle the attitudes that lead to harmful cultural practices, CEDAW further obliges States to take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family, which goes to the heart of the problem.[159] Further, States must develop and implement legislation which aims to address gender roles and stereotypes

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[152] Angela M. Banks "CEDAW, Compliance and Custom" *Fordham International Law Journal* 32 (2008) 781 at 804.
[153] The Universal Declaration of Human Rights, 1948 Article 16(2). Is this the full and proper citation?
[154] Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriage adopted by the United Nations General Assembly on 10 December 1962, entered into force on 9 December 1964, 521 UNTS 231. Ratified by South Africa on 16 June 1995.
[155]The Marriage Convention Article 1; South Africa acceded the Convention on 29th January, 1993, and domesticated in Marriage Act, thus are bound.
[156] The Marriage Convention Article 2.
[157] Act 25 of 1961.
[158] CEDAW General Comment 14 A/4538. South Africa ratified CEDAW on 15th December, 1996.
[159] CEDAW A/RES/34/180 1979 Article 16(1)(a).

that contribute to harmful cultural practices and protect adolescents from them.[160] In addition, the practice of child marriage is implicitly prohibited in the CRC which defines a "child" as a person below the age of 18,[161] and obliges states parties to take all "effective and appropriate measures" to abolish traditional practices that are detrimental to the health of a child.[162] Chapter two of this thesis noted that though *ukuthwala* is not marriage as such, it is often used to trigger *lobola* negotiations. Where the negotiations are successful, a marriage occurs. To this end, where a girl below the age of 18 is *thwala'd* and it results in a marriage, it will be a child marriage, thus an HCP.

(ii) Discrimination

As harmful cultural practices are gendered, to the detriment of women and girls, the discourse surrounding the protection of women and girls necessarily involves ending discrimination and encouraging equality between the sexes. Article 16(1)(a) of the CEDAW requires that discrimination between men and women be eliminated and that consent must be given by both spouses in order for a valid marriage to be entered into.[163] In addition, Article 19 of the CRC prohibits all forms of violence and article 24(3) obliges states to abolish traditional practices prejudicial to children's health.[164]

The CEDAW and the CRC embody the principles of non-discrimination and consent. The international instruments aim to address forced marriages by requiring the full and free consent of both parties to a marriage. Bond, however, criticises the CEDAW on the basis that it views women as victims of their culture, rather than active participants and beneficiaries of it.[165] She argues that the CEDAW does not actively involve women in the formulation of cultural policies, including issues of consent in cultural marriages, thereby

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[160] Convention on the Rights of the Child (CRC), adopted by the United Nations General Assembly on 20 November 1989, entered into force on 2 September (1990), 1577 UNTS 3 Article 3(2).

[161] The CRC 1989 Article 1.

[162] The CRC 1989 Article 24(3); CEDAW A/RES/34/180 1979 Article 16(2).

[163] Convention on the Elimination of all forms of Discrimination against Women (CEDAW), adopted by the United Nations General Assembly on 18 December 1979, entered into force on 3 September (1981), 1249 UNTS 13 Article 16(1)(a).

[164] The CRC Article 19 and 24(3).

[165] Johanna E. Bond 'Gender, Discourse and Customary Law' (2010) *Southern California Law Review* 509 at 511 and 519.

stripping them of their agency to create context specific and effective solutions.[166] Although the aforementioned criticisms of Bond regarding the villainization of culture are valid, I respectfully submit that this is a mislabelling of what the CEDAW actually does. The concept of "living customary law" demonstrates that culture is dynamic and adapts to fit with the social attitudes at the time.[167] The CEDAW is reflective of the change in societal attitudes towards the negative aspects of some cultural practice and lays the foundation for addressing harmful cultural practices. The acknowledgment that culture can have some detrimental effects is not a villainization, but rather a legitimate critique, which can be addressed, thus allowing it to be fully enjoyed.[168]

To this end, Himonga argues that any human rights discourse that engages customary law can look at it as being part of the solution to the issue of the violation of women's rights, while simultaneously acknowledging and rejecting its harmful aspects.[169] In this regard, I submit that the better way to analyse the CEDAW in the context of women's rights in customary law is through a "dialogic framework" which aims to create dialogue between customary law and human rights. In this way, the two systems are interacting, rather than one system antagonizing another.[170] Himonga argues that this framework involves "internal discourse and cross-cultural dialogue" to gain a deepen consensus on the "formulation, interpretation and implementation of human rights norms".[171] I submit that this approach acknowledges that the Global South countries, such as South Africa, were not allowed to be active players in creating international human rights norms and as

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[166] Bond *Southern California Law Review* 512-513.

[167] Living customary law is reflective of the cultural practice as it actually happens in the community as opposed to what is formally, Banks 'CEDAW, Compliance, and Custom: Human Rights Enforcement in Sub-Saharan Africa' (2008) *Fordham International Law Journal* 809 and 822.

[168] Newman Wadesango, Symphorosa Rembe, and Owence Chabaya *Violation of Women's Rights by Harmful Traditional Practices* (2011) as quoted in T Kachika *A Critical Re-Appraisal* 75; T Nhlapo *The African Customary Law of Marriage and the Rights Conundrum* (LLM thesis, University of Pretoria, 2012) 15-16; RH Mgidlana *Should South Africa criminalise ukuthwala leading to child and forced marriages?* (LLM thesis, UWC, 2020) 73.

[169] Himonga *Feminist Constitutionalism* 328 and 330.

[170] Himonga *Feminist Constitutionalism* 328.

[171] Himonga *Feminist Constitutionalism* 329.

such, human rights instruments do not fully represent their contexts.[172] In the dialogic approach, Himonga argues, engagement with culture should be used to protect women, but in a way that does not deny them their universal human rights.[173] In this way, there is interaction between the two normative systems, which will be discussed in Chapter four of this thesis.

Further, Van Bueren argues that such interaction benefits from understanding the purpose for the practice.[174] In the context of *ukuthwala,* the dialogic approach means analysing the social attitudes towards the practice, upholding the aspects that protect the rights of women, but rejecting its violent aspects. The benefits of the dialogic approach will be expounded on later in Chapter four of this thesis.

(b) Regional legal framework

The Charter, which is legally binding, requires that States take steps to eliminate all forms of discrimination against women and protect women and children's rights in line with international standards.[175] Interestingly, the Charter does not prohibit harmful cultural practices, which Gawaya and Mukasa argue overlooks the fact that some cultural practices harm and discriminate against women.[176] This lacuna is filled by the Maputo Protocol, also binding, which requires states to prohibit and condemn all forms of harmful cultural practices which negatively affect women, through the "legislative measures backed by sanctions".[177] The Maputo Protocol further requires states to enact appropriate national legislative measures to guarantee that no marriage takes place without the consent of both

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[172] Abdullah An-Naim 'Cultural transformation and Normative Consensus on the Best Interests of the Child' (1994) 8 *int'l law J. L. on Family law* 64-71 as cited in Himonga *Feminist Constitutionalism* 329.
[173] Himonga *Feminist Constitutionalism* 331.
[174] G Van Bueren "Children's rights: balancing traditional values and cultural plurality" in Douglas G. & Sebba L(eds) *Children's Rights and Traditional Values* (1998) 17; Mglinlana *should* ukuthwala *be criminalized* 75; C Nyami-Musembi "Are Local Norms and Practices Fences or Pathways? The Example of Women's Property Rights" in A An-Na'im (ed) *Cultural Transformation and Human Rights in Africa* 126.
[175] African Charter on Human and Peoples' Rights CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) Article 18(3) South Africa signed and ratified the treaty on 9th July, 1996.
[176] Rose Gawaya and Rosemary Mukasa 'The African Women's Protocol: A New Dimension for Women's Rights in Africa' (2005) 3 *Gender & Development* 42 at 44.
[177] The Protocol to the African Charter on Human Rights and People's Rights on the Rights of Women in Africa (Maputo Protocol) African Union, 2003 Article 5(b).

parties, and that the minimum age of marriage for women is 18 years.[178] Bond asserts that the Maputo Protocol better addresses discrimination against women than the CEDAW and the Charter, by entrenching substantive rights and procedural rights such as Article 8 which entitles access to justice and equal protection before the law for both men and women and Article 9, which obliges states to promote equal participation of women in politics through, *inter alia*, affirmative action and promulgating legislation to this effect to ensure female participation in law-making.[179] This makes the instrument inclusive, as women are given a voice throughout the process of creating policies that affect them and the nation at large. Mukasa also argues that the Maputo Protocol is "developed by Africans, for Africans", meaning it better addresses "African problems" than the other instruments.[180] This makes the solution-seeking process more inclusive, as opposed to Western norms being dictated to Africans, which Rice notes is more likely to create a lasting and effective solution.[181] Bond further argues that the Maputo Protocol recognises that some women may want to participate in certain cultural practices while others do not – a nuanced position not provided for by the Charter.[182] Unfortunately, in practice, the application of the Maputo Protocol has not been ideal. For example, in Malawi, female political participation was at its peak during 2014, with women making only 22% of parliamentarians in the country.[183] This, I submit, illustrates that despite Article 9 specifically requiring increased and equal participation of women in politics, there is lack of sufficient and effective follow through in reality.

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[178] The Maputo Protocol 2003 Article 6(b).
[179] Bond *Southern California Law Review* 512-513.
[180] Rose Gawaya and Rosemary Mukasa "The African women's protocol: A new dimension for women's rights in Africa" (2005) *Gender & Development* 42 at 44.
[181]Rice *African Studies* 382 and 399.
[182] *Ibid.*
[183] Romi Sigsworth and Liezelle Kumalo "Women, peace and security Implementing the Maputo Protocol in Africa" https://reliefweb.int/sites/reliefweb.int/files/resources/Paper295.pdf accessed 7 December 2021; Dumiso Gatsha"An Overview: The Maputo Protocol" https://successcapital.africa/news/an-overview-the-maputo-protocol/ accessed 6 December 2021.

The Maputo Protocol also adopts a stricter approach than The Charter to harmful practices impacting women and children, in particular, child marriages.[184] Article 1(j) of The Maputo Protocol prohibits all forms of violence against women, which it defines as "all acts perpetrated against women which causes or could cause them physical, sexual, psychological and economic harm", including the threat thereof.[185] Through its robust definition of harmful practices, which includes "behaviours and attitudes which negatively affect the fundamental rights of women and girls, such as their right to life, health, dignity, education and physical integrity", the Maputo Protocol explicitly prohibits harmful practices.[186] Though this is the case, HCPs are still carried out in the member countries, such as Malawi and South Africa.

In addition, the African Charter on the Rights and Welfare of the Child (hereafter 'The Children's Charter'), requires all States to take necessary appropriate measures to "eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child*"*.[187] This is with particular reference to "customs and practices" that negatively affect the life or health of the child,[188] and those which discriminate against the child on the basis of sex.[189] Further, child marriage and betrothal must be prohibited through legislation, which sets the minimum age of marriage at 18 years.[190]

IV. SOUTH AFRICAN LEGAL FRAMEWORK

(a) Constitutional framework

Human dignity is a founding value of the South African democratic State.[191] Human dignity informs the content of all of the other rights entrenched in the South African Constitution, as without it, no other right can fully be enjoyed. Section 10 of the

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[184] T Kachika *A Critical Re-Appraisal of Vernacularisation* 98.
[185] The Maputo Protocol 2003 Article 1(j).
[186] The Maputo Protocol Article 1(g); Fareda Banda 'Blazing the Trail: The African Protocol on Women's Rights Comes in Force' (2006) *Journal of African Law* 72 at 80.
[187]African Charter on the Rights and Welfare of the Child, CAB/LEG/24.9/49 (1990) Article 21(1). South Africa signed 10 October 1997 and ratified on 7 January 2000.
[188] CAB/LEG/24.9/49 (1990) Article 21(1)(a).
[189] CAB/LEG/24.9/49 (1990) Article 21(1)(b).
[190] CAB/LEG/24.9/49 (1990) Article 21(2).
[191] The Constitution, 1996 s1(a).

Constitution affirms that everyone in South Africa has inherent dignity and the right to have that dignity respected and protected.[192] In giving content to this right, the Constitutional Court has held that the right to dignity involves acknowledging the inherent worth and value that a person possesses by virtue of being human.[193] This right therefore requires that each person be seen as a right-bearing, autonomous individual, who has value and not as an object that can be possessed and traded.[194]

Ukuthwala, in its coercive forms, infringes this right by stripping the girl of her inherent worth as person. In this way, especially where the girl has not given prior consent to the process, she is reduced to a mere commodity bartered between men. This reinforces patriarchal ideas which place the man at the head of the household, and the woman as the submissive entity who is stripped of her autonomy, so as not to challenge his position in the household or to bring shame to the family.[195] In a very simplistic way, the act of *thwala* itself is undignified, in that in involves a struggle between the man and woman which culminates in the woman being carried away like a bag of maize. This strips women of their value and worth guaranteed in the Constitution. Where a child is married, she is expected to take on her "wifely duties" such as taking care of a household, as well as being intimate with her husband. While taking on these duties, she must forgo her education, her freedom of movement and security during the abduction and her right to health, all of which stem from an infringement on her human dignity.[196]

Equality is also a founding value of the South African Constitution.[197] Furthermore, section 9 of the Constitution states that everyone is equal before the law and have the right to equal protection and benefit of the law.[198] This includes the full and equal enjoyment of all rights and freedoms included in the Constitution and goes on to provide listed grounds upon which discrimination is prohibited, one of which being sex.[199] In *Bhe v*

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[192] The Constitution, 1996 s10.
[193] I Currie and J De Waal *The Bill of Rights* 6ed (2013) 252.
[194] Machaka *The cultural practice of ukuthwala in South Africa* 34.
[195] Machaka *The cultural practice of ukuthwala in South Africa* 24.
[196] Machaka *The cultural practice of ukuthwala in South Africa* 34. These rights are protected in sections 29, 21, 12 and 27 of the Constitution.
[197] The Constitution, 1996 s1(a).
[198] The Constitution, 1996 s9(1).
[199] The Constitution, 1996 s9(2) and (3).

Magistrate, Khayelitsha, Judge Langa stated that equality and dignity are paramount to the success of an open and democratic society and they are afforded reverence in the new constitutional dispensation, due to the past history of inequality and discrimination on grounds such as race and gender.[200] It is important that in this new dispensation, substantive equality should be achieved. Such an aspiration allows for discrimination, such as affirmative action programs that favour one class of persons over another, so long as it is justified by the section 36 of the Constitution.[201] It is submitted that *ukuthwala* infringes on the right to equality as only women are subject to the practice and the power dynamics of the practices places women in a subservient position to the man.[202] The power imbalance allows for gender based violence and sexual exploitation during the *thwala* and the subsequent marriage, which constitutes inequality on the basis of sex.

(b) Criminal sanction

The most obvious form of protection afforded to victims is through criminal law. Perpetrators of violence may be held criminally liable for rape, sexual assault, and kidnapping in terms of the common law and the Criminal Law (Sexual Offences and Related Matters) Amendment Act.[203] The Act imposes criminal liability on accessories by stating that any person who *inter alia* aids another person to commit a sexual offence in terms of this Act is guilty of an offence and may be liable on conviction to the same punishment that a person who actually committed the offence would be.[204] As such, a parent who consents to a *thwala* that results in rape is guilty of an offence and may face the same punishment as the actual rapist.

(c) Statutory protection

I submit that the following statutes give effect to South Africa's international obligations to promote equality, end gender discrimination and safeguard children's rights in terms of, *inter alia,* the CEDAW, the CRC and the African Charter and its Protocol.

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[200] 2005 (1) SA 580 (CC) para 71.
[201] See *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC).
[202] Machaka *The cultural practice of ukuthwala in South Africa* 31.
[203] Act of 32 of 2007.
[204] Act 32 of 2007 s55(c).

(i) Promotion of Equality and Prevention of Unfair Discrimination Act (the Equality Act)

The Equality Act[205] was promulgated to give effect to section 9 of the Constitution. It prohibits "any practice, including traditional, customary or religious", which unfairly discriminates on the basis of gender.[206] It is submitted that *ukuthwala* is a cultural practice that only happens to girls, therefore making it gendered and discriminates against them. As such, a harmful *thwala* will be in contravention of this Act. To date, no case has been pleaded in terms of this section, which might be due to reliance on section 9 of the Constitution as a whole, rather than the Equality Act.

(ii) The Children's Act

Section 12(1) of the Act states that "no child may be subjected to social, cultural and religious practices which are detrimental to his or her well-being".[207] The section lists genital mutilation and male circumcision, but not *ukuthwala.* Section 12(2) further prohibits marriage between persons below the age of 18 years[208] and such children being betrothed without their consent.[209] This accords with international and regional standards on the prohibition of child marriage. Further, s12(2)(b) gives effect to the international and regional instruments which require consent of the parties. Finally, in accordance with international and regional commitments, section 305(1)(a) as read with section 12 of the Act states that any person who gives children in marriage shall be guilty of an offence, and liable to a fine or imprisonment, or a combination, for a period not exceeding 20 years.[210] As such, this section would allow, *inter alia,* family members who were involved in negotiating the *lobolo* to be prosecuted.

[205] Act 4 of 2000.
[206] Act 4 of 2000 s8(a).
[207] Act 38 of 2005.
[208] Section 17 of the Children's Act sets the age of majority at 18 years.
[209] Act 38 of 2005 s12(2)(a) and (b).
[210] Act 38 of 2005 ss305(1)(a) and 12(2)(a) and (b).

(iii) Recognition of Customary Marriages Act

The Recognition of Customary Marriages Act (hereafter 'the RCMA'),[211] recognises the validity of customary marriages in South Africa. To align it with the inherent rights to dignity and equality enshrined in the Constitution, the RCMA requires both parties to consent,[212] a requirement which was aimed at preventing child marriages and forced marriages. Furthermore, parties must be over 18 to enter into a marriage,[213] However, the Act does permit parents to consent to a marriage where the parties are below 18 years.[214] I submit that such a position leaves children vulnerable to the violent forms of *uthuthwala*, as parental consent can be given, which condones the violence. Further, as Chapter two of this thesis demonstrated, consent in *ukuthwala* is nuanced and can result in a child being forced into marriage by their parents, thus leaving them vulnerable to harm. Unlike marriages concluded under the Marriage Act, customary marriages do not involve the State but rather traditional leaders. Though the RCMA is in place *Prima facie,* the Act is silent on enforcement mechanisms, which is a lacuna.

(iv) Prohibition Bill

The Law Reform Commission proposed the Prohibition of Forced and Child Marriages Bill to address *ukuthwala*.[215] The aim of the Bill is to make forced and child marriages an offence, by expanding the meaning of forced marriage and criminalizing both child and forced marriages.[216] While the Bill is not an Act, it is worth noting what it proposes because it provides a model for regulating *ukuthwala.*

Clause 1 of the Prohibition Bill defines child marriages and forced marriages as follows:

"A child marriage is defined as a marriage relationship or cognate union where one or both of the parties are children, and the marriage was without the consent and free will of one or both of the parties."

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[211] Act 120 of 1998.
[212] Act 120 of 1998 s3(1)(a)(ii).
[213] Act 120 of 1998 s3(1)(a)(i).
[214] Act 120 of 1998 s3(3)(a).
[215] The Bill came about after the SALRC's investigations on *ukuthwala* between 2014 and 2015. It is unclear why the Bill has not come into force Act.
[216] Preamble of Prohibition Bill.

> "A forced marriage refers to a marriage relationship or cognate union entered into without the consent and free will of one of the parties and includes those marriage relationships or cognate unions purporting to be contracted in pursuit of such practices such as *ukuthwala, shobediso, tjhobediso, kutlhaka, thlakisa, tahisa, kutaha* and *tshabisa, ukweba umakoti* or any similar practice."

Further, clause 3(1) of the Prohibition Bill states that any person who uses "violence, threats or any other form of coercion" to make a person enter into a marriage, shall be guilty of the offence of forced marriage.[217] The clause goes on to emphasise the importance of consent by stating that it is an offence to make a person marry another if it is contrary to their "full and free" consent.[218] Further, clause 4 of the Bill makes child marriage an offence unless it is in compliance with, *inter alia*, the RCMA.[219] In addition, persons guilty of child and forced marriages may be liable on conviction to imprisonment for a period in line with the punishment prescribed for the offences of assault, abduction, kidnapping, rape and human trafficking or a fine or both such imprisonment or fine.[220]

The Bill would give effect to South Africa's obligation to ensure that marriages are entered into with free and full effect and that both parties must be above the minimum age. However, Mgdilana argues that the Bill places too much focus on the perpetrator and not the victim as it does not provide victim support mechanisms.[221] Further, Mgidlana and Mwambene argue that the fact that the Bill is silent in involving the community in creating legislation and solution that address HCPs is a shortcoming.[222] I agree with this critique, as the social attitudes of communities in respect of *ukuthwala* previously discussed in Chapter two of the thesis reveals a disconnect between laws and lived experiences. Where legislation is created without taking into account people's lived experiences, it will be ineffective and leave the girl child vulnerable.

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[217] The Prohibition Bill, s3(1)(a).
[218] The Prohibition Bill, s3(1)(b).
[219] The Prohibition Bill, s4.
[220] Prohibition Bill, s6; R Mgidlana *Should South Africa criminalise* ukuthwala 60.
[221] ML Hendriks 'Mandatory reporting of child abuse in South Africa: Legislation explored' (2014) 104 *South African Medical Journal* quoted in Mgidlana *Should South Africa criminalise* ukuthwala 63.
[222] Mgidlana *Should South Africa criminalise* ukuthwala 63; Lea Mwambene and Roberta Mgidlana "Should South African Criminalize *Ukuthwala* leading to Forced Marriages and Child Marriages in South Africa?" *PER/PELJ* (2021) 1 at 9.

V. CONCLUSION

The UN and AU instruments illustrate human rights law's commitment to the achievement of substantive and formal equality, while protecting women and children from harmful cultural practices. The CEDAW and African Charter provide the ground work for prohibiting harmful cultural practices and dismantling the social attitudes that lead to, and perpetuate them. This purpose is augmented by the various Protocols to the African Chater, most notably the Maputo Protocol, which includes an obligation to increase women's political participation. Working in collaboration, the international and regional instruments create binding obligations on state parties to protect women and children from violence and discriminatory practices through the promulgation and implementation of legislative measures. The proposed Prohibition Bill is a "light at the end of the tunnel" in the context of *ukuthwala*, but as is it yet to be enacted.

CHAPTER FOUR

COMMUNITY BY-LAWS IN MALAWI: A MODEL FOR EFFECTIVE CHANGE

"*these are our own laws because we made them right here... They [bylaws] are like a child whom everyone in the village has seen growing up.*"[223]

I. INTRODUCTION

The regulation of harmful cultural practices (HCP) is a challenging process, as it involves balancing the rights to culture on the one hand, and the right to dignity, equality and freedom and bodily autonomy on the other. As Chapter Three has shown, South Africa has regional and international obligations to enact legislation to regulate HCP's. Chapter Two of this thesis has traversed some of the social attitudes towards *ukuthwala* and revealed that adherents of the cultural practice view them as meaningful and necessary. In view of this, any form of regulating these practices must have a "bottom-up" approach, meaning that the solution must start at a community level, rather than formal institutions "dictating" norms to the community. In this regard, South Africa should consider the approach of other African countries in balancing competing rights with regards to their own HCP.

This chapter uses Malawi for comparative analysis because, like South Africa, it has a supreme constitution which guarantees the right to practice culture,[224] while protecting the right to dignity,[225] equality in general and gender equality.[226] The chapter examines the practice of child marriage, which involves children marrying before the legal age of 18 years,[227] which is prevalent in the Northern and Southern regions of Malawi.[228] It

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[223] T Kachika *A Critical Re-Appraisal of Vernacularisation* 229-230.
[224] The Constitution of the Republic of Malawi (The Constitution of Malawi), 1994 section 26 which states "Every person shall have the right to use the language and participate in the cultural life of his or her choice".
[225] The Constitution of Malawi, 1994 section 19(1).
[226] The Constitution of Malawi, 1994 section 20 and section 13.
[227] Section 22(7) of The Constitution of Malawi 1994 used to allow children between the ages of 15 and 18 years to enter into marriages with the consent of their parents or guardians. In 2017, it was amended to make marriage before 18 illegal, even with parental consent.
[228] Makwemba *et al.* Survey Report 53.

further evaluates Malawi's legal framework in light of their international and regional obligations to promote gender equality and prevent discrimination. It then points to the use of community by-laws adopted by some Malawian communities as a model for how South Africa can regulate *ukuthwala.*

II. MALAWIAN CONTEXT

Malawi is a Southern African country with a population of 19.1 million people, 87.6% of whom live in rural areas.[229] Like South Africa, Malawi is home to a variety of tribal groups, ten in total, that have their own unique cultures.[230] Malawi became a constitutional democracy in 1994, after adopting a supreme constitution that safeguards various rights.[231] Malawi's Constitution provides that everyone has the right to participate in their culture,[232] ensures the right to dignity[233] and specifically protects and promotes gender equality.[234] The country thus has similar constitutional and international and regional obligations to South Africa – which are discussed later on – to protect and promote women's rights.[235] Like South Africa, Malawi has enacted general legislation to guard against gender discrimination and HCPs, such as child marriage, in light of its international and regional obligations. As this chapter will show, in the context of HCPs, these interventions have largely been ineffective because formal laws are detached from the rural people they are enacted to benefit.[236] As such, there is a need for an intervention that is close to the communities they are aiming to benefit. But first the chapter examines the practice of child marriage and why it is considered an HCP.

III. CONTEXTUALISING CHILD MARRIAGE

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[229] The Hunger Project "Malawi" https://thp.org/what-we-do/where-we-work/africa/malawi/ accessed 20 October 2021.
[230] Malawi is home to the Chewa, Nyanja, Lhomwe, Yao, Tumbuka, Sena, Tonga, Ngoni, Ngonde and Lambya/Nyiha tribes
[231] The Constitution of the Republic of Malawi, 1994.
[232] The Constitution of Malawi, 1994 s26.
[233] The Constitution of Malawi, 1994 s19 (1) and (3).
[234] The Constitution of Malawi, 1994 s20 (1) and s24(2)(a).
[235] The Constitution of the Republic of South Africa, 1996 s10, s9 and s30. Like South Africa, Malawi is party to CEDAW and acceded to it on 12 March, 1987. It is also a States party to the Convention on the rights of the Child which it acceded to 27 February, 2009. It is also party to the African Charter on Human and Peoples' Rights, as well as the Maputo Protocol.
[236]T Kachika *A Critical Re-Appraisal of Vernacularisation* 147.

According to UNICEF, child marriage is any formal marriage or informal union involving a child below the age of 18, whether to an adult or another child.[237] Malawi has one of the highest child marriage prevalence rates in the world, with 41.53% of girls getting married before the age of 18.[238] In Malawi, as with most countries, child marriage is gendered in that it disproportionately affects girls, with the percentage of boys getting married before 18 only sitting at 9.15 percent in Malawi.[239] In many communities, child marriage is a tradition passed down from generation to generation, but it also influenced by high poverty levels amongst those who practice it.

(a) Effects of and contributing factors to child marriage

Child marriage is detrimental to the well-being of the girl child, as it exposes her to various levels of harm which infringe on her human rights.[240] Firstly, it reduces her access to education as many girls drop out of school upon marriage, which affects her opportunities for self-development and self-sufficiency.[241] This is due to the facts that girls often drop out while young, meaning they have low levels of education, which reduces the quality of employment they can acquire later on. Furthermore, the practice renders girls vulnerable to physical and emotional abuse at the hands of their, often older, husbands.[242] Further, child marriage negatively impacts the health of the girl as shown by high mortality rates of young girls while giving birth because the girl's body is too underdeveloped to handle the stress of childbirth.[243]

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[237] Unicef "Child Marriage" accessed 17 October, 2021; this in line with various international instruments such as the Convention on the Rights of the Child (CRC) (1989), Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (1979), and the African Charter on the Rights and Welfare of the Child (ACRWC) (1990) and The Southern African Development Community (SADC) Protocol on Gender.

[238] Makwemba *University of Zurich* 53; Malawi has the fourth highest child marriage rate in Southern and Eastern Africa as cited in Unicef Malawi "Budget Scoping on Programmes and interventions to end child marriage in Malawi" Unicef Malawi, December 2019 9. It has the 9th highest child marriage rate in the world.

[239] Makwemba *University of Zurich* 53.

[240] Human Rights Watch "I've Never Experienced Happiness".

[241] Human Rights Watch "I've Never Experienced Happiness".

[242] *Ibid.*

[243] Emily Maiden "Recite the last by-law: chiefs and child marriage reform in Malawi" (2021) *Journal of Modern African Studies* 82 at 90.

Poverty is one of the biggest contributors to child marriage in Malawi with the national poverty rate, referring to those living below the poverty line, sitting at 51.5% with a large concentration of Malawians living in rural areas.[244] One child bride stated that she had never reported her abusive husband to the police because enduring his violence was better than returning to the poverty at home.[245] To this end, Chimwemwe K, a 14-year-old who married her 19-year-old husband when she was 12 years old stated that she had started trading sex for money and gifts at the age of 10 because her parents could not afford to buy food or clothing.[246] When she fell pregnant, both sets of parents forced them to marry. She stated: "it was my only solution from poverty, and I was pregnant."[247] Chimwemwe's experience is common to many Malawian girls in the country, but mainly the rural areas where abject poverty is highest. Some families in this situation view marrying off the girl child as a way to reduce costs for their family unit and reduce the stress on their already scarce resources.

Lastly, preserving the girl's modesty is a motivation for child marriage. Some view child marriage as serving the "best interests of the child", in particular serving as a deterrent of early pregnancies and promiscuity amongst the girl child.[248] This accords with the motivation behind *ukuthwala* as mentioned by some of the people interviewed by Mwambene and Kruuse.[249] Preserving female modesty is linked to the patriarchy entrenched in Malawian culture, which values the girl's virginity and places restrictions on her sexual expression.[250] As such, it is seen as better to marry off the girl while she is young, as her purity is almost guaranteed.

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[244] The World Bank "Malawi Overview: Development news, research, data" https://www.worldbank.org/en/country/malawi/overview accessed 18 October 2021.
[245] *Ibid.*
[246] Human Rights Watch "I've Never Experienced Happiness".
[247] *Ibid.*
[248] *Ibid.*
[249] See Chapter two of this thesis.
[250] B Team "Why it happens" Girls not Brides https://www.girlsnotbrides.org/about-child-marriage/why-child-marriagehappens/#:~:text=It%20is%20rooted%20in%20gender,and%20within%20%E2%80%93%20regions%20and%20countries accessed 18 October, 2021.

IV. MALAWIAN LEGAL FRAMEWORK ON HARMFUL CULTURAL PRACTICES IN LIGHT OF INTERNATIONAL AND REGIONAL OBLIGATIONS

Like South Africa, Malawi is a party to the Convention on the Elimination of Discrimination Against Women (hereafter 'the CEDAW') and the Convention on the Rights of the Child (hereafter 'the CRC') on an international level and the African Charter on Human and Peoples' Rights and The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (hereafter 'the Maputo Protocol') at an international level. These instruments oblige State parties to promote consent, non-discrimination as well as the implementation of legislative measures for the protection of the rights of women and girls.These instruments aim to promote gender equality and protect women and children from HCP by promoting consent, non-discrimination and mandate that parties implement legislative reform to promote these ends.[251]

In light of its constitutional, international and regional obligations, Malawi has adopted seven gender related Acts since 2006.[252] This section will deal with the Gender Equality Act (hereafter 'the Gender Act') and the Marriage, Divorce and Family Relations Act (hereafter 'the Marriage Act'), which address HCP, minimum marriage age and consent respectively.[253] The Gender Act defines "harmful practices" as a social, cultural or religious practice which, on account of sex, gender or marital status is likely to undermine the dignity, health or liberty of any person or result in physical, sexual, emotional, or psychological harm to any person.[254] Further, the Gender Act prohibits HCPs, by stating that no person shall "commit, engage in, submit another person to or encourage the commission of such".[255] Any person found guilty of contravening the act shall be liable to a fine of one million kwacha (approximately 1,225 USD) and an

[251] See Chapter three of this thesis.
[252] The 2006 Prevention of Domestic Violence Act; the Child Care, Protection and Justice Act No 22 of 2010; the Deceased Estates (Wills, Inheritance and Protection) Act No 14 of 2011; the Gender Equality Act No 3 of 2013; Trafficking in Persons Act No 3 of 2015; and the Marriage, Divorce and Family Relations Act 4 of 2015.
[253] Act No. 3 of 2013 and Act 4 of 2015.
[254] Act No. 3 of 2013 section 3.
[255] Act No. 3 of 2013 section 5(1).

imprisonment term of 5 years.[256] Like *ukuthwala,* child marriage in Malawi is only regulated through the Constitution and general statues, which can leave a lacuna in the law in this regard.

Malawi's consent obligations are fulfilled through the Marriage Act, which sets the minimum marriage age at 18.[257] The Marriages Act defines a "child" as a person below the age of 18-years-old, with the necessary implication being that anyone below this age does not have the capacity to consent, and this appears to be an unqualified prohibition.[258] In 2017, Parliament unanimously adopted a constitutional amendment to increase the minimum marriage age from 15 to 18 for both boys and girls and prohibit marriages of people below 18 years.[259] This demonstrates a commitment to the protection of children and aligns Malawian law with its international and regional obligations.

Further, the Marriage Act read with the Penal Code makes it an offence to have sex with a child, as they have no capacity to consent. The Penal Code creates the crime of defilement and states that: "any person who unlawfully and carnally knows any girl under the age of sixteen [16] years shall be guilty of a felony and shall be liable to imprisonment for life,*"* and this is the case whether there was consent or not.[260] The Penal Code is limited in that it does not speak of the age of consent for girls and does not mention what other sexual activities a person can consent to at different ages. Nevertheless, it is the legislation that governs these acts and is the point of departure. I, therefore, submit that in the case of child marriage, where the girls are almost always below the age of 16, there will never be consent, as they are "children" per the Marriage Act and the other complicit adults will be guilty of defilement.

V. EVALUATION OF LEGAL FRAMEWORK

From the above, there is evidence that Malawi has promulgated laws to fulfil its international and regional obligations regarding the protection of women and girls. This

[256] Act No. 3 of 2013 section 5(2).
[257] Act No. 4 of 2015 section 14.
[258] Act No. 4 of 2015 section 2 and 14.
[259]Plan International "Malawi Changes Law to End Child Marriage" https://plan-international.org/news/2017-02-14-malawi-changes-law-end-child-marriage accessed 17 December 2021.
[260] Act 8 of 1999 Section 138(1).

is a good theoretical framework for doing so, but in practice, it is seldom used.[261] This can be attributed to the disconnect between official customary law, which is customary law that has been formalized through legislation or other written means, and living customary law, which is the actual lived experiences of those living according to customary law.[262] To this effect, Himonga argues that legislative interventions, so called dominant interventions, are not the best solutions in relation to African HCPs. This is because such interventions focus on official customary law, as the point of departure, which is detached from reality, rather than living customary law, which better represents the context that the girls find themselves in.[263] What results is a robust legal framework that protects them in theory, but in practice, the status quo remains the same.[264] This is illustrated by the fact that since the passing of the Gender Act in 2012, there has only been one case where an accused has been charged and convicted under its provisions for committing, engaging in, subjecting another person to or encouraging someone to commission a HCP such as child marriage.[265] Per this section, *inter alia,* parents, chiefs and religious leaders can all be held liable for facilitating a child marriage. If convicted, such a person is liable to a fine of MK1 000 000.00 (about USD1 225.49) and a prison term of 5 years.[266] Further, the Child Care, Protection and Justice Act makes it an offence to involve children in harmful cultural practices, child betrothal and forced child marriage.[267] Such an offender would be liable to a prison term of 10 years.[268] Such a harsh punishment shows the legislators' commitment to protecting children from exploitation. Despite these laws, cases involving child marriage are not pleaded as such, but rather as a case of defilement, in terms of the Penal Code.[269] For example, in December 2021, a 28-year- old man in Blantrye

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[261] Though the Gender Equality Act has been in force since 2013, only one cause of action has been brought in terms of this Act see *The Republic v Eric Aniva* Criminal Case No. 87 of 2016.

[262] Polity "Official customary law and the disruption of patriarchal power: The case of Msinga" https://www.polity.org.za/article/official-customary-law-and-the-disruption-of-patriarchal-power-the-case-of-msinga-2013-09-26 accessed 22 October 2021.

[263] Himonga *Feminist Constitutionalism* 325-326.

[264] Himonga refers to a Women and Law in Southern Africa Research Project (WLSA) which conducted studies on women and law in *inter alia* Malawi, Lesotho and Botswana Himonga *Femininst Constitionalism* 325

[265] Act No 3 of 2013 s5(1); *The Republic v Eric Aniva* Criminal Case No. 87 of 2016 page 2 and 4.

[266] Act No 3 of 2013 s5(2).

[267] Act No 22 of 2010 ss80 and 81.

[268] Act No 22 of 2010 s83.

[269] Plan International "In-depth review of legal and regulatory frameworks on child marriage in Malawi"

impregnated and married a 15-year-old girl. He was charged and convicted of defilement and sentenced to 12 years imprisonment.[270] Such pleadings are problematic because key pieces of legislation enacted to protect children from child marriage and other HCPs are not being utilized as well as they could, and creating variations in sentencing. Using the promulgated Acts will ensure legal certainty and uniformity in sentencing. For example, where a person is charged and convicted in terms of the Gender Act, it is clear that the sanction is a fine and an imprisonment of 5 years, there is no room for discretion.

It is submitted that the lack of prosecution under these Acts should not be interpreted to mean the absence of the practice. Rather, it may be indicative that Malawi took on international obligations, such as those imposed by CEDAW, to promote human rights, without determining how they would work in a Malawian context. I submit that formal laws that regulate HCPs in Malawi do not take into account limited access to justice in areas where these practices take place, and the fact that these laws are written in English, which many Malawians do not speak or read.[271] Further, a lack of understanding by community members of the complex laws governing human rights and the physical and metaphorical distance between the people and the law, may leave individuals reluctant to use them.[272]

In contrast to the formal laws, the by-laws are effective because of their accessibility. In the interviews conducted by Kachika, the community members attributed the success of the by-laws to the fact that they were made by the communities themselves. One interviewee stated that "these are our own laws because we made them right here with the involvement of the Senior Chief, Group Village Heads, Village Heads, and all the people."[273] Another interviewee attributed the community members' adherence to that law

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[270] Thandie Chadzandiyani "Malawi court jails Prophet Saiti Jambo 12 years for defilement" https://theworldnews.net/mw-news/malawi-court-jails-prophet-saiti-jambo-12-years-for-defilement accessed 16 December 2021.

[271] This accords with Himonga's argument that dominant interventions are only effective means of vindicating rights in theory, but not in practice. It is submitted that the fact that the Act has been effective for almost 10 years yet there is virtually no jurisprudence, means it is not being used as an effective tool to counter and deter harmful cultural practices; Maiden *Journal of Modern African Studies* 94.

[272] Himonga *Feminist Constitutionalism* 326 and 328; For example, the *Jezile* case, which took place in Engcobo Eastern Cape, is 909.4 KM away from Pretoria, where the South African Legislature sits in Pretoria and take 9.5 hours to reach by bus.

[273] T Kachika *A Critical Re-Appraisal of Vernacularisation* 228-229.

to the fact that the community members themselves perceive the "by-laws" as their law.[274] I submit that being included in creating the "by-laws" gives the community members a stake in the process and inspires adherence. The above statements illustrate how giving community members ownership in the interventions implemented to address the HCPs is more effective than importing outside standards.

Both Himonga and Kachika argue that importing "outside" interventions in the form of judicial interventions or legislation and "expecting local settings to appropriate and translate international human rights norms" is not an effective way to combating HCPs. This is because it adopts a "one size fits all" approach, which does not adequately account for the social contexts of each community.[275] Such an approach does not take into account the contributing factors to the HCPs, such as poverty and tradition. As such, the interventions will likely have little impact on the ground. As Chimweme's story illustrates, the girl child often enters into marriage as a means to escape the abject poverty she is faced with. Further, her family marries her off for financial gain often out of desperation. As such, returning to her parents' home is not an option, as she will financially burden them once again. Such a context, Himonga argues, is not accounted for by proponents of dominant interventions. She posits that over reliance on "dominant interventions", such as court rulings, inadvertently places the blame on women and girls they are meant to protect. This is because it creates the perception that they are simply choosing not to use the recourse that is readily available to them, which is a view that does not take into account their social context. As such, it is vital that another approach, one that considers context specific problems, must be used to combat harmful cultural practices.

VI. MALAWI'S USE OF COMMUNITY BY-LAWS TO COMBAT HARMFUL CULTURAL PRACTICES

The above section reveals that though there is a legal framework in place to regulate HCPs, it is not being used. The non-use of the laws places the women and children they are meant

[274] T Kachika *A Critical Re-Appraisal of Vernacularisation* 229.
[275] T Kachika *A Critical Re-Appraisal of Vernacularisation* 212.

to protect in a vulnerable position, with only a theoretical remedy for their situations. Kachika argues that for the norms outlined in the regional and international instruments, such as gender equality and non-discrimination, to have an effective and long-lasting effect in rural African contexts, there needs to be a "horizontal vernacularizing" at a grassroots level.[276] This means that the community themselves must be involved in creating measures that speak to these norms. This is in line with Himonga's "bottom-up" approach, which involves working together with the community to use customary law as a tool for improving the lives of women and girls, rather than one for their oppression.[277] Such an approach is illustrated by the adoption of community by-laws in Malawi's regions of, *inter alia*, Dedza, Ntcheu and Karonga, to address harmful practices such as child marriages.

a) What is a community by-law?

The point of departure in the discussion of community by-laws is to provide a definition. To this end, Kachika defines a community by-law as community developed rule, supported by chiefs and traditional authorities, that address a particular HCP in the community and is sanctioned through a local fine called a *chindapusa.*[278] Community by-laws are not legally binding, but have force within the community they exist through social acceptance. As such, they will be referred to as by-laws in this thesis. These by-laws represent interventions that begin within the community itself, which represent a "horizontal vernacularization", as opposed to an importation of external beliefs.[279] According to Kachika's field work, oral by-laws can be traced as far back as 1994 in response to "problematic cultural practices".[280] Written formalization of the by-laws begun in the post-2010 era, due to work with non-governmental organizations (hereafter 'NGOs').[281] It is important to note that the by-laws were obeyed long before they were formally written down. Maiden's interviews with Malawian chiefs revealed that 90% of

[276] T Kachika *A Critical Re-Appraisal of Vernacularisation* 218-219.
[277] Himonaga *Feminist Constitutionalism* 328.
[278] T Kachika *A Critical Re-Appraisal of Vernacularisation* 221.
[279] T Kachika *A Critical Re-Appraisal of Vernacularisation* 219.
[280] T Kachika *A Critical Re-Appraisal of Vernacularisation* 213.
[281] "For example, the Gender Equality and Women Empowerment (GEWE) Programme (2012-2016) robustlydocumented the use of community bylaws for eliminating harmful practices driving gender-based violence and HIV in Malawi" in T Kachika *A Critical Re-Appraisal of Vernacularisation* 218.

them used some form of community by-law to combat HCP's.[282] One chief expressed her joy at the fact that the Parliament of Malawi had passed the constitutional amendment regarding marriage age, as it aligned her by-laws with national laws: "I was so thankful when Parliament changed the laws at the national level because then I wasn't alone anymore. I could point to the law and say, 'See, this is the law of our country'. It was no longer me acting on my own."[283] This statement illustrates that community by-laws can exist within the community and for the community without the influence of formal laws. The next step is determining how they come into existence.

b) Process of creating by-laws

Both Kachika and Maiden's findings emphasise that chiefs, in collaboration with the community, are the driving force behind the creation of the by-laws.[284] Maiden divides the by-law creation process into the following phases:

(1) passing the by-law;

(2) educating the community;

(3) counselling families; and

(4) monitoring the community to determine if the changes have been effective.

During the first phase of passing the by-law, Kachika identifies the following steps of "problem identification; training of community stakeholders; consultation; processing and consolidating ideas; drafting the bylaws; and adoption."[285] This discussion will focus on the passing of the by-law phases and the steps contained therein, as identified by Kachika.

(i) Problem identification

The point of departure is that the Traditional Authority (TA) of the village,[286] must be convinced that there is a problem that needs to be addressed through the creation and

[282] Maiden *Journal of Modern African Studies* 92.
[283] Maiden *ibid*.
[284] Maiden *Journal of Modern African Studies* 92-93; T Kachika *A Critical Re-Appraisal of Vernacularisation* 236.
[285] T Kachika *A Critical Re-Appraisal of Vernacularisation* 236.
[286] In Malawi, the traditional leadership is as follows: Traditional Authority at the top, followed by Group Village Headmen, Village headmen and Chiefs.

implementation of a community by-law.[287] This conviction can arise from personal experience, such as a family member being subjected to a HCP, or through education from outside exposure.[288] One of the TA's noted that his decision to create community by-laws addressing child marriage was motivated by data about girls dropping out of school to enter into marriages.[289] This realization culminates in the TA's decision to create the by-law and not necessarily creating the by-law in substance. Once the decision has been made, the TA must convince members in the traditional leadership structure that there is indeed a problem that needs to be addressed through a by-law. This ensures consensus and follow through regarding the by-law at all levels of traditional leadership and sufficient buy-in from the lower-level chiefs to sustain the by-laws enforcement.[290] In the present case, the TA would have to convince the traditional leadership structure that there is a problem regarding child marriages in their community requiring a by-law to address it.

(ii) Training of community stakeholders

The training of the community stakeholders involves outside entities, mainly Non-Governmental Organizations (NGO), sensitising community members regarding the formal framework surrounding human rights.[291] Human rights norms are used to reinforce already existing attitude changes regarding HCP's in the community.[292] This step is not always required for the formulation of a by-law but rather takes place when there is an opportunity or where needed.[293] As such, it is not examined in much detail in this thesis.

(iii) Consultation, processing and consolidating ideas

I submit that the element of community by-laws that makes them effective, is the fact that they are created through a consultative process that involves the community members. Once the TA and the sub-chiefs have taken the decision to create a community by-law, they embark on a consultation process with their community members. The process is

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[287] T Kachika *A Critical Re-Appraisal of Vernacularisation* 236-237.
[288] T Kachika *A Critical Re-Appraisal of Vernacularisation* 237.
[289] T Kachika *A Critical Re-Appraisal of Vernacularisation* 236.
[290] T Kachika *A Critical Re-Appraisal of Vernacularisation* 237-238.
[291] T Kachika *A Critical Re-Appraisal of Vernacularisation* 242.
[292] *Ibid.*
[293] T Kachika *A Critical Re-Appraisal of Vernacularisation* 240.

democratic and transparent, with consultations taking place at an open forum where the TA's, chiefs and Area Development Committee (ADC)s, which represent the community members, are present.[294] The consultation process involves various stakeholders, and requires that they think critically about the law in order to ensure that they buy into the by-law with free and full consent as illustrated by the quotes below:

> "We have bylaws; we created them as a community. We had a representative from the TA, the GVHs [Group Village Headman], World Vision [an NGO], members of the government headed by the Social Welfare Office, and members of the pastors' groups."[295]

> "We did the main job of consultations to solicit subjects' proposals for the bylaws. We had to mobilise people through village meetings. We even took advantage of funeral ceremonies to inform people that we needed their ideas."[296]

I submit that the consultative and collaborative nature of the by-law making process creates a sense of ownership within the community regarding the solution in the way that formal laws do not. In creating the by-law, the community members were asked what they thought the by-law should say and what they believed was a reasonable punishment for contravention.[297] Their buy-in and contribution to the creation of the by-law is directly linked to the success of the by-law in a way that does not exist with formal laws. Though there is public participation before a bill is passed in the legislature, it is seldom that someone in an African village will be aware of the process, let alone be given an opportunity for meaningful participation.[298] The by-law creation processes recognises the dignity of the community members and values their opinions and contributions in a

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[294] Maiden *Journal of Modern African Studies* 93; Kachika *Community by-laws* 242.
[295] Maiden *ibid*.
[296] T Kachika *A Critical Re-Appraisal of Vernacularisation* 243.
[297] *Ibid.*
[298] For example, in South Africa legislative developments on customary law matters have often been objected to due to lack of consultation with communities, see Meier *et. Al,* 'London Implementing community participation through legislative reform: a study of the policy framework for community participation in the Western Cape province of South Africa' (2012) *BMC International Health and Human Rights* 1.

manner that formal laws do not. This distinction in the rule making process, I submit, is what makes community by-laws more effective.

(iv) Drafting the bylaws

This stage involves consolidating the different ideas and converting them into a by-law. This involves engaging third parties, such as the police and magistrates, to facilitate the drafting of the by-law. This is to ensure that the community rule does not conflict with state law, thereby leaving them liable to breaking the law.[299] This shows an awareness of national laws and a desire to align community by-laws to reflect them. This emphasises collaboration between the state and customary law systems.

Once the by-law has been drafted, the first draft will be distributed to the community, for review and comment, by the chiefs.[300] Once this process is complete, a final draft is sent to the District Commissioner (the head of local government in that area), or magistrate for comment and signature. Kachika argues that these outside experts test the by-laws for validity with state law, which ensures that human rights norms are present in the by-law.[301] Maiden states that an effective by-law for child marriage will:

> "(1) prohibit the practice of marriage for anyone under 18 years of age with no exceptions; (2) outline the actions the chiefs and the community will take to prevent or break such marriages; and (3) detail the punishment for all parties involved breaking this law."[302]

Further, the by-laws will also include punishments for third parties who facilitated the marriage, such as religious leaders and parents.[303] In TA Mwanza's area in Salima, this is illustrated by the following:

> " … With regards to punishments, the forum agreed that if a child, especially a girl child who is not in school, then the parent is punished by paying four chickens to the village chief. If this continues, then the case goes to the group village headman where the parent

[299] T Kachika *A Critical Re-Appraisal of Vernacularisation* 247.
[300] *Ibid.*
[301] T Kachika *A Critical Re-Appraisal of Vernacularisation* 249.
[302] Maiden *Journal of Modern African Studies* 93.
[303] Maiden *ibid*.

> will pay six chickens. If it still continues, then the case comes to me [the TA of Mwanza] and the punishment is the payment of two big goats. If the parent is adamant and carries on, then all of us (the village chief, the group village headman, teachers, school committee members, religious leaders – including sheikhs) can take this person to court."[304]

Kachika's research observed that most by-laws on child marriage relate to prohibition of a child from marrying before the age of 18; prohibit forced marriage, child betrothal and the blessing of such marriages by religious leaders.[305] Some treat child marriage as a criminal offence reportable to the relevant authorities.[306] These by-laws are not uniform and vary from village to village. It is submitted that this variation is because the by-laws are reflective of community attitudes and needs, thus what one community deems important may be different from another. The punishments are varying for the different actors. For example, where a chief is involved in solemnizing a child marriage the *chindapusa* ranges from paying a fine of three goats, to being demoted. Other by-laws state that all religious leaders are prohibited from solemnizing marriages of children below 18 years and anyone who contravenes this may be arrested and prosecuted.[307] Where a girl below the age of 18 marries another child, the parents of both children will be fined K25 000.00 each (approximately 30 USD), and there shall be no marriage.[308] Where a man marries a girl below the age of 16, he will be reported to the police.[309] Once again showing collaboration between the different structures, working together to protect the girl child.

(v) Adoption

Once the by-law has been established using the above process, written by-laws are sent to the TA or Senior Chief for signature, which brings the by-law into force. However, writing the by-law on paper is not a prerequisite for binding force within the community and a Chief's announcement of the by-law is sufficient for formalization.[310]

In summary, in order for a rule to be deemed a by-law, it must:

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[304] Plan International "In-depth review of legal and regulatory frameworks on child marriage in Malawi".
[305]T Kachika *A Critical Re-Appraisal of Vernacularisation* 240-42.
[306] T Kachika *A Critical Re-Appraisal of Vernacularisation* 242.
[307] T Kachika *A Critical Re-Appraisal of Vernacularisation* 290.
[308] T Kachika *A Critical Re-Appraisal of Vernacularisation* 291.
[309] T Kachika *A Critical Re-Appraisal of Vernacularisation* 292.
[310] T Kachika *A Critical Re-Appraisal of Vernacularisation* 249.

1. have the support of local chiefs through signing or verbal agreement by TA;
2. focus on resolving a specific problem(s) in the community; and
3. be sanctioned through local fines.[311]

VII. DO THE BY-LAWS WORK?

It is submitted that by-laws concerning child marriage have been successful in preventing and ending existing child marriages in Malawi. In TA Kachindamoto's area in Dedza, over 3,000 child marriages have been annulled since the advent of the by-laws.[312] Further, the by-laws have been effective in combatting the harmful effects of child marriage, such as school drop outs: "I can now tell you that the adoption of the by-laws has solved problems of early marriages in my area, and many school girls who dropped out of school either because of early marriages or being impregnated have gone back to school."[313]
The success of the by-laws is also supported by empirical data which shows that the by-laws have been successful. Since the implementation of the by-laws in Mwanza's area, over 1,300 girls in TA Mwanza's area were returned to school in four years.[314]

(a) Why do they work?

It is submitted that community by-laws are effective because they use Chiefs, who are revered in their communities as pillars and sources of authority, which makes their involvement in the formulation and enforcement of by-laws vital to their success. Though this is the case, Kachika argues that the chief's role in the fight against HCP has been overshadowed by placing a larger emphasis on "elite" forms of vernacularization, such as domestication of international law,[315] which has largely proved unsuccessful. I agree with Kachika's critique because lack of education and access to justice make it difficult for the people who practice these HCPs to understand or relate to the "elite" forms of

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[311] T Kachika *A Critical Re-Appraisal of Vernacularisation* 221.
[312] Ashlee King Chief Kachindamoto's life mission to end child marriage in Malawi https://unwomen.org.au/chief-kachindamotos-life-mission-to-end-child-marriage-in-malawi/ accessed 15 December 2021.
[313] Plan International "Legal and Regulatory Frameworks on Child Marriage*"* .
[314] UNFPA Malawi "Female chief from Malawi uses her power to end harmful practices against girls and women" https://malawi.unfpa.org/en/news/female-chief-malawi-uses-her-power-end-harmful-practices-against-girls-and-women accessed 24 October 2021.
[315] T Kachika *A Critical Re-Appraisal of Vernacularisation* 222.

vernacularization legislation such as the Gender Act. By using traditional leaders as the driving force behind the community by-laws, the solution is close to home, therefore making it more effective than the "elite" forms. The chiefs are also motivated to ensure the by-laws work as most by-laws state that those who do not follow them will be demoted:

> "The basic issue against such a chief is 'why was the violation happening under your watch? It means you as a chief is undermining the by-laws by being negligent with serious enforcement.' This is getting chiefs' attention and resulting into more deliberate enforcement. I am even suspending chiefs whose own behaviour is contradicting the by-laws."[316]

Further, the fact that the community by-laws refer to specific problems that have been identified by the community themselves, means they have ownership of the problem and its resulting solution.[317] They recognise the practices are problematic, without being told such by an outside entity, which makes them more committed to finding a specific solution. The problem-solving element is linked to the grassroots element of by-laws. When speaking about why the community members obey the by-laws one of interviewees equated her fidelity to them, to watching a child grow up.[318] The by-laws are the brainchild of the community, created to respond to community identified issues, rather than outside driven efforts that can alienate the very communities they are aiming to help.[319] Further, the by-laws are based on consensus and consent, which ensures that they represent the will of the people.[320] Being based on consensus removes the perception and feeling that rules are being dictated by an outside entity. Rather, the community members can confidently adhere to the by-laws, knowing that their views were considered. Although consensus led to some problematic practices such as polygamy escaping regulation through by-laws, Senior Chief Kwataine pointed to this as a strong reflection of the will

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[316] Plan International "Legal and Regulatory Frameworks on Child Marriage".
[317] T Kachika *A Critical Re-Appraisal of Vernacularisation* 288.
[318] T Kachika *A Critical Re-Appraisal of Vernacularisation* 229-230.
[319] T Kachika *A Critical Re-Appraisal of Vernacularisation* 229-230.
[320] T Kachika *A Critical Re-Appraisal of Vernacularisation* 231.

of the people. Although he did not agree with the final decision, he noted that the community can confidently point to the by-law as their own.[321]

I submit that though customary law is often categorized as "backward" and oppressive, the community by-laws are a direct contradiction of this belief. The content of the by-laws reflect human rights norms, just not couched in formal terms. I submit that by-laws remedy the disconnect between the theoretical human rights protection framework and the situation on the ground. By-laws offer human rights protection framed in a manner that is familiar to the community, thus helping them understand their purpose and importance. They are community created and enforced, which remedies the villainization of customary law and removes the power dynamic of one system of norms dictating rules to another. This creates a sense of ownership and pride in connection to the by-laws, which in turn inspires compliance.

Some of the interviewees in Kachika's thesis illustrated the importance of vernacularizing norms in a manner that is understood by those that the norms are trying to govern. They stated that*:*

> *"*Nevertheless, communities have confidence in this insecure law because they relate to its "customarised" way of protecting various groups, and they see its tangible normative effects. This gives the bylaws inner force … communities understand that these bylaws are only for their area, but they fear them more than state law because the bylaws and the punishments they prescribe are closer to them*"*.[322]

I submit that part of the success of the bylaws is their proximity to the communities in which they exist. Borrowing the metaphor of watching a child grow up, as quoted elsewhere in this chapter, the community members are intimately acquainted with the genesis of the by-law, its aims and its sanctions. Unlike legislative rules, which are formulated in a Parliament in a city some of the community members will never see, the

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[321] *Ibid.*
[322] T Kachika *A Critical Re-Appraisal of Vernacularisation* 260.

by-laws are home-grown. This, I submit, makes them more relevant to the lives of those their concern and can play a greater role in protecting women and the girl child. Further, should the community wish to make the by-law legally enforceable, they can register it with the Local Authority, which reveals a willingness for the formal mechanisms and community bylaws to work in collaboration.[323]

VIII. CONCLUSION

This chapter reveals that, vertical norm vernacularization through legislation is not always effective as evinced in Malawi. This is because lack of access to justice and understanding of the legal system creates a strong theoretical human rights protection framework with little practical effect. Further, the "Eurocentric" nature of these norms often alienates and villainizes the communities that they are aiming to protect. This situation requires a "horizontal vernacularization" on these norms, which emphasizes that the communities themselves should be the driving force behind problem identification and solution making. This is the case with community by-laws employed in various parts of Malawi. These serve as community-owned and driven solutions which prevent and sanction HCP through "village-based penalties". The by-laws have played a vital role in combatting HCP's, as community members have a sense of ownership towards them which inspires them to obey the bylaw. It further removes the perception of one "better" system dictating norms to another and recognises the autonomy of the community to create solutions remedy their problems.

CHAPTER FIVE

HORIZONTAL VERNACULARIZATION: A BRIDGE TO HARMONIZATION

"But all these laws that you are telling us about are still very far and new to us. They all happen in the cities. In the rural areas we know nothing about these things that you are telling us about today."[324]

I. INTRODUCTION

[323] *Ibid.*
[324] Jezile's family focus group, September 2015 as taken from Mwambene and Kruuse *SAJHR* 16.

Chapter three of this thesis outlined South Africa's international and regional obligations to protect women and girls, including the need to enact legislation to this effect. However, Chapter four of this thesis demonstrated that in an African context, legislation is not the best way to deal with HCP's. This was illustrated by the social attitudes to formal laws discussed in Chapter two and four of this thesis which was that they are physically and metaphorically detached from the communities they serve, rendering them unused and ineffective.

This chapter suggests that, like Malawi, South Africa should employ a community-oriented "bottom-up" approach to regulate *ukuthwala.* The approach should be an adapted form of Malawi's community by-laws, which provide the community with a sense of ownership of the solution.

II. WHY SOUTH AFRICA SHOULD USE A FORM OF COMMUNITY BY-LAWS

A recurring theme throughout this thesis has been the disconnect between communities' lived experiences, both South African and Malawian, and the laws enacted to protect them. Though the laws work in theory, in reality, they are ineffective.[325] As discussed in Chapter two, rural communities often perceive the law as a foreign body that dictates norms and villainizes their cultural practices.[326]

It is submitted that a top-down regulation of HCP's such as *ukuthwala* is often ineffective due to the inaccessibility of courts and complexity of the law. Kachika argues, and I agree, an over-reliance on "elite" forms of norm venularization alone, such as creating legislation to address HCP's, is ineffective in African pluralist societies due to the abovementioned reasons.[327] It often results in a gap between the formal law and the situation on the ground, where the girl is protected in theory but not in practice, leaving African girls vulnerable. I submit that in the context of *ukutwhala,* South Africa should employ a community-orientated and led solution, in collaboration with formal laws similar to Malawi's community by-laws, to address *ukuthwala.* It is my submission that a

[325] See chapters two,three and four of this thesis and Mwambene and Kruuse *SAJHR* 1.
[326] See chapter two of this thesis; Smit *Anthropology Southern Africa* 61.
[327] T Kachika *A Critical Re-Appraisal of Vernacularisation* 222.

bottom-up approach plays to the strengths of both normative systems because the community by-law will address the problem at a grassroots level, and collaborate with formal laws when needed. Such an instance would be when a *thwala* happens without consent of the girl and involves violence.

Further, some human rights discourse that engages with customary law tends to villainize and "other" customary practices, blaming them and placing human rights as the better system.[328] One social worker interviewed by Smit in Lusikisiki in the Eastern Cape, where *ukuthwala* is prevalent, blamed the continued existence of violence in *ukuthwala* on the fact that the communities were ignorant of human rights and were refusing to let go of their traditions, even if they were harmful:

> "I don't even think they know the human rights … . People, they just want to believe in the golden days as their great grandmothers … . They believe that they are the only people [culturally exclusive], they speak their own language, even their language is different. So I think they want to be those people who are different, who are still holding to their tradition."[329]

Smit opines that the narrative that solely places the blame for violence and oppression of women involved in HCPs on culture alienates the communities and demonizes practices that are deeply personal to them.[330] Further, such discourse fails to acknowledge the fact that the community members themselves, may in some cases be aware of and are against the harmful aspects of the practice – as will be discussed later on.[331] By placing human rights as the "better" system, the constitutional dispensation has "othered" the adherents of these practises, which makes them defensive of them. The bottom-up approach of by-laws can help remedy this while respecting both systems and encouraging their collaboration to seek solutions that protect the adherents.

III. HOW WOULD IT WORK?

[328] Smit *Anthropology Southern Africa* 64-65.
[329] Smit *Anthropology Southern Africa* 64.
[330] Smit *Anthropology Southern Africa* 64.
[331] This was demonstrated by the focus group discussions conducted by Smit which were cited in Chapter two of this thesis.

(a) Problem identification

A key feature for by-laws is that the chiefs and community themselves must see the practice as problematic and deal with it based on that premise.I submit that though there might be some resistance to do so, there is an awareness among the community members that *ukuthwala* can be harmful. In her research, Karimakwenda's interviewees stated that the *thwalas* they had endured caused them great emotional, physical and psychological harm which the still deal with decades on.[332] These women were part of a larger programme of women who raise awareness against *ukuthwala* by telling their stories across the Eastern Cape, which shows an awareness of the harm it causes.[333] Further interviews with a Chief in Jezile's community showed willingness to eradicate the harmful aspects of the practice, such as rape and non-consensual abduction, but maintain the practice itself: "… If there are things that are not done correctly, in this custom of *ukuthwala*, we are willing to change. We can practice the custom but in a different way as how our parents used to, but we are not going to stop practicing our customs."[334]

It is submitted that the resistance from the community members regarding human rights discourse about *ukuthwala* is about ending the practice as a whole. The focus group discussions by Smit and Mwambene and Kruuse show that there is awareness that there is violence in the process and that that must be eradicated.

(b) Training of community stakeholders

Karimakwenda's research discovered that where the community holds patriarchal beliefs, it is more likely that violence towards women will occur.[335] Given this, it is vital that a community-driven approach, one that educates on rights, be used to undo these ideas, is implemented. This is especially important because the law is only a sword in the hands of the people when they know how and when to use it. Without education and a community-driven approach, any law that will be promulgated would be ineffective.[336] This is an

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[332] N Karimakwenda *Where rape does not exist* 211.
[333] N Karimakwenda *Where rape does not exist* 214-218.
[334] Interview with Chief and his delegate 2015 at Jezile's village Mgidlana *should ukuthwala be criminalized* 77.
[335] N Karimakwenda *Where rape does not exist* 148-149.
[336] C Himonga "African Customary Law and Children's Rights: Intersections and Domains in a New Era" in J Sloth-Nielsen (ed) *Children's Rights in Africa: A Legal Perspective* (2008) 85.

approach that has been successful in Malawi, where the regulation of harmful cultural practices has been spearheaded by community members who are against the harmful nature of these practices.[337] Importantly, such training should not villainize culture, but view it as a tool to help being positive change. In the context of *ukuthwala*, such training should not only target the patriarchy that contributes to *ukuthwala*, but also the confusion regarding the consent of the girl.

I submit that, like in Malawi, NGO's should take the lead in conducting the training, as they may have the required expertise to conduct the training. For example, the Masimanyane Women's Centre mentioned in Chapter two has been conducting social work, which includes "expertise in the application and monitoring of the CEDAW" since 1996.[338] Social work, which involves interacting with the community, coupled with knowledge of CEDAW and other human rights instruments gives such an NGO the requisite expertise to conduct the trainings. I submit that though the State can and should be involved in the training, such involvement should be secondary to the NGO involvement, for the following reasons. State involvement in the process is necessary in order to show their commitment to including the communities in creating solutions. Some of the community views in Chapter two demonstrated that the community does not feel included in the process of making legislation, resulting in the laws being dictated to them.[339] In the same vein, Kruuse and Mwambene criticised the Prohibition Bill for not including the community in the creation of the Bill. As such, the State should be involved. Although I advocate for State involvement, I submit that it should be secondary to the NGO involvement and could be restricted to funding capacity. This is because there might be resistance from the community members to a State led training exercise, as the State made the laws which are villainizing their cultures. The mistrust between the State and the communities may hinder the process. Further, if they State representatives have not undergone sensitivity training themselves, it might defeat the purpose of the training. What about leveraging older women in the community, so women who experienced it

[337] Charles Pensulo "Malawi Traditional Leader Orders Chiefs to Dissolve Child Marriages From COVID-19 Lockdown".
[338]Masimanyane Women's Rights International "About us".

[339] Chapter two of this thesis.

could play a role… this is the part of the thesis you need to strengthen, this is your contribution

c) Consultation, processing and consolidating ideas

As Chapter Four explained, one of the reasons for the success of the community by-laws is consultation and collaboration with the traditional leaders and community members. In South Africa, Mwambene and Kruuse point to a lack of involvement of the community in creating solutions that deal with *ukuthwala* as a continued problem in its potential regulation.[340] They note that where the community is included in the process, not only do they gain a sense of ownership to the solution, they are also able to provide context as to the purpose of the practice, which can aid in finding a less harmful approach of achieving the same aim.[341]

Further, the focus groups revealed a desire from the community to be included and consulted in the solution seeking process: "Maybe before these laws are endorsed, they need to come to the traditional leaders, so that these laws can be discussed thoroughly … ."[342] Lack of involvement and invisibility of the communities in regulation of their cultural practices has been a motif of this thesis. It is my submission that both the communities and formal laws want to protect girls from harm, they just have different approaches. Where the formal laws may seek to eradicate the practice all together, the communities want to eradicate the *harmful* aspects of the practice. Collaboration with the traditional authorities and community members can create consensus between the two systems and create a solution that protects the girl child. Thus, I submit, the inclusion of traditional leaders in creating a solution for the community can allow the community to have a voice in the regulation process – an opportunity they were previously denied.

D Drafting the by-laws and adoption

An example of a "by-law" concerning *ukuthwala* could be written in the following terms:

[340] Mwambene and Kruuse *SAJHR* 17.
[341] *Ibid.*
[342] Interview with Jezile's family 2015 in Mgidlana *should* ukuthwala *be criminalized* 69.

"1) both of the prospective spouses must be older than 18 years; 2) both must consent to a customary union; and 3) in the rare case that either is a minor, both his and her parents or legal guardians must also give their consent to the union."[343] 4) where there is no consent, or violence of any form, the perpetrator and involved third parties must be reported to the police. 5) where a person facilitates a *thwala* that is harmful (no consent of both parties to the marriage), they will be liable to a fine of one cow and being surrendered to the authorities to address the crimes that have occurred, namely kidnapping.

Importantly, such a punishment would be for all involved parties such as the parents, religious leaders and chiefs who encourage and facilitate the marriages. I submit that one of the reasons that the by-laws have been successful in Malawi is because they have high stakes for the Chiefs who do not enforce them. Losing their chieftaincy has shown itself to be powerful incentive for Malawian Chiefs and I submit that such a sanction could also be beneficial in a South African context. Further, given the reverence that Chiefs are given in such communities, their support of the by-laws can go a long way in remedying the human rights violations that can occur during *ukuthwala.*

The by-laws would be created by the Chiefs in collaboration with community members and magistrates, with support from NGOs, so as to ensure consensus, community buy-in and adherence to the laws of the land. In this way, the different systems are all given due regard in the solution.

IV. CONCLUSION

As this thesis has emphasised, community by-laws are not laws, but rather norms that have informal binding force within a particular community.[344] As *ukuthwala* is mainly practiced in the Eastern Cape and Kwazulu Natal, a by-law would be a community agreed norm which binds the community members of a particular village. While I acknowledge that undoing the attitudes that contribute to the harmful aspects of *ukuthwala* is not an easy nor short process, I submit that there exists a foundation for change. This is evidenced by the focus group discussions conducted by the various scholars that reveal an awareness

[343] Smit *Anthropology Southern Africa* 61; Act 32 of 1998 s3(1)(a)(i) and (ii).
[344] T Kachika *A Critical Re-Appraisal of Vernacularisation* 260.

of the harmful aspects of the practice and a desire to eradicate those aspects. This is a fundamental to the creation of a solution that respects culture and individual human rights.

It is my submission that the collaborative nature of community by-laws - collaboration with community members and formal legal systems to create them - ensures an inclusive and effective solution. While by-laws are not perfect in that they can sometimes be too far-reaching in their punishments,[345] they provide the community members with a voice. Community by-laws may further address perceptions that customary law and its practitioners are barbaric and backward. Rather, they can use customary law as a tool to help women and girls.

CHAPTER SIX
CONCLUSION

"*Fundamentally, this [bottom-up] engagement entails a view of customary law as part of the solution to the violation of women's rights. Whereas the top-down dominant interventions seem to view customary law as the "villain" and "the problem" that must be "fixed" [bottom-up] engagement with this system of law capitalizes on its potential as a source of solutions"*[346]

I. INTRODUCTION

[345] Some of the *chindapusa's* in the by-laws punish children involved in child marriage, which is generally cautioned against in international human rights law T Kachika *A Critical Re-Appraisal of Vernacularisation* 269.
[346] Himonga *Feminist Constitutionalism* 328.

This thesis examined how South Africa can regulate the HCP of *ukuthwala,* by using community made by-laws to regulate it, as done in various Malawian communities. The aim was to suggest a solution that puts the community, and their opinions, at the forefront of the solution making process. Such a solution, this thesis argues, would address the human rights violations incidental to *ukuthwala,* while respecting the purpose for which its adherents deem *ukuthwala* important.

After a thorough analysis, this chapter concludes the thesis by answering the research questions, namely: Is *ukuthwala* a harmful practice and how does the South African state regulate HCP's? Does the creation of a legal framework curb the prevalence of HCP's and protect women and the girl child? In view of the comparative analysis, what is the best approach to dealing with HCPs in a pluralistic society, such as South Africa?

As such, the purpose of this final Chapter is to summarize the findings of this thesis and present the conclusion.

II. SUMMARY OF FINDINGS

The first questions this thesis aimed to answer was whether *ukuthwala* is a harmful practice and how the South Africa regulates it. The first chapter of this thesis categorizes *ukuthwala* as a HCP, based on the fact that it is a form of bridal abduction, which in its most harmful form involves kidnapping a girl as young as 11 years old, without her consent and often with violence, to force her family into conducting *lobola* negotiations. Current literature dilutes the violence faced by girls in this process, by stating that it only occurs in distorted forms of *ukuthwala.*[347] Other than in these "distorted" occasions, authors such as Bekker and Koyanna argue that *ukuthwala* is a charming and "romantic" procedure. Karimakwenda, however, disputes this narrative and points to it as adding to the erasure of violence in cultural marriages. She argues that violence has always been a part of *ukuthwala* and cultural marriages, because of the systemic patriarchy that empowers men to view women as objects. She further argues that where violence leads to a "legitimate" end, such as marriage, culture condones it at the expense of the women. I

[347] TW Bennet "Customary Law in South Africa" (2004) 212; JC Bekker "Seymour‟s Customary Law in Southern Africa" (1989) 98.; see also Mwambene and Sloth-Nielsen *African Human Rights Law Journal* 5.

argue that Karimakwenda's depiction of *ukuthwala* is there more accurate and holistic of the two, as it accurately tracks the violence in the marriage process and does not diminish the real trauma experienced by the victims of the practice.

In order to gain a better understanding of *ukuthwala* and the reasons why people practice it, it was important to hear from its adherents. This was achieved through canvassing the social attitudes towards the practice of *ukuthwala*. This exercise revealed a gap between the law and community's lived experiences, which often results in a feeling of alienation and a perception that culture is villainized.[348] To combat this sense of alienation, a "bottom-up" approach is required to take into account the aims of the practice meant to be regulated, community's views, and involves them in rule-making itself.[349]

The question of how South Africa regulates HCP's was addressed by briefly outlining and discussing the current legal framework, the core regional and international human rights instruments to which South Africa is a party. South Africa and Malawi are parties to the Convention on the Elimination of Discrimination Against Women (hereafter 'the CEDAW'), the Convention on the Rights of the Child (hereafter 'the CRC'), the African Charter on Human Rights (hereafter 'the Charter') and the Protocol to the African Charter on the Rights of Women in Africa (hereafter 'the Protocol'). These instruments aim to promote gender equality and protect women and children from HCP by promoting consent, non-discrimination, and mandate that parties implement legislative reform to promote these ends.[350] States that are party to these instruments are required to achieve these aims through, *inter alia,* the enactment of legislation. Currently, South Africa regulates *ukuthwala* through legislation such as the Equality Act and the common law. The Prohibition of Forced Marriages and Child Marriages Bill, which has not become an Act, criminalizes *ukuthwala* that occurs without the girl's consent and is the closest South Africa has come to specifically regulating *ukuthwala*. Mwambene and Kruuse, however, criticize the Bill on the basis that though it is progressive, there was a lack of community

[348] Mwambene and Kruuse 16 and 18.
[349] Mwambene and Kruuse *ibid.*
[350] See Chapter three of this thesis.

involvement in the drafting process, which once again alienates communities most affected by the practice.[351] Lack of community participation in the drafting process and the continued practice of the harmful forms of *ukuthwala* show that though legislation provides impressive theoretical protection for women and girls against HCP's, in reality, they are still unprotected. As such, there is need for a practical solution.

In order to find a solution for the abovementioned problem, this thesis employed a comparative analysis of how Malawi has tackled the HCP of child marriage. Girls as young as 11 years old marry other children or older men for various reason such as poverty and entrenched patriarchy. This harmful practice places the girls at risk of physical and emotional harm, such as exposing them to emotional and physical abuse, health risks and reducing their access to education. Malawi has legislation in line with its international and regional obligations for the protection and non-discrimination of women, such as the Gender Act, which outlaws harmful cultural practices and imposes a fine and custodial sentence. However, due to the distance between formal laws and the community, communities in, *inter alia*, Ntcheu and Dedza have created community by-laws that address and prohibit HCP's as a solution. The by-laws are not law as such, but rather "soft-law", which can be formalized, used within the community to address these practices by imposing a local fine, such as giving livestock as an admission of guilt.[352] Notably, when the violations of the by-laws involve common law crimes such as rape, the community hands over the offender to the police force. In turn, local Magistrates also recognize that the by-laws have binding force within the communities in which they operate. The mutual respect between the two systems illustrates how Malawi has used "formal" and "informal" law collaboratively to combat HCP's.

These by-laws are community-made to address specific problems and have inner force.[353] As such, the community members feel a sense of ownership of the by-laws, with one member equating the community's fidelity to them as watching a child grow up. This

[351] Mwambene and Kruuse *SAJHR* 17.
[352] T Kachika *A Critical Re-Appraisal of Vernacularisation* 260.
[353] T Kachika *A Critical Re-Appraisal of Vernacularisation* 260-261.

sense of ownership and "closeness" of the law to the community inspires adherence because there is certainty as to the content of the law, its purpose, and the sanction.

The last question this thesis aimed to address was, in view of the comparative analysis, what approach should South Africa take to address HCP's. This thesis suggests, in light of the social attitudes towards formal laws and South Africa's international and regional obligations, that it should employ an adapted form of Malawi's community by-laws. Though not perfect, community by-laws are a great way to address the disconnect between formal laws and the situation on the ground. The fact that a key feature of the creation and legitimacy of the by-laws is that the community must be involved in their creation may address the alienation from the formal law experienced by some communities. Such a solution, I submit, would regulate the practice in a manner that has community by-in, which gives a sense of ownership which can inspire adherence.

III. CONCLUSION

Ake warned that "democratization without recourse to social experience would lead to the alienation of people who would feel a pervasive sense of helplessness amid a chaos of arbitrariness".[354] This is the situation faced by African pluralistic societies where cultural practices and human rights are often pitted against one another. In South Africa, where the Constitution is supreme, any harmful cultural practice that cannot be justified will not be allowed. *Ukuthwala* that takes place without the consent of the woman violates her rights of, *inter alia,* equality, dignity and freedom and security of the person, and therefore cannot pass constitutional muster. Despite this, it is still practiced and remains important to those who do so.

The language of modern scholars regarding *ukuthwala* serves to trivialize the violence prevalent in the practice as "a new phenomenon", which erases the violence women have also been subjected to. It is not denied that *ukuthwala* have very harmful aspects, but it is important to understand the purpose of the practice in order to come up with a viable

[354] C Ake *Democracy and Development* 178-180 as cited by Mwambene and Kruuse *SAJHR* 16.

solution. This entails engaging with the communities who practice it and including them in the solution seeking process.

As has been shown in above sections, the coercive forms of *ukuthwala* subject the women and children involved to violence, which exposes them to harm and infringes on their human rights. Though this is the case, it must be noted that in discussing the infringements of human rights that occur during *ukuthwala*, the aim is not to place one system of law above the other, but rather to acknowledge that certain aspects of cultural practice are harmful. Though scholars such Karimakwenda and Bhabha opine that the sensationalization of the "mundane" violence that women face every day is a result of relying on "western superiority",[355] this does not negate the fact that violence is occurring and at the expense of the rights of women. What needs to occur is a critical appraisal of the practice, so as to distil the purpose, while discarding the harmful aspects. As the quotation at the beginning of this chapter conveys, human rights discourse dealing with customary laws will only be successful if it views it as a tool for change, rather than a problem that needs to be fixed. In doing this, the reverence of behind the practice is maintained, while preventing harm to the girl.

The primary aim of this thesis was to balance to tension between culture and human rights, through the lens of *ukuthwala*. It acknowledges that vertical vernacularization of norms, through adopting legislation and formal laws, has alienated a lot of the communities that it intended to protect. It, therefore, looked to Malawi, another African, pluralistic constitutional democracy, for a remedy. It suggests that adapting and adopting a version of Malawi's community by-laws, which are informal binding norms within a particular community, in a South African context can remedy the alienation issues the country has been facing. Such an approach, this thesis argues, respects the reasons behind the practices while sanctioning their harmful aspects. Such an approach, I submit, gives the communities a sense of ownership in the creation of a solution that they previously did not have. Social issues cannot be solved with the law alone. A long-lasting, effective and tangible solution would have to acknowledge the importance of the community and

[355] Bhabha, "Liberalism's Sacred Cow," 81-82 as cited in N Karimakwenda *Where rape does not exist* 130.

work with them to create a solution that best suits them. It is my submission that community by-laws can go a long way in achieving this end in the context of *ukuthwala*.

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