Human Rights, Modernity and Culture: Understanding the position of Lobola as a form of VAW and the current human rights normative standards and discourse on VAW.

By

Pretty Mubaiwa

MBWPRE001

Thesis presented in fulfilment of the requirements for the degree of

Doctor of Philosophy

6 September 2021

Supervisor

Professor Rashida Manjoo

Plagiarism Declaration

I, Pretty Mubaiwa, hereby declare that the work on which this thesis is based is my original work (except where acknowledgements indicate otherwise) and that neither the whole work nor any part of it has been, is being, or is to be submitted for another degree in this or any other university. I authorise the University to reproduce for the purpose of research either the whole or any portion of the contents in any manner whatsoever.

Signature: Date:

Abstract

As the feminist movement in Africa continues to question and dismantle long-held religious and cultural beliefs and practices, this has influenced critical debates on the validity of their co-existence with human rights norms and standards, which exist at the national, regional and international levels. The objective of this dissertation is to critically interrogate the relationship between culture, violence against women (VAW), and international and regional instruments focused on VAW. Specifically, it delves into the cultural practice of bride price (also known as lobola) to understand whether the practice is a cause and/or consequence of VAW in family relations.

This dissertation hypothesises that lobola is both a cause and consequence of VAW and therefore should be specifically identified as a form of VAW which is a human rights violation. To test this hypothesis, this dissertation adopts a theoretical analysis using Heise's Integrated Ecological Framework (Heise's framework) on VAW which provides a useful tool to analyse and to deconstruct the systemic causes and influences of VAW. Heise's framework is adopted to analyse how certain cultural practices that exist at the macro systemic level may relate to and influence VAW practices. In order to conduct this analysis using Heise's framework, this dissertation uses available literature on previously conducted focus group discussions on experiences, opinions and perceptions of lobola by both young people and adults. The theoretical analysis highlights that there is a positive correlation between lobola and the violence women face in marriage and upon divorce. However, the analysis also establishes that the practice of lobola itself does not present as a form of violence against women - but because of the perceptions, beliefs, and power systems it creates, the practice becomes an aggravator of VAW. The results from the analysis show that lobola creates rigid gender roles, skewed beliefs of entitlement and ownership of women's lives and bodies, and asymmetrical power relations that influence VAW.

Since the theoretical analysis proved that lobola is an aggravator of the violence women face in marriage and upon divorce, the dissertation also carries out a legal analysis to understand the position of harmful practices and the legal consequences using international human rights norms and standards. In line with fulfilling its mandate, the United Nations Committee on the Elimination of all Forms of Discrimination against Women (CEDAW Committee), after receiving four state periodic reports from Kenya, Zambia, Zimbabwe and Uganda between 2010 and 2012, in its concluding observations expressed concern over the

persistence of harmful traditional and cultural practices that affect women. In each instance, the Committee reiterated that lobola is a harmful practice that aggravates discrimination against women. These concluding observations ushered in an expanded narrative on harmful traditional and cultural practices that disproportionately affect women and thus promote gender-based discrimination. Using these four case studies, this dissertation thus looks at the customary and civil laws of these countries to understand the legislative landscape around traditional and cultural practices. The findings include that in all four states, lobola is a requirement for the recognition and registration of a customary marriage. This means that legally, lobola is recognized as a legitimate requirement for a marriage to be recognized and registered.

Additionally, an appraisal of the standard-setting frameworks protecting the right of women to be free from violence and discrimination shows that even though there are legally binding standards and mechanisms at the regional and international levels that are mandated to protect these rights, there are normative gaps that continue to negatively impact the protection of women from violence. The CEDAW Committee has called lobola a harmful practice. However, as the principal women's rights body within the UN system, the Committee has failed to take further steps towards standard-setting or to follow-up with states to continue to encourage the elimination of this practice. This gap limits the scope for women to pursue justice when they experience multiple and intersecting forms of violence in general. This dissertation thus concludes that lobola should be specifically recognized as a form of VAW within the realm of harmful traditional practice and that it is inconsistent with the current international standards on equality, non-discrimination, and violence against women.

Acknowledgements

My entire postgraduate experience has validated John Donne's statement from his sermon in the seventeenth century which states, "No man is an island, entire of itself." I have learned that to truly succeed, you cannot do it on your own. Academia is not only your own experience, but it is a shared journey you undertake with your supervisor, friends, family, colleagues and the whole university community at large. At each point of my journey, I remember that I had support from different people who made this journey that much easier by sharing knowledge and resources, that much more bearable in times of curtailing self-doubt and that much more interesting by eagerly asking about my topic of research. I am appreciative to the community who enabled this young African woman to realise more than she could have ever dreamed of.

I would like to thank my supervisor Professor Rashida Manjoo. Throughout this entire journey together that started during my Masters in 2015, you have become more than just an academic supervisor, you have been a mentor and a trailblazer for me and so many young academics at UCT. I appreciate you believing in me and for taking a chance on me. You have been a strong pillar of support throughout my research journey, and I am grateful for your patience with me over the years. You always encouraged me and told me I could do it, even when I could not believe it myself. Professor Manjoo, you have stirred in me my activist and feminist spirit and I will forever be grateful to you for leading the way and allowing me to 'dance in your footsteps'. You have left a legacy that will be hard to compete with, but you have shown me that it is possible.

To the Canon Collins Educational and Legal Aid Trust, and the Ros Moger Terry Furlong (RMTF) for reading my research proposal and investing in my dream. My postgraduate experience would have been a strenuous and difficult one without funding. I would also like to thank the CCELAT scholarships team, you have all been supportive and encouraging. You make the whole learning experience so much better.

I would like to also thank my family, the wind beneath my wings, my mothers - Chipo and Alice, dad, Gladys, Tinaye, you have continued to encourage me through it all. Without you, I would not have gotten to believe in myself and work hard towards my dreams. To my husband, Tino, thank you for seeing the light when I could not, thank you for being an exceptional support system. Throughout this journey, you showed me the true meaning of

partnership and long suffering (haha) you never wavered or got tired of my panicking, moaning and whining. You were always present, and I would not be here without you, best friend.

To my friends Anjola, Neo, Farai, Kudzie, Amanda, Ynes, Mandira, Noku, Zoro, Atila, Cornwall Divas (my sisters for 20 years), and Vita. You have all contributed to my research journey and I would like to thank you. For listening to my endless stories, taking me out for coffee, giving me ideas, calling me Dr. Aunty and overall encouraging me, you have been the light to my journey.

I am also grateful to Nyasha Karimakwenda for taking time to read my thesis and reviewing my work. You provided a fresh perspective to my research. You truly embody what sisterhood is.

Finally, to my colleagues from ARC, wow the journey has come to an end now FINALLY!! Thank you for all your support and understanding. I am looking forward to joining you full time now.

Dedication

This one is for you Pretty. You dared to dream, you fought and persevered even when it was difficult. Even when everything around you was dark, you gathered your courage like wildflowers. May you never lose your fighting spirit. Like air, continue to rise!

Table of Contents

Table of Contents

Glossary of Recurring Terms

Lobola/Roora: Is a cultural symbol that validates marriage. It consists of the exchange of good and/or money by the groom to the family of the bride.

Culture: Is 'a complex whole which includes knowledge, belief, art, morals, law, custom, and any other capabilities and habits acquired by man as a member of society.'-Edward Tylor (1903)

Violence Against Women (VAW): Is 'any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life'- Declaration on the Elimination of Violence Against Women (1993)

List of Acronyms

CEDW - Convention on the Elimination of Discrimination against Women

VAW - Violence against woman

HTP - Harmful Traditional Cultural Practice

ECOSOC - United Nation Economic and Social Council

FGM - female genital mutilation

WHO – World Health Organisation

UNICEF - United Nations Children's Fund

WLSA - Women and Law in Southern Africa

ICESR - International Covenant on Economic, Social and Cultural Rights

UDHR - Universal Declaration on Human Rights

DEVAW - Declaration on the Elimination of Violence against Women

ICTR - The International Criminal Tribunal for Rwanda

ICTY - International Criminal Tribunal for the Former Yugoslavia

IHRL - International Human Rights Law

SRVAW - Special Rapporteur on Violence Against Women, its Causes and Consequences

SADC - Southern African Development Community

NMO - Native Marriage Ordinances

OAU - Organization for African Unity

AU - African Union

African Charter - The African Charter on Human and Peoples' Rights

ICESR - International Covenant on Economic, Social and Cultural Rights

ICCPR - International Covenant on Civil and Political Rights

Genocide Convention - Convention on the Prevention and Punishment of the Crime of Genocide

UNIFEM - United Nations Development Fund for Women

CSW - Commission on the Status of Women

EDVAW Platform - Platform of Independent Expert mechanisms on Discrimination and Violence Against Women

ICTY - International Criminal Tribunal for the Former Yugoslavia

OHCHR - Office of the High Commissioner on Human Rights

Maputo Protocol - Protocol of the African Charter on Human and People's Rights on the Rights of Women in Africa

The Convention of Belém do Pàrá - The Inter-American Convention on the Prevention, Punishment and Eradication of Violence

IACHR - Inter-American Commission on Human Rights

SRW - Special Rapporteur on the Rights of Women

Istanbul Convention - Council of Europe Convention on Preventing and Combatting Violence Against Women and Domestic Violence

GBV - Gender-based Violence

GREVIO - Group of Experts on Action against Violence against Women and Domestic Violence

ECtHR - European Court of Human Rights

African Commission - The African Commission for Human and Peoples' Rights

African Court - The African Court on Human and Peoples' Rights

AHSG - African Union Heads of State and Government

LAMA - Legal Age of Majority Act of 1982

NMO - Native Marriage Ordinances in 1901 and 1917

ZWLA - Zimbabwean Women Lawyers Association

DRB - Domestic Relations Bill [Uganda]

HIV - Human Immunodeficiency Virus

HRC- Human Rights Council

CHAPTER 1

Introduction

"How long are women to wait, and who is to determine that society has evolved sufficiently to allow women to enjoy equal rights with men?" - Fareda Banda (2006)[1]

1. Problem Background

In her lifetime, 1 in 3 women will experience some form of violence to her person.[2] Almost four decades after adopting the Convention on the Elimination of Discrimination against Women (hereafter CEDAW) entered into force, these current statistics are still far off from the progress we should be witnessing after the global women's rights movement's advocacy and achievements. In the era of social justice and empowerment movements such as #MeToo[3] globally and the #AmINext[4] closer to home in South Africa, it is evident that women are still fighting for their right to be free from all forms of violence and discrimination. VAW is defined as "… any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life."[5] Women are disproportionately affected by violence due to several factors such as historical inequality, discriminatory structural conditions, and patriarchal dominance systems that have normalised women's subjugation. In his speech upon assuming the chairmanship of the African Union in February 2020, the South African President, Cyril Ramaphosa, remarked that "Violence Against women continues to rage our (*African*) continent.…."[6] Considering the progress made in women's rights globally and regionally, this statement by the AU chair is evidence that there is still much work to ensure that these normative developments make a fundamental change to women's lived realities.

[1] F Banda 'Women, Law and Human Rights in Southern Africa' (2006) *Journal of Southern African Studies* Vol 32 No. 1 available at *https://www.jstor.org/stable/25065064?seq=1*.
[2] Statistics available on UN Women Website available at https://www.unwomen.org/en/what-we-do/ending-violence-against-women/facts-and-figures.
[3] See *https://metoomvmt.org/get-to-know-us/history-inception/* for more detail on the inception and progress of the #MeToo movement.
[4] See *https://aminext.news24.com/* to get more details on this South African movement against the killing of women in the country.
[5] Article 1 of The Declaration on the Elimination of Violence Against Women Proclaimed by General Assembly Resolution 48/104 of 20 December 1993.
[6] Acceptance statement by Cyril Ramaphosa on assuming the chair of the AU at the 33rd session of the AU Assembly, 9 February 2020, Addis Ababa, Ethiopia available at https://au.int/speeches/1465.

Women's lives are intersectional and multi-dimensional. Multiple intersecting layers affect their vulnerability to experiencing violence in their day to day lives, including their economic, social and political statuses. According to Manjoo, there are four spheres where Violence Against Women (hereafter VAW) manifests in country contexts.[7] In their daily lives, women are exposed to violence in the family, violence in the community, violence perpetrated or condoned by the state and violence in the transnational spheres.[8] Additionally, due to their proximity to the familial and communal spaces, women tend to experience violence, usually justified by religious, customary, and communal norms and discriminatory laws against women.[9] The main aggravators of this violence within the family sphere are religious, traditional and/or customary practices that are discriminatory, harmful and degrading to women. An expanded inquiry into the nature, causes and consequences of these harmful practices is critical to advancing women's realisation of lives that are free from violence.

Various scholars have made several inquiries on different forms of harmful traditional practices, including Female Genital Mutilation (FGM), breast ironing, wife inheritance, widowhood rituals, and forced feeding, amongst other practices.[10] I adopt the view of culture as a "… complex whole which includes knowledge, belief, art, morals, law, custom, and any other capabilities and habits acquired by man as a member of society.[11] My approach to culture is a hybrid of discourses and practice that draws the different essences of particular groups of people. In this case, I also adopt Vlopp's view on culture to problematise the Western views and perceptions of culture that refer to culture in relation to non-Western populations and that pigeonhole certain 'harmful practices' to only occur amongst non-Western

[7] Manjoo R 'The Continuum of Violence Against Women and the Challenges of effective Redress' (2012) *International Human Rights Law Review* 1-29.
[8] Ibid at 2.
[9] Ibid at 9.
[10] See generally Elliot Klein, Elizabeth Helzner, Michelle Shayowitz, Stephan Kohlhoff, Tamar A. Smith-Norowitz, 'Female Genital Mutilation: Health Consequences and Complications—A Short Literature Review' (2018) *Obstetrics and Gynecology International* Vol. 1; Olubanke Akintunde Dorcas 'Female Genital Mutilation: A Socio-Cultural Gang Up Against Womanhood' (2010) *Feminist Theology* 18 (2) pp. 192–205; Tchoukou J A 'Introducing the Practice of Breast Ironing as a Human Rights Issue in Cameroon*'* (2014) *J Civil Legal Sci* Vol 3; Leach, E. R. '199. Polyandry, Inheritance and the Definition of Marriage.' (1955) *Man* 55 pp. 182-86; Abidemi Fasanmi Sandra Ayivor 'Widows, Widowhood, and Society in Africa' (2019) *The Palgrave Handbook of African Women's Studies* Vol. 10.
[11] Edward Tylor Primitive Culture: Researches into the Development of mythology, Philosophy, Religion, language, Art, and Custom (1903) John Murray, London.

groups/communities.[12] I argue that culture is actually in everything and everywhere, and it is crucial to problematise western and/or Eurocentric views on cultural practices.

This thesis seeks to expand on the already contentious subject of bride price, also known as Lobola. Lobola[13] is a respected and revered African traditional practice. Although this practice is part of other cultures outside of Africa[14], there are similar trends in the origins and characteristics of the practice on the continent as compared to other locations. The term Lobola will be used in this thesis to refer to bride price, roora, dowry or any other variations across different communities as discussed in Chapter 2.[15] Like many traditional cultural practices, Lobola is organic as it is influenced by the concept of time itself and other prevailing environmental conditions such as economic, political and social factors. My conceptualisation of Lobola in this thesis is that the practice is not absolute regarding how it is practised and how it impacts women and men. Instead, the practice is a cultural symbol through which power struggles, changes and pressures are expressed. Even though over time, due to the different human rights movements such as the LGBTQIA+ movements, Lobola reflects a certain fluidity in modern times. For example, in modern times, women pay Lobola for men, queer couples pay Lobola for each other etc.[16] Even though this concept has developed, it is predominantly patriarchal. This thesis will look at the heteronormative relationships and Lobola as well as its relationship to harmfulness manifesting as VAW.

Bronstein argues that any conceptualisation of culture should consider this phenomenon as fluid and ever-changing rather than being 'rigid and ahistorical'.[17] As practised one hundred years ago, Lobola is very different from Lobola as practised in modern-day Africa. Many changes to this practice took place during the colonial period as it withstood rigorously oppressive religious, political and economic influences from missionaries and colonial

[12] L Vlopp 'Blaming culture for bad behaviour' (2000) *Yale Journal of Law and the Humanities* 12.
[13] Lobola is also known as *roora* in Shona culture, *Bohali* in Sotho culture, *lobolo* in Zulu culture, *Rubu Dinar* in Hausa, *Inkwano* in Kinyarwanda, *Owo Ori* in Yoruba and *Mahari* in KiSwahili) and *Chiongo* (Chichewa).
[14] In India, lobola is known as *Dowry* and is quite different from the African tradition, as it is the bride's family that offers gifts and other resources to the groom's family.
[15] See note 13.
[16] Wieringa S 'Women marriages and other same-sex practices: Historical reflections on African women's same-sex relations' in R Morgan & S Wieringa (Eds.) *Tommy boys, lesbian men and ancestral wives: Female same-sex practices in Africa* (2005) Jacana Media Johannesburg.
[17] Victoria Bronstein 'Reconceptualising the customary law debate in South Africa' (1998) *South African Journal on Human Rights* 14 at 394.

administrators, respectively.[18] During decolonisation, this practice changed in response to the influences of self-determination, democratisation and the advent of human rights on the continent.[19] Oloka Onyango argues that colonialism created a transmutation of social organisation and expression that still affects contemporary socio-political and economic contexts.[20] Therefore, it can be argued that African cultures sustained a permanent mutation and distortion that may or may not have negatively impacted the value of particular practices both from those who practice the culture or those who observe and make policies.

The nature of the debate around whether Lobola is a harmful traditional and cultural practice is an interesting one that delves into both legal and social science disciplines. This is because one cannot adopt a straight and narrow approach to assessing the practice's harmfulness without engaging with multiple discourses and contestations around traditional customs and their meaning to the communities that practice them. As mentioned above, various scholarly inquiries into the subject matter of Lobola include the inclusion of Lobola in marriage customary law, the changing nature of bridewealth systems, focus on Lobola as the root cause of inequality, and its relation to poverty and violence.[21] Sociological and anthropological inquiries discuss the social value and evolution of Lobola in African societies. In this thesis, I critically analyse the harmfulness of Lobola as a cultural practice and how this violence is linked to the violence women face in marriage. Additionally, I also inquire into international and human rights law to understand the current legal positionality of Lobola and how both the international and regional human rights institutions have identified and classified the practice.

[18] Lesala L Mofokeng 'The lobolo agreement as the "silent" pre-requisite for the validity of a customary marriage in terms of the Recognition of Customary Marriages Act' (2003) at 279-281.
[19] NM Ngema 'Considering the abolition of Ilobolo: Quo Vadis South Africa?' (2012) South African Legal Information Institute (SAFLII).
[20] J Oloka-Onyango 'Human Rights and Sustainable Development in Contemporary Africa: A New dawn or retreating Horizons?' (2000) *Human Rights Law Review* 39.
[21] See generally the following studies on lobola Thiara R K 'Bride Price and its links to domestic violence and poverty in Uganda: A participatory action research study' (2011) *Women's International Forum* 34, 6; Osuna M 'The Mifumi Project Domestic Violence and Bride Price Referendum Project Baseline Survey Report: Attitudes to Bride price and its links to domestic violence and human rights abuse' (2003) Tororo District, Uganda; Dekker, M., and Hans H. 'Bridewealth and Household Security in Rural Zimbabwe.' (2002) *Journal of African Economics* 11(1) at 114–45.

1.2. The story of numbers: VAW as a pervasive human rights abuse

Statistics on VAW are a contested issue. Official statistics from the World Health Organisation (WHO) state that 35% of women worldwide have experienced some form of violence in their lifetime.[22] At the national level, for example, in South Africa, a study conducted in 2012 by Gender Links established that in Limpopo, Gauteng, Western Cape and KwaZulu-Natal, the figures for the prevalence of violence against women were 77%, 51%, 45% and 36% respectively.[23] In some countries in Africa, these numbers are even higher.[24] These alarming statistics are a culmination of multiple intersecting factors that disproportionately position women to experience violence.

At the crux of this problem is the view that women's rights exist outside the human rights domain.[25] Because women's rights are seldom recognised as human rights concerns, there is little urgency or willingness to protect women from violence and discrimination effectively. Issues relating to women's rights are in the purview of the private and familial domain. According to Bunch, 'if women's rights are seen as human rights, they become part of a universally accepted goal and form part of jus cogens', providing a valuable framework for seeking redress against gender-based abuse combatting the prevalence of violence against women.[26] By recognising women's rights as human rights, states could start to act according to their obligations to respect, protect, promote, and fulfil women's rights.

In this thesis and the studies referenced, the term women/woman refers to sex in the biological understanding. Violence against women (VAW) manifests in different forms, and this can be violence on their physical, psychological, socio-economic or political well-being. This violence is rooted in the different environments they occupy as citizens and subjects, such as their cultural, economic, religious, social and political identities.[27] VAW is pervasive and

[22] Statistics available at https://www.who.int/health-topics/violence-against-women#tab=tab_1
[23] Gender Links Gender Violence: A reality in South Africa (2012).
[24] Ibid.
[25] Rebecca J Cook 'State responsibility for violations of women's human rights' (1994) *Harvard Human Rights Journal* 125.
[26] Charlotte Bunch 'Women's rights as human rights: Toward a re-vision of human rights' (1990) *Human Rights Quarterly* 12.
[27] Manjoo op cit note **Error! Bookmark not defined.**.

intrinsic in most societies as it is perpetuated by social, cultural, political and economic norms.[28] By impeding the realisation of fundamental human rights, VAW positions women to be victims of structural and societal injustices. According to Manyeruke, everyday violence experienced by women is part-and-parcel of a broad spectrum of suffering experienced by a woman in her lifespan.[29] VAW is a global pandemic that needs to be addressed, whether in the public or private spheres. Manjoo also notes that VAW impedes the realisation of numerous core human rights because it limits women's participation in public and private life.[30] She surmises that VAW becomes a barrier to women's realisation of and engagement with citizenship and that it is a violation of a woman's bodily integrity, liberty and right to life.[31] VAW leads to the disenfranchisement of women economically, politically and socially. This violence also leads to women paying the ultimate price, which is the loss of life.[32]

O'Hare agrees with the assertion of the pervasiveness of violence against women in both the private and public spheres and that it is a 'brutal manifestation of women's oppression.'[33] Women who are subjected to violence are denied their inherent dignity, live a life of constant fear and are especially denied the right to live a fulfilling life. It should be acknowledged that, although violence affects all women, despite geographical space and time, diverse groups of women are affected by the same violence differently. Manjoo also argues that not all women are equally vulnerable to the different acts and structures of violence, with numerous factors influencing the vulnerability of other women to various forms of violence.[34] In Africa, for example, any interrogation of manifestations and consequences of VAW need to be mindful of the historical influences imposed on their experiences of violence.

On the one hand, the historical two-tiered oppression of women in Africa through cultural and traditional norms and practices and, on the other, violently repressive and oppressive colonial regimes reinforces the need for gender equality and elimination of violence

[28] Ibid.
[29] Charity Manyeruke 'The Pervasive Nature of Violence against Women in Zimbabwe: The case of electoral related victimisation' (2011) 1:1 *Sacha Journal of Human Rights*.
[30] Manjoo op cit note **Error! Bookmark not defined.**.
[31] Manjoo op cit note **Error! Bookmark not defined.**; Ursula A O'Hare 'Realizing Human Rights for Women' (1999) 21:3 Human Rights Quarterly at 365.
[32] Ibid.
[33] O'Hare op cit note **Error! Bookmark not defined.** at 364.
[34] Manjoo op cit note **Error! Bookmark not defined.** at 8.

and discrimination against women on the continent. The previously disadvantaged position of women in Africa also means that *de jure* protections will not necessarily lead to *de facto* elimination of violence. Therefore, there is a need to adopt a holistic approach to protecting women from experiencing violence.

The state of violence against women and girl children in Africa is critical. On the one hand, there have been fundamental regional developments of frameworks that protect women's rights. On the other, the rates and forms of violence against women continue to rise. It is important to study why VAW continues to be one of the leading causes of death for women on the continent.[35] As most women's lives on the continent exist within the confines of culture, tradition and religion (among other spheres), it is essential to look at these spheres of influence and how they play a part in influencing the violence a woman suffers in her lifetime. As stated above, the CEDAW Committee in the past few years has unreservedly called Lobola a practice that should be regarded as aggravating discrimination against women and thus should be considered a harmful traditional and cultural practice.[36] However, in its subsequent reports to some countries during the same period, there is no mention of Lobola as a form of violence against women or a call for the respective states to take positive action to eliminate the practice.[37] This selective identification of a widely and uniformly practised practice in Sub-Saharan Africa, as a form of discrimination and violence in certain jurisdictions, but not others, warrants an interrogation into the practice and whether or not it should be classified as such.

It is essential to understand how the CEDAW Committee qualifies certain traditional practices as harmful and forms of VAW. By understanding this appraisal, it assists in answering the overall research question on whether lobola/bride price should be recognised universally as a harmful traditional practice and a form of VAW. Article 2 and 5 of CEDAW mandates states 'to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs, and practices which constitute discrimination against women and also imposes a duty on the state to eliminate all practices that are equivalent to prejudice against women.[38] By recognising tradition and culture as influencing the forms of discrimination a

[35] Ibid.
[36] See note 10.
[37] South Africa, CEDAW/C/ZAF/CO/4 (2011) para 17 and 18.
[38] Articles 2(f), 5 of CEDAW.

woman faces in her lifetime, the Convention identifies the cultural and traditional space as an environment needing constant interrogation to protect women from discrimination. Currently, the highest number of reservations to CEDAW is to Articles 2 & 16, including culture and tradition and marriage rights. These reservations clearly show the states' unwillingness to engage with violence against women that emanates from culture and tradition.

The CEDAW Committee, through its monitoring function, is the foremost body mandated to ensure that states respect, protect, promote and fulfil the rights of women according to the treaty. It thus follows that this Committee is responsible for pioneering the advancement of women's right to be free from any form of violence, whether it occurs in the private or public spheres. Article 21 of CEDAW allows the Committee to make general recommendations through the Economic and Social Council to the UN General Assembly.[39] These general recommendations are to be based on observations from state party reports.[40] Core functions of the CEDAW Committee include its interpretive, investigative and recommendatory power. According to Evatt, as an expert body, in its consideration of state party reports, the CEDAW Committee had a duty to develop a Committee view on applying the Convention in diverse situations.[41] In this regard, the CEDAW Committee is responsible for addressing Lobola as violence and a form of HTP and developing a standard Committee view.

1.3. The concept of harm: considering Lobola as a harmful traditional practice

There are many views about cultural and traditional practices and global human rights standards as mutually exclusive, and one exists outside of the other, and vice versa. Fareda Banda argues that cultural values are fundamentally complex and highly politicised.[42] Historical and patriarchal concerns dissuade various stakeholders from firmly questioning the role of culture and tradition in perpetuating violence against women on the continent. Central to this discourse on tradition and culture is how to locate the harm aggravated by these

[39] Article 21 of CEDAW.
[40] Article 21 (a) of CEDAW.
[41] Elizabeth Evatt 'Finding a voice for women's rights: The early days of CEDAW' (2002) *George Washington International Law Review* 34 at 537.
[42] Banda op cit note **Error! Bookmark not defined.** at 9.

practices. Although the concept of harm can be linked to discrimination, it cannot be categorically argued that all harm stems from prejudice. In the case of harmful traditional practices, it is easier to connect harm and discrimination. Discrimination refers to "… acts, policies or practices that impose relative disadvantages on individuals, due to their social group membership."[43] In most cases, harmful traditional practices are sex and gender-biased. These practices affect women only in specific communities, such as breast ironing or widowhood rites, etc.

The concept of harm is both a legal and moral principle. There is the criminality aspect of harm and the right-ness or wrong-ness of specific actions. Harm is defined as "to damage or injure physically or mentally."[44] In philosophy, John Stewart Mills developed the harm principle, whereby the state and or justice system can legitimately exercise power over an individual against their will only when their actions have caused harm or may cause harm to others.[45] Mills draws a vital principle on state responsibility to prevent, punish and redress acts of harm against any individual in their jurisdictions. In the case of human rights and specifically women's right to be free from traditional and customary normative practices that inflict harm or aggravate harm, the state is obliged to act. According to Manjoo, women's rights have gone through two decades of normativity without legality in addressing violence against women.[46] She argues that '…impunity rather than accountability is the norm…' when it comes to crimes of violence against women.[47] States fail to uphold their due diligence obligations to protect women from violence by instituting all necessary measures.

However, it can be argued that scholars and experts should expand the debate on Lobola to include questions of whether this practice, which aggravates gender-based discrimination, also amounts to a practice that is harmful to women. A comprehensive approach to realising women's rights in Africa should involve an intersectional approach that recognises women's

[43] Moreau S 'What is discrimination?' (2010) *Philos Public Aff* Vol 38 pp. 143–179.
[44] Merriam Webster dictionary available at https://www.merriam-webster.com/dictionary/harm .
[45] J S Mill *On Liberty* (1859) Dover Publications United States.
[46] Rashida Manjoo 'Twenty Years of Normativity without Legality – United Nations Developments on Violence against Women, its Causes and Consequences' (2016) *QMHRR* 3(1) at 1.
[47] Ibid at 2.

distinct positions and roles in society that leaves them vulnerable to violence.[48] Violence in the familial space is a sphere that needs consistent interrogation as this is the most intimate space of a person's socialisation that usually exists outside the purview of the state, regarded as the 'private'. Within this domestic sphere, culture and tradition form the fundamental basis of this unit. The family space is where practices that are forms of violence against women thrive and where this violence is aggravated. According to Kouyate, harmful traditional practices refer to '… all practices done deliberately by men on the body or psyche of other human beings for no therapeutic purpose but rather for cultural or socio-conventional motives and which have harmful consequences on the health and rights of the victims.'[49] Although this definition is problematic in that it doesn't recognise the role of women as participants and gatekeepers of these harmful traditions and cultural practices, this definition shows an unequal relationship of sexes that serves as the cornerstone of these harmful practices. This thesis presents an interrogation into Lobola, a tradition widely practised by African communities, and the international community's approach to classifying the practice in human rights terms.

The CEDAW Committee, in its Concluding Observations to Kenya, Zambia, Uganda and Zimbabwe, respectively, has continued to express concern over the persistence of harmful traditional and cultural practices that affect women. In response to state party periodic report submissions, the Committee consistently reiterated that Lobola (also known as 'bride price') is a harmful practice that aggravates discrimination against women.[50] These Concluding Observations ushered in an expanded narrative on harmful traditional practices that disproportionately affect women and thus promote gender-based discrimination. Lobola is a traditional practice held in high regard[51] in many cultures in Africa and worldwide in its different manifestations. Along with other harmful practices identified below, this practice has received widespread criticism as acts of discrimination and forms of violence against women.[52] The globally expanded list of harmful practices includes female genital mutilation (FGM), wife

[48] Ambreena S Manji 'Imagining women's legal world: Towards a feminist theory of legal pluralism in Africa' (994) *Social and Legal Studies* 8 at 434.
[49] Morissanda Kouyate 'Harmful traditional practices against women and legislation' (2009) United Nations Division for the Advancement of Women: Expert group meeting on good practices in legislation to address harmful practices against women EGM/GPLHP/2009/EP.07.
[50] CEDAW 'Concluding observations of the Committee on the Elimination of Discrimination against Women: Zimbabwe' (2012) *CEDAW/C/ZWE/CO/2-5* paras 21, 37.
[51] Ngema op cit note **Error! Bookmark not defined.** at 37.
[52] See generally the CEDAW Committee's concluding observations to Zimbabwe, Zambia, Uganda and Kenya.

inheritance and virginity testing, all discriminatory practices that have been universally recognised as forms of VAW and are now illegal in some countries/jurisdictions. As international standards evolve to include previously accepted cultural practices as forms of discrimination and violence against women, the practice of Lobola deserves further inquiry.

In an era where human rights are a pinnacle of democracy and state survival, states are increasingly ratifying international instruments on human rights.[53] However, it is argued that states ratify human rights instruments, not because they see the value of preserving them, but merely to tick off their compliance with standards set by the international community to receive acceptance and capital.[54] To date, 189 state parties have ratified CEDAW.[55] However, almost half of these state parties entered reservations to the treaty.[56] Banda argues that the number of reservations to the CEDAW shows the extent to which governments are not committed to upholding women's rights in their fullness.[57] Cook argues that women's rights are not viewed as a state security concern, and therefore this entrenches the disadvantaged position of women.[58] Interestingly, she further argues that states continuously deny violations against women's rights, particularly if, '…the practice has a long history in the cultural or national tradition and is considered to reflect and protect the society's fundamental values.'[59] Governments are concerned with retaining their electoral bases, and thus, any policies that threaten their acceptability by voters are not acted on decisively. Therefore, it can be argued that this is why women's rights violations do not get the adequate state and governance attention they require.

There is a trend of placing human rights in a hierarchy. Women's rights almost always seem to be an after-thought or only considered when other issues have been addressed.[60] For example, the CEDAW Committee in General Recommendation No.35 recognised that 'In

[53] T Evans 'If Democracy: Then Human Rights?' (2001) *Third World Quarterly* Vol 22.
[54] Banda F 'Global Standards: local values' (2003) *International Journal of Law, Policy and the Family* 17 at 5.
[55] United Nations Treaty Depositary Convention on the Elimination of Discrimination Against Women Ratification status available at *https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en*.
[56] Ibid.
[57] Banda (2003) op cit **Error! Bookmark not defined.**
[58] Cook op cit note **Error! Bookmark not defined.** at 127.
[59] Ibid at 128.
[60] Cook op cit note **Error! Bookmark not defined.** at 28.

many States, legislation addressing gender-based violence against women is non-existent, inadequate or poorly implemented.'[61] It is also worth noting that there is a tendency to shy away from addressing violence against women, especially in cultural-traditional spaces. Raising questions on violence against women in cultures is viewed as challenging people's fundamental value systems, norms, and, subsequently, their identity.[62] The United Nations Economic and Social Council (hereafter ECOSOC) first commented on Harmful & Traditional Cultural Practices (hereafter HTP) in 1952. The ECOSOC commented on a resolution from the Commission on the Status of Women calling on states to, '…take immediately all necessary measures with a view to abolishing progressively in the countries and territories under their administration all customs which violate the physical integrity of women, and which thereby violate the dignity and worth of the human person.'[63] During this time, most states in Africa were still under colonial administrations. This comment is attributed to colonial administrators concerned about the 'uncivilised' cultural practices observed in their territories.[64] From this vantage point, any comments on tradition and culture concerning violence against women (hereafter VAW) is viewed as a neo-colonial influence, especially in formerly colonised third world countries. Cook also asserts that justifications of violence against women are usually forwarded as an '…essential element of culture, religion or human nature….'[65] Therefore, by classifying these violations of women's rights as part of culture/tradition or religion, violence against women is then sustained as a 'way of life and women are continuously denied their right to be free from violence.

More recently, in the 2017 Concluding Observations to Kenya, the CEDAW Committee reaffirmed its call from the 2011 Concluding Observations to the state party to take necessary measures to eliminate 'bride price' as it was a harmful traditional practice that should be prohibited.[66] As highlighted earlier, the CEDAW Committee, in its Concluding Observations to Uganda, Zambia and Zimbabwe in 2011, 2019 and 2012 respectively, also

[61] Para 7 General Recommendation No.35 on gender-based violence against women, updating general recommendation No. 19 (July 2017).
[62] Ngema op cit note **Error! Bookmark not defined.** at 37.
[63] Resolution E/RES/445 C [XIV].
[64] Bronwyn Winter, Denise Thompson & Sheila Jeffreys 'The UN Approach to Harmful Traditional Practices' (2002) *International Feminist Journal of Politics* Vol 4:1 pp.72-94.
[65] Cook op cit note **Error! Bookmark not defined.** at 126.
[66] Concluding Observations Kenya at Para 18, 18b.

called the practice of lobola or bride price, a practice that, '…perpetuates discrimination against women.'[67] However, missing from its Concluding Observations to other State parties, including Malawi, Namibia, Nigeria and Swaziland, who have the same traditional practise of bride price, there was no mention or call on states to eliminate the practice. This deliberate or non-deliberate omission of addressing the practice uniformly and calling all states who practice this tradition to take necessary measures to eliminate or prohibit the practice to protect women from violence is evident. This inconsistency raises several concerns and gaps that leave women vulnerable to violence. The SRVAW, in her report to the Human Rights Council, notes that 'if any violence directed at women or experienced by a group that is overwhelmingly female, the violence constitutes a gendered human rights violation.'[68] From this logic, if bride price, according to the CEDAW Committee, is a harmful traditional cultural practice as well as an aggravator of discrimination against women in three countries, why is the Committee not calling on all states to eliminate this practice as it is widespread?

While the law can and should be used as a tool to protect women from violence, in most cases, the law remains silent on critical issues, essentially promoting these violations. Cook argues that violations of women's rights are often unrecognised and underreported, and they often go 'unpunished and unremedied'.[69] Many women and girls are abused and die without realising their rights and protections because these rights are set in non-legally binding provisions, or there are normative gaps that leave women vulnerable to violence and discrimination.[70] According to Manji, women's experiences of the law in third world countries are very different from men's experiences, and she notes that 'the attitude of the state towards women has been at best ambivalent and at worst physically and symbolically coercive.'[71] The policies and laws governing their lives need to be informed by their lived realities. Manji argues that 'African women's lives are far removed from any interactions with state norms…' Therefore, this law becomes of little or no use because their lives are more affected by

[67] Ibid.
[68] UN Human Rights Council (2014) Report of the Special Rapporteur on Violence against Women, Rashida Manjoo UN Doc A/HRC/26/38.
[69] Cook op cit note **Error! Bookmark not defined.** 126.
[70] Ibid.
[71] Manji op cit note **Error! Bookmark not defined.** at 435.

communal norms.[72] In most cases, this juxtaposition is detrimental for women.[73] Thus, any attempt to strengthen the position of women in Africa needs to reconcile the intersecting positions they hold in society, such as their race, class and religion (amongst others)[74] , with the parallel constructions of the different legal regimes that govern their lives.

One such attempt to harmonise women's rights in all areas of life is by removing the public/private dichotomy and recognising that these two spheres are not mutually exclusive. Corker-Appiah, a former member of the CEDAW Committee, commented that, because of the States' acquiescence to the public/private dichotomy, they fail to protect more than half of their citizens, primarily women who experience violence within the private sphere.[75] Any form of oppression of women's rights in the private sphere has repercussions in the public sphere and vice versa. Therefore, women's cultural and traditional lives cannot be separated from their rights as women. From this premise, the global fight towards ending violence and discrimination against women should consider the position of women in society, which is governed by traditional norms and culture, together with their position as civic agents who have certain inalienable rights. It, therefore, becomes essential to look at all aspects of life that inhibit women's realisation of a life free of violence and discrimination, including the private sphere.

In order to position the practice of Lobola in human rights discourse and specifically women's rights, it is essential to discuss what human rights are and their origins. As a body of law, human rights need to be reconciled continuously with emerging societal changes, international legal frameworks, and regimes.[76] More importantly, the endeavour to constantly frame women's rights is important because of the origins of the law itself. Feminist legal scholars argue that there is an inherent male bias in the law, which means that 'the law can never be fully objective, neutral or independent from this bias.[77] Frans Viljoen argues that 'only the explicit and systematic integration of law and the many other relevant disciplines can

[72] Manji (1994) op cit note **Error! Bookmark not defined.** at 434.
[73] Prakashnee Govender The Status of Women Married in Terms of African Customary Law: A study of women's experiences in the Eastern Cape and Western Cape Provinces (1999) National Association of Democratic Lawyers Cape Town.
[74] Fareda Banda 'Women, Law and Human Rights in Southern Africa' (2006) *Journal of Southern African Studies* Volume 32(1) 13-27 at 17.
[75] Dorcas Corker-Appiah 'The CEDAW Convention and Harmful Practices Against Women: The Work of The Cedaw Committee' (2009) Expert Paper at 2.
[76] J Donnelly *Universal Human Rights in Theory and Practice* (2013) Cornell University Press.
[77] Niamh Reilly Women's Human Rights: Seeking gender justice in a globalising age (2009) at 38.

advance our understanding and practice of human rights.'[78] Cook also argues that women's suffering goes largely unseen because 'masculine frames of reference blind society to women's experiences.'[79] It is thus essential to adopt a socio-legal lens within the body of law protecting women from violence and discrimination, especially when defining a particular traditional practice.

It is against this backdrop that this research seeks to interrogate whether the practice of Lobola should be considered universally as a Harmful & Traditional Cultural Practices (HTP) that amounts to a form of violence against women. An HTP is defined as 'forms of violence which have been committed primarily against women and girls in certain communities and societies for so long that they are considered, or presented by perpetrators, as part of accepted cultural practice.'[80] United Nations Children's Fund (UNICEF) also defines HTP quite similarly as 'traditional practices which violate and negatively affect the physical, sexual, psychological well-being, human rights and socio-economic participation of women and children.'[81] Although there is no one standard definition of HTP, the understanding is that it is a form of VAW rooted in cultural and traditional norms and values directed to women as a gendered group. At the International level, CEDAW, as the foremost, legally binding universal women's rights instrument, has gaps that leave women vulnerable. Some weaknesses can also be identified in the Maputo Protocol and are discussed in Chapter 6.

When it comes to women's rights at the national level, states are also reluctant to act decisively.[82] This lack of political will clouds the development of women's rights. For example, the fight for the right to bodily integrity and freedom of choice regarding sexuality for women is addressed as a sexual and reproductive health rights issue and not what it is: the right to choose what to do with one's body as a woman. Window-dressing is a norm in state discourse over women's rights. The argument is 'rephrasing' makes women's rights more palatable for states to act.[83] States continue to make commitments to advancing women's rights through

[78] Franz Viljoen (ed.) Beyond the Law: Multidisciplinary perspectives on human rights (2012) at 3.
[79] Cook op cit note **Error! Bookmark not defined.** at 128.
[80] NHS Scotland at http://www.gbv.scot.nhs.uk/gbv/harmful-traditional-practices.
[81] UNICEF Briefing Note on Harmful Traditional Practices (2015) available at *https://www.unicef.org/ethiopia/Child_Marriage_and_FGM_2015.pdf* accessed on 10th April 2018.
[82] Cook op cit note **Error! Bookmark not defined.**.
[83] UNICEF Briefing note op cit note 81**Error! Bookmark not defined.**.

ratifying international instruments protecting women's rights. However, there is no follow up to these commitments at the domestic level.[84] Therefore, this research aims to highlight that there are critical normative gaps within international and regional women's rights frameworks that leave women vulnerable to different forms of violence. The law is a tool that can be used to influence and shape 'social values and ethos.'[85] States play a fundamental role as they consist of the legislative bodies which possess the power and influence to create law, including enabling the regulation of practices and social values that aggravate, or are in and of themselves, forms of violence against women.

1.4. The Research Question, Aims and Objectives

In this thesis, my main research question is, how is the practice of Lobola harmful to women and what is the current approach undertaken by the CEDAW Committee and its member states to eliminate this practice? This inquiry is against the backdrop of states' responsibilities and the due diligence obligations to fulfil the object and purpose of CEDAW to eliminate gender-based inequality and discrimination. This thesis adopts Heise's Integrated Ecological Framework on Violence Against Women to deconstruct and understand the harmfulness of Lobola through an analysis of its systemic causes and influences.

This research has two main aims. Firstly, the research aims to provide a holistic conception of the harmfulness of Lobola as normative cultural practice in relation to the body of human rights, specifically, frameworks protecting women's right to be free from violence. With diverse cultural, religious and legal meanings, the harmfulness of practice of Lobola deserves scholarly interrogation, especially considering the emerging discourses around decolonised learning and the interrogations of frameworks protecting women's rights. The organic nature of traditional cultural practices and the constantly evolving human rights regime present a challenge to navigating our modern society. Both culture and human rights are organic as both regimes are continually changing due to various influences, including time itself. The difficulty in analysing traditional cultural practices in contemporary society is that the questions that arise usually cover multiple regimes concurrently, including the legal, the

[84] Cook op cit note **Error! Bookmark not defined.** at 127.
[85] Kushal Vibhute & Filipos Aynalem 'Legal Research Methods: teaching Materials' (2009) at 2.

social and sometimes the political and the moral. Furthermore, the research will navigate between two legal regimes: the customary and common laws.

Secondly, the research aims to understand the CEDAW Committee's response to Lobola as a harmful practice and the member states' actions and responses as stipulated by the CEDAW treaty. Stamatopolou raises a fundamental issue regarding the slow responses to addressing women rights issues at the UN and state levels by stating, 'discrimination against women is so embedded in history and tradition that it cannot be tackled with urgency as other human rights concerns.'[86] There is a tendency to deem all things traditional to be backward and oppressive, as noted from Max Weber's writings on modernisation which set modernity and tradition as dichotomies.[87] From this perspective, one can argue that tradition and culture are dichotomous to the modern age when it comes to human rights. The right to culture is entrenched in different international human rights frameworks, including the International Covenant on Economic, Social and Cultural Rights (ICESR) and the Universal Declaration on Human Rights.[88] Traditional cultural practices reflect values and beliefs held by members of a community for periods often spanning generations. Every social grouping in the world has specific traditional cultural practices and beliefs, some of which are beneficial to all members, while others are harmful to a particular group, such as women and children.

The thesis' objectives are to:

a) Critically analyse the harmfulness of the practice of Lobola, including its perceived and lived consequences related to its contribution to violence against women within the institution of marriage. This analysis includes a multifaceted approach to understanding the context and nature of the practice in relation to discourses around modernity, the idea of progress, cultural relativism v. universalism and human rights.

[86] Elisavett Stamatopolou *Women's Rights and the United Nations* (1995) 1st Edition Routledge at 36.
[87] Max Weber *Political Writings* (1994) Cambridge University Press.
[88] Article 15 of ICESR; Article 27 of UDHR.

b) Critically investigate state reporting on Lobola and violence against women to CEDAW in their periodic report and analyse the CEDAW Committee's responses and recommendations.

c) Analyse the current international and regional human rights frameworks on discrimination and violence, in particular, to understand the nature of state obligations to protect women from harmful traditional practices.

d) Finally, to provide recommendations on framing violence against women and African traditional cultural practices, specifically Lobola, within standard-setting mechanisms that promote the elimination of violence against women.

1.5. The Purpose and Significance of the Study

This thesis raises a fundamental inquiry into the harmfulness of the practice of Lobola in a way that highlights the complicated nature of the socio-legal inquiry. Assessing the practice of Lobola and its harmfulness is not a straightforward approach. There are many discourses and contestations around traditional customary practices in Africa and how they affect women disproportionately. These include the cultural relativist vs the universalist debates, the understanding of the origins of human rights, and the functioning of the international human rights systems that further complicate the matter. It is crucial to analyse the practice of Lobola in different African geographical settings from a multi-disciplinary perspective to align the practice within the framework of human rights law. This is to understand what the practice consists of, in both theory and practice. After this understanding has been established, then this thesis will evaluate the effects of Lobola on women's exercise of their right to be free from any form of discrimination and violence. In so doing, this thesis will answer whether the normative practice of Lobola should or should not be universally recognised as a form of violence against women.

There is a need to develop a holistic approach to women's rights, which includes identifying the root causes of violence against women rather than addressing the symptoms of the problem. Despite the strides witnessed in the development of the discourse and legal frameworks around violence against women, there has been a silence around investigating whether the practice of Lobola is an act of violence against women or whether this practice

leaves women vulnerable to violence. There have been several studies on the subject matter of Lobola and how this to practice affects women's realisation of their human rights. This includes Lobola and gender inequality[89]studies, Lobola and the effects of colonial influence, Lobola and its positionality in traditional African culture,[90] and Lobola and VAW, including marital rape.[91] This thesis thus seeks to advance the knowledge and understanding of the relationship between Lobola and harmfulness through critically analysing its relationship with VAW. Additionally, this thesis contributes to the legal inquiry of what the CEDAW Committee, as the body tasked to monitor compliance with the CEDAW treaty and member states, have done thus far in relation to the elimination of Lobola as a harmful practice. This inquiry thus contributes to knowledge concerning Lobola, VAW, International Human Rights Law (IHRL) and domestic legislation, which affect women's day to day lives and their vulnerability to violence.

With the current wave of decolonisation in learning and knowledge production in Africa, it is essential to consider what influence Western scholarship has had on perceptions of various traditional African cultural practices.[92] This thesis thus analyses whether Lobola is inconsistent with the current international and regional normative standards on human rights in general and women's rights specifically. There has been positive progress in the standards promoting and protecting women's rights the world over, with significant strides being witnessed in Africa.[93] This progress has influenced the inquiry into a few traditional cultural practices, such as female

[89] See generally NM Ngema 'Considering the Abolition of Ilobolo: Quo Vadis South Africa?' (2012) *South African Legal Information Institute (SAFLII)*; TS Mwamwenda & LA Monyooe 'Status of Bride wealth in an African Culture' (1997) *The Journal of Social Psychology* No.137:2; NM Ngema 'Considering the abolition of *Ilobolo*: *Quo Vadis* South Africa?' (2012) *South African Legal Information Institute (SAFLII).*

[90] See generally Diane Jeater Marriage, Perversion and Power: The construction of moral discourse in Southern Rhodesia 1894-1930 (1993) Clarendon Press; Adam Kuper Wives for Cattle: Bride wealth and Marriage in Southern Africa (1982) Routledge Keagan Paul Ltd London; Jeffrey Guy Gender Oppression in Southern Africa's Pre-capitalist Societies (1988) University of Natal, Department of African Studies, Local Government Project.

[91] Judith Singleton 'The South African Sexual Offences Act and Local Meanings of Coercion and Consent in Kwazulu Natal: Universal Human Rights?' (2012) *African Studies Review* 55 no. 2; Judith Singleton 'Marital Rape and the Law: The Condition of Black Township Women in South Africa's Democracy' in *Marital Rape: Consent, Marriage, and Social Change in Global Context* ed. Kersti Yllö and M Gabriela Torres (2016) Oxford; New York: Oxford University Press.

[92] See Heleta S 'Decolonisation of higher education: Dismantling epistemic violence and Eurocentrism in South Africa' (2016) *Transformation in Higher Education* Vol 1(1) for a perspective on the importance of decolonizing education.

[93] These developments include the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, the Solemn Declaration on Gender Equality in Africa (SDGEA), Special Rapporteur on Women, SADC Gender Unit, SADC Gender Policy only to name a few.

genital mutilation, which have now been recognised as having harmful effects on women's health and other profound consequences.[94] From this vantage point, different cultural practices should be interrogated by looking at the extent to which they qualify as being harmful traditional practices. Do they constitute a form of violence against women, or do they aggravate this violence?

Additionally, researching whether the cultural practice of Lobola is both an HTP and a form of violence against women is a critical and timeous endeavour. This is because the standard-setting mechanisms on violence against women have been interrogated. Most scholars and activists have found no specific and legally binding tool in international law protecting women from violence.[95] The normative gaps in the standard-setting frameworks for protecting women from violence need to be interrogated further and applied effectively against harmful traditional practices that constitute a form of violence. In 2017, the current Special Rapporteur on Violence Against Women, its causes and consequences called on stakeholders to make submissions commenting on the extent to the normative gaps in international frameworks affect women's vulnerability to violence.[96] This effort is a move to continue the discussion and debate around the questions raised by the former rapporteur in her 2015 report to the General Assembly on '*Normativity without legality'* in frameworks protecting women's right to be free from all forms of violence.[97] There are also current inquiries into developing a self-standing treaty on VAW in Africa.[98] This research thus provides a holistic investigation of the harmfulness of the practice of Lobola and how it contributes to the violence women suffer in their lifetime.

To answer the relevant questions posed by this thesis, this research also discusses how the idea of progress and modernity influences the current human rights discourse by examining

[94] CEDAW General Recommendation No. 14 on Female Circumcision (1990).
[95] Manjoo op cit note **Error! Bookmark not defined.**; Addendum to the Human Right Council Thematic report of the Special Rapporteur on Violence, its Causes and Consequences (A/HRC/29/27).
[96] Report of the Special Rapporteur on violence against women, its causes and consequences on the adequacy of the international legal framework on violence against women A/72/34.
[97] Rashida Manjoo 'Normative Developments on Violence Against Women in the United Nations System' in Rashida Manjoo & Jackie Jones (eds) *The Legal Protection of Women from Violence Normative Gaps in International Law* (2018) Routledge New York.
[98] R Manjoo R Nekura 'Does Africa need a regional treaty on violence against women? A comparative analysis of normative standards in three regional human rights systems' in N Luwaya, R Manjoo, J Omar *Violence Against Women: Law Policy and Practice* (2020) Juta Cape Town.

whether these human rights are universal and of western origin and how traditional practices such as Lobola fit into the discourse. In this thesis, I adopt the naturalist school of thought on human rights. The naturalist school of thought attests that human rights are natural, and all men are entitled to them from birth.[99] Human rights at their core are absolute and universal as they are fundamental to life itself.[100] Understanding human rights as being natural is important in strengthening our understanding of human rights as being non-discriminatory. Concerning women's rights, this universality is also vital because grounding women's rights as universal means that all women are entitled to a life free from discrimination, violence and prejudice. Even though there are differences in communities globally, the idea of human rights is a unifying feature for humanity. Donnelly emphasises that once we correctly understand the nature of universality of human rights, we will also understand that there is room for national, regional and cultural particularity.[101]

As mentioned previously, customary law and civil law (including constitutional law) do not enjoy the same standing with the former as subordinate to the latter.[102] The normative practice of Lobola falls under the purview of customary law. Based on its status and implementation, it is clear that Lobola has received much criticism.[103] In current discourse, harmful traditional practices include female genital mutilation (FGM), forced feeding of women, arranged marriages and child marriage, among other emerging practices such as breast ironing.[104] Therefore, it is critical to discuss how the nuances of human rights, historical, socio-cultural and political discourses align with a woman's right to be free from violence, particularly looking at the practice of Lobola. Furthermore, to understand the obligations of both the member states of CEDAW and the CEDAW Committee, it is critical to provide recommendations on solutions that ensure women's lives are free from discrimination and violence.

[99] M Benedicte-Dembour 'What are human rights: Four schools of thought' (2010) *Human Rights Quarterly by The Johns Hopkins University Press* Vol 32 (1) pp. 1-20 at 2.
[100] Ibid.
[101] J Donnelly 'The relative universality of human rights' (2007) *Human Rights Quarterly* Vol 29 (2) pp. 281-306 at 281.
[102] Chuma Himonga & Craig Bosch 'The Application of African Customary Law under the Constitution of South Africa: Problems solved or just beginning?' (2000) *South African Law Journal* 117 at 309.
[103] Ngema (2012) op cit note **Error! Bookmark not defined.**.
[104] Kouyate (2009) op cit note 49.

Using Heise's Ecological Framework on VAW, the findings show a positive correlation between Lobola and the violence women face in marriage and divorce. This theoretical analysis also establishes that the practice of Lobola itself does not present as a form of violence against women - but because of the perceptions, beliefs, and power systems it creates, the practice becomes an aggravator of this violence. The analysis shows that women experience the practice's harmfulness by creating rigid gender roles, skewed beliefs of entitlement and ownership of women's lives and bodies, and asymmetrical power relations that influence VAW. The legal test includes a case study approach to understand the international, regional and domestic obligations of Zimbabwe, Zambia, Kenya and Uganda to protect women from inequality, discrimination and violence imposed by traditional practices and customs. From these four case studies, the findings include that Lobola is a requirement to recognise and register a customary marriage in all four states. This means that legally, Lobola is recognised as a legitimate requirement for a marriage to be recognised and registered. I argue that the CEDAW Committee has done very little to educate, sensitise and provide recommendations to states detailing the harmfulness of Lobola and the steps they can take to eliminate this practice. I also argue that the current legally-binding frameworks on women's rights do not expressly address VAW as a human rights violation in and of itself and that these normative gaps compromise women's legal protections from multiple forms of violence such as those emanating from traditional practices and/customs.

1.6. Methodology

Due to the nature and questions within this thesis, this inquiry is a thematic socio-legal one. Thus it lends itself to promoting the understanding of traditional customary practices in their natural contexts to provide a holistic basis for the critical legal analysis. Firstly, it is important to contextualise the practice of Lobola to understand both the nature and customs of this practice. Furthermore, the topic of study is an interdisciplinary inquiry rooted in legal and social questions. Interdisciplinary research is "… a mode of research in which teams or individuals that integrates information, data, techniques, tools, perspectives, concepts, and theories from two or more disciplines or bodies of specialised knowledge to advance fundamental understanding or to solve problems whose solutions are beyond the scope of a

single discipline or area of research practice."[105] This method allows an in-depth analysis of the practice of Lobola as part of the cultural normative against the human rights normative standards.

This research poses questions of a socio-legal nature, therefore, interdisciplinary research will is adopted as a tool to underpin the relevant theoretical approaches adopted by this thesis. The research will not merely apply the concepts and theories acquired from different disciplines, including sociology, anthropology, political science and law, to the issue of VAW and the practice of Lobola. The research will also undertake a process of theoretical particularity based upon the norms that define the relevant societies in the countries of study. This research also intends to provide an inter-disciplinary approach to specific legal questions and determine how these different disciplines can be merged to develop new ways of conceptualising the relationship between violence against women and culture.

The research approach is desk-based. The primary sources of evidence to be used in this study include publicly available information from relevant human rights non-governmental organisations, state reports to CEDAW, CEDAW Concluding Observations, position papers, expert comments, and case law. Secondary data in the form of books, journals, scholarly articles and internet sources will be consulted.

1.7. Limitations of the study

This thesis presents a thematic inquiry into the practice of Lobola to understand its position as a harmful traditional cultural practice that influences VAW in marriage. As elaborated in the methodology and considering the nature of the questions of this thesis, an interdisciplinary approach is adopted to analyse and understand this relationship. Furthermore, a socio-legal inquiry is important to provide a robust analysis of the practice itself, its consequences for women in marriage, and the legal position of this practice in international and regional human rights frameworks specific to women. In this thesis, women are defined based on their sex, and this is because this identification also influences the socio-cultural expectations of Lobola in their family and community. This thesis focuses on women who are considered eligible for

[105] S Menken M Keestra *An introduction to interdisciplinary research: theory and practice* (2016) Amsterdam University Press Amsterdam at 31.

marriage, 18 years or older. An inquiry into Lobola and child marriages is a more profound and separate inquiry outside the scope and objectives of this thesis.

Additionally, to answer the questions of this thesis as highlighted in section 1.4 above, this thesis seeks to understand the position adopted by the CEDAW Committee on Lobola as a harmful practice by interrogating the CEDAW framework‘s interpretation and inadequacy in identifying as well as setting standards for women to be protected from violence. The thesis, therefore, does not seek to make a broad inquiry into the numerous human rights frameworks on discrimination and violence.

Finally, because of the limitations of word count and the robust nature of human rights frameworks that include provisions specific to women, this inquiry focuses on the international and regional human rights frameworks that specifically address violence against women. The scope of the inquiry is narrowed to provide a robust and critical analysis of these frameworks at these levels. The recommendations provided in this thesis also reflect the findings emanating from the analyses at the regional and international levels only. They do not include any sub-regional frameworks or analysis.

1.8. Outline of the Thesis

Chapter 1: Introduction

This chapter sets the basis of my inquiry and interest in the subject of Lobola and its position as a harmful traditional practice. Understanding the harmfulness of this practice is essential to set the foundations to understand the CEDAW Committee’s approach and the state parties obligations to eliminate this practice in Africa. The problem statement, research questions, aims and objectives, methodology, and the significance of the study are articulated. The thesis seeks to contribute to already existing knowledge around the practice of Lobola by stating the importance of an interdisciplinary and multifaceted approach to understanding cultural practices and their relation to harmfulness. I also draw from political and social science theories to show this relationship and the complexities around such an inquiry.

Chapter 2: Lobola as a Cultural Practice

To understand the complexities of examining culture and the practices thereof, chapter 2 of this thesis analyses the practice of Lobola. This chapter outlines the basis of the inquiry to unpack what the practice is and how it is carried out. The Shona cultural practice of Lobola (*roora*) is used as an example to illustrate the nuances and intricacies surrounding the actual practice itself, including the forms of payment, the ceremonial rites and the individuals involved. This chapter also reviews the current literature on Lobola and culture. It includes a critical analysis of the existing scholarship on violence against women and the cultural practice of Lobola, including an analysis of the positive and negative views of Lobola as part of a cultural normative system. Additionally, this chapter delves into the legal and socio-cultural normative debate to show how norms are formed, diffused and practiced over time. This chapter aims to provide the background of the practice of Lobola and analyse how this practice exists in an ecosystem influenced by a myriad of factors such as political histories, globalisation, modernity and socio-economic developments.

Chapter 3: Understanding the hybridity of culture against the insider and outsider's gazes

This chapter focuses on the evolution of the practice documented over time. The aim is to provide a holistic inquiry into the practice, including its hybridity, manifestations and complexities. I argue that several influences on the practice of Lobola should be considered in its appraisal as a harmful traditional practice. In this chapter, I delve into the debate of the insider gaze vs outsider gaze. This is because there has been much attention paid to the subject matter. Some of these insights and studies come from Western or non-African scholars who are essentially 'outsiders' as they do not have the experience of the culture or an understanding of the nuances around African marriages. This debate also problematises the language used to describe traditional practices such as Lobola, translated to bridewealth.

Chapter 4: Lobola, Human Rights and Violence Against Women

This chapter tackles the theoretical analysis of the practice of Lobola to answer the question of how it is harmful to women and thus becomes a form of VAW. This chapter provides a technical inquiry into the harmfulness of Lobola. It delves into a critical analysis of whether Lobola is a practice that influences VAW or amounts to VAW in and of itself. I adapt Heise's

Integrated Ecological Framework (Heise's framework) on VAW, which provides a valuable tool to analyse and deconstruct the systemic causes and influences of VAW. Heise's framework is adopted to analyse how certain cultural practices at the macro systemic level may relate to and influence VAW practices. To conduct this test using Heise's framework, this thesis uses available literature on previously conducted focus group discussions on experiences, opinions and perceptions of Lobola by young people and adults. Using available literature and research enables us to understand how the practice takes place and how participants opinions, perceptions and beliefs about the practice influence and legitimise VAW. Addressing the questions of harmfulness provides the basis for understanding international, regional and state legislative bodies' responsibilities to eliminate the practice.

Chapter 5: **Analysing the status of VAW in International Human Rights Law and the approach of the CEDAW Committee**

Chapter 5 focuses on providing an in-depth analysis of the evolution of the prohibition of VAW as an international human rights norm. A review of the normative landscape concerning VAW is vital to understand the standards of protection and the nature of state obligations that stem from their international human rights commitments. Additionally, a review of the CEDAW Committee's work and jurisprudence on VAW outlines the Committee's understanding of VAW and how they have made decisions on cases concerning VAW and or VAW and culture. This chapter seeks to understand the international women's rights normative frameworks and the progress made thus far concerning VAW.

Chapter 6: Closer to home: The regional normative developments on VAW

Chapter 6 provides an in-depth analysis of the regional human rights normative frameworks on VAW and women's rights in general. This discussion aims to examine the adequacy of these frameworks to protect women from multiple and intersecting forms of violence they may suffer in their lifetime. By understanding the prohibition of VAW as a normative standard across regional human rights bodies, this chapter seeks to understand the mechanisms available for justice and redress for women who suffer from the violence that emanates from culture and its inherent norms and practices at the regional level. This discussion will also help identify the

normative gaps that leave women vulnerable to suffering violence and death at this level to provide a basis for the recommendations in Chapter 8.

Chapter 7: **The Country Case Analysis**

This chapter provides an audit of the state reporting under CEDAW. This inquiry aims to understand how Zimbabwe, Zambia, Kenya and Uganda have reported to the CEDAW Committee on Lobola and what these states have done to respond to the Committees Concluding Observations that urge the states to take steps to eliminate the practice of Lobola. In this case, a short review of the marriage laws, both civil and customary laws, is presented to position the practice, whether it is a legal requirement for marriage or not, and the nuances of how this practice influences marriage, custody and inheritance rights of women. Furthermore, because these states are also party to the Maputo Protocol, a short analysis of their periodic reports under the Protocol will be provided to understand whether there has been any recommendations made on the thematic inquiry of Lobola under the principal African women's rights treaty reporting. Finally, this chapter seeks to understand how the CEDAW Committee has approached the subject of Lobola in its Concluding Observations to state parties, including their recommendations to eliminate this practice.

Chapter 8: **Conclusion and Recommendations**

The concluding chapter will provide conclusions to the findings of the research. The chapter will also offer recommendations at three levels; the international, regional and national levels of law-making and standard-setting. These recommendations are based on the premise that the law is a powerful tool and can effectively protect and provide justice for crimes of violence perpetrated against women.

CHAPTER 2

Lobola as a Cultural Practice

"… *when it comes to examining how female agency is restricted by cultural practices some fail to see (and others gleefully celebrate) how women's bodies and voices are colonies taxed by male sovereignty*." - J C Zvobgo[106]

Introduction

Lobola is one of the oldest cultural normative practices in Africa. It has managed to survive through decades of Western imperial colonial influence, which inadvertently brought about the distortion and mutation of African traditions, norm systems and life in general.[107] Lobola is also known as *roora* in Shona culture, *Bohali* in Sotho culture, *lobolo* in Zulu culture, *Rubu Dinar* in Hausa, *Inkwano* in Kinyarwanda, *Owo Ori* in Yoruba and *Mahari* in KiSwahili. This diverse translation of the same practice in several languages from different cultures shows how widespread and influential this practice is in Africa. Ngema argues that African cultures and identities continue to suffer the 'perennial threat' of extinction or elimination under the constant move toward universal culture and morality.[108] In this regard, as part of the cultural normative, African traditional cultural practices are not spared of the threat of extinction.

At its most basic, Lobola is a component of the customary process that joins two individuals in a marriage. Mofokeng identifies Lobola as the main feature of customary marriage recognisable under customary and civil law in some jurisdictions.[109] It occurs as part of a series of ceremonies and traditions that lead to marriage. The symbolic function of Lobola is to signify the union of two individuals as husband and wife, and in most cultures, it is the basis of recognising a marriage.[110] In short, lobola functions as a process to culturally validate a marriage or union in African societies.[111] Kuper notes that the enduring nature of the practice of Lobola and its significant cultural function as an institution has managed to rival

[106] C J Zvobgo 'Aspects of interaction between Christianity and African culture in colonial Zimbabwe, 1893-1934' (1986) *Zambezia* Vol XIII (i).
[107] Adam Kuper *Wives for Cattle: Bride wealth and Marriage in Southern Africa* (1982) Routledge & Kegan Paul Ltd London at 3; Dan K Kaye Florence Mirembe Anna Mia Ekstrom, Grace Bantebya Kyomuhendo & Annika Johansson 'Implications of bride price on domestic violence and reproductive health in Wakiso District, Uganda' (2005) *African Health Sciences* Vol.5 No. 4 at 300.
[108] NM Ngema 'Considering the abolition of *Ilobolo*: *Quo Vadis* South Africa?' (2012) *South African Legal Information Institute (SAFLII)* at 31.
[109] Lesala L Mofokeng 'The lobolo agreement as the "silent" pre-requisite for the validity of a customary marriage in terms of the Recognition of Customary Marriages Act' (2003) at 278.
[110] Nicola Ansell 'Because it is our Culture! Renegotiating the meaning of lobola in Southern African Secondary Schools' (2001) *Journal of Southern African Studies Volume* 27 (4) at 697.
[111] Professor Gill Hague Dr Ravi Thiara and MIFUMI *Bride-Price, Poverty and Domestic Violence in Uganda* (2009) MIFUMI Uganda Violence Against Women Research Group, University of Bristol, UK Centre for the Study of Safety and Well-being, University of Warwick, UK at 4; Linguère Mously Mbaye & Natascha Wagner 'Bride Price and Fertility Decisions: Evidence from Rural Senegal' (2017) *The Journal of Development Studies* Vol. 53 No. 6 pp. 891–910 at 891.

revolutionary exigencies because it is highly durable and adaptable.[112] Thus the long history of Lobola and its endurance over time in African societies shows its status as a powerful norm passed down through generations and across borders.

It is important to note that Lobola is not only a normative practice that is unique to African societies. In Asian communities, dowry is also the practice that constitutes a marriage, and in Arab and Islamic cultures, Mahr is an integral part of the marriage institution.[113] This dowry practice is different from Lobola because it is the bride's family that bears the responsibility of gifting goods and monies to the groom's family.[114] The practice of dowry in Indian cultures has received much attention from both academics and human rights advocates. Dowry is central to influencing violence against women.[115] However, Lobola in Africa has not received the same level of inquiry. Hague, Ravi and Mifumi note that Lobola is '…a neglected area which has attracted relatively little political and policy focus.'[116] It is, therefore, crucial that this thesis interrogates the practice of Lobola in Africa and the extent to which this practice influences VAW directly or indirectly.

This chapter is a contextual and theoretical one. It aims to provide a basic understanding of the subject matter of Lobola through initially defining the practice, including the contestations around the translation of the indigenous definitions of the practice to '*bridewealth or bride price*' or the exchange of '*wives for cattle.'* Secondly, this chapter explains what the practice is and how it is conducted across cultures by highlighting the significant similarities. A case study is drawn of roora in the Shona culture to highlight the intricacies of the practice in a particular culture, thereby providing contextually specific examples for the thesis. A critical discussion on the evolution of the practice follows as it is important to note how the practice has evolved from pre-colonial, colonial and post-colonial eras. This discussion includes the influence of missionary evangelism and the influence thereof as part of imperialism in Africa. By highlighting the mutation of the lobola practice over time, this thesis shows how both time and environmental factors influence both the subjective experiences (insider's gaze) and perceptions (outsider's gaze) of the practice as well as the objective qualifications of the practice in the broader subject matter of this thesis. This pivots the

[112] Kuper op cit note 107 at 3.
[113] Hague Ravi & Mifumi op cit note 111 at 5.
[114] Borah P 'Examining media content: A case study of newspaper coverage of dowry in India 1999-2006' (2008) *Asian Journal of Communication* Vol. 18 No 4 pp 379-395.
[115] Ibid.
[116] Ibid.

discussion around the discourse of language and power, specifically how language negatively or positively influences the perception of different phenomena.

This chapter adopts an interdisciplinary approach. By tapping into the social science discipline, cultural anthropology can help structure our understanding of Lobola and how this practice aggravates violence against women. Understanding the practice of Lobola and its position in society as practised on the ground provides a nuanced inquiry into the subject matter. Cultural phenomena cannot be studied independently as several prevailing societal conditions influence them. In this thesis, the cultural practice of Lobola, a custom and norm, cannot be interrogated solely as a legal problem. An interdisciplinary approach is necessary to answer the questions that this research poses. Regarding examining the position of Lobola and VAW, it is essential to note that culture may create conditions needed for violence, or some aspects of the culture itself may be identified as forms of violence. Galtung notes that culture in its entirety cannot be identified as violent; however, certain aspects of culture can be identified as being violent.[117]

2.1. Defining and Understanding the Practice of Lobola

Lobola is conceptualised differently within different traditions. This practice, also known as bridewealth,[118] can be defined as 'an agreement between the family group of the prospective husband and the family group of the prospective wife that, on or before the marriage ceremony, there would be the transfer of property from the family group of the husband, to the family group of the wife in respect of the marriage.'[119] According to Chigwedere, Lobola is '… the process by which the bride's family receives payment in the form of goods, money and livestock…'[120] Poselt defines Lobola as, '…a custom in which the husband delivers or promises to deliver to the father or family of the bride, stock or other property, in consideration of which the legal custody of the children born of the marriage is vested in their father or his family to the exclusion of the mother's family.'[121] From these definitions, we note that even though the actual practice differs in different ethnic groups and jurisdictions, it can be argued that a core feature of Lobola is that it involves a negotiation between the bride and groom's

[117] Johan Galtung 'Cultural Violence' (1990) *Journal of Peace Research* Vol. 27 No. 3 pp 291-305 at 291.
[118] It is also termed as bride price - this term is highly contested as it is said to prejudice the practice to negative interpretations.
[119] Section 3 (1) (b) of the Recognition of Customary Marriages Act (2000).
[120] Aneeas S Chigwedere *Lobola-the pros and cons* (1982) Books for Africa, Harare.
[121] Cited in Zvobgo C J M *A history of Christian Missions in Zimbabwe* (1996) Mambo Press Gweru.

families with an exchange of monetary or other valuable gifts.[122] The exchange of gifts and money is typically given to the bride's family by the groom's family at an official ceremony. Thus, Lobola has both symbolic and legal significance for the family and individuals involved, and this is where this practice draws its relevance, function, and meaning as part of African culture.

Tylor defines culture as '…a complex whole which includes knowledge, belief, art, morals, law, custom, and any other capabilities and habits acquired by man as a member of society.'[123] Winter, Thompson, and Jeffreys note that a point that emerges from this definition of culture is that culture is an acquired phenomenon that is inevitable.[124] It is where communities draw their identity, kinship, and norms. Culture, in some respects, can be identified as the cornerstone of communities. It creates an 'imagined' sense of commonwealth that binds people together, believing that they are unique in their collective group and shared in the same identity.[125] Culture is organic because it changes and also evolves.

Myers views culture as a way of life of a people indestructible[126], as it continues to exist as long as people live.[127] Culture may be observed at two different levels, the sensory and the structural. The sensory level reflects the surface structures that are susceptible to change, whilst the structural level delves deeper into the system, which is not bound to a specific group and is generative.[128] According to Nobles, the structural level of culture includes philosophical assumptions such as ontology, epistemology, axiology, and cosmology that underpin culture.[129] On the other hand, there are manifestations of the philosophical beliefs of culture at the sensory level, which includes norms, customs, and rituals.[130] At this level, this is where Lobola can be observed. It is a surface manifestation of the structural formations of the family in society at the cultural normative level. Traditional norms evolve due to several extenuating circumstances such as the social, political and economic environments. In an increasingly globalised world,

[122] These may include cows, grain, food items, clothing items, property, etc.
[123]Edward Tylor Primitive Culture: Researches into the Development of mythology, Philosophy, Religion, language, Art, and Custom (1903) John Murray, London.
[124] Bronwyn Winter, Denise Thompson & Sheila Jeffreys 'The UN Approach to Harmful Traditional Practices' (2002) *International Feminist Journal of Politics* Vol 4:1 at 77.
[125] John Breuilly 'Benedict Anderson's Imagined Communities: a symposium' (2016) *Nations and Nationalism* 22 (4) 625–659.
[126] Linda James Myers The Deep Structure of Culture : Relevance of Traditional African Culture in Contemporary Life (2018) Sage Publications, Inc.
[127] Ibid at 72.
[128] Ibid at 73.
[129] Nobles, W 'Extended self: re-thinking the so-called Negro self-concept' in R. Jones (ed.) *Black Psychology* (2nd ed.) (1980) New York: Harper & Row.
[130] Ibid.

prevailing international conditions and norms inevitably play a fundamental role in the evolution of culture and normative practices.[131] Reiter agrees with this assertion by Winter, Thompson, and Jefferys, and he argues that the cultural behaviour of individuals can evolve and deviate from what is perceived as the norm.[132] This argument by Reiter also reinforces the role that individual agency plays in culture, its proliferation and survival.

Anderson identifies the unique position of culture as part of reinforcing the idea of an 'Imagined Community'. He argues that communities that go beyond face to face interactions are, in a sense, imagined.[133] Even though his perspective speaks of political communities regarding nationalism, Anderson's imagined communities' theory can be applied to cultural identity in communities. Anderson compares kinship and religion to nationalism and, drawing on the fact that they all thrive on symbolism,[134] engages our understanding of social cohesion that creates communities through culture. He argues that '… it was through people's newfound ability to conceptualise abstract others as their equals, as metaphorical kinsfolk, that the imagined community of the nation was made possible.'[135]

It is this crucial galvanising peculiarity of culture that enables the creation of the nation as an identity. Lobola plays a fundamental role in culture because it is a symbol of kinship and familial ties.[136] The social function of Lobola will be discussed further in this chapter as the position of this cultural practice and its social functionalism heavily drives its endurance. This thesis draws upon the structural functionalism theory by Spencer and Durkheim to interrogate the function of Lobola and its role in culture. Both anthropologists use the analogy of the human body and its parts to explain how certain social activities or practices serve a function to contribute to the whole.[137] In this regard, certain cultural practices serve a particular social function by contributing to the identity of a group of people.

This thesis looks specifically at the Shona ceremony of roora and how it is conducted. This is because the practice of Lobola greatly varies among different ethnic groups. Thus the Shona ceremonial standard will provide this thesis with a broad and structured understanding

[131] Winter op cit note124.
[132] R. R. Reiter 'Towards an Anthropology of Women' (1975) *Monthly Review Press* London & New York.
[133] Ibid at 630.
[134] Ibid.
[135] Ibid.
[136] Adam Kuper 'Traditions of kinship, marriage and bride wealth in southern Africa' (2016) *Anthropology Southern Africa* Vol. 39 No. 4 267-280 at 275.
[137] Emile Durkheim, Steven Lukes, W D Halls *The Rules of the Sociological Method* (1982) The Free Press: New York.

of the practice. Wahab, Odunsi, and Ajoboye argue that no two cultures can be juxtaposed against each other as identical.[138] This thesis does not presume that the Shona lobola ceremony practice is widely applicable; however, it provides a basic understanding of the practice at a normative level. The purpose is to understand how exactly the ceremony takes place, what it consists of and the exchanges that take place. By looking at the Shona practice, the thesis aims to form some broad basis of the types of behaviour and not the actual contents of the normative culture that will help answer this thesis's questions. Nkosi notes many variations of lobola payments in different cultures depending on ethnic group, religion, and individual families.[139] Thus, it is crucial to understand the ceremonial instance of the practice to understand the meanings, functions, and implications of the practice.

2.2. The Practice of Bride Price/lobola in Africa

Phillips and Morris argue that it is essential to illustrate the dangers of generalisations associated with outlining African customary marriage in a few pages.[140] Generalising traditional African practices as a singular phenomenon potentially risk the inquiry losing an understanding of the unique characteristics, symbolisms, and functions of these practices. When it comes to marriage rituals and specifically Lobola, there are notable differences and diversities amongst different tribes and societies.[141] In other cultures, the actual ceremony of Lobola differs significantly. A study conducted by Women and Law in Southern Africa (WLSA) in seven[142] Southern African countries concluded that Lobola is an enduring cultural practice. Even without a standard universal meaning, it is practised in both patrilineal and matrilineal societies.[143] The practice of Lobola or bride price is widespread in Africa, as most African countries base the marriage contract on bride price payments rather than dowry.[144]

According to Ekong, societies in Africa cannot be viewed as 'static, isolated entities' because, in pre-colonial Africa, large migrations allowed for the diffusion of ideas across

[138] E O Wahab, S O Odunsi, and O Ajiboye 'Causes and Consequences of Rapid Erosion of Cultural Values in a Traditional African Society' (2012) *Journal of Anthropology*.
[139] S Nkosi *Lobola: Black students' perceptions of its role on gender power dynamics* (Unpublished Master's Thesis, University of Witwatersrand, 2011).
[140] Arthur Phillips Henry F Morris 'Marriage Laws in Africa' (2011) *Law Africa Publishing* LTD at 5.
[141] Ibid.
[142] This study was conducted in Lesotho, Zambia, Zimbabwe, Botswana, Malawi, Mozambique and Swaziland.
[143] Women and Law in Southern Africa *Lobola: Its Implications for Women's reproductive rights* (2002) Weaver Press Harare at 12.
[144] L M Mbaye Natascha Wagner 'Bride price and fertility decisions: Evidence from Rural Senegal' (2017) *The Journal of Development Studies* Vol 53 (6) 891-910 at 892.

societies.[145] From this premise, it is essential to look at the practice of Lobola, not as an isolated cultural phenomenon that takes place in a particular society but to understand that this practice is widespread across the continent. This practice is a key component of the marriage contract.[146] It takes place before other marriage ceremonies, whether civil, Christian or customary marriage.[147] Ekong also notes that bridewealth is the most common marriage transaction prevalent in sub-Saharan Africa.[148] Also pointed out in the studies done by Kuper on the bridewealth systems in Swazi, Venda, Tsonga, Lovedu, and Nguni ethnic groups, the practice varies in the manner it is conducted.[149] Heeren et al. agree that the ceremony of Lobola itself differs from region to region and tribe to tribe; however, it follows strict regulations.[150]

A study by Women and Law Southern Africa (WLSA) of seven southern African countries established that more importance is placed on Lobola in patrilineal societies such as Lesotho, Swaziland, Botswana, and Zimbabwe than in matrilineal societies such as Mozambique, Malawi, and Zambia.[151] Lobola plays a social organising function in communities where it is practised to bind families together and determine kinship. Lobola has many features and functions that are similar to various African societies, including the exchange and transfer of goods, the creation of kinship ties, maintaining the social contract, and conferring identity to persons in a community.[152] For illustrative purposes, this thesis will specifically provide an in-depth analysis of the Shona practice of Lobola, also known as roora, to provide an example of the practice in communities.

As a practice that signifies the union of two individuals, usually expected to be male and female, the proceedings of roora are only initiated upon the agreement to marry by the two individuals involved. In Shona culture, this is symbolised by the man and woman going to the woman's *vatete* (who is the sister to the father of the bride). The two exchange items of clothing (also known as *nduma)*. In some cases, a ceremony called *Kushonongora* (loosely translated

[145] Julia Meryl Ekong Bridewealth, Women and Reproduction in Sub-Saharan Africa: A Theoretical Overview (1992) Holos Verlag Bonn at 34.
[146] Ibid at 891.
[147] WLSA op cit note143.
[148] Ekong op cit note 145 at 2.
[149] Adam Kuper Wives for Cattle: Bride wealth and Marriage in Southern Africa (1982) Routledge Keagan Paul Ltd London.
[150] G Anita Heeren John B Jemmot III Joanne C Tyler Sonwabo Tshabe & Zolani Ngwane 'Cattle for wives and extramarital trysts for husbands? Lobola, men and HIV/STD risk behavior in Southern Africa' (2011) *Journal of Human Behaviour in the Social Environment* Vol 21 pp. 73-81 at 74.
[151] Ibid at 8-9.
[152] See generally Ekong (1992), Mbaye & Wagner (2017), Prevost (2017), Diane Jeater *Marriage, Perversion and Power: The construction of moral discourse in Southern Rhodesia 1894-1930* (1993) Clarendon Press.

as unveiling) takes place whereby the bride visits her future in-laws' home and shares a meal with them. This is an introduction of the woman into the future husband's family. Both these ceremonies symbolise an engagement as in the western culture when the groom gives his bride a ring. Once this has taken place, the *vatete* must inform the family, including her brother (the bride's father), of his daughter's intention to marry. This initiates the process of negotiating a date for the roora ceremony to take place at the bride's family's homestead. This initial process shows the important role the *vatete* plays as the family's matriarch, who ensure the bride is consenting to, marriage is noted. This is because if the bride agrees to exchange a personal gift (*nduma)* in the presence of her *vatete* (who culturally acts as the family confidante to her brother's children), she is consenting to marriage.[153] It is also important to note that this engagement, although not formal, cannot be broken without good reason. It can be challenged in a traditional court.[154]

Heeren et al. note that at this stage, the maternal uncles and paternal aunts of the family are involved in setting up the necessary arrangements for the roora ceremony to take place.[155] Although they are part of the negotiation procedures, the bride's father and the older men in the bride's paternal family usually negotiate the price.[156] On the day of the ceremony, the groom is expected to bring his relatives and mediator (*Munyai)* to negotiate on his behalf. In Shona culture, the groom is not allowed to enter the bride's home until the negotiations are underway, and it is his *Munyai* who can negotiate on his behalf. It is also important to note that the couple is not part of this negotiation process; their families are acting on their behalf.[157]

According to Gelfand and Bourdillion, who studied the traditional Shona customary marriages, the roora price is mainly divided into two payments, the *Rusambo* and *Roora.*[158] Mangena and Ndlovu also agree that *Roora* and *Rusambo* make up the bulk of the bride price.[159] The Rusambo component of the bride price, which is the most significant amount, is

[153] Dominique Meekers 'The Noble Custom of Roora: The Marriage Practices of the Shona of Zimbabwe' (1993) *Ethnology* Vol 32 No. 1 pp. 35-54 at 37.
[154] Ibid.
[155] Heeren et al op cit note 150 at 74.
[156] Ibid.
[157] Heeren et al op cit note 150 at 74.
[158] M Gelfand African Background: The traditional culture of the Shona speaking people (1965) Cape Town; M Bourdillion The Shona Peoples: An Ethnography of the Contemporary Shona with special reference to the religion (1987) Gweru.
[159] Tendai Mangena & Sambulo Ndlovu 'Implications and complications of bride price payment among the Shona and Ndebele of Zimbabwe' (2013) *International Journal of Asian Social Science* Vol. 3 No. 2 pp 472-481 at 233.

associated with the bride's sexual rights.[160] Traditionally, this part of the bride price was paid with an artefact such as a hoe or a goat. However, in contemporary practice, this is payment in cash.[161] Because the Rusambo cost is inextricably tied to the bride's sexuality, the amount paid reduces significantly if the bride has had children before. According to Bourdillon, virginity's importance and sacred position in Shona culture are influenced by the value placed on it through lobola negotiations.[162] His assertion that the Rusambo is only payable when a bride is a virgin is challenged by Mangena and Ndlovu because, in their study, they found that, even though the bride was not a virgin, Rusambo was still paid as part of roora.[163] Similarly, if the bride is a virgin, then an extra cow (*mombe yechimanda)* or money is added to the Rusambo amount.[164]

By paying the Rusambo, the groom is now free to have sexual relations with his bride. Meekers notes that after the payment of Rusambo, the bride's father generally allows the groom to have sexual intercourse with his daughter when he visits.[165] Bourdillion translates this payment to equal the husband purchasing 'exclusive sexual rights to his wife.[166] He adds that this is why sexual promiscuity amongst women in Shona culture is a punishable offence.[167] The payment of Rusambo and its meaning in the marriage process in Shona marriages is a point of contention as it draws attention to the 'transactional' nature of the practice. This argument will be further discussed as part of the subjective and objective perceptions of the practice in Chapter 3 as part of the insider versus the outsider's gaze of Lobola.

A second part of the bride price, also known as roora, signifies the handing over any custodial claims to the children born of the marriage to the paternal family.[168] According to Murray, roora symbolised the absolute transfer of the bride's procreative capacities to the groom's family.[169] From these perspectives, roora payment, usually in cash, ensured that the children born of the marriage would belong to the groom's family, thus assuming their father's

[160] Mangena & Ndlovu op cit note 159; Meekers op cit note 153 at 38.
[161] Meekers op cit note 153 at 38.
[162] Bourdillon op cit note 158.
[163] Mangena & Ndlovu op cit note 159.
[164] Ibid.
[165] Ibid.
[166] Bourdillon op cit note 158.
[167] Ibid.
[168] Meekers op cit note 153 at 38.
It should be noted that, legally, this aspect of culture is inadmissible in courts of law as custodial considerations are made in the best interests of the child.
[169] C Murray 'The symbolism and politics of Bohali: Household Recruitment and Marriage by Instalment in Lesotho' in E J Krige & J L Comaroff *Essays on Africa Marriage in Southern Africa* (1981) Juta & Co Cape Town at 118.

name and adopting his culture and lineage. Gelfand argues that roora was also a thank you gift for the bride's parents for raising her well.[170] This roora payment is divided into several components, which include *vhuramuromo* (allowing for the groom's family to speak to the bride's family), *matekenyandebvu* (literally translates as tickling the beard - this is for the father of the bride), *pwanyazhowa* (this is the payment for a virgin bride), *mafukidzadumbu* (a gift for the mother for carrying the bride) and *mafidyongo Amai* (groceries for the mother).[171] Mangena and Ndlovu note that in contemporary Shona payments of roora, a fee called *chitupa chinyoro* (loosely translated as a wet certificate) is included, symbolising the bride's educational qualifications.[172] Although all these payments are now primarily made in cash, the cost is calculated in cattle, and the market value of the cattle is converted into a cash equivalent. Upon the end of the negotiations, the couple is now officially recognised as married, and the groom can enter the bride's family's home and have a meal with them as a sign of welcome into the family. In some instances, the groom can spend the night at the bride's family's home since he is now considered part of the family and has also acquired certain rights through his payment of Lobola.[173]

Some payments are made separately from the initial roora ceremony, which includes when the bride first moves to the groom's home or when the couple's first child is born. According to Meekers, this constitutes the bridewealth system as the roora payments are made over a long period instead of a once-off amount.[174] Roora serves both social and economic control functions as there is never a point where the couple can say that they are fully married, and the groom can never claim to have fully cleared his roora debt.[175]

From this discussion of the Shona roora ceremony, it can be argued that marriage confers several rights, which include the rights to married status, exclusive sexual access, kinship, economic services, domestic services, spouse removal and rights over material objects.[176] The bridewealth payments are the instrument through which these rights can be claimed.[177] These rights are conferred to both the spouse and the family groups of each of the

[170] Meekers op cit note 153.
[171] Mangena & Ndlovu op cit note 159 at 476.
[172] Ibid.
[173] Hereen et al op cit note **Error! Bookmark not defined.** at 75.
[174] Meekers op cit note 153 at 37; Bourdillon 1987; J May *Zimbabwean women in Colonial and Customary Law* (1983).
[175] Bourdillon 1987 at 40; May 1983 at 79-80.
[176] Ekong op cit note 145 at 37.
[177] Ibid at 38.

spouses.[178] In this regard, the lobola ceremony has different obligatory steps, and the meanings of those steps differ in specific cultural groups. As noted earlier, the customary practices that make up the roora ceremony differ. However, this section has provided a generic picture of the Shona ceremony reflecting the role of the families and the parties concerned who are getting married. There are two main features of Lobola that cut across cultures - these include lobola payments and its functions (social and economic). These features will be highlighted to provide a general understanding of the practice in Africa.

2.2.1. The Lobola Payments

One distinct similarity in African customary marriages is the lobola payments, which is a payment of goods or services by the groom to the wife's family group.[179] Cattle are the most common form of payment in various African communities instead of Lobola.[180] They are a central feature of the African pre-colonial and post-colonial societies and a symbol of wealth because there is an economy around the exchange and sale of these beasts. According to Kuper, the valued position of cattle in African traditional societies influenced the role that cattle played in marriage contracts.[181] Heeren et al. argue that it was customary to settle Lobola with cattle, of which the number of cattle could be pre-determined by the wife's family.[182] In the Swazi community, for example, the main lobola ceremony comprises the exchange of several cattle that symbolise different meanings.[183] These include a beast to compensate for the procreative function of the woman, a beast for the mother of the bride for nurturing her, a beast for the father for protecting the woman if the marriage fails as well as a beast to establish cordial relations between the two family groups.[184] In the Tsonga communities of Mozambique, cattle are also the mode of payment for bride price.[185] In Zambia, the Ngoni tribes also have a system of bride price payments in cattle; this can be between one and twelve head of cattle.[186]

On the other hand, other valuable goods are also an acceptable form of payment for Lobola. Over time, the monopolisation of cattle for bride price payments changed due to influences from colonisation, the introduction of a monetary economy and forced migration

[178] Ibid.
[179] Phillips & Morris op cit note 140 at 6.
[180] Kuper op cit note 107.
[181] Kuper op cit note 107 at 267.
[182] Heeren et al op cit note **Error! Bookmark not defined.** at 74.
[183] WLSA op cit note 143 at 15. These cattle include *Khomo ea seboko, khomo eaa thari khapa letsoele* and *Ikhomo ea thebe*.
[184] Ibid.
[185] Ibid at 16.
[186] Ibid.

which influenced urbanisation.[187] Currently, lobola payments are made in other goods such as cloth, clothes, food items and money.[188] It is also important to note that different rules govern bride price in death or divorce. In the Tonga community in Zambia, Lobola, known as *ciko*, is refundable upon divorce.[189] The Ngoni also require that Lobola be returned if there are no offspring from the marriage.[190] This requirement to return the bride price shows how fertility is inextricably tied to the payment of Lobola in African societies. In the Tumbuka community in Malawi, the *chuma* refers to the final and principal amount in the lobola process, and it is refundable upon[191] divorce when the wife's 'bad behaviour influences this separation'. Returning and repaying the bride price, depending on certain conditions, arguably affects economically disadvantaged women's ability to leave abusive marriages. This effect will be discussed further in this chapter.

The importance placed on the value of Lobola and its link to a woman's ability to have children and her home-making abilities is visible in many communities. For example, in Tsonga communities, bridewealth is continuously renegotiated and adjusted depending on cases of childlessness, separation, death or divorce.[192] In Senegal, the value of Lobola is guided by the woman's socio-economic characteristics and the strategic behaviour of herself and her parents.[193] In the case of a 'love marriage' and efforts to prevent mistreatment from the husband or his family and reduce the possibility of divorce, the family may request a low value for the bride price.[194]

In some cultures in Zambia and Zimbabwe, the value of the bride price can be influenced by the level of the woman's education. When the prospective bride is highly educated, the lobola price is much higher.[195] These systems created cycles of debt that tie generations of families. As commented by Junod in his study of South African communities' practices of bridewealth, '… lobola debts are ropes which start from the neck of one and go to the neck of the other…others will get drawn into its coils, and the strands become entangled

[187] Ibid.
[188] Phillips & Morris op cit note 140 at 6.
[189] WLSA op cit note 143 at 17.
[190] Ibid.
[191] Ibid.
[192] Kuper op cit note 107 at 275.
[193] Mbaye op cit note 144 at 893.
[194] Ibid.
[195] Ibid.

around you.'[196] In some instances, fathers use the cattle paid to them from their daughter's Lobola to pay off their lobola debts for their wives or settle their male heir's lobola payments.[197]

2.2.2. Functions of Lobola

In many cultures, the practice of Lobola is not just a ceremony that takes place to symbolise union in marriage. Lobola has several cultural and societal functions, and it is one of the oldest cultural normative practices that are still contemporarily relevant and respected in Africa cultures. Ngema argues that this practice has various culturally significant connotations that embody the very substance of African cultures.[198] These functions influence its survival and significance over time. Notably, he argues that African cultural practices continuously fight the 'ubiquitous and perennial' threat of being obliterated out of history.[199] The function of the practice determines the legitimacy of a cultural practice in society.

The functionalist theory helps our understanding of society's components, including culture and how their existence contributes to societal stability. The functionalist theory assumes that 'society operates according to a coherent logic of mutually dependent and reinforcing practices.'[200] These all serve the function of knitting the social fabric and preserving society as a whole.[201] Durkheim argues that to understand social phenomena, it is crucial to analyse the prevalent social facts and the ends they serve.[202] Cultural practices cannot be independently interrogated because they exist in a broader socio-economic and political context. These relationships provide the functions and meanings of the practices. In his explanation of anthropological functionalism, Holmwood gives the example of the Hopi dance carried out by tribes in North America.[203] He notes that 'the Hopi rain dance is not a form of instrumental activity, but a form of expressive activity that reinforces the bonds of solidarity among the group.'[204] Traditional practices do not exist outside of the meaning and functions that they serve in society. Therefore, it is essential to discuss the functions of Lobola in African

[196] Junod H A 'The life of a South Africa' (1912) *Tribe* Vol 1 Neuchatel: Imprimerie Attinger Freres at 271.
[197] Deborah James Money from nothing: Indebtedness and aspiration in South Africa (2015) Stanford University Press Stanford.
[198] Ngema op cit note **Error! Bookmark not defined.** at 31.
[199] Ibid.
[200] Elizabeth Prevost 'On Feminists, Functionalists, and Friends: Lobola and the Gender Politics of Imperial Trusteeship in Interwar Britain' (2017) *The Journal of Modern History* 89, no. 3 562–600.
[201] Ibid.
[202] Emile Durkheim Steven Lukes W D Halls *The Rules of the Sociological Method* (1982) The Free Press: New York.
[203] John Holmwood 'Functionalism and Its Critics' in Austin Harrington (ed.) *Modern Social Theory: An Introduction* (2004) Oxford University Press.
[204] Ibid.

communities to enable us to critique if the practice is a form of VAW and whether it aggravates this violence.

It is essential to consider the communal and familial context within which the practice of Lobola takes place. This is because, as noted above, the practice bears symbolic significance for families. It is also considered the foundation for starting a new family for the individuals getting married. Lobola plays a fundamental role in marriage as it traditionally precedes both customary and civil marriage or any other marriage-related activities. According to Mofokeng, the traditional significance of the practice is that Lobola is considered marriage on its own.[205] In customary law, Lobola can be used to determine the status of a marriage/union if it has been registered and the marriage solemnised by a recognised authority. It should be noted that the interpretations of its significance regarding the recognition of marriage may vary in different jurisdictions. A study conducted by Dlamini on the '*Modern legal significance of* ilobolo *in Zulu society*' noted that most black people recognise Lobola as a crucial foundation of a marriage. Without it, marriage is invalid.[206] As discussed below, the social functions of Lobola derived from this practice have consequences for women, men, and children.

2.2.3. Social functions

One of the most important social functions of Lobola is that it ascribes an identity to both the woman and children. In patrilineal societies, the lobola ceremony symbolises the transfer of a woman's reproductive capacity to the family group of the husband, thereby ascribing the identity of the children borne of the union as a part of their father's family. This also means that children can use their father's family name and are welcomed into that lineage. In this case, Lobola provides legitimacy not only to the union between two individuals but also to the offspring borne out of this union.[207] This social function, Ansell identifies as the identity function of Lobola.[208] An individual borne out of a marriage where Lobola was not paid is considered illegitimate and is not a full member of the paternal community and lineage.[209] It is important to note that the ascription of the father's family name is not unique to cultures that practice lobola. This is generally the standard applicable even in Western marriages. However, in cultures that practice lobola, this practice facilitates this identity function.

[205] Mofokeng op cit note 109 at 279.
[206] CRM Dlamini 'Modern legal significance of ilobolo in Zulu society' (1984) De Jure Vol 17 at 148-149.
[207] Kuper op cit note **Error! Bookmark not defined.** at 22.
[208] Ansell op cit note 110 at 703.
[209] Ibid.

Following the identity function of Lobola, Mangena and Ndlovu also note another role that Lobola has on children in societies that practice lobola. They note that Lobola has both emotional and spiritual connotations.[210] The practice signifies an expression of love between the man and woman and that it also 'cemented ties between the children and their maternal ancestors.'[211] In the Shona culture, this is done symbolically through the payment of a cow known as *mombe yeumai*.[212] In paternalistic cultures, children are believed to share the same blood as their father's family group. They are not considered to be related to the mother's clan unless this relationship is legitimated through the payment of Lobola.[213] Therefore, the amount of Lobola also provides recognition by the families of both the mother and the father. This is also assumed to tie children to their ancestors as they become part of both families as legitimate offspring.

Not only does Lobola confer identity to the children borne of a union, but the practice also has both sexual and social identity functions for women. It symbolises a transition into adulthood for the woman who is getting married.[214] Adulthood in this regard relates to the sexual and social identity of the woman as a wife and daughter-in-law. The exchange of Lobola signals the transition of the female to be a wife, but it also controls the growth of the young men into adulthood.[215] From this perspective, Lobola can be argued to be an arbiter of gender relations in African communities that follow this practice. As discussed by Whitehead and Vaughan, '...it is about individual relations and group relations, it is about authority and labour, above all, it is about property and persons.'[216] Women's identities are tied to their husbands after Lobola is paid. Evidence of this is the changing of one's surname from maiden to their husband's family name. These are essential social functions that need to be considered when analysing this practice, as these have far-reaching consequences for maternal rights and inheritance matters.

Mbaye and Wagner argue that Lobola served in maintaining the social contract between families.[217] This is because Lobola incentivises husbands to stay with their wives as bride price

[210] Mangena & Ndlovu op cit note 159 at 475; Manase Kudzai Chiweshe 'Wives at the Market Place: The Commercialization of Lobola and Commodification of Women's bodies in Zimbabwe' (2016) *The Oriental Anthropologist* Vol 16 No. 2 pp229-243 at 473.
[211] Ibid.
[212] Ibid.
[213] Ibid.
[214] Ansell op cit note 110 at 703.
[215] Jeater op cit note 152 at 14.
[216] Whitehead and Vaughan op cit note at **Error! Bookmark not defined.**.
[217] Mbaye & Wagner op cit note **Error! Bookmark not defined.**.

payments may be forfeited when they divorce their wives without cause.[218] The same applies to women, as discussed earlier, because Lobola can be reclaimed if the woman has been unfaithful in the marriage. This practice is discriminatory and influences violence in marriage suffered by women because if a woman cannot produce a child and, in some cases, a male child, her parents are expected to return the Lobola.[219]

In addition to this practice being an essential part of sexual, social and cultural identity as discussed, Lobola bears some empowering functions for women. Ngema argues that Lobola legitimises marriage and therefore guarantees that a woman will be well-treated by her husband and her husband's family because of the recognition of union conferred by the practice.[220] Levesque agrees with Ngema's assertion on the belief that certain cultural practices allow families to thrive by encouraging cohesion. However, he argues that this belief of the benefits of culture also 'legitimises problematic practices that reinforce abusive practices.'[221] Therefore, it is vital to take a critical approach when analysing what people view as 'beneficial' to women. In most jurisdictions, Lobola in itself is not recognised legally as a marriage. There needs to be a solemnisation of the marriage by the authorities empowered to do so, including chiefs, magistrates, and other registered marriage officers. This marriage is not recognised without this solemnisation and presents barriers to women accessing their maternal and inheritance rights.

2.2.4. Economic Functions

Kuper's analysis of bridewealth in '*Wives for Cattle'* depicts a socio-economy in traditional African society rooted in the exchange of women in marriage for cattle.[222] He notes that cattle were the medium of exchange between families to officiate a union because of the economic significance of cattle in most traditional African cultures.[223] According to this view, Kuper subscribes to the missionaries' view of Lobola as a commercial transaction whereby women were bought and or sold on the market in exchange for cattle.[224] This transaction forms a chain of transactions that would occur not only between the immediate 'wife-givers' and 'wife-takers' but between a series of relatives that he calls 'debtors and creditors who are involved

[218] Ibid.
[219] Mbaye op cit note **Error! Bookmark not defined.** at 892
[220] Ibid at 37.
[221]R J R Levesque *Culture and Family Violence: Fostering Change Through Human Rights Law* (2001) American Psychological Association Washington DC at 4.
[222] See Kuper op cit note 107.
[223] Ibid.
[224] See generally Jeater op cit note **Error! Bookmark not defined.** at 62, Murray op cit note **Error! Bookmark not defined.** at 126.

in the lobola process.[225] He calls this the 'bridewealth account.'[226] By viewing Lobola as an economy, he gives an example of how the man's family contributes to the cattle for the bride price; some of these cattle also come from cattle that had been paid into the family upon the marriage of the man's sisters. This creates an economy based on the exchange of cattle between and amongst family groups that inadvertently sustains a cattle-based class system and agro-based economy.[227]

Apart from the economy and class system created by Lobola, Jeater notes that this practice facilitates an economy based on women's reproductive labour. She makes a distinction between the rights conferred through Lobola not as property rights but rather as 'capacity rights.'[228] Jeater argues that the rights granted by Lobola are 'capacity rights' because it is women's reproductive and productive capacities that are exchanged for bridewealth. This observation is rooted in the economic functions served by Lobola.[229] The argument is that the economic labour-power provided by women in communities is exchanged on the market for cattle or other goods and commodities. When women are married into a family, their labour-power is transferred to the family group of the husband, and Lobola provides a legitimate basis for carrying out this transaction. Ansell has a different view from Jeater, and she notes that Lobola serves to redistribute scarce resources, including cattle, cash, and productive capacities.[230] In the same vein, not only is the woman's productive value commoditised, but her reproductive capabilities are also given to the man as part of marriage. This means that the offspring borne of the marriage can also partake in labour and production.[231]

According to Guy, one of the principal functions of Lobola in pre-capitalist societies was to extend control over not only female labour but also male labour as well.[232] He argues that this practice is viewed as part of a broader wage-based system that emerged with colonialism and introduced a market economy.[233] By introducing a waged-labour economy, men had to work in mines, farms, and other settler-owned businesses to make a living and enable them to pay the lobola price. According to Ansell, by the 19th century, men's labour was

[225] Kuper op cit note 107 at 27.
[226] Ibid at 26.
[227] Kuper op cit note 107 at 103.
[228] Jeater op cit note 152**Error! Bookmark not defined.** at 14.
[229] Ibid.
[230] Ansell op cit note 110 at 699.
[231] Ibid at 700.
[232] Jeffrey Guy *Gender Oppression in Southern Africa's Pre-capitalist Societies* (1988) University of Natal, Department of African Studies, Local Government Project at 33.
[233] Ibid.

of more value than their labour for subsistence living on their lands.[234] Thus selling their work to get the money needed to pay Lobola was an incentive used by the colonial administration to meet their demands for the capitalist economy.

Murray agrees with this assertion, and in his study of migrant labour in Lesotho, he notes that the high price charged for Lobola (*bohali* in Lesotho) served to power the introduction of a capitalist economy.[235] He argued that during colonialism, Lobola was encouraged by the colonial administrators as it meant that young men looking to marry had to access the economy to earn a wage, and this gave employers access to 'able-bodied manpower.'[236] He adds that bridewealth payments reflected a transfer of resources from young male migrants to the old, this is done by 'paying a proportion of his earnings whereby in return he is granted the security of having a rural subsistence base including a wife and children who could continue with subsistence farming and maintaining the rural home.[237] In this regard, Lobola served a function in the broader transmutation of African economies during colonialism. It served as an incentive for young able-bodied men to go and sell their labour for wages to make money to pay for Lobola.

Lastly, Lobola served the function of transferring wealth between families and generations. Through the payment of Lobola, valuable commodities such as cattle and money were exchanged between families as part of this practice. According to Kuper, cattle occupied a prized position in many African societies as they are an important symbol for bridewealth because of the introduction of ploughing with oxen.[238] Besides having agriculturally productive capacities, cattle were a symbol of wealth and a prized food commodity, and they were the primary inheritance goods handed down from generation to generation.

Thus, cattle became a valuable good that powered an entire economy.[239] These material and economic functions of Lobola are essential in our understanding of the practice of Lobola and how the practice has managed to survive through time. The symbolism and functions of the practice contribute to its persistence in the modern-day era.

---

[234] Ansell op cit note 110 at 699.
[235] Colin Murray *Families Divided: The impact of Migrant Labor in Lesotho* (1981) Cambridge University Press Cambridge at 147.
[236] Ibid.
[237] Ibid.
[238] Kuper op cit note 107 at 12.
[239] Ibid at 15.

2.3. The Legal Normative versus the Socio-Cultural Normative

Over time, as any social, political and economic phenomenon, culture evolves through prevailing social, political and economic environments.[240] Any inquiry made into the practice of Lobola cannot be devoid of considerations of its mutation over time. The transformation is influenced by Africa's colonial history and economic, political and legal developments. Several notable changes to the practice include the move from gifts to monetary exchanges, the ceremony being carried out in the broader community context rather than with the immediate family, and other aspects to the negotiation such as payments for an educated bride in contemporary settings. Understanding the evolution of the practice guides the interrogation of the practice as a form of violence against women and how the practice aggravates violence perpetrated against them. Understanding the position of Lobola as a norm in various African cultures and its subsequent evolution requires us to define its role between the socio-cultural normative and the legal normative. This aids in understanding how these social and legal norms develop and influence each other in society.

Although there is some disagreement amongst scholars on what a norm is. A norm is 'a term used to refer to a variety of behaviours and accompanying expectations.'[241] Norms can be classified into three broad categories: formal or informal, personal or collective, and descriptive or prescriptive.[242] There are also other types of norms within these different categories, including social, cultural, professional, moral, religious, political and familial.[243] Norms are fundamentally shaped by our 'complex and cognitive processes that are made up through our learning and reasoning.'[244] Social and cultural norms survive through intergenerational transmission and social network structures, whilst legal norms are written and codified.[245] All norms possess a specific influential power, including legal norms that have more coercive power than others.

[240] L J Myers 'The Deep Structure of Culture: Relevance of Traditional African Culture in Contemporary Life' (1987) *Journal of Black Studies* Vol 18(1) pp.72-85.
[241] Christina Bicchieri The Grammar of Society: The nature and dynamics of social norms (2006) Cambridge University Press Cambridge at 1.
[242] Ibid.
[243] Martha Finnemore 'Are legal norms distinctive?' (2000) *NYU Journal of International Law and Politics* at 699.
[244] Robert X D Hawkins Noha D Goodman & Robert L Goldstone 'The emergence of social norms and conventions' (2019) *Trends in Cognitive Sciences* Vol 23 No 2 at 158.
[245] Ibid.

When looking at behaviours and practices, descriptive and prescriptive norms help us understand why communities have certain beliefs and why they observe and respect certain practices. As a cultural practice, Lobola can be adequately explained using this categorisation. Descriptive norms include fashions and customs that influence people to conform to behaviours prevalent within their communities. Moral norms (also known as prescriptive norms) are shared notions of justice and fairness that present a quality of oughtness which take up injunctive and coercive characteristics.[246] It is essential to consider that these norms are not bound by communities and are less subjective than the descriptive norms.[247] This is the most distinguishing characteristic between legal norms and other types of norms. Finnemore argues that although legal norms are powerful, moral norms can also have the same coercive power if we look at their effects on state behaviour.[248] Examples of the power of moral norms include the fight for suffrage, anti-slavery, anti-apartheid and the human rights movement. These all greatly influenced state action and influenced the creation of legal norms.[249]

Before understanding the evolution of Lobola as a cultural normative phenomenon, it is vital to make a distinction between legal and cultural norms. Firstly, legal norms possess a more coercive nature than cultural norms. Cultural norms are subjective and therefore are only practised and recognised as such. If these norms are not codified under customary law, there is no legal consequence if they are not followed. However, there may be communal consequences. On the other hand, the power of legal norms comes from the fact that deviation from these norms has punitive consequences.[250] Legal norms are powerful because they are binding.[251] Finnemore attributes this unique characteristic of legal norms to their relationship to state power, and she argues that the state possesses coercive powers through its judiciary and policing authorities.[252] However, at the international level, this power is diminished as the legal normative is difficult to enforce because there are no direct consequences for non-compliance outside of coercion through sanctions, diplomatic isolation and military force.[253] This stems from the classical realist assumption that the state is a sovereign and unitary actor. According to this theory, the international political system is anarchic, and no institution has

[246] Ibid.
[247] Ibid.
[248] Finnemore op cit note 243 at 701.
[249] Ibid at 702.
[250] See generally Hawkins et al (2019), Finnemore & Sikkink, Finnemore (1996), Finnemore (2000).
[251] Finnemore op cit note **Error! Bookmark not defined.** at 702.
[252] Ibid.
[253] Ibid at 703.

any power over the state.[254] Thus, the enforcement of legal normative frameworks at the international level depends upon the state's consent to be held accountable.

Finnemore also argues that there is no real distinction between legal norms and other types of norms. She notes that '…there is nothing inherent in or internal to legal norms that makes them uniquely powerful.'[255] All norms have the same influence on behaviour; even non-legal norms also possess the same coercive power as soft law.[256] Some norms that are observed in communities cannot be legally enforced. These norms have coercive control over those who follow them. According to Popitz, a function of social norms is to prescribe human behaviour by eliminating 'arbitrariness' in interactions, 'they ensure people relate to each other with some certainty and permanence.'[257]

However, when we look at international norms, there is a particular tendency to defer to legal norms and a push to legalise these norms. Norm entrepreneurs and social activists seek to codify moral standards into legal normative frameworks that can be used as social justice mechanisms.[258] This shows the power of legal norms compared to all other types of norms because they have legally sanctioned consequences such as incarceration. On the other hand, Popitz argues that social norms have a behavioural prescribing power, and in some cultures, deviation from certain social norms can have negative consequences, including social sanctions.[259] He notes that people know of a norm when the norm carries a sanction for non-compliance.[260] When a negative consequence sanctions a norm violation, the norm is upheld and respected, and it thus follows that when a norm is hesitatingly sanctioned, its authority fades.[261] On the other hand, sanctions may be irrelevant to their decisions to uphold a norm for some people. This is because the normative expectation is a powerful motivating force. After all, people have the fundamental belief that they ought to conform because of other's expectations.[262]

[254] Stephanie Lawson Theories of International Relations: Contending Approaches to World Politics (2015) Polity Press Oxford.
[255] Ibid.
[256] Ibid.
[257] Henrich Popitz 'Social Norms' (2017) *Genocide Studies and Prevention* Vol 11 (2) pp 3-12 at 6.
[258] Ibid at 704.
[259] Popitz op cit note **Error! Bookmark not defined.** at 3; Bicchieri op cit note **Error! Bookmark not defined.** at 15.
[260] Ibid.
[261] Ibid.
[262] Bicchieri op cit note **Error! Bookmark not defined.** at 15.

In his study of the value of international law in ethnic conflict, Ratner concluded that there was no real difference between legal and non-legal norms.[263] Ratner finds that norm entrepreneurs play a fundamental role in how communities adhere to and recognise these norms.[264] This focus on non-state actors in creating new rules and understandings of 'acceptable' behaviour is at the core of the constructivist approach in international relations theories. Constructivists in international relations posit that non-state actors have a powerful influence on how the state acts with other states.[265] Actions create norms, are reinforced by actions and are also violated, stabilised, and questioned by the same actions.[266] The norm creation process by norm entrepreneurs creates stratification between this group and the excluded (those who have to adhere to the norm).[267] This stratification applies to both social and legal norms.

Finnemore and Sikkink, through their interrogation of norm dynamics in the political landscape, provide a sound theoretical lens to conceptualise the evolution of normative practices in cultural societies.[268] Regarding the role norms play in the political change, they argue that 'norms evolve in a patterned life cycle and that different behavioural logics dominate different segments of that life cycle.'[269] In this respect, this thesis argues that the same can be applied to Lobola as a cultural norm. It goes through a normative lifecycle that involves changes in both behaviour and conduct, with particular reference to the changes that took place due to missionary influence, colonialism and subsequently globalisation and the emergence of a legal normative rights regime. Social realities play a fundamental role in influencing behaviours.[270]

Norms provide a benchmark of acceptable behaviour in African cultural societies that practice Lobola as a standard that should be adhered to in marriage unions. In this interrogation of the position of Lobola with regards to its influence on VAW, when norms are highly internalised, they do not invoke any reactions as they become part of normalised behaviour.

---

[263] Steven Ratner 'Does International Law Matter in Preventing Ethnic Conflict?' (2000) *NYU Journal of International Law & Politics* 32 pp at 591.
[264] Ibid.
[265]Lawson op cit note **Error! Bookmark not defined.**.
[266] Popitz op cit note **Error! Bookmark not defined.** at 3.
[267] Ibid at 4.
[268] Martha Finnemore & Kathryn Sikkink 'International norm dynamics and political change' (1998) *International Organization* Vol 50 No 4.
[269] Ibid at 888.
[270] Martha Finnemore 'Norms, culture, and world politics: Insights from sociology's institutionalism' (1996) *The MIT Press* Vol 50 No 2 pp 325-347 at 325.

Hence, it is difficult to be critical of Lobola as it is a highly internalised norm and may be difficult to appraise critically.[271] This argument will be further explored in Chapter 3 of this thesis.

As noted above, social norms are essentially anchored in belief systems that 'embody a quality of oughtness and shared moral assessment.'[272] They are prescriptive and proscriptive of behaviour and ritualistic standards.[273] In this case, Lobola as a norm provides a benchmark for marriage and recognition of a union. Its components also resemble other norms that should be followed to be recognised as married by community members. Outside of prescribing behaviour and social processes, norms also encourage conformity and limit the range of choice in behaviour by imposing constraints.[274] It is important to note that these social and cultural norms do not exist in isolation. The prevailing international norm culture influences them. From this perspective, it can be assumed that traditional cultural practices are also influenced by the general standards of international human rights law. It is essential to recognise that this expanding, deepening and dominant Western culture emphasises Weberian rationality as the single avenue to justice.[275] In his study of legal rationality, Weber argued that the Western 'logically formal' law presented a gapless system that resulted in the lawful ordering of social conduct.[276] According to Finnemore, this type of Weberian justice comprises equality and progress.[277] Weber's view provides for a perspective that the law helps in creating a just and equal society.

According to Finnemore and Sikkink, norms go through three stages in their lifecycle. The first stage is the emergence stage, when the norm comes into being. The second stage is the cascade stage, which involves wide acceptance of the norm. Lastly, the internalisation stage reflects how the norm becomes a part of and a way of life and acceptable behaviour.[278] At this stage, the norm is no longer a matter of 'public debate.'[279] When the norm lifecycle is applied to Lobola, it can be argued that as a norm, Lobola has gone through this lifecycle and has reached the stage of being an accepted cultural normative practice that symbolises union in

[271] Finnemore & Sikkink op cit note **Error! Bookmark not defined.** at 892.
[272] Ibid.
[273] Bicchiere op cit note **Error! Bookmark not defined.** at 42.
[274] Kenneth Waltz *Theory of International Politics* (1979) McGraw Hill at 76.
[275] Finnemore op cit note **Error! Bookmark not defined.** at 325-326.
[276] Sally Ewing 'Formal justice and the spirit of capitalism: Max Weber's sociology of law' (1987) *Law & Society Review* Vol 21 No. 3 pp 487-512 at 488.
[277] Ibid at 326.
[278] Finnemore & Sikkink op cit note **Error! Bookmark not defined.** at 895.
[279] Ibid.

marriage and thus reflecting the internalisation stage. Finnemore and Sikkink argue that this norm lifecycle can also be used to understand the emergence of women's rights regime as the normative system has gone through all three stages of the norm lifecycle whereby women's rights to equality are no longer an issue for debate; instead, they have become a widely accepted way of life in most parts of the world.[280] An interesting characteristic of norms is that they are not devoid of agents; norms have entrepreneurs who actively encourage conformity to the norm as an acceptable form of behaviour in their communities.[281] As noted above, norm entrepreneurs also serve as gatekeepers to norms and play an active role at all stages of the norm life cycle. Lobola is a cultural norm with gatekeepers who have encouraged and kept the practice going from generation to generation. Hence, the practice has managed to survive through modernisation and is still widely practised.

Conclusion

This chapter provided an in-depth analysis of the practice, including the various definitions, such as bridewealth or bride price. These definitions also influence how the practice is viewed and appraised. The chapter also outlined what the lobola ceremony entails through a broader discussion of the practice in Africa and a more detailed outline of the roora ceremony in the Shona culture as a case study. It is vital to understand the practice and how it is defined as a cultural norm. Lobola is practised differently in various cultural communities; however, the fundamental aspects of exchanging valuable commodities including cattle, grains and money remain crucial to identifying this practice. This is the central feature of Lobola.

As one of the oldest cultural normative practices in Africa, Lobola plays an important role in marriages. This practice also has various functions and meanings, which has contributed to why it is still being observed in modern times. Lobola serves both social and economic functions that are pillars of traditional African society. This chapter outlined the social identity functions as one of the fundamental functions of this practice. After Lobola is paid, both the woman and her offspring gain a culturally legitimate identity because it is a practice that ties families together. Another vital function of Lobola is the practice's contribution to an economy through the exchange of wealth, creation of a social class system and the exchange of

[280] Ibid.
[281] Ibid.

productive and reproductive capacities. These functions of Lobola, both positive and negative, provide a basis for answering the questions posed by this thesis.

The practice of Lobola as practised today is very different from the original practice in most communities. The practice has withstood both internal and external influences, which have shaped the way it is carried out and the value demanded to settle it. It is important to note that the significance of this practice is the legitimisation of marriage; without it, marriage and children are viewed as illegitimate in most cultures. Therefore, scrutinising the functions of Lobola was important to show why the practice has endured over time and influence to remain one of the most revered practices in most African societies. The functions of Lobola can be grouped into the social and the economic. The social functions of Lobola include the identity and legitimacy factors for family groups, whilst the economic functions of Lobola indicate a more sophisticated economy that is sustained by this practice. These functions are essential to understand as they will help evaluate the practice as a form of VAW.

Lobola is part of the cultural normative. This means that it is part of an enduring cultural norm system. It is essential to distinguish the position of Lobola as a socio-cultural norm from legal norms and what power these norms have. As a socio-cultural norm, Lobola possesses distinct power in societies that recognise it as forming part of the marriage institution. Without it, marriages are considered illegitimate, and this may affect relationships, identities and even inheritance. On the other hand, there is a distinction of this practice's coercive power from the power that legal norms have. Legal norms are codified, state-sanctioned and have consequences, for example, incarceration. Whilst the failure to pay Lobola may not necessarily result in imprisonment, it may cause social ostracisation or labelling of a person as a pariah. Understanding the relationship between the power of cultural and legal norms is very important because they both influence certain behaviours and practices. Chapter 4 will highlight a broader discussion of the relationship between Lobola and the legality of the practice in the institution of marriage and its recognition.

In conclusion, this chapter provides a basis for evaluating the position of Lobola in society, including what it is, what its functions and meanings are, and its positionality as a respected symbol for marriage in the communities that practice it. In the next chapter, I deconstruct the practice to understand the impact of the subjective versus outsider perspectives of the practice. It is essential to understand the hybridity of Lobola considering language, meanings and power dynamics.

CHAPTER 3

Understanding the hybridity of culture against the insider and outsider's gazes

Introduction

Chapter 2 highlighted the different interpretations of how lobola has changed over time in its ceremonial and functionality aspects. These observations include the form of 'payment', who is involved, the cultural meaning of lobola and its significance, and its influence on marital and societal relations. It should be recognised that because culture is organic, it is susceptible to change over time as it is transmitted from generation to generation. Linton acknowledges that culture is a learned and shared experience identifiable as a society's collection of ideas and habits.[282] Culture must be taught and passed on to the next generation to survive. Lobola falls into the non-material culture, as it is a practice based fundamentally on a belief system concerning marriage.[283] The inevitability of change ensures that society goes through cultural accumulation, cultural reduction, and cultural diffusion.[284] Social change theory posits that cultural change is inevitable. Therefore it is imperative to delve into the changes the culture has withstood and understand the normative practice, juxtaposed against the legal normative frameworks that protect women from all forms of violence.

3. The Evolution of Lobola as a Cultural Norm

It is essential to understand how lobola has evolved to understand the hybrid nature of the practice and how changes in time and external influences have moulded the practice. The discussion below focuses on three aspects of lobola that have evolved: the payment of lobola, the communal nature of the practice, and the influences on class and social power dynamics.

3.1.1. Payment of Lobola

The introduction of a cash economy during colonialism also influenced the way lobola was conducted and exchanged. In pre-colonial times, lobola was made in the form of artefacts or non-monetary tokens such as hoes, goats or cattle.[285] Gelfand notes that lobola was settled by a hoe in pre-colonial times in Shona culture, which acted as a symbol for marriage.[286] In

[282] R Linton *Present World Conditions in Cultural Perspective* (1945) Columbia University Press, New York.
[283] Ibid.
[284] Ibid.
[285] See generally Dominique Meekers 'The Noble Custom of Roora: The Marriage Practices of the Shona of Zimbabwe' (1993) *Ethnology* Vol 32 No. 1 pp. 35-54, M Bourdillion *The Shona Peoples: An Ethnography of the Contemporary Shona with special reference to the religion* (1987) Gweru, Adam Kuper *Wives for Cattle: Bride wealth and Marriage in Southern Africa* (1982) Routledge & Kegan Paul Ltd London, Diane Jeater *Marriage, Perversion and Power: The construction of moral discourse in Southern Rhodesia 1894-1930* (1993) Clarendon Press, Elizabeth Schmidt *Peasants Traders and Wives: Shona women in the history of Zimbabwe, 1870-1939* (1992) Heinman Portsmouth.
[286] M Gelfand African Background: The traditional culture of the Shona speaking people (1965) Cape Town

traditional Shona marriages, *roora* included one or two cows and bags of grain.[287] Janhi notes that suitors would have to work in the bride's family's fields for some time as a form of lobola payment in some cases.[288] Hereen et al. also agree that lobola traditionally was settled by cattle.[289] Chiweshe asserts that before colonisation, bride price included four to five head of cattle and was supplemented by other items such as hoes, blankets, and baskets of grain.[290] Thus it can be argued that traditionally lobola was based on symbolic material goods and not cash transactions. In Kuper's study of the bridewealth system, he argued that lobola was fundamentally based on exchanging pastoral and agricultural products, as this was the economic order at the time.[291] He argues that lobola functions as a system of creating wealth through the exchange and accumulation of cattle. This is because of the value placed on cattle in traditional societies as a symbol of wealth.[292] From this perspective, it can thus be argued that lobola was based more on symbolism than material accumulation in traditional societies.

With the advent of imperial interest and colonisation and the subsequent introduction of a market economy with money as a mode of transaction, lobola payments also changed.[293] Schmidt argues that with European occupation, lobola payments were now made in cash.[294] Furthermore, she argues that the introduction of waged labour played a crucial role in families pushing for cash payments for lobola rather than the traditional forms of settlement.[295] Heeren et al. note that the change and shift in payment to cash may be primarily influenced by urbanisation as some families who live in the city cannot receive cattle at their homesteads. Thus money is more acceptable as a form of payment.[296] Therefore, one of the most notable

[287] Tendai Mangena & Sambulo Ndlovu 'Implications and complications of bride price payment among the Shona and Ndebele of Zimbabwe' (2013) *International Journal of Asian Social Science* Vol. 3 No. 2 pp 472-481 at 475.
[288] Lydia Janhi 'Roora and Marriage' in Killef Clive & Peggy *Shona Customs* (1970) Mambo Press Gweru at 33; Elizabeth Schmidt *Peasants Traders and Wives: Shona women in the history of Zimbabwe, 1870-1939* (1992) Heinman Portsmouth at 113.
[289] G Anita Heeren John B Jemmot III Joanne C Tyler Sonwabo Tshabe & Zolani Ngwane 'Cattle for wives and extramarital trysts for husbands? Lobola, men and HIV/STD risk behavior in Southern Africa' (2011) *Journal of Human Behaviour in the Social Environment* Vol 21 pp. 73-81 at 74.
[290] Manase Kudzai Chiweshe 'Wives at the Market Place: The Commercialization of Lobola and Commodification of Women's bodies in Zimbabwe' (2016) *The Oriental Anthropologist* Vol 16 No. 2 pp229-243 at 235.
[291] Adam Kuper *Wives for Cattle: Bride wealth and Marriage in Southern Africa* (1982) Routledge & Kegan Paul Ltd London at 14.
[292] See Kuper generally.
[293] E Schmidt Peasants Traders and Wives: Shona women in the history of Zimbabwe, 1870-1939 (1992) Heinman Portsmouth.
[294] Schmidt op cit note 293.
[295] Ibid.
[296] Heeren et al op cit note 289 at 74.

changes lobola has withstood is moving from material costs to monetary settlements. Mangena sums this argument by noting that, after imperialist occupation and the introduction of a capitalist economy, money became the modest form of payment of lobola in Shona and Ndebele communities.[297]

3.1.2. Communal Nature of Lobola and Marriage

An essential trait of lobola as practised in pre-colonial settings was the communal nature of the practice.[298] According to Mangena and Ndlovu, the herd of cattle, or lobola payment, was given by the groom's family to the bride's family.[299] The lobola process was between families and not individuals. It was not the groom who had the sole duty to pay lobola. It was his clan's duty to contribute towards the lobola payment. Mangena and Ndlovu also attribute this transition to capitalism as they note that a more individualistic outlook on life took over the more traditional communal view.[300] Capitalism is based on liberalist principles such as the free market and the importance of individual rights over collective rights. Meekers agrees with the communal pre-colonial nature of lobola, and she argues that lobola was a contract between two families and not individuals.[301]

In modern times, the community's control over the marriage of two individuals has dramatically reduced, as the family has little to no say over who an individual marries.[302] Young men have access to the resources they need to fulfil their lobola obligations through waged labour and formal employment or business.[303] Individually working and earning a living has created the freedom to choose when and who to marry for young people as they do not have to rely on the community to assist in paying the bride price. Therefore, the communal involvement and control over marriage in the cultural context have been greatly diminished over time.

3.1.3. Influence on Class and Social Power Dynamics

Jeater notes that the community's dominance in lobola payments created distinct classes in society, whereby the older men in the community possessed economic power over the younger

[297] Mangena & Ndlovu op cit note 287 at 476.
[298] Nicola Ansell 'Because it is our Culture! Renegotiating the meaning of lobola in Southern African Secondary Schools' (2001) *Journal of Southern African Studies Volume* 27 (4) at 703.
[299] Mangena & Ndlovu op cit note 287 at 474.
[300] Mangena & Ndlovu op cit note 287 at 475.
[301] Dominique Meekers 'The Noble Custom of Roora: The Marriage Practices of the Shona of Zimbabwe' (1993) *Ethnology* Vol 32 No. 1 pp. 35-54 at 37.
[302] Ibid.
[303] Kuper op cit note 291 at 14.

men and women in their communities.[304] He termed this 'labour-power.'[305] In Harries' study of kinship systems in Delagoa Bay, he observed that the elders who had control over the bridewealth goods controlled the junior men and women.[306] This control over bridewealth created a class of privilege that allowed control over labour in the community. It would be this class that had the power to arrange unions and pay lobola. However, Jeater disagrees with Harries' argument on class. He notes that the flaw in this assertion is that wealth accumulation changed the power dynamics in bridewealth systems. According to Jeater's argument, using this logic implied by Harries, if a woman managed to accumulate as much cattle and wealth in a community, she could also become part of this class.[307] This is not necessarily accurate because the gender dynamics and the patrilineal nature of African societies also played a fundamental role in the bridewealth system outside of the control over resources.[308]

Kuper argues that in Southern Africa, women in some lineages who had control over cattle or wealth could assist their male relatives in paying for their lobola. In the process, they could 'claim a stake' in the bride's reproductive capacities.[309] In Sotho-Tswana communities, the individual who contributed the most to the payment could decide who would marry the couple's first daughter.[310] From this perspective, the bridewealth system creates a series of transactions not only between the immediate families of the couple but rather throughout the community with whoever contributed towards this.[311] Outside of creating a socio-economic class system, bridewealth systems also influence control over women's labour and reproductive capacities in the community.

3.2. The Influence of the Outsider's Gaze: Language, Perceptions and Power

This thesis is dependent on literature and historical accounts of the practice written from the 'outsider' perspectives to understand the relationship between Lobola and VAW. There is some literature from African scholars on the practice. However, to develop a meaningful inquiry into

[304] Diana Jeater Marriage, Pervasion and Power: The Construction of Moral Discourse in Southern Rhodesia, 1894-1930 (1983) Clarendon Press at 10.
[305] Ibid.
[306] Patrick Harries 'Kinship, Ideology and the nature of Pre-Colonial Labor Migration' in Marks and Rathbone (eds.) *Industrialization and social change* (1982) London.
[307] Jeater op cit note 304 at 10-11.
[308]Ibid.
[309] Kuper op cit note 291 at 27.
[310] Ibid.
[311] Ibid.

the practice, this study requires the interrogation of literature on the subject matter from all perspectives to be utilised. This use of literature in this respect may influence the understanding and qualification of the practice as a form of VAW. Interrogating socio-cultural phenomenon requires an appreciation of the external influencing factors that condition its existence. However, it is also important to question the source of the prevailing and accepted knowledge regarding African phenomena. Several questions arise when interrogating this knowledge including, who created this knowledge, who has the power and means to discuss certain phenomena, who has the authority to discuss these, and who are their ideas, thoughts, and perceptions representing?[312] Africa's colonial history created an enduring legacy where 'outsiders' created knowledge and wrote the continent's history.[313] Some writings about 'African' cultures, norms, practices and other phenomena were distortive of actual lived realities of African people. Ansell notes that even in contemporary education in Southern Africa, the world views espoused by this system reflect the early colonial administration and missionaries' perceptions and beliefs.[314]

It is vital to question the appropriateness and correctness of outsiders' written knowledge and teachings on behalf of the insiders.[315] Clifford points out a crucial consideration about studying cultures. He notes that '… cultural difference is no longer a stable exotic otherness and that self-other relations are matters of power and rhetoric rather than essence. A whole structure of expectations about authenticity in culture and art is thrown in doubt.'[316] This argument succinctly describes the problems that arise when interrogating history and culture. Our knowledge and position on specific issues should be questioned regarding the source and production of this knowledge, including the power relations created by this knowledge.

For women, there is a double distortion of their lived experiences. Their reality faces distortion issues from a foreign 'outsider' view and is also viewed through patriarchal lenses that do not consider the intersectionality of their experiences. Conley and O'Barr posit that 'there is always more at stake in the relationship between questions of gender and language than just a question of literary style; indeed, that style in itself can constitute a powerful

[312] Mahmood Mamdani 'Political Identity, Citizenship and Ethnicity in Post-Colonial Africa' (2005) Keynote address at Arusha Conference on 'New Frontiers of Social Policy'.
[313] Ibid.
[314] Ansell op cit note 298 at 709.
[315] Janet M Powers 'The Outsider's Gaze' in Katherine J Mayberry *Teaching What You're Not: Identity Politics in Higher Education* (1996) New York University Press at 70.
[316] James Clifford *The Predicament of Culture* (1988) Harvard University Press Cambridge at 8.

socialising device'.[317] Powers calls this a 'belated' recognition that women's experiences cannot be blanketed under the overall experiences of culture or as a singularly unique experience for women, without considering that not all women share a similar cultural background.[318] It is important to discuss the impact of language and power and how these affect the perception of the cultural normative in African societies. Language not only has legal and moral implications but can also serve to construct and strengthen gendered systems.[319] To ensure an appropriate response to the issue of VAW and lobola, it becomes essential to understand the impact that stereotyping, labelling, othering and language, and power dynamics, have had on the perception of the practice over time, including its correlation to VAW.

During the 1920s and 1930s, lobola became a topic of interest for the British settlers who ruled the Anglo-colonial territories in Africa.[320] As the British Colonial administrators inquired into African social relations for colonial policymaking, the topic of bridewealth and its relation to slavery was heavily interrogated.[321] Alongside efforts by the League of Nations to abolish all forms of slavery and the early euro-feminist inquiries into African cultures and traditions, lobola became labelled as a form of slavery that should be abolished in the colonies.[322] It can be argued that colonisation brought about a modification of traditional African practices that have survived over time. The Western migration to Africa and the subsequent superimposition of colonial authority on African communities provoked the usurpation of life in many facets, including traditional authority, cultural practices, the economy, and socio-political relations. Due to these influences and changes, it is crucial to show how this has influenced African marriage in general and lobola. These interruptions, interpretations and distortions of the 'African experience' have consequences on how we understand the practices in modern times and how we interrogate these practices with regards to global standards.

Bhabha strongly argues that '…despite the "play" in the colonial system, which is crucial to its exercise of power, colonial discourse produces the colonised as a fixed reality at

[317] John Conley & William O'Barr, *Just Words: Law, Language and Power* (2005) University of Chicago Press.
[318] Powers op cit note 315 at 72.
[319] K L Hoffman D H Demo & J N Edwards 'Physical wife abuse in a non-western society: An integrated theoretica approach' (1994) 56 *Journal of Marriage and the Family* 131-146. At 193.
[320] Elizabeth Prevost 'On Feminists, Functionalists, and Friends: Lobola and the Gender Politics of Imperial Trusteeship in Interwar Britain' (2017) *The Journal of Modern History* 89, no. 3 562–600 at 564.
[321] Ibid.
[322] Ibid.

once an "other" and yet, entirely knowable and visible.'[323] Besides the native's reality becoming a distorted one, this reality was written and interpreted by the coloniser, who always viewed the colonised as 'the other' and thus inferior.[324] This othering strongly manifests itself in the socio-cultural sphere regarding race, ethnicity and traditional practices, amongst other phenomena. It can be argued that when analysing African traditional cultural practices, it is important to critique these practices from an understanding of the distortions and interpretations that have been influenced by colonialism. This includes the subsequent introduction of Western-centric ideologies and religions that had been foreign to African society.

As previously highlighted, Africa's historical progression was distorted by colonialism and the introduction of Christianity through missionary influence.[325] These influences impacted societies' social, economic, and political advancement as colonialism in its entirety signified a relationship of dominance, power, and control. According to Mamdani, the colonial administrators state-engineered socio-cultural, economic and political identities by creating ethnic identities based on perceived differences.[326] He further argues that 'this engineering of political identities did not cease with the end of colonial rule but rather, these ethnic identities have persisted in disrupting the post-colonial state in Africa.'[327] From this perspective, it is impossible to analyse any post-colonial African phenomenon, including traditional practices, as the impact of colonialism persisted long after the colonial flags had fallen. Jeater agrees with the assertion that African socio-cultural identities have withstood transmutation over time. She notes that, when looking at African marriages, one needs to address the problems related to analysing the impact of colonisation on gender identities, amongst other things.[328]

To understand the influence that colonialism and the subsequent decolonial experience had on power, language and the 'modern' understanding of African society in general, Fanon's explanation of these phenomena are applicable. According to Fanon, colonisation and decolonisation themselves were violent.[329] An excerpt from his prime work, '*The Wretched of the Earth,'* explains how the relationship between the colonial masters and the colonised was

[323] Homi K Bhabha 'The Other Question' (1983) *Screen* Volume 24 (6) pp. 18–36.
[324] Ibid.
[325] C J Zvobgo 'Aspects of interaction between Christianity and African culture in colonial Zimbabwe, 1893-1934' (1986) *Zambezia* Vol XIII (i).
[326] Mamdani op cit note 312.
[327] Ibid.
[328] Jeater op cit note 304 at 5.
[329] Frantz Fanon *The Wretched of the Earth* (1963) Grove Press New York at 35.

that of power. The former created an identity for the latter based on their position of power and perceptions. He notes,

"*… the first encounter was marked by violence and their existence together… that is to say the exploitation of the native by the settler … was carried on by dint of a great array of bayonets and cannons. The settler and the native are old acquaintances. In fact, the settler is right when he speaks of knowing "them" well. For it is the settler who has brought the native into existence and who perpetuates his existence*."[330]

The settler, occupying a position of power, gained through violence, ascribed particular identities and language to the cultural normative from their understanding of what these meant and not based on any form of consultation or study. The labelling of lobola as bride price and bridewealth already signifies a transactional act. Identifying the exchange of both material and monetary goods as a financial element identifies the practice as a transaction where the buyer is the male and the female is being sold. These power dynamics greatly influence our understanding of the practice of lobola. It can thus be argued that the perceptions around lobola as a cultural practice are influenced by how it came to be defined by early scholars and missionaries who wrote about the practice. There is some contention about the translation of the practice to be called 'bride price' and 'bridewealth'.[331] The way language around certain cultural normative practices is framed positively and negatively influences how these practices are perceived and critiqued. Understanding gender relations cannot be devoid of the pseudo-constructions of gender identity and experiences affected by colonialism and missionary influences and the rise of capitalism.[332]

Schmidt notes that European observers identified the practice as 'bride buying', which inherently influenced the naming of the practice.[333] Both colonial administrators and missionaries identified the practice as savage and morally reprehensible.[334] In Zvobgo's analysis of Christian missions in Zimbabwe from 1890-1939, he postulates that lobola was a savage practice that hindered conversion to the Christian missionaries.[335] In Lesotho, Christian missions also held the same view on lobola. They viewed it as '… commercial transactions,

[330] Ibid.
[331] Schmidt op cit note 293 at 112.
[332] Schmidt op cit note 293 at 112.
[333] Schmidt op cit note 293 at 113.
[334] Ibid.
[335] C J M Zvobgo A History of Christian Missions in Zimbabwe 1890- 1939 (1996) Mambo Press Gweru at 412.

degrading women as mere chattels.'[336] According to Jeater, missionaries had to report back to their funders on the progress and success of their work, and the number of Christian marriages was an indicator of success.[337] It can be argued that this influenced their negative perception and positioning of lobola as a form of traditional marriage. Additionally, in 1875, The London Missionary Society ruled lobola as an infringement of church law.[338] If communities continued to observe the practice, they would not be drawn to Christian marriages, thus impacting the missionaries' measures of success. Kuper argues that this prohibition survived through the decolonisation process into modern times, whereby the practice is still viewed as a negative norm juxtaposed against the Christian faith.[339]

The Manichean allegory, which depicts the cosmology between morality, goodness, evil and perverse, ostracises traditional African marriages based on lobola.[340] Before missionary influence and occupation, there was no distinction between morality and perversion in the realm of cultural practices such as lobola. However, after the missionaries introduced the Manichean allegory, it can be argued that African communities had no voice in setting the terms of what was considered perverse or morally acceptable. According to Jeater, the Manichean allegory demanded that African systems of sexual behaviour be governed by white control to eliminate perversion and protect the white Europeans from being influenced by this perversion.[341] The practice of lobola was amongst these labelled practices, as bridewealth was seen as a perverse act that demeaned women. Therefore, these interpretations and labelling of lobola as a savage practice have impacted how the practice is viewed and appraised in modern scholarly thought.

Outside of the labelling of the practice, the colonial authorities in some jurisdictions sought to regulate marriage and lobola in African societies legally. For example, in Southern Rhodesia, the colonial administration introduced the Native Marriage Ordinances in 1901 and 1917 (hereafter NMO)[342] and the Native Adultery Punishment Ordinance in 1916.[343] The NMO was designed to regulate native marriages by creating standard enforceable marriage practices

[336] Jeater op cit note 304 at 62.
[337] Ibid at 62-63.
[338] Kuper op cit note 291 at 163.
[339] Ibid.
[340] Ibid.
[341] Ibid.
[342] Native Marriage Ordinance of 1917 N3/17/4/2.
[343] Native Adultery Punishment Ordinance of Southern Rhodesia of 1916 N3/17/2.

based on the British Natives Commissioner's understanding of cultural marriages.[344] Kapell argues that these ordinances served to alter the local Shona population's conceptions of marriage, kinship, and social relations.[345] The 1901 NMO sought to regulate the cost of lobola by setting the highest rate of the bride price at four head of cattle or 20 pounds and imposed a time limit on the payment of lobola to one year.[346] This effectively transformed the practice into a transaction that was not previously considered. As highlighted above, lobola could be settled by hoes or grain, and there were no payment terms. By introducing monetary limits and payment terms, the practice became a capitalist venture whereby women's bodies were sold on the market. 1901, 1916 and 1917 ordinances were some of the first colonial legal influences into the practice of lobola.

It can also be argued that the colonial influence on traditional African cultural practices was primarily driven by the desire to modernise the dark continent.[347] Early missionary expeditions to the mainland were based on the desire to spread the gospel to Africa, a land primarily described as primitive, dark and immoral.[348] As noted by Foucault in his analysis of sexuality in 19th and 20th century Europe, he argues that, during this time, there was a 'centrifugal movement of heterosexual monogamy', and this movement created both socio-cultural and legal constraints to any sexual expressions that were deemed 'non-normative.[349] Lobola was a non-normative phenomenon according to European standards of marriage and morality. Thus, it faced criticism and disdain from colonial administrators and other European social actors and agents.

Drawing from Said's work on '*Orientalism*' also helps us reflect on how the perceptions we have of the cultural normative are a product of colonial influence. It is important to also note that Said's work is based on studies in the East. However, its application is also important to understanding the Western conceptualisation of former colonies of the West. According to Said, the historical discourse is possessed entirely by the coloniser. This is because the unidirectional nature of power allowed them to fetishise and distort the 'Orient's' experience. He calls this a static system of synchronic essentialism and notes,

[344] Kuper op cit note 291 at 44.
[345] Ibid at 45.
[346] See Jeater op cit note 304 at 83.
[347] Ibid.
[348] See generally Fanon, Mamdani.
[349] Michael Foucault *The History of Sexuality: Volume 1, An Introduction* (1978) New York: Vintage at 38.

"Altogether an internally structured archive is built up from the literature that belongs to these experiences. Out of this comes a restricted number of typical encapsulations: the journey, the history, the fable, the stereotype, the polemical confrontation. These are the lens through which the Orient is experienced, and they shape the language, perception, and form the encounter between East and West…the Orient at large vacillates between the Wests' contempt for what is familiar and its shivers of delight in-or fear of-novelty" - Edward Said, 1978[350]

According to Said, the Western conceptualisation of the Orient (native's) traditions and norms is not objective. He argues that the experience of the Orient is influenced by several factors, including fascination, stereotyping, fantasies and myths, which may not necessarily be accurate and correct.[351] The views are from a biased interpretation of the West's encounter with the native, which does not necessarily consider the native's own experience of their own culture, history, and norms. Therefore, from Said's point of view, historical accounts of traditional practices or norms, including history itself, are not entirely objective. Thus, the influence that Western interpretation has had on the practice of lobola cannot be viewed as altogether objective, but rather, there are considerations to be made when one is trying to position the practice and its influence on VAW. This raises fundamental questions on whether that endeavour can be truly objective.

The influence of tradition versus modernity also influences our understanding, perception and critique of African traditional cultural practices. There is a tendency to view culture as traditional, primitive and outdated.[352] This view means that it does not include the traditional when we speak about the 'modern' and/or progressive. As postulated by Nisbet, the idea of progress came into existence in Europe at the time of Europe's transition into the modern period.[353] The modern period, according to Nisbet, was the era of progress. This idea of progress assumes that there is something called unilinear time and that all societies move in a unilinear direction,[354] from primitive to industrial or premodern to modern. This assumption posits that, because time unfolded in one unilinear direction, all societies moved through this unilinear time.[355] The idea of progress theorises that this movement from the premodern to the

[350] Edward Said *Orientalism* (1978) Routledge & Kegan Paul: London at 72.
[351] Ibid.
[352] Robert Nisbet *History of the Idea of Progress* (1980) Heinman.
[353] Ibid.
[354] Ibid.
[355] Ibid.

modern, pre-capitalist to the capitalist is inevitable or inexorable. It says that all societies would transition from premodern to modern. However, the effect of this idea of progress is that, in non-western societies, this theorisation abolished history and distorted indigenous systems and cultures.

When we look at the practice of lobola, it is a practice rooted in culture and therefore based on these assumptions, it has no space to exist in the modern age. Compartmentalising the cultural as traditional and backward impacts our perception of the cultural as negative and thus undesirable. The perception juxtaposes culture against the contemporary world. This is because the traditional is unpleasant and cannot co-exist alongside the modern. Nisbet's idea of progress fails to consider multiple 'modernities' whereby the traditional and/or cultural can exist alongside the contemporary.[356] In this regard, the labelling of lobola as a traditional practice influences the negative connotations that may be ascribed to it, including its relationship to VAW.

3.3. The Insider's Gaze: the Subjective Experience of Lobola

The study of lobola is a cultural phenomenon of interest and a source of controversy to scholars both in the legal and social science disciplines. The legal inquiries have focused on the normative practice and its position in indigenous and customary law.[357] On the other hand, social science scholars have interrogated the practice's significance in communities, how it is practised, and its consequences on women. As discussed earlier, there are viewpoints on lobola as a transaction whereby women are exchanged for cattle, money and other goods.[358] However, this viewpoint has been primarily rejected by Africans as a simplification of what the practice is, what it entails, and its significance in the unique cultural normative settings.[359] The changes in lobola being regarded as a monetary transaction have encouraged the current scholarship on the subject. This is because as the human rights regime progresses, specifically regarding women's rights, this has become one of the central features of the campaign for equality.[360]

[356] S N Eisenstadt 'Multiple Modernities' (2000) *Daedalus* 129 no. 1 pp. 1-29.
[357] L P Vorster MW Prinsloo GJ van Niekerk *Urbanites perceptions of Lobolo: Mamelodi and Atteridgeville* (2000) Centre for Indigenous Law University of South Africa at 1.
[358] See Kuper, Jeater & Ansell.
[359] Vorster et al op cit note 357.
[360] Ibid.

Vorster et al. argue that it is imperative to consider women's perceptions and experiences around lobola to make a rational inquiry into the practice of lobola.[361]

The insider experience is essential because the law and policymaking pre-and -post-independence in Africa never considered women's subjective experiences and perceptions of lobola. The voices of women, when considered, are usually heavily mediated, thereby condensing the arguments for or against the practice.[362] The insider experience is crucial because it allows us to move away from the mythical and prescriptive nuances about lobola towards understanding women's lived experiences. This allows for a critical understanding of how to position lobola within the context of violence against women both as a cause and consequence of this violence. Hence, it is important to highlight women's lived experiences because to exclude their view would be to erase the subjective experience of cultural normative practices and how these same experiences impact their experiences of inequality, discrimination, and violence. By adopting a feminist approach to socio-legal inquiry, the approach demands that the human (women's) experience be at the starting point of understanding any phenomenon.[363] Bartlett argues that the feminist perspective focuses on real-life experiences as the basis of theorising and incorporating the diversity of women's lives which is essential.[364] Women's experiences of culture are important, and thus adopting this theoretical position is crucial.

Women's experiences of violence and inequality occur in both the private and public spheres. However, states lean toward addressing violations in the public sphere rather than those in the private sphere.[365] This inclination stems from the Lockean distinction between the public and private spheres and the state's role to respect the private sphere.[366] This separation influences the dominance of patriarchal influences on women's lives that may manifest as forms of inequality or violence.[367] The classification of the socio-cultural sphere as 'private' leaves women vulnerable to being controlled by men who traditionally have held this sphere, of which the state has no 'power' to dictate.[368] This private sphere dramatically influences

[361] Ibid at 2.
[362] Prevost op cit note 320 at 564.
[363] Gayle Binion 'Human Rights: A Feminist Perspective' (1995) *Human Rights Quarterly* Vol. 17 pp. 509-526 at 512.
[364] Katharine T. Bartlett 'Feminist Legal Methods' (1990) *Harvard Law Review* Vol. 103 at 887.
[365] Binion op cit note 363 at 517.
[366] Ibid.
[367] Ibid at 216.
[368] Ibid.

women's lives because it is the most basic sphere of social conditioning that shapes their lives, including how they access and participate in the economic, political and public environments.[369]

Manjoo critically notes that VAW impedes the realisation of numerous core human rights because it limits women's participation in public and private life.[370] She argues that VAW becomes a barrier to women's realisation of and engagement with citizenship and that violence is a violation of a woman's bodily integrity, liberty and right to life.[371] O'Hare agrees with the assertion of the pervasiveness of violence against women in both the private sphere and the public sphere, and she adds that it is a 'brutal manifestation of women's oppression' in both these spheres.[372] Women who are subjected to violence are denied their inherent dignity, live a life of constant fear and are especially denied the right to live a fulfilling life.

Women occupy different positions in society, and their positions influence their experience of certain phenomena. Moore defines the gendered subject as an individual who occupies multiple positions within discourse and social practice.[373] According to Moore, the concept of subjectivity cannot be viewed as a static concept, as it is important to view gendered experiences, '…as consisting of multiple, possibly contradictory competing discourses.'[374] Women occupy numerous positions as both citizens and subjects in any context, and their positionality influences their vulnerability and experiences of inequality, violence and other forms of discrimination.

Contemporary studies on the effects and perceptions of lobola in African societies tend to be split between the negative and positive consequences of the practice. On the one hand, studies of lobola in Sub-Saharan Africa argue that the practice is an aggravator of the spread of the Human Immunodeficiency Virus (HIV)[375], a loss of sexual freedom and rights thereof,[376]

---

[369] Ibid.
[370] Ibid.
[371] Manjoo R 'The Continuum of Violence Against Women and the Challenges of effective Redress' (2012) *International Human Rights Law Review* 1-29.; Ursula A O'Hare 'Realizing Human Rights for Women' (1999) 21:3 Human Rights Quarterly at 365.
[372] O'Hare op cit note 371 at 364.
[373] Henrietta Moore 'The Problem of Explaining Violence in the Social Sciences' in *Sex and Violence Issues in Representation Experience* (1994) Penelope Harvey & Peter Gow eds.
[374] Ibid.
[375] See generally Charles Wendo 'African women denounce bride price' (2004) *Lancet* Vol 363 at 716; Heeren et al (2011) op cit note 289.
[376] See Dan K Kaye, Florence Mirembe, Anna Mia Ekstrom, Grace Bantebya Kyomuhendo, Annika Johansoon 'Implications of bride price on domestic violence and reproductive health in Wakiso District, Uganda'(2005) *African Health Sciences* Vol 5 No. 4.

marital rape or forced sex,[377] control over reproductive rights,[378] increased inequality and other forms of abuse. On the other hand, some studies reflect the benefits of the practice as one of the remaining essential components of the cultural norms regarding marriage as it reflects respect, familial ties, and lineage.[379] As argued by Ansell, in her study on lobola and its meaning amongst young people in high schools in Lesotho and Zimbabwe, inherent in the discourse on the subject matter are, '…contradictions and spaces for resistance…'[380] There are varying views on the spectrum (positive to negative) regarding actual lived experiences and perceptions of the practice amongst those who practice it generally.

Therefore, it is vital to highlight the subjective experiences of women and lobola, including perceptions and actual lived experiences of women who have had lobola paid for them and African women who have not had lobola paid for them. The aim is to provide a basis for critiquing the practice and its link to VAW. Studies referenced by this thesis include interviews with young high school students (both male and female for whom lobola has not been paid), disabled women (who have had lobola paid and some who have not) and women and men in general (who have had lobola paid for them or paid lobola).

3.3.1. Lobola as an Important Part of 'African' Culture and Identity

In a study[381] by Chireshe and Chireshe of university students' perception of the practice of lobola, 78% of the respondents highlighted that the practice was an important part of their cultural normative heritage.[382] In an earlier survey carried out in Zimbabwe in 1995, 95% of the respondents (women) indicated they supported the practice stating that it should not be abolished.[383] As part of a culture, lobola serves an identity function because it is practised in specific cultural groupings.[384] Lobola plays a fundamental role as a symbolic normative

[377] Esther Mugweni, Stephen Pearson and Mayeh Omar 'Traditional gender roles, forced sex and HIV in Zimbabwean marriages (2012) *Culture, Health and Sexuality* Vol 15 (5) pp 577-590 at 584.
[378] Ibid.
[379] See generally Ansell (2001) op cit note 298; Mangena & Ndlovu (2013) op cit note 287; Heeren et al (2011) op cit note 289.
[380] Ansell op cit note 298 at 714.
[381] This study comprised of 45 (29 females, 16 males) respondents from Great Zimbabwe University who are studying Women and Religion.
[382] E Chireshe, R Chireshe 'Lobola: The perceptions of Great Zimbabwe University Students' (2010) *The Journal of Pan African Studies* Vol 3 No.9 1-11 at 215.
[383] C Getecha J Chipika *Zimbabwe women's voices* (1995) Zimbabwe Women's Resource Centre and Network Harare.
[384] Ansell op cit note 298 at 705.

practice, facilitating marriage and recognising two people's union.[385] It becomes the identifying factor of marriage outside of the court or church wedding in front of a priest or marriage officer. From this perspective, Africans identify with lobola as a critical component of their cultural normative identity, without which marriage cannot be recognised.[386]

Outside of the cultural identity aspect of lobola, the practice also serves to confer identity and status on women. According to the studies carried out by Ansell and Peta, women viewed the practice as conferring legitimacy and a 'respectable' status on them. Women whose spouses had not paid lobola are regarded as 'damaged goods.'[387] For one woman interviewed by Peta, after cohabiting with her partner and having a child, she decided to leave the marriage as this made her feel that her partner did not value her.[388] In focus groups carried out by Heeren et al., women in the groups voiced that "a wife is always proud if lobola has been paid for her…she will be treated with respect as well as the husband."[389] The children born of the union are also affected if lobola is not paid because the mother's family gives no recognition to the family that fathered the child.[390] In the interviews carried by Heeren et al., women indicated that they linked lobola to the value that the husband and his family placed on them.[391] In a study in the Wakiso district in Uganda, Kaye et al. found that participants equated the value of lobola to the woman's status and that having lobola paid enhances a woman's position in the community.[392] The value placed on women through lobola is also shown by how some men who engage in relationships with disabled women are reluctant to pay lobola.[393] In this research, Peta found that participants reflected that they were viewed as 'damaged goods' and men did not view them as worth paying lobola.[394] This argument is linked to the belief that lobola is transactional and if a woman is physically disabled, she thus becomes less valued in terms of the transaction. Disabled women who have not had lobola paid for them feel that they are not valued by society as wives and mothers. It can be argued that lobola confers both legitimacy and social status to African women's identity.

[385] Heeren et al op cit note 289 at 74.
[386] Ibid at 77.
[387] Christine Peta 'The sacred institution of marriage: The case of disabled women in Zimbabwe' (2017) *Sexuality & Disability* Vol 35 pp. 45-58 at 49.
[388] Ibid.
[389] Heeren et al op cit note 289 at 77.
[390] Ibid.
[391] Ibid at 78.
[392] Kaye et al op cit note 376 at 301.
[393] Peta op cit note 387 at 49.
[394] Ibid.

3.3.2. Lobola as an Aggravator of Inequality and Violence

Kaye et al. note that lobola payments have implications on social relations, which may be both positive and negative.[395] These implications include women's experiences of inequality, discrimination and violence. Lobola creates contexts of social relations which aggravate violence, discrimination and inequality. In a study by Kaye et al., the male participants noted that paying lobola symbolises ownership and control over the woman.[396] The female participants in the survey agreed with this view as they acknowledged that lobola takes away their rights as women, thus reducing them to objects for sale.[397] In Ansell's study on high school male and female youth's perceptions of lobola in Zimbabwe and Lesotho, it is noted that some students have the same perceptions about the practice's symbolism and that lobola is a financial transaction.[398] This 'uneasy' belief by the female students, as Ansell puts it, implies that women are bought and sold using lobola as a cultural normative justification for the transaction.[399] Although male participants in this survey disagreed with this view of lobola as a transaction, they noted a form of exchange that should bring a return in the form of labour and or reproductive capacity from the women.[400] From these surveys, it can be argued that lobola is viewed as transactional in African communities by those who practice it. Even though there is an uneasiness with equating it to buying and selling women, there is some agreement and expectation that the exchange of goods or money infers that the woman must perform some duties in exchange. These duties include domestic work (cooking, cleaning), help with subsistence farming (mainly in rural settings), and reproductive capacities.

Closely linked to this transactional expectation of lobola is the 'purchase' of sexual rights over women's bodies by the men who pay lobola. Men interviewed in Wakiso District in Uganda argued that to cement the relationship and take it to the next level, lobola was necessary to award them exclusive rights to sex with their wives.[401] The women in the same district noted that lobola is paid places them in a disadvantaged position regarding negotiating for safe sex with their husbands, including other sexually related decisions they may want to make.[402] In this regard, the payment of lobola disenfranchises women's right to make decisions

[395] Ibid at 300.
[396] Ibid at 301.
[397] Ibid.
[398] Ansell op cit note 298 at 706.
[399] Ibid.
[400] Ibid at 706-707.
[401] Kaye op cit note 376 at 301.
[402] Ibid at 302.

about their bodies, including in their sexual and reproductive health lives. Wendo's notes that in a discussion at the International Conference on Bride Price, one participant argued that once a man has paid lobola, the woman loses control of her sexual freedom. He added that this means that she cannot decide for herself when or how many children she would like to have.[403] Thus, women's reproductive capacities and sex lives are in the hands of their husbands.

In focus groups conducted by Mugweni, Pearson and Omar in Zimbabwe, they observed that 'male entitlement to sex' was closely linked to their payment of lobola.[404] In these focus group discussions, male participants highlighted nothing called 'marital rape and/or forced sex' within African marriages. From this viewpoint, lobola facilitates and validates rape and violence against women as there is a perception that the practice warrants the husband exclusive sexual rights to the wife. Marital rape and/or intimate partner violence is a concerning feature of marriages in the African context, and it is a contentious subject. This is because sex is viewed as a conjugal right for men. Another reason for this contention is the perception that once man and wife are married, the union warrants mutually exclusive sexual rights.[405] Marital rape is the forced and/or unwanted penetration (vaginal, anal or oral) or contact of genitals resulting from force or threats from a spouse or when one cannot give affirmative consent.[406] From this definition, it is a form of violence against women, as noted in the Declaration on the Elimination of Violence Against Women in Article 2 (a). Marital rape statistics are difficult to find due to the general under-reporting of sexual crimes against women. For example, in Kenya, it is reported that over eight per cent of women experience sexual violence from their partners.[407] In a 2016 World Bank gender equality survey, 112 countries were reported to have excluded marital rape as a criminal offence, and of these, 14 were African countries [408]. In Sub-Saharan Africa, the following countries do not currently have any laws against marital rape: Equatorial Guinea, Ethiopia, Kenya, Malawi, South Sudan and Tanzania.[409] A World Bank

[403] Charles Wendo 'African women denounce bride price: Campaigners claim payment for wives damages sexual health and contributes to AIDS spread' (2004) *The Lancet* Vol. 363 available at *www.lancet.com.*
[404]Mugweni, Pearson & Omar op cit note 377.
[405] World Bank Group 'Women Business and the Law: Closing the Gap—Improving Laws Protecting Women From Violence' (2018) available at *http://pubdocs.worldbank.org/en/349811519938655769/Topic-Note-Protecting-Women-from-Violence-EN.pdf* accessed on 5th May 2019.
[406] Bergen Wife rape: Understanding the response of survivors and service providers (1996) Sage Publications at 5.
[407] Kenya Demographic and Health Survey 2014 available at *https://dhsprogram.com/pubs/pdf/FR308/FR308.pdf* accessed on 7th May 2019.
[408] World Bank Group 'Women Business and the Law: Factsheet Protecting Women from Violence' (2018) available at *http://pubdocs.worldbank.org/en/289441522241133897/WBL-fact-sheet-protecting-women-from-violence-FINAL-PDF.pdf* accessed on 5th May 2019.
[409] World Bank op cit note 405.

report reaffirms a reluctance to remove the exemptions of marital rape from criminal codes because '…courts today still struggle with interpreting the law in conjunction with cultural norms and values.'[410] This struggle leaves women acutely vulnerable to violence in their intimate relationships.

In a study conducted by Thiara and Hague in Uganda, they concluded that women experience dominance and control in marriage because lobola is perceived to give men the right to control and power.[411] This control and loss of sexual freedom is a form of violence that women suffer from having lobola paid for them. Mugweni, Pearson and Omar's study provides a deeper introspection into the sexual violence women suffer. This is because they pooled their participants from groups of women who have experienced forced sex in marriage and women who experienced unsafe sex in marriage.[412] This sampling helped the researchers to understand women's lived realities who experience sexual violence in their marriages and their perceptions about aggravators of this violence, including lobola. In this study, the researchers found that the male participants in the focus groups believed that it was emasculating for a woman to deny her husband sex, which indicated a perceived loss of control over the woman in the relationship.[413] In this regard, forcing sex was a way to regain this control.[414] Male respondents highlighted that rape and physical violence in the form of beating their wives was a way to reassert this control and dominance.[415] Perceptions of control and dominance stem from believing that if lobola is paid, this entails feminine submissiveness. If women refuse this, they experience multiple forms of violence, as highlighted above. However, it should be noted that in the same dataset, some participants did not believe that they owned or controlled women's bodies. Instead, they thought that sexual relations were a negotiation between partners through the bond of friendship they share.[416]

Women in these focus groups reported that they were socialised into submissiveness by their socio-cultural upbringing, and therefore, forced sex was seen as a standard component of marriage.[417] This influences how women report forced sex (marital rape) as a crime because, in the first instance, it is not culturally characterised as such. Women also fail to report this out

[410] Ibid at 5.
[411] R Thiara & G Hague Bride price, poverty and domestic violence in Uganda (2009) Mifumi Uganda.
[412] Mugweni, Pearson & Omar op cit note 377 at 580.
[413] Ibid at 583.
[414] Ibid.
[415] Ibid.
[416] Ibid.
[417] Ibid at 584.

of fear of losing their social status, as discussed above, and the stigma that comes with divorce.[418] From this study and the study in Wakiso, it can be concluded that there is a positive correlation between the paying of lobola and women's experiences of violence within marriage, including loss of reproductive health choices and marital rape. With sexual violence comes vulnerability to diseases. Due to the failure to negotiate sex and safe sex in marriages, women are vulnerable to contracting sexually transmitted infections such as HIV.[419]

The perceptions and experiences by participants in the Kaye et al. study closely linked the payment of lobola with the diminishing of the woman's right to negotiate the use of contraceptives and other contraceptive methods that may prevent them from contracting sexually transmitted diseases.[420] This vulnerability is compounded by the belief that if a man has paid lobola, he can have multiple wives. This increases women's susceptibility to being infected through sexually transmitted diseases, including HIV.[421] Without the freedom to make decisions about safe sex in marriage, women are at a high risk of mortality. On the other hand, the survey by Heeren et al. concluded that there was no correlation between the man paying lobola and the number of extra-marital partners and the sexual behaviour of the husband.[422] The participants in this survey were of the view that husbands would still have sexual relations outside of the marriage regardless of lobola being paid or not.[423] It can be argued that there is an indirect causal relationship between women's vulnerability to contracting sexually transmitted diseases and their perceptions about lobola. Women become vulnerable because there is a perception that women's sexual being becomes a prerogative of the spouse to do whatever they please upon paying lobola.

Lastly, a notable effect of lobola on women is the fear of divorce and having to return the bride price upon the union's dissolution. According to Kaye et al., lobola repayment upon divorce creates limitations on women's ability to leave violent marriages.[424] This requirement to return the bride price is a deterrent for economically disadvantaged women as their families would most likely have used the lobola. Outside of being unable to pay back the lobola, the stigma surrounding being a divorcee in African communities also influences women to stay in abusive marriages. In a survey conducted by Vorster, participants from the Northern Sotho and

[418] Kaye et al op cit note 376 at 302.
[419] Mugweni Pearson & Omar op cit note 377 at 586.
[420] Kaye et al op cit note 376 at 302.
[421] Wendo op cit note 403 at 716.
[422] Heeren et al op cit note 289 at 77.
[423] Ibid.
[424] Kaye et al op cit note 376 at 300.

Ndebele communities reflected that the party responsible for the dissolution of marriage forfeits the lobola and the children.[425] In a survey of 235 participants, 189 responded that if the husband is responsible for the dissolution of marriage, the wife's family gets to keep the lobola.[426] Bennet asserts that returning lobola is, in theory, a necessary reversal of the process of creation of marriage, but it should be recognised that, in modern days, this cannot be carried out without prejudicing the woman.[427] To this end, the process of returning lobola disadvantages women because returning the lobola may be complicated if the woman is economically disenfranchised. This leaves women in a cycle of violence and discrimination from their partners.

Generally, the perceptions about lobola from all groups across demographics are both negative and positive. There is a reluctance to abandon the practice as part of the culture, and cultural change is viewed as abandoning essential values linked to identity and a way of life.[428] Most notably in Ansell's study of young people's assumptions on the practice is that young people do not believe that their views of lobola are different from the older generation.[429] Young people simply accept the practice as valuable in itself.[430] Inherent in this discourse is the synonymised debate around lobola and its relationship with Western ideologies of a universal culture. Therefore, the loss and/or renegotiating of the practice of lobola means adopting a Western culture and neglecting the African culture. From the discussion above, the perceptions of African women are that the practice is both positive and negative. These positive and negative experiences and effects of the practice should be measured against the laws protecting women from violence and discrimination.

Conclusion

This chapter highlighted the evolution of the practice of lobola. It showed how this practice is positioned regarding language, power, and perceptions of the practice from an outsider's gaze and the subjective experiences of the insider. It is crucial for this thesis to highlight how the language used around the practice and the scholarly interpretations of the same practice may influence how it is perceived and critiqued as a form of VAW, which is the subject of this

[425] Vorster op cit note 357 at 65.
[426] Ibid at 68.
[427] T W Bennet A sourcebook of African customary law for Southern Africa (1991) Juta Cape Town at 271.
[428] Ansell op cit note 298 at 712.
[429] Ibid at 714.
[430] Ibid.

thesis. An objective analysis of traditional African practices is vital to evaluate how norms and practices are influenced by translation, naming and history.

Lobola has suffered this transmutation, which influences its position against the progressive regime of women's rights. It is crucial to analyse the individuals who recognise and practice lobola in ensuring a balanced inquiry. It is critical to understand the subjective experiences of women and men on what they think about the practice and how it affects their lives. From the various studies discussed, it can be concluded that both men and women respect the practice and see it as an intricate part of their cultures. However, these studies also showed various reservations and negative connotations that the people involved in the studies have attached to the practice.

Lobola is a traditional practice that is not devoid of meanings drawn from the insiders who practice it and the outsiders who study and observe it. These gazes influence how the practice evolves and how it is perceived and accepted in different societies. The naming, labelling and compartmentalisation of lobola affect the negative connotations and its relationship to VAW that are subscribed to it. This chapter aimed to problematise cultural practices and raised the point that there is no standard approach to defining and categorising them. However, a holistic inquiry is necessary to understand these practices and the influences that may negatively or positively influence our views, thus allowing us to position these practices in the discourse of human rights objectively.

CHAPTER 4

Lobola, Human Rights and Violence Against Women

Introduction

Locating legality or lawfulness in culture and the practices that come with it is a daunting task for socio-legal scholars. The subject of culture and human rights is difficult to interrogate because it straddles the moral-rational and legal-rational.[431] Culture is a way of life and thus forms an integral part of how individuals and communities frame their rights and obligations. Different social groupings have different cultural beliefs, principles and normative practices that distinguish them from other cultural groups.[432] Regarding cultural normative practices, there are contestations around their meanings, validity, and whether they are harmful or prejudicial to a specific group of people in a given society. Culture is not static, and because human beings are agents of culture, their movement and interaction across cultural geographies facilitate the diffusion of their cultures. In this regard, it can be argued that people and information movement equal cultural diffusion. The movement of people and information, over time, has become more accessible through new technologies in information and technology systems (ICTS). These innovations have positively influenced globalisation and the consequent spread of cultural norms and practices.[433]

Globalisation has enabled movement across borders of information, cultures, ideologies, people, goods, and services, just to name a few. According to Lee and Vivarelli, the term globalisation is highly contested. Globalisation essentially encompasses the increasing interconnectedness and the ease of movement of resources and foreign direct investment.[434] Concerning culture, Mazarella argues that 'the world after globalisation is one in which culture is everywhere, and everywhere at issue except, it seems, in the avant-garde of the anthropological ory.'[435] Mazarella argues that, within the subject of anthropology, culture is not an issue of contention but one that should be embraced and understood, and outside of the study of anthropology or social science, culture is juxtaposed in conflict to other subject matters.[436] As culture is influenced by prevailing social, political, economic and other environments, it thus follows that culture is not a static phenomenon. Human beings are agents of culture and normative practices. Brown argues that to improve institutionalism (legal

[431] Mikateko Joyce Maluleke 'Culture, Tradition, Custom, Law and Gender Equality' (2012) 15 No 1 *P.E.R* 1-22 at 2.
[432] Ibid.
[433] William Mazarella 'Culture, Globalization, Mediation' (2004) 33 *Annual Review of Anthropology* 345-367 at 347-348.
[434] Edd Lee & Marco Vivarelli 'The social impact of globalization in the developing countries' (2006) *International Labour Review* 145 No. 3 at 167-183.
[435] Mazarella op cit note 433 at 347.
[436] Mazarella op cit note 433 at 347.

institutionalism in this case), any effort must consider the drivers of human behaviour to be successful.[437]

With the advent of globalisation, one of the most important features has been the ease of movement of people across borders. As a result, cultures in most parts of the world have changed significantly because the movement of people from different backgrounds, environments, and cultures influences the spread of their cultural ideals, values, norms, and practices. Maluleke argues that contemporary African culture represents a mixture of traditional components and foreign features.[438] This is because of the influence of white colonial rule. The imposition altered the fundamental development, value systems, practices and norms of different cultures. Not only did Western colonial influence change the way of life of Africans, but this system created Western-based legal institutions that sought to administer their way of life. For example, in South Africa, common law was introduced in the mid to late 1800s, whilst native law was only recognised roughly four decades later in 1848. However, this Native law was subject to the 'humanitarian principles of society' understood as western principles.[439] This became the beginning of the metamorphosis of traditional African cultures and value systems.

Due to globalisation, the global human rights system has become transnational, and it is no longer only a Western phenomenon.[440] The globalisation of human rights has also meant the weakening of state sovereignty. The international human rights community no longer trusts states to protect their citizens without international oversight.[441] This globalisation requires translating the human rights regime to the local system through codification under national law. Even though human rights have globalised, women's rights, on the other hand, have not enjoyed the same attention. It can be argued that there is resistance to translating women's rights into local contexts. The Convention on the Elimination of Discrimination Against Women (hereafter CEDAW) currently has 62 reservations out of the 189 countries that ratified the treaty.[442] Allowing states to enter reservations to CEDAW means that states can pick and choose which rights to give women and which ones to withhold; this goes against the treaty's

[437] Michael F Brown 'Cultural Reativism 2.0' (2008) 49 No. 3 *Current Anthropology* 363-383 at 370.
[438] Mikateko Joyce Maluleke 'Culture, Tradition, Custom, Law and Gender Equality' (2012) 15 No. 1 *P.E.R* 1-22 at 3.
[439] Ibid at 4.
[440] Sally Engle Merry 'Human Rights Law and the Demonization of Culture (And Anthropology Along the Way)' (2003) 26 No. 1 *PoLAR* at 2.
[441] Ibid at 5.
[442] See statistics on https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&clang=_en#16 accessed on 31 September 2019.

purpose. Engle Merry argues that there are fissures between global and local settings where human rights are codified.[443] These gaps continue to leave women vulnerable to violence as they have international claims for protection but not local and accessible claims. Without translating women's rights into local contexts, these rights remain elusive to the women who need them the most.

This chapter initially engages with the cultural relativity versus universalism debate to understand the perspectives of applying human rights to local contexts. The chapter then delves into harmful traditional practices (hereafter HTPs) and links the discussion to the practice of Lobola. Several theories can be drawn from sociology, political science and anthropology that help us understand the relationship between violence and culture.[444] In trying to understand and explain the relationship between Lobola as a cultural practice and its relationship and correlation with violence against women, this chapter adopts Heise's Ecological Framework on VAW to understand how Lobola is harmful to women and analyse the determinants of this violence.[445] Galtung defines cultural violence as, '…those aspects of culture, the symbolic sphere of our existence exemplified by religion and ideology, language and art, empirical science and formal science (logic, mathematics) that can be used to justify or legitimise direct or structural violence.'[446] He further provides an important observation by noting that the symbolism placed on specific cultural practices may not necessarily proffer physical harm or structural violence on a person.[447] However, it is used to justify both the former and the latter.[448] Heise also provides an ecological framework that helps to conceptualise the etiology of violence.[449] According to Heise, violence originates from the interaction of factors at three different levels, namely, the micro, exo and macro levels.[450] These levels make up the personal, situational and cultural environments.[451] Using this theoretical adaptation and analysis, locating the harmfulness of Lobola will provide the theoretical backdrop needed to interrogate the position of Lobola in the progressive women's rights frameworks, which provide for women's right to be free from all forms of violence.

---

[443] Engle Merry op cit note 440 at 2.
[444] These include the Modernization Theory, Galtung's Theory on Violence expanded on in this chapter.
[445] Lori Heise 'Violence against women: An integrated ecological framework' (1998) 4 No 3 *Violence Against Women* Sage Publications at 263.
[446] Johan Galtung 'Cultural Violence' (1990) 27 No. 3 *Journal of Peace Research* at 292.
[447] Ibid.
[448] Ibid.
[449] Heise op cit note 445 at 263.
[450] Ibid.
[451] Heise op cit note 445.

4. Human Rights: The Cultural Relativity versus Universalism Debate

Culture and human rights are oft viewed as being in tension with each other. In some cases, if culture is considered static and unchanging, it is a barrier to achieving human rights.[452] When considering the relationship between culture, violence and human rights, it is critical to understand the contentious environment within which they are understood and defined. Human rights create a culture of their own as they regulate behaviour and norms based on a set standard.[453] This is because human rights, as legal norms, capture and reinforce cultural norms and community practices.[454] As a universal phenomenon, human rights legal normative standards are set at the international level to moderate behaviours of actors at both the international levels down to the communal and/or societal level.[455] There is more consensus on the need for setting normative standards governing human rights to hold state actors responsible for any acts or omissions by the state or its mechanisms at the international level. However, the human rights culture operates in an environment with conflicting cultural normative practices, values, and principles at the state level.[456] It can be argued that human rights are not devoid of influences from the environment in which they operate and are enforced. Therefore, it is essential to consider what these influences are and how they impact the enforcement of these rights. To fully understand this subject area, it is imperative to adopt an interdisciplinary lens to critically appraise the relationship between cultural normative, violence, and human rights practice.

Even though human rights have a long history dating back to the enlightenment period with thinkers such as Hume, Hobbes, Locke, and Smith, it is only in the recent 1900s that human rights principles became codified.[457] Since the adoption of the Universal Declaration of Human Rights (hereafter UDHR) in 1948, human rights principles have evolved according to various political needs, moral imperatives, and local contexts.[458] This contentious history of human rights is laden with conflicts arising from the inception of human rights themselves,

[452] Engle Merry op cit note 440 at 15.
[453] Phillip Alston & Ryan Goodman International Human Rights: The successor to International Human Rights in Context; Law Politics and Morals (2013) Oxford University Press Oxford at 167
[454] Ibid.
[455] Ibid.
[456] Ibid.
[457] Akira Iriye Petra Goedde William I Hitchcock *The Human Rights Revolution: An International History* (2012) Oxford University Press Oxford at 6.
[458]Ibid.

understanding what they entail, and their applicability to non-Western societies — outside of which they were framed.[459] Notably, in Africa and Asia, human rights were pivotal in states' quests for independence from colonial rule.[460] During this period, human rights were understood as linked to the right to self-determination of nations.

Interestingly, the arguments for cultural relativism were initially made by colonial powers who advocated for the exclusion of colonial territories from the discourse of universal human rights.[461] The view was that colonial territories should be granted an exemption because of the cultural differences that existed in these territories; the extent of these differences meant that they could not be governed by one framework without considering these differences that lived amongst them.[462] Iriye and Goedde argue that this was 'thinly veiled racial discrimination' because colonial administrators recognised that accepting human rights in their entirety meant that they would lose their oppressive power.[463] The recognition of human rights positioned colonialism as a crime against humanity because colonial power was violent, oppressive, and discriminated against individuals based on racial profiling.[464] This is because acts committed by the colonial powers — against civilians — such as torture, arbitrary arrest and imprisonment of political activists, political persecution of liberation movements and political parties, and other mass exterminations are crimes against humanity. Therefore, by accepting the universality of human rights, colonialism would have to end as colonised people also possessed universal human rights.

However, as the human rights discourse continued to expand and become more prolific, African and Asian states, after fighting for self-determination, became advocates for cultural relativism.[465] This, as argued by some scholars, was in reaction to the inclusion of gender equality, freedom of speech, and freedom of religion, which they argued to be against non-

[459] Ibid.
[460] Ibid at 7.
[461] Ibid.
[462] Ibid at 10.
[463] Ibid.
[464] According to the UN, crimes against humanity include murder, extermination, enslavement, deportation or forcible transfer of population; Imprisonment or other severe deprivation of physical liberty, in violation of fundamental rules of international law; torture; Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence of comparable gravity; Persecution against any identifiable group or collectivity based on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognised as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; Enforced disappearance of persons; The crime of apartheid; Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.
[465] S Moyn 'Imperialism, Self Determination, and the rise of Human Rights' in Iriye Goedde & Hitchcock (2012) op cit note 457 at 166.

Western traditional values and norms.[466] These states argued for the right to sovereignty to be considered as critical to the universal claims of human rights.[467] In Article 8 of the Bangkok Declaration, Asian countries agreed that 'whilst human rights are universal in nature, they must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds.'[468] This position — adopted by both Asian and African states subsequently — is an ironic one, considering they used the same framework to fight for independence but, later on, advocated against this framework for taking away human rights. As argued by Moyn, during this era, collective rights were championed over individual rights in favour of self-determination.[469] This privileging of the right to self-determination by former colonies led to these states committing gross human rights abuses.[470]

The Organization of African Unity (OAU), now the African Union (hereafter AU), embodies this stance on collective versus individual rights in its Charter.[471] Though the Charter refers to human rights, it subordinates these rights to the need for African states to 'safeguard and consolidate the hard-won independence as well as the sovereignty and territorial integrity of our states, and to fight against neocolonialism in all its forms.'[472] The African Charter on Human and Peoples' Rights (hereafter African Charter) also embodies the OAU's view of the importance of collective versus individual rights. The naming of the African Charter also depicts the importance and acknowledgement of cultural rights as pivotal to understanding human rights in Africa. According to Stavenhagen, the phrase 'peoples' rights' refers to cultural rights.[473] The OAU was formed as an organisation that would support the anti-colonial movement of African states to help them realise their self-determination. Thus, the organisation's approach to human rights was influenced by this need.

Anti-colonialism emphasised totalistic struggle, whether violent or non-violent, and the human right to self-determination was thus placed as being pivotal to this struggle. This focus on the right to self-determination obscured the need to look at human rights holistically as they

[466] Ibid at 11.
[467] Ibid.
[468] Final Declaration of The Regional Meeting For Asia Of The World Conference On Human Rights (1993).
[469] Moyn op cit note 465.
[470] Iriye, Goedde & Hitchcock op cit note at 457.
[471] Premable of the Organisation of African Union Charter of 1963 at Para 5.
[472] Preamble of the OAU Charter.
[473] Radolfo Stavenhagen 'Cultural Rights: A Social Science Perspective' in Institute of Art and Law *Cultural Rights and Wrongs* (2002) Unesco Publishing United Kingdom at 1.

are co-dependent.[474] In this regard, it can be argued that former colonies did not play a pivotal role in the development of human rights but instead played a crucial role in differentiating the human rights regime.[475] This also contributed to the debate between universalism and cultural relativism of human rights.

Cultural relativists argue that it is essential to take specific considerations into account when interrogating different cultural practices. This includes understanding the prevailing context of the culture, the meanings and nuances around the normative practices, and the language and translation barriers before making any moral or other judgments.[476] According to Eid et al., cultural rights have not been given the attention and importance that they need in human rights theoretical texts.[477] They argue that such rights are mostly treated as a residual category but that states are responsible for ensuring that these are codified, interpreted and protected.[478] The right to culture is entrenched in several international and regional frameworks, including the International Covenant on Economic, Social and Cultural Rights (ICESR), the African Charter,[479] International Covenant on Civil and Political Rights (ICCPR), and the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention). All these instruments directly or indirectly recognise the rights of people to cultural identity and culture. Therefore, from the relativist standpoint, recognising the individual or collective group's right to culture is a necessary part of fulfilling their human rights as entrenched in legislative frameworks.

Although there are various types of relativisms, Brown argues that cultural relativism falls into three categories: methodological relativism, cognitive or epistemological relativism, and ethical or moral relativism.[480] Methodological relativism refers to suspending judgments until a belief or practice can be fully appreciated within its context.[481] For most anthropologists, this is the argument for cultural relativism and why it is crucial. [482] The point from which they argue is that cultures are unique, and the socialisation into a culture develops one's understanding of why its component values and practices are observed. Therefore, this best places them in a position to afford any judgment and/or moral appraisal. An individual's

[474] Moyn op cit note 465 at 171.
[475] Ibid.
[476] Brown op cit note 437 at 363.
[477] A Eid et al *Economic, Social and Cultural Rights* (1995) Martinus Nijhoff Dordrecht at 63-77.
[478] Ibid.
[479] Article 22 of the African Charter.
[480] Brown op cit note 437 at 367.
[481] Ibid.
[482] Ibid.

motivation and/or intention to undertake a specific action is based on their subjective norms, and this is also true vice versa.[483] Smetana and Adler argue that these normative components 'exert direct effects on attitudes as well as their direct effects on intention.'[484] Therefore, the fundamental relativist argument maintains that without any experience and/or knowledge of certain groups and their normative cultures, it is impossible to apply universal standards to codify behaviour. As argued in Chapter 2 of this thesis, Lobola is a cultural normative practice that bears both significance and meaning in the way of life of certain cultural groups across Africa. Thus, when analysing this practice with universal moral standards of human rights, and women's rights, relativists argue that the practice should be appraised within its context. Because one needs an understanding of the practice itself and what it entails before placing moral and/or judgments on it. Engle-Merry agrees with this argument, and she notes that if rights are packaged in familiar cultural terms, they can be persuasive and challenge existing unequal power relations.[485]

Cognitive relativism postulates that 'members of different societies live in different and incommensurable knowledge worlds.'[486] However, this type of classical relativism has been critiqued by scientists who have argued that human cognition is universal because of the shared neural architecture, despite this architecture being influenced by cultural forces.[487] Brown further contends that the globalisation of science and technology is evidence of transcultural validity.[488] According to this argument, humans inherently share similarities, mainly in their cognitive make-up, which influences their behaviour. Clifford and Marcus point out that perfect translation of one culture to another is impossible, as it is laden with issues of power and interpretation and that it should be regarded with some level of scepticism.[489]

Moral or ethical relativism insists that people's values are '*sui generis* and self-validating', and these require that outsiders assess them using the groups' standards.[490] From this perspective, relativists argue that cultures are unique and should thus be appraised from

[483] Hee Sun Park 'Relationships among attitudes and subjective norms: Testing the theory of reasoned action across cultures' (2000) 5 No. 2 *Communication Studies* 162-175 at 163.
[484] J G Smetana & N E Adler 'Fishbein's value x expectancy model: an examination of some assumptions' (1980) 6 *Personality and Psychology Bulletin* 86-96.
[485] S Engle Merry Human rights and gender violence: translating international law into local justice (2006) University of Chicago Press, Chicago at 5.
[486] Brown op cit note 437 at 367.
[487] Ibid.
[488] Ibid.
[489] James Clifford and George E Marcus *Writing Culture: The poetics and politics of ethnography* (1986) University of Carlifornia Press Berkeley.
[490] Brown op cit note 437 at 366.

within or understanding the culture and its functional components. This perspective also encompasses elements of anthropology's variety of natural law because a 'context-sensitive application of natural law requires heroic feats of causality to encompass the varied circumstances of humankind.'[491] Using natural law also enables us to understand how we can influence the change of certain practices in specific contexts. Brown gives an example of sorcery killings where he notes that as disturbing as they may be, their 'moral valence' is defined by a particular cultural context that must be dealt with.[492] Therefore, when trying to instil change, relativists do not reject the idea of change, just that this change must be influenced using the laws from within that cultural context.

Classical relativists[493] believe that there can be no universal culture because each culture exists as an autonomous conceptual universe.[494] On the other hand, universalists argue that universal moral principles, values, and norms cut across cultural boundaries. According to Hume, there are ethical standards of 'moral blame and censure' despite the disagreements on other derivative issues.[495] In Asia, for example, during the 1990s, most states were authoritarian and thus labelled the UDHR as a tool for Western neo-colonialism.[496] This was mainly because of two reasons. Firstly, the human rights regime, which was codified through the UDHR, was developed when some African and Asian states were still colonised, and thus, those states had very little to no contribution to defining these standards.[497] Some scholars call this the 'white man's burden' that signifies the expansion of Western ideas and imperialism, including the human rights regime.[498] Secondly, it can be argued that the moral judgments imposed by the UDHR on culture influence the negative views on non-western cultures by Western society. Tilley argues that cultural relativism can be understood by the following statement, '…although for every culture some moral judgments are valid, no moral judgment is universally valid. Every moral judgment is culturally relative.'[499] He further postulates that universalism can be summed up as arguing that, '… some moral judgments are universally valid.'[500] From Tilley's standpoint, the arguments for relativism or universalism lie in the moral judgments that come

[491] Brown op cit note 437 at 368.
[492] Brown op cit note 437 at 368.
[493] This term depicts the old relativist approach of early relativist thinking.
[494] Brown op cit note 437 at 364.
[495] David Hume *An Enquiry Concerning the Priciples of Morals* (1998) Oxford University Press Oxford at 110.
[496] Ibid.
[497] Ibid.
[498] Sally Engle Merry 'Human Rights Law and the Demonization of Culture (And Anthropology Along the Way)' (2003) 26 No1 *PoLAR* at 56.
[499] John J Tilley 'Cultural Relativism' (2000) 22 No. 2 *Human Rights Quarterly* 501-547 at 505.
[500] Ibid.

with human rights. Human rights, as a regime, set standards of behaviour by defining what is moral, immoral, right or wrong, and acceptable or unacceptable. By setting these standards, judgments are thus based on conformity or non-conformity. In this regard, by prescribing how individuals and groups should behave and/or conduct themselves, it follows that human rights possess a very subjective power. According to Ajzen and Fishbein's Theory of Reasoned Action (TRA), humans behave in ways that allow them to obtain favourable outcomes and to meet the expectations of others.[501] An individual's behaviour is influenced by information and external factors, which informs their normative behaviour and actions.[502] Human rights, in this regard, influence behaviour because they set a standard of what is acceptable or unacceptable.

Varol et al. agree with this assertion that social behaviour, norms, and practices are influenced by external information and sanctions.[503] They argue that it is inherently an entrenched sense of social obligation and normative expectations that proliferate certain practices, for example, Female Genital Mutilation (hereafter FGM).[504] Varol et al. also add that fears of exclusion because of non-conformity also influence why people continue with certain behaviours and practices that are harmful to them.[505] However, Engle-Merry argues that individuals are committed to behaviours and values through their identification with a specific group, and thus it only follows that this behaviour is judged according to the standards of this group.[506] By prescribing morally accepted behavioural and or other measures, human rights influence individuals and groups to act in a particular manner. It can thus be argued that, from this perspective, human rights have a morally charged power to prescribe behaviour or action. Therefore, when certain standards practised in different cultures are appraised by these human rights, they become morally unacceptable. Engle-Merry cautions that even though the human rights process seeks to replace discriminatory cultural practices with ones rooted in modern-day ideas of gender equality, it should be acknowledged that this effort sometimes demonises

[501] I Azjen and M Fishbein *Understanding attitudes and predicting social behaviours* (1980) Prentice-Hall New Jersey. See also Engle Merry op cit note 498.
[502] Sun Park op cit note 483 at 163.
[503] Nesrin Varol Ian S Fraser Cecilia H M Guyo Jadelsa & John Hall 'Female genital mutilation/cutting-towards abandonment of a harmful cultural practice' (2014) 54 *Australian and New Zealand Journal of Obstetrics and Gynaecology* at 400-405.
[504]Ibid at 402.
[505] Ibid.
[506] Engle Merry op cit note 498 at 56.

culture and collective rights as it seeks to empower individuals away from the oppressive effects of culture.[507]

Universalism, derived from the natural law theory in Western jurisprudence, is the idea that human rights are typically understood to be rights that one has simply because one is human.[508] Universalists argue that all people, of necessity, possess common moral standards and cognitive capabilities that enable universal standards. Oksenburg Rorty argues that relativists and anti-relativists tend to overemphasise their positions. Relativists deny the possibility of similarities between humans in general, whilst universalists deny the 'systematic untranslatability' of some values and cultural practices.[509] The universalist position assumes that moral principles are found everywhere, although they may be unevenly applied and understood in different contexts.[510] One could ask the question of the probability of humankind possessing a universal moral language. Hauser argues that morality is in our genes, and therefore humans share a universal moral grammar that enables them to understand each other across cultures.[511] It follows that human rights, as standards sanctioning behaviour, also reflect universality that cuts across borders or cultures.[512] Erh Soon Tay quotes a Chinese professor as having described the basis of human rights to come from the fact that, '…all human beings have common natures, interests, and concerns, as well as common ideals and moral notions.'[513] From this perspective, the concept of the universality of human rights is not a far-fetched phenomenon because of these shared fundamentals.

In his analysis of Hume's 'anti-relativist' argument for universal moral standards, Bohlin argues that when societies increase interaction through education and social intercourse, there is a 'natural progress of human sentiments' in which the rules of justice are extended from the narrow bounds of the individual and his family to the whole society.[514] As society fulfils its natural needs to grow and change by interacting with other communities, this leads

[507] S Engle Merry Human rights and gender violence: translating international law into local justice (2006) University of Chicago Press, Chicago at 12.
[508] Jack Donnelly 'The Relative Universality of Human Rights' (2007) 29 *Human Rights Quarterly* 282.
[509] Amelie Oksenburg Rorty 'Relativism, persons, and practices' in Michael Krauscz *Relativism: Interpretation and confrontation* (1989) University of Notre Dame Notre Dame at 418.
[510] Brown op cit note 437 at 368.
[511] Marc D Hauser Moral minds: How nature designed our universal sense of right and wrong (2006) Ecco/Harper Collins New York at xvii.
[512] Alice Erh Soon Tay Perceptions of cultural rights in the People's Republic of China in Unesco Publishing (1998) at 134.
[513] Ibid at 135.
[514] Henrik Bohlin 'Universal Moral Standards and the Problem of Cultural Relativism in Hume's "A Dialogue"' (2013) 88 *Royal instate of Philosophy* at 600.

to adopting a mutual morality. This means that the basis of the application of standard rules also applies. When people form irreconcilable views, they are influenced by the self-interest of a meaningful relationship or the absence of a relationship.[515] Human beings have incentives to understand different moral and/cultural values and practices. However, because of human beings' inclination to self-preservation, arguments for cultural relativism take precedence. Bernstein argues that when humans interact with other belief systems or cultures, it is an opportunity to learn and 'self reflectively' acknowledge one's privileges and prejudices.[516] Universalists thus argue that, with this concept of learning and reflecting, the universality of norms and values can be fostered, especially concerning human rights. Acknowledging universality and the particularity of human rights and how they are related is the basis of making human rights policies.[517]

As the world becomes a global village, the economic, social, and political environments have become intertwined. It is impossible to deny the impact of the global village and the standards that come with this phenomenon. As states and their subjects increasingly interact, there is a need to establish universally acceptable standards of behaviour as both a protective and preventative measure. These standards govern these interactions with justice and equality. In this regard, the cultural relativist argument is weakened because it does not consider nature and its influence on creating universal moral principles that people across cultures and geographies understand. Secondly, cultural relativism exaggerates the differences between societies and presents a totalising quality of moral minimalism.[518] From this standpoint, universalism would provide a more nuanced understanding of how human rights can be localised.

The universality of human rights is established and recognised in international law. Human rights are emphasised as one of the principal purposes of the United Nations (UN). The UN Charter states that 'human rights are for all without distinction'[519] and further imposes an obligation on the body and all state parties to advance common respect for, and adherence to, human rights and fundamental freedoms.[520] Furthermore, the Universal Declaration of Human

[515] Ibid.
[516] Richard J Bernstein *Beyond Objectivism and Relativism: Science, Hermeneutics, and Praxis* (1983) University of Pennsylvania Press Pennsylvania.
[517] Erh Soon Tay op cit note 512 at 135.
[518] Brown op cit note 437 at 371.
[519] Article 76(c) of the United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI.
[520] Article 1 of the UN Charter op cit note 519.

Rights[521] and other subsequent human rights instruments uphold a universal standard of human rights.[522] By considering the universalist argument, it can be argued that human rights instruments embody the universally accepted standards of behaviour. Some of these rights have a jus cogens status among nation-states showing the possibility of the world agreeing on a set of universal moral standards.[523]

The Vienna Declaration and Programme of Action affirms the universality of rights and freedoms. The declaration states that '…all human rights are universal, indivisible and interdependent and interrelated.' It further states that the international community is required to view human rights generally in 'a just and equitable manner, on the same footing and with the same emphasis.'[524] Although local contexts are critical, the obligation remains for states to uphold and protect all human rights and fundamental freedoms at the domestic level. As noted above, it can be argued that the concept of universality of human rights is a widely accepted principle based on state ratifications of human rights instruments. This is arguably one of the most notable endorsements of the universalist argument. Thus from this perspective, the vast majority of ideas advanced because human rights are alien and insignificant to a more significant part of the world's population. In other words, arguments in favour of cultural relativism may be regarded as futile.[525]

However, after considering the above arguments for cultural relativism and universalism, this thesis adopts Harris-Short's view that relativism should be within reason.[526] This is because societies across the world are diverse and should thus be understood within their contexts. However, it is essential to note that respect for cultural differences should not trump their similarities. It also stands that these differences should not be used as an excuse to reject the development of universal moral standards that protect people across borders. There is an increased need for cooperation across geographies because of the advancements in

[521] The Universal Declaration of Human Rights, 1948, (hereafter UDHR).
[522] These instruments include, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Convention on the Rights of Persons with Disabilities etc…
[523] CEDAW 'General Recommendation No. 35: Updating General Recommendation No. 19' no. 12, July (2017) available at *https://doi.org/CEDAW/C/GC/35* at para 25. Also see Andrea Bianchi, 'Human Rights and the Magic of Jus Cogens' (2008) *European Journal of International Law* 19 no. 3 at 491–508 available at *https://doi.org/10.1093/ejil/chn026*.
[524] Vienna Declaration and Programme of Action, U.N. GABOR, World Conf. on Hum. Rts., 40th Sess., 22nd plen. mtg., part I, 5, U.N. Doc. A/CONF.157/24 (1993).
[525] Harris-Short, Sonia 'International Human Rights Law: Imperialist, Inept and Ineffective? Cultural Relativism and the UN Convention on the Rights of the Child' (2003) 25 *Human Rights Quarterly* 131.
[526] Ibid.

communications and technology. Therefore, it is important to develop rules and standards that facilitate interactions. This is provided through the human rights regime, which comprises frameworks that seek to preserve people's cultures whilst providing principles and standards defining our interactions. In the context of this thesis, the right to culture is enshrined in various human rights frameworks, as discussed above. There is a global-local divide that juxtaposes rights and culture against each other.[527] However, it is possible to reconcile both rights and culture. Cultures can be penetrated by new ideas and influences from other cultural systems.[528] Societies also demonstrate internal diversities and have tensions across lines of gender, sexual orientation, class systems, etc.[529] Brown argues that ethnographers should be cognisant that cultural values and/or practices that are presumably 'long-established' have also gone through changes and tensions.[530] Therefore, it can be argued that there is room for human rights to influence and reconcile these tensions. Engle Merry agrees with this argument, and she notes that for human rights to be effective, they need to be translated to local terms and situated in those contexts of power and meaning.[531] By so doing, human rights become a part of local culture and are not viewed as an 'outsider's' phenomenon.

As this thesis looks at Lobola, it thus stands that the practice should not be viewed in isolation or at face value but interrogated regarding its position and meaning in societies. Cultural relativism is vital because it prompts scholars not to take socio-legal questions for granted through analytical complacency.[532] Nagengast argues against cultural relativism, and she concludes that it has been 'bastardised, appropriated, simplified and deployed by states as a tactic to hold on to patriarchy, commit gross human rights violations and rationalise these violations.'[533] Culture is often used to justify human rights abuses against women because most are patriarchal and tend to objectify women. However, it would be incorrect to say that all cultural practices are demeaning to women. In some cultures, women are well respected and even revered; therefore, it is not a blanket phenomenon.[534] Universal human rights possess both flexibility and adaptability to respect and protect cultural diversity. This flexibility is enabled

[527] Engle Merry op cit note 440 at 6.
[528] Engle Merry op cit note 440 at 11.
[529] Ibid at 372.
[530] Ibid.
[531] Engle Merry op cit note 440 at 1.
[532] Ibid.
[533] Carole Nagengast 'Women, Individual Rights and Cultural Relativity: Power and Difference in Human Rights Debates' (1998) Working Paper 266 University of New Mexico.
[534] Ibid.

by the establishment of minimum standards and the incorporation of cultural rights.[535] Ayton-Shenker argues that universal human rights do not impose one cultural standard but instead provide for one legal standard of minimum protection necessary for human dignity.[536] She also notes that universal human rights signify a firm unanimity of the international community and not the cultural imperialism of any specific region or set of traditions.[537] Therefore human rights pierce the cultural veil and should be accessed by all equally.

To answer questions posed by this thesis, with regards to the position of Lobola as a form of and/or aggravator of violence against women, it is important to understand the perspective of cultural relativism to provide a holistic understanding of the practice in its context, appraising it within that same context, and thereafter applying universal standards. It is important to distinguish between traditional practices that are harmful and are inherently forms of violence against women from practices that are not. Donelly argues that the easiest way to overcome the presumptions of universality for generally recognised human rights is to show either that the predicted violation is not standard in that society, that the value is arguably not considered essential in that society, or that an alternative mechanism protects it.[538] On the other hand, it is also important to understand the rationality of the concept of universal human rights and why it is important to understand cultural relativity, but also at the same time appreciate how human rights are indivisible, interdependent and irrevocable.

4.1. Harmful Traditional Cultural Practices

The introduction of Harmful Traditional Cultural Practices (HTPs) initially surfaced as a concern from colonial administrators who were concerned about traditional practices in their territories.[539] This concept of HTPs has been on the international human rights agenda since the 1950s when the Economic and Social Council of the United Nations tasked the World Health Organization to study the persistence of customs that subjected young girls to ritual operations.[540] HTPs are, '… practices that have some cultural legitimacy but are designated as

[535] Diana Ayton-Shenker 'The Challenge of Human Rights and Cultural Diversity, United Nations Background Note' available at *http://www.un.org/rights/dpi1627e.htm* accessed on the 7th of February 2019.
[536] Ibid.
[537] Ibid at 4.
[538] Jack Donnelly 'Cultural Relativism and Universal Human Rights' (1984) 6 *Human Rights Quarterly* 417.
[539] Elizabeth Prevost 'On Feminists, Functionalists, and Friends: Lobola and the Gender Politics of Imperial Trusteeship in Interwar Britain' (2017) *The Journal of Modern History* 89 no. 3 at 562–600.
[540] Office of the High Commissioner for Human Rights 'Fact Sheet No.23 on Harmful Traditional Practices affecting the health of women and children' (1995) Available at *https://www.refworld.org/docid/479477410.html* accessed on 18 September 2019.

being harmful to women.'[541] According to Office of the High Commissioner for Human Rights' Factsheet No.23 on Harmful Traditional Practices Affecting the Health of Women and Children, traditional practices reflect a society's long-respected values and beliefs.[542] HTPs are long-held practices that are sometimes harmful to women and children. According to Winter, Thompson and Jeffreys, the concept of HTPs was developed by the UN as a measure to name and combat some of the forms of male domination of women in communities.[543] Article 5 of CEDAW acknowledges this reality and calls on states to 'modify the social and cultural patterns of conduct of men and women, to achieve the elimination of prejudices, customary and all other practices which are based on the idea of the inferiority of either of the sexes or stereotyped roles for men and women.'[544] It thus follows that this same codification at a national level should be done to state that culture should not be used as a reason to deny women and girls their rights.

4.2. Defining Harmful Traditional Cultural Practices

The UN recognises that traditional practices are a serious issue that negatively affects the status of women and female children.[545] According to Cottingham and Kizmodi, the initial understanding of harmful traditional practices from a UN perspective was based on the knowledge of these practices to refer only to Female Genital Mutilation (hereafter FGM).[546] However, the OHCHR expanded the types of HTPs also to include forced feeding of women; early marriage; the various taboos or practices which prevent women from controlling their fertility; nutritional taboos and traditional birth practices; son preference and its implications for the status of the girl child; female infanticide; early pregnancy; and dowry price.[547] Some practices continue to be studied and recognised as HTPs that adversely affect women, such as

[541] UN Factsheet No. 23 op cit note 547 at 2.
[542] Ibid.
[543] Bronwyn Winter, Denise Thompson and Sheila Jeffreys 'The UN Approach to Harmful Traditional Practices' (2002) 4 No. 1 *International Feminist Journal of Politics* 72-94 at 72.
[544] Article 5 of CEDAW.
[545] UN Factsheet No. 23 op cit note 547 at 2.
[546] Jane Cottingham and Esther Kizmodi 'Protecting girls and women from harmful practices affecting their health: Are we making progress' (2009) 106 *International Journal of Gynecology and Obstetrics* at 128. Also note that the World Health Organization estimates that over 200 million women and girls have undergone FGM.
[547] Office of the High Commissioner for Human Rights 'Fact Sheet No.23 on Harmful Traditional Practices affecting the health of women and children' (1995) Available at *https://www.refworld.org/docid/479477410.html* accessed on 18 September 2019.

breast ironing in regions of West Africa[548], widow isolation and rituals, virginity testing, etc.[549] Additionally, even though harmful traditional practices disproportionately affect women and girls, there are also harmful cultural practices against men, such as male circumcision in the Xhosa culture in South Africa.[550] The continued expansion of the understanding of which traditional practices are harmful to women is important because it broadens the scope of protection for women. It also supports the efforts to eliminate all forms of discrimination and violence against women, which is an objective of the women's human rights agenda.

Kouyate defines HTPs as '… all practices done deliberately by men on the body or the psyche of other human beings for no therapeutic purpose, but rather for cultural or socio-conventional motives and have harmful consequences on the health and the rights of the victims.'[551] From this definition, there are two critical components about HTPs that she notes. Firstly, the patriarchal nature of traditional practices affects only females; secondly, these practices cannot be justified because their purpose is to perpetuate the continued subordinate position of women in societies. Maluleke agrees with Kouyate and also argues that traditional cultural practices, in most instances, become harmful to women.[552] Ras Work also notes that traditional practices are designed to influence the continued subjugation of women through a long-enduring patriarchal system that fosters these practices.[553] This definition and views of traditional practices show how violence against women is perpetuated through socially constructed belief systems that purposefully subjugate women by using tradition and culture as reasons for this violence.

Winter, Thompson, and Jeffrey argue that the OHCHR Factsheet No. 23 was skewed because it was concerned, for the most part, with non-western practices.[554] This stance influenced the notion that culture is a non-western phenomenon and further demonised these cultures. Thinking about culture in this way also means that it is local and unchanging, and

[548] Bawe Rosaline Ngunshi **'**Breast Ironing : A harmful traditional practice in Cameroon' (2011) Gender Empowerment and Development GeED at 4.
[549] See list of other practices on https://www.stopvaw.org/harmful_practices.
[550] This practice is also known as *ulwaluko* which is considered as a rite of passage into manhood by the Xhosa Community.
[551] Morissanda Kouyate 'Harmful Traditional Practices Against Women And Legislation' (2009) Expert Paper presented by the United Nations Division for the Advancement of Women United Nations Economic Commission for Africa at an Expert Group Meeting on good practices in legislation to address harmful practices against womenin Addis Ababa at 2.
[552] Maluleke op cit note 438 at 2.
[553] Berhane Ras Work 'The impact of harmful traditional practices on the girl child' (2006) EGM/DVGC/2006/EP.4 at 2.
[554] Winter, Thompson & Jeffreys op cit note 543.

therefore it does not exist in the human rights treaties and bodies created to pioneer human rights as a culture. Engle-Merry agrees with this assertion as she argues that those transnational elites in the corridors of the UN are making a human rights culture that is transnationally modern and that this '…specifies procedures for collaborative decision-making conceptions.'[555] Winter adds that the issue of culture in the West is riddled with 'doublethink' and contributes to the incapacity of the Western legal system to address problems arising from these differences.

Holistic approaches to dealing with HTPs work better than siloed efforts. Integrated approaches include but are not limited to the unlabelling of HTPs as traditional since they continue to occur even in the 'modernised' world. Considering economic empowerment as the only key to eliminating HTPs may fall short since that does not equate to cultural empowerment.[556] The human rights system plays a significant role in eliminating HTPs because, firstly, 'it articulates the general principles in various frameworks and documents that result from a consensual process.'[557] Secondly, mechanisms and bodies are set up to investigate individual complaints and national practices to foster adherence to human rights standards.[558] Lastly, the monitoring and review process through periodic reporting ensures that states acquiesce to the agreed standards and norms as set by the human rights system.[559] These aspects will be discussed further in the concluding chapter.

4.3. Consequences of HTPs

Some scholars argue that these practices arise because there is a low value placed on women and girls in different societies.[560] These practices also reflect the skewed power relations between men and women in different cultural settings. HTPs are highly established within the family, remain widely socially tolerated, and often a cycle of abuse that manifests itself in an endless variety of forms.[561] The rationale given for the performance of these practices on women and girls is based on the control of their sexuality, promotion and protection of the family as a social institution, and/or the enhancement of the general interests of the community. Such practices are argued to be a central aspect of culture, and they continue to deny women

[555] Engle Merry op cit note 440 at 2.
[556] Winter Thompson & Jeffreys op cit note 543 at 79.
[557] Engle Merry op cit note 498 at 70.
[558] Ibid.
[559] Ibid at 71.
[560] Cottingham & Kizmodi op cit note 546.
[561] Kouyate op cit note 551.

and girls' equality, security, self-worth, and their right to enjoy fundamental freedoms.[562] When we think of culture in this way, it makes it appear local, impenetrable and unchanging. In the UN, those involved in pioneering women's rights are part of international teams because the UN is an inter-state organisation. This makes human rights a global culture that goes beyond the confines of the UN building.

As a result, in recent years, there has been a greater understanding of cultural violence, its causes, and its consequences — as a critical issue of concern — as these continue to affect various aspects of women's lives. This includes their physical and psychological health, participation in economic, social and political life, and other rights and freedoms guaranteed by the UDHR and other instruments. CEDAW General Recommendation 23 recognises that cultural frameworks of values and religious beliefs inhibit women's participation in public life.[563] However, this position is also criticised for playing a role in demonising culture as the problematising of culture against human rights gives the impression that culture is only a barrier to women's equality.[564]

Focusing on culture as the only barrier to women's equality serves to divert attention from other causes of women's subordination, including economic and political influences. Coomaraswamy argues that defining HTPs as being traditional practices negatively impacts how the issues are addressed.[565] This line of thought implies that once a society modernises, these practices disappear.[566] This is far from accurate because many states in the Global North have also had to deal with HTPs in their jurisdictions. For example, in France, making clitoridectomy (excision) a crime has been a long-winded process.[567] Due to immigration, Western countries have had to deal with codifying various crimes against women that some non-western migrant populations continue to observe even when they move abroad. In France, these crimes were not initially labelled as such. In some cases, the judgment was involuntary assault, failure to assist a minor in danger, voluntary assault on a child under fifteen years of age leading to unintentional death.[568] This difficulty of applying international law to local

[562] Such as right to dignity, the right to life, the right to health, the right to be free from torture and the right not to be subjected to harmful traditional practices.
[563] Para 10 of CEDAW General Recommendation No. 23.
[564] Engle Merry op cit note 498 at 63.
[565] Winter Thompson & Jeffreys op cit note 543 at 77.
[566] Winter Thompson & Jeffreys op cit note 543 at 77.
[567] Bronwyn Winter 'Women, the Law and Cultural Relativism in France: The Case of Excision' (1994) 19 No. 4 *Feminism and the Law* 939-974.
[568] Winter op cit note 567 at 944-948.

contexts is not only an African or Global South problem, but it can also be a direct result of looking at culture as a peculiar phenomenon.

Practising HTPs takes away decision-making power from women. For example, girls who undergo FGM in most cases are incapable of making an independent decision about their sexual and reproductive health at such a young age. According to Article 1 of the Convention on the Rights of the Child (hereafter CRC), a child is '…every human being below eighteen years unless under the law applicable to the child.' As most women go through FGM as children, this practice becomes an act of violence against children because these girls are neither consulted nor possess decision-making capacity, and they do not understand the consequences. Various studies have shown that FGM and other HTPs have lasting effects on women and children.[569] Feminists and women's organisations have continued to place women's rights firmly on the agenda of international human rights mechanisms through advocacy and by suggesting appropriate tools that can be used in tackling these problems.[570]

The consequences of HTPs are fatal and extensive.[571] Some of these practices lead to death, a decline in psychological and/or mental health, physical health challenges, economic and, social and political disempowerment. For example, FGM has been studied extensively in the health sciences.[572] This practice involves cutting the woman's clitoris or, in some extreme cases, removing the external genitalia, the wound is sutured, and only a small opening for urinating is left.[573] At childbirth, this cut is reopened to allow for birth and re-sutured afterwards.[574] Some of the consequences of this practice include transmission of viral infections including HIV, haemorrhage, injury to adjacent organs including the rectum and urinary tract, obstruction during labour, infertility and maternal mortality.[575] These consequences of FGM are not only for the women and girls who experience them but for many, during labour, there are severe complications, including perinatal mortality because the baby could not easily travel through the vaginal canal or there was a lack of oxygen.[576] Nagengast points out that culture

[569] Cottingham & Kizmodi op cit note 546 at 129.
[570] F Ni Aolain 'Learning the lessons: what feminist legal theory teaches international human rights law and practice' (2009) *Transitional Justice Institute* University of Holster.
[571] Factsheet No.23.
[572] Winter op cit note 567 at 939, Nagengast op cit note 533 at 3-4.
[573] Nagengast op cit note 533 at 3.
[574] Ibid.
[575] Nesrin Varol Ian S Fraser Cecilia H M Guyo Jadelsa & John Hall 'Female genital mutilation/cutting-towards abandonment of a harmful cultural practice' (2014) 54 *Australian and New Zealand Journal of Obstetrics and Gynaecology* 400-405 at 400-401.
[576] Ibid.

can become an aggravator of violence because 'no larger group has suffered greater physical, psychological, and symbolic violence in the name of culture and tradition than women.'[577] An understanding of the effects of HTPs on women enables a more effective response to VAW elimination.

4.4. Understanding Violence

Understanding violence is a critical foundational argument in this thesis, and more importantly, understanding how violence against women (VAW) occurs and in what form. Cocks makes an interesting argument about western democracies and violence. She notes that these liberal democracies have an illusion that they have 'transcended violence in human affairs due to their advanced political systems.'[578] This narrow view of violence creates an illusion that hampers the identification and addressing of violence and its different forms. This begs the question of what violence is and if violence in its entirety disappears with the implementation of liberal democracy. By defining violence and VAW, this thesis would be able to test the hypotheses of this thesis to locate the position of Lobola within the framework of violence to identify whether this practice should be considered a form of VAW and the steps CEDAW should take towards this.

According to Galtung, 'violence per se is present whenever influence is exerted to create a difference between the "actual somatic and mental realisations" of human beings and their "potential realisations" with respect to some "fairly consensual value".'[579] In the *World Report on Violence and Health*, the World Health Organization (WHO) defines violence as 'the intentional use of physical force or power, threatened or actual, against oneself, another person, or against a group or community, that either result in or has a high likelihood of resulting in injury, death, psychological harm, maldevelopment or deprivation.'[580] From these definitions of violence, violence is not a singular phenomenon. However, it is observed when it takes place because it can be an act or omission. It can also be argued, from this definition, that violence has characteristics of power as it distinguishes between the 'perpetrator' and the

[577] Nagengast op cit note 533 at 8.
[578] Joan Cocks 'The Violence of Structures and the Violence of Foundings' (2012) *New Political Science* Vol 34 No. 2 at pp 221-227.
[579] Cocks op cit note 578 at 222.
[580] Krug, E. G., Dahlberg, L. L., Mercy, J. A., Zwi, A. B.,&Lozano, R. (Eds) *World report on violence and health* (2002) World Health Organization Geneva, Switzerland.

'victim' of these acts or omissions. Power refers to 'acts resulting from a power relationship that includes threats, intimidation, neglect, and acts of omission.'[581]

Violence is identifiable in three forms, that is, structural, cultural and direct violence. Galtung notes that structural violence refers to 'inequalities built into established patterns of social relationships so that not only are resources "unevenly distributed" but also "the power to decide over the distribution of resources".'[582] Cultural violence refers to 'the use of symbols to "justify or legitimise" direct and structural violence by mystifying or sanitising it as well as by blaming the "victim of structural violence who throws the first stone".'[583] Lastly, direct violence '…involves an identifiable subject who injures another identifiable subject, usually by intent.'[584]

Galtung's framework of violence helps us understand violence at multiple levels. This is because he does not only identify violence as committed by the individual or a group. He also identifies violence as being perpetrated by structures and institutions. Heise also notes this same problem with theorising violence and notes that an emphasis on individual explanations for violence and/or socio-political explanations have dominated academic studies.[585] Most importantly, Galtung also argues that the absence of overt violence does not indicate the existence of peace.[586] Violence is insidious and therefore must be understood in all its forms and realities. Identifying violence as being perpetrated at an individual, group, structural or cultural level broadens the scope for advocacy in human rights.

Analysing the definitions of violence as identified by Galtung, all three depictions of violence can be used to identify VAW. This is because violence against women occurs at different levels in both the public and private spheres. Violence against women is pervasive and intrinsic in most societies.[587] It is perpetuated by social, cultural, political and economic norms. Thus, any study of VAW looks at all three forms of violence to locate and distinguish this violence. The violence suffered by women manifests in different forms.[588] However, it is rooted in discrimination based on gender. Galtung also notes that these forms of violence can

[581] Krug etl al op cit note 580.
[582] Johan Galtung 'Violence, Peace, and Peace Research' (1969) 6 No. 3 *Journal of Peace Research* at 171.
[583] Johan Galtung 'Cultural Violence' (1990) *Journal of Peace Research* 27 No. 3 at 292, 295.
[584] Galtung note 153.
[585] Heise op cit note 445 at 262.
[586] Galtung op cit note 582.
[587] Jennifer L Ulrich 'Confronting Gender-Based Violence with International Instruments : Is a Solution to the Pandemic Within Reach ?' (2000) *Indiana Journal of Global Studies* 7 No. 2 at 636.
[588] Forms of violence suffered by women includes but is not limited to rape, torture, sexual harassment, forced prostitution, genital mutilation, femicide.

be co-enabling. For example, cultural violence also enables direct and structural violence to occur.[589] Studying violence requires scholars to adopt a multi-pronged approach to understand its causes firstly, and secondly, its consequences. Heise points out that efforts to build theories on violence have been frustrated by the narrowness of traditional academic disciplines and the tendency of academics and activists to advance single-factor ideas rather than theories that illustrate the complexities of lived experiences.[590] The failure to study violence in its entirety can also be pointed to as influencing the lack of understanding of VAW, its causes, and its consequences.

4.5. Violence Against Women

The UN Declaration on the Elimination of Violence Against Women (hereafter DEVAW) defines VAW as 'any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.'[591] It is important to note that VAW cannot be limited to specific areas; it is systemic and widespread.[592] VAW cuts across race, socio-economic status, cultures, and even geographical space.[593] CEDAW's General Recommendation No. 19 notes that VAW is a form of discrimination that 'inhibits women's ability to enjoy rights and freedoms based on equality with men.'[594] This violence occurs in both the private and public spheres and cannot be relegated to be committed only by states or private persons. VAW is pervasive and intrinsic in most societies as it is perpetuated by social, cultural, political and economic norms. It is highly prevalent within the family and remains widely socially tolerated.[595]

Understanding VAW requires an intersectional approach because women suffer from multiple forms of violence. There have been debates about what VAW is, with some scholars in the criminal justice field only relating this term to physical abuse.[596] On the other hand,

[589] Galtung op cit note 583 at 291.
[590] Heise op cit note 445.
[591] Declaration on the Elimination of Violence Against Women, General Assembly Resolution A/RES/48/104 1993.
[592] R J Cook 'State responsibility for violations of women's human rights' (1994) 125 *Harvard Human Rights Journal* at 126.
[593] Cook op cit not 592.
[594] *Report of the Committee on the Elimination of Discrimination against Women*: General Recommendation No. 19 (11th Session 1992), UN GAOR, 47th Session, UN Doc. A/47/38 (1992).
[595] Cook op cit note 592.
[596] Dean G Kilpatrick 'What Is Violence Against Women? Defining and Measuring the Problem' (2004) 19 No. 11 *Journal of Interpersonal Violence* 209-1234.

scholars in the public health sphere view VAW in a typology that encompasses interpersonal violence having consequences on the physical and psychological wellbeing of women.[597] The definition of VAW is a contested terrain. For example, Saltzman, Fanslow, McMahon, and Shelley suggest that the term VAW should refer to physical violence, sexual violence, and threats of physical or sexual violence.[598] Saltzman et al. advocate that the term 'violence and abuse against women' (VAAW) should be used to encompass all forms of violence that include emotional, psychological and other forms of obscure violence. According to Kilpatrick, the use of the term VAAW has merit because 'it distinguishes between violent acts and non-violent acts but also permits assessment of actual violence as well as stalking and psychological abuse.'[599] The language and naming of women's rights issues are important as they shape how we perceive and frame these issues, such as VAW. However, the term VAW is all-encompassing enough to cover all forms of violence, and violence is a form of abuse. DEVAW succinctly defines VAW as '…any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.'[600] This definition of VAW is a strong one as it includes overt and latent forms of violence. It also includes acts that may not be violent in and of themselves but have violence as a consequence for women. Therefore, the term VAW sufficiently encompasses all forms of violence against women.

Outside of the definitional problems that exist — about what VAW is — it is important to consider the prevalence of this violence and its consequences that prompt it to be a critical area of concern. Up to thirty-five per cent of women worldwide experience sexual or physical violence from an intimate partner, and over seventy per cent of women experience some form of violence in their lifetime.[601] Violence against women impedes the realisation of core human rights, limits women's participation in private and public life, and is a pervasive barrier to women's realisation and engagement with citizenship.[602] Women who are subjected to violence

[597] Kilpatrick op cit note 596 at 1214.
[598] L Saltzman (Ed.) 'Building data systems for monitoring and responding to violence against women, Part I' (2000a) *6* No. 7 *Violence Against Women* 699-804.
[599] Kilpatrick op cit note 596 at 1217.
[600] The General Assembly et al 'Declaration on the Elimination of Violence against Women Proclaimed by General Assembly Resolution 48/104 of 20 December 1993' (1993).
[601] UNWOMEN 'Facts and Figure: Violence Against Women' available at *http://www.unwomen.org/en/what-we-do/ending-violence-against-women/facts-and-figures#notes* accessed on 20th August 2019.
[602] Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo to the General Assembly A/HRC/26/38 May 2014 at Para 58.

are denied their inherent dignity, live a life of constant fear and are especially denied the right to live a full life. The DEVAW notes that VAW is 'a manifestation of historically unequal power relations between men and women'.[603] It establishes that VAW is rooted in age-old practices, thereby implying that any measure to counter VAW as a human rights issue should be cognisant of its deep-rooted nature. The use of international frameworks to find remedies for women is an ongoing concern. Many women and girls are abused and die without realising their rights and protections espoused in these documents. Chapters 5 and 6 will discuss the international and regional frameworks addressing women's rights to be free from violence.

4.6. The Integrated Ecological Framework for Violence Against Women

Heise's integrated ecological framework for understanding VAW helps us understand the intricacies of violence that other theoretical positions cannot. This is because the ecological approach '… conceptualises violence as a multifaceted phenomenon grounded in an interplay among personal, situational and sociocultural factors.'[604] The approach was first introduced to advance research on child abuse, then later applied to domestic violence. Understanding the different levels of factors that influence violence is critical to understanding the various manifestations of violence, the causes of this violence, and particularly to the questions of this thesis, an understanding of how Lobola is harmful to women. Additionally, it helps us to create frameworks and institutions that can prevent it.

Heise uses Belsky's framework to build on her ecological framework of violence. Belsky identified four concentric circles of levels of analysis for child abuse.[605] These four levels include the personal history, micro, exo and macro systems.[606] The personal history level consists of the unique attributes and history that influence an individual's behaviour and relationships.[607] The second level is the microsystems level, and this consists of the immediate environment the individual thrives in, including the family or more intimate acquaintances or relationships.[608] The third level is the exosystems level which consists of institutions and social structures that influence the microsystem.[609] This level includes formal and informal structures

[603] Para 6 of the Preamble of DEVAW op cit note 600.
[604] Heise op cit note 445 at 263-264.
[605] J Belsky 'Child maltreatment: An ecological integration' (1980) 35 *American Psychiologist* 32-355.
[606] Ibid.
[607] Ibid.
[608] Ibid.
[609] Ibid.

such as work, neighbourhood community, social networks and identity groups.[610] Lastly, the fourth level is the macrosystems level which encapsulates general views and attitudes that permeate the culture.[611] This level influences all levels as it is all-encompassing. Edleson and Tolman added a mesosystems level which they described as an interplay between the different aspects of the social environment. They note that the mesosystem represents linkages between the family, work environment, extended social networks, and state institutions such as the police and/or justice system.[612]

Heise notes that several factors influence an individual's behaviours and attitudes towards violence. She argues that ontogenetic features such as witnessing violence as a child (learning violence), being abused as a child (experiencing violence), and familial structure affect the individual at a personal history level. These risk factors, she argues, can reliably help distinguish between victims and perpetrators and predict vulnerability to committing or receiving abuse.[613] However, it should be noted that there are no definitive markers for exposure to violence, and these factors only assist in identifying probability. For example, a study by Hotaling and Sugarman found that of the 42 risk markers of violence — associated with female victims — only one of these was identified as being consistently related to victims of violence.[614] The marker which they identified was the witnessing of violence between parents or caregivers during childhood.[615]

The personal level is vital to understand violence against women because it also helps explain why VAW is pervasive and underreported. Cook notes that violations of women's rights are often unrecognised and underreported; they often go 'unpunished and unremedied.'[616] This level helps us understand women's susceptibility to violence and how they react to this violence. When women are conditioned to seeing and experiencing violence from a young age or frequently, it becomes difficult for them to label it. Therefore, they may not necessarily report this violence.

---

[610] Ibid.
[611] Ibid.
[612] J Edleson & R M Tolman *Intervention of men who batter: An ecological approach* (1992) Sage Newbury Park, CA.
[613] Heise op cit note 445 at 266-267.
[614] Heise op cit note 445 at 266.
[615] Ibid.
[616] R J Cook 'State responsibility for violations of women's human rights' (1994) 125 *Harvard Human Rights Journal* at 126.

At the microsystem level, there is direct engagement with other individuals.[617] This interaction is laden with subjective meanings that are directly influenced by the personal history level. According to Heise, many microsystemic factors such as male dominance in the family, male control of wealth in the family, marital conflict, and alcohol use all influence the increased risk of abuse and/or violence.[618] According to Levinson, male economic and decision-making authority (two factors that influence each other) are a strong predictor of societies with a high prevalence of VAW. Social conditioning underpins this adoption of violence in these societies, as males are socialised to dominate females.[619] The skewed power relationship influences women's vulnerability to violence. In his definition of violence, Galtung notes that violence is predicated by an unequal relationship whereby the perpetrator uses his position of power to commit acts of violence against the less powerful.[620]

The exosystem displays influences that are the bi-products of changes that take place in the broader community. These changes are influenced by several factors such as migration, globalisation, etc.[621] The factors influencing violence at this level include unemployment or low socio-economic status, isolation of women and the family, and delinquent peer associations. This exosystem also affects the personal history level as it conditions the individual's beliefs and behaviour. Heise notes that it is also important to consider other contributing factors such as race, income, education, etc.[622] It follows that these factors that influence violence at the exosystemic level do not operate in isolation. Instead, they are influenced by other factors arising from the individual and microsystems and the macro system.

Lastly, the macro systemic level reflects the cultural systems that individuals function and thrive in.[623] Factors that influence violence at this level include notions of masculinity, gender roles, a sense of male entitlement/ownership over women, approval of women's physical chastisement, and a warped cultural ethos that condones violence. These factors also reflect the interaction between patriarchal beliefs and values and the other levels discussed above. Heise argues that male dominance in society influences the organisation of power in

[617] Heise op cit note 445 at 269.
[618] Heise op cit note 445 at 270-273.
[619] Heise op cit note 445 at 270.
[620] Galtung op cit 582.
[621] Heise op cit note 445 at 273.
[622] Heise op cit note 445 at 274.
[623] Heise op cit note 445 at 277.

their favour because it creates patriarchal structures that benefit them at the expense of women.[624] This argument is the underlying basis of most feminist theoretical positions.[625]

Using this framework to understand violence against women in general, specifically, violence that arises from culture provides a broader basis to evaluate the aggressors of this violence. The following section analyses the cultural practice of Lobola using this framework.

4.6.1. Analysing Lobola using Heise's Ecological Framework

Using Heise's ecological framework of analysing violence against women enables a better understanding of the relationship between VAW and the practice of Lobola. Heise argues that any analysis of violence should accommodate the fact that an unequal relationship between men and women in culture influences their disadvantaged position by virtue of lack of access to resources and cultural messaging that prescribes the roles of men and women.[626] Heise's framework helps us to deconstruct the multi-level factors influencing violence against women in relation to Lobola.

As part of the cultural normative system, Lobola is located within the macrosystem because it is a practice arising from cultural beliefs and values. However, it is essential to note that because Lobola exists within the macrosystem, it also affects the exo, micro, and personal systems. As a practice representing marriage in most African communities — as discussed in Chapter 2 of this thesis — it thus follows that these systems influence Lobola and its consequences extend to those levels. Heise points out that violence is cyclical because factors at the macro-level affect an individual's experiences and/or perpetuation of violence at the micro, exo and personal levels, affecting the macro-level again.[627] She describes a case of a man that was abused as a child (personal factor), who develops a strong need to feel in control (exosytemic factor); he exists in a culture that defines 'maleness' as responding aggressively to conflict (macro systemic factor), and where 'good women' are supposed to be submissive (macro systemic factor). This man loses his job (exosystem) and his wife, who has become economically empowered, now earns more than him, leading to violence against his wife at the micro systemic level.[628] This analogy shows how factors at a certain level play a role in influencing violence at other levels. Although Heise's framework seems to focus on the causes

[624] Ibid.
[625] Ibid.
[626] Heise op cit note 445 at 263.
[627] Heise op cit note 445 at 279.
[628] Heise op cit note 445 at 285.

of violence and abuse at a personal level, it is still helpful in explaining how culture and the subsequent structures and systems it creates can be violent in and of itself.

4.6.1.1. Gender Roles

As a product of the macro system, cultural normative practices such as Lobola influence belief and value systems that may influence violence. This is because Lobola creates rigid gender roles. It involves the payment of money or valuable goods (such as cattle) or both to the woman's family by the prospective husband.[629] This exchange of goods and sums of money allows for the marriage to be recognised. Mofokeng argues that the customary significance of the practice is that Lobola is considered marriage on its own.[630] Requiring the husband (male) to pay Lobola for his wife (female) for marriage creates gender-specific roles for marriage in customary systems. According to Heise, rigid gender roles at the societal and individual levels increase the likelihood of violence against women.[631]

A study by McConahay and McConahay, with a sample of 17 cultures, showed that gender roles were highly correlated with interpersonal violence, which was in stark contrast to those cultures that did not set these roles.[632] Creating gender roles creates entitlement and expectations of how women should behave. Stith and Farley's study — on the causal framework of marital violence — found a strong correlation between low sex-role egalitarianism scores (a low score indicates traditional and rigid gender roles) and severe wife abuse.[633] Conversely, the opposite of the above findings is true because when roles were loosely defined and men or boys took upon domestic tasks, this was associated with less aggressive behaviour.[634] From this perspective, by creating traditional gender roles, Lobola may be argued to influence acts of violence and aggression against women indirectly. Levesque contends that the belief of the benefits of culture also 'legitimises problematic practices that reinforce abusive practices.'[635] A study by Kaye, Mirembe, Ekstrom, Kyomuhendo and

[629] Tendai Mangena & Sambulo Ndlovu 'Implications and complications of bride price payment among the Shona and Ndebele of Zimbabwe' (2013) *International Journal of Asian Social Science* Vol. 3 No. 2 pp 472-481 at 474.
[630] Lesala L Mofokeng The lobolo agreement as the "silent" pre-requisite for the validity of a customary marriage in terms of the Recognition of Customary Marriages Act (2003) at 279.
[631] Heise op cit note 445 at 279.
[632] S A McConahay & J B McConahay 'Sexual permissiveness , sex role rigidity and violence across cultures' (1977) 33 *Journal of Social Issues* at 134-143.
[633] SM Stith & S D Farley 'A predictive model of male spousal violence' (1994) 8 *Journal of Family Violence* at 183-201.
[634] Ibid.
[635] R J R Levesque *Culture and Family Violence: Fostering Change Through Human Rights Law* (2001) American Psychological Association Washington DC at 4.

Johansson noted that male participants argued that paying Lobola is symbolic of ownership and control over the woman.[636] The female participants in the survey agreed with this view as they noted that Lobola takes away their rights as women, thus reducing them to objects for sale.[637] These prescribed gender roles influence men to believe that they have ownership over their wives' bodies, and this is enabled by the role of the man paying Lobola.

4.6.1.2. Entitlement and Ownership of Women's Bodies

Closely tied to rigid gender roles is the entitlement to women's bodies and lives that comes with the act of paying Lobola. As noted above, men interviewed by Kaye et al. argued that payment of Lobola for their wives symbolised the transfer of ownership of women's bodies and reproductive capacities to their husbands.[638] Dobash and Dobash's study validates this assertion of the correlation between men's sense of entitlement over women's bodies and lives to the aggravation of violence against women.[639] Heise also notes an interview with a minister in Papua New Guinea who argued that wife-beating is an acceptable custom because they paid for the wife, and therefore she became subject to the man's rule as head of the household.[640] In a survey by Ansell[641], the male participants noted that the payment of Lobola was a form of exchange that should bring a return in the form of labour and or reproductive capacity from the women.[642] Horne, Dodoo and Dodua Dodoo, in their study of the correlation between bridewealth and reproductive indebtedness in Senegal, found that brideprice payments strengthened constraints on women's autonomy, especially in the reproductive domain.[643] They conclude that in many cultures, Lobola facilitates the entitlement to women's reproductive capacities and creates conditions that enable violence against women.[644]

[636] Dan K Kaye et al 'Implications of Bride Price on Domestic Violence and Reproductive Health in Wakiso District, Uganda' (2005) *African Health Sciences* 5 no 4 at 300–303.
[637] Levesque op cit note 635 at 4.
[638] Kaye et al op cit note 636 at 301.
[639] R P Dobash & R E Dobash 'What were they thinking? Men who murder an intimate partner' (2011) *Violence Against Women* Vol 17 (1) pp. 111-134.
[640] Heise op cit note 445 at 280.
[641] Refer to Chapter 2.
[642] Ibid at 706-707.
[643] C Horne F N Dodoo & N Dodua Dodoo 'The shadow of indebtedness: Bridewealth and norms constraining female reproductive autonomy' (2013) 78 No. 3 *American Sociological Review* 503-520.
[644] Ibid.

4.6.1.3. Marital Conflict Arising out of Asymmetrical Power Structures

According to Heise, conflict in marriages is highly predictive of VAW. A survey carried out by Strauss et al. found that there was a positive correlation between frequent verbal disagreements and the likelihood of physical aggression.[645] This survey in the United States of America showed that couples who had frequent verbal arguments were 16 times more likely to be engaged in a physical altercation.[646] Hoffman, Demo, and Edwards also found the exact correlation between verbal disagreements in marriage and VAW in Thailand.[647] In both these studies, it was established that marriage disagreements often arose because of disputes over the division of labour, frequent drinking by the husband and higher educational attainment and/or income by the wife.[648] These conflicts are both a product and a consequence of asymmetrical power relations between men and women in marriage. When conflict occurs in a relationship with asymmetrical power structures, it becomes a precursor to VAW.[649] Lobola creates an asymmetrical power structure between men and women because of the transactional nature of Lobola, whereby men believe they are purchasing rights over women's sexual and reproductive rights and economic labour. As discussed in Chapter 2, there is a fundamental belief that the practice of Lobola is a financial transaction.[650] In a study in Wakiso District in Uganda by Kaye et al., the men interviewed argued that Lobola was necessary to award them exclusive rights to sex with their wives.[651] These skewed power relations created by Lobola create destructive beliefs that men can buy women's bodies through Lobola. This asymmetrical power relationship places women in a position whereby they may experience violence due to the entitlement created by the practice of Lobola.

Conclusion

This chapter has provided an in-depth analysis of the cultural relativity versus normativity debate to locate the argument of applying international human rights law to local contexts. The purpose of engaging this debate was to use the arguments to locate Lobola as cultural practice

[645] M A Straus, R J Gelles & S K Steinmets *Behind closed doors: Violence in the American Family* (1980) Doubleday Anchor New York.
[646] Ibid.
[647] K L Hoffman D H Demo & J N Edwards 'Physical wife abuse in a non-western society: An integrated theoretica approach' (1994) 56 *Journal of Marriage and the Family* 131-146.
[648] Heise op cit note 445 at 272.
[649] Ibid.
[650] Nicola Ansell 'Because it is our Culture! Renegotiating the meaning of lobola in Southern African Secondary Schools' (2001) *Journal of Southern African Studies Volume* 27 (4) at 706.
[651] Kaye cited in Levesque op cit note 635 at 301.

in the framework of violence — which is the foundational inquiry of this thesis. As the global system becomes more interconnected, the need for developing universal standards has become critical. The human rights system provides a framework of how to bridge the transition into a global village. The debate between cultural relativity and universalism places culture on two extreme sides of the argument. Universalists criticise relativists for being moral nihilists because they view culture as being present only in groups of people living in isolated communities.[652] Relativists argue that societies are not homogenous and should be studied separately. They disagree with the unilinear application of universal moral standards as these do not consider the local way of life, values and normative systems. On the other hand, through psychology theories, for example, the Theory of Reasoned Action, universalists argue that human beings have shared natural standards of morality that cut across their race, ethnicity, or class. Through prescribing universal standards of human rights, international human rights frameworks affirm this shared morality.

Thus, universal human rights standards are not a new phenomenon applicable to people, as they codify what already is prescribed by natural law.[653] Cultural practices need to be studied from both objective and subjective perspectives. Therefore, this thesis argues for the adoption of 'relativism within reason' because local experiences cannot be entirely ignored in favour of universal standards.[654] Only after understanding the subjective experience can one use this understanding to apply universal standards. Cowan, Dembour and Wilson argue that we should not view universalism and relativism as alternatives, but rather, we should use the tensions between the two positions as part of the continuous negotiation of the ever-changing and interrelated global context.[655] They argue further that viewing culture as open to change affords us the opportunity to use cultural practices as resources for change.[656]

Understanding what harmful traditional practices are is important as it helps in answering the questions of this thesis. CEDAW has urged Zimbabwe, Kenya, Uganda and Zambia to take steps to eliminate Lobola as it is an HTP. By providing an overview of what HTPs are and their consequences, has enabled the discussion on establishing the position of Lobola in the framework for VAW. Using the definitions of HTP to analyse whether Lobola

[652] Engle Merry op cit note 440 at 8.
[653] Engle Merry op cit note 440 at 9.
[654] Jack Donnelly 'The Relative Universality of Human Rights' (2007) *Human Rights Quarterly* Vol 29 (2) pp. 281-306.
[655] J K Cowan, M B Dembour & R Wilson *Culture and Rights: Anthropological Perspectives* (2001) Cambridge University Press New York at 6.
[656] Ibid.

could be classified as such is challenging because the actual customary components of the practice itself cannot be argued to possess the qualities of an HTP. However, the expansion of the analysis to use Heise's ecological framework for violence enabled an investigation and provided an understanding of the harmfulness of the practice, and thus its correlation to VAW.

The analysis above reinforces the view that the ecological framework for analysing violence against women, developed by Heise, is a valuable tool to analyse how certain cultural practices at the macro systemic level may influence VAW. Although the other levels of analysis are important in understanding the etiology of violence, the macro systemic factors provided the best approach to unpacking the position of Lobola as a form of VAW. From this standpoint, it can be argued that the practice of Lobola itself does not present itself as a form of violence against women. However, because of the perceptions, beliefs and power systems it creates, the practice becomes an aggravator of VAW. Lobola creates rigid gender roles, skewed ideas of entitlement and ownership of women's lives and bodies, and asymmetrical power relations that influence VAW. In this regard, this thesis establishes that Lobola is an enabler and/or aggravator of VAW. Not only does Lobola create conditions necessary for VAW, but it also serves to validate the violence at the same time. The findings in this chapter thus provide the basis for analysing Lobola against the international and regional frameworks protecting women from violence, as will be discussed in Chapters 5 and 6.

CHAPTER 5

Analysing the status of VAW in International Human Rights Law and the approach of the CEDAW Committee

"Few movements have made so large an impact in so short a time as the women's human rights movement…[it has] to a large extent also transformed the way human rights issues are understood and investigated" – Human Rights Watch Global Report on Women's Rights, 1995.

Introduction

Understanding the practice of lobola and its position as a form of VAW using social science theoretical approaches provides a basis to interrogate the position of the practice against the standards prohibiting VAW in International Human Rights Law. According to the current Special Rapporteur on Violence Against Women, its causes and consequences (hereafter SRVAW), the existing frameworks on women's rights, including the Declaration on the Elimination of Violence against Women (DEVAW), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), as well as other human rights regional treaties, have managed to define and articulate the international understanding of VAW.[657] The former SRVAW notes that these instruments '…have reaffirmed and acknowledged that violence against women is both a cause and a consequence of discrimination, patriarchal dominance, and control'.[658] However, despite these remarkable strides, the women's rights system is weakened by several gender biases, gaps and inconsistencies in international law and policies that leave women vulnerable to discrimination and violence.[659] Manjoo argues that the international community continues to take a soft law approach to the prohibition of VAW, which has significantly impacted women's right to be free from violence by limiting the understanding of the issue and women's access to justice.[660]

Glaringly missing from the body of human rights instruments is an international legally binding framework prohibiting violence against women and girls. To date, women's rights instruments are 'nothing more than a political expression with moderately powerful weight.'[661] Manjoo argues that in the UN system, the practice of VAW has been to propose soft law

[657]Para 62 of UN Human Rights Council, Report of the Special Rapporteur on violence against women, its causes and consequences, 2014 A/HRC/26/38.
[658] Ibid.
[659] Aisha K Gill 'Violence Against Women and the Need for International Law' in Rashida Manjoo & Jackie Jones (eds) *The Legal Protection of Women from Violence Normative Gaps in International Law* (2018) Routledge London at 10.
[660] Rashida Manjoo 'Normative Developments on Violence Against Women in the United Nations System' in Rashida Manjoo & Jackie Jones (eds) *The Legal Protection of Women from Violence Normative Gaps in International Law* (2018) Routledge New York.
[661] Jennifer L Ulrich 'Confronting Gender-Based Violence with International Instruments : Is a Solution to the Pandemic Within Reach?' (2000) *Indiana Journal of Global Studies* Vol 7(2) at 653.

mechanisms rather than legally binding instruments to protect women from violence.[662] Cook adds that the failure to enforce women's rights is a result of misunderstanding the systemic nature of the subordination of women, the failure thereafter to view this subordination as a human rights violation, and a lack of state practice to act against this discrimination.[663] Even though the progress on women's rights may not necessarily translate to marked differences in their lives, the rights discourse is a critical factor in galvanising this change. This is because the rights discourse offers a robust vocabulary that formulates political and social grievances that can be understood by pivotal actors in state and international environments.[664]

The progression of women's rights as part of the International Human Rights Law (IHRL) discourse has been slow but remarkable.[665] Human rights in international discourse mainly were centred on male experiences and the need for rights. Specifically, women's rights have traditionally been understood in the context of the social space, which influenced the idea that women's experiences were marginal to human rights advocacy unless these experiences 'mirrored or compared to' the experiences of men.[666] Ulrich claims that upon interrogating the Universal Declaration of Human Rights (UDHR)[667], it is not difficult to argue that this framework is sexist.[668] The UDHR, as a principal human rights framework, possesses a 'striking absence of protections for women'.[669] The framework only references women in Articles 16 and 25, reinforcing women's subordination to being recognised as mothers and wives and not full rights-bearing citizens.[670] These references to women as only acting in their capacity as wives and mothers influence the continued subordination of women in both public and private spheres.[671]

---

[662] Rashida Manjoo 'Normative Developments on Violence Against Women in the United Nations System' in Rashida Manjoo & Jackie Jones (eds) *The Legal Protection of Women from Violence Normative Gaps in International Law* (2018) Routledge New York at 75.
[663] Rebecca Cook 'Women's International Human Rights Law: The Way Forward' (1993) *Human Rights Quarterly* Vol 15 No. 1 230-259 at 231.
[664] Cook (1993) op cit note **Error! Bookmark not defined.** at 231.
[665] Ibid.
[666] Liz Kelly 'Inside Outsiders' (2005) *International Feminist Journal of Politics* Vol 7 No. 4 pp. 471-495 at 477.
[667] Universal Declaration of Human Rights, General Assembly Resolution 217A (III) U.N GAOR 3rd Session, UN Doc. A/810.
[668] Ulrich (2000) op cit note **Error! Bookmark not defined.** at 639.
[669] Ulrich (2000) op cit note **Error! Bookmark not defined.** at 639.
[670] Article 16 of the Universal Declaration on Human Rights expands on men and women's rights in marriage and family life, Article 25 expands the right to health and wellbeing including the right to special care for mothers and children.
[671] Hilary Charlesworth 'The Mid-Life Crisis of the Universal Declaration of Human Rights' (1998) *Washington & Lee Law Review* Vol 55(3) at 784.

The UDHR also has gendered blind spots that limit its capacity to protect women by grounding the human rights discourse to validate masculine strands in IHRL.[672] Ford argues that the human rights discourse was initially problematic because human rights were only used as a means to an end.[673] Initially, human rights were a political means because, in the post-World War II global environment, direct acts of aggression on a sovereign state were unacceptable; the only acceptable justification for the use of force was to protect human rights. This initial framing was thus divorced from women's rights and descended into 'technocratic language and processes' that did not leave room for the realisation of these rights by women on the ground.[674]

Women's rights were enshrined in several treaties, such as the Convention on Consent to Marriage, the Minimum Age for Marriage and Registration of Marriages of 1962 and the 1951 Convention on Equal Remuneration.[675] However, before 1979, no international legally binding instrument solely enshrined the recognition of women's rights. It was only in 1979 when women's rights were accorded a specific framework through the adoption of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).[676] The CEDAW is the first universal treaty that specifies women's rights as human rights.[677] This framework has become a foundational framework for various women's rights instruments and discourses. Cook notes that CEDAW is '…universal in reach, comprehensive in scope and legally binding in character.'[678] The purpose of CEDAW is to define global standards for defining discrimination against women and encourages states to take steps to eliminate all forms of discrimination against women as they inhibit the realisation of women's core rights.[679] According to Cook, law-making is central to meeting women's strategic needs because the law provides a means of their realisation.[680]

---

[672] Fionnuala N I Aolain *What Feminist Legal Theory Teaches International Human Rights* (n.d) Transitional Justice Institute: University of Ulster at 2.
[673] Anne Ford (2002) cited in Liz Kelly, 'Inside Outsiders' (2005) *International Feminist Journal of Politics* Vol 7 No. 4 pp. 471-495 at 473.
[674] Kelly (2005) op cit note **Error! Bookmark not defined.** at 473.
[675] UN General Assembly, Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, 7 November 1962; International Labour Organization (ILO), Equal Remuneration Convention, 29 June 1951.
[676] UN General Assembly Convention on the Elimination of All Forms of Discrimination against Women 18 December 1979 A/RES/34/180.
[677] Ulrich op cit note **Error! Bookmark not defined.** at 640.
[678] Rebecca J Cook 'Enforcing Women's Rights through Law' (1995) *Gender & Development* Vol 3 No. 2 pp 8-15 at 8.
[679] Article 1 of the Convention on the Elimination of All Forms of Discrimination Against Women.
[680] Cook (1995) op cit note **Error! Bookmark not defined.** at 9.

As will be argued in this chapter, the CEDAW Committee's jurisprudence on cases of VAW is limited, and this is due to several factors, including the limits of the CEDAW treaty itself, to address VAW. However, CEDAW is insufficient in its scope to provide standards of protection as well as mechanisms for redress. Through its General Recommendations, the Committee imposes a burden on women to prove that the violence they face results from discrimination. International, regional, and domestic frameworks have the power to make a difference in women's lives. [681] This normative gap in international human rights law continues to leave women vulnerable to violence. It shows the international community's unwillingness to decisively act on developing a legally binding treaty that will support the elimination of VAW. This chapter evaluates the international normative standards on women's rights and violence against women to understand the available mechanisms that protect women from violence. Secondly, this chapter seeks to draw attention to the normative gap in international human rights law on VAW, limiting opportunities for protection for women who face violence from traditional cultural practices such as lobola.

5.1. The Evolution of Legal Normative Frameworks on VAW

The progression and evolution of human rights within the UN human rights system has shown that rights frameworks are dependent on the previously established generation of human rights.[682] The recognition of 'new human rights' is dependent upon the interrogation and modification of already recognised human rights. Exploring the development of legal normative standards on VAW is important to understand the progression in our understanding of VAW's issue and provide a basis for exploring the opportunities to improve these legal standards. When examining legal frameworks on VAW, the legal normative history of VAW can be traced back to starting with the adoption of CEDAW in 1979.[683] However, the issue of VAW was an issue of discussion before the adoption of CEDAW. Gill notes that the last four decades have witnessed an increase in VAW awareness, the adoption of criminal justice measures, and other deterrent interventions aimed at preventing it. [684] VAW was initially viewed as a private issue. As mentioned above, it then progressed to be a welfare issue, then a

[681] Cook (1995) op cit note **Error! Bookmark not defined.** at 8.
[682] Liz Kelly 'Inside Outsiders' (2005) *International Feminist Journal of Politics* Vol 7 No. 4 pp. 471-495 at 475.
[683] Ekaterina Yahyaoui Krivenko 'The Role and Impact of Soft Law on the Emergence of the Prohibition of Violence Against Women within the Context of CEDAW' in Stephanie Lagouette Thomas Gammeltoft-Hansen & John Cerone *Tracing the Roles of Soft Law in Human Rights* (Eds) (2016) Oxford University Press; Oxford at 50.
[684] Gill op cit note **Error! Bookmark not defined.** at 2.

criminal justice issue and more recently, a public health issue in women's sexual and reproductive health rights.[685] Presently VAW is viewed as a human rights issue that disproportionately affects women.[686]

According to Kelly, the shift of VAW from being a marginalised area of concern into mainstream women's rights discourse is noteworthy.[687] She further notes that, even though violence, specifically sexual assault on women and girls, was an issue in first-wave feminism, VAW became a mainstream issue during second-wave feminism.[688] Gill agrees with Kelly about the critical role that feminism has played to raise awareness about VAW and ensuring it remained a global human rights issue.[689] Therefore, adopting a feminist lens when developing frameworks to protect women from this violence is important. Using a gender-based theory on violence allows for the appreciation of the historical nature of gender inequality and its link to violence.[690]

Despite the positive progress in standard-setting mechanisms, advocacy and awareness-raising, impunity is a critical issue affecting VAW discourse and action.[691] The prevalence of VAW is still high due to limited state or non-state actor accountability, and this contributes to this prevalence.[692] Kelly argues that it was the development of VAW as a field of scholarly inquiry that highlighted the prevalence of VAW as an epidemic affecting one in two and one in four women directly during their lifetime that propelled global attention.[693] Currently, the prevalence of VAW is very high, with over 35% of women experiencing sexual or other forms of violence from an intimate or non-intimate partner in their lifetime.[694] A 2013 study by the World Health Organisation established that +-37% of ever partnered women in developing countries (Africa and South East Asia) encountered violence from an intimate partner compared to the 28% prevalence in developed countries.[695] About ten years earlier, in a similar

[685] Manjoo op cit note **Error! Bookmark not defined.** at 73.
[686] Manjoo op cit note **Error! Bookmark not defined.** at 73.
[687] Liz Kelly VIP Guide: Vision, Innovation and Professionalism in Policing Violence Against Women and Children (2000) Strasborg, Council of Europe.
[688] Kelly (2005) op cit note **Error! Bookmark not defined.** at 475.
[689] Gill op cit note **Error! Bookmark not defined.** at 2.
[690] Global Rights for Women Time for action: The Way to a Binding International Treaty on Violence Against Women (2020) at 8.
[691] Manjoo op cit note **Error! Bookmark not defined.** at 74.
[692] Manjoo op cit note **Error! Bookmark not defined.** at 74.
[693] Kelly (2005) op cit note **Error! Bookmark not defined.** at 475.
[694] Statistics from UNWOMEN Facts and figures: Ending violence against women available at *https://www.unwomen.org/en/what-wedo/ending-violence-against-women/facts-and-figures* accessed on 27th February 2020.
[695] World Health Organisation Global and regional estimates of violence against women: prevalence and health effects of intimate partner violence and non-partner sexual violence (2013) World Health Organisation at 16

study by the United Nations Development Fund for Women (UNIFEM), it was found that among women aged 15-44 years, more women died from gender-based violence than from cancer, malaria, traffic injuries, and war effects combined.[696] These prevalence statistics show the extent to which VAW is an epidemic and justifies why it should be a critical issue of concern on the global human rights agenda.

One of the trailblazers in women's rights bodies is the Commission on the Status of Women (hereafter CSW). The CSW formed in 1946 through an ECOSOC Resolution[697] is "…the principal global intergovernmental body exclusively dedicated to the promotion of gender equality and the empowerment of women."[698] The functions of the CSW are to "…prepare recommendations to the ECOSOC on promoting women's rights in political, economic, social and educational fields."[699] The CSW recommended adopting an international instrument that addresses VAW at the Commission's 35th session in 1991.[700] Over the years, the CSW has also highlighted VAW in its agreed conclusions, and this has continually put the issue on the international platform of human rights.

The CSW's conclusions in 1998, 2007 and 2013 focused on the issue of VAW. This included measures that governments should take to eliminate VAW, including an integrated and holistic approach to combatting this violence, provision of resources, legal actions, linkages and cooperation between forms of violence against women, research, and gender-disaggregated violence data, and lastly, change in attitudes.[701] In 2007, the CSW agreed conclusions focused on eliminating all forms of discrimination and violence against the girl child.[702] The CSW urged governments to put in place policies and encourage norms that positively impact the lives of girl children, thereby reducing their vulnerability to discrimination and violence.[703] In 2013, the CSW agreed conclusions also focused on

available at https://apps.who.int/iris/bitstream/handle/10665/85239/9789241564625_eng.pdf;jsessionid=ED3E5360C8FD6D896051F8A4AC5692DD?sequence=1.

[696] United Nations Development Fund for Women *Masculinity and Gender Based Violence* (2002) at 2.

[697] ECOSOC resolution 11(II) of 21 June 1946.

[698] See https://www.unwomen.org/en/csw.

[699] Para 11 of ECOSOC Resolution 11(II) see note 47.

[700] Commission on the Status of Women Report on the 35th Session, Economic and Social Council Official Records 1991 Supplement 8 E/CN.6/1991/14.

[701] CSW42 Agreed Conclusions (I) United Nations, March 1998 available at https://www.unwomen.org/-/media/headquarters/attachments/sections/csw/42/csw42_i_e_final.pdf?la=en&vs=1619.

[702] CSW51 Agreed Conclusions United Nations, March 2007 available at https://www.unwomen.org/-/media/headquarters/attachments/sections/csw/51/csw51_e_final.pdf?la=en&vs=1110.

[703] See generally CSW42 Agreed Conclusions op cit note **Error! Bookmark not defined.**. These included education and training, health, gender stereotypes, HIV/AIDS, child labor, armed conflict and condemning violence against girls.

eliminating all forms of violence against women and girls. The agreed conclusions highlighted the intersections between economic, social, cultural rights and this violence.[704] The Commission urged governments to protect women from these multiple and intersecting forms of violence and discrimination through strengthening implementation of legal and policy frameworks and accountability, addressing structural and underlying causes and risk factors to prevent violence against women and girls, strengthening multisectoral services, programmes and responses to violence against women and girls and lastly improving the evidence-base.[705]

In 2018, even though the focus of the agreed conclusions was not on VAW, the Commission highlighted this issue as a challenge to the realisation of gender equality and empowerment of the rural woman and girl child.[706] The CSW noted that VAW results from historical and structural inequalities reflected in many forms and manifestations in private and public life.[707] The continued focus of the CSW on VAW over the years shows that VAW is one of the biggest hindrances to the realisation of women's rights. The CSW's work was also instrumental in the development of CEDAW and DEVAW. The CSW is a critical body and forum for highlighting issues affecting women over the years, and the different agreed conclusions bring attention to these issues. The most recent CSW in 2020 resulted in a political declaration that also recognises that eliminating, preventing and responding to all forms of violence and harmful practices against women in all spheres is a matter of urgency.[708] However, since its recommendation in 1991, the CSW has not made any further recommendations for a legally binding treaty on VAW. Manjoo argues that the CSW has increasingly become a politically contested forum with a growing practice of 'clawbacks'.[709] She further contends that the CSW has made broad and sweeping statements in its outcome documents, and this reflects, "…an attempt to deflect from addressing the reality of widespread and persistent violations of women's human rights globally."[710] To be a more effective body in expanding and refining the global understanding of women's rights issues, the CSW needs to be more rigorous and specific in its agreed conclusions.

[704] See generally Manjoo op cit note **Error! Bookmark not defined.** at 77.
[705] CSW57 Agreed Conclusions, United Nations March 2013.
[706] CSW62 Agreed Conclusions United Nations, March 2018.
[707] Para 25 of CSW62 Agreed Conclusions op cit note 707.
[708] CSW64 Political declaration on the occasion of the twenty-fifth anniversary of the Fourth World Conference on Women, E/CN.6/2020/L.1 available at *https://undocs.org/en/E/CN.6/2020/L.1*.
[709] Manjoo (2018) op cit note **Error! Bookmark not defined.** at 78.
[710] Manjoo (2018) op cit note **Error! Bookmark not defined.** at 78

During the UN Decade for Women from 1975 to 1985, VAW, specifically domestic violence, was an issue of concern for women's rights activists.[711] During this time, global advocacy at different world conferences and meetings, including the Mexico City and Copenhagen World Conferences on Women, influenced the continuation of the global discourse on VAW that led to developing policies and soft law frameworks. VAW was first addressed at the interstate level at the first UN World Conference on Women held in Mexico City, which coincided with the International Women's Year.[712] The conference report mentions VAW. However, it was not addressed in the Plan of Action.[713] Additionally, VAW was not referenced in any normative capacity, but rather these references were general observations of the reality of women's lives.[714] Krivenko argues that in 1975, there existed a global awareness of the issue of VAW, however, there was no normative commitment during this period due to a lack of political will by states to address this issue.[715] Although there were recognitions of some forms of VAW as a phenomenon, it had not yet been defined.[716]

VAW was also discussed at the second World Conference on Women held in Copenhagen in 1980. The Report and Programme of Action adopted in 1980 at this conference mentioned VAW as an issue of international relevance.[717] In this report, member states were urged to enact legislation to prevent domestic and sexual violence against women and ensure a victim-friendly justice system.[718] The report also advocated for developing policies and programmes aimed at eliminating all forms of violence against women and children.[719] The Copenhagen Report and Programme of Action are recognised as the only UN official documents mentioning VAW before the work of CEDAW post-1979.[720] The Programme of Action employed strong language that encouraged legislative measures to be taken to combat VAW.

[711] Report of the Special Rapporteur on Violence Against Women, its causes and consequence, Rashida Manjoo (2014) A/HRC/26/38 at 3.
[712] Krivenko op cit note **Error! Bookmark not defined.** at 50.
[713] See generally Report of the World Conference of the International Women's Year, Mexico City 19 June-2 July 1975, E/CONF.66/34.
[714] Krivenko op cit note **Error! Bookmark not defined.** at 51.
[715] Krivenko op cit note **Error! Bookmark not defined.** at 51.
[716] See the UN General Assembly Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others 2 December 1949, A/RES/317, available at https://www.refworld.org/docid/3ae6b38e23.html accessed on 27 February 2020.
[717] See para 65 and 141 (f) of the World Conference of the United Nations Decade for Women: Equality, Development and Peace, Copenhagen, 14 to 30 July 1980: report. A/CONF.94/35.
[718] Para 65 of A/CONF.94/35.
[719] Para141 (f) of A/CONF.94/35.
[720] Krivenko op cit note **Error! Bookmark not defined.** at 54.

The third World Conference on Women was held in Nairobi in 1985. The ensuing Expert Group Meeting on violence in the family in 1986 "…further highlighted the global nature and concern regarding violence against women."[721] The first notable soft law development in VAW was when the UN General Assembly adopted Resolution A/RES/40/36 on domestic violence.[722] This Resolution urged member states to take urgent action to prevent and address domestic violence and take civil and criminal legislation measures to combat it.[723] Furthermore, it urged the Secretary-General to research domestic violence to formulate strategies that could serve as the basis for informing policies.[724] This Resolution is important because it was one of the first attempts to address the issue of VAW in the UN.

At CEDAW's eighth session in 1989, the treaty's monitoring body, the CEDAW Committee, adopted General Recommendation No. 12 on VAW. This Recommendation will be elaborated under Section 3 of this chapter as it is a crucial document on the interpretation of normative standards on VAW, particularly regarding the questions of this thesis. In 1991, the UN Economic and Social Council (ECOSOC) adopted Resolution 1991/18 that advocated for developing a framework to prevent VAW.[725] The Council also encouraged "…member states to adopt, strengthen and enforce legislation prohibiting VAW, to take administrative social and educational measures to protect women from all forms of physical and mental violence."[726] The ECOSOC Resolution is a significant development because it highlighted the need for a global legal framework to combat VAW as it is a pervasive issue affecting women. From the recommendation of the resolution to convene a meeting of experts to discuss a new instrument on VAW, the experts discussed a draft Convention on violence against women. Also, they prepared a draft declaration on the elimination of violence against women.[727] One of the other matters was establishing a special thematic rapporteur on violence against women during this meeting. This experts meeting triggered by Resolution 1991/18 was instrumental in establishing some of the frameworks and bodies on VAW in the UN to date, that is, the Declaration on the Elimination of Violence Against Women and the thematic mandate of the Special Rapporteur on Violence Against Women, its causes and consequences.

[721] Report of the SRVAW A/HRC/26/38 at 4.
[722] UN General Assembly Domestic violence: resolution / adopted by the General Assembly 29 November 1985, A/RES/40/36, available at https://www.refworld.org/docid/3b00f00b64.html accessed on 25 February 2020.
[723] Section 2 and 7 (a) of General Recommendation 40/36.
[724] Section 3 of General Recommendation 40/36.
[725] United Nations Economic and Social Council Resolution 1991/18.
[726] SRVAW Rashida Manjoo Report A/HRC/26/38 at 4.
[727] UN Secretary General Report on Violence Against Women in All its Forms 1992 E/CN.6/1992/4.

Shortly thereafter, in 1991, at the Expert Group meeting on violence against women, convened by the Division for the Advancement of Women in Vienna in 1991, a draft declaration on VAW was developed. At this meeting, the Expert Group also "…discussed the elaboration and strengthening of CEDAW General Recommendations, the appointment of a thematic rapporteur on violence against women, an optional protocol to the CEDAW, and importantly, the creation of a convention on violence against women."[728] These developments reflect the soft law developments on VAW.

In 1993, another significant development on the recognition of VAW in IHRL took place at the World Conference on Human Rights in Vienna. At this Conference, the Vienna Declaration and Programme of Action affirmed that it was critical to eliminate all forms of VAW in both public and private life.[729] The Vienna Declaration and Programme of Action are universally acknowledged[730] as a milestone in recognising and defining VAW, with its prohibition becoming an inalienable right.[731] Of note is the use of strong language in the framework. It states that the rights of women are an inalienable, integral and indivisible part of human rights.[732] The Declaration and Programme of Action also affirm a vital aspect of VAW, that it occurs in both the private and public spheres.[733] This was a significant development because VAW is usually confined to the private sphere, where the state is reluctant to interfere.[734] By locating VAW as both a private and public issue, this Declaration urged states to take action to protect women at both levels. A call for the General Assembly to adopt the draft declaration on VAW was also made. This is also significant because the draft declaration called upon the UN to integrate VAW in its human rights provisions and appoint a special rapporteur on VAW. In 1993, the UN General Assembly heeded this call and finally adopted the Declaration on the Elimination of Violence Against Women (DEVAW).[735]

The adoption of the DEVAW[736] was a pivotal step in recognition of VAW in IHRL. The General Assembly finally adopted the Declaration in 1993, with no vote, after several other consultations between the CEDAW Committee, CSW and the ECOSOC. The adoption of this

[728] SRVAW Rashida Manjoo Report A/HRC/26/38 at 4-5.
[729] Para 38 of Vienna Declaration and Programme of Action.
[730] Amnesty International It is in our hands-Stop Violence Against Women (2004) London.
[731] Article 18 of the Vienna Declaration and Programme of Action.
[732] Article 18 of the Vienna Declaration and Programme of Action.
[733] Para 38 of Vienna Declaration and Programme of Action.
[734] Manjoo op cit note **Error! Bookmark not defined.** at 73.
[735] Krivenko op cit note **Error! Bookmark not defined.** at 59.
[736] UN General Assembly Declaration on the Elimination of Violence against Women 20 December 1993, A/RES/48/104, available at https://www.refworld.org/docid/3b00f25d2c.html.

framework is credited to the Commission's work on the Status of Women (CSW).[737] ECOSOC, through Resolution 1991/18, recommended the development of this framework, after which the Division for the Advancement of Women convened an Expert Group meeting to prepare the draft declaration on the elimination of violence against women in the same year.[738] Among the recommendations from this meeting, the Expert Group also recommended strengthening CEDAW's General Recommendations, establishing a thematic rapporteur on VAW, developing an Optional Protocol to CEDAW and a separate convention on VAW.[739]

DEVAW serves as the primary soft law normative framework for addressing VAW in the UN human rights system[740] , but it does not have any legally binding power. It can be argued that even though the soft law nature of the Declaration affirms the prohibition of VAW, it also shows the complacency of the international community to take decisive action and transition DEVAW into hard law after 27 years.[741] DEVAW is crucial because it broadens the scope of VAW through its definition of VAW. The framework defines VAW as "any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life."[742] This definition is critical because it not only defines violence as sexual or physical but also psychological. This definition also recognises that violence can be covert, structural and occurs in public and private environments. DEVAW also outlines specific recommendations for states to support the elimination of VAW. Some of these recommendations include encouraging states to ratify CEDAW, to exercise due diligence to prevent, investigate and punish acts of violence against women, passing legislation, drafting a national plan to prevent violence against women, providing assistance to victims of violence, changing social and cultural patterns that aggravate this violence and to include information and data on VAW in their reports to CEDAW.[743] The power of DEVAW is that it serves as a 'consensus statement' by states on the agreement on

[737] SRVAW Rashida Manjoo Report A/HRC/26/38 at 4.
[738] SRVAW Rashida Manjoo Report A/HRC/26/38 at 4.
[739] SRVAW Rashida Manjoo Report A/HRC/26/38 at 5.
[740] SRVAW Rashida Manjoo Report A/HRC/26/38 at 5.
[741] Kriveniko op cit note **Error! Bookmark not defined.** at 60.
[742] Declaration on the Elimination of Violence Against Women, General Assembly Resolution A/RES/48/104 1993.
[743] Articles 2,3 and 4 of DEVAW.

the prohibition of VAW, and it also outlines the UN's responsibility to address this violence as a human rights violation.[744]

However, a glaring weakness of DEVAW is the framework's definition of violence as a form of discrimination. This limitation restricts the scope for seeking justice for crimes of VAW because the victim has to prove that the violence is based on prejudice. Kelly argues that by defining violence in relation to discrimination, the framework uses a weaker concept than oppression.[745] This is because oppression signifies a much harsher form of violence in human rights. Another weakness of the Declaration is that it does not have a review or monitoring mechanism. This means that there is no specific body to monitor states' compliance with standards articulated in the Declaration.[746]

In 1994, the International Conference on Population and Development was convened in Cairo, with some degree of controversy and agitation based on discussions primarily focusing on women's sexual and reproductive rights. De Jong argues that this conference was 'particularly contentious' because a new paradigm in population policy was developed, which shifted population discourse from rapid population growth issues to matters of individual reproductive and sexual rights.[747] A Declaration and a Programme of Action (Cairo Declaration and POA) was adopted by consensus, which outlined women's interests in matters of population and development and the concept of 'sexual and reproductive health rights' was adopted as part of women's rights language across the globe.[748] This conference thus endorsed the concept of sexual and reproductive health, which inherently empowered women as having agency in making decisions concerning their bodies.[749]

As an outcome, principle four of the Cairo Declaration notes that "…advancing gender equality and equity and the empowerment of women and the elimination of all kinds of violence against women, and ensuring women's ability to control their fertility, are cornerstones of population and development- related programmes.[750]" This recognition of the relationship between discrimination, violence and development was an essential step to recognising the

[744] C M Chinkin M A Freeman B Rudolf *The UN Convention on the Elimination of Discrimination Against Women; A commentary* (2012) Oxford University Press New York at 448.
[745] Kelly op cit note **Error! Bookmark not defined.** at 479.
[746] Manjoo (2018) op cit note **Error! Bookmark not defined.** at 80.
[747] Jocelyn DeJong The role and limitations of the Cairo International Conference on Population and Development (2000) Science & Medicine Vol 51(6) p.941-953.
[748] United Nations Population Fund Programme of Action of the International Conference on Population Development 20th Anniversary Edition (2014)
[749] De Jong op cit note 748 at 945.
[750] Ibid at 12.

mutually reinforcing nature of different spheres of women's lives. The framing of women and men's autonomy to make sexual and reproductive decisions also straddles the ethical and legal contexts within which these rights are exercised. This created the basis for discussing the importance of recognising women's bodily autonomy in all contexts, including cultural and religious contexts where women face discrimination. Women's rights to bodily integrity, security of person, informed consent in health and sexual relations are deeply embedded in the Cairo Declaration and heralded an important addition to the discourse on women's rights and VAW.

In 1995, the Fourth World Conference on Women in Beijing marked a pivotal moment in defining the global understanding of women's rights generally and VAW specifically. The Beijing Platform for Declaration was adopted unanimously by 189 states and it set the agenda for women's empowerment and gender equality as critical components of policymaking.[751] In this Declaration, the United Nations outlined the global agenda for gender empowerment and equality in 12 critical areas of concern, of which VAW was one. Under this critical area, three objectives were identified, including taking integrated measures to prevent and eliminate VAW, study the causes and consequences of VAW and the effectiveness of preventative measures, eliminate trafficking in women and assist victims of violence due to prostitution and trafficking. At this conference, it was reinforced that VAW is cyclical in nature as it is mutually reinforced by prevailing cultural, economic, religious and political contexts.[752]

Furthermore, VAW is attributed to be a manifestation of historically unequal power relations between men and women, which have led to the domination of one sex by the other. [753] Governments agreed to take all necessary steps to eliminate VAW and not to invoke any religious, traditional or customary considerations to avoid their obligations. Additionally, governments agreed to undertake both positive and negative obligations to ensure that women are protected from all forms and manifestations of violence.[754]

There have also been other developments within the UN's General Assembly and Security Council that specifically focus on addressing VAW. However, it should be noted that General Assembly Resolutions are not binding on states. The Charter of the General Assembly

[751] The United Nations World Conference on Women, Beijing, China (1995) available at https://www.un.org/womenwatch/daw/beijing/platform/violence.htm
[752] Ibid.
[753] Ibid.
[754] Ibid.

gives the body power to recommend and discuss issues without creating legally binding obligations.[755] However, General Assembly resolutions may create customary international law through state practice and *opinio juris*.[756] On the other hand, Security Council Resolutions can be binding on state parties if adopted under Chapter VII of the United Nations Charter. In 1971, the International Court of Justice in an advisory opinion to Namibia. In considering the legal implications of Security Council Resolution 276, the Court held that the language used in Resolutions of the Security Council "should be carefully analysed before a conclusion can be made as to its binding effect."[757] Therefore, it can be considered that a language test must be applied to consider whether a Security Council Resolution is binding or not if it was not adopted under Chapter VII.

An example of General Assembly Resolutions on VAW is Resolution 67/144 (on Intensification of efforts to eliminate all forms of violence against women. civil remedies, criminal sanctions and provision of psychosocial services to women who have faced violence). Resolution 61/143 and 62/133 (under the same theme as 67/144), the General Assembly urges all states to "…to take action to eliminate all forms of violence against women by means of a more systematic, comprehensive, multisectoral and sustained approach, adequately supported and facilitated by strong institutional mechanisms and financing, through national action plans, including those supported by international cooperation and, where appropriate, national development plans…" and respectively requested the Statistical Commission and the Secretary-General to develop a set of indicators on violence against women.[758] Manjoo states that these Resolutions from the General Assembly provide conceptual clarity and specificity in attempting to set standards and obligations of state parties to act against VAW.[759]

In fulfilling its mandate to maintain peace and security under Chapter V of the United Nations Charter, the Security Council has also developed Resolutions focused on VAW. Resolutions 1325 and 1820 focus on women and conflict, including its relation to gender-based violence and their role in prevention, resolution and peace and security. Both Resolutions recognise that women are disproportionately affected by conflict and war and that the inclusion of women in peace negotiations and processes can positively contribute to these processes.

[755] Article 10 of Chapter IV of the United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI available at *https://www.un.org/en/charter-united-nations/index.html*.
[756] TW Bennett & Jonathan Strug *Introduction to International Law* (2013) Juta & Co. Ltd Cape Town at 29.
[757] Paras 113-114 of the Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia, International Court of Justice (ICJ), 21 June 1971.
[758] General Assembly Resolutions 61/143 (2007) A/RES/61/143 and 62/133 (2008) A/RES/62/133.
[759] Majoo (2018) op cit note **Error! Bookmark not defined.** at 81.

Resolution 1325 explicitly highlights States' responsibility to end impunity and prosecute sexual violence crimes against women, among other war and/genocide crimes.[760] Due to normative and implementation gaps, the UN Security Council adopted another resolution on women peace and security, that is, Resolution 1820.[761] This Resolution is important because it notes that rape and other forms of sexual violence during conflict and/or war times constitute war crimes.[762] This Resolution also called on member states to exclude crimes of sexual violence from amnesty provisions in conflict resolution processes.[763] Resolution 1960 urges the Secretary-General to include information on parties to armed conflict who are taking part in crimes of sexual violence in his annual report.[764] This is meant to deter armed groups from committing these heinous crimes as part of war tactics, as they would be included under the UN Sanctions List.[765]

All these resolutions are important to highlight in the development of VAW in the UN system because they recognise women's vulnerabilities to violence during periods of armed conflict, and they endeavour to close the gap in protecting women during these times. However, a weakness in these resolutions is that they only recognise sexual crimes taking place in periods of armed conflict but not in periods of conflict such as election violence that are not equivalent to the definition of armed conflict. Rape and sexual violence are still used as a weapon to subdue women in politics. Despite the development of these soft law frameworks, there is still no legally binding treaty that imposes obligations on the state to respect, prevent, protect and promote women's right to be free from violence. There exists no legally binding standard framework that clearly outlines the issue of VAW in all its manifestations, including the consequences of this violence that can be used to hold states accountable for any acts or omissions. The soft law provisions can only go so far as to encourage states to consider making domestic legal and policy changes to protect women from violence. Still, there is no enforcement or accountability provision.

[760] UN Security Council, Security Council resolution 1325 (2000) [on women and peace and security], 31 October 2000, S/RES/1325 (2000).
[761] Manjoo (2018) op cit note **Error! Bookmark not defined.** at 83.
[762] UN Security Council, Security Council resolution 1820 (2008) [on acts of sexual violence against civilians in armed conflicts], 19 June 2008, S/RES/1820 (2008), at Para 4.
[763] Ibid.
[764] UN Security Council, Security Council resolution 1960 (2010) [on women and peace and security], 16 December 2010, S/RES/1960(2010).
[765] Manjoo (2018) op cit note **Error! Bookmark not defined.** at 83.

5.2. The Special Rapporteur on Violence Against Women, its causes and consequences

As discussed earlier, the mandate of the SRVAW was established in 1994, and it was extended through Resolution 2003/45 in 2003 at the Commission on Human Rights' 59th session. It is renewed every three years.[766] The SRVAW's role is to " …investigate, call attention to, and recommend measures to eliminate all forms of violence against women at the local, national, regional and international levels."[767] In the discharge of her mandate, the SRVAW has three specific roles. These are to 'transmit urgent appeals and communications to States regarding alleged cases of violence against women,' 'undertake country visits', and submit annual thematic reports.[768] The reporting for the mandate takes different forms. This includes thematic reports that push the conceptual boundaries of the discourse around VAW and state reports that report on specific country contexts. The SRVAW reports to the Human Rights Council (HRC), which is the successor to the former Commission on Human Rights (CHR), the General Assembly and the Commission on the Status of Women (CSW).

In the discharge of her mandate, the SRVAW also conducts consultations with civil society. These consultations take place at the national and regional levels to understand contextual specificities of VAW whilst providing women with an opportunity to inform the SRVAW of the violations they face. It also allows for non-governmental organisations working with women on the ground to contribute to advancing regional and national narratives on VAW.[769] Since its inception, the office of the SRVAW has managed to draw global attention to VAW as a pervasive issue that disproportionately affects women and girls. The role of the SRVAW is critical to understand because this mandate's sole focus is to continue to raise awareness on the different manifestations of VAW and critically analyse the international community's approach and measures to end VAW.

One of the key areas the mandate of the SRVAW has undertaken since its inception is broadening the scope of the understanding of VAW. Through state visits, the mandate of SRVAW has continued to shed light on the different forms of violence suffered by women in

[766] UN Commission on Human Rights, Commission on Human Rights Resolution 2003/45: Elimination of Violence against Women, 23 April 2003, E/CN.4/RES/2003/45, available at https://www.refworld.org/docid/43f3133b0.html accessed on 2 March 2020.
[767] Special Rapporteur on violence against women, its causes and consequences, OHCHR, *https://www.ohchr.org/en/issues/women/srwomen/pages/srwomenindex.aspx* accessed on 16 April 2020.
[768] Ibid.
[769] Ibid.

different contexts. Regarding thematic reports, the first SRVAW submitted reports outlining prevalent causes and consequences of VAW, including cultural practices,[770] normative developments,[771] etc. She also raised the issue of the private vs public divide in addressing women's issues and that the persistence of the public-private divide negatively impacted women's access to remedies and redress when they have faced violence. This divide promotes the view that the state or its institutions cannot interfere in the private issues of the family, where violence is rife.[772]

In her first report to the Commission on Human Rights, the first SRVAW Coomaraswamy argued that there was a dominance of familial ideologies that hindered women from occupying non-traditional roles, and these ideologies served to legitimate VAW in the name of culture.[773] This theme continued in her report to the Human Rights Commission in 2002, where the SRVAW tackled cultural practices in the family that are violent towards women.[774] She argued that the tensions between universal human rights and cultural relativism continue to play out on women's bodies and lives. [775] In this report, she highlights the importance of marriage equality before, during, and at dissolution for both parties.[776] This includes the equal right to consent to marriage, equality during the marriage, and when parties decide to annul the marriage. Specifically, the SRVAW highlights the practice of bride price in Sub-Saharan Africa because it places women at risk of abuse in marriage as they will be treated as commodities that are bought and sold as facilitated by this practice.[777]

The second SRVAW, Ertük, also continued to engage with the first rapporteur's views on culture. In her report to the HRC in 2007 on "intersections between culture and violence against women," she argues that women's rights are usually compromised if not sacrificed by

[770] UN Commission on Human Rights, Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights resolution 2001/49: Cultural practices in the family that are violent towards women, 31 January 2002, E/CN.4/2002/83, available at https://www.refworld.org/docid/3d6ce3cc0.html accessed on 1 March 2020.
[771] UN Human Rights Council, Report of the Special Rapporteur on violence against women, its causes and consequences, Addendum: Mission to India, 1 April 2014, A/HRC/26/38/Add.1, available at https://www.refworld.org/docid/53982c3e4.html accessed on 1 March 2020.
[772] Coomaraswamy op cit note **Error! Bookmark not defined.** .
[773] Preliminary report submitted by the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, in accordance with Commission on Human Rights resolution 1994/45 E/CN.4/1995/42.
[774] UN Commission on Human Rights, Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights resolution 2001/49: Cultural practices in the family that are violent towards women, 31 January 2002, E/CN.4/2002/83.
[775] Ibid at para 5.
[776] Ibid at paras 55-64.
[777] Ibid.

cultural relativist arguments.[778] Ertük also argues that the harmful traditional practices focus has helped to identify practices that are harmful to women; however, this has also contributed to the essentialisation of cultures as the source of the problem.[779] She points out that merely pointing out practices as harmful may be detrimental because if states do not deal with the root causes of discrimination in their societies, then other practices will replace those tagged as harmful.[780] This point is especially critical to the findings and arguments of this thesis, as the conclusions of Chapter 3 established that the practice of lobola itself is not a form of VAW. However, it is the perceptions, entitlements and views that come with the practice that subject women to violence and discrimination. Thus, from the second SRVAW's viewpoint, it is important to address the root causes of gender inequality and discrimination in cultures than simply advocating for eliminating certain practices. She emphasises that engaging with culture does not erode or deform said culture, but rather, it challenges the aspects of that culture that are discriminatory and oppressive. [781] Culture is not static, monolithic and apolitical, she argues, and thus, its inherent practices can also be modified to eliminate discrimination and VAW. [782]

Both the third and fourth SRVAW have also tackled the issue of harmful cultural practices. The third SRVAW Manjoo included a focus on the gender-related killings of women during her mandate. Gender-related killings of women refer to the murders of women in the familial or communal sphere, which the state may condone.[783] She also noted the 2002 thematic report by former SRVAW Coomaraswamy, who highlighted that honour killings were carried out within the familial and communal sphere by men in the name of culture and/or religion.[784] She called upon states to collect data and information concerning such killings to prosecute perpetrators, identify any failures of state protection to develop and improve measures of protection for women.[785] The topic of harmful traditional practices has remained on the agenda of all SRVAW, and they have continued to call on states to adopt measures to combat this violence and protect women. In 2016, the current SRVAW Simonovic also called for

[778] UN Human Rights Council, UN Human Rights Council: Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences on Intersections between Culture and Violence against Women, 17 January 2007, A/HRC/4/34 at para 19.
[779] Ibid at para 33.
[780] Ibid at para 34.
[781] Ibid at para 53.
[782] Ibid.
[783] General Assembly Thematic Report of the UN Special Rapporteur on Violence Against Women, its causes and consequences, Rashida Manjoo (2012) A/HRC/20/16 at para 14.
[784] Ibid.
[785] Ibid.

establishing a femicide watch to curtail the gender-motivated killing of women.[786] She has kept this issue on the international agenda and has put a call out to collect data on gender-related killings and/or femicide to civil society, national governments and other involved stakeholders.[787] Simonovic argues that collecting data is central to understanding the extent of the pandemic of VAW, considering that domestic violence cases have increased during the COVID19 global pandemic.[788]

Reports of the SRVAW have also focused on expanding the scope of the mandate to consider the intersectionality and continuum of violence in both private and public spheres.[789] This includes violence related to race, ethnicity, culture, migration status, trafficking, and economic empowerment, amongst other factors.[790] By highlighting areas influencing the vulnerability of women to violence and suffering, the SRVAW continues to provide a critical approach to policy and law-making to end VAW. The third SRVAW Manjoo notes that the continuum and intersectionality approach have blurred the distinction between the violence perpetrated in public versus private domains.[791] The first SRVAW in 1996 adopted an expansive approach to the issue by suggesting that VAW should be viewed as health, legal, economic, developmental, and human rights issue, and subsequent SRVAW have continued with this approach.[792]

The second SRVAW focused on raising international focus to ensure the effective protection of women's rights and equal access to justice, the effectiveness of strategies to end violence against women, ensuring that women have access to remedies and redress measures and the intersection of the political, economic and social environments on women. The SRVAW also highlighted the importance of the due diligence obligation of states and how it can be used to enforce state responsibility for crimes of VAW.[793] If states understand their international obligations, then they can be held accountable for any inaction or action against

[786] General Assembly Report of the UN Special Rapporteur on Violence Against Women, its causes and consequences, Dubravka Simonovic (2016) A/71/398.
[787] Femicide Watch Call 2020 by the Special rapporteur on Violence Against Women, its causes and consequences, Dubravka Simonovic available at *https://www.ohchr.org/EN/Issues/Women/SRWomen/Pages/FemicideWatchCall2020.aspx.*
[788] Ibid.
[789] Manjoo (2018) op cit note **Error! Bookmark not defined.** at 84.
[790] Manjoo (2018) op cit note **Error! Bookmark not defined.** at 84.
[791] Rashida Manjoo 'The Continuum of Violence against Women and the Challenges of Effective Redress' (2012) *International Human Rights Law Review* Vol 1 pp 1-29 at 2.
[792] Para 132 of the Report of the Special Rapporteur on Violence Against Women, its causes and consequences to the Commission of Human Rights 52nd Session (1996) E/CN.4/1996/53.
[793] Report of the Special Rapporteur on Violence Against Women, its causes and consequences, Rashida Manjoo to the Human Rights Council 'Political Economy of Women's Human Rights' (2009) A/HRC/11/6.

agreed standards. In her 2009 15year review, she concluded that despite the creation of tools and mechanisms to monitor and enhance compliance, implementation and compliance continued to be a severe impediment.[794]

Both the third and current SRVAW agree that there are normative gaps that limit the protection of women from violence. However, the approach taken by these rapporteurs is different. Notably, the former SRVAW, Manjoo, argues that there should be an international treaty on violence against women specifically. On the other hand, Simonovic, the current SRVAW, argues that it is an implementation gap, and there is no need for a self-standing treaty on VAW.[795] Manjoo specifically questions how states can be held accountable if there is no binding treaty on VAW.[796] Usually, when the international community agrees on the pervasiveness and seriousness of certain acts or crimes, a legally binding treaty is developed, signed and ratified. However, this has not been the case with VAW.[797] CEDAW, as the key international treaty on women's rights, does not mention violence against women, and this is a critical normative gap.

In 2016, the current SRVAW Simonovic requested stakeholders to comment on the adequacy of the legal framework on VAW.[798] The responses to this call showed a sharp divide of opinions. Respondents representing international bodies, treaty organisations and other international human rights bodies indicated opposition to a stand-alone treaty, whilst respondents from NGOs, academics and individuals interested in the subject matter argued for a legally binding treaty on VAW.[799] Out of the 114 responses, 101 respondents stated that a new treaty on VAW should be developed.[800] The third group of respondents supported the development of an Optional Protocol to CEDAW on VAW.[801] At the 41st session of the Human Rights Council[802], the fourth SRVAW, Simonovic requested for the adoption of a General

[794] Report of the Special Rapporteur on Violence Against Women, its causes and consequences, Rashida Manjoo to the Human Rights Council '15 Years of the mandate on violence against women, its causes and consequences (1994-2009): A critical Review (2009) A/HRC/6 Add.5
[795] GRW Report *Time for Action* at 3.
[796] Manjoo (2012) op cit note **Error! Bookmark not defined.**.
[797] Nwadinobi E A, Juaristi F R, Pisklakova-Parker M, Aldosari H, Khana M, Aebehard-Hodges J 'Safer Sooner: Toward a Global Binding Norm to End Violence Against Women and Girls' (2020) Every Woman Treaty at 31.
[798] GRW Report op cit note **Error! Bookmark not defined.** at 4.
[799] GRW Report op cit note **Error! Bookmark not defined.** at 4.
[800] GRW Report op cit note **Error! Bookmark not defined.** at 5.
[801] GRW Report op cit note **Error! Bookmark not defined.** at 7.
[802] Report of the Special Rapporteur on Violence Against Women, its causes and consequences to the Human Rights Council 41st Session on Violence Against Women, its causes and Consequences 2019, A/HRC/41/42 at Para 101 (a) available at *https://documents-ddsny.un.org/doc/UNDOC/GEN/G19/178/31/PDF/G1917831.pdf?OpenElement*.

Assembly Resolution to formally institutionalise The Platform, which is a high-level panel of experts and representatives from regional and international mechanisms.[803] The EDVAW Platform, also known as the Platform of Independent Expert mechanisms on Discrimination and Violence Against Women, aims to foster thematic collaboration between independent UN regional mechanisms on violence and discrimination against women and establish strong links between these mechanisms.[804] The EDVAW Platform, through this collaborative approach, seeks "to improve implementation of the existing international legal and policy framework on violence and discrimination against women and to reinforce each mechanism's recommendations relating to observed gaps in implementation."[805]

It is still quite unclear how this group seeks to effect any real change. Thus far, its activities since 2018 have included holding panel discussions and meetings without any substantive outcomes or recommendations from this panel of experts.[806] There has been no contribution to standard-setting on discrimination and VAW. Additionally, notably missing from this panel is any representatives from NGOs; they are considered strategic partners but not members of this group. This is a critical oversight as these are the bodies that work directly with women on the ground.[807] If the panel excludes some of the critical voices in women's rights, the Platform's work becomes divorced from the lived realities of women and will thus fail to take practical steps towards eliminating VAW.

This mandate thus continues to raise awareness about the different forms of violence suffered by women and establishes trends that various stakeholders can use to lobby for changes in the discourse around and frameworks for VAW. As outlined above, all four special rapporteurs have continued to place the issue of harmful traditional and/or religious practices that leave women vulnerable. The first rapporteur, Coomaraswamy, has also highlighted the bride price practice as a form of VAW that states should take steps to eliminate due to its

[803] Members of the Platform include the Special Rapporteur, members of the United Nations Working Group on the issue of discrimination against women in law and in practice, members of the CEDAW Committee, The Inter-American Special Rapporteur on the Rights of Women, The Special Rapporteur on the Rights of Women in Africa, members of the Committee of Experts of the Follow-up Mechanism to the Belém do Pará Convention (MESECVI), and members of the Group of Experts on Action against Violence against Women and Domestic Violence of the Council of Europe (GREVIO).
[804] Concept note of the EDVAW Platform available at https://www.ohchr.org/Documents/Issues/Women/SR/CooperationbetweenGlobalRegionalMechanisms.pdf.
[805] Ibid.
[806] See the list of activities on https://www.ohchr.org/EN/Issues/Women/SRWomen/Pages/CooperationGlobalRegionalMechanisms.aspx.
[807] GRW Report op cit note **Error! Bookmark not defined.** at 7.

adverse effects on women's vulnerability to experiencing violence in marriage.[808] Her engagement with cultural practices that are harmful towards women and specifically identifying bride price/lobola as a harmful practice is essential because the SRVAW is similar to the CEDAW Committee's view.

Additionally, the SRVAW reports to the HRC and General Assembly, thereby keeping VAW relevant in the international community's agenda. The SRVAW carries out empirical visits to different countries and interacts with various groups and women on the ground. Thus, the work of this mandate in the instances of culture and violence is significant as it continues to raise awareness around the different manifestations of violence against women in the private/domestic sphere where the state is usually reluctant to act. However, due to the limitations of the word count of this thesis, I will not engage with all of the SRVAW reports published over the years. I have engaged with the reports that specifically engage culture and VAW.

5.3. The Special Rapporteur in the field of Cultural Rights

The mandate of the Special Rapporteur in the field of Cultural Rights (SRCR) has also made contributions to the UN human rights system on understanding culture, elaborating how this right can be protected whilst respecting other fundamental rights that may be impacted by the harmful practices in cultures. In 2012, the SRCR Shaheed argued that whilst recognising the right to culture, we must also realise that gender, culture, and rights "intersect in intricate and complex ways," and the preservation of the cultural community should not take precedence over the detriment of one group.[809] The SRCR emphasised that the idea that culture thrives in the private sphere where the state should not interfere is a misconception.[810] The state has a role in protecting women from all forms of violence and discrimination as stipulated in various international human rights frameworks. Shaheed also argued that the norms and practices assigned through unequal gender roles are usually equated with the preservation of culture and the derogation from which is seen as 'cultural betrayal'.[811] This argument posits that one of

[808] Report of the SRVAW Coomaraswamy Report E/CN.4/2002/83 op cit note 764.
[809] Special Rapporteur in the field of Cultural Rights Report to the General Assembly Promotion of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms (2012) A/67/287.
[810] Ibid at para 2.
[811] Ibid at para 19.

the cornerstones of culture hinges on the separation of gender roles, usually the subordination and discrimination of women.

Any process to empower women or eliminate this discrimination is viewed as infringing on cultural autonomy, and therefore communities reject cultural change. An example of this belief is shown in chapter three's discussion on the perceptions of the value of lobola in African cultural communities. In the same report, Shaheed highlighted that due to the nature of women's disadvantaged position in society, they usually suffer the most violations of their human rights in the name of culture.[812] The Special Rapporteur clarified that the relationship between women's subordination and culture also stems from the interpretation of religious, traditional and cultural norms and beliefs as being static and immutable and thus, any effort to protect the abuse of women stemming from these practices is viewed as an attack on core community systems.[813] Additionally, Shaheed argued that, "Measures are required to support and enhance the cultural legitimacy and symbolic validation of new tools and interpretations that enable practices harmful to women to be surmounted."[814] This means that it will take a multi-stakeholder approach to understand and eliminate traditional/cultural practices that are harmful to women.

In her 2018 report to the General Assembly on 'Universality, cultural diversity, and cultural rights', SRCR Bonnoune argued that the universality of human rights was currently under attack, despite universality being one of the most important principles of human rights.[815] The report also elaborates that human rights and cultural rights are related and mutually inclusive.[816] Discussions of cultural relativity have surfaced globally yet again with the rise of right-wing and conservative political parties in the Western world.[817] The Special Rapporteur has taken the opportunity to use the mandate's platform to encourage states to uphold their due diligence obligations and not invoke cultural relativism to defer their responsibility to respect human rights.[818]

Additionally, in Factsheet No.23 published by the Office of the High Commissioner, it is noted that women in developing countries are not aware of their fundamental human rights and

[812] Ibid at para 3.
[813] Ibid at para 3.
[814] Ibid at para 3.
[815] Special Rapporteur in the field of cultural rights, Karima Bennoune on 'Universality, cultural diversity and cultural rights' submitted to the General Assembly July 2018 A/73/227.
[816] See generally A/73/227.
[817] Ibid.
[818] Ibid.

consequently accept and practice these practices that perpetuate violence in their lives.[819] The OHCHR also highlights that, harmful traditional practices are not given the continued considerations they need to stay on the global human rights agenda consistently.[820] Due to domestic political reasons, States do not take steps to educate communities and take measures to eliminate practices that are harmful to women. Any perceived threats to cultural and traditional identities are usually contested by local populations, who make up the electorate. Therefore, to please their voters, state politicians acquiesce to these pressures. According to Factsheet no. 23, it is necessary to take steps to change knowledge, attitudes, and behaviour to foster gender equality which positively influences the changes in attitudes towards harmful practices.[821] When communities are educated about how harmful traditional practices impact women and children negatively, they become less resistant to legislative changes outlawing these practices.

5.4. CEDAW's Approach to VAW

CEDAW was adopted in 1979 and came into effect in 1981 and boasts near-universal ratification.[822] CEDAW is considered the international 'Bill of Rights for women because the framework addresses *de jure* and *de facto* discrimination against women.[823] The CEDAW Committee is the treaty monitoring body for the CEDAW Convention. This Committee's legal value is their jurisprudence which is perceived to be unbiased, expert and apolitical.[824] The CEDAW Committee comprises 23 elected members nominated by their governments and are considered experts in women's rights.[825] Central to their appointment and execution of duties is a requirement that members act in their capacities and do not represent their governments.[826] The primary function of this Committee is to receive and consider state party reports on the steps they have taken to give effect to the CEDAW Convention.[827] Article 21 (1) of CEDAW explicitly mandates the Committee to make "… General Recommendations and suggestions

[819] UN Office of the High Commissioner for Human Rights (OHCHR), Fact Sheet No. 23, Harmful Traditional Practices Affecting the Health of Women and Children, August 1995, No. 23, available at: https://www.ohchr.org/documents/publications/factsheet23en.pdf
[820] Ibid.
[821] Conclusions in Factsheet no. 23 op cit note 29.
[822] As of March 2020, OHCHR website reflects 189 ratifications, two signatories and six states that have made no action. See Annex 1 showing the ratification map.
[823] José L Gómez del Prado 'The United Nations and the Promotion and Protection of the Rights of Women: How well has the organization fulfilled its responsibility?' (1995) 2 *Wm. & Mary J. Women & L.*
[824] Cerone op cit note **Error! Bookmark not defined.** at 29.
[825] Article 17 (1) & (2) of CEDAW.
[826] McCall-Smith Kasey 'Interpreting International Human Rights Standards: Treaty Body General Comments as a Chisel or Hammer' in Lagouette et al at 27.
[827] Articles 17-22 of CEDAW.

based on examinations and information provided by state parties."[828] In addition, the Committee has made 37 General Recommendations on several thematic issues concerning discrimination, equality and violence against women.[829] In this thesis, only General Recommendations focused on violence against women are addressed, that is, No.12, No.14, No.19 and No.35. Although General Recommendation No.30 focuses on VAW, it is related to the violence that occurs during conflict times and thus is not relevant for the questions and analysis of this thesis.

As the definitive legal instrument that protects women's rights, CEDAW provides a powerful first step for protecting women's rights in International Human Rights Law.[830] Rao describes CEDAW as "a positive legal framework that can be used to define norms for constitutional guarantees of women's human rights, to interpret laws, to mandate proactive, pro-women policies and to dismantle discrimination".[831] The legally binding nature of CEDAW creates obligations on states to "…promote equality through appropriate means", "… to accelerate de facto equality and to adopt all necessary measures at the national level to ensure the realisation of the rights contained in the convention" respectively.[832] By ratifying CEDAW, states undertake the responsibility to ensure that discrimination against women in all its forms and consequences are eliminated in all civil, political, social, economic, and cultural areas.[833]

An Optional Protocol to CEDAW was adopted in 1999 that establishes a complaints procedure for individuals or groups of individuals under the jurisdiction of states parties to this protocol.[834] Through enabling individual complaints, the Optional Protocol provides an avenue for women who have suffered various forms of discrimination and violence, after exhausting domestic avenues,[835] to seek redress from the CEDAW Committee. The CEDAW Committee is mandated by the Optional Protocol to deal with discrimination complaints, including gender-based violence and/or VAW complaints. While the Optional Protocol gives women a tool to

[828] Article 21 (1) of CEDAW.
[829] See the CEDAW site to access these General Recommendations available at *https://www.ohchr.org/EN/HRBodies/CEDAW/Pages/Recommendations.aspx*.
[830] Cook (1995) op cit note **Error! Bookmark not defined.** at 8.
[831] Anuradha Rao, International Women's Rights Action Watch 'Domestic Application of the Convention on the Elimination of all Forms of Discrimination against Women: Potential and actuality' (2008) 29 *Women Living Under Muslim Law Dossiers* at 13.
[832] UN General Assembly, *Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979, A/RES/34/180, available at *https://www.refworld.org/docid/3b00f2244.html* accessed on 24 February 2020 Articles 2, 3, 4 & 24.
[833] Cook (1995) op cit note **Error! Bookmark not defined.** at 9.
[834] Article 2 of the Optional Protocol to the CEDAW General Assembly Resolution A/54/4 1999.
[835] Article 4(1) of Optional Protocol states that 'The Committee shall not consider a communication unless it has been ascertained that all available domestic remedies have been exhausted.'

seek remedies for the violation of their human rights, it has limitations. For example, the Optional Protocol provides an additional means of monitoring state party compliance, as the Committee has the power to conduct inquiries, develop Concluding Observations and provide recommendations to state parties.[836] However, states can opt out of the inquiry procedure at the time of ratification.[837] Under Article 8, the Optional Protocol requires a state's consent to conduct a country visit to conduct confidential inquiries. This means that, even though complaints may be lodged with the Committee, the state must agree to the investigative visit. Therefore, if the state refuses, the aggrieved victim is still left without justice. There have been very few inquiries that have been conducted to date. Manjoo questions whether this 'opacity of the inquiry process' impacts its ability to provide a valuable framework to address VAW.[838]

The CEDAW itself does not have a provision on VAW broadly except for trafficking and exploitation.[839] Kelly argues that because men's experiences of discrimination influenced the CEDAW framing, it failed to account for VAW except trafficking.[840] Initially, the CEDAW Committee was reluctant to pursue an active role in VAW matters.[841] This was because, firstly, the treaty altogether left out the issue of VAW except for trafficking and thus, the Committee viewed this issue as being out of its scope of application.[842] Secondly, the different constraints faced by the Committee, including time, resources and problems with the consensus on issues of VAW, constrained the uptake of VAW in the Committee's work. The Committee has faced several challenges since its inception, and these have negatively influenced its ability to address the issue of VAW effectively.[843] However, over time, the Committee has undertaken steps to fill the normative gap by developing soft law mechanisms.

According to Bennet and Strug, the term soft law suggests law-making is a process and not a single decisive action.[844] Cerone argues that soft law is a spectrum, and within this spectrum exists norms that are in the process of incubation.[845] This means that soft law is intended to influence the process of instruments becoming legally binding over time or once it

[836] Rao op cit note **Error! Bookmark not defined.** at 17.
[837] Article 10 of the CEDAW Optional Protocol.
[838] Manjoo (2018) op cit note **Error! Bookmark not defined.** at 89.
[839] Manjoo op cit note **Error! Bookmark not defined.**.
[840] Kelly op cit note **Error! Bookmark not defined.** at 477.
[841] Krivenko op cit note **Error! Bookmark not defined.** at 55.
[842] Elizabeth Evatt 'Finding a Voice for Women's Rights: The Early Days of CEDAW' (2002) *George Washington International Law Review* Vol 34 at 13-14.
[843] See generally Evatt op cit note **Error! Bookmark not defined.**.
[844] Bennet & Strug op cit note **Error! Bookmark not defined.** at 29.
[845] John Cerone 'A taxonomy of soft law: Stipulating a definition' in Lagouette, Gammeltoft-Hansen and Cerone (eds) op cit note **Error! Bookmark not defined.** at 18.

fully crystallises into one of the sources of international law, as stipulated by Article 38 of the International Court of Justice Statute.[846] Soft law helps to develop normative regimes until they are robust enough to become legally binding.[847] Krivenko argues that the overall strategy of the CEDAW Committee with regards to VAW is to subsume the prohibition of this violence under the provisions of CEDAW.[848] This is because the prohibition of discrimination is more general and far-reaching, making it legally pliable to protect women's rights.[849] However, this argument can be detrimental and limits the scope of protection for women. It places the burden of proof on victims of violence to prove that the violence they suffered was influenced by discrimination based on their sex and/or gender.

Although there are advantages to adopting a soft law approach, including the ability to shape normative standards and providing rules and standards for interpreting and implementing positive law,[850] the soft law approach does not solve the challenge of normative gaps in international law on VAW. Cerone argues that soft law has become the "…battleground for interpretive struggles to delimit and expand human rights protection."[851] However, the disadvantage of this approach is that it continues to expand the legal vacuum on binding obligations on VAW. By attempting to prescribe legality to political or expert opinions, the soft law approach tends to undermine actual positive legal protection for women.[852] VAW is pervasive, and thus, its prohibition should be part of legally binding instruments. As long as the prohibition of VAW is not part of the positive international law, states will continue to see their obligations to eliminate this violence as optional.[853]

Therefore, the challenge of enforceability continues to be a considerable challenge when it comes to CEDAW's work on VAW. Even though the prohibition of some forms of VAW has become prohibited through interpreting different treaties, there is still no global agreement on the contours of VAW.[854] The soft law approaches such as General Recommendations serve an important role to clarify states understanding of the issue of VAW. However, this approach is only an intermediary one. If there is a legally binding treaty on VAW specifically, states would have clear obligations, and women can also have legal recourse.

[846] Article 8 of United Nations, Statute of the International Court of Justice, 18 April 1946.
[847] Bennet & Strug op cit note **Error! Bookmark not defined.** at 29.
[848] Krivenko op cit note **Error! Bookmark not defined.** at 61.
[849] Krivenko op cit note **Error! Bookmark not defined.** at 61.
[850] Cerone op cit note **Error! Bookmark not defined.** at 1.
[851] Ibid.
[852] Ibid at 2.
[853] Ibid.
[854] Krivenko op cit note **Error! Bookmark not defined.** at 66.

However, Krivenko argues that a treaty may narrow down the definition of VAW, thereby preventing other manifestations of VAW passage into hard law.[855] Soft law approaches such as General Recommendations can solve this problem as the treaty monitoring body's role is to continue to expand on the definition and manifestations of violence in women's lives.

However, the Committee's less critical approach to state reservations to instrumental articles of the treaty is concerning. It seems the Committee is not willing to act decisively regarding allowing states to enter reservations based on culture and religion. For example, Saudi Arabia, Algeria, and other Muslim states have entered reservations to Articles of CEDAW that conflict with Sharia Law.[856] This Law is effectively based on the inequality of men and women.[857] And thus, even though the state parties are signatories to the treaty, their reservations render the treaty inapplicable in most instances of discrimination and gender-based violence. Additionally, Article 28 (2) of CEDAW has an impermissibility clause which states that any reservations that are incompatible with the object and purpose of the treaty cannot be allowed. However, outside of a few objections by state parties and CEDAW's comments on reservations, nothing has been done to sanction the state parties who still have reservations in conflict with Article 28 of CEDAW.

The CEDAW Committee has developed four General Recommendations that explicitly reference VAW: No. 12, 14, 19, 30 and 35. General Recommendations are different from recommendations made to states based on the monitoring of state party reports. The General Recommendations elaborate the Committee's interpretations of treaty obligations and thematic issues.[858] In the case of the CEDAW Committee, these recommendations have expanded on their understanding of VAW and its impact on women. An essential element of the treaty body's mandates is interpreting state obligations in context with prevalent environmental conditions.[859] General Recommendations provide treaty bodies with an opportunity to use the strongest language possible to interpret and guide states' compliance with a specific treaty.[860] There is disagreement amongst legal scholars concerning the legal value of these recommendations from treaty bodies, with some viewing them as authoritative interpretations

[855] Krivenko op cit note **Error! Bookmark not defined.** at 66.
[856] See reservation list at https://documents-dds ny.un.org/doc/UNDOC/GEN/N06/309/97/PDF/N0630997.pdf?OpenElement
[857] Meiraf Girma 'Violence Against Women: inadequate Remedies under CEDAW' (2009) *Mizan Law Review* Vol 3 No. 2 pp 351-357 at 354.
[858] General recommendations https://www.refworld.org/type,GENERAL,CEDAW,,,,10.html.
[859] McCall-Smith op cit note **Error! Bookmark not defined.** at 27.
[860] McCall-Smith op cit note **Error! Bookmark not defined.** at 30.

of treaties. In contrast, others view them as 'unsystematic and unfounded statements.[861] As soft law mechanisms, the General Recommendations play an important role in normative developments and understanding of VAW, including its causes and consequences. The following section discusses General Recommendations 12, 14, 19 and 35. General Recommendation No. 30 focus on women, peace and security, which is not an inquiry of this thesis. Therefore it will not be discussed expansively.

5.4.1. General Recommendation No. 12

In 1989, the CEDAW Committee adopted General Recommendation No. 12 as the first substantive recommendation on VAW.[862] This General Recommendation was a bold step towards acknowledging that VAW was a women's rights issue and a human rights one.[863] It explicitly outlined the responsibility of the state to protect women from all forms of violence in both the private and public spheres,[864] and it references ECOSOC Resolution 1988/27, which focused on eradicating VAW in the family and society.[865] It is important because, in its introduction, it makes a positive link between the states' existing human rights obligations with the obligation of eliminating VAW.[866] It also urges all state parties to report on VAW as part of their periodic reporting to the CEDAW Committee by providing information about legislation and other measures adopted to protect women from violence, including statistics on VAW.[867]

The General Recommendation outlines the member states' obligations to include: details of the steps taken to address and eliminate VAW in their periodic reports to the Committee, modifying legislation to combat VAW, information on the existence of support services for victims of violence, and providing relevant statistical data.[868] Besides emphasising the state's responsibilities to respect, protect, promote, and fulfil women's rights to be free

[861] McCall-Smith op cit note **Error! Bookmark not defined.** at 31.
[862] Krivenko op cit note **Error! Bookmark not defined.** at 56.
[863] Report of the Committee on the Elimination of Discrimination against Women: General Recommendation No. 12 (8th Session 1989), UN GAOR, 44th Sess., UN Doc. A/44/38 (1992).
[864] Report of the Committee on the Elimination of Discrimination against Women: General Recommendation No. 12 (8th Session 1989), UN GAOR, 44th Sess., UN Doc. A/44/38 (1992).
[865] See generally ECOSOC, Efforts to Eradicate Violence Against Women within the Family and Society E/RES/1988/27.
[866] Introduction of General Recommendation No. 12 states that 'Considering that articles 2, 5, 11, 12 and 16 of the Convention require the States parties to act to protect women against violence of any kind occurring within the family, at the workplace or in any other area of social life'.
[867] Sections 1-4 of UN Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendation No. 12: Violence against women*, 1989, available at *https://www.refworld.org/docid/52d927444.html* accessed on 27 February 2020.
[868] See generally Articles 1-4 of General Recommendation No. 12.

from all forms of violence, General Recommendation No. 12 also acknowledges that VAW occurs in all spheres of life, whether public or private. It is argued that this General Recommendation reminded the international community and institutions about the Committee's existence and relevance that is assumed from its legitimacy that it draws from the international community.[869] Lastly, another notable aspect of this General Recommendation is that the Committee makes "an unambiguous determination that inscribes the requirement of combatting all forms of violence against women into other provisions of the CEDAW."[870] This made the prohibition of VAW part and parcel of soft law on discrimination and VAW. By so doing, this initial General Recommendation on VAW from the CEDAW Committee created the space for the Committee to act as norm creators.

5.4.2. General Recommendation No. 14

This General Recommendation came about as CEDAW's concern about the continued abuse of women and girls through female circumcision and harmful traditional cultural practices.[871] The Committee notes the link between the perpetuation of harmful traditional and/or cultural practices and economic drivers.[872] The state is urged to take positive steps towards eliminating female circumcision through information dissemination, educating communities through local and national women's organisations, appealing to community leaders to educate and encourage their communities to eradicate the practice and the dangers associated with the practice.[873] By urging states to take communal based approaches, this recommendation shows how the CEDAW Committee understands the importance of grassroots and community-led approaches to eliminating harmful practices associated with tradition and cultural practices. As discussed in Chapters 2 and 3, these practices are rooted in communities' way of life and fundamental beliefs and normative systems. Thus, to ensure women and girls do not suffer harm from these practices, communities must be involved in the measures taken to eliminate them.

Notably, this recommendation emphasises the health implications of the practice, but it does not explicitly identify the practice as a form of VAW. As noted above, General Recommendation No.12 identified VAW occurring in the family and society whilst also

[869] Krivenko op cit note **Error! Bookmark not defined.** at 56.
[870] Krivenko op cit note **Error! Bookmark not defined.** at 57.
[871] UN Committee on the Elimination of Discrimination Against Women (CEDAW), CEDAW General Recommendation No. 14: Female Circumcision, 1990, A/45/38 and Corrigendum, available at *https://www.refworld.org/docid/453882a30.html* accessed on 17 June 2020 at Para 1.
[872] Para 6 of General Recommendation No. 14.
[873] Article (a) of General Recommendation No. 14.

locating the state's role in eliminating this violence. The CEDAW Committee failed to link General Recommendation No.14 to GR 12 on VAW. Linking these two recommendations would positively influence the development of the thinking around VAW in all its forms. In this case, the CEDAW Committee had an opportunity to include female circumcision as a form of VAW by recalling the state's obligations as highlighted in General Recommendation No. 12. Female circumcision, also known as female genital mutilation, is identified as VAW by DEVAW. It is further elaborated in General Recommendations No.19 and No.35 as part of harmful practices that disproportionately affect women and girls.[874] Through linking related General Recommendations, the CEDAW Committee can play a vital role in helping states to understand how their treaty obligations are linked and not divorced from each other.

5.4.3. General Recommendation No. 19

In 1992, General Recommendation No. 19 was adopted by the CEDAW Committee. It states that VAW is a form of discrimination that 'inhibits women's ability to enjoy rights and freedoms based on equality with men'.[875] Krivenko argues that this General Recommendation is more detailed and concise because the Committee articulates more fully the relationship between VAW and the provisions in CEDAW.[876] This recommendation links the state's responsibility to fully implement the provisions of the CEDAW with its responsibility to address and take positive steps to eliminate VAW. Article 1 includes the view that CEDAW's definition of discrimination includes VAW, that is, 'violence directed towards a woman because she is a woman or disproportionately affects women.[877] This General Recommendation notes that VAW is a result of unequal gender relations and a primary mechanism for the subordination of women in society.

Furthermore, through this General Recommendation, and as informed by Article 2(*e*)[878] of CEDAW, states are required to take positive measures towards eliminating all forms of VAW.[879] As the first expansive General Recommendation on VAW, it also touches on violence against women in the family. The Committee acknowledges the familial space and how many

[874] Para 6 of General Recommendation No. 35.
[875] Report of the Committee on the Elimination of Discrimination against Women: General Recommendation No. 19 (11th Session 1992), UN GAOR, 47th Session, UN Doc. A/47/38 (1992).
[876] Krivenko op cit note **Error! Bookmark not defined.** at 58.
[877] Para 1 of General Recommendation No. 19.
[878] This provision states that state parties undertake 'to take all appropriate measures to eliminate discrimination against women by any person, organisation or enterprise'.
[879] Ibid Para 1.

women are subjected to different forms of subjugation and violence perpetuated by traditional practices and a lack of economic independence.[880]

General Recommendation No. 19 is vital in the development of the discourse on VAW because it sets out the due diligence obligations of the state. Here, the state is understood to be responsible for its acts of VAW and its omissions or failures to act against private perpetrators of VAW.[881] These due diligence obligations require the state to prevent and investigate any acts of VAW, prosecute and punish any person, organisation, or entity for committing acts of VAW, and compensate victims of VAW.[882]

States' due diligence obligations provide a standard for determining state responsibility for neglecting its duty of care.[883] This General Recommendation is significant because it linked acts of omission by the state with the failure to protect women from violence. An example is noted in *AT v Hungary*. The CEDAW Committee found that 'the lack of specific legislation to combat domestic violence and sexual harassment constituted a violation of human rights and fundamental freedoms, particularly the right to security of person'.[884] Similarly, in *VPP v Bulgaria*, the findings by the CEDAW Committee affirmed that 'inadequate legal protections against sexual violence and failure to exercise due diligence concerning the sexual assault of the complainant' was a failure of the state's due diligence obligations.[885] The Committee established that the treaty requires state parties to prohibit and eliminate discrimination against women and girls, including gender-based violence, and exercise due diligence to prevent, investigate, punish, and remedy acts of sexual violence by non-state actors.[886]

Finally, for the first time, the Committee linked the principle of non-discrimination and VAW, which is sometimes considered a significant step in arguing that VAW has moved from soft to hard law.[887] However, this is not the case in international law because the prohibition of VAW has not become hard law. There are still no legally binding provisions that protect women from violence in IHRL. Notably, in 1992, General Recommendation No. 14 on female circumcision made no categorisation of this practice (FGM) as a form of VAW. However, General Recommendation No. 19 lists this practice as a form of discrimination. This shows the

[880] Para 23 of General Recommendation No.19.
[881] Para 10 of General Recommendation No. 19.
[882] Article 24 (a)-(v) of General Recommendation No.19 op cit note **Error! Bookmark not defined.**.
[883] Bennet & Strug op cit note **Error! Bookmark not defined.** at 12.
[884] *AT v Hungary* 2003 (CEDAW/C/36/D/2/2003).
[885] *VPP v Bulgaria* 2011 (CEDAW/C/53/D/31/2011).
[886] Ibid.
[887] Article 1 of General Recommendation No. 19 op cit note **Error! Bookmark not defined.**.

process of how the Committee recognises and categorises what consists of VAW is ever-changing. Importantly for this thesis, it can be seen how the Committee has not explicitly called out lobola as a form of VAW in a General Recommendation, but only in its Concluding Observations to Kenya, Zimbabwe, Uganda and Zambia since 2012. It can be argued that, as the Committee receives more information about the practice from state parties and relevant organisations, the practice may be included as a form of VAW in upcoming General Recommendations.

On the other hand, this lack of consistency can be attributed to how the CEDAW Committee adopts a siloed approach to its work, which then narrows the Committee's conceptualisation of VAW issues. This strategy of linking VAW to discrimination neglects that some forms of VAW cannot be attributed to bias alone.[888] Because of this, it means that these forms of VAW that fall outside of the discrimination strategy are left in the realm of non-law.[889] The Committee continues to push this agenda of VAW as discrimination. Still, it is impossible to holistically understand VAW into the existing human rights obligations, especially the CEDAW discrimination framework.[890]

5.4.4. General Recommendation No. 35

In 2017, the CEDAW Committee adopted General Recommendation No. 35 on gender-based violence against women, which updates General Recommendation No. 19. Whilst General Recommendation No.19 framed VAW, General Recommendation No.35 expands on the nature of this gender-based violence, it does not replace it.[891] This latest recommendation advances the conceptual framing of VAW and the consequences on women's lives. Vijeyarasa argues that General Recommendation No.35 sought to rectify the two significant flaws in General Recommendation No. 19, including the scope of women included and the inadequacy of which the pandemic of VAW Is addressed.[892] In the title, General Recommendation No. 35 moves away from the terminology adopted in the previous recommendation from just violence against women to gender-based violence against women. This framing provides an understanding of

[888] Krivenko op cit note **Error! Bookmark not defined.** at 59.
[889] Ibid.
[890] Ibid.
[891] OHCHR Launch of CEDAW General Recommendation No. 35 on gender based violence against women, updating General Recommendation No. 19 available at *https://www.ohchr.org/en/hrbodies/cedaw/pages/gr35.aspx#:~:text=35%20on%20gender%2Dbased%20violence,Committee)%20adopted%20General%20Recommendation%20No*.
[892] Ramona Vijayarasa CEDAW's General Recommendation No. 35: A quarter of a century of evolutionary approaches to violence against women (2020) *Journal of Human Rights* Vol 19 No. 2 pp. 153-167 at 158.

the problem as a social problem and not an individual problem.[893] However, this is problematic because states' continued adoption of gender-neutral language seeks to equate violence against men and women as the same violation needing the same approach to end it.[894] Not addressing VAW as a violation as a specific human rights violation not only related to gender inequality and discrimination makes it challenging to find holistic approaches addressing this violence. The former SRVAW argues that adopting a gender-neutral approach to VAW dilutes the complexities of violence that women face and thus negatively affects the transformation agenda.[895]

Section B of the General Recommendation outlines state obligations and, more importantly, state responsibility for acts and/or omissions by non-state actors.[896] The Committee recalls Article 2 of CEDAW and notes that "…State parties will be held responsible should they fail to take all appropriate measures to prevent, as well as to investigate, prosecute, punish and provide reparations for, acts or omissions by non-State actors that result in gender-based violence against women…"[897] The Committee further urges states to make efficient and effective measures to ensure they meet their due diligence obligations by adopting legislative, reparation, and rehabilitation efforts to support women.[898] State parties are also called upon to collect data, monitor, and evaluate progress on international and national goals to combat VAW.[899]

In its introductory remarks, in Para 2, the CEDAW Committee takes a step towards acknowledging the *opinio juris* status of the prohibition of VAW in customary international law. Bennet and Strug interpret *opinio juris* as the psychological sense of legal obligation and/or subjective conviction that certain conduct is obligatory.[900] The psychological aspect of the sense of responsibility means that it is open to interpretation, and thus the proof of its existence is elusive.[901] The Committee asserts that General Recommendation No.19, the SRVAW, human rights procedures, and other special mandates in the UN system played a significant role in bringing VAW to this status of law.[902] In this General Recommendation, the

[893] Vijayarasa (2020) op cit note **Error! Bookmark not defined.** at 159.
[894] Para 61 of the Report of the SRVAW, Rashida Manjoo to the Human Rights Council (2014) A/HRC/26/38.
[895] Ibid.
[896] See generally Section B of General Recommendation No.35.
[897] Para 24 of General Recommendation No.35.
[898] See generally paras 24-35 of General Recommendation No.35.
[899] Para 34 General Recommendation No.35.
[900] Bennett & Strug op cit note **Error! Bookmark not defined.** at 19.
[901] Ibid.
[902] Para 2-3 of General Recommendation No. 35.

Committee notes that it has played a role in condemning gender-based violence, clarifying standards and the obligations of state parties to eliminate it.[903] However, the Committee acknowledges that even after 25 years since General Recommendation No. 12, VAW is still pervasive. It manifests as a continuum of multiple and intersecting forms from the public to private settings currently informed by technology and globalisation.[904] Although the Committee has adopted this view of VAW and its position in international law, it neither fully addressed what this means for women who have experienced violence and are seeking justice and/or redress nor specified how the Committee would make their decisions VAW using this interpretation. Additionally, the Committee does not address how this new interpretation of VAW addresses the normative gap, which still plays a critical motivating factor for the pervasiveness of VAW.

General Recommendation No.35 also acknowledges that women's lives are intersectional and how this intersectionality aggravates the violence they face in their daily lives.[905] Women occupy different roles in different environments, and the violence they suffer in one sphere negatively affects their participation in the others. This acknowledgement is essential for the discussion of this thesis because not only do women play a role culturally as wives, but they also occupy other spheres as breadwinners and civil subjects. The violence they face because of cultural normative practices affects their activities as breadwinners and/or civic subjects. It has been argued that the cultural practice of lobola does increase a woman's vulnerability to violence because of the perceptions fostered by the practice.[906] Importantly, Para 14 of this recommendation acknowledges that culture can exacerbate a woman's vulnerability and experience of violence., it states "Gender-based violence against women is affected and often exacerbated by cultural,… Harmful practices and crimes against women human rights defenders, politicians, activists or journalists are also forms of gender-based violence against women affected by such cultural, ideological and political factors."[907]

[903] Section 1 (1) of General Recommendation No.35.
[904] Para 6 of General Recommendation No. 35.
[905] Para 6 of General Recommendation No. 35.
[906] See generally C Horne F N Dodoo & N Dodua Dodoo 'The shadow of indebtedness: Bridewealth and norms constraining female reproductive autonomy' (2013) 78 No. 3 *American Sociological Review* 503-520; [906] K L Hoffman, D H Demo & J N Edwards 'Physical wife abuse in a non-western society: An integrated theoretical approach' (1994) 56 *Journal of Marriage and the Family* 131-146; Dan K. Kaye et al., 'Implications of Bride Price on Domestic Violence and Reproductive Health in Wakiso District, Uganda' *African Health Sciences* 5, no. 4 (2005): 300–303.
[907] Para 14 of General Recommendation No.35.

This recommendation also further equates harmful practices to torture and/or inhumane or degrading treatment.[908] The prohibition of torture is a peremptory (*jus cogens*) norm, and therefore, recognising forms of VAW as torture broadens the attention to the issue globally. [909] The prohibition of torture represents a rule of international law of which no derogation is permissible.[910] In this regard, if women face forms of violence arising out of harmful practices, rape, or domestic violence, they are not limited to using just CEDAW as a mechanism which is linked to gender-based discrimination which leads to the burden of proof being on the victim to prove that the violence they experience results from discrimination. Thus, the linking of harmful traditional practices to torture and or inhumane or degrading treatment widens the opportunities for women to use other legally binding international instruments to seek justice. The CEDAW Committee's view regarding some forms of VAW as forms of torture and/or inhuman or degrading treatment expands the scope for women to seek justice using other legally binding normative frameworks such as the Convention Against Torture (CAT) and ICCPR.[911]

In this recommendation, the Committee also seems to be acknowledging global developments in understanding and interpreting acts of VAW. This is a similar approach adopted by the International Criminal Tribunal for the Former Yugoslavia (ICTY), where rape and enslavement were interpreted to be equal to crimes against humanity.[912] The International Criminal Tribunals of the Former Yugoslavia and Rwanda (ICTY and ICTR, respectively) were ground breaking because they created wartime sexual violence jurisprudence and set precedents for crimes against women in conflict. These tribunals interpreted international humanitarian law to establish rape during war as a 'war crime'.[913] They offered an expanded narrative and interpretation of certain forms of VAW as crimes against humanity. Although

[908] Para 16 of General Recommendation No.35.
[909] The Vienna Convention prescribes that jus cogens refers to peremptory norms of general international law defined as (1) norms (2) accepted and recognised by the international community of states as a whole (3) from which no derogation is permitted. Also see *Questions Relating to the Obligation to Prosecute or Extradite* (*Belgium v. Senegal*), Judgment of 20 July 2012, ICJ Reports 2012, para. 99; Erika De Wett 'The Prohibition of Torture as an International Norm of Jus Cogens and Its Implications for National and Customary Law' (2004) *EJIL* Vol. 50 No. 1 pp 97-121.
[910] Bennett & Strug op cit note **Error! Bookmark not defined.** at 27.
[911] UN Committee Against Torture (CAT), General comment no. 3, 2012: Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: implementation of article 14 by States parties, 13 December 2012.
[912] *Prosecutor v. Kunarac*, Kovac and Vukovic, ICTY Trial Chamber II, Judgement 22 February 2001, Case no. IT-96-32/1-T.
[913] Daniella Nadj *ICTY Wartime Sexual Violence Jurisprudence and the Surrounding Debate: A critical feminist analysis* (unpublished PhD thesis, University of Westminster, 2011), available at http://westminsterresearch.wmin.ac.uk/10642/1/Daniela_NADJ.pdf at 67.

these international bodies expanded the understanding of VAW and its relationship to state and non-state actors' responsibilities, many other forms of VAW that are equally traumatic and debilitating for women occurring outside of conflict times, have not been equated to crimes against humanity.

Lastly, one of the important recommendations is the call upon states to draw upon the UN mechanisms and the international community to seek support and prioritise implementing effective measures to protect women from violence.[914] By calling for a holistic approach to ending VAW, this recommendation positions the pandemic of VAW as an intersectional problem that can be addressed using the different mechanisms within the UN system. Generally, this recommendation sheds light on some of the issues that have been raised by various human rights bodies and special procedures such as the SRVAW.[915] For example, the reports on the intersectionality of women's lives and how violence is intricately linked to their lives, and how the lack of a legally binding instrument on VAW negatively impacts how the issue can be dealt with.

5.5. CEDAW's Work and Jurisprudence on VAW

As argued earlier, the Committee's work has not significantly impacted the jurisprudence on VAW and is currently not as extensive as it should be. This is mainly because the Committee has continued to adopt soft law measures on VAW and this approach continues to create norms that are not part of existing rules of international law.[916] The Committee has tried to adopt a strategy that outlines the prohibition of VAW as being inextricably linked to the prohibition of discrimination.[917] By establishing this connection between the prohibition of discrimination against women and violence against women, CEDAW places this subject matter under its jurisprudence. This may be a progressive idea, however, VAW has broad manifestations, and it cannot be assumed that all these forms of violence can fit into the framework of discrimination.[918] Although the CEDAW Committee has finalised numerous cases, this section only analyses the cases where the aspect of VAW and culture is mentioned due to the limitations placed by the word count of this thesis.

[914] Para 35 of General Recommendation No.35.
[915] See generally A/HRC/26/38; A/HRC/17/26; E/CN.4/2002/83.
[916] John Cerone 'A taxonomy of soft law: Stipulating a definition' in Lagouette, Gammeltoft-Hansen and Cerone (eds) op cit note **Error! Bookmark not defined.** at 1.
[917] Krivenko op cit note **Error! Bookmark not defined.** at 58.
[918] Krivenko op cit note **Error! Bookmark not defined.** at 59.

Table 1. Outlines CEDAW's jurisprudence on gender-based violence and/or VAW since 2005. This table was developed using CEDAW case law information from the Office of the High Commissioner on Human Rights (OHCHR) using an advanced keyword search (gender-based violence, violence against women) on the CEDAW jurisprudence page. The table also highlights the year the communication was submitted and the year it was finalised. Lastly, the table also provides the details of the articles used by CEDAW in their decisions. Because of the focus of this thesis, only cases on VAW and/or gender-based violence will be discussed in this section.

Case Name	Year Submitted	Year Finalised	Case Reference	Articles used
Cecelia Kell v. Canada **1**	2008	2012	Communication No. 19/2008, UN Doc. CEDAW/C/51/D/19/2008 (2012)	1, 2(d), 2(e), 14(2)(h), 15(1)-15(4), 16(1)(h)
X and Y v. Georgia **2**	2009	2015	Communication No. 24/2009, UN Doc. CEDAW/C/61/D/24/2009 (2015)	1, 2(b)-2(f), 5 (a)
R. P. B v. The Philippines **3**	2011	2014	Communication No. 34/2011, UN Doc. CEDAW/C/57/D/34/2011 (2014)	1, 2(c), 2(d) and 2(f)
Angela Gonzalez Carreño v. Spain **4**	2012	2014	Communication No 47/2012, UN Doc. CEDAW/C/58/D/47/2012 (2014)	
Isatou Jallow v. Bulgaria **5**	2011	2012	Communication No. 32/2011, UN Doc. CEDAW/C/52/D/32/2011 (2012)	1, 2(b)-2(f), 3, 5(a), 16(1)(c), 16(1)(d) and 16(1)(f)
V.P.P. v. Bulgaria **6**	2011	2012	Communication No 47/2012, UN Doc. CEDAW/C/58/D/47/2012 (2014)	1, 2(a)-2(c), 2(e)-2(g), 3, 5, 12 and 15
V.K. v. Bulgaria **7**	2008	2011	Communication No. 20/2008, UN Doc. CEDAW/C/49/D/20/2008 (2011)	1, 2(c)-2(f), 5(a), 16(1)

Karen Tayag Vertido v. the Phillipines **8**	2008	2010	Communication No. 18/2008, UN Doc. CEDAW/C/46/D/18/2008 (2010)	1, (2)(c), 2(f), and 5(a)
Fatma Yildrim (deceased) v. Austria and Sahide Goecke (deceased) v. Austria **9 & 10**	2005	2007	Communication No. 6/2005, UN Doc. CEDAW/C/39/D/6/2005 (2007) Communication No. 5/2005, UN Doc. CEDAW/C/39/D/5/2005 (2007)	1, 2(a), (c)-(f) and 3
A.T. v. Hungary **11**	2003	2005	Communication No. 2/2003, UN Doc. CEDAW/C/32/D/2/2003 (2005)	2(a), 2(b), 2(e), 5(a), and 16

NB: This table was created by the author using information and statistics from the OHCHR jurisprudence website.

As illustrated by Table 1, 11 communications have been adjudicated by the Committee since 2005 with 2 cases (not in the table), *N.M v. Turkey*[919] and *D.G v. the Netherlands*,[920] considered inadmissible. Between 2018-2019, the Committee has finalised almost half of the total number of cases received since 2005. Considering the global prevalence of VAW, the number of cases that the Committee has concluded is low.

In addition, as noted by Krivenko, the Committee is reluctant to draw on the language of VAW if the case can easily use other existing provisions of CEDAW.[921] In the case of *L.C. v. Peru,* the Committee did not use the language of VAW even though the victim, a thirteen-year-old girl, suffered sexual abuse and was denied access to an abortion.[922] This resulted in her miscarrying and undergoing surgery which left her paralysed from the neck down.[923] In its decision, the Committee noted that the state had violated the victim's rights to health, freedom from gender stereotyping and the right to an effective remedy and adequate protection.[924] There was no mention of the violence she suffered through sexual abuse. There is a similar trend in other cases where the Committee has opted not to employ the language of VAW, such as in *M.*

[919] CEDAW/C/70/D/92/2015.
[920] CEDAW/C/61/D/52/2013.
[921] Krivenko op cit note **Error! Bookmark not defined.** at 63.
[922] *L.C. v. Peru* Communication No. 22/2009 18 June 2009 CEDAW/50/D/22/2009.
[923] *L.C. v. Peru* CEDAW/50/D/22/2009.
[924] *L.C. v. Peru* CEDAW/50/D/22/2009.

K. D. A.-A. v. Denmark[925], *R.P.B v. The Philippines*[926] and *M.S. v. The Philippines.*[927] In these cases, the Committee interpreted rape and domestic violence using existing provisions of discrimination in CEDAW.

The Committee's reluctance to use the language of VAW as outlined in DEVAW creates several issues including, making the Committee complicit in only identifying the violence women suffer under the guise of discrimination alone. By adopting this approach, the Committee also indicates an '…uncertainty about the normative value' of the prohibition of VAW as stipulated in DEVAW and its General Recommendations.[928] Manjoo notes that the Committee has taken an approach to view VAW as a matter of discrimination and not as a human rights violation, '…in and of itself, with discrimination as both a cause and consequence of this violence'.[929] To a certain extent, the adoption of General Recommendations by the Committee have provided it with the opportunity to expand on the interpretation of the CEDAW treaty provisions, which can be applied to VAW.[930] However, the jurisprudence reflects the limitation of the approach of soft law developments through General Recommendations.

The Committee has also continued to reiterate the CEDAW's provisions on non-discrimination in cases of gender-based violence, including femicide. In cases like *T. Reyes and A. Morales v Mexico,* the Committee used both the CEDAW Convention and its Concluding Observations to decide on Mexico's responsibility. In this case, the Committee found that Mexico had not fulfilled its due diligence obligation to prevent, investigate and prosecute crimes against women.[931] The Committee concluded that Mexico violated articles 1, 2(b),(c) and 5 of the Convention.[932] The Committee argued that even though A.R.M had been found not guilty, the state still had an obligation to continue investigating the murder of Pilar Arguello Trujillo. According to the Committee, Mexico had violated the deceased's right to be free from discrimination (Article 1), failed to adopt legislative measures and adopting legal protections (Article 2(b,c)), and failed to modify social and cultural conditions to promote

[925] M. K. D. A.-A. v. Denmark CEDAW/C/56/D/44/2012.
[926] R.P.B v. The Philippines CEDAW/C/57/D/34/2011.
[927] M.S. v. The Philippines CEDAW/C/58/D/30/2011.
[928] Krivenko op cit note **Error! Bookmark not defined.** at 63.
[929] Manjoo (2018) op cit note **Error! Bookmark not defined.** at 87.
[930] Manjoo (2018) op cit note **Error! Bookmark not defined.** at 91.
[931] Para 19 of General Recommendation No. 28.
[932] Para 9.6 of *T. Reyes and A. Morales v. Mexico* Communication No. CEDAW/C/67/D/75/2014.

gender equality (Article 5).[933] The Committee also established that in its previous Concluding Observations[934] to the state of Mexico, they had already raised concern over the frequent occurrences of femicide in the country, including in Ciudad Juarez, the lack of a firm definition of femicide in the states' penal codes as well as the inaccuracies in the recording and documentation of these crimes.[935] In this case, we see that the Committee also draws on its Concluding Observations to state parties when making decisions on communications.

Interestingly, the Committee also raises the aspect of a misogynistic culture that perpetuates VAW in this case. By doing so, the Committee linked culture, and the violence women suffer in their lifetime. In its Concluding Observations to Mexico, the Committee established that femicide could be attributed to a misogynistic set of behaviours that lead to social and state impunity.[936] Similarly, in *J. I v Finland*, the Committee also argued that stereotypes against women created a culture of impunity for crimes of VAW.[937] These harmful stereotypes contribute to a culture of oppressing women and justify excluding women from accessing justice.[938]

It is not difficult to infer that the Committee itself is unsure and unwilling to act decisively on the issue of VAW by including it as a legally binding normative standard within the UN system of human rights. The cases where CEDAW uses the language of VAW involve issues traditionally associated with this violence, including forced sterilisation, honour killings, and domestic violence.[939] Krivenko also notes that in cases where a state party mentions VAW in their submission, this argument formed part of a supplementary argument to demonstrate how they had complied with the provisions of CEDAW.[940] For example, in *Cecilia Kell v. Canada*, the state's government argued that they had complied with their due diligence obligations as mandated by CEDAW to investigate and punish acts of VAW and thus could not be held accountable for acts committed by an individual not linked to the state.[941] Additionally, in this case, the applicant (Kell) submitted that she had faced discrimination

[933] See generally CEDAW Committee's decision in *T. Reyes and A. Morales v. Mexico* Communication No. CEDAW/C/67/D/75/2014.
[934] CEDAW/C/MEX/CO/7-8, concluding observations on the combined seventh and eighth periodic reports of Mexico, 7 August 2012.
[935] Para 17 of CEDAW/C/MEX/CO/7-8.
[936] Ibid.
[937] Para 8.9 of *J.I v. Finland* Communication No. CEDAW/C/69/D/103/201.
[938] Ibid.
[939] Krivenko op cit note **Error! Bookmark not defined.** at 63.
[940] Krivenko op cit note **Error! Bookmark not defined.** at 63.
[941] Para 8.11 *Cecilia Kell v. Canada* Communication No. 19/2008 26 April 2012 CEDAW/C/51/D/19/2008 at 12.

based on her cultural heritage.[942] According to Kell, she argues that she had faced discrimination by authorities when they removed her name from the title deeds to the land without informing her or obtaining her consent.[943] The authorities processed the request to change ownership of the land because the husband had requested it, they did not take further steps to inquire with Kell if she consented to this change in ownership since she also owned the land.

As noted above, the former SRVAW Manjoo argues that there is a normative gap in international human rights law to protect women from violence.[944] This is because CEDAW does not sufficiently address VAW. Even though some global and regional treaties refer to VAW, they differ in substantive scope and nature.[945] This normative gap also means that there is no prescriptive framework for states to enact domestic legal provisions to protect women from violence. Manjoo argues that the strength of international norms lies in the fact that they create homogeneity of concepts and their application.[946] These norms diffuse evenly across different geographies and provide a more equitable pattern for access to justice.[947] Therefore, there is a positive correlation between international law and strong domestic legal protections of human rights.[948] If there is a specific treaty to eliminate VAW, domestic legislation and policies will also change to reflect the new standard. A new global treaty on VAW will provide the normative specificity and definitional clarity that the violation requires to protect women.[949]

The work and recommendations of the former SRVAW Manjoo has been further developed by an initiative called Every Woman Treaty. Every Woman Treaty initiative comprises of a working group of global experts on VAW and girls from 128 countries are working together to recommend adopting such a treaty.[950] The organisation highlights that the current tools to address VAW have only raised the issue globally in conversation and no concrete framework has been adopted. The argument is that a global and legally binding treaty will contribute to taking action and ending the pandemic of VAW. This is because this treaty will create an international legal mandate for states to act with due diligence to prevent, respect,

[942] Para 3.1 of Communication No.19/2008 CEDAW/C/51/D/19/2008.
[943] Ibid.
[944] Manjoo (2018) op cit note **Error! Bookmark not defined.**.
[945] Nwadinobi et al op cit note **Error! Bookmark not defined.** at 31.
[946] Manjoo (2018) op cit note **Error! Bookmark not defined.** at 201.
[947] Ibid at 201.
[948] Ibid.
[949] Nwadiobi et al op cit note **Error! Bookmark not defined.** at 31.
[950] Find more information on Every Woman Treaty available at < https://everywoman.org/treaties-are-a-global-game-changer/>

protect, promote, and fulfil women and girls' right to be free from violence.[951] This effort by independent organisations to bring together experts and voices from various regions to work together to influence the development and adoption of a global treaty to end violence against women is an important initiative in the development of frameworks that impact and influence women's rights.

The Committee continues to leave VAW on the periphery of normative standards, and this derails the acknowledgement and state compliance with the prohibition of VAW as a legally binding obligation. This negatively impacts states' views about the relevance of the issue of VAW.[952] By oscillating between hard and soft language on VAW in its jurisprudence, the Committee derails the work it has done through General Recommendations and entrenches the system's normative gaps. For example, in General recommendation No. 14 on female circumcision, the language adopted by the Committee does not mention VAW at all, but this could have been an opportunity to be more assertive about the normative value of the prohibition of VAW.[953] The Committee continues to refine soft law standards on VAW; however, these only support the goal to end VAW to a certain degree. A specific legally binding treaty will complement existing treaties like CEDAW to provide more comprehensive protection and legal recourse for women who face various forms of violence.[954] Secondly, this new treaty would have its own monitoring body, giving the pandemic of VAW the attention it deserves.[955] Lastly, a legally binding treaty will provide effective and enforceable legislation and compel states to implement those standards at the domestic level, with specific sanctions for failure.[956] This would go a long way to address the global pandemic of VAW and show an international consensus to eliminate a human rights violation that disproportionately affects women.

Conclusion

In conclusion, this chapter examined the prohibition of VAW in international human rights law and specific mandates focused on women's rights, such as CEDAW and the SRVAW. The purpose of this legal analysis was to establish how VAW has developed under international law and the ensuing state obligations. Various actors, including NGOs, UN system thematic

[951] Ibid.
[952] Krivenko op cit note **Error! Bookmark not defined.** at 64.
[953] Krivenko op cit note **Error! Bookmark not defined.** at 63.
[954] Nwadinobi op cit note **Error! Bookmark not defined.** at 33.
[955] Manjoo (2018) op cit note **Error! Bookmark not defined.** at 210.
[956] GRW op cit note **Error! Bookmark not defined.**.

mandates, experts, academics and the feminist movement, have worked to ensure different forms of VAW are recognised and that steps are taken to eliminate it. The normative developments since the 1970s have firmly placed the issue of VAW on the human rights agenda. However, these normative developments at the international level have been piecemeal, soft law developments that have influenced the continued reluctance of states to act decisively and act on their due diligence obligations.[957]

The office of the Special Rapporteur on Violence against Women, its causes and consequences, has continued to raise the critical issue of 'normativity without legality' that limits the actual protection of women from violence.[958] Since the inception of the mandate, the special rapporteurs have continued to raise violence against women that is usually justified using culture, religion and tradition. The special rapporteurs have continued to raise awareness around the various manifestations of violence against women in cultural and religious communities, such as female genital mutilation, gender-related killings/femicide, breast ironing, dowry killings etc. The nature of VAW in culture and religion is insidious, and it is widely accepted as preserving cultural and religious heritages of communities. Thus, this violence is difficult to eliminate without the full appreciation and support of the state to end these manifestations of violence against women in their jurisdictions.

Although CEDAW has taken steps to utilise existing frameworks to make decisions on cases of VAW, there is still a lack of a common standard on defining and adjudicating matters concerning this issue. For example, as argued earlier in this chapter, the CEDAW Committee has to play legal gymnastics to make decisions on VAW cases. There is a lack of a cohesive, self-standing and legally binding treaty on VAW that can set global standards of protection and define state obligations to respect, protect, promote, and fulfil women's rights to be free from all forms and manifestations of violence. As long as the normative gap persists, VAW cannot be addressed in all its manifestations at the global level.

[957] Manjoo (2018) op cit note **Error! Bookmark not defined.**.
[958] Rashida Manjoo 'Twenty Years of Normativity without Legality – United Nations Developments on Violence against Women, its Causes and Consequences' (2016) *QMHRR* Vol. 3 No. 1.

CHAPTER 6

Closer to home: The regional normative developments on VAW

Introduction

At the regional level, normative standards on VAW are more robust and provide more clarity on the issue of VAW than in the international human rights system.[959] There are three regional human rights systems, with two regions having a dedicated treaty on VAW, that is, the Inter-American and the European Human Rights systems. The African system currently does not have a specific treaty on VAW. However, it does have a dedicated women's rights treaty, which was adopted in 2003 known as the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (hereafter Maputo Protocol). The Inter-American Convention on the Prevention, Punishment and Eradication of Violence, also known as The Convention of Belém do Pàrá, was adopted in 1994 as a legally binding human rights framework to protect and defend women's right to be free from violence in the Americas. The Council of Europe's Istanbul Convention on Preventing and Combatting Violence Against Women and Domestic Violence was adopted by the member states in 2011. These regional standards have had some impact on reducing the normative gap, and their contribution to normative standards and jurisprudence on VAW will be discussed below.[960] Kelly argues that, beyond the UN system of human rights, the jurisprudence and discourse on VAW is more developed and sophisticated.[961] The regional normative standards provide a specific framework to address VAW. However, they cannot be applied globally, and the standards of protection that they offer vary in both degree and definitions of VAW.[962]

The existence of regional laws and mechanisms presents opportunities that women may not access at the international level.[963] Cook argues that the development and application of human rights can be facilitated by geographic proximity, cultural similarity, and economic interdependence.[964] In terms of women's rights, this proximity offers the opportunity to establish the legitimacy of women's rights in similar contexts.[965] Regional normative instruments are crucial, especially when the international human rights regime does not have

[959] Nwadinobi E A, Juaristi F R, Pisklakova-Parker M, Aldosari H, Khana M, Aebehard-Hodges J 'Safer Sooner: Toward a Global Binding Norm to End Violence Against Women and Girls' Every Woman Treaty at 34.
[960] Nwadinobi et al op cit note 959 at 34.
[961] Liz Kelly, 'Inside Outsiders' (2005) *International Feminist Journal of Politics* Vol 7 No. 4 pp. 471-495 at 485.
[962] Nwadinobi et al op cit 959 at 34.
[963] Rebecca Cook 'Women's International Human Rights Law: The Way forward' (1993) *Human Rights Quartely Vol* 15 pp. 230-261 at 256.
[964] Cook (1993) op cit note 963 at 256.
[965] Cook (1993) op cit note 963 at 257.

legally binding treaties concerning an issue, for example, VAW. It thus becomes more important for regional instruments to be developed to cover those normative gaps as well.[966] Additionally, Ulrich argues that varying cultural practices influence various forms of gender-based violence.[967] According to Ulrich, effective protection and the total elimination of VAW can be achieved through scrutinising traditional legal power structures through radical feminist lenses.[968] Feminist principles state that if traditionally male-dominated and organised power structures are re-organised, only then can women realise equality with men.[969]

As argued in Chapters 2 and 3 of this thesis, the subject of cultural normative practices and their influence on VAW is an issue of contention and an area where states are reluctant to interfere. The cultural sphere is also the community or familial sphere, which is deemed a private sphere where the state limits its interference and influence. However, this disengagement from the private sphere has had adverse and compounding effects on VAW. National statistics on VAW indicate that most reported cases of VAW occur in the private and familial sphere, perpetrated by an individual known to the victim.[970] This is indicative of two facts. Firstly, culture as the purveyor of relations in the private sphere has a role in influencing different forms of VAW.[971] Secondly, the fact that women abuse does not only occur in one culture, economic status, or political structure. The abuse of women takes place across all cultures.[972]

6.1. The European and American Human Rights Systems

6.1.1. The Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (Convention of Belém do Para)

The Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belém do Pará) was adopted by the Organisation of American States in 1994 and subsequently entered into force in 1995. It is the first legally binding treaty

[966] Rashida Manjoo & Ruth Nekura 'Does Africa need a regional treaty on Violence Against Women? A comparative analysis of normative standards in three regional human rights systems' (2020) in Nolundi Luwaya Rashida Manjoo and Jameelah Omar *Violence Against Women: Law Policy and Practice* (2020) Juta Law Cape Town at 218.
[967] Jennifer L Ulrich 'Confronting Gender-Based Violence with International Instruments: Is a Solution to the Pandemic Within Reach?' (2000) 7 no. 2 at 629.
[968] Ulrich op cit note 967 at 630.
[969] Ulrich op cit note 967 at 630.
[970] World Health Organisation Violence Against Women Fact Sheet available at https://www.who.int/en/news-room/fact-sheets/detail/violence-against-women
[971] Ulrich op cit note 967 at 632-633.
[972] Ulrich op cit note 967 at 633.

on VAW, albeit a regional one. According to the first SRVAW, the Convention of Belém do Pará, '…provided an unparalleled basis for advances in fighting violence against women in the Americas'.[973] Out of 34 countries, only the United States of America and Canada have not signed or ratified the treaty.[974] The adoption of the Convention of Belém do Pará came about in response to the normative gap on VAW in the Inter-American System of Human Rights. It is noted that "…the jurisprudence of the Inter-American Commission and Court has made it clear general human rights treaties do not address with sufficient specificity the particular complexities and nuances that arise in cases of violence against women."[975] The Convention thus offers several opportunities for the protection of women against violence, including opportunities for justice and redress. Notably, the Convention is strong because it expressly links gender-based violence and discrimination.[976] The Convention also notes that VAW is an offence against human dignity and that it is a historical manifestation of unequal gender relations between men and women, and it recognises that VAW is pervasive and that it is a barrier to women's expression of their full lives.[977] Coomaraswamy notes that the Convention provides an important recognition that the suffering of women crosses the public/private divide and that this violence is a cause of mortality and psychological harm.[978]

State parties to the Convention of Belém do Pará commit to ensuring that any acts or failure to act by the state and/or its agents will lead to accountability for acts of VAW,[979] and further commit to applying due diligence to prevent, investigate, and punish this violence when it occurs.[980] The state agrees to create a conducive legislative environment that ensures women have protection and perpetrators are punished for acts of VAW.[981] The Convention also establishes mechanisms for the implementation and enforcement of the treaty. The Inter-American Commission of Women is mandated to process individual claims and petitions

[973]E/CN.4/2003/75/Add.1 at Para 1257.
[974] See the ratification table on http://www.oas.org/juridico/english/sigs/a-61.html
[975] Rivera Francisco The Inter-American Human Rights system and Violence against Women International Human Rights Clinic at Santa Clara Law School (May 2015) available at http:// law.scu.edu/wp-content/uploads/150602-Santa-Clara-VAW- IAHRS-Report-FINAL.pdf at 92.
[976] Article 6 of Organization of American States (OAS), Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women ("Convention of Belem do Para"), 9 June 1994.
[977] Preamble of The Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women at Paras 4-5.
[978] Coomaraswamy E/CN.4/2003/75/Add.1 at para 1264.
[979] Article 2 (c) of The Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women.
[980] Article 7 (b) of The Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women.
[981] Article 7 (d-g) of The Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women.

alleging VAW through the Inter-American Commission on Human Rights.[982] This Commission also has the power to receive state party reports and make decisions that are informed by the principal obligations in the Convention, and it reports annually to the General Assembly.[983] State reports are an essential monitoring and evaluation tool that can help the Commission track the impact and progress made relative to the state party obligations under this Convention. Importantly, individual petitions are permissible under this Convention, and this further provides an opportunity for women to access justice outside of the available domestic channels. [984] The Convention also made notable advancements in the understanding and definition of VAW whilst providing regional contextualisation of the problem.[985]

The Inter-American Commission of Human Rights has also been instrumental in referring complaints to the Inter-American Court of Human Rights using the Convention of Belém do Pará. Although this Court does not have the mandate to receive complaints concerning individual petitions directly, the Court receives cases referred by the Commission. Although the IACHR has adjudicated several cases, this section only looks at three relevant cases where the Court has made pioneering decisions on VAW. These cases also highlight the cultural aspect of male chauvinism (machismo), patriarchy, and sexist stereotypes deeply rooted in Latin American culture, leading to a high tolerance of VAW.[986] In its 2019 thematic report on 'Violence and Discrimination against women and girls in Latin America and the Caribbean', the IACHR established that gender-related identities in these geographies are influenced by the *machista* culture and influence the high incidence of VAW and which also inhibit access to justice for women.[987] Thus, in this thesis, discussing cases with some relation to culture is essential to establish how cultural nuances and practices affect women's experiences of violence and the communities' tolerance of this violence.

In its first comprehensive ruling on a case of VAW the Inter-American Court of Human Rights in *Ana, Beatriz, and Celia González Pérez v. Mexico (Cotton Fields)*, the IACHR's analysis established that the complainants were subjected to adverse discrimination and

[982] Articles 10 & 12 of The Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women.
[983] Article 19 of The Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women.
[984] Article 12 of The Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women.
[985] Nwadinobi et al op cit note 959 at 36.
[986] Inter American Commission on Human Rights Thematic Report 'Violence and Discrmination against women and girls in Latin America and the Carribean' (2019) OAS. Official records; OEA/Ser.L/V/II.
[987] Ibid.

victimisation on multiple levels because the state failed to exercise due diligence to investigate, prosecute, and punish its agents for the crimes of rape and torture.[988] Further, the court established that even though the State claimed the victims had not exhausted domestic legal remedies, the transfer of the case to a Military court in Mexico resulted in the paralysis of the investigation. Thus, the victims could no longer seek justice domestically.[989] This finding is important because the court interpreted the state's responsibility to act and provide justice mechanisms extended to the use of the correct judicial bodies to adjudicate on the matters of VAW.[990] These developments are critical to fulfilling the object of the Convention and support the elimination of VAW in the region by providing remedies and reinforcing state responsibilities.

Using this case, the IACHR took the opportunity to define state obligations as per the Convention. In this case, the court held that Mexico was responsible for violating women's rights by failing to adequately investigate and punish the killings of women in Ciudad Juárez.[991] The court also specifically referenced Mexico's violation of Article 7 of the Convention of Belém do Pará stating its failure to fulfil its due diligence obligations. The Inter-American Court of Human Rights also interprets state obligations to refer to acts and failure to prevent and punish acts of violence against women. In this case, the Court stated that even though the state of Mexico denied that there were any motives behind the killing of women in Ciudad Juarez, the state agreed that there was a cultural belief that women were inferior beings, and this perpetuated the violence they suffered.[992] The Court also agreed with the comments from CEDAW that the killings were not random or sporadic and that these were representative of a structural, social and cultural phenomenon that is deeply rooted in customs and mindsets that increased women's vulnerability to violence.[993]

In two of its following judgements, *Fernandez Ortega et al. v Mexico and Rosendo Cantú and other v. Mexico,* the Court made similar comments about the culture of VAW in

[988] *Ana, Beatriz, and Celia González Pérez v. Mexico* IACHR Report 53/01 merits, case 11.565 (2001).
[989] See generally summary judgement of Ana, Beatriz, and Celia González Pérez v. Mexico (2001).
[990] See generally summary judgement of Ana, Beatriz, and Celia González Pérez v. Mexico (2001).
[991] Mexico had failed to protect the women's fundamental human rights and guarantee them access to justice: By inadequately investigating the systematic killings in Ciudad Juarez and failing to establish legislation that proportionately punishes perpetrators, Mexico had contributed to "an environment of impunity that facilitates and promotes the repetition of acts of violence in general and sends a message that violence against women is tolerated and accepted as part of daily life."
[992] Ibid.
[993] Report on Mexico produced by the Committee on the Elimination of Discrimination against Women under Article 8 of the Optional Protocol of the Convention, and reply from the Government of Mexico, CEDAW/C/2005/OP.8/MEXICO, 27 January 2005.

Mexico. In both cases, indigenous women had been raped and tortured by military members in the state of Guerrero in Mexico.[994] The Commission in the Merits case identified that there had been no due process to investigate and punish the perpetrators.[995] Therefore, the Court again highlighted a culture of tolerance for acts of VAW by the state and its organs that are meant to protect victims, promote, investigate and punish perpetrators of this violence.

Importantly, the Special Rapporteur on the Rights of Women (SRW) in the Inter-American system has played a significant role in advancing jurisprudence on VAW in the Americas by raising awareness through thematic reports[996] and supporting cases on VAW. This SRW, as a member of the Commission, assists with the preparation of reports on cases involving VAW and the referral of cases to the Court. Established in 1994 with a mandate to '… analyse the extent to which laws and practices involving women's rights in the OAS Member States comply with the general obligations outlined in regional human rights instruments'.[997] The SRW's function in the field of women's rights, in general, is quite extensive, and her role includes assisting the Commission process individual petitions and human rights violations cases with specific gender-specific causes and consequences.[998] In the first case adjudicated by the Inter American Court of Human Rights on women's rights, *Claudia Ivette González et al. v. Mexico* (Cotton Fields Case), the SRW's work was instrumental in bringing this individual petition to the court for a decision.

In the report of the case of *Maria Da Penha Maia Fernandes v. Brazil (2001)*, the Court made continuous references to the SRW reports outlining the state's unwillingness to provide justice and recourse for women who have suffered violence in Brazil.[999] Maria, the applicant in this case, had developed paraplegia due to the beatings and homicide attempts by her husband.[1000] In establishing merits of the case, the Commission established that, by not

[994] See generally the facts of the cases in *Fernández Ortega et al. v. Mexico*, Petition to the Court, Inter-Am. Comm'n H.R., Case No. 12.580 (May 7, 2009) and *Rosendo Cantú et al. v. Mexico*, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 216, ¶ 73 (Aug. 31, 2010).
[995] *Fernandez Ortega et al. v. Mexico*, Preliminary Objection, Merits, Reparations and Costs, Judgement, Inter-Am. Ct. H.R (ser.C) No. 215 (Aug. 30, 2010).
[996] See http://www.oas.org/en/iachr/women/reports/thematic.asp
[997] The mandate of the Special Rapporteur on the Rights of Women available at *https://www.oas.org/en/iachr/women/mandate/mandate.asp*
[998] Ibid.
[999] See Report on The Situation Of Human Rights In Brazil Chapter VIII The Human Rights Of Brazilian Women available at *http://cidh.org/countryrep/brazil-eng/chaper%208.htm*; Report Of The Inter-American Commission On Human Rights On The Status Of Women In The Americas OEA/Ser.L/V/II.100 available at *http://www.cidh.org/countryrep/Mujeres98-en/TableofContents.htm*
[1000] *Da Penha Maia Fernandes v. Brazil*, Case 12.052, Inter-Am. Comm'n H.R., Report No. 54/01, OEA/Ser.L.V/II.111, doc. 20 rev. (2001) at 2.

condemning and sanctioning the perpetrator for 17 years, the state of Brazil had failed in upholding its obligations under Articles 8 and 25 of the Convention to exercise due diligence in preventing, sanctioning, and eradicating domestic violence.[1001] The Commission also made a critical finding that the state's due diligence obligations do not only require the state to prosecute and punish these crimes but that this duty also includes the prevention of these crimes that degrade the dignity of women.[1002] This case is also significant is because the Commission made another critical finding concerning Brazil's handling of the case. They found that the judiciary's ineffectiveness also created conditions that exacerbate domestic violence because the state demonstrates an unwillingness to prosecute these crimes.[1003]

The most significant consequence of this case was domestic legislation in Brazil. In 2006 the Brazilian government enacted the Maria da Penha Law on Domestic and Family Violence.[1004] This law acknowledges the different forms of domestic violence and preventative arrest for offenders. The Maria da Penha Law is described as being innovative and exemplary women's rights legislation.[1005] This is because the law introduced measures to adopt a holistic approach to ending VAW by adopting the Convention of Belém do Pará's definition of VAW and expanding this definition to include acts of psychological, moral or property damages.[1006] To date, a total of 331,000 cases of domestic violence have been prosecuted, with a total of 110,000 having received a final judgement.[1007] This case reflects how precedent can be set by regional treaty bodies that influence domestic legislation and policies on VAW. Such developments set an important legal precedent that the other regions and international systems could follow to ensure that women are protected from the pain and suffering that violence imposes on their lives.

From the cases discussed, the provisions of the Belem do Para Convention have been interpreted by both the Court and the Commission to understand the state's due diligence responsibilities according to the treaty provisions as well as the enhanced nature of these obligations, especially when victims are at risk of violations to their rights based on multiple

[1001] Ibid at para 60.
[1002] Ibid at para 56.
[1003] Ibid.
[1004] Maria da Penha Law no 11.340 of August 7, 2006.
[1005] Passinato Maria The Maria da Penha Law: 10 Years on (2016) available at https://sur.conectas.org/en/the-maria-da-penha-law-10-years-on/ accessed on 7 July 2020.
[1006] Article 7 (I-V) of the Maria da Penha Law op cit note 1004.
[1007] Nwadiobi op cit note 959 at 39.

factors such as race, gender, ethnicity and age. [1008] Additionally, the adoption of the Convention closed a normative gap in the Inter-American Human Rights system, and this has gone a long way in ensuring that women have a means for recourse and access to justice. The Convention also notes that if state parties or the international system have better provisions to protect women, those provisions take precedence.[1009] This is also important in ensuring that women can use the best legal recourse available and that the Court may invoke provisions of CEDAW, DEVAW, or other mechanisms to adjudicate matters of VAW.

6.1.2. The Council of Europe Convention on Preventing and Combatting Violence Against Women and Domestic Violence

The second specific treaty on VAW is the Council of Europe Convention on Preventing and Combatting Violence Against Women and Domestic Violence (Istanbul Convention), the principal treaty on VAW in the European region. To date, the Istanbul Convention has been signed by forty-six states and the European Union.[1010] This Convention was adopted in 2011 and entered into force in 2014.[1011] Nwadiobi et al. argue that the Istanbul Convention is the most far-reaching regional treaty on VAW in scope, and it has a notable encapsulation of best practices in combatting VAW.[1012] The expansive scope of the treaty extends to outlining specific actions to reform domestic legislation to protect women from violence.[1013] The treaty thus takes a survivor-centric approach that urges all states to take all necessary measures to ensure that the rights of victims of violence are central to their coordinated and comprehensive policies to eliminate violence.[1014]

The Istanbul Convention adopts a similar approach to the Convention of Belém do Pará. It recognises that both *dejure* and *de facto* equality of men and women is key to eliminating VAW and that this violence is a product of historical inequalities.[1015] Additionally, the treaty

[1008] Rosa M Celorio 'The Rights of Women in the Inter-American System of Human Rights: Current Opportunities and Challenges in Standard-Setting' (2011) *University of Miami Law Review* Vol. 65 at 842.
[1009] Article 14 of the Convention of Belem do Para.
[1010] See Ratification Table on https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210/signatures
[1011] See https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210
[1012] Nwadiobi et al op cit note 959 at 43.
[1013] Article 7 of Council of Europe, The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, November 2014 available at *https://www.coe.int/en/web/conventions/full-list/ /conventions/rms/090000168008482e*
[1014] Nwadiobi et al op cit note 959.
[1015] Preamble of the Council of Europe Convention on preventing and combating violence against women and domestic violence.

also recognises VAW as a human rights violation and a form of discrimination.[1016] This Convention adopts a 4Ps approach which includes 'prevention' of all forms of VAW, 'protection against all forms of VAW', 'prosecution of those accused of committing acts of VAW' and 'policies on VAW'.[1017] Article 3 (a) provides a broad definition of VAW and recognises that this violence occurs in public and private lives. In the preamble, the Istanbul Convention lists several acts that constitute forms of violence against women, including 'domestic violence, sexual harassment, rape, forced marriage, crimes committed in the name of so-called "honour" and genital mutilation, which constitute a serious violation of the human rights of women and girls and a major obstacle to the achievement of equality between women and men'.[1018] This list of forms of VAW dispels the view that acts of VAW are random or occur by chance, but rather, this violence is deeply rooted in social, political, cultural and economic structures that continue to perpetuate discrimination against women.

The Convention in Articles 60 and 61 calls on state parties to recognise gender-based violence as a form of persecution. It states that state parties have an obligation to "… take the necessary legislative or other measures to ensure that gender-based violence against women may be recognised as a form of persecution within the meaning of Article 1, A (2), of the 1951 Convention relating to the Status of Refugees and as a form of serious harm giving rise to complementary/subsidiary protection."[1019] This provision allows women to seek asylum based on suffering violence and urges states to standardise policies and legislation to recognise GBV as a form of persecution.[1020] This is an essential interpretation of violence against women because women can seek asylum in another country if their persecutor poses a danger to their life and livelihood.

The Istanbul Convention has a monitoring body known as the Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO). GREVIO's mandate is to compile and publish reports on legislative, policy, and other measures states are taking to give effect to the treaty's provisions.[1021] In specific cases where "…action is required to prevent a serious, massive or persistent pattern of any acts of violence…" GREVIO can institute a

[1016] Ibid.
[1017] Articles 1 (a-e) & 6 of the Council of Europe Convention on preventing and combating violence against women and domestic violence.
[1018] Preamble of the Council of Europe Convention on preventing and combating violence against women and domestic violence.
[1019] Article 60 (1) of the Istanbul Convention.
[1020] Nwadiobi et al op cit note 959.
[1021] About GREVIO – Group of Experts on Action against Violence against Women and Domestic Violence available at *https://www.coe.int/en/web/istanbul-convention/grevio*

special inquiry.[1022] However, there is no individual complaints procedure, and cases on VAW continue to be adjudicated by the European Court of Human Rights (hereafter ECtHR), the adjudicating body for all human rights cases.

To date, the Court has adjudicated 34 cases on violence against women.[1023] Of these cases, this section will only highlight two landmark cases that defined state responsibility for crimes of VAW and cases with a cultural element. In one of the more recent cases, *Buturugă v. Romania,* the ECtHR made a landmark ruling that recognised cyberbullying as a form of VAW.[1024] The facts of the case stated that Ms Buturugã had been a victim of abuse by her husband, whom she had reported to the authorities. After reporting this to the police, the husband continued to threaten the victim to withdraw the charges she had made against him. The prosecutor in Romania had dismissed Ms Buturugã's case owing to these acts not amounting to a serious criminal offence.[1025] The ECHR ruled this case as admissible because the domestic system had not viewed this case from a domestic violence angle but rather from the criminal angle.[1026] The ECtHR found that the authorities were responsible because they had failed to find the individual responsible for acts of domestic violence accountable.[1027] According to the Convention, the state's failure to investigate, prosecute, and punish the perpetrator is a failure to uphold its due diligence obligations. It is not only crucial for states to prevent acts of violence against women, but their obligation to the victim also includes ensuring that they receive justice.

In the *Opuz v. Turkey case,* the ECHR ruled that there was general discrimination and passivity by the Turkish authorities in their conduct, which led to the murder of a woman.[1028] Despite the victim reporting to the Turkish authorities multiple accounts of victimisation and violence, the Turkish authorities failed to take any decisive action to prevent further violence and harm by holding the perpetrator responsible.[1029] Instead, the police viewed the violence the woman and her mother faced as a 'private matter' since the husband perpetrated this violence.[1030] The facts of the case state that the police would only detain the applicant's

[1022] Ibid.
[1023] List of Relevant Judgements available at https://www.coe.int/en/web/istanbul-convention/echr-case-law
[1024] *Buturuga v. Romania*, ECHR 056 (2020).
[1025] Ibid.
[1026] Ibid.
[1027] Ibid.
[1028] *Opuz v. Turkey* application no. 33401/02 (2009).
[1029] Ibid.
[1030] Ibid.

husband and make him pay some fines on some occasions.[1031] These steps failed to ensure the applicant and her mother's safety, resulting in the husband murdering the applicants' mother. Despite several attempts to seek justice using the Turkish authorities, the applicant continued to suffer violence at the hands of her husband.[1032] After the murder of the applicant's mother, the perpetrator was arrested and later released after arguing that he had committed these violent crimes to protect his family's honour. [1033] According to Fares, family honour, also known as '*ird',* is a social construct that guides all acts and deeds of humankind that is sacred and closely related to insult.[1034] All actions, especially of women, are judged according to this standard and whether these acts tarnish the honour of men who are the family heads. This honour is usually associated with the virtue of a woman, chastity or prudence. [1035] This cultural acceptance of the importance of family honour and linking it to women's actions or inactions is dangerous because it justifies men to act violently against them with impunity. This lack of attention left women vulnerable to violence, and therefore Turkey failed in their obligation to prevent VAW and further failed to provide a remedy. The Court, in this case, was very critical of the culture of acceptance of VAW in Turkey.[1036] The Court further highlighted how this culture has seeped into the police and judiciary, which are meant to protect, investigate and punish crimes of VAW.[1037] According to the Court, judicial passivity further entrenches discrimination against women and ensuring that perpetrators enjoyed impunity.[1038] In this case, the Court set a precedent by interpreting state responsibility in domestic violence cases conducted by third party actors and that the failure to address these crimes constituted gender-based discrimination.[1039]

However, the ECtHR has been criticised for how it has reasoned in cases where domestic violence ends up affecting a third party, similar to the case of *Opuz v. Turkey*. In *Kurt v. Austria*, the facts of the case state that the applicant had faced domestic violence from her husband that had escalated over time until the husband murdered her son.[1040] The Court heard that the abuse had escalated over time and police reports also showed that the couple's children

[1031] Ibid.
[1032] Ibid.
[1033] Ibid.
[1034] B. Fares,' Ird', in *Supplement to the Encyclopaedia of Islam* (1938) Leiden pp. 96-97.
[1035] Ibid.
[1036] See decision of *Opuz v. Turkey* application no. 33401/02 (2009).
[1037] Ibid at Para 201.
[1038] Ibid at Para 200.
[1039] See generally concluding remarks in *Opuz v. Turkey* op cit note 1028.
[1040] *Kurt v. Austria* application no. 62903/15 (2019).

had also made statements to the police about the abuse they suffered from their father.[1041] In its decision, the Court opined that the Austrian authorities had upheld their obligation under Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Right to Life) to protect the boy, and thus there was no violation of the Convention on Human Rights.[1042] Firstly, in this case, the Court failed to view this case by considering the domestic violence nature of these crimes. Unlike in *Opuz v. Turkey,* although the authorities acted within a reasonable time frame, the actions undertaken were not sufficient as the child ended up being murdered at a place that had not been included in the protection order.[1043] The Osman test used in this case was an insufficient test to carry out in domestic violence cases due to the progression and nature of risk. The ECtHR developed this test in the case of *Osman v. The United Kingdom.*[1044] The test is used to determine the states' duty to prevent violations of the right to life by non-state actors.[1045] The court, in this case, uses five steps in determining state responsibility to prevent harm. These include "the existence of a risk for the right to life (1), if the risk is 'real' (2) and 'immediate' (3), if the risk must concern the life of one or more 'identified individual[s]', that is, a specific, definable individual or group (4) and it must be shown that the State had knowledge of the risk at hand or could, given the circumstances of the case, be expected to have such knowledge(5)." In similar cases in *Valiulené v. Lithuania* and *Talpis v. Italy* in 2013 and 2017, respectively, the Court had already established that this test of 'real and immediate risk' was insufficient in domestic violence cases. The judgements concerning VAW are concerning, and the Court needs to ensure the use of the Istanbul Convention to apply these standards to understand state responsibility.

It can be argued that the ECtHR has done some important work in defining VAW, state responsibility and due diligence obligations for state parties to the Convention through interpretations of its provisions to protect women from violence. From the analysis of the cases finalised by the Court, it has not made many recommendations on the relationship between violence and culture in Europe. This could be attributed to the aversion to making comments on religion and culture, both topics that can be perceived as controversial. Even though the

[1041] Ibid.
[1042] Ibid.
[1043] Ibid.
[1044] *Osman v. United Kingdom* (23452/94) [1998] ECHR 101 (28 October 1998).
[1045] Franz Christian Ebert Romina I Sijiniensky Preventing Violations of the Right to Life in the Eiropean and Inter-American Human Rights Systems: From the Osman Test to a Coherent Doctrine on Risk Prevention (2015) University of Oxford Press at 346.

Istanbul Convention is open for ratification by non-European member states[1046], no non-European states have ratified the treaty.

6.2. The Prohibition of VAW and the Protection of Women under the African Normative System

The African human rights system does not have a specific VAW treaty, unlike the two systems discussed above. This section seeks to analyse the prohibition of VAW and the protections available under the African human rights normative system. Understanding the landscape will enable an analysis of the existing avenues for justice and redress women who face violence caused by or aggravated by cultural practices. As the principal human rights instrument in Africa, the African Charter on Human and Peoples' Rights adopts an Afrocentric approach to human rights. This is because it translates fundamental African norms and values into human rights. For example, the African value of *ubuntu* (community) can be located in its emphasis on family and collective rights.[1047] The African Charter further reinforces respect for cultural practices that make up most communities' traditional and value systems on the continent.[1048] However, the African Charter has been criticised for focusing more on collective rights and duties whilst neglecting the individual rights of women and children.[1049] Elmadmad argues that the African Charter's communitarian focus has put women's rights in a legal coma by not emphasising individual rights.[1050] This instrument has also been criticised because it reinforces gender stereotypes that 'tolerate, confirm and support repressive structures' of traditional African societies to the detriment of women's rights.[1051] In response to the inadequacies of the African Charter, the first women-specific human rights instrument in Africa, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (hereafter

[1046] Article 76 of the Istanbul Convention.
[1047] Articles 17 (3), 18, 20, 27 & 29 of the African Charter on Human and People's Rights.
[1048] Articles 17 (3) and 29 (7) of African Charter.
[1049] See Danwood Mzikenge Chirwa 'Reclaiming (Wo) manity: The merits and demerits of the African protocol on women's rights' (2006) 53:1 *Netherlands International Law Review* at 69; Human Rights Council Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo (2015) Document A/HRC/29/27 available at *http://www.ohchr.org/EN/Issues/Women/SRWomen/Pages/AnnualReports.aspx* accessed on 3 October 2015.
[1050] Elmadmad Khadija quoted in Benedek W and Heinz W, eds. *Regional Systems of Human Rights in Africa, America and Europe: Proceedings of the Conference* (1992) Brussels, Friedrich Naumann Foundation at 17.
[1051] Makau wa Mutua 'The African Human Rights System in a Comparative Perspective: The need for urgent reformulation' (1992) 44 *Nairobi Law Monthly* at 27.

Maputo Protocol), was adopted in 1995.[1052] Even though there are criticisms of this Protocol, it has pioneered normative standards for protecting women's rights in a regional context.

A close analysis of the African Charter shows that it reinforces gender stereotypes. The inclusion of women's rights is reflected in Articles 2 and 18[1053] but is piecemeal because the African Charter adopted the UDHR's male-centric approach.[1054] Article 18(3) notes women's rights, along with children's rights, reinforces the family as the natural unit and basis of Africa societies, whilst expressing the duty to preserve this family unit.[1055] By enjoining women's rights and rights of the family, including their obligation to preserve the family, the African Charter perpetuates the view that women's lives only exist within the family and reinforces stereotypes around the role and place of women.[1056] On the one hand, this dualism presents two gaps: a normative and an interpretive gap because elements of traditional culture reinforce discrimination between sexes, which may include differing gender roles and responsibilities. On the other hand, principles of non-discrimination and equality stipulate that discrimination based on gender or sex cannot be used to deny women their rights. Thus, in as much as the African Charter brings together unique rights with traditional African values and norms, it falls short as a legal framework for protecting women from all forms of violence.

The Maputo Protocol is the principal regional women's rights instrument. However, the response to the adoption of this framework has been mixed.[1057] On the one hand, it has been regarded as a 'band-aid' measure to addressing the cause of women's rights on the continent.[1058] On the other hand, the framework has been praised for bringing an 'Afrocentric' approach to women's rights.[1059] Chirwa argues that the Maputo Protocol elaborates on African-specific issues that affect women such as, HIV and Aids, inheritance rights, and marriage-related rights.[1060] It can be argued that even though the Maputo Protocol is a robust framework, state parties took a minimalist approach by adopting a protocol to the African Charter rather

[1052] Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa Resolution AHG/Res.240 (XXXI).
[1053] The includes right to non-discrimination on the basis of sex and the state's obligation to ensure the elimination of every form of discrimination against women, respectively.
[1054] Nsibirwa Martin Semalulu 'A Brief Analysis of the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women' (2001) *African Human Rights Law Journal* Vol 1 No. 1 at 41
[1055] Article 18 (3) of the African Charter.
[1056] Heyns Christof 'The African Regional Human Rights System: The African Charter' (2004) *Pennsylvania State Law Review* Vol 108 at 687.
[1057] See generally Chirwa (2006), Heyns (2004) & Nsibirwa (2001).
[1058] Cook (1993) op cit note 963 at 258.
[1059] Chirwa (2006) op cit note 1049 at 64.
[1060] Chirwa 2006 op cit note 1049 at 64.

than adopting a self-standing treaty, i.e. not a specific treaty on women's rights with its own monitoring body.[1061]

The Maputo Protocol presents several opportunities for protecting women's rights on the continent, specifically, the right to be free from all forms of violence. Firstly, the Protocol offers a broader scope for women's rights compared to CEDAW. This includes provisions on abortion under limited circumstances, including medical reasons (a first in any international or regional human rights framework).[1062] There are also provisions requiring states to criminalise marital rape and ensure the minimum age for marriage.[1063] Secondly, the framework adopts a similar definition of VAW as DEVAW.[1064] It broadens this definition to include 'explicit reference to deprivation of fundamental freedoms in public and private life and defines harmful practices'.[1065] This is especially important considering the significance of culture and tradition on the continent. This addition is also crucial because it shows how tradition and culture can be a barrier to the realisation of a life free of violence for African women. Thirdly, the Maputo Protocol is also important because it includes provisions on sexual equality[1066] that some national constitutions in Africa do not have.[1067] This sets a normative standard for states' domestic legislation if they are party to the Charter and Protocol and can lead to domestic legislation to enable access to justice. National level provisions promote the empowerment of women with regards to the elimination of VAW by imposing both positive and negative obligations on states to eliminate VAW.

The Maputo Protocol clearly outlines legal and non-legal measures to prevent, respect, protect, and promote women's rights in Africa, including the rights to be free from violence, including during war.[1068] The recognition of the prevalence of violence against women exacerbated by conflict is also vital in the continents endeavour to eliminate this violence. Articles 10 and 11 of the Maputo Protocol outline women's right to peace and protection by the state. As a continent with a long history of conflict and civil unrest, these provisions are powerful and contextually relevant for African women.

[1061] Ibid.
[1062] Article 14 (2) (c) of the Maputo Protocol.
[1063] Ibid Article 6.
[1064] Ibid Article 1(*j*).
[1065] Ibid Article 1(j) and (g)
[1066] Ibid Articles 1 (f) and 2.
[1067] Cook (1993) op cit note 963 at 257.
[1068] Article 11 of the Maputo Protocol.

Another important provision on VAW is in the framework's preamble. The Protocol clarifies that 'positive African values are based on the principles of equality, freedom, justice, solidarity, and democracy'.[1069] According to the former SRVAW, this clarification is necessary because, in some contexts, different forms of VAW such as wife-beating or honour killing are considered to be part of the communal values and norms systems.[1070] By pre-emptively asserting women's right to be free from violent traditional, cultural, and societal values and norms, the Maputo Protocol provides a standard that reinforces states parties' positive and negative obligations to protect women from violence.[1071] Importantly for this thesis's arguments, the provision addresses women's right to participate in positive cultural life.[1072] However, this is limited to the extent that the practices that are part and parcel of this culture are not a form of violence or aggravate this violence.[1073]

Specifically essential to the discussion of this thesis is the Maputo Protocol's specific reference to harmful traditional practices in Article 5. Harmful practices are defined as "…all behaviours, attitudes and/or practices which negatively affect the fundamental rights of women and girls, such as their right to life, health, dignity, education and physical integrity."[1074] The recognition of the harmful impact that traditional practices in Africa may have on women is important. This is because it shows a contextual understanding of the African community's background and history. Secondly, it also offers an appreciation of the adverse impact of these practices on women's well-being and life.[1075] States are obligated to commit themselves to eliminate these harmful practices based on the inferiority and superiority of different sexes and the stereotyped roles of men and women.[1076] Chirwa argues that this obligation for states to eliminate harmful cultural practices presupposes that there are also cultural practices that are consistent with women's rights.[1077] It is important to reiterate that women's rights do not necessarily vilify traditional cultural practices. One must acknowledge that some practices are discriminatory against women, and these should be evaluated and eliminated. As established in Chapter 3 of this thesis, from Heise's theoretical test that was adopted to analyse the practice of lobola, this test established that this practice aggravates the harm suffered by women in

[1069] Para 10 of Maputo Protocol Preamble.
[1070] Manjoo op cit note 964
[1071] See generally Articles 2, 5, 6, 10 and 11 of the Maputo Protocol.
[1072] Article 17 of the Maputo Protocol.
[1073] Ibid.
[1074] Article 1 (g) of the Maputo Protocol.
[1075] Nwadiobi op cit note 959 at 40.
[1076] Chirwa (2006) op cit note 1049 at 74.
[1077] Chirwa (2006) op cit note 1049 at 74.

marriage. The Maputo Protocol thus provides an avenue for women to seek justice if the practice is globally recognised as a form of VAW. The Protocol explicitly identifies female genital mutilation as a harmful practice that should be eliminated in Article 5 (b). However, the definition of harmful traditional practices can be understood to cover other practices, including lobola. Therefore, the African Charter and Maputo Protocol offer protection standards for women to be free from discrimination and violence. The problem of implementing these provisions that exist on the continent will be highlighted in the following section.

6.3. Monitoring and Compliance under the African Charter and Maputo Protocol

The African Commission on Human and Peoples' Rights[1078] (hereafter African Commission) is an important monitoring mechanism for the African Union's human rights frameworks. Its mandate is to interpret the African Charter and other human rights treaties in the AU system and receive complaints and requests from state parties, groups, or individuals. It is argued that just like the CEDAW Committee, the African Commission's weakness stems from its establishment as a quasi-judicial body.[1079] The African Commission is considered a 'juridical misfit' as its treaty basis and institutional mechanisms are inadequate.[1080] The African Commission's work is limited by state sovereignty, and the Commission is at times too respectful of this sovereignty to the detriment of its work.[1081] The African Court on Human and Peoples' Rights (hereafter African Court) was founded to reinforce the work of the African Commission; however, Mbondenyi argues that it only serves as a duplication of the African Commission.[1082] There is a jurisdictional asymmetry between the African Court and African Commission, and the African Court has a broader jurisdictional mandate as stipulated in Article 3 (1) of the Protocol. It extends this to 'all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant human rights

[1078] African Commission for Human and Peoples' Rights inaugurated on 2 November 1987 in Addis Ababa, Ethiopia.
[1079] George William Mugwanya 'Realizing Universal Human Rights Norms through Regional Human Rights Mechanisms: Reinvigorating the African system' (2000) 35 *International & Comparative Law Review* at 43.
[1080] Morris Kiwinda Mbondenyi *International Human Rights and Their Enforcement in Africa* (2011) Law Africa Pub: Nairobi at 413.
[1081] Mbondenyi op cit note 1080.
[1082] Morris Kiwinda Mbondenyi 'Invigorating the African System on Human and Peoples' Rights through institutional mainstreaming and rationalization' (2009) *Netherlands Quarterly of Human Rights* Vol. 27/4, 451–483 at 470.

instrument ratified by the states concerned'.[1083] This goes beyond the jurisdictional scope of the African Commission, which is limited to those treaties under Article 60 of the African Charter.[1084] This asymmetry may confuse as to which jurisdictional authority may adjudicate certain matters. At the same time, the extensive scope of the African Court may deter states from ratifying human rights instruments. [1085] In cases of VAW, this asymmetry impacts the scope for women to seek justice because, in some of these cases, it is unclear which jurisdictional authority has the authority to receive the case. It can also be argued that this asymmetry impacts women's access to justice as both these authorities are not specifically for women's rights matters, but they deal with a wider mandate on all human rights violations or complaints. Therefore, issues concerning VAW may not be given the attention they require and adjudicated in a timely manner.

The monitoring and compliance with these treaties in the African regional system on human rights, specifically women's rights, is of concern. Unlike CEDAW, the Maputo Protocol does not have its own communications procedure; all complaints are adjudicated by the African Commission and the African Court. The absence of an independent monitoring body for the Maputo Protocol weakens the treaty's implementation ability.[1086] According to the SRVAW's report to the Human Rights Council (HRC), 'there is a perception by many women that the lack of or limited access to justice they encounter at the national level is the same at the regional level,' which acts as a barrier to accessing the Commission.[1087] Stifled by implementation gaps, political neglect, and lack of willingness by state parties, the African Commission and African Court are 'toothless bulldogs' when it comes to protecting, promoting and providing redress for human rights violations.[1088]

The African Commission's treaty basis and institutional mechanisms are inadequate for it to fulfil its mandate satisfactorily. The Commission works under the purview of the African

[1083] Article 3 (1) of the Protocol to the African Charter on Human And Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights.
[1084] Article 60 of the African Charter states, 'the provisions of various African instruments on human and peoples' rights, the Charter of the United Nations, the Charter of the Organisation of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples' rights as well as from the provisions of various instruments adopted within the Specialised Agencies of the United Nations of which the parties to the present Charter are members.
[1085] Mbondenyi (2009) op cit note 1082 at 470.
[1086] Ibid.
[1087] Ibid.
[1088] Nsongurua J Udombana 'Toward the African Court on Human and Peoples' Rights: Better Later than Never' (2000) *Yale Human Rights and Development Law Journal* Vol 3 pp. 45-111 at 64.

Union Heads of State and Government (AHSG).[1089] This structure weakens the body's ability to work because it cannot make binding decisions, only recommendations to the AHSG, impeding its ability to force states to comply with their treaty obligations. Even though there are reporting procedures, these are unclear and not implemented in practice. States are supposed to submit an initial periodic report two years after ratification and periodic reports every two years thereafter.[1090] However, as it stands, most countries have overdue reports. For example, Cape Verde has 14 overdue reports, Chad has 2, Kenya has 3, Lesotho has 1, South Africa has 3, Zimbabwe and Malawi have no outstanding reports.[1091] If states do not report on their progress, the issue of VAW cannot be monitored. This is a concerning weakness because human rights need to be monitored, and states are also held accountable when they do not meet their responsibilities under IHRL.

Another critical but missing body in the women's rights legal landscape in Africa is a specific and specialised monitoring body for the Maputo Protocol. Banda (2006) argues that it is not that there is a lack of women's rights frameworks that is the issue in the promotion and realisation of these rights by women in Africa, but that instead, it is the lack of implementation that creates the most significant barrier.[1092] To realise the benefits of established progressive women's rights frameworks, equally progressive institutions must be designed to enforce these standards and help states domesticate and interpret these standards.[1093] As argued by Mbondenyi[1094], the lack of a monitoring body weakens the strength of the Maputo Protocol because the African Commission is already laden with all human rights complaints. Therefore it has been challenging to develop jurisprudence specifically on women's rights. Rudman agrees, she also argues that the lack of a specialised institution in Africa means that women's rights issues are not brought to the agenda as they should be.[1095] This disconnect is evidenced by the fact that even though there has been near continental ratification of the Maputo Protocol

[1089] Article 45 of the African Charter.
[1090] Mbondenyi op cit note 1082 at 470.
[1091] See reporting statistics on the African Commission on Human and Peoples' Rights website available at *https://www.achpr.org/statepartiestotheafricancharter* accessed on 17th July 2020.
[1092] F Banda 'Blazing a trail: The African Protocol on Women's Rights comes into force' (2006) 50 *Journal of African Law* 74.
[1093] Annika Rudman 'Women's access to regional justice as a fundamental element of the rule of law: The effect of the absence of a women's rights committee on the enforcement of the African Women's Protocol' (2018) 18 *African Human Rights Law Journal* 319-345.
[1094] Mbondenyi (2009) op cit note 1082.
[1095] Rudman op cit note 1093 at 323.

(49 states have signed and 42 states have ratified the treaty to date),[1096] very few decisions or judgements have been finalised on women's rights cases using the Maputo Protocol.[1097]

According to the reporting status figures, only five states are up to date with their reports, whilst 24 states are late on reporting by one report or more and 31 states that have never submitted a report. [1098] It is no coincidence that the African Commission has only dealt with a few cases brought forward under the African Charter provisions. The Commission has adjudicated only two cases out of four relating to women's rights since its inception. These cases include *Egyptian Initiative for Personal Rights and Interights v. Egypt*, *Interights (on behalf of Pan African Movement and Citizens for Peace in Eritrea) v. Ethiopia/Interights (on behalf of Pan African Movement and Inter African Group) v. Eritrea, Association pour la Défense des Droits de l'Homme et des Libertés v. Djibouti* and *Echaria v. Kenya.*

The Commission addressed the *Egyptian Initiative for Personal Rights and Interights v. Egypt* case in 2011. This was the first dedicated case on VAW that the Commission dealt with, but the Commission could only use the African Charter in its decision as Egypt is not a party to the Protocol. The facts of the case state that four women had been assaulted both physically and sexually at protests in Egypt whilst either taking part in the demonstrations or passing through the area where demonstrations were taking place.[1099] Even after reporting these violations, the authorities refused to investigate and punish the perpetrators and also took part in violating the victims.[1100] The Commission found Egypt to be in violation of Articles 2 and 18(3) (among others) of the African Charter, citing discrimination based on sex and political opinion. In this case, the Commission also held that there was no other reason that the authorities could have failed to investigate and punish perpetrators of violence outside of gender-based discriminatory practices of the authorities themselves.[1101] This case also shows an acceptance of the culture of violence against women in Egypt because both the perpetrators and authorities saw this violence as usual and thus did not prosecute or condemn it. In Para 152 of the judgement, the Court raises that this case was reflective of the discriminatory culture in Egypt that exposed women to facing violence. The Court held that the perpetrators knew the

[1096] See African Union Treaty Ratification list available at http://www.africaunion.org/root/au/Documents/Treaties/List/Protocol%20on%20the%20Rights%20of%20Women.pdf
[1097] See generally case law adjudicated by the African Commission and the Court of Human Rights.
[1098] Map available at https://www.achpr.org/statepartiestotheafricancharter
[1099] *Egyptian Initiative for Personal Rights and Interights v. Egypt* (2011) (Communication no. 323/2006) [2011] ACHPR 85; (16 December 2011).
[1100] Ibid.
[1101] Egyptian Initiative for Personal Rights and Interights v. Egypt (2011).

consequences of their actions by undressing and sexually violating the journalists as a means to silence them because they knew that in their culture, "… a woman's virtue is measured by keeping herself physically and sexually unexposed except to her husband."[1102] This case also shows how cultural norms and practices aggravate women's exposure to violence and justify impunity for these crimes.

In the two cases relating to women's rights and not VAW specifically – *Interights (on behalf of Pan African Movement and Citizens for Peace in Eritrea) v. Ethiopia/Interights (on behalf of Pan African Movement and Inter African Group) v. Eritrea* and *Association pour la Défense des Droits de l'Homme et des Libertés v. Djibouti* – the Commission reserved the decision on merits of the communication and closed the cases based on the amicable settlement reached by the parties. In *Echaria v. Kenya*[1103], also a case on women's right to property after dissolution of marriage, the African Commission decided that the case was inadmissible, citing that the communication failed to comply with the provisions of Article 56 (6) of the African Charter.[1104] The African Commission opined that the period of 31 months between the exhaustion of local remedies and the submission of this communication was not 'reasonable'.[1105] Citing the case of *Mujuru v. Zimbabwe*, the Commission reasoned that six months is considered a 'reasonable' time gap.[1106] This opinion set a precedent that impacts the admissibility of future submissions because in most cases in Africa, court proceedings are prolonged, and most complainants do not have the resources to meet the six-month time limit for submitting their communications to the African Commission. This thus serves as a barrier to accessing justice.

The African Court in 2018 passed its first judgement on women's rights, which addressed issues of VAW and harmful traditional cultural practices. In the case of *Association Pour Le Progrés Et La Défense Des Droits Des Femmes Maliennes (APDF) and The Institute For Human Rights And Development In Africa (IHRDA) v. the Republic Of Mali*, the African Court established that the Law No. 2011-087 establishing the Persons and Family Code was inconsistent with several provisions of the African Charter, CEDAW and the Maputo

[1102] Para 152 of Egyptian Initiative for Personal Rights and Interights v. Egypt judgement.
[1103] *Echaria v. Kenya* (Communication no. 375/09) [2011] ACHPR 89; (5 November 2011).
[1104] Article 56 (6) of the African Charter states that, Communications, '…Are submitted within a reasonable period from the time local remedies are exhausted or from the date the Commission is seized of the matter,'
[1105] Refer to paras 58-60 of the judgement in *Echaria v. Kenya*.
[1106] Ibid.

Protocol.[1107] Specifically, on the subject of this thesis, the Court established that the state violated Article 5 (a) of CEDAW that imposes an obligation to eliminate harmful traditional and cultural practices.[1108] The court thus ordered Mali to, '…amend the impugned law, harmonise its laws with the international instruments, and take appropriate measures to bring an end to the violations established'.[1109] The court, in this case, looked beyond the African human rights treaties and looked at Mali's obligations to an international treaty (CEDAW) to make its decision. This is an important case that sets precedence on the adjudication of matters concerning VAW. In this case, the African Court sought to use the CEDAW treaty to understand Mali's obligations. There are two considerations to be made in this argument, firstly that if the African Union adopts a legally binding treaty on VAW, this means that the Court does not have to look at African states' international obligations to treaties they may not necessarily be party to or treaties that do not specifically address the subject of VAW. If there is an African region and legally binding treaty on VAW, the African Court's decisions can also be influenced to provide specific protections specified by a specific VAW treaty. Manjoo and Nekura argue that, even though the Maputo Protocol offers provisions for VAW, the weaknesses in the treaty's architecture weaken how women can use it to access justice.[1110] Therefore, not only is it important to adopt a specific treaty on VAW, but it is also critical to establish a specific monitoring mechanism that improves women's access to remedies.[1111] Secondly, as argued throughout this thesis, there is no specific and legally binding treaty on VAW. As shown by the CEDAW Committee's jurisprudence on cases concerning VAW, the Committee uses the lens of discrimination. This limits the scope for attaining justice for women who suffer violence that is not necessarily based on prejudice. Although the African Court and the African Commission both provide mechanisms for justice for women who suffer violence, the opportunity that a specific regional treaty on VAW brings is that VAW can be identified, understood and adjudicated accordingly using specific provisions that protect women from this violence.

From these cases and the discussion above, it can be concluded that, even though both the African Commission and African Court exist, they provide limited opportunities for

[1107] Refer to the judgement of the African Court on *APDF & ANOR. V. Mali* (046/2016) [2018] AFCHPR 15; (11 May 2018) available at *https://africanlii.org/node/2389* accessed on 17th July 2020. Specifically Articles 2 (2) and 6 (a) (b) of the Maputo Protocol.
[1108] Refer to the judgement of *APDF & ANOR v. Mali* op cit note 1107.
[1109] Refer to the judgement of *APDF & ANOR v. Mali* op cit note 1107.
[1110] Manjoo and Nekura op cit note 966 at 220.
[1111] Ibid.

recourse regarding the elimination of discrimination and VAW. This is because of the stringent communication requirements, the barriers in the African Charter itself on communications from both individuals and state parties, unclear and overlapping mandates between the two bodies and a general lack of clarity between political agendas and legal mandates of the human rights bodies in general which cripple the effectiveness of the human rights structures in establishing the effective promotion of these rights in Africa.[1112] Therefore there is still a long road towards the realisation of gender equality, women's empowerment and the elimination of violence in Africa. Although several other non-binding and binding frameworks related to the AU address women's rights in general, they are not discussed here due to the scope and limitations of this thesis.[1113] This thesis focuses on the frameworks that address VAW to locate the opportunities and challenges of the system protecting women's right to be free from all forms of violence.

6.3.1. The Special Rapporteur on the Rights of Women in Africa

This mandate was established in 1999 as a special mechanism overseen by the African Commission.[1114] The objective of the mandate of the Special Rapporteur on the Rights of Women in Africa (SRRWA) is to promote and protect the rights of women in Africa through providing guidance on alleged violations, analysing domestic laws and compliance against the African Charter and other regional and international treaty obligations, conducting monitoring and investigative state visits, and monitoring relevant human rights issues or conditions.[1115] The SRRWA also plays a critical role in providing expert guidance to the African Commission on communications relating to its mandate. This also includes requesting states to undertake specific measures to address human rights violations in the intercession reports.[1116] To date, the mandate has conducted six missions to Angola, Gambia, Sudan, Nigeria, Djibouti and Cotē d'Ivoire. The SRRWA compiles and submits mission reports to the African Commission that highlight particular areas of concern for women's rights in these countries and the proposed measures to address them.

[1112] Mbondenyi op cit note 1082.
[1113] For example, the Protocol on the Prevention and Suppression of Sexual Violence against Women and Children, because it focuses primarily on the Great Lakes Region.
[1114] African Union Resolution on the Designation of the Special Rapporteur on the Rights of Women in Africa ACHPR/res.38 (XXV) 99.
[1115] Ibid.
[1116] These reports are available at https://www.achpr.org/specialmechanisms/detail?id=6.

Some notable legal developments that can be attributed to the work of this mandate include the Resolution on Access to Health and Needed Medicines in Africa as well as the Resolution on Maternal Mortality in Africa, the Resolution on Involuntary Sterilisation and Protection of Human Rights in Access to HIV services and the Resolution on the Situation of Women and Children in Armed Conflict.[1117] These resolutions, amongst others, are vital because they provide an intentional gender focus on issues that are peculiar to women in Africa. Additionally, the SRRWA has also played a role in developing General Comments relating to women's health, child rights and child marriage as a harmful cultural practice.[1118]

In an interview in 2013, the SRRWA highlighted that there are many barriers for African women to realise their rights in full, which include high poverty rates amongst women, illiteracy, a lack of awareness of their rights, and prevalent socio-cultural and religious burdens that legitimise different forms of violence against them.[1119] In this interview, the SRRWA added that, without the effective implementation of the Maputo Protocol, it would be years before the effects of this framework are realised by ordinary women on the continent.[1120] However, the SRRWA has not made any comments and/or reports on the thematic issue of lobola, including the effects on VAW in Africa. Even though the CEDAW Committee has continued to raise this practice as a harmful traditional practice with negative consequences for women's well-being in marriage, the SRRWA has not undertaken the responsibility to conduct an inquiry into the practice of lobola after the recommendations by the CEDAW committee. There is a difference between what the CEDAW Committee is raising as critical issues of

[1117] African Commission Resolution on Access to Health and Needed Medicines in Africa ACHPR/Res 141 (XXXXIIII) 08 (2008); African Commission Resolution on Maternal Mortality in Africa ACHPR/Res 135 (XXXXIIII) 08 (2008); African Commission Resolution 260 on Involuntary Sterilisation and the Protection of Human Rights in Access to HIV Services adopted during the 54th Ordinary Session of the African Commission held from 22 October to 5 November 2013, Banjul, The Gambia ; African Commission Resolution 283 on the Situation of Women and Children in Armed Conflicts adopted during the 55th Ordinary Session of the African Commission on Human and Peoples' Rights held in Luanda, Angola, from 28 April to 12 May 2014.

[1118] These include General Comment of the African Commission on article 14 (1) (d) and (e) of the African Charter on Human and Peoples' Rights on the Rights of Women in Africa adopted by the African Commission at its 52nd Ordinary Session held from 9-22 October 2012 in Yamoussoukro, Cote d'Ivoire; General Comment No. 2 on Article 14.1 (a), (b), (c) and (f) and Article 14. 2 (a) and (c) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa adopted during the 55th Ordinary Session of the African Commission on Human and Peoples' Rights held 28 April- 12 May 2014.

[1119] Interview with the Special Rapporteur (2013) available at < https://www.fidh.org/en/international-advocacy/african-union/13645-women-s-rights-in-africa-interview-with-soyata-maiga-special-rapporteur-of>

[1120] Ibid.

concern and what the SRRWA focuses on. Some recommendations will be highlighted in Chapter 8 of this thesis.

6.3.2. Critical legal developments under the Maputo Protocol in Africa

The research questions of this thesis focus on the international and regional level normative frameworks and developments. However, it is useful to briefly highlight cases where sub-regional juridical authorities have used the Maputo Protocol provisions to determine state responsibilities and obligations to protect women from violence. The ECOWAS Community Court of Justice (hereafter ECCJ) has made seminal judgements by interpreting the Maputo Protocol provisions to adjudicate VAW cases. These decisions are important because they provide interpretations of the 'letter and spirit' of the Maputo Protocol, thereby developing precedent that facilitates the treaty's implementation.[1121]

Even though these cases do not directly relate to the thematic inquiry of lobola, they provide important pronouncements for women's rights using the Maputo Protocol. The ECCJ in 2017 used the Maputo Protocol provisions in its decision in *Dorothy Chioma Njemaze & 3 others v. The Federal Republic of Nigeria.*[1122] This case involved abduction, sexual violence, physical and verbal assault, and unlawful detention of women by police officers in Nigeria. The plaintiffs sought relief from the ECCJ, stating that Nigeria had perpetrated multiple violations of articles 2, 3, 4(1) (2), 5, 8 and 25 of the Maputo Protocol. In its response, the state party argued that these allegations were baseless and that the plaintiffs were commercial sex workers who were using activism as a ploy to legalise sex work in Nigeria. The court decided that Nigeria violated the articles above and failed in its due diligence obligations under the Protocol by refusing to protect, investigate and prosecute the responsible state agents.[1123] This judgement is also significant because the court, in this case, reasoned that the sting operation undertaken by the police was discriminatory as it targeted women, and this was also in violation of the state's obligations under CEDAW to adopt laws, administrative and policy measures to prevent discrimination based on gender.

In another seminal case involving VAW and discrimination in *Mary Sunday v. the Federal Republic of Nigeria*[1124], the ECCJ also made pronouncements based on the Maputo

[1121] Maame Efua Addadzi-Koom 'Of the Women's Rights Jurisprudence of the ECOWAS Court: The Role of the Maputo Protocol and Due Diligence Standard' (2020) Feminist Legal Studies Vol 28 p. 155-178.
[1122] Dorothy Chioma Njemanze & 3 Others v. The Federal Republic of Nigeria ECW/CCJ/JUD/08/17.
[1123] Ibid at 4.
[1124] *Mary Sunday v. Federal Republic of Nigeria. ECW/CCJ/JUD/11/18.*

Protocol. The court reasoned that Nigeria violated the plaintiff's right to an effective remedy under articles 8 and 25 of the Maputo Protocol when she had sought relief from the authorities with matters concerning the arrest of her spouse, who had physically abused her.[1125] In this case, the state party's response alluded to the private nature of the disagreement (between married people) and that the state could not be held responsible for private acts of individuals in their homes.[1126] The court rejected Sunday's claim that the state had discriminated against her based on gender because there was no evidence that this discrimination was systematic in nature.[1127] However, this judgement is important because the court reasoned that Nigeria was responsible for damages because the state had failed in its due diligence obligations under the Protocol to diligently respond to the violations suffered by Sunday even though these violations were not based on gender discrimination.[1128] This case sets an important precedent for due diligence obligations under the Maputo Protocol for states to respect, promote, protect, and fulfil women's rights to be free from violence and discrimination as provided for by the Protocol. This case is also important to the subject of inquiry of this thesis as the court, in its judgement, stated that, "The law also remains valid within private dwellings, it does not cancel itself out on approaching the doors to marital homes."[1129] This is important because the Court, in this case, expanded the due diligence obligations of states to protect women from violence, including violence in marriage. Therefore, this decision by the court provides an understanding of the state's responsibility to protect women from violence in both public and private life.

The ECCJ has played an important role in contributing to the interpretation and understanding of the letter and spirit of the Maputo Protocol's provisions to protect women from experiencing violence in both public and private life. These judgements elaborate on the opportunities that the Maputo protocol has to offer.[1130] The work of the ECCJ is also crucial because this sub-regional body is contributing to the interpretation of the due diligence principles under the Maputo Protocol, which will be useful in holding states accountable for violations under this treaty.[1131]

[1125] Ibid.
[1126] Ibid.
[1127] Ibid.
[1128] Efua Addadzi-Koom op cit note 1121 at 172.
[1129] *Mary Sunday v. Federal Republic of Nigeria* op cit note 1124.
[1130] Ibid at 175.
[1131] Ibid at 176.

6.3. An African Treaty on VAW

In a press release, the African Union in 2020 noted that it will take the continent fifty years to reverse the impact and effects of gender-based violence due to the slow pace of progress on the continent.[1132] The AU also noted the continued rise of issues of VAW due to the lockdown measures imposed by governments to combat the spread of the novel coronavirus in 2019.[1133] This press release also highlighted that more than fifty million girls were at risk of experiencing violence through Female Genital Mutilation (FGM), and even more women were at risk of experiencing violence in their lifetime. During a speech on International Women's day, the chairperson of the African Commission, Moussa Faki Mahamat, also noted the continued deplorable condition of women in Africa, including their susceptibility to experiencing violence. In this speech, Mahamat hailed the efforts by former chair of the African Union, South African President, Cyril Ramaphosa, to develop a self-standing and legally binding treaty on violence against women in Africa.[1134] These efforts have led to the start of negotiations at the AU level for an African Union Convention on Ending Violence Against Women and Girls. According to the AU, this Convention will complement existing legally binding and non-binding mechanisms on women's rights in Africa.

In response to the call by the former AU chair, Manjoo & Nekura argue that a separate legally binding treaty on VAW is necessary. They posit that even though the Maputo Protocol carries some provisions on VAW, its lack of an exclusive focus on VAW and an inbuilt treaty mechanism to monitor violations of women's rights in general weaken the protection, it can offer to women who have faced violence.[1135] A separate treaty can '…broaden and strengthen the ideological' understanding of the prevention and responses to VAW in Africa.[1136] Adopting this treaty at the African level will also influence the normative landscape for the protection, prevention and promotion of women's right to be free from all forms and manifestations of violence they experience in different economic, cultural and religious contexts.[1137] Additionally, adopting a new treaty on VAW will show African states' commitment to ending

[1132] African Union 'It will take 50 years to reverse risks of gender-based violence unless progress is accelerated' Press Release available at < https://au.int/en/pressreleases/20201211/it-will-take-50-years-reverse-risks-gender-based-violence-unless-progress> 11 December 2020.
[1133] Ibid.
[1134] African Union 'Violence Against Women and Girls: Financial and Economic Inclusion of Women Among Key Outcomes of AU Ministerial Meeting' available at < https://au.int/en/pressreleases/20201201/violence-against-women-and-girls-financial-and-economic-inclusion-women-among> 1 December, 2020.
[1135] Manjoo & Nekura op cit note 966 at 199.
[1136] Ibid.
[1137] Ibid.

VAW that is a pandemic in their countries. In his handover speech to the African Union, President Ramaphosa also added that there is also an opportunity to develop a context-specific treaty that addresses all forms of VAW in Africa, including violence manifesting as cultural and religious practices in Africa.[1138]

Conclusion

This chapter sought to examine the regional normative systems and the prohibition of VAW. At this level, normative standards have been adopted through specific VAW treaties or women's rights treaties and the interpretation of existing treaties by different courts. This appraisal showed that even though there have been marked normative developments at the regional level on VAW. Cases such as *Maria Da Penha Maia Fernandes v. Brazil, Kell v. Canada, Ana, Beatriz, and Celia González Pérez v. Mexico (Cotton Fields)* and *Association Pour Le Progrés Et La Défense Des Droits Des Femmes Maliennes (APDF) and The Institute For Human Rights And Development In Africa (IHRDA) v. the Republic Of Mali* have all created seminal precedent for the protection of women's rights at the regional level. These cases have set a precedent regarding opinions on women's rights violations and establishing state responsibility to protect the rights of women in the different regions and influence other jurisdictional authorities in making decisions in their jurisdictions.

The normative frameworks at the regional level are more specific to VAW, such as the Inter-American Convention on VAW and the Council of Europe's Convention on Preventing and Combating VAW and thus provide the jurisdictional authorities with interpretations and normative specificities needed to address VAW holistically. Also highlighted in the above discussion were some cases relating to cultural beliefs and practices. At the regional level, specific treaties on VAW can help tackle the gender-based violence aggravated by factors particular to that region, such as cultural nuances. The cases of *Maria da Penha*, *Cotton Fields* and *Interights* cases all show cultural nuances that aggravate violence against women, for example, issues of the *machista* culture in the Americas and family honour in the Muslim cultures.

In Africa, the Maputo Protocol is the principal framework for protecting women's rights, including provisions on VAW. However, the treaty fails to provide the specificity needed to protect women from multiple and intersecting forms of violence that they may

[1138] AU Ministerial Meeting op cit note 1134.

experience in their lifetime. Additionally, the structural weaknesses in the Maputo Protocol as identified in section 6.3 also create barriers for women seeking remedies. There is an effort to develop a Convention on eliminating VAW at the African Union level, which is a positive step to address VAW regionally. This is also important as this Convention will provide states and other stakeholders in Africa with a contextually specific normative framework that clearly outlines state responsibility and due diligence obligations to eliminate all forms and manifestations of VAW.

The mandate of the SRRWA, which plays the role of monitoring and 'caretaker' under the Maputo Protocol, has also made significant contributions in interpreting the provisions of the treaty to protect women's rights in healthcare, sexual and reproductive health, conflict and other critical areas of concern for women. The work of the SRRWA has led to significant legal developments and General Comments which interpret the spirit of the treaty. However, despite the comments from the CEDAW Committee for member states to take steps to eliminate the practice of lobola, the SRRWA has not addressed this issue. Thus it only remains a concern at the international level and not at the regional level.

Additionally, there are some notable legal developments at the subregional level, particularly with the ECCJ, where the Court has interpreted West African member states' due diligence obligations under the Maputo Protocol to hold them accountable for violating women's rights be free from all forms of violence. The cases of *Njemaze & 3 others v. Nigeria and Mary Sunday v Nigeria* have provided critical interpretation of state due diligence obligations to protect women from violence under the Maputo Protocol. These developments are seminal to our understanding of state responsibility for both public and private acts of VAW. However, due to the limitations of these sub-regional bodies jurisdictions and the lack of effective and/or similar juridical bodies in other sub-regions in Africa, it means that these developments, though they are commendable, are limited. Therefore a separate African regional treaty on VAW with its own monitoring mechanism could provide women with better access to justice in Africa. This treaty can address VAW in all its manifestations, including those with underlying nuances of cultural or religious beliefs and practices that continue to oppress women in Africa.

CHAPTER 7

The Country Case Analysis

Introduction

This chapter explores the domestic legislative landscapes of Zimbabwe, Zambia, Uganda and Kenya and the extent to which women's rights to be free from violence and discrimination under customary and civil law is protected. Secondly, this country case analysis will examine the states' current obligations under international and regional human rights instruments that protect and promote women's rights to be free from harmful traditional practices, violence and discrimination that emanates from culture. These individual states' legislative and policy measures relating to marriage will also be discussed to appraise the extent to which they have fulfilled their international obligations, including the opportunities that exist to promote the elimination and/or regulation of the practice of lobola. Finally, this chapter will analyse the CEDAW Committee's Concluding Observations to these state parties and the steps the Committee has taken to encourage states to eliminate the practice of lobola, and any further monitoring or recommendations developed. Due to the scope and limitations of this thesis, an inquiry into the sub-regional commitments of each state will not be carried out. The focus of this chapter is to provide an in-depth analysis of the four states' commitments under CEDAW and the Maputo Protocol, and this provides a basis to understand the questions posed by this thesis.

To recap, as established in Chapters 2 and 3 of this thesis, the right to culture is central to most human rights treaties. There are various provisions of the right to a culture entrenched in both legally and non-legally binding provisions within the system of the United Nations' human rights and other regional human rights treaties. Even though individuals and communities have a right to culture, there is also a responsibility on the international community and individual states to eliminate all forms of discrimination against women, including harmful traditional and cultural practices. The right to culture thus imposes both positive and negative obligations on the state to ensure that individuals can enjoy their culture and enjoy the right to be free from discriminatory and/or practices, including those that aggravate violence. It is thus the states obligation to ensure that these rights are realised.

Article 27 of the UDHR and Article 15 (1) (a) of the ICESR recognises the right to practice and observe one's culture. Further, the Committee on Economic, Social and Cultural Rights in general comment No. 21 clarifies the scope and content of this right to culture. The African Charter in Article 17 (2) recognises the individual's right to participate in the cultural life of their community. Several human rights instruments recognise that the right to observe

and participate in cultural life is central to the individual's realisation of a full life. However, it is also without much contention that cultural spaces are a contested territory. This is because it is in these spheres where women's rights conflict with certain practices and beliefs.[1139] Article 17 of the Maputo Protocol provisions women's right to live in a 'positive cultural context'.[1140] However, there is no contextualisation of what a positive cultural context entails, reflecting a misunderstanding that culture is not formally created in the public sphere but that norms and values are established at the communal level and in private spheres.[1141] Therefore, this apparent lack of understanding of culture, its roots and how it thrives weakens the African Charter's human rights bodies' ability to ensure women are protected from the negative implications that cultural norms and values may have on women.

The mandate of the UN SRVAW has continuously reiterated the pervasiveness of VAW that is aggravated by cultural practices.[1142] As argued in Chapter 5 of this thesis, the mandate of the SRVAW has continued to raise awareness around violence against women occurring based on religious or cultural beliefs and practices. All the mandate holders have engaged with this subject and continued to call states to eliminate different forms of VAW occurring in the name of culture or religion within their jurisdictions. In her report on 'Cultural practices in the family that are violent against women', the first SRVAW argues that all cultures have practices that are forms of violence against women.[1143] Additionally, in her report to the Economic and Social Council, the SRVAW noted that in Africa, the 'preponderance of legislative issues' was the preferred response to issues of VAW.[1144] She said that even though some states had initiated laws to criminalise practices such as FGM, other practices such as widow inheritance, bride

[1139] The report of the Special Rapporteur in the field of cultural rights, Farida Shaheed, in accordance with Human Rights Council resolution 19/6 (2012) A/67/287.
[1140] Article 17 of the Maputo Protocol establishes that, "Women shall have the right to live in a positive cultural context and to participate at all levels in the determination of cultural policies".
[1141] Danwood Mzikenge Chirwa 'Reclaiming (Wo) manity: The merits and demerits of the African protocol on women's rights' (2006) 53:1 *Netherlands International Law Review* at 69 at 85.
[1142] See generally SRVAW Rashida Manjoo Report A/HRC/26/38 at Para 55; Report of the Special Rapporteur on Violence Against Women, its causes and consequences, Ms. Radhika Coomaraswamy submitted in accordance with Commission on Human Rights Resolution 2001/49 on Cultural practices in the family that are violent towards women.
[1143] SRVAW Radhika Coomaraswamy Report E/CN.4/2002/83 at 3. In this report, Coomaraswamy noted that most cultural practices were based on the belief that women's sexuality and freedom must be regulated. She added that to act on their obligations to protect women from violence, states should not invoke any tradition, custom or religious consideration to avoid this obligation to eradicate all forms of violence against women and children.
[1144] Para 52 of the Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights resolution 2002/52, International, regional and national developments in the area of violence against women 1994-2003 E/CN.4/2003/75/Add.1

price (lobola) or widowhood rituals, which increased VAW or women's vulnerabilities to this violence, remained unregulated.[1145] In this same report, the SRVAW notes the practice of bride price as an issue in Cameroon[1146], Chad[1147], Congo[1148], Sudan (linked to the early marriage of young women and girls)[1149], and in Vanuatu and the Pacific Islands.[1150] In later reports, the former SRVAW continues to identify harmful traditional practices and the adverse impact that they have on women. The SRVAW highlights that, harmful practices are a barrier to realising public health goals, particularly Sustainable Development Goal (SDG) number 5.[1151] In a report to the General Assembly in 2016, the current SRVAW also recalls the 2030 Sustainable Goals and particularly highlights ending VAW as part of Goal 5.[1152] Goal 5.3 aims for the elimination of all harmful practices.[1153]

Although other UN mandates have made comments on lobola and its impact on women's rights, the topic of lobola itself has not been widely dealt with or discussed. The attention that this practice has received from the SRVAW shows that it is a traditional practice that deserves further inquiry. As discussed above, the SRVAW has identified bride price as a widespread practice. This is important because it raises the international community's awareness of this practice as a cause and consequence of VAW.[1154] The SRVAW argues that this practice increases the vulnerabilities of women and girls to violence.[1155] In Chapters 2 and 3 of this thesis, it was highlighted that in some cultures, the bride price has to be returned upon the dissolution of marriage and that it also increases the likelihood of early marriage of girls because families want to collect this bride price. These consequences of the practice increase women's vulnerability to suffering violence.

The CEDAW Committee has also taken an active role in defining the relationship between culture and some harmful practices. According to Raday, the CEDAW Committee's

[1145] Para 52 of E/CN.4/2003/75/Add.1
[1146] Ibid at Para 125.
[1147] Ibid at Para 148.
[1148] Ibid at Para 162.
[1149] Ibid at Para 57.
[1150] Ibid at Para 1252.
[1151] Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo submitted in accordance with Assembly Resolution 67/144, Violence Against Women, its Causes and Consequences 1 September 2014, A/69/368 at Para 39.
[1152] Report of the Special Rapporteur on violence against women, its causes and consequences, Dubravka Simonovic submitted in accordance with Assembly Resolution 69/147, Modalities for the establishment of femicide /gender-related killings watch, 23 September 2016, A/71/398 at Para 41.
[1153] Ibid.
[1154] E/CN.4/2003/75/Add.1 op cit note **Error! Bookmark not defined.**.
[1155] Ibid.

view is that the Convention must not be viewed as being in contention with culture itself, but rather, the convention conflicts with those practices that are in contention with its tenets.[1156] She notes that many practices defended in the name of culture are usually gender-specific and only serve to preserve patriarchy at the expense of women's rights.[1157] Some of these harmful traditional cultural practices are pervasive in specific geographical locations, and it is in the purview of the CEDAW Committee, SRVAW, SRCR, and other human rights bodies to identify these practices, raise awareness and advocate for the elimination of these practices. The Special Rapporteur on the Rights of Women in Africa has not engaged extensively with harmful traditional practices and specifically with the subject of lobola as the thematic enquiry of this thesis. As discussed in Chapters 2 and 3 above, harmful traditional cultural practices are both causes and consequences of VAW. States should take steps to appraise these practices in their jurisdictions, respect, protect, promote, and fulfil their legal obligations under international and regional human rights law. Although the SRVAW and the CEDAW Committee have discussed the practice of lobola and its adverse effects, it has not remained on the agenda. Thus, it has remained a peripheral issue.

7.1. Country Case Analyses

The following sub-sections focus on the case studies of the countries that have received comments in the CEDAW Committee's Concluding Observations to eliminate lobola's practice. The country analysis includes an appraisal of the marital regimes as established by the laws in each country (both civil and customary laws), the implications of these laws on the status of women in matters of lobola and marriage. It should be noted that the majority of customary law is "living", and it adds to the precarity tied to marriage for women. Customary law is mostly unwritten, and it is flexible as it evolves.[1158] The concept of living customary law denotes how this law is generated by the communities that live by that law.[1159] This means that due to the gender-biased nature of communities, women are vulnerable to experiencing discrimination and violence that is justified by this law.

[1156] Israel Frances Raday 'Culture, Religion, and CEDAW's Article 5 (A)' *Canadian Women's Studies* Vol. 33(1-2) pp. 60-69.
[1157] Frances Raday op cit note **Error! Bookmark not defined.** at 70.
[1158] E Moore C Himonga Living customary law and families in South Africa (2018) available at http://www.ci.uct.ac.za/sites/default/files/image_tool/images/367/Child_Gauge/South_African_Child_Gauge_2018/Chapters/living%20customary%20law%20and%20families%20in%20South%20Africa.pdf
[1159] Ibid at 62.

The following sections will deal with each country analysis beginning with its ratification status for CEDAW and the Maputo Protocol. Firstly, an analysis of the CEDAW Committee's Concluding Observations to each country relating to lobola will be carried out to understand the Committee's reasoning with its comments and views on lobola. The states reporting status under each treaty and whether lobola has been addressed is discussed. These analyses will also include a legal landscape analysis of the Constitution and legislative acts concerning women's right to be free from discrimination including any relevant case law. A critique of these laws will be highlighted for each country case, particularly reflecting on the lack of legal, policy, jurisprudence that regulates the practice of lobola at a national level. This establishes the gaps in protecting women from this practice's negative consequences, which includes VAW.

Providing a holistic analysis of each country's landscape is critical because it shows the status of the practice in each country and how each state is tackling this practice. This will also allow this thesis to offer recommendations in the concluding chapter, considering the current landscape. Table 2 below shows an analysis of the state party reporting under the Maputo Protocol and the African Commission's Concluding Remarks using positive keywords such as lobola/bride price/dowry.

Table 2: Search keywords: lobola, bride price, brideprice, dowry

Country	Maputo Protocol State report		Maputo Protocol Concluding remarks	
	Report	Positive Keywords	Report	Positive Keywords
Kenya	1992-2006	N/A	1992-2006	N/A
	2008-2014	N/A		
	2014-2020	N/A		
Zambia	1986-2004	N/A	1986-2004	N/A
		N/A		
Uganda	1986-2000	N/A	1986-2000	N/A
	2006-2008	N/A	2006-2008	N/A
	2008-2010	N/A	2008-2010	N/A
	2010-2012	N/A	2010-2012	N/A
Zimbabwe	1986-1991	N/A		
	1992-1996	N/A		
	1996-2006	N/A		
	2007-2019	N/A		

7.1.1. Zimbabwe

Zimbabwe is a party to CEDAW without any reservations, with its accession dated 13th May 1991 without any reservations.[1160] However, the state party has not signed or ratified the Optional Protocol to CEDAW, which would enable the submission of communications to the CEDAW Committee. There remains a barrier for women of Zimbabwe to access justice for violations of their rights via the CEDAW Committee. This means that the only monitoring the CEDAW Committee can undertake is through the periodic reports submitted under the CEDAW as per the state reporting obligations under Articles 18 (1) (b) and 18 (2). To date, Zimbabwe has submitted three periodic reports in 1996, 2009 and 2018.[1161] The state party has received two Concluding Observations from the CEDAW Committee, one on the combined second, third, fourth and fifth periodic reports in 2012 and 2020. The progress and implementation of CEDAW's provisions on gender equality and eliminating gender-based discrimination in Zimbabwe have been plodding.[1162] According to the Constitution of Zimbabwe under Section 327 (2) (b), an Act of Parliament is required to domesticate international legal standards that Zimbabwe has ratified.[1163] Therefore, there is no express guarantee for protection for women in Zimbabwe as far as CEDAW is concerned unless the treaty's provisions are domesticated through an Act of Parliament. It can be argued that the CEDAW treaty has not had a profound influence on the law and jurisprudence on women's rights in Zimbabwe. The Courts have failed to invoke CEDAW standards in cases of gender-based discrimination or violence against women.[1164]

As discussed above, the current customary law position of the requirement of bride price is inconsistent with CEDAW's provisions on equality and discrimination, specifically Articles 1, 2 and 16. Under the current legislative landscape, the laws relating to marriage are archaic as they are pre-independence laws. These are Rhodesian laws that did not necessarily provide for racial equality and the majority status of indigenous people of Zimbabwe but were

[1160] Zimbabwe ratifications status on OHCHR website available at https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=195&Lang=EN
[1161] See state report submissions available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=3&DocTypeID=29
[1162] C Damiso J Stewart 'Zimbabwe and CEDAW Compliance: Pursuing Women's Equality in Fits and Starts' in A Hellum H S Aasen (eds) *Women's Human Rights: CEDAW in International, Regional and National Law* (2013) Cambridge University Press, Cambridge at 454.
[1163] Section 327 (2) (b) of the Constitution of Zimbabwe Amendment (No.20) Act, 2013.
[1164] Damiso & Stewart op cit note **Error! Bookmark not defined.** at 469.

shaped by the colonialists' experiences.[1165] For the laws of a modern state to still have their roots in the colonial era warrants a need for their appraisal to develop new legislative standards that adhere to international standards protecting human rights. As discussed in Chapter 2, the colonial authorities in different jurisdictions created laws that impacted the way marriage and specifically how lobola was conducted. Examples of such laws include the Native Marriage Ordinances in 1901 and 1917 (hereafter NMO)[1166] and the Native Adultery Punishment Ordinance in 1916.[1167]The 1901 NMO set the cost of lobola by setting the highest rate of the bride price at four head of cattle or 20 pounds and imposed a time limit on the payment of lobola to one year.[1168] This codification of lobola can be argued to impact how the practice is carried out to date.

Zimbabwe's initial report to the CEDAW Committee was in 1996.[1169] The state highlighted the issue of lobola with regards to marriage practices in Zimbabwe.[1170] It was communicated to the CEDAW Committee that lobola was no longer a requirement for entering a marriage. However, the state also noted that practically, women still preferred that lobola be paid for them due to fear of familial and communal isolation.[1171] Due to the value placed on the practice of lobola, not adhering to this practice is also a threat to the wellbeing and participation in their family life and communal life. The state party also reported that women still had no locus standi in intestate inheritance matters at the time, and thus the law was still discriminatory towards this gender.

Additionally, on domestic violence and gender-based violence in general, the state highlighted that both the police and the courts did not take these violations seriously as they viewed this as a 'private issue' that can be resolved by family members and not a criminal act.[1172] The CEDAW Committee's Concluding Observations to the state party noted with concern the negative impact that customary law has on women in Zimbabwe.[1173] The Committee highlighted that, even though the law proffers equal status on both men and women,

[1165] A N Allot 'What is to be done with African Customary Law? The experience of problems and reforms in Anglophone Africa from 1950' (1984) *Journal of African Law* Vol 28 No 1 pp.56-71 at 56.
[1166] Native Marriage Ordinance of 1917 N3/17/4/2.
[1167] Native Adultery Punishment Ordinance of Southern Rhodesia of 1916 N3/17/2.
[1168] Diana Jeater Marriage, Pervasion and Power: The Construction of Moral Discourse in Southern Rhodesia, 1894-1930 (1983) Clarendon Press at 10 at 83.
[1169] Initial report of state party Zimbabwe CEDAW/C/ZWE/1.
[1170] Ibid at p.60.
[1171] Initial report to CEDAW Committee op cit note **Error! Bookmark not defined.** at 60.
[1172] Ibid.
[1173] Report of the Committee on the Elimination of Discrimination Against Women to the General Assembly A/53/38/Rev.1. at Para 139.

customary laws still perpetuated discrimination and specifically in the domestic sphere.[1174] In these Concluding Observations, the Committee also raises that the practice of lobola is discriminatory and that it is concerned that this practice, amongst others, perpetuates the disadvantaged position of women in Zimbabwe.[1175] From the first report, the Committee had already expressed concern over the practice of lobola in Zimbabwe.

In 2009, Zimbabwe submitted combined second, third, fourth and fifth periodic reports to the CEDAW Committee.[1176] In this report, the state party referred to the steps taken to protect women in marriage, which included proposed amendments for marriage laws, namely the Marriages Act [Chapter 5:11], Customary Act [Chapter 5:07] and Matrimonial Causes Act [Chapter5:13].[1177] These Acts have been discussed extensively at the beginning of this section. Generally, the state argues that these laws are intended to legalise three types of marriages in Zimbabwe.[1178] However, in response to the Committee's concerns about lobola, the state highlighted that there had been no steps taken to criminalise or legislate against the practice.[1179] The report notes that lobbying still had to be conducted to identify the 'adverse and discriminatory effects' of the practice on women.[1180] A shadow report from Zimbabwe Civil Society was submitted to the CEDAW Committee in 2012.[1181] In this shadow report, the Zimbabwean Women Lawyers Association (ZWLA) highlighted that there was still a long way for women in Zimbabwe to be protected within the private and familial sphere as stipulated by Article 16 of CEDAW.[1182] The combined civil society report highlighted that women in Zimbabwe were experiencing some of the worst forms of discrimination in marriages because wives are considered subordinates in marriage.[1183] Lobola and polygamy are two of the customary practices that are argued to be the root cause of inequality in divorce and custody of children.[1184] Commenting on the implementation of General Recommendation No. 19 in the country concerning pursuing Article 16 of CEDAW, the civil society representatives argued

[1174] Ibid at Para 140.
[1175] Ibid at Para 141.
[1176] Combined second to fifth periodic report of States parties, Zimbabwe CEDAW/C/ZWE/2-5.
[1177] Ibid at Para 27.
[1178] Ibid at Para 27.
[1179] Ibid at Para 28.
[1180] Ibid.
[1181] Zimbabwe Civil Society's Shadow Report to the CEDAW Committee (2012) produced by Zimbabwean Women Lawyers Association.
[1182] Zimbabwe Civil Society Shadow Report to CEDAW op cit note **Error! Bookmark not defined.** at 30-32.
[1183] Ibid.
[1184] Ibid.

that there is a failure by the state to address the cultural beliefs and norms which cause gender-based violence.[1185]

In their Concluding Observations in 2012, the CEDAW Committee considered the combined second, third, fourth and fifth periodic reports of Zimbabwe. [1186] In this report, the Committee brings attention to the fact that the response to the state party periodic reports was delayed and notes that this is regrettable. Under the principal areas of concern, the Committee expresses, 'serious concern about the persistence of harmful norms, practices and traditions, patriarchal attitudes and deep-rooted stereotypes, regarding the roles, responsibilities, and identities of women and men in all spheres of life….'[1187] Once more, the Committee lists bride price (lobola) as one of these practices that the state party has failed to eliminate. The Committee relates this practice as being influenced by the persistent unequal status of women, and this is linked to the pervasiveness of VAW. The Concluding Observations note again that Zimbabwe's preservation of both customary and civil marriages fuels practices that discriminate against women in the area of marriage and family relations.[1188] These practices include lobola and polygamy.

In the latest periodic report to CEDAW in 2018, the state party makes no mention of lobola or how the state has addressed the Committee's previous comments in the 2012 Concluding Observations.[1189] Additionally, there is no mention of the elimination of the practice of lobola in the Committee's latest Concluding Observations to the state party in March 2020.[1190] It seems that this subject has fallen off the agenda for both the state party and the CEDAW Committee. Additionally, the issue of lobola in Zimbabwe has been raised by the Human Rights Council (HRC) in its Universal Periodic Reviews. In 2011 and 2016, the HRC echoed the CEDAW Committee's concluding remarks to the state party that urged the elimination of the practice of lobola as one of the steps to eliminate gender discrimination and inequality. The HRC noted with concern the subordinate status of women in Zimbabwe that is aggravated by harmful traditional practices such as FGM, early marriage, the statutory difference in minimum marriage age for boys and girls and discriminatory practices such as

[1185] Ibid at 33.
[1186] CEDAW/C/ZWE/CO/2-5.
[1187] Para 21 of CEDAW/C/ZWE/CO/2-5.
[1188] Para 37 of CEDAW/C/ZWE/CO/2-5.
[1189] Sixth Periodic report submitted by Zimbabwe CEDAW/C/ZWE/6.
[1190] CEDAW Concluding observations on the sixth periodic report of Zimbabwe March 2020 CEDAW/C/ZWE/CO/6.

lobola.[1191] The inclusion of lobola amongst the critical concerns for women's rights in Zimbabwe by the HRC shows that the CEDAW Committee's observations and recommendations around lobola as a discriminatory practice and form of VAW have become a core concern at the UN level. However, even though this practice was a significant issue of concern for the CEDAW Committee since the initial report and the subsequent periodic reports, the Committee has thus far not been consistent in raising this issue with the state party.

At the regional level, Zimbabwe is a party to the Maputo Protocol signed on 15th April 2008 with no reservations.[1192] The state party has not ratified the Optional Protocol to CEDAW. It has submitted four reports to the African Commission. As shown in the table above, an analysis of these submissions and concluding reports shows that the state party has not addressed the issue of Lobola in its reporting to the African Commission, and neither has the Commission also discussed the issue of lobola and/or its elimination in its Concluding Remarks.

In Zimbabwe, the domestic legal landscape for women's rights is still a work in progress. Even though certain legislation specific to women's rights exists, there is still a long way for women to access their rights in reality. As the supreme law in Zimbabwe, the Constitution Amendment (No.20) Act, 2013 cements women's right to equality and non-discrimination.[1193] Additionally, Chapter 26 on Marriage provides for the right to consent to marriage and the equality of rights and obligations within marriage.[1194]

Since its independence, Zimbabwe has taken steps to improve the status of women, including the Legal Age of Majority Act of 1982 (LAMA)[1195], 1965 Marriages Act (Chapter 5:11)[1196], 1951 Customary Marriages Act (Chapter 5:07)[1197], and 1986 Matrimonial Causes Act (Chapter 5:13)[1198], to name a few. These Acts promote the status of women as equal

[1191] Human Rights Council Universal Periodic Review: Compilation prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15 (b) of the annex to Human Rights Council Resolution 5/1 A/HRC/WG.6/12/ZWE/2.
[1192] Zimbabwe Maputo Protocol Ratification details available at <https://www.maputoprotocol.up.ac.za/index.php/zimbabwe>
[1193] Chapter 1 Section 3 (g) of the Constitution of Zimbabwe Amendment (No.20) Act of 2013, Founding Principles list gender equality as a core value.
[1194] Ibid at Chapter 26 (a-d).
[1195] Legal Age of Majority Act, No 15 of 1982.
[1196] Marriage Act (Chapter 5: 11) of 1965 available at *https://zimlii.org/zw/legislation/act/1964/81*
[1197] Customary Marriages Act (Chapter 5:07) of 1950 available at https://zimlii.org/zw/legislation/num-act/1950/23/CUSTOMARY%20MARRIAGES%20ACT.pdf
[1198] Matrimonial Causes Act (Chapter 5:13) of 1986 available at https://zimlii.org/zw/legislation/consolidatedact/5%3A13/Matrimonial%20Causes%20Act%20%5BChapter%205-13%5D_0.pdf

citizens, thus enabling them to realise their core rights. For example, through the Marriage Act, women attained majority status and had the right to participate as full citizens at 18 years, including in customary law.[1199]

In matters of marriage, Zimbabwe recognises both civil and customary marriages. This is provided for by the Marriages Act (Chapter 5:11), Customary Marriages Act (Chapter 5:07), and The Matrimonial Causes Act (Chapter 5:13). These Acts seek to regulate marriages and dissolution. These laws are inconsistent and do not allow for marriage equality and non-discrimination. For example, the Marriages Act is inconsistent with the Customary Marriages Act, which lists lobola as a requirement for marriage. In this case, the customary law on marriage has not been reformed to meet the legal standards that have been developed through precedents and international women's rights standards.[1200] The Marriages Act does not list lobola as a requirement for the registration of marriage. Therefore, there is no legal basis that requires it before a civil union can take place. Article 9 of this Act notes that the requirement for the solemnisation of marriages is that a publication of a banns or notice of intention to marry and a marriage licence is required beforehand.[1201] Once these requirements are satisfied, the marriage can be solemnised.

On the other hand, under Section 7(1) of the Customary Marriages Act, the solemnisation of a marriage is dependent on whether the customary marriage officer is satisfied that, "…that the guardian of the woman and the intended husband have agreed on the marriage consideration and the form thereof."[1202] Firstly, this Act considers women as minors who have a male guardian to make decisions on their behalf concerning marriage. This takes away the consent aspect because the women's consent to marriage does not suffice. Secondly, there is a requirement that the guardian should have agreed and received the bride price. The New Marriages Bill tabled before Parliament in Zimbabwe was developed to resolve these inconsistences between civil, customary marriages and women's rights.

[1199] Legal Age of Majority Act, No 15 of 1982.
[1200] Danai Chirawu Understanding the current legal position of lobola in Zimbabwe (2020) available at http://kubatana.net/2020/06/15/understanding-the-current-legal-position-on-lobola-in-zimbabwe/ accessed on 20th July 2020.
[1201] Article 9 of the Marriages Act.
[1202] Section 7 (1) (a) of the Customary Marriages Act Ord. 5/1917; Acts 23/1950, 29/1951 (s. 2), 11/1962, 14/1962 (s. 2), 24/1962 (s. 2), 11/1971, 37/1975 (s. 45), 33/1985 (s. 16), 11/1987 (s. 7), 2/1990, 22/1992 (s. 10), 6/1997, 22/2001; R.G.N. 153/1963, S.I. 666/1983.

The new Marriage Bill seeks to reconcile the civil and customary marriages under one Act of Parliament governing marriages.[1203] It replaces the Marriages Act and the Customary Marriages Act. Notably, this Bill expands on the equality of all marriages and provides for the opportunity to solemnise all marriages, civil and customary, to be recognised under the law. This is in a bid to protect women who have customary marriages that are not recognised by the state. The Marriage Bill sets a precedent for the country's domestication of international standards such as those set by the CEDAW. It shows progress in recognising gender equality, protection of the best interests of the child, recognition of consent in marriage as paramount and the recognition of the right to culture to the extent that these provisions are aligned to the Constitution.[1204] On the other hand, this Bill contains some inconsistencies that may deter the realisation of some core women's rights. These include the failure to recognise same-sex marriages and unregistered customary marriages, and polygynous unions before the law. This leaves several women vulnerable to abuse and discrimination as these types of unions are common in Zimbabwe and are facilitated by cultural and religious practices.

One of the most important provisions in this Bill is the recognition of civil partnerships under Clause 40, which defines civil partnerships as a long-term relationship whereby the spouses have lived together without being legally married.[1205] Civil partnerships without legal recognition place women in a disadvantaged position in the case of separation or death of the spouse. Therefore, without some form of legal recognition by the law, the courts cannot ensure that women get a 'fair' share of accumulated assets and/or finances upon separation or the death of a spouse. Women lose out on the material accumulations that they acquired during the marriage without any form of legal recourse. An analysis of the 2019 Marriage Bill shows that there are some progressive steps towards ascertaining the rights of women and children in matters of marriage and equality. A crucial provision establishing gender equality in marriage is Clause 4, which expands on the importance of free and full consent of both parties for a marriage to occur. It creates equality in marriage by recognising women as bearing majority status and having the full right to consent to the marriage.[1206] The persons who intend to marry (man and woman) only need to agree and have their ages verified for the marriage to be

[1203] Marriages Bill, 2019 available at http://www.veritaszim.net/sites/veritas_d/files/MARRIAGES%20BILL%2C%202019.pdf

[1204] See Sections 3, 4 and 6 of the Marriages Bill of 2019 and Chapter 1 Section 2 of the constitution of Zimbabwe of 2013 states that the Constitution is the supreme law of Zimbabwe and any law, practice, custom or conduct that is inconsistent with this law is invalid.

[1205] Clause 40 (1) (a-d) of the Draft Marriage Bill of 2019.

[1206] Sections 3 and 4 of the Marriages Bill of 2019.

officiated.[1207] In this case, the Bill firstly empowers women to consent to marriage or not and secondly, it criminalises child marriage.

Since early and forced marriages are a feature of Zimbabwean society, as evidence by practices such as *kuripa ngozi* (virgin pledging) and *kugara nhaka* (wife inheritance), these provisions in the Bill are crucial to protecting both women and children's rights.[1208] These unions are not entered into by the consent of the women and/or girls involved. They are culturally prescribed and take place in the private sphere of the family. *Kuripa ngozi* is defined as "the customary practice of compensatory payment in inter-family disputes as well as in the appeasement of avenging deceased spirits.[1209]" By criminalising forced marriages and child marriages, this Bill ensures the standards set in Articles 1, 3, 5 and 15 of CEDAW are upheld. Lastly, this clause also removes the payment of lobola as a prerequisite for marriage registration. Therefore, if Parliament adopts this Bill, men and women can be married without the lobola requirement as a prerequisite for validation.[1210]

Although the Bill presents unique opportunities for women and marriage in Zimbabwe, the Bill also has gaps and inconsistencies that perpetuate inequality, violence, and discrimination against women. These inconsistencies need to be acknowledged and rectified before the Bill is signed into law. As the world moves towards an equal society rooted in respect for diversity, this Bill misses many opportunities to reconcile women's rights to equality and non-discrimination as well as freedom from all forms of violence. Firstly, the Bill interprets marriage to be "a union between persons of the opposite sex".[1211] In this case, the state actively encourages discrimination against women and men based on their sexual orientation and preference.

The Bill also fails to recognise polygynous marriages. These marriages are culturally and religiously promoted, and many women find themselves in these types of marriage in Zimbabwe.[1212] This oversight by the Bill shows how far Zimbabwe's marriage laws still have to go to ensure no woman is left behind. Women thus remain vulnerable to suffering both

[1207] Chirawu op cit note 1200.
[1208] The prevalence rate of child marriage is estimated at 32%. See generally Zimbabwe Demographic and Health Survey 2015 conducted by the Zimbabwe National Statistics Agency Harare, Zimbabwe available at *https://www.dhsprogram.com/pubs/pdf/FR322/FR322.pdf* accessed on 23rd July 2019.
[1209] Norman Chivasa Kuripa Ngozi as a conflict resolution model in Shona communities of Zimbabwe: a conceptual analysis (2018) Taylor and Francis Online.
[1210] Section 15 of the Marriages Bill of 2019.
[1211] Clause 2 of the Marriage Bill of 2019.
[1212] Welshman Ncube 'The decision in Katekwe v. Muchabaiwa: A Critique' (1984) *Zimbabwe Law Review* Vol 1 & 2 pp. 217-228.

discrimination and violence because they cannot make any claims on the estate of their late spouse or any material claims upon divorce or the death of a spouse if they were in this kind of union.[1213]

The Zimbabwean legislature has a long way to go in terms of aligning CEDAW standards to domestic law. Before the Bill can be adopted into an Act of Parliament, it must undergo various stages in Parliament, including public consultations by the Parliamentary Portfolio Committees. This process is very much a political one. When the Bill was first tabled in Parliament and through consultations, many groups argued that the Bill sought to erode essential cultural beliefs and thus, it did not get support.[1214] Politicians who make up the legislative authorities will not necessarily seek to align Zimbabwean laws to international standards, but rather, the decisions made are to appease political constituents. To date, there has not been further progress on this Bill. It can be assumed that the Portfolio Committee has not been able to set up further public consultations due to the lockdown restrictions that have been imposed due to COVID19 since March 2020. The new Marriages Bill does provide some adherence with Zimbabwe's obligations under CEDAW. However, there are still other considerations and women's rights abuses that the Bill does not cover. If the Bill passes into law, lobola will no longer be a requirement under the law. However, communal attitudes towards the practice would also need to be changed.

In 2013, 84% of 'marriages' were not registered in Zimbabwe.[1215] Some women's rights groups currently estimate that in 2019, about 70% of marriages are unregistered.[1216] Civil partnerships are a common type of marriage in Zimbabwe. Usually, when there is an exchange of roora (bride price) between families, this is considered marriage in the community. Most couples do not take a step further to solemnise this marriage to be recognised under customary law or civil law. There are many reasons behind this lack of registration of marriages in Zimbabwe. This includes polygamous unions, lack of knowledge of marriage laws by women, and skewed relationships of power between spouses on choosing the type of marriage they should have.[1217] The requirements and legal landscape on marriage in Zimbabwe do not reflect the reality of marriage on the ground. If over 70% of marriages in the country are unregistered,

[1213] Chirawu op cit note 1200**Error! Bookmark not defined.**.
[1214] Ibid.
[1215] The Herald Zimbabwe '84pc of Zim marriages unregistered**'** available at *https://www.herald.co.zw/84pc-of-zim-marriages-unregistered/* accessed on 1 August 2019.
[1216] Nicola Ansell 'Because it is our Culture! Renegotiating the meaning of lobola in Southern African Secondary Schools' (2001) *Journal of Southern African Studies* Volume 27 (4) at 697.
[1217] Chirawu op cit note 1200.

many women and men are not aware and/or educated about the registration of marriages after the customary practice of lobola has taken place. This negatively impacts many women in unregistered unions who cannot make legal claims against their spouse's estate upon their death or divorce.[1218]

The right to majority status for women was reinforced in *Katekwe v. Muchabaiwa,* where the Supreme Court ruled that, women were emancipated individuals who did not require a guardian to exercise their rights on their behalf.[1219] This ruling provided the basis for the recognition of the majority status of women in the country. To date, the legal status of lobola in Zimbabwe differs between civil and customary marriages. This position creates a legislative gap that should be rectified to protect women. In *Katekwe v. Muchabaiwa*, the court made an important ruling on matters of bride price. The court held that the father could not sue for seduction damages on behalf of his daughter, and this judgement also stripped the father of the right to demand bride price or approve the daughter's marriage.[1220] Chief Justice Dumbutshena added that, concerning lobola, the Legal Age of Majority Act meant that women did not have to seek their guardian's permission to marry, and this also meant that the guardian is not entitled to lobola under the law.[1221] The judge also added that the woman alone could decide whether her father can ask for lobola or not,[1222] thereby reinforcing the fact that the majority status awarded to women meant that they could validly enter into a marriage contract without their guardian's consent.[1223]

Chirawu argues that, even though this case was adjudicated in 1984, customary law is yet to be aligned with this judgement on bride price requirements.[1224] When the LAMA was passed, the Act divided civic opinion as many argued that the Act 'obliterated lobola'.[1225] This is because the law enabled men and women who had reached 18 years to acquire majority status, which meant that neither party had to seek parental consent to get married. Under customary law, there exists "a delict of seduction which is defined as sexual intercourse with a

[1218] Ibid.
[1219] *Katekwe v Muchabaiwa* 1984 (2) ZLR 112 (S).
[1220] See generally judgement of *Katekwe v. Muchabaiwa.*
[1221] See the decision in *Katekwe v. Muchabaiwa* op cit note **Error! Bookmark not defined.**; Welshman Ncube 'The decision in Katekwe v. Muchabaiwa: A Critique' (1984) *Zimbabwe Law Review* Vol 1 & 2 pp. 217-228.
[1222] Ibid at 16.
[1223] Welshman Ncube 'The decision in Katekwe v. Muchabaiwa: A Critique' (1984) *Z. L. Rev.* Vol. 1 & 2 1983-84 at 221.
[1224] Chirawu op cit note 1200.
[1225] Ncube op cit note 1223**Error! Bookmark not defined.** at 217.

woman with her consent, but without her guardian's consent…."[1226] This delict is not committed against the woman because, in customary law, women have no *locus standi*; it is committed against the male guardian.[1227] However, because of the provisions of LAMA, this customary law position became inconsistent with civil law. Even though the LAMA took away the father's status to sue for damages, it did not, however, give women the right to sue for seduction damages under customary law.[1228]

In a highly patriarchal society such as Zimbabwe, where the entire marriage process involves male family members making decisions on behalf of the female getting married, granting women the ability to marry without their male 'guardian's' consent created a backlash to this law. At the time, the then Minister of Justice, Legal and Parliamentary Affairs, Edson Zvobgo, commented in Parliament that the government had heeded the call to reform the Act to allow the demanding of lobola by the legal guardian.[1229] Adding this provision meant that women would continue to be viewed as perpetual minors with no decision-making power or rights in personal law concerning marriage. However, this amendment has not been adopted. This reflects the extent to which marriage issues and women's rights are still a contested issue in the country.

The customary law position of women as minors was reinforced in the case of *Veneria Magaya v. Nakayi Shonhiwa Magaya,* where the Supreme Court ruled that the LAMA did not recognise women's majority status under customary law.[1230] In this case, on intestate inheritance, a man who had died intestate had left behind his eldest child, Veneria (from his first marriage) and three sons from his second marriage the Court had to decide on who would be entitled as heir to his estate.[1231] The Court reflecting on the *Katekwe v. Muchabaiwa* judgement, opined that the Chief Justice's decision upon interpreting the LAMA as offering women majority status within customary law was wrong. The court argued that the discrimination women suffer under customary law is not because of their status as perpetual minors, but that it is '…the nature of African society…' and that any distortions to this nature would disrupt customary laws and society.[1232] Under customary succession laws on

[1226] Ibid.
[1227] Ibid.
[1228] Ncube op cit note 1223 at 223.
[1229] Ncube op cit note 1223**Error! Bookmark not defined.** at 218.
[1230] See generally the judgement of *Veneria Magaya v. Nakayi Shonhiwa Magaya* (SC 210/98).
[1231] Ibid.
[1232] Ibid; The Women's Watch: Two steps back: Customary Law and the Zimbabwe Consitution Vol 12 Nos. ¾, Vol 13 No.1.

inheritance, the court decided that the law preferred males to females as heirs.[1233] The court cited that under Section 2 of the Constitution, discrimination based on race, religion, etc., is prohibited; however, this does not apply to discrimination based on sex.[1234] From this case, it can be argued that the legal systems in some jurisdictions, such as Zimbabwe, serve as the gatekeepers to the oppression of women by failing to align civil and customary laws to protect women's rights. Coldham argues that the court's decision further entrenched women's minority status. He adds that the Court also blatantly disregarded the principle of *stare decisis*.[1235] The Court's decision in the *Magaya* case did not uphold Chief Justice Dumbutshena's judgement in the *Katekwe* and the same court's judgement in *Chihowa v. Mangwende* cases. These different judgements by the courts continued to create tension between civil law and customary law relating to the status of women in Zimbabwe.

Although Zimbabwe has received communication from the CEDAW Committee and the HRC through the Periodic Review to eliminate the practice of lobola, the state has failed to take tangible steps to ensure women are protected from harm and suffering aggravated by this practice. Even though the legal landscape is developing, there is an unwillingness to eradicate lobola. This hesitancy to comply with the CEDAW Committee and HRC recommendations shows how difficult it is to implement and ensure compliance with VAW standards that are not enforceable without a legally binding treaty.

7.1.2. Kenya

Kenya accented to the CEDAW treaty in 1984 without reservations and has not yet signed or ratified the Optional Protocol to CEDAW. To date, the state party has submitted nine reports to the CEDAW Committee. From the reports available on the OHCHR website detailing Kenya's reporting activity, there is no record of the state party's initial report and the first and second periodic reports to the CEDAW Committee.[1236] In the state party's combined third and fourth periodic report to the CEDAW Committee, under compliance with Article 16 of CEDAW, Kenya highlighted that there are multiple legal regimes that govern marriage and divorce. These regimes do not necessarily follow the letter of the law.[1237] For example, the

[1233] See judgement in *Veneria Magaya v. Nakayi Shonhiwa Magaya* op cit note **Error! Bookmark not defined.**.
[1234] Ibid.
[1235] S Coldham 'The Status of Women in Zimbabwe: Veneria Magaya v. Nakayi Shonhiwa Magaya' (SC210/98) (1999) *Journal of African Law* Vol 43 No.2.
[1236]Kenya periodic reports to the CEDAW Committee available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=3&DocTypeID=29
[1237] Combined third and fourth periodic report to the CEDAW Committee, Kenya CEDAW//C/KEN/3-4 at 38.

Mohammedan law allows for the marriage of minors which is inconsistent with the Constitution.[1238] This is contradictory to what the state party says on the marriage of minors in the same report.[1239] The state party highlights that "Marriage of children is forbidden and the administration takes all possible measures to prevent this."[1240] In terms of customary African marriages, the state reported that once a woman consents to this type of marriage, they also consent to a polygamous union and that the dissolution of this marriage is also governed under this law.[1241] As argued above, the law regarding customary marriages in Kenya requires the payment of lobola before the marriage can be recognised.

The state party did not report on the practice of dowry in its combined third and fourth reports.[1242] The Committee urged Kenya to appraise its "…cultures as dynamic aspects of the country's life and social fabric and as subject, therefore, to change."[1243] The committee explicitly noted practices of bride price and polygamy as customs and practices that exacerbate gender inequality and are harmful to women and were thus not compliant with CEDAW's Articles 2 and 16.[1244] In 2006, Kenya submitted its sixth periodic report to the CEDAW Committee. In its report under Article 16 on marriage equality and family law, the state party also highlighted, as it had previously in the combined third and fourth periodic reports, that multiple legal regimes still governed the Kenyan law on marriage.[1245] Concerning African customary marriages, the state highlighted that this marriage is only valid if the parties conform to the relevant community's rituals and practices.[1246] The state party also notes how these multiple regimes can challenge the realisation of women's rights under CEDAW because these regimes confer different rights and obligations to women.[1247] This means that the harmonisation and realisation of equal rights for women in Kenya is still a pipe dream for most. Even though the state party acknowledges that bride price has played a role in advancing the perception of women as property, the state maintained that this practice was required to prove the validity of an African customary marriage. [1248] In CEDAW's Concluding Observations to

[1238] Ibid.
[1239] CEDAW Committee's sixth periodic report CEDAW/C/KEN/6 at 39.
[1240] Ibid.
[1241] Ibid.
[1242] CEDAW Committee's sixth periodic report CEDAW/C/KEN/6.
[1243] Concluding comments of the Committee on the Elimination of Discrimination against Women: Kenya CEDAW/C/KEN/CO/6.
[1244] Para 22 of CEDAW/C/KEN/CO/6.
[1245] Sixth periodic Report to the CEDAW Committee by Kenya CEDAW/C/KEN/6.
[1246] Ibid.
[1247] Ibid.
[1248] Ibid.

the sixth periodic report submission, the Committee continued to urge the state party to address harmful cultural practices such as lobola more vigorously.[1249] Further, the Committee advised the state party to use innovative measures such as media channels to educate their communities to understand gender equality.

In 2009, Kenya submitted its seventh periodic report to the CEDAW Committee. In this report, the state reporting on compliance with Article 16 of CEDAW notes that there are still multiple legal regimes governing marriages in Kenya and that customary law is not codified as it varies amongst communities.[1250] The state party notes that family relations in Kenya's communities are based on patriarchal normative practices that perpetuate inequality, discrimination and violence against women.[1251] However, the state party notes that the Kenyan Parliament was developing a Marriage Bill that sought to harmonise the different marriage regimes under one Act.[1252] Once more, the state party acknowledges the disadvantaged position of women that is aggravated by cultural beliefs and practices.[1253] Violence against women is noted as being promoted by the traditional views about the roles of women in society and the reluctance of law enforcement agencies to intervene in these cases of VAW as they are considered private.[1254]

In response to the states seventh periodic report submission, the Committee reiterated for the third time that the state party should take steps to eliminate stereotypes and harmful traditional practices that adversely affect women. In these Concluding Observations, the committee added genital mutilation (FGM) and wife inheritance to the previously noted polygamy and bride price practices. The addition of FGM and wife inheritance show that the Committee continues to observe and add to the practices they view as harmful to women and call on state parties to take steps to eliminate these practices.[1255] The Committee urged the State party to initiate educational programmes and enforce the prohibition of these practices in their

[1249] Para 22 of Concluding observations of the Committee on the Elimination of Discrimination Against Women CEDAW/KEN/CO/6.
[1250] Para 255 of CEDAW/C/KEN//7.
[1251] Ibid.
[1252] Para 256 of CEDAW/C/KEN/7.
[1253] Para 265 of CEDAW/C/KEN/7.
[1254] Ibid.
[1255] Paras 17-18 of Concluding observations of the Committee on the Elimination of Discrimination against Women CEDAW/C/KEN/CO/7.

jurisdictions.[1256] Kenya is also urged to fulfil its due diligence obligations to eliminate VAW as it was an issue of concern in the country.[1257]

In 2016, Kenya submitted its eighth periodic report to the CEDAW Committee in compliance with its reporting obligations under the CEDAW treaty. As a response to the Committee's previous comments to the state, the report highlights that the state has taken some legislative measures to eliminate discrimination against women.[1258] The state party highlights the Marriage Act of 2014 as one of the measures the government has taken to ensure equality in marriage and upon its dissolution.[1259] Regarding state compliance under Article 16 of CEDAW, the state notes that for the first time, customary marriages are now part of codified law and thus eradicating the precarious position of women within this marital regime.[1260] In this periodic report, the state party does not mention the practice of lobola.

In the latest Concluding Observations to Kenya in 2017, the issue of lobola is raised by the Committee for the fourth time. In these Concluding Observations, drawing on Articles 2, 5 and 16 of CEDAW, the Committee reiterates that Kenya should eliminate this practice. They have added child and forced marriage, beading (a practice of raping young girls by the Samburu group) and widowhood rites such as widow inheritance to the previous list of harmful practices.[1261] Additionally, in 2019, the Universal Periodic Review by the HRC also echoed the CEDAW Committee's views on urging Kenya to eliminate lobola as a step to combat VAW.[1262] The UPR Working Group of the HRC highlighted that the CEDAW Committee was concerned about harmful practices affecting women such as widowhood rites, widow inheritance, polygamy, FGM and lobola, amongst others. The state is called upon to implement a comprehensive strategy to address harmful stereotypes and practices that aggravate VAW. These continued calls by the CEDAW Committee and Human Rights Council for Kenya to eliminate the practice of lobola and the recommendation of ways to eliminate or educate their civic public about the harmful nature of these practices shows that bride price has been identified as a harmful practice. To date, Kenya has not taken any legislative steps to eliminate

[1256] Para 18 of CEDAW/C/KEN/CO/7.
[1257] Para 24 of CEDAW/C/KEN/CO/7.
[1258] CEDAW/C/KEN/8.
[1259] Para 19 of CEDAW/C/KEN/8.
[1260] Para 197 of CEDAW/C/KEN/8.
[1261] Para 18 Concluding observations on the eighth periodic report of Kenya CEDAW/C/KEN/8.
[1262] Human Rights Council Universal Periodic Review on Kenya (2019) A/HRC/WG.6/35/KEN/2 available at <https://undocs.org/A/HRC/WG.6/35/KEN/2> at para 31.

the practice of lobola, and there has been no clear jurisprudence concerning its elimination, as discussed below.

Like in many African states, women's rights in Kenya have improved since the country gained independence in 1964. Kenya signed the Maputo Protocol in 2003 and ratified this treaty in 2010. Kenya made reservations to Article 10(3) of the Maputo Protocol on military expenditure not exceeding social development and spending on women's programmes. Furthermore, Kenya has made reservations to Article 14 (2) (c) on access to sexual and reproductive health rights such as abortion.[1263] The state party has submitted three reports under the Maputo Protocol and has received concluding remarks, as shown in Table 2 above. Additionally, Kenya has not reported on the issue of lobola, and neither has the African Commission raised it in its Concluding Remarks.

The Constitution of Kenya under Article 10 sets out the national values, which include "human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised."[1264] Article 27 of this Constitution also provides for equality and freedom from discrimination. As the state's supreme law, any other law inconsistent with these constitutional provisions for non-discrimination and equality is unconstitutional. In Kenya, the 2012 Marriage Act Chapter 150, African Christian Marriage and Divorce Act 151 of 2010, Sexual Offences Act No. 3 of 2006 and the 2012 Penal Code Chapter 63 all provide some measure of protection for women concerning marriage and sexual and gender-based violence.[1265]

Just like Zimbabwe, Kenya is also a former colony. Thus, it can also be argued that some of its laws are rooted in the colonial administration's discriminatory laws that were enacted during this period. There are four recognised legal systems in Kenya, including Hindu Law, Islamic Law, African Christian or Civil Law, and Customary Law. Although it seems as if having different types of laws for different communities is inclusionary, these multiple systems of law create ambiguities for the judicial system when interpreting these laws to

[1263] See generally Kenya state party reporting and status under the Maputo Protocol available at < https://www.achpr.org/states/detail?id=25>
[1264] Article 10 (1) (b) of The Constitution of Kenya of 2010.
[1265] 2012 Marriage Act Chapter 150, Africa Christian Marriage and Divorce Act 151 of 2010, Sexual Offences Act No. 3 of 2006 and the 2012 Penal Code Chapter 63.

adjudicate civil or criminal matters.[1266] However, there has been some progress with regards to establishing gender equality in Kenya.

Particularly concerning women's rights and marriage, the Kenyan government has enacted some laws to protect women's rights. According to the civil society shadow report to the CEDAW Committee[1267], these progressive laws include the Domestic Violence Act, 2015[1268], Marriage Act, 2014[1269], Matrimonial Property Act, 2013.[1270] These acts ensure the protection of women in marriage and also within the private and familial spheres. The Matrimonial Property Act legislates over property acquired during the subsistence of marriage. According to Section 6 of this Act, matrimonial property refers to the matrimonial home or household goods and effects and any other movable or immovable property.[1271] The Act seeks to ensure equitable sharing of the property upon the death of a spouse or in cases of divorce.[1272] The Act further defines how properties are managed and shared in cases of polygamous unions.[1273] However, this Act also disadvantages women given their roles as homemakers and child-carers. According to Section 6 of this Act, parties must quantify their material contribution to the matrimonial property. This negatively impacts most women whose work cannot be quantified and thus end up not getting recognition for the economic worth of their labour.[1274] This provision in this Act is discriminatory and fails to account for the realities of marriages in Kenya and the intersecting roles of women and their contributions in marriage.

The Domestic Violence Act of 2015 is another progressive women's rights legislation. The Act defines violence in a myriad of ways, including female genital mutilation, forced marriage, forced wife inheritance, sexual abuse and stalking, amongst other types of violence.[1275] The Act further defines domestic violence as, "…in relation to any person, means violence against that person, or threat of violence or of imminent danger to that person, by any other person with whom that person is, or has been, in a domestic relationship."[1276]This act

[1266] M Nzomo 'The Status of Women's Human Rights in Kenya and Strategies to overcome inequalities' (1994) *A Journal of Opinion* Vol 22 No. 2 published by Cambridge University Press at 18.
[1267] The Shadow Report to Kenya's Eighth Periodic Report to the CEDAW Committee (2017).
[1268] The Protection Against Domestic Violence Act, No. 2 of 2015, Kenya.
[1269] Marriage Act, No. 14 of 2014, Kenya.
[1270] The Matrimonial Property Act, No. 49 of 2013, Kenya.
[1271] Ibid at Section 6 (1-3) of the Matrimonial Property Act of 2013.
[1272] See generally the provisions of the Matrimonial Property Act of 2013 op cit note 1269.
[1273] Ibid at Section 8.
[1274] CEDAW Shadow Report to Kenya's Eigth Periodic Report at 7.
[1275] Section 3(a) of the Domestic Violence Act of 2015.
[1276] Ibid at Section 3 (2).

thus seeks to prevent and protect women and children from violence in the private and/or familial space and provides some measure of protection and justice.

The Marriage Act of 2014 is considered one of Kenya's first progressive laws on marriage rights and customs. Section 3 (1) of this Act is an important one, and it defines marriage as the '… voluntary union of the man and the woman whether in a monogamous or polygamous union'. This provision entrenches the importance of consent for both parties to a union. Section 3 (2) of the Marriage Act of 2014 provides for equality in marriage and upon dissolution.[1277] This follows the Constitutional provision on gender equality in the country's Bill of Rights.[1278] Under Section 4 of this Act, only parties who have attained the age of 18 can marry, this goes a long way in protecting children as this provision outlaws child marriage in the state. Further, this Marriage Act recognises Civil, Hindu, Christian marriages. However, these marriages are only considered legal when they are monogamous.[1279]Additionally, the Act provides that a marriage contracted under customary or Islamic law is polygamous in nature.[1280] Section 6 of the Marriage Act further recognises different customary, Christian and/or Hindu rites as a prerequisite for recognising a marriage. In the matter of customary marriages, lobola is a requirement.

The Marriage Act recognises the payment of dowry as a part of the customary marriage.[1281] This dowry is considered a small token, and it is required to prove marriage under customary law.[1282] The responsible parties are to inform the Registrar of the marriage within three months, thus solemnising the marriage.[1283] It is the onus of the couple to show proof of the requisite marriage customs that have been carried out in lieu of the marriage.[1284] However, there is a lack of will to define customary marriage and the practices thereof, as the Act does not evaluate the full extent of marriages under customary law.[1285] For example, the custom of woman to woman marriage practised by different tribes in Kenya[1286] is not legally recognised under the Marriage Act. Under Section 3 (1), the Act only recognises marriage between a man

[1277] Section 3 (2) of the Marriage Act of 2014 op cit note 1269.
[1278] Ibid.
[1279] Sections 6 (2), 24, 43, 46 and 47 of The Marriage Act 4 of 2014.
[1280] Ibid at Section 6 (3).
[1281] Section 43 of the Marriage Act 4 of 2014.
[1282] Ibid at Section 43 (2).
[1283] Ibid.
[1284] Section 45 (b) of the Marriages Act of 2014.
[1285] Monicah Wanjiru Kareithi 'A Historical-Legal Analysis of Woman-To-Woman Marriage In Kenya' (2018) Doctoral Thesis University of Pretoria.
[1286] JR Cardigan 'Woman-to-woman marriages: practices and benefits in Sub-Saharan Africa' (1998) 29 *Journal of Comparative Family Studies* at 90.

and a woman.[1287] The Act adopts the Constitution's views on marriage as provided for in Article 45 (2). This Article states that "Every adult has the right to marry a person of the opposite sex, based on the free consent of the parties."[1288] There is thus no room left to consider other customary marriages that exist in the country. This marriage practice illustrates some of the normative gaps and inconsistencies created by the country's multiple legal regimes. Even though same-sex marriage is not the subject of this thesis, this example shows the discrepancies between civil and customary laws on marriage in Kenya. As a result, many women are left vulnerable because the Constitution also recognises the application of customary law, which may be discriminatory against women.

In matters related to the inquiry of this thesis, the courts in Kenya have made several findings on the legality of marriage based on the payment of bride price and the returning of bride price after the dissolution of marriage. In *Enock Owiti Okanja v Billy Onyango & another*, the court was seized to decide on the validity of the marital status between Enock Owiti Okanja and his deceased wife Christine Dolly Owiti.[1289] Christine Owiti had passed away in a car accident, and her remains were at the local city's mortuary. The plaintiff was not allowed by the first defendant, who claimed that the deceased was his wife and thus refused Mr Owiti to collect his wife's remains for burial.[1290] The court established that the deceased had an identity card that identified her as Christine D Awuor Onyango, which alluded to the fact that the deceased was married to the first defendant. Further, the court argued that since there had been no evidence of lobola being paid by Enock Owiti, the plaintiff, there was no marriage between the two parties according to the Luo custom. Furthermore, the court ruled in favour of the defendant, Billy Onyango stating that according to the Luo custom, the payment of bride price formed a basis for consideration of marriage. Thus, Mr Onyango had fulfilled this requirement and was entitled to the mortal remains of the deceased.[1291] This case thus shows that the payment of lobola according to customary law fulfils the requirements for the recognition of a marriage in Kenya.

It is important to note that Kenyan courts take due consideration of different cultures and customs on bride price in their decisions. The court also ruled on an Islamic marriage matter in *SYT v TA*, on the dissolution of marriage between the two parties, which had

[1287] Ibid.
[1288] Article 45 (2) of the Constitution of Kenya, 2010.
[1289] Enock Owiti Okanja v. Billy Onyango & another [1987] eKLR.
[1290] Ibid.
[1291] Enock Owiti Okanja v. Billy Onyango & another [1987] eKLR.

irretrievably broken down. The court's decision, in this case, held that the return of bride price by the woman to the man at the dissolution of marriage was 'morally acceptable'.[1292] The court's decision in this case negatively impacts the position of women with regards to divorce because if the woman is unable to return the bride price, she may be forced to stay in an abusive marriage which makes her vulnerable to suffering violence. Additionally, as noted in *JMK & another v JMM,* the court consulted with experts on Kamba customary law on the legality of the return of bride price.[1293] In this case, the judge noted that the requirement for the woman to return bride price and that the husband retains custody of the children, whilst if she did not return it, the woman remains the property of the husband, was "repugnant to justice".[1294] The court's opinion in this matter was different to its judgement in the *SYT v. TA* case because, under Islamic law, the court did not see a problem with the returning of bride price upon dissolution of marriage, but in the *JMK & another v JMM* case, the court opined differently. The jurisprudence on the legality of lobola as a requirement for marriage or its return upon dissolution is varied and this is perpetuated by the multiple legal regimes governing marriages in the country. These judgements show that Kenya is not yet ready to decisively outlaw this practice or standardise its approach to marriage to protect women.

Even though the legislative landscape on marriage and bride price is still inconsistent, Kenya has taken some positive steps towards eliminating VAW in general, for example, through the Sexual Offenses Act, which recognises sexual harassment as a criminal offence.[1295] However, this Act fails to recognise and criminalise marital rape, which is also a harmful practice.[1296] Marital rape is also directly related to lobola, as argued in Chapter 3, with the payment of lobola creating entitlements over women's bodies and sexual reproductive capacities. States need to take steps to criminalise marital rape because this measure ensures an avenue to accessing justice for women who face abuse and violence within their marriages and intimate partner relationships. There is an apparent aversion to regulating customs by states in their jurisdictions, which shows how states are unwilling to domesticate their international legal obligations to protect women from discrimination and violence aggravated by traditional

[1292] See generally the judgement in *SYT v. TA* [2019] eKLR.
[1293] Para 68 of *JMK & another v. JMM* [2019] eKLR.
[1294] Ibid.
[1295] Kenya: Act No. 3 of 2006, The Sexual Offences Act 2006 [Kenya], 21 July 2006, available at https://www.refworld.org/docid/467942932.html accessed on 14 March 2020.
[1296] Ibid.

practices.[1297] Just as in the case of Zimbabwe, the inconsistencies between the civil and customary laws leave the practice of lobola and its legality in an uncertain legal position.

7.1.3. Zambia

Zambia ratified CEDAW in 1985. The state party also signed the Optional Protocol to CEDAW in 2008; however, it has not yet ratified it.[1298] To date, the state has submitted six periodic reports to the CEDAW Committee. Zambia submitted its combined initial and second periodic reports to the CEDAW Committee in 1991. In this report, the state party claimed that historical and cultural influences had hindered the country's progress with regard to advancing women's rights.[1299] This initial report was not extensive and did not detail progress or challenges the state experienced under each CEDAW Article. It should be noted that the state party did not make any reference to harmful traditional practices and or lobola specifically. In 1994, in the Concluding Observations to Zambia, the Committee, in respect of Article 5 of CEDAW that obliges the state to modify social and cultural patterns to eliminate prejudices and customary or other practices that influence gender stereotyping and inequality, consulted with Zambia to understand what steps had been taken concerning modifying and/or changing the practice of bride price.[1300] Notably, in these observations, the Committee did not use the language of harmful traditional practices.

In the state party's combined third and fourth periodic report submission to the CEDAW Committee in 1999, the state party reported on specific compliance according to the articles of CEDAW.[1301] In response to the Committee's previous comments on lobola in the Concluding Observations to the initial and second periodic reports, the state noted that Zambia has a dual system of law, and thus marriages can be contracted under these two systems.[1302] Additionally, the state highlighted that marriage contracted under statutory law does not require the payment of lobola as a prerequisite to solemnisation.[1303] However, because marriage can also be contracted under customary law, the parties to the marriage must comply with the relevant customary law of their tribe.[1304] This means that lobola can be a requirement for a

[1297] Shadow Report op cit note **Error! Bookmark not defined.**.
[1298] See CEDAW Ratification table available at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8-b&chapter=4&lang=en
[1299] CEDAW/C/ZMB/1-2.
[1300] Concluding Observations of the Committee on the Elimination of Discrimination Against Women (paras.318-368) A/49/38(SUPP) paras. 318-368.
[1301] CEDAW/C/ZMB/3-4.
[1302] Ibid at 64.
[1303] Ibid.
[1304] Ibid.

marriage to be recognised under customary law if the tribal community recognises this practice. As a result, even though there is no requirement under statutory law for the payment of lobola, it is still a requirement under customary law. Thus, this customary law remains inconsistent with the CEDAW Committee's recommendations to the state party. In the respective concluding observation to the state party in 2002, the Committee did not mention the lobola practice.[1305]

In 2010, Zambia submitted combined periodic reports five and six to the CEDAW Committee.[1306] The state party highlights some statistics on gender-based violence (specifically rape and defilement), which show an average of 1210 cases per year over five years with a conviction rate averaging 274,4 per year.[1307] The state party notes that the Parliament is working on adding stiffer sentencing for cases of GBV as a deterrent and a law on GBV in consultation with relevant stakeholders.[1308] In response to the Committee's advice to align customary and statutory laws, the state party highlights that there have been no changes made to align these laws.[1309] Regarding compliance with the Committee's recommendations referencing compliance with Article 16 with particular reference to the practice of lobola, the state party's response is similar to what it has stated in the previous reports.[1310] Zambia notes that the practice of lobola is still thriving and is still a requirement under some customary law. Further, it is also highlighted that after the husband has paid lobola, he acquires absolute rights over children and the reproductive rights of the wife. [1311] This is a problematic statement to be made by a state party because these perceptions about lobola fuel VAW, as discussed in Chapter 3. In response to this periodic report submission, the CEDAW Committee expresses concern specifically over the states unwillingness to amend laws that perpetuate stereotypes and harmful practices, specifically lobola, property grabbing, sexual cleansing and polygamy.[1312] The Committee notes that despite their continued recommendations to the state party, there has been no action from the state regarding taking steps that will ensure the equal status of women under domestic law.[1313] Zambia is urged to act without delay, to implement a

[1305] Concluding comments of the Committee - CEDAW (paras.211–261) A/57/38(SUPP) paras. 211-261.
[1306] CEDAW/C/ZMB/5-6.
[1307] CEDAW/C/ZMB/5-6.
[1308] Ibid.
[1309] Ibid.
[1310] Para 181 of CEDAW/C/ZMB/5-6.
[1311] Ibid.
[1312] Para 19 of CEDAW/C/ZMB/CO/5-6.
[1313] Para 13 of CEDAW/C/ZMB/CO/2-6.

comprehensive strategy to eliminate these harmful practices.[1314] Further, the Committee calls the state to criminalise the practice of sexual cleansing.[1315] However, this is not explicitly noted for the other listed practices.[1316]

Zambia is a party to the Maputo Protocol since its signature and ratification in 2005 and 2006 respectively.[1317] Zambia has only submitted one report to the African Commission under the African Charter.[1318] The State party has not submitted any reports under the Maputo Protocol, and it has not received any Concluding Remarks thereof. The status of women's rights in Zambia is affected by archaic and colonial laws that continue to strip women of their humanity and rights.[1319]

In the Preamble of the Constitution of Zambia, the state recognises the equality of men and women, including their rights to participate in economic, political, and social life.[1320] The Constitution in Article 23 provides for the right to freedom from discrimination, however, Section 4 (c) limits this right to not be applicable to any laws that make provision on marriage.[1321] The state party has enacted some legislation to protect women from violence and recognises violence emanating from harmful cultural practices, including the Anti-Gender-Based Violence Act and the Penal Code. The Anti Gender-Based Violence Act seeks to provide legal measures to protect victims of gender-based violence.[1322] The Act establishes a committee to focus on steps to eliminate GBV and establishes a GBV fund to support victims of GBV. Under Section 3 of the Act, there is an extensive list of forms of GBV. Specifically, Section 3 (8) (m) includes a list of practices regarded as forms of GBV, including forced marriage, forced virginity testing, forced wife inheritance, and others. [1323] This Act provides a powerful tool that women can use to seek remedies for acts of violence. Notably, the list of practices recognised as forms of GBV reflects the state's willingness to interrogate the harmful nature of some cultural practices in the country, but this does not include lobola. In this case, Zambia is taking

[1314] Para 20 of CEDAW/C/ZMB/CO/5-6.
[1315] Para 20 (b) of CEDAW/C/ZMB/CO/5-6.
[1316] Ibid.
[1317] Find Maputo Protocol Country data here https://www.maputoprotocol.up.ac.za/index.php/zambia
[1318] Refer to Table 2 on state reporting under Maputo Protocol on page 195.
[1319] S Coldham 'Customary Marriages and Urban Courts in Zambia' (1990) *Journal of African Law* Vol 34 No. pp.67-75.
[1320] The Constitution of the Republic of Zambia Amendment Act (No.18) of 1996.
[1321] Ibid at Article 23 (4) (c).
[1322] Anti-Gender-Based Violence Act, 2010 (No. 1 of 2011).
[1323] Section 3 (8) (m) of the Anti-Gender-Based Violence Act, 2010 (No. 1 of 2011).

positive steps to fulfil its due diligence obligations under CEDAW in respect of some cultural practice

However, on the other hand, as shown by the above discussion on the state parties periodic reports to the CEDAW Committee with specific reference to compliance under Article 16, the state party is unwilling to include lobola as a harmful practice or, at the very least, link this practice to gender-based violence. Even though the state party acknowledges that the practice gives the husband full rights over children and the wife's reproductive capacity, the state does not present this observation as a problem. There is still exceptional resistance to identify and outrightly eliminate the practice of lobola by the state.

The SRVAW visited Zambia in 2010 for a country visit, and she noted that customary law in Zambia was still vibrant, with traditional leaders continuing to play a pivotal role as norm creators and influencers in the country.[1324] She added that this had influenced the continued existence of patriarchal social structures that entrench the discrimination and vulnerability of women to violence.[1325] The SRVAW specifically mentions bride price/lobola amongst customary practices that contribute to discrimination against women and violence.[1326] Additionally

There are three types of marriages recognised by law in Zambia: civil, customary, and common law marriages. Similar to Zimbabwe and Kenya, Zambia was also under British colonial rule, and some of its laws are deeply rooted in the colonial administration's legal regimes. For example, Himonga notes that the Marriage Act of Zambia originated from the Northern Rhodesia Marriage Proclamation of 1918.[1327] She argues that any amendments that have been made to the statutory laws on marriage have been to adopt this law to the changing value environment and value systems of the people of Zambia.[1328] Coldham also highlights that the roots of marriage laws in Zambia lie in colonial legislation.[1329] He notes that it was only after 1963 that Africans could contract a statutory marriage in Zambia, as before that, they could only marry under customary law.[1330] This could also be the reason for the popularity of

[1324] Report of the Special Rapporteur on violence against women, its causes and consequences, on her mission to Zambia, 6-11 December 2010 A/HRC/17/26/Add.4.
[1325] Ibid.
[1326] Para 18 of the SRVAW Zambia Country Visit Report.
[1327] C Nchimunya Himonga 'Some Aspects of the Zambian Marriage Act' (1979) *Zambia Law Journal* Vol 11 pp 23-44 at 23.
[1328] Ibid.
[1329] Coldham op cit note 1319 at 69.
[1330] Ibid.

customary marriages amongst local communities in the country. A report by UNICEF in 2015 noted that most people in the country prefer the customary marriage, and this is fulfilled by different traditional customs such as "attainment of puberty by a girl and appropriate initiation ceremonies; parental or guardian consent; negotiations and exchange of lobola (brideprice); and acts of specific ritual symbolising marriage, e.g. wedding."[1331] Concerning the inquiry of this thesis, this finding by UNICEF shows that in cultural communities in Zambia, the payment of lobola amongst other cultural and traditional practices is seen as a prerequisite for the validity of a marriage.

In Zambia, the 1989 Marriage Act Chapter 50 of the Laws of Zambia was enacted to cater for the solemnisation, registration and any matters related to this institution. According to Part II of the Marriage Act, to marry, the couple is required to submit their intention to marry to the Registrar of the district, and upon receipt of this notice, other administrative actions need to be taken before the solemnisation of marriage under civil law.[1332] This Act also specifies that the consent of both parties is required before the solemnisation of the marriage.[1333] A further provision requires that both parties be above the age of 21 for their consent to marry to be recognised.[1334] According to this provision, if any of the parties to the marriage are under 21 years of age, there is a need for the father or the mother's written consent if the father is deceased or incapacitated.[1335] This provision is discriminatory because it purports that the father's consent is superior to the mother's consent. This Act also sets 16 years of age as the legal age for marriage, and any marriage contracted with someone below this age is void.[1336] To the extent that civil law is concerned, this provision in the Act is unclear because it does not explicitly make child marriage illegal. Customary law provisions are similar because it is also a requirement to obtain the consent of the girl's parents for a marriage to occur. This inconsistency between civil and customary laws leaves girl children vulnerable to the excesses of child marriage in Zambia.

According to the Marriage Act, customary and statutory marriages cannot co-exist with two different spouses; that is, it is illegal to contract a civil marriage whilst still being married to another individual under customary law.[1337] The recognition of customary marriages is also

[1331] See https://www.genderindex.org/wp-content/uploads/files/datasheets/2019/ZM.pdf
[1332] Section 6-16 of the Marriage Act Chapter 50 of the Laws of Zambia.
[1333] Sections 17-19 of Marriage Act Chapter 50 of the Laws of Zambia.
[1334] Section 17 of Marriage Act Chapter 50 of the Laws of Zambia.
[1335] Ibid.
[1336] Section 33 (1) of Marriage Act Chapter 50 of the Laws of Zambia.
[1337] Sections 32 & 38 of the Marriage Act Chapter 50 of the Laws of Zambia.

facilitated by the Marriage Act and the 2016 Constitution of Zambia[1338] in Section 7, which recognises customary law, "… that is consistent with the constitution."[1339] There are over 70 cultural tribes in Zambia, and these tribes have different cultural ways of contracting and dissolving marriage.[1340] According to Coldham, even though there are multiple tribes with their laws and practices, when it comes to marriage, there are standard practices that can be attributed to all cultures, including the practice of polygamy and the understanding that marriage is an alliance between two families.[1341] Additionally, Coldham notes that there are also differences in these communities laws on bridewealth systems and inheritance rights.[1342] Customary law can also be applied upon dissolution of marriages in Zambia if the marriage was contracted under this law.

The Matrimonial Causes Act 20 of 2007 is also an important law regarding marriage in Zambia, explicitly making provisions for divorce, child custody and the settlement of properties between the spouses in civil marriage cases.[1343] This Act replaced the English Matrimonial Causes Act of 1973, a remnant of the colonial administration in Zambia. Interestingly, this Act further provides that "a void marriage is considered to be a marriage for the purposes of financial relief for parties to the marriage and their children.'[1344] Himonga argues that this provision allows for parties to a void marriage to seek relief from the courts, for example, to claim maintenance or child support and the redistribution of property.[1345] From these two laws governing civil marriages in Zambia, lobola is not a requirement in entering into this type of marriage.

Section 157 (1-2) of The Penal Code also identifies traditional practices that can be harmful to children. This code imposes criminal liability on a person(s) who commit such practices as "…included sexual cleansing, female genital mutilation or an initiation ceremony that results in injury, the transmission of an infectious or life-threatening disease or loss of life to a child but does not include circumcision on a male child."[1346] The term 'includes' means

[1338] Marriage Act Chapter 50 of the Laws of Zambia, The Constitution of the Republic of Zambia Amendment No. 2 of 2016.
[1339] Section 7 of The Constitution of the Republic of Zambia Amendment No. 2 of 2016.
[1340] Coldham op cit note **Error! Bookmark not defined.** at 69.
[1341] Coldham op cit note **Error! Bookmark not defined.** at 69.
[1342] Ibid.
[1343] The Matrimonial Causes Act 20 of 2007 of Zambia.
[1344] Part VIII of the Matrimonial Causes Act 20 of 2007 of Zambia.
[1345] C Himonga 'Breaking the Tie, Enduring Fragmentation and Reform beyond 2007: The Matrimonial Causes Law' (2008) *International Survey of Family Law* pp.495-524 at 502.
[1346] Section 157 (1-2) of The Penal Code (Amendment) Act 15 of 2005 Assented to on 28 September this Act amends the Penal Code. The following sections focus on child protection issues.

that the list of practices as stated is not exhaustive. Although this penal code specifically refers to children (minors), it does provide a measure of protection for girl children who suffer harmful practices based on their communities' traditional practices.

The courts have dealt extensively with matters of bride price, however, to date, the law (both customary and civil) is not reformed to clarify issues arising, including inheritance, dissolutions and any estate claims. In *Sibande v. The People*, the court held that a customary marriage could not be contracted without the relevant procedures of custom, including the consent of the girl/woman's parents.[1347] In the facts of the case, a 12-year-old girl consented to a union with the defendant. The court stated that even though two parties consented to the marriage, the union was not valid unless the girl's parents had consented to the marriage initially. The court also held a similar position relating to the validity of marriage where the family's consent was involved in the *Siamuchunga v. Musukwa case*.[1348] The appellant, in this case, argued that as the guardian, he should receive damages from a relative who had married off his daughter without his consent.[1349] The court, in this case, ruled in the appellant's favour and ordered that the defendant settle the respective damages.[1350] These two cases highlight the importance of consent from a guardian to enter into a valid customary marriage. From a customary law perspective, marriage is not valid without the payment of lobola. Therefore, it can be argued that bride price is a requirement to recognise customary marriages in Zambia.

An analysis of the practice of bride price in Zambia shows that various communities regard it as symbolising a union between two individuals. The symbolic and traditional importance of this practice means that it will take a multi-pronged approach to realise the recommendations of the CEDAW Committee to eliminate the practice. Zambia's recognition of customary and civil laws hinders the elimination of ambiguity about the approach to eliminating this practice. The CEDAW Committee has consistently called on Zambia to modify its customary laws according to its CEDAW obligations. The state has not taken any measures to do this and has continued to defend its position on lobola for over ten years. As noted by the state's comments, lobola is an explicit requirement for the recognition of customary marriage, whilst it is not for a civil marriage, and this creates a normative gap concerning protecting

[1347] *Sibande v. The People* (1975) Z.R 101 (SC).
[1348] Siamuchunga v. Musukwa High Court Files Series U/3/1.
[1349] Ibid.
[1350] Ibid.

women who are customarily married. This gap means that the practice continues to thrive as it is facilitated by customary law requirements.

7.1.4. Uganda

Uganda signed and ratified the CEDAW treaty in 1980 and 1985 respectively. Uganda is not a signatory to the CEDAW Optional Protocol. In 1992, Uganda submitted its combined initial and second periodic reports in compliance with Article 18 of CEDAW. The state's reporting under Article 16 highlighted that although progress had been made due to the changing socio-economic environment in the country that enabled women to choose a spouse and consent to marriage, due to the recognition of religious and customary laws, women still did not fully have the right to choose their spouse or enter marriage with their free and full consent.[1351] The report also notes that even though bride price is not a requirement under civil law, it is a requirement under customary law. [1352] Additionally, the state reported that the practice on the ground is that lobola is always paid even in lieu of a civil marriage.[1353] This report also highlights how there is no consent sought from the bride or the mother of the bride as all negotiations and payments take place between men.[1354] The state party also notes a similar practice in the Muslim communities in Uganda who also require the payment of '*mahari*' which is a form of bride price made by the groom to the bride's family.[1355] Even though the state party notes the discriminatory nature of this practice to women and how it subjects women to different forms of violence in marriage and upon divorce, the state does not propose any amendments to domestic legislation.

In response to Uganda's initial and second periodic reports, the CEDAW Committee in its Concluding Observations expressed 'serious' concern over the religious and cultural practices that perpetuated domestic violence and discrimination against women.[1356] Furthermore, the Committee urged the state party to take measures to educate and sensitise the

[1351] Para 355 of CEDAW/C/UGA/1-2.
[1352] Paras 360-361 of CEDAW/C/UGA/1-2.
[1353] Para 360 of CEDAW/C/UGA/1-2.
[1354] Para 361 of CEDAW/C/UGA/1-2.
[1355] Para 362 of CEDAW/C/UGA/1-2.
[1356] Para 332 of the Report of the Committee on the Elimination of Discrimination Against Women to the General Assembly's Fourteenth Session (1995) A/50/38 available at *https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=A%2f50%2f38&Lang=en*.

enforcement agencies on how to treat victims of domestic and gender-based violence.[1357] The CEDAW Committee did not raise the issue of lobola in this report.

Uganda submitted its third periodic report to the CEDAW Committee in 2000. In this report, the state party notes that there have been many drastic changes to the position and status of women in the country due to a new Constitution coming into force in 1995.[1358] The changes include raising the minimum age for marriage to 18 for both men and women.[1359] Article 31 also affords women the right to inherit property of their deceased spouse as well as the right to provide consent in marriage.[1360] However, the state party notes that the challenge was to align these constitutional provisions with the domestic legislation.[1361] Similar to the previous report, the state party highlights that women in Uganda are still oppressed by customary law provisions, as most inheritance and divorce cases are dealt under customary law which regards women as subordinate to men.[1362] Concerning bride price, the state reported that even though the practice of bride price symbolises friendship and familial relations in communities, the practice symbolised the transfer or reproductive and productive capacities of women.[1363] The state party further notes that, the practice is unconstitutional according to Article 33 (6) of the Constitution which states that, "Laws, cultures, customs or traditions which are against the dignity, welfare or interest of women or which undermine their status, are prohibited by this Constitution." This shows that the state party understands the negative effects the practice of lobola has on women's lives, however the state party fails to provide measures to address the problem.

Furthermore, in response to the CEDAW Committee's Concluding Observations urging the state party to take steps to educate the police on dealing with domestic violence and stigma, Uganda reported that a new Family Protection Unit and Gender Desk had been established at the district police headquarters.[1364] These mechanisms are a positive step in ensuring women who are raped and/or experience violence do not experience prejudice or stigma from the system that is supposed to support them in getting justice. In their Concluding Observations to Uganda, the Committee also notes with concern, the continued existence of legislation,

[1357] Ibid at Para 344.
[1358] CEDAW/C/UGA/3.
[1359] Article 31 of the Constitution of the Republic of Uganda.
[1360] Ibid.
[1361] CEDAW/C/UGA/3 at 66.
[1362] Ibid.
[1363] CEDAW/C/UGA/3 at 68.
[1364] Ibid at 70.

customary laws, and practices on inheritance, land ownership, widow inheritance, polygamy, forced marriage, bride price, guardianship of children and the definition of adultery that discriminate against women and conflict with the Constitution and the Convention.[1365] The CEDAW Committee notes that whilst the prohibition of discrimination is included in the Ugandan Constitution, several practices still exist that perpetuate this discrimination against women. The CEDAW Committee does note that the domestic laws of Uganda need to align with the Constitution because as shown above, for example, the marriage age requirements differ across the Customary and Civil Marriages Acts.

In 2009, Uganda submitted its combined fourth, fifth, sixth and seventh periodic report to the CEDAW Committee. Reporting on the states' compliance under Article 16 of CEDAW concerning marriage and culture, the report highlights that the state has drafted a Domestic Relations Bill (DRB) which is meant to improve the status of women in customary, civil and/or religious marriages.[1366] The DRB does not require the payment of lobola as an essential requirement for a valid marriage.[1367] However, it is important to note that, to date this Bill has not yet passed through Parliament eleven years after the state party submitted this report. In its Concluding Observations to the state party's combined fourth to seventh reports, the CEDAW Committee expresses concern over the multiple law regimes governing marriages in Uganda.[1368] The Committee also notes that upon assessing the DRB, the concern is that it does not criminalise lobola.[1369] Lobola would now fall under the category of marriage gifts and thus this practice will continue unabated.[1370] The Committee raised concern over the lack of harmonisation of laws concerning marriage, which continue to impede women's realisation of equality and non-discrimination.[1371] Additionally, the Universal Periodic Review reports show that the HRC working groups have not addressed this issue to date. This is a notable discrepancy, considering that the CEDAW Committee has raised this practice with the state party.

In its latest report to the CEDAW Committee in 2020, Uganda highlights several positive steps that have taken place with regards to bride price. The state party reports that the constitutional Court in the *Mifumi* case had ruled that the refund of bride price undermined

[1365] CEDAW Committee's response to the third periodic report (CEDAW/C/UGA/3).
[1366] CEDAW/C/UGA/7.
[1367] Ibid.
[1368] CEDAW/CO/UGA/7.
[1369] Ibid.
[1370] Ibid.
[1371] Ibid.

Constitutional provisions including Articles 33 (6) and 31 (1).[1372] The state party also notes that there has been progress at the regional level as well, for example in the Tororo Bridal Gifts Ordinance which criminalises the refund of lobola upon the dissolution of marriage.[1373] These are positive steps that are taking place in Uganda that will ensure women do not continue to suffer from violence in a marriage if they cannot afford to return their bride price.

Uganda is also a state party under the Maputo Protocol with its signature and ratification in 2003 and 2010 respectively. The state has submitted five periodic reports and received two concluding observations from the African Commission. These reports do not mention lobola or dowry as part of the women's rights concerns. On the other hand, the state has addressed the thematic issue in its reporting to the CEDAW Committee. The Committee in its concluding observations has also raised that the practice of lobola is a harmful practice and has urged the state to take both positive and negative actions to eliminate the practice.[1374]

The Constitution of Uganda as the principal governing law also has progressive women's rights entrenched in its provisions, including with regards to equality in marriage[1375] and by also setting a minimum age for marriage at 18 years[1376]. The Constitution also provides that any laws, cultures or traditions that are inconsistent with the welfare, dignity and interests of women are prohibited. [1377] In Uganda, the practice of lobola has become a serious issue of contention. The marriages Acts include the Hindu Marriage and Divorce Act of 1961, Customary Marriage (Registration) Act of 1973 and the Marriage Act Chapter 251 of 1904. Other notable laws relating to women, equality and discrimination include the Domestic Violence Act of 2010, the Prohibition of Female Genital Mutilation Act of 2010 and the Succession Act (Amendment) Decree 22/72 of 1972. Over time, the development of these new laws that recognise gender equality, women's rights to be free from violence as well as succession or inheritance rights show the steps the state is taking to align its international human rights obligations, specifically with CEDAW.

The Customary Marriages Act, however, sets the minimum age for marriage for females at 16 whilst it is 18 for males.[1378] This Act is inconsistent with the constitutional

[1372] Mifumi (U) Ltd and 12 others v. Attorney General, Kenneth Kakuru. (Constitutional Appeal No 2 of 2014.)
[1373] Local Governments (Tororo district) (Regulation of the Exchange of Bridal Gifts) Ordinance, 2009.
[1374] See generally CEDAW Committee's response to the first, second & third periodic reports (CEDAW/C/UGA/3), CEDAW/C/UGA/1-2.
[1375] Article 33 of the Constitution of the Republic of Uganda Amendment No.2 Act 1995.
[1376] Article 31 of the Constitution of Uganda.
[1377] Article 33 (6) of the Constitution of Uganda.
[1378] Article 11 (1) of the Customary marriages Act of 1973.

provision that sets the minimum age of marriage at 18 for both males and females. However, the Act does not specifically mention a requirement of lobola (bride price) for the registration of a customary marriage. Therefore, in this case, the bride price is not a legal requirement under customary law provisions in Uganda.

Article 17 of the Marriage Act Chapter 251 also has a provision for the contracting of marriage for minors. This article provides that any person who is below the age of 21 cannot consent to marriage on their own, but rather the consent of the father and in cases where he is dead or of an unsound mind, the mother or a guardian can consent on their behalf. This provision is also inconsistent with the Constitution of Uganda. These conflicting requirements by three critical legislative frameworks on marriage leave women vulnerable. If the law is inconsistent, it creates gaps for interpretation that may negatively impact women who are seeking justice.

There are five recognised types of marriage in Uganda, these include, the Customary marriage (*Kwanjula, Okuhingira*), the Mohammedan marriage (Muslim marriage), Church marriage, Civil marriage (before the Registrar), and Hindu marriage (between Indians of the Hindu faith). In Uganda, the practice of lobola has become a serious issue of contention. Unlike in Zimbabwe, Kenya and Zambia, a number of non-governmental organisations such as Mifumi, Ugandan Association of Women and Prevent Gender Based Violence Africa have taken up advocacy against this cultural practice and have continued to pressure the government to reform legislation to outlaw this practice.[1379] This advocacy has influenced the country's legislative landscape concerning marriage and bride price. The courts in Uganda have had to deal with legal questions surrounding the constitutionality of the practice of lobola against Uganda's obligations under the CEDAW treaty.

Although it is not a legal requirement for marriage, lobola is central to marriages in Ugandan communities. In a study carried out by the Ugandan Association of Women Lawyers in 1996, it was found that 95% of the respondents in that study believed that lobola was critical to validating marriage.[1380] One of the central issues of contention around this practice has been the requirement to return lobola upon dissolution of marriage if the dissolution has been

[1379] See generally the reports on bride price under Mifumi website available at *https://mifumi.org/bride-price-campaign-reports*; Prevent Gender Based Violence Africa Organisation available at *https://preventgbvafrica.org/understanding-vaw/vaw-resources/*.
[1380] Uganda Association of Lawyers FIDA-U A Research Project on Marriage, its Rights and Duties and Marital Rape (1996) Paper 4 at 2.

initiated by the woman.[1381] Hague, Thiara and Mifumi argue that it is anecdotal that when a woman returns to her natal family she is likely to be returned back to the abusive spouse if the family cannot afford to pay back the bride price.[1382] In this regard, the returning of lobola as a requirement for divorce perpetuates the violence and abuse women face in marriage because they do not have the resources that allow them to divorce their spouses.[1383]

Central to the advocacy work conducted in Uganda, is an organisation called Mifumi, who have continued to raise the issue of lobola and how it is a harmful traditional cultural practice.[1384] Most importantly, Mifumi has played a vital role in approaching the courts to challenge the constitutionality of the practice and this has influenced court decisions that have pioneered the thinking around addressing the inconsistencies between Uganda's international obligations to CEDAW and its domestic laws around marriage.[1385] In *Mifumi & Anor v. Attorney General & Anor,* the Constitutional Court on appeal from the Supreme Court in Uganda decided that the practice of lobola is constitutional and did not agree with the appellants that this practice promotes inequality in marriage and also hampers consent.[1386] However, the Court held that the requirement to refund bride price upon the dissolution of a customary marriage is unconstitutional.[1387] This decision by the Court, is very important because it sets critical precedents for developing the law around lobola in Uganda and across the continent. This is because by agreeing that the returning of lobola disproportionately affects women, and thus leaves them vulnerable to suffering in customary marriages, the court recognises that there is a link between the practice and VAW. Although the courts in Uganda have dealt with the issue of bride price, the practice has still not been outlawed as the Court purports that there is no evidence to suggest that this practice is linked to VAW and/or is a cause of violence and discrimination. Even though various studies have linked lobola to domestic violence there is still a long way in getting relevant research to inform court decisions.[1388]

[1381] Gill Hague, Ravi Thiara & MIFUMI *Bride price, Poverty and Domestic Violence in Uganda* (2009) Final Report at 5.
[1382] Ibid.
[1383] Ibid.
[1384] Gill Hague, Ravi Thiara & Atuki Turner 'Bride price and its links to domestic violence in Uganda: A participatory action research study' (2011) *Women Studies International Forum* Vol 34 pp. 550-561 at 552.
[1385] *Mifumi (U) Ltd & Anor Vs Attorney General & Ano*r (Constitutional Appeal No. 02 of 2014) [2015] UGSC 13 (6 August 2015).
[1386] Ibid.
[1387] Ibid.
[1388] See generally Matembe M 'The relationship between domestic violence and bride price' (2004) paper presented at the International Bride Price Conference 2004; MP Mbarara and Pan African Parliamentarian Kampala Uganda, Oguli Oumo Bride Price and Violence Against Women: the Case of Uganda (2004) Paper presented at the International Bride Price Conference, February, Kampala, Uganda.

7.2. Critiquing the CEDAW Committee's Concluding Observations to Zimbabwe, Kenya, Zambia and Uganda

As highlighted above in the country cases, the CEDAW Committee in its Concluding Observations has continued to express concern over the continued subjugation of women of women through harmful traditional practices in response to state party reports, from Zimbabwe, Zambia, Uganda and Kenya. Over the years the Committee has continued to urge these state parties to honour their CEDAW obligations by taking steps to eliminate the harmful practice of lobola as it is a practice that discriminates against women and aggravates the violence they face during marriage. These Concluding Observations are based on what the Committee has received in the reports submitted by state parties. Under the Rules of Procedure of the Committee, specifically related to state party reports, and the treaty body's mandate to provide feedback, it is expected that the Committee examines the progress made by state parties, provide states with robust guidelines for reporting and may request special reports from state parties.[1389] Additionally, the Committee is mandated to make Concluding Observations to state parties before closing the session where the state party report was considered.[1390] Rule 52 empowers the CEDAW Committee to make state-specific general recommendations. [1391] This effectively gives the committee considerable power to raise awareness around a critical issue of concern as well as the power to recommend specific steps the state can take to address it.

Through these Rules of Procedure, the CEDAW Committee is empowered to monitor the progress of women's rights across state party jurisdictions as well as to provide general and specific guidance to address any violations. With regards to addressing the issue of lobola as a harmful traditional practice, even though the Committee has raised this issue with individual state parties in Concluding Observations, it has not taken further steps to monitor and/or raise awareness around the issue through the mechanisms it is empowered to use as shown above. The analysis of the Concluding Observations to the four-state parties shows that, even though the CEDAW Committee has continued to raise concern over the issue of lobola, the Committee has done so inconsistently. The Committee has urged state parties to reform their legislation to eliminate the practice of lobola, they have failed to offer specific recommendations and/or

[1389] Rule 48 of Chapter V Rules of Procedure of the Committee on the Elimination of Discrimination Against Women available at *https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/Part%20of%20HRI_GEN_3_Rev-3_7080_E.pdf*
[1390] Rule 53 (2) of the CEDAW Committee Rules of Procedure.
[1391] Rule 52 of the CEDAW Committee Rules of Procedure.

measures to state parties on combatting the practice. Additionally, the Committee has thus not used its mechanisms and global platform to raise global awareness around the practice itself as a women's rights concern, outside of the Concluding Observations.

Despite the CEDAW Committee having made comments to the four state parties to take steps to eliminate the practice of lobola, the Committee has not expanded further on this practice to show exactly how it is linked to violence against women. Secondly, the Committee has also failed to undertake further research and inquiry into how widespread the practice is on the continent. After two reporting cycles (eight years later), the Committee has not raised this issue with Zimbabwe, Zambia, Uganda and Kenya or any other African country that has communities who practice it. For example, in its recent Concluding Observations to Zimbabwe in March 2020, the issue of lobola is not addressed at all. This is concerning because, if the Committee identifies bride price as a form of VAW and discriminatory practice, as shown in the country analyses, it raises the questions as to why the Committee have not made this a global issue such as other harmful cultural practices e.g. FGM. The Committee's continued silence and indecision on calling bride price as a form of VAW or a practice that aggravates the suffering of women, reflects a lack of global concern on this issue. In this regard, questions arise about how the Committee classifies harmful practices and what the criteria is regarding recommendations to states to take steps to eliminate practices and/or to criminalising the practices. If the Committee is explicit about this qualification criteria, this can also provide guidance to states regarding practices that should be eliminated procedurally and those that should be criminalised.

Another important consideration is that the four state parties have not taken legislative action to eliminate the practice of lobola, despite the CEDAW Committee Concluding Observations. Interestingly, in Uganda, through the *Mifumi* case, the Court held that the practice cannot be considered as a form of VAW or a practice that negatively impairs women's enjoyment of their rights.[1392] However, no further action has been taken to eliminate the practice given the effects it has on women's right to be free from violence and discrimination. In Zimbabwe's state report in 2009, the state party noted that the practice of lobola has not yet been legislated against and more research and advocacy would be needed to demonstrate the adverse effects of the practice has on women's rights.[1393] Similar to Zimbabwe, Kenya and

[1392] See the decision in Mifumi (U) Ltd & Anor Vs Attorney General & Anor.
[1393] Combined Second to Fifth Periodic Report of State Parties Zimbabwe (2010) CEDAW/C/ZWE/2-5 at Para 28.

Zambia have not taken any legislative steps to regulate or criminalise the practice. Although there are general debates amongst civil society in general in these countries, the states have not taken any decisive measures to eliminate this practice.

As hypothesised in this thesis, lobola aggravates women's vulnerability to violence and discrimination. The Committee has not taken further steps to interrogate the practice and the harm suffered by women because of it. The Committee's approach over the years has been to continue to urge states to take steps to eliminate the practice, However, the states continue reporting in the next cycle that the practice still thrives in their jurisdictions. Further, the Committee has not used its platform to raise global awareness around recognising the practice as a form of VAW to continue to push states to take legislative and policy-based approaches to protect women.

Additionally, the CEDAW Committee has failed to provide specific recommendations to state parties on how to eliminate the practice. The Committee also highlights lobola as being a discriminatory practice without stating the effects of this discrimination which include violence against women.[1394] By addressing this practice only as a form of discrimination, the Committee fails to highlight for states the negative consequences of this practice. This limits the scope of appreciation of the consequences on women's bodies and lives as discussed in Chapter three. According to Rule 53, "The Committee may, after consideration of the report of a state party, make concluding comments on the report with a view to assisting the state party in implementing its obligations under the Convention." This means that the Committee can take further steps after 'urging' states, to providing specific guidance on how to eliminate the practice of lobola. This is absent in the analysis above.

Finally, an analysis of the CEDAW reports shows that the Committee fails to address the issue of lobola and its relationship to VAW. The Committee in the Concluding Observations to state parties uses the lens of discrimination, but it does not specifically show the relationship between the practice and the violence women suffer in marriage and upon divorce. The Committee fails to use DEVAW provisions to firstly outline the relationship between lobola and VAW and secondly to highlight state parties' obligation to eliminate all forms of VAW. This problem was also reflected in Chapter 5 whereby the CEDAW Committee is reluctant to use the language of VAW in its decisions and recommendations to state parties. Manjoo argues that the Committee has taken an approach to view VAW as a matter of

[1394] See generally concluding observations to Zimbabwe, Zambia, Uganda and Kenya.

discrimination and not as a human rights violation, '…in and of itself, with discrimination as both a cause and consequence of this violence'.[1395] Therefore, by continuing to link harmful practices to discrimination, the Committee fails to address how these practices are in and of themselves forms of VAW.

Although the Committee has raised the issue of lobola as a form of discrimination, it has failed to also carry out further inquiries to understand the practice and how it disproportionately affects women. Therefore, this has limited any action around influencing states to take steps to eliminate this practice as well as the Committee's monitoring of these actions. The inconsistencies and failures by the Committee to address lobola as an aggravator of VAW and lack of specific recommendations to states have negatively impacted any progress around the issue as a women's rights concern. Additionally, the CEDAW Committee has not dealt with any communications regarding harmful traditional practices specifically therefore, the Committee has also failed to use the opportunity to develop international Human Rights Law through setting precedent via its decisions on communications.

Conclusion

The practice of lobola has been raised by the CEDAW Committee in Concluding Observations to Zimbabwe, Zambia, Uganda and Kenya. The Committee highlighted that this practice was based on discrimination against women and perpetuated this discrimination in their lives. Importantly, the Committee urged states to take steps to eliminate this practice, along with other harmful practices. The case analyses highlight that the inconsistencies between customary and civil legislation in these countries show that state parties have not taken any action towards eliminating the practice. In all four cases, lobola is recognised and is a requirement for the recognition of a customary marriage whilst it is not a requirement for civil marriages. However, as noted, most of the population in these countries are customarily married and thus the practice can only be eliminated or modified through amending the customary law requiring the payment of lobola as the basis for recognition of the customary marriage. Zimbabwe is currently taking steps to harmonise customary and civil marriages through the Marriage Bill of 2019. If this Bill passes, the Act will remove lobola as a requirement for the recognition of customary marriage. Although it is a critical first step to

[1395] Rashida Manjoo 'Normative Developments on Violence Against Women in the United Nations System' in Rashida Manjoo & Jackie Jones (eds) *The Legal Protection of Women from Violence Normative Gaps in International Law* (2018) Routledge New York at 87.

eliminating the practice, Kenya, Uganda and Zambia have not taken similar steps to harmonise their marriage laws.

An overarching problem is that the CEDAW Committee has not consistently called out this practice in Concluding Observations to other state parties, despite the SRVAW having identified as also having this practice. Coomaraswamy's report to the Commission on Human Rights in 1994 shows that several states have cultures that observe the practice of lobola.[1396] Chapter three established that lobola is not a form of violence against women in itself, however, it is a cause and consequence of the violence women suffer in marriage. To date, the CEDAW Committee has made comments to four state parties urging them to take steps to eliminate this harmful practice. The inconsistent observations and listing of lobola as a harmful practice despite the SRVAW specifically listing it as a practice that aggravates the violence suffered by a woman is concerning because CEDAW is the leading UN women's rights body. The Universal Periodic Review has also not been consistent in following CEDAW's recommendations and urging states to eliminate the practice. CEDAW is crucial in setting the global agenda on issues affecting women. Therefore, if CEDAW continues to inconsistently address critical women's rights issues, this negatively impacts the development of normative standards to protect women.

The inconsistency of CEDAW's comments has created a gap in the normative developments that firmly place this practice as a recognised harmful practice that increases women's vulnerability to violence. The pervasiveness of violence in women's lives proven by the worldwide statistics should be a priority under CEDAW, and the Committee should take steps to improve the normative provisions for women. This development would also influence the development of regional and domestic legal protections for women across the globe. These recommendations will be discussed further in the concluding chapter.

[1396] SRVAW Radhika Coomaraswamy Report E/CN.4/2002/83 at 3.

CHAPTER 8

Conclusions and Recommendations

"...If no consequences attach to [breach of international law], we should question whether they are rules of law or statements of policy or aspiration…" - Vaughan Lowe[1397]

8. Conclusions

In this thesis, I set out to critically interrogate the relationship between culture, violence against women (VAW), and the practice of human rights in four countries in Africa. Specifically, the central question of this thesis was, how is the practice of lobola harmful to women and what is the current approach undertaken by the CEDAW Committee and its member states to eliminate this practice? This inquiry aimed to provide a holistic understanding of the nuances and discourses around assessing traditional and/or cultural practices in the context of violence. This is because, even though it is a practice that has been linked to VAW, it is important to understand exactly how this practice correlates to the violence a woman suffers in her lifetime.

To recap, my objectives include:

i) critically analysing the discourses and views around the practice of lobola through an interdisciplinary approach to understand how it is harmful to women.

ii) to analyse state reporting to CEDAW and how the state and the CEDAW Committee have approached this practice.

iii) to provide an inquiry into the global, regional and domestic human rights frameworks and domestic legislation protecting women's right to be free from violence that they are exposed to by harmful traditional practices.

iv) lastly, to provide recommendations to the CEDAW Committee and state parties on ensuring the elimination of the practice of lobola in their jurisdictions.

The principal finding of this thesis is that even though the practice of lobola is not itself a form of violence against women, the practice does, however, aggravate the violence a woman suffers during marriage and upon divorce. This practice is harmful towards women and should therefore be recognised as such by the international community and states. I also argue that due to the nature of traditional practices, a nuanced approach is required to understand the practice and, therefore, its harmfulness. This thesis adopts a theoretical framework to analyse the relationship between lobola and violence against women to reach these conclusions. I adapted

[1397] Lowe Vaughan *International Law* (2007) Oxford University Press Oxford.

Heise's Ecological Framework because it provides a valuable tool that helps us to deconstruct the multiple levels that reflect women's daily lives. These spheres help us understand and examine how they influence behaviours, beliefs, perceptions, normative systems and practices that are violent towards women and/or influence violence. Violence against women does not occur in a vacuum, and it is intricately woven into women's day to day lives and reinforced by systemic and structural influences.

In Chapter 2, I argue that lobola is a cultural norm because it goes through a normative lifecycle that involves changes in both behaviour and conduct, with particular reference to the changes that took place as a result of missionary influence, colonialism and subsequently globalisation and the emergence of a legal normative rights regime. I also argue that lobola is not necessarily absolute in terms of how it is practised and impacts women and men. Rather, it is a cultural symbol through which power struggles, change, and pressures are expressed. The practice has a lot of fluidity, however, it is predominantly patriarchal. Therefore, any study of the practice should be informed by how it has evolved and why it is an important symbol for marriage in the communities that practice it.

Chapter 3 is also a background chapter that seeks to examine the hybrid nature of lobola and the different nuances and discourses around the practice, including from an insider or outsider perspective. In this chapter, I problematise the existing language, perceptions and power issues, including the translation of lobola as bridewealth. I argue that this term does not adequately represent what the practice is. This term reflects practices of buying and selling and the transfer of wealth, which is part of the practice, but this does not show other symbolic meanings attached to the practice and the process of marriage in communities that practice it. From this chapter, I conclude that lobola is rooted in culture and based on the debates and discourse around modernity versus the traditional, outsider versus insider gazes; this practice is not devoid of the symbolism and meaning that communities ascribe to it. Furthermore, compartmentalising the cultural as traditional and backward impacts our perception of the cultural as being negative and thus undesirable. This perception juxtaposes culture against the modern world and perceives the traditional as undesirable and that it cannot co-exist alongside the modern. In this regard, the labelling of lobola as a traditional practice influences the negative connotations that may be ascribed to it, including its relationship to VAW.

In Chapter 4, I centre the discussion to analyse how the practice of lobola is harmful to women. To understand this relationship, I interrogate the cultural relativity versus the

universalism debate to problematise how international human rights normative standards are applied to local contexts. I argue that international human rights standards are not new to local contexts because they codify what is already prescribed by the natural laws of men. Therefore, I adopt Donelly's view of adopting relativism within reason because human rights are not a phenomenon that is foreign to communities outside of the Western world; they are standards that are ingrained in these communities' beliefs and practices without being necessarily codified. Additionally, in this chapter, I adapt Heise's Ecological Framework for VAW to analyse the harmfulness of the practice of lobola. Although lobola is argued to be a discriminatory practice that is harmful to women, this thesis sought to examine further how this practice is related to harm. The theoretical analysis concludes that, even though the practice of lobola itself does not present as a form of VAW, it is the perceptions, beliefs and power systems it creates, the practice becomes an aggravator of VAW. Lobola creates rigid gender roles, skewed beliefs of entitlement and ownership of women's lives and bodies, and asymmetrical power relations that influence VAW. In this regard, this thesis establishes that lobola is an enabler and/or aggravator of VAW. Not only does lobola create conditions necessary for VAW, but it also serves to validate the violence simultaneously.

In Chapter 5, the thesis delves into a legal inquiry of the international normative systems on women's rights and specifically reflecting on VAW. Since the subject of this thesis relates to lobola as a harmful traditional practice, it is important to understand how the international system has addressed and responded to the pandemic of gender-based discrimination and VAW. I analyse the evolution of the global normative systems and how VAW has progressed as a critical area of concern for the women's rights movement. I also look at the CEDAW as the principal women's rights framework under the UN system and the jurisprudence on VAW that the CEDAW Committee has made decisions on. As argued in this chapter, the CEDAW treaty, which bears near-universal ratification, is binding on member states. However, the Optional Protocol, which allows for communications to be submitted to the CEDAW Committee, is still struggling to reach the same level of ratification. A discussion on the United Nations Special Procedures of the Special Rapporteur on Violence Against Women and the Special Rapporteur on Cultural Rights is also undertaken to understand these mandates position and contribution to VAW in general and specifically VAW that is aggravated by cultural practices. The mandate of the SRVAW has continued to raise the issue of human rights violations against women that are rooted in culture and justified by it. Additionally, the SRVAW has already identified bride price as a discriminatory practice. Furthermore, the SRCR

has also played a role in raising the issue of culture and VAW in reports to the Human Rights Council and the General Assembly.

This review also highlights that there are normative gaps that leave women vulnerable to using these international frameworks for justice if they suffer different forms of violence that cannot be categorised as based on discrimination. Even though the DEVAW is available, it is not a treaty, and thus its provisions are not legally binding on states. The CEDAW Committee also faces the same challenges despite its development of General Recommendations. In the analysis of the jurisprudence by the CEDAW Committee on communications relating to violence against women and culture, it is clear that the Committee's decisions do not explicitly and coherently use the language of violence. The Committee makes its decisions on these communications by using the lens of discrimination. This creates a barrier to access justice by women who cannot prove that the violence they face is related to discrimination or inequality based on their sex.

Chapter 6 analyses the regional normative standards in the Inter-American the European, and African systems. This analysis shows that there are remedies at the regional level as two out of the three regions have specific legally binding treaties addressing VAW. The African system does not have a specific and legally binding treaty on VAW. This also negatively impacts women's rights to access justice when they suffer different forms of violence. Since the lobola inquiry is Africa specific, I also reiterate that the structural weaknesses in the Maputo Protocol and that its complaints procedures create barriers for women seeking remedies. Although the treaty addresses VAW, it does not provide the specificity and clarity for women to seek justice and redress through its mechanisms.

Furthermore, this chapter also looks at the critical developments under the Maputo Protocol in the African regional system, including the Special Rapporteur on the Rights of Women in Africa (SRRWA) and how this mandate has contributed to states' understanding of their responsibilities under the Maputo Protocol. However, I note that the SRRWA and the concluding observations by the African Commission have not addressed the issue of lobola as a harmful cultural practice as raised by CEDAW. I thus note that there is a gap between the areas of concern for the CEDAW and what the African Commission and the SRRWA have addressed. Additionally, I also look at the emerging jurisprudence coming from the West African regional body ECOWAS, whose regional court ECCJ has made seminal decisions on cases of VAW by interpreting state responsibility using the Maputo Protocol provisions. These

decisions, even though they fall outside of the levels of inquiry of this thesis, are important because they symbolise critical interpretations of state due diligence obligations under the Maputo Protocol that the African Commission and African Court can adopt. I conclude that there is a lack of a cohesive, self-standing and legally binding regional treaty on VAW that can set regional standards of protection as well as define state obligations to respect, protect, promote, and fulfil women's rights to be free from all forms and manifestations for violence.

The country case analysis in Chapter 7 showed that lobola is a prerequisite for the validity of a marriage under customary law in all four countries, Zimbabwe, Uganda, Kenya and Zambia. Even though it is not required under civil law, many people in these countries prefer marriage under customary laws which involve lobola. The legal landscapes concerning lobola in Kenya and Uganda are unclear regarding the legality of this practice even under civil law, as reflected in the country case analysis. None of the states that the Committee has urged to eliminate the practice has done so, over an approximate period of 20 years since the first Concluding Observations. Women are thus still vulnerable to experiencing violence aggravated by this practice, and they have no legal recourse as the practice is still legal in these jurisdictions.

8.2. Recommendations on the way forward

In this section, I provide some recommendations to the international, regional and state levels of law-making. This is because I believe that the law is a powerful tool in creating norms and cultures that foster the elimination of VAW. Therefore, the law can be leveraged to protect and provide justice for women who suffer harmful practices such as lobola. Law-making at the international level is critical to developing global norms that contribute to the understanding and elimination of VAW. Violence against women is a global phenomenon.[1398] Therefore, any attempt to influence the cascading of these norms can filter down to the regional and state levels. The unique position of international law is that it draws from soft law and treaties to leverage states to agree on measures to eliminate the pandemic of VAW.

As discussed in Chapter 2 of this thesis, international bodies such as the United Nations and its human rights mandates play a fundamental role in norm creation, diffusion and compliance. This unique position to create and develop norms and laws also stems from the

[1398] Alice Edwards 'Violence against women as sex discrimination: Judging the jurisprudence of the United Nations treaty bodies' (2008) *Texas Journal of Women and the Law* Vol 18 No. 1 at 2.

fact that, more than any other normative system, international law creates a powerful ideology of justice and rightness that give it a high degree of legitimacy.[1399] Additionally, this position of international law enables the cascading of global norms and standards to the regional and national levels. However, McCall-Smith notes that there are questions around the extent to which treaty body jurisprudence and frameworks influence human rights standards at the domestic level.[1400] Manjoo argues that "… the benefits of the international system include the probative value of standard-setting at the international level and its potential impact at the regional and domestic levels."[1401] Conventions are important in the development of human rights because they signify global consensus on framing human rights violations and provide standards and procedures that can be adopted to ensure that these rights are protected and realised.[1402] Therefore, the influence that international law and treaty body jurisprudence have cannot be ignored.

8.2.1. International Level

As identified in this thesis, there is a normative gap at the international level because there is no legally binding treaty or provisions in CEDAW on VAW, and there is also no single authoritative definition of VAW.[1403] As established, lobola is a harmful practice that aggravates the violence a woman suffers in marriage and upon divorce. Therefore, this practice should be regulated at the global level through a legally binding treaty on VAW. However, as it currently stands, women have to play legal gymnastics to qualify the harmfulness imposed by lobola through the lens of discrimination and/or inequality. The lack of a self-standing and legally binding treaty on VAW is also an impediment to the holistic realisation of a life free from violence by all women around the world. A global treaty on VAW would signify an international consensus to end VAW and a willingness to act on human rights norms, including Sustainable Development Goal 5.2, which urges ending this pandemic. The continued absence

[1399] T W Bennet & J Strug *Introduction to International Law* (2013) Juta & Co Ltd Cape Town at 3.
[1400] Kasey L McCall Smith 'Interpreting International Human Rights Standards: Treaty Body General Comments as a chisel and hammer' in Stephanie Lagoutte, Thomas Gameltoft-Hansen, and John Cerone *Tracing the roles of soft law in human rights* (2016) Oxford University Press, Oxford at 27.
[1401] Rashida Manjoo 'Closing the normative gap in international law on violence against women: Developments, Initiatives and possible options' in Rashida Manjoo & Jackie Jones (eds) *The Legal Protection of Women from Violence Normative Gaps in International Law* (2018) Routledge New York at 210.
[1402] A Aggarwal 'The pros and cons of a convention on the elimination of violence against women and girls' Statement read at 'Thinking Big: A Convention on Eliminating Violence Against Women and Girls' 57th session of Commission on the Status of Women (8 March 2013) available at *https://humanrights.gov.au/about/news/speeches/pros-and-cons-convention-elimination-violence- against-women-and-girls*
[1403] Ekatarina Yahyaoui 'The role and Impact of Soft Law on the emergence of the prohibition of violence against women within the context of the CEDAW' chapter in Lagoutte, Gameltoft-Hansen and Cerone (2016) op cit note 1400 at 65.

of consensus shows that states and the international community are not willing to do what it takes to ensure women's lives are protected from pervasive human rights violations. If there is a legally binding treaty on VAW, women can use this to hold states accountable for any acts or omissions that lead to and/or cause VAW. The global treaty on VAW can also clearly define VAW and provide guidance on how states can realise the obligation to end VAW.

This barrier can be eliminated by a treaty that authoritatively defines VAW and addresses the multiple and intersecting forms of violence that women are vulnerable to. The previous and current SRVAW have both articulated that there is a normative gap in international law on VAW. As highlighted in Chapter 5, after consultation with stakeholders in 2016/2017, several individuals and organisations supported adopting a legally binding treaty on VAW. According to Simonovic, a large number of civil society organisations, who work with women on the ground, supported the development of a new treaty that is "… specifically on violence against women, comprehensive and legally binding' and reflect 'uniformity, specificity and State accountability."[1404] I believe that a self-standing treaty on VAW is the best way to tackle the pandemic of VAW. The current SRVAW opines that an optional protocol to CEDAW would alleviate the implementation gap on VAW that exists. However, the CEDAW Committee has experienced many challenges that have impeded its ability to address the state's reports and communications effectively and on time. A new additional Optional Protocol would only add to the work of the Committee in an already overburdened environment.

A self-standing treaty will have its own monitoring body and will set an authoritative framework on VAW and reflect global consensus on this human rights violation. Manjoo argues that a self-standing treaty can serve as an updated version of the DEVAW, which is over 24 years old.[1405] Nwadiobi et al. also agree that it is important to develop a separate treaty on VAW. They argue that, for more than 20 years, the international community has made progress in increasing awareness on VAW, however, they have, "…stopped short of the very thing with the most power, a global binding norm."[1406] Ulrich argues that as long as instruments on VAW remain without legally binding and implementation power, "…these instruments remain

[1404] UN General Assembly. (2017). Report of the Special Rapporteur on Violence against Women, Dubravka Simonovic. UN Doc. A/73/134 at para 43.
[1405] Manjoo (2016) op cit note 1401 at 212.
[1406] Nwadinobi E A, Juaristi F R, Pisklakova-Parker M, Aldosari H, Khana M, Aebehard-Hodges J 'Safer Sooner: Toward a Global Binding Norm to End Violence Against Women and Girls' Every Woman Treaty at114.

nothing more than a political expression with only moderately powerful weight."[1407] I recommend that a self-standing and legally binding treaty on VAW should be adopted and effectively monitored and implemented through its own body in the UN system. This treaty on VAW can also outline an agreed understanding and consensus on the effects of HTPs on women. It is imperative to find a remedy for women through international frameworks as many women and girls are abused and die without realising their rights and protections espoused in these foundational human rights documents.

Additionally, I recommend that the CEDAW Committee takes the initiative to investigate the practice of lobola and take action to urge all states that have communities that practice it to discourage such practices that are harmful towards women and should therefore be eliminated. As a practice that the Committee identifies as being discriminatory towards women, it is important that the Committee takes time to inquire into the practice and the countries recognising this practice and provide a clear position on the practice for all member states. Taking this step would show the Committee's commitment to eliminating lobola and encourage state parties to take steps to eliminate it as a globally recognised harmful traditional practice.

I also recommend a multi-stakeholder approach which will provide a holistic approach and inquiry into understanding and establishing effective steps to eliminate traditional/cultural practices that are harmful to women. A harmonised approach from other mandates global and regional mandates such as the Special Rapporteur on Violence Against Women, its causes and consequences, the Committee on the Elimination of Discrimination Against Women, the Special Rapporteur on Women and the Special Rapporteur on Cultural Rights, amongst other relevant UN mandates can lead to further inquiries into this practice and offer recommendations. This will encourage states to evaluate their domestic legislation and how they can take steps to protect and prevent harmful traditional practices.

8.2.2. Regional level recommendations to the African Human Rights System

Since lobola has been identified in the African context, it is also important to provide recommendations to the African human rights system, which is much closer to African states with communities that practice lobola. My recommendation is that the African system should also adopt a legally binding treaty on VAW. This is because VAW is a pandemic on the

[1407] Jeniffer Ulrich 'Gender-Based Violence with International Instruments: Is a Solution to the Pandemic Within Reach?' (2000) *Indiana Journal of Global Legal Studies* Vol 11 No. 2 at 653

continent, and there needs to be decisive action from the African Union as the principal governing body on the continent. As discussed in Chapter 6, the European and the Inter-American human rights systems have legally binding treaties addressing VAW specifically.[1408] Manjoo and Nekura argue that there are several benefits to adopting a legally binding treaty on VAW in Africa. These include the lack of focus on VAW in the Maputo Protocol and the lack of a monitoring mechanism attached to the protocol, a new treaty will broaden the scope and conceptual basis for understanding VAW in its different forms and manifestations, and it can ensure effective redress for violations of women's right to be free from violence.[1409] Importantly, this new treaty should have a sound architecture, means for accessing remedies and a monitoring mechanism.[1410] A new treaty is also an opportunity to harmonise and strengthen the African normative system through substantive human rights treaties that establish strong protections for women and contribute to the global fight to end violence against women.

Additionally, I also recommend that at the regional level, the SRRWA also carry out an inquiry into the practice of lobola, including its different forms and manifestations in different cultural settings and jurisdictions. This inquiry will provide a broader conceptualisation of the practice of lobola and how it is directly or indirectly related to violence against women in Africa. By carrying out these inquiries, the SRRWA can raise the issue of lobola and its relationship to VAW at the African regional level and provide recommendations for the adoption of general comments and or Resolutions to address the harmfulness of the practice of lobola on women in Africa. Furthermore, the SRRWA should also engage with policy and lawmakers in member states jurisdictions to understand the multiple and intersecting levels of policies and laws that influence the persistence of the cultural practice of lobola, including how these can be used to influence the elimination of the practice both legally and in cultural settings.

8.2.3. State-level recommendations

At the state level, I recommend that the state parties of Zimbabwe, Zambia, Kenya and Uganda harmonise their customary laws to reflect their commitment to the CEDAW treaty amongst

[1408] These are the Convention of Belem do Para and the Inter American Convention on Violence Against Women.
[1409] Rashida Manjoo and Ruth Nekura 'Does Africa need a regional treaty on Violence Against Women? A comparative analysis of normative standards in three regional human rights systems' (2020) in Nolundi Luwaya Rashida Manjoo and Jameelah Omar *Violence Against Women: Law Policy and Practice* (2020) Juta Law Cape Town.
[1410] A Brysk 'Violence against women: Law and its limits' (2017) *Deusto Journal of Human Rights* Vol 1 pp.145–73.

other human rights frameworks that they have ratified. The continued existence of customary law requirements for lobola undermines the realisation of a life that is free from violence for women in their jurisdictions. An initial first step would be to remove this requirement of lobola as a prerequisite for recognising a valid customary marriage. This would remove the legal pressures and barriers for women when they want to access remedies upon divorce or the death of their spouse. Removing this as a customary law requirement will also influence the communities that practice lobola to review and understand the disadvantages towards women. These state parties should also investigate and make further inquiries into the practice and its harmfulness to guide policies and law-making.

I also recommend that state parties to CEDAW commit to harmonising their domestic laws according to their obligations under the CEDAW treaty. For example, Zimbabwe has not ratified the Optional Protocol to CEDAW, which enables individuals to submit communications to the CEDAW Committee. The ability to submit these individual communications is critical for women to realise the rights provided in CEDAW amongst other treaties. Ratifying the Optional Protocol also signals the state parties' commitment to upholding their due diligence obligations to ensure women do not suffer from gender-based inequality and discrimination. State parties to CEDAW and the Maputo Protocol need to take their obligations seriously and modify their legislative frameworks to protect women in their jurisdictions and thus contribute to the global fight to end violence against women.

In conclusion, I believe these recommendations all work in unison and should be implemented at these three levels to ensure that women are safe and protected from different forms of violence emanating from cultural practices such as lobola. The law is a powerful tool that reflects the aspirations of humanity for a life of dignity, equality and non-discrimination. Therefore, it is a tool for positive change as it can be leveraged to create new norms and practices that positively influence women's lives.

List of References

Cases

APDF & ANOR. V. Mali (046/2016) [2018] AFCHPR 15; (11 May 2018)

Ana, Beatriz, and Celia González Pérez v. Mexico (2001)

AT v Hungary 2003 (CEDAW/C/36/D/2/2003)

Buturuga v. Romania, ECHR 056 (2020)

Cecilia Kell v. Canada Communication No. 19/2008 26 April 2012 CEDAW/C/51/D/19/2008

Da Penha Maia Fernandes v. Brazil, Case 12.052, Inter-Am. Comm'n H.R., Report No. 54/01, OEA/Ser.L.V/II.111, doc. 20 rev. (2001)

Echaria v. Kenya (Communication no. 375/09) [2011] ACHPR 89; (5 November 2011)

Egyptian Initiative for Personal Rights and Interights v. Egypt (2011) (Communication no. 323/2006) [2011] ACHPR 85; (16 December 2011)

Enock Owiti Okanja v. Billy Onyango & another [1987] eKLR

Fernandez Ortega et al. v. Mexico, Preliminary Objection, Merits, Reparations and Costs, Judgement, Inter-Am. Ct. H.R (ser.C) No. 215 (Aug. 30, 2010)

Fernández Ortega et al. v. Mexico, Petition to the Court, Inter-Am. Comm'n H.R., Case No. 12.580 (May 7, 2009)

J.I v. Finland Communication No. CEDAW/C/69/D/103/201

JMK & another v. JMM [2019] eKLR

Katekwe v Muchabaiwa 1984 (2) ZLR 112 (S)

Kurt v. Austria application no. 62903/15 (2019)

L.C. v. Peru Communication No. 22/2009 18 June 2009 CEDAW/50/D/22/2009

Maria Da Penha v Brazil, Case 12.051, Report No. 54/01, Oea/Ser.L/V/Ii.111 Doc. 20 Rev. At 704 (2000)

*Mifumi (U) Ltd & Anor Vs Attorney General & Ano*r (Constitutional Appeal No. 02 of 2014) [2015] UGSC 13 (6 August 2015)

Mifumi (U) Ltd and 12 others v. Attorney General, Kenneth Kakuru. (Constitutional Appeal No 2 of 2014.)

M. K. D. A.-A. v. Denmark CEDAW/C/56/D/44/2012

M.S. v. The Philippines CEDAW/C/58/D/30/2011

Opuz v. Turkey application no. 33401/02 (2009)

Osman v. United Kingdom (23452/94) [1998] ECHR 101 (28 October 1998)

Prosecutor v. Kunarac, Kovac and Vukovic, ICTY Trial Chamber II, Judgement 22 February 2001, Case no. IT-96-32/1-T

R.P.B v. The Philippines CEDAW/C/57/D/34/2011

Rosendo Cantú et al. v. Mexico, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 216, ¶ 73 (Aug. 31, 2010)

Sibande v. The People (1975) Z.R 101 (SC)

Siamuchunga v. Musukwa High Court Files Series U/3/1

SYT v. TA [2019] eKLR

T. Reyes and A. Morales v. Mexico Communication No. CEDAW/C/67/D/75/2014.

Veneria Magaya v. Nakayi Shonhiwa Magaya (SC 210/98)

VPP v Bulgaria 2011 (CEDAW/C/53/D/31/2011)

Legislation

Brazil

Maria da Penha Law no 11.340 of August 7, 2006.

Kenya

The Protection Against Domestic Violence Act, No. 2 of 2015, Kenya.

Marriage Act, No. 14 of 2014, Kenya.

The Matrimonial Property Act, No. 49 of 2013, Kenya.

Kenya Matrimonial Property Act of 2013.

The Constitution of Kenya of 2010.

Act No. 3 of 2006, The Sexual Offences Act 2006 [Kenya].

Uganda

Constitution of the Republic of Uganda Amendment No.2 Act 1995.

Uganda Customary marriages Act of 1973

Local Governments (Tororo district) (Regulation of the Exchange of Bridal Gifts) Ordinance, 2009.

Zambia

Marriage Act Chapter 50 of the Laws of Zambia.

The Constitution of the Republic of Zambia Amendment No. 2 of 2016.

The Matrimonial Causes Act 20 of 2007 of Zambia.

Zambia Customary Marriages Act Ord. 5/1917; Acts 23/1950, 29/1951 (s. 2), 11/1962, 14/1962 (s. 2), 24/1962 (s. 2), 11/1971, 37/1975 (s. 45), 33/1985 (s. 16), 11/1987 (s. 7), 2/1990, 22/1992 (s. 10), 6/1997, 22/2001; R.G.N. 153/1963, S.I. 666/1983.

The Penal Code (Amendment) Act 15 of 2005

Zambia Anti-Gender-Based Violence Act, 2010 (No. 1 of 2011).

Zimbabwe

Zimbabwe Recognition of Customary Marriages Act (2000).

Native Marriage Ordinance of 1917 N3/17/4/2.

Native Adultery Punishment Ordinance of Southern Rhodesia of 1916 N3/17/2.
Legal Age of Majority Act, No 15 of 1982.

Marriage Act (Chapter 5: 11) of 1965.

Zimbabwe Customary Marriages Act (Chapter 5:07) of 1950.

Zimbabwe Matrimonial Causes Act (Chapter 5:13) of 1986

Constitution of Zimbabwe Amendment (No.20) Act, 2013.

International Human Rights Resources

United Nations. Convention on the Elimination of All Forms of Discrimination against Women. Adopted and opened for signature, ratification and accession by General Assembly Resolution 34/180 of 18 December 1979. Entry into Force 3 September 1981

United Nations. Declaration on the Elimination of Violence against Women. Adopted by General Assembly 20 December 1993. A/Res/48/104

Organisation of American States. The Inter-American Convention to Prevent, Punish and Eradicate Violence against Women. Adopted by the Organization of American States. 9 June 1994. 33 I.L.M. 1534 (Convention of Belém Do Parà)

United Nations. Nairobi Forward-Looking Strategies for the Advancement of Women. Adopted at World Conference to Review and Appraise the Achievements of the UN Decade for Women. Nairobi 1985

African Union. Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa. Adopted by the African Union. July 11, 2003 (Maputo Protocol).

United Nations Human Rights Council. Report of the Special Rapporteur on violence against women, its causes and consequences on her mission to the Sudan. 18 April 2016. A/HRC/32/42/Add.1

United Nations Human Rights Council. Report of the Special Rapporteur on violence against women, its causes and consequences on her mission to India. 1 April 2014. A/HRC/26/38/Add.1

United Nations Human Rights Council. Report of the Special Rapporteur on violence against women, its causes and consequences on her mission to Algeria. 13 February 2008. A/HRC/7/6/Add.2

European Parliament. Resolution on Violence against Women. Eur. Parl. Doc. A2-44/86. OJ No C 176/73. 4.7.1986

United Nations Committee on the Elimination of Discrimination Against Women. General Recommendation No. 19. U.N.Doc. A/47/38. 1992

UN Human Rights Council (2014) Report of the Special Rapporteur on Violence against Women, Rashida Manjoo UN Doc A/HRC/26/38

United Nations. General Recommendation No.35 on gender-based violence against women, updating General Recommendation No. 19 (July 2017)

UNICEF Briefing Note on Harmful Traditional Practices (2015)

CEDAW General Recommendation No. 14 on Female Circumcision (1990).

Addendum to the Human Right Council Thematic report of the Special Rapporteur on Violence, its Causes and Consequences (A/HRC/29/27)

Report of the Special Rapporteur on violence against women, its causes and consequences on the adequacy of the international legal framework on violence against women A/72/34

Resolution E/RES/445 C [XIV]

Final Declaration of The Regional Meeting For Asia Of The World Conference On Human Rights (1993)

United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI

The Universal Declaration of Human Rights, 1948, (hereafter UDHR)

CEDAW ‘General Recommendation No. 35: Updating General Recommendation No. 19’ no. 12, July (2017)

UN General Assembly. (2017). Report of the Special Rapporteur on Violence against Women, Dubravka Simonovic. UN Doc. A/73/134

The report of the Special Rapporteur in the field of cultural rights, Farida Shaheed, in accordance with Human Rights Council resolution 19/6 (2012) A/67/287

Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights resolution 2002/52, International, regional and national developments in the area of violence against women 1994-2003 E/CN.4/2003/75/Add.1

Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo submitted in accordance with Assembly Resolution 67/144, Violence Against Women, its Causes and Consequences 1 September 2014, A/69/368

Report of the Special Rapporteur on violence against women, its causes and consequences, Dubravka Simonovic submitted in accordance with Assembly Resolution 69/147, Modalities for the establishment of femicide /gender-related killings watch, 23 September 2016, A/71/398

Chapter V Rules of Procedure of the Committee on the Elimination of Discrimination Against Women

Report of the Committee on the Elimination of Discrimination Against Women to the General Assembly's Fourteenth Session (1995) A/50/38

Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights.

UN General Assembly *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others* 2 December 1949, A/RES/317.

Universal Declaration of Human Rights, General Assembly Resolution 217A (III) U.N GAOR 3 Session, UN Doc. A/810.

General Assembly Resolutions 61/143 (2007) A/RES/61/143 and 62/133 (2008) A/RES/62/133.

UN Security Council, *Security Council resolution 1325 (2000) [on women and peace and security]*, 31 October 2000, S/RES/1325 (2000).

UN Security Council, *Security Council resolution 1820 (2008) [on acts of sexual violence against civilians in armed conflicts]*, 19 June 2008, S/RES/1820 (2008), at Para 4.

UN Security Council, *Security Council resolution 1960 (2010) [on women and peace and security]*, 16 December 2010, S/RES/1960(2010).

UN Commission on Human Rights, *Question of integrating the rights of women into the human rights mechanisms of the United Nations and the elimination of violence against women*, 4 March.1994, E/CN.4/RES/1994/45, available at *https://www.refworld.org/docid/3b00f47f4.html* accessed on 2 March 2020.

UN Commission on Human Rights, *Commission on Human Rights Resolution 2003/45: Elimination of Violence against Women*, 23 April 2003, E/CN.4/RES/2003/45, available at *https://www.refworld.org/docid/43f3133b0.html* accessed on 2 March 2020.

Special Rapporteur on violence against women, its causes and consequences, OHCHR, *https://www.ohchr.org/en/issues/women/srwomen/pages/srwomenindex.aspx* accessed on 16 April 2020.

Human Rights Council Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo (2015) Document A/HRC/29/27

Combined third and fourth periodic report to the CEDAW Committee, Kenya CEDAW//C/KEN/3-4 at 38.

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa Resolution AHG/Res.240 (XXXI).

Sixth periodic Report to the CEDAW Committee by Kenya CEDAW/C/KEN/6.

Concluding observations of the Committee on the Elimination of Discrimination Against Women CEDAW/KEN/CO/6.

Concluding observations of the Committee on the Elimination of Discrimination against Women CEDAW/C/KEN/CO/7.

Concluding observations on the eighth periodic report of Kenya CEDAW/C/KEN/8.

UN Commission on Human Rights, *Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights resolution 2001/49: Cultural practices in the family that*

are violent towards women, 31 January 2002, E/CN.4/2002/83, available at *https://www.refworld.org/docid/3d6ce3cc0.html* accessed on 1 March 2020.

UN Human Rights Council, *Report of the Special Rapporteur on violence against women, its causes and consequences, Addendum: Mission to India*, 1 April 2014, A/HRC/26/38/Add.1, available at *https://www.refworld.org/docid/53982c3e4.html* accessed on 1 March 2020.

Preliminary report submitted by the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, in accordance with Commission on Human Rights resolution 1994/45 E/CN.4/1995/42.

UN Human Rights Council, UN Human Rights Council: Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences on Intersections between Culture and Violence against Women, 17 January 2007, A/HRC/4/34 at para 19.

General Assembly Thematic Report of the UN Special Rapporteur on Violence Against Women, its causes and consequences, Rashida Manjoo (2012) A/HRC/20/16 at para 14.

General Assembly Report of the UN Special Rapporteur on Violence Against Women, its causes and consequences, Dubravka Simonovic (2016) A/71/398.

Femicide Watch Call 2020 by the Special rapporteur on Violence Against Women, its causes and consequences, Dubravka Simonovic available at *https://www.ohchr.org/EN/Issues/Women/SRWomen/Pages/FemicideWatchCall2020.aspx.*

Report of the Special Rapporteur on Violence Against Women, its causes and conseques to the Human Rights Council 41st Session on Violence Against Women, its causes and Consequences 2019, A/HRC/41/42 at Para 101 (a) available at *https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/178/31/PDF/G1917831.pdf?OpenElement* .

UN General Assembly *Domestic violence: resolution / adopted by the General Assembly* 29 November 1985, A/RES/40/36.

United Nations Vienna Declaration and Programme of Action, U.N. GABOR, World Conf. on Hum. Rts., 40th Sess., 22nd plen. mtg., part I, 5, U.N. Doc. A/CONF.157/24 (1993).

Office of the High Commissioner for Human Rights 'Fact Sheet No.23 on Harmful Traditional Practices affecting the health of women and children' (1995) Available at *https://www.refworld.org/docid/479477410.html* accessed on 18 September 2019.

Report of the Committee on the Elimination of Discrimination against Women: General Recommendation No. 19 (11h Session 1992), UN GAOR, 47th Session, UN Doc. A/47/38 (1992).

CSW42 Agreed Conclusions (I) United Nations, March 1998.

CSW51 Agreed Conclusions United Nations, March 2007.

UN Committee Against Torture (CAT), General comment no. 3, 2012 : Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment : implementation of article 14 by States parties, 13 December 2012.

UN General Assembly, Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, 7 November 1962; International Labour Organization (ILO), Equal Remuneration Convention, 29 June 1951.

Council of Europe, The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence.

Inter-American Commission on Human Rights Thematic Report 'Violence and Discrmination against women and girls in Latin America and the Carribean' (2019) OAS. Official records; OEA/Ser.L/V/II.

Report on Mexico produced by the Committee on the Elimination of Discrimination against Women under Article 8 of the Optional Protocol of the Convention, and reply from the Government of Mexico, CEDAW/C/2005/OP.8/MEXICO, 27 January 2005.

Report On The Situation Of Human Rights In Brazil Chapter VIII The Human Rights Of Brazilian Women available at *http://cidh.org/countryrep/brazil-eng/chaper%208.htm*; Report Of The Inter-American Commission On Human Rights On The Status Of Women In The Americas OEA/Ser.L/V/II.100 available at *http://www.cidh.org/countryrep/Mujeres98-en/TableofContents.htm*

Chapter IV of the United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI available at *https://www.un.org/en/charter-united-nations/index.html* .

United Nations Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia, International Court of Justice (ICJ), 21 June 1971.

United Nations Economic and Social Council Resolution 1991/18.

ED3E5360C8FD6D896051F8A4AC5692DD?sequence=1.

CSW64 Political declaration on the occasion of the twenty-fifth anniversary of the Fourth World Conference on Women, E/CN.6/2020/L.1 available at *https://undocs.org/en/E/CN.6/2020/L.1*.

United Nations, Statute of the International Court of Justice, 18 April 1946.

Report of the Committee on the Elimination of Discrimination against Women: General Recommendation No. 12 (8th Session 1989), UN GAOR, 44 Sess., UN Doc. A/44/38 (1992).

United Nations ECOSOC, Efforts to Eradicate Violence Against Women within the Family and Society E/RES/1988/27.

United Nations Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendation No. 12: Violence against women*, 1989.

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

Report of the Committee on the Elimination of Discrimination against Women: General Recommendation No. 19 (11h Session 1992), UN GAOR, 47th Session, UN Doc. A/47/38 (1992).

OHCHR Launch of CEDAW General Recommendation No. 35 on gender-based violence against women, updating General Recommendation No. 19 available at *https://www.ohchr.org/en/hrbodies/cedaw/pages/gr35.aspx#:~:text=35%20on%20gender%2Dbased%20violence,Committee)%20adopted%20General%20Recommendation%20No.*

Questions Relating to the Obligation to Prosecute or Extradite (*Belgium v. Senegal*), Judgment of 20 July 2012, ICJ Reports 2012.

CEDAW 'Concluding observations of the Committee on the Elimination of Discrimination against Women: Zimbabwe' (2012) *CEDAW/C/ZWE/CO/2-5*.

Organization of American States (OAS), *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women ("Convention of Belem do Para")*, 9 June 1994.

Initial report of state party Zimbabwe CEDAW/C/ZWE/1.

Report of the Committee on the Elimination of Discrimination Against Women to the General Assembly A/53/38/Rev.1. at Para 139.

Combined second to fifth periodic report of States parties, Zimbabwe CEDAW/C/ZWE/2-5.

Zimbabwe Civil Society's Shadow Report to the CEDAW Committee (2012) produced by Zimbabwean Women Lawyers Association.

Book Chapters, Books, Journal Articles and Other

A Aggarwal 'The pros and cons of a convention on the elimination of violence against women and girls' Statement read at 'Thinking Big: A Convention on Eliminating Violence Against Women and Girls' 57th session of Commission on the Status of Women (8 March 2013)

A Eid et al *Economic, Social and Cultural Rights* (1995) Martinus Nijhoff Dordrecht at 63-77.

Abidemi Fasanmi Sandra Ayivor 'Widows, Widowhood, and Society in Africa' (2019) *The Palgrave Handbook of African Women's Studies* Vol. 10.

A Brysk 'Violence against women: Law and its limits' (2017) *Deusto Journal of Human Rights* Vol 1 pp.145–73.

Acceptance statement by Cyril Ramaphosa on assuming the chair of the AU at the 33rd session of the AU Assembly, 9 February 2020, Addis Ababa, Ethiopia.

Adam Kuper *Wives for Cattle: Bride wealth and Marriage in Southern Africa* (1982) Routledge & Kegan Paul Ltd London at 3

Adam Kuper 'Traditions of kinship, marriage and bride wealth in southern Africa' (2016) *Anthropology Southern Africa* Vol. 39 No. 4 267-280.

Aisha K Gill 'Violence Against Women and the Need for International Law' in Rashida Manjoo & Jackie Jones (eds) *The Legal Protection of Women From Violence Normative Gaps in International Law* (2018) Routledge London.

Akira Iriye Petra Goedde William I Hitchcock *The Human Rights Revolution: An International History* (2012) Oxford University Press Oxford.

Alice Edwards ‘Violence against women as sex discrimination: Judging the jurisprudence of the United Nations treaty bodies’ (2008) *Texas Journal of Women and the Law* Vol 18 No. 1.

Alice Erh Soon Tay *Perceptions of cultural rights in the People’s Republic of China* in Unesco Publishing.

Amelie Oksenburg Rorty ‘Relativism, persons, and practices’ in Michael Krauscz *Relativism: Interpretation and confrontation* (1989) University of Notre Dame Notre Dame.

Amnesty International *It is in our hands-Stop Violence Against Women* (2004) London.

Andrea Bianchi, ‘Human Rights and the Magic of Jus Cogens’ (2008) *European Journal of International Law* Vol 19(3) pp. 91–508.

Aneeas S Chigwedere *Lobola-the pros and cons* (1982) Books for Africa, Harare.

Anita Heeren John B Jemmot III Joanne C Tyler Sonwabo Tshabe & Zolani Ngwane ‘Cattle for wives and extramarital trysts for husbands? Lobola, men and HIV/STD risk behavior in Southern Africa’ (2011) *Journal of Human Behaviour in the Social Environment* Vol 21 pp. 73-81.

Anne Ford (2002) cited in Liz Kelly, ‘Inside Outsiders’ (2005) *International Feminist Journal of Politics* Vol 7 No. 4 pp. 471-495.

Annika Rudman ‘Women’s access to regional justice as a fundamental element of the rule of law: The effect of the absence of a women’s rights committee on the enforcement of the African Women’s Protocol’ (2018) 18 *African Human Rights Law Journal* 319-345.

Anuradha Rao, International Women’s Rights Action Watch ‘Domestic Application of the Convention on the Elimination of all Forms of Discrimination against Women: Potential and actuality’ (2008) 29 *Women Living Under Muslim Law Dossiers*.

Ambreena S Manji ‘Imagining women’s legal world: Towards a feminist theory of legal pluralism in Africa’ (994) *Social and Legal Studies* 8.

Arthur Phillips Henry F Morris ‘Marriage Laws in Africa’ (2011) *Law Africa Publishing* LTD.

Banda Fareda ‘Women, Law and Human Rights in Southern Africa’ (2006) *Journal of Southern African Studies* Volume 32(1) 13-27.

Banda Fareda ‘Blazing a trail: The African Protocol on Women's Rights comes into force’ (2006) 50 *Journal of African Law* 74.

Banda Fareda ‘Global Standards: local values’ (2003) *International Journal of Law, Policy and the Family* 17.

Bawe Rosaline Ngunshi **‘**Breast Ironing: A harmful traditional practice in Cameroon’ (2011) Gender Empowerment and Development GeED.

Belsky J ‘Child maltreatment: An ecological integration’ (1980) 35 *American Psychiologist* 32-355.

Berhane Ras Work ‘The impact of harmful traditional practices on the girl child’ (2006) EGM/DVGC/2006/EP.4.

Bergen Wife rape: Understanding the response of survivors and service providers (1996) Sage Publications.

Borah P ‘Examining media content: A case study of newspaper coverage of dowry in India 1999-2006’ (2008) *Asian Journal of Communication* Vol. 18 No 4 pp 379-395.

Bourdillon 1987; J May *Zimbabwean women in Colonial and Customary Law* (1983).

Bronwyn Winter, Denise Thompson & Sheila Jeffreys ‘The UN Approach to Harmful Traditional Practices’ (2002) *International Feminist Journal of Politics* Vol 4:1 pp.72-94

Bronwyn Winter ‘Women, the Law and Cultural Relativism in France: The Case of Excision’ (1994) 19 No. 4 *Feminism and the Law* 939-974.

Cardigan J R ‘Woman-to-woman marriages: practices and benefits in Sub-Saharan Africa’ (1998) 29 *Journal of Comparative Family Studies*.

Carole Nagengast ‘Women, Individual Rights and Cultural Relativity: Power and Difference in Human Rights Debates’ (1998) Working Paper 266 University of New Mexico.

Colin Murray *Families Divided: The impact of Migrant Labor in Lesotho* (1981) Cambridge University Press Cambridge

Christina Bicchieri *The Grammar of Society: The nature and dynamics of social norms (2006)* Cambridge University Press Cambridge

Charlotte Bunch ‘Women’s rights as human rights: Toward a re-vision of human rights’ (1990) *Human Rights Quarterly* 12

Charity Manyeruke ‘The Pervasive Nature of Violence against Women in Zimbabwe: The case of electoral related victimisation’ (2011) 1:1 *Sacha Journal of Human Rights*

Charles Wendo ‘African women denounce bride price: Campaigners claim payment for wives damages sexual health and contributes to AIDS spread’ (2004) *The Lancet* Vol. 363

Christine Peta ‘The sacred institution of marriage: The case of disabled women in Zimbabwe’ (2017)

Cook Rebecca ‘Women’s International Human Rights Law: The Way Forward’ (1993) *Human Rights Quartely* Vol 15 No. 1 230-259.

Cook Rebecca J ‘State responsibility for violations of women’s human rights’ (1994) *Harvard Human Rights Journal* 125.

Cook Rebecca J ‘Enforcing Women’s Rights through Law’ (1995) Vol 3 No. 2 pp 8-15 at 8.

C Getecha J Chipika *Zimbabwe women's voices* (1995) Zimbabwe Women's Resource Centre and Network Harare.

Chuma Himonga & Craig Bosch 'The Application of African Customary Law under the Constitution of South Africa: Problems solved or just beginning?' (2000) *South African Law Journal* 117.

Chuma Himonga 'Some Aspects of the Zambian Marriage Act' (1979) *Zambia Law Journal* Vol 11 pp 23-44.

Chuma Himonga 'Breaking the Tie, Enduring Fragmentation and Reform beyond 2007: The Matrimonial Causes Law' (2008) *International Survey of Family Law* pp.495-524.

Coldham S 'Customary Marriages and Urban Courts in Zambia' (1990) *Journal of African Law* Vol 34 No. pp.67-75.

Coldham S 'The Status of Women in Zimbabwe: Veneria Magaya v. Nakayi Shonhiwa Magaya' (SC210/98) (1999) *Journal of African Law* Vol 43 No.2.

C Damiso J Stewart 'Zimbabwe and CEDAW Compliance: Pursuing Women's Equality in Fits and Starts' in A Hellum H S Aasen (eds) *Women's Human Rights: CEDAW in International, Regional and National Law* (2013) Cambridge University Press, Cambridge.

C Horne F N Dodoo & N Dodua Dodoo 'The shadow of indebtedness: Bridewealth and norms constraining female reproductive autonomy' (2013) 78 No. 3 *American Sociological Review* 503-520.

C J Zvobgo 'Aspects of interaction between Christianity and African culture in colonial Zimbabwe, 1893-1934' (1986) *Zambezia* Vol XIII (i)

C Murray 'The symbolism and politics of Bohali: Household Recruitment and Marriage by Instalment in Lesotho' in E J Krige & J L Comaroff *Essays on Africa Marriage in Southern Africa* (1981) Juta & Co Cape Town.

CRM Dlamini *Modern legal significance of* ilobolo *in Zulu society* (1984) at 148-149.

Dan K Kaye Florence Mirembe Anna Mia Ekstrom, Grace Bantebya Kyomuhendo & Annika Johansson 'Implications of bride price on domestic violence and reproductive health in Wakiso District, Uganda' (2005) *African Health Sciences* Vol.5 No. 4

Danai Chirawu 'Understanding the current legal position of lobola in Zimbabwe' (2020) available at *http://kubatana.net/2020/06/15/understanding-the-current-legal-position-on-lobola-in-zimbabwe/* accessed on 20 July 2020.

Danwood Mzikenge Chirwa 'Reclaiming (Wo) manity: The merits and demerits of the African protocol on women's rights' (2006) 53:1 *Netherlands International Law Review*.

David Hume *An Enquiry Concerning the Priciples of Morals* (1998) Oxford University Press Oxford.

Dean G Kilpatrick 'What Is Violence Against Women? Defining and Measuring the Problem' (2004) 19 No. 11 *Journal Of Interpersonal Violence* 209-1234.

Deborah James *Money from nothing: Indebtedness and aspiration in South Africa* (2015) Stanford University Press Stanford.

Dekker, M., and Hans H. 'Bridewealth and Household Security in Rural Zimbabwe.' (2002) *Journal of African Economics* 11(1) pp.114–45.

Diane Jeater *Marriage, Perversion and Power: The construction of moral discourse in Southern Rhodesia 1894-1930* (1993) Clarendon Press.

Diana Ayton-Shenker 'The Challenge of Human Rights and Cultural Diversity, United Nations Background Note' available at *http://www.un.org/rights/dpi1627e.htm* accessed on the 7 of February 2019.

Dominique Meekers 'The Noble Custom of Roora: The Marriage Practices of the Shona of Zimbabwe' (1993) *Ethnology* Vol 32 No. 1 pp. 35-54

Dorcas Corker-Appiah 'The CEDAW Convention and Harmful Practices Against Women: The Work of The Cedaw Committee' (2009) Expert Paper

E Chireshe, R Chireshe 'Lobola: The perceptions of Great Zimbabwe University Students' (2010) *The Journal of Pan African Studies* Vol 3 No.9 1-11.

Edd Lee & Marco Vivarelli 'The social impact of globalization in the developing countries' (2006) *International Labour Review* 145 No. 3 at 167-183.

Edleson J & R M Tolman *Intervention of men who batter: An ecological approach* (1992) Sage Newbury Park, CA.

Edward Tylor *Primitive Culture: Researches into the Development of mythology, Philosophy, Religion, language, Art, and Custom* (1903) John Murray, London

Edward Said *Orientalism* (1978) Routledge & Kegan Paul: London.

Ekaterina Yahyaoui Krivenko 'The Role and Impact of Soft Law on the Emergence of the Prohibition of Violence Against Women within the Context of CEDAW' in Stephanie Lagouette Thomas Gammeltoft-Hansen & John Cerone *Tracing the Roles of Soft Law in Human Rights* (Eds) (2016) Oxford University Press; Oxford.

Elliot Klein, Elizabeth Helzner, Michelle Shayowitz, Stephan Kohlhoff, Tamar A. Smith-Norowitz, 'Female Genital Mutilation: Health Consequences and Complications—A Short Literature Review' (2018) *Obstetrics and Gynecology International* Vol. 1

Elisavett Stamatopolou *Women's Rights and the United Nations* (1995) 1 Edition Routledge London

Elizabeth Evatt 'Finding a voice for women's rights: The early days of CEDAW' (2002) *George Washington International Law Review* 34.

Elizabeth Prevost 'On Feminists, Functionalists, and Friends: Lobola and the Gender Politics of Imperial Trusteeship in Interwar Britain' (2017) *The Journal of Modern History* 89, no. 3 562–600.

Elizabeth Schmidt Peasants Traders and Wives: Shona women in the history of Zimbabwe, 1870-1939 (1992) Heinman Portsmouth.

Elmadmad Khadija quoted in Benedek W and Heinz W, eds. *Regional Systems of Human Rights in Africa, America and Europe: Proceedings of the Conference* (1992) Brussels, Friedrich Naumann Foundation.

Emile Durkheim, Steven Lukes, W D Halls *The Rules of the Sociological Method* (1982) The Free Press: New York.

E O Wahab, S O Odunsi, and O Ajiboye 'Causes and Consequences of Rapid Erosion of Cultural Values in a Traditional African Society' (2012) *Journal of Anthropology*.

Esther Mugweni, Stephen Pearson and Mayeh Omar 'Traditional gender roles, forced sex and HIV in Zimbabwean marriages (2012) *Culture, Health and Sexuality* Vol 15 (5) pp 577-590.

Erika De Wett 'The Prohibition of Torture as an International Norm of Jus Cogens and Its Implications for National and Customary Law' (2004) *EJIL* Vol. 50 No. 1 pp 97-121.

Evans T 'If Democracy: Then Human Rights?' (2001) *Third World Quarterly* Vol 22.

E Moore C Himonga *Living customary law and families in South Africa* (2018) available at *http://www.ci.uct.ac.za/sites/default/files/image_tool/images/367/Child_Gauge/South_African_Child_Gauge_2018/Chapters/living%20customary%20law%20and%20families%20in%20South%20Africa.pdf* .

Fares B,' Ird', in *Supplement to the Encyclopaedia of Islam* (1938) Leiden pp. 96-97.

Fionnuala N I Aolain *What Feminist Legal Theory Teaches International Human Rights* (n.d) Transitional Justice Institute: University of Ulster.

Frantz Fanon *The Wretched of the Earth* (1963) Grove Press New York.

Franz Viljoen (ed.) *Beyond the Law: Multidisciplinary perspectives on human rights* (2012).

Franz Christian Ebert Romina I Sijinienský *Preventing Violations of the Right to Life in the Eiropean and Inter-American Human Rights Systems: From the Osman Test to a Coherent Doctrine on Risk Prevention* (2015) University of Oxford Press.

Gayle Binion ‘Human Rights: A Feminist Perspective’ (1995) *Human Rights Quarterly* Vol. 17 pp. 509-526.

George William Mugwanya ‘Realizing Universal Human Rights Norms through Regional Human Rights Mechanisms: Reinvigorating the African system’ (2000) 35 *International & Comparative Law Review*.

Gender Links *Gender Violence: A reality in South Africa* (2012).

Gill Hague, Ravi Thiara & Atuki Turner ‘Bride price and its links to domestic violence in Uganda: A participatory action research study’ (2011) *Women Studies International Forum* Vol 34 pp. 550-561.

Gill Hague, Ravi Thiara and MIFUMI *Bride-Price, Poverty and Domestic Violence in Uganda* (2009) MIFUMI Uganda Violence Against Women Research Group, University of Bristol, UK Centre for the Study of Safety and Well-being, University of Warwick, UK.

Harris-Short, Sonia ‘International Human Rights Law: Imperialist, Inept and Ineffective? Cultural Relativism and the UN Convention on the Rights of the Child’ (2003) 25 *Human Rights Quarterly* 131.

Hee Sun Park ‘Relationships among attitudes and subjective norms: Testing the theory of reasoned action across cultures’ (2000) 5 No. 2 *Communication Studies* pp.162-175.

Henrik Bohlin ‘Universal Moral Standards and the Problem of Cultural Relativism in Hume’s “A Dialogue”’ (2013) 88 *Royal instate of Philosophy*.

Heleta S ‘Decolonisation of higher education: Dismantling epistemic violence and Eurocentrism in South Africa’ (2016) *Transformation in Higher Education* Vol 1(1).

Henrich Popitz ‘Social Norms’ (2017) *Genocide Studies and Prevention* Vol 11 (2) pp 3-12.

Henrietta Moore ‘The Problem of Explaining Violence in the Social Sciences’ in *Sex and Violence Issues in Representation Experience* (1994) Penelope Harvey & Peter Gow eds.

Heyns Christof ‘The African Regional Human Rights System: The African Charter’ (2004) *Pennsylvania State Law Review* Vol 108.

Hilary Charlesworth ‘The Mid-Life Crisis of the Universal Declaration of Human Rights’ (1998) *Washington & Lee Law Review*.

Homi K Bhabha ‘The Other Question’ (1983) *Screen* Volume 24 (6) pp. 18–36.

I Azjen and M Fishbein *Understanding attitudes and predicting social behaviours* (1980) Prentice-Hall New Jersey.

Israel Frances Raday Culture, Religion, and CEDAW’s Article 5 (A).

J Oloka-Onyango ‘Human Rights and Sustainable Development in Contemporary Africa: A New dawn or retreating Horizons?’ (2000) *Human Rights Law Review* 39.

Jack Donnelly *Universal Human Rights in Theory and Practice* (2013) Cornell University Press.
Jack Donnelly 'The relative universality of human rights' (2007) *Human Rights Quarterly* Vol 29 (2) pp. 281-306.
Jack Donnelly 'Cultural Relativism and Universal Human Rights' (1984) 6 *Human Rights Quarterly* 417.
James Clifford *The Predicament of Culture* (1988) Harvard University Press Cambridge.
James Clifford and George E Marcus *Writing Culture: The poetics and politics of ethnography* (1986) University of Carlifornia Press Berkeley.
Janet M Powers 'The Outsider's Gaze' in Katherine J Mayberry *Teaching What You're Not: Identity Politics in Higher Education* (1996) New York University Press.
Jane Cottingham and Esther Kizmodi 'Protecting girls and women from harmful practices affecting their health: Are we making progress' (2009) 106 *International Journal of Gynecology and Obstetrics* at 128. Also note that the World Health Organization estimates that over 200 million women and girls have undergone FGM.
Jeffrey Guy *Gender Oppression in Southern Africa's Pre-capitalist Societies* (1988) University of Natal, Department of African Studies, Local Government Project.
Jennifer L Ulrich 'Confronting Gender-Based Violence with International Instruments : Is a Solution to the Pandemic Within Reach ?' (2000) *Indiana Journal of Global Studies* 7 No. 2.
J G Smetana & N E Adler 'Fishbein's value x expectancy model: an examination of some assumptions' (1980) 6 *Personality and Psychology Bulletin* 86-96.
Joan Cocks 'The Violence of Structures and the Violence of Foundings' (2012) *New Political Science* Vol 34 No. 2 at pp 221-227.
Johan Galtung 'Violence, Peace, and Peace Research' (1969) *Journal of Peace Research* Vol 6(3).
Johan Galtung 'Cultural Violence' (1990) *Journal of Peace Research* Vol. 27 No. 3 pp 291-305.
John Breuilly 'Benedict Anderson's Imagined Communities: a symposium' (2016) *Nations and Nationalism* 22 (4) 625–659.
John Cerone 'A taxonomy of soft law: Stipulating a definition' in Lagouette, Gammeltoft-Hansen and Cerone (eds)
John Conley & William O'Barr, *Just Words: Law, Language and Power* (2005) University of Chicago Press.

John Holmwood ‘Functionalism and Its Critics’ in Austin Harrington (ed.) *Modern Social Theory: An Introduction* (2004) Oxford University Press.

John S Mill *On Liberty* (1859) Dover Publications United States.

John J Tilley ‘Cultural Relativism’ (2000) 22 No. 2 *Human Rights Quarterly* 501-547.

José L Gómez del Prado ‘The United Nations and the Promotion and Protection of the Rights of Women: How well has the organization fulfilled its responsibility?’ (1995) 2 Wm. & Mary J. Women & L.

Judith Singleton ‘The South African Sexual Offences Act and Local Meanings of Coercion and Consent in Kwazulu Natal: Universal Human Rights?’ (2012) *African Studies Review* 55 no. 2.

Judith Singleton ‘Marital Rape and the Law: The Condition of Black Township Women in South Africa’s Democracy’ in *Marital Rape: Consent, Marriage, and Social Change in Global Context* ed. Kersti Yllö and M Gabriela Torres (2016) Oxford; New York: Oxford University Press.

Julia Meryl Ekong *Bridewealth, Women and Reproduction in Sub-Saharan Africa: A Theoretical Overview* (1992) Holos Verlag Bonn.

Junod H A ‘The life of a South Africa’ (1912) *Tribe* Vol 1 Neuchatel: Imprimerie Attinger Freres.

Kasey L McCall Smith ‘Interpreting International Human Rights Standards: Treaty Body General Comments as a chisel and hammer’ in Stephanie Lagoutte, Thomas Gameltoft-Hansen, and John Cerone *Tracing the roles of soft law in human rights* (2016) Oxford University Press, Oxford.

Katharine T. Bartlett ‘Feminist Legal Methods’ (1990) *Harvard Law Review* Vol. 103.

Kenneth Waltz *Theory of International Politics* (1979) McGraw Hill.

Krug, E. G., Dahlberg, L. L., Mercy, J. A., Zwi, A. B.,&Lozano, R. (Eds) *World report on violence and health* (2002) World Health Organization Geneva, Switzerland.

Kushal Vibhute & Filipos Aynalem ‘Legal Research Methods: teaching Materials’ (2009).

K L Hoffman D H Demo & J N Edwards ‘Physical wife abuse in a non-western society: An integrated theoretica approach’ (1994) 56 *Journal of Marriage and the Family* 131-146.

Leach, E. R. ‘199. Polyandry, Inheritance and the Definition of Marriage.’ (1955) *Man* 55 pp. 182-86.

Lesala L Mofokeng ‘The lobolo agreement as the “silent” pre-requisite for the validity of a customary marriage in terms of the Recognition of Customary Marriages Act’ (2003) pp.279-281.

Lettie Vlopp ‘Blaming culture for bad behaviour’ (2000) *Yale Journal of Law and the Humanities* Vol 12.

Linda James Myers *The Deep Structure of Culture : Relevance of Traditional African Culture in Contemporary Life* (2018) Sage Publications, Inc.

Linguère Mously Mbaye & Natascha Wagner ‘Bride Price and Fertility Decisions: Evidence from Rural Senegal’ (2017) *The Journal of Development Studies* Vol. 53 No. 6 pp. 891–910.

Liz Kelly ‘Inside Outsiders’ (2005) *International Feminist Journal of Politics* Vol 7 No. 4 pp. 471-495.

Liz Kelly *VIP Guide: Vision, Innovation and Professionalism in Policing Violene Against Women and Children* (2000) Strasborg, Council of Europe.

Lori Heise ‘Violence against women: An integrated ecological framework’ (1998) 4 No 3 *Violence Against Women* Sage Publications.

Lowe Vaughan *International Law* (2007) Oxford University Press Oxford

L P Vorster MW Prinsloo GJ van Niekerk *Urbanites perceptions of Lobolo: Mamelodi and Atteridgeville* (2000) Centre for Indigenous Law University of South Africa.

Lydia Janhi ‘Roora and Marriage’ in Killef Clive & Peggy *Shona Customs* (1970) Mambo Press Gweru.

Makau wa Mutua ‘The African Human Rights System in a Comparative Perspective: The need for urgent reformulation’ (1992) 44 *Nairobi Law Monthly*.

Mahmood Mamdani ‘Political Identity, Citizenship and Ethnicity in Post-Colonial Africa’ (2005) Keynote address at Arusha Conference on ‘New Frontiers of Social Policy’.

Mwamwenda T S & Monyooe L S ‘Status of Bride wealth in an African Culture’ (1997) *The Journal of Social Psychology* No.137(2).

Manase Kudzai Chiweshe ‘Wives at the Market Place: The Commercialization of Lobola and Commodification of Women’s bodies in Zimbabwe’ (2016) *The Oriental Anthropologist* Vol 16 No. 2 pp229-243.

Manjoo Rashida ‘The Continuum of Violence Against Women and the Challenges of effective Redress’ (2012) *International Human Rights Law Review* 1-29.

Manjoo Rashisa ‘Twenty Years of Normativity without Legality – United Nations Developments on Violence against Women, its Causes and Consequences’ (2016) *QMHRR* 3(1).

Manjoo Rashida ‘Normative Developments on Violence Against Women in the United Nations System’ in Rashida Manjoo & Jackie Jones (eds) *The Legal Protection of Women from Violence Normative Gaps in International Law* (2018) Routledge New York.

Manjoo Rashida & Nekura Ruth 'Does Africa need a regional treaty on violence against women? A comparative analysis of normative standards in three regional human rights systems' in N Luwaya, R Manjoo, J Omar *Violence Against Women: Law Policy and Practice* (2020) Juta Cape Town.

Marc D Hauser *Moral minds: How nature designed our universal sense of right and wrong* (2006) Ecco/Harper Collins New York.

Martha Finnemore 'Are legal norms distinctive?' (2000) *NYU Journal of International Law and Politics*.

Martha Finnemore & Kathryn Sikkink 'International norm dynamics and political change' (1998) *International Organization* Vol 50 No 4.

Martha Finnemore 'Norms, culture, and world politics: Insights from sociology's institutionalism' (1996) *The MIT Press* Vol 50 No 2 pp 325-347.

Max Weber *Political Writings* (1994) Cambridge University Press.

Matembe M '*The relationship between domestic violence and bride price'* (2004) paper presented at the *International Bride Price Conference* in 2004.

Mazarella William 'Culture, Globalization, Mediation' (2004) 33 *Annual Review of Anthropology* 345-367.

Meiraf Girma 'Violence Against Women: inadequate Remedies under CEDAW' (2009) *Mizan Law Review* Vol 3 No. 2 pp 351-357.

Michael Foucault The History of Sexuality: Volume 1, An Introduction (1978) New York: Vintage.

Michael F Brown 'Cultural Reativism 2.0' (2008) 49 No. 3 *Current Anthropology* 363-383.

Mikateko Joyce Maluleke 'Culture, Tradition, Custom, Law and Gender Equality' (2012) 15 No 1 *P.E.R* 1-22.

Morris Kiwinda Mbondenyi *International Human Rights and Their Enforcement in Africa* (2011).

Morris Kiwinda Mbondenyi 'Invigorating the African System on Human and Peoples' Rights through institutional mainstreaming and rationalization' (2009) *Netherlands Quarterly of Human Rights* Vol. 27/4, 451–483.

Morissanda Kouyate 'Harmful traditional practices against women and legislation' (2009) *United Nations Division for the Advancement of Women: Expert group meeting on good practices in legislation to address harmful practices against women EGM/GPLHP/2009/EP.07*.

Moreau S 'What is discrimination?' (2010) *Philos Public Aff* Vol 38 pp. 143–179.

M Benedicte-Dembour ‘What are human rights: Four schools of thought’ (2010) *Human Rights Quarterly by The Johns Hopkins University Press* Vol 32 (1) pp. 1-20.

M Gelfand *African Background: The traditional culture of the Shona speaking people* (1965) Cape Town.

M Bourdillion *The Shona Peoples: An Ethnography of the Contemporary Shona with special reference to the religion* (1987) Gweru.

MP Mbarara and Pan African Parliamentarian Kampala Uganda, Oguli Oumo ‘*Bride Price and Violence Against Women: the Case of Uganda’* (2004) Paper presented at the *International Bride Price Conference*, February, Kampala, Uganda.

M Nzomo ‘The Status of Women’s Human Rights in Kenya and Strategies to overcome inequalities’ (1994) *A Journal of Opinion* Vol 22 No. 2 published by Cambridge University Press.

Nesrin Varol Ian S Fraser Cecilia H M Guyo Jadelsa & John Hall ‘Female genital mutilation/cutting-towards abandonment of a harmful cultural practice’ (2014) 54 *Australian and New Zealand Journal of Obstetrics and Gynaecology* at 400-405.

Niamh Reilly *Women’s Human Rights: Seeking gender justice in a globalising age* (2009.

Nicola Ansell ‘Because it is our Culture! Renegotiating the meaning of lobola in Southern African Secondary Schools’ (2001) *Journal of Southern African Studies Volume* 27 (4).

Nobles, W ‘Extended self: re-thinking the so-called Negro self-concept’ in R. Jones (ed.) *Black Psychology* (2nd ed.) (1980) New York: Harper & Row.

NM Ngema ‘Considering the abolition of *Ilobolo*: *Quo Vadis* South Africa?’ (2012) *South African Legal Information Institute (SAFLII)*.

Norman Chivasa ‘Kuripa Ngozi as a conflict resolution model in Shona communities of Zimbabwe: a conceptual analysis’ (2018) *Taylor and Francis Online*.

Nsibirwa Martin Semalulu ‘A Brief Analysis of the Draft Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women’ (2001) *African Human Rights Law Journal* Vol 1 No. 1.

Nsongurua J Udombana ‘Toward the African Court on Human and Peoples’ Rights: Better Later than Never’ (2000) *Yale Human Rights and Development Law Journal* Vol 3 pp. 45-111.

Nwadinobi E A, Juaristi F R, Pisklakova-Parker M, Aldosari H, Khana M, Aebehard-Hodges J ‘Safer Sooner: Toward a Global Binding Norm to End Violence Against Women and Girls’ Every Woman Treaty.

Olubanke Akintunde Dorcas ‘Female Genital Mutilation: A Socio-Cultural Gang Up Against Womanhood’ (2010) *Feminist Theology* 18 (2) pp. 192–205

Osuna M ‘The Mifumi Project Domestic Violence and Bride Price Referendum Project Baseline Survey Report: Attitudes to Bride price and its links to domestic violence and human rights abuse’ (2003) Tororo District, Uganda.

Patrick Harries ‘Kinship, Ideology and the nature of Pre-Colonial Labor Migration’ in Marks and Rathbone (eds.) *Industrialization and social change* (1982) London.

Phillip Alston & Ryan Goodman *International Human Rights: The successor to International Human Rights in Context; Law Politics and Morals* (2013) Oxford University Press Oxford.

Prakashnee Govender ‘The Status of Women Married in Terms of African Customary Law: A study of women’s experiences in the Eastern Cape and Western Cape Provinces*’* (2000).

Radolfo Stavenhagen ‘Cultural Rights: A Social Science Perspective’ in Institute of Art and Law *Cultural Rights and Wrongs* (2002) Unesco Publishing United Kingdom.

Ramona Vijayarasa CEDAW’s General Recommendation No. 35: A quarter of a century of evolutionary approaches to violence against women (2020) *Journal of Human Rights* Vol 19 No. 2 pp. 153-167.

Richard J Bernstein *Beyond Objectivism and Relativism: Science, Hermeneutics, and Praxis* (1983) University of Pennsylvania Press Pennsylvania.

Rivera Francisco *The Inter-American Human Rights system and Violence against Women International Human Rights Clinic at* Santa Clara Law School (May 2015) available at *http:// law.scu.edu/wp-content/uploads/150602-Santa-Clara-VAW- IAHRS-Report-FINAL.pdf.*

R Linton *Present World Conditions in Cultural Perspective* (1945) Columbia University Press, New York.

Robert Nisbet History of the Idea of Progress (1980).

Robert X D Hawkins Noha D Goodman & Robert L Goldstone ‘The emergence of social norms and conventions’ (2019) *Trends in Cognitive Sciences* Vol 23 (2).

Rosa M Celorio ‘The Rights of Women in the Inter-American System of Human Rights: Current Opportunities and Challenges in Standard-Setting’ (2011) *University of Miami Law Review* Vol. 65.

R. R. Reiter ‘Towards an Anthropology of Women’ (1975) *Monthly Review Press* London & New York.

Sally Engle Merry ‘Human Rights Law and the Demonization of Culture (And Anthropology Along the Way)’ (2003) 26 No. 1 *PoLAR.*

Sally Engle Merry *Human rights and gender violence: translating international law into local justice* (2006) University of Chicago Press, Chicago.

Sally Ewing 'Formal justice and the spirit of capitalism: Max Weber's sociology of law' (1987) *Law & Society Review* Vol 21 No. 3 pp 487-512.

Saltzman L (Ed.) 'Building data systems for monitoring and responding to violence against women, Part I' (2000a) *6* No. 7 *Violence Against Women* 699-804.

Strauss M A, R J Gelles & S K Steinmets *Behind closed doors: Violence in the American Family* (1980) Doubleday Anchor New York.

Stephanie Lawson *Theories of International Relations: Contending Approaches to World Politics* (2015) Polity Press Oxford.

Steven Ratner 'Does International Law Matter in Preventing Ethnic Conflict?' (2000) *NYU Journal of International Law & Politics* 32.

S A McConahay & J B McConahay 'Sexual permissiveness , sex role rigidity and violence across cultures' (1977) 33 *Journal of Social Issues* at 134-143.

S Menken M Keestra *An introduction to interdisciplinary research: theory and practice* (2016) Asterdam University Press Amsterdam.

SM Stith & S D Farley 'A predictive model of male spousal violence' (1994) 8 *Journal of Family Violence* at 183-201.

S Moyn 'Imperialism, Self Determination, and the rise of Human Rights' in Iriye Goedde & Hitchcock (2012).

S Nkosi *Lobola: Black students' perceptions of its role on gender power dynamics* (Unpublished Master's Thesis, University of Witwatersrand, 2011).

S N Eisenstadt 'Multiple Modernities' (2000) *Daedalus* 129 no. 1 pp. 1-29.

The Herald Zimbabwe '84pc of Zim marriages unregistered' available at *https://www.herald.co.zw/84pc-of-zim-marriages-unregistered/* accessed on 1 August 2019.

The Women's Watch: Two steps back: Customary Law and the Zimbabwe Constitution Vol 12 Nos. ¾, Vol 13 No.1.

Tendai Mangena & Sambulo Ndlovu 'Implications and complications of bride price payment among the Shona and Ndebele of Zimbabwe' (2013) *International Journal of Asian Social Science* Vol. 3 No. 2 pp 472-481.

Tchoukou J A 'Introducing the Practice of Breast Ironing as a Human Rights Issue in Cameroon' (2014) *J Civil Legal Sci* Vol 3.

T W Bennet A sourcebook of African customary law for Southern Africa (1991) Juta Cape Town.

TW Bennet & J Strug *Introduction to International Law* (2013) Juta & Co. Ltd Cape Town.

Victoria Bronstein 'Reconceptualising the customary law debate in South Africa' (1998) *South African Journal on Human Rights* 14.

Wanjiru Kareithi M 'A Historical-Legal Analysis of Woman-To-Woman Marriage In Kenya' (2018) Doctoral Thesis University of Pretoria.

Welshman Ncube 'The decision in Katekwe v. Muchabaiwa: A Critique' (1984) *Zimbabwe Law Review* Vol 1 & 2 pp. 217-228.

Wieringa S 'Women marriages and other same-sex practices: Historical reflections on African women's same-sex relations' in R Morgan & S Wieringa (Eds.) *Tommy boys, lesbian men and ancestral wives: Female same-sex practices in Africa* (2005) Jacana Media Johannesburg.

Women and Law in Southern Africa *Lobola: Its Implications for Women's reproductive rights* (2002) Weaver Press Harare.

World Bank Group 'Women Business and the Law: Closing the Gap—Improving Laws Protecting Women From Violence' (2018) available at *http://pubdocs.worldbank.org/en/349811519938655769/Topic-Note-Protecting-Women-from-Violence-EN.pdf* accessed on 5th May 2019.

World Bank Group 'Women Business and the Law: Factsheet Protecting Women from Violence' (2018) available at *http://pubdocs.worldbank.org/en/289441522241133897/WBL-fact-sheet-protecting-women-from-violence-FINAL-PDF.pdf* accessed on 5th May 2019.

Zvobgo C J M *A history of Christian Missions in Zimbabwe* (1996) Mambo Press Gweru.

Uganda Association of Lawyers *FIDA-U A Research Project on Marriage, its Rights and Duties and Marital Rape* (1996) Paper 4.

Kenya Demographic and Health Survey 2014 available at *https://dhsprogram.com/pubs/pdf/FR308/FR308.pdf* accessed on 7th May 2019.

UNWOMEN 'Facts and Figure: Violence Against Women' available at *http://www.unwomen.org/en/what-we-do/ending-violence-against-women/facts-and-figures#notes* accessed on 20 August 2019.

Statistics from UNWOMEN Facts and figures: Ending violence against women available at *https://www.unwomen.org/en/what-wedo/ending-violence-against-women/facts-and-figures* accessed on 27th February 2020.

World Health Organisation *Global and regional estimates of violence against women: prevalence and health effects of intimate partner violence and non-partner sexual violence* (2013) World Health Organisation at 16 available at *https://apps.who.int/iris/bitstream/handle/10665/85239/9789241564625_eng.pdf;jsessionid=*

Mifumi website available at *https://mifumi.org/bride-price-campaign-reports*; Prevent Gender Based Violence Africa Organisation available at *https://preventgbvafrica.org/understanding-vaw/vaw-resources/*.

https://metoomvmt.org/get-to-know-us/history-inception/ for more detail on the inception and progress of the #MeToo movement.

https://aminext.news24.com/ to get more details on this South African movement against the killing of women in the country.