

UNIVERSITY OF CAPE TOWN



**CHILDREN'S RIGHTS AND GIRL CHILD MARRIAGES: A
CASE STUDY FOR MALAWI.**

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Declaration

I, Theodora Talumba Mkali, 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.

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This minor dissertation is a reflection of my prime ambition: To be part of the conversation of exploring ways to better the lives of the girl children in Malawi through human rights law. This work could not have been possible without the guidance of the Almighty God, from whom all knowledge and wisdom stems from.

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Dedication

Carissime memoriae Mary Wani.

Abstract

The harmful traditional practice of child marriage remains one of the main challenges towards the full realization and enjoyment of children's rights in Africa. In the sub-Saharan Africa alone, countries such as Malawi are faced with the problem of child marriage where as high as 40% of the women are married as children. Malawi has a substantive legal framework that affords protection and prohibits the harmful practice of child marriage. However, child marriages remain prevalent in Malawi where harmonisation of the laws is problematic. This has the effect of robbing the girl child of her childhood, access education and health among other rights that she is entitled. Addressing this problem in Malawi as a matter of urgency is crucial for the promotion, protection and realisation of children's rights, especially to the girl child.

This study therefore conducts an analysis of the legal framework and contextual practice of child marriage in Malawi based on desk research of various laws in Malawi and literature. This analysis is premised on the understanding that human rights law within a legal framework plays a major role towards ensuring that young girls are protected from child marriage and its attendant consequences.

This study has found that the laws of Malawi are not synchronised with each other especially with the Malawi Constitution with regard to protecting the rights. The case in point for instance is the recent passing of the Marriage, Divorce and Family Relations Act which reflects international and regional human rights standards, but is inconsistent with the Constitution of Malawi. It is recommended that Malawi should through the law address the practice of child marriage by amending the Constitution to remove any ambiguities. In this regard, creating a protective legal framework must not be done in vain. This should be supported by effective implementation of national development plans that aim to realise the rights of children, especially the girl child.

Acronyms

ACERWC	African Committee of Experts on the Rights and Welfare of the Child
ACRWC	African Charter on the Rights and Welfare of the Child
CEDAW	Convention on the Elimination of all Forms of Discrimination against Women
CRA	Child Rights Act
CRC	Convention on the Rights of the Child
CSO	Civil Society Organisations
FGM	Female Genital Mutilation
HRC	Human Rights Council
ICCPR	International Convention on Civil and Political Rights
ICESCR	International Convention on Economic Social and Cultural Rights
MGDS II	Malawi Growth and Development Strategy II
MHRC	Malawi Human Rights Commission
NGES	National Girls Education Strategy
NGOs	Non-governmental organisations
OHCHR	Office of the High Commissioner for Human Rights
SRHR	Sexual and Reproductive Health and Rights
UNFPA	United Nations Population Fund
UDHR	Universal Declaration of Human Rights

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CHAPTER ONE

INTRODUCTION

1.1 BACKGROUND AND PROBLEM STATEMENT

Child marriage represents one of several forms of harmful practices that are imposed on children, and has been rightly recognised as a serious children's rights violation.¹ Its prominent feature is that it involves a child whom by definition in the Convention on the Rights of the Child (CRC) is 'a person below the age of 18'.² Child marriage is thus defined as any formal or informal union or marriage where one or both parties are below the age of 18.³

Statistics suggest that child marriages are prevalent in the developing world. About 46% of girls in South Asia, 39% in Sub-Saharan Africa, 29% in Latin America and the Caribbean and 18% in the Middle East and North Africa are married off before they attain the age of 18.⁴ However, child marriages are also contracted in some communities in Europe and North America, though at a relatively lower rate and for different reasons.⁵ A study commissioned by the United Nations predicts that if the rates of child marriages increase, this will lead to more than 140 million girls becoming child brides by the year 2020.⁶ This is equivalent to 14 million child brides every year

¹ IKWRO 'End Child Marriage: Its Child Abuse' (October 10, 2013) < <http://ikwro.org.uk/2013/10/child-marriage-abuse/>> accessed 4, February 2015 para 1. Children also suffer from serious social problems that negatively impact their rights, such as poverty, homelessness, neglect, preventable diseases, unequal access to education and abuse in both industrialized and developing countries that many children are affected by; See UNICEF 'Protecting Children's Rights' (19 May 2014) < http://www.unicef.org/crc/index_protecting.html> accessed 10 February 2015 para 4.

² United Nations Convention on the Rights of the Child GA Res 44/25, annex, 44 UN GAOR Supp (No 49) at 167, UN Doc A/44/49 (1989), entered into force 2 September 1990, Article 1.

³ International Center for Research on Women 'More Power to Her: How Empowering Girls can Help End Child Marriage' (2011) < <http://www.icrw.org/sites/default/files/publications/More%20Power%20pages%20Web.pdf>> accessed 12 February 2015 p3.

⁴ Catherine Nyambura 'Child Marriage or Forced Marriage: Where do we draw the line?' (Nov 6, 2014) <<http://ruralreporters.com/child-marriage-or-forced-marriage-where-do-we-draw-the-line/>> accessed 22/1/2015 para 3.

⁵ Ibid.

⁶ Centre for Reproductive Rights 'UN Takes Major Action to End Child Marriage' (16 October, 2013) <<http://reproductiverights.org/feature/un-takes-major-action-to-end-child-marriage>> accessed 2 February 2015 para 5.

or nearly 39,000 girls becoming child brides every day.⁷ These statistics illustrate how the issue of child marriages is a universal problem that represents perhaps the most prevalent form of sexual abuse and exploitation involving children.⁸

Some of the causes of child marriage include poverty, lack of education, gender inequalities, custom and tradition.⁹ Child marriage is linked to a number of negative health consequences in young girls such as early pregnancy, HIV and AIDS, obstetric fistula and maternal mortality.¹⁰ It has also been associated with lower levels of education among young girls and greater exposure to domestic and sexual violence that occurs as a result of young girls not being ready to shoulder the responsibilities of marriage and motherhood.¹¹ Research has shown that child marriages have profoundly negative impacts on girls both in terms of prevalence and consequences than on boys who are initiated into child marriages.¹²

There are various socio-economic, cultural and religious justifications that contribute to the high prevalence of girl child marriages. For instance from a social and cultural perspective, children in Africa are generally expected to respect the decisions that parents and guardians make on their

⁷ Ibid.

⁸ International Humanist and Ethical Union 'UN Publishes IHEU Statement: Child Marriage is Child Abuse' (March 13, 2009) < <http://iheu.org/un-publishes-iheu-statement-child-marriage-child-abuse/> > accessed 4 February 2015 para 9; Boys are also affected by child marriage but the issue impacts girls in far larger numbers and with more intensity see United Nations Children's Fund 'Early Marriage a Harmful Traditional Practice: A Statistical Exploration' (2005) < http://www.unicef.org/publications/files/Early_Marriage_12.lo.pdf > accessed 11 January 2016 p 1.

⁹ Anju Malhorta 'The causes, consequences and solutions to forced child marriage in the developing world' (15 July, 2010) < <http://www.icrw.org/files/images/Causes-Consequences-and%20Solutions-to-Forced-Child-Marriage-Anju-Malhotra-7-15-2010.pdf> > accessed 12 February 2015 p3-4.

¹⁰ Ibid p6.

¹¹ Ibid p4.

¹² United Nations Children's Fund Innocenti Research Centre 'Early Marriage: Child spouses' (March 2001) in Innocenti Digest no.7 < <http://www.unicef-irc.org/publications/pdf/digest7e.pdf> > accessed 28 November 2014 p3; Child marriages in which the male child is a groom also occur, but the statistics suggest that such marriages are far much less in frequency. Boys in West and Central Africa who go into marriages between the ages of 15 and 19 are less than 5%. The reasons for being initiated into child marriages are different for boys, and the social consequences for them are far less significant than for the girl child. See Juliette Myers 'Untying the knot: exploring early marriage in fragile states' (March 2013) in World Vision Research Report < http://0c43c196086d41d35679-60e8a72e2d60353e590e84e3562c2b51.r53.cf3.rackcdn.com/files/7613/7164/5845/UNTYING_THE_KNOT_-_March_2013.pdf > accessed 11 January 2016.

behalf.¹³ This is on the assumption that such decisions are in the best interests of the children. Specific to the issue of child marriages, parents and guardians play a key role by providing consent to a marriage agreement for a young girl and this is in some cases a result of the fear and anxiety surrounding the importance placed on sexual security of girls.¹⁴

These justifications have the effect of depriving the girl child of rights that she is entitled to, such as the right to enjoyment of the highest attainable standard of health¹⁵, education¹⁶, right to equality and non-discrimination¹⁷ and the right to be free from sexual exploitation and abuse.¹⁸ In most cases, child marriage cuts off many young girls from educational and other opportunities for personal development, in exchange for the role of becoming a spouse and taking on adult responsibilities in marriage that they may not be ready for.¹⁹ The consequences of child marriages as reflected in a number of jurisdictions show that child marriages result in young girls having to deal with violence, poverty and mistreatment.²⁰ In this regard, the harsh realities experienced by child brides cannot be underestimated.²¹

¹³ The African Child Policy Forum (ACPF), 'The African Report on Violence against Children. Addis Ababa: The African Child Policy Forum (2014) <http://srs.violenceagainstchildren.org/sites/default/files/documents/docs/african_report_on_violence_against_children_2014.pdf> accessed 11 January 2016 p 24.

¹⁴ Myers (n12 above) p23.

¹⁵ United Nations Convention on the Rights of the Child GA Res 44/25, annex, 44 UN GAOR Supp (No 49) at 167, UN Doc A/44/49 (1989), entered into force 2 September 1990, Article 24.

¹⁶ UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13, Article 10.

¹⁷ United Nations Convention on the Rights of the Child GA Res 44/25, annex, 44 UN GAOR Supp (No 49) at 167, UN Doc A/44/49 (1989), entered into force 2 September 1990, Article 2.

¹⁸ United Nations Convention on the Rights of the Child GA Res 44/25, annex, 44 UN GAOR Supp (No 49) at 167, UN Doc A/44/49 (1989), entered into force 2 September 1990, Article 34.

¹⁹ Jaya Sagade 'Child Marriage in India, Socio-legal and Human Rights Dimensions' (Oxford University Press 2005) p xxvi.

²⁰ The Associated Press, 'Law failing to protect child bride' (19 January 2014) <<http://america.aljazeera.com/articles/2014/1/19/rights-group-lawfailingtoprotectchildbrides.html>> Accessed 28 November 2014.

²¹ Sagade (n 19 above).

Fortunately, discussions at national and international levels increasingly recognize that child marriage is a violation of a girl's human rights.²² A number of important human rights instruments identify the rights of children and offer legal protection from abuse, violence and exploitation by setting out legal standards. For instance, article 16 of the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) states that 'the betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage'.²³ Although the Convention on the Rights of the Child (CRC) does not address the issue of child marriage directly, the Committee on the Rights of the Child has frequently linked child marriage with other rights such as the right to protection from all harmful traditional practices.²⁴ Article 21 of the African Charter on the Rights and the Welfare of the Child (ACRWC) recognises child marriage as a harmful practice, and calls on states to adopt measures, including legislation that prohibit such practice. Together, these international instruments establish international standards for state parties to follow.

In Malawi, the practice of child marriages remains pervasive. They have been attributed to factors such as poverty, teen pregnancy, lack of adequate education, the acceptance of harmful traditional practices and lack of commitment towards safeguarding the best interests of children (especially the girl child).²⁵ According to a study, one in every two girls is married as a child in Malawi.²⁶ Young girls are forced into marriages as early as 9 years old, immediately after

²² Anju Malhotra and others 'Solutions to End Child Marriage: What the evidence show' (2011) <<http://www.icrw.org/publications/solutions-end-child-marriage>> accessed 28 November 2014.

²³ UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13, Article 16.

²⁴ United Nations Convention on the Rights of the Child GA Res 44/25, annex, 44 UN GAOR Supp (No 49) at 167, UN Doc A/44/49 (1989), entered into force 2 September 1990, Article 24(3).

²⁵ Charles Pensulo, 'Parents Before They are Grown-Up: Child Marriage in Malawi' *The Guardian* (London, 21st May 2014) <http://www.theguardian.com/global-development-professionals-network/2014/may/21/malawi-women-marriage-child-pregnancy> accessed 27 January 2015 para 6.

²⁶ Girls Not Brides, 'African ministers set ambitious target: eliminate child marriage by 2020' (11 December 2013) <<http://www.girlsnotbrides.org/african-ministers-set-ambitious-target-eliminate-child-marriage-by-2020/>> accessed 27 January 2015 para 9.

attaining puberty.²⁷ In the case of boys coming from the same background, they are most likely to get married around the age of 17 years.²⁸ The prevalence of girl child marriages has prompted non-governmental organisations to call on the government of Malawi to increase efforts to end all child marriages.²⁹ The Government of Malawi has acknowledged the problem and indicated its willingness to address it.³⁰

To fulfil its commitment to address the problem of child marriages, Malawi has an obligation to embark upon the measures required under the above-mentioned international and regional human rights instruments. Malawi is to ensure that its laws and Constitution are compliant with international human rights standards. Significant efforts have been made in addressing human rights issues through national laws such as the Gender Equality Act and the Child Care, Protection and Justice Act. Malawi is also a signatory to relevant international human rights instruments. However the reality remains that various practices, traditional or otherwise undermine the issue of gender equality and the promotion of human rights in general. One aspect of this is the fact that young girls in Malawi continue to be victimized through harmful practices such as child marriage.

The implementation of international human rights law into the domestic law is part of state responsibility in illustrating its international commitment towards respecting, protecting and promoting children's rights. This requires an analysis of the status quo of the Malawi legal framework in order to track Malawi's proactive response in addressing child marriage. Section 22 of the Malawian Constitution is arguably not in line with international standards on the issue of minimum age requirement as it states that children between the ages of 15 to 18 can contract a valid marriage provided they obtain parental or guardian consent.³¹ Whilst the Constitution of Malawi prohibits forced marriage, it does not explicitly provide for the requirement of 'free and

²⁷ Human Rights Watch Organisation, 'I've Never Experienced Happiness: Child Marriage in Malawi' (2014) <<https://www.hrw.org/report/2014/03/06/ive-never-experienced-happiness/child-marriage-malawi>> accessed 11 January 2016 p15.

²⁸ Ibid p15.

²⁹ Human Rights Watch organization, 'Malawi: End Widespread Child marriage' (6 March 2014) <<http://www.hrw.org/news/2014/03/06/malawi-end-widespread-child-marriage>> accessed 27 January 2015 para 1.

³⁰ Girls Not Brides (n26 above) para 9.

³¹ The Constitution of the Republic of Malawi, s 22.

full' consent to marriage on the part of the child.³² To address these challenges, the Marriage, Divorce and Family Relations Act was passed into law. The Act both criminalizes forced child marriages and sets the minimum age of marriage at 18 years. Although the law obviously conforms to international standards,³³ it is ineffective as long as the constitutional provision that sets the age of marriage at 15 to 18 years override such legislation.³⁴

As highlighted above the issue here is the lack of harmonisation within the legal framework in Malawi. This thesis proceeds with the argument that the new Act is undeniably progressive with the new feature of addressing the issue of child marriage. It also clearly sets the minimum age of marriage at 18 years. However the effective implementation of this law is only possible if Section 22 of the Constitution of Malawi which provides for rights and freedoms connected with family and marriage is amended.

1.2 AIMS AND OBJECTIVES OF THE STUDY

The main objective of this thesis is to analyse the legal framework on child marriages in Malawi and to assess whether the laws and policies that have been put in place reflect international human rights standards. This will help in determining whether Malawi's legal framework is sufficient.

The thesis also addresses the tension between the human rights legal standards and the social, economic, cultural justifications that support child marriages, in the context of Malawi. The thesis will aim at emphasising the importance of the harmonisation of the national laws in Malawi, in order to ensure the protection of children's rights against the harmful practice of child marriage.

³² The Constitution of the Republic of Malawi, s 22(8).

³³ Human Rights Watch, 'Malawi: New Marriage Law Can Change Lives' (17 April 2015)

<<http://www.hrw.org/news/2015/04/17/malawi-new-marriage-law-can-change-lives>> accessed on 20 April 2015 para 2.

³⁴ The Constitution of the Republic of Malawi, s 5.

1.3 LITERATURE REVIEW

Child marriage is a human rights violation that has been extensively addressed through country-specific reports by NGOs, international organisations and academic scholars. The ‘Report of the Law Commission on the review of Laws on marriages and divorce’ by the Malawian Law Commission provides a background of the road map to the new Marriage, Divorce and Family Relations Act that was passed recently. In this report, it is evident that in addressing the issues of reform the Law Commission considered the lack of consistency pertaining to the age of marriage with the various regimes of marriage in Malawi.³⁵ The Law Commission also noted that under subsection (7) of section 22 of the Malawian Constitution, persons aged between 15 and 18 years are required to obtain parental consent before they can validly enter into a marriage contract.³⁶ In response, the Law Commission took into account the position of the definition of a child under the CRC and made a recommendation that the new law should not allow marriages for persons aged below 18 years.³⁷

The CRC is the founding international human rights document when it comes to children’s rights and will be the focus of this thesis, as regards the normative framework. It is an important treaty that establishes the economic, political, civil, social and cultural rights of children. At the regional level, the African Charter on the Rights and Welfare of the Child (ACRWC) provides for a child rights instrument within the African context. It contains unique factors that have been expressed in a number of specific provisions that touch on issues of particular concern to the African child, such as the prohibition of child marriages.³⁸

The meeting of the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) on “Ending Child Marriages in Africa” during its 23rd Session is worth noting.³⁹ It

³⁵ The Malawi Law Commission, ‘Report of the Law Commission on the review of Laws on marriage and divorce’ (26th June 2006) <http://www.lawcom.mw/docs/Report_on_the_review_of_Marriage_and_Divorce_Act.pdf> accessed 11 January 2016 p24.

³⁶ Ibid.

³⁷ Ibid.

³⁸ Manisuli Ssenyonjo, ‘The African Regional Human Rights System: 30 Years After the African Charter on Human and Peoples’ Rights’ (2011) vol107 International Studies in Human Rights 251

³⁹ African Committee of Experts on the Rights and Welfare of the Child, ‘The Addis Ababa Declaration on Ending Child Marriage in Africa: 23rd Session of the African Committee of Experts on the Rights and Welfare of the Child

was the first platform in Africa that contributed towards the discussions on the issue and called upon the ACERWC, the African Union, Regional Economic communities, civil society actors and national governments to address child marriages as a human rights violation.⁴⁰ The ACERWC recognised child marriage as a multi-faceted social-cultural and endemic harmful practice. As one of the initiatives towards the elimination of child marriage in Africa, it appealed to the members of the African Union to develop and implement transformative social policies that include communities, traditional and religious leaders as central stakeholders.⁴¹

In addition, the Human Rights Council (HRC) during its 26th session addressed the issue of child, early and forced marriage. The Office of the High Commissioner for Human Rights (OHCHR) released its first report on preventing and eliminating child, early and forced marriage. This report looks at achievements and best practices, as well as outstanding challenges and gaps in implementation. This report was discussed at the 26th session by the HRC and it included information received from various states and NGOs. One report compiled by the Girls Empowerment Network (an NGO based in Malawi), indicated a decrease in child marriages after the organisation led a campaign encouraging traditional leaders and parents to devise strategies on how to prevent child marriage.⁴² This report illustrated the need for engagement with non-state actors, and also local and higher levels of government, in order to effectively end child marriage.

Many authors have contributed towards the discussions on the issue of child marriages. According to Mwambene, some cultural practices in Malawi, such as *Mbirigha* and *Kupawila*, encourage child marriages.⁴³ She concluded by suggesting that a substantive approach that

(ACERWC) (14 April 2014) <<http://srg.violenceagainstchildren.org/sites/default/files/documents/docs/ACERWC-Declaration-on-Ending-Child-Marriage-in-Africa.pdf>> accessed 11 January 2016 p3, 4.

⁴⁰ Ibid para 1.

⁴¹ Ibid.

⁴² Human Rights Council, 'Summary Report on the Panel Discussion on Preventing and Eliminating Child, Early and Forced Marriage: Report of the United Nations Commissioner for Human Rights (A/HRC/26/22) (2 April 2014)< http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session27/Documents/A_HRC_27_34_ENG.doc> p11

⁴³ Lea Mwambene, 'Marriage under African Customary Law in Malawi' (2010) vol.10 no.1 African Human Rights Law Journal < https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwix_ujx5aLKAhUFpw4KHxQnCYsQFggdMAA&url=http%3A%2F%2Fwww.ahrj.up.ac.za%2Fissues%2F2010%2Fvolume-10-no-

addresses socio-economic circumstances behind the acceptance of the harmful practice would yield the desired result of addressing human rights violations that occur due to child marriages.⁴⁴ Chinele has illustrated how progress is being made by traditional leaders in order to curb the practice of child marriages in their communities. In her account, traditional leaders across the country are playing an active role by making use of by-laws that place sanctions against perpetrators of child marriage.⁴⁵ It is acknowledged that there is a significant change of attitude at the grassroots level of authority in attempts to engage with the law towards the elimination of the practice of child marriage in their communities.⁴⁶

Willem identified what he referred to as a 'legal shadow land', where he addresses a number of issues such as rehabilitation and emancipation of the deprived, exploited, abused and neglected child in light of human rights, family and child studies, and all related fields. He analyses the articles within the Universal Declaration of Human Rights and their applicability to children's rights in order to illustrate that all humans are born free and equal in dignity and rights, and this includes children.⁴⁷ He offers useful guidance in revealing the direct link between different forms of harmful practices that children endure and the human rights that they are equally entitled to as a fact of being human.

Braimah, in his work examined the protection of children against child marriage through the Constitution and the Child Rights Act in Nigeria. He looked at how the prevalence of child marriages in the Northern part of Nigeria is a traditional cultural issue that is heavily influenced by Islam.⁴⁸ He argues that the Child Rights Act (CRA), which domesticated both the Convention

[1-2010&usg=AFQjCNH51DiT4G32HHBQpQhn7I3m4l1w0w&sig2= hootiU_GUP4whxbvEz9Ug>](#) accessed 11 January 2016 p101.

⁴⁴ Ibid p103.

⁴⁵ Josephine Chinele, 'Chiefs take on child marriage, at a price' The Malawi Daily Times (Malawi, 2 April 2015) feature 49.

⁴⁶ Ibid.

⁴⁷ Win Willems, 'Developmental and Autonomy Rights of Children' (Jan Willems (ed), 2nd revised edn, Intersentia 8 October 2007) p159.

⁴⁸ Tim S Braimah, 'Child marriage in Northern Nigeria: Section 61 of Part 1 of the 1999 Constitution and the protection of children against child marriage' (2014) vol 14 no. 2 African Human Rights Law Journal <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKewiM2g_F6aLKAhUFKw8KHYMcAZgQFggdMAA&url=http%3A%2F%2Fwww.ahrj.up.ac.za%2Ftable-of-contents-volume-14-no-2-2014%2F42-issues%2Fvolume-14-no-2-2014%2F453-child-marriage-in-northern-nigeria-section-61-of-part-i-

on the Rights of the Child and the African Charter on the Rights and Welfare of the Child, has a weakness that stems from the fact that the CRA has to be passed into law in each state in Nigeria before a child marriage may be considered illegal.⁴⁹ The author reasoned that, adherence to Islam and the application of Shari'a law in the northern parts of Nigeria, where child marriage is prevalent, indicates reluctance towards the enactment of the CRA.

This thesis also takes into account the significant contributions from non-governmental organisations (NGOs) that have highlighted some of the causes and consequences that are linked to the prevalence of child marriages in Africa. In a publication by an NGO called Girls Not Brides, improving education for girls was identified as a key strategy for addressing the issue of child marriages in Africa.⁵⁰ The discussion took note of the critical transition from primary to secondary schooling which indicated that school dropout rates for girls escalated during this period in many parts of the world, with over 60% of child brides in developing countries lacking formal education.⁵¹ This publication emphasises that when girls can access and complete quality education, they are less likely to be married before the age of 18, thereby directly addressing the issue of child marriage.⁵²

Baker and others produced a report exploring the challenges to implementing the prohibition against child marriage in Sierra Leone. The discussion specifically looked at how the customary legal system in Sierra Leone is more familiar, accessible, culturally relevant and influential in most people's lives than the formal legal system. The report suggests that strengthening the capacity of customary authorities through legal training could effectively assist in achieving the Child's Right Act's mandate to end child marriage in Sierra Leone.⁵³

[of-the-1999-constitution-and-the-protection-of-children-against-child-marriage&usg=AFQjCNEsHZLj8TyjV7PEAS81S46OfZrEiA&sig2=SWg8KN3m5gDYowOioPiOgg>](#) p474,475.

⁴⁹ Ibid p475.

⁵⁰ Girls Not Brides, 'Child marriage and Education in Africa: A brief for Day of the African Child 2014' <<http://www.girlsnotbrides.org/wp-content/uploads/2014/06/Child-marriage-and-Education-in-Africa-Brief-by-Girls-Not-Brides-for-DAC-2014.pdf>> accessed 11 January 2016 p1.

⁵¹ Ibid p2.

⁵² Ibid.

⁵³ Ben Baker and others, 'Before their time: Challenges to implementing the prohibition against child marriage in Sierra Leone' (Plan United Kingdom, January 2013) <<https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwitpcat66LKAhWJUhQKHfyIDPEQFggdMAA&url=http%3A%2F%2Fwww.plan->

Yusuf also looked at the issue of child marriage as an end result of the harmful practice of female genital mutilation (FGM) in Tanzania. She emphasizes that the practice of FGM holds a high cultural significance due to the fact that it is considered to facilitate the transition of a young girl through to adulthood.⁵⁴ The practice is an initiation process that prepares a young girl for marriage, bearing children and other expected responsibilities she engages in as an adult member of her community.⁵⁵

There is abundant literature pertaining to the causes and consequences relating to child marriages. Some of the key aspects addressed throughout the literature are the issue of gender stereotypical attitudes with the key actors being the individuals responsible for the care of young girls, including parents, guardians and community leaders. This literature can also be applicable to the Malawi case study, in illustrating how such factors impede the efficacy of legal measures, if they are not addressed holistically, through legal measures that address such factors.

1.4 RESEARCH METHODOLOGY

The methodology employed is desk-based research. The primary sources include the Constitution of Malawi, relevant national laws and policies, and international and regional human rights instruments. Secondary sources include journal articles, law reports, textbooks, NGO reports and newspaper articles. Internet blog sources are also included as these usually have readily accessible information on current developments on the subject of child marriage in Malawi.

1.5 OUTLINE OF CHAPTERS

This thesis comprises four chapters.

uk.org%2Fassets%2FDocuments%2Fpdf%2FBefore_their_time_report.pdf&usg=AFQjCNFOWVd1BWA-41joqUF_uRbQF8rYKQ&sig2=B5HVp-40Sieo0I0nRh9dbw> accessed 12 January 2016 p31.

⁵⁴ Camilla Yusuf, 'Female genital mutilation as a human rights issue: Examining the effectiveness of the law against female genital mutilation in Tanzania' (2013) vol.13 no.2 African Human Rights Law Journal p259.

⁵⁵ Yusuf (n41 above) p259.

1.5.1 Chapter one

The introduction sets out the context of the research on child marriages. It provides the general background and problem statement to the study; the aims and objectives; the literature review and an outline of the chapters in this thesis.

1.5.2 Chapter Two

This chapter will look at the concept of a child and childhood. This chapter will analyse the protection of children relating to the issue of child marriage through the relevant international and regional legal standards in light of children's rights. It sets out the international and regional normative foundation for Malawi's response to ensure the protection of children's rights against child marriage.

1.5.3 Chapter Three

The third chapter will focus on Malawi as a case study in light of the prevalence rates, causes and consequences of child marriage in the country. The chapter will also examine the civil, religious and customary marriage law system in Malawi and some of the various cultural practices that encourage child marriages in Malawi. The chapter will address the normative legal framework in Malawi and will analyse its failures/challenges as regards compliance with international, regional human rights standards and policies.

1.5.4 Chapter Four

The final chapter presents general conclusions of the thesis. This chapter will also offer recommendations that can work in the best interest of the girl child as a rights holder.

1.5.5 Conclusion

Chapter one has outlined the context of the research on child marriages by providing a general background and problem statement, the aims and objectives of the study and some literature review. The chapter has also outlined the research methodology and the other chapters that will follow in this thesis.

The next chapter is on the concept of a child and childhood. The chapter will provide an analysis of international and regional legal standards ensuring the protection of the girl child against child marriage.

CHAPTER TWO

GENERAL OVERVIEW AND LEGAL FRAMEWORK OF THE PROTECTION OF GIRLS AGAINST CHILD MARRIAGES

1.1. INTRODUCTION

This chapter analyses the legal definition of a child and the notion of childhood as discussed in international and regional human rights law. The chapter takes into account the concept of child marriage as defined under international and regional human rights standards. This chapter goes on to highlight the protection of the girl child from child marriages as stipulated under international and regional human rights instruments. Malawi has ratified most of the instruments and is therefore legally bound to their standards. The chapter concludes by showing how child marriage is a human rights violation under the international and regional human rights regime. As such, child marriage has the likely effect of leading to further human rights violations towards the girl child.

1.2. THE LEGAL DEFINITION OF A CHILD

The importance of increased international protection of children responds to efforts towards advancing the human rights of children.⁵⁶ States recognise the need to respect, promote and protect child rights, and have shown their commitment through the signing and ratification of the CRC. The CRC provides for the recognition of the child as a full human being and for the respect of all the attached rights he or she holds.⁵⁷ Article 1 of the CRC defines a child as ‘every human being below the age of 18 years unless under

⁵⁶Von Struensee, Susan O’Rourke, ‘Violence, Exploitation and Children: Highlights of the United Nations Children’s Response to Children’s Human Rights’ 18 Suffolk Transnational Review (199) available at http://heinonline.org/HOL/Page?handle=hein.journals/sujtnlr18&div=25&g_sent=1&collection=journals#597

⁵⁷Benyam D Memzur ‘The African Children’s Charter versus the UN Convention on the Rights of the Child: A zero-sum game?’ (LLB (Hons) (Addis Ababa), LLM (Pretoria), PG Diploma on international Protection of Human Rights (Turku), 23 SAPR/PL (2008).

the law applicable to the child, majority is attained earlier'.⁵⁸ This provision sets out the minimum age of 18 years, but it takes a flexible tone in acknowledging the fact that a child may attain majority before the age of 18. The Convention's significance is specific to the special protection of rights afforded to the child as an independent person, not relying on his or her association with other persons or groups for protection under international law.⁵⁹

From a regional perspective, the definition of a child is stipulated in the ACRWC.⁶⁰ Article 2 defines a child as, 'every human being under 18 years.' In this regard there are no conditions or limitations attached to the definition. The ACRWC is of importance because it was adopted in order to address the specificities which affect the African child and it complements the CRC.

Despite having the minimum age of 18 years being clearly stipulated under the CRC and the ACRWC, some countries including Malawi, are still struggling with issues that impact on an all-encompassing definition of a child. There are significant inconsistencies in abiding to the minimum age of 18 years because the understanding of a child is a matter of context, with some of these issues related to criminal responsibility, sexual consent and marriage.⁶¹ As a result children continue to suffer from harmful practices such as child marriage because of inconsistent and ineffective legal protection.⁶²

⁵⁸ CRC, Article 1.

⁵⁹ Glenn Mower, 'The Convention on the Rights of the Child: International Law Support for children' Greenwood Publishing group (1997) at 4.

⁶⁰ CRC, Article 2.

⁶¹ Prof. Jaap Doek, 'In the best interests of the child: Harmonising laws in Eastern and Southern Africa' (2007) the African Child Policy Forum <

http://www.africanchildforum.org/clar/Harmonisation%20of%20Laws%20in%20Africa/Publications/supplementary-acpf-harmonisation-es_en.pdf> accessed 15 January 2016 p4.

⁶² Ibid.

1.3. THE NOTION OF CHILDHOOD

There is no universal definition of childhood.⁶³ Despite this, there are many images of childhood that develop a mutual understanding amongst different societies that children are innocent human beings who are dependent, vulnerable, and incapable of making competent decisions.⁶⁴ Childhood has been conceptualised as a stage in human development that lacks traits of skills and capacities of adulthood.⁶⁵

Article 1 of the CRC provides for the end of childhood at 18 years but it does not state when it begins. This provision serves as a minimum standard⁶⁶, thus there is room for flexibility for States to increase this age for the benefit and protection of children and their childhood stage. This reinforces the fact that there is no universal definition of childhood.

The CRC recognises adolescents up to the age of 18 years as holders of all rights enshrined in the Convention. Adolescence is defined as:

‘A period characterised by rapid physical, cognitive and social changes, including sexual and reproductive maturation; the gradual building up of the capacity to assume adult behaviours and roles involving new responsibilities requiring new knowledge and skills’.⁶⁷

The essence of childhood is therefore, a period where a child, being any person under the age of 18 years, experiences rapid growth physically, mentally and emotionally.

⁶³ Gerison Lansdown, ‘The evolving capacities of the child’ (2005) Innocenti Insight, UNICEF Innocenti Research Centre < <http://www.unicef-irc.org/publications/pdf/evolving-eng.pdf> > accessed 15 January 2016 9.

⁶⁴ Elizabeth S. Scott, "The legal construction of childhood." (Margaret K. Rosenheim and others (Eds), *A century of juvenile justice*, University of Chicago Press 2002) p 113.

⁶⁵ David Archard, ‘Children: Rights and childhood’ (Routledge (2ed), New York Publication, 2004) at 39.

⁶⁶ United Nations Convention on the Rights of the Child GA, Article 41 which states, ‘Nothing in the present Convention shall affect any provisions which are more conducive to the realization of the rights of the child and which may be contained in: (a) The law of a State party; or (b) International law in force for that State’.

⁶⁷ Committee on the Rights of the Child General Comment No 4, ‘Adolescent health and development in the context of the Convention on the Rights of the Child’ (CRC/GC/2003/4, 1 July 2003) < <http://www2.ohchr.org/english/bodies/crc/docs/co/CRC-C-PHL-CO4.pdf> > para 2.

A child that attains majority through for instance, marriage or emancipation is subject to exclusion from the protection afforded by the CRC. This has been a bone of contention considering how such cases result in the end of childhood. In response, several authors have challenged this position that allows states to determine when childhood ends by arguing that this flexibility should not ‘...allow ages to be established which might be contrary to the principles and provisions of the Convention’.⁶⁸

The Convention is the most universally signed and ratified treaty in the world.⁶⁹ This illustrates how the world has taken cognisance of the need to protect and provide for children, it is also evident that many African countries have domesticated the provisions of the CRC.⁷⁰ However, cultural variations and differences in human experience introduce the debate as to whether or not the notion of childhood as stipulated under the CRC is from a western point of view.⁷¹ This is not to say that the CRC falls short of capturing the essence of what childhood comprises of, in isolation of the cultural variations and differences in human experiences. It embodies the core minimum standard of the notion of childhood. Western psychology has made attempts in determining the different stages of childhood and what they comprise of. Piaget, a psychologist best known for his work in the area of development psychology proposes a model that has been relied on by researchers.⁷² He describes childhood as being a time for play and learning, where children are free from the burdens of employment and responsibility. This view is arguably one that western countries can relate to but it may not be true for many other parts of the world.⁷³

⁶⁸ R Hodgkin & P Newel, ‘Definition of the child’ (R Hodgkin and others (Ed) *Implementation handbook for the Convention on the rights of the child*, UNICEF, 2007) p4.

⁶⁹ Prinslean Mahery, ‘The United Nations Convention on the Rights of the Child: Maintaining its Value in International and South African Child Law’ (Trynie Boezaart (ed) *Child Law in South Africa*, Lansdowne: Juta & Co Ltd, 2009) p309.

⁷⁰ Bart Rwezaura, ‘Competing “images” of childhood the social and legal systems of contemporary sub-Saharan Africa’ (1998 vol. 12 issue 3 *International Journal of Law, Policy and the Family*) p253.

⁷¹ United Nations Convention on the Rights of the Child GA, Article 1 states ‘a child shall be anyone below the age of 18 years’.

⁷² Biography.com Editors, ‘Jean Piaget Biography’ <<http://www.biography.com/people/jean-piaget-9439915#psychological-studies&awesm=~oC5FJbHqMt4cLN>> (The Biography.com website, A&E Television Networks publisher) accessed 18 October 2014.

⁷³ Lansdown(n 63 above) p10.

From an African perspective, the ACRWC provides for what the notion of childhood comprises of and shares the same cut-off period of childhood at 18 years similar to the Convention.⁷⁴ It has often been noted that the ACRWC embodies higher protection of child rights in comparison with the CRC. For example, this is supported by the fact that the ACRWC does not permit for exceptions where a national law provides for a lower age of majority, as stipulated in the CRC.⁷⁵

The concept of childhood from an African context is relatively a shorter period than in western regions.⁷⁶ Childhood is viewed as ‘...a time to learn, to build character and to acquire the social and technical skills necessary to perform the future role of adulthood’.⁷⁷ This clearly suggests that an African child is initiated into taking on roles of responsibility during childhood. Initiation in Africa is a centuries-old practice that is meant to establish the gender norms that boys and girls are expected to follow as men and women.⁷⁸ This may arguably affect a child positively or negatively, depending on what such responsibilities involve. For instance, in rural areas and in some urban communities in Africa, children are taught how to herd cattle, fetch water and cook at early ages as part of their development and socialisation.⁷⁹ This is in most cases relevant to the fact that African rural families engage in farming activities where children participate in these activities as a way of coping with the challenges of poverty.⁸⁰ Many of these activities involve girls in particular.⁸¹ This understanding of childhood from an African context is also reflected in Article 31 of the ACRWC.⁸²

⁷⁴ CRC, Article 1, Article 2 also defines a child as ‘any person below the age of 18’.

⁷⁵ Julia Sloth-Nielson, ‘Modern African Childhoods: does law matter?’ (2012 vol.14, M.D.A Freeman (ed) Current Legal issues, Law and Childhood studies, Oxford University Press) p 8.

⁷⁶ Rwezaura (n70 above) 255.

⁷⁷ *ibid.*

⁷⁸ Beenish Ahmed, ‘Confronting a sexual rite of passage’ The Sunday Times (Malawi, 20 September 2015) *feature* para 7.

⁷⁹ Rwezaura (n70 above) 255.

⁸⁰ The African Child Policy Forum, ‘The African Report on violence against children’ in the African child policy forum (2014) available at file:///C:/Users/user/Downloads/The%20African%20Report%20on%20Violence%20against%20Children_Final.pdf at 10.

⁸¹ *Ibid* p10.

⁸² ‘Every child shall have responsibilities towards his family and society, the State and other legally recognised communities and the international community. The child, subject to his age and ability, and such limitations as may be contained in the present Charter shall have the duty:

Taking into account the issue of gender inequality, where poverty is present the girl child has lower access to education in comparison with the boy child and girls are encouraged to take part in activities which involve household chores as opposed to attending school.⁸³ This is due to the fact that in many traditional societies, the idea of an adolescent period between the time of puberty and adulthood is problematic.⁸⁴ If a girl child begins puberty at an early age, she is nevertheless seen as a ‘woman’ based on the understanding that she can bear a child.⁸⁵ These realities of gender inequality go to the crux of human rights such as the right to non-discrimination⁸⁶ as provided for in the ACRWC and the CRC that define the notion of childhood as a process of development regardless of sex or one’s physical maturity. In light of this, General Comment 7 of the CRC emphasises that discrimination against the girl child affects their entire lives.⁸⁷

1.4. CONCEPT OF CHILD MARRIAGE

The accepted definition of child marriage may be understood by taking into account the perspective of what the words ‘child’ and ‘marriage’ mean. The term ‘child’ as discussed, refers to a human being below the age of 18 years.⁸⁸ The term ‘marriage’ is considered to be a formalized relationship with legal standing between an individual man and woman, in which sexual relations are legitimized.⁸⁹ This term now includes same-sex marriages;

-
- *To work for the cohesion of the family, to respect his parents, superiors and elders at all times;*
 - *To serve his national community by placing his physical and intellectual abilities at its service;*
 - *To preserve and strengthen social and national solidarity;*
To preserve and strengthen African cultural values in his relations with other members of the society in the spirit of tolerance, dialogue and consultation’.

⁸³ Anita Raj, ‘When the mother is a child: the impact of child marriage on the health and human rights of girls’ (2010 Global Child Health, BMJ Publishing Group Ltd (& RCPCH)) <<http://adc.bmj.com>> accessed October 18, 2014 p1.

⁸⁴ United Nations Children’s Fund (UNICEF), ‘Early Marriage: Child spouses’ (March 2001, Innocenti Digest No.7, Innocenti Research Centre Florence, Italy) < <http://www.unicef-irc.org/publications/pdf/digest7e.pdf>> p 6.

⁸⁵ *ibid* 6.

⁸⁶ African Charter on the Rights and Welfare of the Child OAU Doc. CAB/LEG/24.9/49 (1990), entered into force Nov. 29, 1999, Article 3; United Nations Convention on the Rights of the Child GA Res 44/25, annex, 44 UN GAOR Supp (No 49) at 167, UN Doc A/44/49 (1989), entered into force 2 September 1990, Article 2.

⁸⁷ CRC General Comment No 7, ‘Implementing child rights in early childhood’ (2005 CRC/C/GC/7/Rev.1 (20 September 2006.)).

⁸⁸ CRC (n58 above).

⁸⁹ Sagade (n19 above) p xxvi.

however this discussion is limited to the narrow definition of marriage.⁹⁰ Giddens shares his view on marriage as being a socially acknowledged and approved sexual union between two individual adults.⁹¹ However, in some cases young people may make a decision to get married resulting from their own free and full consent.⁹² The term ‘child marriage’ refers to a legal or customary union between two people, in which one or both spouses are below the age of 18.⁹³ Child marriage is also referred to as ‘early marriage’ or ‘forced marriage’ but there are some significant differences in the use of these terms. Sagade acknowledges the different limitations these terms have, ‘early’ could be subjective or in reference to marriage of a girl before or during adolescence.⁹⁴ Whilst all child marriages are considered to be forced, not all forced marriages are essentially child marriages.⁹⁵ Some authors have shared the same view by stating that, ‘child marriage is often referred to as ‘early’ and/or forced marriage since children, given their age, are not able to give free, prior, and informed consent to their marriage partners or to the timing of their marriage’.⁹⁶

Most literature reviews on child marriage indicate that child marriage involves both girls and boys, but because of the low status of girls, they are in most cases married off at a much younger age and in large numbers than boys in many countries.⁹⁷ The practice usually involves a union between young girls and significantly older men, and this is the focus of this thesis. The practice of child marriage takes different forms, but the most prominent cases are where a girl child under the age of 18 years is promised or given in

⁹⁰ In the context of a conservative Malawi same-sex marriages are prohibited by Law.

⁹¹ Roselyn Hanzi, ‘Sexual Abuse and Exploitation of the Girl Child through Cultural Practices in Zimbabwe: a Human Rights Perspective’ (LLM (Human Rights and Democratisation in Africa) Faculty of Law, Centre for Human Rights, University of Pretoria 2006) p29.

⁹² Ibid.

⁹³ Centre for Reproductive Rights, ‘Child Marriage in South Asia: International and constitutional legal standards and jurisprudence for promoting accountability and change’ (Briefing Paper, 2013) < http://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/ChildMarriage_BriefingPaper_Web.pdf > p4 accessed 16 January 2016.

⁹⁴ Sagade (n19 above) xxvii.

⁹⁵ Sagade (n19 above) xxvii.

⁹⁶ United Nations Population Fund (UNFPA), ‘Marrying too young: end child marriage’ (Published by the United Nations Population Fund UNFPA, New York, 2012) < http://www.endvawnow.org/uploads/browser/files/marryingtooyoung_unfpa_2012.pdf > p11 accessed 16 January 2016.

⁹⁷ Sagade (n19 above) xxvii.

marriage by either of her parents or guardian to another person.⁹⁸ The parents and senior members of the families play a key role in arranging the marriage and the girl child is expected to respect their decision.⁹⁹ In areas where the practice of child marriage is most prevalent, such an arrangement is socially approved of, and, it does not take into account the young girl's personal convenience and preference of a spouse in light of the understanding of what 'marriage' should be.

1.5. INTERNATIONAL AND REGIONAL PROTECTION AGAINST CHILD MARRIAGE

This section focuses on two main perspectives, namely the international (United Nations instruments) and the regional (African) standards. Where relevant this section will also make reference to some of the Optional Protocols which the human rights treaty bodies have adopted to provide for optimal protection of human rights.

1.5.1. INTERNATIONAL STANDARDS

1.5.1.1. THE UNIVERSAL DECLARATION OF HUMAN RIGHTS (UDHR)¹⁰⁰

The earliest instrument adopted by the international community did not contain an express prohibition against child marriage. However, the practice against child marriage can be interpreted through the provisions contained in the UDHR. Article 16 of the UDHR states the requirements to be met for a valid marriage between persons.¹⁰¹ Firstly,

⁹⁸ The advocates for human rights, 'Defining other forms of forced marriage: forced and child marriage as settlement' (Stop Violence Against Women: A project of The Advocates for Human Rights, last updated October 2014) <http://www.stopvaw.org/defining_other_forms_of_forced_marriage_forced_and_child_marriage_as_settlement> (accessed on 7 January 2015).

⁹⁹ Sagade (n19 above) 3.

¹⁰⁰ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).

¹⁰¹ Nawal M. Nour, 'health consequences of child marriage in Africa' (November 2006 vol.12, No.11, Emerging Infectious Diseases, Perspective) < http://wwwnc.cdc.gov/eid/article/12/11/06-0510_article > p 1644 accessed 16 January 2016.

the person must be at 'full age' at the time of marriage and secondly a valid marriage must be entered into 'freely' and with 'full consent'.¹⁰² In giving context to the term 'full age' authors have stated that drafters of the UDHR intended to refer to the age at which an individual reaches legal majority or the age an individual reaches sexual maturity.¹⁰³ By definition, a child is below the standard age of legal majority and therefore does not meet the first requirement of a valid marriage under the UDHR. The issue regarding sexual maturity may arguably create loopholes in the understanding of "full age", as it goes against the best interests of a girl child and the quest to eliminate child marriage, which is also considered to be sexual abuse of children under the cover of marriage.¹⁰⁴

In addition the UDHR acknowledges sex as a prohibited ground of discrimination¹⁰⁵, and affords equal protection of the law against any form of discrimination.¹⁰⁶ The practice of child marriage has a discriminatory element in light of the significantly higher incidence of the practice involving girls than boys and the particular risks of reproductive and sexual rights violations that are experienced by child brides.¹⁰⁷ Therefore the prohibition of sex discrimination as provided for in the UDHR can be used to protect girls from child marriage and the continuum of violations that result from the practice. It is worth noting that the UDHR is considered part of customary international law, and is therefore binding on all States.¹⁰⁸

¹⁰² Ibid.

¹⁰³ Maja Eriksson, 'Article 16' in *The Universal Declaration of Human Rights: A Commentary* (Aide Eide and others (ed), Oxford: Scandinavian University Press, 1992) p243.

¹⁰⁴ Mohammad Hossein Nayyeri, 'Gender Inequality and Discrimination: The Case of Iranian Women' (published by the Iran Human Rights Documentation Center (IHRDC), 8 March 2013) <<http://iranhrdc.org/english/publications/legal-commentary/1000000261-gender-inequality-and-discrimination-the-case-of-iranian-women.html#10>> para 2.1.1 accessed 16 January 2016.

¹⁰⁵ General Assembly, *Universal Declaration of Human Rights*, Article 2.

¹⁰⁶ Ibid, Article 7.

¹⁰⁷ Center for Reproductive Rights (n93 above) p 11.

¹⁰⁸ United Nations Children's Fund (UNICEF) (n84 above) at 2.

1.5.1.2. THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR)¹⁰⁹, THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS (ICESCR)¹¹⁰ AND THE WORK OF THE HUMAN RIGHTS COMMITTEE (HRC)

Malawi ratified the ICCPR and the ICESCR on 22nd December 1993. These are the two major covenants that expand the aspirations of the UDHR.¹¹¹ They contain provisions that can be used in order to address the issue regarding child marriages. The ICCPR in Article 23¹¹² elaborates on the rights of men and women with regard to the marriageable age and the requirements as stipulated under Article 16 of the UDHR. Similarly, the ICESCR, under Article 10 states that marriage must be entered into with the free consent of the intending spouses.¹¹³ These provisions provide for a right to marriage. However the specific vulnerability of the girl child, as a child and as a girl in reference to the concept of free and full consent is not recognised under these instruments.¹¹⁴

The HRC is the treaty body that monitors compliance with the ICCPR. In its General Comment 28, it highlighted that men and women have the right to enter into marriage only with their free and full consent, and State parties are obliged to protect the enjoyment of this right on an equal basis. The HRC took into account a number of factors that may prevent the advancement of the right to consent. One important factor identifies that some States may either, by customary or statutory law, recognise consent to marriage from a guardian (generally male), instead of the woman herself, thereby preventing the exercise of free choice regarding a marriage union.¹¹⁵

¹⁰⁹ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

¹¹⁰ UN General Assembly, *International Covenant on Economic, Social and Cultural Rights (ICESCR)*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3.

¹¹¹ Human Rights Commission, 'Chapter 2 : The International Human Rights Framework' (New Zealand Action Plan for Human Rights) <<http://www.hrc.co.nz/report/chapters/chapter02/framework01.html>> accessed 16 January 2015).

¹¹² ICCPR 1966, Article 23.

¹¹³ ICESCR 1966, Article 10.

¹¹⁴ Nadeche Adrianasolo, 'The girl child marriage practice in Madagascar: A critical analysis' (LLM in Human Rights and Democratisation in Africa, University of Pretoria 2013) p13.

¹¹⁵ UN Human Rights Committee (HRC), 'CCPR General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women)' (29 March 2000, CCPR/C/21/Rev.1/Add.10) para 23.

The HRC has also addressed the issue concerning the acceptable marriageable age by stating that, individuals should be ‘able to give free and full personal consent in a form and under conditions prescribed by the law’.¹¹⁶ The HRC in this context has overlooked the realities in the world with regards to child marriages, where it is acceptable in many countries for parents or guardians to provide consent on behalf of a girl. In its general comment 28, the Human Rights committee stated that ‘men and women have the right to enter into marriage only with their free and full consent’.¹¹⁷ This supports the position under human rights law that parental consent is not acceptable as a substitute for an individual party’s consent to marriage.¹¹⁸ The emphasis of full and free consent can be used to stress that, the best interests of a girl child should always be protected against human rights violations such as child marriages; where in most cases parents play a key role in overlooking the best interests of the child in exchange for their own interests.

Similarly, the ICESCR Committee in its concluding observations emphasized the importance of increasing the minimum age of marriage to 18 years.¹¹⁹ The committee has also expressed the key significance of investing in educating women and girls.¹²⁰ Education has the ability of empowering women, it ensures the best interests of children, safeguards them from sexual abuse and different forms of exploitation, but also promotes and protects human rights.¹²¹

¹¹⁶ UN Human Rights Committee (HRC), ‘CCPR General Comment No. 19: Article 23 (The Family) Protection of the Family, the Right to Marriage and Equality of the Spouses’ (27 July 1990)

<<http://www.refworld.org/docid/45139bd74.html>> accessed 17 January 2015 para 4.

¹¹⁷ UN Human Rights Committee (HRC) (n115 above) para 23.

¹¹⁸ Centre for Reproductive Rights (n93 above) p25.

¹¹⁹ Committee on Economic, Social and Cultural Rights, ‘Concluding observations of the Committee on Economic, Social and Cultural Rights’ (Twenty-seventh session 12-30 November 2001) <

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f1%2fAdd.72&Lang=en> para 16 accessed 16 January 2015).

¹²⁰ Rita Mutyaba, ‘Early marriage a violation of girls fundamental human rights in Africa’ (International Journal of Children’s Rights 19, 2011)

<http://www.academia.edu/3053636/Early_Marriage_A_Violation_of_Girls_Fundamental_Human_Rights_in_Africa> p342 accessed 16 January 2016.

¹²¹ *ibid.*

1.5.1.3. THE SUPPLEMENTARY CONVENTION ON THE ABOLITION OF SLAVERY, THE SLAVE TRADE, AND INSTITUTIONS AND PRACTICES¹²²

Malawi ratified the Supplementary Slavery Convention on the 2nd August 1965. The Supplementary Slavery Convention protects the girl child against child marriage by placing a duty on the state to eliminate the harmful practice. This Convention states that marriage will equate to slavery if it is forced upon a girl or a woman by her family or guardians respectively.¹²³ State parties are to put in place practicable and legislative measures and other necessary measures that address and guard against cases:

‘whereby a child or young person under the age of 18 years is delivered by either or both of his natural parents or by his guardian to another person, whether for a reward or not, with a view of exploitation of the child or person of his labour’.¹²⁴

In *Hadijatou Mani Korua v Niger*, the ECOWAS Court was approached with a child marriage case involving a girl under the age of 18. The Court made reference to the Supplementary Slavery Convention and concluded that the marriage amounted to slavery. The Court established that slavery can take different forms ‘not only when there is ownership in the legal sense, but also when a certain level of control exists by one individual over another’.¹²⁵ This case illustrates how child marriage is considered to result in similar grave circumstances that are attached to slavery, especially taking into account the vulnerable position that a girl child finds herself in a child marriage situation.

¹²² Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices, Adopted by a Conference of Plenipotentiaries convened by Economic and Social Council resolution 608(XXI) of 30 April 1956.

¹²³ Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices 1956, Article 1(c) (i).

¹²⁴ Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices 1956, Article 1(d).

¹²⁵ H Duffy, ‘Hadijatou Mani Karoua v Niger: slavery unveiled by the ECOWAS Court’ (Human Rights Law Review, 2008) <

http://www.google.com/url?url=http://www.interights.org/files/28/helenduffyhrlr.pdf&rct=j&frm=1&q=&esrc=s&sa=U&ved=0ahUKEwis882r-63KAhUEXhQKHVkdAfgQFggWMAA&usg=AFQjCNHOMls_PLU5yoV5PFaoql69h9Bs0A > p10 accessed 16 January 2016.

1.5.1.4. THE CONVENTION ON THE CONSENT TO MARRIAGE, MINIMUM AGE FOR MARRIAGE AND REGISTRATION OF MARRIAGE (THE MARRIAGE CONVENTION)¹²⁶

Malawi is not a signatory to the Marriage Convention which contains relevant provisions that can be linked to the issue concerning child marriages. The Marriage Convention elaborates on the importance of consent as a requirement for marriage by stating that, ‘No marriage should be legally entered into without the full and free consent of both parties, and such consent is to be expressed by them in person as prescribed by law’.¹²⁷ Taking into account the issue of child marriages, Warner observed that ‘special vulnerabilities of children, whose consent can be easily coerced or unduly influenced by adults has not been captured in a number of Conventions.’¹²⁸

The Marriage Convention places an obligation on state parties to take legislative action to specify a minimum age for marriage and it explicitly states that a marriage that is entered by any person under this age is not legal.¹²⁹ State parties are to ensure that appropriate measures are taken which aim at abolishing customs, ancient laws and practices that have the potential of limiting rights such as the freedom in choosing a spouse.¹³⁰ Some of these practices include those that encourage child marriages and the betrothal of young girls before they reach the age of puberty.¹³¹ It is clear that the provisions set out in this convention seek to overcome and challenge the practice of child marriages by recommending state parties to put in place sanctions that address practices that have the potential of violating the human rights of girls and women.

¹²⁶ UN General Assembly, Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, 7 November 1962.

¹²⁷ UN General Assembly, Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, Article 1.

¹²⁸ Elizabeth Warner, ‘Behind the Wedding Veil: Child Marriage as a Form of Trafficking in Girls, (2004, Vol 12 No. 2, American University Journal of Gender, Social Policy & the Law) <<http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1310&context=jgspl>> p247.

¹²⁹ UN General Assembly, Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, Article 2.

¹³⁰ United Nations Children’s Fund (UNICEF) (n84 above) 12.

¹³¹ Ibid.

The Marriage Convention is the first binding treaty that introduces the requirement for state parties to ensure that marriages are registered. The registration of births and marriages is an effective way to provide proof of age in order to uphold laws against child marriage.¹³² It serves as an international standard that can be used to hold State parties accountable for failure to implement and enforce the obligations within this Convention.

**1.5.1.5. THE CONVENTION ON THE RIGHTS OF THE CHILD (CRC)¹³³
AND THE OPTIONAL PROTOCOL ON THE SALE OF CHILDREN,
CHILD PROTECTION AND CHILD PORNOGRAPHY¹³⁴**

Malawi acceded to the CRC on the 2nd January 1991. The CRC is one of the most important international conventions that covers the context of children's right and recognises that children are entitled to human rights in their own right.¹³⁵ The CRC takes on a general approach and does not specifically prohibit the practice of child marriage. However it has four governing pillars that can be used and interpreted in order to address the human rights violations that occur through the practice of child marriage. These four pillars include the right against non-discrimination¹³⁶, the best interests of a child¹³⁷, the right to life¹³⁸ and the right to participation.¹³⁹

Article 2 provides for the principle of non-discrimination on the grounds of, inter alia, sex and age.¹⁴⁰ Taking into account the fact that child marriage disproportionately impacts girls because they are 'female', Article 2 can be interpreted to protect the girl child against child marriage because it is a discriminatory harmful practice that

¹³² Ibid.

¹³³ UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3

¹³⁴ UN General Assembly, Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, 16 March 2001, A/RES/54/263.

¹³⁵ Ibid.

¹³⁶ UN General Assembly, Convention on the Rights of the Child 1989, Article 2.

¹³⁷ Ibid, Article 3.

¹³⁸ Ibid, Article 6.

¹³⁹ Ibid, Article 12.

¹⁴⁰ Ibid, Article 2.

disproportionately affects young girls. The Committee on the Rights of the Child has in its concluding observations expressed concern about the lack of commitment from State parties towards ensuring the effective implementation of the principle of non-discrimination in order to address the widespread practice of child marriage.¹⁴¹ Where State parties fail to address harmful practices in accordance with the protections embedded under this Convention, the subsequent result is the neglect of the experiences, interests, needs and rights of which the girl child is entitled to.¹⁴² This also demonstrates that ratifying an international instrument requires a genuine commitment from state parties towards all of its provisions in order to ensure its effectiveness.

The second foundational principle in children's rights law is that of the best interests of the child.¹⁴³ Due to their relative immaturity, young children are reliant on responsible authorities to assess and represent their rights and best interests in relation to decisions and actions that affect their well-being, in light of their own views and evolving capacities.¹⁴⁴ The term takes into account the deliberation that courts as the upper guardians of minors and children must undertake when deciding what type of services, actions, and orders will best serve a child as well as who is best suited to take care of a child.¹⁴⁵ What is clear is that there is a duty of care placed on responsible authorities to always prioritise the best interest of the child.

Regarding the issue of child marriage, it is arguable that the best interests of a child as a substantive principle requires the court to always prioritise the best interests of the child against the interests of the other parties involved when faced with child marriage cases. From a substantive point, states are required to establish a mechanism necessary to adequately take into account the best interests of the child, through a legal obligation on

¹⁴¹ UN Committee on the Rights of the Child (CRC), 'UN Committee on the Rights of the Child: Concluding Observations: Vanuatu' (10 November 1999, CRC/C/15/Add.111)

<<http://www.refworld.org/docid/3ae6aeef8.html>> accessed 26 June 2015.

¹⁴² UN General Assembly, Convention on the Rights of the Child 1989, Article 3.

¹⁴³ UN General Assembly, Convention on the Rights of the Child 1989, Article 3.

¹⁴⁴ Committee on the Rights of the Child, 'Implementing Child Rights in Early Childhood' (General Comment No.7 (2005))<<http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/GeneralComment7Rev1.pdf>> p6 accessed 16 January 2016.

¹⁴⁵ Child Welfare Information Gateway, 'Determining the Best Interests of the Child' (State Statutes, November 2012) <https://www.childwelfare.gov/pubpdfs/best_interest.pdf> accessed 16 January 2016 p2.

decision-makers such as judges.¹⁴⁶ The principle of best interests also appears under Article 18 of the CRC. For example, both parents have a shared responsibility in bringing up their children and taking decisions that are in the best interests of the child. This principle can be used to guard against gender-biased decisions that parents make which are influenced by social, economic and cultural factors. This principle must be interpreted in consideration of the Convention as a whole. This means that, the best interest of a child principle should be at the centre of all actions, measures and strategies against the practice of child marriage.¹⁴⁷

Thirdly, the right to life, survival and development refers to the child's inherent right to life, and State parties have the duty to ensure the maximum extent possible of the survival and development of the child.¹⁴⁸ General Comment No 5 states that this principle must be interpreted broadly and holistically, encompassing the physical, mental, spiritual, moral, psychological and social development.¹⁴⁹ Article 27 affirms this statement by explicitly recognising the importance of an adequate standard of living for children's 'physical, mental, spiritual, moral and social development'. According to the CRC Committee, promoting the right to life, survival and development is however unduly threatened by the difficult socio-economic realities in some countries.¹⁵⁰ State parties should ensure that the girl child's right to life, survival and development is not violated through harmful practices such as child marriage which has a direct negative effect on bringing the period of childhood to a premature end.

Lastly, Article 12 provides for the principle of participation by emphasising the importance of children's participation in decisions and actions which affect them.¹⁵¹ As a substantive right it asserts that children are entitled to be listened to and taken

¹⁴⁶ Adrianasolo (n114 above) p19.

¹⁴⁷ Ibid.

¹⁴⁸ UN General Assembly, Convention on the Rights of the Child 1989, Article 6.

¹⁴⁹ Ibid, Article 3.

¹⁵⁰ Committee on the Rights of the Child, 'Consideration of Reports Submitted by States Parties under Article 44 of the Constitution' (Concluding Observations of the Committee on the Rights of the Child: Kenya, 2001) <<http://www1.umn.edu/humanrts/crc/kenya2001.html>> para 28.

¹⁵¹ UN General Assembly, Convention on the Rights of the Child 1989, Article 12.

seriously.¹⁵² As a procedural right it allows children to act in order to protect and promote the realisation of other rights that they are entitled to.¹⁵³ In light of the general elements that constitute a legal marriage as reflected in international Conventions that have been discussed, and also the definition of a child, the principle of participation can be linked to the requirement of free and full consent. A girl child cannot give free and full consent based on the mere fact that she is a child. The assumption that follows is that her parents or guardians provide for consent on her behalf. This infringes upon the girl child's right to participation because she is excluded from the decision- making process on a matter that directly affects her wellbeing and violates the rights she is entitled to as a child.

Malawi acceded to Optional Protocol on the Sale of Children, Child Protection and Child Pornography on the 7th October 2009. This is a Protocol to the Convention on the Rights of the Child and its main objective is to expand the mandate of the CRC, especially where rights have been defined with the corresponding duty placed on State parties to take on action in order to protect them. This Protocol defines sale of children as 'any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration.'¹⁵⁴ The UN Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography considers child marriage as a form of sale of children.¹⁵⁵ This is in light of the bride price transactions which take place when concluding a child marriage. A dowry for younger girls is considered to be an incentive for parents to arrange marriage for their daughters at an early age.¹⁵⁶ Therefore, the Optional Protocol advances the position of the CRC by ensuring that children are protected from all forms of sexual exploitation and abuse. Specifically, the Protocol may also be used in order to protect girls from child marriage which can arguably be considered to be an act of sale of children. Article 2 of the Optional Protocol provides for

¹⁵² Lansdown(n 63 above) p17.

¹⁵³ Ibid.

¹⁵⁴ Ibid, Article 2 (a).

¹⁵⁵ Najat Maalla M'jid, 'Report of the special rapporteur on the sale of children, child prostitution and child pornography, Najat Maalla M'jid' (Human Rights Council 25th session/48, December 2013)<
http://www.google.com/url?url=http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session25/Documents/A-HRC-25-48_en.doc&rct=j&frm=1&q=&esrc=s&sa=U&ved=0ahUKEwii5frYjq7KAhXDXhQKHRf6AQAQFggUMAA&usg=AFQjCNFAeFj-X50uTzUXuJzdijyaOssxEQ> accessed 16 January 2016 para 26.

¹⁵⁶ Ibid.

a definition of the sale of children as, “an act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration”. For instance with regards to child marriage, it takes different forms, one of which is relevant to the response to poverty, or when parents settle their debts by marrying off their daughters.¹⁵⁷

1.5.1.6. THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (CEDAW)¹⁵⁸

Malawi acceded to the CEDAW on the 12th March 1987. CEDAW contains provisions that relate to child marriages. CEDAW calls for an end to all forms of gender-based discrimination against women (and girls).¹⁵⁹ It does not contain a definition of a child, but has a provision that states, ‘the betrothal and the marriage of a child shall have no legal effect’.¹⁶⁰ Therefore CEDAW asserts that child marriages should be declared void ab initio.¹⁶¹

The CEDAW Committee, the body established by CEDAW to monitor compliance with its provisions, has made the observation that, in order to protect children against child marriages or forced marriages that are justified under the basis of ‘custom, religious beliefs or the ethnic’ origins, it is important for States to enact and enforce laws that protect young girls against such harmful practices.¹⁶²

¹⁵⁷ Katy Migiro, ‘Child brides abducted, raped, married to appease gods, settle debts’ (Thomson Reuters Foundation, 18 July 2014) <<http://www.trust.org/item/20140718082523-uh8y3/?source=spotlight>> accessed 16 January 2016.

¹⁵⁸ UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13.

¹⁵⁹ Benyam Mezmur, ‘Protecting Children from Harmful practices in Plural Legal Systems: with a special emphasis on Africa’ (Office of the Special Representative of the Secretary on Violence against Children, New York 2012) <http://srg.violenceagainstchildren.org/sites/default/files/publications_final/SRSG_Plan_harmful_practices_report_final.pdf> accessed 16 January 2016 p11.

¹⁶⁰ CEDAW 1979, Article 16(2).

¹⁶¹ MA Freeman, ‘Article 16’ (MA Freeman and others (ed) The Convention on the elimination of all forms of discrimination against women: a commentary (2011)) p437.

¹⁶² Rita Mutyaba, ‘Early marriage a violation of girls fundamental human rights in Africa’ (2011 Vol.19 International Journal of Children’s Rights) <http://www.academia.edu/3053636/Early_Marriage_A_Violation_of_Girls_Fundamental_Human_Rights_in_Africa> p341.

The Optional Protocol to the CEDAW is an important tool that can be used in response to eliminating harmful practices such as child marriages because it allows for access to justice. This Protocol contains the communication procedure that allows individual women, or groups of women to submit claims of violations of rights protected under the Convention to the Committee.¹⁶³

1.5.1.7. THE UN PROTOCOL TO PREVENT, SUPPRESS AND PUNISH TRAFFICKING IN PERSONS, ESPECIALLY WOMEN AND CHILDREN, SUPPLEMENTING THE UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANISED CRIME (THE PALERMO PROTOCOL)¹⁶⁴

Malawi acceded to the Palermo Protocol on Trafficking on 17th March 2005. The Trafficking Protocol is one of the three Palermo protocols to the Convention against Transnational Organised Crime. The Trafficking Protocol states that the recruitment, transfer, or receipt of a child for the purposes of exploitation is regarded as human trafficking.¹⁶⁵ The Protocol also identifies the different forms relevant to trafficking, where force or coercion is used, money is exchanged or consent is given.¹⁶⁶ This is important in light of the fact that the issue regarding consent is problematic, in most cases it is provided for by an interested third party and not the girl child, or she is coerced or threatened into providing consent. This Protocol also places an obligation on the State parties to adopt or strengthen various measures to alleviate the factors that make persons, especially women and children vulnerable to human trafficking.¹⁶⁷ Some of these factors

¹⁶³ Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (A/RES/54/4) 2000, Article 3.

¹⁶⁴ The UN Protocol to Prevent, Suppress And Punish Trafficking In Persons, Especially Women And Children, Supplementing The United Nations Convention Against Transnational Organised Crime_G.A. Res. 25, annex II, U.N. GAOR, 55th Sess., Supp. No. 49, at 60, U.N. Doc. A/45/49 (Vol. I) (2000), *entered into force* Dec.25, 2003.

¹⁶⁵ The Palermo Protocol 2000, Art 3(a).

¹⁶⁶ *Ibid*, Art 3 (d).

¹⁶⁷ Joy Ngozi Ezeilo, 'Statement by Ms. Joy Ngozi Ezeilo, UN Special Rapporteur on Trafficking in Persons, Especially Women and Children' (57th session of the Commission on the Status of Women, New York 11 March 2013) <<http://www.un.org/womenwatch/daw/csw/csw57/statements/statement-ezeilo.pdf> > p4 accessed 16 January 2016.

include poverty, underdevelopment and lack of equal opportunity.¹⁶⁸ The issue of child marriage can arguably qualify as a form of human trafficking because child marriages equate to forced marriages whereby an individual is forced to enter into a marriage against her own will and without her consent.¹⁶⁹

2.5.2.1 REGIONAL HUMAN RIGHTS STANDARDS

A number of African human rights instruments provide protection of the rights of children against child marriage.

2.5.2.2 THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS ("BANJUL CHARTER")¹⁷⁰

Malawi ratified the Banjul Charter on the 19th November 1989. The Banjul Charter is a significant instrument that confirms the commitment to the protection of human rights in Africa. The Banjul Charter is the foundation on which the African human rights regime is built. The provisions in this Charter take a general view towards the protection of human rights. The Banjul Charter only makes one mention of the child under Article 18 which compels all state parties to "ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions".¹⁷¹ This provision is relevant in addressing the issues of discrimination that women and children face. The Charter makes provision for the right to the best attainable state of physical and mental health, and thus the consequences that are attached to the practice of child marriage, especially towards the girl child, constitute a violation of the rights provided for in the Charter.¹⁷² It

¹⁶⁸ Ibid.

¹⁶⁹The AHA Foundation, 'Forced Marriage and the Many Faces of Human Trafficking' (The AHA Foundation Blog, 2 July 2013) <<http://give.theahafoundation.org/blog-0/bid/149715/Forced-Marriage-and-the-Many-Faces-of-Human-Trafficking>> para 3 accessed 16 January 2016.

¹⁷⁰ Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

¹⁷¹ Ben Baker and others, 'Before their time: challenges to implementing the prohibition against child marriage in Sierra Leone' (published by Plan-UK, 2013) <http://www.plan-uk.org/assets/Documents/pdf/Before_their_time_report.pdf> p23 accessed 16 January 2016 .

¹⁷² Ibid.

endorses internationally adopted principles on children's right by affirming that State parties should ensure that the rights of the child are protected as stipulated in international declarations and Covenants.¹⁷³

2.5.2.3 THE AFRICAN CHARTER ON THE RIGHTS AND WELFARE OF A CHILD (ACRWC)¹⁷⁴

Malawi acceded to the ACRWC on the 16th September 1999. The ACRWC is a regional binding instrument that endorses the CRC and has been said to reflect the African conceptions of children's rights.¹⁷⁵ Africa is the only continent with a region-specific child rights instrument. The ACRWC is a comprehensive treaty that contains civil and political rights, and social, economic and cultural rights. It also provides protection against all forms of discriminatory practices that affect young girls.¹⁷⁶ The ACRWC explicitly contains a provision that prohibits the practice of child marriage and calls on State parties for effective action and legislation to be put in place in order to specify the minimum age of marriage as 18 years.¹⁷⁷ To warrant further protection, it calls for all states to ensure that as a compulsory requirement, all marriages are registered in an official registry.¹⁷⁸ This is an important provision that may be used to guard against child marriages which in many cases are not registered or are falsely registered. It seeks to ensure the development of a child by establishing that State parties should commit themselves towards the survival, protection and full development of the child.¹⁷⁹ The ACRWC provides for a legal framework with high standards and added value to what is provided for under the CRC. It has been stated that this reflects a meaningful attempt in addressing specific continental challenges.¹⁸⁰

¹⁷³ Eric Njungwe, 'International Protection of Children's Rights: An Analysis of African Attributes in the African Charter on the Rights And Welfare of the Child' (June 2009, Vol.3 No.1 CJDHR) p10.

¹⁷⁴ Organization of African Unity (OAU), African Charter on the Rights and Welfare of the Child (ACRWC), 11 July 1990, CAB/LEG/24.9/49 (1990).

¹⁷⁵ Kasongo Theodore Kamwimbi, 'Forces child labour: a critical analysis of the Democratic Republic of Congo's compliance with international labour standards' (Master of Laws, University of Cape Town February 2013) p43.

¹⁷⁶ The Banjul Charter 1981, Article 21.

¹⁷⁷ ACRWC 1990, Article 21.

¹⁷⁸ Ibid.

¹⁷⁹ ACRWC 1990 Article 27.

¹⁸⁰ Memzur (n159 above)

The ACRWC recognises that all children have fundamental rights especially the right to non-discrimination, survival, development, education, health and welfare, and participation, and that child marriage is a serious violation of these rights.¹⁸¹ The African Committee of Experts on the Rights and Welfare of the Child (ACERWC) is the treaty body established by the ACRWC and it is mandated to monitor and report on the fulfilment of child rights in Africa.¹⁸² During its 23rd session the ACERWC adopted the ‘Addis Ababa Declaration on Ending Child Marriage in Africa’.¹⁸³ This Declaration stresses that members of the African Union should ratify the ACRWC and all relevant international child rights instruments and fully harmonise their laws and policies with the international and regional child rights standards on child marriage.¹⁸⁴ The Declaration also calls on the ACERWC to urge member States to combat child marriage through setting the minimum age for marriage at 18 years for both girls and boys without exception, including establishing an effective mechanism for registration of birth, marriage and termination of marriage.¹⁸⁵ Although not legally binding, the Declaration represents political will from member states to end child marriage in Africa.

2.5.2.4 THE PROTOCOL ON THE RIGHTS OF WOMEN IN AFRICA TO THE AFRICAN CHARTER ON HUMAN AND PEOPLES’ RIGHTS (THE MAPUTO PROTOCOL)¹⁸⁶

Malawi ratified the Maputo Protocol on the 20th May 1995. The Maputo Protocol is a progressive legal instrument that sets out a diverse range of rights applicable to African

¹⁸¹African Committee of Experts on the Rights and Welfare of the Child (ACERWC), ‘The Addis Ababa Declaration on Ending Child Marriage in Africa’ (23rd session of the African Committee of Experts on the Rights and Welfare of the Child, Addis Ababa, Ethiopia 11 April 2014) <<https://srs.violenceagainstchildren.org/sites/default/files/documents/docs/ACERWC-Declaration-on-Ending-Child-Marriage-in-Africa.pdf>> p2 accessed 16 January 2016..

¹⁸²ACRWC 1990, Article 32-46.

¹⁸³Ibid.

¹⁸⁴ African Committee of Experts on the Rights and Welfare of the Child (ACERWC) (n181 above) p4.

¹⁸⁵ Ibid p3.

¹⁸⁶ African Union, Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, 11 July 2003.

women and girls.¹⁸⁷ The Maputo Protocol contains provisions relating to the elimination and prohibition of all forms of harmful practices that negatively affect the human rights of women and that are contrary to recognised international human rights standards. Article 6 of the Protocol states that, ‘the minimum age of marriage for women shall be 18 years’ and it provides for the requirement of full and free consent of both parties.¹⁸⁸ Article 17 places an obligation on States to ensure the right of women to live in a “positive cultural context”. Article 17 does not deny the importance or the relevance of culture,¹⁸⁹ however child marriage is arguably a cultural practice that endangers normal growth and affects the physical and psychological development of women and girls.¹⁹⁰ Furthermore, Article 2 requires that States have a duty to eliminate all forms of discrimination against women and girls. These provisions can be used to protect the girl child against child marriage.

2.6 CONCLUSION

Globally child marriage is currently considered to be a human rights violation issue since it has been identified as a form of sexual abuse and exploitation that children have to be protected against. Child marriage refers to a legal or customary union between two people, in which one or both spouses are below the age of 18.¹⁹¹ It has a significant greater negative impact on the girl child, both in terms of prevalence rates and consequences.¹⁹² It is clear that child marriage includes the consequence of removing a child from the protection of relevant human rights instruments applicable to the rights of

¹⁸⁷ Kavinya Makau, ‘The Maputo Protocol 10 years on: How can it be used to help end child marriage’ (Equality Now, 18th July 2013) <<http://www.girlsnotbrides.org/the-maputo-protocol-10-years-on-how-can-it-be-used-to-end-child-marriage/>> par 2 accessed 16 January 2016.

¹⁸⁸ African Union, Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, 11 July 2003, Article 6.

¹⁸⁹ Makau (n187 above).

¹⁹⁰ African Union, Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, 11 July 2003.

¹⁹¹ Centre for Reproductive Rights (n93 above) at 4.

¹⁹² United Nations Children’s Fund Innocenti Research Centre ‘Early Marriage: Child spouses’ (Innocenti Digest no.7, March 2001) <<http://www.unicef-irc.org/publications/pdf/digest7e.pdf>> p3 accessed 28 November 2014.

children, and this comes as a result of the attainment of majority that occurs through marriage.

This chapter has examined the international and regional instruments which indicate that the practice of child marriage violates all forms of human rights that a girl child is entitled to, such as the right to health, education, equality and the right to make a free and informed choice of a spouse. These international and regional human rights instruments also protect the girl child against the harmful practice of child marriage. State parties to these instruments have an obligation to take action and put in place effective laws that respond to the human rights violation that young girls experience through child marriages.

In light of the international and regional normative framework, the next chapter will unpack the prevalence rates, causes and consequences of child marriage in Malawi. The chapter will also examine the civil, religious and customary marriage law system in Malawi and some of the various cultural practices that encourage child marriages in Malawi. The chapter will also address the normative legal framework in Malawi and will analyse its failures/challenges as regards compliance with international and regional human rights standards.

CHAPTER THREE

CASE STUDY: CONTEXTUAL ANALYSIS OF CHILD MARRIAGE IN MALAWI

3.1 INTRODUCTION

Dialogues on child marriages in Malawi are currently in the public domain and gaining popular support from state and non-state organisations. This chapter identifies common causes of child marriage in Malawi. It also outlines the normative legal framework in Malawi, and makes an analysis of the successes and failures in complying with international and regional human rights standards.

The practice of child marriage is prevalent both in the rural and urban areas of Malawi.¹⁹³ Malawi ranks 8th out of the 20 countries in Africa that are considered to have the highest rates of child marriage according to the United Nations Population Fund (UNFPA).¹⁹⁴ At 37%, child marriage prevalence in Malawi is also higher than the regional average for sub-Saharan Africa.¹⁹⁵ In 2010, it was recorded that 50 per cent of women between the ages of 20-24 years were married or were in a union before the age of 18 (compared to 6.4 per cent of boys) while 12 per cent of them were women married before the age of 15, compared to only 1.2 per cent of men.¹⁹⁶ The prevalence of child marriages is linked to the low levels of education in Malawi. It has been reported that about 14,051 primary

¹⁹³Seodi White, 'No ifs or buts': Child Marriage needs to be abolished in Malawi, once and for all' (Special for CNN, 3 March 2015) <<http://edition.cnn.com/2015/03/03/africa/seodi-white-child-marriage/>> p2 accessed 16 January 2016.

¹⁹⁴UNFPA, 'Profiles of 10 countries with the highest rates of child marriage' (<https://www.unfpa.org/sites/default/files/resource-pdf/ChildMarriage_8_annex1_indicator-definition.pdf>.p8 accessed

¹⁹⁵White (n193 above).

¹⁹⁶National Statistical Office (NSO) and others, 'Malawi demographic and health survey 2010' (Zomba, Malawi, and Calverton, Maryland, USA: NSO and ICF Macro, 2011) < <https://dhsprogram.com/pubs/pdf/FR247/FR247.pdf> > p76.

school girls dropped out due to entering into marriage and 5,597 secondary school girls during the same period dropped out because they fell pregnant.¹⁹⁷

3.2 CAUSES AND CONSEQUENCES OF CHILD MARRIAGES IN MALAWI

In Malawi, the forms of child marriage vary according to beliefs, customs, and a host of social practices that have powerful influence on the communities. Thus sometimes they are dependent on individual circumstances and context. Some of the causes of child marriage are stated below.

3.2.1 POVERTY AND TEEN PREGNANCY

Extreme poverty is one of the main reasons that result in many girls being married off whilst still young. Child marriages occur more frequently among girls who are less educated, poor and living in rural areas.¹⁹⁸ In such situations some families marry off their daughters in order to get financial resources to meet their basic needs from continuous support that will come from the husband.¹⁹⁹ The practice of *Kupimbila*, which is practiced in some parts of northern Malawi, is a form of debt repayment in which a girl is given to the creditor for marriage.²⁰⁰ Another example is known as *kutomera*, whereby a financially induced contractual agreement is concluded between the parents of the girl and the interested party, with a promise on the girl's hand in marriage when she becomes of age.²⁰¹ In extreme cases of these arrangements, girls may be as young as 9 years old when they are sent to live with the creditor.²⁰² In some cases, the arrangement entail that

¹⁹⁷ Human Rights Watch (n29 above).

¹⁹⁸ Kids Rights, 'Innocence Lost: Child marriage in a global context, with a focus on Malawi' (Kids Rights Report) <<https://www.kidsrights.nl/Portals/0/Peter%20R/Innocence%20Lost%20-%20Child%20Marriage%20in%20a%20global%20context,%20with%20a%20focus%20on%20Malawi.pdf>> p12 accessed 17 January 2016.

¹⁹⁹ Human Rights Watch (n27 above) p16.

²⁰⁰ Ibid.

²⁰¹ Melanie Stuart, 'A Cultured Education: Malawi As An Example For Protecting the Rights of the Girl Child in the Face of Cultural Barriers' (Professor Deena Hurwitz, Independent Research, 2011) <https://humanrightsstudyproject.files.wordpress.com/2012/07/mstuart_malawi.pdf> p8 accessed 17 January 2016.

²⁰² Stuart (n201 above) p7.

the girl will eventually marry the man when she comes of age.²⁰³ In all these circumstances there is lack of full and free consent from the girl child as she is not part of the decision-making process of the arranged marriage.²⁰⁴

Similar to many other African countries, the correlation between inequality and poverty in Malawi is characterised by among other features, the feminization of poverty. Malawi has a population of about 13.2 million people, 85 percent of whom live in rural areas.²⁰⁵ Women make up 52 percent of the population and they are a major contributor in the informal economy. However, despite their majority in numbers, there are serious gender based disparities in terms of access to, and control of productive resources and opportunities for gainful participation in the country's development.²⁰⁶ In light of this, the status of girls falls into the same cycle with little inspiration to get out of poverty, thereby rendering them potential candidates for child marriage.

Poverty is also linked to the high rates of teenage pregnancies which result in child marriages in Malawi. Girls from poor communities engage in transactional sex with men in order to get money or food.²⁰⁷ Such behaviour, which in some cases is encouraged by desperate parents, result in pregnancies. Due to social stigma and dishonour attached to pregnancies out of wedlock, parents resort to marrying off their daughters to the responsible sexual partner in order to conceal the pregnancy that is out of wedlock.²⁰⁸ This practice is in some areas known as “*ukwatiwotulira*” or “*chipati*” in the vernacular. This arrangement usually involves some payment of damages by the girl's sexual partner.²⁰⁹ Marrying young girls to those responsible for their pregnancy is considered as

²⁰³ Lea Mwambene, 'Malawi: A comparative analysis with the patrilineal customary law marriage in South Africa' (LLM, University of the Western Cape, 2005) p10.

²⁰⁴ Girl Up, 'Malawi: Adolescent Girls in Malawi' (United Nations Foundation) <<https://girlup.org/impact/focus-countries/malawi/>> par 1 accessed 17 January 2016.

²⁰⁵ Human Rights Watch (n27 above) p9.

²⁰⁶ UNICEF 'Malawi: The situation of Women and Children' <<http://www.unicef.org/malawi/children.html>> accessed 17 January 2016.

²⁰⁷ See Stephenson R and others, 'Community Environments Shaping Transactional Sex among Sexually Active Men in Malawi, Nigeria, and Tanzania,' (US National Library of Medicine National Institution of Health, 2012) <<http://www.ncbi.nlm.nih.gov/pubmed/23215551>> accessed 17 January 2016.

²⁰⁸ Baker (n171 above) p16.

²⁰⁹ Stuart (n207 above) p8.

the only option to cure what is perceived to be a ‘disability’ that has fallen before her.²¹⁰ Though these marriages do not necessarily reflect the full range of customary marriage laws, they are still as harmful as other forms of child marriage that violate a wide range of rights that every girl child is entitled to. Young girls who fall pregnant often drop out of school and the reality of them returning to school or being allowed back to take their final exams remains tricky due to stigma and prejudices. However, government, international bodies and education rights advocates are designing programmes to encourage girls to go back to school after delivering their babies.

It has been reported that in some parts of the northern region of Malawi such as Chitipa and Mzimba, guardians tend to marry off young girls (especially orphans) to relieve themselves from the responsibility of looking after them.²¹¹ This arrangement works in favour of the guardians as they stand to benefit from the bride price which is tagged under different forms such as lobola. The young girl is forced into marriage against her will or may give in to the arrangement in order to respect the decision that has been made on her behalf.

3.2.2 TRADITION AND CULTURES

Cases of child marriages are deeply entrenched in Malawian traditions and cultures that encourage early sexual initiation, the status of being married, women’s subordination in society and stigmatisation of teen pregnancies.²¹² The Constitution of Malawi contains legal rights and assurances to all citizens by specifically providing for the right to live a cultural life of their choice.²¹³ The Constitution provides assurance that legislation will be passed to eliminate customs and practices that discriminate against women²¹⁴, it also guarantees all children equal treatment²¹⁵ and prohibits forced marriages.²¹⁶ However

²¹⁰Human Rights Watch (n27 above) p17.

²¹¹ Malawi Human Rights Commission, ‘Cultural Practices and their Impact on the Enjoyment of Human Rights, Particularly the Rights of Women and Children in Malawi’ (2005) p 7.

²¹²Ibid.

²¹³ The Constitution of the Republic of Malawi, s 26.

²¹⁴ The Constitution of the Republic of Malawi, s 24(2).

²¹⁵ The Constitution of the Republic of Malawi, s 23.

girls continue to face a host of disadvantages for merely being female, especially under certain cultural practices that tend to interfere with the fulfilment of various rights of girls.

There are various culture-specific practices revolving around traditions of initiation ceremonies for Malawian children. These ceremonies hold value in communities as they are considered a rite of passage to adulthood. Both girls and boys go through initiation practices where they are taught about the values and norms that are respected in their communities.²¹⁷ For the girl child, the initiation customs primarily revolve around preparing them for married adult life. The initiation ceremony for girls is known vernacular as “*chinamwali cha atsikana*”. Girls who take part in these initiation ceremonies usually come back from the camps reformed, with many thinking that they are matured enough to get married regardless of their age.²¹⁸ In addition to counselling girls on values and manners, girls receive sex education and marriage counselling. However, many girls do not get accurate information on reproductive health from these initiation ceremonies due to the fact that basic knowledge about sexuality, contraception and issues surrounding these topics are not openly discussed.²¹⁹ The assumption follows that the initiation ceremonies are supposed to provide for such knowledge; however what occurs at these ceremonies remains controversial. For instance, in the central region there is a practice known as *Kutsatsa pfumbi* or *kuchotsa pfumbi*, which means removing dust, whereby girls after being counselled by elderly women, they perform a dance while naked in front of everyone at the chief’s house.²²⁰ Anyone is allowed to touch the girl and give her a gift, that may be in the form of money. At the end of the day, the girls are advised to identify any boy with whom to have sex in order to avoid *kutuwa* which literally means to become dirty with dust. In this case, removing dust as referred to above, is a ritual cleansing process.²²¹

²¹⁶The Constitution of the Republic of Malawi, s 22(4).

²¹⁷Stuart (n201 above) p9.

²¹⁸Ibid.

²¹⁹Human Rights Watch (n27 above) p17.

²²⁰ Malawi Human Rights Commission (n211 above).

²²¹ Ibid.

The cultural sexual experiences which girls go through regardless of their age can be linked to be a catalyst of child marriages. These practices can be challenged against certain provisions of the Constitution such as section 13 (a) which provides for principles of national policy, one of which is to obtain gender equality for women with men.²²² The importance of this provision is that it may be used to address child-related gender issues which demand child protection or child justice related policies that have the primary purpose of protecting children against harmful traditional and cultural practices such as child marriages.

Taking into account the prevalence of HIV and AIDS in Malawi²²³, the harmful health problems that result from such cultural practices cannot be overlooked. The Malawi Law Commission isolated a number of rights such as the right to life²²⁴ in the Constitution of Malawi which have a bearing on matters pertaining to HIV and AIDS.²²⁵ The Commission proceeded to recommend the outlawing of customs and practices that perpetrate the risk of infection with HIV and AIDS. This involved the adoption of harmful practices listed in the first schedule which are subject to penalties and imprisonment.²²⁶ However elders remain adamant and they continue to support the initiation of girls as crucial because nobody wants a wife who is not properly trained.²²⁷ Such initiations within this context undermine the protection of children's rights by prioritising the importance awarded to local values.

²²² The Constitution of the Republic of Malawi, s 13(a).

²²³ Ibid.

²²⁴ The Constitution of the Republic of Malawi, s16.

²²⁵ Malawi Law Commission, 'Report of the Law Commission on the Development of HIV and AIDS Legislation' (The Malawi Gazette Supplement,, Law Commission Report No.20, 31st Dec 2008) < http://www.lawcom.mw/docs/Report_on_the_Development_of_the_HIV_and_AIDS_Legislation.pdf> p36 accessed 17 January 2016.

²²⁶ Ibid p35.

²²⁷ Thoko Kaime, 'The African Charter on the Rights and Welfare of the Child: A socio-legal perspective' (Pretoria University Law Press (PULP, 2009) < http://www.pulp.up.ac.za/cat_2009_11.html> p155 accessed 17 January 2016.

Section 20 of the Constitution of Malawi, and the international human rights standards prohibit discrimination based on sex.²²⁸ The significance of this principle as far as girls' rights are concerned cannot be overemphasised. This is why the protection of women and children against discriminatory cultural practices in Africa is also provided for under the African Women's Protocol.²²⁹ Article 6 (a) of the Africa Women's Protocol expects that state parties shall enact appropriate national legislative measures to guarantee, inter alia, free and full consent of both parties to a marriage. From the above discussion, it can be observed that there are some cultural practices that pose serious threats to the rights of girls because they expose them to child marriage.

3.2.3 LACK OF EDUCATION

Education remains a gendered bottleneck problem where ingrained gender roles for women are still confined to those of daughter, wife and mother in many Malawian communities.²³⁰ In Malawi, some young girls especially those that are trapped in rural poverty end up getting married as the next best alternative to education because of the lack of community and support systems to further their educational studies. In most instances girls that are from large families with high poverty levels are denied the opportunity to enrol into schools than those from small and wealthy households since choices may have to be made as to who should benefit from the family's scarce resources.²³¹ Thus girls either do not enrol into school or are withdrawn after reaching puberty in order to undertake domestic duties or specifically to get married.

²²⁸Article 1 UN Charter; Article 2 Universal Declaration; Article 2 ICESCR; Article 2(1) ICCPR; Article 2 CEDAW; Articles 2 & 3 Banjul Charter.

²²⁹The Protocol, which entered into force on 25 November 2005, is the first specialised gender-neutral instrument for the protection of women's rights in Africa. It was adopted by the Assembly of the Heads of State and Government of the African Union at its 2nd ordinary session, on 11th July 2003 in Maputo, Mozambique. It was promulgated out of concern by the AU that women in Africa continue to be victims of discrimination and harmful practices (see Preamble to the African Women's Protocol).

²³⁰UNFPA and others, 'Ending child marriage: a guide for a global policy action' (2006) <<http://www.unfpa.org/publications/ending-child-marriage-guide-global-policy-action>> p14 accessed 17 January 2016.

²³¹Ministry of Education, Science and Technology, 'National Girls Education Strategy' (January 2014) p14.

The failure to retain girls in schools in Malawi is also attributed to serious challenges in getting school fees due to poverty, harmful cultural practices, lack of age-appropriate reproductive health information and knowledge, unavailability of adult classes or other flexible school programs that are compatible to young brides or teenage mothers.²³² This specifically relates to many girls in rural areas who are subjected to less exposure to education for development. They are expected to behave in a manner befitting someone for marriage and motherhood and less for productive engagement in the economy.²³³

In Malawi, less than half of the girls (47%) complete primary school.²³⁴ However, access to secondary education remains poor with only 34% of the girls proceeding to secondary education.²³⁵ The issues regarding achievement, attainment and accomplishment of education is also met with challenges that include, cost, quantity, quality and content of schooling that determine whether girls are subject to dropping out and marrying early.²³⁶ For instance, girls are easily discouraged from continuing with school because they become wary of long distances to school which turns out to be a significant factor that leads to school dropouts.²³⁷

According to a report by Malawi Human Rights Commission (MHRC), long distances to school and lack of boarding facilities in other areas were some of the major problems that have led to many girls dropping out of school. For instance in Nkhata Bay, girls in such situations are sexually harassed or use sex to secure food or meet their material needs.²³⁸ At the same time some parents would rather opt for the girl to discontinue with school and help with household chores especially in cases where she has reached the stage of puberty.²³⁹ Such challenges are met at a stage in child development where girls are most vulnerable to being interrupted from completing their education. Alternatives such as

²³² Human Rights Watch (n27 above) p20.

²³³ Ministry of Education, Science and Technology Girls (n231 above) p19.

²³⁴ UNICEF, 'Keeping Girls in School: New WASH facilities for a brighter future' (UNICEF Global site) <http://www.unicef.org/malawi/development_15901.html>.

²³⁵ Ibid.

²³⁶ Chisomo Kaufulu-Kumwenda (n236 above)p15.

²³⁷ Titus Linzie 'Poverty, long distances fuelling early marriages in Salima.' (Global Post, 2 July 2013)

<<http://www.poverty-long-distances-fuelling-early-marriages-in-salima-76116>> accessed 15 February 2015.

²³⁸ Malawi Human Rights Commission (n211 above) p58.

²³⁹ Kaufulu-Kumwenda (n236 above) p15.

child marriage become a favourable option because once young girls have reached puberty, they are considered to be ready for marriage regardless of their age.

3.3 THE LEGAL FRAMEWORK GOVERNING THE PROTECTION OF THE GIRL CHILD

The legal framework in Malawi does not have a comprehensive or consolidated children's Act. What is available is legislation that relates to children's rights and this can be found from a variety of sources. This section focuses on relevant legislation which includes a number of pieces of legislation related to CEDAW. For instance, the Constitution under section 24, defines the rights of women in addition to the general human rights provisions.

Malawi is a signatory to the core international treaties that protect girls' human rights. Malawi also ratified the ICCPR, ICESCR, the CEDAW and the CRC.²⁴⁰ At regional level, Malawi is party to the Banjul Charter, ACRWC and the Maputo Protocol.²⁴¹ To an extent, the Malawi Government has been proactive by taking steps to domesticate these treaties though gaps still remain.

3.3.1 THE CONSTITUTION OF MALAWI

Chapter IV of the Constitution of Malawi has a Bill of Rights that applies equally to both children and adults. One of the rights guaranteed in the Bill of Rights as being relevant to

²⁴⁰International Covenant on Civil and Political Rights (ICCPR) 1966, ratified by Malawi on December 22, 1993; International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966, ratified by Malawi on December 22, 1993; International Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) 1981, ratified by Malawi March 12, 1987; Convention on the Rights of the Child (CRC) 1989, ratified by Malawi January 2, 1991.

²⁴¹African (Banjul) Charter on Human and Peoples' Rights (ACHPR), OAU Doc. CAB/LEG/67/3 rev. 5, 21 (1982), entered into force October 21, 1986, ratified by Malawi February 23, 1990; African Charter on the Rights and Welfare of the Child (ACRWC) 1990, ratified by Malawi September 16, 1999; and Protocol to the African Charter on Human and Peoples' Rights on The Rights of Women in Africa (the Maputo Protocol) 2003 and ratified by Malawi May 20, 1995.

the issue of child marriages in Malawi is the right to life.²⁴² The general guarantee of the right to life entrenches both the negative and positive aspects of the right.²⁴³ One such positive aspect relates to the duty placed on the state to prevent deprivation of life. According to Chirwa, this responsibility extends to acts committed by third parties or non-state actors.²⁴⁴ In this respect, the state would for example, be held accountable for any death among female adolescents arising from pregnancies and childbirths as a result of child marriages.²⁴⁵

The Constitution of Malawi also recognises the right to protection of the family and the right to marry.²⁴⁶ Despite the importance that the Constitution attaches to the role of the family, child marriage represents one of the most prevalent forms of sexual abuse and exploitation of girls that involves the family as one of the key facilitators of the practice. In this regard, matters that fall within the family domain would have traditionally been covered under the veil of privacy, and away from public scrutiny. This means that human rights violations taking place in private spheres would have been afforded impunity.²⁴⁷ In recognising the occurrence of such violations, the framers of the Constitution showed insightfulness by including s 22 (2) of the Constitution, which guarantees every member of the family full and equal respect and protection by law against all forms of neglect, cruelty or exploitation.²⁴⁸ Furthermore the specific rights of children and other rights within the Constitution and international human rights treaties that Malawi is a signatory to can be used to address violations of human rights within the family set up.

As regards the right to marry, the Constitution provides that individuals should enter freely into marriages. This creates a legally binding union between the parties

²⁴² The Constitution of the Republic of Malawi, s 16.

²⁴³ Danwood Chirwa, 'Human Rights under the Malawian Constitution' (Juta Law, 2011) p94.

²⁴⁴ Ibid p95.

²⁴⁵ Editorial, 'Deprived Lives of Child Brides' The Japan Times (Tokyo, 15 February 2015)

<<http://www.japantimes.co.jp/opinion/2015/02/14/editorials/deprived-lives-child-brides/#.VazAhvmqgko>> para 5 accessed 17 January 2016.

²⁴⁶ The Constitution of the Republic of Malawi, s 22.

²⁴⁷ Chirwa (n 243 above) p172.

²⁴⁸ Ibid.

involved.²⁴⁹ According to the Constitution, persons aged 18 years cannot be prevented from entering into marriage.²⁵⁰ However, there is confusion with regard to the specific minimum age of marriage. Section 22 (7) of the Constitution of Malawi provides that a marriage with or between persons aged between 15 and 18 years can only be entered into with the consent of their parents and guardians.²⁵¹ This means that where consent has been provided for by the parents or the guardians, a child less than 18 years may enter into a marriage. This provision is clearly repugnant to section 22 (4) of the Constitution that provides that, no one shall be forced to enter into marriage.

Addressing the inconsistency between sections 22 and 23 of the Constitution dates back to 1998 when a special Law Commission on the Technical Review of the Constitution addressed this matter.²⁵² In 2010, attempts were made to change the age at which parental consent is required for parties entering into marriage from fifteen to sixteen years.²⁵³ However there were conflicting views as activists sought to have the minimum age placed at nothing less than eighteen years of age. The National Assembly passed the amendment into law by amending the minimum age through which parental consent may be obtained for marriage to sixteen.²⁵⁴ The public continued to protest against this amendment, in the end, the President of the Republic of Malawi refused to assent to the amendment; hence the minimum age remains at fifteen.²⁵⁵ Kamwambe J rightly observes that, a person under the age of fifteen is too immature or incompetent to give consent to a marriage.²⁵⁶ Interestingly, the Constitution does not explicitly prohibit marriage of persons under the age of fifteen. It merely asserts that the State is obliged to “discourage” such marriages.²⁵⁷ The lack of a clear minimum marriageable age within the Constitution that is in line with international and regional human rights standards creates a loophole that effectively gives constitutional approval to the practice of child marriages.

²⁴⁹Hamer v United Kingdom (1979) 24 DR 5.

²⁵⁰ The Constitution of the Republic of Malawi, s22(6).

²⁵¹ The Constitution of the Republic of Malawi, s 22(7).

²⁵²Kaufulu-Kumwenda (n236 above) p22.

²⁵³ Ibid.

²⁵⁴ Ibid.

²⁵⁵ Ibid.

²⁵⁶Chirwa (n 243 above) p187.

²⁵⁷ The Constitution of the Republic of Malawi, s 22(8).

The Constitution of Malawi is the supreme law of the land and addressing the problem of inconsistency with regards to the legal age of marriage, in order to protect the girl child against marriage, would require an amendment to the Constitution. This will ensure the effectiveness of specific laws linked to the issue of child marriages, as opposed to coming up with progressive legislation which is in line with international human rights standards, but is in contradiction with the provisions of the Constitution. An illustrative example can be taken from the position of section 138 of the Penal Code which provides that a ‘child’ means a child under the age of 16 years which is similar to section 23 (5) of the Malawi Constitution. This Act also states that ‘any person who engages or indulges in sexual activity with a child shall be guilty of an offence and shall be liable to imprisonment for fourteen years’.²⁵⁸ The Penal Code does not distinguish between sexual activities with a married child and a non-married child. Thus hypothetically, this section criminalises child marriage in instances where a person who marries a child, consummates the marriage.²⁵⁹ However taking into account the standing point of the Constitution of Malawi, child marriage is not out-rightly prohibited and girls below the age of sixteen can get married²⁶⁰. These inconsistencies point to the consequences of not having a clear minimum legal age for marriage.

It has been observed that data collection especially on child protection cases remains a challenge, with only a small number of well-publicised cases of girl-child abuse portraying the reality of human rights violations that many young girls in Malawi face.²⁶¹ For instance, an account shared by Masanjala a First Grade Magistrate illustrates how the courts address child marriage cases. In one case, a boy aged 17 was married to a girl aged 13 years old in 2013. According to the facts of the case, the boy’s parents had accepted

²⁵⁸ Section 160B(1) of the Penal Code.

²⁵⁹ Kaufulu-Kumwenda (n236 above) p23.

²⁶⁰ The Constitution of the Republic of Malawi, s 22(7)

²⁶¹ Manolo Cabran, ‘Protecting children in Malawi: A report on the major findings of the mapping and assessment of the National Child Protection System’ (2012) <<http://www.socialserviceworkforce.org/system/files/resource/files/Protecting%20Children%20in%20Malawi%20-%20A%20report%20on%20the%20major%20findings%20of%20the%20mapping%20and%20assessment%20of%20the%20NCPS.pdf>> accessed 17 January 2016 ; Women and Law in Southern Africa Research and Educational Trust, ‘the situation of women in Malawi: A WLSA Malawi Perspective (2009) <<http://wlsamw.wordpress.com/situation-of-women/>> accessed 17 January 2016.

the marriage between the two, despite the girl's mother disapproving the marriage. Eventually, the girl's mother sought the court's intervention after unsuccessful attempts to seek help from the traditional authorities. The court took into account section 22(7) of the Constitution of Malawi which requires parental consent and section 22(8) which discourages child marriages. The marriage was nullified following the fact that parental consent from the girl's mother was not given and in upholding the constitutional provision of discouraging child marriages. In this case, the mother's initiative in seeking judicial remedy cannot be underestimated considering the fact that some parents are the key players in encouraging child marriages. This shows the gap that exists when parents support the union, and such cases go unreported to functional authorities, child marriage proceed unchallenged to the disadvantage of the girl child.

Section 23 (1) prohibits discrimination in law and in fact by stating that 'all children, regardless of the circumstances of their birth, are entitled to equal treatment before the law'. The right to protection against discrimination is buttressed in section 24 (2) which include gender as a ground of discrimination applicable to the rights of women. Thus section 23 (1) can be read in light of the rights of women in section 24 in order to address issues of domestic violence, various forms of social and economic exploitation of girls, the girl child's right to inheritance of property and harmful traditional practices.²⁶² Considering that the principle of non-discrimination is one of the fundamental principles underpinning all children's rights, it can be claimed by children as a human right in itself, and it can be used in the interpretation and implementation of all other rights that are afforded to children. However, the challenge remains that long-standing systematic inequalities, aggravated and reinforced by the law, religion, tradition and culture, continue to put the girl child at a disadvantage in her pursuit of social, economic and political opportunities.²⁶³

Section 23 of the Constitution provides for the rights and protection of children and it reinforces the fact that children are a special human group of people with unique needs,

²⁶²Chirwa (n243 above) p199.

²⁶³Ibid.

interests and desires.²⁶⁴ The Constitution does not provide a general definition of a child. However, under section 23 of the Constitution a child is defined as ‘persons under the age of 16’ for purposes of child protection against discrimination, economic exploitation and abuse, and childcare. With this definition, a comparison with the international and regional instruments that set the standard at 18 years for the protection of children reveals that the standard of the Constitution of Malawi is clearly low. The importance of stipulating a definitive minimum legal age of marriage in the Constitution ensures that the girl child is legally protected from abuse, harm, violence and exploitation. The Malawi Law Commission has recommended that the Constitution should prohibit marriages with any person below the age of 18 years.²⁶⁵

Section 25 of the Constitution provides for the right to education. Under this section, it is stipulated that, primary education should consist of at least five years of education.²⁶⁶ Though the Constitution does not guarantee free and compulsory primary education, this has been expressed through the Universal Primary Education policy and the newly adopted Education Act 2015.²⁶⁷

Section 211(1) of the Constitution provides that international law treaties entered into before the coming into force of the Constitution shall form part of the law of the Republic if so provided for on the Act of Parliament ratifying the agreement. Furthermore, binding international agreements entered into before the commencement of the Constitution continue to bind Malawi.²⁶⁸ In addition, section 11(2) of the Constitution stipulates that the courts, where appropriate, should take into account current norms of public international law and comparable foreign case law when interpreting the Constitution. In this regard, the court is obliged to give effect to international law.

²⁶⁴ Ibid p193.

²⁶⁵ Malawi Law Commission, ‘Report of the Law Commission on the Review of the Laws on Marriage and Divorce’ (Lilongwe: Government Printer, 2006) p24-27.

²⁶⁶ The Constitution of the Republic of Malawi, s 25(2).

²⁶⁷ The Constitution of the Republic of Malawi, s 13 (f) (ii) provides that, the State is to actively promote the welfare and development of the people of Malawi by progressively adopting and implementing policies and legislation aimed at achieving, among other goals, the provision of adequate resources to the education sector and devise programmes in order to make primary education compulsory and free to all citizens of Malawi.

²⁶⁸ The Constitution of the Republic of Malawi, s211 (2).

3.3.2 THE CHILD CARE, PROTECTION AND JUSTICE ACT 2010

The Child Care, Protection and Justice Act defines a child as any person who is under the age of sixteen years.²⁶⁹ This Act states that no one shall be forced into a marriage and it provides for criminal penalties in situations where a child was forced to marry.²⁷⁰ Though not stated explicitly, the Act presents opportunity to combat child marriage through the requirement of full and free consent to be provided for by the parties that intend to get married. In this regard, the punishment, if a child is forced into marriage or is to be engaged for the purposes of marriage, is up to ten years imprisonment.²⁷¹ The reality is that many Malawian communities have well-entrenched cultural beliefs that undermine the freedom of the girls to oppose the decisions of their parents, guardians or community elders.²⁷² Therefore, it remains a challenge for girls to seek protection of the law, and therefore implementation of legislation becomes ineffective.

Although this law is highly valuable in providing legal protection against child marriage, the Committee on the Rights of the Child highlighted its concerns that the principle of best interests of the child was not fully taken into account in domestic legislation, programmes and service for children.²⁷³ The Malawi Law Commission, in its review shared the same view and recommended that the principle of the best interests of the child must be included in the Constitution.²⁷⁴ Integration of the best interest of the child principle is important as it can be used by the child justice system in cases that are brought before it on harmful practices such as child marriages. The inclusion of legal provisions that recognise children as bearers of rights thus protects them from child marriages. Despite the observations made by the Committee on the Rights of the Child

²⁶⁹ Child Care, Protection and Justice Act 2010, s 2.

²⁷⁰ *Ibid*, s 81(a).

²⁷¹ *Ibid*, s 83.

²⁷² Human Rights Watch (n27 above) p35.

²⁷³ Committee on the Rights of the Child, 'Consideration of Reports Submitted by States Parties under Article 44 of the Convention' (CRC/C/15/Add.174, 2 April 2002) < http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2FC%2F15%2FAdd.174&Lang=en> para.25.

²⁷⁴ Committee on the Rights of the Child, 'Concluding Observations of the Committee on the Rights of the Child: Malawi' (15th session CRC/C/MWI/CO/2 30 January 2009) < http://www.africanchildforum.org/clr/pdf/malawi-second-uncrc-co_en.pdf > accessed 17 January 2016 .

and the Malawi Law Commission, the law is currently limited to addressing cases of custody and access to children using the best interests of the child principle, but is silent on forced marriages that involve children.

According to the Child Care, Protection and Justice Act, local authorities have a duty to maintain a register of the births and deaths of children in their area of jurisdiction.²⁷⁵ The age of majority which is stated as over the age of sixteen years under this Act, is in practice disregarded due to the fact that Malawian girls are often married off on attainment of puberty or before.²⁷⁶ Therefore, knowing the age of a child through registration of births is a necessary intervention in protecting children from child labour, conscription in armed forces, child marriage, trafficking and sexual exploitation. The courts would particularly find such registers helpful when approached with child marriage cases.

3.3.3 GENDER EQUALITY ACT NO.3 OF 2013

The Gender Equality Act is set out to promote gender equality, equal integration, influence, empowerment, dignity and opportunities, for men and women in all functions of the society in Malawi.²⁷⁷ The Act clearly outlines the prohibition of sex discrimination²⁷⁸, prohibition of harmful practices²⁷⁹, sexual harassment²⁸⁰ and workplace policy for sexual harassment²⁸¹ as the main areas that require a protective mechanism towards the violation of the rights of females. For instance with regards to addressing the issue concerning the prohibition of harmful practice (social or cultural), the Act provides for a fine of one million kwacha (K1,000,000) and to a term of five years to any person charged against this crime.²⁸²

²⁷⁵Child Care, Protection and Justice Act, 2010, s 76.

²⁷⁶MHRC (n 211 above) p 88; Malawi Law Commission (n263 above) p 13.

²⁷⁷ Gender Equality Act, No.3 of 2013, p2.

²⁷⁸ Ibid, s 4(1).

²⁷⁹ Ibid, s 5(1).

²⁸⁰ Ibid, s 6(1).

²⁸¹ Ibid, s 7(1).

²⁸² Gender Equality Act, No.3 of 2013, s 5(2).

Taking into account the fact that this piece of legislation only came into existence three years ago, it is very difficult to evaluate the impact that it has had towards the protection of the rights of females.²⁸³ This finding follows a general assessment of the challenges regarding the implementation of gender laws that was done by the Gender Office at the Human Rights Commission.²⁸⁴ Some of the challenges identified include limited awareness of the gender laws as well as lack of adequate resources for the effective implementation of such laws.²⁸⁵

3.3.4 THE NATIONAL REGISTRATION ACT OF 2009

Birth registration is considered to be one of the most effective tools for ensuring equity over a broad scope of services and interventions for children and women.²⁸⁶ Birth registration is not only the first legal acknowledgment of a child's existence by the government, it also provides for the foundation for safeguarding many of the child's civil, political, economic, social and cultural rights.²⁸⁷ In Malawi birth registrations are governed by the National Registration Act of 2009 which provides that all births are to be registered and the government is required to establish a birth registration system.²⁸⁸

The Human Rights Watch observed that lack of birth registration consequently makes it difficult to take age into account before a marriage.²⁸⁹ Birth registration can strategically help in the combat of child marriages by proving the age of spouses at the time of marriage.²⁹⁰ Thus birth registration is an official system for verifying the ages of children and this subsequently help in enforcing existing laws. Unfortunately, it was only in 2015 when the National Registration Act commenced the universal and compulsory registration and issuance of birth and death certificates in Malawi. Before that, births and

²⁸³ Kaufulu-Kumwenda (n236 above) p25.

²⁸⁴ Kaufulu-Kumwenda (n236 above) p25.

²⁸⁵ Kaufulu-Kumwenda (n236 above) p25.

²⁸⁶ Human Rights Watch (n27 above) p41.

²⁸⁷ UNICEF, 'Birth Registration' (13 January 2014) < http://www.unicef.org/protection/57929_58010.html> accessed 12 January 2016.

²⁸⁸ National Registration Act of 2009, sections 3(1). This has also been covered under section 24(1), 30, 31 and 33 to 35.

²⁸⁹ Human Rights Watch (n27 above) p41.

²⁹⁰ *ibid.*

deaths that occurred at a health facility were recorded in a hospital ward (inpatient) registers and there were no mechanisms for recording births and deaths occurring in communities.²⁹¹ Considering that the population of Malawi is largely rural-based with only 15.3% residing in urban areas²⁹², the prevalence of the practice of child marriage is highest in rural areas.²⁹³ It is, therefore, important to ensure that vital registration systems such as that of births and deaths that occur in the country are fully functional especially in rural areas in order to help in enforcing laws that aim at combating child marriage.

3.3.5 THE EDUCATION ACT OF 2015

For over 50 years, Malawi's educational sector was regulated by the Education Act of 1962. This Act was clearly outdated and did not respond to the needs of a fast growing society like Malawi. In October 1994 free primary education was introduced by the new political administration in fulfilment of an electoral pledge.²⁹⁴ This was adopted through the Universal Primary Education policy. Although Malawi was committed to providing free primary education, the Education Act of 1962 was in contradiction with the position of the Constitution of Malawi and the Universal Primary Education Policy. For example, free primary education was not supported by the Education Act of 1962.²⁹⁵

In an attempt to rectify the problem, the Malawi government started the process of reviewing the 1962 Education Act in order to improve the education system in Malawi in 2003.²⁹⁶ The process took close to a decade to be finalised. Nevertheless, the new

²⁹¹World Health Organisation Regional Office for Africa, 'Civil Registration and Vital Statistics Systems' <http://www.who.int/profiles_information/index.php/Malawi:Civil_registration_and_vital_statistics_systems> accessed 12 January 2016.

²⁹² Kaufulu-Kumwenda (n236 above) p6.

²⁹³ Kaufulu-Kumwenda (n236 above) p10.

²⁹⁴ Abby Riddell, 'The Introduction of Free Education in Sub-Saharan Africa' (16 May 2003) <http://www.google.com/url?url=http://portal.unesco.org/education/en/file_download.php/f2055e1e3843e56bddf020ab7fe49ed1The%2Bintroduction%2Bof%2Bfree%2Bprimary%2Beducation%2Bin%2Bsub-Saharan%2BAfrica..doc&rct=j&frm=1&q=&esrc=s&sa=U&ved=0ahUKEwiS0uKBrqvKAhVDVROKHQBdAQFggqMAM&usg=AFQjCNHZv_ALqCYO1Slt4SFJRjoBuNTH_A> accessed 15 January 2016 p1.

²⁹⁵ Benedict Kondowe, 'Passing Malawi's Revised Education Act' (Civil Society Education Coalition, 20TH April 2015) <<http://campaignforeducationusa.org/blog/detail/passing-malawis-revised-education-act>> accessed 14 January 2016.

²⁹⁶ Benedict Kondowe, (n 295 above).

Education Act 2015 directly responded to various problems such as the inability of parents to afford tuition fees for primary education. It has been observed that such problems associated with poverty and as a result disproportionately affects the girl child.²⁹⁷

The recommendations of the Malawi Law Commission advocated for free and compulsory primary education in government schools for every child below the age of 18 years.²⁹⁸ The Education Act 2015 contains clear provisions that can be used to safeguard the right to education of a child as stipulated under international and regional human rights legal frameworks.

3.3.6 MARRIAGE, DIVORCE AND FAMILY RELATIONS ACT OF 2015

The Marriage, Divorce and Family Relations Act, has come at a time when there is an outcry against girl child marriage. This is the most recent legislation on family law that addresses issues of child marriages. The Malawi Law Commission observed that the law on marriage was unsatisfactory and it, therefore, recommended that there must be one law in Malawi that would consolidate statutory and customary laws on marriage and divorce.²⁹⁹

This Act therefore consolidates all the laws on marriage and divorce and provides for a new advocacy tool that can be used to prosecute perpetrators of child marriage. It also defines a child as anyone below the age of 18 and sets out clearly the minimum age for marriage as 18.³⁰⁰ It is worth noting that the first Malawi legislation on marriages, the Marriage Act, provided for the matrimonial age of 21 years from each of the parties to an intended marriage.³⁰¹ Marriages under this law were optional and were in practice contracted only by a small fraction of the people. The Marriage Act provided that, where

²⁹⁷ Abby Riddell (n 294 above).

²⁹⁸ Malawi Law Commission (n225 above) p6

²⁹⁹ Malawi Law Commission (n265 above).

³⁰⁰ Human Rights Watch (n27 above) p39.

³⁰¹ The Marriage Act (Cap 25:02) 1903.

a person was under the age of 21 years, consent could be obtained from a parent. The Marriage Act clearly afforded more protection regarding the matrimonial age in comparison with the new Marriage, Divorce and Family Relation Act. However this is still problematic because many young girls do not have a say in the decision making process before marriage.

It should also be noted that customary law plays an important role in the Malawi legal system. In fact, it has been said that the overwhelming majority of Malawians contract their marriages under custom.³⁰² In this regard, section 12 in the new Act recognises customary marriages. In discussing the girl child in relation to child marriage, it is fairly important to look at the position of customary marriage law systems in Malawi. Customary marriage law systems in Malawi are considered to be predominantly matrilineal society.³⁰³ A few scholars have studied the marriage aspect of customary law in Malawi.³⁰⁴ As such, there is little analysis of the impact of customary law on child marriages. It has, however, been noted that subject to cultural practice, ‘girls in Malawi may be forced to marry as early as 9 years old, immediately after attaining puberty, or even before attaining puberty as long as they look mature’.³⁰⁵

The Marriage, Divorce and Family Relations Act 2015 Act asserts that every marriage which is celebrated in accordance with the Act shall be registered by the Registrar, and this requirement can be used to make strides in eliminating the practice of child marriage.³⁰⁶ Generally, customary marriage law does not provide a definitive age as to when one attains adulthood and has the capacity to marry.³⁰⁷ Since the new Act specifies marriageable age at 18 years, administrative authorities can use it in assessing the essentials of a valid marriage before registration takes place. Such a measure would

³⁰² Chigawa M, ‘Customary law and social development: de jure marriages vi-a-vis de facto marriages at customary law in Malawi’, (Chancellor College, Malawi, unpublished, 1987) 35.

³⁰³ Mwambene (n203 above) p7.

³⁰⁴ Most notable works are Mwambene (2012). Wanda BP, ‘Patent law, practice and procedure in Malawi’ 1988 vol.4 issue 1 Lesotho Law Journal: A Journal of Law and Development. Chigawa M, ‘Customary law and social development: de jure marriages vi-a-vis de facto marriages at customary law in Malawi’, (Chancellor College, Malawi, unpublished, 1987).

³⁰⁵ Human Rights Watch (n21 above) p15.

³⁰⁶ Marriage, Divorce and Family Relations Act 2015, s 7.

³⁰⁷ Mwambene L, ‘Malawi: A comparative analysis with the patrilineal customary law marriage in South Africa’.

assure the fulfilment of the condition of the ages of the parties involved and their free and full consent.³⁰⁸

An essential element for the validity of a person's marriage in the matrilineal customary law system is consent which is provided by the *nkhoswe* (a marriage counsellor) who intercedes in matters of marriage disputes and divorce.³⁰⁹ The consent is declared at a traditional ceremony called *chinkhoswe*. The role of the *nkhoswe* was emphasised by the court in the case of *Manchichi v Manuel*.³¹⁰

Even though marriage is a social agreement between two persons, in order that such marriage may acquire legal recognition under customary law, the agreement must be sanctioned by the establishment of *chinkhoswe*.³¹¹ And as it has been said in a number of cases, courts do not recognise any union or cohabitation as constituting a valid customary marriage under matrilineal societies in the absence of *chinkhoswe*.³¹²

Section 27 of the Marriage, Divorce and Family Relations Act 2015 Act validates the position that the court took in the *Manchichi v Manuel*. This section acknowledges the customs and rites among ethnic groups under which marriage is celebrated. In addition Section 28 provides for the intention to marry, which is presented to the Registrar. However, this section does not clearly state whether a marriage that is not registered should be declared void ab initio.

Another observation is that the Act does not provide for the granting of an *ex-parte* injunction for stopping a child marriage. Specific provisions aimed at preventing child marriages would have offered an effective mechanism of protecting the girl child from

³⁰⁸Sagade (n19 above) p89.

³⁰⁹Ibik JO, 'Restatement of Africa law' 3 Malawi Vol 1, the law of marriage and divorce, London: Sweet & Maxwell (1970).

³¹⁰Civil Appeal Case No.70 of 1980, N.T.A.C (Unreported).

³¹¹This is a ceremony whereby the two marriage guardians (from the man's and woman's family respectively) meet formally and exchange their consent to a marriage.

³¹²Chigawa M (n307 above) 35.

child marriage, as opposed to putting in place punitive measures against those playing a leading role in facilitating such marriages.

3.4 RELEVANT POLICIES AND NATIONAL PLANS OF ACTION

Malawi has a number of development policies and plans that provide guidance and inform state action on social priorities. They are not binding instruments but they provide an assessment tool in order to examine the scope of protection of the girl child against the harmful practice of child marriage. Policies are very important because they draw from practice and this subsequently responds to the promotion of various human rights. Thus, they consist of goals that the government is expected to achieve through policies and legislation.³¹³ From the outset, it is important to note that all policies in Malawi are required to recognise the need to promote gender equality regardless of their specific thematic areas of interest.³¹⁴

3.4.1 THE MALAWI GROWTH AND DEVELOPMENT STRATEGY II (MGDS II)

The Malawi Growth and Development Strategy II which runs from the period 2012 to 2016 is the second medium term national development strategy formulated to attain the country's long term development aspirations.³¹⁵ The MGDS II commits to addressing the issue regarding reduction of gender inequalities and ensuring equal participation of both sexes in order to achieve sustainable development. It explicitly highlights the importance of advocating for girl's education and delayed marriage to social development.³¹⁶ Water development has been highlighted as one of the key priority areas to socio-economic

³¹³ Enoch Chilemba, 'A Critical Appraisal of the Right to Education of Children with Disabilities in Malawi' (LLM, University of Pretoria 2011) p36. It is worth noting that, following the Beijing Conference in 1995 where countries were encouraged to formulate their own Platforms for Action based on themes that were critical in their countries. In this regard, Malawi formulated its own National Platform in 1997 and one of its 4 themes focused on the girl child. This has certainly led to important developments with regards to policies and legislation. One of the recent develops being the Gender Equality Act 2013 which covers issues of sex discrimination and harmful practices, issues which primarily affect the girl child and women in Malawi.

³¹⁴ Kaufulu-Kumwenda (n236 above) p28.

³¹⁵ Malawi Growth and Development Strategy II, pV

³¹⁶ Ibid, p40.

development of the country for the MGDS II. This rightly addresses the importance of ensuring a safe and conducive environment through improved water supply, sanitation and hygiene facilities which is directly linked to improving school attendance and retention particularly amongst girls.³¹⁷ Girls would concentrate on their studies than worry about roles like fetching water from distant sources.

3.4.2 NATIONAL GENDER POLICY

With respect to gender, there is no current National gender policy that has been adopted by government. The previous policy which covered the period 2000 to 2005 has not yet been relaunched since its revision in 2007.³¹⁸ Child marriage is regarded as a form of gender-based discrimination because the practice disproportionately affects girls and negatively impacts the realization of girls' and women's human rights.³¹⁹ This has undeniably delayed all efforts towards addressing gender issues that largely affect the empowerment and wellbeing of women and girls in Malawi. An effective and renewed national gender policy will serve as an important tool to develop policies against child marriage, considering the fact that child marriage disproportionately affects the girl child in various aspects. Implementation of well-defined policies on gender would strengthen government's efforts towards eliminating the harmful practice of child marriage in Malawi.

In view of raising awareness against gender based violence particularly violence against women and girls, the Ministry of Gender (which is the national gender machinery) spearheads the implementation of an annual campaign called: 16 Days of Activism against Gender Based Violence.³²⁰ Various Civil Society Organisations (CSOs) have also shown their commitment to end child marriage through a shared vision to have a Malawi that has no child brides. A recent development is the drawing up of the Malawi Chapter on child not brides which is part of the global partnership to end child marriage through

³¹⁷ Ibid, p54.

³¹⁸ Kaufulu-Kumwenda (n236 above) p29.

³¹⁹ Human Rights Watch (n27 above) p57.

³²⁰ Kaufulu-Kumwenda (n236 above) p29.

collaborating non-governmental organisations from around the world that tackle child marriage at the grassroots, national, regional and global levels.³²¹ The Malawi Chapter on child not brides will serve as an important tool to advocate for development and implementation of sound child survival, protection, development and participation policies, and practices in order to fight against child marriage.³²²

3.4.3 THE NATIONAL SEXUAL AND REPRODUCTIVE HEALTH AND RIGHTS (SRHR) POLICY.

Under the ministry of Health, Malawi came up with the National Sexual and reproductive Health and Rights Policy (SRHR). The goal of the National SRHR service is to promote through informed choice, safer reproductive health practices by men, women, and young people including use of quality and accessible reproductive health services.³²³ The SRHR policy recognises the challenges young people in Malawi are faced with such as early marriages, early and unwanted pregnancies, early child bearing and poverty.³²⁴ The SRHR policy indirectly addresses the issue of child marriage by recognising that many Malawian women and children experience harmful practices, domestic and sexual violence. It however fails to initiate adequate strategies that can be used in order to strengthen awareness against harmful practices such as child marriage, considering how these practices contribute to poor health such as obstetric fistula a common health condition among young childbearing women in Malawi.

3.4.4 THE 2011-2016 NATIONAL HIV AND AIDS POLICY

The 2011-2016 National HIV and AIDS Policy does not address early and forced marriages extensively. However, it explicitly commits to ensuring the protection against gender-based violence and harmful cultural practices that put children at risk of HIV

³²¹ Nation on Sunday, Sunday November 22 2015, par 1.

³²² Ibid, par 5.

³²³ National Sexual and Reproductive Health and Rights (SRHR) Policy (April 2009).

³²⁴ Ibid p4.

infection.³²⁵ An evaluation within the policy does reveal that increasing HIV infection rates in the youth are strongly correlated to marriage that occurs at earlier ages in young women aged 15-24.³²⁶ Arguably this has potential implications to child marriages.

At the moment, life skills programs in Malawian schools covering sexuality and reproductive health, human rights, and gender-based violence including child marriage are not adequately implemented due to lack of an adolescent reproductive health policy that has the potential to set out goals in response to child health concerns in Malawi.

3.4.5 THE NATIONAL GIRLS EDUCATION STRATEGY (NGES)³²⁷

The NGES committed itself to advancing girls' right to education. The aim of the strategy was to facilitate the pace at which Malawi would achieve the then millennium development goals 2 and 3 that emphasize on universal primary education, promotion of gender equality and empowerment of women. There are many threats to girls' education in Malawi and without a comprehensive approach which simultaneously addresses key threats such as violation of girls' sexual and reproductive rights, inadequate protection and poor quality schooling, girls may avoid only one threat and only to succumb to another.³²⁸

With regards to child marriage, the strategy addresses this issue by taking into account socio-cultural factors that affect girl's access to and retention in school and subsequent completion of education. The strategy highlighted the realities of school girl pregnancies that are said to result from social practises such as initiation camps after the on-set of puberty, where girls are required to stay in seclusion for weeks being taught skills for adulthood (puberty and marriage).³²⁹ Regrettably, the strategy failed to provide for a protective framework in response to the concerns of (female) drop-outs associated with

³²⁵ Kaufulu-Kumwenda (n236 above) p28.

³²⁶ Malawi National HIV and AIDS Strategic Plan (2011-2016) p14.

³²⁷ Ministry of Education, Science and Technology, 'Malawi National Girls Education Strategy' (2014).

³²⁸ UNICEF and others, 'Improving access and quality of education for girls in Malawi' (29 July) <<http://mdtf.undp.org/document/download/13464>> p9 accessed 17 January 2016.

³²⁹ Girls Education Strategy Ministry of Education, Science and Technology (n327 above) p19.

child marriage. The NGES simply pointed out that there is need for specific girl's education policies with clear guidelines on how to achieve the goals indicated within these policies, for instance on the issue of re-admission and retention. There is not much detail with regard to the proposals the strategic plan outlined in order to address the issue of re-admission and retention of girls in schools.

For instance, in 2013 schools which were supported by the World Food Programme in providing school meals reported 5% drop-out rates for girls, compared to the national average of 16%.³³⁰ In addition, enrolment, attendance and pass rates all improved within a period of one year in schools which offered school meals.³³¹ The reality is that most Malawian families are food insecure during a particular period of the year. This results in most girls being asked to stay home to attend to house chores and look for food.³³² Those that manage to still attend school struggle with hunger due to low energy and inability to concentrate, these factors can only demoralise girls from wanting to pursue education.³³³ In practice, this calls for political willingness towards investing in education by addressing factors that militate against girl's access to education.

3.5 ENFORCEMENT CHALLENGES

Although Malawi has some effective laws that are meant to protect the rights of girls, such laws only provide partial protection against child marriages. The government of Malawi opposes early marriage as seen from the adoption of the Marriage, Family Relations and Divorce Act which protects against child marriage. The downside is that the government struggles to enforce the legal protections against child marriage due to capacity issues aggravated by the culture of silence in communities where such cases arise and are therefore not reported to law enforcers.³³⁴

³³⁰ UNICEF and others (n328 above) p16.

³³¹ Ibid.

³³² Ibid, p15.

³³³ Ibid.

³³⁴ Human Rights Watch (n27 above) p3.

There is a relatively weak Ministry of Gender tasked with the responsibility of overseeing and monitoring the implementation of gender programmes in Malawi. Unfortunately, there still lies the misconception that ‘gender issues’ are to be tackled by the Ministry of Gender.³³⁵ Thus there is lack of institutional coordination with other ministries causing the Ministry of Gender to suffer from capacity constraints and lack of resources.³³⁶ Another problem is the fact that government is structured along thematic lines, this means that each ministry or department takes full responsibility for an appropriate thematic area. This wrongly suggests that women’s issues can be ‘compartmentalized’ like the ministries, despite the general understanding that gender is a crosscutting issue.³³⁷

Girls are often reluctant to report cases of child marriage and other forms of violence to the police. This is due to the fact that they lack confidence that the justice system will protect them, or they lack knowledge on how they can access the justice system, and often, because of bribery and corruption within the agencies of government that deal with such cases.³³⁸ Section 41 of the Constitution provides for the right to access to justice and legal remedies to every person. In this regard, every person is entitled to an effective remedy by courts or tribunals for acts violating the rights and freedoms granted by the Constitution or any other law.³³⁹ The reality is that, neither courts nor customary systems succeed in providing adequate redress to survivors of human rights violations. This is especially so under customary processes that prioritizes family reconciliation over punitive remedies, supposedly because it maintains family unity and community peace.³⁴⁰

Subsequently in 2002, the CRC Committee specifically engaged Malawi on the need to take legislative and awareness-raising measures that would prohibit and eradicate

³³⁵ Kaufulu-Kumwenda (n236 above) p30.

³³⁶ Ibid.

³³⁷ Malawi Aide Memoire, ‘For the Consideration of Issues Pertaining to the Development of a Breakthrough Strategy for the Acceleration of the Achievement of MDGs 2, 3 and 5’ (4 July 2011).

³³⁸ Human Rights Watch, ‘No Way Out: Child Marriage and Human Rights Abuses in Tanzania’ (Human Rights Watch Report, October 2014) <http://www.hrw.org/sites/default/files/reports/tanzania1014_forinsert_ForUpload.pdf> p65 accessed 18th January 2016.

³³⁹ Constitution of the Republic of Malawi, s 41(3).

³⁴⁰ Human Rights Watch (n27 above) p4.

traditional practices harmful to the health, survival and development of children.³⁴¹ Child Marriages fall into the category of such practices. Within the measures, Malawi was urged to introduce sensitization programmes in partnership with community leaders in order to get practitioners and the general public to change traditional attitudes and discourage harmful practices.³⁴² In some rural areas, there has been significant progress regarding this issue. In these areas traditional leaders have introduced stringent bylaws to ensure that children in their communities are protected from any form of abuse and harmful traditional practices.³⁴³ An example is where perpetrators that are found forcing a girl or a boy to marry before completing their education are subjected to a 60,000 Malawi Kwacha fine.³⁴⁴

3.6 CONCLUSION

At 37%, child marriages prevalence in Malawi is also higher than the regional average for sub-Saharan Africa.³⁴⁵ This illustrates the lacunae, confusion, contradictions and lack of gender sensitivity inherent in the state of Malawian Law which fails to protect the rights of the girl child. The law plays a role in effecting social change, for instance, the Marriage, Divorce and Family Relations Act rightly prescribes the compulsory requirement for the registration of all marriages. However, the law is silent on the legal consequences attached to the prohibition of child marriages. This brings to question the efficacy of this law. Effectiveness in this sense takes into account Malawi's commitment towards employing enforcement machinery capable of controlling the mischief that the new legislation is trying to correct and the legitimacy of the law on the basis of the apparent inconsistency between Constitution and the provisions within the new legislation. One major factor that requires attention is the cultural approval of the practice

³⁴¹Committee on the Rights of a Child, 'Initial Report of Malawi' (CRC/C/114, 2002) <http://www.bayefsky.com/pdf/malawi_t4_crc.pdf> para 429 accessed 18 January 2016.

³⁴²Ibid.

³⁴³Plan International, 'Traditional leaders outlaw child marriage in Malawi' <<https://plan-international.org/where-we-work/africa/malawi/what-we-do/our-successes/traditional-leaders-outlaw-child-marriage-in-malawi/>> par 5.

³⁴⁴Ibid par 9.

³⁴⁵White (n193 above).

of child marriage. Such cultural approval symbolises society's refusal to recognise the harmful effects that child marriage has on a girl's overall development and human rights.

The aim of protecting the rights for the girl child in Malawi lies in addressing the root causes of child marriage which include; poverty, tradition and cultures and lack of education. This calls for the advancement of their social, economic and cultural rights. It is also critical to recognise the girl child's right to participate in making decisions that affect her overall development. There is need to eliminate discriminatory traditional practices that influence child marriage that continue to disadvantage Malawian girls.

CHAPTER FOUR

4.1 CONCLUSIONS AND RECOMMENDATIONS

Child marriage is a human rights violation against the girl child. The analysis of the international and regional normative framework has been significant in revealing that young girls are without exception, independent rights-holders. Therefore, state parties are obliged to protect, promote and respect the rights of the girl child through a strong legal framework. However, there is still a long road from establishing an ideal solution aimed at eradicating the harmful practice of child marriage.

The international and regional normative frameworks contain provisions that relate to the protection of the girl child against the harmful practice of child marriage. For instance the legal definition of a child is extremely important considering the fact that girls forced into child marriages in Malawi fall below the recognised minimum age of 18 of age years.³⁴⁶ Despite this clear definition, girls in Malawi as young as 9 years old remain compelled to trade their right to education, health, childhood and aspirations for the weighty responsibilities of marriage.³⁴⁷ The definition of a child is directly related to the issue of consent which is one of the essential requirements to a marriage. It is useful as a shield against child marriage in that it builds up on the understanding that a child below the minimum age cannot provide consent. This position provides legal protection against parents or guardians who are often the key perpetrators that offer the girl for marriage without her consent.³⁴⁸ This viewpoint can be accentuated by the guiding principles underpinned in the CRC and the ACRWC, that include non-discrimination, adhering to

³⁴⁶ Convention on the Rights of the Child 1989, Article 1; African Charter on the Rights and Welfare of the Child 1990, Article 1.

³⁴⁷ Baker (n 171) p6.

³⁴⁸ Lea Mwambene and Julia Sloth-nielsen, 'benign accommodation ukuthwala' (2011, vol.11 NO. 1, AHRLJ) p20.

the best interests of the child, ensuring maximum survival and development of the child as well as respecting, promoting the views and participation of the child.³⁴⁹

Furthermore, the international and regional legal framework provide for an understanding of the concept of childhood. Childhood has been understood in a way that recognises a child as a rights holder in light of western and African experiences of childhood which are essentially different. For instance as seen through the case study in Malawi, initiation and cultural practices aimed at preparing girls for married adult life contain elements that may lead to various violations of the girl's right to be protected from all forms of violence.³⁵⁰ As noted by Graca Machel, 'traditions are made by us and we can decide to change them. We should be respectful but we must also have the courage to stop harmful practices that impoverish girls, women and their communities'.³⁵¹ The argument follows that it is not the absence of adequate legal instruments both at international and regional level that matter, but the lack of achievable implementation mechanisms that should be introduced through Malawi's commitment to protecting children's rights.

The causes and consequences of child marriage as seen from the Malawi case study clearly illustrate the perpetuation of the cycle of violence against the girl child. This in turn results in the denial of child rights which include the right to protection against the harmful practice of child marriage.

Based on this case study it is paramount that Malawi addresses the issue regarding discrimination against the girl child and stereotyped gender norms girls are expected to follow as they mature. These two issues are undeniably the underlying causes of child marriages which disproportionately affect the girl as opposed to the boy child. For instance, regarding education in Malawi, the higher the level of education attained, the

³⁴⁹ R Hodgkins and P Newell 'Implementation handbook for the Convention on the Rights of the child' 3 ed (2007) p 589 accessed 18 January 2016. African Committee of Experts on the Rights and Welfare of the Child (ACERWC) (note 181) p2.

³⁵⁰ Convention on the Rights of the Child 1989, Article 19.

³⁵¹ Graca Machel 'we are building an alliance to end child marriage' (The Elders, 7 June 2011) <<http://theelders.org/article/why-we-are-building-alliance-end-child-marriage>> accessed 13 January 2016.

greater the gender disparity. Interventions have been put in place in order to address the gender gap in the education sector. As noted on the issue regarding the retention in and completion of education for girls in Malawi, the NGES recognised the fact that education is a right for all citizens and girls are no exception. It expressed the will power of the government of Malawi towards ensuring that their goals are achieved. The government is, however, encouraged to establish an independent monitoring mechanism that has as part of its mandate a reporting system tracking down progress being made on various issues concerning children's rights. So far, non-state actors such as NGOs and the media have been vocal on the issue of child marriage. They have constantly been reporting on the issue as part of advocacy to raise visibility of the issue. Collaboration between the government and non-state actors is, therefore, encouraged as this creates a supportive network against child marriage and also broadens the scope of advocacy in Malawi.

Child marriage can also be considered to be an indicator of the low socio-economic development of the state.³⁵² The goal should be to achieve gender equality when dealing with social, economic, cultural and religious factors which contribute to the ineffectiveness of laws that seek to protect the girl child. To be blunt, it is common knowledge that the problem is child marriage and that the linked causes and consequences cannot be solved in a vacuum. It, therefore, remains a concerted responsibility to establish solutions which support and provide them with the opportunity to participate as they have a clear understanding of the obstacles that bar them from opportunities.³⁵³

The then African Region World Bank Vice President, Obiageli Ezekwesili, once declared that, the face of poverty is female.³⁵⁴ Child marriage stems from discriminatory social norms, which ascribe different social standing to women and men, girls and boys, so perpetuating damaging gender stereotypes and deep power imbalances, leaving females

³⁵² Andrainasolo (n114) p49.

³⁵³ Anju Malhotra (n22) p9.

³⁵⁴ Reena Gupta 'Multi-Sector Approach to Ending Child Marriage' (Girls Globe, 7 January 2016) <<http://girlsglobe.org/2016/01/07/multi-sector-approach-to-ending-child-marriage/>> accessed 13 January 2016.

poor.³⁵⁵ It is therefore important to empower girls economically and socially in order to curb child marriage. This will subsequently lead to increased earnings for females that can also be achieved through the promotion of the right to education for girls.³⁵⁶

The state should also focus on delivery services by ensuring countrywide access to health care services, including sexual and reproductive health services and family planning information. Cases of obstetric fistula among women aged between 12-89 years remain a major problem in Malawi.³⁵⁷ With many young girls and women having had endured the condition for a median duration of 3 years.³⁵⁸ In this undertaking, allocation of resources to social protection is essential in order to protect the lives of young girls who have become mothers at a young age due to harmful practices such as child marriage.

Jagade is right in asserting that the, “mere passing of any law would not achieve its objectives unless it is meaningfully strengthened by other support mechanisms”.³⁵⁹ In the context of Malawi, there has been an inactive approach in addressing the outrage suffered by many young girls. There seems to be lack of decisiveness from the state and social institutions towards eradicating the problem of child marriages through effective legal protection to ensure the promotion of children’s rights.

The Marriage, Family Relations and Divorce Act 2015 stands as comforting to the young girls in Malawi as it serves as a good deterrent by spelling out clear and strong sanctions against child marriage. However, considering how new the Act is, the state and social institutions are yet to prove that they have taken on responsibility of eliminating factors that affect the enforcement of legislation. This should also include addressing the importance of gender equality which takes into account the low social and economic

³⁵⁵ Leila Asrari ‘Preventing Child Marriage in the Commonwealth: The Role of Education’ (London: Plan International UK and Royal Commonwealth Society, 2015) < <http://docplayer.net/2930828-Preventing-child-marriage-in-the-commonwealth.html>> accessed 13 January 2016.

³⁵⁶ Reena Gupta (n 354).

³⁵⁷ LV Kalilani-Phiri and others, ‘Prevalence of Obsteric Fitsula in Malawi’ (June 2010, 109 (3), Int J Gynaecol Obstet) < <http://www.ncbi.nlm.nih.gov/pubmed/20219194>> accessed 13 January 2016.

³⁵⁸ Ibid.

³⁵⁹ Sagade (n19) p221-222.

status of girls. Gender equality initiates innovative programmes that educate girls in urban and rural communities about their rights and self-empowerment awareness.

Child marriage is a problem that needs to be dealt with holistically in order to come up with a protective legal framework. The main goal should be to ensure that there is harmonisation of national laws in order to protect children's rights. This requires political will towards respecting international obligations on children's rights, taking stock of national policies and laws, and identifying actions that need to be taken and completed by implementation.³⁶⁰ Similarly as noted with the new Education Act of 2015, it also took so long for the new legislation to be enacted into law and yet progressive legislation ensure the promotion and development of the right to education for all without discrimination or exclusion. Progressive legislation also bears witness to the will power that a state has in order to provide quality education and to implement and monitor effective education strategies. Indeed, it is not enough to say that child marriage can be tackled by legislation alone, but it is a means to an end.

For Malawi, the Constitution which is the supreme law from where all legal authority is derived is yet to be amended as it still permits marriages of persons below the age of 18 through parental consent and it does not have a definitive minimum marriageable age.³⁶¹ A strong legal framework that is aligned to international and legal standards for protecting girls against child marriage has to firstly be reflected in the Constitution rather than passing progressive laws which are then left ineffective. In its current form the Constitution exposes the new Marriage, Divorce and Family Relations Act to unwarranted legal challenges that should not be ignored. Therefore, until a strong normative framework is put in place, we are far from protecting the girl child from child marriage and ensuring the realisation of children's rights that she is entitled to.

³⁶⁰The African Child Policy Forum 'In the Best interests of the Child: harmonising laws in Eastern and Southern Africa' (ACPF,2007) <
http://www.africanchildforum.org/cfr/Harmonisation%20of%20Laws%20in%20Africa/Publications/supplementary-acpf-harmonisation-wc_en.pdf> p20 accessed 14 January 2016.

³⁶¹ The Constitution of the Republic of Malawi, s 22(6), 22(7).

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