



**UNIVERSITY** *of the*  
**WESTERN CAPE**

**FACULTY OF LAW**

**AN ASSESSMENT OF THE LEGAL FRAMEWORK ON THE PROTECTION OF  
GIRLS FROM CHILD MARRIAGES IN MALAWI**

A Research Paper submitted in partial fulfilment of the requirements for the LLM Degree in the  
Department of Private Law



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**WESTERN CAPE**

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24 November 2015

## DECLARATION

I declare that '*An assessment of the legal framework for the protection of girls against child marriages in Malawi*' is my own work, that it has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.

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## DEDICATION

To my parents: Johannes Mawodza and Felistus Mawodza.

I will forever cherish your undying love and support,

Thank you!



## ACKNOWLEDGEMENTS

First, special thanks to God Almighty, whose strength, love and guidance made this work possible. Through You, I discovered what lay at the University of the Western Cape (UWC) and I am humbled and grateful for the many lessons learnt and the growth experienced in several domains of my life and personality.

In an extraordinary way: To my supervisor - Dr Lea Mwambene. Your dedication to excellence, depth of knowledge and eagerness to pass on the knowledge always pushed me to give the best I could. It was both a privilege and a blessing to work under your supervision. Thank you very much.

To my parents: Mr Johannes Mawodza and Mrs Felistus Mawodza, my siblings, Ms Athanasia and Mr Benjamin: To us, family has always meant putting our arms around each other and being there. And thank you for being a pillar of strength.

To Ms Teurai Dari: Please accept my heartiest, most earnest, deepest and humblest appreciation. Thank you for your unwavering support and unflagging love in my life and studies. You are invaluable and without you, this venture would have seen no light.

Sincere appreciation goes to Prof Israel Leeman, Mr Francis Chiparawasha and Mr Tinashe Kondo for editing my work. Many thanks to Mr Liyaquat Mohamed for his technical assistance.

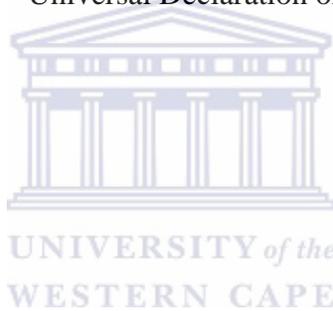
I am overly grateful to the Faculty of Law GLA Programme for providing financial assistance. The Law Faculty GLA Programme also gave me the opportunity to work in a program that has contributed immensely to my professional and personal growth. Thank you!

To friends and colleagues: Thank you for making this journey worthy a ride.

## ACRONYMS AND ABBREVIATIONS

ACERWC	African Committee of Experts on the Rights and Welfare of the Child
ACRWC	African Charter on the Rights and Welfare of the Child
BIC	Best Interests of the Child
CCPR	Committee on Civil and Political Rights
CEDAW	Convention on the Elimination of all forms of Discrimination Against Women
CEDAW Committee	UN Committee on the Elimination of Discrimination Against Women
Children's Act	Child Care, Protection and Justice Act
CRC	Convention on the Rights of the Child
CRC Committee	UN Committee on the Rights of the Child
GEA	Gender Equality Act
HCPs	Harmful Cultural Practices
HRC	Human Rights Committee
HRW	Human Rights Watch
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICESCR Committee	Optional Protocol to the International Covenant on Economic, Social and Cultural Rights
Malawi Constitution	Constitution of the Republic of Malawi.
Maputo Protocol	Protocol to the African Charter on Human and People's Rights
Marriage Act	Marriage, Divorce and Family Relations Act (2015)

Marriages Convention	Consent to Marriage, Minimum Age for Marriage and Registration of Marriages Convention
MHRC	Malawi Human Rights Commission
OPCEDAW	Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women
OPICESCR	Optional Protocol to the International Covenant on Economic, Social and Cultural Rights
SADC Gender Protocol	Southern African Development Community Protocol on Gender and Development
SPs	State Parties
UDHR	Universal Declaration on Human Rights



## KEY WORDS

Children's rights

Family

Girl

Harmful cultural practices

Legal

Malawi

Marriages

Protection

Traditional



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# CHAPTER 1

## INTRODUCTION AND BACKGROUND TO THE STUDY

### 1.1. INTRODUCTION AND BACKGROUND

In many communities, child marriages<sup>1</sup> are commonly the result of harmful cultural practices (HCPs).<sup>2</sup> In Malawi, a study by the Malawi Human Rights Commission (MHRC) has shown that different cultural practices that regulate marriages and initiation ceremonies predispose girls to child marriages.<sup>3</sup> In addition, customary rules have no fixed age requirement to determine the capacity to marry, which also perpetuate child marriages.<sup>4</sup> As a result, statistics indicates that child marriages seem to be high in Malawi.<sup>5</sup> More alarming is that, in Southern African countries, data has shown that 12 per cent of spouses in child marriages are 15 years or younger while 40 per cent were married before 18.<sup>6</sup> Out of these statistics, 11.7 per cent of these child marriages are from Malawi.<sup>7</sup> Furthermore, there are also significant gender disparities between boys and girls in child marriages.<sup>8</sup> In Southern Africa, 1.5 per cent of boys, compared to 13 per cent of girls marry between the ages of 10 and 18.<sup>9</sup> In Malawi, this gap is quite alarming, with 23.4 per cent of female

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<sup>1</sup> This research paper adopts the definition of ‘child marriages’ of the UN Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) and Convention on the Rights of the Child (CRC) as marriage before the age of 18, available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW/C/GC/31/CRC/C/GC/18&](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW/C/GC/31/CRC/C/GC/18&) (accessed 11 March 2015).

<sup>2</sup> Joffe LF ‘Finding a seat on the bus: Is the practice of sex segregation among ultra-orthodox groups in Israel a harmful traditional practice under CEDAW?’ in Longman C and Bradley T (ed) *Interrogating Harmful Practices: Gender, Culture, and Coercion* (2015) 81-96.

<sup>3</sup> See generally, MHRC *Cultural Practices and their Impact on the Enjoyment of Human Rights: Particularly the Rights of Women and Children in Malawi* (2005), hereinafter, MHRC (2005). These practices are discussed in Chapter 3.

<sup>4</sup> Mwambene L ‘Marriage under African customary law in the face of the Bill of Rights and international human rights standards in Malawi’ (2010) 10(1) *AHRLJ*, hereinafter, Mwambene L (2010) 100.

<sup>5</sup> UNICEF ‘Economic and social statistics on the countries and areas of the world, with particular reference to children’s well-being’ available at [http://www.data.unicef.org/corecode/uploads/document6/uploaded\\_pdfs/corecode/SOWC\\_2015\\_Summary\\_and\\_Tables-final\\_214.pdf](http://www.data.unicef.org/corecode/uploads/document6/uploaded_pdfs/corecode/SOWC_2015_Summary_and_Tables-final_214.pdf) (accessed 06 March 2015).

<sup>6</sup> UNICEF ‘UNICEF data: Monitoring the situation of children and women’ available at <http://www.unicef.org/child-protection/child-marriage> (accessed 03 January 2015).

<sup>7</sup> UNICEF ‘Malawi statistics report 2015’ available at [http://www.unicef.org/infobycountry/malawi\\_statistics.html](http://www.unicef.org/infobycountry/malawi_statistics.html) (accessed 19 February 2015).

<sup>8</sup> UNICEF *Early Marriage A Harmful Traditional Practice A Statistical Exploration* (2005) 1. In addition, this disparity is a form of discrimination that seriously inhibits girls’ ability to enjoy rights and freedoms on a basis of equality with boys. See, also UNICEF ‘Ending child marriage: Progress and prospects’ available at [http://www.data.unicef.org/corecode/uploads/document6/uploaded\\_pdfs/corecode/Child-Marriage-Brochure-HR\\_164.pdf](http://www.data.unicef.org/corecode/uploads/document6/uploaded_pdfs/corecode/Child-Marriage-Brochure-HR_164.pdf) (accessed 19 February 2015).

<sup>9</sup> UNICEF ‘Economic and social statistics on the countries and areas of the world, with particular reference to children’s wellbeing’ available at

adolescents were married or in unions as compared to 2.2 per cent of males in the same age group.<sup>10</sup> In addition, Human Rights Watch (HRW) predicted that on average one out of two girls will be married by their 18<sup>th</sup> birthday by 2020 in Malawi.<sup>11</sup>

Malawi is a State Party to various international and regional human rights instruments that have standards which can be used to address HCPs, such as child marriages.<sup>12</sup> These standards prescribe 18 as the minimum age for marriage.<sup>13</sup> As a protective measure against child marriages, the standards require the official registration of all marriages.<sup>14</sup> Furthermore, the standards prescribe that both potential spouses should freely and fully consent to the marriage and this excludes children as they lack the necessary capacity.<sup>15</sup> In addition, State Parties (SPs) are required to use all necessary steps to eliminate harmful practices, especially those which discriminate against women and girls.<sup>16</sup> More importantly, they must adopt or amend legislation with a view to effectively address and eliminate HCPs, such as child marriages.<sup>17</sup>

In order to comply with the above international and regional standards, the Constitution of the Republic of Malawi (Malawi Constitution)<sup>18</sup> recognises and protects children's rights.<sup>19</sup> In addition, the Malawi Government has enacted a number of laws, for example: the Child Care,

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[http://www.data.unicef.org/corecode/uploads/document6/uploaded\\_pdfs/corecode/SOWC\\_2015\\_Summary\\_and\\_Tables-final\\_214.pdf](http://www.data.unicef.org/corecode/uploads/document6/uploaded_pdfs/corecode/SOWC_2015_Summary_and_Tables-final_214.pdf) (accessed 06 March 2015).

<sup>10</sup> UNICEF 'Malawi statistics report 2015' available at

[http://www.unicef.org/infobycountry/malawi\\_statistics.html](http://www.unicef.org/infobycountry/malawi_statistics.html) (accessed 19 February 2015).

<sup>11</sup> HRW 'Malawi: UPR submission September 2014' available at

<http://www.hrw.org/news/2014/09/17/malawi-upr-submission-september-2014> (accessed 13 November 2014).

<sup>12</sup> Malawi is a signatory to the CRC; CEDAW; ACRWC; Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) and the African Youth Charter (AYC).

<sup>13</sup> See, Arts 21(2) and 6(b) of the ACRWC and Maputo Protocol, respectively.

<sup>14</sup> Paragraph 39 of the UN Committee on the Elimination of Discrimination Against Women, *CEDAW General Recommendation No. 21: Equality in Marriage and Family Relations*, 1994, hereinafter, CEDAW/C/GC/21 (1994). See also a discussion by Odala V 'Childhood under Malawian laws as the Constitution becomes of age' (2012) 6(1) *Malawi Law Journal* 97-120.

<sup>15</sup> See Arts 16, 1, 16 of the Universal Declaration on Human Rights (UDHR), Consent to Marriage, Minimum Age for Marriage and Registration of Marriages Convention (Marriages Convention) and CEDAW, respectively.

<sup>16</sup> See, for example, Arts 21, 24(3), 5 and 5 of the ACRWC, CRC, CEDAW and Maputo Protocol, respectively.

<sup>17</sup> Paragraph 55 of the CEDAW Committee, *CEDAW General Recommendation No.31* and UN Committee on the Rights of the Child (CRC Committee), *General comment No. 18 on harmful practices*, (2014), hereinafter, CEDAW/C/GC/31/CRC/C/GC/18 (2014).

<sup>18</sup> The Malawi Constitution Act No.20 of 1994 repealed the 1966 Constitution and came into effect on 16 May 1994.

<sup>19</sup> S23 of the Malawi Constitution.

Protection, and Justice Act, (Children's Act);<sup>20</sup> the Marriage, Divorce, and Family Relations Act; and the Gender Equality Act (GEA).<sup>21</sup>

It is against this background, that this study seeks to critically assess the available legal framework in their protection of girls against child marriages in Malawi.

## 1.2. PROBLEM STATEMENT

Marriage before the age of 18 is a fundamental violation of human rights, as well as a health hazard to girls.<sup>22</sup> The overall impact of child marriages on the welfare and rights of girls was summarised by Chatterjee.<sup>23</sup> She pointed out that child marriages rob girls of their survival and development skills. In addition, Nour also observed that the resultant outcomes of such marriages include: high rates of maternal and child mortality, susceptibility to sexually transmitted diseases, the inability to acquire education, and domestic violence.<sup>24</sup> Cook, just like Chatterjee and Nour, depicted child marriages not only as a human rights crisis, but also as health and social hindrances for girls.<sup>25</sup>

More importantly, according to the international standards, child marriages infringe the girls' rights to dignity, mental and physical integrity, liberty, and security of the person, as well as their right to give free consent.<sup>26</sup> The MHRC also observed that child marriages create great risks of domestic violence since it has been reported that young girls marry older men.<sup>27</sup> Authors have also observed that married girls are powerless, which subjects them to abuse.<sup>28</sup> In addition, there is a strong link between child marriages and the level of education that the girls can acquire. It has

<sup>20</sup> The Children's Act No. 22 of 2010 was adopted on 07 July 2010 and commenced on 29 July 2010.

<sup>21</sup> See, for example ss10, 14, 38, 54 and 77 of the Marriage Act.

<sup>22</sup> Mutyaba R 'Early marriage: A violation of girls' fundamental human rights in Africa' (2011) 19 *International Journal of Children's Rights* 339.

<sup>23</sup> Chatterjee P 'India grapples with its child marriage challenge' (2011) 378 *The Lancet* 1987.

<sup>24</sup> Nour NM 'Child marriage: A silent health and human rights issue' (2009) 2(1) *Reviews in Obstetrics and Gynecology* 51.

<sup>25</sup> Cook RJ *Women's Health and Human Rights* (1994) 62.

<sup>26</sup> See, for example, Arts 19 and 21(2) of the CRC and ACRWC, respectively.

<sup>27</sup> MHRC (2005) 25.

<sup>28</sup> Okereke CJ, Uwakwe JO and Nwamuo P 'Education an antidote against early marriage for the girl child' (2013) 3(5) *Journal of Educational and Social Research* 75.

been established that girls who marry young tend to drop out of school.<sup>29</sup> More importantly, child marriages are more likely to predispose young girls to become child mothers.<sup>30</sup>

### 1.3. RESEARCH AIM

The aim of this study is to assess Malawi's legal framework on the protection of girls against child marriages linked to HCPs. The research is guided by the following objectives:

1. To highlight the international and regional legal framework in addressing traditional HCPs that can lead to child marriages;
2. To discuss different traditional practices that lead to child marriages in Malawi;
3. To analyse Malawi's legal framework and its compliance with international and regional standards for the protection of girls against child marriages;
4. To make suggestions for the available legal framework, if necessary, on how best to address the problem of child marriages in Malawi.

### 1.4. LITERATURE REVIEW

While a lot has been written about child marriages and its consequences in Malawi, there is limited research that directly examines the specific provisions in her legal response to child marriages that affect girls. The available studies on the subject are as follows: firstly, the HRW documented the challenge of child marriages in Malawi.<sup>31</sup> It also examined the lack of redress mechanisms for victims of child marriages in addressing the problem.<sup>32</sup> The study found that the laws do not explicitly prohibit child marriages and recommended that legislative reforms be made with a view of enforcing immediate and long-term measures to protect girls from child marriages.<sup>33</sup>

Secondly, the study by Wadesango, Rembe and Chabaya reviewed the HCPs that violate women's rights in the Southern African Development Community region and the measures taken by the

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<sup>29</sup> Mzuza MK, Yudong Y and Kapute F 'Analysis of factors causing poor passing rates and high dropout rates among primary school girls in Malawi' (2014) 4(1) *World Journal of Education* 52.

<sup>30</sup> Heymann J and McNeill K *Children's Chances: How Countries Can Move From Suffering To Thriving* (2013) 37.

<sup>31</sup> HRW "I've never experienced happiness: Child marriage in Malawi" (2014), hereinafter, HRW (2014) 2.

<sup>32</sup> HRW (2014) 3.

<sup>33</sup> HRW (2014) 4.

Member States to address the problem, particularly child marriages.<sup>34</sup> Due to poor implementation mechanisms, the study found out that little has been done to proscribe child marriages.<sup>35</sup>

Thirdly, the MHRC study documented various cultural practices in Malawi and assessed their impact on the enjoyment of the rights of women and children.<sup>36</sup> Conclusively, the practices were found to disproportionately affect more women and girls than their male counterparts.<sup>37</sup> The study recommended a review in policy reform pertaining to culture to ensure that there is equal treatment between males and females.<sup>38</sup> In support, Himonga rightly argued that ‘customary rules and practices have long been perceived as obstacles to the full realisation of the enjoyment of children's rights’.<sup>39</sup>

Lastly, the Centre for Human Rights of the University of Pretoria released a publication which extensively dealt with child marriages in Malawi.<sup>40</sup> This gave in-depth knowledge on the causes and prevalence of child marriages; the laws relating to sexual consent, child marriages, and birth and marriage registrations; enforcement and monitoring mechanisms; and case law relating to child marriages.<sup>41</sup> This publication suggested the need to prioritise girls’ education in order to improve their life skills, literacy and health which are critical in combating child marriages.<sup>42</sup>

As discussed, the literature above does not fully assess the specific provisions of the available legal framework in addressing child marriages in Malawi. It is for this reason that this research paper seeks to fill this gap by looking at the available legislation and assess their compliance with international and regional standards in their legal protection of girls against child marriages in Malawi.

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<sup>34</sup> Wadesango N, Rembe S and Chabaya O ‘Violation of women’s rights by harmful traditional practices’ (2011) 13(2) *Anthropologist* 122.

<sup>35</sup> Wadesango N, Rembe S and Chabaya O ‘Violation of women’s rights by harmful traditional practices’ (2011) 13(2) *Anthropologist* 128.

<sup>36</sup> MHRC (2005) 8.

<sup>37</sup> MHRC (2005) 93.

<sup>38</sup> MHRC (2005) 95.

<sup>39</sup> Himonga C ‘African customary law and children's rights: Intersections and domains in a new era’ in Sloth-Nielsen J (ed) *Children's Rights in Africa* (2008)74.

<sup>40</sup> See generally, Kaufulu-Kumwenda C ‘Child marriage: A human rights perspective in Malawi’ (2014)*Centre for Human Rights, Faculty of Law, University of Pretoria*, hereinafter, Kaufulu-Kumwenda C (2014).

<sup>41</sup> Kaufulu-Kumwenda C (2014) 5-9, 15-19 and 23-27.

<sup>42</sup> Kaufulu-Kumwenda C (2014) 34-40.

## **1.5. SIGNIFICANCE OF STUDY**

It is acknowledged that much has been written about child marriages in Malawi. However, this study aims to contribute to the existing knowledge and expand on the available literature on the legislation dealing with child marriages in Malawi that have not received much attention. Furthermore, an examination of the international and regional instruments highlights the legal normative standards for the protection of girls against child marriages.

Therefore, the research will be of interest to legislators and policy makers. Students, nongovernmental organisations and civil society organisations that focus on children's rights issues will also benefit from this study. The suggestions of this study may be used to improve the existing domestic laws protecting the rights of girls affected by child marriages in Malawi and in other countries facing similar challenges.

## **1.6. METHODOLOGY**

In determining the legal response to the protection of girls against child marriages in Malawi, the researcher used an analysis of primary sources of law. These include international conventions and protocols that seek to protect girls against HCPs, the Malawi Constitution, relevant legislation and case law that deal with HCPs, such as child marriages. The researcher also used secondary sources, such as textbooks, journal articles, and newspaper articles that deal with early child marriages in Malawi. Internet-based publications, reports, general recommendations and other desktop materials have also been useful for this study.

## **1.7. CHAPTER OUTLINE**

Chapter 1 is the introduction. It includes the general background of the study, the research problem, the significance of the study, the research methodology, the literature review and chapter outline.

Chapter 2 focuses on the international and regional standards that can be used to protect girls against child marriages.

Chapter 3 discusses different traditional cultural practices which lead to child marriages in Malawi. It also shows how these practices are in conflict with children's rights, particularly girls.

Chapter 4 assesses the legislation in Malawi aimed at addressing HCPs by showing her compliance or non-compliance with the international and regional standards in addressing child marriages linked to HCPs.

Chapter 5 concludes the discussion with possible suggestions made on the available legal framework for the protection of girls against child marriages.



## CHAPTER 2

### INTERNATIONAL AND REGIONAL STANDARDS ON THE PROTECTION OF GIRLS AGAINST CHILD MARRIAGES

#### 2.1. INTRODUCTION

This chapter presents the international and regional normative standards applicable to Malawi for the protection of girls against child marriages.<sup>43</sup> The discussion will particularly focus on the CRC, CEDAW, ACRWC, and the Maputo Protocol. The chapter is divided into five parts. The first part is the introduction. The second part discusses the normative standards on the minimum age and the issue of consent in the context of child marriages. The third part focuses on the general measures found in these instruments which can be used to address HCPs linked to child marriages. The protection of children's rights in both the CRC and the ACRWC is guided by four general principles, namely: non-discrimination, the best interests of the child, child participation, and child's survival and development.<sup>44</sup> The fourth part, therefore, discusses these principles to show how they can be used to protect girls from child marriages. The last part is the conclusion.

#### 2.2. MINIMUM AGE AND CONSENT

Starting with the minimum age, Arts 1 and 2 of the CRC and the ACRWC, respectively define a child as a person aged below 18.<sup>45</sup> It has, therefore, been concluded that marrying off persons below 18 years amounts to child marriages.<sup>46</sup> Importantly, the CRC and the Marriages

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<sup>43</sup> These may include: the UDHR which was adopted by the UN General Assembly in 1948. Since the UDHR has been consistently invoked by countries for more than sixty years, it has been argued that it has become binding as a part of customary international law. The Marriages Convention was adopted by the UN General Assembly in 1962. The International Covenant on Economic, Social and Cultural Rights (ICESCR) was adopted by the UN General Assembly in 1966 and acceded by Malawi on 22 December 1993. The CEDAW was adopted by the UN General Assembly in 1979 and Malawi acceded to it on 12 March 1987. The CRC was adopted by the UN General Assembly in 1989 and acceded by Malawi on 2 January 1991. The ACRWC was adopted by OAU Assembly in 1990 and ratified by Malawi on 16 September 1999. The Maputo Protocol was adopted in 2003 and was ratified by Malawi on 20 May 2005. The AYC was adopted in 2006 and ratified by Malawi on 13 August 2010. The Southern African Development Community Protocol on Gender and Development (SADC Gender Protocol) was adopted in 2008 and ratified by Malawi in 2013.

<sup>44</sup> Chirwa DM *Human Rights under the Malawian Constitution* (2011), hereinafter, Chirwa DM (2011) 201. These general principles are found in Arts 2, 3, 6, 12 and 3, 4, 5 and 7 of the CRC and ACRWC, respectively.

<sup>45</sup> Arts 1 and 2 of CRC and ACRWC, respectively define a child as anyone below 18 years.

<sup>46</sup> Para 20 of the CEDAW/C/GC/31/CRC/C/GC/18 (2014).

Convention<sup>47</sup> do not specify a minimum age for marriage.<sup>48</sup> However, the CRC and CEDAW Committees have obliged SPs to stipulate 18 as the age for marriage, but leave leeway for marriages below this age provided certain requirements are fulfilled, for example, confirmation by a court.<sup>49</sup> In addition, the CRC General Comment No. 4 has also emphasised on the importance of interventions to set the minimum age for marriage without discrimination.<sup>50</sup>

More importantly, unlike the CRC that does not specify the minimum age for marriage, the ACRWC explicitly requires SPs to specify 18 as the minimum age for marriage.<sup>51</sup> In addition, the ACRWC defines a child as anyone under the age 18, without attaching any limitation.<sup>52</sup> This definition is unequivocal, it does not allow for any exceptions.<sup>53</sup> Similarly, the Maputo Protocol prescribes 18 as the minimum marriageable age.<sup>54</sup>

Moreover, in 2014, the CRC/CEDAW Committees took a clear position on 18 as the minimum age for marriage.<sup>55</sup> The CRC General Comment No. 4 observed that some countries legally consider married children as adults; a position which deprives children of the special protection provided by the CRC.<sup>56</sup> The CRC Committee has, therefore, clearly set 18 as the minimum prescribed age for marriage with or without parental consent.<sup>57</sup> In addition, Art 19 of the CRC protects children from all forms of violence.<sup>58</sup> SPs must take measures, including legislative, administrative, social, and educational to protect children from all forms of violence which can be perpetrated by child marriages.<sup>59</sup> The CRC General Comment No. 3 explicitly categorised child

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<sup>47</sup> Art 2 of the Marriages Convention.

<sup>48</sup> Freeman M and Napier D *Law and Anthropology: Current Legal Issues* (2009) 397.

<sup>49</sup> Human Rights Watch 'How come you allow little girls to get married? Child marriage in Yemen' (2011) 41.

<sup>50</sup> Paragraphs 9 and 20 of the CRC Committee, *General comment No. 4 (2003): Adolescent Health and Development in the Context of the Convention on the Rights of the Child*, 1 July 2003, hereinafter, CRC/C/GC/4 (2003).

<sup>51</sup> Art 21(2) of the ACRWC.

<sup>52</sup> Art 2 of the ACRWC.

<sup>53</sup> Gose M *The African Charter on the Rights and Welfare of the Child: An Assessment Of The Legal Value Of Its Substantive Provisions By Means Of A Direct Comparison to the Convention on the Rights of the Child* (2002) 53.

<sup>54</sup> Art 6(a) and (b) of the Maputo Protocol.

<sup>55</sup> Paragraph 55(f) of the CEDAW/C/GC/31/CRC/C/GC/18 (2014). See, also a discussion by Njungwe EN 'International protection of children's rights: An analysis of African attributes in the African Charter on the Rights and Welfare of the Child' (2009) 3(1) *Cameroon Journal on Democracy and Human Rights* 18.

<sup>56</sup> Paragraph 16 of the CRC/C/GC/4 (2003).

<sup>57</sup> Paragraph 20 of the CRC/C/GC/4 (2003).

<sup>58</sup> Art 19 of the CRC.

<sup>59</sup> UNICEF 'The United Nations Convention on the Rights of the Child' available at <http://www.unicef.org/gambia/UNCRC.pdf> (accessed 18 May 2015).

marriages as HCPs.<sup>60</sup> In this context, Malawi was urged by the CRC to provide free birth registrations as their non-registration extends the practice of child marriages.<sup>61</sup> Given the high prevalence of the non-registration of births in Malawi, Odala rightly noted that this ‘poses a serious threat to the legal protection of children’, particularly girls ‘who may appear to be of age when in fact they are not’.<sup>62</sup> Therefore, improving the registration of births will help to conform to the requirements of setting 18 as the minimum marriageable age.

Apart from the CRC and the ACRWC, the CEDAW requires SPs to prescribe a minimum marriageable age and declares that child betrothals and/or marriages shall have no legal effect.<sup>63</sup> The CEDAW Committee also explicitly endorsed 18 as the minimum marriageable age.<sup>64</sup> More importantly, the CRC/CEDAW Committees urged Malawi to set 18 as the minimum marriageable age and make birth registration compulsory for all children.<sup>65</sup> In addition, Art 4 of the CEDAW requires SPs to adopt special measures including, legislative, executive, administrative and other regulatory instruments, policies and practices to effectively combat discrimination and improve the welfare of women and girls.<sup>66</sup> Moreover, Art 5(a) specifically obliges SPs to ‘modify the social and cultural patterns of conduct of men and women’.<sup>67</sup> According to Sepper, Art 5(a) is both an interpretive tool and a substance-giver which acts as the guarantor of substantive equality for women.<sup>68</sup>

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<sup>60</sup> Paragraph 11 of the CRC Committee, *General comment No. 3 (2003): HIV/AIDS and the Rights of the Child*, 17 March 2003, hereinafter, CRC/C/GC/3 (2003).

<sup>61</sup> Paragraph 37 of the CRC Committee, *Consideration of reports submitted by States parties under article 44 of the Convention: Convention on the Rights of the Child: concluding observations: Malawi*, 27 March 2009.

<sup>62</sup> Odala V ‘Childhood under Malawian laws as Constitution becomes of age’ (2012) 6(1) *Malawi Law Journal* 100.

<sup>63</sup> Art 16(2) of the CEDAW.

<sup>64</sup> Paragraph 36 of the CEDAW/C/GC/21 (1994).

<sup>65</sup> Paragraphs 43 and 32(a) of the CEDAW Committee, *Responses to the list of issues and questions with regard to the consideration of the 6th periodic report: Malawi*, 5 January 2010 and CRC Committee, *UN Committee on the Rights of the Child: Concluding Observations: Malawi*, 2 April 2002, respectively.

<sup>66</sup> Paragraphs 21-26 of the CEDAW Committee, *General recommendation No. 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures*, 2004, hereinafter, CEDAW/C/GC/25 (2004).

<sup>67</sup> Art 5(a) of the CEDAW. See, also a discussion by Pruitt LR ‘Deconstructing CEDAW's Art 14: Naming and explaining rural difference’ (2011) 17(2) *William & Mary Journal of Women and the Law* 359.

<sup>68</sup> Sepper E ‘Confronting the “sacred and unchangeable”: The obligation to modify cultural patterns under women’s discriminatory treaty’ (2008) 30(2) *University of Pennsylvania Journal of International Law* 597.

Regionally, the 2008 SADC Gender Protocol has also stressed the importance of setting 18 as the minimum marriageable age.<sup>69</sup> This has been observed to protect girls who are prone to be married off by parents if a lower minimum age for marriage exists, and no proper protection mechanisms are in place.<sup>70</sup>

Coming to the issue of consent, Art 16(1)(b) of the CEDAW authoritatively prescribes that men and women have an equal right to freely enter into marriage. The CEDAW General Comment No. 21 also emphasised that the right to freely consent to marriage is central to their life, dignity and equality of girls.<sup>71</sup> To this effect, international standards require SPs to put the necessary mechanisms which ensure that girls are accorded the full protection of the law when providing consent.<sup>72</sup> The CEDAW/CRC Committees have also recommended that SPs adopt or amend legislation with the aim of addressing and eliminating HCPs. In doing so, 18 is the minimum age for marriage which must be accompanied by free and full consent of the intending spouses.<sup>73</sup>

Furthermore, as it will be discussed in chapter 3, many cultural practices predispose girls by allowing parents or guardians to force girls into marriage.<sup>74</sup> Parents take it upon themselves to decide to whom their daughter get married.<sup>75</sup> The international law is very clear: SPs that allow 'either by statutory or customary law a male guardian to consent to the marriage instead of the woman herself prevents women from exercising a free choice'.<sup>76</sup> In these forced marriages, the girls' right to give free and full consent is violated.<sup>77</sup> Marriages concluded without free and full consent are, therefore, void.<sup>78</sup> Likewise, Art 8(2)(b) of the SADC Gender Protocol also requires legislation on marriage to ensure that 'every marriage takes place with the free and full consent of

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<sup>69</sup> Art 8(2) of the SADC Gender Protocol.

<sup>70</sup> Kombo B, Sow R and Mohamed FJ 'Journey to equality: 10 years of the Protocol on the rights of women in Africa' (2013) 55.

<sup>71</sup> Paragraph 16 of the CEDAW/C/GC/21(1994).

<sup>72</sup> Child marriage and the law available at <http://www.girlsnotbrides.org/child-marriage-law/> (accessed 18 may 2015).

<sup>73</sup> Paragraph 55 of the CEDAW/C/GC/31/CRC/C/GC/18 (2014). See, also a similar discussion by Njungwe EN 'International protection of children's rights: An analysis of African attributes in the African Charter on the Rights and Welfare of the Child' (2009) 3(1) *Cameroon Journal on Democracy and Human Rights* 18. See, for example, paragraph 18 of the CEDAW/C/GC/21(1994).

<sup>75</sup> Jonas O 'The practice of polygamy under the scheme of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: A critical appraisal' (2012) 4(5) *Journal of African Studies and Development* 147.

<sup>76</sup> See, for example, the Human Rights Committee as cited by Hathaway JC and Foster M *The Law of Refugee Status* (2014) 222.

<sup>77</sup> Paragraph 16 of the CEDAW/C/GC/21(1994).

<sup>78</sup> Art 6 of the Maputo Protocol.

both parties'.<sup>79</sup> Equally, Art 8(2) of the AYC requires the free consent of young people when concluding a marriage.<sup>80</sup> This principle ensures that marriage is voluntarily entered into, which prevents the conclusion of marriages contracted under duress or threat.<sup>81</sup>

### 2.3. HARMFUL CULTURAL PRACTICES

Human rights bodies have described child marriages as HCPs.<sup>82</sup> HCPs have been defined as:

‘Those practices which constitute a denial of the dignity and/or integrity of the individual and a violation of the human rights, discriminate against women or children on the basis of sex, gender and age regardless of whether the victim provides full, free and informed consent’.<sup>83</sup>

In providing guidelines for the protection of girls against child marriages due to HCPs, Art 24(3) of the CRC can be invoked.<sup>84</sup> Art 24(3) requires SPs to take all appropriate measures, including legislative and administrative measures to abolish traditional practices that are prejudicial to the health of children.<sup>85</sup> According to van Bueren, Art 24(3) advances the rights of children by prohibiting all forms of HCPs including those which have not been explicitly defined, such as child marriages.<sup>86</sup> Since HCPs are being prohibited, Art 24(3) requires SPs to provide children with the highest attainable standard of health as possible.<sup>87</sup> In this way, girls can be protected from HCPs linked to child marriages. Given that there are many traditional cultural practices that lead to child marriages, child marriages are, therefore, detrimental to the health of girls, Art 24(3) can be read to call for the abolition of traditional practices, such as child marriages.<sup>88</sup>

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<sup>79</sup> Art 8(2)(b) of the SADC Gender Protocol.

<sup>80</sup> Art 8(2) of the AYC.

<sup>81</sup> Alfreðsson GS and Eide A *The Universal Declaration of Human Rights: A Commentary* (1992) 333.

<sup>82</sup> See, paragraphs 28 and 11 of the CRC Committee, *General comment No. 13 (2011): The right of the child to freedom from all forms of violence*, 18 April 2011, hereinafter, CRC/C/GC/13 (2011) and the CEDAW Committee, *CEDAW General Recommendations Nos. 19 and 20, adopted at the Eleventh Session, 1992*, respectively.

<sup>83</sup> Paragraph 16 of the CEDAW/C/GC/31/CRC/C/GC/18 (2014).

<sup>84</sup> See paragraphs 16 and 18 of the CRC Committee, *General comment No. 5 (2003): General measures of implementation of the Convention on the Rights of the Child*, 27 November 2003, hereinafter, CRC/C/GC/5 (2003).

<sup>85</sup> Art 24(3) of the CRC.

<sup>86</sup> van Bueren G *The International Law on the Rights of the Child* (1998) 307.

<sup>87</sup> Nilsson AC *Children and Youth in Armed Conflict* (2013) 42.

<sup>88</sup> See, also Braimah TS ‘Child marriage in Northern Nigeria: Section 61 of Part I of the 1999 Constitution and the protection of children against child marriage’ (2014) 14 *AHRLJ* 477.

In addition, Art 2 of the CEDAW calls upon SPs to immediately eliminate all forms of discrimination against women.<sup>89</sup> While commenting on Art 2, the CEDAW General Comment No. 28 recommended that SPs design public policies, programmes and institutional frameworks which meet the needs of women so that they can develop their potential on an equal basis with men.<sup>90</sup> This led Saul, Kinley and Mowbray to argue that any delay to eliminate any form of discrimination cannot be justified because it extends the problem.<sup>91</sup> In the context of child marriages, discriminatory laws and practices that predispose girls to child marriages can be eliminated.

Apart from Art 2, Art 5(a) requires SPs to take legal protection, and preventive measures to eliminate stereotypes and cultural prejudices against women.<sup>92</sup> The CEDAW General Comment No. 28 emphasised that gender is a social and cultural construction that can be changed.<sup>93</sup> In this view of child marriages, these measures are useful tools in eliminating HCPs that specifically target girls.<sup>94</sup> They can be used to eliminate stereotypes and cultural prejudices against girls.

In addition, Art 16 of the CEDAW also requires SPs to ‘take all appropriate measures to eliminate discrimination against women’.<sup>95</sup> These measures include, specifying a minimum age for marriage and to make the registration of marriages compulsory.<sup>96</sup> As discussed in chapter 1, most HCPs that lead to child marriages affect mostly girls.<sup>97</sup> This is discrimination on the ground of sex<sup>98</sup> which is prohibited by human rights instruments.<sup>99</sup> By the same token, the Maputo Protocol obliges SPs to ‘enact and effectively implement appropriate legislative measures to eliminate discriminatory

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<sup>89</sup> Art 2 of the CEDAW.

<sup>90</sup> Paragraph 9 of the CEDAW Committee, *General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, 16 December 2010, hereinafter, CEDAW/C/GC/28 (2010).

<sup>91</sup> Saul B, Kinley D and Mowbray J *The International Covenant on Economic, Social and Cultural Rights: Cases, Materials, and Commentary* (2014) 434.

<sup>92</sup> Biholar R *Transforming Discriminatory Sex Roles and Gender Stereotyping: The Implementation of Art 5(a) CEDAW for the Realisation of Women's Right to be Free from Gender-based Violence in Jamaica* (2013) 145-162.

<sup>93</sup> Paragraph 5 of the CEDAW/C/GC/28 (2010).

<sup>94</sup> See, for example, a discussion by Merry SE ‘Human rights law and the demonization of culture’ (2003) 26(1) *Political and Legal Anthropology Review* 60.

<sup>95</sup> Art 16 of the CEDAW.

<sup>96</sup> Art 16(2) of the CEDAW.

<sup>97</sup> See, the discussion of these harmful traditional practices in chapter 3.

<sup>98</sup> See, for example, Arts 2 and 3 of the CRC and ACRWC, 2, and 6 of the CEDAW and the Maputo Protocol, respectively.

<sup>99</sup> Art 2 of the CRC. See, also paragraph 8 of the CEDAW General Comment No. 29 available at [http://www2.ohchr.org/english/bodies/cedaw/docs/comments/CEDAW-C-52-WP-1\\_en.pdf](http://www2.ohchr.org/english/bodies/cedaw/docs/comments/CEDAW-C-52-WP-1_en.pdf) (accessed 21 October 2015).

practices which negatively affect the human rights of women'.<sup>100</sup> Further, the ACRWC obligates SPs to eliminate harmful social and cultural practices which are prejudicial to the survival and development of the child.<sup>101</sup> Furthermore, the SADC Gender Protocol 'requires SPs to support public awareness programmes aimed at changing behaviour to effectively eliminate HCPs'.<sup>102</sup> Therefore, the international standards require the SPs' duty to modify and eliminate HCPs that may lead to child marriages.<sup>103</sup>

## **2.4. THE FOUR CARDINAL PRINCIPLES IN THE CRC WITH REGARD TO CHILD MARRIAGES**

### **2.4.1. The best interests of the child**

The principle of the 'best interests of the child' (BIC) is found in Arts 3 and 4 of the CRC and the ACRWC, respectively.<sup>104</sup> The BIC has been defined as: 'the principle that is used to determine which services and orders will best serve the child that will be in a particular circumstance'.<sup>105</sup> The CRC General Comment No. 14, on the right of the child to have his or her best interests taken as a primary consideration, did not define the BIC. It, however, noted that 'the BIC should be adjusted and defined on an individual basis, according to the specific situation of the child or children concerned, taking into consideration their personal context, situation and needs'.<sup>106</sup>

The importance of the BIC on the protection and promotion of the children's rights has been observed by different scholars in the following: Ncube observed that the rights of children are embedded by the 'best interests of the child' principle and the protection of their rights must be interpreted in conjunction with this principle;<sup>107</sup> van Bueren perceived the BIC to be given priority when dealing with matters concerning the child;<sup>108</sup> Todres suggested that 'in all actions concerning

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<sup>100</sup> Arts 2(1)(b) and 5 of the Maputo Protocol.

<sup>101</sup> Arts 21 and 20 of the ACRWC and the AYC, respectively.

<sup>102</sup> Art 21 of the SADC Gender Protocol.

<sup>103</sup> See, for example, Arts 27 and 15 of the UDHR and ICESCR, respectively.

<sup>104</sup> Briefly, Arts 3 and 4 of the CRC and ACRWC, respectively require SPs to ensure that children are protected and their interests are safeguarded by giving primary consideration in all actions which affect them, 'whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies'.

<sup>105</sup> The BIC definition is available at <http://www.hg.org/Art.asp?id=33834> (accessed 10 October 2015).

<sup>106</sup> Paragraph 32 of the CRC Committee, *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration*, 29 May 2013, hereinafter, CRC/C/GC/14 (2013).

<sup>107</sup> Ncube W *Prospects and Challenges in Eastern and Southern Africa: The Interplay between International Human Rights Norms and Domestic Law, Tradition and Culture* (1992) 1.

<sup>108</sup> van Bueren G *The International Law on the Rights of the Child* (1995) 46.

children' implies that the CRC can be invoked not only when the action in question applies to a particular child in question, but also when the action in question affects children in general;<sup>109</sup> and Alston observed that what need to be taken into account when dealing with matters concerning children are not just the child's overall interests, but the child's best interests.<sup>110</sup>

In the context of child marriages, the BIC is relevant as most HCPs are linked to giving priority to the interests of parents at the expense of children.<sup>111</sup> One would view the parental interests that surround child marriages as inconsistent with the protection of the BIC.<sup>112</sup> In resolving this inconsistency, the international standard is that the BIC must be given priority.<sup>113</sup> For example, Art 1(3) of the ACRWC as read together with Art 4 of the ACRWC, are vocal in addressing the conflicts between culture and the BIC. Art 1(3) provides that 'any custom, tradition, a cultural or religious practice that is inconsistent with the rights, duties and obligations contained in the present Charter shall, to the extent of such inconsistency, be discouraged'. Art 4(1) provides that 'in all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration'. In view of the above provisions, Lloyd rightly observed that the ACRWC could be seen as an overriding *lex specilis*<sup>114</sup> aimed at the realisation of children's rights and should, therefore, prevail over HCPs.<sup>115</sup> This observation is supported by the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) which recommended that SPs put in place legislative, administrative, and judicial measures to safeguard the BIC.<sup>116</sup>

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<sup>109</sup> Todres J 'Emerging limitations on the rights of the child: The U.N. Convention on the Rights of the child and its early case law (1998) 30 *Columbia Human Rights Law Review* 171.

<sup>110</sup> Alston P 'The best interests principle: Towards a reconciliation of culture and human rights' (1994) 8(1) *International Journal of Law and the Family* 11.

<sup>111</sup> For example, bride price is a form of wealth given to the parents of the girl; hence, they prefer their own interests to the girl's.

<sup>112</sup> Ekundayo O 'Does the African Charter on the Rights and Welfare of the Child only underlines and repeats the Convention on the Rights of the Child's Provisions? Examining the similarities and the differences between the ACRWC and the CRC' (2015) 5 *International Journal of Humanities and Social Science* 143.

<sup>113</sup> See, for example, paragraph 22 of the African Committee of Experts on the Rights and Welfare of the Child (ACERWC), *General Comment No. 1 on Article 30 of the ACRWC: "Children of Incarcerated and Imprisoned Parents and Primary Caregivers"*, 8 November 2013, hereinafter, ACERW/C/GC/1 (2013).

<sup>114</sup> This doctrine relates to the interpretation of laws. It can apply in both domestic and international law contexts.

<sup>115</sup> Lloyd A 'A theoretical analysis of the reality of children' rights in Africa: An introduction to the African Charter on the Rights and Welfare of the Child' (2002) 1 *AHRLJ* 21.

<sup>116</sup> Paragraph 24 of the ACERW/C/GC/1 (2013).

In addressing child marriages linked to HCPs using the BIC, however, conflict may arise with regard to the mode of its application.<sup>117</sup> For example, Lundberg observed that in terms of rules regulating issues of custody, if a cultural construction is used, custody of the child rests with the family, and not the individual.<sup>118</sup> If one uses the legal construction, custody would rest with an individual rather than a family.<sup>119</sup> Using the analogy by Lundberg, a legal construction should be preferred in addressing HCPs that lead to child marriages using the BIC.

#### 2.4.2. Child participation

The ‘child participation’ principle is contained in Arts 12 and 7 of the CRC and ACRWC, respectively.<sup>120</sup> Child participation was defined by the CRC Committee as ‘a social contract which fully recognises children as rights-holders entitled both to receive protection and to participate in all matters affecting them’.<sup>121</sup> Morag observed that the right to participation includes three main components: the right to express views; the right to do so freely; and the right to have those views given due weight.<sup>122</sup> It must be noted that, expressing an opinion is not tantamount as taking a decision, but it implies the ability to influence decisions.<sup>123</sup> While being active participants, children must freely give their views and those views be given due weight. This principle is relevant. Most HCPs discussed in chapter 3 are solely controlled by adults, which negate the free participation of girls.

The importance of child participation in the protection of children’s rights was summarised by Chirwa in the following: ‘Arts 12 and 7 entitle children to be actors in their own lives and to

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<sup>117</sup> Dillion S *International Children’s Rights* (2010) 50.

<sup>118</sup> Lundberg A ‘The best interests of the child principle in Swedish asylum cases: The marginalization of children’s rights’ available at <http://jhrp.oxfordjournals.org/content/3/1/49.full.pdf+html> (accessed 05 April 2015).

<sup>119</sup> Lundberg A ‘The best interests of the child principle in Swedish asylum cases: The marginalization of children’s rights’ available at <http://jhrp.oxfordjournals.org/content/3/1/49.full.pdf+html> (accessed 05 April 2015).

<sup>120</sup> Art 12 of the CRC requires SPs to give an optimum environment where children are freely capable of forming their own views in all matters affecting the child while Art 4(2) of the ACRWC demands all proceedings which affect children must allow them to communicate their views and those views must be considered when giving a decision which affect those children.

<sup>121</sup> CRC Committee, 43rd session of 2006 available at <http://www2.ohchr.org/english/bodies/crc/docs/discussion/> (accessed 11 September 2015).

<sup>122</sup> Morag T ‘The principles of the UNCRC influence on Israeli law’ (2014) 22 *Michigan State International Law Review* 539.

<sup>123</sup> Fact sheet: The right to participation available at <http://www.unicef.org/crc/files/Right-to-Participation.pdf> (accessed 12 October 2015).

participate in the decisions that affect them'.<sup>124</sup> In the context of HCPs that lead to child marriages, Mezmur and Sloth-Nielsen have observed that these provisions can also be used to promote and protect the rights of children affected by those practices.<sup>125</sup> Understood this way, therefore, child participation allows children to voice their concerns, needs and views to the extent that they can challenge HCPs associated with child marriages.<sup>126</sup> Furthermore, the right to child participation can enable children to achieve their best interests.<sup>127</sup> In cognisance of this fact, the CRC General Comment No. 12 recommended that SPs give due regard to the views of the child when decisions are to be made that affect them.<sup>128</sup> In addition, SPs have a duty to create conducive environments that will allow and encourage children to do so.<sup>129</sup>

Notwithstanding its importance, the application of child participation has its own dilemmas. For example, Willow has argued that child participation does not specify if the child has the final say in matters affecting her or not.<sup>130</sup> Sloth-Nielsen is of the impression that child participation does not give a child the right that outweighs that of their parents or families.<sup>131</sup> Consequently, adults make final decisions which may fail to give children's views due weight.<sup>132</sup> These observations are relevant in the context of child marriages, as many cultural practices give due weight to the views of the parents.<sup>133</sup> Traditionally, children are believed to lack the capacity to make reasoned choices about important matters such as marriages.<sup>134</sup> It is, therefore, recommended that in the application of this principle, decision makers are mindful of this fact. Despite these flaws, child participation can be used to protect girls against child marriages. It ensures that all children, regardless of their gender or sex have an equal opportunity to have their voices heard and respected.

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<sup>124</sup> Chirwa DM (2011) 206.

<sup>125</sup> Mezmur B and Sloth-Nielsen J 'The African child and NEPAD: Advocating child participation in NEPAD' (2008), hereafter, Mezmur B and Sloth-Nielsen J (2008) 18.

<sup>126</sup> Chirwa DM (2011) 207. See, also a discussion by Cattrijsse L 'Reflections on the concept of participation' in Ang F et al (eds) *Participation Rights of Children* (2006) 35.

<sup>127</sup> Lansdown G *The Evolving Capacities of the Child* (2005) 2.

<sup>128</sup> Paragraph 132 of the CRC Committee, *General comment No. 12 (2009): The right of the child to be heard*, 20 July 2009, hereinafter, CRC/C/GC/12 (2009).

<sup>129</sup> Paragraphs 11 and 16 of the CRC/C/GC/12 (2009).

<sup>130</sup> Willow C *Children's right to be Heard and effective Child Protection* (2010) 39.

<sup>131</sup> Sloth-Nielsen 'Ratification of the United Nations Convention on the Rights of the Child: Some implications for South African law' (1995) *SALJ* 406.

<sup>132</sup> Mezmur B and Sloth-Nielsen J (2008) 18.

<sup>133</sup> See, the discussion in chapter 3.

<sup>134</sup> Parkinson P and Cashmore J *The Voice of a Child in Family Law Disputes* (2008) 3.

### 2.4.3. Non-discrimination

The principle of non-discrimination is explicitly recognised in Arts 2 and 3 of the CRC and ACRWC, respectively.<sup>135</sup> These instruments disallow differential treatment of boys and girls without objective and reasonable justifications.<sup>136</sup> Discrimination can be defined as:

‘Any distinction, exclusion, restriction or preference based on a number of grounds such as sex, gender, or birth, which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise, on equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field’.<sup>137</sup>

Non-discrimination calls for transformative equality which requires SPs to equally redistribute power, opportunities and resources between women and men and eliminate harmful norms, prejudices and stereotypes.<sup>138</sup> This includes equal opportunities for boys and girls to exercise the right to education, and to have their views heard and be given due respect so that their best interests are taken into account. Male-biased rules that ignore the rights of girls must also be modified.<sup>139</sup> As a result, the HRC has urged SPs to take affirmative action in eliminating HCPs which extend discrimination.<sup>140</sup> The ICESCR General Comment No. 12 recommended that SPs modify discriminatory laws. Legislative, administrative and preventive measures that eliminate attitudes which cause discrimination must, therefore, be adopted.<sup>141</sup>

In addition, the CRC General Comment No. 5 commented that non-discrimination requires changes in legislation, administration, policies and programmes to change the attitude of a society.<sup>142</sup> For example, SPs must provide support and assistance to emancipate girls by retaining or reintegrating them in the education system. The ACERWC observed that both Arts 2 and 3 of

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<sup>135</sup> It is also recognised in Arts 1, 2, 2, 2, and 26 of CEDAW, ICESCR, AYC, Maputo Protocol and ICCPR, respectively.

<sup>136</sup> See, a commentary by Vandenhoe W *Non-Discrimination and Equality in the view of the UN Human Rights Treaty Bodies* (2005) 79.

<sup>137</sup> Paragraph 7 of the UN Human Rights Committee (HRC), *CCPR General Comment No. 18: Non-discrimination*, 10 November 1989, hereinafter, HRC/C/GC/18 (1989).

<sup>138</sup> Cusack S and Pusey L ‘CEDAW and the rights to non-discrimination and equality’ (2013) 14 *Melbourne Journal of International Law* 11.

<sup>139</sup> Chirwa DM (2011) 200.

<sup>140</sup> Paragraph 10 of the HRC/C/GC/18 (1989).

<sup>141</sup> Paragraph 8 of the UN Committee on Economic, Social and Cultural Rights (CESCR), *General comment No. 20: Non-discrimination in economic, social and cultural rights*, 2 July 2009.

<sup>142</sup> Paragraph 12 of the CRC/C/GC/5 (2003).

the CRC and ACRWC oblige SPs to ensure non-discrimination against children on the basis of the actions of their parents.<sup>143</sup> This principle, in the context of child marriages, becomes relevant: it sends a strong message that parents cannot perpetuate discrimination through preferential treatment of a boy child over a girl child.<sup>144</sup> So too, HCPs that affect girls cannot be tolerated.<sup>145</sup> In addition, Hodgkin and Newell rightly observed that Arts 2 and 3 of the CRC and ACRWC are relevant in addressing child marriages.<sup>146</sup> They require special protection be given to children because early childhood is a critical period for the realisation of these rights.<sup>147</sup> For example, all children must have equal access to education and this will help to overcome discrimination against girls, particularly those living in rural areas.

Apart from the CRC and the ACRWC, Arts 2, and 6 of the CEDAW and the Maputo Protocol, respectively, reiterated that ‘women and men enjoy equal rights and are regarded as equal partners in marriage’. The CEDAW General Comment No. 28 recognised that women experience countless forms of discrimination because of their sex and gender.<sup>148</sup> More importantly, the CEDAW General Comment No. 19 has characterised oppressive practices against women such as child marriages as forms of discrimination.<sup>149</sup>

#### 2.4.4. Survival and development

The principle of ‘survival and development’ is found in Arts 6 and 5 of the CRC and ACRWC, respectively.<sup>150</sup> According to Hodgson, ‘survival’ is ‘the meeting of basic needs which sustain human life’.<sup>151</sup> This principle has also been linked to the right to life.<sup>152</sup> Thus, Chirwa has argued that the rights to life and survival are essential preconditions for the enjoyment of other rights.<sup>153</sup>

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<sup>143</sup> Paragraph 18 of the ACERW/C/GC/1 (2013).

<sup>144</sup> See, a discussion of HCPs in chapter 3.

<sup>145</sup> Mezmur B and Sloth-Nielsen J ‘Free education is a right for me: A report on free and compulsory primary education’ (2007) 10.

<sup>146</sup> Hodgkin R and Newell P *Implementation Handbook for the Convention on the Rights of the Child* (2007) 18.

<sup>147</sup> Paragraph 1 of the CRC Committee, *General comment No. 7 (2005): Implementing Child Rights in Early Childhood*, 20 September 2006.

<sup>148</sup> Paragraph 5 of the CEDAW/C/GC/28 (2010).

<sup>149</sup> Paragraph 6 of the CEDAW Committee, *CEDAW General Recommendations Nos. 19 and 20, adopted at the Eleventh Session, 1992*, hereinafter, CEDAW/C/GC/19/20.

<sup>150</sup> Arts 6 and 5 of the CRC and ACRWC, respectively.

<sup>151</sup> Hodgson D ‘Child's Right to Life, Survival and Development’ (1994) 2 *International Journal of Children's Rights* 383.

<sup>152</sup> Detrick SL *A Commentary on the United Nations Convention on the Rights of the Child* (1999) 126.

<sup>153</sup> Chirwa DM (2011) 203.

It is, therefore, not a coincidence that the CRC General Comment No. 5 expects SPs to adopt measures which increase life expectancy.<sup>154</sup> Sloth-Nielsen has recommended that:

‘Arts 6 and 5 require SPs to ensure that girls have a healthy and safe environment by accessing medical care, food, education and be free from physical, psychological or mental harm or abuse which can be accompanied by HCPs leading to child marriages’.<sup>155</sup>

In addition, the right to development creates the concepts of equality of opportunity and distributive justice for all.<sup>156</sup> The CRC regards SPs to interpret ‘development’ as achieving the optimal physical and mental growth for all children.<sup>157</sup> In the context of addressing child marriages, the right to development is important because it is centred on the notion of participation as discussed above.<sup>158</sup> Moreover, according to the ACERWC, the child’s right to development is important because ‘it enables children to grow up in a healthy and protected manner, free from fear and want, and to develop their personality, talents and mental and physical abilities to their fullest potential consistent with their evolving capacities’.<sup>159</sup> Therefore, according to human rights standards, girls must be left to develop into adults who can make free choices and enjoy their fundamental human rights, such as the right to choose their own spouses. This enables girls to shun practices like *mbirigha* which rob them of their optimal development when they marry at puberty.

## 2.5. CONCLUSION

This chapter highlighted some of the major international and regional standards which are directed at achieving the general protection of children, particularly girls against child marriages. What is clear from this discussion is that children’s rights take priority over HCPs that lead to child marriages. The discussions in this chapter, and chapter 3 to follow, lay the foundation for chapter 4, where Malawi’s legal framework will be analysed in its protection of girls against child marriages.

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<sup>154</sup> See generally, CRC/GC/5 (2003).

<sup>155</sup> Sloth-Nielsen J ‘The international framework’ in Sloth-Nielsen J and Gallinetti J (eds.) *Child Justice in Africa: A Guide To Good Practice* (2004) 23.

<sup>156</sup> Kaime T *The African Charter on the Rights and welfare of the Child: A Socio-Legal Perspective* (2009) 121.

<sup>157</sup> Paragraph 12 of the CRC/C/GC/3 (2003).

<sup>158</sup> Chirwa DM (2011) 205.

<sup>159</sup> Paragraph 25 of the ACERW/C/GC/1 (2013).

## CHAPTER 3

### TRADITIONAL CULTURAL PRACTICES AND CHILD MARRIAGES IN MALAWI

#### 3.1. INTRODUCTION

This chapter examines the different traditional cultural practices that can be linked to child marriages in Malawi. These include: *chimeta masisi*; *mbirigha*; *kupawila*; *kutwala*, *lobolo*, and *chinamwali*. The general aim is to show how the above mentioned cultural practices conflict with the international and regional children's rights standards. The chapter is divided into four parts. The first part is the introduction. The second part looks at the different cultural practices that lead to child marriages in Malawi. The third part shows how these cultural practices conflict with children's rights. The last part is the conclusion.

#### 3.2. TRADITIONAL CULTURAL PRACTICES RELATED TO CHILD MARRIAGES

##### 3.2.1. *Chimeta masisi*

*Chimeta masisi* means 'replacement of a deceased wife'.<sup>160</sup> Under this practice, parents persuade a younger sister or niece of the deceased wife to marry the bereaved husband.<sup>161</sup> The replacement of a deceased wife is commonly practised in six out of the 27 districts found in Malawi.<sup>162</sup> According to the MHRC study, 40 per cent of the respondents acknowledged the existence of *chimeta masisi* in their communities.<sup>163</sup> There are several cultural justifications for this practice. First, it is to replace a deceased wife. Second, it also provides a mother figure in the family. It is believed that the mother figure has a duty to look after the children left behind by the deceased woman.<sup>164</sup> Third, the practice of *chimeta masisi* discourages the husband from demanding his *lobolo* back.<sup>165</sup> Analysts, such as Mwambene, also believe that parents do it because they want to constantly access the wealth of their son-in-law.<sup>166</sup>

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<sup>160</sup> MHRC (2005) 23.

<sup>161</sup> Stuart M and Hurwitz D 'A cultured education: Malawi as an example for protecting the rights of the girl child in the face of cultural barriers' (2011) 14.

<sup>162</sup> These include: Chitipa, Koronga, Likoma, Mzimba, Nkhata Bay and Rumphi.

<sup>163</sup> MHRC (2005) 23.

<sup>164</sup> MHRC (2005) 23.

<sup>165</sup> National Youth Council of Malawi 'Report on profiling early marriages in Malawi: Making a case to 'stop' early marriages' (2009) 11.

<sup>166</sup> Mwambene L (2010) 100.

### 3.2.2. *Mbirigha*

*Mbirigha* means ‘bonus wife’.<sup>167</sup> It is a practice whereby parents or guardians give their son-in-law a younger sister or niece of his wife to take as second wife.<sup>168</sup> The wife, aunties, parents and sometimes the husband persuade the younger sibling to join her sister in marriage.<sup>169</sup> *Mbirigha* is commonly practised in the Southern region of Malawi, more especially in the Shire Valley.<sup>170</sup> The MHRC noted that 45 per cent of the interviewees reported that bonus wife takes place.<sup>171</sup> Under this practice, the man prepares gifts, indigenously known as *luphatho*. This gift consists of a basket of maize flour and one chicken and the wife carries the basket and asks the parents for her sister’s hand in marriage.<sup>172</sup> Once *luphatho* is accepted, the bride price is negotiated and the young sister joins her older sister as a second wife.<sup>173</sup> *Mbirigha* is practiced for the following reasons: firstly, it is to give a son-in-law a bonus wife. Secondly, a bonus wife can be given as a reward for being a good son-in-law.<sup>174</sup> Thirdly, wives use *mbirigha* to prevent their husbands from marrying elsewhere; thereby, protecting their husbands’ wealth and riches.<sup>175</sup> Lastly, *mbirigha* is also used as a means to bear children for the husband if the wife is barren.<sup>176</sup>

### 3.2.3. *Kupawila*

*Kupawila* means ‘paying off a debt by marrying a daughter’.<sup>177</sup> *Kupawila* is common in the Northern region of Malawi and takes these forms: first, in Chitipa district, *kupawila* occurs when parents incur a debt and pay it off by marrying a daughter to their creditor.<sup>178</sup> For example, parents can connive with a rich man who agrees to give them money or cattle on condition that he stays with their daughter and eventually marry her.<sup>179</sup> Second, in Mzimba district, parents offer a hard-

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<sup>167</sup> Mwambene L (2010) 101.

<sup>168</sup> Soko B *Vimbuza: The Healing Dance of Northern Malawi* (2014), hereinafter, Soko B (2014) 88.

<sup>169</sup> MHRC (2005) 24.

<sup>170</sup> Zumazuma F ‘Reflections on social injustices that are faced by the girl child - Cases of forced marriages in Malawi’ (2014) available at <http://yoneco2.blogspot.com/2014/07/reflections-on-social-injustices-that.html> (accessed 18 August 2015).

<sup>171</sup> Mwambene L (2010) 101.

<sup>172</sup> MHRC (2005) 24.

<sup>173</sup> MHRC (2005) 24.

<sup>174</sup> Mwambene L (2010) 101.

<sup>175</sup> Soko B (2014) 88.

<sup>176</sup> MHRC (2005) 24.

<sup>177</sup> Mwambene L (2010) 101.

<sup>178</sup> Stuart M and Hurwitz D (2011) 7.

<sup>179</sup> Mwambene L (2010) 102.

working male tenant some work and once the work has been completed, they give their daughters in marriage as payment.<sup>180</sup> Third, a consensus is reached between the parents (of the boy and girl) to force their children to marry each other.<sup>181</sup> 15.4 per cent of respondents interviewed by the MHRC study said that *kupawila* is still practised in their communities.<sup>182</sup> There are also justifications for this practice. For instance, it is used to pay a debt.<sup>183</sup> *Kupawila* also acts as security by parents to ensure that their daughters are married by hard-working husbands who will take good care of their wives. Lastly, *kupawila*, just like *mbirigha*, is also used by parents to secure and protect the wealth and riches of a son-in-law by offering their daughter in marriage.

### 3.2.4. *Kutwala*

*Kutwala* is the practice of ‘marriage by abduction’.<sup>184</sup> This practice is observed in many Southern African countries.<sup>185</sup> In Malawi, *kutwala* is also known as *ukwati wotulira*. *Kutwala* takes place when a girl is found to be pregnant, upon which she is taken by her parents to the boy’s family to force them into marriage. The boy and his family are then asked to pay *zinthulo*.<sup>186</sup> In Nkhata-Bay, after paying *zinthulo* the boy then pays *nkhuku*<sup>187</sup> and finally, *chibadara*.<sup>188</sup> In Chitipa, young people merely caught in a sexual act can be forced into a marriage to avoid embarrassing their parents.<sup>189</sup> After the payment of *chithyola khola*, the boy can either proceed to pay *lobolo* and formalise the marriage or end his relationship with the girl and pledge to only maintain and support the child.<sup>190</sup> Some of the traditional justifications for *kutwala* include: firstly, it holds a boy responsible for causing the pregnancy. Secondly, it exposes boys who impregnate girls before

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<sup>180</sup> MHRC (2005) 25.

<sup>181</sup> MHRC (2005) 25.

<sup>182</sup> MHRC (2005) 25.

<sup>183</sup> Mwambene L (2010) 101.

<sup>184</sup> MHRC (2005) 28.

<sup>185</sup> According to Koyana, *kutwala* means ‘to carry’. See, Koyana DS *Customary Law In A Changing Society* (1980) 1. Curran and Bonthuys have described *kutwala* as the act of ‘stealing the bride’. See, Curran E and Bonthuys E ‘Customary law and domestic violence in rural South African communities’ (2005) 21 *SAJHR* 615.

<sup>186</sup> *Zinthulo* means ‘things a pregnant woman would need like pieces of cloth’.

<sup>187</sup> *Nkhuku* is money equivalent to buying a hen.

<sup>188</sup> *Chibadara* is a fine which the boy pays as a form of damages.

<sup>189</sup> MHRC (2005) 29.

<sup>190</sup> MHRC (2005) 29.

marriage. Thirdly, it is believed that *kutwala* helps to maintain social order in marriage procedures.<sup>191</sup>

### 3.2.5. *Lobolo*

*Lobolo* is defined as the transfer of wealth with the aim of concluding a marriage contract.<sup>192</sup> *Lobolo* is common throughout Malawi and the payments vary from place to place: in Mzimba, *chiwiza*<sup>193</sup> and *mukhuzi*<sup>194</sup> are initial *lobolo* payments. In Nsanje, a *mamotcho* is given to the girl's family<sup>195</sup> and in Chitipa; blankets are given as preliminary payments.<sup>196</sup> In Viphya and Nyika, *fuko* is the first payment given to the bride's.<sup>197</sup> After preliminary payments, *nthenga* (man's messenger) pays *chijulapamlomo*, and *lobolo* negotiations can be initiated.<sup>198</sup> Finally, the bride's parents would charge *malowolo*,<sup>199</sup> and this is the payment of *lobolo* that seals the marriage contract.<sup>200</sup> According to the MHRC study, about 62 per cent of its interviewees support this practice.<sup>201</sup> The traditional purposes of *lobolo* include the following: firstly, it validates the existence of a customary marriage. Secondly, *lobolo* expresses gratitude to the bride's parents in bringing her up. Thirdly, it demonstrates that the man is a capable breadwinner and that he can ensure proper treatment of his wife.<sup>202</sup> Finally, *lobolo* can be used by the bride's brothers to acquire their own wives. *Lobolo* is also a symbol that accords dignity to a customary marriage and helps to strengthen the relationship.<sup>203</sup>

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<sup>191</sup> MHRC (2005) 30.

<sup>192</sup> MHRC (2005) 29.

<sup>193</sup> *Chiwiza* is a head of cattle given to bring families from the two sides together.

<sup>194</sup> *Mukhuzi* is a piece of cloth given to the girl's mother as gratitude.

<sup>195</sup> *Mamotcho* is a package comprising soft drinks, soap, cigarettes and other assorted items given to the girl's family.

<sup>196</sup> MHRC (2005) 29.

<sup>197</sup> Chilaga P 'Lobola system of marriage in the Northern region of Malawi: A biblical critique' (2015) 4.

<sup>198</sup> *Chijulapamlomo* is money given to parents by *nthenga* to get permission to speak to them.

<sup>199</sup> *Malowolo* is the payment of the actual bride price itself.

<sup>200</sup> For instance, if the *lobolo* was not fully paid, the bride's parents can recall the daughter or dissolve the marriage. In some case, if the wife misbehaves her parents are forced to pay back the *malobolo* cattle because this amounts to breach of the marriage contract.

<sup>201</sup> MHRC (2005) 18.

<sup>202</sup> Rice K 'Ukuthwala in rural South Africa: Abduction marriage as a site of negotiation about gender, rights and generational authority among the Xhosa' (2014) 40(2) *Journal of Southern African Studies*, hereinafter, Rice K (2014) 387.

<sup>203</sup> MHRC (2005) 30.

### 3.2.6. *Chinamwali*

*Chinamwali* can be defined as the initiation ceremony that marks the girls' transition from childhood to adulthood.<sup>204</sup> *Chinamwali* begins at puberty, especially when girls experience their first menses, upon which they inform aunts about the new experience.<sup>205</sup> This practice is common in Malawi and takes different names, such as, *msondo*<sup>206</sup>, *chindakula*,<sup>207</sup> and *kukuna*.<sup>208</sup> Girls are taken into isolation for a period up to four weeks where they perform ritual dances while getting some counselling from aunts and *kholodzolo*.<sup>209</sup> *Chinamwali* teaches girls as young as six years how to pull and elongate their labia.<sup>210</sup> This process is done up to the time that they attain puberty or when the labia has been pulled to the right size.<sup>211</sup> In addition, *chinamwali* teaches girls about how to please a man during intercourse.<sup>212</sup> Girls are also counselled on their personal hygiene, especially when experiencing their periods.<sup>213</sup> After performing the ritual dances, girls must identify a boy to have sex with to remove bad omen.<sup>214</sup>

According to the MHRC study, nearly 80 per cent of respondents mentioned that *chinamwali* is common in their community.<sup>215</sup> The main cultural justification for this practice is that it teaches girls how to please men during intercourse.<sup>216</sup> *Chinamwali* also transits girls from childhood to adulthood.<sup>217</sup> Girls are also taught about their personal hygiene, especially when experiencing their periods. *Chinamwali* practice is also believed to strengthen marriages institutions because men

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<sup>204</sup> MHRC (2005) 36.

<sup>205</sup> Ottenberg S and Binkley DA *Playful Performers: African Children's Masquerades* (2006) 233.

<sup>206</sup> *Msondo* is a dance or series of dances which initiate(s) girls to a rite of passage. See a discussion by Dicks ID *An African Worldview: The Muslim Amacinga Yawo of Southern Malawi* (2012).

<sup>207</sup> *Chindakula* is a name in the Mangochi district which is used to refer to *chinamwali*.

<sup>208</sup> See, a discussion by Bagnol B 'Autoerotism, homoerotism, and foreplay in African women who practice *labia minora* elongation: A review' (2014) *International Journal of Sexual Health* 16.

<sup>209</sup> *Kholodzolo* are women who underwent *chinamwali* initiation. See also, Korpela D *The Nyau Masquerade: An examination of HIV/AIDS, Power and Influence in Malawi* (2011) 57.

<sup>210</sup> MHRC (2005) 39.

<sup>211</sup> Tamale F *African Sexualities: A Reader* (2011) 26.

<sup>212</sup> Reis R and Spierenburg M *The Quest for Fruition Through Ngoma: Political Aspects of Healing in Southern Africa* (2000) 45.

<sup>213</sup> MHRC (2005) 38.

<sup>214</sup> MHRC (2005) 38.

<sup>215</sup> MHRC (2005) 37.

<sup>216</sup> Mwenda K. 'Labia elongation under African customary law: A violation of women's rights?' (2006) 10 *The International Journal of Human Rights* 347.

<sup>217</sup> Longwe M *Growing Up: A Chewa Girls' Initiation* (2006) 69.

prefer to marry women with elongated labia.<sup>218</sup> Thus, *chinamwali* is a rite of passage that prepares girls for marriage.<sup>219</sup>

### 3.3. THE CONFLICT BETWEEN TRADITIONAL CULTURAL PRACTICES AND CHILDREN'S RIGHTS

As discussed under 3.2, several traditional cultural practices that lead to child marriages violate children's rights. These cultural practices are also in conflict with international standards in the following: firstly, *chimeta masisi*, *mbirigha*, *kutwala*, and *chinamwali* force girls as young as 15 years to marry.<sup>220</sup> This directly conflicts with the international and regional human rights standards which set 18 as the minimum age for marriage.<sup>221</sup> Secondly, *lobolo* directly reinforces the practice of *chimeta masisi* because parents are reluctant to take back their daughters as they cannot afford nor do not want to pay back *lobolo*.<sup>222</sup> This position highlights two important issues: first, parents can be perpetrators of child marriages. So, in order to address child marriages where parents are involved, the law must target their actions as well. Second, this practice can force girls into marriage, and violates their right to consent as guaranteed by the Malawi Constitution<sup>223</sup> and international human rights standards which require intending spouses to freely choose whom they want to marry.<sup>224</sup>

Thirdly, these practices also conflict with the foundational principles of the CRC and the ACRWC in the following ways: first, the best interests of a girl are not given priority in deciding whether or not she wants to marry a particular husband.<sup>225</sup> As discussed, girls would be persuaded to marry without considering their interests. In this context, these practices prefer the family's interests to

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<sup>218</sup> MHRC (2005) 39.

<sup>219</sup> Schoffeleers JM *Religion and Dramatisation of Life: Spirit Beliefs and Rituals in Southern and Central Malawi* (1997) 29.

<sup>220</sup> National Youth Council of Malawi 'Report on profiling early marriages in Malawi: Making a case to 'stop' early marriages` (2009) 11.

<sup>221</sup> The CEDAW/CRC General Comment No. 31, Arts 2, 6, 8(2) of the ACRWC, Maputo Protocol and SADC Gender Protocol, respectively specify 18 as the minimum age for marriage.

<sup>222</sup> Kaler A 'When they see money, they think it is life': Money, modernity and morality in two sites in rural Malawi' (2006) *Journal of Southern African Studies* (2006) 344.

<sup>223</sup> S22(4) of the Malawi Constitution prohibits anyone to be forced into marriage.

<sup>224</sup> Arts 6, 8(2), 16(1) of the Maputo Protocol, AYC and CEDAW, respectively require the free and full consent of both parties.

<sup>225</sup> Arts 3 and 4 of the CRC and ACRWC, respectively, require the BIC to be the primary consideration in all matters affecting her.

those of girls.<sup>226</sup> Second, these practices also violate the right to participate in that girls are not involved during deliberations even though the decisions have a lifetime effect on them. This violates Arts 12 and 7 of the CRC and the ACRWC, respectively, which entitle children to be actors in their own lives and to participate in the decisions that affect them.<sup>227</sup> More importantly, these practices can disproportionately affect girls because they are not viewed as rights holders.<sup>228</sup>

Moreover, *chinamwali*, *kutwala*, *mbirigha*, and *lobolo* affect the survival and development of girls in that girls are not given the opportunity to develop their personality, talents and mental and physical abilities to realise their fullest potential.<sup>229</sup> This failure, to create an optimal environment that nurtures a positive future for girl children, often leads to poverty.<sup>230</sup> Riley pointed out that the amount of wealth one possesses determines their life expectancy.<sup>231</sup> In addition, these practices compromise the health of girls.<sup>232</sup> Furthermore, husbands who were forced to marry under the *kutwala* practice tend to have casual relationships.<sup>233</sup> This leads to increased risks of spreading infectious diseases, such as HIV and AIDS to married girls.<sup>234</sup> Pregnant girls are also susceptible to complications, such as *obstetric fistulas*, which may also result in husbands abandoning them as young wives.<sup>235</sup> In addition, these cultural practices directly conflict with the international children's rights standards in that they discriminate against girls on the basis of sex, birth or gender.

Furthermore, they affect their right to education in the following ways: first, parents force girls into marriage so that they acquire the *lobolo* to send boys to school, sometimes using their daughter's *lobolo*.<sup>236</sup> Second, most cultural practices target girls as young as 10 years into

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<sup>226</sup> This is not line with Art 3 of CRC and Art 4 of ACRWC which requires the best interests of the child *only* to be given priority as far as *chimeta masisi* is concerned.

<sup>227</sup> Arts 12 and 7 of the CRC and ACRWC, respectively, provide for the right for children to freely express their views in matters affecting them.

<sup>228</sup> Kaime T *The Convention on the Rights of the Child: A Cultural Legitimacy Critique* (2011) 58.

<sup>229</sup> Freeman M *Law and Childhood Studies: Current Legal Issues* (2012) 402.

<sup>230</sup> The girls' education is severely affected by these cultural practices. See chapter 4 for a further discussion on the impact of HCPs on education.

<sup>231</sup> Riley JC *Poverty and Life Expectancy: The Jamaica Paradox* (2005) 1.

<sup>232</sup> Art 12 of the ICESCR states that the right to the highest attainable standard of health is a human right and it is recognised in international human rights law.

<sup>233</sup> Husbands who marry under *kutwala* have often argued that they did not freely choose to marry their wives; hence their right to consent was compromised. See a similar discussion by Rice K (2014) 398.

<sup>234</sup> Leary VA 'The right to health in international human rights law' (1994) 1(1) *Health and Human Rights* 25.

<sup>235</sup> See a discussion on *obstetric fistula* available at <http://www.ics.org/committees/fistula/publicawareness/obstetricfistulaanintroduction> (accessed 29 October 015).

<sup>236</sup> The best interests of girls are clearly not given due respect and this violates Art 3 of the CRC and Art 4 of the ACRWC.

marrying earlier than boys. This has the effect of hampering girls' education which leads to physical, emotional and psychological abuse.

### **3.4. CONCLUSION**

This chapter has highlighted some of the common traditional cultural practices that lead to child marriages in Malawi. In addition to other children's rights violations, the discussion has also shown that traditional cultural practices are discriminatory and not well suited to modern conditions as they leave girls in a particularly vulnerable position. As noted in chapter 2, the international children's rights instruments provide for the standards in addressing child marriages. Malawi, as a party to these instruments, is, therefore, obligated to align its laws with these standards. For that reason, the next chapter examines Malawi's legal framework in addressing child marriages that mostly affect girls.



## CHAPTER 4

### A CRITICAL ANALYSIS OF MALAWI'S LEGAL FRAMEWORK TO ADDRESS CHILD MARRIAGES

#### 4.1. INTRODUCTION

As discussed in chapter 2, Malawi is a party to several international and regional human rights instruments that can be used to protect girls from child marriages. In complying with the requirement of enacting legislation as a first step towards the implementation of international standards on the protection of children's rights, in general,<sup>237</sup> and child marriages, in particular, Malawi has a Constitution<sup>238</sup> that has a Bill of Rights with specific provisions on children's rights.<sup>239</sup> In addition, several legislations have been put in place that can also be used to address harmful cultural practices and child marriages. This includes the Children's Act;<sup>240</sup> the Marriage Act;<sup>241</sup> and the GEA.<sup>242</sup>

This chapter, therefore, critically analyses these available legislative frameworks in addressing child marriages in Malawi. The aim is to highlight their compliance with international and regional standards discussed in chapter 2. The analysis starts with a review of the provisions of the Constitution of Malawi since it is the supreme law of the land.<sup>243</sup> Thereafter, the rest of the legislative framework is discussed. The last part contains a conclusion in which it is observed that most provisions have complied with the international standards, however, some provisions must be aligned with Malawi's human rights standards.

#### 4.2. MALAWI CONSTITUTION

As previously noted in chapter 3, several cultural practices, such as, *lobolo*, *kupawila* and *chimeta masisi* that lead to child marriages, disproportionately affect young girls and are, therefore,

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<sup>237</sup> Arts 24(3), 16, 2(1)(b) and 5, 20 and 21 of the CRC, CEDAW, Maputo Protocol, AYC and SADC Gender Protocol, respectively.

<sup>238</sup> See, chapter 1 of the Malawi Constitution.

<sup>239</sup> S23 of the Malawi Constitution explicitly guarantees the rights of children.

<sup>240</sup> The Children's Act is a custodian of children's rights in Malawi and places a duty on parents and guardians to protect children from violence, absent exploitation and neglect.

<sup>241</sup> The Marriage Act ensures that only one rule applies to different types of marriages that exist and makes provision for the marriage, welfare and maintenance of spouses, unmarried couples and their children.

<sup>242</sup> The GEA seeks to promote gender equality, equal integration, influence, empowerment, dignity and opportunities for men and women in all functions of society.

<sup>243</sup> See, s5 of the Malawi Constitution.

discriminatory on the basis of sex and gender.<sup>244</sup> Several provisions in the Malawi Constitution can be used to address these practices. For example, consistent with international standards, s20 guarantees the right to equality.<sup>245</sup> S20 provides:

- (1) *Discrimination* of persons in any form is prohibited and all persons are, under any law, guaranteed equal and effective protection against discrimination on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, property, birth or other status.
- (2) Legislation may be passed addressing inequalities in society and prohibiting discriminatory practices and the propagation of such practices and may render such practices criminally punishable by the Courts.

According to Chirwa, s20(1) encompasses three aspects of equality, namely; ‘non- discrimination’, ‘equal protection before the law’ and ‘positive measures to combat and eliminate inequality’.<sup>246</sup> These elements have been interpreted as follows: firstly, ‘non-discrimination’ involves equal treatment of all persons irrespective of *sex* (emphasis added).<sup>247</sup> Indeed, Nyirenda has interpreted s20(1) as prohibiting any form of discrimination.<sup>248</sup> In this context, HCPs, which force girls into marriage, discriminate on the basis of sex. Furthermore, the Court in *Malawi Congress Party & Others v Attorney General & Another* held that non-discrimination prohibits any classification which can arbitrarily be used to burden an individual or group of individuals.<sup>249</sup> This observation is relevant as girls belong to a group that is commonly affected by HCPs. Hodgkin and Newman rightly observed that girls have greater risks of discrimination because they are relatively powerless and depend on elders for the realisation of their rights.<sup>250</sup>

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<sup>244</sup> *Chimeta masisi, kupawila and lobolo* allow girls to marry while boys are left to continue schooling.

<sup>245</sup> See for example, Arts 2, 1, 2, 3 and 1 of the UDHR, CEDAW, CRC, ACRWC and the Maputo Protocol, respectively.

<sup>246</sup> Chirwa DM (2011) 142.

<sup>247</sup> According to the Oxford Dictionary available at <http://www.oxforddictionaries.com/definition/english/sex> (accessed 1 August 2015) *sex* is defined as ‘the fact of belonging to either being male or female on the basis of reproductive functions’.

<sup>248</sup> Nyirenda K ‘An analysis of Malawi’s Constitution and case law on the right to equality’ (2014) hereinafter, Nyirenda K (2014) 115.

<sup>249</sup> *Malawi Congress Party & Others v Attorney General & Another* [1996] MLR 244, 299-300 (HC).

<sup>250</sup> Hodgkin R and Newell P *Implementation Handbook for the Convention on the Rights of the Child* (2007) 18.

Secondly, Chirwa asserts that the element of ‘equal protection before the law’ is based on the concept of formal equality.<sup>251</sup> With this interpretation, s20(1) meets the requirement of formal equality in the protection of girls from child marriages because it outlaws discrimination based on sex. The last element of ‘positive measures to combat and eliminate inequality’ entrenches substantive equality.<sup>252</sup> Substantive equality, as opposed to formal equality, recognises the difference between men and women, but affirms equality between them by placing laws, policies and programs which address societal inequalities, for example, affirmative action.<sup>253</sup> Friedman<sup>254</sup> identified three aspects that substantive equality aims to achieve:

‘First, substantive equality redresses stereotype by promoting the respect for equal dignity and worth of all, including girls. Second, it gives positive affirmation and celebration of identity within the community, and, finally, it facilitates full participation in society’.

In this context, substantive equality can protect children’s rights as it breaks the cycle of disadvantage associated with girls.<sup>255</sup> This was affirmed by the Malawi Law Commission while interpreting s20 that women and children require special protection because they are vulnerable.<sup>256</sup>

S20(2) fortifies s20(1) by purposely obliging Malawi to pass legislation which combats HCPs that support discrimination.<sup>257</sup> This concurs with the CEDAW’s Sixth Periodic State Report, in which Malawi affirmed its constitutional obligation to enact laws that address societal inequalities.<sup>258</sup> Thus, the Court in *Republic v Chinthiti & Others* observed that s20(2) reinforces s20(1) in that both formal and substantive equality are indispensable tools in combating discrimination.<sup>259</sup> Thus, s20(2) envisages affirmative action. Affirmative action encompasses law reform efforts to extend existing benefits, privileges, or rights to a particular group that was previously disadvantaged.<sup>260</sup>

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<sup>251</sup> Chirwa DM (2011) 151. Briefly, Cusack S and Pusey L ‘CEDAW and the rights to non-discrimination and equality’ (2013) 14 *Melbourne Journal of International Law* 10 defined formal equality as ‘the equal treatment between women and men’.

<sup>252</sup> *Republic v Chinthiti & Others (1)* [1997] 1 MLR 59, 65 (HC).

<sup>253</sup> Albertyn C ‘Equality’ in Cheadle MH et al *South African Constitutional Law: The Bill of Rights* (2011) 4-5.

<sup>254</sup> Friedman S ‘Providing equality: Substantive equality and the positive duty to provide’ (2005) 21 *SAJHR* 167.

<sup>255</sup> Schorr BL and Schorr D *Within Our Reach: Breaking the Cycle of Disadvantage* (1988) 30.

<sup>256</sup> Malawi Law Commission ‘Constitution Review Conference (2006) 5.

<sup>257</sup> Chirwa DM (2011) 151.

<sup>258</sup> Paragraph 118 of the CEDAW Committee, *Consideration of reports submitted by States parties under article 18 of the Convention on the Elimination of All Forms of Discrimination against Women: 6th periodic report of States parties: Malawi*, 20 October 2008.

<sup>259</sup> *Republic v Chinthiti & Others* [1997] 1 MLR 59, 65 (HC).

<sup>260</sup> Nyirenda (2014) 116.

Through law reform, such as, the enactment of the GEA and the Marriage, Divorce and Family Relations Act (2015) which impose criminal liability on the perpetrators of discrimination, girls can assert their rights and overcome patriarchal discrimination.<sup>261</sup>

Apart from ss20 and 23, which specifically protect children's rights, can also be used to address HCPs, such as child marriages. It provides: '(1) all children, regardless of the circumstances of their birth, are entitled to equal treatment before the law'. Nyirenda rightly argues that s23(1) must be read together with s20(1).<sup>262</sup> S23(1), consistent with international and regional instruments, arguably prohibits discrimination of girls on the basis of sex.<sup>263</sup> S23(1) prohibits discrimination based on the circumstances of the childbirth. Arguably, such circumstances can include the sex of children. As discussed in chapter 3, most cultural practices that lead to child marriages affect the girls' right to education. Once married, girls lose the protection of the law as children.<sup>264</sup> S23(4)(b) which requires non-interference with the education of children, becomes relevant as 'children are entitled to be protected from economic exploitation or any treatment, work or punishment that is, or is likely to interfere with their education'. More importantly, s23(4)(b) must be read together with s25 which also guarantees the right to education.<sup>265</sup> In this context, HCPs deny girls to exercise their right to education by forcing them into marriage. These provisions are, therefore, relevant in that they prohibit parents to practice traditions which interfere with the girls' education rights.<sup>266</sup> As rightly pointed out by the ICESCR Committee, the right to education is important because it obviously gives priority to the best interests of girls; thereby, safeguarding them from abuse associated with HCPs.<sup>267</sup>

In addition, cultural practices that affect the health of girls can be addressed using s23(4)(c). This provision protects the health, physical, mental, spiritual and social wellbeing of children. As

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<sup>260</sup> See, paragraph 24 of the CEDAW/C/GC/19/20 (1992) where the CEDAW Committee held that affirmative action must provide rights, privileges, and benefits to a particular group of people in acknowledgement of inequalities of the past so much that the previously disadvantaged groups are given preferential treatment with the aim of addressing past systematic discrimination.

<sup>261</sup> Paragraph 55 of the CEDAW/C/GC/31/CRC/C/GC/18 (2014).

<sup>262</sup> Nyirenda (2014) 118.

<sup>263</sup> See, Art 2 of the CRC, Art 3 of the ACRWC, Art 2 of the CEDAW and Art 6 of the Maputo Protocol.

<sup>264</sup> Katja ZE *Modernizing Patriarchy: The Politics of Women's Rights in Morocco* (2015) 165.

<sup>265</sup> This is compatible with Arts 13, 28, 12 and 11 of the ICESCR, CRC, Maputo Protocol and ACRWC, respectively.

<sup>266</sup> Chirwa DM (2011) 249.

<sup>267</sup> Paragraph 1 of the UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 13: The Right to Education (Art. 13 of the Covenant)*, 8 December 1999.

discussed, most girls found in child marriages are immature and taken advantage by older men. For example, through the practice of *kutwala*, husbands are involved in casual relationships because they did not marry spouses of their choice (emphasis added). This subjects girls to domestic violence and the risks of HIV infection, which inevitably affect their health, survival and development. Thus, s23(4) can be used to protect girls from harmful cultural practices linked to child marriages.

Despite the positive attributes that come from s23, s23(5), which defines a child as a person less than 16 years old, is problematic. Firstly, it is incompatible with the international standards which set the age of a child at 18 years.<sup>268</sup> Secondly, by defining a child as anyone at 16 years, the Malawi Constitution does not send a strong message against child marriages.<sup>269</sup> Thirdly, it is against the guarantees of the general norms of non-discrimination, child participation, right to survival and development, and the BIC that can be used to reinforce the prohibition of child marriages.<sup>270</sup> What is also problematic, however, is that the BIC, which is a cardinal principle in the protection of children's rights, is not expressly recognised in the Malawi Constitution.<sup>271</sup> Lastly, as the supreme law of the land, the Malawi Constitution sets a bad precedence; hence, the Children's Act, as it will be discussed later on, had a similar prescription.<sup>272</sup>

Apart from ss20 and 23 as discussed, s22 lays down the framework that can also be used to address child marriages. It directly prohibits forcing anybody into a marriage.<sup>273</sup> As discussed in chapter 3, many cultural practices are linked to marriages which force girls against their will. Implied in this provision is that, parties to a marriage should give their consent, which is compatible with international standards.<sup>274</sup> Furthermore, s22(6) seems to set the minimum marriageable age of 18 years, which is in line with the international and regional standards which require 18 as the age of

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<sup>268</sup> Paragraph 55 of the CEDAW/C/GC/31/CRC/C/GC/18 (2014).

<sup>269</sup> This definition contravenes Art 21(2) of the ACRWC. See, also a discussion by Braimah TS 'Child marriage in Northern Nigeria: Section 61 of Part I of the 1999 Constitution and the protection of children against child marriage' (2014) 14 *AHRLJ* 478.

<sup>270</sup> Arts 2, 3 and 3, 4 of the CRC and ACRWC, respectively.

<sup>271</sup> Chirwa DM 'Harmonisation of laws relating to children: Malawi' (2007) 20. See,

<sup>272</sup> observations by Chirwa, Mwambene, Nyirenda and Odala, as discussed above. See,

<sup>273</sup> s22(4) of the Malawi Constitution.

<sup>274</sup> S22 is compatible with Arts 16, 8(2) and 6(a) of the CEDAW, SADC Gender Protocol, and Maputo Protocol, respectively.

marriage.<sup>275</sup> However, s22(7), which allows persons between 15 and 18 years to enter into a marriage, provided that parental consent was given, can be used by parents or guardians to bypass the age requirement under s22(6).<sup>276</sup> This stands in the way of all attempts to end child marriages where parents are particularly involved in the name of culture.<sup>277</sup> The problem of child marriages is further heightened by s22(8) which merely discourages marriages between persons where either of them is under the age of 15 years.<sup>278</sup> The Court, in *Francis Mangani v Republic*, however, held that persons under the age of 15 are too immature and incompetent to give consent to a marriage.<sup>279</sup>

It was also shown in chapter 3 that most HCPs are perpetuated by parents who allow their daughters to marry at puberty. This position conflicts with international standards, specifically CEDAW/CRC General Comment No. 31 which sets 18 as the minimum age for marriage.<sup>280</sup> As noted above, s22(8) does not take a firm standing in prohibiting child marriages. Instead, ss22(6), 22(7) and 22(8), respectively, give ‘a constitutional imprimatur to child marriages’.<sup>281</sup> It suggests that marriages between persons where either of them is under the age of 15 may be permitted since Malawi merely discourages child marriages.<sup>282</sup> This position is incompatible with the international standards.

Apart from ss20, 22 and 23 discussed, s24 of the Malawi Constitution, which protects the rights of women, can also be used to address child marriages.<sup>283</sup> Importantly, women were defined by the Maputo Protocol as ‘persons of the female gender, including girls’.<sup>284</sup> S24(2) complements ss20 and 23 in that it effectively prohibits discrimination against women on the basis of gender. Chirwa rightly stated that men and women require equal treatment and laws that discriminate

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<sup>275</sup> S22(6) which provides that ‘no person over the age of eighteen years shall be prevented from entering into marriage’ is in line with Arts 16, 23, 10(1), 16 and 2 of the UDHR, ICCPR, ICESCR, CEDAW and the Marriages Convention, respectively.

<sup>276</sup> Chirwa DM ‘Harmonisation of laws relating to children: Malawi’ (2007) 11.

<sup>277</sup> S22(7) provides that ‘for persons between the age of fifteen and eighteen years a marriage shall only be entered into with the consent of their parents or guardians’.

<sup>278</sup> S22(8) provides that ‘the State shall actually *discourage* marriage between persons where either of them is under the age of fifteen years’.

<sup>279</sup> *Francis Mangani v Republic* Criminal Appeal no 3 of 2007 (unreported) as cited by Chirwa DM (2011) 186.

<sup>280</sup> Paragraph 55(f) of the CEDAW/C/GC/31/CRC/C/GC/18 (2014).

<sup>281</sup> Chirwa DM (2011) 186.

<sup>282</sup> Mwambene L (2010) 103.

<sup>283</sup> S24(2) Malawi Constitution can be used to address child marriages. It invalidates any law that discriminates against women on the basis of gender or marital status.

<sup>284</sup> Art 1(k) of the Maputo Protocol.

against women are void.<sup>285</sup> In addition, s24(2), just like s20(2), requires Malawi to pass legislation which eliminates patriarchal customs and practices. In compliance with these constitutional provisions, Malawi has enacted several Acts, for example, the Marriage, Divorce and Family Relations Act (2015), which fixed the marriageable age to be 18 years. HCPs, as discussed in chapter 3, are outlawed under the Children's Act and the GEA to be discussed. What is evident here is that Malawi is in compliance with the Arts 21, 16 and 24(3) of the ACRWC, CEDAW and the CRC which requires SPs to enact legislation outlawing discriminatory practices.

### 4.3. THE CHILDREN'S ACT

The Children's Act, which is the principal piece of legislation on matters concerning children,<sup>286</sup> can be described as a direct response to Malawi's obligation to address HCPs that lead to child marriages. For instance, s80 provides that 'no person shall, subject a child to a social or customary practice that is harmful to the health or general development of the child'. This provision complies with Arts 24(3), 21 and 5 of the CRC, ACRWC and Maputo Protocol, respectively. S80, just like s23(4) of the Malawi Constitution, prohibits parents, guardians, public or private agents to practice customs that negatively affect the health, education and general development of children. In addition, s80 complies with the CRC General Comment No. 13 that explicitly prohibits child marriages because they hinder the general health and development of children, especially girls.<sup>287</sup> The Children's Act, therefore, prohibits harmful cultural practices which led Mwambene<sup>288</sup> to rightly observe that:

'No doubt, in the Malawian context banning all harmful cultural practices sends a very strong message that any cultural practice that is harmful to children cannot be in the best interests of the child. The opposite is also true; the Children's Act allows harmless customary practices that are in the best interests of the child'.

In addition, s81 provides that 'no person shall *force* a child into the marriage; or *force* a child to be betrothed'. This provision is unequivocal in dealing with practices such as *kutwala*, *kupawila*, in which girls are forced into marriages. The provision also complies with Arts 16 and 21(2) of the

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<sup>285</sup> Chirwa DM (2011) 248.

<sup>286</sup> See, footnote 20 for the long citation of the Children's Act.

<sup>287</sup> Paragraph 29 of the CRC/C/GC/13 (2011).

<sup>288</sup> Mwambene L 'Child Care, Protection and Justice Act: Merging Customary Family Law? in Atkin B *The International Survey of Family Law* (2012) 207.

CEDAW and ACRWC, respectively.<sup>289</sup> S81 also complements the Malawi Constitution in that consent is an essential element of the right to marry.<sup>290</sup> By prohibiting children to be forced into marriage, this provision is in tandem with the international standards that require consent to be given by a person who has the competency.<sup>291</sup> As Chirwa rightly observed, the decision to marry or not to marry is essential because marriage is a life commitment.<sup>292</sup> Ss80 and 81, therefore, can be used to address HCPs in which parents are involved. Moreover, Courts have, before the Children's Act reprimanded parents who allow young girls to get married.<sup>293</sup>

Furthermore, s82 can also be used to address cultural practices such *kupawila*, in which a child is pledged to obtain credit or used as surety for a debt.<sup>294</sup> It can, therefore, be argued that the practice of *kupawila*, as discussed in chapter 3 is as good as slavery because, just like slavery, *kupawila* forces girls, without the right to refuse, into marriage as payment of a debt owed by their parents. S82 is consistent with s23(4)(b) of the Malawi Constitution and Art 1 of the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956 which also outline and prohibit institutions or practices which can exploit children economically and are similar to slavery.<sup>295</sup>

More importantly, s83 fortifies ss80, 81 and 82 in that a person who contravenes ss80, 81 and 82 commits an offence and shall be liable for a 10-year imprisonment.<sup>296</sup> This provision is in accordance with the CRC/CEDAW Committees which recommended that criminal laws must include protection measures for victims of harmful practices.<sup>297</sup> The imposition of a punishment sends a strong message that child marriages can no longer be justified on cultural practices.<sup>298</sup>

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<sup>289</sup> These also prohibit child betrothal and child marriages.

<sup>290</sup> Jacobson-Widding A *Marriage and Money: Volume 28 of Acta Universitatis Upsaliensis* (1967) 29.

<sup>291</sup> See, for example, Art 8(2) of the AYC.

<sup>292</sup> Chirwa DM (2011) 188.

<sup>293</sup> *Getrude Gondwe v Matiasi Gondwe* (unreported) and *Francis Mangani v Republic* Criminal Appeal no 3 of 2007 (unreported) as cited by Chirwa DM (2011) 186.

<sup>294</sup> S82 prohibits any person to 'sell a child or use a child as a pledge to obtain credit' or 'use a child as surety for a debt or mortgage'.

<sup>295</sup> According to Art 1 of this Convention, slavery is when a woman or anyone below 18 is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person.

<sup>296</sup> Odala V 'Childhood under Malawian laws as the Constitution becomes of age' (2012) 6(1) *Malawi Law Journal* 105.

<sup>297</sup> Paragraph 54(k) of the CEDAW/C/GC/31/CRC/C/GC/18 (2014).

<sup>298</sup> Gaus GF and D'Agostino F *The Routledge Companion to Social and Political Philosophy* (2012) 771.

Apart from the provisions that directly address HCPs as discussed, s23(1)(b) can also be used to address child marriages.<sup>299</sup> This provision is similar to CEDAW/CRC General Comment No.31 which noted that children, particularly girls, are in need of special care and protection against HCPs that lead to child marriages.<sup>300</sup> Thus, child marriages subject girls to substantial risks of physical, emotional and sexual abuse.

Since HCPs are closely linked with child marriages, the Children's Act's definition of a child becomes relevant. Accordingly, a child 'means a person below the age of sixteen years'.<sup>301</sup> This definition, together with that of the Malawi Constitution, does not resonate with international standards where 18 is the age of majority.<sup>302</sup> The age 16 is, therefore, against the guarantees of the general norms of non-discrimination and the BIC that can be used to reinforce the prohibition of child marriages.<sup>303</sup>

#### 4.4. THE MARRIAGE, DIVORCE and FAMILY RELATIONS ACT (2015)

The Marriage, Divorce and Family Relations Act (2015) is premised on the principle of equality as envisaged by s20 of the Malawi Constitution.<sup>304</sup> It fosters equality by guaranteeing equal treatment in terms of the rights and obligations of the parties under this Act.<sup>305</sup> In addition, the Marriage, Divorce and Family Relations Act (2015)<sup>306</sup> has, *inter alia*, provisions which can address HCPs linked to child marriages in the following ways: first, unlike both the Malawi Constitution and the Children's Act, s14 fixes the minimum marriageable age of 18. It provides that 'subject to s22 of the Malawi Constitution, two persons of the opposite sex who are both not under the age of eighteen years, and are of sound mind, may enter into marriage with each other'.

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<sup>299</sup> S23 of the Children's Act provides:

- (1) A child is in need of care and protection if
- (b) the child has been or there is substantial risk that the child will be physically injured or emotionally injured or sexually abused and the parent or guardian or any other person, knowing of such injury, risk or abuse, has not protected or is unlikely to protect the child from such injury, risk or abuse.

<sup>300</sup> Paragraph 55 of the CEDAW/C/GC/31/CRC/C/GC/18 (2014).

<sup>301</sup> S2 of the Children's Act.

<sup>302</sup> Paragraph 55 of the CEDAW/C/GC/31/CRC/C/GC/18 (2014).

<sup>303</sup> Arts 2, 3 and 3, 4 of the CRC and ACRWC. As a result of this violation, the four cardinal principles, as discussed under 2.4, are also affected.

<sup>304</sup> See, Part II of the Marriage, Divorce and Family Relations Act (2015). See, a discussion by Mwambene L 'Reconciling African customary law with women' right in Malawi: The proposed Marriage, Divorce, and Family Relations Bill (2007) 1(1) *Malawi Law Journal* 117.

<sup>305</sup> S14 of the Marriage Act.

<sup>306</sup> See, Part X of the Marriage Act.

Read together with s2, which defines the ‘child’ as a person below 18 years, s14 categorically prohibits marriages of persons below the age of 18. More importantly, it is in compliance with international standards, such as, the ACRWC, Maputo Protocol, and CEDAW/CRC Committees, which also clearly set 18 as the minimum age for marriage.<sup>307</sup> In addition, s14 makes no distinction between boys and girls on their legal minimum age of marriage. As was shown in chapter 3, most HCPs discriminate against girls. S14, therefore, guarantees girls to fully enjoy their rights, such as the right to education which is proven to keep girls from early marriages at an equal basis with boys.<sup>308</sup>

Apart from s14, s77(1)(e) declares a marriage invalid if consent was obtained by force, duress, deceit or fraud. Most cultural practices discussed in chapter 3, that lead to child marriages, force girls to give their consent. Consequently, s77(1)(e) can be used to nullify marriages concluded, based on customary practices in which girls marry under duress, deceit or fraud. In addition, it was observed in chapter 2 that the girl’s right to freely consent to a marriage are fundamental since it affects her life, dignity and equality as a human being.<sup>309</sup> It can, therefore, be argued that s77(1)(e) goes hand in glove with s14, as discussed above, which fixes the minimum age for marriage at 18. Thus, before reaching 18 years, girls cannot give their consent; hence, the age of a person determines whether or not her consent was given. In assessing its compliance with international and regional standards, s77(1)(e) is similar to Arts 16, 8(2)(b), 6(a) and 10 of the CEDAW, SADC Gender Protocol, Maputo Protocol and ICECSR which also emphasise that the free and full consent of both parties is a prerequisite when concluding a marriage.

In addition, s10, which provides rules for the registration of all marriages (civil, customary and religious entered after the commencement of the Marriage, Divorce and Family Relations Act (2015) must comply with s10), can also address HCPs. It complies with Arts 3 and 21(2) of the Marriages Convention and ACRWC, respectively, which require all marriages to be registered. This guarantees women to be married at 18 years or above.

<sup>307</sup> Paragraph 55(f) of the CEDAW/C/GC/31/CRC/C/GC/18 (2014), Arts 21(2) and 6 of the ACRWC and Maputo Protocol, respectively.

<sup>308</sup> Chirwa DM (2011) 261.

<sup>309</sup> Paragraph 16 of the CEDAW/C/GC/21 (1994).

Furthermore, a marriage is void if any of the formalities listed under s10 has not been met.<sup>311</sup> Thus, inadmissible marriages cannot be recognised by law. In the context of customary marriages, s38 has entrusted Traditional Authorities to register all customary marriages.<sup>312</sup> Thus, Traditional Authorities are required to carefully observe and comply with s10 formalities before registering and concluding a customary marriage. As witnessed in chapter 3, most HCPs which allow child marriages, at best, require parental consent of the girls. As such, formalities in s10 will drastically reduce the number of child marriages as it will be difficult to bring admissible evidence which compels girls to marry.

Apart from ss14, 77, 10, 38 as discussed, s54 can also be used to address child marriages. It provides:

‘A registrar who performs the ceremony of a marriage knowing that any of the matters required by law for the validity of a marriage have not been fulfilled, so that the marriage is void on any of those matters, commits an offence and is liable on conviction to a fine of K100 000 and to imprisonment for five years’.

S54 complies with the CRC/CEDAW Committees which recommended SPs to impose punishments to persons who observe harmful practices which are detrimental to the girls’ wellbeing.<sup>313</sup> S54 compels Traditional Registrars to diligently perform their duties when registering and recording customary marriages. Furthermore, the law prevents Traditional Authorities from registering marriages that are otherwise void, for example child marriages. It was shown in chapter 1 that while 49.6 per cent of children were married before their eighteenth birthday, 23.4 per cent were girls<sup>314</sup> as compared to only 2.2 per cent of boys.<sup>315</sup> Clearly, child marriages are a common practice in Malawi which disproportionately affects girls and s54 is,

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<sup>310</sup> Art 6 of the Maputo Protocol.

<sup>311</sup> S10 requires: (a) a certificate of marriage filled in the office of a registrar; (b) a copy of a certificate of marriage, signed and certified as a true copy by a registrar; (c) an entry in a Marriage Register book; and (d) a signed and certified copy of an entry in a Marriage Register Books as admissible evidence to validate a marriage.

<sup>312</sup> S38 of the Marriage Act provides:

The Minister shall deliver to every Traditional Authority Marriage Register Books in which each Traditional Authority shall record particulars of all customary marriages celebrated in his or her area of authority.

<sup>313</sup> Paragraph 54(k) of the CEDAW/C/GC/31/CRC/C/GC/18 (2014).

<sup>314</sup> UNICEF ‘Malawi statistics report 2012’ available at [http://www.unicef.org/infobycountry/malawi\\_statistics.html](http://www.unicef.org/infobycountry/malawi_statistics.html) (accessed 19 February 2015).

<sup>315</sup> UNICEF ‘Malawi statistics report 2015’ available at [http://www.unicef.org/infobycountry/malawi\\_statistics.html](http://www.unicef.org/infobycountry/malawi_statistics.html) (accessed 19 February 2015).

therefore, important in combating the problem. S54 punishes Traditional Authorities who contravene any of the marriage requirements. This prevents offenders from further committing offences and discouraging others from doing the same.<sup>316</sup> Clearly, the law protects girls from Traditional Authorities who intend or register child marriages. At the same time, s54 acts as a deterrent to child rights violations.

#### 4.5. THE GENDER EQUALITY ACT

The GEA fulfils Malawi's commitments to international law on gender equality and women empowerment by addressing sex discrimination, HCPs and sexual harassment.<sup>317</sup> The issues of sex discrimination, harmful practices and sexual harassment have direct linkages with child marriages, of which, girls are the most affected. Several provisions in the GEA can, therefore, be used to address these practices. For example, s3 of the GEA defines *harmful practices* as:

'Social, cultural or religious practices which, on account of sex, gender or marital status, do or are likely to-

- (a) undermine the dignity, health or liberty of any person; or
- (b) result in physical, sexual, emotional, or psychological harm to any person'.

S3 is similar to Art 1(g) of the Maputo Protocol, which also defined 'harmful practices' as:

'All behaviour, attitudes and/or practices which negatively affect the fundamental rights of women and girls, such as their right to life, health, dignity, education and physical integrity'.<sup>318</sup>

Besides s3, s4 of the GEA which prohibits sex discrimination can also be used to address child marriages.<sup>319</sup> S4 complies with ss20(1) and 23(1) of the Malawi Constitution and Arts 1, 2 and 3 of the CEDAW, UDHR and ACRWC, respectively, which guarantee the right to equality. Analysts, such as Chirwa, have argued that if men and women are entitled to enjoy full and equal protection before the law, then children regardless of sex and gender must also be treated in the same way.<sup>320</sup> Most HCPs which were discussed in chapter 3 amount to sex discrimination because they unfairly treat girls on the basis of sex. Through the practices of *lobolo* and *kupawila*, girls are

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<sup>316</sup> Gaus GF and D'Agostino F *The Routledge Companion to Social and Political Philosophy* (2012) 771.

<sup>317</sup> See Part II of the GEA.

<sup>318</sup> Art 1(g) of the Maputo Protocol.

<sup>319</sup> Briefly, s4(2) prohibits anyone to be treated less favourably on the basis of sex and anyone who contravenes s4(1) is liable to a fine of K1,000,000 and to a term of five years' imprisonment.

<sup>320</sup> Chirwa DM (2011) 199.

viewed as a source of wealth or used as debt payment to their parents' creditors. In poor families, girls are forced by parents to swap school for marriage so that they can pay school fees for male siblings to continue schooling. S4, therefore, ensures that both girls and boys are given equal opportunities as a result of which they are treated with dignity, integrity and without distinction. Higgins and Fenrich have argued that provisions, such as s4 of the GEA, imply that States must affirmatively regulate customs and social practices in a way that promotes gender equality.<sup>321</sup> Indeed, s4(2) imposes a punishment on anyone who engages in sex discrimination to guarantee gender equality. In this way, s4 is useful in eliminating sex discrimination leading to child marriages.

In addition, s5 which prohibits any commission of harmful practices can also be used to address harmful cultural practices linked to child marriages. S5 provides:

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

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

S5 is compatible with Arts 16, 5 and 12 of the CEDAW, Maputo Protocol and SADC Gender Protocol respectively, which prohibit and condemn all forms of HCPs that negatively affect the human rights of women and children. Israel has argued that Art 16 of the CEDAW must be understood as referring to traditional and patriarchal norms that conflict with and resist gender equality.<sup>322</sup> According to s5, a person must not commit, or engage in a harmful practice. Furthermore, a person must neither subject another person to a harmful practice, nor encourage the commission of a harmful practice. Child marriages are considered HCPs because they lead to children's rights violations. This undermines the health of girls, subjecting them to the risk of death and diseases, including HIV and AIDS, which can cause physical, sexual, emotional, or psychological harm. A penalty can also be imposed on those who commit or encourage the

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<sup>321</sup> Higgins TE and Fenrich J *The Future of African Customary Law* (2011) 424.

<sup>322</sup> Israel FR 'Culture, religion, and the CEDAW's Art 5 (A)' available at [http://www.institut-fuer-menschenrechte.de/.../culture\\_religion\\_and\\_cedaws\\_ar](http://www.institut-fuer-menschenrechte.de/.../culture_religion_and_cedaws_ar) (accessed 10 September 2014).

commission of harmful practices.<sup>323</sup> Therefore, Malawi has adopted a necessary positive measure which is pivotal in eliminating harmful practices linked to child marriages.<sup>324</sup>

Apart from ss3, 4, 5 discussed, s14 which provides for the right to access education can also be used to address cultural practices leading to child marriages.<sup>325</sup> This is consistent with s25(1) of the Malawi Constitution and Art 13 of the ICESCR. Chirwa rightly observed that education is an indispensable tool for achieving gender equality in Malawi.<sup>326</sup> It was noted in chapter 3 that child marriages are strongly linked to culture and poverty. Therefore, education facilitates a just and fair environment where everyone is given equal opportunities. In addition, the ICESCR Committee emphasised the importance of education as an empowerment tool for women and girls which safeguards them from abuse.<sup>327</sup> Thus, education enables not only children, but everyone to be financially independent and facilitates the challenge to societal stereotypes associated with child marriages.

#### 4.6. CONCLUSION

This chapter has analysed the provisions of the Malawi Constitution, Children's Act, Marriage, Divorce and Family Relations Act (2015) and GEA as legislation that can be used to address child marriages in Malawi. The assessment has shown that these pieces of legislation have the potential to protect girls against HCPs linked to child marriages. What remains is, therefore, the implementation on the ground. The assessment has also shown that some of the provisions in these legislations are incompatible with international and regional law, particularly with the definition of the child. Furthermore, the principle of the BIC is not expressly guaranteed in both the Malawi Constitution and the Children's Act. As a result, there is need to amend these legislations so that they comply with the international and regional normative standards. The next chapter, therefore, presents conclusions and recommendations emanating from, and pertinent to, this study.

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<sup>323</sup> Ss3, 4 and 5 of the GEA.

<sup>324</sup> Art 2(f) of the CEDAW.

<sup>325</sup> S14 of the GEA guarantees the 'right to access education and training including vocational guidance at all levels'.

<sup>326</sup> Chirwa DM (2011) 249.

<sup>327</sup> Paragraph 1 of the UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 13: The Right to Education*, 8 December 1999.

## CHAPTER 5

### CONCLUSION AND RECOMMENDATIONS

This chapter makes possible recommendations and concludes the findings of this research paper in light of the analysis and discussions made in the preceding chapters.

#### 5.1. CONCLUSION.

This study has given an assessment of the legal framework for the protection of girls from child marriages in Malawi. The study also highlighted certain advancements amidst huge barriers in protecting the rights of girls in Malawi. Positive efforts, such as the enactment of child laws, have been made.<sup>328</sup> However, the laws focusing on the rights of girls remain relatively weak; hence, implementation gaps. In order to do so, HRW has rightly observed that there is need for Malawi to fulfil her constitutional and international commitments through legal reform, political will and raising social awareness programmes which equally serve the interests of the public, address and modify cultural practices to be in line with international and regional human rights law.<sup>329</sup>

#### 5.2. RECOMMENDATIONS

##### 5.2.1. Conceptual Recommendations

This study has stressed the fact that HCPs that lead to child marriages also involve patterns of stigma and discrimination which deny girls to enjoy children's rights. As correctly pointed out, HCPs are difficult to change since they are linked to the social patterns of behaviour and are often embedded in patriarchal attitudes.<sup>330</sup> Despite this difficulty, Malawi, as a State Party to various international and regional human rights instruments<sup>331</sup> has enacted laws that can be used to address child marriages.

However, as generally observed, law reform itself must not be isolated on its own.<sup>332</sup> It must be accompanied by other non-legal measures such as holding campaigns and workshops to educate

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<sup>328</sup> The Children's Act, GEA, and Marriage Act have been enacted in this regard to protect the rights of children, particularly girls.

<sup>329</sup> HRW (2014) 63-67.

<sup>330</sup> MHRC (2005) 92.

<sup>331</sup> See, generally chapter 2.

<sup>332</sup> HRW (2014) 63-67.

everyone, including children on their rights and raise awareness on the available pieces of legislations that protect everyone from human rights violations.<sup>333</sup> More importantly, the awareness programmes must emphasise the importance of treating children, particularly girls with respect, equality and dignity.<sup>334</sup> In addition, as demonstrated by Chief Kachindamoto, a female traditional leader, in the implementation of the Marriage, Divorce and Family Relations Act (2015) in her village, effective training must be prioritised to traditional leaders, who are custodians of cultural practices, to denounce child marriages and promote the educational rights of girls.<sup>335</sup> Chief Kachindamoto annulled 330 child marriages and enrolled them back in school.<sup>336</sup> As both a punitive and protective measure against child marriages, Chief Kachindamoto suspended the village heads that were responsible in consenting to those marriages.<sup>337</sup> This serves a lesson to other village leaders who might want to follow suit.<sup>338</sup> In this way, the law with the cooperation of traditional leaders can be used to restrict, and ultimately protect, girls from marrying before the age 18.

### 5.2.2. Legal recommendations

This analysis has shown that both the Malawi Constitution and the Children's Act are in conflict with the international and regional standards on the definition of the child. As such, there is a pressing need for Malawi to amend the definition of the child in her Constitution. Although the Marriage, Divorce and Family Relations Act (2015) fixes the minimum marriageable age at 18, it lacks any legal effect since the supreme law allows anyone under 16 to marry.<sup>339</sup> Malawi is, therefore, obliged to adopt 18 as the definition. Closely linked to this deficiency is that both the Malawi Constitution and the Children's Act do not expressly provide for the BIC, which is the cornerstone for the protection children's rights, particularly girls, against child marriages.<sup>340</sup>

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<sup>333</sup> Kaufulu-Kumwenda C (2014) 38.

<sup>334</sup> Paragraph 21 of the CEDAW/C/GC/19/20 (1992).

<sup>335</sup> See, a discussion in chapter 4.

<sup>336</sup> Nyasa Times 'Malawian Chief Kachindamoto terminates 330 teenage marriage, enrolls them back in school' available at <http://www.nyasatimes.com/2015/06/23/malawi-chief-kachindamoto-terminates-330-teenage-marriage-enrols-them-back-in-school/> (accessed 16 July 2015).

<sup>337</sup> Nyasa Times 'Malawian Chief Kachindamoto terminates 330 teenage marriage, enrolls them back in school' available at <http://www.nyasatimes.com/2015/06/23/malawi-chief-kachindamoto-terminates-330-teenage-marriage-enrols-them-back-in-school/> (accessed 16 July 2015).

<sup>338</sup> Nyasa Times 'Malawian Chief Kachindamoto terminates 330 teenage marriage, enrolls them back in school' available at <http://www.nyasatimes.com/2015/06/23/malawi-chief-kachindamoto-terminates-330-teenage-marriage-enrols-them-back-in-school/> (accessed 16 July 2015).

<sup>339</sup> See, s14 of the Marriage Act.

<sup>340</sup> Mwambene L 'Child Care, Protection and Justice Act: Merging Customary Family Law?' in Atkin B *The International Survey of Family Law* (2012) 202.

For this reason, the Malawi Constitution and the Children's Act must be modified to ensure that the rights of children are given due consideration at all times. As such, the *'Prohibition of Child Marriage Act'*, which deals extensively with the issue of child marriages in Malawi, must be enacted.

In addition, Malawi as a State Party to the ICESCR needs to ratify its Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OPICESCR) in fulfilling her constitutional mandate to protect social and economic rights of girls.<sup>341</sup> By ratifying the OPICESCR, she guarantees the protection of the girls' right to education, right to health and the right to survival and development. In the same context, there is a duty on the Malawi Government to ratify the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (OPCEDAW). OPCEDAW is a body that monitors SPs' compliance with CEDAW.<sup>342</sup> The ratification of the OPCEDAW will enable girls to directly lodge complaints to the Committee in a case where Malawi fails to protect them against HCPs, such as child marriages.

Lastly, under the Marriage Act, the law does not specify child marriage as one of the grounds for nullifying a marriage.<sup>343</sup> This failure only fast-tracks and extends the perpetuation of child marriages. Accountability mechanisms which guarantee the investigation of child marriages and bringing perpetrators to book will effectively tackle the problem of child marriages. Therefore, there is need by both the Malawi Constitution and its supplementing legislations to show committed constitutional affirmations and will in fighting HCPs which disproportionately affect children in general and girls, in particular. As such, the law must clearly specify child marriage as a ground for nullifying a marriage.

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<sup>341</sup> The rights to non-discrimination, life, health and to be free from any form of violence reinforce the prohibition of child marriages in Malawi.

<sup>342</sup> See, Art 7 of the OPCEDAW.

<sup>343</sup> See, s77 of the Marriage Act.

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