

**The Impact of the Bill of Rights on African
Customary Family Laws: A Study of the
Rights of Women in Malawi with some
Reference to Developments in South Africa**

by

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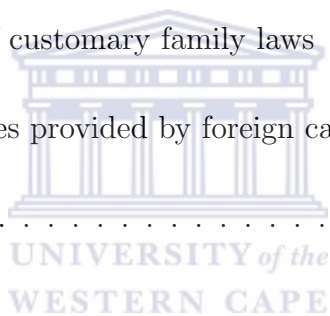
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Key words

African customary family laws

Bill of Rights

Cultural Rights

Customary marriage

Divorce

Inheritance

Matrimonial property

Matrilineal

Patrilineal

Women's rights



Abstract

On the assumption that the Bill of Rights in the Malawi Constitution has brought change in the enjoyment of rights by women married under customary family laws, this research study examines its impact on African customary family laws that are discriminatory against women in Malawi. The main focus is on customary family laws governing marriage, divorce, children after divorce, and inheritance in both patrilineal and matrilineal systems of marriages. The extent to which this has been reflected in practice is assessed in the light of women's rights law reforms and courts' adjudication of customary family law issues. The central argument that has been advanced is that, in reconciling customary family laws with women's rights, courts and law reformers need to look closely at customary family laws that are discriminatory against women, and develop them so that they are compatible with the constitutional principles of equality. In ignoring the application of customary family laws in favour of a constitutional provision that is aimed at the protection of women's rights, courts and law reformers are failing to adequately protect the rights of women married under customary family laws.

Furthermore, it has been argued that ignoring the application of customary family laws not only fails to represent an adequate response to women who wish to live by their cultural rights; it also lacks the constitutional justification that makes it a good part of a well designed constitutional approach that has taken into account the fact that the majority of Malawian women live according to customary family laws.



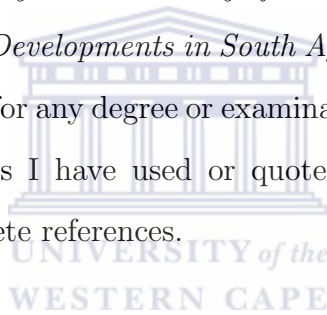
Dedication

To my husband Eric whose love has been the source of all my inspiration; to my two beautiful daughters Temwa-Dango and Maka-gha-Kyala, without whom I would have found this task much more difficult and much less rewarding.



Declaration

I, Lea Mwambene, hereby declare that *The Impact of the Bill of Rights on African Customary Family Laws: A Study of the Rights of Women in Malawi with some Reference to Developments in South Africa* is my own work, that it has not been submitted for any degree or examination at any other university, and that all the sources I have used or quoted have been indicated and acknowledged by complete references.



Signature :

Date: June 2008

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Abbreviations and Acronyms

ACHPR:	African Charter on Human and Peoples' Rights, 1981
AHRLR:	African Human Rights Law Reports
AIDS:	Acquired Immuno Deficiency Syndrome
Art.:	Article/s
AU:	African Union
Bill:	Marriage, Divorce and Family Relations Act
CC:	Constitutional Court of South Africa
CCPR:	Convention on Civil and Political Rights
CEDAW:	Convention on the Elimination of all forms of Discrimination Against Women
CEDAW Committee:	Committee on the Convention on the Elimination of all Forms of Discrimination Against Women

CESCR:	Convention on Economic, Social and Cultural Rights
CESCR Committee:	Committee on the International Convention on Economic, Social and Cultural Rights
CILSA:	Comparative and International Law Journal of Southern Africa
CRC:	Convention on the Rights of the Child, 1989
CRC Committee:	Committee on the Convention on the Rights of the Child
DEPA:	Deceased Estates (Wills, Inheritance and Protection) Act
DTC:	District Traditional Court
DTCA:	District Traditional Court of Appeal
GA:	General Assembly
GR:	General Recommendation
HC:	High Court/s
HIV:	Human Immunodeficiency Virus
Malawi Constitution:	Republic of Malawi Constitution, 1994
MC:	Magistrate Court/s
MHRC:	Malawi Human Rights Commission
MLR:	Malawi Law Reports
MNLP:	Malawi National Land Policy

MOGCS:	Ministry of Gender and Community Services
NGM:	National Gender Machinery
NGO:	Non-Governmental Organisation
NHP:	National Health Plan
NPFA:	National Platform For Action
NSO:	National Statistics Office
NTAC:	National Traditional Appeal Court
OAU:	Organization of African Unity
OPC:	Office of President and Cabinet
RCMA:	Recognition of Customary Marriages Act, 1998 (of South Africa)
Res.:	Resolution
RTCA:	Regional Traditional Court of Appeal
SA:	South Africa
SALC:	South African Law Commission
SARDC:	Southern Africa Research Documentation Centre
SAHRC:	South African Human Rights Commission
SC:	Subordinate Court/s
SCA:	Supreme Court of Appeal

TC:	Traditional Court/s
The Charter:	African Charter on the Rights and Welfare of the Child
The Commission:	African Commission on Human and Peoples Rights
The Order:	British Central Africa Order in Council
The Protocol:	Protocol to the African Charter on the Rights of Women in Africa
UDHR:	Universal Declaration on Human Rights
UMCA:	Universities Mission to Central Africa
UN:	United Nations
UN Charter:	United Nations Charter
UNDP:	United Nations Development Programme
UNGA:	United Nations General Assembly
UNICEF:	United Nations Children's Education Fund
WIDSAA:	Women in Development Southern Africa Awareness Programme
WIA:	Wills and Inheritance Act
WLSA:	Women and Law in Southern Africa

Glossary of African Words

Akamwana (Tumbuka) : daughters-in-law.

Akamwini (Chewa) : sons-in-law.

Banja (Chewa) : composition of a husband and his family together with their children.

Chikamwini (Chewa) : practice whereby a man moves from his village to his wife's village.

Chikole (Chewa) : gift that is exchanged between a man and a woman that have agreed to marry. marriage, are allowed to stay at the husband's village.

Chilongo (Chewa) : agreement made by a wife and a husband with regard to whom the wife will be inherited by after the husband dies.

- Chimeta masisi* (Tumbuka) : replacement of a deceased wife.
- Chinkhoswe* (Chewa) : ceremony at which the marriage guardians from both the man and the woman's sides to the matrilineal marriage meet and exchange chickens as a symbol of validating the marriage.
- Chitengwa* (Chewa) : situation whereby a husband and a wife, in a matrilineal marriage, are allowed to stay at the husband's village.
- Chithyola msana* (Chewa) : father or grandfather having sexual intercourse with their daughter or granddaughter.
- Fuko* (Chewa) : blood relations who trace descent through a female line to the first or common ancestress.
- Ikhazi* (Xhosa) : same as *lobola*.
- Kholo* (Chewa) : oldest living ancestress of matrilineal relatives.
- Kukwatira* (Chewa) : man getting married.
- Kukwatiwa* (Chewa) : woman getting married.
- Kupawila* (Lambiya) : paying off debt by marrying a daughter.
- Kutola* (Tumbuka) : man getting married.
- Kutoleka* (Tumbuka) : woman getting married.

<i>Kutwala</i> (Chewa)	: woman found pregnant is taken to the impragnator's village and forced to get married.
<i>Lobola</i> (Tumbuka)	: livestock or monetary value paid by a man to his wife's father or guardian on the occasion of their marriage. In Zulu, the noun is <i>lobolo</i> , the verb is <i>lobola</i> .
<i>Luphato</i> (Sena)	: gift.
<i>Mafuko</i> (Chewa)	: matrilineal relatives.
<i>Mbirigha</i> (Tumbuka)	: bonus wife.
<i>Mbumba</i> (Chewa)	: composition of all members of a matrilineage with the exception of the <i>Kholo</i> .
<i>Msudzulo</i> (Chewa)	: actual divorce.
<i>Nkhoswe wamkulu</i> (Chewa)	: wife's brother who is the guardian of the marriage. In plural, <i>Ankhoswe</i> .
<i>Tsinde</i> (Chewa)	: ancestress through whom a lineage trace their descent

Chapter 1

Introduction and overview of the study



1.1 Problem statement

In 1994, the Republic of Malawi adopted a new constitution, the Republic of Malawi Constitution of 1994, hereinafter called the ‘Malawi Constitution’.¹ The Malawi Constitution is responsible for revolutionary changes in the application of customary family laws in Malawi. Probably one of the most important changes is the enactment of an entrenched Bill of Rights that

¹The Republic of Malawi (Constitution) Act No. 20 of 1994, came provisionally into force on 18 May 1994, and was fully in force on 18 May 1995, as Act No. 7 of 1995.

recognises a range of rights, including the right to culture.² Section 26 of the Malawi Constitution provides that ‘every person shall have the right to use the language and to participate in the cultural life of his or her choice’. On the basis of this section, an argument can be made that the State is obliged to recognise and apply customary laws in its courts.³ This argument is strengthened by Section 200⁴ of the Malawi Constitution which states, among others, that ‘customary law in force on the appointed day shall continue to have force of law’.⁵ At the same time, there are provisions relating to family law and women’s rights. For example, Section 22 (1) of the Malawi Constitution provides that ‘the family is the natural and fundamental group unit of society and is entitled to protection by society and the State’.⁶ In

²Arguably, Malawi draws its inspiration for constitutionally protecting cultural rights from international instruments, for example, Art. 18 (1) and (2) of the ACHPR and Art. 27 of the CCPR.

³A similar argument was also made by Bennett TW *Human Rights and African Customary Law under the South African Constitution* (1995) 23 in respect of the Constitution of the Republic of South Africa, 1993.

⁴Section 200 of the Malawi Constitution provides: ‘Except in so far as they are inconsistent with this Constitution, all Acts of Parliament, common law and customary law in force on the appointed day shall continue to have force of law, as if they had been made in accordance with and in pursuance of this Constitution: Provided that any laws currently in force may be amended or repealed by an Act of Parliament or be declared unconstitutional by a competent court’.

⁵According to Section 212 (1) of the Malawi Constitution, 18 May 1994 is the appointed day when the Malawi Constitution, as earlier mentioned, came provisionally into force.

⁶This provision, it is argued, draws its inspiration from international instruments, for example, Art. 18 (1) of the ACHPR which calls for the recognition and protection of the

addition, Section 24 (1) of the Malawi Constitution states that ‘women have the right to full and equal protection by the law, and have the right not to be discriminated against on the basis of their gender or marital status . . .’.

The values encoded in customary family laws, on the one hand, and the Malawi Constitution and the international standards on the protection of women’s rights on the other, frequently contradict one another.⁷ This problem is further complicated by the fact that the Malawi Bill of Rights has accommodated culture without providing guidelines for the resolution of conflicts should a right to culture clash with another right, that both fall within the Bill of Rights. The challenge, therefore, is how customary family laws can be applied in a constitutional framework whilst at the same time ensuring that harmful practices are not protected under the guise of cultural propriety.⁸

The difficulties inherent in the application of the universal human rights norms in culturally diverse societies, such as Malawi, are envisaged in the *Vi-*family. Art. 18 (1) of the ACHPR provides that ‘the family shall be the natural unit and basis of society. It shall be protected by the state which shall take care of its physical and moral health’.

⁷See Bennett TW *Customary Law in South Africa* (2004) 76-100; and Nhlapo RT ‘The African Family and Women’s Rights: Friends or Foes’ (1991) *Acta Juridica* 135 at 137-145 who, among others, have also discussed at length the contradictions.

⁸Kaime T ‘The Convention on the Rights of the Child and cultural legitimacy of children’s rights in Africa: Some reflections’ (2005) *African Human Rights Law Journal* 221 at 223.

enna Declaration,⁹ which, even while affirming the ultimate goal of universal protection, makes clear that:

‘... while the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of the state, regardless of their political, economic and cultural systems to promote and protect all human rights and fundamental freedoms’.

The inclusion of culture as a right within the Bill of Rights, as well as the protection of women’s rights, have thus created a new dimension to the whole question of the application of customary family laws. It is against this constitutional dilemma that this thesis examines the impact of the Bill of Rights on African customary family laws focusing on women’s rights in Malawi.¹⁰

⁹Vienna Declaration and Programme of Action, 12 July, 1993, para 5 as cited by Grant E ‘Human Rights, Cultural Diversity and Customary Law in South Africa’ (2006) *Journal of African Law* 2 at 3.

¹⁰The arena of women’s rights provides an ideal laboratory for examining the way the HC, as an interpreter of the fundamental law of the land, both initiates and responds to social change. Cases decided by the HC also provide a stage on which abstract constitutional terms, such as equality, take on concrete meaning as they are seen applied to live controversies of topical interest.

1.2 Significance and objectives of the study

1.2.1 Significance

Identifying the proper ways of applying customary family laws in a constitutional system engages an on-going controversial debate. The legitimacy of customary family laws and the case of women's rights inform the whole debate around the issue. This controversy has gained momentum in Malawi where, among others, a unified form of marriage system is proposed.¹¹ Additionally, the debate has led to a proposition among adjudicating officers of the court and other stakeholders to resolve the problem of conflicts between customary family laws and constitutional rights by applying common law¹² instead of customary laws where the application of customary law would violate women's rights. The significance of this study is, thus, to contribute to this academic debate. But, it should be noted that the issue of protecting women's rights within customary family laws entails an implication way beyond the academic debate as it has practical consequences. Determining when to apply customary family laws and how to prove them in court has

¹¹The Malawi Law Commission recommends a unified law in Malawi that consolidates statutory and customary laws on marriage and divorce. However, this unified law, as it will be discussed later in Chapter 6, seem to negate the precise content of what a customary marriage is. Arguably, one sees it as an imposition of a common law marriage onto a customary system.

¹²This is according to responses from some judicial officers that were interviewed.

important implications in evaluating the level and effectiveness of protection provided for the human rights of those women married under customary family laws. Therefore, from an access to justice perspective, the impact of the Bill of Rights on customary family laws relating to women can have an extremely wide reaching effect on the justice system as a whole.

However, from a practical approach, the target groups that this research will affect are quite specific. Firstly, African customary family laws applies to the majority of the population in Malawi.¹³ There has been concerns in African customary family laws and the rights of women. This study will therefore highlight areas of concern and how they can be addressed. Secondly, there is no literature on the Malawi Bill of Rights and how courts have been interpreting these provisions. This study will therefore provide some literature on how courts have been interpreting the Bill of Rights. Thirdly, Malawi cases are, in most cases, not reported, which makes it difficult for legal practitioners and other stakeholders to know what effect the Bill of

¹³According to quantitative data derived from a household survey by Ngwira N et al *Women's Property and Inheritance Rights in Malawi* (2002), as cited by the Malawi Law Commission *Report on the Review of the Law on Marriage and Divorce* (2005) 10-11, almost 77 percent of respondents opt for *chinkhoswe* or customary officiation of their marriage while 23 percent or so opt for church officiation under the African Marriage (Christian Rites) Registration Act. This Act merely makes provision for the celebration of African marriages in accordance with Christian rites. All a church does under the Act is to register the marriage but the marriage remains a customary one in every respect. It is for this reason that customary laws prevail and the marriages celebrated under the African Marriage (Christian Rites) Registration Act remain potentially polygamous.

Rights has on African customary family laws. Fourthly, magistrates and judges, in so far as they are obliged by the Constitution to apply customary family laws, will also be affected by this study. Although the standards will be specific to formal justice courts, the informal justice delivery systems will also benefit in so far as they will be applying customary family laws in a new constitutional order.

1.2.2 Objectives

The main objective of this research study is to examine and analyse critically the impact of the Malawi Bill of Rights on African customary family laws in Malawi, focusing on women's rights. The main focus is on customary family laws governing marriage, divorce, children after divorce, and inheritance in both patrilineal and matrilineal communities.¹⁴

The specific aims and scope of this thesis are as follows:

1. It will explore the meaning and the nature of African customary family laws in the Malawian context and show how they conflict with the Bill of Rights.
2. It will look at the constitutional protection of fundamental rights in the Bill of Rights. Here, a determination of whether the inclusion of

¹⁴Malawi is composed of both matrilineal and patrilineal customary systems of marriage. A discussion of these systems will be done in Chapter 4.

cultural rights in the Bill of Rights supersedes other rights as contained in the Bill of Rights will be made. Of particular importance in this thesis is whether the protection of cultural rights in the Bill of Rights constitutes a justifiable reason for differential treatment of women and men.

3. It will discuss the application of the Bill of Rights to African customary family laws. The main focus will be on how its application can change rules of African customary family laws governing customary marriages which, ultimately, would be to the benefit of women in their enjoyment of their human rights.
4. It will identify specific problems related to the application of African customary family laws. The main focus here will be upon technical problems of application such as conflicts between different customary family laws and conflicts between different customary family laws and the Bill of Rights.
5. In addition, there will be a determination of specific socio-economic problems related to the application of the Bill of Rights to customary family laws in Malawi.

1.3 Methodology

In examining what impact the Bill of Rights has on African customary family laws in Malawi, reference will be made to relevant provisions of the Malawi Constitution, SC cases¹⁵ and HC decisions.¹⁶ Reference is also made to relevant legislative reforms that are taking place in the field of customary family laws governing marriages in Malawi.¹⁷ In addition to the above, some reference is also made to decisions from South Africa.¹⁸ Finally, reference to international best practice and theoretical material has not been ignored particularly as reform of customary family laws continue to be influenced by the prevailing international standards.

In the following discussion, a description of the methodologies is presented.

¹⁵SC cases will be examined primarily because most customary marriage disputes are adjudicated in these courts.

¹⁶According to Section 108 of the Malawi Constitution, the HC is an interpreter of the Constitution.

¹⁷These reforms are facilitated by the Malawi Law Commission. According to Section 132 of the Malawi Constitution, the Malawi Law Commission is empowered to ‘review and make recommendations relating to the repeal and amendment of laws and which shall have such powers and functions as are conferred on it by the Constitution and any other Act of Parliament’.

¹⁸South Africa has been chosen because it has a CC where issues of women’s rights are finally settled. Secondly, issues of African customary family laws have been well researched and documented in that country. It has also been chosen because of financial reasons. I am currently in South Africa.

1.3.1 Literature review/ interviews/ observations

This thesis puts emphasis on analysis of the relevant available literature on the subject. It also relies much on the practical sources of the research. The data for this thesis is primarily aimed at qualitative, as opposed to quantitative, analysis. With regard to literature research, the study relies on primary sources. This includes international law instruments, constitutions, reports of law reform bodies, women's legislation, children's legislation,¹⁹ case law, resolutions, declarations, general comments, state reports under the various international and regional human rights instruments (particularly CEDAW), and concluding observations (mainly of the CEDAW Committee). The study also places considerable reliance on secondary sources. These are background papers, books and academic articles. Various internet sites have been consulted for relevant data and information.

At a practical level, the thesis is the culmination of a study that I conducted in Malawi, looking at the impact of the Bill of Rights on African customary family laws. On the assumption that the Bill of Rights has brought change in

¹⁹Therefore, concurring with Armstrong A et al 'Toward a Cultural Understanding of Inter-play between Children's and Women's Rights: An Eastern and Southern African Perspective' (1995) *International Journal of Children's Rights* 333 at 333 that in discussing women's rights, it is inevitable that children will also be discussed. The connection between women's and children's rights is usually based on the assumption that mothers are the primary caretakers of children. Furthermore, customary family laws that affect women are likely to have an impact on the children's welfare.

the enjoyment of human rights for women married under customary family laws, the study was conducted in three major cities of the country.²⁰ Structured interviews, observations and court records²¹ were used to determine the judgments made in relation to the awarding of property ownership after divorce or death, and guardianship of children after divorce. In this regard, the study also relies on information obtained from government departments,²² and other stakeholders²³ in the field of women's rights and customary family laws.

The people interviewed were magistrates and judges who were adjudicating over cases involving customary family laws. One open ended questionnaire was prepared for use with magistrates and judges responses.²⁴ The questions

²⁰These cities were chosen for a number of reasons. First, they represent different types of customary marriages. Mzuzu which is in the northern part, represents the patrilineal system, Lilongwe represents both the patrilineal and matrilineal systems, and Blantyre represents the matrilineal system. Secondly, the three cities represent the three regions of the country. Thirdly, each of these cities has a HC that is mandated to review any law that is inconsistent with the Constitution. Fourthly, all appeals from the MC on matters of customary family laws are channeled to them.

²¹This is the largest documentary source of the research. The court cases looked at consisted of all cases on customary family laws after 1994 that could physically be located. For a comparative analysis, cases pre-1994 were also looked at. I also looked at cases that were decided by the NTAC. These cases had been compiled by Dr Boyce Wanda during the period 1978-1987.

²²More especially the Ministry of Gender and Youth.

²³These are NGOs that deal with women's issues.

²⁴See Appendix 2.

sought information relating to knowledge of the relationship between customary family laws and human rights, application of human rights to customary family law rules, and the development of customary marriage rules in view of the Bill of Rights. They were also asked about their general knowledge of customary marriage laws with regard to property relations of a married couple, and devolution of an estate, either on divorce or death of a husband according to customary family laws. Additionally, they were asked how they resolve the conflict between customary family laws and the Bill of Rights.

1.3.2 Use of materials researched

This subsection gives an indication of the main use of the information researched for this study. The literature is used to acquire a broad understanding of issues concerned with legal developments affecting customary family laws in Malawi and other African countries, especially South Africa.

The case records are used as a source of information about customary family law rules, as well as for an evaluation of the role of the courts in the development of the customary family laws. Both the court cases, MC and HC, and the interviews are used to understand the impact of the Bill of Rights on African customary family laws in practice and its application by both levels of court. Interviews, especially with magistrates and judges, are used to analyse issues of implementation of laws in society. NGO reports are used to assess public opinion and attitudes toward the issues concerned.

In light of the use made of this data, I will, in most cases, present court decisions and statements of interviewees in detail. The aim is to maintain the sources' originality. In order to protect the identity of the people interviewed, their names have been abbreviated.

1.3.3 Limitations of study

The difficulties inherent in the generalized reference to 'the impact of the Bill of Rights on African customary family laws in Malawi,' are not overlooked. The study is directed toward a view of the main currents running through, and characteristics identifiable in, African customary family laws applicable in Malawi. A general report on matrilineal and patrilineal customary marriage law issues pertaining to the human rights of women can account for individual differences.²⁵ The thesis will refer to individual examples, but does not endeavour to give an overview of the impact of the Bill of Rights on each and every customary marriage rule of every tribe in Malawi. The same applies to court judgments, journals consulted, interviews conducted and courts visited. These sources had to be selected, sometimes in a haphazard way. This study accepts the premise that conclusions and generalizations can, in any event, never be based on a totality of comprehensive data.

This study also acknowledges the fact that it will become outdated soon.

²⁵Considering the fact that, within matrilineal and patrilineal societies, there are different tribes.

Obviously, the status of customary family laws that are not in conformity with the human rights of women may be changed. New laws governing the status of women married under customary family laws are likely to be passed.²⁶ Considering the fact that culture in general is dynamic, cultural practices relating to marriage, that are discriminatory toward women, may evolve into practices that are not discriminatory. But one need not despair at these thoughts.²⁷ This study is a *work in progress*, embedded in the much greater and more fluctuating context of the project to realize the enjoyment of human rights²⁸ by women married under customary family laws, which is itself very much a work in progress.

²⁶An indication of this is already seen in the procedure that has been adopted by the Malawi Law Commission in reviewing marriage and divorce laws. However, changing laws does not directly translate into changing perceptions of how a society will look at a particular practice.

²⁷Viljoen FJ *The realisation of human rights in Africa through inter-governmental institutions* Unpublished LLD thesis (1997) University of Pretoria, 43.

²⁸As above.

1.3.4 Description of research areas and work done

Blantyre

Blantyre city, situated in the southern region of Malawi, is the second largest city of Malawi. It covers an area of 220 square kilometres.²⁹ The city has a total population of 502,053 (239,938 females and 262,815 males).³⁰ The population is quite diverse. It includes a considerable number of tribes from within Malawi, as well as Asians and other foreigners.

Blantyre is also the government administrative center. The SCA and Principal HC Registries are also situated there. Apart from hearing cases from the Blantyre district, the HC also hears cases from other districts of the country which do not as yet have a HC.³¹ The SCA hears cases from the whole country. There are also MC courts situated in Blantyre. There is, for example, the Blantyre District MC. This court is responsible for handling a large number of matrimonial cases as a court of first instance. The examination of cases was done at this MC, as well as at the HC and SCA.

²⁹This is according to the NSO projected population for 2008 based on the 1998 Malawi Population and Housing Census.

³⁰See 1998 Malawi Population and Housing Census by the NSO accessed at www.nso.malawi.net on 12/10/2006.

³¹Among the districts that channel their appeal cases to this HC are Nsanje, Chikwawa, Mulanje and Thyolo.

Lilongwe

Lilongwe is the capital city of Malawi. It covers an area of 328 square kilometres.³² It is situated in the central region and has an estimated total population of 440,471 (208,955 females and 231,516 males).³³ The main ethnic group is Chewa, who are matrilineal by descent. Smaller numbers from other ethnic groups, as well as foreigners, are also settled in Lilongwe.

Lilongwe has a HC which serves all the districts that are in the central region. Within Lilongwe city, there is a Lilongwe district MC. I conducted research at this MC as well as Lilongwe HC.



Mzuzu

Mzuzu is situated in the northern region of the country. It is also one of the three major cities of the country. It has a total population of 86,980 (42,132 females and 44,848 males).³⁴

Mzuzu city is the main urban center in the northern region. It has a HC which serves six districts of the region. There is also a magistrate court that serves the whole city. Appeals from this MC and other MCs in the region, therefore, go to Mzuzu HC. This area is mostly occupied by the patrilineal

³²See n 29 above.

³³See n 30 above.

³⁴See n 30 above.

ethnic groups. Considering that Mzuzu is a city, it is not completely ruled out that other tribes, from the matrilineal ethnic groups, could also be among its inhabitants. It was, therefore, not surprising to see that a MC was handling a matrimonial case whose parties were married according to matrilineal customary law marriages. However, the main focus of the study in this area was on those marriages contracted under the patrilineal customary laws.

During my field research I examined court cases in both the magistrate court and the HC within the city.

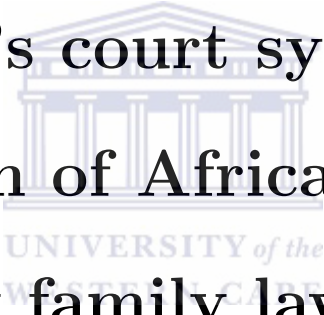
1.3.5 Overview of chapters

In accordance with the general aims of the study as set out above, the discussion will proceed as follows: First, this chapter (Chapter 1) introduces the study, its aims, approach and scope. Thereafter follows a historical overview of the court system and the recognition of African customary family laws in Malawi, with particular emphasis on the period after 1994, in Chapter 2. Chapter 3 examines theoretical debates on the relationship between UN human rights instruments and their effect on customary family laws and women's rights. The aim is to discuss theoretical debates underpinning human rights. The most extensive and detailed part of this study is presented in Chapter 4 and is concerned with outlining African customary family laws and showing how they are incompatible with the Bill of Rights in Malawi. The African customary family laws that are incompatible with the Bill of

Rights will form a benchmark by reference to which the impact of the Bill of Rights will be evaluated when examining what courts and law reformers are doing in order to reconcile African customary family laws and women's rights in Malawi. Chapter 5 examines the Bill of Rights in Malawi and its application to African customary family laws. The aim is to show the possible effect that the application of the Bill of Rights has on African customary family laws governing the customary marriage laws. This Chapter also makes an examination of the socio-economic problems of the application of the Bill of Rights in Malawi. The aim is to discuss factors that limit the application of the Bill of Rights to African customary family laws which ultimately may affect the enjoyment of women's rights. In Chapter 6, an examination of how law reformers are reconciling African customary family laws and women's rights will be undertaken. This is followed by an examination of the courts' application of customary family laws after 1994, in Chapter 7. Finally, it remains to draw the necessary conclusions from the preceding discussion. This will be based on the findings of the study.

Chapter 2

Historical arguments: Overview of Malawi's court systems and recognition of African customary family laws



2.1 Introduction

In order for us to fully appreciate the impact of the Bill of Rights on African customary family laws affecting women's rights, it is important to look at the historical environment in which customary family laws have operated in Malawi. In view of this, this Chapter presents a brief description of Malawi,

as well as a historical overview of African customary family laws and the jurisdictions of the court system from the pre-colonial period to 1994 in Malawi, in an attempt to provide an overview of trends in the recognition and application of customary laws since pre-colonial times.

The Chapter is divided into three sections. The first part presents a brief description of Malawi. In the second part, the Chapter presents a historical overview of the court systems. Given the wide range of both materials and problems, the general theme will have to be limited. In the analysis of the history of the court systems in Malawi, therefore, the following points will receive special emphasis: the development of the institutional structure of the Malawi legal system; and the the recognition of African customary family laws. These will form the points of departure for understanding the impact that the Bill of Rights has had on African customary family laws because, among other reasons, the different courts and their judges were, and still are today, of crucial importance in the area of African customary family laws.¹

Lastly, some tentative conclusions are drawn about the recognition and application of customary laws in the court systems in Malawi that may indicate the impact that the Bill of Rights has had on African customary family laws affecting women's rights.

¹Von Benda-Beckmann F *Legal Pluralism in Malawi: Historical development 1858-1970 and emerging issues* (2007) 29.

2.2 Brief description of Malawi

The Republic of Malawi is a small landlocked country in Africa, south of the equator between latitude 9 degrees 45' and 17 degrees 16' south and between longitudes 33 degrees and 35' east.² It is 900 kilometres long, varying in width from 80 kilometres to 160 kilometres, and covering an area of 118,484 square kilometres. 53, 070 square kilometers of this land is considered suitable for cultivation. With more than 105 persons per square kilometer of arable land, Malawi has one of the highest population densities in Africa.³ The overall life expectancy for the country is low, and is estimated at 39.8 years.⁴ The national literacy level is estimated at 64.1 percent.⁵ Malawi is classified amongst the 10 poorest countries in the world with over 65 percent of the population living below poverty line and women are in majority.⁶ The 2004/2005 Integrated Household Survey show that 52 percent of the population live below poverty line.⁷

The country is bordered by the Republic of Tanzania to the north and north-east, by the Republic of Mozambique to the east, south and south-

²Mutharika P 'Malawi' (2000) *Journal of African Law* 949 at 949.

³MNLP (2002) accessed at [www.malawi.gov.mw/Lands% 20and%20Housing/Home %20Lands.htm](http://www.malawi.gov.mw/Lands%20and%20Housing/Home%20Lands.htm), on 20/10/07.

⁴UNDP *Malawi in Human Development Report* (2006).

⁵As above.

⁶UN *Human Development Report* (2000).

⁷MGDS (2007) 7.

west, and by the Republic of Zambia to the west and north-west⁸ (See map of Malawi in Appendix 1. The major topographic feature is the rift valley, in which lies Lake Malawi at 475 metres above mean sea level. Lake Malawi is a freshwater lake that covers 20 percent of Malawi's land area, and three quarter of the entire length of the country.

Under the Regional and District Boundaries and Place Names Act⁹, Malawi is divided into three administrative regions¹⁰ that are further divided into 28 administrative districts. The northern region has six districts and hosts 12 percent of the country's population.¹¹ These districts are Karonga, Chipita, Mzimba, Nkhata Bay, Rumphu and Likoma. The central region has ten districts and hosts 41 percent of the country's population.¹² The districts are Lilongwe, Mchinji, Kasungu, Dowa, Ntchisi, Nkhotakota, Dedza, Ntcheu and Salima. The southern region is made up of Mwanza, Neno, Blantyre, Machinga, Balaka, Mangochi, Thyolo, Phalombe, Mulanje, Zomba, Chiradzulu, Nsanje and Chikwawa, and hosts 47 percent of the country's population.¹³ The number of districts can be increased or decreased at any

⁸Malawi Government, URL: <http://Malawi.gov.mw>.

⁹Chapter 18:04.

¹⁰Roberts S 'Malawi' in Kritzer HM (ed) *Legal Systems of the World: A Political, Social, and Cultural Encyclopedia* (2002) M-11.

¹¹Lembani S *The Social, Economic and Political Profile for Malawi* (Unpublished) (2007) 2.

¹²As above.

¹³As above.

time as determined by the OPC. As a result, the number of districts has been varying since independence.¹⁴ Between July 1964 to April 1968, there were 23 districts. From May 1969 to January 1970 the number were reduced to 22. Chiradzulu District was merged with Blantyre in May 1969. From January 1970 to January 1971, there were again 23 districts. Chiradzulu District was again made a separate district in January 1970. From January 1971 to 1973 there were 24 districts. Mwanza District was created out of the western portion of Blantyre in January 1971.¹⁵ Recently, in the period between 1994 and 2003, four new districts were created.¹⁶

The Malawi population is currently estimated at 12.6 million¹⁷, with women comprising 51 percent of the total population. 85 percent of the population are in the rural areas.¹⁸ The country is not homogenous. There are several tribes. In the northern region there are, among others, Ngonis and Tumbukas.¹⁹ The Mang'anja, Yaos and Chewas are the largest groups in the

¹⁴Malawi attained political independence from Britain on 6th July 1964.

¹⁵Joffe SH *Political Culture and Communication in Malawi* (1973).

¹⁶Muula AS and Chanika ET *Malawi's Lost Decade 1994-2004* (2005).

¹⁷UNDP (n 4).

¹⁸The fact that a large population stays in rural areas is an important point to note since, as will be noted later in this Chapter, most courts are based in the urban areas. This has an implication on how women can access these courts and enforce their rights as provided in the Bill of Rights. A full discussion, however, on how this can limit the application of the Bill of Rights to African customary family laws is undertaken in Chapter 8.

¹⁹Green C and Baden S *Women and Development in Malawi* Report No. 23, May 1994,

southern and central regions, respectively.²⁰

Malawi's history dates back many centuries. It is believed that the Maravi²¹ started settling around Lake Malawi about 1 000 AD. The Maravi people had a political and social organisation²² that tended towards an inevitable decentralisation of the authority of the nevertheless powerful king, Kalonga, his clansman, Undi, and other tributary kings.²³ In most cases, the supremacy of a king over tribal groups was recognised. In the 16th century there was a vast trading empire established by the Maravi people. Slave trade, which ravaged most of Africa from the 16th century to the 19th century, left its imprints on Malawi's historical development.²⁴

The modern history of Malawi is linked with the Scottish missionary explorer, Dr David Livingstone (1813-1873), who reached the lake he named

accessed at <http://www.bridge.ids.ac.uk/reports.html> on 22/01/05

²⁰Miller D *Matriliny and Social Change: How are the women of rural Malawi managing?* paper presented to CASID on 2nd June 1996, accessed at <http://www.ca.encarta.msu.com/encuet/refpages/search.aspx?=chewa>, on 05/03/05.

²¹The Maravi consisted of the Chewa, Nyanja, Mang'anja, among others.

²²It is not intended here to give an analysis of the social structure of the different tribes in Malawi. On the political and social organisation of these tribes, see Von Benda-Beckmann (n 1) 81-91; and Ibik JO *Restatement of African Law: Malawi Vol 1, The Law of Marriage and Divorce* (1970).

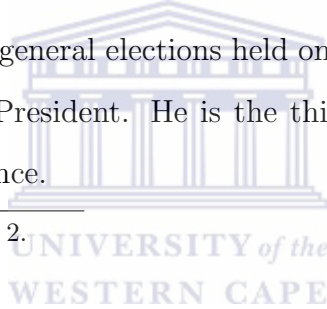
²³Lwanda JL *Kamuzu Banda of Malawi: A Study in Power, Promise and Paralysis (Malawi under Dr Banda 1961-1993)* (1993) 1.

²⁴As above, 2.

Lake Nyasa in 1859.²⁵ Following his appeal to other missionaries to come and fight the slave trade in Central and East Africa, the first missionary expedition of the UMCA arrived in Malawi in 1861. Later on, Christianity brought British colonial authority to Malawi and it became a British Protectorate in 1891.²⁶ Malawi attained political independence on 6 July 1964 with Dr Hastings Kamuzu Banda as the Prime Minister, before he became the first State President of Malawi on 6 July 1966. During the same year, Malawi was declared a one-party state. This position was, however, changed in the multiparty general elections held on 17 May 1994. Mr Bakili Muluzi won the general election and became the second President of Malawi. Following from that, in the multi-party general elections held on 20 May 2004, Dr Bingu wa Mutharika was elected President. He is the third and current president of Malawi since independence.

²⁵See also Lembani (n 11) 2.

²⁶Mutharika (n 2) 950.



2.3 Historical overview of court systems and customary laws in Malawi

2.3.1 Pre-colonial period

During the pre-colonial period, customary laws were administered by the king's *bwalo*. The *bwalo* was an open area under a tree in the village where the king and elders sat when dispensing justice. The young were expected to acquire knowledge of the customary laws of the land by paying close attention to the proceedings and judgments.²⁷

The lowest level of adjudication was the community dispute resolution structure. This first level of adjudication constituted a loose traditional *litis contestatio*.²⁸ The first level of appeal was the headman and, should this fail, the paramount king was the supreme court of appeal who had even the power to banish persons from society.²⁹

In all these cases, while the king or headman, as the case may be, was the

²⁷Chimango LJ 'Tradition and the Traditional Courts in Malawi' (1977) *CILSA* 39.

²⁸Bekker JC *Seymour's Customary Law in Southern Africa* (1989) 28.

²⁹Forster P 'Law and Society under a Democratic Dictatorship: Dr Banda and Malawi' (2001) *Journal of Asian and African Studies* 275 at 280. See also Koyana DS *Customary Law in a Changing Society* (1980) 128 who has noted a similar position to Malawi that the kings' and headmen's courts were the courts of first and final instance in the pre-colonial days in South Africa.

main adjudicator of the matter, anybody (including passers-by) who wished to put in questions and comments could do so.³⁰ The king's main duty was to figure out the consensus of the case and pass judgment from that consensus. The adjudicator and his or her councillors also controlled the proceedings of the case.³¹ The king could hear any case without any limitation either as a court of first instance or on appeal from the village tribunals.³²

The early most notable paramount kings in Malawian history are Kyungu, who controlled the Ngonde-Nyakusa people in the north, Chikulamayembe, who was the king of the Tumbuka people of the Nkhamanga kingdom in Rumphi and surrounding areas, and Kalonga of the Maravi empire, which at its peak stretched from Mozambique to eastern Zambia. The nineteenth century migration of the Nguni and their subsequent invasions saw the establishment of the Mbelwa and Gomani king paramouncies in the northern region and central region, respectively. In each of these kingdoms they had distinct customs and traditional values that were in some respects similar. As such, the customary law that was being applied in deciding cases continued to be confined to unwritten customs of the people of that kingdom.³³

The remnants of the pre-colonial justice system are the traditional leaders

³⁰Chimango (n 27) 40.

³¹See also Mandela N *Long Walk to Freedom. The autobiography of Mandela* (1994) 25 who also wrote about how it went at the king's palace, particularly meetings in South Africa, which is similar to how kings were handling cases in Malawi.

³²Chimango (n 27) 40.

³³Von Benda-Beckmann (n 1) 34.

court systems, observed in various parts of Africa.³⁴ In Malawi, it has been estimated that there are currently over 20 000 traditional leaders of varying levels of seniority who administer justice in almost every village.³⁵ These courts, as will be noted later, have not received any formal recognition after the colonial era, but continue to administer justice even after 1994.

The precolonial period and women's rights

In the area of women's rights, it is important to note that during the precolonial period Malawian society, just like in most African countries,³⁶ manifested a variety of attitudes and practices toward women, with women possessing political and social power in some systems and having little or no power in others. Thus, with regard to matrilineal societies in Malawi, Phiri³⁷ notes that a Chewa woman was looked upon as the root of a lineage (*tsinde*) which gave a woman high status and a certain amount of freedom, which was not present in patrilineal systems. This position was, however, overlaid

³⁴Bennett TW *Customary Law in South Africa* (2004) 135 also observes that the traditional rulers had been dispensing justice before colonisation and continued to do so after colonisation in South Africa.

³⁵Kanyongolo FE *Malawi: Justice Sector and the Rule of Law* (2006) 21.

³⁶See the discussion by Gellar S., 'The Colonial era' in Martin P and O'Meara P (eds) *Africa* (1995) 135 at 139-140.

³⁷Phiri IA *Women, Presbyterianism and Patriarchy: Religious Experience of Chewa Women in Central Malawi* (2000) 35.

by Christianity and colonialism.³⁸ It will be noted in the following section that Christianity and colonialism came as male domination and anything that was incompatible with this perspective was crushed. Women were not a special case in the impact which Christian missionaries made upon 19th century Africa.³⁹ Further disruptions were seen when colonialism introduced a new form of marriage aimed at improving the rights of women. Unfortunately the new form of marriage produced a lot of inequities for the majority of women because of the differences in expectations of women and men. The new marriage had a major effect on women's legal status, and gave rights of succession to property to spouses and children which were not generally recognised in customary law. This position, it is could be argued, created a lot of conflicts when the applicable law to a particular dispute had to be determined in court.

In the following section, what happened after Malawi was colonised is presented.

2.3.2 Colonial period

In the preceding section, it has been noted that kings of different tribes were the main adjudicator in the customary court setting. The customary

³⁸As above.

³⁹Hastings A *African Catholicism: Essays in Discovery* 36 as cited by Phiri (as above) 48.

laws that were being applied in deciding cases were confined to unwritten customs of the people of a particular tribe. After Malawi had been colonised the following developments took place.

Court system

After Malawi had been colonised the general legal system of the Protectorate was founded upon the *British Central Africa Order in Council, 1902* (the Order). The standards of the Malawi court system were set by a HC⁴⁰ and the MC below it. Throughout this period the HC structure was a four-tiered one. In the early years, between 1902-1946, there was the Judicial Committee of the Privy Council at the apex based in London, followed by the East African Court of Appeal which ordinarily sat in Zanzibar.⁴¹ The HC of Nyasaland and its SC were under the East African Court of Appeal. When Malawi became recognised administratively as part and parcel of the Rhodesia and Nyasaland Federation in 1953, the East African Court of Appeal was replaced by the Rhodesia and Nyasaland Court of Appeal; later known as the Federal Supreme Court.⁴² This system was primarily administering common law

⁴⁰Art. 15 (1) of the Order created a HC with full jurisdiction, civil and criminal, over all persons and over all matters in the Protectorate.

⁴¹Chimango (n 27) 44.

⁴²In 1953, the British colonial authorities formed the Federation of Rhodesia and Nyasaland, comprising of the then Southern Rhodesia (now the Republic of Zimbabwe), Northern Rhodesia (now the Republic of Zambia) and Nyasaland (now the Republic of Malawi).

and was not applying customary laws.⁴³ Even though the HC did not apply customary laws, the colonial power, as it will be noted later in the discussion, continued to recognise the application of customary laws in the chiefs' courts albeit with limited jurisdiction.⁴⁴

SC were created by the *Subordinate Courts Ordinance*.⁴⁵ Initially there were the following SC: District and Sub-District courts; and District Native and Sub-District Native courts. Magistrates in these courts were the district and assistant district residents.⁴⁶ They exercised the function of magistrate in the District and District Native courts as well as Sub-District and Sub-District Native courts.⁴⁷ As was the case with the kings' courts during pre-colonial period, these magistrates also exercised both administrative and judicial functions. Thus, there was no separation of powers.

Jurisdiction of District and Sub-District courts was limited to cases where Europeans and Asians were parties.⁴⁸ Appeals from Sub-District courts could be lodged in the district courts. Obviously these courts could not have been expected to apply customary laws to Europeans. On the other hand, the jurisdiction of District Native and Sub-District Native courts was limited to legal disputes between Africans. These courts could apply customary laws

⁴³Allott AN *Judicial and Legal Systems in Africa* (1962) 62.

⁴⁴This has also been noted by Chimango (n 27) 45.

⁴⁵Ordinance No. 5 of 1906.

⁴⁶Von Benda-Beckmann (n 1) 37.

⁴⁷As above.

⁴⁸Von Benda-Beckmann (n 1) 37.

under certain conditions.⁴⁹ Appeals from Sub-District Native courts could be lodged in the District Native courts, and from both these courts⁵⁰ appeals could be made to the HC.⁵¹ It can, therefore be submitted that HC was applying customary laws when presiding over an appeal from a SC in which customary law was applied.

It should, however, be noted that during the colonial period, the judicial institutions of the African population were not legally recognised in the court system. They, however, continued to deliver justice in the villages.⁵² Seen as a move towards the recognition of the judicial institutions of the African population, the *District Administration (Native) Ordinances* of 1912 and 1924⁵³ opened the possibility that certain chiefs and village headmen could be authorised to administer justice in certain spheres and with limited administrative powers. However, no use was made of this authorisation.⁵⁴ As earlier noted, the absence of legal recognition did not mean that customary courts ceased to function. Many reports show that chiefs and village headmen continued to exercise judicial functions, and in some places written records of the proceedings were kept.⁵⁵

⁴⁹Chimango (n 27) 45.

⁵⁰The District and Sub-District, and the District Native and Sub-District Native courts.

⁵¹Von Benda-Beckmann (n 1) 38.

⁵²As it will be shown later in the discussion, this position continued during the one-party rule of Dr Banda, as well as after 1994.

⁵³Ordinance No. 13 of 1912 and No. 11 of 1924, Sections 11 and 13 respectively.

⁵⁴See Von Benda-Beckmann (n 1) 38 and Chimango (n 27) 45.

⁵⁵Von Benda-Beckmann(n 1) 39.

It is also important to note that, during the colonial period, magistrates and the HC could, however, not effectively dispose of all causes between Natives in the districts.⁵⁶ Thus, a large number of matrimonial cases, which were brought before the District Resident Magistrates, were eventually sent to the chief's village where they were settled by the chief in spite of the absence of a provision authorising them to do so.⁵⁷ As earlier noted, many of these chiefs' court disputes were confined to administer 'native law and custom' in both civil and criminal cases in so far as the customs were not repugnant to justice and morality or inconsistent with the provisions of any written law in force in the Protectorate.⁵⁸

The lack of formal recognition of the chiefs' status in connection with the administration of local justice continued until 1933.⁵⁹ The *Native Courts Ordinance* of 1933 brought the following changes: Native Courts had to be established in accordance with customary laws and their jurisdiction was circumscribed in a warrant; the jurisdiction of these courts were limited to legal disputes between Africans; and these courts had to apply customary laws. Apart from customary law, these courts could also apply administrative regulations issued by the Provincial and District Commissioners or those issued by themselves in their capacity as Native authorities. In the area of marriage, Native Courts presided over marriage disputes resulting from

⁵⁶Chimango (n 27) 46.

⁵⁷As above.

⁵⁸As above.

⁵⁹Chimango (n 27) 45.

marriages under customary law or Islamic laws.⁶⁰ This position was almost similar to that in South Africa. During the colonial period in South Africa, the Minister could authorise traditional leaders, approved by government, to hear civil and minor criminal cases and apply customary laws.⁶¹

Another point worth noting is that the chiefs' court system was not part of the HC system. Appeals from the chiefs' court were heard by the Native Commissioners before landing in the HC.⁶²

It should be noted that the introduction of Native Courts meant that Malawi had officially received a two-tiered judicial system which was connected by the HC. However, the appointment of chiefs and village headmen as native authorities did not mean that the traditional judicial system had been re-established in its original form. It happened that those who were chiefs according to customary laws were not necessarily considered as chiefs. Instead, Africans that were favoured by the administrators were appointed as chiefs.⁶³ This, obviously, suggests that the appointed chiefs may not have been very knowledgeable with regard to the traditions of the people. Agreeing with Chimango,⁶⁴ the possible bias in quasi-political issues by these appointed chiefs also cannot be ruled out.

⁶⁰Von Benda-Beckmann (n 1) 42.

⁶¹See discussion by Bennett TW *Human Rights and African Customary Law under the South African Constitution* (1995) 139.

⁶²Chimango (n 27) 46.

⁶³Von Benda-Beckmann (n 1) 43-44.

⁶⁴Chimango (n 27).

In 1947 the Native Courts were renamed African Courts.⁶⁵ The *Local Courts Ordinance* of 1962⁶⁶ extended the jurisdiction of local courts to include legal disputes between Africans and non-Africans. This recognition, it has been said, was a concession to a long-standing demand by Africans, who suspected that Europeans could often escape justice, particularly in affiliation cases, as they could not be sued in the Native Courts.⁶⁷ It is submitted that the 1962 *Local Courts Ordinance*, by extending the jurisdiction of Local Courts to non-Africans, offered some protection to the rights of women and children within customary laws.

Recognition and application of customary laws

As regards the recognition and application of customary laws, the Order provided that, if the case before a court involved Africans, the court should be guided by customary laws.⁶⁸ Art. 20 of the Order, however, did not mean that customary laws became a constituent component of the general law of Malawi.⁶⁹ This position, as it will be noted later, is to be contrasted to the period after 1994 where customary law is part of the law to be administered

⁶⁵ *African Courts Ordinance* No. 17 of 1947.

⁶⁶ Ordinance No. 8 of 1962.

⁶⁷ Von Benda-Beckmann (n 1) 44.

⁶⁸ Art. 20 of the Order.

⁶⁹ See also Von Benda-Beckmann (n 1) 60.

by all courts.⁷⁰

In addition to the above, the recognition of customary laws was also to be found in Art. 28 of the Order which provided that ‘where other provisions had not been made by Ordinance, any law, practice, or procedure established by or under the Africa Orders should, until other provision was made, continue to exist, as if this Order had not been made’.⁷¹

Limitation on the application of customary laws

Having discussed the court system and the recognition of customary laws during the colonial period, it should be noted that the application of customary law, just like everywhere else in the British African possessions where English law was introduced, was subjected to the so-called repugnancy principle.⁷² Customary laws were only applicable in so far as they were not ‘repugnant to the principles of justice and morality’ or ‘inconsistent with any law in force’.⁷³ The repugnancy principle limited the application of customary law.

⁷⁰See Section 200 of the Malawi Constitution.

⁷¹Chimango (n 27) 44.

⁷²Von Benda-Beckmann (n 1) 61; Bennett (n 53) 58.

⁷³Art. 20 of the Order provided that: ‘In all cases, civil and criminal, to which natives are parties, every court shall (a) be guided by native law so far as it is applicable and is not repugnant to justice and morality or inconsistent with any Order-in-Council or Ordinance and (b) shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay’. See the continuation of this rule under Section 12 (d) of the *Local Courts Ordinance* No. 8 of 1962.

This principle saw the *mwabvi* ordeal, for example, prohibited on the basis that it was repugnant to principles of justice.⁷⁴ The *mwabvi* ordeal was a poisonous substance extracted from the bark of a tree and mixed with water.⁷⁵ In court the *mwabvi* was given to the accused person. If the accused vomited, his innocence was proved. If he died, it was proof that he was offender.⁷⁶

Thus Obiagwu and Odinkalu⁷⁷ note that the repugnancy principle comes from the English common law standard and is meant for judicial overview over applicable rules of custom. As it will be noted later, this limitation on the application of customary laws continued even during Independence⁷⁸ as well as the period after 1994.⁷⁹

It could be argued that, since the repugnancy principle did not take into account the notions and interpretations of African justice, the principle diluted customary law. This, invariably, affected the delivery of justice as it was seen in the eyes of the Africans.

⁷⁴Forster (n 29) 279.

⁷⁵Von Benda-Beckmann (n 1) 145.

⁷⁶As above. See also Forster (n 29) 281.

⁷⁷Obiagwu C and Odinkalu CA, 'Nigeria: Combating Legacies of Colonialism and Militarism', in An-Na'im AA (ed) *Human Rights Under African Constitutions: Realising the Promises For Ourselves* (2003) 211 at 235.

⁷⁸See Section 12 of the 1966 (Constitution) Act.

⁷⁹The discussion on how the application of customary laws can be limited occurs in Chapter 5.

Colonial period and women's rights

Before looking at the position of customary laws and the court system in the period after Independence, it is important to note that during the colonial period, some European's judgments of African morality had an important effect on women's rights. They led to a willingness to intervene in African customary marriages.⁸⁰ African sexual morality and the position of African women were severely condemned. Thus, Chanock has said that the European's mission appeared to be both the liberation of women and the improvement of morality.⁸¹ According to him, the colonialists regarded Lomwe⁸² morality to be of a low standard. In Lomwe morality adultery was not considered as an offence, in that women were often shared amongst tribesmen.⁸³ With the Mang'anja⁸⁴, the chastity of a woman and her feelings for being punished was not considered. It was also their custom to occasionally exchange wives with a friend or for money value to any stranger.⁸⁵

It has further been observed that the repugnancy clause was used, for the most part, to protect women's rights. These included: trying to prevent

⁸⁰Chanock M *Law, Custom and Social Order: The Colonial Experience in Malawi and Zambia* (1998) 148.

⁸¹As above.

⁸²This tribal group is found in Mulanje, a district located in the southern part of Malawi.

⁸³Chanock (n 80) 148.

⁸⁴This tribal group is also found in Mulanje district.

⁸⁵Chanock (n 80) 148.

early marriages; preventing girls to be pledged into marriages; facilitating women's right to custody of children; and granting women the right to initiate divorce.⁸⁶

The above position, however, did not have much impact on discriminatory customary family laws affecting women. As earlier noted, most customary family law cases continued to be applied by chiefs' courts and were not part of the formal court system. This position meant that many family customary rules were not subjected to the repugnancy principle which could only be applied in the formal court system. The implication for women, it is submitted, was that discriminatory customary family laws continued to violate their human rights.

Furthermore, British colonial rule accepted the continuation of polygamy provided it was not combined with other forms of marriages, such as civil marriages.⁸⁷ From the protection of women's rights point of view, we see that, in allowing the continuation of polygamy, colonialism was in support of a system that is viewed as subjecting women to an inferior status. The practice of polygamy, as will be discussed later in Chapter 4, is, arguably, incompatible with the equality principle as provided by Section 20 of the

⁸⁶Palley C *The constitutional history and law of Rhodesia 1888-1965* as cited by Banda F 'Women, Law and Human Rights in Southern Africa' (2006) *Journal of Southern African Studies* 13 at 14.

⁸⁷Nmehielle VO *The African Human Rights Systems: Its Law, Practice and Institutions* (2001) 27.

Malawi Constitution, since it allows only men to have more than one wife and not women to have more than one husband. Therefore, by allowing the continuation of polygamy, the colonialists continued to allow the traditional violation of women's right to equality.

2.3.3 Post colonial period

In the preceding section it has been noted that, before Independence, native courts were based on the *African Courts Ordinance*.⁸⁸ The Ordinance empowered the Governor to authorise the Provincial Commissioners to establish native courts and to declare by warrant the area in which they should exercise jurisdiction. These courts administered African law and custom in the area delimited by the warrant.⁸⁹ These courts had certain civil and criminal jurisdiction but could not deal with cases involving matters arising from marriages, except those contracted under Muslim law or African law and custom.⁹⁰ The chief in each area invariably presided over the court. This position, as earlier noted, was, however, changed with the coming into effect of the *Local Courts Ordinance*.⁹¹ The *Local Courts Ordinance* repealed the *African Courts Ordinance* and also removed the judicial powers of the

⁸⁸No. 17 of 1933 Ordinance.

⁸⁹Section 12 (a) of the *African Courts Ordinance*.

⁹⁰Section 11 (b) of *African Courts Ordinance*.

⁹¹No. 8 of 1962.

chiefs.⁹² The new Ordinance gave the Minister of Justice power to establish by warrant 'such local courts as he shall think fit'.⁹³ Just like under the *African Courts Ordinance*, these courts had jurisdiction over marriages contracted under Muslim law or African law and custom.

After the attainment of republic status,⁹⁴ Malawi retained the two-tiered court system⁹⁵ that shared jurisdiction in certain matters. On the one hand, there were the TC system with the NTAC as the highest court. On the other hand, there was the SC, the HC and SCA (the HC system). This system of legal dualism has been noted to be an inheritance from the colonial period.⁹⁶ The two systems will now be discussed separately, making some comparisons with other jurisdictions.

The western HC system was made up of the SCA, the HC and the SC. The SCA was at the apex of the HC system. It was established under Section 67 of the 1966 Constitution of Malawi. Its establishment saw the abolition of appeals from the HC to the Privy Council.⁹⁷ The SCA had no original jurisdiction; it only heard appeals from the HC against final decisions in civil

⁹²Section 3 (2) of the *Local Courts Ordinance*.

⁹³Section 3 (1) of the *Local Courts Ordinance*.

⁹⁴Malawi became a Republic on 6th July 1966.

⁹⁵Machika MRA *The Malawi Legal System: An Introduction to Legal Systems in Malawi* (Unpublished) (1983) 3.

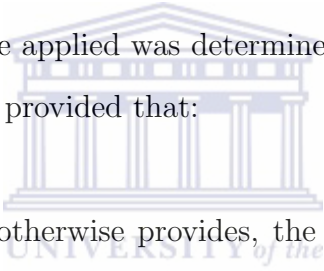
⁹⁶Forster (n 29) 280.

⁹⁷As above.

and criminal proceedings.⁹⁸ Since the SCA heard appeals from the HC, the law that was administered was the same as that of the HC. The question of whether this court was applying customary law is examined when discussing the HC in the following paragraph.

The HC had both original and appellate jurisdiction. With regard to appellate jurisdiction Section 69 of the 1966 Constitution Act provided that ‘the HC could hear appeals from final decisions of the SC and local courts’. It is, however, interesting to note that the TCs were not subordinate to the HC. As will be seen later, the TCs had a separate system of appeal.

The law that was to be applied was determined by Section 15 of the 1966 Constitution Act, which provided that:



‘Until Parliament otherwise provides, the civil and criminal jurisdiction of the Supreme Court of Appeal, the High Court, and subordinate courts (including Traditional Courts) shall, subject to this Act and any law in force in Malawi, be exercised in conformity with the **existing laws** and the substance of the common law and the doctrines of equity’. [Emphasis added]

From the foregoing provision it is noted that the 1966 Constitution Act made no reference to customary law.⁹⁹ The application of customary laws in the

⁹⁸Section 68(1) of the 1966 Constitution Act.

⁹⁹See also Roberts (n 10) M-13.

HC may be assumed on the basis that customary law was part of the law in force in Malawi immediately prior to 6th July 1966.¹⁰⁰ Furthermore, the above provision and Section 62 of the 1966 Constitution Act provided that the HC had unlimited original jurisdiction ‘to hear and determine any civil and criminal proceedings under any law’.¹⁰¹ From this wording it could be argued that the HC had power to administer customary law as part of the ‘existing laws’ and ‘any laws’, as referred to in Sections 15 and 62 respectively.

It is also interesting to note that Section 15 was in contrast to the earlier provisions under the 1964 Independence Act. Under the 1964 Independence Act, the HC was to be ‘guided by customary law so far as is applicable and is not repugnant to justice or morality or inconsistent with any (other) law’ in cases to which Africans were parties.¹⁰² In addition to the above, the 1964 Independence Order made provision for the continuation of the existing laws.¹⁰³ Without such express provision in the later 1966 Constitution Act, it could be argued that the drafters of the 1966 Constitution Act intended that the HC should not apply customary law.

It should, however, further be noted that the 1964 Constitution Act was not very clear on the status and jurisdiction of local courts.¹⁰⁴ The local courts,

¹⁰⁰As above.

¹⁰¹Section 62 of the 1966 Constitution Act.

¹⁰²Section 16 (b) of the 1964 Independence Act.

¹⁰³Art. 5 of the 1964 Independence Order.

¹⁰⁴Roberts S ‘The Constitution of Malawi, 1964’ (1964) *Journal of African Law* 178 at 180.

as noted in the preceding section, were under the control of the Minister of Justice and were excluded from the supervisory jurisdiction of the HC. It was also understood, based on Section 2 of the 1964 Independence Order, that local courts were not subordinate to HC.¹⁰⁵

With regard to appeals from the SC, in which customary law had been applied, the cases seem to suggest that the HC could apply customary laws in Malawi.¹⁰⁶ But, in principle, because the appeal system was complicated, the HC was not administering customary law.¹⁰⁷ It should also be noted that this position is similar to the current position after 1994.

The SC had original jurisdiction to hear both criminal and civil matters. Unlike the SCA and the HC, the SC had no appellate jurisdiction to hear any appeals from any other court. The TCs were not channeling their appeals to these courts. In contrast, the SC of South Africa had both original and appellate jurisdiction. As appellate courts, they could hear appeals from the final judgments of chiefs' courts.¹⁰⁸ These courts, however, were supposed to

¹⁰⁵According to Section 2, 'SC' means any court subordinate to the HC established under the provisions of this Ordinance but does not include an African court established under the *African Courts Ordinance* or any other Ordinance replacing the same.

¹⁰⁶See, for example, *Kandoje v Mtengerenji*, 1964-66 MLR 558 as cited by Judge Unyolo in *Mungomo v Mungomo*, Matrimonial Cause No. 6 of 1996, HC, Principal Registry (Unreported) 4.

¹⁰⁷See Chimango (n 27) 52 for a detailed explanation of this appeal system.

¹⁰⁸Section 12 (4) of the *Black Administration Act* of 1927.

apply customary law only.¹⁰⁹ The law that was applied was the same as that discussed above in connection with the HC.

On the other hand, the TC system was recognised by the 1962 *Traditional Court Act*.¹¹⁰ Just as it was during the colonial period, these courts were to apply customary laws in civil cases and minor criminal offences. Members of the local courts were appointed by the Minister of Justice. The presiding adjudicator was appointed as chairman. In civil cases the chairman was expected to sit with at least one assessor. The judgment was determined by the chairman alone; the assessor had only an advisory function. The jurisdiction of these local courts was still limited to legal disputes between Africans. In 1967 some local courts were granted the wider jurisdiction to deal with disputes between Africans and non-Africans.¹¹¹ In 1969 the local courts were renamed Traditional Courts.¹¹² Appeals against the decisions of the local courts went to the Local Appeal Courts. A Local Appeal Court consisted of three local courts' chairmen from the area concerned. The HC, as the highest court of appeal, heard appeals against the decisions of Local Appeal Courts. In the HC the judge was assisted by three assessors who could advise him on questions of customary laws.¹¹³

¹⁰⁹Bekker (n 28) 16.

¹¹⁰*Traditional Court Act*, No. 8 of 1962.

¹¹¹Von Benda-Beckmann (n 1) 47.

¹¹²*Local Courts (Amendment) Act*, No. 31 of 1969.

¹¹³Von Benda-Beckmann (n 1) 47-48.

However, during the 1970s President Dr Hastings Kamuzu Banda extended the criminal jurisdiction of TCs and authorised TCs to try capital offences, including murder, rape and treason. Dr Banda, who ruled Malawi with an iron fist from independence in 1964 to 1994, felt that the notions of justice and the court procedures of the English law based HC system did not conform to the notions of justice in the African context.¹¹⁴ The TC system was supposed to work in parallel with the HC system, respecting the traditional notions of crime, innocence and justice thereof.¹¹⁵

These TCs were not courts based on the customary laws of Malawi as Dr Banda had intended everyone to believe, but rather courts created by Dr Banda to ensure the outcome of political trials. Judges were appointed by Dr Banda and were not required to have any legal training.¹¹⁶ Dr Banda was of the view that the British magistrates and judges were acquitting people whom in the traditional understanding would have been found guilty. This view led to most criminal cases being tried in the TC. The TC did not allow for legal representation, a feature which could be likened to the chiefs' court procedure before independence.¹¹⁷

¹¹⁴Phiri KM 'Dr Banda's Cultural Legacy and its implications for a Democratic Malawi' in Phiri KM and Ross KR (eds) *Democratisation in Malawi: A Stocktaking* (1998) 147 at 159. See also Forster (n 29) 283.

¹¹⁵Dr Banda, speeches for the period 1964-1971, Information Department as cited by Phiri (n 114) 159.

¹¹⁶Human Rights Watch *Malawi* accessed at <http://www.hrw.org/reports/1989/WR89/Malawi.htm> accessed on 13/05/04.

¹¹⁷As above.

The notion of traditional law, ‘that there is no smoke without fire’, was understood to be the true picture of African justice because it could achieve a 100 percent conviction rate.¹¹⁸

Generally the law that was to be applied by the TC was provided for by Section 15 of the 1966 Constitution Act as discussed above in connection with the HC system. In addition to the above, the specific law that was administered by the TC was set out in Section 12 of the *Traditional Court Act*. For purposes of this discussion, subsection (c) and (d) are of much relevance, and state as follows:

‘Subject to this Act, a Traditional Court shall administer-

(c) the provisions of all rules, orders, regulations or by-laws made under the Local Government (District Council) Act and in force in the area of the jurisdiction of the court;

(d) the customary law prevailing in the area of the jurisdiction of the court, so far as it is not repugnant to justice, or morality or inconsistent with the constitution or any written law in force in Malawi’.

The foregoing provision makes it clear that all TC had jurisdiction to administer customary laws, subject to the principle of repugnancy.

¹¹⁸Wanda B ‘Colonialism, Nationalism and Tradition: The evolution and development of the Legal System of Malawi’ as cited by Forster (n 29) 281.

The TC system consisted of NTAC, RTCA, DTCA, DTC and Grade A & B TCs.¹¹⁹ These courts had jurisdiction over all cases, including murder and treason. The NTAC was composed of a chairman, appointed by the Minister of Justice, and such other members as the Minister may appoint.¹²⁰ In practice it meant courts composed of three traditional chiefs, one of whom was the chairman.

Just like the SCA in the HC system, the NTAC had no original jurisdiction. It was also the final court in the TC system. As such, if one felt aggrieved by the decision of this court, there was no other court to which one could appeal. But, unlike the SCA which heard appeals only from the HC and not from the SC, the NTAC heard appeals from the DTC, RTCA and DTCA.¹²¹ The law that was applied by NTAC was the specific law that ought to have been applied by the lower court from against whose judgment the appeal was to be heard.

The RTC was established by a ministerial warrant under Section 3 of the *Traditional Courts Act*. There were three RTC, one located in each region.¹²² The composition of the court was the same as that of the NTAC. In terms of jurisdiction, these courts were exercising original criminal jurisdiction only.

¹¹⁹Machika (n 95) 18.

¹²⁰Section 33 (2) of the *Traditional Courts Act*. It should be noted that President Banda for a greater part of his 30 year rule was also the Minister of Justice.

¹²¹See Section 34 (1) of the *Traditional Courts Act*.

¹²²Malawi, being divided into three regions, namely: the north; south; and central regions, each region had an RTC.

This was provided for in the Regional Traditional Courts (Criminal Jurisdiction) Orders.¹²³ Among other offences, they tried cases of witchcraft, morality, murder, manslaughter, theft, and treason. As already alluded to, during Dr Banda's rule most people who were seen to be disagreeing with him were charged with treason in these courts and not in the HC.¹²⁴

The law that was applied by these courts was the *Penal Code*¹²⁵ and other Acts that created offences over which they had jurisdiction. These courts, it is submitted, were not applying customary laws, since the Penal Code is based purely on English common law and not customary laws.

The DTCA was established by ministerial warrant under Section 33(1) of the *Traditional Courts Act*. The court was composed of a chairman, who was appointed by the Minister, and such other members as the Minister might appoint.¹²⁶ In practice, however, the court consisted of a chairman and one assessor. The assessor was selected from a panel of assessors appointed by the Minister. The jurisdiction of the court was specified in the warrant establishing such a court.¹²⁷ This court was a court of appeal only. It could hear appeals from local courts in the areas within which it had jurisdiction it

¹²³These Orders were made under Section 13 of the *Traditional Courts Act*.

¹²⁴See, for example, *Chirwa and Chirwa v R*, Criminal Appeal Case No. 5 of 1983, NTAC (Unreported), in which the accused persons were charged with treason and initially tried in the RTC.

¹²⁵Chapter 7:01.

¹²⁶Section 33 (2) of the *Traditional Courts Act*.

¹²⁷Section 33 (4) of the *Traditional Courts Act*.

terms of its warrant.¹²⁸ Any person who had been aggrieved by any judgment in any civil or criminal proceedings before any traditional court (other than the RTCA, DTC and NTAC) could appeal to the DTCA.¹²⁹ In effect, these courts only heard appeals from Grades A and B TC. The law that was applied was the same as that applied in the Grades A and B courts, as will be seen below.

The DTC and Grades A and B TC were established by ministerial warrant under Section 3 (1) of the *Traditional Courts Act*. They were composed of a chairman, who was appointed by the Minister, and other members elected by the Minister. It was also required that each court should sit with one assessor chosen by the chairman from a panel of assessors appointed by the Minister.¹³⁰ In terms of jurisdiction, all these courts had original jurisdiction over both civil and criminal cases. The DTC, however, was more powerful than the Grades A and B courts: they could hear all cases, except those involving customary laws. The cases that the DTC heard were the ones that occurred in the districts and were beyond the jurisdiction of Grades A and B courts. The DTC were not applying customary laws.

Grades A and B courts were generally situated at the chiefs' headquarters. They were mostly trying cases involving customary laws and petty criminal offences that originated in their jurisdiction.

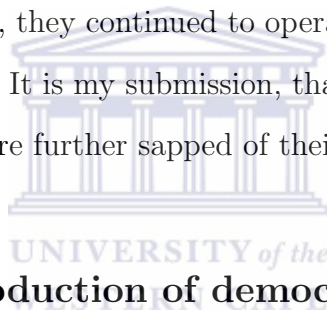
¹²⁸Section 33 (6) of the *Traditional Courts Act*.

¹²⁹Section 34 (2) of the *Traditional Courts Act*.

¹³⁰Section 4 (1) and 4 (4) of the *Traditional Courts Act*.

In conclusion, it should be recalled that the initial aim of these TC was to administer justice as understood by the society within which context the courts were operating. However, as time went by, Dr Banda started using these courts as a tool to annihilate his opponents. By the time Dr Banda stepped down,¹³¹ as Phiri puts it, ‘there was a cultural dimension to the revolt against his regime’.¹³² Consequently the TC system was immediately abandoned, as Dr Banda laid down the reins of power.

It should, however, be noted that the chiefs’ courts, as understood before the colonial period, were still there, but not as part of the TC system as one would expect. Moreover, they continued to operate with limited jurisdiction as before Independence. It is my submission, that with the establishment of the TC system, they were further sapped of their jurisdiction.



2.3.4 After introduction of democracy in 1994

In the preceding subsection it was noted that Section 62 (1) of the 1966 Constitution Act granted the HC unlimited original jurisdiction in civil and criminal proceedings.¹³³ In the area of customary family laws, a spouse could commence proceedings in the HC.¹³⁴ SC, excluding TC could not handle

¹³¹Dr Banda stepped down in 1994 having ruled Malawi for 30 years.

¹³²Phiri (n 114) 164.

¹³³See also the judgment of Mwaungulu J in *Likaku v Likaku*, Matrimonial Cause No. 10 of 1999, HC, Principal Registry (Unreported).

¹³⁴Mwaungulu J (as above) 2.

divorce.¹³⁵ Their jurisdiction was limited by Section 39 (2) (e) of the *Courts Act*¹³⁶ which provided that:

‘Notwithstanding subsection (1), no subordinate court shall have jurisdiction to deal with, try or determine any civil matter except as specifically provided in any written law for the time being in force, wherein the validity or dissolution of **any marriage** is in question’. [My emphasis]

Section 11 (a) of the *Traditional Courts Act*,¹³⁷ however, gave jurisdiction generally to courts under the *Traditional Courts Act*, 1962 over customary law marriages. TC ordinarily granted divorce in a customary law marriages. Customary laws determined most rights and obligations of spouses and children in these courts. This position, however, did not oust the unlimited original jurisdiction of the HC over customary law marriages. Such jurisdiction was conferred by virtue of Section 11 (b) of the *Courts Act*. Appeals from the TC lay to the HC.¹³⁸ As earlier noted, this position, however, was changed with the introduction of the NTAC.¹³⁹ All appeals were being chan-

¹³⁵As above.

¹³⁶Chapter 3:02.

¹³⁷Chapter 3:03.

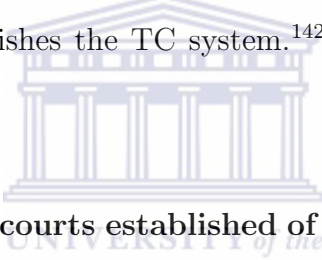
¹³⁸See *Kandoje v Mtengerenji* 1964-66 MLR 558 as cited by Unyolo J in *Mungomo v Mungomo* (n 106) 4.

¹³⁹These courts were introduced in 1969 by the *Local Courts Amendment Act* No. 31 of 1969 and usurped the power of the HC.

neled to the NTAC.¹⁴⁰ The NTAC has now been abolished; and TC no longer exist, having been integrated into the MC structure in or about 1994. After 1994 the following important developments took place.

Court system and its jurisdiction after 1994

After 1994 courts and their powers are defined in the Malawi Constitution.¹⁴¹ However, unlike the position during the 1964-1994 period, the Malawi Constitution merged the HC and the TC system into a single system. In effect, Section 103 (3) of the Malawi Constitution, which provides for the merging of the two systems abolishes the TC system.¹⁴² The said section provides that:



‘There shall be **no courts established of superior or concurrent** jurisdiction with the Supreme Court of Appeal or the High Court’. [Emphasis added]

¹⁴⁰See, for example, *Mikwanda v Nachuma* Civil Appeal Case No. 64 of 1979, NTAC (Unreported); *Menasi v Balakasi*, Civil Appeal Case No. 98 of 1979, NTAC (Unreported); and *Mzumala v Gondwe*, Civil Appeal Case No. 110 of 1979, NTAC (Unreported).

¹⁴¹See chapter IX of the Malawi Constitution.

¹⁴²Mwambene L ‘Malawi: The melting pot of customary law: A comparative analysis’ (2006) *Walter Sisulu University Law Journal* 67 at 75.

On the basis of the above section it could be argued that the Malawi Constitution abolishes TC system.¹⁴³ TC were transformed into MC, which continued to hear customary law matters. Since SC had, before 1994, no jurisdiction to grant divorce in customary law marriages, this created a legal gap as no specific legal provision was made for SC to assume jurisdiction in divorce of customary law marriages. It was only in 2000 that an amendment to the *Courts Act*¹⁴⁴ was made, giving SC the power to grant divorce in African customary law marriages.¹⁴⁵ After the amendment MC have been exercising their jurisdiction to determine the validity of, or dissolve, such marriages.¹⁴⁶

¹⁴³It should, however, be noted that the coming into effect of the Malawi Constitution has not disturbed the chiefs' courts in the various villages in Malawi. These courts, as was the case in the colonial and independence eras, are not formally recognised, but continue to deliver justice.

¹⁴⁴*Courts (Amendment) Act* 2000.

¹⁴⁵Interview with Judge C of the HC in Blantyre at that time, 10 May 2006.

¹⁴⁶See, for example, *Tafere Mafusa v Exton Mtemankhwawa*, Civil Cause No. 136 of 2006, Mzuzu MC (Unreported) in which a woman successfully got a divorce decree from a MC. Other unreported case examples are: *Gracian Villi v Halliet Mphundi*, Matrimonial Cause No. 126 of 2006, Mzuzu MC (Unreported); *Francis Phiri v Cecelia Phiri*, Civil Cause No. 483 of 2005, Lilongwe MC (Unreported); and *Patricia Banda v Andrew Banda*, Civil Cause No. 321 of 2004, Blantyre MC (Unreported), in all of which MCs dissolved customary marriages.

In addition to the above, after 1994 courts were organised in a hierarchy. The lowest courts are SC with appeals lying to the HC and SCA.¹⁴⁷ A brief discussion of each court follows.

Section 110 of the Malawi Constitution provides for the establishment of SC to be presided over by professional and lay magistrates. In June 2006 there were a total of 193 magistrates in posts, of which only 30 were professional magistrates.¹⁴⁸ The minimum academic qualification of lay magistrates is a secondary school certificate. Some chiefs, who were previously presiding in TC applying customary laws, have also been integrated into the judiciary as magistrates. These lay magistrates have now received some legal training at the Staff Development Institute in Mpemba on rules of English court procedure and human rights law. Arguably this group of magistrates may be better equipped with rules of customary laws having come from the TC.

On the other hand, professional magistrates are generally holders of a law degree. They receive their academic education at the Law Faculty, Univer-

¹⁴⁷See, for example, *Mungomo v Mungomo*, Civil Cause No. 23 of 2002, as cited by Kanyongolo (n 35) 46, in which a person, who was dissatisfied with the dissolution of her customary marriage by the MC, successfully appealed against that court's decision to the HC. Other unreported cases are: *Willie Malilo v Martina Malilo*, Civil Appeal Case No. 8 of 1997, HC, Lilongwe District Registry; *Zindawa AB v Zindawa E*, Civil Appeal Case No. 27 of 2002, HC, Lilongwe District Registry; *Bennings Manda v Jane Mpata*, Civil Appeal Case No. 59 of 2005, HC, Mzuzu District Registry; and *Temwanani Nkhonjera v Sebesian Gwengwenya*, Civil Appeal Case No. 9 of 2004, HC, Mzuzu District Registry.

¹⁴⁸Kanyongolo (n 35) 41.

sity of Malawi. They do not, however, usually receive any instruction in customary laws, as this subject is rarely taught at this University.¹⁴⁹ This obviously suggests both lack of knowledge of the traditions of the people and a possible bias toward English law.

Section 108 (1) of the Malawi Constitution provides that the HC has ‘unlimited original jurisdiction to hear any civil or criminal proceedings under any law’. The phrase ‘under any law’ obviously includes customary laws. Therefore, Section 108 (1) of the Malawi Constitution grants original jurisdiction to the HC to preside over customary law cases. Confirming its original jurisdiction over customary marriages, Judge Unyolo stated in *Mungomo v Mungomo*,¹⁵⁰ that ‘Section 108 of the Malawi Constitution confers jurisdiction on the HC to hear divorce petitions, even in cases involving customary marriages’.¹⁵¹ There are, however, more specific powers that the HC can exercise. The HC has original jurisdiction to review any law for conformity with the Constitution.¹⁵² The power of judicial review is the principal means by which the courts can check on the legality of customary laws that are in conflict with the foundational norms of the Constitution. The HC is a

¹⁴⁹This is based on my own experience of having passed through the same law school.

¹⁵⁰See n 106 above.

¹⁵¹As above, 5.

¹⁵²Section 108 (2) of the Malawi Constitution.

court of record.¹⁵³ The HC has both appellate and original jurisdiction.¹⁵⁴ On the particular point of constitutional issues, Section 108 of the Malawi Constitution establishes the HC as the constitutional court, and the *Court (Amendment) Act* No. 2 of 2004 merely enables the HC to create, from within itself, a small chamber to deal with constitutional matters.¹⁵⁵ This position is contrasted with that in South Africa where the composition of the CC, as the highest court on constitutional matters,¹⁵⁶ is separate from the HC.¹⁵⁷

The HC is presided over by professional judges. It is currently composed of twenty judges. Two of the judges are based in Mzuzu, four in Lilongwe, one in Zomba and ten in Blantyre. Occasionally the HC also travels to districts of the country to try murder cases. This position, however, is regrettable since the jurisdiction of the HC in the districts should include cases in which the HC could exercise its constitutional jurisdiction. Most judges have been trained at the University of Malawi. Just like the professional magistrates, they may not have received some instruction in the substantive rules of customary family laws.

¹⁵³This means that the court's acts and judicial proceedings are recorded for perpetual memory and testimony.

¹⁵⁴See Section 108 of the Malawi Constitution.

¹⁵⁵Mutharika AP *Towards a More Manageable Constitution* (Unpublished) (2006) 12.

¹⁵⁶Section 167 (3) (a) of the Constitution of the Republic of South Africa, 1996.

¹⁵⁷Section 167 of the Constitution of the Republic of South Africa, 1996.

The SCA, just as it was during the first republic, is the highest court of the land and only exercises appellate jurisdiction.¹⁵⁸ It hears appeals from the HC and such other courts and tribunals as an Act of Parliament may prescribe.¹⁵⁹ Since all appeals from the SC go to the HC and eventually land in the SCA, customary laws could be said to be applied by all levels of the court system in Malawi. The SCA is located in Blantyre.

Recognition of African customary family laws

Unlike the 1966 Constitution Act which did not recognise African customary laws as part of the law to be applied by the courts of Malawi, the Malawi Constitution has many provisions that directly or indirectly recognise the application and relevance of African customary laws in Malawi. Section 12 provides that the Constitution is founded upon the following underlying principles:

‘... all legal and political authority of the State derives from the people of Malawi and shall be exercised in accordance with this constitution solely to serve and protect their interests; the inherent dignity and worth of each human requires that the State and all persons shall recognize and protect fundamental human rights and afford the fullest protection to the rights and views

¹⁵⁸Section 104 (2) of the Malawi Constitution.

¹⁵⁹As above.

of all individuals, groups and minorities whether or not they are entitled to vote’.

Thus, Nyirenda, Hansen and Kaunda¹⁶⁰ have argued, based on this provision, that the Malawi Constitution attaches great importance to African customary laws and traditional values.

Several provisions in the Bill of Rights itself can support the above position. Section 26 of the Malawi Constitution provides that ‘[e]very person shall have the right to use the language and to participate in the cultural life of his or her choice’. Although this section does not make any explicit reference to customary laws, it expressly recognises the significance of customary or cultural values to human development, well-being and identity.¹⁶¹ In essence, it guarantees the right of everyone to live according to the legal system applicable to the particular cultural grouping to which they (choose to) belong.¹⁶²

There is, however, a difference in the manner in which Section 26 of the Malawi Constitution that recognises the right to culture has been drafted,

¹⁶⁰Nyirenda J, Hansen TT and Kaunda D *A Comparative analysis of the Human Rights Chapter under the Malawi Constitution in an International Perspectives* (Undated) xxiii.

¹⁶¹See also Himonga C ‘Implementing the rights of the child in African legal systems: The *Mthembu* Journey in Search of Justice’ (2001) *International Children’s Journal* 89 at 94 who has noted that the right to culture gives Africans the right to have customary law applied in appropriate cases.

¹⁶²As above.

as compared to the similar provision in South Africa. It is noted that the Malawi Constitution does not have an internal limitation clause, as is the case with its South African counterpart.¹⁶³ With regard to South Africa, some commentators have argued that in the inevitable clash between culture and equality, equality must necessarily take priority.¹⁶⁴ Their argument is based on the fact that the right to equality is not internally limited in the same way as the right to culture. Therefore, the right to equality trumps the right to culture.¹⁶⁵

Contrary to the above position, the Malawi Constitution, as already alluded to, does not have a comparable internal limitation. It is, therefore, submitted that the drafters of the Malawi Constitution had not intended the right to equality to trump the right to culture.¹⁶⁶

¹⁶³Section 30 of the Constitution of the Republic of South Africa, 1996, provides that ‘everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights’.

¹⁶⁴See, for instance, Kaganas F and Murray C ‘The contest between culture and gender equality under South Africa’s interim Constitution’ (1994) *Journal of Law and Society* 401 at 427-428.

¹⁶⁵See Fishbayn L ‘Litigating the right to culture: family law in the new South Africa’ as cited by Grant E ‘Human rights, cultural diversity and customary law in South Africa’ (2006) *Journal of African Law* 2 at 9.

¹⁶⁶A discussion of this will be provided in Chapter 5.

Section 22 (5) of the Malawi Constitution provides another angle to the recognition of customary family laws. It provides for the recognition of marriages according to custom. This, obviously, brings to rest the uncertainty regarding the constitutional recognition of marriages contracted according to customary laws. It also brings to rest the question of whether women, married in such unions, are to equally enjoy the rights as guaranteed by the Malawi Constitution or not. By recognising marriage by custom, the Malawi Constitution affirms the fact that women married according to their customary marriage rules are equally to enjoy their human rights. Thus, persons who are party to such marriages are entitled to all rights applicable to married persons as provided for under Sections 22 and 24 of the Malawi Constitution, for example.¹⁶⁷

On the other hand, the South African Constitution does not provide for the right to marriage, let alone marriage by customary laws.¹⁶⁸ Arguably, with respect to South Africa, marriages by customary laws would be protected under the right to culture.

¹⁶⁷These include the right to be protected by law against all forms of neglect, cruelty or exploitation; the right to enter into contracts; the right to acquire and maintain rights in property; the right to acquire and retain custody of children; the right to citizenship and nationality; the right to a fair disposition of property and fair maintenance on dissolution of marriage.

¹⁶⁸It is, however, noted that according to Section 15 (1) of the Constitution of the Republic of South Africa, 1996 indirect reference is made to the recognition of legislation that recognizes customary marriages.

The implication for the protection of women's rights, it could be argued, is that, in Malawi, where the right to marriage and family, which includes marriage according to customary laws, is a fundamental right and not just a freedom, women governed by customary family laws are offered more protection than in South Africa. As a constitutional right within the Bill of Rights, the right to family and marriage will be competing with other fundamental rights within the Bill of Rights which may result in a series of conflicts between the right to equality and the many rules that govern customary marriages that subordinate rights of women. For a broad and profound analysis on the conflict between customary family rules and women's rights, see the discussions by Nhlapo, Bronstein and Kaganas.¹⁶⁹

Even though these contradictions are inevitable,¹⁷⁰ the Malawi Constitution, however, does not give any indication as to whether the right to family and marriage, especially marriages by custom, supersedes the right to equality or not.¹⁷¹ It is, therefore, submitted that the right to marry according to

¹⁶⁹Nhlapo RT 'The African family and women's rights: Friends or Foes?' (1991) *Acta Juridica* 137 at 139-145; Bronstein V 'Reconceptualizing the Customary Law Debate in South Africa' (1998) *Southern African Journal on Human Rights* 388 at 390; and Kaganas and Murray (n 164) 401.

¹⁷⁰These contradictions are inevitable simply because customary rules are aimed at protecting group rights whilst women's rights are aimed at protecting the individual.

¹⁷¹It should be noted that in constitutions, such as that of Zambia (Act 1 of 1991), where the right to customary law is shielded from the equality provision, this problem would not arise. Furthermore, in South Africa, where a right to a family is not a fundamental right within the Bill of Rights, the conflict between a particular customary rule (which

one's customary laws is ranked equally with other rights that are within the Bill of Rights in the Malawi Constitution.

In addition to the above, customary law is now part of the law to be applied by SC.¹⁷² Section 110 (3) of the Malawi Constitution provides:

‘Parliament may make provision for traditional or local courts presided over by lay persons or chiefs: provided that the jurisdiction of such courts shall be limited exclusively to civil cases at customary law and such minor common law and statutory offences as prescribed by an Act of Parliament’.

It should be noted that, in practice, the third and fourth grade magistrates are the ones who preside over cases in which customary laws are applicable.¹⁷³ Since all appeals from the SC go to the HC and could eventually land in SCA, customary laws would be said to be applied by all levels of the court system in Malawi.¹⁷⁴

is of course covered by the recognition of the right to culture) would not carry the same implication as the Malawi right to family life and marriage.

¹⁷²Section 110 (3) of the Malawi Constitution provides that the jurisdiction of the SC shall be limited to civil cases at customary law.

¹⁷³Third and fourth grade magistrates were, before 1994, adjudicating over cases where customary laws would be applicable in the TC system. After 1994 when the TC were abolished, these magistrates are now in the MC which are part of the HC system.

¹⁷⁴This position should be contrasted with Dr Banda's era where all appeals from the TC were channeled to a NTAC.

In addition, some recognition of customary laws in the Malawi Constitution can be found in Section 200. The wording of Section 200 places customary laws on the same status as common law and other laws in force in Malawi. It provides:

‘Except in so far as they are inconsistent with this Constitution, all Acts of Parliament, common law and customary law in force on the appointed day shall continue to have force of law, as if they had been made in accordance with and in pursuance of this Constitution: . . .’

The above provision, it is submitted, encompasses all customary laws that are relevant to customary marriages. It will, however, be argued in Chapter 7 that in terms of application, customary laws may not enjoy the same status as other laws because of the conflict between customary laws and the fundamental rights in the Bill of Rights.

Last, but not least, Section 108 (1) of the Constitution provides that:

‘. . . there shall be a High Court for the Republic which shall have unlimited original jurisdiction to hear and determine any civil or criminal proceedings **under any law**’.[Emphasis added]

The phrase ‘under any law’ must, apart from common law, statutes and court decisions, include customary laws.¹⁷⁵

At the international level, many instruments also recognise the application and relevance of African customary laws. Art. 22 of the UDHR¹⁷⁶ states: ‘Everyone, as a member of society . . . is entitled to the realisation of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.’ Further, Art. 27 (1) provides: ‘Everyone has the right to freely participate in a cultural life of the **community**, to enjoy the arts and to share in scientific advancement and its benefits’.[My emphasis]

As a declaration, the UDHR is a non-binding instrument that is meant to state mere aspirations of nation states. It is, however, submitted that it has become part of binding international law in Malawi. Reasons that can be advanced to substantiate this point are twofold. First, the standards laid down in the Declaration were re-enacted in two conventions that are binding

¹⁷⁵As already stated above, customary law is recognised, among others, under Section 200 of the Malawi Constitution as part of law that still has force in Malawi.

¹⁷⁶UDHR was adopted by UN General Assembly Resolution in December 1948.

on states. These are CCPR,¹⁷⁷ and the CESC.¹⁷⁸ Art. 15 (1)(a)¹⁷⁹ and 27¹⁸⁰ of the CESC and CCPR, respectively, provide for the protection of cultural rights.

Secondly, the Malawi SCA has held that the Declaration applies and is enforceable in Malawi.¹⁸¹ In this case the SCA said that the UDHR is part of Malawi's law and that the freedoms that it guarantees must be respected and can be enforced in the courts of Malawi.¹⁸² Following the *Chihana* case,

¹⁷⁷GA Resolution 2200A(XXI), 21UNGAOR Suppl.(No.16) at p.52, UN-DOC.A/6316(1966), 999UNTS p.171, entered into force on 23 March 1976.

¹⁷⁸GA Resolution 2200A(XXI), 21UNGAOR Suppl. (No.16) at p.49, UNDoc.A16316(1966), 993 UNTS p.3, entered into force on 3 January 1976.

¹⁷⁹Art. 15 (1) (a) of the CESC provides 'The State Parties to the present Covenant recognise the right of everyone: to take part in a cultural life.'

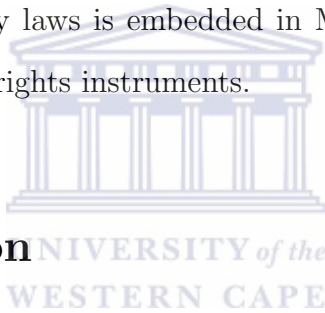
¹⁸⁰Art. 27 of the CCPR provides that: 'In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.'

¹⁸¹See the case of *R v Chakufwa Chihana*, SCA Criminal Appeal No. 9 of 1993 as cited by White S et al *Dispossessing the Widow: Gender based Violence in Malawi* (2002) 32. See also Hansen TT 'Implementation of International Human Rights Standards through the National Courts in Malawi' (2002) *Journal of African Law* 31 at 37 who noted that the SCA considered UDHR as being part of the law of Malawi.

¹⁸²As above.

the cases of *Chisiza v Ministry of education and Culture*¹⁸³ and *S v Nkhata*¹⁸⁴ have also made reference to provisions of the UDHR.¹⁸⁵

From the above analysis, if any justification is required for the courts of Malawi to apply customary laws, it is to be found in the recognition of cultural rights by the Malawi Constitution as well as international instruments. Consequently debate around the status of customary law is confined to such issues as the degree and effects of such recognition, among others.¹⁸⁶ It is not necessary to engage in such debate at this point. It is only important, for the purpose of the present discussion, to underscore the point that the recognition of customary laws is embedded in Malawi Constitution as well as international human rights instruments.



2.4 Conclusion

The overall intention of this Chapter was to evaluate the recognition of customary law by the court system in Malawi from the pre-colonial period to 1994 and thereafter. It has been shown that during the pre-colonial period kings maintained an efficient court system based on customary laws, which

¹⁸³Miscellaneous Civil Case No. 10 of 1993 (Unreported).

¹⁸⁴Miscellaneous Civil Case No. 6 of 1993 (Unreported).

¹⁸⁵Hansen (n 180) 37-38.

¹⁸⁶Nhlapo RT 'African customary law in the interim constitution' in Liebenberg S (ed) *The Constitution of South Africa from a Gender Perspective* (1995) 157 at 157-158.

the British disrupted with the 1902 *British Order in Council*. Then the first republic introduced, alongside the Western HC system, the chiefs' courts which were not based on the customary laws. After 1994 several provisions in the Malawi Constitution directly and indirectly recognise customary laws as part of the law to be applied by the courts in Malawi.

However, throughout the development of the court system, what has been evident is that customary laws continued to be applied by chiefs in the villages. Since the colonial era the chiefs' courts, at the local level, are not part of the formal justice system, and yet they are what most poor people go to for their justice needs.¹⁸⁷ Their interpretation of customary laws, for example, covering marriages, divorce and custody of children, is of great importance for the enforcement and protection of women's rights. But given their informal, oral and decentralised nature, it is difficult to assess the effect that the chiefs' courts have had, and how their practices relate to constitutional norms of equality as contained in the Bill of Rights.

On the other hand, the analysis of the history and future of customary laws shows that the recognition and application of customary law by the courts is slowly ebbing. From the start of the colonial era the recognition and application of customary laws has continuously been subjected to various forms of the so-called repugnancy principle. First there was the evidently

¹⁸⁷Grippen S and Kanyongolo FE 'Courts and the poor in Malawi: Economics, Marginalisation, Vulnerability and the Law' (2007) *International Journal of Constitutional Law* 258 at 258.

clear policy of the repugnancy principle applied by the colonialists; then, by Section 12 of the 1966 Constitution Act in the first republic. Currently its full application is curtailed by the constitutional test principle as provided for by Section 5 and other limiting provisions in the Malawi Constitution.¹⁸⁸

What is evident from the whole analysis is that the recognition and application of customary laws by the court system in Malawi has not been so rigorous as to sustain their development and existence. This position is, unfortunately, regrettable. It is not easy to assess the impact that the Bill of Rights may have on customary family laws in such an environment.



¹⁸⁸See a full discussion on how the Malawi Constitution limits the application of customary laws in Chapter 5.

Chapter 3

Customary laws and human rights: Theoretical debates



3.1 Introduction

Since the drafting of the International Bill of Rights,¹ there has been an expansion of human rights to include cultural issues that are central to women's

¹Which includes: the Universal Declaration of Human Rights (UDHR) (1948), GA Res. 2174 (III), UN Doc. A/810; the International Covenant on Social, Economic and Cultural Rights (CSECR) (1966), GA Res. 2200A (XXI), UN Doc. A/6316; and the International Covenant on Civil and Political Rights (CCPR) (1966), GA Res. 2200A (XXI), UN Doc. A/6316.

rights.² The inclusion of culture as part of human rights has increased the debate between advocates of human rights universalism³ and those of cultural relativism⁴ to the extent that societies and individuals perceive human rights as imposing a foreign way of life.⁵ This debate has the effect of dividing the international community and has generally been observed to serve as a barrier to the promotion of human rights.⁶ This is especially important when we talk about women's rights because the plight of women throughout the world has its roots deep in their respective cultures. This Chapter, therefore, examines the relationship between UN human rights instruments and their theoretical effect on customary family laws and women's rights. Emphasis is placed on the rights to culture and equality and the extent to which these rights interact, conflict and overlap with one another. A detailed examination is therefore made of the UN instruments relating to these rights.

²This is demonstrated by regional human rights instruments such as the African Charter on Human and Peoples' Rights (ACHPR).

³Universalism promotes the belief that all human beings are born with the same set of inherent human rights, guaranteed to them simply because they are human beings.

⁴Cultural relativism promotes the belief that human rights vary from one culture to culture. They maintain that an activity perceived as a human rights violation in one nation may be acceptable under the prevalent cultural values in another.

⁵Bennett TW *Customary law in South Africa* (2004) 81. See also Higgins TE 'Anti-Essentialism, Relativism and Human Rights' as cited by Yuksel EJD 'Universalists versus Universalism' accessed at <http://www.yuksel.org/e/law/universalism.htm> on 10/12/08.

⁶Mayer AE 'Cultural Particularism as a Bar to Women's Rights: Reflections on Middle Eastern Experience' in Peters J and Wolper A *Women's right, human rights: International feminist perspectives* (1995) 176 at 176; and Bennett (n 5).

The Chapter is divided into five sections. The second section makes an analysis of the polarized universalist and cultural relativist debates and conceptions of cultures in human rights law, and of the manner in which human rights law approaches cultures and cultural practices. Particular emphasis is placed on the impact of the debates on the implementation of women's rights.⁷ In the third section a discussion on the international protection of cultural rights is made. The analysis leads to a discussion on the international approach to the interaction between customary laws and human rights. The aim is to understand the weight that human rights law gives to cultural practices and therefore addresses the interaction between customary laws and human rights. In the fourth section, the Chapter then details important developments in international human rights law that directly aim to affect discriminatory family cultural practices against women through an examination of the right to equality under international human rights law. The last section is a conclusion.

Overall, this Chapter demonstrates that international human rights law approaches culture as an institution that serves the development of individuals and deserves of protection only to the extent that they do not violate their constituent's human rights. Thus, human rights documents consistently

⁷Although the Malawi Constitution has an entrenched Bill of Rights that stipulates the human rights guarantees for its citizens, it is externally influenced by international human rights law. To understand the impact of the Bill of Rights on African customary laws affecting women's rights, we have to, therefore, look at and review relevant international human rights documents and the development of international human rights concepts.

address culture as a basis on which protections must be afforded; and when cultures fail to protect, they lose their protection from human rights law.

3.2 Women's rights: Universalism and cultural relativism

The concept of universalism came into prominence after World War II.⁸ With the adoption of UDHR, countries all over the world discussed and negotiated values that would become the basis for human rights. The horrific consequences of World War II left a legacy that great harm could result in allowing individual countries or nations to define and pursue their own values. By establishing racial purity laws that led to the extermination of 'lesser human beings', it has been pointed out that Germany had showed the world how destructive an individual culture could become without an overriding check.⁹

Universalism entails that all members of the human family share the same inalienable rights and argues for more absolute overarching values.¹⁰ This means that the international community has the right to judge, by reference

⁸Reichert *Social work and human rights: a foundation for policy and practice* as cited in Reichert E 'Human Rights: An examination of universalism and cultural relativism' (2006) *Journal of Comparative Social Welfare* 23 at 26.

⁹As above.

¹⁰Hellum A *Women's Human Rights and Legal Pluralism in Africa: Mixed Norms and Identities in Infertility Management in Zimbabwe* (1999) 31.

to international standards, the ways states treat their own citizens and that states must reform their constitutions and laws where necessary to bring them into conformity with international norms.¹¹ Further, universalists¹² argue that people are autonomous individuals whose rights are to be respected because of their individuality. They tend to take the view that the locus of human rights is properly situated in an individual, and recognise that the rights of groups are best protected through attention to individual rights.¹³ Furthermore, universalists argue that once individuals have been treated as equals, with the respect and concern owed them as moral beings, there is no further obligation to treat communities to which they belong as equals.¹⁴ Universalists also argue that other societies already possess basic human rights that simply need further expression or reinterpretation. By doing so, universalists generally champion a positivist approach, which suggests that any bias found in the dominant human rights paradigm may be tempered by empirical research that confirms the universality of core human rights. Thus, the universality view emphasizes comparability of cross-culturally or even globally applicable human rights dimensions and categories. From this perspective, human rights gain legitimacy to the extent that they can be located and expressed in all cultures.¹⁵

¹¹Mayer (n 6) 176; Levesque JR *Culture and family violence: Fostering change through human rights law* (2001) 95-96.

¹²For purposes of this discussion, universalists are those who support universalism.

¹³Kymlicka W *Liberalism, community and culture* (1989) 140.

¹⁴As above.

¹⁵Levesque (n 11) 96.

With regard to changes in cultural practices, universalists argue that human rights seek to transform specific, illegitimate cultural practices. They argue that a search will locate legitimate, indigenous beliefs that comport with universal human rights values and that claims of cultural relativism run the danger of being without cultural basis, and instead, derive from manipulations of repressive regimes and elites who have long since left traditional cultures behind.¹⁶ On the extent to which international human rights law transforms cultural life, universalists propose that universalism deals with only a small core of violations and leaves intact legitimate cultural practices. In their view, the dilution of universalism allows oppressive regimes to continue violations of basic human dignities and to inappropriately justify their practices by claiming cultural rights.¹⁷

Universalism is, however, not without its criticism. Critics argue that universalism perpetuates colonialist practices; complaining that one group assumes superiority over the other and bases values, ethics, power on that assumption.¹⁸ Women's rights activists and scholars have also stated that the problematic nature with the universalist approach resides in the fact that universal model are restricted only to men's rights, and not realised as such.¹⁹ Most governments that propose universal human rights still de-

¹⁶Levesque (n 11) 97.

¹⁷As above.

¹⁸Ife *Human Rights and Social work: towards rights based approach* as cited by Reichert (n 8) 27.

¹⁹See, among others, Charlesworth H 'What are Women's International Human Rights?

fine universality of human rights in terms of male models and patterns of thinking. Consequently, this is still causing women's rights abuses to be pervasive and systematic in that they are regarded as part of the natural order of things. Put it differently, because universal human rights are defined in terms of male models and patterns of thinking, some universalists may tend to justify some women's rights violations under the notion of patriarchy. For instance, the fact that women are denied their right to choose who to marry under the customary family laws in Malawi might be justified by patriarchal universalists who might argue that it is important that only men who are the bread winners of the house choose who to marry, rather than women. Such patterns of thinking obviously lead to ignorance of the importance of universal human rights to be applied to women equally.

On the other hand, relativism was introduced by, among others, the sophist Protagoras. He rejected the objective truth by saying, later quoted by Plato²⁰:

‘The way things appear to me, in that way they exist for me and the way things appear to you, in that way they exist for you’.

Relativism as linked to culture appeared in the works of anthropologists who empirically demonstrated that there exist in the world many different

in Cook RJ (ed) *Human Rights of Women: National and International Perspectives* (1994) 58 at 64.

²⁰Ross K ‘Relativism’, accessed at <http://www.firesan.com/relative.htm> on 24/11/08.

cultures, each equally worthy.²¹ Cultural relativism, however, received its greatest prominence as a means to counter colonialism.²² The theme during colonialism in the 1800s was that one culture was superior to others. However, in the 1900s anthropologists questioned this cultural superiority and emphasised that each culture has values in itself. At the time, it has been said, this view appeared innovative and progressive.²³

Cultural relativism is the assertion that human values, far from being universal, vary a great deal according to different cultural perspectives and all points are equally valid, and any truth is relative.²⁴ The truth belongs to the individual or his/her culture. All ethical, religious, and political beliefs are truths related to the cultural identity of the individual or society.²⁵ Relativists argue that the promulgation of universal human rights law does not recognise the extreme diversity of cultural practices and that universal rights should be subsidiary to local cultural practices.²⁶ Thus, the doctrine of cultural relativism insists that all cultures, notwithstanding their differences, deserve equal respect and that the values of one culture should not be

²¹See, for example, Hellum (n 10) 418.

²²Pierpont 'The measure of America: How a rebel anthropologist waged war against racism' in Reichert (n 8) 28.

²³As above.

²⁴Ayton-Shenker D 'The Challenge of Human Rights and Cultural Diversity' accessed at <http://www.un.org/rights/dpi1627e.htm> on 21/11/08.

²⁵Reichert (n 8) 28.

²⁶Levesque (n 11) 96.

imposed on any other.²⁷ Relativists also argue that people are understandable only in a cultural context, and their contexts may require respect just as much as their alleged individuality. Thus, cultural relativists adopt a group-centered view of the world;²⁸ a partition of the world into intersecting cells. Furthermore, relativists affirm that universal truths actually vary among societies and that positivistic empirical paradigms do not uncover truths obvious to other societies. They assert that the universality of human rights should be sought and achieved through sustained intra-cultural and cross-cultural dialogue, rather than as an abstract cultural neutral proposition, which it can never be. They focus on the context of human rights within a culture and prize the ability to investigate and understand human rights within the culture's own frame of reference.²⁹

Relativists, further, state that the structure of modern human rights recognises the need to respect tradition and cultural practices.³⁰ Relativists argue that leaving legitimate practices intact requires also leaving intact a small core of violations and, more importantly, that the core violations are not necessarily violations of human rights as conceived by the host culture.³¹

An important aspect of cultural relativism today is that it challenges the

²⁷Bennett (n 5) 80.

²⁸Levesque (n 11) 96.

²⁹Levesque (n 11) 96-97.

³⁰As above.

³¹As above.

universality of standards that actually belong to one culture. The cultural-relativist approach, which regards different value systems as unique and incomparable units, may on the other hand constitute a barrier to change and dialogue. Thus, it has been stated, taken to its extreme, that cultural relativism would pose a dangerous threat to the effectiveness of international law and the international system of human rights that has painstakingly been constructed over the decades. If cultural tradition alone governs state compliance with international standards, then widespread disregard, abuse and violation of human rights would be given legitimacy.³²

In summary, we see that the debate between universalism and cultural relativism generally revolves around the sources of standards that determine how countries should treat their citizens and how people should treat one another.³³ The debate also centers around the issues of whether the standard has an absolute, minimal character or whether it is contingent and relative to different communities and cultures.³⁴ In other words, both sides of the debate hold different views of the individual, private life, human rights and the legitimacy of international law.³⁵ Unfortunately, women are often caught and badly caught in these debates and continue to suffer untold hardship from cultural relativists' position.³⁶

³²Ayton-Shenker (n 24).

³³Levesque (n 11) 95-96.

³⁴As above.

³⁵As above.

³⁶This position will be illustrated in Chapter 4 where a discussion on cultural practices

3.2.1 Significance of universalist-relativist debates in the women's rights domain

For purposes of this study, the universalist-relativist debates are significant for two reasons. Firstly, polarized positioning on human rights allows women's rights violations to continue and ensures that significant developments in international human rights law remain ignored and unlikely to elicit commitment or compliance. Certain standards of human rights are continuously and frequently violated because they are not perceived as culturally legitimate in the context of a particular society.³⁷ Secondly, the debate suggests a need to rethink popular conceptions of how international law works and how it actually may address discrimination against women and legitimately lead to reforming customary family laws that are discriminatory against women, for example.³⁸

These debates lead to the conclusion that attempts to address, for instance, customary family laws that are discriminatory against women must consider the impact of abolishing problematic customs and practices, even practices not perceived by the indigenous culture as overtly problematic. The significance of this concern cannot be overestimated. As relativists correctly suggest, ending certain practices may mean ending a practising group's ex-

that are inimical to women's rights in Malawi is ensued.

³⁷Levesque (n 11) 99.

³⁸As above, 98.

isting culture because cultures construct some of the questioned practices as central to cultural conceptions of human development, cultural participation, and cultural life. At the extreme, then, human rights hold the potential to erase cultural diversity. These potential consequences, it has been observed, result in the need to proceed cautiously in efforts to determine which practices have legitimacy and which practices need transforming without compromising legitimacy.³⁹

Levesque has further noted that the manner in which the debates allow violations to continue suggest a need to rethink the dominant views of international law and how international law develops.⁴⁰ International law continues to be viewed as a series of contracts between nations. Addressing the debate requires a modification of the concept of national sovereignty to enhance the principle of international accountability for violating human rights.⁴¹ Levesque further observes that although the debate is an old one, it has taken on a renewed vigour in light of human rights movements' increasing progress.⁴² Notions of sovereignty, domestic jurisdiction, and cultural autonomy formerly enjoyed great strength, but they now suffer increasing strain as they are challenged by efforts to establish an international, universal human rights order.

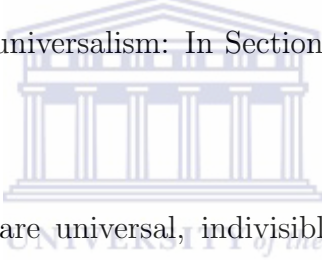
³⁹ As above.

⁴⁰ As above, 99.

⁴¹ As above.

⁴² As above.

On the face of them, however, human rights instruments fall on the ‘universalists’ side of the debate.⁴³ It is asserted that the UN Charter and UDHR use the language which is couched in individualistic terms and therefore imply that the human rights in question are not applicable to group rights.⁴⁴ While the CCPR and CESR to a certain extent do depart from such an approach, their thrust is individualistic.⁴⁵ For example, Art. 27 of the CCPR, dealing in particular with minorities’ rights to enjoy their own culture, does not assert that these minorities have rights but merely that they shall not be denied certain rights.⁴⁶ Furthermore, the most recent declaration regarding the balance between cultural and universal rights, the Vienna Declaration, also falls on the side of universalism: In Section 1, paragraph 5, it provides that:



‘all human rights are universal, indivisible and interdependent and interrelated . . . While the significance of national and re-

⁴³As above.

⁴⁴Thornberry P *International Law and the Rights of Minorities* (1991) 5.

⁴⁵Bennett TW *Human rights and African customary law under the South African Constitution*, 1999, 11 and Niec H ‘Cultural Rights: At the End of the World Decade for Cultural Development’ accessed at <http://krachtvancultuur.nl/uk/archive/commentary/niec.html> on 21/11/08.

⁴⁶Art. 27 of the CCPR provides that: ‘In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language’.

gional particularities and various historical cultural and religious backgrounds must be born in mind, it is the duty of States, regardless of their political, economic and **cultural systems**, to promote and protect all human rights and fundamental freedoms'.
[Emphasis added]

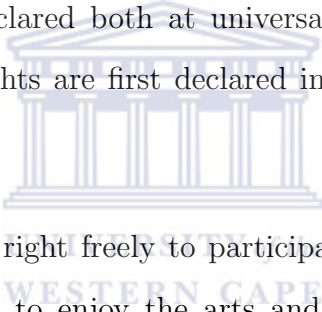
From the above, we see that as human rights law develops, it demands a universal approach that keeps in mind the need to respect some cultural traditions but nevertheless press forward in the search for universals. On the other hand, as human rights law moves forward, resistance accumulates. Yet much of the resistance comes from a lack of understanding of how international human rights law conceives of cultures and from assertions that it only gains power and legitimacy through them.⁴⁷

In the next section, I address these issues to emphasise why and how human rights principles and modern conceptions of human rights law should matter to those who respond to customary family laws that are discriminatory against women.

⁴⁷Levesque (n 11) 100.

3.3 International protection of the right to culture

The first basis of a right to culture can be found in a state's legal duty to guarantee the rights of minorities.⁴⁸ This duty emerged soon after World War I, when a series of treaties were concluded with respect to the newly formed states of Europe.⁴⁹ After 1945, these treaties lapsed, and the task of securing protection for minorities passed to the UN.⁵⁰ At the UN level, when we examine international human rights law, we find that cultural rights as human rights are declared both at universal and regional levels.⁵¹ At universal level, these rights are first declared in the UDHR. Art. 27 states that:



‘Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.’

In Art. 22 it states that:

‘Everyone, as a member of society, has a right to social security

⁴⁸Bennett TW *Human rights and African customary law under the South African Constitution* (1995) 11.

⁴⁹Thornberry (n 44) 38.

⁵⁰Bennett (n 48) 11.

⁵¹Niec (n 45).

and is entitled to realisation, through national effort and international cooperation and in accordance with the organisation and resources of each State, of the economic, social and cultural rights indispensable for his dignity and free development of his personality.’

The right to culture is also an integral part of other fundamental rights enunciated in the UDHR such as freedom from conscience, expression and religion. However, it has been observed that despite the fact that the UDHR recognises the right to culture, cultural rights have remained the least developed in terms of legal content and enforceability.⁵²

Cultural rights acquired a treaty binding character in the following treaty documents. Firstly, Art. 15 (1) (a) of the CESCR provides that:

‘The State Parties to the present Covenant recognise the right of everyone: to take part in a cultural life; to enjoy the benefits of scientific progress and its applications; to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.’

Secondly, Art. 27 of the CCPR provides that:

⁵²Karim and Wayland ‘Culture, Governance and Human Rights’ as cited by Tamale S ‘A Critical Perspective on Women’s Sexual Rights’ (2008) *Feminist Legal Studies* 47 at 51.

‘In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.’

On the regional level, rights to culture are declared in the African Charter on Human and Peoples’ Rights.⁵³

The above sources of cultural rights declare these rights most specifically for the individual.⁵⁴ Within the international framework of human rights, it has been noted that there also exists the recognition of cultural rights as collective right.⁵⁵ For example, the first articles of both the CDESCR and CCPR state that ‘All peoples have a right to self determination. By virtue of that right they ... may freely pursue their economic, social and cultural development’.

Having said that, the question that is asked is whether the right to culture under international instruments means that communities should be able to determine, without external influences, the content of that culture even if it violates the human rights norms such as the norm of equality? Of particular

⁵³Art. 17. See also Art. 13 of the Inter-American Declaration on Human Rights and Art. 14 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights.

⁵⁴Niec (n 45).

⁵⁵As above.

interest in this study is whether the protection of cultural rights constitutes a justifiable reason for differential treatment of women and men? In the following subsection, I make an analysis of the international approach to the right to culture seen as against the background of human rights.

3.3.1 The place of culture in international law: Does it support cultural relativism?

Despite the apparently forceful recognition of cultural rights as discussed in Subsection 3.3, not one cites culture as a basis on which protections may be abridged.⁵⁶ Rather than protecting culture at the expense of human rights, international documents reveal that culture necessarily must cede to universal standards.⁵⁷ Indeed as the above mandate suggests, cultures are protected so that they may enhance human rights and not lead to their derogation. The interpretation finds support from Art. 1 (3) of the UN Charter which seeks:

‘to achieve international cooperation in solving international problems of an economic, social, cultural, humanitarian character and in promoting respect for human rights and for fundamental free-

⁵⁶Levesque (n 11).

⁵⁷Cook R ‘State Accountability under the Convention on the Elimination of all Forms of Discrimination Against Women’ in Cook R (ed) *Human Rights of Women: National and International Perspectives* (1994) 228 at 234-235.

doms for all without distinction as to race, sex, language, or religion’.

It should be noted that the language of the above provision makes two things clear: Human rights are not dependent on specific culture and that human rights are to be respected without distinction as to the basic markers that influence different manifestations of cultural life: sex and religion, among others.

Several treaties that followed the UN Charter serve as examples of the approach that places the preservation of human rights as the most fundamental universal principle, even when human rights protections challenge cultural practices. The Convention on the Elimination of all forms of Discrimination against Women (CEDAW)⁵⁸ confronts the possibility of misuse of culture as a pretext to violate women’s rights in the following fashion. Art. 5 of CEDAW requires States Parties to take all appropriate measures to:

⁵⁸CEDAW was adopted by the UN General Assembly on 18 December 1979, General Assembly Resolution 34180, 32 UN GAOR Suppl.(No.46) at P.193, UNDOC.A/34/46, and entered into force on 3 September 1981. CEDAW was the first international legally binding document devoted solely to the rights of women. Its significance is further emphasized by its wide ratification, being the second most ratified international human rights treaty with 180 ratifications (71 of them have accepted the possibility for individual petition), straight after the UN Convention on the Rights of the Child, with 192 ratifications (situation of 29 July 2005) and comprehensive scope, notwithstanding the high number of reservations made to it.

‘modify the social and cultural patterns of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority of either of the sexes or on stereotyped roles for men and women’.

Another important provision that targets cultural-sex discrimination by requiring the elimination of discriminatory legislation and custom is Art. 2 of CEDAW. Art. 2 (f) in the pertinent part states that:

‘State Parties . . . by all appropriate means and without delay . . . undertake: (f) To take all appropriate measures, including legislation to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.’

With particular reference to discriminatory customary family law practices, Art. 16 of CEDAW provides that:

‘States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:

- (a) The same right to enter into marriage;

- (b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent.

Commenting on Art. 16 (1) (a) and (b), the CEDAW Committee⁵⁹ in its General Recommendation 21 said this:

‘While most countries report that national constitutions and laws comply with the Convention, custom, tradition and failure to enforce these laws in reality contravene the Convention. A woman’s right to choose a spouse and enter freely into marriage is central to her life and to her dignity and equality as a human being. An examination of States parties’ reports discloses that there are countries which, on the basis of custom, religious beliefs or the ethnic origins of particular groups of people, permit forced marriages or remarriages. Other countries allow a woman’s marriage to be arranged for

⁵⁹The CEDAW Committee established under Art. 17 of CEDAW to oversee the implementation of its provisions is composed of 23 experts which are nominated by their own governments, but which serve in their personal capacity and not as delegates or representatives of their country of origin. The CEDAW Committee monitors the implementation of CEDAW by examining reports submitted by the state parties. The CEDAW Committee also interprets the provisions of CEDAW through General Recommendations. These General Recommendations are published in the annual reports of the CEDAW Committee to the General Assembly of the United Nations and can also be found at the United Nations High Commissioner for Human Rights website (<http://www.unhchr.ch/tbs/doc.nsf/>).

payment or preferment and in others women's poverty forces them to marry foreign nationals for financial security. Subject to reasonable restrictions based for example on a woman's youth or consanguinity with her partner, a woman's right to choose when, if, and whom she will marry must be protected and enforced at law'.

(c) The same rights and responsibilities during marriage and at its dissolution,⁶⁰

(d) The same rights and responsibilities as parents, irrespective

⁶⁰Commenting on this provision, the CEDAW Committee in its General Recommendation 21 said this:

'An examination of States parties' reports discloses that many countries in their legal systems provide for the rights and responsibilities of married partners by relying on the application of common law principles, religious or customary law, rather than by complying with the principles contained in the Convention. These variations in law and practice relating to marriage have wide-ranging consequences for women, invariably restricting their rights to equal status and responsibility within marriage. Such limitations often result in the husband being accorded the status of head of household and primary decision-maker and therefore contravene the provisions of the Convention. Moreover, generally a *de facto* union is not given legal protection at all. Women living in such relationships should have their equality of status with men both in family life and in the sharing of income and assets protected by law. Such women should share equal rights and responsibilities with men for the care and raising of dependent children or family members'.

of their marital status, in matters relating to their children;
in all cases the interests of the children shall be paramount;

(f) The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount.⁶¹

(g) The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupa-

⁶¹On Art. 16 (1) (d) and (f), the CEDAW Committee said that:

‘As provided in Art. 5 (b), most States recognize the shared responsibility of parents for the care, protection and maintenance of children. The principle that “the best interests of the child shall be the paramount consideration” has been included in the Convention on the Rights of the Child (General Assembly resolution 44/25, annex) and seems now to be universally accepted. However, in practice, some countries do not observe the principle of granting the parents of children equal status, particularly when they are not married. The children of such unions do not always enjoy the same status as those born in wedlock and, where the mothers are divorced or living apart, many fathers fail to share the responsibility of care, protection and maintenance of their children. The shared rights and responsibilities enunciated in the Convention should be enforced at law and as appropriate through legal concepts of guardianship, wardship, trusteeship and adoption. States parties should ensure that by their laws both parents, regardless of their marital status and whether they live with their children or not, share equal rights and responsibilities for their children’.

tion;⁶²

- (h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.⁶³

⁶²With respect to Art. 16 (1) (g), the CEDAW Committee made this comment:

‘A stable family is one which is based on principles of equity, justice and individual fulfillment for each member. Each partner must therefore have the right to choose a profession or employment that is best suited to his or her abilities, qualifications and aspirations, as provided in Art. 11 (a) and (c) of the Convention. Moreover, each partner should have the right to choose his or her name, thereby preserving individuality and identity in the community and distinguishing that person from other members of society. When by law or custom a woman is obliged to change her name on marriage or at its dissolution, she is denied these rights’.

⁶³Referring to Art. 16 (1) (h), the CEDAW Committee said:

‘The rights provided in this article overlap with and complement those in article 15 (2) in which an obligation is placed on States to give women equal rights to enter into and conclude contracts and to administer property. Art. 15 (1) guarantees women equality with men before the law. The right to own, manage, enjoy and dispose of property is central to a woman’s right to enjoy financial independence, and in many countries will be critical to her ability to earn a livelihood and to provide adequate housing and nutrition for herself and for her family. In countries that are undergoing a programme of agrarian reform or redistribution of land among groups of different ethnic origins, the right of women, regardless of marital status, to share such redistributed land on equal

It also provides that the betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.

Apart from CEDAW, other international instruments that deal with discriminatory customary family law practices that affect women, especially young girls, are the Convention on the Rights of the Child (CRC)⁶⁴ and the African Charter on the Rights and Welfare of the Child (The Charter).⁶⁵ Art. 24 (3) of the CRC provides that ‘States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices

terms with men should be carefully observed. In most countries, a significant proportion of the women are single or divorced and many have the sole responsibility to support a family. Any discrimination in the division of property that rests on the premise that the man alone is responsible for the support of the women and children of his family and that he can and will honourably discharge this responsibility is clearly unrealistic. Consequently, any law or custom that grants men a right to a greater share of property at the end of a marriage or *de facto* relationship, or on the death of a relative, is discriminatory and will have a serious impact on a woman’s practical ability to divorce her husband, to support herself or her family and to live in dignity as an independent person. All of these rights should be guaranteed regardless of a woman’s marital status’.

⁶⁴Ratified by Malawi on 2 January 1991.

⁶⁵Ratified by Malawi on 10 September 1999.

prejudicial to the health of children'. The CRC stresses, in Art. 29, the traditional practices and, in Art. 19, the need to strengthen the family unit. Arguably, these extra protections seemingly make it difficult to base human rights abuses on cultural tradition. However, the CRC clearly places a focus on the child's best interests,⁶⁶ the child's evolving capacities,⁶⁷ the principle of non-discrimination⁶⁸ and the respect for the child's evolving capacities⁶⁹- all of which recenter the focus of human rights back to children and require placing children's interests before those of their abusive cultural practices.

On the regional level, Art. 21 of the Charter provides that:

'States Parties to the present Charter shall take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child and in particular:

(a) those customs and practices prejudicial to the health or life of the child; and (b) those customs and practices discriminatory to the child on the grounds of sex or other status.

2. Child marriage and the betrothal of girls and boys shall be prohibited and effective action, including legislation, shall be taken to specify the minimum age of marriage to be 18 years and make

⁶⁶Articles 3, 9, 20, 21, and 40 of the CRC.

⁶⁷Articles 5, 12, 14 and 40 of the CRC.

⁶⁸Art. 2 and the Preamble of the CRC.

⁶⁹Articles 21, 28, 39, 40, and Preamble of the CRC.

registration of all marriages in an official registry compulsory’.

In addition, the Declaration on the Elimination of Violence Against Women of 1994⁷⁰ makes an important statement. Art. 4 firmly rejects cultural relativism as it prohibits States from invoking ‘any custom, tradition or religious consideration to avoid their obligations’ in pursuing a policy of eliminating gender discrimination by all appropriate means and without delay. This recent recognition of the need to combat culturally ingrained gender discrimination reflects the increasingly accepted view that no other social groups have suffered greater violation of their human rights in the name of culture than women and children.

However, seeing how countries go about reconciling the tensions that arise between the application of international human rights norms of equality and African customary family laws, forms the basis of much of the literature on universalism and cultural relativism.⁷¹ In the following subsection, therefore, I discuss these theoretical debates.

⁷⁰UN General Assembly, 48th Session, Official Records, GA Resolution 04, Agenda item 11, A/RES/48/104, 1994.

⁷¹See also Banda F *Women, Law and Human Rights: An African Perspective* (2005) 253.

3.3.2 Resolving conflicts between African customary family laws and women's rights

The debate about the nature of customary family laws⁷² and how they affect women's rights⁷³ has already received considerable attention in the literature. It is, therefore, not necessary to provide details, but a summary of some of the main ideas on the subject for purposes of theoretical development.

The theory-oriented literature seems to be agreed that African customary family laws (or rather some African customary family laws) do conflict with women's rights.⁷⁴ What seems not to be readily agreed upon, however, is the approach on how to resolve these conflicts between the application of African customary family laws and the resultant effect that they have on women's rights. This problem is, of course, part of a wider question about the impact of the Bill of Rights on African customary family laws, which is the focus of this study.

⁷²See for instance: Himonga C *Family and Succession Laws in Zambia* (1995); Chanock M 'Neotraditionalism and customary law in Malawi' (1978) *African Law Studies* 80; Chanock M *Law, Custom and Social Order: The Colonial Experience in Malawi and Zambia* (1998); and Ibik JO *Restatement of African Law: Malawi Vol 1, The Law of marriage and divorce* (1970).

⁷³See for instance: Banda (n 71) 108-157; Bennett (n 45); Bennett (n 5); Kaganas F and Murray C 'Law, Women and the Family: the Question of Polygyny in a New South Africa' (1991) *Acta Juridica* 116; and Maithufi IP 'The constitution and the application of customary family law in South Africa' (2002) *De Jure* 207.

⁷⁴See, for instance, Bennett (n 45) and Banda (n 71).

Different scholars propound different approaches on how best to resolve the conflict.⁷⁵ Some scholars⁷⁶ propose that if the application of African customary family laws were to result in unfair discrimination, then common law should be applied in its place. Thus, Bennett argues that because the Bill of Rights is a transcendent code of norms, the conflict of laws should no longer remain value-blind.⁷⁷ This approach, however, seems to be giving the common law a superior status over customary laws, thus giving effect to the arguments given by proponents of cultural relativism. Other scholars propose that cultural norms be put through a filter of human rights. If they are found to discriminate against women, then human rights norms have to prevail over culture.⁷⁸ The revolutionary approach by Bennett and Beyani, largely influenced by universalism, has been criticised as being insufficiently sensitive to the needs of people who may value the cultural traditions that

⁷⁵See also the discussion by Banda (n 71) 254 who has grouped them into three. First are those who hold that delivery of human rights is only possible where states are prepared to act on discriminatory cultural practices by way of prohibition. Second are those who see culture as not necessarily being an impediment to the enjoyment by women of their rights. Thirdly reference must be made to An Na'im who incorporates the two arguments in presenting his methodological model for the mediation of culture and human rights in a transformative process for both as cited by Banda (n 71) 254.

⁷⁶For example, Bennett (n 45) 57.

⁷⁷As above.

⁷⁸See also Beyani C 'Towards a More Effective Guarantee of Women's Rights in the African Human Rights System' in Cook R (ed) *Human Rights of Women: National and International Perspectives* (1994) 285 at 292.

do not do well in the human rights test.⁷⁹

On the other hand, some scholars' approach, largely influenced by cultural relativism theory, conceives another version of addressing the conflict: the use of African customary laws. They argue that instead of abolishing customary laws that appear to be inimical to women's rights, we should closely look at local cultures and see which aspects we can best use to achieve the aspirations of human rights.⁸⁰ This is, as it were, sending a thief to catch another of his kin. In other words, this approach is against the view of ignoring customary laws in favour of the common law and human rights.

Specifically addressing himself to the central argument of the second group, Ibhawoh⁸¹ says that:

‘... it is not enough to identify the cultural barriers and limitations to modern domestic and international human rights standards. It is even more important to understand the social basis of these cultural traditions and how they may be adapted to or

⁷⁹Nhlapo T ‘Cultural Diversity, Human Rights and the Family in Contemporary Africa: Lessons from the South African Constitutional Debate’ as cited by Banda (n 71) 254.

⁸⁰Nyamu-Musembi C ‘Are local norms and practices fences or pathways? The example of women's property rights’ 126 as cited by Banda (n 71) 256. See also the MHRC *Cultural practices and their impact on the enjoyment of human rights, particularly women and children* (Unpublished) (2005) 89 in which it was established that some customary laws promote the enjoyment of human rights.

⁸¹Ibhawoh B ‘Between Culture and Constitution: Evaluating the Cultural Legitimacy of Human Rights in the African State’ (2000) *Human Rights Quarterly* 838 at 839.

reintegrated with national legislation to promote human rights. Such adaptation and integration must be done in a way that does not compromise the cultural integrity of peoples. In this way, the legal and policy provisions of national human rights can derive their legitimacy not only from the state authority, but also from the force of cultural traditions’.

The two main approaches to resolving the conflict between African customary family laws and the Bill of Rights can be deduced from the literature. These are: application of common law instead of African customary family laws, and the development of African customary family laws.

The approach to addressing the conflict between customary laws and women’s rights that I prefer in this study was ascertained from three sources. One was the court cases. The other was people, including magistrates and judges, and is manifested in the statements which I have taken from individuals, and in observed or reported instances of court dispute resolution. The last one is from the literature reviewed. Accordingly, the conflict between the right to culture and other rights within the Bill of Rights will therefore be addressed by the development of African customary family laws.

This approach is undoubtedly important to the analysis of the impact of the Bill of Rights on African customary family laws in Malawi, and perhaps elsewhere, for several reasons. Firstly, it is necessary to distinguish between customary family laws that are inimical to women’s rights and those that

advantage women's rights, for the purpose of determining what are the options of developing those that are against women's rights. Secondly, the right to marry according to customary family laws continues to be asserted by most people who are in opposition to changing of the customary marriage system.⁸² Thirdly, the dichotomy between replacing customary laws with the common law, and developing customary laws so that they are consistent with human rights, is carried into the debate about the protection of mostly women and children against discrimination. The development of customary laws is considered to be a good approach to achieving international human rights aspirations because of the cultural legitimacy that it derives from the said communities.⁸³

⁸²Ngwira N et al *Women's Property and Inheritance Rights in Malawi* (2002), n 13 in Chapter 1. Similarly, in South Africa, as noted by Bonthuys E and Erlank N 'The interaction between civil and customary family law rules: implications for African women' (2002) *Tydskrif vir die Suid-Afrikaanse* 748 'in a review of a number of surveys, the South African Law Commission points out that 90 percent of respondents had indicated that *lobolo*, which is a prerequisite for the customary marriages, had being paid and 80 percent were against the abolition of customary marriages'.

⁸³For a full discussion of the cultural legitimacy, see An-Naim AA 'State Responsibility under the International Human Rights Law to change Religious and Customary Laws' in Cook RJ *Human rights of women: National and International Perspectives* (1994) 167 at 173-175 who argues that unless international human rights have sufficient legitimacy within particular cultures and traditions, their implementation will be thwarted, particularly at the domestic level, but also at the regional and international levels. Without such legitimacy, it will be nearly impossible to improve the status of women through the law or other agents of social change.

On the one hand, the literature, as earlier stated, displays uncertainty as to the problem of resolving the conflict between equality and culture. One dimension of this uncertainty, which will be mentioned here, is that to which Grant⁸⁴ draws our attention. Commenting on the South African *Bhe* case⁸⁵ he argues that:

‘As the judgment shows, on one level, reconciling equality and culture is simply a matter of identifying those aspects of customary laws which offend the constitutional guarantee of equality, and striking them down. On the other level, it required the striking down of the male primogeniture rule in customary laws as incompatible with the right to gender equality. What to put in its place

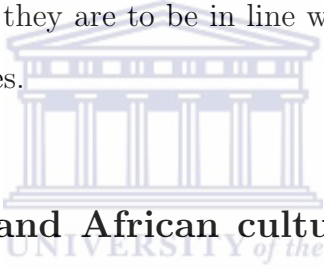
⁸⁴Grant E ‘Human rights, cultural diversity and customary law in South Africa’ (2006) *Journal of African Law* 2 .

⁸⁵*Bhe and others v Magistrate Khayelitsha and others, Shibi v Sithole and others, South African Human Rights Commission and Another v President of the Republic of South Africa and Another*, 2005(1) BCLR 1 (CC); 2005 (1) SA 580 (CC). Both the *Shibi* and *Bhe* cases concerned the customary law of succession embodied in the Black Administration Act 38 of 1927 and the constitutionality of the principle of male primogeniture. The only difference in them is that the female excluded from succession to the deceased’s estate in *Shibi* was the deceased’s sister as compared to the deceased daughters in *Bhe*. On the other hand, the applicants in *South African Human Rights Commission* applied for direct access to the CC to have section 23 of the Black Administration Act and the regulations promulgated thereunder declared unconstitutional, on the ground that its provisions infringed the rights to equality and human dignity, and the court granted direct access to the applicants.

is far more complicated matter. It is complicated not merely because of practical problems which preoccupied the majority of the court in *Bhe* case, but because of potentially contradictory demands of equality and the maintenance of legal dualism’.

It would appear from this that the solution proposed by many writers⁸⁶ to interpose common law in those areas of customary laws that are incompatible with the Constitution would meet with challenges.

On the other hand, it is very difficult to argue that the development of customary laws, so that they are to be in line with the constitution, is also not without its challenges.



3.3.3 Feminism and African culture: The public and private dichotomy in the application of human rights

Globally, it is now recognised that women’s rights are human rights.⁸⁷ This was acknowledged by world leaders in 1993 at the World Conference on Hu-

⁸⁶For example, the SALC *Discussion Paper 93 Project 90 on the Law of Succession* (1998).

⁸⁷Kisaakye EM ‘Women, Culture and Human rights: Female Genital Mutilation, polygamy and bride price’ in Wolfgang B, Kisaakye EM and Oberleitner G (eds) *Human rights of women: international instruments and African experiences* (2002) 268.

man Rights.⁸⁸ However, while it is universally accepted that women's rights are human rights, the question as to whether human rights apply to private law remains crucial for the protection of the rights of the women whose lives are governed by customary family laws.

The concept of the application of human rights in private law adopted in this study is what Barak⁸⁹ has called the 'direct application model' as opposed to the 'non-application model'. This model is based on the idea that human rights apply directly in private law.⁹⁰ Human rights protect the individual not only against the State, but also against private parties.⁹¹ Under this model, a private person is likely to obtain a result in court against another individual that would not be available otherwise.⁹² For example, if A shouts and disturbs a meeting, he infringes the constitutional human right of B, a fellow participant, to associate freely, and will be held liable to him.⁹³

⁸⁸The 1993 World Conference on Human Rights held in Vienna, Austria recognised that the human rights of women and of the girl-child are an inalienable, integral and indivisible part of universal human rights (see para. 18 of the Vienna Declaration). This position was reaffirmed by the world community in subsequent conferences held in Cairo, 1994, Copenhagen and Beijing, 1995.

⁸⁹Barak A 'Constitutional Human Rights and Private Law' in Friedmann D and Barak-Erez D (eds) *Human Rights in Private law* (2003) 13 at 14.

⁹⁰As above.

⁹¹As above.

⁹²As above.

⁹³As above. Applying this reasoning to a woman, whose rights are affected by customary family laws as will be seen in Chapter 4, it is submitted that she is likely to obtain a result in court against another individual that would not be available otherwise. For example,

This model, it is submitted, is important for the protection of women's rights precisely because the lives of women, especially women married under customary laws, are lived out largely in the private sphere, where violations against women are more likely than not to be committed by individuals.⁹⁴ As observed,⁹⁵ 'a common thread that runs through all feminist movements in Africa is the struggle to extend human rights to female citizens of the continent'. Tamale further notes that the usual snag that such activists immediately confront is the conceptual divide between the so called 'public' and 'private' spheres.⁹⁶ Thus, Bunch⁹⁷ observed that this distinction between private and public is a dichotomy largely used to justify female subordination if A forces B to enter into marriage with C, A infringes the constitutional right of B that she should not be forced to enter into marriage. A woman is therefore guaranteed a constitutional remedy that will be offered by the court and which would otherwise not have been possible if human rights were not to be applicable in private law.

⁹⁴Charlesworth H, Chinkin C and Wright S 'Feminist Approaches to International Law' 613 as cited by Banda (n 71) 43. See also Onoria H 'Introduction to the African System of Protection of Human Rights and the Draft Protocol' in Wolfgang B, Kisaakye EM and Oberleitner G (eds) *Human Rights of Women: international instruments and African experiences* (2002) 231 at 234 and Romany C 'State Responsibility goes Private: A Feminist Critique of the Public/Private Distinction in International Law' in Cook RJ (ed) *Human Rights of Women: National and International Perspectives* (1994) 85 at 94-95.

⁹⁵Tamale (n 52) 54.

⁹⁶As above.

⁹⁷Bunch C 'Transforming Human Rights from a Feminists Perspective' in Peters J and Wolper A (eds) *Women's rights, human rights: International feminist perspectives* (1995) 11 at 14.

and to exclude human rights abuses in the home from public scrutiny. The traditional human rights framework places an emphasis on the duty of the state to uphold the rights of its citizens within the public sphere. The state is taken as the primary violator of rights.⁹⁸ Furthermore, it has also been observed that the assumption that states are not responsible for violations of women's rights in the private sphere ignores the fact that such abuses are often condoned or even sanctioned by states even when the immediate perpetrator is a private citizen.⁹⁹ This means that communities and individuals from within the community that violate women's rights fall outside the ambit of the human rights structure and fall under the jurisdiction of culture.¹⁰⁰ For example, Murray takes that part of feminist analysis which focuses on the exclusion of different voices in the construction of norms to argue that African states, like women, have been largely ignored by the international community. She does, however, qualify the private-public dichotomy, noting that the state in Africa has evolved in such a way that the dichotomy between public and private is not clear-cut as it appears in the North.¹⁰¹ It should also be observed that many post-independence constitutions of African states exempted private laws (for example, marriage, inheritance and succession) from the operation of the non-discrimination principle.¹⁰²

⁹⁸Cook (n 57).

⁹⁹Bunch (n 97) 14.

¹⁰⁰Fox and Hasci *Women's rights as human rights* as cited by Tamale (n 52) 54.

¹⁰¹Murray *The African Commission on Human Rights and International Law* as cited by Banda (n 71) 43.

¹⁰²See for example, such provisions in the constitutions of Zimbabwe, Zambia and Kenya.

It has also been noted¹⁰³ that feminist scholars have contended that women's and children's rights are vulnerable to infringement in private relations.¹⁰⁴ To support this view, Romany¹⁰⁵ has observed that:

'Family, through canonization, becomes the refuge for the flourishing of those spheres of privacy and freedom that lie at the core of the non-political foundations of the liberal state. At the root of the enshrinement of family in conventional human rights law within the blown-up liberal state of international society lies a convergence of narratives which legitimates a hierarchical ordering of intimate relations; this convergence is hidden from the refuge narrative claims that the family as a social unit is beyond the purview of the state'.

On the other hand, the 'non-application model' is to the effect that human rights are applicable only in public law. This model is based on the original conception that human rights were rights and freedoms against the State and other public authorities.¹⁰⁶ Their very fundamental purpose was to protect

¹⁰³See, for example, Chirwa DM *Towards binding economic, social and cultural rights, obligations of non-state actors in international and domestic law: A critical study in emerging norms* Unpublished LLD thesis (2005) University of the Western Cape, 62-63.

¹⁰⁴See, for example, Clapham A *Human rights in the private sphere* (1993) as cited by Murray C 'A feminist perspective on reform of the African human rights system' (2002) *African Human Rights Law Journal* 205 at 211-212.

¹⁰⁵Romany (n 94) 94-95.

¹⁰⁶Friedmann D and Barak-Erez D 'Introduction' in Friedmann D and Barak-Erez D

the individual against the omnipotent State with its vast powers.¹⁰⁷ They are directed at the State and the State alone. In the realm of private law, according to the ‘non-application model’, the regular laws continue to apply as they did before human rights were granted constitutional status.¹⁰⁸

The arguments in favour of the ‘direct application model’ have been said to depend on the language of the relevant constitutional provision, including its formulation.¹⁰⁹ For example, in Switzerland, the language of several cantons explicitly mandates application of the direct model.¹¹⁰ Another example is Germany. In Germany, the human rights set forth in the Basic Law apply not only to relations between an individual and the State in the sphere of public law, but also to relations between private parties in private law.¹¹¹ Similarly, in Malawi¹¹² the formulation of the relevant provisions, as quoted above, it is

(eds) *Human Rights in Private law* (2003) 1 at 1.

¹⁰⁷Barak (n 89) 14.

¹⁰⁸As above.

¹⁰⁹As above.

¹¹⁰See Constitution of Canton of Jura, para. 14 (2), which states that every person must use his basic rights in a manner that respects the basic rights of others as cited by Barak (n 89) 15.

¹¹¹As above.

¹¹²The Malawi Constitution provides in Section 15 (1): ‘The human rights and freedoms enshrined in this chapter shall be respected and upheld by the executive, legislature and judiciary and all organs of the Government and its agencies and, where applicable to them, by all natural and legal persons in Malawi and shall be enforceable in a manner prescribed in this chapter’. Similarly, Section 8 (2) of the Constitution of the Republic of South Africa, 1996 provides that ‘a provision of the Bill of Rights binds a natural or a juristic

submitted, explicitly mandates both vertical as well as horizontal application of constitutional human rights.¹¹³ Thus the application of human rights, as defined in these constitutions,¹¹⁴ applies to both public and private laws. Accordingly, the enjoyment of the right to culture exists not only against the State, but also in the context of relations between individuals.¹¹⁵

It is, however, noted that in relations between private parties, a conflict may arise between different human rights.¹¹⁶ For example, one's freedom of contract may conflict with the freedom of expression of another person. Such clashes are resolved by balancing constitutional rights directly in private law.¹¹⁷ In the area of customary family laws, as mentioned earlier, the right to culture frequently contradicts the right to equality. Similarly, it is submitted, the conflicting rights concerned can be resolved by balancing the constitutional rights.

person if, and to the extent that, it is applicable, taking into account the nature of the right to the nature of any duty imposed by the right'.

¹¹³This point has also been noted with reference to South Africa by Fagan A 'Determining the Stakes: Binding and non-Binding Bill of Rights' in Friedmann D and Barak-Erez D (eds) *Human Rights in Private law* (2003) 73 at 91.

¹¹⁴The 1995 Malawi Constitution and the Constitution of the Republic of South Africa, 1996.

¹¹⁵Likewise, a woman who participates in the enjoyment of a cultural right has a right not to have her right to choose whom to marry, for example, infringed through forcing her to marry someone against her will.

¹¹⁶Barak (n 89) 18.

¹¹⁷As above.

The ‘direct application model’, as defined here, avoids the ‘non-application model’ which, it is submitted, does not recognise the power imbalance that exists between a husband and a wife, as unequal parties in a customary marriage contract. Apart from the fact that the ‘non-application model’ does not recognise the imbalance between husband and wife, the assumption inherent in it that marriage family laws will apply equally to parties is without content.¹¹⁸ Furthermore, according to Section 5 of the Malawi Constitution, all laws have to pass a constitutional test for them to be valid. Therefore, if private law is left out of this test, the assumption is that private law is above the Constitution. It is thus not helpful to our analysis of the impact of the Bill of Rights on customary family laws and the enjoyment of women’s rights. For a proper understanding of the impact of the Bill of Rights on customary family laws and the rights of women married under it, the direct model, which assumes that human rights apply to private laws, is preferred.

Considered in relation to courts implementing and enforcing women’s rights, and of course law reform in the area of customary family laws, the question of direct application, as defined here, goes beyond academic debate. It highlights the options for, and effectiveness in, the implementation of women’s

¹¹⁸Historically, private law, which regulates the legal relationship of private individuals, is predicated in practically all modern societies on the theory of equality before the law. A theory that has a long tradition dating back to the Old Testament: ‘Thou shall not prefer the person of the poor, nor favour the person of the mighty; but in righteousness shall thou judge thy neighbour’ (Leviticus 19:15) as cited by Friedmann and Barak-Erez (n 106) 1.

rights by courts and law reformers.

3.4 International norm of equality and non-discrimination

The principles of equality and non-discrimination are commonly described as the right to treat like cases alike and different cases differently.¹¹⁹ The right to equality guarantees, first and foremost, that all persons are equal before the law, which means that the law shall be formulated in general terms applicable to every human being and enforced in an equal manner. Secondly, all persons are entitled to equal protection of the law against arbitrary and discriminatory treatment by private actors. In this regard, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on the grounds of race, colour, and sex, among others.

The principles of equality and non-discrimination have also been described to be the cornerstone of democracy, and indeed, they imbue and inspire the whole human rights concept.¹²⁰ Since the beginning of the human rights

¹¹⁹Wentholt K 'Formal and substantive equal treatment: the limitations and potential of the legal concept of equality' in Loenen T and Rodrigues PR (eds) *Non-Discrimination Law: Comparative perspectives*, (1999) 53 at 53.

¹²⁰Nowak M *UN Covenant on Civil and Political Rights: CCPR Commentary* (1993) 458.

discourse in the Minorities Treaties era after World War I, these principles have been at the fore, having a prominent place in all major human rights instruments.¹²¹ By now, the principle of non-discrimination has undoubtedly acquired the status of a fundamental rule of international human rights law.¹²² The principle of non-discrimination is a principle of customary international law and, at least as regards discrimination on the basis of sex, race and ethnic origin, also has a status of *jus cogens*.¹²³

In order to ensure the principles of equality and non-discrimination, various human rights instruments over the years have enumerated certain grounds on which discrimination is prohibited, and indeed, the prohibition of discrimination on the ground of sex has been fundamental to the concept of the promotion of the principle of equality and non-discrimination.¹²⁴ The significance of these principles, where women's rights are concerned, cannot be over-emphasised. Indeed, as Cook¹²⁵ points out:

‘The reasons for this general failure to enforce women’s rights are

¹²¹See, for example, Art. 2 of the UDHR; Art. 2 of the CESCR; Art. 2 (1) of the CCPR; Art. 2 of CEDAW; Art. 2 (1) of the CRC; and Art. 2 and 3 of the ACHPR.

¹²²United Nations World Conference on Human Rights, Vienna Declaration and Programme of Action, UN Doc.A/CONF.157/24 (Part I) (1993), June 1993, 1.

¹²³According to Art. 53 of the Vienna Convention on the Law of Treaties 1969, no derogation is permitted from a *jus cogens* norm.

¹²⁴See, generally, Art. 1 of CEDAW.

¹²⁵Cook RJ ‘Women’s International Human Rights Law: The Way Forward’ in Cook RJ (ed) *Human Rights of Women: National and International Perspectives* (1994) 3 at 3.

complex and vary from country to country. They include lack of understanding of the systemic nature of the subordination of women, failure to recognise the need to characterise the subordination as a human rights violation, and lack of state practice to condemn discrimination against women’.

To this end, she observes that the legal obligation to eliminate all forms of discrimination against women is a fundamental tenet of international human rights law.¹²⁶ International jurisprudence on this point has consistently affirmed the fact that the principles of equality and non-discrimination are recognised, and their value conceded.¹²⁷

¹²⁶As above. See, for example, Art. 1 of CEDAW; and Art. 24 (3) of the CRC.

¹²⁷In the South African case of *Bhe and others v Magistrate Khayelitsha and others, Shibi v Sithole and others, South African Human Rights Commission and Another v President of the Republic of South Africa and Another*, 2005(1) BCLR 1 (CC); 2005 (1) SA 580 (CC), for example, Langa, DCJ noted that:

‘The rights to equality...are of the most valuable of rights in an open and democratic state. They assume special importance in South Africa because of our past history of inequality and hurtful discrimination on grounds that include race and gender’.

Again, in the case of *Legal Resources Foundation v Zambia*, Communication 211/98, Decision of AfCmHPR, 29th Ordinary Session, April/May 2001 [2001] IIHRL 1 (1 May 2001), paragraph 63, in which a case was brought by a non-governmental organisation challenging an amendment to the Constitution of Zambia, which provided that before a person could contest for the country’s presidency, she or he had to prove that both her or his parents were of Zambian origin as being discriminatory, the Commission noted that:

The principles of equality and non-discrimination, however, are elusive and complex concepts which give rise to several controversies referring to the scope of these concepts.¹²⁸ A main theme in feminist legal studies concerns the question of whether the legal concept of equality can attain genuine equality between men and women. Or is it a concept which offers women the same legal position as men have, without criticising the underlying male dominance of the law? This controversy deals with the potential and limitations of the concept of equality. The questions this controversy raise flow partly from the distinction between a formal and substantive approach to equality.¹²⁹

In this section, therefore, the focus will be on such international law provisions that prohibit discrimination either generally or on the basis of sexual orientation, focusing on the scope of the equality norm as established by international human rights instruments, and lists specific extensions to the family and its comprehensive elaboration in CEDAW.

‘The right to equality is very important. It means that citizens should expect to be treated fairly and justly within the legal system and be assured of equal treatment before the law and equal enjoyment of the rights available to all citizens. The right to equality is important for a second reason. Equality or lack of it, affects the capacity of one to enjoy many other rights.

¹²⁸Wentholt (n 119) 53.

¹²⁹As above.

3.4.1 Scope of equality and non-discrimination principles at international law

The principles of equality and non-discrimination first came to the fore on the universal level in the Minorities Treaties era after World War I.¹³⁰ The Peace Conference held in Paris in 1919-1920 considered, among other things, protecting groups, especially, but not exclusively, minorities, against discrimination.¹³¹ Despite the very noble intentions of the Minorities Treaties, the provisions therein were never rigidly implemented or enforced and were ultimately not a great success. They were, however, the first step in the international recognition of the importance of the principles of equality and discrimination.

The Permanent Court of International Justice was the forum through which the provisions of the Minorities Treaties could be enforced. The case law of this court illuminates the concepts of equality and non-discrimination. For example, in its Advisory opinion of 10 September 1923 in the *German Settlers in Poland case*,¹³² the Permanent Court of International Justice said:

¹³⁰Higgins N 'The Right to Equality and Non-Discrimination with regard to Language' accessed at <http://www.murdorch.edu.au/elaw/issues/v10n1/higgins101nf.html> on 21/11/08.

¹³¹As above.

¹³²Permanent Court of International Justice 1922-5, Series B, No 6, (1923); Judgment of 10 September 1923 in Patel BN (ed) *The World Court Reference Guide: Judgments, Advisory Opinions and Orders of the Permanent Court of International Justice (1922-2000)* (2002) 15.

‘... there must be equality in fact as well as ostensible legal equality in the sense of the absence of discrimination in the words of the law’.

This statement was endorsed in a subsequent Advisory Opinion on Minority Schools in Albania.¹³³ In this judgment, the court said:

‘It is perhaps not easy to define the distinction between the notions of equality in fact and equality in law; nevertheless, it may be said that the former notion excludes the idea of a merely formal equality, that is indeed what the court laid down in its Advisory Opinion of 10 September 1923, concerning the case of the German settlers in Poland. “Equality in law”, the court went on to say, precludes discrimination of any kind whereas equality in fact may involve the necessity of different treatment in order to achieve a result which establishes an equilibrium between different situations’.

¹³³Permanent Court of International Justice 1935, Series A/B, No 64 at 17, in Patel, as above, 75. In this case, the court considered that in order for minorities to be able to live peaceably alongside the majority while at the same time retaining their special characteristics, two elements were necessary: to ensure that nationals belonging to racial, religious or linguistic minorities shall be placed in every respect on a footing of perfect equality with other nationals of the State; and that to ensure for the minority elements suitable means for the preservation of their racial peculiarities, their traditions and their national characteristics.

Commenting on the *Minorities Schools case*, Higgins¹³⁴ said:

‘This decision shows that the Minorities Treaties placed a positive obligation on the State to take affirmative action measures in order to place minorities on an equal footing with the majority in order for true equality to be realised ...’

From the Minorities Treaties era, principles of equality and non-discrimination on the basis of sex are clearly enshrined in international law.¹³⁵ First, the United Nations Charter adopted on 26 June 1945 provided the blueprint for the development of international system of human rights.¹³⁶ Although it did not outline the specific human rights that States were to respect and the mechanisms for their protection and enforcement, it identified non-discrimination and equality as central principles to underpin international human rights law.¹³⁷

¹³⁴Higgins (n 130).

¹³⁵Stamatopoulou E ‘Women’s Rights and the United Nations’ in Peters J and Wolper A (eds) *Women’s rights: International feminist perspectives* (1995) 36 at 37.

¹³⁶Drzewicki ‘The United Nations Charter and the Universal Declaration of Human Rights’, in Hanski R and Suksi M, (eds), *An Introduction to the International Protection of Human Rights: A Textbook*, as cited by Chirwa DM ‘Reclaiming (Wo)manity: The merits and demerits of the African Protocol on women’s rights’ (2006) *Netherlands International Law Review* 2.

¹³⁷Art. 1 of the UN Charter provides that one of the purposes of the UN is to achieve international cooperation in ‘promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.’

Following from that, the principle of non-discrimination under international law was further reiterated under the Universal Declaration on Human Rights (UDHR).¹³⁸ Its non-discrimination provision has had major political influence and is of theoretical importance.¹³⁹ The non-discrimination provision in Art. 2 of the UDHR reads as follows:

‘Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, **sex**, language, religion, political or other opinion, national or social origin, property, birth or other status’.

(Emphasis added)

Unlike for instance the UN Charter, the listing of grounds in Art. 2 of UDHR is open-ended.¹⁴⁰ It does not have independent standing, but is, in a way, accessory to the other articles of the UDHR. While not much is said about women, Art. 2 does entitles all the rights and freedoms set forth in the UDHR without distinction of any kind, including sex.¹⁴¹ Furthermore, when read from the perspective of women’s lives, many violations of women’s rights such

¹³⁸UN General Assembly, Resolution 217A (III), 10 December 1948.

¹³⁹Makonnen T *The principle on non-discrimination in international human rights law and EU law* (2005) 5 accessed at

<http://iom.fi/elearning/files/european-law/essential-reading/Principle-of-Discrimination.pdf>,

on 11/11/08.

¹⁴⁰See the distinction between Art. 1(3) of the UN Charter and Art. 2 of the UDHR.

¹⁴¹Bunch (n 97) 13.

as widow cleansing can readily be interpreted as forbidden under existing clauses. The protection provided is therefore extensive, as the rights guaranteed cover nearly the entire range of what today are recognised as human rights and fundamental freedoms.¹⁴² Several other articles of the UDHR provide added protection from discrimination in particular situations.¹⁴³ Art. 7 in turn provides for equality before the law:

‘All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination’.

It must be noted that the rule that all people are entitled to protection not only from discrimination but also from incitement to discrimination is a unique and thus important feature of the UDHR which has been reaffirmed in many other international instruments, including, the International Convention on Civil and Political Rights (CCPR),¹⁴⁴ and the International

¹⁴²As above.

¹⁴³As an example, Art. 23 provides: ‘[e]veryone, without any discrimination, has the right to equal pay for equal work’.

¹⁴⁴General Assembly Resolution 2200A(XXI), 21 UNGAOR Suppl.(No.16) at p.52, UN-DOC.A/6316(1966), 999 UNTS p.171, entered into force 23 March 1976. The Human Rights Committee is tasked with the monitoring and implementation of the CCPR. The views expressed by the Committee and other treaty monitoring bodies are hereby given considerable weight in the interpretation of the respective human rights treaty. While the

Convention on Economic, Social and Cultural Rights (CESCR).¹⁴⁵ Both of these instruments were ratified by Malawi in 1993 and contain provisions that proscribe discrimination on the basis of sex and guarantee equality before the law.¹⁴⁶

The CCPR contains two all-important provisions on non-discrimination. The first one is to be found in Art. 2 and it relates to the obligation to ensure the rights recognized in the CCPR to all individuals without discrimination as follows:

‘Each State Party to the present Covenant undertakes to **respect** and to **ensure** to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’.(Emphasis added).

The obligation to ‘respect’ and to ‘ensure’ implies both a negative and a positive obligation.¹⁴⁷ States are thus obliged both to refrain from restrict-

views are not legally binding, they are authoritative since the members of these bodies are experts in their specific fields of law and hence worth noting their position on certain matters.

¹⁴⁵General Assembly Resolution 2200A(XXI), 21 UNGAROR Suppl.(No.16) at p.49, UN-Doc.A16316(1966), 993 UNTS p.3, entered into force on 3 January 1976.

¹⁴⁶CCPR arts 2, 2(1), 3 and 26; CESCR arts 2, 2(2) and 3.

¹⁴⁷Makonnen (n 139) 6.

ing the rights guaranteed in the CCPR, as well as to take positive steps to give effect to these rights.¹⁴⁸ The means by which a state gives effect to these rights has been left up to them; to be decided in accordance with its constitutional processes and legislation. The obligation to ensure the rights have been interpreted to mean that the state party must take effective measures to secure that the rights in question are protected in relation to all violations, including those that result from actions by private individuals or other private actors.¹⁴⁹ The obligation in Art. 2 also means that the level of protection afforded cannot vary from group to group. It has to be the same for all. The list of grounds is not exhaustive, as is indicated by the words ‘such as’ and ‘other status’.¹⁵⁰ It is also important to note that the Human Rights Committee has in its practice established that the concept of ‘sex’ includes sexual orientation.¹⁵¹

While the CCPR speaks in Art. 2 of ‘distinctions of any kind’, it is a well-established interpretation that only arbitrary or otherwise unjust distinctions are prohibited.¹⁵² As the Human Rights Committee¹⁵³ has observed:

¹⁴⁸As above.

¹⁴⁹As above.

¹⁵⁰As above.

¹⁵¹*Toonen v Australia*, Communication No 488/1992 as cited by Makonnen (n 139) 6. The Human Rights Committee is a UN body of 18 experts that meets three times a year to consider the five yearly reports submitted by UN member states on their compliance with the CCPR.

¹⁵²See e.g. Thornberry (n 44) 283.

¹⁵³Para. 13 of the UN General Comment No. 18 (Non-discrimination), adopted at the

‘not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the CCPR’.

Thus, positive action or other preferential action measures are allowed and may even be required, if they are needed to correct discrimination in fact and are used only as long as is necessary. In the *Mauritian Women’s Case*,¹⁵⁴ for example, the Human Rights Committee in finding a violation of articles 2 (1) and 3 of the CCPR considered that a distinction based on gender was not in itself conclusive. The determining factor was that no sufficient justification had been given for such a distinction. Thus the decision in this case shows that not all differentiation of treatment constitutes discrimination under the CCPR.

The principles of equality and non-discrimination does not mean that all are always to be treated in an identical manner. This would only be the case if all were really identical in all aspects and lived in exactly the same

¹⁵⁴Communication No. 35/1978, UN Doc. CCPR/C/OP/1 at 67 (1984). In this case 20 Mauritian women’s claim was that the enactment of the *Immigration (Amendment) Act 1977* and *Deportation (Amendment) Act 1977*, by Mauritius constitutes discrimination based on sex against Mauritian women, violation of the right to found a family and home, removal of the protection of courts of law, in breach of articles 2, 3, 4, 17, 23, 25 and 26 of the CCPR.

conditions. Evidently, this is not the case; there are obvious differences between us such as our gender, the languages we speak, whether we are rich or poor, just to mention a few. Where these differences are relevant to a given right or situation, equal treatment may, in fact, mean different treatment. In addition, another example of a situation familiar to us all where equal treatment requires different treatment is maternity. Evidently, only women become pregnant (up until now anyway). In order for women to have equal access to health care, there need to be doctors specially trained to deal with the situation that women experience and not men; thus meting out different treatment.

Furthermore, what the principles of equality and discrimination mean, as it was very eloquently expressed in Judge Tanakas' dissenting judgment in the *South West Africa Case*,¹⁵⁵ and has since been repeated by many courts, is that:

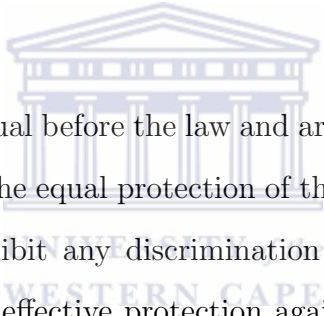
‘All human beings, notwithstanding their differences in their appearance and other minor points, are equal in their dignity as

¹⁵⁵*South West Case* (Second phase) (1966) International Court of Justice Rep. 6 pp 303-305. In the case at hand, Judge Tanaka was discussing the practice of apartheid. He found that discrimination according to the criterion of race, colour, national or tribal origin in establishing the rights and duties of the inhabitants of the territory is not considered reasonable and just. .. If differentiation be required, it would be derived from the difference of language, religion, custom, etc. not from the racial difference itself. The policy of apartheid he consequently found to be fundamentally unreasonable and unjust.

persons. Accordingly, for the point of view of human rights and fundamental freedoms they must be treated equally.’

‘The principle of equality does not mean absolute equality, but recognises relative equality, namely different treatment proportionate to concrete individual circumstances. Different treatment must not be given arbitrarily; it requires reasonableness, or must be in conformity with justice...’

Secondly, is Art. 26 of the CCPR containing a free-standing prohibition of discrimination:



‘All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.’

From the foregoing, we see that Art. 26 is couched in similar terms as Art. 7 of the UDHR and is wide in scope. While Art. 2 limits the scope of the rights to be protected against discrimination to those provided for in the CCPR, Art. 26 is not similarly limited.¹⁵⁶ The scope of this article is mainly delimited

¹⁵⁶UN General Comment No. 18 of the UN doc. HRI/GEN/1/Rev.5, *Compilation of*

by the concepts of ‘equality before the law’ and ‘equal protection of the law’. This double-faceted formulation provides that the equal treatment obligation is binding both in the law-making (‘equal protection of the law’) and in the application of law (‘equality before the law’). Thus, when legislation is adopted by a State Party, it must comply with the requirement of Art. 26 in that its content should not be discriminatory. And when that law is applied in courts or by administrative bodies, it must be applied in a non-discriminatory manner.¹⁵⁷ The scope of Art. 26 is thus sweeping and covers all matters dealt with by law.

Another UN document which illuminates the concepts of equality and discrimination, and should therefore be examined is the UN General Comment No. 18¹⁵⁸ which deals with Art. 26 of the CCPR. Defining the concept of discrimination the Human Rights Committee¹⁵⁹ states that:

‘ ... that the term “discrimination” as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as ... sex ... and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal

General Comments and General Recommendations adopted by Human Rights Treaty Bodies, 134-137.

¹⁵⁷See also Nowak (n 120) 466-469 and Thornberry, (n 44), 285.

¹⁵⁸See n 131 above.

¹⁵⁹UN General Comment of the Human Rights Committee, No. 18, para. 7.

footing, of all rights and freedom.’

From the above, the concept of discrimination is rather broad as it covers intentional as well as unintentional conduct which has discriminatory effects. Given that Art. 26 prohibits any discrimination and that the definition provided above refers to the effects of discrimination, this article has been deemed to cover indirect discrimination.¹⁶⁰

It is also important to note that General Comment No. 18 also deals with other issues affecting the principles of non-discrimination and equality.¹⁶¹ For example, in para. 9¹⁶² it looks at the distinction between discrimination in fact and discrimination in law to States who are parties to the CCPR:

‘Reports of many States parties contain information regarding legislative measures and court decisions, which relate to protection against discrimination in law, but they very often lack information, which would reveal discrimination in fact. When reporting on articles 2 (1), 3 and 26 of the Covenant, States parties usually cite provisions of their constitution or equal opportunity laws with respect to equality of persons. While such information is of course useful, the Committee wishes to know if there remain

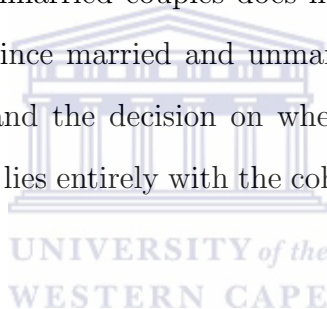
¹⁶⁰Human Rights Committee in the case of *Bhinder v Canada* as cited by Makonnen (n 139) 9.

¹⁶¹Higgins (n 130).

¹⁶²Para. 9.

any problems of discrimination in fact, which may be practised either by public authorities, by the community, or by private persons or bodies. The Committee wishes to be informed about legal provisions and administrative measures directed at diminishing or eliminating such discrimination.’

Furthermore, it has also been interpreted that the enjoyment of rights and freedoms on an equal footing does not mean identical treatment in every instance.¹⁶³ The Committee has considered, for example, that a differentiation between married and unmarried couples does not amount to a violation of Art. 26 of the CCPR, since married and unmarried couples are subject to different legal regimes and the decision on whether or not to enter into a legal status by marriage lies entirely with the cohabitating persons.¹⁶⁴ As de Varennes¹⁶⁵ put it:



‘It is widely accepted that not all distinctions are necessarily discriminatory: Equality and the right to non-discrimination require that individuals be protected against unreasonable or unacceptable different treatment. How a court of law is to decide whether a particular distinction is acceptable or not is a difficult task, as

¹⁶³General Comment No. 18 para. 8.

¹⁶⁴Communication No. 976/2001, CCPR/C/80/D/976/2001, 15 June 2004 as cited by Makonnen (n 139) 10.

¹⁶⁵de Varennes ‘Language, Minorities and Human Rights’ as cited by Higgins (n 130).

it involves a balancing act between the interests and priorities of the government- normally mirroring those of the majority group controlling the state machinery-and the interests and rights of the individuals affected.’

It is also important to note that the prohibition of discrimination does not rule out affirmative action measures. Quite on the contrary, States are required to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the CCPR. This was noted by the Human Rights Committee in its General Comment No. 18 on Non-Discrimination¹⁶⁶:

‘For example, in a state where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the state should take specific action to correct those conditions. Such action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population. As long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation’.

Coming to the CDESCR, it is particularly important to discuss the principles of equality and non-discrimination issues in relation to economic, cultural

¹⁶⁶Para. 10.

and social rights,¹⁶⁷ since it is in this area in which vertical discrimination between an individual and authorities often arises, particularly as regards women. Art. 2(2) of the CDESCR reads:

‘The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’.

The formulation of this provision has been described to be absolute and practice-oriented, as implied by the notions ‘guarantee’ and ‘will be exercised’.¹⁶⁸ As noted above, it imposes obligations on State parties which are of immediate effect. If a state has not taken all measures needed to effec-

¹⁶⁷According to General Comment No. 3 on the nature of States parties obligations, adopted by the Committee at its fifth session(1990), a distinction is often made between civil and political rights on the one hand, and economic, social and cultural rights on the other. The distinction being that only the former are seen as readily justiciable rights, i.e. as rights that can be enforced through courts of law. While it is true that the economic, social and cultural rights are often framed as state obligations aiming at progressive realization and acknowledging also the constraints due to the limits of available financial resources, economic, social and cultural provisions do impose various obligations which are of immediate effect. The justiciable nature of several economic, social and cultural rights has become increasingly recognised, the clearest example of such a right being the right to enjoy economic, social and cultural rights without any discrimination.

¹⁶⁸Makonnen (n 139) 11.

tively ensure that all economic, social and cultural rights can be enjoyed in practice without any discrimination, it is in breach of the ESCR.¹⁶⁹

The list of prohibited grounds is the same as in articles 2 and 26 of the CCPR. Reference can therefore be made to what was submitted above with regard to articles 2 and 26 of the CCPR. On the other hand, unlike Art. 2(2) of the CCPR, Art. 2(2) of the CDESCR explicitly employs the notion of ‘discrimination’. The criteria used for a legitimate differentiation must be reasonable and objective, and the differentiation is to be aimed to achieve a purpose that is legitimate under the CDESCR. Affirmative or other preferential action is not prohibited by the Article; quite to the contrary, it is in some instances required. For example, the Committee on Economic, Social and Cultural Rights¹⁷⁰ has submitted that regarding people with disabilities:

‘... the obligation in the case of such a vulnerable and disadvantaged group [people with disabilities] is to take positive action to reduce structural disadvantages and to give appropriate preferential treatment to people with disabilities in order to achieve the objectives of full participation and equality within society for all

¹⁶⁹In its General Comment No. 5 Persons with disabilities, adopted at the Eleventh session (1994), para. 11, for example, the Committee on Economic, Social and Cultural Rights(CDESCR) has noted that also non-public entities, such as private employers and private suppliers of goods and services, should be subject to both nondiscrimination and equality norms, especially given the increasing privatisation of public services.

¹⁷⁰General Comment No. 5 paras 9 and 18.

persons with disabilities. Such actions are not to be considered discriminatory in the sense of Art. 2 (2) as long as they are based on the principle of equality and are employed only to the extent necessary to achieve that objective.’

The CDESCR itself does not contain a definition of ‘discrimination’, and neither has the CDESCR Committee provided such a general definition. The CDESCR Committee has, however, defined discrimination on the basis of disability as follows:

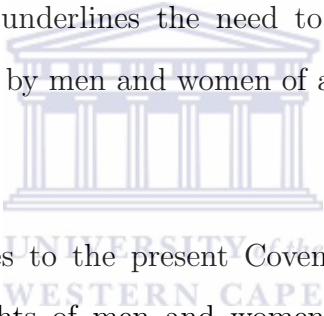
‘For the purposes of the Covenant, “disability-based discrimination” may be defined as including any distinction, exclusion, restriction or preference, or denial of reasonable accommodation based on disability which has the effect of nullifying or impairing the recognition, enjoyment or exercise of economic, social or cultural rights.’

From the foregoing, we see that the definition provided by the CDESCR Committee has been greatly influenced by the definition employed by the Human Rights Committee, which is a positive matter as this contributes to the coherence of human rights law.¹⁷¹ It has been submitted that for all practical purposes the definition of discrimination adopted by the Human

¹⁷¹As it will be noted below, the definition used by the Human Rights Committee, for its part, is based on the definition in CEDAW.

Rights Committee is, *mutatis mutandis*, applicable also in regard of Art. 2 of the CDESCR.¹⁷² However, given that Art. 2 of the CDESCR is not self-standing but accessory to the other rights enunciated in the CDESCR, there might arise situations where discrimination in the social, economic and cultural sphere does not amount to discrimination in the enjoyment of any of the rights enshrined in the CDESCR. Paradoxically, it has been observed, such discrimination would thus be prohibited under Art. 26 of the ICCPR but not CDESCR itself.¹⁷³

In addition to the general guarantee against discrimination discussed above, the CDESCR separately underlines the need to take positive measures to achieve equal enjoyment by men and women of all economic, social and cultural rights in Art. 3:



‘The States Parties to the present Covenant undertake to ensure the equal rights of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.’

Particularly on the protection of women’s rights against discrimination, Art. 1 of CEDAW defines discrimination as follows:

‘For the purposes of the present Convention, the term “discrim-

¹⁷²Makonnen (n 139) 13.

¹⁷³Makonnen (n 139) 13.

ination against women” shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field’.

From the above, we see that Art. 1 of CEDAW provides a comprehensive definition of discrimination that is applicable to all provisions of CEDAW and covers acts falling within the private sphere. The words ‘irrespective of their marital status’ indicate that the elimination of discrimination on the grounds of marital status is a goal in addition to, and separate from, elimination of discrimination on the grounds of sex.¹⁷⁴

It should also be observed that the definition in Art. 1(1) is put into use in the substantive provisions of CEDAW. In Art. 2, for example, States parties undertake, inter alia, to adopt appropriate legislative and other measures prohibiting all discrimination against women and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination. Discrimination is not to be prohibited only with regard to those rights and freedoms that are explicitly mentioned in CEDAW, but in respect of all human rights and fundamen-

¹⁷⁴Makonnen (n 139).

tal freedoms, in accordance with the definition in Art. 1.¹⁷⁵ In terms of Art. 2 (e) states undertake to take all appropriate measures to eliminate discrimination against women by any person, organisation or enterprise. It is thus not enough to strive for ‘vertical’ gender equality of the individual woman vis-a-vis public authorities, but states must also work to secure non-discrimination at the ‘horizontal’ level, including such semi-public areas as employment and provision of services, and even to some extent the family. As noted by the Committee on the Elimination of all forms of Discrimination against Women¹⁷⁶:

‘[u]nder general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.’

In its General Recommendation No. 19, the Committee observed that the:

‘definition of discrimination includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately’.

¹⁷⁵States parties to the Convention must take steps to eliminate discrimination in both public and private spheres.

¹⁷⁶General Recommendation No. 19 Violence against women, Eleventh session (1992), para. 9.

In an individual case of domestic violence against a woman, a state is in breach of its international obligations under CEDAW if it has not taken appropriate measures to ensure the effective protection of women from such violence. CEDAW goes beyond the traditional public sphere in Art. 2(f), in which states undertake to take all appropriate measures, including legislation, to modify or abolish not just existing discriminatory laws and regulations, but also such customs and practices which constitute discrimination against women.

In addition to the above, Art. 4 of CEDAW recognizes that the adoption by States of special measures aimed at accelerating *de facto* equality between men and women or at protecting maternity shall not be considered discrimination. It is thus acknowledged that even if women are provided equality before the law (*de jure* equality), as exemplified by the approach of Art. 1, this does not automatically guarantee that they will in reality be treated equally (*de facto* equality) and thus affirmative action is needed to remedy existing discrimination. While the CEDAW Committee has noted that significant progress has taken place, it also noted that much remains to be done in order to achieve equality in fact. Hence it recommended in its General Recommendation No. 5¹⁷⁷ that:

‘State parties make more use of temporary special measures such as positive action, preferential treatment or quota systems to ad-

¹⁷⁷General Recommendation No. 5 (Temporary special measures), adopted at its seventh session (1988) para. 21.

vance women's integration into education, the economy, politics and employment'.

Thus, according to the above provision, the appropriateness of any special measure should thus be evaluated with regard to the actual existence of discriminatory practices. These special measures aimed at achieving *de facto* equality have to be temporary in character, and must not be put in place as a consequence the maintenance of unequal or separate standards between women and men.

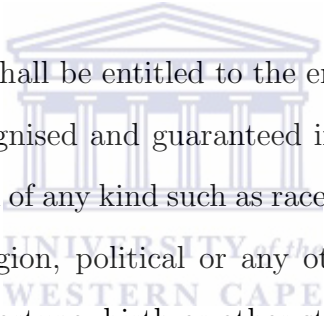
Furthermore, the basic legal norm of CEDAW is the prohibition of all forms of discrimination against women. This norm cannot be satisfied merely by the enactment of gender-neutral laws.¹⁷⁸ In addition to demanding that women be accorded equal rights with men, CEDAW goes further by prescribing the measures to be taken to ensure that women everywhere are able to enjoy the rights to which they are entitled. It has also been noted that CEDAW has distinctive features that makes it different from other international instruments that proscribe discrimination.¹⁷⁹ Firstly, it addresses discrimination

¹⁷⁸See, for example, general prohibitions of non-discrimination provisions in Articles 55(c) as read with 56 of the UN Charter which obligates all members of the UN to take joint and separate action to, among things, promote 'universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.

¹⁷⁹Byrnes A 'The Convention on the Elimination of all forms of Discrimination against Women' in Wolfgang B, Kisaakye EM and Oberleitner G (eds) *Human Rights of Women:*

against women and not sex.¹⁸⁰ It has been applauded that it provides a rights-oriented framework for development that is essential to the full recognition of women's contributions and participation in economic, political, social and cultural life.¹⁸¹ It is submitted that the rights-based framework is precisely important because under customary family laws women are viewed as possessing no rights.

On the regional level, the rights of women were first protected by the African Charter on Human and People's Rights (ACHPR).¹⁸² Art. 2 of the Charter reads as follows:



'Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status'.

Additional protection of women against discrimination in the Charter can also be found in Art. 3 (1) and (2)¹⁸³ and 18 (3). Furthermore, the regional protection is extended by the Protocol to the African Charter on the Rights *international instruments and African experiences* (2002) 120.

¹⁸⁰As above.

¹⁸¹As above.

¹⁸²The Charter was ratified by Malawi in 1989.

¹⁸³Art. 3 (1) and (2) of the Charter provides that 'every individual shall be equal before the law and shall be entitled to equal protection of law.'

of Women in Africa (the Protocol).¹⁸⁴ It was promulgated out of concern by the AU that despite the ratification of the ACHPR and other international human rights instruments by its member states, women in Africa continue to be victims of discrimination and harmful practices.¹⁸⁵ The Protocol has been applauded as an interesting document which goes further than CEDAW in terms of the content.¹⁸⁶ It contains provisions relating to the elimination of harmful practices including the prohibition, through legislative measures backed by sanctions, of all forms of genital mutilation.¹⁸⁷

It is, however, noteworthy that the Protocol has taken a step further than mere non-discrimination provisions in most international human rights instruments, which usually only focus on proscribing discrimination against women generally as a class on the basis of sex.¹⁸⁸ What is particularly re-

¹⁸⁴The Protocol was adopted by the Assembly of the Heads of State and Governments of the African Union (hereinafter the “AU”) at its second ordinary session, on 11th July 2003 in Maputo, Mozambique. This was in line with Art. 66 of the ACHPR, which was adopted in 1981 and came into force in 1986. The Protocol came into force on 25th November 2005, upon receiving the requisite 15 ratifications.

¹⁸⁵See Preamble to the Protocol.

¹⁸⁶Murray R, 2004, 151.

¹⁸⁷Art. 5 of the Protocol.

¹⁸⁸See Art. 1 (f) of the Protocol which provides:

‘Discrimination against **women** means any distinction, exclusion or restriction or any differential treatment based on sex whose objectives or effects compromise or destroy the recognition, enjoyment or exercise by women, regardless of their marital status, of human rights and fundamental freedoms

markable about this categorisation of the women deserving of this special protection, is the Protocol's responsiveness to the African perception of vulnerable women and the reasons for their vulnerability. Thus while widows may not be viewed as a vulnerable class in other regions, the Protocol has singled them out as needing special protection through, for instance, States' enactment of laws proscribing their subjection to inhuman, degrading or humiliating treatment.¹⁸⁹ This provision, it is submitted, responds to Africa's concerns where widows are concerned, as for instance, they are often subjected to cultural practices which undermine their human dignity, such as widow inheritance¹⁹⁰ and widow cleansing,¹⁹¹ which are, for example, still rampant in Malawi.¹⁹²

The provision also protects the widow's right to custody of her children, as well as to the matrimonial property, which are outstanding issues of concern where women are concerned.¹⁹³

in all spheres of life'. [Emphasis added]

¹⁸⁹See Art. 20 of the Protocol.

¹⁹⁰This is a practice whereby a brother or male relative of a deceased person marries the deceased's widow.

¹⁹¹This is a practice whereby a brother or other male relative of a deceased person has sexual intercourse with the deceased's widow.

¹⁹²A full discussion of this will be provided in Chapter 4 when discussing conflicts between the Bill of Rights and customary family laws.

¹⁹³On the prevalence, see report by the Malawi Human Rights Commission (MHRC) *Cultural practices and their impact on the enjoyment of human rights, particularly women*

Looking at the scope of principles of equality and non-discrimination in the family, international human rights instruments specifically prescribe the content of equal rights in the family, imposing an obligation upon states to make substantive interventions into the world of the home and family.¹⁹⁴ Regional human rights instruments similarly call for recognition and protection of the family life.¹⁹⁵

Similar guarantees may be found in CEDAW which also contains guarantees of equality before and under the law, and of equality in marriage and family law.¹⁹⁶ The provisions of CEDAW, and in particular the requirements that State parties modify or amend customary laws that constitute discrimination against women, as earlier on discussed under Section 3.3.1,¹⁹⁷ provide a radical challenge to laws that regulate customary marriages in Malawi. In its general recommendation on marriage and family relations,¹⁹⁸ CEDAW *and children* (2005) 69. See also White S et al *Dispossessing the Widow: Gender Based Violence in Malawi* (2002) 21-29; 49-87.

¹⁹⁴See, for example, Art. 16(1) of the UDHR, Art. 23 (1) of the CCPR, and Art. 10 (1) of the CESC. See also Human Rights Committee General Comment No. 19 on Protection of the Family, the Right to Marriage and Equality of Spouses (Art. 3, 27 July 1990 (Thirty-ninth session 1990) HRI/GEN/1/Rev.7.

¹⁹⁵See, for example Art. 18 of the ACHPR; Art. 17(1) of the American Convention Human Rights 1969, 1114 UNTS 123; and Art. 8 of the European Convention on Human Rights 1950, 213 UNTS 221.

¹⁹⁶Art. 16 of CEDAW.

¹⁹⁷Art. 2 (f) of CEDAW.

¹⁹⁸CEDAW General Recommendation (1994) No. 21, para. 13. As earlier noted, under Art. 21 of CEDAW, the CEDAW Committee has the power to make suggestions and

makes clear that:

‘The form and concept of the family can vary from State to State and even between regions within a State. Whatever form it takes, and whatever the legal system, religion, custom or tradition within the country, the treatment of women in the family both at law and in private must accord with the principles of equality and justice for all people, as Art. 2 of the Convention requires.’

On the regional level, the Protocol has provisions on family relations, including marriage,¹⁹⁹ divorce and separation,²⁰⁰ inheritance,²⁰¹ and rights of widows,²⁰² that closely mirror those found in CEDAW.

From the above discussion on the scope of the principles of equality and non-discrimination, equality and non-discrimination have been illustrated as more than just a matter of treating everyone identically: formal equality and general recommendations to state parties. These recommendations elaborate its understanding of particular articles of the CEDAW, or of how the CEDAW applies to thematic issues, such as violence against women. Though the general recommendations are not binding interpretations of the CEDAW, they are however, considered as influential interpretations of it.

¹⁹⁹Art. 6 (c) of the Protocol.

²⁰⁰Art. 7 (c) of the Protocol.

²⁰¹Art. 20 of the Protocol.

²⁰²Art. 20 of the Protocol.

substantive equality are necessary. In the following subsection, therefore, a brief discussion of the distinction between formal and substantive equality is made.

3.4.2 Formal and substantive equality

Formal equality means sameness of treatment: the law must treat individuals in the same manner regardless of their circumstances.²⁰³ In other words, formal equality supports the view that a person's individual physical or personal characteristics should be viewed as irrelevant in determining whether they have a right to some social benefit or gain. At the heart of most protagonists of this model is the principle of merit. It is a principle that can be applied either to a single individual, whose right to be treated on his or her own merits can be viewed as a right of individual autonomy, or to a group, whose members seek the same treatment as members of other, similarly situated groups.²⁰⁴ Formal equality is defended in that it favours arbitrary decision-making processes when policies or people selectively disadvantage others due to a particular irrelevant trait.²⁰⁵

²⁰³See also De Waal J, Currie I and Erasmus G *Bill of Rights* 4th ed, (2001) 200 who gives an example of educating all children according to the same school curriculum as a conception of achieving formal equality. See also Bartlett KT and Harris A 'Formal equality' accessed at <http://academic.udayton.edu/gender/02Unit/index.htm> on 20/11/08.

²⁰⁴As above.

²⁰⁵Brest P 'In defense of the Anti-discrimination Principle' (1976) *Harvard Law Review* 1 at 1.

What makes an issue about formal equality, however, is that the claim is limited to treatment in relation to another, similarly situated individual or group and does not extend beyond same-treatment claims to any demand for some particular situation.²⁰⁶ Formal equality does not produce equal results because of significant differences to avoid gender-related outcomes that are considered unfair.²⁰⁷ Consequently, it has been noted that formal equality applies to sex based classifications that discriminate against men as well as those that discriminate against women.²⁰⁸ The goal in formal equality terms is equal treatment for all, not just women. However, extending formal equality principles to rules that discriminate against men or favour women, might also be justified on the grounds that rules that appear to benefit women instead promote attitudes and expectations about women, including their dependency or status as victims, that disadvantage them across a wide spectrum. Those who offer this rationale may favour formal equality as a strategy, but in so far as their choice of this principle is based on its woman-centered results or outcomes, they already have their foot in the door of substantive equality, examined below.²⁰⁹

In view of the above discussion, the position adopted in this thesis is that formal equality is not sufficient in order to address the concerns of

²⁰⁶Bartlett KT and Harris A 'Substantive equality' accessed at <http://academic.udayton.edu/gender/03Unit/index.htm> on 20/11/08.

²⁰⁷As above.

²⁰⁸Bartlett and Harris (n 203).

²⁰⁹As above.

women, in particular women married under customary family laws. As Charlesworth²¹⁰ has put it, ‘the fundamental problem women face worldwide is not discriminatory treatment compared to men. Women are in an inferior position because they have no real power in either public or private worlds’.²¹¹ It can thus be argued, human rights are not the only strategy to address the problems of women married under customary family laws. The structure of oppression and subordination of women needs to be analysed from many angles. It needs, however, to be emphasised that one of the reasons why formal equality is not sufficient to address the concerns of women married under customary family laws is that it is not interpreted and applied in a comprehensive and effective manner. As it will be shown in Chapter 7, in some cases some magistrates and judges have used the provisions on equality and non-discrimination to enforce women’s rights while in other cases, the interpretation has not been to the benefit of women. Moreover, the problem with formal equality endorsed by Teson²¹² is that it offers equality when women and men are in the same position, but it fails to address the underlying causes of sex discrimination.

On the other hand, substantive equality requires the law to ensure that

²¹⁰Charlesworth (n 19) 60-61.

²¹¹To illustrate, see discussion in Chapter 5 on the socio-economic factors that affect women to enforce their human rights.

²¹²Teson as cited by Charlesworth H ‘Feminists critiques of international law’ (1994-95) *Third world legal studies*, 1 at 8.

there is equality of outcome.²¹³ It represents a departure from the traditional notion of formal equality or treating likes alike and unlikes unlike. It is partially based on a redistributive justice model, suggesting that measures are taken to rectify past discrimination, because to fail to do so would leave people and groups at different starting points. Advocates of substantive equality demand that rules take into account of the significant differences in the characteristics and circumstances of women and men to avoid gender-related outcomes that are considered unfair.²¹⁴ However, determining what differences should be taken into account and in what ways or what is fair is not always an easy matter. Thus, it has been observed that substantive equality is not one theory, but several theories reflecting multiple types and sources of difference and a number of alternative or overlapping substantive ideals.²¹⁵ One version to which Bartlett and Harris²¹⁶ draws our attention is an attempt to remedy the effects of past discrimination:

‘For example, women historically have been excluded either by law or by gender role norms from having certain jobs excluded wages comparable to those earned by men. Affirmative action designed to boost women into occupational fields dominated historically by men and comparable worth schemes designed to re-

²¹³De Waal, Currie and Erasmus (n 203). See also Bartlett and Harris (n 206).

²¹⁴As above.

²¹⁵As above.

²¹⁶As above.

structure wage scales to eliminate the effects of past patterns of gender-based job segregation are examples of remedial measures designed to reverse the effects of this past discrimination.’

Another type of substantive equality focuses on biological differences between women and men. Only women become pregnant, for example, and pregnancy may disadvantage a woman worker.²¹⁷

CEDAW promotes the substantive model of equality and consolidates two central approaches to equality. It stresses the importance of equality of opportunity in terms of women’s entitlements on equal terms with men to the resources of the country. As earlier observed, the basic legal norm of CEDAW is the prohibition of all forms of discrimination against women. This norm cannot be satisfied merely by the enactment of gender-neutral laws.²¹⁸ In addition to demanding that women be accorded equal rights with men, CEDAW goes further by prescribing the measures to be taken to ensure that women everywhere are able to enjoy the rights to which they are entitled.²¹⁹

²¹⁷As above.

²¹⁸See for example general prohibitions of non-discrimination provisions in Articles 55(c) as read with 56 of the UN Charter which obligates all members of the UN to take joint and separate action to, among things, promote ‘universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race sex, language or religion.

²¹⁹Division for the Advancement of Women accessed at <http://www.un.org/womenwatch/daw> on 15/10/04.

Needless to say, the achievement of equality between men and women, both formally and substantively, would influence women's realisation of their human rights. With regard to women married under customary family laws, their bargaining power of choosing whom to marry, the number of children to have in a family, and control over the property they acquire, would be increased. Unfortunately, the gap between the formal guarantees and the extent to which the rights are actually enjoyed in practice is frequently a wide one.²²⁰

In view of the above, it is noteworthy that the Malawi Constitution, for example, has made significant steps toward the attainment of formal equality between men and women.²²¹ However, substantive equality continues to remain a remote possibility where women are concerned. As it will be illustrated in Chapter 5, the majority of women continue to generally operate from disadvantaged positions in various aspects.

3.5 Conclusion

This Chapter has demonstrated that the conflicts of values arising from world-wide implementation of international human rights instruments oc-

²²⁰Byrnes A 'Towards More Effective Enforcement of Women's Human Rights Through the use of International Human Rights Law and Procedures' in Cook RJ (ed) *Human Rights of Women: National and International Perspectives* (1994) 190 at 190.

²²¹See Section 20 of the Malawi Constitution.

cupy a central position within family and women's law. Whether and to what extent an absolute hierarchy of values should be established at the level of substantive international and domestic law is today a contested issue. Proponents of universalism tend to argue in favour of the establishment of a more absolute hierarchy of values. Cultural relativists deny the existence of overarching values. As it will be noted in Chapter 6, which discusses law reform in the area of customary family laws, it is also an area of law that epitomises the debate on whether a uniform or plural marriage and family law is the best path to pursue in order to improve the position of women married under African customary family laws. On the one hand, the creation of equality in marriage by means of legal unification and abolition of polygamy by law, for example, may imply that entitlements and obligations guaranteed by membership of the family group are fragmented or undermined. On the other hand, the recognition of family based customs and values may imply violating women's right to equality. What is clear is that there is a plethora of human rights norms which call for state intervention in the domestic sphere. Moreover, those norms make clear that men and women are to have equal rights within marriage and at its end.

Chapter 4

Conflicts between African customary family laws and the Bill of Rights in Malawi



4.1 Introduction

The question of what impact the Bill of Rights has on African customary laws in Malawi cannot be adequately answered if customary family laws that are incompatible with the Bill of Rights and international standards on the protection of women's rights, as discussed in Chapter 3, are not discussed. For this reason, this Chapter explores the nature of women's rights abuses based on cultural relativism by discussing how the Bill of Rights and inter-

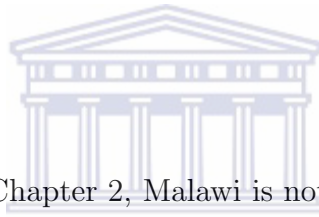
national standards conflicts with a plethora of principles, rules and practices relating to customary family laws in Malawi. However, due to the wealth of material, the discussion of African customary family laws that are at variance with the Bill of Rights will be limited to certain basic principles pertinent to our discussion. These will be in the area of African customary rules that govern marriage, divorce and inheritance in Malawi.

Before I proceed to the main discussion, I first present the geographical location of the main tribes of Malawi so that the rules and practices that will be discussed are put in perspective. For the same reason, I discuss forms of marriages. The main theme of this section is an elucidation of the conflicts between the Bill of Rights and international human rights standards on the one hand and customary marriage laws. However, in tandem with and sometimes tangential to, customary marriage laws are practices and rules that are applicable to sex and sex related rituals. I present these and discuss how they confront the values inherent in the Bill of Rights and international human rights standards.

This Chapter is divided into six sections. The second section presents the geographical location of the main tribes of Malawi. The third section presents an overview of the forms of customary marriages in Malawi. An understanding of African customary family laws is not possible without knowledge of the forms in which customary marriages are contracted. Therefore, its discussion is important. The fourth section gives an account of the principles

and practices governing customary marriages in Malawi.¹ Both matrilineal² and patrilineal³ marriages will be examined with a view to revealing the traditional values implicit in them that are incompatible with the Bill of Rights. The focus will be on the essential requirements to validate a marriage and the rights and obligations flowing from a customary marriage. The fifth section will look at the issue of divorce. The fifth section looks at inheritance. The last section contains the conclusion.

4.2 Geographical location of main tribes of Malawi



As previously noted in Chapter 2, Malawi is not a homogeneous country. It consists of different tribes whose origins go back to a historical ancestor or

¹Marriage, according to Banda F *Women, Law and Human Rights: An African Perspective* (2005) 93, being an almost universal starting point in any discussion on family law, seems a good place to begin consideration of the content of the customary family law systems. With regard to law reform, which will be discussed in Chapter 6, it is only when we appreciate what the prevailing laws governing customary marriages are like that we will be able to appreciate the changes proposed by the law reformers to advance the rights of women married under these laws.

²'Matrilineal customary marriages' refers to all customary marriages that trace their descent line through female relatives.

³'Patrilineal customary marriages' refers to all customary marriages that trace their descent line through male relatives.

ancestress.⁴ Generally, for purposes of customary family laws, these tribes are divided into two categories: matrilineal and patrilineal.⁵ The matrilineal tribes are mostly found in twenty districts of the central and southern regions, viz, Dedza, Dowa, Kasungu, Lilongwe, Mchinji⁶, Nkhotakota, Ntheu, Ntchisi, Salima, Blantyre, Chikwawa, Chiradzulu, Machinga, Mangochi, Mulanje, Mwanza, Thyolo, Zomba, Balaka and Phalombe. The patrilineal tribes are mostly to be found in all of the six districts that are in the northern region and Nsanje, the only patrilineal district in the southern region.⁷ However, for a detailed description of the social organisation of Malawian tribes, see the discussion by Ibik.⁸

⁴Von Benda-Beckmann F *Legal pluralism in Malawi: Historical development 1858-1970 and emerging issues* (2007) 81.

⁵Chigawa M *Customary law and social development: de jure marriages vis-a vis de facto marriages at customary law in Malawi* (Unpublished) (1987) 3.

⁶Mtika MM and Doctor HV *Matriliney, patriliney, and wealth flows in rural Malawi* *African Sociological Review* (2000) accessed at <http://www.codesria.org/Links/Publications/asr6-2full/mtika.pdf> on 26/11/06, have shown that this district is in transition to the patrilineal system.

⁷White S at el *Dispossessing the Widow: Gender based Violence in Malawi* (2002) ix.

⁸Ibik JO *Restatement of African Law: Malawi Vol 1, The law of marriage and divorce* (1970).

4.3 Forms of customary marriages

As pointed out above, in Malawi there are two forms of customary marriages, namely, patrilineal and matrilineal marriages.⁹ As a general rule all customary marriages, whether matrilineal or patrilineal, are contracted according to the customary law of the parties.¹⁰ A discussion of the formation and dissolution of these customary marriages has already received considerable attention in the literature.¹¹ It is, therefore, not necessary to provide details, but only a summary of the main ideas relating to the two forms of customary marriages.



4.3.1 Matrilineal customary marriages

The matrilineal customary marriages can be grouped into *chikamwini* and *chitengwa*.¹² In *chikamwini* marriages the man moves to the wife's village

⁹Chigawa (n 5) 3.

¹⁰Generally customary laws require that the intending spouses must be of marriageable age and that they should be in a good state of mind. For a detailed discussion see Himonga C *Family and Succession Laws in Zambia* (1995) 75. The same issues are equally important in Malawi.

¹¹See, for example, Ibik (n 8); Chigawa (n 5); Koyana DS, Mwambene L and Bekker JC *Customary Marriage Systems in Malawi and South Africa* (2007); Bekker JC *Seymour's Customary Law in Southern Africa* (1989); and White (n 7).

¹²Ngwira N *Women's property and inheritance rights and the land reform process in Malawi* (2003) 6,

and has only a few rights there.¹³ Lineage is traced through the woman.¹⁴ Inheritance of property passes through the female line. Similarly, in Tanzania's matrilineal societies property is inherited through the wife's lineage.¹⁵

In addition to the above, women under matrilineal system have custodial ownership of land. This position is contrasted to Tanzania's matrilineal societies where, as noted by Butegwa,¹⁶ women do not have effective control or ownership of the family land. It should also be noted that in matrilineal systems children 'belong'¹⁷ to the woman and remain under the guardianship of the wife's eldest brother.¹⁸ A woman's child inherits from her brother's property. Upon death of a man, the wife and children continue to live at the place of their abode and continue to use the land. When a woman dies, the

accessed at <http://www.sarpn.org.za/documents/doooo585/p522-Malawi-property-rights.pdf> on 19/10/06. See also Ntata P and Sinoya C *Customary law and the UN conventions on women and children* (Unpublished) (1999) 14.

¹³Von Benda-Beckmann (n 4) 89.

¹⁴Phiri KM 'Some Changes in the Matrilineal Family system among the Chewa of Malawi since the Nineteenth Century' (1983) *The Journal of African History* 257 at 258.

¹⁵Butegwa F 'Using the African Charter on Human and Peoples' Rights to Secure Women's Access to Land in Africa' in Cook RJ (ed) *Human Rights of Women: National and International Perspectives* (1994) 495 at 497.

¹⁶As above.

¹⁷The word 'belong' is used to mean that rights and obligations toward the children in a matrilineal society accrues to the woman.

¹⁸Mandala E 'Capitalism, kinship and Gender in the Lower Tchiri (Shire) Valley of Malawi, 1860-1960: An Alternative Theoretical Framework' (1984) *African Economic History* 137 at 139. See also Phiri (n 14) 258-259.

husband returns to his home. Compared to patrilineal tribes, Von Benda-Beckmann notes that the woman has a much stronger position *vis a vis* her husband.¹⁹

In *chitengwa* marriages too the above rules apply. There are, however, points of difference. In *chitengwa* (matrilineal) marriages the woman goes to live in the man's village, but the children still belong to the woman's lineage.²⁰ Upon the death of the husband, the widow and children return to the widow's village of origin. Therefore, matrilineal is similar to patrilineal's *lobola* system in other respects.

4.3.2 Patrilineal customary marriages

Whilst in *chikamwini* matrilineal marriages residence is in the woman's village, under the patrilineal marriage systems the matrimonial residence is in the man's village. The wife leaves her village and resides in her husband's village. The man pays *lobola* to the wife's father/guardian. The payment of *lobola*²¹ establishes his right to take his wife and children to his own village, signifies that the man owns all the property, and makes the children of the

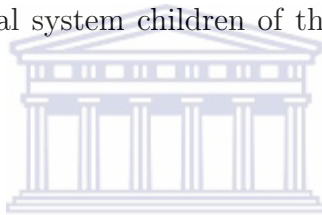
¹⁹See n 13 above.

²⁰Ngwira (n 12) 6 and Phiri (n 14) 262.

²¹This will be discussed later in this Chapter when examining how it conflicts with the Bill of Rights.

marriage legitimate.²²

It should also be noted that whilst in matrilineal tribes descent is from the oldest brother of the wife, in a patrilineal system descent is also through males but from the husband's side.²³ Daughters are expected to get married and live in their husbands' villages. Therefore, they cannot inherit property.²⁴ Thus, some commentators have argued that the patrilocal nature of the marriage and payment of *lobola* in patrilineal tribes, place the man in a position to enjoy a superior status without any qualification.²⁵ It should also be noted that, unlike in the matrilineal system where children belong to the wife and her kin, in the patrilineal system children of the family belong to the man and his kinsmen.



4.4 Rules and practices governing customary marriages

This section examines some rules and practices related to customary marriage which are incompatible with the Bill of Rights, as well as international

²²Ngwira (n 12) 6. See also Armstrong A et al 'Towards a cultural understanding of the interplay between children's and women's rights: An Eastern and Southern African perspective' (1995) *The International Journal of Children's Rights* 333 at 345.

²³Ibik (n 8) 79. See also Armstrong (n 22) 355.

²⁴Ngwira (n 12) 7.

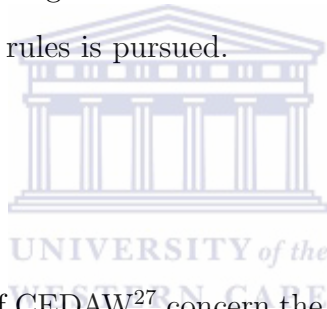
²⁵White (n 7) 56.

standards for the protection of women's rights in Malawi.

All customary marriage laws recognise as essential to the validity of the marriage compliance with the following: the parties must have attained the age of puberty; consent of the parents of a woman must have been given to the marriage; in patrilineal societies *lobola* must be paid by a man to the woman's parents or other relatives who are her guardians; in matrilineal systems there must have been a *chinkhoswe*; and the woman must be unmarried.

There is, however, no precise age when one attains puberty and may marry under the customary marriage laws in Malawi.²⁶ In the following subsections, an examination of these rules is pursued.

4.4.1 Consent



Art. 16 (1) (a) and (b) of CEDAW²⁷ concern the goal of equality at the point of entering marriage. One of the key issues on this provision is consent: Do women have the same degree of freedom to give consent to a marriage as men?

Under customary family laws, consent to a customary marriage by parents of a woman is strictly adhered to whether the marriage is taking place be-

²⁶This position has to be contrasted to civil law where there is a fixed age as to when one can marry.

²⁷For a full quotation of the provision, see Chapter 3.

tween a minor or not.²⁸ Traditionally the consent of the father in patrilineal tribes or the maternal uncle in matrilineal tribes was not a decision of that of the guardian as an individual. The whole family considered the matter since the issue of marriage concerned the whole family. In some instances it concerned the whole village.²⁹ This position, it could be argued, robs a woman of the opportunity for her to enter into marriage autonomously.

Furthermore, where women, particularly young girls, are forced by their families to marry men who have chosen them, the issue of choice is also not exercised. In addition to the above, in some cultures, the question arises as to whether the widow is free to refuse to be inherited by a brother to her deceased husband or not.³⁰ Polygamy also raises significant questions about equality and choice.³¹

It should, however, be noted that the requirement of consent in respect of customary law marriages has to be contrasted with that for civil marriages where consent of parents or guardians is only required when one is marrying below the age of 21.³² Commenting on this difference, Bennett³³ states that

²⁸Ibik JO *The Law of Marriage in Nyasaland* 524 as cited by Von Benda-Beckmann (n 4) 86. See also discussion by Armstrong (n 22) 362.

²⁹Ibik, as above.

³⁰For a full discussion on widow inheritance see subsection 4.5.1 of this Chapter.

³¹See discussion in subsection 4.4.2 of this Chapter.

³²See Section 11 (b) of the *Marriage Act*, Chapter 25:01. See also Section 24 of the South African *Marriage Act* No. 25 of 1961.

³³Bennett TW *Human Rights and African Customary Law under the South African*

‘while a civil or Christian union is exclusively the concern of the spouses and depends for its validity on their consent, a customary marriage is an alliance of two families, for which the co-operation of the spouses is desirable, but not essential’. To understand this customary family rule, the definition of customary marriage by Bekker³⁴ is instructive. A customary marriage is defined as ‘... a relationship that concerns not only the husband and wife, but also the family groups to which they belonged before the marriage.’

Thus the consummation of a customary marriage brings into being reciprocal rights and obligations between the spouses for which their respective family groups are collectively responsible.

On the other hand, Section 22 (3) of the Malawi Constitution guarantees all men and women the right to marry and found a family. A similar provision is also to be found in several international instruments and regional human rights instruments to which Malawi is a party.³⁵ It is, however, noted that Sections 22 (6) and 22 (4) of the Malawi Constitution set restrictions for entry into marriage. It is, therefore, submitted that these sections provide limitations to Section 22 (3) of the Malawi Constitution.

Section 22 (6) of the Malawi Constitution provides that ‘no person over the

Constitution (1995) 113.

³⁴Bekker (n 11) 96.

³⁵See, for example, Art. 16 (1) of the UDHR. It provides that ‘men and women ... have a right to marry and found a family ...’; Art. 17 and 23 of the ICCPR; Art. 10 of the ICESCR; Art. 16 of CEDAW; and Art. 18, 27 and 29 of the ACHPR.

age of eighteen years shall be prevented from entering into marriage'. This means that every person over 18 years is at liberty to marry. The opposite is also true of those who are below 18 years. They lack legal capacity to enter into marriage. On the other hand, Section 22 (4) is to the effect that for those who are 18 years and above, marriage shall take place only with their free and full consent.³⁶

It is, therefore, submitted that the legal requirement of consent by a guardian³⁷ to a customary marriage conflicts with a number of women's rights in the following ways. First, if the guardian withholds his consent to a woman who is older than 18 years, this would be in conflict with Section 22 (3) of the Malawi Constitution which, as noted in the preceding paragraph, grants every person the right to marry. This customary law requirement, therefore, diminishes a woman's status since it effectively relegates her to a position of a legal minor rather than a mature adult. Furthermore, in view of Section 22 (4) of the Malawi Constitution, a marriage which requires the consent of the village or a marriage guardian, conflicts with the right to enter into marriage with a woman's free and full consent.

Secondly, if the guardian gives his consent to a girl who is younger than 18

³⁶Section 22 (4) of the Malawi Constitution is similar to Art. 16 (1) (b) of CEDAW that states that 'women should also enjoy the right to freely choose and enter into marriage only with their free and full consent'.

³⁷It should be noted that 'guardian' is used interchangeably with the parents of the woman intending to marry under customary laws.

years, this would be in conflict with Section 22 (6) that sets the marrying age at 18. Fourthly, this would also be an infringement of her personal freedom.³⁸

From the above analysis we see that the customary law rule in Malawi that no marriage can be contracted without the consent of the guardian is at variance with the Bill of Rights and international human rights instruments aimed at protecting women's rights to equality and choice.

4.4.2 Polygamy

Conflicts over whether polygamy constitutes a violation of women's rights or is in fact a 'good' system that protects them, have been an on-going debate for a long period of time.³⁹ Those who are against polygamy point to the fact that the custom is degrading to women and violates their rights to equality with men. This view finds support within the human rights paradigm, which does not condone polygamy.⁴⁰ Those who support the continuation of the practice of polygamy argue that rather than violating women's rights, polygamy may facilitate their enjoyment.⁴¹ Banda⁴² further notes that the

³⁸See Section 19 of the Malawi Constitution.

³⁹Banda (n 1) 116.

⁴⁰See, for example, CEDAW General Recommendation No. 21 para. 21; Art. 6 (c) of the African Protocol on Women's Rights.

⁴¹Nhlapo 'African Family Law under an Undecided Constitution: the Challenge for Law Reform in South Africa' as cited by Banda (n 1) 116.

⁴²As above.

intensity of the debate over polygamy has not lessened with time, pointing to the debates held during the drafting of the Protocol in which Art. 6 (c) of the Protocol was reached as a compromise.

As earlier noted, both matrilineal and patrilineal customary marriages in Malawi are potentially polygamous.⁴³ The husband is allowed to marry more than one wife.⁴⁴ On the other hand, a married woman is barred from contracting further marriages for as long as she remains legally married.⁴⁵ Concurring with Kamchedzera,⁴⁶ customary laws favour the husband with regard to sexuality.

In Malawi the prevalence of this practice is demonstrated by a study conducted by the MHRC⁴⁷ which shows that polygamy is still a common practice in all areas.⁴⁸ The study shows that about 98 percent of the respondents interviewed stated that polygamy is still practised in their areas. It has also been established that 17 percent of all women in Malawi are in polygamous unions.⁴⁹

⁴³See *Mphumeya v Republic* as cited by Kamchedzera GS 'Malawi: Improving family welfare' (1993-1994) *Journal of Family Law* 369 at 372. As noted by Bekker (n 11) 126, this is also similar to the patrilineal customary marriages of South Africa.

⁴⁴Ibik (n 8) 191.

⁴⁵See *Msowoya v Milanzi*, Civil Appeal Case No. 99 of 1979, NTAC (Unreported).

⁴⁶Kamchedzera (n 43) 374

⁴⁷MHRC *Cultural practices and their impact on the enjoyment of human rights, particularly women and children* (Unpublished) (2005) 18.

⁴⁸The study covered 10 of the 27 administrative districts in Malawi.

⁴⁹WLSA Malawi and SARDC WIDSAA, *Beyond inequalities 2005: Women in Malawi*

In other African countries a 1995 survey of eight anglophone countries established prevalence rates of married women in polygamous marriages as follows: in Ghana, approximately 28 percent; in Kenya, 19.5 percent; in Nigeria, 42.6 percent; and in Zimbabwe one in five married Zimbabwean women and the average union was found to consist of 2.3 wives per man.⁵⁰ In South Africa, a study by Govender⁵¹ shows that only 6 percent of the women interviewed were married to men who had more than one wife.

More interesting to note is that the MHRC study also found that strong support for the continuation of the practice came from women respondents.⁵²

(2005) 19-20.

⁵⁰The Centre for Reproductive Law and Policy and FIDA-(K), *Women of the World: Laws and Policies Affecting their Reproductive Lives - Anglophone Africa* as cited by Kisaakye EM 'Women, Culture and Human Rights: Female Genital Mutilation, Polygamy and Bride Price' in Wolfgang B, Kisaakye EM and Oberleitner G (eds) *Human Rights of Women: international instruments and African experiences* (2002) 268 at 277.

⁵¹Govender P *The status of women married in terms of African customary law: A study of women's experiences in the Eastern Cape and Western Cape Provinces* (Unpublished) (2000) 32.

⁵²This finding has to be contrasted with the Malawi Law Commission *Report on the Review of Marriage and Divorce Laws in Malawi* (2005) 29 which found, during the regional consultations, ninety five percent of the respondents cited more disadvantages than advantages of polygamy and had voiced strong support for it to be abolished. The study by Malawi Law Commission could be compared to the study by Govender (n 51) in South Africa which shows that the predominant view (75 percent), reflected by most interviews, was for the abolition of polygamy.

Similarly, Kisaakye⁵³ has also noted that support for the practice has been voiced by some women.

This position, it could be argued, has a bearing on what impact the Bill of Rights can have on discriminatory customary family laws. For polygamy to be abolished, women have to acknowledge the oppressive nature of polygamy and the inherent conflict it presents to equality.⁵⁴

On the other hand, Sections 20 (1) and (2) of the Malawi Constitution provide that:

‘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. Legislation may be passed addressing inequality in society and prohibiting discriminatory practices and the propaganda of such practices and may render such practices criminally punishable by the courts’.

[Emphasis added]

The prohibition of discrimination on the ground of sex is, arguably, intended to protect women. This position is also similar to that in terms of Con-

⁵³Kisaakye (n 50) 279.

⁵⁴See the discussion on the enforcement of constitutional rights in Chapter 5.

stitution of the Republic of South Africa, 1996.⁵⁵ On the other hand, by including sex as a ground on which discrimination is not allowed, Section 20 of the Malawi Constitution leaves no doubt that no discrimination based on being a woman will be tolerated. Moreover, in international law, several international conventions, to which Malawi is a party, also proscribe discrimination on the basis of sex.⁵⁶

In a polygamous marriage, especially in a patrilineal system, the inequalities between a man and a woman include the following: women bear children but have no rights over them; women carry the burden of labour both within and outside the house so that their husbands may prosper materially and enhance their status; and property rights are vested in men.⁵⁷ Most importantly, a man unilaterally may introduce new wives to the family and has many opportunities to marry, while each wife may have only one shared husband.⁵⁸ These practices, it is argued, go against a woman's rights and

⁵⁵See Section 9 (3) of the Constitution of the Republic of South African Constitution, 1996. It should, however, be noted that other constitutional provisions, for example, Section 13(5) of the Constitution of Tanzania, as noted by Banda (n 1) 35, do not include sex as one of the grounds on which discrimination is prohibited in their non-discrimination clause.

⁵⁶For example: Art. 2 and 7 of UDHR; Art. 2, 2(1), 3 and 20 of ICCPR; Art. 2, 2 (2) and 3 of ICESCR; Art. 1 of CEDAW; and Art. 2, 19 and 28 of ACHPR.

⁵⁷Mann K, 'Marriage, status, and social change among the educated elite in colonial Lagos' 58 as cited by Kaganas F and Murray C 'Law, Women and the Family: the Question of Polygyny in a New South Africa' (1991) *Acta Juridica* 116 at 127.

⁵⁸Dlamini CRM 'The Ultimate Recognition of the Customary Marriage in South Africa'

freedoms as guaranteed by the Malawi Constitution.

With the coming of HIV/AIDS, polygamy also puts the women's right to health in jeopardy.⁵⁹ Under Art. 12 of the CESCRC state parties recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. Given the attendant problems associated with polygamy, including compromised rights to sex and to a relationship generally, women are denied of their rights.⁶⁰

In light of the prevalence of HIV/AIDS in Malawi, polygamy also affects women's rights right to life. The conduct of a husband having multiple partners increases women's vulnerability to be infected with HIV. This position is supported by Malawi Law Commission's findings⁶¹ that some respondents believed that 'polygamy helps in the spread of HIV and AIDS as wives who may feel lonely and neglected may turn to other men for the satisfaction of their sexual needs. The implications of HIV and AIDS infection in a polygamous family were considered quite serious as large numbers of a family may be wiped out by the pandemic'.

Coming back to the theme of this Chapter, the practice of polygamy directly conflicts with Section 20 of the Malawi Constitution and international instruments on the protection of women's right to equality as it treats women

(1999) *Obiter* 14 at 32.

⁵⁹Kisaakye (n 50) 279.

⁶⁰As above.

⁶¹Malawi Law Commission (n 47) 29. See also Kisaakye, (n 50) 279.

differently to men. Arguably, in both matrilineal and patrilineal marriage systems, there is a *prima facie* case of unfair discrimination because women are treated differently to men.

However, one can hardly suggest that the inequality would be addressed if women were given the same opportunity to accumulate men as spouses.⁶² Concurring with Goody, the notion of one woman acting as a wife to more than one man would indeed suggest greater oppression, not liberation.⁶³

4.4.3 *Lobola*

In patrilineal systems payment of *lobola* by the bridegroom's represented by the bridegroom/guardian family members to the bride's family as represented by the bride's guardian is a prerequisite for a valid marriage under African customary law.⁶⁴ Mofokeng⁶⁵ defines *lobola* as:

‘An agreement between the family group of the prospective husband and the family group of the prospective wife that on or

⁶²Kaganas and Murray (n 57) 126.

⁶³Goody J *The Oriental, the Ancient and the Primitive: Systems of marriage and the family in the pre-industrial societies of Eurasia* 140 as cited by Kaganas and Murray (n 51) 127.

⁶⁴Chigawa (n 5) 5.

⁶⁵Mofokeng LL ‘The *lobola* agreement as the silent prerequisite for the validity of a customary marriage in terms of the Recognition of Customary Marriage Act’ (2005) *Tydskrif vir Hedendaagse Romeins Hollandse Reg* 277 at 278.

before the marriage ceremony, there would be the transfer of property from the family group of the husband, to the family group of the wife in respect of the marriage’.

Although traditionally, *lobola* was given to the father of the bride, it appears that there are now cases where the mother of a woman, who may have raised her daughter on her own, will receive the *lobola* for her. This is what happened in the South African case of *Mthembu v Letsela*,⁶⁶ where, *inter alia*, the father-in-law of a woman whose husband had died questioned whether it could be said that the woman had a customary marriage with his son, *lobola* having been paid to her mother. The court replied in the affirmative.

In Malawi the prevalence of this practice is presented by the research findings of MHRC. Of the people interviewed by MHRC, about 62 percent were in support of the institution. Similarly, in South Africa, a study by Govender⁶⁷ shows that 85 percent of the women interviewed indicated whole-hearted support for the system of *lobola*.

It is important to note that under patrilineal marriages, failure to institute *lobola* negotiations renders the marriage void. As Dlamini⁶⁸ has rightly observed, Africans in general:

⁶⁶1997 (2) SA 936. Upheld on appeal 2000 (3) SA 867.

⁶⁷Govender (n 51) 29.

⁶⁸Dlamini CRM ‘The modern legal significance of *ilobolo* in Zulu society 149 as cited in Mofokeng (n 65) 279.

‘are unable to regard a relationship as a marriage even if there can be compliance with all legal requirements if *lobola* has not been delivered or an agreement for its delivery [has not been] concluded’.

In the past *lobola* was paid only in the form of cattle. Nowadays money is often acceptable too.⁶⁹

Furthermore, it is important to note that for African patrilineal societies *lobola* has a deeper cultural symbolism than the commercial meaning ascribed to it by its detractors.⁷⁰ It underscores the fact that a customary marriage creates an alliance not only between husband and wife but also between their respective families and kinships.⁷¹ It is the bedrock on which the African family in patrilineal societies is based. From *lobola* arises reciprocal rights and duties amongst the family groups concerned.⁷² For instance, the male guardian who receives *lobola* does not only act as a mediator in cases involving disputes between the parties to a marriage, he is also expected to assist in stabilising the marriage by protecting the wife if she is mistreated, deserted or neglected. In highlighting its significance in the African family, Koyana, Mwambene and Bekker have rightly observed that *lobola* is the ‘great invention of customary law’ that adequately balances the interests of

⁶⁹Chigawa (n 5) 5; Von Benda-Beckmann (n 4) 87; and White (n 7) 53.

⁷⁰See the criticisms by White (n 7) 53.

⁷¹See Bekker (n 11) 151 and Banda (n 1) 108.

⁷²Mofokeng (n 65) 282.

the parties in a marriage.⁷³ If it is established that a woman was persistently treated cruelly and she refuses to go back to her husband, customary law favours her. *Lobola* is forfeited.⁷⁴ *Lobola* is also a token of appreciation by the man's side to a woman's father/guardian for bringing up the woman to marriageable age.⁷⁵ Similar views were also expressed by Shenge, who noted that in Zimbabwe *lobola* is also a token of appreciation by the bridegroom's side to the brides family.⁷⁶

For purposes of our discussion, however, it is important to note that the payment or non-payment of *lobola* has great legal significance for the rights of women. It determines the rights that a man has over his wife and children.⁷⁷ Custody over children depends on the fulfillment of the obligations under the *lobola* agreement.⁷⁸ A father and his family are entitled to the custody of any children born out of the marriage as long as *lobola* was paid or where the wife's people are satisfied enough with the instalments not to question the validity of the marriage. It is, however, to be noted that there is no similar customary law that applies to the woman. In this instance, the customary law works to

⁷³Koyana, Mwambene and Bekker (n 11) 32.

⁷⁴As above.

⁷⁵See research conducted by White (n 7) 53. See also Von Benda-Beckmann (n 4) 87.

⁷⁶Shenje A 'Balancing gender, equality, and cultural identity: Marriage payments in post-colonial Zimbabwe' (1996) *Harvard Human Rights Journal* 105 at 106. See also Kisaakye (n 50) 281.

⁷⁷See also *Aiya v Aiya*, Divorce Cause No. 8 of 1973 (Unreported) Ugandan case as cited by Kisaakye (n 50) 281.

⁷⁸See also Bekker (n 11) 234 and Armstrong (n 22) 348.

the advantage of men. It has also been observed that, traditionally, children were regarded as the most important, and sometimes the only, reason to get married.⁷⁹ The payment of *lobola* thus denies women all rights to their children, as well as control over their lives.

It has, however, been noted that the rule that children ‘belonged’ to the male line was a major cause of friction in colonial times with colonial officials regarding it as repugnant that a child should be separated from its mother.⁸⁰ Banda⁸¹ further contends that it was this ‘repugnance’ that resulted in the introduction of the rule that a child under the age of 7 had to continue living with its mother. In post-colonial states the presumption has been replaced by the best interests principle articulated in Art. 3 of the CRC and Art. 4 of the Charter.⁸²

In addition to the above, the privileged position of a husband, that comes with the *lobola* institution, is also evident in the married persons’ property relationships.⁸³ Under patrilineal customary family laws, any property the wife brought into the marriage, and which was part of the common household is accredited to the husband. A wife does not have property rights. In the lifetime of a husband, he has control. A wife cannot dispose of household

⁷⁹Shenje (n 76) 106.

⁸⁰Banda (n 1) 109.

⁸¹Banda (n 1) as above.

⁸²See, for example, Section 28 of the Republic of South Africa Constitution 1996.

⁸³Von Benda-Beckmann (n 4) 89.

goods without the consent of her husband.⁸⁴ A striking similarity to lack of property rights of married women in patrilineal marriages is what Fredman⁸⁵ draws our attention to. She noted that in post-feudal legal system:

‘Coverture gave the husband near-absolute control over the wife’s property as well as her person. Married women were perpetual minors, divested of the possibility of economic independence. Any property which a married woman had owned as a single woman became her husband’s property on marriage: personal property vesting absolutely, real property during the lifetime of a husband. Similarly, he had absolute rights to all property which came into her hands during her marriage, including all her earned income’.

On the other hand, Sections 24 (1) (a) (ii) and (iii) of the Malawi Constitution provide that:

‘(1) Women have the right to full and equal protection by the law, and have the right not to be discriminated against on the basis of their marital status which includes the right . . . (a) to be accorded the same rights as men in civil law, including equal capacity;- . . .

⁸⁴As above. See also White (n 7) 58.

⁸⁵Fredman S *Women and Law* (1997) 40, based on accounts by Blackstone W *Commentaries on the Law of England* (1809); Baker JH *An Introduction to English Legal History* (1979), among others.

(ii) **to acquire and maintain rights in property, independently or in association with others**, regardless of their marital status; (iii) **to acquire and retain custody, guardianship and care of children and to have an equal right in the making of decisions that affect their upbringing**' [Emphasis added].

It should be noted that the above constitutional provision is a unique one and finds its parallels in Art. 16 (1) (c), (d) and (f) of CEDAW. At the same time, *lobola* has often been criticised for being an institution of oppression against women.⁸⁶ Critics link women's subordination and lack of strong voice within marriage with the payment of *lobola*, which makes both the women and their families of origin dependent on their abusive partners.⁸⁷ Some critics go so far as to say that *lobola* constructs women as property.⁸⁸ Ironically, it has been noted that this was also the view of colonial authorities who likened it to purchase.⁸⁹ People holding this view argue that to continue with the practice is to perpetuate and encourage the subjugation of women.⁹⁰

⁸⁶White (n 7) 53.

⁸⁷Banda (n 1) 110.

⁸⁸Southern African Research and Documentation Centre (SARDC) *Beyond Inequalities: Women in Zambia* as cited by Banda (n 1) 110.

⁸⁹Kisaakye (n 50) 281.

⁹⁰As above.

It is, therefore, not surprising that Section 24 of the Malawi Constitution guarantees an equal right to full and equal protection by law. Furthermore, Section 22 (1) of the Malawi Constitution guarantees equality within the family. It provides:

‘Each member of the family shall enjoy full and equal respect and shall be protected by law against all forms of neglect, cruelty or exploitation.’

Arguably, this constitutional provision can be used to address the inequality that comes with the *lobola* institution.

Therefore, the legal significance of the cultural determination of the custody of children and of property rights depending on the institution of *lobola*, clearly goes against women’s rights and freedom. It violates not only international standards⁹¹ to which Malawi is a party but also what the Malawi Constitution provides in Sections 19, 20, 24 and 28.⁹²

⁹¹See Art. 16 (1) (c), (d) and (f) of CEDAW.

⁹²Section 28 provides for the right to property. See also White (n 7) 59.

4.4.4 Child marriage

Child marriage is particularly problematic throughout the continent. Writing on the child marriages in Africa, Poulter⁹³ stated:

‘Marriages of girls under the age of 16 are not uncommon in Africa. It is very unusual for African customary laws to specify a minimum age for marriage. Rather it is left to parents to decide when a girl is ready for marriage and the onset of puberty is often regarded as the key pre-requisite’.

At international level, there has been several international attempts to tackle the problem of child marriages, including the 1956 Slavery Convention,⁹⁴ the UN Convention on Consent to Marriage, Minimum Age of Marriage and Registration of Marriages 1962⁹⁵ and CEDAW.⁹⁶ On the African

⁹³Poulter S ‘African customs in an English setting: Legal and policy aspects of recognition’ (1988) *Journal of African Law* 207 at 210.

⁹⁴Art. 2 of the UN Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery 1956.

⁹⁵This Convention did not actually set a minimum age for marriage, preferring to leave it to individual states. However, the 1965 Recommendation on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, UN GA Res. (1 November 1965) A/RES/2018 (XX) Principle II, as cited by Banda (n 1), sets the relatively low age of 15 as the minimum.

⁹⁶Art. 16 (2) of CEDAW. See also CEDAW General Recommendation No. 21 paras 36, 38, and 39.

continent, the African Charter on the Rights and Welfare of the Child 1990 (the Charter) prohibits early marriage and specifies 18 as the legal age of marriage⁹⁷ and the Protocol on the Rights of African Women 2003 has also specified a minimum age of marriage of 18 years.⁹⁸

On the other hand, Sections 22 (6), (7) and (8) of the Malawi Constitution regulate the age for entering into marriage. Subsection (6) provides that: ‘No person over the age of eighteen years shall be prevented from entering into marriage’. This provision, it is submitted, sets the marrying age at 18 years.⁹⁹ It can further be submitted that this constitutional provision is intended to protect young girls against child marriages. However, subsection (7) requires that those who are aged between 15 and 18 need parental consent. By allowing persons of between 15 and 18 to enter into marriage with the consent of their parents, the Malawi Constitution fails to categorically prohibit child marriages.¹⁰⁰ Subsection (8) discourages marriages between persons where either of them is under the age of 15 years.¹⁰¹ This provision

⁹⁷Art. 21 (2) of the Charter.

⁹⁸Art. 6 (b) of the Protocol.

⁹⁹See also Chirwa DM ‘A Full Loaf is Better than Half: The Constitutional Protection of Economic, Social and Cultural Rights in Malawi’ (2005) *Journal of African Law* 207 at 215.

¹⁰⁰Similar sentiments were also expressed in Malawi Law Commission *Constitutional Review Programme: Consultative Paper* (Undated) 21. See also Ntata and Sinoya (n 12) 13.

¹⁰¹Section 22 (8) of the Malawi Constitution provides that:

‘The State shall actually discourage marriage between persons where either

suggests that marriage with a person younger than 15 years of age may be permitted since the State is obliged only to discourage such a marriage and not prohibit.¹⁰² The cumulative effect of Section 22 (8), as read with Section 23 of the Malawi Constitution that provides for the rights of children against exploitation, however, is that children under 18 years of age should rather not marry. Such an interpretation would be in accordance with the age of majority as required by the international standards to which Malawi is a party.

In respect of both matrilineal and patrilineal marriages there is no precise age as to when one attains adulthood and may be able to marry under the customary marriage laws of Malawi. The age of marriage is determined by attainment of puberty.¹⁰³ The graduation to adulthood is, in most cases, attained when one has reached puberty and in some cases, after completing an initiation ceremony.¹⁰⁴ Puberty and completion of ceremonies is not directly connected to age.¹⁰⁵

of them is under the age of fifteen years'

¹⁰²Section 22 (8) of the Malawi Constitution.

¹⁰³See also a discussion by Bennett TW *Customary Law in South Africa* (2004) 304 for a similar position with respect to the patrilineal marriages of South Africa.

¹⁰⁴Puberty for girls is reached when one starts menstruating.

¹⁰⁵Bennett (n 66) 304; Chigawa (n 5) 5 and Armstrong (n 22) 337-340.

In addition to the above, some cultural practices encourage child marriages in Malawi. These cultural practices are now discussed.

Chimeta masisi

Chimeta masisi means replacement of a deceased wife.¹⁰⁶ It is a practice by which a bereaved husband marries a younger sister or niece of his deceased wife.¹⁰⁷ In most parts where this practice is common, the MHRC found that it is usually encouraged by parents who let their young daughters marry the brother-in-law. In most cases, however, these young daughters try to run away, but always end up being taken back. This, obviously, points to the fact that they are forced into these marriages, otherwise there would not be attempts to run away. Some parents, in areas where *lobola* is paid, do this because they are afraid that the husband will ask for his *lobola* back.¹⁰⁸ Others, it was established, do it because they think that the death of the daughter will prevent them from accessing the wealth of the son-in-law.¹⁰⁹ Yet other parents are said to do it because they would want to keep the son-in-law in their family since he is of good character. And some think that

¹⁰⁶MHRC (n 47) 22.

¹⁰⁷According to the MHRC (n 47) study, 40 percent of the respondents reported that replacement of a deceased wife takes place in their areas. It was, however, found to be particularly common in patrilineal systems.

¹⁰⁸Under patrilineal customary laws, however, there is no rule that upon death of a wife *lobola* should be paid back.

¹⁰⁹MHRC (n 47) 22.

they would be protecting their grandchildren.

More disturbing is the fact that these daughters could be as young as 15 and marry a man who might be 50 or older.¹¹⁰ Clearly, this is a form of child marriage.

Mbirigha

Mbirigha means ‘bonus wife’. In this practice the husband is given a younger sister or niece of his wife to take as his second wife. The girl is sometimes enticed by the sister to join her in her marriage, or encouraged by aunts and parents to enter the union.¹¹¹ Sometimes the husband initiates the process himself.

The purposes of *mbirigha* include the following. First, it is a sign of gratitude to the son-in-law who is regarded as very generous or as one who takes proper care of their daughter and the parents themselves. Secondly, a *mbirigha* is offered to bear children for the husband if the elder sister is barren, or has stopped bearing children because of advanced age. Thirdly, if the husband is rich, the wife may want to protect the wealth by letting her younger sister join her so that the man does not marry elsewhere. At times the older sister would invite her younger sister in order to have someone with

¹¹⁰As above.

¹¹¹The MHRC found that 45 percent of the interviewees said that ‘bonus wife’ is a practice that takes place in their area.

whom to live in the event that the husband dies. So too, the older sister may want to consolidate her power at her new home.

This practice, although said to be in general decline, was found to have been common in many of the areas covered by the study conducted by the MHRC. The *mbirigha*, like in the case of *chimeta masisi* discussed above, can be as young as 15, if not younger depending on the age at which she attained puberty. Here again, we see that similar violations occur to the *mbirigha*.

Kupawila

Kupawila means paying off a debt by marrying a daughter.¹¹² The most common form of *kupawila* in the northern parts of the Chitipa district occurs when the daughter's parents get into debt and as payment for the debt offer the daughter in marriage to the creditor. The daughter could be as young as 9 and the man could be 40 or older. The daughter in this situation ends up attaining puberty while staying with the husband. Such daughters, it was established, stick with this arrangement because they are threatened that some curse would befall them if they tried to run away.¹¹³ The MHRC found that 15.4 percent of the respondents in this survey said that *kupawila* still persists in their communities.

A variation of *kupawila* in the Mzimba district takes place when parents eye

¹¹²My definition.

¹¹³MHRC (n 47) 23-24.

a male tenant on an estate who is hard working and shows good prospects for doing well financially. The parents could then ask the tenant to do some piecework for them at their house. When the work has been done, some parents claim that they cannot pay for the services rendered but can instead give the tenant their daughter. In such cases the tenant is not asked to pay *lobola*.

Another form of *kupawila* the study came across is when parents send daughters as young as 9 to stay with a rich man. The parents and the rich man would already have agreed, and money or cattle would already have changed hands. The daughter would be oblivious of the arrangement that her stay with the rich man is going to materialise into a marriage.

In both the Chitipa and the Mzimba districts a variation of the practice of *kupawila* involves an arrangement by which the parents of a boy and those of a girl become very close and, in an attempt to strengthen their relationship, arrange that their children should marry each other. In the end they force their children into marriage.¹¹⁴

Chithyola msana

Chithyola msana means that a father or grandfather is having sexual intercourse with his daughter or granddaughter, respectively. The study by the MHCR found that in all the districts visited there had been isolated cases

¹¹⁴MHRC (n 47) 24.

of fathers or grandfathers who had had such sexual intercourse with their daughters or granddaughters, respectively.¹¹⁵ Such occurrences are a form of incest, and are often linked to rituals associated with witchcraft or charms to boost one's business venture.¹¹⁶

Discussion on child marriages

The problem of child marriages in Malawi is compounded by non-registration of births,¹¹⁷ making it difficult to check on the age of girls who are marrying. Thus, it can be argued, outlawing child marriages by itself may be not enough.¹¹⁸ So, while it may be a good starting point to specify a minimum age of marriage, in order to comply with human rights norm, this legal sanction must go hand in hand with strong social rights provision, including appropriate schooling.

From the discussed cultural practices, we see that several of them are at variance with the rights of young girls as provided in the Bill of Rights and in international instruments. In almost all the practices that have been

¹¹⁵The MHRC found that 16.8 percent of the interviewees said that this practice occurred in their community.

¹¹⁶MHRC (n 47) 24.

¹¹⁷From my own experience there is no birth registration requirement in Malawi once a child is born.

¹¹⁸In Chapter 6, it will be seen that the Malawi Law Commission proposes 18 years as the age at which one can marry.

discussed, young girls are forced to enter into marriages. This practice is a flagrant violation of the right not to be forced into marriage as provided in the Malawi Constitution.¹¹⁹ This clearly violates the requirement of getting married with one's free and full consent. Even if it can be argued that these young girls do give consent, such arguments would not be legally sustainable. A girl who is as young as 9 years would not be in a position to appreciate the effect of her consent.

The discussed practices also show that most girls are married at a very young age. This conflicts directly with the Malawi Constitution that puts the marrying age at 18 years.¹²⁰ Related to the same issue is that girls that are married at a young age are also at a danger of risking their lives due to complications of child bearing. This directly conflicts with their right to life.¹²¹ In addition to the above, marrying daughters at a young age could interfere with their right to education.¹²² In all likelihood, once young girls are married, they are considered adults, and therefore not liable to go to school. Even if it can be argued that these young girls are given the opportunity to go to school whilst they are married, such arguments would not take away the fact that, as a married person, the demands of doing household chores will interfere with their education.

¹¹⁹Section 22 (4) of the Malawi Constitution.

¹²⁰Section 22 (6) of the Malawi Constitution.

¹²¹Section 16 of the Malawi Constitution.

¹²²Section 23 (4) of the Malawi Constitution.

According to the CRC¹²³ and the Charter¹²⁴ a child is defined to be a person who is below the age of 18 years.¹²⁵ The age limit is only for the purposes of enjoying rights enshrined in the CRC and the Charter. As rightly argued by Bennett,¹²⁶ neither of the two instruments obliges states to enact laws specifying an age of majority. However, it could be argued that countries that are parties to these Conventions would be expected to comply with the CRC and the Charter's age limit and therefore enact laws to reflect this.¹²⁷ This line of thinking is buttressed in the recommendation by the CRC Committee on the report submitted by Malawi in 2002.¹²⁸ Malawi, a party to the CRC, has, interestingly, defined a child to be a person who is under 16 years,¹²⁹ while Section 28 (3) of the South African Constitution, 1996 has defined a child to be a person under 18 years.

It is submitted that, by defining a child as a person under the age of 18 years, the drafters of both the Charter and CRC were cognizant of the

¹²³The CRC was ratified by Malawi on 2 January 1991.

¹²⁴The Charter was ratified by Malawi on 16 September 1999.

¹²⁵See Art. 1 and 2 of the CRC and the Charter respectively.

¹²⁶Bennett (n 79) 304 - 305.

¹²⁷The basis of this argument is that State Parties to these Conventions will be expected to implement the rights contained therein.

¹²⁸See www1.umn.edu/humanrts/crc/malawi2002.html, (accessed on 5/13/04) where the Committee recommended that State Parties take the necessary legislative measures to establish a clear definition of "child" in accordance with Art. 1 of the CRC and other related principles and provisions of the Convention.

¹²⁹Section 23 (5) of the Malawi Constitution.

challenges of modern life. The age of 18, it is argued, is considered sufficient age by which one can develop both mentally and physically into an adult, complete a basic education that is fundamental to adult life survival and generally enjoy youth. Whilst bearing in mind the fact that some children do finish school before they are 18, it has been argued that the CRC and the Charter provide general standards for the protection of children. They protect all children, inclusive of slow learners who, due to either economic hardships or intellectual incapacities, may not finish school quickly.¹³⁰

From the above discussion it is my submission that the practice of marrying a girl at puberty can conflict with several of her rights in the following ways. First, biologically a girl can reach puberty at a very young age. This, obviously, renders her a minor who cannot give a proper consent to the marriage. In such a situation it can be argued that there is a possibility that such marriage would be entered into without her free and full consent. A child who is as young as 9 years, for example, would not be in a position to appreciate the effect of her consent. This would be in conflict with Section 22 (4) of the Malawi Constitution that requires that one must enter into marriage with one's free consent.

Secondly, if a girl reaches puberty at a very young age, being married at that age conflicts with the Malawi Constitution that puts the marrying age at 18 years.¹³¹ Thirdly, in the face of the HIV/AIDS pandemic, marrying

¹³⁰Koyana, Mwambene and Bekker (n 11) 13-14.

¹³¹Section 22 (6) of the Malawi Constitution.

girls at a tender age would highly expose them to the dangers of contracting HIV/AIDS. HIV/AIDS is one of the biggest causes of the high mortality rate in Malawi, with an estimated 940 000 people living with HIV in 2005.¹³² Obviously, if young girls are exposed to HIV/AIDS it would interfere with their right to life as provided for in the Malawi Constitution.¹³³ This is not, however, to suggest that all married women in Malawi are HIV positive. The point that is being advanced is that, because they may be found to be in a polygamous union, the chances of them contracting the disease are high.

Fourthly, once a girl gets married she loses, in the eyes of society, the privilege of being treated as a child. She automatically becomes an adult. As a married woman, she is expected to bear children. With the many complications that can come with childbearing, such a girl's right to life, provided for by the Malawi Constitution, could also be compromised.¹³⁴ Fifthly, as a married woman, it could be argued, society does not expect her to go to school. This position conflicts with her right to education.¹³⁵ Lastly, Section 23 (4) of the Malawi Constitution provides:

‘Children are entitled to be protected from economic exploitation or any treatment, work or punishment that is, or is likely to: be hazardous; interfere with their education; or be harmful to

¹³²UNICEF 2007; See also NHP 1999-2004.

¹³³Section 16 of the Malawi Constitution.

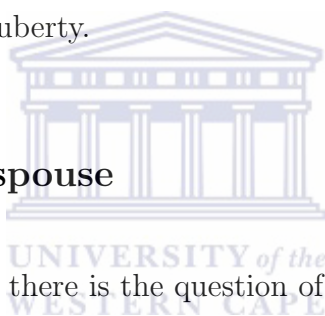
¹³⁴As above.

¹³⁵In the Malawi Constitution, the right to education is provided for by Section 25.

their health or to their physical, mental or spiritual or social development’.

If girls are married at a young age, this provision is also violated.

To sum up, we see that the dictates of the Malawi Constitution and international human rights standards conflict with customary family laws in that what is used as a measure of adulthood in international law is incompatible with what customary laws look at. We also see that several rights of girls married at a young age could be violated as a result of defining and fixing the age of majority at puberty.



4.4.5 Choice of spouse

Interlinked with consent there is the question of choice of a spouse. In both the matrilineal and patrilineal customary marriage systems, a decision on whom to marry is made primarily by the man concerned or such a man in consultation with his kin. A woman, under customary laws, is not expected to make a move and propose marriage. A woman who actively makes such a proposal is considered to have loose morals.¹³⁶ So her choice of whom to marry is squarely dependent on who becomes interested in her and makes a proposal. With such beliefs, arguably, the choice of a spouse is severely compromised for a woman.

¹³⁶Ntata and Sinoya (n 12) 15.

Useful expressions, found in the vernacular languages of Malawi, can help shed light on the issue of choice.¹³⁷ In the vernacular it is only a man who can ‘marry’ a woman: *kukwatira*¹³⁸ or *kutola*.¹³⁹ A woman ‘gets to be married’: *kukwatiwa*¹⁴⁰ or *kutoleka*.¹⁴¹ Thus, clues to the difficulties that women face in realising their right to choose whom to marry can, arguably, be found in the above vernacular usage.¹⁴² This position can be contrasted to the English position, for example, where both men and women ‘get married’ to each other.

The cultural practice that only men are expected to make a spousal choice, and not women, is a human rights issue on the basis that it goes against women’s rights and freedoms guaranteed by the Malawi Constitution, as well as against international standards. It does not rhyme well with Section 22 (3) of the Malawi Constitution which provides that ‘all men and women have the right to marry and found a family’. It should be noted that this provision does not mention the issue of choice. However, it can be argued that it grants all men and women the right to marry someone of their choice. Moreover, a woman’s right to choose whom to marry is guaranteed by the international instruments to which Malawi is a party. Art. 16(1)(b) of CEDAW states that

¹³⁷As above.

¹³⁸This word is used in the matrilineal systems.

¹³⁹This word is used in the patrilineal systems.

¹⁴⁰This word is used in the matrilineal systems.

¹⁴¹This word is used in the patrilineal systems and literally means ‘taken by’.

¹⁴²Ntata and Sinoya (n 12) 14.

that ‘women should also enjoy the right to freely choose a spouse and enter into marriage only with their free and full consent’.¹⁴³

Therefore, it is submitted, that the customary law tradition which only gives the right to propose marriage to men, and not to women, is incompatible with the Bill of Rights and international standards for the protection of women’s rights.

4.5 Other forms of validating customary marriages

In the preceding section we discussed how some principles and rules governing a customary marriage conflict with the Bill of Rights and international standards. This section outlines some of the cultural practices¹⁴⁴ relating to sex and sex rituals, practiced in various parts of Malawi, and shows how these practices are incompatible with the Bill of Rights and international standards.

¹⁴³See also Art. 1 of the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, 1962, GA Res.1763A (XVIII) of 7 November 1962.

¹⁴⁴These cultural practices will be mainly based on the research findings compiled by MHRC (n 47).

4.5.1 Widow inheritance

This is a practice whereby a widow is inherited after the death of a husband.¹⁴⁵ A widow can be inherited by a deceased husband's brother, cousin, or nephew.¹⁴⁶ It should, however, be noted that Malawi is not the only country that practices widow inheritance. In Zimbabwe, for example, customary marriage recognises levirate unions as valid marriages if they are solemnised in terms of the Act.¹⁴⁷

It should be acknowledged that in a traditional society widow inheritance provided a woman with the right to remain married, to have legitimate children and a sense of security.¹⁴⁸ These, agreeing with Dlamini, were very important considerations if one bears in mind the fact that in traditional society, especially in patrilineal customary marriages, if the widow left her late husband's village, she could forfeit her children, her house, property and support.¹⁴⁹ She would not also easily find a partner in order to marry again. However, in the modern setting, these considerations may not be relevant. It should, however, be noted that the same conclusion would not be true for

¹⁴⁵Widow inheritance is also referred to as levirate unions.

¹⁴⁶*Moyo v Chipeta*, Civil Appeal Case No. 107 of 1974, NTAC (Unreported). See also Banda (n 1) 119.

¹⁴⁷Section 3 (1) of *Customary Marriages Act* 5:07, as cited by Banda (n 1) 119.

¹⁴⁸Dlamini CRM 'The role of customary law in meeting social needs' (1991) *Acta Juridica* 71 at 80.

¹⁴⁹As above. See also Armstrong (n 22) 355; and White (n 7) 75.

matrilineal customary marriages. A woman in a matrilineal customary marriage is at an advantage with regard to her rights to the children, house, and property that was accumulated during the lifetime of her husband, because after the institution of a valid marriage, as previously noted, residence is in the woman's village. The institution of widow inheritance is heavily criticized and is generally on the decrease in the matrilineal societies in Malawi.¹⁵⁰ The criticisms are largely based on the fact that women are forced into these marriages and, therefore, do not have the right to choose whom to marry.¹⁵¹

On the other hand, Section 22 of the Malawi Constitution, as previously discussed, guarantees the right to choose whom to marry¹⁵², the right not to be forced to enter into marriage¹⁵³ and the right to give free and full consent as provided for by several international instruments.¹⁵⁴

The institution of widow inheritance is generally at variance with the Bill of Rights. This view is supported by the following responses that the MHRC got from their interviewees. First, some widows responded that they entered into such marriages because the husband's family forced them.¹⁵⁵ Secondly, some widows responded that they became party to these unions because

¹⁵⁰See the report by the MHRC (n 47) 20 which shows that the practice is generally decreasing in the matrilineal societies.

¹⁵¹Section 22 of the Malawi Constitution.

¹⁵²Section 22 (3) of the Malawi Constitution

¹⁵³Section 22 (4) of the Malawi Constitution.

¹⁵⁴See, for example, Art. 16 of CEDAW.

¹⁵⁵MHRC (n 47) 20.

of threats to the effect that they would lose their property and children or suffer from certain illnesses that could lead to their death if they refused.¹⁵⁶ Thirdly, in areas where ordinarily widows live in their husband's home, when a bereaved widow refuses to be inherited, she can be allowed to stay in her matrimonial home so long as she does not associate with men outside her husband's family.¹⁵⁷ This practice, arguably, violates the widow's right to marry and found a family of her choice. Related to the same point, if a widow who so refused to be inherited by her deceased husband's relative is found to associate with any other relative of her husband, she is forced to marry that relative.¹⁵⁸ Fourthly, if the widow wants to marry someone outside the husband's family, she has to leave the village and often *lobola* and children have to be returned to the husband's family. In a situation in which the children are very young, she could be allowed to take them with her for a while and later return them to the husband's family. Lastly, the practice makes it possible for the deceased's relative(s) to inherit his property if he is believed to have amassed property.

From the above responses a number of conclusions can be drawn. First, they show that widow inheritance is, in most cases, done without a woman's consent. This is clearly incompatible with section 22 (4) of the Malawi Constitution. As previously noted, when the issue of consent was discussed, lack

¹⁵⁶ As above.

¹⁵⁷ As above, 21.

¹⁵⁸ As above.

of consent to a marriage is a violation of the woman's rights. Secondly, it is noted that most widows whom are inherited are denied their right to choose who to marry after their husband's death. This position, as earlier discussed, is incompatible with international standards and the Malawi Constitution. Thirdly, the responses also show that a widow's right to property and custody of children are violated. This, obviously, conflicts with Sections 24 and 28 of the Malawi Constitution.

It should, however, be noted that among the Yao, the Lomwe, and the various ethnic groups in the south, widow inheritance is usually entered into after *kusudzula*.¹⁵⁹ If there is more than one man interested in inheriting the surviving widow, in most areas the men are requested to present their *luphatho*,¹⁶⁰ or any symbolic gift, to the widow. She then chooses the *luphatho*, or any such gift, presented by the man that impresses her most. He thereafter becomes her husband. In the northern part of the Chitipa district, it was established that at times a husband and his wife would agree in advance on who would inherit her when he died. This arrangement is called *chilongo*. In the event that the husband dies leaving behind a pregnant widow, the chosen brother is expected to take the pregnant sister-in-law as his wife. In such a scenario, it can be argued, that a widow is given a chance to choose whom to marry. Therefore, not every widow inheritance practice is a violation of a woman's rights.

¹⁵⁹Formal dissolution of marriage after a husband's death.

¹⁶⁰Sena term for gifts.

4.5.2 Marriage by proxy

In some parts of the Mzimba district, the MHRC found that many young men leave for South Africa a few months after entering into marriage.¹⁶¹ During their absence the husbands' brothers are asked by elders to look after their sisters-in-law, including having conjugal relations with them.¹⁶² These relatives end up producing children with the wives concerned and the children are forced upon the husbands when they return. The wives are not given a chance to refuse since they are in a new environment and usually young and naive.¹⁶³ It was also established that sometimes it is the father-in-law that assumes the responsibility of a proxy husband.¹⁶⁴ This practice is similarly observed in Zimbabwe as Onoria¹⁶⁵ has noted:

‘No wonder a Zimbabwean woman was willing to go to prison for arson in burning up her father-in-law’s hut rather than agree to his sexual demands on her on the grounds that while his son was away, he had a duty to look after his son’s “property”’.

¹⁶¹MHRC (n 47) 25.

¹⁶²As above.

¹⁶³As above.

¹⁶⁴As above.

¹⁶⁵Onoria H ‘Introduction to the African System of Protection of Human Rights and the Draft Protocol’ in Wolfgang B, Kisaakye EM and Oberleitner G (eds) *Human Rights of Women: international instruments and African experiences* (2002) 231 at 235.

It is, however, argued that marriage by proxy is a human rights issue on the basis that it is practised against a woman's rights and freedom and, arguably, demeans her dignity and freedom.¹⁶⁶ It violates not only the international conventions to which Malawi is a party but, also, is against what the Malawi Constitution provides, particularly in Section 19 on the right to dignity and personal freedom,¹⁶⁷ and Section 22 (2) that each member of the family shall enjoy full and equal respect and shall be protected by law against all forms of neglect, cruelty or exploitation.

4.5.3 Exchanging of wives

This is a practice in which very close friends make temporary arrangements for the men to exchange their wives for a short period of time. Men discuss their intent to swap wives and on reaching some common understanding each undertakes to convince his respective wife. The MHRC study found that after the wives have subscribed to the arrangement, the men, usually under the cover of darkness and at a specifically agreed time, go to make love to their friend's wife. The reason men engage in this practice is to afford couples different sex experiences. This practice was mentioned particularly

¹⁶⁶Section 19 of the Malawi Constitution.

¹⁶⁷Section 19 (1) of the Malawi Constitution provides that 'the dignity of all persons shall be inviolable'.

in the Mulanje district, which, as earlier noted, is a matrilineal society.¹⁶⁸

It is submitted that exchanging of wives is at variance with the Bill of Rights in the following respects. First, it would appear that the arrangement is made by men without involving their wives. According to Sections 20 and 24 of the Malawi Constitution such arrangements are discriminatory against women. Secondly, because the arrangement is made by men, we see that a woman's right to dignity and personal freedom is infringed upon.¹⁶⁹ Lastly, in a country where HIV/AIDS prevalence is high, such a practice infringes on a woman's right to life.¹⁷⁰

4.5.4 *Kutwala*

This is a practice whereby a girl/woman, found to be pregnant is taken by her relatives to the boy's/man's family to force them into a marriage. If the boy/man wants to marry the girl/woman, he can proceed to pay *lobola* or whatever charges are usually demanded in formalizing customary law marriages. If he is not interested, he can pledge to only maintain and support the child, and end his relationship with the girl/woman. The MHRC study found that *kutwala* takes place in all the areas covered by the study.¹⁷¹

¹⁶⁸MHRC (n 47).

¹⁶⁹Section 19 of the Malawi Constitution.

¹⁷⁰Section 16 of the Malawi Constitution.

¹⁷¹See MHRC (n 47) for the areas that were covered in this study.

What is important to note is that in some areas young people merely caught in a sexual act can be forced into a marriage to avoid embarrassing the morality of their parents. It is also interesting to note that most respondents said that forcing a young woman to marry after a boy/man has impregnated her should be maintained. They reasoned that it helps expose men who often refuse to marry women for whose pregnancy they are responsible. They argued that it helps to bring social order.

From the foregoing, a number of conclusions can be made. First, it is noted that a girl/woman once found to be pregnant is forced into marriage. This, obviously, conflicts with CEDAW¹⁷² and Section 22 (4) of the Malawi Constitution which provides that ‘no person shall be forced to enter into marriage’. Secondly, the fact that young girls caught in a sexual act are forced into marriage, it could be argued that it conflicts with Section 22 (6) which, generally, prohibits child marriages. The practice is also in conflict with Section 23 of the Malawi Constitution which protects children from treatment that would interfere with their education. Thirdly, since a woman’s entry into the marriage is dependent on whether the man that impregnated her is willing to marry her, this, arguably, conflicts with Section 22 (4) of the Malawi Constitution. Lastly, a woman’s right to personal dignity and freedom is also violated.¹⁷³ Once found to be pregnant, it could be argued, the practice seems to take away her liberty to make decisions that will affect her life. The

¹⁷²See Art. 16 (1) of CEDAW.

¹⁷³Section 19 of the Malawi Constitution


choice is exercised by her parents and the man who has impregnated her.

4.6 Rights and obligations arising from customary marriages

In this section, we examine how the rights and obligations arising from a customary marriage conflict with the Bill of Rights and international human rights standards for the protection of women's rights.

4.6.1 Property rights

Section 24 of the Constitution provides:



‘(1) Women have the right to full and equal protection by the law, and have the right not to be discriminated against on the basis of their marital status which includes the right- (a) to be accorded the same rights as men in civil law, including equal capacity... (ii) **to acquire and maintain rights in property, independently or in association with others, regardless of their marital status; (b) on dissolution of marriage- (i) to a fair disposition of property that is held jointly with a husband; and (2) Any law that discriminates against women on the basis of gender or marital status shall be invalid**

and legislation shall be passed to eliminate customs and practices that discriminate against women, particularly practices such as- (iii) deprivation of property, including property obtained by inheritance’.

Similar provisions are included in international human rights law. The UDHR states that ‘men and women of full age ... are entitled to equal rights as to marriage, during marriage and at its dissolution’.¹⁷⁴

We see that the norm, at both national law as well as international law levels is that spouses must have equal property rights. On the other hand, in matrilineal customary law marriages, household property, acquired by the spouses, constitutes matrimonial property.¹⁷⁵ This, of course, excludes personal belongings which are exclusively for the spouse in possession of them. Any other chattel, personal or real, is the property of the couple and is subject to the joint control of both spouses. The only qualification to this basic rule is, that where it is shown that a particular chattel, personal or real, was acquired by the individual effort of one spouse only, that spouse has ultimate control over it.¹⁷⁶

¹⁷⁴Art. 16 (1) of the UDHR.

¹⁷⁵Ibik (n 8) 192.

¹⁷⁶Chigawa (n 5) 20.

There is one exception to these rules. The matrimonial home built by the husband at the wife's village belongs to her as of right.¹⁷⁷ The rule stems from the fact that the matrimonial residence for the married couple in this system is uxorilocal.¹⁷⁸ Here we see an instance where the customary rule works to benefit women at the expense of men.

Unlike the position in matrilineal systems, where a wife has more control over property rights, in the patrilineal system of marriages the husband has greater control over the matrimonial property than the wife, except for odd items of personal property.¹⁷⁹ In fact, the control and ownership of all property vests in him as the family head.¹⁸⁰ Wives do not even have the right to control their own earnings.¹⁸¹ This would obviously lead us to expect that wives, upon dissolution of a marriage, do not get anything. It is further said that upon the death of a husband, this control of the property is with his eldest son of his first wife. A wife has little, if any, say in the administration of the property, as she is, herself, regarded as an 'asset'.¹⁸²

¹⁷⁷See *Poya v Poya*, Civil Appeal Case No. 38 of 1979, NTAC (Unreported).

¹⁷⁸This means that residence is at the wife's village.

¹⁷⁹White (n 7) 59. See also Bennett TW *A sourcebook of African customary law for Southern Africa* 327 as cited by Bronstein V 'Reconceptualizing the customary law debate in South Africa' (1998) *Southern African Journal on Human Rights* 388 at 390.

¹⁸⁰Bekker (n 11) 126.

¹⁸¹See Bronstein (n 179).

¹⁸²Bekker (n 11) 126.

However, in both patrilineal and matrilineal systems, recent studies shows that property is generally labeled as belonging to a man.¹⁸³

This position obviously conflicts with Section 24 of the Malawi Constitution, as discussed above.

4.6.2 Affiliation and custody of children

At both international and regional levels, children's rights are to be exercised and enjoyed without discrimination on the basis of sex.¹⁸⁴ Children's rights have received constitutional recognition in Malawi.¹⁸⁵ Included in the recognition of the notion that children have rights is the understanding that both parents, without discrimination, are under an obligation to provide care for the children in equal measure.¹⁸⁶

Additionally, Art. 16 (1) (d) of CEDAW provides for the equal rights and responsibilities of parents toward their children. This provision, it has been noted, addresses the historical inequities in every legal system as to the distribution of rights and responsibilities between parents of minor children.¹⁸⁷

¹⁸³See research study findings done by White (n 7) 57.

¹⁸⁴Art. 2 (1) of the CRC and Art. 3 of the Charter.

¹⁸⁵Section 23 of the Malawi Constitution.

¹⁸⁶Art. 18 (1) of the CRC; Art. 20 (1) (a) (c) of the Charter; and Art. 6 (1) and & 7 (c) of the Protocol.

¹⁸⁷Freeman MA 'The Human Rights of Women in the Family: Issues and Recommendations for Implementation of the Women's Convention' in Peters J and Wolper A *Women's*

In most systems, it has further been noted, when children were born to married couples, fathers traditionally had sole rights to make decisions concerning them although the day to day care for those children rested on the mother.¹⁸⁸ As earlier noted, under matrilineal customary law, children born out of marriage are affiliated to the clan of the female spouse.¹⁸⁹ This is probably the most important feature of the matrilineal customary marriage.¹⁹⁰ Contrary to the matrilineal system where the children of a family are affiliated to the mother, in the patrilineal system, provided *lobola* obligations have been complied with, the husband and his family have full parental rights to any children born to a wife during marriage.¹⁹¹ The right of a father to custody of his children is absolute. In contrast to the matrilineal system, we see that in the patrilineal system mothers have no rights to their children. However, just as in the matrilineal system, in the patrilineal system customary laws may also conflict with the best interest of the child.¹⁹²

rights, human rights: International feminist perspectives (1995) 149 at 158.

¹⁸⁸As above.

¹⁸⁹*Chakhumbira v Chakhumbira* Civil Appeal Case No. 39 of 1979, NTAC (Unreported).

¹⁹⁰Chigawa (n 5) 10.

¹⁹¹Von Benda-Beckmann (n 4) 88. See also the discussion by Armstrong (n 22) 348.

¹⁹²Burman S 'Illegitimacy and the African Family on a Changing South Africa' (1991) *Acta Juridica* 36 at 41.

4.7 Divorce in customary marriages in Malawi

This section briefly summarises divorce in a customary marriage.¹⁹³ With most customary marriages starting off as customary law unions, it is important to consider how these types of marriages are ended.¹⁹⁴ There are no formal grounds for divorce per se. Thus, Armstrong *et al* note that grounds for divorce at customary law are no more than reasons given by men and women in seeking to convince the family councils that the marriage is no longer practicable.¹⁹⁵

Marriage in both the matrilineal and patrilineal customary law systems may be terminated either by a divorce decree pronounced by a court of competent jurisdiction¹⁹⁶ or by the death of either spouse or both.¹⁹⁷ In the case of death, in a matrilineal system, the demise of a spouse does not terminate the marriage bond.¹⁹⁸ The marriage will subsist until formally terminated at the hair-shaving ceremony, followed by *msudzulo*¹⁹⁹ that will

¹⁹³For a full discussion, see, for example, Chigawa (n 5) and Ibik (n 8).

¹⁹⁴Banda (n 1) 127.

¹⁹⁵Armstrong *et al* 'Uncovering Reality: Excavating Women's Rights in the African Family' as cited by Banda (n 1) 127.

¹⁹⁶As noted in Chapter 3, MC in Malawi have, under the *Courts (Amendment) Act* 2000, original jurisdiction to dissolve marriages contracted under customary laws.

¹⁹⁷Chigawa (n 5) 9-11.

¹⁹⁸Ibik (n 8) 198.

¹⁹⁹Meaning the actual divorce.

officially terminate it.²⁰⁰ On the other hand, termination by divorce is not complicated under customary law.²⁰¹

In patrilineal marriages, if the female spouse dies, the marriage ends with the hair-shaving ceremony.²⁰² On the other hand, if the male spouse dies, the

²⁰⁰Chigawa (n 5) 9.

²⁰¹Any reason is a good ground to end a marriage. This is contrasted to civil marriages where there are specific grounds for divorce. Section 5 of the *Divorce Act*, Chapter 25:04 provides:

‘A petition for divorce may be presented to the Court either by the husband or the wife on the ground that the respondent- (a) has since the celebration of marriage committed adultery; or (b) has deserted the petitioner without cause for the period of at least three years immediately preceding the presentation of the petition; or (c) has since the celebration of the marriage treated the petitioner with cruelty; or (d) is incurably of unsound mind and has been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition, and by the wife on the ground that her husband has, since the celebration of the marriage, been guilty of rape, sodomy or bestiality. For the purpose of this section a person of unsound mind shall be deemed to be under the care and treatment while he is detained, whether in Malawi or elsewhere, in an institution duly recognised by the Government of Malawi as an institution for the care and treatment of insane persons, lunatics or mental defectives, or is detained as a criminal lunatic under any law for the time being in force in Malawi. A certificate under the hand of the Minister that any place is a duly recognised institution for the purpose of this section shall be receivable in all courts as conclusive evidence of that fact’.

²⁰²Chigawa (n 5) 11.

female spouse may continue to live with the relatives of her late husband until she is freed by them.²⁰³ In fact, the death of the husband does not dissolve a marriage. This position is similar to South Africa where Koyana²⁰⁴ has also noted that the death of the husband does not entitle his people to a refund of *ikhazi* because the marriage is not thereby dissolved. On the other hand, we see an instance where under the patrilineal marriages a widow and a widower are treated differently. This is contrary to Sections 20 and 24 of the Malawi Constitution. The widow may sometimes be inherited by her deceased husband's relatives without her consent. As earlier discussed, widow inheritance conflicts with several constitutional rights of a woman.

The virtually total authority of the relatives of the husband over the widow in patrilineal marriage systems is fundamentally at odds with the guarantees of equality²⁰⁵ and dignity²⁰⁶ under the Malawi Constitution. Indeed, by depriving a wife of her prerogative, *inter alia*, to decide whether to marry and whether to remain in a marriage after the death of her husband, customary family laws violates the constitutional right of women to experience 'the full and equal enjoyment of all rights and freedoms'.²⁰⁷ In addition, it de-

²⁰³See also Venter T and Nel J 'African customary law of intestate succession and gender (in)equality' (2005) *Tydskrif vir die Suid-Afrikaanse* 86 at 90 in respect of South Africa. The same rule is applicable in Malawi.

²⁰⁴Koyana DS *Customary Law in a Changing Society* (1980) 43.

²⁰⁵Section 20 of the Malawi Constitution.

²⁰⁶Section 19 (1) of the Malawi Constitution.

²⁰⁷Section 24 of the Malawi Constitution.

prives women of the right to have their ‘dignity respected and protected’ as guaranteed under the Malawi Constitution.²⁰⁸

4.7.1 Grounds for divorce under customary laws

From the preceding discussion, it has been noted that there are no fixed grounds of divorce in customary law. Various grounds may be advanced and supported. These include: adultery; failure by the husband to provide a house for the wife (under a matrilineal system);²⁰⁹ or the wife disobeying her husband (in a matrilineal system).²¹⁰

However, in both matrilineal and patrilineal customary family laws of Malawi, some grounds of divorce seem to favour men more than women. In matrilineal customary marriages, if a woman disobeys her husband, he is entitled to divorce her.²¹¹ The same does not arise as a ground for divorce if it is a husband disobeying a wife.²¹² This position clearly discriminates against women.²¹³

Adultery is another ground of divorce for either spouse to a customary

²⁰⁸Section 19 (1) of the Malawi Constitution.

²⁰⁹*Mwanza v Shaba*, Civil Appeal Case No. 82 of 1974, NTAC (Unreported).

²¹⁰*Kamwendo v Kamwendo*, Civil Appeal Case No. 154 of 1978, NTAC (Unreported).

²¹¹As above.

²¹²As above.

²¹³See Sections 20 and 24 of the Malawi Constitution.

marriage under the customary marriages in Malawi. As a contrast to this rule, in South Africa, it was stated that adultery on the part of the wife is not sufficient cause for the dissolution of the marriage but that the husband may, if he wishes, repudiate his wife. If he does so, he is not entitled to the *ikhazi* paid by him.²¹⁴ Having said that, however, the customary practice of a male spouse recovering compensation in respect of his wife's adultery discriminates against women.²¹⁵ In contrast, a wife is not entitled to recover compensation from either her husband or the woman with whom he has committed adultery.²¹⁶

Desertion of one spouse by the other, for an unreasonable period of time, constitutes sufficient cause for divorce under matrilineal customary laws.²¹⁷ What constitutes an unreasonable period of time is a question of fact in each case, but usually varies between one to two years for the man's absence, and one to three months in the case of a wife's.²¹⁸ It is, however, noted that in determining such unreasonable time, women are treated differently from men. This is also in violation of Section 20 of the Malawi Constitution.

²¹⁴ *Conana v Dungulu*, 1 NAC (1894-1909) as cited by Koyana (n 204) 37.

²¹⁵ *Mwale v Lukhere*, Civil Appeal Case No. 96 of 1978, NTAC (Unreported).

²¹⁶ Kamchedzera (n 43) 374.

²¹⁷ *Menasi v Balakasi*, Civil Appeal Case No. 98 of 1979, NTAC (Unreported).

²¹⁸ Ibik (n 8) 198.

4.7.2 Who can initiate divorce

As earlier stated, in matrilineal societies residence is with the wife's family. It is, therefore, easy for women to chase husbands out of their village after becoming frustrated with them. Obviously, this position leads to the conclusion that in matrilineal customary marriages women would initiate more divorce proceedings than men. In fact, it has been noted by some researchers that, comparatively, there are more divorces in matrilineal systems than they are in patrilineal systems.²¹⁹ It should, however, be noted that under the matrilineal customary marriages either spouse has the right to dissolve the marriage.²²⁰

Similarly, since residence in the patrilineal system is at the husband's family home, it has been noted by scholars that husbands sometimes dissolve their customary marriage by simply ejecting the wife from his family home or abandoning her.²²¹ Obviously, this leads us to the expectation that in the patrilineal systems, husbands initiate more divorce proceedings than wives. In fact, some scholars have noted that it is far more difficult for women than men to obtain a divorce in a patrilineal system.²²² On the other hand, in

²¹⁹Reniers G *Divorce and remarriage in rural Malawi* Demographic Research Special Collection 1 Art. 6 published on 19th September, 2003 accessed at www.demographic-research.org on 14/01/06.

²²⁰Ntata and Sinoya (n 12) 18.

²²¹Bekker (n 11) 180.

²²²Kaganas and Murray (n 57) 129.

a matrilineal customary marriage, either spouse may seek divorce from the other. No outside person can initiate divorce proceedings without the consent or approval of one of the spouses.²²³

As earlier noted, the consent of marriage guardians in matrilineal systems is important for the validity of the marriage; it is then expected that the same consent would be important when one of the spouses would be seeking divorce. However, we see that it is actually the spouse's consent which matters in initiating divorce proceedings.

Unlike in a matrilineal customary marriage, where both spouses have capacity to initiate divorce proceedings, in a patrilineal customary marriage, a wife has no right to dissolve her customary marriage without referring the matter to her guardian.²²⁴ A wife is, in most cases, entirely dependent upon him to take the necessary steps to effect dissolution.²²⁵ On the other hand, a husband is permitted to dissolve his customary marriage extra-judicially by unilateral act at his pleasure and for no reason other than his desire to terminate it,²²⁶ without him being required to get the permission of his guardian. We see here an instance where men and women are accorded different opportunities.

²²³Ibik (n 8) 197.

²²⁴Bekker (n 11) 187.

²²⁵As above.

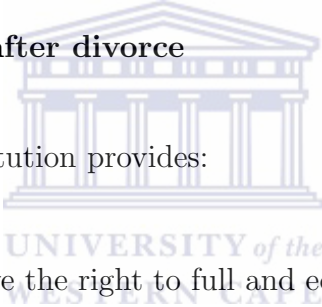
²²⁶As above, 177.

4.7.3 Effects of terminating customary marriages

In the preceding section we discussed the grounds of divorce under both matrilineal and patrilineal customary law marriages and highlighted areas that are incompatible with women's rights. In this subsection an examination of the effect of terminating a customary marriage is made. This will be in the areas of children born from the relationship, property and maintenance. The focus will be to show how customary values implicit in these areas conflict with women's rights as provided in the Bill of Rights and international law.

Custody of children after divorce

Section 24 of the Constitution provides:



‘(1) ... women have the right to full and equal protection by the law, and have the right not to be discriminated against on the basis of their marital status which includes the right... (a) to be accorded the same rights as men in civil law, including equal capacity- ... (iii) to acquire and *retain custody, guardianship and care of children and to have an equal right in the making of decisions that affect their upbringing*; and ...’ [Emphasis added]

In addition to the above, Section 24 (1) (b) of the Malawi Constitution provides that on the dissolution of marriage women have the right not to be

discriminated against on the basis of their gender. It is submitted that this section would be relevant to secure a woman's right to her children when issues of custody are being decided by courts.

At the international level, both the CRC and the Charter dictate that the principle of the best interests of the child must guide those in the decision making process concerning the custody of children.²²⁷ The Charter puts it more forcefully, providing that the child's best interests "shall be the primary consideration", thus making it paramount. It is, therefore, expected that in considering the issue of who must have custody of a child after divorce of a customary marriage, due regard must be given to this principle. Additionally, Art. 16 (1) (c) of CEDAW provides that women have the same rights as men on dissolution of a marriage. With regard to custody of children, it could be argued that CEDAW also advocates that men and women will be at par when the best interests of the child will be decided on the dissolution of a marriage.

It should, however, be noted that the best interests of the child principle is conspicuously missing from Section 23 of the Malawi Constitution.²²⁸ It is submitted that the absence of this general standard for the protection of children's rights in Malawi creates a constitutional vacuum in the review of all proceedings in which decisions are taken regarding children. This, how-

²²⁷See Art. 3 and 4 of the CRC and Charter, respectively.

²²⁸As earlier noted in this Chapter, Section 23 of the Malawi Constitution provides for the rights of children.

ever, does not relieve the Malawi courts from using this principle. Section 11 (2) (c) of the Malawi Constitution mandates courts to use rules of international law in their interpretation of constitutional rights, including children's rights. Therefore, even if the Malawi Constitution does not expressly provide for this principle, courts should widely interpret the constitutional provision on the rights of children, and use this principle to safeguard other rights. Furthermore, the Malawi Constitution enjoins courts to consider comparable foreign case law in interpreting it.²²⁹ Therefore, even if the courts of Malawi have not produced some jurisprudence on the matter, they may be compelled by the Malawi Constitution to use foreign case law.

In addition to the above, Malawi courts are obliged, when interpreting any legislation and developing any law, including customary laws, to promote the values which underlie an open and democratic society.²³⁰ Therefore, despite the absence of the best interests of the child principle in the Malawi Constitution, the values which underlie an open and democratic society must also be considered in the development of customary laws relating to children. The absence of the best interests principle in the Malawi Constitution is contrasted with Section 28 (2) of the South African Constitution.²³¹

²²⁹Section 11 (2) (c) of the Malawi Constitution.

²³⁰Section 11 (2) (a) of the Malawi Constitution.

²³¹Section 28 (2) of the South African Constitution states: 'A child's best interests are of paramount importance in every matter concerning the child.'

Contrary to the dictates of the CRC, the Charter and CEDAW, in matrilineal and patrilineal customary marriages, however, the right of a mother or father, respectively, to custody of the children is absolute. In terms of these, this right cannot be taken away merely because the child might do better if left in the care of another relative.²³² As noted earlier when the issue of *lobola* was discussed, in patrilineal customary marriages this right stems from the father fulfilling his obligation under the *lobola* agreement.²³³ This then entitles the father and his family to have rights to any children born to the wife during the marriage. Mothers had no rights to their children.²³⁴ The best interests of a child, or the wishes of the mother, as a general rule, do not play a part in determining custody under patrilineal customary marriage laws.²³⁵

On the other hand, under matrilineal customary laws, all children born out of a marriage are affiliated to the clan of the female spouse.²³⁶ After divorce custody of the children is granted to the mother.

²³²See also Bekker (n 11) 227 for a comparative analysis with South Africa. See also Armstrong (n 22) 349.

²³³See *Kamcaca v Nkhota*, 1968 MLR 190.

²³⁴See also similar views as expressed by the SALC *Project 90 Report on Customary Marriages*, (1998) 137 with regard to patrilineal customary marriages in South Africa. See also Armstrong (n 22) 349.

²³⁵Burman (n 192) 41.

²³⁶See n 166 above.

Both systems, it is submitted, violate the principle of equality. This is incompatible with the Malawi Constitution that requires that on dissolution of a marriage both men and women should enjoy equal rights.²³⁷ It is also a violation of the international conventions to which Malawi is a party, which require that the best interests of the child are of paramount importance in all matters concerning the welfare of the child.²³⁸

To sum up: we see that the customary laws that favour the interests of the child's family and not those of the child are in principle incompatible with the Bill of Rights for it does not consider the best interests of the child.

Matrimonial home and land

As earlier stated, with matrilineal descent systems, matrilocal residence after marriage is often the prescription.²³⁹ After the dissolution of their marriage, it is obviously expected that the male spouse leave the uxorilocal matrilineal home, after which the house belongs to the woman as of right.²⁴⁰ He is only entitled to remove all doors, windows, and other valuable fixtures not affecting the main structure. It should, however, be noted that this right to remove fixtures is only implicit where the husband has provided them.²⁴¹

²³⁷Section 24 of the Malawi Constitution.

²³⁸See Art. 3 and 4 of the of CRC and Charter, respectively.

²³⁹Chigawa (n 5) 6.

²⁴⁰As above, 20. See also Armstrong (n 22) 347.

²⁴¹Ibik (n 8) 200.

Here we see that a husband is deprived of the house that he himself may have built. This is, obviously, contrary to the constitutional and international standards that require that no one shall be deprived of their property.²⁴² One would, obviously, think that the most equitable solution upon dissolution of marriage would probably be to sell the house and share the proceeds.

Similarly, in the patrilineal systems, a wife who has moved to the husband's home is expected to return to her parent's family home after the dissolution of the marriage.²⁴³ However, unlike in the matrilineal system where a husband is obliged to provide a house to the wife even after the decree of divorce has been granted,²⁴⁴ in the patrilineal systems, after the dissolution of marriage, the wife is not entitled to be provided with accommodation by her erstwhile husband. This position is similar to that in South Africa.²⁴⁵

In the matrilineal system, rights over land allocated to husband by the family of the wife by virtue of the marriage cease upon divorce.²⁴⁶ The land which the spouses used to cultivate will remain the property of the female spouse when the male spouse leave the village, since he had no right of his own to such land.²⁴⁷ It should, however, be noted that under the

²⁴²Sections 24 and 28 of the Malawi Constitution.

²⁴³See also Armstrong (n 22) 347.

²⁴⁴*Dorothy Joswa v Preston Joswa*, Civil Cause No. 113 of 2003, Zomba MC (Unreported).

²⁴⁵*Malaza v Mndaweni* 1974 BAC (C) 45 as cited by Bekker (n 11) 199.

²⁴⁶Ibik (n 8) 200. See also Armstrong (n 22) 347.

²⁴⁷Chigawa (n 5) 21.

matrilineal system, just like in the patrilineal system, land does not belong to an individual. It belongs to the family of a wife or husband respectively. As such, if the marriage is dissolved, it makes sense that the land should go back to the owner, the family.

Traditional movable household property and personal belongings

In dividing property, human rights norms enjoin courts to divide it equally.²⁴⁸ Indeed, the Protocol²⁴⁹ provides:

‘in the case of separation, divorce or annulment of marriage, women and men shall have the right to an equitable sharing of joint property deriving from the marriage’.

In the customary family marriage laws of Malawi, the division of property on divorce is linked to the marriage system under which a woman is married. Generally, the statutory redistributive powers of the courts do not apply to unregistered customary law unions due to their non-registration. Under matrilineal customary laws, each spouse is entitled, on divorce, to retain all personal belongings, including livestock and gifts of a traditional

²⁴⁸See for example Art. 23 (4) of the CCPR; paras 20 and 26 of the Human Rights Committee General Comment No. 28; Art. 16 (1) (h) of CEDAW; paras 25-33 of CEDAW General Comment No. 21 and Art. 18 (3) of the ACHPR.

²⁴⁹Art. 7 (d) of the Protocol. See also Section 24 (1) (b) (i) of the Malawi Constitution.

kind received from the other spouse. The traditional household property is divisible between the spouses, the lesser share going to that spouse adjudged responsible for the divorce.²⁵⁰ However, it has been noted²⁵¹ that among the districts that are matrilineal there are local variations with regard to how this property is handled after divorce. In some areas²⁵² the traditional property is equally divided between the spouses irrespective of who is at fault.

Lobola

In patrilineal marriages the *lobola* is returnable upon the dissolution of a marriage. What is returnable is also dependent on who is at fault. It is also dependent on the duration of the marriage and the number of children born from the relationship.²⁵³ However, most interestingly, if the *lobola* is not paid back by the wife's guardian, children born subsequently to the wife by another man belong to the divorced man. This is so because, if *lobola* is not returned, the marriage in principle still subsists. This position, it is submitted, interferes with the woman's right to found a family.²⁵⁴ It is also a violation of her right to dignity and freedom.²⁵⁵

²⁵⁰Ibik (n 8) 200. See also Armstrong (n 22) 347.

²⁵¹Notably, Ibik (as above) and Chigawa (n 5) 20.

²⁵²For example, in the districts of Dedza, Kasungu and Lilongwe.

²⁵³Armstrong (n 22) 348.

²⁵⁴Section 22 (3) of the Malawi Constitution.

²⁵⁵Section 19 of the Malawi Constitution.

Maintenance

Art. 16 (1) (c) of CEDAW provides that men and women shall have ‘the same rights and responsibilities during marriage and at its dissolution.’ At the national level, the Malawi Constitution provides that, on the dissolution of her marriage, a woman has the right to fair maintenance, taking into consideration all the circumstances, in particular, the means of the former husband and the needs of any children.²⁵⁶ It is, therefore, expected that upon dissolution of a marriage, provision for her maintenance will be made.

Under the matrilineal system, there used to be no provision that a husband had a duty to maintain his wife after divorce. However, this position seems to have changed. Courts, as it will be noted in Chapter 7, are being influenced by the constitutional and international standards that dictate that on the dissolution of a marriage, women have a right to maintenance. For instance, in the case of *Mwandida Saiti v Charles Pemba*²⁵⁷ the Court ordered that the husband should maintain the wife after the divorce by paying her a reasonable amount of money monthly until she found a job.

Similarly, in the patrilineal system, there is no duty placed on the husband to maintain his wife once the marriage has been dissolved. In theory, the divorcee is to be absorbed back into her own family.

²⁵⁶Section 24 (1) (b) (ii) of the Malawi Constitution.

²⁵⁷Civil Cause No. 28 of 2004, Zomba district MC (Unreported).

Matrimonial property

In the southern region of Malawi there is a narrative that a man is supposed to 'leave with his blanket', meaning that he is not only expected to leave the matrimonial home, ordinarily situated in the village of his wife after divorce, that he cannot claim any material goods from the household - except for his blanket.²⁵⁸ This logic would obviously lead us to expect that women take all the matrimonial property after divorce in the matrilineal systems of Malawi. It also leads us to expect that women's right to property is not violated. Of course, on the other hand, we see the inequality, on the basis of gender, between men and women. Men's right to property seems to be violated upon the dissolution of a marriage.²⁵⁹

Contrary to the above position, in patrilineal customary marriages men seem to be at an advantage over women. The rule that wives have no propri-

²⁵⁸Zulu E., 'Social and cultural factors affecting reproductive behaviour in Malawi,' 1996 as cited by Reniers (n 219).

²⁵⁹Section 24 of the Constitution provides:

- (1) Women have the right to full and equal protection by the law, and have the right not to be discriminated against on the basis of their marital status which includes the right- ... (b) on dissolution of marriage- (i) **to a fair disposition of property** that is held jointly with a husband; ... and (2) Any law that discriminates against women on the basis of gender or marital status shall be invalid and legislation shall be passed to eliminate customs and practices that discriminate against women, particularly practices such as- ... (iii) deprivation of property, including property obtained by inheritance.
[Emphasis added]

etary capacity obviously leads us to expect that women lose all their property when the marriage ends.²⁶⁰

4.8 Inheritance under African customary laws of Malawi

4.8.1 Introduction

In this section, I discuss laws that are applicable to a deceased intestate estate governed by customary family laws. The section is divided into two subsections. First, I discuss the customary family laws governing inheritance during the precolonial period. Secondly, I discuss the current position of distribution of a deceased intestate estate as regulated by the WIA.

4.8.2 Customary rules of inheritance

In patrilineal systems, the administrator of the deceased estate is the father of the deceased, or, if he is already dead, a brother of the father. The estate of a woman is administered by her husband.²⁶¹ On the other hand, women are not given a chance to administer their deceased husband's property. This

²⁶⁰Bennett (n 30) 123.

²⁶¹Von Benda-Beckmann (n 4) 114.

practice, it could be argued, conflicts with the right to equality. Furthermore, as a general rule, in most patrilineal systems a married man's estate is inherited by his eldest son from the first wife. If there are no heirs from the first wife, children from the second wife can inherit. In this instance we see that daughters are not included as heirs. This customary rule is in conflict with the right to equality.²⁶² The research by the MHRC found that women strongly felt that the practice of girls not inheriting valuable property, like land, should be abolished.²⁶³

On the other hand, in matrilineal systems the administrator of the deceased estate of a husband is either a brother to the wife, the eldest son of the eldest sister, or the maternal uncle. As a general rule, these males are also the principal heirs of the deceased man.²⁶⁴ As previously noted, children in matrilineal system do not belong to their father's lineage but to their mother's. This means that they do not access or inherit their father's property or position after his death.²⁶⁵

In both patrilineal and matrilineal systems, we see that the administrators and heirs are always males. This position, it is submitted, conflicts with the right to equality since women are not given the same privileges and responsibilities as men.

²⁶²Section 20 of the Malawi Constitution.

²⁶³MHRC (n 47).

²⁶⁴Von Benda-Beckmann (n 4) 114.

²⁶⁵Armstrong (n 22) 357.

4.8.3 Customary inheritance under Wills and Inheritance Act (WIA)

After 1967, the inheritance law is now regulated by WIA.²⁶⁶

Section 3 of the WIA, it is submitted, amends the customary laws relating to inheritance. This provision provides:

‘Except as provided for in this Act, no person shall be entitled, under customary law, to take by inheritance any of the property to which a deceased person was entitled at the date of his death’.

The above provision seems to be all embracing and suggests that inheritance at customary law is now determined by WIA. To that end, Section 16 (2) (a) and (b) provides:

‘if a marriage was arranged in an area described in the Schedule, the persons entitled under such intestate property shall be- (i) as to the half share, the persons entitled upon a fair distribution in accordance with section 17 of the Act. Persons entitled under such fair distribution are the wife, issue and dependants of the intestate; (ii) as to the other half share, the heirs in accordance with customary law’. If the marriage was arranged in any other

²⁶⁶Chapter 10:02.

area of Malawi the persons entitled to such intestate property shall be- (i) as to three-fifths share, the heirs in accordance with customary law; (ii) as to the remaining two-fifths share, the persons entitled upon fair distribution under section 17 of the Act’.

From the foregoing WIA provision, it should be noted that the areas described under the Schedule are: Chitipa, Karonga, Rumphu, Nkhatabay, Mzimba and Nsanje. It should also be noted that persons entitled upon a ‘fair distribution’ are the wife, issue and dependants of the deceased intestate estate. Several conclusions can, however, be drawn from Section 16 (2) of WIA. Whilst acknowledging that WIA makes provision for the distribution of property that belongs to a male person who has died without leaving a will and is survived by widow, issue and dependants, this provision discriminates against women. In the first place, it is noted that a similar position has not been adopted in respect of the intestate estate of a deceased woman.²⁶⁷ Secondly, women in matrilineal and patrilineal societies are treated differently. It is surprisingly peculiar that in matrilineal systems a wife and children acquire two-fifth share of the estate and customary heirs get a three-fifth share of the estate; in patrilineal systems the wife and children get half of the estate. Thus, the law favours one category of beneficiaries of the intestate against the other category.

In addition, under Section 16 (4) of WIA²⁶⁸ the law does not make a like

²⁶⁷See also White (n 7) 35.

²⁶⁸Section 16 (4) of WIA provides that where a deceased man left no wife, issue or

provision for a deceased man as it does for a deceased woman survived by children. On that score, the law is discriminatory as between a man and a woman who are both survived by children.

Furthermore, Section 16 (5) of WIA provides that:

‘A widow shall hold her share of her deceased husband’s estate upon the condition that if she re-marries any portion thereof which still subsists at the date of such re-marriage shall become divisible between her children by the deceased upon a fair distribution in accordance with section 17 of the Act.’

From the foregoing, we see that a widow loses her share of the estate upon re-marriage. This provision, arguably, discriminates against women on the basis of marital status as the widow loses her share of the estate upon re-marriage.

It is also important to note that Section 17 (i) (a) of the WIA provides that before any prescribed share is distributed amongst the widow, issue and dependants, provision should first be made for dependants.²⁶⁹ On the dependant surviving him and also in the case of a deceased woman the persons entitled to the property shall be ascertained in accordance with customary law. However, the proviso to this subsection provides that where the deceased woman leaves children, such children shall be solely entitled.

²⁶⁹According to Section 2 of the WIA, a dependant is defined as ‘a person who was maintained by that deceased person immediately prior to his death who was a child, issue, wife, parent, any other person living with that deceased person or a minor whose

one hand, we see that this position, unfortunately, does not give the widow priority over the property of her deceased husband to which, in all likelihood, she contributed toward acquiring. She is treated like any other dependant. On the other hand, we see that the widow has a chance to benefit twice, both as a dependant and as a surviving spouse.

4.9 Conclusion

This Chapter has depicted the impact of the Bill of Rights on African customary family laws affecting women's rights in Malawi to the ongoing debate about the universalism and cultural relativism from a grounded and situational women's law perspective. African customary family laws that are in conflict with women's rights are located at the cutting edge of cultural relativists values and women's different shifting and complex legal needs as individuals and as members of family group.

Overall, the Chapter has highlighted some of the major rules and practices of African customary laws that potentially offend against the Bill of Rights and international human rights standards aimed at protecting women's rights. These include: polygamy, which entitles a man but not a woman to marry more than one spouse; the rule that entitles a husband the right to own the property acquired by his wife during the subsistence of the marriage, but not education was being provided for by that person, and who is incapable, wholly or in part, of maintaining himself'.

vice versa; the rule that only a husband in patrilineal customary marriages and a wife's guardian in matrilineal marriages can terminate the marriage; the principle of male primogeniture, which entitles males and not females to inherit from a deceased person; not requiring a woman's consent to enter into a marriage; while the practice of *lobola*, symbolising a husband's marital power over his wife, also denies a woman's right to equality. The highlighted customary rules that are incompatible with the Bill of Rights and international standards will further be discussed in Chapter 6 when we will be considering how law reformers have sought to transform some of these features of customary family laws in the field of marriage.

What has been evident from the analysis undertaken in this Chapter is that some features of African customary family laws governing marriage, divorce and inheritance effectively discriminate against women on the basis of their gender, and, accordingly, are in direct conflict with the Bill of Rights, especially Sections 20 and 24 of the Malawi Constitution. Moreover, this discrimination not only deprives women of the capacity to exercise their constitutional rights, but, weakens their overall status in society by not treating them with the human dignity afforded to men.


Malawi has an obligation under both the Malawi Constitution and the international instruments that it has ratified to do all within its powers to stop discriminatory cultural practices against women. The question therefore should be how this should be done. By recognising the power of cultural influences on the acts of both men and women, I intended to show that any

efforts to eradicate these practices, however well meaning, must be undertaken with a very high level of cultural sensitivity.



Chapter 5

The Bill of Rights and application of African customary family laws in Malawi

The logo of the University of the Western Cape is centered behind the title. It features a classical building with a pediment and columns, with the text "UNIVERSITY of the WESTERN CAPE" below it.

5.1 Introduction

In Chapter 2 we saw that after Independence the 1964 Constitution of Malawi had an entrenched Bill of Rights.¹ Unlike the 1964 Constitution, the 1966 Constitution did not have a comprehensive Bill of Rights. Reference was

¹See Sections 11-27 of the Constitution of 1964.

only made in Section 2(1)(iii) of the 1966 Constitution to the fact that the Government and people of Malawi 'shall continue to recognise the sanctity of the personal liberties enshrined in the United Nations Declaration of Human Rights (UDHR), and adherence to the law'.

The major milestone in the constitutional history of Malawi came in 1994 when the 1966 Constitution was replaced. Given Malawi's history of violation of human rights during Dr Banda's autocratic rule, the Malawi Constitution, understandably, has its focus on human rights concerns and grants broader protection to individuals.² In terms of Section 196 its Bill of Rights is considered one of the most entrenched chapters in the Malawi Constitution.³ Substantial amendment to it can only be made through a referendum, while minor amendments can be made by a majority of at least two-thirds of the total number of the members of the National Assembly. The Bill of Rights recognises a range of rights.⁴

²Banda J 'The Constitutional Change Debate of 1993-1995' in Phiri KM and Ross KR (eds) *Democratisation in Malawi: A Stocktaking* (1998) 316 at 319.

³Chirwa DM 'Upholding the sanctity of rights: A principled approach to limitations and derogations under the Malawi Constitution' (2007) 1 *Malawi Law Journal* 3 at 3.

⁴These are: protection of human rights and freedom (sec. 15); right to life (sec. 16); prohibition of acts of genocide (sec. 17); right to liberty (sec. 18); right to human dignity and personal freedom (sec. 19); right to equality (sec. 20); right to privacy (sec. 21); right to family and marriage (sec. 22); rights of children (sec. 23); rights of women (sec. 24); right to education (sec. 25); right to culture (sec. 26); prohibition of slavery and forced labour (sec. 27); right to property (sec. 28); right to economic activity (sec. 29); right to development (sec. 30); labour rights (sec. 31); right to freedom of association

Of particular relevance to this thesis are the right to culture and women's rights. The right to culture is recognised without expressly subordinating it to any other right.⁵ At the same time the Bill of Rights recognises the rights of women to equality and special protection from the state.⁶ This position is also similar to that in South Africa.⁷ These two rights, as noted in the preceding Chapter, often come into confrontation because most African customary law practices are inconsistent with the modern rights of women.⁸

In this Chapter, therefore, I address the problem that has been raised by the dichotomy of Malawi's dual constitutional commitment to the principles of equality and non-discrimination and respect for cultural rights. This will be done by examining the application, interpretation, enforcement and lim-
(sec. 32); right to freedom of conscience (sec. 33); right to freedom of opinion (sec. 34); right to freedom of expression (sec. 35); right to freedom of the press (sec. 36); right to access information (sec. 37); right to freedom of assembly (sec. 38); right to freedom of movement and residence (sec. 39); political rights (sec. 40); right of access to justice and legal remedies (sec. 41); arrest, detention and fair trial rights (sec. 42); and administrative justice (sec. 43).

⁵See Section 26 of the Malawi Constitution. This position, arguably, is a mockery of the constitutional protection of women's rights since most customary practices conflicts with women's right to equality.

⁶See, for example, Sections 20 and 24 of the Malawi Constitution

⁷The Constitution of the Republic of South Africa, 1996 also recognises the right to culture in Sections 30 and 31 and has a non-discrimination clause in Section 9.

⁸See also Mwambene L 'Reconciling African customary law with women's rights in Malawi: The proposed marriage, divorce and family relations Bill' (2007) *Malawi Law Journal* 113 at 113.

itation of the Bill of Rights to African customary laws. It will be argued that the courts' application, interpretation and enforcement of the Bill of Rights in relation to African customary laws has significant implications for the impact that such the Bill of Rights can have on African customary laws in Malawi.⁹ Among the crucial questions that are asked is: what can a court do when a cultural practice conflicts with the right to equality? This question, however, is part of the bigger question which this thesis is trying to address, namely, the impact that the Bill of Rights has on African customary family laws in Malawi. Secondly, it will look at how socio-economic factors influence the measure and application of human rights, especially in so far as they relate to women married under customary family laws in Malawi. This serves to highlight the fact that socio-economic factors are some of the main impediments to the practical application of human rights and instruments to most women married under customary family laws.

An appreciation of the events leading to the Bill of Rights is helpful in understanding and predicting how courts will apply and interpret African customary laws in a constitutional framework. Accordingly, this Chapter will first discuss the background leading to the Bill of Rights in the Malawi Constitution. Then the Chapter will look at the application of such the Bill of Rights to African customary laws. The question that is being addressed is: whether the Malawi Bill of Rights applies to African customary laws or

⁹According to Section 9 of the Malawi Constitution, courts are responsible for interpreting, protecting and enforcing the Constitution and all laws.

not. Thereafter, there is a discussion of the effect of applying such the Bill of Rights to African customary laws. This will be followed by an examination of how such the Bill of Rights limits the application of African customary laws. Reference will be made to cases, both from Malawi and foreign jurisdictions, to illustrate the points under discussion. Before concluding the Chapter, a discussion on socio-economic factors that may limit the application of the Bill of Rights to women married under customary law is undertaken. The last section contains a conclusion.

5.2 Background to the Bill of Rights in the Malawi Constitution

As previously noted in Chapter 3, Malawi attained its Independence in 1964. The 1964 Constitution contained the Bill of Rights and installed a parliamentary system of government following the British Westminster model.¹⁰ Although there was a multiparty system in principle, in practice there was the overall dominance of the Malawi Congress Party under the autocratic leadership of Dr Banda.¹¹ As early as 1965 some cabinet ministers, especially from the northern region, rebelled against Dr Banda's autocratic and repressive leadership and some of his key political decisions. This challenge

¹⁰Chirwa V 'What we fought for' in Immink B et al (eds) *From freedom to empowerment: Ten years of democratisation in Malawi* (2003) 49 at 50.

¹¹Meinhardt H and Patel N *Malawi's process of democratic transition* (2003) 3.

was perceived by Dr Banda as a potential threat to his power. In order to nip the threat in the bud, as it were, he consequently consolidated his authoritarian leadership system. As a first step, he introduced a new constitution in 1966 which abolished the parliamentary system as well as the multi-party system.¹² In addition, Parliament in 1971 passed a law that made Dr Banda the life president of Malawi¹³ He was sworn in as the Life President of Malawi on 6 July 1971.¹⁴

Under the leadership of Dr Banda, Malawi was subjected to a one-party dictatorship¹⁵ supported over the years by the West because of its anti-communist stand.¹⁶ The hallmark of the office of the President was the centralization of power and authority in the executive arm of the government, and, more particularly, in its chief, the President, Dr Banda himself.¹⁷ The legislature and the judiciary were used as rubber stamps for the decisions of the executive.¹⁸ More important is the fact that the judiciary was

¹²Section 4 (2) of the 1966 Malawi Constitution (Amended).

¹³Act No. 35 of 1970.

¹⁴Dzimhiri LB 'Competitive Politics and Chameleon-like Leaders' in Phiri KM and Ross KR *Democratisation in Malawi: A Stocktaking* (1998) 87 at 88.

¹⁵Kanyongolo FE *Malawi: Justice Sector and the Rule of Law* (2006) 34.

¹⁶Mutharika P 'The 1995 Democratic Constitution of Malawi' (1996) *Journal of African Law* 205.

¹⁷Chirwa (n 10) 50. See also Kanyongolo FE 'The Limits of Liberal Democratic Constitutionalism in Malawi' in Phiri KM and Ross KR (eds) *Democratisation in Malawi: A Stocktaking* (1998) 353 at 359.

¹⁸A distinction needs to be made between the HC (Western) system and TC. The HC

not independent.¹⁹ It was, in most cases, acting on the orders of Dr Banda, with the result that the so called TCs which were supposed to be administering customary justice were not doing so. The regime was also characterised by human rights violations. While most accounts of human rights abuses committed by Dr Banda's regime focussed mostly on violations of civil and political rights,²⁰ it is important to note that many violations of women rights were also committed. For example, it was a criminal offence for a woman to wear trousers or mini-skirts because these styles of dress were considered inimical to Malawian cultural values.²¹

The general dissatisfaction with Dr Banda's regime contributed to the maintenance of its independence throughout Dr Banda's rule, although in some areas, its protective role of human rights was severely restricted, especially in the application of the Preventive Act and the Forfeiture Act. It was because of the increased jurisdiction conferred on TC by Dr Banda in 1969 that the whole HC bench of white judges resigned.

¹⁹WLSA *In search of justice: women and the administration of justice in Malawi* (2000) 79.

²⁰See, for example, Meinhardt and Patel (n 11) 5 who, among others, states that during Dr Banda's regime the police force became notorious for making arbitrary arrests, particularly of intellectuals and anyone they suspected of being a threat to the political system. They further state that imprisonment of political opponents without trial, restriction of rights of political organisations, trials conducted in TCs without legal representation, and fabricated 'car accidents' were also among the human rights violations of Dr Banda's regime.

²¹Section 2-3 of the *Decency in Dress Act*, Chapter 7:04 also as cited by Chirwa DM 'A Full Loaf is better than Half: The Constitutional Protection of Economic, Social and Cultural Rights in Malawi' (2005) *Journal of African Law* 207 at 210.

dously to the renewed call for respect of human rights. It created the momentum to fight for change. The most notable event that marked the genesis of the fight for change was the publication of the “Living Our Faith”, the Lenten Pastoral Letter of 8 March 1992 by the Catholic Bishops.²² The church emphasized the need for unity, and the dignity of human beings, and that these could be achieved by allowing people the right to freedom, among others. The decision of the international donor community to promote a more clearly defined path of capitalist development which also led to suspension of donor funds after the Cold War made it impossible to preserve despotism in Malawi.²³ The combined effect of all of these factors was a referendum on 14 June 1993 to enquire from the people of Malawi whether they wanted a change in government from one-party dictatorship to a return to a multi-party democracy.²⁴ The latter prevailed. The positive referendum results indicated that the majority of Malawians were ready to change the government of the day. In addition, the collapse of communism ensured that the international community shifted its policy. It was no longer interested in pursuing anti-communist support. It shifted its attention to human rights and good governance.²⁵

²²Chirwa (n 10) 52; Dzimbiri (n 14) 90.

²³Ngalande EE, Nankhuni FS and Chirwa EW ‘Economy and Democracy: Background, current situation and future prospects’ in Phiri KM and Ross KR, *Democratization in Malawi: A stocktaking* (1998) 70 at 73. See also Kanyongolo (n 17) 361 and Dzimbiri (n 14) 90.

²⁴See also Chirwa (n 20) 210

²⁵Chirwa (n 10) 52.

Following the referendum the date for general elections was set. As earlier noted, the 1966 Constitution contained no substantial recognition of or respect for human rights. It was, therefore, essential that there be a new constitution within which a viable Bill of Rights would be entrenched. Thus, during the period between the referendum and the general elections, a new constitution was drafted. In preparation for the new constitution, a Constitutional Symposium was organised under the auspices of the Legal Resources Centre.²⁶ The Symposium was well attended by people from all sectors.²⁷ Of greater importance to this thesis, women and traditional leaders also attended. Some of the issues discussed were the Bill of Rights and women's rights. All resolutions passed at the Symposium formed the basis of the official Constitutional Drafting Conference in Blantyre that was held in February 1994. The product of this Conference was a draft constitution which was adopted by Parliament on 16 May 1994 and came into force provisionally on 18 May 1994.

It is against this constitutional background that the application of the Bill of Rights to African customary laws in Malawi is examined.

²⁶Banda (n 2) 321.

²⁷Chirwa (n 10) 53.

5.3 The Bill of Rights

5.3.1 Preliminary remarks

Malawi, like many countries in Africa,²⁸ has sought to entrench the Bill of Rights in its constitution. This has been done also as a way of addressing discriminatory customary laws,²⁹ by proscribing discrimination generally,³⁰ and by providing for both gender equality and the application of customary laws.³¹ Customary family laws, just like any other applicable law of the land, are subjected to the non-discrimination provisions contained within the Bill of Rights.³² Arguably, Malawi adopted the ‘universalist’ position,

²⁸See, for instance, chapter 5 of the Constitution of the Republic of Ghana, 1992, accessed at <http://www.ghanareview.com/Gconst.html>, on 23/02/07 and chapter 4 of the Constitution of the Republic of Uganda, 1995, accessed at <http://www.trybunal.gov.pl/constit/Constitu/constit/uganda/uganda-e.htm> on 23/02/07 that also provide for fundamental rights, and chapter 2 of the Constitution of the Republic of South Africa, 1996.

²⁹See chapter 4 of the Malawi Constitution.

³⁰See for instance, Section 20 of the Malawi Constitution, Section 9 of the Constitution of the Republic of South Africa, 1996, Section 17 of the Republic of Ghana Constitution, 1992, and Section 21 of the Republic of Uganda Constitution, 1995. Arguably, Malawi has thus fulfilled its first obligation to CEDAW, which requires states ‘to embody the principle of equality of men and women in their national Constitutions’ in Art. 2 (a).

³¹Kamei-Mbote P *Gender issues in land tenure under customary law* accessed at <http://www.capri.cgiar.org/wp/..5Cpdf5Cbrief-land-05.pdf> on 26/06/06.

³²See Section 10 (2) of the Malawi Constitution which states that ‘in the application and formulation of of any Act of Parliament and in the application and development of

which, whilst recognising customary laws and a right to culture, make both subject to the tests of non-discrimination and equality before the law.³³ In addition to the above, Malawi has shown its commitment to international human rights by ratifying a range of international and regional human rights instruments for the protection of women's rights. These include the CCPR, 1966;³⁴ CEDAW, 1979;³⁵ CRC, 1989;³⁶ and the Charter, 1990.³⁷ This position, however, should be contrasted with a 'cultural relativist' stance which allows customary laws to continue unfettered by provisions relating to non-discrimination or equality before the law.³⁸

Having submitted that Malawi adopts the universalist position with regard to the application of customary laws, in the following subsection we examine common law and customary law, the relevant organs of the State shall have due regard to the principles and provisions of this Constitution'. Similarly, Section 211 (3) of the South African Constitution provides that 'a court must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law'.

³³See the discussion in Chapter 3. See also Grant E 'Human rights, cultural diversity and customary law in South Africa' (2006) *Journal of African Law* 2 at 3.

³⁴Ratified in 1993.

³⁵Ratified in 1987.

³⁶Ratified in 1991.

³⁷Ratified in 1999.

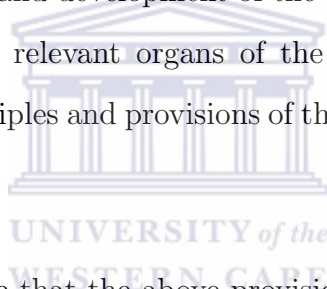
³⁸For example, see Section 23 (4) of the Zambian Constitution and Art. 15 (4)(c) of the 1966 Botswana Constitution, as cited by Banda F *Women, Law and Human Rights: An African Perspective* (2005) 34. See also a discussion in Chapter 3.

provisions of the Malawi Constitution that support this view.

5.3.2 Provisions for the Bill of Rights application to African customary laws in Malawi

The application of the Bill of Rights to African customary laws under the Malawi Constitution is governed by Section 10(2), which states:

‘In the application and formulation of any Act of Parliament and in the application and development of the common law and **customary law**, the relevant organs of the State shall have due regard to the principles and provisions of this Constitution’. [Emphasis added]



It is important to note that the above provision is significant for two reasons. First, it seems to place a limit on the applicability of customary laws: ‘due regard to the **principles and provisions of this Constitution**’ (My emphasis). This, arguably, may lead to contradictions. The question that can be asked is: is promoting cultural rights not having due regard to the principles and provisions of this Constitution as envisaged by Section 10 (2) above? What if such protection conflicts with the right to equality? Obviously these are some of the difficult questions that courts and law reformers are likely to face. Secondly, the above provision suggests that courts have jurisdiction over customary law, giving them the ability to apply and develop

customary law. The question that can be asked is: are courts in Malawi better placed to apply and develop customary laws? The answer to this question is discussed in Chapter 7 when a discussion of the problems that courts face in trying to resolve the conflict between customary laws and right to equality is ensued.

That said, however, the above constitutional provision clearly obligates courts³⁹ to apply customary law. This duty, it is submitted, seems to be subject to several conditions. First, the Malawi Constitution mandates courts to apply customary laws. But the provision, just like its South African counterpart,⁴⁰ does not give guidance to courts as to when customary law should or should not be applied.⁴¹ Courts are then left with the dilemma of choice of laws. The dilemma is further compounded by the fact that application of customary laws may yield the result of denying women their human rights.⁴² This prompts some authors to say that common law should be applied in-

³⁹According to Section 9 of the Malawi Constitution, courts have been mandated to apply and interpret laws.

⁴⁰Section 39 (2) of the Constitution of the Republic of South Africa, 1996 provides that: ‘When . . . developing common law or customary law, every court . . . must promote the spirit, purport or objects of the Bill of Rights’.

⁴¹This has been similarly observed with respect to South Africa by Lehnert W ‘The role of courts in the conflict between African customary laws and human rights’ (2005) *South African Journal of Human Rights* 241 at 244.

⁴²As above.

stead.⁴³ This position, agreeing with Himonga,⁴⁴ is in total disregard of those people who have chosen to live according to their cultural life. In addition to this, such a position lacks a constitutional justification that makes it a good part of a well designed constitutional approach that had obviously to take to account of the fact that the majority of Malawian women live according to customary family laws.⁴⁵

The absence of a provision in the Malawi Constitution directing courts when to apply customary laws gives a discretion to the courts to determine when customary family laws could be applied. Factors that have been suggested to determine applicability are the lifestyle and intention of the parties.⁴⁶ For example, if the parties before a court of law were married under customary law, it should be assumed by it that customary law would be applicable.⁴⁷ With respect to South Africa, where there is only a patrilineal

⁴³See South African Law Reform Project 90 (1998) *Harmonisation of the Common Law and Indigenous Law Report on Customary Marriages* 16 as cited by Himonga C ‘The advancement of African women’s rights in the first decade of democracy in South Africa: The reform of the customary law of marriage and succession’ (2005) *Acta Juridica* 82 at 86 .

⁴⁴As above.

⁴⁵See n 13 in Chapter 1.

⁴⁶Responses from the interviewed magistrates and judges. See also Bennett TW *Human Rights and African Customary Law under the South African Constitution* (1995) 52 in respect of South Africa.

⁴⁷Responses from the interviewed magistrates and judges. See also Lehnert (n 41) 245 in respect of South Africa.

customary marriage system, with of course some differences amongst tribes, this would be an easy pointer to the adjudicating officers. The same would not be true for Malawi where there is dualism in the customary marriage system.⁴⁸

A review of case files in courts that I visited supports Bennett's suggestion that the lifestyle of the parties should direct a court to the law which is applicable to the parties before it. It has been noted that in most cases the determination of what law to apply in a matrimonial dispute was dependent on evidence that showed that either of the parties was married according to a matrilineal or patrilineal customary law system.⁴⁹ The court then would either apply matrilineal or patrilineal customary rules.⁵⁰ This approach, arguably, is consonant with Section 26 of the Malawi Constitution which states that 'every person shall have the right to participate in the cultural life of his or her choice'. In such a scenario courts simply give effect to the agreement that the parties had made that such a cultural practice should

⁴⁸In Malawi, as noted in Chapter 4, customary law marriages are matrilineal or patrilineal.

⁴⁹See, for instance, the cases of *Bennings Manda v Jane Mpata*, Civil Appeal Case No. 59 of 2005, HC, Mzuzu District Registry (Unreported); *Temwanani Nkhonjera v Sebesian Gwengweya* Civil Appeal Case No. 9 of 2004, HC, Mzuzu District Registry (Unreported); and *Lauren Pereira Kamangira v Jones B Kamangira*, Civil Cause No. 266 of 2004, HC, Lilongwe District Registry (Unreported).

⁵⁰This is true for all the case files that I looked at and all the cases that I observed in court.

guide them.⁵¹ It also brings to rest the issue of what law is applicable in a given matrimonial case.

On the other hand, on reading Section 26 of the Malawi Constitution closely one gets the impression that it is immaterial whether a marriage was, for example, contracted according to matrilineal customary law. However, a party may be married according to a matrilineal customary law but choose to live according to a patrilineal customary law. Section 26 of the Malawi Constitution states: ‘Every person shall have the right to **participate in the cultural life of his or her choice.**’ Therefore, in Malawi, the fact that one was married according to a particular customary law, it is submitted, should not be a determinative factor. What should, arguably, direct the courts is: in what type of cultural life are the parties before it participating. *Kinason Tembo v Lucy Tembo*⁵² illustrates this. It was an appeal from a MC. One of the grounds of appeal was that the marriage was celebrated under the *lobola* system, and the appellant could not see why he should be subjected to the *chikamwini* system where a wife is entitled, as of right, to a matrimonial house as from the day of the marriage. The Judge ruled that there was no irregularity on the part of the lower court in awarding the respondent the matrimonial house. By doing so, the HC Judge said the appellant was not subjected to the *chikamwini* system for the said order had nothing to do with

⁵¹Bennett (n 46) 52.

⁵²*Kinason Tembo v Lucy Tembo*, Civil Appeal Case No. 11 of 2004, HC, Lilongwe District Registry (Unreported).

any particular marriage system. However, if, for example, the parties had chosen to live according to a matrilineal system, the magistrate would not have been wrong to subject the man to the *chikamwini* system if their way of life had indicated that they were living according to that custom.

It is extremely difficult to determine people's 'way of life'. Nothing has been developed in this direction.

Furthermore, Section 10 (2) of the Malawi Constitution mandates courts to have due regard to the principles and provisions of the Malawi Constitution in the exercise of their duty to apply and develop **any laws** (Emphasis added). This section is also similar to Section 39 (2) of the Constitution of the Republic of South Africa, 1996.⁵³ On the one hand, Section 10 (2) of the Malawi Constitution seems to put all laws, including customary family laws, on the same footing. This puts to rest the issue of whether the Malawi Constitution ranks the laws to be applied and developed by the courts. On the other hand, since in the area of women's rights the generally patriarchal nature of customary family laws, as discussed in Chapter 4, are at odds with the Malawi Constitution, customary family laws would not enjoy the same position as other laws when it comes to applicability.⁵⁴ This view is supported, arguably, by few customary law cases that were found lodged in

⁵³As previously noted, Section 39 (2) of the South African Constitution provides that 'When ... developing common law or customary law, every court ... must promote the spirit, purport or objects of the Bill of Rights'.

⁵⁴See also Lehnert (n 41) 243, who also noted this point with respect to South Africa.

the HC of Malawi.

From the research that I conducted, I found that there were very few cases involving a customary marriage that were originally instituted in the HC of Malawi.⁵⁵ Most cases⁵⁶ came to the court in the form of appeals from the MC. It was also observed that all customary marriage disputes are instituted in the MC, whilst all marriage disputes in respect of marriages contracted under the *Marriage Act*⁵⁷ are instituted in the HC.

During the interviews, reasons that were given by some judges for this divergence were: firstly, magistrates have no jurisdiction over marriages contracted under the *Marriage Act*⁵⁸ therefore they cannot adjudicate in disputes relating to those marriages; secondly, most litigants whose marriages are contracted under customary laws cannot finance the HC proceedings; and thirdly, instituting proceedings in the MC leaves the litigants room for appeal.

⁵⁵See, for example, *Mungomo v Mungomo*, Matrimonial Cause No. 6 of 1996, HC, Principal Registry (Unreported), and *Likaku v Likaku*, Matrimonial Cause No. 10 of 1999, HC, Principal Registry (Unreported).

⁵⁶For example, *Grevazio Moyo v Elizabeth Moyo*, Civil Appeal Case No. 55 of 2004, HC, Lilongwe District Registry (Unreported); *Kinason Tembo v Lucy Tembo* (n 55); *Zione Chitete v Alex Chitete*, Civil Appeal Case No. 59 of 2004, HC, Lilongwe District Registry (Unreported); *George Kadambo v Catherine Kadambo*, Civil Appeal Case No. 22 of 2002, HC, Lilongwe District Registry (Unreported).

⁵⁷Chapter 25:01.

⁵⁸Interviews at the three HC visited.

It is submitted that, on the face of it, customary law marriages are left with enough room for appeal, and therefore preferred over marriages contracted according to the *Marriage Act*. However, considering that most MC in Malawi are manned by lay magistrates, it leads one to conclude that the court system regards marriages contracted under customary laws as less important than marriages contracted under the *Marriage Act*.⁵⁹ This is, however, not to imply that lay magistrates are not important in Malawi. Lack of jurisdiction of MC to test the validity of customary rules against the Constitution makes the HC, which has such constitutional jurisdiction that can protect the constitutional rights of these women, a better court than that of the the magistrates. Moreover, the disadvantages that women married under the *Marriage Act* are subjected to are far less than those the majority of Malawian women married under customary laws (see Chapter 4).

As regards developing this branch of the law so that it is in line with the Malawi Constitution, one wonders, with due respect, how the MC would approach this issue. In the first place, these courts do not have the power to determine the constitutional validity of a particular rule. Secondly, they are mostly manned by lay magistrates, whose legal expertise is not up to the required standard to be able to resolve the conflicts that arise between the Constitution and the customary family laws governing customary mar-

⁵⁹This position is unfortunately regrettable considering the fact that statistics show that almost all marriages in Malawi, as indicated in Chapter 4, are contracted according to customary laws.

riages.⁶⁰ As earlier noted, in Malawi, on the basis of interviews that I conducted, what is alarming is that this incapacity also extends to some professional magistrates, as well as judges. Most of them are not so conversant with African customary marriage laws.⁶¹ This position, as noted by some judges, was as a result of Dr Banda's dual court system, of TCs and HC, which did not give a chance to judges of the HC to improve their knowledge of customary laws.⁶² As noted in Chapter 3, all cases in which customary law was to be applied were handled by the TC system.

So, on the one hand, we find that the lay magistrates would be conversant with customary marriage laws, but not with constitutional and international principles, to enable them to resolve constitutional conflicts. On the other, we find that professional magistrates and judges are well equipped with constitutional principles, but not conversant with customary family rules. This scenario, obviously, is a challenge to the application and development of customary laws in a constitutional environment.

⁶⁰This point has also been noted by Chirwa DM 'Reclaiming (Wo)manity: The Merits and Demerits of African Protocol on Women's Rights' (2006) *Netherlands International Law Review* 63 at 75 who, in commending the Protocol, stated: 'The undertaking to ensure that law enforcement organs at all levels are equipped to effectively interpret and enforce gender rights is particularly relevant to the protection of women disputes involving African customary laws. In most legal systems in Africa, disputes concerning customary law are resolved by magistrate's courts, which are mostly staffed by lay persons'.

⁶¹See Appendix 3 that presents the responses that I was given during the interviews.

⁶²These views were expressed during an interview that I conducted with two Judges of the HC in Blantyre on 10 May 2006.

5.3.3 Effect of the application of the Bill of Rights to African customary laws

The Malawi Constitution contains general provisions which are relevant to women's rights, such as the right to equality,⁶³ right to family and marriage,⁶⁴ and right to property.⁶⁵ It also contains a provision aimed specifically at the protection of women's rights, namely, the rights of women.⁶⁶ These provisions, it is argued, bring about profound changes in the application of customary family laws under the Malawi Constitution.

For example, Section 20(1) of the Malawi Constitution prohibits discrimination on certain specified grounds, including sex. The prohibition of discrimination on the ground of sex is, arguably, intended to protect women more than men.⁶⁷ It should, however, be noted that some constitutions do not include sex as one of the grounds on which discrimination is prohibited in its non-discrimination clause.⁶⁸ Section 20 (1) of the Malawi Constitution, however, leaves no doubt that discrimination based on being a woman will

⁶³Section 20 of the Malawi Constitution.

⁶⁴Section 22 of the Malawi Constitution.

⁶⁵Section 28 of the Malawi Constitution.

⁶⁶Section 24 of the Malawi Constitution.

⁶⁷This provision is also similar to Section 9 (3) of the Constitution of the Republic of South Africa, 1996.

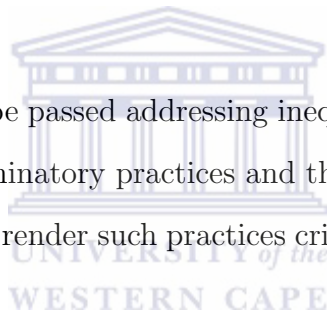
⁶⁸See, for example, Section 13(5) of the Constitution of Tanzania as cited by Banda (n 37) 35.

not be tolerated.

Furthermore, the above provision states that ‘all persons are, under any law, guaranteed equal and effective protection against discrimination . . .’. It is interesting to note the reference to ‘any law’. It is, therefore, no defence to discriminate because of customary laws. As will be shown later, in some cases courts seem to apply laws that are discriminatory toward women and men.

In addition, Section 20(2) of the Malawi Constitution specifically states that:

‘[l]egislation 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’.



The right to protection against discrimination is buttressed by Section 20 of the Malawi Constitution, which includes gender as a prohibited ground of discrimination. In addition, Section 24(2) of the Malawi Constitution expressly states that ‘[a]ny law that discriminates against women on the basis of gender or marital status shall be invalid’. It also obligates the state to adopt legislative measures that eliminate customs and practices that discriminate against women including practices such as sexual abuse, harassment and violence, and deprivation of property including property obtained by customary

inheritance.⁶⁹

Therefore, reading Sections 20(2) and 24(2) of the Malawi Constitution together, one gets the impression that the right to culture does not enjoy the same status as the right to equality.⁷⁰ As noted in the preceding subsection, Section 10 (2) of the Malawi Constitution provides that ‘in the application and development of customary law, the relevant organs of the state should have due regard to the principles and provisions of the Constitution’. Thus, customary law, just like any other law, is subject to the provisions of the Constitution. Any law that is inconsistent with the provisions of the Constitution is invalid to the extent of the inconsistency.⁷¹

On the face of it, therefore, any provision of African customary family law that contravenes any provision of the Bill of Rights may be declared to be unconstitutional. However, courts will not lightly declare African customary family laws to be unconstitutional for being inconsistent with any other right, including the right of women to equality. This is so because any legislation that varies, alters or abrogates any rule of African customary law⁷² must not constitute an unjustifiable infringement on the right to culture. This means that Parliament does not have a free hand to overrule African customary

⁶⁹Mwambene (n 8) 115.

⁷⁰As above.

⁷¹Section 5 of the Constitution.

⁷²According to Section 48 (2) of the Malawi Constitution, ‘An Act of parliament shall have primacy over other forms of law, but shall be subject to the Constitution’.

family laws. It can do so only to the extent that it does not unjustifiably limit the right to culture. Essentially this means that any legislation that seeks to advance and protect women's rights must strike an appropriate balance between many interests and rights, especially the right of women to equality, and the right of individuals and groups of people to culture.⁷³

5.3.4 How does the Bill of Rights affect the application of African customary family laws?

the Bill of Rights affects the application of African customary family laws in a number of ways. First, some rights within the Bill of Rights are capable of being directly invoked in the day to day application of customary family laws in the courts. For example, on the dissolution of a marriage Section 24 (1) (b) of the Malawi Constitution imposes a duty on courts to fairly dispose of property held jointly with a husband, among other issues. Since marriages by custom, as previously noted in Chapter 2, have been recognised by the Malawi Constitution, this duty, therefore, extends to customary marriages as well.⁷⁴ In *Willie Malilo v Maltina Malilo*⁷⁵ the appellant and the respondent were married under matrilineal customary laws. On 24 October 1997 the MC dissolved the marriage and ordered the appellant to pay K3,020.00 by

⁷³Mwambene (n 8) 115.

⁷⁴Section 22 (5) of the Malawi Constitution.

⁷⁵Civil Appeal Case No. 8 of 1997, HC, Lilongwe District Registry (Unreported).

way of compensation to the respondent. The appellant was also ordered to build a house for his wife and their five children. The Court further ordered that their matrimonial properties be shared equally. It is against this order that the unhappy husband appealed. In upholding the lower court's decision, Judge Kumange said:

‘If the husband is found to have built no house for his wife, the court must grant the decree of divorce, but subject to his building the woman a reasonable house for her to live in. That is the customary law requirement, and forcibly operative in matrilocal societies like from Southern Region. Where property is in bulk, courts have power to order that it be shared equitably between the wife and the husband’.⁷⁶

From the above decision, two issues are worth some comment. The Court upheld the matrilineal customary law rule that a husband has a duty to build a house for his wife even after the decree of divorce has been granted. This is a good development, because customary law rules are being used by the courts to enforce a socio-economic right of women, ie the right to housing.

On the other hand, it is noted that the above decision departs from the customary law rule that there is no duty of equitable distribution of property

⁷⁶As above, 10.

and maintenance of a spouse after the dissolution of a customary marriage.⁷⁷ Such a decision, however, is in conformity with the constitutional requirement of the fair distribution of property after the dissolution of a marriage.⁷⁸

Secondly, other rights within the Bill of Rights set broad standards of constitutionality against which any legislation or rule of customary laws is to be measured, and any law or conduct inconsistent with these standards is invalid to the extent of the inconsistency.⁷⁹ Any differentiation in the treatment of women and men, amply provided for in legislation, must meet the broad standard of not being discriminatory.⁸⁰ Likewise, the customary

⁷⁷See Chapter 4 for a discussion of the customary law rules of maintenance and distribution of property after dissolution of a customary marriage.

⁷⁸Section 24 (2) of the Malawi Constitution.

⁷⁹See Section 20 of the Malawi Constitution. Similarly, see also Section 9 of the Republic of South Africa Constitution, 1996. In the South African case of *Bhe and others v Magistrate Khayelitsha and others*, *Shibi v Sithole and others*, *South African Human Rights Commission and Another v President of the Republic of South Africa and Another* (2005(1) BCLR 1 (CC); 2005 (1) SA 580 (CC)) for example, the Court was faced with African women challenging the patriarchal construction of customary law that favoured the inheritance rights of men over women. The Court ruled that the Constitution guaranteed equal rights to women and was premised upon the principle of non-discrimination, including sex. The rule of male primogeniture was declared unconstitutional as it contravened the right to equality.

⁸⁰Section 20 (1) of the Malawi Constitution provides that:

‘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

rules pertaining to who can initiate divorce proceedings in court must be judged against the constitutional norms of equality before the law.⁸¹

Furthermore, it can be argued that Section 20 of the Malawi Constitution sets a broad standard on the legislature. In that regard, it precludes the legislature in Malawi from enacting laws that apply differently to or confer different rights and obligations on persons on the basis of their external attributes such as race, sex or tribe. It also imposes a duty on the legislature and the executive to repeal and abrogate all laws that have the effect of treating persons in like situations differently. This is probably one of the reasons why the Malawi Law Commission is proposing a unified law that would govern all types of marriage in Malawi.⁸²

Drawing upon the example of the different marriage laws applicable in Malawi, Section 20 of the Malawi Constitution, it is further argued, requires that courts refrain from applying laws to women that would yield discriminatory results. Under the Malawi Constitution discrimination in law is not

opinion, nationality, ethnic or social origin, disability, property, birth or other status’.

[Emphasis added] It is proposed that Section 20 should be read together with Section 11 of the Malawi Constitution.

⁸¹Section 41 of the Malawi Constitution.

⁸²A full discussion of the the proposed law is undertaken in Chapter 6. This proposed law, if passed, will ultimately confer the same legal rights on married couples irrespective of the type of marriage. The different types of marriages referred to here are customary, Christian, Asiatic and common law marriages.

permissible. The provisions of Section 5 of the Malawi Constitution,⁸³ which make the Constitution supreme over any other law, is to the effect that any law that negates the essence of equality in law cannot be enforced by the courts.⁸⁴

However, before these rights can be applied in practice the courts must give content to the standards they contain.⁸⁵

Thirdly, the Bill of Rights applies also indirectly to the ordinary rules of the court which may be interpreting a customary law in relation to women's rights. Section 11 (2) (b) of the Malawi Constitution provides that '... in interpreting the provisions of this Constitution a court of law shall take full account of the provisions of Chapter III and Chapter IV'.

From the above constitutional provision it can be argued that, where the language of the legislation permits, the court must interpret, for example, the WIA⁸⁶ in conformity with the Bill of Rights. Furthermore, where legislation gives the court a wide discretion, for example, to give a meaning to the broad use of the gender terms "male" or "female" when they relate to a deceased

⁸³Any act of government or any law that is inconsistent with the provisions of this Constitution shall to the extent of such inconsistency be invalid.

⁸⁴Similarly, see Section 2 of the Constitution of the Republic of South Africa, 1996.

⁸⁵A full discussion of how a court might do this takes place later in this Chapter. However, at this point, it suffices to state that the 'content' refers to: what does the right mean; to whom does it apply; who is bound by it - just to mention a few.

⁸⁶Chapter 10:02.

estate, it should be exercised in conformity with the Bill of Rights. This would, arguably, require that courts insert “female” where the word “male” appears and vice versa. Such an interpretation would also be in conformity with Section 2 (2) of the *General Interpretation Act*⁸⁷ which states that in ‘every written law, unless a contrary intention appears, words and expressions importing a masculine gender include females and words and expressions importing the feminine gender include males’.

It should, however, be noted that Section 11 (2) (b) of the Malawi Constitution can be contrasted with Section 39 (2) of the South African Constitution,⁸⁸ which latter provides that any forum must promote the objects of the Bill of Rights. On the other hand, in Malawi the fact that Section 11 (2) (b) seems to be limited to **courts of law** is very unfortunate. [My emphasis]. As previously noted in Chapter 3, most disputes are resolved by informal courts that have not been recognised by the formal court system. The effect of Section 11 (2) (b) (1), it is submitted, limits the application of the Bill of Rights to those forums that are adjudicating over disputes in a formal court system. It is, therefore, proposed that Section 110 (3) of the Malawi Constitution, that empowers Parliament to make provision for traditional or local courts presided over by lay persons or chiefs, be implemented so that

⁸⁷Chapter 1:01.

⁸⁸Section 39 (2) of the Constitution of the Republic of South Africa, 1996 provides that ‘when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must, inter alia, promote the spirit, purport and objects of the Bill of Rights’.

local courts can also be constitutionally empowered to promote the spirit of the Bill of Rights.

Having said that, however, it is important for us to look at a practical example of how a rule of customary law can be interpreted so as to bring it in conformity with the Bill of Rights. In the South African case of *Mabena v Letsoalo*,⁸⁹ one of the issues before the court concerned the validity of the marriage between a woman (the applicant) and her deceased husband. The mother of the applicant, rather than her father, had negotiated the marriage with regard to *lobola* and consented to the marriage. The deceased husband's father denied the existence of the marriage between his late son and the applicant. He argued that, according to customary law, a female, in this case the applicants's mother, could not be a guardian of her child for the purposes of negotiating the child's marriage. Only a male, the father, could play this role. The Court held that the marriage was valid. While acknowledging the official customary law position that was presented by the deceased's father, the Court noted that there had been instances where mothers have negotiated for, and received, *lobola* and consented to the marriage of their daughters. In this case the court thus allowed a customary marriage to be valid where the negotiations for the payment of *lobola* had been done by the mother instead of the father.

This case is important for two reasons. First, it shows how a court can interpret a customary rule so that it is in conformity with the constitutional

⁸⁹1998 (2) SA 1068 (T).

principles of equality between men and women without taking away the customary rule of *lobola*. Secondly, it balances the customary rule of *lobola* and the right to equality by allowing both men and women to have negotiating powers.

In summary, we see that the decision, arguably, enforced the principles of equality and non-discrimination between men and women with regard to negotiating and consenting to marriages of daughters under customary family laws. It could further be argued that the customary law that only fathers should negotiate their daughters' marriages, was developed to a level where the offending part of the rule was changed by the court. The case forms a precedent upon which future conduct could be regulated with regard to who can negotiate a customary marriage.

Lastly, apart from constitutional rights that can be applied directly to women, it can further be argued that ordinary customary rules will continue to be administered in respect of women who come before a court of law. The constitutional standards set by the Bill of Rights serve, then, only as a safety net and as an interpretative norm.⁹⁰ While the Bill of Rights sets the foundational norms in the application of customary laws, it is submitted that it is no substitute for, or replacement of, the ordinary rules and principles governing customary marriages. It is, therefore, suggested that courts must apply the usual rules and principles, interpreted in the light of the Bill of Rights, and only if the former do not vindicate a person's claim

⁹⁰See Section 10 of the Malawi Constitution.

does the Bill of Rights come into play. The converse is also true; because the Bill of Rights constitutes a minimum set of guarantees, ordinary rules of governing customary marriages could provide more protection than what the constitution demands.⁹¹

5.3.5 Limitations on application of African customary family laws in Malawi

While substantive issues before the court will be important, it is a question of how the limitation sections within the Malawi Constitution operates that will set the tone of future cases before the court. The application of customary laws, just as any other law in force in Malawi, is, arguably, first limited by Section 5 of the Malawi Constitution.⁹²

The principle of the supremacy of the national constitution ensures that, in legal interpretation, human rights guarantees take precedence over any other laws or customary rules.⁹³

⁹¹See *Willie Malilo v Maltina Malilo*, (n 104).

⁹²Section 5 of the Malawi Constitution provides that:

‘any act of Government or any law that is inconsistent with the provisions of this Constitution shall, to the extent of such inconsistency, be invalid’.

⁹³Ibhawoh B ‘Between Culture and Constitution: Evaluating the Cultural legitimacy of Human Rights in the African State’ (2000) *Human Rights Quarterly* 838 at 847. Similar provisions of constitutional supremacy exists in the constitutions of other African countries for instance, Section 26 (1) of the Republic of Ghana Constitution; Section 37 of the

The wording of Section 5 of the Malawi Constitution seems to suggest that if customary law is inconsistent with the Constitution it would be invalidated.⁹⁴ Commenting on Section 2 of the South African Constitution, as read with Section 39, Rautenbach⁹⁵ observed that ‘the wording of these provisions is to the effect that the application of customary law is subjected to the provisions of the Bill of Rights and the Constitution’.

It is, therefore, argued that Section 5 of the Malawi Constitution places limitations on the application of customary law since any customary law that is inconsistent with the Constitution would be invalid. However, as earlier noted in this Chapter, courts do not have a free hand to declare customary laws invalid, since these laws could be justified on the basis of the enjoyment of the right to culture.

A further limitation on the application of customary laws is seen in Section 10 (2) of the Malawi Constitution which provides that: ‘... in the application and development of customary law, the relevant organs of the State shall have due regard to the principles and provisions of the Constitution’.

Furthermore, Section 44 (1) of the Malawi Constitution places the right to

Republic of the Uganda Constitution.

⁹⁴This position is similar to Section 2 of the Constitution of the Republic of South Africa, 1996 which provides: ‘This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid and obligations imposed by it must be fulfilled.’

⁹⁵Rautenbach C ‘Some comments on the status of customary law in relation to the Bill of Rights’ (2003) *Stellenbosch Law Review* 107.

culture among the rights in respect of which a limitation is permitted. As rightly argued by Chirwa,⁹⁶ the limitation clause, as provided by Section 44 (1), has application to all rights in the Bill of Rights. Therefore, even though Section 26 does not have an internal limiting clause within it, the general limitation clause applied under Section 44 (1) of the Malawi Constitution would be applicable. This position, however, is to be contrasted with Section 30 of the South African Constitution,⁹⁷ which subjects the enjoyment of the right to culture to the other provisions of the Bill of Rights.⁹⁸ It is, however, submitted that in Malawi, the absence of a limiting provision under Section 26 implies that the above argument would not be applicable.

On the other hand, it can be argued that in both situations, whether a right is limited by a general limiting provision or an internal limiting clause the effect ultimately is that they both restrict the application of the right. In this particular case they restrict the enjoyment of cultural rights.

Having said that, it is, however, important to note that in terms of Sections 44 (1) and (2) of the Malawi Constitution limitations on a constitutional right, including the right to culture, may be permitted only where they are

⁹⁶Chirwa (n 3) 3.

⁹⁷Section 30 of the Constitution of the Republic of South Africa, 1996 provides: 'Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights'.

⁹⁸Grant (n 33) 7.

‘prescribed by law, which are reasonable, recognized by international human rights standards and necessary in an open and democratic society’.⁹⁹

Section 44 (2) as quoted above sets a number of tests which courts have to meet if it is to be constitutional notwithstanding its restriction of a right or rights contained in the Chapter IV of the Malawi Constitution. The first hurdle that must be met in terms of Section 44 (2) is that the rights contained may be limited by prescription of law. While this may be interpreted in a number of ways, a court will at least have to determine that the ‘prescribed law’ is certain and not vague, or lacking in precision. Those affected by the law must be able to know what is expected of them. Should they be unable to do so, then the law would fall foul of this test.¹⁰⁰ The question that can be asked is: if a limitation is affected by a constitutional right and not law,

⁹⁹Section 44 (2) of the Malawi Constitution provides that:

‘Without prejudice to subsection (1), no restrictions or limitations may be placed on the exercise of any rights and freedoms provided for in this Constitution other than those prescribed by law, which are reasonable, recognised by international human rights standards and necessary in an open and democratic society’.

See also Hansen TT ‘Implementation of International Human Rights Standards through the National Courts in Malawi’ (2002) *Journal of African Law* 31 at 34 who points out the difference between the limitation clause that was in the 1966 Constitution and the Malawi Constitution. In the Malawi Constitution, he noted that apart from the limitation to be prescribed by law and reasonable, it also has to be recognised by international human rights standards.

¹⁰⁰Sieghardt P *The International Law of Human Rights* (1983) 92.

would this provision also apply? Obviously, such are some of the difficult questions that courts are likely to be faced with.

Furthermore, Section 44 (2) further demands that a law, when it impinges on a right, must meet the test of being ‘reasonable’ and ‘recognised by international human rights standards and necessary in an open and democratic society’. The terms ‘reasonable’ and ‘necessary’ in an open and democratic society are vague and will need to be interpreted within the Malawian context. Such interpretation will obviously play a significant role as far as discriminatory customary family laws against women are concerned, where one of the questions will be whether enjoying one’s right to culture can be justified as a limitation on the right to equality? While this will, probably be answered in the affirmative, the real dilemma for a court will be to determine how far this limitation should be permitted to provide for the enjoyment of the right to culture.

The trend internationally in determining the meaning of terms such as ‘open’, ‘democratic’, ‘necessary’, and ‘reasonable’ will obviously have a bearing on the interpretive endeavors of Malawian courts.¹⁰¹ Sieghardt¹⁰² states, in the European context, that to evaluate a democratic society one must consider:

‘... the needs or objectives of a democratic society in relation to

¹⁰¹See a discussion of the role of international law in Malawi in Chapter 6.

¹⁰²Sieghardt (n 100) 93.

the right or freedom concerned; without a notion of such needs, the limitations essential to support them cannot be evaluated. The aim is to have a pluralist, open, tolerant society. This necessarily involves a delicate balance between the wishes of the individual and the utilitarian 'greater good of the majority'. But democratic societies approach this problem from the standpoint of the importance of the individual, and the undesirability of restricting his or her freedom.'

In addition to the above, Section 44 (3) of the Malawi Constitution provides that laws providing for the limitation should not negate the essential content of the right or freedom in question and should be of general application. This means that a limitation of a right that falls short of these requirements cannot pass the constitutional test.

The interpretation of the limitation section will thus play a large part in constitutional adjudication. The manner in which it restricts rights will probably be used to justify customary family laws.

5.3.6 Enforcement procedure under the Bill of Rights

All rights recognised in the Bill of Rights are enforceable in courts of law in Malawi.¹⁰³ It is important to note that the enforcement procedure provided

¹⁰³Section 15 (2) of the Malawi Constitution.

in the Malawi Constitution, has a big role to play in the enjoyment of rights contained in the Bill of Rights. There is no purpose in having a well constructed and phrased Bill of Rights as a legal document whose fruits cannot be enjoyed. For this reason, therefore, this section examines the enforcement mechanism for the rights and freedoms provided for in the Bill of Rights. The aim is to show how the enforcement mechanisms, available within the Bill Rights, can impact on the application and protection of the right to culture.

Section 15 (2) of the Malawi Constitution provides:

‘**Any person** or group of persons with sufficient interest in the protection and enforcement of rights under this Chapter shall be entitled to the assistance of the courts, the Ombudsman, the Human Rights Commission and other organs of Government to ensure the promotion, protection and redress of grievance in respect of those rights’. [Emphasis added]

The language of the above provision, it is submitted, strongly suggests that any claimant must have a genuine reason for approaching the above bodies if a particular right is to be protected or enforced. On a broad interpretation the phrase ‘any person’ clearly suggests that the claimant’s own constitutional rights need not have been infringed.¹⁰⁴ When it comes to the enforcement of the women’s rights of those women married under customary family laws,

¹⁰⁴See also similar arguments by Chirwa (n 20) 237.

this provision is important for two reasons. First, the majority of women whose rights continue to be affected by customary family laws are unaware that they can approach the courts and assert their rights.¹⁰⁵ Secondly, since the jurisdiction to declare a customary law or any other law invalid rests in the HC, not so many claimants can afford the complicated procedure and the expenses of HC cases.¹⁰⁶

In addition to the above section, Section 46 (2) (a) provides:

‘Any person who claims that a fundamental right or freedom guaranteed by this Constitution has been infringed or threatened shall be entitled . . . to make an application to a **competent court** to enforce or protect such right or freedom’. [Emphasis added]

Just like Section 15 (2), discussed above, this section also allows any person to bring a claim to a court of law. Therefore, the advantages for the protection of women married under customary family laws are the same as discussed above. However, the words ‘competent court’ seem to suggest that not all courts are able to grant constitutional remedies. Indeed, according to section 108 (2) of the Malawi Constitution, the HC has:

¹⁰⁵On the general public awareness of the rights contained in the Bill of Rights, see Centre for Advice, Research and Education in Rights *Needs Assessment Survey* 1998 as cited by Kanyongolo (n 15) 131.

¹⁰⁶Kanyongolo (n 15) 135.

‘... original jurisdiction to review any law, and any action or decision of the Government, for conformity with this Constitution, save as otherwise provided by this Constitution and shall have such other jurisdiction and powers as may be conferred on it by this Constitution or any other law’.

Therefore, the competent court envisaged under section 46 (2) is the HC.

Having noted that sections 15 (2) and 46 (2) of the Malawi Constitution grant an expansive application to claimants of a constitutional violation, it is, however, disappointing to find that a decision of the SCA adopts a narrow interpretation of these sections.¹⁰⁷ According to the SCA a litigant must have a direct interest in the case. This position, arguably, greatly disadvantages most Malawian women married under customary family laws because these women may, among other reasons, not be able to finance the expensive HC proceedings. It is my argument that they would have been protected adequately if the above sections were interpreted widely.

Moreover, as rightly noted by others,¹⁰⁸ this position also affects the type of cases that can be litigated in Malawi, preventing test cases that could have a potentially greater transformative potential than the narrow individ-

¹⁰⁷See *Press Trust Case* as cited by Chirwa (n 20) 237.

¹⁰⁸Grippen S and Kanyongolo FE ‘Courts and the poor in Malawi: Economics, Marginalisation, Vulnerability and the Law’ (2007) *International Journal of Constitutional Law* 258 at 276.

ual claims. An example of a test case is *Bhe Case*¹⁰⁹ where (in addition to appellants *Bhe and Shibi*) the SAHRC applied for direct access to the CC to have Section 23 of the *Black Administration Act* and the regulations promulgated thereunder declared unconstitutional on the ground that its provisions infringed the rights to equality and human dignity. The Court granted direct access to the applicants, hearing all three cases simultaneously.

It is also submitted that the narrow interpretation adopted by the courts in Malawi offers little chance for the Bill of Rights to make a noticeable impact on African customary family laws since, as it will be discussed in the following section, most women married under customary laws are unable to enforce their rights. On the other hand, the decision in *Kachere and others v Attorney General*,¹¹⁰ which had adopted the wide interpretation of Sections 15 (2) and 46 (2) of the Malawi Constitution, is to be preferred. With such an interpretation more women's rights violations would be litigated by organisations acting on behalf of women whose rights have been or are being violated but who cannot enforce them on their own.

¹⁰⁹*Bhe and others v Magistrate Khayelitsha and others, Shibi v Sithole and others, South African Human Rights Commission and Another v President of the Republic of South Africa and Another* 2005 (1) BCLR 1 (CC); 2005 (1) SA 580 (CC). This case concerned the customary law of succession embodied in the *Black Administration Act* 38 of 1927 and the constitutionality of the principle of male primogeniture.

¹¹⁰Civil Cause No. 2187 of 1994, HC, Principal Registry (Unreported).

5.4 Socio-economic factors and the application of Bill of Rights in Malawi

The dialogue on women's rights mainly focus on the condemnation of customary family laws and practices governing customary marriages that have failed to satisfy the demands of international human rights law on gender equality.¹¹¹ In Malawi, such condemnation has led to gender sensitive programs and policies,¹¹² and heightened the demand for the repeal of unjust legislation in order to achieve gender equality.¹¹³

However, it should be recalled that the Malawi Constitution can accommodate both rights to gender equality and the practising of culture.¹¹⁴ To a large extent, some international scholars have sought ways of doing this. Sachs,

¹¹¹See White S et al *Dispossessing the widow: Gender based violence in Malawi* (2002); Ntata P and Sinoya C *Customary law and the UN conventions on women and children* (Unpublished) (1999); and MHRC *Cultural practices and their impact on the enjoyment of human rights, particularly women and children* (Unpublished)(2005). See also similar views with regard to Kenya by Juma L 'Reconciling African Customary law and Human rights in Kenya: Making a case for Institutional Reformation and revitalization of customary adjudication processes' (2002) *St Thomas Law Review* 459 at 493.

¹¹²See Malawi Government *National Gender Policy* (2000-2005) and Malawi Government *Malawi Poverty Reduction Strategy Paper* (2002).

¹¹³See, for example, Malawi Law Commission *Report on the Review of Marriage and Divorce laws* (2005); and Malawi Law Commission *Report No. 12 on the Review of Wills and Inheritance Act* (2004).

¹¹⁴Sections 20 and 26 of the Malawi Constitution, respectively.

for example, argued for consultation to ensure that distortions of traditional customary practices were corrected and that positive aspects of customary systems were emphasised and developed.¹¹⁵ Chanock pointed to the erroneous assumptions underlying the association of customary family laws with gender inequality. To support this view, Chanock showed that in the past both civil and customary law failed African women by restricting the rights of women and children.¹¹⁶

Despite this, it should be recalled that in Malawi socio-economic factors limits the application of the Bill of Rights more than the inhibitions imposed by African customary family laws.¹¹⁷ For example, most customary family rules that were discriminatory against women are changing due to social change and yet customary family laws are still blamed for the disadvantages that women face. This section, therefore, examines these limitations with a view to showing how the complex interrelations of the various factors in Malawi, place limitations on the application of the Bill of Rights to African customary family laws which would ultimately benefit the enjoyment

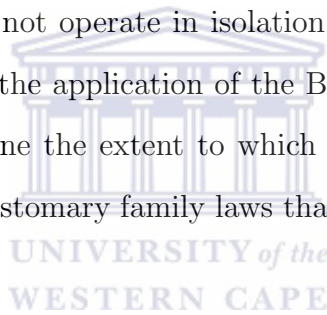
¹¹⁵Sachs 'Towards the Bill of Rights in a Democratic South Africa' 1990 as cited by Mbatha L, Moosa N and Bonthuys E 'Culture and religion', in Bonthuys E and Albertyn C (eds), *Gender, Law and Justice* (2007) 158 at 167.

¹¹⁶Chanock 'Law, State and Culture: Thinking about "Customary Law" after Apartheid' 1991 as cited by Mbatha, Moosa and Bonthuys (as above) 167.

¹¹⁷See also similar views by Grippen S and Kanyongolo FE 'Courts and the poor in Malawi: Economics, Marginalisation, Vulnerability and the Law' (2007) *International Journal of Constitutional Law* 258 at 259.

of women's rights.

The limitations placed on the application of the Bill of Rights to African customary family laws in Malawi can be seen from a number of perspectives. First, there are those that are related to poverty and the marginalisation of women. Secondly, there are those related to the economy of the country. Thirdly, there are those related to high levels of illiteracy of women. Fourthly, there is an added complication resulting from lack of knowledge of the resolution of conflict between African customary laws and women's rights. Lastly, the judicial system has its own limitations. In practice, however, these limitational dimensions do not operate in isolation. All these limitations have serious implications for the application of the Bill of Rights to African customary laws. They define the extent to which the Bill of Rights can have an impact on African customary family laws that are discriminatory against women.



5.4.1 Poverty and marginalisation of women

Malawi is one of the world's least developed countries in Southern Africa.¹¹⁸ Poverty and the high prevalence of HIV/AIDS reduced life expectancy at birth, in Malawi, to an estimated 39.8 years in 2006.¹¹⁹ The average household income in Malawi is around 50,000 Malawi Kwacha (US \$400) per year.

¹¹⁸UNDP *Malawi in Human Development Report* (2006).

¹¹⁹As above.

The median per capita income of the richest 10 percent of the population is eight times greater than that of the poorest 10 percent.¹²⁰ The majority of the Malawian population are poor. Fifty two percent of the population is poor, with 22 percent unable to meet the minimum standard for their daily recommended food requirement.¹²¹ International measures of poverty and development confirm the picture. UNDP's 2006 Human Poverty Index for Least Developed Countries ranks Malawi at 83 out of 102 developing countries, and the 2006 Human Development Index places it at 166 out of 177 countries.¹²² In addition to the above, in Malawi the condition of poverty is characterised by lack of productive means to attain basic needs such as food, water, shelter, education and health. In absolute terms, poverty is associated with starvation and hunger.¹²³

Historically women have been susceptible to exploitation, and have been shunted to the periphery of economic power by laws and policies that promoted the interests of men, urban elites, and colonial and post-colonial landowners and employers.¹²⁴ Women, children, and rural peasants are particularly affected by poverty. The average yearly income for male-headed households is US \$415 and that of female-headed households is US \$250.

¹²⁰Malawi Government *Malawi Growth and Development Strategy: From poverty to Prosperity* (2006-2010) xiii.

¹²¹As above.

¹²²See also Grippen and Kanyongolo (n 117) 261.

¹²³White (n 111) 27.

¹²⁴Grippen and Kanyongolo (n 117) 261.

Ninety percent of poor people live in rural areas. Households in urban areas have an income almost three times higher than that of rural households and, while 25 percent of urban dwellers live in poverty, 56 percent in the rural population are considered impoverished.¹²⁵

Malawian women operate from a disadvantaged position. Women form 51 percent of the population. A third of Malawian households are female-headed.¹²⁶ The marginalisation of women is both a result and a cause of their political weakness. As rightly noted by Grippen and Kanyongolo¹²⁷

‘... the involvement of women was critical during the campaigns for decolonisation and democratisation, power has now been ceded to a ruling class of men whose interests coincided with those of the landowners, employers, and the emerging urban middle class. The latter’s interests had displaced those of other groups, who were subsequently excluded from decisions on the distribution of resources and power. Political weakness re-inforces marginalisation, causing further political weakness’.

Thus, it could be argued that the web of marginalisation and poverty in which

¹²⁵As above (n 7) 263.

¹²⁶White (n 111) 27. See also Liebenberg S ‘Social and economic rights; A critical challenge’ in Liebenberg S (ed) *The Constitution of South Africa from a Gender Perspective* (1995) 79 at 87 with respect to South Africa.

¹²⁷Grippen and Kanyongolo (n 117) 262-263.

women are trapped negatively impacts on what impact the Bill of Rights would have on African customary family laws. Few women are in a position to enforce or challenge discriminatory laws against them.

5.4.2 Economic limitations

This section examines the performance of the Malawi economy and how it places limitations on the application of the Bill of Rights to African customary laws, and which ultimately defines the extent to which the Bill of Rights can have an impact on women married under customary family laws.

Malawi's economy is largely based on agriculture which accounts for 90 percent of its export earnings and 45 percent of its gross domestic product (GDP). The main export crops are tea and tobacco. Maize is an important food crop. More than 80 percent of the population, located in the smallholder sector, depend on agriculture for their livelihood.¹²⁸ The majority of women are found in the smallholder agriculture sector that is characterised by low incomes due to low productivity and unfavourable input/output price ratios.¹²⁹ The result is that 65.3 percent of the population lives on less than 20 US cents per day. Of these, more than 70 percent are women. Numerous accounts have also shown how women and children bear the greatest burden of poor economic conditions and how they suffer discrimination in the

¹²⁸WLSA Malawi and SARDC WIDSAA *Beyond inequalities* (2005) 6.

¹²⁹As above.

allocation of resources.¹³⁰

Good economic conditions are important because they determine a government's ability to better the living conditions of its people. Heightened by the implementation of structural adjustment programs emphasising 'economic liberalisation, deregulation of prices of all commodities, factors and services, large scale privatisation of public enterprise, cutbacks in government expenditures on social services and employment,'¹³¹ the inability of government to spur economic development, it is argued, negatively impacts on what impact the Bill of Rights could have on the practice and enjoyment of human rights by women married under customary laws. The ability to file suit and seek recovery for violations of human rights, as discussed, often depends on one's ability to pay exorbitant legal fees. To that end, it has been rightly observed that 'it is reasonable to assume that the vast majority of Malawians who live on less than US\$ 1 per day cannot afford to pay the fees that are required to commence judicial proceedings, let alone pursue them to a satisfactory conclusion'.¹³²

In Malawi seeing that rural women depend on their agriculture, it is also obvious that the impact of poor economic performance in the rural areas could be because of droughts that impact on agricultural productivity. This obviously causes rural women to be especially vulnerable. Good nutrition

¹³⁰As above, 6-10.

¹³¹As above, 7.

¹³²Kanyongolo FE *Malawi: Justice Sector and the Rule of Law* (2006) 134.

and income are also directly related to the ability to successfully complete an education. An education is essential for sustained and effective participation in political and economic decision making, and for the effective enjoyment of civil and political rights.¹³³ Without effective economic power, women are unable to enforce their political rights. This demonstrates that human rights are interdependent and indivisible, and that the denial of social rights as human rights reinforces the marginalisation of women in society.¹³⁴

Therefore, if the Bill of Rights is to have any impact on the lives of women married under customary laws, it is suggested that there is need for the government to address the immediate socio-economic concerns of the rural women who are mostly farmers.

The importance of economic factors to people at the international level is reinforced under the CESC.¹³⁵ Under the CESC, States have an obligation to take steps 'individually or through international assistance' to ensure that the rights provided by the Covenant are realised.¹³⁶

¹³³Liebenberg (n 126) 87-88.

¹³⁴As above, 88.

¹³⁵CESC, adopted Dec. 19, 1966, entered into force Jan. 3 1976, G.A. Res. 2200A (XXI), 21 U.N. GAOR, Supp. (No. 16) 49, U.N. Doc. A/6316 (1966).

¹³⁶Art. 2 of CESC.

5.4.3 Literacy levels

The relationship between a high literacy level and how it can enable one to assert one's rights cannot be over emphasised. High levels of literacy locate people at the centre of cultural, economic, social and political activity.¹³⁷ Unfortunately, in Malawi there are significant differences regarding literacy and formal education between women and men. The literacy rate of women is 50 percent against 76 percent for men.¹³⁸ In urban areas 86 percent of the population is literate, compared with 61 percent of rural dwellers.¹³⁹ In addition, only 31.4 percent and 40.2 percent of women and men respectively have completed primary education. The completion rates for secondary schooling are 11.1 percent and 19.9 percent respectively.¹⁴⁰

The discussion in the preceding paragraph suggests that there is a significant link between high levels of literacy and the positive impact that the Bill of Rights can have on discriminatory customary family laws. The extent to which a woman is able to assert her rights, it could be argued, depends on her level of understanding of the rights in question. Therefore, higher illiteracy levels among most Malawian women as shown by the above statistics mean lower chances of women asserting their rights.

¹³⁷See also Grippen and Kanyongolo (n 117).

¹³⁸Government of Malawi (n 2).

¹³⁹As above. It is important to note that in Malawi most women governed by customary family laws live in rural areas.

¹⁴⁰NSO/ Macro (2001).

5.4.4 Judicial limitations

As it will be noted in Chapter 7, the jurisprudence emanating from the HC of Malawi shows that the courts have narrowly interpreted the Constitution when seeking to confer the benefits of the Bill of Rights or of rights under international instruments on women married under customary family laws.

The relationship between the Bill of Rights and African customary laws presents a great challenge to the Malawi judiciary. As it will be discussed in Chapter 7, individual magistrates and judges interpret the rights in the Malawi Constitution differently, with the result that there are inconsistencies in the application of the Bill of Rights to African customary family laws. It is, however, important to note that how magistrates and judges interpret rights contained in the Bill of Rights determines the impact that the Bill of Rights can have on customary family laws. However, the question that should be asked is: what shapes judicial interpretation?

From the interviews that I conducted, it would appear that the following circumstances seem to shape judicial interpretation. They are: the personal value placed by individual magistrates or judges on the importance of enforcing cultural rights or not; and the understanding of what is the appropriate way to deal with the conflict between cultural rights and women's rights. The responsiveness of magistrates and judges in dealing with the conflicting claims of rights depends on how they understand the relationship between

them. As Grippen and Kanyongolo¹⁴¹ have correctly noted:

‘The Malawi Constitution is ambiguous. Sections 13 and 14 require the judiciary to take into account the principles of national policy in its interpretation of the law, suggesting that judges should not delink law from politics. On the other hand, Section 9 seems to require a stricter dichotomisation, providing that the judiciary shall have the responsibility of interpreting, protecting and enforcing this Constitution and all laws in accordance with this Constitution in an independent manner with regard only to legally relevant facts and the prescriptions of law’.

Among Malawian magistrates and judges, it was noted that some emphasise the importance of customary family laws and are reluctant to regard them as violating the rights of women. Others welcome the Bill of Rights and use it to replace customary rules. In effect, therefore, the application of the Bill of Rights to customary family laws has become subject to varying interpretations by individual courts based on the sketchy guidelines provided by the Malawi Constitution.

¹⁴¹Grippen and Kanyongolo (n 117) 287.

5.5 Conclusion

This Chapter set out to look at first, how the application of the Bill of Rights can impact on African customary laws. Among others, it has been noted that certain rights within the Bill of Rights can directly or indirectly affect the application of African customary family laws. These rights are provided in Sections 20 and 24 of the Malawi Constitution.

The Chapter has also looked at some provisions that place limitations on the application of African customary family laws. To that end, the Chapter has outlined several provisions in the Malawi Constitution that potentially limit the application of African customary family laws. However, several factors need to be satisfied before a right can be limited.¹⁴²

In conclusion, this Chapter looked at how socio-economic factors place limitations on the application of the Bill of Rights to African customary family laws. In this regard, the Chapter has demonstrated that the limitations placed on the application of the Bill of Rights to African customary family laws in Malawi stems from a myriad of conditions, some of which are predicated upon the weakness of court structures. These limitations, and the prevalence of incongruent customary practices sanctioned by African customary family laws as discussed in Chapter 4, form part of a mammoth infra-structural deficiencies which the legal system must surmount before

¹⁴²Section 44 (3) of the Malawi Constitution.

any meaningful change can occur.¹⁴³ In order for the Malawi legal system to evolve, the approach taken must incorporate mechanisms or responses that are holistic and all encompassing. As rightly pointed out by Juma,¹⁴⁴ ‘responses that are aimed at eliminating incongruence on aspects of personal law may be justified only on account of their overall effect in stimulating change in the legal system as a whole’.¹⁴⁵ However, agreeing with Juma, the mere adjustment of law to conform to standards established under international law¹⁴⁶ as will be demonstrated in Chapter 6 without offering a concurrent process of resolving the conflict between customary family laws and women’s rights may evoke criticisms.



¹⁴³see also Juma (n 111) 501 in relation to Kenya.

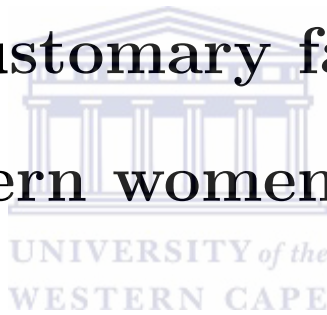
¹⁴⁴As above.

¹⁴⁵As above.

¹⁴⁶As above.

Chapter 6

Law reform: Reconciling African customary family laws with modern women's rights



6.1 Introduction

In Chapter 4, African customary family laws that are in conflict with the Bill of Rights and international standards, and how the conflicts emanate, were briefly examined. In this Chapter an examination will be undertaken of how the legislature is using the Bill of Rights and international standards to reconcile some customary family laws that have been noted to be at variance with women's rights. The aim is to discuss the approach that the legislature

in Malawi, through the Malawi Law Commission, has taken to advance the rights of women married under customary family laws and bring this system of law in line with the Bill of Rights and international standards on the protection of women's rights.¹ It also aims at considering factors that may affect the implementation of these laws.

This Chapter is divided into five sections. First, the Chapter looks at the role and relevance of international law on law reform of customary family laws in Malawi. The aim is to assess how reform of customary family laws in Malawi seek to incorporate the relevant international standards for the protection of women's rights. It then examines the proposed Marriage, Divorce and Family Relations Bill, hereinafter called 'the Bill'.² The aim is to discuss the law reforms that have been proposed to the institutions of African customary marriage and divorce. It then examines the Deceased Estates (Wills, Inheritance and Protection) Act, hereinafter called 'DEPA'.³

¹It should be noted that the legislature, of course, bears the principal duty to advance human rights, a responsibility that may well entail legislation to change customary laws in Malawi. This duty stems from Section 8 of the Malawi Constitution: 'The legislature when enacting laws shall reflect in its deliberations the interests of all people of Malawi and shall further the values explicit or implicit in this Constitution.' However, the legislature is assisted by the Malawi Law Commission which has the general mandate of reviewing and making recommendations regarding any matter pertaining to the laws of Malawi, and preparing reports. This is in accordance with Sections 132-135 of the Malawi Constitution.

²The Bill is attached to the Malawi Law Commission *Report on the Review of Marriage and Divorce Laws in Malawi* (2005).

³DEPA is attached to Malawi Law Commission *Report No. 12 on the Review of the*

The fourth section briefly discusses factors that may affect the implementation of the proposed laws. The last section is a conclusion.

6.2 International law and law reform on women rights in Malawi

International law is of special relevance to Malawi women's rights law reform in view of the fact that the constitutional drafting process was premised on guaranteeing a human rights based democracy, in sharp contrast to the one party dictatorial rule of Late Dr H.K Banda which had resulted into total denial of human rights.⁴ As Chirwa⁵ points out:

‘The institutional set up of Dr Banda's regime could not, however, ensure the efficient and effective observance of good governance and respect for human rights’.

Wills and Inheritance Act (2004).

⁴Chirwa V ‘What we fought for’ in Immink *et al* (eds) *From freedom to empowerment: Ten years of democratisation in Malawi* Forum for Dialogue and Peace (2003) 49 at 52.

⁵Chirwa as above.

6.2.1 Justification of use of international law

There are two central reasons why international law plays an important role in law reform in Malawi. The first emanates from the fact that some international law norms in the women's rights sphere have been elevated to constitutional status in the Malawi Constitution, which renders them justiciable in Malawian courts.⁶ The second rationale derives from the legal status of international law in Malawian municipal law. According to section 211 (2) of the Malawi Constitution⁷ some international agreements form part of the laws of Malawi. This position is relevant with respect to ICCPR,⁸ the

⁶Section 4 of the provides that:

the Constitution shall bind all executive, legislative and judicial organs of the State at all levels of Government and all the peoples of Malawi are entitled to equal protection of this Constitution, and laws made under it'.

UNIVERSITY of the

⁷Section 211 (2) of the Malawi Constitution provides:

'International agreements entered into before the commencement of this Constitution and binding on the Republic shall form part of the law of the Republic, unless Parliament subsequently provides otherwise or the agreement otherwise lapses.

⁸Ratified by Malawi in 1993.

CRC,⁹ the ICESCR¹⁰, the CEDAW¹¹ and the ACHPR.¹² All these international agreements, as can be seen from their date of ratification, became part of domestic law in Malawi by virtue of section 211 (2) of the Malawi Constitution and they are, therefore, enforceable as part of domestic law. Therefore, the justification for considering international law in relation to women's rights reform is the elevation of international law in Malawian domestic law. This is through a direct incorporation of some international law standards pertinent to women's rights in the Malawi Constitution.¹³ Thus a key principle of CEDAW and other international instruments, namely, the non-discrimination clause has been enshrined in the Malawi Constitution. This principle, as discussed in Chapter 3, has significance for a substantial area of according women equal rights in all cycles.

However, in addition to these general points, the socio-political justification for considering international law's influence on legislation dealing with women in Malawi, and the significance of the incorporation of certain international law principles in Malawi's Bill of Rights, as discussed above, there are two further reasons why, in the legal sense, international law has particular implications for women legislation reform here. These are first, that

⁹Ratified by Malawi in 1991.

¹⁰Ratified by Malawi in 1993.

¹¹Ratified by Malawi in 1987.

¹²Ratified by Malawi in 1990.

¹³An example would be section 20 of the Malawi Constitution on the right to equality.

having ratified CEDAW, as a treaty, it enjoys binding status.¹⁴ Second, international law has been granted enhanced status in the Constitution, not only in relation to the interpretation of constitutional provisions, but also as a relevant factor in the development of the customary family laws and in the interpretation of municipal statutes by the judiciary.¹⁵ Consequently, international law assumes a position of importance in relation to two aspects of legal development in this sphere, namely in respect of the drafting of legislation, and in respect of law reform via judicial interpretation.

The impact of these justifications for taking international law into account in a descriptive analysis of women's rights reform in Malawi can be explained from a number of reasons. First, from 1994 onwards, women's rights reform processes have unfolded during a period of escalating violence¹⁶ against women that have, in most cases been justified by customary family laws. For example, it has also been reported that women are grabbed of their husband's deceased intestate estate because of customary family laws which regard women as perpetual minors without capacity to own property.¹⁷ These

¹⁴Art. 18 of the Vienna Convention on the Law of Treaties, 1969 obligates State Parties to international instruments to 'refrain from acts which would defeat the object and purpose of the treaty'.

¹⁵See Section 11 of the Malawi Constitution.

¹⁶Sevenier A 'Life-skills education for girls helps end the cycle of abuse in Malawi' Nyasatimes, 12 March 2008 accessed at <http://www.nyasatimes.com>. See also the 'Chronicle newspaper' 20 July 2004' in which traditional cultures were reported to be among the demand for early marriages of young girls, among other cultural practices.

¹⁷White S et al *Dispossessing the widow: Gender based violence in Malawi* (2002) 53.

are some of the facts that have occasioned raging debates about how to deal with the discriminatory customary family laws and the problems accompanying it. One response to these pressures has been the enactment of the *Prevention of Domestic Violence Act, 2006* (PDVA) which, among others, seeks to prevent incidents of domestic violence in Malawi within the general framework of the Constitution, the National Gender Policy and the National Strategy on Gender-Based Violence.¹⁸

A consequence of these, therefore, has been that the international standards on the protection of women's rights have competed with local influences in shaping the process of women's rights reform, and, more specifically, the proposals for new legislation contained in the reports.¹⁹

6.2.2 Relevance of international law principles concerning women's rights reform in the Malawi Constitution

An international law regime may add weight to scrutiny of domestic women's rights legislation,²⁰ practices and decisions of courts in a number of ways.

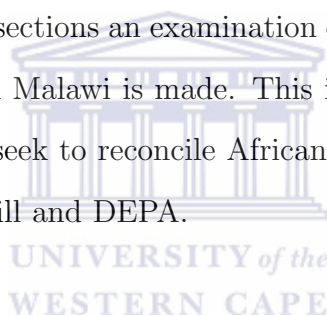
¹⁸Memorandum to the PDVA.

¹⁹Report of the Malawi Law Commission (n 2) and Report of the Malawi Law Commission on the Review of Wills and Inheritance Act. These will be discussed in Chapter 6.

²⁰See, for example, the report of the Law Commission (n 2). In this report, it is stated, *inter alia*, that Malawi has an obligation to meet international standards in its municipal laws.

International law may be used to resolve ambiguities and gaps, as well as in areas where judges may have to exercise a discretion in relation to any matter.²¹ As a general proposition, international law may be important in the women's rights field precisely because it invokes an external normative standard of review, to some degree detached from politics, social contingencies and the changing shape of looking at women's rights in general. International law may also give guidance to legislative drafters as to the standards that municipal legislation is required to meet.²²

Having seen the justification and significance of international law in law reform, in the following sections an examination of how international law has influenced law reform in Malawi is made. This is by looking at the manner in which law reformers seek to reconcile African customary family laws and women's rights in the Bill and DEPA.



6.3 Bill

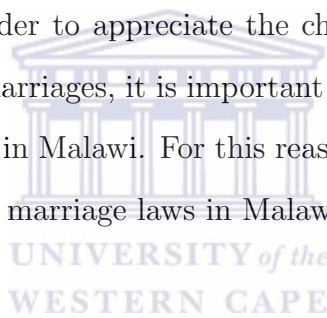
The reform of customary marriage laws in Malawi is planned to be effected through the Bill. Responding to the new and emerging socio-political en-

²¹See, for example, the Botswana case of *AG vs Dow* case as it will be discussed in Chapter 7.

²²See Report by Malawi Law Commission on Marriage and Divorce (n 2).

vironment in Malawi,²³ the Malawi Government, in pursuit of its policy to promote the principles equality and non-discrimination and empowerment of women in all spheres of life in Malawi, in September 2001, through the Malawi Law Commission, constituted a special law commission to undertake a review of the marriage and divorce laws of Malawi.

With that end in view, the special law commission produced a Report.²⁴ This has, however, not been translated into law yet. The discussion will therefore center on the draft of legislation for the enactment of the recommendations of the Malawi Law Commission attached to the abovementioned Report. However, in order to appreciate the changes that are proposed to the area of customary marriages, it is important to understand the marriage laws that are applicable in Malawi. For this reason, the following subsection gives an overview of the marriage laws in Malawi.



6.3.1 Marriage laws in Malawi

There is no comprehensive Act that deals with rights pertaining to marriage in Malawi. Separate laws apply, depending on the marriage regime that a person belongs to. In general, there are four marriage regimes. The first deals

²³Malawi Law Commission *Overview and Issues of Gender-Based Law Reform in Malawi* (2003) (hereinafter called ‘The Gender Overview’).

²⁴See n 2 above.

with marriages contracted under the *Marriage Act*.²⁵ These are monogamous marriages contracted in terms of the rites of civil marriages in England. The rights and obligation of the parties to this marriage type are defined in the said *Marriage Act*, the *Divorce Act*,²⁶ the *Married Women (Maintenance) Act*²⁷ and the common law.

The second regime embraces customary law marriages. As earlier noted in Chapter 4, customary marriages are potentially polygamous marriages contracted by anyone according to the customary law applicable to him or her. The rights and obligations of the parties to this type of marriage are embodied in the customary law applicable to that at marriage. The majority in Malawi marry according to this type of marriage.²⁸

Christian marriages constitute the third marriage regime. These are contracted in accordance with Christian rites in terms of the *African Marriages (Christian Rites) Registration Act*.²⁹ This Act merely makes provision for the celebration of African marriages in accordance with Christian rites but the marriage remains a customary one in every respect.³⁰ It does not lay down any rights and obligations which the parties to this marriage have.

²⁵Chapter 25:01.

²⁶Chapter 25:04.

²⁷Chapter 25:05.

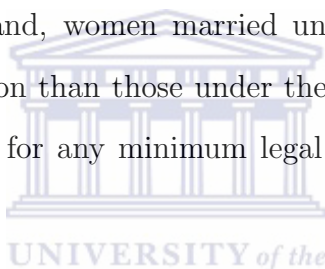
²⁸See n 15 in Chapter 1 where it has been noted that 77 percent of respondents opt for customary officiation of their marriage.

²⁹Chapter 25:02.

³⁰See Section 3 of the *African Marriages (Christian Rites) Registration Act*.

The fourth type is Asiatic marriages. These are marriages contracted and regulated by the *Asiatic (Marriage, Divorce and Succession) Act*.³¹ The rights and obligations of parties to these are defined in the relevant customs applicable to these marriages.

The division of marriages into these separate regimes has meant that women involved in these marriages have received different legal protection. For example, the *Married Women (Maintenance) Act*,³² which is an Act for the protection and maintenance of married women and their children, does not apply to cases in which the parties are married solely under customary law.³³ On the other hand, women married under the *Marriage Act* have enjoyed greater protection than those under the other regimes as the latter have not been provided for any minimum legal rights which their customs must guarantee.³⁴



The Bill represents an effort to adopt a comprehensive piece of legislation protecting women's rights during marriage, upon divorce and on the death of a spouse.³⁵ It is through this Bill that the Malawi Law Commission

³¹Chapter 25:03.

³²See n 8.

³³Section 1 of the *Married Women (Maintenance) Act* (n 8).

³⁴For example, right to property, right to custody of children after divorce, right to maintenance, among others.

³⁵According to its extended title 'the Bill aims to make provision for marriage, divorce and family relations between spouses and between unmarried couples, their welfare and maintenance and that of their children and for connected matters'.

seeks to reconcile the intricate relationship between African customary family laws (cultural rights) and modern women's rights. As aptly noted in the introduction to the Bill:

‘The country has since evolved from a legal system based on parliamentary supremacy to one based on constitutional supremacy with an entrenched Bill of Rights. Such a paradigm shift has consequences on the rights and obligations of persons, let alone parties in a marriage contract’.³⁶

The Bill proposes a unified law that will govern all systems of marriage³⁷ with all having the same rights and obligations.³⁸

Essentially, the Bill purports to create the same legal status for all.³⁹ This position, it is argued, complies with the Malawi Constitution, as discussed in Chapter 5.⁴⁰

³⁶See n 2 above.

³⁷Section 12 of the Bill states that marriages recognised by the Act shall be either a civil marriage, a customary marriage, a religious marriage, or a marriage by repute or permanent cohabitation.

³⁸Part IX of the Bill provides for the rights and obligations of parties to a marriage. This position is to be contrasted with that in South Africa. In South Africa, the *Recognition of Customary Marriages Act* (RCMA), Act No. 120 of 1998 applies only to customary marriages, but puts customary marriages on the same legal footing as civil marriages.

³⁹See Section 12 (3) of the Bill.

⁴⁰See Section 20 of the Malawi Constitution.

The Bill represents, to some extent, limited legislative reform addressing some of the salient issues relating to how customary family laws disadvantage women. However, the Bill can be faulted for its lack of wholesale application to existing customary marriages.⁴¹ In the following subsection, an examination of the manner in which the Bill has addressed some of these salient issues is undertaken.

6.3.2 *Lobola*

It should be recalled that in patrilineal systems payment of *lobola* by a bridegroom is a prerequisite for a valid marriage under African customary law.⁴² Failure to institute *lobola* negotiations renders the marriage void.

It was also noted in Chapter 4 that the concept of *lobola* is often criticised on the ground that it amounts to the purchase of women.⁴³ The fact that women are ‘bought’, the argument proceeds, renders them vulnerable to abuse as they are treated as property of their husbands.⁴⁴ It has therefore

⁴¹See Section 3 of the Bill.

⁴²See the discussion in Chapter 4.

⁴³White (n 17) 53. See also The Centre for Reproductive Law and Policy and FIDA-(K), *Women of the World: Laws and Policies Affecting their Reproductive Lives - Anglophone Africa* as cited Kisaakye EM ‘Women, Culture and Human Rights: Female Genital Mutilation, Polygamy and Bride Price’ in Wolfgang B, Kisaakye EM and Oberleitner G (eds) *Human Rights of Women: international instruments and African experiences* (2002) 268 at 281.

⁴⁴As above.

been argued that *lobola* undermines the status and dignity of women, and the right of every member of the family to full and equal respect and protection against all forms of neglect, cruelty and exploitation.

The Bill makes provision for African marriages solemnised in accordance with African customs. Section 27 provides:

‘Subject to Sections 15, 16, 17 and 18, the procedures preceding the celebration of a religious or customary marriage shall be governed by the rules and customs or rites which are usual among the ethnic group, religion or sect under which the marriage is celebrated’.

The above provision is not clear on whether *lobola* is a legal prerequisite for the formation of a customary marriage. It is, however, submitted that when determining what ‘the rules and customs under which the marriage is celebrated are’,⁴⁵ one must conclude that the *lobola* agreement is in fact a silent requirement procedure preceding the celebration of a customary marriage in a patrilineal customary marriage in Malawi. Thus, it can be argued that this section impliedly recognises *lobola* as a valid requirement for a patrilineal customary marriage. This position has been similarly noticed with regard to the RCMA of South Africa. Just like the Bill, the RCMA does not prescribe *lobola* as a requirement for the validity of a customary marriage.

⁴⁵Section 27 of the Bill.

However, it has been argued that Section 3 (1) (b) of the RCMA⁴⁶ may be interpreted as meaning that negotiations preceding the entering into of a customary marriage are regarded as requirements in respect of *lobola*.⁴⁷

However, this does not mean that the rights and obligations of the parties to the marriage will be defined solely by reference to *lobola*. As a departure from the rules of customary law, Section 96 of the Bill, for example, states that with respect to the custody of children the court shall treat the welfare of the child as paramount. It should be recalled that in patrilineal customary marriage systems the right of a father to custody of his children is absolute. The right stems from fulfilling his obligation under the *lobola* agreement.⁴⁸ This, then, entitles the father and his family to have rights to any children born to the wife during the marriage. The rights and obligations that arise from fulfilling the customary requirements of a customary marriage or, in case there is no marriage, the requirements for obtaining such a child,⁴⁹ characterise the customary family social arrangement of who is responsible for the welfare of the child. This is irrespective of whether the marriage

⁴⁶Section 3 (1) of the RCMA provides that: ‘For a customary marriage entered into after the commencement of this Act to be valid- ... (b) the marriage must be negotiated and entered into or celebrated in accordance with customary law’.

⁴⁷See Mofokeng LL ‘The lobola agreement as the silent prerequisite for the validity of a customary marriage in terms of the Recognition of Customary Marriage Act’ (2005) *Tydskrif vir Hedendaagse Romeins Hollandse Reg* 277 at 278.

⁴⁸See *Kamcaca v Nkhota* 1968 MLR 190.

⁴⁹For example, through the customary requirement of giving a beast to the family of a woman so that the father can take over the responsibilities of taking care of such a child.

subsists or not. The position adopted by the Bill is a departure from the customary rule that *lobola* begets children. The *lobola* institution, though impliedly recognised in the Bill, is not a measure of determining who gets custody of a child. This, obviously, puts women in the same position as men in respect of issues of custody of children. This is quite a positive departure.

The modern continuation of the practice of the *lobola* institution, however, is likely to be persuasive to the courts of Malawi when they will be interpreting Section 27 of the Bill. During my field research it was noted that the need for fulfilling the customary procedures, including *lobola*, preceding customary marriages, were among the requirements that courts considered whenever a determination of whether a marriage was valid or not was being made.⁵⁰

It is, therefore, argued that the customary concept of *lobola* intersects with another important area of the right of women - the right to marry and found a family⁵¹ that underpins all other rights of the woman in a customary marriage

⁵⁰See, for instance, the cases of *Charity Msuku v Lloyd Phiri*, Civil Cause No. 117 of 2004, Mzuzu MC (Unreported), *Florence Mwale v Gervazio Phiri*, Civil Cause No. 4 of 2004, Mzuzu MC (Unreported) and *Joshua Kumwenda v Angela Kachali*, Civil Cause No. 34 of 2004, Mzuzu MC, (Unreported) where the courts ruled that they could not adjudicate over a marriage that was not valid under any law since the requirement of *lobola* was not met. Similarly, in Uganda, it has been noted by Kisaakye (n 13) 280 that the courts have unanimously held that *lobola* should have been paid in full before they can recognise a customary marriage as having been contracted.

⁵¹Section 22 (3) of the Malawi Constitution.

system.

6.3.3 Requirements of customary marriages

According to Section 2 of the Bill a customary marriage means:

‘... a marriage celebrated in accordance with rites under the customary law of one or both of the parties to the marriage’.

This definition, arguably, makes no changes to the customary requirements for celebrating a customary marriage. Obviously, in view of such a definition one is led to the conclusion that the Bill retains all the requirements for contracting a customary marriage that are in accordance with customary family laws.⁵²

It is, however, noted that, although the customary requirements for contracting a customary marriage are retained, the Bill introduces new concepts to a customary marriage that are not known to strict customary marriages rules. For example, under Section 15 of the Bill the parties to a marriage must be at least 18 years. It provides that:

‘Two persons of opposite sex who are both not below the age of eighteen years and are of sound mind may enter into marriage

⁵²See discussion on the requirements for contracting a customary marriage briefly discussed in Chapter 4.

with each other.’

From the foregoing, we see that the influence of the Bill of Rights and international standards that determine the majority age at 18 years might have played a role in setting the age of entering into marriage at eighteen.⁵³ We also find that the customary rule that marriage is entered into after puberty is being replaced by the requirement that one has to be 18 years. The position to adopt a minimum age for marrying for all persons in the Bill is commendable as it may ensure that the spouses consent to such a marriage is properly informed. To avoid discrimination on the ground of sex, the minimum age is for both sexes.

However, it should be recalled that under the CRC and the Malawi Constitution a provision is made for the underage children to get married with their parents’ consent.⁵⁴ Of course such power to consent to marriage must be exercised only in the child’s best interests.⁵⁵ Accordingly, a parent may not unreasonably prevent a child’s marriage. Instead, consent of a guardian should be deemed necessary to remedy deficiencies in the judgment of a minor. Thus, according to the CRC and the Malawi Constitution marriages by children below age, where such consent was not supplied, should be voidable at the instance of a spouse or the parent concerned.

⁵³See discussion in Chapter 4.

⁵⁴See Section 22 of the Malawi Constitution. See also Section 3 of the RCMA that allows for marriages under eighteen years, with minimum permission.

⁵⁵This is a guiding principle in all matters affecting the welfare of the child.

Thus, in this situation we see that the proposed law is inconsistent with the Malawi Constitution and international standards in that it does not provide for underage children to get married with their parental consent. Since the Malawi Constitution is the supreme law of the land⁵⁶ the position adopted in the Bill directly conflicts with the Malawi Constitution and to the extent of such inconsistency, it may be invalidated by courts.

6.3.4 Marriage by permanent cohabitation and repute

Section 22 (5) of the Malawi Constitution provides for the recognition of marriages by repute or permanent cohabitation. This provision has significant implications for African customary family laws relating to the recognition of a valid customary marriage.

In Malawi, as earlier noted in Chapter 4, a valid customary marriage is contracted either when *lobola*⁵⁷ has been negotiated or by the *chinkhoswe*.⁵⁸ Absence of the *lobola* or *chinkhoswe* renders such a union invalid. No matter how long they live together, and whether or not they have children, the

⁵⁶See Section 5 of the Malawi Constitution.

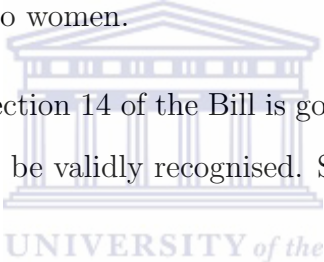
⁵⁷This is in respect of a patrilineal customary marriage and the term has already been defined earlier in the discussion.

⁵⁸This is done in respect of a matrilineal customary marriage. *Chinkhoswe* means the ceremony at which the marriage guardians from both the man and the woman's sides to the matrilineal marriage meet and exchange chickens as a symbol of validating the marriage.

parties cannot subsequently institute divorce proceedings to dissolve the marriage, for it is inconsistent with common sense to dissolve a marriage that never existed.⁵⁹ Such is the strict custom.

Section 22 (5) of the Malawi Constitution alters this custom in that it recognises marriages in which customary formalities, such as the *lobola* and *chinkhoswe*, aimed at validating a customary marriage have not been followed. This section, however, does not state when a marriage by repute and permanent cohabitation could validly be recognised. Courts are left to decide according to the circumstances of each case. The result is inconsistencies in the protection afforded to women.

If enacted, however, Section 14 of the Bill is going to provide guidelines on how these marriages will be validly recognised. Section 14 provides:

- 
- ‘ 1. A marriage by repute or permanent cohabitation shall only be recognised under this Act if there is evidence of- (a) mutual consent; and (b) capacity to enter into marriage as provided under this Act.
 2. Before making a finding that a marriage by repute or permanent cohabitation exists, a court shall consider- (a) the length of the relationship; (b) the fact of cohabitation; (c) the existence

⁵⁹ *Christina Mhango v Amani Ali*, Civil Appeal Case (TC) No. 15 of 1970 as cited by Chimango LJ *Women without Ankhoswe in Malawi: A discussion of a legal position of women who enter into informal marital relations*’ (Unpublished)(Undated).

of a conjugal relationship; (d) the degree of financial dependence or interdependence and any agreement for financial support between the parties; (e) ownership, use and acquisition of property; (f) the degree of mutual commitment to a shared life; (g) whether the parties mutually care for and support children; (h) the reputation of the parties and the public display of aspects of their shared relation: and (i) any other factors that the court considers fit.’

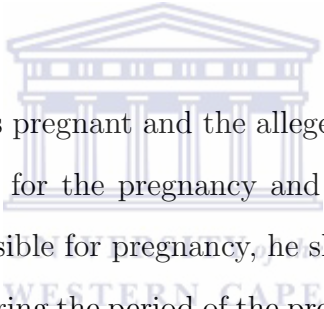
The above guidelines are precisely important to courts when recognising as valid marriages by repute and permanent cohabitation. In Chapter 7, it will be shown how different courts, due to lack of such guidelines, have inconsistently interpreted Section 22 (5) of the Malawi Constitution. Due to such inconsistencies, women involved in such relationships have received different protection from courts.

6.3.5 Maintenance of unmarried women

African customary laws make provision for the payment of damages by a man in a patrilineal marriage who impregnates a woman outside wedlock. This customary practice is also part of the rules for the affiliation of children born outside wedlock. An unmarried biological father acquires full parental

responsibilities and rights if he pays damages in terms of customary law.⁶⁰ This customary practice ensures that the child's right to the father's care is achieved by giving the father full parental responsibilities and rights.

The Affiliation Act⁶¹ provides for the maintenance of a child born out of wedlock.⁶² The *Married Women (Maintenance) Act*⁶³ only provides for the protection and maintenance of married women and their children. As earlier noted, this Act does not apply to customary marriages. However, these Acts did not make any provision for the maintenance of the mother of the child during and after pregnancy. The Bill seeks to rectify this gap by providing thus:



‘Where a woman is pregnant and the alleged father does not dispute responsibility for the pregnancy and is adjudged by the court to be responsible for pregnancy, he shall be liable to maintain the woman during the period of the pregnancy and to pay for or reimburse the attendant costs of delivery and the court may make an order for enforcement as may be deemed appropriate’.⁶⁴

This provision, interestingly, assumes that the woman is in a weaker position

⁶⁰Based on my own experience, in most patrilineal systems in Malawi, one cow, payable to the parents of the mother of the child, suffices.

⁶¹Chapter 26:02.

⁶²Section 3 of the *Affiliation Act*.

⁶³See n 8 above.

⁶⁴Section 97 (1) of the Bill.

and must get protection from the law.

Curiously, the Bill also provides that where the alleged father is a minor, 'liability will lie against his parent or guardian' until he ceases to be a minor.⁶⁵ This too reflects the customary law practice in Malawi. These provisions are vital to securing the rights of women to human dignity⁶⁶ and to be protected against all forms of neglect, cruelty and exploitation.⁶⁷ They are also significant in that they can facilitate the realisation of the rights of the child to know and be raised by his or her parents.⁶⁸ In this particular instance, customary laws and modern human rights are in tandem.

However, the Bill does not provide for the rights and obligations that accrue to the father of the child after it is born. Without any such provision it cannot be assumed that the father will have rights and obligations over the child. It is, therefore, suggested that the Bill should have incorporated the customary practice of the payment of damages to ensure that the child's right to the father's care is achieved. The incorporation of this customary practice would ensure that the child's right to the father's care is achieved by giving the father full parental responsibilities and rights, along with the child's mother.⁶⁹

⁶⁵Section 97 (3) of the Bill.

⁶⁶See Section 19 (1) of the Malawi Constitution.

⁶⁷See Section 22 (2) of the Malawi Constitution.

⁶⁸See Section 23 (2) of the Malawi Constitution.

⁶⁹Mwambene L 'Reconciling African customary law with women's rights in Malawi: The proposed marriage, divorce and family relations Bill' (2007) *Malawi Law Journal* 113 at

6.3.6 Maintenance of spouses and children after dissolution of customary marriages

Section 93 of the Bill proposes a change in the customary law of maintenance of spouses after the dissolution of marriage.

It should be recalled that according to both matrilineal and patrilineal customary laws, a spouse is not entitled to maintenance from the other spouse after the dissolution of the marriage. In the matrilineal system, for example, the original intent of *chikamwini* was to provide cheap labour to the wife's family, and not only to the wife.⁷⁰ As such, where a husband wished to do *chitengwa*, the *nkhoswe* had to be satisfied that not only would his sister's child be well taken care of by the husband, but that there was also an assurance that the husband will be able to take care of his wife's family at home. Therefore, when such a marriage is dissolved, it is obviously expected that the cheap labourer would stop providing his services. In the patrilineal system, wives and children were an economic asset of the family, and rules that developed around them were part of a group's survival strategy.⁷¹ It is

120.

⁷⁰Mandala E 'Work and control in a peasant economy: a history of lower Tchiri valley in Malawi' as cited by Miller D *Matriliney and social change: How are the women of rural Malawi managing* presented to CASID on 2nd June 1996, accessed at <http://www.ca.encarta.msu.com/encuet/refpages/search.aspx?q=chewa> on 05/03/05.

⁷¹Nhlapo RT 'The African Family and Women's Rights: Friends or Foes' (1991) *Acta Juridica* 135 at 137; See also Nhlapo RT 'African customary law in the interim Consti-

submitted that after divorce, since the wife will not be performing her duties for the group's survival, a husband is not expected to maintain her.

The Bill proposes a change to the above scenario. It empowers courts to make maintenance orders for spouses following divorce at any stage of the marriage. Concerning maintenance of a divorced spouse, the Bill⁷² provides:

‘On the decree absolute declaring a marriage to be dissolved, or on a decree of judicial separation obtained by applicant, the court may order the respondent to secure to the applicant such sum of money as it thinks reasonable, having regard to his/her income to the ability of the respondent, and the conduct of the parties. The court may direct the maintenance to be paid either in a lump sum or in yearly, monthly, or weekly payments for any period not exceeding the life of a spouse ...’

A question arises as to whether the above section contemplates maintenance orders only for spouses whose divorces are conducted in courts, or also for spouses divorced out of court. This question is particularly important in Malawi, since in practice, the majority of customary marriages are dissolved out of court by the parties' families. Therefore, if the application of Section tution' in Liebenberg S (ed) *The Constitution of South Africa from a Gender Perspective* (1995) 157 at 160.

⁷²Section 93 (1) and (2) of the Bill.

93 is restricted to spouses divorced in court, few spouses would benefit from the change in the law.

6.3.7 Custody of children on divorce

It is generally accepted that custody and access must be determined according to the best interests of the child. This standard, though missing in the Malawi Constitution, has been argued in Chapter 4 as being of application in Malawi. However, magistrates' and judges' perceptions of the best interests of the child can be influenced by their social position and their cultural backgrounds.⁷³

It should be recalled that under patrilineal customary marriage laws fathers are entitled to the custody of the children after divorce. According to matrilineal marriage laws mothers are entitled to such custody. The Bill determines that a court granting a divorce may make an order determining the custody or guardianship of a child, but does not stipulate the incorporation of customary rules in this regard.⁷⁴ Similar observations exist with respect to South Africa.⁷⁵

Thus in this instance the legal consequence of Section 93 (3) of the Bill for customary law is that the concept of the best interests of the child replaces

⁷³See the discussion in Chapter 7.

⁷⁴Section 93 (3) of the Bill.

⁷⁵See Section 8 (4) (d) of the RCMA.

specific customary law rules governing the custody of children.

6.3.8 Polygamy

Section 17 of the Bill provides that '[n]o person shall be married to more than one spouse'. The ban on polygamy is to be enforced by Section 52 of the Bill.⁷⁶ Section 17 of the Bill makes a strong statement against polygamy and is more categorical than that contained in Art. 6 of the Protocol. The Protocol obliges State Parties to discourage polygamous marriages. It should, however, be pointed out that the proposal by the Malawi Law Commission to include Section 17 has been made despite some support for polygamy displayed by a section of rural women.⁷⁷ It is, however, submitted that the battle fought on behalf of some women who had stated that they were marginalised by this customary rule may be won at the expense of another equally marginalised and vulnerable group- the illiterate rural women⁷⁸ who

⁷⁶Section 52 of the Bill provides:

‘A person who is married or purports to be married to more than one spouse commits an offence and is liable upon conviction to imprisonment for five years.’

⁷⁷As previously noted in Chapter 4, MHRC *Cultural practices and their impact on the enjoyment of human rights, particularly women and children* (Unpublished) (2005) indicated that strong support for the continuation of this practice had been voiced by women.

⁷⁸As noted in Chapter 5, these women are demographically in the majority.

are in support of this practice.⁷⁹

As earlier noted in Chapter 4, polygamy denotes the practice whereby a husband is allowed to marry more than one wife,⁸⁰ whereas a married woman is barred from contracting further marriages for as long as she remains legally married.⁸¹

On the question of whether Section 17 of the Bill is vital to securing the rights of women, especially the right to equality, the position adopted in this thesis is that it is, perhaps, a matter of debate whether women's equality⁸² with men will be achieved through legislative prohibition of polygamy or through a vigorous application or enforcement of Section 24 of the Malawi Constitution,⁸³ among others. The difficulty of enforcing a ban and the fact that polygamy appears to be obsolescent, customary marriages should have been allowed to continue to be potentially polygamous. Seen from another angle, the concept of polygamy intersects with a number of rights of women protected by the Malawi Constitution and international instruments, particularly the right to marry and found a family⁸⁴ and the right not to be forced to enter into marriage.⁸⁵ Section 17 of the Bill, arguably, may interfere

⁷⁹MHRC (n 77).

⁸⁰Ibik JO *Restatement of African Law: Malawi Vol 1, The Law of Marriage and Divorce* (1970) 191.

⁸¹See *Msowoya v Milanzi*, Civil Appeal Case No. 99 of 1979, NTAC (Unreported).

⁸²See Section 20 of the Malawi Constitution

⁸³Section 24 of the Malawi Constitution provides for rights of women.

⁸⁴Section 22 (3) of the Malawi Constitution

⁸⁵Section 22 (4) of the Malawi Constitution.

with these rights.

However it seems that the Bill may not apply retrospectively to existing polygamous customary marriages.⁸⁶ This position is regrettable. The rights and obligations of parties to these marriages would still remain largely unregulated.⁸⁷

By restricting the application to limited sections of all marriages regardless of the date they were celebrated,⁸⁸ the Bill fails to protect all women, particularly on issues of divorce. It is therefore suggested that the application provision should include all marriages that are in existence when the Act comes into operation. That would amply protect all women who were married before it came into operation. Furthermore, in view of the entrenchment of polygamy in Malawian society, there is a danger that whilst the law may forbid it, it may continue to subsist. If this happens, women in these polygamous unions may find that the law is cruel when it does not offer any protection.

⁸⁶See Section 3 of the Bill: 'This Act shall apply to marriages entered into on or after the day it comes into operation; but Sections 49, 50 and 51 shall apply to all marriages regardless of the date they were celebrated.'

⁸⁷This position can be contrasted with that adopted by the RCMA of South Africa which recognises customary marriages existing before the coming into effect of the Ac. Section 2 (1) of the RCMA provides: 'A marriage which is a valid marriage at customary law and existing at the commencement of this Act is for all purposes recognised as a marriage.'

⁸⁸See the discussion in the preceding paragraph.

6.3.9 Child marriages

As earlier discussed in Chapter 4, entry upon customary marriages has no fixed age requirement and the attainment of puberty tends to be a critical determinant of capacity to marry. It was also noted that in Malawi there is a common practice among parents and guardians in many parts of the country to marry off daughters at very tender ages, sometimes as low as 12 years. The result is teenage mothers who are not physically and mentally prepared for childbearing, taking care of their children, and, indeed, the general demands of marital life. Further, such teenage mothers or wives may encounter multiple problems. For example, they may experience early divorce.

The problem of childbearing has direct links with maternal and infant mortality rates, now at 1120 per 1000,000 and 104 per 1,000 live births respectively.⁸⁹ These statistics show that, indeed, the younger the woman the more dangerous is motherhood.

It should also be recalled that the Malawi Constitution has put the age of 18 at which a person can freely enter into marriage.⁹⁰ The law also stipulates that persons between the ages of fifteen and eighteen shall only enter marriage with consent from either parents or guardians.⁹¹ In addition the State is

⁸⁹Malawi Government *Malawi Demographic and Health Survey* (2000) and UNDP 2006.

⁹⁰Section 22 (4) of the Malawi Constitution.

⁹¹Section 22 (6) of the Malawi Constitution.

required to discourage marriages of persons under the age of fifteen, as such marriages put the lives of the parties at risk.

Section 15 of the Bill also puts the marrying age at 18 years. This position, is a departure from the customary law requirement for a customary marriage.⁹² This position, obviously, is compatible with the Bill of Rights.⁹³

6.3.10 Consent

In Chapter 4 we noted that Section 22 (4) of the Constitution provides that no person shall be forced to enter into marriage. However, in some cases children below the age of 18 and even adults are forced into arranged marriages. This practice is widespread in many rural areas of the country, and in some instances in urban areas, for a number of reasons, including poverty and culture. This practice, as alluded to in Chapter 4, is a flagrant violation of the right not to be forced into marriage. Another form of forced marriage is the practice of widow inheritance, which is common in patrilineal societies in the country.

The Bill, unfortunately, does not address the above problem head on. There is no provision that addresses the issue of consent. By failing to make any provision on the issue of consent, the Bill fails to protect other rights of women, particularly as regards forced marriages. It is, therefore, suggested

⁹²See also discussion under 'requirements of a customary marriages' above.

⁹³Section 22 (6) of the Malawi Constitution.

that there should be a provision that should directly address the issue of consent to a marriage. That would amply protect all women who are, due to several cultural practices, married without their consent.

6.3.11 Widow inheritance

The concept of widow inheritance intersects with a number of women's rights protected by human rights instruments, particularly the right to marry and found a family,⁹⁴ the right not to be forced to enter into marriage,⁹⁵ and the right that each member of the family shall be protected by law against all forms of neglect, cruelty and exploitation.⁹⁶

Arguably, the Bill allocates a role to the institution of widow inheritance in the protection of these rights by providing in Section 16: 'A person entering into a marriage under this Act shall first prove, by way of declaration before a Registrar or Minister, that he or she is single.'

Widow inheritance takes place when a husband dies. This, obviously, renders the woman single as contemplated by Section 16 of the Bill. It should be recalled that in some cases, a relative of a young widow's deceased husband is the one who inherits her, with her consent.⁹⁷

⁹⁴Section 22 (3) of the Malawi Constitution.

⁹⁵Section 22 (4) of the Malawi Constitution.

⁹⁶Section 22 (2) of the Malawi Constitution.

⁹⁷This is contrary to popular belief that women are forced into these relationships. In

This provision is important as it may be interpreted to protect women inherited without their consent.

6.3.12 Equal status and capacity of spouses

As previously discussed in Chapter 3, international human rights instruments specifically prescribe the content of equal rights of spouses in the family.⁹⁸ It was also observed that the provisions of CEDAW, and in particular the requirements that states parties modify or amend customary laws that constitute discrimination against women provide a radical challenge to laws that regulate customary marriages in Malawi, and specifically the equal status of spouses in the family.⁹⁹ Similarly, Section 24 of the Malawi Constitution provides for the equal status of women in marriage and at the dissolution of such marriage.¹⁰⁰

fact, in some cases it is alleged that some women kill their husbands so that they can be inherited by a relative of the husband whom they find more attractive.

⁹⁸See, for example, Art. 16 of CEDAW; Art. 16(1) of the UDHR; Art. 23 (1) of the CCPR, and Art. 10 (1) of the CESC. See also Human Rights Committee General Comment No. 19 on Protection of the Family, the Right to Marriage and Equality of Spouses, Art. 18 of the ACHPR; Art. 6 (c) of the Protocol; Art. 17(1) of the American Convention Human Rights 1969, 1114 UNTS 123; and Art. 8 of the European Convention on Human Rights 1950, 213 UNTS 221.

⁹⁹See discussion in Chapter 3.

¹⁰⁰See discussion in Chapter 4.

Contrary to the above international standards and the Bill of Rights, in Chapter 4 it was discussed that a wife to a customary marriage does not enjoy the same status as the husband. The Bill seeks to rectify this in the following fashion. Section 49 of the Bill, the pertinent parts of this provision, provides:

‘(1) A spouse is entitled to equal rights to consortium in marriage.
... (5) A spouse may severally, or jointly with the other, exercise responsibility towards the upbringing, nurture and maintenance of the children of the marriage. (6) Both spouses have the right to mutual custody of the children during its subsistence.

This provision is important as it may be interpreted to address the woman’s right to equal custody of children, among other rights, in which customary family laws do not provide.¹⁰¹

¹⁰¹See discussion in Chapter 4.

6.4 DEPA

6.4.1 Historical background to reform of inheritance laws in Malawi

It should be recalled that a number of well-defined customary systems of succession were in operation even before Malawi was colonised.¹⁰² A broad division was drawn between patrilineal and matrilineal succession systems. Of course, it should be pointed out that within these two categories, there was no uniformity.¹⁰³ The current administration of deceased estate is governed by the WIA. In Chapter 4, it was noted that certain aspects of the WIA, with regard to the distribution of the deceased intestate property under customary laws, were discriminatory against women.

In view of the fact that the Malawi Constitution embraces the principles of equality and non-discrimination, the Malawi Law Commission decided to commence its law reform programme by looking at the core statute on succession in Malawi, the WIA. The exercise of reviewing the WIA commenced in February 2003. In January 2004 a Report on the review of the WIA was produced.¹⁰⁴ Attached to this Report is the proposed DEPA which forms the focus of this discussion.

¹⁰²See the discussion in Chapter 4.

¹⁰³This is due to the fact that within the two categories, there exists different tribes.

¹⁰⁴See n 3 above.

If enacted DEPA will represent the most significant attempt at legal reform of succession rules in Malawi. Its importance lies in the fact that it seeks to impose uniformity in the area of law which has previously been dominated by diverse systems of customary laws, and subjected women to an inferior position.¹⁰⁵ However, this piece of legislation is in no sense a codification or restatement of customary laws. It strikes at the very roots of existing customary law systems that discriminate against women.¹⁰⁶ Although it is not the first attempt at reforming this area of the law,¹⁰⁷ it is novel in its ambitions, aims and unequivocal implications for policy. For that reason the degree of success which it will enjoy will be closely followed by those interested in the legal development of modern Malawi.

6.4.2 Overview of DEPA

The long title of DEPA¹⁰⁸ is:

‘An Act to provide for the making of wills and the devolution of property under a will; the inheritance to the estates of persons dying without valid wills; the protection of deceased estates; the

¹⁰⁵See Section 17 of DEPA.

¹⁰⁶As above.

¹⁰⁷Previous laws that were enacted include: *African Wills and Succession Ordinance*, No. 13 of 1960; and the *Wills and Inheritance (Kamuzu Mbumba Protection) Ordinance*, No. 36 of 1964.

¹⁰⁸See (n 3) 126.

administration of deceased estates; the prosecution of offences relating to deceased estates; the civic education of the public; and the functions of courts in relation to deceased estates and for other connected matters’.

This title, it is submitted, divorces itself from the premise that there is a necessary connection and interaction between the law of succession and the family structure. This position, unfortunately, limits the scope of the application of the Act. There is a need for it to contain a provision that would provide a frontal attack upon customary rules of succession that discriminate against women. If this assumption regarding the scope of the Act is correct, DEPA will have limited application. In this respect, it is far less lacking in its complete protection of women governed by customary laws.

DEPA has a dual purpose. First, it provides for a system of testamentary succession to be administered by the courts. The formal requirements of writing a will are similar to the WIA.¹⁰⁹ Secondly, it provides mandatory provisions to be applied on intestacy which pay no regard to pre-existing customary rules of succession or the modification that was made in the WIA.¹¹⁰ This is the most radical change that has been introduced by DEPA. What is particularly important to note is that DEPA discards the approach of the WIA and abolishes the customary rules of succession. In the following subsection, therefore, an examination of the intestacy provisions of DEPA are

¹⁰⁹Sections 5-15 of DEPA and compare with Section 5 of the WIA.

¹¹⁰Sections 16-18 of DEPA.

made. The aim is to assess how DEPA addresses the relationship of African customary family laws relating to inheritance and women's rights.

6.4.3 Choice of law governing deceased estate

In Chapter 4, it was noted that under subsection 1 of Section 16 of the WIA, the choice of law governing the deceased's estate is determined upon the area where the marriage was arranged. This is understood to mean the customary marriage rules of the area forming the basis of the validity of the marriage.¹¹¹ However, despite the issue of choice of law, it is also noted that the law discriminates as between a surviving wife in a patrilineal society who gets a one-half share (jointly with children and dependants of the intestate) and the surviving wife in a matrilineal society who gets two-fifths share (also jointly with children and the dependants of the intestate). One-half being greater than two-fifths, the law favours women from patrilineal society and discriminates against women from matrilineal category.

To reconcile the above position with the equality principle, as stipulated in the Bill of Rights and international standards, Section 17 of DEPA has moved away from the categorisation of choice of law according to the area where the marriage was arranged.¹¹² This provision is important as it addresses the

¹¹¹These would be according to patrilineal and matrilineal customary marriage rules.

¹¹²See the difference between the two sections. Section 16 of the WIA, under paragraph (a) of subsection (2) it is stated that if a marriage was arranged in an area described in the Schedule (areas described in the schedule are Chitipa, Karonga, Rumphu, Nkata

inequality in the law that treated women from a matrilineal society differently from those who were from patrilineal society.

6.4.4 Property rights of a widow

As noted in Chapter 3, Articles 2 and 16 of CEDAW enjoins States Parties to take appropriate measures to eliminate discrimination against women in all matters and ensure, on the basis of equality of men and women the same rights for both spouses in respect of ownership, acquisition and disposition of property.¹¹³ It should be recalled, however, that the dynamics of both patrilineal and matrilineal systems, as discussed in Chapter 4, manifest patriarchy. The processes of dispossession of a widow begins from the dynamics of patrilineal and matrilineal societies, which reinforces male superiority. The concept of family also recognises the male as having ultimate authority. Ultimately, when a husband dies, the construction of widowhood Bay, Mzimba and Nsanje which are predominantly patrilineal), the persons entitled to such property shall be-, under paragraph (b) of subsection (2) it is stated that if the marriage was arranged in any other area of Malawi the persons entitled to such intestate property shall be-... Section 17 of DEPA on the other hand, provides:

- (1) Upon intestacy the persons entitled to inherit the intestate property shall be the members of the immediate family and dependants of the intestate and their shares shall be ascertained upon the following principles of fair distribution- ...

¹¹³See, especially Art. 16 (1) (h) of CEDAW.

is a stepping-stone for relatives of the deceased man to dispossess the widow.

It should further be recalled that according to Section 16 (5) of the WIA a widow could lose her share of the estate upon re-marriage.¹¹⁴ This position conflicts with Section 24 (1) of the Malawi Constitution which prohibits discrimination on the ground of marital status. This provision poses a threat to and an interference with a widow's right to marry because of the fear that she may lose her property.¹¹⁵

Section 17 (4) of DEPA introduces a change to the above scenario by providing that 're-marriage shall not deprive the surviving spouse of property inherited under intestacy'.¹¹⁶ This is a positive development as the woman's right to marry will not be affected because of the fear that she may lose property inherited from a deceased husband. Also, very obviously, this provision protects the widow's right to property. It is however, observed that this provision does not limit the number of inheritances that a surviving spouse may

¹¹⁴Section 16 (5) of WIA provides that 'a widow shall hold her share of her deceased husband's estate upon the condition that if she remarries, any portion thereof which still subsists at the date of remarriage shall become divisible between her children ...'

¹¹⁵Section 22 (3) of the Malawi Constitution.

¹¹⁶Section 17 (4) of DEPA provides that:

'Re-marriage shall not deprive a surviving spouse of property inherited under intestacy except in the case of property on customary land where title in that property shall devolve to the children of the spouse by the intestate upon the re-marriage of the surviving spouse'.

be entitled to in his/her lifetime. This provision, arguably, may result in spousal enrichment through serial marriages, and perhaps increase incidents where spouses kill their spouses in order to inherit a share of their property.

6.4.5 Provision for spouses in polygamous marriages

In Chapter 4 we noted that customary marriages are potentially polygamous and that some women are indeed found in these polygamous unions.¹¹⁷ It is obvious, therefore, that upon death of a husband who was married to more than one wife, his intestate estate should be distributed among all the wives he was married to. Section 16 of the WIA that deals with the application of the law of intestate property of a person to whose estate customary law would apply does not make provision for spouses in a polygamous marriages.¹¹⁸ The use of the word 'wife' in both sections 16 (a) (2) (i) and 16 (b) (2) (ii) of the WIA obviously means that the law denies some women found in a polygamous relationship the right to inherit from their husbands' intestate estate. The difficult with implementing this provision also lies in the fact

¹¹⁷This is based on the study by the MHRC (n).

¹¹⁸Section 16 (a) (2)(i) of the WIA, states: 'if the marriage was arranged in an area described in the Schedule, the persons entitled to such intestate property shall be- (i) as to the share, the persons entitled upon a fair distribution in accordance with section 17 of the Act. Persons entitled under such fair distribution are the **wife**, issue and dependants of the intesate.' Similarly Section 16 (b) (2) (ii) provides that 'as to the remaining two-fifths share, the persons entitled upon a fair distribution under Section 17 of the Act are the **wife**, issue and dependants of the intestate. [Emphasis added]

that if the husband was married to more than one wife, which wife does the law envisage to benefit from such an intestate estate, is it the first wife, the second, or the third wife?

As a move to implement the right to equality before the law to women found in polygamous marriages, DEPA makes provision for spouses in a polygamous relationship in the following manner: Section 17 (1) (b) (c) and (d) of DEPA provides that:

‘Upon intestacy the persons entitled to inherit the intestate property shall be the members of the immediate family and dependants of the intestate and their shares shall be ascertained upon the following principles of fair distribution- (b) every spouse of the intestate shall be entitled to retain all the household belongings which belong to his or her household; (c) if any property shall remain after paragraphs (a) and (b) have been complied with, the remaining property shall be divided between the surviving spouse or **spouses** and children of the intestate; (d) as between the surviving spouse or spouses and the children of the instate their shares shall be determined in accordance with all the special circumstances ...’ [Emphasis added]

More specific, Section 17 (2) of DEPA provides:

‘If the intestate left more than one **female spouse** surviving him

each living in a different locality, each spouse and her children by the intestate shall be entitled to a share of the property of the intestate in their locality in accordance with this section; but such spouse and children shall have no claim to any share of the property of the intestate in the locality where another spouse lives.’ [Emphasis added]

In addition to the above, Section 17 (3) provides:

‘If the intestate left **more than one female spouse** surviving him all living in the same locality, each spouse and her children by the intestate shall be entitled to a share of the property of the intestate proportionate to their contribution.’ [Emphasis added]

From the foregoing provisions, we see that DEPA has made good recommendations with regards to protection of widows found in polygamous marriages from protection from infringement of property rights, thus providing formal equality.

Having noted that DEPA protects the right of inheritance of all widows that are in a polygamous relationship, it is interesting to note that the Bill, as discussed above,¹¹⁹ outlaws polygamy and has made no provision for women who are already in existing polygamous marriages. The position of the Bill

¹¹⁹See the discussion under 6.2.9. Section 17 of the Bill provides that: ‘No person shall be married to more than one spouse.’

and DEPA as quoted above on intestate estate of a husband who was married to more than one wife is interesting for two reasons. First, when a court is going to recognise the spouses who are entitled to benefit from the deceased estate as provided under Section 17 of DEPA, the Bill will also play a major role. The question that can be asked is: are courts going to recognise polygamous marriages for purposes of distribution of a deceased estate? If the answer is in the affirmative, then a further question would be: Under what law since the Bill outlaws polygamy and makes it an offence to be in a polygamous relationship.¹²⁰

Secondly, we see that there is no harmony in the reform of the laws that negatively impact on the rights of women. DEPA seems to acknowledge the harsh realities that come with polygamous marriages to women found in these unions. In that respect, it reconciles this harshness by making equal provision for all spouses involved in such unions. However, the implementation of this provision could be challenged by the fact that the proposed law on marriage, the Bill, outlaws the institution of polygamy. It is therefore proposed that there should be uniformity in the law reforms that are being proposed, otherwise the protection is rendered illusory if there will be difficulties in implementing it due to contradictory law reforms.

¹²⁰See discussion on polygamy above.

6.4.6 Deceased woman survived by children

It should be recalled that the norm at international law, as discussed in Chapter 3, is that both men and women are to be treated equally. The proviso to Section 16 (4) (a) of the WIA provides that: ‘Where the (deceased) woman leaves children, such children shall be solely entitled.’¹²¹

From the above provision, the following observations can be made: first, there is no like provision for a deceased man as it does for a deceased woman survived by children. On that score, the law is discriminatory as between a man and a woman who are both survived by children; second, men seem not to be beneficiaries of their wife’s intestate estate. This obviously is discrimination against men.

To reconcile this position, DEPA uses the words ‘spouse’ which obviously includes both a man and a woman. For example, Section 17 (1) (b) of DEPA provides that: ‘... every spouse of the intestate shall be entitled to retain all the household belongings which belong to his or her household.’¹²²

¹²¹ “Child” shall have the meaning under paragraph (a) of subsection (2) of Section 17 of the WIA to include the issue of the deceased child who is entitled upon prescribed trusts ...

¹²² Similar use of the word “spouse” are also to be found in Section 17 (1) (c), (d) and (f) of DEPA.

6.4.7 Widow inheritance

A major substantive provision, which is unfortunately missing in DEPA, is protection against widow inheritance. It was noted in Chapter 4 that this practice conflicts with several women's rights as protected under the Bill of Rights.¹²³ Therefore, a provision to forbid or regulate the practice of widow inheritance would have amply protected women married under customary law.

6.5 Problems in implementation of proposed law



From the above propositions, that are generally in line with the international human rights standards and the Malawi Constitution, the following observations are made. First, the proposals contained in the Bill, if submitted, do not take into account the fact that customary marriages are different from civil marriages. Most of the proposals seem to extend the civil law of marriages onto customary marriages. Secondly, the provisions do not take into account the fact that the majority of Malawians are still in support of customary marriages. As such, there would be a lot of resistance against

¹²³For example, the right to consent to a marriage, the right not to be forced to a marriage, the right to freely choose who to get married to, and in some cases the right to property.

implementation of a law that does not have cultural legitimacy. To illustrate these points, the following discussion on the distinction between individual and group rights will help elucidate how certain concerns about customary marriage laws were not adequately considered by the Malawi Law Commission.

6.5.1 Individual versus group rights

Customary norms enforcing discrimination against have long been perceived to be amongst the offenders against human rights.¹²⁴ Art. 5 of CEDAW, in cognisance of this fact, obliges State Parties to:

‘... take all appropriate measures ... to modify the social and cultural patterns of conduct of men and women with a view to achieving the elimination of prejudices and customs and all other practices which are based on the idea of the inferiority ... of either of the sexes’.

Whilst Malawi has ratified CEDAW, ACHPR and the Protocol, and upholds the principle of non-discrimination in its Constitution,¹²⁵ as examined in Chapter 5, it also provides for the recognition of cultural rights¹²⁶ to

¹²⁴Bennett TW ‘The Compatibility of African Customary Law and Human Rights’ (1991) *Acta Juridica* 18 at 25.

¹²⁵See Section 20 of the Malawi Constitution.

¹²⁶Section 26 of the Malawi Constitution.

which African people have a right.¹²⁷ As Bennett¹²⁸ notes, the idea of individuals (more so women) enjoying special rights is fundamentally at odds with African culture. Social life subsisted on the basis of mutual support and sharing. The claim of individual rights would place the group's survival, and ultimately individual survival, at risk. Thus, under customary laws individual interests are underplayed to mitigate any risks of undermining the cohesion of the group.¹²⁹ The emphasis, therefore, is placed on individual duties rather than rights.¹³⁰ It may be argued that to capture the spirit of such dynamics and interpersonal relations, Art. 18 (2) of the ACHPR obliges State Parties 'to assist the family which is the custodian of moral and traditional values recognised by the community'. It should also be noted that the ACHPR does not make reference to individual rights in marriage. This could be argued to be a strong commitment to the preservation of the African culture. Furthermore, as rightly noted by Butegwa,¹³¹ women, like men are cultural beings. They identify themselves and are identifiable by

¹²⁷Dlamini CRM 'The Ultimate Recognition of the Customary Marriage in South Africa' (1999) *Obiter* 15 at 21.

¹²⁸Bennett TW *Customary Law in South Africa* (2004) 296.

¹²⁹Armstrong A et al 'Towards a cultural understanding of the interplay between children's and women's rights: An Eastern and Southern African perspective' (1995) *The International Journal of Children's Rights* 333 at 363

¹³⁰Nhlapo RT *Family Law and Traditional Values* (Unpublished) DPhil thesis (1990) 260.

¹³¹Butegwa F 'Mediating Culture and Human Rights in favour of Land Rights for Women in Africa: A framework for Community level Action' in An-Na'im AA (ed) *Cultural Transformation and Human Rights in Africa* (2002) 108 at 109.

others within specific cultures and religions. These cultures not only shape women's and their communities' values and norms and practices, but they also are an intrinsic part of each woman. Women are also human beings with an identifiable sense of dignity which is rarely understood or acknowledged.¹³²

Coming to the issue of marriage, a customary marriage is said to be based on the communitarian family ethic which emphasises social solidarity. This has been marked as a contrast to the individualistic approach of the nuclear family based on civil marriage.¹³³ In customary marriages the interest of the particular wife or husband are incidental to family interests that are secured by institutions such as *lobola*.¹³⁴

Whilst it is claimed that international human rights represent a universal and neutral value system, they betray at every turn their origins in Western law and philosophy,¹³⁵ a philosophy that is not premised on the cohesion of any group and its survival *per se*, as is the case in Africa. Some writers have argued that the Western value system is inapplicable in non-Western societies because of the philosophical cultural differences.¹³⁶

¹³²As above.

¹³³Nhlapo RT 'The African Family and Women's Rights: Friends or Foes' (1991) *Acta Juridica* 135 at 137.

¹³⁴Kaganas F and Murray C 'Law, Women and the Family: the Question of Polygyny in a New South Africa (1991) *Acta Juridica* 116 at 124.

¹³⁵Bennett TW *Human Rights and the Customary Law under the South African Constitution* (1999) 1.

¹³⁶One such writer, quoted by Nhlapo (n 95) 269, is Dustain Wai.

Therefore, customary family rules should be evaluated in the light of African culture rather than other different cultures.¹³⁷ Bearing in mind that cultures differ, what may be viewed to be unequal in one society may not be so in another. Because of this fact, it is inevitable, therefore, that the practice of polygamy, for example, should not necessarily be seen as being at variance with women's rights.

Further, under customary laws, marriage is an alliance between two kinship groups for purposes of realising goals beyond the immediate interests of a particular husband or wife. The goals aimed at in this type of marriage have been summarised to be procreation and survival. Both of these goals can be seen to have been essential for the well-being of the larger group. Wives and children were an economic asset, and the rules that developed around them were part of the survival strategy.¹³⁸

Because the goals of a customary marriage are procreation and survival, the institution of polygamy was designed, among other reasons, to lessen the burden of one wife bearing so many children that it could be detrimental to her health.

¹³⁷Dlamini (n 92) 22 also pointed out this fact in his discussion.

¹³⁸Nhlapo (n 54) 160.

6.6 Conclusion

This chapter set out to look at how law reform has addressed the intricate relationship between the right to culture and women's rights. In general, it has been observed that most customary family laws that are at variance with women's rights, have been replaced by provisions that are in total disregard of customary laws. This approach, it could be argued, will affect the implementation of these reformed laws as they lack cultural legitimacy.

Having said that, however, the specific findings of this chapter are now concluded with a summary of the Bill and DEPA.

6.6.1 Concluding remarks on the Bill

The Bill is an interesting development in Malawian law. It is a commendable effort, especially as it seeks to provide equal protection for all women in Malawi irrespective of the marriage regime to which they belong. It is clear that the Bill goes a long way to addressing formal equality of women married under customary laws. The Bill has several provisions that directly or indirectly address aspects of African customary laws. Crucially, it recognises monogamous African marriages and accords them full status in law, but it redefines the rights and obligations of the parties to these marriages in ways that depart from African customary family laws. For example, the Bill, while recognising the significance of *lobola* or *chinkhoswe*, provides that these

are not overriding considerations determining the rights and obligations of parents in respect of their children. The Bill also incorporates provisions of African customary laws. A prime example is the provision on damages to be paid by a person who impregnates a woman to whom he is not married. The Bill also takes a bold step in prohibiting polygamy. These provisions are vital to the protection of women's rights.

However, it has also been pointed out that some areas require further consideration. Examples include the retroactive application of the Bill. The Bill should apply to all marriages whether contracted before or after it comes into force. Otherwise there will be unequal protection under the law. The rights and obligations of parents in respect of children born out of wedlock should be clarified. Lastly, the Bill must clarify the legal position of parties to existing polygamous unions and include protective measures in favour of women who are parties to these unions.

6.6.2 Concluding remarks on DEPA

The transformation of customary law proposed in DEPA probably shows the direction in which Malawi is moving in creating a new society and laws. Reconciling the various systems of law with modern human rights and the Constitution is an unavoidable process. However, certain aspects of DEPA also show the practical problems of this process, and how some of the most important provisions of the new laws are likely to be of little benefit to women

married according to customary laws for whom transformation is intended. For example, DEPA essentially aims at extending civil intestate succession to customary marriages, with some modifications to allow for polygamous marriages. The problem is that the individualistic basis of the civil law of intestate succession cannot accommodate the need in customary law to protect group rights.

It is beyond the scope of this thesis to consider what the alternatives are, but one question for reflection may be posed: is the simple extension of the common law and its complexities to the customary laws of inheritance the way to go in the process of reconciling the inequities of the latter with women's rights?



Chapter 7

The Bill of Rights and courts’ application of African customary family laws



7.1 Introduction

The Bill of Rights in the Malawi Constitution contains a number of operational provisions that guide the courts with respect to conflicts between fundamental rights.¹ However, no provision speaks directly to the resolution

¹For example, Section 5 of the Malawi Constitution provides: ‘Any act of Government or any law that is inconsistent with the provisions of this Constitution shall, to the extent of such inconsistency, be invalid’. See also Section 11 of the Malawi Constitution.

of tensions between them. As a result courts have been obliged to develop doctrines designed to harmonise the demands of fundamental rights with the dictates of constitutional provisions that engage the exercise of power by various other branches or spheres of government. It is for this reason that this Chapter examines how courts go about reconciling substantive provisions in the Bill of Rights aimed at protecting women's rights and some African customary family laws that appear to conflict with them. In simple terms, the Chapter aims at discussing the approach that the Malawi courts have taken to advantage the rights of women married under customary family laws and to bring them in line with the Bill of Rights and international standards for the protection of women's rights. This will include examining some relevant judgments since 1994.²

This Chapter is divided into four sections. The second section examines the role that MC have played in reconciling the right to culture and women's rights. The third section analyses the approach that HC have taken thus far. In the fourth section a critical analysis of the challenges that courts face in the application of customary laws is made. In turn, the analysis, coupled with research findings, provides the direction which legal and institutional

²These judgments were selected randomly from the courts that I visited during the period April-May 2006. The criteria for selection were based on a number of factors: first, whether the case file was a matrimonial case in which customary family law would be applicable; secondly, the availability of the case file; and thirdly, the court proceedings that I had attended. The overriding consideration was whether that court was going to deal with a divorce case in which customary law would be applied or not.

reforms should take. The last section is a conclusion.

7.2 Examination of role of MC in practice

As previously noted MC do not have jurisdiction in constitutional matters.³ Thus, these courts cannot decide on the constitutionality of rules of African customary laws. Given that, as pointed out in Chapter 2, almost all customary marriage issues are instituted in MC, an examination of how these courts are handling the conflicting relationship between the right to culture and women's rights is very important. In the following discussion, therefore, I examine how MC are handling the conflicts between customary law and women's rights.



7.2.1 Divorce

In Chapter 4 various grounds upon which a customary marriage can be dissolved were examined. The customary rules governing who can commence divorce proceedings in both matrilineal and patrilineal marriages were also examined. However, from the case files reviewed, it was noted that the majority of divorce claims in the courts that I visited are commenced by women.⁴

³See the discussion in Chapter 3.

⁴That is approximately 90 percent of the 135 divorce cases heard by all the courts that I visited.

This position was also noted by a senior court clerk in Lilongwe MC who stated that: ‘previously most divorce cases were brought to court by men. This position has changed in that more women are having the courage to commence divorce proceedings.’⁵

Two reasons were given for this position. First, this was attributed by most of the magistrates interviewed⁶ to the fact that it is women who require a formal divorce, because without it they would have problems in remarrying since a wife under customary law is not allowed to marry more than one husband.⁷ Indeed during the court observation in Mzuzu MC, most women who wanted their marriage dissolved stated that they want a divorce so that they can remarry.⁸

For example, in *Ireen Jamson v Blessings Gama*,⁹ a woman had lost her husband in 2004. According to the patrilineal marriage system, as noted in Chapter 4, the death of a husband does not dissolve a customary marriage. Therefore, this woman was not free to remarry. For this reason, the woman had to ask the Court to formally divorce her from her deceased husband so that she could go back to her home village and remarry. In granting the order sought, the magistrate stated that ‘since your husband died, you are

⁵Interview conducted on 16 May 2006 at Lilongwe MC.

⁶That is, 12 out of 15 magistrate interviewed.

⁷See also the discussion in Chapter 4.

⁸I attended a court session on 3 May 2006. The presiding magistrate was the Chief Resident Magistrate.

⁹Civil Cause No. 137 of 2006, Mzuzu MC (Unreported).

free to go to your family and remarry’.

This decision is striking for three reasons. To begin with, it begs the question whether after the death of a husband the woman was indeed in law free to go and marry. What law? That was the very question posed by the respondent’s (the brother in-law of the applicant) reliance on the patrilineal customary law. Under that law, the death of a husband does not dissolve a customary marriage. The magistrate’s decision, without addressing this question, was based, it is assumed, on the constitutional provision of the woman’s right to marry,¹⁰ which did not take into consideration customary law rules.

Secondly, in the above decision one does not find any reference to either the Malawi Constitution or to even the common law. Instead, the patrilineal customary law is denied enforcement because, arguably, it was incompatible with the individual’s right to marry. It is, however, noted that such decision thus makes explicit what can be suggested as an important factor behind many decisions rejecting the application of specific customary family laws in favour of rights contained in the Bill of Rights.

Thirdly, the Court did not pay due regard to the intricate customary rule of *lobola* and its important implications for granting the woman the right to marry or not. In the patrilineal system, it must be remembered that the validity of a customary marriage depends on the *lobola* contract. This

¹⁰Section 22 (3) of the Malawi Constitution that provides for the right to marry.

contract, as noted in Chapter 4, is between the husband's family and the wife's parents. Consequently, no dissolution of the marriage can be effected unless the return of *lobola* by the wife's parents to the husband's family is negotiated. The return of it lobola signifies the termination of the marriage under customary law. This officially terminates the marriage, and thus frees the widow to marry. The size of the *lobola* to be returned¹¹ depends on whether there were children of the marriage or not. By failing to address this important customary rule, the Court failed to protect the woman's right to marry in its entirety. It is suggested that the Court should have ordered that, upon the return of *lobola*, the woman was free to marry, because the customary rule, that denies a wife the right to marry after the death of her husband, was a violation of her rights. This position, it is submitted, would have been a proper reconciliation of the offending customary rule and women's rights. In this particular instance, a woman may still not be able to marry because of the *lobola* issue that was left unresolved by the Court. Such a decision, I am afraid, may be a mere paper judgment.

Secondly, the magistrates interviewed also reasoned that, because of civic education regarding women's rights by NGOs in the communities, more women are now able to know their rights and come to court to seek a remedy. They are ignoring the customary rule of initiating divorce through their male guardians.¹² However, because of the customary rule that it is the husband

¹¹In the number of head of cattle.

¹²See the discussion by Ibik JO *Restatement of African Law: Malawi Vol 1, The law of marriage and divorce* (1970).

who has the right to divorce a wife, it was observed that women indirectly ask the court to dissolve their marriage by use of the Chewa word *mundisuzule*, which literally means that a wife is asking the husband to formally divorce her in court.¹³

It is also important to note the following: first, that divorce is granted in the majority of cases.¹⁴ This supports the fact that at customary law any reason is good enough to end a marriage. By dissolving these marriages, courts are, arguably, fulfilling the right to divorce which automatically comes into the statutory provision by virtue of Section 22 (4) of the Malawi Constitution on the right not to be forced to marry.¹⁵

Furthermore, in most cases, the case files reviewed and the court observations made, show that there was little or no discussion by the court of the facts alleged by the applicant as proof that the marriage had irretrievably broken down. Magistrates seem not to be concerned about the issue at all. As a result of this, customary marriages seem to be dissolved quite easily.¹⁶

¹³See, for example, the cases of *Elizabeth Maluwasa v Smart Maluwasa*, Civil Cause No. 420 of 2004, Blantyre MC (Unreported); *Eunice Makamu v Luka Makamu*, Civil Cause No. 586 of 2005, Mzuzu MC (Unreported); *Eliza Kalanjira v Dickson Kalanjira*, Civil Cause No.8 of 2001, Lilongwe MC (Unreported); *Thokozire Kalanjira v Darton Kalanjira*, Civil Cause No. 756 of 2005, Mzuzu MC (Unreported).

¹⁴For example, in approximately 93 percent of the cases that I reviewed, the divorce sought was granted.

¹⁵Judge Kumange in the case of *Zindawa AB v Zindawa E*, Civil Appeal Case No. 27 of 2002, HC, Lilongwe District Registry (Unreported).

¹⁶From a court observation that I made, it was noted that within less than an hour a

This may partly explain the high percentage of cases ending in divorce. This position is striking. According to Section 22 (1) of the Malawi Constitution, the institution of the family is entitled to the protection by society and the State. This, therefore, means that courts have a duty to protect the families and should not be seen as front-runners in breaking them. The fact that they seem not to discuss the issues thoroughly is, in my opinion, a failure on their part to fulfill their constitutional duty of protecting the family. It, is however, noted that such an exercise would conflict with the right not to force them into marriage if the intention of the parties is to divorce.

7.2.2 Recognition of customary marriages

In Chapter 6 it was noted that Section 22 (5) of the Malawi Constitution alters the procedures to be followed to validate a customary marriage.¹⁷ This section recognises marriages in which the usual formalities aimed at validating a customary marriage are not followed. It was further noted that this section does not state when a marriage by repute or permanent cohabitation could validly be recognised. By default courts are left to decide what is fit for each case. The result is inconsistencies in the protection afforded to women. In this subsection, therefore, an attempt is made to show how courts are currently reconciling the customary rules of *lobola* and *chinkhoswe* and Section 22 (5) of the Malawi Constitution in relation to a customary marriage.

magistrate had dissolved four marriages.

¹⁷See section 6.2.5 in Chapter 6.

An analysis of cases decided at the Blantyre, Lilongwe, and Mzuzu MC reveals that courts have not been consistent in their adjudication of unions which had not been preceded by *lobola* or *chinkhoswe*.¹⁸ In a number of cases courts, especially in regions which are predominantly matrilineal and also where a court in a patrilineal region is handling a case in which matrilineal customary law is applicable, have consistently held a marriage to exist even where *chinkhoswe* had not taken place. Courts have gone further, and made orders with regard to property and children of the marriage as if a valid customary marriage existed. For example, in *Violet Mwale v Harold Mwale*¹⁹ a wife wanted to divorce her husband on the grounds of adultery and cruelty. The wife and the husband came from a matrilineal customary system. The marriage was not preceded by *chinkhoswe*. The court in granting the order sought noted that there was no marriage under customary law. However, using Section 22 (5) of the Malawi Constitution ‘there was no express provision to stop the court from assuming that marriage existed’.

Another example is *Tafere Mafusa v Exton Mtemankwawa*²⁰ where a wife wanted to divorce her husband because he had a girlfriend. She came from a patrilineal customary marriage system and the man from a matrilineal one. Their union had neither been preceded by *lobola* nor *chinkhoswe* ceremony. According to customary law there was no valid marriage. The husband did

¹⁸I conducted research at these courts in April and May 2006.

¹⁹Civil Cause No. 470 of 2005, Lilongwe MC (Unreported).

²⁰Civil Case No. 136 of 2006, Mzuzu MC (Unreported).

not contest the case. The Court made a pronouncement dissolving the marriage. The Court stated that, although this marriage had not been preceded by *chinkhoswe* or *lobola* negotiations, the parties had lived together for one year and had a child, and that therefore, it was a marriage according to Section 22 (5) of the Malawi Constitution. The Court went further and made orders with regard to property and the child.

Thus, in the case of *Tafere* we see that the Court regarded a one year period as enough to recognise that a marriage existed under Section 22 (5) of the Malawi Constitution. On the other hand, in *Violet* the court did not even know the period as to how long the parties had been together and yet the court recognised the existence of a marriage.

Similarly, in *Thokozile Kalanjira v Darton Kalanjira*,²¹ the complainant petitioned for divorce on the ground that the defendant was guilty of bad behaviour. The Court stated that, although there was no *ankhoswe*, the parties had lived together for five years and had children, and that therefore a marriage existed. Similar approaches are also observed in the cases of *Gracian Villi v Halliet Mphundi*²²; and *Tamala Chunda v Wanangwa Mwafulwali*.²³

The above cases, it is submitted, demonstrate the significance of the role courts play in protecting women's rights. Strict application of formalities for a valid marriage may leave many women and children, who live in unions

²¹See n 13 above.

²²Civil Case No. 126 of 2006, Mzuzu MC (Unreported).

²³Civil Case No. 127 of 2006, Mzuzu MC (Unreported).

that are not recognised as valid marriages at customary law, unprotected. By applying Section 22 (5) of the Malawi Constitution which, among others, recognises marriages by repute or permanent cohabitation, courts are indirectly protecting the rights of women and children.

However, we see that there is no prescribed period for which parties must live together before they could be declared to be married. Each court decides according to what it thinks is right. This position, unfortunately, does not offer uniformity in the protection offered to women. If enacted the Bill, as discussed in Chapter 6, will provide a solution to these inconsistencies.²⁴

On the other hand, on the protection of customary family laws and the right to culture, two issues can be deduced from the courts' jurisprudence. First,

²⁴Section 14 of the Bill lays down the requirements for recognising marriages by repute permanent cohabitation. It provides that:

'A marriage by repute or permanent cohabitation shall only be recognised under this Act if there is evidence of- mutual consent; and capacity to enter into marriage as provided under this Act. Before making a finding that a marriage by repute or permanent cohabitation exists, a court shall consider- the length of the relationship; the fact of cohabitation; the existence of a conjugal relationship; the degree of financial dependence or interdependence and any agreements for financial support between the parties; ownership, use and acquisition of property; the degree of mutual commitment to a shared life; whether the parties mutually care for and support children; the reputation of the parties and the public display of aspects of their shared relation; and any other factors that the court considers fit.'

courts are ignoring customary rules of *lobola* and *chinkhoswe*, that validates customary marriages in patrilineal and matrilineal marriages, respectively. This automatically renders the institution of *lobola* and *chinkhoswe* outdated. This position, unfortunately, is not what the majority of the people who follow this customary rule would like to see. The discussion in Chapter 4 has indicated that the MHRC had revealed that the institution of *lobola* still receives a lot of support. Therefore, we see that courts' judgments are detached from what the peoples value. This position, it is submitted, has negative implications for the protection of the rights of women and children.

If enacted, however, the Bill as discussed in Chapter 6, seems to recognise these institutions. It would, therefore, be interesting to see how courts are going to marry the requirements of Section 27 of the Bill and marriages by repute or permanent cohabitation. The question that can be posed is: is replacing of a customary marriage with marriage by repute or permanent cohabitation the way to go in reconciling cultural rights and women's rights? It is submitted that development of customary family laws that go against the enjoyment of women's rights is the way to go and not replacing with a different system of marriage.

Secondly, it is noted that courts are recognising a marriage as valid which would not have been valid under customary family laws. They do this by replacing customary marriages with marriages by repute or permanent cohabitation. Such a position does not take into account the fact that marriages

by custom are equally recognised under the same constitutional provision.²⁵ Section 22 (5) of the Malawi Constitution provides:

‘Sub-sections (3) and (4) shall apply to all marriages at law, custom and marriages by repute or permanent cohabitation’.

From the foregoing provision we see that the Malawi Constitution recognises that marriages by custom are equal to any other marriage, whether at law or marriages by repute or permanent cohabitation. The assumption that can be made from this constitutional provision is that the drafters of the Constitution did not intend that one form of marriage should replace any other. Moreover, as has been noted in Chapter 1 footnote 13, most Malawians marry according to customary laws. Therefore, it is my submission that by replacing customary marriages with marriages by repute or permanent cohabitation, courts not only fail to provide an adequate response to women who wish to live in accordance with their cultural rights, but also lack a constitutional justification to make such response a good part of a well designed constitutional approach that has taken into account the fact that the majority of Malawian women live according to customary family laws.

On the other hand, in Mzuzu, where most cases were from predominantly patrilineal customary, courts tended to invalidate marriages that did not follow customary family law procedures. For example, in the case of *Florence*

²⁵Section 22 (5) of the Malawi Constitution.

*Mwale v Gervazio Phiri*²⁶ the parties had been living together for nine years, since 1993. Their relationship was not formalised according to patrilineal marriage rules. Thus, according to patrilineal marriage rules there was no marriage. The parties had children born out of this relationship. In 2004 the wife brought an action to divorce her husband. The Court dismissed the action. The Court stated that it cannot preside over a marriage that is not valid in law, since there was no proof that *lobola* had been negotiated. In dismissing the action, the Court did not make any orders with regard to the children born out of this marriage. Similarly, in *Charity Msuku v Lloyd Phiri*²⁷ the Court dismissed the case because it reasoned that if no *lobola* had been paid, there was no marriage. Furthermore, in *Joshua Kumwenda v Angela Kachali*²⁸ where the facts were almost similar to those of the above cases, the Court, after dismissing the action, ordered that the man should maintain the children, failing which the wife was advised to bring affiliation proceedings.

Unlike in courts that are in predominantly matrilineal societies, in patrilineal societies courts are protective of cultural rights, especially where parties are from patrilineal system, without recognising the effect of such protection on women's rights. Thus, it can be argued that these courts fail to protect women because they dwell on the formality of observing the *lobola* custom

²⁶Civil Cause No. 4 of 2004, Mzuzu MC (Unreported).

²⁷Civil Cause No. 117 of 2004, Mzuzu MC (Unreported).

²⁸Civil Cause No. 34 of 2004, Mzuzu MC (Unreported).

at the expense of children's and women's rights. Such decisions also fail to recognise the social reality that, in urban areas, a woman living together with a man in the same house is socially recognised as a spouse notwithstanding the absence of *lobola*.²⁹ It is, however, important to note that the Bill,³⁰ if enacted, will rectify the harshness of such decisions on the rights of women and children. The institution of formalities for a marriage will no longer regulate the rights and obligations of the parties to a marriage.³¹

It is, however, suggested that, as a way forward, courts, instead of dismissing cases where formalities were not followed, should order that parties must first formalise their union and then come back to court to seek the relief sought.³² This would, however, not be an unfamiliar practice in respect of patrilineal customary law marriages. Men are supposed to pay *lobola* before they are given the right to bury their wives, where *lobola* was not paid during the lifetime of the deceased wife.³³

Also, in recognising the social reality in cities, where parties live together

²⁹See also Chimango LJ *Women without "Ankhoswe" in Malawi: A discussion of a legal position of women who enter into informal marital relations'* (Unpublished) (Undated) who expressed similar sentiments with respect to the institution of *chinkhoswe* in matrilineal systems.

³⁰As discussed in Chapter 6.

³¹See Section 49 of the Bill.

³²Of course the practicality of this suggestion takes into account the fact that the parties are at the point of divorce and would therefore not be willing to formalise such a union.

³³My own experience.

for a long time without formalising the union, courts should invalidate such a union only when consent of either party to the marriage is lacking. This approach would be in line with the constitutional principle that requires that no one should be forced into a marriage.³⁴

In conclusion, we see that courts are divided. Some courts seem to be relying on constitutional provisions that protect children's and women's rights and avoid strict application of customary family laws. Other courts apply strict customary family laws that do not provide protection to women and children involved in such relationships.

It is also interesting to note that where parties are from matrilineal customary marriage system, courts whether in predominantly patrilineal or matrilineal regions tend to recognise a marriage as valid even though such a union was not preceded by *chinkhoswe*. Thus, we see that women's and children's rights seem to be better protected by courts if women are from matrilineal customary systems. If enacted, the Bill will address this anomaly because, among other issues, it lays down guidelines that a court may consider to validate a marriage under Section 22 (5) of the Malawi Constitution, specifically marriages by repute or permanent cohabitation.

³⁴See Section 22 (4) of the Malawi Constitution.

7.2.3 Custody of children

Section 24 (1) (iii) of the Malawi Constitution provides that women have the same rights as men in civil law, including the right:

‘... to acquire and retain custody, guardianship and care of children and to have an equal right in the making of decisions that affect their upbringing’.

Children are also entitled to the right to ‘know, and to be raised by, their parents.’³⁵

These provisions have significant implications for African customary family laws relating to custody of children. As noted in Chapter 4, in patrilineal societies children ‘belong’ to the family of the male spouse, unless *lobola* was not negotiated. In matrilineal societies children ‘belong’ to the female spouse’s family.³⁶ Section 24 (1) (iii) of the Malawi Constitution alters these customary rules in that they give both spouses equal rights to custody over their children irrespective of whether they were married under customary laws or not.

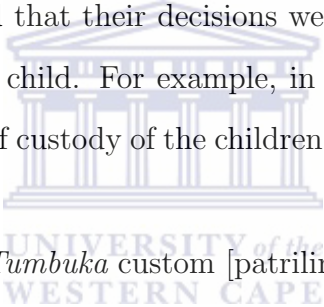
However, the above constitutional provision does not necessarily mean that spouses have the right to joint custody over children. All it guarantees is the equal opportunity of both spouses to contend for custody. Thus, the actual

³⁵Section 23 (3) of the Malawi Constitution.

³⁶*Chakhumbira v Chakhumbira* Civil Appeal Case No. 39 of 1979, NTAC (Unreported).

decision to grant custody to one spouse or both will depend on various factors including, the best interests of the child. In respect of customary marriages, African customary family laws constitutes a relevant consideration in this regard. In this part an attempt is made to show how courts are currently addressing the issue.

An examination of the cases dealing with custody of children after dissolution of a customary marriage, displayed a bias against applying or considering African customary laws in custody proceedings. Of the 150 cases that dealt with the issue of custody of children following dissolution of a customary marriage, 134 mentioned that their decisions were based on the principle of the best interests of the child. For example, in *Mercy Nyirenda v Lusungu Mwenda*,³⁷ on the issue of custody of the children, the magistrate stated that:



‘according to the *Tumbuka* custom [patrilineal], where *lobola* has not been paid, the custody of the child goes to the mother. However, in line with the Constitution, the issue of custody has to be decided in the best interests of the child’.

For that reason, custody of the child went to the father. The decision taken by the Court to award custody of the child to the father where *lobola* had not been negotiated was a departure from the customary rule that, where *lobola* has not been negotiated, custody of the child goes to the mother and her

³⁷Civil Cause No. 118 of 2003, Mzuzu MC (Unreported).

family. Similarly, in *Patricia Banda v Andrew Banda*³⁸ where parties before the Court were from Nsanje that follows the patrilineal system of marriage, custody of the child after this marriage was dissolved was granted to the mother and not the father as would have been required by the patrilineal customary law. The Court reasoned that because the child was still young, its best interests would be properly looked after by the mother. Again, in *Khetase Kapila v Haris Skilter Kapila*³⁹ where the marriage was governed under the patrilineal customary laws, in granting custody of children to the mother the Court said that:

‘In some customary rules, issues of custody of children are determined by a particular culture. For instance *Nkamanga v Phiri* 1966-68 African Law Series Malawi, 106. The one at fault loses custody of the child. But the rule is subject to the best interest of the child principle.’

With the above reasoning, the Court granted custody to the mother despite the fact that the mother⁴⁰ was at fault for the dissolution of the marriage. Furthermore, in *Frimley Fulukiya v Beatrice Fulukiya*⁴¹ the marriage was contracted according to matrilineal customary family laws. When this marriage was dissolved, the Court granted custody of the first child (10 years) to the

³⁸Civil Cause No. 321 of 2004, Blantyre MC (Unreported).

³⁹Civil Cause No. 32 of 2002, Lilongwe MC (Unreported).

⁴⁰The wife committed adultery and was therefore at fault.

⁴¹Civil Cause No. 87 of 2004, Blantyre MC (Unreported).

father and the second child (2 years) to the mother. The Court reasoned that custody of the 2 year old child was granted to the mother because the child was still very young and therefore her welfare would best be looked after by the mother. Otherwise, the Court felt that if both children were of old age, custody of both children was to be granted to the father. The decision taken by the Court to grant custody of one child to the father was a departure from the matrilineal customary rule that custody of children goes to the mother and her family. Similarly, in *Cathy Assani v Andrew John*,⁴² where the marriage was contracted according to matrilineal customary family marriage system, the Court granted custody of children to the father and not the mother. In invoking the best interests of the child principle, the Court reasoned that the father was in the position to properly look after them. The matrilineal customary family rules were ignored as a guiding principle. Its application in this case, it should be noted, would have resulted in custody being awarded to the wife (mother).

In addition to the above cases, a departure from the strict customary rules in favour of the best interests of the child principle was observed in issues of maintenance of children. In *Francis Phiri v Cecilia Phiri*⁴³, for example, where the marriage was contracted according to matrilineal customary marriage laws, on the issue of custody of the child after divorce, the Court granted it to the mother but ordered that the father maintain the child until

⁴²Civil Cause No. 21 of 2003, Zomba MC (Unreported).

⁴³Civil Cause No. 483 of 2005, Lilongwe MC (Unreported).

that child reaches 18 years of age. It should be observed that in granting custody of the child to the mother, the Court followed the matrilineal customary rule that children belong to the wife and her family. However, as a departure to this customary rule, we see that the Court further ordered that the father maintain the child until the child reaches majority age, which is 18 years. The duty to maintain the child under strict matrilineal customary laws, as discussed in Chapter 4, lay in the hands of the brother to the wife (maternal uncle) and not a husband. This rule was well elaborated in the case of *Aisha Jawadu v Edward Jawadu*⁴⁴ where the Court, in deciding who should have custody of children after the marriage was dissolved, said:

‘In matrilineal customary law society, children remain with the mother or maternal uncle upon dissolution of the marriage. This is regardless of whose fault it was for the breakdown of the marriage. This is because the children take the lineage of their mother, unlike in the patrilineal set up where they take the lineage of the father. The father in matrilineal society has no customary obligation to **maintain his children** after divorce since they do not belong to him at custom. But due to change of life style of Malawian society and economic focus, courts have developed the principle that the welfare of the child is paramount, see, for example, *Margaret Kafele v Kamowa* 1968-70 African Law Reports, Malawi Series, 146.’ [Emphasis added]

⁴⁴Civil Cause No. 361 of 2005, Lilongwe MC (Unreported).

In this case, the Court granted custody of children to the mother but ordered the father to maintain the child based on the best interests of the child principle. Similar instances where courts have granted custody to mothers but ordered that fathers maintain children after divorce of a matrilineal customary marriage were observed in the cases of *Jenifa Nthukwa v Rodney Chapinda*,⁴⁵ *Keturia Phiri v George Phiri*,⁴⁶ *Jessie Namvenya v Fred Kaphyola*,⁴⁷, and *Edna Chigoni v Blessings Matiya*.⁴⁸

The decisions of the courts in the above cases need some comment. First, one cannot but question and wonder how the whole decision of what is in the best interests of the child was arrived at. The cases reviewed show that there is no proper inquiry to find out whether the husband or the wife would best be given custody of the child. This position brings us to the question that has been frequently asked: what are the factors that a court must consider in determining what would be in the best interests of the child, and apply in a given case?

This problem has been there even under the common law rule of the best interests of the child. In the Malawian case of *Kamcaca v Nkhota*⁴⁹, Bolton J, in considering what is in the best interest of the child, stated:

⁴⁵Civil Cause No. 36 of 2005, Lilongwe MC (Unreported).

⁴⁶Civil Cause No. 261 of 2005, Lilongwe MC (Unreported).

⁴⁷Civil Cause No. 19 of 2002, Mzuzu MC (Unreported).

⁴⁸Civil Cause No. 275 of 2004, Blantyre MC (Unreported).

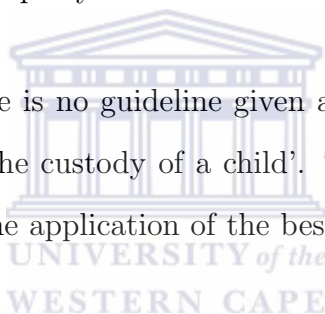
⁴⁹1968 MLR 529.

‘When there is a dispute about custody each party may be able to advance reasons why an order should be made in his or her favour and in Rhodesia at any rate, as I have just emphasised, it has been held that the welfare of children is paramount’.

In *Laureen Pereira Kamangira v Jones B Kamangira*⁵⁰ Chombo J said that:

‘in considering what is in the best interests of a child, the courts must examine all issues surrounding the custody of the child before deciding which party must have custody’.

In all these cases there is no guideline given as to what would constitute ‘all issues surrounding the custody of a child’. This, as pointed out above, presents difficulties in the application of the best interests of the child principle to specific cases.



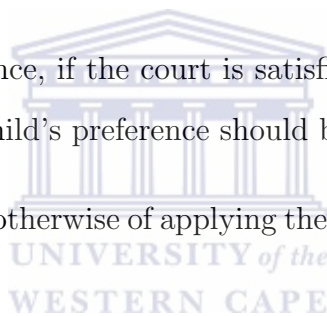
However, in South Africa some development has taken place with regard to factors to be taken into account in assessing how best the child’s interests may be determined. These are outlined in *Mc Call v Mc Call*.⁵¹ This case involved a custody and access dispute. Some of the listed factors include:

1. the love, affection and emotional ties which exist between a parent and a child and the parent’s compatibility with that child;

⁵⁰Civil Cause No. 266 of 2004 HC, Lilongwe District Registry (Unreported).

⁵¹1994 (3) SA 201 (C).

2. the capabilities, character and temperament of the parent and the impact thereon on the child's needs and desires;
3. the ability of the parent to communicate with the child and the parent's insight into, understanding of and sensitivity to the child's feelings;
4. the ability of the parent to provide for the educational well-being and security of the child, both religious and secular;
5. the capability of the parent to give the guidance the child requires;
6. the mental and physical health and moral fitness of the parent;
7. the child's preference, if the court is satisfied that, in a particular circumstances, the child's preference should be taken into consideration;
8. the desirability or otherwise of applying the doctrine of same sex matching.



It would, therefore, mean that courts in South Africa should use, among others, the listed factors in varying weightings as the basis in the decision-making matrix when the welfare of children is at issue. In view of the fact that Malawi courts may be compelled to use comparable foreign case law,⁵² the above factors would equally apply, when assessing what would be in the best interests of the child.

⁵²Section 11 (2) (c) of the Malawi Constitution.

It should, however, be noted that these factors are, in my opinion, not exhaustive of factors that a court may consider. A court may consider other factors that would ensure that the decision reached is in the best interests of the child. For example, the age of the child. In addition to this, it should also be noted that not all the factors listed above can apply in each and every case. Depending on the social background of the parties before a court, some of these factors may not be applicable. In most customary marriages, for example, factors such as communication with a child would not be determinative. Communication, in my opinion, may in some cases mislead the courts and result in them making orders that are not in the best interests of the child. Children under customary laws are educated/trained not to freely communicate with their parents.⁵³ Lastly, some factors, such as the capacity of the parent to give the guidance the child requires, are difficult to prove. How would a court solicit evidence to show that a parent is capable of giving a child the guidance required, or not?

Second, it was generally observed that in the Mzuzu MC, which is located in a predominantly patrilineal region, the decisions of whom to give custody of the child was inclined towards fathers.⁵⁴ Similarly, in the Lilongwe and Blantyre MC, which are located in predominantly matrilineal societies, the

⁵³Through my own experience as an African child, a child who is shy and not freely giving his/her opinions in the presence of older people is regarded as a respectful child. This position is not the same with westernised children.

⁵⁴For example, approximately 80 percent of the cases that dealt with custody of children, custody of children was granted to fathers.

decisions inclined towards mothers.⁵⁵ This position, as also noted by Bennett,⁵⁶ brings us to the conclusion that the influence of cultural beliefs- that the best interests of the child will, in most cases, influence the courts to grant custody of the child to fathers in patrilineal systems and to mothers in matrilineal systems- cannot be ruled out. It is thus submitted that the fact that courts mention the best interests of the child does not mean that in principle cases are indeed decided according to it.

In summary, we see that some courts are indirectly protecting cultural rights rather than women's rights. They use the best interests of the child principle as a shield to conceal their actual belief as to who should have custody of the child. This position, unfortunately, does not benefit women, especially in patrilineal systems, under whose customary family laws they have no right to custody of children after divorce.⁵⁷

It should also be noted that, apart from the cases reviewed, most magistrates and judges interviewed⁵⁸ stated that, when faced with custody issues, they do not consider customary laws and cultural values that are discriminatory to women. One magistrate⁵⁹ said:

⁵⁵For example, approximately 80 percent of the cases that dealt with custody of children, custody of children was granted to mothers.

⁵⁶Bennett TW 'The Compatibility of African Customary Law and Human Rights' (1991) *Acta Juridica* 18 at 24.

⁵⁷See the discussion in Chapter 4.

⁵⁸That is eleven out of 15 magistrates and four out of five judges.

⁵⁹Interview with a First Grade Magistrate in Mzuzu MC on 5 May 2006.

‘... custody of children in my judgments is mostly based on the best interests of the child principle which is not based on customary laws that dictates that only husbands, where *lobola* was paid, should be awarded custody.’

However, the practice on the ground does not reflect this rhetoric. The fact that there is no proper assessment made by the MC before making a custody order leaves a lot to be desired.

7.2.4 Property after divorce

Section 24 (1) (b) of the Malawi constitution, as discussed in Chapter 4, is to the effect that on the dissolution of a marriage, women and men would have the same property rights. This provision, it is submitted, has significant implications for African customary laws relating to distribution of property after divorce of a customary marriage.

In this regard it was noted that most MC make orders for the sharing of matrimonial property by the spouses after divorce. These orders are being made without any consideration of who owns what. For example, in *Tafere Mafusa v Exton Mtemankhwawa*,⁶⁰ the magistrate, after asking what property the divorcing couple had, went on to make distribution orders without paying any regard to the issue of who owns what. This practice is commend-

⁶⁰See n 20 above.

able for two reasons. First, most women make non-monetary contributions towards acquiring property for the “house”.⁶¹ Such decisions, it is assumed, take cognisance of the harsh reality that women face.

Secondly, such decisions provide protection to women beyond what the Malawi Constitution is offering, since they are not subject to the constitutional requirement of proving ownership.⁶² Looked at from another angle, since customary rules that apply in relation to distribution of property after divorce are not considered in such judgments, it is doubtful whether they can have an impact in this regard.

On the other hand, the response of the HC in the protection of women’s property rights is rather different. The HC are upholding the rule that was laid down in *Malinki v Malinki and Gomani*⁶³ in which it was stated that ‘where the husband bought a house without the wife’s direct or indirect contribution the wife could not be given a share of it.’

⁶¹White S et al *Dispossessing the widow: Gender based violence in Malawi* (2002) 34.

⁶²Section 24 (1) (b) of the Malawi Constitution states that: ‘on dissolution of marriage women are entitled to a fair disposition of property that is **held jointly** with a husband’ (Emphasis added).

⁶³1978-80 MLR 441.

7.3 Examination of the role of HC in practice

It should be recalled that the HC is vested with original jurisdiction to review any law for conformity with the Malawi Constitution.⁶⁴ In view of the fact that customary family laws that are seen to offend the Malawi Constitution, are to be reviewed by the HC, it is only proper to examine the role that the HC has played since the advent of the Malawi Constitution.

It is, however, important to note that in Malawi since the advent of the Bill of Rights the cases reviewed reveal that no fierce challenges to how customary family laws impact on women's rights have been launched in the HC of Malawi. This position should, however, be contrasted to that in South Africa where a number of applicants have asked the court in various cases to declare certain rules of customary family laws to be in conflict with the liberating spirit of the South African Constitution.⁶⁵ However, the following discussion

⁶⁴Section 108 (2) of the Malawi Constitution provides: 'The High Court shall have original jurisdiction to review any law, and any action or decision of the government, for conformity with this Constitution ...'

⁶⁵See, for example, *Bhe and others v Magistrate Khayelitsha and others, Shibi v Sithole and others, South African Human Rights Commission and Another v President of the Republic of South Africa and Another*, 2005 (1) BCLR 1 (CC); 2005 (1) SA 580 (CC), in which the Court was faced with African women challenging the patriarchal construction of customary laws that favoured the inheritance rights of men over women. The Court ruled that the constitution guaranteed equal rights to women and was premised upon the principle of non-discrimination, including on the basis of sex. The rule of male primogeniture was thus declared unconstitutional as it contravened the right to equality.

will focus on how the operation and application of African customary family laws has been handled by the HC of Malawi thus far.

7.3.1 Recognition of customary marriages

In the preceding section it was noted that most MC are invoking Section 22 (5) of the Malawi Constitution to validate a marriage that would otherwise not have been valid under customary laws. The position taken by the HC is, however, different. The HC seems to attach a lot of value to the customary law requirements for validating a marriage. In *Getrude Gondwe v Matias Gondwe*,⁶⁶ for example, the appellant had fallen in love with the respondent. The respondent proposed marriage and the issue of marriage advocates was initiated. This, however, did not materialise as the respondent father was not happy with the relationship. Whilst the negotiations were still under way the appellant moved in with the respondent. The two had a child. Later on the respondent fell ill and was hospitalised. Upon being discharged the respondent went to live with his parents. This brought about misunderstandings, with the result that the appellant issued summons for dissolution of the marriage. In upholding the lower court's finding that there was no marriage at custom, Judge Twea said:

‘I agree that there was no marriage at custom and in my view
the union would not, on the facts, be viewed as a marriage by

⁶⁶Civil Appeal Case No. 26 of 2002, HC, Principal Registry (Unreported).

cohabitation or repute. The union was less than two years old and there were marriage negotiations going on, although not fruitful. The parties were minors and in need of parental consent. I find that the finding that this was mere friendship, notwithstanding the birth of the child, correct’.

The position adopted by the HC in this case is striking for several reasons. First, we see that there is a difference in approach between the MC and the HC. In the MC, where parties have cohabited for less than two years without formalising such a union, courts have been quick to use Section 22 (5) of the Malawi Constitution, and have regarded such a union as a marriage by repute or permanent cohabitation.

Secondly, the above decision seems to place too much reliance on the customary rules of validating a customary marriage. This position has been so expressed by the Judge’s words: ‘that because the negotiations had not been fruitful there was no marriage’. Thirdly, the Judge observed that the parties were minors and, therefore, needed parental consent in line with the constitutional provision that requires that there should be parental consent to the marriage of minors.⁶⁷ However, it should be stressed that whatever the Malawi Constitution now provides, under customary family laws consent of the guardian is a requirement whether the marriage is taking place

⁶⁷Section 22 (7) of the Malawi Constitution.

between minors or not.⁶⁸ The position adopted by the Judge points to the fact that, in reconciling the right to equality and customary laws, the Court simply ignored constitutional provisions aimed at protecting women's rights and follow customary family laws that may not always protect the rights of women.

7.3.2 Custody of children

Just like the position in most MC, as discussed above, cases involving custody of children in the HC are largely decided by the principle that the welfare of the child is the paramount consideration,⁶⁹ a principle which has no basis for application in relation to customary marriages, as stated in Chapter 4. Almost all cases that have been decided by the HC pay no regard to the customary rules for the affiliation of children after divorce. In *Susan Chabuka v Thokozani Manyika Banda*, for example,⁷⁰ the parties before the Court had been, before the marriage was dissolved, married under Tonga customary laws, which is a patrilineal system. The case before the Court was about custody of their child. According to patrilineal customary laws, the man was

⁶⁸See the discussion in Chapter 4.

⁶⁹For example, *Joseph C Sibande v Edward Mushani and Janet Mushani*, Matrimonial Cause No. 134 of 2004, HC, Mzuzu District Registry (Unreported); *Lauren Pereira Kamangira v Jones B Kamangira*, Civil Cause No. 266 of 2004, HC, Lilongwe District Registry (Unreported).

⁷⁰Matrimonial Cause No. 1 of 2000, HC, Principal Registry (Unreported).

entitled to custody of the child. However, in granting custody of the child to the mother, Judge Chipeta⁷¹ said:

‘... it is quite clear from these authorities that regardless of the type of marriage from which issue is born, when the marriage breaks and it comes to the question of considering which parent should have custody of the child, the welfare of the child takes priority’.

However, an exception to this observation is to be found in *Willie Malilo v Maltina Malilo*.⁷² In this case the husband and wife had been, before the marriage was dissolved, married according to matrilineal customary laws. The husband complained to the Court that he had not been given custody of the children born out of this relationship. In upholding the customary rule that in matrilineal marriages a child is affiliated to the mother, Judge Kumange⁷³ held that:

‘Inherently children born under matrilineal society are deemed to be for the wife. If there is departure to that practice, then there must be proof of the prevailing custom through testimony in court’.

⁷¹As above, 4.

⁷²Civil Appeal Case No. 8 of 1997, HC, Lilongwe District Registry (Unreported).

⁷³As above.

It should, however, be noted that the principle of the welfare of the child has been articulated in a number of cases, essentially in the following terms⁷⁴:

‘Whether a parent will have custody or not is determined on whether it is in the children’s best interests to stay with one or the other parent. So that if upon careful consideration of the totality of the facts of the case the children’s custody should be awarded to the father such will the conclusion be’.

As noted in Chapter 4, the Malawi Constitution does not have the best interests of the child principle. However, it may be argued that the above formulation of the welfare of the child principle follows the common law as enunciated in the cases of *Ndasowa v Ndasowa*,⁷⁵ and by Judge Chombo in *Lauren Pereira Kamangira v Jones B Kamangira*⁷⁶

It should also be noted that there are several factors that the HC takes into consideration in determining the welfare of the child. This process is to be contrasted to that of the MC which simply mention the principle without examining relevant factors. The most common factors that the HC consider are the age of the child and the physical availability of a parent to the child.

⁷⁴See, for example, *Joseph C Sibande v Edward Mushani and Janet Mushani* (n 55). See also *Lauren Pereira Kamangira v Jones B Kamangira* (n 39).

⁷⁵Civil Cause No. 657 of 1979, NTAC (Unreported).

⁷⁶See n 39 above.

Age of the child

Judges often repeat in their judgments that the law says that young children are better looked after by their mother. For example, in *Joseph C Sibande v Edward Mushani and Janet Mushani*⁷⁷ the plaintiff and the second defendant were still husband and wife.⁷⁸ They had been married under the customary laws of Tumbuka/Ngoni, which is essentially a patrilineal customary law. The plaintiff and the second defendant quarreled. This made them to separate. The wife went to live in the Chitipa district with their children. The husband remained in the Mzuzu city where he was working. The plaintiff brought an action seeking an order that he be granted custody of the two children.

From the facts of the case it was apparent that the plaintiff had a better job than the second defendant. This, therefore, meant that he was financially better off than the wife. The plaintiff was also living in an urban area, which might have been better than where the second defendant was living, in the sense that he was close to better health care and educational facilities than in Chitipa district. However, in granting custody of the child to the second defendant, the mother, Judge Chikopa⁷⁹ stated that:

‘The children are nine and five years old. The law says young

⁷⁷See n 55 above.

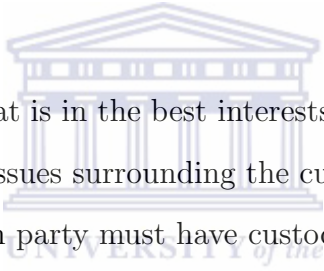
⁷⁸The first defendant was the father of the second defendant.

⁷⁹Judge Chikopa in *Joseph C Sibande v Edward Mushani and Janet Mushani*, (as above)

children are better looked after by their mother. That they should be so looked after unless the facts are such that it would not be in the best interests of the children to so order’.

Physical availability of the parties

The physical availability of a parent to children at home is considered a factor in allocating custody of the children. In *Lauren Pereira Kamangira v Jones B Kamangira*,⁸⁰ in awarding custody of the child to the mother, the plaintiff, Judge Chombo⁸¹ said this:



‘In considering what is in the best interests of a child, the courts must examine all issues surrounding the custody of the child before deciding which party must have custody of the child. In the case before me, evidence has been given that the defendant’s duty necessitates his spending time out of home and that the child is mostly left in the care of a house servant’.

Similar reasoning was also observed in the case of *Joseph C Sibande v Edward Mushani and Janet Mushani*⁸² where Judge Chikopa, in refusing to grant custody of the child to the father, said:

⁸⁰See n 39 above.

⁸¹As above, 5.

⁸²*Joseph C Sibande v Edward Mushani and Janet Mushani* (n 55).

‘... the father is a working father. He is mostly likely, and by his own admission, to spend the better part of the day at work. He said he would employ help to look after the children. Should we allow outside help to look after these children when their mother is alive ready and willing and says she is able to look after them?’⁸³

In summary, we see that HC generally discuss factors to be considered before awarding custody orders. However, just like the MC, they also do not take customary laws on board when the best interests of the child is being examined.



7.4 Challenges of application of African customary family laws by courts in Malawi

There are many theoretical and practical problems that courts in Malawi face, arising from the application of customary laws in a constitutional framework. Key among these is the fact that the Malawi Constitution contains language favourable to both cultural rights and women’s rights, without indicating which of these is to prevail in the event of a clash. The specific problems identified in this study are: that the application of African customary family laws has been hampered by a lack of knowledge of African customary laws,

⁸³As above, 9.

traditionalist arguments and how to resolve the conflicts between customary laws and women's rights. These obstacles, unfortunately, define the extent to which the Bill of Rights in Malawi will have an impact on African customary family laws, and, ultimately, the enjoyment of women's rights.

I now discuss these obstacles.

7.4.1 Lack of knowledge of customary family laws

During the interviews most judicial officers stated that they lacked knowledge of African customary family laws.⁸⁴ As previously noted in Chapter 1, in Malawi there are two classes of magistrates that preside in the SC: viz lay magistrates and professional magistrates. Lay magistrates are mostly chiefs who were presiding in TCs applying customary laws. These chiefs are not formally trained but presumed to be schooled in customary law through pupillage in the life and work of rural societies.⁸⁵ However, this does not meet the needs of modern democratic Malawi. This group of magistrates, however, may be better equipped with customary family rules. On the other hand, professional magistrates receive their academic education at the Law Faculty, University of Malawi. They do not usually receive any instruction

⁸⁴This was so expressed by 95 percent of the magistrates and judges interviewed.

⁸⁵See Mzunda M 'Criminal Law in Internal Conflict of Laws in Malawi' (1985) *Journal of African Law* 129 at 146.

on customary laws, as this subject is rarely taught in the Faculty.⁸⁶ Similarly, the HC is presided over by professional judges. Most of them have been trained at the University of Malawi. Just like the professional magistrates, they may not have received any instruction in the substantive rules of customary family laws.

In addition to the above, it can be argued that in Malawi the problems faced by the British judges in colonial Malawi have not disappeared. While all of the Malawian judiciary is manned by magistrates and judges who are originally from Malawi, a magistrate or a judge often does not come from a particular locality whose customary law he/she has to deal with. For example, in the Mzuzu HC the two judges are both from the matrilineal systems, and yet Mzuzu, as noted in Chapter 1, is predominantly patrilineal. This position, unfortunately, does not render them good arbiters on customary family laws in which they are not conversant.

Apart from this ethnic question, there is, arguably, an enormous educational and cultural gap between a judge with a Western education and the ordinary families with whom he/she may have to deal. Thus, in Malawi the judicial system may have moved from a problem of race and ethnicity to one of class.

Considering that the majority of Malawians marry according to customary law, educating judicial officers in this branch of the law is an urgent neces-

⁸⁶My own experience having gone through the same school.

sity, if we were to see courts protecting the rights of women. In addition, prescribing customary law as one of the core modules for students at the Law Faculty, University of Malawi, is another important necessity.

7.4.2 Determining what law to apply

During the interviews with magistrates and some judges, most of them said that they replace customary rules with common law whenever they envisage a conflict between customary law and a constitutional provision aimed at protecting women's and children's rights. They reasoned that the common law has been tried and tested over the years. It has less human rights violation effects on women's rights than customary laws. This position is regrettable. It is not compatible with the HC's constitutional mandate as far as the development of customary laws is concerned. It is also doubtful whether applying a different system of law to parties to whom that law is not generally applicable can serve to protect the rights of women. What is ideal, it is suggested, is for courts to examine a particular customary rule that is seen to be in conflict with women's rights, and to develop it so that it is in line with the constitutional values.

However, through examining of the courts' practice on the ground, the study has revealed that they do replace customary laws with constitutional provisions for the protection of children's and women's rights whenever there is a conflict between customary law and women's rights. For example, as

earlier discussed,⁸⁷ the customary rules of *lobola* and *chinkhoswe* are being replaced by Section 22 (5) that recognises a marriage by repute or permanent cohabitation. This is a positive development. Customary laws that discriminate against women are being ignored in favour of constitutional provisions that are aimed at the protection of women's and children's rights. However, the question that one can ask is: is replacing customary law the way to proceed in reconciling the right to culture and women's rights?

Furthermore, some magistrates related that they had encountered problems in dealing with two competing customs. The challenge that they face is: whose custom carries the day?⁸⁸ The sentiments expressed by Judge B further elaborate on the matter. He noted:

‘The challenge on the application of customary laws in modern Malawi is not so much on recognition, but, identifying what in our context is the customary law to apply considering the diversity of customs. Over the years customary law is changing. The problem with courts is to establish where custom is today or how far do we go back or come to the present day before we dilute the whole issue of custom. Even if you consider to apply living customary law, it also has its problems because you get different views on customary laws as there are always people moving in and out of

⁸⁷See section 7.2.3

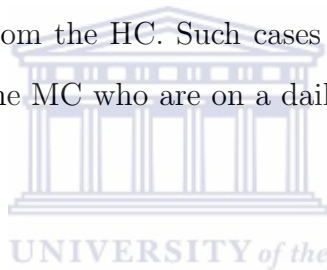
⁸⁸Interviews by some magistrates conducted at the Lilongwe District MC on 16 May 2006.

the cities'.⁸⁹

7.4.3 Proof of customary family laws

Courts generally encounter difficulties in finding expert witnesses to prove a particular customary law. This was also expressed during the interviews as one of the challenge that magistrates and judges face .

In addition to the above, the other problem that courts face is the issue of precedents. There are generally not enough court cases dealing with customary marriages coming from the HC. Such cases would have been helpful in providing direction to the MC who are on a daily basis handling customary marriage cases.



7.4.4 Examples provided by foreign case law

Pursuant to Section 11 (2) (c) of the Malawi Constitution, courts in Malawi may consider foreign case law as well as international law when interpreting the rights set forth in the Bill of Rights. Thus, Malawi courts may look to their neighbours for guidance. The Tanzanian case of *Ephraim v Pastory*⁹⁰ and the Botswana case of *Attorney General v Unity Dow*⁹¹ illustrate

⁸⁹Judge B of the Lilongwe HC on 18 May, 2006.

⁹⁰*Ephraim v Pastory*, [1990] LRC 757.

⁹¹*Attorney General v Unity Dow*, (1992) BLR 119 CA 72; [1991] LRC 574.

that other African states have successfully used international law in resolving the conflict between cultural rights and women's rights.⁹² For example, in *Ephraim v Pastory*, Holaria Pastory, the first respondent, inherited some clan land from her father by will. Finding that she was getting old and senile and had no one to take care of her, she sold the clan land on 24th August 1988 to the second respondent, Gervazi Kaizelenge. This second respondent was a stranger and not a clan member. On 25th August 1988 the appellant, Bernardo Ephraim, filed a suit in the Kashasha primary court praying for a declaration that the sale of the clan land by his aunt was void, as a female under Haya customary laws has no power to sell clan land. In interpreting the anti-discrimination provisions of the Constitution, the HC invoked Tanzania's ratification of major international human rights instruments, including CEDAW, to support a modification of customary inheritance rules so that 'males and females now have equal rights to inherit and sell clan land.'⁹³

Similarly, *Unity Dow* was an attorney, married to a foreigner and had three children. She challenged the 1984 *Citizenship Act*. This Act stated that

⁹²See also Byrnes A 'The Convention on the Elimination of all Forms of Discrimination against Women' in Wolfgang B, Kisaakye EM and Oberleitner G (eds) *Human Rights of Women: international instruments and African experiences* (2002) 120 at 146; Banda F *Women, Law and Human Rights: An African Perspective* (2005) 48; and Butegwa F 'Using the African Charter on Human and Peoples' Rights to Secure Women's Access to Land in Africa' in Cook RJ (ed) *Human Rights of Women: National and International Perspectives* (1994) 495 at 498.

⁹³As above.

children of a woman married to a foreigner were not entitled to citizenship, while children of a man married to a foreigner were entitled to citizenship. Dow contended that the *Citizenship Act* violated both the Constitution and international law, including CEDAW which Botswana had subscribed to. The Court cited CEDAW which, in its opinion, invalidated the law concerned as unconstitutional. The government had then granted citizenship to Dow's children and others in similar circumstances. The HC of Botswana used the 1981 ACHPR, among other international instruments, to find that the provision of the 1984 Botswana *Citizenship Act* which discriminated against women in the conferral of citizenship was *ultra vires* the Constitution.⁹⁴

From the above cases, we see that Malawian courts are not alone in encountering the problems in trying to eliminate discrimination against women based on customary laws. At the same time, we see that principles of human rights as shown in *Pastory* and *Unity Dow* cases provide a basis for negating retrogressive traditions and customs that are adverse to the position of women in society and in their enjoyment of human rights.⁹⁵ Therefore, education, both judges and magistrates, in Malawi on how they would interpret human rights provisions generally, and women's rights in particular, is of utmost importance.

⁹⁴As above.

⁹⁵Beyani C 'Toward a More Effective Guarantee of Women's Rights in the African Human Rights System' in Cook RJ (ed) *Human Rights of Women: National and International Perspectives* (1994) 285 at 297.

7.5 Conclusion

This Chapter is now concluded with a summary of the application of customary family laws by the courts in Malawi. The Chapter has demonstrated that reconciling African customary family laws and women's rights has been hampered by courts' restrictive approach in interpreting human rights generally, and women's rights in particular. These obstacles, unfortunately, define the extent to which courts will be able to reconcile women's rights and customary laws. With good institutional improvements and legal education on customary family laws courts will be in a better position to reconcile customary laws with women's rights. An important instrument for courts to utilise in order to resolve conflicts between customary laws and women's rights, under the Malawi Constitution, is to actively apply and develop customary family laws in line with the values of both the Malawi Constitution and the international standards for the protection of women's rights.

Overall, since the majority of people in Malawi are married by customary family laws, emphasis on its development is extremely important.

Chapter 8

Conclusions and observations

8.1 Introduction



This thesis set out to examine the impact of the Bill of Rights on African customary family laws in Malawi, focusing on the rights of women married under customary family laws. In this final Chapter I draw certain basic conclusions from the previous discussion. It should, however, be noted that the purpose of this final Chapter is not to provide a summary of all the questions that have been examined. The aim here is to set out, in a nutshell, the impact of the Bill of Rights on African customary family laws, as discussed in the preceding chapters. It should be noted, too, that certain concluding remarks on the historical overview of African customary laws, and on the Bill of Rights and its application to customary laws, have already been made

at the end of Chapters 2 and 5, respectively.

Overall, an examination of the impact of the Bill of Rights on customary family laws in Malawi shows that the Bill of Rights has had a strong impact on customary family laws that are discriminatory against women in Malawi. This has been reflected in Chapters 5, 6 and 7. Law reformers and courts in Malawi are generally to be commended for this state of affairs. They have, on a positive note, descended into the arena of conflicts between customary laws and women's rights in the areas of marriage, custody of children after divorce, maintenance of spouses after divorce, and inheritance. However, the effectiveness of their intervention will be measured by the extent to which the implementation of the new laws benefits women in practice. This thesis has attempted to identify the method of the reform of customary laws, replacing it with a fundamental right, as one of the likely major sources of implementation problems, together with the related issue of the socio-economic limitations presented in Chapter 5.

Furthermore, this thesis has hopefully brought to scrutiny a dimension of the uncritical superficial approach of the courts to customary family laws.¹ This has been argued to have a serious bearing on the extent to which women living under customary family laws may enjoy their human rights under the Malawi Constitution and international human rights instruments that Malawi has ratified. It has been argued that if the Bill of Rights is to have a meaningful impact on women married under customary family laws in

¹See the discussion in Chapter 7.

Malawi, it is important that its application to African customary family laws by the courts needs to be accommodating of local cultures. Mere replacement of a cultural practice with a constitutional provision is not a solution to solving the conflict.

Having said that, however, the specific findings presented in the preceding chapters are now summarised.² First I will discuss the impact of the Bill of Rights on the courts and their application of African customary family laws; then the obstacles surrounding the court system in the application of customary laws; to be followed by a conclusion regarding the impact of the Bill of Rights on African customary family laws as demonstrated by law reform in Malawi. The last part deals with obstacles to implementation of the proposed laws.

²Clearly the discussion of the issues in question is not conclusive, but it is hoped that it will act as a starting point for future research into the impact of the Bill of Rights on African customary family laws in Malawi and their impact in transforming the lives of women married under customary family laws in line with principles of equality and non-discrimination as discussed in Chapter 3.

8.2 Impact of the Bill of Rights on courts and their application of African customary family laws

The impact of the Bill of Rights on the application of African customary family laws by the courts, particularly highlighted in Chapter 7, has several manifestations. In these concluding remarks I will only mention three. First, the granting of custody of children to their divorced parents based on the best interests of the child principle; secondly, the development of African customary laws whereby the courts have given a new rationale to a remedy of equal distribution of property after divorce; and thirdly, where courts have expanded the idea of customary marriages to include instances where the formal requirements for a customary marriage have not been met, but where, through repute or permanent cohabitation, the couple is considered to be married in the eyes of law.

8.2.1 Custody of children

In Chapter 7 it has been shown that the HC are generally awarding custody of children after divorce of a customary marriage according to the principle of the best interests of the child. While the MC generally mention the best interests of the child, some seem to mention it and apply it to specific cases,

whilst in other cases they mention it but their decisions are not based on it. However, the fact that the HC and some of the MC award custody of children according to the best interests of the child is a departure from the customary family rules.

As discussed in Chapter 4, in matrilineal customary family laws children born out of the marriage are attached to the clan of the female spouse. On the other hand, in patrilineal customary family laws provided *lobola* obligations have been complied with, children born of a married woman are affiliated to her husband. The issue of custody of the children upon the dissolution of marriage is also dependent on whether *lobola* has been paid or not. The implication is that even if the child's best interests would better be achieved if custody is granted to the mother, custody of the child has to be granted to the father because of *lobola*.

The practice of the HC and some of the MC has been to disregard these rules in favour of the best interests of the child principle. However, it has been observed that the influence of customary laws in determining who must be awarded custody of the child has, undoubtedly, considerable influence on the way in which the general principles of the best interests of the child are applied in specific cases.³

³For instance, in a custody dispute, if both parents of an older child owned equally adequate homes, the tendency would be to follow tradition and, therefore, favour the mother's home. In my opinion, such tendencies should not constitute rules. Each case should still be judged on its own merits. They might, however, prove to be decisive if all

In addition to the above, magistrates' and judges' perception of the best interests of the child principle is also influenced by their social position and their cultural and religious backgrounds.

8.2.2 Property after divorce

The attitude of the MC towards distribution of property after divorce has been to order equal distribution irrespective of who owns what. This is a departure from the customary family rules as discussed in Chapter 4.

However, the position adopted by some HC judges is rather disappointing. The practice of the Court has been to distribute property after divorce on the basis of proof of ownership. This position, as argued in this thesis, has not been very helpful for the protection of women's right to property, especially women married under customary family laws. Most women indirectly contribute to the property of the house, although that may be difficult to prove.

8.2.3 Recognition of marriages

In Chapter 7 it has been noted that most of the MC, especially those that are in predominantly matrilineal societies, recognise as valid customary marriages in which the essential requirements for the validity of a customary

other considerations were more or less equal.

marriage have not been met. Section 22 (5) of the Malawi Constitution is used to justify the recognition of such marriages. This is a departure from the customary family laws. As noted in Chapter 4, all customary marriage laws recognise as essential to the validity of the marriage compliance with the following: the parties must have attained the age of puberty; consent of the parents of a woman must have been given to the marriage; in patrilineal societies *lobola* must have been paid by a man to the woman's parents or other relatives who are her guardians; in matrilineal systems, there must have been a *chinkhoswe*; the woman must not have been married.

The practice of most of the MC that are in predominantly matrilineal societies has been to disregard these customary family laws. There are of course some inconsistencies on the number of years. Some courts would hold that a marriage is valid after the couple have stayed together, and have had children, even for less than two years. Others would not recognise a similar marriage even if the parties have stayed together for more than five years.

On the other hand, most MC that are in predominantly patrilineal societies, and HC decisions have not recognised a customary marriage if the customary requirements have not been fulfilled by the parties.

8.3 Challenges faced by courts

The application of the Bill of Rights to the customary marriage laws of Malawi by the courts is, in some cases, impeded by practices or values which enjoy cultural legitimacy but are incompatible with women's rights. The nature of the court system, as noted in Chapter 2, also impedes women's enjoyment of their human rights. I now draw conclusions as regards the nature of the court system, and their cultural legitimacy, and show how these impede women's enjoyment of their human rights.

8.3.1 Nature of court system

After 1994, the jurisprudence revealed an enduring inconsistency by courts in the application of customary family laws.⁴ Problems related to determination of customary family laws, dealing with its changing position in relation to social life, and defining customary law in the face of the Bill of Rights. This position leads formal courts to be poor arbiters in matters of customary family laws.⁵

Further, the legal system in Malawi, just like many other African countries that were colonised by Britain, is based on the English common law. This position, as discussed in Chapter 7, lead to court's reliance on the English

⁴See the discussion in Chapter 7.

⁵See the discussion in Chapter 7.

common law as a yardstick. Arguably, this position diminishes the courts ability to make any meaningful inquiry on matters of African customary family laws and its applicability in resolving the conflict between African customary family laws and women's rights.⁶

In addition, most poor people, who live in rural areas, still go to the chiefs' courts for their justice needs⁷ and yet these courts are not part of the formal court system. The different forums by which judicial powers are exercised point to the inadequacy of court networks.⁸ Though scarcity of resources and poor infrastructural conditions can be blamed for this state of affairs, the more plausible reason is that the majority of rural Malawian women still prefer to resolve their problems locally, and with the help of African customary family laws. There is no doubt, therefore, that the abolition of the TCs in Malawi after 1994 should have been preceded by the creation of other forms of traditional judicial forums capable of dealing with local and customary law related disputes.⁹ As noted by Juma,¹⁰ in Malawi, it can equally be argued that as far as the application of the Bill of Rights

⁶Juma L 'Reconciling African customary law and human rights in Kenya: Making a case for institutional reformation and revitalization of customary adjudication processes' (2002) *St Thomas Law Review* 459 at 506.

⁷WLSA *In search of justice: women and the administration of justice in Malawi* (2000) 22-23; and Kanyongolo FE *Malawi: Justice Sector and the Rule of Law* (2006) 21.

⁸Juma (n 6).

⁹As above.

¹⁰As above, with respect to Kenya.

to African customary family laws is concerned, the benefit of such judicial forums would be that human rights discourse would be undertaken at village level. In addition, claims of violations of women's rights would be adjudicated through mediation, arbitration and other forms of customary procedures that are familiar to the people which, arguably, would mean more compliance.¹¹

8.3.2 Cultural legitimacy

In Chapter 7 we saw that Malawian courts have generally respected cultural rights, but have done so on the basis of individual rights and equality. This is contrary to the emphasis on group rights in customary laws as discussed in Chapter 3. However, it is important to note that as courts continue to develop Malawi's constitutional jurisprudence, they should also consider the impact of their decisions on local customs and culture, and should be mindful that those, too, are important rights. In so doing courts can work with law reformers to help develop customary family laws in accordance with developing principles of equality and non-discrimination.

Furthermore, in order to ensure that principles of human rights remain firmly rooted in Malawi, local cultures need to adopt and incorporate constitutional norms with their own understandings and values.¹² Simply ignoring the application of customary family laws can lead to people resorting to in-

¹¹As above.

¹²As above, 502.

formal people's law, and the courts' official decisions becoming mere paper law. This would, obviously, be catastrophic in terms of Malawi's attempts to implement constitutional principles which respect the principles of equality and non-discrimination and protect women's rights.

In that respect the thesis has demonstrated that the promotion of the Bill of Rights and universal standards respecting women's rights by the courts are legitimate goals. However, the implementation of the Bill of Rights respecting women's rights within customary family laws in Malawi will, in some cases, be impeded by practices or values which enjoy cultural legitimacy but are incompatible with women's rights. Among others, these values are reflected in the stereotypical nature of some of the judgments made by judicial officers.

For example, in a custody dispute before a court, instead of awarding guardianship of a child to a father, which would be in the best interests of the child, custody of a child has been awarded to a mother just because the customary family rules requires thus. Another example relates to the distribution of intestate deceased estates. Judicial officers, who are called upon to do so, simply endorse the customary rule available without due regard to the promotion of women's rights.¹³

It is, therefore, suggested that the incorporation of women's rights values into customary values should be accomplished by recognising what those differing systems have to offer to each other with regard to the protection of

¹³Interview by Assistant Registrar of the HC in Mzuzu on 6 May 2006.

human rights.¹⁴

8.4 Impact of the Bill of Rights on law reform of African customary family laws in Malawi

In Chapters 2, 5 and 6 of this thesis, it has been observed that the Malawi Constitution clearly recognises the applicability of African customary laws. However, it also recognises that some African customary practices are discriminatory against women.¹⁵ It thus obligates the state to adopt legislation that eliminates or criminalises such practices. This is not an easy task for law makers as they are also obligated to ensure that the right to culture is protected. Furthermore, what constitutes a discriminatory practice may depend on the context.

Having said that, the question remains: what has been the impact of the Bill of Rights on law reform of African customary laws? To answer this question two things have been particularly highlighted in this thesis. First,

¹⁴For a full discussion of the cultural legitimacy, see An-Na'im AA 'State Responsibility under the International Human Rights Law to change Religious and Customary Laws' in Cook RJ (ed) *Human rights of women: National and International Perspectives* (1994) 167. See also Juma (n 6) 462.

¹⁵Section 20 (2) of the Malawi Constitution.

changes and developments that are being made to African customary family laws reflect pursuing goals of national gender equality and the adaptation to constitutional and international standards aimed at protecting women's rights. Secondly, changes made to customary marriage laws pay little regard to customary laws and cultural dictates. In general, it has been observed that most customary family laws that are at variance with women's rights, have been replaced by provisions that are in total disregard of customary family laws. This approach, arguably, will go to affect the implementation of these reformed laws as they lack cultural legitimacy. Agreeing with Himonga¹⁶ and Malefane,¹⁷ such a position negates the precise content of what customary family laws are. The foreseeable result would be a disjunct between law and people. This position, unfortunately, creates more problems than it solves. It renders the position of women with regard to their rights uncertain. This unfortunately reduces such law reform initiatives to mere paper law.

¹⁶Himonga C 'The advancement of African women's rights in the first decade of democracy in South Africa: The reform of the customary law of marriage and succession' (2005) *Acta Juridica* 82 at 97.

¹⁷Malefane P 'South African Customary law at Crossroads: What is our Customary law of Marriage?' (2005) *Walter Sisulu University Journal* 7 at 16.

8.4.1 Proposals to reform customary marriages and inheritance laws

Recent proposals to reform the law on marriage and inheritance, discussed in Chapter 6, have attempted to address discriminatory customary family laws against women to a certain extent. However, the inherent difficulty of regulating private relations may diminish the value of this. In spite of this, the importance of these proposed laws in providing the theoretical legal framework within which customary marriages and customary inheritance are to operate is acknowledged.

The evaluation of the Bill and DEPA, as discussed in Chapter 6, reflects that most provisions will be well received by the majority of women married under customary family laws. In particular, provisions directed at laying down guidelines for the recognition of marriages by repute or permanent cohabitation appear to address many of the disadvantages that women are facing. If enacted, this provision will go a long way to addressing the right to property, right to maintenance, and right to custody of children, among others.

However, this thesis has also pointed out some areas which require further consideration. Examples include the retroactive application of the Bill. The Bill should apply to all marriages whether contracted before or after it comes into force. The Bill must also clarify the legal position of parties to existing polygamous unions and include protective measures in favour of women who

are parties to these unions.

8.5 Obstacles to implementation of proposed laws

One of the most probable obstacles to implementation of these proposed laws is low awareness of their existence, which is compounded by high illiteracy levels among most women Malawi, as discussed in Chapter 5.¹⁸ This position, obviously, calls for the need to have programmes that target public awareness of these new laws that, as discussed, would have an impact on women's lives. Obviously, such programmes must take into account social and economic factors inhibiting accessibility of legislation by women, for example, disparities in educational levels. This may be undertaken through various means, including community based organisations.¹⁹

An observation is also made that legal mechanisms may have a limited impact on private relationships, especially since implementation is difficult to monitor and enforce. Consequently the change in the law may not have the desired benefits for women married under customary family laws. This becomes increasingly apparent when considered in the light of socio-economic

¹⁸These proposed laws have not been passed into law yet which could also be the cause of its low awareness.

¹⁹Juma (n 6).

limitations, as discussed in Chapter 5. This position, however, needs to be examined, both in the light of Malawi's obligation to eliminate sex based discrimination in accordance with the provisions of CEDAW and the Malawi Constitution, and against the demands placed on women by socio-economic limitations in this context.²⁰

8.6 Conclusion

This study has argued that, by including the right to culture as well as the protection of women's rights within its Bill of Rights, the Malawi Constitution stands firmly in the justification of any issue regarding the protection of women's rights within customary family marriage systems. The extent to which this has been reflected in practice has been assessed in the light of women's rights law reforms and the courts' adjudication of customary family law issues. The central argument that has been advanced is that, in reconciling customary family laws with women's rights, courts and law reformers need to look closely at customary family laws that are discriminatory to women, and develop them so that they are compatible with the constitutional principles of equality and non-discrimination. In ignoring the application of customary family laws in favour of a constitutional provision that is aimed at the protection of women's rights, courts and law reformers are failing to ad-

²⁰See the discussion in Chapter 5 on the possible socio-economic limitations placed on women to enjoy their human rights.

equately protect the rights of women married under customary family laws. Furthermore, it has been argued that ignoring the application of customary family laws not only fails to represent an adequate response to women who wish to live by their cultural rights, it also lacks the constitutional justification that makes it a good part of a well designed constitutional approach that has taken into account the fact that the majority of Malawian women live according to customary family laws.



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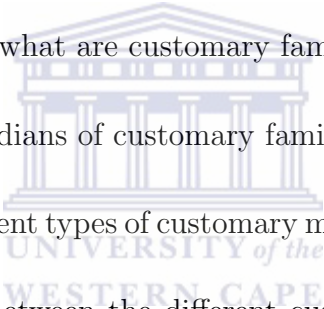
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Appendix 1: Map of Malawi

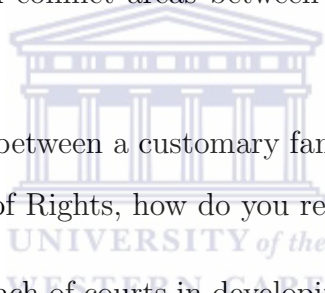


Appendix 2: Questionnaire for Magistrates and Judges

- 
- In your own view, what are customary family laws?
 - Who are the custodians of customary family laws?
 - What are the different types of customary marriages available in Malawi?
 - Is there conflicts between the different customary marriages that are available in Malawi?
 - How do they resolve such a conflict?
 - How is a customary law proved in court?
 - What are the common disputes that come before the courts regarding customary family marriages?
 - According to customary family laws, what is your general knowledge regarding property relations during and after marriage; custodianship

of children after marriage?

- Are you aware of the Bill of Rights in the constitution?
- What is the Bill of Rights?
- Are marriages under customary family laws protected by this Bill of Rights?
- Is there any relationship between the marriages under customary law and the Bill of Rights?
- What are common conflict areas between customary family laws and the Bill of Rights?
- In case of conflict between a customary family rule and the rights contained in the Bill of Rights, how do you resolve it?
- What is the approach of courts in developing this branch of customary law so that it is in line with the Bill of Rights?



Appendix 3: Interviews with Magistrates and Judges

My study of magistrates and judges applying customary family laws within a constitutional order in Malawi has provided an opportunity to analyse the consequences of legal pluralism in terms of co-existing international, national and local customs and values from the judicial officers' perspectives. In the course of my fieldwork among the magistrates and judges in all the three MC and HC visited, I gradually became aware of the multiple problems facing the judicial officers, engaged in applying customary family laws in a constitutional framework. At the same time I gained insight into the wide variety of normative imperatives to which different magistrates and judges were susceptible as regards the choice of law to be made in a given circumstance. The following interviews illustrate the complex realities that the Bill of Rights notions, such as section 20 of the Malawi Constitution on the right to equality, impinge upon.

- Judge 1.

[Q] What factors lead you to apply customary law in a given case before you?

[A] It is a question of evidence in each case that has come before me. In most cases one has to plead the custom with which he/she is asserting that it is applicable to him/her. The duty of the court is to be vigilant toward testing that customary law against the Bill of Rights provision.

[Q] How would you deal with a conflict between customary family laws and the Bill of Rights provision?

[A] Any customary law that is inconsistent with the fundamental principles of the Malawi Constitution, for example, right to equality, would be invalid. For example, the customary law of inheritance *kuhaha* is inconsistent with the Bill of Rights because it affects the dignity, health and life of the prayers in the family.

[Q] How would you balance the both of the conflicting rights in the Bill of Rights?

[A] In balancing the two conflicting rights, the right to culture and the other provisions of the Bill of Rights, consideration will be made towards the question of whether a particular right violates the fundamental principles of the Malawi Constitution or not.

[Q] My Lord, what are the problems that a court would face in

applying customary law in a constitutional framework?

[A] Most judicial officers are not comfortable with customary law in the sense that for so long this branch of law was entrusted with the Traditional Courts that were manned by local chiefs. So even if Judges would be well conversant with women's rights issues, they may not properly enforce them when it comes to applying it to customary family laws.

- Judge 2.

[Q] My Lord, what court has jurisdiction over customary law cases?

[A] Prior to 1994, customary marriage cases were in the exclusive domain of the Traditional Courts. After 1994, there was a gap as to which court would be adjudicating over divorce matters under customary family laws. This gap came in because section 39(2) of the Courts Act did not allow magistrates to adjudicate over divorce matters. This anomaly, however, was resolved by an amendment to the Courts Act of 2000 that gave MC additional jurisdiction.

[Q] As a judge, have you been faced with a challenge in which a customary rule is being challenged for its unconstitutionality? If so, what was your approach?

[A] Since the Malawi Constitution, no challenge has been instituted in the HC of Malawi on a particular customary family law as being inconsistent with a right in the Bill of Rights.

[Q] How would you resolve a constitutional challenge between a customary family rule and a right within the Bill of Rights?

[A] In resolving the conflict between a customary family rule and a right in the Bill of Rights, facts on the ground will determine which of the rights should prevail over the other.

[Q] What are the problems that a court may face in applying customary law in a constitutional framework?

[A] Lack of knowledge on the customary family laws pose as a big challenge on how best courts can be able to develop this branch of law in a constitutional order.

- Judge 3

[Q] My Lord, what is the position of customary laws in Malawian courts.

[A] Courts in Malawi have, on a general term, accepted that customary law is part of the laws of Malawi. The challenge, therefore, is not so much on the recognition but on identifying what customary law to apply in a given case considering the diversity of the society.

[Q] How do you resolve conflicts between different customary laws?

[A] In the event that there is a conflict of different customary laws, rules of fairness become difficult to apply. Courts are found in a situation where they have to decide according to what is realistic and fair.

[Q] My Lord, how do you resolve conflicts between a customary rule and a right within the Bill of Rights?

[A] In the event that there is a conflict between a customary rule and women's rights, if the customary law is not offensive, I would be inclined to recognise the application of customary law.

[Q] What are the problems of the application of customary family laws in a constitutional order?

[A] Under customary law marriages, generally, a woman is taken as a burden and not an equal contributor to the assets of the family. This brings in the challenge of distributing the property of the said marriage after divorce. When it comes to customary law, the issue of precedence is a problem. Over the years customary laws have been changing. So, the problem with the courts is to establish the customary law of a particular given time. The questions that are asked are: how far do we go back or come to the present scenario before we dilute the custom? Living customary law presents its own problems because one gets different views because of the inflows and outflows of people in most communities.

- Magistrate 1

[Q] Since on a daily basis, your Worship, you handle cases that require the application of customary law. How do you deal with conflicts that arise due to the application of customary family laws in a constitutional order?

[A] If faced with a conflict between customary laws and women's rights, I would apply common law instead of customary law because it has been tried and tested that it does not infringe on women and children's rights.

[Q] What are the problems that you face as a court in the application of customary family laws in a constitutional order?

[A] The problems that I normally face with the application of customary laws are: there is no literature on customary laws; where there are competing customs, whose custom must take the show; and lack of expert witnesses in court.

[Q] What factors determine the application of customary family law in court?

[A] Factors that determine what customary law to apply in a given case is the type of marriage.

- Magistrate 2

[Q] How do you handle a conflict between a customary law and a right within the Bill of Rights?

[A] Any customary law that is inconsistent with the constitution would be invalidated. The danger that if all customary laws are declared invalid, which would obviously mean the end of customary laws, should not be an excuse for denying women of their rights. In most cases I am pragmatic in that I practise judicial activism. I do state

what the requirements of a particular customary law require me to do. I then state a constitutional provision that gives me a justification of ignoring a particular customary law and enforce the protection of women's rights.

- Magistrate 3

[Q] How do you deal with a conflict between customary laws and a constitutional right?

[A] If there is any conflict between a constitutional right and customary law, that necessitates me to hold the supremacy of the constitution.

[Q] Do you think customary family laws stand a chance of being developed so that they can be in line with the constitutional requirements?

[A] The problem with developing customary law is that I am not fully conversant with customary law rules. As such, it is even difficult to resolve the conflict, let alone thinking that this branch of law can be developed. It is assumed that all customary laws are inconsistent with the Bill of Rights and yet customary laws are dynamic.

- Magistrate 4

[Q] How do you handle conflicts between a customary law and a right within the Bill of Rights?

[A] Most judgments that I deliver disregard the dictates of customary laws that infringe on the rights of women and children, for example. In my opinion, all customary laws that infringe on the rights of women and children should be invalidated. In the case of an offending customary law, the application of common law is preferred instead of a customary law that would violate the rights of women.

