

# Marriage under African customary law in the face of the Bill of Rights and international human rights standards in Malawi

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## Summary

*Contracting a marriage under African customary law in Malawi poses difficulties and challenges in the light of the Bill of Rights and international human rights standards. There are bound to be conflicts which, seen from a human rights perspective, amount to violations of women's human rights. The article explores the nature of the conflict between human rights and a plethora of principles, rules and practices pertaining to marriage under African customary law in Malawi. The article also shows strong support from both men and women for cultural practices that conflict with women's human rights. It is therefore argued that efforts to eradicate these cultural practices, however well-intended, must be undertaken with a very high level of cultural sensitivity. It is suggested that, instead of a formal approach to the realisation of human rights, a substantive approach which is inclusive of the reasons behind the support for cultural beliefs and values, be adopted in order to address those aspects of a particular cultural practice that violate human rights.*

## 1 Introduction

The article examines the way in which the Bill of Rights and international human rights standards conflict with a plethora of principles, rules and practices of African customary family law that govern customary

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marriage in Malawi. The article also shows how strong cultural support can pose a threat to any effort aimed at addressing human rights violations in African customary law. It is therefore suggested that a substantive approach be adopted.

The words 'formal approach' and 'substantive approach' are borrowed from formal equality and substantive equality paradigms.<sup>1</sup> A formal approach means using law in its strict sense to address human rights violations. A substantive approach entails the use of law, while taking into account the reasons behind views in support of cultural values when implementing human rights. The position therefore is that the formal approach is not sufficient to address human rights violations under African customary law.

The article is divided into five sections. The next section examines the position of international human rights law in the Malawian Constitution (Constitution). The section also briefly discusses the international human rights position on cultural practices that conflict with human rights. The aim is to highlight the relevance of international human rights standards in Malawi. The third section looks at the position of customary law under the Constitution and discusses the implications of the status that the Constitution gives to customary laws. The fourth section discusses principles and practices governing a customary marriage in Malawi. Both matrilineal<sup>2</sup> and patrilineal<sup>3</sup> marriages are examined with a view to revealing the traditional values that are incompatible with the Bill of Rights and international human rights standards. The last section concludes the discussion.

## 2 Position of international human rights law in terms of the Constitution

The position of international human rights law in terms of the Constitution may be looked at in different ways. Firstly, some international human rights norms have been elevated to constitutional status in the

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<sup>1</sup> J de Waal *et al* *The Bill of Rights handbook* (2005) 232 have defined formal equality as 'sameness of treatment'. The law must treat individuals in the same manner regardless of their circumstances. 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. On the other hand, substantive equality requires the law to ensure that there is equality of outcome. It is partially based on a redistributive justice model which suggests that measures have to be taken to rectify past discrimination, because to fail to do so would leave people and groups at different starting points.

<sup>2</sup> Matrilineal customary marriage refers to all customary marriages that trace their descent line through female relatives.

<sup>3</sup> Patrilineal customary marriage refers to all customary marriages that trace their descent line through male relatives.

Constitution, which renders them justiciable in Malawian courts.<sup>4</sup> This is through a direct incorporation of certain international law standards in the Constitution. For example, the non-discrimination clause, a key principle of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)<sup>5</sup> and other international instruments, has been enshrined in the Malawian Constitution.<sup>6</sup> In addition, international law has been granted an elevated status in the Malawian Constitution, not only in relation to the interpretation of constitutional provisions, but also as a factor relevant in the development of customary law and in the interpretation of municipal statutes by the judiciary.<sup>7</sup> 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 second angle derives from the legal status of international law in Malawian municipal law. According to section 211(2) of the Constitution, certain international agreements form part of the laws of Malawi.<sup>8</sup> This position is relevant with respect to the International Covenant on Civil and Political Rights (ICCPR),<sup>9</sup> the Convention on the Rights of the Child (CRC),<sup>10</sup> the International Covenant on Economic, Social and Cultural Rights (ICESCR),<sup>11</sup> CEDAW,<sup>12</sup> and the African Charter on Human and Peoples' Rights (African Charter).<sup>13</sup> As can be seen from their date of ratification, all these international agreements became part of domestic law in Malawi by virtue of section 211(2) of the Constitution and are, therefore, enforceable as part of domestic law.

<sup>4</sup> Sec 4 provides that '[t]he 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'.

<sup>5</sup> CEDAW was adopted on 18 December 1979 and entered into force on 3 September 1981.

<sup>6</sup> An example would be sec 20 of the Malawian Constitution on the right to equality.

<sup>7</sup> Sec 11(2)(c) of the Malawian Constitution provides that '[i]n interpreting the provisions of this Constitution a court of law shall ...where applicable, have regard to current norms of public international law and comparable foreign case law'.

<sup>8</sup> Section 211(2) of the Constitution provides that '[i]nternational 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'.

<sup>9</sup> Ratified by Malawi in 1993; GA Resolution 2200A(XXI) 21UNGAOR Suppl (No 16) 52, UN Doc A/6316 (1966), 999 UNTS 171, entered into force on 23 March 1976.

<sup>10</sup> Ratified by Malawi in 1991.

<sup>11</sup> Ratified by Malawi in 1993; GA Resolution 2200A(XXI) 21UNGAOR Suppl (No 16) 49, UN Doc A/6316 (1966), 993 UNTS 3, entered into force on 3 January 1976.

<sup>12</sup> Ratified by Malawi in 1987.

<sup>13</sup> Ratified by Malawi in 1989. The African Charter was adopted on 27 June 1981 and entered into force on 21 October 1986.

## 2.1 Position of international human rights law regarding cultural practices that conflict with human rights

At the international level, it is important to note that many instruments recognise the application and relevance of African customary law. Article 22 of the Universal Declaration of Human Rights (Universal Declaration)<sup>14</sup> states that '[e]veryone, 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, article 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 Universal Declaration is a non-binding instrument that merely states the aspirations of nation states. However, it is 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 Universal Declaration were re-enacted in two conventions that are binding on states. These are ICCPR and ICESCR. Articles 15(1)(a)<sup>15</sup> and 27<sup>16</sup> of ICESCR and ICCPR, respectively, provide for the protection of cultural rights.

Secondly, the Malawi Supreme Court of Appeal (SCA) has held that the Universal Declaration applies and is enforceable in Malawi.<sup>17</sup> In the *Chihana* case, the SCA held that the Universal Declaration 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.<sup>18</sup> Following the *Chihana* case, it has been noted that the cases of *Chisiza v Ministry of Education and Culture*<sup>19</sup> and *S v Nkhata*<sup>20</sup> have made reference to provisions of the Universal Declaration.<sup>21</sup> At the regional level, rights to culture are declared in the African Charter.<sup>22</sup>

<sup>14</sup> The Universal Declaration was adopted by UN General Assembly Resolution on 10 December 1948.

<sup>15</sup> Art 15(1)(a) of ICESCR provides: 'The State Parties to the present Covenant recognise the right of everyone (a) to take part in a cultural life.'

<sup>16</sup> Art 27 of ICCPR provides: '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.'

<sup>17</sup> See the case of *R v Chakufwa Chihana* SCA Criminal Appeal 9 of 1993, as cited by S White *et al* *Dispossessing the widow: Gender-based violence in Malawi* (2002) 32. See also TT Hansen 'Implementation of international human rights standards through the national courts in Malawi' (2002) 46 *Journal of African Law* 31-37, who noted that the SCA considered the Universal Declaration as part of the law of Malawi.

<sup>18</sup> As above.

<sup>19</sup> Miscellaneous Civil Case 10 of 1993 (unreported).

<sup>20</sup> Miscellaneous Civil Case 6 of 1993 (unreported).

<sup>21</sup> Hansen (n 17 above) 37-38.

<sup>22</sup> See eg art 17 of the African Charter.

Of particular importance in this article, however, is whether the protection of cultural rights at the international level constitutes a justifiable reason for violating human rights.

The position at international level is that no international human rights document cites culture as a basis on which protections may be abridged.<sup>23</sup> Rather than protecting culture at the expense of human rights, international documents reveal that culture necessarily must cede to universal standards.<sup>24</sup> Indeed, as the above mandate suggests, cultures are protected so that they may enhance human rights and not lead to their derogation.<sup>25</sup> Such an interpretation finds support in article 1(3) of the United Nations (UN) Charter,<sup>26</sup> which seeks

to achieve international co-operation in solving international problems of an economic, social, cultural, humanitarian character and in promoting respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.

The language of the above provision makes clear two things: Human rights are not dependent on a specific culture, and 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.<sup>27</sup>

Furthermore, numerous treaties that followed the UN Charter serve as examples of the approach that places the preservation of human rights as a fundamental universal principle, even when human rights protections challenge cultural practices. CEDAW confronts the possibility of misuse of culture as a pretext to violate women's rights in the following way. Article 5 of CEDAW requires state parties to take all appropriate measures to

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.

Article 2(f) of CEDAW provides:

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.

<sup>23</sup> JR Levesque *Culture and family violence: Fostering change through human rights law* (2001) 95-96.

<sup>24</sup> R Cook 'State accountability under the Convention on the Elimination of all Forms of Discrimination Against Women' in R Cook (ed) *Human rights of women: National and international perspectives* (1994) 234-235.

<sup>25</sup> Levesque (n 23 above) 96.

<sup>26</sup> The UN Charter was adopted on 26 June 1945.

<sup>27</sup> Levesque (n 23 above) 96.

With particular reference to discriminatory customary family practices at the point of contracting a marriage, articles 16(1)(a) and (b) of CEDAW<sup>28</sup> provide:

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.

Apart from CEDAW, CRC also deals with discriminatory customary family law practices that affect women, especially young girls.<sup>29</sup> In addition, the Declaration on the Elimination of Violence Against Women of 1994<sup>30</sup> makes an important statement. Article 4 firmly rejects cultural relativism<sup>31</sup> as it prohibits states from invoking 'any custom, tradition or religious consideration to avoid their obligations' in pursuit of a policy of eliminating gender discrimination by all appropriate means and without delay.

At the regional level, the African Charter on the Rights and Welfare of the Child (African Children's Charter) deals with discriminatory practices that affect young girls.<sup>32</sup> Furthermore, the regional protection is extended by the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's

<sup>28</sup> Commenting on arts 16(1)(a) and (b), the CEDAW Committee (established under art 17 of CEDAW to oversee the implementation of its provisions) 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 contravenes 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 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.'

<sup>29</sup> See art 24(3) of CRC which provides: 'State parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.'

<sup>30</sup> UN General Assembly, 48th session, Official Records, GA Resolution 4, Agenda item 11, A/RES/48/104 1994.

<sup>31</sup> Cultural relativism promotes the belief that human rights vary from one culture to another.

<sup>32</sup> Art 21 of the African Children's Charter provides: 'State 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.' The Children's Charter was adopted on 11 July 1990 and entered into force on 29 November 1999. Malawi ratified the Charter on 10 September 1999.

Protocol).<sup>33</sup> The Protocol was promulgated out of the African Union (AU)'s concern that, despite the ratification of the African Charter and other international human rights instruments by member states, women in Africa continue to be victims of discrimination and harmful cultural practices.<sup>34</sup> The Protocol contains provisions relating to the elimination of harmful practices, including the prohibition, through legislative measures backed by sanctions, of all forms of harmful practices that negatively affect the human rights of women and which are contrary to recognised international standards.<sup>35</sup>

To sum up, we see that international human rights standards call for state intervention with regard to cultural practices that violate human rights.

### 3 Position of customary law in the Bill of Rights

The 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:

[A]ll 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 recognise and protect fundamental human rights and afford the fullest protection to the rights and views of all individuals, groups and minorities whether or not they are entitled to vote.

Thus, Nyirenda, Hansen and Kaunda<sup>36</sup> have argued, based on this provision, that the Malawian Constitution attaches great importance to African customary law and traditional values.

Several provisions in a bill of rights itself can support the above position. For example, section 22(5) of the Constitution provides for the recognition of marriages by custom. This provision makes it obvious that marriages contracted according to customary laws are valid. Section 26 of the 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 law, it expressly recognises the significance of customary or cultural values to human development, wellbeing and identity.<sup>37</sup> In

<sup>33</sup> The Protocol was adopted on 11 July 2003 and entered into force on 25 November 2005. Malawi ratified it on 20 May 2005.

<sup>34</sup> See Preamble to the Protocol.

<sup>35</sup> Art 5 of the Protocol.

<sup>36</sup> J Nyirenda *et al* *A comparative analysis of the human rights chapter under the Malawi Constitution in an international perspective* (undated) xxiii.

<sup>37</sup> See C Himonga 'Implementing the rights of child in African legal systems: The Mthembu journey in search of justice' (2001) 9 *International Children's Journal* 89.

essence, it guarantees the right of everyone to live according to the legal system applicable to the particular cultural group to which he or she (chooses to) belong.<sup>38</sup>

Section 26 of the Malawian Constitution must be contrasted with section 30 of the South African Constitution. The latter provides that '[e]veryone 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'. It has been argued that this provision means that when the right to culture clashes with the right to equality, the latter must take priority since this provision expressly subordinates the right to culture to all other rights in the South African Bill of Rights.<sup>39</sup> By contrast, section 26 of the Constitution does not have any express internal limitation. This may be interpreted to mean that the right to culture enjoys the same status as all other rights in the Malawian Bill of Rights.<sup>40</sup>

However, section 20(1) of the Constitution prohibits discrimination on certain specified grounds, including sex. Section 20(2) of the 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 in section 24 of the Constitution, which includes gender as a ground of discrimination. Furthermore, section 24(2) of the 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 government to take legislative measures that eliminate customs and practices that discriminate against women, including practices such as sexual abuse, harassment and violence, and the deprivation of property, including property obtained by inheritance.

Reading sections 20(2) and 24(2) of the Constitution together one gets the impression that the right to culture does not enjoy the same status as the right to equality. Furthermore, customary law, just like any other law in force in Malawi, is arguably limited by section 5 of the Constitution.<sup>41</sup> The principle of the supremacy of the national

<sup>38</sup> Himonga (n 37 above) 94.

<sup>39</sup> See, eg, F Kaganas & C Murray 'The contest between culture and gender equality under South Africa's interim Constitution' (1994) 21 *Journal of Law and Society* 427-428; L Fishbayn 'Litigating the right to culture: Family law in the new South Africa' cited in E Grant 'Human rights, cultural diversity and customary law in South Africa' (2006) 50 *Journal of African Law* 2; TR Nhlapo 'The African family and women's rights: Friends or foes?' (1991) *Acta Juridica* 135; V Broinsein 'Reconceptualising customary law debate in South Africa' (1998) 14 *South African Journal on Human Rights* 388.

<sup>40</sup> L Mwambene 'Reconciling African customary law with women's rights in Malawi: The proposed Marriage, Divorce and Family Relations Bill' (2007) 1 *Malawi Law Journal* 113.

<sup>41</sup> Sec 5 of the Malawian 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'.

Constitution ensures that, in legal interpretation, human rights guarantees take precedence over any other laws or customary rules.<sup>42</sup> The wording of section 5 of the Malawian Constitution seems to suggest that if customary law is inconsistent with the Constitution, it is invalid.<sup>43</sup> A further limitation on the application of customary laws is seen in section 10(2) of the Malawian 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’.

In addition, section 44(1) of the Malawian Constitution places the right to culture among the rights in respect of which a limitation is permitted. As rightly argued by Chirwa,<sup>44</sup> the limitation clause, as provided by section 44(1), has application to all rights in a bill of rights. Therefore, even though section 26 does not contain an internal limiting clause, the general limitation clause applied under section 44(1) of the Malawian Constitution would be applicable.

Having said that, it is, however, important to note that in terms of sections 44(1) and (2) of the Constitution, limitations on a constitutional right, including the right to culture, may be permitted only where they are ‘prescribed by law, which are reasonable, recognised by international human rights standards and necessary in an open and democratic society’.<sup>45</sup> Section 44(2) 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 chapter IV of the Malawian 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

<sup>42</sup> B Ibhawoh ‘Between culture and constitution: Evaluating the cultural legitimacy of human rights in the African state’ (2000) 22 *Human Rights Quarterly* 838 847. Similar provisions of constitutional supremacy exist in the constitutions of other African countries. See eg sec 26(1) of the Constitution of Ghana; sec 37 of the Ugandan Constitution.

<sup>43</sup> This position is similar to that in South Africa. Sec 2 of the Constitution of the Republic of South Africa, 1996 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.’ Commenting on sec 2 of the South African Constitution, as read with sec 39, C Rautenbach ‘Some comments on the status of customary law in relation to the Bill of Rights’ (2003) 1 *Stellenbosch Law Review* 107 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’.

<sup>44</sup> DM Chirwa ‘Upholding the sanctity of rights: A principled approach to limitations and derogations under the Malawian Constitution’ (2007) 1 *Malawi Law Journal* 11.

<sup>45</sup> Sec 44(2) of the Malawian Constitution provides: ‘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.’

lacking in precision.<sup>46</sup> 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.<sup>47</sup> The question that can be asked is: If a limitation is effected by a constitutional right and not law, would this provision apply? Obviously, such are some of the difficult questions that courts are likely to be faced with in Malawi.

Furthermore, section 44(2) 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.<sup>48</sup> Such interpretation will obviously play a significant role as far as discriminatory African customary 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 meaning of terms such as 'open', 'democratic', 'necessary' and 'reasonable' will obviously have a bearing on courts. On the other hand, the trend internationally in determining the meaning of these terms will also have a bearing on the interpretive endeavours of Malawian courts. Sieghardt<sup>49</sup> states, in a European context, that to evaluate a democratic society one must consider

the needs or objectives of a democratic society in relation to 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 Malawian 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. As a result of the above discussion, the substantive approach becomes inevitable.

<sup>46</sup> Chirwa (n 44 above) 18.

<sup>47</sup> P Sieghardt *The international law of human rights* (1983) 92.

<sup>48</sup> In *Friday A Jumbe & Humphrey C Mvula v Attorney-General* Constitutional Case 1 & 2 of 2005 (unreported), as observed by Chirwa (n 44 above) 19, '[i]t was held that it was not enough for the state to argue in general that the reverse onus created by the Corrupt Practices Act was reasonable and necessary in an open and democratic society. The state was under the obligation to demonstrate with empirical evidence that such provision would lead to a reduction or curbing of corruption.'

<sup>49</sup> Sieghardt (n 47 above) 93.

It is, however, important to note that courts will not lightly declare African customary laws to be unconstitutional for being inconsistent with any other right, including the right of women to equality, for example. This is so because any legislation that varies, alters or abrogates any rule of African customary law<sup>50</sup> must not constitute an unjustifiable infringement on the right to culture. This also means that parliament does not have a free hand to overrule African customary law. 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.<sup>51</sup>

In summary, we see that the interpretation of the limitation section will also play a large part in constitutional adjudication. The manner in which it restricts rights will probably be used to justify human rights violations.

#### 4 Rules governing customary marriages and the Bill of Rights

In this section, we examine how rules and practices governing customary marriage conflict with the Bill of Rights and international human rights standards. However, we start by giving an overview of forms of customary marriages so that the rules and practices that will be discussed are put into perspective.

In Malawi, there are two forms of customary marriages, namely, patrilineal and matrilineal marriages.<sup>52</sup> As a general rule, all customary marriages, whether matrilineal or patrilineal, are contracted according to the customary law of the parties.<sup>53</sup> 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 woman's parents to the marriage; in patrilineal societies *lobola* must be paid by a man to the woman's parents or other relatives

<sup>50</sup> According to sec 48(2) of the Constitution, an 'Act of Parliament shall have primacy over other forms of law but shall be subject to the Constitution'.

<sup>51</sup> Mwambene (n 40 above) 114.

<sup>52</sup> M Chigawa *Customary law and social development: De jure marriages vis-à-vis de facto marriages at customary law in Malawi* (1987).

<sup>53</sup> Generally, customary law requires 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 C Himonga *Family and succession laws in Zambia* (1995) 75. The same issues are equally important in Malawi. It should be noted that Malawi is not a homogeneous country. It consists of different tribes whose origins go back to a historical ancestor or ancestress. Generally, for purposes of customary family laws, these tribes are divided into two categories: matrilineal and patrilineal. The matrilineal tribes are

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.<sup>54</sup>

A discussion of the formation and dissolution of these customary marriages has already received considerable attention in the literature.<sup>55</sup> It is, therefore, not necessary to provide details, but only a summary of the main ideas relating to the two forms of customary marriages, starting with matrilineal marriages.

Matrilineal customary marriages can be grouped into *chikamwini* and *chitengwa*.<sup>56</sup> In *chikamwini* marriages, the man moves to the wife's village and has only a few rights there.<sup>57</sup> Lineage is traced through the woman.<sup>58</sup> Inheritance of property passes through the female line.<sup>59</sup> In addition, women under the matrilineal system have custodial ownership of land.<sup>60</sup> It should also be noted that in matrilineal systems, children 'belong'<sup>61</sup> to the woman and remain under the guardianship of the wife's eldest brother.<sup>62</sup> A woman's child inherits from her brother's property. Upon the 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 husband returns to his home. Compared to patrilineal

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mostly found in 20 districts of the central and southern regions, namely, Dedza, Dowa, Kasungu, Lilongwe, Mchinji, Nkhotakota, Ntheu, Ntchisi, Salima, Blantyre, 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 Chikwawa and Nsanje districts in the southern region.

<sup>54</sup> This position has to be contrasted to civil law where they have a fixed age as to when one can marry.

<sup>55</sup> See, eg, JO Ibig *Restatement of African law: Malawi Vol 1, The law of marriage and divorce* (1970); Chigawa (n 52 above); DS Koyana *et al Customary marriage systems in Malawi and South Africa* (2007); JC Bekker *Seymour's customary law in Southern Africa* (1989); White (n 17 above) 56.

<sup>56</sup> N Ngwira *Women's property and inheritance rights and the land reform process in Malawi* (2003) 6. See also P Ntata & C Sinoya *Customary law and the UN conventions on women and children* (unpublished) (1999) 14.

<sup>57</sup> F von Benda-Beckmann *Legal pluralism in Malawi: Historical developments 1858-1970 and emerging issues* (2007) 89.

<sup>58</sup> KM Phiri 'Some changes in the matrilineal family system among the Chewa of Malawi since the nineteenth century' (1983) 24 *Journal of African History* 257-258.

<sup>59</sup> Similarly, in Tanzania's matrilineal societies, as noted by F Butegwa 'Using the African Charter on Human and Peoples' Rights to secure women's access to land in Africa' in Cook (n 24 above) 497, property is inherited through the wife's lineage.

<sup>60</sup> This position is contrasted to Tanzania's matrilineal societies where, as noted by Butegwa (n 59 above), women do not have effective control or ownership of the family land.

<sup>61</sup> The word 'belong' is used to mean that rights and obligations toward the children in a matrilineal society accrue to the woman.

<sup>62</sup> E Mandala 'Capitalism, kinship and gender in the lower Tchiri (Shire) Valley of Malawi, 1860-1960: An alternative theoretical framework' (1984) 13 *African Economic History* 137-139. See also Phiri (n 58 above) 258-259.

tribes, Von Benda-Beckmann notes that the woman has a much stronger position *vis-à-vis* her husband.<sup>63</sup>

In *chitengwa* marriages, the above rules also apply. There are, however, points of difference. In *chitengwa* (matrilineal) marriages, the woman goes to live in the man's village, but the children belong to the woman's lineage.<sup>64</sup> Upon the death of the husband, the widow and children return to the widow's village of origin. Therefore, although matrilineal to a large extent, it is similar to the patrilineal *lobola* system in other respects.<sup>65</sup>

On the other hand, in 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 or guardian. The payment of *lobola* establishes his right to take his wife and children to his own village, and signifies that the man owns all the property, and makes the children of the marriage legitimate.<sup>66</sup> 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.<sup>67</sup> Daughters are expected to get married and live in their husbands' villages. Therefore, they cannot inherit property.<sup>68</sup> Thus, some commentators have argued that the patrilocal nature of the marriage and the payment of *lobola* in patrilineal tribes place the man in a position to enjoy a superior status without any qualification.<sup>69</sup> 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.

Having briefly looked at the two forms of customary marriages, in the following subsections I examine rules and practices governing these marriages.

#### 4.1 Consent

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

Under customary family law, consent to a customary marriage by the parents of a woman is strictly adhered to whether the marriage is

<sup>63</sup> Von Benda-Beckman (n 57 above).

<sup>64</sup> Ngwira (n 56 above) 6; Phiri (n 58 above) 262.

<sup>65</sup> This will be discussed later when examining how it conflicts with the Bill of Rights.

<sup>66</sup> Ngwira (n 56 above) 6. See also A Armstrong *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* 345.

<sup>67</sup> Ibik (n 55 above) 79. See also Armstrong *et al* (n 66 above) 355.

<sup>68</sup> Ngwira (n 56 above) 7.

<sup>69</sup> White (n 17 above) 56.

taking place between minors or not.<sup>70</sup> Traditionally, the consent of the father in patrilineal tribes or the maternal uncle in matrilineal tribes was not a decision of a 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.<sup>71</sup> 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, autonomy is 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 of her deceased husband. Polygamy also raises significant questions about equality and choice.<sup>72</sup>

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 the consent of parents or guardians is only required when one is marrying below the age of 21.<sup>73</sup> Commenting on this difference, Bennett<sup>74</sup> states:

[W]hile 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 Bekker<sup>75</sup> 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* (my emphasis).

On the other hand, section 22(3) of the Malawian 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.<sup>76</sup> It is, however, noted that sections 22(6) and 22(4) of the Malawian

<sup>70</sup> JO Ibik 'The law of marriage in Nyasaland' unpublished PhD thesis, University of London, 1966 524, as cited by Von Benda-Beckmann (n 57 above) 86. See also the discussion by Armstrong (n 66 above) 362.

<sup>71</sup> Ibik (n 70 above).

<sup>72</sup> See discussion below.

<sup>73</sup> See sec 11(b) of the Marriage Act, chr 25:01. See also sec 24 of the South African Marriage Act 25 of 1961.

<sup>74</sup> TW Bennett *Human rights and African customary law under the South African Constitution* (1995) 113.

<sup>75</sup> Bekker (n 55 above) 96.

<sup>76</sup> See, eg, art 16(1) of the Universal Declaration. It provides that 'men and women ... have a right to marry and found a family'; arts 17 & 23 of ICCPR; art 10 of ICESCR; art 16 of CEDAW; arts 18, 27 & 29 of the African Charter.

Constitution set restrictions for entry into marriage. It is, therefore, submitted that these sections provide limitations to section 22(3) of the Malawian Constitution.

Section 22(6) of the Malawian Constitution provides that 'no person over the 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.<sup>77</sup> It is, therefore, submitted that the legal requirement of consent by a guardian<sup>78</sup> 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 Malawian 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 Malawian 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 years, this would be in conflict with section 22(6) that sets the marrying age at 18. Thirdly, this would also be an infringement of her personal freedom.<sup>79</sup>

From the above, we see that the customary law rule 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.

Interlinked with consent there is the question of choice of a spouse. In both the matrilineal and patrilineal customary marriage systems, the 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 law, is not expected to make a move and propose marriage. A woman who actively makes such a proposal is considered to have loose morals.<sup>80</sup> So her choice of whom to marry is squarely dependent on who gets interested in her and makes a proposal. With such a belief

<sup>77</sup> Sec 22(4) of the Malawian 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'.

<sup>78</sup> It should be noted that 'guardian' is used interchangeably with the parents of the woman intending to marry under customary laws.

<sup>79</sup> See sec 19 of the Malawian Constitution.

<sup>80</sup> Ntata & Sinoya (n 56 above) 15.

system, arguably, the choice of a spouse is severely compromised for a woman.

Useful expressions, found in the vernacular languages of Malawi, can help shed light on the issue of choice.<sup>81</sup> In the vernacular it is only a man who can 'marry' a woman: *kukwatira*<sup>82</sup> or *kutola*.<sup>83</sup> A woman 'gets to be married': *kukwatiwa*<sup>84</sup> or *kutoleka*.<sup>85</sup> Thus, clues to the difficulties that women face in realising their right to choose whom to marry can be found in the above vernacular usage.<sup>86</sup> This position can be contrasted with 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 is against women's rights and freedoms guaranteed by the Malawian Constitution, as well as against international standards. It does not rhyme well with section 22(3) of the Malawian 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 international instruments to which Malawi is a party. Article 16(1)(b) of CEDAW states that 'women should also enjoy the right to freely choose a spouse and enter into marriage only with their free and full consent'.<sup>87</sup>

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.

## 4.2 Polygamy

The debate whether polygamy constitutes a violation of women's rights or is in fact a 'good' system that protects them has been ongoing for a long time.<sup>88</sup> 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.<sup>89</sup> Those who support the con-

<sup>81</sup> As above.

<sup>82</sup> This word is used in matrilineal systems.

<sup>83</sup> This word is used in patrilineal systems.

<sup>84</sup> This word is used in matrilineal systems.

<sup>85</sup> This word is used in patrilineal systems and literally means 'taken by'.

<sup>86</sup> Ntata & Sinoya (n 56 above) 14.

<sup>87</sup> See 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.

<sup>88</sup> F Banda *Women, law and human rights: An African perspective* (2005) 116.

<sup>89</sup> See, eg, CEDAW General Recommendation 21 para 21; art 6(c) of the African Women's Protocol.

tinuation of the practice of polygamy argue that rather than violate women's rights, polygamy may facilitate their enjoyment.<sup>90</sup> Banda<sup>91</sup> further notes that the intensity of the debate over polygamy has not lessened over time, pointing to the debates held during the drafting of the African Women's Protocol in which article 6(c) of the Protocol was a compromise.

As noted earlier, both matrilineal and patrilineal customary marriages in Malawi are potentially polygamous.<sup>92</sup> The husband is allowed to marry more than one wife.<sup>93</sup> On the other hand, a married woman is barred from contracting further marriages for as long as she remains legally married.<sup>94</sup> Concurring with Kamchedzera,<sup>95</sup> customary laws favour the husband with regard to sexuality.

In Malawi, the prevalence of this practice is demonstrated by a study conducted by the Malawi Human Rights Commission (MHRC),<sup>96</sup> which shows that polygamy is still a common practice in all areas.<sup>97</sup> The study shows that about 98 per cent of the respondents interviewed stated that polygamy is still practised in their areas. It has also been established that 17 per cent of all women in Malawi are in polygamous unions.<sup>98</sup> In other African countries, a 1995 survey of eight anglophone countries established the prevalence rates of married women in polygamous marriages as follows: in Ghana, approximately 28 per cent; in Kenya, 19,5 per cent; in Nigeria, 42,6 per cent; and in Zimbabwe, one in five married Zimbabwean women and the average union was found to consist of 2,3 wives per man.<sup>99</sup> In South Africa, a study by Govender<sup>100</sup> shows that only 6 per cent of the women interviewed were married to men who had more than one wife. Interesting to note

<sup>90</sup> T Nhlapo 'African family law under an undecided constitution: The challenge for law reform in South Africa' in J Eekelaar & T Nhlapo (eds) *The changing family: Family forms and family law* (1998) 629, as cited by Banda (n 88 above) 116.

<sup>91</sup> Nhlapo (n 90 above).

<sup>92</sup> See *Mphumeya v Republic*, as cited by GS Kamchedzera 'Malawi: Improving family welfare' (1993-1994) 32 *Journal of Family Law* 372. As noted by Bekker (n 54 above) 126, this is also similar to the patrilineal customary marriage in South Africa.

<sup>93</sup> Ibik (n 55 above) 191.

<sup>94</sup> See *Msowoya v Milanzi* Civil Appeal Case 99 of 1979, NTAC (unreported).

<sup>95</sup> Kamchedzera (n 92 above) 374.

<sup>96</sup> MHRC *Cultural practices and their impact on the enjoyment of human rights, particularly women and children* (2005) 18.

<sup>97</sup> The study covered 10 of the 27 administrative districts in Malawi.

<sup>98</sup> WLSA Malawi & SARDC WIDSAA *Beyond inequalities 2005: Women in Malawi* (2005) 19-20.

<sup>99</sup> 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 by EM Kisaakye 'Women, culture and human rights: Female genital mutilation, polygamy and bride price' in B Wolfgang et al (eds) *Human rights of women: International instruments and African experiences* (2002) 277.

<sup>100</sup> P Govender *The status of women married in terms of African customary law: A study of women's experiences in the Eastern Cape and Western Cape Provinces* (2000) 32.

is that the MHRC study also found strong support for the continuation of the practice from women respondents.<sup>101</sup> Similarly, Kisaakye<sup>102</sup> has also noted that some women have voiced support for the practice.

The above position, it could be argued, has a bearing on what impact the Bill of Rights and international human rights norms can have on human rights violations that come with polygamy. With women supporting the practice, it is doubtful that a formal approach of abolishing the institution of polygamy as proposed by the Malawi Law Commission<sup>103</sup> would be a solution in addressing human rights violations.

On the other hand, sections 20(1) and (2) of the Malawian Constitution provide as follows:

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 (my emphasis).

The prohibition of discrimination on the ground of sex is, arguably, intended to protect women.<sup>104</sup> By including sex as a ground on which discrimination is not allowed, section 20 of the Malawian Constitution leaves no doubt that no discrimination based on sex will be tolerated. Moreover, at international law, several international conventions to which Malawi is a party proscribe discrimination on the basis of sex.<sup>105</sup>

In a polygamous marriage, especially in a patrilineal system, at the point of contracting a subsequent marriage 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.<sup>106</sup>

<sup>101</sup> This finding has to be contrasted with the Malawi Law Commission's *Report on the Review of Marriage and Divorce Laws in Malawi* (2005) 29 which found, during the regional consultations, that 95% of the respondents cited more disadvantages than advantages of polygamy and had voiced strong support for it to be abolished. The study by the Malawi Law Commission could be compared to the study by Govender (n 100 as above) in South Africa, which shows that the predominant view (75%), reflected by most interviews, was for the abolition of polygamy.

<sup>102</sup> Wolfgang *et al* (n 99 above) 279.

<sup>103</sup> Malawi Law Commission (n 101 above).

<sup>104</sup> This position is also similar to sec 9(3) of the South African Constitution, 1996. It should, however, be noted that other constitutional provisions, eg, sec 13(5) of the Constitution of Tanzania, as noted by Banda (n 88 above) 35, do not include sex as one of the grounds on which discrimination is prohibited in their non-discrimination clause.

<sup>105</sup> Eg, arts 2 & 7 of the Universal Declaration; arts 2, 2(1), 3 & 20 of ICCPR; arts 2, 2(2) and 3 of ICESCR; art 1 of CEDAW; and arts 2, 19 & 28 of the African Charter.

<sup>106</sup> See also CRM Dlamini *The ultimate recognition of the customary marriage in South Africa* (1999) 32.

With the coming of HIV/AIDS, polygamy puts women's rights to health in jeopardy.<sup>107</sup> Under article 12 of ICESCR, 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 their rights. In light of the prevalence of HIV/AIDS in Malawi, polygamy also affects women's rights 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 findings:<sup>108</sup>

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.

The practice of polygamy directly conflicts with section 20 of the Malawian Constitution and international instruments on the protection of women's rights to equality as it treats women 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.<sup>109</sup> Concurring with Goody, the notion of one woman acting as a wife to more than one man would indeed suggest greater oppression, not liberation.<sup>110</sup> On the other hand, the fact that women support the practice speaks volumes of why a substantive approach should be preferred.

### 4.3 *Lobola*

In patrilineal systems, the payment of *lobola* by the bridegroom (represented by 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.<sup>111</sup> Mofokeng<sup>112</sup> defines *lobola* as

<sup>107</sup> Wolfgang *et al* (n 99 above) 279.

<sup>108</sup> Malawi Law Commission (n 101 above) 29: See also Wolfgang *et al* (n 99 above) 279.

<sup>109</sup> F Kaganas & C Murray 'Law, women and the family: The question of polygyny in a new South Africa' (1991) *Acta Juridica* 126.

<sup>110</sup> J Goody *The Oriental, the ancient and the primitive: Systems of marriage and the family in the pre-industrial societies of Eurasia* (1990) 140, as cited by Kaganas & Murray (n 109 above) 127.

<sup>111</sup> Chigawa (n 52 above) 5.

<sup>112</sup> LL Mofokeng 'The *lobola* agreement as the silent prerequisite for the validity of a customary marriage in terms of the Recognition of Customary Marriage Act' (2005) 68 *Journal of Contemporary Roman-Dutch Law* 278.

[a]n agreement between the family group of the prospective husband and the family group of the prospective wife that on or before the marriage ceremony, there would be the transfer of property from the family group of the husband, to the family group of the wife in respect of the marriage.

In Malawi, of the people interviewed by MHRC, about 62 per cent were in support of the institution. Similarly, in South Africa, a study by Govender<sup>113</sup> shows that 85 per cent of the women interviewed indicated whole-hearted support for the system of *lobola*. These findings point to the fact that women and society at large are supportive of *lobola*. In view of this fact, it is clear that a formal approach is not likely to succeed because communities do not see it as a violation of their human rights. What may be practical, as a suggestion, is to address the sting of violations of human rights pertaining to *lobola* itself.

It is important to note that under patrilineal marriage, the failure to institute *lobola* negotiations renders the marriage void. As Dlamini<sup>114</sup> has rightly observed, Africans in general

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 view of the above, to an African woman, negotiating and the subsequent delivery of *lobola* means a valid marriage. The opposite is also true. A formal approach to addressing human rights violations that come with *lobola* would require legislating against the practice. Such an approach would likely face resistance because it strikes at the very significant requirement of an African marriage.

Furthermore, for African patrilineal societies, *lobola* has a deeper cultural symbolism than the commercial meaning ascribed to it by its detractors.<sup>115</sup> 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.<sup>116</sup> It is the bedrock on which the African family in patrilineal societies is based. From *lobola* arise reciprocal rights and duties amongst the family groups concerned.<sup>117</sup> 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, but 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'

<sup>113</sup> Govender (n 100 above) 29.

<sup>114</sup> CRM Dlamini 'The modern legal significance of *ilobolo* in Zulu society' (1984) *De Jure* 149, as cited in Mofokeng (n 112 above) 279.

<sup>115</sup> See the criticisms by White (n 17 above) 53.

<sup>116</sup> See Bekker (n 55 above) 151 and Banda (n 88 above) 108.

<sup>117</sup> Mofokeng (n 112 above) 282.

that adequately balances the interests of the parties in a marriage.<sup>118</sup> If it is established that a woman was persistently treated cruelly and she refuses to go back to her husband, customary law favours her. The *lobola* is forfeited.<sup>119</sup>

From the above discussion, we see that the institution of *lobola* is at the centre of negotiating and balancing all rights that come with a customary marriage in the patrilineal system. So, looking at the protective aspects that come with *lobola*, it is obvious that no woman would want to forfeit that in a marriage, and it may explain its support.

At the same time, *lobola* has often been criticised for being an institution of oppression.<sup>120</sup> Critics link women's subordination and lack of a strong voice within marriage with the payment of *lobola*, which makes both the women and their families of origin dependent on their abusive partners.<sup>121</sup> Some critics go so far as to say that *lobola* constructs women as property.<sup>122</sup> Ironically, it has been noted that this was also the view of colonial authorities who likened it to purchase.<sup>123</sup> People holding this view argue that to continue with the practice is to perpetuate and encourage the subjugation of women.<sup>124</sup>

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.<sup>125</sup> Custody over children depends on the fulfilment of the obligations under the *lobola* agreement.<sup>126</sup> 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 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 the advantage of men. It has also been observed that, traditionally, children were regarded as the most important, and sometimes the only, reason for getting married.<sup>127</sup> The payment of *lobola* thus denies women all rights to their children, as well as control over their lives.

<sup>118</sup> Koyana *et al* (n 55 above) 32.

<sup>119</sup> As above.

<sup>120</sup> White (n 17 above) 53.

<sup>121</sup> Banda (n 88 above) 110.

<sup>122</sup> Southern African Research and Documentation Centre (SARDC) *Beyond Inequalities: Women in Zambia* (2005), as cited by Banda (n 88 above) 110.

<sup>123</sup> Wolfgang *et al* (n 99 above) 281.

<sup>124</sup> As above.

<sup>125</sup> See also *Aiya v Aiya* Divorce Cause 8 of 1973 (unreported) Ugandan case, as cited by Wolfgang *et al* (n 99 above) 281.

<sup>126</sup> See also Bekker (n 55 above) 234 and Armstrong *et al* (n 66 above) 348.

<sup>127</sup> A Shenje-Peyton 'Balancing gender, equality, and cultural identity: Marriage payments in post-colonial Zimbabwe' (1997) 9 *Harvard Human Rights Journal* 106.

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.<sup>128</sup> 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 goods without the consent of her husband.<sup>129</sup>

A striking similarity to the lack of property rights of married women in patrilineal marriages is what Fredman<sup>130</sup> draws our attention to. She notes that in the 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.

It is, therefore, not surprising that section 24<sup>131</sup> of the Malawian Constitution guarantees an equal right to full and equal protection by law. Furthermore, section 22(1)<sup>132</sup> of the Constitution guarantees equality within the family. It should be noted that section 24 of the Constitution is a unique one and finds its parallels in articles 16(1)(c), (d) and (f) of CEDAW.

Arguably, this constitutional provision can be used to address the inequality that comes with *lobola*. 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 standards<sup>133</sup> to which Malawi is a party, but also the Malawian Constitution in sections 19, 20, 24 and 28.<sup>134</sup>

<sup>128</sup> Von Benda-Beckmann (n 57 above) 89.

<sup>129</sup> As above. See also White (n 17 above) 58.

<sup>130</sup> S Fredman *Women and law* (1997) 40, based on accounts by W Blackstone *Commentaries on the law of England* (1809); JH Baker *An introduction to English legal history* (1979), among others.

<sup>131</sup> Secs 24 (1)(a)(ii) & (iii) of the Malawian Constitution provide: '(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; (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' (my emphasis).

<sup>132</sup> Sec 22(1) provides that '[e]ach member of the family shall enjoy full and equal respect and shall be protected by law against all forms of neglect, cruelty or exploitation'.

<sup>133</sup> See arts 16(1)(c), (d) & (f) of CEDAW.

<sup>134</sup> Sec 28 provides for the right to property. See also White (n 17 above) 59.

#### 4.4 Child marriage

Child marriage is particularly problematic. Writing on child marriage in Africa, Poulter states:<sup>135</sup>

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 prerequisite.

As noted, 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 the attainment of puberty.<sup>136</sup> The graduation to adulthood is, in most cases, attained when one has reached puberty and, in some cases, after completing an initiation ceremony.<sup>137</sup> Puberty and the completion of ceremonies are not directly connected to age.<sup>138</sup>

In addition to the above, some cultural practices encourage child marriages in Malawi. Some of these cultural practices are now discussed.

##### 4.4.1 *Chimeta masisi*

*Chimeta masisi* is the replacement of a deceased wife.<sup>139</sup> It is a practice by which a bereaved husband marries a younger sister or niece of his deceased wife.<sup>140</sup> In most parts where this practice is common, the MHRC found that it is usually encouraged by parents who let their young daughters marry a 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.<sup>141</sup> 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.<sup>142</sup> Yet other parents are said to do it because they would want to keep the

<sup>135</sup> S Poulter 'African customs in an English setting: Legal and policy aspects of recognition' (1988) 31 *Journal of African Law* 210.

<sup>136</sup> See also a discussion by TW Bennett *Customary law in South Africa* (2004) 304 for a similar position with respect to the patrilineal marriages of South Africa.

<sup>137</sup> Puberty for girls is reached when menstruation starts.

<sup>138</sup> Chigawa (n 52 above) 5 and Armstrong *et al* (n 66 above) 337-340.

<sup>139</sup> MHRC (n 96 above) 22.

<sup>140</sup> According to the MHRC study, 40% 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.

<sup>141</sup> Under patrilineal customary laws, however, there is no rule that upon the death of a wife *lobola* should be paid back.

<sup>142</sup> MHRC (n 96 above) 22.

son-in-law in their family since he is of good character. And some think that 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.<sup>143</sup> Clearly, this is a form of child marriage.

#### 4.4.2 *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.<sup>144</sup> 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, *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 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*, as 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*.

#### 4.4.3 *Kupawila*

*Kupawila* means paying off a debt by marrying a daughter.<sup>145</sup> 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 their daughter in marriage to the creditor. The daughter could be as young as nine 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.<sup>146</sup> The MHRC found that 15,4 per

<sup>143</sup> As above.

<sup>144</sup> The MHRC found that 45% of interviewees said that 'bonus wife' is a practice that takes place in their area.

<sup>145</sup> MHRC (n 96 above) 23-24.

<sup>146</sup> As above.

cent of the respondents in their survey said that *kupawila* still persisted in their communities.

A variation of *kupawila* in the Mzimba district takes place when parents eye 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 nine 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.<sup>147</sup>

Having said that, it is observed that at the international level there have been several attempts to tackle the problem of child marriages, including the 1956 Slavery Convention,<sup>148</sup> the UN Convention on Consent to Marriage, Minimum Age of Marriage and Registration of Marriages 1962 and CEDAW.<sup>149</sup> On the African continent, the African Children's Charter prohibits early marriage and specifies 18 as the legal age of marriage.<sup>150</sup> The African Women's Protocol has also specified a minimum age of marriage of 18 years.<sup>151</sup>

As noted earlier in this article, sections 22(6), (7) and (8) of the Malawian Constitution regulate the age for entering into marriage. Subsection (6) provides that: '[n]o person over the age of eighteen years shall be prevented from entering into marriage'. This provision, as noted earlier, sets the marrying age at 18 years.<sup>152</sup> It is clear 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

<sup>147</sup> MHRC (n 96 above) 24.

<sup>148</sup> Art 2 of the UN Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery 1956.

<sup>149</sup> Art 16(2) of CEDAW. See also CEDAW General Recommendation 21 paras 36, 38 & 39.

<sup>150</sup> Art 21(2) African Children's Charter.

<sup>151</sup> Art 6(b) African Women's Protocol.

<sup>152</sup> See also DM Chirwa 'A full loaf is better than half: The constitutional protection of economic, social and cultural rights in Malawi' (2005) 49 *Journal of African Law* 215.

of between 15 and 18 to enter into marriage with the consent of their parents, the Malawian Constitution fails to categorically prohibit child marriages.<sup>153</sup> Subsection (8) discourages marriages between persons where either of them is under the age of 15 years.<sup>154</sup> This provision 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 it. The cumulative effect of section 22(8), as read with section 23 of the Malawian 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.

The MHRC findings on the cultural practices that encourage child marriages clearly show that some parents are indirectly or directly behind these marriages. For that reason, it is doubtful that a categorical prohibition of child marriages, which would be the formal approach, would yield the desired result of addressing human rights violations that come with child marriages. It is therefore suggested that a substantive approach, which would include addressing the socio-economic circumstances behind the support, in some instances becomes inevitable.

## 5 Conclusion

This paper has highlighted some of the major rules and practices pertaining to contracting a customary marriage under African customary laws that potentially offend against the Bill of Rights and international human rights standards aimed at protecting women's rights. What has been evident from the analysis undertaken is that some features of African customary law governing a marriage effectively discriminate against women on the basis of their sex and, accordingly, are in direct conflict with the Bill of Rights and international human rights law. 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 the Constitution and those 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

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<sup>153</sup> Similar sentiments were also expressed in Malawi Law Commission Constitutional Review Programme: Consultative Paper (undated) 21. See also Ntata & Sinoya (n 56 above) 13.

<sup>154</sup> Sec 22(8) of the Malawian Constitution provides that '[t]he state shall actually discourage marriage between persons where either of them is under the age of fifteen years'.

power of cultural influence 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 and hence I am advocating a substantive approach. The straightforward formal approach of addressing human rights violations is not satisfactory. Moreover, the conflict between human rights and African customary law needs to be analysed from many angles, including the reasons for the support by both men and women for some of the cultural beliefs which may seem to violate their human rights.