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**18+ PROGRAMME ON ENDING CHILD
MARRIAGE IN SOUTHERN AFRICA**

IN-DEPTH REVIEW OF LEGAL AND REGULATORY FRAMEWORKS ON CHILD MARRIAGE IN MALAWI



About Plan International

Founded in 1937, Plan International is one of the oldest and largest children's development organisations in the world. Plan International is currently working in 71 countries worldwide. Their vision is of a world in which all children realise their full potential in societies that respect people's rights and dignity. Through its *Because I Am A Girl (BIAAG)* global campaign, Plan International has had a major focus on promoting gender equality to lift millions of girls out of poverty.

About the 18+ Programme

The 18+ Programme on Ending Child Marriage in Southern Africa was conceptualised as an initiative to domesticate and operationalise the BIAAG campaign. It is a programming model with a clear theory of change and pathways for attaining the desired change. The programme, hosted in Zambia, covers Malawi, Mozambique, Zambia, and Zimbabwe and has three main objectives:

1. To mobilise girls at risk of child marriage so that they have the capabilities to determine their own futures and make their own choices about if, when and whom they marry.
2. To transform, through social movement-building, the gender norms and practices that drive child marriage.
3. To facilitate an enabling legal and policy environment to protect girls from child marriage.

About the study

The study, which took place between November 2014 and April 2015, analysed and documented domestic and regional legislation that prohibits and/or perpetuates the practice of child, early and forced marriage in the four countries. It interrogated whether formal, customary or religious laws are in conformity with international human (child) rights standards. The validation workshop was held in April 2015 and the final draft reports were out in July 2015. This in-depth review of the legal and policy environment has informed the development of policy briefs for the four participating countries, which recommend legal and policy changes at country and regional levels.

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ACRONYMS

CAWOC	Centre for Alternatives for Victimized Women and Children
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CEYCA	Centre for Youth and Child Affairs
CRC	Convention on the Rights of the Child
GBV	Gender-based violence
GEWE	Gender Equality and Women's Empowerment
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
JSSP	Joint Sector Strategic Plan
MDG	UN Millenium Development Goal
MGDS	Malawi Growth and Development Strategy
MHRC	Malawi Human Rights Commission
MSCA	Malawi Supreme Court of Appeal
NAP	National Plan of Action
NGES	National Girls' Education Strategy
NGOGCN	NGO Gender Co-ordination Network
NSO	National Statistical Office
NYP	National Youth Policy
SADC	Southern African Development Community
SAT	Southern African AIDS Trust
SRH	Sexual and reproductive health
TA	Traditional authority
UNFPA	United Nations Population Fund
UNICEF	United Nations Children's Emergency Fund
UPR	Universal Periodic Review
VAWC	Violence against women and children
WOLREC	Women's Legal Resources Centre
YONECO	Youth Net and Counselling
YFHS	Youth Friendly Health Services

EXECUTIVE SUMMARY

This in-depth review of legal and regulatory frameworks on child marriages in Malawi has been carried out under Plan's sub-regional programme 18+: *Ending Child Marriages in Southern Africa*. Malawi ranks eighth as a country with the highest rates of child marriage in the world. As such, there is urgent need to pursue preventative measures by ensuring that the country's legal and policy frameworks, and programmes, are strong enough to support and sustain efforts to combat early, child and forced marriage. Other in-depth reviews have been produced in three more countries where the +18 programme is being implemented, namely Mozambique, Zambia and Zimbabwe.

The findings of the review have revealed that while Malawi has several legal and regulatory frameworks and interventions that provide an enabling environment for addressing the problem of early, child and forced marriage, there are also limitations that inhibit concrete progress given the very high prevalence of the problem to date (50 per cent of girls get married by the age of 18 years, and all regions have a prevalence of child marriage of above 40 per cent). Regarding the status of international and regional frameworks, milestones are that the government of Malawi has ratified key treaties such as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention on the Rights of the Child (CRC), the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, and the SADC Gender and Development Protocol. Malawi also subscribes to the Universal Periodic Review (UPR) process, and the implementation of the UPR 2010 recommendations is being monitored by the Malawi Human Rights Commission (MHRC).

Furthermore, several of the measures that the country has so far undertaken to address child marriage coincide with recommendations that have been made by treaty monitoring bodies such as the CRC Committee and the CEDAW Committee. Despite this progress, weaknesses that remain in relation to the implementation of international and regional framework include:

- the absence of strong systems for monitoring the diligent implementation of international and regional child marriage commitments;
- the lack of deliberate steps to ensure the wide dissemination of recommendations of treaty monitoring bodies to a comprehensive body of stakeholders that have a role in addressing child marriage in Malawi; and
- insufficient clarity on who has the responsibility to coordinate the implementation of relevant recommendations related to child marriage.

These gaps have compromised the quality of implementation and impact of relevant international and regional recommendations that are meant to strengthen the fight against early, child and forced marriage.

As for legislation on the minimum age of marriage, the positive news is that formal law sets the same age of marriage for boys and girls. The Marriage, Divorce and Family Relations Act No. 4 of 2015 imposes the marriage minimum age of 18 years, and this complements the constitutional minimum age of marriage without parental consent, also 18 years. However, while the marriage law also applies to customary and religious marriages, in practice, some customary and religious practices declare puberty as the age of marriage for girls, but not for boys. The Constitution also accepts a lower age of marriage with parental consent (between 15 and 18 years), and merely discourages marriages for those aged below 15 years. This means that although the new marriage law sets 18 years as the minimum age of marriage, this will not be an absolute minimum until the Constitution is amended.

With respect to laws related to marriage consent, formal law is again at variance with customary law. The Constitution specifically disallows forced marriage, while the Marriage, Divorce and Family Relations Act No. 4 of 2015 treats forced marriage as one of the grounds for nullifying a marriage. Since the new marriage law has consolidated all marriage laws, this

means that customary and religious marriage cannot be legally entered into by force either. This legal position is cemented by the fact that harmful practices are outlawed under the Child Care, Protection and Justice Act No. 22 of 2010 and the Gender Equality Act No. 3 of 2013. The former law even specifically prohibits child betrothal and forced child marriage. Despite this progress, the drawback is that there is weak enforcement of the various legal prohibitions. The fact that the Constitution allows children aged between 15 and 18 years to get married with parental consent provides room for forced child marriage under the guise of 'parental consent.' In addition, in customary law, the consent of the parties to a marriage does not carry as much weight as parental consent, implying that the issue of free consent of the parties is usually regarded as secondary, especially where a girl has fallen pregnant outside wedlock.

The legal requirement regarding the compulsory marriage registration has been stipulated in the Marriage, Divorce and Family Relations Act No. 4 of 2015. The mechanisms that the law has put in place to ensure that all forms of marriages are registered at all levels just need to be operationalised, and efforts made to ensure that marriage registrars (who include clerics and traditional authorities) are fully competent in the performance of their duties. Given that most Malawians do not have birth certificates, the success of a marriage registration system hinges on the complementary implementation of a birth registration system. Positively, as of August 2015, the birth registration system has begun to be implemented in all districts.

A comprehensive approach to tackling early, child and forced marriage also implies eliminating discrimination against women and girls in all matters relating to marriage and family relations. In this regard, there has to be attention to how formal law and customary/religious laws are interacting, and addressing areas where the inconsistencies in customary and religious laws are promoting child marriage. The advantage that Malawi has is that the Constitution invalidates laws (including religious and customary) that are incompatible with constitutional provisions, principles and values. Furthermore, as described above, various statutes are clear in proscribing child marriage and harmful practices. For sustainable change to happen towards addressing child marriage, well considered strategies are necessary in order to practically realise the intentions of

the Marriage, Divorce and Family Relations Act No. 4 of 2015 to harmonise the regulation of customary, religious and civil laws. One good thing is that in some areas in Malawi, by-laws that are being facilitated by chiefs have become a tool for implementing formal laws that are specifically seeking to address early, child and forced marriage.

In terms of eliminating discrimination in family relations through statutory law, the Marriage, Divorce and Family Relations Act No. 4 of 2015 has created several rights and obligations of spouses towards each other. It has clarified how to establish the existence of marriages by repute and permanent cohabitation; it recognises that non-monetary contribution counts in determining a spouse's contribution to maintenance and property acquisition; and it recognises marital rape as an offence during judicial separation. At the same time, the discrimination-related shortfalls in the new law include: the specification that the law will only apply to marriages that existed before its enactment (except for provisions related to rights and obligations of spouses); the law only outlaws polygamy in civil marriages; and it does not criminalise marital rape during informal separation over the course of a marriage. Other domestic frameworks that are also relevant in addressing early, child and forced marriage include laws and policies related to sexual offences and gender-based violence/harmful practices; access to education; access to sexual and reproductive health and services; and laws on inheritance. The full implementation of good aspects of these laws and policies, as well as the harmonisation of all laws relevant to child marriage, are the important elements that are missing in order to have a comprehensive multi-sectoral response towards addressing the problem.

Having strong formal and informal mechanisms of justice delivery to support efforts to address early, child and forced marriage is necessary in efforts to combat the practice. In Malawi, justice structures such as the police, courts and traditional systems are relevant to this fight, although current efforts remain fragmented. At police level, despite the fact that some laws that can facilitate prosecution of child marriage offences exist; prosecution of offences is rare; and there is inadequate proactiveness on the part of the police to look out for and prosecute child marriage cases. Inadequate knowledge about child marriage and its impacts is a challenge that affects many police personnel.

As for access to justice through courts, although a few examples of cases of defilement or abduction have come to light after being reported by either parents or NGOs, it is a fact that the constitutional low minimum age of marriage confuses courts, especially where the perpetrator is an adolescent himself. Also, knowledge of child marriage laws is not common amongst magistrates. In terms of access to justice through traditional structures, by-laws that exist in some areas are proving to be a strategic tool for eradicating child marriage and enforcing compulsory education. However, the challenge is that child marriage projects that are building awareness and capacity of chiefs so that they can address child marriage have no comprehensive coverage. In addition, by-laws are being developed outside the district council structure, thus threatening their legal validity, sustainability and potential for replication.

Lastly, tangibly addressing early, child and forced marriage demands the presence of strong coordination mechanisms. Fortunately, at national level, the ministry responsible for gender and children is displaying strong leadership, and is closely collaborating with other partners in addressing child marriage. National structures to address child marriage also exist through the Child Marriage Working Group and the End Child Marriage Network. However, for these coordination mechanisms to be fully effective in achieving their purpose, there is recognition that challenges that have to be addressed include: weak community level coordination; the lack of a multi-sectoral approach to most interventions; and the reduction of direct support for child marriage-related programmes to the responsible ministry, which is affecting the efficiency of the delivery of child protection interventions at district level.

Child marriage, also referred to as early marriage, is any marriage where at least one of the parties is under 18 years of age. The overwhelming majority of child marriages, both formal and informal, involve girls, although at times their spouses are also under the age of 18. A child marriage is considered as a form of forced marriage given that one or both parties have not expressed their full, free and informed consent.

Joint General Recommendation/General Comment No. 31 of the Committee on the Elimination of Discrimination against Women and No. 18 of the Committee on the Rights of the Child on Harmful Practices (2014), paragraph 19

REPORT BACKGROUND

Why Plan's interest in this in-depth review?

This Malawi report complements similar reports that have been documented in Mozambique, Zambia and Zimbabwe under Plan's sub-regional programme 18+: *Ending Child Marriages in Southern Africa*, which is focusing on the four countries. Plan is an international, rights-based, child-centred and community development organisation working worldwide for the realisation of children's and other human rights to end child poverty in developing countries. Plan's vision is of a world in which all children realise their full potential in societies that respect people's rights and dignity. The 18+ programme is a flagship initiative of the Global Girls Innovation Programme (GGIP) which aims to reduce and eradicate child marriages in the four participating countries. It is guided by six strategies, which are based on promising approaches used in other programmes. These are:

- a) Increase girls' capabilities through safe spaces and group formation;
- b) Increase girls' and communities' demand for girls' education;
- c) Enhance access to sexual and reproductive health information, services and rights;
- d) Increase awareness and understanding at household level about child marriage, girls' education and rights;
- e) Motivate mobilisation of communities, families and advocates to prevent child marriage; and
- f) Advocate for legal and policy change at all levels.

The 18+ programme does not address every driver of child marriage. Rather, it focuses on core drivers that perpetuate the phenomenon. The programme adopts a 'preventive' approach as opposed to a response, and prioritises interventions that benefit girls aged 10 to 14 years old. One preventative measure is to ensure that domestic legal and policy standards create and/or sustain an environment for defeating the practice of child marriage. It is in this context that Plan commissioned this in-depth review of the legal and policy environment and the enforcement of legislation

related to child marriage in Malawi. Plan is aware that even where equal legislation exists, there are problems with implementation. This is due to weak institutional capacity across multiple sectors, alongside lack of awareness by families and community leaders. Girls themselves may not be aware of their own rights. Customary structures that govern child marriage and traditional authorities are not often aware of child, early and forced marriage as a violation of children's rights.

Contributions of the report to existing research on child marriage in Malawi

The process of documenting this report uncovered that apart from the budding of various local programmes and a national campaign against child marriage in Malawi, the topic of child marriage has been an exclusive research subject of three reputable international institutions in 2014 alone. The Centre for Human Rights (based at the Faculty of Law, University of Pretoria) released its Malawi Country Report on Child Marriage for 2013/14. The detailed report documents the prevalence of child and forced marriage and its root causes. It also expansively reviews legal obligations to address child marriage that emanate from international and regional law, consensus documents and state party reporting mechanisms. In addition, it analyses the domestic legal framework in relation to issues of sexual consent, child marriage, marriage registration, birth registration and education. Furthermore, it examines the responsiveness of policy frameworks to the problem. The report goes further to examine case law related to child and forced marriage, and to scrutinise how customary and religious beliefs perpetuate the problem. Enforcement and monitoring mechanisms are also analysed, and so are examples of promising interventions. The report's recommendations are made with a view to advocating for legislative reforms, capacity building, education access, community mobilisation and sensitisation, and better coordination.

Human Rights Watch, which is dedicated to protecting the human rights of people around the world, documented the Malawi child marriage situation in its 2014 report *I've Never Experienced Happiness: Child*

Marriage in Malawi. The report gives good background information on women's and girls' rights in the country; how Malawi laws respond to the challenge of child marriage; the redress mechanisms that are lacking/available to effectively address the problem; and Malawi's international legal obligations on child marriage. The report enumerates recommendations for specific players such as the State President; Ministry of Justice; the Ministry responsible for Gender; the Ministry responsible for Home Affairs; the Ministry of Education; the Ministry of Health; the Judiciary; MHRC; and UN agencies/donors.

In May 2014, KidsRights Foundation released a report entitled *Innocence Lost: Child Marriage in a Global Context with a Focus on Malawi*. The report provides a global perspective of child marriage, as well as a country perspective. In relation to the latter, it details the legal framework, the background context, the scale of child marriage in Malawi, its challenges, and underlying causes. It also addresses the roles of the government and NGOs in combatting the practice. The conclusion and recommendations of the report, similarly made from global and country perspectives, generally stress that child marriage should be raised as a human rights issue that warrants multi-faceted interventions.

In addition to three researches, also in 2014, the African Child Policy Forum, a Pan-African institution for policy research and dialogue on the African child, produced *The African Report on Violence Against Children*. The report was developed in close collaboration with the African Committee of Experts on the Rights and Welfare of the Child and the Office of the Special Representative to the Secretary General on Violence Against Children. The report findings are based on studies that were conducted in eight African countries, of which Malawi was one.¹ The report exposes multiple experiences of violence by children, including early marriage. It recognises birth registration and cash transfers as some of the measures that help to prevent early marriage. It also acknowledges that the African Union has taken some critical initiatives to spearhead action to stop child marriage, and that these have been translated into domestic responses in some countries.

Therefore, this report has been developed from the wealth of existing information from the above studies and other programme reports of local interventions. However, the unique contribution of the report is that it

emerges at a time when Malawi experienced some policy and legal shifts between 2014 and early 2015 that are not covered in the above research documents. One notable legal movement is the passing of the Marriage, Divorce and Family Relations Act by Parliament on 12 February 2015. The law was assented to by the State President on 10 April 2015 as the Marriage Divorce and Family Relations Act No. 4 of 2015. It was gazetted on 17 April 2015. This law has extensively altered the law on marriage in Malawi both progressively and retrogressively, and its comprehensive analysis within the framework of other existing domestic laws, policies and international standards makes the report relevant in supporting Plan's advocacy work for legal and policy change at all levels. This report further strengthens advocacy initiatives by streamlining all available information in order to provide a concise and up to date document that reveals how statutory, customary or religious laws are supporting or undermining efforts to eliminate child, early and forced marriage; and how existing implementation and enforcement mechanisms are succeeding or falling short.

Specific objectives of the in-depth review

- a) To conduct an in-depth review of laws and policies as they relate to child marriages in Malawi, and their implementation and enforcement status.
- b) To review international and regional frameworks/provisions related to child marriage and analyse how the domestic context responds to these frameworks.
- c) To develop a policy brief on child marriages in Malawi.

Thus this review of legislative and policy frameworks takes stock of how Malawi is fairing regarding minimum age of marriage for girls and boys; registration of marriages; consent laws for marriage; eliminating discrimination against women and girls in all matters relating to marriage and family relations; customary/religious laws on marriage (and the relationship between national law and customary law in plural legal systems); and the ratification status of key international treaties relevant to addressing child marriage. It will also assess the level of implementation and enforcement of existing laws and policies.

1. Other countries are Ethiopia, Kenya, Mali, Morocco, Uganda, Zambia and Zimbabwe.

Methodology

This report has been produced from a combination of secondary data review and primary data collection and analysis. The secondary data/desk review involved the analysis of research documents, programme reports and media articles on the topic of child, early and forced marriage in Malawi. Relevant legal and policy frameworks and sectoral strategic documents were also analysed. The desk review was guided by recommended areas of research and analysis under the Terms of Reference (TORs) for the assignment. Primary data collection applied the ranking tool in Annex 1, and concentrated on key informants such as selected government sectors, UN agencies and NGOs (see Annex 2 for names of interviewees). The purpose of the primary data was to fill literature gaps and update or validate some of information that was highlighted during the desk review.

The information in the report facilitated the fulfilment of another deliverable to the assignment, namely to produce a policy brief that will be used for advocacy purposes on legal and policy changes. With the support from Plan International, both the draft report and the policy brief underwent a validation process by a sub-regional meeting involving representatives from Malawi, Mozambique, Zambia and Zimbabwe that took place in Zambia from 16-17 March 2015. Contributions from this engagement were used to finalise the two documents. The work was supervised by the sub regional manager of Plan18+, Ms Emmily Kamwendo-Naphambo, who has provided strategic insights from the inception report through to the conclusion of the work.

Report structure

This report is divided into 10 parts as follows:

Part 1 outlines relevant international and regional frameworks that are applicable to child marriage in Malawi, and the state of their implementation. Part 2 scrutinises child marriage-related indicators and prevalence of early, child and forced marriage in Malawi. Part 3 contains an analysis of the legal position on minimum age of marriage both in legislation as well as at custom and religion. Part 4 describes the legislative and customary position on the issue of consent to a marriage. Part 5 sheds light on laws related to marriage registration. Part 6 examines the extent to which the law eliminates discrimination against women and girls in all matters relating to marriage and family relations. Part 7 closely looks closely at other laws, government policies and programmes that are related to early, child and forced marriage. Part 8 discusses the issue of access to justice and law enforcement by justice delivery systems, such as the police, courts and traditional structures. Part 9 exposes perceptions on the state of harmonisation of marriage laws and coordination mechanisms. Part 10 lists key conclusions and recommendations.

PART 1: RELEVANT INTERNATIONAL & REGIONAL FRAMEWORKS THAT ARE APPLICABLE TO CHILD MARRIAGE IN MALAWI

Human rights treaties, General Comments/General Recommendations, and Concluding Comments/Observations of treaty monitoring bodies constitute the international human rights framework that is relevant to the early, child and forced marriage discourse. These are defined in turn. Before outlining the frameworks that Malawi subscribes to and the state of their implementation, the following analysis describes what the various frameworks entail.

1.1 The meaning of various international and regional human rights frameworks

In order to understand the obligations of Malawi in respect to different international and regional frameworks that are outlined under Part 1.2, it is important to first understand what the different types of frameworks mean in terms of their legal force.

1.1.1 Human rights treaties

Also known as conventions, protocols and charters, treaties are instruments that are legally binding upon countries that have ratified them. Cognisance is taken of the fact that under Section 211 of the Constitution of the Republic of Malawi, treaties have to be

domesticated by an Act of Parliament for them to become part of the country's laws, unless they were ratified before the adoption of the Constitution. Treaties such as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW, ratified on 2 October 1991), the Convention on the Rights of the Child (CRC, ratified on 2 January 1991), the International Covenant on Civil and Political Rights (ICCPR, ratified on 2 December 1993) and the International Covenant on Economic, Social and Cultural Rights (ICESCR, ratified on 2 December 1993) would ideally fall in the category of treaties that are automatically part of the laws of Malawi.

But the interpretation of Section 211 has been a long-standing debate in Malawi, which seems to have been settled by the Supreme Court of Appeal case entitled *In the Matter of Adoption of Children Act (Cap 26:01) and in the Matter of Chifundo James (A Female Infant)*.² In its judgment, the Supreme Court ruled that although the executive has taken up the role of ratifying treaties, the job of making laws remains with Parliament. As such, the executive cannot usurp legislative powers through the ratification of treaties. For any treaty to become a law in Malawi, it is Parliament that must exercise its powers by domesticating it accordingly. Despite the apparent setbacks of this judgment,

2. MSCA Adoption Appeal No. 28 Of 2009 (Being Adoption Cause No. 1 of 2009, High Court of Malawi, Lilongwe District Registry)

Malawi is doing relatively well in domesticating a number of treaties by incorporating some of their principles in emerging laws. This has been manifested through the Prevention of Domestic Violence Act (Chapter 7:05) of the Laws of Malawi; the Child Care (Justice and Protection Act) No. 22 of 2010; the Criminal Procedure and Evidence Code No (2010); the Deceased Estates (Wills, Inheritance and Protection) Act No. 14 of 2011; the Penal Code (Amendment) Act No. 1 of 2011; the Gender Equality Act No. 3 of 2013; the Marriage, Divorce and Family Relations Act No. 4 of 2015; and the Trafficking In Persons Act No. 3 of 2015.³ Several of these laws are discussed in various contexts in order to shed light on the extent to which they support an enabling environment for combating early, child and forced marriages; or indeed whether they have some inherent features to obstruct the fight.

General Comments or General Recommendations

Various bodies (treaty monitoring bodies) monitor the implementation of human rights treaties. In the United Nations System, these are normally called committees. The African Union has a commission that monitors the African Charter (1981) and its associated protocols. Treaty monitoring bodies sometimes interpret the provisions of treaties that they are tasked to monitor through General Comments or General Recommendations. These frameworks are significant because they establish criteria for assessing States' compliance with conventions.⁴ Furthermore, they are very important documents in ensuring that specific rights in particular treaties are given meaning.⁵ The analysis in this report uses General Comments or General Recommendations that directly relate to several aspects of early, child and forced marriage as issued by the African Commission on Human and People's Rights, the CEDAW Committee, the Committee on the Rights of the Child, the Human Rights Committee and the Committee on Economic Social and Cultural Rights. In addition, the recommendations of the UPR are also used where applicable.

1.1.2 Concluding Observations or Concluding Comments

As part of the treaty monitoring routine, countries are required to regularly submit reports (State party reports) to treaty monitoring bodies regarding the status of implementation of a particular treaty in their country. For instance, this report demonstrates that Malawi has so far submitted State party reports to the African Commission on Human and People's Rights, the CEDAW Committee, the Committee on the Rights of the Child, the Human Rights Committee and the UPR process. The UPR is a new and unique human rights mechanism established by the Human Rights Council of the UN, created through the UN General Assembly. It aims at reviewing and assessing the performance of Member States on human rights issues. Instead of concluding observations, the UPR issues recommendations that are based on observations made by different countries.⁶ Concluding Observations, Comments or Recommendations are an important framework because they isolate specific milestones that a country has made; and outstanding challenges that it has to speedily work on. For Malawi, the extent to which the outstanding matters have been addressed by the time the country submits a subsequent State party report becomes a pivotal measure of the government's seriousness to fulfil its international commitments.

1.2 Human rights frameworks that are relevant to child marriage in Malawi

The matrix below contains legally binding treaties that have been ratified by the Government of Malawi, and General Recommendations/General Comments and Concluding Observations that are related to such treaties. Apart from these, it is recognised that there are other non-binding frameworks that inspire countries to address child marriage more robustly. A comprehensive list of these documents and their relevance has been generated through a separate document, which ought to be closely referenced by the four countries that are part of the Plan+18 programme.

3. LawPlus (forthcoming).

4. Ipas 2002, note 1 above.

5. Ipas 2006.

6. MHRC, 2015

Table 1: Descriptions of international and regional frameworks related to child marriage in Malawi

FRAMEWORK	DESCRIPTION
<p>Convention on the Elimination of All Forms of Discrimination against Women (1979)</p>	<p>This was ratified by the government of Malawi on 12 March 1987, initially with reservations on Article 5. The reservation was withdrawn on 24 October 1991.</p> <p>Article 2 (f) States parties shall condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.</p> <p>Article 5 (a) States parties shall 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 customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.</p> <p>Article 16 (2): Marriage and family life 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.</p>
<p>CEDAW General Recommendation No. 21: Equality in Marriage and Family Relations (1994)</p>	<p>Paragraphs 36-39 The General Recommendation establishes that the CEDAW Committee considers that the minimum age for marriage should be 18 years for both man and woman; and mandates States to set a minimum age for marriage, prohibition of bigamy and polygamy and the protection of the rights of children. It requires the abolition of the practice of betrothal of girls, since this contravenes CEDAW as well as the Convention, but also a woman's right freely to choose her partner. It commits States to require the registration of all marriages whether contracted civilly or according to custom or religious law.</p>
<p>CEDAW General Recommendation No. 24: Women and Health (1999)</p>	<p>Paragraphs 15(d) & 28 The General Recommendation elaborates on Article 24 of CEDAW, which has provisions related to women and health. It obliges State parties to enact and ensure the effective enforcement of laws that prohibit marriage of girl children. It also asks State parties to be mindful of Article 16 (2) of CEDAW, which proscribes the betrothal and marriage of children, an important factor in preventing the physical and emotional harm which can arise from early childbirth.</p>
<p>Concluding Comments of the Committee on the Elimination of Discrimination against Women on Malawi's Combined Second, Third, Fourth and Fifth Periodic Report (2006)</p>	<p>Paragraphs 13, 14, 19 & 20 The Concluding Comments express the CEDAW Committee's concerns that: there are contradictions between the Marriage Act, which establishes 21 years as the minimum age for marriage, and the Constitution, which allows child marriages. There is a prevalence of a patriarchal ideology with firmly entrenched stereotypes and the persistence of deep-rooted cultural norms, customs and traditions, including forced and early marriage and other such practices enumerated in the State party's report that discriminate against women and constitute serious obstacles to women's enjoyment of their human rights.</p>

Table 1: cont

FRAMEWORK	DESCRIPTION
	<p>The Committee recommends that Malawi should:</p> <ul style="list-style-type: none"> • Accelerate its law review process and ensure that its discriminatory legislation is speedily brought into compliance with the Convention so as to establish women's <i>de jure</i> equality. • Introduce, without delay and in conformity with Articles 2 (f) and 5 (a) of the Convention, concrete measures to modify or eliminate customs and cultural and harmful traditional practices that discriminate against women, particularly forced and early marriages, so as to promote women's full enjoyment of their human rights. • Increase its efforts to design and implement comprehensive education and awareness-raising programmes targeting women and men at all levels of society, including village heads and chiefs, with a view to changing discriminatory social and cultural patterns of conduct and creating an enabling and supportive environment for women to exercise their human rights. • Implement the necessary efforts, in collaboration with civil society organisations, women's non-governmental organisations and community leaders. • Review periodically the measures taken to assess the impact of those efforts and take appropriate remedial measures, and to report on the results to the Committee in its next report.
<p>Convention on the Rights of the Child (1989)</p>	<p>Ratified by the government of the Republic of Malawi on 2 January 1991.</p> <p>Article 1 For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.</p> <p>Article 24 (1) & (3)</p> <ul style="list-style-type: none"> • States parties recognise the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States parties shall strive to ensure that no child is deprived of his or her right of access to such health care services. • States parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.
<p>CRC General Comment No. 4: Adolescent Health and Development in the Context of the Convention on the Rights of the Child (2003)</p>	<p>Paragraphs 20 and 31</p> <ul style="list-style-type: none"> • The Committee expressed the concern that early marriage and pregnancy are significant factors in health problems related to sexual and reproductive health, including HIV and AIDS. Both the legal minimum age and actual age of marriage, particularly for girls, are still very low in several States parties. Children who marry, especially girls, are often obliged to leave the education system and are marginalised from social activities. Further, in some States parties married children are legally considered adults, even if they are under 18, depriving them of all the special protection measures they are entitled under the Convention. • Thus the Committee strongly recommends that States parties review and, where necessary, reform their legislation and practice to increase the minimum age for marriage with and without parental consent to 18 years, for both girls and boys. • The Committee also requires that adolescent girls should have access to information on the harm that early marriage and early pregnancy can cause, and those who become pregnant should have access to health services that are sensitive to their rights and particular needs. States parties should take measures to reduce maternal morbidity and mortality in adolescent girls, particularly caused by early pregnancy and

Table 1: cont

FRAMEWORK	DESCRIPTION
	<p>unsafe abortion practices, and to support adolescent parents. Young mothers, especially where support is lacking, may be prone to depression and anxiety, compromising their ability to care for their child.</p>
<p>Joint General Recommendation /General Comment No. 31 of the Committee on the Elimination of Discrimination against Women and No. 18 of the Committee on the Rights of the Child on Harmful Practices (2014)</p>	<p>This is a historical General Recommendation/General Comment because it is the first time that the CEDAW Committee and the CRC Committee have jointly interpreted provisions on harmful practices (which affect women and children) under CEDAW and the CRC.</p> <p>Paragraphs 6, 19 and 54(f) Establish the correlation between child marriage and forced marriage, given that one or both parties have not expressed their full, free and informed consent. It also twists the debate on the issue of age of marriage, declaring that, in exceptional circumstances, the minimum age of marriage can be 16 years, and that such a decision should be made by a judge based on legitimate exceptional grounds defined by law and on the evidence of maturity without deference to cultures and traditions. Otherwise, a minimum legal age of marriage for girls and boys, with or without parental consent, is set at 18 years.</p>
	<p>Paragraphs 20, 22 and 23 Describe the elements of a forced marriage by listing examples of situations when forced marriages may occur. These include: marrying girls too young when they are not physically and psychologically ready for adult life or for making conscious and informed decisions, and thus not ready to consent to marriage; cases where guardians possess the legal authority to consent to marriage of girls in accordance with customary or statutory law and in which girls are thus married contrary to their right to freely enter into marriage; exchange or trade-off marriages (ie baad and baadal; servile marriages; coercing a widow to marry a relative of her deceased husband (levirate marriages); permitting a rapist to escape criminal sanctions by marrying the victim; in migration situations, ensuring that a girl marries within the family’s community of origin in order to provide extended family members or others with documents to migrate to and/or live in a particular destination country; in conflict situations, marriage of girls by armed groups or compelling a girl to get married as a means for a girl to escape post-conflict poverty; marriage in which one of the parties is not permitted to end or leave it; payment of dowry and bride price, which increases the vulnerability of women and girls to violence; situations where families will agree to the temporary ‘marriage’ of their daughter in exchange for financial gains (contractual marriage).</p>
	<p>Paragraph 21 The General Recommendation/General Comment encourages States to address all the harmful implications of child marriage. The document lists the following examples of these implications: early and frequent pregnancies and childbirth, resulting in higher than average maternal morbidity and mortality rates; pregnancy-related deaths as the leading cause of mortality for 15-19 year old girls (married and unmarried) worldwide; high infant mortality among the children of very young mothers; limited decision-making power by girls in relation to their own lives, particularly in cases where the husband is significantly older and where girls have limited education; higher rates of school dropout, particularly among girls, forced exclusion from school; increased risk of domestic violence; limited enjoyment of the right to freedom of movement; girls’ lack of personal and economic autonomy; girls’ attempts to flee or commit self-immolation or suicide to avoid or escape the marriage.</p>

Table 1: cont

FRAMEWORK	DESCRIPTION
	<p>Paragraphs 39 & 41 The Committees call on States parties to explicitly prohibit by law and adequately sanction or criminalise harmful practices, in accordance with the gravity of the offence and harm caused, provide for the means of prevention, protection, recovery, reintegration and redress for victims and combat impunity for harmful practices.</p> <p>Paragraph 54 The joint General Recommendation/Comment calls on State parties to seriously implement strategies to promote education for girls. The Committees emphasise that the completion of primary and secondary education provides girls with short- and long-term benefits by contributing to the prevention of child marriage and adolescent pregnancies, preparing women and girls to better claim their right to freedom from violence and increasing their opportunities for effective participation in all spheres of life. The joint General Recommendation/Comment prescribes that some of the measures that State parties ought to take to boost enrolment and retention in secondary education are: ensuring that students complete primary school; abolishing school fees for both primary and secondary education; promoting equitable access to secondary education, including technical-vocational educational opportunities; giving consideration to making secondary education compulsory; ensuring that adolescent girls, during and after pregnancy, have the right to continue their studies, which can be guaranteed through non-discriminatory return policies.</p> <p>Paragraphs 62 and 64 The joint General Recommendation/Comment suggests that as part of a holistic approach to addressing harmful practices (including child marriage), State parties should ensure the economic empowerment of women. Therefore, women and girls should be enabled to build their economic assets through training in livelihood and entrepreneurship skills.⁷ They should benefit from programmes that offer an economic incentive to postpone marriage until the age of 18, such as scholarships, micro-credit programmes or savings schemes. Further, complementary awareness-raising programmes should be carried out in order to communicate the right of women to work outside of the home and challenge taboos about women and work.</p>
<p>Concluding Observations of the Committee on the Rights of the Child on Malawi's Second Periodic Report (2009)</p>	<p>Paragraphs 26, 27, 58 and 59 (c) & (f) In its Concluding Observations, the CRC Committee noted with concern that constitutional provisions defining a child and in particular current legislation on minimum age for marriage remain unclear. The Committee urged Malawi to:</p> <ul style="list-style-type: none"> • Ensure the swift adoption of the recommendations of the constitutional review process to establish the definition of the child in accordance with the CRC. • Take steps to adopt the proposed Marriage, Divorce and Family Relations Bill; and to carry out awareness-raising campaigns which involve traditional leaders, to prevent the practice of early marriages • Strengthen its HIV and AIDS awareness campaigns and ensure access to age-appropriate HIV and AIDS education and information which target children and adolescents, inside and outside schools, to equip them with the life skills to deal with and reduce their vulnerability to HIV and STIs.

Table 1: cont

FRAMEWORK	DESCRIPTION
<p>Concluding Observations of the Committee on the Rights of the Child on Malawi's Initial Report (2002)</p>	<p>Paragraphs 18 & 19(c) The Committee stated its concern about the various legal minimum ages, which are inconsistent, discriminatory and/or too low. In particular, the Committee was concerned that the Constitution defines a child as any person below the age of 16 years. It recommended that Malawi should take the necessary legislative measures to establish clear minimum ages for marriage and correct the discrimination between boys and girls.</p>
<p>International Covenant on Civil and Political Rights (1966)</p>	<p>The Convention was ratified by the government of Malawi on 2 December 1993.</p> <p>Article 23 (3) No marriage shall be entered into without the free and full consent of the intending spouses.</p>
<p>CCPR General Comment No. 19: Protection of the Family, the Right to Marriage and Equality of the Spouses (1990)</p>	<p>Paragraph 4 It reiterates that Article 23, paragraph 2 of the Covenant reaffirms the right of men and women of marriageable age to marry and to found a family, and that paragraph 3 of the same article provides that no marriage shall be entered into without the free and full consent of the intending spouses. Therefore, the CCPR reminds State parties that although the Covenant does not establish a specific marriageable age either for men or for women, that age should be such as to enable each of the intending spouses to give his or her free and full personal consent in a form and under conditions prescribed by law. Such legal provisions must be compatible with the full exercise of the other rights guaranteed by the Covenant.</p>
<p>CCPR General Comment No. 28: Equality of Rights between Men and Women (2000)</p>	<p>Paragraphs 23 & 24</p> <ul style="list-style-type: none"> • The Human Rights Committee restates that men and women have the right to enter into marriage only with their free and full consent, and States have an obligation to protect the enjoyment of this right on an equal basis. The Committee acknowledges that many factors may prevent women from being able to make the decision to marry freely. One factor relates to the minimum age for marriage. It therefore requires that age should be set by the State on the basis of equal criteria for men and women. These criteria should ensure women's capacity to make an informed and uncoerced decision. A second factor in some States may be that either by statutory or customary law a guardian, who is generally male, consents to the marriage instead of the woman herself, thereby preventing women from exercising a free choice. • States should also ensure that a woman's free and full consent to marriage is not undermined by laws which allow a rapist to have his criminal responsibility extinguished or mitigated if he marries the victim. Women should enjoy the right to marry only when they have given free and full consent.
<p>Concluding Observations of the Human Rights Committee on Malawi's Initial Report (2014)</p>	<p>Paragraph 25 The Human Rights Committee's Concluding Observations particularly noted the concern about the persistent practice of forced and child marriages in Malawi. The Committee recommended that the State should:</p> <ul style="list-style-type: none"> • Expedite the adoption of the Marriage, Divorce and Family Relations Bill and ensure that it explicitly criminalises forced and child marriages and sets the minimum age of marriage in accordance with international standards; • Provide training to relevant stakeholder and conduct awareness raising campaigns aimed at preventing forced and child marriages; • Prosecute alleged perpetrators, punish those convicted and compensate the victims.

Table 1: cont

FRAMEWORK	DESCRIPTION
<p>CESCR General Comment No. 16: Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (2005)</p>	<p>The General Comment was issued by the Committee that monitors the implementation of the International Covenant on Economic, Social and Cultural Rights (ICSECR), which was ratified by the Government of Malawi on 2 December 1993.</p> <p>Paragraph 27 Recognises that Article 10, paragraph 1 of the ICSECR requires that States parties recognise that the widest possible protection and assistance should be accorded to the family, and that marriage must be entered into with the free consent of the intending spouses. Therefore, implementing Article 3, in relation to Article 10, requires States parties to ensure that men and women have an equal right to choose if, whom, and when to marry – in particular, the legal age of marriage for men and women should be the same, and boys and girls should be protected equally from practices that promote child marriage, marriage by proxy, or coercion. And since gender-based violence is a form of discrimination that inhibits the ability to enjoy rights and freedoms, including economic, social and cultural rights, on a basis of equality, States parties must take appropriate measures to eliminate violence against men and women and act with due diligence to prevent, investigate, mediate, punish and redress acts of violence against them by private actors.</p>
<p>Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003), Article 6(a)&(b)</p>	<p>This was ratified by the government of Malawi on 20 May 2005.</p> <p>Article 6: Marriage States parties shall ensure that women and men enjoy equal rights and are regarded as equal partners in marriage. They shall enact appropriate national legislative measures to guarantee that</p> <ul style="list-style-type: none"> • No marriage shall take place without the free and full consent of both parties; • The minimum age of marriage for women shall be 18 years.
<p>General Comments on Article 14 (1) (a), (b), (c) & (f) and Article 14 (2)(a) & (c) of the Protocol to the African Charter on Human and Peoples' rights on the Rights of Women in Africa (2014)</p>	<p>Paragraphs 17, 39, 43, 51, 52, 53 & 61 These General Comments were adopted by the African Commission on Human and Peoples' Rights – the ACHPR - (the treaty monitoring body for the African Charter on Human and Peoples' Rights on the Rights of Women in Africa) on 7 May 2014. The ACHPR recognises that sub-Saharan Africa still holds one of the highest rates of early marriage, some girls being given in marriage at the age of 7 to 10 years, and this exposes them to early pregnancies before reaching their full physical maturity. The result is an increased risk of deliveries with maternal complications and a high rate of mortality and morbidity. The ACHPR recommends specific action that State parties should implement in order to promote the right to family planning education and access to information and education on family planning/contraceptive and safe abortion for adolescent girls and women.</p>
<p>African Youth Charter (2006)</p>	<p>The Charter was ratified by the government of Malawi on 13 August 2010.</p> <p>Article 8: Protection of the family</p> <ul style="list-style-type: none"> • The family, as the most basic social institution, shall enjoy the full protection and support of States parties for its establishment and development noting that the structure and form of families varies in different social and cultural context • Young men and women of full age who enter into marriage shall do so based on their free consent and shall enjoy equal rights and responsibilities.

Table 1: cont

FRAMEWORK	DESCRIPTION
	<p>Article 13 (3)(f): Education and skills development The education of young people shall be directed to the development of life skills to function effectively in society and include issues such as HIV and AIDS, reproductive health, substance abuse prevention and cultural practices that are harmful to the health of young girls and women as part of the education curricula.</p> <p>Article 23: Girls and young women 1. States parties acknowledge the need to eliminate discrimination against girls and young women according to obligations stipulated in various international, regional and national human rights conventions and instruments designed to protect and promote women's rights. In this regard, they shall:</p> <ul style="list-style-type: none"> • Introduce legislative measures that eliminate all forms of discrimination against girls and young women and ensure their human rights and fundamental freedoms; • Ensure that girls and young women are able to participate actively, equally and effectively with boys at all levels of social, educational, economic, political, cultural, civic life and leadership as well as scientific endeavours; • Institute programmes to make girls and young women aware of their rights and of opportunities to participate as equal members of society; • Guarantee universal and equal access to and completion of a minimum of nine years of formal education; • Guarantee equal access to, and completion of, vocational, secondary and higher education in order to effectively address the existing imbalance between young men and women in certain professions; • Enact and enforce legislation that protect girls and young women from all forms of violence, genital mutilation, incest, rape, sexual abuse, sexual exploitation, trafficking, prostitution and pornography; • Develop programmes of action that provide legal, physical and psychological support to girls and young women who have been subjected to violence and abuse such that they can fully re-integrate into social and economic life.
<p>African Charter on the Rights and Welfare of the Child (1990)</p>	<p>This Charter was ratified by the government of Malawi on 16 September 1999.</p> <p>Article 21: Protection against harmful social and cultural practices 1. 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:</p> <ul style="list-style-type: none"> • Those customs and practices prejudicial to the health or life of the child; and • Those customs and practices discriminatory to the child on the grounds of sex or other status. <p>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 registration of all marriages in an official registry compulsory.</p>
<p>SADC Protocol on Gender and Development (2008), Article 8 (2) (a) & (b)</p>	<p>The government of Malawi ratified the protocol on 17 June 2013.</p> <p>Article 8(2): Marriage and family rights Legislation on marriage shall ensure that:</p> <ul style="list-style-type: none"> • No person under the age of 18 shall marry, unless otherwise specified by law, which takes into account the best interests and welfare of the child; • Every marriage takes place with the free and full consent of both parties.

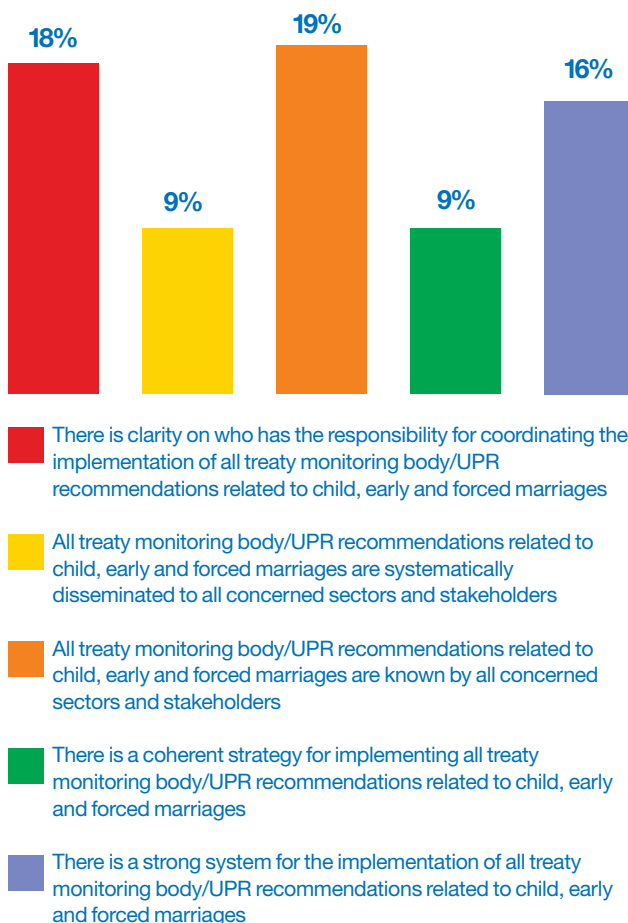
1.3 Implementation of treaty monitoring body/UPR recommendations

Key informants were asked on whether, in their view, recommendations of treaty monitoring bodies such as the CEDAW Committee, the CRC Committee, and the UPR process on early, child and forced marriage are followed up adequately. With regards to UPR recommendations of 2010, it should be noted that there was no specific recommendations on child marriage. However, Malawi was asked to take measures to address violence against children and harmful practices against women.

Figure 1 illustrates that out of those that responded to this question; only 18 per cent felt that there is a strong system for documenting the implementation of recommendations of treaty monitoring bodies on child marriage. Those who held this opinion referred to general efforts by the Ministry of Justice to coordinate taskforce meetings for purposes of compiling and submitting State party reports. Mention was also made of the mid-term review of the implementation of UPR recommendations that was undertaken by the MHRC in 2013. The review reported that although Malawi had criminalised child betrothal and forced child marriage through the enactment of the Child Care, Justice and Protection Act No. 22 of 2010, the presence of a unique arrangement to systematically follow up on child marriage specific recommendations does not exist. Of course, there is broad recognition that advocacy efforts related to child marriage, including the passing of the Marriage, Divorce and Family Relations Act No. 4 of 2015 are also inspired by the desire to address recommendations of treaty monitoring bodies.

Most of the key informants felt that they lack clarity as to who has the responsibility for coordinating the implementation of child marriage-related recommendations. While the MHRC is obviously there to monitor the promotion of all aspects of human rights, the distinction or synergy with the role of the ministry responsible for gender and children is not obvious to many. In addition, the role that the Ministry of Justice is supposed to play in mid-term reporting and the extent of implementation of that role, if any, is not clear. No wonder that only a small

Figure 1: Key informants' views regarding the implementation of treaty monitoring bodies' recommendations on child marriage



number of key informants (9 per cent) mentioned that there is a coherent strategy for implementing treaty monitoring body/UPR recommendations. A similarly small number of key informants was of the view that many concerned stakeholders do not know of relevant recommendations, which is also a signal that a coherent strategy is missing.

The conclusion is that most key informants are unsatisfied with the haphazard management of the implementation of treaty monitoring body/UPR recommendations on early, child and forced marriage, and they would want to see a more organised mechanism.

1.4 Key conclusions: opportunities and challenges on international and regional frameworks and their implementation

Opportunities

- a) Malawi has an international and regional mandate to address child, early and forced marriage since it has ratified important treaties such as the CEDAW, the CRC, the Maputo Protocol and the SADC Gender and Development Protocol. It also subscribes to the UPR process.
- b) Malawi has established a regular pattern of submitting State party reports to the CEDAW Committee. And since 2002, two reports have been submitted to the CRC Committee. Further, the Human Rights Committee discussed the first report to be submitted by Malawi to the committee in 2014. All these have steps have provided important spaces for treaty monitoring bodies to make specific recommendations on how the government can improve the child marriage challenge.
- c) The MHRC has conducted a mid-term review of the implementation of recommendations of the UPR process, signalling commitment to follow up on the recommendations.
- d) Measures have been taken to address some treaty monitoring body recommendations, whether purposefully or incidentally.

Challenges

- a) There are weak systems for tracking the implementation of international and regional child marriage commitments, including relevant recommendations of treaty monitoring bodies, and conducting necessary advocacy where implementation is lagging behind. Therefore, while the findings of the review illustrate that action that coincides with some child marriage-related recommendations of treaty monitoring bodies has been witnessed, the fact that the implementation of these recommendations is not organised deprives the country of optimal results.
- b) Treaty monitoring body recommendations on child marriage are not purposefully disseminated to strengthen multi-sectoral responses.
- c) Most stakeholders are not clear on who has the responsibility to coordinate the implementation of relevant recommendations.

PART 2: CHILD MARRIAGE INDICATORS AND PREVALENCE IN MALAWI

This part reveals a bleak picture about most indicators that closely relate to child marriage in Malawi. Additionally, Malawi is a known child marriage hotspot in the world. While general data on the prevalence of child marriage in the country is available and there is some indication about where some child marriage practices occur, solid data on local hotspots is unavailable.

2.1 Current state of indicators related to child marriage in Malawi

The MDG Endline Survey of 2014 (Table 2) confirms that adolescent girls in Malawi have poor health indicators. An overwhelming 50 per cent of girls get married by the

age of 18 years, which makes the prevalence of child marriages in Malawi higher than the regional average for sub-Saharan Africa (37 per cent).⁸ Though occurring, child marriage amongst male adolescents is not as common, because only 9 per cent get married before 18 years. Similarly, the figure for girls who marry before the much younger age of 15 years (10.3 per cent) is seven times that of their male counterparts (1.5 per cent). The alarming fact is that if the current trend in Malawi persists, 631,000 of the young girls born between 2005 and 2010 will be married and/or in union before the age of 18 years by 2030.⁹

The high rates of child marriage in Malawi are linked to the country's high adolescent birth rate, which is at 143 births per 1,000 girls. Although this is a drop from 193

Table 2: Indicators related to child marriage in Malawi

Indicator	Gender disparity where applicable	
	Female	Male
Marriage before the age of 18 years	49.9%	9.1%
Adolescent birth rate	143 births per 1,000 girls	-
Women aged 20-24 years with one live birth before 18 years	31.3%	-
People aged 15-49 years who were married/in union before 15 years	10.3%	1.5%
Young women 15-19 years married/in union whose spouse is 10 or more years older	7.8%	-
Young women 20-24 years married/in union whose spouse is 10 or more years older	10.4%	-
Young people 15-24 years who had sex before 15 years	14.7%	18.2%
People aged 15-49 years in polygamous union	13.8%	1.9%
HIV prevalence among young people aged 15-24 years	5.2%	8.3%

Source: MDG Endline Report, 2014

8. UNFPA 2012
9. *idem*.

per 1,000 live births in the 2008 National Population and Housing Census, it is still a very high figure considering that the rate in east and southern Africa currently stands at 108.2 births per 1,000 girls.¹⁰ The rates should also demand urgent action as part of the HIV response, because the HIV prevalence of young girls outnumbers that of their male counterparts by more than three times.¹¹ The fact that 31.3 per cent of women aged 20–24 years will have given birth before the age of 18 years is a truly worrisome health and development indicator. About 7.8 per cent of girls aged 15–19 years that are married or in union get married to spouses 10 years and older, which gives credibility to concerns of how child marriages expose girls to grave consequences of unequal power relations such as heightened risk of HIV infection, domestic violence and polygamy.¹² Even the ACHPR has condemned that the practice in many African countries of giving young girls in marriage exposes them to early pregnancies before reaching their full physical maturity.¹³ A study by the MHRC found that child marriage was also linked to high fertility, and some girls had up to four children by the time they were 20 years old. Moreover, most of them were ‘guilty’ of child neglect as they had little clue on how to balance childhood needs and adulthood expectations.¹⁴

Therefore, the interplay of multiple factors is contributing to the poor indicators for adolescent girls’ health/development in the country. With respect to poverty as a contributing factor to child marriage, what should be realised is that poverty is both a cause and a consequence of child marriage. On the one hand, it may drive parents/and or girls to view marriage as a poverty breather. On the other hand, a child marriage robs a girl of social and economic opportunities, and entraps her in poverty if a husband is unable to provide a decent standard of living. The Concluding Comments of the CEDAW Committee to Malawi’s State party report (2006) attribute the persistence of forced and early marriages to the prevalence of a patriarchal ideology with firmly entrenched stereotypes and the persistence of deep-rooted cultural norms, customs and traditions.¹⁵

In addition, this report uncovers that other factors include religious norms; poor access to education and reproductive health services; the presence of legislative gaps and enforcement bottlenecks that lead to failure to create a comprehensive enabling environment for curbing child marriages; and weakly coordinated efforts to address the challenge. Recurring humanitarian crises including flooding, drought and related disasters have also sometimes led desperate families to see the marriage of their young daughters as a solution to recover from these shocks. For instance, in Karonga and having lost their homes due to floods in 2013, some girls revealed that they were left with no choice but to drop out of school and get married.¹⁶ However, on a positive note, there are also promising developments in some policy, legal and programmatic frameworks.

2.2 Child marriage hotspots in Malawi

Globally, Malawi is a child marriage hotspot. According to Figure 2, the country’s child marriage rate ranks eighth amongst the top 20 countries with the highest child marriage rates in the world. Within the country, a report by Human Rights Watch (2014) captures data by UNFPA and the MHRC that shows that while child marriage occurs in both urban and rural areas of Malawi, it is more common among girls who are less educated, poorer, and living in rural areas.

Regionally, Figure 3 illustrates that the Central Region has the highest prevalence (57 per cent), followed by the Northern Region (50 per cent) and Southern Region (44 per cent). In the Northern Region, Mpherembe in Mzimba district had the highest prevalence. Child marriages are also reported as being rampant in some tribes and/or faith groups, though exact statistics are not known. For example, child marriage is associated with Muslims of the Yao tribe in Mangochi and Machinga districts. In Mulanje, the apostolic faith has been identified as a group that tolerates and practices child marriage.¹⁷

10. National Statistics Office, National Population and Housing Census Thematic Report on Youth (2010).
11. NSO 2010.

12. Human Rights Watch 2014.

13. Through General Comments on Article 14 (1) (a), (b), (c) & (f) and Article 14 (2)(a) & (c) of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (2014), adopted on 7 May 2014.

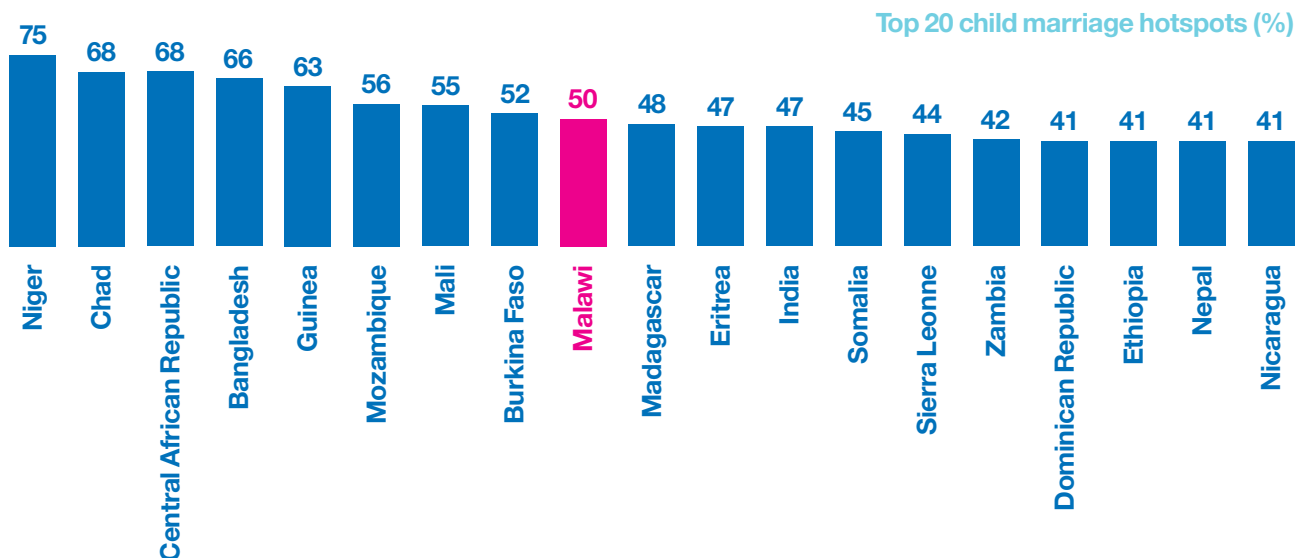
14. MHRC 2006.

15. Paragraph 19.

16. UNICEF 2013; Nyasatimes 2013.

17. SAT Malawi 2013.

Figure 2: Comparative statistics on child marriage amongst 20 hotspots



Source: International Centre for Research in Women, 2013

Key informant interviews that were conducted as part of this report established that early introduction to sex is a contributing factor to perceptions that an adolescent girl is ready for marriage. Table 1 discloses that about 14.7 per cent of women aged 15-24 years have had sex before 15 years old. The number for males is higher (18.2 per cent). The study by Human Rights

Watch (2014) has observed that Malawi’s deep-seated traditions and patriarchal cultures encourage such early sexual initiation.

2.3 Key conclusions: opportunities and challenges on child marriage indicators and prevalence

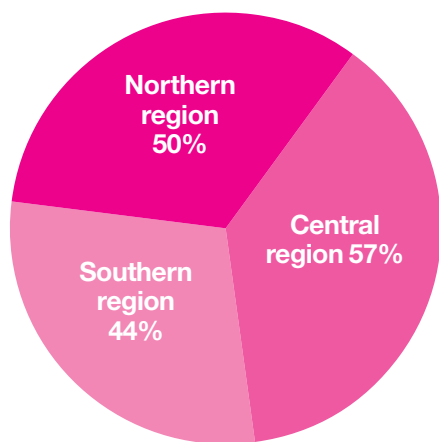
Opportunity

Some hard data that provide evidence of the poor state of health indicators that are related to child marriage as well as prevalence of the practice exist, and this should inspire the development and/or scaling up of urgent preventative measures and responses.

Challenges

- Half of the girls in Malawi get married by 18 years, and this is associated with an array of worrying maternal health indicators.
- All regions in Malawi have a child marriage prevalence of above 40 per cent, which is too high. The figures in the Central Region and Northern Region (50 per cent and above), are particularly dejecting.
- Data on local child marriage hotspots are not comprehensive and current.

Figure 3: Child marriage prevalence in Malawi’s three regions (%)



Source: UNFPA (undated)¹⁸/ MHRC, 2006

18. Quoted in Human Rights Watch, note 12 above.

PART 3: LEGISLATION ON MINIMUM AGE

Plan's position is that legislation on the minimum age of marriage provides a framework for legal protection and provides leadership, guidance and legitimacy for policy makers and activists to tackle the financial, social and cultural drivers behind the practice of child, early and forced marriage. The overarching theme in treaties, General Comments, General Recommendations and concluding observations of treaty monitoring bodies is that the minimum age of marriage for both boys and girls should be 18, whether with or without parental consent. An unequal minimum age of marriage reinforces cultural ideas, which allows girls to be married younger than boys. The analysis below shows that in Malawi, the legal minimum age that is prescribed by legislation and custom is different; and that the minimum marriage age (with consent) between the Constitution and statutory law is also at variance. The way the low minimum marriage age is determined both under customary/religious law and the Constitution fails to satisfy the criterion that is applied in allowing a lower minimum marriage age (below 18 years) in exceptional circumstances under the international human rights system. The situation under formal written law and religious and customary law is discussed separately.

3.1 Legislative minimum age

In conformity with the dictates of international human rights frameworks (Table 1), Malawi has an equal age of marriage for girls and boys under formal law. However, the difficulty is that there are conflicting legal positions whereby the minimum age of marriage that is prescribed by human rights treaties and treaty monitoring bodies (18 years for both boys and girls) is upheld under statutory law, but not the Constitution of the Republic of Malawi (1994). This is one of the recurring concerns in the Concluding Observations of the CRC and the CEDAW Committees to Malawi's State party reports. For instance:

- After considering Malawi's Second Periodic Report in 2009, the CRC Committee noted with concern that Constitutional provisions defining a child and in particular current legislation on minimum age for marriage remain unclear. The Committee urged Malawi to (a) ensure the swift adoption of the recommendations of the Constitutional Review process to establish the definition of the child in accordance with the Convention of the Rights of the Child; and (b) take steps to adopt the proposed Marriage, Divorce and Family Relations Bill.¹⁹
- Pursuant to the consideration of Malawi's Initial Report in 2002, the CRC Committee was explicitly concerned about the various legal minimum ages, which the Committee labelled as 'inconsistent, discriminatory and/or too low.' In particular, the Committee was concerned that the Constitution defines a child as any person below the age of 16 years. It recommended that Malawi should take the necessary legislative measures to establish clear minimum ages for marriage and correct the discrimination between boys and girls.²⁰
- Following the consideration of Malawi's Combined Second, Third, Fourth and Fifth Periodic Report to the CEDAW Committee in 2006, the Committee's concern was that there are contradictions between the Marriage Act, which establishes 21 as the minimum age for marriage, and the Constitution, which allows child marriages. It was recommended that the State should introduce, without delay, concrete measures to modify or eliminate forced and early marriages, so as to promote women's full enjoyment of their human rights.²¹

On 12 February 2015, Malawi celebrated a legal victory when Parliament passed the Marriage, Divorce and Family Relations Act No. 4 of 2015. One of the important provisions under this new law is Section 14, which

19. Paragraphs 26, 27, 58 and 59 (c) & (f).

20. Paragraphs 18 & 19(c).

21. Paragraph 20.

stipulates “subject to Section 22 of the Constitution, two persons of the opposite sex who are both not below the age of eighteen years, and are of unsound mind, may enter into marriage with each other.” This marks the first time that the minimum age of marriage of 18 has been articulated in a marriage law that is meant to apply to all forms of marriage –statutory, customary, religious and marriage by repute or permanent cohabitation. Previously, statutory law on marriage only governed those that had contracted civil marriages under the Marriage Act (Chapter 25:01) of the laws of Malawi, now repealed. This law had a minimum age of marriage of 21. Arguably, the new marriage law has lowered the standards in the Marriage Act. Even the non-binding Chiefs Declaration that was adopted by senior and paramount chiefs in Malawi in 2013 also advocates for the marriageable age of 21 years.²² However, to the extent that (a) the new law is in conformity with the prescription of the minimum marriage age of 18 years by the CRC, and (b) it comprehensively applies to all marriages, it is still a good step.

But the reality is that this headway does not really attract joyous leaping because the new law defers to the Constitution as the supreme law of the country. Apart from the CRC Committee’s observation that the Constitution sets the definition of a child at a low age (below 16 years), the Constitution is also guilty of facilitating child marriage by accepting that the minimum age of marriage can fall below the age of 18 years with parental consent. Thus while Section 22 (6) of the Constitution allows persons over the age of 18 years to get married without parental consent, Section 22(7) allows persons between the age of 15 and 18 years to get married with the consent of their parents and guardians. To worsen the situation, Section 22(8) mandates the State to discourage marriage between persons when either of them is under the age of 15.

By all accounts, this legal position flouts the minimum accepted marriage age of 18 years in both international and regional human rights frameworks (Table 1), perhaps with the exception of the SADC Protocol on Gender and Development (2008) and the Joint Recommendation/General Comment No. 31 of the CEDAW Committee and No. 18 of the CRC Committee (2014). Article 8(2) of the former provides that legislation

on marriage shall ensure that no person under the age of 18 shall marry, unless otherwise specified by law, which takes into account the best interests and welfare of the child.²³ In this context, the Joint Recommendation/General Comment No. 31 of the CEDAW Committee and No. 18 of the CRC Committee (2014), which disappointingly accepts possibilities of a legal marriage of those below 18 years subject to conditions, has clarified this exception by stating that:

*The Committees recommend that the States parties to the Conventions should ensure that a minimum legal age of marriage for girls and boys is established, with or without parental consent, at 18 years. When exceptions to marriage at an earlier age are allowed in exceptional circumstances, State parties shall ensure that the absolute minimum age is not below 16 years, grounds for obtaining permission are legitimate and strictly defined by law, and marriage is permitted only by a court of law upon full, free and informed consent of the child or both children who appear in person before the court.*²⁴

Therefore, the Joint CEDAW/CRC General Recommendation/General Comment accepts that as a matter of respecting the child’s evolving capacities and autonomy in making decisions that affect her or his life, in exceptional circumstances a marriage of a mature, capable child below the age of 18 may be allowed. However, the child should be at least 16 years old, and a judge, based on legitimate exceptional grounds defined by law and on the evidence of maturity without deference to cultures and traditions, should make the decisions.²⁵ It is obvious then that the fact that the Constitution specifically and randomly allows marriages with parental consent for those aged 15 years is out of order, let alone when one considers that the recommended procedures for waiving 18 years as a minimum age of marriage are not applied. The constitutional position in Malawi has the effect of allowing girls to be married off at any age in Malawi because if the State’s mandate is to **discourage** but not to **prohibit**, then early and child marriage is not outlawed. Thus the provision brings ambiguity to the definition of the minimum marriage age, resulting in problematic enforcement.²⁶ Part 8 illustrates how this condition is complicating justice delivery.

22. On 30 October 2013, Senior and Paramount Chiefs in Malawi signed a declaration of commitment following their meeting with the High Level Taskforce on Women, Girls, Gender Equality, HIV and AIDS for Eastern and Southern Africa.

23. SADC Protocol on Gender and Development (2008), Article 8(2)(a)&(b). The Government of Malawi ratified the Protocol on 17 June 2013.

24. Paragraph 54 (f).

25. Paragraph 19.

26. Centre of Human Rights, University of Pretoria, Child Marriages: Malawi Country Report 2013/14 (2014).

Clearly, the problem in Malawi is not that the constitutional minimum age of marriage for boys and girls is different, but rather that the constitutional minimum age of **marriage without parental consent** is different from the age of **marriage with parental consent**. Thus the challenge is to standardise the age of marriage with or without consent. More recently, the Concluding Observations of the CCPR²⁷ on Malawi's Initial Report in 2014 particularly recommended that Malawi should ensure that the Marriage, Divorce and Family Relations Bill (as it then was) sets the minimum age of marriage in accordance with international standards.²⁸ This has been done, but without having the Constitution on board; the 18 years as the minimum age of marriage under the new law does not become a legally absolute minimum, since the lower age of marriage with consent under the Constitution still applies.

Sustaining this lower age of marriage is a direct permission of child marriage because under-aged girls can enter into marriage with their parents' consent. This is so because as various treaty monitoring bodies have also decried, the Constitution's own definition of a child is 'any person under the age of 16'.²⁹ This age ceiling, which is also embraced by the Child Care (Justice and Protection) Act No. 22 of 2010, is in itself in contravention to the Convention of the Rights of the Child,³⁰ which regards as a child anyone under the age of 18. Indeed, the Marriage, Divorce and Family Relations Act No. 4 of 2015 has endorsed the CRC's definition of child, meaning that the Constitution has to be similarly amended in this respect so that laws that affect child marriages are harmonised. Thus unless harmonisation of the constitutional and statutory position happen quickly, the observation that was made before the passing of the new marriage law that 'the apparent confusion over the legal minimum age for marriage in Malawi has resulted in the inability of the law to effectively protect children from early marriages'³¹ will still hold even after the passing of the act.

3.2 Minimum age of marriage according to custom or religion

Despite the equality that exists regarding the minimum age of marriage for boys and girls at the level of statutory law, there is evidence that two different standards are applied to the two sexes at customary and religious levels. Commonly, puberty defines the eligibility of a girl to enter into a marriage at custom, such that for areas that practice child betrothal, a girl is usually handed over to her husband upon reaching this stage. And an investigation by the MHRC reported that in the Northern Region, while many girls married from the age of 12 years, boys in the same contexts typically entered into marriage at about 17 years of age.³² Indeed Plan Malawi recently documented the case of a girl in Karonga who was married very young and was 15 years at the time of the interview:

"It happened when I was only 13 years old. My friend who had already found herself a husband convinced me into marriage. Life was very difficult at home. We could not even afford soap. My friend told me it would be better if I got married like her, so that my husband could take care of my needs. Although I was reluctant about the idea, there was a man in our village who kept pursuing me to marry him. He promised to take care of me, provide whatever I wanted, and after sitting for my grade 8 exams I accepted. But life was not any better, my husband was an alcoholic. But because my grandmother was equally poor, I decided to persevere in the marriage. He never kept any of his promises. When I asked him, he told me he had already paid my dowry of 37,000 kwacha (110 USD) and that was the money he would have used for my upkeep."³³

From this case, it is clear that the young girls are totally dependent on their spouse, and have little authority to safeguard their interests in their marriage. Even in respect of the influence of religion, key informants that were interviewed for purposes of this report also confirmed what Human Rights Watch and the Centre

27. This monitors the International Covenant on Civil and Political Rights.

28. Concluding Observations of the Human Rights Committee on Malawi's Initial Report (2014) Paragraph 28.

29. Section 23 (5).

30. Ratified by Malawi on 2 January 1991.

31. Centre of Human Rights, University of Pretoria (2014), note 26 above.

32. Malawi Human Rights Commission, Cultural Practices and Human Rights: A Study into Cultural Practices and their Impact on the Enjoyment of Human Rights, Particularly the Rights of Women and Children in Malawi (2006).

33. Rescued child bride: now changing attitudes. <http://plan-international.org/where-we-work/africa/malawi/what-we-do/our-successes/traditional-leaders-outlaw-child-marriage-in-malawi>

of Human Rights have documented – that where Islam is prevalent, incidences of arranged marriages for girls as young as 12 do occur. This is particularly common in Yao tribes.³⁴ While many Sheikhs are playing their part to discourage followers from applying this literally, mind-sets are slow to change. In Mulanje district, Luchenza Youth Organisation has further observed that it is normative for girls of the apostolic faith to marry very young compared to their male counterparts.

The heightened incidence of marriage of girls before the age of 15 years (10.3 per cent) as opposed to boys (1.5 per cent) that is exposed under the MDG Endline Survey of 2014 is also general solid testimony of the socio-cultural acceptance that young adolescent girls are fit to be married off much earlier than boys. This challenge displays differences in the equality of minimum marriage age between boys and girls at law (*de jure*) and that in practice (*de facto*), resulting in the curtailing of education and related opportunities for girls much faster. KidsRights has observed that one of the main difficulties in enforcing minimum age legislation is that families do not perceive child marriage as a criminal offence. Rather, it is accepted as a culturally legitimate practice.³⁵

The passing of the Marriage, Divorce and Family Relations Act (2015) is supposed to make a difference in aligning the age of marriage at custom/religion with that under statute. However, taking steps to harmonise the Constitution with the act would also play a significant role in ensuring that traditions and formal law are in sync. And the Joint General Recommendation/General Comment No. 31 of the CEDAW Committee and No. 18 of the CRC Committee (2014) has shown that this alignment should be aware that culture and tradition should never be deferred to in a legal decision to accept a marriage age that is lower than 16 years where exceptional circumstances justify it.³⁶

3.3 Key conclusions: opportunities and challenges on minimum age of marriage

Opportunities

- a) Malawi has ratified all key international and regional human rights frameworks that uphold the minimum age of marriage of 18 years; it also is increasing the rate of submission of State party reports.
- b) The Marriage, Divorce and Family Relations Act No. 4 of 2015 applies to all forms of marriage in Malawi.
- c) Legislation provides for a similar age of marriage for boys and girls.
- d) The Marriage, Divorce and Family Relations Act No. 4 of 2015 prescribes the marriage minimum age of 18; just as it defines child as one below 18 years.
- e) The Chiefs' Declaration advocates for 21 years as a minimum marriage age.

Challenges

- a) In practice, girls are married much earlier (upon puberty) than boys. Customary and religious perceptions contribute to this.
- b) The Constitution of the Republic of Malawi (1994) is supreme law, and accepts marriage age with consent for those between 15 and 18 years. It only discourages marriages for those aged below 15 years. It does not lay down internationally recommended legal procedures for the court to sanction a marriage of anyone aged below 18 years.
- c) Despite treaty monitoring bodies' repeated recommendations since 2002 that the Constitution should be amended to conform to the internationally accepted minimum age of marriage of 18 years, this has not happened. The Constitution and the Child Care, Justice and Protection Act No. 22 of 2010 still define a child as a one below 16 years.

34. Centre of Human Rights (2014), note 26 above; Human Rights Watch (2014), note 12 above.

35. KidsRights 2014

36. Paragraph 19.

PART 4: MARRIAGE CONSENT LAWS

International human rights instruments that are outlined in Table 1 emphasise that a man's and a woman's freedom to choose a marriage partner is non-negotiable, and that practices such as the betrothal of girls and the low minimum age of marriage interfere with this freedom. In particular, CEDAW enunciates that the betrothal and the marriage of a child shall have no legal effect.³⁷ All instruments agree on the basic message that "no marriage is to take place without the full and free consent of both parties". Joint General Recommendation/General Comment No. 31 of the CEDAW Committee and No. 18 of the CRC Committee (2014) explicitly state that where one or both parties have not personally expressed their full and free consent to the union, then it is a forced marriage;³⁸ and that child marriage is considered as a form of forced marriage given that one or both parties have not expressed such full, free and informed consent.³⁹

Pursuant to this context, a review of legislation was conducted in order to see what consent is required for marriage in Malawi, and whether or not the standard for the full and free consent of parties to a marriage is respected unequivocally. This issue was assessed at two levels: (a) whether written law permits consent from parents or guardians and the implications that this has on the notion of 'free and full consent'; and (b) what the law says on the 'free and full consent of the parties to a marriage'. The latter will also examine whether the notion of the parties' free and full consent is realistic in customary law.

4.1 The law and parental consent

In 2010, UNFPA recorded Malawi among one of the 146 countries in the world where with consent or approval, girls could marry below the age of 18.⁴⁰ Part 3.1 outlined that under Section 22(7) of the Constitution, children between the ages of 15 and 18 years can get married in Malawi with the consent of their parents or guardians.

Plan subscribes to the school of thought that parental consent, while intended to ensure the safety of the child, fails to do so when it is not used in the best interest of the child. Indeed, CCPR General Comment No. 28 (2000) notes that a factor that may prevent women from being able to make the decision to marry freely is that either in statutory or customary law, a guardian, who is generally male, consents to the marriage instead of the woman herself, thereby preventing women from exercising a free choice. Where parental consent is exercised, the degree of freedom to enter into a marriage is usually limited for girls rather than men, because the girls are usually forced by their families to marry men who have chosen them.⁴¹

Box 1: Examples of forced child marriage incidences with parental consent

Elina V, who married a 24-year-old man when she was 15:

"My husband was a fisherman who used to give me money. I was in form two when I became pregnant by him and my mother forced me to marry him because 'it was my only option'."

A traditional leader in Lilongwe:

"In my culture, a pregnant unmarried girl is called 'disabled.' When I learn of a teenage pregnancy, I try to convince the boy to marry the girl because marriage is the only option for her."

Chikondi R, who was 14 when she married her 19-year-old boyfriend:

"After dating for some time, my boyfriend asked my sister (who was married and with whom I was living) if he could marry me. She said 'yes'; but I said 'no' because I was in school. However my mother and sister pressured me to marry the boyfriend because they wanted to get money. He was a potter and used to give me some money. My mother used to tell me: 'marry him so that he can assist us in any way'."

Source: Human Rights Watch 2014

37. Article 16 (2).
38. Paragraph 22.
39. Paragraph 19.
40. UNFPA 2011.

41. Mwambene 2010.

Malawi has well-documented instances where parental consent (which is more parental decision-making) has been exercised to the detriment of adolescent girls. For example, in 2014, Human Rights Watch recorded several cases, summarised in Box 1, where girls were forced into marriage because of teenage pregnancy (and protection of family honour) and monetary incentives. KidsRights has noted that for generations, girls in Malawi are expected to get married and be supported by their husbands. Anxiety that delayed marriage will expose a girl to improper behaviour and ruin her future chances of marriage also plays a role. All this has been well-captured in the sentiments of one girl who said: “they thought that I was just a girl; that education was not important, but that marriage was”.⁴² Unless this attitude is shifted, perceptions that marriage, regardless of its quality, ‘is the only option for a girl’ will continue to drive parents or guardians to force girls into child marriage under the conviction that they are doing this for the best interest of the girls.

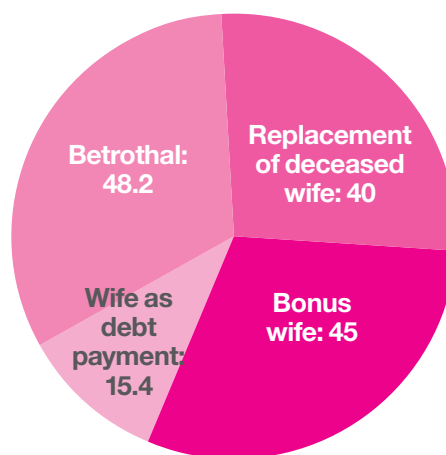
Some cases where parental consent is flexed occur under the guise of promoting cultural practices such as *chimeta masisi* (offering a girl to replace a deceased wife), *mbirigha*/bonus wife (offering a girl as a reward to a good husband), *kupimbira* (offering a girl in repayment of a debt), *kutomera* (child betrothal), and *chisomphola* (abduction that is later formalised as a marriage).⁴³ A study on cultural practices published by MHRC in 2006, which is the most comprehensive one to date, found that respondents who confirmed that the practices of *chimeta masisi*, *mbirigha*, *kupimbira* and *kutomera* happen in their communities were substantive (Figure 4). Considering that *kupimbira* was only reported in northern Chitipa, even the figure of 15 per cent is worrying. While a follow-up study is certainly needed to track the prevalence of the practice about 10 years from now, the figures are indicative of the fact that these widespread practices may not be straightforward to eradicate, and therefore are likely to be practiced even currently.

The practice of *lobola* sometimes drives parents to marry children or dependants off for different financial motives. For example, the assessment discovered a Sena woman who was married at 16 years in 2006, after a mother from Ntcheu district sent her relatives to Nsanje district to ‘buy a wife’ for her only son. The mother wanted a woman from Nsanje because the

patrilineal culture there would guarantee her control of her grandchildren. The relatives only had to pay MK2,000.00 for the young girl to be handed over and transported by her ‘in-laws’ to Blantyre to start living with a husband that she had never met (then 23 years old). Human Rights Watch has reported that the payment of dowry by the groom to the bride’s family is a relief from financial hardship. In addition, guardians have been known to marry off girl orphans in order to relieve themselves of the burden of care, and benefit from *lobola* in the process.

Joint General Recommendation/General Comment No. 31 of the CEDAW Committee and No. 18 of the CRC Committee (2014) remind State parties that child and forced marriage that includes the payment of dowry and bride price constitutes the ‘sale of children’ under the CRC Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography (2002)⁴⁴; that it may increase the vulnerability of women and girls to violence and to other harmful practices; and that the CEDAW Committee has repeatedly stressed that allowing marriage to be arranged by such payment or preferment violates the right to freely choose a spouse.⁴⁵ In Malawi, there is evidence that some girls who attempt to refuse forced marriages are threatened, verbally abused, or thrown out of their homes by their families.⁴⁶ CEDAW General Recommendation No. 29

Figure 4: Forced child marriage practices that are legitimised by parental consent



Source: MHRC 2006

42. KidsRights (2014), note 35 above.

43. Centre of Human Rights (2014), note 26 above.

44. Ratified by Malawi in 2009.

45. Paragraph 23.

46. Human Rights Watch, note 12 above.

(2013) has declared that dowry payments should not be required for a marriage to be valid, and such agreements should not be recognised by the State party as enforceable.⁴⁷

CESCR General Comment No. 16 (2005) emphasises that States parties should ensure that men and women have an equal right to choose if, whom, and when to marry – in particular, boys and girls should be protected equally from practices that promote child marriage, marriage by proxy, or coercion.⁴⁸ Yet, all the cited practices involve decision-making and/or coercion by parents or guardians with little or no regard to the consent of the girl herself. For a practice such as *chisomphola*, Part 7.1.1 discusses how an abductor literally gets away with defilement by marrying the girl. CCPR General Comment No. 28 (2000) and Joint General Recommendation/General Comment No. 31 of the CEDAW Committee and No. 18 of the CRC Committee (2014) have censured this practice. They have advised that States should ensure that a woman's free and full consent to marriage is not undermined by laws that allow a rapist to have his criminal responsibility extinguished or mitigated if he marries the victim.⁴⁹

Thus constitutionally permitting parental consent for a lower marriageable age (under 18 years) should not be an option for a country that is serious about eradicating child marriage and complying with minimum international standards. By pursuing the current route, the Constitution is only sanctioning damaging impacts of child marriage to occur with its blessings. Some of these impacts are well-expressed in Joint General Recommendation/General Comment No. 31 of the CEDAW Committee and No. 18 of the CRC Committee (2014):

Child marriage is often accompanied by early and frequent pregnancies and childbirth, resulting in higher than average maternal morbidity and mortality rates. Pregnancy-related deaths are the leading cause of mortality for 15-19 year old girls (married and unmarried) worldwide. Infant mortality among the children of very young mothers is higher (sometimes as much as two times higher) than among those of older mothers. In cases of child and/or forced

marriages, particularly where the husband is significantly older than the bride, and where girls have limited education, the girls generally have limited decision-making power in relation to their own lives. Child marriages also contribute to higher rates of school dropout, particularly among girls, forced exclusion from school, increased risk of domestic violence and to limiting the enjoyment of the right to freedom of movement. Forced marriages often result in girls lacking personal and economic autonomy, attempting to flee or commit self-immolation or suicide to avoid or escape the marriage.⁵⁰

In fact, the current constitutional stand makes is very complicated to apply Section 5 of the Constitution, which declares any law that is inconsistent with the provisions of the Constitution to be invalid. The use of the words **constitutional provisions**, and not **constitutional rights**, complicates matters. Firstly, child marriage, usually forced, is a harmful practice which if perpetuated in pursuant to customary, religious or any laws, is contrary to constitutional provisions that: (a) prohibit forcing anyone into marriage;⁵¹ (b) guarantee children below the age on 16 years protection from economic exploitation or treatment that is likely to interfere with their education and be harmful to their health or their physical, mental or social development;⁵² and that (c) guarantee children special protection in the promotion of the right to development.⁵³ These are just a few illustrative examples of constitutional provisions that have been violated. Secondly, despite its clear harmful implications, it becomes unintelligible to posit that child marriage with parental consent is 'contrary to **provisions** of the Constitution' under Section 5, when the offending provisions under Section 22(7) are situated in the Constitution itself. Therefore, Malawi needs a constitutional framework that makes it possible to unconditionally implement and enforce the minimum age of marriage of 18 years under the Marriage, Divorce and Family Relations Act No. 4 of 2015, as well as the child rights that are bestowed under the Constitution. The current constitutional position does not make this possible and is therefore untenable.

47. Paragraph 33.

48. CESCR General Comment No. 16: Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (2005), paragraph 27.

49. General Comment No. 28: Equality of Rights between Men and Women (2000). Paragraphs 23 & 24.

50. Paragraph 21.

51. Section 22(4).

52. Section 23(4).

53. Section 30(1).

At the same time, it is acknowledged that some statutory laws exist to address harmful practices that are directly linked to parental consent for forced child marriage. For example, Section 5 of the Gender Equality Act No. 3 of 2013 prohibits all harmful practices.⁵⁴ A fine of MK1,000,000 and imprisonment for five years is imposed on perpetrators.⁵⁵ Furthermore, Sections 80 and 81 of the Child Care, Protection and Justice Act No. 22 of 2010 proscribe all harmful traditional practices against children, child betrothal and forced child marriage. Offenders are punished with 10 years' imprisonment.⁵⁶ However, the constitutional acceptance of child marriage is still an obstacle to effectively implementing these provisions because it makes it difficult to distinguish parental consent from coercive acts that a girl may not resist or report because of her young age. In any event, CCPR General Comment No. 28 (2000) has rightly observed that a woman's age can obstruct her capacity to make an informed and uncoerced decision to a marriage, and this is why States should set a reasonably higher minimum marriage age to allow the development of this capacity.

4.2 The legal position on the free and full consent of parties to a marriage

The right of both spouses to 'free and full' consent to a marriage finds its genesis in Article 16(2) of the Universal Declaration of Human Rights (1948). Since then, this right has been espoused in several international human rights frameworks that Malawi has ratified in General Comments or General Recommendations of treaty monitoring bodies (Table 1), as well as in the Constitution.

This part first observes that the concept of free and full consent of the parties to a marriage is not easy to claim at customary law because the consent of family members is a significant factor to a marriage, sometimes at the expense of the consent of the parties themselves. Then, it is also noted that while legislation acknowledges the need for free and full consent of the parties, realisation in practice is uncertain because

proof of age is not obligatory, and because parental consent to child marriage, as permitted by the Constitution, can undermine the consent of a party to a marriage. The analysis first considers the issue of consent at customary law before turning to legislation.

4.2.1 Is the notion of the parties' free and full consent realistic in customary law?

Under customary law, the consent or co-operation of the parties to the marriage has been described as being merely desirable, but not essential. This is because customary marriage is an alliance of two families, whereby the consent of the maternal uncle is vital in matrilineal marriages, and that of the father/brother critical in patrilineal areas.⁵⁷ This reasoning/rule follows the definition of a customary marriage as 'a relationship that concerns not only the husband and wife, but also the family groups to which they belonged before the marriage'.⁵⁸ Thus whether the marriage is taking place between minors or not, consent to a customary marriage by the parents of a woman is strictly adhered to under customary family law.⁵⁹ This approach enables force or coercion to be exerted, and consent of the parties to be undermined in child marriage that is driven by the self-interests of family members and traditional practices as set out in Part 4.1 above. Therefore, reinforcing respect for the principle of 'the spouses' full and free consent' is not just a matter of having the right legislation, but also securing buy-in from customary systems so that all child marriage practices, which are at variance with the principle, are completely eliminated.

4.2.2 How does legislation protect the right of parties to free and full consent to a marriage?

Section 22(4) of the Constitution provides that no person shall be forced into marriage. The Child Care (Protection and Justice) Act No. 22 of 2010 outlaws forced child marriage (not child marriage generally), and imposes a fine of ten years for anyone who is found guilty of forcing a child to marry.⁶⁰ However, Parts 4.1 and 4.2.1 in this report have shown that these enabling legal provisions are clearly contradicted in practice, because children are being forced into marriage in Malawi on the premise that parents or guardians are exercising 'consent'. Since the justice system usually

54. Section 3 – a harmful practice is defined as a social, cultural, or religious practice which, on account of sex, gender or marital status, does or is likely to (a) undermine the dignity, health or liberty of any person; or (b) result in physical, sexual, emotional, or psychological harm to any person.

55. Section 5(2).

56. Section 83.

57. Mwambene 2010, note 41 above.

58. Bekker 1989, in Mwambene 2010, note 41 above.

59. Mwambene 2010, *ibid.*

60. Sections 81 and 83 respectively.

relies on aggrieved parties (in this case most likely parents) to report issues of child rights violations, reporting becomes difficult when it is the parents themselves that are committing the violation.

The passing of the Marriage, Divorce and Family Relations Act No. 4 of 2015 has added some weight to the need for 'free and full consent of parties to a marriage' because Section 77(1) provides that a marriage will be nullified if the consent of either party to the marriage was obtained by force, duress, deceit or fraud. Though the Bill that was passed into the Marriage, Divorce and Family Relations Act (2015) was critiqued for failing to create a specific offence of forced marriage,⁶¹ this offence is present under the Child Care, Protection and Justice Act No. 22 of 2010. It just needs to be made easy to enforce by eliminating the permission of parental consent to child marriage under the Constitution. The Marriage, Divorce and Family Relations Act complements this position under the act by providing a legal avenue for getting out of a forced marriage (and declaring the same as invalid) while protecting any relevant interests, eg child custody, maintenance and property. However, the challenge will be to facilitate and monitor the implementation of this provision.

The one flaw is that the Marriage, Divorce and Family Relations Act No. 4 of 2015 does not include preventative measures by requiring that parties that are intending to marry should declare their free and full consent at the onset as one prerequisite to the celebration of a marriage. Thus arguably, this may be a loophole whereby marriages that seem to *prima facie* comply with the law may in fact be forced. In the context of the Marriage, Divorce and Family Relations Act, one can only hope that the parties that are submitting themselves before the registrar would already respect the need to be compliant with the requirement for them to be 18 years and over. However, this cannot be guaranteed given that the marriage law does not specifically require the registrar to get proof of age as one of the preconditions to a marriage. There is room though to capture the age at the time of celebration of a marriage during the recording of the marriage in a Marriage Register Book (but again, proof of age is not mandatory). This challenge is related to the whole issue of laws around registration, which is discussed in Part 5.

Section 16 of the Marriage, Divorce and Family Relations Act No. 4 of 2015 only requires the parties to sign an acknowledgement form that a registrar has explained to them about prohibited degrees of kindred or affinity; the prohibition of polygamy in civil marriages; and the penalties that are imposed for various offences under the act. Section 17 expects a party that intends to get into a civil marriage to only prove to a registrar, through a declaration, that he or she is single. The two sections would have been the ideal provisions to impose the requirement for parties to a marriage to declare the presence or absence of free and full consent; and for identifying cases that require screening before proceeding with registration.

Even the specific preliminaries for celebrating customary and religious marriages under Section 27 of the Marriage, Divorce and Family Relations Act No. 4 of 2015 only require the person intending to marry to give a notice in writing to the registrar, but not to confirm that the notice is being given with his or her free and full consent. However, it is observed that the Certificate of Marriage form that is to be issued by a cleric, and presumably the traditional authority, contains a column where the person that is celebrating the marriage is supposed to record 'resistance at the time of marriage'. Whether it is realistic to expect a party to a marriage to openly show resistance during officiation is debatable. Indeed, research by the Centre of Human Rights at the University of Pretoria (2014) has observed that since marriage under customary law is not only between two people, but rather a union of families, a girl may be coerced by their families to enter and remain in arranged marriages as the decision is not entirely hers.

4.2.3 How does free and full consent work in marriage by repute or permanent cohabitation?

In Malawi's scenario that allows marriage by repute or permanent cohabitation, the issue of free and full consent of parties to marriage becomes complex because these marriages are usually voluntary. The Centre for Human Rights has noted that though rare, some Malawian young girls below 18 years may naively opt for marriage with 'wealthier' men, even resisting any attempts to dissuade them from such marriages.⁶² For these girls, marriage presents a fast route, often unfulfilled, to escape poverty.⁶³ In these circumstances, it may be difficult to oppose the presence of free and full consent of the girl involved.

61. Human Rights Watch, note 12 above.

62. Centre of Human Rights 2014, note 26 above.

63. Human Rights Watch 2014, note 12 above.

However, instead of being defeated and accepting such undesirable child marriages, the law on free and full consent itself provides solutions. First, what should be remembered is that both the Constitution and the Marriage, Divorce and Family Relations Act give an open licence to marry with 'free and full consent' to anyone who is 18 years or older. Second, any deviation from the above rule can only occur for those aged between 15 and 18 years old that have parental consent. The implication of this legal position on marriages and repute or permanent cohabitation (and indeed on all forms of marriage in Malawi), is that a party to a marriage who is under 18 years old is deemed to be incapable of giving free and full consent, unless such consent is given by a parent instead. Therefore, violations of this principle can find a man who is cohabiting with a girl child in direct conflict with laws on abduction and defilement (further discussed in Part 7).

4.3 Key conclusions: opportunities and challenges related to laws on consent to marriage

Opportunities

- a) Harmful practices against children are outlawed under the Child Care, Protection and Justice Act No. 22 of 2010; just as harmful practices are generally outlawed under the Gender Equality Act No. 3 of 2013. Punishments are specified.
- b) The Child Care, Protection and Justice Act No. 22 of 2010 outlaws child betrothal and forced child marriage; and imposes penalties.
- c) The Constitution of the Republic of Malawi (1994) regards as invalid any law that is inconsistent with the provisions of the Constitution.
- d) The Constitution disallows forcing any person into a marriage; and allows those aged 18 years and above to get married without consent.
- e) The Marriage, Divorce and Family Relations Act No. 4 of 2015 includes obtaining the consent of a party to a marriage by force as grounds for nullifying a marriage; and offers necessary safeguards regarding child custody, maintenance and property for those whose marriage has been nullified.
- f) The provisions regarding minimum age of marriage under the Marriage, Divorce and Family Relations Act No. 4 of 2015 apply to all forms of marriage, including customary and religious marriages.

Obstacles

- a) The Constitution allows children aged between 15 and 18 years to get married with parental consent. The age of 15 is below that which is accepted as an absolute minimum age of marriage in exceptional circumstances (16 years) in some international frameworks.
- b) Without legal guidelines for allowing child marriage in exceptional circumstances as is prescribed by the international frameworks, forced child marriage with parental consent continues to be culturally justified as a form of 'protection of the girl child'/ being done in the best interest of the child.
- c) The Constitution is in conflict with itself by on one hand declaring as invalid any law that is contrary to the provisions of the Constitution; while on the other hand enshrining provisions that facilitate child marriage with parental consent, and therefore violating some constitutional rights.
- d) The implementation, enforcement and monitoring of existing legal provisions that prohibit harmful practices, child betrothal and forced child marriage are weak.

PART 5: LAWS ON MARRIAGE REGISTRATION

Several international human rights frameworks that have been ratified by Malawi consider the registration of marriages as a crucial factor in preventing harmful practices such as forced child marriage. Both Article 21(2) of the African Charter on the Rights and Welfare of the Child (1990) and Article 16(2) of CEDAW expect State parties to take all necessary action, including legislation, to make registration of all marriages in an official registry compulsory. CEDAW General Recommendation No. 21 (1994) expounds on this duty by committing States parties to require the registration of all marriages, whether contracted civilly or according to custom or religious law.⁶⁴

This review scrutinises the extent to which Malawi has a system for the registration of marriage, and whether such a system is compulsory and comprehensive. It also examines whether the State has signed up to the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (1962). In respect to the former, Malawi has not yet signed or ratified the convention, which similar to CEDAW and the African Charter on the Rights and Welfare of the Child, places an obligation on State parties to ensure that all marriages are registered in an appropriate official register by a competent authority.⁶⁵ Generally, this part concludes that a new system for compulsory marriage registration exists, but it is limited by the fact that the law does not include provisions to facilitate the competence of registration authorities; to require proof of age; and to build comprehensive awareness on marriage registration requirements. The weak implementation of birth registrations in the country also adds to the limitations.

5.1 Registration structures

The passing of the Marriage, Divorce and Family Relations Act No. 4 of 2015 is opportune because, for the first time, the law has introduced a compulsory arrangement for the registration of civil, religious and customary marriages. This is exactly what the respective international human rights frameworks are urging countries to do, and is a major departure from the previous legal set-up that only required the registration of civil marriages. The act has instituted the public office of Registrar of Marriages, who shall be the same person holding the position of Registrar General or acting on his or her behalf. It has designated specific offices as ‘registrars’ with authority to perform functions of the Registrar of Marriages. These are: (a) district commissioners; (b) traditional authorities who have been given the power to register a marriage; and (c) clerics.⁶⁶ The ministry responsible for gender and social welfare will be responsible for publishing a list of registrars under the act.⁶⁷

Sight should not be lost of the fact that the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (1962) promotes the use of a ‘competent authority’ in marriage registration processes.⁶⁸ This underlines the necessity for the registration to be credible. Arguably, the presence of a registrar of marriage is a vital step towards ensuring that ‘competent authorities’ handle the responsibility of registering marriages at all levels. However, it is not the end. Black’s Law Dictionary defines competence as ‘the capacity of an official body to do something’.⁶⁹

64. CEDAW General Recommendation No. 21: Equality in Marriage and Family Relations (1994), Paragraphs 36-39.
65. Article 3.

66. Section 4.
67. Section 5.
68. Article 3.
69. Third Pocket Edition (2006).

Therefore, ensuring that the designated offices have the desired capacity to institutionalise the registration of civil, religious and customary marriages is what will create a competent authority. Further, Joint General Recommendation/General Comment No. 31 of the CEDAW Committee and No. 18 of the CRC Committee (2014) stress that apart from establishing a legal requirement of marriage registration, State parties should ensure that this is effectively implemented through awareness-raising, education and the existence of adequate infrastructure to make registration accessible to all persons.⁷⁰ However, the Marriage, Divorce and Family Relations Act No. 4 of 2015 does not include any provision that guarantees the training of all designated registrars in order to develop full competence and avoid situations that may lead to the application of the above offences. Nor does it impose the legal obligation to raise awareness and educate the public.

5.2 The registration and marriage celebration process

Before a marriage is celebrated, a registrar has the duty to first issue a permit after being satisfied that a marriage can validly be celebrated. For customary and religious marriages, a registrar will fix a notice of the marriage at his or her office for 21 days. If there are no objections, the registrar will issue the permit requiring the marriage to occur within a certain period before the permit expires.

For civil marriages, upon receiving a declaration that the person making the application is single, the registrar shall display the written notice outside his or her door or place of worship or work for at least 21 days. Then if there are no impediments, the registrar shall issue a marriage permit requiring the marriage to occur within a certain period before the permit expires. Part 5.3 contends that although these steps create the ideal space for checking child marriage and refusing to issue a marriage permit on account of age, limitations in the law itself may not make this

possible. Additionally, in respect of those married under civil law, a functional registration system should be capable of catching parties that have entered into a marriage in one locality, and are also entering into a different marriage in another locality. This entails ensuring that part of creating a functional marriage registration system should be to have a unified network that makes registration information across Malawi immediately accessible amongst all registrars.

For the celebration of marriages, the Registrar of Marriages has the mandate to ensure that all registrars have Marriage Register Books and Books of Marriage Certificates.⁷¹ The registrars are required to make and sign in the Marriage Register Book an entry of any marriage that they celebrate.⁷² All registrars shall submit monthly records of their entries in their Marriage Register Books to the Registrar of Marriages.⁷³ There is a specific responsibility on the Minister responsible for gender and social welfare to deliver Marriage Register Books to every traditional authority in order to record details of all customary marriages celebrated in his or her area.⁷⁴

In addition, a registrar who celebrates a religious or customary marriage is required to keep a 'register of marriage celebration', in which he or she is to make an entry of a marriage that he or she celebrates.⁷⁵ In civil marriages, the registrar is supposed to give the parties to marriage a copy of their marriage certificate immediately after celebration of a marriage, and to file a duplicate copy in his or her office.⁷⁶ In customary and religious marriages, it is not clear if the parties are supposed to get their copy of the certificate. The law specifically requires them to sign the certificate in duplicate, and the registrar who is celebrating the marriage to deliver the duplicate copy to the Registrar of Marriages.⁷⁷

70. Paragraph 54 (g).

71. Section 6.

72. Section 43.

73. Section 8(4).

74. Section 38.

75. Section 43.

76. Section 35 for civil marriage; Section 42 for religious and customary marriages.

77. Sections 45 and 46.

5.3 The issue of 'age' during the registration and marriage celebration process

Part 4.2.2 analysed how the Marriage, Divorce and Family Relations Act No. 4 of 2015 does not direct the registrar to have/demand proof of age during the time that a party is giving a marriage notice; during the celebration of a marriage; or during the recording/registration of a marriage in a register. This implies that registrars have to rely on information from third parties or their own proactiveness. During the 21-day period of notice that is observed before a registrar can give parties a marriage permit, the reality is that third parties can only come forward within this period if they are aware that a marriage notice has been publicised by the registrar, which may not usually be the case. In the context of poor birth registrations as discussed below, a more practical precaution would have been to legally require that the registrar should receive a formal declaration from the parties or any authority that the minimum age of marriage has been satisfied. The celebration and registration of the marriage would then proceed based on this evidence.

Generally, although age is supposed to be recorded during registration of a marriage, this remains a weak safeguard in a country that has very low birth registration rates, thus making it difficult to determine the age of a party to a marriage. In 2012, UNICEF reported that only 17 per cent of children under 18 have their birth registered.⁷⁸ This is the situation despite the fact that the National Registration Act (2009) requires all births to be registered and for the government to establish a birth registration system.⁷⁹ This same problem exists in the implementation and enforcement of the requirement under the Child Care, Protection and Justice Act No. 22 of 2010 for every parent to register their child's birth, and for local government authorities to maintain a registry of the births of children in the area of their jurisdiction.⁸⁰ In August 2015, the government of Malawi announced that it had started implementing a national birth and death registration system in all districts with the support of several partners, including

Plan Malawi. This is a positive development that has huge potential to complement the marriage registration system in stopping child marriage. However, results can best be achieved with the diligent enforcement of a mandatory birth registration system for all children, whether or not they are born in health facilities. The marriage registration system itself will do little to stop child marriages. The birth registration system would also be strengthened by a national identity system, which is long overdue.

Thus currently, Malawi is only partly compliant with the requirement under Joint General Recommendation/General Comment No. 31 of the CEDAW Committee and No. 18 of the CRC Committee (2014) that member states should have a system for national birth registration. However, it is incompliant because such a system remains largely inaccessible to many. The Joint General Recommendation/General Comment recognises that the presence of a compulsory, accessible and free birth registration system for all children is vital to efforts to effectively prevent harmful practices, including child marriage.⁸¹

5.4 Offences related to registration of marriages

Generally, in order to ensure compliance with marriage registration formalities, the law has created several offences against registrars. First, a registrar who wilfully fails to discharge his or her duty to complete a certificate of a marriage that is presided by him or her and to deliver the certificate to the Registrar of Marriages commits an offence punishable by a fine of MK100,000,00 and five years' imprisonment. This provision ought to prompt registrars to take marriage registration seriously. Second, it is an offence punishable by a fine of MK100,000.00 and five years' imprisonment for a registrar to perform a marriage ceremony fully knowing that some legal requirements that would make the marriage void have not been fulfilled. This provision would take care of circumstances where there is proof that a registrar has connived in the celebration of a child marriage, including by ignoring the young age of a party to a marriage.

78. UNICEF (10 October 2012).

79. National Registration Act of 2009 – see Sections 3(1), 24(1), 30, 31, 33, 34 & 35.

80. Child Care, Protection and Justice Act No. 22 of 2010, Sections 122 to 124.

81. Paragraph 54 (h).

5.5 Key conclusions: opportunities and challenges related to the marriage registration laws

Opportunities

- a) Despite Malawi not signing or ratifying the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (1962), the Marriage, Divorce and Family Relations Act No. 4 of 2015 has introduced a compulsory scheme for the registration of civil, customary and religious marriages by the Registrar of Marriages.
- b) Registration of marriages is decentralised by designating district commissioners, traditional authorities and clerics as registrars to act on behalf of the Registrar of Marriages.
- c) Registration of customary marriages is to be formally recorded by all traditional authorities in respect to marriages that are happening in their respective jurisdictions.
- d) Age is to be recorded at the time of issuing a marriage notice and celebration of a marriage before a registrar.
- e) The law makes it an offence if registrars do not perform their duties to record marriages and thereby prevents them from registering marriages that are otherwise void.
- f) As of August 2015, the birth registration system is being implemented in all districts.

Challenges

- a) To date, birth registrations are rare, making it very difficult to establish the true age of a party to marriage.
- b) Though the marriage law mandates registrars to record age, given that there is a wide absence of birth certificates, there is no obligation on the registrar to demand alternative proof of age during the time that the parties to a marriage are giving notice of the marriage, or celebrating the marriage (eg a declaration, chief's certification/affidavit etc.).
- c) With the widespread absence of birth certificates, honest disclosure of age at the time of giving notice of a marriage depends on the goodwill of parties to the marriage or third parties, but the practicality of enforcing such disclosure is difficult.
- d) Borrowing from implementation challenges with many laws, it is likely that unless purposeful measures are taken, a comprehensive system for registration of marriages may take a long time to be functional/be implemented, since this has only just been introduced in a 2015 law.
- e) Training of registrars in order to create competent authorities for the compulsory registration of all marriages is not legally mandated; neither is education or awareness-raising of the new registration system.

PART 6: HOW FAR DOES THE LAW ELIMINATE DISCRIMINATION AGAINST WOMEN AND GIRLS IN ALL MATTERS RELATING TO MARRIAGE AND FAMILY RELATIONS?

This assessment has focused on aspects of the new Marriage, Divorce and Family Relations Act No. 4 of 2015 that have managed to dispense with forms of discrimination that were being encountered in various systems of marriage; as well as aspects that continue to harbour discriminatory undertones, whether directly or indirectly.

This part reviews other laws that may impact on child marriage in Malawi, starting with an analysis of the relationship that exists between formal and customary laws. This discussion complements the analysis in the preceding parts about how customary/religious laws obstruct or perpetuate child, early and forced marriage, especially in the contexts of minimum age and age of consent. It then discusses laws governing sexual offences with children; education and training; inheritance and succession; and sexual and reproductive health. It also examines administrative action that has been taken in some of these areas in the form of laws and policies. The presence of some laws and policies creates an enabling environment for addressing child marriage; just as the inadequate enforcement of these laws and their implementation (as well as the absence of some laws) obstruct efforts to address the practice.

6.1 What is the relationship between national law and customary law in Malawi?

Malawi has a plural legal system, where national legislation co-exists with customary and religious law. The right to culture and freedom of religion is guaranteed under the Constitution (1994). With regards to the right to culture, Section 26 stipulates that every person shall have the right to use a language and participate in the cultural life of his or her choice. The right to freedom of religion is protected under Section 33, which provides that every person has the right to freedom of conscience, religion and belief. The Constitution also recognises customary and religious marriages,⁸² as does the new Marriage, Divorce and Family Relations Act No. 4 of 2015.

The question that often arises is whether constitutional rights in respect to culture and religion are a clear licence to all forms of cultural and religious practices, including those that promote child marriage. The fact that the Constitution upholds only positive aspects of culture or religion is clear from the wording of Section 5, which declares the supremacy of the Constitution by

82. Section 22(5).

stating that “any law that is inconsistent with the provisions of this Constitution shall, to the extent of such inconsistency, be invalid”. On the other hand, in respect of customary law, Section 10(2) gives specific direction that “in the application and development of customary law, relevant organs of the State shall have due regard to the principles and provisions of this Constitution”. To the extent that the Constitution guarantees gender equality, non-discrimination, human dignity and child protection from harm, the nature of customary law that can be said to be in conformity with the Constitution is such which does not promote violations through practices such as child marriage.

This report later establishes that several statutes are conjoined with the Constitution in the intent to only promote **positive** customary and religious values. The Gender Equality Act No. 3 of 2013 prohibits ‘harmful practices’. This terminology, and not that of ‘harmful traditional practices’, was chosen deliberately so as to be inclusive of **all** harmful practices – social, cultural and religious.⁸³ The Child Care, Justice and Protection Act No. 22 of 2010 proscribes harmful cultural practices, in particular “subjecting a child to a social or customary practice that is harmful to the health or general development of the child”.⁸⁴

It can therefore be concluded that, theoretically, the Constitution and statutory law supersede customary and religious law by setting down the parameters of what type of law is acceptable or not acceptable in Malawian democratic society. What makes practice different is the fact that customary and religious laws have a life of their own and are revered in communities where they are practiced; and mechanisms for holding customary and religious laws accountable when they ‘stray’ are weak. Part 8 shows that by-laws are the one mechanism that attempts to discard harmful practices, including child marriage, in some communities. However, what is noticeable is that these communities are able to transform negative customs because it is the custodians of culture – the chiefs – who are in the forefront of community advocacy, and not necessarily because there are special enforcement systems to ensure that the constitutional or statutory provisions that prohibit harmful practices are widely enforced.

The challenge with a substantive alignment of formal and informal law is more visible with religious law, which is hinged on doctrines that believers hold as sacred. As

a result, in the area of marriage, religious law has even influenced how the new Marriage, Divorce and Family Relations Act No. 4 of 2015 ended up being couched. If one reads the proposed law that was formulated under the report of the Malawi Law Commission on the proposed Marriage, Divorce and Family Relations Law in 2006, it is clear that the intention of the Malawi Law Commission was to outlaw polygamy in Malawi. However, this sparked an uproar from the faithful in religions that allow polygamy, leading to the relevant provision being dropped by the Ministry of Justice from the final Bill that was presented before Parliament.

On the other hand, with regard to customary laws related to marriage, the Marriage, Divorce and Family Relations Act No. 4 of 2015 has admittedly narrowed the gap between formal law and customary/religious law because women who are married religiously or under customary law can now resort to civil courts for all matters relating to marriage, family relations and inheritance due to the fact that the new law has consolidated all these issues, and made the provisions uniformly applicable regardless of whether the marriage is civil, religious, or customary. What remains is for women married under customary or religious law to start invoking this law in practice.

6.2 Aspects of the new marriage law that promote non-discrimination

As alluded to above, one of the most important steps that the Marriage, Divorce and Family Relations Act No. 4 of 2015 has taken towards eliminating discrimination against women and girls in all matters relating to marriage and family relations is to create a single body of law that protects all marriage regimes in the country, regardless of differences in celebration formalities. The analysis establishes that positive aspects of the act that promote equality and non-discrimination in marriage and family relations are the following:

- incorporation of rights and obligations of parties to a marriage that have elements that specifically empower women;
- recognition of limitations to the right of spouses to a sexual relationship with each other that may protect those in child marriages;

83. Section 3.

84. Section 80.

- clearer provisions regarding maintenance, child custody and property distribution in all forms of marriage;
- guidelines for establishing the existence of marriage by repute or permanent cohabitation; and
- steps taken to criminalise aspects of marital rape.

The following section outlines areas where progress has been made:

6.2.1 Consortium, name and citizenship

The act guarantees equal rights to each party to a marriage as the other in their right to consortium.⁸⁵ In addition, a wife can opt to retain her maiden name, use the surname of her husband or both, and choose to continue to use her husband's surname after divorce. The law also supersedes discriminatory provisions of the Citizenship Act⁸⁶ by giving a spouse the right to retain her citizenship or nationality upon marrying a foreigner.⁸⁷ Under the Citizenship Act (Chapter 15:01), a Malawian woman who is married to a foreigner automatically loses her citizenship on the first anniversary of a marriage unless she renounces the citizenship of her spouse. This provision does not apply to Malawian men who marry foreign women.

The Citizenship Act therefore leaves many Malawian women stateless and without legal protection. Some children in border districts may enter into child marriages with foreigners, just as some in migrant communities/refugees, refugee women/girls may get married to refugees that want to assimilate themselves into society. Indeed, during the process of compiling this report we came across a guardian with a complaint that her 17-year-old sister had run away from home to 'get married' to a Burundian and the two were staying in Lunzu in Blantyre district. Therefore, by protecting their citizenship status, the new law ensures that women and girls who get married to foreigners are always guaranteed legal protection as Malawian citizens.

6.2.2 Limitations on the right to a sexual relationship

The law recognises that the right for a spouse to a sexual relationship with the other cannot be upheld in certain situations/reasonable grounds, namely poor health; if a wife is recovering after giving birth; if a

spouse is recovering after surgery; if a spouse has reasonable fear that engaging in sexual intercourse is likely to cause physical or psychological harm to either spouse; or if there is need to reasonably respect custom.⁸⁸ However, the provisions that are labelled as being discriminatory under the act show that there is no guaranteed relief for marital rape for all spouses who are forced into sex despite the stated circumstances. Nevertheless, it can be contended that if a married child has reasonable fear that sexual intercourse will cause her physical or psychological harm, then the right of her 'husband' to sexual intercourse should not be enforced even at customary law level.

With proper awareness, children that have been forced into child marriage could use this provision to perpetually withhold consent, and later have the marriage nullified on the ground that it was not consummated. But admittedly, this is easier said than done because in practice, the right cannot be asserted perpetually without families 'doing something about it' due to the traditional belief that no matter what, a wife has an obligation to endure sex with her husband. This belief resounds in the research that was conducted by Human Rights Watch (2014), in which one of the common pieces of advice that young married girls in Malawi obtained from their families was that 'they should not deny their husband sex.'⁸⁹ For a girl caught in a child marriage, this means she should brace herself up even for marital rape. The only solution is to put the absolute minimum age of marriage at 18 years, so that children do not have to suffer physical and mental harm resulting from forced sex because they are in an early marriage.

6.2.3 Maintenance and child custody

Unlike the treatment of maintenance in the past whereby this was viewed as an exclusive obligation of a husband, the Marriage, Divorce and Family Relations Act No. 4 of 2015 provides that each spouse has the responsibility towards the upbringing, nurturing and maintenance of children of a marriage, whether alone or together with the other spouse.⁹⁰ Both spouses also have a duty to maintain each other.⁹¹ The act has broken new ground by recognising that a non-monetary contribution⁹² will count as a maintenance

85. Section 2 – this means the fact of a husband and wife living together, and includes a right to consummation, companionship, care, maintenance and rights and obligations commensurate with the status of marriage.

86. Section 9 – a wife is expected to give up her citizenship upon the first anniversary of a marriage to a foreigner unless she has denounced her husband's citizenship.

87. Section 48.

88. Section 48 (2).

89. Note 11 above.

90. Section 48(5).

91. Section 50(1).

92. Section 2 – means the contribution made by a spouse for the maintenance, welfare or advancement of the family other than by way of money, and includes: domestic work and management of the home; child care; companionship; the endurance of the marriage; and any other manner or form of contribution as the court may consider appropriate.

contribution.⁹³ However, the monetary contribution of each spouse is expected to be proportionate to his or her income.⁹⁴ Also, during the course of a marriage, both spouses are entitled to mutual custody of their children.⁹⁵ The law also allows one to sue for maintenance during the subsistence of a marriage,⁹⁶ which is a positive direction to cushion hardships for women and children who are economically neglected within a marriage. During dissolution, the best interests of the child shall be paramount in deciding issues of child custody.⁹⁷ The fact that these provisions now extend to all marriages (civil, customary, and other marriages) is a progressive step because in the past, this has depended on the courts' interpretation of constitutional and customary prescriptions, which have not been consistent.

6.2.4 Distribution of property upon divorce

The new marriage law provides guidelines for the court to equitably distribute property by taking into account the income of each spouse, the assets of each spouse, the financial needs of each spouse, the obligations of each spouse, the standard of living during the subsistence of the marriage, the age and health of each spouse, and the direct and indirect contribution of each spouse, including domestic work.⁹⁸ The fact that this will apply to all marriages addresses discriminatory tendencies whereby non-monetary contribution was previously excluded, but also whereby the formula that courts were using for distributing property, especially during the dissolution of customary and religious marriages, was ad hoc and non-standard.

However, one recent judgment that brought optimism that women would be fairly considered in property distribution is the case of *Kamphoni v. Kamphoni*,⁹⁹ in which the court determined that fairness and not contribution, determines disposal of matrimonial property on dissolution of customary law marriage. In the opinion of Mwaungulu J, property distribution does not depend on who owns the property, but who holds it because “you can acquire property independently, yet hold it jointly”. Therefore, one can hold property without being the owner. The judge therefore stressed that what Section 24 (1) (b) (i) of the Constitution does is to give women the right to a fair disposal of property jointly ‘held’ with their spouses. This case serves to strengthen

the position relating to non-monetary contributions in the new marriage law, and even provides guidance on how the court should handle property distribution in concrete terms. Since girls that are in child marriages are likely to have been robbed of the opportunity/capability to earn an income and make financial contributions in their marriage, the legal position is highly relevant in ensuring that they obtain justice should the marriage break down.

6.2.5 Clarification of marriage by repute or permanent cohabitation

Marriages by repute or permanent cohabitation have been recognised in Malawi since the adoption of the Constitution of the Republic of Malawi (1994). However, for a long time the status of this form of marriage remained unclear, rendering the legal position/protection of women married by repute when compared to those married by custom or under statute quite vulnerable. Even courts seemed to grapple with how to deal with these marriages. This is manifested in the 2008 case of *Charity Black v. Chikondi Black*,¹⁰⁰ where the High Court stated that “it is not clear in the law whether marriages by repute are dissoluble in the ordinary manner as are marriages under custom or under statute”. However, in 2012, an appeal decision regarding the validity of a marriage (in order to guide the issue of distribution of matrimonial property) that was made by the Mzuzu High Court in *Edgar Mwilang’ombe v. Christina Mwaungulu*¹⁰¹ was more decisive. Madise J ruled “where parties present themselves to the community as husband and wife and create a reputation thereof, they will be regarded as being married by repute. To state otherwise would violate Section 22 of the Constitution”.

Still, the exact facets of marriages by repute or permanent cohabitation needed to be settled through legislative guidance, and this is what the Marriage, Divorce and Family Relations Act No. 4 of 2015 has sought to do. In determining the existence of this form of marriage, the law requires the court to establish the presence of several elements, namely the existence of a relationship of not less than five years; the fact that the parties were cohabiting; the presence of a sexual relationship; the existence of some level of financial dependence or interdependence and any arrangement

93. Section 50(2).

94. Section 50(3).

95. Section 48(6).

96. Section 88.

97. Section 95(3).

98. Section 74.

99. Matrimonial Cause No 7 of 2012.

100. Matrimonial Cause No. 26 of 2008.

101. Civil Appeal Cause No. 32 of 2011, Mzuzu District Registry.

for financial support between the parties; the ownership, use and acquisition of property by the couple; the presence of some level of mutual commitment to a shared life between the couple; and the fact that together, the couple has, cares for, or supports children.¹⁰² Leaving the court to settle the fact of marriage by repute or permanent cohabitation is understandable from the perspective that in a normal scenario, these marriages, just as other forms, ought to be accepted in society. Parties to the marriage are expected to enjoy relevant spousal rights without contention. However, where such contention arises, it should be left to the courts to determine whether or not a valid marriage existed.

What is not clarified though is whether this legal protection will be available even to parties who may have gone into cohabitation before the prescribed age of 18 years. In Malawi, while forced marriage is more prevalent, Part 6.1.1 has highlighted that there are situations where girls below the age of 18 years, without the consent of parents, land themselves in cohabiting situations. And since clearly the Marriage and Divorce and Family Relations Act No. 4 of 2015 expects its provisions to apply to a valid marriage (in this case where parties to a marriage meet the minimum age of 18 years and above at the time of the marriage), it may be problematic for one to argue a case of lawful cohabitation by asserting, for example, that she has been in the relationship for five years – when part of these were in defiance of the marriage law. Indeed one key informant noted that:

“A person is not supposed to come to the law with dirty hands, so how does the law/court resolve the fact that one entered into a voluntary child marriage against the law itself (and with no consent from parents even), but now want to claim benefits of cohabitation because the relationship has soured?”

This brings attention to the gap in the act that perhaps it is an anomaly not to specifically recognise child marriage as grounds for nullification of a marriage (and therefore resolve issues of property distribution etc. in that context) as discussed in 6.3.2 below.

6.2.6 Some steps have been taken towards criminalising marital rape

Though Part 6.3.5 notes some discriminatory aspects of provisions of the Marriage, Divorce and Family

Relations Act No. 4 of 2015 that partially recognise marital rape, it should be acknowledged that Malawi has taken some steps forward in the partial criminalisation of marital rape. The recommendation that Malawi should create the offence of marital rape is resounding in the Concluding Observations of treaty monitoring bodies such as CEDAW¹⁰³ and the Human Rights Committee.¹⁰⁴ The new marriage law has partly addressed this recommendation by recognising that a husband will be guilty of rape during judicial separation. Considering that previously the law did not recognise marital rape at all, this is a meaningful step. However, this is not enough as many married women have been denied this type of legal protection.

6.3 Discriminatory aspects of laws on marriage and family relations

Despite the above progress, the analysis finds that the Marriage, Divorce and Family Relations Act No. 4 of 2015 has some discriminatory elements such as: the non-applicability of many aspects of the law to existing marriages; the exclusion of child marriage as a specific ground for nullifying a marriage; the permission of polygamy in types of marriages that are commonly pursued in Malawi; and the exclusion of many married women in the provision that criminalises marital rape. These gaps are explained below.

6.3.1 Non-application of many aspects of the new law to existing marriages

If interpreted according to the way it is worded, the Marriage, Divorce and Family Relations Act No. 4 of 2015 does not apply wholesale to all marriages that currently exist in Malawi. This is because it explicitly states that the act shall apply to marriages that would have been celebrated after its enactment. The act mentions that only Part IX of the act (about rights and obligations of parties to a marriage) shall apply even to existing marriages. Part IX is progressive, and it is indeed important that its provisions should be universally applicable.

In discussions with the researcher when compiling this report, some stakeholders, including the Chief Parliamentary Council, contended that the intention is for the act to apply to all marriages, although they cannot explain away the language that says “this act shall only apply to marriages entered into on or after the

102. Section 13.

103. Concluding Comments of CEDAW on Malawi (2006), paragraphs 21 & 22.

104. Concluding Observations of the HRC on Malawi's Initial Report (2014), paragraph 14.

day it comes into operation; but Part IX shall apply to all marriages regardless of the date they were celebrated¹⁰⁵. Therefore, the questions that remain unanswered are: if the argument is that the new law has been created to institute a better and uniform system for handling issues of divorce, separation, property distribution, maintenance and child custody (non-Part 4 provisions), why should the law contain language that prevents existing marriages from benefitting from this improved arrangement? A follow-up question would be, if the old marriage and divorce laws that used to govern civil marriages have been repealed by the new act, which law will govern parties in existing marriages that find themselves in need of relief?

Even assuming for a moment that courts would still have to resort to principles in the old laws in respect to existing marriages, what sense does it make for the justice system to be forced to apply provisions that have been found to be unsatisfactory, and even discriminatory at times (eg only awarding maintenance to women; not providing room to sue for maintenance during a marriage; only allowing a man to sue the person that committed adultery with his wife and not *vice versa* etc.). And if religious or customary marriage and divorce laws were faulted for not offering comprehensive and clear protection, why should applicable existing marriages be subjected to this position regardless of there being a new comprehensive law?

Even for forced child marriages that existed prior to the new law, would a court be justified in denying a petition for its nullification under the new law on the ground that this provision is only applicable to those that would get married after the enactment of the new law? Then take marriages by repute or permanent cohabitation; if courts have been desperate for a clear formula for establishing these marriages and the new law now presents that formula, are courts expected to rightly ignore the formula when faced with marriages that were existing at the time of enacting the new law? In addition, if a spouse legitimately requires maintenance during the subsistence of a marriage, why shouldn't the new law come to his or her rescue considering that marriage laws previously did not accommodate this type of maintenance?

In short, it is a serious anomaly for the new law to expressly exclude existing marriages from a large part

of its provisions, thereby excluding millions of married people. If anything, it would have been more practical to limit this exclusion to provisions related to registration and celebration of marriages. At best, banning existing marriages from benefiting from fundamental provisions of the new legislation that are definitely essential to parties in all marriages is a form of discrimination (against those in existing marriages), and will only serve to create absurdity and confusion in the justice system.

6.3.2 Exclusion of child marriage as a specific ground for nullifying a marriage

The Marriage, Divorce and Family Relations Act No. 4 of 2015 does not include a marriage in which one or both of the parties is below the age of 18 years as one of the grounds for a court to nullify a marriage under Section 77. Perhaps the hesitation to do so originates from the fact that for now, the Constitution permits such marriages to occur with the consent of parents or guardians.¹⁰⁶ Therefore, including these grounds would directly contradict the Constitution. However, it can be taken as a given that child marriages (especially those entered into without the consent of a parent or guardian) are void. But the question becomes, can one be allowed to still make an application to court to have a marriage declared null and void on the grounds that the marriage did not meet the minimum age in the first place, even though these grounds are not listed under Section 77?

The advantage of obtaining a decree of nullity from the court is that the decree gives the court authority to also make other orders related to property settlement; temporary or permanent maintenance (of either spouse or children of the marriage); or custody of children of the annulled marriage. Therefore, this draws the conclusion that if one cannot make a petition to court to nullify a marriage on the grounds of 'child marriage,' then it is difficult for a person who is being withdrawn or is withdrawing from such a marriage to use the Marriage, Divorce and Family Relations Act No. 4 of 2015 to claim any of these orders. Of course an argument can be made that if the marriage was forced in the first place, then a petition for nullifying a marriage can be made on this basis.¹⁰⁷ But what happens if a person below 18 years old had entered into the marriage voluntarily?

It is recognised that where the child wants to stay in the marriage, perhaps neither of the parties to the marriage

¹⁰⁵.Section 3 of the Marriage, Divorce and Family Relations Act.

¹⁰⁶. Section 22(6).

¹⁰⁷. Section 77(e) – a decree of nullity of marriage may be made on the grounds that the consent of either party to the marriage was obtained by force, duress, deceit or fraud.

can be a petitioner. However, there is no indication that the law only intends a petitioner to be a party to a marriage. For example, the law allows the court to nullify a marriage based on the grounds that the parties to a marriage are within prohibited degrees of kindred or affinity. This is a perfect scenario where a concerned third party, and not necessarily parties to the marriage themselves, may petition the court for the marriage to be declared null and void.

Therefore, the exclusion of child marriage as a specific ground of nullification of a marriage is not in the best interest of the child, because there is no certain protection in terms of property, maintenance or child custody rights in case the child has to get out of the marriage either voluntarily or because of third party action. The denial of this protection, when it is duly conferred to other void marriages, is arguably discriminatory against those in child marriage situations.

6.3.3 The legal acceptance of polygamy continues

CEDAW General Recommendation No. 29 (2013) explains that the CEDAW Committee has consistently noted with concern that despite earlier recommending that polygamy should be discouraged and prohibited in CEDAW General Recommendation No. 21 (1994), polygamous marriages still persist in many States parties.¹⁰⁸ Therefore, the CEDAW Committee reiterates that States parties should take all legislative and policy measures needed to abolish polygamous marriages.¹⁰⁹ Despite the fact that the new Marriage, Divorce and Family Relations Act No. 4 of 2015 presented an opportunity to depart from the pack, Malawi has retained the long standing position that only outlaws polygamy in civil marriages, and allows it in all other forms of marriage.¹¹⁰ Only the punishment has changed. In the old marriage law, the offence of bigamy was punishable with five years' imprisonment.¹¹¹ However, the new law has added a fine of MK100,000.00 to the imprisonment term of five years.¹¹²

This legal stand is in fact a rejection of a proposal that polygamy should be banned in absolute terms that was made by the Malawi Law Commission in its report on the Review of Laws on Marriage, Divorce and Family Relations (2006). It also clearly contradicts the Protocol to the African Charter on Human and Peoples' Rights on Rights of Women in Africa (2003), which recommends

that State parties should adopt monogamy as the preferred form of marriage in all marriage regimes.¹¹³

The MDG Endline Survey (2014) found that 14 per cent of women aged 15–49 years are in polygamous unions in Malawi, compared to 8 per cent of men. Polygamy has its opponents and proponents. Opponents argue that the custom is degrading to women and violates their rights to equality with men. Indeed this has been the basis of the advocacy for monogamy by the Malawi Law Commission and at African Union Level. Further, CEDAW General Recommendation No. 21 (1994) says that polygamous marriage contravenes a woman's right to equality with men, and can have serious emotional and financial consequences for her and her dependents.¹¹⁴ The position of proponents is that polygamy facilitates the protection of women;¹¹⁵ and the fact that it is enshrined in some religious doctrines makes it therefore non-negotiable.

In the context of forced child marriage, what is known is that young girls are very vulnerable to polygamy, especially where they are being driven into marriage to honour practices such as *mbirigha* (bonus wife) and *kupawila* (paying off a debt by giving a daughter for marriage). Further, the MHRC found that, in Nkhata Bay, some parents would withdraw their young daughters from poor monogamous marriages into polygamous marriages with older men who were considered wealthy.¹¹⁶ The discriminatory aspects of polygamy on girls that enter into child marriages were summed up by one key informant as follows:

Polygamy that involves child brides fuels discrimination and inequality because it denies them of education opportunities, increases their risk of domestic violence even from co-spouses as young girls have no emotional maturity to compete with the older wives; and it heightens their inability to protect themselves from HIV infection because it is a known fact that they are in a relationship where there are multiple sexual relationships, and yet their age makes it impossible for them to protect themselves.

Key informants mentioned religion as a big influencing factor of polygamy. As outlined in Part 2, it was made apparent, through a literature review and interviews with key informants, that it is very common for girls in Yao tribes to be married into polygamous unions because of

108. Paragraph 27.

109. Paragraph 28.

110. Section 18.

111. Section 43 (Chapter 25:01) of the Laws of Malawi.

112. Section 51.

113. Article 6(c). Protocol ratified by Malawi on 25 November 2005.

114. Paragraph 14.

115. Mwambene 2010, note 41 above.

116. Malawi Human Rights Commission (note 32 above); Centre of Human Rights (2014), note 26 above.

the Islamic faith. In Mulanje, communities that practice the apostolic faith were also identified as driving young girls into polygamous unions.

6.3.4 Partial criminalisation of marital rape

As stated in Part 6.2.6, one of the gains that have been made in the Marriage, Divorce and Family Relations Act No. 4 of 2015 is to secure the partial legal recognition of marital rape. Section 62 provides that “a husband commits the offence of rape during the subsistence of a decree for judicial separation if he has sexual intercourse with his wife without her consent”.¹¹⁷ This means that: (a) there must be a court decision that the parties should go on separation; and (b) the rape must occur while the court’s decision is still valid. Therefore, to the extent that this offence only covers those that are on judicial separation, the provision excludes many women, particularly younger women who may suffer from marital rape in the absence of a formal separation decree, or during the subsistence of a marriage. The Centre of Human Rights at the University of Pretoria has rightly observed that marital rape often occurs in ‘marriages’ involving a girl child and a male adult.¹¹⁸ Therefore, this partial protection of married women is discriminatory against the group of other married women that has no protection though it may encounter exactly the same wrong. It also makes it difficult to give relief to a married woman who may be forced by a husband to have sex despite the fact that she may be exercising her right to refrain from sex based on any of the grounds listed in Part 6.2.2.

6.4 Key conclusions: opportunities and limitations

a) Relationship between formal law and customary law in Malawi

Opportunities

- (i) The Constitution promotes laws (including religious and customary) that are compatible with constitutional provisions, principles and values.
- (ii) The Marriage, Divorce and Family Relations Act No. 4 of 2015 has taken the significant step of harmonising the regulation of customary, religious and civil laws through one law.
- (iii) Harmful practices (including cultural and religious) are specifically outlawed by the Gender Equality Act No. 3 of 2013, and the Child Care, Justice and Protection Act No. 22 of 2010.

- (iv) As a traditional mechanism, by-laws that are being facilitated by some chiefs have become a tool for implementing formal laws that are specifically seeking to address child, early and forced marriage.

Challenges

- (i) Although it is clear that the Constitution and several statutory laws are above customary and religious laws and practices that are harmful, lack of strict enforcement and monitoring means that harmful religious and cultural practices are still commonplace.
- (ii) Religious doctrines that are harmful are particularly hard to critique and dismantle since they are held as sacred by practitioners.

b) Opportunities and limitations that exist in eliminating discrimination in family relations through statutory law

The Marriage, Divorce and Family Relations Act No. 4 of 2015:

- (i) Guarantees spouses equal rights and responsibilities regardless of the form of marriage;
- (ii) Recognises that the right of spouses to a sexual relationship can be limited in specific circumstances;
- (iii) Provides for maintenance of a spouse even during the subsistence of a marriage;
- (iv) Recognises non-monetary contribution as relevant in determining a spouse’s contribution to maintenance and property acquisition;
- (v) Provides clear guidelines for the court to establish the existence of a marriage by repute or permanent cohabitation;
- (vi) Creates the offence of marital rape during judicial separation.

The Marriage, Divorce and Family Relations Act No. 4 of 2015 DOES NOT:

- (i) Apply to marriages that existed before its enactment (except for provisions related to rights and obligations of spouses) despite that it’s more protective and has repealed other marriage-related laws;
- (ii) Outlaw polygamy in marriages at customary or religious levels and by repute or permanent cohabitation, but only in civil marriages;
- (iii) Include child marriage as one of the specific grounds for nullifying a marriage;
- (iv) Criminalise marital rape during informal separation or the course of a marriage.

117. Section 62.
118. Note 26 above.

PART 7: OTHER LAWS, GOVERNMENT POLICIES AND PROGRAMMES RELATED TO CHILD MARRIAGE

This part reviews other laws that may impact on child marriage, namely laws governing sexual offences with children; education and training; inheritance and succession; and sexual and reproductive health. It also examines administrative action that has been taken in some of these areas through laws and policies. The presence of some laws and policies creates an enabling environment for addressing child marriage; just as the inadequate enforcement (or the absence) of the laws and their implementation obstruct efforts to address the practice.

7.1 Sexual offences and harmful practices

Sexual offences which come under the Penal Code and which have the potential to address child marriage are examined in this section, although the judicial system does not work well in this regard. The provisions of key policies/strategic documents that address gender-based violence and harmful practices are also analysed, and the extent to which they are being implemented by existing programmes is assessed.

7.1.1 Laws related to sexual offences affecting child marriage

The development and enforcement of laws relating to sexual offences against children is crucial to addressing child marriage. In Malawi, the point of conflict is that early, child and forced marriages that are sanctioned by the Constitution occur amidst criminal laws that would have otherwise charged the male party with defilement or other related offences. Section 138 of the Penal

Code (Chapter 7:01), as amended in 2011, has increased the minimum age of sexual consent to 16 years (from 13 years) through the offence of defilement. Thus any person who has sexual intercourse with a person aged below 16 years can face up to life imprisonment. The prevalence of child marriage shows that this is only a good law on paper because evidently, men that marry girls below the age of 16 are not being prosecuted for this offence. If anything, Part 8 demonstrates that some cases that have come before courts do not involve a marriage relationship, but rather just a sexual relationship of which parents disapprove.

As Part 4.2 has submitted, the consent of the girl is usually disregarded with impunity in pursuance of some traditional practices thereby permitting sexual offences to be committed without legal consequences. For example, the Centre for Human Rights has echoed findings by the MHRC that the practice of offering a girl as a replacement for a deceased wife (*chimeta masisi, chidzutsa nyumba*) results in forcing girls as young as 15 years to get married to men as old as 50 years. In communities where the practice of child betrothal (*kutomera*) is practiced, a girl as young as 9 years old may be betrothed to a man of 40 years or older, particularly if he is considered wealthy and/or capable of paying a handsome bride price. Even the practices of forcing a young girl to marry a man as repayment for her parents' debt (*kupimbila*); and be a bonus wife in order to reward a good husband/in-law (*mbirigha* or *nthena*)¹¹⁹ involve defilement. So does the provision of a girl as a chief's 'blanket' (to provide temporary sexual companionship to a visiting chief).

119. MHRC (2006), note 32 above; Centre of Human Rights (2014), note 26 above.

Additionally, the abduction of girls (*chisomphola*) is a common occurrence in some cultures. For example, Human Rights Watch has reported that, in the northern region, a man can 'kidnap' a girl without her parents' consent, and arrange to formalise the marriage later. Sometimes parents who do not want to take the girl back for a variety of reasons just accept the marriage despite the girl's young age.¹²⁰ This is an affront to criminal provisions on abduction and defilement. Section 136 of the Penal Code provides that a person who unlawfully takes an unmarried girl under the age of 16 years from the protection of her father or mother or guardian against the will of such protection is guilty of a misdemeanour (small offence). If the Penal Code is applied to the letter, not only is the abductor guilty of a misdemeanour for the act of abduction, but he is also guilty of defilement if he engages in sexual intercourse with the girl.

It should be reiterated that the Joint General Recommendation/General Comment No. 31 of the CEDAW Committee and No. 18 of the CRC Committee are unreservedly concerned about forced marriages that occur when a rapist is permitted to escape criminal sanctions by marrying the victim, usually with the consent of her family.¹²¹ This requires law enforcement to look past the 'formalisation' of the marriage and prosecute for the crimes committed. Part 8.1, which analyses the state of access to justice through the police system, observes that in Malawi, justice is grossly defeated through the failure by the police to invoke penal provisions related to defilement and abduction under Sections 138 and 136 of the Penal Code respectively, in order to punish those who forcibly marry young girls through harmful practices. For example, Human Rights Watch discovered one classic incident in 2013. At one Victim Support Unit, the police confessed that they handled a case in which a man had befriended a 15-year-old girl and she went to cohabit with him. When her father reported the case, the police decided to just 'counsel' the perpetrator because he was looking after four orphans.¹²²

7.1.2 Policies related to gender-based violence and harmful practices

The Joint CEDAW/CRC General Comment/General Recommendation (2014) considers child and forced marriage to be one of the most prevalent forms of harmful practices that is also a form of violence against women and children.¹²³ CEDAW places a duty on State parties to take all measures to modify or abolish existing practices that discriminate against women.¹²⁴ The Concluding Observations of the CEDAW Committee to Malawi's State party report (2006) spell out that child marriage discriminates against women and constitutes a serious obstacle to women's enjoyment of their rights.¹²⁵ Even the SADC Protocol on Gender and Development (2008) carries the obligation for States parties to adopt policies and programmes to ensure the development and protection of the girl child by eliminating all forms of discrimination against her in the family, community, institutions and at state level.¹²⁶ These are only a few examples of the mandate that Malawi has to take concrete policy and programmatic measures to address all forms of gender-based violence under international law. This report has also shown how this obligation is located in domestic laws such as the Child Care, Protection and Justice Act No. 22 of 2010 and the Gender Equality Act No. 3 of 2013. In the absence of a revised national gender policy, this assessment considers three strategic documents that are guiding gender-based violence (GBV)-related responses by the ministries responsible for gender and youth.

a) Addressing child marriage through the National Plan of Action to Combat Gender-Based Violence

The National Plan of Action to Combat Gender-Based Violence (GBV NAP 2014 – 2020) is a strategic document that has the vision of achieving 'a violent free society where women, men, girls and boys enjoy equal rights, treat each other with dignity and respect, and are able to contribute to and benefit from the economic and social development of Malawi'.¹²⁷ The GBV NAP recognises that sexual violence includes forced early marriage as a problem that is encountered by both girls and boys because of social cultural beliefs and poverty. It further explains that early marriage denies children education opportunities, thereby contributing to high illiteracy levels and under-development.

120. Human Rights Watch (2014), note 12 above.

121. Paragraph 22.

122. Human Rights Watch (2014), note 12 above.

123. Paragraph 6.

124. Articles 2(f) & 5(a).

125. Paragraph 19.

126. Article 11(1).

127. Part 5.1

In its priority areas of action, the GBV NAP takes a generic approach to gender violence by not singling out particular acts of violence that will be targeted, except in a few cases. For instance, in its first priority area that focuses on 'prevention of GBV and its relationship with HIV, sexual and reproductive health and maternal and new born health,' the first result area intends to improve public awareness/knowledge and capacity on human rights, (including women's and child rights, the negative impacts of GBV and harmful cultural practices, sexual and other forms of abuse and trafficking of women, men and children). This broad approach runs through all the other priority areas (and their envisaged results), namely: support for survivors and rehabilitation of perpetrators of GBV (Priority Area 2); coordination, implementation and sustainable financing of GBV programmes (Priority Area 3); and research, monitoring and evaluation (Priority Area 4).

Thus the GBV NAP leaves it up to different stakeholders to develop interventions to address specific acts of GBV that can contribute to the different results that are being sought in the GBV response. This approach has both advantages and limitations. The advantage is that the broad approach allows interventions to target any acts of GBV that are of concern in different contexts. The major limitation is that by not specifying acts of GBV that will be addressed, there may be weak interventions to address some forms of violence in comparison to others. Positively, in relation to child marriage, there should be little concern that this act can fall in the peripheral because specific interventions are being developed by several stakeholders to address the problem. For now, it is too early to assess the extent to which child marriage interventions are being systematically coordinated under the GBV NAP. However, Part 9 notes that coherent coordination is what will make a difference in whether or not interventions achieve solid results.

b) Addressing child marriage through the JSSP

The Gender, Children, Youth & Sports Sector Working Group Joint Sector Strategic Plan (JSSP 2013–2017) has been developed by the Gender, Children Youth and Sports Sector Working Group GCY&S SWG).¹²⁸ The GCY&S SWG is responsible for all planning and budgeting activities affecting the Gender, Children,

Youth and Development Sector in order to contribute to the achievement of priorities related to gender, child development and youth empowerment under the Malawi Growth and Development Strategy II. Its goal is to protect and empower children, youths, athletes, and women economically, socially and politically.¹²⁹ The JSSP does not feature specific language on child marriage. Rather, one of its planned strategies is to lobby for the modification of harmful cultural practices that perpetuate GBV among children, youths and women. This is broad enough to include child marriage. Interventions will be targeted at traditional and religious leaders as custodians of culture, community structures, and men.¹³⁰

Key informants from the Ministry of Gender, Children, Disability and Social Welfare admitted that efforts are still underway to find the best mechanisms for synergising the implementation of child marriage interventions with the relatively new JSSP. One of the mechanisms through which the ministry is implementing the JSSP is the Gender Equality and Women's Empowerment (GEWE) Programme (2012–2015), and this has provided a window for addressing child marriage. Part 9 has examples of how some GEWE implementing partners are actively working in the area of child marriage. In addition, through the ministry, the State is moving with seriousness to launch initiatives towards addressing the problem, and these are also discussed under coordination mechanisms in Part 9.

c) Addressing child marriage through the National Youth Policy

The National Youth Policy (2013) identifies early marriage and teenage pregnancy as factors that are increasing the vulnerability of young people,¹³¹ and that one of the responsibilities of the youth is to protect themselves against early child bearing and marriage.¹³² Similarly, it recognises that one of the important roles that adults, guardians and parents play in guiding the youth is to protect them against GBV and early marriage.¹³³ The objective of the NYP is to advocate for the enactment of legislation against early, forced and arranged marriage¹³⁴ that has been partly satisfied through the Child Care, Protection and Justice Act No. 22 of 2010 and the Marriage, Divorce and Family

128. Comprising the Ministry of Gender, Children, Disability and Social Welfare; the Ministry of Youth, Sports and Culture; and Government departments, Non-Governmental Organisations, Private Sector and Development Partners.

129. Part 3.2.130. Part 1.4.

131. The policy defines youth as young persons from 10–35 years old.

132. Part 1.5 (b) and Part 2.7(l).

133. Part 2.8(e).

134. Part 2.7(e).

Relations Act No. 4 of 2015. However, Part 9 shows that it is the view of some key informants that there should be independent legislation to tackle child marriage comprehensively.

The policy recognises that a healthy youth population is an asset to the development of any nation that seeks to achieve sustainable development and commits to ensure that sexual and cultural practices that promote early marriage are discouraged and that laws are enforced.¹³⁵ However, the language to ‘simply discourage’ is weak, since the ideal aspiration should be to uproot these practices. On the other hand, advocacy for the enforcement of laws is a strong strategy in light of the existing laws that can potentially address child marriage as discussed in this report. The National Youth Council is responsible for coordinating the implementation of the policy, and Part 7.2.5 below cites how its functional literacy interventions are helping girls that previously dropped out to enter into mainstream primary education. However, the outstanding issue is to coordinate the implementation of relevant provisions as part of a holistic national response to address child marriages. This is elaborated in Part 9.

7.2 Promoting girls’ access to education and training opportunities

Though improvements are always necessary, Malawi has an enabling legal policy environment to promote education for girls and therefore address child marriage. In a context of a high prevalence of child marriage, having unique strategic actions for girls’ education is important because even the Joint CRC/CEDAW General Comment/General Recommendation (2014) has confirmed that there is a clear correlation between low educational attainment of girls and women and the prevalence of harmful practices.¹³⁶ In addition, it has noted that the completion of primary and secondary education provides girls with short- and long-term benefits by contributing to the prevention of child marriage and adolescent pregnancies; lower rates of infant and maternal mortality and morbidity; preparing women

and girls to better claim their right to freedom from violence; and increasing their opportunities for effective participation in all spheres of life.¹³⁷

Put differently, education is key to combating child marriage because it leads to delayed marriage for girls; it makes (educated) parents and women aspire for their children to get an education and not an early marriage; and it facilitates economic empowerment thereby dispensing with household poverty, which is one of the leading causes of child marriage. In 2009, the Concluding Observations of the CRC Committee on Malawi’s State party report actually advised the government to take concrete action to address the reasons behind non-completion of schooling, including cultural traditions and poverty. We scrutinise below several key laws and supporting policies in order to check how they are being implemented in practice.

7.2.1 Improving access to education through the Gender Equality Act

Through the Gender Equality Act No. 3 of 2013, Malawi seeks to use the law as a measure to attain equal access to education opportunities for girls and boys. Relevant provisions of the act that are quoted in Box 2 demonstrate that the government has an interest in ensuring that equal access to education between boys and girls is attained through participation/attendance; benefiting from opportunities that present themselves in educational settings; the provision of gender responsive infrastructure; human rights and a gender responsive curriculum; and establishing quotas for tertiary education participation. Most of these provisions are modelled after CEDAW, the Maputo Protocol (2003) and the SADC Gender and Development Protocol (2008), and are inspired by recommendations of various treaty monitoring bodies (see Table 1).

The implementation of the relevant provisions under the act is not yet methodical, though some interventions that match its spirit have been occurring over several years. For instance, the MHRC, which also enforces the act, already facilitates the integration of human rights in the curriculum through the Malawi Institute of Education.¹³⁸ What is remaining is to expand this work to meticulously cover all subjects that are recommended by the Gender Equality Act.

135. Part 3.6.3.

136. Paragraph 21.

137. Paragraph 62.

138. MHRC (2013), note 6 above.

Box 2: Gender Equality Act provisions related to education

- The Gender Equality Act provides for the right of every person to access education and training, including vocational guidance at all levels. Except in the cases of special need, this entails providing equal access to girls and boys and women and men to the same curricula; the same examinations; the same teaching staff with qualifications of the same standard; institutional premises and equipment of the same quality, irrespective of the sex of students at the same level; and the provision of sanitary facilities that take into account the specific needs of the sex of the students.¹³⁹
- Furthermore, in co-education facilities, both girls and boys have the right to access a scholarship, grant, bursary, benefit or other scholastic endowment without regard to their sex. The government is required to take active measures to ensure that every educational institution has guidelines that facilitate this.¹⁴⁰
- The law has even imposed a quota for tertiary co-education, requiring the government to take active measures to ensure the enrolment at tertiary education institutions of either sex to a minimum of forty per cent (40 per cent) and a maximum of sixty per cent (60 per cent) of students.¹⁴¹
- In general, the government holds the duty to ensure that the curricula for all primary and secondary schools integrate particular principles/subjects towards the promotion of human rights, gender equality; and promote subjects that enhance the integration of female students in disciplines that are traditionally male dominated.¹⁴²

In addition, available records from the University of Malawi (UNIMA) indicate that even before the act imposed the 40:60 quota for the participation of males and females in tertiary education, it had exceeded this quota by 2012/13. In the 2014/15 normal entry programme, the ratio of girls to boys in the normal entry programme at UNIMA was 48:52. Another public university is doing well is which had the female to male ratio of 43:57 in its 2014/15 normal entry programme.

This is a commendable direction because the progress has happened despite the fact that public universities have very limited space and that the applications by qualified girls are far lower than those of boys.¹⁴³ The challenge is to sustain or improve these ratios, and to ensure that other public universities that are lagging behind can only follow suit. Furthermore, purposeful measures still have to be put in place to ensure that both girls and boys are benefiting equally from opportunities such as scholarships, bursaries etc.

7.2.2 Ensuring equal access to education through the Education Act

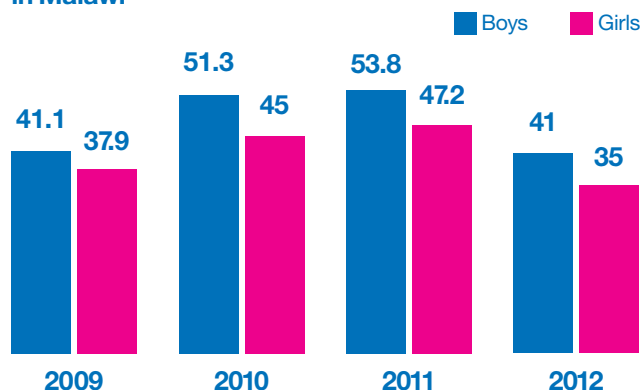
The Education Act No. 21 of 2013 follows up on a constitutional commitment to make primary education free and compulsory, which is a good entry point for ensuring that girls finish primary education and enter secondary education. This legislative step is timely considering that generally girls (and admittedly boys too) in Malawi are not faring well in education. Although both primary and secondary school enrolment has reached parity, the numbers of girls who complete their education is far from satisfactory. For example, the trends in Figure 5 illustrate that the lowest peak according to latest available data was 2012, when only 35 per cent of girls completed Std 8 (the highest primary school level).¹⁴⁴ The MDG Endline Survey (2014) reported that the current secondary school attendance for girls is only 18 per cent. But notably, this is higher than that of boys (14 per cent), meaning that overall, most young people in Malawi are not getting an education. If this cycle continues, it will be difficult to end early, child and forced marriages.

Making primary school free and compulsory means that the government is addressing some recommendations that have been made within the international human rights system, but not entirely. For instance, secondary education is not free and compulsory, despite that the Joint CRC/CEDAW General Comment/General Recommendation (2014) reminds States parties that their obligations to ensure the universal right to quality education and to create an enabling environment that allows girls and women to become agents of change entails: (a) providing universal, free and compulsory primary school enrolment; and (b) boosting enrolment and retention in secondary education, including by abolishing school

139. Section 14.
140. Section 15.
141. Section 16.
142. Section 17.

143. Government of Malawi 2015.
144. Education Management Information System, 2013.

Figure 5: Std 8 completion trends for boys and girls in Malawi



Source: EMIS 2013

fees for secondary education and making it compulsory.¹⁴⁵ Generally, compulsory primary education is yet to be achieved in practice due to inadequate enforcement. Part 8 outlines some by-law initiatives that seek to promote compulsory education, but these are only random and isolated interventions.

Barriers to accessing both primary and secondary education also continue. For instance, the CEDAW Committee has lamented the persistence of structural and other barriers to quality education which constitute particular obstacles to the education of girls and young women. The perseverance of early and forced marriage and their impact on girls' education, and the persistence of barriers to the ability of pregnant girls to exercise their right to education have been specifically singled out as existing problems.¹⁴⁶ Specific factors that hinder access to secondary education by girls include poverty (because education is not free); long distances to community day secondary schools; and gender-based violence, either perpetrated by parents (eg forced marriage), or by teachers and fellow male learners. Even the low quality of secondary school self-boarding facilities increases the vulnerability of girls to exploitation and abuse by men.¹⁴⁷ However, full implementation of the Education Act (and its amendment to extend compulsory education to secondary schooling) is one way that can guarantee that girls are found in schools and not in marriages.

7.2.3 The National Girls Education Strategy as a tool to promote girls' education

Complementary to the education-related statutes that Malawi has enacted, the government has adopted the National Girls' Education Strategy (NGES 2014–2018), which aims to accelerate progress to improve girls' education. Particularly, it aims to ensure that increased numbers of girls are equitably accessing, participating in, excelling and completing primary, secondary and tertiary education through the removal of obstacles to their education. One priority area is to address traditional beliefs and social cultural factors affecting girls' education. At primary school level, this is with the aim of reducing girls' drop-out rates in senior classes, and improving girls' attainment rates to Std 8. Figure 4 showed how retention is a problem. For secondary school, addressing traditional beliefs and social cultural factors affecting girls' education will be pursued in order to increase the safety of and security for girls.

Though the strategy is quite broad, it meets one of the requirements of the Joint CRC/CEDAW General Comment/General Recommendation (2014) for State parties to make schools and their surroundings safe, girl-friendly and conducive to girls' optimal performance. The emphasis on safety and security leaves room to accommodate child marriage as a factor that threatens the general safety and educational security of girls. One of the proposed strategies under the NGES is to strengthen the capacity of local leaders to advocate for girls' security. Given the examples of the successful involvement of some traditional leaders through by-laws that are highlighted in Part 8, this is an important strategy to pursue at a national scale. Key informant interviews mentioned that there now exists a National Girls' Education Network (whose current secretariat is Theatre for a Change), which is in the process of establishing regional networks. The plan is to eventually have these networks at district level.

7.2.4 Girls' education in the Malawi Growth and Development Strategy II

The Malawi Growth and Development Strategy (MGDS) II (2011–2016) is the overarching medium-term policy that aims to steer the nation's growth and development. It tackles child marriage as a concern related to Malawi's high fertility rates, which has been estimated at 5.0 in the MDG Endline Survey (2014). Therefore, the

145. Paragraphs 61 & 62.

146. Concluding Observations of the CEDAW on Malawi's Sixth Periodic Report (2010), paragraphs 30 & 31.

147. Government of Malawi (2015), note 143 above.

MGDS II recommends advocacy for girls' education and delayed marriage as one way of controlling fertility. In addition, the MGDS II has included girl-specific strategic actions in its efforts to improve access to quality and relevant education at primary, secondary and tertiary levels. In primary and secondary school systems, these include providing supportive infrastructure/ facilities for girls (and boarding facilities for secondary school girls); reviewing policies related to girls; providing grants to schools to address equity issues; rolling out 'mothers' groups' in all schools; providing girl-friendly sanitary facilities; and recruiting more female teachers. For tertiary and vocational education, strategic actions include advocating for girls' education; providing guidance, counselling, care and support to girl students; providing supportive infrastructure/ facilities for girls; expanding the provision of grants to college and university students; carrying out awareness-raising campaigns and increasing the enrolment of girls in science programmes.¹⁴⁸

There are several programmes in which the government and international NGOs and development partners are collaborating within the scope of the objectives of the MGDS II and related strategies in order to promote girls' education. For example, Plan has been implementing an initiative called *Because I am A Girl*, which is geared towards supporting girls to get the education, skills and support they need to transform their lives and the world around them. DFID has the *Keeping Girls In School* programme, whose goal is to enable thousands of girls to complete primary and secondary education by tackling child marriage, early pregnancy, violence against girls, poverty, lack of girl-friendly sanitary facilities and the provision of bursaries. Some schools also have targeted school meals programmes, which includes the provision of take home food rations for girls in some areas.¹⁴⁹ A Joint United Nations Programme on Adolescent Girls has also been implemented in Chikwawa and Mangochi districts since 2011. It provides girl drop-outs with school fees and materials as an initiative to enable them to resume their studies.¹⁵⁰

And a key informant communicated, in Mulanje, the Luchenza Youth Organisation has linked the village savings and loans scheme to girls' education by forming groups of parents in an area where school

drop-outs were rampant. The parents are empowered with information and skills in order to use their returns from the scheme to fund education provisions for girl students so that they do not drop out of primary school due to poverty or other pressures. The cash transfer programme, which is being spearheaded by the Department of Social Welfare and targets 18 districts, is also supposed to motivate targeted poor families to send children to school by offering households an additional cash payment of MK300 and MK600 for each child that attends primary and secondary school respectively. Perhaps one gender-specific model of a cash transfer programme has been a World Bank-funded initiative called the Zomba Cash Transfer Programme. This has provided incentives (in the form of school fees and cash transfers) to current schoolgirls and recent girl dropouts to stay in or return to school, resulting in significant declines in early marriage, teenage pregnancy, and self-reported sexual activity among programme beneficiaries after just one year of implementation.¹⁵¹

While these interventions are crucial, they need to be comprehensively coordinated as part of the NGES in order to achieve systematic implementation and the scaling-up of interventions. The newly established National Girls' Education Network would play an important role in ensuring the presence of stronger coordination mechanisms and the availability of resources. At the same time, interventions that are lagging behind require full attention. For instance, one strategy for keeping girls in school, which is also being pursued under the Malawi Growth and Development Strategy II is to build girls' hostels in order to reduce long distances that girls cover to go to secondary schools. Efforts are being taken to implement this though funding constraints are hampering speedy progress, and the Malawi Beijing +20 country report (2015) admits that a project to construct 17 girls' hostels is at standstill due to lack of finances.

7.2.5 The school readmission policy for pregnant girls

The Discipline Policy on Girls Education (1993), also known as the Readmission Policy, allows schoolgirls who have fallen pregnant and schoolboys who are responsible for such pregnancies to withdraw from school and return after a period of one year. Several international commitments that Malawi subscribes to

148. Matrix 4.1.1-4.1.3

149. Government of Malawi (2015), note 143 above

150. Centre of Human Rights (2014), note 26 above

151. Baird *et al.* 2010.

require that girls should be given this opportunity, although unlike Malawi (which gives this as a one-time chance in a girl's or boy's education cycle), this is recommended as an open opportunity. For instance, the African Youth Charter (2006) urges States parties to take all appropriate measures to ensure that girls and young women who become pregnant or married before completing their education shall have the opportunity to continue their education.¹⁵² The Joint General Recommendation/General Comment No. 31 of the CEDAW Committee and No. 18 of the CRC Committee (2014) elaborates that adolescent girls, during and after pregnancy, have the right to continue their studies.¹⁵³

However, contrary to the suggestion of the Joint General Comment/General Recommendation, the policy in Malawi does not accommodate the right to continue studies during the pregnancy itself if the girl so wishes. The education system is therefore challenged to build a practical supportive environment to make this choice available and a possibility. This would constitute one of the measures that have been recommended by the CEDAW Committee, that Malawi should take steps to overcome traditional attitudes that constitute obstacles to girls' and women's education to strengthen its policy on the readmission to school of pregnant girls and young mothers.¹⁵⁴ In addition, a broader (girls') school dropout policy/strategy is necessary. Overall, a weak monitoring of the policy makes it impossible to know the full scale of the impact of the readmission policy.

However, anecdotal evidence from key informants dealing with girls' education suggests that the readmission policy has increased the enrolment of girls in school, although in some cases the girls meet an unwelcoming environment that demotivates them from pursuing studies as they fail to 'fit in'. In realisation of this obstacle, YONECO (Youth Net and Counselling) is an example of an NGO that has been providing on-going psychosocial support to the victims of child marriages and their families. Upon returning to school, the girls are linked to mothers' groups and teachers are informed of their situation in order to reduce stigma and bullying.¹⁵⁵ In addition, a key informant observed that *"usually interventions ignore the issue of basic needs as a stumbling block to education that may have led to a*

girl's pregnancy in the first instance. If such needs are not satisfied, the readmission policy itself cannot keep the girl in school." Several implementing partners of the GEWE Programme¹⁵⁶ are addressing this aspect in their impact areas through the provision of fees, basic education needs, sanitary materials, and school meals. Sometimes, these girls are linked to other organisations which provide relevant support.

Whether or not the readmission policy is being directly invoked, the assessment uncovered that several interventions are being promoted to bring back schoolgirls that dropped out from child marriages or related factors, although the challenge of low coverage remains cross cutting. Initially introduced by NGOs, mothers' groups have been adopted as a national education strategy through which the government is collaborating with NGOs to address school drop-outs by supporting girls and advocating for girls' education within the communities. For instance, the Malawi Beijing +20 country report notes that mothers' groups that are being supported by different implementing partners of the Gender Equality and Women Empowerment Programme have achieved results in bringing girls back to school since 2013. For instance, in Kapiri, mothers' groups that are being supported by CRECCOM had brought back 31 girls to school who had dropped out due to early marriages and other factors. In Nkhata Bay, campaigns by the church and society programme's mothers' groups have resulted in the readmission of 86 girls in school. WOLREC's project in Nsanje has seen the return to school of 30 girls.

In Machinga district, YONECO rescued 14 girls from early marriages and they have now been readmitted to schools. Five of these are at Mbenjere and Chikweo community day secondary schools. Even Plan Malawi's Child Protection Committees are withdrawing girls that married at a tender age from marriages, and resettling them back into education. For instance, in Karonga, they helped the girl whose story is captured in Part 3.2 to leave marriage and enter secondary school after she learnt that she had passed her Std 8 exams. Members of the committee even promised to contribute to part of her school fees, giving the girl confidence to run away from the marriage while her husband was away.

152. Article 13(4)(h).

153. Paragraph 60.

154. Concluding Observations of CEDAW on Malawi's Sixth Periodic Report (2010), paragraph 31.

155. Ministry of Gender/UNFPA/EU, Accounts of the Human Impacts of the Gender Equality and Women's Empowerment (GEWE) Programme (May 2015).

156. Such as WOLREC, MIAA, CRECCOM, Ecumenical Counselling Centre and Livingstonia Synod Church and Society Programme, YONECO.

The National Youth Council has established that in some areas, its functional literacy classes have helped to facilitate the return of girls to school, as some girls that would have been shy to start from a lower grade have proceeded to enter a higher grade after attending such classes. All these effective interventions need to be properly synchronised with the implementation of the National Girls' Education Strategy in order to have results at a large scale. In addition, by-laws that are enforcing compulsory education need to be adopted and scaled up as a national mechanism.

7.3 Access to sexual and reproductive health and services

CRC General Comment No. 4 has expressed the concern that early marriages and pregnancy are significant factors in health problems related to sexual and reproductive health, including HIV and AIDS.¹⁵⁷ The Gender Equality Act No. 3 of 2013 specifically guarantees everyone the right to adequate sexual and reproductive health (SRH). This is a milestone because this right is absent in the Constitutional Bill of Rights. Thus the right to adequate SRH under the Gender Equality Act implies that everyone has the right to: access sexual and reproductive health care services; access family planning services; be protected from sexually transmitted infection; self-protection from sexually transmitted infection; choose the number of children and when to bear those children; control fertility; and choose an appropriate method of contraception.¹⁵⁸

The Gender Equality Act imposes certain duties on health officers in order to achieve adequate sexual and reproductive health for all. These include the duty to: respect the sexual and reproductive health rights of every person without discrimination; respect the dignity and integrity of every person accessing sexual and reproductive health services; provide family planning services to any person demanding the services irrespective of marital status or whether that person is accompanied by a spouse; impart all information necessary for a person to make a decision regarding whether or not to undergo any procedure or

to accept any service affecting his or her sexual and reproductive health. It is an offence punishable by a fine of MK750,000.00 and imprisonment for three years for a health officer to neglect these duties.¹⁵⁹ In order to effectively discharge their duties, commodities need to be available to all. Currently, most SRH interventions are funded by donors, though in the past two financial years, a budget for family planning has been introduced in the national budget (up to MK60,000,000 in 2014/15).

The full implementation of obligations relating to: (a) non-discrimination in the provision of services; and (b) the provision of family planning services irrespective of marital status are particularly important for adolescents if they are to avoid teenage pregnancies. However, the reality for adolescents suggests that despite the fact that Malawi has been implementing a Youth Friendly Health Services (YFHS) initiative since 2007, the youth have very little knowledge on where to get YFHS. In 2014, only 23.8 per cent of female youths had this knowledge, compared to 24.5 per cent of males. In particular, girls were not comfortable to visit YFHS sites due to judgmental attitudes of service providers and misconceptions that contraceptives are only for married people.¹⁶⁰

Another factor that impedes the success of YFHS is that there is no shared policy direction between the Ministry of Education and the Ministry of Health. While the former has accepted the teaching of life skills as an examinable subject in school, this is not viewed as deep enough in order to equip young girls and boys with the skills that they need to safeguard their own sexual and reproductive health. The Ministry of Health prefers comprehensive sexual education to be introduced in schools, but this has so far not been totally embraced by the Ministry of Education.¹⁶¹ It is however acknowledged that the teachers' union in Malawi is currently piloting a project in five teacher training colleges to build the capacity of teacher trainees to conduct comprehensive sexuality education through ICT in a few pilot schools. However, the pilot coverage is very low.

157. Adolescent Health and Development in the Context of the Convention on the Rights of the Child (2003), paragraphs 20 and 31.

158. Section 19(1).

159. Section 20.

160. Government of Malawi (2015), note 143 above.

161. As above.

For adolescents that are already in child marriages, the right to choose the number of children and when to bear those children under the Gender Equality Act is significant for them to defer child bearing. The ACHPR General Comments on Article 14 (1) (a), (b), (c) & (f) and Article 14 (2)(a) & (c) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2014) recognise that the fact that some girls as young as 7 to 10 years are given in marriage in sub-Saharan Africa exposes them to early pregnancies before reaching their full physical maturity.¹⁶² In practice, Malawi's high adolescent fertility rate of 143 births per 1,000 girls means that child bearing is happening very early, especially as those in child marriages strive to immediately fulfil the social expectation to have children.

Indeed, it is a concern that married girls are often under pressure to become pregnant immediately or soon after marriage, although they are still children themselves and know little about sex or reproduction.¹⁶³ Added to this social pressure is the fact that although the act stipulates that every person has the right to choose whether or not to have a child,¹⁶⁴ this is not an absolute right as it is subject to 'other existing written law'. Therefore, this limits access to safe abortion services because under the Penal Code (Chapter 7:01), abortion is only legally permissible to save a mother's life.¹⁶⁵ Through a Malawi Law Commission report of July 2015, a proposed law to support the provision of safe abortion services has been developed by a special law commission set up in 2013 to review the highly restrictive abortion laws. The proposed law specifically prohibits abortion on socio-economic grounds, which is a setback because these are grounds that would mostly apply to adolescent girls. Furthermore, the proposed law is supported by regulations, which amongst other things propose the promotion of parental consent to termination of pregnancy for a girl who is younger than 16 years. Arguably, this could be a barrier to accessing safe abortion services by minors.

7.4 Inheritance and succession

The quality of inheritance laws and their enforcement have an impact on whether or not girls are driven into child marriage. This is because strong inheritance laws that are effectively enforced can prevent sudden loss of property or livelihood and keep children in school. On the other hand, weak inheritance laws or inadequate enforcement of good laws can expose families to impoverishment through property dispossession, thereby making children's future vulnerable. Malawi is in the latter category. The Deceased Estates (Wills, Inheritance and Protection) Act No. 14 of 2011 has created a stronger legal framework for inheritance and succession that its predecessor, the Wills and Inheritance Act of 1967 has now repealed. Section 17 of the act states that where a person dies without a will, the deceased person's immediate family members and dependants are entitled to inherit his or her property.¹⁶⁶

In particular, the distribution of property under the act should first be aimed at ensuring that immediate family members and dependants are protected from hardship¹⁶⁷ to the extent that the property that is available for distribution can allow.¹⁶⁸ A spouse is supposed to keep all household belongings.¹⁶⁹ If any property remains, this is to be distributed between the surviving spouse and children of the deceased person.¹⁷⁰ Section 84 then makes it a criminal offence for a person to unlawfully dispossess, grab, seize, direct or deal in any manner with the property of a deceased person. The punishment is ten years' imprisonment and a fine of not less than the value of the property involved.

All these are relatively good provisions that can ensure the security of families' property by protecting it from property dispossession. In addition, the act places emphasis on ensuring that property dispossession is geared at sustaining education opportunities for minor children and dependants, which is an important

162. Paragraphs 17, 39, 43, 51, 52, 53 & 61. These General Comments were adopted by the ACHPR on 7 May 2014.

163. Hansen and Tallarico (no date), powerpoint presentation.

164. Section 19(2).

166. Section 2 – 'dependent' in relation to a deceased person means a person, other than a member of the immediate family, who was maintained by that deceased person immediately prior to his or her death and who was – (a) his or her parent; or (b) a minor whose education was being provided for by that deceased person, who is not capable, wholly or in part, of maintaining himself or herself.

167. Section 2 – 'hardship' in relation to any person means deprivation of the ordinary necessities of life according to the way of living enjoyed by that person during the lifetime of the intestate, and in the case of a minor includes deprivation of the opportunities for education which he or she could reasonably have expected had the intestate continued to live.

168. Section 17(1)(a).

169. Section 17(1)(b).

170. Section 17(1)(c).

principle that can contribute to avoiding school drop-outs and child marriage. However, a combination of inadequate resources, dissemination and monitoring has resulted in very weak enforcement of the law and has sustained the prevalence of the practice of property dispossession.¹⁷¹ Additionally, NGO programmes related to inheritance are loosely uncoordinated. Close collaboration is needed between the permanent committees on children; gender-based violence; and gender-related laws of the NGO Gender Co-ordination Network (NGOGCN) so that their activities build a formidable response that can make the inheritance laws more relevant to women and children.

7.5 Key conclusions: Opportunities and challenges

a) Sexual offences and gender-based violence/harmful practices

Opportunities

- (i) The Penal Code was amended in 2011 to place the age of defilement at 16 years.
- (ii) The Penal Code includes the crime of abduction, which applies to cultural practices that force girls into marriage.
- (iii) There is a GBV National Action Plan (2014-2018) to guide all sectors in combating various elements of GBV.
- (iv) As a way of implementing GBV-related strategic actions under MGDS II, the Joint Sector Strategic Plan of the Gender, Children, Youth and Sports Sector Working Group (2013-2017) is guiding the sector working group in coordinating various efforts to address harmful practices and gender-based violence.
- (v) The National Youth Policy (2013) incorporates strategic actions to address child marriage.
- (vi) The government, donors and NGOs are starting to actively collaborate in addressing child marriage through campaigns and projects.

Challenges

- (i) Laws against defilement and abduction are hardly applied to crack down early, child and forced marriage.
- (ii) There is no national action plan for addressing child marriage in order to properly guide multi-sectoral coordination and scaling-up of the coverage of interventions.
- (iii) The finalisation of a national action plan for child protection continues to be delayed.
- (iv) A 2015 work plan of a child marriage working group that is being led by the ministry responsible for gender and children is yet to be actively implemented.

b) Access to education

Opportunities

- (i) Primary education is free and compulsory.
- (ii) The Gender Equality Act No. 3 of 2013 has specific provisions to promote equal access to education at all levels.
- (iii) Gender parity in primary and secondary education has been attained.
- (iv) Tertiary education selection for generic programmes at the University of Malawi and Lilongwe University of Agriculture and Natural Resources has surpassed the quota set under the Gender Equality Act in the past few years. In 2015/16 Mzuzu University met the 40:60 quota in its generic programmes selection.
- (v) MGDS II contains strategic actions to strengthen girls' access to education at all levels.
- (vi) Malawi has adopted the National Girls' Education Strategy in order to accelerate the promotion of girls' education, and a National Girls' Education Network has been formed.
- (vii) Malawi has a school readmission policy for pregnant girls and for boys that impregnate girls.
- (viii) There is evidence that some interventions are succeeding in bringing girls that dropped out back into the education system. These can be considered as good practices for systematic national replication.

¹⁷¹ Government of Malawi (2015), note 143 above.

Challenges

- (i) Primary school is not compulsory in practice because retention levels are poor, particularly for girls.
- (ii) Secondary school attendance for both boys and girls is very low.
- (iii) Secondary education is neither free nor compulsory.
- (iv) The school readmission policy is not effectively monitored and enforced; and the support system for girls that have come back to school is inadequate.
- (v) Barriers to primary and secondary education exist despite enabling policy frameworks, mainly due to low coverage of programmes, poor coordination; inadequate resources, and socio-cultural practices.
- (vi) Successful interventions such as by-laws to enforce compulsory primary education are not yet institutionalised within the whole education system.

c) Access to sexual and reproductive health and services

Opportunities

- (i) Sexual and reproductive health is guaranteed as a right under the Gender Equality Act.
- (ii) Health personnel have specific obligations towards dealing with the SRH needs of everyone, and violations are punishable as an offence.
- (iii) The Gender Equality Act protects the right of everyone to choose whether, when and if to have children, which may suit those in child marriages.
- (iv) Abortion law reform is in progress.
- (v) Youth friendly health services are endorsed as a government programme.
- (vi) In recent years, the government has started committing some funds for family planning out of the national budget.

Challenges

- (i) The right to choose whether or not to have children and when is currently limited under the Gender Equality Act by highly restrictive abortion laws. For those in child marriage, it is also hindered by their incapacity to assert independent decisions on child bearing.

- (ii) Youth friendly health services are not very effective in addressing adolescent girls' SRH needs.
- (iii) Most SRH programmes focused on adolescents are donor-funded, thus limiting their sustainability.
- (iv) There is a conflict between limitations in the education system to address comprehensive sexuality education over and above life skills; and the demand by the health system for comprehensive sexuality education to be taught in schools as a way of minimising poor adolescent health indicators.

d) Inheritance

Opportunities

- (i) The Deceased Estates (Wills, Inheritance and Protection) Act No. 14 of 2011 protects the nuclear family.
- (ii) The education of children/dependants is one of the priority considerations in the distribution of property of a person that has died without a will.
- (iii) Property dispossession is a criminal offence, and the fine that is imposed is based on the value of the property dispossessed.

Challenges

- (i) Enforcement of the law is very loose.
- (ii) Programmes related to awareness and education about the law are fragmented.

PART 8: ACCESS TO JUSTICE AND LAW ENFORCEMENT

The assessment looked at how the enforcement of laws is trending within criminal justice and traditional/community systems as a way of emphasising that not only should laws to punish child marriage-related offences exist, but that they should be meaningful in practice. To put these issues in context, this part first examines the issue of reporting.

8.1 Who reports child marriage-related cases?

According to Figure 6, key informants mentioned that most child marriage cases do not go to court unless the parent of the child concerned initiates proceedings. But then, this is a rare occurrence because usually parents or guardians are the very same people that may have facilitated or sanctioned the marriage. Even where parental consent was initially not given, Part 7.1.1 described how in some areas, it is normative for parents to opt for the formalisation of abduction cases into a marriage instead of reporting these as defilement. Key informants also mentioned that sometimes parents that have no resources to travel to distant police and court structures, or who are unsure about how to access the court system may just accept fines that are offered by the offender.

In relation to the girls themselves, Human Rights Watch (2014) recorded that a girl whose grandmother and sister forced her to marry at 15 simply did not know that she could report them. This summarises the situation of many girls who are trapped in forced child marriages just because they are not aware of their rights and what to do, most likely because child marriage interventions and campaigns have not spread to all corners of the country.

8.2 Access to justice through the police

This part of the assessment aimed to find out how prosecution of early, child and forced marriage cases is handled, if at all; and the barriers or opportunities to prosecution. The finding was that there are significant potholes to achieving access to justice through the police system in early, child and forced marriage-related cases due to challenges related to 'cultural baggage', and knowledge and inconsistencies in the legal framework itself. According to key informants, while the police have contributed a lot to the strides that have been made in child protection, mostly with support from UNICEF,¹⁷² crimes related to child marriage do not have the same profile as other crimes.

Figure 6: Views of key informants regarding those that likely report child marriage cases



172. UNICEF has provided support to the police to develop a module on child protection for police training schools to be used in training new recruits.

Human Rights Watch (2014) interviewed a magistrate in Chikwawa who stated, “many cases reported to the police stay at the police station and are not brought before a magistrate.”¹⁷³ In the opinion of one key informant, “child marriage cases are not taken as serious legal issues but as family matters that should be discussed by family members. For example, a police officer may not be promoted for being serious in cracking down child marriage, but is definitely promoted for combating robbery.”

Thus although there are some exceptions, generally the police may sometimes hesitate to invoke the law, and will instead encourage family discussions in order to ‘avoid enmity’ since concerned parties are sometimes from the same community. This stand is also echoed in Human Rights Watch’s report, which quoted a senior government official in the Ministry of Home Affairs and Internal Security as saying “there are traditional mechanisms of dealing with these issues. Matters of marriage are not easy. There are children involved. Why should we lean more towards prosecution?”¹⁷⁴ However, the case in Box 3 also illustrates that sometimes, mediation may be preferred by the offended party (parent) in order to avoid this antagonism. Still, a close examination of the facts of this case will show that the police expressed the intent to prosecute the offender **during a round table discussion** of both sides that they facilitated together with YONECO Child Protection Officers. This is an unusual way of handling typical criminal cases and it leaves some doubt as to whether they sincerely wanted to prosecute or just wanted to threaten the offender amidst the process of mediation.

The challenge of non-prosecution of child marriage cases is in part due to the observation by key informants that most police officers still do not have the necessary professional knowledge to enable them to appreciate and handle these cases. In fact, Joint General Recommendation/General Comment No. 31 of the CEDAW Committee and No. 18 of the CRC Committee (2014) realise that one of the primary challenges in the elimination of harmful practices relates to the lack of awareness or capacity of relevant professionals, including front-line professionals, to adequately understand, identify and

Box 3: Police’s threats to prosecute countered by parent’s preference for counselling

YONECO reported that in March 2015, its Child Protection Officers worked hand in hand with the police in Ntcheu district to withdraw a girl from a child marriage. The girl, who was living with her grandmother, did not return home after school on 23 February 2015, as she slept at the house of her 23-year old boyfriend. When she was rebuked by her grandmother upon returning home the next day, she challenged that she was old enough to take care of herself and that she was getting married. She then left with her belongings to start living with her boyfriend. Upon hearing this news, her furious father followed her, but the girl stubbornly told him that she was happy with her marriage.

The father reported the matter to YONECO office in Ntcheu on 2 March 2015. YONECO Child Protection Officers informed the police, and together they went to the couple’s home but the girl hid in a nearby toilet after she saw a police vehicle coming into the village. Her husband was not around and by the time he returned, he found police officers and YONECO Child Protection Officers waiting for him.

Eventually the man’s sister went in the toilet and came out with the girl who continued to stubbornly assert that her marriage was no one’s business. The police officers ordered her to pack her belongings and together with her husband and some of his relatives, they were taken to Ntcheu Police Station. The man was locked up until his relations were asked to report to the police on 11 March 2015. After discussing the issue at length on this day, the police told them that the case would be taken to court but the girl’s father pleaded with the police to release the man as they all come from the same village. After counselling both parties, the marriage was annulled. Bridget has now gone back to school and she is expected to sit for her Junior Certificate of Education (JCE) exams this year.

Source: YONECO March 2015¹⁷⁵

respond to incidents or the risks of harmful practices. The committees recommend that a comprehensive, holistic and effective approach to capacity building and education should be pursued at all levels.¹⁷⁶

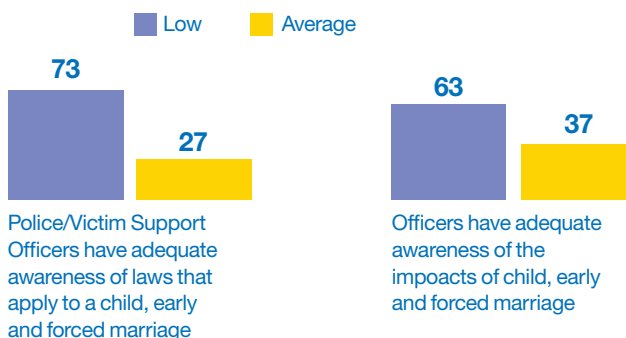
173. Human Rights Watch (2014), note 12 above.
174. As above.

175. Written by Sewenthe Chipofya Mahwayo, available at www.yoneco.org/site/index.php/news-and-events/articles/506-sewenthe-chipofya-mahwayo
176. Paragraph 69.

Figure 7 suggests that 73 per cent of key informants that gave their opinion on the subject were of the view that the police, particularly victim support unit officers, have poor knowledge of laws that apply to early, child and forced marriage. On the other hand, 63 per cent felt that most police officers are not comprehensively aware of the impacts of child marriage. It was suggested that police officers that are privileged with knowledge are usually located in areas where projects on child marriage are being implemented, but these projects have relatively low coverage. In addition, 31 per cent of key informants that answered the question did not think that the police usually referred cases of child marriage for prosecution. About 59 per cent thought cases are ‘somehow’ prosecuted. The description of ‘somehow’ is due to the view that in the rare incidences where cases are brought to court, perpetrators are charged with defilement, abduction or kidnapping. Many key informants would rather prefer the perpetrators to be charged with the crime of marrying a child. However, this crime does not exist in Malawi. Despite calls by the Human Rights Committee in its Concluding Observations on Malawi’s Initial Report (2014), the Marriage, Divorce and Family Relations Act No. 4 of 2015 has not criminalised child marriage.¹⁷⁷ The Child Care, Protection and Justice Act No. 22 of 2010 only criminalises the offence of forced child marriage, and not the mere act of marrying a child.

Even for forced child marriage, Part 7.1 has shown that the police have not been proactive to lay charges where a girl is married following cultural practices that completely snub her consent such as replacement of deceased wife (*chimeta masisi*, *chidzutsa nyumba*); child betrothal (*kutomera*); forcing a young girl to marry a man as repayment of her parents’ debt (*kupimbila*, *mbirigha* or *nthena*); and bonus wife (to reward a good husband/in-law). These marriages have both elements of defilement, and violations of specific provisions prohibiting forced child marriage and/or child betrothal under the Child Care, Protection and Justice Act No. 22 of 2010. In addition, the practice of abduction (*chisomphola*), which allows the formalisation of a marriage by a man who previously abducted a girl, is also practiced in some areas. This means that the offence of defilement is involved if the girl is below 16 years.

Figure 7: Key informant’s perception regarding the police capacity to address child marriage



The question then is: considering that the State is the offended party in criminal proceedings, why don’t the police normally prosecute these crimes even on their own volition in a move to crack down forced marriages or harmful practices? As Part 8.2 further discusses, this is not purely a problem of weak enforcement though, because in the words of one judge who was interviewed “*the dilemma for law enforcers is – how do they insist that they will arrest a person for defilement when the person is pointing to a provision in the Constitution that cleared him to marry the girl with the consent of her parents or guardians?*” However, one can still posit that it is possible for law enforcers to pursue charges because parents are expected to give their consent to a marriage in which both of the parties are entering with their free will. If free will is absent, then constitutional and international standards that proscribe forcing anyone into a marriage are violated. Therefore, it is not farfetched to conclude that consummation of such a marriage was happening without the free will of the girl concerned, and therefore is an act of defilement.

By not prosecuting these as crimes, law enforcers provide the impression that they are colluding with the systemic social sanctioning of the defilement of girls under the guise of ‘culture’. At the same time, it is recognised that the law accepts the defence that defilement will not have been committed if the accused person had reasonable cause to believe and indeed believed that the girl was 16 years and over.¹⁷⁸ This provision is self-defeating, as it gives leeway for a perpetrator to wiggle themselves out of a defilement case by negotiating with parents or corrupting the justice system.

177. Concluding Observations of the Human Rights Committee on Malawi’s Initial Report (2014), Paragraph 25.

178. Section 138.

This report takes the position that in cases of marriages that are clearly forced as articulated above, the police should regard the Penal Code (defilement laws) as a strong tool to punish men that marry young girls; just as the Child Care, Protection and Justice Act No. 22 of 2010 is useful for punishing parents, guardians and others who facilitate forced child marriages. However, an analysis of the court system is also important in order to see opportunities and obstructing factors to prosecution throughout the whole justice system.

8.3 How accessible is justice through formal courts?

The assessment found one pure child marriage case that had come through the court system, and a few cases of abduction and defilement. The latter is helpful in exposing the general approach of courts when dealing with girls of the age groups that commonly encounter early, child and forced marriage. The findings of the assessment are that the tension between the Constitution, statutory laws on defilement, and cultural practicalities has usually underpinned the inability by most courts to mete out effective sentences.

Furthermore, inadequate appreciation of the gender dimensions of child marriage or perceptions that the Penal Code irrationally covers some age groups in the application of defilement provisions has sometimes led to ‘judicial empathy’ and failure by judicial personnel to apply the letter of the law. Knowledge deficiencies of laws related to child marriage are also another factor.

The findings show that while charges may be laid sometimes, this does not always lead to conviction, resulting in perceptions that there is lack of seriousness in the enforcement of laws by the courts. For example, as an illustration of how the constitutional permission of child marriage with parental consent ‘confuses’ justice, Human Rights Watch documented an interview with a magistrate in Dowa District in 2013, who explained that:

“Last month, the 1st grade magistrate handled a case of a 15-year-old girl who got married. The Constitution allows a girl who is 15 years to get married yet the Penal Code says anyone who has carnal knowledge of a girl below 16 commits a crime. The perpetrator was acquitted based on the Constitution.”¹⁷⁹

The difficulty to strike a balance between the Constitution and the Penal Code was also discernible in a conversation with a judge, who divulged that he acquitted a boy of about 19 years, who was convicted by a magistrate’s court for having sex with a ‘girlfriend’ of 15 years. Parents of the girl who were concerned about the relationship had reported the matter, and the case came to the Lilongwe High Court for confirmation of the sentence. In the reasoning of the judge:

“If the intention of the penal law is to cure society of their vices by making defilement an offence of strict liability, then it is contradictory that a girl of the same age (of defilement), in the same village, is having sex with a much older man to whom she is ‘married’ because parents have approved it, and the Constitution accepts it. How then can it be so heinous that people who are both teenagers are engaging in ‘consensual’ sex? How defensible is it to punish a relatively harmless juvenile while a predatory man who is in a relationship of absolute power imbalance is getting away with the same act in the name of marriage? In any event, penetration in the boy’s case was not proven so it was not easy to acquit.”

The judge here raises a profound question, which is well-matched with one of the questions that this report proposes in the checklist for harmonisation of marriage laws (Annex 1) – “does the country’s law avoid criminalising teenage sexual contraventions of the minimum age of sexual debut?” For ‘consensual’ adolescent sex, the *Teddy Bear* case in South Africa (2013) is informative regarding how far the conduct can be criminalised. The South African Constitutional Court ruled that provisions in the Sexual Offences Act that pertain to consensual sexual penetration with a child between 12 and 16 years, thereby criminalising romantic or sexual contact between adolescents (including kissing, hugging consensual sexual intercourse between adolescents), need to be amended so that these acts are not criminalised for adolescents where the age difference between them was not more than two years at the time of the alleged committing of the offence.¹⁸⁰

Apart from the above Malawian case, Human Rights Watch also documented a similar case, though the age of the male perpetrator is not mentioned. On this occasion, upon charges being laid by a father of a

179. Human Rights Watch (2014), note 12 above.

180. The *Teddy Bear* Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another (CCT 12/13) [2013] ZACC 35.

pregnant 15-year-old girl, a magistrate at a child justice court in Dowa district convicted the accused man of defilement and sentenced him to four years in prison. The magistrate admitted:

“the conflict I faced is that under the Penal Code it is an offense to have sex with a girl below 16 years. But what about our culture? They say if a girl is mature, has attained puberty, she can do what she wants. This girl was 15, she was mature. So the law is conflicting with culture. There is also the civil side of it: if you imprison this man, who will maintain the baby?”¹⁸¹

This reasoning has nothing to do with the law, and it shows how courts are sometimes at pains to concede that a girl who looks mature can be defiled even when she has engaged in consensual sex. Despite the fact that the concerns about maintenance may be legitimate, the capacity to apply gender and human rights lenses by courts would lead to increased appreciation that cultural perceptions and dealings that result in harm to children in relation their health, physical and social well-being cannot be justified in turning a blind eye to defilement. Overall, while the two case examples help to illustrate the dilemma faced by some court personnel at a general level, all the public sees from the outside are court sentences that make little sense given the law that is in place. This attracts the perception that judicial officers, particularly magistrates, are poorly trained and lack necessary expertise, do not usually know the law, are corrupt, or that the consideration of mitigating factors by a court defeats the course of justice.

But admittedly, the two cases above are broad defilement cases that were not brought in the context of child marriage. However, they remain very relevant because with regard to child marriage, they illuminate that the big challenge is to ensure that laws in the country should not harbour double standards that support the sustenance of child marriage in practice by making it meaningless for courts to enforce such laws.

8.4 The role of traditional mechanisms in facilitating access to justice

The assessment of access to justice through traditional systems sought to understand whether or not (directly or indirectly) the customary justice system is supporting the enforcement of any laws that have the effect of addressing early, child and forced marriages. While key informants acknowledged that interventions are not at a nationwide scale, one innovation that seems to be catching speed is the introduction and enforcement of community by-laws that are aimed at reinforcing compulsory primary education, especially for girls; withdrawing girls from child marriage; and banning child marriage. These by-laws are mostly being developed through the collaboration of chiefs and NGOs in areas where child marriage projects are taking place. The following provides examples of successful by-laws:

Case study 1: Use of a ‘community parliament’ to formulate by-laws to strengthen girls’ education

By-laws have been developed in Traditional Authority Mwanza’s Area in Salima district under a project that is being run by Malawi Interfaith AIDS Association (MIAA).¹⁸² This is how they came about:

1. A training of traditional leaders on how gender inequalities between men, women, girls and boys were negatively impacting accessing productive resources and development opportunities jolted Traditional Authority Mwanza, who leads about 800 village headmen, into action. She decided to develop by-laws to ‘outlaw’ practices that prevent women and girls and youths from developing to their optimum.
2. However, she opted not to impose the by-laws and penalties, but to use a participatory approach instead. So with the help of MIAA, she mobilised representatives of community members, religious leaders, law enforcers, hospital workers, teachers and a magistrate to be part of a ‘community parliament’ to draw up the by-laws.

181. Human Rights Watch (2014), note 12 above.

182. With support from the Gender Equality and Women Empowerment Programme (2012 - 2015), being coordinated by the ministry responsible for gender with technical support from UNFPA and financial support from the EU.

3. In order not to influence the ‘parliament’ and to encourage free discussions, she delegated her Group Village Headman Mwanza to be the ‘speaker’. The magistrate provided guidance so that the by-laws would be in conformity with the country’s laws.
4. Upon being satisfied, the community parliament submitted the by-laws to Traditional Authority Mwanza, who organised a stakeholders’ meeting to scrutinise and finalise them. With regards to punishments, the forum agreed that if a child, especially a girl child who is not in school, then the parent is punished by paying four chickens to the village chief. If this continues, then the case goes to the group village headman where the parent will pay six chickens. If it still continues, then the case comes to me and the punishment is the payment of two big goats. If the parent is adamant and carries on, then all of us (the village chief, the group village headman, teachers, school committee members, religious leaders – including sheikhs) can take this person to court.
5. The final by-laws and punishments were then taken to the district commissioner for him to know what had been done in the area. Traditional Authority Mwanza signed the by-laws together with the DC and the Magistrate.

Traditional Authority Mwanza confidently asserts “*I can now tell you that the adoption of the by-laws has solved problems of early marriages in my area, and many school girls who dropped out of school either because of early marriages or being impregnated have gone back to school. I can challenge you that you will no longer find child marriages being celebrated in this area.*”¹⁸³

MIAA’s data shows that many girls are being rescued from child marriages and readmitted to school. For instance, out of the 457 girls that have been mobilised to go back to school since the start of the project in Traditional Authority Mwanza’s area in 2013, 92 are teen mothers.¹⁸⁴

Case study 2: Applying by-laws not only to punish the perpetrator, but also the enforcer

Senior Chief Chikumbu of Chiradzulu district is a girls’ education champion who works with other African Queens (female chiefs) to promote this agenda. She explains of her community’s by-laws:

“Although they are handwritten, we have posted our by-laws right on the door to my office for all to see. All chiefs in my area also have them so that they should know what to enforce since I rely on them to be ‘eyes’ in their own smaller communities. We have ended child marriages through these by-laws where it has been evident that a minor is involved in a marriage; and we have ordered the minor to return to school. We are trying hard to send a signal of zero tolerance for school dropouts and child marriage by imposing a punishment system against both parents or guardians and the chief in whose jurisdiction the violation has occurred. So both parents and chiefs are paying goats as punishment. We are doing this because the basic issue against such a chief is ‘why was the violation happening under your watch? It means you as a chief is undermining the by-laws by being negligent with serious enforcement.’ This is getting chiefs’ attention and resulting into more deliberate enforcement. I am even suspending chiefs whose own behaviour is contradicting the by-laws. So far I have suspended two of them because as leaders, we just don’t have to preach, but we all have to be seen to be practicing what we are preaching. There is no sense in expecting community members to behave better when you as a chief are having sexual relationships with schoolgirls, not sending your children to school or generally doing other things that the by-laws are prohibiting. Socio-cultural habits run deep and while some may for now be resentful and label me as ‘a difficult woman’ because of all the restrictions that the by-laws are imposing, as leadership we are optimistic that these by-laws are laying a strong foundation to help the girl child in our area to develop and become a national asset, not liability.”

183. Ministry of Gender/UNFPA/EU (May 2015), note 155 above.
184. As above.

185. Centre of Human Rights (2014), note 26 above.

Case study 3: Supporting school development projects with fines from by-law violations

Plan Malawi has trained and supported communities to set up child protection committees in Karonga district. The committees seek to empower community members to address child protection and rights concerns through preventative measures, monitoring, reporting, advocacy and facilitating rehabilitation of victims where necessary.¹⁸⁵ Plan Malawi narrated the following about one of its experiences:

In northern Malawi, marrying off girls under 18 years to older men who pay a huge bride wealth has been common for many years. In the past, community members considered girls as a source of wealth. Due to widespread child marriage and high incidences of school dropout, Plan Malawi trained and supported communities to set up child protection committees in Karonga district. The committees seek to empower community members to address child protection and rights concerns through preventative measures, monitoring, reporting, advocacy and facilitating rehabilitation of victims where necessary.

After training on child rights, the chiefs and the committees joined forces and drafted stringent by-laws. The laws are different from state legislation and ensure that children in the community are protected from any form of abuse and harmful traditional practices, and that any perpetrators face tough penalties. *“In the past, we had our own cultures that allowed us to take a girl to a man without any question, whether young or at any age. The girl could be referred to as wealth. If a girl was born in a family, the father considered himself rich,”* said Mackson Mwakaboko, traditional authority leader of Karonga district.

“When the child protection committees went round the villages to raise awareness in our community on child rights’ issues, they called a meeting summoning all traditional leaders. We were trained on child rights and they told us that the kupimbira culture was harmful to our girls. I thought about their mission, and realised that fewer than 10 girls had been educated in my village. We decided to work as a team,” Mackson explained.

One of the by-laws drafted by the team states that: *“If someone in the community is found forcing a girl or boy to marry before completing their education they will be fined 60,000 Kwacha.”*

“These bylaws are working and helping our children to get education. Many people are afraid of breaking them because they fear the consequences as they feel the penalties are too high that they cannot afford,” said Mackson.

The monies collected from any penalties are donated to schools for development projects.

The above are simply an illustrative in-depth insight into a variety of by-laws that are being implemented in different parts of the country when community structures and their chiefs are educated about the challenge of child marriage and its impacts. This report also recognises accomplishments that have been made by Senior Chief Inkosi Kachindamoto of Dedza district, who has recently dissolved over 300 marriages and revoked the chieftaincy of four chiefs for allowing early marriages of girls and boys between the ages of 13-16 contrary to by-laws that have been adopted in her area under the Gender Equality and Women Empowerment Programme. In the same district, a joint local advocacy of young people and Youth Empowerment and Civic Education (YECE) convinced a group of local authorities in the area of Kamenyagwaza to develop and implement local by-laws that punish the act of forcing girls into marriage through fines. In order to support wide enforcement, communities/parents were involved in an awareness campaign focused on child rights, the importance of education, and the reproductive health risks of early child bearing.¹⁸⁶

Likewise, the Girls Empowerment Network (GENET) has been implementing a Stop Child Marriage campaign in Chiradzulu district since 2011. The campaign had empowered girls to lobby 60 village chiefs to adopt by-laws that protect adolescent girls from child marriage and harmful sexual initiation practices. The by-laws compel men who marry girls under the age of 21 to give up their land in the village and pay a fine of seven goats. They also impose social sanctions on parents who consent to child marriage that include three months of mandatory janitorial service in the local health clinic.¹⁸⁷

By-laws represent an example of local activism by traditional justice delivery structures because traditional leaders are not enforcing them solely based on actual complaints of child marriage or other harmful practices. Rather, they are institutionalising systems to ensure that

186. 'Youth and Parents against Early and Forced Marriages in Malawi' available at www.choiceforyouth.org/en/news/youth-and-parents-against-early-and-forced-marriages-in-malawi [accessed 22 January 2016].

187. Government of Malawi (2015), note 143 above.

the practices are prevented, and that there is a response for those already in the situation. It can only be hoped that the by-laws and their systems will live beyond the lifespan of their projects because when compared to the formal justice system, this is one area where tangible enforcement using community mechanisms is happening. Although statutory penalties are not necessarily being applied, chief driven by-laws have the potential to practically contribute to the fight against early, child and forced marriages since traditional authorities wield a lot of power in their areas. More important are such by-laws that link the informal/customary penalties with those under statutory laws by first offering perpetrators 'a chance to change/abandon the practice' through the application of local fines; and then following this up with court action in the event of non-compliance as is being done in TA Mwanza's area in Salima. Equally significant is the measure to punish both the perpetrators and chiefs that are neglecting to enforce by-laws within their smaller jurisdictions as has been witnessed in TA Chikumbu's area.

In fact, Malawi's Beijing+20 country report has recommended that since district councils are now fully functional with the election of councillors in 2014, the development of by-laws aimed at promoting girls' education and the eradication of child marriage and harmful practices should be adopted as a formal district standard countrywide.¹⁸⁸ This would address the challenge that by-laws are for now discretionary, with no backing from the local government system. Of course, when it comes to this level, the issue will be to implement workable by-laws that do not necessarily undermine national laws.

8.5 Key conclusions: Opportunities and challenges

a) Access to justice through police

Opportunities

- (i) Some laws that can facilitate the prosecution of child marriage offences exist.
- (ii) Although not widespread, some police officers have received child protection training.
- (iii) Some parents bring forward cases of defilement, especially when they do not approve their daughter's relationship.

Challenges

- (i) Prosecution of offences is rare; and mediation is preferred.

- (ii) The law does not criminalise child marriage generally, but only forced child marriage and child betrothal.
- (iii) Knowledge about child marriage, related impacts and laws is not widespread amongst police personnel.
- (iv) Inadequate resources promote mediation in some cases.

b) Access to justice through courts

Opportunities

- (i) Some cases of defilement or abduction are brought before courts, either after reporting by parents or NGOs.
- (ii) Applicable criminal laws that can facilitate access to justice by victims of child marriage exist.

Challenges

- (i) The constitutional low minimum age of marriage confuses courts in applying defilement laws strictly, especially when girls of 14 and 15 years are involved; or when the perpetrator is an adolescent himself.
- (ii) Cases that come through the court system are mainly those where a girl's parents do not approve a sexual relationship, but not generally cases of forced child marriage.
- (iii) Knowledge on child marriage laws is not common amongst magistrates.

c) Access to justice through traditional structures

Opportunities

- (i) By-laws exist in some areas, and these are proving to be a strategic tool for eradicating child marriage and enforcing compulsory education.
- (ii) In some areas, traditional leaders are leading community action to address child marriage.
- (iii) Where they exist, NGO programmes are helping to strengthen community structures.

Challenges

- (i) Child marriage projects that are building awareness of chiefs and generally using traditional structures to address child marriage have no comprehensive coverage.
- (ii) By-laws have not been imposed as a mandatory requirement for district councils. Formulating by-laws outside the district council structure weakens their legal validity, sustainability and potential for replication.

188. *ibid.*

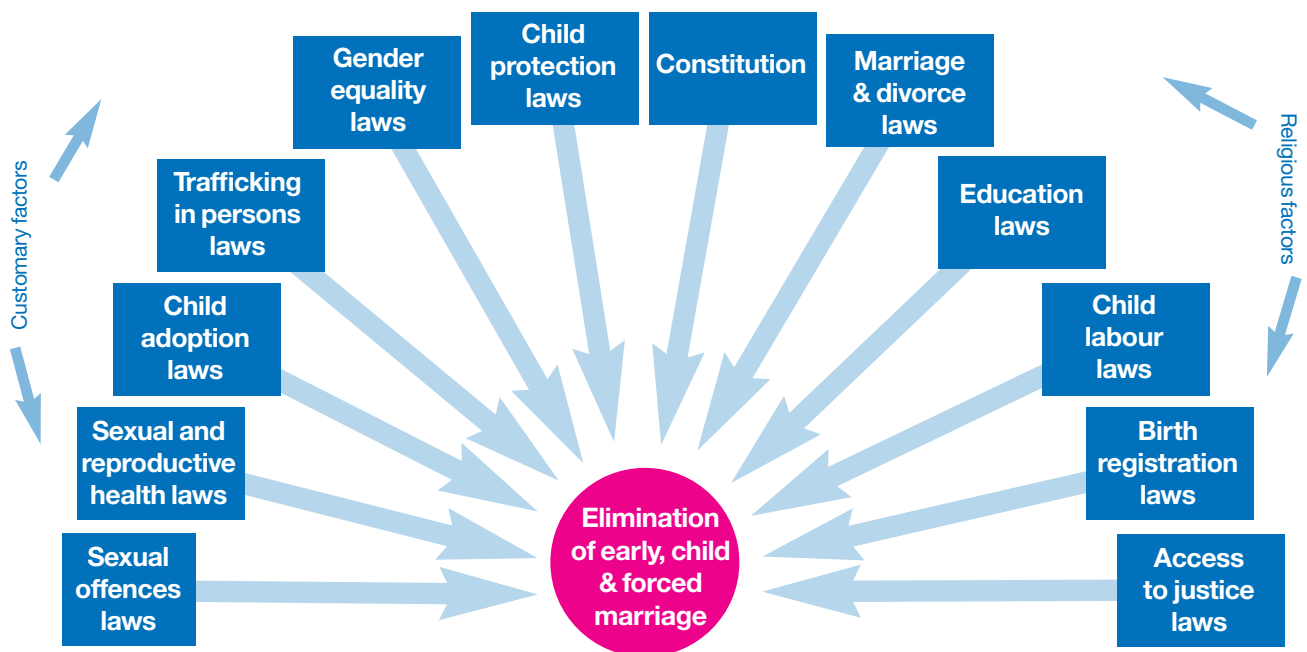
PART 9: PERCEPTIONS ON THE STATE OF HARMONISATION OF MARRIAGE LAWS AND COORDINATION MECHANISMS

The review proposes that other components, such as marriage-related laws and coordination mechanisms, that would help create an ideal environment for confronting early, child and forced marriage are harmonised. Despite the existence of some good laws, Malawi needs to work towards harmonising piecemeal legislation related to child marriage that sometimes sabotages each other. Moreover, strengths that exist in relation to the coordination role of the ministry responsible for gender need to be capitalised, just as limitations need to be quickly addressed.

9.1 Harmonisation of laws

Key informants broadly asserted that despite the commendable efforts to pass the Marriage, Divorce and Family Relations Act No. 4 of 2015, tackling child marriage through legal measures will remain chaotic without harmonising this law in line with the Constitution. They emphasised that cultural and religious laws and/or practices have to be harmonised with legislation because as Part 3 has shown, the absence of the definition of age of marriage in some

Figure 8: Areas of law requiring harmonisation in order to combat child marriage



cultural or religious systems means that early, forced or child marriage is not regarded as a legal or social wrong. But to the extent that the Marriage, Divorce and Family Relations Act No. 4 of 2015 is now applicable to all forms of marriage in Malawi, this report takes the position that this level of harmonisation has been achieved. However, what is left is to harmonise all outstanding aspects of written law, and aggressively work towards changing cultural mind-sets so that the new laws are widely disseminated, accepted, respected and enforced.

Some key informants even suggested that the solution is to have one law on child marriage that should consolidate all relevant laws. In February 2015, UN Women shared the annual work plan (2015) of a working group to address child marriage,¹⁸⁹ which includes the harmonisation of laws as one of its activities. However, the targeted laws (Constitution; Penal Code; Child Care, Protection and Justice Act; and the Marriage Divorce and Family Relations Act) are quite limited.

Annex 1 contains a proposal by this report that the comprehensive harmonisation of child marriage laws should be geared at re-examining specific aspects of laws related to children, marriage, sexual conduct and sexual offences, child labour, education, sexual and reproductive health, trafficking in persons, gender equality, access to justice etc. (see Figure 8). The aim is to create a cohesive body of laws that ‘talk to each other’ so that an enabling environment to consistently address child marriage through all key sectors is present.

9.2 Coordination of child marriage interventions

This assessment examined strengths and weaknesses in coordination mechanisms to address early, child and forced marriage in Malawi.

9.2.1 Strengths in coordination mechanisms

Being the duty bearer, the Ministry of Gender, Children, Disability and Social Welfare has an important role to play in ensuring that the child marriage problem has enough prominence. There is common agreement amongst key informants that coordination of child marriage activities under the leadership of the Ministry

of Gender, Children, Disability and Social Welfare is strong at national level, and also perhaps at district level. According to one key informant “*the ministry as a duty bearer has been very flexible in permitting NGOs to operate child marriage interventions in various districts, and its skilled social welfare personnel have always been available to collaborate and support.*” As an example of this support, soon after the passing of the Marriage, Divorce and Family Relations Act in February 2015, YONECO conducted a refresher training of representatives of its ten Child Protection Committees in Machinga district that was facilitated by Child Protection Workers from the police and the Social Welfare Department.¹⁹⁰ Some of the notable areas where there has been collaboration between the ministry and other stakeholders at national level are as follows:

Passing the Marriage, Divorce and Family Relations Act No. 4 of 2015

The Ministry, in collaboration with partners, played an important role in advocating for the passing of the Marriage, Divorce and Family Relations Act No. 4 of 2015 as part of its efforts to eradicate child marriage. Some of the notable partners were UN Women, the End Child marriage Network that is coordinated by YONECO, Plan Malawi and the parliamentary Women’s Caucus.

National symposium on child marriage

In August 2013, the Ministry collaborated with YONECO to organise the first ever national symposium on child marriage under the theme ‘Act now! Stop child marriages in Malawi—it starts with me’. The symposium aimed at galvanising collective responsibility and commitment to address child marriage in Malawi in different sectors by bringing together government officials, members of parliament, civil society, religious leaders, traditional leaders and media representatives among others.¹⁹¹

Launching of the Campaign to Eradicate Child Marriage

During the celebrations of the International Day of the Girl Child in 2014, the Minister of Gender, Children, Disability and Social Welfare launched the Campaign to Eradicate Child Marriages. Key informants from the ministry mentioned that this launch was at national

189. Steered under the leadership of the Ministry of Gender, Children, Disability and Social Welfare and is also constituted by the Malawi Human Rights Commission, Youth Network and Counselling; Women’s Legal Resources Centre; NGO Coalition on Child Rights, CAVWOC, National Network on Girls Education, EDUCAIDS Network, CEYCA and the NGO Coalition on Child Rights; Department of Reproductive Health Services; Centre for Languages.

190. YONECO (19 March 2015), written by Wanangwa Mumba, available at www.yoneco.org/site/index.php/news-and-events/articles/507-yoneco-takes-marriage-divorce-and-family-relations-act-to-child-protection-committees-in-machinga-district

191. Times Media (28 August 2013).

level, and districts launched their own context-specific campaigns. This followed a landmark step by the State President Professor Arthur Peter Mutharika when he became the first SADC Head of State to sign a commitment to end child marriage on 25 July 2014.¹⁹² The ministry is working with a range of stakeholders in rolling out the district campaigns, and these include Save the Children, Action Aid, World Vision, Malawi Interfaith AIDS Association and the End Child Marriage Network. The He4She Campaign that was launched by the State President on 26 February 2015 provides a further powerful platform for spotlighting the child marriage eradication campaign.

Setting up child protection structures

The Ministry of Gender, Children, Disability and Social Welfare has facilitated the formation of about 300 Community Victim Support Units (CVSUs) in different parts of Malawi in order to support communities in addressing gender-based violence. In addition, the ministry is setting up child protection committees to monitor child marriage issues and raise awareness in communities and schools through the 'Journey of Life' initiative. Some key informants felt that given the wide scope of child marriage challenges in Malawi, these structures remain too few and members, who are volunteers, sometimes lack adequate training, resources and motivation. However, where NGOs are present, structures such as child protection committees or their equivalent are being empowered to have the right knowledge on how to deal with child marriage issues. The example of YONECO's training of its child protection committees in Machinga district highlighted above is a good example.

Working group to address child marriage

Nationally, the ministry is steering a working group to address child marriage,¹⁹³ which has since developed an annual work plan (2015) with a comprehensive agenda. While Part 9.1 mentioned that the laws that are targeted for harmonisation under the work plan are not comprehensive, the earmarked actions can generally begin to address existing challenges related to the coordination of responses towards child marriage. In fact, the initiative by Plan 18+ to develop this in-depth review of child marriage from a legal, regulatory and programmatic perspective fits well with some actions in

the work plan. However, a key informant from the ministry acknowledged that the implementation of the work plan is yet to start in earnest, as so far, the working group has not been as active as it should be. Besides, this review noted that National Youth Council is not prominent among the responsible institutions for implementing the work plan despite the fact that the national youth policy also has components aimed at addressing child marriage as analysed below.

Child protection cluster

The Ministry of Gender, Children, Disability and Social Welfare and UNICEF are leading this cluster, of which Plan Malawi is a member. With the current flood response, this cluster has become relevant in bringing child marriage issues to the fore as part of child protection in flood disaster areas.

Coordinating chiefs in the fight against child marriage

The ministry responsible for gender is closely collaborating with UN Women and the Ministry for Local Government and Rural Development to galvanise Malawi chiefs into action to fight child marriage. Since the country has different tiers of chieftaincy, the first step has been to build the capacity of higher-level chiefs. In turn, these chiefs will be developing action plans so that they in turn can raise the awareness of other chiefs and their spouses in their jurisdictions. Such awareness-raising will include building the knowledge of chiefs on relevant provisions of the Marriage, Divorce and Family Relations Act No. 4 of 2015. In June 2015, the ministry responsible for gender hosted a forum for the Queen Mother of the Kingdom of Toro and Malawi chiefs to launch their further commitments to ending child marriage, early pregnancies, and violence against women and children (VAWC). This event also witnessed the launch of the African Queens Women Cultural Leaders' Network (AQWCLN). For all these efforts to be meaningful there has to be cohesiveness in consolidating the responses/efforts of all chiefs on the ground, with the Ministry of Local Government and Rural Development playing a stronger role so that child marriage and VAWC issues are mainstreamed into local government planning.

192. Government of Malawi (2015), note 143 above.

193. Ministry of Gender, Children, Disability and Social Welfare, Malawi Human Rights Commission, Youth Network and Counselling; Women's Legal Resources Centre; NGO Coalition on Child Rights, CAVWOC, National Network on Girls Education, EDUCAIDS Network, CEYCA and the NGO Coalition on Child Rights; Department of Reproductive Health Services; Centre for Languages.

9.2.2 Weaknesses in coordination mechanisms

Community level mechanisms

Gauging by the continued prevalence of child marriage in many communities, most key informants are of the view that the weakness lies in community-level coordination. Therefore, what remains is to consolidate the implementation of multi-sectoral interventions on the ground. It was proposed that as one way of attaining this consolidation, a child marriage action plan as articulated in Part 10 (Recommendations) is important. Several organisations are using child protection committees to drive campaigns against child marriage at local level. Strengthening such type of community coordination can take into account Plan Malawi's community systems approach that the organisation has adopted in order to address child marriage through its partners. This approach shifts attention from an issue-based approach (eg where child protection efforts are based on single thematic issues such as HIV and AIDS, disability, and child trafficking thereby resulting in a fragmented and unsustainable child protection response), to a larger systemic framework by ensuring that the composition of the child protection committees is diverse. This means the committee has to comprise police forum members, religious leaders, chiefs, and community-based organisation (CBO) members, among others. These child protection structures are strengthened in order to help them to ably protect children in the district.¹⁹⁴

Scaling down of direct financial support

The assessment unearthed that the coordination of child marriage interventions is being weakened by the fact that following the cash gate saga that was exposed in 2013,¹⁹⁵ direct support to the ministry has dwindled or even been withdrawn as a result of low donor confidence in the government's management of financial resources. The consequence is that without adequate resources, district social welfare officers are not able to effectively discharge their child protection functions, and this is predictably affecting child marriage-related responses as well. The challenge is acute for those districts where NGO programmes to address child marriage are meagre or non-existent.

Lack of a multi-pronged approach

Plan Malawi has observed that Malawi still lacks a multi-faceted approach to encourage delayed marriage for girls. Plan has conceptualised that a multi-faceted approach to ending child marriage is about having a set of strategies focusing on girls' empowerment, community mobilisation, enhanced schooling, economic incentives and policy changes in order to improved knowledge, attitudes, and behaviour related to child marriage prevention. This approach can flexibly accommodate other innovative approaches and be implemented in a seamless manner so that: (a) multiple district level stakeholders are able to complement each other depending on their areas of strength instead of duplicating efforts; (b) there is cross learning in order to improve the quality of nationwide interventions.

Generally, it is important to bear in mind that effective coordination on interventions will depend on the presence of a specific national action plan to address child marriage. Key informants from the ministry responsible for gender suggested that a national action plan on child protection is under development. Notably, this process has been going on for a few years. While acknowledging the relevance of this action plan, the reality is that unless the plan dedicates enough attention to child marriage, it may not be the most appropriate document for dealing with the problem comprehensively. In this case (and coupled with delays in finalising) a stand-alone action plan on child marriage is still a national priority. The objective should be to harmonise fractional efforts that exist to address child marriages under different policies, strategies and programmes.

194. Plan Malawi concept note.

195. Looting of government money by officials in different ministries.

PART 10: CONCLUSION AND RECOMMENDATIONS FOR ADVOCACY

10.1 Conclusion

The findings of this in-depth review of legal and regulatory frameworks related to early, child and forced marriage in Malawi have uncovered that while some frameworks and interventions to tackle Malawi's high prevalence of child marriage exist, there are gaps that need to be urgently filled. Some legislative milestones have been reached with the passing of the Marriage, Divorce and Family Relations Act No. 4 of 2015, the Gender Equality Act No. 3 of 2013, the Child Care, Protection and Justice Act No. 22 of 2010 and Penal Code amendments in 2011. Legal provisions that have improved with these laws related to the age of marriage without parental consent, age of defilement, criminalisation of harmful practices, child betrothal and forced child marriage, greater protection of sexual and reproductive health as a right, and guarantees of equal access to education for boys and girls at all levels.

In addition, an enabling policy framework to respond to

child marriage exists through the Malawi Growth and Development Strategy II (2011 – 2016); the National Girls Education Strategy (2014 – 2018); the Re-Admission Policy (1993); the National Action Plan to Combat Gender Based Violence (2014 -2018); the Joint Sector Strategic Plan of the Gender, Children and Youth Sector Working Group; and the National Youth Policy (2013). The report has also captured examples of interventions that are being implemented on the ground in pursuant to these legal and policy frameworks.

However, the statistics that a staggering 50 per cent of girls in Malawi get married by the age of 18 are a manifestation of shortcomings to attain a comprehensive and multi-disciplinary preventative approach. The recommendations that are outlined below aim to help Plan and its collaborating partners address existing limitations and make the most impact in overcoming the child marriage plague.

The following represents the key conclusions that are reflected in each part of the report.

Table 3: Key conclusions at a glance

1. INTERNATIONAL AND REGIONAL FRAMEWORKS RELEVANT TO CHILD MARRIAGE

Opportunities

- a) Malawi has an international and regional mandate to address child, early and forced marriage since it has ratified important treaties such as CEDAW, CRC, the Maputo Protocol and the SADC Gender and Development Protocol. It also subscribes to the Universal Periodic Review (UPR) process.
- b) Malawi has established a regular pattern of submitting State party reports to the CEDAW Committee. And since 2002, two reports have been submitted to the Committee on the Rights of the Child. Further, the Human Rights Committee discussed the first report ever to be submitted by Malawi to the committee in 2014. All these steps have provided important spaces for treaty monitoring bodies to make specific recommendations on how the government can improve the child marriage challenge.
- c) The MHRC has conducted a mid-term review of the implementation of recommendations of the UPR process, signalling commitment to follow up on the recommendations.

Table 3: cont

- d) Whether purposefully or incidentally, measures have been taken to address some treaty monitoring body recommendations related to child, early and forced marriage.

Challenges

- a) There are weak systems for tracking the implementation of international and regional child marriage commitments, including relevant recommendations of treaty monitoring bodies, and conducting necessary advocacy where implementation is lagging behind. Therefore, while the findings of the review illustrate that action that coincides with some child marriage related recommendations of treaty monitoring bodies has been witnessed, the fact that the implementation of these recommendations is not organised deprives the country of optimal results.
- b) Treaty monitoring body recommendations on child marriage are not purposefully disseminated to strengthen multi-sectoral responses.
- c) Most stakeholders are not clear on who has the responsibility to coordinate the implementation of relevant international recommendations.

2. CHILD MARRIAGE INDICATORS AND PREVALENCE IN MALAWI

Opportunity

Some hard data that provides evidence of the poor state of health indicators that are related to child marriage as well as the prevalence of the practice exist, and this should inspire the development and/or scaling up of urgent preventative measures and responses.

Challenges

- a) Half of the girls in Malawi get married by 18 years, and this is associated with an array of worrying maternal health indicators.
- b) All regions in Malawi have a child marriage prevalence of above 40 per cent, which is too high. The figures in the central region and northern region (50 per cent and above), are particularly dejecting.
- c) Data on local child marriage hotspots is not comprehensive and current.

3. LEGISLATION ON MINIMUM AGE

Opportunities

- a) Malawi has ratified all key international and regional human rights frameworks that uphold the minimum age of marriage of 18 years. The country is increasing the rate of submission of State party reports.
- b) The Marriage, Divorce and Family Relations Act No. 4 of 2015 applies to all forms of marriage in Malawi; and it prescribes the marriage minimum age of 18; just as it defines child as one below 18 years.
- c) Legislation provides for a similar age of marriage for boys and girls.
- d) The Chiefs' Declaration of 2013 advocates for 21 years as a minimum marriage age.

Challenges

- a) In practice, girls are married much earlier (upon puberty) than boys. Customary and religious perceptions and practices contribute to this.
- b) The Constitution of the Republic of Malawi (1994) is supreme law, and it accepts marriage age with consent for those between 15 and 18 years. It only discourages marriages for those aged below 15 years. The Constitution does not stipulate or recommend the need for conforming with internationally recommended legal procedures in the exceptional event of a marriage of anyone aged below 18 years.

Table 3: cont

- c) Despite treaty monitoring bodies' repeated recommendations since 2002 that the Constitution should be amended to be consistent with the internationally accepted minimum age of marriage of 18 years, this has not happened. The Constitution still defines child as a one below 16 years. So does the Child Care, Justice and Protection Act No. 22 of 2010.

4. MARRIAGE CONSENT LAWS

Opportunities

- a) The Constitution disallows forcing any person into a marriage; and allows those aged 18 years and above to get married without a parent's or guardian's consent.
- b) The Marriage, Divorce and Family Relations Act No. 4 of 2015 includes obtaining the consent of a party to a marriage by force as a ground for nullifying a marriage; and offers necessary safeguards regarding child custody, maintenance and property for those whose marriages have been nullified.
- c) The provisions regarding minimum age of marriage under the Marriage, Divorce and Family Relations Act No. 4 of 2015 apply to all forms of marriage, including customary and religious marriages.
- d) Harmful practices against children are outlawed under the Child Care, Protection and Justice Act No. 22 of 2010; just as harmful practices are generally outlawed under the Gender Equality Act No. 3 of 2013. Punishments are specified.
- e) The Child Care, Protection and Justice Act No. 22 of 2010 outlaws child betrothal and forced child marriage; and imposes penalties.
- f) The Constitution of the Republic of Malawi (1994) regards as invalid any law that is inconsistent with the provisions of the Constitution, and this include customary and religious laws.

Obstacles

- a) The Constitution allows children aged between 15 and 18 years to get married with parental consent. The age of 15 is below what is accepted as an absolute minimum age of marriage in exceptional circumstances (16 years) in some international frameworks.
- b) Without legal guidelines for allowing child marriage in exceptional circumstances as is prescribed by the international frameworks, forced child marriage with parental consent continues to be culturally justified as a form of 'protection of the girl child' / being done in the best interest of the child.
- c) The Constitution is in conflict with itself by, on one hand declaring as invalid any law that is contrary to the provisions of the Constitution; while on the other hand enshrining provisions that facilitate child marriage with parental consent, and therefore violating some constitutional rights.
- d) Implementation, enforcement and monitoring of existing legal provisions that prohibit harmful practices, child betrothal and forced child marriage is weak.

5. LAWS ON MARRIAGE REGISTRATION

Opportunities

- a) Despite Malawi not signing or ratifying the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (1962), the Marriage, Divorce and Family Relations Act No. 4 of 2015 has introduced a compulsory scheme for the registration of civil, customary and religious marriages by the Registrar of Marriages.

Table 3: cont

- b) Registration of marriages is decentralised by designating district commissioners, traditional authorities and clerics as registrars to act on behalf of the Registrar of Marriages.
- c) Registration of customary marriages is to be formally recorded by all traditional authorities in respect of marriages that are happening in their respective jurisdictions.
- d) Age is to be recorded at the time of giving a marriage notice and celebration of a marriage before a registrar.
- e) The law provides for an offence to ensure that registrars perform their duties to record marriages and to prevent them from registering marriages that are otherwise void.
- f) As of August 2015, the birth registration system has started being implemented in all districts.

Challenges

- a) So far, birth registrations are rare, making it very difficult to be sure about the true age of a party to marriage.
- b) Though the marriage law mandates registrars to record age, given that there is a wide absence of birth certificates, there is no obligation on the registrar to demand alternative proof of age during the time that the parties to a marriage are giving notice of the marriage, or celebrating the marriage (eg a declaration, chief's certification/affidavit etc.).
- c) With the widespread absence of birth certificates, honest disclosure of age at the time of giving notice of a marriage depends on the goodwill of parties to the marriage or third parties, but the practicality of enforcing such disclosure is difficult.
- d) Borrowing from implementation challenges with many laws, it is likely that unless purposeful measures are taken, a comprehensive system for registration of marriages may take a long time to be functional/be implemented, since this has only been introduced in a 2015 law.
- e) Training of registrars in order to create competent authorities for the compulsory registration of all marriages is not legally mandated. Neither is education and raising awareness of the new registration system.

6. HOW FAR DOES THE LAW ELIMINATE DISCRIMINATION AGAINST WOMEN AND GIRLS IN ALL MATTERS RELATING TO MARRIAGE AND FAMILY RELATIONS?

a) Relationship between formal law and customary law in Malawi

Opportunities

- (i) The Constitution promotes laws (including religious and customary) that are compatible with constitutional provisions, principles and values.
- (ii) The Marriage, Divorce and Family Relations Act No. 4 of 2015 has taken the significant step of harmonising the regulation of customary, religious and civil laws through one law.
- (iii) Harmful practices (including cultural and religious) are specifically outlawed by the Gender Equality Act No. 3 of 2013, and the Child Care, Justice and Protection Act No. 22 of 2010.
- (iv) As a traditional mechanism, by-laws that are being facilitated by some chiefs have become a tool for implementing formal laws that are specifically seeking to address child, early and forced marriage.

Table 3: cont

Challenges

- (i) Although it is clear that the Constitution and several statutory laws are above customary and religious laws and practices that are harmful, lack of strict enforcement and monitoring means that harmful religious and cultural practices are still commonplace.
- (ii) Religious doctrines that are harmful are particularly hard to critique and dismantle since they are held as sacred by practitioners.

b) Opportunities and limitations that exist in eliminating discrimination in family relations through statutory law

The Marriage, Divorce and Family Relations Act No. 4 of 2015:

- (i) Guarantees spouses equal rights and responsibilities regardless of the form of marriage;
- (ii) Recognises that the right of spouses to a sexual relationship can be limited in specific circumstances;
- (iii) Provides for maintenance of a spouse even during the subsistence of a marriage;
- (iv) Recognises non-monetary contribution as relevant in determining a spouse's contribution to maintenance and property acquisition;
- (v) Provides clear guidelines for the court to establish the existence of a marriage by repute or permanent cohabitation;
- (vi) Creates the offence of marital rape during judicial separation.

The Marriage, Divorce and Family Relations Act No. 4 of 2015 DOES NOT:

- (i) Apply to marriages that existed before its enactment (except for provisions related to rights and obligations of spouses) despite that it's more protective and has repealed other marriage related laws;
- (ii) Outlaw polygamy in marriages at custom, religion and by repute or permanent cohabitation, but only in civil marriages;
- (iii) Include child marriage as one of the specific grounds for nullifying a marriage;
- (iv) Criminalise marital rape during informal separation or the course of a marriage.

7. OTHER LAWS, GOVERNMENT POLICIES AND PROGRAMMES RELATED TO CHILD MARRIAGE

a) Sexual offences and gender-based violence/harmful practices

Opportunities

- (i) The Penal Code was amended in 2011 to place the age of defilement at 16 years.
- (ii) The Penal Code has the crime of abduction, which applies to cultural practices that force girls into marriage.
- (iii) There is a Gender-Based Violence (GBV) National Action Plan (2014-2018) that is meant to guide all sectors in combating various elements of GBV.
- (iv) As a way of implementing GBV-related strategic actions under MGDS II, the Joint Sector Strategic Plan of the Gender, Children, Youth and Sports Sector Working Group (2013-2017) is guiding the sector working group in coordinating various efforts to address harmful practices and GBV.
- (v) The National Youth Policy (2013) incorporates strategic actions to address child marriage.
- (vi) The government, donors and NGOs are starting to actively collaborate in addressing child marriage through campaigns and projects.

Challenges

- (i) Laws against defilement and abduction are hardly applied in order to crack down on early, child and forced marriage.

Table 3: cont

- (ii) There is no national action plan for addressing child marriage in order to properly guide multi-sectoral coordination and scale up the coverage of interventions.
- (iii) The finalisation of a national action plan for child protection continues to be delayed.
- (iv) A 2015 work plan of a child marriage working group that is being led by the ministry responsible for gender and children is yet to be actively implemented.

b) Access to education

Opportunities

- (i) Primary education is free and compulsory.
- (ii) The Gender Equality Act No. 3 of 2013 has specific provisions to promote equal access to education at all levels.
- (iii) Gender parity in primary and secondary education has been attained.
- (iv) Tertiary education selection for generic programmes at University of Malawi and Lilongwe University of Agriculture and Natural Resources has surpassed the quota set under the Gender Equality Act in the past few years. In 2015/16 Mzuzu University met the 40:60 quota in its generic programmes selection.
- (v) MGDS II contains strategic actions to strengthen girls' access to education at all levels.
- (vi) Malawi has adopted the National Girls' Education Strategy in order to accelerate the promotion of girls' education, and a National Girls' Education Network has been formed.
- (vii) Malawi has a school re-admission policy for pregnant girls and for boys that impregnate girls.
- (viii) There is evidence that some interventions are succeeding in bringing girls that dropped out back into the education system. These can be considered as good practices for systematic national replication.

Challenges

- (i) Primary school is not compulsory in practice because retention levels are poor, particularly for girls.
- (ii) Secondary school attendance for both boys and girls is very low.
- (iii) Secondary education is neither free nor compulsory.
- (iv) The school readmission policy is not effectively monitored and enforced; and the support system for girls that have come back to school is inadequate.
- (v) Barriers to primary and secondary education exist despite enabling policy frameworks, mainly due to low coverage of programmes, poor coordination; inadequate resources; and socio-cultural practices.
- (vi) Successful interventions such as by-laws to enforce compulsory primary education are not yet institutionalised within the whole education system.

c) Access to sexual and reproductive health and services

Opportunities

- (i) Sexual and reproductive health is guaranteed as a right under the Gender Equality Act.
- (ii) Health personnel have specific obligations towards dealing with the sexual and reproductive health needs of everyone, and violations are punishable as an offence.
- (iii) The Gender Equality Act protects the right of everyone to choose whether, when and if to have children, which may be relevant those in child marriages.
- (iv) Abortion law reform is in progress.
- (v) Youth Friendly Health Services have been endorsed as a government programme.
- (vi) In recent years, the government has started committing some funds for family planning out of the national budget.

Challenges

- (i) The right to choose whether or not to have children and when is currently limited under the Gender Equality Act by highly restrictive abortion laws. For those in child marriages, it is also hindered by their incapacity to assert independent decisions on child bearing.

Table 3: cont

- (ii) Youth Friendly Health Services are not being very effective in addressing adolescent girls' sexual and reproductive health needs.
- (iii) Most sexual and reproductive health programmes focused on adolescents are donor-funded, thus limiting their sustainability.
- (iv) There is a conflict between limitations in the education system to address comprehensive sexuality education over and above life skills; and the demand by the health system for comprehensive sexuality education to be taught in schools as a way of minimising poor adolescent health indicators.

d) Inheritance

Opportunities

- (i) The Deceased Estates (Wills, Inheritance and Protection) Act No. 14 of 2011 protects the nuclear family.
- (ii) The education of children/dependants is one of the priority considerations in the distribution of property of a person that has died without a will.
- (iii) Property dispossession is a criminal offence, and the fine that is imposed is based on the value of the property dispossessed.

Challenges

- (i) Enforcement of the law is very loose.
- (ii) Programmes related to awareness and education about the law are fragmented.

8. Access to justice and law enforcement

a) Access to justice through police

Opportunities

- (i) Some laws that can facilitate prosecution of child marriage offences exist.
- (ii) Although not widespread, some police officers have received child protection training.
- (iii) Some parents bring forward cases of defilement, especially when they do not approve their daughter's relationship.

Challenges

- (i) Prosecution of offences is rare, and mediation is preferred.
- (ii) The law does not criminalise child marriage generally, but only forced child marriage and child betrothal.
- (iii) Knowledge about child marriage, related impacts and laws is not widespread amongst police personnel.
- (iv) Inadequate resources promote mediation in some cases.

b) Access to justice through courts

Opportunities

- (i) Some cases of defilement or abduction are brought before courts, either after reporting by parents or NGOs.
- (ii) Applicable criminal laws that can facilitate access to justice by victims of child marriage exist.

Challenges

- (i) The constitutional low minimum age of marriage confuses courts in applying defilement laws strictly, especially when girls of 14 and 15 years are involved; or when the perpetrator is an adolescent himself.
- (ii) Cases that come through the court system are mainly those where a girl's parents do not approve a sexual relationship, but not generally cases of forced child marriage.
- (iii) Knowledge of child marriage laws is not common amongst magistrates.

Table 3: cont

c) Access to justice through traditional structures

Opportunities

- (i) By-laws exist in some areas, and these are proving to be a strategic tool for eradicating child marriage and enforcing compulsory education.
- (ii) In some areas, traditional leaders are leading community action to address child marriage.
- (iii) Where they exist, NGO programmes are helping to strengthen community structures.

Challenges

- (i) Child marriage projects that are building awareness of chiefs and generally using traditional structures to address child marriage have no comprehensive coverage.
- (ii) By-laws have not been imposed as a mandatory requirement for district councils. Formulating by-laws outside the district council structure weakens their legal validity, sustainability and potential for replication.

9. Perceptions on the state of harmonisation of marriage laws and coordination mechanisms

a) Harmonisation of laws

Opportunities

- (i) Laws dealing with all marriages (civil, customary, religious, by repute/permanent cohabitation) have been unified through the Marriage, Divorce and Family Relations Act No. 4 of 2015;
- (ii) Several pieces of legislation that need to be harmonised in order to expansively address early, child and forced marriage exist and are known.

Challenges

- (i) The lack of cohesiveness in several laws makes the battle against child marriage arduous;
- (ii) The harmonisation of marriage related laws will not have full impact unless it is matched by resources to ensure that relevant laws are extensively disseminated, accepted, respected and enforced in order to achieve transformation of cultural mind-sets.

b) Coordination mechanisms

Opportunities

- (i) The ministry responsible for gender and children is playing a strong leadership role by closely collaborating with other partners and chiefs in addressing child marriage;
- (ii) Following a high level commitment to eradicate child marriage by the State President, a campaign to eradicate child marriage has been launched at national level, and it is being decentralised to districts. A He4She Campaign was also recently launched in 2015.
- (iii) National structures to address child marriage exist through the child marriage working group; and the end child marriage network.

Challenges

- (i) Community level coordination is weaker, resulting in thinly spread interventions and continued prevalence of child marriage;
- (ii) Many interventions still lack a multi-sectoral outlook;
- (iii) Direct support for child marriage-related programmes to the ministry responsible for gender and children has been affected by cash gate, thus impacting on the efficiency of the delivery of child protection interventions at district level.

10.2 Advocacy-based recommendations

10.2.1 Legislative

a) Operationalisation of the Marriage, Divorce and Family Relations Act

Despite the few shortfalls that have been covered in this report (also in areas proposed for amendment under f) below), the Marriage, Divorce and Family Relations Act No. 4 of 2015 is a good step towards fighting early, child and forced marriage. Now that the State President has given assent to the act, the Ministry responsible for gender should be lobbied for the act to enter into operation as soon as possible through a ministerial announcement in the gazette. The ministry undertook to operationalise the act by end of August 2015,¹⁹⁶ so there is need for close follow-up so that necessary pressure is exerted if the self-imposed deadline is not met.

b) Scrapping of parental consent for a lower minimum age of marriage

Intensive advocacy should be carried for the immediate deletion of Section 22(7) of the Constitution of the Republic of Malawi (1994), which states that “for persons between the age of 15 and 18 years old, marriage shall only be entered into with the consent of their parents or guardians”. No parental consent should be allowed for boys and girls that are below 18 years old as a measure of addressing child marriage generally, and forced marriages that parents, but not children, want.

Alternatively, if a lower age is to be considered, there should be strict adherence to guidelines that are provided under Joint Recommendation/General Comment No. 31 of the CEDAW Committee and No. 18 of the CRC Committee (2014) that when exceptions to marriage at an earlier age are allowed in exceptional circumstances:

- a) The absolute minimum age should not fall below 16 years;
- b) The child/children who want to get married should appear before the court in person, and show that they are entering into the marriage with their full, free and informed consent; and

c) A judge should make a decision based on legitimate exceptional grounds that are defined by law and on the evidence of maturity of the party/parties, without deference to cultures and traditions.

c) Amending constitutional provision that mandate the State to ‘discourage’ child marriage

Advocacy should ensure that this constitutional provision is amended so that the State shoulders the undisputable duty to prohibit all child marriages without any concessions.

d) Standardisation of the definition of ‘child’ in different laws

As a preventative measure to early, child and forced marriage, advocacy should be conducted to reconcile the definition of child in different legal frameworks with the Marriage, Divorce and Family Relations Act No. 4 of 2015 and the Convention on the Rights of the Child. The definition of child should be amended from a person aged below 16 years to one aged below 18 years under the Constitution, the Child Care, Protection and Justice Act No. 22 of 2010 and the Penal Code (Chapter 7:01) of the Laws of Malawi.

e) Harmonisation of child marriage-related laws

Pursuant to the proposed checklist of how laws can be harmonised (Annex 3), advocacy and lobbying should concentrate on guaranteeing congruence between the following multi-sectoral areas of law and policy that are critical to addressing early, child and forced marriage: child protection, marriage, sexual conduct and sexual offences, child labour, education, sexual and reproductive health/comprehensive sexuality education, trafficking in persons, gender equality and access to justice.

f) Strengthening the Marriage, Divorce and Family Relations Act No. 3 of 2015

Experiences with the Prevention of Domestic Violence Act (Chapter 7:05) of the Laws of Malawi are that it is possible for a law that has some inherent deficiencies during its enactment to be immediately reviewed through the Malawi Law Commission. Therefore, when the act comes into operation, there is need to lobby the ministry responsible for gender to request a technical review of the act in order to address gaps that have been noted in this report. The review should seek to achieve the following:

196. Draft Responses to the list of issues and questions by the CEDAW Committee in relation to the Seventh Periodic Report of Malawi (June 2015).

- a) With a few exceptions, ensure that most of the provisions under the act are also applicable to existing marriages, unlike currently when it is only provisions regarding rights and obligations of spouses that are deemed to be generally applicable. This would ensure that the many young women that entered into child marriage before the act became operational have the complete protection of the more comprehensive law in all matters related to marriage, separation and divorce;
- b) Incorporate penalties for violations of rights and obligations of spouses;
- c) Apart from separation, broaden the scope of application for the crime of marital rape to other contexts within a marriage. For example, give meaning to provisions that limit a spouse's entitlement to sex from the other spouse under Section 48(7) by considering a violation of any aspects of this provision an act of marital rape. In addition, forced marriage that was made by arrangements of the male spouse and parents/guardians can be considered a form of marital rape if it was consummated.
- d) Include child marriage as a specific ground for nullification of a marriage in order to ensure that courts can entertain young women who want to invoke this ground and equally determine issues of custody and property that affect them as provided by the law;
- e) Even in the absence of a birth certificate, mandate a written declaration/proof of age of the parties during the registration process(es) in order to achieve more meaningful enforcement of the minimum age of marriage.
- f) Require awareness-raising of the public and capacity building of registration structures as a necessary and important measure to implement the law.

UN Women should also be lobbied to take interest in funding this type of law review.

10.2.2 Law enforcement and implementation

a) Institutionalisation of competent marriage registration systems

There is need to advocate for, and even support (technically and financially), the work to make the marriage registration system that has been established under the Marriage, Divorce and Family Relations Act No. 4 of 2015 functional. This will enable traditional officers, clerics and district councils that are

designated as registrars of marriages under the act to start performing their functions on the ground as a practical avenue to stop child marriage. Making these systems functional would require ensuring that:

- a) All registrars are knowledgeable of their roles under the law in order to **competently** discharge their functions under the act;
- b) Marriage registers and certificates are consistently available at all levels;
- c) Monitoring mechanisms are instituted in order to confirm that registration of all marriages is occurring as required;
- d) Communities are fully aware of the new marriage registration system.

In terms of technical and/or financial support, Plan and other stakeholders can offer this support in their respective impact districts in order to achieve a nationwide response.

b) Bolstering public awareness of the unification of marriage laws

An intensive countrywide public awareness campaign is necessary in order for rural and urban masses to understand the unification of marriage laws and ensure that the same standards will apply across all types of marriage in relation to the minimum age of marriage, free and full consent etc. The Marriage, Divorce and Family Relations Act No. 4 of 2015 should be simplified, translated into multiple languages and widely disseminated. Other forms of media to capture those that are illiterate should be employed.

c) Reinforcing human rights and gender approaches within the police and judiciary

A nationwide programme is needed in order to ensure that police and court personnel are very conversant with child marriage-related laws, human rights and gender dimensions of child marriage, and the negative impacts of the phenomenon. The ministry responsible for gender should be supported to develop child marriage modules that can be used in training justice system service providers countrywide, as well as to develop resource materials that these personnel can use in their daily work.

d) Promoting enforcement of criminal laws related to child marriage

Advocacy to ensure that the police and courts are applying laws against defilement, abduction, child betrothal, forced marriage and harmful practices with

the seriousness that they deserve is necessary. This can be achieved by building knowledge/awareness amongst victims of child marriage, engaging the structures, and providing incentives for both formal and informal justice delivery structures (eg formal recognitions/awards for prosecutions, convictions, marriage nullifications etc.).

e) Strengthening child marriage monitoring mechanisms in the justice delivery system

As part of strengthening access to justice within the police and judiciary, functional monitoring mechanisms to trace reporting, investigation, prosecution and quality of court judgements in child marriage-related cases should be established. The efforts by the ministry responsible for gender and UN Women to work with chiefs should put more focus on strengthening the monitoring of child marriages, early pregnancies, and violence against women and children in customary justice delivery structures. The Ministry of Local Government and Rural Development should be prominently part of these efforts.

f) Institutionalising/formalising the tracking of the implementation of treaty monitoring bodies

Advocacy is needed to ensure the presence of an organised mechanism to routinely disseminate and follow up on the multi-sectoral implementation of all recommendations of treaty monitoring bodies/UPR that are relevant to child marriage. Structures that can play a role in agitating for stronger mechanisms include the Child Rights Committee of NGOGCN and the End Child Marriage Network.

g) Allocating resources for the implementation of policies, strategies and laws related to child marriage

There should be strong advocacy to ensure that the national budget is funding various multi-sectoral interventions that are necessary in a holistic approach to combat child marriage. This report has isolated the need for investments to protect and promote quality girl education as prescribed under the National Girls Education Strategy (2014) and the Gender Equality Act No. 3 of 2013; the establishment of operational systems for registration of marriages; the education of marriage registration personnel and the public in the new marriage law; the promotion of adolescents' sexual and reproductive health; the development and strengthening of nationwide structures to address child marriage; the training of community structures and justice delivery systems etc. In particular, planning by

the Ministry of Local Government and Rural Development should commit adequate resources for addressing the issues of child marriage, early pregnancy, violence against women and children and harmful practices generally.

10.3 General

a) Developing a child marriage national action plan

Although a lot of work is going on, in order to meaningfully start reducing the current child marriage statistics, there is need to harmonise implementation through a well-coordinated child marriage action plan that all stakeholders can subscribe to. Advocacy can ensure that through this action plan:

- (i) The government and development partners would be able to track programmes by INGOs and NGOs to specific impact areas/districts, and know areas that are excluded so that nationwide coverage is better planned;
- (ii) Stakeholders would develop mechanisms that can enable implementers to better draw lessons from each other and replicate best efforts;
- (iii) District level and community structures and systems to address child marriage would be institutionalised and strengthened across the country;
- (iv) Implementation of various multi-sectoral laws and policies would be better adopted as part of standard child marriage responses (eg related to education, sexual and reproductive health, inheritance, criminal justice);
- (v) An implementation strategy for aspects of the Marriage, Divorce and Family Relations Act No. 4 of 2015 that closely relates to child marriage would be developed. These aspects include public awareness, education/training of registrars, availability of resources for registration (materials and infrastructure, where necessary).

b) Advocate for successful programme models to be adopted at national level

This report has shown, for example, that the Gender Equality and Women Empowerment Programme being coordinated by the ministry responsible for gender, is witnessing some successful innovations to address child marriage and associated problems through its implementing partners in 13 districts. Similarly, Plan Malawi's systems approach to child protection has the potential to consolidate community level interventions.

Table 4: Key recommendations at a glance

LEGISLATIVE ADVOCACY	LAW ENFORCEMENT AND IMPLEMENTATION	OTHER RECOMMENDATIONS
<p>Advocate for the Ministry responsible for gender to operationalise the Marriage, Divorce and Family Relations Act, and follow up on the Ministry's commitment to achieve this task by end of August 2015.</p>	<p>Advocate for, and even support (technically and financially), the work to make the marriage registration system that has been established under the Marriage, Divorce and Family Relations Act No. 4 of 2015 functional.</p>	<p>Advocate for the harmonisation of the implementation of all child marriage related activities through a well-coordinated child marriage action plan that all stakeholders can subscribe to.</p>
<p>Intensify advocacy for the immediate deletion of section 22(7) of the Constitution so that no parental consent should be allowed for boys and girls that are below 18 years.</p>	<p>Strengthen public awareness of the unification of marriage laws under the Marriage, Divorce and Family Relations Act No. 4 of 2015 through a systematic campaign. Simplified, translated versions of the Act and illiteracy friendly methods should be widely utilised.</p>	<p>Advocate for successful programme models to be adopted at national level. Such interventions include those occurring under the Gender Equality and Women Empowerment Programme, and Plan Malawi's systems approach to child protection.</p>
<p>Advocate for the amendment of the constitutional provision that mandate the State to 'discourage' child marriage to that the wording bestows on the State the undisputable duty to prohibit all child marriages without any concessions.</p>	<p>Support the Ministry responsible for gender to develop child marriage modules that can be used in training justice system service providers countrywide, as well as to develop resource materials that these personnel can use in their daily work.</p>	
<p>If at all lower age of marriage is to be considered, advocate for constitutional and statutory amendments for the stringent exceptional conditions that are spelt out under Joint Recommendation/General Comment No. 31 of the CEDAW Committee and No. 18 of the CRC Committee (2014) to be clearly stipulated in the law.</p>	<p>Advocate for the diligent enforcement of criminal laws related to child marriage, eg for building knowledge/awareness amongst victims of child marriage, engaging the structures, and providing incentives for both formal and informal justice delivery structures (eg formal recognitions/awards for prosecutions, convictions, marriage nullifications etc.).</p>	
<p>Push for the standardisation of definition of 'child' in the Constitution, the Child Care, Protection and Justice Act No. 22 of 2010, and the Marriage, Divorce and Family Relations Act No. 4 of 2015.</p>	<p>Advocate for and support the establishment of functional monitoring mechanisms within the police/court systems in order to trace reporting, investigation, prosecution and quality of court judgements in child marriage. Also ensure that stronger monitoring mechanisms exist through chiefs at local levels.</p>	

Table 4: cont

LEGISLATIVE ADVOCACY	LAW ENFORCEMENT AND IMPLEMENTATION	OTHER RECOMMENDATIONS
<p>Strengthen advocacy and lobbying efforts towards ensuring congruence between multi-sectoral laws and policies that are critical to addressing early, child and forced marriage, eg those related to child protection, marriage, sexual conduct and sexual offences, child labour, education, sexual and reproductive health/comprehensive sexuality education, trafficking in persons, gender equality and access to justice.</p>	<p>Advocate for (eg through the Child Rights Committee of NGOGCN and the End Child Marriage Network) an organised mechanism to routinely disseminate and follow up on the multi-sectoral implementation of all recommendations of treaty monitoring bodies/UPR that are relevant to child marriage.</p>	
<p>Lobby, through agencies such as UN Women and the ministry responsible for gender, for the technical review of the Marriage, Divorce and Family Relations Act No. 3 of 2015 in order to, with a few exceptions: make the act unequivocally applicable to all marriages; incorporate penalties for violations of rights and obligations of spouses; broaden the scope of application for the crime of marital rape in order to other contexts within a marriage; include child marriage as a specific ground for nullification of a marriage; mandate a written declaration/proof of age of the parties during the registration process(es) in order to achieve more meaningful enforcement of the minimum age of marriage; and to require awareness raising of the public and capacity building of registration structures as a necessary and important measure to implement the law.</p>	<p>Strengthen advocacy to ensure that the national budget is funding various multi-sectoral interventions that are necessary in a holistic approach to combat child marriage. Examples of areas of investment are the implementation of National Girls Education Strategy (2014); the Gender Equality Act No. 3 of 2013; the establishment of operational systems for registration of marriages; the education of marriage registration personnel and the public in the new marriage law; the promotion of adolescents' sexual and reproductive health; the development and strengthening of nationwide structures to address child marriage; the training of community structures and justice delivery systems etc. The budget of the Ministry of Local Government should also display commitment to addressing issues of child marriage, early pregnancy, violence against women and children, and child marriage generally.</p>	

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ANNEX 1: INTERVIEW TOOL

Name:

Institutional Affiliation of Key Informant:

Position/Designation of Key Informant:

Notes:

- (a) The statements in this tool are to be rated using the scale below.
- (b) An explanation of key informants' assessment for all statements in the tool will be appreciated.
- (c) Key informants will only rate all statements that are within their area of expertise, and ignore those that are not. If the tool is being administered directly by an interviewer, she/he will exercise discretion on areas of assessment that are suitable for any particular key informant.

RATING SCALE

- 1. No evidence
- 2. Negligibly (only anecdotal or sporadic)
- 3. Partially (solid but incomplete steps take)
- 4. Fully

CORE ASSESSMENT ISSUE:	RATING: Indicate current situation				Explanation (i.e. Limiting factors, strengthening factors, recommendations)
	1	2	3	4	
1. Implementation of treaty monitoring body/UPR recommendations					
1.1. There is clarity on who has the responsibility for coordinating the implementation of all treaty monitoring body/UPR recommendations related to child, early and forced marriages					
1.2 All treaty monitoring body/UPR recommendations related to child, early and forced marriages are systematically disseminated to all concerned sectors and stakeholders					
1.3. All treaty monitoring body/UPR recommendations related to child, early and forced marriages are known by all concerned sectors and stakeholders					

1.4. There is a coherent strategy for implementing all treaty monitoring body/UPR recommendations related to child, early and forced marriages					
1.5. There is a coherent strategy for monitoring the implementation of all treaty monitoring body/UPR recommendations related to child, early and forced marriages.					
1.6. There is a strong system for documenting the implementation of all treaty monitoring body/UPR recommendations related to child, early and forced marriages.					
2. Harmonisation of laws	1	2	3	4	Explanation (i.e. Limiting factors, strengthening factors, recommendations)
2.1 The following laws are relevant to holistically addressing child, early and forced marriage					
a) By-laws governing traditional and/or cultural practices					
b) Minimum age of sexual conduct/ consent at both custom and statute					
c) Child Labour					
d) Education/Re-admission					
e) Sexual and reproductive health					
f) Trafficking					
g) Access to justice					
h) Gender Equality					
i) Other					
2.2. There is a strategy to harmonise all laws related to child, early and forced marriage					
3. Access to justice (Formal Courts)	1	2	3	4	Explanation (i.e. Limiting factors, strengthening factors, recommendations)
3.1 Judicial officers have adequate awareness of laws that apply to child, early and forced marriage					

3.2 Judicial officers have adequate awareness of the impacts of child, early and forced marriage					
3.3 Courts currently handle complaints of child, early and forced marriage					
3.4 Complaints of child, early and forced marriage are brought by:					
a) Victims of child, early and forced marriage					
b) Parents/Guardians of victims					
c) NGOs					
d) Other					
3.5 Legal penalties for addressing child, early and forced marriage are adequate					
3.6 Cases of child, early and forced marriage often end up in conviction					
3.7 Victims of child, early and forced marriage are linked to psycho-social services					
4. Access to justice (Police)	1	2	3	4	Explanation (i.e. Limiting factors, strengthening factors, recommendations)
4.1 Police/Victim Support Officers have adequate awareness of laws that apply to child, early and forced marriage					
4.2. Officers have adequate awareness of the impacts of child, early and forced marriage					
4.3 Police/Victim Support Units handle complaints of child, early and forced marriage					
4.4 Complaints of child, early and forced marriage are brought by:					
a) Victims of child, early and forced marriage					
b) Parents/Guardians of victims					
c) NGOs					
d) Other					
4.5 Legal penalties for addressing child early and forced marriage are adequate					

4.6 Police often refer cases of child, early and forced marriage to court for prosecution					
4.7 Cases of child, early and forced marriage often end up in conviction					
4.8 Victims of child, early and forced marriage are linked to psycho-social services					
5. Access to justice (Community structures)	1	2	3	4	Explanation (i.e. Limiting factors, strengthening factors, recommendations)
5.1 There is an existence of community structures to address child, early and forced marriage					
5.2 Community structures comprise traditional leaders and religious leaders					
5.3 Community structures receive the support of traditional and religious leaders					
5.4 Community structures strongly involve males					
5.5 Community structures have adequate awareness of laws that apply to child, early and forced marriage					
5.6 Community structures have adequate awareness of the impacts of child, early and forced marriage					
5.7 There is a strong system of referral of cases of child, early and forced marriage to Police and Court systems					
5.8 Cases of child, early and forced marriage often end up in prosecution and conviction					
6. Influencing factors (religion)	1	2	3	4	Explanation (i.e. Limiting factors, strengthening factors, recommendations)
6.1 Religion plays a significant role in promoting child marriage					
6.2 Religion plays a significant role in reinforcing the elimination of child marriage					

6.3 Religious factors that undermine child marriage can best be addressed by:					
a) Statutory laws					
b) Engagement					
c) Civic awareness					
d) Other					
7. Influencing factors (tradition)	1	2	3	4	Explanation (i.e. Limiting factors, strengthening factors, recommendations)
7.1 Tradition plays a significant role in promoting child marriage					
7.2 Tradition plays a significant role in reinforcing the elimination of child marriage					
7.3 Tradition factors that undermine child marriage can best be addressed by:					
a) Statutory laws					
b) Engagement					
c) Civic awareness					
d) Other					
8. Awareness and Coordinating Mechanisms	1	2	3	4	Explanation (i.e. Limiting factors, strengthening factors, recommendations)
8.1 Mechanisms to address child marriage are systematic and well-coordinated					
8.2 Mechanisms to create citizen awareness on child, early and forced marriages are systematic and well-coordinated					
8.3 There is collaboration between the Ministry responsible for gender/children, UN agencies, NGOs and civil society to create awareness on child, early and forced marriages					
8.4 There are mechanisms to encourage and accommodate children's voices in interventions					
8.5 There is consensus amongst collaborating stakeholders on the minimum age of marriage for both girls and boys					

9. Interventions and impact	1	2	3	4	Explanation (i.e. Limiting factors, strengthening factors, recommendations)
9.1 Interventions, campaigns and strategies on child, early and forced marriages re well informed by research evidence					
9.2 Interventions on child, early and forced marriages are purposefully informed by international standards and recommendations of treaty monitoring bodies/UPR					
9.3 Interventions child, early and forced marriages are targeted at:					
a) Formal legal systems					
b) Traditional systems					
c) Religious systems					
d) School systems					
e) General communities					
f) Other					
9.4 There is an impact of interventions related to child, early and forced marriages on:					
a) School drop- out rates					
b) Retention of girls in Std 8					
c) Retention of girls in Secondary schools					
d) School readmission (of girls who were previously married)					
e) Access to sexual and reproductive health services by adolescent girls					
f) Eradication of traditional and religious practices					
g) Modification of traditional and religious practices					
h) Other					

ANNEX 2: LIST OF KEY INFORMANTS

Name of Institution	Person Interviewed	Position
Malawi Human Rights Commission	Peter Chisi	Director
Youth Empowerment and Civic Education (YECE)	Tisungane Nanthoka	Project Coordinator
Youth Net and Counselling	Charles Banda	Program Manager
National Youth Council	Promise Matatiyo	Programme Officer
Judiciary	Zione Ntaba	High Court Judge
Judiciary	Maxon Mbendera, SC	Supreme Court Judge
Ministry of Education	Manifred Ndovi	Spokesperson
Girls Empowerment Network	Joyce	Program Coordinator
Catholic Commission for Justice and Peace	Elita Yobe	Gender and Civic Education Coordinator
UNICEF	Alexander Mwale	Child Protection Officer
Ministry of Justice	Apoche Itimu	Senior State Advocate
FAWEMA	Thokozani Phiri	Project Officer
Ministry of Gender	Andrew Nkhoma	Social Welfare Officer
Ministry of Gender	Harry Satumba	Social Welfare Officer

ANNEX 3: PROPOSED CHECKLIST FOR THE HARMONISATION OF LAWS THAT ARE RELEVANT TO CHILD MARRIAGE

Marriage and family relations

- Does the law prescribe at least a minimum age of marriage at 18 for both girls and boys?
- Does the law prescribe consequences for persons violating this provision by sanctioning or conducting an early marriage?
- Does the law provide for voidness or other civil consequences/remedies for child victims of early marriage, enabling them to resile from the marriage?
- Does the law apply to all forms of marriage – civil, customary and religious? Or are there at least laws governing both civil and customary marriages, even though they may not be dealt with in one enactment?
- Does the law require the registration of all marriages for validity, including customary and religious marriages?
- Does the law prohibit forced marriage and prescribe that all marriages must be entered into with full and free informed consent of the parties?
- Does the law prescribe consequences for violating the prohibition on forced marriage?
- Does the law prohibit pledging or betrothal of children or giving them out in engagement as a precursor to marriage?
- Has the law removed all exceptions to the minimum age of marriage, such as ministerial consent or authorisation by a court or religious or customary authority?
- Does the law provide for redress (compensation, access to services, psychosocial support) for victims of child marriages?
- Does the law provide adequately for the maintenance/support of wives and children born of child marriages that are dissolved?
- Does the law provide for the equality of spouses within marriage?
- Does the law prohibit the betrothal of children below the age of 18 years?

Sexual conduct

- Does the law prescribe a minimum age for sexual debut which corresponds to or is lower than the minimum age of marriage?
- Does the law avoid criminalising teenage sexual contraventions of the minimum age of sexual debut (consensual sexual activity between teenagers should not attract criminal responses)?
- Does the law provide equally for boys and girls as regards the minimum age for sexual debut?
- Does the law provide a minimum age for sexual debut at which consent is presumed impossible and any sexual act with the child constitutes rape?
- Does the law prohibit the withdrawal of rape charges if the perpetrator agrees to marry the victim?
- Does the law sufficiently distinguish between consensual sexual activity (defilement) and non- consensual sexual activity with teenagers?
- Does the law criminalise marital rape?

Child Labour

- Does the law provide a minimum age for child labour set no lower than 15 years?
- Does this prohibition apply to child labour in the formal and informal sector?
- Does the law prohibit forced labour?
- Does the law sufficiently domesticate the ILO Convention on the Worst Forms of Child Labour, especially the prohibition on all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, insofar as this is in particular relevant to early child and forced marriage (article 3(a))?

Education

- Does the law provide for free education at primary level? And secondary level?
- Does the law provide a minimum number of years of compulsory schooling?
- Is the final year of compulsory schooling no lower than the minimum age of entry into the workforce?
- Are sanctions prescribed for parents who fail to send their children to school in the face of the provision of free education, especially adolescent girl children?
- Is there a national law, policy or regulation concerning pregnant girls or girls who have given birth that eschews expulsion and allows them to complete their schooling?
- Is there a law, policy regulation or directive that provides for sexual and reproductive health education in schools as part of the curriculum?

Sexual and reproductive health

- Does the law provide an age, which approximates the age at which teenagers mature sexually, for access to sexual and reproductive health services without parental consent?
- Does the law provide for free access to contraception and other reproductive health services?
- Does the law provide for access to termination of pregnancy for teenagers without parental consent?
- Does the law guarantee confidentiality of sexual and reproductive health services provided to teenagers, except where instances of sexual abuse require reporting to authorities?
- Does the law sufficiently accommodate the needs for sexual and reproductive health services of children with disabilities?

Trafficking

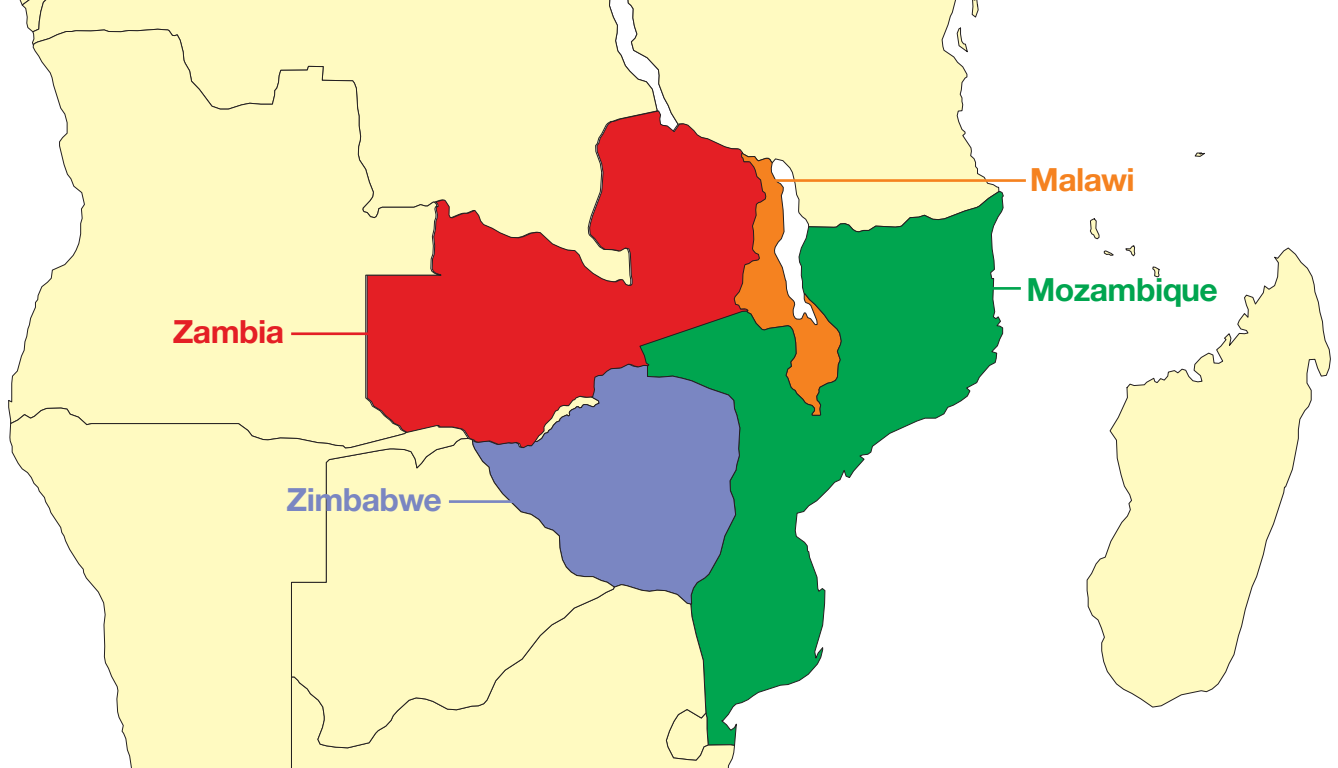
- Does the law criminalise trafficking on women and children, and adequately domesticate the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime (1980)?
- Are penalties for contraventions sufficiently severe?

Access to justice

- Does the law provide for dedicated/specialised units and courts for violations to be investigated and violators to be prosecuted?
- Does the law provide for children to independently lodge complaints of violations, without parental consent or assistance?
- Does the National Human Rights Institution have a dedicated children's desk and mechanism for receiving complaints by children?
- Are child friendly justice principles given authority in law, policy regulations and training, including regarding statement taking from children, the provision of evidence by children, court set up when children testify, privacy and confidentiality?

Desirable:

- Is the prohibition on child marriage sanctioned by a constitutional provision which is justiciable in a court of law?
- Is the equality of spouses within marriage given constitutional status in such a way that this is justiciable?
- Is the prohibition on forced labour sanctioned by a constitutional provision which is justiciable in a court of law?



The 18+ Programme on Ending Child Marriage in Southern Africa is hosted at:

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