



Violence Against Women: A Comparative Analysis Between Malawi and South Africa

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Abstract

The United Nations defines violence against women as any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering. Violence against women is among the world's most systematic and ubiquitous human rights violations. The use of violence against women, unlike many other forms of violence, is neither arbitrary nor indiscriminate. On the contrary, violence against women is ingrained in the social, religious and moral fibres of society. In Malawi and South Africa, like many of their counterparts in Sub-Saharan Africa, women and girls are subjected to various forms of violence, such as sexual violence, domestic violence, harmful cultural practices and violence in relation to maternal healthcare and reproductive rights. As a result, Malawi and South Africa through their constitutions and various national laws have adopted measures that aim at preventing and combatting violence against women. Furthermore, Malawi and South Africa are State Parties to a wide range of international human rights instruments, which aim to protect and promote women's rights. These international instruments include but are not limited to the Declaration on the Elimination of Violence against Women, the Convention on the Elimination of All Forms of Discrimination against Women and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. Despite the existence of the abovementioned legal mechanisms, however, violence against women remains a widespread occurrence in both Malawi and South Africa. Accordingly, this article aims to discuss various forms of violence against women and their prevalence in Malawi and South Africa. The article analyses the current legal framework on violence against women in both Malawi and South Africa in order to

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determine their effectiveness and make recommendations.

1 INTRODUCTION

The United Nations identifies violence against women as a problem that transcends racial, cultural, religious, geographical and economic borders.¹ Violence against women is arguably the most widespread form of abuse known to man. The various forms of violence suffered by women in Malawi and South Africa include, but are not limited to, sexual violence, domestic violence, harmful cultural practices and violence in relation to maternal healthcare and reproductive rights.²

In response, many countries including Malawi and South Africa have ratified several international human rights instruments protecting the rights of both women and girls. In addition, the two countries have enacted various national laws aimed at combatting violence against women. Nevertheless, the violation of women's rights in Malawi and South Africa continues unabated.³

This article discusses violence against women as a global occurrence and investigates the extent to which the forms of violence suffered by women in Malawi and South Africa are addressed by constitutional and legislative measures as well as international law. The article identifies the strengths and weaknesses in promoting and protecting women's rights in Malawi and South Africa and concludes with viable recommendations on what can be done to ameliorate violence against women.

2 VIOLENCE AGAINST WOMEN AS AN INTERNATIONAL ISSUE

Violence against women is among the world's most systematic and ubiquitous human rights violations.⁴ The use of violence against women, unlike many other forms of violence, is neither arbitrary nor indiscriminate. On the contrary, violence against women is ingrained in the social, religious and moral fibres of society.⁵

The United Nations defines violence against women as "any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering."⁶ In terms of this definition, violence against women includes threats of acts of violence, coercion or arbitrary deprivation of liberty in both public and private life.⁷ Furthermore, the terms "violence against women" and "gender-based violence" are often used interchangeably.⁸

Malawi and South Africa have both ratified several international human rights instruments protecting the rights of both women and girls. However, this article refers largely to the Declaration on the Elimination of Violence against Women, the Convention on the Elimination of All Forms of Discrimination against Women and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (hereinafter referred to as the Maputo Protocol).⁹

In addition to the above stated instruments, Malawi and South Africa have democratic constitutions and internal laws, which promote women's rights and acknowledge their obligations under international law.¹⁰ However, in Malawi and South Africa, like many of their counterparts in the Sub-Saharan Africa, women and girls are subjected to various forms of

1 United Nations Office on Drugs and Crime "Violence against Women and Children" <http://www.unodc.org/southernafrica/en/vaw> (accessed 22-09-16).

2 Institute for Security Services "Monograph 41: Violence against Women In Metropolitan South Africa: A Study On Impact and Service Delivery by Sandra Bollen, Lillian Artz" <https://www.issafrica.org/publications/monographs/monograph-41-violence-against-women-in-metropolitan-south-africa-a-study-on-impact-and-service-delivery-by-sandra-bollen-lillian-artz> (accessed 22-02-16).

3 Decker *et al* "Sexual Violence among Adolescent Girls and Young Women in Malawi" 2018 *BMC Public Health* 341; IOGT International "South Africa: Violence against Women at Crisis Level" <http://iogt.org/news/2017/09/07/south-africa-violence-women-crisis-level/> (accessed 02-02-19).

4 UN Women "Defining Violence against Women and Girls" <http://www.endvawnow.org/en/articles/295-defining-violence-against-women-and-girls.html> (accessed 2017-05-09).

5 *Ibid.*

6 Convention on the Elimination of All Forms of Discrimination against Women, 1979.

7 *Ibid.*

8 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2003.

9 Was ratified by Malawi on 20/05/2005 and South Africa on 17/12/2004.

10 See section 39 of the Constitution of the Republic of South Africa, 1996 and section 11 of the Constitution of the Republic of Malawi, 1994.

violence, such as sexual violence, domestic violence, harmful cultural practices and violations of their maternal healthcare and reproductive rights.¹¹

The South African Constitutional Court case of *Carmichele v The Minister for Safety and Security*¹² provides a clear example of how easily women's rights can be violated. The *Carmichele* case dealt with the brutal attack of a woman by a man with a known history of sexual violence, whom the police and prosecutor had released without bail, and the Constitutional Court recognised the state's liability for negligent omissions of such nature by its officials.¹³ In reaching at this decision, the Constitutional Court emphasised the need to protect the fundamental rights of women such as equality, human dignity and freedom.¹⁴ Furthermore, in *Van Eeden v Minister of Safety and Security*¹⁵ the court recognised the state's obligation to protect women from violent crimes. This duty on states was internationally recognised in the case of *Velasquez Rodriguez v Honduras*.¹⁶

In addition to the aforementioned cases, Malawi and South Africa have attempted to combat violence against women through various legislative measures. Nevertheless, Malawi and South Africa continue to fall short with respect to the implementation of legislation due to poor enforcement mechanisms and inadequate reporting standards.¹⁷ For example, studies conducted in South Africa have revealed that one in every four South African women is in an abusive relationship and that every six days a woman is murdered by her husband or partner.¹⁸ Among the cases that have confirmed the gravity of violence against women in South Africa are *S v Pistorius*, *S v Dewani* and *Panayiotou v S*.

In the above cases, which attracted unprecedented publicity in the trial courts, all the accused persons were found responsible for the brutal killing of their deceased partners. For example, the *S v Pistorius*¹⁹ case involved a human tragedy where an Olympian who became an international celebrity, began a romantic relationship with a young woman, Reeva Steenkamp who was a law graduate and a successful model. Ironically, on Valentine's Day 2013, Oscar Pistorius, shot and brutally killed Reeva at his home in a secured complex alleging that he had believed she was an intruder.²⁰

The killing of women by intimate partners as seen in the abovementioned case is alarmingly common and has even been referred to as "femicide".²¹ It has been revealed that in South Africa at least 21 per cent of women over 18 years of age have experienced violence orchestrated by their partners.²² This indicates how urgently the criminal justice system ought to effectively address the issue of violence against women.

11 United Nations Office on Drugs and Crime "Violence against Women and Children" <http://www.unodc.org/southernafrica/en/vaw> (accessed 22-09-16).

12 *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) 62.

13 *Carmichele v Minister of Safety and Security* 62.

14 *Ibid.*

15 *Van Eeden v Minister of Safety and Security* 2003 1 SA 389 (SCA) 13.

16 4 Inter Am Ct HR Ser C No 4 1988; The Inter-American Court found that the failure by state officials to protect the victim from violence amounted to violations of the right to life, the right to human treatment and the right to liberty (para 194).

17 Mullick, Teffo-Menziwa, Williams and Jina "Women and Sexual Violence: Reflections on the Millennium Development Goals" 2010 *South African Health Review* 50; Bisika "Do Social and Cultural Factors Perpetuate Gender-based Violence in Malawi?" 2008 *Gender and Behaviour* 1886.

18 Institute for Security Services "Monograph 41"; see also *S v Pistorius* (CC113/2013) [2014] ZAGPPHC 793; *S v Dewani* (CC15/2014) [2014] ZAWCHC 18; *Panayiotou v S* (CA&R 06 /2015) [2015] ZAECGHC 73.

19 *S v Pistorius* (CC113/2013) [2014] ZAGPPHC 793.

20 *Director of Public Prosecutions, Gauteng v Pistorius* (96/2015) [2015] ZASCA 204 para 2.

21 Hopkins "Government Action on Femicide Goes Wrong from the Bottom Up" 22 May 2017 <https://mg.co.za/article/2017-05-22-00-government-action-on-femicide-goes-wrong-from-the-bottom-up> (accessed 10-05-18).

22 IOL "Femicide, a South African Curse" 4 May 2018 <https://www.iol.co.za/the-star/news/femicide-a-south-african-curse-14780746> (accessed 08-05-18).

Although South Africa has the highest ratio of reported rape cases per 100 000 people in the world, only nine per cent of the rape cases that take place in South Africa are reported to the police.²³ In March 2015, a similar study was carried out by the United Kingdom's Department for International Development (DFID), United Nations Children's Emergency Fund (UNICEF) and the Ministry of Gender, Children, Disability and Social Welfare in Malawi. It was revealed that one in every five Malawian girls falls victim to sexual abuse before the age of 18.²⁴ The study further revealed that violence against women is considered a social norm in Malawi, with 42 per cent of young women believing that it is acceptable for men to beat their wives under certain circumstances.²⁵ In a study carried out by Together for Girls²⁶ on sexual violence against children and young women in Malawi, it was found that while 61 per cent of girls told someone about their experience of sexual violence, only nine per cent received any help or services.²⁷

Apart from sexual and domestic violence, women in developing countries such as Malawi and South Africa are subjected to other forms of violence; for instance, pregnancy and reproductive healthcare related violence, which have been perceived as the biggest cause of death among girls aged between 15 and 19.²⁸ Moreover, there are a number of harmful cultural practices in the two countries such as child marriages, female genital mutilation (FGM) and sexual cleansing, *inter alia*, which are violent in nature and have resulted in an increase in the victims' exposure to HIV/AIDS and maternal mortality rates.²⁹

3 VIOLENCE AGAINST WOMEN WITHIN THE LEGAL CONTEXT

In line with the aim of this article, which is to analyse the law relating to violence against women in Malawi and South Africa, this section highlights the various international human rights provisions that apply to Malawi and South Africa.

Firstly, the 1948 Universal Declaration of Human Rights provides that "everyone is entitled to all the rights and freedoms set forth in the Declaration". The rights and freedoms included in the Declaration apply irrespective of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.³⁰

Furthermore, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) defines discrimination against women as gender-based distinctions or exclusions, which "[have] the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women of human rights and fundamental freedoms".³¹ Moreover, the Convention on the Elimination of All Forms of Discrimination against Women and General Recommendation No 19 on Violence against Women states that, "gender-based violence may be in breach of specific provisions of the Convention, regardless of whether those provisions expressly mention violence."³² General Recommendation No 19 provides further that "states may be responsible for private acts if they fail to act with due diligence to prevent violations of women's rights or investigate and punish acts of violence".³³

23 Institute for Security Services "Monograph 41".

24 UNICEF "Malawi, 24 March 2015: New Study Reveals Violence against Children Widespread" http://www.unicef.org/esaro/5440_mlw2015_new-study.html (accessed 22-02-16); see also *Republic v Peter* (65 of 2008) [2008] MWHC 168.

25 UNICEF "Malawi, 24 March 2015: New Study Reveals Violence against Children Widespread" http://www.unicef.org/esaro/5440_mlw2015_new-study.html (accessed 22-02-16); see also *Republic v Tangwe* (38 of 2007) [2007] MWHC 10.

26 Is an international partnership which was established in 2009 with the view of ending violence against children, particularly sexual violence against girls. It brings together governments, United Nations agencies and private organisations to prevent and respond to such violence, as a fundamental step to protecting the individual's fundamental rights, their well-being, gender equality and sustainable development.

27 Together for Girls "Report Violence against Children and Young Women In Malawi Findings from A National Survey 2013" http://www.togetherforgirls.org/wp-content/uploads/2017/10/MLW_resources_violencereport_final.pdf (accessed 02-02-19).

28 Klugman "Women's Health and Human Rights: Public Spending on Health and the Military One Decade after the African Maputo Protocol" 2014 *African Human Rights Law Journal* 34.

29 Bisika *Gender and Behaviour* 1886.

30 Article 2 of the Universal Declaration of Human Rights 1948.

31 Article 1 of the Convention on the Elimination of All Forms of Violence against Women, 1979.

32 CEDAW General Recommendation No. 19: Violence against Women.

33 CEDAW General Recommendation No. 19: Violence against Women.

In addition, the 1999 Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women has made it possible for victims to bring complaints directly to the Committee, where the Committee is empowered to investigate gross women's rights violations and adjudicate such matters brought before it, as shown in the case of *AT v Hungary*.³⁴

In *AT v Hungary*, which was the first domestic violence case the Committee heard, a woman, whose partner systematically abused her, received no protection or alternative housing from the government and was made to wait three years before her matter was heard before the Hungarian courts. Accordingly, the Committee held that Hungary had failed to fulfil its obligations and had violated the rights of the victim in terms of Articles 2, 5 and 16 of the Convention on the Elimination of All Forms of Discrimination against Women.³⁵ This case has set a precedent for all State Parties to the CEDAW and reaffirmed their obligation to provide protection from violence against women in accordance with international human rights standards.³⁶ Another noteworthy instrument with regard to violence against women is the Declaration on the Elimination of Violence against Women.

While the Declaration on the Elimination of Violence against Women (DEVAW), as a declaration by the UN General Assembly, does not possess the binding legal force of a treaty or convention, it remains a widespread and important source of principle among the international community.³⁷ The DEVAW defines violence against women as any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life.³⁸ In addition to the aforementioned international human rights instruments, several human rights instruments apply to Malawi and South Africa on a regional level, including the Maputo Protocol and the SADC Declaration.

The Maputo Protocol defines violence against women as all acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat to take such acts. This definition extends to both public and private spheres, and during both times of peace and times of war.³⁹

The Maputo Protocol is imperative in the field of women's rights in that it is the first human rights instrument to call explicitly for the eradication of female genital mutilation.⁴⁰ In addition, the Maputo Protocol has addressed women's rights within the context of the HIV/AIDS pandemic. Furthermore, the Protocol is the first human rights instrument to make provision for the right to have an abortion in cases of rape, incest and where the continued pregnancy poses a danger to the life of the mother.⁴¹ In the SADC region, the SADC Declaration requires State Parties to put in place legal measures, education programmes, and services aimed at preventing violence against women.⁴²

4 FORMS OF VIOLENCE AGAINST WOMEN: A COMPARATIVE ANALYSIS BETWEEN SOUTH AFRICA AND MALAWI

As mentioned above, violence against women takes a variety of forms. However, this article is limited to a discussion of violence against women in the form of sexual violence that include: rape, violence against women in schools and higher education institutions (HEIs), domestic violence, harmful cultural practices, and violence in relation to maternal healthcare and reproductive rights.

It is important to note from the outset that, whilst the above stated forms of violence against women as discussed in this article are subdivided into various sections and subsections

34 CAT/C/22/D/062/1996, UN Committee against Torture (CAT) 11 June 1999 <http://www.refworld.org/cases,CAT,3f588eda7.html> (accessed 15 June 2017).

35 Banda 2008 *African Human Rights LJ* 18.

36 Tackling Violence against Women "AT v Hungary" <http://blogs.lse.ac.uk/vaw/landmark-cases/a-z-of-cases/at-v-hungary/> (accessed 06-10-16).

37 The Advocates for Human Rights "DEVAW" <http://www.stopvaw.org/devaw> (accessed 06-10-16).

38 Article 1 of the Declaration on the Elimination of Violence against Women, 1993.

39 Article 1 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2003.

40 Pambazuka News "The Maputo Protocol: Evaluating Women's Rights" <http://www.pambazuka.net/en/category.php/features/94934> (accessed 10-04-16).

41 *Ibid.*

42 Addendum to the SADC Declaration on Gender and Development: Prevention and Eradication of Violence against Women and Children.

for practical reasons, many of them have similar characteristics and overlap as far as the laws surrounding them are concerned. Accordingly, the body of law relating to violence against women is better viewed in its entirety as discussed hereunder.

4 1 Sexual Violence

The 2002 World Health Organization (WHO) Report on Violence and Health defines sexual violence as “any sexual act, attempt to obtain a sexual act, unwanted sexual comments or advances using coercion, threats of harm or physical force”. Acts of sexual violence are criminalised and punished under national legal systems, as they constitute direct attacks on the most basic of human rights.⁴³

4 1 1 Rape

Rape is the most longstanding form of sexual violence.⁴⁴ However, despite it being the oldest form of sexual violence, rape was only defined as a crime under international law in 1998 by the International Criminal Tribunal for Rwanda (ICTR) Trial Chamber in the case of *The Prosecutor v Jean Paul Akayesu*.⁴⁵ Since this judgment, the definition of rape as an international crime has been developed and expanded by the International Criminal Court to include the following elements:

1. The Perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body, and
2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment or the invasion was committed against a person incapable of giving genuine consent.⁴⁶

In light of the recognition of rape as an international crime, the need to combat rape and other forms of sexual violence has been affirmed by various international legal instruments including the DEVAW. Accordingly, Article 4 of the DEVAW requires all State Parties to condemn acts of violence against women.⁴⁷

Within the South African context, rape is defined in terms of the Criminal Law (Sexual Offences and Related Matters) Amendment Act as unlawfully and intentionally committing an act of sexual penetration against a complainant without their consent.⁴⁸ Sexual penetration is widely defined by the Act as:

Any act which causes penetration to any extent whatsoever by the genital organs of one person into or beyond the genital organs, anus, or mouth of another person; any other part of the body of one person or, any object, including any part of the body of an animal, into or beyond the genital organs or anus of another person; or the genital organs of an animal, into or beyond the mouth of another person.⁴⁹

In the South African case of *S v Chapman*,⁵⁰ Mahomed CJ, the presiding judge affirmed that “the rights to dignity, to privacy, and the integrity of every person are basic to the ethos of the Constitution” and that the courts therefore have a duty to uphold these rights when deciding on matters involving rape.

On the contrary, the Malawian Penal Code, under section 132, retains the old English

43 Le Roux and Yves “The Status of Acts of Violence in International Criminal Law” 2009 *South African Journal of Criminal Justice* 69.

44 *Ibid.*

45 *The Prosecutor v Jean Paul Akayesu*, Chamber I, Case No ICTR 96 4 T, Decision of 2 September 1998, 597 687.

46 Article 7(1) of the International Criminal Court, Elements of Crimes, 2011.

47 The Declaration on the Elimination of Violence against Women.

48 32 of 2007.

49 *Ibid.*

50 (345/96) [1997] ZASCA 45.

common law definition in providing that:

Any person who has unlawful carnal knowledge of a woman or girl, without her consent, or with her consent if the consent is obtained by force or means of threats or intimidation of any kind, or by fear of bodily harm, or by means of false representations as to the nature of the act, or in the case of a married woman, by personating her husband, shall be guilty of the felony termed rape.⁵¹

In the context of the Malawian Penal Code, sexual violence and rape are defined narrowly in comparison to the international and South African positions. As a result, the Malawian definition of rape fails to take into account societal developments and the various forms of rape that occur today, including marital rape.

4.1.2 Marital Rape

Marital rape is a form of rape involving unwanted sexual acts by one spouse against another without their consent.⁵² In terms of the English common law followed by many countries, including Malawi and South Africa, husbands were exempt from prosecution for raping their wives.⁵³ In the British case of *R v Clarence* the approach taken by the court was as follows:

The wife submits to her husband's embraces because at the time of the marriage she gave him an irrevocable right to her person. The intercourse, which takes place between a husband and wife after marriage is not by virtue of any special consent on her part but is mere submission to an obligation imposed on her by law. Consent is immaterial.⁵⁴

Hence, up until the enactment of the 1993 Prevention of Family Violence Act⁵⁵ which criminalised marital rape; husbands in South Africa could not be found guilty of raping their wives.⁵⁶ However, the introduction of the Prevention of Family Violence Act⁵⁷, has made South Africa one of the first African countries to criminalise marital rape.⁵⁸

Surprisingly, the Malawian law only recognises rape outside of marriage.⁵⁹ This was confirmed in the case of *Moffat v Moffat*⁶⁰ where a husband had non-consensual sexual intercourse with his wife. Furthermore, in *R v Mwasomola* the court held that a wife could not lawfully deny her husband sexual intercourse.⁶¹ Clearly, the position which were adopted by the Malawian courts in the cases of *Moffat* and *Mwasomola* contravened Article 4 of the DEVAW which required Malawi as a Member State to condemn the acts of violence against women.

It is acknowledged in this article that the issue of marital rape in Malawi has been addressed to some extent by the Marriage, Divorce and Family Relations Act, which was passed by parliament in 2015.⁶² For example, the Act provides that non-consensual sexual intercourse with a spouse will amount to marital rape where the spouses concerned are separated.⁶³ This must be viewed as a stepping stone towards combating violence against women, however, the application of the provisions of Marriage, Divorce and Family Relations Act remains uncertain.

51 Chapter 7:01 of the Laws of Malawi.

52 Hasday "Contest and Consent: A Legal History of Marital Rape" 2000 *California Law Review* 2.

53 *Ibid.*

54 1888 22 QB 23.

55 133 of 1993.

56 Open Society Initiative for South Africa "Marital Rape in South Africa" <http://www.osisa.org/buwa/south-africa/marital-rape-south-africa> (accessed 09-05-16).

57 133 of 1993.

58 Open Society Initiative for South Africa "Marital Rape in South Africa".

59 *Ibid.*

60 Case 10 of 2007 11.

61 4 ALR (Mal) 572.

62 Nyasa Times "The Marriage, Divorce and Family Relations Bill Passed by Parliament" <http://www.nyasatimes.com/2015/02/17/malawi-marriage-divorce-and-family-relations-bill-passed-by-parliament/> (accessed 23-04-15).

63 The Marriage, Divorce and Family Relations Act, 5 of 2015.

4 2 Sexual Violence in Schools and Higher Learning Institutions

It has been contended that men tend to use violence in order to establish dominance over women within educational establishments and other similar institutional structures.⁶⁴ For example, in a study conducted by DFID in Malawi revealed that teachers have propositioned more than half of the girls in Malawi's public school system, and that girls often fall pregnant as a result of sexual abuse by their teachers.⁶⁵ Correspondingly, a study conducted by Human Rights Watch in South Africa revealed that their teachers had raped a third of the reported child rape victims.⁶⁶ It must be emphasised that in terms of the Convention on the Rights of the Child, the DEVAW, Maputo Protocol, South African and Malawian Constitutions and other internal laws in the form of Acts of Parliament, sexual violence against women in schools and higher learning institutions is a serious problem that amounts to gross violation of human rights.

Notably, teachers are not the only perpetrators of sexual violence in schools and HEIs. Likewise, women and girls also fall victim to rape by fellow students.⁶⁷ This has recently been brought to the forefront in the context of HEIs in South Africa following student protests against what is being referred to as "The Rape Culture at Rhodes University".⁶⁸ It has been reported that during the period between January and April 2016 alone over 20 female students at Rhodes University fell victim to rape by fellow students at the University.⁶⁹ Similarly, 10 schoolboys appeared in court in Durban on 1 February 2016, after having been charged with gang-raping a 15-year-old schoolmate.⁷⁰

Sexual violence in schools and HEIs is expressly prohibited by the Convention on the Rights of the Child (CRC)⁷¹ and the DEVAW,⁷² which all require children and women, respectively, to be afforded protection against discrimination and place an obligation on schools to protect the students in their care. Furthermore, the CEDAW calls on State Parties "to take all appropriate measures to eliminate discrimination against women in order to ensure equal rights with men in the field of education".⁷³ In addition, the Maputo Protocol deals with sexual violence in schools and HEIs by calling on State Parties to take all appropriate measures to protect women, especially the girl-child, from all forms of abuse, including sexual harassment in schools and other educational institutions.⁷⁴

Within the South African context, these rights are protected by section 9 of the Constitution,⁷⁵ Criminal Law (Sexual Offences and Related Matters) Amendment Act,⁷⁶ which extensively reviewed and amended all aspects of the laws and the implementation of the laws relating to sexual offences. For example, common-law crimes such as rape and indecent assault were replaced by broad statutory crimes. Moreover, the Children's Act was enacted to give effect to children's rights⁷⁷ and the South African Schools Act⁷⁸ requires schools to admit students and educate them free from all forms of discrimination. Furthermore, the South African case of *S v Zothile* recognised the duty on schools to protect learners against sexual violence.⁷⁹

The Malawian Constitution provides for the protection of children from any treatment that

64 McFadden *et al Southern Africa in Transition: A Gendered Perspective* (1998) 42.

65 Benigner "Combating Sexual Violence in Schools in Sub-Saharan Africa: Legal Strategies under Regional and International Human Rights Law" 2013 *African Human Rights LJ* 284.

66 *Ibid.*

67 See Benigner *African Human Rights LJ* 284.

68 See The Daily Vox "South Africa: Rhodes University has a Rape Problem. Why?" (22 April 2016) <http://allafrica.com/stories/201604221238.html> (accessed 09-05-16). News 24 "10 Boys in Durban Court for School Gang-rape" <http://www.news24.com/SouthAfrica/News/10-boys-in-durban-court-for-school-gang-rape-20160209> (accessed 31-07-16).

69 The Daily Vox "Rhodes University Has a Rape Problem".

70 News 24 "10 Boys in Durban Court".

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

72 Article 2 of the Declaration on the Elimination of Violence against Women, 1993.

73 Article 10 of the Convention on the Elimination of All Forms of Discrimination against Women, 1979.

74 Article 12(1) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2003.

75 The Constitution of the Republic of South Africa, 1996.

76 32 of 2007, which extensively reviewed and amended all aspects of the laws and the implementation of the laws relating to sexual offences,

77 38 of 2005.

78 84 of 1996.

79 (SS57/08)[2008] ZAGPHC 288 (12 May 2008) para 19.

interferes or is likely to interfere with education.⁸⁰ Moreover, the 1962 Malawian Education Act provides for a complaints procedure as well as the shutdown of schools where “the school is being conducted in a manner detrimental to the physical, mental or moral welfare of the pupils”.⁸¹ However, the Act⁸² has been criticised for being outdated and unable to address the needs of the contemporary society.⁸³

Accordingly, whilst Malawi and South Africa have both criminalised rape, South Africa provides an updated and inclusive definition of the crime, while Malawi retains the outdated common-law definition of rape. Furthermore, South Africa criminalised marital rape through the Prevention of Family Violence Act⁸⁴ whilst Malawi has only passed legislation; which in itself provides only limited relief by making provision for the recognition of marital rape between separated spouses.⁸⁵

In addition, although Malawi and South Africa provide constitutional as well as legislative protection against sexual violence in schools and HEIs, Malawi’s 1962 Education Act, which was enacted before Malawi’s independence, is heavily criticised for being outdated and failing to address the issues of modern society.⁸⁶

4.3 Domestic Violence

Domestic violence involves violence between married couples as well as other members of the household.⁸⁷ Studies have revealed that over 90 per cent of domestic violence is carried out by men against women.⁸⁸ The South African Domestic Violence Act provides what Meyersfeld refers to as one of the most progressive definitions of domestic violence.⁸⁹ The Act defines domestic violence as follows:

(a) physical abuse; (b) sexual abuse; (c) emotional, verbal and psychological abuse; (d) economic abuse; (e) intimidation; (f) harassment; (g) stalking; (h) damage to property; (i) entry into the complainant’s residence without consent, where the parties do not share the same residence; or (j) any other controlling or abusive behaviour towards a complainant, where such conduct harms, or may cause imminent harm to, the safety, health or wellbeing of the complainant.⁹⁰

In terms of the above definition, domestic violence involves, *inter alia*, physical, sexual, emotional, financial as well as psychological abuse. Furthermore, children can be described as the “hidden victims” of domestic violence as there is often a link between violence towards mothers and their resultant abusive parenting.⁹¹ There are various national and international laws concerning domestic violence in Malawi and South Africa whose application remains contentious.

The DEVAW prohibits acts of violence irrespective of whether they occur in the public or private spheres such as within the household.⁹² Whilst the CEDAW does not contain an express provision on domestic violence, discrimination against women includes gender-based violence and it specifically provides for the elimination of discrimination against women in marriage and family relations.⁹³ In this regard, Meyersfeld argues that certain forms of domestic violence, such as violence against female cohabitants, must also be considered violations of

80 Section 23(4) of the Constitution of the Republic of Malawi, 1994.

81 Chapter 30:01 of The Laws of Malawi.

82 The Education Act, Chapter 30:01 of The Laws of Malawi.

83 Civil Society Education Coalition (CSEC) “CSEC Campaign for the New Education Act” <http://csecmw.org/uploads/CSEC%20Edu%20Act%20-%20media%20brief.pdf> (accessed 05-07-16).

84 133 of 1993.

85 Nyasa Times “The Marriage, Divorce and Family Relations Bill Passed by Parliament” <http://www.nyasatimes.com/2015/02/17/malawi-marriage-divorce-and-family-relations-bill-passed-by-parliament/> (accessed 23-04-15).

86 CSEC “CSEC Campaign”

87 The Free Dictionary “Domestic Violence” <http://legal-dictionary.thefreedictionary.com/Domestic+Violence> (accessed 04-04-16).

88 Hague and Malos *Domestic Violence: Action for Change* (1998) 4.

89 Meyersfeld “Reconceptualizing Domestic Violence In International Law” 2003 *Albany Law Review* 378.

90 Section 1 of the Domestic Violence Act, 116 of 1998.

91 Harne and Radford *Tackling Domestic Violence* (2008) xi.

92 Banda 2008 *African Human Rights LJ* 18.

93 Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, 1979; Article 16 of the Convention on the Elimination of All Forms of Discrimination Against Women, 1979.

international human rights law.⁹⁴ Such contention is based on the fact that, where a state fails to protect a vulnerable group of people such as women from harm, whether perpetrated by the state or individual persons, such state is in breach of its obligations to protect against human rights violations. In other words, a state should be held accountable under the doctrine of the "Responsibility to Protect"⁹⁵ recognisable under international law for not protecting women against all forms of domestic violence.

Similar provisions can be found in the Maputo Protocol.⁹⁶ In addition to these international instruments, Malawi and South Africa have national laws aimed at addressing domestic violence.

Domestic violence in South Africa is prohibited in terms of the Constitution⁹⁷ as well as the Domestic Violence Act;⁹⁸ as a result, special family courts exist to deal with domestic violence related cases.⁹⁹ In the case of *S v Baloyi*, the court recognised that domestic violence infringes the fundamental right to be free from violence and that the South African government is under an obligation in terms of international law to combat it in all its forms.¹⁰⁰

Correspondingly, domestic violence in Malawi is dealt with under the Constitution¹⁰¹ as well as the Prevention of Domestic Violence Act, which provides for the appointment of enforcement officers to enforce judgments in domestic violence cases.¹⁰² In the case of *Vaux v Vaux*, where a husband had repeatedly subjected his wife to acts of domestic violence, the court referred directly to its obligations under Article 3 of the DEVAW. Article 3 provides that women are "entitled to the equal enjoyment and protection of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."¹⁰³ The court therefore granted the petitioners prayer for dissolution of marriage.

From the above, it is evident that Malawi and South Africa both make provision for legal protection against domestic violence. However, it is apparent that both Malawi and South Africa need to take steps to improve the application of the above provisions. Evidence of this lies in the fact that South Africa's Domestic Violence Act¹⁰⁴ is criticised for not providing police officers with adequate gender sensitivity training and for not being readily accessible to victims.¹⁰⁵ Correspondingly, the Prevention of Domestic Violence Act¹⁰⁶ in Malawi has been criticised for providing poor gender sensitivity training to enforcement officers, for not making provision for co-operation between its enforcement officers and the judiciary and for being inaccessible to victims in the rural areas.¹⁰⁷

While unequal power relations in the family have been identified as a cause of violence against women in the form of domestic violence,¹⁰⁸ cultural practices are also among the factors that can contribute to violence against women.¹⁰⁹ Consequently, the following section discusses the various harmful cultural practices that women in Malawi and South Africa fall victim to.

94 Meyersfeld *Domestic Violence* (2008).

95 International Commission on the Intervention and State Sovereignty Report *The Responsibility to Protect* (2001) <http://responsibilitytoprotect.org/ICISS%20Report.pdf>. The doctrine advocates that sovereign states have a responsibility to protect their own citizens from avoidable violence including all forms of violence against women.

96 Article 4 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2003.

97 See Article 12 of the Constitution of the Republic of South Africa, 1996.

98 116 of 1998.

99 Gibson-McCray and Upchurch "Treatment of Women and Domestic Violence in Africa" 2015 *Journal of Gender, Information and Development in Africa* 58.

100 (CCT29/99) [1999] ZACC 19.

101 The Constitution of the Republic of Malawi, 1994.

102 5 of 2006.

103 (9 of 2006) [2007] MWHC 127.

104 116 of 1998.

105 Artz and Smythe "Bridges and Barriers : A Five Year Retrospective on the Domestic Violence Act" 2005 *Acta Juridica: Advancing Women's Rights: The First Decade of Democracy* 205.

106 5 of 2006.

107 Kanthambi *More Than Advice: An Analysis of the Implementation of Counselling as an Effective Remedy for Women Complainants of Domestic Violence as Provided for by The Prevention of Domestic Violence Act, 2006, In Malawi* (Unpublished Master's Thesis, University of Zimbabwe) 2010 50.

108 Church "Constitutional Equality and the Position of Women in a Multi-cultural Society" 1995 *Comparative and International Law Journal of Southern Africa* 291.

109 Pickup et al *Ending Violence against Women: A Challenge for Development and Humanitarian Work* (2000)15.

4.4 Harmful Cultural Practices

Within the Malawian and South African perspectives, gender inequalities are to a large extent embedded in cultural, religious and societal practices.¹¹⁰ Child marriages, female genital mutilation and sexual cleansing are among the commonly occurring harmful practices identified by this article.

The aforementioned practices involve the violation of fundamental human rights and freedoms and as such are prohibited by international law. For instance, the CEDAW requires State Parties to “take all appropriate measures to modify the social and cultural patterns of men and women.”¹¹¹ In addition, Malawi and South Africa have made attempts to prohibit such harmful cultural practices through various domestic laws.

Section 30 of the South African Constitution promotes cultural rights but simultaneously recognises the need to protect women’s rights in spite of cultural norms and traditions. Thus, section 30 stipulates: “everyone has the right to use the language and to participate in the cultural life of their choice, but, no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights, particularly section 30 of the Constitution.”¹¹² Furthermore, section 36 of the Constitution provides for the limitation of rights subject to the proviso that they are limited in a manner that is reasonable and justifiable in an open and democratic society, based on human dignity, equality and freedom.¹¹³ Moreover, section 8 (d) of the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (PEPUDA) prohibits any cultural practice which impairs the dignity of women and undermines equality.¹¹⁴

The Constitution of Malawi does not expressly subordinate the right to culture or other rights, which creates room for abuse.¹¹⁵ The corresponding provision of the Malawian Constitution, namely section 26, merely states that, “every person shall have the right to use the language and to participate in the cultural life of his or her choice.”¹¹⁶ Therefore, the right to practice one’s culture and women’s rights to dignity, bodily integrity and equality, often clash.¹¹⁷ This interrelationship between culture and women’s rights is evident in a number of harmful cultural practices, one of which is child marriage.

4.4.1 Child Marriage

Child marriages are a form of forced marriage. Forced marriages involve the absence of informed consent from at least one of the parties.¹¹⁸ According to the UN, a child marriage is a union before the age of 18.¹¹⁹ Kamyongolo and Malunga advance that child marriages typically arise because of financial difficulty as well as the perceived relationship between puberty and maturity.¹²⁰

Child marriages are strictly prohibited by the Maputo Protocol, which provides that “no marriage shall take place without the free and full consent of both parties and the minimum age of marriage for women shall be 18 years.”¹²¹

110 *Ibid.*

111 Article 5 of the Convention on the Elimination of All Forms of Discrimination against Women, 1979.

112 The Constitution of the Republic of South Africa, 1996.

113 *Ibid.*

114 The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

115 Mwambene “Marriage under African Customary Law in the Face of the Bill of Rights and International Human Rights Standards in Malawi” 2010 *African Human Rights LJ* 78-79.

116 The Constitution of the Republic of Malawi, 1994.

117 Mwambene 2010 *African Human Rights LJ* 85.

118 The Advocates for Human Rights “Definition of Forced Marriage” http://www.stopvaw.org/definition_of_forced_marriage_3 (accessed 22-03-16).

119 UNICEF “Child Protection from Violence, Exploitation and Abuse” http://www.unicef.org/protection/57929_58008.html (accessed 22-03-16).

120 Kamyongolo and Malunga “The Treatment of Consent in Sexual Assault Law in Malawi” <http://theequalityeffect.org/wp-content/uploads/2013/04/consent-paper-Malawi-NK.pdf> (accessed 22-03-16).

121 Article 6 of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, 2003.

Protection against child marriage is also specifically dealt with at an international level in terms of the Convention on the Consent to Marriage, Minimum Age for Marriage and Registration of Marriage, which South Africa has ratified but Malawi has not.¹²² Furthermore, Article 12 of the CRC states that, "a girl child has the right to express her views freely in all matters affecting her."¹²³

Child marriages are particularly prevalent in Malawi and are dealt with under section 23(4) of the Malawian Constitution, which protects children from economic exploitation, or hazardous treatment that is likely to interfere with their education, health or physical, mental, spiritual or social development.¹²⁴ This provision was until recently¹²⁵ to a large extent curtailed by section 22(8) which did not prohibit, but merely discouraged the marriage of an individual younger than 15 years.¹²⁶ However, on 14 February 2017 Malawi made a historic amendment to its Constitution¹²⁷ to outlaw fully child marriage.

In South Africa, child marriages are prevalent among the *Zulu* and *Bapedi* cultures.¹²⁸ However, in the case of *Christian Education of South Africa v Minister of Education*, the Constitutional Court of South Africa held that cultural and religious rights cannot be used to defend practices that violate the Bill of Rights.¹²⁹ Child marriages in South Africa encroach upon the rights provided for by the Constitution, the Children's Act,¹³⁰ the Criminal Law (Sexual Offences and Related Matters) Amendment Act¹³¹ and the Recognition of Customary Marriages Act.¹³²

Section 3(1) of the Recognition of Customary Marriages Act states that in order for a customary marriage entered into after the commencement of the Act to be valid, the prospective spouses must both be older than 18 years and must both give consent to each other under customary law. Furthermore, the marriage must be negotiated and entered into or celebrated in accordance with customary law. Nevertheless, a discrepancy lies in the wording of section 3(3) which provides that where a spouse is a minor, her parents have the power to consent to the marriage.¹³³

In *Jezile v S*, an appeal case heard by the High Court, a 28-year-old man abducted and took as his wife a 14-year-old girl against her will but with the consent of her uncle.¹³⁴ She was then raped numerous times and forcibly relocated to Cape Town. In his defence the appellant relied on the legally recognised customary practice of *ukuthwala* which entails the kidnapping of young girls and forcing them into marriage, often with the consent of their parents or uncles. The Court upheld the convictions of rape and human trafficking. In reaching its decision the Court brought various experts to testify on the requirements of the *ukuthwala* custom and the Court relied on the fact that the appellant did not follow the proper *ukuthwala* custom which requires the bride's consent to show that the convict had in fact raped and trafficked the victim.¹³⁵ Notably however, no mention was made of the legality of the practice itself or its contribution to child marriages and violence against women. In light of the above, it is apparent that South Africa must take decisive steps towards structuring its laws to prohibit child marriages even in cases where the child's parents consent.

4 4 2 Female Genital Mutilation

FGM can be defined as the cutting, partial or total removal of the external female genitalia for cultural, religious, or other non-medical reasons.¹³⁶ FGM causes both physical and psychological

122 Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, 1962.

123 Convention on the Rights of the Child, 1989.

124 The Constitution of the Republic of Malawi, 1994.

125 Plan International "Malawi Changes Law to End Child Marriage" <https://plan-international.org/news/2017-02-14-malawi-changes-law-end-child-marriage> (accessed 25-05-17).

126 The Constitution of the Republic of Malawi, 1994.

127 The Constitution of the Republic of Malawi, 1994.

128 Velani "Forced Child Marriage Practiced Under the Pretext of Customary Marriage in South Africa" 2014 *Child Abuse Research in South Africa* 52.

129 (CCT4/00) [2000] ZACC 11.

130 38 of 2005.

131 32 of 2007.

132 120 of 1998.

133 120 of 1998.

134 (A 127/2014) 2015 ZAWCHC.

135 *Ibid.*

136 The Free Dictionary "Female Genital Mutilation" <http://medical-dictionary.thefreedictionary.com/>

harm and violates the rights to non-discrimination, health, as well as bodily integrity.¹³⁷

The MHRC has revealed that FGM is secretly conducted in certain parts of Malawi's southern region. FGM in Malawi is viewed as a rite of passage, with 89 per cent of the respondents stating that it is carried out on girls between the ages of 10 and 15.¹³⁸ The removal of the genitalia is done by a *Namkungwi* (elderly woman or counsellor), who uses her fingernails to remove the organ by pinching and severing it under conditions that are neither sterile nor hygienic.¹³⁹

FGM in South Africa is practiced by members of the *Venda* tribe in the north-east of the country.¹⁴⁰ It is practiced not only as a form of initiation, but also as part of a post-natal traditional ceremony called *Muthuso*. *Muthuso* involves cutting the vaginal flesh and mixing it with oils and powders in order to cure what is known as *Goni*, a swelling on the back of the child's head.¹⁴¹

The practice of FGM is in violation of various instruments of international law that protect women's rights. The Maputo Protocol, which was the first international instrument to deal specifically with FGM, requires State Parties to take legislative and other necessary measures aiming at prohibiting FGM; through legislation as well as sanctions, all forms of female genital mutilation, scarification, medicalisation and para-medicalisation must be eradicated.¹⁴²

In compliance with its international human rights obligations, South Africa has outlawed FGM through the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (PEPUDA). Section 8(b) of the PEPUDA prohibits discrimination on the grounds of gender in the form of FGM.¹⁴³ Malawi, however, has failed to comply with its obligations under the Maputo Protocol and continues to reject recommendations by the UNCHR to criminalise FGM.¹⁴⁴

4 4 3 Sexual Cleansing

Sexual cleansing is practiced among certain cultures as a form of female initiation ritual, or rite of passage into adulthood. Sexual cleansing is a ritual that is aimed at teaching girls how to engage in sexual acts. It involves female children being made to have unprotected sex with selected future husbands, relatives or professional cleansers or "hyena men".¹⁴⁵ Whilst sexual cleansing is more commonly practiced in Malawi, it has also been reported in certain parts of South Africa.¹⁴⁶ Due to the perceived relationship between the onset of puberty and adulthood in African society, girls as young as nine years old are expected to undergo this form of initiation.¹⁴⁷

Sexual cleansing is particularly dangerous in light of the prevalence of HIV/AIDS in Malawi and South Africa as well as the health risks associated with underage pregnancies.¹⁴⁸ While the centuries-old practice has traditionally been cloaked in secrecy, recent reports, as well as the arrest of a professional widow cleanser in Malawi, have brought sexual cleansing and its human

female+genital+mutilation (accessed 12-04-16).

137 Center for reproductive rights "Female Genital Mutilation (FGM): Legal Prohibitions Worldwide" <http://www.reproductiverights.org/document/female-genital-mutilation-fgm-legal-prohibitions-worldwide> (accessed 13-04-16).

138 Malawi Human Rights Commission "Cultural Practices and their Impact on the Enjoyment of Human Rights, Particularly the Rights of Women and Children in Malawi" http://www.mwfountainoflife.org/files/4413/9395/3331/cultural_practices_report.pdf (accessed 21-03-16).

139 All Africa "Malawi: Female Genital Mutilation Being Conducted on the Quiet with Young Girls Exposed to Infections and to HIV" <http://allafrica.com/stories/200602130979.html> (accessed 21-03-16).

140 Kitui "Female Genital Mutilation in South Africa" <https://africlaw.com/2012/06/07/female-genital-mutilation-in-south-africa/> (accessed 13-03-16).

141 *Ibid.*

142 Article 5(b) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2003.

143 4 of 2000.

144 Parliamentary Campaign "Stop Violence against Women: Female Genital Mutilation" <http://www.ipu.org/wmn-e/fgm-prov-m.htm> (accessed 11-03-16).

145 BBC News "Malawian 'Hyena Man' Arrested for Having Sex with Children" <http://www.bbc.com/news/world-africa-36892963> (accessed 31-07-16).

146 BMC Public Health "Sexual Behaviour of Women in Rural South Africa: A Descriptive Study" <http://mcpublichealth.biomedcentral.com/articles/10.1186/s12889-016-3207-6> (accessed 22-09-16).

147 Kamyongolo and Malunga "The Treatment of Consent in Sexual Assault Law in Malawi".

148 BBC News "Malawian 'Hyena Man' Arrested".

rights implications to the forefront.¹⁴⁹

Sexual cleansing violates various international as well as national laws in Malawi and South Africa. Article 12 of the CRC states that, "a girl child has the right to express her views freely in all matters affecting her".¹⁵⁰ Furthermore, Article 5 of the Maputo Protocol calls on State Parties to prohibit and condemn all harmful practices, which negatively affect the rights of women and are contrary to recognised international standards.¹⁵¹ In addition, DEVAW requires states to "condemn violence against women and not invoke any custom, tradition or religious consideration to avoid their obligations with respect to its elimination."¹⁵²

While the laws of both Malawi and South Africa recognise the rights of both women and children,¹⁵³ neither country currently has legislation in place dealing specifically with sexual cleansing which is a particularly harmful form of sexual violence. Nevertheless, the arrest and conviction of a professional cleanser in Malawi in November 2016 is indicative of the prohibition of the practice in the country. On the contrary, it has been submitted that the two-year sentence he was given is not sufficient as a punishment or as a deterrent to other hyena men involved in the practice.¹⁵⁴

Therefore, while South Africa can be commended for placing a constitutional restriction on cultural rights where they violate women's rights as seen in *Christian Education of South Africa v Minister of Education*,¹⁵⁵ there is a clear discrepancy in the minimum marriage age. Furthermore, it has been reported that sexual cleansing occurs in certain parts of South Africa and as such legislative provision must be made for its prohibition.

On the other hand, Malawi has significantly more progress to make in this regard starting with creating a constitutional mechanism that subordinates cultural rights to women's rights and recognising and outlawing the practice of FGM. Whilst Malawi has entered its first conviction of sexual cleansing, taking into account the nature and consequences of the crime, the provision of a two-year sentence is not sufficient as neither a punishment nor a deterrent.

4.5 Maternal Health Care and Reproductive Rights

Maternal healthcare and reproductive rights are an integral component of the universal right to physical and mental health.¹⁵⁶ The creation of barriers to maternal health and reproductive rights can constitute a form of violence against women. It violates, among others, the rights to health, bodily integrity, dignity, and the right to be free from torture.¹⁵⁷ The prevalence of HIV and AIDS, sexually transmitted infections, maternal mortality as well as the procurement of unsafe abortions, make maternal healthcare and reproductive rights particularly significant in Africa.¹⁵⁸

At the international level, the Maputo Protocol states that parties shall ensure that the right to health of women, including sexual and reproductive health is respected and promoted.¹⁵⁹ This provision includes various rights such as the right to be informed on the status of one's partner and the right to pre- and post-natal care. Article 14 further provides for medical abortions subject to certain requirements. In addition, Malawi and South Africa give effect to the right to maternal and reproductive healthcare through various national laws.

Section 27(1)(a) of the South African Constitution provides that everyone has the right to adequate healthcare. Furthermore, section 27(2) places an obligation on the state to "take reasonable legislative and other measures, within its available resources, to achieve the

149 *Ibid.*

150 Convention on the Rights of the Child, 1989.

151 The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2003.

152 Article 4 of the Declaration on the Elimination of Violence against Women, 1993.

153 Section 9 of The Constitution of the Republic of South Africa, 1996; section 23 of The Constitution of the Republic of Malawi, 1994.

154 News Deeply "Hyena Man Trial Exposes 'Sexual Cleansing' Rituals In Rural Malawi" <https://www.newsdeeply.com/womenandgirls/articles/2017/01/09/hyena-man-trial-exposes-sexual-cleansing-rituals-rural-malawi> (accessed 25-05-17).

155 (CCT4/00) [2000] ZACC 11.

156 Article 25 of the Universal Declaration of Human Rights, 1948.

157 United Nations Human Rights Office of the High Commissioner "Sexual and Reproductive Health and Rights" <http://www.ohchr.org/EN/Issues/Women/WRGS/Pages/HealthRights.aspx> (accessed 06-10-16).

158 Balogun and Durojaye "The African Commission On Human and Peoples' Rights and the Promotion and Protection of Sexual and Reproductive Rights" 2010 11 *African Human Rights LJ* 370.

159 Article 14 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2003.

progressive realisation of this right”.¹⁶⁰ Moreover, section 12(2) states that “everyone has the right to bodily and psychological integrity, which includes the right to make decisions concerning reproduction”.¹⁶¹

The right to healthcare and reproductive healthcare in particular, was dealt with in the landmark South African case of *Minister of Health v Treatment Action Campaign*.¹⁶² This case dealt with the provision of the drug Nevirapine to HIV positive expectant mothers. The court applied the reasonableness test developed in the case of *The Government of the Republic of South Africa v Grootboom*¹⁶³ and held that, limiting the provision of the drug to pilot programmes in selected hospitals fell short of the reasonableness requirement provided for by the Constitution.¹⁶⁴ The *Treatment Action Campaign* case¹⁶⁵ therefore affirmed the justiciability of the right to healthcare in South Africa.¹⁶⁶ However, despite the fact that South Africa’s reproductive and maternal healthcare laws are among the most progressive in the world, the current level of maternal mortality in South Africa is far higher than the target of 38 per 100 000 live births by 2015 set by the Millennium Development Goals.¹⁶⁷

The corresponding provision in the Malawian Constitution is section 30, which deals with the right to development and includes access to basic healthcare.¹⁶⁸ Unlike the position in South Africa however, socio-economic rights in Malawi are not directly enforceable in courts. Instead, they constitute fundamental objectives and directives of state policy.¹⁶⁹ The non-justiciability of this right in Malawi, coupled with the extensive misappropriation of resources by government officials,¹⁷⁰ has led to the violation of women’s rights to healthcare. As of now, Malawi has one of the highest maternal mortality rates in the world. According to UNICEF, one in every 36 women in Malawi dies as a result of childbirth.¹⁷¹

Maternal and reproductive rights include the right to choose to terminate pregnancy. Malawi is yet to make provision for this right in accordance with Article 14 of the Maputo Protocol, thus the procurement and performance of abortions remains a criminal offence in terms of the Penal Code.¹⁷² The failure by government to decriminalise abortions in Malawi has therefore exasperated the issues surrounding unsafe abortions and maternal deaths. Parliament attempted to address maternal and reproductive healthcare related issues through the Gender Equality Act,¹⁷³ which contains the right to choose whether to have a child. However, this right is yet to be given legislative effect as the Termination of Pregnancy Bill¹⁷⁴ continues to be contested by various religious groups and has not yet been approved by Parliament.¹⁷⁵

On the other hand, South Africa has made provision for the right to abortion in terms of the Choice on Termination of Pregnancy Act,¹⁷⁶ which sets out the circumstances under which women in South Africa may have pregnancies terminated.

South African law makes provision for the justiciability of socio-economic rights such as the right to healthcare in order to ensure state compliance with its obligation to take reasonable

160 The Constitution of the Republic of South Africa, 1996.

161 *Ibid.*

162 (2002) 5 SA 721.

163 (CCT11/00) [2000] ZACC 19.

164 Section 27(2) of the Constitution of the Republic of South Africa, 1996.

165 *Minister of Health v Treatment Action Campaign* (2002) 5 SA 721.

166 Sebenzile *The Treatment Action Campaign (TAC) Case As A Model For The Protection Of The Right To Health In Africa, With Particular Reference to South Africa and Cameroon* (Unpublished LLM thesis, Catholic University of Central Africa) 2005 26.

167 African Health Observatory “MDG Goal 5: Improve Maternal Health” http://www.aho.afro.who.int/profiles_information/index.php/South_Africa:MDG_Goal_5:_Improve_maternal_health (accessed 02-02-2019).

168 The Constitution of the Republic of Malawi, 1994.

169 Ibe “Beyond Justiciability: Realising The Promise of Socio-Economic Rights in Nigeria” 2007 7 *African Human Rights LJ* 225.

170 IRIN News “Government Corruption Cripples Malawi’s Health Sector” <http://www.irinnews.org/report/98990/government-corruption-%E2%80%9Ccripples%E2%80%9D-malawis-health-sector> (accessed 31-07-16); BBC News “‘Cash Gate’ – Malawi’s Murky Tale of Shooting and Corruption” <http://www.bbc.com/news/world-africa-25912652> (accessed 31-07-16).

171 UNICEF “Statistics” http://www.unicef.org/infobycountry/malawi_statistics.html (accessed 05-07-16).

172 Chapter 7:01 of the Laws of Malawi.

173 6 of 2013.

174 2015.

175 The Maravi Post “Malawi’s Termination of Pregnancy Bill; Why We Need Separation of Church, State on Abortion Laws” <http://www.maravipost.com/malawis-termination-of-pregnancy-bill-why-we-need-separation-of-church-state-on-abortion-laws/> (accessed 02-02-19).

176 92 of 1996.

measures and the progressive realisation of the right. On the other hand, the right to healthcare in Malawi is not justiciable. Moreover, Malawi's refusal to decriminalise abortions continues to encourage the procurement of unsafe abortions and the country's high maternal mortality rate. The adoption of the Termination of Pregnancy Bill¹⁷⁷ would therefore improve the current situation significantly.

Notably, human rights which include maternal healthcare and reproductive rights cannot be viewed in isolation. Reproductive rights in Malawi and South Africa for example, are to a large extent, compromised by the various forms of violence used against women, for instance rape and FGM. Therefore, in order to protect reproductive rights, work must be done elsewhere to protect women from the various human rights violations that contribute to the infringement of reproductive rights.

5 CONCLUSION AND RECOMMENDATIONS

The central question posed by this article is whether the existing legal framework is effective enough to combat violence against women in Malawi and South Africa. In response, this article has identified the need for a multi-faceted approach towards the implementation of the law on violence against women in Malawi and South Africa, as well as the need for legal reform, particularly within the Malawian context. Furthermore, it has been noted from the comparative analysis that the current legal framework in South Africa is structured in such a way that it is markedly more comprehensive than that of Malawi.

The comparative analysis and discussion section contains a number of key findings concerning violence against women in Malawi and South Africa. Firstly, this article has revealed that Malawi needs to update its definition of rape from the old English common law in order to facilitate the effective prosecution of rape as a crime in contemporary society. A good example of such an updated definition is the definition of rape contained in South Africa's Criminal Law (Sexual Offences and Related Matters) Amendment Act.¹⁷⁸ In addition, marital rape is yet to be recognised comprehensively under Malawian law, as the current position is that rape can only take place within a marriage where the spouses are separated.

Whilst South Africa has made major strides in terms of providing an inclusive definition of rape and acknowledging marital rape as a crime in terms of the Prevention of Family Violence Act,¹⁷⁹ which has since been repealed under Schedule 4 of the Children's Act,¹⁸⁰ it faces major challenges with respect to reporting and implementation. Uncertainty regarding what constitutes rape is among one of the major causes of the lack of reporting.¹⁸¹ Accordingly, there is a need to educate women on the various forms of sexual violence as well as how and to whom to report should such violations occur. Moreover, a multi-sector approach involving police and community training on post-rape care should be adopted.¹⁸²

In addition, this article has found sexual violence in schools and HEIs to be a major issue in both Malawi and South Africa. Although Malawi and South Africa afford protection through constitutional and legislative provisions, issues surrounding sexual violence require more than mere legislative measures. It is necessary to hold teachers and students who commit such acts in school accountable and to train school personnel on how to tackle sexual violence related issues. Victims must also be provided with counselling and alternative educational facilities where necessary.¹⁸³

177 2015.

178 32 of 2007.

179 133 of 1993.

180 38 of 2005.

181 Mullick *et al* 2010 *South African Health Review* 50.

182 *Ibid.*

183 Banda 2008 *African Human Rights LJ* 19.

Another important finding of this article relates to the poor implementation of domestic violence laws in both Malawi and South Africa. The major areas for improvement with respect to the implementation of the Domestic Violence Act¹⁸⁴ in South Africa include the poor training of police officials as well as lack of resources and accessibility to victims of domestic violence. Malawi faces similar issues, as well as concerns surrounding the enforcement of judgments in terms of the Prevention of Domestic Violence Act.¹⁸⁵ Therefore, it is recommended that officials in Malawi and South Africa undergo extensive training, including gender sensitivity training, and collaborate with other sectors to ensure proper enforcement. There is also need for community education, particularly in Malawi where violence against women is considered a social norm.¹⁸⁶ Moreover, Banda notes that apart from counselling, the provision of alternative housing for victims is required.¹⁸⁷

In addition, several of the harmful cultural practices affecting women in Malawi and South Africa have been looked at, namely child marriage, female genital mutilation and sexual cleansing. Of particular relevance here are Articles 5 and 14 of the Maputo Protocol, which call on States Parties to prohibit and condemn all forms of harmful practices which negatively affect the human rights of women and provide for the right to be informed on one's health status and on the health status of one's partner, respectively. Article 6 further provides that no marriage shall take place without the free and full consent of both parties and that the minimum age of marriage for women shall be 18 years.

In terms of child marriages, Section 3(3) of the South African Recognition of Customary Marriages Act provides that where a spouse is a minor, her parents have the power to consent to the marriage, yet section 3(3) of the same Act sets the minimum marriage age at 18 years. In this respect, Malawi can be commended for addressing the discrepancy that until recently existed in its law in terms of which section 22(8) which did not prohibit, but merely discouraged the marriage of an individual younger than 15 years.¹⁸⁸

Moreover, this article has conducted an investigation into sexual cleansing as a harmful cultural practice and its negative effects including HIV/AIDS transmission and underage pregnancy.¹⁸⁹ Nevertheless, both Malawi and South Africa are yet to specifically address sexual cleansing through legislation as required by Article 5 of the Maputo Protocol, which calls for the elimination of all harmful practices, which negatively affect the rights of women and are contrary to recognised international standards.¹⁹⁰ Furthermore, Malawi has been criticised for sentencing the first convicted sexual cleanser to a sentence of only two years.¹⁹¹

The Maputo Protocol is the first international human rights instrument to deal explicitly with FGM.¹⁹² The comparative analysis has pointed out that South Africa has complied with its obligations under the Maputo Protocol by outlawing FGM in terms of section 8(d) of the PEPUDA, which disallows any cultural practice which impairs the dignity of women and undermines equality, including FGM.¹⁹³ On the other hand, Malawi has rejected UN recommendations to outlaw FGM and refuses to acknowledge that FGM is practiced in Malawi, despite reports by the MHRC.¹⁹⁴ Therefore, the first step would be for the Malawian government to acknowledge that FGM takes place in Malawi and subsequently outlaw it. Moreover, there is a need for increased awareness regarding FGM in Malawi as it is practiced virtually unnoticed by most of the population.¹⁹⁵

184 116 of 1998.

185 5 of 2006.

186 UNICEF "Malawi, 24 March 2015: New Study Reveals Violence against Children Widespread" http://www.unicef.org/esaro/5440_mlw2015_new-study.html (accessed 22-02-16); see also *Republic v Tangwe* (38 of 2007) [2007] MWHC 10.

187 Banda 2008 *African Human Rights LJ* 18.

188 The Constitution of the Republic of Malawi, 1994.

189 Mwambene 2010 *African Human Rights LJ* 89.

190 The Protocol to The African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2002.

191 IOL "Anger as 'Hyena' gets 2 Years for 'Sexual Cleansing'" <http://www.iol.co.za/news/africa/anger-as-hyena-gets-2-years-for-sexual-cleansing-2092948> (accessed 25-05-17).

192 Article of the Protocol to The African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2002.

193 4 of 2000.

194 Parliamentary Campaign "Stop Violence against Women: Female Genital Mutilation" <http://www.ipu.org/wmn-e/fgm-prov-m.htm> (accessed 11-03-16).

195 All Africa "Malawi: Female Genital Mutilation Being Conducted on the Quiet with Young Girls Exposed to Infections and to HIV" <http://allafrica.com/stories/200602130979.html> (accessed 08-08-2016).

Notwithstanding the importance of legal measures, cultural practices have been found to be deeply rooted in society and cannot be addressed by means of law alone. Therefore, states must implement a multi-faceted approach involving a combination of law, community-based education on the harmful effects of such practices and pre-emptive measures, such as removing the individuals who carry out such practices from the communities.¹⁹⁶

In addition, this article has discussed the issues faced by women in Malawi and South Africa in relation to maternal healthcare and reproductive rights. There are a number of key differences between Malawi and South Africa in this regard. Firstly, the right to healthcare in the South African Constitution,¹⁹⁷ including maternal healthcare, is a justiciable right and can form a cause of action in a court of law, as confirmed in the landmark case of *Minister of Health v Treatment Action Campaign*.¹⁹⁸ Conversely, the right to access to basic healthcare in the Malawian Constitution¹⁹⁹ cannot be enforced in a court of law as it is merely regarded as a directive of state policy.²⁰⁰

Furthermore, while South Africa has recognised the right to abortion in line with Article 14 of the Maputo Protocol in terms of the Choice on Termination of Pregnancy Act,²⁰¹ abortions remain illegal in Malawi. In light of the prevalence and fatal effects of unsafe abortions, it is recommended that Malawi approve the Termination of Pregnancy Bill,²⁰² which makes provision for the liberalisation of abortion in Malawi.

Moreover, this article has noted the interrelationship between reproductive rights as provided for in terms of Article 14 of the Maputo Protocol, and the various harmful cultural practices in Malawi and South Africa. Harmful cultural practices, among other things, expose women to HIV/AIDS and other sexually transmitted infections and as such, the need for the adoption of a holistic approach when addressing these issues was recognised.

In summation, it is clear from the above discussion that Malawi and South Africa have taken major strides in terms of achieving gender equality and combatting violence against women. South Africa in particular, can be singled out for its progressive approach towards protecting women from violence; hence, the comparative analysis revealed several areas in which Malawi can draw on South Africa's approach to women's rights.

Nonetheless, in response to the central question of this article, the legal frameworks in both of the two countries cannot be said to be effective enough as this article has noted a number of gaps and discrepancies in the law. Furthermore, it is overwhelmingly evident that the law alone is not enough to address the issues presented by violence against women. Accordingly, Malawi and South Africa must both adopt a multi-faceted approach involving both law and education, as well as preventative measures and programmes aimed at the rehabilitation of victims.

196 Article 5 of the Convention on the Elimination of All Forms of Violence against Women, 1979; CEDAW General Recommendation No 14 on Female Circumcision, UN Doc A/45/38 (1990); CEDAW General Recommendation No 19 on Violence against Women; CEDAW General Recommendation No 24 on Health, UN Doc A/54/38 (2003).

197 The Constitution of the Republic of South Africa, 1996.

198 (2002) 5 SA 721.

199 The Constitution of the Republic of Malawi, 1994.

200 Ibe 2007 *African Human Rights LJ* 225.

201 92 of 1996.

202 2015.