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Juxtaposing emerging community laws and international human rights jurisprudence on the protection of women and girls from harmful practices in Malawi

*Tinyade Kachika**

Consultant, Gender and Social Inclusion, Lilongwe, Malawi

<http://orcid.org/0009-0003-0092-1969>

Summary: *In recent years, community laws to address harmful practices affecting women and girls in rural Malawi have been forming under the leadership of traditional authorities (chiefs), plural justice system actors who usually are suspected by international human rights law and jurisprudence of being on the side of women's rights violations. Yet, being community engineered, the community laws have some potential to practically protect women and girls from harmful practices. Taking off from a 'norm internalisation' conceptual footing, this article closely examines how the phenomenon of community laws sits with the expectations of international human rights law and jurisprudence on measures that states ought to take to internalise norms protecting women and girls from harmful practices. The article establishes that international human rights law and jurisprudence is saturated with calls for states to prioritise formal and macro-level measures to address harmful practices, although latest jurisprudence at both United Nations and African Union levels has cautiously begun to also recognise the role of plural justice systems. The article argues that it is high time that the human rights treaty-monitoring bodies started to critically re-examine*

* PhD (CapeTown); tkachika@hotmail.com

the high insistence on formal measures, given that the community laws, which are also internalising the norm protecting women from harmful practices, are manifesting at the level of chiefs' jurisdictions.

Key words: *harmful practices; community laws; norm internalisation; CEDAW/CRC General Recommendations/General Comments; African Commission/African Children's Committee General Comments*

1 Introduction

Recent scholarship¹ documents that in some parts of Malawi, chiefs are leading efforts to informally adopt community laws towards addressing harmful practices that mostly affect women and girls in their communities. These community laws address socio-cultural challenges and harmful practices, such as child marriage; incest; impregnation of schoolgirls (by teachers, schoolboys and other men); school-related gender-based violence; harmful puberty rituals for girls; harmful initiation rituals and practices; harmful widowhood rituals and practices; property dispossession of widows; harmful pregnancy-related practices; wife swapping; and domestic violence, among others. These practices, which are mere examples of harmful practices towards women and girls obtaining in various societies, fall within the purview of the definition of harmful practices under the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol),² namely, 'harmful practices are all behaviour, attitudes and/or practices which negatively affect the fundamental rights of women and girls, such as their right to life, health, dignity, education and physical integrity'.³

Legal formalists may be apprehensive of the community law phenomenon, and questions may justifiably arise regarding the legal force of these community laws in light of domestic legal frameworks. This would be a valid concern, and while the subsequent analysis alludes to the need to consider the community laws within a legal pluralism context, this is an issue for another article. For now, the focus is to use Malawi as a mere example to demonstrate that chief-led community laws on harmful practices are emerging in earnest

1 T Kachika 'A critical re-appraisal of vernacularisation in the emergence and conceptualisation of community bylaws on child marriage and other harmful practices in rural Malawi' PhD thesis, University of Cape Town, 2020 223 (on file with author).

2 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa AU Doc CAB/LEG/66.6 13 September 2000.

3 Art 1(g) African Women's Protocol.

in some societies, and to interrogate how these community laws are positioned within United Nations (UN) and African Union (AU) human rights jurisprudence, which prescribes ways in which states should internalise norms protecting women and girls from harmful practices. This inquiry is important given that scholarship has established that the community laws that were studied in Malawi have inner force and tangible normative effects since they are closer to rural people than statutory law.⁴ As such, one could argue, well-considered community laws have high potential to be a norm-internalisation conduit for tackling entrenched harmful practices at very local levels.

However, to what extent does international and regional human rights jurisprudence recognise that community laws and chiefs could be viable entry points for norm internalisation when it comes to protecting women and girls from harmful practices? This is the question being explored in this article. Drawing on the conceptual framework of norm internalisation, the article begins by briefly explaining how chiefs and their subjects are making these community laws in rural Malawi. It then provides a conceptual analysis of norm internalisation and how it is positioning community laws. Thereafter, legal sources of norms protecting women and girls from harmful practices are examined, followed by an analysis of international human rights jurisprudence that require states to take specific measures to internalise human rights norms. Next, the article examines how the community laws to address harmful practices in rural Malawi are located within the international human rights jurisprudence before concluding. Notably, the article does not involve conceptualising 'harmful practices', but concentrates on the global acceptability of community laws that address such practices.

2 Community laws: Description and role of chiefs

In Malawi, the hierarchical tiers of traditional leaders are paramount chief, senior chief, chief and sub-chief.⁵ The 'chiefs' and 'sub-chiefs' are commonly known as traditional authorities and sub-traditional authorities respectively. Under these two groups are group village headpersons and village headpersons. A study conducted in Malawi⁶ revealed that these community laws address contextual harmful

4 Kachika (n 1) 260. Examples of Malawian statutory laws are the Child Care, Protection and Justice Act 22 of 2010 (Malawi); Gender Equality Act 3 of 2013 (Malawi); and HIV and AIDS (Prevention and Management) Act (Malawi).

5 Sec 3 Chiefs Act Ch 22:03 Laws of Malawi.

6 Kachika (n 1).

practices prevalent in a chief's territory. These chief-led⁷ community laws, which can be written or oral, are jointly agreed upon by chiefs and their communities to govern the behaviour of all community members in order to address specified harmful practices. Violations of the community laws attract various village fines such as chickens, goats or monetary equivalents that are also agreed upon at community level.⁸

Community laws, loosely dubbed 'community bylaws' in Malawi, can be made in any sector, but this article focuses on community laws in the gender sector. The community laws are usually made at the level of traditional authority (TA). While the TA champions the whole process, group village headpersons and village headpersons are usually active in the consultative formulation of the community laws through facilitating consultations with their subjects; and attending forums where proposals from the subjects are further debated to see what should be refined, rejected or adopted. Then, the community laws are usually adopted through a public launch within the community.⁹

This article will not dwell on how the community laws are conceptualised,¹⁰ but suffice to say that the community laws are introducing an alternative mechanism, albeit informal, of addressing entrenched negative customs and practices, and it is intriguing that chiefs are leading this revolution. This role of chiefs defies literature, which usually situates chiefs and women's rights on binary opposing sides. Often, traditional leaders are viewed as the 'problematic other' on the women's rights question.¹¹ Of course, some scholars have acknowledged the relevance of traditional leaders to the implementation of women's rights. For example, Becker contends that traditional authorities are not at all stuck in old tradition, but are a changing and modern institution that, together with rural people, produces local modernities as the institution interacts with global social forces.¹² Bennett also acknowledges instances

7 While others could argue that the community laws are pushed on communities by NGOs, donors and even government (eg the Social Welfare Department) evidence in four study districts has rejected this argument. Chiefs and their communities are adamant that while outside players may technically or financially support consultations and other processes related to the community laws (eg publicly launching and printing the community laws) the actual laws formulated are purely the brainchild of communities.

8 For an exhaustive analysis, see Kachika (n 1) 228-245.

9 Implying that they are applicable to all villages governed by group village heads and village heads under the Traditional Authority; Kachika (n 1) 214.

10 For an exhaustive analysis, see Kachika (n 1) 228-245.

11 Kachika (n 1) 28.

12 H Becker 'New things after independence: Gender and traditional authorities in postcolonial Namibia' (2006) 32 *Journal of Southern African Studies* 31.

when chiefs' courts in Zambia modified customary law in order to improve women's status, only to have such decisions overturned by subordinate courts on the ground that the chiefs were negating customary law.¹³ Sieder and McNeish identify traditional and community structures for dispute resolution as potential means of making quick gains in justice projects.¹⁴

With these few exceptions, literature, including some feminist scholarship, presents traditional leaders as being antagonistic to women's rights. This suspicion of traditional leaders is not exactly unfounded. For example, Bond observes that 'traditional leaders may be hostile to equality based cultural change'.¹⁵ Williams argues that customary law systems (of which traditional leaders are custodians) 'legitimise and enforce' gender discrimination and threaten women's status, including in areas of marriage, divorce and property.¹⁶ Doho asserts that in the Zimbabwean context, traditional leadership systems were, and indeed continue to be, partly responsible for 'women's pathetic conditions',¹⁷ arguing, among other things, that the traditions that traditional leaders have condoned have been without women's consent.¹⁸ Ewelukwa observes that Nigerian local rulers often resist efforts to reform customary practices that disadvantage women, and they suppress women's voices by undermining democratic processes at village levels.¹⁹ Much of this literature is tainted by the tendency to overgeneralise which, in turn, invisibilises positive chief-led initiatives such as the community laws presented in this article. Furthermore, while some of the literature accepts the potential of traditional leaders as agents of positive change, it assumes without more ado that such change only happens under the influence of the state, and sometimes non-governmental organisations (NGOs).²⁰

13 TW Bennett *A sourcebook of African customary law for Southern Africa* (1991); WVD Meide 'Gender equality v right to culture – debunking the perceived conflicts preventing the reform of the marital property regime of the official version of customary law' (1999) 116 *South African Law Journal* 108.

14 R Sieder & JA McNeish *Gender justice and legal pluralities: Latin America and African perspectives* (2013) 12.

15 J Bond 'Gender, discourse and customary law in Africa' (2010) 83 *Southern California Law Review* 567. Bond captures how, during the drafting of the new South African Constitution, traditional leaders in South Africa lobbied to exclude personal and customary law from the purview of the non-discrimination clause in the Constitution. A strong and organised women's lobby defeated the effort.

16 SH Williams 'Democracy, gender equality, and customary law: Constitutionalising internal cultural disruption' (2011) 18 *Indiana Journal of Global Legal Studies* 65.

17 O Dodo 'Traditional leadership systems and gender recognition: Zimbabwe' (2013) 1 *International Journal of Gender and Women's Studies* 38-39.

18 Such as forced marriages, levirate marriages, polygamy, FGM and inheritance inequalities; Dodo (n 17).

19 UU Ewelukwa 'Postcolonialism, gender, customary injustice: Widows in African societies' (2002) 24 *Human Rights Quarterly* 472-473.

20 Ewelukwa (n 19); S Wendoh & T Wallace 'Rethinking gender mainstreaming in African NGOs and communities' (2005) 13 *Gender and Development* 78.

It should be noted that this article has deliberately opted for the term ‘community laws’, and avoided using the locally popular term of ‘community bylaws’, given that in Malawi ‘bylaws’ can only be legally made by a district, town or city assembly,²¹ or at area/traditional authority level to respond to contextual matters, so long as legal procedures are followed.²² Nevertheless, the so-called ‘community bylaws’ (or ‘community laws’ as labelled in this article) also cannot be sweepingly discarded due to their informality. Although they are not a recognisable norm internalisation method under formal law, they could still be considered law within the scope of living law and legal pluralism (and, therefore, capable of internalising human rights norms). Claassens defines living law as ‘blended law and experiences (ie from vernacular, constitutional or statutory sources),’²³ and Hellum labels living law as ‘the outcome of the interplay between international law, state law, and local norms that takes place through human interaction in different historical, social and legal contexts’.²⁴ This means that even if they may not have the status of formal law or customary law, the community laws/‘bylaws’ have legal status as living law in the context pluralistic legal system.

Of course, scholars such as Tamanaha hesitate to give the label of ‘law’ to ‘negotiated orders’ under the guise of ‘living law’ because the term ‘living law’ betrays analytical clarity and drags ‘non-law’ materials into the law field.²⁵ However, this article agrees with Claassens’s argument, that the rejection of living law as law, on whatever basis, carries with it the implication that people-made law cannot be law as such. Such rejection implies that, to qualify as law, a practice must be made by authorised ‘experts’, such as lawyers, judges, governments and traditional leaders.²⁶ Yet, legal pluralism demands the acceptance of different laws and mechanisms that draw legitimacy from international, state, local or non-official systems.²⁷ In fact, legal pluralism is even embraced to an extent by

21 Sec 5(1) Local Government Act 42 of 1998 (Malawi) as read with secs 6(1)(f) & 15(1)(b); Kachika (n 1) 9.

22 Sec 102 Local Government Act 42 of 1998 (Malawi); Kachika (n 1) 9.

23 A Claassens ‘Entrenching distortion and closing down spaces for change: Contestations over land and custom in South Africa’ PhD thesis, Roskilde University, 2012 31-32 (on file with author).

24 A Hellum ‘Women’s human rights and legal pluralism in Africa: Mixed norms and identities in infertility management in Zimbabwe, north-south legal perspectives (1999) in Claassens (n 23) 32-33.

25 BZ Tamanaha ‘A vision of social-legal change: Rescuing Ehrlich from “living law”’ (2011) 36 *Law and Social Inquiry* 297-318.

26 Claassens (n 33) 34.

27 DM Engel ‘Vertical and horizontal perspectives on rights consciousness’ (2012) 19 *Indiana Journal of Global Legal Studies* 428.

international human rights jurisprudence.²⁸ The next part introduces norm internalisation theory and its interaction with community laws.

3 Theorising norm internalisation and the place of community law

The internalisation of international norms has been defined as ‘a process by which states incorporate international law concepts into domestic practice’.²⁹ Indicators of norm internalisation include the integration of the norms into domestic formal legal systems and into domestic administrative arrangements.³⁰ However, the challenge lies in that there is a blurred conceptualisation of how norm internalisation percolates beyond formal domestication of international norms and formal institutional changes to reach rural settings dominated by customary law, tradition and practices in the African context (such as the community laws).

Several scholars recognise the relevance of local mechanisms in norm internalisation, but not in the context of phenomenon such as community laws. Zwingel appreciates that ‘the label of norm internalisation’ fails to expose diverse processes that unfold domestically after the state’s treaty ratification.³¹ However, she does not allude to harmful practices or local processes such as community laws. Rajaram and Zararia acknowledge that textbook rights must translate into lived rights in local communities,³² and that villagers may consciously or unconsciously translate global human rights discourses to local contexts.³³ However, the authors were not studying community laws or harmful practices or other micro-processes. Zwart argues that local institutions are essential to the full implementation of international human rights³⁴ without an examination of the mechanisms of local ‘laws’ or even the institution of chiefs. Even

28 Eg, CEDAW General Recommendation 33: Women’s access to justice (23 July 2015) UN Doc CEDAW/C/GC/33 paras 61-64.

29 SH Cleveland ‘Norm internalisation and US economic sanctions’ (2001) 26 *Yale Journal of International Law* 6 in AD Kent ‘Custody, maintenance and succession: The internalisation of women’s and children’s rights under customary law in Africa’ (2006-2007) 28 *Michigan Journal of International Law* 510.

30 SS Englund ‘Transnational norm diffusion and norm localisation: A case study of gender equality in the Republic of Chile and Bolivarian Republic of Venezuela’ MS thesis, Leiden University, 2013 9 (on file with author).

31 S Zwingel ‘How do norms travel? Theorising international women’s rights in transnational perspective’ (2012) 56 *International Studies Quarterly* 118.

32 N Rajaram & V Zararia ‘Translating women’s human rights in a globalising world: The spiral process in reducing gender injustice in Baroda, India’ (2009) 9 *Global Networks* 465.

33 Rajaram & Zararia (n 32) 469.

34 T Zwart ‘Using local culture to further the implementation of international human rights: The receptor approach’ (2012) 34 *Human Rights Quarterly* 547.

Merry's norm internalisation concept of vernacularisation,³⁵ which engages how international human rights ideas and practices seep deeper into and are made resonant with lived realities of small(er) communities,³⁶ has not engaged the community laws phenomenon.

With these theoretical gaps in mind, the next part examines how international human rights jurisprudence approaches community law and informal systems.

4 Legal sources of the norms protecting women from harmful practices

Norms protecting women and girls from harmful practices are codified within both UN and AU human rights systems. At UN level, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)³⁷ and the Convention on the Rights of the Child (CRC),³⁸ which advance women's and children's rights respectively, legally establish the norm that women and girls should be free and protected from harmful practices. CEDAW's approach to harmful practices is inspired by the Convention's key principles: non-discrimination against women and gender equality. Zwingel further observes that 'state responsibility' is the third key principle of CEDAW.³⁹

Despite some critiques that CEDAW portrays culture negatively,⁴⁰ CEDAW has undeniably given traction to the concept of harmful practices.⁴¹ In striving to eliminate harmful practices, article 2(f) of CEDAW obliges states 'to pursue a policy of eliminating discrimination against women by undertaking all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against women'. Article 5(a) commits state parties 'to take all appropriate measures to modify the social and cultural patterns of conduct of men and women so as

35 SE Merry *Human rights and gender violence: Translating international law into local justice* (2006) 135.

36 SE Merry & P Levitt 'The vernacularisation of women's human rights' in S Hopgood et al (eds) *Human rights futures* (2017) 213-236.

37 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) UN Doc A/RES/34/180.

38 Convention on the Rights of the Child (CRC) UN Doc E/CN.4/RES/1990/74.

39 S Zwingel 'Women's rights norms as content-in-motion and incomplete practice' (2017) 2 *Third World Thematics: A TWQ Journal* 678.

40 SE Merry 'Human rights law and the demonisation of culture (and anthropology along the way)' (2003) 26 *Political and Legal Anthropology Review* 71; JE Bond 'CEDAW in sub-Saharan Africa: Lessons in implementation' (2014) *Michigan State Law Review* 260.

41 C Longman & T Bradley *Interrogating the concept of 'harmful cultural practices'* (2016) 12.

to eliminate 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'. Cusack and Pusey rightly note that these two provisions are buttressed by the principle of transformative equality, desiring state parties to intervene and eliminate obstinate gender stereotypes.⁴²

For its part, CRC is underpinned by four principles: non-discrimination; the best interests of the child; the right to life, survival and development; and respect for a child's views.⁴³ These principles 'frame children's protection from violence and harmful practices'.⁴⁴ Article 19 of CRC proscribes all forms of violence against children, while article 24(3) requires state parties to abolish traditional practices prejudicial to children's health. The prohibition of harmful practices is also implicit in several CRC provisions.⁴⁵

The AU human rights system has also established the elimination of harmful practices as a legal normative standard.⁴⁶ While the African Charter on Human and Peoples' Rights⁴⁷ (African Charter), does not openly proscribe harmful practices, several protocols to the Charter address harmful practices and child marriage more rigorously. The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol)⁴⁸ is lauded for taking a 'more nuanced approach to culture and tradition' when compared with CEDAW and the African Charter.⁴⁹ According to Banda, the Women's Protocol unequivocally rejects harmful practices by expansively defining what amounts to harmful practices.⁵⁰ Thus,

42 S Cusack & L Pusey 'CEDAW and the rights to non-discrimination and equality' (2013) 14 *Melbourne Journal of International Law* 63.

43 UNICEF Armenia, <https://www.unicef.org/armenia/en/stories/four-principles-convention-rights-child> (accessed 15 March 2022). These principles draw much from arts 2, 3, 6 & 12 of CRC.

44 Plan International 'In-depth review of legal and regulatory frameworks on child marriages in Malawi' (2016) 7.

45 Art 2: non-discrimination; art 3: primacy of the child's best interests; art 6: child's right to life, survival and development; art 12: right to participation; art 17: right to access information and materials; art 19: prohibition of violence against children; art 28: right of the child to education; art 31: child's right to rest, leisure and recreation; art 34: protection against sexual exploitation and sexual abuse; art 35: protection from abduction, sale of or trafficking; art 39: support for child victims of all forms of neglect, exploitation or abuse.

46 While the revised SADC Protocol on Gender and Development, adopted on 23 June 2016, also addresses harmful practices and child marriage under arts 2(2), 8(2)(a), 11(c), 20(1)(b) & 27(2), this article is attentive to the more globally comparable continental human rights system.

47 African Charter on Human and Peoples' Rights OAU Doc CAB/LEG/67/3 rev. 5, 21 ILM 58 (1982).

48 African Women's Protocol (n 2).

49 Bond (n 40) 261.

50 F Banda 'Blazing the trail: The African protocol on women's rights comes in force' (2006) 50 *Journal of African Law* 80. See art 1(g) of the African Women's Protocol for a definition of harmful practices.

the Protocol owns women's rights violations through harmful practices as African problems, and discredits views that such issues are driven by Western agendas.⁵¹

Besides article 5, which decrees legislative and other measures that states should take to eliminate harmful practices,⁵² several provisions of the African Women's Protocol mandate states to address harmful practices. Article 2(2) of the Protocol has developed articles 2(f) and 5(a) of CEDAW⁵³ by committing states to eliminate harmful tradition practices through public outreach strategies.⁵⁴ Article 4(d) obliges states to use educational measures in eradicating traditional and cultural beliefs, practices and stereotypes that stimulate violence against women. However, article 6(c) of the Women's Protocol is soft on polygamy, since it only 'encourages monogamy as the preferred form of marriage'. Commenting on Article 17, Bond contends that the Women's Protocol has higher potential⁵⁵ to facilitate the local internalisation of human rights norms since it guarantees women the right to enjoy positive culture and to be key actors in the formulation of cultural policies.⁵⁶ Furthermore, this right guarantees that women can dialogue with traditional leaders to ensure that women's rights and positive cultural practices are localised.⁵⁷

The African Charter on the Rights and Welfare of the Child (African Children's Charter)⁵⁸ similarly disapproves harmful practices. Article 1(3) discourages customs, traditions, cultural or religious practices that are inconsistent with the provisions of the Charter. Notably, 'discourage' is rather cautious language.⁵⁹ However, article

51 RS Mukasa 'The African Women's Protocol: Harnessing a potential force for positive change' (2008) *Jacana Media* 7 in Bond (n 15) 519.

52 Under art 5 of the Women's Protocol, state parties 'shall take all necessary legislative and other measures to eliminate such practices, including (a) creation of public awareness in all sectors of society regarding harmful practices through information, formal and informal education and outreach programmes; (b) prohibition, through legislative measures backed by sanctions, of all forms of FGM, scarification, medicalisation and para-medicalisation of FGM and all other practices in order to eradicate them; (c) provision of necessary support to victims of harmful practices through basic services such as health services, legal and judicial support, emotional and psychological counselling as well as vocational training to make them self-supporting; (d) protection of women who are at risk of being subjected to harmful practices or all other forms of violence, abuse and intolerance'.

53 Banda (n 50) 80.

54 Art 2(2) African Women's Protocol.

55 Than CEDAW or the African Charter.

56 Bond (n 15) 541.

57 Bond (n 15) 547.

58 AU Doc CAB/LEG/24.9/49 (1990).

59 Nevertheless, the fact that the African Children's Charter asserts superiority over any custom, tradition, cultural or religious practice that contradicts it has been marked as a strength of the Charter; DM Chirwa 'The merits and demerits of the African Charter on the Rights and Welfare of the Child' (2001) 10 *International Journal of Children's Rights* 158.

21(1) plainly requires states to pursue ‘all appropriate measures to eliminate discriminatory social and cultural practices that harm the welfare, dignity, growth and health of the child’. For its part, the African Youth Charter⁶⁰ directs that young people’s education should preserve and strengthen positive traditional values and cultures, and that life skills education curricula should address cultural practices harmful to young girls’ health.⁶¹ Implementation frameworks such as the AU Agenda 2063⁶² and the African Agenda for Children 2040⁶³ buttress these commitments.

5 What does human rights jurisprudence require states to do to internalise norms protecting women and girls from harmful practices?

Various scholars assert that international norms as outlined above become fully institutionalised nationally as states integrate the norms into formal sources of national law, policy and practice, as the norms become accepted and enforced by law, and as the norms become local practice.⁶⁴ Already, this norm internalisation model centres on formal institutional changes,⁶⁵ and not informal community level changes, as the community laws. The ensuing narrative confirms that international human rights jurisprudence on harmful practices prioritises this ‘institutionalisation’ approach to norm internalisation, urging states to chiefly address harmful practices through legal and administrative exploits.

5.1 Norm internalisation through legal measures

The use of the formal domestic legal system and instruments in domesticating global human rights norms is preferred as ‘more

60 African Youth Charter, 2 July 2006, entered into force on 8 August 2009.

61 Art 13(3)(d) African Youth Charter.

62 Aspiration 6, Goal 1 AU Agenda 2063.

63 Aspiration 8 African Agenda for Children 2040.

64 A Acharya ‘How ideas spread: Whose norms matter? Norm localisation and institutional change in Asian regionalism’ (2004) 58 *International Organisation* 241; M Finnemore & K Sikkink ‘International norm dynamics and political change’ (1998) 52 *International Organisation* 895; SH Cleveland ‘Norm internalisation and US economic sanctions’ (2001) 26 *Yale Journal of International Law* 6, cited in AD Kent ‘Custody, maintenance and succession: The internalisation of women’s and children’s rights under customary law in Africa’ (2006-2007) 28 *Michigan Journal of International Law* 510; SS Englund ‘Transnational norm diffusion and norm localisation: A case study of gender equality in the Republic of Chile and the Bolivarian Republic of Venezuela’ MS thesis, Leiden University, 2013 9 (on file with author); T Flockhart (ed) *Socialising democratic norms: The role of international organisations for the construction of Europe* (2005) 50.

65 S Alldén ‘How do international norms travel? Women’s political rights in Cambodia and Timor-Leste’ PhD thesis, Umeå University, 2009 90 (on file with author).

proficient and programmatic'.⁶⁶ Out of the analysed jurisprudence, only CEDAW General Recommendation 14 on female circumcision and other harmful practices (before being updated) did not explicitly demand legal measures for addressing female genital mutilation (FGM) and other harmful practices.⁶⁷ Jurisprudence on legal measures calls for (a) the enactment and review of legislation; and (b) the criminalisation and enforcement of criminal sanctions.

5.1.1 *Enactment and review of legislation*

Despite recent position shifts, both UN and AU jurisprudence mostly urges states to purge harmful practices through formal laws. CEDAW General Recommendation 12 on Violence against Women starts by inviting states to report on legislation enacted to protect women from all kinds of violence.⁶⁸ CEDAW General Recommendation 24 on women and health agitates for laws prohibiting FGM and child marriage.⁶⁹

CEDAW General Recommendation 35, which updates General Recommendation 19,⁷⁰ regrets that states breach their due diligence obligation to address gender-based violence against women through inadequate or deficient implementation of legislation.⁷¹ It recommends the prioritisation of functioning laws, institutions, and systems to address violence against women.⁷² The CEDAW Committee's macro-delineation of arrangements that states should make in implementing General Recommendation 35 at legislative, executive and judicial levels exposes overt attentiveness to formal legal measures.⁷³

66 AM Banks 'CEDAW, compliance, and custom: Human rights enforcement in sub-Saharan Africa' (2009) 32 *Fordham International Law Journal* 783; Z Orr 'The adaptation of human rights norms in local settings: Intersections of local and bureaucratic knowledge in an Israeli NGO' (2012) 11 *Journal of Human Rights* 243.

67 This general recommendation was updated by the joint General Recommendation/General Comment 31 of CEDAW and 18 of CRC on harmful practices (2014) UN Doc CEDAW/C/GC/31-CRC/C/GC/18.

68 CEDAW General Recommendation 12: Violence against women UN Doc A/44/38 (1989) para 1.

69 CEDAW General Recommendation 24: Article 12 of the Convention (Women and health) UN Doc A/54/38/Rev.1, ch I (1999) para 15(d).

70 CEDAW General Recommendation 19: Violence against women UN Doc A/47/38 (1992).

71 CEDAW General Recommendation 35: Gender-based violence against women, updating General Recommendation 19 (26 July 2017), UN Doc CEDAW/C/GC/35 para 7.

72 General Recommendation 35 (n 71) para 25.

73 Under General Recommendation 35, the CEDAW Committee has interest to see that (a) legislation prohibiting all forms of gender-based violence against women is adopted and that all national laws are harmonised with CEDAW. This includes repealing, including in customary, religious and indigenous laws, all legal provisions that are discriminatory against women and thereby enshrine,

CEDAW General Recommendation 33 on women's access to justice also trumpets state-level mechanisms as the arsenal for resolving women's justice-related challenges. It recommends measures that states should implement in six areas considered pertinent to guaranteeing women access to justice. These measures are mostly judicial or quasi-judicial, and within the formal justice machinery.⁷⁴ Although the CEDAW Committee positively recognises alternative dispute resolution (ADR) processes⁷⁵ and plural justice systems,⁷⁶ its pitch that 'VAW cases should never undergo ADR processes'⁷⁷ divulges discomfort with these systems.⁷⁸

The joint General Recommendation/General Comment 31 of CEDAW and 18 of CRC on harmful practices (2014) declares that states should prioritise developing, enacting, implementing and monitoring relevant legislation as 'a key element of any holistic strategy to address harmful practices'.⁷⁹ Legislation aimed at eliminating harmful practices must include befitting measures for budgeting, implementing, monitoring and effective enforcement,⁸⁰ and provide victims of harmful practices with redress.⁸¹ Moreover, the joint General Recommendation/General Comment provides guidance on legislative considerations that states should make in order to effectively address harmful practices.⁸² CEDAW General Recommendation 36 on the right of girls and women to education supports measures that are prescribed by the joint General Recommendation/General Comment 31 of CEDAW and 18 of CRC.⁸³ CRC General Comment 13 similarly urges states to pursue comprehensive legislative measures

encourage, facilitate, justify or tolerate any form of gender based violence. Also in particular, repealing provisions that allow, tolerate or condone forms of gender-based violence against women, including child or forced marriage and other harmful practices – paras 26(a) & 29(c); (b) public authorities are investigated and sanctioned for their inefficiency, complicity and negligence in dealing with complaints – para 26 (b); and (c) all legal procedures involving allegations of gender-based violence against women should meet international law standards – para 26(c).

74 The six areas are justiciability; availability; accessibility; good quality; provision of remedies for victims; and accountability of justice systems – CEDAW General Recommendation 33: Women's access to justice (23 July 2015) UN Doc CEDAW/C/GC/33 paras 15-19.

75 CEDAW General Recommendation 33 (n 74) paras 57 & 58.

76 CEDAW General Recommendation 33 (n 74) paras 61-64.

77 CEDAW General Recommendation 33 (n 74) para 58(c).

78 Part 5.4 below discusses these informal systems.

79 Joint CEDAW General Recommendation/CRC General Comment (n 67) para 40.

80 Joint CEDAW General Recommendation/CRC General Comment (n 67) para 12.

81 Here, the joint General Recommendation/General Comment quotes what has been prescribed under CEDAW General Recommendation 28 (2010) UN Doc CEDAW/C/GC/28 para 38(a); and under CRC General Comment 13: The right of the child to freedom from all forms of violence (2011) UN Doc CRC/C/GC/13 para 40.

82 Joint CEDAW General Recommendation/CRC General Comment (n 67) 52.

83 Joint CEDAW General Recommendation/CRC General Comment (n 67) para 55.

83 General Recommendation 36: The right of girls and women to education (2017) UN Doc CEDAW/C/GC/36 para 55.

(including budgetary, implementation and enforcement) against all forms of violence against children.⁸⁴ Furthermore, CRC General Comment 4 invites states to take all appropriate legislative measures and protect adolescents from all harmful practices.⁸⁵

In the AU jurisprudence, the first call made by the joint General Comment of the African Commission on Human and Peoples' Rights (African Commission) and the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) on ending child marriage (2017) is for states to 'enact, amend, repeal or supplement legislation' to prohibit the harmful practice of child marriage, and to set the minimum marriage age at 18 years. States are asked to make such legislation superior to customary, religious, traditional or sub-national laws.⁸⁶ Standards that should be observed in constitutional reforms related to child marriage are also articulated.⁸⁷ The emphasis on legislative reforms and the supremacy of legislation over other laws entails that formal legal structures are presumed to be the centres of human rights engineering, appropriation and internalisation, with the community/local structures being the recipients. Notably, some jurisprudence calls for criminal measures as well.

5.1.2 Criminalisation and enforcement of sanctions

Some jurisprudence recommends the criminalisation and imposition of penalties for harmful practices and violence against women. For example, CEDAW Recommendation 19 advises states to protect women from all kinds of violence through penal sanctions.⁸⁸ Even the updated CEDAW General Recommendation 35 on gender-based violence against women exhibits a punitive inclination, urging states to prosecute and punish gender-based violence against women through courts and tribunals.⁸⁹ Additionally, it urges that all judicial bodies are to strictly apply all penal provisions punishing gender-based violence against women.⁹⁰ States will become complicit in promoting gender-based violence against women when they fail to

84 CRC General Comment 13 (n 80) para 40.

85 CRC General Comment 4: Adolescent health and development in the context of the Convention on the Rights of the Child (1 July 2003) UN Doc CRC/GC/2003/4 para 39(g).

86 Joint ACHPR/ACERWC General Comment on ending child marriage (2017) paras 18 & 19.

87 As above.

88 CEDAW General Recommendation 19: Violence against women UN Doc A/47/38 para 24(t)(i) –updated by General Recommendation 35.

89 CEDAW/C/GC/35 para 32(b).

90 CEDAW/C/GC/35 (n 89) para 26(c).

investigate, prosecute, and punish perpetrators and to compensate victims.⁹¹

UN and AU jurisprudence has slightly different positions on punishment targets. The joint CEDAW General Recommendation/CRC General Comment expects states to consistently enforce criminal sanctions, while being mindful of 'potential threats to and negative impact on victims, including acts of retaliation'.⁹² Thus, no perpetrator is exempted from punishment. The joint African Commission/African Children's Committee General Comment asserts that states should not penalise/sanction children involved in child marriages. However, where they do, 'states must carefully avoid any risk of retaliation against a child'.⁹³ Unlike the joint CEDAW General Recommendation/CRC General Comment, which nets all perpetrators, the joint African Commission/African Children's Committee General Comment is hesitant about the sanctioning of parents 'to avoid clandestine child marriages'.⁹⁴ Instead, it targets punishment towards those registering child marriages without conducting checks, those officiating child marriages, and 'any person who actively encourages and facilitates a child marriage'.⁹⁵ However, it is inconceivable how parents could be divorced from the latter category, or how children could be consistently protected if reprobate parents face no consequences.

Generally, applying punitive measures to harm affecting women, as well as the deterrent effect of such measures, is a controversial issue. For example, there is concern that 'an abolitionist approach, backed by punitive measures like imprisonment and fines hardly works well for complicated challenges such child marriage and FGM, as penalties mostly lead to camouflaging the practices and driving them underground'.⁹⁶ Even rape discourse demonstrates that some early feminists were hesitant to support harsh penalties for rapists, arguing that such penalties would result in fewer convictions (and, therefore, less deterrence) unlike light punishments.⁹⁷

These conversations attest that in dealing with harmful practices, a 'one-size-fits-all' punitive approach that is encouraged by international jurisprudence, and that has been massaged into

91 CEDAW/C/GC/35 (n 89) para 25.

92 Joint CEDAW General Recommendation/CRC General Comment (n 67) para 51.

93 Joint ACHPR/ACERWC General Comment (n 86) para 19.

94 As above.

95 Joint ACHPR/ACERWC General Comment (n 86) paras 18 & 19.

96 J Boyden, A Pankhurst & Y Tafere 'Child protection and harmful traditional practices: Female early marriage and genital modification in Ethiopia' (2012) (22) *Development in Practice* 517.

97 Discussed in M Davis 'Setting penalties: What does rape deserve' (1984) 3 *Law and Philosophy* 162.

legislative approaches, may not always work. The next part illustrates that the jurisprudence also heralds formal administrative measures as important in tackling harmful practices.

5.2 Norm internalisation through administrative measures

Human rights jurisprudence recommends administrative measures that states ought to implement to address harmful practices in several categories: policy and other institutional frameworks; services for victims; budgetary resources; and capacity building/awareness raising.

5.2.1 *Policies and other institutional frameworks*

The jurisprudence bids states to undertake policy and other institutional measures at national and sector levels. CEDAW General Recommendation 4 on female circumcision charges states to review their national health policies,⁹⁸ while CEDAW General Recommendation 24 requires states to protect women's health by formulating policies, health care protocols and hospital procedures to address violence against women.⁹⁹ CEDAW General Recommendation 28 prompts states to design women-tailored public policies for the equal development of women and men.¹⁰⁰ CRC General Comment 13 further expects administrative measures to involve policy establishment.¹⁰¹ CRC General Comment 4 stresses that states should regularly review and revise policies and strategies, and take all appropriate administrative and other measures to protect adolescents from all harmful practices.¹⁰²

While each country has to determine appropriate measures for its comprehensive strategies or action plans for dealing with harmful practices, the joint CEDAW General Recommendation/CRC General Comment elucidates that such measures should target 'specific obstacles, barriers and resistance to the elimination of discrimination that fuel harmful practices and VAW'.¹⁰³ Similarly, Ibhawol has observed that cultural barriers to human rights should be identified, not for purposes of rejecting cultural traditions wholesale, but in

98 Updated by the joint CEDAW General Recommendation/CRC General Comment (n 67).

99 CEDAW General Recommendation 24: Article 12 of the Convention (Women and health) (1999) UN Doc A/54/38/Rev.1 para 15(a).

100 CEDAW General Recommendation 28: The core obligations of state parties under Article 2 of the CEDAW (2010) UN Doc CEDAW/C/GC/28 para 9.

101 CRC General Comment 13 (n 80) para 42.

102 CRC General Comment 4 (n 85) paras 2 & 39(g).

103 Joint CEDAW General Recommendation/CRC General Comment (n 67) para 30.

order to understand their social bases so that apt human rights-based transformative solutions can be found.¹⁰⁴

The intervention models that the jurisprudence recommends for states to adopt in their national strategies or action plans on harmful practices reveal a preference for programmes targeting the state machinery or those that are state-led, as opposed to community-(led) programmes. For example, CRC General Comment 13 advises states to introduce elaborate programmes, and monitoring and oversight systems to address all forms of violence against children within national and sub-national governments,¹⁰⁵ and within governmental, professional and civil society institutions.¹⁰⁶ The joint African Commission/African Children's Committee General Comment promotes the establishment and improvement of official births and marriages registration systems.¹⁰⁷

The joint General Recommendation/General Comment recommends that a special 'high level entity should facilitate the vertical coordination of local, regional, and national level actors with traditional and religious leaders'.¹⁰⁸ This suggests the intent that a national level structure should be in control. Even the joint African Commission/African Children's Committee General Comment expects 'competent judicial, administrative and legislative authority,

104 B Ibhawoh 'Between culture and constitution: Evaluating the cultural legitimacy of human rights in the African state' (2000) 22 *Human Rights Quarterly* 856.

105 By establishing a government focal point to coordinate child protection strategies and services; defining the roles, responsibilities and relationships between stakeholders on inter-agency steering committees with a view to their effectively managing, monitoring and holding accountable the implementing bodies at national and subnational levels; ensuring that the process of decentralising services safeguards their quality, accountability and equitable distribution; implementing systematic and transparent budgeting processes in order to make the best use of allocated resources for child protection, including prevention; providing independent national human rights institutions with support and promoting the establishment of specific child rights mandates such as child rights ombudsmen where these do not yet exist; accountability and equitable distribution; implementing systematic and transparent budgeting processes in order to make the best use of allocated resources for child protection, including prevention; providing independent national human rights institutions with support and promoting the establishment of specific child rights mandates such as child rights ombudsmen where these do not yet exist.

106 This includes adopting intra- and inter-agency child protection policies; professional ethics codes, protocols, memoranda of understanding and standards of care for all childcare services and settings (including daycare centres, schools, hospitals, sport clubs and residential institutions etc); and involving academic teaching and training institutions with regard to child protection initiatives; promoting good research programmes; CRC General Comment 13 (n 80) para 42(b).

107 Joint ACHPR/ACERWC General Comment (n 86) paras 26 & 28.

108 Joint CEDAW General Recommendation/CRC General Comment (n 67) para 33.

or any competent authority provided by law' to provide institutional remedies related to access to justice.¹⁰⁹

The jurisprudence also primarily situates the establishment of administrative monitoring mechanisms for harmful practices and all forms of violence against women and violence against children at state level. CEDAW General Recommendation 33 recommends states to take measures that strengthen the accountability of formal justice systems.¹¹⁰ Similarly, the recommended 'independent monitoring mechanism' to track how women and girls are being protected from harmful practices under the joint General Recommendation/General Comment's holistic strategy¹¹¹ is likely to function at national level as well. CRC General Comment 13 promotes the national statistical system as an important tool in eliminating all forms of violence against children,¹¹² and 'strongly recommends' formal mechanisms for reporting violence against children that are entwined with the state's justice machinery.¹¹³

5.2.2 *Services for victims*

The CEDAW, CRC and African Commission/African Children's Committee jurisprudence stresses that the state should ensure that victims of harmful practices access effective remedies and adequate protection. The joint CEDAW General Recommendation/CRC General Comment enjoins states to provide prevention, protection, recovery, reintegration, and redress measures to victims.¹¹⁴ Particularly, victims

109 Joint ACHPR/ACERWC General Comment (n 86) para 41.

110 This includes (a) monitoring to guarantee that justice systems function in harmony with the principles of justiciability, availability, accessibility, good quality and the provision of remedies; (b) monitoring the actions of justice system professionals; CEDAW General Recommendation 33 (n 74) para 14(f).

111 Joint CEDAW General Recommendation/CRC General Comment (n 67) para 34.

112 It urges the establishment of a comprehensive and reliable national data collection system in order for states to have systematic monitoring and evaluation of systems (impact analyses), services, programmes and outcomes based on indicators aligned with universal standards, and adjusted for and guided by locally established goals and objectives; CRC General Comment 13 (n 80) para 42(a)(v).

113 These recommended reporting mechanisms include the use of 24-hour toll-free hotlines and other information, communication and technologies (ICTs). Appropriate reporting mechanisms will be established by (a) providing appropriate information to facilitate the making of complaints; (b) participation in investigations and court proceedings; (c) developing protocols that are appropriate for different circumstances and made widely known to children and the general public; (d) establishing related support services for children and families; and (e) training and providing ongoing support for personnel to receive and advance the information received through reporting systems; CRC General Comment 13 (n 80) para 42.

114 Joint CEDAW General Recommendation/CRC General Comment (n 67) para 13.

should access legal remedies, victim support and rehabilitation services and socio-economic opportunities.¹¹⁵

According to CEDAW Concluding Observations on Malawi's state party report (2015), making justice accessible to women is part of the state's duty to investigate, prosecute and adequately punish perpetrators of all harmful practices.¹¹⁶ CEDAW General Recommendation 33 stipulates that justice accessibility necessitates establishing justice access centres, such as one-stop centres,¹¹⁷ and the 'creation, maintenance and development of courts, tribunals and other entities'.¹¹⁸ Legal remedies should include rehabilitation.¹¹⁹ The joint CEDAW General Recommendation/CRC General Comment regards medical, psychological and legal services as urgent support services for harmful practice victims.¹²⁰ Even for women in rural and remote areas, the CEDAW Committee still promotes formal systems – mobile courts.¹²¹ Markedly, the Committee's imagination regarding making justice systems accessible to women concentrates on judicial and quasi-judicial systems and technologies.¹²²

The joint African Commission/African Children's Committee General Comment proposes legal, health and education services for victims as well as those at risk of child marriage. Legally, it recommends that states should establish women's and children's police units.¹²³ Health services should include providing age-appropriate comprehensive sexual and reproductive health school curricula;¹²⁴ and comprehensive sexual and reproductive health services to girls, including married girls.¹²⁵ Educational services should include the provision of sanitary facilities for girls and bursary programmes targeting girls at risk.¹²⁶

115 Joint CEDAW General Recommendation/CRC General Comment (n 67) para 52.

116 Concluding Observations on the 7th Seventh Periodic Report of Malawi, CEDAW Committee 24 November 2015 UN Doc CEDAW/C/MWI/CO/7 (2015) para 21.

117 These should be devoted to the provision of legal advice and aid, commencing legal proceedings and coordinating necessary support services for women, including poor and rural women; CEDAW General Recommendation 33 (n 74) para 17(f).

118 CEDAW General Recommendation 33 (n 74) para 16(a).

119 Particularly medical and psychological care and other social services; CEDAW General Recommendation 33 (n 74) para 17(f).

120 Joint CEDAW General Recommendation/CRC General Comment (n 67) para 82.

121 CEDAW General Recommendation 33 (n 74) para 16(a).

122 Eg, the removal of economic barriers to justice (filing fees and other court costs) and linguistic barriers in judicial and quasi-judicial processes (para 17(a)); videoconferencing of court hearings (para 17(d)); and ensuring a conducive physical environment for judicial and quasi-judicial processes (para 17(e)); CEDAW General Recommendation 33 (n 74).

123 Joint ACHPR/ACERWC General Comment (n 86) para 40.

124 Joint ACHPR/ACERWC General Comment (n 86) para 36.

125 Joint ACHPR/ACERWC General Comment (n 86) paras 34 & 37.

126 Joint ACHPR/ACERWC General Comment (n 86) para 32.

The joint African Commission/African Children's Committee General Comment recommends that states should provide support for boys and girls who are already in marriage. Such support includes comprehensive social protection and health services, education assistance, legal assistance, and parenting support.¹²⁷ In this way the joint General Comment seeks to reduce the harsh impacts of child marriage on and further victimisation of those who married as children.¹²⁸ The already married category is not clearly covered in the support meant for 'children and women who are, or are at high risk of becoming victims of harmful practices'¹²⁹ under the joint CEDAW General Recommendation/CRC General Comment.

The various services require money, and the jurisprudence regards budgets as essential in internalising norms protecting women from harmful practices.

5.2.3 *Budget and resource allocation*

Under the jurisprudence, successfully addressing harmful practices cannot be achieved without central and local government budgets. The joint CEDAW General Recommendation/CRC General Comment and CRC General Comment 13 uphold the budget as one key strategy for implementing legislation to address harmful practices and violence against children respectively.¹³⁰ CEDAW General Recommendation 35 expects the executive to coordinate with relevant state agencies and commit adequate budgetary resources for the implementation of specific institutional measures.¹³¹ The joint African Commission/African Children's Committee General Comment anticipates that states would meet their obligations under the General Comment by 'allocating sufficient budgetary and other resources' towards ending child marriage.¹³²

127 Joint ACHPR/ACERWC General Comment (n 86) para 42.

128 Joint ACHPR/ACERWC General Comment (n 86) para 25.

129 Joint CEDAW General Recommendation/CRC General Comment (n 67) para 87(a).

130 Joint CEDAW General Recommendation/CRC General Comment (n 67) para 12; CRC General Comment 13 (n 80) paras 40 & 41, CRC/C/GC/13. The latter urges laxing state parties to provide adequate budget allocations for the implementation of legislation and all other measures adopted to end VAC (para 41(e)).

131 That is, design of focused public policies, development and implementation of monitoring mechanisms and the establishment and/or funding of competent national tribunals; Joint ACHPR/ACERWC General Comment (n 86) para 26(b).

132 Joint ACHPR/ACERWC General Comment (n 86) para 45. Generally, para 17 of this joint General Comment explains that the normative framework of the joint ACERWC/ACHPR General Comment is also guided by art 26 of the African Women's Protocol, which urges state parties to adopt measures and provide budgetary and other resources towards the full and effective implementation of the Protocol.

Thus, the availability of budgets and resource allocation towards the implementation of institutional laws, policies and programmes targeting the elimination of harmful practices is an important indicator of whether states have internalised the norm protecting women from harmful practices. Relatedly, budgets are also vital for capacity-building interventions related to harmful practices.

5.3 Norm internalisation through capacity building and awareness raising

5.3.1 *Nature of capacity-building and awareness-raising interventions*

The CEDAW, CRC and African Commission/African Children's Committee jurisprudence on harmful practices is unrelenting about the need to immerse wide categories of people in the human rights discourse if socio-cultural transformation leading to the abandonment of harmful practices is to materialise. This should be achieved through top-down 'capacity building', 'trainings', 'awareness raising' – and often the difference between these terminologies is vague.¹³³

'A comprehensive, holistic and effective approach to capacity building' should focus on attitudinal and behavioural transformations towards harmful practices among targeted groups and the wider community.¹³⁴ The jurisprudence recommends capacity-building measures for purposes of empowering various cadres of duty bearers to know human rights norms and apply them to their services domains. UN jurisprudence shows that for the activities branded as 'capacity building/training', the CEDAW Committee has at times been engrossed with professional groups. For example, CEDAW General Recommendation 24 on women and health requires states to train health workers to spot and manage the health impacts of gender-based violence.¹³⁵ In the justice sector, CEDAW General Recommendation 33 instructs states to arrange 'capacity-building programmes for judges, prosecutors, lawyers and law enforcement officials'.¹³⁶

¹³³ Kachika (n 1) 130.

¹³⁴ Joint CEDAW General Recommendation/CRC General Comment (n 67) para 70.

¹³⁵ CEDAW General Recommendation 24 (n 69) para 15(b).

¹³⁶ CRC General Comment 13 (n 80) para 29(f) provides that the training should be about the application of international legal instruments relating to human rights, including the convention and the jurisprudence of the Committee; and of legislation prohibiting discrimination against women.

However, the joint CEDAW General Recommendation/CRC General Comment accommodates both formal and informal structures in the 'comprehensive, holistic and effective approach to capacity building' that states should implement at all levels to eliminate harmful practices.¹³⁷ It observes that a key preventative measure is to develop the capacity of all relevant professionals who are in regular contact with victims, potential victims and perpetrators of harmful practices.¹³⁸ Police, public prosecutors, judges and other law enforcement officials should be trained to implement legislation criminalising harmful practices, equipping them with knowledge and skills about women's and children's rights, as well as victim handling.¹³⁹ Additionally, the joint General Recommendation/General Comment prompts states to include those serving in ADR and traditional justice systems in human rights training programmes.¹⁴⁰

CRC General Comment 13 also supports building the capacity of personnel in both formal and informal structures. It requires states to provide initial and in-service general and role-specific training to all professionals and non-professionals working with and for children, including traditional and religious leaders, so that they can protect children from all forms of physical or mental violence.¹⁴¹ The CRC Committee prefers that educational measures towards addressing attitudes, traditions, customs and behavioural practices that condone and promote violence against children should be implemented under the state's responsibility.¹⁴²

The joint African Commission/African Children's Committee General Comment recommends that training programmes should be implemented for prosecutors, court personnel, national human rights institutions, civil society organisations supporting child

137 Joint CEDAW General Recommendation/CRC General Comment (n 67) paras 69-72: These include influential leaders (such as traditional and religious leaders), as many relevant professional groups as possible (including health, education and social workers, child care professionals, asylum and immigration authorities, the police, public prosecutors, other law enforcement officials, judges and politicians at all levels). They need to be provided with accurate information about the practice and applicable human rights norms and standards with a view to promoting a change in attitudes and behaviours of their group and the wider community.

138 Joint CEDAW General Recommendation/CRC General Comment (n 67) para 56.

139 Joint CEDAW General Recommendation/CRC General Comment (n 67) paras 70-72(c).

140 The training should be on human rights and the appropriate application of key human rights principles. Traditional and religious leaders and professional groups should receive with accurate information about harmful practices and applicable human rights norms and standards; Joint CEDAW General Recommendation/CRC General Comment (n 67) para 69.

141 CRC General Comment 13 (n 80) para 44(d).

142 Such measures should encompass well-programmed training/education undertakings targeted at a wide range of government and civil society professionals and institutions; CRC General Comment 13 (n 80) para 44.

marriage victims, and statutory bodies.¹⁴³ Additionally, states should 'conduct trainings and capacity building workshops for marriage and birth registration officials, teachers, health providers, judicial officers, and religious, community and traditional leaders', to enlighten them of laws proscribing child marriage and the rights of children to be protected from child marriage.¹⁴⁴

When it comes to interventions coined 'awareness raising,' CEDAW General Recommendation 35 proposes that these programmes should target women and men at all societal levels; education, health, social services and law enforcement personnel and other professionals and agencies involved in prevention and protection responses; traditional and religious leaders; and perpetrators of any form of gender-based violence.¹⁴⁵ The joint CEDAW General Recommendation/CRC General Comment stipulates that traditional and religious leaders should be given accurate information about applicable human rights norms in order to renew their thinking.¹⁴⁶

Furthermore, the joint CEDAW General Recommendation/CRC General Comment advises states to raise awareness of the causes and consequences of harmful practices through dialogue with relevant stakeholders.¹⁴⁷ Awareness-raising programmes targeting state structures should engage decision makers, relevant programmatic staff and key professionals working within local and national government agencies.¹⁴⁸ Personnel within national human rights institutions should also be awakened to the human rights implications of harmful practices so that they can focus on eliminating such practices.¹⁴⁹

The above demonstrates that international human rights jurisprudence on harmful practices considers human rights education and awareness raising, including of traditional leaders, as a key step in creating an enabling environment for transforming traditional practices harmful to women and children.¹⁵⁰ This begs the question whether community systems are expected at all to be responsible

143 Joint ACHPR/ACERWC General Comment (n 86) para 40.

144 Joint ACHPR/ACERWC General Comment (n 86) para 43.

145 CEDAW General Recommendation 35 (n 71) para 30(b)(ii).

146 Joint CEDAW General Recommendation/CRC General Comment (n 67) para 69.

147 Joint CEDAW General Recommendation/CRC General Comment (n 67) para 56.

148 Joint CEDAW General Recommendation/CRC General Comment (n 67) para 80(b).

149 As above.

150 CEDAW General Recommendation 19 (n 70) para 24(t)(ii); CRC General Comment 4 (n 85) para 20; CRC General Comment 13 (n 80) para 44; Banks (n 66) 834.

for designing and facilitating education and awareness-raising interventions.

5.3.2 Conceptualisers of education and awareness-raising interventions: Positioning of the state, civil society organisations and traditional leaders

The CEDAW, CRC and African Commission/African Children's Committee jurisprudence on harmful practices recommends that states should design and implement awareness raising and education and capacity-building programmes. The jurisprudence is partially noncommittal about the need for the state to partner with civil society organisations and other local allies (norm translators/vernacularisers) in developing relevant programmes. For example, CRC General Comment 4 places on state parties the onus of developing and implementing awareness-raising campaigns and education programmes to overcome harmful traditional practices.¹⁵¹ The joint African Commission/African Children's Committee General Comment asserts that enforcement and awareness will occur only if states train all relevant stakeholders, especially government officials, police and the judiciary to protect girls and boys from child marriage and its effects.¹⁵²

Part of the jurisprudence explicitly mandates states to design awareness-raising campaigns and education programmes together with civil society organisations. For example, CEDAW General Recommendation 35 requires states to develop and implement effective awareness and education measures¹⁵³ with the active participation of women's organisations and marginalised groups of women and girls.¹⁵⁴ Similarly, the 'ethnicity and minority sensitive' targeted outreach activities under CEDAW General Recommendation 33 are to be designed in close cooperation with women's and other relevant organisations.¹⁵⁵ Additionally, states are to cooperate with non-state actors in capacity-building and training programmes for justice system personnel.¹⁵⁶ Also, CRC General Comment No

151 CRC General Comment 4 (n 99) para 20.

152 Joint ACHPR/ACERWC General Comment (n 86) para 63.

153 To address and eradicate the stereotypes, prejudices, customs and practices that condone or promote gender-based VAW and underpin the structural inequality of women with men. prejudices, customs and practices that condone or promote gender-based VAW and underpin the structural inequality of women with men. </DisplayText></Cite></EndNote>

154 CEDAW General Recommendation 35 (n 71) para 30(b)(ii).

155 CEDAW General Recommendation 33 (n 74) para 17 (c).

156 To ensure that religious, customary, indigenous and community justice systems harmonise their norms, procedures and practices with the human rights standards; CEDAW General Recommendation 33 (n 74) para 64(a).

13 stipulates that both state and civil society organisations should facilitate educational measures, although the state is given overall responsibility.¹⁵⁷

Besides trusting state actors and civil society organisations, jurisprudence developed in 2014, 2016 and 2017 respectively has pushed the frontiers and embraced local or traditional leaders in the pipeline that designs programmes, and transports human rights norms to the ground. The joint CEDAW General Recommendation/CRC General Comment promotes the engagement of all relevant stakeholders, including local leaders, practitioners, grassroots organisations and religious communities, in preparing and implementing public discussion activities for eliminating harmful practices.¹⁵⁸ Similarly, CEDAW General Recommendation 34 invites states to adopt outreach and support programmes, awareness raising and media campaigns to eliminate harmful practices and stereotypes in collaboration with traditional leaders and civil society organisations.¹⁵⁹

The language of 'collaboration' is also found in the joint African Commission/African Children's Committee General Comment, which urges states 'to facilitate dialogue, and promote collaboration between all stakeholders and particularly traditional, community and religious leaders, in preventing child marriage' as one harmful practice.¹⁶⁰ However, unlike CEDAW General Recommendation 34 that only specifies collaboration with traditional leaders when the state is adopting awareness programmes, the nature of collaboration in the joint General Comment could be variedly interpreted. It could either mean that traditional, community and religious leaders should be involved in implementing child marriage preventative strategies or that they should in fact also participate in developing such strategies.¹⁶¹

However, whatever the case, the fact that the above jurisprudence is not integrating traditional leaders as mere targets of awareness and education certainly is a paradigm shift. It addresses Bank's concern that CEDAW jurisprudence fails to guide states to collaborate with providers of customary justice as meaning making institutions and

157 CRC General Comment 13 (n 80) para 44.

158 Joint CEDAW General Recommendation/CRC General Comment (n 67) para 81(f).

159 CEDAW General Recommendation No 34: The Rights of Rural Women (2016) UN Doc CEDAW/C/GC/34 para 23.

160 Joint ACHPR/ACERWC General Comment (n 85) para 62.

161 Kachika (n 1) 137.

actors.¹⁶² By conscripting traditional leaders in both the formulation and facilitation of awareness programmes against harmful practices, traditional leaders are effectively being endorsed as having a role in diffusing human rights norms to the local.

One would argue that it is not surprising that traditional leaders have weight in CEDAW General Recommendation 34, the joint CEDAW General Recommendation/CRC General Comment and the joint African Commission/African Children's Committee General Comment – which are primarily about rural dealings¹⁶³ – since this is the best opportunity to capitalise on the territorial influence of traditional leaders. Nevertheless, the development is a fresh twist given the circumspect attitude that the same jurisprudence holds towards plural justice mechanisms, as the next part demonstrates.

Still, one should be mindful that the positive shifts notwithstanding, the foregoing illustrates that the extent to which traditional leaders are entrusted with the responsibility to facilitate norm internalisation pales compared to the high demand in the jurisprudence that they should be targets of awareness-raising and capacity-building programmes. Clearly, the very responsibility of traditional leaders to culturally sanitise 'the other' comes with the duty to first subject 'the self' to the internalisation dosage.¹⁶⁴

5.4 Position of plural and community law in the jurisprudence

Jurisprudence regarding alternative dispute resolution (ADR) and plural legal systems is relevant because the community laws could fall under either. CEDAW General Recommendation 33 describes ADR processes as mandatory or optional systems that many jurisdictions have adopted for mediation, conciliation, arbitration and collaborative resolutions of disputes. ADR is mainly applied in issues of family law, domestic violence, among others.¹⁶⁵ Informal ADR processes include 'non-formal indigenous courts and chieftaincy-based ADR, where chiefs and other community leaders resolve interpersonal disputes'.¹⁶⁶ The community laws on harmful practices could operate as the 'chieftaincy-based ADR' mechanism since they are informally

¹⁶² Banks (n 66) 784.

¹⁶³ CEDAW General Recommendation 34 is about the rights of rural women; the joint CEDAW General Recommendation/CRC General Comments is exclusively about harmful practices; and the joint ACHPR/ACERW General Comment is exclusively on ending child marriage, a notorious harmful practice.

¹⁶⁴ Kachika (n 1) 139.

¹⁶⁵ CEDAW General Recommendation 33 (n 74) para 57.

¹⁶⁶ As above.

used to resolve locally-contextualised challenges affecting women and girls.

Relatedly, CEDAW General Recommendation 33 defines plural legal systems as 'religious, customary, and indigenous or community laws and practices that sometimes legally coexist with state laws, regulations, procedures and decisions'.¹⁶⁷ By individually mentioning customary law and community law, the CEDAW Committee contradicts Onyango's assertion that customary law is community law.¹⁶⁸ Therefore, the community laws in Malawi would fit under the jurisprudence's 'community law' label, especially as the jurisprudence considers it immaterial 'whether or not such laws have categorical legal basis'.¹⁶⁹

Examined chronologically, the jurisprudence on harmful practices has been unstable in its endorsement of ADR and legal pluralism systems as potential mechanisms for addressing harmful practices. The joint CEDAW General Recommendation/CRC General Comment in 2014 concedes that ADR or traditional justice systems could sometimes be deployed to respond to harmful practices.¹⁷⁰ However, the joint General Recommendation/General Comment affirms that states' obligations under CEDAW and CRC¹⁷¹ prohibiting harmful practices supersede customary, traditional or religious laws.¹⁷² Thus, the joint General Recommendation/General Comment recommends the instant repeal of all legislation, traditional, customary or religious laws that condone, allow, or stimulate harmful practices.¹⁷³

Then, while acknowledging the relevance of ADR and pluralist processes, CEDAW General Recommendation 33 of 2015 cautions that these flexible and cheaper processes may harbour patriarchal values that embolden perpetrators, violate women's rights, and hinder women's access to justice.¹⁷⁴ Therefore, it utterly disapproves of subjecting any case of violence against women to ADR processes.¹⁷⁵ Like the joint General Recommendation/General Comment, General Recommendation 33 expects multiple sources of law, notwithstanding their legal viability,¹⁷⁶ within states to respect

167 CEDAW General Recommendation 33 (n 74) para 61.

168 P Onyango *African customary law: An introduction* (2013) 134.

169 CEDAW General Recommendation 33 (n 74) para 61.

170 Joint CEDAW General Recommendation/CRC General Comment (n 67) para 71.

171 And other international human rights standards.

172 Joint CEDAW General Recommendation/CRC General Comment (n 67) para 54(b).

173 Joint CEDAW General Recommendation/CRC General Comment (n 67) para 54(c).

174 CEDAW General Recommendation 33 (n 74) paras 57 & 62.

175 CEDAW General Recommendation 33 (n 74) para 58(c).

176 From a formal law point of view.

and protect women's rights according to CEDAW and other human rights principles.¹⁷⁷ Thereafter, CEDAW General Recommendation 35 of 2017 reverts to the position accommodating ADR, only disputing the mandatory reference of violence cases to ADR procedures; and calling for ADR procedures to be strictly regulated.¹⁷⁸ It further urges plural legal systems to protect victims of gender-based violence against women and guarantee them access to justice and effective remedies.¹⁷⁹

The fact that the jurisprudence between 2014 and 2017 exhibits fluctuating positions on whether violence against women, which includes harmful practices, should be subjected to ADR, including within traditional mechanisms, reveals that the jurisprudence on harmful practices itself is a living negotiation site.¹⁸⁰ Indeed, Krook and True have observed that norms evolve as their content is subjected to continuous scrutiny or affected by emerging developments.¹⁸¹ Zwingel has also called norms 'never finished products and content-in-motion'.¹⁸²

In recognising both the risk and the potential of plural justice systems to women's access to justice and women's rights generally, the jurisprudence draws attention to debates about living customary law, cultural relativism and universalism. CEDAW General Recommendation 33 expects states to reconcile existing plural justice systems with CEDAW by, among others, formally recognising and codifying religious, customary, indigenous, community and other systems.¹⁸³ However, the codification of customary law or equivalent is contested by living customary law scholars.¹⁸⁴ Furthermore, the pre-eminence of education and awareness-raising measures to promote norms protecting women from harmful practices in the jurisprudence betrays the commitment of the jurisprudence to universalism – the

177 CEDAW General Recommendation 33 (n 74) para 61.

178 CEDAW General Recommendation 35 (n 71) para 32(b).

179 CEDAW General Recommendation 35 (n 71) para 29(b).

180 As seen above, the jurisprudence went from a guarded acknowledgment of ADR as a possible avenue for such cases in 2014; to 'absolutely not' in 2015; and back to a cautious 'yes' in 2017.

181 ML Krook & J True 'Rethinking the life cycles of international norms: The United Nations and the global promotion of gender equality' (2012) 18 *European Relations* 117.

182 Zwingel (n 39) 676.

183 CEDAW General Recommendation 33 (n 74) para 62.

184 R Sieder & J-A McNeish *Gender justice and legal pluralities: Latin America and African perspectives* (2013) 13; TW Bennett *Human rights and African customary law* (1995) 23; R Ozoemena 'Living customary law: A truly transformative tool' (2013) 6 *Constitutional Court Review* 147.

notion that all societies must protect certain minimum standards of human dignity¹⁸⁵ – and not cultural relativism.

This bias towards universalism is underlined by the jurisprudence's rejection of any form of harmful practices and violence against women and violence against children, both in law and in practice. The rejection of cultural relativism is evident in the various instances when the jurisprudence denotes that culture and tradition directly incite harmful practices against women and girls.¹⁸⁶ This universalistic approach has been justified by concerns that 'the respect of cultural differences' may eventually translate into women's rights invasions.¹⁸⁷

The implication of the jurisprudence's positivist approach to human rights is that CEDAW and CRC are not seen as 'legal codes amongst the several alternatives that exist in a plural legal field'.¹⁸⁸ Yet, it has been proven that in plural legal systems, the enthusiasm by a treaty-monitoring body to universalise could lead to the misunderstanding of local 'legal' arrangements that communities find functional.¹⁸⁹ This is a risk that orderings, such as the community laws on child marriage and harmful practices in rural Malawi, face, especially when they come across as potentially diluting statutory law and human rights standards. Indeed, the jurisprudence suggests that the internalisation of the norms protecting women from harmful practices either within ADR or other traditional processes would be incomplete if international human rights standards are shortchanged.

6 Conclusion

A key aspect of the international human rights law and jurisprudence on harmful practices are measures that states are expected to pursue to eliminate harmful practices. International law and jurisprudence suggest that internalisation of norms protecting women from harmful

185 SE Merry 'Constructing a global law: Violence against women and the human rights system' (2002) 28 *Law and Social Inquiry* 944.

186 CEDAW General Recommendation 35 (n 71) para 14; Joint CEDAW General Recommendation/CRC General Comment (n 67) paras 5, 6 & 8; CRC General Comment 13 (n 80) para 12.

187 SM Okin 'Feminism, women's human rights and cultural differences' (1998) 13 *Hypatia* 36.

188 SE Merry 'Human rights and transnational culture: Regulating gender violence through global law' (2006) 44 *Osgoode Hall Law Journal* 74.

189 Merry (n 188) 59 & 72. Merry provides an example regarding how the CEDAW Committee, in deliberations of a Fiji state party report and ensuing Concluding Observations, instinctively rushed to demand the scraping of a useful and entrenched reconciliatory local mechanism called *bulubulu*. The Committee was reacting to a concern expressed by the state party delegation that *bulubulu* was sometimes being misused to handle rape cases. Instead of condemning this element of abuse, the Committee insisted that *bulubulu* be abolished which, according to the Fiji delegation, is a non-starter as it is a Fiji way of life.

practices should address three programmatic areas, predominantly at the formal or macro-level. There is a resounding call for states to prioritise legislative measures, administrative measures, and to adopt policy and other capacity building, training, awareness raising as a strategy for ensuring that different duty bearers are internalising international standards towards eliminating harmful practices.

Notably, community laws are not a legislative measure under the jurisprudence. Rather, CEDAW jurisprudence suggests that community laws fall under ADR and plural justice systems and recommends that plural justice systems should be harmonised with CEDAW through codification. Over the years, the jurisprudence seems unstable about whether to subject violence against women to ADR. This inconclusiveness confirms that international human rights norm negotiation is rolling business.

Newer jurisprudence that tasks the state to design and implement awareness raising and education or capacity-building programmes in collaboration with traditional leaders is a novelty, considering that the jurisprudence is generally nervous about plural justice mechanisms. Therefore, the emergence of community laws in contexts such as rural Malawi is challenging relevant UN and AU human rights treaty-monitoring bodies to critically examine the current stance that suggests that norm internalisation is mostly credible within state or formal institutions and systems. Yet, the community laws, which are also internalising the norm protecting women from harmful practices, are at the level of chiefs and their subjects and territories.

More remains to be understood about community laws on harmful practices themselves, for example, what domestic laws say about their domestication as well as about harmful practices in general; and how the community laws are actually internalising human rights norms on the ground, and how they contrast with customary law. All these are topics for further articles.¹⁹⁰

¹⁹⁰ These issues have also been holistically analysed in the author's PhD thesis; Kachika (n 1).