

ENDING EARLY/CHILD OR FORCED MARRIAGE IN MALAWI: THE ROLE OF THE JUDICIARY*

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Abstract

This article examines the role of the judiciary in the elimination of early/child or forced marriage. With regard to the traditional role of adjudication, the author also examines other roles judicial officers can play beyond the courtroom, to end early/child and forced marriage. These include utilisation of their ready-made platform to advocate for change and condemn the practice of child marriage. Judicial officers also play the role of record-keeping with the capacity to generate data concerning the numbers of cases concerning early/child or forced marriages, in whatever form they present themselves, the context within which they occur, and the measures taken. This article argues that the data will enable governance structures to develop plans and strategies in allocating funds to eliminate early/child, and forced marriage.

I BACKGROUND

According to UNICEF, child marriage is defined as the formal or informal marriage that involves children who are below the age of 18.¹

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¹ A Kohno & T Techarivichien et al 'Investigation of the Key Factors that Influence the Girls to Enter into Child Marriage: A Meta-synthesis of Qualitative Evidence' (2020) 15(7) *PLoS ONE*, <https://www.unicef.org/protection/child-marriage> (accessed 5 October 2023).

Child marriage has been earmarked as the ‘critical priority area in Malawi’.² Owing to systemic gender inequality, which places low value on a girl child, girls are the most vulnerable group in this practice.³ The practice is further exacerbated by poverty, insecurity and conflict.⁴ Malawi is a sub-Saharan country that is plagued by high levels of poverty and gender inequality. It has the fourth highest rate of child marriage in Eastern and Southern Africa.⁵ Malawi ranks as the African state with the ninth highest child marriage rate; it is also the country with the eleventh highest rate of child marriage in the world.⁶ Approximately 42 per cent of girls are married before the age of 18 years and 9 per cent are married before the age of 15 years.⁷ Childbirth typically follows within a year after marriage, elevating Malawi’s teenage pregnancy rate to 29 per cent of girls aged 15–19.⁸

The impact of child marriage in Malawi is evident in the country’s low development indicators.⁹ Child marriage adversely impacts the physical health of a child (due to increased risk of sexually transmitted disease, cervical cancer, obstetric fistula and maternal death or other complications). Children born from teenage mothers are also at a high risk of being born premature, higher mortality risks and stunted growth as well as lower

² Government of Malawi, National Strategy on Ending Child Marriage (2018–2023) 7.

³ SADC Parliamentary Forum, Girls Not Brides: The Global Partnership to End Child Marriages, UNFPA (2018) ‘A Guide to Using the SADC Model Law on Eradicating Child Marriage and Protecting Children Already in Marriage’ <https://esaro.unfpa.org/sites/default/files/pub-pdf/J7288E%20-%20SADC%20Model%20Law%20Toolkit%20final.pdf> (accessed 5 October 2023).

⁴ Kohno et al (note 2 above).

⁵ Government of Malawi (Ministry of Gender, Children, Disability and Social Welfare) & UNICEF (2019) ‘Government Scoping on Programmes and Interventions to End Child Marriage’ <https://www.unicef.org/esa/media/7446/file/UNICEF-Malawi-End-Child-Marriage-Budget-Scoping-2020.pdf> (accessed 17 October 2023).

⁶ UNICEF *The State of the World’s Children: A Fair Chance for Every Child* (2016) 12.

⁷ ‘Government Scoping’ (note 6 above).

⁸ Malawi: Demographic and Health Survey, 2015–16 (2017) Zomba, Malawi: National Statistics Office.

⁹ In 2020, Malawi ranked 174 out of 181 on the human development index but in 2021 it was ranked 169 out of 191 countries. (See Government of Malawi & UNDP Malawi National Human Development Report the Experience of Decentralisation in Malawi (2021).)

cognitive development.¹⁰ The mental health of teenage mothers is also affected due to heightened risk of isolation and depression.¹¹ It is axiomatic that educational attainment is also lowered by child marriage. In many cases the marriages are characterised by exploitation: teenage brides are often exposed to marital rape, domestic violence and exploitative labour. Child marriage therefore violates and threatens the fundamental rights of the child to health, dignity, life, freedom and the right to education.

In view of the seriousness of the impact of child marriage, elimination of child marriage (ECM) has a number of benefits for Malawi. First, recognition that child marriage denies girls their fundamental human rights. Secondly, at the country level, child marriage has a huge economic impact on the state due to the increased fertility and population growth that it causes.¹² Child marriage consequently undermines numerous development priorities,¹³ and ECM would boost Malawi's chances of achieving the Sustainable Development Goals (SDGs) necessary to lift it out of poverty, for instance achievement of universal primary education, maternal and child health, and most specifically SDG 5, which aims at achieving gender equality and empowering women and girls.¹⁴

As a way to recognise the seriousness of the consequences of child marriage to the rights of the girl child and to development in general, the government of Malawi has responded by not only providing strategic direction, but by also amending the legal framework to ensure that it aligns not only with the Bill of Rights in the Constitution of Malawi, 1994 but also with international treaty obligations to which Malawi is a party. These include the development of the National Strategy on Ending Child Marriage (2018–2023) to provide a framework for interventions aimed at reducing the prevalence of child marriage in Malawi by 20 per cent by 2023 and the creation of an enabling legal and policy environment to end

¹⁰ Ministry of Gender, Children, Disability, and Social Welfare and African Institute for Development Policy (AFIDEP) (2017) 'Issue Brief: Ending Child Marriage in Malawi' *What the Evidence Tells Us* <https://www.afidep.org/publication/ending-child-marriage-in-malawi-what-the-evidence-tells-us/> (accessed 17 October 2023).

¹¹ 'Ending Child Marriage in Malawi' (note 10 above).

¹² Q Wodon, C Male, A Nayihouba et al *Economic Impacts of Child Marriage: Global Synthesis Report* (2017) 51.

¹³ Wodon et al (note 12 above) 51.

¹⁴ A Koski, S Clark & A Nandi 'Has Child Marriage Declined in sub-Saharan Africa? An Analysis of Trends in 31 Countries' (2017) 43(1) *Population and Development Review* 7–29 <https://doi.org/10.1111/padr.12035> (accessed 17 October 2023).

child marriage at all levels through the amendment and enactment of laws aimed at criminalising child marriage and conduct related to it.

Despite various government initiatives¹⁵ aimed at ECM, progress remains slow, and this was exacerbated by the Covid-19 pandemic which increased the number of cases of child marriage (13 000 cases registered) and teen pregnancies (40 000 cases registered) since the onset of the pandemic.¹⁶ The obstacles to progress are mostly caused by lack of enforcement of the existing laws to prevent or tackle the problem of child marriage, with the result that perpetrators are rarely charged or convicted,¹⁷ if reported in the first place. The plural legal system in which customary law considerations often take priority in the communities enables child marriages to thrive. Lack of knowledge of rights amongst survivors and their families is also a problem.¹⁸ This article explores the challenges of ECM through the legal framework amidst the difficulties that surround implementation of the law from a judicial perspective. Most interventions aimed at ECM are not pragmatically addressing the socio-economic and cultural root causes; they are not aimed at strengthening the legal enforcement framework from the moment the matter is reported to the police and taken to court by the prosecution; and there has been very little focus, if any, on the judicial role in ECM.

¹⁵ According to the National Strategy on Ending Child Marriage (note 2 above) other notable initiatives by government aimed at ECM include hosting the first symposium on ending child marriage in 2013 and launching a campaign on ending child marriage using mass media for maximum outreach in 2014. A national child help line was also established for those affected to report to relevant authorities on possible or existing child marriages, domestic and gender-based violence and other harmful practices. These initiatives were backed by strengthening the birth registration system and the national identity registration processes which make it easier to prove that a person is a child and therefore protected by law from early marriage as well as other forms of abuse. The government is also implementing a re-admission policy that allows girls who become pregnant while in school to return after giving birth as well as a National Girls Education Strategy that focuses on reducing child marriage and teenage pregnancies. Further, through collaboration with other stakeholders, the government has also implemented a number of noteworthy interventions including annulment of unions and withdrawal of children from existing marriages and supporting them to get re-admitted in school. Social support programmes have also been implemented to target girls and their parents so that the girls are able to get back into the education system.

¹⁶ Office of the United Nations *Malawi Covid-19 Update Situation Update No 29* 9 October 2020 <https://reliefweb.int/report/malawi/un-malawi-covid-19-update-situation-update-no-29-9-october-2020> (accessed 17 October 2023).

¹⁷ Government of Malawi, National Strategy (note 2 above) 18.

¹⁸ Government of Malawi, National Strategy (note 2 above) 18.

II THE LEGAL FRAMEWORK

Historically, the role of the judiciary in responding to early/child or forced marriages was traditionally perceived as being confined to applying the law to situations in which perpetrators are brought to book for marrying child brides or for having forced the victim into marriage. Thus, courts must be moved to adjudicate in matters where an identified child marriage has occurred. Whilst this is indeed a proper role for the judiciary, cases involving child marriage will rarely present themselves in the traditional manner, despite an enabling legal framework, for a number of reasons.

Between 2010 and 2015 Parliament enacted a number of laws that prohibit early/child and forced marriages. The Marriage, Divorce and Family Relations Act¹⁹ enacted in 2015 prohibits child marriages by setting the minimum age for all marriages at 18 years. The provision was previously controversial as it was in direct contravention of subsections (6), (7) and (8) of section 22 of the Constitution which, until its amendment, defined a child as a person under the age of 16 years and permitted marriage from the age of 15 years.

The Gender Equality Act²⁰ enacted in 2011 prohibits harmful traditional practices and encompasses any practices that result in, encourage or conduce early/child and forced marriages.

The Penal Code²¹ was amended in 2023 to define a child as a person under the age of 18 years and subsequently raising the age of consent to sexual intercourse to 18 years. Thus, any person who engages in sexual intercourse with a child commits the offence of rape of a minor which attracts a maximum penalty of life imprisonment. Sexual intercourse with a minor, even in the so-called marriage, is therefore a criminal offence.

Section 81 of the Child Care, Protection and Justice Act²² makes it a criminal offence to force a child into marriage and to force a child to be betrothed. The penalty for committing any of these offences is imprisonment for ten years.

The enactment of the Deceased Estates (Wills, Inheritance, and Protection) Act²³ in 2011 also contributes to eliminating child marriages by preventing the dispossession of deceased estates by unscrupulous relatives to the detriment of surviving spouses and children. The economic hardships faced by such surviving spouses and children often leave them

¹⁹ Chapter 25:01 of the Laws of Malawi.

²⁰ Chapter 25:06 of the Laws of Malawi.

²¹ Chapter 7:01 of the Laws of Malawi.

²² Chapter 26:03 of the Laws of Malawi.

²³ Chapter 10:02 of the Laws of Malawi.

with no choice but to resort to early marriage as a way out of the ensuing hardships caused by losing a breadwinner and the inheritance they are entitled to.

Proscription of child marriage and strict penalties, albeit necessary for ECM, paradoxically also inadvertently push the practice underground by creating unintended consequences. Where such legal proscription is accompanied by public awareness, this often discourages individuals from reporting or seeking help regarding child marriage due to fear of legal consequences or stigma associated with their involvement.²⁴ The secrecy that ensues makes it harder for authorities, organisations, and communities to identify and intervene in such cases. The element of secrecy shields the practice from scrutiny and prevents support systems from reaching those in need. Socio-economic complexities also contribute to under-reporting, despite the existence of the law. Most victims are economically dependent on the perpetrators, who sometimes happen to be prominent figures in society and as a result the likelihood of the child marriage being reported is very low. Further, the Marriage, Divorce and Family Relations Act makes it a criminal offence for officials to perform marriage ceremonies knowing that the matters required by law for the validity of the marriage have not been fulfilled.²⁵ Such functionaries are therefore obliged to ensure that the persons whose marriages they officiate are amongst other things, of full age, lest they commit an offence which is punishable by a term of imprisonment of up to five years. Such strict regulations may lead to an increase in informal or unregistered marriages, where child marriages occur without official documentation or oversight. This makes it difficult to track and address child marriage effectively. Nonetheless, the existence of an enabling legal framework means that some cases do end up in the criminal justice system, and in many instances, a conviction is secured. Strengthening the judicial function to ensure that survivors receive justice and appropriate services from the criminal justice system is an important step to ECM and should be prioritised along with other criminal justice strengthening initiatives which are currently lacking.

²⁴ See A Melnikas, N Mulauzi & J Mkandawire et al 'Perceptions of Minimum Age at Marriage Laws and Their Enforcement: Qualitative Evidence from Malawi' (2021) 21 *BMC Public Health* 1350 <https://doi.org/10.1186/s12889-021-11434-z> (accessed 17 October 2023).

²⁵ Section 54 of the Marriage, Divorce and Family Relations Act (Chapter 25:01 of the Laws of Malawi).

(a) *The role of the judiciary – A theoretical framework*

The role of the judiciary in the elimination of child marriages can be understood within the framework of human rights and child protection. This framework emphasises the rights and well-being of children, as enshrined in the Constitution and international human rights instruments to which Malawi is a party, such as the United Nations Convention on the Rights of the Child (CRC). The CRC recognises the right of every child to be protected from all forms of exploitation, including child marriages. It establishes the principles of non-discrimination, best interests of the child, and the child's right to participate in decisions affecting them. The judiciary, in their role as guardians of the law, are tasked with upholding and promoting these rights.

Additionally, the framework of gender equality and women's rights is relevant to the issue of child marriages. As evidenced by the statistics, child marriages disproportionately affect girls and perpetuate gender inequalities. The judiciary can address this issue by considering gender-based discrimination and ensuring that girls have equal access to justice and protection from child marriages.

Overall, the theoretical framework for the role of judges in ending child marriages encompasses human rights, child protection, and gender equality, with a focus on safeguarding the rights and well-being of children, particularly girls, and promoting a society free from child marriages.

This role of the judiciary is not restricted to the courtroom or to court proceedings. By placing the role of the judiciary in this confined box, it is usually impossible to conceive of its broader capabilities in responding to the phenomenon.

The traditional perceptions of the role of the judiciary as being at the receiving end of a criminal justice conveyor belt at which suspects are tried, overlooks two important factors. The influence of a judicial officer, especially a senior one, goes beyond the courtroom and exceeds international boundaries. Judicial officers, in addition to their judicial functions, have the unique advantage of having a ready-made platform to raise awareness and contribute to civic education so that more cases are brought to court. Furthermore, within their adjudicatory role, whether they resort to judicial activism or not, they can recognise and act, based on the fact that the incidence of early/child or forced marriages does not always manifest itself expressly but can be disguised in a number of matters that fall before them. This is critical to enhancing the legal and policy framework. In both these premises, judicial officers are uniquely positioned to shape, advance and implement such a framework, within their countries and beyond. Judicial officers can lead in the development of robust jurisprudence, fostering a culture of zero tolerance. Judicial officers can also guarantee that the voices of citizens are heard (in the courtroom and outside), including those of the

girl child, in ensuring access to justice especially by the girl child, creating a conducive courtroom environment for the voice of the girl child and consistently enforcing the law to end child marriage. Lastly, judicial officers can also highlight the range of services or social protection measures available to survivors. Yet, judicial officers are often overlooked as essential stakeholders and drivers of change from this perspective.²⁶

(b) *Role of judiciary in criminal matters*

Child marriage is a form of violence; it results in sexual violence against children when the marriage is consummated. Implicit in the conduct are various criminal offences under law such as child trafficking,²⁷ rape of a child,²⁸ engaging in harmful practices,²⁹ forcing a child into marriage or betrothal,³⁰ amongst others. Like other offences involving violence against women and girls, child marriage is under-reported and even when reported to the police or other authorities, the attrition rates are so high³¹ that very few cases ever make it to trial.³² Criminology literature recognises that there are ‘many points of attrition in the life cycle of the case before, during or after the trial.’³³ Four major points of attrition are recognised.³⁴

²⁶ The National Strategy on Ending Child Marriage (note 2 above) makes no mention of the strategic role of the judiciary in this context.

²⁷ Contrary to section 79 of the Child Care, Protection and Justice Act (Chapter 26:03 of the Laws of Malawi) and section 15 of the Trafficking in Persons Act (Chapter 7:06 of the Laws of Malawi).

²⁸ Contrary to section 137 of the Penal Code (Chapter 7:01 of the Laws of Malawi).

²⁹ Contrary to section 5 of the Gender Equality Act (Chapter 25:06 of the Laws of Malawi).

³⁰ Contrary to section 81 of the Child Care, Protection and Justice Act (Chapter 26:03 of the Laws of Malawi).

³¹ For a general discussion on attrition in sexual violence see J Murphy-Oikonen, L Chambers & K McQueen ‘Sexual Assault Case Attrition: The Voices of Survivors’ (2022) 12 *SAGE Open* <https://doi.org/10.1177/21582440221144612> (accessed 17 October 2023).

³² In the case of *Republic v Yusuf Willy*, Criminal Review No 06 of 2021, High Court, Zomba District Registry (Unreported) Ntaba J notes in paragraph 2.35 that high levels of attrition in sexual violence cases result in impunity.

³³ A Garg ‘Attrition in Indian Rape Cases that Fail to Reach a Verdict: Going Beyond Conviction’ and ‘Acquittal’ https://www.law.ox.ac.uk/sites/default/files/migrated/criminal_justice_hub_proposals_-_garg.pdf (accessed 17 October 2023).

³⁴ See J Gregory & S Lees ‘Attrition of Rape and Sexual Assault Cases’ (1996) 36 *British Journal of Criminology* 1–17. Although these attrition points are identified in rape cases, they apply equally to cases of child marriage.

The first is police discretion: the police must decide, upon receiving a report, whether to record the case as an offence. Second, police investigators must decide whether or not to refer the matter for prosecution. It is also at the discretion of the police investigators to decide whether there is sufficient evidence to refer the matter forward. Third, the prosecution must decide whether to prosecute the defendant or to take no further action. Fourth, the judiciary must decide whether to convict the defendant or not. Whilst it is this fourth point of attrition that is entirely in the realm of the judiciary, the other three also provide an opportunity for the judiciary to exercise an oversight function in the exercise of police discretion which is a crucial function in ECM.

(c) *Resolving challenges resulting from prosecutorial discretion*

Prosecutorial discretion is governed by statute. Section 81 of the Criminal Procedure and Evidence Code³⁵ vests in any public prosecutor the power to withdraw any criminal proceedings with the consent of the Director of Public Prosecutions in subordinate courts. The power to withdraw a matter in the subordinate courts under this provision, must be made with 'the consent of the court'. Whilst no guidance is provided in the provision as to what considerations the court might consider in deciding whether or not to consent to the prosecution's decision to withdraw, enough space is created within this provision for the judiciary to exercise oversight over such decisions. Since the subordinate courts are not courts of record, there is no recorded case law in which such courts have taken the prosecution to task in their decision to withdraw a case, and anecdotal accounts suggest that the subordinate courts merely rubber stamp the decision of the prosecution to withdraw. Research is required on the effects of this provision as it holds an important key in ensuring that the prosecution is held accountable in its decision to withdraw sexual violence cases, and

³⁵ Chapter 8:01 of the Laws of Malawi provides that:

'In any trial before a subordinate court any public prosecutor may, with the consent of the court or on the instruction of the Director of Public Prosecutions, at any time before judgment is pronounced, withdraw from the prosecution of any person; and upon such withdrawal—

- (a) if it is made before the accused is called upon to make his defence, he shall be discharged, but such discharge of an accused shall not operate as a bar to subsequent proceedings against him on account of the same facts;
- (b) if it is made after the accused is called upon to make his defence, he shall be acquitted.'

more specifically child marriages cases if attrition rates are to be reduced. It would also be very important to enhance the capacity of the subordinate courts with specific contextual training on child marriages so that they are able to examine the prosecution on the reasons for withdrawal with a better understanding of how this would affect further prosecution of the case. Training on evidential analysis in complex cases would also assist in capacitating the subordinate courts to reflect critically on whether the prosecution has considered the totality of the evidence in making its decision to withdraw.

Section 77 of the Criminal Procedure and Evidence Code also empowers the Director of Public Prosecutions to enter a discontinuance at any stage in the proceedings. Under this provision, however, the court does not have any power to question the entry of a discontinuance by the Director of Public Prosecutions during the proceedings and therefore any challenge to such a decision can lie only in judicial review. Unlike with section 81 of the Criminal Procedure and Evidence Code, the court would have to be moved in separate proceedings to challenge the discretion. Despite numerous anecdotal accounts that many cases of sexual violence are withdrawn by the prosecution, the discretion of the Director of Public Prosecutions does not seem to have been challenged in judicial review proceedings. Since cases have to be brought before the courts, more civic education and rights education is needed in order for an informed populace to make the prosecution more accountable. Strategic interest litigation for this purpose would also ensure that such cases are brought before the courts.

The judiciary of Malawi has recently initiated open days where it showcases its functions to the general public. The Women Judges Association of Malawi also conducts awareness campaigns aimed at making justice more accessible to the people. The work of the Women Judges Association in Malawi (WOJAM) is an example of judicial officers coming together to complement their adjudicatory role with wider advocacy activities. WOJAM, the Malawi Chapter of the International Association of Women Judges, is a corporate body membership which includes all female judicial officers and has an open-door policy for male judicial officers. The main objective of this Association is to bring the courts to the people and the people to the courts while upholding the rule of law. Its vision is to provide effective and efficient legal and judicial service. Amongst its objectives, WOJAM aims to promote public awareness of all issues relating to fair administration of justice. By virtue of being made up of judicial officers, WOJAM has members in every district in Malawi and uses court centres to conduct sensitisation and public awareness campaigns.

To the extent that WOJAM has attempted to incorporate issues of child marriage in its diverse awareness raising programmes showcasing the various roles of the judiciary and encouraging the public to access justice through the courts, it has been very effective. The levels of effectiveness are yet to be measured; however, bearing in mind that the baseline of access to justice for such matters has previously been very low, the fact that some cases in which pertinent issues have emerged have seen their way up to the High Court is evidence of WOJAM's effectiveness. There is however still room for improvement. No specific awareness programmes on the oversight role of the judiciary with regard to police investigatory and prosecutorial discretion have been held. WOJAM has worked with other justice providers such as the Women Lawyers Association, who have set up legal advice clinics at joint awareness raising functions. Such partnerships ensure that the general public is assured of the functions of the court and receives legal advice and assistance on how to access them and challenge any actions that prevent survivors or complainants in child marriage cases from seeking justice. It is therefore critical in anti-child-marriage strategies that the agency of the judiciary, particularly its constituent bodies, is recognised and supported to the fullest by all duty bearers and stakeholders.

Awareness raising activities by the judiciary must however be carried out with ethical constraints. As judicial officers, any extrajudicial role in access to justice could be construed as eroding the impartiality of the judiciary. WOJAM therefore restricts its activities to simply raising awareness about the laws that are available to respond to any issue, including ECM, and any legal advice on the application or interpretation of the laws is left to partners that provide legal aid and assistance. Enhancing the awareness raising role of the judiciary, either as an institution or through its constituent bodies like WOJAM, makes sense and should be a critical component in ECM.

(d) *Resolving challenges resulting from investigatory discretion*

Ordinarily, very little is known about the standards by which the police exercise their discretion in deciding whether or not to prosecute sexual violence cases, amongst others, and this contributes to reporting attrition rates, as most members of the public are not sure if their complaints will be processed. The power vested in the police to decide whether to investigate or not is also a judicially reviewable power, yet few legal actions have been commenced to challenge it. One notable case does exist, namely the case of *The State v The Inspector General of Police Ex Parte MM*³⁶ (hereafter

³⁶ *The State v The Inspector General of Police Ex Parte MM* Judicial Review Cause No 7 of 2020, High Court, Lilongwe District Registry.

the ‘Nsundwe case’). This case is notable not only because it sought the review of the actions of the Malawi Police Service for its ‘failure to conduct prompt, proper, effective and professional investigations into complaints of sexual assault and rape made by the complainants’,³⁷ but also because the case was brought to court by the Women Lawyers Association who acted on behalf of the victims. One of the grounds on which judicial review was sought in the Nsundwe case was that the applicants had no alternative remedy, as the Malawi Police Service has the sole authority to investigate and arrest the perpetrators of sexual violence against women and girls, and once the police decided not to investigate and prosecute, the survivors were left with no remedy but recourse to the court.

The High Court ordered the Malawi Police Service to compensate the 18 women allegedly sexually assaulted, to arrest the 17 police officers and to set up an Independent Police Complaints Commission, which was hailed by the United Nations Resident Representative in Malawi as an important milestone towards the protection of survivors of violence in Malawi.³⁸ The United Nations representative also hailed the Women Lawyers Association for the pivotal role they played in bringing the case to the attention of the courts and thereby reinforcing the constitutional right of survivors of sexual violence to access justice and effective remedies for the harm they have suffered. The jurisprudential value of the Nsundwe case in highlighting the crucial role of the judiciary in police oversight over all investigation of sexual violence offences cannot be overstated. Strengthening this role will therefore also play a significant role in ECM. In view of the low legal literacy in Malawi and the lack of awareness about human rights remedies and procedures for redress, it is important that in strengthening the capacity of the judiciary to perform its oversight functions, human rights defenders such as the Women Lawyers Association should also be capacitated and supported to bring such matters before the courts.

(e) *The court’s duty to adjudicate*

With regard to the final point of attrition, the ability of the judiciary to effectively adjudicate over a child marriage prosecution cannot be overemphasised in order to avoid attrition at this stage. As courts can

³⁷ *The State v The Inspector General of Police* (note 36 above).

³⁸ ‘UN Hails Malawi Justice on Nsundwe Rape Galore: “Important Milestone”’ *Nyasa Times Online News* 17 August 2020 <https://www.nyasatimes.com/un-hails-malawi-justice-on-nsundwe-rape-galore-important-milestone/> (accessed 17 October 2023).

only convict on the availability of evidence that satisfies the beyond reasonable doubt standard, effective adjudication is adjudication that properly conducts and manages the cases in accordance with the law that places primacy on the role of the judge in protecting the survivor during the criminal process (which includes providing oversight for the role of other actors in the criminal justice system), as well as managing the court room during the trial in a manner that ensures that all who interact with the survivor protect and fulfil her rights. The Criminal Procedure Evidence Code³⁹ provides for various measures for survivor protection in section 71G which can be used for this purpose.

Effective adjudication also requires proper analysis of the evidence before court. An acquittal or conviction must be justified by sound reasoning in accordance with the law of procedure. Increasing the capacity of the judicial officers through knowledge and skills training as well as attitude or mind-set change in child marriage cases is crucial for this role. The analysis of evidence in such cases should also be consistent with human rights principles, with judicial officers not only incorporating a gender perspective into the decision-making process, but also avoiding any gender or sex stereotypes or bias that will prevent justice being done.

Once the judicial officer is satisfied upon the evidence to convict the perpetrator, sentencing should reflect the seriousness of the offence and ancillary orders should also be made aimed at compensating the survivor and linking her to service providers that will rehabilitate her and help her to deal with the trauma caused by the process.⁴⁰ The Penal Code⁴¹ gives judicial officers powers of compensation in criminal matters.

Without adequate psychosocial support and other measures, the term of imprisonment alone does nothing to change the victim's mindset towards entering an early union. If she is pregnant, she may even find another man to marry or be forced into marriage or even chased out of her home. Such girls need support and well-informed judicial officers could address these issues at the time of sentencing.

In order to send a strong message that child marriage will not be tolerated, there is a need for the courts to carry out appropriate and consistent sentences. The judiciary has developed sentencing guidelines for a number

³⁹ Chapter 8:01 of the Laws of Malawi (note 35 above).

⁴⁰ UNODC *Handbook for the Judiciary on Effective Criminal Justice Responses to Gender-based Violence against Women and Girls* (2019) 58 https://www.unodc.org/pdf/criminal_justice/HB_for_the_Judiciary_on_Effective_Criminal_Justice_Women_and_Girls_E_ebook.pdf (accessed 18 October 2023).

⁴¹ See section 32 of the Penal Code (Chapter 7:01 of the Laws of Malawi).

of offences to ensure consistency in the manner in which some offences are handled nation-wide. Child marriage offences could also benefit from sentencing guidelines, either in the form of jurisprudence or a practice direction from the office of the Chief Justice. Sentencing guidelines are enhanced through training which enables the judicial officers to appreciate the facts, the context and the seriousness of the offence.

Training or capacity building is therefore key in ensuring effective adjudication of child marriage cases. In this regard, social context training would be more desirable. Social context judicial training in particular can play a crucial role in assisting judges to effectively address and eliminate child marriage. There are various ways in which such training can be beneficial:

1. Understanding cultural norms and practices: Social context judicial training helps judges understand the cultural norms and practices that contribute to child marriages. This understanding allows judges to approach cases with cultural sensitivity, ensuring that legal decisions are appropriate and respectful of the communities involved.⁴²
2. Recognising root causes: Social context training helps judges identify the underlying factors that contribute to child marriages, such as poverty, gender inequality, and lack of access to education. By understanding these root causes, judicial officers can address them more effectively in their decisions and recommendations.⁴³
3. Enhancing awareness of child rights: Social context training educates judges about the rights of the child, as enshrined in international human rights instruments. This knowledge enables judges to make informed decisions that prioritise the best interests of the child, ensuring their protection from child marriages.⁴⁴
4. Promoting collaboration: Social context training encourages judges to collaborate with other stakeholders, such as child protection agencies, NGOs, and community leaders. By fostering partnerships, judicial officers can work together with these actors

⁴² See New South Wales Handbook for Judicial Officers https://www.judcom.nsw.gov.au/publications/benchbks/judicial_officers/currency.html (accessed 18 October 2023).

⁴³ See S Goodman & J Louw-Potgieter 'A Best Practice Model for the Design, Implementation and Evaluation of Social Context Training for Judicial Officers' (2012) 5(2) *African Journal of Legal Studies* 181–197 <https://doi.org/10.1163/17087384-12342004> (accessed 18 October 2023).

⁴⁴ Goodman & Louw-Potgieter (note 43 above).

to develop comprehensive strategies for preventing and addressing child marriages.⁴⁵

5. Building community trust and engagement: Social context training equips judges with the skills to engage with communities affected by child marriages. By actively involving community members in the judicial process, judges can build trust, gain valuable insights, and promote community ownership of efforts to end child marriages.⁴⁶
6. Creating awareness and advocacy: Social context training empowers judges to raise awareness about child marriages and advocate for legal and social reforms. Judicial officers can use this platform to educate the public, policymakers, and other judicial colleagues about the harmful effects of child marriages and the importance of ending this practice.

In summary, social context judicial training enhances judges' understanding of the cultural, social, and economic factors that contribute to child marriages. By incorporating this knowledge into their decision-making processes, judicial officers can effectively address child marriages and contribute to ending this harmful practice.

(f) Role of the judiciary in civil cases

The judicial officer must however be aware that child marriage may not always manifest in criminal actions in which the victim and perpetrator are identified since this phenomenon is practised underground. The judicial officer must therefore be capable of identifying an incidence of child marriage which may be an underlying issue in a matter that comes before him or her.

Victim identification is one of the most critical roles a judicial officer can play in any case involving violence against women or girls.⁴⁷ Because victims of child marriage will not be readily self-identifiable and may not even testify, the judicial officer must be able to elucidate the context from the facts so as to identify any potential victim and take appropriate action. Having noted for example that most child marriages will not be formally officiated, such unions will continue in existence as *de facto* unions. Such unions may persist for a number of years and upon dissolution the parties may seek the court's intervention for distribution of property which was

⁴⁵ Goodman & Louw-Potgieter (note 43 above).

⁴⁶ Goodman & Louw-Potgieter (note 43 above).

⁴⁷ *UNODC Handbook* (note 39 above) 58.

acquired during the subsistence of the union. By the time such parties come to court, the wife may no longer be a child and therefore the issue of child marriage would not naturally arise. By simply calculating the length of time the parties have cohabited, it will be possible to determine whether the de facto union was a child marriage at the time it was entered into. While the perpetrator may not be tried for child marriage in the case for distribution, the judicial officer may, as a consequential order, recommend that the police investigate the husband and prosecute if any offences relating to child marriage are uncovered. This course of action may not protect the child bride who would be an adult at that point but contributes to the legal protection framework if perpetrators are aware that they can still be prosecuted even after the child attains majority as long as the marriage was entered into when she was a child.

Maintenance proceedings are an appropriate platform for the identification or detection of child marriages. The statistics discussed earlier point to the magnitude of the problem of teenage pregnancies in Malawi which is a country equally plagued with high numbers of child marriages. Although no research has been carried out on the subject, anecdotal evidence shows that these marriages do not last very long, and with the initiatives being undertaken with progressive chiefs, such as Chief Kachindamoto,⁴⁸ a large number of children are withdrawn from such marriages. For children born in such circumstances, the fathers routinely fail to provide maintenance. A recent report of research findings commissioned by the Child Justice Directorate in the Malawi Judiciary shows that the majority of court users in maintenance proceedings are women and adolescent girls, recognising that the complainant in an action for maintenance is the foundation for providing such complainant with protection and social protection as a survivor of sexual violence. This requires the judicial officer to consider the maintenance application as an opportunity to ensure that the child or children born to child marriages are accorded their right to maintenance in accordance with the law.⁴⁹

⁴⁸ Chief Kachindamoto has annulled 2 049 child marriages. She's developed a network of 'secret mothers and secret fathers' who keep an eye on other parents, making sure no one pulls their girls out of school. See VitalVoices Global Partnership Website, Senior Chief Teresa Kachindamoto Leadership in Public Life 2017 <https://www.vitalvoices.org/honoree/chief-theresa-kachindamoto/> (accessed 18 October 2023).

⁴⁹ Particularly the Constitution of Malawi, 1994; the Child Care Protection and Justice Act (Chapter 26:03 of the Laws of Malawi); the Marriage, Divorce and Family Relations Act (Chapter 25:01 of the Laws of Malawi) as well as the Prevention of Domestic Violence Act (Chapter 7:05 of the Laws of Malawi).

Generally, the judiciary has experienced problems with the enforcement of maintenance orders which has reached crisis proportions with high levels of non-compliance by defaulters. Enforcement remains a problem despite the law recognising non-compliance with maintenance orders as an offence.⁵⁰

Responding to maintenance orders in a manner that recognises their status as survivors of child marriage is thus an important role for the court in ECM. It is through recognition that child marriage survivors need measures such as child maintenance for their own survival and that of their children, that judicial officers can begin to engage with the law and the system to find effective means of ensuring that orders they make on maintenance are appropriate and sufficient to prevent pushing the child back into a situation of destitution where child marriage seems to be the only way out. Maintenance applications also present evidential complexities that require the judicial officer to possess sufficient knowledge and skills to properly analyse the evidence and to request further particulars where the evidence is lacking. Since the judgments of the courts provide them with a forum to raise awareness, elucidating the issues in properly reasoned judgments contributes to ECM by sending out the message that survivors of child marriage must not only be assisted with social protection measures, the proceedings in which such measures are sought must be consistent with human rights principles and the best interests of the child. Further, maintenance actions in the lower courts must be procedurally straightforward with relaxed rules of procedure which enable the judicial officer to interact with the litigant in a manner that ensures the best interests of the child. These issues are routinely overlooked and should be prioritised for training.

The role of the judicial officer in maintenance also goes beyond the making of an order and extends to contributing to awareness raising campaigns, over and above clearly elucidating the issues in their judgments by participating in other activities aimed at raising awareness of the law which shall be discussed below.

Applications for the grant of letters of administration and probate under the Deceased Estates (Wills, Inheritance and Protection) Act⁵¹ also provide the courts with a platform to identify child and early marriages by again calculating the age at which the surviving spouse (who statistically will more often be a woman) entered into the marriage. Whilst it is too late to

⁵⁰ Section 22(1) of the Child Care Protection and Justice Act (Chapter 26:03 of the Laws of Malawi).

⁵¹ See Chapter 10:02 of the Laws of Malawi (note 23 above).

offer any social protection measures for such spouses, the scenario presents an opportunity for data collection on the extent of the phenomenon with a view to assessing its prevalence and whether there is a decline, and also which years indicate an increase in such marriages. There are many opportunities for the development of national action plans with social protection measures based on actual data to respond to the specific manifestations of the problem.

Working in the context of a country with a poor record for data collection, the judiciary as the record keeping institution has the capacity to generate data with regard to the numbers of cases that touch on early/child or forced marriages, in whatever form they present themselves, the context within which they occur, and the measures taken. In most cases, judicial measures overlook the needs of the victims and do little to enhance victim protection and convenience. The judiciary is better at imposing sanctions on perpetrators than it is at interrogating social contexts. The number of victims who pass through the system without having their needs addressed is also recordable data which should assist governance structures in developing plans and strategies and in allocating funds to ending early/child and forced marriage. Lastly, conducting research on the incidence of early/child and forced marriage in whatever manifestation and the social factors surrounding it that are recorded as the facts of the case, provides a more complete picture on the social phenomenon which can be used by the governance structures in addressing the issues.

(g) *Role of the judiciary in ensuring that survivors get protection measures and services*

In order to avoid relegating the recent constitutional and legislative interventions prohibiting child marriage to the status of ineffective ‘paper laws’ devoid of correlative practical effect, they must be matched with protection services to women and girls running away or rescued from early/child and forced marriages. What is required, has been described by ‘Background Paper for the Expert Meeting on the Impact of Existing Strategies and Initiatives to address Child, Early and Forced Marriage’ as follows:

Joint general recommendations No.31 of the Committee on the Elimination of Discrimination against Women/General Comment No.18 of the Committee on the Rights of the Child on Harmful Practices stresses that women who are victims of harmful practices need immediate support services. . . . Given that perpetrators of harmful practices are often the spouse of the victim, a family member or a member of the victim’s community, protective services should seek to relocate victims outside their immediate community if there is reason to believe

*that they may be unsafe. Psychosocial support must also be available to treat the immediate and long-term psychological trauma of victims, which may include post-traumatic stress disorder, anxiety and depression.*⁵²

Without victim protection measures, compensation schemes as well as support in terms of safe accommodation, psychosocial counselling and even economic empowerment and life-skills orientation, the legal framework will have limited impact. The significance of the measures must be understood in the sense that social security is not provided to all needy persons in Malawi.⁵³ The court's role in providing such protection measures and services goes beyond the duty of the court to make ancillary orders after sentencing the perpetrator. The judiciary should understand the social context within which child marriage is practised.

The ideal situation for survivor protection measures arises where the law actually provides for them. Some countries, like Kenya, have general legislation providing for victim protection⁵⁴ for survivors of violence. Malawi does not have a specific law, and survivor protection provisions are spread across various statutes providing protection measures connected with the subject of the legislation. There are therefore no specific protection measures for protecting survivors of child marriage; however, such protection can be provided under the other laws where applicable.

⁵² UN OHCHR *Background Paper for the Expert Meeting on the Impact of Existing Strategies and Initiatives to address Child, Early and Forced Marriage* (2016).

⁵³ 'The Government of Malawi's Social Cash Transfer Programme (SCTP) scheme is an unconditional transfer targeted to rural ultra-poor and labor-constrained households operated by the Ministry of Gender, Community Development and Social Welfare (MoGCDSW) with policy oversight and guidance provided by the Ministry of Economic Planning and Development (MoEPD) and UNICEF Malawi. The programme began as a pilot in 2006 in Mchinji District and was subsequently expanded to an additional eight districts in 2009 (Balaka, Likoma, Chitipa, Salima, Machinga, Phalombe and Mangochi). As of August 2020, the program reached approximately 283,000 households and 1,195,000 individuals, or 7 percent of the total population. The main objectives of the SCTP are to reduce poverty and hunger, and to improve children's human development. Transfer amounts vary by household size and number of school-aged children, and averaged MK 6400 per household per month (approximately US\$8). The specific benefit structure as of August 2020 was: MK2600, MK 3300, MK 4400 and MK5600 for households of size one, two three and four or more respectively. An additional bonus of MK 800 and MK 1500 was provided to household members of school going age.' See The Transfer Project website Malawi 'Malawi's Social Cash Transfer Programme (SCTP) 2013–2015'.

⁵⁴ Victim Protection Act, Act No 17 of 2014.

For example, in the long title to the Prevention of Domestic Violence Act,⁵⁵ the protection of persons affected by domestic violence is amongst the objects of the Act. Another purpose of the Act is to provide ‘legal services and other social services to persons affected by domestic violence’.⁵⁶ These services are primarily provided through an ‘enforcement officer’⁵⁷ who may, where necessary, arrange medical care or alternative residence or a temporary place of shelter for the victim. The enforcement officer may enlist the assistance of any service provider to provide these services. In the absence of express statutory provisions, strategic interest litigation could be the answer. There is a need to test whether child marriage can be considered domestic violence by virtue of the relationship involving a minor so that any such scenario should automatically lead to enforcement officers providing protection measures and social services for survivors.

The Trafficking in Persons Act⁵⁸ also creates a protection officer in section 43 with similar duties towards trafficked persons. The Trafficking in Persons Act goes a step further to empower the Minister to designate premises for the care and protection of trafficked persons.⁵⁹ The Trafficking in Persons Act also provides measures for witness protection in trafficking cases, leaving it up to the discretion of the court to decide on appropriate measures for trafficking victims on a case by case basis, upon application.⁶⁰ The Trafficking in Persons Act also creates a fund⁶¹ which may be used, inter alia, to provide for the protection and compensation of victims of trafficking. Where the child marriage is the exploitation phase of the act of child trafficking, the judiciary should ensure that survivors that require the services under this law are able to access them.

One of the greatest challenges to providing survivors with protection measures and social services is the physical availability of such measures. Once girls are rescued from child marriages, very few are provided with the means to survive such as alternative accommodation, education, vocational

⁵⁵ Chapter 7:05 of the Laws of Malawi.

⁵⁶ Section 3 of the Prevention of Domestic Violence Act (Chapter 7:05 of the Laws of Malawi).

⁵⁷ Created under section 32 of the Prevention of Domestic Violence Act (Chapter 7:05 of the Laws of Malawi).

⁵⁸ Chapter 7:06 of the Laws of Malawi.

⁵⁹ Section 45 of the Trafficking in Persons Act (Chapter 7:06 of the Laws of Malawi).

⁶⁰ Section 47 of the Trafficking in Persons Act (Chapter 7:06 of the Laws of Malawi).

⁶¹ Section 51 of the Trafficking in Persons Act (Chapter 7:06 of the Laws of Malawi).

skills or social security funds. There are some state programmes underway which involve social cash transfers to such survivors.⁶² Whilst there are state and NGO shelters in some localities, the state of repair of some shelters has been bemoaned by some victims who would rather stay with the perpetrators of violence against them than stay in the existing shelters. Decrepit shelters lead to double victimisation which is institutionalised if the courts unknowingly refer victims to such measures. The judiciary also has a role in directing the state to live up to its obligations to provide for such survivors by providing these types of protective measures and facilities. Law reform providing statutory obligation for such structures would be an optimal solution, but progressive jurisprudence along the lines of *Francis Kapu and 7 Others v The State*⁶³ could produce the same results in the interim. In this case, Chirwa J ordered that detaining a child in a police station was contrary to section 96(1) of the Child Care, Protection and Justice Act as well as contrary to section 23(1) of the Constitution. Chirwa J proceeded to order the release of the children and since there appeared to be no safety homes designated by the Minister under section 157 of the Child Care, Protection and Justice Act, the judge ordered that such homes should be immediately designated and established under that Act as these are the only institutions where children in conflict with the law may be lawfully detained. The learned judge went on to remind the Minister that as a duty bearer, he ought to have designated such safety homes immediately after the Act was passed. The principles elaborated in this judgment could equally be used to order the Minister responsible for shelters for survivors of child marriage to construct shelters and ensure that they are well maintained for the purpose of rehabilitating and providing security for survivors of sexual or other types of violence. Orders by the courts that such shelters be constructed or renovated and made available as is required under the Trafficking in Persons Act will ensure that there is a ready supply of shelters that can be used for child marriage survivors.

III CONCLUSION

The efforts made by the Government of Malawi in ECM in the areas of law reform, policies and strategies in place are laudable. The levels of attrition of cases of child marriage in the criminal justice system is, however, cause for concern. There are a number of intervention areas that

⁶² See The Transfer Project (note 53 above).

⁶³ Miscellaneous Criminal Review Case No 5 of 2021 High Court, Principal Registry (unreported).

would assist, but in relation to the judiciary, targeted interventions with the specific role of the judiciary in mind would result in considerable gains in inspiring confidence in the system so that complainants would not readily withdraw cases and would be empowered to challenge the decision of the police to fail to act. Whilst it has been argued that law reform is needed to improve the laws, this has not been the focus of this paper. While there may be room for law reform, there is a lot that can be achieved using the existing legal framework if the roles of all duty bearers are recognised and each duty bearer strengthened to better perform their functions.

Current emphasis on the functions of duty bearers in the Strategy to Eliminate Child Marriage focuses on legal interventions, does not recognise the important role the judiciary can play in ECM and does not focus on strengthening its capacity for this purpose. Child marriage introduces various contextual and human rights considerations that require sufficient knowledge and skills for effective adjudication. The judiciary also has the unique position of ensuring that victims are accorded proper protection and social welfare measures such as counselling, provision of accommodation, survival funds or means to earn a livelihood, maintenance and restitution amongst others. These issues require sufficient knowledge and skill for effective adjudication. A strategy aimed at ECM should prioritise such capacity building.

The judiciary is also underutilised because it provides an oversight function over the discretion of the police to investigate or prosecute child marriage offences which is rarely invoked. Lack of legal literacy and awareness of the laws is a major contributor for the inability of most complainants to challenge decisions of law enforcement officials that negatively affect them. Beyond adjudication, judicial officers can also play roles to end child marriage by raising awareness on the avenues of redress. Collaborating with human rights defenders strengthens this role as the complainants usually lack the legal assistance to enforce their rights through litigation. The importance of strategic interest litigation by human rights defenders in such circumstances cannot be overstated. The survivor friendly jurisprudence that has emerged from the courts as a result of strategic interest litigation, has clarified various issues and these judgments now need to be widely publicised so that they achieve maximum impact. In these progressive judgments as well in collaborative awareness raising activities, judicial officers have a ready-made platform to advocate for change and condemn the practice of child marriage.

If the awareness raising function of the judiciary was strengthened, then programmes that include participation of other stakeholders to provide specific legal advice on child marriage would yield significant results. However, it is essential to maintain a clear distinction between the judicial

role and advocacy activities. The following guidelines should therefore be considered during awareness raising campaigns:

1. **Neutrality and impartiality:** Judges must be impartial and avoid any appearance of bias. Engaging in awareness raising activities should not compromise their ability to remain neutral in their judicial decisions.
2. **Separation of powers:** Judges are part of the judicial branch, which is separate from the executive and legislative branches. Their primary role is to interpret and apply the law. Engaging in awareness raising activities should be done with caution to avoid blurring the boundaries between branches of government.
3. **Public education:** Judges can contribute to public education by participating in educational initiatives focused on legal processes, the justice system, and the rights of individuals. This can help enhance public understanding of the law and promote access to justice.
4. **Collaboration with stakeholders:** Judges can collaborate with relevant stakeholders, such as legal professionals, community organisations, and government agencies, to collectively raise awareness about legal issues and promote legal literacy.
5. **Judicial code of conduct:** Judicial officers should adhere to the Malawi judiciary codes of conduct and ethics that outline ethical standards and guidelines. These codes provide guidance on the extent of judges' involvement in extrajudicial activities, including awareness raising.

Ultimately, judicial officers should exercise discretion and balance their judicial responsibilities with any involvement in awareness raising activities. It is important to respect the principles of judicial independence, impartiality, and the separation of powers while considering opportunities to contribute to public education and legal awareness.

The judiciary also play the role of record-keeping as an institution with the capacity to generate data concerning the numbers of cases that touch on child marriages, in whatever form they present themselves, the context within which they occur, and the measures taken. This data will enable or assist governance structures to develop plans and strategies in allocating funds to end early/child, and forced marriage. Establishing a data management system that links the ministry responsible for children and social welfare and the police would also go a long way toward developing data that shows the trends of child marriage with sufficient particularity for strategic interventions.

Ending child marriage will require innovative measures and strategies that look beyond the traditional and recognise those stakeholders like the judiciary who can contribute to this end. With a new vision for judicial activities with strategies that enhance their skills and knowledge and enhanced collaboration with other stakeholders, some considerable gains towards ECM could be made.

Overall, supporting the judiciary with capacity building, especially with social context training, will assist in effective adjudication aimed at ECM. While the judiciary is often trained, ECM has a number of cultural and economic-specific nuances that require specialist training if matters involving child marriage are to be adjudicated in a survivor friendly manner, according the survivor all her rights as well as developing jurisprudence that is in the best interests of the child and which respects, protects and fulfils all constitutional rights.