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The 2017 Constitutional Reform in
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step in the process of building a true
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di Giulia Sulpizi
Laureata in Giurisprudenza
Università degli Studi di Padova



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Abstract [En]: In 2017 the Malawian Parliament adopted a constitutional amendment that forbade child marriages and stated that both boys and girls could wed only from the age of eighteen. Nevertheless, Malawi is still facing many issues dealing with basic human rights, such as women equality. Nowadays, Malawi can be considered as a rather young democracy, that is hold back by some of its own religious beliefs and traditions. The purpose of Malawi legislative and judiciary bodies is to ensure fundamental rights: in fact, without equality people could not significantly take part in political and social activities. The present work therefore considers the above-mentioned constitutional amendment concerning the ban of child marriage, adopting a double perspective, both a comparative and a legal realism approach. In this way, we come to understand that it is thanks to the action of the legislative bodies, international organizations, constitutional justices and cultural leaders that society can truly evolve and guarantee fundamental rights, such as parity and dignity for all its citizens.

Titolo: La riforma costituzionale del 2017 in Malawi: bandire il matrimonio infantile come passo fondamentale nella costruzione di una compiuta democrazia.

Abstract [It]: Nel 2017 il Parlamento del Malawi ha adottato un emendamento alla Costituzione del Paese allo scopo di proibire i matrimoni infantili, sancendo, così, che solo dall'età di diciotto anni ragazzi e ragazze possano convolare a nozze. Nonostante ciò, il Malawi tutt'ora presenta numerose contraddizioni, soprattutto in tema di diritti umani e di tutela del genere femminile. Attualmente, infatti, il Paese può essere considerato come una democrazia di recente formazione, ancora astretta ad alcune tradizioni culturali e religiose. La finalità degli organi legislativi e giudiziari del Malawi è di assicurare la garanzia delle prerogative fondamentali dei cittadini: senza una vera eguaglianza, infatti, i singoli non possono prendere attivamente e concretamente parte alle attività politiche e sociali dello Stato. Il presente lavoro considera il sopracitato emendamento alla Costituzione adottando, quindi, un approccio di comparazione e di realismo giuridico. In questo modo, si riuscirà a comprendere che è grazie all'azione del legislatore nazionale, delle organizzazioni internazionali, dei giudici costituzionali e dei leader culturali che la società può davvero evolversi e garantire i diritti fondamentali, soprattutto in tema di parità e dignità per tutti i cittadini.

Parole chiave: dignità – donne – democrazia – matrimonio – emendamenti costituzionali

Keywords: dignity – women – democracy – marriage – constitutional amendments

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* Articolo sottoposto a referaggio.

1. A look at real life experience in Malawi: a country facing its contradictions

Malawi has one of the highest rates of child marriage in Eastern and Southern Africa and in the whole world¹. This issue is still common in several African legal systems², even though these countries have adopted numerous international and regional treaties in order to guarantee women's and children's rights³.

This paper focuses its attention on the Malawian legal framework, considering how legislative and constitutional changes have influenced the country's everyday life⁴.

In particular, this work considers the 2017 Constitutional Reform, that banned child marriage, alongside with other factors, such as strong social and cultural norms and habits that still persist in this country⁵.

Starting from this analysis, this paper has the aim to demonstrate that law is not sufficient to provide true rights and parity among citizens: innovative assets and tools are significant in order to enforce the laws of the land⁶.

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¹ GOVERNMENT OF MALAWI, *Budget Scoping on Programmes and Interventions on End Child Marriage in Malawi*, 2019, p. 9.

² This aspect is clearly analyzed in J. SVANEMYR, E. SCOLARO, K. BLONDEEL, V. CHANDRA-MOULI, M. TEMMERMAN, *The contribution of laws to change the practice of child marriage in Africa*, in *Inter-Parliamentarian Union*, 2013, pp. 9 ss.

³ We can make references to the CEDAW, the Convention on the Rights of the Child, the Convention on the Consent to Marriage, The African Charter on the Rights and Welfare of the Child, the African Charter on Human and People's Rights and the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (Maputo Protocol). "According to the United Nation Children's Fund (UNICEF), 'the fastest progress in reducing child marriage in Africa has been in the northern region, with Southern Africa lagging behind'. Yet, all Southern African countries are state parties to the major international and regional instruments that condemn child marriage": L. MWAMBENE, *Recent legal responses to child marriage in Southern Africa: The case of Zimbabwe, South Africa and Malawi*, in *African Human Rights Law Journal*, n. 18, 2018, pp. 529-530.

⁴ On the importance of legal reforms, see L. MWAMBENE, *Recent legal responses to child marriage in Southern Africa*, cit., pp. 528 ss.

⁵ "In line with strong social and cultural norms, rather than giving consent, parents are pushing or forcing girls to get married. Under local customs, attainment of puberty is seen as readiness for marriage, particularly for young girls. In particular in rural areas families choose to marry their daughters off very young to improve their financial status": J. SVANEMYR, E. SCOLARO, K. BLONDEEL, V. CHANDRA-MOULI, M. TEMMERMAN, *The contribution of laws to change the practice of child marriage in Africa*, cit., p. 17. We can name several causes of child marriage in Malawi. Among them, we can find poverty, poor education, social norms and cultural and religious beliefs. "Traditional initiation practices, done as part of a rite of passage when a girl reaches puberty, have encouraged early sexual activity": these are the words expressed in GOVERNMENT OF MALAWI, *Budget Scoping on Programmes and Interventions on End Child Marriage in Malawi*, cit., p. 10. In addition to these elements, child marriage often becomes "a more likely coping mechanism, as families seek to reduce the burden of feeding the family": *ivi*, p. 11.

⁶ "Implementation and enforcement of laws on child marriage across Africa experience several common problems. These include: weak judicial systems in general; lack of effective monitoring and enforcement mechanisms that could prevent or sanction child marriages; poor understanding of the laws; lack of adequate training and poor coordination between relevant government ministries; lack of a clear delegation of responsibilities to specific authorities, a lack of guidelines on how to handle child marriage cases, and ad hoc responses": J. SVANEMYR, E. SCOLARO, K. BLONDEEL, V. CHANDRA-MOULI, M. TEMMERMAN, *The contribution of laws to change the practice of child marriage in Africa*, cit., p. 19.

Adopting a legal realism approach⁷ we can describe Malawi's situation and we can understand which elements can help to achieve gender equality and children's protection⁸.

2. The Malawi Constitution

Malawi has an ancient history. It became an English protectorate in 1891, assuming the name of British Central Africa⁹. Later known as Nyasaland¹⁰, it was renamed Malawi upon gaining independence in 1964¹¹.

The 1964 Malawi Independence Act was described as an instrument “to make provision for and in connection with the attainment by Nyasaland of fully responsible status within the Commonwealth”¹².

Nevertheless, during the second half of the XX century this country faced many issues and challenges. The Constitutional referendum, held on June 14, 1993, came after decades of dictatorship and it represented the basis of a multi-party democracy¹³.

This event led to the adoption of a newly drafted Constitution on May 18, 1994¹⁴. From that moment on, several amendments passed in order to improve the text, correct some textual mistakes and clear ambiguities emerged during its provisional application¹⁵. However, it was during the first National Conference on the Review of the Constitution that a significant number of non-technical amendments – with the ambition of addressing political problems and filling legislative gaps – passed¹⁶. There were, in fact, a lot of problems that the newly born country had to face¹⁷, one of them being gender discrimination¹⁸.

⁷ We can refer to the words of the Associate Justice of the Supreme Court of United States Oliver Wendel Holmes, who stated that “La vita del diritto non è mai stata logica, ma esperienza”.

⁸ The key elements of this enforcement process include setting a minimum age for marriage at eighteen years old, providing for no exceptions upon parental consent or Court's authorization and criminalizing child marriage and implementing clear sanctions: J. SVANEMYR, E. SCOLARO, K. BLONDEEL, V. CHANDRA-MOULI, M. TEMMERMAN, *The contribution of laws to change the practice of child marriage in Africa*, cit., p. 21.

⁹ T. MASENGU, *Report on citizenship law: Malawi*, in *Country Report*, n. 8, 2021, p. 2.

¹⁰ From 1906 to 1964.

¹¹ T. MASENGU, *Report on citizenship law: Malawi*, cit., p. 2.

¹² Malawi Independence Act of 1964, chapter 46 of 196.

¹³ P. STURGES, *The Political Economy of Information: Malawi under Kamuzu Banda, 1964-94*, in *International Information and Library Review*, 30, n. 3, 1998, p. 195.

¹⁴ That came into force the following year, in 1995. C. RANALLI, *L'effettività della giustizia costituzionale Africana alla prova: la questione dell'eguaglianza tra generi*, in *Federalismi*, n. 2, 2014, p. 2. We can refer to the “seconda ‘ondata costituzionale’, risalente agli anni Novanta”, which “rappresenta un eccezionale volano per la diffusione e il mutamento dei sistemi di giustizia costituzionale”. This concept is linked to the notion of the “transizioni democratiche”.

¹⁵ MALAWI LAW COMMISSION, *Constitutional Review Programme: discussion paper no. 7. Amendments to the Constitution & preservation of its sanctity*, 2006, p. 1.

¹⁶ MALAWI LAW COMMISSION, *Constitutional Review Programme: discussion paper no. 7*, cit., p. 2.

¹⁷ Malawi has to face both the child rights issues and the gender equality problems. We can see the considerations of the [Committee on the Rights of the Child of United Nations](#), that examined the reports of Malawi on January 31, 2017.

¹⁸ “(...) the Constitution of Malawi, which was amended as recently as 2017, enshrines gender equality as a principle of national policy and explicitly states that gender equality will be obtained by implementing non-discrimination principles other measures as required”: T. MASENGU, *Report on citizenship law: Malawi*, cit., p. 1

The 1994 Constitution stated that “This Constitution shall bind all executive, legislative and judicial organs of the State at all levels of Government and all the peoples of Malawi are entitled to the equal protection of this Constitution, and laws made under it”¹⁹. In particular we have to notice that “the inherent dignity and worth of each human being requires that the State and all persons shall recognize and protect human rights and afford the fullest protection to the rights and views of all individuals, groups and minorities whether or not they are entitled to vote” and that “all persons have equal status before the law, the only justifiable limitations to lawful rights are those necessary to ensure peaceful human interaction in an open and democratic society”²⁰.

One of the main principles guaranteed by Malawi newly drafted Constitution is gender equality, that represents a never-ending goal of this legal system. This aspect is specified in the Constitution itself, where it states the importance of gaining “gender equality through (...) full participation of women in all spheres of Malawian society on the basis of equal opportunities with men; (...) the implementation of the principles of nondiscrimination and such other measures as may be required; and (...) the implementation of policies to address social issues such as domestic violence, security of the person, lack of maternity benefits, economic exploitation and rights to property”²¹.

The entire Chapter IV deals with Human Rights, which are fundamental in order to guarantee protection to all human beings and Malawi citizens.

Section 20, in particular, declares that “Discrimination of persons in any form is prohibited and all persons are, under any law, guaranteed equal and effective protection against discrimination on grounds of race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, disability, property, birth or other status or condition” and that “Legislation may be passed addressing inequalities in society and prohibiting discriminatory practices and the propagation of such practices and may render such practices criminally punishable by the courts”.

Another important article states some basic principles, regarding gender equality and women empowerment. “Women have the right to full and equal protection by the law and have the right not to be discriminated against on the basis of their gender or marital status²²(...). Any law that discriminates

¹⁹ Section 4.

²⁰ Section 12.

²¹ Section 13. For this reason, Malawi has adopted policies and enacted laws aimed at addressing some of the challenges affecting the family unit. Some of them are the Prevention of Domestic Violence Act, which was enacted in 2006, and the Child Care, Protection and Justice Act of 2010. This are the considerations expressed in REPUBLIC OF MALAWI, *Report to the African Commission on Human and Peoples’ Rights. Implementation of the African Charter on Human and Peoples’ Rights 1995-2013 and the Protocol to the African Charter on Human and Peoples Rights on the Rights of Women 2005-22013*, pp. 51-52.

²² “(...) which includes the right (...) to be accorded the same rights as men in civil law, including equal capacity (...) to enter into contracts; (...) to acquire and maintain rights in property, independently or in association with others, regardless of their marital status; (...) to acquire and retain custody, guardianship and care of children and to have an equal right in the making of decisions that affect their upbringing; and (...) to acquire and retain citizenship and nationality (...) on the dissolution of marriage, howsoever entered into (...) to a fair disposition of property that is held jointly with a husband; and (...) to fair

against women on the basis of gender or marital status shall be invalid and legislation shall be passed to eliminate customs and practices that discriminate against women, particularly practices such as (...) sexual abuse, harassment and violence; (...) discrimination in work, business and public affairs; and (...) deprivation of property, including property obtained by inheritance”²³.

The above-mentioned provisions affirm general legal principles, and they stress the importance of giving an actual meaning and a concrete application to these human rights. Words without consequences have no significance²⁴. This is the reason why we cannot make any consideration without referring to a legal realism approach²⁵.

It is not surprising that Malawi approved The National Gender Policy in 2000, whose thematic areas include education and training, poverty eradication, reproductive health, governance and human rights, natural resources, and nutritional security²⁶. In 2004 the National Gender Programme was launched, following the 2000 Plan. It describes new resources and tools in order to guarantee women’s rights and encourage gender equality²⁷. Alongside with these strategies the Ministry of Women and Child Development grew its importance and started implementing gender equality principles²⁸.

We cannot forget that in this country – under the 1994 Constitution – there was the practice of child marriage, that permitted girls to be wed at the age of fifteen with parental consent²⁹. This legal provision was in contrast with several charters of human rights and international conventions on children’s and women’s rights³⁰. This led to the Constitutional Amendment Act No. 36, which represents “the culmination of efforts across civil society organisations, including Girls Not Brides members parliamentarians, traditional and religious leaders, UN Agencies, and government Ministries to strengthen legal protections against child marriage”³¹.

maintenance, taking into consideration all the circumstances and, in particular, the means of the former husband and the needs of any children”: these are some of the provisions of Section 24.

²³ Section 24.

²⁴ This is the position of different authors. Among them we can find the words of P. GROSSI, *L’invenzione della Costituzione: l’esperienza italiana*, in P. Grossi (a cura di), *L’invenzione del diritto*, Laterza, Roma-Bari, 2017, p. 69, who affirms that natural, economic and social facts do not represent “il terreno inerte e sterile della mera irrilevanza giuridica”. On the other hand, they are “il terreno tipico della storia”.

²⁵ This approach emphasizes the relevance of concrete facts. This is the position expressed by M. BERTOLISSI, *Autonomia e responsabilità sono un punto di vista*, Jovene, Napoli, 2015, p. 120: “(...) il diritto (...) nasce (...) dalla storia, dall’economia, dalla realtà sociale effettivamente sentita dalla gente e non ha consistenza durevole se formulato (...) da comandi normativi (...) che si distaccano troppo da cose, persone, vicende concrete (...)”.

²⁶ *Malawi: Country Gender profile. Final Report*, January 2007, p. 7.

²⁷ *Ibidem*.

²⁸ *Ivi*, p. 8.

²⁹ [Theory of Change](#), *Malawi’s constitutional change: a step forward towards ending child marriage*, p. 1.

³⁰ Among them we can find the Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination against Women and the recently adopted Sustainable Development Goal 5 on gender equality

³¹ [Theory of Change](#), *Malawi’s constitutional change*, cit., p. 1.

2.1 The 2017 Constitutional Reform

As already said, Malawi was a British colony. For this reason, its legal system is based on English common law as well as African customary law³². This country recognized several human rights, among which we can find human dignity and equality between sexes³³.

This principle deals with an important law field, such as marriage law, that includes four categories³⁴: marriage under the Marriage Act, marriage under Customary Law, Asiatic marriage, and Foreign Customary Law marriage³⁵. These legal fields share a common background and each one of them testifies the interaction between state institutions and society³⁶. Some scholars speak about “semi-autonomous social fields”, which are “collectivities with ‘rule generating’ and ‘rule enforcing capacities’”³⁷. These two different processes are essential to separate law operating at the official level and law operating at the unofficial level³⁸. The courts and state institutions apply their own version of customary law, a version that was originally constructed in collusion with African male leaders³⁹. There are nowadays other versions of customary law, that evolve when people regulate their own communities and solve disputes through customary institutions without the assistance of the state system⁴⁰. It is defined as “living customary law”, that is often more common in everyday life than state law⁴¹.

Malawi still has several customary practices, that are not entirely compatible with the content of gender equality as expressed in the country’s Constitution⁴².

³² K. BESENDAHL, *Negotiating Marriage on the Eve of Human Rights*, in *African Sociological Review*, n. 8, 2004, p. 12. “In many African countries, customary laws need to be taken into account as a component of the national legal framework. A plural legal system is very often in place, where two or more systems based on formal laws, religious laws and traditional systems based on customary laws co-exist. (...) Within some plural legal systems in Africa, customary laws are given Constitutional recognition as part of the State’s law. In relation to marriage, ten Constitutions in Africa recognize customary marriages”: J. SVANEMYR, E. SCOLARO, K. BLONDEEL, V. CHANDRA-MOULI, M. TEMMERMAN, *The contribution of laws to change the practice of child marriage in Africa*, cit., p. 12. Among them, we can find Malawi itself.

³³ *Ibidem*.

³⁴ *Ibidem*.

³⁵ *Ibidem*.

³⁶ *Ibidem*.

³⁷ *Ivi*, p. 14.

³⁸ *Ibidem*.

³⁹ *Ibidem*.

⁴⁰ *Ibidem*.

⁴¹ A. ARMSTRONG, *Internalising International Women’s Rights Norms*, in P. Nherere, M. D’Engelbronner-Kolff, *The Institutionalisation of Human Rights in Southern Africa*, Norwegian Institute of Human Rights, Oslo, 1993, pp. 55-70-

⁴² M. CHIGAWA, *The law Commission Constitutional Review Conference. Concept paper one*, March 2006, p. 25, as well as A. DIRRI, C. M. FOMBAD (a cura di), *Separation of Powers in African Constitutionalism*, Oxford, Oxford University Press, 2016, pp. 448, in *Nomos*, n. 2, 2017, pp. 3-4, who states the importance of customary law and of traditional courts in countries such as Malawi, Nigeria and Zimbabwe. In particular, the author affirms that “Il problema sorge in caso di conflitto tra le tradizioni giuridiche locali e il riconoscimento dei diritti fondamentali; a tal riguardo la maggior parte delle costituzioni dell’Africa anglofona affermano che il *customary law* non deve contraddire i principi, i valori e i diritti espressi in costituzione (...). Inoltre, non vengono trascurati i tentativi messi in atto dalle organizzazioni internazionali e regionali, i cui effetti tuttavia non stati rilevanti sulle costituzioni africane, ad eccezione dell’*African Charter of Human and Peoples Rights* (ACHPR). Fombad conclude che sono sostanzialmente due le tradizioni giuridiche prevalenti in Africa: il modello di *common law*, inizialmente basato sul modello Westminster e successivamente sul presidenzialismo statunitense, e il modello di *civil law* le cui radici sono individuabili nella costituzione

Among them, we can find the institution of paying valuable consideration for marriage or dowry, which are common practices in some parts of the country⁴³. In some cases, men's and women's rights differ⁴⁴. The female spouse cannot own properties both during marriage and its dissolution⁴⁵ and she cannot decide on the future of her children, since she has to submit to her husband's will⁴⁶.

Starting from these considerations it is hard to say that Malawi has gained both normative and real equality⁴⁷.

This is the reason why, as already mentioned, until the 2017 Constitutional Reform child marriage was a common and, above all, a legal practice in the country. Malawi allowed families to arrange weddings between their daughters and young men. Young girls' self-determination and personal freedom were not considered⁴⁸.

Since the Government wanted to take actions and amend some legal frameworks to fight child marriage, the State enacted some important new pieces of legislation.

Among them we can find the "Prevention of Domestic Violence Act" (2006), the "Child Care, Protection and Justice Act" (2010), the "Deceased Estates (Wills, Inheritance and Protection) Act" (2011), the "Gender Equality Act" (2013), the "Marriage, Divorce and Family Relations Act" (2015) and, finally, the 2017 Constitutional reform⁴⁹.

According to Section 22 of the 1994 Constitution, family was "the natural and fundamental group unit of society". This article further stated that no person over the age of eighteen shall be prevented from entering into marriage. On the other hand, it also prescribed that for persons between the ages of fifteen and eighteen a marriage shall only be entered into with the consent of their parents or guardians. It was

francese del 1958. Quindi, nonostante il costituzionalismo africano non sia individuabile come un genere *tout court*, è doveroso sottolineare l'adozione di alcune interessanti soluzioni giuridiche maggiormente allineate alla realtà del continente".

⁴³ M. CHIGAWA, *The law Commission Constitutional Review Conference. Concept paper one*, March 2006, p. 25.

⁴⁴ *Ibidem*.

⁴⁵ *Ibidem*.

⁴⁶ *Ibidem*.

⁴⁷ These practices can be fought through the adoption of new policies or affirmative actions: M. CHIGAWA, *The law Commission Constitutional Review Conference*, cit., p. 26.

⁴⁸ This aspect is strictly connected to religious and traditional beliefs. "Customary marriage is the most common form of marriage and this was reported by 60% of the respondents followed by religious marriages at 25% and then marriage by reputation/permanent cohabitation at 13%. Civil marriage is rare in Malawi and only 2% of the respondents reported this form of marriage": UNICEF, *Survey Report. Traditional Practices in Malawi*, March 2019, p. 44. "Concerning the frequency of child marriage, (...) reports different measures for males and females: the incidence of marriage below 15 and the incidence of marriage below 18. The latter corresponds to the legal age of marriage in Malawi. Child marriage is considerably more common among girls than among boys all over Malawi: 9% of the females married before the age of 15 while 42% got married before the age of 18. The corresponding proportions among males were 1.2% and 6% respectively. Marriage below 15 is particularly widespread in the southern region, while marriage below 18 is highest in the northern region: the northern region had the highest proportion of female respondents at 51% who reported getting married before age 18 followed by the southern region at 47% and then the central region at 36%. Child marriage is prevalent in urban and in rural areas: the prevalence of child marriage among females in rural areas (42%) is higher than in urban areas (37%)": *ivi*, p. 46.

⁴⁹ MINISTRY OF GENDER, CHILDREN, DISABILITY AND SOCIAL WELFARE, *Workshop Report. Learning Event on Ending Child Marriages in Malawi*, 21-22 March 2019, p. 7.

then given to the State the task to discourage marriages between persons when one of them is under the age of fifteen years⁵⁰.

This aspect was a real *vulnus* in the former British colony legal system⁵¹. In order to fight against this local and traditional practice it was up to the Malawian Parliament to take concrete actions and measures. It is through Parliament's proposals and their consequent approval that the Constitution can be amended⁵².

For this reason, on February 14, 2017, the Constitutional Amendment Act No. 36 passed, stating that the minimum age to get married is eighteen. In particular, the existing Constitution affirms that "All men and women have the right to marry and found a family. (...) No person shall be forced to enter into marriage. (...) No person over the age of eighteen years shall be prevented from entering into marriage"⁵³. In this way Parliament unanimously adopted an amendment with the purpose of aligning the Constitution with the 2015 Marriage, Divorce and Family Relations Act⁵⁴.

"By changing the constitutional age of marriage in Malawi, the Government has also changed the narrative of the lives of countless Malawian girls so that girls can just be girls; not brides or wives" said Clara Mah Anyangwe, UN Women Country Representative in Malawi⁵⁵. These words stress the importance of this legal and constitutional change. It does not surprise that Malawi is starting to protect women's and children's rights⁵⁶.

However, many cases of child marriage persist. Nowadays many girls are married before turning eighteen and nine per cent of them before getting fifteen⁵⁷. This problem is caused by poverty and cultural and religious traditions, sometimes linked with limited education and employment opportunities⁵⁸.

Fighting against these practices UNICEF is working with the Government of Malawi to protect girls and boys from sexualized violence, including child marriage and other harmful traditional practices⁵⁹. This

⁵⁰ REPUBLIC OF MALAWI, *Report to the African Commission on Human and Peoples' Rights*, cit., pp. 6 ss.

⁵¹ Recent reports on women and children condition in Malawi describe all the country's discriminations and problems: there are many issues that the former colony has to face. It is because of religious and traditional beliefs that many of these problems are still not solved. Generally speaking we can look at the [UNICEF](#), *Survey Report. Traditional Practices in Malawi*, March 2019.

⁵² The process for reforming the Malawian Constitution is described at its Section 200. It states that "Except in so far as they are inconsistent with this Constitution, all Acts of Parliament, common law and customary law in force on the appointed day shall continue to have force of law, as if they had been made in accordance with and in pursuance of this Constitution (...) Provided that any laws currently in force may be amended or repealed by an Act of Parliament or be declared unconstitutional by a competent court".

⁵³ Section 22.

⁵⁴ [UN Women](#), *Malawi Parliament adopts amendment to end child marriage*, February 22, 2017, p. 1.

⁵⁵ *Ibidem*.

⁵⁶ *Ibidem*.

⁵⁷ [UNICEF](#), *Child Marriage Factsheet 2018*, p. 1.

⁵⁸ *Ibidem*.

⁵⁹ *Ibidem*.

action has the aim to increase awareness on the above-mentioned issues among local communities⁶⁰. This practice, in fact, causes important – both physical and psychological – damages on young girls⁶¹.

3. A new methodology

The present work analyzes the above-mentioned issue – dealing with child marriage and gender equality – through the adoption of a double perspective.

On the one hand, it considers a comparative approach⁶². Looking at other legal systems is a fundamental key to identify the main features of a country's legislation and jurisprudence and therefore to find innovative solutions to ancient and persistent social, legal and cultural problems⁶³.

On the other hand, this paper stresses the great relevance that real life experiences have in Malawi contemporary society⁶⁴. Constitutional and legislative changes have no true value if they are not followed by concrete application of human right principles and values⁶⁵.

3.1 Comparative perspective

Also, different legal landscapes can underline some important elements that characterize Malawi system itself⁶⁶. This country, in fact, has long tried to become a true democracy. Its own newly drafted Constitution expresses this aspiration. For this reason, following a long tradition that started with the U.S. Constitution Preamble⁶⁷, Malawi's Constitution has its own Preamble as well. This part affirms that

⁶⁰ *Ibidem*.

⁶¹ On the impacts of child marriages on girls see [UNICEF](#), *Child Marriage Factsheet 2018*, cit.

⁶² G. DE VERGOTTINI, *Diritto costituzionale comparato*, Cedam, Padova, 2019, p. 5: “Per l’odierno studioso del diritto costituzionale l’impegno ad approfondire la tematica della comparazione si presenta particolarmente attuale a causa dell’intensificarsi dei rapporti fra le diverse aree geografiche che caratterizza il mondo contemporaneo e per il diffondersi di processi di collaborazione e integrazioni fra ordinamenti che richiedono confronti fra diverse concezioni dei valori costituzionali”.

⁶³ This approach encourages what we can define as “bisogno critico”. M. BERTOLISSI, *Fiscalità Diritti Libertà. Carte storiche e ambiti del diritto costituzionale*, Jovene, Napoli, 2015, pp. 18-19 expresses this concept: the comparative study “(...) lasciandosi alle spalle il rigido schematismo della teoria dei sistemi giuridici (...) tende a radicarsi nel concreto delle esperienze giuridiche come terreno di condivisione di problematiche ed esigenze comuni”.

⁶⁴ “Ancora una volta (...) sono gli accadimenti, i comportamenti, le scelte umane che muovono le idee, le riflessioni e (...) le parole”: G. TIEGHI, *Educare, non solo decidere. Nuovi scenari. Dalle recenti opere dei giudici costituzionali Grossi e Sotomayor*, in *Rivista AIC*, 2020, n. 1, p. 177.

⁶⁵ This aspect is strictly connected to a legal approach analysis, whose importance is stated in L.L. FULLER, *American legal Realism*, in *University of Pennsylvania Law Review and American Law Register*, vol. 82, n. 5, 1934.

⁶⁶ “La diffusione del sindacato di legittimità costituzionale su scala mondiale (...) rappresenta uno degli aspetti maggiormente caratterizzanti lo sviluppo del costituzionalismo negli ultimi decenni. Tale fenomeno è accompagnato non solo dalla tendenza all’ibridazione fra i due modelli classici del controllo di costituzionalità, ma più in generale da un complesso processo di ricezione e circolazione delle esperienze di giustizia costituzionale. Quest’ultimo trae origine (...) dalla esponenziale crescita delle interdipendenze fra gli ordinamenti costituzionali degli Stati e (...) dalla moltiplicazione e dall’articolazione delle domande di giustizia costituzionale che si indirizzano alle giurisdizioni costituzionali e organi equivalenti”: C. RANALLI, *L’effettività della giustizia costituzionale Africana alla prova: la questione dell’eguaglianza tra generi*, cit., pp. 1-2. It reprises the considerations expressed by M. CALAMO SPECCHIA, *La legittimazione delle Corti costituzionali tra modalità di composizione e principio di indipendenza*, in M. Calamo Specchia (a cura di), *Le Corti costituzionali. Composizione, Indipendenza, Legittimazione*, Giappichelli, Torino, 2011, p. VIII.

⁶⁷ It reflects the framers’ desires to improve the citizens’ conditions: MALAWI LAW COMMISSION, *Constitutional Review Programme: discussion paper no. 7*, cit., p 8.

“The People of Malawi (...) recognizing the sanctity of human life and the unity of all mankind; guided by their private consciences and collective wisdom; seeking to guarantee the welfare and development of all the people of Malawi, national harmony and peaceful international relations; desirous of creating a constitutional order in the Republic of Malawi based on the need for an open, democratic and accountable government (...)”⁶⁸.

These words are particularly significant since they reflect “the beliefs and political aspirations of those who framed” the Constitution⁶⁹. In the opening of such an important and central text it is not surprising that we can find a list of some of the basic human rights, which are often included in Bills of Rights⁷⁰. Chapter IV of the Malawi Constitution contains the provisions regarding equality, human dignity, life and privacy, freedom of religion and expression⁷¹.

The attention given to constitutional preambles is significant in order to define which are the main values and principles of a democratic and open society⁷². Linguistic features are therefore very important, but – above all – the provisions’ meaning is central⁷³. Comparing different legal systems, we can understand that interpretation is fundamental. In fact, it “should be aimed at fulfilling the intention of Parliament”⁷⁴ since all the principles expressed in constitutional texts are meant “to effectuate the great purpose of the Constitution”⁷⁵.

Even some state courts share legal principles dealing with basic human rights and stress the importance of comparative law and foreign precedents in order to give solutions to their countries’ issues⁷⁶.

Nowadays, most African countries state some basic and important principles in their Constitutions, such as gender equality and non-discrimination⁷⁷. Nevertheless, a comparative approach emphasizes that several legal systems face many challenges to give concrete implementation to constitutional provisions on these matters, since, as the same text says, customary and religious traditions still persist⁷⁸. In this way they remain “silent” on how potential conflicts can be solved, relying on the judiciary to settle contradictions⁷⁹. For this reason, given the choice between a constitutional equality clause and customary

⁶⁸ This is the Preamble of the 1994 Malawi Constitution.

⁶⁹ “Emotional words, inspirational preambles and broad sweeping provisions make up the content of constitutions. Regular legislation, on the contrary, is more technical in form and language and tends to address specific areas of the law”: *Constitutional Review Programme: discussion paper no. 7*, cit., p. 8.

⁷⁰ This happened in the United States, where the Bill of Rights was adopted in 1791, and in South Africa, that included its Bill of Rights in Chapter 2 of its 1996 Constitution: *Ivi*, cit., p. 9.

⁷¹ *Ibidem*.

⁷² *Ivi*, cit., p. 10.

⁷³ *Ibidem*.

⁷⁴ *Ibidem*.

⁷⁵ *Ivi*, p. 11.

⁷⁶ This happens for instance in South Africa, as noted by G. DE VERGOTTINI, *Oltre il dialogo tra le Corti. Giudici, diritto straniero, comparazione*, il Mulino, Roma-Bologna, 2010, pp. 190 ss.

⁷⁷ R. SINGSWORTH, L. KUMALO, *Women, peace and security. Implementing the Maputo Protocol in Africa*, cit., p. 7.

⁷⁸ *Ibidem*.

⁷⁹ *Ibidem*.

law, gender equality is often not guaranteed by a male-dominated judicial system, where social and cultural traditions prevail⁸⁰.

Considering countries such as Zimbabwe and South Africa, we can see that these instances are common to different legal systems.

In particular, in Zimbabwe child marriage is still a reality because of the persistence of strong social attitudes which support early and underage marriages, and of religious beliefs, connected to the Apostolic church communities, which encourage girls between twelve and sixteen to get married not to sin by having sexual relations outside marriage⁸¹.

This country has numerous international and regional obligations that deal with gender equality and children's protection. For this reason, in response to its obligations, the State passed several Acts relevant to child marriage⁸². The first document is the 2013 Constitution, that sets the minimum age for marriage at eighteen and prohibits forced marriages. Its sub-sections further require the State to take appropriate measures to ensure that no marriage is entered into without the free and full consent of the intended spouse⁸³. The second fundamental legal document is the Customary Marriage Act, whose Section 11 prohibits the pledging of girls in marriage, with no reference to the prescribed age of marriage⁸⁴.

For this reason, in order to give concrete implementation to legal provisions, we can see the fundamental role of the Constitutional Court. It dealt with the case of *Mudzuru*⁸⁵, where two young women brought their cases to the Court to challenge child marriage. The constitutional justices ruled that the Constitution sets that the minimum age of marriage is eighteen. Therefore, they declared the Marriage Act or any customary and religious practices authorizing any child to be married before the age of eighteen to be illegitimate to the extent of its inconsistency with the Constitution⁸⁶. In addition to that, the Court also stated that no person, neither male or female, may enter into any marriage, including one arising from religion or religious rites, before attaining the age of eighteen⁸⁷. This decision is fundamental because it stresses the importance for the country of aligning its provisions to the international background and legal standards on the protection of children's rights⁸⁸. It does not surprise that also this State has to face the contradictions between children's rights and customary practices that lead to child marriage⁸⁹, a still

⁸⁰ *Ibidem*.

⁸¹ L. MWAMBENE, *Recent legal responses to child marriage in Southern Africa*, cit., p. 531.

⁸² *Ivi*, p. 540.

⁸³ *Ibidem*.

⁸⁴ *Ibidem*.

⁸⁵ *Loveness Mudzuru and Ruwimbo Tsopodzji v. Minister of Justice, Legal and Parliamentary Affairs, Minister of Women Affairs, Gender and Community Development, Attorney-General of Zimbabwe*, Application 79/14 CC 12/2015.

⁸⁶ L. MWAMBENE, *Recent legal responses to child marriage in Southern Africa*, cit., p. 541

⁸⁷ *Ivi*, p. 542

⁸⁸ *Ibidem*.

⁸⁹ *Ibidem*.

present problem in Zimbabwe. The Constitutional Court itself did not prescribe measures to ensure that children are protected from child marriage, such as by giving the Parliament a reasonable time to amend laws that allow child marriage⁹⁰.

In South Africa much attention is still given to the customary practice of *ukuthwala*⁹¹, i.e. the mock abduction of an unmarried woman or girl for a customary marriage. This is still common in rural areas of this country, and it represents a threat to the protection of children's and young girls' rights⁹².

In recent years South Africa has fixed the marriable age at eighteen for both girls and boys under the Recognition of Customary Marriages Act and has therefore outlawed all customary marriages of children under that age⁹³. However, this piece of legislation allows persons below that age to get married with the proper consent: this aspect implies that in South Africa child marriage is a cultural practice that is not always sanctioned⁹⁴.

Starting from these considerations we can consider the work of the South African Law Reform Commission, that proposed the Prohibition of Forced Marriages and Child Marriages Bill, which is aimed at criminalizing forced marriages and child marriages, including those as a result of *ukuthwala*⁹⁵. This document is still a proposal and has not been approved by the State. For this reason, cultural practices and social norms still persist in South Africa and these traditional beliefs have the power of inhibiting or acting against the reforms that have taken place⁹⁶. Therefore, criminalization of child marriages is still far away⁹⁷.

Malawi itself has enacted several pieces of domestic legislation in order to guarantee true parity among sexes, both through administrative and criminal law provisions⁹⁸. This country has also understood the importance of culture and education: as a matter of fact Malawi has recently enacted the "Gender Equality & Women Empowerment Programme" (2012-2016)⁹⁹ and the National Strategy on Ending Child Marriage (2018-2030). Through this comparative approach we can realize how nowadays African countries deal with international standards in order to fight against cultural practices that stand in the way of children's rights¹⁰⁰.

⁹⁰ *Ibidem*.

⁹¹ *Ivi*, p. 532.

⁹² *Ivi*, pp. 532-533.

⁹³ *Ivi*, pp. 542-543. The reference is to the 1998 Act.

⁹⁴ *Ibidem*.

⁹⁵ *Ibidem*.

⁹⁶ *Ivi*, pp. 548-549.

⁹⁷ *Ibidem*.

⁹⁸ R. SINGSWORTH, L. KUMALO, *Women, peace and security. Implementing the Maputo Protocol in Africa*, cit., p. 6.

⁹⁹ *Ibidem*.

¹⁰⁰ L. MWAMBENE, *Recent legal responses to child marriage in Southern Africa*, cit., p. 539.

3.2. Legal realism

Starting from these considerations, UNICEF is partnering with traditional and religious leaders to fight against social norms that enable child marriages. Social and cultural beliefs relating to girls' and women's position and prerogatives in society contribute to the actual and persistent gender-based discrimination¹⁰¹. Malawi has one of the highest rates of child marriage in the world, even though it signs several international treaties and conventions aimed at fighting and prohibiting these practices¹⁰². The recent change in the country's Constitution – that raised the age of the child from sixteen to eighteen – is not sufficient to preside over true equality and girls' self-determination¹⁰³.

This aspect emphasizes the importance of changing social norms and breaking traditions that harm children¹⁰⁴. These goals can be reached through an unrelenting struggle against traditional practices. In poor and rural areas certain traditions continue to promote child marriage. For instance, here it is practiced, “kupimbira”, which involves giving a young daughter for marriage as repayment for a debt¹⁰⁵, as well as “kusasafumbi”, a sexual initiation for young girls to cleanse them of their “childhood curses” and prepare them to become wives¹⁰⁶. Other practices involving parental consent deal with “chimeta masisi”, offering a girl to replace a deceased wife, “mbirigha”, offering a girl as a reward to a good husband, “kutomera”, child betrothal, “chisomphola”, abduction that is later formalized as a marriage, and “lobola”, that allows parents to marry children or dependants off for different financial motives¹⁰⁷. Since the police forces and the judiciary are integral parts of these traditional principles, it is hard for young girls to find protection¹⁰⁸.

Only through a new cultural education we can find innovative tools and strategies to protect women and girls¹⁰⁹.

¹⁰¹ [UNICEF](#), *Child Marriage Factsheet 2018*, p. 1. “Marriages in Malawi occur in forms of tradition, legal or religious but tradition unions are not recognized by the state. Often, traditional marriages ignore the law since some of them re arranged or forced ones that involve under aged girls. Child Marriages and childbearing are deeply embedded in harmful cultural practices. And archaic marriage laws in Malawi also facilitate them with the disregard of young women’s life and future”: H. MLOZI, *Information on GENET Malawi’s work in the fight against Child Marriage*, in *GENET Malawi*, December 2013, p. 3.

¹⁰² MINISTRY OF GENDER, CHILDREN, DISABILITIES AND SOCIAL WELFARE, *Republic of Malawi National Review on the Beijing +25: Twenty-fifth Anniversary of the Beijing Declaration and Platform for Action (1995)*, June 2019, p. 19.

¹⁰³ *Ibidem*.

¹⁰⁴ H. MLOZI, *Information on GENET Malawi’s work in the fight against Child Marriage*, cit., p. 3.

¹⁰⁵ T. BRAUN, *The Role of the Law in Eliminating Child Marriage in the Commonwealth*, in *Commonwealth Lawyers Association*, 2018, p. 45.

¹⁰⁶ At such camps, girls may be forced to have sexual relationships with an older man paid by the village: *ibidem*.

¹⁰⁷ [PLAN INTERNATIONAL](#), *In-depth Review of legal and regulatory frameworks on Child Marriage in Malawi*, 2016, pp. 33 ss.

¹⁰⁸ *Ivi*, pp. 62 ss.

¹⁰⁹ *Ibidem*. “Studies (...) identified a number of factors that seem to influence the timing of marriage. (...). Some of the factors are region of residence, place of residence, education, occupation, economic status, religion and ethnicity. (...) in Malawi, where marriage is nearly universal, age of marriage has a strong influence on a variety of social, economic and demographic factors”: M.E. PALAMULENI, *Socioeconomic determinants of age at marriage in Malawi*, in *International Journal of Sociology and Anthropology*, Vol. 3, July 2011, p. 225.

It is not surprising that UNICEF is now supporting the Malawi Government's effort to strengthen community responses to child protection. This has led to the development of child protection services such as victim support groups, frontline child protection workers and Children's Corners, safe environments for recreation, child rights education, life skills education, management of HIV/AIDS, and provision of psychosocial support¹¹⁰. UNICEF also works alongside with the Ministry of Gender, Children, Disability and Social Welfare operation of Children's Corners, with the aim of creating communities where children can receive good education and information, that help them to prevent child marriage¹¹¹. This organization also collaborates with the police and the judiciary system in order to strengthen new tools and strategies to protect victims of violence and to give them a better access to justice¹¹².

UNICEF partners with the Ministry of Education, Science and Technology, Malawi Police and the Ministry of Gender, Children, Disability and Social Welfare in the Safe Schools Programme. It plays an important role in the fight against child marriage, since it helps to decrease gender-based violence and to empower girls by giving them new skills to reduce risks associated with sexual violence¹¹³. This program also works with boys, supporting them to become "champions of change" and promote non-violent behavior and gender equality, subverting ancient social norms¹¹⁴.

To guarantee true justice, we can take into account the customary justice system, that can be useful to support the enforcement of any laws that have the effect of addressing early, child and forced marriages¹¹⁵. Through community-in-laws, aimed at reinforcing compulsory primary education, withdrawing girls from child marriage, and banning these practices, we can develop new tools to strengthen young women's position¹¹⁶. In particular, also thanks to the collaboration of Custodians of Culture, the so-called Chiefs, Malawi could create "community parliaments" to formulate by-laws to enforce girls' education¹¹⁷ and apply by-laws not only to punish the perpetrator but also the enforcer¹¹⁸.

¹¹⁰ *Ibidem.*

¹¹¹ *Ibidem.*

¹¹² *Ibidem.*

¹¹³ *Ibidem.*

¹¹⁴ On the importance of education of new generations we can see the thoughts of B.C. KALIMBUKA, *The very traditions that support child marriages in Malawi can be used to end them*, in *Youth Transforming Africa*, May 14, 2020: "(...) we can use tradition to end child marriages. To mark their rite of passage into adulthood, children in Malawi undergo initiation ceremony camps, chinamwali. On top of training children on their cultural norms and vices, respect and how to be useful citizen, sexual reproductive health and anti-child marriage talks could also be tendered at such gatherings. This should replace the current system where instructions are mostly about sex and encouraging sexual cleansing (...) in schools and communities, girls and boys should be exposed to role models who can motivate and guide them (...)".

¹¹⁵ [PLAN INTERNATIONAL](#), *In-depth Review of legal and regulatory frameworks on Child Marriage in Malawi*, cit., pp. 66 ss.

¹¹⁶ *Ibidem.*

¹¹⁷ *Ibidem.*

¹¹⁸ *Ibidem.*

4. The international context

Since Malawi has joined several international treaties, it is also subject to international law. This principle implies that regional obligations not only deal with the adherence or ratification of international instruments, but also with their concrete implementation¹¹⁹.

The 2017 reform aligns the new Constitution with the country's supranational obligations.

Marriage is mentioned for the first time in 1948 with the Universal Declaration of Human Rights, that defined an ideal marriage with respect to age, presence of full consent and equality¹²⁰.

The 1962 Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages was then adopted and appeals to all member states to take measures to abolish customs regarding marriage, to open the way for “complete freedom in the choice of a spouse” and to eliminate child marriages and betrothals of young girls before the age of puberty¹²¹.

Starting from these provisions, Malawi dealt with the concrete application of the Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination against Women and the Sustainable Development Goal 5 on gender equality¹²². The first of the above-mentioned documents was adopted by the General Assembly resolution 44/25 on November 20, 1989, and it came into force on September 2, 1990. Starting from the recognition “that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding” and from the consideration “that the child should be fully prepared to live an individual life in society, and brought up in the spirit of the ideals proclaimed in the Charter of the United Nations, and in particular in the spirit of peace, dignity, tolerance, freedom, equality and solidarity”, this text provides several tools meant to protect children all around the world¹²³. In particular, “States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention”¹²⁴. This provision is strictly connected with the approval in Malawi of the 2015 Marriage, Divorce and Family Relations Act. This document supports all Malawian girls in order to have their own identity and freedom¹²⁵.

¹¹⁹ M. CHIGAWA, *The law Commission Constitutional Review Conference*, cit., pp. 49-50.

¹²⁰ I. EBETÜRK, *Global diffusion of laws: The case of minimum age of marriage legislation, 1965-2015*, in *European Journal of Cultural and Political Sociology*, 2021, p. 296.

¹²¹ *Ibidem*.

¹²² The great relevance of the international context and obligations is stressed by the persistent legal globalization. On this theme see O. ROSELLI, *Le ragioni del convegno*, in O. Roselli (a cura di), *Cinema e diritto. La comprensione della dimensione giuridica attraverso la cinematografia*, Giappichelli, Torino, 2020, p. 26. Globalism “include un pluralismo diversificato di realtà normative”: G. DE VERGOTTINI, *Tradizioni costituzionali e comparazione: una riflessione*, in *Rivista AIC*, 2020, n. 4, p. 297.

¹²³ [OHCHR](#), *Convention on the Rights of the Child*.

¹²⁴ Section 4.

¹²⁵ “By enacting a new marriage law, Malawi is telling the world that it is ready to protect girls from the abuse and exploitation that result from child marriages”: [Human Rights Watch](#), *Malawi: New Marriage Law Can Change Lives*, April 15, 2017.

Banning child marriages represents an important step in the democracy making process in Malawi, since it is central for this country to act and adopt concrete measures that can lead to child protection¹²⁶. A global city society mobilization against child marriages started in the early 1990s following the 1995 Fourth World Conference on Women. In this context this issue was addressed as a human rights problem¹²⁷, that could be solved only through both legislative changes and social and cultural changes¹²⁸. This is the reason why solving this issue goes together with the educational programs in Malawi, that have to emphasize equality of treatment and parity between boys and girls, granting them the opportunity to develop their own personality¹²⁹.

This is the reason why in 1979 the United Nations adopted the Convention on the Elimination of All Forms of Discrimination against Women, an important tool to give women more opportunities and tools to protect themselves from men's discriminatory actions¹³⁰. Malawi signed this international text with the aim to ensure true gender equality.

In this context we cannot forget the enactment of "The African Charter on the Rights and Welfare of the Child" (1990), that states in its Article 21 the protection against harmful social and cultural practices, and the "Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa" (the so called Maputo Protocol) (2003), that affirms that all States have to guarantee the free and full consent of both parties and that the minimum age of marriage for women shall be eighteen years¹³¹. In particular, the Maputo Protocol aspires to guarantee comprehensive rights for women in Africa by providing family units, community security and sustainable peace¹³².

Nevertheless, courts also fail to acknowledge women's rights and prerogatives. When they hear family law or customary marriage law cases they preserve and enhance female subservience to the authority of their husbands and family elders¹³³.

Therefore, we can understand that child marriage is a still-facing issue both in Malawi and in other legal systems. The recent approval of the Sustainable Development Goal 5 on gender equality testifies it¹³⁴.

¹²⁶ "In passing this marriage's law, Malawi's government has itself recognized its obligation to uphold international law": *ibidem*.

¹²⁷ I. EBETÜRK, *Global diffusion of laws*, cit., p. 297. Changes in civil society have been encouraged with the Forum on Marriage and the Rights of Women and Girls and the civil society partnership *Girls not Brides: ini*, p. 299.

¹²⁸ L. MWAMBENE, O. MAWODZA, *Children's Rights Standards and Child Marriage in Malawi*, in *African Studies Quarterly*, Vol. 17, November 2017, p. 22: "(...) for the national laws to be effective, they must be accompanied by civic education, effective training of different stakeholders, and amendment of out-dated laws".

¹²⁹ Child marriages prevent girls to be fully and completely self-determined. "(...) child marriage negatively affects the rights of girls to health, life, education, survival and development, freedom from sexual abuse, dignity and personal integrity, and not to be discriminated against": *ini*, p. 22.

¹³⁰ This is considered a rather important instrument that can guarantee equality and parity of treatment. Effectiveness of provisions is a central element in all contemporary legal systems: this is the reason why Malawi has also enacted The Gender Equality Act. See *ini*, p. 32.

¹³¹ [THE AFRICAN CHILD POLICY FORUM](#), December 2015.

¹³² R. SINGSWORTH, L. KUMALO, *Women, peace and security. Implementing the Maputo Protocol in Africa*, cit., p. 2.

¹³³ K. BESENDAHL, *Negotiating Marriage on the Eve of Human Rights*, cit., p. 23.

¹³⁴ It was adopted by United Nations in 2015 as a goal to be reached by 2030.

Starting from these considerations, we have to stress the importance of the newly born Regional Economic Communities (RECs), that determines the presence of the sub-regional courts¹³⁵. This aspect is strictly connected to the growing relevance of the so-called multilevel constitutionalism¹³⁶.

We have, in fact, to recall the existence of the African Court on Human and Peoples' Rights, which was born thanks to the Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights¹³⁷, and of the Court of Justice of the African Union¹³⁸. The former is a continental court established by African countries to ensure the protection of human and peoples' rights in Africa¹³⁹, while the latter is meant to solve inter-African disputes¹⁴⁰.

Operating side by side, these Courts contribute to give concrete effects to the rights guaranteed and enforced by the recently adopted Charters of Human Rights¹⁴¹.

5. The High Court as a guarantor of human values

These two Courts are not the only ones to secure human basic rights.

In Malawi the importance of ensuring the implementation of the Constitution is represented by the fundamental role that the Constitution has given to the judiciary, which is defined as the Constitution's interpreter, protector, and enforcer¹⁴². It is only in 2004 that in the amendment to Section 9 of the Courts Act a special formula for constitutional adjudication was devised¹⁴³. It states that the High Court, when composed by no less than three judges, acts as a constitutional court, dealing with proceedings that are related to, or concern, the interpretation or application of the provisions of the Constitution¹⁴⁴.

¹³⁵ C. RANALLI, *L'effettività della giustizia costituzionale Africana alla prova: la questione dell'eguaglianza tra generi*, cit., p. 11.

¹³⁶ *Ivi*, p. 12.

¹³⁷ It was adopted in 1998 and it came into force in 2004. Among its functions we can see that the Court deals with cases "riguardanti l'interpretazione e l'applicazione della Carta Africana sui diritti dell'uomo e dei popoli, del Protocollo ad hoc che provvede alla sua stessa creazione e di altri strumenti sui diritti umani ratificati dagli Stati in questione". It is also significant to stress that "Per quanto riguarda i singoli individui e le Organizzazioni non governative a cui è stato riconosciuto lo status di osservatore presso la Commissione Africana sui diritti umani e dei popoli, essi hanno facoltà di adire direttamente la Corte solo nel caso in cui gli Stati, contro cui si presenta il caso, abbiano esplicitamente dichiarato di accettare tale procedura. Al 2014, solo sette Stati lo avevano fatto: Burkina Faso, Ghana, Malawi, Mali, Tanzania, Ruanda e Costa d'Avorio": this is the description given on the website of the [Centro di Ateneo per i Diritti Umani "Antonio Papisca"](#).

¹³⁸ It was adopted in 2003 and it came into force in 2009.

¹³⁹ See the official website of the [Court](#).

¹⁴⁰ K.D. MAGLIVERAS, G.J. NALDI, *The African Court of Justice*, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht, Heidelberg, 2006, p. 188. On its functions, see the following pages of the paper itself.

¹⁴¹ C. RANALLI, *L'effettività della giustizia costituzionale Africana alla prova: la questione dell'eguaglianza tra generi*, cit., p. 12.

¹⁴² M.J. NKHATA, *The High Court of Malawi as a constitutional court: constitutional adjudication the Malawian way*, in *Law Democracy & Development*, vol. 24, 2020, pp. 448-450.

¹⁴³ *Ibidem*.

¹⁴⁴ *Ibidem*.

In this way the judiciary is one of the main bodies that have the purpose of interpreting Malawian law and giving effects to the Constitution's provisions¹⁴⁵. Its action is significant in relation to the concrete application of Section 24 of the 1994 Constitution, that claims that women have equal capacity and the same rights as men in civil law and prohibits discrimination against women on the basis of gender or marital status¹⁴⁶.

It is thanks to the High Court that we can find the importance given to these rights. It is not surprising that in Malawi we can often find some contrasts between the constitutional principles and customary law¹⁴⁷, where local traditions still determine women's subordination and inferiority to men¹⁴⁸.

Since human rights are strictly connected and inter-dependent, most cases about the right to equality regard issues present on two or more constitutional provisions¹⁴⁹.

Since the importance of the role of constitutional justices in Malawi, some of them have recently received a prize for their commitment in guaranteeing rights and democracy. Five justices of Malawi's High Court, who in February 2020 nullified the country's presidential elections, were selected as winners of the prestigious Chatham House award¹⁵⁰ because of their courage and independence in the defence of the democratic system¹⁵¹.

Especially in this difficult historical time, where democratic legal standards are under threat in Africa as well as in other countries, Malawian High Court, and its constitutional justices, set an example for all Constitutional courts, by establishing and enforcing the importance of the law of the land and of fundamental principles¹⁵².

As already mentioned, Malawi has recently ratified the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol). Therefore, the country's leadership is obliged to ensure the right to health for women and girls and to be certain that sexual and reproductive health is respected and promoted in order to guarantee women's mental and physical health¹⁵³.

¹⁴⁵ "Constitutional jurisprudence on the right to equality in Malawi suggest that the judiciary is adequately empowered to uphold the supremacy of the Constitution, to enforce respect for human rights, and to declare null and void legislation and other governmental action that is contrary to the rights to non-discrimination and equality guaranteed under the Constitution. To effectively carry out this mandate, courts have to be vigilant and bold": K. NYIRENDA J, *An analysis of Malawi's Constitution and case law on the right to equality*, in *Using the courts to protect vulnerable people*, March 2014, p. 122.

¹⁴⁶ K. NYIRENDA J, *An analysis of Malawi's Constitution and case law on the right to equality*, cit., p. 119.

¹⁴⁷ For instance, *Namatika v. Namatika*, (1999) MLR 287.

¹⁴⁸ Women's rights – related to marriage, family acts and successions – are not taken into account.

¹⁴⁹ K. NYIRENDA J, *An analysis of Malawi's Constitution and case law on the right to equality*, cit., p. 121.

¹⁵⁰ G. MATONGA, *Malawi court judges win global prize*, in [Mail and Guardian](#), October 2020.

¹⁵¹ *Ibidem*.

¹⁵² *Ibidem*.

¹⁵³ In general, L. MWAMBENE, *Recent legal responses to child marriage in Southern Africa*, cit.

As part of the country's institutions, giving effect to the Constitution's provisions represents the fundamental role of the High Court of Malawi, which has to decide cases dealing with constitutional matters¹⁵⁴.

In conclusion, we can underline that not only legislative changes have been important in Malawi constitutional history. In fact, also judiciary work and thoughts have been fundamental in granting basic human rights and in proving equal treatment under law and true parity¹⁵⁵. Judges – not only in Malawi – have to create “a dialogue with other organizations of government, and with the people as well”¹⁵⁶.

6. Conclusion

Malawi is a rural country that still presents numerous issues¹⁵⁷. Even though this State has adopted international and regional provisions and has launched various law reforms banning child marriage¹⁵⁸, much work is still to be done¹⁵⁹.

After the 1995 Beijing Conference this country identified four critical areas of concern, i.e., poverty alleviation and empowerment, the child brides, violence against women and peace¹⁶⁰, issues still not solved¹⁶¹.

Starting from the present analysis – based on a legal realism approach – we can make three final considerations.

¹⁵⁴ “The mandate of the ‘constitutional court’ is delineated by section 9(2) of the Courts Act. Its jurisdiction is limited to proceedings that expressly and substantively relate to or concern the interpretation and application of provisions of the Constitution”: M.J. NKHATA, *The High Court of Malawi as a constitutional court: constitutional adjudication the Malawian way*, in [Law, Democracy and Development](#), 2020.

¹⁵⁵ R.B. GINSBURG, *My own words*, Simon & Schuster, New York, 2016, p. 196.

¹⁵⁶ Judges are not “platonic guardians”, but they play “an interdependent part in democracy”: R.B. GINSBURG, *My own words*, cit., p. 196.

¹⁵⁷ MINISTRY OF GENDER AND COMMUNITY SERVICES, *Progress on the Beijing +10 Report*, February 2004, p. 7. “According to UNICEF, banning child marriage has proven to be a vital step for the protection of women and girls. By banning child marriages, women and girls are less likely to be denied opportunities such as access to education and earning an income, which are vital for a country's economic growth. According to a report conducted by UNICEF and the World Bank in 2017, a country's overall economy benefits when women and girls are protected. The report found that the Dominican Republic's poverty rate decreased by 10% after introducing laws against child marriages. Banning child marriage is one of the most important steps toward officially recognising child marriage as a crime; it sends a clear message condemning this harmful practice. But is banning child marriages enough?”: these are the considerations that we can find in T. MULLER, *2021 progress in banning child marriages worldwide*, in [International Women and Girls Series](#).

¹⁵⁸ In this perspective, a comparative approach is significant: see L. MWAMBENE, *Recent legal responses to child marriage in Southern Africa*, cit., pp. 549-550.

¹⁵⁹ *Ibidem*.

¹⁶⁰ *Ibidem*.

¹⁶¹ *Ibidem*. “(...) prejudice and stereotyping remain a major challenge in Malawian society. There are numerous social, religious, traditional, customary and cultural practices that perpetuate the subjugation of women”. This is the reason why the Government of Malawi has adopted both legislative and administrative measures to eradicate such prejudices: COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN, *Eight periodic report submitted by Malawi under article 18 of the Convention, due in 2019*, February 2021, p. 10.

The first one deals with the importance of finding some “champions” who could apply pressure on legislative and executive bodies in order to ensure equality and legal changes. This has already happened in Malawi, where the President and the First Lady were involved in condemning child marriage¹⁶². Global and regional pressure helped as well: these elements emphasized the terrible Malawian girls’ conditions and status and this action led to a considerable change in the country’s legal system¹⁶³. The implementation of the Constitution’s provisions to serve the interests of women has been widely promoted by the Malawian NGOs. Thanks to their legal aid services, the NGOs accumulate knowledge about laws and social and cultural practices that affect women in a negative way, acting as social vehicles of cultural change¹⁶⁴.

The second consideration one emphasizes the fundamental role that justices and judges have in contemporary societies. They have to engage in “a temperate brand of decision making”, that “proceeds incrementally, ordinarily deciding what is required by the case before it and leaving further development to later cases”¹⁶⁵. This is the reason why they are crucial for the development of a democratic country¹⁶⁶, such as Malawi. Judges, in fact, are asked “to give responses” and “their deference to the Constitution represents at the same time our defense against the violation of fundamental principles and our chance to foster their successful safeguard”¹⁶⁷.

The third and final consideration is that in Malawi, in order to achieve gender equality, a cultural change is needed¹⁶⁸. In 2018 Malawi adopted a National Strategy on Ending Child Marriage (2018-2023) to provide leadership, guidance, and oversight in national efforts of ending child marriages through women empowerment and programs to support girls to enroll for school, reduce the dropout rate and keep them in school through to secondary level¹⁶⁹.

¹⁶² [Theory of Change](#), *Malawi’s constitutional change*, cit., p. 2

¹⁶³ *Ibidem*.

¹⁶⁴ K. BESENDAHL, *Negotiating Marriage on the Eve of Human Rights*, cit., pp. 24-27.

¹⁶⁵ R.B. GINSBURG, *My own words*, cit., p. 196.

¹⁶⁶ M. D’AMICO, *The legacy of Ruth Bader Ginsburg*, in *Rivista AIC*, 2021, n. 4, p. 145.

¹⁶⁷ M. D’AMICO, *The legacy of Ruth Bader Ginsburg*, cit., pp. 145-146. We have to stress “la fondamentale funzione degli organi di giustizia costituzionale nell’evoluzione dei diritti in terra d’Africa che si scontra di frequente (...) con una scarsa effettività rispetto all’esecuzione delle sentenze e (...) la difficoltà di armonizzazione e i persistenti contrasti – con speciale riguardo alla tutela dei diritti fondamentali – caratterizzanti, ancora oggi, gli ordinamenti africani”: C. RANALLI, *L’effettività della giustizia costituzionale Africana alla prova: la questione dell’eguaglianza tra generi*, cit., pp. 20-21.

¹⁶⁸ “The legal provisions need also to go beyond formal and substantive equality to transformative equality. Transformative equality obliges the state not only to deal with direct discrimination, but also to combat systemic or structural gender discrimination. (...). Malawi’s laws (...) display (...) a formal, legal approach to equality. Thus, Malawi’s policies, regulations, and guidelines need to explicitly recognize the disadvantaged position of women and award protection to women exclusively”. The legislative changes that occurred in Malawi during the last few years can be seen as affirmative actions: I. AMUNDSEN, H. KAYUNI, *Women in politics in Malawi*, Chr. Michelsen Institute, Bergen, 2016, pp. 24-25.

¹⁶⁹ MINISTRY OF GENDER, CHILDREN, DISABILITEIS AND SOCIAL WELFARE, *Republic of Malawi National Review on the Beijing +25*, cit., pp. 19-20. There is a great need to change behaviors and cultural norms, even though it takes time. “It is good news that Malawi has assumed a leadership role and issues of coordination are on the ground. Sustainability is key and to achieve this we urge for joint planning, joint resource mobilization and capacity building”: MINISTRY OF GENDER, CHILDREN, DISABILITY AND SOCIAL WELFARE, *Workshop Report*, cit., p. 24.

This aspect, that involves society and education, can be reached through two different means.

On the one hand, in Malawi we can recommend the enactment of a special law that deals with child marriages. It could be called “Prohibition of Child Marriage Act” and it could address long time traditions that have encouraged those practices¹⁷⁰.

On the other hand, it is up to the educational system to teach young women – and young men – the importance of equality and of its concrete implementation to build a better – and more democratic and inclusive – society¹⁷¹. This goal can be reached through an appropriate healthcare education¹⁷² and through the work of the previous mentioned Chiefs, that has been fundamental in restraining child marriages in the country¹⁷³.

The importance of this approach can be seen in the work of Theresa Kachindamoto, a traditional chieftain in Malawi, in Dedza district, in the centre of the country. In an interview she explained that in the field of gender equality “the strongest bastion of change most difficult to shake remains the cultural and traditional practices”. This is the reason why it is up to the cultural and religious leaders to strengthen women’s and young girls’ position, by introducing new social norms in order to adopt measures against child marriage or practices such as female genital mutilation¹⁷⁴.

Culture is not static, and this means that community leaders can act and improve citizens’ rights and prerogatives by promoting the education of girls, but also of boys, and fighting against ancient beliefs and traditions¹⁷⁵.

Together with parents, teachers, the village committee and NGOs, Theresa Kachindamoto has for instance banned child marriages in her community and annulled various child marriages made prior to her arrival¹⁷⁶.

¹⁷⁰ L. MWAMBENE, O. MAWODZA, *Children’s Rights Standards and Child Marriage in Malawi*, cit., p. 22 and p. 34.

¹⁷¹ Human sciences and arts are essential elements for education, since they “(...) costituiscono effettivamente un vitale e insostituibile contributo alla cittadinanza stessa, senza il quale avremmo, molto probabilmente, cittadini ottusi ed emotivamente inerti”: M.C. NUSSBAUM, *L’intelligenza delle emozioni*, il Mulino, Roma-Bologna, 2001, p. 508. In particular, “As society sees what women can do, as women see what women can do, there will be even more women out there doing things – and we’ll all be better off for it”: S. DAY O’CONNOR, *The Majesty of the Law*, Random House, New York, 2003, p. 201. Education and self confidence are fundamental aspects if we want to build a more democratic society. In this way, we can value social cohesion and inclusion. “Di certo anche l’analfabetismo e le condizioni di difficoltà in cui versa gran parte della popolazione costituiscono un ostacolo di non poco conto per la reale affermazione, credibilità e garanzia dei diritti fondamentali, elementi cui vanno a sommarsi realtà politiche di democrazia solo apparente e revisioni costituzionali frequenti e spesso prive di fondamento”: C. RANALLI, *L’effettività della giustizia costituzionale Africana alla prova: la questione dell’eguaglianza tra generi*, cit., p. 22.

¹⁷² MINISTRY OF GENDER, CHILDREN, DISABILITIES AND SOCIAL WELFARE, *Republic of Malawi National Review on the Beijing +25*, cit., p. 20.

¹⁷³ *Ibidem*.

¹⁷⁴ K. ADAMS, *In Malawi, Chief Theresa Kachindamoto Fights against Child Marriage*, in [Africa femme](#), January 2021.

¹⁷⁵ *Ibidem*.

¹⁷⁶ *Ibidem*.



Getting parents to change their minds takes in an innovative perspective, that guarantees and implements the rights established in the newly drafted Constitution¹⁷⁷.

¹⁷⁷ *Ibidem.*