

**WOMEN AND LAW IN SOUTHERN AFRICA RESEARCH AND EDUCATIONAL TRUST (WLSA
MALAWI)**



**A SHADOW REPORT TO THE MALAWI GOVERNMENT SIXTH PERIODIC
REPORT ON THE IMPLEMENTATION OF THE CONVENTION ON THE
ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN**

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By

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CEDAW

List of Acronyms

BESTAP	Business Environment Strengthening Technical Assistance Project
CEDAW	Convention on the Elimination of All Form of Discrimination Against Women
GoM,	Government of Malawi
MDHS,	Malawi Demographic Health Survey
MGDS	The Malawi Growth and Development Strategy
MMR	Malawi's maternal mortality rates
MoH	Ministry of Health
NAWOLOG	National Women's Lobby Group
QECH	Queen Elizabeth Central Hospital
UDHR.	Universal Declaration of Human Rights
WLSA Malawi	Women and Law in Southern Africa Research and Educational Trust

**THE SHADOW REPORT
TO THE SIXTH PERIODIC REPORT OF MALAWI ON THE IMPLEMENTATION
OF THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION
AGAINST WOMEN**

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A SHADOW REPORT TO THE MALAWI GOVERNMENT SIXTH PERIODIC REPORT ON THE IMPLEMENTATION OF THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN

I. Introduction

Women and Law in Southern Africa Research and Educational Trust (WLSA Malawi Office) in partnership with the Malawi NGO Gender Coordinating Network are submitting the Second Shadow Report to the Malawi Government 6th Periodic State Report dated 20th October, 2008 (CEDAW/C/MWI/6). This shadow report is a follow up to the the list of critical issues that WLSA Malawi submitted for the pre-session scheduled for 9th to 13th February, 2009 to discuss the Sixth Periodic Report of Malawi on the Implementation of The Convention on the Elimination of All Forms of Discrimination against Women. WLSA Malawi has identified eight critical issues, some of which arise out of the Government of Malawi's direct failure to implement the concluding comments of the CEDAW Committee when the Committee considered the combined second, third, fourth and fifth periodic report of Malawi (CEDAW/C/MWI/2-5) at its 727th and 728th meetings, on 19 May 2006 (see CEDAW/C/SR.727 and CEDAW/C/SR.728). Further to this the report will also raise emerging issues with regards to the situation of women in Malawi since 2006 when the combined 2nd, 3rd, 4th, and 5th reports were considered by the committee. The emerging issues were not listed as critical issues in February 2009 but have emerged as issues of concern through the consultative process that was engaged in the writing of this report. Further to this, the report also responds to some of the issues raised in the Malawi Governments 6th Periodic Report.

The emerging issues raised in the report are:

- Domestication of the CEDAW in Malawi
- The Use of International Legal Framework in the Court In Malawi
- Knowledge of the CEDAW and Concluding Comments By the General Populace

The identified critical issues that are barricading women's full development in Malawi are that:

1. The failure to pass any gender related laws submitted to Parliament by the Law Commission is entrenching state-sanctioned discrimination against women
2. A weak public legal aid department is exacerbating the inaccessibility of justice to women
3. Lack of implementation of the Prevention of Domestic Violence Act 2006 is depriving victims of domestic violence of maximum legal protection
4. Women's property rights are insecure due to constitutional ambiguities
5. The proposed HIV/AIDS Bill contains provisions that perpetuate the victimization and stigmatization of women and the infringement of their rights
6. The criminal justice system is hostile towards women
7. Women continue to be the poorest, signaling the weak responsiveness of government's development strategies to women's challenges
8. Maternal mortality rate continues to be staggering and to be triggered by the avoidable cause of unsafe abortion

This report briefly elaborates on each of the eight issues by making reference to the CEDAW Articles that are being violated, and where relevant, to 2006 CEDAW Committee's concluding comments that the government of Malawi has failed to implement. It ends with a list of questions that could guide the Committee in seeking relevant responses from Malawi as a State Party.

II. Emerging Issues

- **Domestication of the CEDAW**

In its concluding comments to the 2nd, 3rd, 4th and 5th Periodic Report the committee stated that:

The Committee is concerned that, although Malawi ratified the Convention in 1987, the Convention's status in the domestic legal system is still unclear. It notes with concern that, short of such full domestication, the primacy of the Convention over domestic law is not clarified, nor is the Convention justiciable and enforceable in Malawian courts.

It is hereby submitted that the need to legally domesticate the CEDAW now in Malawi is more pertinent than ever before. This is because the Supreme Court has made a clear position on the matter of the status of International legal instruments. As was discussed during Malawi's submission to the CEDAW committee on 20th May 2006 that the constitution of the Republic of Malawi provides as follows:

Sections 11(2) (c):-

"In interpreting the provisions of this Constitution a court of law shall where applicable, have regard to current norms of public international law and comparable foreign case law."

Further to the above the constitution also provides under section 211 which provides as follows:-

(1) Any international agreement entered into after the commencement of this Constitution shall form part of the law of the Republic if so provided by an Act of Parliament.

(2) Binding international agreements entered into before the commencement of this Constitution shall continue to bind the Republic unless otherwise provided by an Act of Parliament.

(3) Customary international law, unless inconsistent with this Constitution or an Act of Parliament, shall form part of the law of the Republic."

In the Supreme Court of appeal case of *In the Matter of the Adoption Of Children Act (Cap 26:01) And In The Matter Of Chifundo James (A Female Infant) (MSCA Adoption Appeal No. 28 Of 2009), being Adoption Cause No. 1 of 2009*, otherwise known as the Madonna case; the court addressed themselves to the issue of whether international convention ratified before the enactment of the Constitution forms part and parcel of the laws of Malawi in accordance with section 211 of the Constitution as we have pointed out above. The court was of the view that:

“the correct reading of that section is to follow the clear language that has been employed. If one does that; one will find that the clear thread that runs through the fabric of all the subsections of section 211 of our Constitution is that all international agreements entered into prior to the Constitution or after the Constitution are only binding if they are not in conflict with the clear provisions of our statutes. Put differently, “whether an international agreement forms part of our law, regardless of when it was entered into, will depend on whether there is no Act of Parliament that provides to the contrary. And the question whether customary international law forms part of our law will depend on whether it is consistent with our Constitution or our statutes.”

In this regard the court stated that:

We have looked at this submission and it is clear to us that it is not in all cases that when interpreting the Constitution courts must have regard to current norms of public international law and comparative foreign case law. Section 11(2) (c) makes it clear that the courts will only have regard to current norms of public international law and comparative foreign case law where it is **applicable** to do so.

On the matter of sections 211 the court stated that

In all cases therefore the courts will have to look at our Constitution and our statutes and see if the international agreement in question or the customary international law in question is consistent or in harmony with the law of the land and the Constitution. In doing so the courts will try as much as possible to avoid a clash between what our laws say on the subject and what the international agreements or conventions are saying on the subject, but where this is not possible, the provisions of our Constitution and the laws made under it will carry the day. It should not come as a surprise that this is the state of the law in Malawi because, by their nature, international agreements are a product of compromise arising out of hard bargaining by high contracting parties. They involve a lot of give and take. They are also negotiated by the executive branch of the Government and not by parliament. Our constitutional order clearly defines the role which each branch of the State has to play in the making of the laws that bind our citizens. It is the executive branch of Government that initiates policy and formulates the laws. It is also the executive branch of Government that enters into international conventions. If the executive branch of Government wishes any of the international conventions, which it has freely acceded to, to have the force of law, then it should bring such convention before parliament, which has the Constitutional mandate to make all laws of this land. In this regard, sections 7, 8 and 9 of the Constitution are not only in tandem with what is contained in section 211 of the Constitution, but are also conclusive on the matter. We do not therefore agree with counsel’s submission that the intention of section 211(1) is to make any international convention which Malawi signs automatically part of the law of the country.

This case puts to rest the argument that was before the committee when the issue was presented to it during the engagement with the Malawi Government in May 2006. The issue that vexed the Committee at that time was: Is Malawi a dualist or monist state in the light of the two provisions outlined above? Do international legal instruments form part and parcel of the Laws of Malawi upon

their ratification or not? Or in the light of Section 211 do those international legal instruments ratified before the enactment of the constitution automatically become part and parcel of the laws of Malawi without a need for formal domestication process? This issue has been contentious in Malawi raging over a number of years as to whether the CEDAW having been ratified to before the enactment of the constitution in 1986 forms part and parcel of the laws of Malawi by virtue of Sections 11 and 211 of the Constitution. The 2009 Supreme Court judgement has in our opinion put the matter to rest: The CEDAW does not form part and parcel of the laws of Malawi unless it is so domesticated by parliament.

It is therefore more pertinent than ever that the government of Malawi should ensure that the Parliament domesticates CEDAW through a legislative process. Otherwise Malawian women and girls cannot legitimately enjoy the rights under the CEDAW despite the ratification of the same.

- **Use of International Legal Framework in the Court In Malawi**

In the concluding comments cited above the committee urged the Malawi government:

“to place high priority on ensuring that the Convention can be invoked and applied in the national courts. It calls on the State party to ensure that the provisions of the Convention and related domestic legislation are made an integral part of legal education and the training of judicial officers, including judges, lawyers and prosecutors, so as to firmly establish in the country a legal culture supportive of women’s equality”.

In reality, there remains a technical hitch, in terms of how the judges in Malawi view their role in the application of International Human Rights Law including the CEDAW.

Some judges have produced some really progressive judgements in this respect. The Industrial Relations Court (IRC) is a very good example in this respect. It has also documented its decisions through a number of international standards publications. This in itself is inherently rights based as the publication of these cases makes case law accessible¹. However in the High Court there is a difference of opinion with respect to the application of international human rights law including the CEDAW.

Some members of the Bench feel that they cannot on their own motion without submission from counsel engage the human rights legal framework as this would tantamount to helping counsel and therefore taking sides and compromising the neutrality of the Bench. The duty of the court in this respect is believed to merely listen to the submissions before it and make a judgement based on the submissions of counsel.

However, another view from the same Bench is that the provisions of the Constitution outlined in Section 11 above compelled the bench to engage public international Human rights law on its own motion. That the human rights agenda is not with counsel alone. That the position of the court should also be there to protect litigants by engaging in critical research in the area before it and adjudicate

¹ Banda, Zibelu. R, (2005) Unfair Labour Practices in Malawi: a Guide to Relevant Cases and Materials. Lexis Nexis. Butterworth’s

accordingly. This is particularly important in an environment like Malawi where a good number of lawyers are not well conversed with the international human rights agenda. This is the only way that the court will ensure that people appearing before it are accorded human rights.

Magistrates who are placed at lower court level and have a greater access to the people felt that they apply the IHRL and CEDAW as a reference and some specific articles are cited in the course of their judgments, sometimes mention them as the International laws that are available to which Malawi is a party to, and therefore the IHRL apply to the Malawian situations as well. (White 2009)²

However Magistrates' courts' decisions are not binding nor do they set precedents both in terms of practice and in terms of substantive issues of the law. The High Court can only test the use of these International Legal instruments by the magistrate through an appeal. The reality of the matter is that very few individuals are able to appeal their cases and in particular women. This is due to the fact that women are not knowledgeable with regards to the operations of the legal system and where they have opportunities to know the system they find it intimidating and impenetrable.

- **Knowledge of the CEDAW and Concluding Comments By the General Populace**

The Committee in its concluding comments also stated that the State party should publicise the content of the Concluding comments widely.

The concluding comment reads:

The Committee requests the wide dissemination in Malawi of the present concluding comments in order to make the people, including government officials, politicians, parliamentarians and women's and human rights organizations, aware of the steps that have been taken to ensure de jure and de facto equality of women, as well as the further steps that are required in that regard.

In response to this; Women and Law in Southern Africa (WLSA) and The National Women's Lobby Group (NAWOLOG) commissioned a study to gauge the knowledge levels as well as the attitudes of Malawian communities on human rights instruments with special emphasis on the CEDAW. This study was conducted between the months of March and April 2009.

The objectives of the study were:

1. To collect information, knowledge, attitudes and behaviour of communities around the CEDAW and UDHR
2. To establish the communities level of knowledge in understanding the CEDAW
3. To assess the attitude and practices of communities with regards to the CEDAW

The study was carried out in the Districts of Karonga, Nkhosvota and Mangochi, which are the organizations' impact areas. The study was designed to establish and assess the level of communities' knowledge, understanding and attitudes around the CEDAW. The study was designed to collect data from women aged 20 to 49 and girls aged 14 to 19 but however men were also incorporated into the sample which was 500. The results reveal that in the rural districts of Malawi,

² The Kenyan And Swedish Sections Of The International Commission Of Jurists (ICJ), African Human Rights And Access To Justice Programme (AHRAJ) (2009) Baseline Survey On Access To Justice: The Malawi Country Report: Access To Justice For The Poor And Marginalised In Malawi

the low literacy levels affect the peoples' knowledge and understanding of the CEDAW. This therefore influences people to develop negative attitudes towards human rights instruments and in particular the CEDAW because the communities do not fully understand them. Out of the 500 respondents interviewed, in this study 48 percent had no formal education and of these 13 percent were male and 35 percent were female. While the above assertion is true even in most districts of the country, the study found out that even those who had formal education even up to tertiary level did not quite understand what the CEDAW is all about. Most people interviewed revealed having heard a lot of the Universal Declaration of Human Rights (78%) as compared to the CEDAW (11.2%). The radio was reported as the media channel where respondents had heard about the CEDAW and UDHR.

The study also revealed that there are several cultural norms deemed as normal in the communities, which are still being practiced, but are repugnant to the human rights justices which were mentioned. Respondents reported these being, widow inheritance (17%), and early marriages for girls (12%). Respondents mentioned behaviours which are still happening in their communities and are violations of the rights of women. The behaviours that were most prominently mentioned are, insulting of women (25%) and beating of women (19%) but however about 24 percent of the respondents thought these were normal behaviours. To assess the respondents' understanding of the CEDAW, articles from CEDAW were read out by interviewers to respondents and at the end, they were required to select articles which they felt would be of importance to Malawian women. Sixteen percent of the respondents reported all articles in the CEDAW being of importance to the women, 11 percent thought article 1 was more important, 10 percent recorded article 13, while 8 and 7 percent reported articles 10 and 11 being of importance respectively.

In conclusion it shows that the majority of Malawians are not aware of the CEDAW its contents and let alone concluding comments emanating from the same. It is important that a national programme is put in place aimed at raising awareness of the CEDAW as part of government efforts to mainstream gender in its development activities. This will also facilitate that the CEDAW will be domesticated through an act of parliament as there will be demand for such from the people on the ground.

III. List of Critical Issues

Critical issue 1: The failure to pass any gender related laws submitted to Parliament by the Law Commission is entrenching statute-sanctioned discrimination against women

From 2000 to date, the Malawi Law Commission has developed gender related Bills which could have the effect of implementing CEDAW Article 2 (a), (b), (f) and (g); and Article 16 (c). These are the Penal Code Reform Bill (submitted to the Ministry of Justice in 2000), which proposed to adjust the age of defilement from 13 years to 16 years; the Citizenship Act (submitted to the Ministry of Justice in 1996), which seeks to give women and men equal rights in passing citizenship to their children; the Deceased Estates (Wills, Inheritance and protection) Bill, which seeks to repeal the current discriminatory laws on the distribution of intestate property (submitted to the Ministry of Justice in 2003); and the Marriage, Divorce and Family Relations Bill, which seeks to give equal rights and

responsibilities to all parties in all marriage regimes, including customary (submitted to the Ministry of Justice in 2006). The Report on Proposed Gender Equality statute which will essentially domesticate the CEDAW (2007). The reluctance by state machinery to facilitate that the laws should be discussed by to prioritise the passing of these Bills, even after the submission and discussion of Malawi's fourth combined periodic report in 2006, demonstrates lack of commitment by the State to implement the CEDAW Committee's concluding comment urging "the State party to set a clear time frame for the adoption of the revised Citizenship Act, Immigration Act and the Wills and Inheritance Act and for the new Marriage, Divorce and Family Relations Bill, designed to eliminate discrimination against women."³

It also means a number of women's rights continue to be violated. In particular we would like to draw the committee's attention to some of the issues that were raised in the Shadow report to the combined 2nd, 3rd, 4th 5th periodic report. These are:

- ***Lack of legislation to outlaw discriminatory customs in contravention to articles 2 and 5 respectively, which state that***

Article 2

(f) States parties undertake to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.

Article 5

(a) States Parties shall take all appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.

The 6th Periodic State report has indicated that the State is committed to enact these Bills into laws. However the reality on the ground is that these Bills have been in place for years and some even close to a decade. In 2006 the Malawi Government assured the committee the Bills were "on the way to parliament" sadly this has not happened to date.

Further to the above the issues that were raised in the Shadow report to the combined 2nd, 3rd, 4th 5th periodic report with regards to absent laws continue to be a challenge and these are:

- ***Lack of specific legislation to address the issue of sexual harassment at the work place*** in contravention of **article 2 (b) (c) (d)** of the CEDAW which states that
(b) States parties undertake to adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women.

³ See paragraph 14

(c) States parties undertake to establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination.

(e) States parties undertake to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise.

- **Lack of specific legislation to address the issue of Marital Rape**

In its Concluding Comments to the State party report the committee urged the State Party as follows:

The Committee urges the State party to accord priority attention to the adoption of comprehensive measures to address violence against women and girls, in accordance with its general recommendation 19 on violence against women and the Declaration on the Elimination of Violence against Women. The Committee calls on the State party to enact legislation outlawing discriminatory customs and practices and criminalizing marital rape, as well as legislation concerning all forms of sexual abuse, including sexual harassment, as soon as possible.

The Malawi government has failed to implement this recommendation and should put measures in place to ensure that women are protected as recommended.

Critical issue 2: A weak public legal aid department is exacerbating the inaccessibility of justice to women

Contrary to the State's obligations under CEDAW Article 2(c), poor women's access to justice continues to be gravely inhibited by the low availability of government funded legal aid. The Legal Aid Department remains underfunded and understaffed, signalling that the State is giving low priority to the CEDAW Committee's concluding comment in 2006 that "the Committee is concerned that, although women's access to justice is provided for by law, their ability in practice to exercise this right and to bring cases of discrimination before the courts is limited by factors such as lack of information on their rights, lack of assistance in pursuing their rights, practical difficulties to reach courts and legal costs. . ."⁴ The Legal aid department remains understaffed with less than 10 lawyers and most of whom are concentrated in the Southern Region of Malawi.

⁴ See paragraph 17

Critical issue 3: Lack of implementation of the Prevention of Domestic Violence Act 2006 is depriving victims of domestic violence of maximum legal protection

By passing the Prevention of Domestic Violence Act in April 2006, Malawi has taken an important step towards implementing CEDAW Committee’s General Recommendation No.19,⁵ as read with Article 2 (b) and (f). However, the full implementation of these provisions remains rhetorical due to the inability of government to ensure (i) that courts are equipped with necessary resources, including Forms and Orders; (ii) that relevant implementing structures, like Alternative Dispute Resolution avenues, are set up and trained. Since 2006 when the law was passed there has not been a budgetary allocation by the Government to ensure that the law now becomes effectively institutionalised within the justice delivery system. Efforts to do so are mainly done by NGOs and because of this the Law is not effectively institutionalised. Although there has been efforts by the government and NGOs to train relevant personnel mandated by the Act to implement it; many Magistrates, Police officers and judges remain ignorant on the contents of this law and how it can be used to protect women from various forms of domestic Violence. In addition many women and many remain ignorant as to how this law can protect women.

It is therefore recommended that the Ministry of Gender should seek an allocation from the national budget for the implementation of the law as well as training all personnel mandated to implement the law more systematically in partnership with NGOs.

Critical issue 4: Women’s Property Rights Are Insecure Due To Constitutional Ambiguities

CEDAW Articles 2, 3 and 16 are not being fully implemented by the lack of unequivocal protection of married women’s property rights in Malawi.

Article 16 states inter alia that:

1. *States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:*
 - (c) *The same rights and responsibilities during marriage and at its dissolution;*
 - (h) *The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.*

⁵ a. “The definition of discrimination includes gender-based violence, that is, violence that is directed against a woman because she is a woman, or that affects women disproportionately. It includes actions that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion, and other deprivations....”

b. “Under general international law and specific human rights covenants, states may also be responsible for private acts if they fail to act with due diligence to prevent violation of rights, or to investigate and punish acts of violence....”

In Malawi, women's status as owners of property remains comparatively poorer than that of men because of inequitable construction of gender roles. Due to the socio-cultural construction of gender in Malawi, women tend to earn less and in marital situation do not usually buy property of value. It is usually their husbands who, due to men's socio-economic position, they have more economic prowess, and are therefore able to acquire properties of value. Notable is also the fact that women commonly take over household financial responsibilities that do not draw huge resources, i.e. buying food, paying utility bills etc- leaving the acquisition of tangible property of high value to men.

With regards to land, the land tenure systems in Malawi. Land in Malawi can be classified into three categories: public, private, and customary land (Kishindo 2004). Public land is owned or held in trust by the government or Traditional Authorities. This category includes such areas as national parks, forest reserves and conservation areas. Private land is held or owned under freehold title, leasehold title, or Certificate of Claim granted by early colonial governors to European settlers. Most large-scale estates fall under this third category of private land. Customary land is held under the customary law of each ethnic group and makes up 69 per cent of total land in Malawi (Government of Malawi 2001⁶). Private Land Freehold land can be bought and sold by all individuals, regardless of nationality or gender. Private land is generally expensive, titled, urban land that is more often acquired by men than women are, because men have better financial means to do so.

As highlighted above customary land represents the greatest proportion of land. Strictly speaking, rights to customary land are regarded as held by communities as a whole. Local chiefs exercise trusteeship over land on behalf of the people in the area. Village heads are entrusted with the management of the land within their territory and make decisions regarding land allocation to community members. Every indigenous inhabitant, by virtue of membership in a community, is entitled to access to a piece of land (Tsutomu Takane: 2007)⁷.

Under both the patrilineal and matrilineal systems in Malawi, decisions pertaining to customary land are primarily made by men and property rights are vested in men.⁸ Customary land is not owned as such but is vested in the community as a whole, the permanent alienation of customary land (such as through sale) is usually prohibited (Government of Malawi 1999, p.63⁹).

In reality, however, alienation of customary land through sale is common. In the study by Takane (supra) mentioned above, he studies land tenure issues in across six communities in Malawi. In each community, several cases of land sales were observed. What happens is that such sales are done

⁶ Government of Malawi (2001) *Malawi National Land Policy*, Lilongwe: Ministry of Lands and Housing.

⁷ Tsutomu Takane (2007) *Customary Land Tenure, Inheritance Rules, and Smallholder Farmers in Malawi*. Discussion Paper No. 104, Institute Of Developing Economies

⁸ Under patrilineality, an individual is considered to belong to the same descent group as his or her father, and residence is patrilocal. Upon marriage, a woman would leave her village and reside in her husband's village. Under matrilineality, an individual is considered to belong to the same descent group as her or his mother and marriages are matrilineal. In patrilineal societies, a married woman is regarded as a member of the husband's family because of *lobola* or bride wealth. Upon divorce, she is expected to leave her house, land, any matrimonial property and her children and return to her family. In matrilineal societies, the *mwini mbumba* is the head of the household, the legal guardian of the children and the custodian of land owned by his clan. The chief custodian of the land is the village headman who is the traditional chief of the village. When women marry, their husbands control their land and assets. Upon divorce, husbands take the assets which they brought into the marriage and leave the land, but take the harvest. A study by Ngwira et al (2003) confirmed that under both matrilineal and patrilineal systems of marriage, women have few or no independent rights to property due to the mixture of traditional customs and market economies.

⁹ Government of Malawi (1999) *Final Report of the Presidential Commission of Inquiry on Land Policy Reform, Volume 1 Main Report*, Lilongwe.

through giving a gift or money to the chief who then “sells” the land to the individual. An analysis of cases in the High Court done on Friday 5th June 2009, it was found out that in 10 matrimonial cases awaiting property distribution by the High Court at least eight of them had land/ house as one of the items of property to be distributed by the court¹⁰. Such land was not necessarily private land but was customary land acquired by the parties or one of them from a chief through the process of sale in the manner outlined above. It was also found out that in most of the divorce cases customary land is at the centre of the dispute with respect to property distribution; however, this customary land is not necessarily titled through a freehold or leasehold nor is it subject to customary rules of inheritance. It was bought by the couple or one of them through a process of sale. The cases at the High Court were predominantly divorce cases that had been decided at the lower court level (magistrates Courts). They were then sent to the High Court on the point of property distribution as lower courts do not have the jurisdiction to deal with civil cases issues relating to monies or property value of over MKW 50,000=00 (USD362).

Section 28 of the Constitution, states that every person has the right to own property either in their own right or if they want to, in association with others.

Section 24 of the Constitution primarily recognises women’s rights as follows:

1. 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 status which includes the right -
 - a. to be accorded the same rights as men in civil law, including equal capacity -
 - i. to enter into contracts;
 - ii. to acquire and maintain rights in property, independently or in association with others, regardless of their marital status;
 - iii. to acquire and dispose land in their own right or in association with others despite any cultural dictates and the state shall ensure that there is gender equity in any land and reform programmes”
 - iv. 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;
 - v. To acquire, retain citizenship and nationality.
 - (i) *to equal disposition of property that is jointly held with a husband;*
 - ii. to fair maintenance, taking into consideration all the circumstances and, in particular, the means of the former husband and the needs of any children.

Therefore, it is noted under this section that, women have a right to acquire and maintain rights in property, independently or in association with others, regardless of their marital status. Therefore; taking into account section 13 above and part of section 24; the freedom to acquire property regardless of marital status is clear under the law and in particular under this section. Problems begin where the constitution then further adds that on the dissolution of marriage, women are entitled to a fair disposition of property **held jointly** with a husband and to a fair maintenance. The Constitution assumes that property in marriage in Malawi is separately owned unless the couple owned it jointly.

¹⁰ Seodi White (2009) **Constitutionalism and Women’s Property Rights in Malawi** Unpublished paper

Under the English common law, jointly held property refers to property that both parties have **clearly intended** to own jointly such as through attaching both names to the property or through joint purchase. That each person should have a substantial interest in the property. Substantial interest is proved through tangible input into the purchase or acquiring of the said property, which is monetary in nature. S. 24 (1) (b) (i) is drafted in such a way that it does not recognise a marriage as a joint enterprise of interdependence (White, Kachika and Kathewera-Banda, 2006). This has created a situation in Malawi whereby all marriage institutions currently recognised in Malawi presume that objects of property are separately owned (Malawi Law Commission, 2003). The Constitution does not progressively recognise that women's contribution through reproductive labour can amount to '**joint**' acquisition of property. The Constitution retrogressively promotes the exclusive nature of property law even within the context of marriages, i.e. that it puts one spouse in a position of a third party with no or inferior claim over matrimonial property- thereby excluding such spouse from legal entitlement (White, et al supra). Further, the prevailing construction/interpretation of *jointly held* property therefore ignores the reproductive labour done by women in terms the valuable time women spent in contributing to the well being of their families, as well as the monetary investment they make towards consumables and other intangible resources (White et al supra). Unfortunately, in order to maintain dominance and reinforce women's subordination, most Malawian men refrain from having joint titles with their partners/spouses (Malawi Law Commission, 2003 cited in White et al supra). This means women are usually short-changed when it comes to distribution of property during divorce¹¹.

- **Interpretation of Women's Property Rights by The Courts**

Generally, the High Court of the Republic of Malawi has taken this interpretation with regards to property distribution upon divorce. The presumption in courts is *that "an inference of joint ownership of property is not to be made from a mere fact of marriage."*¹² The courts insist on strict proof of ownership for a spouse to be allocated a piece of property. The courts have relied on section 17 the Married Women's Property Act of 1882, which is an English Act, but the courts have treated it as one of general application and that it therefore applies to the Malawi Courts¹³. Any spouse wishing to claim a share in an object of property that is not in her or his name must prove that he or she contributed¹⁴. The courts have held that the contributions must be financial. Contributions to the maintenance of property items, housekeeping and child-care by spouses are not accepted as sufficient for any proprietary rights¹⁵, which disadvantages women, most of whose contribution in the household is not monetary (WLSA Malawi/SARDC WIDSAA, 2005: 36). Interestingly the High Court has extended this interpretation in matters related intestate succession. In the case of Sinalo vrs Sinapyanga and others,¹⁶ the facts before the court related to the estate of a businessman named Felix Sinalo who had died in Dec 1994 and was survived by a wife who was the plaintiff in the proceedings and children who were the second and third defendants. The applicant asked the court to declare that she was entitled to over and above her beneficiary interest; 50% proprietary interest in the business as well as 50% proprietary interest in a house, which she had completed after the death

¹¹ Seodi White Supra

¹² Nyangulu vs Nyangulu 10 Malawi Law Reports 435 per Villiera J.

¹³ Malenga vs Malenga MC no 13 of 2001

¹⁴ Malinki vs Malinki 9MLR 441 Mtegha vs Mtegha MC No. 9 of 1994

¹⁵ Nyangulu vs Nyangulu supra

¹⁶ Civil cause number 544/1995

of the husband with money from the estate of the deceased husband, and some of her own personal money. The basis of her whole claim was that she had helped the husband start up and to ran the business and had made substantial contribution to the same through labour and some financial input. The Court gave her 20% proprietary interest in the business because she was able to prove tangible financial input to the extent proportionate to the given 20% ratio. The court turned down the whole application regarding proprietary interest in the house because the claim was not proved. The court stated that there was no evidence before the court that the personal money that the applicant claimed to have inputted in the business had actually been so inputted and the court actually said that her claim that she had spent some time and labour in the building of the house was not believable as *it was obvious that she could not profess that she had building skills or carpentry (!)*. The court clearly that its position on the matter as stated above was consistent with the provisions of sections 24(1)(b)(i) and 28(1) of the Constitution of the Republic of Malawi which have been cited above. More recently, the High Court sitting in Mzuzu, has taken a more agreeable approach. In the case of *Kayira vs. Kayira*¹⁷ Chikopa J.; stated the position of the law as follows:

We had occasion to debate the distribution of matrimonial property, albeit in a customary law setting, in the case of **Barnet Phiri v Fanny Phiri** Civil Appeal Cause Number 15 of 2006 [Mzuzu Registry, unreported]. Quite apart from everything that we said in that case about the distribution of matrimonial property on the dissolution of a marriage, it is clear that the starting point is section 24(1) (b) of the Constitution.

We are aware that some have tended to read the words in paragraph (i) strictly and think therefore that the property to be distributed should only be such as is jointly held. We hold a different view. We think in accordance with the cases of **Fred Nseula v Attorney General & Malawi Congress Party** MSCA Civil Appeal Number 32 of 1997 [unreported] and **Attorney General v Dr Mapopa Chipeta** MSCA Civil Appeal Cause Number 33 of 1994 [unreported] that the Constitution should be interpreted in a generous and broad fashion as opposed to a strict, legalistic and pedantic one. A manner that gives force and life to the words used by the legislature and avoids at all times interpretations that produce absurd consequences. Pursuant to the foregoing, we refuse to interpret paragraph (i) to mean only such property as is held [jointly] in the name of the husband and wife on the date of the dissolution of the marriage. That would unjustly disadvantage either of the parties to the marriage [experience has shown the disadvantaged to be mostly the wife].

As was stated in the Madonna case cited above is that the practice of the High Court is that one judge can take a different position from another in the same court if they do not agree. Since there is no supreme court ruling on the matter the issue of interpretation remains controversial. This is because despite the existence of the Nseula case cited above, the High Court has shown disregard of the direction provided and continued to interpret the Constitution strictly.

Therefore the Constitution causes hardship for married women who may find themselves divorcing. Over and above this, subsidiary laws which relate to property such as the Wills and Inheritance law reinforces this position in that it assumes that that objects of property in marriage are separately owned and makes the assumption that men own most of them if not all of them. This thinking is

¹⁷ Civil Cause Number 44 Of 2008

stemming from the common law position about property ownership. Therefore when a woman becomes a widow she loses out due to the constitution of marriage laws, which in turn impact on inheritance laws. This is not the end of the story. In Malawi there exists the social practice of dispossession of widows which mainly stems from the fact that relatives of the deceased, man illegally take away the property belonging to the matrimonial union on the assumption that since in marriages couples own property separately and since most women are not able to buy tangible items of property the matrimonial property therefore belonged to their deceased relative. They therefore take the property since in Malawi marriages do not create a relationship of consanguinity. All this goes against the spirit of the Constitution as well the CEDAW to which Malawi is a party.

It is therefore imperative that the Malawi government takes up its duty and create where there is none or strengthen where it exists, the legal mechanisms to protect widows in the face of dispossession and married women in an ongoing marriage and at the dissolution of such marriage. In the light of this, the Constitution should provide that with the exception of couples who choose otherwise through a contractual agreement, all property acquired in marriage and taking into account all forms of marriage shall be deemed to be *owned in common* under the concept of community ownership. Property held in common is generally all property that is not statutorily defined as either spouse's property (especially which the parties have acquired during the subsistence of the union). This is opposed to separate property, which is generally the property that each spouse brought into the marriage as well as property that came to one of them during the marriage through inheritance (either by will, bequest or devise)¹⁸. The current substantive content of the Constitution makes any review of the marriage with regards to property rights quite difficult. This was the experience of the Special Law Commission on Gender Related Laws mandated to review marriage laws. The commission failed to reach an equitable agreement with regards to property rights for women. The main impeding factor was the wording of the constitution as outlined above¹⁹.

Women and Law in Southern Africa Research and Educational Trust (WLSA Malawi) presented a position paper²⁰ at the 1st Constitutional Review Conference which took place in April, 2006 which highlighted some critical issues for reform some of which have been presented in this document. The idea behind the first National Constitutional Conference was to give an opportunity for various stakeholders to present issues around the Constitution in order to give the empanelled Special Law Commission on the Constitutional Review²¹ an opportunity to deliberate with the stakeholders and understand the critical issues and therefore deliberate those issues among themselves and compile the a report which would highlight their position in terms of how the new Constitution would like. The report touched on the various thematic areas of the Constitution as raised by different groups but also as presented in the Constitution. This report was presented in April 2007 at a second national Constitutional Conference. Suffice to say that the issues relating to Women's rights were omitted by the Commission citing that they were not relevant in so far as the Constitutional Review was concerned.

¹⁸ This is what was submitted to the Special Law Commission at the 1st Constitutional Review Conference by (WLSA Malawi)- Seodi White, Tinyade Kachika and Maggie Kathewera Banda(2006)

¹⁹ www.lawcom.mw

²⁰ White, S. Kachika, T. Kathewera -Banda M (2006) Contributing towards the Realisation of Women's Human Rights and Gender Justice: Recommendations for a More Equitable Constitution Blantyre Malawi (2006).

²¹ See www.lawcom.mw

The Women and Law in Southern Africa Research and Educational Trust (WLSA Malawi) and the NGO Gender Network extensively lobbied critical stakeholders in the Conference in particular the Law Commissioner and the Chairperson of the Special Law Commission that the omission was erroneous as the proposed recommendation that had been submitted went to the root of the wording of the Constitution. For example where the Constitution talked about the property jointly held in section 24 as cited above. One thing that became clear was that the submission by WLSA had not been read nor considered seriously by the Commission.

After vigorous lobbying by WLSA as well as other stakeholders interested in gender related issues; the programme for the conference was reorganised to include yet another presentation from WLSA on the gendered issues of the Constitution that some Commissioners saw the point. However that is not the end of the story. What was even more at stake was the input by the representatives at the conference to the presentation by WLSA. Some of them saw the women's rights submission and in particular the part related to property rights in marriage in which we recommended that the Constitution should change the term **jointly** to **commonly** held to protect women's property rights in the context of their reproductive and productive labour and roles in the family. Some of the men looked at this submission as a conspiracy by women to kill their husbands (!) in order to get all the property in the marital home. This thinking arises out of the general fear in Malawi by men that their wives can kill them by adding poison to the food since they are the ones who prepare the food and family wealth is one of the motivating factors for doing so. This sent fears in the audience and divided it as to whether this clause should be amended as proposed. Those arguing for the proposed amendment advanced their argument using the human rights framework as per the spirit of the Constitution itself and with regards to the fact that Malawi as a Member State of the international community had ratified several international Conventions including the CEDAW and therefore it was under the obligation to protect women' and in this instance their property rights. Arguments against the proposal included that this proposed amendment goes against the cultural fabric of Malawian society as it gives women more power and equality to their husbands²².

Critical Issue 5: The Proposed HIV/AIDS Bill Contains Provisions That Perpetuate The Victimization And Stigmatization Of Women And The Infringement Of Their Rights

Malawi stands to contravene CEDAW Article 2 (d) and (e) of the 2008 if the Law Commission's provision (under the HIV And AIDS (Prevention And Management Bill) to make HIV infection mandatory for commercial workers is adopted by Parliament. This proposed provision also contravenes Article 19 (1) of the Republican Constitution which provides that "the dignity of all persons shall be inviolable;" and Article 20 which states 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, nationality, ethnic or social origin, disability, property, birth or other status." This provision continues to stigmatise women as vectors and transmitters of the disease. The ripple effect of this over and above its inherently discriminatory and degrading nature is that it is bound to victimize commercial

²² Seodi White Supra

sex workers and thus increase violations of women's rights at the hands of public authorities and male clients.

The draft provision penalizes "deliberate or negligent" transmission in two places. The section on health makes it offence to "deliberately or negligently" do "any act which is, and which he knows or has reason to believe to be likely to spread the infection of HIV and AIDS." The section on "deliberate transmission and exposure to HIV infection" similarly penalizes "any person who deliberately or negligently does an act or omission that he knows or has reason to believe to be likely to spread the infection of another person with HIV."²³ These provisions, as drafted, are inconsistent with international guidance on HIV/AIDS and human rights. The International Guidelines on HIV/AIDS and human rights recommend that "[c]riminal and/or public health legislation should not include specific offences against the deliberate and intentional transmission of HIV but rather should apply general criminal offences to these exceptional cases. Such application should ensure that the elements of foreseeability, intent, causality and consent are clearly and legally established to support a guilty verdict and harsher penalties."³ There is no evidence that using the criminal law to respond to HIV is effective in protecting public health, and some evidence that it may in fact cause harm.⁴ Criminalizing transmission may deter people from getting tested, since ignorance of HIV status may be a defence. This, in turn, deters people from getting tested, and if they don't know their HIV status, they can't take steps to obtain treatment, care, and support, and keep from infecting others. In addition, criminalizing HIV transmission may also keep people from disclosing their HIV status to health care providers and other health professionals for fear it may be used against them in the criminal justice system²⁴.

Critical Issue 6: Women In State Custody Are Most Excluded And Vulnerable

In contravention to the general spirit of CEDAW Article 2. Women caught in the web of the law are tried unfairly and most of whom are accused of witchcraft and which cannot be fundamentally proved in a court and law as well as those accused of prostitution and yet courts have gone on a rampage of convicting women so accused. Once women enter the prison machinery they are incarcerated as opposed to rehabilitation. So much that most of them leave prison without any new skills, stigmatised and unable to cope with the rest of the world.

WLSA Malawi has just published research entitled *Poor, Invisible and Excluded: Women in State Custody Malawi (2009)*.

Witchcraft

One of the common crimes allegedly committed by women is that of witchcraft. In all of the 11 prisons visited; there was on average four witchcraft cases per prison. This is quite a high number considering that the female prison population is particularly low when one compares to the male prison population. There was reasonable evidence showing that the offence of witchcraft not only is it age specific but is quite feminised. What was very clear is that the profile of a convict or remand

²³ Obtained from Human Rights Watch Submission to the Malawi Law Commission, 2008

²⁴ Ibid HRW 2008

witchcraft prisoner is that of an elderly lady from her 50s up to 70s with an extra piece of land or a little bit more food than her neighbour. In consideration of the crime of witchcraft we first examined what the law says about the crime. What initially vexed the minds of the researchers is under what charge were the witchcraft offenders convicted? This is because the Witchcraft Act it provides as follows:

Under section 4:

Any person who, otherwise than in laying information before the court, a police officer, a chief, or other proper authority, accuses any person with being a witch or with practicing witchcraft or names or indicates any person as being a witch or wizard shall be liable to a fine of GBP25 and to imprisonment for five years.

Under Section 5

Any person who employs or solicits any other person to name or indicate by the use of any non-natural means any person as the perpetrator of any alleged crime or other act complained shall be liable to a fine of GBP 25 and to imprisonment for five years.

Under Section 6

Any person who by his statements or actions represents himself to be a wizard or a witch or as having or exercising the power of witchcraft shall be liable to a fine of GBP 50 and to imprisonment for 10 years.

An analysis of Section 4 is that it actually prohibits the very act that police condone: accusing someone of witchery. In fact if anyone is supposed to be arrested and tried it is the people who report of such a crime and not the ones who are reported on. Further to this, in most cases police have charged people accused of witchcraft with the Charge of "Conduct likely to cause of breach Peace" under section 181 of the Penal Code which actually states that

"Every person who in any public place conducts himself in a manner likely to cause a breach of peace shall be liable to a fine of K50 and to imprisonment for three months".

This is problematic from four perspectives. The first is that for a conduct to take place it must be in a public place and must be seen or be able to be proved by the prosecution that the said conduct actually took place. Now, witchcraft is a belief which is difficult to prove as it is not tangible in character. It is couched in mystery and magic. Many claim it doesn't exist due to the fact that it cannot be seen to the naked eye; whilst others believe it does. Its nature is that it is constructed in beliefs. The charge of conduct likely to cause a breach of peace means that such conduct has to be proved to have been so done. The onus of such proof beyond reasonable doubt lies with the prosecution. In most cases however, this conduct is not proved. It just takes one villager or child to accuse an older woman in the village of witchcraft and then this creates a public outcry which in turn puts pressure on the police to charge that person with an offence and then the magistrate feels compelled to convict due to the public outcry. Second, even though the law in this respect provides that the person shall be liable to a fine of K50 and to imprisonment for three months; sentences given to women said to have breached peace through practicing witchcraft far surpass the required penalty.

The third point reiterates the earlier point that according to Section 4 of the Witchcraft Act the accusation of witchcraft by one party vis-à-vis another itself is criminal. Therefore WLSA concluded that arrests and trials and sentences made on these charges for the purpose that a person is a witch are illegal and amount to a miscarriage of justice. This is primarily because it is whosoever reports an act of witchcraft who commits an offence and not the other way round. It is therefore these people who should have been prosecuted in the first place and yet all of the convicts in prison are the ones who have been accused. Fourth, another point is that many of the prisoners had denied having practiced witchcraft. So the question is if one has denied the accusation surely they are not pretending to practice witchcraft as provided for under Section 6 of the Witchcraft Act? This because it is only when one states that they are practising witchcraft; that the hand of the Act (law) strikes them. The law in our understanding assumes that one is pretending to be a witch when one states that they are so or probably act in a manner that proves beyond reasonable doubt that they wish to convey a message that they are a witch. And yet some of the prisoners interviewed had been charged with pretending to practice witchcraft and yet the evidence showed that they had actually denied the charge. The facts do point out that they had been accused of witchcraft by a member or members of the public. They did not pretend in the eyes of the law but were accused to be so which as pointed out above is illegal²⁵.

The following are some of the cases we came across.

Mrs Fanny Banda²⁶, aged 73

Mrs Fanny Banda aged 73 who was charged of witchcraft and given a prison sentence of 3 years imprisonment. It was not clear what exactly the charge was since she did not even know it. She stated that she and her brother owned a considerable piece of land in Nkhatabay. One of the villagers accused her of practicing witchcraft and she was taken to a traditional witch doctor who is believed to have powers to prove whether one is a witch or not. In this case the traditional doctor found that she was not a witch (In any case the practice of calling of witch finder or witchdoctor or trial by ordeal to determine whether one is a witch or not is illegal under Sections 2, 3 and 8 of the Witchcraft Act). However despite the “*verdict*” the matter was resuscitated by the police due to pressure from the community and she was tried and was sentenced to 3 years imprisonment.

Kate Kanjere aged 55

In the same prison another woman Kate Kanjere aged 55 was imprisoned for 6 years because of *ufiti* (practising witchcraft). She was from Chitipa which is about 300km from Mzuzu. What had happened was that 4 children had claimed that she taught them *ufiti*. She was taken to the police and later to court and was given a 6 year prison sentence. The evidence that was used was the testimony given by the children about how she comes to “**take**” them at night and go to South Africa, Zimbabwe, etc using the “*magic plane*”.

The witchcraft phenomenon is so big that we came across one woman in Mulanje district who was on remand after having beaten up her aunt on the belief that the aunty had killed her child through witchcraft. What had happened was that her child died suddenly. He was 8 months old when he died. Ironically she had tested HIV positive and refused to believe that there could be a possibility that the

²⁵ Seodi White, Emmily Kamwendo. Wezi Malonda (2009) *Poor, Invisible and Excluded: Women in State Custody Malawi WLSA Malawi, Limbe Malawi*

²⁶ Mzuzu Prison

death of her child was somewhat connected to that. She stoically blamed the aunty for “*eating*” her child.

Severe Kalonga²⁷ aged 65

One particularly disturbing case was that of Severe Kalonga a 64 year old woman currently being held at Chichiri. Mrs Kalonga came from Manasseh a township in the city of Blantyre. She had been a primary school teacher for 32 years and had retired and settled in Manasseh where she built a house and had an extra piece of land where she ran a nursery school. One afternoon she was called by the chief and told that some children in the neighbourhood had accused her of *teaching* them witchcraft. When she went to see the chief she was told that the children had accused her of taking them to Zimbabwe, South Africa on a magic plane. She denied the accusations. Nonetheless her neighbour who was one of the parents to the children pressed charges and the matter went to the courts. Her children hired a lawyer on her behalf. She was charged under the witchcraft act. Interestingly, another woman whom she had never met before was also charged with the same offence and both were tried together. There was no evidence that was produced other than the testimony of the children. The lawyer withdrew from the case after making a number of submissions that the evidence produced by the state was insufficient to prove beyond reasonable doubt that the crime in question had been committed. The lawyer was so frustrated because repeated submissions on his part to the magistrate that the evidence was inadmissible and the charges were erroneous were continuously ignored by the magistrate. She was sentenced to 3 years imprisonment. At the time of the Interview she had since appealed the case and was waiting for a trial.

Prostitution

Further to the above; it was found that gender specific crimes of prostitution and rogue and vagabond fall under this category. Analysis of the findings have revealed a trend in that prisons which are near to tourist attraction features, particularly Lake Malawi, had more cases of prostitution and rogue and vagabond than any other cases²⁸. Prisons, generally, experience an influx of female law offenders on such charges during peak celebration periods like the Christmas and New Year festive season, Easter holidays and Malawi Independence Day holidays because women target tourists who flock to such areas during such periods. Women arrested for prostitution present a recurring problem to the criminal justice system because after release they just move to another district and other women move in from other districts to loiter in the bars and sell sex.

From a criminal justice perspective again, crimes committed within the framework of prostitution also vexed the minds of the researchers and also caused confusion as well as concern with regards to the operations of the justice delivery system in this respect. We provide this analysis as follows:

The charge that most the female prisoners are convicted with in relation to prostitution is called rogue and vagabond or Idol and Disorderly conduct in accordance with sections 180 and 184 is that of The Penal Code. In fact the rogue and vagabond charge is so common that most women who are so charged and convicted (or not) call it *vakabo* which is a loose vernacular for vagabond.

The Sections provide as follows:

Section 180, Idle and Disorderly Persons:

The following persons –

²⁷ Chichiri Prison

²⁸ Examples of which are Mangochi, Nkhatabay and Nkhotakota.

- (a) Every common prostitute behaving in a disorderly or in an indecent manner in any public place;
- (b) Every person wandering or placing himself in any public place to beg or gather alms, or causing or procuring or encouraging any child or children to do so,
- (c)
- (d) Every person without who lawful excuse publicly does any indecent act,
- (e) Every person who in any public place solicits for immoral purposes;
- (f)
- (g)

Section 184, Rogues and Vagabonds:

- (1) The Following Persons-
 - (a) Every person going about as a gatherer or collector of alms, or endeavouring to procure charitable contributions of any nature or kind under any force or fraudulent pretence;
 - (b) Every suspect person or reputed thief who has no visible means of subsistence and cannot give a good account of himself
 - (c) Every person found in and upon or near any premises or in any road or highway or any place adjacent thereto or in public place at such time and under such circumstances as to lead to the conclusion that such person is there for an illegal or disorderly purpose.
 - (d)
 - (e)

The major problem is that the arrest and trial and subsequent imprisonment of women who are deemed to be prostitutes is that their behaviour in comparison to the law under which they are charged is that they do not tally. When one looks at Sections 180 (a) 184 (c) there is no mention of prostitution. The Act does not define who is and what prostitution is. Nor is an indecent act defined. Further the Penal Code does not specifically say prostitution in itself is illegal. It is silent on the matter. What is illegal is aiding and abetting prostitution by a man or a woman under sections 145 and 146 of The Penal Code. Further the Penal Code makes it illegal to run or keep a house or a room or set of rooms for purposes of prostitution, under section 146. So, if any arrests are supposed to be made, they are supposed to be made in respect of those people who run motels and other rooms for the purpose of prostitution as well as those who earn money from the prostitution of others. However, when arrests are made the police usually break and enter the motels which they know are frequented by persons known to be prostitutes and arrest the women and do nothing to the owner of the premises. The arrest of the women in itself is actually illegal. This is because as indicated above, nowhere under the Penal code has actually defined engaging in prostitution as illegal. It became apparent from the discussions with the convicted women that in some cases even when the women are found to be alone they are still arrested and where they are found to be with a partner, the partner is let loose. And yet if prostitution was illegal, then both parties would be engaging in the act and should be arrested.

The experience of women arrested and subsequently convicted because of prostitution shows the irregularity of these arrests.

It is our submission that the government should relook at the situation of female prisoners and come up with policies aimed easing their plight and removing deeply entrenched injustices. What emerged from the research findings is that rights of female prisoners in Malawian prisons are not respected and are below constitutional and international standards. An overhaul of both policy and legal instruments is imperative for Malawi to enforce the ideal conditions for women in prison. One critical

finding is that because the prison system in Malawi is the mainly used by poor people; that is those who have been caught by the law and put in prison are poor, illiterate and live on the margins of society.

Critical issue 7: Women continue to be the poorest, signalling the weak responsiveness of government's development strategies to women's challenges

Article 12 of the CEDAW states:

Article 12

1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.

2. Notwithstanding the provisions of paragraph 1 of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.

Malawi is failing to fully implement CEDAW Articles 13 and 14 by its failure to dramatically improve the economic status of women (including rural women) as well as reduce women's poverty levels. About 55 percent of people in male-headed households in the rural areas are poor compared to 60 percent those who reside in female-headed households.²⁹ And currently, 62.9 percent of female headed households report inadequate consumption of food, compared to 54.6 percent of male headed households. Out of those who participate in national economic decision making bodies, only 21 percent are women compared to 79 per cent men.³⁰ The Malawi Growth and Development Strategy (MGDS) 2006-2011 has been critiqued for its failure to capture the centrality of gender issues in attaining national economic growth and poverty reduction. It fails to recognize the socio-cultural dynamics that govern the social, economic and political interactions between men and women at different levels.³¹ Even the Business Environment Strengthening Technical Assistance Project (BESTAP), which was started in 2007 (funded by the World Bank with support from the EU), only notes that the main constraints to doing business in Malawi are macro-economic instability and the tax rate and its administration. Gender is not mentioned in the project proposal, or in any of the indicators.³²

In 2006, the CEDAW Committee expressed the concern that prostitution continues to thrive, owing to the poverty of women and girls.³³ It was also particularly concerned that widespread poverty among women and poor socio-economic conditions are among the causes of the violation of women's

²⁹National Statistical Office, Integrated Household Survey 2004-2005, Vol.1 (October 2005), at 147.

³⁰ Gender and Economic Empowerment Fact Sheet

³¹ Olivia Mchaju Liwewe, Dr Naomi Ngwira and Bright Sibale, Gender Needs Assessment of the Malawi Growth and Development Strategy (July 2006), at 5

³²UNDP Malawi, National Human Development Report 2008 soon forthcoming

³³ See paragraph 23

human rights and discrimination against women.³⁴ The fact that more recent key national policies continue to sideline gender demonstrates the lack of adherence to the CEDAW Committee 2006 concluding comment urging “the State party to make the promotion of gender equality an explicit component of its national development plans and policies, in particular those aimed at poverty alleviation and sustainable development . . . The Committee invites the State party to place emphasis on women’s human rights in all development cooperation programmes with international organizations and bilateral donors, so as to address the socio-economic causes of discrimination against women, including those impacting women in rural areas, through all available sources of support.”³⁵

Critical issue 8: Maternal Mortality Rate Continues To Be Staggering And To Be Triggered By The Avoidable Cause Of Unsafe Abortion

At 980 deaths per 100,000 live births,³⁶ Malawi’s maternal mortality rates (MMR) continue to be one of the highest in the world, thereby contravening Articles 12(2) and 16 (e) of CEDAW. One reason for the abnormally high MMR in Malawi is the de-link between the lived realities of women that die due to pregnancy related complications and the interventions that are put in place. For instance, while it is known that unsafe abortions contribute to about 30 percent of Malawi’s maternal mortality rates, Malawi continues to harbour one of the most restrictive abortion laws in the world. This situation is prevailing notwithstanding that in 2006, the CEDAW Committee already expressed alarmed at “the persistent high maternal mortality rate, particularly the number of deaths resulting from unsafe abortions, high fertility rates and inadequate family planning services, especially in rural areas, low rates of contraceptive use and lack of sex education.”³⁷ So far, Malawi has therefore failed to meet the Committee’s concluding observation calling on “the State party to integrate a gender perspective in all health sector reforms, while also ensuring that women’s sexual and reproductive health needs are adequately addressed.”³⁸ One of the missing actions is for government to create an enabling environment for the health sector to provide safe abortions to the full extent of the law.

In a background paper commissioned by Ipas Alliance Africa Kangaude³⁹ has raised the following issues with regards to maternal mortality rate in Malawi.

The causes of maternal mortality in Malawi have been captured in a number of hospital/ institutional and community-based studies. The most important direct causes are sepsis, complications of abortion and obstructed labour, sometimes resulting in ruptured uterus and haemorrhage. Other direct causes include eclampsia, retained placenta and complications from caesarean sections. The

³⁴ See paragraph 33

³⁵ See paragraph 34

³⁶ National Statistical Office and ORC Macro, Malawi Demographic and Health Survey 2004 (2005), at 1.

³⁷ See paragraph 31

³⁸ See paragraph 32

³⁹ Kangaude, (undated) A Strategic Assessment Of Policies, Programmes And Research Related To The Reduction Of Unsafe Abortion In Malawi Commissioned by Ipas Alliance Africa

most important cause of indirect maternal deaths are anaemia, AIDS and meningitis. Other indirect causes include malaria, pneumonia and other infections.

The Southern Region maternal deaths audit conducted by Ratsma revealed some characteristics of maternal mortality. One characteristic is that, a significant number of maternal deaths occur outside of the health care system. A community audit of all maternal deaths in Nankumba (population 62 327) revealed that approximately 44% of maternal deaths occurred either at the patient's home, the home of a TBA or in transit to a health facility. A high proportion of these community-based deaths are due to obstetric haemorrhage, ruptured uterus, obstructed labour, and complications of abortion (McCoy, Ashwood-Smith, Ratsma, Kemp, & Rowson, 2004). The study by Ratsma also shows avoidable causes of maternal deaths. The audit found that the quality of care had been 'sub-standard' in 62% of deaths. Deficient hospital care was the principal avoidable factor in 38% of deaths, and deficient health centre care in 5% of deaths. Delay on the part of the patient in utilising the health service was the principal avoidable factor in 15% of maternal deaths. Only in 5% of women had a 'contraindicated pregnancy' (against medical advice) the principal avoidable factor. Ten percent of all women who died were had already given birth six times or more and 9% were 35 years old or more. Approximately 24% of women who died from both direct and indirect obstetric causes were teenagers.

McCoy et al also noted that although there had been a rise in the uptake of modern family planning methods from 7% to 26% in the period between the 1992 and 2000 MDHSs, the unmet family planning needs and fertility rates (6.3 live births per woman) remained high. The fact that 24% of the maternal deaths covered by the Southern Region audit occurred in teenagers implied that there is room to reduce maternal mortality through primary pregnancy prevention efforts. The uptake of modern family planning methods only rose to 28% in 2004 showing that the room to reduce maternal mortality through primary pregnancy prevention may still exist.

Cultural beliefs and practices about pregnancy and childbirth lead to the first delay. For example some women are kept in prolonged labour at home until there is a 'confession' of infidelity. Another example is the practice of women to take local herbs to stimulate uterine contractions, which may prove fatal in some cases (Matinga & McConville, 2002). Further, lack of knowledge of complications of pregnancy and childbirth contributes to this delay. Financial barriers such as the cost of services present barriers to care. The cost of travelling and money for upkeep while awaiting delivery may be prohibitive where services are free.

Pregnancy at an early age is a factor that increases vulnerability of young girls to obstructed labour and eclampsia. This is due to their immature physiology, lack of access to accurate information and antenatal services, and limited decision-making abilities. A baseline survey done in Ntchisi district revealed that about 69 percent of young women get married between 15 and 19 years of age (Matinga, 2005). The Southern Region audit estimated that adolescents accounted for 24 percent of maternal deaths. Unsafe abortion is another serious problem in Malawi. Up to 60% of hospital admissions regarding obstetric and gynaecological problems are due to unsafe abortion (Girvin, 2004).

Kangaude⁴⁰ also raises social and economic factors as issues that also impact on maternal mortality. The high maternal mortality ratio is also the consequence of gender disparities between men and

⁴⁰ Supra

women, which leaves woman in a subjugated position in relation to men. Women lack the autonomy to make decisions that affect their health.

The state of maternal health is also inextricably linked to poverty. At the household level, poverty severely limits access to obstetric care where the family cannot afford user fees. Even without user fees, the cost of accessing a health care facility can be high, for example transportation. At the health systems level, inadequate funding for the health department limits capacity of the government to provide essential maternal health services.

Policy and legal factors are also determinants of maternal mortality. An example is the laws and policies which deny women access to safe abortion which leads to women seeking unsafe methods of abortion resulting in illness and death. Tinyade Kachika analyses the abortion issue as follows⁴¹.

Incomplete abortions are the most common reason for admission to gynaecological wards in Malawi (Coombes, 2001). This is underscored by recent evidence, which shows that Central hospitals in Malawi are attending to high numbers of women seeking post abortion care. In an examination of records in Malawi's Central Hospitals between 1999 and early 2006, Kamuzu Central Hospital had registered 2384 cases, while Queen Elizabeth Central Hospital (QECH) has registered 3178 cases; and Zomba Central Hospital had registered 1239 cases (Linyenga 2006).

In a recent assessment of the availability of Emergency Obstetric Care in Malawi (MoH/GoM, 2005) out of the 48 hospitals assessed, complications of abortion accounted for the 2nd most frequent direct obstetric complication (at 30% of obstetric cases). And a key informant discussion⁴² with nursing staff in the Gynaecological Ward of QECH uncovered that the hospital receives an estimated 15-20 gynaecological cases a daily basis, half of which are complications related to abortions. According to both nursing staff and specialists in the Department of Gynaecology and Obstetrics at QECH, a good number of patients who come for post abortion care are adolescents. Kachika⁴³ therefore argues that this evidence shows that more women, including adolescents, undergo life threatening backstreet abortion, and possibly many more face unrecorded deaths if they have not accessed post abortion care. This is highly likely given the fact that according to the assessment of availability of Emergency Obstetric Care in Malawi⁴⁴ 94% of the country's health centres do not provide this critical reproductive health service (MoH/GoM, 2005). Yet, health centres are most accessible to people, rather than hospitals.

Mc Coy et al (2004) also note that the illegality of termination of pregnancy in Malawi, and the associated stigma means that this figure may be an under estimation (2004). This is a plausible assessment, since the illegality of abortions may in fact drive women to desperately try and self manage complications of abortion, instead of having recourse to health facilities. Further, because of the stigma, findings from the rapid survey conducted to inform this desk review show that even at family level, women suffering from complications of abortions hardly disclose to family members that they have procured an abortion. This therefore makes it difficult for them to be referred for timely medical help. At QECH, a woman in a focus group discussion testified to the reality of this situation:

⁴¹ Kachika, T (2007) Legislative And Policy Framework On Access To Safe Abortion Services In Malawi, Commissioned by Ipas alliance in Africa

⁴² Conducted to support this desk review

⁴³ supra

⁴⁴ Of which post abortion care is one of the first 6 critical components/services

We just knew that my neighbour's daughter was unwell. When she later passed away, it was when we discovered that she had had an abortion. When we were cleaning up the corpse, we found a nearly rotten stick stuck deep into her vagina.

Even for those who ultimately disclose, and are taken to hospital, extensive infection to their internal organs has occurred, and it is often too late to save their lives. One woman in a focus group discussion at Kamuzu Central Hospital shared the story of her personal bereavement:

My late younger sister secretly went to a traditional doctor to procure an abortion. Though she started feeling unwell immediately after, she did not confide in any family member. For a whole month, she struggled to pretend she was not too sick, and yet she was suffering from severe stomach pains and was bleeding profusely. By the second month, she was getting too weak and it was getting harder to conceal the extent of her ailment, though she tried to explain it away as a migraine headache. All along, she was refusing to be taken to hospital and was just taking panado tablets. But later, when she became worse, she confessed that 'her actual problem was her stomach.' When my mother probed hard, she finally disclosed that she had procured an abortion. We immediately took her to hospital, where she immediately underwent an operation. But after 2 months, most of her internal organs were rotten. She was very ill, and died 3 days after the operation.

Another mother at Kamuzu Central Hospital who was caring for her daughter shared the story of how her daughter's life was only saved by her (mother's) intrusiveness:

When my daughter told me she was suffering from malaria, a certain instinct told me that was not true. I asked her aunt to question her whether this was not something related to pregnancy, but she refused. 2 days later, I insisted that we go to the nearest mission hospital. When she started to tell the Clinical Officer the same malaria story, I blurted out 'I have not noticed her having her monthly periods for the past 3 months. So I suggest that you check everything.' This is probably what saved her life because after examining her abdomen, the Clinical Officer decided to conduct a vaginal examination. The room was immediately engulfed by such a bad smell, and the doctor pulled out (from her vagina) a stick that had gotten retained in the abortion procedure, and confirmed that it was an abortion. So we came here to the central hospital, and she had to have an operation because the procedure had damaged her intestines. We have been admitted for 3 weeks now but she is still quite sick.

The focus group discussions disclosed that in peri urban and rural communities, cases like these are so many, and many women die at home. This therefore places a very high likelihood that a lot of (unsafe) abortion related deaths remain unrecorded since they occur outside health facilities.

Fear of the law is another reason why unsafe abortions as outline are common. The penal code states:

149. Any person who, with intent to procure a miscarriage of a woman, whether she is or is not with child, unlawfully administers to her or causes her to take any poison or other noxious

thing, or uses any force of any kind, or uses any other means whatever, shall be guilty of a felony and shall be liable to imprisonment for fourteen years.

150. Any woman who, being with child, with intent to procure her own miscarriage, unlawfully administers to herself any poison or other noxious thing, or uses any force of any kind, or uses any other means whatever, or permits any such thing or means to be administered or used to her, shall be guilty of a felony, and shall be liable to imprisonment for seven years.

151. Any person who unlawfully supplies to or procures for any person anything whatever, knowing that it is intended to be unlawfully used to procure the miscarriage of a woman, whether she is or is not with child, shall be guilty of a felony and shall be liable to imprisonment for three years.

231. Any person who, when a woman is about to be delivered of a child, prevents the child from being born alive by any act or omission of such a nature that, if the child had been born alive and had then died, he would be deemed to have unlawfully killed the child, shall be guilty of a felony and shall be liable to imprisonment for life.

243. A person is not criminally responsible for performing in good faith and with reasonable care and skill a surgical operation upon any person for his benefit, or upon an unborn child for the preservation of the mother's life, if the performance of the operation is reasonable, having regard to the patient's state at the time, and to all the circumstances of the case.

The core rights issues in reproductive health are the ability of women to exercise their agency and make decisions that shape the course of their lives, such as the determination of when to start a family, its size, and the interval between children. These rights entail that services related to family planning, maternal health, treatment of HIV and AIDS and sexually transmitted infections, infertility, and reproductive cancer be effective and available. Reproductive rights entails that women should be able to make decisions about reproduction free of discrimination, coercion and violence (Correa, 1996 and Julie H, 1994).

However in Malawi the reality on the ground outlined is contrary to this position. There is need to liberalise abortion laws so that they are no longer restrictive. This will enable women to choose safe abortion means.

IV. Conclusion

The challenges facing Malawian women are many. The CEDAW remains of the critical international legal instruments that can be used to change women's lives. These critical issues as well emerging issues are is no way exhaustive in terms of identifying some of the problems faced by Malawian women. However it is our view that these form the pressing issues that the Committee may use to create a more effective engagement with the State Party in January 2010.

V. Helpful questions

These are some of the relevant questions which the committee may pose to the government of Malawi at this stage or at the reporting stage.

1. Kindly appraise the committee on the following issues:

The status of the following Bills which have been submitted by the Law commission to Ministry of Justice which is responsible for presenting these before parliament and have not yet been passed:

- a. Penal Code Reform Bill
 - b. Citizenship Act
 - c. the Deceased Estates (Wills, Inheritance and protection) Bill,
 - d. (submitted to Ministry of Justice in 2003);
 - e. Marriage, Divorce and Family Relations Bill,
- 2. Kindly appraise this committee on the Status female headed household and demographic survey indicators.**
 - 3. We understand that the Maternal Mortality rates remain high, kindly appraise the committee on what the government is doing about this?**
 - 4. We understand that unsafe abortion is quite prevalent; can the government make a comment about this?**
 - 5. Kindly comment on the status of women in state custody.**
 - 6. In particular kindly let us know about the crimes committed by women and rehabilitation programme aimed at such women**

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