

MALAWI

Sections 20 and 41 of the Constitution of Malawi uphold the principle of equal rights for men and women and prohibit any discrimination based on gender or marital status.¹ The Republic of Malawi ratified the Convention on the Elimination of All Forms of Discrimination against Women in 1987. Malawi signed the Optional Protocol in 2000, but has yet to proceed with ratification. It ratified the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa in 2005.

The unequal status of women in Malawi is shaped by the inter-locking factors of general poverty, discriminatory treatment in the family and public life and a vulnerability to HIV/AIDS. Both matrilineal and patrilineal systems operate in Malawi's ethnic groups and it is reported that both systems perpetuate discrimination against women in the family with respect to control over resources.² Women in Malawi generally fare worse than their male counter-parts on most social and economic indicators including wage equality, political participation, secondary and tertiary education enrolment and literacy.³ However, Malawi has achieved gender parity with respect to primary school enrolments, which indicates an improvement in attitudes towards girls' education.⁴

1. Discriminatory family code

Marriage in Malawi can be entered into under common and customary laws; the later may be either patrilineal or matrilineal in nature. Matrilineal descent systems are the customary norm for a majority of the population, although the formal legal system is modelled on patrilineal English legislation. The central areas of the country, where much of the population lives, as well as most of the southern areas, are dominated by matrilineal norms, while the patrilineal system of marriage is practised in the northern regions, some central areas, and the Nsanje and Chikwawa districts in the south.⁵

Malawi recognizes customary marriages, for which no minimum age is set; the government reports that most marriages are contracted under the later and are not formally registered.⁶ With respect to the legal system, there is ambiguity concerning the minimum **legal age of marriage**. Under the constitution, a person of 18 years of age may enter into marriage without parental consent. Persons between 15 and 18 must obtain parental consent before entering into marriage. The constitution also provides that the state is obliged to 'discourage' marriages where either party is under the age of 15.⁷ The Constitution is, however, in conflict with the common

¹ Section 20(1) and 40(1) of the Constitution of the Republic of Malawi, adopted in 1995

² White, S. (2007) pp.5-6

³ World Economic Forum (2010) p.202

⁴ Idem

⁵ Berg et al. (2013); CEDAW (2008) p.48; Kishindo (2010), Peters (2010)

⁶ University of Pretoria. Centre for Human Rights (2009); Report of the law commission on the review of law on marriage and divorce (2006); Gender Links (2013) p.21

⁷ Idem, p.10

law Marriage Act, which provides 21 years of age as the minimum age of marriage.⁸ The Law Commission has recommended that the government increases the minimum legal age of marriage to 18 years with parental consent and 21 years without parental consent.⁹ A proposed Marriage, Divorce, and Family Relations Bill is currently under review and provides 18 years as the minimum age for marriage.¹⁰

Although the Constitution provides that any person above the age of 18 years may not be forced to enter into marriage¹¹, survey data indicates **early marriages** are relatively widespread. According to the 2010 Demographic and Health Survey, 75% of women age 20-49 were married by age 20, and 13.5% were married by age 15.¹² Using data from the same survey, the United Nations estimates that 26.2% of 15-19 year old women have ever been married, divorced or widowed.¹³ Moreover, data from 2013 reveals that 50% of women between the ages of 20 and 24 were married or in union before they were 18 years old, ranking Malawi 9th country in the world, within the 20th highest-prevalence countries.¹⁴ Several factors contribute to this relatively high prevalence of early marriage. Under custom, attainment of puberty is seen as readiness for marriage, particularly for young girls.¹⁵ Further, many poor families in rural areas choose to marry their daughters off very young to improve their financial status.¹⁶ A practice known as kupimbira practiced in the northern part of Malawi is a form of debt repayment where a young daughter may be transferred to the creditor for marriage for failure to pay the debt back.¹⁷ A key challenge for eliminating early marriage in Malawi is the persistence of attitudes that accept the practice. For example, a recent community-based study of 500 males and females by the Women and Law in Southern Africa and The National Women's Lobby Group found that 12% of respondents deemed early marriage as normal.¹⁸

In Malawi, under the constitution, husbands and wives share **parental authority** and have joint child custody rights.¹⁹ Equal parental responsibility for husbands and wives is also reinforced in the proposed Marriage, Divorce and Family Relations Bill.²⁰ In the event of **divorce**, the custody of children is determined based on the age and in the best interests of the child.²¹ Women are allowed to initiate divorce under both customary and common law and there are no restrictions on the latter.²²

In 2011, the parliament passed the Deceased Estates (Wills, Inheritance and Protection Act) Bill, which provides widows and daughters equal **inheritance** rights and addresses the issue of widows being denied their inheritance upon the death of a spouse.²³ The Act has however, been difficult to enforce, due to differing practices under both patrilineal and matrilineal systems, whereby inheritance notably passes exclusively to male

⁸ Idem, p.48

⁹ Idem, p.11

¹⁰ CEDAW (2013) p.3

¹¹ Idem, p.48

¹² DHS (2010) p.76

¹³ United Nations (2012)

¹⁴ UNICEF (2012)

¹⁵ CEDAW (2008) p.48

¹⁶ Idem

¹⁷ Idem

¹⁸ Women and Law in Southern Africa (2009) p.10

¹⁹ CEDAW (2008) p.49

²⁰ Idem; CEDAW (2013) p.3

²¹ Idem

²² Poulin, M. (2013) p.740

²³ Women's Inheritance Now (2012); CEDAW (2013) p.2

heirs under the patrilineal system. In addition, customary land accounts for approximately 75% of the country's total and high illiteracy rates among women hinders awareness of rights. The treatment of widows has, however, been noted as a particularly serious problem in Malawi. The Women and Law in Southern Africa group report that the practice of dispossession and 'property-grabbing' from widows is common.²⁴ In response, the new law sets out principles of fairness that should be applied where there is no will. If the spouse and children are left out of a will, the law makes a provision for the spouse and children to make a claim for inheritance. The law stipulates that customary laws do not apply for inheritance and also makes property grabbing a specific offence. Finally, the law provides for the Minister to engage in public awareness activities to educate the judiciary, traditional authorities and the public about the new provisions.²⁵ Notwithstanding these efforts, practices such as the appropriation of property from widows, 'sexual cleansing,' and levirate continue to remain an issue.²⁶

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Although **polygamy** is prohibited by the Malawian Penal Code for common law marriages and is similarly prohibited in the proposed Marriage, Divorce and Family Relations Bill,²⁷ customary laws allow for this type of marriage and efforts to outlaw polygamy have met with strong opposition from Islamic religious leaders. The 2010 Demographic and Health Survey (DHS) reported that 14% of married women are in polygamous unions, rising to 21% in the Northern Region²⁸

The age specific fertility rate for women aged 15-19 is 152 per 1,000 women.²⁹

When it comes to decision-making, most women (40.1%) report that it is primarily their husbands who decide how their earnings are used, although 36.6% of women responded it is mainly the wife, and 21.0% the husband and wife jointly.³⁰ Women also report that decisions concerning major household purchases are primarily made by the husband (68.9%), as are decisions regarding the purchase of daily household needs (46.1%).³¹

2. Restricted physical integrity

A new law adopted in 2012, the Gender Equity Bill, specially addresses **sexual harassment**, defining the later as "a person commits an act of sexual harassment if he or she engages in any form of unwanted verbal, non-verbal, or physical conduct of a sexual nature in circumstances in a which a reasonable person, having regard to all the circumstances, would have anticipated that the other person would be offended, humiliated or intimidated."³² The crime of sexual harassment is punishable with a fine and a prison term of five years.³³ The Bill also addresses sexual harassment in the workplace, requiring public and private workplaces of not less than 15 people to

²⁴ Women and Law in Southern Africa (2009) p.18

²⁵ Women's Inheritance Now (2012)

²⁶ US State Department (2012)

²⁷ CEDAW (2013) p.3

²⁸ DHS (2010) p.74

²⁹ DHS (2010) p.43

³⁰ Idem, p.225

³¹ Idem, p.228

³² Gender Equality Bill (2012)

³³ Idem

develop and implement appropriate policies and procedures regarding sexual harassment.³⁴ There are, however, no clear criminal sanctions for the later.³⁵

The 2006 Prevention of Domestic Violence Act criminalizes **domestic violence**, providing a maximum penalty of life imprisonment. The Act protects women in unmarried intimate relationships and includes emotional, financial, physical and sexual abuse.³⁶ One key challenge that the Prevention of Domestic Violence Act fails to address is that of marital rape. The act does not provide for marital rape as a criminal offence yet there is evidence that some women are being coerced into sex by their intimate partners. A study done by COWLHA in 2012 found that 25% of women living with HIV are coerced into unprotected sex (COWLHA, 2012). A recent national gender-based violence survey also confirms 16% of respondents have ever experience marital rape. In addition, Malawi also launched the National Response to Combat Gender-Based Violence, 2008-2013, run by the Ministry of Women and Child Development. Despite these efforts, implementation remains a challenge and much domestic violence goes unreported due to financial dependence, lack of awareness of legal rights (on both the part of women and police officers and judges), and fears of retribution or ostracism.³⁷ While police investigate cases of sexual assault, they do not normally intervene in domestic disputes and their capacity to assist and document cases is limited.³⁸ The 2010 Demographic and Health Survey (DHS) reports that 28.2% of women aged 15-49 have experience physical violence since the age of 15, and 14.2% report having experienced physical violence in the last 12 months.³⁹ 31% of women reported having experienced physical and/or sexual violence by an intimate partner in their lifetime and little over 25% of women report having experience sexual violence.⁴⁰

A 2009 community-based survey by the Women and Law in Southern Africa group found that 19% of respondents said that beating of women occurred in their communities. Further, the survey revealed a level of acceptance around violence against women, with 24% respondents reporting beating of women as normal behaviour.⁴¹ Data from the 2010 Demographic and Health Survey (DHS) suggests similar levels of acceptance of violence: 13% of women agreed that a husband is justified in beating his wife under certain circumstances.⁴²

The law in Malawi prohibits **rape** with a maximum penalty of life imprisonment or death. Marital rape is not, however, specifically prohibited, although it can be prosecuted under the same rape laws.⁴³ Courts are increasingly convicting perpetrators of rape, who routinely receive prison sentences. While data on the prevalence of rape is not available, frequent press reports of rape arrests and convictions are published.⁴⁴

³⁴ CEDAW (2010a) p.9

³⁵ World Bank (2013)

³⁶ Idem

³⁷ Demographic and Health Survey (DHS) (2010) p.239; US State Department (2012); Women and Law in Southern Africa (2009) p.13

³⁸ US State Department (2012)

³⁹ DHS (2010) p.241

⁴⁰ Idem, p.244

⁴¹ Women and Law in Southern Africa (2009) p.10

⁴² DHS (2010) p.232

⁴³ US State Department (2012)

⁴⁴ Idem

There is limited information on the prevalence of **female genital mutilation (FGM)** in Malawi.⁴⁵ In 2012, the US Department of State reported that there was no specific legislation prohibiting FGM, and only a few small ethnic groups practiced FMG/C, mostly on girls between the ages of 10 and 15.⁴⁶

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Abortion is illegal in Malawi, except to save a woman's life.⁴⁷

Having control over the timing and spacing of children is an important aspect of women's physical integrity. The 2010 Demographic Health Survey (DHS) found that 32.6% of women use a modern form of **contraception**. Further, access to family planning can be problematic.⁴⁸ In Malawi, 26% of women age 15-49 declared having an unmet need for contraception.⁴⁹ The recent Gender Equity Bill adopted in 2012 imposes an obligation on health-service employees to provide services irrespective of marital status and without requiring that both spouses are present.⁵⁰ That said, in the 2010 DHS, 43.8% of married women report that it is mainly their husbands (43.8%) who make decisions regarding their own health care.⁵¹

Women in Malawi are disproportionately affected by HIV/AIDS. A recent report by the Malawian government suggests HIV prevalence among women is 12.9%, compared to prevalence among men at 8.1%.⁵² The higher prevalence of HIV/AIDS amongst women is attributed to women's greater vulnerability to poverty and the persistence of discriminatory practices that restrict women's control over their sexual and reproductive freedom.⁵³ Women are also most likely to be the caregivers of HIV positive family members – in Malawi the number of female-headed households has increased dramatically as a result of HIV and AIDS.⁵⁴

3. Son bias

The Central Intelligence Agency (CIA) reports that the country has a male/female **sex ratio** for the working age population (15-64) of 1.0 and a sex ratio at birth of 1.02.⁵⁵

Evidence suggest the Malawi is a country of concern in relation to **missing women** die to high rates of mortality from AIDS.

More

Gender disaggregated data on early childhood vaccinations and nutrition do not indicate the preferential treatment of sons with respect to access to household nutrition.⁵⁶ Malawi has achieved gender parity in primary school enrolments, indicating that there has been a change in preferential treatment of sons with respect to

⁴⁵ Malawi Human Rights Commission (2005)

⁴⁶ US State Department (2012)

⁴⁷ Women on Waves (n.d.)

⁴⁸ DHS (2010) p.58

⁴⁹ DHS (2010) p.90

⁵⁰ CEDAW (2010a) p.10

⁵¹ DHS (2010) p.228

⁵² Malawi Government (2012)

⁵³ Idem

⁵⁴ Idem

⁵⁵ Central Intelligence Agency (2013)

⁵⁶ Government of Malawi (2010) p.8; DHS (2010)

access to primary education. There does however remain a gender gap in secondary and tertiary enrolments indicating the preferential treatment of sons for higher education.⁵⁷

4. Restricted resources and assets

Under Malawi law, men and women in Malawi have equal ownership rights to property, however under customary law, practices may vary.⁵⁸ With specific regard to **land**, women's access to the latter is often through the family head, who are usually men. In patrilineal societies, access to land is through a male.⁵⁹ In matrilineal societies, the family head is frequently the maternal uncle. In such societies, men access land through their marriages unless the woman is taken to live in the man's village. In both matrilineal and patrilineal societies, the husband is regarded as the key controller in the use of any land allocated to his family.⁶⁰ The National Land Policy of 2002 highlighted the need to increase women's access to land. However, the policy allows for the name of the head of a family to be registered as the proprietor of family land, resulting in men's names being recorded with a likely loss to women and young men.⁶¹ Despite these barriers, a 2010 report from the Government of Malawi found that there is only a very small gender gap in land ownership in Malawi.⁶² The Government has also proposed moving away from the current land tenure system and instead moving towards a system of title holding which, it is hoped, would also increase access to lands, in that the latter could be used as collateral.⁶³

While legally, women have equal rights to own and access **non-land assets**, discriminatory practices limit the latter. More specifically, section 24 of the Constitution recognizes equal ownership rights for men and women, regardless of marital status.⁶⁴ However, under customary law, such rights are closely linked to gendered roles and expectations, thus women tend to own less valuable property. For example, kitchen utensils belong to women whereas other property, such as land or cars, generally belongs to men.⁶⁵ Even under matrilineal systems, men are also frequently considered to be the main controllers of property, even if they can only formally access the later through their wives.

While there are no legal restrictions on women's access to **financial services** including credit, the government reports that women face difficulties due to the need for collateral and the high interest rates charged by microfinance institutions.⁶⁶ Bank loans often require even higher collateral, which women have more limited access to, and thus women tend to turn to credit through micro-finance institutions.⁶⁷ The Ministry of Finance has established a department charged with regulating microfinance institutions, so as to ensure that interest rates are not significantly higher than those offered in the commercial banking system, but data on the results of

⁵⁷ World Economic Forum (2010) p.202

⁵⁸ World Bank (2013)

⁵⁹ CEDAW (2008) p.71

⁶⁰ Idem

⁶¹ FAO (n.d.)

⁶² Government of Malawi (2010) p.14

⁶³ CEDAW (2010b) p.7

⁶⁴ World Bank (2013)

⁶⁵ CEDAW (2004) p.81

⁶⁶ CEDAW (2010b) p.5

⁶⁷ CEDAW (2008) p.45

these efforts is not available.⁶⁸ In 2010 the government reported a gender gap in access to credit, with only 11% of women having access to credit, compared to 14% of men.⁶⁹

5. Restricted civil liberties

Women in Malawi legally enjoy free **access to public space** and freedom of movement. Married and unmarried women may also confer their citizenship to their children in the same way as a man. However, while unmarried women may apply for a passport in the same way as a man, married women must provide their marriage certificate.⁷⁰ Women's movement may also be restricted through control measures on the part of their male relatives or husbands.⁷¹ In the 2010 Demographic and Health Survey (DHS), 10.4% of 15-49 year old ever-married women reported that their husband or partner does not permit her to meet female friends⁷² and 32% reported that it is mainly their husband who makes decisions regarding her visits to family or relatives.⁷³ Half of the women (50.9%) reported that their husband or partner insists on knowing where she is at all times.⁷⁴ While unmarried women can apply for a passport in the same way as a man, married women must show their husbands' names through production of a marriage certificate.

The Constitution and law provide for freedom of assembly and association, although the government has at times restricted these rights. The 2010 Police Act, for example, holds organizers responsible for any damages or injuries that may occur during a protest. Groups wishing to assemble or demonstrate have often been blocked, although such abuses have declined notably under the leadership of President Banda.⁷⁵ Similarly, registration for new political parties and NGOs are routinely delayed and politicized by the involvement of the Office of the President and Cabinet.⁷⁶

With respect to women's participation in civil society, in 2010 the government reported that there is a poor representation of women in civil society leadership positions. For example, women held only 274 head of community organisation positions, compared to 1603 men.⁷⁷ However, there is evidence to suggest that Malawi has a strong and active women's movement, with the government's 2008 reported to the United Nations Committee on the Convention on the Elimination of Discrimination against Women (CEDAW) referencing several initiatives led by civil society organisations.⁷⁸

The Government of Malawi has at times restricted press freedom. Most notably in July 2011, discontent over economic turmoil and an increasingly authoritarian government led to public protests. Journalists were particularly targeted for beating and radio stations were shut down.⁷⁹ In that same year, the President at the time, Mutharika, promulgated a law granting the government the power to ban publications deemed contrary to

⁶⁸ CEDAW (2010b) p.5

⁶⁹ Government of Malawi (2010) p.13

⁷⁰ World Bank (2013)

⁷¹ CEDAW (2008) p.47

⁷² DHS (2010) p.398

⁷³ Idem, p.228

⁷⁴ Idem, p.398

⁷⁵ US State Department (2012)

⁷⁶ Idem

⁷⁷ Government of Malawi (2010) p.14

⁷⁸ CEDAW (2008)

⁷⁹ Freedom House (2013)

public interest. The law was, however, repealed in mid-2012 under President Banda.⁸⁰ Specific information with regard to women's representation and participation in the media is not available.

With respect to women's participation in political life, there were 39 women in the 193-seat National Assembly and 12 women in the 36-member cabinet, including Joyce Banda, the first female president of Malawi (and previously first-ever vice-president).⁸¹ In 2012, women held 22.3% of seats in the national parliament.⁸² There are no legislated **quotas** to promote women's political participation, although several political parties have adopted voluntary quotas ranging from 25 to 33% of seats, which the parties aim to be filled by women, either at the parliamentary level or at all levels of the party structure.⁸³ Attitudes towards women as leaders may play a role the level of women's political voice in Malawi. A recent study suggests that Malawians associate politics with "male" traits of strength, deceit, and fighting.⁸⁴ Women's own attitudes also play a role in that female politicians have reported that women themselves are incapable of evaluating political issues. The study reports that single female politicians are particularly regarded with suspicion and that generally, female politicians face discrimination in campaigning.⁸⁵

More

The constitution provides for basic **workers' rights**, prohibits discrimination and enshrines the principle of fair wages and equal remuneration for work of equal value without distinction or discrimination of any kind, in particular, on the basis of gender.⁸⁶ Despite these protections the government reports that discrimination in the workplace on the grounds of pregnancy is common, as well as sexual harassment towards women.⁸⁷ The Employment Act of 1999 provides pregnant workers with **maternity leave** of 8 weeks paid at 100% of wages. Maternity leave can only be accessed once every three years⁸⁸ and is entirely paid by the employer.⁸⁹

⁸⁰ Idem

⁸¹ US State Department (2012)

⁸² UNdata (2013)

⁸³ QuotaProject (2013)

⁸⁴ Kamlongera, A.P. (2008)

⁸⁵ Idem

⁸⁶ CEDAW (2008) p.39

⁸⁷ Idem

⁸⁸ International Labor Organization (2010)

⁸⁹ World Bank (2013)

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