

SOUTHERN AFRICA LITIGATION CENTRE

Update Submission to the Committee on the Elimination of all Forms of Discrimination against Women Regarding the Government of Malawi's 7th Periodic Report

Submitted by the Southern Africa Litigation Centre (SALC)
<http://www.southernafricalitigationcentre.org/>

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Introduction

In February 2015, the Southern Africa Litigation Centre (SALC) submitted a report in advance of the preparation of the list of issues for the Republic of Malawi's 7th periodic report to the Committee for the Elimination of all Forms of Discrimination against Women (the Committee). The submission contained SALC's concerns regarding compulsory HIV testing of women; women's property rights, particularly at dissolution of marriage; the impact on the health of women of the discriminatory application of laws relating to property rights; harsh abortion laws which contribute to the rate of maternal mortality in the country; and possible intersectional discrimination against lesbian women and those perceived to be lesbian women. There have since been a number of developments in relation to our concerns, particularly those regarding compulsory HIV testing and women's property rights. In view of these developments, SALC hereby submits an update to the report submitted in advance of the list of issues. The organisation further includes an additional concern in relation to child marriages and reiterates its concerns related to unsafe abortions and criminalisation of same sex acts between women, taking into account the replies to the list of issues by the government of Malawi.

SALC is a non-governmental organisation based in Johannesburg, South Africa. It aims to provide support—both technical and financial—to human rights and public interest initiatives undertaken by domestic lawyers and local civil society organisations in southern Africa. SALC works in Angola, Botswana, Democratic Republic of Congo, Lesotho, Malawi, Mozambique, Namibia, Swaziland, Zambia and Zimbabwe. Its model is to work in conjunction with domestic lawyers and civil society organisations in each jurisdiction who are litigating public interest cases involving human rights or the rule of law. SALC has been working on addressing concerns related to the rights of women in southern Africa since 2005.

Compulsory HIV testing of women

On 20 May 2015, the Malawi High Court ruled that the police and medical personnel violated the rights of 11 Mwanza women by subjecting them to mandatory HIV testing. The court went further to declare the mandatory testing of HIV/AIDS as illegal and unconstitutional as it amounted to a violation of the applicants' constitutional rights, including their right to privacy; their right to non-discrimination; their right to freedom from cruel, inhuman and degrading treatment; and their right to dignity. The judgement provides an important precedent in protecting the rights of vulnerable groups who are often subjected to such practices.

In our submission to the list of issues, SALC raised the concern that the HIV and AIDS Prevention and Management Bill provided for compulsory HIV testing of sex workers. In response to the list

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of issues, the government of Malawi stated that it was aware that such practices had been declared unconstitutional by the court. Although it was not expressly stated, the assumption is that this provision will no longer form part of the law.

Women's property rights at dissolution of marriage

On 10 April 2015, the Marriage, Divorce and Family Relations Act (Marriage Act)¹ was signed by the president and published in the government gazette on 17 April. SALC has not had access to the final law, but the bill which was made public in February 2015 contained favourable provisions in respect of division of property at dissolution of marriage. It removed the controversy concerning Section 17 of the Marriage Women Property Act, 1882 (UK)² and any other law requiring women to prove monetary or substantial contribution towards the acquisition of the property in order for them to have a share upon the dissolution of a marriage. It further removed the discretion granted to the Court by Section 17 of the Marriage Women Property Act and makes it mandatory for the Court to “equitably divide and re-allocate property upon the dissolution of a marriage taking into account”, inter alia, “the direct and indirect contribution made by either spouse, including through the performance of domestic duties”.³ If the provisions of the final law are similar and are applied in practice, this will go a long way towards improving the situation of women in the country with respect to property rights at dissolution of marriage.

Child marriages

In its replies to the list of issues, the state referred to initiatives to reduce child marriages. In addition, the new Marriage Act has been presented in the media, including by government, as banning child marriages. Under the heading “essential elements of a marriage”, Section 14 of the Act says “Subject to section 22 of the Constitution, two persons of opposite sex who are both not below the age of eighteen years, and are of sound mind, may enter into marriage with each other.” However, Section 22(7) of the Constitution says “For persons between the age of fifteen and eighteen years a marriage shall only be entered into with the consent of their parents or guardians”. And section 22(8) of the Constitution says “The State shall actively discourage marriage between persons where either of them is under the age of fifteen years.” In effect this means that, until there has been a constitutional amendment, child marriage between the age of 15 and 18 is still legal.

The Committee has recommended that, “The minimum age for marriage should be 18 years for both man and woman.”⁴ Furthermore, in its concluding observations to Malawi in 2006, the

¹ Marriage, Divorce and Family Relations Act 4 of 2015

² This law was applied by some courts in Malawi prior to the passing of the new Marriage Act and appeared to provide some discretion to the courts in determining fair distribution of property upon dissolution of marriage. The section provides, “In any question between husband and wife as to the title to or possession of property, either party, . . . , may apply by summons or otherwise (in a summary way) to the High Court or such county court as may be prescribed and the court may, on such an application (which may be heard in private), make such order with respect to the property as it thinks fit.”

³ Section 74 of the Marriage, Divorce and Family Relations Bill accessed in February 2015

⁴ Committee on the Elimination of Discrimination against Women, General Recommendation 21, Equality in marriage and family relations (Thirteenth session, 1992), U.N. Doc. A/49/38 at 1 (1994), paragraph 36

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Committee expressed concern about, “the contradictions between the Marriage Act [at the time], which establishes 21 as the minimum age for marriage, and the Constitution, which allows child marriages.”⁵ In addition, in its concluding observation to the countries’ 6th periodic report, the Committee called on Malawi to, “to set the minimum age of marriage at 18 years”.⁶

Unsafe abortions

In terms of Malawi’s Penal Code, abortions are only permitted to save the life of a pregnant woman. Any person who performs an abortion outside these circumstances faces up to 14 years imprisonment and those who knowingly supply or procure anything to be used in an abortion can be sentenced to three years imprisonment. A woman who has had an abortion can also be sentenced and faces up to seven years imprisonment.⁷ In addition, a person involved in a successful abortion, including the woman herself, can be charged with the killing of an unborn child in terms of section 231 of the Malawi penal code and could be liable to imprisonment for life.⁸ Malawi’s abortion laws are the strictest in the region.

The Committee has on a number of occasions expressed concern regarding unsafe abortions in Malawi and their contribution to maternal mortality in the country.⁹ In its concluding observations to Malawi’s 6th periodic report, the Committee recommended that Malawi, “review the laws relating to abortion with a view to removing the punitive provisions imposed on women who undergo an abortion, providing them with access to quality services for the management of complications arising from unsafe abortion and reducing maternal mortality rates...”¹⁰ Although Malawi has recognised the need for this, including in its 6th and 7th periodic reports to the Committee, progress in this area has been slow.

In its replies to the list of issues to the current periodic report, the government stated that the law on abortion was being reviewed through a special commission of the Malawi Law Commission and that the commission was expected to hand over the report and bill to Ministry of Justice in 2015.¹¹ In August 2015 there were reports that the Law Commission report had been handed to the Ministry but there were no indication of when it would be discussed in parliament.¹² In the interim,

⁵ Concluding comments of the Committee on the Elimination of Discrimination against Women: Malawi, Thirty-fifth session, 15 May-2 June 2006, paragraph 13

⁶ Concluding observations of the Committee on the Elimination of Discrimination against Women, Malawi, Forty-fifth session, 18 January-5 February 2010, CEDAW/C/MWI/CO/6, paragraph 43

⁷ Section 149 – 151 of the Penal Code of 1930.

⁸ section 231 states, “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.”

⁹ Including in CEDAW/C/MWI/CO/5, paragraph 31 and CEDAW/C/MWI/CO/6, paragraph 37

¹⁰ Concluding observations of the Committee on the Elimination of Discrimination against Women, Malawi, Forty-fifth session, 18 January-5 February 2010, CEDAW/C/MWI/CO/6, paragraph 37 *Ibid*

¹¹ Paragraph 55

¹² <http://www.nyasatimes.com/2015/08/29/parties-endorse-abortion-law-reforms-in-malawi/>

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women in the country continue to be subjected to unsafe abortions due to a lack of an alternative, legal option.

Criminalisation of same sex acts between women

Despite the inclusion of this concern in the list of issues by the Committee, the Malawi government did not refer to the criminalization of same sex acts between women in its replies.

In 2011, President Bingu Wa Mutharika approved an amendment to the Penal Code which provides a punishment of up to five years imprisonment for same sex acts between women. SALC is concerned that, as a result of this criminalisation, women seen to be engaging in same sex acts will be subjected to intersectional discrimination. SALC is particularly concerned that this amendment will limit access to services, including health care services, for lesbian women and/or those perceived to be lesbian. Due to the discrimination women already experience, the additional discrimination based on sexual orientation is likely to affect them to a greater degree than men in a similar position. The Committee has called on states to, “legally recognise and prohibit such intersecting forms of discrimination and their compounded negative impact on the women concerned... also ... to adopt and pursue policies and programmes designed to eliminate such occurrences...”¹³ The passing of this amendment therefore, not only constitutes discrimination based on sexual orientation, but also a retrogressive step in the realisation of Malawi’s obligations to eliminate all forms of discrimination against women.

Conclusion and Recommendations

As stated in our submission on the list of issues, Malawi has shown its willingness to engage with the Committee and has submitted a number of reports in terms of the Convention. While the country has no doubt made progress, including since the submission of SALC’s report on the list of issues, areas of concern relating to discrimination against women in law and practice remain. SALC therefore calls on the government of Malawi to:

Compulsory HIV testing

- ensure that all police, medical officials, courts and other institutions are made aware of the decision of the High court that the compulsory HIV testing of any group is illegal and a violation of human rights;
- amend, if it has not already done so, the HIV and AIDS Prevention and Management Bill so as to ensure that the compulsory HIV testing of any group is not passed into law;
- put into place measures, including trainings, to ensure medical practitioners are aware of and adhere to ethical dimensions in HIV testing, including informed consent and confidentiality, as well as counseling options, regardless of the perceived profession or other status of those being tested;

¹³ Committee on the Elimination of Discrimination Against Women, General Recommendation No. 28 on the core obligations of States parties under article 2, paragraph 18

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- provide redress, including compensation and psychological counseling, to the 11 women who were found to have been subjected to compulsory HIV testing by police and investigate and provide redress in other similar cases;

Women's property rights at dissolution of marriage

- continue to carry out awareness raising campaigns regarding the provisions of the new Marriage, Divorce and Family Relations Act, particularly those related to division of property at dissolution of marriage, with a view to ensuring its provisions are well known and implemented in courts at all levels, as well as in alternative dispute resolution mechanisms;

Child marriages

- take steps to amend the Constitution so as to set the minimum age of marriage as 18 years, in accordance with the Committee's General Recommendation 21 and previous concluding observations by the Committee to Malawi;

Abortion law

- ensure genuine consultation and participation of civil society in the review of the abortion bill and ensure it is passed into law without unnecessary delay; and

Criminalisation of same sex acts between women

- put in place measures, including human rights training of public service actors, to ensure that women engaging in, or perceived to be engaging, in same sex acts are not subjected to intersectional discrimination in accessing public services, including health care services.

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