

# THE IMPACT OF THE MAPUTO PROTOCOL IN MALAWI



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## 1 Introduction

The Republic of Malawi is a landlocked country bordered by Zambia, Tanzania, and Mozambique. In 2020, the estimated population of Malawi was 19.3 million,<sup>1</sup> about 52 per cent being women.<sup>2</sup> Malawi is an agriculture-based economy where about 90 per cent of the land is held under customary systems.<sup>3</sup> In 2019, Malawi was ranked 142 out of 193 on the UNDP's Gender Inequality Index,<sup>4</sup> reflecting inequality in achievement between women and men in reproductive health, empowerment, and the labour market.

Malawi ratified the African Charter on Human and Peoples' Rights (African Charter) on 17 November 1989 and the Maputo Protocol on 20 May 2005. Between 1989 and 2005, Malawi adopted the 1994 Constitution, which included a fully justiciable Bill of Rights. The 1994 Constitution was the basis upon which the Maputo Protocol was ratified. In addition, it contained provisions on the ratification and domestication of international instruments.<sup>5</sup> The Bill of Rights<sup>6</sup> enshrines, among others, the protection of human rights and freedoms, the right to life, liberty, human dignity and personal freedoms. Section 20 of the Constitution provides for the right to equality and non-discrimination. It proscribes discrimination of any person on several grounds, including sex.

Additionally, section 24 of the Constitution provides for women's right to full and equal protection of the law, including passing laws to eliminate customs and practices that discriminate

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1 World Population Review (2020) <https://worldpopulationreview.com/countries/malawi-population> (accessed 7 November 2020).

2 NSO 2008 Census Gender Report.

3 EW Chirwa 'Land Tenure, Farm Investments and Food Production in Malawi' (2008) 18 *Research Programme Consortium on Improving Institutions for pro-poor growth* <https://assets.publishing.service.gov.uk/media/57a08bb2e5274a31e000cf4/IPPGDP18.pdf> (accessed 29 March 2021).

4 UNDP Human Development Report 'The next frontier: Human development and the Anthropocene' (2020).

5 S Chisala-Tempelhoff & SS Bakare 'The impact of the African Charter and the Maputo Protocol in Malawi' in VO Ayeni (ed) *The impact of the African Charter and the Maputo Protocol in selected African states* (2016) at 151.

6 The Constitution of Malawi 2004 chap 4.

against women.<sup>7</sup> The Constitution further contains principles of national policy, the first of which is gender equality.<sup>8</sup> Through this principle, the state is mandated to achieve gender equality by ensuring the full participation of women in all spheres of Malawian society based on equal opportunities with men; the implementation of the principles of non-discrimination; and the implementation of policies to address social issues such as domestic violence, security of the person, lack of maternity benefits, economic exploitation and rights to property.

In keeping with the spirit and prescriptions of the Maputo Protocol, Malawi has made various amendments and adopted a myriad of legislation to give effect to the provisions of the Maputo Protocol. One of the most notable changes made to the Constitution was raising a child's age from 15 to 18.<sup>9</sup> The African Committee of Experts on the Rights and Welfare of the Child made a landmark decision on the child's age in Malawi. This decision spurred, in earnest, the continuity of the efforts to raise the age of the child in Malawi. On 14 February 2017, the Constitutional Amendment Act No 36 was passed by Malawi's National Assembly, amending the Constitution to state that 18 years should be the minimum age of marriage. This change was prompted by a challenge filed by the Institute for Human Rights Defenders and Development in Africa (IHRDA) on behalf of Malawian children aged between 16 and 18 years against the Malawian Government challenging the definition of a child under section 23(5) of the Malawian Constitution.<sup>10</sup> Following

this amicable settlement, there were concerted lobbying efforts for the amendment by civil society organisations, traditional and religious leaders, UN agencies, and government Ministries and regional human rights mechanisms in a bid to strengthen legal protections against child marriage.

Further, the legal framework had been changing over time through court pronouncements such as the 2015 *Kashuga* case<sup>11</sup> where the High Court declared that for purposes of criminal justice, a child is anyone aged below 18 years old and declared section 2 of the Child Care, Justice and Protection Act invalid because it afforded special protection only to children under 16 years of age. As well as through statutes such as the Marriage, Divorce and Family Relations Act (2015) that sets the minimum age for marriage at 18 years old. The Constitution is therefore evolving and meeting new challenges as they arise.

Since the last report in 2016,<sup>12</sup> the Malawian Courts have been instrumental in upholding various rights and declaring some state acts as unconstitutional. For example, the Supreme Court of Malawi upheld rights to freedom of association and assembly when faced with a challenge to nationwide protests that called for the resignation of the Chairperson of the electoral commission.<sup>13</sup> On the other hand, 2020 mainly

7 The Constitution of Malawi (n 6) sec 24.

8 The Constitution of Malawi (n 6) sec 13(a).

9 Constitutional Amendment Act Number 36 (2017).

10 *IHRDA on behalf of children of Malawi v The Republic of Malawi* Communication 4/Com/001/2014 ACERWC.

11 *The State v the Second Grade Magistrates Court (Thyolo) and Malawi Prisons Service ex Parte Stanford Kashuga* (4 February 2015) Miscellaneous Civil Cause Number 129 of 2012.

12 Chisala-Tempelhoff & Bakare (n 5) 149.

13 *The Attorney General v Gift Trapence, Timothy Miambo, and Malawi Human Rights Defenders Coalition* (6 August 2019) Civil Cause Number 556 of 2019.

saw numerous constitutional challenges against the presidential election results of May 2019,<sup>14</sup> against a decision to ban phone-in radio programmes by the Malawi Communications Regulatory Authority,<sup>15</sup> the denouncement of rape, and extortion by members of the Malawi Police Service,<sup>16</sup> the unconstitutionality of a nationwide lockdown by the state,<sup>17</sup> and against a threat to judicial independence when the President attempted to oust the Chief Justice and de-facto Deputy Chief Justice.<sup>18</sup>

Women in Malawi have limited control and access to productive resources, limited power and access to opportunities for participation in the country's development, women are concentrated in the informal sector. There is little or no participation of women in government programmes, high incidences of violence against

women, and the feminisation of poverty and high rates of human immunodeficiency virus/acquired immunodeficiency syndrome (HIV/AIDS).<sup>19</sup> While steps are being taken toward amendment and enactment of laws that will be in line with one of the main aims of the Maputo Protocol 'to take concrete steps to provide further attention to the human rights of women to eliminate all forms of discrimination and of gender-based violence (GBV) against women,'<sup>20</sup> the prevalence of violence against women and girls remains high. Civil society has been very active in mobilising protests against the rampant physical and sexual violence against women and girls and has been involved in implementing programmes on prevention and service delivery concerning violence against women and girls. Thus, civil society remains a critical voice in the realisation of women's rights.

The inherent dignity and worth of each human being need to be recognised. The state is implored to recognise and protect human rights and afford the fullest protection to the rights and views of all individuals, groups and minorities whether or not they are entitled to vote.<sup>21</sup> The Constitution also provides that the only justifiable limitations to the rights enshrined in the Constitution are those that are necessary to ensure peaceful human interaction in an open and democratic society; the limitations must be prescribed by law, reasonable, and ought not to negate the rights in question.<sup>22</sup>

- 14 *Prof Arthur Peter Mutharika and Electoral Commission v Dr Saulos Klaus Chilima and Dr Lazarus M Chakwera* MSCA Constitutional Appeal Number 1 of 2020.
- 15 *The State v Malawi Communications Regulatory Authority* (on the application of The Registered Trustees of National Media Institute of Southern Africa and 3 others) – Constitutional Case Number 3 of 2019.
- 16 *The State v The Inspector General of Police, the Clerk of the National Assembly and the Minister of Finance ex-parte MM and 18 others* – Judicial Review Cause Number 7 of 2020 (High Court of Malawi, Lilongwe District Registry) before the Honourable Justice Kenyatta Nyirenda.
- 17 *The State (on application of Esther Cecilia Kathumba, Monica Chang'anamuno, Church and Society Programme the Livingstonia Synod of the Church of Central Africa Presbyterian & Prophet David F Mbewe) v President of Malawi, Ministry of the Malawi Government Responsible for Health, Inspector General of the Malawi Police Service, Commander of the Malawi Defence Force, Attorney General & Malawi Council of Churches* – High Court of Malawi, Constitutional Reference Number 1 of 2020.
- 18 *The State (on behalf of Human Rights Defenders Coalition, Association of Magistrates in Malawi, and Malawi Law Society) v The President of the Republic of Malawi and the Secretary to Government / Chief Secretary to the Government and the Women Lawyers Association as Amicus Curiae* Judicial Review Case Number 33 of 2020.

19 Malawi Country Report (2016) Progress Report on the Implementation of the United Nations Security Council Resolutions on Women, Peace and Security in East and Southern Africa.

20 Preamble of Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa

21 The Constitution of Malawi (n 6) sec 12(d).

## 2 Ratification of the Maputo Protocol

The Maputo Protocol was ratified on 20 May 2005 with no reservations entered by Malawi. The role of ratification is placed on the President, who may delegate such powers to ministers, ambassadors and high commissioners. This power encompasses the process of negotiating, signing, entering and acceding international agreements.<sup>23</sup> In practice, the Ministry of Foreign Affairs and International Relations is tasked with the practical aspects of ratification. Upon recommendations from relevant stakeholders or international actors, the Ministry of Foreign Affairs assesses Malawi's ability to commit to the obligations under the treaty and whether there is a need to make declarations or reservations. After that, the Treaties and Legal Affairs Department drafts an instrument of ratification/accession, which is then forwarded to the Ministry of Justice and Constitutional Affairs. If approved, the draft instrument is transmitted to the President for their consideration and signature. Once the President's signature is appended, the Ministry of Foreign Affairs sends the signed instrument for depositing at the relevant depository.

The government of Malawi ratified the Maputo Protocol, an instrument dedicated to women's rights, which considered the African perspective. Malawi had already ratified the Convention on the Elimination of Discrimination Against Women (CEDAW), whose principles are also espoused in the Maputo Protocol.<sup>24</sup> However, Malawi needed to subscribe to a justiciable regional charter with

implementation mechanisms in proximity.

## 3 Government focal point

Implementation of the Maputo Protocol is through a multi-stakeholder process and roles. The Ministry of Gender plays a leading role in monitoring the implementation of provisions of the Maputo Protocol. The Human Rights Section of the Ministry of Justice and Constitutional Affairs compiles the state party report on Malawi's implementation of the Maputo Protocol. The Human Rights Commission is the enforcement agency of the Gender Equality Act. The Law Commission is responsible for the review of all laws, including gender insensitive laws.<sup>25</sup>

The focal members of the implementation of state responsibilities under the Maputo Protocol are relatively informed about the contents and usefulness of the Maputo Protocol. The Ministry of Justice and Constitutional Affairs considers the channel of communication with the African Commission to be satisfactory. However, it was noted that the state's responsibilities in relation to the Protocol could be improved by promoting the institutionalisation of the responsibilities.

22 The Constitution of Malawi (n 6) sec 44.

23 The Constitution of Malawi (n 6) sec 89(f).

24 Republic of Malawi *Periodic Report to the African Commission on Human and Peoples' Rights: Implementation of the African Charter on Human and Peoples' Rights 1995-2013 and the Protocol to the African Charter on Human and Peoples' Rights 2005-2013*.

25 Republic of Malawi *Periodic Report to the African Commission on Human and Peoples' Rights: Implementation of the African Charter on Human and Peoples' Rights 1995-2013 and the Protocol to the African Charter on Human and Peoples' Rights 2005-2013*.

#### 4 Domestication

The Maputo Protocol is a persuasive source of law in Malawi. International law is both a direct and indirect source of law.<sup>26</sup> After gaining political independence in 1964, Malawi adopted a new constitution that recognised statutory law, common law, and customary law as constituting the laws in force, subject to their conformity with the Constitution.<sup>27</sup> Although there is no consolidated Act of Parliament domesticating or incorporating the Maputo Protocol, some acts of parliament have domesticated aspects of the Maputo Protocol. For example, the Constitutional Amendment raises the minimum age of marriage to 18 years. Similarly, the Marriage Divorce and Family Relations Act emphasises the rights and equality of spouses by increasing the scope of what is recognised as a valid marriage to include marriages by repute and permanent cohabitation.<sup>28</sup> The Act also recognises direct and indirect contributions made by either spouse towards the acquisition of matrimonial property and insists on equitable distribution of that property at the dissolution of a marriage.<sup>29</sup>

International agreements entered into after the commencement of the Constitution form part of the law as long as they are approved by an Act of Parliament.<sup>30</sup> The approval by an Act of Parliament may be done in two ways: 1) through the enactment of a law that transforms the international agreement into domestic law, or 2) through the incorporation of provisions/clauses

from the international agreements into pieces of legislation.<sup>31</sup> Malawi has mainly done the latter through legislative reforms such as the Trafficking in Persons Act 2015, the Marriage Divorce and Family Relations Act 2015, Access to Information Act 2016, the HIV and AIDS (Prevention and Management) Act, and the Constitutional Amendment Act of 2017 which raised the age of a child from 15 to 18.

The Courts have recourse to international instruments in the determination of cases.<sup>32</sup> Malawi is a common law country, and determinations by the Courts form part of the law.<sup>33</sup> By extension, once international instruments are referred to by the High Court and the Supreme Court, their interpretations become binding upon the lower courts.

Malawi's Bill of Rights already guarantees the rights in the Maputo Protocol. However, there have been some changes to the Bill of Rights since the ratification of the Maputo Protocol. Most notable is the raising of the age of marriage from 15 to 18 years.<sup>34</sup> Provisions of the Maputo Protocol have also been incorporated into various law, such as the Gender Equality Act,<sup>35</sup> to eliminate harmful cultural practices<sup>36</sup> and uphold the rights to equality and non-discrimination enshrined in the Maputo Protocol.<sup>37</sup> The Prevention of

26 Chisala-Tempelhoff & Bakare (n 5) 149.

27 The Constitution of Malawi (n 6) sec 200.

28 Marriage, Divorce and Family Relations Act 4 of 2015 sec 12.

29 Marriage, Divorce and Family Relations (n 28) sec 74.

30 The Constitution of Malawi (n 6) sec 211.

31 Republic of Malawi, *Periodic Report on The African Charter on Human and Peoples' Rights and the Maputo Protocol, May 2015 to March 2019* (2019).

32 *Periodic Report to the African Commission on Human and Peoples' Rights: Implementation of the African Charter on Human and Peoples' Rights 1995-2013* (n 24).

33 The Constitution of Malawi (n 6) sec 200.

34 Constitutional Amendment Act 36 (2017).

35 Gender Equality Act 3 of 2013.

36 Maputo Protocol art 5.

37 Maputo Protocol art 2.

Domestic Violence Act<sup>38</sup> and the Marriage, Divorce and Family Relations Act<sup>39</sup> give effect to articles of the Maputo Protocol in protecting and promoting equal rights and partnerships in marriage. The HIV/AIDS (Prevention and Management) Act,<sup>40</sup> the Deceased Estates (Wills, Inheritance and Protection) Act,<sup>41</sup> and the Trafficking in Persons Act are also relevant.<sup>42</sup>

## 5 Legislative reform or adoption

Although Malawi did not conduct a compatibility study before the ratification of the Maputo Protocol, it was considered an important document to ratify in line with Malawi's Constitution and Bill of Rights and CEDAW, which it had already ratified in September 1987.

As stated above, since the last study was conducted, Malawi has adopted

numerous pieces of legislation to incorporate various provisions of the Maputo Protocol. The concluding observations from the African Commission on Malawi's Initial and Combined Reports of 2013 encouraged Malawi to: enact a legislative framework for affirmative action for women, review laws and policies on abortion, amend the Prevention of Domestic Violence Act to include marital rape as a punishable offence, to raise the minimum age of marriage to 18 years, pass the Access to Information Act, decriminalise defamation and other laws limiting the right to freedom of expression, adopt a law protecting human rights defenders, pass the education Bill, review the definition of non-discrimination in the Disability Act to include reasonable accommodation.<sup>43</sup>

The most significant reform was the constitutional amendment in 2017 which changed a child's age to 18 years (section 23(6)). The Amendment also raised the age of marriage to 18 years (section 22(6) of the Constitution). This was in line with the recommendations made by the African Commission to adopt measures to effectively end early/child marriage and harmonise domestic laws and international standards on the minimum age of marriage.<sup>44</sup>

In terms of legislative measures, the Prevention of Domestic Violence Act (PDVA),<sup>45</sup> the Marriage Divorce and Family Relations Act (MDFRA),<sup>46</sup> the Gender Equality Act (GEA)<sup>47</sup> and the

38 Prevention of Domestic Violence Act 5 of 2006.

39 Marriage Divorce and Family Relations Act 4 of 2015 – the Long Title of the Act describes it as 'An Act to make provision for marriage, divorce, and family relations between unmarried couples, their welfare and maintenance, and that of their children; and connected matters.'

40 HIV and AIDS (Prevention and Management) Act 9 of 2018.

41 Deceased Estate, Wills, Inheritance and Protection Act 14 of 2011 – Long title of the Act describes It as 'An Act to provide for the making of wills and the devolution of property under a will; the inheritance to the estates of persons dying without valid wills; the protection of deceased estates; the administration of deceased estates; the prosecution of offences relating to deceased estates; the civic education of the public; the functions of courts in relation to deceased estates and for other connected matters.'

42 Trafficking in Persons Act 3 of 2015 – Long title of the Act describes it as 'An Act to make provision for the prevention and elimination of trafficking in persons; to provide for the establishment of the National Coordination Committee against Trafficking in Persons for the coordination and management of matters related to trafficking in person; and to provide for matters incidental thereto and connected herewith.'

43 African Union *Concluding Observations and Recommendations on the Initial and Combined Periodic Report of the Republic of Malawi on the Implementation of the African Charter on Human and Peoples Rights* (2015) 14-16.

44 *Concluding Observations and Recommendations* (n 42) 15.

45 Prevention of Domestic Violence (n 38).

46 Marriage, Divorce and Family Relations (n 28).

47 Gender Equality (n 35).

HIV and AIDS (Prevention and Management) Act (HIV Act)<sup>48</sup> contain provisions that criminalise different forms of violence and harmful practices against women including domestic violence,<sup>49</sup> marital rape during court-sanctioned judicial separation,<sup>50</sup> sexual harassment<sup>51</sup> and harmful cultural practices,<sup>52</sup> and forced HIV testing.<sup>53</sup> Despite these developments, there are still gaps with respect to compliance with the recommendations from the African Commission; for example, the laws have not been amended to criminalise marital rape and decriminalise safe abortions.

The PDVA makes provision for the prevention of domestic violence and the protection of persons affected by domestic violence through the issuance of protection orders, occupation orders and tenancy orders. The Malawi Law Commission has completed the review of the PDVA. A Bill was submitted to the Ministry of Justice and Constitutional Affairs.<sup>54</sup> The Criminal Procedure and Evidence Code (CP&EC) was amended in 2010 to provide stronger protections for children during trial, especially where they are victims of sexual abuse.<sup>55</sup> The CP&EC allows proceedings to be held in camera, does not require a victim to face her abuser

and encourages a victim-friendly approach during criminal proceedings.<sup>56</sup>

The Penal Code was amended in 2010, and it raised the age of defilement (sexual assault of a female child) from 13 years to 16 years of age.<sup>57</sup> Further, the Penal Code provides a blanket offence and punishment for all perpetrators of defilement without considering same-age consensual sex.<sup>58</sup> While the Penal Code aims to prevent sexual assault on young girls, the perpetrators also include young boys who are minors and have sex with their peers. Sexuality is broad and diverse, and the punishment for an abusive adult ought not to be like that of an experimenting teenager in a consensual relationship. This argument always elicits a heated debate on whether defilement changes its gravity when the perpetrator is the same age as the victim/survivor and when the sex is consensual. This is based on the overarching principle that minors, despite engaging in sexual acts with peers, cannot consent to sexual activity. On a related note, the High Court, on 14 July 2021, heard the case of an adolescent child of 15 years old who was arrested and charged with the offence of defilement due to having a consensual sexual relationship with another child. The applicant filed an application for crimi-

48 HIV and AIDS (n 40).

49 Prevention of Domestic Violence Act 5 of 2006 sec 2 defines domestic violence as 'any criminal offence arising out of physical, sexual, emotional or psychological, social, economic or financial abuse committed by a person against another person within a domestic relationship'.

50 Marriage, Divorce and Family Relations (n 27) sec 62.

51 Gender Equality (n 35) sec 6.

52 Gender Equality (n 35) sec 5.

53 HIV and AIDS (n 40) sec 14.

54 Republic of Malawi, *Periodic Report on The African Charter on Human and Peoples' Rights and the Maputo Protocol, May 2015 to March 2019* (2019) 84.

55 Criminal Procedure and Evidence Code Cap 8:01 of the Laws of Malawi sec 81A.

56 Criminal Procedure and Evidence Code Cap 8:01 of the Laws of Malawi sec 81A – 'Where a victim of a sexual offence is to give evidence in any proceedings under this Code, the court may, of its own motion, upon application made by a party to the proceedings, or a victim of a sexual offence, make one or more of the following orders – (b) that a screen, partition or one-way glass be placed to obscure the witness's view of a party to whom the evidence relates, but not so as to obstruct the view of the witness by the magistrate or the judge and jury'.

57 Penal Code Chapter 7:01 of the Laws of Malawi sec 138.

58 As above – 'Any person who carnally knows any girl under the age of sixteen years shall be guilty of a felony and shall be liable to imprisonment for life.'

nal review. He argues that the defilement provision in the Penal Code is overly broad and criminalises both abusive acts against children and non-exploitive consensual sexual conduct between adolescents.<sup>59</sup>

Human trafficking disproportionately affects women and girls, who make up to 70 per cent of trafficking cases and 90 per cent of victims trafficked into the sex industry worldwide.<sup>60</sup> The African Commission implored Malawi to expedite the enactment of what was then the Trafficking in Persons Bill.<sup>61</sup> Malawi enacted the Trafficking in Persons Act<sup>62</sup> that provides for the prevention and elimination of trafficking in persons. Trafficking in children attracts a sentence of 21 years imprisonment.<sup>63</sup> This sentence contradicts the Childcare, Justice and Protection Act's<sup>64</sup> provision on child trafficking that attracts a maximum sentence of life imprisonment.

Similarly, offences related to harmful practices are contained in three pieces of legislation, namely the Child Care Justice and Protection Act (CCJPA), the Gender Equality Act (GEA) and the HIV and AIDS (Prevention and Management) Act (HIV Act). The CCJPA proscribes any person from subjecting a child 'to a social or customary practice that is harmful to the health or general development of the child'.

Contravention of this provision attracts imprisonment for ten (10) years.<sup>65</sup> The GEA then prohibits the commission, engagement in, the subjection of another and encouragement of the commission of a harmful practice and makes it punishable by K1,000,000.00 and five years' imprisonment. The HIV Act criminalises practising a harmful practice and the permission or encouragement of another person to practice a harmful practice. These offences attract five years imprisonment and a fine of K5,000,000.00.<sup>66</sup> Each statute provides different definitions of what harmful practices are, depending on their context, and provides different sentences for that context. This can either be construed as a strong stance against harmful practices, however defined, but might also bring about confusion. For example, a female child is subjected to a harmful practice as defined by the GEA but is also exposed to HIV in terms of the HIV Act. Such a scenario would give discretion to the prosecutor as to which charge should be brought against an accused person.

Malawi is a nation that is heavily dependent on agriculture, which makes land a very precious resource.<sup>67</sup> Most of this land is held under customary and lineage-based systems of inheritance. In 2016, the Land Act<sup>68</sup> was amended. The Land Act abolishes land formerly known as customary land. The land now consists of two categories 1) public land, which comprises government land and unallocated customary land; and 2)

59 *Alex Jimu v the State* Criminal review Case 5 of 2021.

60 American College of Obstetricians and Gynaecologists, *Human Trafficking* (2019) <https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2019/09/human-trafficking> (accessed 15 July 2021).

61 African Union, *Concluding Observations and Recommendations on the Initial and Combined Periodic Report of the Republic of Malawi on the Implementation of the African Charter on Human and Peoples Rights* (2015) 16.

62 Trafficking in Persons (n 42).

63 Trafficking in Persons (n 42) sec 15.

64 Child Care, Justice and Protection Act 22 of 2010.

65 Child Care, Justice and Protection (n 64) sec 83.

66 HIV and AIDS (n 40) secs 4 and 5.

67 EW Chirwa 'Land Tenure, Farm Investments and Food Production in Malawi' (2008) <https://assets.publishing.service.gov.uk/media/57a08bb2e5274a31e0000cf4/IPPGDP18.pdf> (accessed 29 March 2021).

68 Land Act 2 of 2016.

private land, which comprises leasehold land and customary estates. In the same year, Malawi also enacted a Customary Land Act<sup>69</sup> that further entrenches the equalisation of inheritance of customary land between the sexes despite lineage base.<sup>70</sup> These pieces of legislation ignore lineage-based systems of landholding prevalent in Malawi, most of which benefit women and girls under matrilineal systems of landholding.

The Deceased Estates Wills, Inheritance and Protection Act (DEWIPA)<sup>71</sup> prioritises the nuclear family in inheritance. It protects the nuclear family's interests in intestate property from the extended family. A revolutionary addition brought by the DEWIPA was the criminalisation of unlawful possession of a deceased estate, also known as 'property grabbing' that attracts a fine of K1,000,000.00 and ten (10) years imprisonment. This underscores the widows' rights<sup>72</sup> and the right to inheritance<sup>73</sup> provided in the Maputo Protocol.

Malawi has enacted legislation that protects numerous articles of the Maputo Protocol but still falls short in some areas, for example, the lack of criminalisation of marital rape. The MDFRA criminalises marital rape where spouses are judicially separated (judicial separation is court-sanctioned).<sup>74</sup> The African Commission, however, recommended that marital rape be unconditionally criminalised.<sup>75</sup>

Additionally, the continued criminalisation of abortion<sup>76</sup> and limited

grounds for legal abortion have not been expanded despite the high maternal mortality rates caused by unsafe abortions in Malawi.

## 6 Policy reform and formulation

There are several policies, action plans and strategies that have been adopted to give effect to the Maputo Protocol. The Malawi Growth and Development Strategy (MGDS III) is the overarching policy aimed at enhancing national productivity to boost global competitiveness while strengthening the nation's ability to deal with natural shocks and disasters.<sup>77</sup> The MGDS III provides a policy and strategic framework to sector policies and strategies with the main aim of fostering economic development. Article 13<sup>78</sup> of the Maputo Protocol encourages states parties to provide equal opportunities for women in work, career advancement and economic opportunities. The MGDS, therefore, contains five priority areas that address cross-cutting themes to be mainstreamed, these are gender; women and youth development; empowerment of persons with disabilities; management of HIV and AIDS and nutrition; environmental management; disaster risk reduction and resilience building; peace, security, and good governance. All these cross-cutting themes have specific target areas for women and the holistic improvement of women's circumstances.

69 Customary Land Act 3 of 2016.

70 Customary Land (n 69) secs 3, 13, and 20.

71 Deceased Estate, Wills, Inheritance and Protection Act 14 of 2011.

72 Maputo Protocol art 20.

73 Maputo Protocol art 21.

74 Marriage, Divorce and Family Relations (n 28) sec 62.

75 African Union *Concluding Observations and Recommendations on the Initial and Combined Periodic Report of the Republic of Malawi on the Implementation of the African Charter on Human and Peoples Rights* (2015) 14-16.

76 Penal Code Cap 7:01 of the Laws of Malawi secs 149 and 150.

77 Malawi Government *Malawi Growth and Development Strategy III (MGDS III)* (2017-2022) <https://www.afidep.org/publication/malawi-growth-development-strategy-mgds-iii-2017-2022/> (accessed 16 July 2021).

78 Maputo Protocol art 13.

Malawi has a National Gender Policy (NGP), effective from 2015 to 2020. The core objective of the NGP is to strengthen gender mainstreaming and women empowerment at all levels to facilitate the attainment of gender equality and equity in Malawi. This NGP is set for review and renewal but has addressed the concluding observation from the African Commission targeted at affirmative action for women. The NGP specifically aims to 'reduce gender inequalities and enhance participation of women, men, girls and boys in socio-economic development processes'.<sup>79</sup>

Malawi adopted a Sexual and Reproductive Health Rights Policy (SRHR Policy). A reading of the SRHR policy shows that it is in line with the Maputo Protocol,<sup>80</sup> the policy was adopted to guide Malawi's provision of integrated sexual and reproductive health services. The SRHR Policy focuses on reducing incidences of harmful practices and domestic violence among women, men, and young people, among other thematic areas.<sup>81</sup> It also ensures that victims of harmful practices and domestic violence have access to legal recourse and counselling. This policy is complemented by the National Plan of Action to Combat Gender-Based Violence in Malawi, effective 2014 to 2020. It provides guidance to Government, civil society, academia, private sector, and development partners to address GBV within their programmes in a coordinated, holistic, participatory, accountable, and multi-sectoral fashion. The Plan of Action is the blueprint for all actions taken by the Government to

reduce the prevalence of violence against women.

Malawi adopted a National Economic Empowerment Policy (NEEP) in 2017 that contains a plan for women's empowerment. The NEEP aims to build women's entrepreneurial skills, review legislation to improve women's development, access to credit, land, markets, and information. The rationale was that:

there still remains a big challenge to build the capacity of women entrepreneurs to give them the requisite business skills and confidence to enable them to actively participate in the economic empowerment programme. Initiatives should also be undertaken to improve the women's access to technology, their understanding of local and international markets to enhance their businesses and exploit opportunities. Empowerment initiatives should also aim at promoting the access to information and communication technologies such as internet/email, therefore widening their information sources to support their businesses.

## 7 Impact on the judiciary

Little mention of the jurisprudence of the African Commission and the African Court is made in Malawian jurisprudence. However, the incorporation of provisions of the Maputo Protocol in Malawi's Bill of Rights and other legislation allows jurisprudence to develop in a commensurate manner with the spirit of the Maputo Protocol.

79 Malawi Government, *National Gender Policy* (2015) 15.

80 Protocol to the African Charter on Human and Peoples' Rights of Women in Africa Article 14 – Health and Reproductive Rights.

81 National Gender Policy (n 79) 22.

One of the Concluding Observations made by the African Commission was on the elimination of harmful traditional practices.<sup>82</sup> In 2016, the Magistrate Court in Nsanje convicted Eric Aniva for indulging in harmful practices contrary to section 5 of the Gender Equality Act. He was accused of knowingly having unprotected sexual intercourse with over 100 women while he was HIV positive. The Court sentenced him to 2 years imprisonment with hard labour. The case has set a precedent for the prosecution of those who engage in harmful practices.

Another one of the Concluding Observations made by the African Commission was to strengthen initiatives to combat HIV and AIDS and expedite the conclusion of a human rights centred pending legislation on HIV and AIDS. In *EL (a female) and the Republic*,<sup>83</sup> the High Court overturned the applicant's conviction for the offence of unlawfully (negligently) doing an act likely to spread a dangerous disease contrary to section 192 of the Penal Code. The appellant, knowing her serostatus, breastfed someone else's child and, upon her conviction, was incarcerated with her 14 month old child who was also living with HIV. The Court stated as follows:

However, this court after noting the various material provided by the experts as well as upon its own reading of the various available jurisprudence, research and material, is of the view that negligent infection of a deadly disease through breast-feeding should not be put in the same category or class of intentional

infections. The law must be sensitive to various issues including the lack of knowledge on how HIV is transmitted. Most importantly, the circumstances of the accused must also play a role. Unquestionably, the law should still ensure the traditional standard of proof applies and should be established by prosecutors. Fundamentally, in this human rights era, the law should remember to uphold the accused person's rights to privacy, dignity and due process ...

The circumstances in this case demanded leniency, especially when the tests revealed that the Complainant's child tested negative. Incidentally, that the facts themselves barely showed any wrongdoing on her part. Further that the Appellant also had a small breastfeeding child who if she had not been breastfeeding on that day and had her breasts exposed would not have led to her finding herself in this situation. The court should have remembered that Malawians courts have always upheld the principle of the best interests of the child...

The custodial sentence for an offence which was a misdemeanor and not a felony was grossly excessive. I would like to state that these statements I have made herein are conscious that the victim in the lower court was a five (5) month old baby. However, this court's main function is to ensure justice is administered. Thus having undertaken numerous prisons visits, this court very much knows the state of such prisons and incarcerating a woman with her child should always be the last resort for any court especially where the offence is a misdemeanor. In this regard, courts in Malawi should really take into account the guidelines set by the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders.

The Maputo Protocol guarantees equal economic and other opportunities and career advancement for women.<sup>84</sup> The Malawian Bill of Rights in Section 20 of the Constitution provides for a similarly couched right. In a September 2016 determination,<sup>85</sup> the High Court ruled

82 African Union, *Concluding Observations and Recommendations on the Initial and Combined Periodic Report of the Republic of Malawi on the Implementation of the African Charter on Human and Peoples Rights* (2015) 14.

83 *EL (Female) v The Republic*, High Court of Malawi, Zomba District Registry, Criminal Case 95 of 2016 (unreported).

84 Maputo Protocol art 13.

that arresting sex workers was discriminatory and embarrassing to the detained women. Nineteen women labelled sex workers were arrested during a raid at a rest house. The women were brought before a Fourth Grade Magistrates Court where they entered a group plea of guilty, were convicted and sentenced to a fine of K7,000.00 each (about \$10) in default of which they were to serve 6 months imprisonment. Upon review, the Court held that section 146 of the Penal Code that criminalises 'living off the earnings of prostitution does not target sex workers themselves but those who exploit them'. The court went further and stated that the arrest of the 19 women was unconstitutional as it was

based on a biased and discriminatory reasoning by the police as well as a clear lack of evidence to support such a charge but was made merely to embarrass, label and harass the 19 women.

The High Court consequently set aside the conviction and sentences.<sup>86</sup>

On 7 July 2020, the High Court declared that the corroboration rule in sexual offences was contrary to the right to non-discrimination and the procedural rule that prohibits a mandatory number of witnesses per case.<sup>87</sup> The Maputo Protocol mandates reforms of existing discriminatory laws and practices.<sup>88</sup> Although the rule on corroboration had been a long-standing practice, the High Court declared that it had no place in Malawi's current constitutional dispensation and legal theory. The judge based her decision on the additional

burden placed on women to provide extra evidence to prove their allegations of sexual assault. The Court said:<sup>89</sup>

It therefore comes as no surprise that over the years this practice which is blatantly discriminatory against women has lodged itself firmly in our jurisprudence and enjoyed elevated status not simply as a practice but an immutable rule.

...

In view of our current Constitutional dispensation, the practice requiring corroboration in sexual offences based on the fact that women are unreliable witnesses, must be called out for what it is. It is discrimination against women based on their sex and or gender and cannot be sustained. Section 20 of the Constitution expressly forbids discrimination on any ground, including sex and gender.

Further, the practice requiring corroboration is also unlawful. It is in direct contravention of section 212 of the Criminal Procedure and Evidence Code which provides as follows:

Subject to this Code and any other law for the time being in force, no particular number of witnesses shall in any case be required for the proof of any fact.

These words competently sum up the effect of the practice requiring corroboration when viewed against both section 20 of the Constitution and section 212 of the Criminal Procedure and Evidence Code and it is for this reason that the appellant's insistence on corroboration in this case and every other case of this nature must be disregarded so that the practice is relegated once and for all, to its rightful place which is to non-observance.

...the practice requiring corroboration has no place in contemporary legal theory... If the circumstantial evidence in a case can

85 *R v Pempho Banda and 18 others*, High Court of Malawi, Zomba District Registry, Review Case 58 of 2016 (unreported).

86 As above.

87 *Steven Kaliyati v R* Criminal Appeal 109 of 2018.

88 Maputo Protocol art 8.

89 *The Kaliyati case*.

prove beyond reasonable doubt all the element of the offence, it is not necessary for a trial court to look at any further evidence to corroborate the complainant's version of events.

The African Commission recommended that Malawi undertake reforms to protect women and children from physical, mental and sexual abuse by persons or institutions entrusted with their care. On 13 August 2020, the High Court declared that the actions of the Inspector General of Police, the Clerk of the National Assembly and the Minister of Finance had flouted their duties towards 18 women who were sexually assaulted and raped by members of the Malawi Police Service.<sup>90</sup> The police officers had been deployed to M'bwatalika and Mpingu to keep the peace following unrest in the area after the fatal injuring of Superintendent Usman Imedi. The Court found that the Inspector General of Police (the IG) had failed to put in place a credible system of ensuring that the officers of the Malawi Police Service (MPS) acted following the law, the conduct of officers of the MPS who sexually assaulted and raped women was unlawful, unreasonable and ultra vires the police powers. The IG failed to conduct prompt, proper, effective and professional investigations into the complaints of sexual assault and rape made by the Applicants including of all other women and girls that were sexually molested, harassed, assaulted or raped by MPS officers, and finally that the MPS did not provide for the protection of public safety and rights.<sup>91</sup>

90 *The State v The Inspector General of Police, The Clerk of the National Assembly and the Minister of Finance ex parte MM and 18 others*, High Court of Malawi, Lilongwe District Registry, Judicial Review Cause 7 of 2020 (unreported).

91 As above.

On 31 August 2020, the High Court declared that educational qualifications are marital property that can be divided at the dissolution of marriage.<sup>92</sup> Article 7(d) of the Maputo Protocol provides for equitable sharing of joint property deriving from the union. The Malawian Constitution and the Marriage, Divorce and Family Relations Act reiterate the same. In making the determination, the High Court stated thus:

It is in the court's discretion to order compensation to the Petitioner on the basis of her contribution to the Respondent's educational qualifications be it financially and in kind. ...

How would then the couple share these qualifications? It is indeed understandable that the Respondent acquired these qualifications while he was married to the petitioner. Moreover, the Petitioner might have contributed either financially or in kind to the pursuance of his tertiary education.

The Court ordered that, among other remedies, the wife's contribution to her husband's qualification be assessed and that she be compensated based upon that contribution.

On women's rights to property, on 19 March 2020, the High Court also made a declaration on the lineage-based inheritance of land by women. This pronouncement cements the lamentations on the Land Act, and Customary Land Act discussed earlier. In this matter, the Claimant was asked to vacate a piece of customary land that she inherited from her father's family. Being an area that practised matrilineal land inheritance, it was determined that the Claimant ought to return to her own

92 *Ellen Tewesa v Chimwemwe S Tewesa*, High Court of Malawi, Principal Registry, Matrimonial Cause 9 of 2012 (unreported).

mother's land. The High Court held that this 'approach to customary law might, once again, end up with unfair and unconstitutional consequences.'<sup>93</sup> The court stated:<sup>94</sup>

The appellant had used the land for such a long time, after taking over the use from her parents, she had a right to occupancy and use over the land. Dispossessing her over the land based on the type of marriage system would, in my view, be repugnant to the constitutional right to own property.

## 8 Awareness and use by civil society

The African Commission categorises Malawi as a state with 0-5 NGOs granted Observer Status.<sup>95</sup> The Centre for Human Rights and Rehabilitation (CHRR) and Centre for the Development of People (CEDEP) are two of the organisations that have observer status. In 2014 and 2015, they submitted shadow reports to the African Commission in response to Malawi's Initial and Combined Periodic Report of 2013.<sup>96</sup> The Paralegal Advisory Service Institute (PASI) attended the 65th Ordinary Session of the African Commission held in 2019. PASI's focus is on the rights of detained persons, and they have conducted numerous projects on the provision of paralegal services to detained persons. As a result, PASI was granted Observer Status in 2019. The Centre for Human Rights Education Advice and Assistance (CHREAA) attended the 60th Ordinary Session of the African Commission held in May

93 *Mary Manyenje v Manuel Mpingo and Melenia Pondani*, High Court of Malawi, Principal Registry, Miscellaneous Civil Appeal No 86 of 2018 (unreported).

94 As above.

95 African Commission on Human and Peoples' Rights 'Network' <https://www.achpr.org/ngos> (accessed 15 November 2020).

96 Chisala-Tempelhoff & Bakare (n 5) 156.

2017. CHREAA focuses on prisoner's rights and the rights of detained persons. CHREAA was also granted observer status by the Commission and submitted a shadow report to the Commission.

It should be noted, however, that the NGOs that have observer status from Malawi have been incorporated into the government task forces responsible for the preparation of the State Party Reports.<sup>97</sup> This might compromise the quality of the shadow reports and might have an impact on whether shadow reports are submitted at all. This may be counteracted by the fact that participating civil society organisations then proceed to write their own independent shadow reports in an objective manner.

## 9 Awareness and use by lawyers and judicial officers (law societies and other practising lawyers)

Use of the Maputo Protocol by lawyers has been limited. However, the closing submissions by the Women Lawyers Association in the *ex-parte MM* case<sup>98</sup> cited decisions of the African Committee of Experts on the Rights and Welfare of the Child (ACERWC). They argued that the Court ought to consider the circumstances of the violation when determining the amount of damages to be awarded as per *Institute for Human Right and Development in Africa and Finders Group Initiative on behalf of TFA (a minor) v The Republic of Cameroon*.<sup>99</sup> They further depended on a decision of the Commission in *Equality Now and Ethiopi-*

97 Republic of Malawi, *Periodic Report on The African Charter on Human and Peoples' Rights and the Maputo Protocol, May 2015 to March 2019* (2019) 104.

98 *The Inspector General of Police* case (n 90).

an *Women Lawyers Association (EWLA) v The Federal Republic of Ethiopia*.<sup>100</sup>

## 10 Higher education and academic writing

As the only certified law school, the University of Malawi's Faculty of Law has a comprehensive curriculum on human rights. The Maputo Protocol is taught explicitly in Gender and Law and International Human Rights. The faculty introduced the Law of Human Rights as a separate and compulsory course in the 2001-2002 academic year. Women's rights and the Maputo Protocol are taught under special categories of human rights, alongside disability rights, child rights, and sexual minority rights.<sup>101</sup>

The Maputo Protocol is also taught in Gender and Law with the aspiration that 'students will discuss and analyse the relationship between gender and the law, as an agent of social ordering and social change for men and women'.<sup>102</sup> Gender and Law is a compulsory course. To wit, the University of Malawi also boasts a Gender Justice Clinic that provides pro-bono legal services to women from surrounding areas.

The African human rights framework is often referred to in academic writing. A general mention was made by Dr Alan Msosa in his PhD thesis that discussed rights regarding sexual orientation and gender identity in Malawi.

He highlighted the fact that Malawi ratified the African Charter on Human and Peoples' Rights (amongst others) and therefore:<sup>103</sup>

Since Malawi's legal framework incorporates international human rights norms, the content and decisions from the international human rights system must be applicable. International human rights bodies are increasingly recognising the urgent need to extend protections on the basis of sexual orientation and gender identity.

The Maputo Protocol was explicitly discussed by Dr Bernadette Malunga's Master's thesis that mentions the violation of article 3 of the Women's Protocol. Dr Malunga argued that the requirement for corroboration assumes that women make false accusations in rape and defilement cases. This assumption was not based on any empirical findings, and therefore, it violates article 3 of the Maputo Protocol that requires that the dignity of every woman is protected and that she be protected from sexual and verbal violence.<sup>104</sup>

## 11 Impact on independent state institutions and civil society

The Malawi Human Rights Commission (MHRC) is constitutionally mandated to protect and investigate violations of the rights enshrined in the Constitution.<sup>105</sup> The MHRC boasts a Directorate of Gender and Women's

99 *Institute for Human Right and Development in Africa and Finders Group Initiative on behalf of TFA (a minor) v The Republic of Cameroon* No 006/Com/002/2015 No 006/Com/002/2015

100 African Commission on Human and Peoples' Rights, Communication 341/2007.

101 From the 2020 Syllabus: LLB 327 – The Law of Human Rights II.

102 From the 2020 Syllabus: LLB 122 – Gender and the Law.

103 Unpublished: A Msosa 'Human rights and same-sex intimacies in Malawi' unpublished PhD thesis, University of Essex, 2017 80.

104 Unpublished: BW Malunga 'Remember Potipher's wife': The 'rule' on corroboration in rape and defilement offences. A systematic violation of the rights of women and girls in Malawi' unpublished Masters thesis, University of Zimbabwe, 2010 62.

105 Human Rights Commission Act 27 of 1998 sec 12.

Rights whose sole focus is women and gender.<sup>106</sup> It is also the leading implementing authority of the Gender Equality Act through the Gender Equality Committee, comprising representation from Government, Civil Society Organisations and Development partners.<sup>107</sup> The committee meets regularly to deliberate gender issues and conduct monitoring visits to assess the awareness levels and adherence to the Gender Equality Act.<sup>108</sup> In addition, MHRC has also authored its own shadow/alternative reports and been part of Malawi's delegation to state party reporting processes. The MHRC has made submissions to regional human rights bodies such as the African Commission.

The Office of the Ombudsman is constitutionally mandated to take action or steps to remedy instances of abuse of power or unfair treatment of any organ of government or manifest injustice or conduct by such official which would properly be regarded as oppressive or unjust in an open and democratic society.<sup>109</sup> Accordingly, the Ombudsman institutionalised Hospital Ombudspersons in public hospitals to deal with complaints from service users, patients, staff and stakeholders.<sup>110</sup> In her opening remarks, the Ombudsman Martha Chizuma stated that 'these focal persons will be responsible for ensuring that principles important to public health accountability are upheld which include

transparency, fairness, integrity and trust'.<sup>111</sup>

Both the MHRC and the Office of the Ombudsman were members of the Taskforce instituted by the Ministry of Justice and Constitutional Affairs to draft Malawi's latest state party report submitted in 2019. Other human rights institutions that were involved in the process of drafting the state party report were: Article III, Paralegal Advisory Service (PASI), Centre for Human Rights Education Advice and Assistance (CHREAA), Centre for the Development of People (CEDEP), Youth and Society, and Saccode Trust.<sup>112</sup>

## 12 State reporting

The Ministry of Justice and Constitutional Affairs is tasked with state reporting under the Maputo Protocol. To prepare the state report, the Ministry of Justice collaborates with the Ministry of Gender empanels a task force. First, the Maputo Protocol and recommendations from the previous review are disseminated to the key stakeholders (both state and non-state stakeholders). The task force then meets to compile data on the implementation of the report. After this, representatives from the Ministry of Justice and Constitutional Affairs, and the Ministry of Gender, Children, Disability and Social Welfare, travel to 4 districts in each region of Malawi to collect data on the implementation of the Protocol. Based on this data, the Ministry of Justice generates a zero draft

106 'Malawi Human Rights Commission, Background' <http://www.mhrcmw.org/mhrc/who-we-are/background> (accessed 13 November 2020).

107 Malawi Human Rights Commission, 'Gender Equality' <http://www.mhrcmw.org/mhrc/our-work/gender-equality> (accessed 13 November 2020).

108 Gender Equality Act (n 35) sec 9.

109 Ombudsman Act 17 of 1996 sec 5.

110 Office of the Ombudsman, 'Hospital Ombudsman' <https://www.ombudsmanmalawi.org/main.php?pages=hospital%20ombudsman> (accessed 13 November 2020).

111 MBC 'Ministry of Health launches hospital Ombudsman' <https://www.mbc.mw/index.php/radio-2/item/6537-ministry-of-health-launches-hospital-ombudsman> (accessed 13 November 2020).

112 Republic of Malawi, *Periodic Report on The African Charter on Human and Peoples' Rights and the Maputo Protocol, May 2015 to March 2019* (2019) 104.

of the State Report. The draft is further developed through regional consultative working sessions. A national validation is called to validate the report. And finally, the report is submitted through the Permanent Mission to the African Union.

Malawi has submitted two state party reports to the African Commission. The Initial and Combined Periodic Report was submitted on 19 July 2013 for the period 2005 to 2013.<sup>113</sup> It combined the initial and all outstanding reports (second to eleventh) that spanned the eight-year reporting period, from the date of accession, for the Maputo Protocol. The second report was submitted in 2019 for the period May to March 2019.<sup>114</sup> Thus at the time of writing, Malawi is up to date in its reporting under the Protocol.

The Concluding Observations are disseminated to key stakeholders by the Ministry of Justice and Constitutional Affairs. The Ministry of Justice also assigns tasks to responsible Ministries, Departments, and Institutions.

At the time of writing this chapter, the most recent state report is yet to receive concluding observations from the African Commission. However, the concluding observations from the African Commission on the earlier report (Initial and Combined Periodic Report of 2013) highlighted issues to be addressed by the government in the realisation of the rights enshrined under the

Maputo Protocol. Most pertinent of all was the recommendation that processes for the domestication of the Maputo Protocol be expedited and that enactment of legislation and policies be concluded.<sup>115</sup>

The African Commission made numerous recommendations on various rights of women and children. A few of the recommendations will be highlighted.

- Affirmative action: The number of women in political positions such as Members of Parliament significantly fell during the 2014 general elections. This was despite a 50-50 campaign which sought to increase the number of women representatives at local government and parliament levels. The 2019 Gender Profile indicates that there are fewer women than men the decision-making positions (per grade) in the civil service, and oversight institutions.<sup>116</sup> The Gender Equality Act provides a quota for public sector institutions, no more than 60 per cent of one gender and no less than 40 per cent of one gender.<sup>117</sup> Despite this law, in October 2020 there were nationwide demonstrations denouncing the lack of gender representation of public service board appointments.<sup>118</sup>
- Reduction of maternal and infant mortality and access to maternity services: The status of child mortality and maternal mortality improved during the reporting period of the

113 Republic of Malawi, *Periodic Report to the African Commission on Human and Peoples' Rights: Implementation of the African Charter on Human and Peoples' Rights 1995 – 2013 and the Protocol to the African Charter on Human and Peoples' Rights 2005 – 2013*.

114 Republic of Malawi, *Periodic Report on The African Charter on Human and Peoples' Rights and the Maputo Protocol, May 2015 to March 2019*.

115 African Union *Concluding Observations and Recommendations on the Initial and Combined Periodic Report of the Republic of Malawi on the Implementation of the African Charter on Human and Peoples Rights* (2015) 14.

116 Republic of Malawi *Periodic Report on The African Charter on Human and Peoples' Rights and the Maputo Protocol, May 2015 to March 2019* (2019) 89.

117 Gender Equality (n 35) sec 11.

118 The Nation, 'Women to protest against gender imbalance' <https://www.mwnation.com/women-to-protest-against-gender-imbalance/> (accessed 14 November 2020).

Initial and Combined Report of 2013. According to the 2015-2016 Malawi Demographic and Health (MDHS), childhood mortality rates have declined since 1992. Infant mortality has decreased from 135 deaths per 1,000 live births in 1992 to 42 in 2015-2016. During the same period, under-5 mortality has markedly declined fourfold from 234 to 63 deaths per 1,000 live births. 95 per cent of women aged between 15 to 49 receive antenatal care (ANC) from a skilled provider (doctor, clinical officer, medical assistant, nurse, and midwife).

- Abortion: The Law Commission produced a Termination of Pregnancy Bill that aimed to expand the legally justifiable grounds for abortion. At the moment, induced abortion is criminalised by the Penal Code with one exception – induced abortion is legal where it is used to save the mother’s life.<sup>119</sup> The Termination of Pregnancy Bill suggests three additional grounds: prevention of injury to the physical or mental health of the woman, severe malformation of the foetus that will affect its viability/compatibility with life, and if the pregnancy is a result of rape, incest or defilement.<sup>120</sup> The Bill was due for debate in parliament as at 2020.<sup>121</sup> An electronic survey conducted by the authors found that 67 per cent of the respondents thought the Maputo Protocol could have an impact on the debate of the Termination of Pregnancy Bill while 33 per cent were unsure that it would. Placing this in context could encourage

greater dissemination of the details and awareness raising on the Maputo Protocol, especially to members of the National Assembly, to garner the knowledge and support needed for the enactment of the Termination of Pregnancy Bill.

- Marital rape: Marital Rape is a criminal offence in Malawi only in the context of court sanctioned judicial separation.<sup>122</sup> By this prescription, marital rape cannot occur during the subsistence of the marriage. The Penal Code does not criminalise marital rape.
- Child marriage: The Constitution was amended to raise the age of the child from 16 to 18 and this abolished child marriages. The amendment was done in line with the African Charter on the Rights and Welfare of the Child. Currently, the Government is undertaking a process to harmonise all laws on the definition of the child.
- Prohibition of child labour and trafficking: At the time the concluding observations were made, the Trafficking in Persons Act was still a Bill. It was eventually passed into law and has been operational since 2015. Section 79 of the Child Care, Protection and Justice Act also criminalises child trafficking. The National Plan of Action against Trafficking in Persons (2017-2022) targets a 50 per cent reduction of trafficking in persons cases by 2022. Law enforcement officers have been trained on anti-trafficking training, victim identification and assistance to potential trafficking victims, sentencing guidelines for offenders and the legal instruments available to counter trafficking.<sup>123</sup>

119 Penal Code 22 of 1929 sec 243.

120 Society for Medical Doctors, ‘Termination of Pregnancy Bill’ [https://www.smdmalawi.com/media/com\\_acymailing/upload/termination\\_of\\_pregnancy\\_bill\\_1.pdf](https://www.smdmalawi.com/media/com_acymailing/upload/termination_of_pregnancy_bill_1.pdf) (accessed 14 November 2020).

121 All Africa, ‘Malawi: MPs Pledge to Table Termination of Pregnancy Bill’ <https://allafrica.com/stories/202009280740.html> (accessed 14 November 2020).

122 Marriage, Divorce and Family Relations Act (n 28) sec 62.

123 Republic of Malawi, *Periodic Report on The African Charter on Human and Peoples’ Rights and the Maputo Protocol, May 2015 to March 2019* (2019) 72-73.

Freedom of Expression and Access to Information: The Access to Information Bill was passed in December 2016 and assented to in February 2017. The Act became operational on 30 September 2020 by way of a notice of commencement of operation that was gazetted on 31 August 2020.<sup>124</sup> The Malawi Human Rights Commission oriented information holders, media, civil society, traditional leaders, directors and heads of departments in the civil service. MHRC also trained information officers and oriented District Commissioners on the Act.

- HIV/AIDS: The HIV and AIDS (Prevention and Management) Act was passed in November 2017. The Act ensures that authorities are able to prevent and manage the HIV/AIDS pandemic. In line with international human rights standards, the Act prohibits compulsory testing for pregnant women, domestic workers and men in uniform. It also establishes the National Aids Commission as a statutory body that facilitates the management of HIV/AIDS response in the country.<sup>125</sup>

Malawi needs to establish a National Mechanism for Reporting and Follow Up (NMRF). In the meantime, the Ministry of Justice and Constitutional Affairs coordinates the implementation and follow-up of concluding observations through a task force that consists of Ministry of Justice and Constitutional Affairs as the Chair, Ministry of Gender, Children, Disability and Social Welfare, Ministry of Homeland Security, Ministry of Foreign Affairs and

International Cooperation, Ministry of Health and Population, Ministry of Education, Science and Technology, Ministry of Labour and Vocational Training, Malawi Police Service, Malawi Prisons Service, Malawi Human Rights Commission, Law Commission, National Registration Bureau, National Statistical Office, the Office of the Ombudsman, the Department of Immigration, the Legal Aid Bureau, the Malawi Judiciary, University of Malawi, Chancellor College Law School, Article III, Paralegal Advisory Service (PASI), Centre for Human Rights Education Advice and Assistance (CHREAA), Centre for the Development of People (CEDEP), Youth and Society, and Saccode Trust.<sup>126</sup>

### 13 Communications

While Malawi has not yet had any communications under the Maputo Protocol, there have been some indications by individuals and NGOs that complaints may be brought to the African Commission for consideration. This might be because of a lack of awareness and/or the inaccessibility of the court process generally. Accessing justice can be costly, and the requirement to exhaust of local remedies might dissuade parties from lodging complaints with the African Commission.

Historically, the communication made against Malawi found that Malawi had violated articles 4, 5, 6 and 7 of the African Charter. This communication resulted in the repeal of legislation that created the Traditional Courts, awarded compensation to Vera Chirwa,

124 Malawi LII, 'Notice of Commencement – Access to Information Act' <https://malawi.lii.org/mw/gazette/29> (accessed 14 November 2020).

125 Republic of Malawi *Periodic Report on The African Charter on Human and Peoples' Rights and the Maputo Protocol, May 2015 to March 2019* (2019) 56.

126 Republic of Malawi *Periodic Report on The African Charter on Human and Peoples' Rights and the Maputo Protocol, May 2015 to March 2019* (2019) 104.

who had been sentenced wrongly by these courts and referred the matter to the Assembly of Heads of States and Government.<sup>127</sup>

#### 14 Special mechanisms and promotional visits of the African Commission

The last African Commission human rights promotion visit took place between 7 and 11 April 2008.<sup>128</sup> The delegation consisted of a member of the African Commission responsible for the promotion of human rights in Malawi, the African Commission's Special Rapporteur on Prisons and Conditions of Detention in Africa and the Legal Officer for Protection at the Secretariat of the African Commission. The purpose of the visit was to 'among other things, exchange views with human rights stakeholders on ways and means of enhancing the enjoyment of human rights in the country'.<sup>129</sup>

Despite no further visits being made, the African Commission has issued a press release on Cyclone Idai and its attendant flooding that specifically addressed the plight of women and girls during natural disasters. The Press Release on Cyclone Idai stated:<sup>130</sup>

The Commission is particularly concerned about the impact of the flood to women

127 *Krishna Achuthan (on behalf of Aleke Banda), Amnesty International (on behalf of Orton and Vera Chirwa) v Malawi* Communication 64/92-68/92-78/92\_8AR.

128 African Commission on Human and Peoples' Rights 'Press Release on the Promotional Mission to Malawi' <https://www.achpr.org/pressrelease/detail?id=364> (accessed 13 November 2020).

129 As above.

130 African Commission on Human and Peoples' Rights 'Press Release on Cyclone Idai and the subsequent flooding in Mozambique, Malawi and Zimbabwe' <https://www.achpr.org/pressrelease/detail?id=399> (accessed 13 November 2020).

and girls who usually bear the brunt of such disasters, to the extent that access to resources, including shelter, food and other opportunities, is systematically disadvantaged to this group of people, rendering them more vulnerable to the impact of the disaster. This is also compounded by the specific vulnerability of women and girls with respect to mortality from such floods and their aftermath. In light of this, the Commission calls on the Governments of the concerned States, to attend to the special needs of women and girls during these difficult times and ensure that they have access to all relief opportunities and strategies. While internally displaced persons issues are primary State responsibilities, in cases of natural disasters, the support of all stakeholders are crucial.

#### 15 Factors that may impede or enhance the impact of the Maputo Protocol

Malawi's Periodic Report identifies four factors that may impede the impact of the Maputo Protocol, namely: weak implementation of laws and policies, resource constraints, slow pace of institutional reforms, and lack of public awareness of rights.<sup>131</sup> These observations are like those received from an anonymous self-administered survey conducted by the authors.

The electronic survey was completed by 22 people, 17 were female, and five were male. Ten of them were aged between 26 and 35, and 20 had tertiary education. In addition, 6 of the respondents were in the legal profession, four in the community and social service professions, and the rest were in other cross-cutting professions. The survey aimed to gauge awareness and impressions of the Maputo Protocol. The elec-

131 Republic of Malawi, *Periodic Report on The African Charter on Human and Peoples' Rights and the Maputo Protocol, May 2015 to March 2019* (2019) 103.

tronic survey was widely disseminated online through a web link posted on WhatsApp groups and targeted individual emails sent to networks. 90 per cent of respondents said that the Maputo Protocol had minimal impact in Malawi, with the remaining 10 per cent saying it had no impact at all. However, 95 per cent believe that the impact could improve through public awareness campaigns, media was a close second with 86 per cent, and 71 per cent of the respondents believed public debates would also increase awareness of the Maputo Protocol.

## **16 Conclusion**

Malawi has made great strides in implementing the Maputo Protocol, such as amending legislation to raise the legal marriage age. However, there are numerous areas for improvement, such as civic awareness of the Maputo Protocol, broadening grounds for legal abortion, and addressing the comments raised by the African Commission. In addition, Malawi ought to ensure that the promises made in the Maputo Protocol and the legislation enacted are actualised in practice.