

## COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN

35th Session (New York, 15 May to 2 June 2006)

Reports of States

### Malawi (Combined 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> periodic report<sup>1</sup>)

*Information submitted to the Committee*

#### Information provided by the Government

In its combined 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> periodic report, the Government of Malawi described a country in intense transition, in the midst of a comprehensive review of laws and with a considerable list of legislative amendments and draft bills on the table. Indeed, the country has undergone dramatic changes since the presentation of its initial report in 1990, having made the shift to a multiparty democracy in 1993, and held its first democratic elections in 1994. The State report indicated that laws were being reviewed with respect to gender, but was also quite frank in mentioning the complete absence of judicial or legislative definition of discrimination.

In the presentation made to the Committee on 19 May 2006, the head of the delegation (the Honourable Joyce Banda, Minister of Gender, Child Welfare and Community Services) made an effort to outline the changes that have occurred since the report was submitted to the Committee in 2004. These included collaboration with non-governmental organisations (NGOs) to pass a bill on domestic violence (passed in April 2006), the creation of draft bills on wills and inheritance as well as on marriage and divorce, and work towards the creation of a gender equality statute. In her statement she also noted the launch of a national gender program consisting of eight thematic areas, namely: (1) capacity building and institution strengthening, (2) education, (3) health, (4) HIV/AIDS, (5) agriculture, food and nutrition security, (6) natural resources and the environment, (7) poverty and economic empowerment, (8) governance and human rights. Ms. Banda noted that there continue to be challenges towards women's equality in Malawi, notably: stereotypical attitudes, the inadequate capacity of service providers, and limited resources. She also commented on the need for "coordinated and concerted action" between government, civil society, and development partners. On behalf of Malawi, Ms. Banda requested technical and financial assistance in the following areas: education and training for women and girls, capacity building for service providers, review of legislation, lobbying, and advocacy. Malawi does not have any reservations to the Convention<sup>2</sup> and is a party to the Optional Protocol.

#### Information provided by non-governmental organisations

A shadow report was prepared by the Women and Law in Southern Africa Research and Educational Trust-Malawi (WiLSA-Malawi), the Centre for Human Rights and Rehabilitation, and the National Association of Business Women. In presentations made to the Committee representatives from these groups expressed concerns about the 'misconceptualisation' of gender and development. They explained that despite the adoption of CEDAW, the expressed mandate of the Ministry was to advance the rights of women, men, boys, girls, and vulnerable groups, and argued that such a broad and inclusive mandate denied the particular challenges faced by women and girls. In both the written report and comments made to the Committee, the representatives from NGOs highlighted Constitutional issues, indicating that the Constitution was not self executing, did not compensate for past gender imbalances, and that the Government was not taking "strategic advantage" of the Constitutional review process as an opportunity to better integrate gender issues. Cohabitation was given as an example, where the Government took the view that it should not be promoted and, as a result, did not offer to provide some form of legal

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<sup>1</sup> <http://daccessdds.un.org/doc/UNDOC/GEN/N04/419/30/PDF/N0441930.pdf?OpenElement>

Questions: <http://daccessdds.un.org/doc/UNDOC/GEN/N06/242/39/PDF/N0624239.pdf?OpenElement>

Responses: <http://daccessdds.un.org/doc/UNDOC/GEN/N06/286/62/PDF/N0628662.pdf?OpenElement>

<sup>2</sup> See the following link for information on withdrawn reservations:

<http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm#N40>

recognition for this union and access to the benefits available for married couples. The topic of discriminatory legislation was also addressed with the citizenship act, inheritance laws and the absence of sexual harassment legislation cited as examples. The NGO representatives also noted that although women can access a continual cycle of small loans, the fact that most women lack assets makes it very difficult to access more substantial loans. The representatives present at the Committee meeting on 16 May 2006, called upon the Government of Malawi to initiate a clear and deliberate policy on the economic empowerment of women.

### *Themes and Issues*<sup>3</sup>

#### **Constitution**

During the session and in the Concluding Comments<sup>4</sup> the Committee raised concerns with regards to the status of the Convention in domestic law and the process of harmonising domestic law in both traditional and common law systems with Malawi's international treaty obligations. At the time of the submission of Malawi's initial report the country had not decided whether to follow the dualist or monist approach with regard to the treatment of international treaty obligations in domestic law. The Government delegation indicated that Malawi has now chosen to abide by the dualist approach, and has established a commission responsible for law reform but that the harmonising process has been slow. Ms. Huguette Bokpe-Gnacadjia questioned the strength of political will to make the country's laws gender sensitive given the slow pace of change. The Government noted that Section 11 of the Constitution did allow for the courts to use international law including the Convention to interpret the Constitution but so far there has been no litigation in this area. The Government delegate also noted that it would be necessary to modify Section 24 (addressing women's rights) to include a definition of discrimination in line with the Convention as there is currently "neither a legislative nor a judicial definition of discrimination." In the Concluding Comments the Committee stipulated that a definition of discrimination in line with the Convention needed to be included in either the Constitution or the forthcoming Gender Equality Statute and that such a definition should include reference to temporary special measures, in accordance with Article 4, paragraph one, and General Recommendation 25. The Committee also cited a need for clarity with respect to the Convention's status in the Constitution and called on the Government to ensure that the Convention could be cited in domestic courts<sup>5</sup>.

#### **Legal System**

Malawi has both a traditional legal system and a Common Law system based on the British model. While the Government report indicated that the low level of public interaction with the Common Law system is likely due to the higher level of comfort and confidence that Malawians have with the traditional system, the Government delegation noted that the traditional courts have been suspended since 1994 pending a review on their *modus operandi*. Committee members raised concerns both with the inaccessibility of Common Law courts to women who would normally use the suspended traditional courts and with some of the procedures and practices of traditional courts, which place women in a subservient position and conflict with human rights principles. The Government acknowledged that women's access to justice at the grassroots level has been limited in the last 12 years due to the suspension of traditional courts. A review of the traditional court system has been finalised and it was recommended that a complete overhaul of the system occur to ensure compliance with Malawian Common Law and international treaties to which Malawi is a party. The Government delegation indicated one challenge they faced was to present the traditional court system as "alternative forums and to make it understood that civil courts would take precedence over them". Committee Member Ms. Dubravka Simonovic called upon the Government to abolish discriminatory customary (i.e. traditional) laws and to invoke Article 2 of the Convention (policy measures) in doing so.

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<sup>3</sup> For a full record of the proceedings please see:

<http://www.un.org/News/Press/docs/2006/wom1560.doc.htm>

<sup>4</sup> [http://www.un.org/womenwatch/daw/cedaw/cedaw35/cc/Malawi\\_%20rev.pdf](http://www.un.org/womenwatch/daw/cedaw/cedaw35/cc/Malawi_%20rev.pdf)

<sup>5</sup> [http://www.un.org/womenwatch/daw/cedaw/cedaw35/cc/Malawi\\_%20rev.pdf](http://www.un.org/womenwatch/daw/cedaw/cedaw35/cc/Malawi_%20rev.pdf)

## **Law Reform**

With a wide variety of laws under review and a high number of amendments before parliament, the Committee directed many questions towards law reform. With respect to Article 9 (nationality) the Committee was informed that an amendment was before parliament to bring Malawian law in line with the Convention by enabling women who married foreign men to retain and to transmit their citizenship to their husbands and children. A bill had also been put before parliament to eliminate male control over women's travel permits, and the Government indicated that in practice this had already desisted. A comprehensive Gender Equality Bill has been drafted and was estimated by the Government delegation to be put into force by September 2006.

Several questions were raised with respect to the contents of the recently passed law on domestic violence. The Government delegation indicated that it included violence between all members of the household and allowed for the provision of protection orders. The Committee was particularly interested in whether this applied to unmarried couples and whether marital rape was criminalised. The Committee was informed that amendments had been submitted that would protect women who were unmarried and that at present spousal rape was not considered a crime. There was no indication of whether an amendment was intended or had been proposed on this topic. In its Concluding Comments the Committee called for the criminalisation of spousal rape, sexual harassment and all forms of sexual abuse.

With regards to Article 16 (marriage and family life) Committee members noted with great concern that although the Marriage Act prohibits child marriages, it is superseded by the Constitution which permits such marriages. The delegation stated that the ongoing Constitutional review would address this and that a "new regime" on marriage was proposing dramatic changes including a prohibition of polygamy, and putting the minimum age of marriage at 18. It was also noted that laws on marital property rights were also under review.

## **HIV/AIDS**

Surprisingly little attention was paid to HIV/AIDS given Malawi's high prevalence rate and geographical location with reference to the pandemic. Ms. Mary Shanthi Dairiam asked about the relationship between women's "lack of control over their bodies" and the high rate of HIV transmission. The Government agreed that some cultural practices resulted in women's higher risk of HIV infection and outlined programs in existence, including one targeting local chiefs, and indicated that there were plans to undertake a study in this area. The Committee called for "concrete measures" towards the elimination of harmful cultural practices as per Articles 2 (f) and 5 (a), a "gender perspective in all health reforms", and urged the State to seek technical support towards the implementation of laws and policies relating to HIV/AIDS.

## *Conclusions and Next Steps*<sup>6</sup>

In its Concluding Comments, the Committee stated its "appreciation for the frank and constructive dialogue" and also had positive comments with regard to the "clear and candid" report and high level of the Government delegation. Although the Committee welcomed information about legal reform, they expressed concern regarding the "continuing lack of compliance" calling on the Government to "accelerate the law review process", provide a time frame, and ensure that any changes made were accompanied by educational and public awareness initiatives<sup>7</sup>. The State was urged to increase women's access to credit, particularly in rural areas. Concern was expressed regarding the "low level of coordination" with NGOs. The Committee encouraged the ratification of the Optional Protocol, the amendment to Article 21, paragraph one, and of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families. The State was requested to include further information about refugee women and women's employment in subsequent reports. The Committee requested that the State consider the recommendations expressed in the Concluding Comments to be of utmost priority and

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<sup>6</sup> [http://www.un.org/womenwatch/daw/cedaw/cedaw35/cc/Malawi\\_%20rev.pdf](http://www.un.org/womenwatch/daw/cedaw/cedaw35/cc/Malawi_%20rev.pdf)

<sup>7</sup> [http://www.un.org/womenwatch/daw/cedaw/cedaw35/cc/Malawi\\_%20rev.pdf](http://www.un.org/womenwatch/daw/cedaw/cedaw35/cc/Malawi_%20rev.pdf)

requested that the Government of Malawi focus on these, present them to parliament and relevant ministries and report on action in these specific areas in the next periodic report.