

SOUTHERN AFRICA LITIGATION CENTRE

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

Introduction

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 Southern Africa Litigation Centre (SALC) would like to bring to the attention of the Committee concerns regarding compulsory HIV testing of women; women's property rights; the impact on the health of women of the discriminatory property rights regime; 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. SALC requests the Committee to include these concerns in the list of issues for Malawi's review under the Convention for the Elimination of all forms of Discrimination against Women (the Convention).

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 at least two separate occasions in 2009, police arbitrarily arrested scores of individuals, including a number of women, during sweeping exercises carried out under vague Penal Code provisions.¹ Following these arrests, police took the women to hospital, where they were subjected to blood tests and had their test results and personal details handed over to the police - all without their informed consent. The women were then taken to the Magistrate's Court where some of them were charged with spreading venereal diseases in contravention of section 192 of the Penal Code and their HIV status was read out loud. For some of the women, this was the first time they became aware of their HIV status.

¹ Section 184 (c) of the Malawi Penal Code of 1930 dates back to the English Vagrancy Act of 1824, provisions of which were subsequently introduced into the Penal Codes of British colonies. The provisions give the police wide powers of arrest, particularly of a "suspected person or reputed thief" who has no visible means of subsistence and cannot give good account of himself, and any person found in a public place at such time and under such circumstances to lead to the conclusion that the person is there for an illegal or disorderly purpose.

Second Floor, President Place, 1 Hood Avenue/148 Jan Smuts Avenue (corner Bolton Road), Rosebank, 2196,
Johannesburg, South Africa
PO Box 122 Parklands 2121 South Africa
| T: +27 (0) 10 596 8538 |
www.southernafricalitigationcentre.org

an initiative of the International Bar Association and the Open Society Initiative of Southern Africa
NPO 138-655

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The compulsory HIV testing of women in Malawi has been carried out in violation of their rights to privacy;² liberty of person;³ and dignity⁴; as well as their right to be free from cruel, inhuman and degrading treatment,⁵ as guaranteed in Malawi's national and international human rights laws and treaties.⁶ Furthermore, the compulsory HIV testing constitutes a discriminatory practice and a failure on the part of Malawi to meet its commitments under the Convention,⁷ particularly since men, including those arrested during the sweeping exercises, have been exempted from such testing. In addition, the involvement of the police, medical officers and the courts in this process is a clear violation of Malawi's obligation to ensure that public authorities and institutions refrain from "engaging in any act or practice of discrimination against women."⁸

On 10 March 2011, eleven women from Mwanza, Malawi, filed an application in the Blantyre High Court challenging their subjection to mandatory HIV tests, the admission of the HIV test results as evidence in criminal cases against them, and the public disclosure of their HIV status in open court. SALC worked with a local lawyer and the Centre for the Development of People in this case which was heard on 25 February 2014. No decision has as yet been taken by the court, but judgment is anticipated before mid-2015.

To date, the authorities have failed to publicly take a stance against this discriminatory practice despite provisions of the Conventions requiring them to, "take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women."⁹ In addition the failure of Malawi to prevent and suppress such practices constitutes a violation of article 12 of the Convention requiring states to, "eliminate discrimination against women in the field of health care."

In most cases, women subjected to compulsory HIV testing are those perceived as being sex workers. Regardless of the profession of the women, compulsory HIV testing is a violation of human rights. In fact, Article 6 of the Convention recognises that sex workers require special protection against discrimination by providing that states should take measures to "suppress all forms of exploitation of prostitution of women." Furthermore, in the concluding observation of Malawi's 6th periodic report, the Committee expressed concern that, "compulsory [HIV] testing for key populations, including sex workers, may result in discrimination."¹⁰ At the time the draft HIV

² Section 21 of the Constitution of the Republic of Malawi of 1997 (the Constitution) and article 17 of the International Covenant on Civil and Political Rights (ICCPR)

³ Section 21 of the Constitution, article 9 of the ICCPR and 6 of the African Charter on Human and Peoples' Rights (African Charter)

⁴ Section 19(1) of the Constitution, article 10 of the ICCPR and article 5 of the African Charter

⁵ Section 19(3) of the Constitution, article 7 of the ICCPR and article 5 of the African Charter. It is also a violation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)

⁶ Malawi acceded to the ICCPR on 22 December 1993 and CAT on 11 June 1996. It ratified the African Charter on 17 November 1989

⁷ In particular, articles 2(c), (d), (f), 6 and 12

⁸ Article 2(d) of the Convention

⁹ Article 2 (f) , *Ibid*

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 38

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and AIDS Prevention and Management Bill provided for compulsory HIV testing of sex workers. This Bill is yet to be passed into law.

Women's property rights

In terms of section 17 of the Married Women's Property Act of 1882, courts in Malawi appear to have some discretion in determining fair distribution of property upon dissolution of marriage.¹¹ In making such a determination, the courts have to take into account section 24 of the Constitution of the Republic of Malawi (the Constitution), which states that women have the right to equality before the law and non-discrimination, including the right to fair distribution of "jointly held property" upon dissolution of marriage.¹² However, the courts have often interpreted "jointly held property" to exclude non-monetary contributions to marital property. Both these provisions of the law have been applied by courts in Malawi in such a way that women are frequently deprived of their right to property at the time of divorce. In 2009, the Registered Trustees of the Women & Law (Malawi) Research & Education (WLSA-Malawi), together with SALC, the Malawi Human Rights Commission and the Canadian HIV/AIDS Network, presented a constitutional challenge to the prevailing legal interpretation of "jointly held" property. They further challenged the validity of section 17 of the Married Women's Property Act on the grounds that it violates provisions of Malawi's Constitution, in particular sections 20(1) which prohibits discrimination;¹³ 24(1)(b)(i) which guarantees equal right of women including to property at dissolution of marriage;¹⁴ and 28 which guarantees the rights of all people to acquire property.¹⁵

In addition to violating Malawi's Constitution, such an application is a contravention of Malawi's human rights obligations under the Convention.¹⁶ In the concluding observations of Malawi's last review, the Committee expressed concern that, "the interpretation of the divorce law by the High Court, where a woman's non-financial contribution is not taken into account, results in inequality in property distribution during divorce."¹⁷ The Committee further urged Malawi to, "take measures to ensure that the distribution of property during divorce provides for equality and equity for both parties, as provided for in article 16 of the Convention."¹⁸

¹¹ 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.

¹² Section 24(1)(b)(i) reads, "'Women have the right to full and equal protection by the law, and have the right not to be discriminated against on the basis of their gender or marital status which includes the right . . . on the dissolution of marriage . . . to a fair disposition of property that is held jointly with a husband"

¹³ "Discrimination of persons in any form is prohibited and all persons are, under any law, guaranteed equal and effective protection against discrimination on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, property, birth or other status."

¹⁴ *Supra* note 12

¹⁵ "Every person shall be able to acquire property alone or in association with others."

¹⁶ In particular, it violates articles 2(c), 2(d), 2(f), 2(g), 13, 15 and 16

¹⁷ 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 42

¹⁸ Paragraph 43, *Ibid*

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Despite this, the discriminatory practice remains in place. In fact, the government in its 7th state report states, “In instances of real estate, the law still stands that if title to the property, in this case a house or land, is in the name of the male spouse, the women usually loses out entirely notwithstanding contribution made to the property, financial or otherwise.”¹⁹ On 28 February 2014, the Constitutional Court issued judgment in the case brought before it finding that WLSA-Malawi did not have the necessary standing. WLSA-Malawi is appealing the decision.

Health impact of discriminatory property rights

The inequality in property rights further impacts the health of women in the country. In the constitutional challenge to the application of the property laws, SALC presented an amicus submission showing how the current application of the Married Women’s Property Act presents barriers to accessing property for women that make them vulnerable to HIV and less able to mitigate its impact.²⁰

Extensive research has shown that disempowerment, inequality of, and discrimination against women exacerbate their vulnerability to contracting HIV/AIDS and to suffering negatively from the consequences of HIV and AIDS.²¹ In particular, laws that discriminate against women with respect to property rights fuel the HIV/AIDS pandemic by reducing women’s economic autonomy and thus their ability to protect themselves against transmission and to mitigate HIV’s negative impact.²² The

¹⁹ Consideration of reports submitted by States parties under article 18 of the Convention, Seventh periodic report of States parties due in 2014, Malawi, Date received: 3 July 2014, paragraph 148

²⁰ SALC’s Amicus Submission can be accessed at: <http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2014/03/SALC-Amicus-Submission-for-WLSA-Malawi-property-rights-case.pdf>

²¹ See for example: Amaro H and Raj A, “On the Margin: Power and Women’s HIV Risk Reduction Strategies” *Sex Roles* 2000 (2) 723; Kim JC and Watts CH, “Gaining a Foothold: Tackling Poverty, Gender Inequality, and HIV in Africa” *BMJ* 2005, 331; Gupta GR “Gender, Sexuality, and HIV/AIDS: The What, the Why, and the How” *Plenary Address, XIIIth International AIDS Conference, Durban, South Africa*, 12 July 2000; Langen TT, “Gender Power Imbalance on Women’s Capacity to Negotiate Self-Protection against HIV/AIDS in Botswana and South Africa” *African Health Sciences* 2005 (5) 188; Strickland RS, “To Have and the Hold: Women’s Property and Inheritance Rights in the Context of HIV/AIDS in Southern Africa”, *International Centre for Research on Women Working Paper* 2004; Türmen T, “Gender and HIV/AIDS” *International Journal of Gynecology and Obstetrics* 2003 (28) 411; UNAIDS, “Women, Girls, Gender Equality and HIV”, Factsheet, 2012; Varga, *A Network Approach to Women’s Property and Inheritance Rights in the Context of HIV/AIDS: the Case of the Justice for Widows and Orphans Project in Zambia*, International Center for Research on Women, 2006; World Health Organisation Department of Gender, Women and Health, “Integration Gender into HIV/AIDS Programmes in the Health Sector: Tool to Improve Responsiveness to Women’s Needs, July 2009.

²² See, e.g., Kachingwe et al., *Securing women’s right to land and livelihoods: a key to ending hunger and fighting AIDS* (ActionAid, June 2008), available at http://www.landcoalition.org/sites/default/files/legacy/legacypdf/08_Women_s_right_to_land_HIV_and_Hunger.pdf?q=pdf/08_Women_s_right_to_land_HIV_and_Hunger.pdf (accessed at 20 Jan. 2015); Welch et al., “Women’s Property Rights as an AIDS Response: Lessons from Community Interventions in Africa,” (International Center for Research and Women, 2007), available <http://www.icrw.org/files/publications/Womens-Property-Rights-as-an-AIDS-Response-Lessons-from-Community-Interventions-in-Africa.pdf> (accessed on 20 Jan. 2014); “Economic Security for Women Fights AIDS” (The Global Coalition on Women and AIDS, 8 Mar. 2006), available at http://data.unaids.org/pub/BriefingNote/2006/20060308_BN_GCWA_en.pdf (accessed on 20 Jan. 2014); Villarreal, “Changing customary land rights and gender relations in the context of HIV/AIDS in Africa,” Colloque

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economic dependence of women on their husbands, fuelled by discriminatory property laws and practices, makes women less likely to leave violent relationships, insist on the use of a condom, or refuse sex with a partner suspected of, or known to be living with HIV/AIDS. Studies have shown that women in such circumstances are often afraid to insist on condom usage for fear of losing their access to food and shelter for themselves and their children.²³ Economic insecurity also reduces women's ability to mitigate the impact of HIV by making it more difficult for women living with HIV to access HIV testing, medical services and HIV treatment. Fear of loss of economic support if widowed or divorced seriously impedes HIV positive women's efforts to access and adhere to HIV treatment and in some cases prevents them from sharing their HIV status with their partners.²⁴

The link between inequality in property rights and HIV is not new to Malawi. Indeed the country's National HIV/AIDS Policy acknowledges the importance of equal property rights in responding to HIV by requiring the government to "ensure women's rights to legal capacity and equality within the family, in matters such as divorce, inheritance, child custody, property, and employment rights."²⁵ Despite this recognition, the government has failed to bring an end to the discriminatory application of the Married Women Property Act.

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.²⁶ 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.²⁷ In its concluding observations to Malawi's 6th periodic report, the Committee recommended that Malawi, "review the laws relating

International "Les frontières de la question foncière – At the frontier of land issues" (2006) at 5-9; A Dose of Reality: Women's Rights in the Fight Against HIV/AIDS (Human Rights Watch, March 2005) at 2-3, available at <http://www.hrw.org/sites/default/files/reports/doseOfReality2005.pdf> (accessed on 20 Jan. 2015); Strickland, To have and to hold: women's property and inheritance rights in the context of HIV/AIDS in sub-Saharan Africa (International Center for Research on Women, June 2004); Policy Paralysis, available at <http://www.icrw.org/files/publications/To-Have-and-To-Hold-Womens-Property-and-Inheritance-Rights-in-the-Context-of-HIV-AIDS-in-Sub-Saharan-Africa.pdf> (accessed at 20 Jan. 2015)

²³ White et al., Beyond Inequalities: Women in Malawi (Women and Law in Southern Africa Research and Education Trust, 2005) at 30

²⁴ Hidden in the Mealie Meal: Gender-Based Abuses and Women's HIV Treatment in Zambia (Human Rights Watch, Dec. 2007) at 26-31, available <http://www.hrw.org/sites/default/files/reports/zambia1207web.pdf> (accessed on 20 Jan. 2015).

This study further found that women identified their unequal property rights and inability to protect their property rights as "a major factor impeding their access to ART and their ability to adhere to treatment." Id. at 31

²⁵ Ministry of Health, National HIV/AIDS Policy (June 2003), section 5.2.1, available at http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---ilo_aids/documents/legaldocument/wcms_125540.pdf (accessed on 20 Jan. 2015).

²⁶ Section 149 – 151 of the Penal Code of 1930.

²⁷ Including in CEDAW/C/MWI/CO/5, paragraph 31 and CEDAW/C/MWI/CO/6, paragraph 37

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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...²⁸

In its 6th periodic report, Malawi stated that the country's Gender Commission had made a recommendation for criminal laws penalising abortion to be altered "in the least in order to ensure the enjoyment of reproductive rights by females."²⁹ Four years later, in its 7th report, the state once again acknowledged the link between unsafe abortions and maternal mortality, as well as the need to review legislation relating to abortion.³⁰ Despite this recognition by the state, progress in this area remains very slow and 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

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..."³¹ 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

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 since submitting its initial report in 1988, areas of concern relating to discrimination against women in law and practice remain. As shown in this submission, the Committee has in the past raised concern regarding compulsory HIV testing, discriminatory property rights and the abortion laws. However, as Malawi has failed to implement measures to eradicate these concerns, there is a need for the

²⁸ 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*

²⁹ Consideration of reports submitted by States parties under article 18 of the Convention, Sixth periodic report of States parties, Malawi, 20 October 2008, paragraph 240

³⁰ Consideration of reports submitted by States parties under article 18 of the Convention, Seventh periodic report of States parties due in 2014, Malawi, Date received: 3 July 2014, paragraph 180

³¹ Committee on the Elimination of Discrimination Against Women, General Recommendation No. 28 on the core obligations of States parties under article 2, paragraph 18

Second Floor, President Place, 1 Hood Avenue/148 Jan Smuts Avenue (corner Bolton Road), Rosebank, 2196,
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concerns to be raised again during Malawi's 7th periodic review. SALC therefore requests the Committee to include the concerns raised in this submission in the list of issues for consideration of Malawi's 7th periodic report. SALC specifically requests the Committee to seek clarification from the government of Malawi regarding the following:

i) Compulsory HIV testing

- The extent to which Malawi has ensured that compulsory HIV testing of any group is not included in the HIV and AIDS Prevention and Management Bill, or any other legislation;
- Legal, policy and other measures Malawi has put in place to ensure police, courts and other institutions are not permitted, or enabled to subject arrested, detained or other women to compulsory HIV testing;
- Information regarding training and/or other measures in place, 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 of those being tested;
- Steps Malawi has taken to investigate and provide redress, including compensation and psychological counseling, to women who have been subjected to compulsory HIV testing by police and the courts;

ii) Women's property rights

- Considering the recognition by Malawi of the discriminatory effects of the interpretation of laws relating to divorce; the steps being taken to end the discriminatory interpretation and application of sections 24 of the Constitution and 17 of the Married Women's Property Act, including through legal reform;
- In the absence of legislative measures, guidelines that have been put in place by Malawi to assist courts in ensuring an interpretation of the common law on divorce that is equitable for women;
- The time frame envisaged by Malawi for reforming laws relating to divorce to bring them in line with Malawi's international obligations under the Convention;
- Steps being taken to ensure genuine consultation and participation of civil society and other key stakeholders in the process of reforming discriminatory practices, policies and laws related to women's property rights;

iii) Property rights and health of women

- In view of the recognition by Malawi of the negative effects of discriminatory property rights on the health of women; the steps being taken by Malawi to ensure laws, policies and practices related to property rights in the country are aligned with the country's national HIV/AIDS policy

iv) Abortion law

- The current status of the legal reform process relating to the abortion laws and the steps being undertaken to ensure genuine consultation and participation of civil society in this process; and

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- The timeframe Malawi envisages for the alteration of the harsh abortion laws
- v) Criminalisation of same sex acts between women
- Steps Malawi has taken to eliminate intersectional discrimination against lesbian women, as well as women perceived to be engaging in same sex acts, in accessing public services, including health care services.