



MALAWI LAW COMMISSION

**CONSTITUTION REVIEW CONFERENCE
CAPITAL HOTEL, MARCH 2006**

**CIVIL SOCIETY PRESENTATION
GENDER ISSUES**

Prepared and Presented by

**Jessie KABWILA-KAPASULA
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Before I start, let me thank this whole house for the commitment it has shown towards gender equity. The woman question in Malawi has been brought up and supported by both the urban and rural Malawian and what was refreshing to see was that more men are in support of concrete empowerment of women in our beloved country. Even Chiefs, the spine of our indigenous and backbone of what we may call the reservoir of power in our country, have openly and loudly affirmed the importance of empowering women and lamented the presence and prevalence of gender based violence which is usually in the form of violence against women. I therefore am aware that I am mostly preaching to the converted but the objective of this conference entails that we spell out all the areas that women are being shortchanged by the constitution and how we can make it better for us not only to have gender justice on paper but to translate it to a reality. In the face of HIV and AIDS and the centrality of women in development issues, we need as a people to be sure that the highest of law of the land entrenches gender equity and its operationalisation.

1 The Language of the constitution

It needs to make it more binding for the government to initiate and implement processes and programmes that will translate gender equality from its paper and theoretical form and take concrete steps to operationalise it.

e.g. In section 20 it provides that legislation **may** be passed to address discriminatory practices. Instead of **may**, we could have **shall**. See the Ministry of Gender paper by Mrs Mchiela.

2. Section 13

(i) the implementation of policies that identify, unveil and minimize the various forms of patriarchy that author, perpetuate and legitimize various forms of female oppression, be it the patriarchy of religion, traditional practices or the one in the sphere of urban economic zones.

3. **Ensuring that the state is accountable for its fiduciary duties.**

We need to ensure that the state is accountable for its fiduciary duties. In Section 13 the state has the obligation to introduce measures that will guarantee accountability, transparency, personal integrity, and financial probity and which by virtue of their effectiveness and transparency will strengthen confidence in public institutions. The problem is that in Malawi, there are no sufficient laws to require fiduciary performance of duties by public functionaries whose decision and actions affect women's lives and development.

The state needs to be cognisant that it is not about women getting charity or the state deciding what women need, rather, it is about women asserting their rights and deciding what they want. It is important that Section 13 a be made self executing. It is critical that sections that deal with disempowered groups, in this case women, have mechanisms that ensure that government is accountable to its citizens. This will enable sections like number 13 to be linked to indicators like good governance and public trust.

Section 13 should have 2 parts. The current provision can read as S.13 part 1 and then have the following has S.13. (2)

The principles of national policy impose a fundamental duty on the State to ensure significant progressing realization of individual rights under the Constitution. Failure by the State to fulfill such duty shall be actionable by individuals or other private and public institutions.

4. **Strengthening equality: Section 20**

Gaps

- 1 There is a gap of people living with HIV and AIDS and this increasingly attaining an African and female face. It is a big menace in our country. 58% of People living with HIV and AIDS in Malawi are women.
2. the provision does not underscore the need of equality by mandating State to take measures to acknowledge and address past, present and possible future gender imbalances. In order to address the problem of gender equality there is need for a change of mindset, paradigm shifts of many types. The supreme law of the land needs to take a lead in initiating and setting the conducive foundation for paradigm shifts of historical male supremacy principles in circles of culture, tradition and history.

Section 20 should add

1. including HIV status, after other status.
2. To promote the achievement of equality, legislation and other measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination may be taken.
3. Women shall have the right affirmative action for the purpose of addressing imbalances created by history, tradition and custom.

5. Ensuring equal rights in all forms of marriage

Section 22

The constitution should clearly define what constitutes each of marriages, including the accompanying rights and obligations. This would help women as marriages e.g. of repute would not just be reduced to friendships.

Marriage by repute and cohabitation be retained for the security of women as the formalization is male based.

The constitution should not allow girls between 15-18 to get married, even with consent of parents, considering that

the power imbalance created by marriages of girls to old men
early marriages fuel health hazards of early pregnancies. Malawi has one of the highest mortality rates in the world: 1800 per 100 000. 00 live births.
this exposes the girls to domestic violence
young girls are often married to older men and this creates problems that come with power imbalance.

So the constitution can say the following:

- a. Marriages by repute or by permanent cohabitation shall be recognized as such if the couple has continuously lived together for a period of not less than 3 years.
- b. marriage with anyone under the age of 18 is prohibited.
- c. Any form of early marriage, regardless of cultural, religious and customary dictates is illegal.
- c. Any two spouses to a marriage shall be deemed to be equal in rights, obligation and power relations.
- d. Marriage shall mean an institution voluntarily entered by any two persons being a man and a woman for purpose of among other related things, building a life together with nurturance, love, affection, providence, procreation and support.

5. Section 24

Property ownership

Marriage is not recognized as joint enterprise. The definition of property needs to be looked at. The Malinki vs Malinki case states that any spouse wishing to claim a share in an object that is not in her or his name must prove that she or he made contributions and that such contributions must be financial. Women's reproductive labour is not recognized and this should legitimize joint acquisition of property. One party of the marriage, the woman in general is made a third party.

This is a problem as women are often poorer and more illiterate than men. They do not usually buy property and if they do in the case of the urban woman, valuable assets are male e.g. research done by Kamchedzera and Ngwira.

The constitution should reflect equity in property rights in view of the reproductive and domestic labour women bring and practice in marriage.

6. Custody of Children

Section 24 has the gap on women in the event of a death of spouse or divorce, especially in cultures where there is lobola.

This is serious in view of hiv/aids and it threatens the enjoyment of the rights of the child.

Suggestion: Women have the right to acquire and retain custody, guardianship and care of children and to have an equal right in the making of decisions that affect their upbringing regardless of cultural dictates.

7. Citizenship

Section 24

This is looking at citizenship in terms of marriage, if a Malawian woman is married to a foreigner. Women cannot pass their citizenship to their children and spouses.

Suggestion: Women have the right to acquire and retain citizenship and nationality and pass on such citizenship to their children and spouses. This needs to

8. Additional provisions in the marriage institution

Marriage is the major institution of female oppression, most of the violence against women and domestic violence happens in its context. The constitution needs to have additional provisions under section 24 to ensure gender equity.

4.1 Protection of women during the subsistence of a marriage.

There is the problem of the power relations within a marriage and women have limited power to manage, control and dispose of assets. The husband can mismanage property. Most women sadly depend on men for their livelihood and definition of the self, being a human being to themselves, at home, market, church etc, in the public and private domain.

It can say

During the subsistence of the marriage to:

- i. equal; management, control and disposition rights over property that is held in common.
- ii. fair maintenance, taking into consideration the means of the husband, and the needs of any children that require maintenance.

9. Women's Participation in Decision Making

The constitution needs to put mechanisms to guarantee women equal participation in areas of decision making and participation in politics. There are no measures to reverse the patriarchal historical status quo.

It should say, Section 24 (2)

- i. Women shall have the right to representation of not less than 30% in political and decision making structures, including in both public and private institutions.
- ii. The State shall take legislative measures to ensure gender balance and fair representation of women in Parliament, and other public and private institution.
We suggest the quota system here.

10. Women Access to Land

Land is a male asset in rural and urban societies, especially patrilineal societies. Sons inherit land. Even in matrilineal, it is the men who usually have the real control. Lack of information which is heightened when one is dealing with a group challenged by literacy like women, land ownership becomes a problem.

The constitution should say, Women have the right to acquire and dispose land in their own right or in association with others despite any cultural dictates and the State shall ensure that there is gender equity in any land and reform programmes.

11. Domestication International and regional conventions Section 211

The constitution depends on the goodwill and proactiveness of the legislature in domesticating international agreements. So we end up with the state just looking eager but not operationalising its commitment. The constitution should help ascertain that agreements signed, especially those without economic value are turned into law.

1. Any international agreement ratified by the State shall automatically form part of the law of the Republic, unless the agreement otherwise lapses.
2. Provided that any monetary international agreement shall first be laid before Parliament within at least 21 sitting days before it is ratified by the State/
3. Customary international law, unless inconsistent with this Constitution, shall form part of the law of the Republic.

12. Additional Rights Right to Security of the Person

The issues of domestic violence, VAW and GBV shows that section 13 is inadequate to offer security to women.

Right to Security of the person:

1. All persons have the right to be free from all forms of violence from either public or private sources.
2. All persons have the right to bodily and psychological integrity, which includes the right of women to:
 - i. make decision concerning reproduction.
 - ii. security and control over their body.

13. Environmental Rights

Access to natural resources is a gender issue as women are the first to suffer from environmental change and degradation. Their task in agriculture and animal husbandry and the household make them managers and users of natural resources such as soil, water, forests and energy.

The constitution can say:

Every person shall have the right to an environment which is not detrimental to his or her health or well-being.

14. Right to Health Care, food and water.

Section 30 (2). This should read,

Every person has the right to health care, food and clean water.

15. Violence Against Women to be added where we have incidences of GBV as research shows that that is the real definition of the problem women are facing in Malawi.

16. Funding of Parties

Gender equity, its entrenchment and deliverables be basis for funding.

This paper is mainly a summary of WILSA MALAWI handbook 'CONTRIBUTING TOWARDS THE REALISATION OF WOME'S RIGHTS AND GENDER JUSTICE.'

It also quotes from the Ministry of Gender, Child Welfare and Community Services.

Thank you for listening.