



MALAWI LAW COMMISSION

CONSTITUTION REVIEW CONFERENCE

28TH – 31ST MARCH, 2006

CAPITAL HOTEL, LILONGWE

**REALISATION OF WOMEN'S HUMAN RIGHTS
AND GENDER JUSTICE**

*Paper Presented at the
Constitutional Review Conference 28th-31st March, 2006
Capital Hotel, Lilongwe*

Presented by:

Andrina F. Mchiela - Principal Secretary

Ministry of Gender, Child Welfare and Community Services

P/Bag 330

Lilongwe 3

Tel: 265 01 770 411

FAX: 265 770 826

1.0 INTRODUCTION

The Ministry of Gender, Child Welfare and Community Services as a principal national gender machinery is mandated to coordinate gender related issues and provide backstopping services to all stakeholders on gender issues. With this mandate, the Ministry is obliged to ensure that the review of all policies and laws in the country are gender sensitive if Malawi is to achieve gender equality.

Gender is socially and culturally constructed roles, responsibilities, status and privileges that are assigned to men and women in a given cultural context. The assignment of these roles, responsibilities, status, and privileges has advantaged men more than women thereby creating an imbalance between and among males and females.

Gender equality means an equal visibility, empowerment and participation of women and men, boys and girls in all spheres of public and private life. It entails equality in rights, opportunities to participate in political, economic, social and cultural developments and benefit from results. It aims at promoting the full participation of women and men in society. In general terms it means having same status and responsibilities. It should be noted that the definition of equality that is often used is narrow as it only covers *de jure* equality and protection against *de facto* discrimination is not always provided.

It is based on this facts that the Ministry has also reviewed the Constitution to identify gender issues that needs to be incorporated in the Constitution. The review of the Constitution was therefore undertaken to place gender equality at the centre of the Constitution as the supreme law of the land and to ensure that it is translated in practice by making the law and statutes in tandem with constitutional provisions.

1.1 INTERNATIONAL OBLIGATIONS

Malawi has made a number of international commitments which facilitates gender equality and human rights through international conventions and declarations including the Universal Declaration on Human Rights (UDHR), the International Convention on Civil and Political Rights (ICCPR), the International Convention on Economic, Social and Cultural Rights (ICESCR) and the Convention on the Rights of the Child (CRC), the African Charter on Human and Peoples' Rights, the Convention on the Elimination of all forms of Discrimination Against Women, the SADC Declaration on Gender and Development, among others.

For instance, Article 2 (a) of the CEDAW which Malawi acceded to in 1991 calls on state parties 'to embody the principle of equality of men and women in their national Constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realisation of this principle'. Thus this provides a solid foundation to review the national Constitution and ensure that it promotes gender equality in a succinct and practical manner.

1.2 GOVERNMENT EFFORTS TO ENSURE GENDER EQUALITY IN MALAWI

In an effort to promote gender equality in Malawi, the Ministry spearheaded the development and implementation of:

- Malawi National Platform for Action to operationalise the Beijing Declaration and Platform for Action (1997)
- National Gender Policy (2000)
- National Strategy to Combat gender Based Violence (2002-2006)
- National Gender Programme and Plan of Action (2004)

through gender mainstreaming, advocacy and women empowerment. Gender mainstreaming involves looking at what already exist or is being developed (e.g.

the Constitution) and then looks at how gender equality perspectives can be incorporated into the policy process, so that the specific interests and values of men, women, boys and girls and other special groups can be taken into account. Emphasis should therefore be put on re-organizing, improving and evaluating current provisions or adding new ones so that gender biases that characterize society and the structural character of gender inequalities are removed. A major prerequisite for gender mainstreaming is political will and this can be reflected in the Constitution and other policy documents.

Implementation of these efforts is done in collaboration with various stakeholders such as the Government Department and ministries, Constitutional bodies, private sector, NGO Gender Coordination Network, civil society and Faith Based Organisations.

2.0 SECTORAL/GENDER ISSUES IN THE CURRENT CONSTITUTION

2.1 FAMILY AND MARRIAGE

In section 22 (1) of the Constitution, the family is recognised as the natural and fundamental group unit of society which is entitled to protection of society and the State. Each member of the family is equally entitled to full and equal respect and protection from neglect, cruelty and exploitation.

The Constitution unfortunately has not defined what family or marriage is. Neither does it describe which parties would unite to form a valid marriage. It says that all men and women have a right to marry and found a family. This is ambiguous in the light of same sex marriages and polygamous unions. It is not clear as to whether the Constitution intended to include these forms of marriage in the legal definition and understanding of the concept of marriage.

The Constitution however, recognises in a special way, marriages by repute and permanent co-habitation. All men and women can found these marriages and people can enter into them without compulsion. It should be noted that

these marriages also adversely affect women who are married in that by default, their husbands are likely to end up with more than one wife from their secret relationships that usually come up when issues of inheritance arise.

2.2 AGE

Age is an essential aspect of gender. Gender as a relational concept determines how men, women, boys and girls relate. The relations between and among these people is also affected by age among other factors. The Constitution recognises age as being such a vital component of gender. Among the Principles of National Policy, this recognition extends from the disabled, children to the elderly under section 13. Children are further specially recognised under section 23 which makes provision for the rights of children.

However, going through the Constitution, it becomes almost impossible to establish the age of minority. For instance, for marriage and voting, it appears to be 18 years, while under section 23 on the rights of children, it is 16 years and yet for eligibility to stand as an MP, it is 21 years. These inconsistencies have led to absurd results. For instance, while someone is still a minor for purposes of exercising the right to vote, by which act he or she places another person in National Assembly or as President, the Constitution approves that that individual could bear the responsibility of getting married and founding a family.

This is further compounded by the fact that in the special provision for rights of children, the age of minority is at 16. What also appears amiss under section 23 on the rights of children is the categories of protection listed under that provision. The protection provided for thereunder appears to be entitlement to a name, nationality, knowledge of parents and the right to be raised by them and protection from economic exploitation. This provision does not extend to the issues which people it purports to protect actually face other than what is provided for. For example, issues of sexual exploitation are conspicuously

omitted. It would also appear that this would be the appropriate provision to establish the age under which a child could consent to sex if at all.

While children have section 23 providing for their special rights, there is no corresponding provision dealing with the rights of the elderly. Malawi has a considerable population of the elderly. The omission of a special provision on the elderly has led to ambiguity as to what age would be the legal age to define for the elderly after which they would be entitled to special protection. It is also essential that the elderly do receive special protection and more recognition under the Constitution. The consultations revealed that in all the regions the elderly are usually exposed to ridicule, censure and condemnation as perpetrators of harmful practices such as witchcraft simply on the ground of their age.

During consultations it was noted that the institution and practice of witchcraft is apparently growing and would require legal intervention, it was submitted that the treatment of elderly members of society on this issue of witchcraft borders on discrimination on the ground of age and a gross abuse of human rights and freedoms.

The African fabric of society also demands that when people are young, their parents take care of them and when they grow old, it is the young who take care of them. However, unlike the African Charter on Human and Peoples' Rights on the protection to the elderly from the youth and their children.

2.3 THE GIRL CHILD AND CHILDREN

Issues of gender go beyond men and women to include girls and boys. The problems that naturally affect women do not spare the girl child. These problems include but are not restricted to sexual, physical and economic exploitation, lack of economic empowerment, lack of education and general discrimination. In recent times, even the boy child is also being subjected to

peculiar problems and also those that affect the girl child which needs to be dealt with. Issues of economic exploitation and especially human trafficking have preyed on both the boy and girl child equally. Instances of sexual exploitation and child trafficking are on the increase for boys as well as girls. These practices are not prohibited by the Constitution and yet very detrimental to the children of Malawi. However, it should be noted that girls are more vulnerable to sexual exploitation and trafficking than boys of the same age regardless of the age group. In many instances, there are no mechanisms to assist the victims of sexual offences.

Further, Section 23 does not touch on all matters that are relevant for the child, especially the girl child taking into account the emerging issues and the prevalent practices, customs and stereotypes that prevent the girl child from accessing social amenities including education and that on entry into the education system, girl children have a higher dropout rate than boys. In many instances, girls are engaged in very lowly paid chores, jobs and employment including domestic work compared to boys. Ultimately, the girl child becomes less empowered to survive economically than the boy child who has better access to education, better chances at employment and other income generating activities.

While section 23 highlights the problem of economic exploitation and addresses it to some extent, the question of child labour, it is not clear whether the words of that provision prohibit such exploitation, work, treatment or punishment.

Other than section 23, it should be noted that section 13 (h) refers to a principle intended 'to encourage and promote conditions conducive to the full development of healthy, productive and responsible members of society'. On this score, it should be noted that issues of malnutrition and infant mortality in Malawi have not received constitutional recognition despite being responsible for the demise of alarming numbers of Malawi's youngest citizens. It should also be noted that mortality of infants is accelerated by

communicable which preventable diseases, poor access to water and food resources, various causes linked to malnutrition and poor access to health services and infant care from conception to 5 years at least. Further, it should be noted that although access to food is included under section 30 on the right to development, this provision does not clearly spell out other than access to health services and food, the right to health, the right to food and the right to nutrition commensurate with the needs of the child.

2.4 CULTURE

The Malawian population comprises various ethnic groups whose identity is supported by the different cultures they practice. Cultural practices, customs, rites and activities indeed are vital for maintaining the identity of particular ethnic groups.

The Constitution recognizes the right of all persons to speak a language and participate in the culture of choice in Section 26. Practices and customs under different cultures vary. Some of these customs and practices tend to be harmful especially to such vulnerable groups of people as women and children. The harmful practices also tend to conflict with other goals and aspirations of the Constitution such as gender equality. Examples are plenty of practices that only affect women to the total exclusion of men such as polygamy, wife inheritance (*chokolo, kupimbira*) and *mbiligha*. As such, while men are allowed to practice polygamy, women are not allowed and this is considered taboo. This is so and yet the Constitution promotes gender equality, equality of all before the law and prohibits all forms of discrimination including that based on sex. Not only do these practices contradict fundamental human rights, they also entrench stereotypes that place women under patriarchal institutions led and made to serve men. Some cultural stereotype practices which bar women and girl children from socialising and education.

The Constitution has provided that all people are entitled to education and no person shall be forced to enter into marriage, among other rights. Some

customs, however, promote arranged marriages where the freedom to choose whether to marry or not is curtailed. Other customs coincide with school calendars to the extent that education of the child is seriously affected. These are only but examples of harmful practices that different cultures promulgate.

Education is one of the pillars of development and is also provided for as a principle of national policy in the Constitution. At the same time, culture is the very essence of a people's identity and most cultural practices contain value that would otherwise be lost if it was to be prohibited. This throws a dilemma as to whether the culture provision ought to continue existing as it stands. Since Chapter IV has equally provided for various rights without distinction, it becomes a struggle between proponents of tradition and proponents of education as to which right ought to prevail. Ultimately, one finds that allowing culture wholesome without limitation means the Constitution gives with one hand and takes away with the other.

2.4 RELIGION

Like culture, religion is provided for in absolute terms. Religion also perpetrates some known disparities that contradict Constitutional principles and human rights. Some religious beliefs violate equality between men and women, like those that prohibit women from conducting sermons and reserve this duty exclusively for men. Under the guise of religion, men are allowed to marry up to four wives while women are restricted to one husband. In some denominations, women are not allowed to preach while men do. Further, in some denominations, women are not allowed to go for employment and this happens despite the relevant educational qualifications. On the other hand, some religious beliefs and practices do not allow their members to seek for medical health when need arise. This is worse when it comes to issues of maternal health, family planning and child health and survival.

The use of the term religion is restrictive and discriminatory. The term religion connotes belief in divine beings while not all beliefs have an attachment to

divinity. The term religion be replaced with the term, 'faith' in order to include all kinds of beliefs including religious beliefs.

2.5 REPRESENTATION AND PARTICIPATION

Women universally constitute more than fifty percent of the population of any given country. However, their role in decision-making structures, positions and roles is very limited. As such, many countries attempt to forge ahead in their development efforts without sufficient involvement and representation of women. Since these efforts are undertaken to the exclusion of women especially in decision-making structures, women's interests and concerns do not receive much attention. Meanwhile men continue to dominate all spheres of life whether private or public.

The same can be said of public institutions from the home, village, district, regional and national level. This is the case both at central and local government as well. In many instances, women are appointed as token representatives without the much-needed clout to advance the agenda and concerns of women as a special group that needs special attention.

Public institutions and structures usually comprise elected positions and appointed office holders. The most common appointing authority in the Constitution is the President of the Republic. During consultations it came out that the rules in place currently do not prevent women from participating at all levels of government. In terms of public appointments, the general provision that empowers the President with the power to make public appointments does not limit or discriminate against women. The Constitution in section 89 (1) (d) gives powers to the President to make public appointments to various public offices. Several other provisions in the Constitution give specific power to the President to make various appointments. However, due to long standing inequalities between men and women, more men are naturally available for these public appointments than women. So while the access is not limited for women to access decision-making structures, and in fact, women have been

appointed to very senior positions of leadership, the fairness of means does not guarantee fairness of result.

The same conclusion can also be reached in reference to elected positions. For instance, eligibility for membership of the National Assembly does not prevent women from participation, as there are clear grounds that establish eligibility. The eligibility rules apply equally for men and women and it is on this basis that men and women have contested for parliamentary seats since 1994. However, presently there are only 27 women parliamentarians in the National Assembly out of 193 seats which is an improvement from the 1999 elections. It comes out clearly that while the system is fair and open to both men and women, there is a long way to go before women participation and representation in Parliament increase.

It should be noted that most women are not economically empowered to take up the challenge of becoming an MP. Men have traditionally had better access to employment and financial resources than women and surely since the competition is made on a level field, only few women shall ever make it to the august House.

Another gap in the Constitution is that while the President has powers to make public appointments, there are no gender sensitive provisions to guide the President in making the appointments. Such guidelines would be consistent with provisions that empower women to participate fully in every sphere of Malawian life.

2.6 LABOUR

In section 31, the Constitution provides for the right to fair and safe labour practices and fair remuneration. It is worth pointing out that discrimination of any kind, in particular on basis of gender, is prohibited and everyone, is entitled to fair wages and equal remuneration for work of equal value. However, there are peculiar issues that need attention and are specific to women.

Pregnancy in the workplace is usually an issue that affects women oftentimes to the exclusion of men. As such, how women are treated during pregnancy in the workplace and how they continue to be treated after delivery are issues that require special mention in the Constitution. It has been noted that pregnant women are harassed at work and are not entitled to much if at all by way of maternity benefits. These maternity benefits are often nominal and are the source of the absence of job security.

Women also face problems with a limited choice of profession and employment. In many cases, women are constrained to remain with traditional feminine occupations and careers as involvement outside this is seen as an intrusion.

Additionally, sexual harassment in the workplace continues at an alarming rate and in many instances women acquire jobs in exchange of sexual favours offered to men. This is another form of discrimination and exclusion of women in the work place.

2.8 HEALTH

The Constitution in section 30 provides for equality of opportunity for all in accessing basic resources such as health services. Under the right to development, it is noteworthy that women are recognised along with children and people with disabilities as special groups requiring special consideration in the application of the right to development. Unlike other rights which apply to the individual, the right to development is a collective right.

This reference to accessing basic resources (health services) does not offer much in terms of the right to health and all that it entails. With the prevalence of HIV/AIDS, it is only proper to bring the right to health to the forefront. The absence of a specific right to health has serious implications on gender matters. Issues of reproductive rights including the right to choose whether or when to have children, the type of contraception to use and choice to use contraceptive methods, protection from communicable diseases including

sexually transmitted infections including HIV/AIDS, reduction of maternal and infant mortality, maternal care have profound gender implications.

It should be noted that issues of reproductive health adversely affect women more than men. Statistics indicate that HIV infection is higher among women than men in the reproductive age group of 15 to 40 years. Maternal mortality also remains extremely high in Malawi.

2.9 DISCRIMINATION

The concept of gender equality is premised on the fact of existing inequalities between men and women, boys and girls. The Constitution has outlawed discrimination in all forms and makes reference to sex as one of the bases on which discrimination shall be prohibited. Gender and marital status are as grounds on which discrimination is based are prohibited under section 24. However, among the principles of national policy, it is emphasised that as a goal of national policy, gender equality shall ensure participation of women in all spheres of Malawian society on the basis of equality with men.

It should be noted that this goal is far from being achieved. As pointed out earlier, social aspects such as culture and religion have entrenched very strong stereotypes that prevent women from participating in many activities on the basis of equality with men. This is also the case in employment. In many cases women are prevented from participation in affairs of society on the basis of sex and sex alone. Some traditions do not, for instance, readily accept that women can take leadership roles.

Some churches in fact do not allow women priests to exist among their clergy, let alone allow women to preach. In Islam, women pray apart from men. In employment, women are hardly promoted on the basis that it would be an affront for a woman to earn as much as a man and in some instances for the same type of job men are known to earn higher than women notwithstanding equal qualifications and experience. This entrenches the beliefs that women's

roles are defined in society and if they take upon responsibilities outside their realm, women would not perform as well.

It was also observed that as a matter of practice in many families, women diagnosed to be HIV positive are more at risk from various mishaps than men. For instance, it was learnt that in case of a woman being found HIV positive, it is more likely than not that she would be abandoned by the husband (especially with the routine HIV testing and counselling on pregnant women). On the contrary, women are usually the ones laden with the burden of caring for HIV positive and AIDS suffering husbands.

It has been observed that while there is discrimination in the way citizenship is acquired and lost, especially under Immigration laws, people noted the abuse arising from marriage as a basis for conferment of citizenship. It should be noted that this has led to hardship on the part of many Malawian women who are married to foreigners who in turn abandon them upon acquiring citizenship through them. In many instances, the foreign men proceed to marry women of their own nationalities who come into the country as potential spouses of the men who have acquired citizenship.

2.10 LANGUAGE

There are many areas that the Constitution uses non-committal expressions such as 'may' (section 20). The Constitution for instance uses the expression 'may' which is not absolute and creates opportunities for non-action. Instead of providing that legislation to eliminate discrimination may be passed, it should be made clear that legislation shall be passed. In section 22, the Constitution uses the expression 'discourage'. It is observed that the use of expressions such as these is elusive and lacks emphasis on those empowered with the task to implement these obligations.

Gender sensitivity of the language is crucial as a mode of communication. The Constitution as a supreme law of the land should therefore have language which reflects both males and females in our society.

2.0 RECOMMENDATIONS

FAMILY AND MARRIAGE

The Constitution should define ‘family’ and ‘marriage’ to remove the ambiguities brought by its lack of definition. These definitions should not include marriages by people of the same sex and that the Constitution be amended further to remove the recognition of marriages by repute and permanent co-habitation which are perceived to threaten the sanctity of the institution of marriage. This proposal in turn also alluded to the fact that the Constitution should provide for the registration of all marriages.

AGE

The Constitution should eliminate such inconsistencies by introducing a standard age limit for minority which should be 18 years. As such, marriages for persons under the age of 18 years shall be prohibited. This is in line with the principle of best interest of the child since the child would be protected from all sorts of abuse that would result from applying different age limits. For instance, elevating the marital age of marriage to 18 becomes consistent with the right to education in that it allows a child to complete education or any other vocation without the interference that marriage would bring.

While children have section 23 providing for their special rights, there is no corresponding provision dealing with the rights of the elderly. Malawi has a considerable population of the elderly. The omission of a special provision on the elderly has led to ambiguity as to what age would be the legal age to define for the elderly after which they would be entitled to special protection. It is also essential that the elderly do receive special protection and more recognition under the Constitution. It is a fact that in all the regions of Malawi, the elderly

are usually exposed to ridicule, censure and condemnation as perpetrators of harmful practices such as witchcraft simply on the ground of their age.

Further, it should be recognised that the institution and practice of witchcraft is apparently growing and would require legal intervention as it is usually associated with maltreatment of the elderly members of society, incest, child defilement, mutilation of body parts which results in gross violations of human rights and freedoms.

The African fabric of society also demands that when people are young, their parents take care of them and when they grow old, it is the young who take care of them. However, unlike the African Charter on Human and Peoples' Rights on the protection to the elderly from the youth and their children.

The Constitution should have a special provision regulating the rights of the elderly including elderly women. This provision would define the age upon which a senior citizen would be adjudged to be an elderly member of society thereby entitled to the protection the provision would offer. This provision should also entitle the elderly to care from the state and their children when in need of such help and care arise.

The Constitution should be amended to reflect the disparities that arise between the girl child and the male counterpart and re-affirm measures that should ensure the empowerment of the girl child economically and socially. These measures include introduction of compulsory and enforceable education for all children with special reference to the girl child, affirmative action in favour of the girl child and provision for stringent measures for the protection of the girl from sexual and economic exploitation.

Section 23 of the Constitution be amended to include more pertinent issues affecting children including prohibition of sexual exploitation and child trafficking and protection from economic exploitation including the prohibition

of child labour. The Constitution should spell out clearly the definition of “child” as persons under the age of 18 years.

Compulsory education should be enforced for all children and measures against parents and guardians who fail to comply be pronounced in the Constitution.

The Constitution, especially in section 23, should provide for the principle of the best interests of the child as a basis on which child protection should be founded. The absence of this provision left the protection agencies without a clear obligation on the measure and level of protection they would expect from parents and guardians.

The Constitution should adopt the right to water, the right to housing, the right to food including the right to nutrition for the benefit of children and all women. Women fall within this ambit since from conception until the child is about 3-5 years, the child heavily depends on the mother for nutrition, care and support.

CULTURE

Section 26 on culture be amended to prohibit practices and cultures that are harmful to individuals or groups of individuals, especially vulnerable groups such as women and children. As such, while choice of culture should be allowed, those elements of culture that are harmful and anti-development should be clearly and emphatically prohibited.

Equality being a fundamental principle on which the Constitution is founded, it should be respected without distinction. As such, cultural practices that promote gender or sex based discrimination such as polygamy should be eliminated

RELIGION

The Constitution be revised to re-affirm fundamental principles especially the principle of equality of all before the law in respect of religion in order to eliminate the use of religion as a guise for perpetrating gender insensitive practices. Further, all religious practices, rites and practices that are harmful or discriminatory should be eliminated by providing a clause. And to this end, Section 33 on religion should be amended accordingly.

PROPORTIONAL REPRESENTATION

The guidelines that are gender-sensitive be introduced in the Constitution in order to ensure representation of women in decision-making positions. These guidelines would come by way of directing that on making appointments into public offices, a minimum percentage of women be included. Section 89 therefore would have to be amended to clarify that on making public appointments, the President shall appoint a given minimum percentage of women into public positions. A recommended percentage that can effectively make an impact is between 30-50% women representation in all decision making positions.

It is often argued that exacting percentages of women to be appointed into public office would be frustrated by lack of human resources to meet the percentage. This is true and false. True in that the numbers of women who would meet other criteria for appointments are relatively low in Malawi. False in that it is fallacious to argue thus when there are reasons behind the status quo and in time it can be reversed. For traditional and historical reasons, women have been prevented from participating in economically empowering activities, such as education, businesses and politics and the public sphere at large. These hindrances are cultural, religious, paternalistic attitudes, pure selfishness, lack of insight and the socialisation process.

The Constitution should adopt affirmative action as a measure of addressing inequalities between men and women in all structures of government and decision-making. This would be achieved by reserving a prescribed number of

seats in Parliament for women to meet the minimum percentage of representation (at least 30-50%) and providing that the same minimum percentage be applied to all appointments and elected positions even in political parties and other social organizations of leadership.

The Constitution should embrace in clear terms, measures that would empower women to sustain themselves economically and financially such as affirmative action on access to financial resources, educational process and consideration on non-financial contribution in the households. This measure would prevent dependence on men that limits their participation in decision-making structures.

LABOUR

The Constitution should be amended to address issues of gender and women including introduction of gender and women friendly labour practices. This is intended to secure as a matter of right the protection that women need in the workplace from adverse practices. The labour provision should as such provide for transparency and fairness in terms of access to work for both men and women, ensure free choice of career, fair treatment during employment including equal remuneration for equal work for both men and women. The criminalisation of sexual harassment should be emphasised.

HEALTH

The Constitution should adopt an elaborate right to health as a separate right to deal with special issues such as reproductive and sexual health and rights and issues affecting women's health. It shall also deal with maternal issues, including maternal benefits and care, the prohibition of circumstances that are likely to endanger reproductive health for the girl child all the way to adulthood. As such, the prohibition of religious, cultural and any other type of practices likely to affect reproductive health should be provided under this right.

DISCRIMINATION

Gender should be introduced as a basis on which discrimination is prohibited within section 20. The Constitution should spell out clearly what measures shall be introduced in order to address gender imbalances. These measures include but are not limited to affirmative action and quota systems. Affirmative action would ensure that a prescribed minimum of women participating in all spheres of Malawian society other than leaving it to society to decide.

The concept of gender in the Constitution should clearly include men, boys and girls to ensure that the protective regime for women captures the girl child as well.

Gender equality should further aim at including women to participate not just in all spheres of Malawian society but clearly provide for participation of women in decision-making structures at all levels. This should be done to ensure empowerment of women in leadership.

The Constitution should spell out clearly measures protecting women from discrimination on basis of sero-status. This would be achieved through the introduction of sero-status among the grounds on which discrimination should be prohibited.

The establishment of an independent constitutional body under the style: Gender Commission or Equal Opportunities Commission which would look into the implementation of a Gender Equality statute and police all gender related issues while being responsible for the mainstreaming of gender and certifying gender compliance in all aspects of life and legislation, policy and activity.

The Constitution should have a provision to remove marriage among the grounds under which citizenship may be acquired. The Constitution should be amended to either remove this ground in its totality or to include marriage as a

ground only when the applicant has resided in Malawi for a period of not less than seven years.

Language

The Constitution be amended to clarify the intentions behind its provisions. As such, instead of using expressions such as ‘may’, it should use the expression ‘shall’. Where it has used the term ‘discourage’ it should use the term ‘prohibit’.

There is need to have a gender sensitive language in framing the provisions of the Constitutions. Currently the Constitution has gender neutral approach hence it does not recognize differences that exist between men and women or any groups and treats everyone equally regardless of differences that may arise due to sex, age, social economic status or any other variables. Thus such equal treatment in the constitution may cause inequalities as needs of men and women vary and are to a large extent determined by both biological and social cultural factors. Gender neutral approaches do not change the status quo instead systematically perpetuates inequalities in our societies.

4.0 CONCLUSION

This review of the Constitution has come at an opportune time for a better Malawian society which reflects values of peace, justice and equality for sustainable development. The need for the new Constitution of Malawi to be truly gender responsive and sensitive can not be overemphasized. There is need to put the promotion of gender equality at the centre of the letter and spirit of the constitution. This can be achieved if the draftpersons of the new constitution take a rationale attitude and give these highlighted suggestions, a critical gender analysis so that the different needs of women, men, boys and girls and indeed other disadvantaged / vulnerable groups such as those with disabilities, widows and widowers and the elderly are articulated to promote human dignity and freedoms. This should be in line with Malawi’s commitments at international level without compromising the national identity and positive cultural elements of this country.

ANNEX 1

DEFINITION OF TERMS

There is need to clarify some terms that have been used in this document so that there is a common understanding of the use and application of those words. Some of these terms are outlined below: -

Gender Equality:

Gender equality means an equal visibility, empowerment and participation of women and men, boys and girls in all spheres of public and private life. It entails equality in rights, opportunities to participate in political, economic, social and cultural developments and benefit from results. It aims at promoting the full participation of women and men in society. In general terms it means having same status and responsibilities. It should be noted that the definition of equality that is often used is narrow as it only covers de jure equality and protection against de facto discrimination is not always provided.

Gender Equity:

It should be understood to mean fairness and being just. It is a major step that has to be undertaken to achieve gender equality thus equality provisions should be interfaced with provisions on equity. It involves putting special measures to cover the gap that exists between one group and another. Such mechanisms could involve positive discrimination and affirmative action to close existing gender gaps. It should be noted that such measures are meant to be temporary in nature and therefore they have to be removed as soon as they have achieved their purpose.

Gender Mainstreaming:

Within the premise of this exercise it means that gender equality should become an integral part of the national constitution and other guiding policies that inform its work as the supreme law of the country. Gender mainstreaming involves looking at what already exist or is being developed (e.g. the constitution) and then looks at how gender equality perspectives can be incorporated into the policy process, so that the specific interests and values of men, women, boys and girls and other special groups can be taken into account. Emphasis should therefore be put on re-organising, improving and evaluating current provisions or adding new ones so that gender biases that characterize society and the structural character of gender inequalities are removed. A major prerequisite for gender mainstreaming is political will and this can be reflected in the constitution and other policy documents.

Discrimination/ Gender Discrimination:

Article 1 of CEDAW defines discrimination as “Any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of

impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. The South African Constitution goes further by laying grounds for non discrimination by prohibiting discrimination on the basis of race, gender, sex, pregnancy, marital status ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language or birth. But it gives room for fair discrimination and allows affirmative action.

Thus in this study gender discrimination should be understood as meaning any differential treatment that is accorded to men, women, boys and girls on the basis of gender, sex, age, or on other social ,economic and political grounds. Thus any legally entrenched differentiation in the constitution should be considered as discrimination.

Gender Neutral:

A gender neutral approach does not recognize differences that exist between men and women or any groups and treats everyone equally regardless of differences that may arise due to sex, age, social economic status or any other variables. Thus such equal treatment in the constitution may cause inequalities as needs of men and women vary and are to a large extent determined by both biological and social cultural factors. Gender neutral approaches do not change the status quo instead systematically perpetuate inequalities.

Affirmative Action:

Is defined as a deliberate effort that is taken to improve the situation of a specific target group regardless of race, colour, gender, religion, national origin or ethnicity. It is a quick way of enabling women/ men to have equal access to opportunities and resources. It helps to solve problems of inequalities by putting in special measures for a group that has been disadvantaged. It is argued that women shall have the right to affirmative action for the purpose of redressing the imbalances created by history, tradition and custom.