PARALLEL REPORT TO THE UNITED NATIONS HUMAN RIGHTS COMMITTEE

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Submitted by:

The Women and Law in Southern Africa Research and Educational Trust (WLSA-Malawi)

and

The Global Initiative for Economic, Social and Cultural Rights (GI-ESCR)
About the Submitting Organizations

The Women and Law in Southern Africa Research and Educational Trust Malawi National Office (WLSA-Malawi) is an action-oriented research organization founded in 1998. The main objective of WLSA is to engage in advocacy and conduct research that supports action to improve the socio-legal position of women. In addition to its research and advocacy work, WLSA-Malawi has extensive experience organizing and conducting training workshops and courses on gender and the law issues in Malawi. WLSA-Malawi champions an approach to law reform, which considers the intersection between women’s rights, gender equality and the law. In 2006, WLSA-Malawi, in partnership with 2 other NGOs in Malawi, led the NGO delegation to the United Nations where it presented Malawi’s First Shadow Report on the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) to the CEDAW Committee. This Report was entitled “Taking Malawian Women’s True Lived Realities to a Global Forum.” WLSA-Malawi also wrote and spearheaded the second shadow report entitled “Shadowing the CEDAW in Malawi” which was presented to the treaty body in 2010 in Geneva, Switzerland.

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The Global Initiative for Economic, Social and Cultural Rights seeks to advance the realization of economic, social and cultural rights throughout the world, tackling the endemic problem of global poverty through a human rights lens. We believe this crisis — wherein close to 2 billion people worldwide daily lack access to adequate nutrition, health care, education, housing, water and sanitation — will only be overcome through the concerted efforts of human rights, women’s rights, environmental and development organizations and agencies. The Global Initiative seeks to play a catalyzing role in fostering these cross-sector partnerships on key issues. We can change the world as we know it into a world where all economic, social and cultural rights are respected, protected and fulfilled, so that all people everywhere are able to live in dignity.

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**Country Profile**

Malawi is a small country in the Southern Africa region, bordered by Tanzania, Mozambique and Zambia. The country is divided into three regions: the North, Central and Southern Regions, which are further divided into 28 districts; six in the Northern region, nine in the Central, and thirteen in the Southern region. The Malawi 2008 Population and Housing Census enumerated a total population of 13,066,320. Out of this, 6,365,771 (49 percent) are males and 6,700,549 (51 percent) are females. The population grew from 9,933,868 in 1998 to 13,066,320 in 2008, representing an increase of 32 percent.

Malawi is a poor country and poverty is highly feminised in Malawi. According to the Integrated Household Survey 3 (IHS3: 2012); the national poverty rate is 50.7 percent. The survey also highlights that 25 percent of the population is ultra-poor. About 49 percent of persons in male-headed households are poor, contrasted with 57 percent of persons in female-headed households are poor. When looking specifically at the rural poor, the survey showed that 55 percent of people in male-headed households in the rural areas are poor, as compared to 63 percent of people who reside in rural female-headed households. When one looks at the poverty statistics presented in the IHS3 (2012), the distribution of poverty levels across regions reflects the nature and character of patrilineality and matrilineal societies. The Southern Region of Malawi which is mainly matrilocal (with the exception of Nsanje and South of Chikwawa) is the poorest region. Matrilocality is more widespread than patrilocality, however, in both the husband is regarded as the key controller in the use of any land allocated to his family.

The economy is dominated by agriculture, mainly smallholder agriculture. Agriculture is the principal source of livelihood in Malawi, with almost 90 percent of all Malawian households can be labeled farming households. Subsistence agriculture accounts for the bulk of the smallholder agriculture evidenced by small proportions of marketed agricultural produce. It is estimated that 56 percent of farming households produce only to consume what they are able to produce themselves. Women constitute the majority of small holders, making land rights a vital issue for them. Farm provision of services overshadows manufacturing, and the economic and trade liberalization has favoured the distribution sector. Malawi’s overarching framework for guiding national development for the period of 2011 to 2016 is the Malawi Growth and Development Strategy II (MGDS II) which succeeds the first MGDS (2006-2011). The overall objective of the MGDS II is continued poverty reduction through sustainable economic growth and infrastructure development. The Malawi Development Assistance Strategy (DAS) formulates policy and strategies to achieve the goals of the MGDS II and it is a key element for coordination and alignment of aid to national priorities.

**Women’s Rights to Land and Property under Malawian National Law**

Under Malawi’s formal law, women and men have the right to own land, individually or jointly with others, and the Constitution prohibits gender discrimination. Section 24 of the Constitution recognises:

(1) 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--

(a) to be accorded the same rights as men in civil law, including equal capacity--

(i) to enter into contracts;

(ii) to acquire and maintain rights in property, independently or in association with others, regardless of their marital status;

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1 This reflects the views of the authors and not the IHS interpretation of statistics.
2 Social Institutions and Gender Index (SIGI) Country Profile for Malawi. Available online at: [http://genderindex.org/country/malawi](http://genderindex.org/country/malawi) [last accessed 10 January 2014].
(iii) 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; and

(iv) to acquire and retain citizenship and nationality.

(b) on the dissolution of marriage--

(i) to a fair disposition of property that is held jointly with a husband; and,

(ii) to fair maintenance, taking into consideration all the circumstances and, in particular, the means of the former husband and the needs of any children.

(2) Any law that discriminates against women on the basis of gender or marital status shall be invalid and legislation shall be passed to eliminate customs and practices that discriminate against women, particularly practices such as--

(a) Sexual abuse, harassment and violence;

(b) Discrimination in work, business and public affairs; and

(c) Deprivation of property, including property obtained by inheritance.

In addition, in recent years there have been important new legal advancements for women in Malawi, for example, the recent Gender Equality Act of 2013. In addition, the recent Deceased Estates (Wills, Inheritance and Protection) Act of 2011 protects the spouse’s and children’s share in the estate and makes property grabbing a criminal offense, liable for a fine of 1 Million Malawian Kwacha or imprisonment of up to three years.

The De Facto Situation of Women’s Rights to Land and Property in Malawi

Despite these and other progressive legal protections, significant problems persist for women in gaining equal and secure rights to land and property. Indeed, in its 2010 Concluding Observations on Malawi, the Committee on the Elimination of Discrimination against Women (CEDAW Committee) expressed concern “about the precarious situation of women in rural areas, who constitute the majority of women in the State party and are disproportionately affected by the lack of adequate health services, education, ownership of land and inheritance, economic opportunities and social benefits.”

Malawi has a dual matrilineal and patrilineal customary ownership system. USAID reports that “Both women of patrilineal and virilocal (wife moves to husband’s village) marriages and men of matrilineal and matrilocal (husband moves to wife’s village) marriages express insecurity when considering the potential death of their spouse or the possibility of divorce, because they and their children may be forced to leave the land. The high prevalence of HIV/AIDS among the adult population exacerbates the degree of insecurity that a spouse may experience.” Under both the patrilineal and matrilineal systems in Malawi, decisions pertaining to customary land are primarily made by men and property rights are vested in men. Likewise, Malawi’s Women’s

4 Concluding observations of the Committee on the Elimination of Discrimination against Women, Malawi, UN Doc. CEDAW/C/MWI/CO/6, 5 February 2010, at para. 40.
6 Under patrilineality, an individual is considered to belong to the same descent group as his or her father, and residence is patrilocal. Upon marriage, a woman would leave her village and reside in her husband’s village. Under matrilineality, an individual is considered to belong to the same descent group as her or his mother and marriages are matrilocal. In patrilineal societies, a married woman is regarded as a member of the husband’s family because of lobola or bride wealth. Upon divorce, she is expected to leave her house, land, any matrimonial property and her children and return to her family. In matrilineal societies, the mwini mbumba is the head of the household, the legal guardian of the children and the custodian of land owned by his clan. The chief custodian of the land is the village headman who is the traditional chief of the village. When women marry, their husbands control their land and assets. Upon divorce, husbands take the assets which they brought into the marriage and leave the land, but take the harvest. A study by Ngwira et al (2003) confirmed that under both matrilineal and patrilineal systems of marriage, women have few or no independent rights to property due to the mixture of traditional customs and market economics.
Legal Resources Center (WOLREC) has found “major disparities and discrepancies” in women’s access, control and ownership of land in both patrilineal and matrilineal societies. As WOLREC highlights: “In matrilineal where women are said to own land, ownership is limited for married women because their husband’s control the use of land and decisions about crops. For other women, such as sisters, divorced and widowed women, the maternal uncle sits in the background as a key decision maker who can, if it is in his interests, threatened [sic] the tenure security and ownership of women.”

Legally speaking, customary land (the majority of land in Malawi is customary land) is not owned as such, but rather is vested in the community as a whole. The permanent alienation of customary land (such as through sale) is usually prohibited. In reality, however, alienation of customary land through sale is common. In the study by Takane, several cases of community land sales were observed. This is normative and has had a tremendous impact on land ownership for married women in both patrilineal and matrilineal societies. Such sales are done through giving a gift or money to the chief, who then “sells” the land to the individual.

One study of women’s land rights in Malawi highlighted that women’s land rights may “become increasingly marginalised, not only in the informal family and lineage negotiations over rights and access to land, but also in the bargaining processes related to the implementation of land reform policies and programmes.” As WLSA-Malawi has observed, customary laws generally dictate unequal gender relations, compounding the discrimination that women face by public and private institutions. Many statutory laws which comprise subsidiary legislation to the Constitution continue to discriminate against women. Furthermore, customary laws and norms deny women their constitutional rights and jeopardize women’s access to property, inheritance and divorce. For example, wives are often victims of discriminatory inheritance practices in which the deceased husband’s family unlawfully takes property. Such discriminatory customary laws and practices are in need of being removed and/or amended in order to come in line with national and constitutional legal protections.

Violations of Women’s Land and Property Rights in Cases of Divorce
A critical problem facing women in Malawi is denial of their marital property rights, as is clearly seen in cases of divorce. An analysis of cases in the High Court done by WLSA-Malawi in June 2009 found that in 10 matrimonial cases awaiting property distribution by the High Court, at least eight of them had land as one of the items of property to be distributed by the Court. Such land was not necessarily private land, but was customary land acquired by one or both of the parties from a chief through the process of sale (as noted above). It was also found that in most of the divorce cases, customary land is at the centre of the dispute with respect to property distribution; however, this customary land is not necessarily titled through a freehold or leasehold, nor is it subject to customary rules of inheritance. It was bought by the couple, or one of them, through a process of informal sale.

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7 Maggie Kathewera-Banda, Veronica Kamanga- Njikho, Grace Malera, Gift Mauluka, Martino Kamwano Mazinga, and Stephen Ndhlouvo, ‘Women’s access to land and household bargaining power: a comparative action research project in patrilineal and matrilineal societies in Malawi,’ Women’s Legal Resource Centre (WOLREC), March 2011.
8 Ibid.
12 The cases being referred to here were High Court cases which were predominantly divorce cases that had been decided at the lower Court level (magistrates Courts). They were then sent to the High Court.
Part of the reason that women lose their rights to land and property in these and other cases is due to discriminatory application of current statutory law. As highlighted above, Section 24(1)(b)(i) of Malawi’s Constitution provides that women are entitled to “a fair disposition of property that is held jointly with a husband” upon the dissolution of marriage. However, many domestic Courts currently interpret Section 17 of Malawi’s Married Women Property Act, 1882 in a way that property is only held “jointly” if a direct, financial contribution has been made to its acquisition. However, the Act itself does not mandate such an approach. Section 17 of Malawi’s Married Women Property Act, 1882 provides:

> In any question between husband and wife to the title or possession of property, either party… may apply by summons or otherwise in a summary way to any judge of the High Court of Justice and the Judge… may make such order with respect to the property in dispute… as he shall think fit. [emphasis added]

As the Government of Malawi itself has reported, in relation to Malawi’s approach to marital property: “The High Court, on its part, insists that the party who can prove that the title vests in her/him should be given the property. If a party’s claim is based on contributions, Malawi Courts still insist that the contribution must be direct and financial. Housework and indirect contributions are not given any value.” The presumption in the Courts is that “an inference of joint ownership of property is not to be made from a mere fact of marriage. The Courts insist on strict proof of ownership for a spouse to be allocated a piece of property. Any spouse wishing to claim a share in an object of property that is not in her or his name must prove that he or she contributed. The Courts in general have held that the contributions must be financial.

This approach is discriminatory against women because women more often than men make non-monetary contributions to property and perform household and child-rearing labour. Because these contributions are not valued and taken into consideration, husbands can more often claim ownership of the assets that they personally purchased. Property is rarely registered in women’s name and rarely can women prove a direct, economic contribution to its acquisition or maintenance. As a result, women are deprived of marital property upon divorce or the death of their husbands. Not surprisingly, this approach to marital property has been criticized for the hardships and injustices that it is capable of producing, and has many times produced, for women.

**State Obligations to Ensure Women’s Equal Rights to Land and Property**

International law is clear on the protection of women’s land and property rights, including within the context of marriage. Specifically as related to women’s rights to marital property, in its General Comment No. 19 on protection of the family, the right to marriage and equality of the spouses, the Human Rights Committee has underscored that “During marriage, the spouses should have equal rights and responsibilities in the family. This equality extends to all matters arising from their relationship, such as choice of residence, running of the household, education on the point of property distribution as lower Courts did not at that time not have the jurisdiction to deal with civil cases issues relating to monies or property value of over MKW 50,000 (about USD 250). This position has since been changed as the jurisdiction of lower Courts has been increased to 2 Million MKW (about USD 2300).


14 Nyangulu vs Nyangulu 10 Malawi Law Reports 435 per Villiera J.

15 Mtegha vs Mtegha MC No. 9 of 1994.

of the children and administration of assets.”

In its General Comment No. 28 (2000) on equality of rights between men and women, the Committee has also stated that “the capacity of women to own property […] may not be restricted on the basis of marital status or any other discriminatory ground” and that States parties must ensure that the “matrimonial regime contains equal rights and obligations for both spouses with regard to […] the ownership or administration of property, whether common property or property in the sole ownership of either spouse.”

The CEDAW Committee’s General Recommendation No. 29 on the economic consequences of marriage, family relations and their dissolution also provides useful guidance. That General Recommendation specifically recognizes that “[p]roperty distribution and post-dissolution maintenance regimes often favour husbands regardless of whether laws appear neutral, because of gendered assumptions relating to the classification of marital property subject to division, insufficient recognition of non-financial contributions, women’s lack of legal capacity to manage property, and gendered family roles” and states that “States parties are obligated to provide, upon divorce and/or separation, for equality between the parties in the division of all property accumulated during the marriage. States parties should recognize the value of indirect, including non-financial, contributions with regard to the acquisition of property acquired during the marriage.”

Similar equality provisions in the African Charter on Human and Peoples’ Rights and the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (Maputo Protocol) and the recent resolution of the African Commission on Human and Peoples’ Rights, on women’s rights to land and productive resources which urges States parties to “fully comply with their obligations and commitments to ensure, protect and promote women’s right to land and property.”

**Recommendations**

In light of the above information, WLSA-Malawi and the Global Initiative for Economic, Social and Cultural Rights respectfully suggests that the Human Rights Committee urge the State party to take the following measures:

1) Ensure equal division of property is cases of divorce by, *inter alia*, fully recognizing the value of indirect, including non-financial, contributions with regard to the acquisition of property acquired during marriage.

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18 Human Rights Committee, General Comment No. 28 (2000) on equality of rights between men and women, paras. 19, 25. In 1988, the Human Rights Committee issued its judgment in the case of *Avellanal v. Peru*, finding a violation of the Covenant in a case where the petitioner challenged a legal provision stipulating that when a woman is married only the husband is entitled to represent matrimonial property before the Courts (then Article 168 of the Peruvian Civil Code).
21 Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, Adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo, CAB/LEG/66.6 (Sept. 13, 2000), entered into force Nov. 25, 2005. See in particular Articles 7 (separation, divorce and annulment of marriage), 8 (equal protection before the law), 13 (recognition of the economic value of the work of women in the home), 15 (right to food security), 16 (right to adequate housing) and 21 (inheritance rights).
22 ACHPR/Res.262 (LIV) 2013: RESOLUTION ON WOMEN’S RIGHT TO LAND AND PRODUCTIVE RESOURCES, The Gambia, 5 November 2013
2) Remedy negative customs and traditional practices, especially in rural areas, which affect full enjoyment of women’s land and inheritance rights, including by ensuring that local customary leaders and traditional authorities are trained to protect women’s land rights at the community level and receive specific training with respect to the Gender Equality Act of 2013 and the Deceased Estates (Wills, Inheritance and Protection) Act of 2011.

3) Ensure that judges, magistrates, administration officials, police, community leaders, and lawyers are trained to protect women’s land rights at all levels and are held accountable when they fail to do so.