



General Assembly

Distr.: General
21 October 2010

Original: English

Human Rights Council
Working Group on the Universal Periodic Review
Ninth session
Geneva, 1–12 November 2010

**National report submitted in accordance with paragraph 15
(a) of the Annex to Human Rights Council resolution 5/1***

Malawi

* The present document was not edited before being sent to the United Nations translation services.

I. Methodology and consultation process

1. The National Report on Human Rights is a product of a consultative process on the human rights situation in Malawi. The consultations and compilation of this report was coordinated by a team of officials from the Ministry of Justice and the Ministry of Foreign Affairs and the institutions that participated in this process included Government Ministries, the Malawi Human Rights Commission, The Malawi Law Commission, The National Assembly, The Ombudsman and Non-governmental organizations.

II. Country background

2. Malawi is a landlocked country located in South-Eastern Africa. The country borders Tanzania to the north, Zambia to the West, and Mozambique to the South, South East and South West. It has a territory of about 118,484Km², 20 per cent of this territory is taken up by Lake Malawi, which comprises an area of about 24,400 KM². It is a freshwater lake that is indisputably the most prominent topographical feature of the country. Malawi's population was, as at the last census in 2008, estimated at 13.1 million.

A. Political history and structure

3. Malawi attained the status of a British colonial protectorate in 1891. In 1953, Nyasaland as it was then known, became part of the Federation of Rhodesia and Nyasaland, which comprised the territories of Southern Rhodesia (Zimbabwe), Northern Rhodesia (Zambia) and Nyasaland. The Federation was terminated on 31st December, 1962 and self-government was attained in 1963 with Dr. Hastings Kamuzu Banda as the first Prime Minister. The country became an independent nation of Malawi on 6th July 1964 with the British Monarch retained as Head of State.

4. The 1964 Constitution had a Bill of rights which guaranteed human rights. However at the attainment of a Republican status in 1966 when Dr. Hastings Kamuzu Banda became President, the new Constitution removed the Bill of Rights and also created a one party status, with the then ruling party, the Malawi Congress Party, as the sole legally recognizable party.

5. In 1993, through a referendum, the people of Malawi adopted a multiparty system of government and general elections in 1994 ended the three decade rule of Dr. Hastings Kamuzu Banda. Malawi's political transformation was complete with the adoption of a new Constitution in 1994 with a fully fledged Bill of Rights.

6. The 1994 Constitution moved away from presidential supremacy to constitutional supremacy seeking to forestall tyranny whether it be by political will expressed in executive or legislative action. There are three arms of Government namely –

1. The Executive

7. The Executive arm is headed by the President who is the Head of State and Government and can hold office for a maximum of two five year terms. Section 7 of the Constitution provides that the Executive shall be responsible for initiation of policies and legislation.

2. The Legislature

8. The Legislature consists of a single 193 member Chamber with members directly elected by the people of Malawi. Section 8 of the Constitution deals with the responsibilities of the legislature stating that “the Legislature, when enacting laws shall reflect in its deliberations the interests of all the people of Malawi and shall further the values explicit or implicit in this Constitution.” The Legislature has enacted several laws which directly deal with the protection of human rights and good governance.

3. The Judiciary

9. The Judiciary comprises the Supreme Court, the High Court and subordinate courts. The role of the judiciary is crucial in sustaining good governance and the rule of law. The Constitution replaced the doctrine of parliamentary supremacy with constitutional supremacy thereby highlighting the role of the courts in the new Malawi as the primary protectors and final arbiters of constitutional interpretation. Section 9 of the Constitution provides that the judiciary has the responsibility of interpreting, protecting and enforcing this constitution and all laws in accordance with this Constitution in an independent and impartial manner with regard only to legally relevant facts and the prescription of law.

10. The Judiciary is adequately empowered to uphold the supremacy of the Constitution, enforce respect for human rights and declare legislation and other governmental acts null and void.

11. Section 108(2) of the Constitution gives the High Court original jurisdiction to review any law, action or decision of the Government, for conformity with the constitution.

B. Malawi’s development agenda and the vision 2020

12. In the late 1990’s Malawi developed the vision 2020, which was launched in 2000. This policy framework sets out long term development agenda for the country. By the year 2020, Malawi’s vision is that, as a God Fearing Nation, it will be secure, democratically mature, environmentally sustainable, self reliant, with equal opportunities for and active participation by all, having social services, vibrant cultural and religious values and a technologically driven middle-income economy.

13. The main policy frameworks through which Malawi is implementing measures for achieving the Millennium Development Goals (MDGs) are the Poverty Reduction Strategy Paper (PRSP), which was launched in 2002, and the Malawi Economic Growth Strategy (MEGS), which was launched in 2004. The MGDs is the overarching operational medium-term strategy for Malawi designed to attain the nation’s economic and development growth by 2020 by creating wealth through sustainable economic growth and infrastructure development as a means of achieving poverty reduction.

14. The MGDs are implemented through the Government Budget, in line with the Medium Term Expenditure Framework (MTEF) and with the participation of all stakeholders. It is a challenge for all Malawians to embrace this idea and actively participate in the same with the full assistance of the Government.

III. National priorities

15. The country’s national priorities are contained in the Malawi Growth and Development Strategy. Generally, the MGDs recognize the importance of Human Rights within the context of good governance and democracy and as an integral part of the overall national Development Agenda. There are nine key priority areas that were identified in

order to ascertain immediate economic benefits for the people of Malawi, namely, agriculture and food security; green-belt irrigation and water development; education, science and technology; transport infrastructure and Nsanje world inland port; climate change, natural resources and environmental management; integrated rural development; public health, sanitation, HIV and AIDS management; youth development and empowerment; and, energy, mining and industrial development.

16. There are five broad thematic areas that demand immediate progress if the overall strategy is to be successful namely - sustainable economic growth, social protection, social development, infrastructure development, and improved governance. The strategy of government is that accelerated and sustainable growth be the main focus while outlining steps to ensure social development, good governance and environmental sustainability. If these areas attain progress, prosperity, poverty reduction and achievement of Millennium Development Goals (MDGs) will be fulfilled.

IV. Human rights framework

17. The Constitution is the supreme law of the land. It provides for the full protection and enjoyment of human rights. The Constitution contains a Bill of Rights which drew inspiration from major international human rights instruments including the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, as well as the African Charter on Human and Peoples Rights. Prominent in the Bill of Rights is the right to life, the prohibition of torture, cruel, inhuman or degrading treatment or punishment and a cluster of fair trial rights.

18. The Constitution, in line with prominent international human rights instruments, permits derogation during a state of emergency with respect to freedom of expression, freedom of information, freedom of movement, freedom of assembly. The right to be promptly brought before a court of law, and not to be detained without trial, is also subject to derogation. Such derogation however, has to be consistent with Malawi's obligation under international law. In addition, all derogation measures, such as the detention of suspects without trial are subject to applications and challenges in the High Court.

19. The Constitution enhances the position of international law regarding its domestic application, which was lacking in the 1966 Constitution. Section 211(3) provides that customary international law shall form part of the law of Malawi. Courts take into account current norms of public international law and comparable foreign case law when interpreting the constitution. The judiciary is sufficiently empowered to apply international human rights standards.

20. The Constitution has established several independent human rights institutions charged with the task of promoting, protecting and monitoring the enjoyment of human rights and freedoms. The institutions include the following-

A. The Human Rights Commission

21. The Human Rights Commission is an independent body established under section 129 of the Constitution, mandated to investigate and make recommendations reasonably necessary for the effective promotion of human rights. The Commission has the power to study legislation, judicial decisions, administrative provisions, Bills and administrative proposals, to ensure that they are in conformity with fundamental principles of human rights. In exercising this mandate, the Commission receives complaints and conducts investigations and hearings in cases of human rights abuses.

B. Office of the Ombudsman

22. The Office of the Ombudsman is established under section 120 of the Constitution. It is independent of the interference or direction of any person and is answerable to Parliament. It has the powers to investigate any case where it is alleged that a person suffered injustice and it does not appear that there is any remedy available by way of proceedings in court, by way of appeal from a court or where there is no other practicable remedy. The powers of the Ombudsman do not oust the jurisdiction of the court and his decisions are subject to review by the High court. For the first time in the history of the country, a female Ombudsman has just been appointed into Office.

C. The Law Commission

23. The Law Commission is established under section 132 of the Constitution to review the laws of Malawi in conformity with the Constitution and applicable international law. The goals of the Commission include the modernization of laws, the elimination from the laws of any defects, whether of a procedural, substantive or policy nature, simplification of the law so that society is organized and governed within a proper legislative framework that guarantees the rule of law, good governance and respect for human rights.

V. Status of human rights treaty implementation

A. Civil and political rights

1. The right to Life

24. The Constitution provides that everybody has the right to life and shall not be arbitrarily deprived of his or her life but that the execution of the death penalty imposed by a court of competent jurisdiction shall not be deemed as arbitrary deprivation. The High Court of Malawi in the case of Republic versus Kamfantayeni, ruled that mandatory death penalty in capital offences violates the right to life. The effect of the ruling is that the death penalty is no longer mandatory. This interpretation has already been incorporated in the Penal Code Bill which will be passed by Parliament soon.

2. The right to liberty, freedom of movement, religion and association

25. Every person has the right to personal liberty. This right has been enforced by courts and there have been several cases where the courts have ordered compensation for false imprisonment. Section 39 of the Constitution also guarantees the freedom of movement and residence for all persons within the borders of Malawi.

26. Every person has the right to freedom of conscience, religion, belief and thought and to academic freedom. The enjoyment of this right is evidenced by the diverse range of religious practices in the country. The Jehovah's Witnesses are no longer prohibited as was the case before the multiparty dispensation. Religious associations are recognized by government and are often involved in many spheres of Government work and their views are sought in some policy formulation.

3. Freedom of assembly and association

27. Freedom of assembly and association are guaranteed under section 38 and 32 of the Constitution respectively. Every person in the country is allowed to assemble freely and associate with any person for legitimate purposes.

28. As in any democratic country, these rights may be limited taking into account the interests of national security, public safety, public order, morality or health.

4. Right to fair trial

29. The Constitution provides for a cluster of fair trial rights. In order to ensure to realization of these rights, several steps have been taken which include the amendment of the Criminal Procedure and Evidence Code which provides for pretrial custody time limits to prevent prolonged detention of suspects before trial.

30. The Government now takes a part in funding of homicide cases which were previously supported by cooperating partners. Government has taken the initiative to ring fence funds not only in the Directorate of Public Prosecutions but also in the Judiciary and Department of Legal Aid. This is aimed at reducing the backlog of homicide cases and reduces the number of people on remand in prisons. The Legal Aid Department provides legal representation to accused persons in all capital offences.

5. Torture and cruel, inhuman or degrading treatment or punishment

31. Section 19 of the Constitution provides that the dignity of all persons shall be inviolable and that no person shall be subjected to torture of any kind or to cruel, inhuman or degrading treatment or punishment.

32. Malawi is party to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or punishment. Corporal punishment in connection with any judicial proceedings or in any other proceedings before any organ of the state is also proscribed under the laws of Malawi.

6. Elimination of Racial Discrimination and Gender Equality

33. The Constitution prohibits discrimination in any forms 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. The Constitution, however, allows for positive discrimination to address inequalities in society and prohibiting discriminatory practices and the propagation of such practices. Any person that propagates discriminatory practices may be amenable to criminal sanctions before the courts of law.

34. Malawi ratified the International Convention against Racial Discrimination and the Convention on Elimination of Discrimination against Women. In light of the disparities that exist between what is contained in the Constitution, applicable international instruments and what is obtaining on the ground, the Government, through recommendations of the Malawi Law Commission, is introducing policies that prohibit harmful social and cultural practices that perpetuate the subservice of women and which invoke exploitative sexual relations. It recommends that employment in the public service of women be not less than 40 per cent in any department and that there be equality in access to education and training, including scholarships. It also recommends taking active measures that ensure the enrolment at tertiary education institution of either sex to a minimum of 40 per cent. These recommendations will be incorporated into a Gender Equality Bill for consideration by Cabinet before being tabled in Parliament.

35. Intermarriages between tribes are allowed and local languages are also permitted as a government policy to be used in Primary schools until the pupils reaches standard 3 when English becomes a formal medium of teaching.

7. Freedom of movement

36. Every person has the right to freedom of movement and assembly. This applies to all citizens of Malawi and foreigners with proper documentation as well. Refugees are restricted to living in camps unless they are granted a residence permit. Malawi strictly enforces this requirement as it also made a reservation in respect of Article 26 of the 1951 Convention Relating to the Status of Refugees.

8. Prison reforms

37. The government recognizes that a prisoner is entitled to the enjoyment of basic and fundamental human rights. As such, it has embarked on several programmes that are aimed at reforming prison service in the country. New prisons are being built to reduce congestion and those prisons that do not meet international standards on sanitation and hygiene are being closed. The biggest challenge for the country is overcrowding and poor prison conditions which is a result of human and financial resource constraints. Efforts are being made to reduce this situation by promoting alternative modes of enforcing justice in the country.

38. The High Court in the case of Gable Masangano and others versus Attorney General highlighted the need for improvement of prison conditions. In response, government has taken measures which include a draft Prison Bill to replace the current Prison Act and has embarked on programmes toward general improvement of prison conditions. A model prison was built in Mzimba in northern Malawi.

9. Police reforms

39. The Police Act passed in 2009 establishes a new legal framework for the operations of the Malawi Police Service. The Act establishes the Office of an Independent Complaints Commission to investigate complaints of brutality, deaths or misconduct at the hands of the police. It also creates a Lay Visitors Scheme which is a team of local people at every police station mandated to inspect conditions of detention at police stations.

10. Good governance and corruption

40. In its efforts to fight corruption, the Government has set up the Anti-Corruption Bureau in 1998 which is an independent organ of the state. It has the mandate to investigate and prosecute corruption, abuse of office and other criminal cases related to corruption. There have been several cases where prominent personalities have been prosecuted for corruption.

B. Economic social and cultural rights

1. Right to development

41. The Constitution, in section 30 provides that all persons and peoples have the right to economic, social and cultural development and the enjoyment of economic, social and cultural development and women, children and the disabled are given special consideration in the enjoyment of this right. To ensure the enjoyment of this right, the Government has formulated policies and taken steps to raise the living standards of the people of Malawi. These include, the Fertilizer Subsidy Program, the Green Belt Project.

42. The Ministry of Gender, Children and Community Development has the mandate to promote the welfare of and protection of women and children who are the back bone in developmental issues. In that regard, the Government makes provision on child development and welfare and community development. In order to reach a wide range of

the citizenry and full participation of the target beneficiaries, implementation of projects in these areas are generally community based. These projects, however, face resource constraints, financial, material and human challenges.

2. Right to education

43. The Government introduced free primary education to allow all children attend and go through primary education. Since 1994, there has been a steady rise in the number of children enrolled in primary schools.

44. Private schools and other private institutions of higher learning are permissible provided that such schools or institutions are registered and comply with the legal requirements in the education sector. The Government has a responsibility to ensure that standards maintained by private schools or institutions are not inferior to official standards in State schools.

45. University education is heavily subsidized by the Government. Students get scholarships which they repay after completion of their degrees. The biggest challenges facing our Government are financial and human constraints.

3. Right to health

46. The vision of the Government through the Ministry of Health is the improved status of Malawians through the provision of effective, efficient and safe health care.

47. The right to health is implemented through the Essential Health Package (EHP). This package contains the priorities of the Ministry which addresses major causes of morbidity and mortality that disproportionately affect the poor and most vulnerable groups in society. It is delivered in the context of sectors wide approach (SWAP). In this approach, all stakeholders in the health sector implement a single program but an inherent principle of the EHP is equal opportunity of access and utilization of EHP services for individual with equal need.

48. Right to health is one of the main priority areas of the Government in its vision 2020 and the Government, currently implements a policy of free health care to all Malawian citizens.

49. Priority areas in the field of health include the reduction of maternal deaths and improving the reproductive health of every pregnant woman.

50. The Government has also integrated human rights in its policies and strategies as enumerated in the National Health and the Sexual and Reproductive Health and Rights Policies which gives access to all the people of Malawi to health care without distinction of ethnicity, gender, disability, religion, political affiliation, economic status, social circumstances or geographical location. There is a Charter of Rights for patients which has been introduced and is being applied in all major Government hospitals.

51. A challenge remains to ensure that both medical personnel and patients are fully aware of their rights and obligations. The Government continues to make efforts in integrating human rights in the health sector.

4. Right to work and employment

52. The Constitution, in section 31, provides that every person has the right to fair and safe labor practices and remuneration. Any individual in the country can therefore take up any employment and is also free to form and join trade unions.

53. The Ministry of Labour is charged with the responsibility of ensuring that there is social justice, peace and skills assessment as a prerequisite for poverty reduction and economic growth in the country.

54. The country is a party to numerous International Labor Conventions.

55. The Industrial Relations court was established to adjudicate on all labor related matters and complies with ILO standards in implementing the law on employment and labour.

5. Children's rights

56. The Constitution provides that all children regardless of circumstances of their birth are entitled to equal treatment before the law. They are entitled to be protected from economic exploitation or any treatment, work or punishment that is likely to be hazardous, interfere with their education or be harmful to their health or to their physical, mental or spiritual or social development.

57. Malawi is a party to the Convention on the Rights of the Child and has also ratified the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict and the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and child Pornography.

58. The Government has also introduced several policies and measures aimed at protecting orphaned children since they are vulnerable members of the society. The government instituted the Ministry of Gender, Children and community Development to promote the welfare and protection of women and children. The Ministry through the Child development and welfare department strengthens the capacity of families and communities to provide support, care and protection to vulnerable children, the aged, marginalized families and those affected by HIV/AIDS.

59. Despite all these efforts, the Government realizes that challenges are still abound as violation of children's rights seems to continue. Lessons continue to be learned so that effective measures to curtail this problem can be eradicated. For example, the Children and Young Persons Act, which was considered by the Law Commission to be obsolete in view of developments in the area of child justice, was repealed. This was replaced by the Child Care, Protection and Justice Act 2010 which consolidates the law relating to children. The Act seeks to improve child care and protection systems by giving duties and responsibilities of parents toward their children, among others.

60. In order to ensure protection of violation of children's rights, the Act establishes Child Justice Courts which are actively adjudicating over children matters and promotes diversion and prohibits unnecessary detention of children.

6. Women's rights

61. The constitution provides that 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 and marital status which include the right to be accorded the same rights as men in civil law.

62. The Government has put in place a policy to increase the number of women in positions of power and influence. For example, a significant number of high profile offices are held by women, such as the Vice President, Attorney General, Chairperson of the Electoral Commission, the Ombudsman, the Clerk of Parliament, the Law Commissioner, the Chief Legislative Counsel, and the Administrator General. The total number of female Members of Parliament is forty-three out of a total of one hundred and ninety three Members of Parliament.

63. The Law Commission has reviewed laws perceived to be gender insensitive and discriminatory. This review has resulted into The Marriage, Divorce and Family relations Bill.

7. Culture

64. The Constitution in section 26 provides that every person has the right to use language and to participate in the cultural choice of his or her choice. Malawi is a country with rich and diverse culture and values which makes each tribe distinct from the others. Although there are several tribes, these coexist in harmony and the country has not experienced tribal wars so far which is an indication of the citizen's respect for the rights to culture of others

65. Government realizes that culture has a significant bearing on development of the country. The Constitution, in Section 26, provides that every person has the right to use the language and to participate in the cultural life of his choice. The country promotes the enjoyment of culture by its citizens. This is witnessed by the formation of numerous associations that promote their Heritage and there are several cultural and traditional dance troupes.

VI. International human rights instruments and treaty domestication

66. Malawi attaches great importance to the promotion and promotion of human rights as universally shared principles and norms enshrined in the United Nations Charter, the Universal Declaration of Human Rights and other relevant human rights instruments. Malawi has ratified the International Human Rights Treaties listed in Schedule A.

67. All international agreements entered into by Malawi before 1994 are part of the law of Malawi. However all other international instruments ratified by Malawi since 1994, require to domesticated by an Act of Parliament in order to be part of the laws of Malawi.

VII. Challenges and constraints

68. Despite the various efforts made to ensure the realisation of human rights of its citizens, Malawi still faces the following major challenges.

A. Poverty

69. The majority of the population is below the poverty line and live in rural areas. This part of the population is more concerned with basic rights such as the right to food, at the expense of other economic, social and cultural rights, like the right to education. This does have a bearing on the literacy levels in the country as some children end up dropping out of school with the encouragement of their parents so that they seek employment as a means to sustain themselves and their families.

B. Weak institutions

70. There is still need to strengthen government institutions. The main challenge in this area has remained the inability to retain human resource. This has had an impact on the continuity of in the progress of work.

71. Due to low remuneration packages, some institutions are affected by corruption, however, where this has been reported, the law has taken its course.

C. Lack of Public Awareness

72. The key areas of concern in human rights awareness are the rights of vulnerable groups and how to exercise them, and the roles of governance institutions in promotion and protection of human rights. Efforts continue to be made to make the public aware of their human rights. This work is done by both government institutions and civil society.

VIII. Conclusion

73. The Government of Malawi is committed to the promotion and protection of Human Rights at the national and International levels. There is still much to be done to ensure practical enjoyment of human rights for all Malawians.

74. The Republic of Malawi views its participation at the UPR process as an opportunity to interact and share with our nationals and fellow members of the Human Rights Council our accomplishments, challenges and indeed vision for the future on human rights. The Republic of Malawi welcomes any observations, suggestions, comments or recommendations that can help the country achieve its human rights aspirations.

Schedule

The following are some of the conventions to which Malawi is a Party:

1. Slavery Convention and its amending protocol;
 2. Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institution and Practices similar to Slavery;
 3. African Charter on Human and Peoples Rights;
 4. Protocol relating to the Status of Refugees;
 5. International Convention on Civil and Political Rights;
 6. International Convention on Economic, Social and Cultural Rights;
 7. Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment;
 8. International Convention on the Elimination on the Elimination of All Forms of Racial Discrimination;
 9. Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict;
 10. Optional protocol to the Convention on the rights of the Child on the Sale of Children, Child Prostitution, and Child Pornography;
 11. Convention on the Elimination of All forms of All Forms of Discrimination against Women;
 12. Convention on the Rights of the child;
 13. International Convention on the Rights of Persons with Disabilities;
 14. African Charter on Human and Peoples Rights;
 15. African Charter on the Rights and Welfare of the Child;
 16. Protocol to the African Charter on Human and Peoples Rights on the Establishment of the African Court on Human and Peoples Rights;
 17. Protocol to the African Charter on Human and Peoples Rights on the rights of Women in Africa.
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