



REPUBLIC OF MALAWI

**REPORT TO THE AFRICAN COMMISSION ON HUMAN AND
PEOPLES' RIGHTS**

**IMPLEMENTATION OF THE AFRICAN CHARTER ON HUMAN AND PEOPLES
RIGHTS**

1995-2013

AND

**THE PROTOCOL TO THE AFRICAN CHARTER ON HUMAN AND PEOPLES
RIGHTS ON THE RIGHTS OF WOMEN**

2005-2013

PART A- THE AFRICAN CHARTER ON HUMAN AND PEOPLES’ RIGHTS

Introduction

1. This report was prepared in line with Article 62 of the African Charter on Human and Peoples Rights (the Charter). Malawi acceded to the Charter in 1989. This is Malawi’s initial report covering the period from date of accession to the present. Part A of the Report was prepared by a National Task Force chaired by the Ministry of Justice and Constitutional Affairs. Members of the Task Force included, Ministry of Foreign Affairs, Office of the President and Cabinet, Ministry of Finance, Ministry of Information, Ministry of Education, Ministry of Lands, Ministry of Internal Security, the National Assembly, the Judiciary, the Law Commission, the Human Rights Commission, the Ombudsman, Malawi Police Service, Malawi Prison Service, the Anti-Corruption Bureau and National Statistics Office. Civil Society organizations were also represented on the Task Force by the Human Rights Consultative Committee, and the Public Affairs Committee.
2. Part B of the Report comprises the African Protocol on the Rights of Women. The information in this report was compiled as Malawi prepared her Report under the Convention on the elimination of all forms of Discrimination against Women (CEDAW) which will be submitted by early 2014.

Historical Background of Malawi

3. Malawi was known as Nyasaland and was colonised by Great Britain prior to attaining her political independence. Nyasaland was declared a British colonial protectorate in 1891. In 1953, Nyasaland became part of the Federation of Rhodesia and Nyasaland which also comprised of the territories of Southern Rhodesia (Zimbabwe) and Northern Rhodesia (Zambia). The Federation ended on 31st December 1962, and Nyasaland attained self-government in 1963 with Dr. Hastings Kamuzu Banda as her first Prime Minister. Nyasaland became an independent nation of Malawi on 6th July 1964 with the British Monarch retained

as Head of State. At independence in 1964, Malawi adopted a Constitution which provided for a Bill of Rights.

4. Malawi became a full Republic in 1966 with Dr. Hastings Kamuzu Banda as her President. Malawi became a one party state with the Malawi Congress Party, as the sole legally recognizable party. On becoming a Republic, a new Constitution was adopted which did not contain a Bill of Rights. Having become a one party autocracy, and in the absence of a mechanism to monitor the respect and fulfilment of human rights, serious violations occurred against the population for almost thirty years. In 1971, President Kamuzu Banda was made President for life.
5. Political change began in March, 1992 upon the publication of a pastoral letter by Catholic Bishops entitled, *Living our Faith*. This was followed in April 1992 by the arrival into Malawi of Chakufwa Chihana a trade unionist, whose sole mission was to challenge the established autocracy. He was arrested on arrival, tried for sedition and imprisoned after conviction. As pressure mounted on Government to introduce political change, President Banda announced a referendum in which Malawians were to decide whether they wanted to continue under the one-party State or wanted political pluralism.
6. The referendum was held on 14th June 1993 and the nation voted in favour of political pluralism. Government accepted the result and started the process of transformation into pluralistic politics which culminated in the first Multiparty General Elections on 17th May, 1994. At the General Elections, the main parties contesting were Alliance for Democracy (Aford), which had its stronghold in the Northern region and led by Chakufwa Chihana; Malawi Congress Party (MCP) led by the incumbent President, Dr. H. Kamuzu Banda with its stronghold in the Central region; and the United Democratic Front (UDF), which had a large following in the populous Southern region under the leadership of Mr. Elson Bakili Muluzi.
7. Mr. Bakili Muluzi and the UDF won the elections and formed Government. The UDF won the subsequent two General Elections, first under Bakili Muluzi in 1999; and under Dr. Bingu wa Mutharika in 2004. The UDF was abandoned by Dr. Bingu wa Mutharika

in 2005 and he formed the Democratic Progressive Party (DPP). In the fourth General Elections in 2009 the DPP secured a landslide majority with President Bingu wa Mutharika at its helm. Bingu wa Mutharika died on 5th April 2012 and was succeeded by the then Vice President, Mrs Joyce Banda who is the current head of State

Geography

8. Malawi is a sub-Saharan African country located south of the equator. It is bordered in the North and Northeast by the United Republic of Tanzania; in the East, South, and Southwest by the Republic of Mozambique; and in the West and Northwest by the Republic of Zambia. The country is 901 kilometres long and 80 to 161 kilometres wide. The total area is approximately 118,484 square kilometres, of which 94,276 square kilometres is land. The remaining area is mostly composed of Lake Malawi, which is about 475 kilometres long and delineates Malawi's eastern boundary with Mozambique. Malawi's most striking topographic feature is the Rift Valley, which runs the entire length of the country, passing through Lake Malawi in the Northern and Central Regions to the Shire Valley in the South. The Shire River drains the water from Lake Malawi into the Zambezi River in Mozambique. To the West and South of Lake Malawi lie fertile plains and mountain ranges whose peaks range from 1,700 to 3,000 metres above sea level.
9. The country is divided into three regions: the Northern, Central, and Southern Regions. There are 28 districts in the country. Six districts are in the Northern Region, nine are in the Central Region, and thirteen are in the Southern Region. Administratively, the districts are subdivided into traditional authorities (TAs), presided over by chiefs. Each TA is composed of villages, which are the smallest administrative units, and the villages are presided over by village headmen.

Demography

10. The most recent Population and Housing Census was conducted in June 2008, making it the fifth post-independence census. The population has grown from 4,039,583 in 1966 to 13,077,160 in 2008, an increase of 9 million. The 2008 census results show that 2.8 million people were aged under-five years and about 6.0 million were aged 18 years or more. At national level the census results reveal that about 7 percent of the total population comprised of infants aged less than 1 year, 22 percent were aged under-five years and about 46 percent were aged 18 years or older, while a further 4 percent were aged 65 years or older. The median age of the population is 17 years.

Economy

11. The economy of Malawi is based primarily on agriculture, which accounts for 30 percent of the gross domestic product (GDP). The country's major exports are tobacco, tea, and sugar. They account for approximately 85 percent of Malawi's domestic exports. In 2000, Malawi launched Vision 2020 as a policy framework setting out long term development agendas for the country. The vision stated that by the year 2020, *Malawi, 'as a God Fearing Nation, 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'*.

12. The Malawi Growth and Development Strategy 2006 to 2011 (MGDS I) was 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. MGDS 1, entitled From Poverty to Prosperity: 2006-2011 identified five thematic areas that are crucial to the success of the overall strategy, namely: sustainable economic growth, social protection, social development, infrastructure development, as well as improved governance. MGDS I recognised that any social economic development hinges to a very large extent on good governance stating at page 60 that:

“The success of the strategies suggested... depends much on the prevalence of good governance. The main tenets of good governance are issues to deal with good public sector management, absence of corruption and fraud, decentralization, justice and rule of law, security, good corporate governance, and respect of human rights. In addition, the need for political will and change of mindset within a democratic political environment is also envisaged to contribute positively towards the attainment of economic prosperity and poverty reduction. Malawi will, therefore, endeavour to address concerns in these areas as they underpin the achievement of all economic growth and social development objectives in the medium term.”

13. MGDS I has been used for the implementation of the Millennium Development Goals (MDGs). MGDS II which runs from 2011 to 2016 was approved by Cabinet in April 2012. MGDS II is based on six thematic areas. These are: Sustainable Economic Growth; Social Development; Social Support and Disaster Risk Management; Infrastructure Development; Governance; and Gender and Capacity Development as an additional theme. From these themes, the MGDS II derives nine key priority areas which are central to the achievement of sustainable economic growth and wealth creation. These key priority areas are: Agriculture and Food Security; Energy, Industrial Development, Mining and Tourism; Transport Infrastructure and Nsanje World Inland Port; Education Science and Technology; Public Health, Sanitation, Malaria and HIV and AIDS Management; Integrated Rural Development; Green Belt Irrigation and Water Development; Child Development, Youth Development and Empowerment; and Climate Change, Natural Resources and Environmental Management.

Constitutional, Legal and Human Rights Structure

14. The dawn of multiparty politics in 1993 necessitated the revision of the Constitution in order to delegitimize the one party Government and accommodate other political players. In May, 1994, a new Constitution was adopted provisionally for one year. The provisional Constitution transformed relations between the individual and the State; and

relations between State institutions. The former was accentuated by the adoption of principles of National Policy and a Bill of Rights, among other things while the latter was reinforced through the entrenchment of the doctrine of separation of powers between State organs – the Executive; the Legislature and the Judiciary. The system of Government moved from Parliamentary Supremacy to Constitutional Supremacy under section 5 which provides that:

“Any act of Government or any law that is inconsistent with the provisions of this Constitution shall, to the extent of such inconsistency, be invalid

The Constitution came definitely into force in May, 1995 and established the three organs of Government namely the Executive, the Legislature and the Judiciary.

15. **The Executive:** Section 7 of the Constitution provides that the Executive shall be responsible for initiation of policies and legislation and implementation of all laws which embody the express wishes of the people of Malawi and promote the principles of the Constitution. It comprises of the President and Cabinet. The President is responsible for providing executive leadership in the interest of national unity in accordance with the Constitution and the laws of the Republic. The President is Head of State and Government and Commander-in-Chief of the Defence Force. Under Section 88(1) of the Constitution, the President is responsible for the observance of the Constitution by the Executive arm of Government and, is also required to defend and uphold the Constitution as the supreme law of the land.
16. The Presidency consists of the offices of the President; Vice President and the Second Vice President. The Office of the President is established under Section 78 of the Constitution while that of the Vice President is established under Section 79. Section 79 of the Constitution requires the Vice President to assist the President and exercise the powers and perform the functions conferred on him or her, as the case may be, by the Constitution or by any Act of Parliament, and by the President. The holder of the of the office of the Presidency or Vice Presidency may hold office for a maximum of two consecutive five year terms.

17. Cabinet is established under Section 92(1) of the Constitution and consists of the Presidency and such Ministers and Deputy Ministers as may, from time to time, be appointed by the President. Cabinet is appointed to advise the President; to direct, co-ordinate and supervise the activities of Government departments, including parastatal bodies; to initiate Bills for submission to the National Assembly and to explain those Bills; to prepare, explain and formulate for the Parliament the budget of the State and its economic programmes; to be available to Parliament for the purposes of answering any queries or participating in any debate pertaining to the content of the policies of the Government; to assist the President in determining what international agreements are to be concluded or acceded to and to inform Parliament thereon; to take responsibility for the implementation and administration of laws; and to carry out such other functions reasonably necessary for the performance of their duties in accordance with this Constitution, as may be prescribed by an Act of Parliament or the President.

18. **The Legislature:** The Legislature, in 1994, consisted of the President, the National Assembly and the Senate. The Senate was never established and was formally dissolved in 2001. The Legislature, presently, comprises the National Assembly and the President as Head of State. The National Assembly comprises a 193-member Chamber with members directly elected by the people of Malawi in accordance with the Constitution and relevant electoral law. Under section 62 of the Constitution, the numbers of seats in the National Assembly represent every constituency in Malawi as determined by the Electoral Commission. The responsibility of the National Assembly is to enact laws and ensure that its deliberations reflect the interests of the people of Malawi and that the values of the Constitution are furthered by the laws enacted.

19. Although the Constitution has not made it explicit, the National Assembly is headed by the Speaker who has two deputies. The Speaker is elected by a majority vote of members at the first sitting after every dissolution of the National Assembly. The office of the Speaker is independent and as such, is expected to discharge its functions and duties independent of the direction or interference of anybody or authority, expect in accordance

with the provisions of the Standing Orders of the National Assembly. The Speaker's main function is to preside over sittings of the National Assembly. Parliament transacts its business through Motions and Bills. Members of Parliament (MPs) have an opportunity to influence legislation through debates, particularly in Parliamentary Committees where Bills are sometimes referred to after the First Reading in the House. At the relevant Parliamentary Committee, any MP or other interest groups can make proposals for amendments for consideration by the house at the appropriate time. Parliament may also initiate legislative reforms through Private Members' Bills under section 66 (1) (b). These proposals are supposed to be in line with the national development agenda. Parliament also has powers of oversight over public funds as empowered by the Constitution.

20. This oversight function gives Parliament the power to regulate and monitor Government expenditure of public resources through the budgetary process. It approves the annual budget among other oversight roles in holding the Government accountable for its policies and administrative practices regarding use of public funds in developing the nation. To this end, Parliament is empowered to approve Government expenditure annually. Members of Parliament have the responsibility to consider debate and pass the financial estimates (budget) including taxation measures for raising revenue to finance public development programmes/projects presented by the Executive. This means that Parliament has a role in ensuring that sufficient resources are allocated to Government departments in order to achieve good governance and national development.
21. **The Judiciary:** Prior to 1994, there existed in Malawi a traditional courts system which ran parallel to the High Court structure. The traditional courts were established by the Traditional Courts Act, which was not repealed after the adoption of the 1994 Constitution but the traditional courts were suspended. The traditional courts remained suspended until the enactment of the Local Courts Act in 2011. The suspension of the traditional courts in 1994 was largely based on section 103(3) of the Constitution which prohibits the establishment of courts with superior or concurrent jurisdiction with the Supreme Court of Appeal or High Court'. The role of the judiciary is to interpret, protect

and enforce the Constitution and all laws in accordance with the Constitution in an independent and impartial manner having regard only to legally relevant facts and the prescriptions of law.¹

22. The judiciary is adequately empowered to uphold the supremacy of the Constitution, to enforce respect for human rights and to declare null and void legislation and other governmental actions which are contrary to the Constitution. To effectively carry out this mandate, the courts have to be vigilant and bold. In the words of Kapanda J in Jumbe and Mvula v Attorney General (Constitutional Cases 1 and 2 of 2005):

‘...Unless the courts maintain their vigilance the State will not be stopped in its adventure of trampling on people’s rights...’

The judiciary comprises, in order of precedence, of the Supreme Court of Appeal, the High Court and subordinate courts, namely the Industrial Relations Court, Magistrate Courts and Local Courts. The Supreme Court of Appeal, as established under section 104 of the Constitution, is the highest appellate court in Malawi and has no original jurisdiction in any matter. The Supreme Court of Appeal is a superior court of record and may exercise any powers conferred on it by the Constitution or any other law. Appeals lie to the Supreme Court of Appeal from the High Court or any tribunal prescribed by an Act of Parliament. The judiciary is administratively divided into registries at High Court level and for courts subordinate thereto. The Principal Registry of the High Court is in Blantyre in the Southern region, The Zomba District Registry in the Eastern region, Lilongwe District Registry in the Central region, and Mzuzu District Registry in the Northern region complement the structure. Each High Court Registry is headed by the most Senior Judge known as Judge President.

¹ See section 9 of the Constitution.

23. The High Court has unlimited original jurisdiction to hear and determine any civil or criminal matter under any law. Beyond the dual original and appellate jurisdiction of the High Court, the High Court also exercises general supervisory powers over subordinate courts and can review decisions of Magistrate courts at any stage of proceedings in the lower court. In addition the court is required to confirm decisions of magistrate courts in exercise of the courts supervisory powers. Of late, the High Court has over and above the General Division, established through legislation, the Commercial Division which exclusively deals with commercial matters and the Constitutional Division which presides over disputes of a constitutional nature. Section 110(1) of the Constitution permits the existence of courts subordinate to the High Court if prescribed by an Act of Parliament. The Magistrate's courts may be presided over by professional or lay magistrates. Section 110 (2) of the Constitution provides for the creation of the Industrial Relations Court, subordinate to the High Court, which has original jurisdiction over labour disputes and such other issues relating to employment.
24. The Local Courts Act establishes Local Courts with a jurisdiction to preside over minor criminal cases. These courts established under the authority of the Constitution are intended to improve access to justice, in terms of primary justice, as they shall be easily accessible to people in rural areas.
25. The **Human Rights Commission** is an independent body established under section 129 of the Constitution with the Human Rights Commission Act as the enabling law. The Commission is 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.
26. **The Office of the Ombudsman** is one of the Constitutional bodies created by the 1994 Republican Constitution and Ombudsman Act No. 10 of 1996. The office commenced its operations in 1995.

Section 123 (1) of the Constitution states that:

"The office of the Ombudsman may investigate any and all cases where it is alleged that a person has suffered injustice and it does appear that there is any reasonable remedy available by way of proceedings in a court of law or by way of appeal from a court or where there is no practicable remedy."

Section 5 (1) of the Ombudsman Act states as follows:

"Subject to the Constitution, the Ombudsman shall inquire into and investigate in accordance with the provision of this Act and take such actions or steps as may be prescribed by this Act on any request or complaint in any instance or matter laid before the Ombudsman in accordance with Section 7(1) or (2), and concerning any alleged instance or matter of abuse of power or unfair treatment of any person by an official in the employ of any organ of Government, or manifest injustice or conduct by such official which would properly be regarded as oppressive or unfair in an open and democratic society."

Section 8(1) of the Ombudsman Act goes on to state that:

"The Ombudsman shall after holding any inquiry or investigation in accordance with this Act-

- (a) notify the person who laid the matter before him under section 7(1) or (2) of the outcome of such inquiry or investigation, in such manner and form as the Ombudsman may determine and to such extent as the Ombudsman may deem necessary or appropriate in the public interest, or that the matter will not be inquired into or investigated in accordance with section 7(3)*
- (b) take appropriate action or steps to call for or require the the remedying or reversal of matters or instances specified in section 5 through such means as are fair, proper, and effective, including by-*
 - i. Negotiation and compromise between the parties concerned;*
 - ii. Causing the complaint and the ombudsman's finding thereon to be reported to the superior of an offending person;*

iii. Referring the matter to the Attorney General or the Director of Public Prosecutions or both, as the case may be.

(2) The Ombudsman may, but without derogating from any organ of the provisions of subsection 1(b) if he is of the opinion that any instance or matter inquired into or investigated by him under section 5 can be rectified or remedied in any lawful manner, notify the organ of government his findings and the manner in which the matter can be rectified or remedied.”

27. The Ombudsman compliments the work of the courts as an Alternative Dispute Resolution (ADR) mechanism. However section 123 (2) of the Constitution expressly states that, the powers of the office of ombudsman do not oust the jurisdiction of the courts. . The office is there to promote good governance, access to justice and respect to the rule of law. It is a watchdog against any acts of maladministration by public officials and institutions. The office resolves most of its cases through ADR but where matters are complex or there is lack of co-operation from the respondents, matters are resolved through public inquiries after which the Ombudsman issues a determination. Any dissatisfied party may to appeal to the High Court within three months for review of the Ombudsman’s decision.

28. Ever since its establishment, the Office has received complaints from the general public through various means including letters, telephone, e-mail and walk-ins. The majority of the complaints are received through people walking in. At the beginning of 2011, the office had 2962 active files as established by a File Audit conducted in March 2011. In the course of the year, the office received 537 new complaints, bringing the total of active files to 3499. A total of 702 files were resolved through ADR mechanisms which was a record in the history of the office, and 33 determinations were issued. On 31st December, 2011, the office had 2797 active files. Over the years, the five top most respondents have been the Ministry of Education, Science and Technology; the Malawi Police Service; the Ministry of Health, the Ministry of Local Government and Rural Development; and the Ministry of Agriculture and Food Security. Below is a table showing the number of complaints received against each of these institutions between 2009 and 2011.

Table 1

	Respondent/Ministry	2009	2010	2011
1	Education, Science and Technology	97	110	91
2	Malawi Police Service	64	60	31
3	Health	49	38	30
4	Local Government and Rural Development	25	33	22
5	Agriculture and Food Security	48	37	20

The nature of cases received could be put into five major categories of: manifest injustice, unfair treatment or practice, abuse of power or discretion, oppressive conduct and breach of rules of natural justice as shown below.

Table 2

	Nature of Complaints Received	2009	2010	2011
1	Manifest Injustice	626	372	214
2	Unfair Treatment/Conduct/Practices	268	175	138
3	Abuse of Power/Discretion	32	2	16
4	Oppressive Conduct	83	2	51
5	Breach of Rules of Natural Justice	17	3	6
		1026	554	425

Over the years, some of the determinations made by the Ombudsman have not been complied with which has negatively impacted on people's right to access justice. The statistics are as shown in the table below. Enforcement of determinations is difficult because implementation relies on goodwill since the Ombudsman has no powers to enforce his decisions.

Table 3 Status of Determinations

YEAR	NO. OF DETERMINATIONS MADE	NO. OF CASES DISMISSED	NO. OF DETERMINATIONS COMPLIED WITH	NO. OF DETERMINATIONS NOT COMPLIED WITH
2000	177	14	142	10
2001	158	46	93	11
2002	141	42	79	13
2003	112	34	62	10
2004	51	11	28	8
2005	213	67	108	33
2006	174	45	82	44
2007	122	24	67	26
2008	185	58	60	60
2009	22	1	11	10
2010	1	1	0	0
2011	35	15	0	20
TOTAL	1391	358	732	252

29. Over and above investigations, the office also undertakes outreach and civic education activities through public lectures and rallies to communities and public institutions in order to create awareness on the roles and responsibilities of the Office. The office has several challenges that impact on its performance. These range from: inadequate staff, lack of lawyers, inadequate funding, obsolete equipment- vehicles and office equipment, lack of knowledge by both the general public and the respondents in the way the office of the Ombudsman operates and its roles and responsibilities, large backlog of cases due to long absence of the Ombudsman, and inaccessibility due to lack of decentralized grassroots structures.

30. **The Law Commission** is established under Chapter XII of the Constitution. The Commission commenced its operations upon the appointment of the first Law Commissioner in 1996 before the enactment of the enabling statute, the Law Commission Act, which was passed in 1998. Its functions, under the Constitution, are to review and make recommendations regarding any matter pertaining to the laws of Malawi and their

conformity with the Constitution and applicable international laws; review and make recommendations regarding any matter pertaining to the Constitution; review any submissions from any person or body regarding the laws of Malawi or the Constitution; and report its findings and recommendations to Parliament through the Minister of Justice.

31. Under section 6 of the Law Commission Act, the Commission is mandated, in addition to the constitutional functions, to review the laws of Malawi with a view to the systematic development and reform of the law, including, in particular:

- (i) *the modernization of the laws by bringing them into accord with current national and international conditions and norms;*
- (ii) *the elimination from the laws of any defects, whether of a procedural, substantive or policy nature;*
- (iii) *the simplification of the laws;*
- (iv) *the recommendation of new or more effective methods and procedures for the administration of the laws;*
- (v) *to make recommendations for the fusion or harmonization of customary law with other laws of Malawi;*
- (vi) *to make recommendations for the codification of any branch of the law or of any customary law; and to promote awareness of the laws and the Constitution by the public and by departments of the Government and other authorities or bodies.*

32. The Commission's Secretariat comprises a Law Commissioner, as the executive head of the institution, and other officers subordinate to the Law Commissioner. The Law Commissioner is appointed by the President on the recommendation of the Judicial Service Commission for a renewable term of five years. The Commission has two main divisions: the Law Reform Division and the Corporate Services Division. The core business of the institution is law reform which involves legal research, law development,

law review, legislative drafting and civic education. The Corporate Services Division provides support services in general administration and human resource management. Under the Law Commission Act, the Commission, from time to time, prepares a list of programmes of its work for any specified period not exceeding a calendar year in which matters that require consideration are included in order of priority.

33. The Law Commission, in consultation with the Judicial Service Commission, from time to time, appoints Commissioners to serve on special Law Commissions where law review processes are conducted in plenary and through legal research, investigations and consultations. The special Law Commission then prepares a Report for publication. The Report sets out the problem areas, the status of a particular law in Malawi including international instruments and the special Law Commission's findings and recommendations for reform, taking into account its own research findings, submissions received from stakeholders, relevant Government policies, legislative trends in comparable foreign and regional jurisdictions. The Report containing a proposed legislation (a Bill) is submitted to the Minister of Justice for its publication in the *Gazette* under the Minister's hand and the published Report is laid before Parliament by the Minister. The Minister also submits the Report to Cabinet and if Cabinet adopts the recommendations of the Commission, the proposed legislation is adopted as a Government Bill and presented before Parliament for enactment.
34. Under the 2013 Programme of Work for the Law Commission, the Commission shall undertake the Review of certain Laws of Concern, which include section 35 of the Police Act; the Local Courts Act; sections 137A, 153 to 156 of the Penal Code in line with the concerns that were raised regarding these provisions by different sections of society; and the Prisons Act per submissions by the Department of Prisons. The Commission intends to conduct a thorough law reform process and make recommendations accordingly with respect to the said provisions and legislation.
35. **The Electoral Commission (EC)** is established under Section 75 (1) of the Constitution as a body responsible for the conduct of elections in Malawi. The Chairperson of the Commission is a judge nominated by the Judicial Service Commission. Section 76(2) of

the Constitution spells out the functions of the EC as the impartial determination of constituency boundaries on the basis of ensuring that constituencies contain approximately equal numbers of voters eligible to register; the review of existing constituency boundaries at intervals of not more than five years to determine electoral petitions and complaints related to the conduct of any elections; to ensure compliance with the provisions of this Constitution and any other Act of Parliament; and the performance of such other functions as may be prescribed by the Constitution or an Act of Parliament. Malawi has had four Parliamentary and Presidential Elections since 1994. While the elections have generally been deemed free and fair, there remain challenges about the conduct of elections such as the capacity of the EC, the independence of the EC, conduct of public broadcasters, and abuse of public resources during campaign.

36. **The Prison Service-** The Constitution provides for the Prisons Service in Section 163, the Office of the Chief Commissioner of Prisons in Section 164, the Prison Service Commission and the Inspectorate of Prisons in Sections 167 and 169 respectively. The Service is headed by a Chief Commissioner who is tasked to ensure proper and efficient administration of prisons, protection of human rights, respect for judicial orders and directions and adherence to international standards. According to Section 8 of the Prison Act, Malawi Prison Service consists of all penal institutions, labour camps, special and secure schools and other institutions that are used to house, detain and rehabilitate persons sentenced to imprisonment in whatever form such imprisonment may take, but shall not include holding cells in police stations. The Prisons Act was enacted in 1955 and is in much need of total overhaul. The Act provides for the administration and structure of the Prison Service. As indicated above, the Act is currently being reviewed by a Special Law Commission.

37. The Service has its headquarters in Zomba with regional offices headed by Regional Commissioners in the South, Centre and the North. Every prison is headed by an Officer in Charge who is the supervisor and controller of both prison officers and prisoners. He is assisted by prison officers who are tasked with various duties. The Prison Service Commission and the Inspectorate of Prisons provide oversight over the running of

prisons. According to Section 2 of the Prisons Act, a prisoner means any person, whether convicted or not, under detention in any prison. An unconvicted prisoner means any person, not being a convicted prisoner, duly committed to custody under a writ, warrant or order of any court, or any order of detention issued by any person authorised thereto by any law, or by order of a court- martial.

38. In 2010 the existing prison staff totalled 1,109. Of these 886 were males and 223 were females. The warder prisoner ratio is an important indicator. In 2005 the warder - prisoner ratio was 1:16. The 2010 Malawi Justice baseline survey showed that the warder prisoner ratio is 1:11. According to gender the warder to prisoner population ratio is better for females at 1:1.4 compared to males 1:1.3. There are thirty two (32) prisons in Malawi; most of them were built before Malawi's independence. **Table 4** below shows data on prisons, prison personnel and number of prisoners between 2006 and 2010.

Table 4 Number of prisons, prison personnel and prisoners 2006-2010

Indicator	Unit	2006	2007	2008	2009	2010	
Number of Prisons, correctional institutions	Number	32	32	32	32	32	
Number of prison personnel	Total	763	791	855	1,002	1,109	
	Male	623	630	689	812	886	
	Female	140	161	166	190	223	
Number of inmates incarcerated	Sentenced	9,004	9,382	9,567	9,511	11,050	
	Awaiting trial	3,087	3,255	3,550	3,787	3,424	
Number of convicted prisoners	Total	10,078	10,368	10,691	11,722	11,864	
	Male	9,912	10,187	10,481	11,452	11,558	
	Female	166	181	210	270	306	
Prison Population ratio	Warder: Prisoner	Total	13.2	13.1	12.5	11.7	10.7
	Male	15.9	16.2	15.2	14.1	13.0	
	Female	1.2	1.1	1.3	1.4	1.4	

39. A major challenge in Malawi prisons is overcrowding. In response, government has taken measures to review the Prison Act and has embarked on programmes toward general improvement of prison conditions. A model prison was built in Mzimba in northern Malawi. There are also plans to build new high security prisons in Lilongwe and Blantyre to replace Maula and Chichiri Prisons respectively.

40. **Police Service:** The Malawi Police Service is established under section 152 of the Constitution as an independent organ of the Executive arm of Government charged with the responsibility of ensuring public safety and the rights of persons in Malawi in line with the Constitution and any written law in Malawi. The Police Service is under the political responsibility of the Minister of Internal Security and Public Safety and is headed by the Inspector General who is appointed by the President with approval of Parliament under Section 154(2). The organization and structure of the Service for operational purposes is as follows in descending order :

- i. National Police Headquarters
- ii. Regions
- iii. Stations
- iv. Sub Stations
- v. Posts
- vi. Units

41. The Service has a national headquarters in Lilongwe with four regional offices in the Southern, East, Central and Northern regions. Each region is headed by a Commissioner. Presently there are a total of thirty four (34) police stations across the country. Each Police Station is administratively headed by an Officer- in-Charge and assisted by a Station Officer who deals with day to day operations such as handling crime reports. The core functions of the Malawi Police Service provided for under Section 4(1) of the Police Act 2010. These are the prevention, investigation and detection of crime; the apprehension and prosecution of offenders, the preservation of law and order, the

protection of life, property, fundamental freedoms and the rights of individuals, and the due enforcement of all laws with which the Police are directly charged with.

42. It is important to emphasize that the Police Service exists to protect the lives of the people of Malawi and to ensure the full enjoyment of their rights. The Service therefore is not a tool of oppression. Throughout Malawi's young history, challenges have been faced in ensuring a professional and competent Police Service. While the 1994 Constitution clearly spells out the functions of the Service, gaps have existed between the ideals enshrined in the law and the practical reality on the ground. The enactment of the Police Act in 2010 sought to address such gaps with radical changes.
43. The Act establishes the Office of an Independent Complaints Commission to investigate complaints of brutality, deaths or misconduct at the hands of the police. The Commission will be established in the 2013/2014 fiscal year. The Act 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. In addition, the Act comprehensively provides for the conduct and regulation of public assemblies, demonstrations and crowd control at football matches.
44. Many challenges remain, chief among them the lack of resources and capacity. The findings of the 2010 Malawi Justice Baseline Survey show that the police- population ratio in Malawi is still high, more than 1,000 persons per police officer. In the year 2010, the police to population ratio was 1: 1,450 against the recommended target of 1:500. The situation is worse in the rural areas where the ratio is 1: 6,455 compared to the urban where the ratio is 1:266.
45. **Ministry of Justice and Constitutional Affairs** - The Ministry of Justice and Constitutional Affairs plays a significant role in the area of human rights and the rule of law in Malawi. The Ministry has recently established a Human Rights Unit which will be coordinating issues of human rights and state party reporting. The plan in place is for Malawi to clear a backlog of reports under the UN and AU human rights systems by 2015. The Unit is however understaffed and lacks capacity.

46. The Malawi Growth and Development Strategy (MGDS) of 2006-2011 recognize that improving democratic governance is a foundation for poverty reduction and a sustainable development agenda. However, continued systemic constraints and challenges exist within democratic governance institutions. Coupled with a weak demand side and a lack of empowered citizens, this has resulted in poor delivery of justice and democratic accountability services, including to the poor and marginalized.
47. Taking leadership in this area, the Government established a Sector Wide Approach to Democratic Governance in 2008. UNDP Malawi supported the consolidation of the Democratic Governance Sector Working Group (DGSW) under the leadership of the Ministry of Justice. The group coordinates and guides effective implementation of sector policies and strategies. Also, it serves as a management structure for open discussion and for strengthening mutual accountability between the Government of Malawi and development partners.
48. The group divides its work in two sub-sectors on justice and democratic accountability. With assistance from the Global Programme on Governance Assessments, a project was designed in 2010 supporting the Sector Wide Approach to Democratic Governance, and later the Sector Strategic plan for 2012-2016. The project aims to establish a Monitoring and Evaluation Framework through a participatory and consultative process. This will strengthen the evidence based work of the Working group, as well as provide a track record of performance providing accountability. Indicators and results from this framework will also inform the monitoring and evaluation framework of the Malawi Growth and Development Strategy II 2012-2016.
49. The Policy Framework Paper has seven pillars namely, Rule of Law, Human Rights, Access to Justice, Public safety and security, Integrity, accountability and transparency, Public participation, Free and fair elections. In July 2013, Cabinet approved the Policy Framework Paper.
50. The Directorate of Public Prosecutions (DPP) is responsible of all criminal prosecutions in Malawi and is a department within the Ministry of Justice. The mandate of the DPP is

provided by the Constitution in sections 99-102 with powers to institute, take over, discontinue and supervise criminal proceedings. The DPP is appointed by the President with the approval of the Public Appointments Committee of Parliament. The DPP's office has a duty to ensure that suspects in criminal cases enjoy their constitutional rights. This includes trial within a reasonable time. Due to resource constraints this has been a major challenge especially in serious cases such as homicides. In last few years some progress has been made with the establishment of the Homicide Working Group made of key players in the Criminal Justice Sector. As a result, between 2009 and 2012, 1272 homicide cases have been disposed.

51. The office faces numerous challenges. These include lack of capacity due to inadequate resources and few numbers of prosecutors. The Directorate has offices in the major cities of Lilongwe, Blantyre and Mzuzu only which makes it difficult for the office to supervise police prosecutors. There have also been concerns about the security of tenure of the office of the Director of Public Prosecution. The current DPP is the fourth in the last eight years.
52. **The Legal Aid Department** has traditionally been part of the Ministry of Justice as a department tasked with the responsibility of providing legal aid to Malawians. The enactment of the Legal Aid Act in early 2011 has revolutionised the legal and structural setup of legal aid services in Malawi with the establishment of the Legal Aid Bureau as a separate entity from the Ministry of Justice. The Legal Aid Bureau, once established, will perform its functions and duties independent of any person or authority. The Bureau will be headed by a Director and assisted by a Deputy Director. The establishment of the Bureau is geared towards addressing the huge gap of provision of legal aid services experienced in Malawi mainly in terms of accessibility by those mostly in need of such services. In view of that, the operations of the Bureau shall be decentralized with establishment of Legal Aid centres across the country, as opposed to the present situation where the Legal Aid Department has offices in the urban centres of Blantyre, Lilongwe and Mzuzu only.

53. Section 4 of the Act provides for the duties and functions of the Bureau as being the provision of legal aid, liaison and cooperation with civil society organizations(CSOs) and other bodies in the provision of legal aid, undertaking research in the aspects of legal aid, and preparation of reports and recommendations to the Minister. Legal aid has been broadly defined as legal advice, legal assistance, representation in any court, tribunal or similar body or authority and the provision of civic education and information about the law. The mandate of the Bureau is broad particularly with inclusion of provision of civic education and information about the law as part of legal aid services.. Section 28 of the Act permits the Bureau to enter into what are called cooperation agreements with CSO sin the provision of legal aid. This is significant considering the pronounced presence in the justice system of CSO. While the role of civil society has previously been felt and noted, the specific provision for cooperation between the Bureau and CSOs in the Act makes the Act the first of its kind to give legal recognition to such organizations in the criminal justice system. .

54. **Civil Society-** Malawi has a thriving civil society community with a growing influence in successive years. The operations of civil society organisations, well known as Non-Governmental Organizations, (NGOs) are regulated by the Non-Governmental Organizations Act (Chapter 5:05 of the Laws of Malawi, [hereinafter referred to as NGO Act]. The NGO Act applies to institutions or organizations constituted for public benefit purposes and this expressly exclude churches, religious organizations, political parties, trade unions or social clubs. The Act as a regulatory framework of NGOs seeks to promote the development and values of a vibrant civil society. The Act is based on three key components of an NGO regulatory system. These are registration; monitoring; identifying; and dealing with use of NGO's for un-intended purposes. Sections 20 to 24 in Part VI of the NGO Act deal with the registration of NGOs in Malawi. The Act requires that in order for an NGO to be registered it has to provide the following: its governing instrument;, plan of activities; source of funding; latest available audited annual financial statements; proof that the NGO is a member of Council for Non-Governmental Organization of Malawi(CONGOMA) which is an umbrella group for all NGOs in Malawi. For monitoring and detection of abuse, the law requires NGOs to

report to the NGO Board on their activities, present annual audited financial records, disclose sources of funding, and present annual activities undertaken

IMPLEMENTATION OF RIGHTS, DUTIES AND FREEDOMS UNDER THE CHARTER

Recognition and Implementation of Rights, Duties and Freedoms under the Charter (Article 1)

55. The general framework for recognition, protection and enjoyment of human rights in the Charter is provided by the Constitution. The Constitution provides for a model which comprises the institutional and enforcement framework; *locus standi*; specific rights; limitations and restrictions; and derogation from rights. Arguably, the Constitution also provides for non-justiciable rights, termed principles of national policy which have been described in the Constitution, as ‘directory in nature’ but the courts are entitled to have recourse to them in interpreting and applying any provision of the Constitution or law in determining the validity of decisions of the Executive branch and in the interpretation of the Constitution. The Constitution has, in addition to the courts, established a number of bodies to buttress the institutional and enforcement framework for the promotion and protection of human rights. These include; the Ombudsman; the Human Rights Commission and the Law Commission. While the regime under the Constitution is restrictive in terms of standing in order to promote, protect and enforce human rights, the courts have gradually been relaxing the rule requiring ‘sufficient interest’ for applicants who seek to enforce rights or prosecute violations of those rights.

In terms of specific rights, the Constitution has craftily provided for some rights in an unjusticiable fashion under section 13. These include gender equality; nutrition; environment; education; the elderly; and peaceful settlement of disputes. Some of these principles have been expressly provided for as rights, such as gender equality; children; and education. In all cases of principles of national policy, the State is the ultimate duty bearer. Under the Bill of Rights (Chapter IV), there are civil and political rights as well as economic, social and cultural rights.

56. The Bill of Rights operates within an international and regional human rights framework fraught with several instruments at international, continental and regional levels. The major international human rights instruments include the Universal Declaration on Human Rights; the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; the African Charter on Human and Peoples Rights; the SADC Protocol on Gender and Development, at various levels. However, the operation and accessibility to these instruments is regulated by the Constitution. As such, unless an international instrument is domesticated, it cannot be invoked in local courts.
57. Section 211(1) of the Constitution provides that any international agreement ratified by an Act of Parliament shall form part of the law of Malawi if so provided for in the Act of Parliament ratifying the agreement. The enjoyment of rights is not absolute in all cases or with respect to all rights. The Constitution sets out strict conditions for the limitation or restrictions of rights. Thus, a right may be limited if the restriction or limitation is legal when it is prescribed by a law of general application; is reasonable; does not negate the essential content of the right; is recognized by international human rights standards; and is necessary in an open and democratic society. The Constitution, in line with prominent international human rights instruments, permits derogation during a state of emergency with respect to some specified rights, such as 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 obligations 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.
58. The Constitution of Malawi, in section 4, binds all organs of Government and guarantees "all peoples of Malawi" to equal protection of the Constitution and the laws made under it. Section 11(2)(c) of the Constitution provides that courts of law in Malawi shall, when interpreting the provisions of the Constitution, have regard to current norms of public

international law and comparable foreign case law. In that regard, courts, tribunals and administrative authorities do consider the provisions of key international human rights instruments in applying the law to ensure conformity with international law and obligations under the Covenant.

Non Discrimination and Equality before the Law (Articles 2 and 3)

59. Section 20 of the Constitution of Malawi is the core provision for the equality of all persons before the law and equal protection without any discrimination. It also prohibits discrimination of persons in any form 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. It goes on to say that legislation may be passed addressing inequalities in society and prohibiting discriminatory practices and the propagation of such practices and may render such practices criminally punishable by the courts. Section 4 of the Constitution also provides that the Constitution shall bind all executive, legislative and judicial organs of the State at all levels of Government and all the peoples of Malawi are entitled to the equal protection of the Constitution and laws made under it. Section 41(1) of the Constitution states that every person has a right to recognition as a person before the law. The right to equality and recognition before the law is non derogable. 56. The Principles of National Policy enshrined under section 13 of the Constitution requires that the State should actively promote the welfare and development of the people of Malawi by progressively adopting and implementing policies and legislation aimed at achieving gender equality for women with men through:

(a) full participation of women in all spheres of Malawians society on the basis of equality with men;

(b) the implementation of the principles of non-discrimination and such other measures as may be required; and

(c) the implementation of policies to address social issues such as domestic violence, security of the person, lack of maternity benefits, economic exploitation and rights to property.

In relation to persons with disabilities, they are equally protected under section 20 of the Constitution. In addition, section 13 states that the Government shall implement policies to ensure they have adequate and suitable access to public places, fair opportunity in employment and full participation in all spheres of Malawian life. In 2009 Malawi ratified the Convention on the Rights of Persons with Disabilities. In 2012 Malawi enacted the Disability Act to implement the Convention. While the constitutional framework on equality and non-discrimination is solid, issues of inequality and discrimination in Malawi still persist especially against vulnerable groups such as women and children.

60. There are laws, policies and programmes that have been adopted by the Malawi Government aimed at addressing inequalities and to actively promote non-discrimination. The following are a few examples:

- (a) Gender Equality Act 2012
- (b) Disability Act 2012
- (c) Prevention of Domestic Violence Act 2006;
- (d) Deceased Estates (Wills, Inheritance and Protection Act 2011;
- (e) Child (Care, Protection and Justice) Act 2010
- (f) Review of discriminatory laws on marriage and divorce resulting in the Marriage, Divorce and Family Relations Bill;
- (g) The National Policy on Orphans and other Vulnerable Children (OVC) is facilitating support for care, protection and development of OVC in a coordinated manner in order to provide them with an environment in which they realise their full rights and potential;

- (h) The Ministry of Education's Accelerated Girls' Education Programme where school infrastructure is improved with sufficient sanitary facilities in order to make them more accommodating to female needs;
- (i) Positive discrimination or affirmative action is being done in allocating bursaries to needy pupils. The ratio is currently in favour of girls in order to address the inequality of access to education;
- (j) There is also a Re-admission Programme for young mothers to provide them with an equal right to education despite being mothers before the completion of their education;
- (k) The Ministry of Education is also making a deliberate effort to ensure an equal selection rate for girls and boys from primary to secondary schools which was hitherto not the case;
- (l) The Education Policy Investment Framework, which is the national education strategic framework, ensures the promotion of educational equity by making an inclusive environment supportive of the needs of boys and girls as well as children with special needs and severe disabilities;
- (m) The provision of subsidized farm input such as fertilizer to the elderly, the very poor, the disabled, and other socially disadvantaged groups is also meant to address the issue of lack of equal access to resources for farming and hence food;

61. Malawi also ratified the International Convention against Racial Discrimination, the Convention on Elimination of Discrimination against Women, the African Protocol on Women's Rights, and the SADC Protocol on Gender and Development.

Right to Life and Integrity of a Person (Article 4)

62. The Constitution provides for the right to life in Section 16(1) and that such life shall not be arbitrarily deprived. Malawi retains the death penalty such that the execution of the death penalty imposed by a court of competent jurisdiction cannot be deemed as arbitrary deprivation. The majority of people in Malawi do not support the abolition of the death penalty and hence there are no immediate plans to abolish the death penalty. Section 8 of the Constitution stipulates 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 and implicit in the Constitution. Malawi will continue to listen to the voices of its people regarding the issue of death penalty.
63. Following the case of Francis Kafantayeni and others (Constitutional Case No. 12 of 2005), the imposition of the death penalty is no longer mandatory in murder cases. Section 210 of the Penal Code which provided for death as a mandatory penalty for murder was amended in 2010. The Courts have the discretion of imposing a death sentence or life imprisonment for persons convicted of murder and other cases which carry death as a penalty such as treason. Such a sentence can only be passed by the High Court.
64. Any form of arbitrary deprivation of life by any person including law enforcement agents such as Police Officers is unacceptable in Malawi. Police officers suspected of having arbitrarily deprived life of persons are prosecuted like any other suspect would be. There are cases in which Police Officers have been tried for alleged arbitrary deprivation of life. In Republic versus Windson Matumba(Criminal Case Number 14 of 2007) , a Police Officer, shot dead an Army Officer, allegedly mistaking him for a wanted suspect. He was convicted of manslaughter and sentenced to twelve years imprisonment. In Republic versus Joshua Cheuka and 3 others (Criminal Case number 73 of 2008), Police officers were convicted of manslaughter for shooting charcoal vendors. The Government is committed to ensure the full protection of the sanctity of life.

65. However, many challenges still remain in upholding the guarantee of the arbitrary deprivation of life. On July 20 2011, nationwide demonstrations organized by Civil Society Organizations resulted in violent deaths and widespread looting and destruction of property. In the aftermath, Government instituted a Commission of Inquiry which started its work in late 2011 and presented its findings in June 2012. The Commission established that a total number of twenty people died as a result of the public disorder. Two people died in the City of Blantyre, seven people died in the City of Lilongwe, ten people died in the City of Mzuzu and one person died in the Township of Karonga. Out of the twenty people, nineteen died of injuries resulting from gunshots. One person was suffocated by teargas. About fifty eight people sustained injuries. Most of the injuries were due to gunshots or police beatings. The Commission further established that there were no deaths or injuries during the march along the designated route after vacation of the injunction. It was established that most people were killed or sustained injuries when the police tried to quell the public disorder. However, the Commission also established that some victims met their fate while not participating in any of the demonstrations or in any criminal activity. It was also established that amongst the people who sustained injuries were police officers. The Commission established that the Police used excessive force. Although it was established that lives of people including police officers were in danger due to the public disorder which may have justified the use of force, the force used was not proportionate to the situation. The action of the Police was therefore contrary to the Constitution, the Police Act as well as applicable international law. The Commission recommended that the Executive must ensure that police officers who were responsible for the deaths and injuries are thoroughly investigated and prosecuted where unlawful conduct is established. This process is still ongoing.

66. In 2011, Robert Chasowa, a student at the Polytechnic College of the University of Malawi, in Blantyre, was found dead in mysterious circumstances. A Commission of Inquiry was set up to establish the cause of his death. The Commission presented its report to the President on 9th October 2012 with the finding that Mr. Chasowa was murdered. The Commission recommended criminal investigations and prosecution of several individuals. This process is still ongoing.

67. In late January 2012, Edson Msiska a student at the Natural Resources College in Lilongwe died in police custody in Mzuzu. An internal inquiry set up by the Inspector General of Police has concluded that he was beaten to death by officers. The officers alleged to have caused the death were identified and arrested. Trial commenced in 2012 and is yet to be concluded.
68. Despite the challenges faced, Malawi is committed to ensuring that the right to life is respected and that there is no arbitrary deprivation of life. As demonstrated above, the legal framework protecting the right to life is solid, and Government will ensure that where this right is violated or threatened, the law will take its course.

Right to respect of human dignity, prohibition of slavery; slave trade; torture cruel inhuman and degrading treatment (Article 5)

69. Section 19 of the Constitution guarantees the inviolability of the dignity of all persons. It provides that no person shall be subjected to torture of any kind or to cruel, inhuman or degrading treatment or punishment. This right may not be derogated from in accordance with section 45. In the same vein, section 45 prohibits subjection of people to corporal punishment in connection with any judicial proceedings before an organ of the State. As such, even before this Constitutional amendment of 2010, the courts had long stopped issuing corporal punishment when sentencing convicts.
70. The majority of victims of torture or cruel, inhumane and degrading treatment are persons in police custody or in detention centres. In an attempt to deal with such violations, several oversight mechanisms have been put in place. Firstly, under the law, the Police Act established the Independent Police Complaints Commission to investigate cases of abuse or deaths which occur in Police stations or at the instance of Police actions. This Commission is expected to be set up in the 2013/2014 fiscal year. Secondly, each Police station has a Lay Visitors Scheme, made of local people around the station who will be monitoring conditions of detention. Thirdly, already existing institutions such as the

Prison Inspectorate and the Human Rights Commission have mandate to inquire into any violations of human rights in Prisons or Police custody.

71. Malawi ratified the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) on 11 June 1996. While the Convention is yet to be domesticated, the inclusion of provisions of section 19 of the Constitution, the adoption of the new Police Act which has transformed the Police from a force to a service, and established oversight institutions with the Police Service, among other things, and the taking of other significant steps seek to ensure that a culture of torture and inhuman treatment is completely rooted out signifies commitment towards eventual adoption and domestication of the CAT. During the Universal Periodic Review process in 2010, Malawi indicated her intention to ratify the Optional Protocol to CAT.
72. Regarding conditions of detention, a 2008 High Court of Malawi judgment in the case of Gable Masangano vs. Attorney General (Constitutional Case No. 15 of 2007), required the Government to improve prison conditions in line with constitutional and international standards within eighteen (18) months. The conditions mainly related to diet and overcrowding in prison cells. Since that judgment some measures have been taken to ensure that prisoners are not kept in conditions which are inhumane and cruel. These include plans to build purpose built prisons to replace old and dilapidated ones, improvement of diet, and adoption of non-custodial measures such as diversion systems, community service, in order to reduce prison population. In addition, a new law is being developed to replace the current Prison Act which is outdated and not in line with constitutional requirements.
73. Despite this solid constitutional and legal framework, challenges still remain. Firstly torture has not been criminalized such that alleged perpetrators can only be charged with offences such as assault, or causing grievous bodily harm. Secondly there are no adequate mechanisms for reporting incidents of alleged torture either at the hands of police officers or prison authorities. It is hoped that the Police Complaints Commission will establish a clearer and effective mechanism for such reporting. The strengthening of the institution

of the Inspectorate of Prisons in the proposed Prison Act will assist in improving the role of the Inspectorate in its monitoring and oversight duties.

74. Slavery, servitude and forced labour are prohibited under section 27 of the Constitution. Section 44 expressly states that this prohibition is not subject to derogation. This regulation is also provided for under employment legislation which also criminally punishes forced labour and regulates conditions of employment. In order to avoid exploitation of persons, the Constitution provides in section 31 for labour rights, among which are the rights to fair and safe labour practices; fair remuneration; fair wages; and equal remuneration for work of equal value without distinction or discrimination of any kind.
75. While the general outlook is that slavery in its traditional sense has been eliminated, Malawi, along other like-minded States, has come to realize that there are emerging forms and trends that may be properly termed, modern day slavery. In light of the realization of the emergence of a practice called ‘trafficking in persons’, Malawi took stock of its existing policy and legislative framework in order to develop legislation in this regard. In 2005, Malawi ratified the Protocol to the Convention against Transnational Organized Crimes to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children. The initiative which was led by the Law Commission also noted, with concern, the extent to which trafficking in persons was a problem in Malawi as a source, transit and destination country for trafficked persons.
76. The process of developing legislation was completed in 2011 through the publication of the Law Commission Report on the Development of Trafficking in Persons legislation. The proposed law on trafficking in persons shall criminalize both trafficking in persons and children; and aggravated forms of committing these offences; provide for victim friendly and crime specific methods of investigating the crimes and conducting proceedings in court. It proposes the establishment of a Trafficking in Persons Board which shall be responsible for coordinating and overseeing the proper implementation of all activities in furtherance of the objects of the Act including the promotion and protection of the rights of the trafficked persons. The proposed legislation also proposes

the establishment of a fund which shall primarily be used for funding prevention of trafficking, care and protection mechanisms of victims which includes witness protection; restrictions on some media activities; non-prosecution of victims for immigration offences and provision of shelters, where necessary. The Commission has also made recommendations towards the amendment of other pieces of legislation where provisions relevant to trafficking in persons are concerned. The Bill is before Cabinet.

Right to Liberty, Security and Fair Administration of Justice (Articles 6 and 7)

77. Section 42 of the Constitution provides for what are called a cluster of fair trial rights, which are extended to persons suspected of having committed offences from arrest to detention. It is therefore a requirement of the law that on arrest a suspect has to be informed of the reasons for the arrest, and that he has a right to remain silent. The law also requires that a suspect should be brought to court within 48 hours to be charged or informed of the reasons for further detention. Where a person has not been brought to court within 48 hours, their detention is unlawful. Arrested persons have a right to bail. The granting of bail is regulated by the Bail Guidelines Act, and various court decisions have laid down principles to guide the courts when required to grant bail. Any suspect has a right to be tried within a reasonable time. Suspects detained unlawfully can sue for compensation for false imprisonment.

78. While the legal standard on the treatment of suspects is clear, challenges have always existed in the realization of such rights. Firstly, suspects are always not brought to court within the required 48 hours. Secondly, the criminal justice system is so overwhelmed such that criminal cases, especially serious ones such as homicides take long to complete. In addition, the criminal justice as a whole lacks human resource capacity. Remedial steps have been taken to address some of these challenges. These 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. The Government now takes a part in funding of homicide cases which were previously supported by development partners. Government has taken the initiative to ring fence funds not only in the DPP's

office 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.

79. Malawi guarantees equality before the law. Section 44 (1) of the Constitution prohibits derogation, restriction or limitation with regard to the right to equality and recognition before the law. Furthermore, section 42 of the Constitution guarantees rights for every person who is detained. It stipulates that a person has a right to (a) be informed of the reason for his or her detention promptly and in a language which he or she would understand; (b) be detained under conditions consistent with human dignity, which shall include at least the provision of reading and writing materials, adequate nutrition and medical treatment; at the expense of the State, to consult confidentially with a legal practitioner of his or her choice; be informed promptly of his or her rights; where interests of justice require be provided with services of a legal practitioner by the State, to be given means and opportunity to communicate with relatives, be visited by next of kin, partner, medical practitioner, and religious counselor of his choice, to challenge the lawfulness of his detention in person or through his legal practitioner, and to be released from unlawful detention.
80. The Malawi Supreme Court of Appeal in the case of The Republic -v Lucius Chicco Banda(Criminal Appeal No. 1 of 2007) held that the right to remain silent remains one of special rights accorded to an accused person during interrogation or trial. The exception to the general rule is where there is a reverse onus placed on a suspect. An example in this regard is section 32A of the Corrupt Practices Act which requires public officers to explain their wealth where it is deemed by the law to be way above their known sources of income (otherwise known as illicit enrichment). A conviction may result where the public officer gives an -unsatisfactory explanation. The use of reverse onus provisions such as section 32 is internationally recognised. Illicit enrichment is specifically mentioned as a corruption offence in Article 20 of the United Nations Convention against Corruption, Articles 8 and 9 of the African Convention on Preventing and Combating Corruption and the Inter-American Convention against Corruption, respectively. In all

conventions state parties are urged to pass legislation making illicit enrichment an offence.

81. It is an established principle of law that evidence obtained from a compelled or tortured person does not conform with the Republican Constitution's section 42 (2) (c). Only free and voluntary confession evidence is admissible before the Courts in Malawi. This principle has even been upheld by the High Court of Malawi in the cases of Republic –v- Chizumila (Confirmation Case No. 316 of 1994); and Rep v Chinthiti(Criminal Case No. 17 of 1997 (unreported).

Freedom of Religion and conscience (Article 8)

82. The Constitution in section 33 provides for every person's right to freedom of conscience, religion, belief and thought, and also to academic freedom. Considering that other rights such as the right to education or health can at times be hampered by freedom of conscience, Malawi government takes reasonable steps to raise awareness among parents of the need to protect children and not interfere with their right to education and health in the name of protecting their freedom of conscience. The freedoms protected in section 33 cannot be derogated from under section 44 of the Constitution. The manifestation of these freedoms however is subject to state regulation for purposes of public health, security and order. In this regard government has taken steps that go against some religious sects beliefs and practices which prevent vaccination of children as this poses a health risk to particular communities.

83. However, problems have arisen where there is conflict between the exercise of the right to religion and the duty of parents or guardians towards children. In the case of The Republic v Jamison Ofesi and 10 Others (Criminal Cause No. 64 of 2010, Unreported) the accused persons were parents who had refused to vaccinate their children against the measles outbreak because of their religious beliefs. They were convicted and fined for failure to provide necessities of life for their children. Malawi has many religions and religious denominations. Religious groups are mainly registered under the Trustees Incorporation Act. In addition, there are various groupings which act as umbrella

organizations for particular religious denominations such as Malawi Council of Churches, the Evangelical Association of Malawi, and the Muslim Association of Malawi among others which is evidence of the respect of the right to freedom of religion.

Right to receive information and right to express opinion (Article 9)

84. Section 37 stipulates that every person shall have the right of access to all information held by the State or any of its organs at any level of government in so far as such information is required for the exercise of his rights. Malawi is yet to enact an access to information law. Section 34 of the Constitution states that every person has a right to freedom of opinion, including the right to hold opinions without interference to hold receive and impart opinions. Furthermore, Section 35 of the Constitution states that every person shall have the right to freedom of expression. It is therefore imperative to state that Malawi Government guarantees persons the right to hold opinions without interference, right to freedom of expression, receive and seek information. Subject to some other provisions such as penal laws, exercise of these rights carries special duties and responsibilities.

85. Malawi has a thriving print and electronic media. Electronic media is regulated by the Communications Act (Cap 68:01 of the Laws of Malawi) which established the Malawi Communications and Regulatory Authority (MACRA). MACRA is responsible for the granting of licences to radio stations. There are both public and private radio stations in Malawi. The Malawi Broadcasting Corporation (MBC) is the sole public broadcaster which provides both radio and television services. Operating on tax payers' money, MBC is expected to be fair and impartial in its services. The main challenge faced by MBC is that since 1994, there has been a perception of bias in favor of successive ruling parties, especially during election time. Opposition parties have consistently complained about the lack of coverage of their pre-election activities by public broadcasters. Section 87(2) of the Communications Act of 1998 requires MBC to provide broadcasting services without any political bias and independently of any person or body of persons, support the democratic process, provide balanced coverage of any elections. There is a clear legal requirement that MBC has to operate without any bias.

In 1999, the High Court found MBC to be in breach of its obligations under the Parliamentary and Presidential Elections Act, the Communications Act, the Electoral Commission Act as well as the anti-discrimination provisions of the Constitution. In Kafumba and Others vs. Electoral Commission and Malawi Broadcasting Corporation, a case which was filed in the High Court just a few days before the end of the official campaign period for the 1999 election, the complainant sought declarations against the defendants to enable all political parties to enjoy equal access to MBC. MBC was found to be biased towards the ruling party as it made little effort to give fair coverage to other political parties. It is clear therefore that there is need to ensure that the public broadcaster takes immediate measures to meet its legal obligations in line with an open, democratic and pluralistic Malawi.

86. During the July 20, 2011 demonstrations which were organized by civil society organizations, MACRA ordered several private radio stations off the air because they were deemed to be inflaming incidents of violence across the country with their live coverage. MACRA has authority to revoke broadcasting licenses, but such revocation is subject to judicial review. In the case of The State and MACRA ex-parte Joy Radio Limited (Miscellaneous Civil Cause No. 143 of 2008), a decision by MACRA to revoke the license of Joy Radio was reversed by the High Court.

Right to free association and Free Assembly (Articles 10 and 11)

87. Section 32 of the Constitution guarantees freedom of association which includes freedom to form associations. Section 31 states that all persons shall have the right to form and join trade unions or not to form or join trade unions. The enactment of the Labour Relations Act and the Employment Act has buttressed this right and enhanced democratic accountability human rights observance in employment. Malawi also has the office of the Registrar of Political Parties which ensures the implementation of everyone's right to form a political party. Any refusal to register a political party is subject to judicial review. Such was the case in The State and The Honourable Attorney General (Representing Ministry of Justice, Department of the Registrar General) and The Maravi People's Party and The People's Progressive Movement, ex parte Joyce Banda for herself and on Behalf

of the People's Party, (Civil Cause No. 83 of 2011 (Unreported) where the Applicant brought judicial review proceedings in the High Court of Malawi because the office of the Registrar of Political Parties refused to register the party on the basis that the party colours, the name of the party and symbol resembled those of another party. The claim succeeded in the High Court of Malawi and the party was registered thereafter.

Right to free assembly and Free Movement (Articles 11 and 12)

88. Every person shall have the right to assemble and demonstrate with others peacefully and unarmed. This right is enshrined in Section 38 of the Constitution. Further to this, the Police Act provides for procedures to be followed before an assembly or demonstration can take place. . The organizers of any such assembly or demonstration are required to notify and liaise with the local authorities on issues such as date of the event, route to be used, and the number of people expected at such an event. The notice should be given at least 48 hours prior to the event. The role of the police service in such events is critical as the service is tasked to advise the local authorities whether it is appropriate to hold such events.
89. The challenges faced in the enjoyment of these freedoms are enormous as demonstrated by the events of July 2011. The Commission of Inquiry established to investigate the events of this day made wide ranging recommendations to Government, Malawi Police, Civil Society, the media and organizers of demonstrations in general on how demonstrations should be organized without loss of life and property. According to the National Police Headquarters, about fifteen (15) criminal cases involving forty one persons were commenced following the July 2011 demonstrations.
90. Section 39 of the Constitution guarantees freedom of movement and residence within the borders of Malawi. Every person shall have the right of freedom of movement and residence within the borders of Malawi. Further to this, every person shall have the right to leave the Republic and to return to it. If at all there are restrictions in terms of national security, public order, public health or morals or other rights and freedoms, these are done pursuant to prescription by law. For instance, examination upon entry on health

reasons such as out-breaks are done within the purview of the Immigration Act (Cap. 15:03), Refugee Act (Cap. 15:04) and Public Health Act (Cap. 34:01) of the Laws of Malawi. The restrictions are made with cognizance of the existence of other rights such as non-discrimination. For Refugees in Malawi, there is a designated place for their residence namely Dzaleka Refugee Camp which is managed by Ministry of Home Affairs and Internal Security. Notwithstanding this, these persons are allowed to visit other areas in Malawi and return to Dzaleka Camp and are therefore not deprived of their freedom of movement.

91. Pursuant to Section 39 stated above and the non-discrimination provision in the Republican Constitution, the Government has put in place mechanisms that help achieve the objects of Article 13 of the Convention. The Refugees Act provides for a Refugee Committee that works hand in hand with the Department of Disaster Preparedness and the United Nations High Commissioner For Refugees (UNHCR). Further, there is a procedure that needs to be followed before an alien is expelled from Malawi. The Act allows a person claiming to be a refugee to enter and remain in Malawi while the Committee processes his application for refugee status. The law also allows refugees seeking the rights of passage going to a country where he or she intends to seek asylum as a refugee. The Act also allows people who enter Malawi illegally for purposes of seeking asylum as refugees to present themselves before a competent officer within twenty four hours of their entry or within such longer period as the competent officer may consider acceptable in the circumstances. The Act further guarantees such persons protection from being detained, imprisoned, declared prohibited immigrant or otherwise penalized by reason only of their illegal entry or presence in Malawi unless and until the Committee has considered and made a decision on the application for refugee status. This is in line with the 1951 Convention, which prohibits sanctions for illegal entry.

92. Malawi acceded to the 1951 Convention relating to the Status of Refugees (hereinafter referred to as the “1951 Convention”), as well as its 1967 Protocol following accession on 10 December 1989. On 4 November 1987, the country ratified the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa. The refugee

definitions in the 1951 Refugee Convention and the 1969 OAU Convention are incorporated into the country's 1989 Refugees Act. On 7 October 2009, the country ratified the 1954 Convention relating to the Status of Stateless Persons. Malawi has yet to accede to the 1961 Convention on the Reduction of Statelessness. Malawi made reservations to the 1951 Convention regarding articles 2, 7, 13, 15, 19, 22, 24, 28 and 34 of the 1951 Convention relating to the Status of Refugees. The requirement for Refugees and asylum seekers to reside at designated camps has been held to be a sound administrative measure to ensure certainty of their population, provision of basic necessities, communication of information, protection of their persons and property, facilitation of repatriation.²

Right to participate in public affairs (Article 13)

93. Section 40 of the Constitution provides for the right to vote and right to stand for elections for any elective office. A person shall be qualified to be registered as a voter in a constituency if he is:

- a. is a citizen of Malawi or, if not a citizen, has been ordinarily resident in the Republic for seven years;*
- b. has attained the age of eighteen years; and*
- c. is ordinarily resident in that constituency or was born there or is employed or carries on a business there.*

It further states that no person shall be qualified for registration as a voter in a constituency if that person is under any law in force in the Republic adjudged or otherwise declared to be mentally incompetent; is under sentence of death imposed by a court having jurisdiction in the Republic, either before or after the appointed day; or is disqualified from registration as a voter on the grounds of his or her having been

² The State and The Department of Poverty and Disaster Management Affairs and the Commissioner For Disaster Preparedness, Relief and Rehabilitation, Ex parte: Frodovard Nsabimana and 83 others Miscellaneous Civil Cause Number 19 of 2006 (High Court), per Justice Chinangwa, page 18

convicted of any violation of any law relating to elections passed by Parliament and in force at the time of, or after, the commencement of this Constitution, but such disqualification shall be valid only with respect to registration for the election in question and the person so disqualified shall be qualified to be registered as a voter in the next or any subsequent election. Such qualified person is supposed to be registered in one constituency and that can only cast one vote in any election.

94. The Constitution in section 44 (1) (g) prohibits derogation, restrictions or limitations with regard to right to equality and recognition before the law. Section 15 of the Constitution gives legal personality to natural persons as well as organizations in so far as the protection and enforcement of human rights is concerned. Consequently, under section 41 and 46 where there is violation or threat of violation of any right or freedom, such natural and legal persons can seek redress under the law by using the courts, the Human Rights Commission, the Ombudsman or indeed any relevant tribunal.
95. According to section 40 of the Constitution, every person shall have the right to form, to join, to participate in the activities of, and to recruit members for a political party; to campaign for a political party or cause; to participate in peaceful political activity intended to influence the composition and policies of the Government; and freely to make political choices. It goes further to say that every person shall have the right to vote, to do so in secret and to stand for election for public office. Apart from the Constitution, Malawi also has legislation governing presidential and local elections which provides for not only the procedures to be followed but also reiterates the rights mentioned under the Constitution in this regard. These include the Local Government Elections Act (Cap.1:03) and the Parliamentary and Presidential Elections Act (Cap.22:01). The holding of Local Government Elections has faced challenges. For example, local government elections have not been held since 2001 due to lack of funding. To address this challenge, the Constitution was amended in 2012 to pay way for tripartite election, thus Presidential, Parliamentary and Local Government Elections. The first of such elections will be held in 2014.

96. General elections in Malawi though largely deemed free and fair have not been free from complaints of irregularities. Some have ended up in court as evidenced by the case of The State and the Malawi Electoral Commission, Ex Parte Yerehiah Chihana (Miscellaneous Cause No. 41 of 2009) where the Applicant brought a claim for violation of his right to stand for election to hold public office in accordance with Section 40 of the Constitution. The Courts held that such a right can only be either derogated from, limited or restricted in accordance with section 44 (2) of the Constitution. Hence, because the Respondent had not shown on a balance of probabilities that there was reason justifiable in terms of section 44 (2) of the Constitution to warrant the limitation, restriction or derogation from the applicant's right to stand for elective office or the rights of such of his constituents as want to vote for him the applicant and they were ordered to remain free to exercise such rights unless and until the Respondents showed on a balance of probabilities that whatever derogation, limitation or restriction they were seeking was prescribed by law, reasonable, recognized by international human rights standards and was necessary in an open and democratic society.

Right to property (Article 14)

97. The Constitution enshrines the right to property in section 28. It states that every person shall be able to acquire property alone or in association with others. Further to this no person shall be arbitrarily deprived of property. The High Court of Malawi has buttressed this constitutional provision in the case of Saviour Gombera acting as Administrator of Deceased Estate of Titus Gombera –v- Attorney General and Village headman Laiti³ where Justice Potani held that the Republican Constitution guarantees the right to property as stipulated in section 28 and that any government decisions affecting such property is subject to judicial scrutiny. The right to property is not an absolute one.⁴ In the case of The Administrator of the Estate of Dr. H. Kamuzu Banda –v- Attorney

³ Civil cause Number 1558 of 1993 (High Court of Malawi, Unreported)

⁴ Attorney General –v- Malawi Congress Party and L.J. Chimango and Dr. H. Ntaba, MSCA Appeal Number 22 of 1996 (Malawi Supreme Court of Appeal) (famously known as the Press Trust Case).

General⁵ Justice Chimasula Phiri held that, “ ...*expropriation of property shall be permissible only when done for public utility and only when there has been adequate notification and appropriate compensation provided that there shall always be a right to appeal to a court of law.*”

98. Further to the general protection of right to property, the Constitution has a special provision on the right to property for women. Section 24 guarantees right of women to acquire and maintain rights in property, independently or in association with others regardless of their marital status. On dissolution of marriage, the section provides for fair disposition of property that was held jointly. Legislation that affects property includes the Deeds and Registration Act; the Registered Land Act; and the Land Act.

Right to work (Article 15)

99. The Constitution provides for fair labour practices under section 31. In addition to this, the Employment Act and Labour Relations Act provide for fair labour practices. It has been held that Malawi constitution recognizes fair labour practices as stipulated by the International Labour Organization.⁶ Therefore, every person has a right to fair and safe labour practices and to fair remuneration.

Right to health (Article 16)

100. Malawi has undertaken to protect the right to health starting with principles of national policy. Section 13 (b) and (c) of the Constitution provide that the state shall actively promote the welfare and development of the people of Malawi by progressively adopting and implementing policies and legislation aimed at achieving *inter alia*, adequate nutrition for all in order to promote good health and self-sufficiency, provide adequate health care, commensurate with health needs of Malawian society and international standards of health care. In the case of R-v- Chimwemwe Mphembedzu Bail

⁵ Civil Cause Number 1889(A) of 1997 (High Court, unreported)

⁶ Chiume –v- SS Rent a Car Ltd, IRC Matter Number 149 of 2000 (unreported); Kamono –v- Curmarces Investments Limited IRC Matter Number 50 of 2001 (unreported)

Case Number 70 of 2011⁷, where the applicant being a juvenile made a bail application from his detention at Bvumbwe Young Offenders Centre. One of his arguments was that he was ill. In agreeing with the applicant that he had a right to health, the Court went on to add that this right is extended to all persons living in Malawi.

101. Malawi has also taken significant steps to address the HIV/AIDS pandemic. In 2001, Government created a public trust called National AIDS Commission to inculcate the new paradigm of HIV and AIDS beyond bio-medical understanding. Until 2002, NAC operated under the Ministry of Health and reported to the Cabinet Committee on HIV and AIDS and Health. In August 2002, the reporting structure was changed and NAC, through the Office of the President and Cabinet, reported to the Minister responsible for HIV and AIDS who was the President himself. The change in the reporting structure of NAC to the Office of the President and Cabinet was done with a view to bringing the highest political office to commit fully to fighting the epidemic and to ensure Government oversight activities at the highest political level. In April, 2003, a Ministry responsible exclusively for HIV and AIDS was established. The Chairperson of NAC, then, reported directly to the Minister.

102. After the General Elections in May, 2004, the Ministry responsible for HIV and AIDS was abolished and in the same year, the Department of Nutrition, HIV and AIDS was established under the Office of the President and Cabinet. Government realized that issues of HIV and AIDS cannot be separated from nutrition for a developing country such as Malawi. In line with principles of national policy enshrined in the Constitution, it was considered that embracing nutrition as an accompaniment of the fight against the spread of HIV would go a long way in prolonging life and improving survival chances for persons that are infected. The Department was established with a view to providing policy direction and guidance, overseeing and facilitating mainstreaming and the creation of operational structures with respect to nutrition and HIV and AIDS. The Department is also responsible for the facilitation of the enactment and enforcement of legislation and networking on issues of nutrition and HIV and AIDS. The objectives of the Department

⁷ See also Gable Masangano case

are to formulate and review nutrition, HIV and AIDS policies and to implement strategies; to provide guidance and support for the implementation of government policies on nutrition, HIV and AIDS; and to monitor and evaluate the implementation of Government policies on nutrition and HIV and AIDS.

103. In 2003, Malawi adopted her first HIV and AIDS Policy under the theme “A Call to Renewed Action”. It was meant to guide the National Response in an effort to prevent the further spread of HIV infection; and mitigate the impact of HIV and AIDS on the socioeconomic status of individuals, families, communities and the nation. The Policy expired in 2008 and has been revised since. The new Policy awaits Government endorsement and launching. The new Policy is intended to promote evidence-based reprogramming and strengthening of the National HIV and AIDS response while recognizing emerging issues, gaps, challenges and lessons learnt over the duration of the first National HIV and AIDS Policy; scaling up of evidence based innovative interventions; and re-alignment of the National HIV and AIDS response to the current Government development agenda.

104. In terms of legislation, in 2007 the Law Commission constituted a special Law Commission to develop legislation on HIV and AIDS following a submission from NAC and the Department of Nutrition, HIV and AIDS. The Commission decided to take a three pronged approach in developing the proposed law and encompassed issues of public health, human rights. The resultant report and proposed legislation, notwithstanding the debate that has ensued since the publication of the Report, promotes largely a human rights approach to HIV and AIDS management and prevention. It was the view of the special Law Commission that all tools available to Government should be deployed in order to combat the epidemic. The law has proposed mandatory testing in exceptional circumstances. For instance, with respect to pregnant women and their sexual partners; people intending to enter into polygamous unions; sexual offenders; and blood and tissue donors. In the case of uniformed services and domestic workers, pre-recruitment testing may be permissible under certain circumstances but this is neither compulsory nor

mandatory. The proposed law also prohibits and criminally punishes discrimination on account of perceived or actual HIV status. The proposed legislation also seeks to provide for effective remedies, in line with the Constitution, for persons infected deliberately, negligently or recklessly with HIV. It is proposed to impose criminal sanctions for such kind of infection. In the Commission's view, this provision is meant to compliment other initiatives that are specifically meant to promote prevention of further spread of HIV infection. The Report was completed in December, 2008 and is currently with Cabinet, for consideration, before it is brought before Parliament, for enactment.

105. Overall Malawi has made some progress in meeting the Millennium Development Goal of combating HIV/AIDS, malaria and other diseases as shown below:

- HIV prevalence among 15-24 year old pregnant women- Baseline in 2000 was 24.1%. The status as of October 2011 decreased to 12%. The target set for 2015 is 0%.
- Death rates associated with malaria- Baseline in 2000 was 3.6%. The current status as of October 2011 decreased to 2.8%.
- Access to Malaria treatment- Baseline in 2000 was 8%. The current status as of October 2011 decreased to 2.8%.
- Proportion of household with at least one ITN- Baseline in 2000 was 31%. The current status as of October 2011 increased to 56.8%.
- Death rates of Tuberculosis- Baseline in 2000 were 22%. The current status as of October 2011 reduced to 7%
- Proportion of TB cases under DOTS- Baseline in 2000 was 57%. The current status as of October 2011 increased to 87%.

It has been projected that achieving the Goal to Combat HIV and AIDS, Malaria and other Diseases is likely to be met by 2015.

Right to education (Article 17)

106. In 1994, the Government introduced free primary education to enable all children to attend and go through primary education. Since 1994, there has been a steady rise in the number of children enrolled in primary schools. 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. University education is heavily subsidized by the Government. Students get scholarships which they repay after completion of their degrees.

107. In the case of BSC Nursing Students & Another –v- Mzuzu University Registrar & Others Miscellaneous Civil Cause Number 22 of 2010, where Ministry of health stopped paying for its scholarship sponsored students before they finished their studies, it was held that section 25(1) of the Constitution provided for the protection of the right to education for all and this had been violated. In terms of Malawi's effort to achieve the Millennium Development Goal of universal primary education, the latest statistics are as follows:

- Net Enrolment in Primary- The baseline in 2000 was 78%. The status as of October 2011 increased to 80.2%. The target set for 2015 is 100%.
- Proportion of Pupils Starting Standard 1, Reaching Standard 5- The baseline in 2000 was 69%. Its current status as of October 2011 increased to 73.5%. The target to be met in 2015 is set at 100%.
- Literacy rate 15-24 years-The baseline in 2000 was 68.1%. Its current status as of 2011 increased to 84%. Target set for 2015 is 100%.

Despite progress being made, achieving Universal Primary Education by 2015 is unlikely to be met. In 2013, Government introduced in Parliament the Education Bill which in section 13

seeks to introduce compulsory primary education. The Bill was referred to the Legal Affairs Committee of Parliament for further consultations.

Protection of family, women and children (Article 18)

108. According to Section 22 of the Constitution of Malawi, the family is the natural and fundamental group unit of society and is entitled to protection by society and the State. Each member of the family is entitled to enjoy full and equal respect and to be protected by law against all forms of neglect, cruelty or exploitation. All men and women regardless of nationality have the right to marry and found a family and no person shall be forced to enter into marriage. Section 22 further states that no person over the age of eighteen years shall be prevented from entering into marriage. For persons between the ages of fifteen and eighteen years, a marriage shall only be entered into with the consent of their parents or guardians. Under Section 22 (8), the State shall actually discourage marriage between persons where either of them is under the age of fifteen years.

109. Malawi faces challenges in ensuring equality of rights and responsibilities within the marriage set up. In particular, there are cultural practices that favour men as opposed to women or the male as opposed to the female child. An example is where a woman is at times forced to marry her brother in law following the death of her husband or, where a male child is given financial support by his family to attain education whereas a female child is encouraged to stay at home and help to look after the family.

Under section 13 of the Constitution of Malawi, the State is required to progressively adopt and implement policies and legislation aimed at recognizing and protecting the family as a vital and fundamental social unit. To this end, Malawi has adopted policies and enacted laws aimed at addressing some of the challenges affecting the family unit. An example is the Prevention of Domestic Violence Act which was enacted in 2006 and makes provision for the prevention of domestic violence and for the protection of persons affected by domestic violence in a bid to contribute towards the protection of the family as an important social unit. In addition to this, the Government created victim support units in Police Stations which

are meant to help victims of domestic violence and help to address the problem of domestic violence.

110. Parents and guardians are also given rights and duties towards children under the Child Care, Protection and Justice Act, 2010. For example, Section 3 provides that a parent or guardian shall not deprive a child of his or her welfare and has responsibilities whether imposed by law or otherwise towards the child which include the responsibility to-

a- protect the child from neglect, discrimination, violence, abuse, exploitation, oppression and exposure to physical, mental, social and moral hazards;

b- provide proper guidance, care, assistance and maintenance for the child to ensure his or her survival and development, including in particular adequate diet, clothing, shelter and medical attention;

c- ensure that during the temporary absence of the parent or guardian, the child shall be cared for by a competent person;

d- exercise joint primary responsibility for raising their children,.

111. In cases of dissolution of marriage, be it a marriage at law, by repute, by permanent cohabitation or at custom, the paramount consideration is the welfare of the child when it comes to custody of children as was decided in the cases of Chilingulo v. Chilingulo & Others (1990) 13 MLR 110 and Kamanga –v- Kamanga (1990) 13 MLR 165. The same applies to children born out of wedlock. Section 23 of the Constitution of Malawi explicitly confers equal rights to children before the law regardless of the circumstances of their birth. In addition to this, Section 3 of the Deceased Estates (Wills & Inheritance) Act (Act No. 14 of 2011) makes provision for equal treatment of both children born outside and within wedlock in terms of inheritance.

112. Section 22 (5) of the Constitution of Malawi recognizes all marriages at law, custom and marriages by repute or by permanent cohabitation. However, there is no legislation governing marriages by repute or permanent cohabitation. As a result, there are uncertainties surrounding such marriages in terms of matrimonial rights and duties of the parties when it comes to issues such as dissolution of the marriages or distribution of matrimonial property. According to Section 23 of the Constitution of Malawi, children are persons under sixteen years of age. The Constitution has guaranteed children additional rights. For example, the Constitution provides that all children, regardless of the circumstances of their birth, are entitled to equal treatment before the law. They have the right to a given name and a family name and the right to a nationality. They also have the right to know, and to be raised by their parents. The Office of the National Registration Bureau is responsible for the registration of births and deaths under the National Registration Act. A duty is imposed on the father or mother of a child to register his or her birth. Malawi, however, still faces challenges in this respect because there still remain a number of children that are born at home in the villages and not the hospitals whose births remain unregistered.
113. The Constitution of Malawi also states that children are entitled to be protected from economic exploitation or any treatment, work or punishment that is, or 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. Sections 21 to 23 of the Employment Act (Cap.55:01) provides for additional protection of children between the ages of 15 and 18 who are employed and prohibits the employment of children under the age of 14 years. Section 24 of the Act goes on to criminalize any act that contravenes the provisions contained in Sections 21 to 23.
114. 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. However, challenges still remain in the implementation of the rights of

children and the violation of children's rights still takes place. Malawi recognizes this and is progressively making efforts to address this issue. For example, the Government has introduced several policies and measures aimed at protecting orphaned children as vulnerable members of society. The Ministry of Gender, Children and Community Development was created 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 and AIDS.

115. The Children and Young Persons Act of 1969, 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 which consolidates the law relating to children. The Act seeks to improve child care and protection systems by giving, among other things, duties and responsibilities to parents toward their children. In order to ensure protection of children's rights, Section 132 of the Act establishes Child Justice Courts which actively adjudicate over children's matters, promote diversion and prohibits unnecessary detention of children. In terms of abandoned children, Sections 38 to 48 of the Child Care, Protection and Justice Act 2010, make provision for the procedure for abandoned or neglected children to be taken care of, be it in terms of providing foster care for them or giving legal guardianship to someone for their care. The Penal Code has also recently been amended to include and create (among other things) offences against morality relating to children under sections 160A to 160G. These amendments include offences such as procuring children to take part in public entertainment; photographing or filming a child in a prohibited sexual act and indecent practice in the presence of a child.

Equality of peoples (Article 19)

116. Section 20 of the Constitution of Malawi makes provision for the equality of all persons before the law. It also provides that discrimination of persons in any form is prohibited and all persons are, under any law, guaranteed equal and effective protection

against discrimination on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, property, birth or other status. It goes on to say that legislation may be passed addressing inequalities in society, prohibiting discriminatory practices and their propagation and may render such practices criminally punishable by the courts. Section 4 of the Constitution also provides that the Constitution shall bind all executive, legislative and judicial organs of the State at all levels of Government and all the peoples of Malawi are entitled to the equal protection of the Constitution and laws made under it. The Principles of National Policy enshrined under Section 13 of the Constitution require that the State should actively promote the welfare and development of the people of Malawi by progressively adopting and implementing policies and legislation aimed at achieving gender equality for women with men through-

(a) full participation of women in all spheres of Malawians society on the basis of equality with men;

(b) the implementation of the principles of non-discrimination and such other measures as may be required; and

(c) the implementation of policies to address social issues such as domestic violence, security of the person, lack of maternity benefits, economic exploitation and rights to property.

The Malawi Constitution protects the rights of all people either as individuals or group of individuals. In that regard the Constitution protects the rights of groups of individuals with some or all of the following features: a common historical tradition; racial or ethnic identity; cultural homogeneity; linguistic unity; religious or ideological affinity; territorial connection; and common economic life.

Self-determination (Article 20)

117. Malawi became a sovereign state upon attaining independence in 1964 and a republican status in 1966. Section 1 of the 1994 Constitution recognizes this sovereign status with rights and obligations under the Law of Nations. One of the Principles of National Policy in Section 13 of the Constitution states Malawi's quest to govern in accordance with law of nations, and the rule of law and actively support the further development in regional and international affairs. Section 3 of the Constitution highlights the territorial integrity of Malawi and the country has, at all times respected the borders of other sovereign nations.
118. The transformation of Malawi from a one-party State to a pluralistic democracy, in 1993, through a referendum is evidence of the respect of the right of people of Malawi to determine their political destiny. Since 1994, Malawians have periodically held credible, free and fair presidential and parliamentary elections in order to choose their Government. The Constitution that emerged from the 1993 transformation from one party rule to multiparty system of rule, was formally adopted in 1994. It provisionally applied for a year, after which it became substantively applicable as the Constitution of the Republic. The Constitution creates a constitutional order based on the need for an open, democratic and accountable government.
119. In pursuit of this right, Malawi has, through its duly elected Government established diplomatic, economic, social, cultural or political links with other countries and is a member of the Southern African Development Community, the Common Market for Eastern and Southern Africa, the African Union, the United Nations, the World Bank and the International Monetary Fund. Malawi has also pursued economic policies commensurate with its needs and aspirations in order to attain development generally. The adoption of a democratic Constitution, various pieces of legislation, policies and strategies such as the Vision 2020, the Malawi Poverty Reduction Strategy and the Malawi Growth and Development Strategy I and II, among others, is evident of this fact.

Right to free disposal of wealth and natural resources (Article 21)

120. Malawi has substantial number of mineral deposits. Coal and uranium are the ones being mined at the moment. There are a few explorations being considered as well. Malawi maintains a free market economy where any person with the right to property or resources is entitled to disposition thereof. At the same time, Malawi retains its prerogative to regulate the exploitation, export of natural resources and impose duties thereon. Apart from its mineral resources Malawi's major comparative advantage is its diverse and abundant wildlife and natural resources. These include amongst others; the Grass plains of Nyika National Park, Vwaza Game Reserve, Lake Malawi National Park, Kasungu National Park, Nkhotakota Game Reserve, Lengwe National Park and Lake Malawi. These resources attract tourists globally and strongly compliment the global tourism trend towards greater environmental awareness and the desire to experience nature in its original state.

121. This state of affairs has resulted in primary and secondary job creation as well as business establishment across the tourism sector such as transport, accommodation, tour operations, social and personal services such as safari lodges and lake resorts. Just like revenue accrued from all other sources of government revenue, revenue made from all natural resources goes into centralized government coffers and is re-distributed through the annual budget that allocates funds to all sectors of the economy.

Right to economic, social and cultural development (Article 22)

122. The Constitution provides for the right to economic activity under section 29. Every person shall have the right freely to engage in economic activity, to work and to pursue a livelihood anywhere in Malawi. Further, section 30 of the same Constitution provides for the right to development. All persons and peoples have a right to development and therefore to the enjoyment of economic, social, cultural and political development and women, children and the disabled in particular shall be given special consideration in the application of this right. The State shall take all necessary measures

for the realization of the right to development. Such measures shall include, amongst other things, equality of opportunity for all in their access to basic resources, education, health services, food, shelter, employment and infrastructure. The State shall take measures to introduce reforms aimed at eradicating social injustices and inequalities. The State has a responsibility to respect the right to development and to justify its policies in accordance with this responsibility. Malawi acceded to the International Covenant on Economic, Social and Cultural Rights and has strived to implement internationally accepted social and cultural norms in the field of human rights.

123. Malawi Growth and Development Strategy I and II (MGDS) provide the policy and implementation framework for the realization of the Millennium Development Goals (MDGs) targets and the Vision 2020 ideals. Recent statistics show Malawi's efforts to eradicate extreme poverty and hunger as follows:

- Proportion of population living below US\$1.00 per person per day- The baseline in 2000 was 53.9% which decreased to 39% as at October 2011. The target set for 2015 is 27%.
- Poverty Gap Ratio: in 2000 the baseline was 18.6%, which decreased to 17.8% in October 2011. The 2015 target is 8%.
- Poorest Quintile Share in National Consumption: The baseline in 2000 was 10%. The status as of October 2011 was 10.1%. Target for 2015 is set at 20%.
- Prevalence of Underweight Children: Baseline in 2000 was 25.4%. Current status as of October 2011 was 12.8%. The target for 2015 is 14%.
- Proportion of Population below minimum level of dietary energy consumption: Baseline in 2000 was 23.6%. Current status as of 2011 it decreased to 15%. The target to be met in 2015 is 11.8%.

124. In terms of developing global partnership for development the progress made is as follows:

- Net ODA as percentage of Real Gross Domestic Product- Baseline in 2000 was 12%. The current status as of October 2011 increased to 13%.
- Unemployment of 15-24 year olds (urban) - Baseline in 2000 was 1%. The status as of October 2011 increased to 4%.
- Cellular subscribers per population of 1000 people- Baseline in 2000 were 1.8%. The status as of October 2011 increased to 22.5%.
- Telephone lines subscribers per 1000 population- Baseline in 2000 were 0.57%. The current status as of October 2011 increased to 1.19%.
- Internet users per 1,000 population- Baseline in 2000 was 0.007%. The current status as of 2011 had increased to 16.8%.

Achieving the Goal to Develop Global Partnership for Development is likely to be met.

Right to national and international peace (Article 23)

125. Since attaining independence, Malawi has always enjoyed peace and has institutions empowered to maintain peace within the country. Section 153 of the Constitution of Malawi establishes the Malawi Police Service which is an independent organ of the Executive whose function is to provide the protection of public safety and security within Malawi. Section 159 of the Constitution of Malawi establishes the Malawi Defence Force whose function (amongst others) is to uphold the sovereignty and territorial integrity of the Republic and guard against threats to the safety of its citizens by force of arms. In addition to this, the Penal Code of Malawi criminalizes acts and conduct likely to threaten national peace. For example Section 181 of the Penal Code makes it an offence to conduct oneself in a manner likely to cause breach of peace.

126. The main challenge in terms of the right to national peace has been the capacity and independence of the police. There have been cases of violation of rights by the police

in the process of maintaining national peace. For example, during the mass demonstrations that took place in July 2011, the police reportedly shot at unarmed civilians in the process of dispersing the demonstrations. In relation to the right to international peace, Malawi has peaceful and amicable relations with both its neighboring countries as well as those further out.

Section 13(k) of the Constitution of Malawi deals with Malawi's national policy on international relations. It states that:-

“The State shall actively promote the welfare and development of the people of Malawi by progressively adopting and implementing policies and legislation aimed at achieving the following goals--

International Relations

To govern in accordance with the law of nations and the rule of law and actively support the further development thereof in regional and international affairs.”

Malawi maintains diplomatic relations with many countries. Malawi is also active in its promotion for regional economic integration as evidenced by the fact that it is a signatory to a number of economic trade agreements such as the Southern Africa Development Community and the Common Market for Eastern and Southern Africa.

127. In relation to refugees, Section 9 of the Refugee Act, (Cap. 15:04 of the Laws of Malawi), provides that any person granted refugee status is subject to the laws of Malawi, jurisdiction of courts in Malawi and to all measures taken for the maintenance of public order. Thus, a refugee may not engage in terrorism or acts of terrorist financing against any State as the same is contrary to and punishable under the Money Laundering, Proceeds of Serious Crime and Terrorist Financing Act, (Cap. 8:07 of the Laws of Malawi).

Right to satisfactory environment (Article 24)

128. The principles of national policy under Section 13 of the Constitution of Malawi 1994 states that

“The State shall actively promote the welfare and development of the people of Malawi by progressively adopting and implementing policies and legislation aimed at achieving the following goals:-

(d) The Environment

To manage the environment responsibly in order to--

(i) prevent the degradation of the environment;

(ii) provide a healthy living and working environment for the people of Malawi;

(iii) accord full recognition to the rights of future generations by means of environmental protection and the sustainable development of natural resources; and

(iv) conserve and enhance the biological diversity of Malawi.”

Malawi enacted the Environmental Management Act, (Cap. 60:02 of the Laws of Malawi), which makes provision for the protection and management of the environment, the conservation and sustainable utilization of natural resources and other related matters. The Act also provides for the right to a clean and healthy environment. It goes further under Section 5 to provide *locus standi* to anyone to bring an action in the High Court—

“(a) to prevent or stop any act or omission which is deleterious or injurious to any segment of the environment or likely to accelerate unsustainable depletion of natural resources;

(b) to procure any public officer to take measures to prevent or stop any act or omission which is deleterious or injurious to any segment of the environment for which the public officer is responsible under any written law;

(c) to require that any on-going project or other activity be subjected to an environmental audit in accordance with this Act.”

129. Further to this, Section 245A of the Penal Code criminalizes acts done in a manner that endangers the environment or are likely to cause harm to it such as through managing hazardous material, through illegal trafficking in wastes and chemicals and, but not limited to, emitting pollutants into the environment otherwise than in accordance with the provisions under the Environment Management Act. Malawi also has the Department of Environmental Affairs, which is responsible for regulating and implementing environmental protection. Although Malawi has the legal instruments to regulate environmental protection, it still faces challenges in implementation. For example, under the Environmental Management Act, certain projects such as mining may not be carried out without first being subjected to an environmental impact assessment.

Duty to promote respect of rights under Charter (Article 25)

130. Malawi promotes respect for human rights through teaching, education and publication by including human rights as part of the syllabus for law enforcement officers as part of training and lawyers and judges as part of the Law Degree syllabus taught at the University of Malawi. There are also various human rights programmes that are taught by the Government to the public through the media such as through television and radio broadcast. However Malawi recognizes that there is need for more promotional activities on the African Charter.

Duty to guarantee independence of Courts and Human Rights Institutions (Article 26)

131. The 1994 Constitution introduced 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 states that:

*“The judiciary shall have 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.*

The Constitution provides for a judiciary adequately empowered to uphold the supremacy of the Constitution, enforce respect for human rights and declare legislation and government actions which are contrary to the Constitution null and void. The Constitution established several independent institutions charged with the task of promoting, protecting and monitoring the enjoyment of human rights and freedoms. These include the Human Rights Commission, the Ombudsman and the Law Commission as narrated above.

Duty of family (Article 27)

132. Section 3 of the Child Care, Protection and Justice Act 2010 creates duties and responsibilities for parents and guardians towards their children. It states that a parent or guardian:-

- a) *shall not deprive a child of his or her welfare;*
- b) *has responsibilities whether imposed by law or otherwise towards the child which include the responsibility to-*
 - i) *“protect the child from neglect, discrimination, violence, abuse, exploitation, oppression and exposure to physical, mental, social and moral hazards;*

- ii) *provide proper guidance, care, assistance and maintenance for the child to ensure his or her survival and development, including in particular adequate diet, clothing, shelter and medical attention;*
- iii) *ensure that during the temporary absence of the parent or guardian, the child shall be cared for by a competent person;*
- iv) *exercise joint primary responsibility for raising their children.”*

133. Section 4 creates duties for children towards their parents. It states that children shall:

- a) *“respect the parents, guardians, superiors and elders at all times and depending on the age of the child assist them in cases of need;*
- b) *serve the community by placing his or her physical and intellectual abilities at its service;*
- c) *preserve and strengthen social and national unity and character of Malawi;*
- d) *uphold the positive values of the community; and*
- e) *contribute towards the child's own development into being a useful member of the society,*

but due regard shall be paid to the age and ability of the child and to such limitations as are contained in this Act.”

Respect to fellow beings (Article 28)

134. Individuals in Malawi have a duty to treat their fellow human beings without discrimination as required by Section 20 of the Constitution. This provision prohibits discrimination of persons in any form and guarantees all persons equal and effective protection against discrimination on grounds of race, color, sex, language, religion,

political or other opinion, nationality, ethnic or social origin, disability, property, birth or other status. In spite of this, Malawi recognises that cases of discrimination still exist, especially in relation to persons with disabilities, persons suffering from HIV and AIDS, and most especially gender based discrimination. Existing inequalities between men and women are largely due to customary laws and traditions. There is discrepancy between the declaration of equality in the Constitution and the actual relationship that exists between men and women.

Individual duties (Article 29)

135. Section 4 of the Child Care, Protection and Justice Act 2010 creates a duty for children to respect their parents. Every individual has a duty under the law not to compromise the security. The Penal Code creates offences against public order which would compromise the security of Malawi. Such offences include but are not limited to: promoting war, treason, inciting mutiny and inducing soldiers or policemen to desert. The Taxation Act, (Cap. 41:01 of the Laws of Malawi) provides for the taxation of incomes and creates a duty for all working Malawians earning taxable income to pay tax.

136. The Constitution under 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 citizens' respect for the rights to culture of others. 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 existence of numerous associations that promote their Heritage and there are several cultural and traditional dance troupes.

Challenges

137. Malawi has made significant progress in human rights, the rule of law and good governance. However many challenges remain. These include:
138. **Poverty**-The majority of the population is below the poverty line and lives 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, such as 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.
139. **Weak Institutions**-There is still need to strengthen key government institutions. The main challenge in this area has remained the inability to retain human resource and there exists a high staff turnover. This has had an impact on the continuity of in the progress of work.
140. **Lack of Public Awareness**-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.
141. **Slow pace of reform**-While the 1994 Constitution lays down the ideals and dreams of the people of Malawi, legislative and administrative reforms to match the constitutional standards has been rather slow. Significant progress has been made to review laws and practices to bring them in conformity with constitutional standards. However, such reviews can and should be at a much faster pace.

PART B: IMPLEMENTATION OF THE AFRICAN PROTOCOL ON THE RIGHTS OF WOMEN

Process of preparation

142. This Report was prepared Pursuant to article 26 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Protocol), read together with article 62 of the African Charter on Human and Peoples' Rights (the African Charter) and covers the period 2005 to 2013. The report was prepared following the preparation by Malawi of her report under the African Charter and the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW). The information that forms this report therefore was gathered after proper consultations in the process of compiling the two reports above.

Background information

143. The 1994 Constitution of Malawi is the supreme law of the land and provides for full protection of women in terms of enjoyment of human rights in general, equality in all aspects, non discrimination and the enjoyment of specific women's rights. Section 13 (a) of the Constitution provides for Gender Equality as a Principle of National Policy which states that:

The State shall actively promote the welfare and development of the people of Malawi by progressively adopting and implementing policies and legislation aimed at achieving the following goals—

(a) *Gender Equality*

To obtain gender equality through—

(i) *full participation of women in all spheres of Malawian society on the basis of equal opportunities with men;*

(ii) *the implementation of the principles of non discrimination and such other measures as may be required; and*

- (iii) *the implementation of policies to address social issues such as domestic violence, security of the person, lack of maternity benefits, economic exploitation and rights to property.*

In addition Section 24 of the Constitution specifically provides for the Rights of Women as follows:

(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;

(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, howsoever entered into—

(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 order to effectuate the rights provided for in the Constitution, Malawi has adopted legislation, policies, programmes and administrative measures. . The following are a few examples:

(a) Gender Equality Act 2012- The Act covers the following key issues-

- i. prohibition of sex discrimination, prohibition of harmful social, cultural or religious practices and prohibition of sexual harassment;
- ii. enhancement of the participation of women in public life and decision making positions through the introduction of quotas in public appointments and transparency in public appointments;
- iii. equality of access to education and training;
- iv. the right to access sexual and reproductive health services which is complemented by a right to information about sexual and reproductive health services to enable users of those services to make informed choices.
- v. the enforcement mechanism of the proposed legislation which will be through the Human Rights Commission;

vi. the need for the Minister responsible for Gender, Children and Social Welfare to ensure that programmes aimed at educating the public on gender equality issues are developed and implemented;

(b) Disability Act 2012

(c) Prevention of Domestic Violence Act 2006;

(d) Enactment of Deceased Estates (Wills, Inheritance and Protection) Act in 2011;

(e) Review of discriminatory laws on marriage and divorce resulting in the Marriage, Divorce and Family Relations Bill;

(f) Ratification of key international legal instruments which include the Convention on the Elimination of Discrimination against Women (CEDAW), the African Union Women's Protocol, the SADC Protocol on Gender and Development, the Beijing Declaration and the Beijing Platform for Action.

(g) The adoption of National Policy on Orphans and other Vulnerable Children (OVC) is facilitating support for care, protection and development of OVC in a coordinated manner in order to provide them with an environment in which they realise their full rights and potential;

(h) The Ministry of Education's Accelerated Girls' Education Programme where school infrastructure is improved with sufficient sanitary facilities in order to make them more accommodating to female needs; positive discrimination or affirmative action is being done in allocating bursaries to needy pupils. The ratio is currently in favour of girls in order to address the inequality of access to education which was in favour of male as opposed to female children;

(i) there is also a Re-admission Programme for young mothers to provide them with an equal right to education despite being mothers before the completion of their education;

- (j) the Ministry of Education is also making a deliberate effort to ensure an equal selection rate for girls and boys from primary to secondary schools which was hitherto not the case;
- (k) the Education Policy Investment Framework, which is the national education strategic framework, ensures the promotion of educational equity by making an inclusive environment supportive of the needs of boys and girls as well as children with special needs and severe disabilities; the provision of subsidized farm input such as fertilizer to the elderly, the very poor, the disabled, and other socially disadvantaged groups is also meant to address the issue of lack of equal access to resources for farming and hence food;

144. The Protocol is not directly applicable before national courts. Section 211 of the Constitution requires domestication of international instruments before they become part of the laws of Malawi. However courts have always had recourse to international instruments in the determination of cases.

145. The key institutions in the implementation of the Protocol include the Ministry of Gender, Children and Social Welfare as the line Ministry, the Human Rights Commission as the enforcement agency of the Gender Equality Act, the Law Commission which is responsible for review of all gender insensitive laws.

Equality and non-discrimination

146. The Constitution in section 20 provides for prohibition of any discrimination and guarantees equality of all people. Section 24 specifically provides for the rights of women granting them full and equal protection under the law as men in areas such as capacity to enter into contracts, acquire and maintain property, acquire and retain custody or guardianship of children, acquire and retain citizenship and nationality. In addition, the section specifically provides for passing of legislation to eliminate customs and practices that discriminate against women in areas such as sexual abuse, harassment and violence, discrimination at work and in public affairs, and deprivation of property especially inherited property.

147. Section 13 of the Constitution which lists Principles of National Policy provides for Gender Equality to ensure full participation of women in all spheres of Malawian society on the basis of equality with men. In this regard and in pursuance of these constitutional provisions and Goal Number 3 of the Millennium Development Goals on promotion of gender equality and empowerment of women, several legislative and administrative steps have been adopted. The revised National Gender Policy, although not formally adopted by Government, continues to drive the public sector approach by isolating issues that are relevant, contemporary and in dire need of attention when it comes to issues of discrimination.
148. The first National Gender Policy operated between 2000 and 2005. While efforts were undertaken to revise it with a view to eventual replacement, this has not been done. It must be noted that during the Reporting Period, Government did not review or adopt reviewed policies due to what was termed as ‘under-implementation’ of the existing policies. Government felt that unless and until the policies already in place were largely or fully implemented, there was no reason to revise or adopt new policies.
149. Some of the programmes undertaken by Government include Gender Equality and Women Empowerment which commenced in July, 2012; National Response to Combat Gender Based Violence, running from 2008 to 2013; Increasing Women Representation in Parliament and Local Government dubbed the “50:50 Campaign” from 2009 to 2014; Women, Girls and HIV and AIDS from 2005 to 2012; Gender Mainstreaming as an on-going semi-permanent programme; and the Economic Empowerment Programme. An inquiry with the National Statistical Office (NSO) reveals that, now, it is a matter of standard practice for the Office to generate data that is sex segregated in order to monitor and inform initiatives that seek to attain gender equality.
150. One of the major challenges in the country’s pursuit of equality between men and women has been the elimination of customs and cultural practices against women in

marriage, violence against women and property grabbing. In dealing with this, a comprehensive review of laws on marriage and divorce was conducted which has resulted in the Marriage and Divorce Bill. The Prevention of Domestic Violence Act was also passed in 2002 to deal with cases of violence against women.

151. The Gender Equality Act was enacted in 2013. It looks beyond Government practice in terms of discrimination on the basis of sex, gender and marital status and provides individuals with civil and criminal sanctions where practices that are considered discriminatory and harmful are committed. At international level, it must be noted that during the Reporting Period, Malawi signed the SADC Gender and Development Protocol in 2011. The Protocol provides for the general development of women and specifies areas such as protection of women and girls rights to property and land rights; access to water; protection from violence, among others. Of particular significance is the introduction of the aspiration towards the attainment of equality in the political space. The position of most members to the Protocol remains distant from this aspiration. Malawi is no exception.

Access to Justice, including Legal Aid and the Training of Law Enforcement Officials (Article 8)

152. The Constitution of Malawi is founded upon, key principles which include the inherent dignity and worth of each human being requires that the State and all persons shall recognize and protect human rights and afford the fullest protection to the rights and views of all individuals, groups and minorities whether or not they are entitled to vote; all persons have equal status before the law, the only justifiable limitations to lawful rights are those necessary to ensure peaceful human interaction in an open and democratic society; all institutions and persons shall observe and uphold the Constitution and the rule of law and no institution or person shall stand above the law.

153. In civil matters, the Constitution recognizes matters of contracts; rights in property; custody, guardianship and care of children; and citizenship and nationality. This list is not exhaustive. It is clear that the wording of section 24 clearly guarantees that any restriction on the legal capacity of women is a nullity. In practice, women are capable of entering into various kinds of contracts, including for employment and commerce without discrimination.
154. The Constitution calls for the enactment of legislation to eliminate practices that promote discrimination in work, business and public affairs. To this end, the newly enacted Gender Equality Act attempts to address the problem. Every person including women have access to justice at every level of society. In addition Malawi passed the Legal Aid Act in 2010 which creates the Legal Aid Bureau as a standalone and independent organisation responsible for legal aid. It is hoped that will increase accessibility to legal aid. There is also increased use of paralegals both in Government institutions and in civil society organizations as foot soldiers in enhancing access to justice especially by rural people. The Local Courts Act which is now undergoing review, provides for creation of courts and adjudication of minor criminal cases and civil cases at village levels thereby increasing access to justice.
155. The law enforcement organs comprise the Malawi Police Service (MPS); the Malawi Defence Force (MDF); the Immigration Department; and the Prison Service. In the MDF, women constitute 6.8 per centum and women only started being recruited after 1990. The MPS has the highest number of female service persons at 21.7 per centum and also boasts a high number of women in decision making positions especially at the rank of Commissioner where women comprise 33.3 per centum (2 of out of 6 Commissioners). In response to this, a female Deputy Inspector General of Police has been tasked to operate a Gender desk which will, among other things, look into gender disparities in the institution.

156. The Immigration Department has uniformed and civilian officers. Of the uniformed officers, 219 are male and 55 are female. Of the civilian officers, 71 are male and 44 are female. The Immigration Department is currently recruiting 300 officers, out of whom 200 are male. In the Prison Service, the numbers of personnel reflect the demands of the institution in terms of the number of prisoners. Almost invariably, the number of male prisoners exceeds the number of female prisoners and as such, females constitute 22 per centum of the Prisons staff.

157. In the Judiciary, there are several tiers of judicial officers. Among judges, there has been a decline in the number of female judges during the reporting period. In the magistracy, which is lower than the High Court, in 2011, 24 per centum of the magistrates were female while only 14 per centum of judges in the higher courts are female. All the law enforcement officers in Malawi go through human rights training as part of their studies as such they are aware of gender equality rights which as already mentioned are protected under the law. In addition to this ongoing human rights are conducted for law enforcement agencies by Government, Malawi Human Rights Commission and Civil Society Organizations.

Political Participation and Decision-Making (Article 9)

158. There is significant political will in ensuring that women are appointed to key positions and that their participation in politics is enhanced. The following key positions are held by women, State President, Acting Chief Justice, the Chief Secretary to Government, Solicitor General, Ombudsperson, Law Commissioner, Chairperson of Human Rights Commission, the Administrator General, the Chief Legal Aid Advocate, the Registrar General. There are several female Cabinet Ministers and Members of Parliament. In addition there is a campaign to ensure that there is 50-50 representation between male and females in Parliament. The Gender Equality Act also introduces quotas in the Public Service in Section 11 which states that

Notwithstanding anything contained in the Public Service Act and subject to subsection (2), an appointing or recruiting authority in the public service shall appoint no less than forty percent (40%) and no more than sixty percent (60%) of either sex in any department in the public service.

159. Besides the constitutional provisions on visibility of women in public life, there are statutes that regulate elections. The main statutes are the Parliamentary and Presidential Elections Act and the Local Government Elections Act. The Electoral Commission also has an enabling piece of legislation which governs it as an institution. In Malawi, there appears to be little or no issue surrounding disenfranchisement on the basis of sex. The presence of women in the National Assembly has steadily increased from 5.65 per centum in 1994 to 22.85 per centum in 2009 when the last elections were held. Since 2004, the number of women contesting for electoral positions has increased from 136 women out of which 27 were elected. In the last General Elections in 2009, 237 women contested for elected positions and 43 were elected. The only female contestant in the presidential race came fifth out of seven candidates. In the last election in 2009, the number of female candidates contesting in presidential elections was 3 against a total number of 14 candidates.

160. The next Local Government Elections are expected in 2014 where they shall be held alongside Presidential and Parliamentary Elections. Looking back at the last Local Government Elections in 2000, among a total number of 843 Councillors, 76 were female representing 9 per centum. The number of women elected into office at the time of the last General Elections was 43 for a 193-member House which gives a score of 0.287 marking a slight increase in the numbers of female cabinet ministers at 9 females and 21 males representing 30 and 70 per centum respectively. This falls far short of the desired 50 per centum representation laid out under the SADC Gender and Development Protocol by 2015.

161. Despite an improvement from a score of 0.323 in 2010 to 0.429 in 2011, the female MP population falls short of the desired 50 per centum by 20 per centum. This increase may be attributed to the 'Increasing Women Representation in Parliament and Local Government programme which was launched in July, 2008 with a view to increasing the number of female elected members in the 2009 General Elections. The 50:50 Campaign brought together Civil Society and Government Departments and some of the activities included providing financial support to female candidates and offering voter education to the public on the need to engender the election.
162. In civil service, higher positions are still dominated by men. The NSO assessed 45 positions using data from 2 Government Ministries and found that by 2011, only 4 positions were occupied by women representing a mere 9 per centum which depicts a large gap with a score of 0.098. The traditional domain however, remains non-responsive to gender issues due to succession processes where one succeeds as leader following lineage. In 2011, from a total of 265 recognized traditional leaders, 16 were female. Table 1 illustrates the gaps that exist in the political block as provided through the Malawi Gender and Development Index. Overall, it is clear that women fare dismally in this sector notwithstanding increasing input of resources and effort.
163. Despite tremendous and collective efforts by various gender players in Malawi, the general situation of females in Malawi remains dire. In the political arena, visibility of women in decision making positions remains dismal. Notwithstanding the improvement in numbers of women participating during the last general election, there have been a number of factors that have stifled their visibility. Firstly, the failure to conduct Local Government elections during the last 7 years has denied women an opportunity of space to compete for positions through elections. Secondly, political institutions remain non-committal to entrenching equality between the sexes within themselves. Most political institutions remain patriarchal and as such, they often practice measures that although seemingly fair, are intrinsically biased. Thirdly, little has been done to eliminate the

underlying factors of subordination of women in the political field. Factors like limited to lack or low levels of education; lack of financial and economic prowess; and a generally unfavourable atmosphere towards women continue to undermine their participation in the political space.

164. However, with respect to the Presidency, Malawi owing to the death of Professor Bingu wa Mutharika in April, 2012, witnessed a peaceful though not entirely seamless transition of power to Joyce Banda, hitherto Vice President. Her nomination and eventual election alongside the late Mutharika created the first Presidency rooted in equality within the SADC region. After overcoming resistance from the ruling party from which she had been expelled in December, 2010, she was sworn in as President on 7th April, 2012. Her appointment of Hon. Khumbo Kachali as Vice President reverted the *status quo* in the Presidency.

165. However, it must be noted that the situation that Malawi finds herself in does not speak much for posterity in that while the current situation may have tremendous influence of the general welfare of females in Malawi, there are no rules that would entrench the current balance. The incumbent President nor her successors are bound to maintain a balance in the Presidency during their terms. The 2014 elections remain a crucial test of the national response towards female leadership at the level of the Presidency

Education (Article 12)

The Constitution provides for the right to education. In addition the Gender Equality Act provides in sections 14 to 16 for equality in education and training, access to scholarships and quotas in tertiary education as follows:

14.- (1) Every person has the right to access education and training including vocational guidance at all levels.

(2) *Except in the cases of special need, the Government shall take active measures to ensure that educational institutions provide equal access to girls and boys and women and men, to—*

- (a) *the same curricula;*
- (b) *the same examinations;*
- (c) *teaching staff with qualifications of the same standard;*
- (d) *institutional premises and equipment of the same quality, irrespective of sex of students at the same level; or*
- (e) *provision of sanitary facilities that take into account the specific needs of the sex of the students.*

15.- (1) *Every person has the right to access a scholarship, grant, bursary, benefit or other scholastic endowment without regard to his or her sex.*

(2) *The Government shall take active measures to ensure that every educational institution has guidelines that facilitate compliance with subsection (1).*

16. *The Government shall take active measures to ensure the enrollment at tertiary education institutions of either sex to a minimum of forty percent (40%) and a maximum of sixty percent (60 %) of students.*

166. Matters of education are sub-divided into literacy, enrolment, survival and dropout of pupils and students depending on the level of education. Literacy has recorded a slight increase from 0.839 to 0.864 indicating that the proportion of women who are able to read and write is increasing towards that of men. Out of the 70% of the adult population who were literate, 69% were females and 79% were males. Findings of the 2009 Welfare Monitoring Survey (WMS) show that literacy rates decreased with increased age both among male and females which correlates with the observed trend of increasing enrolment experienced over time.

167. On enrolment, there has been a further decline in gender disparities particularly for primary and secondary school education. Gender disaggregated data for early childhood enrolment has been hard to find, therefore it has not been possible to paint a clear picture of progress between female and male children in this area. The scarcity of early childhood enrolment data is currently not available because it is not being collected. The only data available annually is the aggregate number Early Child Development (ECD) Centres and number of children attending ECD centres. The Ministry of Gender, Children and Community Development with support from the World Bank and UNICEF is currently setting up a database which will be able to capture data on early childhood enrolment. In 2010, there were 895,818 children enrolled in 9,780 ECD Centres representing 34 per centum coverage across the country compared to 771,666 children enrolled in 8,890 Centers in 2009 representing 32 per centum.

168. Government developed a policy on ECD in 2003 to provide guidance on how best to prepare a future generation for Malawi. Government recognizes that investing in early childhood would reduce inequalities rooted in poverty and social discrimination in society by enabling all children a fair and sound start in life. The policy ensures that the provision of care and support is in the best interest of the child and in line with local legislation and international obligations. Government has translated the Policy into two major vernacular languages and distributed copies to stakeholders concerned with ECD. Further, the Government developed a National Strategic Plan (2009 – 2014), an Advocacy and Communication Strategy and training materials on ECD. Caregivers and Parents Committees have been trained. Incentives have also been provided to caregivers to encourage them in their work.
169. Malawi has achieved gender parity with respect to primary and secondary school enrolments with girls slightly surpassing boys, an indication of improvement in attitudes towards girls' education. The gender parity also creates the picture that Malawi has succeeded in enrolling the majority of its primary school age group with an overall enrolment rate of 83% which is a very good stride towards the Millennium Development Goal and the Education For All (EFA) goals for 2015. The introduction of Free Primary Education in 1994 has played a significant role in primary school enrolments.
170. In terms of net primary education enrolment, 84% girls as compared to 82% boys were enrolled. Whilst the available statistics shows that the primary school age population of girls has grown faster than that of boys in the recent past leading to the achievement of parity in net enrolment rate, the picture may be slightly different if the issues of repetition at each level of the primary education cycle were to be factored in. The repetition rate between standards 1 and 8 ranges between 12.9% and 25.1% for boys and 13.5% and 24.1% for girls.

171. The Education Management Information System (EMIS, 2010) shows an increasing trend in the survival rate of pupils to standard 8 (the last class of primary education). According to the EMIS, the total survival rate for standard 8 increased from 26.1% in 2005 to 48.8% in 2010. In terms of gender, the trends have also been increasing for both boys and girls during the period. However, the rate of increase for girls has been lagging behind that of boys. For instance, in 2005 the survival rate for girls to standard 8 was 22.9% against 30.1% for boys and in 2010 the rate for girls was 45.0% as compared to 53.1% for boys. It should, however be noted that by 2010 survival rate was higher in lower classes up to standard 5, with a record 74.7% for boys and 72.0% for girls. An increase in the survival rate may partly be attributed to an improvement in sanitary facilities particularly for girls in most schools.
172. Despite the stated discrepancy which has continued over the years, it should be noted that there has been an improvement in the survival rate for both standards 5 and 8 since 2005. In 2005 the aggregate survival rate for standards 5 and 8 were at 49.8% and 26.1% respectively before rising to 51.8% and 30.2% in 2007 before getting to 73.5% and 48.8% in 2010 (EMIS, 2010). A Country Status Report for Malawi (2009) on education highlights both demand and supply factors that influence the low retention and the survival rate in primary schools. On the demand side, families' economic difficulties and behaviour such as pushing girls into early marriage as well as early pregnancy and family responsibilities are cited as the main factors. With regard to economic difficulties, most families would resort to sending their children to engage in child labour either as house workers in towns and/or to work in farms.
173. When girls reach standard 5 and a little beyond, they reach puberty and are often subjected to sexual harassment and assault both on their way to and from school as well as within the classroom walls from their male peers and teachers. This discourages the girls from continuing with school. Their parents would also keep them home from school both to protect them from violence, as well as to help with childcare, food gathering and

household chores as they are deemed to be of age. Long distance to schools is also a significant factor leading to school dropout.

174. Malawi still remains without a comprehensive Girl Dropout Policy but has a Re-admission Policy for girls who dropped out of school on account of pregnancy. Other significant policies for retention of pupils in school include the School Feeding Programme in primary schools and a 2 year cash transfer programme for girls between 13 and 20 years. The girls get a stipend directly to encourage them to attend school and preventing them from dropping out. Since 2007, Government has also intensified efforts to bring civic awareness to the public through the Primary Curriculum and Assessment Reform (PCAR). PCAR promotes both social and academic development of the student by giving the student a more active role in the process of learning.

175. On the supply side, crowded classrooms with a pupil classroom ratio of 101 in 2010 which increased from 85 in 2005, and open air or temporary classrooms mainly due to the introduction of free primary education in 1994 without adequate infrastructure in form of classrooms and sanitary facilities has influenced more pupils, particularly girls who become more aware of their sanitary needs as they get to puberty, to drop out of school. Learning under a tree becomes more problematic during the rainy season when the little available classroom space is preserved for the younger pupils in the lower classes at the expense of the upper classes. This means some classes are frequently disrupted by the rains which then discourages the learners and leads to increased absenteeism and drop out. Despite improvements in sanitary facilities particularly for girls in most schools, the situation still remains dire.

176. Whilst the survival rate indicator is used to measure the extent to which the school system is able to retain pupils, with or without repetition, it conversely measures the magnitude of dropout as has been discussed above. Despite the notable progress in reducing school dropout at entry point, the situation is still not good with slow improvement as one goes up the ladder. The EMIS data shows high dropout rates

particularly for girls in higher classes i.e. standard 7 and 8 and also in rural as compared to urban areas. The main reasons for girls' dropout continue to be poverty, early marriages, pregnancies and family responsibilities. Dropout at secondary school level is also influenced by lack of fees due to poverty. Generally, the opportunity cost of sending female children to school in rural areas, where girls are married quite early, is high because benefits of girls' schooling seem to be far-fetched for most poor households.

177. The EMIS also shows that in 2005, the general pupil-teacher ratio was at 71 and increased to 80 in 2010. The ratio for pupils to the number of trained teachers was even higher at 83 in 2005 and rose to 91 in 2010. In terms of classroom structures, 15% of the structures in use for the 2009/10 school year were temporary or makeshift structures probably to accommodate the increasing number of pupils. Crowded classrooms, open-air or temporary classrooms, and incomplete classroom blocks and schools have had a negative effect on retention.

178. The Malawi Education Country Status Report (CSR) of 2008/09 found that 16% of pupils were enrolled in a school that did not provide the 8 grades of the primary cycle and giving a high probability of the students to dropout before completion. Among some of the measures that Government needs to undertake to address the decrease in the quality of education include, increasing investment in infrastructure development especially classrooms and sanitary facilities; providing adequate teaching and learning materials to schools; and training more teachers by promoting more private sector participation in establishment and running of teachers' training colleges. With regard to infrastructure, as of 2010, there were 36,819 classrooms in the public primary schools against 1,470 classrooms under private schools comprising only 3.8% of the total. Government needs to provide incentives to teachers like transport and house allowances since many teachers stay far away from the schools where they teach. To ease the problem of shortage of teacher houses, more investment needs to be made in the area. Increased budgetary allocation to the education sector to support private schools would also encourage them to play an active role in the promotion of education.

179. Gender parity has also been achieved in secondary school enrolment. Statistics show that net enrolment rate (NER) for females and males by 2009 were 15% and 12% respectively. With an overall NER of 13%, it shows that fewer students enter secondary education mainly due to less number of spaces in terms of schools and classroom space at the secondary level than in primary. During 2009/10, there were 5,392 primary schools compared to 1,045 secondary schools. Despite this gloomy picture, the private sector and religious agencies under the Association of Christian Educators in Malawi (ACEM) are doing a lot in recruiting girls in secondary schools. They have more girls-only secondary schools than the government. Out of 28 girls-only secondary schools, government only owns one representing a mere 3.6%.

180. At secondary school level, some schools that released the students during the day have been converted into boarding schools by providing hostels for both male and female students. With regard to tertiary education, males (66.4%) continue to dominate females (33.4%). Data on tertiary education was obtained from two public universities, University of Malawi and Mzuzu University, and three prominent private universities, the Catholic University of Malawi, University of Livingstonia and Shareworld University. Of the two categories of providers, the gender gap is higher in the public than in the private institutions. The two public institutions in 2011 together recruited 31.8% females and 68.2% males whereas the private institutions combined recruited 45% females and 55% males in the same year.

181. The major discrepancy in the public institutions emanates from two major factors which border around college accommodation space and university entry requirements. From the time of establishment, both University of Malawi and Mzuzu University have had more bed spaces for male than female students and so could only admit a specified number of females into the universities. The other limiting factor for female admission has been, until recently, the overemphasis on good passes in science subjects including mathematics. In most cases, it has been male students who have had an upper hand in

science subjects than females, a fact which has perpetuated the enrolment differences between males and females. On the whole, male students have always enjoyed a higher pass rate than their female counterparts. For instance, in 2010 nearly 58% male students passed their Malawi School Certificate of Education Examinations (MSCE) against 46.5% for females.

182. To mitigate the gender disparities in tertiary education, the University of Malawi introduced non-residential system to increase intake for both males and females and also constructed more hostels for female students. Currently the Ministry of Education is in the process of introducing pool selection system where all tertiary institutions would be given a chance to select students from a pool of school leavers. Additionally, the institutions will also be encouraged to enroll students based on class space and not bed space. These two initiatives will definitely increase the number of females enrolled for tertiary education. For the Teachers Training Colleges in the country, Government has adopted the 50-50 enrolment policy in order to reduce disparity between males and females. In 2010, the education enrolment sub-component had a score of 0.874 and has gone up to 0.901 in 2011. However, because more girls dropped out of school relative to boys it affected the overall education score leading to a slight decline in the score from 0.872 to 0.864 for the preceding and current years respectively.

183. While it was reported that issues of violence against girls in school are on the increase, the Malawi Human Rights Commission, together with the Ministry of Education, Ministry of Gender, the Law Commission, Action Aid International and some media houses, spearheaded the process of developing the Violence Against Girls in School Policy which was earlier in 2012, submitted to Government for possible adoption. The proposed policy identifies causes and instances of violence, including sexual harassment, issues of lack of sanitary facilities that usually drive girls once they reach the age of puberty out of school and other general matters. It is largely hoped that Government will welcome this proposal considering that some of its departments participated in the process.

Protection of women from violence- Bodily Integrity and Dignity, Including Sexual Violence, Trafficking of Women and Medical and Scientific Experimentation (Articles 3 and 4)

184. Sexual violence against women is a criminal offence under the Penal Code and Domestic Violence Act in Malawi. The review of the Penal Code was completed in 2000 and enacted into law in 2010. It has, among other things, extended the definition of ‘sexual activity’ to include practices between or perpetrated by females. However, during the enactment process, no effort was made to reconsider the neutralization of rape as an offence which may be committed by both males and females. The enactment of the Penal Code (Amendment) Act also revised the age under which a girl may be defiled from 13 years to 16 years in line with the constitutional provision of protection of rights of children under section 23.

185. The Gender Equality Act outlaws sexual harassment defining it in Section 6:

A person commits an act of sexual harassment if he or she engages in any form of unwanted verbal, non-verbal or physical conduct of a sexual nature in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the other person would be offended, humiliated or intimidated.

186. The Bill on HIV and AIDS (prevention and management) is also currently under consideration by parliament which when enacted will address some of the issues to do with not only discrimination of those living with HIV and AIDS but also gender based violence as it will outlaw customary discriminatory practices such as widow cleansing through sexual intercourse and widow inheritance.

187. The special Law Commission on the Development of Trafficking in Persons Legislation published its recommendation and findings, including draft legislation, in February, 2011. This publication marked the conclusion of a seven year process of developing legislation on trafficking in persons. The proposed legislation takes a multi-pronged approach in line with international instruments and the existing legal climate. It aims at achieving suppression of trafficking in persons by providing for an institutional framework that shall be responsible for dealing with matters on trafficking in persons; establishment of a fund which shall finance the initiatives against trafficking in persons; providing for protection of witnesses and victims of trafficking in persons; punishing (severely) offenders against the law; and making provision for specialization within law enforcement in practices and procedures for dealing with trafficking in persons. The proposed legislation is before Cabinet for approval.

188. There have been renewed efforts for liaison between Government and Non-State Actors, especially through the Malawi Network Against Child Trafficking (MNACT) in trying to combat prostitution and trafficking and the exploitation that comes with these. To this end, Government through the Ministries of Gender and Home Affairs, carries out periodic training for law enforcement agents, judicial officers and social welfare officers to enlighten them on the contents of the proposed legislation and other challenges arising in connection with trafficking in persons and exploitation of the prostitution of women. Between 2011 and 2012, through the Law Commission, Government reached out to almost 540 officers throughout Malawi.

Practices harmful to Women, Including Female Genital Mutilation and Female Stereotypes (Articles 5 and 4(2)(3))

189. Culture remains the main contributing factor to harmful practices to women and female stereotypes/ Culture is enshrined in the Constitution under section 26 in the following words:

“Every person shall have the right to use the language and to participate in the cultural life of his or her choice.”

190. There are plenty of practices that promote the notion of inferiority of women and reinforce the superiority of men. While there is no conclusive evidence that all women who participate in these practices do not choose to participate in such cultures, in most cases, it is clear that the participation whether by choice or compulsion, does negate the essence of gender rights. Any attempt to eliminate social or cultural practices must be examined with the constitutional lens. The question then becomes, would the elimination pass the constitutional test.

191. In the event that law does prohibit practices as they are enjoyed by people of a particular group or the nation in common, it is obvious that it would offend section 26. The next question then becomes whether this offence is justifiable under the Constitution. The question of modification, prohibition or elimination of certain practices in society became the subject matter of two special Law Commissions on gender equality and the other on HIV and AIDS. Under these special Law Commissions, the approach was to categorize practices of concern as harmful and acknowledge that they may emanate from social, cultural or religious practice. In both cases, the special Law Commissions, having identified gender and exposure to HIV infection respectively, opted to prohibit certain practices. Where possible, these have been listed.

192. The Gender Equality Act prohibits harmful practices which have been defined as:

a social, cultural, or religious practice which, on account of sex, gender or marital status, does or is likely to –

(a) *undermine the dignity, health or liberty of any person; or*

(b) *result in physical, sexual, emotional, or psychological harm to any person;*

193. In Malawian society, maternity matters are primarily considered as matters for women. Men have a cursory role, if at all, when it comes to taking responsibility over maternity issues. In fact, it remains ironical that while all maternity issues arise from interaction with men, women hardly share responsibilities with the men that contributed to the circumstances in which they find themselves.

194. Malawi does not have issues of FGM. Issue of female stereotypes are covered in the Gender Equality Act. One stop centres have been established in hospitals in every district where we have police officers, social welfare officer and health officers to offer all required assistance to victims of violence. Civil society organisations have initiated a program called Men for Gender Equality Now, where men talk to fellow men on the bad effects of gender based violence.

**Support to Victims of Violence, Including Health Services and Psychological Counseling
(Article (5) (c))**

195. There are a number of special victims units (SVU) normally located at police stations throughout the country which are mandated to support victims of violence through counseling, assistance with legal redress and where appropriate referrals to the public hospitals for relevant medical assistance. One stop centres have been established in hospitals in every district where we have police officers, social welfare officer and health officers to offer all required assistance to victims of violence.

Marriage and its Effect on Property Relations, Nationality, Name (article 6(e) to (j))

196. Family and marriage are the subject matter of section 22 of the Constitution and a myriad of legislation. There are currently, over and above customary laws, about 15 statutes that regulate marriage in Malawi. According to the Constitution, the family is the natural and fundamental group unit of society. Statutory marriages – meaning marriages under the Marriage Act compete unfavourably with customary and religious marriages which are by far more prevalent than statutory marriages.

197. All men and women have the right to marry and found a family in Malawi under Sections 22, 23 and 24 by mutual agreement. Upon marriage the wife is entitled, to the use of her husband's surname and to keep this name even after the marriage has been terminated, either by death or by divorce. While there is a generation emerging in Malawi which is more conscious of their rights, considering it has been almost 20 years since the adoption of the rights-based Constitution, progress remains slow when it comes to exercising some rights such as retention of a maiden name, choice of profession and occupation. In most instances, choices on these matters are determined by men whether as parents, siblings or spouses. In many instances, men feel challenged if a woman chooses a profession or career that is largely dominated by men. The Constitution has not been explicit in provision of these rights whereas the Gender Equality Act does make provision.

198. The enabling legislation on matters of citizenship is the Malawi Citizenship Act of 1966. On the issue of marriage which is prescribed under section 47 of the Constitution, the Malawi Citizenship Act, which obviously precedes the Constitution provides as follows:

“A citizen of Malawi, being a woman, who acquires by marriage the citizenship of some country other than Malawi shall cease on the first anniversary of the date of that marriage to be a citizen of Malawi unless, before that anniversary, she has made a declaration in writing—

- (a) in the form specified in the Third Schedule, of her intention to retain citizenship of Malawi; and*
- (b) in the form specified in the Fourth Schedule, renouncing, so far as it lies within her power, citizenship of that other country.”*

199. It is clear from the wording of the two provisions that it is not automatic, in the first instance, that marriage is a ground for acquiring or losing citizenship except in accordance with the provisions of an Act of Parliament, in this case, the Malawi Citizenship Act. To this end, the law may and does prescribe that marriage under law is a ground for cessation of citizenship only for a woman who has acquired other citizenship, by marriage. The exception to this is that a woman will retain her citizenship, if she announces her intention to retain Malawian citizenship or if she renounces the citizenship of the country whose citizenship she acquires by reason of marriage.
200. This special effect of marriage upon citizenship may not be fully appreciated without considering other constitutional provisions contained in sections 13 (a), 20 and 24. These provisions provide for gender equality and specify as prohibited grounds for discrimination, sex, gender and marital status. The precise text of the Constitution under section 24 provides that women have the right to be accorded the same rights as men in civil law, including equal capacity to acquire and retain citizenship and nationality. In any event, the Malawi Citizenship Act does not make provision for reciprocal arrangements where a woman by virtue of section 9 loses her citizenship and subsequently loses citizenship of the other country. It is interesting to note that the Malawi Citizenship Act attempts to prevent a scenario of statelessness by only requiring announcement of retention or renunciation of citizenship where other citizenship has been acquired by marriage.
201. Under these provisions, it becomes clear that in the absence of a corresponding provision for a Malawian man, then the distinction is on account of sex, gender and marital status. Section 24(2) of the Constitution proceeds to provide that “any law which discriminates against women on the basis of gender or marital status shall be invalid ...”.

If a court were to find the provisions of section 9 of the Citizenship Act discriminatory, it would be nullified. However, no litigation has taken place around the matter and in the absence of a repeal, section 9 of the Malawi Citizenship Act remains the law.

202. The Department of Immigration which administers the Malawi Citizenship Act has taken note of the discriminatory effect of section 9. It has noted that in line with section 47 of the Constitution, as read with sections 13 (a), 20 and 24, there is need to review the Citizenship Act. The Department notes that while it has submitted to the Law Commission a request for a comprehensive review of the Malawi Citizenship Act and the Immigration Act, the matter of women on matters of citizenship and immigration remains of high concern. In an interview with the Chief Immigration Officer, Mr. Mankhwala, he emphasized the need for urgency in having the statutes reviewed. Having observed that there has been inordinate lapse of time since the last submission was made to the Law Commission, one of his priorities is to ensure that the matter is re-submitted to the Law Commission and that the Department of Immigration together with the Law Commission work together towards sourcing of funds for the exercise.

203. On matters of property, the law is severe against women. Even under the Constitution where protection has been guaranteed for women to acquire property alone or in association with others (others meaning parents, siblings and spouses or even strangers of either sex), women are often forced into surrendering their property to men or being allowed to enjoy their property only through men. According to the Constitution, women are entitled, on termination of marriage, to property which was jointly held by the couple. In instances of real estate, the law still stands that if title to the property, in this case a house or land, is in the name of the male spouse, the women usually loses out entirely notwithstanding contribution made to the property, financial or otherwise.

Minimum Age of Marriage (Article 6(b))

204. The Constitution does not specify the minimum age of marriage. During the reporting period, there were two proposed amendments to section 22 of the Constitution. The first affected the issue of minimum age at which parental consent may be required for parties entering into marriage which was at 15 years. The proposal came from a special Law Commission on the Technical Review of the Constitution, which in 1998 felt that sections 22 and 23, the latter being on rights of children, were inconsistent. Section 22 allowed a fifteen year old to seek consent to enter into marriage while section 23 protected persons below 16 years from hazard and recognized these citizens as children. This proposal was shot down, notwithstanding the fact that the National Assembly had passed the law and when the outrage came to the public, the President then, refused to assent to the proposal to raise the minimum age under section 22 to 16 years. The special Law Commission also proposed an amendment to section 22 of the Constitution to read as follows:

“(8) The State shall actively discourage marriage between persons where either of them is under the age of fifteen years.”

205. This amendment passed and was assented to. Previously, the law provided for instead of “actively”, the word “actually”. Even after the amendment, it is clear that there is no outright prohibition of marriages for persons below the age of 15 years. This brings out an interesting angle where both parties are below the age of 15 years. The proposed Marriage, Divorce and Family Relations Bill, drawing from the spirit of the Constitution as provided for under sections 22 and 23, provides that the minimum age at which a person shall not be prevented from entering into matrimony is 18 years. While this provision has been welcomed by child protectors, it has the effect of negating the right of people of a certain age from exercising a right that the Constitution grants. This might create a litigious point at a later stage and has the potential of being declared unconstitutional.

Registration of Marriages (Article 6(d))

206. The law in Malawi recognizes both customary and statutory marriages. The former is contracted under customary law and is the predominant form of marriage in Malawi. It need not be recorded in writing or registered for it to be legally recognized unlike the case of statutory marriages. The Constitution and the proposed Marriage, Divorce and Family Relations Bill do not cover the issue of customary marriages. As such, customary marriages remain unregulated at statute level although the proposed legislation does provide for compulsory registration of all forms of marriage except for marriages by repute or permanent cohabitation which by their nature cannot be registered.

Protection of Women in Polygamous Marriages (Article 6(c))

207. As already mentioned, most marriages in Malawi are contracted under customary law and as such they are potentially polygamous in nature. The Rights and responsibilities are often determined by the culture under which a marriage is celebrated. If the culture is the same, problems don't usually ensue as parties go into matrimony with full knowledge of the expectations under that particular culture. In the event that the parties are from different cultures, choice of the culture to adopt for the marriage may present problems on entry into marriage. While the man's culture is likely to be dominant, misunderstandings and fear often lead to compromises as to the exact nature of the culture to be used. While these compromises may be easier to reach on entry, they are, firstly, not determined by the parties themselves with family members dominating the negotiation process, and secondly, it may present problems during the subsistence and upon dissolution of the marriage. For instance, under the matrilineal and patrilineal traditions, children will belong to one parent depending on the culture of that marriage. This right may be challenged especially where the aggrieved party belongs to a different culture.

208. In order to resolve this problem where rights and privileges of parties to a marriage are determined by the culture chosen, the Marriage, Divorce and Family Relations Bill provides that the traditions that are adopted upon entry into marriage will only go as far as validating the marriage but will no longer confer rights on any party whatsoever. Since children are considered wealth and a form of investment, the battles ensuing may, and in most instances, do ignore the best interests of the children.

Protection of Children in the Family (Article 6(i) & (j))

209. 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. However, challenges still remain in the implementation of the rights of children and the violation of children's rights still takes place. Malawi recognizes this and is progressively making efforts to address this issue.

210. The Ministry of Gender, Children and Community Development was created 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 and AIDS. The Children and Young Persons Act of 1969, 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 which consolidates the law relating to children. The Act seeks to improve child care and protection systems by giving, among other things, duties and responsibilities to parents toward their children. In order to ensure protection of children's rights, Section 132 of the Act establishes Child Justice Courts which actively adjudicate over children's matters, promote diversion and prohibits unnecessary detention of children. In terms of abandoned children, Sections 38 to 48 of the Child Care, Protection and Justice Act 2010, make provision for the procedure for

abandoned or neglected children to be taken care of, be it in terms of providing foster care for them or giving legal guardianship to someone for their care. The Penal Code has also recently been amended to include and create (among other things) offences against morality relating to children under sections 160A to 160G. These amendments include offences such as procuring children to take part in public entertainment; photographing or filming a child in a prohibited sexual act and indecent practice in the presence of a child

Access to Health Services

211. The principal statute on matters of health is the 1948 Public Health Act. Since 2011, the Public Health Act is undergoing comprehensive review by the Law Commission. One of the issues under consideration is the issue of the right to health which has not been provided for in the Constitution. It is hoped that the work of this Commission will be completed in 2013. The Gender Equality Act specifically provides for the right to adequate sexual and reproductive health under law. The right covers the following areas:

- (a) access to sexual and reproductive health care services;
- (b) access to family planning services;
- (c) protection from sexually transmitted infections;
- (d) self-protection from STIs;
- (e) choice of whether and when to have a child;
- (f) fertility control; and

(g) choice of contraceptive method.

212. Over and above, the general duties of health service providers, the proposed law provides for additional duties covering issues of respect for sexual and reproductive health rights; respect for the dignity and integrity of people who access health services; provision of services, including family planning services, without discrimination and irrespective of marital status; promoting informed decisions; record keeping; obtaining written and informed consent from clients and patients.

Reproductive Health Services, Including the Reduction of Maternal Mortality (Article 14(1)(a) & (b))

213. There are a number of policies related to public health and especially with respect to health care for women. The National Sexual and Reproductive Health Rights Policy, the National HIV and AIDS Policy and the National Post Abortion Care Strategy are most visible. Since 2009, Government embarked on a National Safe Motherhood Programme which aims mainly at reducing maternal mortality ratio which currently stands at 675 per 100,000 births. Broadly, Malawi is still burdened with very poor general health indicators. Main areas of concern are HIV and AIDS, maternal health and child health. On maternal health, the Presidency established the Safe Motherhood Initiative which is coordinated under the Office of President and Cabinet and the President has since appointed a new National Coordinator of the initiative. The President has since April, 26 2012 also been encouraging Traditional Leaders to take their role in preventing maternal mortality and discouraging the use of traditional birth attendants (TBAs).

214. On child mortality, the figures show a decline of more than 50 per centum from 234 deaths per 1,000 live births in 1992 to 112 deaths per 1,000 live births in 2010. On the basis of sex, the 2010 MDHS estimates lower child mortality at 117 deaths per 1,000 live births for female children under the age of 5 years compared to 138 deaths per 1,000

live births for male children of the same age. The major causes attributed to these statistics low education levels, low levels of wealth and age of the mother coupled with poor child spacing and birth size of the child. In terms of health for the children, girls have overtaken boys in stunting; underweight and under-five mortality. In 2010, the scores under this head were equal while in 2011, the score is 1.185 indicating that more girls are less stunted, underweight and are experiencing less under-five mortality. Some reasons attributing to this development include the fact that previously, communities showed more preference towards feeding male children than girls based on the belief that boys are busier than girls. Due to civic awareness on gender equality, most communities have started treating children equally.

Provision for Abortion (Article 14(2) (c))

215. With respect to family planning, it is clear that knowledge of contraception is almost universal at 98 per centum for women and 99 per centum for men. Modern methods are more known than traditional forms of contraception. Among married women this figure is at 100 per centum while for sexually active women, this is at 99 per centum. Abortion is not illegal per se in Malawi; however it is only allowed where the life of the mother is endangered. In the past year there has been increased lobbying by civil society organizations for reform of the law in the area of abortion. Malawi Law Commission (and therefore Malawi) has been reviewing the abortion laws through Special Law Commissions. First was during the review of Penal Code where in the report of the Special Commission in the year 2000, it was recommended that there is a need of a standalone law on abortion. Secondly was during the Development of Gender Equality Law. The Special Commission on Gender Equality in its 2011 Report recommended the need to develop a new law on abortion. In the year 2007, Ministry of Health recommended to Malawi Law Commission to develop a new and independent law on abortion. Ministry of Health has to date done three research studies on abortion. (a) The Magnitude Study on Unsafe Abortion (b) The Strategic Assessment on Abortion (c) the Cost Study on Abortion. Results from the study show that 70,000 women go through

abortion every year, 31,000 women develop complications including loss of uterus, fertility, permanent injury and death, 40 percent of admissions in gynecological wards are due to abortion related cases, 17 percent of maternal mortality is due to abortion. The Malawi Law Commission has empanelled a Special Commission Government officials, chiefs, academicians, lawyers, doctors, chiefs and Faith Communities to draft a new and model law on abortion.

HIV/AIDS (Article 14(1) (g))

216. While general awareness of HIV and AIDS remains almost universal, it is still a large concern and burden to the enjoyment of good health. Currently, the national prevalence rate for HIV infection is at 12 per centum, down by 2 percentage points from the time of the last Report. Currently, 10.6 per centum of adults are HIV positive. This is a decrease from 2004 when at 11.8 per centum. Prevalence is higher in women at 12.9 per centum and 8.1 per centum for men. Women in urban areas have the highest prevalence rate at 22.7 per centum while men in rural areas have the lowest rate at 7.1 per centum.

217. During the reporting period, the DNHA which is under the Office of the President and Cabinet registered several achievements including the strengthening of governance and coordination structures; the development and conclusion of a new proposed HIV and AIDS Policy; scaling up of HIV and AIDS services; and the decline of HIV prevalence from 14 per centum in 2004 to 10.6 per centum in 2010. It was also noted that mother to child transmission had declined from 21.3 per centum to 12.8 per centum within the same period. The DNHA also managed to spearhead the mainstreaming of HIV and AIDS in national policies and programmes. The number of people starting Anti-Retroviral 27 treatment (ART) rose from 4,000 in 2004 to over 223,437 in 2008. In 2011, the Ministry of Health reports that the actual number of women accessing ART stands at 274,238 representing 61 per centum compared to 177,308 men.

218. The difference is largely attributed to the women's access to programmes supporting Prevention of Mother To Child Transmission (PMTCT) which provides an entry point to accessing ART unlike men who are hampered by their egos and fear of stigmatization and discrimination. In response to this disparity, Government has introduced 'moonlight' testing for couples at night in order to encourage men to access HTC. 'Door-to-door' testing has also been found to be favorable towards encouraging men to go for testing.

219. In spite of these successes, challenges remain on institutional, financial and other capacities. The proposed policy aims at facilitating evidence-based programming and strengthening of the National HIV and AIDS response while recognizing emerging issues, gaps, challenges and lessons learnt. The proposed policy also aims at re-aligning the National HIV and AIDS Response to the broader Government development agenda. The proposed policy has 7 priority areas which are: a comprehensive multi-disciplinary response to HIV and AIDS; prevention, treatment, care and support; impact mitigation; protection, participation and empowerment of PLHIV and other vulnerable populations; mainstreaming and linkages; research; and capacity development. With respect to family planning, it is clear that knowledge of contraception is almost universal at 98 per centum for women and 99 per centum for men. Modern methods are more known than traditional forms of contraception. Among married women this figure is at 100 per centum while for sexually active women, this is at 99 per centum.

Economic and welfare rights (Article 13)

220. According to section 30 (2) of the Constitution, the State is under obligation to *'take measures to ensure equality of opportunity for all in their access to basic resources, education, health services, food, shelter, employment and infrastructure.'*

221. The Government has sought to improve the economic and social welfare status of the people of Malawi through strategies such as the Malawi Growth and Development Strategy I and II.

Right to food security (Article 15)

222. Section 13 (b) and (c) of the Constitution provide that the state shall actively promote the welfare and development of the people of Malawi by progressively adopting and implementing policies and legislation aimed at achieving inter alia, **adequate nutrition** for all in order to promote good health and self-sufficiency. Section 30 (2) of the Constitution states that the State is under obligation to ‘take measures to ensure equality of opportunity for all in their access to basic resources, education, health services, **food**, shelter, employment and infrastructure. The Malawi Government has obligations to international agreements and commitments that have a bearing on food security. These include the following:

- (a) The World Declaration of the 1992 International Conference on Nutrition (ICN);
- (b) The **United Nations Millennium Development Goals**
- (c) The World Food Summit declaration of 1996 re-iterated in the African Union Declaration on Agriculture and Food Security in Africa (July 2003) and WFSFYL;
- (d) The Sirte declaration on the challenges of implementing integrated and **Sustainable** Development on Agriculture and Water in Africa, (February 2004); and
- (e) The Dar es Salaam Declaration on Agricultural and Food Security in the SADC region (May 2004).

To build on the constitutional provisions, Malawi adopted a Food Security Policy in 2006. The long term goal of the Food Security Policy is to significantly improve food security of the population. The specific objective of the policy is *to guarantee that all men, women, girls and boys and under-five children in Malawi have at all times, physical and economic access to sufficient nutritious food required to lead an active and healthy life.*

The Policy notes that the concept of food security implied that:

- (a) **All Malawians** at all times have both physical and economic access to enough nutritious food for an active, healthy life;
- (b) The ways in which food is produced and distributed should be environmentally friendly and sustainable;

- (c) Both the production and consumption of food are governed by social values that are just and equitable as well as moral and ethical;
- (d) The ability to acquire food is ensured;
- (e) The food is obtained in a manner that upholds human dignity.

In 2012 the Ministry of Agriculture launched the Agriculture Sector Gender, HIV and AIDS Strategy for the period 2012 to 2017. The goal of this Strategy is to contribute to sustainable and equitable food, nutrition and income security at national, community and household level through the empowerment of women and other vulnerable gender categories. The strategy has 3 pillars and these are: Quality participation of women and other vulnerable gender categories in ASWAp focus areas and key support services; Gender, HIV and AIDS responsive technology generation and dissemination and Effective coordination, capacity building and resource mobilization The strategy was developed through a national participatory process, which involved consultations with a wide range of stakeholders at all levels. The main guiding documents for the strategy are: Agriculture Sector Wide Approach (ASWAp), the draft National Gender Policy and the National HIV and AIDS Action Framework. It is also aligned with the objectives of the Millennium Development Goals and the Malawi Growth and Development Strategy. In the agriculture sector, women provide 70 percent of the workforce and produce 80 percent of food for home consumption. However, there are disparities between men and women in their access to and control over agriculture production resources such as land, credit, extension services, farm implements and inputs. Furthermore, the participation of women in decision-making in the sector is also limited as the process is dominated by men. Women, especially widows, are most affected as they generally experience agricultural related property-grabbing including land, oxen, ploughs and inputs. They also have limited access to agricultural markets due to lack of transport, technology and price negotiation skills. Malawi continues to experience severe HIV and AIDS epidemic with prevalence rates among sexually active adults relatively higher among females at 12.9 percent than males at 8.1 percent. The effects of HIV and AIDS on agriculture include loss of persons in their most economically productive years due to death which affects both the quality and quantity of agricultural labour. AIDS related illnesses and

deaths have resulted in loss of assets, income, intergenerational and technical skills, knowledge and practices thereby negatively affecting agriculture production and productivity.

In addition to the strategy, Malawi adopted the Farm Input Subsidy Programme in 2005 in which disadvantaged people such as women, the elderly and the disabled receive farm inputs such as fertilizer and seeds. This programme has resulted in significant improvement in food production in the country.

Right to adequate housing (Article 16)

223. According to section 30 (2) of the Constitution, the State is under obligation to ‘take measures to ensure equality of opportunity for all in their access to basic resources, education, health services, food, **shelter**, employment and infrastructure. The Government of Malawi therefore recognizes its obligation to ensure that the people of Malawi have basic resources which include proper shelter and housing. It is further recognized that adequate housing encompasses legal security of tenure, including protection against forced eviction; availability of services, materials, facilities and infrastructure, including access to safe drinking water and sanitation; affordability, including for the poorest, through housing subsidies, protection against unreasonable rent levels or rent increases; habitability, including protection from cold, damp, heat, rain, wind and disease vectors; accessibility for disadvantaged groups, including to the elderly, children, the physically disabled, the terminally ill and victims of natural disasters; location, far from polluted sites or pollution sources but near to health-care, services, schools, child-care centers and other social facilities

224. In seeking to achieve adequate housing Malawi has adopted policies that will broadly raise the economic and social status of the people. These include the Vision 2020, Malawi Growth and Development Strategy I and II, the Economic Recovery Plan of 2012, the Farm Input Subsidy Programme.

Right to positive cultural context (Article 17)

225. Section 26 of the Constitution recognizes culture as a human rights issue. However culture has in the case of Malawi also been a major contributing factor to harmful practices against women and stereotypes. A 2007 report by the Malawi Human Rights Commission entitled Cultural Practices and their Impact on the Enjoyment of Human Rights, Particularly the Rights of Women and Children in Malawi notes that Malawi is replete with cultural practices some of which are harmful to women and the full enjoyment of their rights. In order to enhance a positive cultural context for women, Malawi enacted the Gender Equality Act with the purpose of promote gender equality, equal integration, influence, empowerment, dignity and opportunities, for men and women in all functions of society, to prohibit and provide redress for sex discrimination, harmful practices and sexual harassment, to provide for public awareness on promotion of gender equality, and to provide for connected matters.

Right to a healthy and sustainable environment (Article 18)

226. The principles of national policy under Section 13 of the Constitution of Malawi 1994 states that

“The State shall actively promote the welfare and development of the people of Malawi by progressively adopting and implementing policies and legislation aimed at achieving the following goals:-

(d) The Environment

To manage the environment responsibly in order to--

(i) prevent the degradation of the environment;

(ii) provide a healthy living and working environment for the people of Malawi;

(iii) accord full recognition to the rights of future generations by means of environmental protection and the sustainable development of natural resources; and

(iv) conserve and enhance the biological diversity of Malawi.”

**Right to sustainable development, including the right to property; access to land and credit
(Article 19)**

227. Access to benefits for women while in matrimony or afterwards remains a challenge. Patriarchy still demands that women access property through men. This is in spite of constitutional provisions which guarantee the right to acquire and maintain rights in property including property obtained by inheritance. The passing of the Deceased Estates (Wills, Inheritance and Protection) Act in 2011 entrenches the protection offered to women and the immediate family more than it was under the Wills and Inheritance Act.

228. At household level, the IHS 3 shows that within 12 months of the Report data collection process, almost 14 per centum of Malawian households interact with the credit market as follows: 8 per centum had successfully obtained a loan; 5 per centum had tried to get a loan and were turned down; and 2 per centum are still waiting for a response. 52 per centum of female headed households are more likely to borrow business start-up capital than male headed households which stand at 37 per centum.

229. Most women are unbanked and often lack access to capital. Men (14%) seem to have slightly more access to credit compared to their female (10.7%) counterparts. Limiting factors to accessing credit at banks and microfinance institutions include issues of collateral and security guarantees. Studies in microfinance have found that formal lenders in Malawi including rural banks, savings and credit cooperatives, and special credit programs supported by the government and nongovernmental organizations prefer to give loans to households with diversified asset portfolios and with diversified incomes. This usually put women at a disadvantage compared to their male counterparts. Even in cases where security is provided, some financial institutions still require the involvement of a male reference point in order to give full access to financial facilities.

230. While there appears to be no serious issue with access to recreational activities by women in Malawi, consumption on recreational activities is the lowest among consumption groups in Malawi. In school, both male and female students are encouraged to participate in sport. This has led to the emergence of male and female dominated sports activities. Soccer, for instance, is a male dominated sport while netball remains a female dominated sport. During the reporting period, more women have been engaging in soccer at a slow but steady pace. The problem comes in at sponsorship level. Female dominated sports and male dominated sports done by women enjoy lack adequate sponsorship. Even in the most evident case where the National Netball Team ranks number one in Africa and the National Football Team remains above 70 in the rankings, netball attracts decimal funding. The women's soccer league does not receive much support as the men's. Data on expenditure on the football and netball teams was not readily or available at all.

231. No legislation has touched on this except that this attitude and practice may be challenged under the general discrimination provisions. The Constitution may shed light in this regard and as it prohibits discrimination of all forms. Although rural women do not form a specific cadre under legislation or the Constitution, they fall into most of the broad categories of protection under law and policy. Currently, 85 per centum of the total natural population lives in rural areas versus 15 per centum urban population. Females head 25 per centum of households in Malawi. Women also head 25 per centum of households in rural areas compared to 18 per centum in urban areas. It appears that most of the initiatives towards women do not disaggregate on account of location but rather other distinctive marks such as age, marital status and family responsibility. In any event, although most of the initiatives cut across the board, rural women bear the brunt of problems faced by women in terms of gender. They still remain the most exploited, vulnerable and abused.

232. The efforts under the development of legislation on HIV and AIDS and gender equality programmes both propose to prohibit harmful practices. An examination of these

proposals shows that they are targeted at protecting rural women who often are subjected to the harmful practices. Of late, elderly women have been subjected to torture and violence on account of suspicion of practicing, including teaching children, witchcraft. This has brought severe stigma upon the women and in extreme cases, death has occurred. Since 2006, Government has been operating a Social cash transfer scheme as a means of offering social protection to the ultra-poor. Social protection constitutes the protection and promotion of livelihoods and welfare of people suffering from unacceptable levels of poverty or vulnerable to risks and shocks through identifiable policies and practices.

233. When the scheme commenced, poverty levels were at 52 per centum, out of which 22 per centum were ultra-poor. The ultra-poor comprise the elderly, child-headed households, people with disabilities and the chronically ill. Almost 10 per centum of the ultra-poor is unable to participate on productive activities because they are labour constrained. At the time of inception, it was estimated that the Scheme would reduce the percentage of the ultra-poor from 22 per centum to 12 per centum. The Social Cash Transfer Scheme was piloted in Mchinji with the projection that by 2016, all districts would be covered. Table 4 below illustrates the projection and costs of scaling up the exercise.

234. By the end of 2009, the Social Cash Transfer Scheme had been rolled out to 7 of the 28 districts. It had also influenced economic development by (a) enabling the poor to protect themselves against shocks; (b) increasing the productive capacity and asset base of poor and vulnerable households; (c) encouraging investment by reducing risk through the predictability of transfers; (d) unlocking economic potential; and (e) stimulating demand for local goods and services and supporting enterprises in rural areas. In short, the Scheme was working especially towards reduction of poverty among the ultra-poor.

Table 5: Cost and projection of Social Cash Transfer Scheme

Phase	Time span	No of beneficiary Households	One-off costs for capacity building (in USD)	Annual costs of transfers and operational costs (in USD)
Pilot phase (4 TAs of Mchinji)	Sept 2006 to Dec 2007	3,000	60,000	480,000
1 st extension (all of Mchinji plus 3 more districts)	July 2007 to Dec 2008	32,000	180,000	5,380,000
2 nd extension (6 additional districts)	Jan 2009 to Dec 2010	80,000	360,000	13,440,000
3 rd extension (8 additional districts)	Jan 2011 to Dec 2013	144,000	480,000	24,200,000
4 th extension (last 12 districts)	Jan 2014 to Dec 2015	250,000	720,000	42,000,000
All districts covered	From 2016 onwards	250,000	Annual costs of replacement 250,000	42,000,000

Women’s participation in peace and conflict prevention and management (Article 10(1)) and in all aspects of post-conflict reconstruction and rehabilitation (Article 10(2)(e))

235. The law enforcement organs comprise the Malawi Police Service (MPS); the Malawi Defence Force (MDF); the Immigration Department; and the Prison Service. In the MDF, women constitute 6.8 per centum and women only started being recruited after 1990. The MPS has the highest number of female service persons at 21.7 per centum and also boasts a high number of women in decision making positions especially at the rank of Commissioner where women comprise 33.3 per centum (2 out of 6 Commissioners). In response to this, a female Deputy Inspector General of Police has been tasked to operate a Gender desk which will, among other things, look into gender disparities in the institution.

236. The Immigration Department has uniformed and civilian officers. Of the uniformed officers, 219 are male and 55 are female. Of the civilian officers, 71 are male and 44 are female. The Immigration Department is currently recruiting 300 officers, out of whom 200 are male. In the Prison Service, the numbers of personnel reflect the demands of the institution in terms of the number of prisoners. Almost invariably, the number of male prisoners exceeds the number of female prisoners and as such, females constitute 22 per centum of the Prisons staff.

Measures of protection for asylum seekers, refugees, internally displaced women and ensure the punishment of all violators of such protection (Article 11(1) – (3)).

237. The main legislation on refugees and asylum seekers is the Refugee Act 1989. Refugees have access to basic social amenities, provided by Government and its cooperating partners, especially the UNHCR, such as education, hospitals and nutrition. The Act provides for a Refugee Committee that works hand in hand with the Department of Disaster Preparedness and the United Nations High Commissioner For Refugees (UNHCR). Further, there is a procedure that needs to be followed before an alien is expelled from Malawi. The Act allows a person claiming to be a refugee to enter and remain in Malawi while the Committee processes his application for refugee status.

238. The law also allows refugees seeking the rights of passage going to a country where he or she intends to seek asylum as a refugee. The Act also allows people who enter Malawi illegally for purposes of seeking asylum as refugees to present themselves before a competent officer within twenty four hours of their entry or within such longer period as the competent officer may consider acceptable in the circumstances. The Act further guarantees such persons protection from being detained, imprisoned, declared prohibited immigrant or otherwise penalized by reason only of their illegal entry or presence in Malawi unless and until the Committee has considered and made a decision on the application for refugee status.

239. Malawi acceded to the 1951 Convention relating to the Status of Refugees (hereinafter referred to as the “1951 Convention”), as well as its 1967 Protocol following

accession on 10 December 1989. On 4 November 1987, the country ratified the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa. The refugee definitions in the 1951 Refugee Convention and the 1969 OAU Convention are incorporated into the country's 1989 Refugees Act. On 7 October 2009, the country ratified the 1954 Convention relating to the Status of Stateless Persons. Malawi has yet to accede to the 1961 Convention on the Reduction of Statelessness. Malawi made reservations to the 1951 Convention regarding articles 2, 7, 13, 15, 19, 22, 24, 28 and 34 of the 1951 Convention relating to the Status of Refugees. The requirement for Refugees and asylum seekers to reside at designated camps has been held to be a sound administrative measure to ensure certainty of their population, provision of basic necessities, communication of information, protection of their persons and property, facilitation of repatriation. In a situation where an Asylum's application has been denied, the country ensures that the Asylum seeker is treated humanely and within the standards expected at the international level.

Protection that no child especially girls take a direct part in hostilities and no child is recruited as a soldier (Article 11(4))

240. There has been no armed conflict in Malawi since independence in 1964 and as such, the applicability of this provision has not arisen. However, since independence Malawi has always had a standing Army now termed the Malawi Defence Force. Under section 19(2) of the Defence Force Act, a Recruiting Officer shall not enlist a person under the age of 18 years. This means that all persons covered under the Constitution and the Child Care Protection Justice Act cannot be employed under the Defence Force.

Vulnerable Groups, such as Widows, Elderly women, Women with Disabilities (Articles 20, 21, 22 and 23)

241. The 2010 amendments to the Constitution increased the profile of disability issues in Malawi. Section 13 (g) which lists one of the Principles of National Policy initially made provision for the Disabled. It provided that the State shall actively promote the

welfare and development of the people by progressively adopting and implementing policies and legislation aimed at achieving support for the disabled through greater access to public places; fair opportunities in employment; and the fullest possible participation in all spheres of Malawian society. The provision reads as follows:

“(g) Persons with Disabilities

To enhance the dignity and quality of life of persons with disabilities by providing—

(i) adequate and suitable access to public places;

(ii) fair opportunities in employment; and

(iii) the fullest possible participation in all spheres of Malawian society.”

242. The language of provision has changed in order to incorporate the new paradigm towards people with disabilities. In May, 2012, Malawi passed the Disability Act which provides for equalization of opportunities for persons with disabilities through the promotion and protection of their rights; provides for the establishment of a Disability Trust Fund, among other things. The main areas for equalization of opportunities include health care services; education and training; work and employment; political and public life; cultural, sporting and recreational activities and services; housing; economic empowerment; information and communication technologies; and research. The Trust Fund is established mainly to support the implementation of disability programmes and services.

243. Malawi signed the Convention on the Rights of People with Disabilities (CRPD) on 27th September, 2007 and formally ratified the same on 27th August, 2009. The Department of Disability Affairs which were previously handled by the Ministry responsible for Social Welfare has evolved into a stand-alone and fully fledged Ministry which also couples with the Department for the Elderly. The Human Rights Commission has also since 2013 established a Directorate of Disability Affairs to handle the human rights aspects of disability issues.

CONCLUSION

244. This report has highlighted Malawi's progress in ensuring that the rights of women are fully enjoyed, protected and enforced. The constitutional framework with specific rights of women and principles of national policy on gender equality has formed a solid basis on which legislation, policies and programmes have been developed to address major gaps in the respect of the rights of women.

245. The report has also highlighted the challenges being faced in Malawi's quest to implement the ideals well articulated in the Constitution. Despite such challenges, the country has made tremendous progress which the people of Malawi are very proud of. On the eve of fifty years of independence and twenty years of the adoption of a new Constitution, Malawi looks at this moment of presenting this report as an opportunity to appreciate the progress made and the lessons learnt, and hope for a brighter and successful future in the enjoyment of rights of women.

HUMAN RIGHTS INSTRUMENTS RATIFIED BY MALAWI

- 1. International Covenant on Economic, Social and Cultural Rights: 22 December 1993**
- 2. International Covenant on Civil and Political Rights: 22 December 1993**
- 3. Optional Protocol to the International Covenant on Civil and Political Rights: 11 June 1996**
- 4. International Convention on the Elimination of All Forms of Discrimination: 11 June 1996**
- 5. Convention on the Elimination of All Form of Discrimination Against Women: 12 March 1987**
- 6. United Nations Convention against Transnational Organized Crime: 17 March 2005**
- 7. Protocol to Prevent, Suppress and Punish Trafficking Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Preamble, Supplementing the United Nation Convention against Transnational Organized Crime: 17 March 2005.**
- 8. Protocol against the Smuggling of Migrants by Land, Sea and Air Supplementing the United Nations Convention against Transnational Organized Crime: 17 March 2005.**
- 9. Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery: 2 August 1965**

- 10. Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of others: 13 October 1965**

- 11. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: 11 June 1996**

- 12. Convention on the Rights of the Child: 2 January 1991**

- 13. Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Labour: 19 November 1999**

- 14. Right to Organize and Collective Bargaining Convention: 22 March 1965**

- 15. Freedom of Association and Protection of the Right to Organise Convention: 19 November 1999**

- 16. Equal Remuneration Convention: 22 March 1965**

- 17. Discrimination (Employment and Occupation) Convention: 22 March 1965**

- 18. Convention Concerning Forced and Compulsory Labour: 19 November 1999**

- 19. Abolition of Forced Labour Convention: 19 November 1999**

- 20. Convention Relating to the Status of Refugees: 10 December 1987**

- 21. Protocol Relating to the Status of Refugees: 10 December 1987**

- 22. Rome Statute of the International Criminal Court: 19 November 2002**

- 23. Geneva Convention for Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field: 5 January 1968**
- 24. Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea: 5 January 1968**
- 25. Geneva Convention Relative to the Treatment of Prisoners of War: 5 January 1968**
- 26. Geneva Convention Relative to the Protection of Civilian Persons in Time of War: 5 January 1968**
- 27. Protocol Additional to the Geneva Convention of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol I): 7 October 1991**
- 28. Protocol Additional to the Geneva Convention of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II): 7 October 1991.**
- 29. Convention Governing the Specific Aspects of Refugee Problems in Africa: 4 November 1987**
- 30. African Charter on Human and Peoples Rights: 17 November 1989**
- 31. African Charter on the Rights and Welfare of the Child: 16 September 1999.**
- 32. African Protocol on the Rights of Women: 20 May, 2005**