

**SOUTHERN AFRICA
LITIGATION CENTRE**

Malawi's 3rd Universal Periodic Review 36th Session (April-May 2020)

Submission by:

**Centre for Human Rights Education, Advice and Assistance
Southern Africa Litigation Centre**

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The Centre for Human Rights Education, Advice and Assistance (CHREAA) is a non-governmental organisation which was established in the year 2000 and works across Malawi. CHREAA's mandate is the provision of paralegal services, litigation and advocacy for law reforms.

Youth-Watch Society (YOWSO) is a human rights non-governmental organisation established in 1994. YOWSO works on a number of critical issues including access to justice for vulnerable groups, strategic litigation and rule of law in Malawi.

The Southern Africa Litigation Centre (SALC) is a regional non-governmental organisation which was established in 2009. SALC promotes and advances human rights and the rule of law in Southern Africa, primarily through strategic litigation support.

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**SOUTHERN AFRICA
LITIGATION CENTRE**

Contents

INTRODUCTION	2
RIGHTS RELATING TO ARREST, TRIAL AND DETENTION	3
Rights of Persons in Detention	3
Children in Prison	4
Arbitrary Detention of Migrants	5
Access to Justice for Accused Persons	6
Overstay of Homicide Remandees	7
Arbitrary Arrests and Abusive Police Practices	7
Petty Offences	8
Extrajudicial Killings	9
SOCIO-ECONOMIC RIGHTS	10
Rights of Persons with Mental and Psychosocial Disabilities	10
Gender-based Violence Experienced by Persons with Disabilities	10
Right to Education	11
Women's Access to Land	12
NATIONAL HUMAN RIGHTS INSTITUTIONS	13
Malawi Human Rights Commission	13
Independent Police Complaints Commission	14

INTRODUCTION

1. This submission was prepared by the Centre for Human Rights Education, Advice and Assistance (CHREAA), Youth-Watch Society (YOWSO) and the Southern Africa Litigation Centre (SALC). The issues are organised thematically, with recommendations following each section. Our organisations work in collaboration to address the needs of marginalised groups, and the submission focuses specifically on our experiences relating to the manner in which



**SOUTHERN AFRICA
LITIGATION CENTRE**

marginalised groups are treated within the criminal justice system. The submission further raises issues relating our work on the rights of children, women and persons with disabilities.

RIGHTS RELATING TO ARREST, TRIAL AND DETENTION

Rights of Persons in Detention

2. Despite court orders¹ and extensive publication² and advocacy³ calling for the reform of conditions of detention and imprisonment over many years, Malawi's prisons persist in retaining conditions of severe overcrowding, high rates of malnutrition, poor sanitation and inadequate access to healthcare, amongst others:
 - Prisoners receive on average only one meal a day of maize meal and peas or beans leading to at least 95% of prisoners being food insecure.⁴ Prisoners suffer from high rates of malnutrition and illness as a result. In some cases, malnutrition is so severe that it has led to malnutrition-related psychosis and death by starvation of inmates with chronic pellagra.⁵
 - Prisons remain desperately overcrowded. Data collected by the Centre for Human Rights Education, Advice and Assistance (CHREAA) in cooperation with SALC has indicated that in some prison cells, prisoners may have as little as 0.17 m² per person. In these conditions, inmates who sleep on the floor without mattresses or beds and spend on average 15 hours per day in their cells, are forced to sleep in sitting positions or sleep in shifts. SALC and CHREAA have published video footage⁶ taken from the prisons that shows how inmates must in some cases be physically packed in slavery-like conditions to fit into cells.
3. These conditions have led to life-threatening outbreaks of disease, including outbreaks of deadly and highly-contagious multi-drug resistant tuberculosis.⁷ The conditions pose not only a threat to the lives and dignity of persons in detention but also to staff working in the prisons and to public health more generally.
4. The Prisons Act⁸ has been stated by the courts for many years to be outdated.⁹ Amongst others, it fails to provide for an effective parole system (separate to discretionary powers of the executive to grant pardons and remission of sentences) to enable a fair, transparent and reviewable legal process for the release of inmates, including inmates with severe medical conditions or who are terminally ill. The Malawi Government has failed to fulfill undertakings to table promised reforms of the Act over many years. This has included repeated undertakings¹⁰ over many years to develop a parole system, which has not materialized to date. In the previous review, the State indicated that the review of the Prisons Act would be completed in 2015,¹¹ but the review appears to have stalled.
5. These issues were raised in the Report of the Working Group on the UPR in July 2015, where Malawi supported the recommendations that the Prisons Bill be submitted to parliament as soon as possible, and to increase efforts to improve the living conditions in detention,



**SOUTHERN AFRICA
LITIGATION CENTRE**

including addressing overcrowding and insufficient food provisions.¹² The recent Malawi Inspectorate of Prisons' report¹³ indicates that few of these issues have been attended to properly.

Recommendations

- a. The Prisons Act should be urgently reviewed and amended in line with human rights standards including to provide for a fair, transparent and reviewable parole system.
- b. The Malawi government should urgently develop comprehensive plans aligned with adequate budgetary allocations to address systemic overcrowding and poor conditions of detention in line with human rights obligations as articulated in the Constitution.
- c. Redress should be provided to persons in detention who have been affected by violations of their rights.

Children in Prison

6. The Child Care, Protection and Justice Act has been in place since 2010, yet some of its most critical provisions have not been consistently implemented, including those relating to children in conflict with the law.
7. The World Prison Population Brief has noted that 7,7% of persons in prison in Malawi are children, with children also often arrested and detained with adults. CHREAA, YOWSO and SALC have raised concerns relating to children detained awaiting trial or serving sentences at prisons, including at Bvumbwe and Kachere prisons even though these facilities are not formally designated as safety homes or reformatory centres and conditions in the prisons are deplorable.¹⁴ A 2018 High Court judgment¹⁵ highlighted that **children in conflict with the law** should be imprisoned only as last resort, separated from adults, and treated in a manner that is consistent with their dignity and best interests. The Blantyre High Court ordered that all children detained at Kachere and Bvumbwe prisons be sent to safety homes or reformatory centres. The Court order was slow to be implemented and the incarceration of children in prisons remains a concern. Cases which ought to be sent for review are also often lost within the system, resulting in persons literally spending years in prison.
8. A number of **children are detained with their caregivers** when the latter are sentenced to prison. This results in children often spending years in deplorable conditions in detention. International guidelines recommend taking into account the best interests of the child in decisions relating to incarceration of caregivers and generally encourage non-custodial arrangements for women with young children where possible and appropriate.
9. Section 138 of the Penal Code establishes the offence of defilement, in terms of which any person who has sexual intercourse with a girl under the age of 16 years is guilty of an offence and is liable for imprisonment for life. There are no exceptions or considerations for child offenders, and as such the law also criminalises **consensual sex between adolescents**. As a result, numerous boys (some as young as 15) have been convicted and sentenced to excessive prison terms, some as much as 8 years' imprisonment, for having consensual sex with



**SOUTHERN AFRICA
LITIGATION CENTRE**

adolescent girls. The criminalization of consensual sex between adolescents is contrary to the best interests of these children.

Recommendations

- a. The Malawi government should ensure that all relevant government departments are familiar with the provisions of the Child Care, Protection and Justice Act, and in particular the provisions relating to the detention of children.
- b. The Malawi government should develop sentencing guidelines for magistrates which take into consideration the best interests of children in decisions to incarcerate caregivers, and in decisions relating to children in conflict with the law. In particular, magistrates should be dissuaded from using section 138 of the Penal Code to incarcerate children who engaged in consensual sex.
- c. The Malawi government should improve the administrative mechanisms relating to the automatic review by the High Court of convictions and sentences imposed by magistrates.
- d. Section 138 of the Penal Code requires reform to ensure that it does not result in the criminalisation of consensual sex between teenagers.
- e. The Malawi government should facilitate the urgent review of all cases where children were sentenced to lengthy periods of imprisonment under section 138 of the Penal Code for consensual sexual acts.

Arbitrary Detention of Migrants

10. Malawi has been detaining increasing numbers of asylum seekers and other migrants from Ethiopia and other African countries as they migrate across Malawi in transit to opportunities in other countries.¹⁶ This includes unaccompanied child migrants. In 2015, the International Organisation for Migration (IOM) reported that 387 Ethiopian immigrants had been detained in Malawian prisons.¹⁷ They were often held for months at a time and one in six of the detained migrants was an unaccompanied minor. In 2016 it was reported that a further 120 Ethiopian immigrants had been detained in prisons for more than two years whilst awaiting deportation.¹⁸ Many of them remained in prison even after finishing serving their custodial sentences or paying fines. Their detention was in harsh conditions, with extensive overcrowding, inadequate food and precarious sanitary conditions. The detention of the migrants in Malawi lacks judicial oversight; the migrants are detained in prison for an indefinite period of time without any periodic review of their detention. Further, migrants are unable to challenge the legality of their continued detention because they cannot access legal aid or communicate with their families or relations to seek any legal assistance on their behalf. Language barriers compound their situation. They remain in a state of uncertainty as to when they will be deported back to their countries of origin. This amounts to cruel and unusual punishment.
11. In May 2016, CHREAA and SALC launched an Audit of Malawi's immigration laws¹⁹ including a list of 24 recommendations to ensure compliance with human rights and the rule of law in the government's response to the ongoing detention of migrants in Malawi's prisons. The Audit in particular makes strong recommendations with respect to child migrants, stating



**SOUTHERN AFRICA
LITIGATION CENTRE**

that child migrants should not be detained and that unaccompanied child migrants are children in need of care and protection under the Child Care, Protection and Justice Act and are entitled to safe accommodation, medical treatment and care, amongst other protections.

Recommendations

- a. The Malawi government must ensure that all prohibited migrants are given a reasonable opportunity to leave Malawi voluntarily before a decision is made to detain them.
- b. Considering the severe overcrowding in criminal detention facilities and the vulnerability of migrants to inhospitable conditions in prisons, the Malawi government should identify alternative places of custody and authorise these to detain prohibited migrants.
- c. The prosecutorial discretion to charge persons with migration-related offences should be cautiously exercised with necessary provision made for accused migrants to mount an effective defence. Sentencing guidelines may also assist in ensuring excessive sentences are not imposed that are disproportionate to the offences.
- d. The Malawi government must respect and protect the right of migrant detainees to access food, clothing, bedding and other welfare necessities on the same terms as other prisoners.
- e. Child migrants should not be detained. Unaccompanied minors are children in need of care and protection under the Child Care, Protection and Justice Act. They are entitled to safe accommodation and medical treatment funded by the state. Strict compliance with preliminary inquiries must be adhered to if criminal charges are pursued.
- f. Asylum seekers must be allowed to lodge applications for asylum.
- g. The Malawi government should allow short term and transitory migrants to pass through Malawi by issuing temporary permits as an alternative to detaining them in terms of section 17 of the Immigration Act.

Access to Justice for Accused Persons

12. In a 2017 UN report on capital punishment, it was noted that although the Constitution entitles indigent accused to legal aid “where the interests of justice so require”, in practice, “legal aid is provided only in homicide cases as there are so few lawyers to serve the entire country”.²⁰ The Legal Aid office remains woefully underfunded.
13. The Malawi High Court in May 2019, unanimously held that the judiciary should set down guidelines on how every criminal court should ensure that in every trial every accused person is informed of the right to legal representation.²¹
14. In addition to the need for magistrates to advise accused persons of their rights, it is also important to improve administrative management of the automatic review by higher courts of decisions of magistrates. Since the majority of persons arrested and brought to trial are unable to afford legal representation, they are often unable to successfully appeal convictions and sentences and are reliant on the automatic review of decisions of magistrates by higher courts. As explained under the various sections below, the institution of a functioning review system will assist access to justice. Currently, many persons end up serving sentences imposed by magistrates, without a review of the sentence by a higher court, as required by the Criminal



SOUTHERN AFRICA LITIGATION CENTRE

Procedure and Evidence Act.²² This failure of lower courts to send records for review has often been raised as a concern by the High Court, but the problem continues despite performance standards set by the Judiciary.²³

Overstay of Homicide Remandees

15. Although the Malawi government reformed its Criminal Procedure and Evidence Code in 2010 to provide for custodial time limits, these provisions are often not adhered to.
16. It is often the case, that persons who are arrested for murder, are brought to court within the required 48 hours so that the case is committed to the High Court, but after that they literally spend years in custody without any attempts by the State to prosecute them. Some detainees have been on remand without being committed to the High Court for trial for the past five years.²⁴ The situation is worse in the northern judicial region of Malawi and, as of 24 September 2019, YOWSO notes that Mzimba Prison had 70 Homicide Remandees while Mzuzu Prison had 65 Homicide Remandees.

Recommendations

- a. The Malawi government should develop guidelines for magistrates to ensure that the accused's fair trial rights are respected, protected and promoted.
- b. The Malawi government should improve the administrative mechanisms which hinder the automatic review of decisions, including the case management system.
- c. The Malawi government should provide additional resources to enable a more comprehensive service by the Legal Aid Bureau.
- d. The Malawi government should take urgent steps to prosecute or release all persons who have been in custody awaiting trial for periods exceeding those provided for in the Criminal Procedures and Evidence Code.
- e. The Malawi government should not treat homicide cases as a "special case", and instead accused in homicide cases should be tried with the same speed as other serious offences. To facilitate this, the Malawi government should improve postmortem and other examinations.

Arbitrary Arrests and Abusive Police Practices

17. Mass arrests or 'sweeping' exercises are typically conducted by police over weekends and at night and tend to have very general objectives, meaning that persons are arrested, for example, for being on the street at night, even when they have not committed a specific offence or engaged in suspicious activity. Sweeping exercises are targeted at whoever the police deem to be 'undesirable', including sex workers, vendors, street children, persons who beg and persons with disabilities. Often the objective of sweeping exercises is to assure the public that sufficient attention is paid to crime prevention. However, in reality people find themselves imprisoned or detained in potentially life-threatening conditions, especially in cases where they cannot afford bail or the fine, even when there is no proof of an actual offence having been committed.



SOUTHERN AFRICA LITIGATION CENTRE

18. Numerous High Court judgments have criticised the way sweeping exercises violate human rights, including the fact that people are rounded up and charged jointly even though they were found at different places under different circumstances, and the fact that basic criminal procedure requirements for arrests are not followed. In 2016, the High Court of Malawi²⁵ repeated concerns about the various legal protections that are violated by sweeping exercises.²⁶ In 2017, the Malawi High Court explained the importance of establishing alternatives to arrests; ensuring arrests that are more targeted and intelligence based and that there are sufficient reasons for the arrest.²⁷

Recommendations

- a. The Malawi government should improve mechanisms of oversight during police arrests and should ensure that officers who violate procedures for lawful arrests are disciplined.
- b. The Malawi government should establish consistent practices for police record-keeping and arrest procedures (e.g. all police officers should record relevant details such as date/time of arrest and protective measures applied). The Malawi Police Service should further ensure that all police officers record the results of all cases of detention, such as the outcome of a court proceeding or plea agreement, in order to serve the interests of transparency and accountability. Record-keeping could be improved through the issuing of directives requiring increased supervision of record-keeping practices at police station level.
- c. The Malawi government should ensure that all police officers are trained on the provisions of the Penal Code, Police Act, Child Care Protection and Justice Act and the recent amendments to the Criminal Procedure and Evidence Code.
- d. The Malawi Police Service, in collaboration with other stakeholders, should devise community-based alternatives to arrest and detention for minor nuisance-related offences.

Petty Offences

19. In 2013, SALC and CHREAA launched a report on the use of minor nuisance-related offences in Malawi.²⁸ The research found that police frequently arrested persons for behaviour which does not constitute an offence, and that many nuisance-related offences are so broadly framed that they serve as a catch-all provision for police to arrest all persons they deem undesirable.
20. The arrest of persons for petty offences has been raised repeatedly as a concern by regional bodies.²⁹
21. In January 2017, the Malawi High Court ruled that section 184(1)(c) of the Penal Code is unconstitutional.³⁰ The offence provided that every person found in a public place under circumstances that lead to the conclusion that the person is there for an illegal or disorderly purpose, is deemed a rogue and vagabond.³¹ However, following this judgment, the police simply use other offences to arbitrarily arrest people, such as being an idle and disorderly person, begging, being found without subsistence, common nuisance and breach of peace. The High Court has noted that these offences are vague and overly broad and has called on parliament to urgently reform them.³²



SOUTHERN AFRICA LITIGATION CENTRE

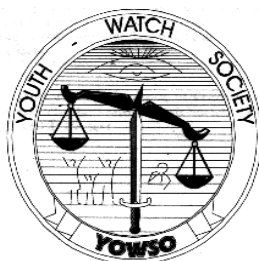
22. We commend the Director of Public Prosecutions for developing Prosecutor Guidelines on Minor Nuisance Related Offences. The Guidelines follow a human rights approach to the interpretation of a range of petty offences in the Penal Code.

Recommendations

- a. The Malawi government should fast-track reform of its Penal Code, and repeal obsolete and archaic offences, particularly those based upon status rather than criminal activity and those that are overly broad and provide law enforcement with too much discretion;
- b. The Malawi government should train police officers on alternatives to arrests to avoid the resort to arrest for minor petty offences.
- c. The Malawi government should amend the Criminal Procedure and Evidence Code to make certain petty offences non-arrestable offences.

Extrajudicial Killings

23. In 2014, the UN Human Rights Committee following its review of Malawi, noted cases of extrajudicial killings where the alleged perpetrators have not yet been prosecuted or where the prosecutions are not progressing expeditiously.³³ The Committee recommended that the State prosecute all alleged perpetrators of extrajudicial killings, complete expeditiously any process that has already been initiated, punish those who are convicted, and protect, rehabilitate and compensate the victims. The Committee also noted the high number of reported cases of torture by law enforcement officers. It was also concerned that the law does not comply with international standards in regard to the use of firearms by police officers.
24. There have since been reports of alleged extrajudicial killings by the Malawi Police Service. On 8 September 2018, the Nation Newspaper published an article entitled “Are Police on killing spree?”.³⁴ The article alleged that between May and June of 2018, at least 10 suspects (6 in Ntcheu and 4 in Blantyre) died in what appeared to be police shootings. A mortuary attendant at Queen Elizabeth Hospital who spoke on condition of anonymity to the Nation Newspaper on the 4 that were killed in Blantyre indicated that the police occasionally bring to the mortuary bullet riddled bodies of suspects, with explanations that range from “there was a gun fire exchange with armed robbers” or “the suspects were trying to escape”. The article also reports that in February 2016, the police killed Thomson Chigoneka in Lilongwe, and in August 2016, 3 others were killed by the police in Lilongwe in what was alleged by the police to be a shootout and one further person survived. In November 2016, the police reportedly killed Kapisi Tembo, John Ntaja, Ephraim Mkandawire and one unidentified individual in Blantyre, who were suspected of planning a robbery. In October 2017, Harry Joseph and George Chanza were reportedly killed by the police in Area 25 in Lilongwe when they were ambushed at their suspected hideout. In September 2017, two unidentified suspects were gunned down in Lilongwe in what the authorities alleged was an exchange of fire.
25. CHREAA has also received reliable reports from former prisoners that the Malawi Police Service was extrajudicially executing former prisoners on their release from prison, particularly those who had served a sentence of armed robbery. The authorities reportedly



SOUTHERN AFRICA LITIGATION CENTRE

failed to conduct investigations/ inquests in accordance with the requirements of the Inquest Act and the UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, 1989. Families are frequently unaware of the fate of their loved ones.

Recommendations

- a. The government of Malawi should promptly and impartially investigate the deaths of the alleged victims and appropriate measures should be put into place to establish the truth relating to the events leading to the deprivation of life of the victims, including the reasons and legal basis for targeting certain individuals and the procedures employed by State forces before, during and after the time in which the deprivation occurred.
- b. The government of Malawi should in accordance with the Inquest Act institute inquests in all the cases where the victims allegedly died in police custody.
- c. The government of Malawi should ensure that those police officers that were responsible for the killings be brought to justice.

SOCIO-ECONOMIC RIGHTS

Rights of Persons with Mental and Psychosocial Disabilities

26. Malawi ratified the Convention on the Rights of Persons with Disabilities (CRPD) in August 2009. In 2012, it enacted the Disability Act.³⁵ The Disability Act seeks to advance equal opportunities for persons with disabilities in Malawi but fails to domesticate the CRPD in a number of aspects, including its failure to recognise and protect the legal capacity of all persons with disabilities.
27. Despite ratifying the CRPD, Malawi continues to apply an outdated Mental Treatment Act³⁶ from 1948, which enforces involuntary detention and deprivation of property for persons deemed to have a “mental disorder” or “mental defect”. While the Act does not specifically deal with involuntary treatment, it is widely interpreted and applied to permit for coercive, involuntary psychiatric treatment to be enforced against the express wishes of patients detained under the Act as well as persons held under forensic detention in terms of the Criminal Procedure and Evidence Code.³⁷
28. We have observed that involuntary detention, forced psychiatric treatment, isolation and abuse of persons with mental and psychosocial disabilities persists in Malawi, including through the denial of legal capacity. This regime has further been abusively applied against political activists.³⁸

Gender-based Violence Experienced by Persons with Disabilities

29. Women and girls with disabilities who experience gender-based violence often struggle to obtain justice.³⁹ There are serious problems with discretion at many key points in the criminal justice process but particularly at the entry point – the police.



SOUTHERN AFRICA LITIGATION CENTRE

30. Section 139 of the Penal Code provides for the offence of defilement of “idiots or imbeciles”⁴⁰ and denies women and girls deemed an “idiot or imbecile” any capacity at all to consent to sexual intercourse or other sexual activity, and fails to take account of the existence of widely divergent psychosocial and intellectual disabilities and employs legal determinants of “idiot or imbecile” that are ambiguous, arbitrary and dehumanizing.
31. The Disability Act’s provision on “reasonable accommodation” and the Criminal Procedure and Evidence Act’s protective measures for witnesses, could be used more effectively to support survivors of gender-based violence to obtain justice.

Recommendations

- a. The Malawi government should repeal the 1948 Mental Treatment Act.
- b. To the extent that any legislation to deal with the rights of persons with mental disabilities and mental health care is considered necessary by persons with disabilities and mental health users in Malawi, any subsequent legislation should be uncompromisingly compliant with the CPRD, including providing for full recognition and protection of the right to legal capacity and the protection of the right to informed consent, and respect for the will and preferences of all patients.
- c. The Criminal Procedure and Evidence Code should be reviewed to ensure that the rights of persons with mental and psychosocial disabilities are protected within the criminal justice process in line with the CRPD.
- d. The Ministry of Health and health professions and nursing councils should revise and update codes of conduct and policy frameworks governing mental health treatment to ensure that Malawi’s obligations under the CRPD are fully respected, including to ensure respect for the dignity, autonomy, and legal capacity of persons with mental and psychosocial disabilities as well as the right to freedom from torture, inhuman and degrading treatment and punishment.
- a. Section 139 of the Penal Code should be reviewed to ensure its conformity with human rights principles. The Malawi government must develop regulations and/or practice directions on attending to complaints by persons with disabilities.
- b. The Malawi government must provide mandatory training on how to manage court proceedings involving sexual assault, particularly of victims with disabilities, to overcome intimidation of victims and witnesses.

Right to Education

32. According to the Committee on the Rights of the Child, Malawi has a significantly high rate of school drop outs, particularly among girls who are pregnant and subjected to child marriage.⁴¹
33. During the previous UPR process, the Malawi government supported the recommendation to strengthen the legal and institutional framework to fight against **child marriage**.⁴² We commend the Malawi government for accordingly amending the Constitution and stipulating the minimum age of marriage as 18 years in section 14 of the Marriage Divorce and Family



SOUTHERN AFRICA LITIGATION CENTRE

Relations Act No. 4 of 2015. This will greatly support access to education. We are further encouraged to see that the police are acting where they identify cases of child marriage.⁴³

34. The Malawi government further supported UPR recommendations to put in place measures to increase access of children to education and promote attendance of girls and women.⁴⁴ We commend Malawi for reviewing its policy on **learner pregnancy**, but remain concerned that in practice, girls find it difficult to return to school following a pregnancy due to stigma and limited support to enable her to return and care for her child.
35. Of concern is the use of community by-laws against pregnant learners. For example, in 2016, some learners in Nkata Bay were hauled before a First Grade Magistrate on allegations of breaching a community by-law discouraging teenage pregnancies. The Magistrate ordered the pregnant learners, the boys who had allegedly made them pregnant, and some parents, to pay hefty fines. Those who were unable to pay the fines were placed in police custody and only released upon payment. The learners and their parents, with support of YOWSO and SALC, filed an application for review. The High Court confirmed that a punitive approach to learner pregnancy is unlawful. Sadly, many of the learners who were fined in this case have since dropped out of school.
36. The government of Malawi has a **policy that bans long hair in government secondary schools**. Rastafari leaders have complained for years of an unofficial ban on long hair in government-run schools via dress codes.⁴⁵ In March 2017 it was reported that the Ministry of Education had denied reports of an order for schools to register children with dreadlocks and to allow female students to wear hijabs.⁴⁶ In 2000, 2 female students from the Blantyre Secondary School were suspended for refusing on religious grounds to cut their long hair. The case was taken to the Office of the Ombudsman who resolved the matter and ruled that the school violated section 33 of the constitution by suspending the students on the basis of their religious motivations. The ombud ordered their reinstatement.

Recommendations

- a. The Malawi government should de-centralise and simplify the re-admission process for adolescent girls returning to school after pregnancy and ensure they are given appropriate support.
- b. The Malawi government should ensure that public and private schools, local leaders and communities are aware of the policy.
- c. The Malawi government should endeavour to popularize the Awareness Handbook for Child and Gender-related Laws.
- d. Malawi government should abolish the policy that bans long hair in Government Secondary Schools as it violates the right to education.

Women's Access to Land

37. The CEDAW Committed has raised concerns with the passage of the customary land bill jeopardizes rural women's access to use of land for food crops and income-generating



SOUTHERN AFRICA LITIGATION CENTRE

opportunities. It is also concerned that rural women are disproportionately affected by malnutrition and food insecurity.¹ The Customary Land Act, 2016 commenced in March 2018. The commencement notice was followed by Customary Land Regulations, 2018 in April 2018.²

38. Access to land in Malawi remains a far fetched dream for most women, especially in rural areas, due to among other factors such as tradition and culture. A recent High Court case, supported by YOWSO and SALC, highlighted some of the problems linked to security of tenure on customary land and the corrupt practices which sometimes result in customary land being converted to title deed land without following the correct legal procedures and without providing compensation to persons for the loss, damage or disturbance in their use of land. The High Court held that failure to follow the procedure and compensate appropriately will lead to arbitrary deprivation of users and occupiers of land contrary to section 28 of the Constitution of the Republic of Malawi.”⁴⁷ The Court further stated that “allocating the purported customary land to other people in the absence of the legal users of the land under customary law was tantamount to arbitrary deprivation of the land from the defendant”.

Recommendations

- a. The Malawi government should ensure that women have equal access to land as men. More work should be done to sensitise local leaders on women’s access to land and the applicable laws.

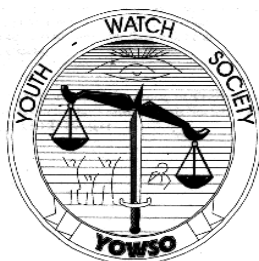
NATIONAL HUMAN RIGHTS INSTITUTIONS

Malawi Human Rights Commission

39. During the previous UPR, the Malawi government supported the recommendation that the Human Rights Commission Act be amended to ensure that the Commission is independent and adequately resourced.⁴⁸
40. In terms of effectiveness, the MHRC has institutional independence; complainants enjoy the rights to make representations and to information; and the MHRC processes a relatively high volume of complaints. However, its efficiency is constrained by severe funding shortfalls and limitations in geographic accessibility.⁴⁹
41. The Commission has had no Commissioners since August 2018 when the term of office for the previous team expired. Since then, irregularities in the appointment of Commissioners, resulted in the Malawi High Court in April 2019 granting two civil society organisations an injunction stopping the President from swearing in two of the six commissioners appointed into the seventh cohort of Malawi Human Rights Commission (MHRC).⁵⁰

¹ CEDAW Committee Concluding Observations on Malawi, 2015, CEDAW/C/MWI/CO/7, at para 42.

² <https://malawilii.org/mw/legislation/act/2016/19>



SOUTHERN AFRICA LITIGATION CENTRE

Independent Police Complaints Commission

42. In 2014, the UN Human Rights Committee following its review of Malawi, noted cases of extrajudicial killings and torture by police.⁵¹ The Committee concluded that Malawi should: (a) Establish expeditiously the Independent Police Complaints Commission and allocate adequate human and financial resources to it; (b) Establish a central system to keep track of all complaints and make them publicly accessible; and (c) Investigate all cases of torture, prosecute the alleged perpetrators and compensate the victims.
43. During the 2015 UPR review process, Malawi received and accepted the recommendations to establish and resource an Independent Police Complaints Commission to track and investigate complaints, in line with section 128 of Malawi's Police Act" and to "take the necessary measures for the prompt and effective operationalization of the Independent Police Complaints Commission, including by providing sufficient financial and human resources".⁵² Sadly, the Commission is yet to be properly constituted.³

Recommendations

- a. The government of Malawi should operationalise the Independent Police Complaints Commission.
- b. The above institutions are critical to addressing some of the human rights concerns raised in these submissions and the Malawi government should provide these institutions with sufficient resources to enable them to further decentralize their operations to increase access and response mechanisms, and to enable them to conduct civic education on citizens' rights to access these and other complaints mechanisms in the case of human rights violations or other injustices.

¹ See, for example, *Gable Masangano (Suing on his own behalf and on behalf of all Prisoners in Malawi) v. The Attorney General (Minister of Home Affairs and Internal Security and the Commissioner of Prisons)* Constitutional Case No. 15 of 2007.

² See, for example, the annual reports and inspection reports of the Malawi Human Rights Commission as well as the reports of the Malawi Inspectorate of Prisons.

³ See, for example, a series of videos detailing calls for change by activists, judges, lawyers and former inmates here: <https://www.southernafricalitigationcentre.org/2018/07/16/inhumane-detention-in-malawi-part-1-the-historical-context/>.

⁴ Moloko et al "Incidence and Severity of Food Insecurity in Malawi Prisons" (2017) *Journal of Agricultural Economics and Development* 6(5):044-049, available at: <http://www.academereseearchjournals.org/download.php?id=722299447465519302.pdf&type=application/pdf&op=1>.

⁵ For more information on the death of such an inmate, Mr Abyuthi Phiri, see here: <https://www.southernafricalitigationcentre.org/2018/10/16/wfd2018-stop-the-torture-by-starvation-in-malawis-prisons/>.

⁶ Available at: <https://youtu.be/m8zupPJs0to?t=152>.

⁷ See for example the case of *Banda and Others v Attorney General and Others* (Constitutional Case No 120 of 2018), Zomba District Registry. More information is available at:

³ <https://mwnation.com/blame-game-on-police-complaints-commission/>.



SOUTHERN AFRICA LITIGATION CENTRE

<https://www.southernafricalitigationcentre.org/2019/01/17/malawi-seeking-an-effective-and-humane-response-to-mdr-tb-in-prison/>.

⁸ Chapter 9:05.

⁹ *Gable Masangano (Suing on his own behalf and on behalf of all Prisoners in Malawi) v. The Attorney General (Minister of Home Affairs and Internal Security and the Commissioner of Prisons)* Constitutional Case No. 15 of 2007.

¹⁰ See, for example, the reports of undertakings for legislating parole in 2013 (<https://mwnation.com/prisons-to-adopt-parole-by-next-year%E2%80%9494nkhoma/>) in 2015 (<http://www.manaonline.gov.mw/index.php/national/general/item/3433-prisoners-told-to-apply-for-early-release-from-prison> and <http://www.manaonline.gov.mw/index.php/component/k2/item/3231-malawi-law-commissions-stakeholders-review-the-prison-act>); in 2016 (<https://mwnation.com/commission-proposes-pardon-guidelines/>); in 2019 (<https://mwnation.com/minister-hails-prison-reforms/>)

¹¹ Report of the Working Group on the Universal Periodic Review: Malawi, 20 July 2015, A/HRC/30/5, para 54.

¹² Report of the Working Group on the Universal Periodic Review: Malawi, 20 July 2015, A/HRC/30/5, para 110.

¹³ <https://mwnation.com/justice-system-rotten-report/>

¹⁴ The Inspectorate of Prisons in its 2016 report to Parliament noted that Kachere prison “is a health disaster in waiting”. The report noted several concerns including a severe shortage of food including days where inmates receive no food, the risk of disease outbreak, the risk of the building collapsing, and a shortage of blankets. Regarding Bvumbwe prison, the Inspectorate of Prisons’ report noted that cells were poorly ventilated and toilets inside cells were without running water. In contrast, the Mpemba Reformatory Centre in Blantyre, for example, houses only 25 children in a facility that can accommodate 150 children.

¹⁵ *Republic v Children in Detention in Bvumbwe and Kachere Prisons*, Review Case No. 21 of 2017, <https://www.southernafricalitigationcentre.org/wp-content/uploads/2018/06/Judgment-children-in-prison.pdf>

¹⁶ Chikoni Chijozi “Arbitrary Detention of Migrants under the Malawi Immigration Act” in *Protection Frameworks for Refugees and Migrants in Southern Africa*, 2014, Southern Africa Litigation Centre, <https://www.southernafricalitigationcentre.org/wp-content/uploads/2018/05/Protecting-Refugees-draft3.pdf>

¹⁷ “Stranded Ethiopian Migrants Return Home from Malawi” International Organization for Migration (2015) available at <http://www.iom.int/news/stranded-ethiopian-migrants-return-home-malawi> (last accessed 23 September 2017).

¹⁸ O Khamula “120 Ethiopian immigrants languish in Malawi jails” Nyasa Times (2016) available at <http://www.nyasatimes.com/120-ethiopian-immigrants-languish-malawi-jails/> (last accessed 23 September 2017).

¹⁹ <https://www.southernafricalitigationcentre.org/wp-content/uploads/2017/08/Malawi-Immigration-Audit-FINAL-20-05-16.pdf>

²⁰ Capital punishment and the implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty, Human Rights Countril, A/HRC/36/26, August 2017, at para 19.

²¹ *Republic v Daudi*, Reference No. 1 of 2016, Confirmation Case No. 748 of 2015, MWHC. On 8 August 2018, the Malawi High Court in Blantyre heard a constitutional application relating to the case of *State v Willias Daudi*. Mr Daudi had been convicted of robbery after a full trial. At the time of his trial, however, he was not informed of his right to legal representation, and he further did not benefit from the offer of legal aid. The bench unanimously held that there was a violation of the right to be informed of the right to legal representation.

²² Section 15 of the Criminal Procedure and Evidence Code provides;

(1) Where in any proceedings a subordinate court imposes—

(a) a fine exceeding “K1,000”;

(b) any sentence of imprisonment exceeding

(i) in the case of a Resident Magistrate’s court, two years;

(ii) in the case of a Magistrate’s court of the first or second grade, one year; or

(iii) in the case of a court of a magistrate of the third or fourth grade, six months;

(c) any sentence of imprisonment upon a first offender which is not suspended under section 340,

it shall immediately send the record of the proceedings to the High Court for the High Court to exercise powers of review under Part XIII.

²³ *Kalanje v Republic*, Miscellaneous Criminal Application 20 of 2013(High Court) (Principal Registry) (Unreported). *Nancy Sifa Lamulani v Republic*, Criminal Review Case No. 14 of 2014 (High Court) (Principal Registry) (Unreported).

²⁴ See for example, *Lingston Nkhoma and 19 Others*, Miscellaneous Criminal Application, High Court of Malawi, Criminal Division, Mzuzu Registry.



SOUTHERN AFRICA LITIGATION CENTRE

²⁵ *Republic v Pempho Banda and Others* (58/2016) [2016] MWHC 589.

²⁶ <https://www.southernafricalitigationcentre.org/2016/09/28/malawi-challenging-the-use-of-the-offence-of-living-on-the-earnings-of-prostitution/>

²⁷ *Mayeso Gwanda v State* [2017] MWHC 23, per Ntaba J.

²⁸ <https://www.southernafricalitigationcentre.org/2013/07/24/salc-research-report-no-justice-for-the-poor-a-preliminary-study-of-enforcement-of-nuisance-related-offences-in-blantyre-malawi/>

²⁹ Ouagadougou Declaration and Plan of Action on Accelerating Prison and Penal Reform in Africa, African Commission 34th Ordinary Session, November 2003; African Commission on Human and People's Rights' Principles on the Decriminalisation of Petty Offences, 2018.

³⁰ *Mayeso Gwanda v State* [2017] MWHC 23, <https://www.southernafricalitigationcentre.org/2017/01/28/malawi-challenging-constitutionality-of-rogue-and-vagabond-offence/>

³¹ *Mayeso Gwanda v State* [2017] MWHC 23, Kalembera J ("What evidence was there that the applicant intended to commit an offence?... there was no investigation, there was no evidence that the applicant intended to commit an offence or an illegality... His dignity was violated. He was presumed guilty until proven otherwise. All because he possibly appeared to be of no means. He was not treated as a human being. And where a person's dignity is violated or compromised, it likely creates a chain reaction, that is, several of the individual's human rights end up being violated.").

³² *Mayeso Gwanda v State* [2017] MWHC 23, per Ntaba J.

³³ Human Rights Committee, Concluding Observations on the Initial Periodic Report of Malawi, CCPR/C/MWI/CO/1/Add.1, para 12

³⁴ <https://mwnation.com/are-police-on-killing-spree/>

³⁵ Act No. 8 of 2012.

³⁶ Cap 34:02.

³⁷ Chapter 8:01.

³⁸ See, for example, the case of Mr Vincent Wandale who, following charges of "spreading false news" in October 2017, was subjected to prolonged psychiatric detention and forced psychiatric treatment between the end of October 2017 and February 2018. Psychiatric medications were coercively and forcefully administered to him against his express wishes under the premise of a forensic detention order. His charges have still not been prosecuted two years later.

³⁹ SALC Research Report, *Prosecuting sexual violence against women and girls with disabilities in Malawi: A preliminary analysis of the attrition of sexual offence cases in the criminal justice system*, 2017

<https://www.southernafricalitigationcentre.org/wp-content/uploads/2017/08/Sexual-violence-against-women-with-disabilities-in-Malawi.pdf>

⁴⁰ "Any person who, knowing a woman or girl to be an idiot or imbecile, has or attempts to have unlawful carnal knowledge of her under circumstances not amounting to rape, but which prove that the offender knew at the time of the commission of the offence that the woman or girl was an idiot or imbecile, shall be guilty of a felony and shall be liable to imprisonment for fourteen years, with or without corporal punishment."

⁴¹ Comm. On the Rights of the Child, Concluding observations on the combined third to fifth periodic reports of Malawi, U.N. Doc. CRC/C/MWI/CO/3-5, para. 37(c) (2017).

⁴² Report of the Working Group on the Universal Periodic Review: Malawi, 20 July 2015, A/HRC/30/5, para 110.87.

⁴³ <https://www.nyasatimes.com/malawi-police-arrest-parents-for-marrying-off-girl-14/>

⁴⁴ Report of the Working Group on the Universal Periodic Review: Malawi, 20 July 2015, A/HRC/30/5, para 110.128-129.

⁴⁵ Malawi, International Religious Freedom Report for 2011, United States Department of State Bureau of Democracy, Human Rights and Labour (last accessed 10 January 2018) <https://www.state.gov/documents/organization/192943.pdf>.

⁴⁶ Bright Malenga, *Education Ministry clears mist on hijab, dreadlocks in Malawi schools*, 27 March 2017 (last accessed 10 January 2018) <https://malawi24.com/2017/03/27/education-ministry-clears-mist-on-hijab-dreadlocks-in-malawi-schools/>.

⁴⁷ *Madikhula v Goba*, Civil Cause No. 2 of 2017, Mzuzu High Court, <https://www.southernafricalitigationcentre.org/2017/05/22/malawi-protecting-women-from-illegal-land-seizure/>

⁴⁸ Report of the Working Group on the Universal Periodic Review: Malawi, 20 July 2015, A/HRC/30/5, para 110.33.



**SOUTHERN AFRICA
LITIGATION CENTRE**

⁴⁹ SALC, *Accountability and Redress for Discrimination in Healthcare in Botswana, Malawi and Zambia*, 2016, <https://www.southernafricalitigationcentre.org/wp-content/uploads/2017/08/Report-Accountability-and-Redress-for-Discrimination-in-Healthcare.pdf>

⁵⁰ <https://www.maravipost.com/malawi-court-stops-president-mutharikas-botched-mhrc-appointments/>

⁵¹ Human Rights Committee, Concluding Observations on the Initial Periodic Report of Malawi, CCPR/C/MWI/CO/1/.

⁵² Report of the Working Group on the Universal Periodic Review: Malawi, 20 July 2015, A/HRC/30/5, para 110.34.