

Universal Periodic Review — 9th Session (April 2010)
Review of the Republic of Malawi

Submission of the Canadian HIV/AIDS Legal Network

Introduction

1. The Canadian HIV/AIDS Legal Network was founded in 1992 to promote the human rights of people living with and vulnerable to HIV/AIDS, in Canada and internationally, through research, legal and policy analysis, education, and community mobilization. It is Canada's leading advocacy organization working on the legal and human rights issues raised by HIV/AIDS.

2. This submission describes key national human rights priorities and provides recommendations for the Government of Malawi to better respect, protect and fulfill human rights, consistent with its international legal obligations, in areas of particular relevance to an effective response to HIV. These priorities are: 1) women's rights in relation to marital property and 2) the rights of people living with, and at risk, of HIV as reflected in Malawi's *HIV and AIDS (Prevention and Management) Bill*.

Rights of women in relation to marital property

3. In 2007, close to one million people were living with HIV/AIDS in Malawi—with women representing 58.3% of those over the age of 15 infected with the virus—an increase of approximately 2% since 2001.¹ How the property of married couples is administered, owned and distributed at the end of a relationship has considerable relevance for women's rights in the context of HIV/AIDS. While women in Malawi increasingly worry about HIV infection as a result of their husbands' sexual activity outside marriage, many remain in those relationships.² Moreover, women in Malawi are often inhibited from demanding safer sex in marriage because of their fear of the poverty associated with divorce.³ Conversely, women with access to marital property may be better able to negotiate safer sex, to leave abusive partners and to provide for their own needs and those of their children.

4. Under statute, anybody can acquire and inherit land in Malawi, but discriminatory legal barriers greatly limit women's property-holding capacities. Section 24 of the *Constitution of the Republic of Malawi* provides that on the dissolution of marriage (either through divorce or the death of one spouse), women are entitled to property that is "held jointly" with her husband. However, the prevailing interpretation of Section 17 of the *Married Women Property Act, 1882* only considers property to be held "jointly" if a monetary contribution has been made to its acquisition. As the Government of Malawi has reported in relation to Malawi's approach to marital property: "The High Court, on its part, insists that the party who can prove that the title vests in her/him should be given the property. If a party's claim is based on contributions, Malawi courts still insist that the contribution must be direct and financial. Housework and indirect contributions are not given any value."⁴ Because women more often than men make non-monetary contributions to property and perform household and reproductive labour, husbands can more often claim ownership of the assets that they personally purchased. Women are consequently deprived of marital property upon marriage dissolution.

5. Malawi's current approach to marital property does not recognize women's equal claim to marital assets in the context of mutual rights and responsibilities and implies that women's non-financial contributions are not valued, thus legitimizing gender inequality. Malawi's approach to marital property thus violates women's rights to non-discrimination and equality before the law—rights recognized in Malawi's Constitution and under numerous international and regional laws, including

the *Convention on the Elimination of all Forms of Discrimination Against Women* (CEDAW), the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), the *International Covenant on Civil and Political Rights* (ICCPR), the *African Charter on Human and Peoples' Rights* (African Charter), and the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* (Protocol) all of which Malawi has ratified.⁵

6. In particular, Article 16(1)(h) of CEDAW requires States to ensure that both spouses enjoy the same rights with respect to the ownership, acquisition, management, administration, enjoyment and disposition of property. According to the CEDAW Committee, “any law or custom that grants men a greater share of property at the end of marriage or *de facto* relationship ... is discriminatory and will have a serious impact on a woman’s practical ability to divorce her husband.” Accordingly, the CEDAW Committee has recommended that “[f]inancial and non-financial contributions [of women in marriage] should be accorded the same weight.”⁶ Similarly, the Protocol recognizes specific rights of women with respect to marital property⁷ and includes obligations to enact appropriate national legislative measures to guarantee that during marriage, a woman shall have the right to acquire her own property and to administer and manage it freely.⁸ Moreover, Article 13(h) of the Protocol calls for States to adopt legislation and “take the necessary measures to recognize the economic value of the work of women in the home.” Read together, these provisions are correctly interpreted as acknowledging women’s contributions to marital property which they should consequently have rights of administration and ownership over.

7. By reinforcing women’s dependence on their husbands, unequal marital property rights can also affect women’s economic autonomy, security, dignity and health. Numerous studies have demonstrated how the fear of poverty inhibit married women from engaging in safe sex or from leaving violent relationships, making them more vulnerable to contracting HIV.⁹ Upon marriage dissolution, women without access to marital property may face daunting difficulties in terms of securing a place to live and maintaining a basis for survival. This may drive women to engage in behaviours that put them at increased risk of HIV exposure.¹⁰

8. Property rights can also help ease the impact of HIV on those living with the disease.¹¹ In African households affected by HIV/AIDS, it has been estimated that household incomes can drop by 80 percent, food consumption by 15 to 30 percent, and primary school enrolment by 20 to 40 percent.¹² Access to shelter, clean water and services helps to keep those infected with HIV healthy.¹³ Failing to recognize women’s interests in marital property can have particularly harsh consequences for HIV-positive women, who may face forced eviction as a result.¹⁴

9. As the CEDAW Committee has clarified, the “right to own, manage, enjoy and dispose of property is central to a woman’s right to enjoy financial independence, and in many countries will be critical to her ability to earn a livelihood and to provide adequate housing and nutrition for herself and for her family.”¹⁵ This statement underscores the interdependence of rights related to women’s access to marital property. Given the nexus between property and women’s physical security and capacity to provide for herself, a right to marital property is directly linked to the right to the highest attainable standard of health, which encompasses the right of every person to control one’s health and body.¹⁶ This right is also linked to the right to an adequate standard of living and the right to housing.¹⁷ In its General Comment interpreting the right to housing, the U.N. Committee on Economic, Social and Cultural Rights emphasized that the right is to *adequate housing*, which encompasses legal security of tenure.¹⁸ To the extent that the prevailing approach in Malawi’s marital property law undermines women’s health during and after marriage and impedes her ability to leave abusive marriages, it further violates other pertinent human rights, including the rights to be free from cruel, inhuman or

degrading treatment or punishment; to be free from slavery and servitude; to liberty and security of the person; and to life.¹⁹

HIV and AIDS (Prevention and Management) Bill (“HIV Bill”)

10. In effective responses to the HIV epidemic, health and human rights are fundamentally linked. When human rights are not respected, HIV prevention efforts are hindered and the impact of the epidemic on individuals and communities is exacerbated. While the Malawi government should be commended for its commitment in the HIV Bill to preventing HIV-related discrimination and to providing free HIV medication, there are fundamental flaws in the HIV Bill that may limit its effectiveness and result in human rights violations.

Disclosure and Privacy

11. The privacy rights of persons living with HIV are extremely important. For women in particular, confidentiality of medical information (including HIV status) is essential to the protection of their human rights, because women may find themselves abandoned, subject to domestic violence, or ostracized if their domestic partners, spouses, families or communities discover their HIV status. Protection of the right to privacy is also vital to enable women to consent to HIV tests and treatment for themselves and their children without fear of their domestic partners’ or spouses’ reactions. Research from Africa indicates that the fear of disclosure of HIV status is one of the main barriers to women’s use of voluntary counseling and testing services, and that this fear “reflect[s] the unequal and limited power that many women have to control their risk for infection.”²⁰ Moreover, because of the stigma and shame that are still too often associated with a diagnosis of HIV, protecting the privacy of persons living with HIV is essential in order to protect them from discrimination and enable them to access employment, housing and services.

12. Although the HIV Bill features strong wording protecting the right of HIV-positive people to privacy and confidentiality with regard to health information, Article 10 of the Bill permits a health service provider to disclose one’s HIV status, where he [or she] reasonably believes that it is medically appropriate, to “any person he reasonably believes has been or will be exposed to the risk of infection in the course of his duties or emergency services” or “the spouse or the sexual partner of the infected person.”

13. With respect to partner notification, the *International Guidelines on HIV/AIDS and Human Rights* (“*International Guidelines*”) recommend voluntary partner notification, but with provision for exceptional circumstances.²¹ As the *Handbook for Legislators on HIV/AIDS, Law and Human Rights* recognizes, “coercive strategies are inappropriate, ineffective and counter-productive because they deter those at risk of infection from presenting early for counselling, testing, treatment and support.”²² We would therefore recommend that the proposed disclosure provision include a requirement that, prior to breaching the confidentiality of a person living with HIV, a health service provider should “reasonably believe” not only that the individual’s behaviour puts another person at risk of infection, but that, (i) in the case of a spouse or sexual partner, he or she has been thoroughly counselled and refuses to change his or her behaviour; (ii) the risk to another person is a serious or significant risk in the circumstances; (iii) the individual is given reasonable advance notice of the impending disclosure of his or her HIV status; (iv) the identity of the person living with HIV is concealed from the individual at risk of infection, if this is possible; and (v) follow-up is provided to ensure support to those involved.

HIV Testing

14. The HIV Bill recommends compulsory testing of persons charged with sexual offences, sex workers, persons in polygamous unions, pregnant women and their sexual partners or spouses, and blood and tissue donors. HIV testing without consent, however, is almost never justified. Because of the invasive nature of compulsory HIV testing, this practice violates fundamental rights to the security of the person and the highest attainable standard of health protected by international treaties to which Malawi is a party. Moreover, by distinguishing between certain population groups and the community in general, provisions of the laws permitting compulsory testing may in some cases unjustifiably violate the principle of non-discrimination. As recommended in the *International Guidelines*, “[p]ublic health, criminal and anti-discrimination legislation should prohibit mandatory HIV-testing of targeted groups, including vulnerable groups” such as women and sex workers.²³

15. Not only are compulsory testing provisions for certain population groups discriminatory, but could undermine the health of third parties. Compulsory testing of pregnant women, for example, potentially exposes women to the risk of intimate partner violence and abandonment by male partners, especially when there is the likelihood that health service providers will disclose women’s HIV status to sexual partners. Compulsory testing of pregnant women and sex workers will also impede HIV treatment and care, as women will be less likely to access such treatment and care if they are compelled to undergo HIV testing and have their HIV status involuntarily disclosed. And in all cases involving compulsory testing, misinformation about one’s HIV status could arise if a test is conducted during the “window period” of HIV infection. In the case of compulsory testing of persons charged with sexual offences, this could undermine rape survivors’ ability to make informed decisions about their health by providing misinformation about alleged offenders’ HIV status. Because of a false negative HIV test of an accused, a survivor might not be inclined to obtain HIV post-exposure prophylaxis. Similarly, a false negative HIV test in the context of polygamous unions could deter polygamous spouses from using condoms, inadvertently increasing their vulnerability to HIV.²⁴ As such, we recommend that the exceptions to forced testing be removed from the HIV Bill.

Reckless, Negligent and Deliberate HIV Exposure and Transmission

16. Article 43 of the HIV Bill criminalizes a person who knows he or she is HIV-positive and does an act or omits to do an act “which is likely to transmit or spread HIV to another person” unless, before the act or omission takes place, the other person “has been informed of the risk of contracting HIV from him or her” and “has voluntarily agreed to accept that risk.” Those contravening this Article face five years’ imprisonment. For those who deliberately infect another person with HIV, Article 44 imposes a lengthier period of 15 years imprisonment. For those who “recklessly or negligently” infect another person with HIV, Article 45 imposes a punishment of 10 years imprisonment.

17. The *International Guidelines* recommend that “[c]riminal and/or public health should not include specific offences against the deliberate and intentional transmission of HIV but rather should apply general criminal offences to these exceptional cases. Such application should ensure that the elements of foreseeability, intent, causality and consent are clearly and legally established to support a guilty verdict and/or harsher penalties.”²⁵ Correspondingly, UNAIDS has recommended that if States decide to resort to criminal law to address HIV exposure or transmission, they should not enact HIV-specific legislation, but instead apply general criminal offences since enacting HIV-specific legislation contributes to already widespread HIV-related stigma and invites further discrimination against people living with HIV by singling them out as potential criminals.²⁶

18. While the criminal law provisions in the HIV Bill may be driven by a well-intentioned wish to protect women and to respond to serious concerns about the ongoing rapid spread of HIV in Malawi,

applying criminal law to HIV exposure or transmission does nothing to address the epidemic of gender-based violence or the deep economic, social, and political inequalities that are at the root of women's and girls' disproportionate vulnerability to HIV. On the contrary, applying criminal law to HIV exposure or transmission is likely to heighten the risk of violence and abuse women face; strengthen prevailing gendered inequalities in healthcare and family settings; further promote fear and stigma against people living with HIV; and increase women's risks and vulnerabilities to HIV and to HIV-related violations of rights.²⁷ In light of these recommendations, we recommend removing the provisions in the HIV Bill which broadly criminalize exposure to, or transmission of, HIV.

¹ *Epidemiological Fact Sheet on HIV and AIDS: Core data on epidemiology and response Malawi* (October 2008).

² K. Smith and S. Watkins, "Perceptions of risk and strategies for prevention: responses to HIV/AIDS in rural Malawi," *Social Science & Medicine* 60 (2005): 649–660.

³ T. Lindgen et al., "Malawi women and HIV socio-cultural factors and barriers to prevention," *Women & Health* 41(1) (2005): 69–86 at 81.

⁴ CEDAW Committee, "Consideration of Reports Submitted by States Parties under Article 18 of the CEDAW, Combined Second, Third, Fourth and Fifth Periodic Report of States Parties: Malawi," CEDAW/C/MWI/2-5, 28 June 2004, para. 16.11.1.

⁵ CEDAW, articles 15 and 16; ICESCR, article 3; ICCPR, articles 3, 23(4) and 26; African Charter, article 3; Protocol, article 2.

⁶ CEDAW Committee, "General Recommendation No. 21: Equality in Marriage and Family Relations," U.N. Doc. A/49/38, 1994, para. 28.

⁷ E.g., article 21 of the Protocol specifies a widow's right to an equitable share in the inheritance of her husband's property.

⁸ Protocol, article 6.

⁹ See, for example Human Rights Watch, *Just Die Quietly: Domestic Violence and Women's Vulnerability to HIV in Uganda*, Vol. 15, No. 15(A), 2003, p. 32; T. Lindgen et al., (supra) at 81; COHRE, *Bringing Equality Home*, 2004, p. 29; M. Hattori and F. Dodoo, "Cohabitation, marriage, and 'sexual monogamy' in Nairobi's slums," *Social Science & Medicine* 64(5) (2007): pp. 1067–1078.

¹⁰ S. White, "Extreme poverty and its impact on women's vulnerability to HIV transmission: a rights issue," October 2007 [publication forthcoming] and CEDAW Committee, "Consideration of Reports Submitted by States Parties under Article 18 of the CEDAW, Sixth Periodic Report of States Parties: Malawi," CEDAW/C/MWI/6, 20 October 2008, para. 62.

¹¹ R. Strickland, *To Have and To Hold: Women's Property and Inheritance Rights in the Context of HIV/AIDS in Sub-Saharan Africa*, International Center for Research on Women, 2004.

¹² A. Whiteside, "Poverty and HIV/AIDS in Africa," *Third World Quarterly* 23(2) (2002): pp. 313–332.

¹³ Human Rights Watch, *Double Standards: Women's Property Rights Violations in Kenya*, 2003, p. 30.

¹⁴ K. Izumi (ed), *Reclaiming Our Lives: HIV and AIDS, Women's Land and Property Rights and Livelihoods in Southern and East Africa* (Cape Town: HSRC Press, 2006), pp. 19–22.

¹⁵ CEDAW Committee, "General Recommendation No. 21" (supra), para. 26.

¹⁶ ICESCR, article 12; Protocol, article 14; African Charter, article 16. See U.N. Committee on Economic, Social and Cultural Rights, "General Comment No. 14: The Right to the Highest Attainable Standard of Health," 22nd Session, E/C.12/2000/4, 11 August 2000, para. 8.

¹⁷ See Protocol, articles 15 ("Right to Food Security") and 16 ("Right to Adequate Housing") and ICESCR, article 11(1).

¹⁸ U.N. Committee on Economic, Social and Cultural Rights, "General Comment No. 4: The Right to Adequate Housing (Article 11(1))," 6th session, 1991, paras. 7–8.

¹⁹ See ICCPR articles 6–10; Protocol, article 4; African Charter, articles 4–6.

²⁰ S. Maman et al., "Women's barriers to HIV-1 testing and disclosure: challenges for HIV-1 voluntary counseling and testing," *AIDS Care*, Vol. 13, No. 5, p. 601.

²¹ OHCHR and UNAIDS, *International Guidelines on HIV/AIDS and Human Rights, Consolidated Version*, 2006.

²² UNAIDS and IPU, *Handbook for Legislators on HIV/AIDS, Law and Human Rights*, 1999, pg. 45.

²³ *International Guidelines* (supra), para 30(j).

²⁴ See also WHO, *Statement from the Consultation on Testing and Counselling for HIV Infection*, 1992, at 3–4.

²⁵ *International Guidelines* (supra), Guideline 4, para. 21(a).

²⁶ UNAIDS, *Criminal Law, Public Health and HIV Transmission*, 2002, pp. 30–32.

²⁷ ATHENA Network, *10 reasons why criminalization of HIV exposure or transmission harms women*, 2009.