

## RESPECTING AND PROMOTING THE REALIZATION OF WOMEN'S MARITAL PROPERTY RIGHTS IN MALAWI

Marriage is a contract — and an important promise — between two people: both must contribute to make the marriage and the household run smoothly. It takes much more than money to care for a family and, in many cases, women do much of the care-giving and the household work that is required to keep their family happy and healthy. But, as they are now interpreted, the laws of Malawi do not recognize the importance of this work. The laws do not respect women and the critical role they play in gaining marital property — real property and wealth shared by a married couple. The laws do not acknowledge that women contribute equally to their family's wealth even if they do not handle the family finances. This means that when a marriage ends, women in Malawi are often left destitute, with nothing to show for years of hard work on behalf of their families. This is unjust and leaves women in Malawi in terrible circumstances that can affect not only their economic situation but their health and well-being in very profound ways, including by putting them at greater risk for HIV infection. **Women and Law in Southern Africa Research Trust–Malawi (WLSA–Malawi) is working to change this devastating reality by fighting for an approach to marital property that would give a husband and wife equal control and ownership over property obtained during the subsistence of the marriage during marriage, and half the value of this property when a marriage ends either by death or through divorce.**

### DISCRIMINATORY LAWS IN MALAWI

WLSA–Malawi is challenging Malawi's approach to marital property law before the Constitutional Court of Malawi because it discriminates against women:

- Malawi's Constitution provides that **women are entitled to “a fair disposition of property that is held jointly with a husband” upon the dissolution of marriage.**
- However, the current interpretation of Section 17 of Malawi's *Married Women Property Act, 1882* only considers property to be held “jointly” if a direct, financial contribution has been made to its acquisition.

This means that although Malawi's Constitution says that women should receive their fair share of joint marital property when a marriage ends, the reality is that women often cannot prove how they directly and financially contributed to that joint property. This is because most women do not have well-paid jobs or own businesses which enable them to purchase expensive items during marriage like housing, land, vehicles or even bicycles.

Since the law, as developed by the courts over the years, has shown that the courts in

Malawi do not recognize household and care-giving work that women often undertake during marriage as an economic activity that contributes to the acquisition or maintenance of marital property, **many women walk away with virtually nothing upon the end of the marriage.** The current interpretation of Section 17 and **this approach to marital property have been criticized for the hardships and injustices that they often create, especially for women.**

## THE SOLUTION

WLSA-Malawi is requesting that the Constitutional Court of Malawi declare Section 17 of the *Married Women Property Act* invalid, or alternatively declare that Section 17 be interpreted in a way that recognizes women's contributions to marital property and guarantees that women receive half of this property when a marriage ends.

The Constitutional Court can do this by recognizing the household and care-giving work that women do as an important and valuable activity that contributes to the acquisition or maintenance of marital property. Using this approach, marital property would be deemed to be owned and controlled equally by husband and wife during the marriage and each spouse would receive half the value of the marital property when a marriage ends.



A re-interpretation of Section 17 of the *Married Women Property Act* by the Court does not prevent couples from making ante-nuptial (i.e., before marriage) contracts outlining alternative approaches to marital property, meaning that, before getting married, couples can still choose how they want to regulate their property rights during the subsistence of the marriage. Recognizing the equal contributions of each spouse to marital property just gives a fair starting point for the equitable division of marital property, from which couples may make their own decisions based on their circumstances.

Organizations, both national and international, such as the Malawi Human Rights Commission, the Malawi Women Lawyers Association, the Southern African Litigation Centre and the Canadian HIV/AIDS Legal Network are supporting WLSA-Malawi's efforts by providing the national, regional and international human rights arguments for changing Malawi's current approach to marital property law.

## MARITAL PROPERTY: A HUMAN RIGHTS ISSUE

Malawi's Constitution and regional and international human rights treaties all feature sections that are relevant to marital property. For example, virtually all regional and international human rights treaties guarantee women's rights to equality and non-discrimination, including in all matters relating to marriage and family relations. States are required to ensure that both spouses enjoy the same rights with respect to the ownership, acquisition, management, administration, enjoyment and disposition

## FACTS AND FIGURES

- **In Malawi, women earn considerably less than men and few women have sufficient resources to independently purchase substantial property.**
- **Unequal marital property rights can affect women's economic autonomy, security, dignity and health** by reinforcing women's dependence on their husbands. For example:
  - Fear of poverty and insecurity often prevents women, including those who are married, from engaging in safe sex, or from leaving violent relationships, making them more vulnerable to contracting HIV. In Malawi, **women represent almost 60 percent of those over the age of 15 who are living with HIV.**
  - Women with access to land and property are better able to negotiate condom use in their sexual relationships, to provide for their own and their children's needs, and to leave abusive partners.
  - When marriage ends, women without access to marital property may face daunting difficulties in securing a place to live, maintaining a basis for survival and finding economic opportunities. This may drive women to engage in behaviours that put them at increased risk of contracting HIV.
  - Property can help ease the impact of HIV and AIDS on those living with the disease. Access to shelter, clean water and services helps to keep HIV-positive people healthy. Failing to recognize women's interests in marital property can have particularly harsh consequences for women affected by HIV, who may face stigma, discrimination and forced eviction as a result.

of property. In particular, the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*, which Malawi has signed and ratified, means Malawi must ensure that women and men are regarded as equal partners in marriage. This Protocol also calls for states to adopt legislation and take the necessary measures to recognize the economic value of women's work in the home. In Malawi, because the common interpretation of Section 17 of the *Married Women Property Act* does not recognize women's equal claim to marital property and implies that women make a less important contribution to marriage, women's right to equality before the law is violated.

## CASE STUDIES

- Worldwide, there is a trend favouring the equal division of a married couple's marital property. In many countries, including Austria, Canada, Croatia, Denmark, France, Germany, Greece, Italy, the Netherlands, New Zealand, Norway, Spain, Sweden and the United States, a marital-property approach reflecting an equalization of marital property when a marriage ends has been put in place, recognizing women's non-economic and indirect contributions to marital property.

- In countries such as South Africa and Namibia, a “community of property” approach exists, in which all of a couple’s assets and liabilities are pooled and shared equally by the spouses, no matter whether they were acquired before or during the marriage, and each spouse assumes joint control with his or her partner over these assets.
- In Ethiopia, only marital property acquired during marriage is jointly administered and equally divided when a marriage ends.
- Also in South Africa, a “community of gains” or “accrual” approach is available, in which each spouse keeps and controls his or her own assets and liabilities during marriage. When a marriage ends, the growth in value of property built up by the two spouses during the marriage is automatically divided equally.



Each of these approaches recognizes women’s economic and non-economic contributions to marriage and allows for equal distribution of marital property at the end of a marriage. While women can still own property independently or in association with others, law makers in these countries have recognized that ordinary laws of property should not apply to the administration and distribution of marital property. They have put in place specific laws governing marital property in recognition of the economic partnership and interdependence between spouses.

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