



COUNTRY PROFILE

The Constitution of the Republic of Malawi protects the family as the natural and fundamental group unit of society.¹⁹¹ The same provision provides that each member of the family is entitled to full and equal respect and protection by the law against neglect, cruelty and exploitation. In addition, the provision establishes that all men and women have the right to marry and start a family and that no person shall be forced to enter into marriage. These provisions apply to all forms of marriage, and indeed Malawi embraces legal pluralism by recognising and regulating civil marriages, customary marriages, religious marriages, and marriage by cohabitation or reputation.¹⁹²

Malawi’s Constitution also contains impressive provisions protecting the rights of women, including within the context of family law. Section 13 provides that the State must progressively adopt and implement policies and legislation aimed at obtaining gender equality through full and equal participation of women in all spheres of Malawian society; non-discrimination; and 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.

Section 24 of the Constitution is dedicated to the rights of women and provides for, among other things:

- ▶ Full and equal protection by the law;
- ▶ The right not to be discriminated against on the basis of their gender or marital status;
- ▶ The right to be accorded the same rights as men in civil law, including equal capacity to enter into contracts; to acquire and maintain rights in property, 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;
- ▶ To acquire and retain citizenship and nationality;
- ▶ Women are also entitled to a fair disposition of property that is held jointly with a husband; and to fair maintenance upon dissolution of a marriage;
- ▶ That any law that discriminates against women on the basis of gender or marital status shall be invalid; and
- ▶ The passage of legislation to eliminate customs and practices that discriminate against women, particularly practices such as sexual abuse, harassment, violence, and deprivation of property, including property obtained by inheritance.

Treaty	Date of ratification	Reservations/Declarations
CEDAW	12 March 1987	None
African Charter	17 November 1989	None
Maputo Protocol	20 May 2005	None

191 Section 22 of the Constitution of the Republic of Malawi 1994, amended 2020 . Available at https://malawilii.org/akn/mw/act/1994/20/eng@2020-11-03#chp_IV_sec_24 (accessed 17 April 2024)

192 Section 12 of the Marriage, Divorce and Family Relations Act 2015. Available at <https://malawilii.org/akn/mw/act/2015/4/eng@2017-12-31> (accessed 17 April 2024)

MAIN TRENDS ON FAMILY LAW

The Marriage, Divorce and Family Relations Act 2015 consolidated previously fragmented legal regimes and advanced progressive legal reform. The Act recognises and regulates civil marriages, customary marriages, religious marriages and marriage by reputation or permanent cohabitation, granting all unions equal legal status.¹⁹³ The recognition of marriage by reputation or permanent cohabitation is of special import, and will protect many vulnerable women who do not have the protection of a formally concluded marriage. Recognition of marriage by repute, where a couple may be considered married without formally registering their relation, is not automatic and requires a declaration by a court which must consider a number of factors, including the length of the relationship (which must be a minimum of five years), cohabitation, and the existence of children.¹⁹⁴

Another key and much celebrated attribute of the Marriage, Divorce and Family Relations Act is that it effectively prohibits child marriage. Malawi has historically had one of the highest rates of child marriage in the world. The UN Women Global Database on Violence Against Women estimates that 42.1% of women are married before reaching 18 years of age.¹⁹⁵ While civil marriages have been confined to persons 18 years of age and above for some time, customary marriages used puberty as a marker of maturity, thus allowing child marriage. The Marriage, Divorce and Family Relations Act set the universal

minimum age of marriage to 18, subject to the provisions of Section 22 of the Constitution. Section 22 of the Constitution allowed marriage of children between the ages of 15 and 18 with the consent of their parents and guardians. In 2017, however, two years after the adoption of the Act, Parliament adopted the Constitutional Amendment Act¹⁹⁶ which amended the Constitution to make 18 the absolute minimum age of marriage, without exceptions, based on an amicable settlement arising from the case of *Institute for Human Rights and Development in Africa vs the Government of Malawi*.¹⁹⁷

A key step towards recognising the contribution of women to the marriage is Section 50(3) read with Section 2 of the Act, which states that non-monetary contributions of spouses must be taken into account when determining the contribution of the spouses to the marriage, including domestic work and management of the home, childcare, companionship, and the endurance of the marriage.

Finally, Malawi has taken extensive legislative and policy steps to combat violence against women, including adopting the Prevention of Domestic Violence Act 2014¹⁹⁸, which provides a civil framework for addressing various acts of violence amongst people within a domestic relationship, and the Gender Equality Act 2014¹⁹⁹, which proscribes sexual harassment and harmful practices.

193 Section 12 of the Marriage, Divorce and Family Relations Act 2015

194 Section 13 of the Marriage, Divorce and Family Relations Act 2015

195 See UN Women Global Database on Violence Against Women. Available at: <https://evaw-global-database.unwomen.org/en/countries/africa/malawi>. (accessed 17 April 2024)

196 Constitutional (Amendment) Act 2017. Available at <https://malawilii.org/akn/mw/act/2017/15/eng@2017-04-07> (accessed 17 April 2024)

197 https://www.acerwc.africa/sites/default/files/2022-10/Agreement-on-amicable-settlement_Malawi.pdf (accessed 15 April 2024)

198 Prevention of Domestic Violence Act - MalawiLII. Available at <https://malawilii.org/akn/mw/act/2006/5/eng@2014-12-31> (accessed 15 January 2024)

199 Gender Equality Act - MalawiLII. Available at <https://malawilii.org/akn/mw/act/2013/3/eng@2014-12-31> (accessed 15 January 2024)

KEY GAPS AND CONTESTATIONS

(i) **Polygamy:** The Marriage, Divorce and Family Relations Act adopts the same position as previous legal regimes regarding polygamy. Polygamy is prohibited in civil marriages, and the penalty for violating this prohibition has been increased, but allowed in customary and religious marriages.²⁰⁰ While polygamy is a part of some religious and cultural customs, polygamy violates women's rights to equality and economic well-being. The Maputo Protocol obliges States to adopt measures to ensure that monogamy is encouraged as the preferred form of marriage.²⁰¹ Regardless, steps must be taken to ensure that women in polygamous marriage have their rights safeguarded, especially those relating to inheritance and maintenance.

(ii) **Marital rape:** Another key gap in Malawi's laws relates to marital rape, which is not unequivocally outlawed. Malawi's Penal Code defines rape as unlawful carnal knowledge with a woman or girl without her consent,²⁰² however, courts have held that this does not extend to marriage:

"The question has been raised whether a wife can lawfully refuse intercourse at any time, that is to say, irrespective of custom and place, etc. in this connection, it would seem reasonable for a respectable wife to refuse her husband, e.g., in a public place in front of other people. But in a normal way, I doubt whether she can do so... It has been observed that a man can never be guilty of raping his wife and conversely that she can never refuse her consent. Whether this is a sound argument or not, I am inclined to the view... that a wife

cannot lawfully refuse her husband intercourse."²⁰³

Additionally, under customary law in Malawi marriage results in presumed and perpetual consent to sex. The Marriage, Divorce and Family Relations Act seems to confirm this position. Rather than prohibiting marital rape outright, it states that a spouse may deny the other spouse the right to consummation on certain limited grounds, such as poor health, post-natal recuperation, post-surgical convalescence, a reasonable fear that engaging in sexual intercourse is likely to cause physical or psychological injury or harm to either spouse, or reasonable respect for custom.²⁰⁴ Additionally, the Act provides that a husband commits rape if he has sexual intercourse with his wife without her consent *while they are legally separated*.²⁰⁵ Consequently, women's ability to refuse sex within marriage is limited and a wife's lack of consent only amounts to rape if the spouses are legally separated. This is an egregious violation of women's rights to equality, dignity and bodily autonomy.

(iii) **Same-sex marriage:** Marriage in Malawi is restricted to opposite sex couples. Section 14 of the Marriage, Divorce and Family Relations Act states that two persons of the opposite sex who are both not below the age of eighteen years, and are of sound mind, may enter into marriage with each other. Similarly, cohabitation is defined as the fact of a man and a woman, not married to each other in accordance with this Act, living together as, or as if they were, husband and wife.²⁰⁶ Same-sex couples are thus denied the protection of the law and the right to form families.

RECOMMENDATIONS

Implementation: The prohibition of child marriage must continue to be enforced.

Legal reform:

- ▶ Marital rape must be expressly prohibited. In addition, the law regarding rape should be made gender neutral.
- ▶ Same-sex marriage should be recognised by law.
- ▶ Steps must be taken to protect the rights of women in polygamous customary or religious marriages.

200 Section 51 Marriage, Divorce and Family Relations Act 2015

201 Article 6(c) of the Maputo Protocol

202 Section 132 of the Malawi Penal Code reads: Any person who has unlawful carnal knowledge of a woman or girl, without her consent, or with her consent if consent is obtained by force or means of threats or intimidation of any kind, or by fear of bodily harm, or by means of false representations as to the nature of the act, or in the case of a married woman, by personating her husband, shall be guilty of the felony termed rape

203 *R vs Mwasomola* 4 ALR (Mal) 572

204 Section 48(7) of the Marriage, Divorce and Family Relations Act 2015

205 Section 62 of the Marriage, Divorce and Family Relations Act 2015

206 Section 2 of the Marriage, Divorce and Family Relations Act 2015

THANDI'S* STORY

Malawi



Case study collected with the support of People Serving Girls at Risk (PSGR)

In Malawi, an estimated 38% of girls are married before reaching 18 years of age, and 7% are married before their 15th birthday. Before 2017, Section 22 of the Constitution allowed marriage of children between the ages of 15 and 18 with the consent of parents and guardians. In 2017, two years after adopting the Constitutional Amendment Act, Parliament amended the Constitution to make 18 the absolute minimum age of marriage without exceptions. In Thandi's case, while she was married after the reform, child marriage continued to be a practice despite the law prohibiting it. The government needs to be vigilant in enforcing these laws, with community awareness being a critical component of law enforcement.

"My name is Thandi*. I live in a mud house with a grass-thatched roof in a dry, rural place in the Neno District of Malawi. My life took a drastic turn upon the death of both my parents. My grandmother decided to force me into marriage in 2022 when I was only 14 years old. She received a bride price of 15,000 Malawian Kwacha (approximately USD 8), which she used to buy food for the extended family.

Marriage as a child proved to be a difficult journey. The challenges were overwhelming. My husband was violent, and the dreams I had for my education were abruptly halted when I left school in Standard 7 (Grade 6). This impacted not only my education but also my mental and emotional well-being. Watching my friends continue with their schooling while I grappled with the challenges of marriage has left lasting scars.

I am now a mother to a baby boy. Being a parent at such a young age, I couldn't play with my friends or enjoy some good banter. Sometimes, I would watch them come from school from my grass-thatched house veranda and cry. The struggles of child marriage are still vivid: the beatings, the lost opportunities, and the hunger - my husband would often beat me senselessly, and I would go to bed without food often.

I underwent a lot of hardship while I was pregnant because the man never gave me any financial support. My husband ran away when I was five months pregnant after hearing that People Serving Girls at Risk (PSGR), a national civil society organisation, had intervened and was looking for the perpetrators of child marriage. I have not seen him since. I hear that he currently resides in Mozambique.

During my pregnancy, a community-based organisation came to my rescue. It provided me with meagre support, offering one bag of corn flour, two litres of cooking oil, and five kilos of beans. Once in a while, they would come and give these supplies to the girls who had been married and pregnant at an early age in our community, but this was not sustainable, and I would sleep hungry sometimes.

I didn't know the law could protect me against child marriage

I didn't know the law could protect me against child marriage as I was not aware of the legal instruments available. I have since learned that child marriage is illegal after I encountered a lady working for a community-based organisation who informed me about the criminalisation of child marriage in Malawi. She also encouraged me to be a voice for change and to educate our community about the dangers of child marriage. I firmly believe that everyone in Malawi, including children, should know the risks and consequences of such practices.

Despite the hardships, I hold on to my dreams. I aspire to become a nurse and to be self-reliant, and I am patiently waiting for my baby to grow up so that I can pursue my aspirations and finally break free from the chains of child marriage."

* Not her real name