Abstract

The Government of Malawi has undertaken a number of general measures of implementation in order to promote and protect the rights of children in the country. These measures are taken both on the legal and institutional framework. Until recently, Malawi’s children’s rights framework was characterized by a list of archaic laws. However, in 2010, Parliament passed the Child Care, Protection and Justice Act of 2010, which overhauled the child rights law framework in the country.

1. INTRODUCTION

Malawi has an estimated population of 12 million people. The latest census indicated that half of the population are persons below 18 years of age.

Malawi is a democracy governed by a Constitution. Adopted in 1994, the Constitution contains a Bill of Rights. Chapter IV of the Constitution, which is the Bill of Rights, guarantees human rights to “every person” which includes children. The Malawian Constitution protects the specific rights of children in sections 23 and 42(2) (g). As the supreme law of the land, any law that contravenes the Constitution shall be declared void.

The Constitution clearly provides a clear outline of the status of international law within the domestic legal system. Therefore, while international agreements that were ratified by Malawi are considered to be part of the domestic law of Malawi, those agreements that are ratified after 1994 are required to be domesticated by an Act of Parliament for it to be part of Malawi’s law. Customary international law too is considered to form part of the law of Malawi.¹

Malawi is a State Party to a number of human rights instruments among which are the Convention on the Rights of the Child (CRC) and the two Optional Protocols and the African Charter on the Rights and Welfare of the Child (ACRWC).

Until recently, Malawi’s children’s rights framework was characterized by a list of archaic laws. However, in 2010, Parliament passed the Child Care, Protection and Justice Act of 2010, which overhauled the child rights law framework in the country and replace a number of laws, such as the Children and Young Persons Act.

2. GENERAL MEASURES OF IMPLEMENTATION

The Government of Malawi has undertaken a number of general measures of implementation in order to promote and protect the rights of children in the country. These measures include both institutional and substantive law measures some of which are highlighted below.

¹ Section 211(3).
The Constitution of Malawi established a Human Rights Commission as the National Human Rights Institution of the country. The Commission is an independent body with the mandate to receive, investigate and recommend measures in order to uphold human rights in the country. As a testament to its compliance with the Paris Principles, the Commission was accredited with an “A” grade by the International Coordinating Committee of National Human Rights institutions.

The Constitution also established the Office of the Ombudsman. The Office has the mandate to investigate any alleged injustice, especially in the context of any decision made by public authorities. The Office of the Ombudsman enjoys a good deal of independence, as it is accountable to the Parliament.

Another important institution worth mentioning is the Malawi Law Commission. The Law Commission too is established by the Constitution. Its main function is to review the laws of Malawi against the Constitution and international standards.

Children’s rights related issues are the main responsibilities of the Ministry of Gender, Child Development, and Community Development. Within the Ministry, the Child Development and Welfare Department is directly responsible for children’s rights related issues. Apart from providing direct support to children, families and communities, the Department coordinates Government’s efforts on child rights. With the adoption of the National Plan of Action for Orphans and Other Vulnerable Children (2005-2009), the role of the Ministry in service delivery to orphans and vulnerable children has been strengthened.

In 2009, the UN Committee had regretted the non-finalisation of the National Plan of Action which meant the absence of a comprehensive children’s policy in the country. The absence of a comprehensive children’s policy also meant absence of an accountable national body with clear authority on child-related issues.

3. DEFINITION OF THE CHILD

While it is difficult to mention that there is an overarching definition of a child in the Malawi Constitution, it is notable that Section 23 defines the word “children” for its purposes as persons below the age of 16 years. The Child Care, Protection and Justice Act (2010) gives a similar definition under article 2. Despite the recommendation of the Malawi Law Commission that the age limit be extended to 18 years, it is unfortunate that the Child Care, Protection and Justice Act defines a child as a person below the age of 16 years. In the context of setting minimum ages for various activities, the Constitution has some relevant provisions. For instance, it allows marriage, upon fulfilment of some conditions, for persons between the ages of 15 and 18. It also sets the voting age at 18 years.

---

2 Section 129 of the Constitution.
3 Section 120 of Constitution.
4 Section 132 of the Constitution.
5 Section 23(5) of the Constitution.
7 Section 77(1)(b) of the Constitution.
A number of other subsidiary laws provide for minimum ages. The Marriage Act sets the minimum age for marriage at 21. Thus there is a lack of clarity with respect to the minimum age for marriage in Malawi. With regard to the minimum age of criminal responsibility Art 70(1) of Children and Young Persons Act 2001 conclusively presumes that no child under the age of 10 years can be guilty of an offence. Furthermore, it shall not be presumed that a child aged 10 years or over is incapable of committing an offence. According to the Adoption of Children Act (Cap 26:01 of the Laws of Malawi), any person below the age of 21 can be adopted.

While there is no explicit minimum age for sexual consent under the law, the Penal Code notably criminalises the Act of any person engaged in sexual intercourse with a child (a child below the age of 16 years) and provides for punishment of 14 years imprisonment. A boy below the age of 12 years is irrebuttably presumed to be incapable of having sexual intercourse. A young prisoner is defined as a person under the “apparent age” of 19 years, while a young person is defined as any person below the age of 18 years under the Liquor Act (Cap 50:07 of the Laws of Malawi).

<table>
<thead>
<tr>
<th>Category</th>
<th>Age</th>
</tr>
</thead>
<tbody>
<tr>
<td>Definition of a child</td>
<td>16</td>
</tr>
<tr>
<td>Age of majority</td>
<td>21</td>
</tr>
<tr>
<td>Minimum age of employment</td>
<td>14</td>
</tr>
<tr>
<td>Minimum age of sexual consent</td>
<td>16</td>
</tr>
<tr>
<td>Minimum age of marriage</td>
<td>15</td>
</tr>
<tr>
<td>Minimum age of criminal responsibility</td>
<td>10, 12 for sexual offence by boys</td>
</tr>
<tr>
<td>Minimum age of recruitment into the army</td>
<td>18</td>
</tr>
</tbody>
</table>

4. THE FOUR GENERAL PRINCIPLES

The best interests of the child: The Constitution of Malawi has been amended recently to entrench the best interests of the child principle expressly. The Child Care, Protection and Justice Act also incorporates the principle explicitly. In fact, the best interest of the child principle is mentioned in different parts of the Act almost 20 times. For instance, in Section 8(3), the Act stipulates that “[t]he child justice court shall consider the best interests of the child and the importance of the child, on account of age, being with his mother when making an order for custody or access”. In the past, in recognition of the important role of including the principle in domestic legislation, the Malawi Law Commission had recommended as early as 1998 that this principle should be included by way of an amendment to the Constitution.12
**Non-discrimination:** The Constitution explicitly incorporates the rule against discrimination on children. It states that “all children, regardless of the circumstances of their birth, are entitled to equal treatment before the law”.\(^{13}\) The Constitution also provides for a general non-discrimination provision in Section 20(1). However, the Child Care, Protection and Justice Act does not have a general non-discrimination provision for children similar to Article 2 of the CRC and Article 3 of the ACRWC. However the Child Care, Protection and Justice Act provides that parents or guardians have the “responsibilities whether imposed by law or otherwise towards the child which include the responsibility to protect the child from…discrimination”.\(^{14}\)

*De facto* discrimination within the family, in schools and communities against the girl child, children with disabilities, children from minority groups and orphans and vulnerable children exists. The need to address *de facto* discrimination is also as urgent as the need to address discriminatory provisions in the law books, such as in the Wills and Inheritance Act (Cap 10:02 of the Laws of Malawi) which does not comply with the non-discrimination rule when applied against the girl child.

**The right to life, survival and development:** The Malawian Constitution does recognise the right to life and prohibits arbitrary deprivation of life.\(^{15}\) In addition, it expressly recognises the right to development in the Constitution.\(^{16}\)

Unfortunately, the Child Care, Protection and Justice Act does not recognise the right to life explicitly. However, the concepts of survival and development are incorporated in the Act. For instance, parents and guardians have the duty to “provide proper guidance, care, assistance and maintenance for the child to ensure his or her survival and development, including in particular adequate diet, clothing, shelter and medical attention.”\(^{17}\) As a general rule, in the application of the provisions of this Act, due regard shall be had to duties and responsibilities of the child to “contribute towards the child's own development into being a useful member of the society…”\(^{18}\)

**Respect for the views of the Child:** The Constitution does not expressly recognise the child's right to participate. However, the Constitution provides that “every person shall have the right to freedom of opinion, including the right to hold and receive opinions without interference and to impart opinions”.\(^{19}\) It also enshrines the right to freedom of expression.\(^{20}\)

The Child Care, Protection and Justice Act, however, entrenches the principle of child participation in different contexts. In instances of preliminary inquiries, one of the objectives of the exercise is to “encourage participation of the child and his or her parent, guardian, or appropriate adult in decisions concerning the child”.\(^{21}\) One of the factors that a child justice court has to

---

\(^{13}\) Section 23(1) of the Constitution.

\(^{14}\) Section 3(1)(b)(i) of the Act.

\(^{15}\) Section 16.

\(^{16}\) Section 30.

\(^{17}\) Section 3(1)(b)(ii) of the Act.

\(^{18}\) Section 4(e) of the Act.

\(^{19}\) Section 34 of the Constitution.

\(^{20}\) Section 35.

\(^{21}\) Section 99(3)(g) of the Act.
consider before deciding on a matter involving children is the views of the child.\textsuperscript{22} Moreover, before making an adoption order, due consideration should be given to the wishes of the infant, having regard to the age and understanding of the infant.\textsuperscript{23}

The National Youth Policy adopted in 1996 which was made into law in 1996 through the National Youth Council Act,\textsuperscript{24} also offers children an opportunity to participate. Children in Malawi also participate in the Youth Parliament, which has been convened regularly for over a decade now.

5. CIVIL AND POLITICAL RIGHTS AND FREEDOMS

Section 23(2) of the Constitution provides that "[a]ll children have the right to a given name and a family name and the right to nationality."\textsuperscript{25} Under the Births and Deaths Registration Act,\textsuperscript{26} registration is compulsory only for children whose parents are or either of them is not of African origin or race.\textsuperscript{27} According to the Child Care, Protection and Justice Act, "[u]nless the duty to do so has been conferred on another authority, a local government authority shall keep and maintain a register of the births and deaths of children in the area of its jurisdiction".\textsuperscript{28} The Act further provides what the contents of the registration of the birth or death certificate should be. Accordingly "[t]he registration of the birth or death of a child …shall be with sufficient particulars including in particular…the name and gender of the child; …the name of the parents of the child; …place of birth and the home origin of the child; …".\textsuperscript{29}

The Act, in Sections 72 and 77 respectively, also provides for specific provisions for the registration of children with disabilities and children that are affected by HIV/AIDS. This is a positive move in order to facilitate the registration of these groups of marginalized children.

In 2009, during the consideration of the Periodic State Party Report of Malawi, the UN Committee expressed concern that the National Registration Bill had not yet passed into law and that many children were still without proper proof of age and at risk of exploitation and abuse. The Committee recommended that Malawi expedite the enactment of the Bill as a matter of priority, and urged it to ensure the allocation of adequate financial, human and other resources to registration offices, as well as take measures to ensure that the population, particularly those in rural areas, have access to the registration offices.

Under Section 9 of the Malawi Citizenship Act (1966), a Malawian woman loses her national citizenship when she marries a non-Malawian man.\textsuperscript{30} This is in direct contravention of the Constitution of the Republic of Malawi.\textsuperscript{31}

\textsuperscript{22} Section 8(4) of the Act.  
\textsuperscript{23} Section 4(b) of the Adoption Act.  
\textsuperscript{24} Act No 22 of 1996.  
\textsuperscript{25} Section 23(2).  
\textsuperscript{26} Chapter 24:01 of the Laws of Malawi.  
\textsuperscript{27} Section 18(1).  
\textsuperscript{28} Section 76(1) of the Act.  
\textsuperscript{29} Section 76(2) of the Act.  
\textsuperscript{30} Chapter 15:01 of the Laws of Malawi (2002).  
\textsuperscript{31} Section 24(2).
According to Section 23(3) of the Constitution, children in Malawi have the right to “know and to be raised by their parents”. The Constitution also provides that “every person shall have the right to freedom of opinion, including the right to hold and receive opinions without interference and to impart opinions”. It also enshrines the right to freedom of expression, the right to freedom of association, the right to freedom of opinion, the right of access to information, and the right to freedom of assembly.

6. PARENTAL RESPONSIBILITIES, FAMILY ENVIRONMENT AND ALTERNATIVE CARE

The Child Care, Protection and Justice Act states that parents have the responsibility to “protect the child from neglect, discrimination, violence, abuse, exploitation, oppression and exposure to physical, mental, social and moral hazards” and “provide proper guidance, care, assistance and maintenance for the child to ensure his or her survival and development”. This right is supported by Section 22(1) of the Constitution, which states that the family is “the natural and fundamental unit of society which is entitled to protection by society and the State”.

In addition, “[a] parent or guardian shall be responsible for the registration of the birth of his or her children”. Moreover, under the guise of exercising parental duties and responsibilities, a parent cannot act in any way that would be incompatible with any court order made in respect of the child. For the purpose of safeguarding the welfare of the child, a person who does not have parental responsibility for a child but has the duty to care for a child has the mandate to do what is reasonable under the circumstances. All these duties and responsibilities provided for in the Act are in addition to those imposed by Section 23 of the Constitution.

In the past, child maintenance used to be obtained through the Affiliation Act. With the coming into force of the Child Care, Protection and Justice Act, the issue of maintenance for children is regulated in further detail. For instance, while Section 12 generally refers to maintenance orders, according to Section 9(1) of the Act, “[w]here a parent or any other person who is legally liable to maintain a child …neglects to maintain the child or to make the contribution”, a long list of persons including the child, the parent of the child, the relatives of the child, a social welfare officer, a teacher or any other appropriate person with authority may apply against such person to the child justice court for a maintenance order of the child. According to the Penal Code and Section 22 of the Child Care, Protection and Justice Act, a parent, guardian or any other person having lawful care or charge of a child under the age of 14 years and neglects or deserts such child commits an offence. Section 2 of the Adoption of Children Act provides that children younger than 21 years may be adopted. The person applying to be an adoptive parent must not

32 Section 23(3) of the Constitution.
33 Section 34 of the Constitution.
34 Section 35.
35 Section 32.
36 Section 34.
37 Section 37.
38 Section 38.
39 Section 3.
40 Section 3(2) of the Act.
41 Section 3(3) of the Act.
42 Section 3(4) of the Act.
43 Section 164.
be less than 25 years old. An adoption by a person younger than 25 years may be permitted where the applicant and the child are related and the court sanctions it.

There is currently a cash-transfer programme as an innovative way to help the poorest households – while simultaneously increasing school attendance – in order to end the cycle of poverty for future generations. Malawi’s social cash-transfer programme began as a pilot project in Mchinji district in 2006 and has since been extended to more districts.

In 2011, the Malawi Parliament passed the Deceased Estates (Wills, Inheritance and Protection) Act in order to address the problem of property grabbing by relatives of the deceased. This phenomenon adversely affects women and children, especially those that are infected or affected by HIV/AIDS.

7. HEALTH AND DISABILITY

In Malawi, the right to health is mainly implemented through the Essential Health Package (EHP) that contains the priorities of the Ministry of Health. These priorities include issues such as major causes of morbidity and mortality that disproportionately affect the poor and most vulnerable groups in society. The right to health is also one of the main priority areas of the Government in its vision 2020.

The Child Care, Protection and Justice Act, while it does not explicitly provide for the right to access to health care, it contains some provisions that are intended to promote a child’s right to health. For instance, the provision on social or customary practice that is harmful to the health or general development of the child, and the provision on HIV/AIDS affected children in Malawi.

Malawi ratified the Convention on the Rights of Persons with Disabilities on 27 August 2009. The domestication of this instrument is still ongoing. However, there are two provisions in the Child Care, Protection and Justice Act that directly address children with disabilities. Apart from the registration of children with disabilities under Section 72, already mentioned above, a child justice court has the duty to ensure that “children with disabilities are accorded assistance to meet their special needs where necessary.”

8. EDUCATION

According to Art 13(f, ii) of the Constitution the state has the obligation to make primary education compulsory and free to all citizens of Malawi. Since 1994, the Government of Malawi has strived to provide free primary education. Despite the abolition of school fees in 1994, over 10% of eligible children in Malawi do not attend school. Partly because the 1994 Fee-Free primary policy was not adequately planned for, there is still a severe shortage of teachers, which was compounded by a fairly incoherent teacher deployment system as well as an extensive shortage

---

44 Section 3(1).
45 Section 3(2).
47 Section 80 of the Act.
48 Section 77 of the Act.
49 Section 145(d) of the Act.
of teaching and learning materials in schools. Access, retention and completion rates remain unsatisfactory due to a complex web of related factors around tradition, culture and poverty. Primary education is also not compulsory.

Government is undertaking some programmes to facilitate access to primary education. For instance, the Girls’ Attainment of Basic Literacy and Education programme which sought to increase girls’ enrolment, achievement and persistence in schools by paying primary school fees for non-repeating girls can be highlighted.

Corporal punishment is unlawful in schools under Section 19 of the Constitution. There were however reports that a review of the Education Act was planned. School environments in Malawi are generally unsafe, with cases of bullying, gender-based violence and abuse, and corporal punishment still frequently reported.

9. VIOLENCE AGAINST CHILDREN AND SPECIAL PROTECTION MEASURES

Section 23 of the Constitution addresses a number of violence against children related issues. In particular, Section 23(4) of the Constitution protects children from economic exploitation or any treatment, work or punishment that is likely to be hazardous, interfere with their education, or harmful to their health or physical, mental, spiritual or social development.50

Child abduction is prohibited by Section 78 of the Child Care, Protection and Justice Act. Child trafficking is also prohibited. In this regard, Section 79(a) provides that “[a] person who takes part in any transaction the object or one of the objects of which is child trafficking commits an offence and shall be liable to imprisonment for life”. Trafficking is defined under Section 79(b) as “…the recruitment, transaction, transfer, harbouring or receipt of a child for the purposes of exploitation”. The sale of a child or use of a child as a pledge to obtain credit; as well as use as surety for a debt or mortgage; or the use of force on a child into providing labour for the income of a parent, guardian or any other person are also explicitly prohibited under Section 82 of the Act.

Given the fact that there are a number of harmful practices in Malawi that infringe on children’s rights, the Child Care, Protection and Justice Act prohibits anyone from subjecting a “…child to a social or customary practice that is harmful to the health or general development of the child”.51 For instance forcing a child into marriage or forcing a child to be betrothed are specifically prohibited under Section 81 of the Act. Though the practice of Female Genital mutilation exists in some communities there is no law prohibiting it.52

The Act places a duty on a social welfare officer who has reasonable grounds to believe that any of these prohibited acts have taken place in relation to a child, to remove and temporarily place the child in a place of safety.53

Despite the fact that the Malawi Law Commission completed a draft comprehensive anti-trafficking legislation, which specifically prohibits all forms of human trafficking, it appears that the

50 Section 23(4).
51 Section 80.
52 Concluding observation second periodic report 2009 CRC/C/MWI/CO/2 30
53 Section 84(1).
document remains a draft. In 2010, the Penal Code Section 147 was amended to specifically prohibit trafficking for sexual exploitation.

The Employment Act,\(^{54}\) in an effort to complement Section 23(4) of the Constitution provides that no person under the age of 14 years may be employed in any public or private agricultural, industrial or non-industrial undertaking.\(^{55}\) Therefore, according to the Employment Act, any economic activity by a child under 14 years of age is child labour. However, this prohibition has an exception and does not apply to work done in homes, vocational technical schools or other training institutions.\(^{56}\)

As mentioned above, corporal punishment is unlawful in the penal system as a sentence for crime and as a disciplinary measure in penal institutions under Section 19 of the Constitution. The Child Care, Protection and Justice Act provides, under Section 176, for the manager of a reformatory centre or safety home to “make rules not repugnant to, or inconsistent with, this Act for the maintenance of discipline at the centre or home”. A regulation by Ministry of Education and Vocational Training bans corporal punishment in schools.\(^{57}\) Corporal punishment would appear to be lawful in private institutions and in non-institutional forms of care.

The Constitution, in Section 42(2) (g), provides a long list of rights of children that come in conflict with the law. These rights include the right not to be sentenced to life imprisonment without a possibility of release; to be imprisoned only as a last resort and for the shortest period of time; to be separated from adults when imprisoned; to be treated in a manner consistent with the promotion of their sense of dignity and to be treated in a manner which takes into account their age and the right to be dealt with in a form of legal proceedings that reflects the vulnerability of children while fully respecting human rights and legal safeguards.

As the title of the Act- the Child Care, Protection and Justice Act- indicates, the Act governs issues related to children in conflict with the law and builds on Section 42(2) (g) of the Constitution. In fact, the Act governs child justice issues in a fairly comprehensive manner by providing for age determination procedures, diversion and diversion processes, preliminary inquiry, children’s right to legal representation, rules for children in custody, a child justice court and other important child friendly substantive and procedural rights.\(^{58}\)

### 10. TABLES SHOWING RATIFICATION OF RELEVANT TREATIES, STATUS OF REPORTING TO THE COMMITTEES AND MEMBERSHIP THEREOF

#### 1. Ratification of Child Related Instruments

<table>
<thead>
<tr>
<th>Treaty</th>
<th>Date of Ratification (or signature if not ratified)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Protocol to the African Charter on Human</td>
<td>Ratification, 20/05/2005</td>
</tr>
</tbody>
</table>

\(^{54}\) Act No 6 of 2000.  
\(^{55}\) Section 21(1).  
\(^{56}\) Section 21(1).  
\(^{57}\) Concluding observation second periodic report to the UN Committee2009  
\(^{58}\) See Part III-Part VIII of the Act.
and People’s Rights on the Rights of Women in Africa, 2003

<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Optional Protocol on the Involvement of the Child in Armed Conflict (OPAC), 2000</td>
<td>Ratification, 16/09/1999</td>
</tr>
<tr>
<td>Optional Protocol to the CRC on a Communications Procedure (OPCP), 2011</td>
<td>-</td>
</tr>
<tr>
<td>Optional Protocol to the Convention on the Rights of Persons with Disabilities, 2006</td>
<td>-</td>
</tr>
<tr>
<td>ILO Convention 169 on Indigenous and Tribal Peoples, 1989</td>
<td>-</td>
</tr>
<tr>
<td>ILO Convention 182 on Worst forms of Child Labour, 1999</td>
<td>Ratification, 19/11/1999</td>
</tr>
<tr>
<td>Hague Convention on International Child Abduction, 1980</td>
<td>-</td>
</tr>
<tr>
<td>Hague Convention on Inter country Adoption, 1993</td>
<td>-</td>
</tr>
<tr>
<td>Hague Convention on Parental Responsibility and Protection of Children, 1996</td>
<td>-</td>
</tr>
<tr>
<td>Hague Convention on Child Support and other Forms of Family Maintenance, 2007</td>
<td>-</td>
</tr>
</tbody>
</table>

2. Table of the reporting status to the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) and the UN Committee on the Rights of the Child

<table>
<thead>
<tr>
<th>Committee</th>
<th>Initial Report</th>
<th>Second</th>
<th>Third</th>
</tr>
</thead>
<tbody>
<tr>
<td>ACERWC</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>UN Committee</td>
<td>1 Aug 2000</td>
<td>17 Oct 2007</td>
<td></td>
</tr>
</tbody>
</table>

3. Shadow reports submitted to the UN Committee and to the African Committee of Experts on the Rights and Welfare of the Child - Malawi

<table>
<thead>
<tr>
<th>UN Committee on the Rights of the Child (shadow report on the CRC,OPSC,OPAC)</th>
<th>African Committee of Experts on the Rights and Welfare of the Child</th>
</tr>
</thead>
<tbody>
<tr>
<td>Organisation</td>
<td>Date</td>
</tr>
<tr>
<td>Child Helpline International and Member Help lines</td>
<td>January 2009</td>
</tr>
</tbody>
</table>
The Human Rights Consultative Committee (HRCC) & Plan International Malawi

September 2008

4. Membership to the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) and to the UN Committee on the Rights of the Child

<table>
<thead>
<tr>
<th>ACERWC</th>
<th>UN Committee</th>
</tr>
</thead>
<tbody>
<tr>
<td>None</td>
<td>None</td>
</tr>
</tbody>
</table>

Useful links to background documents used