
**Women as offenders – the social and legal
circumstances of women who commit crimes:
A case study of selected prisons in Malawi**

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List of international instruments

The African Charter on Human and Peoples' Rights, 1979 (Article 7)

The Convention for the Elimination of all forms of Discrimination Against Women, 1979 (CEDAW) (Articles 12:2, 14 d)

International Covenant on Civil and Political Rights (ICCPR) 1966 (Article 2, 9 (4), 6:1, 10, 14 (d))

The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) 1985 (Rule 26.1, 26.3)

The Standard Minimum Rules for Treatment of Prisoners (1957) Rules of General Application Part 1

The United Nations Commission on Human Rights (1988) (Principle 6, 18)

The Universal Declaration of Human Rights , 1948 (Article 3)

List of cases

Republic v Stella Nthini and Mayamiko Kubwalo Cr Appeal No.30 2002

Republic v Fages Gadama Misc. Cr Application No 145 of 2001

Republic v Alice Gwanzantini Cr. Case No. 208 of 2002

Republic v I.N.S Kara Cr. Case No.94 of 2002

List of statutes

Malawi Prison Act (Chapter 9:02 S60)

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List of acronyms

AIDS	acquired immuno deficiency syndrome
CEDAW	Convention on the Elimination of all forms of Discrimination Against Women
CID	Criminal Investigation Department
FGD	focus group discussion
HIV	human immuno deficiency virus
ICCPR	International Covenant on Civil and Political Rights
LAAs	legal aid advocates
JCE	Junior Certificate in Education
MPRSP	Malawi poverty reduction strategy paper
PAS	paralegal advisory service
OIC	officer in charge
SASFs	semi-autonomous social fields
SAPs	structural adjustment programmes
TB	tuberculosis
UDHR	Universal Declaration of Human Rights
UNO	United Nations Organization

1 Introduction

This study was conducted in three major prisons in Malawi (Zomba, Maula and Chichiri) between October 2003 and February 2004. It focused on establishing the social and legal circumstances that have shaped the condition and position of the female offender. To do this it was necessary to understand and probe the system of justice delivery and its accessibility to women who commit crimes. The research revealed that before women are confronted with the law, they try to seek redress to their problems by consulting other informal structures of justice delivery such as marriage counsellors and chiefs. This aspect and the testimonies of women themselves brought to light a number of social impediments that determine the status quo for women offenders and the trigger factors in the commission of crime.

The research has brought to light a number of socio-legal problems that women who have committed crime face apart from the practical problems that they have in prisons. Poverty, gender, socio-cultural beliefs, illiteracy and marriage relationships are pertinent issues in the woman offender's story. Legally, the study has established that there are many legal bottlenecks at different points of the criminal justice delivery system and these affect women disproportionately more than men. It is thus imperative that a gender differentiated approach should be used in processing women when they commit crime. The practical problems arising from keeping women as offenders are influenced by the inherent structural problems that prisons have, the physical needs of women stemming from their sex and gender and the failure of the prison system to address the problems in a gender sensitive manner.

There are a number of important recommendations that different stakeholders made to improve the way women offenders are maintained in prison and to make justice more effective for women. These recommendations and the research recommendations are aimed at ensuring that human rights standards embedded in the Constitution of Malawi and in international human rights instruments are observed.

Problem statement

A review of literature in Malawi shows that there is an absence of information concerning women and crime or women as offenders. A lot of research, for instance by Mwakasungula *et al.* (2000) and Mvula *et al.* (1997), has concentrated on highlighting the position of women in relation to men in such issues as decision-making and other socially-related matters that reveal the gender disparities that exist between women and men in health, education, access to resources and employment. Thus although there are at times sporadic reports concerning women's status before the law, concern has been to articulate the negative stereotyped images of women who have committed serious crimes in order to throw a bad light on women as a group. There is no evidence of any documentation on the status or condition of women offenders or prisoners and what incarceration in Malawian prisons means from the time a woman is arrested, to the time she is sentenced and confined. Thus there is need to understand the realities of what a prison term means to women offenders, the social and legal problems that they face and the practical problems that arise in maintaining them in Malawian prisons; especially as the majority of prisons were set up for males and have an inherent male bias.

The study is based on the premise that there is inadequate understanding of female criminology hence sentencing of women offenders does not take into consideration the underlying or influencing factors that drive women to commit crimes nor does sentencing consider the negative repercussions arising from the confinement of such offenders. Secondly, a major assumption of this study is that the confinement of female prisoners raises a number of difficulties for both the prisoner as an individual and the prison authorities in the location of female prisoners. The district prisons are small and built for male detainees with no provision for women. Since the number of women offenders is small and almost negligible, the district prisons often find themselves with one

female prisoner. Hence a major problem is how to keep a single prisoner in the absence of others and what this isolation means to the individual.

Studies in a variety of jurisdictions demonstrate that recorded crime is overwhelmingly a male activity. Hindelang (1971) argues that women have a consistently lower rate of officially recorded crimes than men. The second observation, which has been increasingly stressed by feminists since the 1960s is that this low criminal participation rate has not been sufficiently remarked upon nor studied. Feminists see this as another example of the characteristic invisibility of women in social science or social policy, while several non-feminist writers have pointed out that any causal explanation of crime which does not include gender-related factors cannot be valid according to Harris (1977) and Box (1983). Heidenson (1985:6) points out that:

‘ Indeed women’s low level of performance in crime has been regularly cited as the reason for the lack of attention given to them by criminologists, both because they seemed not to pose a problem (Smart 1977) and because of their small numbers made study difficult Manheim (1965).’

However, a lot of studies show that although criminal activity as officially recorded is by and large a masculine activity, it is one in which women do participate but there is a pattern to women’s criminality which does not conform with men’s behaviour.

Literature also reveals that females are likely to be first offenders and thus literally they are inexperienced in court affairs. It may be argued that because of the negligible number of women committing crimes the systems in many jurisdictions, including prisons, do not respond adequately to the presence of women in prison or the challenges that they face from the time an offence is committed to their confinement in prison. Rafter (1997) argues that what has been ignored is both the physical presence of women in prison and the fact that prisons themselves are gendered institutions, reflecting and reinforcing beliefs about sexual differences. She further explains that the discipline of male convicts was shaped by notions of masculinity and concepts of manhood based on beliefs about what men can endure. Thus this ignores the fact that women as well as men are held in prison and that women would require a different kind of care. Leonard (1982) argues that theories of crime should be able to take account of both men and women’s behaviour and to highlight those factors which impact differently on men and women.

Research objectives

In the light of the above, the main objectives of this research are to:

- 1 Identify the social-legal problems that women face when they commit crimes in Malawi;
- 2 Explore the nature of the crimes that women commit;
- 3 Analyze what incarceration in Malawian prisons means for women offenders;
- 4 Establish the attitudes of society and service providers to women offenders.

Research assumptions

The study is based on the following assumptions:

- 1 That women have social problems before commission of a crime;
- 2 That women offenders face legal problems when they commit crime;
- 3 That the justice delivery system does not adequately recognize or address the needs of female offenders;
- 4 That conditions in Malawian prisons make incarceration harder for women offenders;
- 5 That incarceration in prison has far-reaching psycho-social effects on women offenders;
- 6 That there is a gendered aspect in the crimes that women commit;
- 7 That women prisoners need a gender differentiated treatment from male prisoners while in prison;

- 8 That the social status of an individual determines the level of comfort they enjoy while serving a prison term.

Research questions

- What are the needs of women prisoners and are these needs met by the justice delivery system?
- What are the common crimes that women commit that result in their imprisonment and what are the influencing factors behind them?
- What are some of the social and legal problems that women face when they commit a crime?
- Do women prisoners face any psycho-social problems while in prison and if they do what are they?
- What practical problems arise from keeping women as prisoners in Malawi?

Expected outcome

It is hoped that the results of this research will be used to:

- Influence policy change such as better conditions for women prisoners and facilitate a review of the law.
- Create more sensitivity on the part of service providers in dealing with issues of women offenders.
- Effect structural changes in district prisons and remand centres to accommodate female prisoners.

2 Study context

Malawi country profile

Malawi is a small landlocked country which shares common borders with Tanzania to the north, Zambia to the West and Mozambique to the west, south and east. It has a population of 9.6 million and women constitute 51 per cent of the population (UNDP, 1997). Agriculture is the mainstay of the economy; however poverty is rampant with 68 per cent of the population living below the poverty line. Women form the majority of the poor. Literacy levels for men are 71.7 per cent in contrast to 40.4 per cent for women. These figures are pertinent in understanding the condition and position of the female offender and how poverty and illiteracy are key variables in the commission of crime.

History of the courts in Malawi

Malawi has a dual system of law in which the indigenous customary law co-exists with received law from its former colonial master, Britain. Customary courts existed in pre-colonial Malawi from time immemorial but they were only recognized by the colonial government in 1933 when the Native Courts Ordinance was passed. This allowed the creation of native courts. The most radical amendment to the local courts Act took place between 1969 and 1970 when the local courts were changed into traditional courts under the government of Dr Hastings Kamuzu Banda, the first president of independent Malawi. The National Traditional Court of Appeal was the highest court in the traditional court system and stood at par with the Malawi Supreme Court of Appeal. The regional traditional court on the other hand had concurrent jurisdiction with the High Court. These traditional courts, according to Scharf *et al.* (2002) were known to strictly apply customary law even where it would occasion injustice.

The 1994 reforms

The dual court system existed until 1994 when the dawn of multi-party politics necessitated the abolition of the traditional court system. This was in compliance with Section 103 of the Constitution of Malawi which stipulates that there shall be no courts of superior or concurrent jurisdiction with the High Court and Supreme Court of Appeal. The traditional courts were subsequently integrated into the judiciary and turned into magistrate's courts. It is significant to note that this integration has not been smooth and it has brought about its own problems. Among them is the creation a serious backlog of cases which brought a heavy strain on the already limited resources of the judiciary, according to Scharf *et al.* (2002). Thus cases involving women who form an insignificant and negligibly small group of offenders could suffer unnecessarily while waiting for their cases to be heard as priority may be given to the backlog of cases often involving men.

Another significant development with multi-party politics has been the commutation of death sentences to life imprisonment for prisoners who have been condemned to death. This has been a prerogative of the incumbent President Bakili Muluzi since 1994. It should be noted, however, that in spite the many reforms that have been undertaken in the law, the legal position of women has not changed much because of the existence of the dual system of statutory and customary laws, lack of awareness of rights provided in the constitution and provisions under the law. This is further compounded by discriminatory cultural practices, customs and social attitudes that relegate women to a low social position in society and under the law.

Legal aid

The Legal Aid Act, Chapter 4:01 of 14 February 1964, makes provision for the granting of legal aid to persons committed for trial in the High court on the basis of the following:

- a) It is in the interest of justice that such person should have legal aid at his trial; and
- b) Such a person has insufficient means to enable him to obtain the services of a legal practitioner to represent him at his trial.

It should be noted that legal aid is highly problematic in Malawi because of serious understaffing in the legal aid department and the only guarantee for legal aid for women is in homicide trials where legal representation is compulsory. Another problem is that many women are not aware of the need or existence of legal aid.

Definition of terms

Formal institutions of justice delivery

Formal institutions of justice delivery are defined as 'all those institutions created under the general law for the purpose of adjudication or to contribute to the process of adjudication' according to Chuulu *et al.* (1999: 26). In Malawi this includes all the courts from the magistrates' courts, the High Court to the Supreme Court and other agencies charged with the dispensation of justice like the police (prosecution), prisons, legal aid, state advocates chambers, private legal firms and the Department of Social Welfare, especially in cases involving juveniles.

Informal structures

In this study informal structures include non-governmental organizations, churches, the family, marriage counsellors (*ankhoswe*), village headmen and chiefs' courts and even the general public as they often apprehend suspects and bring them to police, chiefs or chairpersons of political parties. WLSA research concerning the administration of Justice in Malawi (2000) shows that apart from the formal system women use various informal systems for a variety of problems. It was observed that chiefs refer cases like family disputes, rape and property-related disputes to the informal courts while those of theft, violence or debt are referred to the police. What is of interest here is to establish what measures of justice women get from such informal institutions and

if there is satisfaction with such systems. Scharf *et al.* (2002) argue that women feel that due to their economic disempowerment, they fare worse in traditional forums of dispute resolution since men are able to bribe the chief.

The customary justice forums

In Malawi, the customary justice system encompasses traditional leaders such as chiefs and these deal with petty criminal cases as well as the majority of civil cases occurring through out the villages. There are at least 24,000 customary justice forums in Malawi in contrast to 217 formal court centres. These forums are accessed by the majority of the poor because the formal justice system is inadequate. It is important to point out that they do this outside the current legal framework and their work is based on the principle of restorative justice and the need to maintain social cohesion in the community.

Scharf *et al.*, mention that the system is undoubtedly more accessible in terms of distance, language, cost, values and outcomes. But they are also quick to point out that there are serious violations of human rights in some instances, especially those of vulnerable and marginalized groups such as children and women.

Access to justice in Malawi

In this study, this refers to how different people – men and women, offenders and victims – are able to penetrate the structures entrusted with justice delivery and the satisfaction they get from them. Access to justice is a major impeding factor for the realization of justice to both the victim and offender in Malawi. This situation is particularly felt by the poor, especially women, who constitute the majority of the poor in Malawi. Literature reveals that the system fails to cope with the demand for justice because it operates with an extremely limited infrastructure and does not have adequate resources to deal with disputes affecting the poor. This could possibly explain the high numbers of both men and women held on remand without accessing the courts or held within the minimum period of remand. This problem is further highlighted in the *Malawi poverty reduction strategy paper* (2000) which recognizes the need to improve access to and delivery of efficient and effective justice. It should be noted however that these ideals set out in the paper focus largely on the formal system of justice delivery and ignore the informal and customary structures which often are the first contact point for most women seeking redress to their problems.

3 Literature review

Relevant laws governing prison conditions and treatment of offenders

There are several international instruments that provide standards for the treatment of prisoners as well as the general condition for prisons. The Standard Minimum Rules for the Treatment of Prisoners is by far the most comprehensive instrument that prescribes acceptable treatment of prisoners or any persons subjected to any form of detention or imprisonment anywhere in the world. The rules, which were adopted in 1955 by the first United Nations Congress on the Prevention of Crime and Treatment of Offenders and approved in July 1957, provide rules applicable to all categories of prisoners and prison conditions.

The rules cover such issues as accommodation, health, clothing, communication and religion, and have set guidelines for discipline, punishment and instruments of restraint, among other things. This also specifies a major requirement in prison regarding prison personnel. Paragraphs 46–54 of the rules require that persons chosen to serve in prisons should be carefully selected on the basis of integrity, humanity, professional capacity and personal suitability. It should be noted however that these rules are intended as guidelines rather than binding rules. Thus the extent to which these rules are observed or applied is subject to interpretation by individual states and the commitment that they have to international conventions and instruments. Practice may vary from country to country and Malawi is not an exception to this.

Principles for the Protection of all Persons under any Form of Detention or Imprisonment

The United Nations Commission on Human Rights drafted a set of principles in 1978 aimed at protecting the rights of prisoners. These were adopted by the General Assembly in 1988. Some of the significant principles, which are relevant for the purposes of this study include:

- An obligation to detain persons as close as practicable to their family home as stated in Principle 18; and
- Principle 6 which prohibits torture and cruel or inhuman or degrading treatment or punishment of persons subject to any form of detention or imprisonment.

Article 9 (4) of the International Covenant on Civil and Political Rights (ICCPR) states that:

‘Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.’

It is noteworthy that practice in many jurisdictions, including Malawi, is contrary in this respect as accused persons often spend long periods in remand centres and jails. In Malawi this period can be as long as 6 years and many prisoners have died in custody without ever being tried. This also contravenes rights which prisoners have as set out in the African Charter on Human and People’s Rights to which Malawi is also a party.

The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules, 1985) rule 26.1 sets guidelines for keeping juveniles which require that they are kept separately from adults. The need for accused persons to be tried within reasonable time is further cemented in rule 26.3 which makes it clear that detention pending trial must be used as a last resort and then only for the shortest time possible.

Thus it can be seen that at an international level there are several instruments that have been developed to protect the rights of accused persons and prisoners during the time that they are in custody pending investigations and even when they are finally incarcerated. What is pertinent is the extent that these various conventions and standards are followed by different states that are signatories to them. It is also significant to note that all these instruments do not specifically address the treatment of women as a separate group and that there is no gender differentiated treatment of prisoners except in the area of keeping women. Paragraph 46–54 of the Standard Minimum Rules for the Treatment of Prisoners stipulates that women prisoners should be attended and supervised only by women officers except for special circumstances such as medical attention. Paradoxically, the Beijing rules on the other hand state that female juvenile offenders should receive the same level of care and attention as male juvenile offenders. This does not take into consideration that the needs of the female offenders may be different because of their sex and gender.

Thus on the issue of female convict management, Ruggles Brise (chairperson of the prison commission in England in the early 1920s) pointed to the inhumanity of treating men and women in prison in exactly the same way. He stressed the physiological and emotional differences between men and women in their reaction to prison life and how women suffered much more, mentally, than men (Morris, 1987:107). Makarati (2001) argues that although documents like the Kampala Declaration recognize in its preamble that women are vulnerable and they require special attention, the declaration does not spell out the actual vulnerabilities or the measures that can be taken to address them. She further states that the principle of equality is overemphasized to the extent of even overshadowing the menstrual needs of female prisoners.

National level: relevant documents and laws on the treatment of prisoners

The Malawi constitution adopted in 1995 with the dawn of a multi-party democracy is one of the most progressive constitutions in southern Africa as far as the principle of equality and non-discrimination is concerned. In contrast to many human rights instruments in article 24 (1) it specifically recognizes the rights of women to non-discrimination on the basis of their gender or marital status and guarantees them equal protection under the

law. This can be used as a yardstick in safeguarding the rights of women and even those who are in prison.

The constitution has taken special measures to safeguard the rights of prisoners in general based on the country's past human rights' records, especially regarding the treatment of political prisoners under the one-party regime of former life President Hastings Kamuzu Banda. Article 42 (1) stipulates that:

'Every person who is detained, including every sentenced prisoner, shall have the right:

(b) To be detained under conditions consistent with human dignity which shall include, at least the provision of reading and writing material, adequate nutrition and medical treatment at the expense of the state.'

In the same article (42) the constitution also provides for the presumption of innocence and the 48-hour rule during which one should be charged or brought to court. It should be stated from the outset that the situation in Malawian prisons falls far short of these ideals. Women, particularly, are known to bear the consequences of these disparities disproportionately to men because their needs are different as they may be pregnant or lactating.

The presumption of innocence is provided for in article 42 of the Malawi constitution and stipulates the rights of a person under arrest. Under this article, the law states that every person shall be presumed innocent until the prosecution proves that person guilty of the offence. This is in line with article 14 (2) of the International Covenant on Civil and Political Rights which stipulates that:

'Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.'

It is significant to note that there is a lot of ambivalence in the application of this rule in Malawi and suspects have been arbitrarily held on remand for prolonged periods far exceeding the minimum remand period of 15 days, actually lasting years without regard to this provision, even for minimum offences. This is particularly true for female suspects in Malawian prisons; their small numbers mean priority is often given to male offenders who are in larger numbers and cause congestion in the prisons.

Relevant laws in Malawi governing administration of prisons

The Prison Act: Chapter 9:02 of the laws of Malawi enacted on 23 April 1956 under the colonial government prescribes the general administration of prisons. This Act has not been reviewed since 1956 and it is only recently (2000) that Penal Reform International has engaged a team of consultants to review it. Some of the reasons behind this are that the Act is not in line with international standards for the treatment of prisoners. The new Act is trying to encompass some basic principles of human rights enshrined in the constitution of Malawi and exclude issues such as the use of corporal punishment and straightjackets, among others. The Act, though outdated, has set guidelines pertaining to the treatment of prisoners in special circumstances as highlighted below:

Chapter 9:02 Section 60: Admission of infant child with female prisoner stipulates that:

'...any unweaned child of a female prisoner may be received into any prison with its mother and may be supplied with clothing and necessaries at the public expense: Provided that when such child has been weaned, the Officer In Charge (IOC), on being satisfied that there are relatives or friends of the child able and willing to support it, shall cause such a child to be handed over to such relatives or friends, or, if he is not satisfied, shall hand such child over to the care of social welfare authority as may be approved for the purpose by the commissioner.'

It should be stated that there are several challenges associated with keeping children in prison and more serious repercussions regarding leaving an unweaned child at home when its mother has been incarcerated. However,

due to the general conditions in prisons, diet and welfare of children maybe compromised by inadequate resources and failure to comply with what the law prescribes.

On the segregation and classification of prisoners, Chapter 9:02 S64, subject to subsection (1), states that prisoners of each sex shall be divided into the following classes:

- a) Unconvicted prisoners
- b) Convicted prisoners
- c) Young prisoners
- d) Adults
- e) First offenders
- f) Prisoners with previous convictions
- g) Prisoners suspected or certified to be of unsound mind

This is in line with what is stipulated in the United Nations Minimum Standards for the Treatment of Offenders. However for female prisoners in Malawi, this is one rule that grossly infringes on their human rights as prisoners of different categories above are mixed without segregation including juveniles and very young children.

Nature of crimes committed by women

There are certain offences which are largely committed by women by nature of their sex. Literature shows that it is women who are charged with the offence of infanticide, abortion, concealment of birth, abandonment of children and prostitution in jurisdictions where prostitution is illegal. Stewart *et al.* (2001:14) argue:

'We postulate that many women commit these crimes because they wish to ameliorate the adverse consequences which they believe will follow if the pregnancy or birth becomes public knowledge. Women who abandon their children may do so because as women they have limited access to adequate resources to sustain themselves and their children.'

Men on the other hand often commit violent crimes such as armed robbery, burglary, murder and drug trafficking. However, women also commit crimes of violence such as murder.

Some social scientists have suggested that the loosening up of traditional gender roles has produced 'an increase in male-like criminality' and an increase in involvement of women in crime. One criminologist has described a 'masculinization of female behaviour' specifically with regard to criminality. It is however imperative to understand the factors that are driving women into an area which has for a long time been largely a male domain. Thus although patterns can be drawn between male and female criminality, an understanding of changing gender roles and the factors influencing these patterns be they social, economic, political or cultural, need to be unpacked to understand the realities that are propelling women into crime.

A study of homicide by Chicago women carried out by Jeffrey Adler (1986:870) found that:

'...women engaged in homicide behaviour at one-fifteenth the rate of men, but when they resorted to violence, they overwhelmingly killed relatives or suitors.'

The study further shows that men killed a higher percentage of loved ones than women and that 77 per cent of homicides committed by women happened at home compared with 27.6 per cent of those committed by men. Literature also shows that children account for the second largest category of victims in crimes committed by women and that the homicides committed by women resulted from deep emotional attachments. Thus it would be useful to establish the patterns emerging from the women who are currently in prison in Malawi on homicide charges.

Societal perception of criminal women

Freud (1925, 1933) believed that criminal women were neurotic, maladjusted, sexual misfits who were not content with their roles of wives and mothers. Lombroso and Ferrero (1895) further stated that the criminal woman is consequently a monster. It is important in this study to understand the nature, character and status of criminal women in order to establish whether the views above are applicable to all criminal women or whether this is pure stereotyping in the imagery of criminal women as typically seen in the local media in Malawi.

Imprisonment and alternatives

The view that women find prison harder to take and that its effects are more traumatic for them than their male counterparts has quite widespread support both from the continued evidence of their behavioural reactions and also from a series of studies which have looked at inmate subcultures. Carlen (1985:46) argues that 'in no way does the imprisonment of women have a positive impact on women themselves or society as a whole.' Literature shows that in many cases women are victims of maltreatment by their husbands and therefore react impulsively or it may be a husband's fault that an offence was committed thus leading to imprisonment.

Evidence shows that in many pre-colonial African societies customary dispute resolution procedures were characterized by negotiation, mediation, compromise and reconciliation. Weisbrot (1983) argues that the colonizers, Britain and later Australia made little attempt to incorporate local customs and methods of social control into the official legal system or to officially recognize existing indigenous dispute settling mechanisms. It may be argued that the few women who commit crimes could easily be absorbed by such traditional methods of dispute resolution instead of sending them to prison at the expense of their family obligations.

4 Methodology

The methodological aspect of this study was largely influenced by the women's law approach, a bottom-up approach that takes women as a starting point and seeks to understand their lived experiences and realities. Thus in this research a woman-focused but gender-relational perspective was combined to reveal the lived experiences of women who are incarcerated in some of the prisons of Malawi juxtaposed with the experiences of men and crime because the intention was not to conduct a comparative study. The aim was to understand the woman offender's position, her story, and experiences from the time a crime was committed to her current status in prison. The idea was to appreciate how the woman offender perceived herself (building the self concept of the offending woman) before all other players could give their side of the story. In this vein, prison warders, the police and members of the judiciary were only interviewed after getting the women's story. Family and community members were also consulted in order to build a more holistic picture of who these women are.

Another primary objective of the research was to explore the efficacy of using grounded theory as a research and analysis tool. Bentzon *et al.* (1998: 15) describe grounded theory as:

'... an iterative process in which data and theory, lived reality and perceptions about norms are constantly engaged with each other to help the researcher decide what data to collect and how to interpret it.'

This process is best explained through what is known as 'the dung beetle method'. It is a grounded research process in which the researcher collects data, sifts and analyzes it, considers the implications of the findings, determines what to collect next to meet her needs and continues the collection and analysis circle. This was the main methodology that guided the research in that after talking to the women offenders in the first instance, elements of shock, disbelief and confusion set in on my part especially in cases where women were held for murder. Thus it became necessary to repeat the research process on another occasion more objectively using

different methods. Where at first group collective interviews were done according to the nature of crime committed, on the second occasions, in-depth one to one interviews were done and in the last interview an informal visit to the prison helped me to observe certain elements while chatting with the prisoners. Thus the data grew bigger and bigger as different strands of information came in at different points.

To a certain extent the research sought to understand the application of legal pluralism as it affects the lives of women in general. Legal pluralism recognizes that there are regulatory or normative systems other than the formal law that affect or control people's lives. In the case of Malawi, general law as applied by the courts, customary law and the living law as practised by chiefs using traditional structures and other normative orders (semi-autonomous social fields) interact at different points to shape women's legal and social position prior to committing a crime especially where women offenders claimed that they had consulted them and tried to seek redress to their marital problems. Semi-autonomous social fields, a concept developed by Sally Falk Moore (1978), describes and tries to analyze the rule generating and rule upholding processes which affect the position of women and gender relations in a situation where a plurality of normative structures informs human interaction. Thus it became necessary in this research to probe semi-autonomous social fields like non-governmental organizations, chiefs and marriage counsellors to understand their role in conflict resolution.

Based on the issue at hand the study also employed the legal centralist approach, a dominant approach towards law by lawyers. The approach is based on the premise that state recognized and enforced law is the most important normative order and all other norm creating and enforcing social fields, institutions and mechanisms are illegal, insignificant or irrelevant according to Bentzon *et al.* (1998:31). This was used to try and establish to what extent the operations of prisons in general and treatment of women offenders in Malawi is in compliance with the national constitution and the law at both the national and international level. Thus the legal centralist approach was combined with a multiplicity of other approaches above to determine the extent to which women in prison were cushioned against the variety of driving forces that influence their position and condition within the justice delivery system and society at large.

In this study, data gathering was done by employing both primary and secondary sources of information. Secondary information was obtained through the review of several books and documents on women and crime in order to establish societal perception of women who commit crime but also what a prison term means to women. Several international instruments and documents were also reviewed. These instruments were used as a yardstick to measure the extent to which the prison system in Malawi complies with these international obligations and how far the rights of prisoners in general are respected. At national level, the Malawi constitution, laws of Malawi and the Prison Act were reviewed specifically to identify specific provisions dealing with the treatment of prisoners and to isolate the ones covering the rights of women. Court records, case files, prison and police records were also reviewed to get a deeper understanding of women offenders and to balance their stories with what was said by different stakeholders.

Primary data was obtained through participatory interviews which were done through group discussions with female offenders and in-depth and semi-structured interviews. All 69 inmates were interviewed in one way or the other. The focus group discussions with female offenders were done by grouping women according to the crime they had committed. These proved to be very useful as the women were able to identify with each other on the basis of their crime and were freer to talk because they had a common problem. The main groupings at all three prisons were murder, theft, grievous bodily harm, abortion and malicious damage of property. In-depth interviews were done with selected prisoners with unique cases, for example women who had killed their own children or husbands and those who had killed because of witchcraft. Other semi-structured interviews were done with members of the police force, the judiciary, (judges and magistrates) and prison officials. At community level, two chiefs were interviewed and family members of some of the prisoners. Data for female prisoners and general prison conditions were collected from three maximum security prisons in Malawi, namely, Zomba, Chichiri and Maula. A full list of people interviewed and female offenders is included at the end of this report as annexes 1, 2, 3 and 4.

An iterative theory building process informed the study at different points. This provided an excellent opportunity for redeveloping the original assumptions in view of the data which was being collected. Different questionnaires which had been developed originally were modified time and time again to address the gaps that were being noted. It was quite apparent at the beginning of the research that the inmates thought that this was an opportunity for their early release or pardoning of their sentences thus their original stories were often 'doctored' to draw sympathy. This convinced me about their innocence but at the same time forced me to dig deeper into their stories to establish the truth. Thus, apart from talking to the offender, I had to meet the CID who took the caution statement, trace the prosecution file at the High Court and even meet relatives and peers of the woman offender. It was only after this that patterns began to emerge from which conclusions could be drawn.

A good example of this was the case of a juvenile, Brenda Mlombwa (14), who mentioned that she had been wrongly picked up on charges of malicious damage of property. At the time of this interview she had already been released on bail and could not come out because she did not have a surety. In an attempt to assist her to get a surety I contacted her father but at the time he was not available. His secretary informed me that the father could not sign the bail bond as she was already on bail for a more serious crime of murder and also theft.

Observation was another important method that was used in collecting vital information which could not be obtained directly because of the sensitivity of the issue. This concerned issues like relationships between prisoners and wardresses and issues of sexuality which one could deduce from reactions of respondents and some of the things that were happening while interviews were going on. For example, I observed that in the three prisons which I visited relations between prisoners and their keepers were very relaxed. I reached this conclusion after noticing a prisoner braiding a wardresses' hair, wardresses sleeping on the prisoners' mats and the friendly way prisoners were addressed when a visitor arrived. On the issue of sexuality, I was able to gather that it is a problem because of the way one prisoner (Loveness Kalonga) reacted when she had a glimpse of men as she escorted me to the prison gate. She said '*Ine kusilira amunawa*'. Literally meaning that she was, 'yearning for the men'.

Quid pro quo methods of research were used in order to set a conducive atmosphere for research, particularly in prisons and the community. This was done in form of providing food and clothing and sometimes money for the prisoners. This was quite useful during interviews with the women inmates in prison. Prior to the prison visits inquiries were made with prison officials to find out the needs of female prisoners and items which are allowed in prison. This on the one hand helped to supplement prisoners' needs but on the other hand also acted as an incentive for the research because by the next visit the prisoners had opened up, were relaxed and ready to tell their stories. It should be mentioned that although this is useful, it does not always work because you cannot satisfy the needs of your respondents and one should be aware of the feelings of dissatisfaction that this could cause. For example, some prisoners felt that some prisoners had received better items than others but since the distribution was done by the wardresses the blame was shifted to them. It should be pointed out that I did not think that my action caused any ethical dilemmas as prisoners are allowed to receive certain items from visitors.

Respondents to this study were selected on the basis of the type of crime committed, the sentence and the uniqueness of the offence. Initially, considering the small number of female offenders, I wanted to talk to each of the prisoners but this proved difficult due to time limitations. A research assistant recorded all the details of each inmate in terms of name, crime committed, length of sentence or remand period, marital status, age, home district and so on. It should be mentioned that the use of research assistants, though useful, sometimes does not work well. For instance, I lost vital details about women offenders because the research assistant did not record them or felt they were not important. This explains some of the gaps in the quantitative information provided in tables 7 and 8. Secondly, service providers were selected on the basis of the position they occupied and their proximity to women offenders in the case of wardresses, police CIDs, legal aid advocates and paralegals.

The prisons that were used in this study were Zomba maximum security prison and Chichiri located in the southern region of Malawi (Zomba and Blantyre respectively) and Maula prison in the central region (Lilongwe).

The selection of the prisons was on the basis of the availability of female prisoners and prior knowledge of the type of offenders that these prisons keep, such as murder and other serious offence suspects and convicts. It should be mentioned that the northern region prisons were not researched because of distance and time limitations. However this did not affect the results of the research as Zomba maximum security prison keeps prisoners from all over Malawi, including the northern region.

Limitations of the study

The main limiting factor to this research was encountered because of the magnitude of the research topic. In trying to understand the position of women offenders there was need to explore issues in a systematic and elaborate manner. But as it turned out this was difficult to do because of the variety of players in the criminal justice system. There was need to dig more deeply into the socio-economic position of the offender and trace some of the survivors of Malawian prisons but this was done to a very limited extent as it proved difficult to trace some survivors because of distance and remoteness of the areas they came from and, in certain cases, failure to locate them.

Police stations were not adequately probed due to a certain level of bureaucratic resistance in that permission to research these institutions only came in the final week of the research. However, I was able to research one police station (Blantyre) without the permission of the inspector general by seeking permission from the regional commissioner of police based in Blantyre. So when the inspector general's permission was obtained I had already collected adequate information. A good lesson from this is that when one is researching institutions like these, it is sometimes much easier to penetrate them using lower structures than following the rigid bureaucratic channels of authority. There were other institutions which were not reached, for example, the Department of Social Welfare and the state advocates chambers, due to time limitations. Another problem was that within the praxis of this research, it was not possible to adequately interrogate the social circumstances of women offenders at village level or to carry out a comparative study with male offenders in order to set a case for women offenders. Thus this aspect and others mentioned above have not been addressed adequately and can form the basis of future research.

5 Presentation and analysis of study findings

An analysis of the findings of this study has confirmed a major research assumption that there are a number of social and legal problems that women offenders in Malawi face apart from practical problems that arise in keeping women in Malawian prisons. These generally stem from the fact that society does not perceive women as offenders and as such there are inadequate mechanisms for dealing with them both at societal and legal level. This shortfall is further aggravated by the inadequacies in the criminal justice system apart from the manner in which prisons are run or were constituted. It may be argued that at the time that prisons were being built in Malawi it was not adequately envisaged what kind of needs women would have while in prison. Most prisons were built for men and ad hoc measures had to be taken to cater for women. Chapters 5 and 6 provide a synthesis of the major findings of this study based on what women offenders in prison and the different stakeholders in both the formal and informal justice delivery system said. The analysis also highlights how the identified problems are in keeping with human rights standards.

For easier discernment of the findings and analysis, the information is presented in four major categories correlating with the major assumptions of the study as follows:

- 1 Female prisoners profile: highlighting the number of women prisoners currently in prison, the nature of crimes committed as well as other variables such as age, marital status, occupation and educational levels.

- 2 The practical problems that women face while in prison. This is based on what both the female offender and prison officials said.
- 3 The social circumstances of women offenders (the woman offender’s story): this provides an overview of the social position of the offender and its possible linkages to the crime that was committed.
- 4 The legal circumstances of the female offender. This describes the way different players in the criminal justice system (police, courts, legal aid, non-governmental organizations and so on) handle women offenders

1 Female prisoners profile and the nature of crimes committed

Table 1: Inmate statistics ratio of male: female prisoners

Name of prison	M	F
Zomba Central Prison	1883	17
Maula Prison	1726	15
Chichiri Maximum Security Prison	1411	37
Total	5020	69

Table 1 above shows that there are very few women who commit crimes in contrast to males as only 2 per cent of offenders are female in contrast to 98 per cent male. This confirms the observations in the literature that crime is a largely male activity but in which women also participate.

Table 2: No. of female prisoners by offence in three major prisons

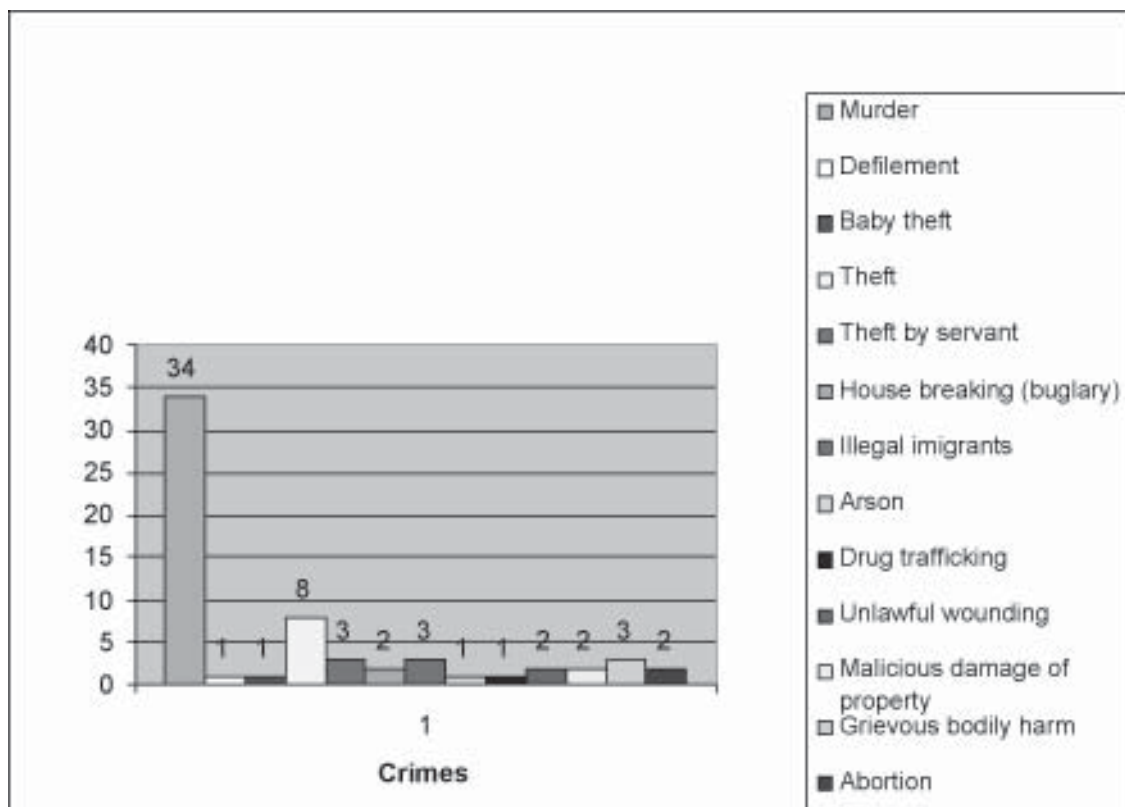


Table 2 on the previous page provides a clear picture of the type of offences that women are often arrested for and the magnitude of the crime. It is significant to note that the highest number of offenders is in the category of murder, with theft as the next highest while all other crimes appear to be almost evenly and sporadically distributed. One magistrate stated that generally women are not offenders and rarely are they involved in crimes that men are involved in, for example, theft and robbery. If they do take part in these crimes, they are charged together with men as accomplices in the crime. Cases of theft involving women were often by servant and carried out by those who worked as cashiers or accounts assistants. Thus it may be concluded that women's crimes are influenced by the position that they occupy in society. Note that at the time of the research there were two Japanese women and one South African woman held on immigration-related charges at Chichiri Prison in Blantyre. Annexes 2, 3 and 4 provide full details of all the 69 female prisoners who were convicted and remanded in the three prisons above.

Table 3 Maula prison ratio of male to female convicts against selected crimes ('male crimes')

Crime	2001		2002		2003	
	Male	Female	Male	Female	Male	Female
Theft	349	10	363	2	259	5
Burglary	82	0	111	0	129	0
House breaking	25	0	48	0	40	0
Murder	9	0	5	1	8	1
Grievous bodily Harm	9	0	5	1	18	1
Malicious Damage	14	0	8	1	5	0
Rogue and Vagabond	23	3	23	0	24	0

Statistics of convicted prisoners at Maula prison provide a significant contrast of female involvement in what may be described as 'male' crimes and confirm women's low participation in crime (Source: Maula prison).

Table 4: Categorization of murders committed by women

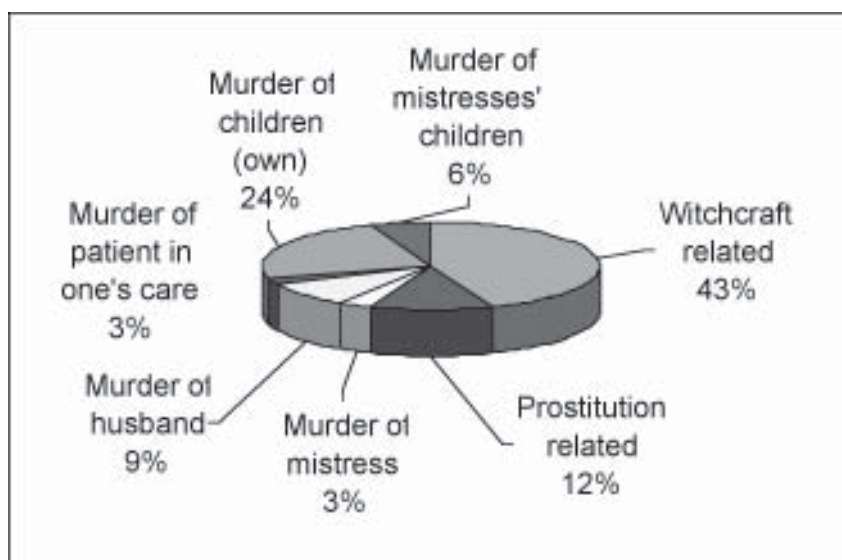


Table 4 on page 20 shows that the majority of murder cases committed by women based on women currently in prison are witchcraft related and the murder of children as the next highest. The interviews also showed that the victims are often people closely associated or related to them, for example, children, husbands and elderly relations (in the case of witchcraft related murders). The 12 per cent of prostitution-related murders involved women who were working as prostitutes or sex workers who murdered their associates under the influence of alcohol. In contrast, according to prison warders, men often murder other males due to drunkenness, jealousy or suspecting their wives of having an affair. They rarely murder their own children.

Table 5: Female participation in crime by age

Age	Mur.	GBH	Theft	Theft by servant	Abor.	MDP	Rob.	Imm.	UW	Def	Ars	DV
14-20	5	–	7	–	–	1	1	–	–	–	–	–
21-30	17	2	2	1	2	–	1	1	2	–	–	2
31-40	2	1	–	3	–	–	–	2	1	–	–	–
41-55	13	–	–	–	–	1	–	–	–	1	1	–

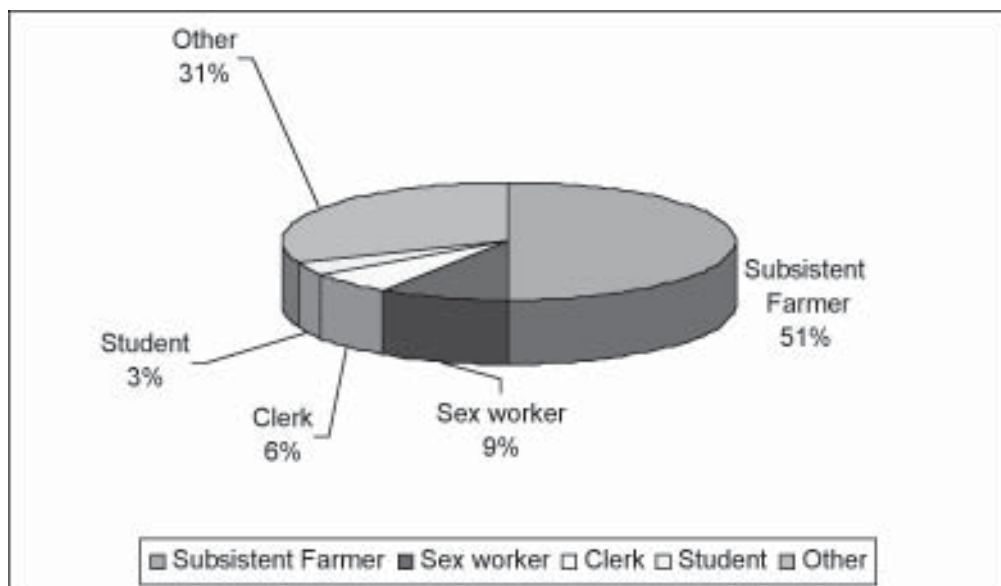
Key: Mur – Murder
 GBH – Grievous bodily harm
 Abor – Abortion
 Rob – Robbery,
 Imm – Immigration
 UW – Unlawful; wounding,
 Def – Defilement
 Ars – Arson,
 DV – Domestic violence

Table 6: Summary of female participation in crimes by age

Age group	Number of offenders	Percentage
14–20	14	22.8 per cent
21-30	31	43.3 per cent
31-40	9	13.3 per cent
41-50	15	21.6 per cent

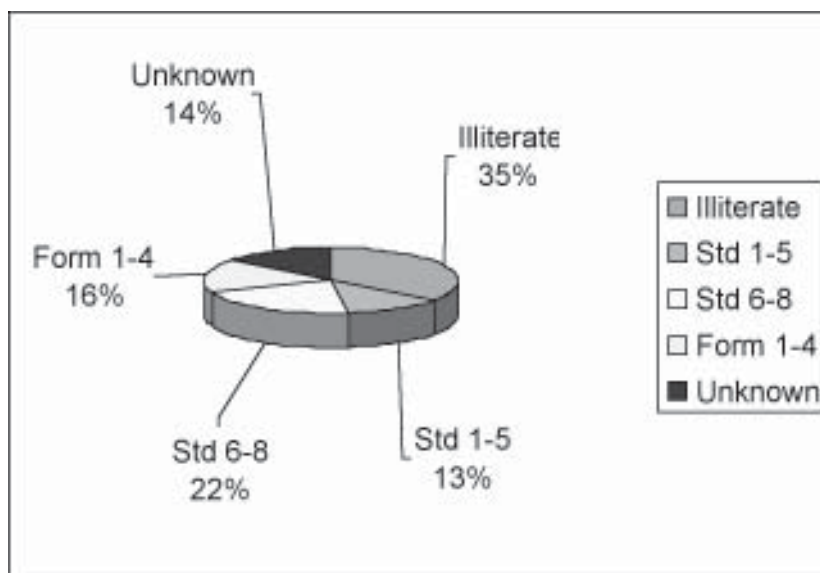
Tables 5 and 6 show that the highest number of recorded crimes committed by women are mostly in the 21–30 age group and at the same time the highest number of murder, including abortion, fall under the same age group. The 14–20 age group constitute 22.8 per cent of criminal activity but their highest participation is in theft, they are under represented in crimes like murder and surprisingly do not appear in crimes of abortion. The 41–50 age group, which paradoxically shows to have the next high frequency in criminal activity, largely participate in murder without any involvement in such cases as theft, infanticide or abortion. Interesting to note that there is one rare case of defilement falling under the same age group.

Table 7: Female prisoners by occupation (out of a sample of 32)



A large majority of women offenders currently in prison are illiterate, were unemployed or were subsistent farmers as tables 7 and 8 show. From the statistics in the two tables there appears to be a high correlation between crime and the socio-economic status of an individual (occupation and literacy). The 31 per cent under ‘other’ represent a number of prisoners of various occupations which could not be classified and include a traditional healer, nanny, teacher and others whose details were not recorded. Similarly for the 14 per cent unknown below.

Table 8: Literacy levels of female offenders



Marital status

Out of a total of 69 female prisoners in the three prisons visited, 37 were married, representing 63 per cent of female offenders while five were single mothers (8.3 per cent) and 15 per cent (nine) of the respondents were single, 6 per cent widowed (four), and 3 per cent (two) divorced. Only one respondent came from a polygamous relationship and interestingly she was being held for stealing a baby. Statistics provided in annexes 2, 3 and 4

and individual interviews revealed that most female offenders are mother as and their children are mostly minors. A good example is Maula prison where 11 out of 15 female offenders are mothers. It is important to note that there are eight babies currently in prison with their mothers and the age range is 10 months –1.6 years. There are also three women who are pregnant.

In light of the information provided above it can be argued that there is a high link between crime and marital status in that most of the violent crimes committed by women stem from their relationships with men as wives or mothers to their children. Secondly, the most common cases involving women evolve around causing grievous bodily harm (GBH), unlawful wounding and malicious damage of property and often these arise from petty jealousy (in marriage and non-marriage relationships) and are mostly domestic-related crimes. This also confirms the study assumption that the crimes that women commit are gender related.

The nature of crimes that women have committed

The findings below were gathered through focus group discussions with inmates at Chichiri prison, grouped mainly into five different categories (murder, theft, grievous bodily harm, malicious damage of property and abortion). Note that those on murder charges are not classified and some would fall under the category of infanticide, manslaughter or culpable homicide. It is significant to note the background characteristics that are linked to these crimes. Issues of illiteracy, poverty, promiscuity on the part of partners or failure by men to accept responsibility of pregnancy and belief in witchcraft are strong influencing factors in the commission of crime.

Murder:

There were 8 inmates charged with murder and all are still on remand. Ages ranged from 23 to 52. There were four charged jointly for murdering their uncle whom they accused of witchcraft. Two others had committed murder because of witchcraft (Maureen Bwanali jointly charged with her aunt and brother for killing her brother's two children) while Esther Rafaele killed her husband and is jointly charged with her son-in-law. Another inmate killed her girlfriend over a lover at a drinking place. All the eight remandees except one were subsistence farmers and illiterate. The one exception was a sex worker and one had reached grade 8 level of education.

Grievous bodily harm:

At the time of the interview there were six convicted inmates charged with the above offence. The youngest was 20 and the oldest 40 and the average age was 29.5. Four of the convicts were apprehended for injuring a husband's girlfriend; two for injuring a child belonging to a husband's mistress while one had fractured her husband's skull because he was always coming home late (3am) and drunk. The group was convinced that they were justified to do what they did because they did not have any peace of mind at home due to their husbands' promiscuity.

Malicious damage of property:

The accused were two sisters jointly charged with four men and sentenced to 2.4 years imprisonment for destroying a house belonging to their aunt because they suspected that she was a witch. They were convinced that their sentencing was rather harsh as there was no consideration that they have very small children.

Theft:

There were seven inmates with three juveniles charged with theft and two others charged with theft by servant. One, Sheila Chipwanya aged 27, was sentenced to 11 years' imprisonment for three counts of robbery, house-breaking and escape from lawful custody. With the exception of two (held for theft by servant) inmates who had reached form four, 75 per cent of the respondents were illiterate while the rest could hardly write their own names. On the question of why they found themselves in prison they explained that they lacked support, were poor and in one case the husband was not working and needed to survive. The 15 year old juvenile who also

worked as a sex worker was an orphan and said that she was driven by the devil. Sentences ranged from 2.5 years as the lowest and 11 years as the highest.

Abortion:

Two inmates were held on charges of abortion and sentenced to two years and eighteen months' imprisonment respectively. Both mentioned that they were involved with married men who did not want to take responsibility for the pregnancy, thus they had decided to abort.

2 Practical problems arising from keeping women in prison

One of the research assumptions was that there are practical problems that arise from keeping women in Malawian prisons. This assumption has been confirmed by what both women offenders and prison officials said. These problems are outlined below.

General provisions, food and nutrition

Upon arrival prisoners are given two or three blankets, two uniforms (dresses), a cup and a plate. They are supposed to receive one piece of soap per week but currently two or three months can elapse without them receiving any. Prison officials pointed out that men and women suffer equally but women tend to be favoured when resources are minimal. Prisoners eat once a day. They are fed on *nsima* (thick porridge) with beans or pigeon peas. The prescribed diet according to the prison public relations officer is nsima with beans or rice, peas, fresh vegetables, fruit and sweet potatoes. These are not provided due to inadequacy of resources. He mentioned that government spends MK20 (US \$0.5 cents) on the maintenance of each prisoner every day. The research also showed that children were being maintained on adult diets except in rare circumstances when soy flour could be provided for children. A mother at Chichiri prison reported that she mixed her portion of nsima with water to make porridge for her baby.

It should be stated that there is a gross infringement of the rights of prisoners, particularly female prisoners, as the standards for the treatment of offenders both nationally and internationally are not followed as reflected by the practical situation mentioned above. The Malawi constitution and many human rights instruments, including the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), give all persons equal status before the law without discrimination. This equality is emphasized without recognizing the different needs of men and women based on sex and gender. Gender-blind policies have infiltrated the prison to such an extent that even in matters of the food given to prisoners, there is no consideration that certain categories of women have special needs, such as those who are pregnant, breast-feeding or those who have just given birth. CEDAW article 12: 2 states that:

'...state parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary as well as adequate nutrition during pregnancy and lactation.'

Based on the diet provided currently in prison, it can be argued that this ideal is grossly violated and Malawi has to revise its commitment to CEDAW by providing adequate nutrition for such women. The women could be anaemic due to lack of nutrients in their food. The children maybe underweight, malnourished and weak.

It cannot be overemphasized that this compromises the health of women with special needs and particularly the children as they do not get adequate nutrition from the food provided. This also contravenes article 6 of the Convention on the Rights of a Child (CRC) which calls upon state parties to recognize the child's right to survive through the provision, among other things, of enough healthy food and clean drinking water. It is significant to note also that there is no provision of underwear and this is problematic during menstruation and particularly for long-term prisoners who may not have access to new supplies.

Accommodation

Zomba female inmates are currently occupying four cells housing 17 inmates and three babies. The cells are very narrow and make sleeping difficult. However there are three additional cells which could be used if need be. Chichiri has two cells with 20 inmates and five babies. The cells are totally congested with some women sleeping next to very smelly toilets and bathrooms. In contrast to Maula and Zomba the cells are poorly ventilated, dark and with low standards of hygiene. In Maula the prisoners were in one large cell made from corrugated iron housing all 15 inmates with lots of space. There were four additional cells which were unoccupied at the time of the research. The lock up period is from 3pm –6am.

The study revealed that female prisoners of all categories are mixed without any discrimination. This in essence means that first offenders, juveniles, those on capital punishment, convicted and unconvicted murderers, and remanded prisoners are all kept together. What is disturbing about this is that there is no consideration for the psychological impact this has on the different categories of offenders or the repercussions that may follow from such an arrangement. This can also have traumatic consequences on those that have been arrested on charges other than murder, especially juveniles.

Prisons like Maula and Zomba could easily separate the prisoners according to the classifications provided in the Malawi Prison Act Chapter 9:02 and the United Nations Standard Minimum Rules for the Treatment of Prisoners (Part 1: Rules of General Application 8) stipulate that:

‘The different categories of prisoners shall be kept in separate institutions or parts of institutions taking account of their sex, age, criminal record, the legal reason for their detention and the necessities of their treatment.’

Part b provides for the need for untried prisoners to be kept separate from convicted prisoners.

Secondly, there are no separate sleeping arrangements for babies thus they can easily contract infections such as tuberculosis (TB). It is interesting to note that there is differentiated treatment for men as they are classified and separated accordingly. Similarly male juveniles have their own facilities but in contrast the girls do not.

Medical care and health

This is another area which is problematic for female offenders. Inmates reported that they are often sick from malaria, constipation and diarrhoea due to the poor food. It should be noted that apart from these common ailments some prisoners have serious health problems such as TB as in the case of Sheila Chiphwanya and Mary Tambulasi in Chichiri prison and cancerous ‘elephantiasis’ as in the case of Ellena Maganizo as described below.

Ellena maganizo who is approximately 40 years old was condemned to death for murder of her husband in 2003. She claims that she prepared some food in which she put a love potion to strengthen her marriage. Her husband started purging and vomiting after eating the food and died the next day. She stated that her husband was very abusive, a drunkard who often beat her up, never provided for the home and Ellena had to do piece work to survive. After her arrest she was released on bail and this, according to her, angered her husband’s family who told her that although she has been released she has already been punished, this is known as ‘*tamulanga kale*’. Soon after she started developing a strange cancerous disease covering her private parts and left leg (almost like elephantiasis). On her anus there is a big hairy-looking ball much bigger than two testicles covering the anus so that she cannot easily defecate and cries in pain. There are more growths on her pubis and genitalia. She cannot sit properly, is uncomfortable, cannot change her clothes and often cries. She believes that the disease is a worse punishment than imprisonment and the hospital has told her that there is nothing they can do, therefore she should seek traditional medicine.

Although prisoners have access to the prison medical officer, routine medical check-ups for females are not carried out. The question is to what extent prisoners with special ailments, such as the ones mentioned above, have access to quality health care, special diet or proper medical examination. While medical care may be poor for all prisoners, the situation is far worse for women prisoners because prison health care systems were originally created for men. As women, the prisoners need routine check-ups associated with their sex such as gynecological care, pap smears, breast examinations and other check-ups related to reproductive health. Care is frequently only administered once the situation becomes an emergency. There were also indications that children were not adequately accessing under five clinics and basic immunization against polio, TB, diphtheria and measles. Hence it may be mentioned that women need differentiated treatment while in prison.

Keeping children in prison

This is probably one of the greatest challenges facing the female offender as well as the prison authorities. Ideally children should be left at home but issues of poverty are key in understanding why confinement with the mother becomes necessary. Among these is the absence of a support system in the village, especially in a patrilocal set-up of marriage where a woman lives in her husband's village. It would be very difficult for a woman offender to leave a child at home and Borey (1992: 32) argues that:

'If she has committed an offence against her husband, the chances of being supported by her in-laws will be very slim. If residence was in an urban area there will usually be no immediate family close by.'

Another problem for many families in Malawi is the general poverty of the populace where over 68 per cent live below the poverty line. This implies that the extended family would not cope easily with keeping a child or children for a convicted relative. This would ultimately affect the child's health and general upbringing.

Separating a child from the mother conflicts with the CRC and is not in the best interest of the child. It may be argued on the other hand that keeping children in prison may also violate the rights of a child although it can make the situation more bearable for the mother. The failure to separate offenders could be a risk to the child but also to other inmates who may psychologically be reminded of the crime that they had committed, for example in cases of infanticide.

Another factor that has to be critically problematized and could be an area of future research is the impact of imprisonment on the child. The child is exposed only to females and has no idea of men and the world outside. He or she may grow up resenting one sex or may have a skewed perception of the world as he grows up. There is need to have a conducive environment in prison so that a child's rights are not violated. The need to separate prisoners with children cannot be overemphasized and this should be in line with provisions in the Malawi Prison Act 1956 (Chapter 9:02, section 60) regarding the admission of children in prison and international provisions on the rights of a child as contained in the CRC.

Location of prisoners and visits

Zomba central prison keeps long-term prisoners, those condemned to death and those on life sentences. Chichiri and Maula also keep those with capital offences from within their region who are still on remand. A prison official stated that there are more advantages in keeping a prisoner closer to home:

- The security risk is reduced as prisoners are closer to home and less likely to run away;
- Prisoners complain less;
- Prisoners are psychologically more relaxed as they can be visited often;
- It is less expensive to transport the prisoners home upon release.

However, prison officials pointed out that the opposite may also be true. The female prisoner may be the only prisoner in a district prison and may suffer psychologically because of having no-one to relate to except the wardress. It has been seen that due to inadequacies in the district prisons an incarcerated woman is ordinarily much farther away from her home than the average male prisoner. The negative repercussions of this could easily be deduced from what the women said. They stated that they are often desperate for news about their children and are isolated from their families:

'We do not receive letters and sometimes do not get any news from home concerning family and even death of relatives.'

They believe that they have very few visits because of travel expenses or they have been forgotten by their relations:

'I spend my time wondering if my mother is alive and what is happening to my children as I do not receive any letters' (Tipilira Salikani on remand for infanticide since 2002).

It is noteworthy that increased distance causes substantial transport problems and as a result deprives women prisoners of contact with their children and families. On the other hand access to necessities such as food and soap is also denied. While it may be psychologically appropriate to have the woman remanded with others in contrast to the isolation in a district prison, follow up of her case becomes difficult as she gets removed from the crime locus and thus could experience delays in having her case heard. This often compromises her mental and physical wellbeing. Most of the women interviewed were lonely, depressed and psychologically down as is the case of Maggie Makolija, described later.

Management of menstruation

Prison officials mentioned that this is one area that prisons fail to address adequately. In the past, prisoners were provided with specially made sanitary towels. These were made from the white cloth used for making prison uniforms and were tailored by male prisoners. Due to inadequate resources these are no longer provided. The prisoners mentioned that they wear pieces of cloth cut from old uniforms but they experience problems in washing them when they have no soap. The cloth is not adequate either and does not provide enough protection.

Wardresses mentioned that sometimes they receive donations of cotton wool from well-wishers but these are problematic as prisons do not have incinerators and this would cause blockages in toilets. Some prisoners from rural areas expressed reservations about using cotton wool as they are not used to it.

From the research findings it can be seen that this is one area that explicitly shows that women need gender-differentiated treatment while in prison. For example, the absence of incinerators, access to sanitary wear or the need for more frequent baths only affect women. There are two key issues here, firstly, the availability of sanitary wear in whatever form and secondly, the suitability of the sanitary wear to different categories of prisoners based on what is culturally acceptable to them and based on their socio-economic status as well as the menstrual flow needs of individual women. The prison response to this need is only partially fulfilled as it does not have enough materials to provide to women. One weakness is that the napkins provided erratically by the prison officials have an ingrained male bias in that they are made by male prisoners who have no experience with menstruation and have no idea of what is physiologically comfortable for women. Not surprisingly the women do not find them user friendly and claim that they bruise their skin. For most of the poor, the traditional way of managing menstruation is through a piece of cloth which is folded and secured on the waist using a piece of string, thus old uniforms would do. For the urban women, cotton wool is more appropriate while for a small group of affluent prisoners, tampons and sanitary pads would be ideal. Prisons have difficulties in reconciling these different needs as well as providing the means to dispose of or make it possible to re-use used materials.

Education rehabilitation and recreation

The penal system of imprisonment is often justified by the factor of rehabilitation. Through rehabilitation prisoners are to be re-educated to function properly in society but it is surprising that this is completely overlooked for female prisoners in Malawi. The women rarely go out for sports and have no access to the prison library which is on the male side but books can be borrowed on their behalf. Sporting activities are also rare.

It should be stated that rehabilitation requires establishment of a supportive mental attitude besides teaching a skill. There is need for a person as a whole to be helped to prepare for life in the outside world. This need for rehabilitation is paradoxically captured in the mission statement of the Malawi prison service which states:

'We exist to provide for safe, humane custody and rehabilitation of offenders in order to contribute to public security and socio-economic development in Malawi.'

Women spend their day cleaning cells and surroundings and thereafter they are idle as there is nothing to do. The routine for women is different from men's routine in that men are allowed to go out and work, except those on death row or serving life sentences or prisoners with special circumstances. This may have negative repercussions upon release as they come out in the same status that they left. Worse still, they have a new label as ex-prisoners, with no occupation and may not easily secure employment. There is need to introduce practical skills for women so that they can be successfully integrated back into society after release. The step taken by Maula prison in training women to raise rabbits is a step in the right direction.

At international level article 14 (d) of CEDAW calls on state parties to ensure that women obtain all types of training and education, formal and non-formal, including that relating to functional literacy, as well as, *inter alia*, the benefit of all community and extension services in order to increase their technical proficiency.

It is significant that this is another element that is not adequately addressed for women offenders. Organized formal classes are currently being provided for men in all three prisons, particularly Zomba where even secondary education is being offered. A convicted male prisoner, an ex-teacher runs the school. The inmates were able to write both their Junior Certificate and their Primary School Leaving certificate. Attempts have also been made to provide functional literacy to the women and warders are in charge of the classes. However, the question here is the quality of education that is being provided through these wardresses considering that they themselves have very low education levels. During interviews a good number of them were unable to respond in English, which is the main mode of communication in school.

The difficulty of providing education to female prisoners is further aggravated by not having special facilities for women to sit for examinations separately. One remanded prisoner, Maureen Bwanali, wrote the Primary School Leaving certificate in 2003 but had to be transferred to Zomba central prison from Chichiri where an all-male examination centre for male prisoners had been set up. This too has its own implications. It raises questions about the reaction of the male inmates to seeing a female for the first time while in prison and her own feelings in a class of all-male inmates and examiners.

Counselling and psycho-social support

Most inmates who were interviewed said that their main problem is anxiety about the children at home. In the words of two inmates:

'I feel desperate and worry all the time as my future is bleak' (Maggie Makolija, 21 year old on life sentence for murder of her two sons).

'I do not get visitors and not even letters; Ndilibe m'bale, m'bale wanga ndi mulungu' (I have no relative, my relative is God according to Venita Maiche, death row inmate who murdered her grandson).

The most pressing problem for those on remand is delays in having bail or having their cases heard. They felt

that those convicted were better off because they knew their fate but some of them have been in prison for two years now without being tried. Borey (1992:43) argues that:

'Fear of the unknown and long waiting periods are known to be the worst mental strain for the detainees.'

It was quite evident from the observation of inmates at the three prisons that prisoners were not receiving any form of organized counselling to help them cope with imprisonment. The cases of Emmie Mkumbira who talks to herself and is currently receiving treatment from the mental hospital and another inmate in Zomba who has been on life sentence since 1992 and is completely demented, illustrate this. It should be emphasized that there is need for systematic counselling especially for women on long-term sentences to help ease the psychological pain and trauma of imprisonment.

Sexual abuse and sexuality

It was reported that sexual abuse is rare but there have been sporadic allegations of male officers trying to abuse female inmates. Prison officials pointed out that males do not have direct access to female prisoners except in rare cases, for example, when they are sick. Wardresses mentioned that female offenders sometimes have problems with their sexuality but not to the extent that males have. Those in Zomba are provided with counselling by nurses from St John of God and inmates sometimes request to talk to the nurses in confidence on issues pertaining to sex and sexuality. It was reported that at one of the prisons (Maula) where males and females are only separated by a barbed wire, one female inmate was soliciting money from the male prisoners by exposing her body to them at the ablution block which is close to the male hostels. Another female prisoner was communicating with male prisoners through a water drain running to the female yard from the male yard.

It should be mentioned that although issues of sexual abuse or sexuality are rare among women, the few incidents cited above are an indication that female offenders also experience problems with their sexuality like their male counterparts. This emphasizes the need to occupy them in certain activities and counselling. On the other hand there is need to have secure facilities for women. The current arrangement in Maula prison where separation from men is only a barbed wire fence could be a cause of emotional stress to both female and male prisoners.

Discharge procedures

There are no specific procedures for release. The officer in charge stated that they provide the prisoner with her personal belongings that had been kept for safekeeping and counsel them about their behaviour and not committing more crime. Warrants are also provided for travel. There is no direct support given to women at the time of release. Prison Fellowship International is providing support to men who are about to be released. They have a kind of open prison where they are taught skills and rehabilitated for smooth integration back into society. This is an opportunity for earlier freedom before the end of the jail term. But this opportunity is not available for women and no one knows what happens to these women when they go back to the villages. It should be stated that the need for this kind of support for women cannot be overemphasized, considering the social circumstances of incarcerated women.

Wardresses

Six wardresses were interviewed from Chichiri, Zomba and Maula prisons. Their educational levels ranged from standard 8 (one), Junior Certificate of Education (three) and form 4 (two). Four out six wardresses said that they were not happy with the job and joined the prison service because of lack of alternatives for other jobs while the other two said that it was out of curiosity and admiration of the uniform. One officer in charge pointed out that the prison service does not attract people of high calibre. Most have little education and are frustrated.

It was also reported that there are no graduates in the system.

The wardresses said that they meet a number of problems in keeping female prisoners but most of these have to do with individual prisoners failing to cope with prison life. They said that some prisoners need comforting and assurance as they cry often and are sad. Sometimes prisoners fall sick and they do not have things like first aid kits to deal with the problem immediately. In certain instances when provisions run short, they do not have means to assist the prisoners and at times have to provide from their meagre resources. From a work perspective they face the following problems:

- The guardhouses are open, dusty and very cold. Thus they suffer during the rainy season and in winter due to lack of protection;
- They have no means of protecting themselves from prisoners and they are not armed;
- They are rarely given the opportunity to attend seminars or escort female prisoners when transferred hence do not access allowances;
- Promotion is slow and one wardress mentioned that she has been in service from 1989 and it is only recently that she has been promoted to the rank of second sergeant.

Relationships between prisoners and warders were reported to be cordial according to both prisoners and wardresses. It was also observed that the warders in all three prisons treated the prisoners well, were sympathetic to their cause and treated some of them as their friends. However prisoners pointed out that there were one or two who were harsh and warders at Chichiri mentioned that some prisoners are rude and say vulgar things, especially those on remand.

It is significant to mention that wardresses play a vital role in the maintenance of prisoners and to a certain extent can determine the level of comfort that prisoners enjoy while in prison. They are the closest and interact with prisoners on a day to day basis and are the only link that prisoners have with the outside world. It is important that people who are charged with such a significant task are not left in the periphery but should be provided with a conducive work atmosphere, job satisfaction and should be chosen because of their high personal integrity and professional proficiency as stated in the Standard Minimum Rules for the Treatment of Prisoners. It should also be pointed that the safety of wardresses can be compromised by their lack of protection from prisoners in contrast to their male counterparts who are armed. CEDAW article 11 provides for non-discrimination in the area of employment by calling on state parties to ensure on the basis of equality of men and women the same rights, in particular:

‘(b) the right to the same employment opportunities, including the application of the same criteria for selection in matters of employment.’

Changes in the prison system

The study revealed that there are some positive changes which have taken place in the prison system as a whole. The regional prison officer mentioned that prisons are now closely linked to society and other stakeholders. People can easily visit prisoners and provide them with necessities, and there is more observance of the rights of prisoners. Prisoners are allowed access to phones when necessary and can receive letters without much interference. Non-governmental organizations, churches and their own relations are free to visit them. In the past no one knew what happened in prisons and there was maltreatment of prisoners. But currently with the change to multi-party politics, issues of human rights have come into the limelight through the work of non-governmental organizations and this has necessitated change. The prisons are currently in the process of reviewing the Prison Act to make it congruent to these new challenges.

It should be mentioned however that on the issue of keeping women in prison, there is still a lot that needs to be done in view of the observations above.

3 The social circumstances of the women offender

An analysis of the women offenders' stories, especially of those held for murder, reflect the gendered nature of women's crime, against a backdrop of issues of poverty, illiteracy, orphanhood, failed marriage relationships, socio-economic hardship and socio-cultural beliefs as strong influencing factors in the commission of crime by women.

This is discussed below under four thematic areas:

- Socio-cultural beliefs;
- Poverty and economic deprivation;
- Marriage and failed relationships;
- The challenge of motherhood and murder of own children.

The story of each woman is provided to illustrate how the factors above have influenced their condition and position in society and the crime committed.

Social cultural beliefs – witchcraft-related murders

An analysis of these murder cases revealed the extent to which social cultural beliefs like witchcraft are so ingrained in people's thinking to the extent of persuading them to take human life. The percentage of witchcraft-related murders (43 per cent) in contrast to other murder cases signifies that this is an area that needs to be critically examined in Malawi. It is interesting that this problem is also recognized in the Malawi poverty reduction strategy paper as an impediment to development. The practice or imputation of witchcraft is specifically penalized by the laws of Malawi under the Witchcraft Act (Chapter 7:02) which states that:

'Any [person who within Malawi instigates or conspires or confederates or agrees to hold a trial by ordeal which is prohibited by this Act, whether the same is to be held within Malawi, or elsewhere, shall be liable to imprisonment for seven years.

'... Where any such a trial ... results in the death of any person, the person directing, controlling or presiding at such trial and the person instigating any such trial or conspiring, confederating or agreeing to hold any such trial shall be liable to imprisonment for life or for any shorter term.

It can be seen that the legal position on this is clear and yet belief in the practice continues, often with tragic consequences. The stories below explain the magnitude of the problem.

Mary Tambulasi

Mary Tambulasi was remanded for the murder of her sister's nine year old son whom she forced to drink rat poison. She suspected that he and his mother were witches who were responsible for the death of her four children. All the children died under the age of one year. When she was interviewed, she mentioned that she was sick, suffering from TB, heart palpitations and she had had pneumonia recently. In response to her offence she said that she did it because she was angry and every witchdoctor that she met told her that her sister and son were responsible for her children's premature death:

'Even the boy that I murdered used to talk about it.'

This story raises a lot of questions about how people interpret unnatural phenomenon. In the case of Mary Tambulasi a visit to a doctor could easily explain her predicament. Her medical history and the mysterious deaths of her children could probably be linked to the issue of HIV/AIDS and this could have been quickly ascertained had she undergone a test. It is significant to note that the victim in this story and Maureen Bwanali's story below are children.

The story of Walire Amini and Esnath Burnet and others below provide good examples of how abuse of the elderly is common in issues of witchcraft and how they become scapegoats for deaths which cannot be ex-

plained. Another important feature to note in these murders (the cases of Esnath Burnet and Maureen Bwanali below) is the involvement of men in violent crimes as these women are jointly charged with men.

Walire Amini

Walire Amini was arrested on 5 June 2003 by Namitambo police for the murder of her grandmother. She beat her to death after she was told by a witchdoctor that her grandmother was responsible for the death of her mother and several other relatives in the village. The woman died a day later.

Esnath Burnet

Esnath Burnet, 23 years old, is jointly charged with five others (three women – all with babies – and three men) for killing their aunt whom they accused of witchcraft. They have been in prison for five months without bail.

Maureen Bwanali

Maureen Bwanali age 28 presents a very interesting story of the extent that people believe in witchcraft. Her case also emphasizes the need for psycho-social support and counselling. She was arrested in November 2002 together with her aunt and her brother for murdering her brothers' two children. The reason given was that they wanted to exorcise the children from witchcraft. This was done by inserting pieces of reeds taken from a reed mat into the children's anuses. This happened for two days until the children died in the presence of their mother and father and Maureen's aunt.

Maureen claims that she does not understand how she committed the crime and why the people she was with did not restrain her because they claim that she is the one who killed the children. All the people who were with her at the time were much older than her and probably stronger, as in the case of her brother (father to the children). She stated emphatically that no one can understand her crime unless they go back to her village in Chingale where she 'died'. She said:

'I am a stranger in Manase, Blantyre and the police are not keen to find out what happened to me and they can only understand this if they go back to my village.'

Interviews with her mother and chief in Chingale, revealed that prior to the crime, in October 2002 she died and was reported dead for two days during which all her funeral arrangements were made. Her body was even washed and prepared for burial. The chief certified her death and also received the ceremonial payment for her burial. Her father was in the process of buying a coffin when he was told not to proceed as she had resurrected.

It would appear that her experience left her with a psychological perception of herself as rooted in the supernatural and this also convinced others that she had acquired some clairvoyant powers. Thus her actions after this incident could not easily be questioned which explains why her proposition that the children were witches was easily accepted.

Poverty and economic deprivation

The story below and several others not documented here clearly illustrate how poverty, illiteracy and cross-cutting issues such as gender and power relations between men and women, are serious social factors that have driven women into crime. It could be argued that as a result of adverse social economic situations, failed marriages and the need to survive, some women, like Tipilira Salikani (described below), are driven into crime. Their stories also show that these women have both practical and strategic gender needs. The practical needs of food, clothing and so on for day to day survival but also strategic interests such as literacy and family planning to help them make informed choices on whether to have children or not. This need is also illustrated by the story of Agnes Mandala described below.

It is significant to note that this murder case and those of Venita Maiche (murder of 4 year old grandson) and Laina Chisoni (murder of 6 year old son) in annex 2 were committed at the time of serious hunger in Malawi following the drought in 2001–2002. This was aggravated by governments sale of the grain reserves to Kenya.

It could be argued that the negative repercussions of these two factors influenced these women's decisions to kill their children. This issue also came out clearly in *Republic v Stella Nthini and Mayamiko Kubwalo* (Cr. Appeal No. 30 of 2002) where their learned counsel, Mr Chirwa, referred to the prevailing economic situation in the country:

'Generally the majority are destitute and are compelled to do what they would not otherwise do if they were better off.'

In light of this, the court was basically being asked to sympathize with the situation of the appellants and to view them as victims of circumstances in their commission of the crime.

Tipilira Salikani

Tipilira Salikani – a 22 year old divorcee, illiterate and a first offender – was remanded on 17 April 2002 for murdering her two week old twins. She explained that she did this out of anger with her boyfriend who did not care to support her. She explained that she is very poor and survived by collecting husks of maize flour from maize mills to feed her three children and this forced her to throw the twins in a well. She stated that:

'I accept that I committed a crime but I wish my trial could be speeded up. I worry a lot about my other children, I don't sleep, I cry a lot and often I don't eat.'

At the time of the interview she was depressed and deeply regretted what she had done. She explained that at the time of interrogation the police beat her and her left hand and face were heavily swollen.

She believes that she has not been visited because her mother cannot afford the transport costs. Poverty is a big issue for her and she pointed out that if I had seen her clothes and bedding, I could have appreciated what drove her to commit such a crime. She says that she was not aware that she could ask for bail until she was visited by paralegals in prison. Her first marriage ended when her husband took another woman and she was continuously insulted by her mother in law. She thereafter found a lover and got quickly pregnant during the first few months of the relationship.

Prostitution and murder

Agnes Mandala

Agnes Mandala, an 18 year old prostitute, was arrested in March 2002 for murder of her 4 month old baby. She claims that on the material day she got very drunk after taking various drinks while in the company of some young men. She said that she does not know what happened because she was drunk and thinks the young men she was with threw her baby in a well. She stated that she is an orphan and was living with a sister who was forcing her to abort when she was pregnant but she refused and had the baby. During her arrest the police beat her up trying to force a confession and she said the woman constable was very harsh. She is afraid of going back into the community for fear that no one will welcome her and she would not have anywhere to go, thus she does not want to ask for bail.

Analysis of the story above and that of Loveness Kalonga below reveal that most women are driven into prostitution by a number of factors. Lack of parental care, as in the case above where the girls are orphans, and raising of children by single mothers are crucial in understanding how these girls became prostitutes and eventually ended up committing crime. In the case of Loveness Kalonga and Aida Kazembe (annex 3), lack of education is yet another factor that has compromised their situation socially.

Another aspect is the issue of access to abortion and family planning as in the case of Agnes and Tipilira. Drunkenness is another factor that needs to be unpacked because it was a crucial element in the crimes committed by both Agnes and Loveness Kalonga below. These examples and others confirm the study assumption that women have social problems that drive them into crime.

4 Marriage and failed relationships

The stories of Loveness Kalonga, and Rahabe Kata below explain the binary predicament that women often find themselves in as a result of marriage relationships. On one hand there is the desire to remain in an abusive relationship and be supported because of adverse social and economic circumstances and on the other hand there is the need to leave and face the world and its consequences on their own. Marriage is a common variable among most women who have committed crime – 63 per cent of all women offenders currently in prison are married. What is of interest among the women who have committed murder is that in most cases husbands, broken relationships and husbands' promiscuity or maltreatment form the nexus of the stories. In the case of Loveness Kalonga, failed marriage relationships drove her into prostitution. In the case of Rahabe Kata (see annex 3) it was her husband's promiscuity which finally landed her in prison. It is also pertinent to mention that the value that a man attaches to a woman's body as a mere sex object is clearly illustrated by the experiences of Loveness with different men at different times, as a married woman and as a prostitute. In both instances she was disadvantaged. Some of these issues can easily be deduced from her story below:

Loveness Kalonga

Loveness Kalonga, a 23 year old sex worker at Nchalo Trading Centre was arrested in November 2002. She has been on remand for one year for the murder of a fellow sex worker. Her background reveals that she comes from a family of eight and was raised single-handedly by her mother from when she was 6 years old. She has never attended school. She got married in 1997 and separated from the husband after two years when she was 4 months pregnant because the man was sleeping out often. Later she found employment at a nightclub where she used to pick up bottles and was paid K450 (US \$ 4) a month but she also started to sleep with the men who came to the club for money who would pay K800 (US \$7.6).

Towards the end of 2001 she was married but left after four months because the man was very abusive and this also forced her out of Blantyre to a small trading centre in Chikwawa district because her husband said that if he found her he would kill her. It was here that she killed a fellow sex worker. She claims that they were both drunk and believes it was because of her drunkenness that she got very angry and stabbed her friend.

The challenge of motherhood and murder of own children

The study has revealed that there are some crimes that women commit because of their motherhood, thus confirming the gendered nature of women's crimes. This perspective came out clearly during the research in cases where mothers murdered their own children, aborted or committed the crime of infanticide due to unbearable social and economic circumstances or lack of support from husbands, boyfriends or the extended family system. The stories also underline the despair that women undergo socially at the hands of relations, husbands and semi-autonomous social fields like marriage counselors and chiefs. The case of Tipilira Salikani and Maggie Makolija confirm this assumption.

Maggie Makolija

Maggie Makolija, 21 years old, is on life sentence for the murder of her two sons in 1999. She took poison and also gave some to her sons. The boys died and she survived. She had family problems with her stepfather and mother and her husband did not support her either. Thus she decided to end her life and that of her children. Her trial was by jury and she was represented by a legal aid advocate. She feels that she was not well represented, as she was not allowed to speak. She looks very depressed and she confirmed this by saying that she does not sleep well and worries a lot.

6 The legal circumstances of women offenders in the criminal justice system

The study has revealed that from a legal perspective women offenders face a variety of problems as they go through different stages of the criminal justice continuum. This continuum commences from the time of arrest, through to the trial and ultimate confinement. It is argued that a defendant's passage through the criminal justice system may be seen as part of a sequential process, since a decision at one point may influence the movement, direction and outcome of a defendant's progress at another stage. This section provides a synthesis of the major problems that women face in police stations and courts before their eventual confinement in prison.

Police

Procedure at the time of arrest

The police's first step is to interrogate a woman accused and commit her into a remand cell. The interrogation is done by any police officer but if it is a male officer he has to be in the company of another officer to avoid allegations of sexual abuse. Male police officers mentioned that sometimes women offenders try to manipulate officers sexually to have the case quashed. A policeman pointed out that some women prefer to be interrogated by men as they are more comfortable with them than the policewomen who are renowned for being rude and uncompromising. Policemen also mentioned that women suspects display certain weaknesses in contrast to men when they are in custody such as:

- They are full of fear and afraid of police officers;
- They quickly plead guilty with the belief that they will be set free if they confess and turn round in court to say they were beaten and coerced to confess;
- They cry often and fail to explain clearly. Some even faint;
- They often need pre-counselling before a court session;
- Some women are convicted because they are unable to talk or fail to secure lighter sentences because they do not explain the situation they are in.

Facilities for suspects in police stations

At Blantyre police station there is one cell for female suspects and four cells for males. At the time of research the male cells were filled to capacity and some suspects who wanted to lie down were sleeping in the bathroom. The female cell was empty because it was being used for storage of examination papers. It was mentioned that at such a time women suspects if there are any are kept in the police reception area day and night and use the toilet facilities of policewomen outside the building. Thus they need to be accompanied every time they go outside and sometimes a female officer is not available. At Limbe police station there is no specific cell for women and instead women are kept in the victim support unit.

Police stations do not provide food and have no facilities for food preparation. Remanded suspects have to rely on relations for food until they are transferred to prison. Those without relations suffer or survive on the generosity of other inmates or police officers. Those on remand are allowed to receive food three times a day but this is limited up to 4pm for security reasons. Ideally, suspects are supposed to be charged within two days, based on article 42 (2) of the Malawi constitution. This provides for:

'... the 48 hour rule whereby every arrested person has the right to be brought before an independent and impartial court of law and to be charged or to be informed of the reason for his or her further detention, failing which he or she shall be released (e) with or without bail unless the interests of justice requires otherwise.'

The minimum remand period is 15 days according to the Criminal Procedures and Evidence Code (CP and E

SS250, 267). But police officers interviewed were quick to point out that this 48-hour rule does not always apply.

The major weaknesses that have been noted with the police are centred on their failure to provide adequate and conducive facilities for keeping women offenders while they are still on remand and delays in effecting bail. These problems occur mostly in the district police stations where there may be only one woman offender at any time. The issues arising from this include the inadequacies of facilities for keeping the lone suspect as the women's cell is often taken over by male suspects who are usually in large numbers. While most of the problems can affect men and women equally, the study has revealed that women may suffer more because of other needs pertaining to their sex and gender. Therefore there is need for differentiated treatment for female offenders.

The argument that is being put forward is that female suspects can be subject to all kinds of abuse because of the ad hoc measures that are being used to detain them. The need to keep things like examinations securely can mean that the security of women suspects is compromised as the suspect is exposed to male policemen who are on duty. Since police stations do not have facilities to provide food or other needs particular to women, it means that women who are pregnant, with small babies or menstruating may suffer more if they do not have relatives close by.

Prosecution and bail

Interviews with both policemen and women offenders revealed that women experience delays in obtaining police bail and in the processing of their cases to reach courts. The policewoman interviewed said that this is usually due to the convict herself being uncompromising or refusing to reveal information. Other factors affecting bail are:

- There is a poor follow-up mechanism with prisons to check suspects requiring bail or appearing in court. Often this is done on the initiative of the investigating officer who sometimes forgets the case because of new cases. Police are supposed to visit prisons every day but this does not happen;
- Female suspects sometimes fail to produce a surety for bail in the form of another person to sign on their behalf that bail conditions will be observed;
- Several women are afraid or too shy to ask for bail;
- Some are unaware of their right to bail;
- Very few women have the ability to hire a lawyer.

This is probably one of the most serious problems affecting the woman suspect as the right to bail or to be prosecuted is at the discretion of the police on one hand and the courts on the other. They may also use their power to extend or deny bail. It is at this stage that a woman's fate is decided – whether she is going to be freed or face the consequences of her action. Although judges and magistrates mentioned that there are a number of mitigating factors that may work in favour of women offenders, such as the presence of children, this is only prima facie. Practice shows otherwise. There were a number of women on remand with young babies (eight in all) who had not been released. Even when they had been committed to court for bail, bail was not automatic as cited in Misc. Criminal application No. 145 of 2001: *Republic v Fages Gadama*. In dismissing the application the presiding Judge had this to say:

'In this fresh application the additional detail supplied is that the applicants last born child is only one and half years old while the other two are five years and seven years respectively and that they are all in need of motherly care. Frankly speaking, I do not know whether a child of one and half years is or is not normally a breast-feeding child. I must say however that the age does not alarm me into any panic on the question of bail raised herein. From affidavit evidence it would appear that the applicant has now been in custody for six months. If that child has survived those six

months I think it can also survive the period from now to the trial of its mother. If the applicant cannot bear this, the onus is on her to convince the commissioner of prisons that her infant child is unweaned so that under section 60 of the Prisons Act the child may be accepted to join her in custody and live therein at Government expense.'

The decision to prosecute is another consideration which involves the use of discretion. These women are often at the mercy of the investigating officer who may speed up investigations and drop the charges or send the file for prosecution. It should be noted that this is a very slow process and women have been known to remain on remand for several years, especially those on homicide charges.

Although policemen gave their reasons for delays in remand or failure to observe the 48-hour rule or the minimum remand conditions as stipulated in the Malawi constitution, it is apparent that cases of women are not treated as a priority in the criminal justice system. If there is lack of funding it is women who are affected mostly because they constitute a minority in penal institutions and therefore they do not get the necessary attention.

The case of Loveness Kalonga who has been on remand since November 2002 and so many others underline that the follow-up mechanism of cases is very poor. To prove this, I followed up her case to Chikwawa district (where the crime was committed) to check if she was on the list of the homicide cases that were being tried since January 2004. She was not. The police claimed that her file had been sent to the regional prosecution officer in Blantyre while the criminal registry at the High Court had not yet received the file. Thus she will be on the waiting list until the next not so eminent round of homicide trials.

Although police bail is a non-cash bail, some women offenders revealed that some policemen demanded money from them so that they could be released. This, it should be stated, is a serious malpractice and it also raises questions of whether such unscrupulous policemen would not go to the extent of demanding sexual favours if the woman failed to produce the money. Practice also shows that bail is often refused in untypical female crimes of murder and violence, for instance. The story of Emmie Mkumbira (below), charged with defilement of a 9 year-old boy, shows how she was denied bail and her case concluded expediently before investigations were even finalized. The argument that some suspects are remanded for their own protection does not hold because there are cases of suspects who have committed gruesome murders, for instance the cases of Member of Parliament N. I. W. Kara (Cr. Case No.94/2002) and Alice Gwanzantini (Cr. Case No.208/2002 still pending) both well-to-do citizens who were released in spite of public outcry reflected in the print and electronic media. This partly confirms that one's social status is a factor in the way different people are treated in the criminal justice system. This is an obvious gender bias in the treatment of offenders.

The failure to provide women with bail or commit them to court for trial seriously abrogates provisions in Article 7 of the African Charter on Human and People's Rights which, among other things, stipulates that all individuals shall have:

- The right to be presumed innocent until proved guilty by a competent court or tribunal;
- The right to defence, including the right to be defended by counsel of their choice;
- The right to be tried within reasonable time by an impartial court or tribunals

Courts and legal aid

The research assumption that women's needs are not adequately recognized or addressed in the criminal justice system is confirmed to a certain extent by what both different stakeholders in the judiciary and the Department of Legal Aid said and from the experiences of the women themselves. It may be erroneous to project the idea that women's needs are not recognized because interviews showed that there is a lot of awareness on the part of different stakeholders on the need to treat women as a special group in the criminal justice system. This opinion

was drawn from statements like, 'women are mothers', 'they are vulnerable' and, according to the principal legal aid advocate:

'I am not comfortable to see women in prison, prison is not the best solution for women.'

However, what is not so well understood is the mechanism to address the various problems that women have and their legal experiences when they commit a crime. This observation is confirmed by Mahjouba Salik (in Schuler, 1986: 330) who states that :

'...it becomes clear therefore that the legal problems that women face do not lie in the actual laws or legal structure but with the application of those laws and the discriminatory attitudes and actions towards women.'

Hence women's ignorance of their legal rights, for example, the right to bail or appeal, only extenuates the problem. The key problems based on an analysis of the findings are presented below.

High Court interviews revealed that few cases involving women come to the High Court as they are often settled by the lower courts. The few that trickle to the High court are often homicide cases, theft by servant, drug-related crimes and appeals or other cases that qualify for trial at the High Court.

Differences in the types of crimes committed by men and women

According to one High Court judge (Chipeta J.):

'Men cover the broader spectrum of crime while women cover a small portion of crime. They are basically new entrants but are slowly committing crimes that are normally associated with men, for example, murder, theft, drug trafficking and so on.'

He saw the reasons as being twofold:

- A hostile economic situation which is driving both men and women into desperation for survival;
- The liberty and freedoms guaranteed under the new political dispensation in Malawi. Thus more women are free to move around than before and thus find themselves trapped into committing similar crimes to men.

In cases involving murder these are often crimes committed in the heat of passion and circumstances of provocation. Rarely are the offences premeditated. It was stated that the crimes sometimes stem from unbearable marriage circumstances, personal relationships which have collapsed and quarrels arising from suspecting someone of witchcraft.

Treatment of men and women in the criminal justice system

The chief resident magistrate at the Blantyre court believes that women are treated differently, for instance, it is easier for women to obtain bail because they are unlikely to run away. It was stated that sentencing may differ for men and women depending on the nature of the crime and in most cases women are first offenders. One judge pointed out that it is natural to feel sympathetic towards a female offender but he tries to balance up things by considering the nature of the offence. Some of the mitigating factors that may arise in favour of women include:

- If the accused is a first offender;
- If one enters a plea of guilty;
- The age of the offender, in other words, whether they are youthful or aged;
- In property-related cases, if the goods were recovered;
- In violence cases, if there was provocation, although provocation cannot be used as defence;
- Pregnancy and the fact that a pregnant woman cannot be sentenced to death;

- Presence of small babies, especially unweaned babies.

A female first grade magistrate, Kitty Nkhono, stated that she has more empathy for women in that they have a lot of responsibilities and using her own discretion she is relatively lenient towards female offenders. Presence of a child is a strong mitigating factor, hence sometimes she will hasten the trial to assist the woman with a child. However, it should be stressed that the experience of several women in prison shows that these mitigating factors are not always taken into consideration as the bail application case of Fages Gadama above reveals.

Problems that women face before the courts, which also compromise their position were cited as:

- Nervousness and failure to talk;
- Low levels of confidence;
- Failure to ask questions to support or strengthen their evidence;
- Lack of aggressiveness in the cross examination of witnesses;
- Being less organized in thought and preoccupied with being polite;
- They are full of fear, timid and shy. Men are more assertive and persistent about having their cause heard;
- Most women are not aware of the need for legal representation and often cannot afford it;
- Most women are uneducated and do not even understand the seriousness of the crime that they have committed. They only realize this at the time of sentencing when they hear the length of their sentence;
- The trial is conducted in English and most women offenders are illiterate and fail to follow the proceedings consistently even though there is an interpreter. Most interpreters are not trained for their job and have low education and sometimes misrepresent facts;
- Courts are male-dominated, that is, often it is a male presiding officer, male prosecutor and male clerk.

Trial and sentencing

An outstanding need as far as women offenders are concerned is the need for legal representation during trial in any type of offence that they are suspected of. The current practice is that women are only represented by a legal aid advocate in cases of murder. The major problem here, as table 7 shows is that most women are poor (subsistence farmers) and cannot afford the services of a lawyer. Even in instances where women may be economically better-off, some are not even aware that they can hire a lawyer to represent them. Thus the women have to speak for themselves. Based on the research findings it is clear that this affects women negatively because they have no experience with court affairs since they are often first offenders. It has been mentioned before that during interrogation, whether in court or police stations, they fail to express themselves and are full of fear. Many of the convicted prisoners in the three prisons felt that their sentences were rather harsh. This could be attributed to failure to present their stories coherently, lack of confidence due to their social and economic status, low literacy levels and low self esteem in a largely male-dominated court, and also based on their socialization. Article 10 of the Universal Declaration on Human Rights states that:

‘Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal in the determination of his rights and obligations and of any criminal charge against him.’

A pertinent question as far as the criminal justice system in Malawi functions is how far women get fair trials considering the problems cited in obtaining legal representation and their poor performance during trial as stated above. In murder trials, the use of a jury appointed at the discretion of the court with no legal background and training may also aggravate the woman’s weak position before the law even further. The case of *Republic v Ellena Maganizo* Cr No.153/ 2003 before Ansah J raises a lot of questions of how women fair in trials by jury. There are indications that she was sentenced to death without any consideration of the state of health she was in at the time of the trial, as described above.

Sentencing patterns also appear to be problematic and there are variations between one judge or magistrate and another. Edwards (1984:10) cites Bottomley *et al.* (1973) in observing that many of the decisions made within the criminal justice system depend upon the use of discretion, including discretionary patterns of law enforcement and decision-making by the police, courts and other penal agencies. It may be argued that the sentencing powers of a judge or magistrate as to the type of sentence, its leniency or severity are to a certain extent influenced by their own perceptions of women according to their socialization. This is in agreement with what one female magistrate, Kitty Nkhono, said that:

'Judges are greatly influenced by their own cultural backgrounds and this affects the kind of judgments that they give sometimes in cases involving women.'

This, it should be pointed out, can have positive or negative consequences for the offender.

The study also showed that in untypical female crimes women are perceived negatively and may receive a harsher sentence because of their gender. If the story of Emmie Mkumbira below is taken into account, her trial and sentencing appear to have been influenced by the uniqueness of her case and the public outcry which it invoked. Scutt (1981: 10) cites Sheldon who argues that for offences against morality women receive harsher sentences than men. This could be said to be true as in many defilement cases involving men in Malawi, men go away with sentences of between 2 to 5 years and rarely are they given a sentence of this magnitude. The story of Emmie Mkumbira illustrates this differential treatment between male and female offenders.

Emmie Mkumbira

Emmie Mkumbira, 50 years old, a former local government employee, is in prison for defiling a nine year old boy and infecting him with a sexually transmitted infection (STI). She has been sentenced to seven years imprisonment. She is psychologically down and has been to the mental hospital twice for psychiatric treatment. She has developed continuous headaches, high blood pressure and a hearing problem. She often speaks to herself. Speaking about her trial, she believes that it was very unfair in that her trial was speedily done and judgement was passed quickly without proper representation of her part of the story. Within three days she was sentenced to seven years imprisonment. She believes the magistrate was not fair and was only anxious to dispose of the case. The public and even the police treated her badly. She was beaten and insulted. Her family paid MK 15,000 (US \$100+) to hire a lawyer but the lawyer never took up the case and has been elusive about paying back. She worries a lot because at home she has a mentally handicapped child who is often sexually abused and is now pregnant. She is also anxious about going back home and especially fears her children's attitude towards her.

This story confirms the findings of Swiggert and Farrell that:

'stereotypes not only shape public attitudes and behaviour towards deviants, but guide the very choice of individuals who are to be so defined and processed' (in Edwards, 1984: 17.)

Another area that is problematic for women offenders is their social background. One judge conceded that there is very little information on social background of the accused that filters into the case. This may come in the form of a caution statement taken at the police station and sometimes when the accused is of questionable behaviour, for example, a sex worker. This is often treated as irrelevant in a trial and what matters are the facts of the case. Considering the social background of the women who are currently in prison, it is quite evident that this is a factor in the crimes that have been committed and this can determine the nature and severity of the sentence that could be passed. According to Chipeta J:

'A court ought to be level-headed when dealing with accused persons by treating everyone as a human being who has a right to say yes or no regardless of their occupation. Thus there is need to evaluate evidence and decide accordingly.'

There may be need to conduct a social inquiry but there could be many limiting factors to this, among them lack of financial and material resources. Morris (1987:1) concludes:

'in the processing of female defendants, the courts and the criminal justice system draw on their everyday assumptions of what kinds of people do what kinds of things.'

A male police officer observed that judgments do not often favour women and believed that there is often differentiated treatment of offenders by both the police and judges. He alluded to the release on bail of Alice Gwanzantini after allegedly killing her housemaid with boiling water.

Appeal

The study has revealed that women experience problems when they want to appeal. Many of the convicted prisoners mentioned that they would like to appeal against their sentences although they did not express this need at the time that the sentence was delivered. They said that they failed to mention this need initially because they were afraid and in a state of shock. Those who have realized this is a possibility do not know how they can proceed. This calls for paralegal officers working in prisons to intensify their programmes in the women's section so that the women are not denied the right to appeal if they feel that their trial was unfair. However this is another area which is greatly affected by inadequate staffing in the judiciary and in the Department of Legal Aid. Thus although paralegals may be of assistance at one level (prison) they have little or no control over processes in the judiciary or police. It has been observed that paralegals spend more time with male offenders due to their greater numbers so that their cases can be quickly processed to ease congestion on the male side. It is significant to note that on a daily basis the paralegals provide the only direct link between the prisoner and the justice delivery system.

There is need to understand that having an appeal filed is not an automatic guarantee for release as illustrated in Criminal Appeal No. 30 of 2002, *Republic v Stella Nthini (first appellant) and Mayamiko Kubwalo (second appellant)* who were appealing against the sentence of seven years imprisonment in a case of theft by servant (they stole MK 751, 854.50) whose maximum sentence under section 286 of the Penal Code is 14 years imprisonment. The judge (Chipeta J) dismissed their appeal and in his judgement stated that:

'I believe that once this court gives these appellants the impression that you can steal large amounts of money with abandon and that as long as you can plead that you are young and rather immature and that you are a newcomer to the life of crime you can easily save yourself from lengthy imprisonment then I think they will have all reason to trust crime as a lucrative engagement ...'

Alternative sentencing

Patterns in sentencing based on the experiences of women currently in prison show that community service is one area which is not currently favoured for women but could be used to relieve women from confinement in some minor cases. The option for community service is one alternative which is currently being used in Malawi in criminal cases that qualify for a one-year sentence. Interviews with judges and magistrates and even chiefs revealed that they saw this as a good alternative in most cases involving women, except for murder and other violent crimes. However the main limiting factor is the period prescription, which entails that any sentence above one year would not qualify for community service. It is the argument of this study that there is need to seriously consider this period limitation so that a broader spectrum of women who are mostly first offenders could do community service and save them the pain of confinement in prison. Alternative sentencing also involves payment of fines and suspended sentences. Based on the economic status of women offenders, it may not be economically viable for them to pay fines thus proposals to have them do community service could go a long way in compensating the wrong that they have done.

The appropriateness of imprisonment for female offenders

A male magistrate stated that imprisonment is not appropriate for anyone, regardless of sex. He would give a custodial sentence based on the nature of the crime that has been committed regardless of what drove one to the crime whether one is a woman or not. A male judge of the High Court stated that depending on the manner of the crime:

'I would not hesitate to send them (women) to prison, to inculcate a lesson.'

But he added that women are mothers and have a greater responsibility for providing love and care to children. If they are imprisoned they deprive children of parental love therefore for lighter crimes he would opt for suspended sentences, payment of fines and community service as alternatives to imprisonment. Officials from both the police and the courts stated that sometimes women deserve to be in prison to protect both the victim and the offender. But the attitude of the law should be to give them another chance rather than subjecting them to harsh punishment, as women's crimes are more accidental.

A female magistrate, in contrast, stated that prison is supposed to reform a person but female offenders do not get reformed, as there are no programmes to this effect. Instead they just get punished and are further humiliated by the conditions in prison in addition to their social condition that drove them to commit the crime. Custodial sentences are not the best; courts should allow payment of fines or compensation or even suspended sentences in less serious offences.

Legal aid

Interviews with the Department of Legal Aid revealed that it is heavily understaffed with only five legal aid advocates in all (four males and one female) and one has not yet been cleared to practise. Their services are supported by four paralegals and two law clerks. It was stated that due to lack of resources legal aid advocates have little access to inmates; ideally they are supposed to visit prison every Thursdays. However, they only visit homicide inmates a day before the trial for pre-trial consultation. This includes getting disclosures from state advocates and reading them to the accused, review of caution statements, getting a free version of statements from the accused in cases where they claim that the statement was not voluntary. The principal legal aid advocate in Blantyre mentioned that not many women come to access legal aid as suspects or offenders but many come on behalf of their spouses or relatives who are already in custody.

Based on the weaknesses that women present both in courts and police stations the research has revealed that legal aid is crucial for women offenders. It should be mentioned that this need, although essential, cannot be fulfilled in view of the current weaknesses in the Department of Legal Aid. Government has to take drastic measures to improve the availability of lawyers in the department and ensure their retention in the system through conducive conditions of service.

Role of non-governmental organizations in the criminal justice system

There have been four local non-governmental organizations working in Malawian prisons since 2000 under the initiative of Penal Reform International. These non-governmental organizations are Malawi CARER, Eye of the Child, Youth Watch and Centre for Legal Assistance. By 2002 there were 28 paralegals working in 13 prisons. The main focus of their activities is provision of paralegal advisory services through:

- Conducting paralegal clinics in prison on a daily basis;
- Inspecting prison conditions;
- Screening of prisoners to assist them with bail and appeal applications and assisting those who are vulnerable, for example, women, children, the elderly and terminally ill;
- Compiling case lists and referring individual cases to the courts or police.

Interviews showed that paralegals assisted a number of prisoners to secure bail and appeal. An evaluation of the paralegal advisory services in Malawi shows that they have facilitated the release of over 1,350 prisoners through bail, discharge or release on compassionate grounds and have played an important role in speeding up the trials of homicide remand prisoners by bringing their cases to the attention of the relevant authorities. Although the non-governmental organizations consulted could not give figures of the women they have assisted, Malawi CAREER mentioned that they had secured the release of 16 women in the last six months through collaboration with a female lawyer, Ngei Kanyongolo, of the Legal Resource Centre. She took up the women's cases on a pro bono basis.

It should be pointed out that the work of paralegals is sometimes hampered by the failure of the criminal justice system to respond in a timely manner to the issues that are brought to light through the paralegals. Paralegals can only influence what happens in the justice delivery system to a certain extent and are thus dependent on the goodwill of the players in the system to take action. It is noteworthy that their involvement in prisons has brought out visible results, particularly for vulnerable groups including women. It goes without saying that linkages between paralegals and the justice delivery system need to be further strengthened and formalized to assist more women and vulnerable groups in accessing justice.

7 Key emerging themes

Poverty and illiteracy

Poverty and illiteracy is one of the major themes that has come out explicitly as a problem that has influenced the women offenders' position prior to committing a crime. The impoverished family backgrounds of the women offenders and their lack of education are important variables in the offences that have been committed. Many of the women outlined stories of how they were economically handicapped in feeding and providing for their children, and others, due to orphanhood, illiteracy and lack of employment, were forced into prostitution in order to survive.

From a legal point of view, poverty is a real issue for both the offender and the system that dispenses justice. The women are not empowered economically therefore cannot afford legal representation. On the other hand lack of resources by the courts, police, Department of Legal Aid and prison are all factors that affect the effective and expedient dispensation of justice. Remote issues like bureaucratic limitations of the state stemming from demands for economic reforms by the World Bank and IMF through structural adjustment programmes have made poverty more perverse in Malawi, particularly for women, and are essential in understanding women's involvement in crime. It has been established that there is a high link between crime and poverty.

Women's 'emancipation' or increased freedom

Many people who were interviewed, including judges and policemen, believed that the increased involvement of women in crime in Malawi could be explained by social liberalization and democracy that women have gained with multi-party politics since 1994. The media too has had its role in projecting this idea and have attributed it to the 'emancipation' of women which they have associated with the wave of gender equality sweeping the country following the Beijing conference of 1995. It should be mentioned that there is an ingrained weakness in this view as practice shows that the higher the level of education the more likelihood that a woman will break away from an oppressive relationship which may influence her to commit a crime.

This study has significantly challenged the view above as a large majority of women offenders belong to the lower socio-economic spectrum. Tsanga (in Chiedza and Stutton, 2003:215) observes that:

'...as the women narrate their stories from childhood, we better understand the opportunities and constraints that shaped their lives, and how social, cultural and economic realities often act in combination to reinforce women's oppression.'

These women are simple subsistence farmers, unemployed, prostitutes, widows and single women who are mostly not empowered socially or economically. Indicators in tables 5, 6, 7 and 8 show that there is less crime among the urban, the literate and the middle age groups, aged 41 to 50, who are likely to be engaged in some form of occupation. Paradoxically it has been seen that empowerment of women through education, economic independence and decision making could go a long way towards alleviating the double burden that women have as a result of the dichotomy of being poor and being female. Similarly, socio-cultural beliefs, such as beliefs in witchcraft, could be significantly weakened by exposure to education and scientific reasoning.

Gender and socialization of women

This is a major point of reference and influencing factor in the crimes that women have committed. It is the contention of this research that the criminal behaviour of women currently in prison has been largely determined by their social position and role. It is their social circumstances emanating from their status as mothers, wives, daughters, female students, girlfriends and sex workers that have shaped their circumstance before the law. The low social status of women could also explain their involvement in certain crimes rather than others, for example, theft by servant in contrast to murders of husbands, children or even those that are witchcraft related. There are differences in opportunity for committing certain crimes that men are involved in because of the socially constructed roles assigned to women. Responses from interviews with both police and prison officials confirmed that:

- Women are generally not criminal and their crimes are gender related – to do with their relationships with men – which result in unplanned murder (accidental), fights with a husband's girlfriend or causing grievous bodily harm;
- Women are afraid of crime, unlike men. However, one prison official observed that the number of women committing crimes is increasing. He attributed this to society being more fluid and restriction on women's movement as more lax hence women can engage in the same activities as men.

It can also be seen that cultural expectations of women result in women being condemned before the system finds them guilty. Society does not give a woman room to consider mitigating factors and they are rarely given the opportunity to access redress to their problems so that in the end they resort to violence. Harris (1977) explains how particular perceptions of women in relation to crime are a product of wider power relations within society. The unifying theme is that women, whether suspects, defendants or offenders, are dealt with in part in accordance with the degree to which their criminal behaviour deviates from what is expected of them in their appropriate gender role.

Hence a gender analysis of women's roles in the family, their access and control over resources (poverty analysis) and identification of the influencing factors that determine who gains, benefits and controls, would be useful in determining women's position before the law. The study has revealed that men are prime determinants of the status quo because of unequal power relations stemming from the socialization of girls and boys in the family. Womanhood or motherhood and male hegemony are other gender dimensions which are detrimental and pose a number of challenges to women, and in this instance to women who have committed crimes. Crimes like abortion underline this theme quite clearly. Thus the criminalization of abortion and lack of access to family planning methods has led to the further marginalization of women.

There is also serious need for the conscientization of these women to challenge unequal power relations with men emanating from their socialization which often relegates them to subordinate positions in matters of marriage and relationships. A key issue here is the double predicament that women have as a result of being female and poor, apart from the socio-economic underpinnings of their subordination.

Family life and imprisonment

This is probably one of the greatest challenges facing the female offender. It has been established through this study that women offenders face greater emotional stress because of the severed family relationship resulting from their imprisonment. For most women their major worry is the welfare of their children, the lack of motherly care and repercussions that may befall the children as a result of their absence. It may be argued that imprisonment of women has far-reaching consequences on children especially those who are not yet mature enough to stand on their own feet. As the story of Emmie Mkumbira above shows, children may be prone to child abuse, early pregnancy and may suffer materially because of the absence of a mother at home. This is further compounded by the breakdown of the extended family system due to real challenges such as HIV/AIDS and poverty, thus there is failure to provide the necessary support. Another social dimension of the female offender is that imprisonment often leads to breakdown of marriage relationships for those that were married. Several female offenders pointed out how their husbands had abandoned them and were not visiting them. Some had fears that their husbands may have remarried.

Traditional structures of conflict resolution

The study has revealed that semi-autonomous fields, like chiefs and marriage counsellors, have an important role to play in conflict resolution at village level but there are weaknesses in the way they handle matters relating to women. As stated earlier, such forums operate under the principle of restorative justice and social cohesion. It should be mentioned that in issues affecting women the need to restore marriage and build sound relationships has been taken as a priority without considering the deep emotional pain that a woman may be undergoing. Thus sometimes a woman is forced to take matters in her own hands and she commits a crime. Some of the women who are currently in prison for various reasons, particularly malicious damage of property, murder and causing grievous bodily harm, mentioned that they tried to resolve their marital problems using these forums. To their dismay they were not adequately assisted. It can be argued that customary law which governs relations within the family, though not detrimental to women, in many instances adversely affects women, particularly when it is supported by patrilineal systems of marriage which often favour men. Thus it can be seen that the failure to effectively penetrate traditional structures of conflict resolution which are also male-dominated is another problem that women experience socially. On the other hand, legal powers of chiefs are not adequately recognized in conflict resolution hence this limits how much they can do to resolve matters. There may be need to give them formal recognition so as to improve access to justice at community level.

Community re-integration

The study has revealed that a lot of women who are currently in prison have a lot of anxiety about returning to their communities after serving a prison term. Many expressed fears about how they would be perceived by the family of the victim on one hand, their own family and others within their community. It should be noted that this is a real predicament for women offenders considering that they come out of prison without any special skills which could help them make informed choices of what they should do next or to lead an independent life away from a community which may shun or ostracize them. Efforts currently being made in Zomba prison by Prison Reform International to rehabilitate male offenders before release could go a long way towards easing the pressure that women undergo before they are released. There may also be need to escort the woman back into her community to ensure that they are no reprisals from the aggrieved party.

Fairness and equality before the law

The right to be heard or *audi aterm portem* is a fundamental right for anyone who finds herself or himself on the wrong side of the law. In addition to this, fairness and equality are core elements for the dispensation of justice for both the offender and the victim. The research has shown that these basic elements of justice are elusive as far as criminal women who are processed in the criminal justice system are concerned. The reason being that there is ambivalence in the system in that much as it recognizes the weaknesses that women have as offenders in general, it does not effectively respond to the problems that women face at different levels of the criminal justice system when they commit crime. Hence women bear the consequences of committing crime doubly because of the failure of the system to adequately and expediently respond to their needs.

Different stakeholders have emphasized the vulnerability of women but surprisingly evidence shows that there are no adequate mechanisms for addressing the problems that women face as defendants. Chuulu *et al.* (1999:9) argues that a critical look at the rule of law in practice indicates that the conception of justice as the formal and impartial administration of public rules has not been fully realized. Chuulu further observes that radical feminists such as Catherine Mackinnon (1989) Carol Smart (1982) and Carol Gilligan (1982) have all identified male bias in the law and hence question its ability to deliver gender justice, particularly in view of the public/private divide which limits state law to the public arena. It may be argued that in the processing and confinement of the female offender there is need to understand the ingrained weaknesses that women have at different points of the system (police, judiciary and prisons) so that their basic right to equality under the law is not compromised by the factors cited in the study. There may be need to draw specific guidelines for the treatment of women offenders based on their special circumstances. However, it should be emphasized that this should not be detrimental to the position of the male offender who may also require a differentiated treatment in the system.

8 Recommendations and conclusion

General recommendations

There were a number of recommendations that were made by different stakeholders, including women offenders, to improve prison conditions and the entire criminal justice delivery system. These recommendations are summarized below:

Suggestions for improving prison conditions for women

- 1 A separate prison should be built for women to cater for women's needs. This should have facilities for children and lactating mothers.
- 2 Rehabilitation facilities should be provided for women because they tend to spend too much time thinking and being idle only enhances this problem.
- 3 Practical skills should be introduced for women to help them to successfully integrate back into society after release.
- 4 Library facilities should be introduced in the female section to make books more accessible to women.
- 5 Suitable and adequate sanitary wear should be provided.
- 6 The prison service should introduce a system whereby female prisoners are separated according to the type of crimes they have committed.
- 7 Women offenders should be given time to meet spouses at least once a month (30 minutes in privacy) because they are often teary and get sick due to depression.

- 8 Separate facilities should be introduced for children in prison and appropriate diets for pregnant, nursing and lactating mothers.
- 9 Conditions of service for prison officers should be improved in terms of promotion into senior positions, especially for long-serving officers.
- 10 Resources provided to prisons such as transport facilities and food provisions for prisoners should be improved.
- 11 Services offered at Zomba central prison should be decentralized to regional level to relieve pressure on Zomba and ensure that prisoners are nearer home.

Suggestions for improving holding of women in police stations

- 1 Policewomen should be used to give services to women while in police custody to avoid allegations of sexual abuse.
- 2 The system of follow-up of suspects on remand needs to be improved in order to conform to the 15 day remand period, otherwise suspects should be released.
- 3 Cells for both males and females should be spacious and include adequate ablution facilities.
- 4 There should be provision of a government subvention to officers in charge to cater for food for the needy.
- 5 Police stations should have confidential rooms for private interviews.
- 6 Holding and remand facilities should be introduced for female juvenile offenders.

Suggestions for improving justice delivery

- 1 Legal representation should be made available to women to ensure fair trials as the system seems to intimidate them and women generally cannot afford to hire lawyers.
- 2 Government should recruit more legal aid advocates and provide them with conducive conditions of work so as to retain them in the system.
- 3 The training of those in charge of dispensing justice should be intensified so that they are sensitive to the needs of female offenders.
- 4 Application and interpretation of the law should consider issues of equality between men and women.
- 5 Women lighter should be given lighter sentences depending on the circumstances of the crime.
- 6 Suspended sentences, fines or community service should be considered and courts in their own right should consider not sending women to prisons for minimal offences.
- 7 There should be careful screening of women before they go to court. Women like juveniles are vulnerable, therefore they should be treated as vulnerable.
- 8 Women's cases need to be looked at carefully by judges because most of their crimes are committed in the heat of passion. Investigations involving women should include thorough background information about the person and the case.
- 9 Some cases are minimal therefore they should be dealt with at village level to avoid women being imprisoned.
- 10 Civic education in villages should be intensified to warn others about the evils of committing crime.

Recommendations of the study

Based on the findings and analysis of the study, the following major recommendations are proposed to effect changes for the benefit of women offenders in Malawi and elsewhere.

Legal reform and policy review

There is need to push for review in the interpretation and application of current constitutional and international human rights provisions favouring women, to effect equitable and consistent application of the law.

- Review of existing laws that do not favour women. The Law Commission initiative to review all gender-related laws should be recommended. This should also consider the issues raised in this study pertaining to women offenders.
- Introduction of new legislation to improve the status of women before the law. A key area is the review of abortion laws to make abortion legal and accessible to women.
- Domestication of international Instruments, such as CEDAW and the Universal Declaration of Human Rights, into national law.
- Review the efficacy of trial by jury in murder cases to avoid incompetence and mismanagement of justice. The provision in the CP and E Code can be used so that a competent judge can handle trial in murder cases.
- Lobby for the abolition of the death sentence. The current measures taken by the incumbent president to commute death sentences to life are a step in the right direction.

Legal and social education

The study has shown that women are unaware of their legal rights and are handicapped by their subordinate status socially, economically and even before the law. Another observation is that women's inferior status is produced and reinforced through adverse social practices and ignorance of the law by its intended beneficiaries. It is being proposed that legal education is essential to promulgate popular support for progressive changes in the law. Based on this finding the following broad recommendations are made to address this shortfall:

- Broad-based legal rights education targeting rural masses, particularly women.
- Mass civic education on such issues as gender, cultural beliefs, marriage, and so on, using popular theatre and drama.
- Legal literacy programmes incorporated into curricular for functional literacy or adult literacy programmes.
- Mass legal literacy programmes using the mass media, radio and popular theatre.

Legal aid

Lack of legal representation and inability to access legal services is a major challenge to a female defendant. This factor is further compounded by women's lack of economic muscle on one hand and the shortage of resources in the Legal Aid Department on the other. The following recommendations can go a long way to meet the need for legal aid by female defendants:

- Increased use of volunteers, paralegals and law students to provide basic legal services to women and the poor.
- Introduction of mobile legal aid clinics based on the model of the paralegal system but supported by a qualified lawyer.
- Setting up a network of lawyers from the private sector to offer pro- bono legal aid services to women.

Training

It has been established that the justice delivery system is substantially complex for women offenders. The critical areas being court processes and procedures, male dominance at different levels of justice delivery and, above all, obstacles entrenched in the interpretation and application of the law by different stakeholders from the police to the judiciary. It may be said that the problem is not just in the letter of the law but also with those who administer it. It is suggested that to improve the situation for female offenders, there is need for:

- Continuous gender sensitization and analysis training for all stakeholders involved in the administration of justice;
- Incorporation of the subject of gender and the law, and gender and sexuality in the curriculum of law students at the university;
- Training of prison wardresses and policewomen on how to handle female offenders;
- Provision of training in psycho-social counselling for select prison and police officers;
- Formal educational programmes and practical skills training for female inmates

Structural changes

The study has revealed that there are several weak areas in the operations of the criminal justice delivery structure. Some of the key suggestions in this area are:

- Introduction of an open prison for women so that their role as mothers and care givers is not completely disrupted by confinement. In this vein, extension of community service beyond one year for women should be effected. Another alternative is building of a separate prison for women with special facilities to meet the needs of women;
- Introduction of conducive conditions of service for staff in the prison service and opening of opportunities and promotion for female warders;
- Adequate provision of appropriate food, accommodation and sanitary facilities to women based on their specific conditions in prison. Particular attention should be paid to those that are sick, pregnant and lactating;
- Improvement of remand and holding centres. This should include issues of cell capacity and facilities like toilets and bathrooms, food and provision of bedding;
- Government should establish reformatory activities and a relevant system for dealing with female juvenile offenders.
- Introduce resettlement projects for female ex-prisoners to help them re-integrate into the community and develop viable income-generating activities.
- Non-governmental organizations should be given more formal recognition as potential government allies in the accessibility of justice.

Conclusion

This research has revealed that there are a number of social and legal challenges that have shaped the condition and position of women as offenders. These problems can be traced to the inferior position of women before and after commission of a crime and the legal obstacles that affect them more adversely than men. There are a number of pertinent issues that have to be addressed if women are to achieve both de facto and de jure equality with men. It is hoped that this research will provide insights for further development of theoretical and practical strategies needed to overcome the injustices that women suffer as they seek to pursue their rights, even in circumstances where they find themselves on the wrong side of the law. The following quotation rightly concludes the despair that women face, both socially and legally:

‘It is men, men only men, from the first to the last that we have to do with! To please a man, I did wrong at first, and then I was flung about from man to man. Men, police lay hands on us. By men we are examined, handled, doctored and messed about with. We are had up before magistrates who are men and we never get out of the hands of men (Shield, 9 May 1870, quoted in Edwards, 1984: 1)

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Annex 1: List of people interviewed

Name	Organization	Position
Maxwell Matewere	Eye of the Child	Executive Director
Gift Numeri	Eye of the Child	Para- Legal officer
Victor Mhango	Eye of the Child	Para- Legal officer
Norah Khonje	Eye of the Child	Para- Legal officer
McDonald Kaipa	Eye of the Child	Para- Legal officer
Mellonisa Kachimanga	Eye of the Child	Para- Legal officer
Mr Kainja	Malawi Prison Service	Public Relations Officer
Mr Tobias Nowa	Malawi Prison Service	Senior Assistant Commissioner of Prisons
.Mr Chisi	Malawi CAREER	Co-ordinator
Dalitso Mipando	Malawi CAREER	Para- Legal
Chifundo Harawa	Malawi CAREER	Paralegal
Charity Kalimba	Zomba Central Prison	Wardress
Nellie Nyambalo	Zomba Central Prison	Wardress
Mr Chitete	Maula Prison	Station Officer
Mrs Anne Sanudi	Blantyre Police Station	Woman Sub- Inspector
Mr Gama	Blantyre Magistrate Court	Chief Resident Magistrate
Ms Kitty Nkhono	Soche magistrate Court	First grade Magistrate
Reynock Matemba	Dept. of Legal Aid	Principal Legal Aid advocate
Sergent Rauchi	Blantyre Police Station	C.I.D
Mr. Kamwera	Blantyre Police Station	Officer In Charge
Dorothy Silumbu	Chichiri prison	Wardress
Norah Juwa	Chichiri Prison	Wardress
?	Nchalo Police	Officer In Charge
Mrs Bwanali	Manase Township	Mother to female offender
Name with held	Nchalo Trading Centre	Acquaintance of a female offender
Justice A. Chipeta	High Court of Malawi	Justice of the High Court
Mavis Kumimba	Maula Prison	Wardress
Joyce Banda	Maula Prison	Wardress
Patricia Katapa	Maula Prison	Wardress

Annex 2: Statistics of women offenders in Zomba prison

Name	Age	Marital status	Educ. level	Offence	Sentence
Venita Maiche (Farmer)	Over 50	Widow	Illiterate	Murder of 4 year old grandchild	Condemned to death
Elena Maganizo (Farmer)	40	Married (Widow)	Illiterate	Murder of husband	Condemned to death
Emmie Mkumbira (Clerk)	50	Widowed 1993	Form 2	Defilement of 9 year old boy and infecting him with an STI	7 years
Anna Ntaja Loni Ntaja and son jointly charged (farmers)	48 23	Married	?	Murder of 2 year old child belonging to their brother	On remand
Gladys Lalli	19 (With baby 1.6 years)	Married	Standard 7	Murder of their aunt–suspected of witchcraft	Remand since 9 September 2003
Ndamilile Lalli	41 (with baby 7months)	Married	Illiterate		
Esnath Barnett Farmers, jointly charged	23 (with baby 10 months)	Married	Standard 2		
Marium Geoffrey	31	Married to a polygamist	Standard 8	Baby theft (kidnapping a 1 week old baby)	5 years imprisonment
Margret Makolija	21	Married	–	Murder of her 2 sons	Life sentence
Tambudzai Chirwa	20	Single	Standard 6	Theft, house breaking Escape from lawful custody	7 years
Edesi kuwula	53	Single	–	Murder of husband	On remand
Stella Nthini	23	Single	Form 4	Theft by servant	7 years imprisonment
Dorice Namboya	23	Married	–	Murder of 6 year old son	Life sentence
?	Over 50	Widow	–	Murder of husband jointly charged with boyfriend	Life sentence since 1992

Annex 3: Statistics of women offenders in Maula prison

Name	Age	Marital status	Educ. level	Offence	Sentence
Idah Kazembe (barmaid)	20	Divorced (4 children)	Illiterate	Murder – killed a lover	Remand since 6th October 2002
Tipilira Salikani (Subsistence farmer)	22	Divorced (3 children)	Illiterate but on prison lit. prog.	Murder of her twins (1 wk old thrown in well)	Remanded 17 April 2002
Aliness Dokotala (Subsistent farmer)	middle aged	Single (4 children)	Illiterate	Murder of month old baby (thrown into a well)	Remanded February 2002
Monica Stanley (subsistent farmer)	20	Married and currently 8 months pregnant	On remand since end of September 2002	Jointly charged with husband for causing grievous bodily harm to co-wife	Illiterate
Agnes Mandala (Sex worker)	18	Single	Std 4	Murder of baby. (4 months old)	On remand since 3 rd April 2003 (Alleges that she was drunk.)
Laina Chisoni (subsistent farmer)	beyond middle age	Married	Illiterate	Murder of 6 year old son, husband jointly charged	On remand since June 2002
Daina Wilson (Sex worker)	18	Single (1 child)	Std. 7	Theft- stole MK 12.000.00 from friend	Remanded 19 October 2003
Dailessi Vikacha (student)	18	Single	Form 1	Murder of 1 week old baby	Remand since October 2002
Mercy Sitolo (hospital cleaner)	35	Widow (4 children)	Form 4	Theft by servant	On remand since 30 October
Rahabe Kata (subsistence farmer)	42	Married, baby (22 months)	Std 7	Murder of baby (7 months) of husband's girlfriend	On remand since 28 October 2003
Iness Jumbe (domestic/ nanny)	25	Married	Std 7	Theft of R2,200 from employer jointly charged with male domestic	12 months imprisonment
Nasimango Kauta (subsistence farmer)	47	Divorced	Illiterate	Arson – set fire to son in laws' garden, accused him of being a witch	13 months imprisonment
Zelipha Nkhoma (subsistence farmer)	middle aged	Married	Illiterate	Drug trafficking – found in possession of hemp (belonging to husband)	5 years imprisonment
Maggie Banda Daka (Clerk)	43	Married	Form 4	Theft by servant –MK 50,000 belonging to her office	4 years imprisonment

Annex 4: Statistics of women offenders in Chichiri prison

Name	Age	Education	Marital status	Offence	Status of offence	Time in prison
Enifa Chibale	24	Std 5	Married (2 children)	Unlawful wounding- injured husbands girlfriend	Remand	2 months
Sheila Chiphwanya * Has T.B.	27	Std 5 (1 child)	Single	3 counts of robbery	Convicted – 11 years	11 yrs
Maria Solomoni	46	Std 6	Widow (6 children)	Malicious damage of property - witchcraft related	Convicted – 2.4 years	2 yrs 4 mths
Maria Chankomba	27	Std 6	Married (1 child)	Murder	Remand	One month
Merie Tambulasi	23	Form 1	Married (no children)	Murder of sister's 9 year old son	Remand	5 months
Faulemeni Thedi	52	Std 1	Married (6 children)	Murder of neighbour over a petty quarrel	Remand	9 months
Fegi Moyo	23	Std 5	Married (1 child)	Murder	Remand	One month
Loveness Kalonga	23	Illiterate	Single (1 child)	Murder of her girl friend	Remand	1 year
Mary Kachiswe	18	Illiterate	Single (no children)	Murder	Remand	1 yr 9 mnths
Agie Manyozo	25	Std 5	Single (3 children)	Abortion	Convicted	1 yr 5 months
Violet Kunje	19	Form 1	Single (no children)	Theft	Convicted – 6 years	6 yrs
Veronica Gule	22	Std 4		Abortion	Remand	2 yrs
Evelyn Mawere	42	Illiterate	Married (7 children)	Murder	Remand	2 yrs
Jelinda Chokuwa	45	Illiterate	Married (4 children)	Murder	Remand	
Twalire Amini	35	Illiterate	Married (6 children)	Murder – beat grandmother to death over witchcraft	Remand since 5 July 2003	4 months
Agness Time	30	Illiterate	Married (4 children)	Unlawful wounding	Convicted	10 months
Blandina Tewesa	17	Std 8	Married (no children)	Theft	Remand	2 days
Susan Thanki	27	Form 4	Married (no children)	Theft by servant	Convicted – 4 years sentence	48 months
*Esther Lafaele (baby in prison)	-	Illiterate	Widow (11 children)	Murder of husband jointly charged with son in law.	Remand – 13 June 2003	5 months

Name	Age	Education	Marital status	Offence	Status of offence	Time in prison
Funny Malemia (no children)	30	Illiterate	Married	Murder – jointly charged with husband for killing a patient under their care	Remand	
*Solofina Manuelo (baby in prison)	27	Std 7	Married (3 children)	Murder	Remand since October 2003	
Gezina Kanthukanko	31	Form 4	Married (2 children)	Obtaining goods by false pretence	Convicted	2 yrs 6 months
Eliza Chiwanda	40	Std 4	Married (no children)	Murder	Remand	One month
*Elizabeth Dick (baby in prison)	29	Std 7	Married (3 children)	Robbery	Convicted – 2.5 years	2 yrs 6 months
*Yasmin Jeke (baby in prison)	20	Form 2	Married (1 child)	Robbery/ fighting	Convicted – 2.5 years	2 yrs 6 months
*Eunice Malunga (baby in prison)	22	Form 1	Married (1 child)	Murder	Remand since 27 May 2003	
Agness Kojola	42	Illiterate	Married (4 children)	Grievous bodily harm	Convicted	4 yrs
Priscilla Kukada	15	Form 1	Single (no children)	Theft	Convicted – 6 months	6 months
Fallace Anderson	21	Std 8	Single (no children)	House breaking	Convicted	3 yrs
Loveness Zimba	17	Std 7	Married (1 child)	Housebreaking	Convicted	3 yrs
Esther Moffat	19	Std 7	Single (no children)	Malicious damage of property -witch craft related	Convicted – 2.4 years	2 yrs 4 months
Julita Micheal	32	Illiterate	Married (1 child)	Unlawful wounding	Convicted	4 months
Felista Zeka	30	Std 8	Married (1 child)	Domestic violence	Remand	2 days
Maureen Bwanali	28	Std 7	Married (3 children)	Murder of brothers children – ritual cleansing from witchcraft	Remand since 2002	5 months
Shulling	34			Illegal immigrant		2 days
Xie Fang Kan	28			Illegal immigrant		2 days
Precious Ntanzi	31			Illegal immigrant		2 weeks

*Has a baby in prison