

Report on Malawi

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This report is submitted by **Charlotte wezi Mesikano**, a woman's rights activist, lawyer and researcher on behalf of the **Women's Crisis Centre**¹ and the **Sexual Rights Initiative**². It focuses on issues of the legal position in relation to sexual and reproductive health rights, and how the law enables or infringes on the full realisation of rights for Lesbian

Background and Context

1. Malawi as a state, signed, ratified and acceded to several major UN Conventions. Specifically the Convention on the Elimination of All Forms of Racial Discrimination³, International Covenant on Civil and Political Rights⁴, The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment⁵, the Convention on the Elimination of All Forms of Discrimination against Women⁶, the International Covenant on Economic, Social and Cultural Rights⁷, the Convention on the Rights of the Child⁸, and the African Charter⁹.

2. According to section 211 of the Constitution¹⁰, only the Conventions which entered into force before 1994, form part of the law, which can be used in domestic courts and are binding. Ratifications to UN Conventions after 1994 can only have a binding effect if a specific Act of Parliament to domesticate the provisions set out in the Convention has been enacted. Failure of which, the Convention shall be persuasive and used in interpretation of the constitution but not have a binding effect.

¹**The Women's Crisis Centre**, is a young organisation which aims to assist women in all forms of crisis in Malawi. WCC was created in 2009 with its mission to provide, legal and psychosocial assistance to women who are victims of human rights violations.

² **Sexual Rights Initiative**: Coalition including Action Canada for Population and Development (ACPD), Creating Resources for Empowerment and Action (CREA, India), Federation for Women and Family Planning (Poland), Mulabi - Latin American Space for Sexualities and Rights, and others.

³ Ratified in 1996

⁴ Ratified in 1996 Optional Protocol 1, <http://www.equitas.org/english/ed-manuals/un-road-map/ch-05-Ratification-UN-Instruments.pdf>

⁵ Ratified in 1996

⁶ Ratified in 12 March 1987 <http://www.nova.edu/SASA/cedaw/cedrat.html>

⁷ Ratified in 1976

⁸ Acceded in 1991

⁹ Ratified in 1989

¹⁰ (1) Any international agreements entered into after the commencement of this constitution shall form part of the law of the republic if so provided by an Act of or under an Act of Parliament. (2) Binding international agreements entered into force before the commencement of this Constitution shall continue to bind the republic unless otherwise provided by an Act of Parliament. (3) Customary international law, unless consistent with this constitution or an Act of Parliament, shall form part of the law of the Republic.

Malawian context on homosexuality

3. In Malawi homosexuality and same sex relationships are viewed offensive to laws, morals and values rather than a human rights issue. Currently it is perceived as a weapon of abuse by those in high financial standing, to impose their sexual preferences on economically disadvantaged groups.

4. In reality the environment in Malawi provides no protection but hostility towards the promotion of human rights of GLBT persons. The lack of appreciation of the subject, and the strong religious and cultural background within which human rights are accepted in the country present hostility and resentment for this group of people. Resultantly human rights are accepted but with reservation on this group of minority's rights.

5. The Malawian population of 13.1 million¹¹, 82 percent practises Christianity and 13 percent practice Islam¹². Consequently these religions set the pace, for social values which people respect and adhere to. The social construct of sex and gender naturally develops according to religious doctrines. The church in Malawi institutionalises sexual conduct, and accepts only heterosexual relationships, therefore normalising resentment towards same sex relationships. This has encouraged a situation where, some anonymous organisations have formed an ANTI-GAY¹³ movement in Malawi which aims to advocate and launch a publicity campaign against gays in the country. They are openly looking for funding and support. Yet homophobia is a social evil equally destructive as xenophobia, racism, and any other form of discrimination which propagates hate. This open display of homophobia directly forces those people who are same-sex attracted to live fearing for their lives, due to the social environment which is against their sexual orientation and preference.

6. The religious definitions of gender have constantly been challenged by women's rights activist in Malawi. With the advent of democracy after 1994, the equality and non-discrimination provisos in the constitution have broadened the understanding of sexual identity by many young men and women. This has led to a younger generation of people exercising their rights to have non-traditional sexual preferences and not conforming to social expectations of sexual and social behaviour.

7. Gender identity is defined as a personal conception of oneself as male or female¹⁴. The understanding of Sexual Rights in Malawi has evolved, such that both women and men enjoy the right to chose whom to have sex with, under what conditions, and when. This in a way has liberated individuals to explore other none conventional choices of same sex relationships, which are being expressed today.

Repressive regulation of Sexual conduct through unnatural offences in the Penal Code

8. The Code criminalises sexual conduct between people of the same sex. This discourages same sex relationships, and people in such relationships live in fear of prosecution by state authorities. Fear of arrest and detention has driven people in same sex relationships

¹¹ <http://www.nso.malawi.net/>

¹² http://unstats.un.org/unsd/demographic/sources/census/2010_PHC/Malawi/Malawi_Press.pdf

¹³ Daily Times 31 March 2010

¹⁴ <http://emedicine.medscape.com/article/917990-overview>

underground, to live secretive lives, fearing not only castigation, discrimination, and harassment. But also arrest and serving long sentences due to their breach of the law. Under section 153 of the Penal Code, sex against “the order of nature” is a felony. Section 156 further provides for indecent practices between males.

9. In legal interpretation “sex against the order of nature”, is classified not only in homosexual activity, but in heterosexual activity as well. Anal sex and oral sex fall in this category because they are considered sexual acts against the order of nature. And these remain offences under this provision even when they are consensual, between adults and conducted in private. Therefore the perception that homosexuality is illegal is misleading as it is the sexual acts that are illegal, and in fact many opposite-sex consensual adult sexual acts are also illegal under the provision. The illegality of these consensual sexual acts between adults violates constitutional and international HR principles and standards. Much as interpretation or alignment of human rights with LGBT rights is believed as an interference with human rights in Malawi. The law of god and the law of man are in this debate, used synonymously. This interpretation of statute law based on religious principles, is a manifestation of discrimination and the use of the reproduction argument, that men and women were designed for procreation, distorts reproductive rights. On the other hand, the availability of contraceptives in Malawi has enabled men and women to determine whether, when, and how often to have children.

10. Malawi’s policy on HIV/AIDS acknowledges the prevalence of homosexuality and classifies it as Men having sex with Men. However there is a code of silence in policy and law, to protect people in same sex relationships, since it is illegal and should not be promoted in one way or the other.

Sexual and Reproductive Health Rights

11. In Malawi women have limited power and control over their sexual and reproductive health because of gender norms and unequal gender relations that are deeply embedded in a culture that promotes male dominance in sexual relations; condones male promiscuity and sexual exploitation of women through harmful cultural practices¹⁵. In response to this imbalance, sexual rights have been advocated, to reduce transmission of HIV/AIDS and protect women, in heterosexual relationships.

12. While Sexual and reproductive health rights education are promoted, they remain wanting in that they are not informative of the human rights of those people same-sex attracted. Because same-sex choices are criminalised, LGBT rights are not well publicised, organizations fear that they will be admonished, to be promoting acts which are criminal in nature. Homophobic penal laws, and religious interpretation of secular laws, have created a hostile environment for full enjoyment of Sexual and Reproductive Health rights.

Constitutional provisions and Discriminatory treatment of homosexuals in Malawi

13. Within a constitutional framework, the right to dignity is provided for under Section 19¹⁶. Yet in criminal cases involving sexual offences, a medical examination of the victim or the

¹⁵ Government of Malawi , Women , Girls and HIV/AIDS , Programme and National Plan of Action 2005-2010

¹⁶ (1) The dignity of all persons shall be inviolable. (2) In any judicial proceedings or in any other proceedings before any organ of the State, and during the enforcement of a penalty, respect for human dignity shall be guaranteed. (3) No person

accused is undertaken to validate the offence. In sexual assault cases, the necessary medical examinations must be undertaken with consent of the victim or court order of the accused and this doesn't occur always. In cases of offences against the "order of nature provision" it implies not only a violation of international human rights standards to consider it a crime, but such intrusive medical examinations further violate the same standards and undermine the dignity of those who engage in consensual sexual acts with other adults of the same-sex.

14. The right to equality is further protected under Section 20 of the Constitution¹⁷ and the right to privacy is further protected under Section 21¹⁸. The constitution in this regard is important, in that it protects privacy of individuals in every aspect of life. This means that section 156 of the Penal Code cannot withstand constitutional scrutiny since it aims to prosecute consensual acts, conducted in private.

15. Currently the case involving same sex relationships, which led to the arrest of two men try to apparent that their arrest, interrogation, and taking of witness's statements was not done with respect to their right to privacy and human dignity. This happened despite the freedom from torture, inhuman and degrading treatment, being enjoyable without limitation in the constitution under Section 44. This raises pressing concerns that the inhuman treatment which people in same-sex relationships have received in the hands of the police contravenes the constitution. And further that they do not enjoy equal protection from the law.

16. Conclusively, the rights of people in same sex relationships, or with same sex preferences are not enjoyed freely in Malawi. They face double discrimination, firstly that their sexual acts are criminalised, and secondly they cannot be protected by the law and are in essence discriminated against. The state instead of providing a protective environment is prosecuting people in same sex relationships. Society at large is hunting them down, and social spaces such as churches are castigating people with same sex preferences. Much as sexual orientation and preference is a cornerstone of sexual rights, the state is failing to protect this right, therefore limiting and creating a hostile environment for same-sex relationships to exist.

Recommendations

The State of Malawi should:

17. Criminalize the inhuman treatment of people in sex relationships, and outlaw homophobia and publication of anti-gay propaganda and hate speeches.
18. Request reforming the law, through the Malawi Law Commission which is the Constitutional Body responsible for law reform, for reformulation of the Penal Code so that it protects and not persecute people who chose same sex partners.
19. Provide training workshops for lawyers and judicial officers such as judges and magistrates, to understand the different forms of sexual orientation, and to be able to

shall be subject to torture of any kind or cruel, inhuman or degrading treatment or punishment. (5) No person shall be subjected to medical or scientific experimentation without his or her consent.

¹⁷ (1) Discrimination of persons in any form is prohibited and all persons are, under any law, guaranteed equal and effective protection against discrimination on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, property, birth or other status (2) Legislation may be passed addressing inequalities in society and prohibiting discriminatory practices and the propagation of such practices and may render such practices criminally punishable by the courts

¹⁸ (1) Every person shall have the right to personal privacy, which shall include the right not to be subject to: searches of his or her person, home or property

identify when discrimination is being perpetrated because of it. Magistrates and judges should pronounce judgements which highlight sexuality as a basis for discrimination, and these landmark cases should be used as precedents in future cases to protect people in same sex relationships from discrimination and persecution.

20. Set up a special law commission on Gender and Sexuality, which shall conduct extensive research and make recommendations for the constitutional amendment which will define sex and broaden the definition to include biological sexual and reproductive organs, and psychological state of mind. The special law Commission should lobby for Gender identity to be classified as "other status", requiring special protection under the Constitution.
21. Repeal provisions of the penal code which criminalise same sex relationships / homosexuality; this will encourage informative discussions to be done openly for the benefit of the general public.
22. Set up special educational programs, and school curricula's which demonstrate none religious interpretation of human rights, to safeguard the rights of both majority and minority groups.
23. Training law enforcement agents such as the Police to respect the private life of people in same sex relationships. Thereby taking the necessary measures to avoid the violation of the right to privacy by state agents.
24. Increase -through the Ministry of Gender women and children's affairs- the capacity of NGO's through conducting workshops and trainings to enable them to analyse sexual and reproductive health rights and promote linkages with LGBT rights.
25. Make budgetary allocations in the national budget annually to provide funding for publicity campaigns which provide information on LGBT rights.
26. Promote the Courts to rule that, the interrogation, and forced confessions from accused person in unnatural offences cases should not be admissible in a court of law, because evidence has been obtained while violating the Constitution.
27. Initiate special police reform programs, to teach the police, deliberate efforts to protect the right to dignity during arrest, examination, interrogation.
28. Make a special recommendation to the Chief Justice to issue a Practice Direction to all Magistrates that trials for people in same sex relationships, in the mean time should be held in camera with special protection of the identity of people in same sex relationships to enable them to live a life free of discrimination and harassment.