

MALAWI
SHADOW REPORT ON UNIVERSAL PERIODIC REVIEW

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And

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LIST OF ABBREVIATIONS

ACHPR	African Commission on Human and People's Rights
CEDEP	Centre for Development of People
CHRR	Centre for Human Rights and Rehabilitation
CEDAW	Convention to Eliminate all forms of Discrimination Against Women
ICC	Independent Complaints Commission
ICCPR	International Covenant on Civil and Political Rights
IGLHRC	International Gay and Lesbian Human Rights Commission
LGBTI	Lesbian, Gay, Bisexual, Transgender and Intersex
MACRA	Malawi Communications Regulatory Authority
MLC	Malawi Law Commission
MPS	Malawi Police Service
SADC	Southern African Development Community

1. Background and Framework

- 1.1 This submission is on the current state of human rights in Malawi since the conduct of the last Universal Periodic Review in November 2010. It is a joint submission prepared by the Centre for the Development of People (CEDEP), the Centre for Human Rights and Rehabilitation (CHRR) and International Gay and Lesbian Human Rights Commission (IGLHRC), with input from several other non-governmental organisations working in the human rights and governance sector in Malawi. It assesses the state of Malawi's implementation of the recommendations that came out of the last review, and of some of those Malawi rejected. The submission also gives an account of developments of the human rights situation over the past four or so years. A number of recommendations are directed to different stakeholders at the end of the submission, and the State Party.
- 1.2 The methodology used in compiling this submission was essentially through observation, desk research, lessons from projects and activities being implemented by CEDEP and CHRR and IGLHRC. There was also interaction, albeit limited, with some government Ministries and Departments. Some Civil Society Organisations (CSOs) were also interviewed and finally, there was a validation workshop on the draft report which was held in early September 2014 in Lilongwe, Malawi, and which was attended by some partners and stakeholders including the academia.
- 1.3 It must be quickly mentioned that the areas of recommendations mentioned in paragraph 2 of Malawi's submission are not the only ones the country accepted. It also accepted specific recommendations related to law reform, human trafficking, freedom of association and peaceful assembly among others. In total, Malawi accepted 71 recommendations, rejected 44 and provided general responses to 14 without taking a position on them.
- 1.4 On law reform, Malawi rejected the recommendation to: *reform the Penal Code and abolish discrimination against people based on their sexual orientation or gender identity and decriminalise same-sex relationships* in spite of glaring evidence that the continued criminalisation of consensual

same-sex relationships in Malawi is a serious factor that drives violations of human rights of lesbian, gay, bisexual, transgender and intersex (LGBTI) persons. Interestingly, in paragraph 5 of Malawi's submission, Law Commission and Human Rights Commission are mentioned as some of the constitutional institutions that play a critical role in the promotion and protection of human rights within their specific mandate. We surely agree with that observation.

- 1.5 However, we have come to doubt whether the human rights of the LGBTI community are adequately taken into account in that regard. While the recommendation in 2.4 above did not enjoy the support of Malawi in November 2010, on 7 December 2011, the Malawi Government referred the issue of the so-called bad laws to the Law Commission for further review. The bad laws were a set of laws the Commission had determined infringed and violated human rights of the people of Malawi. They included sections in the Penal Code that criminalize same-sex relations, banning of a publication deemed not to be in the public interest, injunctions law under the Civil Procedure (Suits by or Against Government) Act and the change of the flag law under the Names, Emblems and Flag Act.

- 1.6 Our interest is mainly on the same-sex relations provisions. These are few sections, three in number, namely, sections 137A, 153 and 156., Progress has been made on the other bad laws. For instance, section 46 of the Penal Code (Amendment) Act, which used to empower a Minister of Information and Civic Education to ban any publication which he or she deemed not to be in the public interest, was repealed by the Malawi Parliament in 2012, and so too the change of the flag law and indeed the injunctions law. Since December 2011 to-date (at the time of writing the submission), the Law Commission has, however, not taken significant action on the repeal of the provisions that criminalize same-sex relations. Certainly, the review of the three provisions has not yet taken place. The Law Commission has been giving one excuse after another on this particular request. At one point it was said that the review could not be undertaken because of funding. At another, it was reported that the Penal Code had just been reviewed recently and so the second review could not

be undertaken. It is worth noting that former State President, Joyce Banda in her first State of the Nation Address in 2012 promised Malawians that her administration was going to repeal laws that criminalize homosexuality practices. However, until now, nothing tangible has been done to fulfil that promise. Recently, we learnt that there is a *de facto* moratorium on the laws until after the case in which the laws are being reviewed by the High Court is concluded. To the extent that the Law Commission appears to be unwilling or unable to review these few sections in the Penal Code and come up with a position on the matter, this would be an abdication of its constitutional mandate and responsibility. To some degree the inaction on the part of the Law Commission is perpetuating the *status quo* i.e. discrimination against people based on their real or perceived sexual orientation or gender identity. In our view, it is critically important that the issue of discrimination of persons based on their real or perceived sexual orientation or gender identity, through the criminalization of consensual same-sex relations practices in Malawi, is decisively dealt with once and for all. Council may wish to inquire from the Law Commission, through the State Party, as to when these few sections in the Penal Code will be reconsidered and reviewed and a report of its findings and recommendations produced and submitted to Malawi Government for its implementation, if any.

- 1.7 As alluded to above, the Human Rights Commission (the Commission) has done tremendous work in promoting and protecting human rights in Malawi for which it is hereby commended. However, if the case of sexual and gender minorities is anything to go by it would appear that the Commission picks and chooses which human rights it should promote or protect in spite of the ‘universality, interdependence, indivisibility and interrelatedness of all human rights’. This arbitrariness is evident in the following example. In October 2013, the High Court of Malawi, on its own motion, called for submissions from institutions, both local and international, individuals e.t.c. to address it on the constitutionality of provisions that criminalise same-sex relations in the Penal Code as against section 20 of the Malawi Constitution which prohibits discrimination. A reasonable expectation based on the mandate of the

Commission, would be that the Commission would take the lead in assisting the High Court with its submissions for it to determine the matter. However, at the time of writing this submission, the Commission had never joined the case as a friend of the court. The High Court would definitely have benefitted from the Commission's expertise as an institution charged with the responsibility of promoting and protecting human rights in Malawi. This appears to be an abdication of the Commission's constitutional and statutory mandate and responsibility. The Commission was established to protect and promote the human rights of all people in Malawi and not just some or many of them. The Human Rights Council may wish to inquire as to the reasons why the Commission, through the State Party, did not to join the case as *amicus curiae* when the High Court could have benefitted from its expertise in the area of human rights and when it has joined other similar cases in the past as such friend of the court.

2. **Promotion and Protection of Human Rights on the Ground**

2.1 **Police reform**

2.1.1 Malawi received the following recommendations which it accepted with regard to policing and human rights:

- i. *adopt and implement appropriate measures in accordance with international standards to eliminate reported torture, ill-treatment and other excessive force by law enforcement personnel against suspects, and ensure due accountability for such misconduct as stipulated in the Malawi Constitution;*
- ii. *promptly operationalise the Independent Complaints Commission as provided for in the Police Act.*

2.1.2 A number of measures have been taken to implement the first recommendation, such as trainings, the establishment of the Internal Affairs Unit within the Malawi Police Service (MPS) and Malawi Prisons, legal and policy reforms, as

explained in Malawi's submission. However, in July 2011 the Malawi Police Service used disproportionate and even lethal force against citizens who were demonstrating peacefully against serious violations of human rights, attacks on human rights defenders, lack of fuel and foreign exchange, and high cost of living .. Twenty unarmed public demonstrators were shot dead by police officers. The Malawi Government reported that the 20 deceased persons were thieves and looters who took advantage of the nationwide public demonstrations to carry out crimes. Regardless of whether this is true, eye witness accounts indicate that at no point were the demonstrators threatening the police in a manner that warranted the use of lethal force. Due process of law requires the use of minimal force, to potentially apprehend and try alleged offenders, if relevant, or to maintain public order during demonstrations, as necessary. In this case, Malawi Government violated the right to life of these persons, as well as their freedom of expression and opinion and assembly all of which are guaranteed in the Malawi Constitution and many international and regional human rights instruments to which Malawi is a party. While investigations were carried out by the Human Rights Commission and also through a Commission of Inquiry, the perpetrators have not yet been brought to book. Both investigations concluded among other things that MPS officers clearly used excessive force against the unarmed public demonstrators in the circumstances. At the time of writing this submission, none of the 9 police officers who had been charged with offences of manslaughter and murder had been convicted by a competent court of law for those crimes nor have the deceased families been compensated by the Malawi Government. In addition, the media in Malawi continue to report cases of suspects dying in police cells due to torture by police officers in a bid to extract confessions. While Malawi is a party to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment, other than a general prohibition in the Malawi Constitution, torture is not a criminal

offence in Malawi. While persons suspected to have committed torture may be tried under other provisions in the Penal Code, torture is a more serious offence than either endangering life or health or indeed assaults and should be separately sanctioned.

2.1.3 The Independent Complaints Commission (ICC) established by section 128 of the Police Act is yet to be operationalised, four years on. During the mid-term review, the Commission reported that negotiations were at an advanced stage to roll out the ICC. It must be noted that the legislation was enacted in 2010 and four years on at least at the time of writing the submission, ICC had not yet been operationalised. This is acknowledged in the submission by Malawi under paragraph 23. Council may wish to inquire as to what the delay is in implementing such an important body. In addition, the public in Malawi continues to express concern that it is difficult for the police officers to investigate each other when they are suspected to have committed an offence. The ICC inspires confidence because it is an independent body outside the MPS structures. Its importance cannot be overemphasised in modern policing and protection of human rights. Council may wish to get a commitment from the State Party as to when the ICC will be operationalised.

2.2. **Prison reform**

2.2.1 Malawi received a number of recommendations in relation to prison conditions and the entire penitentiary system. These were:

- i. take measures to significantly improve prison conditions such as overcrowding, substandard sanitation and poor health facilities;*
- ii. continue efforts to promote access to justice with a view to ensuring legal protection in the enjoyment of human rights by all citizens on an equal basis;*

- iii. ensure that no one is detained for long periods without trial; and*
- iv. adopt and implement expeditiously the Prisons Bill and other measures needed towards humanization of its penitentiary system.*

2.2.2 The State Party is commended for a number of efforts that it has taken to improve prison conditions in Malawi as reflected in paragraph 22 of its submissions. However, while the population of prisoners in Malawi continues to rise, there is no consistent corresponding increase in financial resource allocation to the penitentiary system. Furthermore, while there has been political rhetoric that new prisons will be constructed to ease congestion, other than Mzimba Prison which was already constructed at the time of the first review in 2010 the proposed new prisons namely, construction of Rumphu, Luwani, Makhanga and Chitedze Maximum Prison have not yet started. The 2014/2015 budget does not have an allocation to the construction of these new prisons or for the renovation of the Karonga Prison, which is in bad shape following an 2012 earthquake. Prison congestion remains a challenge to-date. In spite of some of the measures that have been taken, there is no improvement on overcrowding and sanitation and health facilities in Malawian prisons remain poor. In a nutshell, on a score of 1 to 5, we would score Malawi at 1.5 on the first recommendation. The situation has largely remained the same.

2.2.3 Malawi has taken legislative measures to reduce the time that a suspect is held on remand. The Criminal Procedure and Evidence Code (Amendment) Act, has introduced pre-trial custody time limits which range from 30 days to a maximum of 90 days in very serious offences such as treason and murder triable by the High Court. At the expiry of the pre-trial custody time limit, the court either of its own motion or on application

by the accused person releases the accused person on bail while awaiting trial. The High Court has held that it has no discretion in the matter. Once the custody time limit has expired, the court has to release the accused person on bail pending the hearing of his or her case.¹ However, this progressive legislative development is faced with two challenges in practice. First, many accused persons are not aware of this right to be released from detention at the expiry of the prescribed pre-trial custody time limit if the State does not prosecute them. Second, even where they are aware of the right, they require legal representation for them to enjoy the benefits of this legislative measure. More often than not, many of the accused persons in Malawi cannot afford to hire the services of private legal practitioners to bring such an application before the courts. This is where the Legal Aid Bureau would be helpful. However, the Legal Aid Bureau is not yet operational, at least at the time of writing this submission. This legislation was supposed to take effect in May 2013. However, until now, the Legal Aid Bureau does not exist. This is another example of Malawi passing improved legislation but taking rather too long to operationalise it. The same process happened with the amendment to the Legal Education and Legal Practitioners Act which created the Malawi Institute of Legal Education was passed in 2010 and until now, the Institute is not in place. The Disability Act enacted in 2012 creates a Disability Trust Fund which is also not in place. The Consumer Council created by the Consumer Protection Act is also not in place. We have already discussed about the Independent Complaints Commission under the Police Act. All these are important pieces of legislation which would go a long way in improving the human rights situation in Malawi. Reverting to the subject matter under consideration, even if the Legal Aid Bureau had been operationalised, it is still doubtful whether it would attract the required number of advocates to

¹ See *Edwin Kamfozi v The Republic*, Bail Cause No. 100 of 2013 (High Court of Malawi) (Principal Registry) (Unreported).

be able to represent many of the indigent accused persons answering criminal charges in our courts. Council may wish to inquire from the State Party as to why a number of legislation or aspects within certain legislation have not yet been operationalised and plans if any, that have been put in place to ensure that the legislation are fully operationalised as soon as possible.

2.2.4 It will be recalled that in November 2010, the State Party reported that among many measures it had undertaken to deal with prison reform was that it had drafted a Prison Bill (See para 38) which was to replace the current Prison Act. However, in its new submission under consideration in paragraph 11, the State Party reports that the review process is expected to be completed by the end of 2014. The question is: why has the review of the Prison Act taken so long? Again, Malawi has not done very well on the remaining recommendations on this matter.

2.3 **Human trafficking**

2.3.1 Malawi received recommendations on this matter. The recommendations were as follows:

- i. address the legal gaps in national legislation on human trafficking and ensure that cases of trafficking are investigated effectively at the earliest possible date with a view to bringing to justice those responsible, and ensure that victims benefit from full reparation; and*
- ii. include the effective prosecution and punishment of traffickers in legislation.*

2.3.2 There is still no comprehensive legislation in Malawi dealing with human trafficking. There are a few provisions in the Penal Code dealing with such offences as kidnapping, buying or

disposing of any person as a slave, unlawful compulsory labour and abduction which are used when a case of human trafficking occurs.² Admittedly, these are not adequate to address the complex nature of human trafficking hence the first recommendation that Malawi received and accepted.

2.3.3 The only progress which has been made in this regard is in relation to child trafficking. Child trafficking is now an offence under section 79 of the Child Care, Protection and Justice Act, 2011 punishable with a maximum penalty of life imprisonment. A child is defined as a person under the age 16.

2.3.4 The Trafficking in Persons Bill which was finalised some time ago is yet to be considered and passed by the National Assembly. This is the Bill which addresses the recommendations comprehensively.

2.4 **Women's rights**

2.4.1 Malawi received many recommendations in so far as the rights of women are concerned. We have taken note of some of the gains which have been made in Malawi's submission. However, in this our submission, we will only highlight a few where we believe there has been no significant progress over the last four years. Some of them were:

- i. repeal legislation that causes Malawian women to lose their citizenship when marrying a foreign national;*
- ii. take measures, including through legislation, to ensure equality of women, particularly in decision-making processes and access to basic services and infrastructure; and*
- iii. strengthen efforts aimed at increasing the representation of women in decision-making processes*

² See Generally Chapter XXV of the Penal Code, Cap. 7:01 of the Laws of Malawi.

- 2.4.2 On the first recommendation, Malawi has not taken any such legislative measure to repeal that part of the Citizen Act, which causes its women to lose their citizenship when they marry a foreign national man. The reason is that the Malawi Government has taken a position that loss of citizenship under the legislation is not automatic but rather a choice. Council may wish to find out from the State Party as to what measures it has taken to sensitize Malawian women on the position and its understanding of the law so that they are aware of it, especially those in border areas of the country.
- 2.4.3 On the second recommendation, the passage of the Gender Equality Bill in February 2013 is a milestone in that regard. This legislation has extremely progressive provisions which when fully implemented will change the landscape in so far as women empowerment issues are concerned.
- 2.4.4 Finally and sadly, on the third recommendation, not much has been achieved. For instance, in the first review in November 2010, it was reported that the Malawi Government had put in place a policy to increase the number of women in positions of power and influence. A number of high profile offices occupied by women were cited. These were: Vice President, Attorney General, Chairperson of the Electoral Commission, the Ombudsman, the Clerk of Parliament, the Law Commissioner, the Chief Legislative Counsel, and the Administrator General. The total number of female Members of Parliament was forty-three out of a total of one hundred and ninety three Members of Parliament.
- 2.4.5 The gains reflected above have been lost over the past four years or so. For instance, the Vice President, Attorney General, Chairperson of the Electoral Commission, the Clerk of Parliament and the Administrator General are no longer women-at least at the time of compiling the submission.

Similarly, following the May 20, 2014 tripartite general elections, the number of female Members of Parliament has also dwindled to thirty-two representing only 16.5% and a reduction by 15. Female councillors are also very few with only 56 being elected against 462 male counterparts. They are only 12.1%. The Malawi Cabinet at the time of compiling this submission had only 3 women out of 20 Ministers representing 15%. Even though there are few by-elections that will be taking place both for Members of Parliament and Councillors in October 2014, it is extremely doubtful whether these would change these figures significantly. Malawi needs to do more to ensure that women are supported to compete favourably for public offices.

2.4.6 There have been some gains in other areas. The Director of Public Prosecutions, the Registrar General, the Solicitor General and Secretary for Justice, the Chief Justice-again, at the time of writing the submission, were also female.

2.5. **Freedom of the press**

2.5.1 Malawi received one major recommendation on this. It was:

take the steps necessary to ensure that laws protecting freedoms of the press are implemented and adhered to.

2.5.2 Malawi has made strides in ensuring that freedom of the press is respected and promoted. The media landscape is much liberalised. There are so many radio and television stations both public and private in Malawi.

2.5.3 However, there are serious concerns with respect to the public broadcaster, Malawi Broadcasting Corporation (MBC) both its television and radio stations. MBC is not a truly public broadcaster. Most of the coverage is given to the political party in power and the Head of State and Government and opposition political parties and leaders are hardly given

coverage. This is wrong considering that MBC is run on public funds which every citizen contributes to through taxes. Part of the problem lies in the manner in which the Communications Act was drafted. Similarly, even though the Malawi Communications Regulatory Authority (MACRA) is independent, there is a public perception that MACRA is not truly independent. The perception is that it is sometimes used to oppress private radio stations that are critical of government or associated with some opposition political leaders.

2.5.4 Malawi is also commended for developing and adopting a policy on Access to Information in January 2014. However, the Access to Information Bill which was drafted in 2003 has not yet been considered and passed by the National Assembly. It is important that Malawi enacts this Bill into law.

2.6 **Ratification and domestication of instruments**

2.6.1 Malawi received a recommendation to ratify the following human rights instruments and also ensure that domestic laws are in conformity with international human rights obligations:

- i. Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment;*
- ii. International Convention for the Protection of all Persons from Enforced Disappearance;*
- iii. Optional Protocol to the International Covenant on Economic, Social and Cultural Rights;*
- iv. Optional Protocol to the Convention on the Rights of Persons with Disabilities;*
- v. Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women; and*
- vi. Convention on the Prevention and Punishment of the Crime of Genocide.*

2.6.2 Malawi has not ratified any of these conventions. Council may wish to inquire from the government as to why that is the case.

2.6.3 At regional level, Malawi ratified the African Charter on Democracy, Elections and Governance which is a very commendable step. However, this instrument is yet to be domesticated and harmonised with national laws. Perhaps as Malawi is in the process of reviewing its electoral laws, it may wish to use that opportunity to domesticate as far as it is possible articles in the African Charter on Democracy, Elections and Governance. A number of international human rights instruments to which Malawi is a party have been domesticated³ and continue to be so domesticated.

2.7 Rule of Law and Impunity

2.7.1 Malawi is a party to a number of instruments both at sub-regional and regional levels that also protect and promote human rights. One such instrument is the SADC Tribunal Protocol. Malawi participated in a SADC Heads of State and Government summit at Victoria Falls in Zimbabwe in August 2014 at which the SADC Tribunal Protocol was amended by removing access to the Tribunal by individuals from SADC countries. This is a retrogressive step for which the State must be engaged so that Malawian citizens should not be deprived of the right of access to sub-regional justice should their circumstances demand.

3 Achievements, Best Practices, Challenges and Constraints

As the discussion has shown, a number of achievements have been registered thus far. The challenges and constraints which Malawi identified in 2010 are still there.

4 Capacity-Building and Technical Assistance

³ For instance, most of the articles in the Convention on the Rights of the Child have been domesticated through the Child Care, Protection and Justice Act. Most of the articles in the Convention on the Rights of Persons with Disabilities have been domesticated through the Disability Act. Most of the provisions in the Convention on the Elimination of Discrimination Against Women have been domesticated through the Gender Equality Act.

N/A

5 Recommendations

The following are recommendations based on the human rights concerns described in this submission.

- 5.1 The State must take measures to explicitly recognise and protect against discrimination on the basis of real or perceived sexual orientation or gender identity in its laws.
- 5.2 All police officers or other security agencies that have been involved in torturing suspects must be swiftly investigated and brought to book.
- 5.3 Malawi must make every effort to make torture a crime.
- 5.4 Take measures, legislative or otherwise, to ensure human rights defenders are not attacked for doing their work as was the case in 2012.
- 5.5 Malawi must ensure that the Independent Complaints Commission is operationalised within a reasonable time and it must be given adequate financial resources for it to discharge its functions effectively and efficiently.
- 5.6 The policy on ensuring that women occupy positions of power and influence should be maintained and efforts should be redoubled to ensure more women participation in the life of the nation.
- 5.7 Operationalise as a matter of urgency various pieces of legislation which were already enacted such as the Legal Aid Act, the Legal Education and Legal Practitioners (Amendment) Act, and Disability Trust Fund created by the Disability Act, the Consumer Council established by the Consumer Protection Act among others.
- 5.8 Allocate adequate financial resources towards the trial murder suspects and use other alternative modes of sentences other than custodial sentences such as community service orders, fines and others to reduce prison congestion.

- 5.9 Enact Trafficking in Persons Bill into law as a matter of urgency.
- 5.10 Review the Communications Act with a view to freeing MBC and ensure that its Management and employees are protected and insulated from political pressure and influences and also that MACRA is truly independent.
- 5.11 Enact Access to Information Bill. The Government having committed itself to pass this Bill, it must do so without further delay.
- 5.12 Malawi must implement various recommendations that it received from various treaty bodies such as ICCPR, CEDAW, ACHPR.
- 5.13 Popularisation and awareness of various pieces of legislation should not only be left to Law Commission and Human Rights Commission. Ministry of Information and Civic Education and Ministry of Justice & Constitutional Affairs and non-state actors should be involved in that process.

END.