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REPORT ON COLONIALISM AND SOGIESC

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ACRONYMS

NRA	Nyasa Rainbow Alliance
SOGIESC	Sexual Orientation, Gender Identity and Sexual Characteristics
LGBTI	Lesbian, Gay, Bisexual, Transgender and Intersex
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
MACRA	Malawi Communications Regulatory Authority
UPR	Universal Periodic Review

1. Background

In Malawi, lesbian, gay, bisexual, transgender and intersex (LGBTI) people continue to experience violations of their human rights and exclusion. This stems from the fact that Malawi has refused or neglected to decriminalize LGBTI in its statute books despite receiving numerous calls from some local and international human rights organizations, and development partners on the same. Thus, the Penal Code of Malawi (Cap: 7:01 of the Laws of Malawi) in sections 137A, 153, 154, and 156 criminalize homosexuality and other consensual activities among adults. As a result, homophobia and other forms of stigma, violence and discrimination against LGBTI people contribute significantly to their exclusion from society, limit their access to health and social services and hinder their social and economic development. Research has also shown that the majority of LGBTIQ persons in Malawi are among the poorest, and most marginalized members of the society who suffer disproportionate discrimination and abuse, and are struggling to survive.¹ This report, therefore, depicts the genesis of criminalization of LGBTI in the Penal Code and the plight of the LGBTIQ community in Malawi.

2. Historical Background of Penal Provisions Against LGBTI In Malawi

The laws that criminalize same-sex relations in Malawi have colonial roots and were enacted in 1930 during British colonial rule. Thus, the laws against homosexuality are colonial relics that Malawians strongly support. Sodomy has been illegal since at least 1930, when Malawi was the British colony Nyasaland.

Ironically, after gaining independence in 1964, Malawi has maintained the said repressive and discriminatory laws, even though Britain repealed such laws from common law in 1967, and replaced them with legislation that promotes equality.²

The statutes have remained firmly in place even though the Constitution of Malawi has been revised twice since then, first at independence in 1965, and then again following the introduction of multiparty democracy in 1995.

¹ https://www.cospe.org/wp-content/uploads/2021/01/Risk_Vulnerability-Analysis_OP_final.pdf

² <https://www.afrobarometer.org/articles/one-graph-shows-biggest-threat-lgbt-rights-malawi/>

Thus, it is perfectly clear, therefore, that the Penal Code which the Government of Malawi continues to enforce today to punish LGBTI people in Malawi is Western in origin particularly from England, and is a legacy of 19th Century colonial powers.³

3. Harassment and Discrimination Faced by the LGBTIQ+ Persons in Malawi.

As stated above, based on real or perceived Sexual Orientation and Gender Identity and Sexual Characteristics (SOGIESC), and due to failure by the government to repeal laws that criminalize consensual same sex relationships between two consenting adults in private, the LGBTIQ+ persons continue to face homophobic violence, arbitrary arrest and detention, harassment, discrimination, sexual violence, extortion and other abuses.

Ironically, the government of Malawi despite being a signatory to countless international human rights instruments, and also sitting on the human rights council has paid little attention to the abuses and harassment that the LGBTIQ+ persons are facing in Malawi. Some of the documented cases of human rights violations which the LGBTIQ+ persons in Malawi are facing include but not limited to the following:

3.1. Arbitrary arrests

Arrests on the basis of sexual orientation or gender identity occur frequently in most parts of Malawi. Thus, the police have been making frequent arrests of LGBTIQ+ people simply because they are lesbians, gays, bisexual, transgender, and intersex among others. This has even forced some gay and lesbians in Malawi to adopt some self-censoring behavior by getting married to women and men respectively in order to conform to society's expectations, and avoid harassment, discrimination and arbitrary arrests, among others.⁴

Furthermore, the police also seldom render assistance to LGBTIQ+ persons who have been assaulted as a result of their status, or for any other criminal complaint they may have. Instead, they threaten to reveal the complainant's sexual orientation to family members, friends or colleagues to obtain a confession or they may even bring a transgender person to the police station on a false pretext in order to ask them for money or sexual favours in exchange for their freedom.⁵

³ <https://malawi24.com/2019/10/27/lgbtiq-rights-in-malawi-colonial-era-penal-codes-fan-intolerance/>

⁴ Emergency cases documented by Nyasa Rainbow Alliance (NRA).

⁵ Human Rights Watch Report, Let Posterity Judge. 2018. pg 21.

Some police officers have also been forcing some LGBTIQ+ detainees to submit to genital verification without their consent in order to ascertain whether they are male or female. There have also been instances where the LGBTIQ+ persons have been subjected to medical examination without their consent in order to verify their mental faculties simply because of their sexual orientation. Such examinations are conducted on the assumption that identifying oneself as LGBTIQ+ person is a sign of insanity.⁶

Ironically, genital verification and medical examination without one's consent run counter to the right to dignity and privacy of the individual, and in most cases, such practices are used to harass, intimidate or unnecessarily intrude upon the privacy of the LGBTIQ+ persons in Malawi. We also note that the genital verification exercise is discriminatory as it only applies to the LGBTIQ+ suspects who are forced to expose their nakedness to the police officers, which is also degrading to say the least.

Moreover, the LGBTIQ+ people are even viewed by the authorities as more likely to be criminal simply for who they are, who they love, and who they are attracted to, hence they are prevented from living their lives as equal members of the society.

3.2. Denial of healthcare to the LGBTIQ+ people

There have been increased reports of denial of healthcare to the LGBTIQ+ people by health workers at public health facilities as some health care providers refuse to attend to them citing religious beliefs, among others. Ironically, the government of Malawi has failed to take any palliative measures to address such discriminatory and illegal practices.⁷

However, cases of ill-treatment and discrimination faced by the LGBTIQ+ people in most health facilities in Malawi are potentially discouraging them from seeking sexual and reproductive health, and gender reassignment services from public health institutions. As a result, LGBTI people in Malawi are being denied access to a wide range of essential healthcare services and education.

⁶ See the State v. Jana Gonani, Criminal Case No. 547 of 2021 (Mangochi SRMC).

⁷ Emergency cases documented by Nyasa Rainbow Alliance (NRA).

3.3. Illegality of Buggery Laws

Discrimination on the grounds of sexual orientation adversely affects the equal enjoyment of a person's rights and freedoms contrary to the dictates of the Constitution of Malawi.

Section 20 of the Constitution prohibits any discrimination and guarantees to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Although the Malawi Constitution does not explicitly include sexual orientation and gender identity among the prohibited grounds of discrimination in section 20, nonetheless, the list of prohibited grounds of discrimination in section 20 is generally non-exhaustive, and include 'other status' which should be read to include discrimination based on sexual orientation and gender identity.

Furthermore, although section 153 (c) of the Penal Code prohibits any person from indulging in sexual intercourse against the order of nature, the act which includes oral-genital and anal-genital, it is only the LGBTIQ community which is targeted by this law. This is irrespective of the fact that persons of opposite sex (heterosexuals) including those in lawful marriages also practice oral and anal sex freely but they do not get arrested for contravening section 153 (c) of the Penal Code simply because there is some 'unfounded assumption' that their sexual intercourse is done in the order of nature.

Normally, sexual intercourse is done in private where only the two who are engaged would know the nature of the act, hence we find the application of buggery laws problematic because their enforcement is largely based on speculation and assumption and that such laws are discriminatory and unconstitutional.

It can never be forgotten that discrimination is the antithesis of equality and that it is the recognition of equality which will foster the dignity of every individual. It is also our considered view that recognizing the human dignity of people with a different sexual orientation is critical to ensuring their right to equality.

It is clear, therefore, that Malawi's anti-homosexuality laws contravene rights and fundamental freedoms under regional and international human rights treaties which Malawi has ratified including the African Charter on Human and People's Rights, the International Covenant on Civil

and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

Thus the buggery laws among others, fail to conform to the right to non-discrimination, the right to equality and equal protection of the law, and the right to privacy which the Constitution of Malawi also guarantees. They also contribute to violations of right to liberty and security of the person, the right to the highest attainable standard of health, and the right to freedom of Association.

4. Decriminalization of LGBTI in Malawi

4.1. Court Case on Denial of Registration of LGBTIQ led organization

Nyasa Rainbow Alliance has commenced proceedings in the High Court of Malawi. The first case is about the decision of the Malawi Government to deny the registration of the organization on account that its objectives are against public policy. The case was certified by the Chief Justice as a constitutional case in 2017 and is inviting the Court to determine the legality of the decision as it violates section 32 of the constitution which provides for the right to freedom of association. Currently, the matter is awaiting hearing and determination by three judges of the Constitutional Court.

4.2. Court Case on Decriminalization of LGBTI in Malawi

Another case which Nyasa Rainbow Alliance has commenced is challenging the legality of section 153 and 156 of the Malawi Penal Code which criminalize consensual same sex conducts between two consenting adults in private. According to the Malawi Penal Code, such conduct is deemed unnatural and attracts a maximum penalty of 14 years imprisonment with Hard Labour (IHL).

The background of the case is that Jana Gonani—a transgender woman who was based in Mangochi—was on the 23rd day of December, 2021 convicted of unnatural offence contrary to section 153(c) of the Penal Code. The particulars of the charge which led to the conviction was that Gonani on or about the 14th day of October, 2021, within Mangochi Township, in the District of Mangochi willfully permitted a male person to have sexual intercourse of her against the order of nature. In order to obtain evidence for the case, the police in Mangochi among other things:

(a) Forced Gonani to undress herself to submit to genital verification which was meant to confirm whether she was male or female;

- (b) Forced Gonani to submit to medical examination to ascertain her mental faculties whether or not she was of unsound mind on account of her sexual orientation;
- (c) Forced Gonani to be placed in a male cell despite identifying herself as female; and
- (d) Unjustifiably exonerated men who slept with Gonani from the offence despite admitting that they had carnal knowledge of her against the order of nature.

The overall objective of the case, therefore, is to challenge the legality of section 153 of the Penal Code which criminalizes consensual same sex relations between consenting adults in private. Thus, if successfully litigated, the case will promote the rights of LGBTIQ community in Malawi since the said law is limiting their access to social services, infringe upon human dignity, and promote an unjustified violation of non-discrimination principles.

4.3. Threats and Intimidation Against NRA Officials Over the Decriminalization Case

The commencement of the two cases has raised security risks to the officials of the organization as they are being targeted by some members of the society for a possible attack for promoting what is being considered as unnatural and a sin in religious perspectives.

Recently, people have been sharing images on social media outlets such as Facebook and whatsapp bearing faces of senior officers of Nyasa Rainbow Alliance while alleging that such officials have received money from the western world to promote acts that are against cultural values of Malawi.

This development has created panic among members of the organization, and other activists who are supporting the case as they are now failing to move freely owing to the imminent attacks.

Further, the state and other stakeholders such as religious groupings have been advocating for national protests against the decriminalization of homosexuality in Malawi. A video has also been released from the Muslim community which is calling upon all sheikhs to speak against homosexuality in Malawi. Moreover, some religious groups such as the Malawi Council of Churches, Evangelical Association of Malawi, the Episcopal Conference of Malawi, and the Muslim Association of Malawi have issued press statements condemning the commencement of the case, and calling upon the judges that are presiding over the case not to decriminalize homosexuality in Malawi on account that such conducts are against the religious and moral values of the Malawian society.

The said developments are coming at a time that Uganda has proposed a string bill against homosexuality in parliament including death penalty. This has perpetuated other African countries to instill laws that threaten the existence of the LGBTIQ + community. The same phenomenon has happened in Tanzania with an addition of castration of the LGBTIQ + members. Thus, Malawi is also following suit also in consideration of the aforementioned court case that is likely to be in favor of the LGBTIQ+ community.

5. Morality Versus LGBTIQ Rights in Malawi

It is sad to note that, the government of Malawi continues to use culture, tradition and religion to justify the denial of basic rights of the LGBTIQ+ persons in Malawi contrary to the dictates of the constitution of Malawi which guarantees to everyone the right to equal protection, and to be recognized as a person before the law, and the right not to be discriminated against on the basis of one's status.

Our firm position is that, culture, religion, and tradition can never justify the denial of basic human rights guarantees enshrined in the Republican Constitution because Malawi is a secular state which is governed by the rule of law, and not morality or religious doctrines.

6. Conclusion and Recommendation

In Malawi, LGBTI persons face discrimination and marginalization which put them at the risk of not being able to attain social economic development, and the highest attainable standard of health. This report has highlighted, in detail, human rights issues that affect the rights of LGBTI persons. Therefore, the following are the recommendations that NRA would like to make in the light of the violations that the report has highlighted:

- (a) The Government of Malawi should uphold the principle of non-discrimination by decriminalizing consensual same-sex relations, and to explicitly include sexual orientation and gender identity among the grounds of discrimination prohibited by the Constitution;
- (b) The Government of Malawi should respect its obligations under the African Charter to protect LGBTIQ+ persons, especially in accordance to Resolution 275;

- (c) The Government of Malawi should empower the Malawi Communication and Regulatory Authority (MACRA), to monitor and take all necessary measures on all forms of hate speeches against LGBTIQ+ people in all media outlets through its service providers;
- (d) Protect the right of freedom of expression for LGBTIQ persons and all those who want to speak out in solidarity with LGBTIQ persons, and cease the use of unlawfully motivated reprisals by both state and non-state actors;
- (e) Exercise due diligence to prevent, investigate, prosecute, punish and provide remedies for discrimination, violence and other harm, whether committed by State or non-State actors; and
- (f) Adopt and implement all LGBTI related UPR recommendations for Malawi.

7. Annexes

- Statement of Christian Mother Bodies on Same Sex Unions in Malawi;
- Statement of Muslim Mother Bodies on Same Sex Union in Malawi.
- <https://www.facebook.com/120942427951729/posts/pfbid02AxywQKzjfkSJvHbiBs1n2fcbPELujyTM58AV33TG4CD7bRRFWtXbMsGVqnsaNMCjl/?app=fbl>