



Malawi

Universal Periodic Review (UPR)

Civil Society Mid-Term Review Stakeholder Report

Third UPR Cycle
November 2022

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Introduction

Universal Periodic Review (UPR) is a unique process which involves a review of the human rights records of all 193 UN Member States. It provides the opportunity for each State to declare what actions they have taken to improve the human rights situations in their countries and to fulfill their human rights obligations. Malawi's first and second UPR reviews took place in November 2010 and May 2015 respectively. In November 2020, Malawi went through UPR and received 226 recommendations from UN member states including recommendations on gender-based violence, sexual orientation and gender identity, and HIV/aids among others. 183 of the recommendations were accepted, whereas 42 of those were noted.

The Human Rights Council institutionalized mid-term reporting as a critical, albeit voluntary, component of the UPR process. It allows for both State actors as well as civil society to submit updated information regarding the implementation of recommendations in between two reviews.

This document wants to give an overview of the implementation of a selection of recommendations.

Methodology

This report was developed and prepared through consultations and direct meetings with key stakeholders such as the relevant Government Ministries, Departments and Agencies (MDAs), civil society organizations, the diplomatic community, journalists, and the academia. The development of this report was also dependent upon the willingness or ability of the participants to respond to questions during consultation meetings.

A multistakeholder interface meeting was also organized on 9 November 2022, to collect input for this midterm report.

Signatory organizations

Nyasa Rainbow Alliance

Ivy Foundation

Community Health Rights and Advocacy

Centre for Key Populations and Rights

Angaza Foundation

Assessment of the implementation of the recommendations

Recommendation	Number	Noted/accepted	Assessment (not implemented, partially implemented, fully implemented)	Explanation
Provide sexuality education, reproductive health services and contraception	122.128, 124.40, 124.41, 124.42, 124.43, 124.44, 124.45	Noted (except 122.128)	Partially implemented	<p>Although the Government of Malawi has been offering compulsory Life Skills Education to students in schools, nonetheless, the school curricula of Malawi fail to incorporate Comprehensive Sexuality Education (CSE). Thus, educational materials that address sexual orientation and gender identity issues, or even acknowledge the existence of LGBTIQ+ concerns, are banned from schools. This is risking the health of young LGBTIQ+ people in the process.</p> <p>Moreover, access and availability of youth friendly services are very limited due to a critical shortage of providers of such services. This is contradicting Malawi's Reproductive Health Policy which guarantees the right to all women, men and young people to freely determine the type of contraceptives to use, how many children to have, and when to have them based on informed consent (<i>see p.9 of Malawi's Reproductive Health Policy, 2002</i>)</p>
Criminalize marital rape	122.23, 122.154, 124.39	Accepted (except 124.39)	Not implemented	The current legal position in Malawi is that a man (husband) can never be guilty of raping his wife and conversely that she cannot lawfully refuse her husband intercourse according to the case of R v. Mwasomola, 4 ALR (Mal) 572.

				<p>The justification for this legal position has always been that, a woman gives an irrevocable consent to sexual intercourse when she is accepting the marriage proposal, and that her husband has the right to have sexual intercourse with her at his will. Under the Marriage, Divorce and Family Relations Act, the only acceptable instances that would enable a spouse to deny the other spouse the right to consummation is on grounds which may include—poor health, post-natal recuperation, in respect of custom, and when they are on judicial separation.</p> <p>Malawi’s failure to criminalize marital rape runs counter to the human rights provisions under the constitution including the right to dignity and personal freedom in section 19.</p>
Establish a moratorium on/abolish the death penalty	123.1, 124.1, 124.2, 124.3, 124.4, 124.5, 124.26, 124.27, 124.28, 124.29, 124.30, 124.31, 124.32, 124.33, 124.34, 124.35, 124.37	Noted	Not implemented	<p>The Government of Malawi has maintained the death penalty in its statute books under section 209 as read together with section 2010 of the Penal Code. This has been the case despite the said law not being useful to Malawi as no state president has signed the death sentence since 1994. Although the government through the ministry of justice has been conducting consultation meetings whether the death penalty should be abolished or upheld, and those consultations have culminated into a death penalty bill, nonetheless, it remains uncertain if the said bill will come into law.</p>

Reduce the stigma and discrimination of LGBTI persons	124.12, 124.17, 124.18, 124.21, 124.36	Noted	Not implemented	<p>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. Malawi has refused or neglected to repeal laws that criminalize consensual same sex relationships between consenting adults in private. As a result, lesbians, gays, bisexuals, transgender, and Intersex (LGBTI) people in Malawi face routine harassment, violence and discrimination in almost all aspects of their daily lives.</p> <p>For example, according to the Out & Proud LGBTI Equality and Rights in Southern Africa, "Risk and Vulnerability Analysis" 2021¹, 80% of the participants to the survey have experienced stigma, 61% have experienced harassment and 43% violence in their lifetime. Over and above, a quarter of all participants had experienced all three types of risks in their lifetime. Further to that, 79% of LGBTI persons in Malawi do not have enough money for everyday needs because due to the homophobic attitudes of a majority of employers in Malawi, the LGBTI persons struggle to find employment. The barometer has also exposed Job and economic instability among the LGBTIQ+ persons as a major factor with poverty affecting more than 60% of the populations in Malawi. The presence of deep religious and cultural conservatism also makes LGBTQI+ people targets for abuse and harassment.</p>
Decriminalize sexual activities between consenting adults	124.12, 124.13, 124.14, 124.19, 124.20,	Noted	Not implemented	As stated above, the Government of Malawi has maintained in its statute books penal provisions that criminalize consensual same sex relationships between two consenting adults in private, which has resulted in many LGBTI persons facing discrimination and marginalization which has put them at the risk of not being able to attain

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

	124.21, 124.22, 124.23, 124.24, 124.25			the highest attainable standard of livelihood. Due to failure by the Government of Malawi to repeal laws that criminalize consensual same sex relationships, the LGBTIQ+ persons continue to face homophobic violence, arbitrary arrest, harassment, discrimination, sexual violence, extortion and other abuses.
Adopt anti-discrimination laws inclusive of the LGBTI community	124.15, 124.18, 124.19, 124.20, 124.22, 124.23	Noted	Not implemented	The constitution of Malawi has explicitly prohibited all forms of discrimination under section 12 (2) as read with section 20 of the Constitution of Malawi. It is evident that all cases of violence and discrimination of the LGBTIQ+ persons are being instigated by laws that criminalize consensual sexual acts between two consenting adults in private (i.e. sections 137A, 153, 154, and 156 of the Penal Code) which the Government of Malawi is refusing to repeal as people harassing the LGBTIQ+ persons are hiding behind the said laws to advance their selfish motives against the LGBTIQ+ persons. Moreover, the Government of Malawi has shown no interest to include sexual orientation, gender identity and expression as an explicitly prohibited ground of discrimination.
Increase access to health services for LGBTI people	124.16	Noted	Not implemented	The LGBTIQ+ community in Malawi continues to struggle to access various services from public health institutions due to their sexual orientation. Reports of denial of healthcare to the LGBTIQ+ people by health workers at public health institutions are very common in Malawi as some health care providers refuse to attend to them citing religious beliefs, among others. Invariably, such experiences trigger severe emotional distress which can be associated with the LGBTIQ+ community having higher rates of mental health issues, suicide, and substance abuse among, others.
Strengthen the mechanisms for	122.182	Accepted		No information available

protection of children with disabilities, albinism or HIV/Aids				
Investigate cases of suspected sexual assault	122.161	Accepted		No information available
End all forms of gender-based violence and discrimination	122.27, 122.65, 122.66, 122.89, 122.90, 122.164, 122.141, 122.145, 122.147, 122.155, 122.156, 122.157, 122.158, 122.159, 122.160	Accepted	Partially implemented	<p>Despite the enactment of the Prevention of Domestic Violence Act of 2006 by the Government of Malawi, the vice continues to haunt women and girls in Malawi due to poor law enforcement mechanisms that fail to bring the perpetrators of the vice to book. According to the most recent Demographic and Health Survey² released in 2016, 34% of women aged between 15 and 49 reported experiencing physical violence, 14% sexual violence, and 23% emotional violence in the 12-month period preceding the survey.</p> <p>This suggests that violence is an everyday experience for women and adolescent girls in Malawi, and they have little opportunity to escape from those that intimidate, hurt, and scar them. The government ought to step up its effort to eliminate all forms of gender –based violence. The constitution of Malawi has also explicitly prohibited all forms of discrimination under section 12 (2) as read with section 20 of the Constitution of Malawi.</p>
Improve the quality of and	122.122, 122.123, 122.124,	Accepted	Partially implemented	Although the Government of Malawi is striving to improve the quality of and access to health care services to its citizens, nevertheless, the LGBTI patients in Malawi also suffer ostracism, invasive questioning,

² <https://dhsprogram.com/pubs/pdf/FR319/FR319.pdf>

access to health care services	122.125, 122.126, 122.127, 122.129, 122.130, 122.131, 122.132			rough physical handling, derogatory comments, breaches of confidentiality, shock, embarrassment, unfriendliness, pity, condescension, and fear at the hands of healthcare providers who normally hide behind repressive laws that criminalize homosexuality in Malawi. This is impeding the right of LGBTIQ+ people to receive appropriate and gender-affirming healthcare that is not being adequately provided for by the State.
Investigate attacks and killings of vulnerable groups, including human rights defenders	122.49	Accepted	Not implemented	<p>Instead of investigating the attacks and harassment of LGBTIQ persons, let alone bringing the perpetrators of such attacks and abuses to book, there have been persistent reports of human rights violations of LGBTIQ+ persons by the police, including unlawful detention, extortion, threats of disclosure of confidential information, denial of legal protection as well as physical violence in detention.</p> <p>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.</p> <p>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 (e.g. the case of a transgender woman who was arrested in Mangochi district of Malawi on 20th October, 2021 where she was forced to submit to the genital verification exercise, placed in a police cell for men when she had identified herself as a woman, and she was also subjected to medication examination without her consent – more information below)</p>

				Further, according to the Out and Proud Risk and Vulnerability Analysis of 2021, statistical analysis on risks in association with SOGIE shows that there is a statistically significant relationship between SOGIE and the risk of being violated by police officers and being excluded from health services, with the results at 10% level of significance.
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Other issues that emerged after the last UPR review

There are several issues that emerged after the last UPR review. The following are some of the issues:

Arrest and Conviction of a Transgender Woman in Mangochi

On 20th October 2021, the Mangochi Police Station arrested a transgender woman Jana Gonani on allegation that she was identifying herself as a woman when, according to the Police, she was a man. While at Mangochi Police Station, Gonani was forced to submit to genital verification without her consent by a male police officer where she was also placed in a male cell despite identifying herself as female. She was also subjected to medical examination without her consent in order to verify her mental faculties simply because of her sexual orientation. Currently, Gonani is serving an 8-year jail term at Zomba maximum prison where she has also been placed in a male cell irrespective of her sexual orientation. Recently, her case was certified by the Chief Justice as a constitutional referral case number 2 of 2022 courtesy of Nyasa Rainbow Alliance and is awaiting hearing and determination by a panel of 3 Constitutional Court judges of the High Court.

NRA Registration Case

On 26th July 2016, the trustees of Nyasa Rainbow Alliance applied for registration as a Non-governmental organization under the Trustees Incorporation Act (Cap:5:03) of the Laws of Malawi. However, the Ministry of Justice in a letter dated 18th May, 2017, rejected the registration of NRA on account that its objectives were against public policy, hence illegal. The response from the Ministry of Justice prompted NRA to challenge the impugned decision as it was a gross violation of section 32 of the Constitution of Malawi which guarantees right to freedom of association. Consequently, on 26th July, 2017, NRA filed an application for leave (permission) to apply for judicial review of the said decision which application was granted by the High Court of Malawi on 12 September, 2017. On 15th March, 2018, the case was referred to the Chief

Justice for certification as a constitutional matter. Ever since the case was certified as a constitutional matter, the Malawi judiciary has been subjecting the case to indefinite adjournments without any cogent justification. The latest indefinite justification was on 23rd September, 2022 when the Registrar of High Court communicated that the panel of constitutional Court could not proceed to hear the case on the 26th to 30th September 2022, as initially scheduled due to what they described as 'logistical challenges.' Currently, it remains unclear or known as to when the case will be heard by the Court.

Voted Against the Renewal of the Mandate of the HRC's Independent Expert on SOGIE

In July 2022, Malawi voted against the renewal of the mandate of the HRC's Independent Expert on Violence and Discrimination based on Sexual Orientation and Gender Identity. Although Malawi's decision did not affect the renewal of the mandate of the said Independent Expert on SOGIE as the said mandate was nonetheless renewed, however, the mere act of voting against the renewal had portrayed a negative signal that Malawi condones violence and discrimination against the LGBTIQ+ persons. Thus, Malawi's decision to vote against the renewal of the Independent Expert of SOGI was a serious breach of UN General Assembly's founding resolution of the Human Rights Council requiring council members to uphold the 'highest standards' of human rights, and to 'fully cooperate' with the council.

The Enactment of the NGO Amendment Bill of 2022

In March, 2022, the Government controversially passed the NGO Amendment Bill which in effect amended the NGO Act of 2021 which among other things changed the name of the NGO Board of Malawi to NGO Regulatory Authority (NGORA). The new Act which was passed without consulting the relevant stakeholders including CSOs has consolidated powers of the NGORA to deregister a duly registered organization without cogent justification. The new Act will most likely stifle the operations of NGOs in Malawi as they will be operating at the mercy of the state which is against well founded democratic principles enshrined in the constitution of Malawi.