



Malawi Shadow Report on the International Covenant on Civil and Political Rights

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International Gay and Lesbian Human Rights Commission (IGLHRC)

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List of Abbreviations

CEDEP	Centre for Development of People
EC	Electoral Commission
FGM	Female Genital Mutilation
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICC	Independent Complaints Commission
MHRC	Malawi Human Rights Commission
MLC	Malawi Law Commission
MPS	Malawi Police Service
MSCA	Malawi Supreme Court of Appeal
PDVA	Prevention of Domestic Violence Act
VSU	Victim Support Unit

Introduction

This shadow report is prepared on behalf the Centre for Development of People (CEDEP) along with Communication Workers Union of Malawi (COWUMA), International Gay and Lesbian Human Rights Commission (IGLHRC), Media Institute of Southern Africa - Malawi Youth Empowerment and Civic Education (YECE). It follows the submission of Malawi's Initial Report under the International Covenant on Civil and Political Rights (ICCPR) and the subsequent adoption of a list of issues on that report by the Human Rights Committee (HRC). CEDEP submitted a shadow report with regard to the Adoption of the List of Issues for Malawi, therefore the present report is focused on presenting more information with regard to the issues raised by the HRC in its list of issues.¹

The general information about the country and its legal system is already captured in the Common Core Document and we do not see any reason to repeat the same.

¹ The list of issues are contained in the document reference CCPR/C/MWI/Q/1/Add.I

The Specific Issues Raised in the List of Issues

Constitutional and Legal Framework within which the Covenant is Implemented (Article 2)

Malawi's legal system remains dualist. This means that the applicability of treaty law in the country is conditional upon domestication. The provision of the Constitution dealing with applicability of treaty law is section 211 and it provides as follows:

1. Any international agreement entered into after the commencement of this Constitution shall form part of the law of the Republic if so provided by an Act of Parliament
2. Binding international agreements entered into 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 inconsistent with this Constitution or an Act of Parliament, shall form part of the law of the Republic

The provisions of section 211 notwithstanding, the practice in terms of incorporation of international treaties into Malawian law has been inconsistent. There has been, to date, no specific legislation that sets out the appropriate procedure for the incorporation of international human rights standards into national law.² This has brought about two major consequences. First, it has granted Parliament the discretion to determine how best to incorporate particular international standards resulting in an un-uniform domestication strategy. Second, it has produced uncertainty as to whether particular standards have been incorporated or not especially because in some cases Parliament has passed domesticating statutes while in many other cases nothing has been done.³ Despite the fact that Malawi is dualist, what is immediately noticeable is that Parliament has rarely passed legislation specifically designed to domesticate the treaties to which Malawi is a party.

The ICCPR has not been incorporated into the domestic laws of Malawi though, courts have sometimes referred to its provisions. The effect of a lack of domestication is that the provisions of the ICCPR cannot be invoked directly as founding a cause of action before the courts in Malawi. It must also be recalled that because of the supremacy clause in the Constitution of the Republic of Malawi (section 5) where international law is applicable in Malawi it is applicable only in so far as it does not contravene the provisions of the Constitution. Further there seems to be no clear Government strategy that outlines the measures that are in place to implement the Committee's

² FE Kanyongolo *Malawi: Justice Sector and rule of law* (2006) 33.

³ Examples of domesticating statutes in Malawi include the Refugee Act, 1989 (Act 3 of 1989) which was passed to domesticate the UN Convention Relating to the Status of Refugee, 1951 and the 1967 Protocol and the OAU Convention governing the specific Aspects of Refugee Problems in Africa (1969) and the Geneva Conventions Act, 1967 which domesticates the Geneva Conventions.

views under the Optional Protocol. The State has failed to educate judges, lawyers and prosecutors of their obligations under ICCPR and its protocols.

The Malawi Human Rights Commission (MHRC) is established under Section 129 of the Constitution with the Human Rights Commission Act⁴ responsible for the promotion and protection of human rights of people in Malawi. The MHRC is established as an autonomous Government institution. In practice, however, perennial underfunding from Government compromises the autonomy of the Commission forcing the Commission to rely on external funding to run its operations. Additionally, the Commission's independence is at perpetual risk of being compromised since in the appointment of Commissioners, the Constitution directs that it is the Law Commissioner (appointed under section 133 of the Constitution) and the Ombudsman (appointed under section 122 of the Constitution) who must jointly forward to the President the list of names from which the Commissioners are finally appointed. The logic behind involving the heads of other autonomous constitutional institutions in appointing Commissioners for the MHRC remains very dubious and is a potential challenge to the independence of the MHRC.⁵

In terms of Government compliance with recommendations from the MHRC, it is to be noted that the record of the Government in this regard is not very impressive. By law, the MHRC prepares annual reports in which it details whatever activities it has undertaken in the passing year and this report is meant to be presented to Parliament for consideration. The Executive has never presented the annual reports by the MHRC for consideration meaning that in cases of Executive non-compliance with MHRC's directions, Parliament has failed to intervene.

Recommendations:

- Malawi should take clear and targeted steps towards the domestication of the ICCPR and other major international human rights instruments.
- Malawi should put in place a clear strategy for raising awareness about the ICCPR and its protocols.
- Malawi should adequately fund the MHRC and also review its laws with regard to the appointment of Commissioners with a view to enhancing and entrenching the autonomy of the organization.
- The Government must also take steps to comply with directions from the MHRC with regard to implementing recommendations and addressing human rights violations. In particular, the Government must make special effort to present before Parliament the

⁴ Human Rights Commission Act of 1998, Act No. 27.

⁵ See "Countries at the Crossroads: Malawi," Freedom House p6 (2012) available at <http://www.freedomhouse.org/sites/default/files/Malawi%20-%20FINAL.pdf>

Annual Human Rights Report for consideration by Parliament of the various recommendations from the MHRC.

Non-Discrimination, Equality between Men and Women (Articles 2, Paragraph 1, 3 and 26)

Articles 2(1) and 26 of the Covenant provide for the respect, equality and nondiscrimination of all individuals on the grounds of, inter alia, race, color, sex, and any other status. In 2004 the Committee found that the reference to “sex” in these articles must be taken to include sexual orientation.⁶

Consensual same-sex conduct is still criminal in Malawi. The Penal Code⁷ criminalises all ‘carnal knowledge against the order of nature’ – section 153. The prohibition in section 153 has generally been interpreted to mean a prohibition of all sexual intercourse other than that which involves penile/vaginal penetration. Additionally, section 156 of the Penal Code criminalises what are termed ‘indecent practices between males’ with a penalty of five years imprisonment if one is found guilty of the offence. Under a 2011 amendment to the Penal Code, section 137A, the offence of indecent practices between females has also been added to the Penal Code. It must be highlighted that the offences under sections 156 and 137A cover not only the alleged perpetrators of the offence but also those who have procured the commission of the offence or attempted to procure the commission of the offence and it does not matter if the activities happened in public or private.⁸ A confirmation case before the High Court of Malawi in which the Court would have ruled on the constitutionality of the Penal Code’s provisions has stalled because of the Government’s appeal to the Malawi Supreme Court of Appeal on a procedural matter. As it stands, anyone suspected of engaging in same sex conduct can be tried and convicted by a court in Malawi. Under the Immigration Act, section 4(1) any prostitute or homosexual, or any person, male or female, who lives or has lived on or knowingly receives or has received any part of the earnings of prostitution or homosexuality, or has procured men or women for immoral purposes is deemed a prohibited immigrant.⁹

The Marriage, Divorce and Family Relations Bill is yet to be passed by Parliament. However, in 2011 the Government passed the Deceased Estates (Wills, Inheritance and Protection Act)¹⁰

⁶ Human Rights Committee Communication No. 488/1992, Australia, CCPR/C/50/D/488/1992, (Apr. 4, 1994).

⁷ Act No. 22 of 1929, Chapter 7:01 Laws of Malawi

⁸ Malawi Suspends Sodomy Laws: Activists Proceed with Caution and Call for Full Repeal,” International Gay and Lesbian Human Rights Commission (IGLHRC), 6 Nov. 2013, <https://iglhrc.org/content/malawi-suspends-sodomy-laws>

⁹ *Malawi: Immigration Act of 1964*, 1964.

¹⁰ Act No. 14 of 2011

which legislation has significantly improved the law on succession in the country. Over the past years governmental and non-governmental organisations (NGOs) have engaged in considerable work across the country sensitising the populace about many illegal practices targeting widows. The passing of the Gender Equality Act, 2013 was another significant milestone towards the attainment of equality between men and women in the country and it builds on the foundations for equality as stipulated by the Constitution. Many of the laws dealing specifically with women's issues are meant to address the various practices that are harmful and prejudicial to women. A lingering problem in the consideration of equality between men and women is the provision in the Citizenship Act, Chapter 15:01 Laws of Malawi whereby under Section 9 a Malawian woman who marries a foreigner loses her Malawian citizenship unless she makes a declaration retaining her Malawian citizenship within one year of her getting married. There is no similar requirement for Malawian men marrying foreign women.

Recommendations:

- Malawi should repeal section 153, 156 and 137A of the Penal Code which criminalise same sex conduct. The provisions of the Penal Code are contradictory to many stipulations in Malawi's own Constitution as well as the various obligations the country has assumed under the international conventions to which it is a party. The continuation of these provisions on the statute book infringes many rights of people in Malawi including, prohibition of discrimination, protection of privacy and protection of dignity, among some rights.
- The Government of Malawi should take active steps to create awareness about same-sex issues especially the patent unconstitutionality of the provisions in the Penal Code that criminalise same sex conduct.
- The Government of Malawi should take concrete steps to raise awareness about many of the new pieces of legislation as well as to create necessary structures enabling the full application of the new laws.
- The Government should repeal the provisions of the Immigration Act, which declare persons of known homosexual orientation as prohibited immigrants.
- The Government of Malawi must also take immediate steps to repeal section 9 of the Citizenship Act to ensure that Malawian women who marry foreign men are treated the same way as Malawian men who marry foreign women. This would contribute to achieving equality.

Right to Life (Article 6)

Death Penalty

The crime of murder is still punishable by death under section 209 of the Penal Code. The effect of the decision of the Constitutional Court in *Kafantayeni and others v Attorney General*¹¹ was that the death penalty was no longer mandatory in murder cases in Malawi. For the first time in Malawi, courts were granted the discretion to look at the factors of the offence and the circumstances of the perpetrator before determining the appropriate sentence and were not bound to impose the death penalty in all murder cases. No one convicted of murder has been executed in the country since approximately 1994 though the current law permits the Court to impose it at any time. Importantly, one of the directives from *Kafantayeni and others v. Attorney General* was that every person who had been sentenced to death prior to the court's judgment was entitled to a resentencing so that an appropriate sentence could be passed. Almost ten years after the *Kafantayeni* decision, not a single resentencing has been done.

Extrajudicial Killings

On the question of extrajudicial killings: the death of Fanikizo Phiri, a student of the University of Malawi, remains unresolved and so is the death of Robert Chasowa¹², another University of Malawi student. The Government set up a Commission of Enquiry to look into Robert Chasowa's death but nothing tangible has emerged from the Commission's work.¹³ Further, the growing tendency of mob justice, especially in Malawi's major urban centres is a serious cause of concern. There are increasing reports of mobs of people taking the law into their own hands and dealing with suspected criminals and in most cases resulting in the death of the suspects.

Recommendations:

- The State Malawi must ensure that all persons sentenced to death before the Kafantayeni decision be allowed re-sentencing hearings to ensure sentences reflect the circumstances of their crimes
- The Government of Malawi should abolish the death penalty and ratify the Second

¹¹ High Court of Malawi: *Kafantayeni v. Attorney General* (27 April 2007) No. 12 of 2005.

¹² In September 2011, a student at Malawi Polytechnic, University of Malawi, Robert Chasowa was found dead. Chasowa was known to be a critic of former Malawi president, Bingu wa Mutharika. While the police insisted that the student committed suicide, renowned Malawian pathologist, Dr. Charles Dzamalala, confirmed through his autopsy that the student was killed. "Robert Chasowa was Assaulted – Autopsy," *The Nation Newspaper*, 5 October 2011. Available online at <http://www.scribd.com/doc/67574687/Robert-Chasowa-was-Assaulted-%E2%80%93-autopsy>.

¹³ "Chasowa family still demand justice as case stalls" *Nyasa Times Reporter* (Jun. 10 2014), available at <http://www.nyasatimes.com/2014/06/10/chasowa-family-still-demand-justice-as-case-stalls/comment-page-2/>; Commission on Inquiry into the Death of the Late Robert Chasowa, President Joyce Banda, New State House, Lilongwe Ref. No. RC/16.

Optional Protocol.

- Regarding extrajudicial killings, the Government should conclude investigations into the killing of Robert Chasowa, Fanikizo Phiri and Edson Msiska and bring the perpetrators to justice. In cases where the State has already arrested and charged suspects with regard to extrajudicial killings, the Government should proceed without undue delay.
- Regarding violent mob justice, the Government is urged to strengthen the law enforcement agencies capacity to respond to reports of crime such that the opportunity for crowds to resort to mob justice is eliminated.

Prohibition of Torture and Cruel, Inhuman or Degrading Treatment or Punishment, Right to Liberty and Security of the Person, Treatment of Persons Deprived of Liberty (Articles 7, 9, 10, 12, and 13)

Allegations of torture committed by police offices continue to surface in many criminal trials especially. Under Chapter IV 19(3)¹⁴, Malawi's Constitution prohibits torture and any cruel or inhuman or degrading treatment but it seems the Malawi Police Service (MPS) does not consistently adhere to this stipulation. Part XIII of the Police Act¹⁵ established an Independent Complaints Commission (ICC). The ICC was meant to have the power to receive and investigate complaints by the public against police officers and MPS and investigate all deaths or injury as a result of police action. The ICC has not been established resulting in the MPS not having statutory oversight as envisaged under the Police Act.

Recommendations:

- The Government of Malawi should conduct police sensitivity trainings to reduce officers performing torture and other forms of cruel or inhuman treatment.
- The Government should also take steps to investigate and punish all police officers proved to have been involved in acts of torture.
- The Government should establish the ICD as envisaged by the Police Act to ensure that there is adequate supervisory authority over the MPS.

In recent years Malawi has made some progress in addressing violence against women. Malawi has enhanced the justice and remedial system to ensure speedy and appropriate assistance to victimized women and children through the setting up of Victim Support Units (VSU) in various

¹⁴ Constitution of Malawi, Chapter IV 19(3).

¹⁵ Police Act (No. 12 of 2010) under Part XIII.

police stations. Specifically VSUs have been established in 34 police stations, 13 police posts and 200 other Support Units in 300 Traditional Authority institutions. Malawi has also established 20 ‘One Stop Centres’ (where victims are counselled and provided health assistance and investigations initiated) in the central and district hospitals. According to recent data, 30% of the reported cases of violence against women and children are almost immediately prosecuted. The adoption of the Prevention of Domestic Violence Act (PDVA)¹⁶ is a manifestation of the progress that Malawi has been making on matters pertaining to violence against women. Despite these facts, violence against women remains prevalent. Part of the problem is a knowledge and implementation gap with regard to the PDVA. While very elaborate in the structure and systems that it sets up to deal with domestic violence, very little is known about the PDVA outside of societies of affluent women. Additionally, in practice there is little to support the mechanisms that the Act establishes. Reported cases of Female Genital Mutilation (FGM) in Malawi are very rare. A recent study estimated no more than 5 % of women who confirmed having gone through the process.

Recommendations:

- The Government of Malawi should take steps to ensure the full implementation of the PDVA and other laws meant to eliminate all forms of violence against women in the country.
- The Government should establish all structures necessary for the full implementation of the PDVA.
- With regards to FGM, the Government takes steps to totally eradicate the practice in Malawi through education/sensitisation and the punishment of the perpetrators but more importantly the Government should aim at eradicating all practices harmful to women in the country.

Elimination of Slavery and Servitude (Article 8)

In terms of human trafficking, Malawi is predominantly a source country and a transit country for migrants. Malawi is a source country in so far as many Malawians will generally make their way to the more affluent economies of Botswana and South Africa. However, the geographical region of the country means that Malawi is also a conduit for migrants that may be trafficked especially those heading for South Africa, Botswana and beyond. Considering the clandestine nature of the activity, it is very difficult to obtain precise data about the extent of the problem in Malawi. Initiatives to combat trafficking in persons in Malawi started in 2004 and culminated in the adoption by the Malawi Law Commission (MLC) of a report on the development of trafficking in

¹⁶ Act No. 5 of 2006, Chapter 7:05 Laws of Malawi.

persons legislation in 2011.¹⁷ Unfortunately, the proposed legislation on human trafficking has not been adopted in the country. The bill is still pending cabinet approval before being tabled in Parliament. This means that Malawi does not have legislation to deal with the trafficking of persons. This is a very serious lacunae. The absence of a law dealing with the trafficking of persons also makes it difficult to have formal mechanisms for collecting data about human trafficking in the country and the lack of accurate data in turn makes it difficult to formulate meaningful responses to the problem.

Recommendations:

- The government should take immediate steps to finalise the adoption of legislation on human trafficking in Malawi.
- The State must provide law enforcement agencies with adequate training to recognise and process cases of human trafficking. The State should also ensure disaggregated data collection on the practice of human trafficking.
- The law enforcement agencies must be provided with adequate resources to enable properly monitor the movement of human beings along all of the country's borders.

Right to a Fair Trial (Article 14)

Section 42 of the Constitution, which provides for the various fair trial guarantees, is one of the longest sections in the Constitution detailing numerous rights to which the detainee is entitled. In practice, however, the pace at which cases are concluded is extremely slow, resulting in extended periods of pre-trial detention and interfering with detained persons' access to justice. Many pre-trial detainees in Malawi will spend months or even years in detention without being tried or found guilty.¹⁸ There is an insufficient amount of qualified personnel to deal with the cases as they arise and because the pace of the trial is dependent on the availability of court personnel and other supporting officers, the result is extended delays for trial dates.¹⁹ The number of trained lawyers remains low as is the number of judges and professional magistrates.²⁰ The Legal Aid Department, now to be called the Legal Aid Bureau, remains heavily underfunded and cannot attract and retain sufficient numbers of trained practitioners meaning that legal aid is not always available to those who need it the most.

¹⁷ Report Of The Law Commission On The Development Of Trafficking In Persons Legislation, Malawi Law Commission (February 2011). available at http://www.lawcom.mw/docs/Report_on_the_Development_of_Trafficking_in_Persons_Legislation.pdf.

¹⁸ *Pre-Trial Detention Custody Time Limits: Ensuring Compliance in Malawi*, Open Society Foundations, Open Society Initiative for Southern Africa (OSISA), p2 (2013) available at http://www.osisa.org/sites/default/files/malawi_report_-_pre-trial_detention_english.pdf.

¹⁹ Ibid at 21.

²⁰ Ibid.

Recommendations:

- The Government should allocate sufficient resources to the Legal Aid Department to enable it attract and retain sufficient numbers of trained personnel as well as to enable the Department fully discharge its responsibilities across the country.
- The Government must also ensure that the Judiciary is adequately resourced in order to ensure a speedy resolution of cases.

Right to Recognition as a Person Before the Law (Article 16)

CEDEP commends the Government of Malawi on the adoption into law of the Disability Bill. Malawi now has a law that specifically deals with matters pertaining to disability. The Act is based on the social model of disability. According to the model, disability is a human rights issue and the problems that people with disabilities face are due to environmental factors such as individual prejudices and institutional discrimination, which impose restrictions upon the disabled. The Act contains the following key provisions:

- Right to non-discrimination in the fields of health, education and training, social life, culture, sports, recreation, employment, public and political life/affairs, housing, and many others – and seeks to ensure that people with disabilities have access to all places including buildings.
- Remedies enforceable by the courts to disabled people, who suffer from disability discrimination. For example, individuals and organisations who practice disability discrimination may be fined or imprisoned and may have their licenses revoked.
- The introduction of a national sign language and establishment of a trust fund to pool resources for programmes aimed at ensuring the mainstreaming of disability.

However, the Act lacks the following crucial aspects in the promotion of disability rights:

- Provision for the collection of disability statistics and data, or for the establishment of an independent mechanism involving national or other human rights institutions to monitor its implementation – yet these are crucial in the promotion of disability rights.
- Provision for the role of disabled persons' organisations, persons with disabilities or children with disabilities in its implementation although disability rights advocates emphasise the need for their active participation.

Recommendation:

- The Government that the adoption of the Disability Act is not the same thing as a full realization of the rights of all persons with disability in the country. The Government

needs to conduct a serious audit of the Act to map out the areas in which there can be improvement of the framework for disability rights in the country.

Prohibition of Arbitrary or Unlawful Interference with Privacy, Family, Home or Correspondence (Article 17)

Article 17 provides for “the right of every person to be protected against arbitrary or unlawful interference with his privacy, family, home or correspondence.” Under section 10 of the proposed HIV/AIDS (Prevention and Management) Bill, a health service provider may disclose information relating to any person’s HIV status to any person the provider reasonably believes has been or will be infected or will be exposed to the infection. The partner may also disclose to the spouse or sexual partner of the infected person so long as the provider reasonably believes that it is medically appropriate in both these instances.²¹ The provision is likely to bring into question its relationship with the constitutional guarantee for individual privacy. It must be recalled that privacy, at its most basic, requires that one must exercise full autonomy about himself/herself which includes autonomy to choose when and how to disclose information about oneself. As we speak, Malawi has not passed the Bill into law so there is not legal obligation on health service providers to make the disclosures that section 10 envisages.

Recommendations:

- On the HIV/AIDS (Prevention and Management) Bill, CEDEP recommends to the Government of Malawi should conduct further consultation on the Bill including but not limited to the proposed section 10 of the Bill.
- While preventing and managing HIV infection rates in the country is a commendable objective it is important that the means chosen to achieve these purposes must not lead the country to violate its own Constitution or other international obligations that it has voluntarily acceded to.

Freedom of Conscience and Religion (Article 18)

The Constitution guarantees freedom of conscience and belief in section 33. Unlike the situation that obtained before the adoption of the Constitution, there are no religious sects that are expressly

²¹ Malawi's draft HIV and AIDS (Prevention and Management) Bill contains three provisions (Articles 43 to 45) relating to HIV exposure and transmission. 'Deliberate', 'reckless' and 'negligent' HIV exposure or transmission all appear to be criminalised with a maximum prison sentence of ten years for 'reckless' or 'negligent' transmission and 14 years for 'deliberate' transmission. Disclosure of HIV-positive status is not mentioned, either as a legal obligation or as an affirmative defense. NAM, *Malawi*, <http://www.aidsmap.com/law-country/East-Africa/page/1444793/#item1444833>

outlawed in Malawi. The Government of Malawi must thus be commended for, generally, treating all religions equally. There have, however, been media reports of school children of a Rastafarian persuasion being returned from public schools for failure to shave their hair.

Recommendations:

- The Government of Malawi must continue treating all religions equally. Where Rastafarian children are denied access to public schools because of wearing long hair the Government is urged to put in place mechanisms to stop the practice.
- The Government also needs to adopt measures to ensure that all people of Malawi of differing religions accept religious diversity and treat each other equally.

Freedom of Opinion and Expression (Article 19)

Under an amendment to the Penal Code that was passed in 2011, in section 46, the Minister was given power to prohibit the publication or importation of any material that the Minister had reasonable grounds to believe would be contrary to the public interest. Where the Minister exercised his powers to prohibit a publication, section 46 required that the Minister issue an Order to be published in the Gazette. The problem with the provision as amended was that it was not so clear what would amount to the reasonable grounds on the basis of which the Minister would be acting to ban the publication or importation of any material. Fortunately, the amended section 46 was repealed and it is presently of no effect.

In October 2011 the police arrested five civil society activists – Habiba Osman, Billy Mayaya, Brian Nyasulu, Ben Chiza Mkandawire and Comfort Chitseko on charges of holding an illegal demonstration. The activists were later released on bail after five days. In September of the same year, unknown people threw petrol bombs at the homes and offices of several critics of government including McDonald Sembereka and Rafik Hajat. Police investigations into these incidents have been inconclusive. On September 12, 2011 police arrested journalist Ernest Mhwayo for allegedly taking pictures of the former President, Bingu wa Mutharika's, house without permission. During the July 20, 2011 demonstrations, police reacted in a very heavy-handed manner towards journalists attempting to cover the event. Some journalists were beaten while others were taken into custody. Journalists Raphael Tenthani and Mavuto Banda were also arrested by the Government because of the stories that they published just as was the director of the Consumer Association of Malawi. In all the cases, the arrests of the human rights defenders and the journalists all seemed to have had a very shaky basis, if any at all, in law.

Malawi has yet to pass into law the Access to Information Act. The irony here is that section 37 of the Constitution guarantees a right of every person to access information held by the State or any of its organs in so far as the information is required for the exercise of one's rights. Although there has been a lot of effort put into the adoption of an Access to Information law the actual progress towards the adoption of the law remains limited. The most recent Bill on access to information is still pending presentation to Parliament for deliberation and possible approval into law.

Recommendation:

- CEDEP while commending the Government of Malawi for repealing section 46 of the Penal Code urges the Government to expedite the process of adopting the access to information law. In adopting the access to information law the Government of Malawi will, in reality, be merely fulfilling the constitutional imperatives as expressed in section 37.

Freedom of Assembly and Association (Articles 21, 22)

The Commission of Inquiry set up to investigate the demonstrations, deaths, injuries, riots and looting, arson, public disorder and loss of property that took place on 20 and 21 July 2011 delivered its report to the President of Malawi in June 2012. Among other things, the Commission established that twenty people were killed, fifty-eight people were injured and significant property was also damaged. The deaths and injuries, as the Commission established, were caused, principally, by the police actions. In the absence of ICC the actions taken by the MPS to deal with its officers who were involved in the killings and beatings remains unclear. In terms of making reparations to the victims of police brutality during the demonstrations, it seems to be the case that Government has adopted an ad hoc response with regard to the question of compensating the victims. As it stands presently, there does not seem to be a clear indication of the measures that the Government put in place to compensate the victims and/or their families.

Recommendation:

- The Government should immediately take steps to compensate all the victims of the July 20, 2012 demonstrations. The Government must also ensure that all those implicated in the violence are dealt with in line with law to ensure accountability. The Government should also indicate clearly the steps that it is taking to implement the recommendations of the Commission of Enquiry into the July 20, 21 demonstrations.

Freedom of Movement, Marriage, Family and Measures for Protection of Minors (Articles 12, 23 And 24)

The Employment Act (section 21), the Constitution (section 23) and the Child Care, Protection and Justice Act, 2010 all operate to prohibit child labour in Malawi. The totality of the provisions in the laws just referred to is that the welfare of children must always be prioritised and children should never be exposed to conditions that are hazardous to their well being. Despite the existence of these various laws, a number of studies have found that Malawi has one of the highest levels of child labour in the region and the most publicized cases are in the agricultural (tobacco estates) sector. Official data from the National Statistical Office shows that 26% of children aged 5–14 in the country are involved in child labour. The breakdown of child labour statistics is as follows: 15% of children are involved in family business and 5% in household chores. 80% of children do unpaid work and 3% are engaged in paid work. However, 86% of child labourers are able to attend school (Labourer students). It must be highlighted, however, that up-to-date statistics on child labour in Malawi are not readily available. Adding complexity to the situation is the fact that the age of majority is not defined uniformly across the various statutes in Malawi. For example, the definition of child as a person below sixteen years of age is not consonant with the Employment Act's definition of a child which basically covers the bracket between fourteen and eighteen years of age. This anomaly has created a lot of misunderstanding of the actual definition of child labour in the country. Another problem is that due to lack of funding, monitoring child labour especially in the agricultural sector is highly challenging.

Recommendations:

- The Government of Malawi should initiate public dialogue aimed at resolving the national age of majority which will be informed by the relevant international standards. Hopefully, following from this process the country would have childhood defined uniformly across the various statutes.
- The Government should allocate sufficient resources to combating child labour especially within the agricultural sector. This should include a comprehensive system of monitoring the agricultural estates to ensure that they do not engage children and where the same happens appropriate sanctions must be levied. The Government should also deliberately take steps to collect comprehensive statistics about the problem of child labour in the country so that its interventions are well grounded.

One of the harmful social cultural issues that Malawi has been grappling with is the one related to early marriages. Currently, Section 22 (7) of the Constitution says that marriage for people between the age of 15 and 18 years shall only be entered into with the consent of their parents or guardians. Section 22 (8) says the State shall discourage marriages between persons where either

of them is under 15. Recent statistics show that in Malawi, 10 percent of women aged 15–49 marry before the age of 15 and 50 percent of women aged 20–49 marry before the age of 18.²² One in every three female teenagers is either married or in an informal union. Early marriage is less common for men than it is for women and this is the case because only 1 percent of men marry before they reach 15 and 7 percent of men in the 20–49 age group marry before age 18.²³

Recommendation:

- The Government should take effective steps to bring to an end the practice of early marriages.

Rights of Persons Belonging to Minorities (Article 27)

Malawi is not linguistically or religiously homogenous. However, there has been a general tolerance among the various ethnic and religious groups in the country and the Government must be commended for ensuring a harmonious co-existence between the various groups of people in the country.

²² See also Malawi: East Widespread Child Marriage: Pass Marriage Law, Adopt Comprehensive Approach , (Mar. 6, 2014) available at <http://www.hrw.org/news/2014/03/06/malawi-end-widespread-child-marriage>.

²³ Ibid.

The Right to Take Part in Public Affairs and the Right to Determine Political Status (Articles 2 and 25)

Regarding the tripartite elections that Malawi recently held. on May 20, 2014, Malawi was choosing its President, Members of Parliament and Councils for the local government. CEDEP takes the view that the right of the Malawi populace to participate in the May 20 elections, either as voters or contestants was/is properly guaranteed under the Constitution (see, section 40 of the Constitution). CEDEP takes the further view that the right to participate in shaping the destiny of one's country also finds support in articles 2 and 25 of the ICCPR. As it turns out, the tripartite elections were amongst the most highly contested elections that Malawi has ever had. The law requires the Malawi Electoral Commission to release the results of the election within eight days after the conclusion of the voting. By the Electoral Commission's own confession the results had irregularities which required that the Commission should conduct a verification of some of the results. In the impasse that subsequently arose, one person was killed in a demonstration in Mangochi while sporadic public violence was also witnessed in Blantyre – it must also be recalled that at least 2 people were killed in Goliati, Thyolo in the run-up to the election as the then President, Joyce Banda, was coming from a campaign rally. The results were finally announced on the eighth day after the conclusion of voting declaring Professor Arthur Peter Mutharika as President. If indeed there were irregularities with the votes, as seemingly conceded by the Electoral Commission, it is not clear the precise nature of these irregularities and from whence they originated and how the Electoral Commission resolved these irregularities before declaring the final results.

Recommendations:

- The Government direct the Electoral Commission to properly explain the nature of the irregularities that it allegedly found with the results before making the final announcement.
- The Electoral Commission should also be directed to make public the manner in which it resolved the alleged irregularities.
- The Government should take steps to investigate the full circumstances leading up to the death of the person who was killed in the post-election violence in Mangochi and if there is liability on the part of its agents, it should ensure that those responsible are properly dealt with in accordance with law and the same should be done with regard to those killed in the pre-election violence.

Conclusion

In the final analysis, it is clear that Malawi has made considerable progress toward the promotion and protection of human rights since the adoption of its Constitution in 1994. At the same time, however, it is clear that numerous challenges still persist before it can be said that human rights are being fully realised in the country. The Government needs to engage a broad cross-section of society on many of the issues that we have highlighted in our report before meaningful progress can be made towards the rectification of the deficiencies in its human right stature. On some of the issues, the Government can with a proper realignment of its priorities achieve immediate rectification of the situation while on other issues the Government needs to make a long-term commitment to properly resolve the issues.