



Moving beyond the politization of same-sex sexuality and leveraging right to health to counter inter-personal sexual violence and HIV in Malawi's prisons

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ABSTRACT

Sexual minority rights in contemporary Africa is a contentious issue, where in some countries, same-sexuality is portrayed by media and politicians as “*un-African*” and a “*white disease*” imported from the West. Same-sex sexual activity is criminalised in 31 African countries. Political, legal and religious frameworks exacerbate homophobic attitudes, and related discrimination and hate crimes toward individuals who identify as lesbian, gay, bisexual or transgender (LGBT). We focus here on the rights of people in prison to protection from harm (same-sex sexual violence and sexually transmitted diseases), and who (in many African countries) are ignored in national HIV prevention programming. Prison conditions in Africa are harsh and congested, with inadequate basic needs provisions and this fuels exposure of the vulnerable to sexual violence and engagement in survival sex. HIV rates in prisons are also disproportionately higher than in the community. We present a socio-legal assessment on Malawi where same-sex sexual behaviours are criminalised. The assessment highlights how inmates’ exposure to sexual violence is invisible in political, legal, human rights and public health/HIV agendas in Malawi. Notwithstanding that the Malawi Penal Code and Prison Act prohibits same-sex sexual activity, there are enormous complications with victim disclosure, as claims of rape infer that sodomy has occurred, resulting in victim arrest. We focus here on tackling sexual violence and HIV, and advocate for broad based torture prevention initiatives in prisons to protect the vulnerable from inter-personal sexual violence, and consequent acquisition and onward transmission of HIV. The voices of people in prison in Malawi are regrettably still kept out of societal and public health discourses.

1. Introduction

The UNAIDS Zero Discrimination Day held on March 1, 2022 under the mantra “*Remove laws that harm, create laws that empower*” has highlighted the need for continued global efforts to end all forms of discrimination, including the eradication of discriminatory laws, and the encouragement of States to enact anti-discrimination laws (UNAIDS, 2022). Despite these efforts, the substantial stigma and discrimination of homosexual people worldwide continues. Lesbian, gay, bisexual and transgender (LGBT) activism and same-sex sexuality rights are at the core of international human rights and health discourse (McKay, 2012). In 2011, the United Nations Human Rights Committee (UN HRC) passed

a “Resolution on Human Rights, Sexual Orientation and Gender Identity (UN HRC, 2011) designed to affirm the cross cutting nature of LGBT rights and human rights, and to combat related human rights violations. The Committee expressed “*grave concern at acts of violence and discrimination, in all regions of the world, committed against individuals because of their sexual orientation and gender identity.*”

Historically same-sex orientation and gender identity in Africa was not socially stigmatised or associated with ill-health. Murray et al. (2021) state; “*there are no examples of traditional African belief systems that singled out same-sex relations as sinful or linked them to concepts of disease or mental health — except where Christianity and Islam have been adopted.*” LGBT rights in contemporary Africa however remains

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contentious and in many African countries is taboo (Human Rights Watch (HRW), 2008; McKay, 2012; Nordic Africa Institute, 2017). Many criminalise same-sex sexual activity, a legacy of the colonial sodomy laws prohibiting “unnatural carnal desires and acts” (Kyomya et al., 2012). In 2010, 16 out of the 18 African Commonwealth nations had sodomy laws (Polity, 2010). In 2019 the British Prime Minister Theresa May offered an apology to former Commonwealth countries for Britain’s role in exporting homophobic laws to its former colonies (Sowemimo, 2019). Same-sex sexual activity is illegal in 31 African countries (International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA), 2020) (see Table 1). Enforcement varies in severity of sanctions, and ranges from death penalty, life imprisonment, public stoning, flogging, forced labour and fines (Hairsine, 2019).

Table 1
Criminalization of same-sexuality in Africa (IGLA, 2020; p325).

Country	Are Same Sex Sexual Acts Legal?	Date of Decriminalization	Max Penalty
Algeria	No	-	2
Angola	Yes	Never criminalised	-
Benin	Yes	2019	-
Botswana	Yes	Never criminalised	-
Burkina Faso	Yes	Never criminalised	-
Burundi	No	-	2
Cameroon	No	-	5
Cabo Verde	Yes	2004	-
Central Africa Republic	Yes	Never criminalised	-
Chad	No	-	2
Comoros	No	-	5
Congo	Yes	Never criminalised	-
Côte d’Ivoire	Yes	Never criminalised	-
DRC	Yes	Never criminalised	-
Djibouti	Yes	Never criminalised	-
Egypt	De Facto	-	Undetermined
Equatorial Guinea	Yes	Never criminalised	-
Eritrea	No	-	7
Eswatini	No	-	Undetermined
Ethiopia	No	-	3
Gabon	Yes	2020	-
Gambia	No	-	14
Ghana	No	-	3
Guinea	No	-	3
Guinea-Bissau	Yes	1993	-
Kenya	No	-	14
Lesotho	Yes	2012	-
Liberia	No	-	1
Libya	No	-	5
Madagascar	Yes	Never criminalised	-
Malawi	No	-	14
Mali	Yes	Never criminalised	-
Mauritania	No	-	Death
Mauritius	No	-	5
Morocco	No	-	3
Mozambique	Yes	2015	-
Namibia	No	-	Undetermined
Niger	Yes	Never criminalised	-
Nigeria	No	-	Varies
Rwanda	Yes	Never criminalised	-
Sao Tome and Principe	Yes	2012	-
Senegal	No	-	5
Seychelles	Yes	2016	-
Sierra Leone	No	-	10
Somalia	No	-	Death penalty
South Africa	Yes	1998	-
South Sudan	No	-	10
Sudan	No	-	Life
Tanzania	No	-	Life
Togo	No	-	3
Tunisia	No	-	3
Uganda	No	-	Life
Zambia	No	-	Life
Zimbabwe	No	-	1

Media campaigns and punitive politico-legal frameworks in many African countries exacerbate homophobia, stigmatisation, social discrimination of LGBT people and hate crimes toward them (Kyomya et al., 2012; Nordic Africa Institute, 2017; Sowemimo, 2019). Gloppen and Rakner (2019) comment on the politization of same-sexuality in Africa and state that; “Africa may be considered a “front-runner” continent in terms of employing homophobia as an issue of political contestation and conflict”. Same-sexuality is portrayed by politicians and in the media as “un-African” and a “white disease” imported to Africa from the West, and this fuels the association of same-sexuality with the HIV/AIDS epidemic (Human Rights Watch (HRW), 2008; McKay, 2012; Nordic Africa Institute, 2017). Homophobia is further driven by the promotion of ultra-conservative religious agendas by Pentecostal churches who recruit local Africans and manipulate influential religious leaders in domestic politics, and the establishment of anti-LGBT legal infrastructures (Nordic Africa Institute, 2017; Amnesty International UK, 2018; Hairsine, 2019).

In 2013 Uganda passed the Anti-Homosexuality Bill known as “Kill the Gays Bill” (later overturned in 2014) followed by plans in 2019 to impose the death penalty for gay sex (later backtracked due to pressure from international aid donors) (Deutsche Welle, 2019; Gloppen & Rakner, 2019; Hairsine, 2019; Reuters, 2020). The Ugandan Anti-Homosexuality Bill of 2013 increased the severity of sentences for consensual homosexual sex, and was broad in that it included sanctions to those ‘promoting’ homosexuality and resulting in the detention of LGBT activists (Hairsine, 2019). Sanctions for ‘those’ promoting same-sex sexuality were similar to provisions in the Nigerian Same-Sex Marriage Prohibition Act (SSMPA) of 2014. Commenting on the situation in Nigeria since enactment of the SSMPA, the Special Rapporteur on Human Rights Defenders in Africa expressed concern regarding: “the increase in physical violence, aggression, arbitrary detention and harassment of human rights defenders working on sexual minority issues” (Human Rights Watch (HRW), 2016). Other examples include Tanzania (Dar es Salaam) where, in 2018, homosexuals were hunted down and arrested by a dedicated task force. In 2020, two men in Zambia were imprisoned for 15 years for gay sex and were later pardoned. On a more positive note, progressive countries such as South Africa, Mozambique and Botswana have revised their penal codes to remove dated laws criminalising same-sex relations, and others which criminalise same-sex sexual behaviours (for example the Gambia, Malawi) choose not to prosecute under their existing legal frameworks (Amnesty International UK, 2018; Hairsine, 2019).

2. HIV, dimensions of vulnerability and interpersonal sexual violence in African prisons

Prisons are rather ignored in the debate around LGBT rights in Africa and are particularly invisible in the HIV agendas in conservative African countries where same sex relations are criminalised. We focus here on sexual transmission of HIV, and the subject of same-sex sexual behaviour and exposure to inter-personal sexual violence in African prisons. The rationale is that injecting drug use, tattooing and scarification practices in prison pose minimal transmission routes in African prisons. There is substantial global and African regional evidence to support the identification of men who have sex with men (MSM), and people in prison as key populations at risk of HIV acquisition (Todrys et al., 2011; Todrys & Amon, 2012; Telisinghe et al., 2016; Golrokhi et al., 2018; World Health Organization (WHO), 2021; UNAIDS GLOBAL AIDS Update, 2021). HIV prevalence among people in sub-Saharan African prisons is higher than domestic rates, and varies from 2.3% to 34.9% (Telisinghe et al., 2016). In some African countries (where data is available, Zambia, Nigeria) higher HIV rates are observed among already incarcerated inmates than those tested on entry, with studies and systematic reviews demonstrating the association between transactional same-sex sexual activity and sexual violence perpetrated by adult inmates, and the transmission of HIV and sexually transmitted diseases during incarceration (Saliu and

Akintunde, 2014; Egelund-Ryberg, 2014; Golrokhi et al., 2018; Joshua & Ogbai, 2008; Kumwenda et al., 2017; Lawan et al., 2016; Phiri, 2020; Sabitu et al., 2009; Ikuteyijo and Agunbaide, 2008; Telisinghe et al., 2016; Usman et al., 2020, 2021).

A recent scoping review of the past twenty years in sub-Saharan African prisons has documented the exposure of people in prison to sexual violence (peers and to a lesser degree staff) and the engagement of inmates in survival sex in exchange for protection, food, soap and sleeping space (Van Hout & Mhlanga-Gunda, 2019). Corruption, the operation of gangs and vulnerability of juveniles, disabled and LGBT minorities to rape, sexual exploitation and transactional (“survival”) same-sex sexual activity in prisons is documented in Zambia, Mozambique, Uganda, Burundi, Côte d’Ivoire, Nigeria, Malawi and South Africa (Van Hout & Mhlanga-Gunda, 2019). The African Commission on Human and Peoples’ Rights (ACHPR) Special Rapporteur on Prisons and Conditions of Detention in Africa has reported that the lack of segregation of young people from adult inmates heightened their exposure to sexual violence, non-consensual same-sex sexual activity and exploitation (ACHPR, 2012). Country mission reports by the ACHPR indicate concerns around rape and coercive same-sex activity in prisons, with officials ignoring victim disclosures in Uganda, South Africa, Namibia and Malawi (ACHPR 2001, 2002, 2003a, 2004). Juveniles in Zambia were documented to agree to pair with adults for their survival and protection within prison confines; “... *Forced sexual activity is very common. The way we sleep, we are in one another’s lap.*” (Human Rights Watch (HRW) (2010); Todrys & Amon, 2011; Todrys et al., 2011). Similar power dynamics between older inmates and young boys was reported in Malawi where older males would provide food and a place to sleep, in return for sexually violating them and controlling them as their “wives” (ACHPR, 2002). Same-sex sexual activity in South African prisons is also not a newly documented phenomenon (Achmat, 2008), with extensive literature describing the interplay of sexual victimisation, exploitation, co-dependency and violent homosexual male gang dynamics (particularly the *Numbers* gang) (Gear & Ngubeni, 2002; 2003; Gear, 2005; Booyens & Bezuidenhout, 2014; Lindegaard & Gear, 2014; Fortuin, 2018). Similar is reported in Namibia (Legal Assistance Center AIDS Law Unit and the University of Wyoming College of Law, 2008).

3. The situation in Malawi: the imperatives of tackling HIV in prisons

We focus on Malawi, which is classified as a least developed country by the Organisation for Economic Co-operation and Development (OECD, 2022). Same-sex sexual activity between men in Malawi is criminalised and punishable by a custodial sentence of eight to 14 years. In late 2009 two men were arrested for sodomy (Demone, 2016). Human Rights Watch (HRW) (2018) has reported on the routine discrimination and violence experienced by LGBT Malawians. The recent public attitudes survey conducted by Africa Scope (2019) reports that 80% believe homosexual sex is wrong and 60–68% do not yet envisage legal protection of LGBT people in Malawi. In June 2021, Malawi held its First LGBTQ + Pride Parade in Defiance of Anti-Gay Laws (Lang, 2021).

Malawi has a complex relationship and economic dependence on foreign aid donors, many of whom focus on the HIV/AIDS agenda (MacNamara, 2014; McKay, 2012). Whilst the country has made great strides in curbing HIV at the domestic level, with deaths and new infections declining, it continues to have high HIV prevalence rates among adults aged 15–49 years (8.1% [7.6–8.5]) (UNAIDS, 2020). Key populations most affected by HIV in Malawi are sex workers (HIV prevalence of 60%); and gay men and other MSM (HIV prevalence of 17.3%) (UNAIDS, 2015). There has been little progress in addressing policy gaps and legal barriers experienced by MSM, sex workers, transgender people, people who use drugs and people in prison in Malawi (Frontline AIDS, 2022).

The country has 30 prisons, with most recent data from December 2020 indicating 14,500 inmates (1.1% female, 7.7% juveniles) with an

official occupancy level of 7000 (World Prison Brief, 2022). Most recent data indicates that the prison system is operating at 207% (December 2020) (World Prison Brief, 2022). In 2018 and 2019 it was 260% over capacity (Malawi Law Commission, 2018; Malawi Inspectorate of Prisons, 2021). Whilst Malawi’s prison system has tried to improve its HIV programming in recent years, it suffers from lack of government resourcing, with civil society and faith based organisations backfilling basic needs provisions and supporting HIV (and COVID-19) responses (Gadama et al., 2020; Gondwe et al., 2021; Jumbe et al., 2022). Severe congestion contributes to food insecurity, inadequate sanitation, unrest and inter-personal violence and deaths (Chirwa, 2002; Kapindu, 2013; Chilemba, 2016; Malawi Inspectorate of Prisons, 2019, 2021; Water Supply & Sanitation Collaborative Council, 2020; Van Hout, 2020a; US Department of State, 2020; UN Malawi, 2020; Gauld, 2021). Extant academic literature illustrates the chronic ill health of people in prison, exacerbated by daily exposure to disease and disease outbreaks (Banda et al., 2009; Chirwa et al., 2018; Gadama et al., 2020; Jumbe et al., 2022; Zachariah et al., 2008).

Since 2004, studies in two of Malawi’s largest prisons (Chichiri, Zomba) have been documenting particularly high rates of HIV (up to 36.6%), TB and sexually transmitted infections (STI), including incidence cases of STIs acquired in prison (indicative of same-sex sexual activity) (Banda et al., 2009; Chimphambano et al., 2007; Gondwe et al., 2021; Harries et al., 2004; Kanyerere et al., 2012; Makombe et al., 2007; Mpawa et al., 2017; Singano et al., 2020; Zachariah et al., 2008). Reports of same-sex sexual activity and sexual violence are documented in some prison investigations and HIV/public health studies (Kanguade, 2014; Nyadani, 2009). Others observe there is “*overwhelming evidence of sex in prisons*” (Jolofani & DeGabriele, 1999; Mwakasungula, 2013), with same-sexualities (spanning the consensual, transactional, becoming a prison “wife” and rape) remaining covert and ill-considered by Malawi’s officials (Biruk, 2014; Currier, 2020). Efforts to address these risk have come from within the prison walls. For example in Zomba Central prison, an “*Inmates Anti AIDS*” club was created to sensitise inmates around same-sexuality and HIV risks. These peer led initiatives however operate in complete isolation from mainstream donor and government funded HIV programmes and neglect to acknowledge prison to community HIV transmission (Currier, 2020).

4. International and normative human rights frameworks pertinent to prisons

A broad range of international and regional human rights instruments are relevant to the protection of fundamental rights of the LGBT community and people deprived of their liberty. The fundamental rights of people in prison are enshrined in international instruments that are binding for Malawi under Section 211(2) of its national Constitution. Malawi has ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR) (United Nations (UN), 1966a) and International Covenant on Civil and Political Rights (ICCPR) (United Nations (UN), 1966b). It accepts individual complaints procedures under the Optional Protocol to the ICCPR (United Nations (UN), 1966c). It has not ratified the Optional Protocol to the ICESCR (United Nations (UN), 2009). Right to equality and non-discrimination is provided in Articles 2 (1) of the ICCPR, and supported by Article 26 (see ICCPR General Comment No. 18, United Nations Human Rights Committee (UN HRC), 1989). In the 1992 case of *Toonen v Australia*, the UN HRC that monitors compliance with the ICCPR, established that: “*reference to ‘sex’ in articles 2, para. 1, and 26 is to be taken as including sexual orientation*” (United Nations Human Rights Committee (UN HRC), 1992). The ICESCR recognises several other prohibited grounds in a non-exhaustive list, including health status, age, disability, nationality, marital and family status, sexual orientation and gender identity. The UN Committee on Economic Social and Cultural Rights (UN CESCR, 2009), in defining the same right to non-discrimination in the ICESCR, has stated in their General Comment No. 20 that “*a flexible approach to the ground of ‘other*

status' is needed." Laws against sodomy are deemed to violate international human rights treaties (United Nations (UN), 2011).

Secondly, relevant to the obligation of the State to protect those deprived of their liberty from violence, inhumane, cruel and degrading treatment, and other health harms, a range of positive obligations exist concerning the rights of inmates, which include the right to health, protection from disease and right to access healthcare under the international treaties (Lines, 2008). This is most pertinent regarding general health rights, protection from violence and disease acquisition, and the right to access of HIV testing and treatment. Article 10 of the ICCPR specifically provides "that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person." ICESCR Article 12 (United Nations (UN), 1966a) is applicable to the rights of inmates to healthcare and obligations of States to take necessary measures to mitigate disease and ensure access to healthcare. The stipulations contained in General Comment No. 14 provides that CESCR States are (at the very least) required to meet a threshold of a "core minimum" of social and economic rights (UN CESCR, 2000). This is especially pertinent when considering the hidden nature of sexual violence and sexual transmission of HIV and STIs in Malawi's prisons.

The UN HRC (2019) in its General Comment No 36 on the right to life outlines States responsibility to protect the lives of those deprived of their liberty. Concluding observations by the UN HRC reflect the binding obligation for States to "take action to safeguard the health of prisoners." The UN HRC (1997) has stated that it is "incumbent on States to ensure the right of life of detainees, and not incumbent on the latter to request protection" (see *Lantsova v. The Russian Federation*). Regarding conditions of detention and rights to protect the health of those in prison, and the potential routes for strategic litigation, whilst Malawi ratified the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) (United Nations (UN), 1984) in 1996, it has not ratified the CAT-Optional Protocol (United Nations (UN), 2003) and does not accept individual complaints procedures under the CAT, Article 22. At the same time, Malawi accepts the inquiry procedure under the Article 20 of the CAT.

Finally with regard to non-binding normative standards of care for those deprived of their liberty, the UN Standard Minimum Rules for the Treatment of Prisoners (*Mandela Rules*) (United Nations (UN), 2016) cover States' responsibility for the physical and mental health of people in prison. Rule 1 states that: "All prisoners shall be treated with the respect due to their inherent dignity and value as human beingsall prisoners shall be protected from, torture and other cruel, inhuman or degrading treatment or punishment, for which no circumstances whatsoever may be invoked as a justification." Rule 13 refers to the environmental determinants of health in terms of reasonable accommodation (United Nations (UN), 2016) (applicable to aggravation of sexual violence in Malawi's congested prisons). The right to State protection of LGBT inmates also fall under the *Yogyakarta Principles* (International Commission of Jurists, 2007) which outline State obligations to ensure constitutional protections from violence, discrimination and other harm to all regardless of sexual orientation and gender identity (*Principle* 30).

5. Regional African human rights frameworks and rights of people in prison

With regard to regional human rights frameworks protecting the rights of people deprived of their liberty and pertinent to African states, Malawi is a State party to the African Charter on Human and People's Rights (the *African Charter*) (Organisation of African Unity (OAU), 1981) and is bound by the provisions of the *African Charter* as well as decisions of the African Court on Human and Peoples Rights (ACoHPR) and the African Commission on Human and Peoples Rights (ACHPR) resolutions. Basic non-discrimination provisions are outlined in Article 2 of the *African Charter*. Article 3 provides for equality before the law as well as equal protection. In the 2009 case of *Zimbabwe Lawyers for Human Rights and Institute for Human Rights and Development in Africa* (ACHPR, 2009),

the ACHPR interpreted Article 3 to infer that "no person or class of persons shall be denied the same protection of the laws, which is enjoyed, by other persons or class of persons in like circumstances in their lives, liberty, property, and in the pursuit of happiness." It has further held that the aim of Article 3; "is to ensure equality of treatment for individuals irrespective of nationality, sex, racial or ethnic origin, political opinion, religion or belief, disability, age or sexual orientation." Articles 4 and 5 contain provisions to ensure protection of dignity and respect and prohibition of cruel, inhuman or degrading punishment and treatment. Jurisprudence at the ACHPR advises to interpret this provision broadly to encompass the broadest range of physical and psychological abuse, thereby directly relevant to sexual violence and health harms in prisons (see *Doebbler v Sudan*; *Purohit and Another v The Gambia*, ACHPR, 2003b). The Charter provides that State obligations regarding the right to health and right to access healthcare are 'heightened' when an individual is in the custody of the State in Article 16(1)(2). These articles are directly relevant to the protection of inmates from disease whilst in detention.

Two special mechanisms on prisons exist in Africa (Special Rapporteur on Prisons, Conditions of Detention and Policing in Africa, Committee for the Prevention of Torture in Africa). The *Kampala* declaration on prison conditions in Africa provides for the rights of people in prison to living conditions commensurate with human dignity. Further normative guidance is outlined in the *Robben Island Guidelines* (ACHPR, 2008) which are aligned to the Basic Principles for the Treatment of Prisoners (United Nations (UN), 1991) and the *Mandela Rules* (United Nations (UN), 2016). Jurisprudence at the ACoHPR level complements that of the ACHPR and where prison conditions are mentioned, generally refers to the right to life and prohibition of cruel, inhuman or degrading treatment, including health threatening conditions of detention (overcrowding, malnutrition, lack of clean water, space, sanitation and ventilation) (Muntingh, 2020).

6. Domestic law in Malawi: Aspects of equality, dignity, health, humane conditions of detention and protection from harm

Malawi has a constitutionally entrenched Bill of Rights, with a comprehensive catalogue of economic, social, cultural, civil and political rights directly enforceable by the courts. Since 1994, Malawi has been guided by the Human Rights National Action Plans (HRNAPs) designed to promote human rights in the country.

The Constitution of the Republic of Malawi has comprehensive laws for ensuring that individuals are treated fairly and justly, and includes strong provisions on equality, non-discrimination and human dignity. Section 12(1)(d) of the Constitution is directly applicable to inmates and LGBT communities who are entitled to this protection. The Constitution also guarantees equal protection before the law and prohibits discrimination (Section 20(1)). In 1999, the Supreme Court of Malawi (MSCA) in *Somanje v Somanje and Others* (MSCA, 1999) observed that: "The right to equality under the law is an absolute right. This right cannot be limited or restricted in terms of section 44(2). Section 44(1) (g)¹ specifically lays down that there shall be no derogation, restrictions or limitations with regard to the right to equality and recognition before the law." (MSCA 1999). Legal scholars in Malawi posit that as Section 20(1) does not provide an exhaustive list of prohibited grounds of discrimination, and was left open ended (for example it omits age, sexual orientation and citizenship). Hence, this provision can be interpreted to accommodate "other status" not explicitly stated (Chirwa, 2011). It is commonly argued that "other status" also includes sexual orientation and is therefore directly applicable to same-sex sexual activity in prisons and the rights of people deprived of their liberty.

The State has obligations to provide for people in prison in accordance with fundamental rights frameworks and minimum standards of detention (see Section 19(1)). Similar to Article 5 of the Universal

¹ Now Section 45(1)(g) of the Constitution as amended in 2010.

Declaration of Human Rights (UDHR) (United Nations (UN), 1948) and the ICCPR Article 7, Section 19(3) states: “No person shall be subject to torture of any kind or to cruel, inhuman or degrading treatment or punishment.” The Malawi High Court at Lilongwe (MLR) in the infamous case of *Gable Masangano vs The Attorney General, Minister of Home Affairs and Chief Commissioner of Prisons* in 2009 (MLR, 2009) held that deplorable and overcrowded prison conditions constituted a violation of basic human dignity; and amounted to inhuman and degrading treatment. The *Masangano* case describes how inhumane prison conditions are directly relevant to heightened risk, vulnerabilities and exposure to non-consensual same-sex relations in prison, and the exposure of individuals to rape, sexual exploitation and sexual violence; “... packing inmates in an overcrowded cell with poor ventilation with little or no room to sit or lie down with dignity, but to be arranged like sardines violates basic human dignity and amounts to inhuman and degrading treatment” (MLR, 2009). The Court reaffirmed that whilst inmates are deprived of their liberty, they retain all other fundamental rights as guaranteed by the Malawi Constitution. Even if the plaintiffs in the *Masangano* case did not directly raise the issue of exposure to HIV related to sexual violence between men, the basic rights they claimed are not dissociated from same-sex sexual behaviours in prison. Respect for the right to dignity of inmates therefore encompasses protection from health harms related to sexual violence and the spread of HIV and other sexually transmitted diseases. The Court ordered, *inter alia*, that the prison authorities take steps to reduce congestion and improve conditions to meet minimum international and regional normative standards.

One of the guiding principles of the Malawi Health and Sexual and Reproductive Health Rights Policy (2017–2022) is the adoption of a human rights and equity based approach to support equality rights, right to health and access to healthcare (Ministry of Health Malawi, 2018). This is directly relevant to the situation of people in prison, and their right to access non-discriminatory equivalence of health care to that in the community. It also directly applies to situations where a prison system fails to protect an inmate from disease, and an inmate acquires HIV whilst incarcerated. In the 2005 case of *Banda v Lekha*, the Industrial Relations Court (MWIRC) held that HIV status was a prohibited ground of discrimination (MWIRC, 2005).

Difficulties arise with regard to the Malawi Penal Code which prohibits same sex relations. This stifles attempts to tackle spread of HIV and other sexually transmitted diseases in prisons, and the recognition of same-sex sexual violence in prisons. With regard to women, Sections 132 and 138(1) prohibit the act of having carnal knowledge of a girl under the age of 16 years and having carnal knowledge of a woman without her consent (defilement and rape respectively). The Penal Code contains contentious specifications regarding the prohibition of same sex sexual relations in Sections 153(a) and (c), 154, 156 and 137A. Section 153 states that; “Any person who— (a) has carnal knowledge of any person against the order of nature; or (c) permits a male person to have carnal knowledge of him or her against the order of nature, shall be guilty of a felony and shall be liable to imprisonment for fourteen years.” The outdated term “carnal knowledge against the order of nature” is interpreted by the Courts to refer to anal intercourse (See the case of *R v Davis Mpanda* in the Malawi Supreme Court of Appeal (MCSA, 2011)). In (a), the perpetrator is named while in (c), the recipient who ‘permits’ anal penetration is named with the ‘permission’ implying consent. Thus, those who do not ‘permit’ penetration (i.e., give consent or were raped) would not be guilty. This lack of differentiation makes Section 153 discriminatory, whereby it equates cases of rape through anal penetration of a man or a woman, with cases of consensual anal intercourse between two adults. Section 156 further stipulates that: “Any male person who, whether in public or private, commits any act of gross indecency with another male person, or procures another male person to commit any act of gross indecency with him, or attempts to procure the commission of any such act by any male person with himself or with another male person, whether in public or private, shall be guilty of a felony and shall be liable to imprisonment for five years, with or without corporal punishment.” Of note is that “carnal knowledge

against the order of nature” is understood to refer to anal intercourse, while gross indecency refers to any other same-sex sexual act (Southern Africa Litigation Centre and Nyasa Rainbow Alliance, 2020). Section 156 violates the right to privacy between two consenting adults, either between male or female adults. Similar is observed in Section 137A which applies to “indecent practices between females” and states; “Any female person who, whether in public or private, commits any act of gross indecency with another female person, ...shall be guilty of an offence and shall be liable to imprisonment for five years.” This additional Section (137A) in the Malawi Penal Code (as a replica of Section 156) was added following the pardoning of the first ever male couple sentenced to 14 years imprisonment for having “carnal knowledge against the order of nature” (see the 2010 case of *R v Soko and Another*) (Malawi High Court (MWHC) (2010)). Lastly, Section 64(b) of the Marriages, Divorce and Family Relations Act No. 4 of 2015 cites crimes under Section 153 of the Penal Code regarding “unnatural offences” as grounds for divorce.

Notwithstanding the range of Malawi Penal Code Sections which prohibit same-sex relations, there are enormous practical and legal complications with disclosure of same-sex rape both in community and prison settings. Essentially the claim of rape regardless of setting infers that sodomy has occurred, generally resulting in victim arrest (Currier, 2019). Part XIV of the Malawi Prison Act provides for discipline of people in prison where they have committed offences under Section 89 (“disorderly and indecent behaviour”). Whilst Section 89 is vague, it applies to inmates of the same sex found engaging in any kind of sexually related activities. Subsection 44 is also vague and applies also to the victim in that it states; “89. The following acts and omissions shall be prison offences when committed by a prisoner (39) disorderly or indecent behaviour; (44) any other act, conduct, disorder, or neglect to the prejudice of good order or discipline.” The recognition that sexual violence and same -sex sexual activity both consensual and non-consensual occurs in prisons thus fails to gain traction due to these legal parameters. It also creates substantial difficulties in achieving HIV prevention and harm reduction programming in prisons, for example condom provision in support of HIV sensitisation.

In 2014, the Malawi Government established a special law commission to review the Malawi Prisons Act in order to align it with the Constitution and other applicable international law and principles in the administration, governance and management of prisons and people in prison (Kitta, 2015; Kajawo, 2021a;b). Section 13 of the Act provides for the powers of the Commissioner of Prisons to issue standing orders in relation to a matter at hand (for instance a disease outbreak). Sections 74 and 75 contain provisions regarding delivery of healthcare that is equivalent to that provided in the community and the notification of serious illness/infections or communicable disease is detailed in Regulation 33 (c). Section 30 recognises the rights of inmates to access to appropriate healthcare and Section 25 outlines the responsibility of the prison medical officer for ensuring; “that every prisoner is medically examined on admission to and before discharge from a prison.” Whilst not explicitly mentioning and recognising the presence of same-sex sexual activity between inmates and the potential for HIV and other sexually transmitted disease outbreaks, these Sections are restricted to the detection of spread of disease and sexually transmitted infections, and do little to tackle and address prison dynamics of same-sex sexual violence. Indeed, the Malawi Law Commission has criticized the Malawi prison legislation in its failure to; “entrench and safeguard the right of prisoners to access health services by ensuring that the standards of services that are available to prisoners are the same as those that are available to the general public” and documented a lack of vigilance around the health of those in prison, lack of prison monitoring inspections and lack of medical examination on entry, as well as observing that unqualified medical staff were treating inmates (Malawi Law Commission, 2018). It has observed that conditions are “leading to unacceptable and dehumanizing levels of congestion.” (Malawi Law Commission, 2018). The Commission recommended that a new Prisons Act would require mandatory medical examination, screening for infectious diseases upon admission and

appropriate healthcare responses.

7. Conclusion

In 2014, the “KwaZulu Natal Declaration” (Global Faith and Justice Project, 2015) called on all African individuals, governments, and churches to action and reflection on human sexuality, religion, and equality. It includes the imperatives to eliminate colonial sodomy laws and to oppose attempts to further criminalised LGBT communities and protect all citizens, including all communities affected by, and living with HIV and AIDS.

Tackling HIV and other infectious diseases in prisons is a public health and human rights imperative given recidivism and the bridge of transmission between prison and community (Todrys & Amon, 2012; Van Hout, 2020b). These specific UN targets encompass the key ingredients in providing people centred services cognisant of international and regional human rights standards, striving for the fulfilment of health, including access to good quality healthcare, and includes legislative and policy reform to support an equitable AIDS response within a broad sustainable development agenda (UNAIDS, 2015).

The recognition of inmates exposure to HIV via sexual violence whilst detained is completely ignored in Malawi’s political, human rights and public health agendas (Kanguade, 2014). The HIV/AIDS agenda in Malawi sidesteps the issue of same-sex sexual activity in prison, with people in prison notably absent in the UNAIDS list of key populations (men who have sex with men, sex workers), and ignoring the broader dimensions of sexual violence in prison. Malawi should recognise people in prison as a key population when tackling HIV/AIDS in the country, and when reaching the UNAIDS 95-95-95 targets by 2030. We recognise that prison health research in Africa is under-developed, and increasingly stifled by political sensitivities (O’Grady et al., 2011; Todrys & Amon, 2012; Mhlanga-Gunda et al., 2020; Ako et al., 2020). Further research on this issue is important, in Malawi and other African countries which criminalise same-sexuality. The need to document, understand and to engage with the factors that create prison conditions that sustain sexual violence are paramount (Southern Africa Litigation Centre and Nyasa Rainbow Alliance, 2020). Efforts will support evidence based policy and practice reforms.

Systems change is warranted. Human rights advocacy efforts striving to improve the situation in prisons could also leverage broad based torture prevention initiatives in prisons (Jefferson & Jalloh, 2019). The systemic failure of officials, the prison system and indeed fellow inmates to prevent the rape and sexual violence constitutes torture or degrading treatment and violates international human rights law (Gear, 2005). Kanguade (2014) refers to the ‘inhuman and non-sexual’ official lens in Malawi regarding inmates in that; “Prison systems foster unhealthy expressions of sexuality[same-sex sexuality and/or sexual violence] when they treat prisoners inhumanely, that is, when they fail to respect their human and sexual rights”. Components of the comprehensive HIV package could be implemented to protect against sexual transmission of HIV and related health harms (for example condom provisions), along with conjugal visitation rights (Kajawo, 2021a;b) and targeted human rights sensitisation and capacity building of prison staff. With exception of Lesotho, prison authorities in Africa still refuse to implement condom provision for fear of promoting same-sex sexual activity.

Despite the robust international, regional and local laws to support the protection of people in prison, there are no real strategies and actions available to achieve this. This is especially the case in Malawi due to criminalization of same sex relationships, cultural and religious beliefs. Foundations for change can include advocacy, awareness raising, political sensitisation and ultimately legislative reforms drafted to promote sexual wellbeing of people in prison. Voices of those deprived of their liberty in Malawi are still regrettably kept out of the discourse (Kajawo, 2021a;b). They deserve better. Prison populations must now be included in the discourse to prevent same-sex sexual violence and HIV in prisons.

Declaration of competing interest

The authors declares that they have no conflict of interest to declare and has no known competing financial interests or personal relationships that could have appeared to influence the work reported in this paper.

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