UNIVERSITÄT BAYREUTH

Chair of African Legal Studies

Chair of African Legal Studies
Universität Bayreuth, 95440 Bayreuth

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Independent Expert on sexual orientation and gender identity

Submission to the call for inputs to the report on colonialism and sexual orientation and gender

Introduction

The Chair of African Legal Studies at the University of Bayreuth, with Prof. Dr Thoko Kaime as Chairholder, holds a special place across all European Law Schools as it is the only Chair to focus exclusively on studying African legal systems. One of the Chair's critical areas of research and teaching is human rights on the African continent. In this context, the Chair has developed particular expertise on so-called intractable problems of human rights, so defined because of the seeming impossibility of resolving them. LGBTIQ+ rights have been identified as one of these intractable problems. In addition, the Chair regularly organize 'Everyone's human rights', a series of debates on human rights in Africa and runs the africanlegalstudies.blog, which provides cutting-edge analysis on critical issues in African politics, law and development with a particular emphasis on human rights issues.

Critical engagement with promoting and protecting SOGIESC rights in Africa requires understanding the past and ongoing Western influence on the world regarding law and sexuality. Particularly in Africa, polities are yet to recover from the imposition of colonial legal and moral frameworks that have not allowed any divergence from a supposedly only true heterosexual cis existence. The hurdles that arise from the attempts at disentanglement of these perspectives on sexual orientation and gender identity are there for all to see in the allegedly 'African debates on homosexuality'. There are many relics of colonialism's hate-based laws. One enduring example of this type of 'civilising' legislation is the many still existing colonial model penal codes, complete with extensive provisions in the so-called *unnatural offences*. Throughout the British colonial empire (latterly the Commonwealth), such laws are systematically imposed in the name of civilisation and good order. These colonial-era relics have set up what sometimes seems an insurmountable task of decriminalising same-sex sexual conduct. The imposition of colonial order was so effective that these rules, which the colonial metropoles have long discarded, are sticking around in the old empire in the name of culture and all that is holy.

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The following input will focus on Malawi's colonial-era laws criminalising same-sex sexual conduct (Chapter XV Malawi Penal Code) and claims its causation of today's contradiction between human rights law and reality. The tragic reality of LGBTIQ+ individuals today shows that the law is insufficient, and the contradiction must be overcome through interdisciplinary and innovative approaches.

Historical context of Malawi's colonial era laws criminalising same-sex sexual conduct

Laws criminalising same-sex sexual conduct embedded in the colonial model penal code have travelled and emerged through India (1860) over Queensland (1899) and through to the whole former British Empire including Malawi (1930).[1] The respective norms are since then to be found in Sections 153, 154 and 156. Malawi gained independence from Britain on 6 July 1964, three years prior to the decriminalisation of consensual same-sex sexual conduct between adults in England and Wales (1967).[2] Since the introduction of multiparty democracy in 1994, Malawi has been struggling to liberate itself from the imposed colonial structures through legislative changes, such as the inclusion of customary legal mechanisms into the statutory legal system. However, the imposed dual understanding of sex and gender carved out by heterosexuality and patriarchy[3] has been aggravated since independence by passing new laws to further criminalise LGBTIQ+ individuals. For example, in 2011, the Malawi Parliament amended the Penal Code to include a new provision to criminalise 'indecent practices between females'[4] since the initial colonial penal code did not include female-to-female intimacy. According to the Minister of Justice then, the law was 'gender sensitive' and purposes to not discriminate against the criminalisation of same-sex conduct between males and females.[5] In relation to the topic of gender identity, the parliament passed the Marriages, Divorce and Family Relations Act in 2015, which restricts in Section 2 recognition of gender identity exclusively to the one which was assigned at birth. In other words, a transgender or intersex person could not assume their real gender to fit how they identify themselves. These two examples result from ongoing attempts by politicians, religious leaders, and conservative Malawians to push their anti-queer agenda to eradicate the incorrectly perceived "un-African identity of homosexuality." [6] However, it is not homosexuality but homophobia that is initially a foreign phenomenon and un-African.

Contradiction between human rights law and reality

[1] A Jjuuko & M Tabengwa, 'Expanded criminalisation of consensual same-sex relations in Africa: contextualising recent developments', *Envisioning Global LGBT Human Rights* 72 et seq.
[2] The process of decriminalisation in the UK was achieved through legislative reform, test case litigation and an active civil society.
[3] Tamale (n 2), 100.
[4] Section 137 A of the Malawi Penal Code.
[5] A Msosa, 'Human Rights and Same-sex Intimacies in Malawi' PhD Thesis, University of Essex, 2017.
[6] P De Vos, 'The Limit(s) of the Law: Human Rights and the Emancipation of Sexual Minorities on the African Continent in D Higginbotham & VC Buthelezi *Contested Intimacies: Sexuality, Gender, and the Law in Africa* (2015) 1-16') 9.

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Colonialism has imposed Western modes of existence in all areas of life.[7] Essential to this imposition was the exclusivity of these imposed models and the concomitant eradication of pre-colonial indigenous life. In the legal context, the transplanted legal frameworks essentially served as two sides of one coin. First, the implementation of these frameworks has been imposed and thus attempted to extinguish African traditional legal systems, informal dispute settlement structures and indigenous philosophy of law. At the same time, these colonial legal frameworks have served as an enforcement tool for the new modes of colonial existence in all other areas of life. These colonial impositions on legal and societal frameworks continue to govern people worldwide despite long-time and exhausting attempts to disentangle from these deadlocked structures. This is inter alia evident in the intruded binary understanding of sex and gender, which is reflected in 'the apparently only true heterosexual cis existence'[8] which continues to thrive right across Africa. This gives rise to hostile environments for LGBTIQ+ individuals in which they regularly suffer discrimination, hate crimes, and marginalisation perpetrated by individuals and institutions. According to Currier, such an environment is often used and fostered by politicised homophobia which sees a politician aiming to '[consolidate] their moral and political authority'[9] by flexing their anti-homosexual muscles. Malawi is no exception to this scenario of hostility towards non-conforming SOGIESC. However, this reality for LGBTIQ+ individuals contradicts the provisions of the international, regional, and national legal corpus of Malawi's extensive human rights framework, which logically also has to include SOGIESC-based human rights. The Malawi Constitution, adopted in 1994 at the advent of multiparty democracy[10], is the country's supreme law to the effect that any other law contradicting it is invalid.[11] It contains the Bill of Rights, which guarantees that everyone is entitled to human rights without discrimination of any kind.[12] Thus, any provision excluding individuals on grounds such as sexual orientation contradicts the purposes and spirit of the Constitution. Beyond that, Malawi also recognises several international human rights treaties as part of its domestic laws according to Section 211 of the Constitution.[13] For example, Malawi has ratified the African Charter on Human and Peoples' Rights, which gives a similar promise to African peoples. The promise is that 'every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction

[7] S Tamale, *Decolonization and Afro-feminism* (Daraja Press 2020) 17 et seq.

[8] I Zundel, 'Beyond Celebration – The Search for Possible Pathways in the Protection of LGBTQI+ Rights' *African Legal Studies* (23 December 2021) <https://africanlegalstudies.blog/2021/12/23/beyond-celebration-the-search-for-possible-pathways-in-the-protection-of-lgbtqi-rights/> (accessed 22 March 2022).

[9] A Currier, *Politicizing sex in contemporary Africa: Homophobia in Malawi* (Cambridge University Press 2019).

[10] Read more about the previous period under President Banda and the accompanying oppression and neglect of human rights, in B Demone, 'LGBT Rights in Malawi: One Step Back, Two Steps Forward? The Case of R v Steven Monjeza Soko and Tiwonge Chimbalanga Kachepa' (2016) 60(3) *Journal of African Law* 365, 368.

[11] Section 5 of the Constitution.

[12] U Mwakasungula, 'The LGBT situation in Malawi: an activist perspective', *Human Rights, Sexual Orientation and Gender Identity in the Commowealth* , 359.

[13] Other examples are the International Covenant on Civil and Political Rights (ICCPR) or the International Covenant on Economic, Social and Cultural Rights (ICESCR).

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of any kind […]'.[14] This also includes LGBTIQ+ individuals. Through these different laws and policies, a legal paradox exists[15] in which LGBTIQ+ individuals are confined in a tragic contradiction between the applicable and binding human rights frameworks against the social and political reality shaped by the impositions of colonialists.

Ongoing impact of colonial era laws on LGBTIQ+ individuals' enjoyment of human rights

As mentioned, the persisting colonial-era laws continue to have a tragic and unacceptable impact on LGBTIQ+ individuals through discrimination, hate crimes, and marginalisation perpetrated by individuals and institutions. All the multiple dimensions of queer life, including the individual and structural vulnerabilities and struggles of LGBTIQ+ individuals, cannot be captured satisfactorily in this input. The experienced forms of violation depend on one's actual or imputed sexual orientation, gender identity, gender expression and sex characteristics, and other intersecting factors such as race, class, age and religion.

For example, the criminalisation of same-sex sexual conduct pushes LGBTIQ+ individuals to society's peripheries, thereby creating significant barriers such as accessing healthcare services. The government of Malawi itself acknowledged the detrimental effects of forced secrecy on lesbian, gay, and bisexual people, stating that "[homosexuality] is not practiced in the open […] it is therefore implausible that cases of discrimination and violence based on sexual orientation would be reported," in its report to the Human Rights Committee. Tragically, homophobic attacks occur within communities, targeting individuals suspected of being gay or lesbian. Disturbingly, even law enforcement officers are involved in these attacks, arbitrarily arresting individuals and coercing them into confessing to being in same-sex relationships.

The continued existence of the colonial-era laws not only hampers access to justice for the LGBTIQ+ community but also impacts the broader population. Stigma and discrimination contribute to this, but the difficulties faced by civil society organizations (CSOs) in representing gay and lesbian individuals further compound the problem. Fear prevents many from seeking or receiving legal support, while the shrinking space for CSO support, especially for those working with the LGBTIQ+ community, hinders progress.

Efforts for Law Reform and Advancing Human Rights

These developments raise questions regarding what practical alternatives Malawi has to initiate a dialogue process to repeal the dual understanding of sex and gender to ultimately facilitate the protection of human rights for LGBTIQ+ individuals in the country. The decriminalisation of same-sex sexual conduct and, thus the annulment of these provisions from the penal code could be many things. It could be a prompt leading towards positive legal and non-legal transformation and the effective protection of rights.

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[14] Art. 2 of the African Charter on Human and Peoples' Rights.

[15] A Msosa & CG Sibande, 'LGBT+ Rights Lawfare in Malawi' in A Jjuuko et al (eds*) Queer lawfare in Africa: Legal strategies in contexts of LGBTIQ+ criminalisation and politicisation* (2022) 184.

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However, South Africa is a good example of the insufficiency of statutory legal reforms to achieve equality and individual freedom for sexual minorities. This realisation speaks to a well-known dilemma in the sociology of law discourses: namely, the connection between law and society. This raises questions such as: What role can legal measures play in improving the living conditions of the non-ideal? One positivist approach to this is social engineering, according to which different tools, such as law, can bring social change. The idea of having a loaded toolbox to achieve social change according to a modular system is tempting. However, the concept has a very mechanic and simplistic view of societal processes. Moreover, the usability of this approach in an African context is an underexplored research field. Regional specific conditions such as the strong influence of legal pluralism, colonial legacy and struggles regarding law enforcement would have to be considered, and research thereby goes beyond the mere transplantation of Western approaches. In this regard, Stoddard equally admitted that the reach of his 'rule-shifting, culture-shifting' paradigm could be limited in specific settings.[16]

In our opinion, the call for an interactionist-people-centred approach[17] aligns with the need to use and include pluralistic legal structures of every 'semi-autonomous social field' to follow Sally Moore's theory of legal pluralism.[18] Thereby, any solely state-centring has two effects. First, it denies the reality of the structural composition of and rulemaking in African social fields. What then happens to the intended result, in our case, effective protection of human rights, is left to one's imagination. But this much can be said, when the structures and modes of operation of the actual social field are not adequately reflected, the intended result seems far away. Second, it is reproducing the colonial hubris in relation to the only 'right' approach towards the organisation and structure of social fields as well as law enforcement. It is long overdue to abandon the attempts to convert to apparently 'purely' Western and thus, better systems. Instead of constantly minimising the space and relevance of pluralistic legal structures and thus fighting the same, it is time to actively utilise the tools and possibilities to protect rights given through these pluralistic legal structures.

[16] T B Stoddard, 'Bleeding Heart: Reflections on Using the Law to Make Social Change' (1997) 72 *NYU Law Review 967.*
[17] Nyeck (n 87) 5.
[18] SF Moore, 'Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study' (1973) 7(4) *Law & Society Review* 719.

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