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**UNIVERSITY OF CAPE TOWN  
FACULTY OF LAW  
DEPARTMENT OF PUBLIC LAW  
MASTER OF LAWS IN CRIMINAL JUSTICE  
MINOR DISSERTATION**

**THE NARROW ROAD TOWARDS A POSSIBLE  
DECRIMINALISATION OF CONSENSUAL SODOMY IN  
MALAWI**

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**Research dissertation presented for the approval of Senate in fulfilment of part of the requirements for the Master of Laws in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.**

**DECLARATION**

I, Josephine Lucia Kunitengo, hereby declare that I have read and understood the regulations governing the submission of the Master of Laws dissertations, including those relating to length and plagiarism, as contained in the rules of the University of Cape Town, and that this dissertation conforms to those regulations.

Signed at Cape Town this 10<sup>th</sup> day of February, 2012.

**Josephine Lucia Kunitengo**

University of Cape Town

**DEDICATION**

*This work is dedicated to my late mother, Marianne Kunitengo who played a powerful role in focusing my attention on education and never stopped believing in me.*

*To my daughter Nicola Naledi Gwaza and the love growing in me, may you be inspired through this work to be the best you can be and to excel in whatever talent God has blessed you with.*

*Mommy loves you 'Tiwiri'.*

University of Cape Town

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May God bless you all.

**ABBREVIATIONS**

ALR Mal	African Law Reports, Malawi Series
BCLR	Constitutional Reports of South Africa
CC	Constitutional Court of South Africa
DLR	Dominic Law Reports (Canada)
ECHR	European Court of Human Rights
LRC	Law Reports of the Commonwealth
MLR	Malawi Law Reports
SALJ	South African Law Journal
SCC	Supreme Court of Canada
SCR	Canada Supreme Court Reports
UKHL	British cases heard by the House of Lords
ZLR	Zimbabwe Law Reports

## CONTENTS

<b>Declaration.....</b>	<b>ii</b>
<b>Dedication .....</b>	<b>iii</b>
<b>Acknowledgements .....</b>	<b>iv</b>
<b>Abbreviations .....</b>	<b>v</b>
<b>CHAPTER ONE: INTRODUCTION.....</b>	<b>1</b>
1.1 General overview .....	1
1.2 The problem .....	2
1.3 Significance of the study.....	3
1.4 Methodology and Limitations.....	3
1.5 Chapter outline.....	3
<b>CHAPTER TWO: THE CRIME OF SODOMY: A MALAWIAN PERSPECTIVE .....</b>	<b>5</b>
2.1 Introduction.....	5
2.2 The nature of the offence .....	5
2.3 The rationale behind section 153 (a) and (c) .....	7
2.4 Elements of the offence .....	8
2.4.1 Canal knowledge.....	9
2.4.2 Against the order of nature .....	11
2.5 The implication of the scope of section 153 (a) and (c) .....	14
2.6 Conclusion .....	15
<b>CHAPTER THREE: THE CONSTITUTIONAL VALIDITY OF SECTION 153.....</b>	<b>17</b>
3.1 Introduction.....	17
3.2 The facts in the Steven Monjeza and Tionge Chimbalanga Kachepea Case.....	17
3.2.1 The evidence .....	18
3.2.2 The judgment .....	20
3.2.3 The sentence.....	21
3.3 Some reflections on the case and the general perceptions about men who have sex with fellow men .....	22
3.3.1 On the offence itself.....	22
3.3.2 Morality vis a vis sodomy.....	22
3.3.3 Consensual sodomy is evil and a disease.....	24
3.3.4 Consensual sodomy is committed by sub humans only.....	25
3.3.5 Would heterosexual couples be subjected to the same treatment if established that they were having anal sex? .....	26
3.3.6 Investigation and prosecution difficulties .....	27
3.4 The basis of the Constitutionality challenge .....	28
3.5 Grounds for the challenge.....	30
3.5.1 Infringement of the right to equality.....	30
3.5.2 Discrimination based on sex .....	34
3.5.3 The discrimination ground on “sex” to be read in “sexual orientation” .....	36

3.5.4	Violation of the right to privacy.....	39
3.5.5	Privacy as contextualized in the right to dignity.....	40
3.5.6	The right to dignity .....	41
3.6	Are the infringements justifiable?.....	43
3.7	Conclusion .....	47

**CHAPTER FOUR: THE CHALLENGES AND PROSPECTS TO THE  
DECRIMINALISATION OF CONSENSUAL SODOMY IN  
MALAWI.....48**

4.1	Introduction.....	48
4.2	The challenges .....	48
4.2.1	The Chief Justice’s certification of the constitutionality of a matter .....	48
4.2.2	The set up of the Constitutional Court.....	49
4.2.3	The <i>locus</i> standi requirement in constitutional matters .....	50
4.2.4	Malawi’s general consensus that homosexuality is immoral and a sin .....	51
4.3	The prospects .....	53
4.3.1	The role of international law in protecting sexual minority rights .....	53
4.3.2	Pressure from the international community to promote minority rights.....	54
4.3.3	Threat of losing the fight against HIV/AIDS.....	56
4.4	Conclusion .....	58

**CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS .....59**

5.1	Introduction.....	59
5.2	Should it be a case of partial amendment .....	59
5.2.1	Deleting the word ‘male person’ from Malawi’s anti sodomy provision and substituting it with ‘any person’ .....	59
5.3	The appropriate remedy .....	62
5.4	Summary of findings.....	63
5.5	Recommendations.....	64
5.5.1	To the executive.....	64
5.5.2	To judges.....	64
5.5.3	On technicalities surrounding the sitting of a Constitutional Court .....	65
5.5.4	What about the <i>locus</i> standi requirement? .....	66
5.6	Concluding remarks .....	67

**BIBLIOGRAPHY .....69**



## CHAPTER ONE

### INTRODUCTION

#### 1.1 General overview

The Penal Code<sup>1</sup> is the principle statute that governs criminal offences and their punishments in Malawi. Of particular interest among the various offences it provides is section 153 (a) and (c) which prohibits the commission of carnal knowledge against the order of nature.<sup>2</sup> The proscription of consensual sodomy has attracted immense public debate and is often linked to the criminalisation of homosexuality.<sup>3</sup> The thrust of the argument in these debates has been the justification and retention of sodomy laws vis a vis the repeal of such laws as they violate human rights.<sup>4</sup>

In 2010, Malawi featured highly in the limelight of this debate when it prosecuted and convicted two men under section 153 (a) and (c).<sup>5</sup> It is through their trial process when it became apparent for Malawi, that the ramifications of the consensual sodomy law are quite grave on the rights of accused persons who fall under it. Notably, and for the first time, the case ignited an open discussion on the issue of homosexuality. Unfortunately, as hard as justifying the proscription on consensual sodomy between adults is, it seems its review and abolishment in Malawi, might on the surface of it be close to impossible.

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<sup>1</sup> Chapter 7:01 of the Laws of Malawi, hereinafter referred to as the Code.

<sup>2</sup> For the purpose of this study and ease of reference this law would also be referred to as the consensual sodomy law.

<sup>3</sup> Human Rights Watch (2008) *This alien legacy: the origin of 'sodomy' laws in British colonialism* 4

<sup>4</sup> Ottoson D (2008) *State sponsored homophobia: a world survey of laws prohibiting same sex activity between consenting adults* 45

<sup>5</sup>This was in *Republic v Steven Monjeza Soko and Tionge Chimbalanga Kachepa* Criminal case number 359 of 2009 (unreported)

## 1.2 The problem

The realities of the anti sodomy nature of section 153 of the Code were tested in the first ever same sex couple case of *Republic v Steven Monjeza Soko and Tionge Chimbalanga Kachepe*.<sup>6</sup> Under the main charge of sodomy, the two men were convicted and given the maximum punishment offered by the offence. During the course of their trial, the defence counsel made an application for leave to review the constitutionality of section 153 of the Code under which the two persons were charged. The Chief Justice of the High Court and Supreme Court of Malawi dismissed the application on the grounds that it did not raise any constitutional issues to warrant the sitting of a Constitutional Court over the matter. His ruling is of critical importance as it effectively limited the prospects of a constitutional review of section 153 (a) and (c) of the Code which criminalises sex between men with or without consent.

Prior to the case of *Republic v Steven Monjeza Soko and Tionge Chimbalanga Kachepe*,<sup>7</sup> a special Law Commission task force was created to review the Penal Code of Malawi.<sup>8</sup> The Commission noted that there were some penal provisions that were inconsistent with the new Constitutional order. Therefore, such provisions were to be reviewed and reformed to ensure conformity with the Constitution.<sup>9</sup> Sadly, in 2011, despite such an ample review, the Penal Code still retained the impugned section 153 (a) and (c). Worse of it all, it introduced a new offence of indecent practices between females which has often been argued to criminalise same sexual conduct between females.<sup>10</sup> This confirms further Malawi's rigidity to the promotion of minority rights.

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<sup>6</sup> (note 5 above)

<sup>7</sup> (note 5 above)

<sup>8</sup> Malawi Law Commission (2007) *Report of the Law Commission on the review of the Penal Code* 1

<sup>9</sup> (note 8 above) 3. It observed that newly adopted Malawi Constitution entrenches a bill of rights which envisages major law reform pertinent to penal law. Importantly, the bill of rights enjoys the status of supremacy over all legislation and other sources of law. Consequently any act of government or any law that is inconsistent with a provision of the bill of rights should be reviewed and reformed accordingly.

<sup>10</sup> Section 137 A The Penal Code (Amendment) Act No. 1 of 2011

### **1.3 Significance of the study**

The study has two major objectives. Firstly, it will provide a discussion on the nature, impact and significance of section 153 (a) and (c) of the Code and the extent to which it violates the rights to equality, dignity and privacy. Secondly, the thesis will examine the challenges and prospects of decriminalising section 153 (a) and (c) and make a recommendation on the way forward.

This study makes no pretence in analysing section 153 (a) and (c) in the light of the Constitution of the Republic of Malawi and international human rights law. It is of critical importance as it highlights the unconstitutionality of the said provision and the need for its ultimate decriminalisation. The study hopes to make a contribution that regardless of existing challenges there is a possibility of repealing this law. In addition, this study is a contribution on the emerging debate of the law against consensual sodomy in Malawi, an area which has been left under wraps over the years.

This study also points out impediments to the reform of section 153 (a) and (c) that need attention to from the legislature and other stakeholders and not necessarily through the Court process. Thus it is significant to policy reform, legislative or otherwise without invoking the Courts.

### **1.4 Methodology and Limitations**

The study will be conducted by desk research only. Malawi is the main focus area of study in the paper. However, where necessary, examples will be drawn from other jurisdictions that had their colonial inherited sodomy laws invoked before the Courts. Even though there is wealth of material on consensual sodomy, no scholars have comprehensively studied section 153(a) and (c).

### **1.5 Chapter outline**

The study is comprised of five chapters, with this as the first and will proceed on the hypothesis that criminalisation of consensual sodomy is unconstitutional and should be invalidated even in

the midst of challenges to such a declaration. Chapter two will give comprehensive outline of the offence of carnal knowledge against the order of nature under section 153 of the Code.

The ambiguities created by section 153 are analysed in chapter three where a critical discussion on the case of *Republic v Steven Monjeza Soko and Tionge Chimbanga Kachepe* will also be made. A constitutional analysis of section 153 (a) and (c) will be done and it will be argued that it impairs the rights to equality, privacy and dignity in a manner that is indefensible.

Chapter four will highlight among others, how the requirement of locus standi in constitutional cases is a limitation to the constitutionality challenge of section 153 (a) and (c). It will also show how the current Malawi setup of the appointing judges of the High court by the Chief Justice to sit as a constitutional court is another hindrance to the decriminalisation of the provision. In addition, the possibilities of decriminalising the offence of sodomy will be explored.

Chapter five is the concluding remarks and recommendations.

## CHAPTER TWO

### THE CRIME OF SODOMY: A MALAWIAN PERSPECTIVE

#### 2.1 Introduction

Section 153 of the Malawi Penal Code<sup>11</sup> which provides for the offence of carnal knowledge against the order of nature is one of the provisions in the code which has survived any amendment or repeal ever since its codification. This chapter discusses the nature and elements of the provision. It also highlights the effect of the scope of the provision and the Court's restrictive interpretation of the elements of the offence.

#### 2.2 The nature of the offence

Section 153 stipulates that

Any person who-

- (a) has carnal knowledge against the order of nature; or
- (b) ...
- (c) permits a male person to have carnal knowledge of him or her against the order of nature,

is be guilty of a felony and shall be liable to imprisonment for 14 years

To have a full appreciation of the offence, it is important to note that section 153 was adopted from section 12 (1) of the British Sexual Offences Act, of 1956. The provision simply provided that it is a crime for a person to commit buggery<sup>12</sup> with another person. The 1956 Act did not define or specify in detail the elements of the offence or the exact conduct the law was proscribing. Going back to section 61 of the 1861 English statute on Offences against the Person, where section 12 of the Sexual Offences Act emanates from, it is explicit that the offence was regarded as a detestable crime.<sup>13</sup> Thus for example, sodomy<sup>14</sup> was defined by Coke<sup>15</sup> as a

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<sup>11</sup> Hereinafter referred to as the Code.

<sup>12</sup> The term buggery was inspired from the medieval Latin ' bulgarus' which referred to a heretical religious sect from Bulgaria whose religious deviance included sexual deviance as well.

<sup>13</sup> See section 61 of the Offences Against the Person Act of 1861 which provides that anyone who commits the abominable crime of buggery with mankind or with any animal shall be liable for imprisonment for life or any term not less than 10 years. This provision is a combination of the crimes of bestiality and sodomy. According to the

detestable and abominable sin amongst Christians not to be named, committed by carnal knowledge against the ordinance of the creator and order of nature, by mankind with mankind, or with a brute beast, or by womankind with a brute or beast.<sup>16</sup> From the foregoing, section 153 (a) and (c) therefore makes an offence any carnal knowledge between two men or a man and a woman which is committed against the dictates of nature. For instance, the nature of the offence under section 153 (a) and (c) of the Code was elaborated in the first reported case of sodomy in Malawi of *Twaibu v Reginum*<sup>17</sup>

The state of the law, however is clear enough in England. At common law the offence of sodomy is defined as sexual intercourse committed against the order of nature, i.e., in the anus by a man with a man or in the same unnatural manner by a man with a woman...

The above is the literal interpretation of offence as it is provided for in the law. Though a reading of the provision does not specify the type of sexual intercourse which is unlawful, the court takes the view that the offence is focused on anal intercourse. The extent to which it includes acts between women and men as well is debatable as the trend in the gender of the parties to the crime on the few cases that have been brought before the Malawi courts<sup>18</sup> has shown that it is an unnatural sexual intercourse between men that is a prohibition in this offence.

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1861 statute, bestiality is carnal knowledge against the order of nature with an animal while sodomy is carnal knowledge against the order of nature with mankind. Sections 153(a) and (c) of the Code deal with the offence of sodomy only. Bestiality is specifically provided for under section 153 (b). See also the Statute of Henry VIII of 1533 which had the first codification on the crime of sodomy under the description of a detestable and abominable vice of buggery committed with mankind or beast.

<sup>14</sup> The name sodomy comes from that of a Biblical city of Sodom whose men attracted the wrath of God for their evil ways. It was alleged that the men of Sodom were having sexual intercourse with fellow men hence the proscription against sodomy which followed thereafter in the Numbers book of the Bible. (see note 9)

<sup>15</sup> Sir Edward Coke (1797) *The third part institutes of the laws of England*, 3<sup>rd</sup> part 58: cap X, "Of Buggery or Sodomy"

<sup>16</sup> (note 5 above)

<sup>17</sup> 1961-63 ALR Mal 352

<sup>18</sup> *Republic v Steven Monjeza Soko and Tionge Chimbalanga Kachepa* Criminal Case Number 359 of 2009 (Unreported) involved two men who were charged with sodomy after they conducted a traditional engagement ceremony. See also *Republic v Betland* Criminal Case No 159 of 2007, High Court (Unreported) and *Twaibu v Reginum* (Note 7)

Whether this is due to under reporting of cases involving females and males or is simply a prosecutorial discretion not to bring before the Courts cases involving men and women is another issue beyond the scope of this paper.

### 2.3 The rationale behind section 153 (a) and (c)

Section 153 is intended for cases that are deemed shocking<sup>19</sup> and ungodly<sup>20</sup> to the dynamics of a society. Section 153(a) and 153(c) creates what is commonly referred to as the offence of sodomy. Section 153(a) is for the active participant whereas s.153(c) is for the passive participant. The subsections codify the common law offence of sodomy. Unlike the offence of rape, consent is no defence to the charge under section 153(a) of the Penal Code<sup>21</sup>

A study of the early British laws against sodomy from where section 153 (a) and (c) were exported from, shows that the purpose of creating the offence was to protect society against those who endangered Christian principles.<sup>22</sup> The offence was designed to punish conduct which was viewed as defiling social purity and against the will of God.<sup>23</sup> Further, the provision seemed to have been designed to enable the state obtain convictions even in cases involving adults who voluntarily consent to what is alleged as carnal knowledge against the order of nature. Thus the

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<sup>19</sup> In *Republic v Steven Monjeza Soko and Tionge Chimbalanga Kachepa* (note 8) the court held that the union of the two men was bizarre and could not be equated to any lawful marriage in Malawi. It further observed that the society of Malawi was not ready to see its sons getting married to other sons.

<sup>20</sup> This traces back to the Bible in the book of Leviticus 20 verse 13 which makes it a sin for a man to have sex with mankind as one does with a woman. According to Thomas Aquinas quoted in Mills R 'Male-male love and sex in the middle ages' in Matt Cook et al, *A gay history of Britain* (2007), sodomy is a subspecies of the sin against nature performed with a person of the same sex.

<sup>21</sup> See Cram J in *Twaibu v Reginum* (note 7) 532.

<sup>22</sup> Most people who reportedly oppose consensual sodomy in the Malawi public media do so on the basis of religion and morality. They argue that the practice is against the creation of man and woman as God designed them to be. See Muula A 'Perceptions about men having sex with men in Southern African country: Case study of print media in Malawi 2007' *Coat Med J* 399. See also Blackstone W, *Commentaries on the laws of England* (1767) who described the offence of carnal knowledge against the order of nature as an offence of deeper malignity than rape, a heinous act the very mention of which is a disgrace to human nature and society. It is important to note that Blackstone's commentaries had a profound effect on the development and expression of criminal law in the colonies of England like Malawi, India, Zimbabwe, Botswana, Zambia, just to mention a few.

<sup>23</sup> Blackstone W (note 8)

assumption inherent in the offence so defined is that, carnal activities against the order of nature contravene human integrity and pollutes society. As a consequence, even if a victim can claim that he agreed to unnatural carnal activities, and is of full age, the act is still punishable because more than the person's will or body is at stake. The defence of consent or that participants to the act are of full age and committed the offence in the realms of their own privacy is irrelevant.

Other common reasons advanced for the criminal prohibition of sodomy is that; firstly it hinders procreation which is the basic purpose for a sexual relationship.<sup>24</sup> The Malawi Classification Board previously known as the Censorship board is on record to have stated that all ethnic groups in Malawi recognise the happy natural arrangement of a man marrying a woman and that it is the basis of a healthy family institution.<sup>25</sup> This arrangement fulfills the duty of mankind to procreate. Anything to the contrary subverts the family institution.

Lastly, it is also often argued that perpetrators of this crime corrupt and lead astray young persons.<sup>26</sup> One fact that runs across the rationale for criminalizing unnatural sexual intercourse is that the offence is not just about the act, it has more to do with society's moralistic prejudice against this type of sexual intercourse.

## 2.4 Elements of the offence

The essential elements of section 153 (a) and (c) are:

- a. carnal knowledge
- b. against the order of nature

The prosecution has to prove that there was sexual intercourse committed against the order of nature regardless of the fact that the participants might have consented to the act. It is worth to

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<sup>24</sup> Burchell J *Principles of criminal law* (1997) 631

<sup>25</sup> Kanyinji J 'Big no to homosexuality' *The Sunday Times* 20 February 2000

<sup>26</sup> *Republic v Steven Monjeza Soko and Tionge Chimbalanga Kachepa* (note 8) 23, the Court passed a scarring sentence to protect Malawi's sons and daughters from emulating the horrendous example set by the accused persons by committing consensual sodomy.



note that to a greater extent the elements of the offence were inherited from the English common law jurisprudence which is an authoritative source of law in Malawi.<sup>27</sup>

### 2.4.1 Carnal knowledge

The word ‘carnal’ derives from the Latin word ‘carnalis’ which means ‘fleshly’. And when combined with knowledge, the meaning of knowledge has a biblical<sup>28</sup> sense attached to it. The word ‘sexual relations’. In criminal law, the word carnal knowledge has had varying meanings at different times in different jurisdictions. In Malawi, it is restrictively confined to specific sexual acts such as contact between a vagina and penis<sup>29</sup> or between anus and penis. In *Twaibu v Reginum*,<sup>30</sup> the Court was drawn to an issue raised by the prosecution which was whether carnal knowledge meant there has to be an actual penetration of the anus as an essential element of the sodomy. The Court took judicial notice of the fact that this was a novel point in the Malawi laws hence it resorted to how the English common law defined sexual intercourse in the cases of sodomy.<sup>31</sup> The Court came to the conclusion that this meant anal sexual intercourse.<sup>32</sup> Despite the fact that English law did not specify the elements of the offence in its criminal codes, there seemed to be a general agreement from its jurisprudence that the precise act that was prohibited was anal intercourse between men or between a man and a woman.<sup>33</sup> In one of the earliest cases

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<sup>27</sup> In the case of *Twaibu v Reginum* (note 7 above), Cram J held that the definition of the offence in Nyasaland is similar to that at common law hence English reported cases should be applied when deciding the constitutive elements of the offence. Malawi used to be known as Nyasaland before it attained its independence from the British in 1964.

<sup>28</sup> In the book of Genesis 4 verse 1 it is written that Adam ‘knew’ his wife Eve and she conceived and bore Cain.

<sup>29</sup> This is evident in the way rape is defined in section 132 of the Code. It is limited to penetration of a woman’s vagina by the male penis.

<sup>30</sup> (note 7 above)

<sup>31</sup> *Twaibu v Reginum* (note 7 above) 321

<sup>32</sup> Ibid

<sup>33</sup> Ibid

of *Rex v Jacobs*,<sup>34</sup> it was held that *fellatio* or oral sexual stimulation was not encompassed under the common law elements of sodomy.

At common law there was a tendency to equate the evidence required to prove the offence of rape with that of sodomy.<sup>35</sup> Two factual issues in the case of rape are penetration and emission, but if the former is achieved, the latter is immaterial to the commission of the offence.<sup>36</sup> However, mere emission in the course of a sexual assault on a woman without penetration does not amount to rape. This was considered in the case of *R v Reekspears*<sup>37</sup> and adopted in *Twaibu v Reginum*<sup>38</sup> where on a charge of sodomy penetration of the anus was proved but emission into the body did not result on account of an interruption during the act. The court affirmed that in a case of sodomy the crime is committed if the jury is satisfied that penetration of the anus took place. Even though the English law on sodomy has tremendously changed, the position remains the same in Malawi.<sup>39</sup> Carnal knowledge in respect of this offence is still interpreted as anal sexual intercourse.<sup>40</sup> Thus, the present stance of the law in Malawi is that the offence is committed only by the insertion of the penis of one party in the anus of the other.

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<sup>34</sup> (1817) Russ. & Ry. 331;168 E.R. 830 where a man was convicted of sodomy based on evidence that he engaged in oral sex with a 7 year old boy. The court was of the view that the man be pardoned because this did not constitute the crime of sodomy. That is, for one to be guilty of sodomy, the act must have performed where sodomy is usually committed

<sup>35</sup> *Twaibu v Reginum*, (note 7 above)

<sup>36</sup> *Twaibu v Reginum* (Note 7 above)

<sup>37</sup> (1832) 1 Mood C.C. 341; 168 E.R. 1296

<sup>38</sup> (note 7 above)

<sup>39</sup> The 19<sup>th</sup> century was an era of major criminal law reform in England. In 1954, noting among others that the meaning of sodomy had varied widely over the ages and had included at times everything from heterosexual intercourse in atypical positions to oral sexual contact, the government set up the Wolfenden Committee to review its laws on the same. The Committee recommended a vast modification and containment of same sex sexual offences, removing adult consensual conduct from the realms of the criminal law. It was until 1967 when the English parliament finally changed the laws on England in its Sexual Offences Act with a limitation on the age of consent. See Kirby MD, 'Lessons from the Wolfenden Report' (2008) 34 *Commonwealth Law Bulletin* 551

<sup>40</sup> This reasoning is evident in the recent case of *The Republic v Tiwonge Chimbalanga and Steven Monjeza Soko* (note 8 above)

### 2.4.2 Against the order of nature

In analysing the elements of the offence in section 153 (a) and (c), the Court in *The Republic v Tiwonge Chimbalanga and Steven Monjeza Soko* said:

The state must prove that Steven had carnal knowledge of Tiwonge. The State must also prove that Tiwonge allowed Steven carnal knowledge. In any case if this is proved, the method used should be deemed to have been against the order of nature because the two are men.<sup>41</sup>

The above case defined unnatural sex as sex through the anus. Arguably, it seems any sexual intercourse that does not involve contact of a vagina and penis is against the order of nature hence it is deemed unnatural. It is not surprising that the offence falls under unnatural offences in the Code. In this context, the Court's view on sexual acts that qualify as being committed against the order of nature seems to be attached to biology and morality.<sup>42</sup> By incorporating this element of the offence, the Courts merely embrace the long tradition of western culture that generally condemned all sexual acts other than heterosexual vaginal intercourse committed for the sole purpose of procreation. In this case, the conduct of an accused is perceived as unnatural and against the order of nature if the anus is used for sexual gratification. In the *Chimbalanga and Soko* case, the Court is seen to be clinging to the old reasoning of the English decision in *Jacobs*<sup>43</sup> that all natural forms of intercourse are not within the meaning sodomy. The holding of the *Jacobs*<sup>44</sup> case seems to be widely accepted and upheld in the few sodomy cases that have been brought before the Malawi courts. Hence, to prove that the sexual penetration was against the order of nature, the prosecution simply needs to show that penetration was per anus and it was between males. Any other type of penetration apart from that does not constitute the offence.

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<sup>41</sup> (note 8 above)

<sup>42</sup> In *The Republic v Tiwonge Chimbalanga and Steven Monjeza Soko* (note 8), the court found that the conduct of the accused persons was against public morals. It is interesting to note that many countries that share the English common law doctrines link morality and common decency. In England, the legislature was not expected to enact laws that contradicted the wishes of the majority because it was believed that they only had to represent the views of the people. See Dicey 55 Lectures on the relationship between law and public opinion in England during the 19<sup>th</sup> century, quoted in Gray P *Unitary, self correcting democracy and the public law* (1990) 111

<sup>43</sup> (note 24 above)

<sup>44</sup> (note 24 above)

The above proposition was ably distinguished in the American case of *Ex parte De Ford*<sup>45</sup> which explained away *Jacobs*<sup>46</sup> on the ground that oral sex was not well known at the time of that decision. The Court was of the view that had the English judges been more sexually sophisticated at that time, they would have held otherwise.<sup>47</sup> Similar sentiments were shared in *Government v Bapoji Bhatt*<sup>48</sup> where a case was brought under section 377 of the Indian Penal Code of 1860<sup>49</sup> which is in the same fashion as section 153 of the Penal Code of Malawi. The issue before the Court was whether oral sex amounted to an offence under section 377.<sup>50</sup> It was held that the provision punishes persons who engage in carnal intercourse against the order of nature.<sup>51</sup> Further to that, where oral sex is committed, it is clearly against the order of nature, because the natural object of carnal intercourse is that there should be the possibility of conception of human beings, which in the case of coitus per mouth is impossible.<sup>52</sup> Thus, it was observed that carnal intercourse against the order of nature could not be extended to include acts

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<sup>45</sup> (1917) Oklahoma Criminal Appeals 59

<sup>46</sup> (note 24 above)

<sup>47</sup> (note 35 above) In adopting the decision in *Herring v State* 46 S.E. 876 at 881-82:

After much reflection, we are satisfied that, if the baser form of the abominable and disgusting crime against nature- i.e. by the mouth- had prevailed in the days of the early common law, the courts of England could well have held that that form of offence was included in the current definition of the crime of sodomy. And no satisfactory reason occurs to us why the lesser form of this crime against nature should be covered by our statute, and the greater excluded, when both are committed in a like manner, and when either might well be spoken of and understood as being “the abominable crime not fit to be named among Christians”

<sup>48</sup> (1884) 7 Mysore LR 280

<sup>49</sup> The Indian Penal Code provided a model template for sodomy laws in many British colonies. Section 377 provides that whoever has carnal intercourse against the order of nature with any man, woman or animal shall be punished with imprisonment

<sup>50</sup> (note 38 above)

<sup>51</sup> (note 38 above)

<sup>52</sup>( note 38 above)

of oral sex.<sup>53</sup> Ultimately, the case was dismissed because it was thought that the sexual act must engage the body part where sodomy is usually committed, that is, the anus.

The local jurisprudence in Malawi has haphazardly dealt with the issue of whether oral sex or other forms of lurid sexual intercourse are crimes against the order of nature in one case only.<sup>54</sup> Nevertheless, one can safely assume how such an issue is likely to be addressed if we look at the way the Courts have interpreted the constitutive elements of the offence. As has been indicated, there is a strong adherence to the decisions in *Reekspear*<sup>55</sup> and *Jacobs*<sup>56</sup> which regards penetration of the anus as an important element of the offence. And the recent Malawian expansion on this is that it is when anal intercourse is committed by two men that it is against the order of nature.<sup>57</sup> In *Republic v Raphael Malira*<sup>58</sup> a charge of indecent assault was preferred where a male had sexual intercourse per anum with his niece. The same line of thinking is also evident in the Courts of Zimbabwe<sup>59</sup> when faced with cases brought under section 73 (1) of the Criminal Law (Codification and Reform) Act.<sup>60</sup> For instance, mutual masturbation between males with consent has been held to be against the order of nature hence qualifies for the crime. Thus, here we find another confirmation on the ancient reasoning that the purpose of sexual intercourse is procreation and any sex which does not lead to procreation is against the prescriptions of nature.

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<sup>53</sup> (Note 28)

<sup>54</sup> In *Twaibu v Reginum* (note 7 above), it was held that oral sex does not constitute an unnatural offence.

<sup>55</sup> (note 27 above)

<sup>56</sup> (note 24 above)

<sup>57</sup> *The Republic v Tiwonge Chimbalanga and Steven Monjeza Soko* (note 5)

<sup>58</sup> Confirmation Case No 13 of 2008 (High Court) unreported

<sup>59</sup> Another former British colony that inherited the sodomy laws as well and they still remain in force up to date.

<sup>60</sup> Chapter 28 of the Laws of Zimbabwe, which provides:

Any male person, who with the consent of another male person, knowingly performs with that other person anal sexual intercourse, or any act involving sexual intercourse other than that would be regarded by a reasonable person to be an indecent act shall be guilty of sodomy and liable to a fine up to or exceeding level fourteen or imprisonment for a period not exceeding one year or both...

## 2.5 The implication of the scope of section 153 (a) and (c)

Firstly, if we construe a literal interpretation of section 153 (a) and (c), the perpetrators of sodomy can either be male or female. In addition, the provision is quite clear that both parties to the offence are offenders. This is one of the very few offences in criminal law that has no individual complainant. Notwithstanding the interpretation of unnatural offence by Cram J in *Twaibu v Reginum*,<sup>61</sup> there are apparent ambiguities created in the drafting of section 153(a) and 153(c) of the Penal Code. It is notable from the decided cases and from the common law principles that natural sex denotes penetration of a man's penis into a woman's vagina. Arguably, the framers of section 153 of the Penal Code intended to criminalise penetration of the penis into either a man's or a woman's vagina. This is despite the fact that the word sodomy does not appear anywhere in the section. Now, if natural sex involves penetration of a man's penis into a woman's vagina, would penetration of a man's penis into a woman's mouth constitute natural sex or unnatural sex? Put it clearly, is oral sex natural? Possibly, when Cram J in *Twaibu v Reginum* held that penetration of the mouth did not amount to unnatural offence he actually was grappling with the ambiguities created by the subsections (a) and (c) of section 153 above. The fact that heterosexuals are also susceptible to commit the crime compounds the problem of lack of clarity further.

As pointed out earlier, the cases under this provision that have been brought before the Courts of law indicate that the parties who will be rightly convicted of sodomy are males. Where a female and male have anal intercourse, the charge that is preferred is indecent assault and not sodomy. The question that arises is, is the proscription in section 153 (a) and (c) of the Code restricted to certain sexual acts? Or without beating about the bush, is generally on homosexuality? In light of a recent amendment to the Penal Code which has introduced a new offence on indecent practices between females<sup>62</sup>, one can rightly assume that criminal law is against sexual activities between members of the same sex and not just the unnaturalness of a particular act.

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<sup>61</sup> (note 7 above)

<sup>62</sup> Section 137A of the Amendment Act to the Penal Code of 2010

In addition, is the provision explicit enough to justify the confinement of the meaning of carnal knowledge to anal sexual intercourse only? If the basis for making the offence unnatural boils down to fact that it does not lead to procreation, then it would rightly follow that other forms of sexual activity for example oral sex, mutual masturbation and peno-vaginal sex with contraception should all be criminalised. From the discussion above, it is clear that section 153(a) and 153(c) would fall foul of the principle against doubtful penalization. As to doubtful penalisation Brett J in *Dickenson v Fletcher* made the following observations:

Those who contend that a penalty may be inflicted must show that the words of the Act distinctly enact that it shall be incurred under the present circumstances. They must fail if the words are merely equally capable of a construction that would, and one that would not inflict the penalty.<sup>63</sup>

The principle against doubtful penalisation has never been mounted in trials under section 153 (a) and (c) of the Penal Code. Nonetheless, that does not mean that the section is clear and unambiguous.

Furthermore, the scope of section 153(a) and (c) ignores an important possibility of consent. The act is still punishable even if where there is consent and the parties are of full age. It is irrelevant even if the forbidden act is done in private. The implication of this disregard is that male adult abusers of young boys, men who rape other men and men who freely consent to indulge in sexual intercourse are all one and the same thing. In these circumstances, consensual unnatural carnal knowledge is being equated to the crime rape.

## **2.6. Conclusion**

This chapter has looked at the nature of section 153 (a) and (c) and the implications it brings therein. It has shown that the scope of the offence in Malawian law, even though it is clear enough in wording to apply to both males and females, in practice it is used to proscribe sexual intercourse between men including those who do it consensually. It has also indicated the Court's restrictive interpretation on the constitutive elements of the offence which is directed at anal intercourse between males only. From the foregoing, can section 153 (a) and (c) stand a constitutional test in light of the principle of the rights to equality, dignity and privacy? Through

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<sup>63</sup> (1873) LR 9 CP1 at page 7

an analysis of *The Republic v Tiwonge Chimbalanga and Steven Monjeza Soko*,<sup>64</sup> these questions will be considered in the next chapter.

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<sup>64</sup> (note 8 above)



## CHAPTER THREE

### THE CONSTITUTIONAL VALIDITY OF SECTION 153

#### 3.1 Introduction

In *Steven Monjeza Soko and Tionge Chimbalanga Kachepa v The Republic*,<sup>65</sup> an application was made for the Chief Justice's declaration that the criminal charges brought under section 153 of the Code related to the interpretation and application of the Constitution of Republic of Malawi.<sup>66</sup> The Chief Justice dismissed the application in its entirety on grounds that the criminal proceedings in question dealt with criminal offences under the Penal Code namely the offence of buggery and indecent practices. And that these offences have no bearing on the constitutional rights of privacy, dignity and non discrimination.<sup>67</sup> In this chapter, the paper provides an analysis of the criminal proceedings in *Steven Monjeza Soko and Tionge Chimbalanga Kachepa v the Republic* and highlights the constitutional issues that can be raised from it. This chapter further argues that contrary to the Chief Justice's assertion, section 153 of the Code impugns on the rights to equality, privacy and dignity.

#### 3.2 The facts in the Steven Monjeza Soko and Tionge Chimbalanga Kachepa Case

On 26<sup>th</sup> December 2009, Steven Monjeza Soko,<sup>68</sup> aged 26 and Tionge Chimbalanga Kachepa<sup>69</sup> aged 20 conducted the first ever same sex traditional engagement ceremony at Blantyre city in Malawi. Soon after their public ceremony, the two men were arrested. Steven was charged with buggery or having carnal knowledge against the order of nature contrary to section 153 (a) of the Penal Code. Tionge was charged with buggery or permitting Steven to have carnal knowledge of him against the order of nature contrary to section 153 (c) of the Penal Code. In the alternative,

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<sup>65</sup> Miscellaneous Application Number 2 of 2010 (Unreported)

<sup>66</sup> Act No 20 of 1994. Hereinafter referred to as the Constitution

<sup>67</sup> (note 1)

<sup>68</sup> Hereinafter referred to as Steven

<sup>69</sup> Hereinafter referred to as Tionge

Steven and Tionge were also charged with gross indecency<sup>70</sup>, the subject of which is beyond the scope of this paper. They pleaded not guilty to the charges. The main issue to be decided by the Court was whether the two had carnal knowledge against the order of nature.

### 3.2.1 The evidence

In proving the allegations brought against Steven and Tionge, the State paraded a total of 9 witnesses.

The first witness was a grandmother to Steven who told the court that in October 2009 Steven introduced Tionge to her as his wife and that the two were cohabiting.<sup>71</sup> She said she recalled asking Steven whether Tionge was male or female because according to her, Tionge did not have feminine features such as breasts.<sup>72</sup> The second witness was a church elder at Abraham Church of which Tionge was a member.<sup>73</sup> He testified that Tionge told him that they were a couple with Steven and had plans of getting married.<sup>74</sup> He said Tionge was admitted to the church as a woman.<sup>75</sup>

The evidence of the third witness was quite illuminating. She told the Court that she knew both Tionge and Steven and that Tionge was her friend and she had always known him as a woman.<sup>76</sup> She said she even lent Tionge her traditional cloth for his engagement to Steven.<sup>77</sup> She went further to state that after the engagement ceremony someone brought her a newspaper and told her that she had been chatting with a male all along because the paper had revealed that Tionge

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<sup>70</sup> Provided for in section 156 of the Penal Code

<sup>71</sup> *Steven Monjeza Soko v Tionge Chimbalanga Kachepa* Criminal case number 359 of 2009, 1 . Available at [www.malawilii.org/cgi-bin/malawi\\_disp.pl?file=mw/cases/MWHC/2010/2.HTM&query=Monjeza](http://www.malawilii.org/cgi-bin/malawi_disp.pl?file=mw/cases/MWHC/2010/2.HTM&query=Monjeza) at 3 (accessed 4 August 2011)

<sup>72</sup> (note 7 above) 4

<sup>73</sup> (note 7 above)

<sup>74</sup> Ibid

<sup>75</sup> Ibid

<sup>76</sup> (note 7) 4

<sup>77</sup> Ibid

was male.<sup>78</sup> She was not amused and, together with a female friend they proceeded to Tionge's house to verify what was reported in the news.<sup>79</sup> They were joined by another (the fourth State witness) and the three of them summoned Steven and Tionge.<sup>80</sup> Steven is said to have confirmed that Tionge was his wife and that he slept with him.<sup>81</sup> The witness said Tionge voluntarily took off his clothes and she saw that he had male genitalia.<sup>82</sup> However, during cross examination the witness admitted that she together with the other women undressed Tionge.<sup>83</sup>

Tionge's employer who was the fourth witness said she employed him as a woman. She stated that Tionge introduced Steven as his husband. She further said that she was present when Tionge was asked to undress and she saw that he had male private parts. She personally asked Tionge how the two were having sex and Tionge said that Steven would do it anywhere he wanted, including the anus. The evidence of the fifth witness was that she was among the group of women that confronted Tionge about him being a man. She also said she was present when Tionge voluntarily undressed and confirmed that he was having sex through the anus or by the thigh with Steven.<sup>84</sup>

A photographer who took pictures of the engagement ceremony between Steven and Tionge was the sixth witness.<sup>85</sup> He did not aver much only to state that he was engaged to take pictures of Tionge and Steven during the engagement ceremony.

The seventh witness was an obstetrician and gynecologist.<sup>86</sup> He was requested by the Police to conduct an examination on Tionge.<sup>87</sup> He was asked to make an assessment on whether Tionge

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<sup>78</sup>Ibid

<sup>79</sup>Ibid

<sup>80</sup> Ibid

<sup>81</sup> Ibid

<sup>82</sup> (note 7) 4

<sup>83</sup>Ibid

<sup>84</sup> (note 7 above) 5

<sup>85</sup> Ibid

was male or female. In addition, he was to find out if Tionge had been involved in sexual intercourse.<sup>88</sup> The witness was unable to establish if Tionge was involved in anal sex because it was not within an area of his expertise.<sup>89</sup> He said that there was no one in Malawi who could do it.<sup>90</sup> He however confirmed that Tionge was a man.<sup>91</sup>

A psychiatrist who was the eighth witness presented his findings on the fitness of Tionge and Steven to stand trial.<sup>92</sup> He also testified that Tionge had gender disorientation as he regarded himself as a woman.<sup>93</sup>

The last witness was a police officer who arrested and obtained a confession statement from Steven and Tionge.

Tionge and Steven are said to have admitted to having anal sexual intercourse.<sup>94</sup> In defence, the two exercised their right to remain silent.

### **3.2.2 The judgment**

The Court found Steven guilty of having carnal knowledge of Tionge through the anus of Tionge which it held was against the order of nature contrary to section 153 (a) of the Penal Code.<sup>95</sup> Tionge was convicted of permitting Steven to have carnal knowledge of him through his

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<sup>86</sup> (note 7 above) 6

<sup>87</sup> Ibid

<sup>88</sup> Ibid

<sup>89</sup> Ibid

<sup>90</sup> Ibid

<sup>91</sup> Ibid

<sup>92</sup> Ibid

<sup>93</sup> Ibid

<sup>94</sup> Ibid

<sup>95</sup> (note 7 above) 18

anus which the court also found to be against the order of nature.<sup>96</sup> It was the Court's view that the evidence brought before it was sufficient enough to conclude that the two men were having sex against the order of nature. This finding was based on the fact they were living together as husband and wife, had publicly become engaged and had confessed to the police and some of the witnesses that they had been having anal sex together. The Court further observed that an engagement in Malawi happens between a man and a woman. Therefore, when two people both being male live together as husband and wife [as in the in the circumstances of Steven and Tionge], their conduct is beyond doubt contrary to the accepted moral conduct. It is the type of conduct that transgresses the Malawian standards of living.

### 3.2.3 The sentence

Steven and Tionge were sentenced to 14 years imprisonment which is the maximum punishment reserved for the offence. In justifying the harsh sentence, the Court said that the crime committed carried a sense of shock to the Malawian society.<sup>97</sup> Further to that the two men seemed to be proud of what they did and did not show remorse at all.<sup>98</sup> The Court could not imagine a more aggravated sodomy than where perpetrators seek heroism in public.<sup>99</sup> The Court observed that the marriage of the two was bizarre and could not be equated to a normal practice of a lawful marriage in Malawi.<sup>100</sup>

A submission in mitigation of sentence was made by the defence counsel. He said among others, the court should show some leniency to the two offenders.<sup>101</sup> He said they should be forgiven, loved, preached to and incorporated or they should receive counseling at a mental hospital.

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<sup>96</sup> (note 7 above)

<sup>97</sup> (note 7 above) 23

<sup>98</sup> Ibid

<sup>99</sup> Ibid

<sup>100</sup> Ibid

<sup>101</sup> (note 7 above) 22.

### **3.3 Some reflections on the case and the general perceptions about men who have sex with fellow men**

This section brings insights from the case and links such with how persons charged with sodomy under section 153 of the Code are discriminated against and how their right to privacy and dignity can be violated in Malawi. The reflections evolve from the manner in which Tionge and Steven were treated by the court of law and the general public.

#### **3.3.1 On the offence itself**

Firstly, it is worth noting that the offence of carnal knowledge against the order of nature in Malawian law, even though is explicit enough, by the wording in the provision that it applies to any persons, that is, both heterosexuals and homosexuals, in practice it targets sex between men including where it is done consensually. The offence is generally perceived as sexual intercourse per anus between males. The Court relied on the old common law definition of sodomy that it is anal sex between men. No comment was made in respect to the fifth witness' evidence that Tionge said he would have thigh sex with Steven as well. This restrictive approach has a strong likelihood of confining the offenders of section 153 (a) and (c) to males only. It is evident in the judgment that a traditional engagement let alone sex between two men are abhorrent. This type of sex is not within the confines of nature. It constitutes conduct that is not only shocking but uncalled for in the Malawian society.<sup>102</sup> Similar opinions can be drawn from the witnesses' testimonies in the case. The consensus seems to be that no sound man can have sex with another man. This can be observed from one of the female witnesses who seemed to have been annoyed that she did not know that she had been chatting with a male who was having sex with another male.

#### **3.3.2 Morality vis a vis sodomy**

The Court's finding that Steven and Tionge had to be punished severely for their lack of remorse is also indicative of its perception that what the offenders did was inconceivable, for which they should be ashamed of and apologise for. The prosecution's submission that, if not punished,

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<sup>102</sup> (note 7 above) 23-24

Steven and Tionge's conduct would corrupt public morality seems to be based on the belief that in Malawi, sex between males is immorality of the highest order and must be met with a stiff punishment.

The reaction of Malawians including senior government officials towards the arrest, conviction of the two men and generally to issues of homosexuality is interestingly unfortunate. For instance, President Bingu Wa Muntharika<sup>103</sup> is on record to have vowed that under his leadership he would never legalise homosexuality. He referred to those who have sex with other men as satanic, worse than dogs and that such activities are disgusting.<sup>104</sup> The then Deputy Minister of Information and Civic Education told the press that as far as the Malawi government was concerned there were only two homosexuals in Malawi namely Steven Monjeza and Tionge Chimbalanga. The minister further said that if there were any other homosexuals in country they were to come out in the open and face arrests.<sup>105</sup> Soon afterwards, an operation to arrest homosexuals was launched by the Malawi Police Force.<sup>106</sup>

A member of the Clergy is reported to have said that homosexual acts are such a disgrace so much so that those practicing it are timid to come out in the open.<sup>107</sup> One wonders how men who have consensual sex with other men would come out in the open when first of all there is a law proscribing it, secondly, senior government officials are giving warnings to arrest the men who would brave it to come out in the open and thirdly the state police established a special operation

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<sup>103</sup> He was the head of State of Malawi when the case occurred.

<sup>104</sup> Moyo J (2011) 'PAC speaks on gays, foul mouthed Bingu' *Nyasa Time* 27 May 2010. Available at [www.nyasatimes.com/national/pac-speaks-on-gays-foul-mouthed-bingu.html](http://www.nyasatimes.com/national/pac-speaks-on-gays-foul-mouthed-bingu.html) (Accessed 15 July 2011).

<sup>105</sup> 'Malawi minister urges gays to come out in the open and face arrests' *Nyasa Times* 9 February 2010. Available at [www.nyasatimes.com/national/malawi-gays-urges-by-minister-to-come-out-in-the-open.html](http://www.nyasatimes.com/national/malawi-gays-urges-by-minister-to-come-out-in-the-open.html) (Accessed 15 July 2011).

<sup>106</sup> Mponda F & Chiumia T 'Malawi police launches hunt for gays' *Nyasa Times*, 28 February 2010. Available at [www.nyasatimes.com/national/malawi-police-launches-hunt-for-gays.html](http://www.nyasatimes.com/national/malawi-police-launches-hunt-for-gays.html) (Accessed 15 July 2011). In reference to the common law prohibition on sodomy, Ackerman J in *National Coalition of Gay and Lesbian Equality v Minister of Justice* (2000) 4 LRC 292 said: 'As a result of the criminal offence, gay men are at risk of arrest, prosecution and conviction of the offence of sodomy simply because they seek to engage in sexual conduct which is part of their experience of being human.'

<sup>107</sup> Kumwenda O 'Clergy warns on gaiety' *The Nation* 8 April 2005

to apprehend such persons. The issue therefore is not about the men in question being timid but rather the fear for their lives in the midst of the proscription of the law and the possible arrests. It is about the stigma and negative differential treatment that these men face even from the State which ideally is supposed to protect them.

### 3.3.3 Consensual sodomy is evil and a disease

The defence counsel submitted in mitigation of sentence that Steven and Tionge did not deserve to be given a sentence of imprisonment.<sup>108</sup> His view was that prayer and psychiatric counseling could be the appropriate manner to deal with persons involved in sodomy. The link between same sex relations and religion seem to be shared by many. Professor Etta Banda who was the Minister of Foreign Affairs is on record to have said that same sex relations were against Malawi's religious and cultural values.<sup>109</sup> The Public Affairs Committee of Malawi<sup>110</sup> released a press statement in which it stated that basing on religious teachings, the Committee held the view that homosexuality is immoral and sinful. In addition, the Committee believed that the weakness in individuals practicing homosexuality could be dealt with through prayer.<sup>111</sup> Sexual activities between males were described as sinful and should be purged.<sup>112</sup> It was reported that Malawi needs transformation as there is too much wickedness happening.<sup>113</sup>

From the foregoing statements including the submissions made by the lawyer who supposedly was to represent the interests of Steven and Tionge, males who have sex with fellow males are sinners and need divine intervention to abandon their immoral activities so that they become

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<sup>108</sup> (note 7 above)

<sup>109</sup> The same sentiments were made by the Minister of Information and Civic Education. See 'Malawi Anglican bishop supports government's stance on gays' *Nyasa Times* 2 May 2010. Available at [www.nyasatimes.com/national/malawi-anglican-bishop-supports-govts-stance-on-gays.html](http://www.nyasatimes.com/national/malawi-anglican-bishop-supports-govts-stance-on-gays.html) (Accessed 15 July 2011).

<sup>110</sup> A well known civil society, which is an inter faith organization comprised of the main Protestant, Catholic and Muslim faith groups in Malawi.

<sup>111</sup> (note 27 )

<sup>112</sup> (note 43 above)

<sup>113</sup> (note 43 above)



spiritually strong individuals of integrity. The defence counsel's proposal for psychiatric counseling in respect of Steven and Tionge at a mental institution implies that men who conduct themselves in homosexual activities are mentally sick and in need of specialized care by a psychiatrist. The print media has often reported sex between males or homosexual practices as social and psychological problems of the individuals concerned. For instance, it was reported in one of the common daily papers in Malawi that: 'Homosexuality is a psychological problem affecting people in the western countries, which should not be normalized in African countries like Malawi in the name of human rights.'<sup>114</sup>

### **3.3.4 Consensual sodomy is committed by sub humans only**

In a newspaper debate on the possibility of decriminalizing the law on sodomy, one journalist wrote; 'We have better things to worry about than to waste time and resources discussing homosexuality, a way of life that does not even exist among dogs and pigs.'<sup>115</sup> To the ordinary Malawian, dogs and pigs despite being man's friend are regarded as unclean and are despised.<sup>116</sup> Doggish behavior is typically associated with disorientation, ill mannerism and lack of purpose in life. Hence a comparison to dogs and pigs indicates how low and stigmatized homosexuals are perceived in the Malawian society.<sup>117</sup> The criminalization of sodomy and the justifications that people raise for this law gives homosexuality a subhuman status. Men who prefer to have sex with other males are stigmatized and afraid to come out and enjoy the inherent freedoms that any individual is entitled to. They are isolated and wrongly judged because of their sexual orientation status. We see Steven and Tionge being treated as outcasts by the Court, prosecution witnesses and the media. They were perceived as deviants because of their sexual conduct and traditional engagement which is deemed as horrendous to the Malawian society.

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<sup>114</sup> Kanyinji 'Big no to homosexuality' *The Sunday Times* 20 February 2005.

<sup>115</sup> Chitosi I 'Homosexuality debate proves touchy' *The Sunday Times* 13 February 2005.

<sup>116</sup> Muula A 'Perceptions about men having sex with men in Southern African country: case study of print media in Malawi' (2007) 400

<sup>117</sup> Ibid

One other observation made in the case analysis relates to the way in which Tionge was compelled to undress before three women. It was inhuman, degrading and also an intrusion to his personhood. His body was neither respected nor accorded some privacy. On a number of occasions, Tionge was undressed and his male genitalia displayed and examined by different people who were so eager to share their findings with the public and the media. To add insult to injury, their conclusions were widely published by the media across Malawi. The viewing of Tionges's private parts was possibly under the curiosity and the misguided disbelief on how a man can have sex with another man. This indicates that the intimate and of course private life of a homosexual can be invaded regardless of whether it is justifiable or not.

### **3.3.5 Would heterosexual couples be subjected to the same treatment if established that they were having anal sex?**

It is quite doubtful if it would have been the same treatment in a case of a husband having consensual anal sex with a wife. It is quite doubtful whether a husband having consensual anal sex would receive the same treatment as the one Steven and Tionge got. In such a scenario, the man and woman would be given the due respect and privacy they need. It is even more doubtful if a case where a woman permits a man to have carnal knowledge of her against the order of nature would be prosecuted let alone whether the perpetrators would be arrested. This uncertainty further exists in light of Malawi Law Commission's justification of the rejection of a proposal to include marital rape in the Penal Code.<sup>118</sup> The commission argued that prosecution of husband and wife in such circumstances has the effect of opening up to the general public the private relations of husband and wife, which for valid social and family reasons should be strongly protected.<sup>119</sup> The Law Commission's reasoning demonstrates the importance of respecting the privacy of persons' intimate relations. It indicates that there is some sort of personal space which the State is not justified to interfere. Sadly it seems in Malawi, the beneficiaries of this recognition of privacy are heterosexuals. This is so regardless of the fact that marital rape lacks consent whereas in consensual sodomy there is an agreement between the two to have that type of sex.

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<sup>118</sup> Malawi Law Commission (2000) *Report of the Law Commission Report on Review of the Penal Code* 35.

<sup>119</sup> (note 44 above)

Steven and Tionge who were traditionally engaged<sup>120</sup> must have been unlucky to be men who freely chose to have anal sex because the law and the public do not afford a strong protection to such private relations. In these circumstances, when privacy is viewed as an ideology that serves to bolster the heterosexual nuclear family, it will not protect the interests of those who are outside such a frame work like Steven and Tionge.

On the other hand, it is noteworthy that, the law reviewing and reforming function of the Law Commission can be related to that of the Courts. They become both productive in nature. It goes further to reinforcing the people's perception on the norms of society. However, in the performance of this function, the Commission should always bear in mind to strike a balance between societal norms, the law, foundational principles of the Constitution and the minimum standards of international human rights law.

### **3.3.6 Investigation and prosecution difficulties**

Lastly, the case study shows that the criminalization of consensual sodomy presents difficulties in investigating and prosecuting the offence.<sup>121</sup> The challenge lies in how to lawfully obtain evidence for a sexual act that is usually done in private.<sup>122</sup> In passing judgment against Steven and Tionge, the Court observed that neither the doctor nor any of the other witnesses could adduce direct evidence that the accused had carnal knowledge against the order of nature. Hence you find that enforcement of anti sodomy laws like section 153 of the Penal Code becomes pervasive and degrading to the persons involved.

For example, in the name of gathering evidence, Tionge and Steven were given a less human status and their bodies were treated with no respect at all. To determine whether anal sex took place and if Tionge was indeed a man, the two men were compelled to undergo medical tests without their consent and show their private parts to different people including women. This was not only inhuman and degrading but also a total disregard of a man's ego. However,

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<sup>120</sup> In the Malawian context, a traditional engagement is one form of a valid marriage one can enter into.

<sup>121</sup> See also Gupta A 'Section 377 and the dignity of Indian homosexuals' (2006) *Economic and Political Weekly* 4819

<sup>122</sup> Ibid

nowhere do we see the Court condemning such conduct and in actual fact it went ahead to rely on evidence which was obtained in this manner.

All things considered, does the above practical example of the case of Steven Monjeza Soko and Tionge Chimbalanga Kachepa which was on consensual sodomy under section 153 (a) and (c) of the Penal Code bring insights on the constitutional concerns that can be raised in the provision? The discussion below will assess whether section 153 (a) and (c) can be declared unconstitutional in relation to the rights of equality, dignity and privacy.

### **3.4 The basis of the Constitutionality challenge**

The Constitution of the Republic of Malawi<sup>123</sup> is the supreme law of the land and all people are entitled to equal protection under it. Section 4 of the Constitution provides:

This Constitution shall bind all the executive, legislative and judicial organs of the State at all levels of the Government and all the peoples of Malawi are entitled to the equal protection of this Constitution, and laws made under it.<sup>124</sup>

Further, the validity of any act of Government or any law is to be tested by the extent of its consistency with the provisions of the Constitution.<sup>125</sup> Therefore to successfully challenge the constitutionality of sections 153 (a) and (c) of the Penal Code it has to be shown that the criminal proscription is unconstitutional in that it is in contradiction with the provisions of the Constitution. A Court of law is to have recourse to section 11 of the Constitution when interpreting the provisions thereof. Section 11 of the Constitution states as follows:

- (1) Appropriate principles of interpretation of this Constitution shall be developed and employed by the courts to reflect the unique character and supreme status of this Constitution.
- (2) In interpreting the provisions of this Constitution a court of law shall-
  - (a) promote the values which underlie an open and democratic society

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<sup>123</sup> Act 20 of 1994. Hereinafter referred to as the Constitution.

<sup>124</sup> (note 59 above)

<sup>125</sup> Section 5 of the Constitution.

(b) take full account of the provisions of Chapter III and IV; and

(3) where applicable, have regard to current norms of public international law and comparable foreign case law ...<sup>126</sup>

The importance of understanding the impact of the Constitution on the proscription against sodomy in section 153 (a) and (c) of the Penal Code cannot be underestimated. It has been argued that the use of the word “shall” in section 11 (2) indicates that is mandatory for Malawian courts to consider international law whenever the latter is relevant to the provision being interpreted.<sup>127</sup> The international human rights standards to be considered are not limited to treaties binding on Malawi.<sup>128</sup> The Courts are entitled to have recourse to other international law norms not ratified by Malawi and soft law norms.<sup>129</sup> In determining whether a limitation of a right is constitutionally allowed, one factor to be considered by the Court is whether it is recognisable by international human rights standards.<sup>130</sup> In light of this provision, the Courts have relied on foreign case law in resolving constitutional issues such as the scope and meaning of rights. Much as section 211 of the Constitution provides for the domestication of international law, it also recognises the continued application of customary international law so long as it is not inconsistent with the provisions of the Constitution or any Act of Parliament. International law may be binding or persuasive whereas foreign case law has a persuasive effect only.

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<sup>126</sup> The same was restated by the Supreme Court of Malawi in *Attorney General v Malawi Congress Party and Others* MSCA No 22 of 1996 (unreported) that:

...the proper approach to the construction of the unique character of the Constitution of Malawi is set out exhaustively in s.11(2) which prescribes for three principles. By virtue of section 11(2)(a), (b) and (c) of the Constitution, we are, firstly, required, when developing principles of interpreting the Constitution to promote values which underlie a democratic society in Malawi; secondly, we are required to take full account of the provisions within Chapter III of the Constitution (which provide for principles upon which the Constitution is founded and for principles of national policy) and of the provisions within Chapter IV of the Constitution (which provide for Human Rights to be protected); and finally, we are required to have regard, where applicable, to relevant norms of public international law and comparable foreign case law.

<sup>127</sup> Chirwa DM ‘A full loaf is better than half: The constitutional protection of economic, social and cultural rights in Malawi’ (2005) 49(2) *Journal of African Law* 207, 235

<sup>128</sup> (note 63 above)

<sup>129</sup> (note 63 above)

<sup>130</sup> Section 44 (2) of the Constitution

In February 1990, Malawi ratified the African Charter on Human and Peoples' Rights<sup>131</sup> and in December 1993 the International Covenant on Civil and Political Rights<sup>132</sup> was ratified. The ratification of these treaties has no reservations or declarative interpretations. Despite the treaties being non domesticated, Malawi still has international obligation towards the implementation thereof as some provisions of the treaties like the ICCPR now form part of international customary law which is binding on all States.

### 3.5 Grounds for the challenge

#### 3.5.1 Infringement of the right to equality

The starting point is section 20 (1) of the Constitution which is as follows:

(1) Discrimination of persons in any form is prohibited and all persons are, under any law, guaranteed equal and effective protection against discrimination on grounds of race, colour, sex, ethnic or social origin, disability property or other status.

(2) legislation may be passed addressing inequalities in society and prohibiting discriminatory practices and the propagation of such practices and may render such practices criminally punishable by courts.

A reading of section 20 (1) indicates that the provision is a general prohibition on discrimination, which in essence comprises of a negative protection of the right to equality.<sup>133</sup> This prohibition is both in law and in fact.<sup>134</sup> That is to say, the State cannot pass discriminatory laws or conduct itself in a manner which discriminates.<sup>135</sup> Further, there are other forms of positive discrimination that are allowed with the exception of those grounds provided for in the section.<sup>136</sup> At the same time, one can contend that by virtue of having "other status" as a ground for discrimination, the list of grounds is non exhaustive. That aside, what is clear cut from

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<sup>131</sup> Hereinafter referred to as the African Charter

<sup>132</sup> Hereinafter referred to as the ICCPR

<sup>133</sup> Chirwa D (2011) *Human rights under the Malawian Constitution* 142

<sup>134</sup> (note 69 above) 145

<sup>135</sup> Ibid

<sup>136</sup> This brings in the distinction between fair and unfair discrimination.

section 20 (1) is that it is insufficient to rely on discrimination in its generality. It must be shown that the discrimination is on a restricted particular ground and that the discrimination is unreasonable or unjustifiable.<sup>137</sup> Numerous cases<sup>138</sup> have held that there are four elements of discrimination. In addition to the already stated two; at least two or more people must have been treated differently; the differentiation must amount to inferior treatment, place the person at a disadvantage, or deprive him or her benefits, privileges or rights.

The Constitution does not define what constitutes “other status.” However, in *Banda v Lekha*,<sup>139</sup> the Industrial Relations Court held that section 20 of the Constitution prohibits unfair discrimination against persons in any form.<sup>140</sup> Further to that, although the section does not specifically cite discrimination on the basis of one’s HIV status, it is to be implied that it is covered in the general statement of anti discrimination in any form.<sup>141</sup> The court went on state to that this is why the South African Constitutional Court in *Hoffman v South African Airways* held that:

The need to eliminate unfair discrimination does not arise only from Chapter 2 of our Constitution. It also arises out of international obligations. South Africa has ratified a range of anti discrimination Conventions, including the African Charter on Human Rights. In the preamble to the African Charter, member States undertake, amongst other things, to dismantle all forms of discrimination. Article 2 prohibits discrimination of any kind. In terms of Article 1, member States have an obligation to give effect to the rights and freedoms enshrined in the Charter...<sup>142</sup>

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<sup>137</sup> *ANE Sakala v Registered Trustees of the Designated Schools Board* Civil Cause No 2652 of 1999 (unreported)

<sup>138</sup> See among others, *Moatswi & Another v Fencing Centre (Pty) Ltd* (2004) AHRLR 131 (High Court of Botswana), *Attorney General v Dow* [1992] BLR 119 (CA), *Andrews v Law Society of British Columbia* (1989) 1 SCR 143 (Supreme Court of Canada)

<sup>139</sup> Matter No IRC of 277 of 2004 (unreported) the applicant was dismissed from employment due to her HIV positive status. She brought an application before the Industrial Relations Court that she was unfairly dismissed based on her HIV status

<sup>140</sup> (note 59)

<sup>141</sup> (note 59)

<sup>142</sup> (2002)1 ILJ 2357 (CC). The Malawi Court often resort to South African Constitutional cases when trying to find the content or meaning of some rights which are also provided for in the South African Constitution. The basis adopting the decision in the case of *Hoffman v South African Airways* was the mandate that section 11 (2) (9c) of the Constitution of Malawi gives the Courts to have regard to comparable foreign case law.

It was the Court's view that the position on anti discrimination enunciated in the *Hoffman* case fits squarely with the situation in Malawi.<sup>143</sup> Malawi ratified the African Charter and this places a constitutional duty on the State to invalidate legislation that is inconsistent with the constitution or does not promote the fundamental rights entrenched in the Charter.<sup>144</sup> In that sense, then arguably the spirit of the Constitution of Malawi would demand that "other status" should be a wide and open ended concept because exclusion from the ambit of section 20 (1) has far reaching consequences on relying on other rights.

Therefore, despite the lack of an explicit definition on "other status", there is room to fully accommodate the argument that nothing bars one from interpreting the said phrase as including sexual orientation.<sup>145</sup> It is important to note that, in interpreting Article 2 of the African Charter,<sup>146</sup> the African Commission on Human and Peoples' Rights observed that the words "other status" in Article 2 could be interpreted to include sexual orientation.<sup>147</sup> It has been contended that the use of the phrases "such as" and "other status" in Article 2 of the Charter

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<sup>143</sup> (note 75 above)

<sup>144</sup> (note 75 above)

<sup>145</sup> Cameroon E 'Sexual orientation and the constitution: A test case for human rights' (1993) 110 SALJ 450 at 452 defines sexual orientation as a reference to erotic attraction; in the case of heterosexuals, to the members of the opposite sex; in the case of gays and lesbians, to members of the same sex. Potentially a homosexual or gay or lesbian person can therefore be anyone who is erotically attracted to members of his or her own sex.

<sup>146</sup> Stipulates that:

'every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or [other status]' Emphasis supplied.

<sup>147</sup> See *Zimbabwe Human Rights NGO Forum v Zimbabwe* Communication 245/2000, 21<sup>st</sup> Activity Report of the African Commission on Human and Peoples' Rights (January 2007), where The African Commission on Human and Peoples' Rights held that the principle on non discrimination provided for in Article 2 of the Charter establishes the foundation for enjoyment of all human rights. That the aim of this principle is to ensure equality of treatment of individuals irrespective of nationality, sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.



clearly shows that the list for unacceptable grounds for discrimination is not exhaustive.<sup>148</sup> It is argued that this language suggests that the drafters foresaw that the African Charter permits for an expansion of the specific grounds, hence accepting the principle that the exact content of the Charter will not be frozen in time.<sup>149</sup> Therefore, there should be no limit to the growth that could be allowed.

Against this background, it is hereby argued that the proscription in section 153 (a) and (c) relates to a type of sexual conduct which is anal sex. This criminal law is based on the fact that anal sex is an unnatural act just like bestiality. Even though the impugned Penal provision may on the face of it appear to envisage both male and female sexual acts, apparently it unfairly targets sexual acts of a specified class of persons. Justice Mwaungulu<sup>150</sup> said ‘Unfortunately, sodomy, and we judges take judicial notice occurs very frequently as normal sexual behaviour among the married and prisoners who may be heterosexual. However, it is more incident among gays where it is their way of sexual expression.’ In reality, it is when males are erotically attracted to fellow males that section 153 (a) and (c) is invoked and seen in operation. The truth of the matter is that the unnatural sexual act that is criminalized by this provision is associated with homosexuals as a group.

Section 153 (a) and (c) of the Penal Code has the effect of viewing all homosexuals as criminals. When everything associated with homosexuality is treated as criminal, the whole homosexual community is marked with deviance and perversity. They are subject to extensive prejudice because of what they are or what they are perceived to be, not because of what they do. As a consequence, the minority group of the population is, because of its sexual orientation,

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<sup>148</sup> Murray R & Viljoen F ‘Towards non discrimination on the basis of sexual orientation: The normative basis and procedural possibilities before the African Commission on human and peoples rights and the African Union’ *Human Rights Quarterly* 29(2007) 88

<sup>149</sup> (note 69 above)

<sup>150</sup> ‘Justice Mwaungulu tips Bingu on cabinet and gays’ Available at [www.nyasatimes.com/national/malawi-justice-mwaungulu-tips-bingu-on-cabinet-gays-laws.html](http://www.nyasatimes.com/national/malawi-justice-mwaungulu-tips-bingu-on-cabinet-gays-laws.html) (accessed 7 August 2011)

persecuted and marginalized. Looking at the case of *Steven Monjeza Soko and Tionge Chimbalanga Kachepa*,<sup>151</sup> it is evident that the two men were treated as outcasts by the Government of Malawi, state witnesses, the Court, media and the public. The unfair treatment that was accorded to these men was not on the basis that someone caught them red handed having anal sex but because they accepted themselves as homosexuals by virtue of their public traditional engagement. Hence they were perceived to have performed homosexual acts like anal sex which according to the Penal Code is deemed an unnatural offence. They were discriminated against on the basis of the erotic attraction between them. It is important to note that this social discrimination is there even in cases where the males concerned never in fact performed any homosexual activities.<sup>152</sup>

### 3.5.2 Discrimination based on sex

Section 153 (a) and (c) is discriminatory in nature based on sex. Section 20 (1) of the Constitution prohibits discrimination on several enumerated grounds including “sex”. In *Malawi Congress Party & Others v Attorney General & Another*,<sup>153</sup> the Malawi High Court held that the right to equality prohibits an impermissible criterion or a classification arbitrarily used to burden a group of individuals. For instance, a company cannot refuse to promote a woman to a management position based on her sex or gender. While men and women are of different sexes, that difference does not justify treating women differently. A sex-based discrimination was found by the Malawi High Court in *Bridget Kaseka & Others v Republic*,<sup>154</sup> where the Police had arrested and prosecuted women suspected of being prostitutes while allowing their male partners to go free.

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<sup>151</sup> (note 7)

<sup>152</sup> (note 73above)

<sup>153</sup> (1997) 1 MLR 59, 65 (High Court)

<sup>154</sup> Criminal Appeal No 2 of 1999 (Unreported)

The same could be applied when one looks at the manner in which section 153 (b) and (c) have been utilized by law enforcers. The police will only arrest males suspected to have consensually committed anal sex and not a male and female suspected to have committed the same. Where one is brought before the criminal justice system in cases of male to female anal sex encounter, it is when consent is lacking and the preferred charge is usually indecent assault and not sodomy. Reverting to the case involving Tionge and Steven, it can be noted that the two men were brought before the criminal justice system because they were men who had anal sex. They were prosecuted and convicted not solely because they committed anal sex but also due to the fact that they were men. Sex or gender becomes one characteristic of the offence envisaged in section 153 (a) and (c) of the Penal Code when it comes to its practical application thereof. This is against the spirit of section 20 (1) of the Constitution which guarantees the right to equality and effective protection under the law. In *Malawi Congress Party & Others v Attorney General & Another* the equality provision in section 20 (1) was utilized to hold that the legislature had a duty to enact laws that are neutral and do not target particular individuals. Justice Mwaungulu said:

Under the equality before the law provisions of our Constitution, laws that are promulgated by our national Parliament must be directed to all in [a] class. Short of that, they will be attacked for discrimination. Laws which are promulgated against one individual are likely to be disqualified as vindictive and implying unequal treatment before under the law...<sup>155</sup>

Section 20 (1) is a prohibition of discrimination in law and fact. This was emphasized in the case of *Republic v Chinthiti and Others*<sup>156</sup> where it was held that equality under the law does not require mere formal or mathematical equality, but a substantial and genuine equality in fact. From the foregoing, it is hereby argued that in reality, section 153 (a) and (c) is blatantly discriminatory on grounds of sex by subjecting men to unequal treatment before the law.

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<sup>155</sup> (note 89 above)

<sup>156</sup> (1997) 1 MLR 65

### 3.5.3 The discrimination ground on “sex” to be read in “sexual orientation”

On the other hand, relating section 153 (a) and (c) to discrimination based on sex, the contention would be that the word “sex” in section 20 (1) must be read expansively to include prohibition of discrimination on the ground of sexual orientation as the prohibited ground of sex discrimination cannot be read as applying to gender simpliciter.

The ICCPR in article 2 recognises the right to equality and states that ‘the law shall prohibit any discrimination on the grounds such as race, colour, sex, language, religion, political and other opinion, national or social region, property birth or other status’ In *Toonen v Australia*<sup>157</sup> the Human Rights Committee while holding that certain provisions of the Tasmanian Criminal Code which criminalise various forms of sexual conduct between men violated the ICCPR, observed that the reference to “sex” in article 2, paragraphs 1 and 26 is to be taken to include sexual orientation. In Canada, despite the fact that section 5 (10) of the Canadian Charter does not expressly include sexual orientation as a prohibited ground of discrimination, the Supreme Court of Canada held that sexual orientation is a ground analogous to those that are listed in section 20 (1) of the Constitution of Malawi.<sup>158</sup>

The same reasoning is evident in the European Court of Human Rights where “sexual orientation” does not feature in the European Convention of Human Rights but the court made a finding that the Convention does provide protection for gays in particular.<sup>159</sup> Adopting the interpretive inclusion of sexual orientation within the ground of “sex” in section 20 (1) of the Constitution and in addition to paying due regard to the norms of international jurisprudence and comparable foreign case law, it follows that homosexuals fall within the protected scope of the

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<sup>157</sup> Communication 488/92, Human Rights Committee, U.N. Doc.CCPR/C/50/488/1992, 31 March 1994

<sup>158</sup> See *Vriend v Alberta* (1998) 1 S.C.R 493

<sup>159</sup> See *Dudgeon v UK* 45 Eur. Ct. H.R. (Ser. A) (1981), *Norris v Ireland* 142 Eur. Ct H.R. (Ser. A) (1991), *Modinos v Cyprus* 259 Eur. Ct. H.R (Ser. A) (1993)

Constitution. Hence a law like that of section 153 (a) and (c) discriminates on the basis of one's sexual preference is unconstitutional.

It is noteworthy that a challenge on this basis might be highly contentious due to the fact that the provision as it is covers perpetrators who are either heterosexual or homosexual. However, it is very important to note that the test of whether a provision is discriminatory or not should not only be limited to the word by word assessment of the law as it is drafted in Penal Code. A lot of factors come into play, like the impact that the law brings forth in actual practice.

Ackerman J<sup>160</sup> observed that discrimination does not occur in the abstract areas of the law, hermetically sealed from one another, where each aspect of discrimination is to be examined as it is and its impact assessed in isolation. He argued that we must understand discrimination in context of the experience of persons on whom it impacts.

In assessing the impact of the discriminatory nature of section 153 (a) and (c) of the Penal Code, an examination on how the perpetrators in *Steven Monjeza Soko and Tionge Chimbalanga Kachepe* were treated is of relevance. Steven and Tionge found themselves in conflict with section 153 (a) and (c) because of their sex, that is, by reason of them being males. They were arrested because they were males who conducted a traditional engagement which has the same status as a valid marriage in the Malawian laws. Had it been that the traditional engagement was between a man and woman, there would have been no arrest. The lawfulness of arrest was based on section 153 (a) and (c) in that by reason of them being traditionally married, they must have consummated the marriage through anal sex which is a crime against the order of nature.

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<sup>160</sup> *National Coalition for Gay and Lesbian Equality and Another v Minister of Home Affairs* (2000) 4 LRC 292. The court in this matter affirmed the position that was adopted in the constitutional challenge of sodomy laws in South Africa. See also *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice* (1998) 3 LRC 648, where it was held that the determining factor regarding the unfairness of discrimination is, in the final analysis, the impact of the discrimination on the complainant or the members of the affected group. The approach to this determination is a nuanced and comprehensive one in which various factors come into play which, when assessed cumulatively and objectively, will assist in elaborating and giving precision to the constitutional test of unfairness.

It is worth noting that the Court unequivocally held that in Malawi the bizarre marriage of the two men cannot be equated to the normal practice of any other lawful marriage.<sup>161</sup> The Court was also quick to point that Malawi was not ready to see its sons getting married to other sons or conducting engagement ceremonies. The distinction is in the fact that a marriage between man and woman is lawful and the provision would not be invoked on the basis that the respective man and woman might be having sex against the order nature. But where there is a same sex union, then the law fits squarely. Consequently, sexual intercourse between a man and a woman is the norm. On the other hand, sexual intercourse between males is shocking, sinful and unlawful. Therefore, in practice, the provision differentiates the lawfulness of sexual intercourse by reason of one being of the same sex or different sex.

It was observed by Ackerman J that in assessing the impact of discrimination which has a bearing on the fairness and unfairness of the discrimination, the following factors though not exhaustive should be considered:

- (a) the position of the complainants in society and whether they have suffered in the past from patterns of disadvantage;
- (b) the nature of the provision or power and the purpose sought to be achieved by it. If its purpose is manifestly not directed, in the first instance, at impairing the complainants in their fundamental human dignity or in a comparably serious respect, but is aimed at achieving a worthy and important societal goal, such as for example, the furthering of equality for all, this purpose may, depending on the facts of the particular case, have a significant bearing on the question whether the complainants have in fact suffered the impairment in question.
- (c) with due regard to (a) and (b) above, and any other relevant factors, the extent to which the discrimination has affected the rights or interests of complainants and whether it has led to an impairment of their fundamental dignity or constitutes an impairment of a comparable serious nature.<sup>162</sup>

As shown in the analysis of the case of *Steven Monjeza Soko and Tionge Chimbalanga Kachepa*, section 153 (a) and (c) reinforces already existing social prejudices on men who have sex with fellow men. The provision ends up giving homosexuals a subhuman status and encourages

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<sup>161</sup> (note 7 ) at 23

<sup>162</sup> (note 96 above) 316

stigma of such men. This can be observed in the public perceptions as reported in the Malawi media and the judgment in Steven and Tionge's case. The threats of impending arrests from the government and the police instill fear and vulnerability amongst homosexuals. Being a disadvantaged and minority group, their solace remains in the Constitution for protection of their fundamental rights. It is trite that the more vulnerable the group adversely affected by the discrimination, the more likely the discrimination would be held to be unfair.<sup>163</sup>

### 3.5.4 Violation of the right to privacy

Section 21 (1) (a) of the Constitution provides for the right to privacy as follows:

‘ Every person shall have the right to personal privacy, which shall include the right not to be subject to searches of his or her person, home and property.’

The right to privacy is a hallmark of a free society founded on the respect for human dignity.<sup>164</sup> It is the right to be left alone and has been described as the most comprehensive right and the most valued by civilized men.<sup>165</sup> It guarantees autonomy over the self and moral integrity of an individual. At the very minimum, the right to privacy protects the inner core or sanctum of the person.<sup>166</sup> This right is also about how an individual exercises his or her freedom by making personal choices relating to one's identity, personality and lifestyle.

The State is obliged to uphold the right to privacy and at the same time should avoid interference with people's bodies and homes, whether they are homosexuals or not. Private life has been held to include sexual life<sup>167</sup> and should as well cover homosexual conduct between consenting adults. In *National Coalition for Gay and Lesbian Equality v Minister of Justice*, the South African Constitutional Court said:

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<sup>163</sup> *Hugo v President of the Republic of South Africa* (1998) 1 LRC 662

<sup>164</sup> Chirwa D (note 69 above) 159

<sup>165</sup> *Olmstead v United States* 277 US 438, 478 (1928)

<sup>166</sup> *Bernstein v Bester* 1996 (2) SA 751 (CC) para 67

<sup>167</sup> *Norris v Ireland* (1988) 13 EHRR 186 ECt HR

Privacy recognizes that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community. ... If, in expressing our sexuality, we act consensually and without harming one another, invasion of that precinct will be a breach of or privacy.<sup>168</sup>

The right to privacy encompasses the freedom from interference with the sphere of private activity, in which an individual can indulge and explore their own tastes and preferences in their sexuality without any state interference.

The implementation of the law in Section 153 (a) and (c) subjects accused persons to unjustified searches of their body. It is a clear cut hindrance to an individual's freedom of choice relating to personality and lifestyle in that person who elects to express his sexuality through consensual sodomy activities is deemed to be in conflict with the law. This is a clear cut intrusion of a person sexual life which in these circumstances should be protected under the rubric of privacy. Consensual sodomy between adults does not in any way cause harm to warrant such an invasion of privacy.

### **3.5.5 Privacy as contextualized in the right to dignity**

It has been contended that it would be treading on dangerous grounds one rely on the right to privacy when challenging sodomy laws.<sup>169</sup> This is so because arguing on the privacy claim, one inadvertently reinforces societal norms that consensual sodomy or homosexual conduct should be hidden from the public forum, as it is a private matter and an embarrassment to the litigation process.<sup>170</sup> The privacy ground has the potential of suppressing debate on sexual orientation even in court, since it encourages the culture of silence where coming out and publicity would be vital tools in challenging sodomy laws. Not undermining a challenge on the constitutionality of section 153 (a) and (c) on the ground of privacy,<sup>171</sup> but when privacy is properly contextualized

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<sup>168</sup> (note 96 above)

<sup>169</sup> Harris A 'Outing privacy litigation toward a contextual strategy for lesbian and gay rights (1997) *George Washington Law Review* 3

<sup>170</sup> (note 93 above) 4

<sup>171</sup> Violation of the right to privacy has been successfully applied as a challenge to sodomy laws in a very notable decisions. See *Toonen v Australia* Communication No 488/1992, *Norris v Ireland* (1988) 13 EHRR 186, *Modinos v*



it can be fused with dignity and form a powerful ground which is firmly protected by the Constitution.

### 3.5.6 The right to dignity

Section 19 (1) of the Constitution states that: ‘The dignity of all persons shall be inviolable.’ This unlimited constitutional protection of dignity requires one to acknowledge the value and worth of all members of the society. The decision in Constitutional Court of South Africa in the case of *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice*<sup>172</sup>, noted that there is a link between the rights of dignity and privacy. Privacy encompasses the inner core of an individual like family life, sexual preference and the home environment.<sup>173</sup> The way we give meaning to our sexuality is at the core of our being in the area of private intimacy.<sup>174</sup> No aspect of a person’s life may be said to be more private or intimate than that of sexual relations. And since private, consensual, sexual preferences figure prominently within the individual’s dignity and personality, they are an inalienable component of the right to dignity.

Section 153 (a) and (c) of the Penal Code prohibits all sexual intercourse per anus between males regardless of the whether there is consent or not. As has already been outlined, this provision punishes a form of sexual conduct identified by homosexuals. This leads to arrests of men who are presumed to be having sexual intercourse per anus. The infringement of the right to privacy and dignity is more evident because of the difficulty that arises in finding evidence where the sexual act was consensual which most of the times is done in private. Hence the enforcement of section 153 (a) and (c) leads to the invasion of the intimate private lives of homosexuals. A practical example is what happened in the case of Steven and Tionge. The two men were subjected to mortifying conduct during the investigation of their case and throughout the trial

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*Cyprus* (1993) 16 EHHR 485, *National Coalition for Gay and Lesbian Equality v Minister of Justice* (note 85 above)

<sup>172</sup> (note 96 above) at 673. It is important to note that judgments from the South African Constitutional Court have a strong persuasive value in interpreting several rights provided for in the Constitution of Malawi. This is so because of the similar nature of some of the South African human rights provision to the Malawi constitution.

<sup>173</sup> (note 96 above)

<sup>174</sup> (note 69 above)

process. The psychiatric assessment to determine the soundness of their minds, the gender examination establishing whether they were male or female and the gynecologist's examination to find out if there were traces of semen in their anal areas; are clear cut cases of a violation of a person's privacy and dignity.

It should be borne in mind that physical and moral integrity is an integral part of the right dignity and privacy. The right to privacy prohibits the subjection of individuals to medical or scientific experimentation without their consent.<sup>175</sup> This element is listed as an aspect of the right to dignity in some international instruments.<sup>176</sup> This example provides an idea on how the existence of a law that prohibits sexual intercourse per anus between males is bound to degrade the person and dignity of homosexuals as well as breach their right to privacy. In overruling the well known case of *Bowers v Hardwick*,<sup>177</sup> the Supreme Court of the United States explained the general effect of anti sodomy laws in *Lawrence v Texas* as follows:

Although the laws involved in *Bowers* and here purport to do no more than prohibit a particular sexual act, their penalties and purposes have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home. They seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals. The liberty protected by the Constitution allows homosexual persons the right to choose to enter upon relationships in the confines of their homes and their private lives and still retain their dignity as free persons.<sup>178</sup>

The above ruling further confirms the proposition that an invasion to one's sexual preference goes beyond an infringement to the right to privacy. It has the effect of invading a person's sense of being. An individual preference of sodomy without aggression, force, violence or abuse is a legitimate exercise of his autonomy to that preferred sexual behavior and should be respected.

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<sup>175</sup> In *X v Germany* (1983) 5 EHRR 511, it was held that forced medical examination or treatment constitutes an invasion of privacy.

<sup>176</sup> See for example article 7 of the ICCPR

<sup>177</sup> 478 US 176 (1986)

<sup>178</sup> 539 US 558, 123 SCt 2472 US (2003)

It is in this light that it is hereby contended that the prohibition of consensual sexual relations in section 153 (a) and (c) abridges a person's privacy in the context of the right to dignity.

### **3.6 Are the infringements justifiable?**

It is a common feature of human rights protection jurisprudence that only a few rights are absolute. Restriction or limitations on human rights are indeed recognized. Under the Constitution this is provided for in section 44. Section 44 (1) (g) outlines the non derogable rights. Among them is the right to equality and recognition before the law. In addition, according to section 19 (1) the right to dignity is inviolable. The crux of the argument is that the net effect of the impugned Penal Code provision is the denial of the right to equality and recognition before the law. These rights being non-derogable cannot therefore be subjected to the limitation test under section 44 (2). Nevertheless, it remains important to take note that even if for instance, it can be argued that the right to equality is limitless, the inquiry on a finding of discrimination entails justifying differential treatment.<sup>179</sup> In essence, this is the same as going through the test of limitation of rights.

Section 44 (2) and (3) of the Constitution provides that a limitation must:

#### **a) be prescribed by law**

It is trite that a limitation on a constitutional right must be prescribed by law as a measure against impromptu and arbitrary limitations. In the present case, it is clear that the limitation in section 153 is prescribed by law.

#### **b) be reasonable**

Reasonableness in this regard demands that a limitation on rights must be sensibly connected to its stated objectives. This is confirmed in *Maggie Kaunda v Republic*<sup>180</sup> where it was held that reasonableness calls for the proportionality inquiry between the

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<sup>179</sup> Chirwa D (note 69 above) 157

<sup>180</sup> Criminal Appeal No 8 of 2001 (unreported)

limitation and the aim sought by it.<sup>181</sup> This means that, the limitation must not only be capable of achieving the objective sought but also that it must not infringe on human rights more than necessary to achieve that objective.<sup>182</sup>

The purpose of section 153 (a) and (c) is to arrest and prosecute those persons alleged to have committed sex against the order of nature. Consent is irrelevant. This objective was an important one and made sense back then when the basis for criminalizing carnal knowledge against the order of nature was that it was an abominable sin. The rationale behind the section is a presumed belief that sex against the order of nature is immoral or unacceptable. Analysing this assertion closely, it is evident that morality does not sufficiently justify section 153 regulation of homosexual sodomy. The legislature or State's justification for the provision was without doubt grounded in religion than morality. A state can no more punish private behavior because of religious intolerance than it can punish such behavior for racial animus.<sup>183</sup> It is not logical in this era to promote such an objective between consenting adults to anal sex. It has already been elaborated that in the advancement of the objective that section 153 (a) and (c) seek to achieve, the accused person's rights to equality, privacy and dignity are infringed. In addition, since the scope of section 153 (a) and (c) is quite broad it ends up impinging on the mentioned rights more than necessary. In this regard, section 153 fails the proportionality test.

**c) be recognised by international human rights standards**

This requisite serves as an external check on the validity of a law limiting a right. A State should show that the limitation is recognized in international law and most democratic states. Evidence that the limitation is rarely found in comparative human rights law will cast doubt as to its necessity.<sup>184</sup>

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<sup>181</sup> In the Canadian case of *R v Oakes* (1986) 1 SCR

<sup>182</sup> Chirwa D (note 69 above) 48

<sup>183</sup> *Bowers v Hardwick* 106 S. Ct. 2855

<sup>184</sup> Chirwa D (note 58 above) 49

Limiting a person's right to dignity, privacy and equality for the sake of curbing sodomy cannot stand the wrath of international human rights standards. This is evidenced by the protection of minority rights in various regional human rights instruments and the pronouncements made by international human rights courts on the matter.

**d) be of general application**

The principle behind this requirement is that any law must apply impersonally, that is, it must apply to everyone equally and must not target specific persons.<sup>185</sup> Selective application of laws results into arbitrary and unjust action. The Court in the American case of *Railway Express Agency v New York* said:

..., nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected.<sup>186</sup>

Section 153 (a) and (c) may appear to apply to any person however it is widely accepted that in practice the provision prohibits homosexual conduct between consenting adults. This law specifically targets males who commit anal sex. Homosexuals are arrested and prosecuted for consensual sodomy while heterosexuals are not. There is differential treatment between homosexuals and heterosexuals. The selective approach that this law is being used results into unjustified discrimination, invasion of privacy in intimate relations and demeaning conduct subjected to consenting adult males.

**e) be necessary in an open and democratic society**

This demands that the limitation must serve a legitimate purpose necessary in an open and democratic society. The Malawian courts have held that this measure calls upon a consideration on whether a limitation promotes fundamental principles of the Constitution or principles of national policy.<sup>187</sup>

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<sup>185</sup> *S v Makwanyane & Another* 1995 (3) SA 391 (CC)

<sup>186</sup> 336 US 106 (1949) para 112

<sup>187</sup> See *Attorney General & Another v Malawi Congress Party & Others* (1997) 2 MLR 210 (SCA)

The Constitution of Malawi lists the rights to equality and dignity as inviolable. On one hand, this denotes the importance placed on these rights against other rights. On the other hand, the presumption would be that an abridgement of the said rights should be very necessary as it would be against the foundational principles of the constitution.

Even if the said rights were said to be limited, which is clearly not the case, it is submitted that the limitations on the right to equality, dignity and privacy imposed by the existence of section 153 (a) and (c) of the Penal Code are unreasonable, not recognized by international human rights standards and not necessary in an open and democratic society.

**f) not negate the essential content of the right or freedom in question**

A law should not negate the essential components of a right. In cases where a limitation negatively affects the core of a given right or abrogates the whole right, it is doubtful that a court will be uphold it.<sup>188</sup>

Section 153 (a) and (c) negate the very essence of the rights to equality, dignity and privacy. This is due to the fact that firstly, it creates differential treatment before the law between homosexuals, heterosexuals, males and females in that the law will basically punish anal sex between males only. Secondly, it allows the State to arbitrarily invade the privacy of consenting adults in intimate activities. If sexual conduct between a consenting male and female is regarded as private and protected, what then would be the justification for limiting the right to privacy of consenting males conducting the same activities? Thirdly, because investigation and prosecution of sodomy cases between consenting males is generally difficult in as far as evidence is concerned, accused persons are subjected to very inhuman and degrading treatment in a manner that pays less regard to the sense of worth. Hence, in fulfilling the objective of section 153 (a) and (c), the dignity of persons caught by that provision is massively abridged. This destroys the very essence of the right to dignity.

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<sup>188</sup> *Friday Jumba & Humphrey Mvula v Attorney General* Constitutional Cases No's 1 & 2 of 2005 (unreported)

### 3.7 CONCLUSION

This chapter has analysed the constitutionality of the provision. It is without doubt that section 153 (a) and (c) of the Penal Code substantively relates to the interpretation or application of the Constitution. It has been established that the section infringes on the rights to equality, dignity and privacy. Section 153 (a) and (c) is, therefore, unconstitutional. Is the constitutional challenge on the provision as simple as it sounds on paper? What are the challenges and prospects if any of declaring the invalidity of the provision? What would be the appropriate remedy? Can the provision be amended in order to bring it in line with the Constitution? Or should it totally be deleted from the Penal code? These questions are considered in the next chapter.

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## CHAPTER FOUR

### THE CHALLENGES AND PROSPECTS TO THE DECRIMINALISATION OF CONSENSUAL SODOMY IN MALAWI

#### 4.1 Introduction

It has been argued in the preceding chapter that section 153 (a) and (c) of the Penal Code is unconstitutional as it infringes on the right to equality, dignity and privacy. The contention that anti sodomy laws violate human rights principles is beyond doubt and widely accepted by a lot of democratic states and international human rights organizations. What remains a challenge for countries like Malawi is the probability of declaring such a law by the Courts as unconstitutional. This chapter will highlight some of the challenges that might be faced in bringing the constitutionality test of section 153 (a) and (c) and how notwithstanding such challenges, there are still prospects to do so.

#### 4.2 The challenges

##### 4.2.1 The Chief Justice's certification of the constitutionality of a matter

For every matter relating to the application or interpretation of the Constitution, leave has to be sought from the Chief Justice of Malawi. The Chief Justice has the mandate to certify whether an issue is fit to be heard by the Constitutional Court. This serves as a major impediment in intricate matters like the constitutionality of anti sodomy laws where preconceived notions and other political influences come into play.

For instance, in Malawi, the Chief Justice is appointed by the President and confirmed by a majority of two thirds of members present in a voting session.<sup>189</sup> The Chief Justice's appointment is neither based on a recommendation by the Judicial Service Commission as is the case with the appointment of other judges nor based on a rigorous assessment of his credibility or competence. This provides lee way for purely political appointments whose honorable candidates may at times want to please their appointee when faced with certain highly contentious matters.

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<sup>189</sup> Section 111 (1) of the Constitution



This assertion can be inferred in the manner in which the Chief Justice dealt with the case of Steven and Tionge. The application for leave to have Steven and Tionge's case heard by a Constitutional Court came at a time when the Malawi head of state had made pronouncements that he would not allow abolishment of anti sodomy laws during his tenure. He further referred to men who have sex with fellow men as demons and stated that such conduct should not be legalised in Malawi. When one looks at the ruling dismissing the application to certify section 153 of the Penal Code as raising constitutional issues, it simply states that the matter does not raise any issues requiring the application or interpretation of the Constitution. This is baffling bearing in mind that it is trite that anti sodomy laws and human rights are closely intertwined and do not need special lenses to deduce their linkage. Hence, the presumption that granting the powers of certification on the constitutionality of a highly contentious law like section 153 to a single judge, opens the whole process to personal biases, political or other influences.

#### **4.2.2 The set up of the Constitutional Court**

Malawi does not have a permanent Constitutional Court per se. It has a High Court which sits as a Constitutional Court at an appointed time. After the Chief Justice's certification that a given matter raises issues related to the Constitution, he appoints at least three High Court judges to sit as a constitutional court.<sup>190</sup> The Chief Justice is at liberty to appoint any judge to preside over a constitutional matter. What this means is that, presumably, the Chief Justice may decide to appoint those judges whom he knows would surely conform to the same views as his or to the source of political influence if at all there is any. This would have probably happened with the case of Steven and Tionge had it been certified. Taking into account the anti sodomy attitude of the President of Malawi, the executive branch of government, the Church, media, the general public and the criminal justice system itself, apart from giving a lame excuse for dismissing the application, the Chief Justice would have just appointed judges who are homophobic.

As far fetched as this proposition might seem, if analysed critically it is evident that the current set of appointing judges to sit as a Constitutional Court in the above mentioned manner poses a great threat for matters that do infringe on rights of the minority.

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<sup>190</sup> Section 9 of Courts (Amendment) Act of 2004

### 4.2.3 The *locus standi* requirement in constitutional matters

*Locus standi* may be defined as the existence of a right of an individual or a group of individuals to have a court adjudicate upon an issue brought before it by the individual or group.<sup>191</sup> Two constitutional provisions are relevant to this point. Section 15 (2) of the Constitution provides as follows:

Any person or group of persons with sufficient interest in the protection and the enforcement of rights under this Chapter shall be entitled to the assistance of the courts, the Ombudsman, the human rights commission and other organs of Government to ensure the promotion, protection and redress of grievance in respect of those rights.

The second provision in section 46 (2), is couched in the following manner:

Any person who claims that a fundamental right or freedom guaranteed by this Constitution has been infringed or threatened shall be entitled-

- (a) to make application to a competent court to enforce or protect such a right or freedom; and
- (b) to make application to the Ombudsman or the Human Rights Commission in order to secure such assistance or advice as he or she may reasonably require

*United Democratic Front (UDF) v Attorney General*<sup>192</sup> was the first case which interpreted the above provisions. It held that according to the mentioned constitutional provisions, the court will only enforce the performance of a statutory duty on the application of a person who can show that he himself has a legal right to insist on the performance of that duty.<sup>193</sup> It is important to note that, the Malawi Supreme Court of Appeal has constantly referred to it with approval.<sup>194</sup> Therefore, as far as the issue on *locus standi* is concerned, the law is that an individual must establish a personal interest or substantial interest over and above that of other citizens in order

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<sup>191</sup> Cane P (1995) 'Standing up for the public' in Oliver D (ed) *Public law* (London: Sweet & Maxwell) 276

<sup>192</sup> (1994) MLR 354 (HC)

<sup>193</sup> (note 3 above)

<sup>194</sup> See *President of Malawi & another v Kachere & others* (1995) 2 MLR 616 (SCA), *Attorney General v Malawi Congress Party & Others* (1997) 2 MLR 181 (SCA)

to have sufficient standing to commence an action related to the protection or enforcement of human rights.

With the *locus standi* requisite in mind, it is worth mentioning that a challenge to the constitutionality of section 153 (a) and (c) should be done by a litigant who must possess sufficient interest and demonstrate that the provision adversely affects his or her rights or interests. The case of Steven and Tionge presented one great opportunity where the constitutional validity of section 153 (a) and (c) could have been tested by the Malawi Constitutional Court. Steven and Tionge would have had sufficient interest to commence a constitutional matter before the Court. Unfortunately, this important opportunity was thwarted by the Chief Justice's non certification of the matter. The case not only exposed the worst side of Malawi's criminal justice system towards homosexuality but it has also uncovered a very hostile environment which the public has created towards people who openly disclose their homosexual conduct.

In the mean time, it is quite unlikely that any person or individuals who might be affected by the criminalization of consensual sodomy between adults would come out in the open and commence an action to test the constitutionality of the provision. This, coupled with the requirement for sufficient standing in a matter, is another obstacle to the constitutional scrutiny of section 153 (a) and (c). Had it not been for the requisite to demonstrate enough standing, the proscription in section 153 (a) and (c) would have been brought before the Court through public interest litigation<sup>195</sup> or by some human rights organizations who had openly expressed their discontent with the provision.

#### **4.2.4 Malawi's general consensus that homosexuality is immoral and a sin**

As highlighted in chapter two, the criminalization of sexual conduct against the order of nature is based on a biblical understanding that sodomy is a religious abomination and immoral. The early church held the view that sodomy was against God's ordinance of nature and should be

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<sup>195</sup> Public interest litigation is particularly relevant in the Malawian context. It is of great benefit to the poor, vulnerable and marginalized, who form the bulk of Malawian society and cannot access the court themselves due to among others, fear and distrust of the legal system and the public.

given a stiff punishment.<sup>196</sup> Malawi has close to 80 percent<sup>197</sup> of its citizens as Christians who are persuaded by virtue of their Christian doctrine to subscribe to the same view. They hold the view that homosexuality or consensual sodomy is a perverted practice which must be eradicated from society.<sup>198</sup> It is considered as a mental disease to be cured by psychiatrists or divine intervention. In some sectors it is likened to bestiality.<sup>199</sup>

The theological point of view equates consensual sodomy to Sodom and Gomorra, territories which the Bible refers to as infested with evil.<sup>200</sup> This mind-set towards sodomy has infiltrated a greater section of the Malawi Christian church. During the time when Steven and Tionge were being tried for sodomy, the Malawi Council of Churches, which is a representative council of all christian churches in Malawi, issued a press statement on the churches' view on homosexual conduct. It stated that those who commit sodomy commit a sin before God.<sup>201</sup> The Council further stated that homosexual conduct is evil and must not be condoned by the Malawian society. In addition, it advised the Malawi government to retain current laws against homosexuality in the criminal code and to disregard the pressure from donor countries. The Council advised the countries to respect Malawi's cultural and religious values and refrain from using aid as a means of forcing the country to legalise sinful acts like homosexuality in the name of human rights.

The Church in Malawi has a very significant impact on instigation to change oppressive laws, poor governance and lack of the rule of law in the country. For example, it was through a pastoral letter issued by the Church in 1994 that the change from 30 years of dictatorship to a

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<sup>196</sup> The Holy Bible, Leviticus 20 verse 13

<sup>197</sup> 'Map and basic facts about Malawi' Available at <http://goafrica.about.com/library/bl.mapfacts.malawi.htm>. (Accessed on 5 December 2011)

<sup>198</sup> Kumwenda O 'Clergy warns on gaiety' *The Nation* 8 April 2005

<sup>199</sup> Republic v *Steven Monjeza Soko & Tionge Chimbalanga Kachepa* Criminal case No 359 of 2009 (Unreported)

<sup>200</sup> The Holy Bible, Genesis chapter 19. The men of Sodom and Gomorra used to have sex with other men.

<sup>201</sup> 'Malawi Council of Churches back up government's criminalisation of homosexuality' Available at [www.africanactivist.org/.../malawi-council-of-churches-backup.html](http://www.africanactivist.org/.../malawi-council-of-churches-backup.html). (Accessed 27 August 2011)

multiparty system was ignited.<sup>202</sup> It is the same Church that issued several press statements in 2003 urging citizens to peacefully protest against the then government's proposal to increase the constitutional two years presidential term of office to three years.<sup>203</sup> The trend has been that when the church makes a stand on a topical issue, the populace usually sees sense in it and obediently adopts the Church's view. Therefore, it is not surprising that most Malawians are homophobic and consequently, it would take the bravest of all to come out in the open and challenge the consensual sodomy provision.

### 4.3 The prospects

#### 4.3.1 The role of international law in protecting sexual minority rights

The interpretive value of jurisprudence from the international and regional human rights systems is given recognition in a number of provisions of the Constitution.<sup>204</sup> For instance, section 13 (k) of the Constitution directs the State to govern in accordance with the law of nations. Besides, section 44 (2) states that laws that limit constitutional rights must be recognized by international human rights standards. Further, where applicable, a court is to have regard to current norms of public international law and comparable case law when interpreting provisions of the Constitution.<sup>205</sup> Furthermore, apart from serving as an interpretive aid in constitutional interpretation, international law is a source of law in Malawi. These provisions make it justifiable for the courts to draw insights from international law when interpreting constitutional rights.<sup>206</sup> This means that a court can hold the State responsible for violating a right that is not specifically provided for in the Constitution. For example, by applying the Human Rights Committee decision in *Toonen v Australia*,<sup>207</sup> the Malawi Courts can find section 153 (a) and (c)

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<sup>202</sup> Phiri M & Ross R (1998) *Democratisation in Malawi: A stock taking* 1

<sup>203</sup> (note 13 above)

<sup>204</sup> Chirwa D (2011) *Human rights under the Malawian Constitution* 26

<sup>205</sup> Section 11(2)(c) of the Constitution

<sup>206</sup> Chirwa (note 16 above) 27

<sup>207</sup> Communication 488/92, Human Rights Committee, U.N. Doc.CCPR/C/50/488/1992, 31 March 1994

discriminatory on the ground of sexual orientation even if that specific ground is not provided for in the Constitution.

In addition, by virtue of being a party to a treaty, a state must implement the provisions of the covenant in a domestic setting. This also entails compliance with decisions made by monitoring bodies to reflect a state's respect of its international obligations. In this light, the jurisprudence of the Human rights committee in upholding sexual minority rights should be respected and implemented by Malawi as it is a party to the ICCPR. The ICCPR forms part of the law of Malawi and can be enforced in the domestic courts. The role that the ICCPR and international law generally can play in challenging the anti sodomy provision cannot be underestimated. It legitimizes the constitutional challenge in a country like Malawi where there is a minute record of human rights litigation.

#### **4.3.2 Pressure from the international community to promote minority rights**

The trial and conviction of Steven Monjeza Soko and Tionge Chimbalanga Kachepa on sodomy awakened Malawi to the fact that the international community has an eagle eye's view on the State's protection and promotion of minority rights. This can be observed in that Malawi came under pressure when the court convicted and sentenced Steven and Tionge to 14 years imprisonment.

The then United Nations Human Rights Chief, Navi Pillay slammed the jailing of the gay couple and stated that it set an alarming precedent.<sup>208</sup> She said the law which enabled the conviction dates back to the colonial era and had been dormant for a number of years, rightly so because it is discriminatory and has the effect of criminalizing individuals based on perceptions of their identity.<sup>209</sup> Pillay urged that the conviction be quashed and the anti sodomy provision

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<sup>208</sup> 'High Commissioner's statement on Malawi' Available at <http://arc-international.net/global-advocacy/high-commissioner-for-human-rights/hc-statement-malawi>. See also Laws criminalizing homosexuality are incompatible with international human rights standards and fuel homophobia. Available at [www.ohchr.org](http://www.ohchr.org) (Accessed 19 July 2011)

<sup>209</sup> (note 20 above)

repealed.<sup>210</sup> She further remarked that such a law was in violation of a number of key human rights treaties of which Malawi was a party to.<sup>211</sup>

Amnesty international reacted with condemnation as did donor entities like the African Development Bank, European Union and the World Bank.<sup>212</sup> Several countries, among others, the United Kingdom, Germany, and South Africa<sup>213</sup> also condemned Malawi's attitude towards homosexuality. They all called for the release of the two men and reform of the penal provision criminalizing consensual sodomy.

Most important of all was the intervention by the then United Nations Secretary General Ban Ki-Moon in May 2010.<sup>214</sup> He paid a visit to Malawi a few days after the conviction of Steven and Tionge and had talks with the Head of State, Bingu wa Muntharika.<sup>215</sup> After this meeting, President Muntharika granted a presidential pardon to the two men.<sup>216</sup> His sentiments made after granting the presidential pardon indicate that he was not amused with the release of Steven and Tionge but was compelled due to the pressure mounted on him by the UN secretary general.<sup>217</sup>

Since the trial of Steven and Tionge on sodomy, the Malawi government has been receiving donor pressure to respect rights of minority groups.<sup>218</sup> This has prompted the Ministry of Justice to refer section 153 of the Penal Code which outlaws consensual sodomy to the Malawi Law

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<sup>210</sup> (note 20 above)

<sup>211</sup> Ibid

<sup>212</sup> 50 percent of Malawi's national budget is donor funded.

<sup>213</sup> 'Zuma slams malawi on imprisonment of gays' Available at <http://www.nyasatimes.com/national/zuma-slams-malawi-imprisonment-of-gays.html> (accessed 27 August 2011)

<sup>214</sup> 'Under pressure, Malawi's leader pardons gay couple' ABC news available at <http://abcnews.go.com/international/wirestory?id=10778353> (accessed on 27 August 2011)

<sup>215</sup> (note 14 above)

<sup>216</sup> Ibid

<sup>217</sup> Ibid

<sup>218</sup> 'Malawi reviews homosexual laws' available at [http://www.zodiakmalawi.com/zbs%20malawi/index.php?option=com\\_content&view=article&id=3695:malawi-reviews-homosexual-laws&catid=44:newstop&Itemid=123](http://www.zodiakmalawi.com/zbs%20malawi/index.php?option=com_content&view=article&id=3695:malawi-reviews-homosexual-laws&catid=44:newstop&Itemid=123) (accessed 20 January 2012)

Commission for review.<sup>219</sup> The review of the law comes at a time when two of Malawi's major donors, Britain and the United States of America have threatened that they would use the financial assistance it renders to the country as a means to push for the rights of minorities like homosexuals.<sup>220</sup> This is a major step for Malawi in what could be a possible repeal of the anti sodomy law.

### 4.3.3 Threat of losing the fight against HIV/AIDS

Malawi continues to experience a severe HIV epidemic.<sup>221</sup> Out of a population of 12 million people, 1 million people are living with HIV.<sup>222</sup> The government and international donors have put in place a comprehensive response to the epidemic in recent years.<sup>223</sup> Men who have sex with other men or commit consensual sodomy are a well known high-risk group with a very high incidence.<sup>224</sup> Data from a study which used a snow ball sampling method identified 200 men who have sex with men in urban centres of Malawi, and this group had an HIV prevalence of 21%.<sup>225</sup>

The National HIV/AIDS Strategy states that Government and partners shall put in place mechanisms to ensure that HIV/AIDS prevention, treatment, care and support and impact mitigation services can be accessed by all without discrimination.<sup>226</sup> 'Without discrimination' implies that persons engaged in same sex sexual relations are to be included. The Malawi Secretary for Nutrition, HIV and AIDS in the President's Office, Dr Mary Shawa, acknowledged the need to incorporate a human rights approach in the delivery of HIV and AIDS services to

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<sup>219</sup> (note 18 above) The request for review of section 153 was made in December 2011.

<sup>220</sup> (note 18 above)

<sup>221</sup> National HIV prevention strategy: 2009 to 2013 (2009) National AIDS Commission, Lilongwe Malawi 4

<sup>222</sup> (note 21 above) AIDS is the leading cause of death amongst adults in Malawi.

<sup>223</sup> (note 21 above)

<sup>224</sup> (note 21 above) 9

<sup>225</sup> Ibid

<sup>226</sup> (note 33 above)



men who have sexual intercourse with men.<sup>227</sup> She said Malawi must recognize the rights of its gay population in order to fully step up the fight against AIDS.<sup>228</sup> She further asked men who have sex with men to come out in the open in order to assist in HIV prevention efforts.<sup>229</sup> This cannot be done given the statements made by governmental officials and other members of the public denouncing sex between men, which has served to further drive this already vulnerable community further underground.

The importance of reaching out to persons having same-sex relations as a critical component of the response to HIV has been well-recognised by leading medical institutions as well as UNAIDS, UNDP and the World Health Organisation.<sup>230</sup> . An effective response to HIV/AIDS requires improved strategic information about all risk groups, including men who have sex with other men.

The criminalization of sodomy which in true sense makes homosexuality illegal is the primary setback to the Malawi government's goal of preventing and managing HIV/AIDS on all high risk groups. It is believed that the inclusion of interventions on how the government of Malawi will address and manage HIV and AIDS in the high risk but minority group is one of the core reasons why the Global fund rejected Malawi's proposal for Round 10 funding on preventive and management of HIV/AIDS for men who have sex with other men considering that homosexuality is illegal in the country.<sup>231</sup> Reports indicate that Malawi's proposal was rejected

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<sup>227</sup> 'LGBT rights in Malawi' *The Daily Times* 17 November 2009

<sup>228</sup> (note 39 above)

<sup>229</sup> (note 39 above)

<sup>230</sup> According to an August 2009 research paper published in the *Lancet*, the world's leading medical journal, the HIV/AIDS community now has considerable challenges in clarifying and addressing the needs of men having sex with men (MSM) in sub-Saharan Africa because of states' political and social hostility towards homosexuality

<sup>231</sup> 'Malawi would rather lose aid than legalise homosexuality' *The Malawi Democrat* 10 June 2011. The Global fund rejected Malawi's proposal for funding high risk groups which included men who have sex with men, in the prevention and management of HIV/AIDS. See also Available at included <http://www.africareview.com/News/-/979180/1081462/-/i6wsdlz/-/login>

because the country's laws are rigid and do not favour the marginalised groups like homosexuals and prostitutes.<sup>232</sup>

The proscription on consensual sodomy is not only a legal, but a structural and social barrier to the national and international commitment to the fight against HIV/AIDS across the board. Malawi would not be able to effectively fight the virus without giving gays access to HIV/AIDS services.<sup>233</sup> This is so because most men who have sex with other men in Malawi have female sexual partners as well, hence increasing the likelihood of HIV transmission to their female partners.<sup>234</sup> Thus, from the statements made by the Secretary for HIV/AIDS and Nutrition, the government of Malawi is fully aware that it is imperative that interventions aimed at curbing HIV/AIDS must target men who commit consensual sodomy. The dilemma created between condoning the impugned sodomy provision and the threat to losing the fight against HIV/AIDS will definitely lean on the possibility of a reform on section 153 of the Penal Code.

#### 4.4 Conclusion

The challenges that could be encountered in the process of declaring section 153 (a) and (c) unconstitutional are daunting. However, despite these challenges, the chapter has highlighted that; firstly, the Malawi courts can resort to international law in interpreting the rights enshrined in the Constitution. Secondly and lastly, pressure from the international community and the threat to losing the fight against HIV/AIDS, provide an opportunity for law reform on the provision. What would be the appropriate law reform for section 153 (a) and (c)? Can the provision be amended in order to bring it in line with the Constitution? Or should it totally be deleted from the Penal Code? These questions are considered in the next chapter.

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<sup>232</sup> (note 43 above)

<sup>233</sup> 'Malawi man arrested for posting gay rights posters' Available at <http://www.cnn.com/2010/WORLD/africa/02/07/malawi.posters/index.html?hpt=T2> (Accessed 13 January 2012)

<sup>234</sup> (note 21 above) 9. For example, case of male prisoners who commit sodomy with other male prisoners may get infected with HIV while in prison as a result of having unprotected sex. Once they are released after serving their sentences, these men will infect their partners.

## CHAPTER FIVE

### CONCLUSION AND RECOMMENDATIONS

#### 5.1 Introduction

The fact that section 153 (a) and (c) is unconstitutional because it trumps upon the rights to equality, dignity and privacy is no understatement. Even though comparable international human rights law, the international community and the commitment to curb HIV/AIDS might have a critical role to play in the reform of this law, what remains as a fact is that the strongest possibility for sodomy law reform rests with Malawi's legislature and the courts. The questions that arise in the event of a law reform are; should section 153 (a) and (c) be deleted completely from the penal code? Or should the sodomy provision be retained with slight amendments? I consider these issues in this chapter and make recommendations on the way forward.

#### 5.2 Should it be a case of partial amendment?

The legislature is empowered to enact laws.<sup>235</sup> It thus has powers to amend section 153 (a) and (c) as long as such an amendment is consistent with the Constitution.<sup>236</sup> In the fulfillment of this mandate, the legislature is under an obligation. The most likely law reform for section 153 (a) and (c) that Malawi would attempt, would be an amendment by substitution.

##### 5.2.1 Deleting the word 'male person' from Malawi's anti sodomy provision and substituting it with 'any person'

The penal code of Botswana had a similar provision to section 153 (a) and (c). Prior to its amendment, its section 164 read:

Any person who has-

- (a) carnal knowledge of any person against the order of nature;
- (b) ...

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<sup>235</sup> Section 8 of the Constitution

<sup>236</sup> Sections 4 and 15 (1) of the Constitution expressly state that the legislature is bound by the Constitution and the bill of rights.

- (c) permits a male person to have carnal knowledge of him or her against the order of nature, is guilty of an offence and is liable to imprisonment for a term not exceeding seven years.

In 1998, the above provision was amended. It now reads as follows:

Any person who has-

- (a) carnal knowledge against the order of nature
- (b) ...
- (c) permits any other person to have carnal knowledge of him or her against the order of nature, is guilty of an offence...

The above provisions came under constitutionality test in the case of *Kanene v State*.<sup>237</sup> The appellant, an adult male had been charged with committing an unnatural offence contrary to section 164 (c) of the Botswana penal code, prior to its amendment.<sup>238</sup> He pleaded not guilty arguing that the section was ultra vires section 3 of the Constitution of Botswana providing for, among others, non discrimination, right to privacy.<sup>239</sup> The appeal took place after the provision was amended. Counsel for the appellant argued that the fact that the offender in the pre amended section 164 (c), in committing the offence, permitted only a male person and not a female to have carnal knowledge of him or her was discriminatory.<sup>240</sup> More importantly, he contended that the whole section 164 in its pre and post amendment was discriminatory.<sup>241</sup> He said it subjected one class of persons to disabilities or restrictions to which other persons in Botswana are not subjected.<sup>242</sup>

In its judgment, the Constitutional Court considered section 164 prior to its amendment and after it was amended. It observed that it became readily apparent from the amendment that the

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<sup>237</sup> 2003 (2) BLR 67 CA

<sup>238</sup> (note 1 above)

<sup>239</sup> (note 1 above)

<sup>240</sup> (note 1 above)70

<sup>241</sup> Ibid

<sup>242</sup> Ibid

legislature widened the scope of section 164 (c) by changing the person who the offender permits to have carnal knowledge of him or her from a 'male person' to 'any person'.<sup>243</sup> The Court applauded the broader scope of section 164 and confirmed that the wide scope made the law even more non discriminatory. In other words, it did not infringe on the right not to be discriminated against. All in all, it held that both the pre and post amended section 164 were not unconstitutional.

The court's justification for holding that section 164 does not target a specific group of people, that is those who engage in homosexual conduct is rather disheartening and serve as bad precedent for other African nations who still have the anti sodomy provision. As has been discussed in the preceding chapters, the issue is not mainly about the plain reading of the anti sodomy law as envisaged in the section 153 (a) and (c) of the Malawi penal code. A plain reading of the law reveals little and is very ambiguous. Its unjustified violation to the rights of equality, dignity and privacy are clearer upon the practical operation of the provision. Thus, even if it is amended in such a manner, and not mention homosexual or heterosexual, lesbian or gay, the law would still be infringing on the rights of a specific group of people. The ambiguity is further widened when the provision is amended by substituting 'any man' with 'any person'. On the surface of it will appear to penalize whoever but in reality it will be targeting homosexual or lesbian conduct.

For instance, in Sri Lanka, the word 'person' was used to replace 'man' resulting into legislation that criminalises both men and women for same sex sexual activity.<sup>244</sup> It was noted that the introduction of a bill aimed at decriminalizing homosexual conduct between men, ultimately resulted in extending the scope of the original law.<sup>245</sup> In addition, this meant that women in same sex unions would also come under the law.<sup>246</sup> Such an amendment does not provide a cure to the

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<sup>243</sup> Ibid

<sup>244</sup> Human rights and the criminalisation of consensual same sex sexual acts in the Commonwealth, South and Southeast Asia (2008) The south and southeast resource centre on sexuality 7

<sup>245</sup> ' Law, ethics ad HIV/AIDS in South Asia: A study of the legal and social environment of the epidemic in Bangladesh, India, Nepal and Sri Lanka, UNDP report, 9.

<sup>246</sup> (note 11 above)

condemned law on consensual sodomy rather it brings in another minority group to the harsh and unjustified application of this law.<sup>247</sup>

From the foregoing, a partial amendment of section 153 is as oppressive to minority rights as the original provision and should not be an option.

### **5.3 The appropriate remedy**

The Court has the power of declaring a law invalid if it is inconsistent with the Constitution of Malawi<sup>248</sup> and interpret it in a manner that is in line with the Constitution,<sup>249</sup> or make any other appropriate remedy.<sup>250</sup> An appropriate remedy is determined according to the extent to which a law infringes on a right or rights. When an infringement fails the constitutionality test, a declaration that the provision is invalid in its entirety is likely to ensue. Therefore, this should be the measure to be applied to the infringements occasioned by section 153 (a) and (c).

As noted in chapter three, firstly, the discriminatory effect in section 153 (a) and (c) is unjustified in any democratic society. Discrimination caused by criminalisation of consensual sodomy is unreasonable and negates the very essence of the right to equality.<sup>251</sup> It arbitrarily targets homosexuals who are already a disfavoured minority group.

Secondly, the impugned law unlawfully interferes with a person's right to privacy. The infringement caused by section 153 (a) and (c) on the right to privacy is not proportional to the end sought or purpose the limitation seeks to achieve. Consensual sexual conduct between adults is a private matter in which the state need not interfere.<sup>252</sup> Issues of private intimacy and one's sexuality are closely intertwined with an individual's autonomy and dignity.<sup>253</sup> However, as

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<sup>247</sup> (note 11 above)

<sup>248</sup> Section 5 of the Constitution

<sup>249</sup> Section 11(3) of the Constitution

<sup>250</sup> Section 46 (3) of the Constitution

<sup>251</sup> *National Coalition for Gay and Lesbian Equality v The Minister of Justice* 1999 (1) SA 6

<sup>252</sup> *Dudgeon v United Kingdom* (1981) Ser. A No 45

<sup>253</sup> *Norris v Ireland* (1988) Ser A No 142

noted implementation of the provision, results into arbitrary searches on the body person suspected to have committed sodomy. The individual is subjected to unjustified degrading treatment and forced to undergo embarrassing medical and psychological tests.

From the above, it is, hereby submitted that section 153 (a) and (c) cannot be interpreted in a manner that is consistent with the constitution. As a result, this defect cannot be rectified with any amendment. After all, doing so will only create a more ambiguous offence that will target both homosexuals and lesbians. It thus follows that, Section 153 (a) and (c) should be deleted from the penal code. Ultimately, the conduct punishable under the provision should be decriminalized.

#### **5.4 Summary of findings**

This paper sought to critique the criminalisation of consensual sodomy in Malawi. Firstly, it reckoned in chapter two that there are apparent ambiguities created by section 153 (a) and (c) of the Penal Code. These ambiguities fault the principle against doubtful penalisation.

Secondly, by way of a case study of *Republic v Steven Monjeza Soko and Tionge Chimabalanga Kachepe*,<sup>254</sup> the study has shown that section 153 (a) and (c) violates the rights of sexual minorities. These violations are committed by the criminal justice system, the executive arm of government and the general public, all under the guise that section 153 has a prescription on unnatural offences. The paper found out that Malawi has a comprehensive bill of rights which enjoys the status of supremacy over all legislation including section 153 (a) and (c). And that the infringements occasioned by the implementation of the provision are unjustified and fall short of the constitutionality test.

Finally, the paper has established that there are impediments and some prospects to the decriminalization of section 153 (a) and (c). The challenges exist despite the Constitution's guarantee on the protection of the rights of Malawians regardless of whether one belongs to a majority or minority group of society. The study also noted that there is a plethora of international human rights law that propagates for the decriminalization of anti sodomy laws.

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<sup>254</sup> Criminal case number 359 of 2009

Yet, notwithstanding these laws, there seem to be an apparent disregard of the Malawi's obligation to its Constitution and international human rights covenants.

## **5.5 Recommendations**

### **5.5.1 To the executive**

There seem to be politicization over the issue of carnal knowledge against the order of nature committed by men. There is lack of political will to promote and protect the rights of sexual minorities who usually find themselves caught by the consensual sodomy law. The executive should put in place measures to ensure that individuals in same sex relationships are also protected by the Constitution. There is need for an open dialogue on the promotion of sexual minority rights. This process should be spearheaded by the executive and other politicians in a manner that is not insulting, castigating and intimidating to those who commit consensual sodomy. The government should respect the rule of law by ensuring fulfillment of rights of everyone as required by domestic and international law. They should banish harassment, forced medical assessments, arrest and imprisonment of adults who commit consensual sodomy.

### **5.5.2 To judges**

Analysing Malawi's highly publicised case that came under section 153 (a) and (c), it shows the commencement of a very disturbing indicating that cases of this nature are most likely to be adjudicated based on morality and promoting the interests of the heterosexual majority in society.<sup>255</sup>

Judges who are generally custodians of law must abide by the notion of supremacy of the Malawi constitution and the respect for the rule of law. When human rights are trumped upon,

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<sup>255</sup> Republic v Steven Monjeza Soko & Tionge Chimbalanga (note 16 above). The dissenting opinion of Justice Scalia in *Lawrence v Texas* 539 US 558, 123 SCt 2472 US (2003), is worth noting. He said the people may feel that their disapprobation of homosexual conduct is strong enough to disallow homosexual marriage, but not strong enough to criminalise private homosexual acts and may reflect accordingly. Chirwa D (2011), remarks that the above opinion reflects a democratic theory based on view of the role of judges, which is that judges should refrain from pronouncing on matters which should be settled through political and democratic means. This, he further argues that is a very dangerous basis for protecting human rights, especially those of minorities and vulnerable groups.



even by the executive, Malawians have their trust and turn to the judiciary for protection. Recognizing the noble task judges have, they should not without legal basis pander to the whims of the majority in society. Rather they ought to be productive and progressive by upholding the minimum standards in the protection of rights of every Malawian including those belonging to the sexual minority group. Judges should give meaning to constitutional rights like the rights to equality, dignity and privacy. Even though the constitution does not provide for sexual orientation as a ground for non discrimination, the Malawi courts should use international law as well as the rights in the constitution to protect the rights of minorities by decriminalizing consensual sodomy.

In addition, there is a wealth of pronouncements from regional and international human rights committees declaring that anti sodomy laws offend the rights to dignity, privacy and not to be discriminated against.<sup>256</sup> The judges should build on jurisprudence on the matter and be bold enough to declare this law as unconstitutional. Criminal provisions on unnatural offences similar to section 153 (a) and (c) have been declared invalid in a number of states thus it is high time Malawi does the same.

### **5.5.3 On technicalities surrounding the sitting of a Constitutional Court**

As noted in chapters three and four, a challenge on the constitutionality of any law has to be certified by the Chief Justice before it can be heard by the Constitutional Court.<sup>257</sup> The Chief Justice refused to certify the challenge to the sodomy law in section 153 (a) and (c) on the sole ground that it did not raise any constitutional issues. Understanding the intricacies associated with the promotion of human rights and more specifically rights of the minority group, the Chief Justice should have given a well reasoned decision for non certification of a matter.

This is a manifestation of a major challenge in leaving the Chief Justice to be the ultimate decider on whether a law should be referred to a constitutionality scrutiny. Hence the submission that, the Chief Justice alone should not be vested with exclusive powers to veto

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<sup>256</sup> See *Dudgeon v United Kingdom* (1981) Ser.A No 45, *Norris V Ireland* (1988) Ser. A No. 142, *Toonen v Australia* Communication No. 488/1992

<sup>257</sup> Section 9 (3) of the Courts (Amendment) Act 2004

whether proceedings relate to the application of the Constitution. For fairness and justice to be seen to be done, the determination on whether a matter comes within the ambit of the Constitution should be done by a minimum of three judges. By so doing, there would be some assurance that the decision would be enriched with balanced and well justified opinions from the three judges.

#### **5.5.4 What about the *locus standi* requirement?**

Persons who find themselves in conflict with section 153 (a) and (c) are in the most ridiculed minority group of the Malawian society. Due to the degrading treatment and insults that these people receive from the public, they are likely to be timid and prefer to express their sexuality underground as a result their rights to equality, privacy and dignity being infringed upon. There might be civil society organizations willing to challenge the validity of section 153 (a) and (c), however they are hindered owing to a lack of standing in the matter.

Currently, there are two divergent views to the constitutional requirement of *locus standi* by the Malawi Supreme Court of Appeal and the High Court. The Supreme Court of Appeal has adopted an unduly restrictive stance of *locus standi*. This approach waters down the scheme for the promotion and protection of human rights in Malawi. On the other hand, the High Court is more liberal. For example in *Registered Trustees of the Public Affairs Committee v Attorney General & Others*, it was stated as follows:

The answer on *locus standi* on the issues raised in the originating summons will not come from how judges in America, in England, in South Africa or elsewhere in the world construe it depending on their peculiar traditions and/or special wording in their Constitutions or statutes, although that might still provide us a guide on the trend generally applicable. I do believe that the answer we need on this issue and in this case will come directly from our own Constitution, ... The more genuinely we give it attention and the more sincerely we evaluate its enabling provisions without rushing to disable them by trying to force them to fit in some ancient and expiring doctrinaire concepts, the nearer we will get to the justice regime the framers of the Constitution contemplated for the people of Malawi.<sup>258</sup>

The Court concluded in this manner:

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<sup>258</sup> Civil Cause No 1861 of 2003 (Unreported) HC

...As regards the wording ‘with sufficient interest,’ from the way the provision is couched, in my view, it amounts to deliberately choosing to walk down the narrow path rather than through the recommended highway of interpretation if we choose to interpret that phrase only to mean persons possessing personal interest and to leave out all others. I do not doubt that a person with a clearly identifiable grievance on a matter he wants to bring to the Court will certainly have sufficient interest. Can we, however confidently say that is the only person the provision had in mind when it was couched so broadly and loosely? I sincerely think not.<sup>259</sup>

The proposition that only the person whose rights are violated has a sufficient interest in the protection and enforcement of rights, is restrictive and unjustified.<sup>260</sup> The Constitution recognizes a liberal approach to *locus standi* and public interest litigation. The High Court’s liberal stand on *locus standi* is welcoming and could be of great assistance to the decriminalization of consensual sodomy in Malawi. However, it being a subordinate court to the Supreme Court of Appeal, its stance is merely persuasive. Thus the need that Malawi Supreme Court being the highest court on the land, should revisit its position on *locus standi* in order to rediscover the true spirit of the Constitution and protect rights of all people including sexual minorities.

## 5.6 Concluding remarks

The world wide recognition and protection of sexual minority rights cannot be overemphasized. Through the case of *Republic v Steven Monjeza Soko and Tionge Chimalanga Kachepa*,<sup>261</sup> Malawians woke up from their slumber of denial that homosexuality is not practiced in the country and began to discuss the issue openly.<sup>262</sup> It will probably take a while for Malawi to allow same sex marriages, but it is hard to defend the proscription of homosexual conduct between consenting adults.<sup>263</sup> The starting point for Malawi would be a definite

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<sup>259</sup> (note 24 above)

<sup>260</sup> This was held in the High Court case of *Thandiwe Okeke v Minister of Home Affairs & Controller of Immigration* Miscellaneous Civil Application No 3 of 1997 (unreported)

<sup>261</sup> (note 16 above)

<sup>262</sup> Chirwa D (2011) 165

<sup>263</sup> (note 21 above)

decriminalization of consensual sodomy. The argument that there is no binding international human rights agreement that specifically provides for the protection of sexual minority rights is no excuse for the retention of the consensual sodomy law. Malawi has a Constitution and it ratified the ICCPR among other international human rights treaties. These pieces of law provide for human rights guarantees such as the rights to dignity, privacy, equality and non discrimination, which should be interpreted and applied to provide protection for sexual minorities. Section 153 (a) and (c) of the Penal Code erodes the mentioned rights and until such a time that the constitutionality of this impugned law is tested, and declared unconstitutional, they remain paper rights with zero impact on the protection of sexual minorities.

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