



IN THE HIGH COURT OF MALAWI  
CONSTITUTIONAL CASE NO. 2 OF 2021

[Being Blantyre Criminal Case No. 146 of 2020 and High Court (Lilongwe Registry) Criminal Appeal Case No. 4 of 2022]

JAN WILLEM AKSTER

1<sup>ST</sup> CLAIMANT

JANA GONANI

2<sup>ND</sup> CLAIMANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

1<sup>ST</sup> DEFENDANT

THE ATTORNEY GENERAL

2<sup>ND</sup> DEFENDANT

*AMICUS CURIAE:*

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THE REGISTERED TRUSTEES OF THE CENTRE FOR HUMAN RIGHTS EDUCATION, ADVICE AND ASSISTANCE (CHREAA)

THE REGISTERED TRUSTEES OF THE CENTRE FOR HUMAN RIGHTS AND REHABILITATION (CHRR)

THE REGISTERED TRUSTEES OF THE CENTRE FOR THE DEVELOPMENT OF PEOPLE (CEDEP)

THE REGISTERED TRUSTEES OF THE EPISCOPAL CONFERENCE OF MALAWI (ECM)

THE REGISTERED TRUSTEES OF THE EVANGELICAL ASSOCIATION OF MALAWI (EAM)

THE REGISTERED TRUSTEES OF THE MALAWI COUNCIL OF CHURCHES(MCC)

THE REGISTERED TRUSTEES OF THE MUSLIM ASSOCIATION OF MALAWI (MAM)

THE REGISTERED TRUSTEES OF THE NETWORK OF RELIGIOUS LEADERS LIVING WITH OR PERSONALLY AFFECTED BY HIV AND AIDS (MANERELLA+)

**CORAM :** HONOURABLE JUSTICE JOSEPH CHIGONA  
HONOURABLE JUSTICE VIKOCHI CHIMA  
HONOURABLE JUSTICE CHIMBIZGANI MATAPA KACHECHE  
COUNSEL FOSTINO MAELE, FOR THE 1<sup>ST</sup> CLAIMANT  
COUNSEL BOB CHIMKANGO, FOR THE 2<sup>ND</sup> CLAIMANT  
HONOURABLE THABO CHAKAKA NYIRENDA,  
ATTORNEY GENERAL  
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COUNSEL VICTOR JERE, FOR THE DIRECTOR OF PUBLIC PROSECUTIONS  
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RIGHTS AND REHABILITATION AND NETWORK OF  
RELIGIOUS LEADERS LIVING WITH OR PERSONALLY  
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**COURT REPORTERS**

MR. MUTINTI

**JUDGMENT**

**I. INTRODUCTION**

1. This is the unanimous decision of this Court.
2. This case involves two claimants, Jan Willem Akster and Jana Gonani, who came to the Constitutional Court to have certain questions resolved. Despite the differing circumstances of their cases, the matters were consolidated because they involved the same constitutional questions.

**II. FACTS OF THE CASE ABOUT THE FIRST CLAIMANT: JAN WILLEM AKSTER**

3. Jan Willem Akster, the first claimant, appeared before the Chief Resident Magistrate sitting at Blantyre facing nine counts: four counts of buggery contrary to section 153 (a) of the Penal Code; three counts of attempted buggery contrary to section 154 of the Penal Code; and two counts of gross indecency contrary to section 156 of the Penal Code. The particulars of the buggery counts alleged that the first claimant on divers dates at Timotheos Foundation had carnal knowledge of ME, SB, MM and LH against the order of nature. The particulars of the attempted buggery alleged that the first claimant had on various dates at Timotheos Foundation attempted to have carnal knowledge

against the order of nature of HM and FK. The indecency counts alleged that the first claimant, being a male person, had on various dates at Timotheos Foundation committed acts of gross indecency with KC, also a male person.

4. At plea stage, the first claimant raised the objection that sections 153 (a), 154 and 156 of the Penal Code were unconstitutional. The Chief Resident Magistrate then referred the matter to the Chief Justice for his consideration for certification that the issues raised be determined by a constitutional court.
5. The Chief Justice certified the following questions as necessitating the determination by a constitutional court:
  - (1) Whether section 153 (a) of the Penal Code is unconstitutional;
  - (2) Whether section 154 of the Penal Code is unconstitutional;
  - (3) Whether section 156 of the Penal Code is unconstitutional;
6. The first claimant made it clear that in as far as section 154 of the Penal Code is concerned, he is only challenging attempts in terms of section 153 (a) of the Penal Code and not the rest of the subsections of section 153.

### **III. FACTS OF THE CASE ABOUT THE SECOND CLAIMANT: JANA GONANI**

7. As for the second claimant, Jana Gonani, he is a twenty-seven year old individual, who had appeared before the Senior Resident Magistrate Court sitting at Mangochi. He was charged with three counts: two counts of obtaining by false pretences contrary to section 318 as read with section 319 of the Penal Code and the other of committing an unnatural offence contrary to section 153 (c) of the Penal Code. The particulars of the first count were that Jana Gonani on or about 14 October 2021 within Mangochi township, with intent to defraud, obtained money amounting to K16, 000 and a Huawei P8 cellphone from Mr EJ by falsely representing himself as a woman who was trading as a commercial sex worker. The particulars of the second count were that Jana Gonani on or about 19 October 2021 within Mangochi township, with intent to defraud, obtained a Samsung J5 cellphone from Mr WS by falsely representing himself as a woman who was trading as a commercial sex worker and that the said cellphone was to act as payment for the sexual intercourse service rendered. The third count, which was for unnatural offence, contrary to section 153 (c) of the Penal Code, stated that Jana Gonani on or about the same time and place as stated in the second count in the township of Mangochi, wilfully and

unlawfully, permitted a male person to have sexual intercourse of him against the order of nature.

8. He was, after full trial, found guilty on all the three counts and was convicted accordingly. He was sentenced to three years imprisonment with hard labour on each of the first two counts of obtaining by false pretences; he was sentenced to eight years imprisonment with hard labour on the offence of committing an unnatural offence; all the three sentences were to run concurrently. On 9 March 2022, the second claimant filed a petition of appeal challenging both his conviction and sentence. Before the court scheduled a date of hearing for the appeal, the second claimant filed a summons on application for referral for the certification of the matter as a constitutional one under section 9 (2) of the Courts Act. The application for referral related to the grounds of appeal on the third count. These grounds of appeal were that:

- (1) The lower court erred in convicting the appellant of an offence that was not properly defined in law and thus violated the appellant's right to fair trial;
- (2) The lower court erred at law in convicting the appellant on a charge that violates the appellant's right to privacy;
- (3) The lower court erred at law in convicting the appellant on a charge that violates the appellant's right to human dignity;
- (4) The lower court erred at law in convicting the appellant on a charge that violates the appellant's right to personal liberty;
- (5) The lower court erred at law in convicting the appellant on a charge that violates the appellant's right to equal protection before the law;
- (6) The lower court erred at law in failing to take into consideration the evidence of the appellant that his sexual preference was natural to him, denying him his right to equal recognition before the law;
- (7) The lower court erred at law in admitting evidence of PW3, detective of the Malawi Police Service, whose evidence was obtained in violation of the appellant's rights to privacy, human dignity, liberty and personal freedoms;
- (8) The lower court erred in admitting the evidence of PW3 and PW4 which evidence was obtained by subjecting the appellant to medical examination without his consent.

9. The issues listed for constitutional determination were:

- (1) Whether section 153 (c) of the Penal Code violates section 42 (2)(f) of the Constitution in that it does not give sufficient particularity of "unnatural

offences" as it does not define "carnal knowledge" and "order of nature" and thus violates the right to fair trial for lack of particularity.

- (2) Whether section 153 (c) of the Penal Code violates section 21 of the Constitution in that it violates the right to privacy;
- (3) Whether section 153 (c) of the Penal Code violates section 19 of the Constitution in that it violates the right to human dignity and personal freedoms;
- (4) Whether section 153 (c) of the Penal Code violates section 18 of the Constitution in that it violates the right to personal liberty;
- (5) Whether section 153 (c) of the Penal Code violates section 20 of the Constitution in that it violates the right to equal protection before the law;
- (6) Whether by failing to take into consideration the appellant's sexual preference, the lower court denied him his right to equal recognition and protection before the law;
- (7) Whether the evidence of PW3, a detective of the Malawi Police Service, was obtained in violation of the appellant's right to privacy and whether such evidence is admissible at law;
- (8) Whether the evidence of PW4 was obtained in violation of the appellant's right to privacy, human dignity, liberty and personal freedoms and whether such evidence is admissible at law.

#### **IV. THE EVIDENCE ON RECORD BEFORE THE MAGISTRATE COURT**

10. The first prosecution witness, PW1, whom the magistrate identified as a man, had testified that he had met the second claimant, Jana Gonani, at Club 700 in Mangochi township. He said he had all along been perceiving the second claimant as a woman who was also a commercial sex worker and who used to stand along Devil Street. He said he had known the second claimant by the name of "Triza". He said on this material night, the second claimant was putting on a dress and had a weave of hair on the head and that the second claimant looked like a woman the same way he had known the second claimant. PW1 said he approached the second claimant and asked for sexual intercourse services. He testified that the second claimant asked for K10, 000 in exchange for the service. PW1 stated that he bargained for the price and that the two agreed on a fee of K8, 000. The second claimant then led PW1 to Grace Rest

House and to the second claimant's room. While there, the second claimant demanded the payment before the service and that PW1 paid the K8,000 that was demanded. PW1 stated that after getting the money, the second claimant went out of the room temporarily and having locked PW1 inside the room. It took almost an hour before the second claimant came back looking very tired. The second claimant climbed onto the bed and slept.

11. PW1 stated that he started caressing the second claimant on the cheeks. He stated that he was surprised that he was feeling buds of beard. When PW1 tried to touch the second claimant's private parts, the second claimant resisted and denied him access. PW1 stated that he waited until the second claimant had completely slept. He then went ahead and touched the second claimant's private parts and realised that the second claimant had a penis and testicles just like himself. He said that he did not wake up the second claimant until dawn.
12. At dawn, the second claimant locked PW1 in the room again and also went out. The second claimant then reappeared about two hours later. PW1 said the second claimant told him that someone had stolen the second claimant's phone and that the second claimant wanted to go with him to the police to report the theft. PW1 stated that since he felt defrauded he agreed to escort the second claimant to the police in order to get the second claimant arrested. PW1 stated that the second claimant started demanding an extra K2, 000 and thus bringing back the payment of the sexual services to the initial K10, 000. PW1 said that he wondered why he was to pay the said sum when no service had been rendered. However, the second claimant threatened him such that PW1 gave in and made the payment.
13. PW1 testified that the second claimant demanded even more money such that PW1 said he told the second claimant that they were to go to FDH autoteller machine to withdraw some money before they could proceed to the police. The witness said that he lied to the second claimant that they were to go to the ATM machine; in PW1's mind, he wanted them to get into the crowd where he would feel safe and to have the second claimant apprehended by the people. At the bank, the second claimant took PW1's phone from him and also K6, 000 from PW1's pocket. PW1 was struggling with the second claimant to get his phone back but the second claimant picked up stones and threatened to throw them at PW1. The second claimant threatened him saying: "*Nyamuka uzipita apo ayi*

*ndikupha. Ndapha ambiri ine.*" PW1 tried to calm the second claimant down and eventually the second claimant left and went away.

14. The magistrate also identified PW2 as a man. PW2 told the magistrate court that he knew the second claimant as a woman called "Triza". He said that he chats with "her" in the "shabeens" drinking joints. He said he met the second claimant at a drinking joint known as Greenland. He said that the two being friends, the second claimant asked PW 2 to escort him to the second claimant's house for the second claimant to take a bath. The two went to Aliko Rest House to a room there where the second claimant was putting up. The second claimant lay on the bed and started caressing PW2. PW2 was responding positively and the second claimant asked how much he was going to pay the second claimant if the second claimant rendered sexual services to him. PW2 stated that he responded that he had no money. He stated that the second claimant told him that since the two were friends the second claimant was going to render the sexual services for free. The second claimant then took out a condom, opened it and put the condom on PW2's penis. PW2 stated that the second claimant held his (PW2's) penis and inserted it onto the second claimant's body—PW2 said that he believed that he was having sexual intercourse with a woman through a vagina. He said he felt well accommodated within the body of a woman and he ejaculated and that he had no inkling that he might have penetrated another place other than a vagina.
15. The second claimant did not take a bath as planned. Together, they went outside the room. The second claimant told him that if PW2 had money he could have spent the night with the second claimant. The two proceeded to the drinking joint. There, the second claimant told PW2 that PW2 should spend a night at the second claimant's place since the second claimant had loved him so much. The two then ended up at the same room and the two had sexual intercourse and also spent the night there. In the morning, the second claimant asked PW2 as to where PW2's phone was. PW2 said that he trusted the second claimant and that he gave the second claimant his J5 Galaxy Samsung phone. PW2 said that after the second claimant took the phone, the second claimant said that if PW2 was not going to give the second claimant K6,000, PW2 was not going to get back his phone. PW2 said that he told the second claimant that he had no money as he had earlier indicated.

16. PW2 stated that he told the second claimant that he was going to report the second claimant to the police that the second claimant had stolen his phone. The second claimant then locked PW2 in the room. PW2 said that while he was locked up in the room, he learnt that the second claimant was involved in another case when he saw the police coming to the room together with the second claimant. The police also picked PW2 and took him to Mangochi Police Station. He said it was the police who told him that the second claimant was not a woman but a man. He did not recover his phone.
17. PW3, Detective Banda, testified that in October 2021 the police received information that there was a certain man within Mangochi township who was dressing himself as a woman and that he was stealing from men. He testified that PW1 had on 15 October 2021 made a complaint to the police about a man (who had dressed himself as a woman) stealing from him.
18. On 20 October 2021, the police got information that the second claimant was seen at M'baluko and the police rushed to arrest second claimant. They arrested the second claimant. At the time, the second claimant was dressed as a woman and had a weave on the head. PW3 said that the second claimant insisted as being a woman and not a man. PW3 said that the second claimant told him that the second claimant's name was Triza Banda. PW3 said that the second claimant was asked to choose between a male officer or a female officer to inspect the second claimant's genitalia. The second claimant chose a female officer. PW3 stated that after the second claimant and the female officer had gone into a room, the female officer reported that the second claimant had refused to undress before her. PW3 testified that he then asked the second claimant to undress before him. On the outside, the second claimant had put on a sweater and a chitenje wrapper and was carrying a handbag. PW3 said that the second claimant voluntarily undressed and that he saw that the second claimant was putting on a half slip petticoat and ladies' underwear. PW3 said that he also saw a penis and testicles on the second claimant. PW3 then inspected the second claimant's chest and saw that the second claimant had a bra on but that the chest had no breasts but had only plastic breast like things.
19. PW4 was a clinical officer at Mangochi Disctrict Hospital who testified that he examined the second claimant to ascertain whether the said person was a male or a female. He also examined the second claimant to satisfy himself as to the second claimant's mental wellness. PW4 testified that he found the second

claimant to be mentally sound. He said he examined the second claimant's sex using a machine which measures the neulogy of a person. He said the second claimant scored 15 out 15 as a male. He also said he examined the second claimant's chest cavity and also the abdominal cavity and found that both were functioning properly. He then examined the second claimant's genitalia and found that the second claimant had a penis, two testicles and an anus. He said he did not find any ambiguity in terms of the second claimant's genitalia as happens with some people who may possess both genitals.

20. PW5, the police investigator, recovered the two cellphones that the second claimant had taken from PW1 and PW2. He recovered them from the second claimant's handbag. In the caution statement, the second claimant admitted to being approached by PW1 for sexual intercourse services. The second claimant also admitted to having accepted to offer such and that the two went up to the second claimant's room. There they slept until morning. From there they went to FDH Bank where the two parted ways.
21. In his defence, the second claimant expressed a preference of being referred to as a "man" rather than a "woman". The second claimant stated that on 17 October 2021, he had gone to the police to report about his stolen phone. While here, the police told him they were looking for him. They also asked him if he was a male or a female. He said he told them that he was a boy. He said the police told him about his alleged involvement in the taking away of PW1's and PW2's phones. He said he was cautioned for these offences and then released. On his dressing, the second claimant testified that everyone has a right to dress as he wishes. He also said that he is sponsored by CEDEP and HRDC in what he does. He said he was born with a disability and that he does not have sexual intercourse with women as he feels like he is a woman.
22. The magistrate found that the second claimant falsely represented himself as a woman in order to defraud PW1 and PW2 and convicted him on the two counts of obtaining by false pretences contrary to section 318 as read with section 319 of the Penal Code. He also found the second claimant to have permitted PW2 to commit an unnatural offence by letting PW2 penetrate his (the second claimant's) anus.

## **V. SWORN STATEMENT IN SUPPORT OF THE 2<sup>ND</sup> CLAIMANT'S APPLICATION**

### **A. Qualification and Expertise**

23. The second claimant put in a sworn statement made by Professor Alexandra Müller of Sonnenallee 101, 12045, Berlin in Germany. In it, Professor Alexandra Müller stated that she is a general practitioner and also an empirical medico-sociological researcher. Until 2020, she was an Associate Professor at the Gender, Health and Justice Research Unit in the Division of Forensic Medicine, Department of Pathology in the Faculty of Health Sciences at the University of Cape Town in South Africa. She stated that she studies the relationship between society and health and illness in South Africa and also throughout Southern and Eastern Africa, including Malawi. She conducts quantitative and qualitative studies on the impact of law and policy on the health and well-being of people who identify as lesbian, gay, bisexual, transgender and intersex, including men who have sex with men and women who have sex with women.
24. She stated that the second claimant had asked her to investigate and comment on the impact of sections 137A, 153 and 156 of the Penal Code on the health and well-being of people living in Malawi who identify as lesbian, gay, bisexual, transgender or intersex and also men who have sex with men or women who have sex with women.

### **B. Methodology**

25. She stated that the findings that she presented in her sworn statement were based on empirical research of a study in Malawi as well as existing international research evidence. She explained the methodology that she and her team employed in the empirical research stating that it was a cross-sectional quantitative study and that it was conducted in nine Southern and Eastern African countries (Botswana, Eswatini, Ethiopia, Kenya, Lesotho, Malawi, South Africa, Zambia and Zimbabwe). Data was collected using a standardised survey instrument across all the countries. Participants were eligible if they identified as LGBTI or were men who have sex with men or women who have sex with women and lived in one of the nine countries and were over the age of 18. In Malawi, the study was conducted in partnership with Prof Adamson Muula from the University of Malawi, College of

Medicine, and also the non-governmental organisation called Centre for the Development of People (CEDEP). The study was approved by the Human Research Ethics Committee of the Faculty of Health Sciences of the University of Cape Town.<sup>1</sup> In Malawi, the study was approved by the University of Malawi College of Medicine Research and Ethics Committee.<sup>2</sup>

26. The participants were sampled using a combination of community-based sampling and internet-based sampling. Participants who were eligible and agreed to participate filled out the survey instrument by themselves, or with the assistance of a fieldworker. Participants who participated through online sampling filled out the survey instrument through an internet-based link. The research evidence from Malawi was based on data of 197 participants and the study is entitled “Are we doing alright?”

### **C. Mental Health and Well-Being of LGBTQI and MSN and WSW**

27. Her conclusions were that the levels of mental health problems, suicidal behaviour and substance use among LGBTI are higher than those reported for the general Malawian population. She stated that while the World Health Organisation had recently estimated the prevalence of depressive disorders in the general population to be at 4.1% and of moderate or severe anxiety levels at 3%,<sup>3</sup> the “Are we doing alright?” study found that 48% of LGBTI people including men who have sex with men and women who have sex with women, were classified as depressed and 23% showed signs of moderate or severe anxiety. She stated that while the World Health Organisation reported that “heavy episodic drinking” is 15% among adult Malawian men and 1% among adult Malawian women,<sup>4</sup> the “Are we alright?” study found that 27% of LGBTI including men who have sex with men and women who have sex with women showed alcohol use which is classified as hazardous by the World Health Organisation; and 25% showed alcohol use that is classified as dependence.
28. In the “Are we doing alright?” study, 21% of LGBTI including men who have sex with men and women who have sex with women had thought of committing

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<sup>1</sup> HREC-Ref 012/2016

<sup>2</sup> COMREC Ref P.01/18/2330

<sup>3</sup> World Health Organisation, 2017

<sup>4</sup> WHO Global Alcohol Report: Malawi, 2014

- suicide at some point in their life and 15% had tried to commit suicide at some point in their life.
29. The findings from the “Are we doing alright?” study showed that 47% of LGBTI including men who have sex with men and women who have sex with women felt that health care staff treated them with less respect because of their sexual orientation or gender identity; 41% had been called names or insulted in a health care facility because of their sexual orientation or gender identity; and 34% had been denied health care because of their sexual orientation or gender identity.
  30. She also found that the LGBTI people living in Malawi experience higher levels of violence, both physical and sexual, than have been reported for the general Malawian population. She stated that while the latest Demographic and Health Survey, published in 2017, found that one in five women in the general population (20%) had experienced *sexual* violence,<sup>5</sup> the “Are we doing alright?” study found that 42% of LGBTI people (including men who have sex with men and women who have sex with women) had experienced *sexual* violence in their lifetime. She stated that while a 2014 study<sup>6</sup> found that 10% of men of the general population in rural Malawi reported to being a victim of *sexual* violence, the “Are we doing alright?” study found that 43% of gay men and other men who have sex with men had experienced *sexual* violence.
  31. Further, it was noted that 41% of LGBTI people as well as men who have sex with men and women who have sex with women had experienced *physical* violence in their lifetime and that 33% of this population of peoples had experienced *physical* violence in the past year.
  32. She stated that the LGBTI people living in Malawi also experience sexual orientation and gender identity-related discrimination when accessing healthcare services. She stated that the disparities in mental health status are, at least in part, due to minority stress linked to stigma, prejudice and discrimination based on sexual orientation and gender identity.<sup>7</sup> The high levels of violence and discriminatory experiences in access to healthcare are, at least in part, linked to sexual orientation and gender identity-related stigma, prejudice and discrimination and further negatively impact the mental health of

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<sup>5</sup> National Statistical Office (NSO); and ICF, 2017

<sup>6</sup> Conroy and Chilungo, 2014

<sup>7</sup> Hendricks & Testa, 2012; Meyer, 2003

the LGBTI. Criminalisation of sexuality is an example of structural stigma which contributes to the disparities in mental health status, to high levels of violence and to the barriers to access to healthcare experienced by the LGBTI in Malawi.

#### **D. Sexual Orientation, Gender Identity and Health**

33. She stated that until 1973, the American Psychological Association considered same-sex orientation, attraction and behaviour (formerly referred to as homosexuality) to be a mental illness<sup>8</sup> but that it is widely recognised that what is considered a mental illness depends on what society and scientists at a certain time and in a certain context agree to be “abnormal” behaviours, cognitions and emotions.<sup>9</sup> She stated that today, international medical and health organisations, such as the World Psychiatry Association have clearly stated that same-sex orientation, attraction and behaviour are not mental illnesses and that to this extent, the World Health Organisation (WHO) removed “homosexuality” from its International Classification of Diseases in 1993. She stated that there is agreement across all international health institutions such as WHO that same-sex orientation, attraction and behaviour is not a mental illness.
34. She stated that over the last two decades research on LGBTQI people’s health and exposure to violence has highlighted substantial vulnerabilities to ill health and health disparities based on sexual orientation and gender identity in many parts of the world. There is a large body of international research evidence for the broad ranging negative consequences of stigma, marginalisation and discrimination on the health of LGBTQI. For example, in a 2011 landmark report on sexual and gender minority health the United States Institute of Medicine pointed out that LGBTQI people are at increased risk of violence, harassment and victimisation.
35. She stated that studies document that compared to heterosexual, cisgender counterparts, LGBTQI people suffer from more mental health disorders, such as substance use (including alcohol, tobacco and illegal drug use), affective disorders (for example, depression and anxiety disorders) and suicide.<sup>10</sup> The

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<sup>8</sup> Drescher, 2008

<sup>9</sup> Gergen, 2001

<sup>10</sup> Logie, 2012; Pega & Veale, 2015

reason for these disparities in mental health outcomes is that stigma (widespread disapproval held by many people in a society), prejudice and discrimination lead to stressful social environments for LGBTQI people.<sup>11</sup> This is called minority stress.

36. She stated that there are four distinct ways in which minority stress negatively affects the mental health of LGBTQI people.<sup>12</sup> First, chronic and acute events or social circumstances might add to stress. This might include experiences of discrimination in healthcare facilities or schools, or being insulted or harassed in private or public. Second, expecting such stressful events, and guarding oneself against them, also leads to stress (regardless of whether or not the discriminatory encounter actually happens). Third, hearing negative, discriminatory attitudes means that people internalise the idea that they have less value. Fourth, hiding one's sexual orientation in anticipation of discriminatory events further contributes to stress.
37. Anti-gay stigma and the resulting minority stress directly impacts the life expectancy of LGBTQI. A recent study has found that LGBTQI people who live in areas with high levels of stigma died 12 years sooner than LGBTQI who lived in areas with low levels of stigma.<sup>13</sup> The same study found that LGBTQI people who lived in areas with high stigma were three times more likely to die from homicide and violence-related deaths when compared to LGBTQI living in areas of low stigma.
38. Structural stigma describes social stigma that is institutionalised or made into law, such as laws that criminalise consensual same-sex behaviour<sup>14</sup> like sections 137 (a), 153 and 156 of the Penal Code. Studies have shown that structural stigma, meaning discriminatory laws and policies that deprive a group of people of certain rights, contribute to higher levels of health problems among that group of people. For example, a study that looked at the health consequences of structural stigma among black people living in the United States during the time of racial segregation found that states with laws that enforced racial segregation had higher death rates of black people.<sup>15</sup>

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<sup>11</sup> Meyer, 2003

<sup>12</sup> ibid

<sup>13</sup> Hatzenbuehler et al, 2014

<sup>14</sup> Hatzenbuehler et al, 2014; Krieger, 2012

<sup>15</sup> Krieger, 2012

39. Recent studies have shown that sexual orientation-related discriminatory laws and policies—laws and policies that deprive LGBTQI people including men who have sex with men and women who have sex with women of certain rights—contribute to higher levels of stigma and related health problems among LGBTQI people including men who have sex with men and women who have sex with women. For example, a study from Nigeria showed that men who have sex with men experienced higher levels of verbal harassment and blackmail after the Nigerian government signed the Same-Sex Marriage Prohibition Bill into law in 2014.<sup>16</sup> The same study showed that men who have sex with men were more afraid to seek healthcare and were thus less likely to go for HIV testing, care and treatment after the Bill was signed into law.
40. It follows that laws that criminalise consensual sexual activity between people of the same sex—which sections 137A, 153 and 156 of the Penal Code do—contribute to prejudicial attitudes against LGBTQI persons in the wider population in Malawi. These prejudicial attitudes are justified by the criminalisation of consensual same-sex sexual activities and manifest in several forms, including violence, discrimination in accessing civil services, including healthcare, and disparate health outcomes.

## **VI. THE FIRST CLAIMANT'S ARGUMENTS**

### **A. The Absence of a Definition of “Against the order of Nature” in Section 153 of the Penal Code**

41. It has been submitted that the Penal Code does not define “against the order of nature” or state as to what amounts to “gross indecency”, even though in judicial parlance, “against the order of nature” is stated to refer to sexual intercourse which does not involve penile-vaginal penetration. The first claimant argues that such a failure to define these terms causes sections 153 (a) and 156 to fail the test of legality of a law. It is explained that the test of legality entails that all laws must be certain and clear as to what conduct is proscribed to allow citizens to properly comply with the law. It is the claimants’ submission that these impugned provisions can be declared unconstitutional simply on the basis of their failure to meet the legality test.

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<sup>16</sup> Schwartz et al, 2015

42. It is also stated that these provisions do not distinguish whether the forbidden activities are consensual or non-consensual or whether they involve only adults or not. Counsel for the first claimant submits:

'The court should specifically note that the charges preferred against the accused person do not at any point allege that the claimant herein forced himself on any of the persons mentioned in the charges. The court should also note that whilst section 153 (a) criminalises carnal knowledge against the order of nature, section 153 (c) of the Penal Code criminalises the permitting of a person to have carnal knowledge of [another] against the order of nature. Since the section uses the word "permits", an otherwise consenting person would easily make [himself/herself] look like they did not permit, merely to avoid being caught under section 153 (c) of the Penal Code.'

## B. Right to Equality

43. It is submitted by the first claimant that section 20 of the Constitution prohibits discrimination in any form on any of the grounds like race, colour, sex, social origin or other status. It is argued that the Constitution's prohibition extends beyond the grounds expressly listed and covers any form of discrimination on grounds analogous with those expressly mentioned and that the term "other status" can be read to extend the grounds to a person's sexual orientation. It is further argued that a similar conclusion can be reached on the basis of Article 2 of the International Covenant of Civil and Political Rights.
44. The first claimant has pointed out that the Canadian Supreme Court held that sexual orientation is a ground analogous to those listed in the Canadian Constitution, stating that "what these grounds have in common is the fact that they often serve as the basis for stereotypical decisions made not on the basis of merit but on the basis of a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity." (The court would like to note here that counsel did not provide a citation for this case in his skeleton arguments. The court, however, has found this quotation in the Canadian case of *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203. However, that case had nothing to do with sexual orientation as a ground for discrimination but it dealt with off-reserve Aboriginal band members' voting privileges' discrimination).
45. It is submitted that sections 153 (a), 154 and 156, and especially section 153 (a) of the Penal Code, though they seem neutral on the face of them, they target persons who engage in a particular form of sexual conduct which is almost universally identified with persons of a homosexual orientation. It is thus

argued that these provisions therefore contravene section 20 of the Constitution which prohibits discrimination. It is said that criminalising same sex sexual activities such as sodomy is tantamount to discriminating a class of persons based on the status of their sexual orientation. The effect is the nullification or impairment of their recognition, exercise or enjoyment, of all rights and freedoms, by homosexuals, on an equal footing with heterosexuals.

46. Counsel for the first claimant has quoted from the South African case of *National Coalition for Gay and Lesbian Equality v Minister of Justice* (CCT11/98),<sup>17</sup> (hereinafter *the National Coalition Case*) which considered similar provisions as the ones under challenge, where Ackerman J said that section 9 (3) of the South African Constitution which provides for the right to non-discrimination:

‘...applies equally to the orientation of persons who are bi-sexual or transsexual and it also applies to the orientation of persons who might on a single occasion only be erotically attracted to a member of their own sex.’

47. Counsel for the first claimant also highlighted that it was the unanimous view of the court in that case that the issue of gay relationships is not only a matter of protecting the right to privacy but also affording equal opportunity of worth and dignity to gay men including self actualisation and fulfilment that comes from asserting one’s sexual identity. And that the court went further to rule that the inclusion of the offence of sodomy in the schedules of Criminal Procedure and Evidence Act and also in the Security Officers Act was a violation of human rights and indeed a limitation of human rights.
48. It was further pointed out that Ackerman J. had also stated that the criminalisation of sodomy in private between consenting males was a severe limitation on the right to equality in relation to sexual orientation and at the same time a severe limitation of the right to privacy, dignity and freedom.

### C. The Right to Privacy

49. It was submitted that the penal provisions also violate the right to privacy under section 21 of the Constitution. It was stated that the core of the right to privacy is the fact that there is an inner sanctum of personhood in which every human being is free from any form of interference and that no aspect of human life is more private than the area of sexual relations. It was thus submitted that the

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<sup>17</sup> (1999) (1) SA 6 (CC), [1998]ZACC 15.

effect of the provisions is to invade the private arena of an individual's sexual relations and impose criminal sanctions on sexual conduct even between consenting adults irrespective of where the activity takes place.

#### **D. The Inviolability of the Dignity of All Persons**

50. The first claimant explains that preserving everyone's right to dignity under section 19 of the Constitution requires recognition of every person's worth and value as a human being and member of society. The diversity that inheres within society requires that everyone irrespective of his background, ethnicity, colour, sex, race and even sexual orientation must be accorded the same dignity. Criminalising homosexual intercourse, therefore, that takes place in private between consenting adults is demeaning and degrading to all people of a homosexual orientation. And labelling such people as criminals makes them appear as lesser human beings who must be criminally penalised simply because of their sexual orientation.
51. Counsel for the first claimant submitted that:

'...human dignity protects the physical and psychological integrity of individuals. It is intimately linked to the concept of personal liberty. Human dignity is a radical concept because it challenges social status-based constructions of personhood and emphasises the importance of treating every person as an equal member of society regardless of his or her race, social or economic standing, gender, or other characteristics. Therefore, the treatment of persons of a homosexual orientation that subjects them to penal sanctions or views them as morally deviant persons for engaging in consensual homosexual acts between adult males and in private, not only violates the right to non discrimination on the basis that a similar conduct between heterosexual adults is not subject to penal sanctions but is also a violation of the right to human dignity as the differential treatment is tantamount to social status-based constructions of personhood. This law contributes to an environment in which homosexuals are de jure and de facto discriminated and marginalised and often provide the broader society with a justification for the proliferation of prejudice, violence and hatred against homosexual persons i.e. homophobia. This court needs to take a position that will help arrest the prejudice, violence and general homophobia because in doing so the court will give effect to the values that underlie our Constitution.'<sup>18</sup>
52. The first claimant cited what the UN Special Rapporteur had said that: 'members of sexual minorities are a particularly vulnerable group with respect to torture in various contexts and that their status may affect the consequences of their ill-treatment in terms of their access to complaint procedures or medical

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<sup>18</sup> Page 45, para 8.14 of the first applicant's submissions

treatment in state hospitals, where they may fear further victimisation.’ The first claimant explains that in the area of health and particularly with regard to HIV, criminal sanctions against homosexuality have been shown to be an obstacle in reaching vulnerable populations and deterring people from coming forward for testing and treatment.

53. The first claimant has pointed out that the Malawi National HIV Prevention Strategy acknowledges the existence of men who have sex with men (MSM) in Malawi and that it puts them in high risk group as far as infections are concerned. He explains that the Strategy states that according to a study that was conducted in 2007, two thousand MSM were identified in urban centres of Malawi and this group has HIV prevalence of 21%. Further, it is said that the Strategy notes that this is due to the high risk of unprotected sexual contact between MSM.

## **E. The Right to Development**

54. The first claimant submits that laws like section 153 (a) of the Penal Code compromise the right to health of all MSM as confessing about their sexuality is akin to confessing to a crime. According to the first claimant, this runs counter to the constitutional provision of the right to development in section 30 of the Constitution. The first claimant submits that this right to development includes the right to health. The first claimant asserts that people who practise consensual same sex suffer discrimination and isolation and that they fail to access mainstream health services as the practice is considered illegal. It is his claim that there are no comprehensive healthcare programs that address homosexuals. He cites *Toonen v Australia*<sup>19</sup> where it was stated that:

‘as far as the public health argument of the Tasmanian authorities is concerned, the Committee notes that criminalisation of homosexual practices cannot be considered a reasonable means or proportionate measure to achieve the aim of preventing the spread of HIV and AIDS. The government of Australia observes that statutes criminalising homosexual activity tend to impede public health programmes “by driving underground many of the people at the risk of infection.” Criminalisation of homosexual activity thus would appear to run counter to the implementation of effective education programmes in respect of the HIV and AIDS prevention. Secondly, the Committee notes that no link has been shown between the continued criminalisation of homosexual activity and the effective control of the spread of the HIV and AIDS.’

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<sup>19</sup> Communication No. 488/192 (HRC)

55. The first claimant has stated that in order to address HIV and AIDS, the Global Commission on HIV and Law has recommended that countries like Malawi “reform their approach towards sexual diversity. It is submitted that rather than punishing consenting adults involved in same-sex sexual activity, countries must offer such people access to effective HIV and health services and commodities.” It is stated that specifically, the Global Commission has called for “the repeal of all laws that criminalise consensual sex between adults of the same sex and/or laws that punish homosexual identity” and the amendment of anti-discrimination laws to prohibit discrimination based on sexual orientation (as well as gender identity). The first claimant submits that this is an opportune time for Malawi to heed this advice and that a major step towards heeding this advice would be to repeal section 153 (a) of the Penal Code.

#### **F. The Limitation Test under Section 44 of the Constitution**

56. The first claimant submits that the laws in question need to be passed through the test of limitations of rights under section 44 (1) and (2) of the Constitution. For a limitation to pass the test under these provisions, it must be such a one, that is: (1) prescribed by law; (2) reasonable; (3) recognised by international human rights standards; (4) necessary in an open and democratic society; (5) it must not negate the essential content of the right or freedom in question and must be of general application.
57. The first claimant submits that the limitation would not pass the reasonableness test since the measures taken to achieve the purpose of the law are disproportional to the outcome. In terms of whether the limitation is necessary in an open and democratic society, it is submitted that, the key issue is that democracy rests on the tenets of tolerance, respect of human rights and the rule of law, among others. The limitation in question is said to suggest intolerance to persons with a homosexual orientation as well as the violations of their human rights and their being accorded a lesser status before the law.
58. The first claimant submits that even though this limitation of the rights is prescribed by law, as one criterion for limiting a right under section 44 (1) of the Constitution and also under a number of international human rights instruments, it has the effect of negating the essence of the rights in question (with the probable result of the subjection to discrimination of the concerned category of persons, the arbitrary interference with, intrusion into their privacy,

- denial of their right to health, as well as human dignity) which is contrary to section 44 (2) of the Constitution. The first claimant argues that this limitation should be compared with a law that applies to persons with a heterosexual orientation, for instance, a law that restricts sexual conduct between heterosexuals in public. It is submitted that such a law is at face value a limitation of rights but such a one which does not negate the essence of the rights in question.
59. The first claimant is of the view that the provisions belong to a bygone era and do not deserve protection under our present constitutional dispensation. Furthermore, he states that although these laws are often defended as an expression of the Malawian cultural perspective on homosexuality, these provisions are a relic of British legislative history and a reflection of the Victorian morality that dominated at the time the provisions were first conceived and drafted in Britain. The first claimant asserts that it is poignant that similar provisions in British law have since been repealed.
60. Furthermore, the first claimant asserts that public opinion and debates about public morality have only, if any, a peripheral relevance to the court's resolution of the question of constitutionality of these provisions and has urged the court to steer clear of public opinion arguments and to only have regard to legally relevant facts as even the Constitution urges. It is argued that the court is ill-positioned to gauge which way public opinion on particular matter is leaning. The scheme of our legal system, the first claimant argues, has deliberately provided a Bill of Rights in the Constitution to remove certain subjects from the "vicissitudes of political controversy" and "place them beyond the reach of majorities". It is submitted that human rights are not dependent on public opinion or public vote and that constitutional adjudication exists principally because there are matters over which public opinion is not the determining factor.
61. It is submitted by the first claimant that:

'In resolving the question of the constitutionality of the sections 153 (a), 154 and 156 of the Penal Code, the court must be guided by "constitutional morality" that underlies the Constitution. Constitutional morality entails two major things: firstly, to be governed by a constitutional morality is to be governed by the substantive moral entailment which a Constitution carries; secondly, constitutional morality refers to the conventions and protocols that govern decisionmaking in a democracy. In effect, constitutional morality requires that allegiance to the Constitution should be non-transactional. The essence of constitutional morality is that allegiance to the

Constitution should not be premised upon it leading to outcomes that are a mirror of any agent's beliefs. A constitutional morality requires accepting the possibility that what eventually emerges from an adjudicative process may be personally unpalatable but nevertheless supported by the Constitution. In our submission, interrogating the constitutionality of sections 153 (a), 154 and 156 of the Penal Code does not require the individual judges to state their personal preferences over sections 153 (a), 154 and 156 of the Penal Code but merely to apply constitutional standards to the provisions and to state what the conclusion that the analysis presents. The outcome needs not to be personally palatable to any individual judge as long as it is supported by the Constitution. To properly decipher the constitutional morality that underlies our Constitution, the court must bring all the provisions of the Constitution to bear on the current question.'

#### **G. Prayer**

62. The first claimant emphasises that the said provisions are unconstitutional because in their current formulation they criminalise consensual sexual intercourse between adult males irrespective of their ages and irrespective of the circumstances surrounding the intercourse. The first claimant submits that there be a judicial expansion of the definition of rape in section 132 of the Penal Code to cover the non-consensual intercourse between a man and a man. The first claimant also submits that section 137A of the penal Code which criminalises acts of gross indecency between females even when they are done in private should be declared unconstitutional. Alternatively, the first claimant asks the court to strike out the word "private" in sections 137A and 156 of the Penal Code so that the offences of gross indecency should only be committed when the acts are done in public.

### **VII. THE SECOND CLAIMANT'S ARGUMENTS**

#### **A. The Judicial Definition of "Against the Order of Nature Versus Sexual Orientation Perspective**

63. The second claimant has explained that section 153 of the Penal Code criminalises a number of acts whereby sexual gratification is obtained in a manner that is termed as "against the order of nature" and that paragraph (a) and (c) provide for the offence which is commonly known as sodomy.<sup>20</sup> He continues to state that when two consenting individuals have carnal knowledge "against the order of nature", the active participant is charged under paragraph

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<sup>20</sup> *Sadala v Sadala* Matrimonial Cause No. 8 of 2016 [2017] MWHC 116

- (a) and the passive one would be charged under paragraph (c) as was the case in *Rep v Steven Monjeza Soko and Tionge Chimbalaanga Kachepe*.<sup>21</sup>
64. The second claimant argues that neither the provision nor the Penal Code defines what “carnal knowledge against the order of nature” is and that it has been left to the courts to speculate and to come up with a definition. The second claimant asserts that courts have defined carnal knowledge as penile-vaginal penetration<sup>22</sup> and that any other manner of obtaining penetrative sexual gratification other than through penile-vaginal penetration is regarded as carnal knowledge against the order of nature.<sup>23</sup> The second claimant submits that this simply means that this offence aims at controlling how people obtain their sexual gratification and that this prescription is done irrespective of the fact that different people have different sexual preferences or orientations.
65. The second claimant cites the South African Constitutional case of *National Coalition for Gay Case*<sup>24</sup> as having adopted a definition of sexual orientation by Cameron from his article<sup>25</sup> where he stated thus:
- ‘...sexual orientation is defined by reference to erotic attraction: in the case of heterosexuals, to 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.’
66. The second claimant submits that section 153 of the Penal Code criminalises all other manner of obtaining sexual gratification other than the penile-vaginal penetration (which is commonly done by people of one sexual orientation, the heterosexuals). He further submits that it also clearly follows that all manner through which people of other sexual orientation like homosexuals obtain sexual gratification is criminalised and punishable by fourteen years’ imprisonment with hard labour.
67. The second claimant submits that section 153 (c) of the Penal Code is unconstitutional to the extent of its inconsistency with several provisions of the Constitution in that it contravenes sections 18, 19, 20, 21 and 42 of the Constitution which provide for the right to personal liberty, right to dignity,

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<sup>21</sup> Criminal Case No. 359 of 2009 in the CRM Court (cited for purposes of illustration only)

<sup>22</sup> *Mariette v Rep* [1966-68] ALR Mal 119 (HC); *Rep v Fred* 8 MLR 48

<sup>23</sup> *Steven Monjeza Soko* case supra

<sup>24</sup> Note 17 above

<sup>25</sup> Sexual Orientation and the Constitution: A Test Case for Human Rights (1993) 110 SA Law Journal 450

right to non-discrimination, right to equal and effective protection before the law, right to privacy and the right to fair trial, respectively.

## B. The Right to Liberty

68. He submits that the right to personal liberty is not only important because it guarantees every individual the freedom from bodily restraint, arrest and detention, or administration of justice but that as the Botswanan case of *Letsweletse Motshiemang v Attorney General and Lesbians, Gays and Bisexuals of Botswana (LEGABIBO)*<sup>26</sup> (hereinafter the *Letsweletse Motshiemang Case*) states it also covers the freedom to make choices of a fundamentally personal character without the interference of others. He cites the United States of America Supreme Court case of *Lawrence and others v Texas*,<sup>27</sup> as holding that liberty presumes an autonomy of self that includes freedom of thought, belief, expression and certain intimate conduct. He states that the holding there agrees with the holding of the Supreme Court of Canada in *R v Clay*,<sup>28</sup> which stated that:

‘What stands out from these references, we think, is that the right within s.7 is thought to touch the core of what it means to be an autonomous human being blessed with dignity and independence in “matters that can properly be characterised as fundamentally or inherently personal”’

69. He submits that as it was further held in the Canadian case of *R v Morgentaler*,<sup>29</sup> liberty is a phrase capable of a broad range of meaning and that this right, properly construed, grants the individual a degree of autonomy in making decisions of fundamental personal importance.
70. He submits that the choice and freedom to decide on how to have consensual carnal knowledge with a fellow adult including the gender of that person is intimately within the ambit of irreducible sphere of personal autonomy wherein an individual is entitled to be free from anyone’s interference. It is submitted that the second claimant, being a homosexual, gets erotically attracted to fellow men and not women because he feels to be a woman and he has no sexual feelings towards women. It is stated that he is of a sexual orientation whose sexual gratification can only be obtained through having carnal knowledge with

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<sup>26</sup> MAIGB—000591-16 (High Court 2009)

<sup>27</sup> 539 U.S. 558

<sup>28</sup> [2003] 3 R.C.S.

<sup>29</sup> [1988] 1 SCR 30

fellow men. It is argued that the right to personal liberty guarantees him the freedom to have sexual intercourse with people that he feels erotically attracted to without the unjustified interference of DPP.

### C. Human Dignity

71. The second claimant asserts that under section 12 (1) (d) of the Constitution, the inherent dignity and worth of each human being requires that DPP and all persons recognise and protect human rights and afford the fullest protection to the rights and views of all individuals, groups and minorities. He cites the definition of human dignity from the Supreme Court of Canada decision of *Law v Canada*<sup>30</sup> where it was stated that:

'Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities and merits of individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalised, ignored, or devalued, and is enhanced when laws recognise the full place of all individuals.'

72. He also cites *National Coalition* case,<sup>31</sup> which stated that:
- 'It is clear that the constitutional protection of dignity requires us to acknowledge the value and worth of all individuals as members of our society.'
73. And also the Botswanan case of *Attorney General v Rammoge and others*,<sup>32</sup> where it was stated that:

'Members of the gay, lesbian and transgender community, although no doubt a small minority, and unacceptable to some on religious or other grounds, form part of the rich diversity of any nation and are fully entitled in Botswana, as in any other progressive states, to the constitutional protection of their dignity.'

74. The second claimant pointed out that in *National Coalition* case, the court had held that the law that punishes the sexual expression of gay men degrades and devalues them and thus constitutes a palpable intrusion into their dignity. He further states that the court in that case had also held that the prohibition of sodomy criminalises all sexual intercourse per anum between two consenting adults regardless of the relationship of the couple, their age, the place where it occurs, or indeed other circumstances whatsoever. And that in so doing, it punishes a form of sexual conduct which is identified by our broader society

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<sup>30</sup> [1999] 1 SCR 497

<sup>31</sup> Supra note 17

<sup>32</sup> [2017] 1 BLR 494 (CA)

with homosexuals. As a result, gay and transgender individuals are at risk of arrest, prosecution and conviction of the offence of sodomy, simply because they seek to engage in consensual sexual conduct which is part of their experience of being human. It is submitted that the offence denies people who get sexual gratification through non-penile/ vaginal penetration the ability to achieve self-identification and self-fulfillment as human beings because it hits at one of the ways in which people of other sexual orientations express their sexual preferences.

75. The second claimant urges the court to take judicial notice of what he said is a notorious fact that sexual intercourse is generally and ordinarily an inherent part of life, experience and well-being of a human being and that denying someone this experience is the refusal to recognise or acknowledge his essence and self-worth as a human being. And that such denial is clearly inhumane and degrading. It is submitted that the prohibition denies homosexuals the core essence of their humanity that is freely enjoyed by their heterosexual counterparts.

#### **D. The Right to Equality**

76. The second claimant cited *Sheriff of Malawi and another v Universal Kit Suppliers*<sup>33</sup> as defining discrimination as treating similarly placed individuals differently or treating differently placed individuals alike (per Mwaungulu JA). He submits that section 153 of the Penal Code denies a group of a particular sexual orientation the sexual gratification, companionship and family life that gives them an experience of being human while the same enjoyment is not denied or criminalised if done by heterosexuals in the order of nature. According to the second claimant, the discrimination is unjustifiable. He quotes from the *National Coalition* case as stating that:

‘The nature of the power and its purpose is to criminalise private conduct of consenting adults which causes no harm to anyone else. It has no other purpose than to criminalise conduct which fails to conform to the moral or religious views of a section of society.’

77. It is the second claimant’s assertion that the judgment of the lower court that convicted the second claimant and also the judgment that convicted the accused in the *Steven Monjeza* case make it clear that the objective and purpose of the offence on which the second claimant was convicted is to protect the morals of

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<sup>33</sup> MSCA Civil Appeal No. 6 of 2017

the Malawian society. The second claimant pointed out that the court in the *National Coalition* case vehemently rejected morality as a justifiable reason for limiting the rights guaranteed under the Constitution and that the court had stated that:

‘A state that recognises differences does not mean a state without morality or one without a point of view. It does not banish concepts of right and wrong, nor envisage a world without good and evil. It is impartial in its dealings with people and groups, but is not neutral in its value system. The Constitution certainly does not debar the State from enforcing morality. Indeed, the Bill of rights is nothing if not a document founded on deep political morality. What is central to the character and functioning of the State, however, is that the dictates of the morality which it enforces, and the limits to which it may go, are to be found in the text and spirit of the Constitution itself.’

78. To buttress this point, he also cited the South African constitutional court case of *Minister of Home Affairs v Fourie*,<sup>34</sup> as stating as follows concerning criminalising conduct based on religious views and beliefs:

‘It is one thing for the court to acknowledge the important role that religion plays in our public life. It is quite another to use religious doctrine as a source for interpreting the Constitution. It would be out of order to employ the religious sentiments of some as a guide to the constitutional rights of others. Between and within religions there are vastly different and at times highly disputed views on how to respond to the fact that members of their congregations and clergy are themselves homosexual. Judges would be placed in an intolerable situation if they were called upon to construe religious texts and take sides on issues which have caused deep schisms within religious bodies.’

79. It is also argued that the Supreme Court of the United States observed the same thing when it was considering the prohibition of same sex marriages that many who consider same sex marriages as wrong reach that conclusion based on decent and honourable religious or philosophical premises.<sup>35</sup>
80. The second claimant thus submits that the cases show that it is not justifiable to restrict an adult person from the enjoyment of sexual intercourse which poses no risk of harm to any person whatsoever on the basis that it is against the moral and religious views of other people in the society and that such a law is merely discriminatory.
81. The second claimant argues that the second component of section 20 (1) guarantees him equal and effective protection against discrimination on whatever grounds listed as well as any other status or condition. He argues that any other status was deliberately put there by the framers of the Constitution because they knew that all potentially vulnerable groups and classes who would

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<sup>34</sup> Case CCT 60/04

<sup>35</sup> *Obergefell v Hodges* 576 US 644 (2015)

be affected by discriminatory treatment had not been identified and mentioned in that provision. The second claimant states that in an Advisory Opinion, the African Court emphasised that the phrase “any other status” in Article 2 of the Charter “encompasses those cases of discrimination which could not have been foreseen during the adoption of the Charter”.<sup>36</sup> He argues that if the drafters of the Constitution were drafting it in the present day, sexual orientation would have been listed as one of the specific grounds upon which discrimination is prohibited. As such, the second claimant argues that, considering that the Constitution is a living document which has to be interpreted contextually and generously, the court should include sexual orientation as one of such grounds.

82. Notwithstanding the above submission, the second claimant submits that “sex” as a prohibited ground should be generously interpreted, as constitutional interpretation ought to be, to include sexual orientation as was held in the Botswanan case of *Letsweletse Motshiemang case*.<sup>37</sup> It has been pointed out that in that case, the court proceeded to hold that the anti-sodomy laws under section 164 of their Penal Code discriminated against homosexuals on the basis of sex. The second claimant has commented that the Botswanan section 164 of their Penal Code is in *pari materia* with section 153 of our Penal Code.
83. Furthermore, the second claimant has stated that more recently, the Eastern Caribbean Supreme Court in *Orden and another v Attorney General of Antigua and Barbuda*<sup>38</sup> held that:

“In giving a liberal and purposive interpretation to section 14 (3) of the Constitution, the reference to “sex” ought not to merely reference physical gender. Such an approach would be too linear and restrictive. The reference to “sex” would necessarily encompass concepts such as gender identity, sexual character and sexual orientation. It would be self-defeating to the constitutional provision if the notion of sex were to be separated from matters of sexual orientation and sexual identification since the concept of sex as physical gender carries with it a perception of how people identify or are oriented even in those instances where the identification and orientation are stereotypical or traditional in nature.”

84. The second claimant has also referred to the United Nations Human Rights Committee decision of *Toonen v Australia*,<sup>39</sup> as stating that various forms of sexual conduct including consensual sexual acts between men in private under Tasmanian law were incompatible with the International Covenant on Civil and

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<sup>36</sup> Advisory Opinion No. 001/2018, African Court on Human and People’s Rights, 4 December 2020, para 66

<sup>37</sup> Supra note 26

<sup>38</sup> Claim No. ANUHCV2021/0042, 5 July 2022

<sup>39</sup> Communication No. 488/ 1992

Political Rights. The Committee further held that the word “sex” in Articles 2 and 26 of the ICCPR was to be interpreted so as to include sexual orientation. The second claimant submits that Malawi which ratified the ICCPR on 23 December 1993 ought to adopt the interpretation of “sex” by the Committee.

### E. The Right to Privacy

85. He turned to the United States Supreme Court case of *Lawrence and others v Texas*<sup>40</sup> for the holding that the right to privacy guarantees personal autonomy and freedom from any interventions into the private conduct, including sexual conduct of individuals. He states that *Minister of Justice and Constitutional Development and others v Prince Gareth and others*<sup>41</sup> is stating that “the right to privacy can concisely be defined as the right to be let alone”. Also *Stanley v Georgia*<sup>42</sup> and *Patrick and others v Minister of Safety and Security and others*<sup>43</sup> are referred to for the proposition that whatever an individual does and keeps within his personal boundaries is his personal sanctum and he is entitled to freedom from the public’s interference.
86. The second claimant asserts that privacy is closely associated with dignity: that our right to ‘privacy fosters human dignity insofar as it is premised on and protects an individual’s entitlement to a “sphere of privacy and autonomy”’<sup>44</sup>. The second claimant has quoted from the Fiji High Court case of *Nadan and McCoskar v State*<sup>45</sup> as stating that:

‘The way in which we give expression to our sexuality is the most basic way we establish and nurture relationships. Relationships fundamentally affect our lives, our community, our culture, our place and our time. If, in expressing our sexuality, we act consensually and without harming one another, invasion of that precinct risks relationships, risks the durability of our compact with DPP and will be a breach of our privacy.’
87. The second claimant has also found support from the views of the Inter-American Commission on Human Rights and the Inter-American Court which pointed out that sexual orientation is part of the private life of persons and that therefore it involves a sphere that cannot be subject to arbitrary interference.

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<sup>40</sup> Supra note 27

<sup>41</sup> Case CCT 108/17

<sup>42</sup> 394 US Reports 557

<sup>43</sup> Case No CCT 20/95

<sup>44</sup> *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* 2014 (1) SACR 327, para 64

<sup>45</sup> [2005] FJHC 500

The second claimant noted that the Inter-American court and the Inter-American Commission explained that “privacy is an ample concept that is not subject to exhaustive definitions and includes, among other protected realms, the sex life and the right to establish and develop relationships with other human beings.”<sup>46</sup> The second claimant has quoted Malhotra J. in the Indian case of *Navtej Singh Johar v Union of India*<sup>47</sup> as explaining the facets of privacy:

‘The right to privacy is not simply the “right to be left alone” and has travelled far beyond that initial concept. It now incorporates the ideas of spatial privacy and decisional privacy or privacy of choice. It extends to the right to make fundamental personal choices including those relating to intimate sexual conduct without unwarranted state interference. Section 377 affects the private sphere of the lives of LGBT persons. It takes away the decisional autonomy of LGBT persons to make choices consistent with their sexual orientation which would further a dignified existence and a meaningful life as a full person. Section 377 prohibits LGBT persons from expressing their sexual orientation and engaging in sexual conduct in private, a decision which inheres in the most intimate spaces of one’s existence.’

88. The second claimant argues that the impugned provisions allow police officers, prosecutors and judicial officers to scrutinise and assume control of the most intimate relationships of LGBT persons, thereby intruding into a deeply personal realm of their lives. Autonomy, the second claimant submits, must mean far more than the right to occupy an envelope of space in which a socially detached individual can act freely from interference by State and that what is crucial is the nature of the activity and its site. He explains that sexual intercourse is by its nature covert and personal and it is generally and ordinarily done in private and that penalising how people conduct sexual intercourse by the State is a clear interference with what private individuals do in the privacy of their homes. *Ravin v State*,<sup>48</sup> held that if there is any area of human activity to which a right to privacy pertains more than any other, it is the home. It is submitted that, if the State is controlling how two consenting adults have sexual intercourse in the privacy of their homes, it is interfering with their right to be let alone, the right to privacy. The *National Coalition* case is submitted for the proposition that a law prohibiting individuals from having sexual intercourse in other ways forces people of certain sexual orientation to abstain from sexual intercourse and therefore it is a contravention of their right to privacy. It was

<sup>46</sup> IACtHR, Report No. 400/20 Case No.13.637. Merits (Publication). *Gareth Henry and Simone Carline Edwards*. Jamaica December 31, 2020, para 57-8

<sup>47</sup> AIR 2018 SC 4321 (6 September 2018) at 16.2

<sup>48</sup> 537 P.2d 494 (Alas. 1975)

pointed out that the court in the *National Coalition* case reasoned that the right to privacy recognises 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 and that the way in which we give expression to our sexuality is at the core of this area of private intimacy. It is said that if in expressing our sexuality, we act consensually and without harming one another, invasion of that precinct will be a breach of our privacy.

#### F. Right to Fair Trial

89. The second claimant also argues that the impugned provision violates section 42 (2) (f) (ii) of the Constitution which speaks of sufficient particularity of a charge as a component of the right to fair trial. He states that it has been held that the lawmaker in crafting and enacting laws must speak with irresistible clarity, lucidity and certainty for a person to have his conduct in sync with the law's normative repertoire, otherwise the law will lack predictability.<sup>49</sup> The second claimant has looked to the constitutional case of *Mayeso Gwanda v DPP*<sup>50</sup> as authority for the proposition that vagueness is an important factor in the determination of whether a law is constitutional or not. The second claimant has explained that the court in that case found that the law that created the offence of rogue and vagabond was vague and ambiguous and that it held further that the failure of the law to state with precision the forbidden acts left the police with unregulated discretion to be arresting people without justifiable reason. For these reasons, the second claimant explains, that law on rogue and vagabond was declared unconstitutional.
90. The Penal Code, the second claimant argues, does not define what "carnal knowledge against the order of nature" means. However, the second claimant explains, according to the decided cases of offences that have "carnal knowledge" as their essential element, like rape and defilement, carnal knowledge has been defined as penetration of the penis into the vagina. It has been repeatedly held by the courts that if there is no penetration of a penis into a vagina, there is no carnal knowledge.<sup>51</sup> According to the second claimant,

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<sup>49</sup> *Letsweletse Motshiemang v Attorney General* supra note ; *Affordable Medicine and others v Minister of Health and another* (2006) (3) SA 247 (CC)

<sup>50</sup> Constitutional Case No. 5 of 2015

<sup>51</sup> *Mariette v Rep* [1966-68] 4 ALR Mal 119; *Rep v Fred* 8 MLR 48 (HC)

this therefore implies that any penetration which is not penile-vaginal is not carnal knowledge. The second claimant goes on to state that, logically, carnal knowledge against the order of nature should imply the penetration of a penis into a vagina *against the order of nature* and that this further implies that there is a certain order of nature of penile-vaginal penetration. The second claimant argues that the failure of the law to state what the order of nature of the penile-vaginal penetration means makes it unclear what it means by the penile vaginal penetration against the order of nature and thereby creating vagueness and ambiguity as to the prohibited conduct of the offence.

### G. The Limitation of Rights

91. The second claimant submits that section 44 of the Constitution states that for a law to be declared unconstitutional, it has to pass the limitation under section 44 of the Constitution and that the court in *Mayeso Gwanda* case held that the burden lies on the party claiming that the limitation is justifiable. It was submitted that the court in the *Mayeso Gwanda* case held that the prohibition against discrimination cannot be limited. The second claimant thus argues that it is thus unnecessary to consider whether the discrimination in the present matter is a valid constitutional limitation. It is submitted further that the court in *R v Lutepo*<sup>52</sup> held the right under section 42 (2) (f) of the Constitution to be non-derogable. The second claimant submits that section 153 (c) of the Penal Code degrades and brings inhuman treatment to the persons whose realisation of sexual gratification is done through other ways of sexual intercourse. He further argues that section 19 (3) of the Constitution states that no person shall be subjected to degrading and inhuman treatment and that in terms of section 45 (2) (b) of the Constitution, this prohibition against degrading and inhumane treatment is non-derogable. It is submitted that the test under section 44 of the Constitution is thus going to be applicable to the limitable rights only which are the right to privacy and the right to personal liberty.
92. The second claimant submits that the law under section 153 (c) is of general application as it applies to the whole country thereby passing the test of being prescribed by law and being of general application.

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<sup>52</sup> Criminal Case 2 of 2014 [2020] MWHC 23

93. It is submitted that a limitation is necessary in an open and democratic society when it promotes respect for people's free choice, human dignity, social justice and equality, transparency, accountability to State and political institutions and participation of citizens and social groups.<sup>53</sup> The second claimant argues that the impugned provision controls what people do in the privacy of their homes and thus interferes with their free choice as to who to have sex with and how and also their dignity and thus the limitation is unjustifiable under this head.
94. It was pointed out that *Mayeso Gwanda* case cited with approval *R v Oakes*.<sup>54</sup> The *Oakes* case states that for a limitation to be reasonable several factors need to be considered. Firstly, one needs to look at the importance of the purpose or the objective of the limitation; secondly, examine the proportionality between the limitation and its purpose; thirdly, analyse if there are less restrictive means of achieving the purpose; and lastly, consider whether the limitation has managed to achieve the intended purpose.
95. The objective of the offence under section 153 (c) of the Penal Code as observed by the court in the *Steven Monjeza Soko* case is to protect and safeguard the morals of Malawian society. That is not a justifiable reason to penalize a conduct with imprisonment. The court in the *National Coalition* case held that the dictates of the morality which DPP wants to enforce and the limits to which it may go are to be found in the text and spirit of the Constitution itself. This means that morality cannot be a reasonable excuse to subvert the provisions of the Constitution. In *Obergefell v Hodges*<sup>55</sup>, the court had reasoned that the emotional feelings of the society cannot torpedo rights that are constitutionally protected and that an individual can invoke constitutional protection when he or she is harmed even if the broader public disagrees and even if the legislature refuses to act. The constitutional court in *S v Makwanyane*<sup>56</sup> stated that:

‘Public opinion may have some relevance to the inquiry but in itself is not substitute for the duty vested in the courts to interpret the Constitution and to uphold the provisions without fear or favour. If public opinion were to be decisive, there would be no need for constitutional adjudication. The protection of rights could then be left

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<sup>53</sup> *Attorney General v Friday Jumbe & Humphrey Mvula* Constitutional Appeal No. 29 of 2009; *R v Oakes* (1986) 19 CRR 308

<sup>54</sup> [1986]1 SCR 103

<sup>55</sup> Note 35

<sup>56</sup> 1995 (3) SA 391 (CC)

to Parliament which has the mandate from the public and is answerable to the public for the way its mandate is exercised.'

96. This means that the limitation of the rights that is brought by section 153 is not justifiable on the basis that it is against the moral or religious views of other people in the society. As such, it is not necessary to consider the issue of proportionality. The second claimant submits that as much as it is important to safeguard our morals, the same can be done by other social institutions like religion, social sanctions, among others. Otherwise to use the long arm of criminal law to bring people to the agreed standards of the society has proven and held to be in violation of the minority rights that the drafters of the Constitution strived to protect.
97. The second claimant also submitted that the limitation negates the essential content of the rights to privacy and personal liberty in that it negates the autonomy and free choice that a person is entitled to make decisions that are strictly personal within his sanctum. It also negates the integrity and the value of the persons by denying them the sexual expression that is an integral part of their human experience and thus negate the essential content of the right to dignity. The limitation of the right to privacy is not recognised by human rights standards.

## **VIII. THE DEFENCE CASE**

98. On their part the Attorney General and the DPP are of the view that the provisions in question are constitutional and that they do not infringe on any of the claimants' rights.
99. Apart from the substantive issue of the constitutionality of the three provisions the Honourable Attorney General has long dwelt on preliminary issues concerning procedure on commencement of the matter and locus standi.

### **SWORN STATEMENT IN OPPOSITION**

100. The defendants filed a sworn statement sworn by Samuel Chisomo Chisanga. In it, the defence purports to establish that the first claimant committed criminal acts which violated the rights of the victims who are complainants in the matter in the lower court, and that the second claimant was convicted of a criminal offence based on actions that had nothing to do with consenting participants as per the finding of the magistrate court.

101. Paragraph 5 of the sworn statement contains the details and we reproduce it:

'That in so far as surrounding facts are concerned, the sexual acts which the claimants had with the victims, violated the right of the victims. The sentiments above are observed from statements of the victims themselves. In regard to offences under section 153(a) and 156 of the Penal Code the following statements are relevant:

5.1. MM worked as a garden boy and he states that the first claimant invited him to his house and told him to play with his penis. When he refused, he was threatened that he will be laid off and the first claimant proceeded to have sexual intercourse with the victim. I attach and exhibit the statement as "SC 1."

5.2. ME was a student and states that the first claimant had sexual intercourse with him and when he refused to do it again the first claimant stopped paying his school fees. I attach and exhibit the statement as "SC 2."

5.3. TC was also a student and he states that the first claimant told him that he is the boss of the organisation and that if he wanted to be included in the bursary, he was supposed to have sexual intercourse with him. I attach and exhibit the statement as "SC 3."

5.4 FN was a garden boy and he states that he applied for a loan and the first claimant promised that he will approve the loan provided the (sic) he has sexual intercourse with him, which he had. I attach and exhibit the statement as "SC 4."

5.5. FK, a garden boy also states that the first claimant had been having sexual intercourse with him and every time he refuses, he was told to quit his job. I attach and exhibit the statement as "SC 5."

5.6. HN also worked as a gardener. He states that he was invited by the first claimant to his house and was forced to touch his private parts until he ejaculated. I attach and exhibit the statement as "SC 6."

102. The deponent then refers to statements of AM, JK and a Mr. K who also claim that the first claimant had attempted to have sex with them but that they turned him down.
103. He further states that the first claimant's constitutional rights have not been violated at any point as he was charged with a criminal offence and that it is the dignity of the "victims" which were violated as he considered the said "victims" primarily as objects of sexual gratification and not as human beings.
104. He further depones that no evidence has been adduced to demonstrate that either of the claimants has been denied access to health care on the basis that he engaged in sexual acts with men and that there was no interference with the claimants' privacy as the victims are the ones who went to report to police that the claimants had been having sexual acts with them against the order of nature and against their will. The DPP argues that the state did not pry into the personal affairs of the claimants and certainly did not snoop around the claimants' houses to see what was going on there.
105. In cross-examination, the second claimant's counsel took issue with the fact that MM did not state in his statement that he had sexual intercourse with the

first claimant and also that the deponent was not present when all the exhibited statements were being recorded. Further, counsel dwelt on the fact that the evidence concerning these documents was hearsay despite the insistence by the deponent to the contrary.

106. Counsel for the second claimant then went on to challenge the deponent's assertion that the second claimant's rights were not infringed upon by pointing out that, during investigations, the second claimant was referred to hospital for sex determination, apparently, without his consent and/or without a court sanction. Of course the deponent asserted that the second claimant had consented to the investigation.
107. Counsel further brought to the attention of the witness the possibility that some people may have both male and female genitalia in accordance with the opinion of the medical practitioner in the lower court.
108. On the question why the Police did not arrest the other persons who allegedly had sexual intercourse with the first claimant, the deponent responded that they were victims and in criminal law the state does not arrest victims. To this answer, counsel suggested that they were referred to as victims because they were the first to report, but the deponent denied that it was not just on that basis that they were referred to as victims. Similar questions and answers were also recorded with respect to the second claimant.
109. The deponent further stated that before the state makes an allegation and or arrest, they consider the status of the reporter (suspected victim) whether they are vulnerable or not. In further cross-examination on this point, the witness insisted that it is not the first person who reports to police who is considered a victim and that the police look at all the facts before they decide their course of action.
110. When asked what factors are taken into consideration when deciding who the victim is and who is not, the deponent stated that the person who actively participates is considered the suspect while the one who is passive is considered the victim. When asked what is passive or active participation, the deponent stated that the one who actively uses his penis to penetrate the anus of the other is the one considered active and the one who is penetrated is considered passive. On being reminded that in the case of the second claimant, he was the one receiving, the deponent seemed to change his stance and then told the court that his response was in respect of the first claimant. He clarified to say in respect

of the second claimant, it was because he had been the one actively inviting fellow men to have sex with him as if he were a woman.

111. Counsel then took the deponent to section 153 of the Penal Code which criminalises the act of a male person permitting another male person to have sex against the order of nature. Here counsel alleged that that provision is discriminatory against the one who permits and not the one who penetrates. To this the deponent stated that he could not speculate.
112. The other question was whether the government does intervene when a man and a woman lock themselves in a room and have sexual intercourse. The deponent answered that it does if one of them is a vulnerable person.
113. Finally, counsel brought to the attention of the deponent the opinion of the lower court on section 153 of the Penal Code, that the said provision does not embrace the concept of *consensual* intercourse against the order of nature, that such sexual intercourse is prohibited in all circumstances whether consensual or not--the deponent admitted that that was indeed the position of the court.
114. In re-examination, the deponent stated that the statement of MM can be interpreted both ways as it was clear from that statement that the first claimant was forcing MM to have sex with him but it seems that MM would not report to anyone for fear of losing his job.

## **IX. DEFENCE SUBMISSIONS**

115. The Attorney General and the Director of Public Prosecutions (DPP) filed separate submissions. We will accordingly summarise them separately.

## **X. THE DPP'S SUBMISSIONS**

116. The DPP identified three broad issues as follows:
  - a) Whether section 153(a) of the Penal Code is constitutional;
  - b) Whether section 154 of the Penal Code is constitutional;
  - c) Whether Section 156 of the Penal Code is constitutional.
117. Despite the identification of these three broad issues when submitting he went on to do a provision by provision analysis as has been the format adopted by the rest of the parties herein

118. Counsel for the DPP, Mr Jere, introduced his submissions by addressing us on the principles to be followed on interpretation of the Constitution. He also addressed us on the preliminary issue of locus standi.

#### **A. The Malawi Constitution and Interpretation of the Constitution**

119. Counsel for the DPP, Mr. Jere, opened his submission by making a statement that we ought to put at the forefront of our minds that each society does define its own value system, history and aspirations. And that similarly, when the court is interpreting our constitution, it must take into account the history and development of our country, our societal norms and values that are obtain here in Malawi. He also reminded us that the moral threshold of societies differs from one society to another.

#### **B. The Burden in Constitutional Matters**

120. On the parties' duty in this case, counsel submitted that although he agreed with the position taken by the claimants that their duty was simply to show, on a balance of probabilities, that their constitutional rights had been infringed upon and that then the balance would shift to the DPP to show that the same was in compliance with Section 44 of the Constitution, the claimants had failed to discharge that burden. He submitted that, both in testimony and in submissions, it was evident that the arguments that the claimants were making in this court were not supported by the facts as presented by the claimants themselves.

#### **C. Locus Standi**

121. He further submitted that in so far as the first claimant is concerned the allegations against him relate to non-consensual sexual acts and that the same applied to the second claimant. He stated that it was on record that the lower court having heard evidence from both sides made the finding that the second claimant, despite being a man was, for all intents and purposes, conducting himself as well as dressing up as a woman thereby tricking his complainants into believing that they were hooking up with a woman. He further pointed out that the lower court found that whatever sexual acts took place between the second claimant and the second complainant, the same were nonconsensual, for the consent was obtained by fraud. Counsel submitted that the claimants had come to this court seeking the nullification of the various provisions of the law

for being unconstitutional based on facts dealing with non-consensual sexual activities and that therefore the claimants had not discharged the burden of proof. To this extent he submitted that this court is not here to offer gratuitous opinions or decisions for mere academic purposes.

122. He then referred to response of the first claimant in cross-examination when he was asked about his sexual orientation and he replied that he is not a homosexual or gay but that he is a heterosexual; that he is only in this court to decriminalise same sex relationships in aid of the complainants in the criminal case he is answering in the lower court. This, counsel contrasts, with the fact that the first claimant is answering charges in the lower court that he had sex against the order of nature without consent of the alleged complainants.
123. Counsel then posed a question as to what business he has challenging provisions which do not affect him? To this extent counsel submitted that the first claimant did not have *locus standi*. According to counsel, it does not lie with the first claimant or anybody else whose rights have not been infringed, to come to court on behalf of those whose rights are supposedly being infringed to come to court to ask for the declaration that the laws are unconstitutional.

#### **D. The Evidence on Behalf of the Second Claimant**

124. As far as the evidence that was brought on behalf of the second claimant is concerned, counsel submitted that Professor Muller's evidence, apart from making mere assertions which were said to be supported by certain studies, the said studies were never tendered in this court. He stated that the witness conceded that those studies were mostly conducted in other countries and not in Malawi and that her only study in Malawi had 197 participants whom she found on social media and that these were not identified. He observes that she also admitted that considering that her source of information were people from social media, it was possible that the feedback she got was incorrect. He further pointed out that Professor Muller conceded that all these 197 participants were all supposedly members of the LGBTQ community and that she never got the views of other relevant stakeholders.
125. Counsel also took issue with the fact that the witness presented herself as an expert witness when the second claimant had not obtained leave from the court to call an expert witness. Counsel observed further that even though Professor Muller presented herself as an expert witness, the witness having admitted in

cross-examination that she was a member of the LGBTQ community herself, it was clear that she had come to court just to support the second claimant's case. Thus counsel submitted that she was not an expert witness or that if she was, she was a biased one.

126. Counsel then argued that although the claimants make assertions that people engaged in consensual same sex relationships are discriminated against, there was no evidence in this court in respect of these two claimants or anyone else that they are being discriminated against. He argued that in fact the first claimant's testimony showed that he had been treated like anyone else in all circumstances, as no one had ever asked about his sexual orientation, for example, when he visited public offices looking for public services.
127. It is to this extent that the DPP submitted that the facts that have been presented are different from the claimants' arguments. Counsel Jere went on to say that it is more or less like both claimants had just transplanted arguments from other jurisdictions and brought them into these proceedings. At this point counsel reminded us that the values and the systems obtaining in this particular country must be borne in mind.

#### **E. Interpretation of the Constitution**

128. Coming to the question of how we should interpret the Constitution, the DPP brings sections 10 and 11 of the Constitution to our attention. The DPP asserts that our Constitution must be taken as a document *sui generis*. He posits that it must be read as a whole and that one part must be construed in light of the provisions in other relevant parts. Further that it must be construed purposively and generously in order to give it full effect.

#### **F. Applicability of International Standards and Foreign Case Law in Interpreting the Constitution**

129. As to the question of the applicability of international standards, counsel pointed out that the claimants are giving the impression that it is not true that the world out there is taking the same direction on this issue. He gave an example of the United States of America from which much case law has been adopted, that in that country there are many states which are against same sex relations and that there is no consensus at all. He stated that the same is the case in Africa that several countries have not decriminalised same sex relationships

save for a few. He submitted that much as the court has to take into account the international standards where applicable, it must consider the whole picture. Counsel emphasised the words '*where applicable*' and '*comparable*' in section 11(2). He further submitted that if change has to be made to our laws that change must come from within and that such could be after the court realises that the values have changed or that it should come through legislation.

130. As regards his understanding of what unnatural carnal knowledge is, Counsel Jere, described what is natural as carnal knowledge or sexual intercourse between a man and a woman where a penis penetrates a vagina. He stated that anything other than that is unnatural.
131. Coming to the specific issues of the constitutionality of the challenged provisions of the Constitution, the DPP disputes the position taken by the claimants that the provisions are unconstitutional on account that they infringe on their specific constitutionally guaranteed rights.

#### **G. Right to Equality and Freedom from Discrimination**

132. It has been submitted by the DPP that sections 153(a) and 154 do not infringe on the claimants' right to equality. Adopting the *Black's Law Dictionary*'s<sup>57</sup> definition of discrimination, the DPP submits that discrimination has to do with differentiating between members of the same class arbitrarily, i.e., without reasonable cause. According to the DPP, therefore, the provisions that criminalise having carnal knowledge against the order of nature with regards "all persons" cannot qualify as discrimination as there can be no discrimination without unequal treatment of persons similarly situated. To this extent the DPP submits that the South African decision of *National Coalition* case<sup>58</sup> is distinguishable as, in that case, the court was dealing with issues of sodomy at common law which traditionally is homosexuality between males. It is submitted that it meant that anal or oral sex between consenting adults of opposite sex or sex between consenting females was not punishable. Thus, Counsel Jere submitted, that the South African section 20A targeted actions of male homosexuals only and did not target heterosexuals or female homosexuals and that such targeting created a differentiation between male homosexuals, lesbians and heterosexuals.

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<sup>57</sup> 6<sup>th</sup> ed.

<sup>58</sup> Supra note 17

133. In a similar manner the DPP notes that the United States case of *Lawrence v Texas*<sup>59</sup> which also went on to outlaw the Texas sodomy law observed that the said law only targeted conduct of male homosexuals and not the conduct of opposite sex partners. It is because of that the law was found to be discriminatory.

#### **H. Right to privacy**

134. The DPP concedes that legislating into the area of sexual orientation is an interference with the right to privacy. However, they go on to submit that such interference is justifiable in the context of our country. To this extent the DPP submits that each state has to define itself according to its own value system, history and aspirations. The DPP submits that while a number of countries, notably in the whole of Europe and Australia, a number of countries in Asia, a number of countries in Africa and a number of states in America have done away with anti-sodomy laws, there are still many countries across the world which still criminalise sodomy.
135. Counsel then goes on to submit that the interference with the right to privacy in this country is justifiable under section 44 of the Constitution and that the reason for the limitation is a legitimate one, being, to ensure morality in society. It has been submitted by the DPP that both the law and international conventions do recognise morality as a lawful limitation of human rights including the right to privacy. It has been further submitted that the limitation is also a legitimate means for controlling the spread of sexually transmitted diseases – the DPP is of the view that anal sex has the tendency to spread the virus HIV because as people are having anal sex they do not benefit from the advantage offered by lubrication which naturally occurs when people engage in penile-vaginal sex.
136. Speaking to facts in this present matter, the DPP submits that the law intends to protect vulnerable people from predatory or perverse behaviors like the ones alleged to have occurred. The DPP therefore wants to persuade this court to leave the issue in the hands of Parliament to decide which laws are good for the protection of people both from self-harm and harm occasioned unto others.

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<sup>59</sup> 539 U.S. 558 (2003)

### **I. Right to Dignity**

137. On this right the DPP has submitted that the right to dignity of the claimants cannot be breached by merely criminalizing anal sex. Citing Ackermann J in the *National Coalition* case, the DPP has said that the right to dignity is closely connected to the equality and privacy rights. Counsel submits that, if it be found that these related rights have not been breached, then the right to dignity cannot be said to have been breached. The DPP has further submitted that the fact that the law allows people to be arrested for committing offences, whether offences under the impugned provisions or any other offences, and that it then directs the State to treat arrested people with dignity all the way up to trial and sentencing means that the arrest of a person per se does not amount to a breach of the right to dignity.

### **J. Right to Health**

138. Counsel Jere has submitted that the Constitution does not provide for the right to health and that therefore, any talk about the provisions infringing on such a right is misconceived. Referring to section 13 of the Constitution and specifically to paragraph (c), the DPP submits that all that the provision does is to impose an obligation on the government to provide adequate health care. The DPP has further submitted that there is no evidence that the Government has failed to do so in respect of gay individuals. The submission goes further stating that even the right to development under section 30, which mentions health, does not guarantee the right to health. It is argued that all that the right entails in respect to health is for the government to take all measures as are necessary for the realisation of the right to development including ensuring equality of opportunity for all in their access to health services. Counsel submits, therefore, that all that section 30 is guaranteeing is access and nothing else and that this case has nothing to do with access to health services by the claimants.
139. The DPP then goes on to submit that although Article 12(1) the International Covenant for Economic, Social and Cultural Rights does establish the right to health, the same does not become a constitutional right. Counsel reminds us that for an international agreement ratified by an Act of Parliament to form part of the law, the ratifying statute must provide so. A breach of international agreements by statute cannot entitle individuals to a constitutional review. Counsel then goes on to argue that even if the right to health were to be a

constitutional right, there is no evidence that people targeted by section 153(a) and 154 suffer discrimination and fail to access health services by virtue of those sections. He asserts that health services in Malawi are available to all without discrimination. To this end, the DPP has asked this court not to be swayed by foreign case authorities that have no backing local facts.

#### **K. Right to Liberty and Security of the Person**

140. The DPP has submitted that, in light of its arguments on the constitutionality of the provisions with regard to the right to equality, and it being made abundantly clear that the provisions do not interfere with that right, the constitutionality of the two provisions cannot be brought into question on the basis that it breaches the right to liberty and security of the person. He argues that there is no evidence that offenders are subjected to anal examination or that there is a law mandating such. Again the DPP has argued that sexual orientation is not a ground for arresting people with regard to the impugned provisions but that everybody is targeted regardless of their sexual orientation.

#### **L. The Right to Life**

141. The DPP has argued that there is nothing in sections 153(a) and 154 that has the effect of depriving the claimants of their right to life. This is so, he argues, because the right only guarantees the right of a person not to be arbitrarily deprived of his or her life. Thus, in counsel's opinion, the only way the provisions would have breached the constitutional guarantee would be by imposing a death sentence which is not the case in our case. He states that another possible way in which the government can be condemned for violating the right to life would be where it tolerated communities killing gay people and that this again is not the case for Malawi.

142. Commenting on the Indian case of *Paschim Banga Khet Mazdoorsamity v DPP of West Bengal*<sup>60</sup> which held that the right to health inhered a fundamental right to life, counsel submits that in view of its submission that there is no guaranteed right to health and the lack of evidence that the government is failing to conduct comprehensive programs on HIV and AIDS, the case does not assist the claimants.

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<sup>60</sup>(1996) AIR SC 2426

143. Counsel further submits that although the right to life may, in theory, include the right to private life, it does not follow that if you violate someone's private space you also deprive them of life.

#### **M. Right to Freedom from Torture, Cruel and/ or Inhuman Treatment and Punishment**

144. Counsel submits that the protection of the right under section 19(3) is not breached by the provisions of sections 153(1) and 154 of the Penal Code. He argues that the sections are of general application to all offenders regardless of their sexual orientation. And that as such the statement by the United Nations Special Rapporteur on Torture that "discrimination on the grounds of sexual orientation or gender identity may often contribute to the process of dehumanisation of the victim, which is often a necessary condition for torture and ill-treatment to take place" is not borne by any evidence as being perpetrated in Malawi. He submits that there is no evidence brought by the claimants or anyone of torture, cruel, inhuman or degrading treatment or punishment in Malawi on the basis of the impugned section. He asserts that these proceedings are not an academic exercise and that the sections can only be declared unconstitutional if there is proof that acts of torture, cruel, inhuman and degrading treatment or punishment are perpetrated on the basis of those sections.

#### **N. The Right to Equality**

145. The DPP has submitted that the arguments relating to sections 153(1) and 154 apply equally to section 156 as far as all the cited constitutional provisions are concerned except for the right to equality.

146. Nevertheless, counsel submits that section 156 does not infringe the claimants' right to equality. He states that although on the face of it, the provision targets male persons only, there is another provision in the Penal Code, to wit, section 137A which targets females and that the two provisions must be read together. He, however, admits that the combined reading of the two provisions is that heterosexuals are excluded from the offence. Still, he poses the question whether this fact alone would make the offence unconstitutional for being discriminatory.

147. Submitting that the provisions are not proscribing mere indecency but “gross indecency”, counsel goes further to note that “gross indecency” is not defined in the Penal Code. He, however, submits that the conduct would have to be sufficiently grave beyond ordinary indecency for it to be punishable. This means that the section does not negate the essential content of the rights as it only targets flagrant beyond average indecency.
148. The other point by the DPP is that not all differentiation is sanctionable discrimination. Quoting a dictum of the Supreme Court in *Attorney General v Malawi Congress Party and others*,<sup>61</sup> which adopted principles enunciated by RN Sharma,<sup>62</sup> counsel submits that it is possible to have a law targeting one entity but still find the law to be non-discriminatory. Counsel states that men and women being different, a law that targets man on man gross indecency is not discriminatory because men are in a class of their own. He states that problems would arise if the law targeted only some men and left out others, all of whom are engaged in man on man gross indecency. And that the same applies to women. The argument further goes to say man on man indecency is a different category altogether and that he does not see any discrimination at all.
149. Counsel further argues that indecent activity between man and woman is not frowned upon as much as between members of the same sex. He submits that one justification for such prohibition is that such activity can be deeply erotic and can act as a strong stimulant for unnatural sex between man and man and woman and woman exposing them to liability under sections 153(1) and 154. According to counsel, it is good to nip the prospective offence in the bud.
150. In the final analysis, the DPP submits that section 156 is constitutional.

## XI. THE ATTORNEY GENERAL’S SUBMISSIONS

151. On his part, the Honourable Attorney General has identified nine issues:
- Do the claimants have locus standi to commence the present proceedings?
  - Considering that the claimants do not have locus standi to commence the present proceedings, are the issues raised by the claimants moot, academic and hypothetical?

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<sup>61</sup> [1997] 2MLR 181

<sup>62</sup> Fundamental Rights, Liberty and Social Order, (1992) New Delhi, Deep and Deep, at 101-102

- c) Have the claimants properly commenced the present proceedings? Have they commenced the present proceedings against a proper party?
  - d) Who bears the burden of proving the unconstitutionality of a statutory provision?
  - e) Are Sections 153, 154 and 156 of the Penal Code constitutionally valid?
  - f) Do laws relating to unnatural offences violate a person's right to privacy, dignity and the right not to be discriminated against?
  - g) Does the Constitution protect a person's engagement in any sexual activity against the will of another person?
  - h) In as far as the claimants forced their victims to engage in unnatural offences against the will of the victims, do the actions commenced by the claimants constitute abuse of court process?
  - i) Whether costs can be awarded to the Defendants.
152. In oral submissions the Honourable Attorney General responded to the claimant's submissions on section 9 of the Constitution and also cited two cases on the issue of procedure which had not been cited in his written submissions: *Republic vs Roosevelt Franklin Mike Ndovie*<sup>63</sup> and *DPP vs the Ministry of Finance and the Secretary to the Treasury ex parte Dr. Bazuka Mhango and Others*.<sup>64</sup> Regarding these two cases, the Attorney General submitted that whereas the Constitution provides for the substantive law, the procedure for challenging the constitutionality of a law is not in the Constitution itself. He stated that the procedure is provided for in the Courts Act<sup>65</sup>, in the Civil Procedure (Suits by or against the Government or Public Officers) Act<sup>66</sup> and in the Courts (High Court) (Civil Procedure) Rules 2017<sup>67</sup> (hereinafter the CPR). He thus submitted that one cannot make reference to the Constitution to argue that the case is properly before this Court. He argued that as much as this Court has the mandate under section 9 of the Constitution, it cannot handle the case before it complies with the procedure.

#### *A. Locus Standi*

<sup>63</sup> Misc. Crim. Case No. 214 of 2017 (High Court, Lilongwe District Registry) (unreported)

<sup>64</sup> MSCA Appeal No. 17 of 2009 (unreported)

<sup>65</sup> Cap 3:02 of the Laws of Malawi

<sup>66</sup> Cap 6:01

<sup>67</sup> Made under the Courts Act

153. The Honourable Attorney General dwelt long on the issue of *locus standi*. He first acknowledged that this court had already dealt with the issue but submitted that on the evidence presented the issue keeps coming back. He submitted that issues of *locus standi* are jurisdictional questions and that since the court has to always satisfy itself on the issue of jurisdiction, before proceeding to substantive issues, it means the issue of *locus standi* can arise and or be raised anytime and can be revised anytime and at any point of proceedings, including on appeal. To this end, he called upon the court to reconsider the issue of *locus standi* in light of the evidence that has come before this Court.
154. When asked by the court, if the issue of *locus standi* would already have been dealt with by the Chief Justice, the Honourable Attorney General said that the function of the Chief Justice is administrative and not judicial and he thought nowadays the Chief Justice seems to have no choice when certifying matters as constitutional because of how the law is framed.
155. Then, citing a number of case authorities, the Honourable Attorney General submits that the claimants lack *locus standi* to commence the present proceedings and that hence this court lacks jurisdiction to handle the substantive issues in line with sections 108 and 15 of the Constitution. He argues that the burden lies on the claimants to show that they have standing.
156. The gist of the Honourable Attorney General's argument is that since the basis of the claimants' case is that they engaged in sex against the order of nature with consenting male adults, they needed to establish first that they are gay or lesbian and secondly, that they engaged in consensual sex. He argues that in the absence of these, the claimants do not have standing.
157. He thus submits that it is on record that the first claimant said that he is not gay [therefore] had no consensual sex [with the complainants in the criminal case]. As for the second Claimant he submits that he had non-consensual sex.
158. He refers to the second claimant's desire to help those who it is alleged he had unnatural carnal knowledge of and submits that his desire to help them does not give him *locus standi*. He states that in any event if they intended to claim their rights they should have been made parties.
159. The Honourable Attorney General therefore submits that in view of the established facts the claimants do not have *locus standi*, the constitutional questions they are raising are therefore merely moot, academic and hypothetical. He further submits that the constitutional ripeness of the issues

presented depended more upon a specific contingency needed to establish a concrete controversy than on the general development or underlying facts. The mere desire to obtain a reply from this court to some of the constitutional questions which the claimant considers to be fundamental, even if it is understandable, is not capable of conferring on the claimant the legal standing. According to him, only the President can seek the Court's advisory opinion on constitutional questions under section 89(1)(h) of the Constitution.

160. He submitted further that for the court to admit a constitutional challenge the test should be does the public say something had gone wrong with the administration of justice?

### B. Procedure

161. The Honourable Attorney General submits that the proceedings have not been properly commenced as enunciated in the Supreme Court of Appeal decision of *Dr. Bakili Muluzi v The Director of the ACB*.<sup>68</sup> He submits that according to this case a challenge against the constitutionality of legislation should be filed after the giving a three months' statutory notice to the Attorney General, in accordance with section 4 of the Civil Procedure (Suits by or against the Government or Public Officers) Act. Therefore, he submits, if the claimants were minded to lodge a constitutional challenge following the stay of the criminal proceedings in the magistrate court and in the High Court, they should have commenced proceedings by way of summons in the High Court and not bring the matter in the manner as they did.
162. In addition, the Honourable Attorney General submits that the proceedings have been commenced against an improper party. He states that section 3 of the Civil Procedure (Suits by or against the Government or Public Officers) Act requires that suits against the Government be commenced against the Attorney General. In this case the claimants have commenced the constitutional challenge against a wrong party, namely, the DPP. Under the law, the DPP lacks capacity to be sued. He submits that the court does not entertain an action by or against a wrong party. Therefore, he urges that the DPP should be struck off as a party to these proceedings.

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<sup>68</sup> MSCA Civil Appeal No. 17 of 2005 (Unreported)

### C. Constitutionality of the Impugned Provisions

163. Citing the case of *Attorney General v Malawi Congress Party and others*<sup>69</sup> as his authority the Honourable Attorney General has passionately submitted that there is always a presumption in favour of the constitutionality of a statutory provision. In his view the burden is on the claimants to prove the unconstitutionality of sections 153(a), 154 and 156 of the Penal Code as well as the conduct of the police in the investigations against the second claimant. He submits that the impugned penal provisions do not offend any provision of the Constitution. He accuses the claimants and the amici who support them to have relied on precedent of poor quality. He submits that for this court to be persuaded by foreign case law precedents the quality of reasoning in those cases has an important bearing. He went on to attack the judgment of *Letsweletse Motshidiemang Case*<sup>70</sup> as being of poor quality. He urged this court not to be persuaded by the judgment in the said *Letsweletse Motshidiemang* case, stating that the court in that case had abandoned the definition of the right to privacy as contained in the Constitution of Botswana and opted to follow the definition that was provided by King Hammurabi of Ancient Babylon. The Honourable Attorney General stated that the court in that case had also been persuaded by extra judicial, non-legal and non-academic statements by Ban Ki-Moon, former Secretary General of the United Nations and also of Nelson Mandela, former President of South Africa. This Court disapproves of the Honourable Attorney General referring to a judgment of the High Court as a poor quality judgment. It does not matter whether that judgment is from a foreign jurisdiction or not. The Honorable the Attorney General could have respectfully disagreed with or distinguished the judgment as he subsequently did.
164. Further, in his submission, the Honourable Attorney General says it is not the function of the court, undemocratically appointed, to seek to modernise the social mores of the state or of society at large. He states that the court ought not to strain to interpret the provisions in the Constitution which were not designed to put Malawi among the front-runners of liberal democracy in sexual matters. He says the rights that the claimants seek this court to protect are not identifiable in the Constitution. He submits further that by inviting this court to refuse to adhere to the traditions, the history of this nation and the collective

<sup>69</sup> [1997] 2 MLR 181 (SCA)

<sup>70</sup> Ibid

conscience of our people, the claimants “*would remove from this area of legitimate state concern, a most important function of government and possibly make each individual a law unto himself.*”

165. He submits further that courts should defer moral and social issues to the people through their representatives. He points out that laws that are made pertaining to those moral and social issues are repealed through Parliamentarians and not the courts. He states that it is the right of the nation to maintain a decent society, representing the collective moral aspirations of the people and reflecting the unique character and supreme status of the Constitution. He asked the court to heed the question posed by Kapanda, JA in *Chaponda and another, ex parte Kajoloweka and others*.<sup>71</sup>

‘Are we as courts not the bulwarks of civilisation and social and political order, that we need to look at the bigger picture in our decision making?’.

166. He said we should, therefore, look at the bigger picture, which is that, if the claimants succeed in challenging the provisions, the victims would be left helpless and without justice. He argues that it would mean that those who forcibly engage in homosexual relationships would be committing those crimes with impunity.

#### D. On Evidence

167. The Honourable Attorney General asked this court to disregard the evidence of Professor Muller because the second claimant never sought the permission of the court to present an expert or put in evidence an expert’s report under Order 17 rule 19(1) of the CPR.
168. He also submitted the professor’s evidence lacked in three important aspects which an expert evidence must possess: impartiality, independence and objectivity. On the strength that Professor Muller admitted being a lesbian, he submitted that the professor was biased. Further, he submitted, the expert falls foul of the requirements spelt out under Order 17 rule 18 of the CPR which states that the duty of the expert to the court overrides the obligation to the person from whom the expert received instructions or by whom the expert is paid.
169. He also attacked the methodology the expert used in collecting information as lacking in material aspects. He observed that the professor admitted to never

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<sup>71</sup> (MSCA Civil Appeal No. 5 of 2017); [2019] MWSC 1 (13 February 2019) at 41

having interacted with the second claimant on behalf of whom she came to testify. He submits that the professor made factually incorrect statements that gays and lesbians are denied medical care. He stated that this contradicted the first claimant's evidence who, in cross-examination, admitted that he had faced no discrimination at any point when he sought medical or any other public services. The Honourable Attorney General further submitted that the data used was collected using dubious methods i.e. used social media platforms with no way of verifying the identity or truthfulness of the respondents.

170. The Honourable Attorney General further attacks the research conducted by Professor Alexandra Muller as lacking merit. He says the research failed to show how laws that criminalise same sex practices caused poor health among LGBTI, brought about violence against them, brought about alcohol abuse to them as well as suicide attempts. He says the research did not care to engage and consult key stakeholders such as hospital staff who understand and keep reliable records on health issues and the police who investigate suicide cases. He stated that she did not consult traditional and religious leaders to enrich the research with better information and to make it inclusive.
171. He submits that Professor Müller never brought any statistics from Malawi to support her findings that gay and lesbian people are susceptible to suicide because of the laws that criminalise unnatural offences. He says she conceded during cross-examination that the police and the hospitals would have statistics of suicide cases but she did not interview them. He stated that she could not even mention a victim who took his or her life because he or she was facing problems as a consequence of being gay.

**E. Whether the Evidence of PW3, a Detective of the Malawi Police Service, Was Obtained in Violation of the Claimants Right to Privacy and Whether Such Evidence Is Admissible at Law**

172. The Honourable Attorney General has submitted that this allegation requires evidence to be adduced. According to him, the second claimant who bears the burden of proving the unconstitutionality of the conduct of the Malawi Police Service, never led any evidence to support the allegations above. The complaint against the second claimant was that he pretended to be a woman and hoodwinked unsuspecting men into having unnatural sex with him. He

introduced himself with a feminine name. He talked like a woman. He dressed perfidiously as a woman. He never revealed to his victims that he was a man.

173. He submits that it was important for the prosecution to prove all the elements of the offence charged. This could be done only following an investigation regarding the second claimant's gender. According to Counsel Samuel Chisomo Chisanga, the medical examination was court-sanctioned considering that it took place after the commencement of the trial.
174. From the foregoing, the Honourable Attorney General has submitted that the impugned provisions do not violate the right to privacy of the claimants or any person in their position. While admitting that the claimants have the right to privacy, he submits that that right is not absolute. He says privacy cannot be an excuse to engage in criminal activities in private and cannot certainly be used to legitimise conduct which the society abhors even in the absence of the impugned provisions. To treat the right to privacy as absolute as the claimants suggest, would defeat the public interest in the enforcement of laws.
175. He submits that the state is allowed in certain circumstances to interfere with the privacy provided it is done in accordance with the law. He states that the claimants were arrested because they were suspected to have committed offences and that therefore, a reasonable interference with the privacy of claimants by the law enforcement agents cannot be regarded as arbitrary or unlawful.

#### **F. Allegations of Threats Against the Second Claimant**

176. The Attorney General responded to the statement by the second claimant that he has been warned to move out of Mangochi for fear of being killed. The Attorney General commented that what he understood from the judgment was that the warning was not with regards to the fact that the second claimant was gay, the warning was with regard to the fact that he was tricking men that he was a woman and dressing like a woman.

#### **G. Mr Chisanga's Evidence**

177. The Honorable Attorney General accused counsel for the second claimant of cherry picking with the evidence of Mr. Chisanga in that in one breath he (counsel for the second claimant) had submitted that the whole of that evidence was hearsay and ought to be disregarded, and in another, it was to be allowed

in favour of the second claimant. The Honourable Attorney General submitted that a party is entitled to object to the hearsay evidence before it is tendered and not subsequently after the evidence has been accepted and cited *Gunde v Msiska* for that proposition.<sup>72</sup> He submitted that since the evidence that Mr. Chisanga proffered was the evidence that the DPP would use for the prosecution of the matter and that since Mr. Chisanga was part of the prosecution team, the same could not be held to be hearsay.

178. On the evidential issue of why the police did not arrest the “complainants” the Honorable Attorney General responded that the said complainants were not arrested because they were victims according to the evidence.

#### **H. Applicability of Foreign Case Law in the Interpretation of the Constitution**

179. Citing a number of case authorities, the Honourable Attorney General submits that courts in Malawi can be persuaded by foreign case law interpreting a foreign statute only if the provisions of that statute are in *pari materia* with the provisions of the statute to be interpreted in Malawi. He says while we may not ignore decisions from foreign jurisdictions, what is of paramount consideration is that the approach to be adopted in interpretation of the Republic of Malawi Constitution is that which reflects ““the unique character and supreme status” of our Constitution as section 11 (1) thereof enjoins us to do.”<sup>73</sup>
180. Joining the position taken by DPP and the Episcopal Conference of Malawi, the Honourable Attorney General accuses the Claimants and the *amici* who support them of ignoring the decision of the Supreme Court of Appeal in *the Attorney General v Hon. Friday Anderson Jumbe and Humphrey Chimphando Mvula*<sup>74</sup> by citing the decisions from South Africa and other countries in spite of the fact that the issues are not comparable and despite the fact that the Republic of Malawi Constitution has unique character and history. He thus submits that the decisions from the Republic of South Africa have no application to the present case as the South African Constitution explicitly safeguards sexual orientation unlike the Republic of Malawi Constitution.

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<sup>72</sup> [1961-63] ALR Mal 465;

<sup>73</sup> Per Twea, JA in *Attorney General v Hon. Friday Anderson Jumbe and Humphrey Chimphando Mvula Constitutional Appeal Number 29 of 2005, MSCA (Unreported)*.

<sup>74</sup> Constitutional Appeal Number 29 of 2005, MSCA (Unreported)

Moreover, the South African decisions were rendered without contest. The Court never had the benefit of analysing opposing views.

181. Additionally, he submits that for this court to be persuaded by foreign case law precedents the quality of reasoning in those cases has an important bearing. He submits that the decisions relied on by the Claimants were incorrectly decided as they assumed that the Constitutions of those countries explicitly protect same sex relationship. He says the Claimants and the *amici* sympathetic to them have not explained why the South Africa court decisions which were decided based on the text of the Republic of South African Constitution and its historical context are relevant to the present case. Moreover, the facts in the present case do not reveal consensual sexual intercourse between persons of the same sex. The facts reveal violent non-consensual sexual intercourse with persons of the same sex.
182. He submits that the case of *Letsweletse Motshidiemang* which the *amici* are relying upon cannot apply to the present case because, firstly, the decision was influenced heavily by the text of the Botswana Employment Act which makes it illegal to terminate a person's employment on account of their sexual orientation. He observes that Court held that legislative and policy actions could represent the will of the people. As such, in amending the Employment (Amendment) Act<sup>75</sup> to protect the LGBT community against discrimination, Parliament articulated the will of the people of Botswana to protect the LGBT community. He then submits that we do not have a similar provision in our Employment Act, 2000<sup>76</sup> as amended.
183. He then further submits that the court in *Letsweletse Motshidiemang* was heavily influenced by faulty expert evidence which was not challenged through cross-examination unlike in the present case. He says, further, that the Botswana High Court ignored binding precedent such as *Kanane v DPP*<sup>77</sup> in which the Botswana Court of Appeal held that Section 164 of the Penal Code (after its amendment) was gender neutral and therefore it was not discriminatory.
184. Finally, he attacked the reasoning in that case for relying on the evidence led by *amicus curiae* which this Honourable Court has excluded. He says the Court

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<sup>75</sup> By Act no. 10 of 2010

<sup>76</sup> Cap 55:01 of the Laws of Malawi

<sup>77</sup> [2003] 2 BLR 67 (A)

abandoned the definition of the right to privacy as contained in the Constitution of Botswana and opted to follow the definition that was provided by King Hammurabi of Ancient Babylon (page 58) and an article by Posner R.A, *The Right to Privacy*<sup>78</sup>.

185. The Honourable Attorney General goes further to submit that that court was also persuaded by extra judicial, non-legal and non-academic statements by Ban Ki-Moon, Former Secretary General of the United Nations and Nelson Mandela, Former President of South Africa. He observes that although the court cited the case of *Banana v DPP*<sup>79</sup>, it rejected to be persuaded by it but allowed itself to be persuaded by non-legal, extra judicial and non-academic statements by Ban Ki-Moon and Nelson Mandela.
186. He also attacks the decision for relying on *R v. Oakes*<sup>80</sup> which called for evidence to justify limitation of rights. He observes that the approach adopted in *R v. Oakes* was rejected by the Supreme Court of Appeal in *the Attorney General v Hon. Friday Anderson Jumbe and Humphrey Chimphando Mvula*<sup>81</sup>. He submits that what the Court did in *Letsweletse Motshidiemang Case* by ignoring the language used by the law giver in favour of a general resort to values was not interpretation but divination.
187. He says the High Court of Botswana in *Letsweletse Motshidiemang Case* in interpreting the discrimination provision of the Botswana Constitution erroneously defined sex to include sexual orientation which is contrary to the dictionary plain dictionary definition of the word ‘sex’ which is either male or female. Sex refers to gender. He submits that had the legislature intended to include sexual orientation in Section 20 of the Constitution, it would have clearly included the word ‘sexual orientation’ as the South African Parliament did to the South African Constitution.
188. He further says the decision of the High Court of Botswana in *Letsweletse Motshidiemang Case* contradicts the holding of the High Court of Malawi sitting as a constitutional panel in *Von Gomani v Republic*,<sup>82</sup> on how Article 9 of the International Covenant on Civil and Political Rights applied to penal law. The Court held that Article 9 of the International Covenant on Civil and

<sup>78</sup> Georgia Law Review Vol. 12 No. 3 (1978) p. 409

<sup>79</sup> 1998 (1) ZLR 309 (S)

<sup>80</sup> Note 54

<sup>81</sup> ibid

<sup>82</sup> Constitutional Case No. 1 of 2018, HC, Principal Registry (Unreported)

Political Rights applies to police conduct and not to the actual penal law while the High Court of Botswana in *Letsweletse Motshidiemang case* held that Article 9 applies to penal law.

189. He also asks this court to note that some of the provisions of the International Covenant on Civil and Political Rights only recommends to State Parties to frame legislation that would promote human rights. He says on the right to privacy the High Court of Malawi in *Von Gomani v Republic* held that one cannot use the veil of the right to privacy so as to declare the section offensive to the Constitution, or to avoid prosecution.
190. He submits that the facts in *Von Gomani v Republic* are similar to the present case. He thus asks this court to follow the reasoning in *Von Gomani*.
191. On the question that criminal law should not be based on morality he adopts the reasoning of Justice Scalia dissenting opinion in *Lawrence v Texas* (in the Attorney Generals submissions he cited *Roe v Wade*, which is erroneous as *Roe* was decided long before Justice Scalia was appointed to the Supreme Court of the United States Bench) who stated that if the court was not prepared to validate laws based on moral choices as it had done in *Bowers*, state laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity would not prove sustainable.
192. On the meaning of privacy the Honourable Attorney General submits that the claimants and the amici curiae who support them have ignored the clear text of Section 21 of the Republic of Malawi Constitution which does not include private conduct. It is limited to searches of homes or property, seizure of private possession, or interference with private communications, including mail and all forms of telecommunications. He submits that the court cannot be called upon to add new elements of the right to privacy under Section 21 of the Constitution. That task should be left to the legislature.
193. The Honourable Attorney General observes that there is no suggestion from the Claimants that the impugned provisions require the law enforcement officers to conduct searches in homes of those who practice sex against the order of nature or that the provisions require the seizure of private possessions or interference with private communications. Thus, he submits, Section 21 of the Republic of Malawi Constitution read carefully, does not apply to unnatural offences.
194. The Honourable Attorney General concludes that the rights the claimants seek to protect through this court are not identifiable in the Constitution and it is not

the business of the court to decide what the law must be. The court's business is to apply and interpret the law.

195. He submits that while Section 21 of the Constitution provides for a general right to privacy concerning the home, property and communication, it does not prevent Parliament from enacting regulations which govern activities in the home. He submits that if the right to privacy under Section 21 of the Constitution transcends *searches of a person, home or property, the seizure of private possessions; or interference with private communications, including mail and all forms of telecommunications*, that the right is limitable under Section 44 of the Constitution.
196. Citing the US Supreme Court in *Dobbs v Jackson Women's Health Organization*<sup>83</sup> he says for a right to be protected by the court it must be explicitly mentioned in the text of the Constitution.
197. He then alleges that by inviting this court to refuse to adhere to the traditions, the history of this nation and the collective conscience of our people, the claimants would remove from this area of legitimate state concern, a most important function of government and possibly make each individual a law unto himself. He submits that moral and social issues should be deferred to the people through their representatives. Laws that are drafted pertaining to those moral and social issues are repealed through Parliamentarians and not the courts. Otherwise, the natural order of the public debate and the formulation of consensus concerning these issues, he submits, would be interrupted and misshapen.

#### I. On Whether Sections 153, 154 and 156 of the Penal Code Violate the Right Not to Be Discriminated Against?

198. The Honourable Attorney General submits that the concept of equality does not mean that all persons are to be treated equally, but simply that all persons should be treated alike in all situations. He says, further, that there is a presumption that Parliament knows best for its people, that its laws are directed at problems made manifest by experience, and hence its differentiation is based on adequate grounds.

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<sup>83</sup> No. 19-1392, 597 U.S. (2022)

199. The Honourable Attorney General thus does not agree that the law on unnatural offences discriminate against the Claimants. He says the claimants ought to have adduced evidence of discrimination and not postulate examples of discrimination in a vacuum. He says if the laws discriminate against the claimants then the discrimination is based on rational grounds, that is, morality and the need to 'protect the family as a fundamental and vital social unit' (Section 13(i) of the Constitution).

#### **J. Whether Sections 153, 154 And 156 of the Penal Code Violate the Right Human Dignity and Personal Freedoms?**

200. The Honourable Attorney General submits that Section 19 of the Republic of Malawi Constitution is exhaustive of what it seeks to protect. He says the claimants would like to invite the court to invent a new right under Section 19 of the Constitution. Contrary to the claimants' argument that criminalizing sexual intercourse that takes place between consenting homosexual adults violates the claimants' dignity, he submits that the provisions which the Claimants are challenging do not criminalize sexual orientation but particular acts, which would, if committed amount to an offence. He submits that to impose a criminal sanction on a person who has offended the law is not a declaration that they are lesser human beings but it is a means of maintaining law and order. Therefore, to argue that homosexuals are declared to be lesser human beings is grossly misleading as it suggests that the provisions target only a specific group of people in the society when in fact they apply to any person regardless of identity or orientation.
201. He submits that the State recognizes that a person who has offended the law is still a human being and that their inherent human dignity demand that they be treated as having inherent worth. That is why in fulfilling its obligation in section 12(1)(d) of the Constitution, measures have been put in place to ensure that those that have offended the law should be treated by the justice system in a manner consistent with their rights and their inherent dignity as human beings. He says section 19(2)(3) and (4) and section 42 of the Constitution has those measures to ensure that dignity of person accused of an offence is maintained throughout the criminal justice system and even in prison.
202. He thus concludes that imposition of criminal sanctions or criminal proceedings do not take away a person's dignity.

## **K. Right to Health**

203. The Honourable Attorney General submits that the Claimants allegations of violations are based on unsupported hypotheses and, therefore, should fail. The Claimants never adduced any evidence which demonstrate that anyone or any person has been denied access to health care on the basis that he is a homosexual.

## **L. Whether the Offences Vague?**

204. The Honourable Attorney General submits that the claimants have not shown how the impugned provisions are vague contrary to what the court required in *Von Gomani v Republic* [supra]. Further, he submits, little effort has been made to analyse and substantiate the Constitutional provisions and the applicable laws. He argues further that the claimants have not shown any provision of the Constitution that disallows vague laws. Unlike section 108 of the Constitution of Botswana, Malawi does not have any constitutional provision that targets vagueness of laws.
205. He says courts in Malawi are allowed to resort to dictionaries or previous court decisions in cases where legislation does not define words or phrases and if a law is vague, it would, under principles of penal law be interpreted in favour of the accused person. He says the irony in the argument by the claimants is that they are able to argue that the offence targets persons who engage in sexual intercourse with members of the same sex. He then goes back to argue based on *Letsweletsse* case<sup>84</sup> which held that laws on unnatural offences are not vague. He then accuses the claimants of cherry picking the application of the case.

## **M. Whether the claimants Discharged the Burden of Proving the Constitutionality of Sections 153, 154 and 156 of The Penal Code?**

206. The Honourable Attorney General submits that the Claimants have not proven that the impugned provisions are unconstitutional. He submits that although the US Supreme Court overruled *Bowers v. Hardwick* in *Lawrence v. Texas*,<sup>85</sup> 539 U.S. 558 (2003), it is still persuasive and it should be applied in this case. Moreover, he submits, *Lawrence v. Texas* relies heavily on *Roe v Wade* which

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<sup>84</sup> Supra note 26

<sup>85</sup> Supra note 27

was overruled in *Dobbs v Jackson Women's Health Organization*. Additionally, he submits, the Judges' views in *Lawrence v. Texas* were polarized being a 6-3 opinion.

207. He submits that unnatural sexual encounters or sodomy have never been morally accepted in Malawi society. Its neither illogical nor unjust for society to express its condemnation of immoral behaviours. Further, the Claimants have not proven that the right to sexual orientation exists under the Republic of Malawi Constitution.

#### **N. Whether the law is necessary and Is Recognisable in an Open and Democratic Society**

208. Quoting Kapanda J in *In the matter of the admission of David McRester Nyamirandu and In the matter of the Legal Education and Legal Practitioners Ac<sup>86</sup>t*, the Honourable Attorney General submits that the Republic of Malawi Constitution states, at s.44 :

“ ... except for the rights which are expressly identified as non-limitable under section 44(1) of the Constitution, the rest of the rights in Chapter IV of the Constitution can be derogated from, limited or restricted.”

209. He says the rights in issue can be limited and the limitation must –
- be prescribed by law
  - be reasonable
  - be recognized by international human rights standards,
  - be necessary in an open and democratic society,
  - not negate the essential content of the right or freedom in question, and
  - be of general application.

210. He says while considering section 44 of the Constitution, the Court must also consider the Principles of National Policy of the Constitution under Section 13.

211. He submits that Sections 153(a) & (c), 154 and 156 of the Penal Code are laws of general application. The provisions do not unjustifiably limit the rights of the claimants as alleged. He further submits that if at all there are any limitations to such rights the limitations are reasonable and that the objective which they serve is of sufficient importance and relates to concerns which are pressing and substantial in an open and democratic society.

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<sup>86</sup> [2012]MLR 144

212. He submits that looking at Sections 153 and 156 of the Penal Code their purpose is to protect people by upholding social and cultural values and morals at the basic level of the society including marriage. To this extent he quotes *Hyde v Hyde*<sup>87</sup> which defined marriage as a union between one man and one woman to the exclusion of all others. The legislature in enacting the provisions was reflecting a public concern. Therefore, to decriminalize the impugned provisions would amount to recognizing the very act which is considered as immoral and despicable by the people of Malawi.
213. He further submits that there is a rational relationship between the prohibition and the purposes which the impugned provisions serve and that the limitation, if any, is justifiable in an open and democratic society as it is not only Malawi which has penal provisions which criminalizes homosexuality.

### O. Prayer

214. In the final analysis the Honourable Attorney General submits that the Claimants do not have *locus standi*. Therefore, the court does not have jurisdiction to hear the matter. Consequently, and in the alternative the issues raised by the Claimants are moot, academic and hypothetical.
215. In the alternative he submits that the court must consider the impugned provisions alongside other section(s) of the Constitution and determine whether they meet the constitutional validity test. In the Honourable Attorney General's opinion the provisions meet the limitation standard.
216. He also prayed that the Court should consider both the purpose and effect of Sections 153 and 156 of the Penal Code, and determine whether the purpose of a provision or its effect, may lead to constitutionality of the said provision. He submits that the impugned provisions are aimed at achieving an important goal of protecting the society from immorality.
217. He submits that the claimants have not rebutted the presumption of the constitutionality of sections 153, 154 and 156 of the Penal code. He submits that the question to be asked here is whether a fair minded Court, deliberating the purpose of legislation as against its effects on the individuals adversely affected, and upon giving due weight to the right of the legislature to pass laws for the good of all, would find that legislative means adopted are unreasonable.

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<sup>87</sup> 1866 L.R. 1 P & D 130

218. He submits that a fair-minded court would find that the legislative means adopted by the legislature by enacting section 153, 154 and 156 in the Penal code is reasonable and the claimants' prayer should be dismissed with costs.

## XII. SUBMISSIONS OF THE *AMICI CURIAE*

219. Several organizations expressed interest in this constitutional matter and this court duly admitted them following their petitions to join as *amici curiae* (friends of the court). These organizations included both those who argued that the law in question is constitutional and those who contended that it is not. Episcopal Conference of Malawi (ECM), The Registered Trustees of the Muslim Association of Malawi (MAM), The Registered Trustees of the Malawi Council of Churches, and Evangelical Association of Malawi (EAM), progressed with the arguments that the laws in question are constitutional. On the other hand, Centre for Human Rights Education, Advice and Assistance (CHREAA), J.M and The Registered Trustees of Centre for the Development of People (CEDEP), The Registered Trustees of Centre for Human Rights and Rehabilitation ("CHRR") and The Registered Trustees of Network of Religious Leaders Living with or Personally Affected by HIV and AIDS (MANERELA+) contended that the laws in question are not constitutional.

## XIII. EPISCOPAL CONFERENCE OF MALAWI (ECM)

220. ECM which is one of the parties that joined the matter as *amicus curiae* contends that the impugned provisions are constitutional.

221. ECM seeks to address the following issues:

- a) Whether the claimants have *locus standi* to commence the present proceedings?
- b) Who bears the burden of proving unconstitutionality of a statutory provision?
- c) Are sections 153, 154 and 156 of the Penal Code constitutionally valid? Do laws relating to unnatural offences violate a person's right to privacy, dignity and the right not to be discriminated against?
- d) Does the Constitution protect a person's engagement in any sexual activity against the will of another person? In as far as the claimants forced their victims to engage in unnatural offences against the will of the victims, do the actions commenced by the claimants constitute abuse of court process?

e) Is legalising same sex tantamount to legalising same sex marriage?

#### A. Locus Standi

222. In the context of *locus standi*, it is ECM's argument that the claimants lack the right to commence proceedings, citing *President of Malawi v Kachere*,<sup>88</sup> where it was established that a person without sufficient interest cannot seek a declaratory judgment. Reference was made to *The Registered Trustees of the Women & Law (Malawi) Research & Education Trust v The Attorney General*,<sup>89</sup> where the court dismissed a constitutional referral due to insufficient locus standi. Additionally, ECM cited the case of *Australian Conservation Foundation v The Commonwealth*<sup>90</sup> where the court highlighted that a person must have a concrete interest, not merely a belief in upholding principles. Furthermore, their argument is that Malawian courts emphasised that to establish standing, a party must prove the adverse effect of the defendant's conduct on their legal rights based on the holding in the case of *Civil Liberties Committee v. Minister of Justice*.<sup>91</sup> ECM argues that the claimants were accused of engaging in unnatural sexual acts and, despite their defence, they lack sufficient interest based on precedents. ECM contended that their interest did not align with the established criteria for *locus standi*.
223. In the alternative, ECM argues that claimants could only have *locus standi* if they engaged in consensual same-sex acts, emphasising the need for a real person alleging rights violations. The absence of individuals affected by the impugned sections was presented as a basis for dismissing the claimants' case. ECM contended that the claimants posed abstract hypothetical questions without a concrete legal dispute. ECM argued that there being no legal dispute involving a victim of the impugned decisions, would be asking the court to provide a gratuitous legal opinion.

#### B. The Burden of Proving the Unconstitutionality of the Provisions

224. ECM argued that there is a presumption in favour of the constitutionality of statutory provisions, citing the Supreme Court of India in *Ram Dalmia v Justice*

<sup>88</sup> [1995] 2 MLR 616).

<sup>89</sup> Constitutional Case number 3 of 2009, High Court of Malawi, Principal Registry, (Unreported),

<sup>90</sup> (1980) 146 C.L.R. 493

<sup>91</sup> [2004] MLR 55 (SCA)

*Tendolkar*.<sup>92</sup> They pointed out that the burden rests on those challenging the law to demonstrate a clear transgression of constitutional principles. Referring to cases like *Lee Keng Guan v Public Prosecutor*,<sup>93</sup> ECM maintains that there is a presumption that all laws enacted by Parliament are constitutional, placing the burden on those asserting unconstitutionality to prove the contrary.

225. In the matter of burden of proving unconstitutionality of the impugned laws, ECM emphasised that challenging a law's constitutionality requires the presentation of material or factual evidence, as stated in *Public Prosecutor v Taw Cheng Kong*.<sup>94</sup> ECM observed that the court in that case held that merely postulating examples of arbitrariness without concrete evidence does not rebut the presumption of constitutionality. They also cited the Kenyan High Court case of *EG & 7 others v Attorney General DKM & nine others (Interested Parties); Katiba Institute & another (Amicus Curiae)* as having highlighted the importance of clear evidence to support allegations of constitutional rights violations. ECM observed that in that case the court dismissed a claim against laws criminalising unnatural offenses and advocating for same-sex orientation status rights, holding that the petitioners failed to adduce evidence supporting their allegations.
226. ECM argues that in the specific context of the present case, the claimants have not adduced evidence showing violations of their rights, particularly in relation to rights to equality, freedom from discrimination, privacy, freedom of the person, human dignity, life, and health. According to ECM, the claimants did not provide material to demonstrate arbitrary enactment or operation of the impugned provisions.

### C. Does the Constitution Protect a Person's Engagement in any Sexual Activity against the Will of Another Person?

227. ECM further points out that the claimants were implicated in engaging in unnatural sex without victims' consent leading to a criminal charge. ECM cautioned the court against being used to sanction criminal conduct and emphasised the necessity for the proper criminal trial process to address such matters.

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<sup>92</sup> AIR 1958 SC 538

<sup>93</sup> [1975] SLR 231

<sup>94</sup> [2000] 2 LRC17 at 41

#### **D. Interpreting the Malawi Constitution**

228. Citing the case of *Attorney General v Hon. Friday Anderson Jumbe and Humphrey Chimphando Mvula*,<sup>95</sup> ECM submits that the Supreme Court of Appeal highlighted that when considering foreign case law, the determining factor should not be the similarity of foreign constitutions to Malawi's Constitution, but rather the comparability of the issues at hand. ECM observed that the court, in that case, stressed the need for an interpretation reflecting "the unique character and supreme status" of the Malawi Constitution, cautioning against the risk of subjugating it to other nations' constitutions.
229. ECM asserts that contrary to this guidance, the claimants and supporting amici curiae in the present case, adopted court decisions from countries such as South Africa without heeding the advice in *Hon. Friday Anderson Jumbe* case. ECM pointed out that while South Africa's Constitution explicitly protects sexual orientation, the Republic of Malawi Constitution does not. As a result, ECM submitted that cases from South Africa on the subject of sex against the order of nature are deemed irrelevant to the present case.

#### **E. Right to Privacy**

230. According to ECM, section 21 of the Constitution which safeguards personal privacy is aimed at protection against arbitrary searches, seizures, and interference with communications, excluding private conduct. ECM is of the view that the court cannot add new elements to the right to privacy beyond what is explicitly provided for in the Constitution. ECM asserted that the claimants could not show that the impugned provisions required searches, seizures, or interference with private possessions or communications. They urged the court to interpret section 21 as it is, without extending its scope to cover unnatural offences.
231. It was further submitted that while section 21 provides for a general right to privacy concerning the home, property and communication, it does not prevent Parliament from enacting laws that govern activities in the home. ECM cited the US Supreme Court's decision in *Bowers v Hardwick*<sup>96</sup> where it was said:

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<sup>95</sup> Constitutional Appeal Number 29 of 2005

<sup>96</sup> 478 U.S. 186 (1986)

'Plainly enough, otherwise illegal conduct is not always immunised whenever it occurs in the home. Victimless crimes, such as the possession and use of illegal drugs, do not escape the law where they are committed at home...And if respondent's submission is limited to the voluntary sexual conduct between consenting adults, it would be difficult, except by fiat, to limit homosexual conduct while leaving exposed to prosecution adultery, incest and other sexual crimes even though they are committed in the home. We are unwilling to start down that road.'

232. ECM referred the court to *Bowers* where the court was confronted with the argument that the law against same sex relations was to be invalidated because there was no rational basis for it other than the presumed belief of a majority of the electorate in Georgia that homosexual activity was immoral and unacceptable—a similar contention having been made in the present case. ECM highlighted the court's holding on the point as stating that the law being "constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed".

233. ECM contends thus:

'The claimants, by inviting this court to refuse to adhere to the traditions, the history of this nation and the collective conscience of our people, would remove from this area of legitimate state concern, a most important function of government and possibly make each individual a law unto himself. The Episcopal Conference of Malawi submits that moral and social issues should be deferred to the people through their representatives or through a referendum. Laws that are drafted pertaining to those moral and social issues are repealed through Parliamentarians and not the courts. Otherwise, the natural order of the public debate and the formulation of consensus concerning these issues, it is submitted, would be interrupted and misshapen. It is the right of the nation to maintain a decent society, representing the collective moral aspirations of the people and reflecting "the unique character and supreme status of the Constitution" ...The laws against unnatural offences reflect the interest of Malawians. Public interest must be supreme when enacting laws and the laws must reflect what the people believe in...Same sex acts are against the cultural, traditional and religious practices and beliefs that Malawians advocate for...'

234. ECM brought our attention to certain of the African Charter on Human and People's Rights articles. They cite Article 27 as providing that the rights of each individual are to be exercised with regard, among other things, morality and common interest. They also point to Article 17 (3) which places an obligation on states to promote and protect morals and traditional values recognised by the community. Reference is also made to Article 29 (7) as placing a duty on states to preserve and strengthen positive African cultural values and to contribute to the moral well-being of society.

## **F. Right to Equality and Freedom not to be Discriminated Against**

235. In addressing the question of whether Sections 153, 154 and 156 of the Penal Code violate the right not to be discriminated against, ECM argues that the principle of equality does not necessitate treating all persons equally but rather treating them alike in similar situations. Referring to the case *Public Prosecutor v Taw Cheng Kong*, it was noted that there is a presumption that Parliament, in enacting laws, is knowledgeable about the needs of its people and that differentiation in legislation is grounded in adequate reasons. ECM reiterated that the challenging party bears the burden of rebutting the presumption of constitutionality to demonstrate arbitrary enactment or operation of the law. ECM criticised the claimants for failure to present evidence showing human rights violations against individuals engaged in same-sex relations in Malawi. The case of *Suresh Kumar & another v Naz Foundation & Others*<sup>97</sup> was cited for the proposition that the mere possibility of abuse of a legal provision does not render legislation invalid unless proven otherwise.
236. ECM argued that sections 153(c), 154 and 156 of the Penal Code do not discriminate against the claimants. They stressed that these sections are gender-neutral and criminalise conduct irrespective of the sexual orientation of the individuals involved. If any discrimination is found, it was submitted that such differentiation is rational being based on moral grounds and the imperative to ‘protect the family as a fundamental and vital social unit’ as outlined in section 13(i) of the Constitution.

## **G. Right to Dignity**

237. ECM submitted that the cases of *Bowers v. Hardwick* and *EG & 7 others v Attorney General; DKM & 9 others (Interested Parties); Katiba Institute & another* address the question of whether the impugned provisions violate the right to dignity and that they answer it in the negative.
238. ECM contended that the specific text of section 19 which enshrines the inviolability of the dignity of all persons does not explicitly classify arrest and prosecution for offenses against the order of nature as a violation of the right to dignity and any expansion of rights should be the legislature’s prerogative

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<sup>97</sup> Civil Appeal No. 10972 of 2013

rather than the Court's. They stated that section 19 outlines specific protections regarding human dignity, as including the prohibition of torture, cruel or degrading treatment, corporal punishment, and non-consensual medical or scientific experimentation. ECM asserted that the claimants sought to establish a new right under section 19, a role explicitly designated to the legislature rather than the courts, according to their submission.

239. ECM argued that despite the U.S. Supreme Court's overturning of *Bowers v Hardwick* in *Lawrence v. Texas*, the former case remains persuasive. They highlighted the polarised views in *Lawrence v Texas* and emphasised Justice Scalia's dissent as stating:

‘Today’s opinion is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda, by which I mean the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct... [T]he court has taken sides in the culture war, departing from its role of assuring, as a neutral observer, that the democratic rules of engagement are observed.’

240. ECM stressed the societal non-acceptance of sodomy in Malawi, asserting that it is neither illogical nor unjust for society to express its condemnation of immoral behaviours.

#### **H. Is Legalising Same Sex Tantamount to Legalising Same Sex Marriage?**

241. According to ECM, allowing same-sex individuals to engage in sexual activities would result in the recognition of same-sex marriages. It is argued that since section 22 of the Constitution and Section 13 of the Marriage, Divorce and Family Relations Act recognises marriage by repute and permanent cohabitation, should the impugned provisions be declared unconstitutional, individuals in a same-sex relationship would be given a right to move the court to recognise their union as a marriage.

242. ECM elaborates that section 14 of the Marriage, Divorce and Family Relations Act, 2015<sup>98</sup> allows individuals of the opposite sex to enter into marriage. ECM submits that the court can validate marriages under section 13 if parties can prove the existence of certain factors, such as: the existence of a relationship of not less than five years; the fact of cohabitation; sexual relations; the existence of some financial dependence; ownership, use and acquisition of property by the couple; mutual commitment to shared life between the couple; and the

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<sup>98</sup> Cap 25:01 of the Laws of Malawi

reputation in the community that the couple is married and their public display that they have a shared life.

243. In conclusion, ECM submits that sections 153, 154, and 156 in the Penal Code are constitutionally valid and they request the dismissal of the claimants' prayer.

#### **XIV. THE REGISTERED TRUSTEES OF THE MUSLIM ASSOCIATION OF MALAWI (MAM)**

244. The Registered Trustees of MAM stated that they are a registered organisation incorporated under the Trustees Incorporation Act. They mentioned that they are a faith-based organisation dedicated to promoting the interests of Muslims in Malawi. In their application to join the case as friends of the court, they expressed the belief that their submissions would assist the court in reaching a just conclusion. According to MAM, informed by the teachings of the Holy Quran and the lessons of Prophet Muhammad, they asserted that the case presented by the claimants is misconceived.
245. The question to be considered by the court was stated to be whether or not sections 153(a), 154, and 156 of the Penal Code are constitutional.

##### **A. No Constitutional Dispute but a Mere Criminal Matter**

246. MAM highlighted the lack of evidence that the first claimant engaged in consensual anal sex and stated that the recorded statements actually suggested coercion. Referring to the case of *James Phiri v Muluzi*,<sup>99</sup> MAM submitted that the mere certification by the Chief Justice of a matter as constitutional does not create a constitutional dispute. MAM argued that the claimants should have been engaging in consensual sodomy and challenging the illegality of the laws afterwards rather than victimising others through coercive or deceptive acts. According to MAM, there was no constitutional dispute to be decided and that the claimants were merely seeking a gratuitous opinion from the court. MAM reiterated that the claimants had committed offences and that the court was not to entertain a challenge to the laws in such circumstances. They prayed for the court to dismiss the Chief Justice's certification of the present proceedings as not containing or involving a constitutional dispute.

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<sup>99</sup> (Constitutional Matter 1 of 2008) [2008] MWHC 4 (24 July 2008),

## B. Comparison of the Cases from other Jurisdictions with our Present Legal Setup

247. In comparing and distinguishing cases from other jurisdictions, MAM pointed to the case of *The National Coalition Case*<sup>100</sup> from South Africa, where the High Court there invalidated certain statutory provisions relating to sodomy, subsequently referring the matter to the Constitutional Court. Counsel Mbata observed that the offence of sodomy was a common law one as opposed to our case where the offences against the order of nature are statutory ones. Counsel Mbata observed that the case was undefended and that the Attorney General had actually supported the claimants' action. Further it was pointed out that the case primarily involved interpreting an equality provision, section 9 of the 1996 South African Constitution, that contained the term "sexual orientation". MAM submitted that this provision explicitly addresses equality and prohibits unfair discrimination based on various grounds, including sexual orientation. MAM argues that Malawi, however, lacks a comparable constitutional provision explicitly incorporating the term 'sexual orientation', thus making the *National Coalition case* less persuasive case law for our present matter.
248. MAM referred to the case of *Toonen v Australia*, a decision rendered by the Human Rights Committee under Article 5 (4) of the Optional Protocol to the International Covenant on Civil and Political Rights, where the complainant, an anti-sodomy law activist in Tasmania (Australia), contended that the existing laws of Tasmania violated Article 17 of the ICCPR and where the Committee agreed with the complainant. MAM argued that *Toonen* case primarily centred on the interpretation of Article 17 of the ICCPR. MAM submitted that international treaties are subordinate to the Constitution and municipal statutes and that, consequently, the *Toonen* decision is not to be considered a good precedent to be followed.
249. Concerning *Dudgeon v The United Kingdom*,<sup>101</sup> a decision by the European Court of Human Rights (ECHR) with regard to section 11 of the Criminal Law Amendment Act 1885 which criminalised male homosexual acts in England, Wales, and Northern Ireland, which provision was deemed to be in violation of the European Convention on Human Rights, Counsel Mbata observed that this

<sup>100</sup> CCT 11/98

<sup>101</sup> Application no. 7525/76

case held a lot of significance as it marked the first successful challenge to the criminalisation of male homosexuality before the European Court of Human Rights. Moreover, counsel submits that, it played a pivotal role in subsequent legal developments, including the alignment of Northern Ireland's laws on male homosexuality with those in Scotland, England, and Wales. Additionally, it was pointed out, that it set a legal precedent leading to the Council of Europe's directive that no member state could criminalise male or female homosexual behaviour.

250. MAM submitted that through a decision rendered on October 22, 1981, the Court concurred with the Commission's assertion that Northern Ireland's criminalisation of homosexual acts among consenting adults violated Article 8 of the European Convention on Human Rights. The article safeguards the right to respect for private and family life, home, and correspondence, emphasising that public authorities must not interfere unless it aligns with the law and is deemed necessary in a democratic society for the protection of health or morals.
251. Further, MAM noted that the Court, while acknowledging the disproportionate nature of the restriction imposed on Mr. Dudgeon under Northern Ireland law, emphasized that countries had the autonomy to establish an appropriate age of consent for such conduct. The ruling, dated 1981, contended that the breadth and absolute character of the restriction, apart from the severity of potential penalties, exceeded the aims sought to be achieved.
252. It is MAM's reasoning that the legal precedent set by *Dudgeon v United Kingdom* was pivotal. The same provision of the 1885 Act remained in effect in the Republic of Ireland and was upheld by its Supreme Court in 1983. However, in 1988, *Norris v Ireland* successfully challenged this provision in the European Court of Human Rights, utilizing Dudgeon as a key precedent. Subsequently, the Republic of Ireland decriminalized homosexuality in 1993. This legal trajectory extended to *Modinos v Cyprus*<sup>102</sup> and resonated in the US Supreme Court's decision, *Lawrence v Texas*<sup>103</sup> where Justice Anthony Kennedy cited Dudgeon in declaring anti-sodomy laws in 14 remaining US states unconstitutional.
253. MAM presented the viewpoint that the dissenting opinion penned by Judge Zekia in the *Dudgeon* case, he addressed the central issue of whether the laws

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<sup>102</sup> (1993)

<sup>103</sup> (2003)

criminalising homosexual relations were necessary in a democratic society for the protection of morals and the rights and freedoms of others. Judge Zekia contended that the Acts of 1861 and 1885, prohibiting gross indecency and buggery, remained essential for maintaining moral standards deeply rooted in religious beliefs and traditions. He emphasised the potential public outcry and societal disturbances that could arise from repealing or amending such laws, considering the prevailing views against unnatural practices in both Northern Ireland and Cyprus.

254. MAM, in expressing their position, emphasised that Judge Zekia's dissenting views in the Dudgeon case align with the legal stance in Malawi. It was asserted that the legislature holds the responsibility to enact laws in accordance with societal morals, which may vary based on geographical, historical, cultural, and religious factors. The argument highlighted the need for a contextual assessment of morality, emphasizing that a wholesale nullification of laws based on moral standards would be inappropriate. The assertion was made that the Constitution should reflect the aspirations of the people, considering the specific context in which they live.
255. Furthermore, Statement conveyed a belief that Malawi, as a society, possesses its own set of moral standards, exemplified by the enactment of the Marriage, Divorce, and Family Relations Law in 2015, which explicitly prohibited same-sex marriages and unions. MAM submitted that this law was cited as reflective of the country's moral values, and similar comparisons were drawn with other legal prohibitions, such as the illegality of smoking dagga and the criminalization of certain drugs. The overall argument emphasized the legislative authority's role in shaping laws based on societal values, illustrating this with examples of various offenses deemed illegal in Malawi.
256. Further, MAM asserts that Judge Zekia argued that, in assessing the necessity of respect for private life, it was crucial to acknowledge the rights of the majority in a democratic society who held opposing views on moral grounds. He emphasized the entitlement of the majority to uphold their religious and moral beliefs, asserting that a change in the law to legalize private homosexual activities could lead to disturbances. Judge Zekia concluded that the state government, in keeping the relevant Acts, did not violate the European Convention on Human Rights, considering the protection of morals and the preservation of public peace as justifications for maintaining these laws.

257. MAM cited the case of *Modinos v Cyprus*<sup>104</sup> which involved the European Court of Human Rights and centered on Article 8 of the European Convention on Human Rights. The case originated from Alexandros Modinos, a gay rights activist and founder of the "Cypriot Homosexual Liberation Movement," who, in 1987, engaged in a sexual relationship with another male adult. Modinos expressed significant distress and fear of prosecution due to section 171 of the Criminal Code of Cyprus, which criminalized specific homosexual acts. The report highlighted that Article 15 of the Cyprus constitution, guaranteeing the right to respect for private and family life, played a crucial role. The Court ruled in Modinos's favour, declaring certain sections of Section 171 invalid. MAM underscored the differences in the constitutional context between Cyprus and Malawi and emphasized that the judgments are not directly applicable to each other.
258. MAM quoting the case of *Costa v The Republic*,<sup>105</sup> puts out that a 19-year-old soldier was convicted of permitting another male person to have carnal knowledge of him, as per section 171(b) of the Criminal Code in Cyprus. The accused argued that this section was contrary to Article 15 of the Constitution and/or Article 8 of the European Convention on Human Rights. The Supreme Court, in its judgment on June 8, 1982, acknowledged that the offense was not committed in private and involved a 19-year-old soldier, thus falling outside the scope of the European Court of Human Rights' interpretation in the *Dudgeon v The United Kingdom* case. Despite this, the Supreme Court, while not following the majority view in Dudgeon, adopted the dissenting opinion of Judge Zekia, emphasizing the need to interpret the Convention and Constitution in light of the country's social and moral standards. The court concluded that section 171(b) did not violate either the Convention or the Constitution, considering the prevailing morals in Cyprus.
259. MAM highlighted that the Supreme Court, in the Costa case, based its decision on the dissenting opinion of Judge Zekia, asserting the authority of domestic tribunals to interpret the Convention and Constitution in alignment with the country's social and moral standards. The court concluded that, given Cypriot realities, section 171(b) of the Criminal Code did not violate the Convention or the Constitution, deeming it necessary for the protection of morals in Cyprus.

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<sup>104</sup> 16 EHRR 485

<sup>105</sup> (2 Cyprus Law Reports, pp. 120-133 [1982])

260. MAM cited the case of *Lawrence v Texas*<sup>106</sup> where it puts out that it was presented that Lawrence and Garner contended Texas' law was an unconstitutional intrusion into citizens' private lives, asserting that liberty and privacy were fundamental rights protected by the constitution. They argued that the law, criminalizing certain sexual activities only when practiced by same-sex couples, sent a message of discrimination, portraying gay people as second-class citizens and lawbreakers. Conversely, State of Texas justified the law as a regulation of extra-marital sexual conduct, rooted in the state's interest in upholding public morality and promoting family values.
261. It was MAM's point of view that Justice Anthony Kennedy, in delivering the majority judgment, overturned *Bowers v Hardwick* and affirmed consenting, sexual conduct between adults as a constitutional right to liberty. Kennedy emphasized the entitlement of petitioners to respect for their private lives, asserting that the state cannot criminalize their private sexual conduct. On the dissenting side, Justice Scalia criticized the decision, expressing concerns about its impact on social order and arguing that the majority had ignored stability and consistency. The case illustrated a shift in societal morals over time, particularly in the United States, and highlighted the evolving interpretation of constitutional provisions by the Supreme Court.
262. It was discussed by MAM that the central question addressed by the Supreme Court of India in the case of *Justice K. S. Puttaswamy (Retd.) v Union of India*<sup>107</sup> was whether there existed a fundamental right to privacy under the Indian Constitution, challenging previous decisions that denied such rights. The landmark judgment, delivered by a nine-judge bench, upheld the fundamental right to privacy under Article 21 of the Indian Constitution, emphasizing its integral role in Part III, which delineates citizens' fundamental rights. The Court asserted that the right to privacy is not absolute and must adhere to the triple test of legitimate aim, proportionality, and legality when challenged by state or non-state actors.
263. Further, MAM asserts that the judgment's implications were highlighted, noting its role in subsequent decisions such as *Navtej Singh Johar v Union of India* (2018), which decriminalized homosexuality in India, and *Joseph Shine v Union of India* (2018) which abolished provisions criminalizing adultery. A

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<sup>106</sup> 539 U.S. 558 (2003)

<sup>107</sup> writ petition (civil) no 494 of 2012

distinction was drawn, noting that the Indian Constitution lacks a specific provision for the right to privacy, unlike Section 21 in the analysed constitution. It emphasized that the right to privacy doesn't imply the right to engage in illegal activities like sodomy, bigamy, or bestiality as clarified by their constitution.

264. MAM asserted that challenging the constitutionality of sections 153, 154, and 156 was deemed inappropriate, as these sections were considered entirely constitutional. The presented argument highlighted several points: first, emphasizing that the sections, akin to offenses like rape and defilement, do not diminish the dignity of any person and treat sexual offenses equally, with the accused entitled to rights under section 42 of the Constitution upon arrest. Second, it was argued that the sections do not violate the right to privacy, as there is no authorization for state agents to intrude into citizens' private affairs. Third, it was pointed out that the sections do not impede the right to health, as government or private hospitals are not prohibited from treating injuries resulting from sexual intercourse. Lastly, in addressing concerns of discrimination, it was noted that the offenses apply universally without discrimination based on classes, gender, or race, and that gender-specific provisions exist, such as section 137A, which applies to females. This female-specific provision parallels section 156, which applies to males only.
265. MAM concludes by asserting that the Malawian Constitution, meticulously crafted, did not incorporate sexual orientation within the non-discrimination clause, and the privacy clause specifically addressed government interference rather than sexual offenses. Sodomy, bigamy, and bestiality are maintained as constitutional, with no violation of constitutional provisions in arresting individuals accused of sodomy. The submission emphasizes that individuals still retain their rights to dignity, equality, health, and various other rights. The argument draws attention to the prevalence of anti-sodomy laws in over half the countries globally, emphasizing that Malawi is not an exception. The submission questions the necessity of the case, suggesting that the claimants seek a legal opinion rather than initiating legal action. Overall, the belief is expressed that the legal action is misconceived.

## XV. THE REGISTERED TRUSTEES OF THE MALAWI COUNCIL OF CHURCHES (MCC)

266. The Registered Trustees of the MCC sought admission as *amicus curiae* due to their significant interest in the case. On May 16, 2023, the court admitted MCC as *amicus curiae*. The MCC, representing 27 main Protestant Christian Churches and 20 Para-Church organisations in Malawi, emphasise their commitment to promoting Christian values and the dignity of the family as central to social stability. Supporting sections 153(a), 154, and 156 of the Penal Code, they argue that these provisions align with Christian teachings by criminalising behaviors deemed unnatural and contrary to God's will. They contend that these laws do not violate constitutional rights and are necessary to uphold public morality and the common good.
267. MCC opposes any attempts to legitimize same-sex relations, arguing that such actions would undermine family values and the rights of children as protected under the Constitution. They stressed the importance of respecting individual rights while considering collective security, morality, and the common interest.

### A. Professor Muller's evidence

268. MCC turned to the evidence given in court by Professor Alexandra Muller, a German citizen employed at the Faculty of Health Sciences, University of Cape Town. They pointed out that, during cross-examination by the Attorney General and the DPP, she had showed that she had not personally interacted with the second claimant, Jana Gonani, and that her research, based on a survey of 197 individuals conducted anonymously on LGBTQ community, did not directly involve Gonani. Further, MCC stressed Professor Muller's lack of experience in practising medicine in Malawi and her inability to confirm Gonani's victimisation in the surveyed incidents.
269. Further, MCC elaborates that in her responses, Professor Muller highlighted the limitations of her study, which preceded Gonani's arrest and conviction, and did not specifically address his circumstances. MCC pointed to her admission to being a lesbian and therefore a member of the LGBTQ community. They underscored her reliance on the survey data, which, according to MCC, did not encompass interviews with other pertinent parties or verification of individual claims.

270. MCC argues that the evidence presented in the case reveals significant details regarding the actions of both claimants. They state that the second claimant was convicted on charges related to obtaining property by false pretenses and permitting sexual intercourse against the order of nature. They also state that the first claimant's involvement in coercing men into sexual intercourse is documented, with victims including junior employees of an organisation where the claimant held a senior position, as well as needy students seeking financial assistance. MCC argues that in both cases there was no consent from the victims, negating any possibility of consensual sexual intercourse.

#### B. First claimant's *locus standi*

271. MCC also stressed the first claimant's assertion during cross-examination that he is heterosexual, which according to them, contradicts the basis of his constitutional reference, which was framed around the denial of the right to engage in consensual homosexual intercourse. MCC wondered how despite his heterosexual identity claim, the first claimant would seek to challenge the constitutionality of certain Penal Code sections stating that he was doing it to advocate homosexual rights of alleged victims who lack legal representation and his commitment to justice. MCC reasons that these revelations raise questions regarding the claimants' credibility and motivations, that the discrepancy between the first claimant's sexual orientation and his advocacy for homosexual rights calls into question the sincerity of his position and the legitimacy of his legal standing. Similarly, MCC argues that, the second claimant's actions demonstrate a pattern of deceit and coercion, further undermining his claim of consensual sexual intercourse and the constitutional issues at hand.

272. MCC submitted that the requirements of *locus standi* as elucidated by various judgments in Malawi courts underscore the necessity for plaintiffs to demonstrate a legitimate legal interest or substantial stake in a matter to seek declaratory judgments. They cite *United Democratic Front v Attorney General*<sup>108</sup> and *Civil Liberties Committee v Minister of Justice*<sup>109</sup> for the proposition that mere advocacy for public welfare or principles is insufficient to establish standing. They also submit that notably, Malawi Supreme Court of

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<sup>108</sup> [1994] MLR 354

<sup>109</sup> [2004] MLR 55

Appeal has consistently held that plaintiffs must show tangible evidence of how their legal rights or interests are adversely affected by the actions in question, as seen in cases like *Attorney General v Malawi Congress Party*<sup>110</sup> and *Chaponda v Kajoloweka*.<sup>111</sup>

273. MCC points out that these decisions reinforce the principle that *locus standi* is a jurisdictional issue in public law, requiring plaintiffs to prove a direct connection between their legal rights or interests and the subject matter of the action. Further, MCC stated the principle that courts do not entertain academic questions from *James Phiri v Bakili Muluzi and Attorney General*<sup>112</sup> where the Constitutional Court cited with approval the dictum in *Maziko Charles Sauti-Phiri v Privatization Commission*,<sup>113</sup> that courts are not platforms for providing gratuitous legal opinions, but rather to address genuine disputes and issues brought before it. They state that legal practitioners, not courts, should be sought for opinions, and litigation should focus on resolving tangible disputes rather than hypothetical scenarios.
274. MCC submits that the first claimant in denying being homosexual lacks locus standi to advocate for the rights of others in the context of sections 153, 154, and 156 of the Penal Code. They argue his assertion that he aims to aid the very complainants who alleged to being the victims of these criminal charges against him raises doubts about the logic behind his plea. MCC argues that his defense against the charges before the magistrate court can be addressed without resorting to this constitutional challenge. Further, MCC argues that the second claimant's conviction for non-consensual acts negates his plea to declare the mentioned sections unconstitutional as he failed to provide evidence of consensual intercourse.
275. According to MCC, the absence of evidence showcasing rights violations against LGBTQ individuals in Malawi, undermines the substantive nature of the claims.

### C. Principles of interpretation

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<sup>110</sup> [1997] 2 MLR 181

<sup>111</sup> (MSCA Civil Appeal Number 5 of 2017

<sup>112</sup> Constitutional Case Number 1 of 2008

<sup>113</sup> Case Number 13 of 2005

276. MCC argues that sections 153, 154, and 156 of the Penal Code are not unconstitutional. MCC states that section 12 of the Constitution establishes fundamental principles such as popular sovereignty and the duty of citizens to exercise their rights responsibly, balancing individual freedoms with societal welfare. They state that section 12 highlights the duty of citizens to uphold Malawian values and morality so as to ensure that rights are exercised within the boundaries of communal well-being and moral considerations.
277. MCC points out that section 13 of the Constitution outlines the Principles of National Policy aimed at promoting the welfare and development of the people of Malawi, including the encouragement of conditions conducive to the full development of healthy, productive, and responsible members of society, as well as the recognition and protection of the family as a fundamental social unit. They stress that while section 14 stipulates that these principles are directory in nature, the same provision also states that courts should be entitled to have regard to them when interpreting constitutional provisions or any law, or in determining the validity of executive decisions, just as it was held in the *Masangano* case.<sup>114</sup>
278. MCC further submitted that the cardinal principle is that there is a presumption of constitutionality for legislation as held by the Supreme Court of Appeal in *Attorney General v Malawi Congress Party and others*<sup>115</sup> and that consequently, the burden must fall on the claimants to demonstrate that sections 153(a), 154, and 156 of the Penal Code are unconstitutional to rebut the presumption.
279. MCC submits that section 11 of the Malawian Constitution mandates courts to interpret the Constitution in a manner that reflects its unique character and supreme status. They state that this involves promoting the values of an open and democratic society, consideration of fundamental principles that underlie the Constitution and also human rights principles, and incorporation of international norms and foreign case law, where relevant. It is submitted that the Constitution's interpretation must align with its overarching purpose and coherence as held by Banda, CJ., in *Fred Nseula v Attorney General*.<sup>116</sup> Additionally, MCC asserts that courts must prioritise the intentions of the

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<sup>114</sup> Ibid

<sup>115</sup> [1997] 2 MLR 181

<sup>116</sup> [1999] MLR 313.

Constitution's framers and ensure that all of the Constitution's provisions are considered harmoniously, as demonstrated in *Presidential Referral Appeal*.<sup>117</sup>

280. MCC argues that in light of the present case involving a non-Malawian claimant challenging Malawi's constitutional provisions, the Constitutional Court must safeguard the will of Malawian citizens as expressed in the Constitution. They submit that the preamble of the Constitution underscores the Constitution's embodiment of the collective aspirations of the Malawian people and also of the importance of accountable governance and national harmony. It is thus submitted that the courts must carefully ascertain the implications of allowing foreign influence on the Malawi's constitutional framework so as to ensure that the principles and values enshrined in the Constitution continue to authentically represent the desires and interests of Malawian citizens.

#### **D. Right to privacy**

281. MCC argues that the criminalisation of offences against the order of nature does not violate the right to privacy guaranteed by section 21 of the Constitution. It is asserted that the right to privacy protects individuals from unwarranted searches and intrusions into their personal space, allowing them the freedom to live privately. It is highlighted that there is no evidence of the state having intruded into the private lives of the claimants through the application of the impugned penal code sections in question.

#### **E. Right to equality**

282. MCC argues that sexual orientation is not protected under section 20(1) of the Malawi Constitution which prohibits discrimination based on various grounds. They state that while similar constitutional provisions in other countries explicitly include sexual orientation, the omission in Malawi's Constitution suggests exclusion. They support their position with the legal principle from *Malawi Human Rights Commission v The Attorney General*<sup>118</sup> that what is not expressly included is considered excluded. Additionally, they state that the interpretation of constitutional provisions should reflect the will and values of the people of Malawi, by considering factors such as morality, societal norms, and the common good. Moreover, MCC asserts that the decision to include

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<sup>117</sup> Number 44 of 2006

<sup>118</sup> [2000–2001] MLR 246

sexual orientation as a protected right should be determined by Parliament as representatives of the collective will of the people. They are persuaded in their stance by the House of Lords' decision in *Airedale N.H.S. Trust v Bland*<sup>119</sup> on the role of elected representatives in addressing contentious moral and social issues. They argue that allowing such changes through parliamentary channels fosters dialogue and consensus-building within the community more than reliance on judicial interpretation to establish new rights does.

#### F. Limitation of rights

283. MCC argues that the criminalisation of offences against the order of nature satisfies the criteria for lawfully limiting human rights under section 44 of the Constitution which stipulates the parameters of the limitations that they should be: prescribed by law, reasonable, recognised by international human rights standards, necessary in an open and democratic society, of general application, and not such as to negate the essential content of the rights in question. They state that this is so because, according to them, the limitation respects various rights and freedoms recognised under the Constitution while at the same time addressing societal concerns. Moreover, MCC asserts that section 45 of the Constitution allows for derogation from human rights guarantees in exceptional circumstances, such as during emergencies like armed attacks or natural disasters. They add that, of course, such derogation is temporary and must be proportionate to the threat faced by the nation. They are also quick to point out that the present case is not a question of derogation but of limitation. It is submitted that overall, lawful restrictions on human rights aim to ensure peaceful human interaction.

284. MCC argues that public morality shapes communal standards of behavior, often sacrificing individual freedoms for the collective good and that balancing the protection of sexual activity and public morality proves challenging due to their uneasy relationship. They state that in Malawi, upholding morality is a duty of every citizen as prescribed by the Constitution's fundamental principles.<sup>120</sup> According to MCC, public morals are shared beliefs shaping societal values and behavior which are crucial for societal cohesion and order. They argue that the law often intervenes to safeguard public morality, as seen in cases such as

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<sup>119</sup> [1993] AC 789

<sup>120</sup> Section 12 (2) of the Constitution

*Shaw v Director of Public Prosecutions*, where convictions for activities that corrupt public morals were upheld. MCC cites justifications for criminalising certain activities, like sexual behavior against the order of nature, as including the protection of children from exposure to harmful behaviors and the preservation of societal moral.

### **G. The Kenyan Case of EG and others**

285. MCC states that the Kenyan case of *EG and others*<sup>121</sup> where the Constitutional and Human Rights Court delivered a unanimous judgment dismissing applications seeking to declare certain sections of the Kenyan Penal Code unconstitutional, the court emphasised the importance of interpreting constitutional provisions purposively and in context to ensure alignment with the spirit, purpose, and values of the Constitution. MCC states that the case highlighted the principle that courts should not enlarge the scope of legislation beyond its plain meaning but that they should remain true to textual interpretation and thus to bring out the legislative intent.
286. MCC also observed that the Kenyan court underscored the necessity for specificity and the presentation of evidence in support when alleging violations of constitutional rights and thereby placing the burden of proof on the party making such allegations. It was further observed that the court also considered societal values and aspirations reflected in the Constitution, asserting that constitutional validity should take into account the will of the people as expressed in the constitutional framework. MCC noted that the Kenyan court, while drawing on jurisprudence from various jurisdictions, including South Africa, highlighted the distinction between the Kenyan and South African Constitutions. It is stated that the court pointed to the explicit inclusion of sexual orientation as a ground against which discrimination was prohibited in the South African Constitution, an equivalent which lacked in the Kenyan Constitution. MCC submits that our Constitution is the same as the Kenyan Constitution with regards to the absence of that element among prohibited grounds of discrimination.

### **H. Costs**

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<sup>121</sup>Petition Number 150 of 2016

sexual deviations and depravities leading to societal chaos. They caution against equating personal autonomy and intimate choices with an unfettered right to act upon them without legal limitation, highlighting the potential for extreme outcomes like bestiality, paedophilia, necrophilia and such others if liberty were unconditionally guaranteed under the Constitution. EAM contends that while claimants may assert their right to personal autonomy, it does not automatically mean that the Constitution guarantees such liberties, especially if they conflict with the broader societal interest and the attached legal principles.

294. In evaluating whether the right to practise sodomy and other sexual preferences is protected under section 18 of the Constitution, EAM emphasises the importance of scrutinising the cited provisions under the limitations set forth in section 44. EAM argues that the only modes of exercising such liberty are those that are not legitimately limited by permissible restrictions. They assert that the practice of sodomy and other sexual deviations is legitimately restricted by section 153 and related provisions of the Penal Code, as these provisions are competent legislative acts of Parliament, prescribed by law, which is based on the interests and views of Malawians. Additionally, EAM contends that these restrictions are reasonable, stating that as was established in cases such as *State and another, ex parte Hophmally Makande and another*,<sup>127</sup> there exists a rational connection between law that imposes the limitation on one hand and the purpose served by the interference and limitation of the right on the other hand. EAM contends that section 153 and related provisions of the Penal Code are intended to uphold and protect public morality regarding sexual acts as evidenced by their placement within Chapter XV of the Penal Code, which is titled “Offences against Morality”. They argue that these provisions reflect the moral convictions held by the people of Malawi as demonstrated by their democratic decision to impose criminal sanctions for such acts. Furthermore, it is EAM’s opinion that, the legislative history of these provisions, including a review of the provisions by the Law Commission in 2000 and subsequent amendments in Act No. 1 of 2011, underscores the ongoing recognition and reinforcement of public morality through legitimate law reform processes.

295. EAM challenges the representation made by the amici curiae, The Registered Trustees of the Centre for Development of People, The Registered Trustees of

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<sup>127</sup> [2012] MLR 403 (HC).

the Network of Religious Leaders Living with or Personally Affected by HIV and Aids and The Registered Trustees of the Centre for Human Rights and Rehabilitation regarding a supposed determination by the Law Commission in a “Discussion Paper No. 11” regarding the anti-homosexuality provisions in December 2011. They assert that this representation is misleading, as discussion papers are intended for public consultation and do not constitute official determinations or recommendations by the Law Commission. They insist that no Law Reform Report concerning the anti-homosexuality provisions of the Penal Code exists, and that if such a determination had been made, it would likely have been incorporated into Act No. 1 of 2011, which amended the Penal Code.

296. EAM argues that the provisions of the Penal Code, including section 153 and related provisions, are upheld to protect public morality and the social fabric of Malawian society. They stress that these provisions have undergone thorough legislative scrutiny, including consultations and amendments as recently as 2011, demonstrating their enduring validation by Malawian lawmakers and citizens. Moreover, EAM asserts that these provisions are reasonable under section 44 of the Constitution, as they serve to preserve collective morality and common interests in accordance with domestic and international legal principles.
297. Furthermore, EAM highlights the recognition of protection of public morality as a legitimate limitation on rights and freedoms both domestically and internationally. They cite the International Covenant on Civil and Political Rights (ICCPR) and the Syracuse Principles,<sup>128</sup> demonstrating that international law recognises limitations on rights that are essential for maintaining respect for fundamental community values. Additionally, EAM refers to European Court of Human Rights jurisprudence, such as in *Dudgeon v United Kingdom*,<sup>129</sup> where protection of public morality was accepted as a legitimate basis for retaining laws against certain sexual conduct, thus reflecting the diversity of moral conceptions across societies and the discretion of states in determining legislation.

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<sup>128</sup> On the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, U.N. Doc. E/CN.4/1985/4, Annex (1985), ICCPR

<sup>129</sup> [1981] ECIIR 7525/76

298. EAM underscores the legitimacy of protecting morals as a basis for limiting rights, citing foreign case law such as *Bowers v Hardwick*<sup>130</sup> and *Barnes v Glen Theatre, Inc.*<sup>131</sup> They argue that recent legal developments, including the overruling of theoretical foundations in *Roe v Wade* and *Casey* by *Dobbs v Jackson*, undermine precedents like *Lawrence v Texas*, diminishing their influence even outside the United States. EAM contends that acknowledging the protection of societal moral convictions as a legitimate state interest is fundamental as evidenced by numerous legal decisions recognising the importance of preserving order and morality.
299. Moreover, EAM asserts that denying the legitimacy of protecting majoritarian sexual morals would undermine the validity of all sexual morality laws. They argue that permitting certain sexual behaviours while denying others would lack principled justification, highlighting the inconsistency in the claimants' position. EAM asserts that the denial of public morality as a legitimate basis for limiting rights is legally unfounded and is only attributable to sensationalised judicial pronouncements that defy both international and national consensus on the matter.
300. EAM refutes the contention made by the claimants and their amici that Part XV of the Penal Code merely enforces religious moral convictions, arguing that historical condemnation of such sexual acts predates Judeo-Christian religions and is rooted in secular Greco-Roman moral philosophy. They cite Richard B. Hays' account, which demonstrates that the opposition between "natural" and "unnatural" behaviour existed in Stoicism, with numerous examples from Greek and Roman moral philosophers distinguishing between heterosexual and homosexual behaviour as moral and immoral respectively. Additionally, they highlight the writings of Stoic-Cynic preacher Dio Chrysostom and Plutarch's Dialogue on Love as disparaging homosexual acts as contrary to nature and effeminate, thus reflecting a longstanding moral repulsion towards such behaviours predating religious influences.
301. EAM states that Hays' analysis emphasises that in Paul's time, the categorisation of homosexual practices as "para phisin" meaning "contrary to nature" was widespread, particularly in Hellenistic Judaism, indicating a cultural context where homosexuality was viewed negatively. EAM asserts that

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<sup>130</sup> 478 U.S. 186

<sup>131</sup> 501 U.S. 560, 569 (1991)

the argument presented depicts that criminalisation of buggery and related sexual indecencies is not solely driven by religious morality but is deeply rooted in Malawian public morality. According to EAM the impugned provisions of the Penal Code are necessary in an open and democratic society, going beyond mere convenience, to fulfil indispensable roles in upholding Malawian public morality, moral ethos and building the social fabric. EAM concludes that the claimants and those in support fail to recognise the legitimate grounds for the cited provisions which are firmly embedded in Malawian societal values and democratic processes. It is submitted that the necessity of these provisions is to safeguard collective morality and to ensure societal cohesion of a balanced and ordered society and thus countering attempts to prioritise individual liberties at the expense of broader societal interests.

## B. Right to Dignity

302. The argument by EAM refutes the claimants' contention that the cited provisions of the Penal Code violate the right to dignity, asserting that the criminalisation of buggery and related sexual acts is not an affront to human dignity but rather a necessary regulation in the interest of societal morality and cohesion. It dismisses the sentimental premise that the criminalisation encroaches upon the inherent worth of individuals, emphasising Emmanuel Kant's conception of dignity as personal autonomy and rational decision-making capacity. Drawing parallels with the case of *Wackenheim v France*,<sup>132</sup> where a ban on a dwarf being tossed for spectacle did not violate his dignity, the argument highlights that certain outward expressions, even if propelled by innate attributes, may be subject to ethical or moral evaluation and regulation.
303. Furthermore, EAM's argument distinguishes between innate attributes and the outward expression thereof, asserting that while innate attributes may not be morally evaluable, the legitimate expression of these attributes through specific acts can be. It cites scientific and moral analyses of homosexuality to underscore this distinction, emphasising society's need to evaluate and regulate

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<sup>132</sup> Communication No 854/1999 (before the Human Rights Committee of the United Nations)

the means of expressing innate attributes, particularly when they conflict with prevailing moral standards. Thus, it concludes that the cited provisions of the Penal Code focus on regulating specific acts rather than innate attributes, aligning with societal moral evaluations and constitutional principles.

304. EAM argues that the criminalisation of certain sexual acts under the Penal Code does not violate the right to dignity as guaranteed by the Constitution. It maintains that the regulation of outward expressions of innate attributes is a legitimate societal endeavour aimed at upholding moral standards and societal cohesion.

### **C. Right to Privacy**

305. EAM's argument maintains that the cited provisions of the Penal Code do not violate the right to privacy but that they constitute legitimate limitations on privacy. They claim that the expansive interpretation of privacy, akin to that in *Roe v Wade*, would allow unacceptable means of expressing sexuality to escape regulation under the guise of individual decisional autonomy. By applying the same analysis of limitations as with the right to liberty, the argument concludes that the provisions in question are legitimate limitations of the right to privacy.

### **D. Right to Equal Protection before the Law**

306. EAM argue that the cited provisions of the Penal Code do not contravene the right to equal protection of the law or the prohibition of discrimination under section 20 of the Constitution. EAM emphasises the gender neutrality of the provisions, highlighting that they apply equally regardless of the gender or sexual orientation of the individuals involved. Furthermore, they contend that there is no basis for discrimination analysis regarding the sex or gender of participants in the proscribed act, as individuals of homosexual orientation are not denied rights granted to heterosexuals. The argument concludes that the provisions are constitutionally sound as they are in line with societal consensus on the moral reprehensibility of certain sexual acts as evidenced by legislative maintenance and amendments as recent as 2011.

307. EAM's assertion is bolstered by arguments challenging claims that anal penetration is the only means of sexual expression for individuals of homosexual orientation. It points out the ongoing debate in scientific circles regarding this claim and asserts that societal consensus in Malawi deems

buggery morally reprehensible justifying its criminalisation. The argument dismisses the notion that the provisions violate equal protection or discrimination prohibitions, citing their gender neutrality and alignment with societal moral fabric. Thus, it contends that the claimants' case on these grounds lacks merit.

308. In conclusion, EAM asserts that employing the same analytical framework applied to previous claims, none of the other alleged violations of rights or freedoms justify the invalidation of the cited provisions of the Penal Code as sought by the claimants. Consequently, the claims for the invalidation of these provisions are deemed to fail entirely. The claimants and their supporters are advised to engage in legitimate law reform and legislative processes to effect changes in the law if they believe that societal moral views in Malawi have evolved.

## XVII. CENTRE FOR HUMAN RIGHTS EDUCATION, ADVICE AND ASSISTANCE (CHREAA), AMICUS CURIAE

### A. INTRODUCTION

309. Since the matter was revealed to involve the constitutionality of sections 153(a), 154, and 156 of the Penal Code, CHREAA gained admission as *amicus curiae* in this matter pursuant to an order issued by the High Court on 30th July 2021. CHREAA asserted that sections 153(a) and (c), 154, and 156 of the Penal Code, when applied to consensual acts, were deemed to violate various constitutional rights. The organisation urged the court to adopt a broad interpretation of constitutional rights, emphasising the interconnectedness of equality, dignity, and privacy. Reference was made to the Supreme Court case of *Nseula v the Attorney General*<sup>133</sup> which stressed the importance of interpreting the Constitution generously rather than strictly. CHREAA observed that the court stressed that the Constitution should be viewed as a unified document with all provisions considered in harmony to understand the true intent. They cited Sachs J's sentiments about the inappropriateness of compartmentalising and ranking rights—but rather, that any inquiry into rights violations must be person-centred and contextual as opposed to abstractly.<sup>134</sup>

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<sup>133</sup> MSCA, Civil Appeal No 32 of 1997

<sup>134</sup> *National Coalition* case supra note

- Sachs J is quoted to have said that “a single situation can give rise to multiple, overlapping and mutually reinforcing violation of constitutional rights.”<sup>135</sup>
310. CHREAA citing *Attorney-General v Dr Mapopa Chipeta*<sup>136</sup> asserts that the courts were implored to interpret the Constitution in a manner that gives life to legislative words and avoids interpretations leading to absurd consequences. CHREAA highlighted that in interpreting the Malawi Constitution, the courts should consider current norms of public international law and comparable foreign case law. CHREAA points out what the court stated in *In the matter of David Banda (a male infant)*,<sup>137</sup> that Malawi had consciously and decidedly undertaken obligations dictated by international conventions which it had ratified and that the courts were thus accordingly duty-bound to comply with the provisions of those conventions.
311. They pointed out that once the court finds infringements in sections 153(a) and (c), 154, and 156 of the Penal Code, it is the state’s responsibility to demonstrate that the limitations are in line with international human rights standards and that they are reasonable and necessary in a democratic society.<sup>138</sup> CHREAA submitted that an important aspect in justifying any limitation of constitutional rights is the consideration of whether the justification is proportional to the goal to be achieved by the said limitation. CHREAA turned to the Canadian Supreme Court case of *R v Oakes*,<sup>139</sup> as outlining the three components of a proportionality test and where Dickson CJ said:
- “There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair “as little as possible” the right or freedom in question... Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of “sufficient importance”.
312. A pivotal aspect of CHREAA’s submissions emphasised the need to make a clear distinction between instances of consensual anal penetration and those involving non-consensual acts of anal penetration. CHREAA stated that Grote, in 1846, when he wrote about the rise and fall of Athenian democracy,

<sup>135</sup> Ibid

<sup>136</sup> MSCA No. 33 of 1994.

<sup>137</sup> Adoption Cause No.2 of 2006 (Lilongwe Registry)

<sup>138</sup> *Friday Junbe and Humphrey Mvula v Attorney General* supra note 53

<sup>139</sup> Note 54

explained that the diffusion of the sentiment of “constitutional morality” throughout society is essential for a stable, peaceful and free society and that this morality included the acceptance of the universality of human rights by both state and society. They point out that following the atrocities of World Wars 1 and 2, states globally committed to the Universal Declaration of Human Rights in 1948. They state that its Preamble and provisions embody the idea of “constitutional morality”. CHREAA states that drawing from the African Charter on Human and Peoples’ Rights, post-independence constitutions aimed at transforming their societies into just, humane and compassionate ones.

313. CHREAA states that William Guthrie, a century ago, reflecting on rising populism in the United States had cautioned of the inevitable consequences of such and had stressed the importance of courts retaining power to protect the rights of all persons.<sup>140</sup> CHREAA cited the Indian Supreme Court’s decision of *Navtej Singh Johar v Union of India*,<sup>141</sup> which held that section 377 of the Indian Penal Code was unconstitutional in so far as it criminalised carnal knowledge against the order of nature of consenting adults of the same sex. The court is quoted to have said:

‘Constitutional morality cannot be martyred at the altar of social morality and it is only constitutional morality that can be allowed to permeate into the rule of law. The veil of social morality cannot be used to violate fundamental rights of even a single individual, for the foundation of constitutional morality rests upon the recognition of diversity that pervades the society.’<sup>142</sup>

314. CHREAA comments that in the *Navtej* case the court placed constitutional morality over social morality. They define constitutional morality as “adherence to or being faithful to the principles of constitutional values”. On the hand, social morality is regarded as the notion of feeding on public opinions. This, CHREAA submits, must not be allowed to breed at the expense of the human rights values and principles entrenched in the Constitution.

315. CHREAA also cited *Justice Puttaswamy and another v Union of India and others* where the court said that:

‘that “a minuscule fraction of the country’s population constitutes lesbians, gays, bisexuals or transgenders” (as observed in the judgment of this court) is not a sustainable basis to deny the right to privacy. The purpose of elevating certain rights to the stature of guaranteed fundamental rights is to insulate their exercise from the disdain of majorities, whether legislative or popular. The guarantee of constitutional

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<sup>140</sup> WD Guthrie ‘Constitutional Morality’ (1912) 196 *The North American Review* 157

<sup>141</sup> Supra note

<sup>142</sup> At 253

rights does not depend upon their exercise being favourably regarded by majoritarian opinion. The test of popular acceptance does not furnish a valid basis to disregard rights which are conferred with the sanctity of constitutional protection. Discrete and insular minorities face grave dangers of discrimination for the simple reason that their views, beliefs or way of life does not accord with the “mainstream”. Yet in a democratic Constitution founded on the rule of law, their rights are as sacred as those conferred on other citizens to protect their freedoms and liberties.”

### B. Right to Equal Protection

316. CHREAA argued that sections 153(a) and (c), 154, and 156 of the Penal Code, in criminalising consensual acts, contravene section 20(1) of the Constitution. CHREAA pointed out that section 20(1) of the Constitution, mirroring Article 26 of the International Covenant on Civil and Political Rights (ICCPR) and Article 2 of the African Charter on Human and Peoples' Rights (ACHPR), prohibits discrimination based on various grounds. Referring to section 153 of the Penal Code, CHREAA noted its origins as being in the English buggery offence and how the same applied to British colonies. It was submitted that the Global Commission on HIV and the Law had noted that much of the hostility towards homosexuality was attributable to colonialism and that pre-colonial cultures were often more tolerant of sexuality and diversity.<sup>143</sup>
317. CHREAA stated that while the term “carnal knowledge against the order of nature” is outdated and might be obscure to some, courts within the commonwealth jurisdictions have interpreted the term to refer to anal intercourse and that some countries have since replaced the term “against the order of nature” in the Penal Code with terms such as “anal intercourse”. They cited *R v Davis Mpanda*,<sup>144</sup> as a decision where the court accepted the aspect anal penetration when as an element of the offence in section 153 (a) of the Penal Code.
318. CHREAA asserts that while it may be argued that this provision would be said to prohibit anal intercourse between heterosexual couples as well as same-sex couples, it is unlikely that the state can show that prosecution of consensual anal intercourse is not selectively enforced against same sex-sex couples. They cite *Nadan & McCoskar v The State*<sup>145</sup> where the High Court of Fiji in considering a similar provision to section 153 of the Penal Code said:

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<sup>143</sup> Global Commission on HIV and the Law (2012) HIV and the Law: Risks, Rights and Health, 44

<sup>144</sup> Criminal Appeal Case No. 333 of 2010

<sup>145</sup> High Court of Fiji [2005] FJHC 500

‘The technical description of the law may read as equal. The application of the law is not. State’s counsel was unable to provide me with statistics to demonstrate that a prosecution had been brought against a heterosexual couple for consensual private acts against the order of nature. I accept the Human Rights Commission’s submission that while section 175 offences are not exclusively anti-homosexual they are selectively enforced primarily against homosexuals.’

319. They also cited the Botswanan Court of Appeal case of *Attorney General v Rammoge and others*<sup>146</sup> as stating:

‘This refers to the fact that ss167 and 167 of the Penal Code while being gender-neutral themselves, do have the practical effect of limiting sexual activity, even in private, between consenting same-sex partners. It is not, however, and never has been, a crime in Botswana to be gay.’

320. Reference was also made to the Hong Kong case of *Leung v Secretary for Justice*,<sup>147</sup> for the same proposition that although such penal provisions appear gender-neutral, they were in effect discriminatory because of the negative effects they have on gay men. The South African case of *City of Pretoria v Walker*,<sup>148</sup> is also cited for the principle that indirect discrimination occurs when conduct that may appear neutral and non-discriminatory may nonetheless result in discrimination.

321. It was stated that section 153 (c) which makes it an offence for any person to permit a man to have carnal knowledge of him or her against the order of nature makes “consent” an element of the crime. CHREAA submits that this means that where a person did not consent to someone having carnal knowledge of him, as was the case, CHREAA adds, in the matters before this court, the victim of the act should not be convicted of a crime. They state that essentially section 153 (a) and (c) includes within its ambit anal intercourse between two adults of a consensual nature and anal intercourse between two adults of a non-consensual nature. It was argued that it is this lack of differentiation which makes the section discriminatory. CHREAA asserted that while the section does not completely curtail the sexual expression of heterosexual couples, it does that in the case of two men who are in a consensual relationship. Further, CHREAA argued that the selective enforcement of section 153 in cases of consensual anal intercourse between same-sex couples as opposed to heterosexual couples adds to the discriminatory nature and effect of the section. It was said that the offence has become a justification for a whole range of

<sup>146</sup> [2017] 1 BLR 494 (CA) at 515

<sup>147</sup> [2006] 4 HKLRD 211 (CA)

<sup>148</sup> 1998 (2) SA 363

discriminatory acts perpetrated against sexual minorities irrespective of whether they engage in the acts prohibited by the offence and that this discriminatory effect deters male victims of non-consensual anal penetration from reporting such crimes.

322. Reports on discrimination against LGBTQ+ individuals in Malawi, similar international studies, and opinions from the Inter-American Commission on Human Rights and the Supreme Court of India were referenced.
323. Turning to section 156, which deals with gross indecency between male persons, CHREAA contended that its discriminatory application regardless of age, consent, or location is unjust and referred to similar cases in Fiji and Malawi. CHREAA emphasized that sections 153(a) and (c), 154, and 156 of the Penal Code violate constitutional provisions and international human rights standards, contributing to discrimination, stigma, and violence against LGBTQ+ individuals. The cases, reports, and sections referred to, underscore the argument against the constitutionality of these provisions.
324. CHREAA presented the argument that various national and regional courts, as well as human rights bodies, have recognised sexual orientation as a prohibited ground of discrimination. They cited instances where courts found it analogous to other prohibited grounds or interpreted the ground prohibiting discrimination based on sex to include sexual orientation. CHREAA emphasised that the Malawi courts have previously extended the prohibited grounds of discrimination, referring to the case of *Banda v Lekha*<sup>149</sup> where the Industrial Relations Court included HIV status as a prohibited ground, implicitly covered under the general anti-discrimination provision in section 20(1) of the Constitution. Referring to international perspectives, CHREAA quoted General Comment No 18 from the United Nations Human Rights Committee and the United Nations Committee on Economic Social and Cultural Rights, stressing the flexible approach needed to capture forms of differential treatment comparable to expressly recognised grounds, including sexual orientation.
325. CHREAA contended that the differentiation in sections 153(a) and (c), 154 and 156 of the Penal Code based on sexual orientation arbitrarily discriminates between individuals. They referenced legal principles from the United Nations Human Rights Committee, the African Commission on Human and Peoples'

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<sup>149</sup>IRC 277 of 2004

Rights, the South African Constitutional Court, and cases such as *Hoffmann v South African Airways*<sup>150</sup> and *Legal Resources Foundation v Zambia*<sup>151</sup> to buttress their point.

326. CHREAA argued that sexual orientation should be considered a prohibited ground of discrimination either explicitly or by reading it into the ground of “sex” emphasising the core principle of equality and non-discrimination based on the inherent dignity and personal autonomy of all individuals.

### C. The Inviolability of the Dignity of Persons

327. CHREAA argued that sections 153(a) and (c), 154, and 156 of the Penal Code violate section 19(1) of the Constitution which entrenches the inviolability of the dignity of all persons. They highlighted section 12(iv) of the Constitution and Article 5 of the African Charter on Human and Peoples’ Rights as asserting that inherent dignity and worth demand recognition and protection of fundamental human rights. According to CHREAA, sections 153(a) and (c), 154, and 156 of the Penal Code, by prohibiting all forms of anal intercourse between men without distinguishing whether the acts are consensual or not infringe upon the inherent right to dignity. CHREAA argues that criminalisation of consensual acts not only degrades individuals but perpetuates daily degradations, stigma, and vulnerability, violating the constitutional protection of human dignity as shown in the South African Constitutional Court’s decision of *Dawood v Minister of Home Affairs*.<sup>152</sup> They contended that such criminalisation fosters insecurity and integrates stigma into the lives of LGBTQI persons.

328. CHREAA argued that sections 153(a) and (c) 154, and 156 of the Penal Code, criminalizing sexual acts between consenting adults, violate section 44 (1) of the Constitution. They emphasised that any limitations on constitutional rights must be reasonable, recognized by international human rights standards, and necessary in an open and democratic society. According to CHREAA, the criminalisation negatively affects the criminal justice system’s credibility, leading to a range of human rights infringements. They stressed the importance of equality before the law for a tolerant society, asserting that a law

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<sup>150</sup> [2000] ZACC 17

<sup>151</sup> (2001) AHRLR 84 (ACHPR).

<sup>152</sup> 2000 (3) SA 936 (CC).

criminalising consensual same-sex intercourse justifies discrimination based on sexual orientation, contradicting the principles of equal protection before the law.

329. CHREAA referred to the Wolfenden Committee's findings that private morality should not be regulated by criminal law unless shown to be contrary to the public good. They argued that criminal law should deter and prevent harm to society and that where it lacks distinction between consensual and non-consensual acts, it oversteps its boundaries. CHREAA highlighted the detrimental impact of sections 153(a) and (c), 154, and 156 on individuals, families and public health. They pointed to the negative consequences in detention facilities contributing to HIV transmission and fostering abuse and discrimination.

#### **D. Reclassification of Non-Consensual Anal Penetration as Rape**

330. CHREAA argued for the reclassification of non-consensual anal penetration, currently covered by sections 153(a) and (c) of the Penal Code to fall under the offence of rape. They emphasised the severity of non-consensual anal intercourse, comparable to rape, and the lack of adequate legal protections for male victims. Referring to legal reforms in various jurisdictions, CHREAA highlighted the expansion of the definition of rape to include acts beyond vaginal penetration. In the United Kingdom, for instance, legislation acknowledged male victims of rape and broadened the definition to cover anal intercourse without consent and made it punishable by life imprisonment. They also cited international cases like *Prosecutor v Jean-Paul Akayesu*,<sup>153</sup> where the definition of rape was seen as encompassing aggression in a sexual manner under coercion.
331. The submission referenced the Constitutional Court of South Africa's consideration in the *Masiya* case<sup>154</sup> where Chief Justice Langa argued for a gender-neutral definition of rape that includes anal penetration of men. He stated that such recognition would align with constitutional values of dignity,

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<sup>153</sup> ICTR-96-4-T (2 September 1998)

<sup>154</sup> The refusal of the majority in *Masiya* to extend the definition of rape to men who had been raped, was criticised by Nomthandazo Ntlama "Masiya: gender equality and the role of the common law" *Malawi Law Journal* 2009 vol 3 No 1.

- equality, and freedom, ensuring equal protection for male victims of rape, especially those vulnerable due to age, incarceration, or sexual orientation.
332. CHREAA asserted that while sections 153(a) and (c), 154 and 156 of the Penal Code, which criminalise consensual acts between men, are unconstitutional, a complete invalidation would create a legal void. They proposed interpreting these sections to incorporate “lack of consent” as an element of unlawfulness, aligning with the essence of criminal behaviour related to sexual offenses.
333. Referring to a recent South African Constitutional Court *Teddy Bear Clinic* case<sup>155</sup> CHREAA recommended a remedy involving notional or actual severance, or reading in, to bring the law in line with constitutional standards. If the court deems these sections unconstitutional concerning consensual acts, CHREAA suggested retrospective invalidity dating back to the 2005 Constitution enactment, enabling individuals convicted in cases involving consent to appeal their convictions.
334. It is CHREAA’s submission that Justice Anand Venkatesh from the High Court of India recently noted the growing strength of the LGBTQIA+ community’s voice, urging society not to interfere with their choices related to sexual orientation and identity. Meanwhile, the Botswana Court of Appeal acknowledged that the Constitution protects the rights of every individual, emphasising the importance of respecting diversity within a democratic society, including the rights of the gay, lesbian, and transgender community, who are entitled to constitutional protection for their dignity.

## XVIII. J.M AMICUS

335. The *amicus curiae*, J.M, expressed that his interest in this matter lies in his belonging to the LGBTQI community, and that he specifically identifies himself as gay. He conveyed that the court is being asked to assess the constitutionality of sections 153(a), 154, and 156 of the Penal Code, which directly pertain to issues impacting the sexual practices of individuals, including himself. Stressing that the court’s decision will have an impact on

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<sup>155</sup> The section of the Criminal law (Sexual Offences) Amendment Act which applied to consensual sex with children, irrespective of whether the other party is an adult or a child, was declared unconstitutional only to the extent that it imposed criminal liability on children under the age of 16. The declaration of invalidity was suspended for a specific period to allow parliament to amend the law, whilst a moratorium was placed on arrests of children in terms of the section from the date of judgment pending parliament’s correction.

him, he asserted that it is crucial for him to be heard before any determination is reached, citing it as both in his interest and in the interests of justice.

336. It is JM's assertion that the following issues were identified for determination by the Court: firstly, the constitutionality of section 153(a) of the Penal Code; secondly, the constitutional status of section 154 of the Penal Code; and thirdly, the constitutionality of section 156 of the Penal Code.
337. JM argues that sections 153(a) and 154 of the Penal Code that criminalise carnal knowledge against the order of nature for "all persons" are not discriminatory as they apply uniformly. However, JM asserts that the gender-neutral language disguises the laws' intent to target homosexual acts thus leading to indirect discrimination. JM contended that similar gender-neutral laws in Belize, Botswana, and India were found to disproportionately impact homosexual individuals and thus violating principles of equality. He submits that courts in Fiji and Belize invalidated such similar provisions despite their neutral wording based on the discriminatory impact on homosexual relationships and their unequal treatment.
338. JM cited the *Orozco* case<sup>156</sup> of Belize that deemed a gender-neutral law unconstitutional emphasizing its disproportionate impact on the dignity of homosexual men. In the *Navtej Singh Johar* case in India, a statute applicable to all genders was found discriminatory criminalising specific identities within the LGBT community. JM asserts that the evidence suggests disproportionate and discriminatory application of sections 153 and 154 in Malawi against homosexuals. He states that the lack of evidence of prosecutions against heterosexual individuals raises concerns about equal protection. He states that noteworthy cases like that of *Steven Monjeza and Tiwonge Chimalanga*,<sup>157</sup> highlight the discriminatory impact on consensual same-sex sexual activities. It is JM's reasoning that section 4 of the Constitution emphasises equal protection for all Malawians. The application of sections 153(c), 154, and 156 of the Penal Code is argued to target the LGBT community and denying them basic rights and violating the universality of the law as enshrined in international declarations of human rights.
339. In the sworn statement filed with the court, J.M highlighted the pervasive human rights violations faced by the LGBTQI community in Malawi. He

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<sup>156</sup> *Caleb Orozco v Attorney General of Belize*, Claim No. 668 of 2010

<sup>157</sup> Criminal Case Number 359 of 2009

detailed instances of routine violence, arbitrary arrests, and physical assaults by the police, often without legal justification. J.M stated that he personally experienced threats to his life, avoiding certain places out of fear, and recounted a demeaning encounter at Queen Elizabeth Hospital which led him to avoid seeking medical treatment to protect his health. The states that the challenges faced by the LGBTQI community, as documented by the claimants, CEDEP, and Human Rights Watch, underscore the discrimination and abuse they endure, hindering their access to basic rights, such as the ability to seek police services without facing violence and mistreatment.

340. JM argues that section 153 of the Penal Code which terms certain acts as “unnatural offences” without providing a clear definition of the same lacks precision and therefore renders the section unconstitutional. The contention is based on the violation of other constitutional rights, such as the right to privacy, and the section's imprecise nature, which fails to justify any reasonable limitation on constitutional rights. Additionally, he raises the question whether morality and religion can be invoked to restrict human rights, particularly in relation to sections 153(a), 154 and 156 of the Penal Code, which criminalise certain sexual behaviours as contrary to the order of nature.
341. JM reasons that while the DPP and church-based amici curiae assert that morality and religion can serve as a basis for limiting constitutional rights, other legal commentators caution against equating crime with sin and thus justifying the enforcement of religious morality through the legal system. He states that courts in other jurisdictions, such as the Supreme Court of India, have struck down statutes criminalising “unnatural offenses” on constitutional grounds and emphasised the principles of dignity, privacy and constitutional morality over societal morality. He asserts that the protection of rights is deemed crucial even if the views of discrete minorities diverge from the majority since constitutional morality takes precedence. Furthermore, he argues that, the disapproval of homosexuality based on religious views is misguided, considering that Malawi guarantees the right to freedom of conscience, religion, belief, and thought. He asserts that the criminalisation of consensual same-sex conduct is seen as imposing specific religious morals on individuals who may not adhere to those beliefs. He urges that making findings about the morality and cultural beliefs of Malawians should be based on reliable factual material rather than speculative submissions.

342. In addressing access to justice, it is highlighted by JM that section 41 of the Constitution guarantees the right to recognition as a person before the law, access to any court or tribunal for the settlement of legal issues and the right to an effective remedy for acts violating constitutional rights. However, he argues, that the existence of sections 153, 154 and 156 of the Penal Code operates as a threat by hindering LGBTQI individuals from approaching law enforcement when they are victims of criminal acts, especially those of an intimate or sexual nature. This fear, he states, stems from the potential exposure to charges under the aforementioned Penal Code sections leading to a violation of their right to access justice.
343. In conclusion, JM maintains that laws such as sections 153, 154 and 156 of the Penal Code, which effectively criminalise consensual same-sex conduct, are deemed inconsistent with the rights to privacy, equality, dignity, liberty and access to justice, as submitted by the claimants.
344. He clarifies that the objective is not the complete striking-out of the provisions but rather a declaration of their inconsistency with the Constitution, specifically regarding the criminalisation of consensual sexual conduct between adults in private, irrespective of the individuals' genders.

## **XIX. THE REGISTERED TRUSTEES OF CENTRE FOR THE DEVELOPMENT OF PEOPLE(CEDEP), THE REGISTERED TRUSTEES OF CENTRE FOR HUMAN RIGHTS AND REHABILITATION (“CHRR”) AND THE REGISTERED TRUSTEES OF NETWORK OF RELIGIOUS LEADERS LIVING WITH OR PERSONALLY AFFECTED BY HIV AND AIDS (MANERELA+)**

### **A. Introduction**

345. In a joint submission to the court, the Registered Trustees of Centre for the Development of People (CEDEP), Human Rights and Rehabilitation, (“CHRR”) and Network of Religious Leaders Living with or Personally Affected by HIV and AIDS (MANERELA+) collectively argued against the constitutionality of Malawi’s anti-homosexuality provisions. They contended that these provisions which criminalise consensual same-sex sexual activity between adults in private violate several constitutional rights including the

rights to personal liberty, dignity, non-discrimination and personal privacy. These *amici curiae* highlighted the importance of constitutional principles and international law and urged the court to interpret the provisions in a manner that upholds rights while addressing concerns about non-consensual sexual activity and sexual activity involving minors.

346. Furthermore, the *amici curiae* clarified that their submission does not advocate for the decriminalisation of non-consensual sex, sexual activity involving minors, public indecency or bestiality. They argued that the court could interpret the anti-homosexuality provisions to protect against the above-listed activities while safeguarding constitutional rights regarding consensual same-sex sexual activity in private between adults. Additionally, they acknowledged the role of the National Assembly that it could address the issue through repealing or amending the provisions for conformity with the Constitution. They, however, at the same time underscored the court's constitutional duty to protect human rights and strike down any parliamentary Act that violates these rights.
347. Ultimately, the *amici curiae* urged the court to declare the anti-homosexuality provisions unconstitutional and invalid to the extent that they criminalise consensual sexual conduct in private between adults irrespective of the sex or sexual orientation of those involved. They emphasised the need for the court to uphold constitutional rights while ensuring that the law aligns with principles of equality and personal freedom.

## B. Judicial mandate

348. The *amici curiae* mention the importance of understanding the boundaries of judicial power concerning the separation of powers. They assert that their request for the court to review the constitutionality of the anti-homosexuality provisions does not imply an overreach into legislative functions. Instead, they argue that the court's core duty lies in upholding the supremacy of the Constitution and its principles of international law. The amici highlight specific constitutional sections that mandate the judiciary to interpret and enforce the Constitution and declaring any governmental acts or laws inconsistent with it invalid. They stress the court's responsibility to ensure the protection of constitutional rights and freedoms, as well as its authority to review laws for conformity with the Constitution. They argue that in fulfilling this duty, the

court must find the anti-homosexuality provisions of the Penal Code unconstitutional to the extent of their inconsistency with the Constitution.

### C. Historical context

349. The *amici curiae* stated that the historical context of Malawi's anti-homosexuality provisions is crucial to understanding their origins and evolution. They state that these were initially introduced in 1930 and that these provisions reflected medieval British Christian attitudes towards sexuality. They state that, as a British Protectorate, Malawi inherited British common law and statutes, including laws criminalising same-sex sexual conduct. They state that the anti-homosexuality provisions, rooted in colonial-era legislation, mirrored similar laws found in other British colonies across Africa.
350. The *amici curiae* argue that following Malawi's independence in 1964, these laws persisted, remaining unchanged despite shifts in societal attitudes towards homosexuality. They note legislative developments in England and Wales in 1967 which decriminalised consensual same-sex sexual conduct between adults, that it did not influence Malawi's legal stance on the matter. They state that despite calls for reform, including a review initiated by the Executive in 2011 and subsequent findings by the Law Commission in 2012, which concluded that the anti-homosexuality provisions violated constitutional rights to privacy, equal treatment, non-discrimination, and dignity, no substantive legislative changes have been enacted.

### D. Principles of interpretation

351. The *amici* point to the Supreme Court of Appeal's stance on constitutional interpretation which favoured a broad and generous approach over a strict, legalistic one. The *amici curiae* observe that this interpretation entails considering all relevant provisions of the Constitution to effectuate its overarching purpose and ensuring coherence and harmony within the constitutional framework. The *amici curiae* draw attention to judicial pronouncements affirming the importance of understanding the Constitution as a cohesive whole, guided by fundamental principles and human rights values, as well as the incorporation of international norms where applicable.

352. Citing precedents such as the *Gwanda Chakuamba* case<sup>158</sup> and *Re Section 65 of the Constitution*,<sup>159</sup> the *amici curiae* stress the necessity of interpreting the Constitution broadly and purposively to fulfill the intentions of its framers. They underscore the court's duty to develop interpretative principles that align with the fundamental character of the Constitution as the supreme law of the land and promote the values of an open and democratic society.

353. The *amici curiae* stress Malawi's obligation to adhere to international treaty obligations and the jurisprudence of international bodies when interpreting constitutional rights. They cite specific constitutional provisions, such as, section 211, which enshrine the binding nature of international law and jurisprudence within Malawi's legal framework. Notably, they highlight the relevance of the International Covenant on Civil and Political Rights (ICCPR), the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the African Charter on Human and Peoples' Rights (ACHPR), to which Malawi is a party.

354. In advocating for the invalidation of the anti-homosexuality provisions, the *amici curiae* refer to landmark cases where international law and foreign jurisprudence have influenced domestic legal decisions. The cited notable examples include the Belizean case of *Orozco v Attorney General of Belize*,<sup>160</sup> the South African case of *National Coalition Case*,<sup>161</sup> and the Indian case of *Navtej Singh Johar v Union of India*.<sup>162</sup> They state these cases demonstrate the significance of considering international human rights norms and comparative foreign case law in constitutional interpretation.

## E. Right to personal liberty

355. The *amici curiae* have drawn the court's attention to cases from diverse jurisdictions, including South Africa, Kenya, Fiji, and Antigua and Barbuda, where courts have referenced international treaties and foreign jurisprudence to advance human rights and combat discrimination. The *amici curiae* argue that the anti-homosexuality provisions, insofar as they criminalise private sexual acts between consenting adults violate section 18 of the Constitution which

<sup>158</sup> MSCA Civil Appeal Number 20 of 2000, per The Honourable Chief Justice Richard Banda, SC at pp. 5-6.

<sup>159</sup> *Re Section 65 of The Constitution (15 of 2005)* [2006] MWHC 139 (6 November 2006).

<sup>160</sup> *Orozco v Attorney General of Belize*, Belize Supreme Court, Claim No 668 of 2010, 10 August 2016, ¶¶ 58-59

<sup>161</sup> 1999 (1) SA 6.

<sup>162</sup> AIR 2018 SC 4321 ("Johar"), ¶ 3 per Misra CJI

guarantees the right to personal liberty. They draw parallels to international case law, notably citing *Letsweletse Motshidiemang HC*<sup>163</sup> of Botswana, where the High Court deemed such criminalisation to infringe upon individuals' inherent right to sexual autonomy and freedom from undue interference in their private lives. Similarly, they reference *Lawrence v Texas*,<sup>164</sup> a pivotal case in the United States, where Justice Kennedy emphasised the importance of liberty as extending to personal relationships and intimate conduct and affirming the right of individuals, including homosexual persons, to engage in consensual sexual relationships without fear of criminalisation.

#### F. Human Dignity and personal freedoms

356. The *amici curiae* contend that the anti-homosexuality provisions, in their restriction of private sexual acts among consenting adults, contravene section 19(1) of the Constitution, which upholds the inviolable dignity of all individuals. They assert that the Constitution not only recognises human dignity as a fundamental right but also as a guiding value that underpins all other rights enshrined within it, echoing the approach taken by the Constitutional Court of South Africa in *Dawood v Minister of Home Affairs*.<sup>165</sup> They observe that in *Dawood*, the court stressed the overarching importance of human dignity in interpreting various rights, such as equality and protection from cruel, inhuman, or degrading treatment and illustrated how breaches of specific rights often implicate violations of human dignity.
357. The *amici curiae* further state that the importance of human dignity is underscored in various international human rights instruments, including the African Charter on Human and Peoples' Rights and the Universal Declaration of Human Rights and that it serves as the foundation for other fundamental rights, such as privacy, non-discrimination, and liberty. They submit that court judgments, such as those in *National Coalition Case*<sup>166</sup> and *Lawrence v Texas*,<sup>167</sup> have highlighted how anti-homosexuality laws infringe upon human dignity by subjecting individuals to stigma, discrimination, and vulnerability.

<sup>163</sup> [2019] 4 LRC 507 ("Motshidiemang HC"). In this case, the High Court found that the criminalization of consensual same-sex conduct under the Botswanan Penal Code was unconstitutional. The Botswanan Penal Code, introduced in 1964 (i.e., pre-independence), was based in part on Malawi's colonial Penal Code.

<sup>164</sup> 539 US 558 (2003).

<sup>165</sup> [2000] 5 Law Reports of the Commonwealth 147, 2000 (3) SA 936 (CC), at [35].

<sup>166</sup> Supra note

<sup>167</sup> Supra note

They point to a Botswana Court of Appeal, in *Attorney General v Rammoge and others*,<sup>168</sup> and also the Supreme Court of the United States, in *Lawrence v Texas*,<sup>169</sup> as acknowledging the demeaning effects of criminalising consensual same-sex conduct.

358. Moreover, the *amici curiae* stated that international and domestic courts have recognised the inherent and intimate nature of an individual's sexuality, affirming its importance in defining identity and autonomy. It is observed that cases like *McCoskar v State*<sup>170</sup> and *Perry v Schwarzenegger*<sup>171</sup> emphasised the deeply personal characteristic of sexual orientation, which is either innate or fundamental to human dignity. It is stated that the African Commission on Human and Peoples' Rights in *Purohit and Another v The Gambia*,<sup>172</sup> reiterated the obligation to respect human dignity without discrimination.
359. The *amici curiae* argue that legislation criminalising consensual same-sex conduct in private has been found to perpetuate stigma, discrimination, and violence against the LGBTQ+ community and that courts have ruled that such laws undermine personal autonomy, impose daily indignities, and violate the right to dignity. It is said that the European Court of Human Rights in *Aghdgomelashvili and Japaridze v Georgia*<sup>173</sup> recognised that discriminatory treatment against LGBTQ+ individuals constitute degrading treatment, violating their human dignity. Additionally, the *amici curiae* state that laws targeting specific groups based on sexual orientation are deemed contrary to human dignity, as seen in *East African Asians v United Kingdom*<sup>174</sup> where immigration controls subjected individuals to degrading treatment based on their origin.
360. The *amici curiae* are of the view point that laws criminalising consensual same-sex conduct infringe upon the right to human dignity, as affirmed by various international and domestic court and that these laws perpetuate stigma, discrimination, and vulnerability, undermining the autonomy and identity of LGBTQ+ individuals. Therefore, the Amici argue that the anti-homosexuality

<sup>168</sup> [2017] 1 BLR 494 (CA).

<sup>169</sup> Supra note

<sup>170</sup> [2005] FJHC 500.

<sup>171</sup> 704 F.Supp.2d 921, [46].

<sup>172</sup> [2003] AHRLR 96 (ACIIPR), 15-29 May 2003, ¶ 57.

<sup>173</sup> [2020] ECHR 7224/11

<sup>174</sup> (1981) 3 EHRR 76, in particular ¶¶ 203-209

provisions violate the right to dignity enshrined in section 19(1) of the Constitution.

#### G. Right to Equality

361. The *amici curiae* submit that section 20 (1) of the Constitution explicitly prohibits discrimination in any form on grounds including sex and other status. They state that the principle of non-discrimination, along with equality and dignity, is fundamental to the protection of human rights, as emphasized by the Malawi Human Rights Commission and affirmed in international jurisprudence. They state that courts, such as the High Court of Trinidad and Tobago in *Sanatan Dharma Maha Sabha*, recognise that equality, fairness, and non-discrimination are essential for achieving true democracy and protecting individual rights.
362. The *amici curiae* argue that the impugned provisions contravene section 20 (1) of the Constitution by criminalising consensual sexual acts between adults in private on the basis of sexual orientation. They contend that discrimination based on sexual orientation falls within the scope of “other status” as interpreted in binding international law. Additionally, past decisions in Malawi have acknowledged the inclusion of non-enumerated grounds within the prohibition of discrimination, such as discrimination based on HIV status, further supporting the Amici's interpretation.
363. The *amici curiae* highlight international and comparative jurisprudence to bolster their argument. They point to cases like *Toonen*,<sup>175</sup> where the Human Rights Committee concluded that discrimination based on sexual orientation is encompassed within the prohibition of discrimination on the grounds of sex under the ICCPR. Similarly, the *amici curiae* submit, that regional human rights bodies, including the African Commission on Human and Peoples' Rights and the ECtHR, have recognised sexual orientation as a protected characteristic from discrimination.
364. The *amici curiae* state that courts in various jurisdictions, such as Kenya, Botswana, and India, have interpreted non-discrimination provisions in their constitutions to include protection against discrimination based on sexual orientation. They contend that penalising individuals for their sexual

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<sup>175</sup> No.488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994) (“Toonen”)

orientation undermines their dignity and equality and perpetuates discrimination.

## H. Right to Privacy

365. The *amici curiae* submit that section 21 of the Constitution that guarantees the right to personal privacy, encompasses various dimensions such as informational privacy, the privacy of space and life and the liberty to be left alone. They also state that the right to privacy is also protected under international human rights instruments like the ICCPR, which prohibits arbitrary interference with privacy. They submit that international jurisprudence consistently affirms that criminalising consensual sexual activity between adults in private violates the right to privacy as evidenced in cases like *Toonen v Australia*.<sup>176</sup>
366. They assert that Malawi's constitutional framework, including the four-way test for limitations on rights, necessitates stringent justification for restrictions, which the impugned provisions fail to meet. Drawing on international jurisprudence, they reject public morality as a valid basis for such restrictions, advocating instead for adherence to enduring constitutional values and human rights obligations. Emphasising the state's duty to uphold the dignity and rights of all individuals irrespective of sexual orientation, they argue that the provisions in question run counter to the core principles of the Constitution and should be reconsidered in light of constitutional morality and human rights standards.
367. The *amici curiae* argue that the impugned provisions of the Penal Code violate several constitutional rights, including personal liberty, dignity, non-discrimination, privacy and health, as well as international law obligations that are binding on Malawi. They propose a targeted remedy, suggesting that sections 137A, 153, 154, and 156 of the Penal Code be declared inconsistent with the Constitution insofar as they criminalise consensual sexual conduct between adults in private, regardless of the individuals' sexes. Additionally, they request the court to interpret certain sections to exclude consensual private conduct and to strike out section 153 (c) entirely while acknowledging the need to retain provisions concerning non-consensual same-sex sexual conduct.

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<sup>176</sup> Supra note

## XX. DETERMINATION

### A. Commentary on the Mode of Commencement

368. We are of the considered view that a commentary on how these cases found themselves before this Court is imperative. We have noted that the *Jam Akster* case was referred to the Chief Justice for certification from the lower court.

369. The starting point is section 9(2) of the Courts Act, that provides as follows:

“Every proceeding in the High Court and all business arising thereout, if it expressly and substantively relates to, or concerns the interpretation or application of the provisions of the Constitution, shall be heard and disposed of by or before not less than three judges.”

370. It is clear to us that the Courts Act refers to the proceedings in the High Court.

There is no reference to a lower court under section 9(2) of the Courts Act.

371. In *Joshua Chisa Mbele v Republic*,<sup>177</sup> the court pronounced that the Courts Act does not confer power on a magistrate court/ lower court to refer a matter for certification to the Chief Justice. The Court also correctly observed that the Court (High Court) (Civil Procedure) Rules, 2017 that provide procedure for constitutional matters, do not apply in the lower court. This only buttresses the point that power of referral, is vested in the High Court. We are persuaded and totally agree with this interpretation by the Court. Unfortunately, there is no law that empowers a lower court to refer a matter for certification. We are of the considered view that the framers of the law were mindful of the fact that interpretation of the Constitution is the ambit of the courts higher than the magistrate courts. We are of the view that had the framers intended that magistrate courts should also have power of referral, definitely, that could have been provided in section 9(2) of the Courts Act or any other written law governing proceedings in the magistrate court/lower court.

372. In our considered view, where a party in the lower is of the view that a matter raises constitutional issues, the party is at liberty to either lodge an application in the High Court for transfer of the matter to the High Court or through an application, invoke the supervisory powers of the High Court pursuant to section 26 of the Courts Act. Where the High Court agrees with the claimant, it will proceed to refer the matter to the Chief Justice for certification. Where the High Court is of the considered view that the matter does not raise any

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<sup>177</sup> Miscellaneous Criminal Case No.04 of 2022 (Unreported)

constitutional issues, the matter will be referred back to the lower court for continuation and disposal of the proceedings. Further, we are of the opinion that where no application is made by any party to the proceedings in the High Court, the lower court may proceed to deal with the issues as presented before it. In this case, the party desirous to subject certain elements of the proceedings to a constitutional test is at liberty to do so at appeal stage in the High Court. This is exactly what happened in the second claimant's case. In this case, the lower court convicted and sentenced the accused person, Jana Gonani. Being dissatisfied with both conviction and sentence, the accused person appealed to the High Court. In the High Court, on appeal, the accused person lodged an application that the matter be referred for certification to the Chief Justice as it raised some constitutional issues. In agreement with the accused person/appellant, the High Court referred the matter to the Chief Justice for certification. The Chief Justice duly certified the proceedings as constitutional.

373. In conclusion on this matter, based on the foregoing, we reiterate that a lower court has no power to refer a matter for certification as constitutional. That power of referral solely vests in the High Court. As for the certification in *Jan Akster* case, we are of the view that no party to these proceedings has been prejudiced in one way or the other. We therefore, in the best interest of justice, hold that the same should proceed in this Court as a constitutional matter following certification by the Chief Justice.

**B. On whether the claimants should have complied with the Civil Procedure (Suits by or against Government or Public Officers) Act**

374. The Honourable Attorney General argued that the claimants case is incompetent as they did not comply with section 4 of the Civil Procedure Act. It is our view that the procedure cited applies where it is the claimant who instigates action against the Government whether for the purposes of challenging a law or not. It does not apply where the legal action is instigated by the Government itself.

375. In the present case the proceedings herein were, technically instigated by the Government. It is the Government which arrested the claimants herein. They are before the Court at the instance of the Government. All they are doing is to raise issues which can help their case.

376. The Honourable Attorney General has also raised the issue of the DPP being a party. Again, it is the DPP who brought the matter to Court. The DPP is a party

because he is the party in the substantive case in the Magistrate Court and in this Court on appeal. The claimants have not dragged the DPP to Court. The Attorney General is a party by operation of the law. So the Honourable Attorney General's objection on this point is without merit.

#### C. *Locus Standi*

377. As alluded to above, the defendants (Attorney General, DPP and some *amicus curiae*) have raised issues with regard to *locus standi* of the Claimants. To that effect, they cited a litany of cases where Courts (Supreme Court and the High Court) have pronounced on *locus standi*. We agree with the parties that section 15(2) of the Republican Constitution provides for a threshold to be complied with by any person or group of persons, natural or legal, involved in the promotion, protection and enforcement of rights. The Constitution provides that all these persons must have sufficient interest or *locus standi* for them to have effective remedy from the Courts. We are aware that the issue of *locus standi* or sufficient interest is a jurisdictional issue as enunciated in *Attorney General v Malawi Congress Party and Others*.<sup>178</sup> In this case, the Court emphasized that any person cannot maintain a suit or action unless he has an interest in the subject of it. The issue of *locus standi* was also ably dealt with in the case of *President of Malawi and another v Kachere and others*<sup>179</sup> and *Chaponda and another, ex parte Kajoloweka and others*,<sup>180</sup> where the court pronounced that to have sufficient interest or standing, a party needs to satisfy the court that the conduct of the defendant adversely affected his or her legal right over and above others.

378. The Attorney General has submitted that the Claimants have no *locus standi* or sufficient interest in this matter as their case is premised on the fact that they engaged in sex against the order of nature with consenting male adults. The Attorney General submitted that the onus was on the claimants to prove that they had consent for them to establish *locus standi* or sufficient interest. The Attorney General submitted that there is no evidence of consensual sexual activities.

379. We have gone through the submissions by the Attorney General, DPP and *amici curiae* several times to fully understand their position. We are grateful to all

<sup>178</sup> [1977] 2 MLR 181 (SCA), 211

<sup>179</sup> [1995] 2 MLR 616

<sup>180</sup> MSCA Civil Appeal No. 5 of 2017

parties and *amici curiae* for their industrious research on this point. Having perused through all submissions, we have come to the conclusion that the issue of evidence is immaterial at this point. We are of the considered view that issues of evidence are to be dealt with by the lower court where the matter originated from, and not this Court. We are not here to admit evidence on whether the claimants committed the offences. That is, in our view, the ambit of the lower court in case of the 1<sup>st</sup> Claimant and, the appellate court in case of the 2<sup>nd</sup> Claimant.

380. Having said that, we are of the view that by virtue of the Claimants being charged under the impugned provisions of the Penal Code, that brings them close to section 15 of the Constitution. We are of the view that as long as they have been arraigned under those provisions, they have sufficient interest to commence the present proceedings. We are mindful of the fact that the 1<sup>st</sup> Claimant indicated in Court that he is not gay. He indicated that he is upright. However, in our interpretation, we are of the view that not only those who admit to be gays are the only ones perceived to have *locus standi* to challenge the impugned provisions. By virtue of being charged under those provisions, one is deemed to have sufficient interest. It is, in our considered view, different from a scenario where one just comes to court to challenge constitutionality of these provisions. In that scenario, definitely, *locus standi* is lacking. Therefore, we are of the view that the assertion by the 1<sup>st</sup> Claimant that he is not gay is immaterial. What is crucial is the fact that he is being charged under those impugned provisions. As pointed out above, the claimants have not brought the Attorney General or the DPP to Court. It is the DPP who has brought the claimants to Court. As a matter of emphasis, the issue of evidence as to whether there was consensual sex is not the ambit of this Court. In conclusion, it is our finding that the claimants have *locus standi*/sufficient interest, and we so hold.

#### **D. The Court's Mandate and principles of interpretation**

381. The Court's mandate is spelt out in section 9 of the Constitution. It is to interpret, protect and enforce "the Constitution and all laws in accordance with the Constitution in an independent and impartial manner with regard only to relevant facts and prescriptions of law".
382. To interpret is to determine the meaning of language i.e. words, phrases or sentences, in order to discover the intent of the user of the language. To interpret the law, statute or the Constitution therefore means to determine the meaning

of the language used in the law, statute or Constitutional provisions. The purpose of interpreting any legal document is to give full effect of what its maker intended. In the case of legislation and Constitution it is to give effect to the intention of Parliament.<sup>181</sup>

#### E. Principles of Interpretation

383. Unfortunately, this task interpretation does not come easy. Words are not always used with clear meanings. Sometimes the usage of words or a combination thereof produces vague or unclear meanings. Sometimes they will produce more than one meaning (ambiguous). It becomes the duty of the Court to decide what the most appropriate meaning is. Where the ordinary meaning of the words produces clear and unambiguous results the task of the court ends there. But where it produces unclear, vague, ambiguous or absurd results then the court goes further to determine the most appropriate meaning in the context.
384. Due to various reasons words may have more than one meaning or may be used to have broader or narrower meanings than ordinarily used. Further words are used in a context or environment. The context or environment, that is to say, general language used in a statute, socio-cultural background and other factors may give a meaning to words that are not ordinary. It is in view of this that sometimes the ordinary and clear meaning of the words may lead to absurd results.
385. In this case we are called upon to interpret provisions of the Penal Code, which is statutory law in the light of constitutional provisions. Which means our task is not restricted to interpreting the penal provisions, but also the Constitutional provisions and determine whether the two are compatible. If they are not, then the Constitution will prevail and the penal provisions will have to be declared unconstitutional and unenforceable.
386. Apart from a few instances the parties herein have generally focussed on the meaning of the Constitution and not on the meaning of the penal provisions. As we will see later the second claimant has faulted section 153(c) of the Penal Code for being unclear in that there is no definition of what an unnatural offence is. Apart from that challenge, it seems that the parties do not have problems with the meaning of the penal provisions themselves. What they submit is that those meanings run contra to the cited provisions of the Constitution. As such,

<sup>181</sup> *Fred Nseula v Attorney General and another* [1999] MLR 313; and *Gwanda Chakuamba and others v The Attorney General and others* [2000-2001] MLR 26 at 36

our task is to determine the meaning of the Constitution vis-a-vis the meaning, or accepted meaning of the challenged provisions.

387. If the determined meaning of the various provisions of the Penal Code be found to be consistent with the determined meaning of the Constitutional Provisions against which they are being tested, then the penal provisions will be allowed to stand, if they are inconsistent then they will have to be declared unconstitutional and invalid as the Constitution is the Supreme law of the land.

388. Although, generally, the principles of statutory interpretation apply equally to interpretation of the Constitution, the Constitution is taken to be a special document which requires special rules of interpretation.<sup>182</sup> It is therefore necessary that at this point we should delve into principles of constitutional interpretation.

389. The starting point is that the words of a statute must be assigned their ordinary meaning in order to discover the intent of its formulators.<sup>183</sup>

390. Unlike general legislation, which focuses on specific issues and restricts its application to specific actions however, the Constitution represents the general aspirations of its people. Indeed, although the Constitution is adopted by an Act of Parliament, its contents are supposed to be representative of the aspirations of the whole people rather than the agenda of the rulers as other legislation mostly is. All other laws of the land derive their legitimacy from the Constitution<sup>184</sup>. That is why any law that is inconsistent with it is invalid to the extent of the inconsistency.

391. Section 11 of the Constitution recognises this special nature of the Constitution as such it provides for the general principles on its interpretation as follows:

- (1) Appropriate principles of interpretation of this Constitution shall be developed and employed by the Courts to reflect the unique character of 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;
  - (b) Take full account of the provisions of Chapter II and Chapter IV; and
  - (c) Where applicable, have regard to norms of public international law and comparable foreign case law.

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<sup>182</sup> *Fred Nseula v Attorney General and another* [1999] MLR 313

<sup>183</sup> *Chakuamba and others v Attorney General and others* [2000-2001] MLR 16

<sup>184</sup> See section 10 of the Constitution

392. The Supreme Court of Appeal in the case of *Fred Nseula v Attorney General and Malawi Congress Party*<sup>185</sup> had this to say:

‘The rules and presumptions which are applicable to the interpretation of other pieces of legislation are not necessarily applicable to the interpretation of a Constitution ... The starting point therefore, is that a Malawi Court must first recognize the character and nature of our Constitution before interpreting any of its provisions. The purpose of interpreting any legal document is to give full effect to what Parliament intended, and you cannot give full effect to that intention unless you first appreciate the character and nature of the document you are interpreting.’

393. It was observed in the *Nseula* case<sup>186</sup> that Constitutions are drafted in broad and general terms which lay down broad principles calling for a generous interpretation and avoiding strict legalistic interpretation. The Court went further to guide that the language of a Constitution must not be construed in narrow legalistic and pedantic way but broadly and purposively. The interpretation should be aimed at fulfilling the intention of Parliament. The Court went further to state as follows:

“It is an elementary rule of Constitutional interpretation that one provision of the Constitution cannot be isolated from all others. All provisions bearing upon a particular subject must be brought to bear and be so interpreted as to effectuate the greater purpose of the Constitution”.

394. A Constitution is a single document and every part of it must be considered as far as it is relevant in order to get the true meaning and intent. The entire constitution must be read as a whole without “one provision destroying the other.”<sup>187</sup>

395. When interpreting constitutional provisions one must always remember that the Constitution is a unique document and the interpretation must reflect that uniqueness.<sup>188</sup> Indeed, that is what is required under section 11.

396. However, the Constitution allows this Court, where applicable, to have recourse not only to international law but also to comparable foreign case law<sup>189</sup>. This simply means that while keeping in mind the unique context of our Constitution, the Court should also look at what other judicial minds have decided on similar provisions. It also means that while the language of a

<sup>185</sup> [1999] MLR 313 at 323

<sup>186</sup> at 324

<sup>187</sup> *Chakuamba and others v Attorney General and others* [2000-2001] MLR 26 at 37 (MSCA).

<sup>188</sup> *The Trustees of Malawi Against Physical Disabilities v DPP and the Office of the Ombudsman* [2000-2001]

MLR 391 at 396

<sup>189</sup> Section 11(2)(c)

401. At this point we refer to the wise words of the Kenyan High Court which stated as follows:

"The Court, as an independent arbiter of disputes, has fidelity to the Constitution and must be guided by the letter and spirit of the Constitution. Similarly, in interpreting a statute, the Court should give life to the intention of the lawmaker instead of stifling it."<sup>192</sup>

402. From all this discussion we think the following are the principles to be used when interpreting the Constitution:

- a. The aim of the interpretation is to find and implement the intention of the framers of the Constitution.
- b. The intention of the framers shall be found in the clear meaning of the words or language used in the Constitution itself.
- c. The language of the Constitution should be given a broad interpretation.
- d. The Constitution must be read as a whole. All provisions bearing on a subject matter must be considered before coming to a decision.
- e. Although we can have regard to the current norms of international law and comparable foreign case law, we must recognise that the Malawi Constitution is of a unique character requiring its own unique interpretation. However, where the language of the Constitution is different from or inconsistent with international law, the language of the Constitution prevails, being the supreme law of the land.

403. We need to take note that, since it is the statutes which are being challenged, we will also have to interpret the provisions that are being challenged vis-à-vis the Constitutional provisions. The interpretation of the provisions of the statute shall follow normal rules of interpretation unless the meaning derived from such interpretation will lead to absurd results.

#### **F. Burden and Standard of Proof**

404. Legal challenges affecting the Constitutionality of legislation and/or government actions are civil in nature. Therefore, the standard of proof is on a balance of probabilities.

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<sup>192</sup> *EG and 7 others v Attorney General; DKM and others (Interested parties) Katiba Institute & another (Amicus Curiae) petition no. 150/16*

405. In deciding on the constitutional validity of laws, the Supreme Court of Appeal in the case of *Attorney General v Malawi Congress party and others*<sup>193</sup> adopted the following principles among others:

- a. That a law may be constitutional even though it relates to a single individual or institution on account of some special circumstances or reasons applicable to him only;
- b. That there is always a presumption in favour of the constitutionality of the enactment;
- c. That it must be presumed that the legislature understands and correctly appreciates the needs of its own people and that its discriminations are based on adequate grounds;

406. This casts the burden of showing the unconstitutionality of a law on the person challenging it. He or she has to show, on a balance of probabilities, that the challenged provisions offend the relevant constitutional provisions. The claimant's duty therefore is to show evidence or demonstrate an interpretation that, on a balance of probabilities, establishes that the challenged provision offends the Constitution.

407. Once the claimant successfully establishes a *prima facie* case that a law infringes on his or her rights under chapter IV of the Constitution, the burden then shifts to the State, mostly the Attorney General, to show that although there is an infringement of the claimant's chapter four rights, the same passes the requirements for limitation under section 44 of the same Constitution. Of course the Attorney General or any other party retains the right to show that the provision in fact does not infringe the Constitution.

## **XXI. DISPOSAL**

408. Although as pointed out the first claimant has formulated the issues broadly, in his submissions counsel has basically formatted the submissions by highlighting each constitutional provision allegedly violated in the same manner that the second claimant does. We therefore resolve to decide the issues following right by right scrutiny as presented in the submissions.
409. Having looked at the parties' submissions and outlined the principles on which the interpretation is based we will proceed to examine each challenged provision against the constitutional provisions alleged to be violated. We start

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<sup>193</sup> 1997] 2 MLR 181 at 209

with reproducing sections 153, 154 and 156 of the Penal Code being the challenged statutes herein. They provide as follows:

410. Section 153 of the Penal Code stipulates:

Any person who –

- (a) Has carnal knowledge of any person against the order of nature; or
- (b) Has carnal knowledge of an animal; or
- (c) Permits a male person to have carnal knowledge of him or her against the order of nature,

shall be guilty of a felony and shall be liable to imprisonment for fourteen years.

411. Section 154 of the Penal Code states:

Any person who attempts to commit any of the offences specified in section 153 shall be guilty of a felony and shall be liable to imprisonment for seven years.

412. Section 156 of the Penal Code states that:

Any male person who, whether in public or private, commits any act of gross indecency with another male person or procures another male person to commit any act of gross indecency with him, or attempts to procure the commission of any such act by any male person with himself or with another male person, whether in public or private, shall be guilty of a felony and shall be liable to imprisonment for five years.

**A. Whether or Not Section 153 (c) Violates the Second Claimant's Right to Be Informed with Sufficient Particularities of the Charge as Guaranteed under Section 42(2)(F)(i) of the Constitution**

413. We think it is prudent that we start by determining the second claimant's argument that section 153(c) is unconstitutional on the ground that it is vague. This is so because the determination of this point involves an interpretation which will, in a way, help in determining some of the grounds of the applications.

414. Section 42(2)(f)(ii) of the Constitution provides as follows:

Every person arrested for, or accused of, the alleged commission of an offence shall, in addition to the rights which he or she has as a detained person, have a right, as an accused person, to a fair trial, which shall include the right to be informed with sufficient particularity of the charge.

415. This is a very important right on the part of an accused person. The right guarantees an accused person's ability to know the offence that he is answering before he can take plea. A charge that does not sufficiently express the unlawful acts with which an accused person is being charged violates the claimant's right to be informed with sufficient particularity under section 42(2)(f)(ii). It has been submitted by the 2<sup>nd</sup> claimant that a law that is not well defined cannot

- have its particularities sufficiently laid down in a charge. Therefore, such law would be unconstitutional.
416. There is no definition of unnatural offence in the provision itself nor is there such definition elsewhere in the Penal Code. The claimant says the lack of definition means that the provision offends section 42(2)(f)(ii) of the Constitution.
417. From authorities cited, counsel for the claimant concludes that carnal knowledge is penetration of a penis into a vagina – and that if there is no penetration of the penis into the vagina then there is no carnal knowledge. His logic goes on to conclude that any penetration which is not penile-vaginal is not carnal knowledge.
418. He says therefore, logically, carnal knowledge against the order of nature is penetration of a penis into a vagina against the order of nature. He also says it implies that there is a certain order of nature of penile-vaginal penetration. In his view therefore failure to state what the order of nature the penile-vaginal penetration means is a failure of precise definition of the crucial elements of the offence. That creates vagueness and ambiguity. As such a person convicted with such an offence cannot be informed with sufficient particularities of the charge he was answering.
419. We need to state at the outset that lack a definition of a particular word or phrase in a statute does not render that word or phrase meaningless or vague or ambiguous. Legislation in this country uses English language. Where no specific definition is given then an ordinary meaning of the word is to be assigned, subject to rules of interpretation of course.
420. It is clear from its usage in the law that carnal knowledge refers to nothing other than sexual intercourse<sup>194</sup>. All the legal authorities cited by counsel for the claimant are doing by explaining the offences that were committed in those cases is to show that the word carnal knowledge is understood to mean having sexual intercourse and that there could be no sexual intercourse in relation to those cases without penetration of the penis into the vagina. In our view therefore the expression carnal knowledge is a well-defined and understood expression in English language by virtue of it being found in the ordinary

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<sup>194</sup> See Collins Dictionary, 10<sup>th</sup> Edition (2009) and Black's Law Dictionary, 5<sup>th</sup> Edition (1979)

English language dictionary and need not be specifically defined in the Penal Code.

421. On the other hand, “against the order of nature” has been defined as sexual intercourse per anum i.e. sexual penetration of the anus<sup>195</sup>. Of course it is our view that this definition is too restrictive. The phrase “against the order of nature,” in our view, presumes that there is a correct order. That is why the offences of rape and defilement that counsel refers to do not define the order which is well known in the society. They presume that, ordinarily, sexual intercourse will follow that correct order of nature – that is the penile-vaginal order. Parliament is presumed to understand and intend the meaning of its enactments. And Parliament is a representative of the people. Therefore, it should further be presumed to pass what is understood by its people.
422. As regards the offence itself, it does not matter who is involved. In our view therefore, the offence is neither vague nor ambiguous. Therefore, the claimant’s right to be told with sufficient particularities the nature of the charges that he is facing is not infringed by the challenged provision.

#### **B. Right to Equality under Section 20 of the Constitution**

423. It has been submitted by the claimants that provisions of Sections 153(a) and (c), 154 and 156 of the Penal Code infringe on the claimants’ right to equality. Section 20 provides 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, language, religion, political or other opinion, national, ethnic or social origin, disability, property, birth or other status or condition.

424. The Supreme Court of Appeal in *Attorney-General v Malawi Congress Party and others*<sup>196</sup> commenting on the right to equality had this to say:

“The concept of equal protection of laws is a positive concept. It postulates for the application of the same law alike without discrimination to all persons similarly situated. It denotes equality of treatment in equal circumstances. It implies that, among equals, the law should be equal and equally administered, that the like should be treated alike without distinction of race, religion, wealth....”

425. It has been submitted by counsel for the first claimant that though seemingly neutral on their face these provisions target persons who engage in a particular

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<sup>195</sup> See the Letsweletse case; the Black’s Law Dictionary and the Collins Dictionary.

<sup>196</sup> [1997] 2 MLR 181 at 210

form of sexual conduct that is almost universally identified with persons of a homosexual orientation.

426. The second claimant comes to a similar conclusion. He cites the South African case of *National Coalition Case* which according to him reasoned that the prohibition of sodomy criminalises all sexual intercourse per anum between two consenting adults regardless of their age, the place where it occurs, or indeed of any other circumstances whatsoever. In so doing, it punishes a form of sexual conduct which is identified by our broader society with homosexuals.

427. A plain reading of those provisions in our view does not support the submission that they discriminate against a particular section of the society. Sections 153 and 154 prohibit all people (male or female) from engaging in certain sexual conduct regardless of whether they are engaging with a member of the opposite sex or not. Section 156 on the other hand prohibits all males from engaging in the type of conduct specified among themselves. The Kenyan case of *EG and others v Attorney General*<sup>197</sup> is persuasive on this point. The decision dealt with applications to declare sections 162 and 165 of the Kenyan Penal Code unconstitutional, provisions which are similar to sections 153, 154 and 156 of our Penal Code, and in which arguments presented on both sides were similar to the ones that have been advanced in this case respectively on both divides.

In that case, the court said:

‘The language of section 162 is clear. It uses the words “any person”. A natural and literal construction of these words leaves us with no doubt that the section does not target any particular groups of persons.

Similarly, section 165 uses the words “any male person”. A plain reading of the section reveals that it targets male persons and not a particular group with a particular sexual orientation. The wording of this section leaves no doubt that in enacting this provision, Parliament appreciated that the offence under this section can only be committed by a male person. In fact, the short title to the section reads “indecent practices between males”. The operative words here are “any male person” which clearly does not target male persons of a particular orientation.’

428. The submission that the provision punishes a form of sexual conduct which is identified with homosexuals is not supported by evidence. It is a mere statement. In fact, Counsel for the first claimant seems to contradict himself when he says “it is almost universally identified with”. Such statement clearly

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<sup>197</sup> Petition No. 150 of 2016

accepts that there are certain sections of the society which do not understand it as such. What percentage of the “universal” identify the conduct with homosexuality has not been shown.

429. Further, even if it was accepted that the conduct is identified with certain members of the society, it does not, in our view, mean that it is exclusive to that group or that such group “owns” that particular conduct. It might as well be that the majority of those who engage in that conduct in a population are not identified with the group. Therefore, proscribing the conduct cannot be interpreted to mean that members of the homosexual community are being targeted without proof to that effect. We therefore find no discrimination perpetrated by the provisions.
430. Just to add that according to the marginal notes in the Penal Code, all the impugned sections as well as the rest of the sections in the Penal Code were reviewed in 2011 and these impugned provisions were maintained. In addition to the impugned provisions being maintained, a counterpart to section 156 of the Penal Code, which is section 137A of the Penal Code, was added. It reads:

‘Any female person who, whether in public or private, commits any act of gross indecency with another female person, or procures another female person to commit any act of gross indecency with her, or attempts to procure the commission of any such act by any female person with herself or with another female person, whether in public or private, shall be guilty of an offence and shall be liable to imprisonment for five years.’

431. Thus there is not only offences of “indecent practices between males, but there is also an offence of “indecent practices between females”
432. We are unable to be persuaded by the *National Coalition Case* because the Republic South African constitutional provision which was being interpreted explicitly lists down “sexual orientation” as a ground on which one cannot discriminate upon, ours Constitution does not spell out such. Whether “sexual orientation” should be read into “any other status” or into “sex” would be such a leap for the court in light of the principles of constitutional interpretation. We are of the considered view that the framers of the Constitution deliberately omitted the ground of ‘sexual orientation’ under section 20 of the Constitution. We are of the view that assuming sexual orientation is something in tandem with our values inclusive of morality, the framers could have included the same under section 20. This is in view of the fact that our Constitution and the South African Constitution are almost contemporaries and that most provisions are

similar in the two Constitutions but this was a stark departure on purpose. At the time of the drafting of the Constitution issues concerning rights based on sexual orientation were live and the framers could easily have included them in the Constitution.

### C. Right to Personal Liberty--Section 18 of the Constitution

433. Section 18 of the Constitution guarantees the right to personal liberty. The provision uses very short, straight forward language: "every person has a right to personal liberty". Citing *Frackson & others v Republic*,<sup>198</sup> counsel for the second claimant submits that personal liberty is a high profile right under the constitutional dispensation that exists in this jurisdiction. He submits that whenever it is affected, the inclination of the law is that the circumstances surrounding such revocation be looked into at the earliest opportunity with an eye towards the possible restoration of the said liberty.
434. It must be pointed out that in the *Frackson case* the right was mentioned in respect to the claimants' pre-trial detention having been held for an unreasonably long period without being taken to trial. Thus the right being commented upon by the learned JA in that sense is the right to free movement. That freedom was curtailed by keeping the claimant in detention for a long time without trial. The right in that sense can also be limited if a person is lawfully detained or imprisoned.
435. Counsel for the first claimant submits that the right to personal liberty not only guarantees every individual the freedom from bodily restraint, arrest, detention in administration of justice but extends to freedom to make choices of fundamentally personal character without interference. The right, guarantees every individual a degree of personal autonomy over important decisions intimately affecting their personal lives. We agree that the right to personal liberty is not confined to the right not to be physically restrained in one's movements. The Oxford Mini Dictionary defines liberty as "freedom" and "right or privilege". Collins Dictionary defines it as "the freedom the power of choosing, thinking and acting for oneself, freedom from control or restrictions; the Shorter Oxford Dictionary defines it as "freedom from arbitrary, despotic or autocratic rule or control; faculty or power to do as one likes".

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<sup>198</sup> MSCA Criminal Appeal 1 of 2018 (Unreported)

436. As the Constitutional provision has not defined what personal liberty is, it can reasonably be concluded that the ordinary meaning be applicable. The dictionaries definitions in our view represent the ordinary meaning. However, the enjoyment of the right is not absolute. It is subject to limitations or restrictions under section 44 (1) of the Constitution.

437. The restriction of the claimants' right to engage in sexual conduct of their choice therefore indeed limits the claimants' right to liberty.

438. We are of the opinion that the right is limitable under section 44 of the Constitution. The limitation is obviously prescribed by the law. The definition of whether a restriction or limitation is reasonable means that the limitation has legitimate reasons. It has been argued that the limitation has a legitimate reason i.e. to secure morality of the people. Chapter XV of the Penal Code under which the provision falls is headed "Offences against morality". The question whether public morality should inform criminal law or not is a long existing and controversial debate. There seems to be no settled position among jurists and philosophers at all.

439. Section 12(2) of the Constitution provides as follows:

"Every individual shall have duties towards other individuals, his or her family and society, DPP and other legally recognized communities and the international community and these duties shall include the duty to respect his or her fellow beings without discrimination and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance; and in recognition of these duties, individual rights and duties shall be exercised with due regard for the rights of others, collective security, morality and common interest."

440. This provision falls under "Fundamental Principles" of the Constitution. It is our considered view that in light of this provision that Parliament is entitled to make law that would enhance the moral fabric, collective security and common interests of the society. What is moral or not is not for this Court to decide but for the representative of the people -- that is Parliament. In view of this we are of the view that the limitation is reasonable for purposes of enforcing moral standards.

441. It is also our view that morality is recognised internationally as a legitimate limitation to the exercise of rights. Therefore, Parliament cannot be faulted for restricting rights with the sole aim of the protection of morals. Indeed, Article 29 of the Universal Declaration of Human Rights stipulates that:

1. Everyone has duties to the community in which the free and full development of his personality is possible.

2. In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.
  3. These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.
442. Is it necessary for the protection of morals to limit the right to liberty? In our view, the answer is in the affirmative. In our view, it is necessary. The right to liberty is therefore correctly limited.

#### D. Right to Dignity--Section 19 of the Constitution

443. Section 19 provides as follows:
- (1)The dignity of all persons shall be inviolable.
  - (2)In any judicial proceedings or in any other proceedings before any organ of the State, and during the enforcement of a penalty, respect for human dignity shall be guaranteed.
  - (3)No person shall be subject to torture of any kind or to cruel, inhuman or degrading treatment or punishment.
  - (4)No person shall be subject to corporal punishment in connexion with any judicial proceedings or in any other proceedings before any organ of the State.
  - (5)No person shall be subjected to medical or scientific experimentation without his or her consent.
  - (6)Subject to this Constitution, every person shall have the right to freedom and security of person, which shall include the right not to be –
    - (a)detained without trial;
    - (b)detained solely by reason of his or her political or other opinions; or
    - (c)imprisoned for inability to fulfil contractual obligations.

444. Dignity is defined as the State of being worthy of respect or pride in oneself.

The case of *Law v Canada*<sup>199</sup> defines it as follows:

“Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment.” The court in that case continued to state “Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities or merits.”

445. The Constitutional Court of South Africa in the case of *National Coalition Case*<sup>200</sup> says:

“it is clear that the constitutional protection of dignity requires us to acknowledge the value and worth of all individuals as members of our society”.

446. Having cited a number of authorities the first claimant submits as follows:

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<sup>199</sup> [1999]1SCR 497

<sup>200</sup> (1999) (1) SA 6 (CC)

"The gist of all these authorities is that all persons, by virtue of being human, have the same inherent worth and dignity as human beings, whatever their other differences may be. They are entitled to dignity like any other person for simply being a human. It is this dignity that entitles them to have a freedom from being treated in a manner that humiliates or degrades them. Since they are equal to all others by virtue of their existing as a human being, they are entitled to freedom from being treated as inferiors to others or be made subject to arbitrary will of others.

It follows that if a person or a group of people is deprived of control over their own lives or excluded from enjoyment or equally participating in the society like all members of the society, it means that he or she is being treated as inferior ...."

447. Specifically referencing the impugned provision, counsel for the second claimant submits that section 153 (c) of the Penal Code creates a criminal offence on the conduct which is part of the experience and expression of homosexuals. The prohibition denies them the core essence of their humanity that is freely enjoyed by their heterosexual counterparts. The impugned provision prohibits the second claimant from having sexual intercourse per anum which as a homosexual is his only preferred way of having sexual intercourse. In effect, the prohibition devalues and degrades people whose sexual gratification is obtained through "carnal knowledge against the order of nature". He goes on to submit that such treatment is inhuman and degrading.
448. Although not using exact words the first claimant's submission is couched in similar lines.
449. The submission is presuming that the said conduct, and therefore the offence, is only applicable to persons of homosexual orientation, that it is discriminatory. As stated above, such a submission would require evidence. We do not have the evidence before us. The provision itself clearly targets everyone regardless of who they are engaged in the acts with. We therefore find that the right to dignity is not violated.

#### E. Right to Health

450. Section 30 of the Constitution provides for a right to development. Subsection (2) obliges the State to take "all necessary measures for the realisation of the right to development." Such measures include equality of opportunity for all in their access to health services. And indeed this is consistent with State's obligations under Article 12 of the International Covenant on Economic, Social and Cultural Rights. The first claimant submits that his right to health has been violated. We are unable to see any demonstration of the violation of such right

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if his testimony is to be taken into consideration. Indeed, no evidence was called to show that when accessing health services in this country people are required to disclose their sexual orientation or preferences and that after they state that they are of a certain orientation they are not allowed to access those services.

451. The first claimant was asked, in cross examination, if he had ever accessed a public hospital and he replied that he had gone to Zomba Central Hospital after he was involved in a car accident. When he was asked about his experience there, specifically, as to whether he was asked about his sexual orientation before he was assisted, he said he was not. He actually stated that he was medically assisted so well. The only complaint he had about the facility were spiders in his ward.

452. Coming to the study that Professor Muller conducted, we note that the study she conducted was general in nature. It does not bear specifically on the lived experience of the second claimant who summoned her. In other words, there is no nexus between her evidence and the 2<sup>nd</sup> claimant. Even further, the court would place very little weight on it because the reliability of its findings are suspect. We say this because the way the study sample was found makes the accuracy of its findings doubtful. This was a study whereby some of the participants were found on the internet. How sure would one be that the participant on the other end whom the witness does not know and has never met was telling the truth?

453. When Professor Muller was cross-examined on her affidavit, she stated that the LGBTI people find difficulties in accessing medical help whenever they present to the hospital a disease that they contracted in a part of the anatomy whereby the major or only avenue of contraction of that disease and in that body part is through sexual intercourse against the order of nature. But as we have already stated above, the evidence of Professor Muller is unreliable.

## **F. The Right to Life**

454. The first claimant submits that his right to life has been violated. Section 16 of the Constitution provides that every person has the right to life and no person shall be arbitrarily deprived of his or her life. The first claimant quotes the UN Special Rapporteur who calls upon states to renew their efforts aimed at protecting the security and the right to life of persons belonging to sexual minorities. The Special Rapporteur recommends decriminalising same sex laws to overcome the social stigmatization of members of sexual minorities, “and

thereby curb impunity for human rights violations directed against these persons". The submission still presupposes that the provisions target sexual minorities which, in our considered view is not correct.

455. The first claimant submits that the impugned provisions violate the claimants right to health. We have already made our position clear on the presumed violation of the right to health and we find that there is no such violation.

#### **G. Right to Privacy under Section 21 of the Constitution**

456. Section 21 provides as follows:

Every person shall have the right to personal privacy, which shall include the right not to be subject to –

- (a) searches of his or her person, home or property;
- (b) the seizure of private possessions; or
- (c) interference with private communications, including mail and all forms of telecommunications.

457. Quoting the American case of *Ms. X v Argentina* the claimant submits that the "right to privacy guarantees that each individual has a sphere into which no one can intrude a zone of activity which is wholly one's own". Several other cited cases support the proposition that the right to privacy extends beyond mere searches and seizure. That they go to the autonomy of the individual and the right to live as he wishes in his private life. By prohibiting the claimant from engaging in sexual conduct of his choice in private, the law is essentially allowing authorities to interfere with what he does in private.

458. Article 11 of the American Convention of Human rights which was being interpreted here has a far wider scope than our own. We have had an opportunity to read and understand the guaranteed rights in respect of other cited foreign case laws. In all the cited instances the formulation of the right was not restricted in scope as it is in section 21 of our Constitution.

459. In our view such interpretation is not warranted by the wording of section 21 of our Constitution. That right is a negative one – prohibiting the State from interfering with the person of the claimant. It is specific in scope and cannot be extended to mean an individual has a right to be left alone or to live as they please. That would be getting into the legislative realm of Parliament. The right is not infringed by the impugned provisions.

## **H. Freedom from Torture, Cruel and/or Inhuman Treatment or Punishment – Section 19 (3) of the Constitution**

460. It has been submitted by the claimants that the UN Rapporteur on Torture has observed that discrimination and attitudes towards people with different sexual orientation increases the vulnerability to torture, cruel, inhuman or degrading treatment or punishment. The claimants have not demonstrated how this is applicable to their own situation in Malawi – whether they have actually been so subjected to such treatment or not. We find the submission on this head wanting. There is no evidence in this court that this right is violated.

## **I. Whether or Not the Evidence by PW3 and PW4 in The Lower Court Was Obtained in Violation of the Second Claimant's Right to Dignity and Privacy**

461. We are unclear as to what is being challenged here. The second claimant did not submit any legal argument on the same and neither did he withdraw the issue. We know that by section 24 of the Criminal Procedure and Evidence Code that the police are empowered to search a suspect who is reasonably suspected of having committed a particular offence and who has been arrested. The caveat is that the search only extends as far as it is reasonably required for discovering a thing upon his person in connection to the offence suspected. Section 24 stipulates thus:

- 1) ‘Whenever a person is arrested—
  - a. by a police officer under a warrant which does not provide for the taking of bail, or under a warrant which provides for the taking of bail but the person arrested cannot furnish bail; or
  - b. without warrant, or by a private person under a warrant, and the person arrested cannot legally be admitted to bail or is unable to furnish bail, the police officer making the arrest or, when the arrest is made by a private person, the police officer to whom he makes over the person arrested may search such person and place in safe custody all articles, other than necessary wearing apparel and shoes, found upon him.
- 2) In addition to the power to search an arrested person conferred under subsection (1), the police officer shall have power in any such case—
  - a. to search the arrested person for anything which—
    - i. may present a danger to himself or others;
    - ii. he might use to assist himself escape from lawful custody;
    - iii. may afford evidence of the commission or suspected commission of an offence whether within Malawi or elsewhere; or
    - iv. is intended to be used, or is on reasonable grounds believed to be intended to be used, in the commission of an offence within Malawi or elsewhere;

- b. to enter and search any premises in which the person was when arrested or immediately before the arrest for evidence relating to the offence for which he has been arrested.
  - 3) A police officer may not search a person in the exercise of the power conferred by subsection (2), unless he has reasonable grounds for believing that the person to be searched may have concealed on him anything for which a search is permitted under that subsection.
  - 4) The power to search conferred under subsection (2) is only a power to search to the extent that is reasonably required for the purpose of discovering any such thing or any such evidence.'
462. The court record shows that during police investigations the second claimant was made to undress for the police to determine whether he was male or female. This was due to the fact that the second claimant was claiming to be female yet one of the complainants had told the police that the second claimant was male. The police went on to refer the second claimant to hospital to be medically tested to confirm his sex. Indeed, he was machine scanned and physically examined. In his testimony the clinical officer said, among other things, that he had examined the "private parts of the accused person".
463. Now is the challenge that those who were doing the search on the second claimant lacked legal backing for their actions or that section 24 of the Criminal Procedure and Evidence Code is unconstitutional. Is the second claimant challenging specific actions that were done to him in the name of search that they were in violation of his rights and outside section 24 of the Criminal Procedure and Evidence Code? If such be the case, then those actions may well have been challenged before the magistrate court that tried him. The magistrate was well equipped to handle the question of the admissibility of challenged evidence. If the matter was not brought up then, the issue can be dealt with at appeal. The Supreme Court of Appeal in a litany of cases already settled the law on how to deal with illegally obtained evidence. In such instances, the court has discretion whether to admit the evidence. According to the Supreme Court of Appeal judgment in *Mike Appel and Gatto Limited v Chilima*<sup>201</sup> the overriding purpose in a trial is to ascertain truth. In that case the court said:

'Where evidence is obtained illegally, improperly or unfairly two opposing views exist, one in favour of admitting the evidence as long as it is relevant and necessary, and the other view is to exclude it regardless of its relevance and whether it is necessary. The former position represents English Common Law while the latter represents the view that rejects fruit of the poisonous tree in some jurisdictions. There

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<sup>201</sup> (2014) MSCA Civil Appeal no. 30

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463. Now is the challenge that those who were doing the search on the second claimant lacked legal backing for their actions or that section 24 of the Criminal Procedure and Evidence Code is unconstitutional. Is the second claimant challenging specific actions that were done to him in the name of search that they were in violation of his rights and outside section 24 of the Criminal Procedure and Evidence Code? If such be the case, then those actions may well have been challenged before the magistrate court that tried him. The magistrate was well equipped to handle the question of the admissibility of challenged evidence. If the matter was not brought up then, the issue can be dealt with at appeal. The Supreme Court of Appeal in a litany of cases already settled the law on how to deal with illegally obtained evidence. In such instances, the court has discretion whether to admit the evidence. According to the Supreme Court of Appeal judgment in *Mike Appel and Gatto Limited v Chilima*<sup>201</sup> the overriding purpose in a trial is to ascertain truth. In that case the court said:
- 'Where evidence is obtained illegally, improperly or unfairly two opposing views exist, one in favour of admitting the evidence as long as it is relevant and necessary, and the other view is to exclude it regardless of its relevance and whether it is necessary. The former position represents English Common Law while the latter represents the view that rejects fruit of the poisonous tree in some jurisdictions. There

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<sup>201</sup> (2014) MSCA Civil Appeal no. 30

has been a plethora of academic discourse on the subject. Sometimes this is considered to be the battle between search for truth and the need to observe the due process of the law. Malawi has over time followed the English common law position that a Court will exercise discretion to admit relevant evidence if in its view the probative value outweighs the prejudicial effect. That remains the position under Malawi law.<sup>7</sup>

464. Therefore, where the court is faced with unconstitutionally obtained evidence, it has the liberty to assess it, and where it decides that it has a greater probative value than its prejudicial effect, or if it nevertheless believes that the evidence is materially true, it can admit it. In that case, one who feels his rights were injured in the process of obtaining evidence would have his remedies in a civil action.

## **XXII. CONCLUSION**

465. Based on the foregoing, we find that the impugned provisions are Constitutional. If the claimants feel that the said provisions unfairly target them, the best option for them is to lobby Parliament to change the law.

466. We therefore decline to grant the prayers applied for and we remit the first claimant's matter back to the lower court to proceed with the criminal proceedings pursuant to Order 19 Rule 7(5) of the CPR and the second claimant's appeal to the original Judge who will proceed to deal with the merits of the appeal in accordance with this determination.

467. On the question of costs, the general rule is that costs generally follow the event and are in the discretion of the Court. However, we are of the view that the constitutional issues raised very important matters of national interest relating to the country's Constitutional rights. We therefore order that each party must bear its own costs.

**PRONOUNCED IN OPEN COURT THIS 28<sup>TH</sup> DAY OF JUNE 2024 AT THE HIGH COURT, PRINCIPAL REGISTRY, BLANTYRE.**

  
**Honourable Justice Joseph Chigona**

  
**Honourable Justice Vikochi Chima**

  
**Honourable Justice Chimbizgani Matapa Kacheche**