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## LGBT+ RIGHTS LAWFARE IN MALAWI

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### 1 Introduction

LGBT+ rights remain highly contested in Malawi since the arrest of Steven Monjeza Soko and Tiwonge Chimbalanga Kachepa in December 2009, when they held a traditional wedding ceremony (*chinkhoswe*). The last decade has seen public contestations over the acceptability of non-conforming sexualities and legitimacy of human rights for LGBT+ persons.

Emerging LGBT+ research in Malawi has focused on access to HIV and AIDS health services among men who have sex with men (MSM),<sup>1</sup> blackmail and extortion of MSM,<sup>2</sup> civil society activism around LGBT+ rights,<sup>3</sup> and the epistemological ambiguities in the ‘homosexuality debates’.<sup>4</sup> Previous studies about Soko and Kachepa’s case (*Republic v Soko*)<sup>5</sup> have focused on the unfair treatment of the accused during their arrest and trial<sup>6</sup> and how the judgment was bad law for overlooking critical human rights questions (for example, the right to a fair trial or rights to

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1 See for example, C Beyrer et al ‘Bisexual concurrency, bisexual partnerships and HIV among Southern African men who have sex with men’ (2010) 86 *Sexually Transmitted Infections* 323.

2 See for example, W Chibwezo ‘Blackmail among gay people in Malawi’ in R Thoreson & S Cook (eds) *Nowhere to turn: Blackmail and extortion of LGBT people in sub-Saharan Africa* (2011) 74.

3 See for example, A Currier & T McKay ‘Pursuing social justice through public health: Gender and sexual diversity activism in Malawi’ (2017) 9 *Critical African Studies* 71.

4 See for example, A Msosa ‘Human rights and same-sex intimacies in Malawi’ PhD thesis, University of Essex, 2017 <http://repository.essex.ac.uk/21553/1/180216%20PhD%20Thesis%20Alan%20MSOSA.pdf> (accessed 29 April 2022).

5 *Republic v Soko* Criminal Case 359 of 2009 at Blantyre Chief Resident Magistrate Court.

6 U Mwakasungula ‘The LGBT situation in Malawi: An activist perspective’ in C Lennox & M Waites (eds) *Human rights, sexual orientation and gender identity in the Commonwealth: Struggles for decriminalisation and change* (2013) 359.

privacy).<sup>7</sup> So far there has not been adequate interrogation of the role of the courts as the arena for contesting issues of sexual orientation and gender identity. Beyond the litigation in the courtroom, there has also been little consideration of how the public debates and advocacy around and outside the courtroom have influenced the formal court proceedings, or have been influenced by them.

This chapter discusses cases from the Malawian courts to explore how decisions by judicial officers have constrained or sustained the views on LGBT+ rights. We conclude that contrary to the common assumption that judicial officers are independent and impartial players during court proceedings, they are active lawfare actors who deploy their own strategies in support or against LGBT+ rights. We begin this chapter by revisiting the key issues that dominated the local debates since the arrest of Soko and Kachepea in 2009. We indicate that Malawi is faced with a paradox of having anti-gay laws within a progressive constitutional Bill of Rights and international human rights obligations. This is followed by a brief examination of the concept of LGBT+ lawfare, and the need to draw attention to the issues under contestation and the role of subtle actors. We then discuss the cases showing how some judicial officers have overlooked the law to advance homophobic attitudes, used technicalities to discontinue or refuse constitutional considerations, or tolerated judicial inefficiencies to perpetrate delays in concluding cases. We acknowledge the challenges faced by LGBT+ persons during the COVID-19 pandemic and recommend research on its impact in the Malawian context. We conclude that the lawfare for the protection of LGBT+ rights in Malawi will depend on the extent to which actors deploy ‘positive lawfare’ over its negative counterpart.

## 2 The paradox in LGBT+ rights in Malawi

The Malawian context offers an important case study for studying LGBT+ rights lawfare in several ways. Firstly, Malawi is a legal paradox when it comes to LGBT+ related laws and policies in the context of conflicted social and cultural values influenced by a tension between ‘tradition’ and ‘modernity’. Sections 153 and 156 of the Penal Code criminalise carnal knowledge and indecent practices respectively.<sup>8</sup> These provisions were initially enacted in the British-colonial penal code, inherited from

7 MR Phooko ‘Homosexuality and privacy: *Rep v Soko & Another* under the magnifying glass’ (2011) 5 *Malawi Law Journal* 55.

8 Mwakasungula (n 6) 359.

the Empire's template and first introduced to Malawian laws in 1930.<sup>9</sup> However, Danwood Chirwa has opined that section 20(1) of Malawi's Republican Constitution which guarantees equal and effective protection against discrimination of any kind extends to sexual orientation and gender identity.<sup>10</sup> The Constitution's article 211(1) renders international treaties ratified prior to its commencement as part of Malawian domestic laws. According to the United Nations, international instruments such as the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW),<sup>11</sup> the Convention on the Rights of the Child (CRC),<sup>12</sup> the International Covenant on Civil and Political Rights (ICCPR),<sup>13</sup> and the International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>14</sup> ought not to exclude their protections on the basis of sexual orientation and gender identity.<sup>15</sup> Further, the country's HIV and AIDS Policy which was initially adopted in 2003 has recognised that people who engage in same-sex sexual relations need protection for effective access to health services.<sup>16</sup> Secondly, previous court proceedings and decisions have influenced adoption of new laws that have further criminalised sexual and gender non-conformity. Notable is the amendment of the Penal Code in 2010,<sup>17</sup> to introduce a new section 137A to expand criminalisation towards 'indecent practices between females' which reads:<sup>18</sup>

- 9 See generally Human Rights Watch 'This alien legacy: the origins of 'sodomy' laws in British colonialism' in Lennox & Waites (n 6) 83.
- 10 D Chirwa *Human rights under the Malawian Constitution* (2012) 147.
- 11 UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, United Nations, Treaty Series, vol 1249, p 13.
- 12 UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol 1577, p 3.
- 13 UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol 999, p 171.
- 14 UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol 993, p 3.
- 15 United Nations Human Rights General Assembly 'Discrimination and violence against individuals based on their sexual orientation and gender identity' A/HRC/29/23 (4 May 2015) <https://www.ohchr.org/en/documents/thematic-reports/ahrc2923-discrimination-and-violence-against-individuals-based-their> (accessed 4 May 2022).
- 16 Malawi National AIDS Policy *Assessment of legal, regulatory & policy environment for HIV and AIDS in Malawi* (2012).
- 17 Mwakasungula (n 6) 359.
- 18 Malawi Penal Code of 1930 (as amended) Cap 7:01 Laws of Malawi, Mwakasungula (n 6) 341-362.

[A]ny female person who, whether in public or private, commits any act of gross indecency with another female shall be guilty of an offence and liable to a prison term of five years.

During the passing of the amendment, parliamentarian and prominent politician Dr George Chaponda called the new law ‘gender sensitive’ as it aimed to criminalise homosexuality for both males and females ‘without discrimination’.

In 2015, the Marriage, Divorce and Family Relations Act was enacted, following the announcement of a moratorium on gay arrests a year earlier, for the first time annulling any legal recognition of any gender identity other than that assigned at birth.<sup>19</sup> This new law renders it impossible for transgender or intersex persons to claim any gender identity other than that imposed on their birth certificates. Thirdly, the courts have themselves acknowledged that they are ‘social animals’ who are prone to rely on societal and political trends as portrayed in 2012 when they played the role of catalysts of social change by unilaterally calling parties to join a case as *amicus curiae* to review the constitutionality of section 153 of the Penal Code.

Whether in pondering legal or policy paradoxes, or the contested issues within and around the LGBT+ rights, the various actors that have been involved in the Malawian context include non government organisations (NGOs), donors, local foreign diplomatic missions and agencies, faith-based movements, cultural movements, government, academics, influential personalities, politicians, institutions and actors from abroad, and the courts themselves. The contestations have been open to all and disorderly. Importantly, the rise in social media has increased public participation, mostly among elites, in publicising their views of the various issues being contested. We aim to understand at what point various participants get involved, what their motivations and expectations are, what risks they incur and how their participation influences the lawfare processes and outcomes.

Does understanding of LGBT+ lawfare in the Malawian context offer any conceptual or political utility for a better understanding of contestations about issues of sexual orientation and gender identity more broadly, or about the use of courts as an arena for contesting social and political issues? Firstly, just as in other African contexts where criminalisation exists such as Kenya, Nigeria and Uganda, LGBT+ rights

19 The Marriage, Divorce and Family Relations Act, 2015, defines ‘sex’ in relation to the gender of a person, as the sex of that person at birth.

issues remain fiercely polarised socially and politically. The assumed high attitudes against homosexuality in most African societies have compromised the prospects of formal state institutions to fairly and objectively arrive at solutions that in the end protect the rights and welfare of LGBT+ individuals who are usually at an actual or potential risk of homophobic stigma, discrimination and violence.<sup>20</sup> Secondly unlike cases where there is broad public support for the rights in question (such as rights of people with albinism, child rights and women's rights), highly contentious issues where there is no consensus offer an opportunity to interrogate the strategies that actors deploy to solicit public support towards their viewpoints. Especially in non-Western contexts, they offer an opportunity to understand the circumstances and premises that are used (with or without good reasoning) in the contestation of the concept of rights. Lastly, understanding LGBT+ rights as lawfare is important intrinsically as it remains marginalised in mainstream legal or human rights research about Malawi, particularly among Malawian human rights and legal scholars. Beyond being significant academically, such scholarship can itself be considered a form of LGBT+ rights lawfare.

### **3 LGBT+ rights lawfare: Concept, praxis and utility**

Gloppen's definition of LGBT+ rights lawfare as the use of rights and law as a strategy to socially or politically contest issues about same-sex sexualities<sup>21</sup> offers an important framework for exploring how 'lawfare actors' navigate values and strategies for strengthening or weakening advancement of LGBT+ rights. Actors may draw from formal rules clarifying laws and values that recognise and protect LGBT+ rights, or indeed codes that dismiss existence of such rights. For example, conservative groups may cite anti-gay laws to justify their homophobic attitudes or to seek the court's intervention to reinforce the anti-gay laws. Informal sentiments against LGBT+ rights are usually drawn by actors to inspire populist rejection of LGBT+ rights as commonly cited by influential politicians under the mistaken assumption that their rejection of LGBT+ rights is in line with majority opinion.<sup>22</sup>

20 B Dulani, G Sambo & KY Dionne 'Good neighbours? Africans express high levels of tolerance for many, but not for all' Afrobarometer Dispatch 74 (March 2016) [https://www.afrobarometer.org/wp-content/uploads/migrated/files/publications/Dispatches/ab\\_r6\\_dispatchno74\\_tolerance\\_in\\_africa\\_eng1.pdf](https://www.afrobarometer.org/wp-content/uploads/migrated/files/publications/Dispatches/ab_r6_dispatchno74_tolerance_in_africa_eng1.pdf) (accessed 24 June 2022).

21 S Gloppen 'Conceptualising lawfare: A typology and theoretical framework' (2017).

22 The Other Foundation 'Under wraps: A survey of public attitudes to homosexuality and gender non-conformity in Malawi (2019) <https://theotherfoundation.org/wp-content/uploads/2019/09/Other-Foundation-Malawi-Paper-v7.pdf> (accessed 4 May

Analysis of any lawfare ought to pay attention to the conceptual issues being contested. As will be shown when discussing *Republic v Soko* later in this chapter, the debate in Malawi has often focused on the rhetorical question of whether non-conforming persons have a right to same-sex sexual relations as opposed to whether LGBT+ people are equally entitled to all human rights enshrined in the laws of Malawi (including relevant international human rights treaties). As will be shown when discussing *Republic v Soko*, the presiding magistrate's outrage over the idea of a marriage between two Malawian men, not equal entitlement to human rights, led him to impose what he called 'a scary sentence'. A contextual understanding of LGBT+ lawfare in the Malawian context therefore necessitates conceptual understanding of homosexuality, LGBT+ rights and the debates that have so far ensued in the Malawian context, and the challenges in the diversity of meanings that arise when sexual or gender non-conformity is applied.<sup>23</sup>

As the definition of LGBT+ lawfare focuses on actors who deploy strategies to contest LGBT+ rights, there is a risk of focusing attention on active contestants such as complainants or defendants, civil society, politicians or the public. The significant role of obscured actors such as judges or magistrates in determining the final outcome of court cases is often overlooked because they are assumed to be independent in their conduct and impartial during proceedings. To an inattentive mind, judges or magistrates only look at facts and the law to come up with a decision. However, the cases discussed in the section that follows indicate that formal rules and informalities can influence court decisions. To understand the concept of lawfare, interests of actors and their incentives, explicit or implicit strategies, expected outcomes, and underlying values, more focus needs to be placed on the role of magistrates and judges in court cases and proceedings.

#### 4 LGBT+ rights in Malawi's case law

Although *Republic v Soko* is the most reported case about same-sex activities, there is rich case law involving same-sex conduct that has been decided by the Malawian courts. The significant difference in the cases is that preceding cases were not about activities involving consenting adults.

2022).

23 A Msosa 'Chilungamo and the question of LGBTQ+ Rights in Malawi' in J Johnson & G Hamandishe *Pursuing justice in Africa: Competing imaginaries and contested practices* (2018) 115.

Additionally, the previous cases did not arouse the same media interest as seen in 2009.

#### 4.1 *Republic v Soko*

The case of *Republic v Soko* (also known as the *Republic v Steven Monjeza Soko & Tiwonge Chimbalanga Kachepa*)<sup>24</sup> has been widely discussed as a key case study of the courts overstepping legal principles in support of populist public opinion against LGBT+ rights.<sup>25</sup> The case arose from a newspaper headline in December 2009 of a traditional wedding between Soko and Kachepa, both born male, resulting in their immediate arrest and clampdown of any activism for LGBT+ rights.<sup>26</sup> The two were charged with buggery or having carnal knowledge against the order of nature and indecent practices between males.<sup>27</sup> They were denied bail ordinarily guaranteed in section 42(2)(e) of the Malawian Constitution which provides that every person who has been arrested or accused of committing an offence is entitled to be released from custody with or without bail unless the interests of justice require otherwise. Section 118(1) of the Criminal Procedure and Evidence Code also provides entitlement to bail for every person who has been arrested or charged with any offence unless the person is answering the offence of murder or treason or where the punishment for the offence is death.<sup>28</sup> In delivering his bail ruling, Magistrate Usiwa-Usiwa said that he could not grant bail to protect the couple from angry Malawians.<sup>29</sup> This was despite court precedent where bail had been granted to persons answering more serious charges such as murder and treason.<sup>30</sup>

Secondly, when the court found found Soko and Kachepa guilty in May 2010, the magistrate ignored the sentencing guidelines in sections

24 Criminal Case 359 of 2009 at Blantyre Chief Resident Magistrates Court.

25 Phooko (n 7) 55.

26 'Men wed in Malawi's first gay ceremony' *Mail & Guardian* 28 December 2009 <https://mg.co.za/article/2009-12-28-men-wed-in-malawis-first-gay-ceremony> (accessed on 11 July 2018).

27 Sections 153 and 156 of the Malawi Penal Code, Chapter 7:01 of the Laws of Malawi.

28 Chapter 8:01 of the Laws of Malawi.

29 D Smith 'Malawi gay wedding couple denied bail for "own protection"' *The Guardian* 4 January 2010 <https://www.theguardian.com/world/2010/jan/04/malawi-gay-wedding-couple-bail> (accessed 26 June 2022).

30 *R v Mvaha* Malawi Supreme Court of Appeal Criminal Appeal 25 of 2005; *McWilliam Lunguzi v The Republic* Malawi Supreme Court of Appeal Criminal Appeal 1 of 1995; *John Tembo and 2 Others v the DPP*, Malawi Supreme Court of Appeal Criminal Appeal 16 of 1995; *The Republic versus Dr Cassim Chilumpha and Yusuf Matumula* High Court of Malawi Criminal Case 13 of 2006.

337, 339 and 340 of the Criminal Procedure and Evidence Code, which guide the courts in Malawi and which prevent imposing maximum sentences to first offenders,<sup>31</sup> encourage consideration of non-custodial sentences,<sup>32</sup> and give due regard to youth, old age, character, antecedents, home surroundings, health or mental condition of the accused.<sup>33</sup> However, the magistrate imposed the maximum 14 years' imprisonment with hard labour.

The underlying reasoning behind the harsh sentence is evident in the magistrate's hard-line sentiments that the *chinkhoswe* was 'bizarre' and 'grossly wrong' because, in his view, Malawi was not ready

at this point in time to see its sons getting married to other sons, or cohabiting or conducting engagement ceremonies. I do not believe Malawi is ready to smile at her daughters marrying each other. Let posterity judge this judgment.<sup>34</sup>

He also stated:

So this case being 'the first of its kind', to me, that becomes 'the worst of its kind'. I cannot imagine more aggravated sodomy than where the perpetrators go on to seek heroism, without any remorse, in public, and think of corrupting the mind of a whole nation with a *chinkhoswe* ceremony. For that, I shall pass a scaring sentence so that 'the public must also be protected from others who may be tempted to emulate their [horrendous] example'.

In this case, the magistrate played a central role in lawfare by overlooking the parameters provided in the law in his pursuit of the majority public opinions on homosexuality and LGBT+ rights.

#### 4.2 *The State v Officer in charge of Karonga Police Station*

Only a year after *Republic v Soko*,<sup>35</sup> the Malawi Police Service (MPS) and Malawi Revenue Authority (MRA) intercepted advocacy materials (known as '*zitenje*' in Chichewa language) which were being imported from Tanzania by two non-governmental organisations (NGOs), the Centre for Human Rights and Rehabilitation (CHRR) and the Centre for the Development of People (CEDEP). The materials were detained on

31 Section 340 of the Criminal Procedure and Evidence Code Chapter 08:01 of the Laws of Malawi.

32 Section 339 of the Criminal Procedure and Evidence Code.

33 Section 337 of the Criminal Procedure and Evidence Code.

34 *Republic v Soko* at 23. 2

35 Miscellaneous Civil Cause 21 of 2011, Mzuzu High Court.

suspicion that they would be used to ‘promote homosexuality’ as the two organisations had produced them for awareness activities on access to HIV and AIDS services among men having sex with men (MSM).

CEDEP and CHRR successfully filed an application before the High Court of Malawi and asked for an interim order for the MRA and Police to release the materials. The strategy by the applicant’s lawyer, the co-author of this chapter, focused on the need for advocacy in the promotion of HIV and AIDS prevention and treatment as well as freedom of opinion and expression guaranteed by the Bill of Rights. Success in the case can be attributed to the applicant’s strategy to avoid bringing explicit questions about homosexuality or LGBT+ rights to the fore which ultimately preempted the opportunity for a judge to digress as seen in *Republic v Soko*.

Although the presiding judge’s views on LGBT+ rights were not tested in the case, the court took extra efforts to ensure that the advocacy materials were released to CEDEP and CHRR by sending a court messenger to personally deliver the court order and wait for two hours until MRA and MPS released the materials. This successful lawfare suggests that opponents may consider non-explicit claims for LGBT+ rights especially if matters of public interest (such as HIV and AIDS prevention) are concerned.

The views of the judge on sexual(ity) rights and the importance of educating the public on issues of sexual orientation, gender identity and sexual diversity could not be ascertained. The safer lawfare in this case was to focus on HIV and AIDS prevention and treatment for the ultimate aim to expedite delivery of the advocacy materials to ultimately prevent further vulnerability to HIV infections among LGBT+ people.

### 4.3 *Msonda case*

Politicians are prominent in Malawi’s LGBT+ lawfare particularly to mobilise the masses towards their political parties amidst diminishing support over failure to keep campaign promises. Following the historical coming out by LGBT+ activist Eric Sambisa on national television in January 2016, Ken Msonda, a senior member of the ruling Democratic Party (DP) who also served as spokesperson for former ruling Peoples’ Party (PP) wrote on his Facebook page that homosexuals should be killed in Malawi:<sup>36</sup>

36 “‘Homosexuals should be killed’ - Malawi politician’ *News24* 5 January 2016. <https://www.news24.com/Africa/News/homosexuals-should-be-killed-malawi-politician-20160104-2> (accessed 30 November 2018).

Government should come up clear on the DPP administration stand on the issue of gays and lesbians. Gays and lesbians are worse than dogs. Arresting them won't address this problem because sooner or later they are being released on bail. The best way to deal with this problem is to KILL them ... It is pathetic to see our media houses parading these dogs on TV and newspapers hiding behind human rights- human rights my foot! THE DEVIL HAS NO RIGHTS.<sup>37</sup>

As Msonda's hate speech amounted to a threat to the lives of homosexuals and the LGBT+ community in Malawi, amidst the emergence of mass killings of people with albinism and inaction by the MPS,<sup>38</sup> it prompted human rights NGOs to call for criminal prosecution.<sup>39</sup> CHRR and CEDEP filed a criminal case against Msonda<sup>40</sup> under section 83(a) of the Criminal Procedure and Evidence Code.<sup>41</sup> This section allows any person in Malawi to move the court to lay criminal charges against any accused person. Whilst the Court granted the application to prosecute Msonda, the Director of Public Prosecutions (DPP) took over the case and thereafter applied for the court to discontinue the case without giving any reasons.<sup>42</sup> Although section 99(2)(c) of the Constitution gives powers to the DPP to discontinue any criminal case before any court as long the case has not reached judgment stage, she was required to provide reasons to the Legal Affairs of National Assembly in accordance with section 99(2) of the Constitution.<sup>43</sup> CEDEP and CHRR sued the DPP in the High Court

37 M Nkawihe 'Kill gays in Malawi, demands Msonda: "Devil has no rights"' *Nyasa Times* 3 January 2016 <https://www.nyasatimes.com/kill-gays-in-malawi-demands-msonda-devil-has-no-rights/> (accessed 24 June 2022).

38 'Albinos "hunted like animals" for body parts in Malawi' *News24* 3 March 2015 <https://www.news24.com/Africa/News/Albinos-hunted-like-animals-for-body-parts-in-Malawi-20150303-4> (accessed 25 November 2018).

39 'PP's Msonda get more sticks: CEDEP, CCJP denounce "kill gays" hate speech' *Nyasa Times* 5 January 2016 <https://www.nyasatimes.com/pps-msonda-get-more-sticks-cedep-ccjp-denounce-kill-gays-hate-speech/> (accessed 30 November 2018). T Chiumia 'Malawi Law Society slam Msonda's "kill the gays" remarks: Police asked to act on hate speech' *Nyasa Times* 4 January 2016 <https://www.nyasatimes.com/malawi-law-society-slam-msondas-kill-the-gays-remarks-police-asked-to-act-on-hate-speech/> (accessed 30 November 2018).

40 *Republic v Ken Msonda* Criminal Case 16 of 2016 before the Senior Resident Magistrate's Court in Blantyre Registry.

41 Chapter 8:01 of the Laws of Malawi.

42 M Nkawihe 'DPP snoops on Msonda's case, takes over the matter' *Nyasa Times* 4 July 2016 <https://www.nyasatimes.com/dpp-snoops-on-msondas-case-takes-over-the-matter/> (accessed 30 November 2018). G Muheya 'Msonda's "kill gays" case discontinued: SG says Malawi not ready to change anti-gay-laws' *Nyasa Times* 21 January 2016 <https://www.nyasatimes.com/msondas-kill-gays-case-discontinued-sg-says-malawi-not-ready-to-change-anti-gay-laws/> (accessed 30 November 2018).

43 Section 99(2)(c) of the Constitution of Malawi.

of Malawi, asking the court to review the decision to discontinue the case on the grounds that the DPP acted unreasonably, unfairly and unlawfully in discontinuing the case without giving reasons to the concerned parties.<sup>44</sup>

The High Court's review of *Msonda* focused on reviewing the decision of the DPP to discontinue a criminal case in the magistrates' court, without attempting to address the legitimacy of LGBT+ rights.<sup>45</sup> Justice Kapindu acknowledged in the first ruling that the applicants, Gift Trapence and Timothy Mtambo, directors of CEDEP and CHRR respectively, filed a criminal case to protect the rights of members of the lesbian, gay, bisexual, transsexual, and inter-sexed community in Malawi.<sup>46</sup> Msonda had also filed for the High Court to determine whether his remark 'kill the gays' was in line with his freedom of speech, freedom of opinion and religious belief as provided in the Constitution of Malawi. The Court also acknowledged that the DPP took over the criminal case with the ultimate aim of discontinuing it.<sup>47</sup> The notice to take over the criminal case and the discontinuance certificate were filed on the same day, clearly for the sole purpose of the DPP taking over the case was only to discontinue it. Justice Kapindu referred to the Chief Justice to empanel a Constitutional Court for a determination on whether the DPP's conduct violated the Constitution. The Chief Justice ruled that human rights issues such as the right to freedom of expression, freedom of religion, thought, conscience, belief, opinion, association and speech should not be part of the determinations by the Constitutional Court. Section 9(2) provides that the matters being certified by the Chief Justice should relate to proceedings before the High Court and all business arising therefrom if the proceedings relate to application and interpretation of the Constitution. By restricting the certification to the issue of the exercise of power by the DPP, this was a lost opportunity for the courts to determine the constitutional issues on LGBT+ rights. In this instance, the DPP and Chief Justice played the 'avoidance lawfare' card to block constitutional litigation on recognition of human rights for LGBT+ people.

44 *The State v Director of Public Prosecutions: Ex-Parte Gift Trapence and Timothy Mtambo* High Court Zomba Registry Miscellaneous Civil Cause 16 of 2016.

45 *Ex-parte Gift Trapence and Timothy Mtambo* (n 44).

46 Paragraph 3 of Justice Kapindi's judgment dated 25 April 2016 in *State v Director of Public Prosecutions Ex-Parte Gift Trapence and Timothy Mtambo*, High Court Zomba Registry Miscellaneous Civil Cause Number 16 of 2016. The case has a number of rulings on different subject matters.

47 Paragraph 8 of Justice Kapindi's judgment dated 25 April 2016 of the *State v Director of Public Prosecutions Ex-Parte Gift Trapence and Timothy Mtambo*, High Court Zomba Registry Miscellaneous Civil Cause Number 16 of 2016.

The Malawi judiciary has avoided determining the fate of LGBT+ rights in the context of a progressive Constitution and the Chief Justice's decision in *Msonda* is not the first one. In *Republic v Soko*, the lawyers referred the matter to the Chief Justice to empanel a Constitutional Court for a determination on whether the charges against Soko and Kachepa were constitutional and in line with human rights principles.<sup>48</sup> The Chief Justice ruled that there were no proceedings in the High Court and the review of the laws could not be made on the basis of criminal charges in the magistrates' court.

In *Republic v Mussa Chiwisi*,<sup>49</sup> *Republic v Matthew Bello*,<sup>50</sup> and *Republic v Amon Champyuni*<sup>51</sup> the High Court of Malawi on its own motion called for submissions from the University of Malawi, Malawi Law Society, Malawi Human Rights Commission, CSOs and the general public to determine whether same-sex laws were constitutional and in line with human rights principles. However, the case was subjected to a number of technical and procedural issues at the instance of the state and eventually files went missing at the Court. While the Court got submissions from the listed institutions, the future of the case could not be determined at the time of writing this article. Two judges who were involved in this matter have since retired without proper handovers. 'Avoidance lawfare' can therefore be defined as a strategy used by actors to avert substantive litigation that is likely to secure legal guarantees for LGBT+ rights.

#### 4.4 The Moratorium case

The Malawi government through the Minister of Justice announced in November 2012 during a radio debate that it had declared a Moratorium on prosecuting individuals involved in same-sex relationships and all anti-gay laws were suspended.<sup>52</sup> The ruling party at that time, the People's Party, adopted this position to promote its international image as a progressive and pro-human rights party. However, no official document was issued by the Malawi government confirming the existence of the Moratorium. When the Democratic Progressive Party won elections in 2014, the new

48 'Lawyers for gay Malawi couple seek change to law' *Reuters* 11 January 2010 <https://www.reuters.com/article/ozatp-malawi-gays-20100111-idAFJJOE60A0F420100111> (accessed on 25th November, 2018).

49 Confirmation Case 22 of 2011, High Court of Malawi, Principal Registry.

50 Confirmation Case 422 of 2011, High Court of Malawi, Principal Registry.

51 Confirmation Case 662 of 2011, High Court of Malawi, Principal Registry.

52 'Malawi suspends anti-gay laws as MPs debate repeal' *The Guardian* 5 November 2012 <https://www.theguardian.com/world/2012/nov/05/malawi-gay-laws-debate-repeal> (accessed 10 November 2018).

Minister of Justice confirmed the application of the Moratorium and that nobody would be arrested in Malawi based on same-sex laws.<sup>53</sup>

In *State v Minister of Justice and Constitutional Affairs: Ex-parte Kammasamba*<sup>54</sup> three applicants including two pastors filed a case with the High Court of Malawi challenging the Moratorium on the grounds that only Malawi Parliament can suspend implementation of the law. The Court granted the injunction, setting aside the Moratorium. The Attorney-General challenged the decision on the grounds that the pastors had no sufficient interest in the case. CEDEP and CHRR applied to join the case as friends of the court, *amicus curiae*, to raise issues in the interest of the LGBT+ community, resulting in the Court adding CEDEP and CHRR and removing the two pastors based on arguments from the Attorney-General. The Court ruled that the issue before it was entirely legal and had nothing to do with morality or religion.<sup>55</sup>

The issue before this Court is to a large extent, whether the Executive Branch of Government was within its legal mandate when it suspended gays laws. The other questions, ancillary thereto are to do with the human rights of minority groups including gay people and whether gay laws violate the constitution of the Republic. This has nothing to do with religion or morality.

However, the Court added one more applicant, Christopher Kammasamba, who argued that he was arrested on theft allegations and was challenging the Moratorium on grounds of equality and non-discrimination. The Court referred the case to the Chief Justice to certify and empanel a Constitutional Court on the ground that the matter related to application and interpretation of the Constitution of Malawi.

The Attorney-General appealed to the Supreme Court the decision of the High Court to suspend the Moratorium but no hearing of the appeal had been made at the time of publishing this chapter. The judgment of the High Court setting aside the Moratorium and referring the case to the Chief Justice was made on 11 May 2016.

Malawi has been described as having mixed signals on LGBT+ rights, struggling between retaining anti-gay laws whilst showing unwillingness

53 'Malawi "suspends" anti-homosexual laws' *BBC News* 21 December 2015 <https://www.bbc.com/news/world-africa-35151341> (accessed on 10th November, 2018).

54 Miscellaneous Civil Cause 17 of 2016, High Court of Malawi, Mzuzu Registry.

55 Paragraph 2.2.1 of the *State v Minister of Justice and Constitutional Affairs: Ex-parte Kammasamba*, Miscellaneous Civil Cause 17 of 2016, High Court of Malawi, Mzuzu Registry.

to enforce them.<sup>56</sup> The ‘tug of war’ is beneficial to the government in two ways. First, the existence of the laws places the government in good standing with the assumed anti-gay public opinion, thus minimising the risk of losing votes in future elections. Similarly, the law is a source of mobilising legitimacy of the leadership. On the contrary, the unwillingness to implement the law provides for a ‘convenient explanation’ before international human rights mechanisms when requested by other member states to repeal anti-gay laws.

The above cases illustrate how the courts have conveniently deployed the law to navigate away from hearing cases for LGBT+ rights. Judicial officers have disregarded the law to pronounce their alignment with anti-gay public opinion (*Republic v Soko*), deployed technicalities to avoid hearing constitutional matters (*Msonda*), or conveniently tolerated court inefficiency (the *Moratorium* case). The courts are therefore active agents in the LGBT+ lawfare by contributing towards sustaining negative perceptions on LGBT+ rights and obstacles towards the possibility of facilitating legal recognition of LGBT+ rights. However, formal recognition of human rights for LGBT+ people in Malawi in accordance with constitutional principles or precedents under international human rights law will be dependent on key actors embracing positive lawfare over negative lawfare.

## 5 Impact of COVID-19

COVID-19 has exposed inequalities, structural and entrenched discrimination and other gaps in human rights protection.<sup>57</sup> Countries like Malawi have inadequate frameworks to address structural inequalities and negative discrimination in the context of COVID-19. Malawi developed several policy documents on how to combat COVID-19 but no policy document made specific provision to address issues anticipated by LGBT+ persons. The Public Health (Corona Virus Prevention, Containment and Management) Rules, 2020<sup>58</sup> were developed to combat disasters but did not anticipate health needs of LGBT+ persons during COVID-19. Section 3 of these Rules states that the objective of the Rules is to prevent, contain

56 ‘Gay arrests in Malawi: More mixed signals on gay rights’ *Rights Africa* 19 December 2018 <https://rightsafrica.com/2018/12/19/gay-arrests-in-malawi-more-mixed-signals-on-gay-rights/> (accessed 19 December 2018).

57 United Nations Office of High Commissioner on Human Rights ‘OHCHR and COVID-19: About COVID-19 and human rights’ [https://www.ohchr.org/en/covid-19?gclid=CjwKCAjw9-KTBhBcEiwAr19ig4n3fgKOUTYUUVB0nbXuZEXzfZtDIR6gn6lPNTbQQ7YVoBM37WavyTxoCuZ8QAvD\\_BwE](https://www.ohchr.org/en/covid-19?gclid=CjwKCAjw9-KTBhBcEiwAr19ig4n3fgKOUTYUUVB0nbXuZEXzfZtDIR6gn6lPNTbQQ7YVoBM37WavyTxoCuZ8QAvD_BwE) (accessed 4 May 2022).

58 Published in Government Gazette 4A on 9 April 2020, assented to on 8 April 2020 and commenced on 9 April 2020.

and manage the incidence of COVID-19 but section 3(2) provides that the enforcement of the Rules is under the Disaster Preparedness and Relief Act. The Rules provided for compulsory testing, detention, isolation and quarantine of individuals through use of force. Failure to comply with the rules would subject citizens to criminal sanctions including fines and imprisonment.<sup>59</sup>

At the time of publishing this chapter there was no assessment of the impact of current COVID-19 mechanisms on LGBT+ people. However, the absence of explicit mechanisms seen previously in HIV and AIDS policies or strategies suggest that LGBT+ persons are likely to be at increased vulnerability to stigma, discrimination or lack of services during lockdown or hospitalisation in isolation wards. CSOs and other stakeholders working on the rights of LGBT+ persons had challenges to reach out to the communities to provide essential health services.<sup>60</sup> Interrupted health services may include access to anti-retroviral therapies, psychosocial services and hormonal therapy. Elsewhere in Africa, LGBT+ persons have reported increased violence as a result of being at home and not accessing support services during lockdown.<sup>61</sup> So far the public discourses on COVID-19 have not extended to review the impact on LGBT+ persons. When the Rules were eventually challenged in a Malawi court, the focus was on political considerations and economic implications of lockdown and not consideration of its impact on the protection of human rights.<sup>62</sup>

## 6 Conclusion

This chapter has discussed cases in the courts of Malawi to demonstrate that judicial officers are also deploying strategies to contest LGBT+ rights. Importantly, strategies deployed by some judicial officers include deliberately ignoring the law or formal rules to advance populist homophobic views, using technicalities to discontinue or refuse constitutional proceedings, or tolerating judicial inefficiencies to perpetuate delays. The courts have

59 Section 6(4) of Malawi Public Health (Corona Virus Prevention, Containment and Management) Rules, 2020.

60 Email discussion with the Programme Manager of CEDEP on the status of LGBT+ activities in the context of COVID-19.

61 OA Oginni, K Okanlawon & A Ogunbajo 'A commentary on COVID-19 and the LGBT community in Nigeria: Risks and resilience' (2021) 8 *Psychology of Sexual Orientation and Gender Diversity* 261 <https://psycnet.apa.org/record/2021-28764-001> (accessed 26 June 2022).

62 SB Kaunga 'How have Malawi's courts affected the country's epidemic response?' London School of Economics (2020) <https://blogs.lse.ac.uk/africaatlse/2020/11/13/how-have-malawis-courts-law-affected-epidemic-response/> (accessed 4 May 2022).

therefore been active players in shaping the judicial, social and political contestations which have been dominated by rejection of homosexuality and related human rights, counteracted by a minority voice that is gradually gaining ground. The courts have therefore played a significant role in sustaining the dominant voices and obstructing the legal recognition and protection of LGBT+ rights in Malawi. The status quo has benefited ruling governments to retain popular support through continued existence of anti-gay laws whilst claiming not to implement the laws when queried at international human rights mechanisms. Success in the advancement of LGBT+ rights will therefore depend on the extent to which the key actors will deploy positive lawfare over its negative counterpart.

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