

Human Rights and Same-sex Intimacies in Malawi

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Dedication

The journey towards this PhD project started in 2009 when I read an article in a Malawian online newspaper warning Malawians about the arrival of 'homosexuals' in 'our god-fearing country'. What stunned me was the academic silence on the subject among Malawians, and the challenges which took me a few years to overcome before I had an opportunity to come to the University of Essex Human Rights Centre to embark on this historical interdisciplinary journey.

This thesis is dedicated to the 44 queer Malawians who shared with me part of their lives so that together we should tell a story in pursuit for a better world for all. Through your stories we will contribute in populating this marginalised subject matter. Change is on the way...

Abstract

In recent years, Malawi has received global attention as a global hotspot for human rights violations based on sexual orientation and gender identity since the arrest of Tiwonge Chimbalanga and Steven Monjeza for holding a wedding ceremony in 2009. The violations are a result of negative attitudes against 'homosexuality', and the application of anti-gay provisions of the Penal Code and the Marriages Divorce and Family Relations Act, which outlaw consensual adult same-sex relationships and non-conforming gender identities. Malawi's failure to protect queer persons amounts to the violation of its domestic and international human rights obligations. Paradoxically, the Malawian Constitution and international human rights obligations (to which Malawi subscribes), guarantee equal and effective protection against discrimination, which I have argued that it includes discrimination based on sexual orientation and gender identity.

This interdisciplinary study explores the life stories of 44 queer Malawians examining how the lack of human rights protection affects their daily lives. I have found that the majority of queer Malawians are unlikely to come out due to fear of stigma and discrimination. As a result, they are unable to claim the full status necessary to enable them to formally assert their identity, citizenship and relationship rights.

Drawing from social construction theories, this study will show that local meanings regarding human rights and sexuality include a misinterpretation of SOGI-based human rights as 'the right to conduct *mathanyula*', which is locally (mis)understood to imply permission to engage in sexual activities between men and young boys. I have recommended a radical shift in the articulation of SOGI-based human rights so that it is understood as the equal entitlement to protections in accordance with

Malawi's domestic and international human rights obligations. If understood as the latter, Malawians are likely to endorse human rights protection based on sexual orientation and gender identity.

Abbreviations

AIDS	Acquired Immune Deficiency Syndrome
ASSAf	Academy of Science of South Africa
AU	African Union
BLM	Banja la Mtsogolo
CEDAW	Convention on the Elimination of Discrimination Against Women (CEDAW)
CEDEP	Centre for Development of the People
CHERA	Community Health Rights Advocacy
CHREAA	Centre for Human Rights Education Advice and Assistance
CHRR	Centre for Human Rights and Rehabilitation
CRAC	Civil Rights Advocacy Centre
CRC	Convention on the Rights of the Child
CSO	civil society organisation
DPP	Democratic Progressive Party
DoPP	Director of Public Prosecutions
EAM	Evangelical Association of Malawi
GNX	Gender Dynamix
HIV	Human Immunodeficiency Virus
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights

LITE	Lesbian, Intersex, Transgender and other Extensions
MANERELA+	Malawi Network of Religious Leaders Affected by HIV and AIDS
MARPS	most at risk populations
MHRC	Malawi Human Rights Commission
MLS	Malawi Law Society
MSM	Men who have sex with other men
MSRA	Malawi Sexual and Reproductive Health Alliance
NAC	National AIDS Commission
NAP	National AIDS Policy
NCST	National commission for Science and Technology
NGO	Non-Governmental Organisation
PEJUSUN	Peace and Justice Support Network
SADC	Southern Africa Development Community
SOGI	Sexual Orientation and Gender Identity
STD	Sexually Transmitted Disease
STI	Sexually Transmitted Infection
UDF	United Democratic Front
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations

UN HCHR	United Nations High Commissioner of Human Rights
UNGASS	United Nations General Assembly
UPR	United Nations' Universal Periodic Review
US	United States of America
USA	United States of America
YMSM	Young men who have sex with other men

Introduction

There is more interest in sexuality as a topical global issue today than ever before.¹ In the early part of the twentieth century, the study of sexuality was dominated by 'sexology', which focused on studying sex, based on the understanding of it as a biological instinct primarily aimed at procreation.² The late 1960s saw the emergence of sociological studies of sexuality, which have now found that sexuality is a product of social forces that are shaped by context-specific histories.³ The studies have taught many things, but two stand out in relation to this research. First, there are as many sexual histories as there are contexts.⁴ In other words, each community has (potentially) its own history of sexuality. Second, such histories are shaped by the tug of war between forces of control or power on the one hand, and resistance on the other.⁵ However, although studies about sexuality have flourished and entered the mainstream since the 1970s, the discourse is still relatively young especially in and about the global south.

In the last three decades, diverse views about (homo)sexuality among Africans have generated increasing debate among scholars, activists, politicians, religious and traditional leaders, and the general public.⁶ For example, until the late 1990's, issues about (homo)sexuality were rarely of interest in mainstream discourses about sexuality or gender in Africa.⁷ Early research about (homo)sexuality in

¹ (Weeks J. , *Sexualities*, 2009)

² (Weeks J. , *Coming Out: Homosexual Politics in Britain, from the Nineteenth Century to the Present*, 1977), (Weeks J. , *What is a Sexual History?*, 2016)

³ (McIntosh, 1968), (Weeks J. , *Sexualities*, 2009)

⁴ (Weeks J. , *Sexualities*, 2009)

⁵ (Foucault, 1978), (Plummer K. , *Sexual Stigma: An Interactionist Account*, 1975), (Weeks J. , *Sexualities*, 2009)

⁶ (Human Rights Watch, 2003)

⁷ For example, see (Ahlberg, 1994) which is a critique of Caldwell et al's research that about the drivers of the spread of HIV and AIDS in Africa. In her critique, there is repeated mention of 'African sexualities' but nowhere does she suggest existence of same-sex sexualities as part of such 'African sexuality'. Also see, (Arnfred, 2004) *Rethinking Sexualities in Africa* which, published in 1998, proposes a paradigm shift in sexuality research about Africa, but only discusses homosexuality in passing without much analysis or acknowledgment that it is an important aspect of African sexualities.

Africa that emerged in the early 1990s focused only on whether same-sex intimacy existed in Africa, such as the ground-breaking study by Murray and Roscoe, which established that there were communities in all regions of the African continent where same-sex intimacy existed.⁸ The flourishing recent research has revealed that same-sex intimacy is very much part and parcel of African societies.⁹ The research has established that sexualities in the African continent are also diverse and contextual.¹⁰ This diversity and contextuality of African sexualities, in its plurality, draws us to the early sociological research with a reminder that Africa is a continent comprising 54 diverse countries, each with unique landscapes, communities and struggles for 'sexual equality'. More recently, there has been a notable increase in scholarly interest in 'homophobia hotspots', include Uganda, Nigeria, and paradoxically South Africa.¹¹ South Africa is the only African country with an explicit constitutional protection of non-discrimination based on sexual orientation, but it is also notorious for communities that perpetrate the most violent atrocities against lesbians. Research about the continent remains young overall. If sexuality is indeed locally contextual, the extent of the research gap about sexuality in Africa is as wide as the number of unique communities in Africa. We have a lot to learn about Africa and indeed Malawi.

The Human Rights, Sexual Orientation, Gender Identity Dilemma

Worldwide, people continue to suffer human rights violations based on perceived or actual sexual orientation and gender identity.¹² Many reports have found that lesbian, gay, bisexual, transgender and intersex persons around the world face social stigma, discrimination, exclusion,

⁸ (Murray & W, 1998)

⁹ (Epprecht M. , Hungochani: The History of Dissident Sexuality in Southern Africa, 2013), (Currier, Out in Africa: LGBT Organizing in Namibia and South Africa, 2012)

¹⁰ (Tamale, African Sexualities: A Reader, 2011)

¹¹ (Chitando & Mateveke, 2017)

¹² (O'Flaherty & Fisher, 2008)

harassment and violence.¹³ The absence of laws to protect people from violations based on sexual orientation and gender identity is a significant factor in this problem. Currently (2017), there are 72 countries in the world where same-sex relationships are against the law, and 32 of those countries are in Africa.¹⁴ Eight countries still implement the death penalty for same-sex acts, four of which are in Africa.¹⁵ Only 22 countries in the world recognise same-sex marriage, and 26 countries permit joint adoption of children by same-sex couples.¹⁶ 19 countries have laws that prohibit advocacy aimed at protecting people who do not conform to heterosexuality.¹⁷

The continued lack of human rights protection based on sexual orientation or gender identity have been of concern to the global community for a long time. Notable efforts to address the situation include a historical step in 2005 by a coalition of NGOs who proposed to develop the *Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity* (Yogyakarta Principles). This had the aim of developing principles to facilitate a unified approach in the application of human rights law to the issues of sexual orientation and gender identity.¹⁸ Adopted in November 2006, the principles outlined duties of states to abide to legal obligations towards guaranteeing protections, with the aim to promoting that states view human rights obligations in their constitutions and international human rights law in a way to extend protection to all persons from discrimination based on sexual orientation and gender identity.¹⁹ However, in July 2011 the United Nations adopted a resolution on human rights, sexual orientation and gender identity in which member states expressed concern that there were people

¹³ (Human Rights Watch, 2016), (Human Rights Watch, 2017), (Amnesty International, 2016), (Amnesty International, 2017)

¹⁴ (Carroll & Mendos, 2017, p. 8) (Carroll & Mendos, 2017, pp. 8, 40)

¹⁵ (Carroll & Mendos, 2017, p. ibid)

¹⁶ (Carroll & Mendos, 2017, p. 9)

¹⁷ (Carroll & Mendos, 2017, p. ibid)

¹⁸ (International Commission of Jurists & International Service for Human Rights, 2007), (O'Flaherty & Fisher, 2008, pp. 232-233)

¹⁹ (O'Flaherty & Fisher, 2008, pp. 232-233)

around the world who were still suffering from acts of violence and discrimination on the basis of their sexual orientation and gender identity.²⁰ The resolution included the commissioning of a study by the United Nations High Commissioner of Human Rights aimed at guiding a United Nations' dialogue on the matter.²¹ In November of the same year, the High Commissioner's report outlined a comprehensive list of treaties and decisions by the UN, which offered grounds for human rights and freedoms without discrimination on the basis of sexual orientation and gender identity.²² Following a resolution by the UN general Assembly in 2014 requesting the High Commissioner to report on best practices of addressing violence and discrimination based on sexual orientation and gender identity,²³ in his report the High Commissioner noted with concern that violations continued to occur:

the overall picture remains one of continuing, pervasive, violent abuse, harassment and discrimination affecting LGBT and intersex persons in all regions. These constitute serious human rights violations, often perpetrated with impunity, indicating that current arrangements to protect the human rights of LGBT and intersex persons are inadequate. There is as yet no dedicated human rights mechanism at the international level that has a systematic and comprehensive approach to the human rights situation of LGBT and intersex persons.²⁴

In June 2016, the UN General Assembly passed a resolution to appoint an Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity.²⁵

The first two reports by the Independent Expert have also noted that people continue to face human rights violations based on the sexual orientation and gender identity as a result of obstacles including, criminalisation of same-sex relations and gender identity, and violence and discrimination.²⁶ At the Africa-regional level, in 2014 the African Commission on Human and Peoples' Rights passed a resolution on *Protection against Violence and other Human Rights*

²⁰ (United Nations General Assembly (A/HRC/C/RES/17/19), 2011, p. 1)

²¹ (United Nations General Assembly (A/HRC/C/RES/17/19), 2011, p. 2)

²² (United Nations General Assembly (A/HRC/C/RES/17/19), 2011, p. 2)

²³ (United Nations General Assembly (A/HRC/RES/27/32), 2014)

²⁴ (United Nations (A/HRC/29/23), 2015, p. 20)

²⁵ (United Nations General Assembly, 2016)

²⁶ (United Nations General Assembly (A/HRC/35/36), 2017),

Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity in which it expressed alarm at the violence, discrimination and human rights violations on the basis of sexual orientation and gender identity occurring in Africa, calling for states to effectively prohibit and punish such violations.²⁷ Reports of violations based on their real or perceived sexual orientation and gender identity have been reported in Malawi.²⁸

The continued violations that occur in Malawi deserve scrutiny in terms of their sustenance despite existence of relevant human rights obligations with potential to guarantee protections as stipulated in domestic and international human rights law. Such laws include the Constitution at the domestic level, and at the regional or international level, the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Rights of the Child (CRC) and the Convention on the Elimination of Discrimination Against Women (CEDAW).²⁹ Based on the interpretation in the Yogyakarta Principles and the High Commissioner's recommendations,³⁰ Malawi's domestic and international human rights obligations must be principally sufficient to extend protections based on sexual orientation and gender identity. However, the fact that people continue to suffer those violations demands understanding about who suffers, what it is that they suffer, how they suffer and why. To understand who suffers, there is a need to know the identities of those targeted with the violations. Using social constructionist theory, I argue that both human rights and sexuality in the Malawian context are locally specific and shaped by local histories of control and resistance.³¹ In chapter 2, I will show that same-sex sexualities in the Malawi are complex and shaped by the local

²⁷ (African Commission on Human and Peoples' Rights, 2014). Also see Appendix A6

²⁸ (CEDEP & CHRR, *Human Rights Violations on the Basis of Real or Perceived Sexual Orientation and Gender Identity in Malawi*, 2014), (CEDEP & CHRR, *Violence and Discrimination Based on Real or Perceived Sexual Orientation and Gender Identity in Malawi- Human Rights Violation Report 2015, 2016*)

²⁹ (Ghandhi, 2004)

³⁰ *Supra* note 21, 22

³¹ *Supra* note 5

context. To understand what it is that they suffer, I highlight two distinguishable forms of human rights constructions relevant to this study, 'human rights' and 'human rights law'.³² Human rights are moral claims, and human rights law are legal claims.³³ According to Viljoen, codifying human rights in law, thus human rights law, has a distinct advantage that entitlements in laws such as treaties and constitutions makes them legally enforceable and therefore, it hold states accountable to the obligation to promote, fulfil and protect.³⁴ In addition, there are set international, continental, and domestic legal mechanisms to legally enforce protection of codified human rights. In the case of Malawi, this includes the constitutionally established courts, the African regional human rights system,³⁵ or the United Nations human rights system. While human rights law guarantees protection through state obligations, I approach the problem based on the conviction that the disregard of human rights, is a significant factor in the violations that occur in everyday ordinary social interactions at the community level. As such, both are significant for the experiences of queer persons. To understand why and how the suffering occurs, it is important to analyse how the Malawian community negotiates human rights in terms of tolerance towards human rights protection of its queer members, or normalisation of human rights violations.

My point of departure in the first chapter that both (homo)sexuality and human rights are social constructs necessitates paying attention to the terminology and meanings that these terms carry. I am reminded that words are sticky and they retain association even when used differently.³⁶ On the other hand, I am cautious that just because something is cited by the term 'human rights' it does not always refer to the same thing.³⁷ Understanding of the local Malawian terminologies

³² (Viljoen & Njau, *Beyond the law: Multi-disciplinary perspectives on human rights*, 2012), (Viljoen, *International Human Rights Law in Africa*, 2012)

³³ (Viljoen & Njau, *Beyond the law: Multi-disciplinary perspectives on human rights*, 2012)

³⁴ (Viljoen & Njau, *Beyond the law: Multi-disciplinary perspectives on human rights*, 2012), (Viljoen, *International Human Rights Law in Africa*, 2012)

³⁵ (Jjuuko, 2017)

³⁶ (Ahmed, 2010, p. 214)

³⁷ (Shivji, 1989)

about human rights, human rights law, and sexuality is crucial to understanding the human rights violations and their context. I argue that for both human rights law and human rights, the local languages and meanings are influential in the understanding why Malawi has a favourable legal framework, but insufficient protections in practice.

It is therefore a critical task for this research to interrogate the terminologies of 'sexuality', and 'human rights' in relation to 'Africa' and 'Malawi'. Far from assumptions made in many discussions that the terms carry common meanings, these terms are distinct and context-specific. Africa is both a geographical and epistemological construct. The origin of the name Africa remains unresolved and its boundaries contested. Its communities transcend the boundaries and its peoples are not homogeneous in terms of colour, culture, religion, language, and practices. Africa is as complex and diverse as the sum of its parts. It is as oblivious an idea as is the origins of its name. It is therefore problematic to declare anything as African, for Africa is only a sum of distinctly diverse and unique parts. If there exists an Africa, or indeed anything African, then it is merely a political tool to identify the distinct parts located in the mass geographical space that it occupies. Defining anything as 'African' should therefore be treated as a conceptual anomaly, and at most a matter of convenience. Assigning 'sexuality' and 'human rights' to 'African' therefore requires sophisticated justification.

It is hypothetically possible to establish and align 'sexuality' and 'human rights' in the geographical location of Africa. However, in the true sense, it is not practical to generalise sexuality found in Africa as African, bearing in mind the distinct cultures, religions, languages and practices in the different societies and communities. Indeed, as suggested by Tamale, we must think of sexualities

about Africa in plural terms.³⁸ Some of them may be similar, but they are specific to each community and its similarity must be viewed as coincidental.

The complexity of the African continent and the distinctiveness of the communities within it demands consideration that the characteristics of human rights may be specific to communities. The concept of human rights must be viewed as contextual, and its languages unique to specific local communities. I will discuss this at length in the first chapter. While Malawi itself is also diverse geographically and socially, it offers an important case to study due to the heated debates the subject matter has triggered in the last decade.

Most research about (homo)sexuality in Malawi has focused on the impact of HIV and AIDS on men who have sex with other men (MSM). These research projects are part of the national HIV and AIDS response efforts. The research is donor funded, with a pre-set agenda, and in turn usually restricted to inquiry on MSM in relation with the HIV and AIDS crisis.³⁹ The dependence on external funding limits its scope to the parameters of the funding objectives. In the case of Malawi, the early research projects were predominantly a collaboration of international and local academics focusing on quantitative measures of medical data aimed at generating statistical data for the national HIV and AIDS response.⁴⁰ The data may also have been used to inform donors about the success of their intervention. It should however be acknowledged that discussion has

³⁸ (Tamale, *African Sexualities: A Reader*, 2011)

³⁹ (Tamale, *African Sexualities: A Reader*, 2011, p. 27)

⁴⁰ E.g. (Baral, 2009) HIV Prevalence, Risks for HIV Infection, and Human Rights among Men Who Have Sex with Men in Malawi, Namibia, and Botswana, (Fay & al, 2010) Stigma, Health Care Access, and HIV Knowledge Among Men Who Have Sex With Men in Malawi, Namibia, and Botswana, (Wirtz & al, 2009) HIV among men who have sex with men in Malawi: elucidating HIV prevalence and correlates of infection to inform HIV prevention, and (Wirtz A. , et al., 2014) Final report to UN Joint Team on HIV &A IDS in Malawi through UNDP: HIV Prevalence and Sociobehavioral Characteristics among Men Who Have Sex with Across Seven Sites in Malawi.

slowly moved beyond clinical studies, but the interest in broader inquiries remain limited especially among Malawian scholars.⁴¹

There are several gaps in existing research in the field. Firstly, the focus on MSM and HIV diminished interest in viewing sexuality as complex and diverse. Conveniently, the clinical studies have settled on researching the impact of HIV and AIDS on MSM, misrepresenting Malawian same-sex sexualities as homogeneous, and within it misrepresenting MSM as the main category of the Malawian queer population. The research has mentioned 'homosexuality', 'same-sex', and 'gay', without critically reflecting whether these terms carry locally unique meanings in Malawian contexts. For example, there is no curiosity in past research about whether Malawian MSM connotes any local translation of homosexuality that may trigger homophobia. As I will argue in this research, connotations that such local lexicon carry has an impact on whether Malawians find protection of the concerned subjects as legitimate. Correspondingly, there has been no attention to whether any localised meanings about human rights impacts by health service providers towards respecting the entitlement to the right to health as stipulated in domestic and international human rights law.⁴² There is therefore a need for detailed analysis of what 'sexuality' or 'human rights' mean locally, and by implication an exploration of its distinctness or relationship with the meanings, whether direct or implied, to the broader questions about protection of human rights based on sexual orientation and gender identity in the Malawian context.

Similarly, past research has not fully explored the issue of sexual orientation and gender identity as a human rights issue. Several researches have cited stigma and discrimination that queer people

⁴¹ This includes; (Chibwezo, 2011) Blackmail Among Gay People in Malawi, (Chanika, Lwanda, & Muula, 2013) Gender, Gays and Gain: The Sexualised Politics of Donor Aid in Malawi, (Dionne & Dulani, 2014) Research Note: Attitudes toward homosexuality in sub-Saharan Africa, 1982-2012, and (Kabwila, 2013) Seeing beyond Colonial Binaries: Unpacking Malawi's Homosexual Discourse

⁴² By extension, past research has overlooked the impact on 'human rights' on 'human rights law'

face in the country, but they have presumed human rights as human rights law, and in the process fixated their attention on the lack of protection in law and the need to decriminalise anti-gay laws. This focus on the law is because the debate in Malawi arose from a legal case following the arrest of Steven Monjeza and Tiwonge Chimbalanga for holding a public same-sex *Chinkhoswe* in December 2009.⁴³ In the process, the discourse has conflated human rights, human rights law and sexuality without critically reflecting the community level dynamics that sustain the status quo where human rights, as law, is ignored. There is a need to move beyond the legal debates and explore how actions by ordinary Malawians contribute to the failure of human rights in terms of protecting queer peoples in their ordinary everyday lives.

So far, the analysis of lived experiences of queer Malawians has been insufficient, with only two research projects on life experiences of queer Malawians done so far. The first research on *Queer Malawi* presented first hand stories about queer Malawians living in Malawi. While the publication exposed the existence of queer Malawians, it was mainly a public advocacy project aimed at 'revealing' that queer people really existed in Malawi. A new project published in 2016 has focused on Malawian lesbians. Significantly, the two research projects were not headed by Malawian researchers. It is my hope that my unique positionality as a Malawian researcher familiar with local languages and social practices puts me at an advantage in analysing the local nuances in the construction of human rights and sexuality.

Past research studies have inquired about (homo) sexuality in Malawi, but has focused less on the discourse about (homo)sexuality itself. This lack of focus misrepresents the discourse as uncontested and straightforward. This research will present the impact of the discourse itself on

⁴³ For example, please refer to (Price, 2010). Chinkhoswe is a traditional wedding ceremony. For a detailed discussion of the wedding by Monjeza and Chimbalanga, please refer to section 2.2

the emerging issues about (homo)sexuality in Malawi. This research is an interdisciplinary inquiry offering sociological perspectives where legal analysis falls short, to offer legal perspectives where sociology, and to raise sociological and legal perspectives where science (sexology) falls short.

Nature and Scope of inquiry

The key objective of this research is to understand the local context of the protection of human rights based on sexual orientation and gender identity in Malawi through the following research questions: What are the experiences of queer people in Malawi? What discrimination and exclusions do they experience? How do they overcome such discrimination and exclusions? What do participants' experiences in the Malawian context tell us about the epistemology of sexualities in the African or Malawian context? In the process, I explore the Malawian context in terms of its history, local languages and meanings about sexuality and human rights, and past and contemporary struggles.

Contextual studies about sexuality presents conceptual and political difficulties when it comes to naming or categorising the sexualities being studied.⁴⁴ Previous researchers have used different terms to describe persons who do not conform to heterosexual norms. 'Western' forms of categorisation such as L (lesbian), G (gay), B (bisexual), T (transgender), and I (intersex) categories remain disputed by some queer Africans both in language and concept, as exemplified in the emergence of the MSM category in the wake of the HIV and AIDS crisis. Others have opted to use broader terms such as 'non-heterosexuals'⁴⁵ or 'men/individuals who engage in same-sex relations' to depict the complexities of sexual identification where individuals self-identify

⁴⁴ (Matebeni & Msibi, *Vocabularies of the non-normative*, 2015), (Matebeni, *Reclaiming Afrikan: Queer Perspectives on Sexual and Gender Identities*, 2014)

⁴⁵ (Waites M. , *Genocide and Global Queer Politics*, 2017)

differently.⁴⁶ In this research, I have opted to use the term ‘queer’ to refer to any identities that do not conform to heterosexuality. I find queer appropriate because it is an all-encompassing term about non-conformity or the act of non-conforming.⁴⁷ Msibi has cautioned against the use of ‘queer’ in the context of African sexual politics as it connotes western sexuality struggles and may be perceived as a continuity of Western sexuality terminology in the African context.⁴⁸ However, the participants interviewed in this study referred to themselves with multiple, and sometimes conflicting categories. For example, although Musandide engages in sexual relationships with both men and women, thus potentially self-identify as bisexual, he identified as heterosexual during the interview. To him, having the capacity to engage in sexual relationships with members of the opposite sex waived him from self-identifying as homosexual, gay or bisexual. Similarly, Chifundo was born male but lives as a woman. However, he insisted that he is not a transgender but a gay man. As I will argue in chapter 2, the Malawian lingua franca does not have appropriate words to translate the complex L, G, B, T, I categories. As such, -any (in)appropriateness cautioned by Msibi can only be replaced if there was an equally appropriate terminology indigenous to the Malawian and indeed any African-local context.

I will show in chapter 1 that Malawi lacks appropriate terminology that describes the complexity of sexualities found in Malawi. I use the term ‘same-sex intimacy’ to refer to any sexual or intimate conduct that does not conform to heterosexuality. I have opted to use the term ‘SOGI-based human rights’ to refer to human rights or any related claims in the context of sexual orientation and gender identity. Unlike ‘gay rights’, ‘LGBT rights’, ‘LGBTI rights’, ‘LGBTQ rights’, ‘LGBTQI rights’ or ‘LGBTIQ rights’, this rarely used term opens possibility for articulating rights-claims that are

⁴⁶ (Msibi T. , Denied love: Same-sex desire, agency and social oppression among African men who engage in same-sex relations, 2013, p. 106), (Epprecht M. , Hungochani: The History of Dissident Sexuality in Southern Africa, 2013)

⁴⁷ (Jagose, 1996)

⁴⁸ (Msibi T. , Denied love: Same-sex desire, agency and social oppression among African men who engage in same-sex relations, 2013, pp. 107-108)

distinct from those pursued in Western advocacy. Any attribution of Western-based concepts to claims of human rights in the African context misrepresents the specific local human rights demands being pursued by queer persons in the African or indeed the Malawian context. For example, to most Africans, 'gay rights' terminology is associated with the demand for the right to same-sex marriage. Since same-sex marriage is not a demand in the advocacy in Malawi, it would be difficult to demand 'gay rights' in a manner that convincingly articulates that the rights being demanded exclude the call for same-sex marriage. However, other commonly used terms such as 'gay', 'homosexual', 'LGBT rights', 'gay rights' or 'homosexuality' have also been cited in this thesis to emphasise the manner such terms were used in specific cases.

Approach of this research

This research is about histories, concepts, methods, context and stories about human rights and sexuality in the ordinary lives of Malawians. As such, it focuses on understanding the local histories, languages, debates and lived experiences. It is an interdisciplinary inquiry. I have used several qualitative research methodologies to review documents, including archive colonial materials, legal and policy documents, case law, media reports, and government and non-governmental reports. In my analysis of the documents, I paid attention to the earliest possible documentation about same-sex intimacy in the Malawian context. I also focused on the type of issues that were prominent in the local media debates. Within these debates, I identified key players in the discourse and the main issues that featured in contestations. I also drew from 44 face-to-face interviews with queer Malawians conducted in the southern region of Malawi during October and November 2014.⁴⁹ The interviews were semi-structured and paid attention to daily

⁴⁹ All participants interviewed during fieldwork were anonymised and their location has been kept confidential. Please refer to chapter 3.4 for details on ethical considerations of this study.

lived experiences in terms of sexuality and SOGI-based human rights. The methodology will be discussed further in depth in Chapter 3.

Structure of the Thesis

This thesis is divided into eight components. This first is the introduction, which outlines the problem, rationale and approach of the study.

Chapter one reviews the literature about sexuality and human rights. It begins by discussing the significance of interdisciplinary approaches, and in the process justifying the relevance of sociology in the study of human rights. In this chapter, it is argued that both human rights and sexuality are social constructions whose content and processes are shaped by local histories. It is through the social constructionist perspective that I propose a framework for understanding SOGI-based human rights.

Chapter two examines the Malawian historical and social context in order to analyse how the paradox of criminalisation of (homo)sexuality vis-a'-vis Malawi's domestic and international human rights obligations have influenced the contestations around same-sex intimacies. I argue that the varied meanings and terminologies that human rights and (homo)sexuality carry in the Malawian context have resulted in the misconstruction of SOGI-based human rights in a manner that contradicts the true meanings intended in domestic and international human rights instruments. I further propose that it is through such misconstruction that most Malawians have rejected any calls for protection of SOGI-based human rights.

Chapter three outlines the research design and methodology used. It clarifies the dual qualitative approach comprising discourse analysis and life stories. I also discuss ethical considerations for the field work conducted in Malawi in 2014. The chapter outlines my experiences in the field in terms of collaboration with gatekeepers, identifying research participants and conducting interviews, and challenges experienced in the field are also discussed in this chapter. I also give a reflexive account of my positionality as a heterosexual researcher doing research about same-sex intimacy in Malawi. This account is a timely contribution to future researchers on the topic. The chapter concludes with an overview of the profile of the participants interviewed in this research.

Chapter four is the first of three chapters analysing the empirical findings based on interviews from the field. Using coming out as a process for claiming identities, I discuss the experiences of queer Malawians upon coming out to their families. The family, primarily represents the private sphere through which heterosexual norms are learnt and enforced. It is a site where human rights, and in part, norms of human rights laws, are negotiated. The family is an important basic unit of Malawian society as stipulated in the Constitution. It is also the customary custodian of traditional values. The process of coming out is a social process through which queer Malawians negotiate with society regarding their departure from heterosexual norms. This negotiation is by extension a fight for SOGI-based human rights claims. I argue that although queer Malawians have devised strategies to claim some human rights that they ought to have as entitlements, such claims remain inadequate without formal recognition of their queerness as part of their formal identity.

Chapter five focuses on how churches, the police and public health facilities enforce restrictions of public space usage by queer Malawians. I argue that the enforcement exerted by these three institutions restrict queer persons from accessing rights and freedoms associated with worship, dignity and health.

Chapter six focuses on how queer Malawians have confronted stigma and discrimination by creatively occupying public and digital spaces to convene, experience intimacy and resist norms. Unlike discussions in previous research, I show that queer Malawians started resisting social oppression much earlier than the arrest of Monjeza and Chimbalanga in 2009. However, I also argue that so far that the absence of legal recognition of queer identities restricts their extent to which they can negotiate corresponding human rights, as such, there is no full guarantee of protection both in human rights and human rights law.

The last section summarises the research, offering concluding remarks and recommendations.

1. Literature Review: Constructing Human Rights in the context of Sexual Orientation and Gender Identity

In this chapter, I begin by arguing that sociology and human rights law can complement each other in the understanding and protection of SOGI-based human rights. Drawing from social constructionist theories, I argue that both sexuality and human rights are social constructions whose content and meanings are shaped by local contexts. I propose that while the law is important in providing a formal and enforceable framework for the protection of human rights generally, respect and observance of human rights mostly takes place during ordinary peoples' everyday social interactions outside the legal arena. Specifically, an understanding of the social processes in which people engage with human rights in their ordinary social interactions outside the legal arena is critical to the understanding why human rights violations continue to occur.

Previously in Malawi, research focused on human rights as law, and in the process ignored how ordinary people engaged with human rights as moral norms.⁵⁰ In this chapter, I draw from global and continental literature on sexuality and human rights in order to provide a theoretical overview through which I will set the Malawian context in the next chapter. I suggest three conceptual and strategic challenges that arise with the legal-centred analysis when dealing with the contentions human rights issues in the context of SOGI in the African context. First, I revisit social construction theories of sexuality in order to highlight the need to come up with a Malawian-specific framing of configurations of sexualities. Second, I propose that an over emphasis on human rights as law risks overlooking the role of human agency in negotiating the human rights claims. The extent to which ordinary people negotiate human rights in their ordinary interaction is underrated. Third, I draw from social constructionist theories of human rights in order to propose that while universality of human rights is

⁵⁰ For example, (Mlenga, 2012), (Price, 2010)

necessary in the aspiration that all humans must attain protection, human rights must be viewed as shaped by local contexts in terms of social meanings, terminology and local significance.

This chapter suggests that an understanding of both sexuality and human rights as social constructions has potential to enable researchers to pay attention to local nuances that arise when the concepts are applied in locally unique contexts such as Malawi. This approach also enables the understanding of local debates in relation to the historical or social contexts in which they occur.

1.1. Relevance of Sociology in the study of Human Rights and Sexuality

Until recently, legal studies dominated human rights scholarship, positing the law as the primary source for the interpretation, enforcement and implementation of rights.⁵¹ Human rights-as-law has distinct advantages in that codifying human rights entitlements in legal instruments makes them enforceable through ordering legal sanctions for redress of violations.⁵² However, legal sanctioning of codified entitlements is not without challenges in practice. The concept of Human rights has a long history in terms of moral or normative foundations, but the adoption of the Universal Declaration of Human Rights (UDHR) by the UN General Assembly on 10 December 1948 is taken as the effective starting point of the standards upon which the current global human rights system is founded.⁵³ Between the 1950s and 1980s, there was rapid progress in the setting of human rights standards at the international level, but in the last three decades the pace has slowed.⁵⁴ At the level of the UN human rights system, a great deal of progress has been achieved,

⁵¹ (Donnelly, *Universal Human Rights in Theory and Practice*, 2003, p. 13)

⁵² (Viljoen & Njau, *Beyond the law: Multi-disciplinary perspectives on human rights*, 2012, p. *ibid*). (Viljoen, *International Human Rights Law in Africa*, 2012)

⁵³ (Freeman M. , 2011, pp. 4-5), (Mutua, 2016, p. 9)

⁵⁴ (Mutua, 2016, p. *Ibid*)

but challenges have also been registered. In 1998, as the world celebrated the 50th anniversary of the UDHR, former UN High Commissioner on Human Rights (UN HCHR) Mary Robinson issued a provocative paper entitled *Shame of failure on human rights*⁵⁵ in which she argued that there was little to celebrate about success of human rights since the adoption of the UDHR in 1948.

The international system's achievements in implementing human rights standards cry out for fresh approaches. As we prepare for the 50th Anniversary of the Universal Declaration, I have told my colleagues that I do not see this as an occasion for celebration. Count up the results of 50 years of human rights mechanisms, 30 years of multi-billion-dollar development programmes and endless high-level rhetoric, the global impact is quite underwhelming. We still have widespread discrimination on the basis of gender, ethnicity, religious belief or sexual orientation... This is a failure of implementation on a scale which shames us all. So much effort, money and hopes have produced such modest results.⁵⁶

Eighteen years later in 2016, during the celebrations of the 50th anniversary of the (ICESCR and ICCPR, the current UN High Commissioner on Human Rights Zeid Ra'ad Al Hussein expressed alarm at the failure of the international human rights to protect individual human rights.

I am also disturbed by a widespread practise of what could be termed "human rights window-dressing". The ratification of treaties and agreements, and acceptance of recommendations stemming from UN human rights mechanisms, are not in themselves human rights achievements. There needs to be follow-up and real change to bring greater freedoms and dignity to the people. Unless consequential at the level of the rights of the individual, the work we do will remain bureaucratic – or even theatre. Human rights obligations should not be a "tick-the-box" exercise designed only to boost a country's international image.⁵⁷

Over the last three decades, several scholars have expressed concern that human rights have started to experience a decline.⁵⁸ In 2014, for example, Hopgood argued that the ground of human rights was crumbling and the '150-year experiment in creating global rules to protect and defend individual human beings is coming to an end.'⁵⁹ His concerns included that the dominant principles and practice of universal human rights were encountering backlash from nationalists, authoritarian and conservative-religious groups. According to him, societies are increasingly questioning the

⁵⁵ (Robinson, 1998) *Shame of Failure on Human Rights*

⁵⁶ (Robinson, 1998, p. 46)

⁵⁷ United Nations Office of the High commissioner of Human Rights, Statement by Zeid Ra'ad Al Hussein, United Nations High Commissioner for Human Rights, to the Human Rights Council's 31st session, 10 March 2016, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=17200&LangID=E#sthash.iQPyd7QD.dpuf> (accessed 28 June 2016)

⁵⁸ Such work includes (Douzinas, 2000), (Moyn, 2010), (Posner, 2014), and (Adeney & Sharma, 2007)

⁵⁹ (Hopgood, 2014)

applicability of the conventional human rights principles to their local contexts, most notably by superpower states such as China and Russia. Also in the same year, Posner expressed concern that the current legal framework of human rights would gradually dissolve away due to unresolvable disputes about the content and competing claims of human rights.⁶⁰ One problem regarding international human rights that he cited was that local actors, who are also UN member states, were cautious in granting discretion about human rights to institutions that were not local on the basis that such institutions were not intimately in touch with the issues and problems that they faced at the local level. However, other scholars have claimed that the state of human rights is in fact improving. This includes Landman who has challenged Hopgood's claim on the basis that evidence has shown that human rights have had a positive impact towards creating legal standards and local legitimacy.⁶¹ More countries have recognised human rights standards and embraced legal and quasi-legal processes to address human rights violations.⁶² In her latest book *Evidence for Hope: Making Human Rights Work in the 21st Century*, Sikkink has drawn from decades of empirical research to show that contrary to pessimism from Hopgood, Posner and others, the situation of human rights protection is in fact improving in areas such as gender and child rights.⁶³ She has also expressed concern that the world's fixation on challenges about human rights, sometimes overshadow the remarkable progress shown by the type of evidence that she presents.

At times we hear about human rights crises, but not about progress. We learn about the failure of the Arab Spring in Egypt or Syria, but not about a more successful outcome in Tunisia, which in 2016 started the public hearings in its Truth and Dignity Commission. We learn about the breakdown of democracy in Burundi, but not about the struggle for democracy in Gambia, where People voted in late 2016 to oust a strongman who had been president for twenty-two years. Where we find human rights progress, as in these cases, we see that it has been the result of countless struggles over decades.⁶⁴

⁶⁰ (Posner, 2014)

⁶¹ (Lettinga & van Troost, 2014, p. 26)

⁶² (Lettinga & van Troost, 2014, pp. 26-27)

⁶³ (Sikkink, 2017)

⁶⁴ (Sikkink, 2017, p. 10)

In her view, critiquing human rights with blanket statements, such as those by scholars or leaders at the OHCHR, claiming the deterioration of human rights without any empirical data is unhelpful and a disservice to the progress made thus far.⁶⁵ A constructive critique, she proposes, required clarity on the nature of critique, and the definition of terms and methods.⁶⁶

This study does not dispute the relevance or importance of human rights, both as law and moral norms. It also does not dispute the aspiration for universality in the entitlement to either international, or domestic human rights. It acknowledges the gains achieved by human rights thus far. However, it also recognises, as discussed earlier, that there are people who continue to face serious human rights violations based on their sexual orientation and gender identity in Africa and indeed Malawi. In such cases where human rights protection falls short, whether legally or otherwise, there is need for a radical shift in interrogating the factors that have sustained the obstacles. Re-examining the basic framing of sexuality and human rights facilitates an understanding of how such concepts are locally constructed. By doing so, there is a better prospect for a better understanding of how human rights claims are framed and negotiated in specific local contexts such as Malawi. As a starting point, the recent history of the concepts must be revisited to create a reference point.

The legal and philosophical connotations about the term 'human rights' imply two ways of conceptual interpretation. They can be understood as a moral claim that people can invoke, or as a claim that is enshrined in law (constitutional or international) to which states are accountable through legal obligations.⁶⁷ The UDHR, upon which the current international legal human rights framework is founded, is based on the philosophical view that rights are inalienable and human

⁶⁵ (Sikkink, 2017, p. 11)

⁶⁶ (Sikkink, 2017, p. Ibid)

⁶⁷ (Viljoen, International Human Rights Law in Africa, 2012, p. 3)

dignity is inherent, a notion also found in the United States Declaration of Independence (1776) and the France's Declaration on the Rights of Man and Citizen (1789).⁶⁸ This notion originated from a normative concept of natural rights grounded in ancient theology, philosophy and law.⁶⁹ The basic principle in the UDHR is that human rights ought to be universal, and universally applicable to everyone without any form of discrimination.⁷⁰ That human rights exist because human dignity is inherent and rights inalienable has also been reiterated by human rights scholars such as Donnelly who defined human rights as follows:

Human rights are equal rights: one either is or is not a human being, and therefore has the same human rights as everyone else (or none at all). They are also inalienable rights: one cannot stop being human, no matter how badly one behaves nor how barbarously one is treated. They are universal rights, in the sense that today we consider all members of the species Homo Sapiens "human beings," and thus holders of human rights.⁷¹

The importance of viewing human rights as universal cannot be doubted: if states around the world are to agree to a legal framework for protecting human rights, such an agreement must be that to which everyone is eligible as a potential beneficiary. As Zeid Ra'ad Al Hussein, UN HCHR stated in a speech in London in 2017, advocating for universality of human rights is another way of encouraging states and communities to work together to avoid recurrence of previous violence and wars that necessitated the current system.⁷² The relevance and necessity of human rights cannot be doubted based on the ratification of key human rights treaties (ICCPR and ICESCR) by nearly all states across the world.⁷³

However, the pursuit for universality of human rights has overshadowed the conceptual and practical challenges that the ideal of a universal human right presents. As early as 1947, the

⁶⁸ (Malawi Government, 2004).

⁶⁹ (Freeman M. , 2011, p. 89)

⁷⁰ Universal Declaration of Human Rights, <http://www.un.org/en/universal-declaration-human-rights/> (Accessed 20 June 2016)

⁷¹ (Donnelly, Universal Human Rights in Theory and Practice, 2003, p. 10)

⁷² (United Nations Office of the High Commissioner for Human Rights, 2017)

⁷³ (Donnelly, Universal Human Rights in Theory and Practice, 2013, p. 94)

American Anthropological Association had submitted to the drafters of the UDHR that universal norms and standards were likely to face challenges in attaining cross-cultural legitimacy that is based on democratic participation of diverse communities around the world.⁷⁴ In other words, they could not conceive how all members of the communities of the world, if asked, could reach a consensus on a universal standard of human rights to which they must abide. The question of cultural legitimacy is even more problematic for non-Western communities because at the time the standards, which were set for the UDHR, had less standing at the UN.⁷⁵ This is not to imply that the standards set were irrelevant or unimportant to non-Western communities, but rather that such communities did not contribute their norms in the negotiations at the time. What is important to note is that the universality of human rights must not be taken for granted as unproblematic in the understanding of how human rights are applied by within nation states.

In practice, the implementation and application of human rights law relies on the states who implement within their territorial jurisdiction to enforce them.⁷⁶ States operate within territories comprising societies, from which politicians attain the mandate to govern. Outside the formal level where a state formally accepts human rights obligations upon itself, local acceptance and implementation of those rights relies on whether such rights are backed by political will, usually grounded in local values (overlapping consensus universality)⁷⁷ and effective responses to standard threats to human dignity (functional universality).⁷⁸ If viewed uncritically, the universality or inalienability of human rights expressed in the declarations, treaties, constitutions and dominant theories appear obvious. If the world must come up with a human rights framework to eliminate all suffering, then all rights therein must be inalienable and each human worthiness inherent. In

⁷⁴ (Mutua, 2016, p. 18)

⁷⁵ For example, Malawi only gained independence in 1964. At the time, the ICCPR and ICESCR were adopted, it is reasonable to assume that Malawi did not meaningfully negotiate the texts of the two critical international instruments. (Mutua, 2016, p. 19)

⁷⁶ (Donnelly, *Universal Human Rights in Theory and Practice*, 2003)

⁷⁷ (Donnelly, *Universal Human Rights in Theory and Practice*, 2013, p. 96)

⁷⁸ (Donnelly, *Universal Human Rights in Theory and Practice*, 2013, p. Ibid)

other words, human rights must be universally applicable a priori. However, if we look at the international human rights system, such claim of universality relies on the assumption that specific rights have been established in law. The heavy reliance on this legal understanding of human rights as law has tended to overshadow the fact that human rights are not entirely legal.⁷⁹ Human Rights, even in their legal form, are a product of aspirations of ordinary people. Indeed, as stated by Freeman, the present international human rights architecture is a result of political negotiations through which hard laws are developed through a process of legalisation⁸⁰ and judicialization.⁸¹ Human rights are therefore norms first, before they become enshrined in law. It is possible for human rights to exist as moral norms only. As such, while human-rights-as-law are important, rights cannot be understood without the societies and institutions that negotiate, develop and enforce them.⁸² Legal approaches to human rights tend to overlook the ethical, political, sociological, economic and anthropological foundations of human rights.⁸³ Disciplines such as political science, philosophy sociology, anthropology, and economics are essential for the broader understanding of how the people and societies engage with human rights.⁸⁴ Human rights are increasingly being recognised as a social concept requiring social scientific inquiries.⁸⁵ For example, social sciences may offer insight as to why societies violate or respect human rights.⁸⁶ In this thesis, I rely on the complementarity between sociology and human rights law.

A good starting point in consideration of sociology as a complementary to law in the understanding of human rights is the outline of Turner's theory of human rights.⁸⁷ He argued that sociology finds it difficult to accept the notion of human rights because of its grounding in a

⁷⁹ (Freeman M. , 2011, p. 4)

⁸⁰ (Viljoen & Njau, Beyond the law: Multi-disciplinary perspectives on human rights, 2012, p. xiii)

⁸¹ (Viljoen & Njau, Beyond the law: Multi-disciplinary perspectives on human rights, 2012, p. xiv)

⁸² (Steiner & Aliston, 2000)

⁸³ (Freeman M. , 2011, p. 91)

⁸⁴ (Cushman, 2012), (Freeman M. , 2011, pp. 89-92). Also, see (Sheeran & Rodley, 2013)

⁸⁵ (O'Bryne, 2012, p. 832)

⁸⁶ (Freeman M. , 2011, p. 13)

⁸⁷ (Turner & Bryan, 1993), (Morris, 2006)

universalistic human ontology.⁸⁸ This scepticism against human and natural rights, according to him, is also found in classical sociology (i.e. sociology of rights).⁸⁹ He noted that sociology has been critical to the idea of human rights because of its (human rights) assumption of the human or humanity as a universal category when in fact, humans or humanity are socially and historically variable across cultural contexts.⁹⁰ Secondly, rights are a product of individuals and societies.⁹¹ To get around the scepticism about human rights, he proposed two bases that sociology, focused on the concept of citizenship, can add value in the engagement with human rights namely human frailty in terms of vulnerability to its environment and death, and precariousness of institutions in terms of how they yield the monopoly of power to threaten human rights.⁹² In other words, even if problematic, human rights must be accepted because of its potential to protect human beings from their vulnerabilities arising from the monopoly of power. While Turner's theory transformed the engagement between sociology and human rights by identifying critical gaps and persuasively proposed a citizenship-focused approach to understanding of human rights, he continued the tradition found in law of uncritically justifying a universal regime.

Sociology is well placed as a discipline to complement law in the understanding of how the aspirations found in human rights ideals translate to practice or reality, and the strengths and weaknesses of applying international or domestic frameworks to local contexts.⁹³ At the centre of the designing and application of human rights, are negotiations of specific human rights claims between individuals and people and their societies. This social process reflects involving negotiation of power between individuals and society. Specifically, human rights can benefit from the focus of sociology on human associations that mediate human experience such as the family,

⁸⁸ (Turner & Bryan, 1993, pp. 496-497)

⁸⁹ (Turner & Bryan, 1993, p. 497)

⁹⁰ (Turner & Bryan, 1993, p. 500)

⁹¹ (Turner & Bryan, 1993, p. ibid)

⁹² (Turner & Bryan, 1993, pp. 501-502)

⁹³ (Morris, 2006, p. 2)

class, villages, towns, movements, and organisations.⁹⁴ Sociology complements human rights theory, legal or otherwise, by adding value in the understanding of the practice of human rights. Importantly, sociology has the potential to contribute to the understanding of how ordinary people engage with human rights law and human rights.

The sociology of human rights is a fast-emerging sub-field of sociology.⁹⁵ Other sub-fields of sociology interested in human rights include sociology of law, the globalisation of law, the internationalisation of law, and public sociology⁹⁶ This new interest is indicative that emerging sociology scholarship is increasingly recognising the relevance of sociology to the study of human rights. The interest has seen new work specifically exploring the role of sociology in the study of human rights and sexuality. For example, in 2010 the *International Journal of Human Rights* published a special issue entitled 'Sociology and human rights: new engagements' in which sexuality features as a key issue for sociological inquiry in the broader human rights discourse.⁹⁷ The special issue included an article by Waites who critically analysed how a multi-faceted campaign that led to a High Court ruling in 2009 in India that decriminalised oral and anal sex in private for adults reshaped the local understanding of sexuality for adults.⁹⁸ In another study of policy concerning the provision of social care of older people and people with mental health issues in the United Kingdom, Ferrie argued for the importance of going beyond the law in the understanding of lived realities in care institutions.⁹⁹ She observed that a variation of rules and

⁹⁴ (Plummer K. , *Sociology: The Basics*, 2016, pp. 21-24), (Woodiwiss, 2011)

⁹⁵ (Hynes, Lamb, Short, & Waites, 2010, p. 819) For example, see the article by Matthew Waites entitled *Human rights, sexual orientation and the generation of childhoods: analysing the partial decriminalisation of 'unnatural offences' in India* in which he discusses the global struggle over sexual orientation and human rights using a case study about the fight to end criminalization of same-sex behavior in India (Waites M. , *Human rights, sexual orientation and the generation of childhoods: analysing the partial decriminalisation of 'unnatural offences' in India*, 2010)

⁹⁶ (Deflem & Chicoine, 2011, pp. 104-110) (Deflem & Chicoine, 2011, pp. 106-110)

⁹⁷ (Hynes, Lamb, Short, & Waites, 2010).

⁹⁸ (Waites M. , *Human rights, sexual orientation and the generation of childhoods: analysing the partial decriminalisation of 'unnatural offences' in India*, 2010)

⁹⁹ (Ferrie, 2010)

practices of care, cannot be discovered by looking at rights formally protected at the legislative level. This led her to conclude that the legal understanding of rights in elderly care was inadequate in addressing social realities of inadequate care. This indicates that Sociology has the potential to enhance our understanding of the practical relevance of human rights beyond the abstract character of (legal) human rights.¹⁰⁰ The need to look beyond the law when analysing the complexity of the application of human rights in relation to sexual orientation and gender identity is also relevant in the Malawi context. As I will reiterate in this study, a look at Malawi's domestic and international human rights obligations disguises the fact that its society disregards such obligations in a preference for traditional values and criminalisation in the Penal Code and the Marriage Act.

Sociology also offers an understanding of languages through which meanings about human rights are constructed.¹⁰¹ Societies use diverse languages to describe human rights, and some of the meanings that local terminologies carry can be questionable in terms of their representation of meanings intended in law. For example, when terrorists flew aeroplanes into the twin towers of New York City in 2001, the USA justified their war in Iraq as a measure protecting the human rights of Americans. Organisations such as *Amnesty International* and *Human Rights Watch* have reported serious human rights violations perpetrated by several western states in the name of the 'war on terror.' Such tensions about the use and misuse of human rights are of interest to sociologists.¹⁰²

However, critique of the dominant legalistic approach to human rights and a call for an increased engagement between sociology and human rights should not be misread as suggesting that law is irrelevant in the understanding of human rights, or an attempt to signal an ending, or a call for an

¹⁰⁰ (Burawoy, 2006)

¹⁰¹ (O'Bryne, 2012, p. 830)

¹⁰² (Burawoy, 2006)

end of human rights, as we know it. It is rather a proposition that interdisciplinary approaches, which include non-legal disciplines, such as sociology, can complement law by contextualising how societies formulate or apply human rights in their daily lives. Usually there is no controversy about the relevance of law when interrogating the importance of protecting people from atrocities such as genocide, torture, murder or slavery.¹⁰³ While it may be hard to imagine context and intersecting social issues that necessitate such protections, societies still need to achieve a consensus in order to agree whether it is necessary, relevant or important to implement such protections. Furthermore, the operationalisation of such protections relies on the preparedness and goodwill of the concerned societies. However, looking beyond the law becomes critical when dealing with matters that trigger cultural conflicts, and the issue of SOGI-related human rights is one.

A study of SOGI-related human rights about Africa presents several epistemological conceptual challenges. Africa is a contested product of a complex history that is worth revisiting in order to contextualise the origins of the debates being discussed in this study. It was first named Libya by the Greeks, Africa by the Romans, and 'discovered' by the Europeans in the 15th Century.¹⁰⁴ When Africa was 'discovered', its people were viewed as primitive and savagery. Its local knowledge was viewed as inferior to western 'scientific' ones.¹⁰⁵ The systemic erasure of African knowledge that followed led to an invention of an Africa knowledge system based on a western epistemological order.¹⁰⁶ A number of scholars have implicated western knowledge for imposing itself as the dominant episteme over all other knowledge from the near and far east.¹⁰⁷ They claim that the west has historically established itself as the global axis of knowledge through its imposition of

¹⁰³ (Bell & Daniel, 2000, pp. 27-28)

¹⁰⁴ (Mundimbe & V, *The Idea of Africa*, 1994). Also, see (Mundimbe & V, *The Invention of Africa: Gnosis, Philosophy, and the Order of Knowledge*, 1988)

¹⁰⁵ (Mundimbe & V, *The Idea of Africa*, 1994). Also, see (Mundimbe & V, *The Invention of Africa: Gnosis, Philosophy, and the Order of Knowledge*, 1988)

¹⁰⁶ (Mundimbe & V, *The Idea of Africa*, 1994, p. xiv)

¹⁰⁷ (Said, 1979)

(western-based) religion, education, language and colonialism.¹⁰⁸ Scholars have questioned the efficacy of western-based knowledge in accounting for Africa's lived experiences.¹⁰⁹ Mbembe proposes that there is a need to reclaim Africa's place in global knowledge:

Research on Africa has hardly stood out for its attempts to integrate nonlinear phenomena into its analyses. Similarly, it has not always been able to account for complexity. On the one hand, it has assimilated all non-linearity to chaos, forgetting that chaos is only one possible corollary of unstable dynamic systems. In addition, it has underestimated the fact that one characteristic of African societies over the *longue durée* has been that they follow a great variety of temporal trajectories and a wide range of swings only reducible to an analysis in terms of convergent or divergent evolution at the cost of an extraordinary impoverishment of reality. Further, research on Africa has literally impoverished our understanding of notions such as rationality, value, wealth, and interest— in short, what it means to be a subject in contexts of instability and crisis.¹¹⁰

The dominance and 'othering' of western knowledge content and systems cannot be ignored in this research if I am to arrive at a truly localised theory on sexuality, human rights, human rights law or SOGI-based human rights. Such a task requires me to draw from both 'global' and local knowledge in order to balance the axes of knowledge to address the concerns raised above.¹¹¹ This attempted shift of the axes contributed to (re)validating the relevance of African knowledge as worthy scientific status. It also demonstrates a mutual enforceability between global and local knowledge. Having proposed earlier that social context is crucial to the understanding of both human rights and sexuality, application of local epistemologies offers a perspective befitting any given local context.

Social construction theorists such as McIntosh,¹¹² Plummer¹¹³ and Weeks¹¹⁴ have successfully challenged naturalist or essentialist arguments about sex and sexuality for decades. Its application to human rights discourses is relatively recent. I have opted for the social constructionist

¹⁰⁸ (Mundimbe & V, *The Idea of Africa*, 1994, p. 27)

¹⁰⁹ (Mbembe, 2001, pp. 7-9)

¹¹⁰ (Mbembe, 2001, p. 17)

¹¹¹ (Epprecht M. , *Sexuality and Social Justice in Africa: Rethinking Homophobia and Forging Resistance*, 2013)

¹¹² (McIntosh, 1968)

¹¹³ (Plummer K. , *Symbolic Interactionism and the Forms of Homosexuality*, 1996)

¹¹⁴ (Weeks J. , *Sexualities*, 2009)

approaches for three reasons. Firstly, the world in which we live in is social. Analytical understanding of people requires resisting careless simplification through abstraction, decontextualization, universalisation, and essentialisation. Social constructionist theories allow the analysis of how people and their societies influence the understanding of phenomena. Secondly, human societies are diverse. Social constructionist perspectives remind us that different societies view any phenomenon differently due to the influence of local language, cultures and value systems. Importantly, as argued earlier, it reminds us that western experiences cannot always answer for African or Malawian questions or experiences. Thirdly, social constructionist perspectives are crucial in clarifying the abstract nature of law. In principle, the law offers the best formal potential for securing SOGI-based human rights in law. A government official can argue that Malawi's constitutional and international human rights obligations already guarantees human rights for all, and conclude that any legal reform is unnecessary. But why is it that queer persons in Malawi do not always enjoy such guarantees? Why do societies reject the need for respecting or protecting such rights? How do ordinary people observe or respect such rights in their ordinary daily lives? Social construction theories offer a framework for the analysis of ordinary peoples' lived experiences beyond the mechanics of the law and its enforcement institutions.

The rest of this chapter consists of two key components. Firstly, I review the social construction of sexuality in order to arrive at a framework for understanding African and Malawian sexualities. Secondly, I review the social construction of human rights to propose a framework for understanding and operationalising SOGI-related human rights in Malawi.

1.1.1. Social Construction of Sexuality

Since the 1960's, sociologists in the West have revolutionised the way sexuality is understood, debunking 19th Century medicine that viewed sexuality as a biological instinct aimed for

procreation and originating from genetics, hormones and physiology.¹¹⁵ According to this school of thought, which enjoyed popularity with the church, any sexual practices that did not aim at procreation were unnecessary, and at times pathological or abnormal. The word homosexuality was coined in 1869 by Hungarian Researcher Benkert von Kertbeny, and gained usage in the English language in the 1880s and 1890s.¹¹⁶ This coinage marked the emergence of the homosexual as a category.¹¹⁷ The pathologizing of homosexuality and the labelling of people who practised it shaped how sexuality was organised, controlled and contested.

McIntosh's article entitled *The Homosexual Role* marks an important moment in the shift from the early medical theories. In this article, she noted that it was problematic for sexologists, psychologists and others to view sexuality as a condition with fixed characteristics, wondering why they were preoccupied with establishing pathological causes of homosexuality, when instead homosexuality was a social category.¹¹⁸ She argued that essentialist theories that rendered homosexuality as deviant had a motive to create a unified category opposite to heterosexuality for the purpose of social control through pathologizing and criminalisation in order to enforce heterosexual institutions (e.g. family and marriage).¹¹⁹ Since the motive was not aimed at understanding that which was being pathologized, the categorisation as one unified deviant sexuality overshadowed the diversity of such deviancy. She argued, for example, that there are non-western societies where some homosexual characteristics observed in the west were not considered deviant.¹²⁰ In other words, she implied that

¹¹⁵ (Seidman, Fischer, & Meeks, *Introducing the New Sexuality Studies*, 2007, p. x), (Weeks J. , *Coming Out: Homosexual Politics in Britain, from the Nineteenth Century to the Present*, 1977), (Haggerty, Benyon, & Eisner, 2000),

¹¹⁶ (Walby S. , 1990, p. 16)

¹¹⁷ (Weeks J. , *Sex, Politics and Society: The Regulation of Sexuality since 1800*, 2012)

¹¹⁸ (McIntosh, 1968). Also, see (Weeks J. , *The 'Homosexual Role' After 30 Years: An Appreciation of Works of Mary McIntosh*, 2002)

¹¹⁹ (McIntosh, 1968, pp. 183-184)

¹²⁰ (McIntosh, 1968, p. 185)

homosexuality cannot be stereotyped as a universal and unified category opposite to heterosexuality. The important point that she made was that homosexuality, as it was known in Britain at that time, was specific to Britain and could not be assumed to exist in the same form elsewhere. Importantly, within this context, she noted that gender was not a prefixed stable annotation of the sex of a person.¹²¹ She also suggested that what we consider natural, whether heterosexual or homosexual, is in fact a social construction whose meaning we get accustomed to over a long period.¹²² Her ground-breaking and radical shift from essentialist theories led to a new agenda signifying the social characteristic of homosexuality.¹²³

Plummer agreed with McIntosh that if the categorisation of a unified and unacceptable (homo)sexuality was only a matter of differentiation from heterosexuality, then it was necessary to study the diverse forms of deviant sexual practices that exist outside heterosexuality.¹²⁴ He proposed that the naming of homosexuality as a deviant category created a symbolic world that set rules constructing a social world, which distinguished permissible from non-permissible sexual activities. To Plummer, sexual experiences beyond the biological mechanics of doing sex had to be a social construction learnt through personal interaction with others.¹²⁵ If sexual experiences are a result of an ongoing processes of interpersonal interaction, he proposed that meanings about (homo)sexuality must be context specific.¹²⁶ It therefore follows that there are as many categories of sexuality as there are societies in the world. In his later work, Plummer noted the emergence of new sexual configurations globally in the 21st Century.¹²⁷ Similarly, Tamale, a leading African sexuality

¹²¹ (Butler J. , 1999, pp. 13,32)

¹²² (Butler J. , Undoing Gender, 2004) & (Butler J. , Bodies that Matter: On the discursive limits of sex, 1993)

¹²³ (Weeks J. , The 'Homosexual Role' After 30 Years: An Appreciation of Works of Mary McIntosh, 2002, p. 440)

¹²⁴ (Plummer K. , Sexual Stigma: An Interactionist Account, 1975, pp. 8-9)

¹²⁵ (Plummer K. , Sexual Stigma: An Interactionist Account, 1975, p. 30), (Stein, 2002, pp. 253-255)

¹²⁶ (Plummer K. , Symbolic Interactionism and Sexual Conduct: An Emergent View , 1982, pp. 232-233)

¹²⁷ (Plummer K. , Cosmopolitan Sexualities, 2015, pp. 268-269)

scholar, has concurred that sexuality about Africa must be understood in its plurality and diversity, as African sexualities.¹²⁸ I have already proposed that Malawian sexualities must also be unique to its local contexts.

Also inspired by McIntosh, Weeks studied the history of homosexual politics in Britain to illustrate how homosexuality was constructed in Britain's 19th Century, and focussed on the criminalisation of sex between men in the United Kingdom (UK).¹²⁹ In the UK context studied by Weeks, criminalisation was a significant force in solidification of a unified homosexual identity, through which negative attitudes about homosexuals were shaped and reinforced, and as a consequence resulting in the birth of a liberation movement.¹³⁰ The central point in his social construction theory is that homosexuality ought to be viewed as varied and diverse, shaped by historical experiences of specific societies. What is important in this study is that he established, agreeing with McIntosh, that the homosexuality, which existed in Britain had specific characteristics and meanings, which differed from what existed in other societies where sexual variation may have existed.¹³¹ In his theory, Weeks identified five broad elements crucial in the social organisation of sexuality namely: kinship and family systems, economic and social organisation, social regulation, political interventions, and the development of a 'culture of resistance'.¹³² On kinship and family, for example, he also noted that far from being a natural unit based on blood relationships, the family is the social institution, which sets out the rules of acceptable and unacceptable sexual behaviour.¹³³ These

¹²⁸ (Tamale, *African Sexualities: A Reader*, 2011)

¹²⁹ (Weeks J. , *Coming Out: Homosexual Politics in Britain, from the Nineteenth Century to the Present*, 1977), (Waites M. , 2010, pp. 258-259), (Lennox & Waites, 2013, p. 148)

¹³⁰ (Weeks J. , *Coming Out: Homosexual Politics in Britain, from the Nineteenth Century to the Present*, 1977, pp. 6-7)

¹³¹ (Weeks J. , *Coming Out: Homosexual Politics in Britain, from the Nineteenth Century to the Present*, 1977, pp. 2-3)

¹³² (Weeks J. , *Sexualities*, 2009), (Weeks J. , *Sexuality*, 2010). Also, see (Weeks J. , *The Invention of Sexuality*, 2002)

¹³³ (Weeks J. , *Sexuality*, 2010)

rules are shaped by the economic and social framework, which include culture, poverty, employment, and religion. Sexuality is also shaped by how society regulates people's sexual lives through criminal laws, religious codes, and other forms of sanctions. Moral or legislative control depends on the influence of political actors in a society, who mobilise consensus for the public to endorse or legitimise laws and regulations. Control of people's sexual lives is met by a culture of resistance by those affected by such regulation.

Foucault noted that the scrutiny of sexual lives in Europe emerged at the beginning of the 17th Century, during a period when sex was restricted for the conjugal homes, and was not a matter of public discussion.¹³⁴ Two forms of social control emerged to regulate any sexual activities outside the institution of marriage, formal regulation by law (prohibition) and social rejection (repression).¹³⁵ Unlike prohibition, which served to allow the state to punish dissidence, repression was an informal method through which communities regulated peoples' sexual lives outside the formal regulation. Repression operated to eliminate any deviant sexual behaviour, silence the dissidents, silence public discussion about dissidence, and erase existence of deviant sexualities.¹³⁶ In these informal non-legal regulation, societies constructed discourses that generated power to establish heterosexuality as the natural preference of human beings, the monogamous conjugal home as the home for heterosexuality, and everything else as deviant and therefore not tolerable by society.¹³⁷ However, the efforts to silence or disappear deviant sexualities produced the opposite effect as it aroused peoples' interest in discussing sex publicly.¹³⁸ In the process, how those outside monogamous marriage experienced sex (i.e. their sexuality) became a subject for public interest and scrutiny.¹³⁹

¹³⁴ (Foucault, 1978, p. 3)

¹³⁵ (Foucault, 1978, p. 4)

¹³⁶ (Foucault, 1978, p. Ibid)

¹³⁷ (Foucault, 1978, pp. 11-12)

¹³⁸ (Foucault, 1978, p. 26)

¹³⁹ (Foucault, 1978, pp. 91-92)

Foucault agreed with McIntosh, Plummer and Weeks that sexuality was a contextual social process through which rules of what is permissible is enforced.

Until recently, studies about homosexuality focused on male homosexuality, and not recognising other forms of sexualities beyond the male-focussed categories.¹⁴⁰ It has been argued that this omission was deliberate to silence lesbian life as an option for women.¹⁴¹ However, lesbian existence has a long history and deserves scholarly attention.¹⁴² This observation is relevant to the emerging sexuality studies in Africa which has concentrated on the study of male (homo)sexualities, dominated by the studies about men who have sex with other men (MSM) in the context of the HIV and AIDS crisis. The focus on MSM has also obscured other diverse non-heterosexual categories found in Africa such as, for lack of indigenous terms, bisexual, transgender and intersex. This is perhaps a result of restricted assumptions of interpreting gendered and sexual practices that Butler wrote of in *Gender Trouble* limited discourses about minority genders and sexualities.¹⁴³ Since the existence of non-normative sexualities destabilises the heterosexual framework through which we interpret genders, it becomes difficult to imagine a transgender woman because a human being born with a penis, according to the heterosexual framework, must be a man. This process, in her view, denotes a compulsory ordering by society through a repetitive dominant discourse. She has reiterated that what we consider natural, whether heterosexual or homosexual, is in fact a social construct whose meaning we have become accustomed to over a long period of time.¹⁴⁴ The focus on male homosexuality may therefore be a product of repetitive learning and socialisation towards the narrative that homosexuality is

¹⁴⁰ (Weeks J. , *Coming Out: Homosexual Politics in Britain, from the Nineteenth Century to the Present*, 1977, p. ibid)

¹⁴¹ (Rich A. , 2002)

¹⁴² (Rich A. , 2002, p. 648)

¹⁴³ (Butler J. , 1999, p. viii)

¹⁴⁴ (Butler J. , *Undoing Gender*, 2004) & (Butler J. , *Bodies that Matter: On the discursive limits of sex*, 1993)

predominantly about males. It is therefore crucial to think outside the box and consider that non-heterosexual configurations are endless beyond male homosexuality, and importantly beyond dominant conventional categories that exist today. Such consideration is critical in African contexts like Malawi where the possible configurations are currently understudied or yet to be discovered.

Critics of social construction theories have worried that this approach renders sexuality fictitious, sexual identities easily changeable, and open to discontinuity or rupture.¹⁴⁵ Scepticism also arises from the lack of a unitary social constructionist approach and the variation of degrees of approaches, which has been argued makes it difficult to use the theories comparatively.¹⁴⁶ For example, other social constructionists accept essentialist aspects of sexuality in their approaches while others do not.¹⁴⁷ Vance has noted that essentialist arguments that sex is primarily aimed at procreation remain preferable in terms of social interpretation of sexuality, and as a result social constructionists who do not accept essentialism may not enjoy political utility.¹⁴⁸ While others have argued that it is difficult to draw from both essentialist and social constructionist approaches in one theory,¹⁴⁹ Social constructionist approaches do not deny that there are physiological mechanics of sex. Heterosexual sexual intercourse has a biological element whose essentialist purpose includes procreation. However, sex is also about how one experiences pleasure (sexuality), whose realisation is a product of social meanings that are influenced by the dynamics of power in which humans wrestle between social control of permissible and non-permissible sexual conduct, and the resistance to choose preferable sexual experiences. Social constructionist theories therefore offer an understanding of the realities of how peoples' sexual lives are

¹⁴⁵ (Vance C. , 2002, pp. 358-359)

¹⁴⁶ (Vance C. , 2002, pp. 360-361)

¹⁴⁷ (Vance C. , 2002, pp. 361-362)

¹⁴⁸ (Vance C. , 2002, pp. 366-68)

¹⁴⁹ (DeLamater & Hyde, 1998, p. 16)

organised, and how sexual lives extend beyond heterosexual intimacy. Importantly, social constructionist approaches highlight the importance of contexts in understanding how sexuality is organised. To be specific, the theories opens room for the possibility that sexualities found in Africa or Malawi may vary from those that exist in the West. In the next section, I will argue that African sexualities are diverse but also unique to the continent.

1.1.1.1. Construction of African Sexualities

Several studies have shown that same-sex intimacies exist in Africa, including the historical work of two American social scientists Murray and Roscoe who compiled a comprehensive history of homosexual practices across Africa. In this study, they observed that a myth that Africa was homosexual-free, was created by Europeans who thought that homosexuality was absent or incidental in African societies on the assumption that Africans had to be heterosexual by virtue of being primitive and therefore closer to nature.¹⁵⁰ Where early western researchers observed homosexuality, they classified it as a unified deviant category.

For individuals from a society in which homosexuality is defined as a unitary, predominantly sexual phenomenon with fixed internal psychological motivations- and who have judged that phenomenon so harshly that even its leading social engineers and intellectuals are afraid to study or discuss the subject- the diversity of African homosexualities is “all very confusing.” But ... African homosexuality is neither random or incidental- it is a consistent and logical feature of African societies and belief systems.¹⁵¹

In addition to presenting one of the earliest comprehensive accounts about the existence of homosexuality in Africa, their work was significant in its calls against myths about homosexuality in Africa, including western beliefs and values about sexuality, love, and personal relationships. The political utility of this work cannot be underestimated as it opened

¹⁵⁰ (Murray & W, 1998)

¹⁵¹ (Murray & W, 1998, p. xv)

an agenda for viewing African sexualities in their diversity, complexity and continental particularity.

The need for viewing African sexualities as unique to their local contexts is not new. In 1987 African anthropologist Amadiume studied the Nnobi culture in Nigeria and recorded a case where a priest's daughter was recalled from a heterosexual marriage to take on the role of priesthood ordinarily taken by men, and in the process assumed a status of a son accorded with entitlement to male cultural privileges such as inheritance of 'his' father's property.¹⁵² She also noted the title of Ekwe, associated with their goddess Idemili,¹⁵³ through which women assumed control of the family by, among other things, having a wife and assuming the role of a female husband. This flexibility in gender configuration did not render them deviant to local norms about sex or gender. Amadiume however interpreted her findings as distinct of any deviance found in the West. She therefore cautioned the West against misinterpreting the experiences she observed as lesbianism:

There are already some indications that black lesbians are using such prejudiced interpretation of African situations to justify their choices of sexual alternatives, which have roots and meaning in the west. Black lesbians are, for example, looking into African women's relationships and interpreting some as lesbian... What prejudices and assumptions are they imposing on African material? How advantageous is it for lesbian women to interpret such practices as woman-to-woman marriages as lesbian...? Such interpretations of, for example, the case cited in this book would be totally inapplicable, shocking and offensive to Nnobi women, since the strong bonds and support between them do not imply lesbian sexual practices. In our search for power, or more positive models and images of powerful women, there is a limit of how facts can be bent or our own wishes and fantasies imposed. Women's politics is consequently becoming more and more complex.¹⁵⁴

Her observation that naming of same-sex sexualities about Africa using western sexuality discourse as the axis for reference reiterates the concerns raised by Mbembe and others about

¹⁵² In such culture, only sons could inherit their father's property (Amadiume, 1987, p. 32)

¹⁵³ (Amadiume, 1987, p. 42)

¹⁵⁴ (Amadiume, 1987, p. 7)

the unequal powers between western and other epistemologies.¹⁵⁵ It also re-emphasises the relevance of social construction approaches in highlighting the need for the understanding of local contexts in the study of sexuality. The refusal by local African women who engage in same-sex intimacy to self-define as lesbian was also documented by Kendall, in her study of Basotho women of Lesotho.¹⁵⁶ During the interviews with Kendall, the women studied accepted engaging in same sex intimacy but did not view themselves as lesbian.¹⁵⁷ She correctly observed that the Basotho women may not have interpreted their conduct as lesbian, nor sexual, because the environment that they grew up in did not offer them the social symbols for them to learn about their conduct in lesbian or related sexual terms. Even when Kendall, herself a lesbian, discussed her sexuality with the rural Basotho women, they were puzzled and could not understand the concept.¹⁵⁸ To borrow from Said,¹⁵⁹ Mudimbe¹⁶⁰ and Mbembe,¹⁶¹ this is a reminder of the need for caution when using western terminology to interpret African sexualities in order to avoid misrepresenting their local meanings.

Uniqueness of African sexualities can also be interpreted through the emergence of the term MSM, which was popularised by the most-at-risk-populations (MARPS) identified in HIV and AIDS response programmes.¹⁶² MARPS are highlighted in the response programmes because they were identified as a distinct social group at higher risk of HIV infection than the general

¹⁵⁵ Supra note 109

¹⁵⁶ (Murray & W, 1998, pp. 225-241), (Kendall, 1999)

¹⁵⁷ (Murray & W, 1998, pp. 225-241)

¹⁵⁸ (Murray & W, 1998, p. 233)

¹⁵⁹ (Said, 1979)

¹⁶⁰ (Mundimbe & V, The Idea of Africa, 1994)

¹⁶¹ (Mbembe, 2001)

¹⁶² MSM is defined by United Nations Joint Agency on AIDS (UNAIDS) as “...the term ‘men who have sex with men’ to describe those males who have sex with other males, regardless of whether or not they have sex with women or have a personal or social identity associated with that behaviour, such as being ‘gay’ or ‘bisexual’. In using the term ‘transgender people’ in this document, we are referring primarily to transgender people whose initial given identity was male, but who now identify as female or who now exhibit a range of what are usually deemed female characteristics. Such ‘male to female’ transgender people have much higher rates of HIV infection than ‘female to male’ transgender people” (United Nations Joint Programme on AIDS (UNAIDS), 2009, p. 2)

population.¹⁶³ A targeted response for this group is imperative for the HIV and AIDS response in sub-Saharan Africa, including Malawi. It is necessary as they face stigma and discrimination when seeking health-related services.¹⁶⁴ Importantly, the HIV and AIDS response has revealed that men who engage in anal sex, who also are the most vulnerable of MARPS, do not identify as homosexuals or gay men for various reasons. One reason is to avoid carrying a label that makes them vulnerable to social stigma, discrimination, or even violence. But importantly it is because not all men who engage in anal sex with other men identify as homosexual. For example, Chikondi who was interviewed in this research preferred to be called MSM than gay because he felt that being called gay was too strong in describing the sexual intimacy that he engages in.¹⁶⁵ In terms of sexual practices, he usually identifies as male, engages in sexual intimacy with both men and women, but also identifies as female whenever he feels feminine.¹⁶⁶ On the other hand, Mfulu is married with children (currently separated from his wife). He identifies as male and heterosexual, although during the interview he acknowledged that he sometimes feels feminine.¹⁶⁷ However, he engages in intimate relationships with men, which he takes as being an extension of his heterosexual life. Both Chikondi and Mfulu were of the view that the MSM category was the closest available English term, which they could identify with. While the characteristics of Malawian sexualities will be discussed more in depth in the next chapter, the emergence of the MSM category in Africa, as illustrated here with two case studies from Malawi, are indicative of the complex particularities of local sexualities found in Africa.

While it is necessary to signify that African sexualities are contextual, it is also important to re-emphasise that Africa is itself a diverse collection of 54 individual states with their own distinct

¹⁶³ (United Nations Joint Programme on AIDS (UNAIDS), 2009),

¹⁶⁴ (Beyrer, et al., 2010), (Trapence, et al., 2012), (Wirtz, et al., 2014), and (Wirtz A. L., et al., 2013)

¹⁶⁵ (Chikondi, 2014) (Chikondi, 2014)

¹⁶⁶ (Chikondi, 2014) (Chikondi, 2014)

¹⁶⁷ (Mfulu, 2014)

cultures, languages and peoples. It is therefore important to avoid imposing an epistemological fallacy of an 'African homosexuality' across the diverse societies on the continent. Emerging African researchers therefore need to engage with the dialogue and address epistemological challenges that may arise from this pursuit of an African sexuality identity. Similarly, the sexual diversity that must be contextualised must be understood as not exclusive to Africa. Indeed, such particularities can also be observed globally.

It is also important to avoid misinterpreting any critique of the misinterpretation of African homosexuality by early western researchers as a vendetta to erase all relevant past knowledge generated by non-Africans. Any attempt to erase past knowledge would be self-defeating in terms of progress achieved so far in African sexuality discourse. It should be acknowledged that the research had critical importance in revealing a silenced discourse, more so that at that time when Africans had very minimal interest in the subject.

The practical approach is to locate the relevance of the past knowledge to the current discourse while acknowledging its limitations. African scholars should also refrain from making assumptions that African sexualities are exclusively distinct from western ones, as it is now established that through globalisation some characteristics found in Africa resemble western ones.¹⁶⁸ Therefore, for this research I acknowledge the early western researchers who documented diverse forms of homosexuality in Africa.¹⁶⁹ I applaud the rising interest in African sexualities among African scholars. I view the combined histories about sexuality as a mutually

¹⁶⁸ Anthropological research by Christoph Boqua studying homosexuality in Bamako has established that there are profound similarities between the forms locally existing in Bamako and those that exist in the west (Nyeck & Epprecht, 2013)

¹⁶⁹ (Murray & W, 1998, p. 101)

enforcing enrichment of the trajectory towards a better understanding of same-sex sexualities found in Africa. This research is part of that history.

1.1.2. Human rights as a Social Construction

I have proposed earlier in this chapter that a narrow focus on the law as the primary source of human rights over-simplifies the complex social processes in which meanings influence its content, relevance and contextual application. In this section, I discuss the social construction of SOGI-based human rights in order to propose a framework that can be adopted in contextualising specific human rights claims that are negotiated in the Malawian context. If sexualities found in African societies are contextual, human rights concerns that arise must also be contextual to such societies. Human rights ought to be understood in relation to the context in which claims are negotiated. Social construction theory offers a framework for understanding and outlining the terms through which SOGI-based human rights are applied.

My starting point of looking at SOGI-based human rights is to view both human rights law and human rights as social phenomena shaped by local histories and values. It is very surprising that in the study of sexuality, which has now championed the view that sexuality is a social phenomenon, which is socially constructed, the concept of human rights is not interrogated in the same regard when assessing its relevance to protection of people based on sexual orientation and gender identity.

Cultural relativism has been used to challenge the idea of universality of human rights, arguing that moral values and social institutions are culturally and historically specific, and since human rights are moral values, their foundations must be culturally and historically specific as

opposed to being universal.¹⁷⁰ Although Donnelly, cited earlier, adopts a universalist definition of human rights, he has cautioned against extreme commitment to drawing an irreconcilable dichotomy between universality and relativity of human rights, suggesting that universality and relativity should be seen as multidimensional (as opposed to binary two-dimensional) where elements of universality and relativity could be combined.¹⁷¹ For example, he is of the view that human rights principles may be universal, but their local applicability depends on local contexts. Furthermore, he has proposed that human rights must be viewed as relatively universal because its local implementation depends on local actors. However, Donnelly maintains an essentialist presupposition- if you are human, you automatically must have human rights, and if all people are equally entitled to all rights, then there must be a list of human rights to which everyone must claim an inalienable entitlement.¹⁷² In other words, what local societies must implement are human rights already set a priori. While a social constructionist approach to the understanding human rights may appear unpopular based on the misinterpretation that it destabilises the popular idea that everyone is entitled to human rights on the basis that they are universal and realisable through international or domestic human rights law, it has potential to enhance understanding about why people continue to suffer violations based on their sexual orientation and gender identity. For example, Nash has argued that understanding human rights as social constructions helps us understand the structures in which it operates, thereby offering a better understanding of how violations can be addressed.¹⁷³

¹⁷⁰ (Donnelly, *Universal Human Rights in Theory and Practice*, 2003, p. 89)

¹⁷¹ (Donnelly, *Universal Human Rights in Theory and Practice*, 2003, p. 104)

¹⁷² (Donnelly, *Universal Human Rights in Theory and Practice*, 2003, p. 1)

¹⁷³ (Nash, 2015, pp. 6-19)

Gregg's theory has addressed the dilemma of whether human rights ought to be universal a priori by making a distinction between 'otherworldly' and 'thisworldly' human rights.¹⁷⁴

Otherworldly human rights are a metaphysical framework towards which societies must aspire, and assumed universal and universally valid a priori.¹⁷⁵ In contrast, thisworldly human rights are contingent rights locally constructed by communities.¹⁷⁶ In his view, local validity of human rights relies on them being established by local communities.¹⁷⁷ In other words, locally valid human rights must derive from thisworldly rights. Any universality of human rights must result from local communities establishing thisworldly human rights, through which they can seek universal consensus.

Gregg uses a metaphor of a human rights state, in which members of a nation state constitute themselves as a human rights state by authoring their own human rights, which they mutually recognise and observe among themselves first, before spreading out to seek consensus outside their own legal and political system.¹⁷⁸ The idea of a human rights state has been interpreted as a useful tool for tracking the implementation of human rights, but others have cautioned against viewing human rights outside transcendence.¹⁷⁹ Viewing human rights as otherworldly makes them vulnerable to rhetorical rejection on the basis that local communities did not author or endorse particular rights. This vulnerability becomes even more critical when dealing with contentious rights such as SOGI-based human rights, which are implicated of being western imports by many non-western states. Establishing such rights as

¹⁷⁴ (Gregg, Human Rights as Social Construction, 2012)

¹⁷⁵ (Gregg, Human Rights as Social Construction, 2012, pp. 5-6)

¹⁷⁶ (Gregg, Human Rights as Social Construction, 2012, p. Ibid)

¹⁷⁷ (Gregg, The Human Rights State: Justice within and Beyond Sovereign Nations, 2016, pp. 11-12)

¹⁷⁸ (Gregg, The Human Rights State: Justice within and Beyond Sovereign Nations, 2016, p. 13), (Wolfsteller & Gregg, A realistic utopia? Critical analyses of The Human Rights State in theory and deployment: Guest editors' introduction, 2017), (Gregg, The human rights state: theoretical challenges, empirical deployments: reply to my critics, 2017)

¹⁷⁹ For example, see responses to Gregg's theory of a human rights state: (Wolfsteller, The institutionalisation of human rights reconceived: the human rights state as a sociological 'ideal type', 2017), (Li & McKernan, 2017)

thisworldly reduces their vulnerability to rhetorical challenge. It also balances the north-south power relationship in the enforcement of human rights norms.

International human rights norms have tended to suffer a lack of local legitimacy when extrapolated to the national level in non-western states, particularly when dealing with contentious issues such as SOGI-based human rights. Culturally legitimate norms or values are those that are respected and observed by members of specific community, on the basis that they bring satisfaction or benefit to the community members.¹⁸⁰ SOGI-based human rights suffer deficiency of cultural legitimacy in many African countries because societies perceive them as promoting abominable alien practices. They are viewed as an imposition from western countries. In principle, cultural legitimate human rights norms can attain universality in a bottom up approach where local addressees seek universal consensus between their other human rights states and others outside their legal and political system.¹⁸¹ Since issues around SOGI-based rights remain unresolved in most African states, including Malawi, consensus has not been achieved so far. Establishing a framework for applying SOGI-related human rights demands elimination of contextual challenges, framing the content for such rights, and facilitating protection of specific rights necessary for equitable enjoyment of human rights claims applicable to all other persons.

1.2. Framing SOGI-based human rights

So far, I have argued that both sexuality and human rights are socially constructed, whose meanings and application are subject to social and historical context. In this section, I offer an alternative for framing SOGI-based human rights for the Malawian context. Plummer explained a

¹⁸⁰ (An Naím, 1990, p. 333)

¹⁸¹ (An Naím, 1990, pp. 342-345)

general model outlining five stages through which sexual rights are socially constructed. Firstly, rights are imagined in terms of elements which can make protection possible.¹⁸² The identified elements are articulated and announced as a right claim.¹⁸³ Once the specific target groups to benefit from the rights are identified, a social world of rights is created through rules and regulations, for which a culture of rights is established.¹⁸⁴ This process relates to Gregg's social construction theory where addressees in a human rights state establish 'thisworldly sexual rights' in which they outline human rights claims necessary for protections based on sexual orientation and gender identity.

The concept of citizenship offers an alternative framework for framing SOGI-based sexual rights because of its potential to highlight the significance of sexual identity to the exercise of citizenship.¹⁸⁵ A good starting point of early citizenship theories is the work of Marshall, which outlined the framework for civil, legal and welfare rights in Western societies in the context of class conflicts.¹⁸⁶ The theories became important because they signified the construction of subjects (or subjectivities) through which rights may be allocated to persons and claimed.¹⁸⁷ However, the early theories framed the citizen as heterosexual, focusing on the straight male, which as a result was criticised by Evans who pioneered the concept of sexual citizenship in the 1990's, who claimed that the early theories excluded some minority categories such as homosexual, bisexual, transvestite, and transsexual from the 'matrix of citizenship'.¹⁸⁸ Bell and Binnie proposed that since human beings cannot be separated from their sexual selves, all citizenship must be regarded as sexual citizenship, and their belonging to a community (i.e.

¹⁸² (Morris, 2006, p. 150)

¹⁸³ (Morris, 2006, p. Ibid)

¹⁸⁴ (Morris, 2006, p. Ibid)

¹⁸⁵ (Richardson D. , Citizenship and Sexuality: What Do We Mean by "Citizenship"?, 2012, p. 219)

¹⁸⁶ (Marshall, 1950)

¹⁸⁷ (Morris, 2006, p. 162)

¹⁸⁸ (Richardson D. , Citizenship and Sexuality: What Do We Mean by "Citizenship"?, 2012, p. ibid), (Evans, 1993, p. 8)

citizenship) is the basis through which one can claim rights and exercise responsibilities.¹⁸⁹ Since the claim of rights and exercise of responsibilities require inclusion of all members of the society, an understanding that all citizenship as sexual citizenship opens up prospects of extending rights and responsibilities to those who do not conform to heterosexual norms.¹⁹⁰

Emerging studies have used the concept of citizenship in the understanding of same-sex intimacy in diverse contexts. For example, Ryan-Flood conducted an empirical study of experiences of 68 lesbians parents in Sweden and Ireland in terms of context, kinship and normativity.¹⁹¹ This study was significant as it contributed to the understanding of the lives of new generation lesbians who choose to become mothers in the context of their lesbian lives, and in the process destabilising the assumed contradiction between being lesbian and a parent in the understanding of sexual citizenship.¹⁹² A study of Hong Kong's older gay men by Kong investigated how the men used private and heterosexual spaces to experience same sex intimacy.¹⁹³ He has also studied claims of sexual citizenship by Hong Kong gay men through social movements to claim identity rights.¹⁹⁴ In the two studies, citizenship can be viewed as a framework through which one can claim a queer identity for advancing human rights claims. A claim to use public and private spaces by Hong Kong men, and the right to found a family by the lesbians in Sweden and Ireland, is the first step towards the society formalising state recognition of any relevant human rights and freedoms such as dignity, identity and founding a family.

Through an analysis of SOGI-based case law of the European Court of Human Rights, Ammaturo argued beyond the nation state by proposing the notion of a multisexual citizenship, in which

¹⁸⁹ (Bell & Binnie, 2000), (Plummer K. , *Intimate Citizenship: Private Decisions and Public Dialogues*, 2003, p. 54), (Morris, 2006, p. 163)

¹⁹⁰ (Walby S. , 2002, p. 113)

¹⁹¹ (Ryan-Flood, 2009)

¹⁹² (Ryan-Flood, 2009, p. 17)

¹⁹³ (Kong T. S., 2012)

¹⁹⁴ (Kong, Lau, & Li, *The Fourth Wave? A Critical Reflection on the Tongzhi Movement in Hong Kong*, 2015)

citizens can alter the meaning and role of citizenship by claiming membership to an alliance of nation states as a tool to claim rights.¹⁹⁵ Ammaturo's alternative for subjects to claim sexual rights outside the nation state has the potential to face resistance by some countries who are cautious to implement decisions by an institution outside its direct authority. There is also the dilemma about whether states may abide to rights authored by an interstate body as opposed to its local addressees. However, the chances for the implementation or enforcement by such interstate bodies increase if such bodies are a product of a well-established local consensus by local addressees within a given nation state. For example, if all countries of Europe internally agreed that marriage is legal regardless of sexual orientation and gender identity, then anyone who successfully makes a claim that they were denied the right to marriage based on their sexual orientation and gender identity has a greater chance of securing redress. Ammaturo's study importantly contributes to the understanding of how SOGI-based human rights can be legally enforced through inter-state agencies.¹⁹⁶

The primary interest in this research is how ordinary people negotiate human rights in their daily lives, and most of the negotiations take place outside the courtrooms. Plummer's five stages for the construction of human rights offers us an insight into the elementary processes through which sexual rights may be imagined. However, I will draw from Richardson who has come up with a comprehensive framework of citizenship through the conduct, identity and relationship-based rights claims.¹⁹⁷ Conduct-based rights are those claims in relation to sexual practices in personal relationships, focusing on choice of sexual activities, sexual pleasure, and sexual self-determination and bodily autonomy.¹⁹⁸ Identity-based claims are those regarding sexual identity as a basis for claiming inclusion, or fighting exclusion, in categories of citizenship.¹⁹⁹ Identity is a mitigating factor

¹⁹⁵ (Ammaturo, 2016, pp. 103-113)

¹⁹⁶ (Plummer K. , *Intimate Citizenship: Private Decisions and Public Dialogues*, 2003, pp. 30-60)

¹⁹⁷ (Richardson D. , 2000, p. 126), (Richardson D. , *Rethinking Sexual Citizenship*, 2015)

¹⁹⁸ (Richardson D. , 2000, p. 108)

¹⁹⁹ (Richardson D. , 2000, p. 116)

for advancing conduct and relationship based claims. For example, during the emergence of the gay liberation movements in the 1970s in USA and Europe, a claim for identity as homosexuals catalysed calls for recognition to the pave way for the demand of rights associated with conduct and relationships.²⁰⁰ Richardson's comprehensive framework through which various rights claims can be formally established and claimed can also be utilised to frame how identity, conduct and relationship rights are claimed in peoples' daily undertakings.²⁰¹

Framing human rights claims based on same-sex sexual citizenship is challenging in most African contexts, including Malawi because sexual identities which exist are obscured, unnamed contested, and under-theorised.²⁰² For example, the silence and secrecy surrounding issues of sexuality in African communities have resulted in most same-sex identities remaining unnamed or obscured, resulting in the absence of a language to identify those who practice diverse forms of same-sex intimacy. In other words, the subjects remain known as heterosexual. In some cases, subjects such as Chikondi and Mfulu refuse to be identified with conventional labels such as L, G, B or T to avoid stigma, and instead opting to identify with the MSM category. Claiming human rights on the basis of a same-sex sexual citizenship in terms of conduct, identity and relationships will require identification of identities or categories through which those who engage in same-sex intimacy will identify as a medium for claiming SOGI-based rights. It will require going beyond a general opposite to heterosexuality, to the identification of unique categories requiring specific rights. For example, a transgender would have different needs from an MSM. Nyanzi has proposed that rights' claims in the African context should focus on safety issues such as privacy, protection from violence and access to health services.²⁰³ However, we should not ignore Richardson's framework that outlines identity, conduct, and relationship rights because one cannot claim any

²⁰⁰ (Richardson D. , 2000, p. Ibid). Also, refer to (Evans, 1993, pp. 7-8)

²⁰¹ (Richardson D. , 2000, p. 107)

²⁰² (Nyanzi, 2011, p. 487), (Richardson D. , Rethinking Sexual Citizenship, 2015, p. 4), (Tamale, African Sexualities: A Reader, 2011)

²⁰³ (Nyanzi, 2011, pp. 486-487)

same-sex sexual citizenship rights without claiming an identity, which is a necessary component for experiencing preferred sexual conduct and relationships. Similarly, one cannot enjoy the privileges of a same-sex sexual identity without an entitlement to freedom and rights to allow them to engage in preferred sexual activities and enter relationships. Privacy, protection from violence and access to health services are broader needs required by those who have claimed an identity, and are able to engage in same-sex intimacy and enter relationships.

Constructing SOGI-based human rights in the Malawian context will therefore require acknowledging the complexity, multiplicity and diversity of the local sexual identities. One must be cautious not to be misled and assume that Africanness of Malawian sexualities renders them entirely distinct from characteristics found elsewhere. Recent studies of African sexualities have found that some local African same-sex sexual identities have similarities with categories found in the West. For example, Broqua's ethnographic research conducted in Bamako found that contemporary same-sex practices of Bamako closely resemble western sexuality, more so than traditional forms of African sexualities, leading him to conclude that plural models of homosexuality are found in sub-Saharan Africa just as much as in the West.²⁰⁴ In other words the Bamako sexual citizen had characteristics, which resemble those found in the West. On the other hand, in O'Mara's study of LGBT networks and communities in Accra, she found that the hostile environment in Accra prompted the building of new modes of sexual citizenship through which to claim rights.²⁰⁵ Since the diversity and complexity of same-sex sexual identities in Malawi has not been previously researched, I conducted this study with an open mind towards new forms of sexual citizenship through which SOGI-based rights can be negotiated.

²⁰⁴ (Broqua C. , 2013, p. 224)

²⁰⁵ (O'Mara, 2013, pp. 206-207)

It however remains a critical task to establish a same-sex sexual citizenship through which one can claim specific rights. What is well established in the Malawian context is the vulnerability of being sexually different. I have stated earlier that queer persons in Malawi experience horrendous human rights violations. While establishing sexual categories is important for future research, identification of types of violations and injustices is sufficient to facilitate the framing for advancing sexual citizenship rights for queer Malawians.

1.3. Conclusion

In this chapter, I have established that social science is a critical discipline in the study of sexuality and human rights, and proposed that Sociology can complement law in the study of SOGI-based human rights. I have highlighted the utility of adopting an Africa-centred epistemology in the construction of sexuality and human rights, as a basis for establishing a framework for human rights protection relevant to African contexts such as Malawi. Proposing that the concept of sexual or intimate citizenship is one socially constructed framework for understanding and advancing SOGI-based human rights, I have adopted a framework of sexual citizenship for Malawi that focuses less on identity formation, but rather identifies the injustices upon which human rights protections must be enforced.

2. The Malawian Context and the local Construction of SOGI-based Human Rights

Human rights issues understood in the context of sexual orientation and gender identity in Malawi are influenced by three key issues. First, the local narrative remains dominated by the view that homosexuality is alien to Malawi and an import from the West. In a heated debate about homosexuality that emerged in 2009, most Malawians believed that there is a historical period, not so long ago, when homosexuality did not exist in Malawian societies. So far there is no comprehensive research to debunk this inaccurate myth that has been cited by conservative communities to justify, usually based on poor reasoning, that human rights' claims in terms of sexual orientation and gender identity are a project of Western neo-colonialism. This necessitates a critical revisiting of the socio-political history context of Malawi as a way of revealing the rich history of same-sex intimacies in Malawian society. Secondly, briefly introduced earlier, the rejection of any calls for the recognition and protection of SOGI-based human rights are based on an assumption that Malawi does not have a legal framework that can potentially extend such protections. However, I will show that Malawi has a comprehensive human rights framework. Thirdly, the preoccupation with the law as the primary tool for human rights protection in Malawi results in overlooking how the social force of human rights, as non-legal moral norms, influences how people transact rights claims outside the legal arena. Most of the negotiations for human rights claims occur among ordinary people as they live their ordinary lives. One does not need to sit in parliament or be in a courtroom to experience and negotiate their rights.

In this chapter, I discuss the socio-political history of Malawi highlighting the history of same-sex intimacies and criminalisation of same-sex conduct. Following this will be an analysis of the contradiction between Malawi's domestic and international human rights obligations, and the Penal Code and the Marriages, Divorce and Family Relations Act (Marriage Act). I will construct the Malawian

same-sex subject and the key local debates in order to show the role of local languages in the construction of local meanings about SOGI-based human rights.

2.1. Socio-political history of Malawi

Malawi has an estimated population of 16.3 million.²⁰⁶ It is multi-ethnic, with the Chewa people making the largest ethnic group comprising one-third of the population, followed by the Lomwe (16%), and Yao and Ngoni (13% each).²⁰⁷ Each tribe has their own unique framework of cultural values. Only 15% of the population live in urban areas, and only 12% located in the four major cities of Blantyre, Lilongwe, Mzuzu and Zomba.²⁰⁸ 80% of the population are Christian and 13% Muslim, while 4% is non-religious.²⁰⁹ Religious groups and leaders influence public opinion in the country and have previously played a pivotal role in guiding the nation on issues of national importance.²¹⁰ For example, the transition from a 30-year dictatorship under Dr Hastings Kamuzu Banda to multiparty democracy in 1994 was triggered by a pastoral letter from Catholic Bishops, and sustained by the Public Affairs Committee, a 35-member multi-faith organisation with a mandate to conduct advocacy and civic education on topical issues.²¹¹

64% of the population are literate, with ability to read and write.²¹² English and Chichewa are the official languages of Malawi.²¹³ Chichewa is the lingua franca of Malawi, but urbanisation has seen the language-evolution (evolve) among the youth, who have blended local words with foreign

²⁰⁶ (The World Bank, 2017)

²⁰⁷ (National Statistics Office, 2011)

²⁰⁸ (National Statistics Office, 2008, pp. 7-8). The urban areas are classified as the four major cities of Malawi namely; Blantyre, Lilongwe, Mzuzu and Zomba. It also includes the Bomas (district administration headquarters) and gazetted town planning areas.

²⁰⁹ (National Statistics Office, 2008, p. 13)

²¹⁰ (US Government, 2015)

²¹¹ (Mitchell, 2002)

²¹² (National Statistics Office, 2008, p. 14) Language proficiency refers to the ability to write in any of the following languages; English, Chichewa, Tumbuka or Yao.

²¹³ (Matiki, 2001)

languages to invent a popular new language that Kamanga has termed Chibrazi.²¹⁴ Malawi is classified as a country in the low human development category, ranked 170 out of 178 countries on the Human Development index.²¹⁵ It is ranked 170 out of 188 countries on gender-based inequalities in terms of reproductive health, empowerment, and economic activity.²¹⁶ Malawi's national poverty rate is 50%.²¹⁷ Close to 70% of Malawians are classified as socially and economically vulnerable. The country relies heavily on foreign financial assistance from institutions such as the European union, the World Bank, International Monetary fund, and several Western countries including the United Kingdom (UK), USA, Norway and Germany. The donors are arguably influential on some decisions taken by the government on development matters.

The earliest foreign visitors to Nyasaland, as it was known then, were Arab traders around 1840,²¹⁸ followed by the arrival of the first Christian missionary from Scotland, David Livingstone, in 1859.²¹⁹ As a nation-state, Malawi was heavily influenced by British colonialism. However, it was Livingstone who raised the British colonial government's interest to colonise the territory. According to the foreign Jurisdiction Act of 1890, the Queen gained powers to gain jurisdiction over territories colonised by the British.²²⁰ Malawi's territory was declared a British colony of British Central Africa in 1891.²²¹ The British declared jurisdiction over the Nyasaland territory through the British Central Africa Order in Council of 1902, conferring itself powers and jurisdiction over the territory. It was named Nyasaland through the British Central Africa Order in the council of 1907.²²² It was through this transition process that Nyasaland inherited British common law and

²¹⁴ (Kamanga, 2014), (Moto F. , 2001)

²¹⁵ (United Nations Development Programme, 2016, p. 200), (United Nations Development Programme, 2015).

²¹⁶ (United Nations Development Programme, 2016), (United Nations Development Programme, 2015)

²¹⁷ (National Statistics Office, 2011)

²¹⁸ (Bone, 1982)

²¹⁹ (Emtage, 1955)

²²⁰ Foreign Jurisdiction Act, 1890 (enacted 4 August 1890)

²²¹ (McCracken, 2012, p. 7)

²²² (British Government, 1907)

statutes.²²³ In the Nyasaland Ordinance in Council of 1908, the Order in Council of 1902 was amended to specify that all laws of Nyasaland were to conform to all laws in force in England.²²⁴ The Order in Council of 1902 is cited as the first written Constitution of the country, but without any provisions about human rights.²²⁵ During this period when the British were setting up the colony, Christianity expanded and local customs were outlawed.²²⁶ Despite intermittent waves of native resistance, the colonial administration held until 1961 when Nyasaland natives were allowed national elections, which resulted in independence in 1964 and a takeover by Malawi Congress Party (MCP) under the leadership of Dr Hastings Kamuzu Banda,²²⁷ Nyasaland became independent on 6 July 1964 and was renamed Malawi.²²⁸ The country initially adopted a new Constitution with a comprehensive Bill of Rights guaranteeing human rights and fundamental freedoms of all people, along with limitations of governmental authority.²²⁹

Barely six weeks after declaration, a disagreement within the cabinet led to a historical cabinet crisis, arising from a heated disagreement between Dr Banda and his cabinet ministers over a draft bill on education, that resulted in party loyalists calling for unlimited powers for Banda.²³⁰ In 1966

²²³ (British Government, 1902, p. 5311), The London Gazette, 15 August 1902, British Central Africa Order in Council, p 5311.

²²⁴ (British Government, 1908, p. 313). The amendment stated: Subsection (2) of section 15 of the British Central Africa Order in Council, 1902, is hereby revoked, without prejudice to anything lawfully done thereunder, and in place of the said subsection the following shall be substituted:— " (2) Such civil and criminal jurisdiction shall, so far as circumstances admit, be exercised in conformity with the substance of the common law, doctrines of equity, and statutes of general application in force in England, on the eleventh day of August, one thousand nine hundred and two, and with the powers vested in, and according to the procedure and practice observed by and before Courts of Justice and Justices of the Peace in England, according to their respective jurisdictions and authorities at that date, save in so far as the same may at any time before the commencement of this Order have been, or hereafter may be, modified or amended by or under the authority of any Order of His Majesty in Council, or by any Ordinance or Ordinance passed in and for the Protectorate

²²⁵ (Chigawa, The fundamental values of the republic of Malawi constitution of 1994 , 2006) (Chigawa, The fundamental values of the republic of Malawi constitution of 1994 , 2006)

²²⁶ (McCracken, 2012)

²²⁷ (McCracken, 2012, p. 378). Also, refer to (Chirwa, Patel, & Kanyongolo, p. 2)

²²⁸ (McCracken, 2012, p. 429)

²²⁹ (Chigawa, The fundamental values of the republic of Malawi constitution of 1994 , 2006, p. 3) (Chigawa, The fundamental values of the republic of Malawi constitution of 1994 , 2006, p. 3). Also, refer to (Chirwa, Patel, & Kanyongolo, p. 2), and (Roberts, 1964)

²³⁰ (Sindima, 2002, p. 133)

Malawi became a republic and adopted a new republican Constitution, which made Banda the life president and repealed the bill of rights.²³¹ Banda became increasingly authoritarian.

After decades of oppressive rule, in the early 1990s underground opposition parties emerged to challenge Banda's dictatorship and demand multiparty democracy.²³² Following pressure, Dr Banda appointed a National Referendum Commission in 1993 to hold a national referendum on whether Malawians wanted democratic rule, which resulted in Malawians overwhelmingly voting in favour of a multiparty democracy, thus paving way for a process that led to the holding of multiparty general elections in 1994.²³³ As it was clear that Malawi would transition into multiparty democracy, in February 1994 the National Consultative Council, which had been appointed to manage the transition process²³⁴ held consultations, which resulted in a draft constitution.²³⁵ Following multiparty general elections held on 17 May 1994, the new leadership was sworn in and a new republican Constitution with a bill of rights was adopted in 1995.²³⁶ The history of regulation of same-sex intimacies in Malawi can be understood through the paradox between the criminalisation of homosexuality inspired by British criminal laws, and the bill of rights in the republican Constitution as well as international human rights obligations in the context of the emergence of Christianity that othered local indigenous histories and narratives.

²³¹ (Chigawa, The fundamental values of the republic of Malawi constitution of 1994 , 2006, pp. 4-5) (Chigawa, The fundamental values of the republic of Malawi constitution of 1994 , 2006, pp. 4-5)

²³² (Sindima, 2002, pp. 211-213)

²³³ (Sindima, 2002, p. Ibid)

²³⁴ The National Consultative Council was established 1993 by the National Consultative Council Act (Act No 20 of 1993). Along with the National Executive Committee, the Act was passed to facilitate constitutional and legal reforms for the transition, including the drafting of a democratic constitution.

²³⁵ (Chirwa D. , 2011, p. 5)

²³⁶ (Sindima, 2002)

2.2. The Paradox of Criminalisation of (homo)sexuality vis-à-vis

Malawi's International and Domestic Human Rights Obligations

The history of criminalisation of same sex conduct in Malawi can be traced back to British colonial law. When Nyasaland was declared a British protectorate, it inherited from the British Empire laws such as *Offences against the Person Act of 1861*²³⁷ and the *Criminal Law Amendment Act of 1885*,²³⁸ which included crimes of buggery and indecent practices between males. These crimes were part of criminal laws against homosexuality that the British Empire introduced to its colonies, initially introduced to the Indian Penal Code in 1860 through the crime of unnatural offences:

Section 377: Unnatural offences – Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished with imprisonment for life, or with imprisonment ... for a term which may extend to 10 years, and shall be liable to fine. Explanation – Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this Section.²³⁹

In Malawi's Penal Code, homosexual acts are criminalised through sections 153, 156, and 137A.²⁴⁰

Section 153 on unnatural offences reads:

anyone who: (a) has carnal knowledge of any person against the order of nature; (b) has carnal knowledge of any 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, with or without corporal punishment.²⁴¹

Section 156 on Indecent practices between males reads:

Any male 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

²³⁷ (United Kingdom Government, 2015)

²³⁸ (United Kingdom government, 2016)

²³⁹ (Lennox & Waites, 2013), (Human Rights Watch, 2008)

²⁴⁰ (Malawi Government, 1930) Malawi Penal Code of 1930 (as amended) Cap 7:01 Laws of Malawi. Sections 14, 153 and 156 originally existed in the Penal Code until an amendment in 2010 that resulted in introduction of section 137A.

²⁴¹ Malawi Penal Code of 1930 (as amended) Cap 7:01 Laws of Malawi

guilty of a felony and shall be liable to imprisonment for five years, with or without corporal punishment.²⁴²

However, a previously uncited section 14 on immature age reads:

A person under the age of seven years is not criminally responsible for any act or omission. A person under the age of twelve years is not criminally responsible for an act or omission unless it is proved that at the time of doing the act or making the omission he had capacity to know that he ought not to do the act or make the omission. A male person under the age of twelve years is presumed to be incapable of having carnal knowledge.²⁴³

Although section 153 does not specify whether carnal knowledge refers to both male and female persons, this section can be read to imply that carnal knowledge in section 153 was intended to refer to the conduct between males. The specific reference to males in terms of criminal responsibility, and not females, suggests that the criminality in question referred to males. While its origins are yet to be established, specification that male persons under the age of twelve are incapable of having carnal knowledge affirms a common myth among Malawians, to be discussed later in this chapter, that sodomy implies the capacity of adult men to molest underage boys.

The Penal Code was initially passed in 1930 by the British colonial administration and its contents were based on English criminal law, whose provisions criminalising homosexuality were inspired by Christianity, most notable the book of Leviticus, which is interpreted as a declaration that homosexuality is seen as an abominable sin.²⁴⁴ In England the sin of sodomy

²⁴² Malawi Penal Code of 1930 (as amended) Cap 7:01 Laws of Malawi

²⁴³ Malawi Penal Code of 1930 (as amended) Cap 7:01 Laws of Malawi

²⁴⁴ Malawi Penal Code of 1930 (as amended) Cap 7:01 Laws of Malawi. Section 3 of the Penal Code reads: This Code shall be interpreted in accordance with the principles of legal interpretation obtaining in England, and expressions used in it shall be presumed, so far as is consistent with their context, and except as may be otherwise expressly provided, to be used with the meaning attaching to them in English criminal law and shall be construed in accordance therewith. Also, see (SALC & CHREAA, 2013, p. 29). Leviticus 20 verse 13 states: If a man also lie with mankind, as he lieth with a woman, both of them have committed an abomination: they shall surely be put to death; their blood shall be upon them. This verse is among the most cited by Christians as the basis to reject and criminalise homosexuality. Also, see (Lennox & Waites, 2013, p. 61)

was taken very seriously, initially tried in church courts until King Henry VIII broke away from the Catholic Church in the 16th Century, resulting in the introduction of statutory crimes of sodomy and buggery to enable the state to carry on the role previously taken by the church.²⁴⁵ The rapid popularisation of Christianity among Nyasaland natives legitimised the need for criminalising the 'sin' of homosexuality crimes through the enactment of anti-gay provisions in the penal code in 1930. However, no record was found in this research to show that anyone else was previously charged or convicted under the provisions for engaging in consensual adult same-sex conduct until in the arrest of Steven Monjeza Soko (hereinafter referred to as Monjeza) and Tiwonge Chimbalanga Kachepa (hereinafter referred to as Chimbalanga) in 2009.

The emergence of the issue of homosexuality as a matter for national debate was triggered by a front-page headline in *The Nation* newspaper about a Chinkhoswe ceremony between Monjeza and Chimbalanga in the commercial city of Blantyre.²⁴⁶ Chinkhoswe is a traditional wedding ceremony that is held to attain customary recognition that people are married. While Chinkhoswe is enough to attain recognition of marital status in Malawian communities, others formalise their union by registering either at church or at the marriage registrar's office. Monjeza and Chimbalanga were arrested the same day the news broke and charged with gross indecency under section 156 of the Penal Code.²⁴⁷ Monjeza and Chimbalanga were denied bail throughout the duration of the case because, according to the presiding magistrate in the case, the pair had to remain in custody for their own safety as the public was outraged with their actions.²⁴⁸ The prosecutors also requested for the two to remain in custody to allow more time for investigations.

²⁴⁵ (Human Rights Watch, 2008, pp. 13-14)

²⁴⁶ (Somanje, 2009)

²⁴⁷ (Botomani, 2009)

²⁴⁸ (Nyasa Times, 2010)

During detention, Chimbalanga and Monjeza were forced to undergo psychiatric examination to confirm that they were mentally fit to stand trial.²⁴⁹ Their mental fitness was necessary, from the viewpoint of the state, to ensure that the case was not dismissed on grounds of insanity. Chimbalanga was forced to undergo a medical examination to determine that he had been penetrated through anal sex.²⁵⁰ After investigations, Monjeza was charged with buggery contrary to section 153(a) of the Penal Code, and Chimbalanga was charged with permitting buggery contrary to section 153(c), and the original charge under section 156 of the Penal Code for both.²⁵¹ They pleaded not guilty, and opted to remain silent throughout the case. The pair's lawyer applied to the court for the matter to be heard as a constitutional case because the law used to charge the two had violated their constitutional rights to privacy, belief and self-expression. However, the Chief Justice declined to admit the case for constitutional review, deciding that the issue was a criminal case that required criminal proceedings only.²⁵²

After a dramatic court case while the couple remained in police custody, on 20 May 2010 Chief Resident Magistrate Nyakwawa Usiwa-Usiwa found Monjeza and Chimbalanga guilty on all charges.²⁵³ They were sentenced to a maximum of 14 years in prison with hard labour.²⁵⁴ The strong worded judgement by Usiwa-Usiwa suggests that the preoccupation was on how the Soko and Kachepa had offended Malawi's public morals than what the law prescribed.

... if the court is to find a case against an accused person based on circumstantial evidence, the evidence should be such that it is not in any way compatible with the innocence of an accused person except the accused person's guilt.

When we take all this above into consideration we find it is fanciful to think that this was a rare conventional couple where people could only be deemed married and have sexual intercourse, only after the engagement and not before.

Therefore the Prosecution's proof beyond reasonable doubt of a man who behaves like a woman and likes to be treated as such; the wearing of female clothes by one; the

²⁴⁹ (Republic versus Steven Monjeza Soko and Tionge Chimbalanga Kachepa, 2009)

²⁵⁰ (Price, 2010)

²⁵¹ (Republic versus Steven Monjeza Soko and Tionge Chimbalanga Kachepa, 2009, pp. 1-2)

²⁵² (Nyasa Times, 2010)

²⁵³ (Republic versus Steven Monjeza Soko and Tionge Chimbalanga Kachepa, 2009, p. 20)

²⁵⁴ (Republic versus Steven Monjeza Soko and Tionge Chimbalanga Kachepa, 2009, p. 24)

engagement or purported engagement of the two (to the extent of hiring a photographer); the soundness of their mind; their both being male; and the lie which Ti(w)onge had been telling people that he was a woman; all these leave us with one rational conclusion of inference leading to only the guilt of Steven having anal carnal knowledge of Ti(w)onge and Ti(w)onge permitting it by the anus (contrary to sections) 153(a) and (c) respectively and therefore convict both of them of the offence of buggery. Otherwise the law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice".²⁵⁵

The above narrative suggests that the court focused on generalised non-legal discussion of morals than taking weight of the facts before them and the relevant applicable laws.²⁵⁶ The magistrate had concluded that Soko and Kachepa had offended Malawi's moral standards where relationships were supposedly restricted to members of the opposite sex. Moreover, he wanted to make an example of them to the rest of society. Since the case had raised international attention, he also wanted to make a political statement to the world about Malawi's moral position on homosexuality and marriage. In Usiwa-Usiwa's own words above, even if there was a remote possibility that Chimbalanga and Monjeza were eligible for marriage, their presumed immorality excluded them from capacity to abide by the rules of a Christian marriage i.e. having sexual intercourse before officiating their marriage within the church. Further, he believed that it was a lie for Chimbalanga to tell people that he was a woman when, according to Usiwa-Usiwa, she was a man. Based on his conviction, not what the law prescribed, he felt a duty to protect society from what he found to be fanciful possibilities. As a result, Soko and Kachepa, who were both first offenders, were sentenced to a maximum sentence of 14 years imprisonment with hard labour, and during the sentencing he boasted that his harsh sentence was a warning to all queer persons in Malawi.

Coming to the present case when Learned Counsel for the Defendants said that **sending them to prison is like sending married people to prison** I thought he was equating the **bizarre** marriage in this case to a normal practice of any other lawful marriage in Malawi. Be it as it may, I want to put it on record here that this I find to be grossly wrong.

²⁵⁵ (Republic versus Steven Monjeza Soko and Tionge Chimbalanga Kachepa, 2009, p. 19)

²⁵⁶ (Phooko M, 2011)

Fortunately, Learned Counsel put this court in a very correct context: that we are sitting in place of the Malawi society. Which I do not believe is 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.**

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**".²⁵⁷

This case was exceptional in the Malawian context because it involved two consenting adults, unlike the rest of the cases cited in this study which are about non-consensual same-sex sex.²⁵⁸

In a dramatic twist of events, the two were pardoned by the (then) President Bingu wa Mutharika, in a press conference that coincided with a visit by the UN Secretary General Ban Ki-Moon.²⁵⁹ Although the lawyer representing Monjeza and Chimbalanga had failed to secure consideration of the case as a constitutional one, it has been argued that the trial was unconstitutional.²⁶⁰ It has also been argued that the disjuncture between criminal laws regulating same-sex conduct in Malawi and the constitutional purpose to protect human rights in Malawi on one hand, influenced by strong anti-gay views based on religion and culture on the other, resulted in procedural and legal errors in the case.²⁶¹

Until this case, the anti-gay provisions in the Penal Code had never been amended since inheriting them from the British colonial administration. However, in the same year (2010), parliament amended the Penal Code to introduce a new section, 137A which read:

²⁵⁷ (Republic versus Steven Monjeza Soko and Tionge Chimbalanga Kachepa, 2009)

²⁵⁸ During the study, consultations were made with the registry of the High Court of Malawi and no other judgement involving consensual adult same-sex sex was confirmed.

²⁵⁹ (Nyasatimes, 2010)

²⁶⁰ (Phooko M, 2011)

²⁶¹ (Price, 2010)

any 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.²⁶²

To announce the passing of the amended law, the then Minister of Justice and Constitutional Affairs addressed a press conference, defending the amendment as gender sensitive, citing that it was intended to eliminate discrimination between males and females in terms of the criminalisation of homosexuality.²⁶³ This amendment was the parliamentarians' warning against homosexuality, in reaction to the pardon of Soko and Kachepa. In 2016, Malawi parliament passed the Marriages, Divorce and Family Relations Bill into law (hereinafter referred to as the Marriage Act).²⁶⁴ The new law was widely applauded because it contained section 14 which prohibited any marriages by persons under the age of 18. This provision was celebrated as a significant step in the fight against child marriages in Malawi. However, the new law also defined sex in relation to the gender of a person as that which is assigned to a person at birth.

In the report of the special law commission on the review of laws of marriage and divorce authored ten years earlier, the special commission emphasised that only the gender identity assigned at birth should be recognised in accordance with common law.²⁶⁵ This emphasis, according to the special law commission, was meant to avoid problems caused to transsexuals or persons who have undergone sex-changing surgery later in life in terms of their options regarding marriage with a person of the same-sex as that which they held at birth.²⁶⁶ By the extension, the emphasis was aimed at restricting anyone from assuming a gender identity other than the one assigned at birth, thereby restricting any change of gender identity for

²⁶² Malawi Penal Code of 1930 (as amended) Cap 7:01 Laws of Malawi, (Mwakasungula, 2013, pp. 361-362)

²⁶³ (Mwakasungula, 2013, p. 362)

²⁶⁴ (Malawi Government, 2015)

²⁶⁵ (Malawi Law Commission, 2006, p. 27) (Malawi Law Commission, 2006, p. 27). Also, see (Malawi Law Commission, 2007, p. 15)

²⁶⁶ (Malawi Law Commission, 2006, p. Ibid) (Malawi Law Commission, 2006, p. Ibid)

anyone who may come out as queer at a later stage in life. According to the special law commission, marriages in Malawi must be heterosexual unions and therefore law-regulating marriages must prohibit homosexual unions.²⁶⁷ Unlike the Penal Code, which criminalises conduct, the Marriage Act is the first law in Malawi to restrict legal recognition on the basis of sexual orientation and gender identity. Section 64(b) of the new law cites crimes under section 153 of the Penal Code, on unnatural offences, as grounds for divorce.

Evidence of breakdown of marriage

64. In deciding whether or not a marriage has or retrievably broken down, the court may accept any one or more of the following facts as evidence that the marriage has irretrievably broken down

...

(b) the respondent has been convicted of the offence of rape or an offence under section 153 of the Penal Code.²⁶⁸

This section can therefore be understood as validating and legitimising section 153 of the Penal Code.

What is peculiar about the Penal Code (sections 153, 156 and 137A) and the Marriage Act is their contradiction with Malawi's Constitution and regional and international human rights obligations.²⁶⁹ Malawi's republican Constitution is the supreme law of the land, to the extent that any act of Government or any other law that is inconsistent with it is invalid.²⁷⁰ Unlike past constitutions, which concentrated power to the president, article 6 derives the authority to govern from the people of Malawi through universal and equal suffrage.²⁷¹ It also sets out a

²⁶⁷ (Malawi Law Commission, 2006, p. Ibid) (Malawi Law Commission, 2006, p. Ibid)

²⁶⁸ Supra note 264

²⁶⁹ (Mwakasungula, 2013), (Price, 2010), (Phooko M, 2011), (Phooko M, 2011), (Mlenga, 2012),

²⁷⁰ Section 5 of Malawi's constitution (Malawi Government, 2004, p. 5). Also, see (Chirwa D. , 2011, p. 6) and (Chigawa, The Fundamental Values of the Republic of Malawi Constitution- Summary of the Main Concepts and Issues, 2006, p. 2)

²⁷¹ (Malawi Government, 2004, p. 12)

principle of separation of powers through three branches of government namely legislature, judiciary and the executive.²⁷² In line with the UDHR and international or regional human rights treaties, section 12(4) of the Constitution recognises the universality of rights and the inherence of human dignity, including minorities.²⁷³ Article 12(5) restricts the limitation of lawful rights unless such limitations are justifiable to the extent that does not render persons unequal in status before the law.²⁷⁴ Section 12(6) requires all institutions and people to observe and uphold the Constitution and rule of law, stating that no one is above the law.²⁷⁵ The restrictions of the Constitution towards limitation of any rights, makes it potentially sufficient in the protection of rights of minorities.

Section 20(1) in the bill of rights prohibits any form of discrimination against any person, and guarantees equal and effective protection against discrimination on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, property, birth or other status.²⁷⁶ Chirwa, a leading Malawian human rights scholar, has argued that ‘other status’ under section 20(1) was deliberately left open to guarantee protection any other groups entitled to rights.²⁷⁷ He also argued that equal and effective protection from non-discrimination based on sexual orientation and gender identity must therefore be implied. In other words, it is unreasonable to assume that ‘other status’ excluded non-discrimination regarding SOGI-based human rights.

Section 20(1) of the Constitution does not lay down an exhaustive list of prohibited grounds of discrimination. For example, age, sexual orientation and citizenship are not mentioned. Nevertheless, by including the words ‘other status’ at the end of the list of

²⁷² (Malawi Government, 2004, p. *ibid*)

²⁷³ (Malawi Government, 2004, p. 13)

²⁷⁴ (Malawi Government, 2004, p. *ibid*)

²⁷⁵ (Malawi Government, 2004, p. *ibid*)

²⁷⁶ (Malawi Government, 2004, p. 17)

²⁷⁷ See (Chirwa D. , 2011, p. 147)

the prohibited grounds, this section leaves room for extending the grounds on which discrimination may be prohibited.²⁷⁸

Malawian case law supports Chirwa's view that 'other status' is open to other statuses not explicitly mentioned in the Constitution. In the case of *Banda v. Mahindra Lekha* before the Malawi Industrial Relations Court, Banda complained that Lekha, her employer, had unfairly dismissed her upon her disclosing that she had tested positive for HIV infection.²⁷⁹ The court ruled that Banda was unfairly dismissed on prohibited grounds of discrimination, and that the respondents violated Banda's right to equality and fair labour practices under the Constitution.²⁸⁰ Importantly the court found that anti-discrimination provisions under Malawi's constitutional and international human rights obligations extend, although not explicitly stated, to HIV status.

All human rights listed in the bill of rights must be read as SOGI-based human rights, on the understanding that they are also needed by queer persons. This include rights such as the right to life,²⁸¹ personal liberty,²⁸² dignity,²⁸³ prohibition of torture or cruel, inhuman or degrading treatment or punishment,²⁸⁴ right to freedom and security of a person, the right not to be detained solely by reason of his or her political or other opinion,²⁸⁵ and the right to privacy.²⁸⁶ The constitution also guarantees equal entitlement to human rights such as; education (article 25), economic activity (article 29), right to development (article 30), freedom of association (article 32), freedom of conscience (article 33), freedom of opinion (article 34),

²⁷⁸ (Chirwa D. , 2011, p. Ibid)

²⁷⁹ (*Banda Versus Mahindra Lekha*, 2005)

²⁸⁰ (*Banda Versus Mahindra Lekha*, 2005, p. 3)

²⁸¹ (Malawi Government, 2004, p. 17)

²⁸² (Malawi Government, 2004, p. *ibid*)

²⁸³ (Malawi Government, 2004, p. *ibid*)

²⁸⁴ (Malawi Government, 2004, p. *ibid*)

²⁸⁵ (Malawi Government, 2004, p. *ibid*)

²⁸⁶ (Malawi Government, 2004, p. 18)

freedom of expression (article 35), freedom of assembly (article 38), freedom of movement and residence (article 39), and right to fair administrative action (article 43). Article 41 entitles everyone

access to courts or legal tribunals. It also entitles every person to the right to an effective remedy from institutions such as the Ombudsman and Human Rights Commission.

Furthermore, there is no justification to exclude queer children from section 23 on the rights of children which states that all children are entitled to equal treatment before the law, and are entitled to protection from any treatment or punishment that is harmful to their physical, mental, spiritual or social development.²⁸⁷ It is unreasonable to claim that queer children would not be entitled to protection accorded to children on the basis that they are not heterosexual. So far issues about children remain unexplored in the public and scholarly debates about SOGI-based rights in Malawi. My proposed interpretation of section 23 opens up opportunity for viewing child rights as also a SOGI-rights issue.²⁸⁸

Section 44 of the Constitution requires a rigorous test for justifying the limitation of rights by guaranteeing that *laws prescribing restrictions or limitations shall not negate the essential content of the right or freedom in question.*²⁸⁹ Restricting or limiting rights on the basis of sexual orientation and gender identity negates the purpose of all rights contained in the Constitution, as they ought to be applied to all persons without any discrimination.

²⁸⁷ (Malawi Government, 2004, pp. 18-19)

²⁸⁸ For example, see report on violence against children and young women in Malawi, published by Malawi government in collaboration with the US Centre for Disease Control, UK Aid, and UNICEF. This report was a result of a national household survey involving 2,162 interviews but did not report any issues about LGBTIQ children even though there are numerous court judgements of adults sodomising children. (Malawi Government, 2014)

²⁸⁹ (Chirwa D. , 2011, pp. 39-40)

The Constitution recognises international law under section 11(2)(c), which allows the consideration of current norms of public international law and comparable foreign case law.²⁹⁰ Section 44(2) also requires adherence to international human rights standards when placing any limitations on the exercise of any rights and freedoms provided by the Constitution.²⁹¹ Section 45(3)(b) restricts derogation of rights in the Constitution to state of emergency, subject to consistency with obligations under international law.²⁹² Article 211(1) provides that any international agreement ratified by an act of parliament shall form part of Malawian laws. In addition, article 211(2) provides that international agreements entered before the commencement of the Constitution (in 1994) and binding on Malawi shall form part of its laws, unless otherwise provided by parliament or lapse of the agreement. Further, article 211(3) provides that customary international law has continued application unless inconsistent with the Constitution or an act of parliament. International law, and by extension, international human rights law, is applicable to Malawi's legal framework. In terms of the monism vs. dualism debates in reference to the relationship between international and domestic law, although Malawi can be classified as a dualist state according to section 211(1) of the constitution, whereby an international agreement becomes part of domestic law upon ratification or accession,²⁹³ section 211(3) of the constitution employs a monist approach in relation to customary international law where an act of parliament is required for international law to become part of domestic law.²⁹⁴

²⁹⁰ (Malawi Government, 2004, p. *ibid*)

²⁹¹ (Malawi Government, 2004, pp. 25-26)

²⁹² (Malawi Government, 2004, p. 27)

²⁹³ (Southern African Litigation Centre, 2015, p. 74)

²⁹⁴ (Xanthaki, 2015)

International law is crucial for Malawi as a source of interpreting Constitutional human rights because Malawi has a relatively short record in litigating human rights.²⁹⁵ According to article 211(2), international treaties entered before commencement of the 1995 Constitution and therefore part of Malawi's laws include CEDAW (ratified in 1987),²⁹⁶ CRC (ratified in 1991),²⁹⁷ ICCPR (ratified in 1993),²⁹⁸ and ICESCR (ratified in 1993),²⁹⁹ and at the continental level, African Cultural Charter for Africa (ratified in 1987)³⁰⁰ and the African Charter on Human and Peoples' Rights (ratified in 1989).³⁰¹

Since Malawi's legal framework incorporates international human rights norms, the content and decisions from the international human rights system must be applicable. International human rights bodies are increasingly recognising the urgent need to extend protections on the basis of sexual orientation and gender identity. In *Toonen v. Australia* in 1994,³⁰² in a complaint to the UN Human Rights Committee regarding Tasmanian laws that criminalise consensual sex between adult males, the Committee held that states should protect individuals on the basis of sexual orientation.³⁰³ They found that prohibition of discrimination on the basis of sex under 4(1) of the ICCPR must include non-prohibition on the basis of sexual orientation. In 2009 the Committee on Economic, Social and Cultural Rights urged state parties to ensure that a person's sexual orientation is not a barrier to realising rights in the ICESCR as 'other status', in

²⁹⁵ (Chirwa D. , 2011, p. 27)

²⁹⁶ (Ghandhi, 2004, p. 95)

²⁹⁷ (Ghandhi, 2004, p. 131)

²⁹⁸ (Ghandhi, 2004, p. 64)

²⁹⁹ Please refer to the Office of the United Nations High Commissioner on Human Rights website, http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=104&Lang=EN (accessed 30 August 2016)

³⁰⁰ Status of ratification, (African Union, 2007))

³⁰¹ Status of ratification, African Charter on Human and People's Rights, Please refer to the African Union website http://www.au.int/en/sites/default/files/treaties/7770-sl-african_charter_on_human_and_peoples_rights_0.pdf (accessed 30 August 2016)

³⁰² (*Toonen v. Australia*, 1994)

³⁰³ (United Nations (A/HRC/19/41), 2011, p. 6), (Ghandhi, 2004, p. 65)

its article 2(2) included sexual orientation.³⁰⁴ In 2011 the Committee on the Rights of the Child urged member states to implement protective measures to protect lesbian, gay, transgender and transsexual children, as they were likely to be exposed to violence.³⁰⁵ In 2014, at its 55th Ordinary Session, the African Commission on Human and Peoples' Rights unprecedentedly condemned violence, discrimination and other human rights violations committed against individuals in Africa based on sexual orientation or gender identity.³⁰⁶ They called on state parties to end the violence and prosecute perpetrators of such violence. Although several conservative states, both at the UN and African Union levels, have attempted to reject extension of human rights protection on the grounds of sexual orientation and gender identity, this progress is significant.

Although international law is not widely applied by Malawian courts as much as it could bearing in mind the generous opportunities provided for by the constitution,³⁰⁷ positive trends in the use of international human rights law discussed in the cases below offer opportunity for invoking grounds for legal protection of SOGI-based rights. In a constitutional case in 2007, Gable Masangano, a Malawian prisoner, sued the Attorney General, Minister of Home Affairs and Internal Security, and Commissioner of Prisons, on behalf of all prisoners in Malawi, that they were subjected to torture and cruel, inhuman and degrading treatment which infringed rights under section 44 of the Constitution.³⁰⁸ In his submission, he complained that prisoners

³⁰⁴ (United Nations Economic and Social Council, 2009, p. para 32)

³⁰⁵ (United Nations Committee on the Rights of the Child, 2011, p. para 72(g))

³⁰⁶ (African Commission on Human and Peoples' Rights, 2014)

³⁰⁷ (Southern African Litigation Centre, 2015, p. 84)

³⁰⁸ (Gable Masangano Versus The Attorney General, Minister of Home Affairs and Internal Security, Commissioner of Prisons, 2009) , Chapter 44 of the Constitution reads:

Limitations on rights

44. -

1. There shall be no derogation, restrictions or limitation with regard to
 - a. the right to life;
 - b. the prohibition of torture and cruel, inhuman or degrading treatment or punishment;
 - c. the prohibition of genocide;

lacked ordinary meals, had insufficient clothing and equipment, had insufficient space, and were denied access to medical care. He argued that minimum standards for imprisonment must be regulated by the Constitution, the Prison Act and international law. The court found that the Constitution reigned supreme, over any other laws or institutions, in protecting human rights for all Malawians. They also found that prohibition of torture and cruel, inhuman and degrading treatment or punishment was contrary article 5 of the UDHR, and article 7 of the ICCPR.³⁰⁹

In so far as the Respondents argue non-justiciability of the matters before us, it is clear that the arguments are reminiscent of the long-established principle that prison authorities possessed complete discretion regarding the conditions of confinement of prisoners and that the courts had no authority, not even jurisdiction, to intervene in this area. But that principle belongs to the old days when the human rights culture was in its rudimentary stages of development. In the present day and age where we have new constitutional orders deeply entrenching human rights and where the human rights culture is fully fledged and continues to bind all public institutions, courts cannot stand by and watch violation of human rights in prison as complained of by prisoners. Prisoners may have their right to liberty curtailed by reason of lawful incarceration,

-
- d. the prohibition of slavery, the slave trade and slave-like practices;
 - e. the prohibition of imprisonment for failure to meet contractual obligations;
 - f. the prohibition on retrospective criminalization and the retrospective imposition of greater penalties for criminal acts;
 - g. the right to equality and recognition before the law;
 - h. the right to freedom of conscience, belief, thought and religion and to academic freedom; or
 - i. the right to *habeas corpus*.
2. Without prejudice to subsection (1), no restrictions or limitations may be placed on the exercise of any rights and freedoms provided for in this Constitution other than those prescribed by law, which are reasonable, recognized by international human rights standards and necessary in an open and democratic society.
 3. Laws prescribing restrictions or limitations shall not negate the essential content of the right or freedom in question, shall be of general application.
 4. Expropriation of property shall be permissible only when done for public utility and only when there has been adequate notification and appropriate compensation, provided that there shall always be a right to appeal to a court of law.
 5. Wherever it is stated in this Constitution that a person has the right to the services of a legal practitioner or medical practitioner of his or her own choice, that right shall be without limitation, save where the State is obliged to provide such services of a legal practitioner or medical practitioner, in which case an Act of Parliament may prescribe that the choice of the legal practitioner or medical practitioner should be limited to those in Government service or employment.

³⁰⁹ (Gable Masangano Versus The Attorney General, Minister of Home Affairs and Internal Security, Commissioner of Prisons, 2009, p. 38). The UN General Assembly declaration under discussion here preceded the Convention against Torture and other cruel, inhuman or degrading treatment or punishment

they however retain all their other human rights as guaranteed by the Constitution whose guardians are the Courts. What happens in prisons is no longer sacrosanct.³¹⁰

In an earlier appeal case of Chakufwa Thom Chihana versus the Republic in 1992, in which Chihana, a politician, was appealing against his imprisonment on charges of importing seditious materials, the court had recognized that the UDHR was part of Malawi's laws and must be respected and enforced by the courts:

We were referred to Section 2(1) (iii) of Schedule 2 to the Constitution of Malawi. That Section provides in the following terms: -

“The Government and people of Malawi shall continue to recognise the sanctity of the personal liberties enshrined in the United Nations Declaration of Human Rights and of adherence to the law of Nations.”

We accept that the Universal Declaration of Human Rights is part of the law of Malawi and that the freedoms which that Declaration guarantees must be respected and can be enforced in these Courts. It seems to us, therefore, that it is the right of every citizen of the Republic of Malawi to have a candid, full and free discussion on any matter of public interest. It is open to every citizen of the Republic to express his or her concern on any aspect of Government policy. This Court must be the protector of the fundamental human rights, which are part of our law.³¹¹

In another landmark case about a petition by Guy Stuart Ritchie and Madonna Louise Ritchie regarding the adoption of an infant, David Banda, the court stressed the importance of recognising that Malawi's constitutional ratification of international human rights treaties makes the treaties binding on Malawi by choice.³¹² Justice Nyirenda emphasised that if a law conflicts with our international obligation it runs the risk of conflicting with the Constitution. In such a case, Justice Nyirenda found that the Constitution and international law must reign supreme over domestic laws, especially where the latter may conflict the former.

³¹⁰ (Gable Masangano Versus The Attorney General, Minister of Home Affairs and Internal Security, Commissioner of Prisons, 2009, pp. 28-29)

³¹¹ (Chakufwa Tom Chihana versus The Republic, 1992)

³¹² (In the matter of the Adoption of Children Act (CAP. 26:01) and In the matter of David Banda (a male infant), 2008)

Thus far I hope I have meaningfully established two points. The first point is that it is our singular Constitutional obligation to uphold, binding international law. Secondly, and by implication, it says to me if a law is in conflict with our international obligation it runs the risk and the likelihood of being in conflict with our Constitution and this Court is called upon to apply such interpretation of the act or law as is consistent with the Constitution, and by extension, international law, because applicable international law and the Constitution are supposed to work in tandem.³¹³

The above case law indicates that international human rights law can be used to justify promotion and protection of SOGI-based human rights in Malawi. The Constitution itself has provisions that validate the legal force of international human rights law, which I have argued above that it does not exclude protection of human rights based on sexual orientation and gender identity. The supremacy of the Constitution, which invalidates any other law contrary to it, principally renders sections 137A, 153 and 156 of the Penal Code, as well as the definition of sex in the Marriage act, invalid to the extent to which they are an obstacle to the access of rights in accordance with Malawi's domestic and international human rights obligations. However, in practice the cases which with potential to establish case law asserting supremacy of the constitution over the relevant provisions of the penal code and marriage act have so far stalled. In 2013 the High Court issued a notice in the press inviting interested parties to join a case to consider constitutionality of section 153(a) of the penal code vis-à-vis section 20 of the Constitution.³¹⁴ This was in relation with high court confirmation of cases of Mussa Chiwisi, Matthew Bello and Amon Champyuni who had been convicted by the lower courts. The Malawi Law Society (MLS), which has a mandate to promote effective implementation of the laws of Malawi in accordance with section 26 of the Legal Education and Legal Practitioners Act applied to join the case *amicus curiae*. In their submission, they argued that although they found anti-homosexuality laws to contravene the constitution, any repeal of the relevant penal

³¹³ (In the matter of the Adoption of Children Act (CAP. 26:01) and In the matter of David Banda (a male infant), 2008, p. 12)

³¹⁴ (Malawi Law Society, 2011)

code provisions should restrict to the extent relating to consensual same-sex conduct between adults in private.³¹⁵ To MLS, it was crucial for the law to retain its criminalisation of non-consensual same-sex conduct, failing which there would not be any other alternative law for convicting future such crimes. The Centre for Human Rights Education, Advice and Assistance (CHREAA) also submitted to join the case. In their submission they similarly argued that sections 153(a) and 153(c) were contrary to sections 19(1), 20(1) and 21(1) of the constitution in as far as they criminalised consensual same-sex conduct.³¹⁶ The proactive reviewing of anti-gay laws demonstrated the willingness of the courts to review the contentions that had preoccupied the Malawian society since the wedding by Chimbanga and Monjeza in 2009. However, the proceedings were stopped after the Attorney General filed to the courts requesting for the applicants to first get certification of the matter from the Chief Justice.³¹⁷ A later request of the matter to be heard as a constitutional matter was turned down. It is not surprising that the state opted to discontinue the case, because any court declaration that anti-homosexuality provisions of the penal code are unconstitutional would trigger public backlash and thereby resulting in the ruling government losing popularity. In another case, Gift Trapence and Timothy Pagonachi Mtambo, Executive Directors of CEDEP and CHRR respectively, filed a complaint to the magistrate courts against a prominent politician Ken Msonda who had called on his Facebook account that gays must be killed in Malawi following an appearance of a queer Malawian on national television in which he (the queer Malawian) called for Malawians to give him his rights or kill him.³¹⁸ In the complaint, the demanded that Msonda be charged with an offence under section 124 (1) (b) of the Penal Code on inciting another to contravene the law in accordance with section 83(1)(a) and section 83(6) of the Criminal Procedure and Evidence Code which states:

83. Mode of instituting proceedings

³¹⁵ (Malawi Law Society, 2011, p. 1)

³¹⁶ (Centre for Human Rights Education, Advice and Assistance, 2013)

³¹⁷ (Namangale, 2014)

³¹⁸ Supranote 429

(1) Proceedings may be instituted—
(a) by the making of a complaint before a magistrate;

...

(6) If the magistrate considers that there are sufficient grounds for proceeding with a complaint made under subsection (1) (a), or upon the bringing before him of an accused arrested without warrant under subsection (1) (b), the magistrate shall forthwith draw up and charge containing a statement of the offence with which the accused is charged.³¹⁹

However, the Director of Public Prosecution (DoPP) filed a notice to the court to take over the case in accordance with section 99(2)(b) of the constitution which gives her power to take over and continue any criminal proceedings instituted by any other person.³²⁰ Similarly to the constitutional case discussed earlier, the DoPP issued a notice to the court discontinuing the case in accordance with section 99(2)(c) of the constitution which gives her powers to discontinue criminal proceedings at any stage before judgement.³²¹ The efforts by the state to have the two landmark cases discontinued suggest unwillingness to settle legal questions about sexual orientation and gender identity, especially in cases where it sees a likelihood of losing the case.

The state's worry about losing popularity is also found in the manner that it has politically defended the criminalisation of same-sex conduct on the claim that it is in accordance with the wishes of Malawians. For example, in 2010 at its first Universal Periodic Review (UPR) before the UN Human Rights Committee, Malawi rejected calls by several of its peers to decriminalise anti-gay laws on the claim that Malawians 'had no plans to legalise homosexuality' and their wishes must be respected.³²² Although Malawi interpreted any questions on issues of sexual orientation or gender identity as a call to legalise homosexuality, a review of the specific questions tell a different story. The Czech Republic asked Malawi to provide information on

³¹⁹ (Malawi Government, 1968)

³²⁰ (Malawi Government, 2004), (Director of Public Prosecutions, 2016)

³²¹ (Malawi Government, 2004), (Director of Public Prosecutions, 2016), (Director of Public Prosecutions, 2016)

³²² (United Nations Human Rights Council, 2011, p. 6)

how it ensures promotion and protection of all individuals regardless of their sexual orientation.

How the Government of Malawi ensures the promotion and protection of human rights of all individuals regardless of their sexual orientation? Would the national law be brought into line with Malawi's international commitments and reviewed in order to decriminalise homosexuality and prohibit discrimination on any grounds?³²³

Similarly, Norway expressed concern about the arrest of Monjeza and Chimbanga, and requested Malawi to explain any steps being taken to protect sexual minorities.

Earlier this year, two men were detained for holding an engagement ceremony and they were later found guilty of gross public indecency and sentenced to maximum prison sentence of 14 years. Later the men were pardoned by the President. What is being done to improve the legal protection of sexual minorities?³²⁴

In both cases, calls for protection of SOGI-based human rights through the decriminalisation of anti-gay laws or other legal protections were interpreted as a call to 'legalise homosexuality'.

It should however be noted that during the second UPR in 2015, a number of member states and the UN Human Rights Council raised concern that the MHRC was reluctant to engage on LGBTIQ rights issues thereby appearing not to be independent.³²⁵ They also raised concern about the criminalisation of consensual same-sex conduct and the lack of explicit prohibition of discrimination on the basis of sexual orientation and gender identity in Malawi's laws.³²⁶ They also raised concern that queer people did not enjoy free access to health services and that LGBTIQ discrimination was detrimental to the right to health.³²⁷ In response, the Malawi government accepted a recommendation from Honduras to guarantee LGBTIQ people

³²³ (United Nations Human Rights Council, 2011)

³²⁴ (United Nations Human Rights Council, 2011)

³²⁵ (United Nations Human Rights Council (A/HRC/WG.6/22/MWI/2), 2015)

³²⁶ (United Nations Human Rights Council (A/HRC/WG.6/22/MWI/2), 2015)

³²⁷ (United Nations Human Rights Council (A/HRC/WG.6/22/MWI/2), 2015)

effective access to health services, including HIV and AIDS treatment.³²⁸ It also accepted a recommendation from Austria to take effective measures to protect LGBTIQ people from violence and prosecute perpetrators of such violence.³²⁹ However, Malawi rejected 16 recommendations to decriminalise consensual same-sex conduct citing that the issue of discrimination against queer people was not a Malawi problem only but a global problem, suggesting that Malawi society needed time to evolve and become better informed on the issue in order to take an informed decision.³³⁰ They also claimed that there were no attempts by civil society to locally engage with government on this issue, hence their lack of action regarding concerns raised by civil society at the UPR.

The insistence to retain the anti-gay laws and disregard SOGI-based human rights is a result of a (mis)understanding of what is being demanded regarding human rights, resulting from local meanings about human rights and homosexuality as articulated through in Chichewa language. This requires an analysis of how the language about sexuality and rights in Chichewa influences how Malawians construct SOGI-based human rights.

2.2.1. History of the Malawian same-sex subject

An understanding of the local meanings about human rights in relation to same-sex intimacy requires an understanding of the history of homosexuality in Malawi. The inadequacy of early historical sources that recorded same-sex intimacy among Nyasaland natives can be attributed to the lack of interest on the issue by the early missionaries and colonial administrators during the time they were documenting life of the natives. Their preoccupation was to Christianise

³²⁸ (United Nations Human Rights Council (A/HRC/30/5), 2015)

³²⁹ (United Nations Human Rights Council (A/HRC/30/5), 2015, p. 19)

³³⁰ (United Nations Human Rights Council (A/HRC/30/5), 2015, p. 8)

the natives. It can also be attributed to the silences and secrecy about sex and sexuality among African communities.³³¹ While the colonial writers did not document much about sex or sexuality of the natives, the evidence presented below indicates that a history of Malawians is not exclusively heterosexual as mostly believed.

The earliest evidence of homosexual conduct documented in this research was by Sir Harry Johnston in 1897, he was the first British consul and commissioner of Nyasaland. In his book giving account of his tenure in Nyasaland, he documented a 'real vice' that he observed among native boys. Although he did not explicitly mention the vice, which he claimed also existed in European societies, his description has been interpreted to refer to a euphemism for masturbation among boys.³³²

A medical missionary who was at work for some time on the west coast of Lake Nyasa gave me information concerning the depravity prevalent among the young boys in the Atonga tribe of a character not even to be expressed in obscure Latin. These statements might be applied with almost equal exactitude to boys and youths in many other parts of Africa as almost any missionary who thoroughly understands the native character would know.³³³

Fifteen years later, colonial administrator HL Duff gave an account about morality of Nyasaland natives, in which he reported that the natives could tolerate some vices as long as they were viewed negligible by the community, but 'unnatural crimes' were held in strong detestation.³³⁴

The mention of unnatural crimes, which connoted homosexuality among the British at that time, indicates that such conduct existed. Importantly, that some Nyasaland communities detested homosexuality is very important as it disproves the view by most scholars about Africa that homophobia did not exist in Africa until the West introduced it to the natives. It

³³¹ (Tamale, *Researching and theorizing sexualities in Africa*), (Tamale, *African Sexualities: A Reader*, 2011)

³³² (Epprecht M. , *Heterosexual Africa? The History of an Idea from the Age of Exploration to the Age of AIDS*, 2008, p. 42). Also, see (Epprecht M. , *Hungochani: The History of Dissident Sexuality in Southern Africa*, 2013, p. 265)

³³³ (Johnston, 1897, pp. 408-409)

³³⁴ (Duff & H, 1903, p. 242)

may be true that Christianity and colonial laws institutionalised homophobia, but the above historical account suggests that some Malawian communities had negative attitudes towards homosexuality. As such, it is important to consider that native cultures and practices may also include a historical leaning towards homophobia in Malawi.

Additional evidence of homosexuality about Malawians can be found in historical accounts about labour migration of Nyasaland natives to neighbouring countries such as Zambia, Zimbabwe, South Africa in search for work in the mines and mining towns. In Zimbabwe, several Nyasaland migrants were arrested and tried for homosexual-related crimes. Out of the 300 hundred cases recorded by the earliest colonial courts in Zimbabwe between 1892 and 1923, 9% of the accused were natives from Nyasaland.³³⁵ The fact that such cases were recorded so early in the existence of the courts, suggest that the alleged acts pre-existed the arrival of colonial settlers.

Other records have suggested that Nyasaland natives had a reputable history of same-sex intimacy. In colonial Zimbabwe, Malawian natives, who were also called 'MaNyasa' or 'MaBlantyre' were despised for doing the dirtiest jobs, and were called by a derogatory Shona word for public lavatory cleaner, Matanyera.³³⁶ The word initially emerged as part of black humour among local Zimbabwean communities. However, the word had a second meaning to describe sexual encounters between the thighs by two men.³³⁷ Matanyola or matanyula in several southern African languages translates to sexual acts between men.³³⁸ The word originates from a Chichewa word Mathanyula, which means anal sex between males. A variant of the word, matanyola, also emerged in Botswana due to migration of Nyasaland natives in

³³⁵ (Murray & W, 1998, p. Ibid)

³³⁶ (Epprecht M. , Hungochani: The History of Dissident Sexuality in Southern Africa, 2013, p. 122)

³³⁷ (Epprecht M. , Hungochani: The History of Dissident Sexuality in Southern Africa, 2013, p. Ibid)

³³⁸ (Epprecht M. , Hungochani: The History of Dissident Sexuality in Southern Africa, 2013, p. 160)

search for work.³³⁹ The association of the words to Nyasaland natives support the thesis that they were well known for homosexual conduct.³⁴⁰ For example, in research conducted by Epprecht about homosexuality in Zimbabwe, an informant who had previously worked in the mines of colonial Zimbabwe told him that Nyasaland natives were so famous for homosexuality that it was thought that all of them did it.³⁴¹ There were those who engaged in same sex conduct for pleasure, and others who did it for muti.³⁴² Muti was believed to give supernatural powers to increase strength during manual labour, boxing, or to kill enemies.³⁴³ Chijere-Chirwa has also recorded homosexual conduct in his ethnographic research about Malawian migrant miners in South African.³⁴⁴ This history suggests that same-sex intimacy is not new among Malawians. The existence of the terminology offers a medium to explore the local meanings about same-sex intimacy.

2.2.1.1. Representation of Same-sex Conduct in Contemporary Public Debates

The contemporary history since the advent of multi-party democracy in 1994 also offers an account that contextualises how same-sex intimacy is understood among Malawians. In this section, I discuss selected key developments that have influenced the local understanding about SOGI-based human rights in Malawi.

³³⁹ (Epprecht M. , Hungochani: The History of Dissident Sexuality in Southern Africa, 2013, p. 4). Also, see (Human Rights Watch, 2003, pp. 135-136)

³⁴⁰ (Msibi T. , 2011), also, see (Epprecht M. , Hungochani: The History of Dissident Sexuality in Southern Africa, 2013, p. 72).

³⁴¹ (Epprecht M. , Heterosexual Africa? The History of an Idea from the Age of Exploration to the Age of AIDS, 2008, p. 72 & 122)

³⁴² Muti refers to traditional witchcraft rituals. (Msibi T. , 2011, p. 73). Also, see (Epprecht M. , Heterosexual Africa? The History of an Idea from the Age of Exploration to the Age of AIDS, 2008, p. 122)

³⁴³ (Epprecht M. , Heterosexual Africa? The History of an Idea from the Age of Exploration to the Age of AIDS, 2008, p. ibid)

³⁴⁴ (Chirwa W. C., 1997)

2.2.1.1.1. The National HIV and AIDS Response

The significance of HIV and AIDS is overlooked in discourse about same-sex intimacy in Malawi in terms of how it significantly shaped the public understanding of 'homosexuality', and the government's early approaches to accommodating queer Malawians in policy. As early as 2002, the Malawi country reports to the United Nations General Assembly Special Session on HIV/AIDS (UNGASS) on progress achieved in the HIV and AIDS noted the absence of laws protecting groups vulnerable to HIV and AIDS including MSM.³⁴⁵ A key development in the protection of queer people in Malawi took place in 2003 when the first democratically-elected government, the United Democratic Front (UDF), under the leadership of the first democratically elected president Bakili Muluzi, launched Malawi's first National AIDS Policy (NAP).³⁴⁶ In the policy's foreword, Muluzi called it robust and home-grown. One of the guiding principles of the policy identified persons engaging in same-sex relations as vulnerable to stigma which makes them vulnerable to HIV and AIDS.³⁴⁷ Significantly, the policy classified the vulnerability of people engaged in same-sex relations along with that of women and young girls, orphans, widows and widowers, children and young people, the poor, sex workers, prisoners, mobile populations and people with disabilities.³⁴⁸ What is important to note is that at that point in Malawi's history, at least in policy, queer persons were deemed as vulnerable as any other vulnerable group. They were not categorised in any derogatory or stigmatised terms such as homosexuals or gay or LGBT. They were considered as people first, but with vulnerability equal to all other

³⁴⁵ (National AIDS Commission, 2013, p. 25). The UNGASS process involved monitoring of countries' progress towards progress in meeting the global HIV and AIDS response indicators. However, in 2012 the process was revised and is now known as Global AIDS Response Progress Reporting (GARPR) indicators (World Health Organisation; UNAIDS, 2015)

³⁴⁶ (National AIDS Commission, 2003)

³⁴⁷ (National AIDS Commission, 2003, p. 4)

³⁴⁸ (National AIDS Commission, 2003, p. Ibid)

vulnerabilities. The policy also clarified why people engaged in same-sex relations are vulnerable:

People who engage in same-sex sexual relations are often underprivileged socially, culturally, economically or legally, may be less able to fully access education, health care, social services and means of HIV prevention; to enforce HIV prevention options; and to access needed treatment, care and support. They are thus more vulnerable to the risks of HIV infection and suffer disproportionately from the economic and social consequences of HIV/AIDS ... (they are also) socially and culturally vulnerable to prevailing attitudes. If they are not accorded access to HIV/AIDS prevention education, treatment, care and support, they may endanger others as a result of their ignorance... Government, through the NAC, undertakes to... put in place mechanisms to ensure that HIV and STI prevention, treatment, care and support can be accessed by all without discrimination, including people engaged in same-sex sexual relations.³⁴⁹

Further in the policy, the government committed to conduct awareness campaigns targeting traditional leaders and religious groups to facilitate review of laws in order to decriminalise same-sex conduct, and also to secure a favourable legal environment to enable service providers to reach out to the relevant persons.³⁵⁰

Government shall engage in education and sensitisation campaigns with all stakeholders, including traditional leaders and religious groups, with a view to decriminalising prostitution, sodomy and same-sex sexual practices in the long term, for more effective management of the epidemic... The laws shall be revised to decriminalise aiding and abetting for all those who take HIV/AIDS intervention strategies to people engaged in prostitution, sodomy and same-sex sexual practices.³⁵¹

What is important to note is that the policy was adopted without any significant public controversy. There is no indication of a surge in media reports about this inclusion of protection of sexual minorities in the policy. As a result, the development did not trigger a moral panic.

³⁴⁹ (National AIDS Commission, 2003, pp. 15-19)

³⁵⁰ (National AIDS Commission, 2003, p. 29)

³⁵¹ (National AIDS Commission, 2003, p. Ibid)

The 2008-2009 NAC Monitoring and Evaluation Report recommended the need to incorporate MSM in the HIV and AIDS response as part of a human rights-based public health approach.³⁵² In a government assessment of the legal, regulatory and policy environment for HIV and AIDS in Malawi published in 2012, it was noted that criminal laws prevent health services from meeting the needs of MSM due to stigma and discrimination from health care employees.³⁵³ The report recommended the repeal of laws criminalising consensual sex between adults of the same sex:

(recommendation) 25. Laws criminalising consensual sex between adults of the same sex must be reviewed with a view to repeal. Current processes underway in the Law

Commission to review the laws criminalising unnatural sexual offences within the Penal Code should be supported by the LEA, and participatory national debate on the issue should be encouraged to explore the context, cultural and religious values and human rights issues around same-sex relationships. Efforts should be taken to ensure that men who have sex with men are supported to access appropriate and non-discriminatory health care services in the interim and that law enforcement officials do not violate their rights or create barriers to their organisations.

(recommendation) 26. The Immigration Act must be reviewed to ensure that its provisions are not inappropriately applied to HIV, and to review the travel restrictions on men who have sex with men and sex workers alongside the review of relevant punitive laws relating to same-sex relationships and sex work. The Law Commission's review of the Immigration Act should be supported by the LEA, to ensure that considerations relevant to HIV are integrated into the review."

(recommendation) 28. Current and future processes to review statutes that may impact on HIV and AIDS (such as the Public Health Act, the Patents Act and the Penal Code in the case of unnatural sex offences) should take into account the findings of this LEA, in order to ensure the inclusion provisions that protect rights, reduce stigma and discrimination and promote universal access to HIV prevention, treatment, care and support.

36. All existing and planned processes to strengthen law enforcement need to take into account and integrate the findings of the LEA, for instance:

...

- Law enforcement officials who abuse the rights of vulnerable and key populations (e.g. women, sex workers, men who have sex with men) should be held accountable for their actions.³⁵⁴

³⁵² (National AIDS Commission, 2010, p. 24) (National AIDS Commission, 2010, p. 24)

³⁵³ (Malawi Government, 2012, p. 35)

³⁵⁴ (Malawi Government, 2012, pp. 139-141)

The Malawi national HIV and AIDS Plan of Action 2011- 2016 stated that structural legal barriers existed in the implementation of programmes and interventions targeting MSM, and proposed to create an enabling environment for an effective strategy.³⁵⁵

Malawi's current National Strategic Plan on HIV and AIDS for 2015-2020, launched in July 2015, states that it was developed through a consultation process that included representatives from MSM communities.³⁵⁶ It also recognises that MSM are a vulnerable populations whose human rights are not respected and therefore driven underground as a result of stigma and discrimination.³⁵⁷ The strategy also notes evidence that men or women who have sex with people of the same sex can be victims of gender-based violence and legal obstacles present barriers in the access to legal redress and medical or social services.³⁵⁸ In order to create an enabling social legal environment, the strategy aims to 'review of the interpretation and application of laws that affect ... MSM... including... criminalisation of homosexual activities'.³⁵⁹ In 2015 Malawi had received Global Fund funding amounting over USD 300 million to implement HIV and AIDS interventions based on a Malawi Government project proposal which included interventions aimed removing legal and policy barriers affecting access to HIV and AIDS services for people who engage in same-sex relationships.³⁶⁰

³⁵⁵ (National AIDS Commission, 2011, pp. 28-36)

³⁵⁶ (National AIDS Commission, 2015, p. 5)

³⁵⁷ (National AIDS Commission, 2015, p. 8)

³⁵⁸ (National AIDS Commission, 2015, p. 67)

³⁵⁹ (National AIDS Commission, 2015, p. 58)

³⁶⁰ (The Global Fund, 2015)

2.2.1.1.2. Public Consultations on the Constitution

In 2004, the Malawi Law Commission embarked on a national consultative process to review the republican constitution. The Commission held consultative meetings with various interest groups in the country. It also received written submissions regarding various aspects of the constitution. Malawi Human Rights Resource Centre, a local human rights NGO submitted a written proposal for the repeal of anti-gay provisions in the Penal Code, citing that the provisions violated rights to sexual orientation.³⁶¹ The issue was covered by the local press, raising moderate public debate, dominated by voices dismissing the proposal.

From 28 to 31 March 2006, the Malawi Law Commission held a national consultative conference on the review of the constitution, held in the capital city of Lilongwe.³⁶² The issue of sexual orientation or gender identity did not feature as a hot topic in the official report. However, in a written presentation by Professor Gerhard Erasmus from University of Stellenbosch (South Africa), he noted that there was need for cultural and political sensitivities when considering issues of sexual orientation during the review process.³⁶³ He further advised that the choices about such issues must be local.³⁶⁴ At the same conference, participants discussed whether non-discrimination on the basis of sex under section 20 of the constitution reflected the reality in Malawi.³⁶⁵

The second national consultative conference was held from 17 to 19 April 2007.³⁶⁶ In the consultation paper prepared for the conference, the Malawi Law Commission

³⁶¹ Daily Times, 28 January 2005, legalize homosexuality says human rights body (accessed 30 November 2008)

³⁶² (Malawi Law Commission, 2006) (Malawi Law Commission, 2006)

³⁶³ (Erasmus, 2006, p. 15) (Erasmus, 2006, p. 15)

³⁶⁴ (Erasmus, 2006, p. Ibid) (Erasmus, 2006, p. Ibid)

³⁶⁵ (Malawi Law Commission, 2006, p. 30) (Malawi Law Commission, 2006, p. 30)

³⁶⁶ (Malawi Law Commission, 2007) (Malawi Law Commission, 2007)

reported that it had held public consultations on the issue of sexual orientation in relation to sections 153 and 156 of the Penal Code vis-à-vis section 20 of the constitution. According to the report, the people consulted rejected the proposal to decriminalise anti-gay laws:

The meeting with civil society in Blantyre rejected the idea of legalizing homosexuality or lesbianism. The Parliamentary Women caucus, DPP and villagers of Gumulira Village, T/A Mlonjeni also rejected gay marriages and the gay rights. The same sentiments were expressed by the Chiefs in all regions. It was argued that such relationships undermine the institution of marriage. The Chiefs thus cautioned the Law Commission against importing and copying practices and tendencies that are immoral from both the religious and social perspective.³⁶⁷

The above narrative suggests that the discussion conducted by the Law Commission did not focus on whether criminalisation of same-sex conduct in sections 153 and 156 was an obstacle to non-discrimination in section 20 of the constitution. What was discussed was whether Malawi should legalise homosexuality or gay marriage. However, as I will argue throughout this study, homosexuality carries various meanings when translated into Chichewa, and the prevalent local terminology misinterprets it as paedophilia.³⁶⁸ It is therefore possible that the participants were opposed to the idea of legalising homosexual paedophilia, and not necessarily consensual adult same-sex conduct. The rejection should therefore be understood as not a response to the substantial question about the conflict between relevant Penal Code provisions and Malawi's domestic or international human rights obligations.

It must also be noted that the Law Commission did not distinguish gay marriages and 'gay rights' in their consultations. Malawians are strongly opposed to the idea of same-sex marriages. But nowhere in section 153 and 156 is same-sex marriage mentioned or even implied. Again, there is no indication that gay rights were defined in the

³⁶⁷ (Malawi Law Commission, 2007, p. 19)

³⁶⁸ See section 2.2.2

discussion. In the report, the chiefs cautioned against copying practices, presumably from abroad. However, the participants were not cautioned, as we have discussed earlier when presenting history of same-sex intimacy among Nyasaland natives, that some same-sex identities and practices are indigenous to Malawians. It is also unclear whether the consultations took place in English or any local language. It can therefore be concluded that the discussions were based on the wrong premises, and that the conclusions drawn by the Law Commission were erroneous. The Law Commission also fell short in their approach in facilitating the discussion. It is also important not to naïvely assume that the facilitators of the consultations were immune to the alarming levels of prejudice against homosexuals in Malawi.³⁶⁹ The paper does not reveal what languages were used during the consultations or whether homosexuality was defined. There is need to investigate the usage of local languages in the consultations through an analysis of transcripts or field notes, if at all they are available or accessible.

The confusion between SOGI-based human rights and the issue of same-sex marriage was also reported in the conference report in which it was noted that conference delegates urged the law commission to tighten provisions of marriage in order to eliminate possibilities of same-sex marriages.³⁷⁰ In their final decision, the Law Commission concluded that Malawi was not ready for same-sex relationships.³⁷¹ Again in this instance, there was preoccupation of same-sex marriage and lack of consideration of any conflict with domestic or international human rights obligations that may arise when considering introducing an explicit restriction of marriage to heterosexuals.

³⁶⁹ On attitudes about homosexuality in Malawi, see *supra* note 349

³⁷⁰ (Malawi Law Commission, 2007, p. 9) (Malawi Law Commission, 2007, p. 9)

³⁷¹ (Malawi Law Commission, 2007, p. 32) (Malawi Law Commission, 2007, p. 32)

The public attention to the national consultations on the constitutional review focused less on issues of SOGI-based human rights because of the multitude of competing issues that were discussed such as presidential term limits, gender issues and child marriages. As such, the issues that were raised or reported during the process did not trigger extensive nationwide debate. Curiously, the participant list of the two national conferences did not include the current key figures in the advocacy on SOGI-based human rights in Malawi. Their absence could also explain the lack of challenge to any proposals against queer persons that were raised at the meeting.³⁷²

2.2.1.1.3. Chikayidi ('Situational homosexuality')

In 2007 media attention on the issue emerged when Lucius Banda, a Member of Parliament and popular musician, said in parliament that homosexuality existed in Malawi prisons.³⁷³ Banda had spent a few months as a convict in Zomba central prison. According to him, homosexuality in prison was popularly known as 'chikayidi' and was rampant. However, the 'chikayidi' that was reported, was about adult prisoners forcing younger inmates to become their 'wives.' Prison officials confirmed receiving reports of existence of homosexual acts in prisons. Around the same time, Banja La Mtsogolo, a local NGO promoting sexual and reproductive rights, was implementing prisons service projects in which they were advocating for condoms to be introduced in prisons to reduce sexually transmitted infections. The existence of homosexuality in Malawi prisons had previously been reported by Malawian Vera Chirwa who was a special rapporteur on prisons at the African Commission of Human and Peoples' Rights. In 2001, she had issued a report on prison conditions in Malawi in which she

³⁷² At that time, CEDEP had only been established. There was no civil society organisation which was publicly advocating for SOGI-based human rights.

³⁷³ Nation Malawi Online, 23 April 2007, Homosexuality exists in mw prisons- Lucius Banda, <http://web.archive.org/web/20100129203437/http://www.mask.org.za/article.php?cat=malawi&id=1559> (accessed 14 September 2016)

documented reports by inmates of prison rape, adult inmates targeting juveniles and other vulnerable prisoners for sex, and cases of sexually transmitted infections among prisoners.³⁷⁴ However, as homosexual acts in such cases are perceived as situational, reporting on this issue did not trigger public controversy.

2.2.1.2. Representation of Same-sex Conduct by the Courts

It is important to note that with the exception of the case of Chimbanga and Monjeza, Malawian courts have only tried cases of non-consensual same-sex acts, including acts between adult males and young boys. The media reporting of such cases has consequently perpetrated the wrong impression that most same-sex conduct that occurs in Malawi is non-consensual or to do with young boys.

In 2003, Muluzi had pardoned and deported Richard Edward Hayles, a British man who had served 17 months of a 12-year imprisonment term for sexual offences against street children.³⁷⁵ Hayles was convicted for crimes under sections 153 and 156 of the Penal Code on charges of sodomy and indecent practices between males respectively, on allegations that he had engaged in sexual activities with underage boys under his care.³⁷⁶ He attempted to appeal against the conviction, but the appeal court upheld the judgement from the lower court, expressing outrage at Hayles' actions on which he was convicted.

Although Mr Salimu did not raise in this Court, and quite properly so, the issue of the sentence we feel that we should briefly say something on it. The appellant took under his charge children of a tender age. Some of them came to him when they were only 10 or 11 years of age. He provided them with shelter, food, clothes, gifts and in some

³⁷⁴ (African Commission on Human and Peoples' Rights, 2001, p. 29)

³⁷⁵ Associated Press, Briton jailed for child sex wins pardon, <https://www.theguardian.com/uk/2003/may/21/childprotection.society> (accessed 13 September 2016)

³⁷⁶ (Malawi Government, 2003)

cases, he paid school fees for them. He was a father figure to the children who reposed in him complete trust and confidence. The inducements which the appellant gave to the young children under his charge could be very corrupting. The sentence which the trial Court imposed must be one which must reflect public revulsion and abhorrence of the kind of offences which the appellant perpetrated on the young children. The homosexual offences which were perpetrated on the children can lead to corruption and depravity and can cause severe emotional damage. The appellant abused the trust which the children reposed in him for the sake of gratifying his deviant sexual urges. It was important for the trial Court to impose a sentence which show that society will not tolerate the moral corruption of children.³⁷⁷

While the issue of child molestation is not the same as the issue under discussion in this research, same-sex identities or conduct thereof between consenting adults, the fact that this case did not trigger public outrage is very important. Firstly, Malawians do not distinguish between consensual same-sex conduct between adults and sex with children in their imagination about homosexuality. In fact, Malawians implicate sex with children as the potential danger of homosexuality. The judgement had highlighted that homosexual offences against children are a grave offence. However, the pardoning had insignificant public backlash against Hayles, or against Muluzi and his government. The absence of backlash is important because this pardon occurred only two years before Muluzi sought a third (unconstitutional) presidential term.³⁷⁸ If the issue had become divisive at that time, it would have posed a significant obstacle to Muluzi's bid for a third presidential term.

³⁷⁷ (Malawi Government, 2003, pp. 72-73)

³⁷⁸ It should be noted that Muluzi's UDF recently included protection of human rights based on sexual orientation in their manifesto for the 2014 tripartite elections but did not experience any backlash. This was besides the fact that in 2014 the issue of LGBTIQ rights was fiercely contentious and that UDF was the first political party to include the issue of LGBTIQ rights in its manifesto. The UDF Manifesto reads 'No- one should be prevented from political participation or be denied anything based on class, ethnic identity, race, political affiliation, religious persuasion, sexual orientation, gender or otherwise. We will uphold principles of transparency and accountability... We reiterate that no one is excluded from social, political and economic life on the basis of gender, sex orientation, ethnic background, race, religious persuasion, and political affiliation or otherwise' (United Democratic Front, 2014, p. 7)

In the case of the Republic v. Davie Tizola, in which Tizola had been charged with the crime of buggery contrary to section 153 of the Penal Code, evidence narrates a case of homosexual rape

...on 11/05/2011 he went to accused`s house in the company of his friend Thom where they were to carry some goods to the market and upon their arrival there, they were asked to enter into his house where accused hugged him before grabbing him anandipanilira,³⁷⁹ laid him down, removed his short trousers and then produced his member which he inserted it in his buttocks. He asked him what he was doing and the reply was he was doing “yanga ija”.³⁸⁰ He felt pain in his anus. Then a sister to Nkhonde came to ask what was happening in the house but accused took to his feet and run away.³⁸¹

In this case, the victim was 14 years old and the magistrate stressed the need to protect children as required by article 22 of the constitution on children`s rights. The accused was given a 24-month suspended sentence. In the case of Matias Maweta versus The Republic, the accused was charged with Sodomy offences for taking a drunken secondary school student to the bushes to forcibly have anal sex with him.³⁸² The accused was sentenced to 6 years imprisonment.

In an appeal case of the Republic V. Davie Mpanda where the accused was appealing a 10-year sentence by the lower court, the accused had been convicted of taking advantage of a drunk man to sodomise him. The victim only discovered that he had been sodomised upon going to the hospital following abdominal pains.³⁸³ Mpanda had pleaded guilty and informed the court that he was born to only sexually desire males and was never attracted to females.³⁸⁴ He told the court that with the help of his parents he had sought help of herbalists and traditional doctors to no avail. The sentence was revised down to 3 years.

³⁷⁹ He grabbed me

³⁸⁰ Yanga ija means ‘that thing I do...’

³⁸¹ (The Republic versus Davie Tizola , 2011)

³⁸² (Matias Maweta v. The Republic, 2013)

³⁸³ (Republic Versus Davie Mpanda, 2011)

³⁸⁴ (Republic Versus Davie Mpanda, 2011)

However, in this case the appeal judge cautioned the courts against getting carried away and depart from the law when handling cases about homosexuality in order to remain fair and just. The judge also acknowledged the impact of negative attitudes towards homosexuality in court judgements

Just to entertain a wandering mind the heavy sentences have been meted unjustifiably on "homosexuals" as one may wish to call it, most likely due to the intensive and hounding publicity, negative or positive that the media has given. Since the act of homosexuality has born acute debate, criticism and abhorrence, the courts have fallen in danger of adopting such strong sentiments and imposing heavier sentences than practice allows. Courts should not be carried away by public opinion anyhow so as not to be distracted from the realities of the offence. As such buggery as unacceptable as it may be should not be regarded as the most heinous offence deserving more severe punishment than the law and practice provides. Due and appropriate sentences should be meted. A woman can also be sodomised by a man. So, buggery is not always between males.³⁸⁵

In this rare instance, the higher court's judge acknowledged that public opinion may influence judges to divert from the law as in the case of Nyakwawa Usiwa-Usiwa.

Where nearly all cases registered at the Malawi courts prior to the Soko and Monjeza case involved non-consensual instances which at times involved children, it is not surprising that the courts and the public associate same-sex intimacy and identities with non-consensual acts. Furthermore, bearing in mind the negative attitudes about homosexuality in the Malawi population, it should be noted that such high negative attitudes do not spare the court officials. The court decision in the Soko and Monjeza case should therefore be seen in the context of past cases. Similarly, public attitudes towards same-sex intimacies and SOGI-based human rights must be viewed as influenced by the cases.

The accounts discussed in the last three sections show that same-sex conduct has a long and complex history in Malawi. There are terminologies, which are used to refer to difference forms of same-sex conduct. However, reference by the general public mostly

³⁸⁵ (Republic Versus Davie Mpanda, 2011)

connote to acts outside consensual adult same-sex relationships. The connotations have potential to influence how SOGI-based human rights are misunderstood among most Malawians.

2.2.2. Construction of SOGI-based Human Rights in the Malawian context

In this section, I look at how the terminology and meanings of SOGI-based human rights are constructed in Chichewa. Understanding of such meanings reveals how Malawians transact human rights in their ordinary everyday interactions. I will argue that the purported meanings in the constitution and international instruments, which principally implies that everyone is entitled to listed human rights, is different from some meanings carried in Chichewa. I will look at the meanings about sexuality, same-sex intimacy, rights and human rights in order to propose how a particular understanding of SOGI-based human rights in Chichewa misrepresents the purported meaning described above.

There is no word to translate sexuality in Chichewa. The English-Chichewa dictionary does not translate sexuality. However, it may be described as *Kukhala ndi kuthekera kwa mchitidwe wakugonana* or *Mthekero wa mchitidwe wakugonana*. The literal translation of this description is 'to have possibilities to sleep with each other' or 'possibility for sleeping with each other'. This translated description falls short of describing the literal meaning of sexuality i.e. capacity to be sexual. It can therefore be concluded that Chichewa does not have a word or terminology to fully translate the meaning of sexuality as expressed in English.

Sex between persons of the same-sex is only translated through terms such as *mathanyula*, *cha matonde*, or *chikayidi*. All the three words refer to anal sex between men. *Mathanyula* is

the most common word to describe homosexuality. There is no translation of sex between women, and the languages of sex primarily connote penetration of the penis. Although usage of the word *mathanyula* has evolved as an all-encompassing term about same-sex acts, homosexuality remains predominantly understood as anal penetration involving men (the penis and anus).

Human rights are translated as *ufulu wa chibadwidwe wa munthu*.³⁸⁶ *Ufulu* refers to freedom, right, liberty or independence.³⁸⁷ *Chibadwidwe* means ‘something that comes from *kubadwa*’. *Kubadwa* means birth. The English translation of *ufulu wa chibadwidwe wa munthu* can be translated as *freedom that a human being is born with*.³⁸⁸ It can also be translated as freedom from birth,³⁸⁹ or freedoms that comes along with being born as human. While *ufulu* implies that a human being must be free because s/he is a member of the human species, the concept does not make such freedom an automatic an inalienable right, liberty or freedom. This is because *ufulu* itself connotes a broad range of freedoms, some of which may be controversial or contestable. *Ufulu* can also connote exercising liberty even in cases where one’s freedom defies reasonable social norms. For example, a man may claim *ufulu* to worship (right to belief), but may also cite *ufulu* to marry an underage girl. *Ufulu wa chibadwidwe* was coined as a term translating human rights during the liberation for democracy in the late 1980s and early 1990s.³⁹⁰ Chichewa does not have a concept of human rights as understood in English, since the local terminologies carry multiple, and sometimes conflicting, meanings.³⁹¹

³⁸⁶ (Englund, Chinyanja and the Language of Rights, 2001, p. 301)

³⁸⁷ (Sarelin, 2014, p. 4)

³⁸⁸ (Englund, Chinyanja and the Language of Rights, 2001, p. ibid)

³⁸⁹ (Kishindo, 2000, p. 24)

³⁹⁰ (Kishindo, 2000, p. 25)

³⁹¹ (Kishindo, 2000, p. Ibid)

The terminology of 'gay rights' or 'LGBT rights' became popular in the public discourses in Malawi following the arrest of Soko and Kachepea in December 2009. The terms have been translated in the local media, poetry or public debates as *ufulu woti amuna adzikwatirana*, or *ufulu wa anthu ofanana ziwalo*, or *ufulu wa mathanyula*. The literal translation of *ufulu woti amuna adzikwatirana* is 'freedom or liberty for men to marry'. *Ufulu wa anthu ofanana ziwalo* translates as 'freedom or liberty about persons with similar sex organs'. *Ufulu wa mathanyula* translates as 'freedom of conducting *mathanyula*'. However, it can also translate as freedom for same-sex sex. The four Chichewa terms imply that when one translates 'gay rights' or 'LGBT rights' into Chichewa, the local meaning that arise imply that such rights are about the liberty to conduct same-sex sex, primarily in reference to anal sex between males, irrespective of whether such sex is consensual or not. In addition, since *mathanyula* is usually associated with anal sex between adults and young boys, 'freedom to conduct *mathanyula*' does not explicitly exclude the potential liberty to engage in sexual activities with underage boys. The translations therefore do not in any way capture the essence of human rights entitlements found in Malawi's constitution and international human rights obligations.

SOGI-based human rights in the Malawian context must be understood as the entitlement to the rights outlined in Malawi's constitution, and regional or international human rights treaties that Malawi is party to. I have earlier proposed that Malawi's constitution and international human rights obligations are sufficient to extend human rights protections on the basis of SOGI. However, if SOGI-based rights are misconstrued through the Chichewa terms cited above, the majority of Malawians find it legitimate to reject such rights. It is critical to highlight how translation into Chichewa misrepresents the true meanings about SOGI-based rights. As such, there is need for the reframing of the localised constructions in order to realign them with the meanings contained in Malawi's domestic and international human rights obligations.

Such reframing is critical in clarifying the demands for SOGI-based human rights in any public discourse.

2.3. Conclusion

In this chapter, I have discussed same-sex intimacy in Malawi and contemporary human rights debates to show that Malawi has a long history of same-sex intimacy. I have argued that the local construction of SOGI-based human rights, based on meanings derived from the Chichewa language, misrepresents such rights as freedom to engage in *mathanyula*. Because *mathanyula* connotes both consensual and non-consensual same-sex conduct, usually associated with anal sex between adult males and underage boys, the majority of Malawians fundamentally misunderstand SOGI-based human rights, believing that it opens door for adult males to freely molest underage boys. This misunderstanding misrepresents the intended meaning intended in human rights as law, exemplified in Malawi's constitutional and international human rights obligations, which connote human rights as an equal entitlement to rights to life, dignity, privacy and health. Rejection of SOGI-based human rights by the majority of Malawians therefore requires paying attention to the possibility of misunderstanding of the true essence of what is intended and prescribed in Malawi's domestic and international human rights obligations. Further, there is need to reframe the local construction of SOGI-based rights in order to align it with the purported intention and meanings in constitutional and international human rights law.

3. Research Methodology

In this chapter, I discuss the epistemological rationale for my research design and the methods used to data collection and analysis. I focus on the processes that I deployed during fieldwork in terms of ethical clearance, accessing and interviewing respondents, and data analysis. I explore my reflexive positionality in the research process, signifying how my own experiences influenced the research process and findings. I finish by discussing the challenges experienced in the field and my mitigation strategies. This chapter contributes to the framing and implementation of research methodologies in sexuality and human rights studies that are responsive to locally constructed concepts, identities, languages and institutional arrangements. Importantly, it contributes to effective strategies for accessing and interviewing hard-to-reach populations in third-world communities in the Global-South.

3.1. Research Design

In the last two chapters, I argued that both sexuality and human rights are socially constructed, and that the languages and meanings that they carry in the Malawian context are specific to the local context. A research design befitting this research must therefore align to the constructionist epistemological position of this research. I considered between quantitative and qualitative research.

Key research about same-sex intimacies in Malawi have so far focused on quantitative clinical research in response to the HIV and AIDS pandemic.³⁹² For example, in 2009, a study of bisexual partnerships and HIV among MSM revealed ground-breaking evidence that MSM in Malawi had an

³⁹² For example:, (Ntata, Muula, & Siziya, Socio-demographic characteristics and sexual health related attitudes and practices of men having sex with men in central and southern Malawi., 2008, July), (Wirtz & al, 2009) (Beyrer, et al., 2010), (Fay & al, 2010), (Wirtz A. L., et al., 2013) and (Wirtz A. , et al., 2014)

HIV prevalence twice the national rate.³⁹³ It also found that 95% of the MSM population did not know their HIV status.³⁹⁴ Another study of HIV prevalence and sociobehavioral characteristics among MSM across seven sites in Malawi is popularly known for establishing that MSM population comprise 1% of the Malawian population.³⁹⁵ This report was widely reported by the press. The quantitative data has been used to inform national plans of action on HIV and AIDS targeting ‘most at risk populations’.³⁹⁶ In 2017, the Malawi Human Rights Commission (MHRC) has indicated that it will conduct a national survey to ‘establish the population size of the LGBTI population’.³⁹⁷ However, conceptually it is challenging to quantify a population engaging in same sex intimacies because individual identities are difficult to establish into a distinct category.³⁹⁸ In the Malawian context, for example, how do you ascertain whether a male who has sex with other males identifies as MSM (the English term), when Chichewa is the lingua franca for the local communities? In addition, as I will show in chapter 4, when discussing the coming out process, some participants in this research had fluid identities. Sometimes they engaged in same-sex intimacy, and at other times they engaged in heterosexual intimacies, but did not identify as MSM or bisexual. Would the quantification of MSM not misrepresent the extent to which men engage in same-sex intimacies in Malawi? None of the participants that I interviewed in this research identified as MSM, except for two who said they would prefer to be called MSM rather than homosexual because MSM is a term little known to Malawian society and as such, therefore, being labelled MSM would obscure their real sexual identity to avoid stigma.³⁹⁹ Overlooked in the local sexuality discourse in Malawi is that the obsession with the MSM category, understandably due to the impact of HIV and AIDS, has made invisible other including lesbians, transgender and intersex

³⁹³ (Baral, 2009)

³⁹⁴ (Baral, 2009)

³⁹⁵ (Wirtz A. , et al., 2014)

³⁹⁶ (National AIDS Commission, 2003), (National AIDS Commission, 2011), (Malawi Government, 2015), and (National AIDS Commission, 2015)

³⁹⁷ (Malawi Human Rights Commission, 26)

³⁹⁸ (Weston, *The lady vanishes: On never knowing quite who is a lesbian*, 2009), (Rooke, 2009), (Ward, 2015)

³⁹⁹ (Chikondi, 2014) (Chikondi, 2014)

people. In the process, the complexity and diversity of Malawian sexualities have been misrepresented and undermined.

A good quantitative method aimed at analysing the numbers of same-sex identities or practices in Malawi therefore needs to classify the identities that exist in Malawi. At this point in the history of Malawian sexualities, it is difficult to quantify since the categories are yet to be understood fully. Qualitative methods are appropriate for this research because they go beyond numbers.⁴⁰⁰ Qualitative approaches are committed to seeing the social world in relation to its context.⁴⁰¹ The viewpoint is inductive, where theory is generated from the data.⁴⁰² Their epistemological position is interpretivist, in which the focus is on the understanding of the social world by analysing how the world is seen from the viewpoint of the research participants.⁴⁰³ The ontological position is constructionist, which focuses on interaction between individuals in the way they construct social reality.⁴⁰⁴

In this light, to frame my research methodology I considered five factors namely my theoretical perspective, epistemological orientation, research questions, ethical considerations, available resources, and my reflexive positionality as a straight African researcher. Qualitative methods are appropriate because this research is not interested in establishing quantitative patterns or inferences about queer lives in Malawi. It is not aimed at testing a theory or hypothesis. It is rather interested in analysing the qualitative factors that influence the lack of protection of SOGI-based human rights in Malawi. It is interested in seeking to understand the social reality deriving from

⁴⁰⁰ (Bryman, *Social Research Methods* (4th Ed), 2012)

⁴⁰¹ (Bryman, *The Debate about Quantitative and Qualitative Research: A Question of Method or Epistemology?*, 1984, pp. 77-78)

⁴⁰² (Bryman, *Social Research Methods* (4th Ed), 2012, p. 380)

⁴⁰³ (Bryman, *Social Research Methods* (4th Ed), 2012, p. 380)

⁴⁰⁴ (Bryman, *Social Research Methods* (4th Ed), 2012, p. *ibid*)

meanings and languages in terms of how they influence how society negotiate same-sex intimacies and the rights that come with it. It is inductive in that it has no predefined concepts and categories. It starts from the position that the researcher does not yet know the identities or social dynamics that exist in the field.

There is increasing consensus that the understanding and implementation of human rights requires methods beyond conventional legal approaches.⁴⁰⁵ The benefits of looking at human rights questions from a multidisciplinary lens is now becoming more acceptable, as human rights scholarship is increasingly becoming curious about social dynamics of the people and societies in which human rights operates.⁴⁰⁶ Social science research methods are now considered necessary in human rights research as they offer robust analysis and empirical testing of social practices and phenomena.⁴⁰⁷

Quantitative methods in social scientific human rights research have served an important function of classifying, monitoring, and mapping trends of human rights phenomena such as violations or degree to which states respect rights.⁴⁰⁸ For example, Raub and others have drawn on global data from 193 UN member states to examine how constitutional protections of equal rights varied according to the decade of constitutional adoption and the year of constitutional amendment.⁴⁰⁹ In this research, they reviewed the national constitutions of all UN member states and created a quantifiable database of constitutional rights by developing a standard list of fourteen special groups across fifty-one rights.⁴¹⁰ The focus was on constitutional protections based on sexual

⁴⁰⁵ (Viljoen & Njau, *Beyond the law: Multi-disciplinary perspectives on human rights*, 2012, pp. 3-5)

⁴⁰⁶ (Viljoen & Njau, *Beyond the law: Multi-disciplinary perspectives on human rights*, 2012)

⁴⁰⁷ (Landman & T, 2006, pp. 1-6)

⁴⁰⁸ (Landman T. , 2010), (Landman T. , 2009)

⁴⁰⁹ (Raub, Cassola, Latz, & Heymann, 2016)

⁴¹⁰ (Raub, Cassola, Latz, & Heymann, 2016, p. 154)

orientation and gender identity, and their choice relied on analysis of legal provisions that mentioned homosexuality, sexual orientation, sexual preference, gender identity, gender reassignment, or transsexuals.⁴¹¹ In their findings, for example, they found that only 5% of the UN member states specifically guaranteed equality or prohibited discrimination on the basis of sexual orientation and gender identity as at May 2014, with only one state based in Sub-Saharan Africa (South Africa).⁴¹² Malawi was considered as a state that does not constitutionally prohibit discrimination or guarantee equal rights protection on the basis of sexual orientation and gender identity, contrary to my findings in the previous chapter, backed by that of the eminent Malawian human rights scholar Chirwa,⁴¹³ Malawi's constitution should be read as extending the prohibition of discrimination on the basis of sexual orientation and gender identity. Because Malawi's constitution did not contain any of the words chosen by Ruby et al, it was considered as not extending any human rights protections based on sexual orientation and gender identity.⁴¹⁴ Qualitative methods would have offered insight that same-sex intimacies and human rights thereof may be expressed in language and meanings that are particular to the Malawian context. In addition, a contextual understanding of Malawi's constitution would reveal that language of sexual orientation or gender identity, even if protections were intended, would not have been explicitly mentioned due to the secrecy and silences around sex and sexuality that exist in African contexts.⁴¹⁵ Furthermore, the researchers overlooked the impact of colonial(colonialism?) in shaping Africa's laws, which misrepresent local realities in terms of how the constitution can attain explicitness on issues of sexual orientation and gender identity.⁴¹⁶ For example, for Malawi, in other cases it is irrelevant to explicitly state sexual orientation or gender identities in law because

⁴¹¹ (Raub, Cassola, Latz, & Heymann, 2016, p. Ibid)

⁴¹² (Raub, Cassola, Latz, & Heymann, 2016, pp. 157-158)

⁴¹³ Supra note 278

⁴¹⁴ Supra note 411

⁴¹⁵ (Ryan-Flood & Gill, *Secrecy and Silence in the Research Process*, 2013), and (Tamale, *African Sexualities: A Reader*, 2011)

⁴¹⁶ (Smith L. T., 1999)

of their fluidity, temporarily and obscurity. A flexible and robust qualitative research method has potential to open discovery of such contextual complexities.

It is usually overlooked that the researcher is also an active participant in the research process, and that s/he is a critical component for consideration when choosing a research design. My limitations in quantitative techniques and strengths in qualitative methods, and my theoretical position towards social constructionist epistemologies, naturally drew me towards qualitative methods. I had to consider my own characteristics as a native Malawian, an activist, a researcher with a passion in SOGI-based human rights, a PhD student, a Commonwealth Scholar, a Christian (Catholic), heterosexual male, married, a parent etc. For example, being a native Malawian enabled me to speak Chichewa and other local languages, thereby enhancing my access to potential respondents. However, being out as heterosexual risked that potential participants would be unwilling to discuss with me their most intimate stories as I was someone whose sexuality they may not have identified with.

While being a Malawian PhD student gave the potential participants a rare opportunity to tell their stories to a fellow Malawian (as opposed to the majority of past researchers who are foreign and white), it was also possible that I was perceived in such high esteem that some participants may have felt compelled or obliged to accept my interview requests. I did not experience anyone who refused to be interviewed by me, and that was unexpected because prior to going into the field, I expected that participants would not trust to tell me so much during our first meeting. Being a native Malawian may also have led to others to suspect that I would reveal the identities of the research participants to my local friends, relatives, or even to authorities. However, my being a human rights activist focusing on SOGI-based human rights issues would have been appealing to some potential participants, as they would have expected that I am sympathetic towards the protection of their human rights and therefore most likely to tell their story in a way that

advocates for positive change. My positionality as a researcher was therefore central to my engagement with the field. An unexpected result of my research is that I also engaged with the research participants and the wider relevant communities through social media, leading to my deepening familiarity with the Malawian queer scene.

3.2. Methods

Based on the social constructionist paradigm about both sexuality and human rights, my methods lead towards a social constructivist and anti-positivist worldview which posits that reality is constructed through social interaction, whose meanings depends on the local context.⁴¹⁷ Since meanings are negotiated socially and historically, concepts and terminology have multiple or varied meaning based on the individual perspective of each research participants.⁴¹⁸ As a result, I did not restrict analysis by setting a comparable criteria. I drew my analysis from two key sources namely local discourses about SOGI-based human rights in public debates arising from media reports and case law, and life stories of 44 queer Malawians interviewed during field research conducted in October and November 2014. The profiles of the participants will be provided in the last section of this chapter.

3.2.1. Discourse Analysis

Discourse analysis comprises of a series of interdisciplinary approaches that can be used to explore different social domains in many different types of studies.⁴¹⁹ It is a framework for analysing social issues using a selection of different forms of text and talk, which is relevant in the analysis of matters whose content are discursive, socially constructed and their meaning

⁴¹⁷ (Silungwe, 2015, p. 31)

⁴¹⁸ (Creswell & J., 2009). Also, see (Silungwe, 2015, pp. 29-31)

⁴¹⁹ (Jorgensen & Phillips, 2002, p. 1)

contested.⁴²⁰ Contested meanings in a text and talk can be explored as a struggle between discourses, comprising multiple representation of narratives and speakers.⁴²¹ In addition to being a method for data analysis, Jorgensen and Phillips have argued that discourse analysis presents ontological and epistemological perspectives about the role of language in the social construction of the world.⁴²² The social constructionist paradigm in discourse analysis methods enables the researcher to adopt a critical approach to analysing taken-for-granted knowledge by paying attention to how local historical and cultural processes influence how knowledge is generated.⁴²³ In this approach, language and meanings represent the local social reality. Discourse analysis is inductive and 'outward' looking, exploring how language in the text or words socially produce and sustain ideas and objects that constitute 'reality'.⁴²⁴ Discourse is about discursive production of socially constructed realities. As such, how the object or phenomenon under study is conceptualised in existing literature influences the research questions.⁴²⁵ Analysis from these methods enables the exploration of the balances of power, and ideology in terms of how knowledge is established or contested.⁴²⁶ In the last chapter, I have argued that previous research about same sex intimacy in Malawi had taken for granted the meanings about (homo)sexuality and SOGI-based human rights. There has been no critical awareness of the discrepancies that arise when the terms are cited in English or Chichewa, and the influence of such citation in interpretation of the protections found in law (constitution and international human rights law), policy (National HIV and AIDS Plan), and social or institutional practices.

⁴²⁰ (Jorgensen & Phillips, 2002, p. 2)

⁴²¹ (Jorgensen & Phillips, 2002, p. 2)

⁴²² (Jorgensen & Phillips, 2002, p. 4)

⁴²³ (Jorgensen & Phillips, 2002, p. 4)

⁴²⁴ (Phillips & Hardy, 2002, pp. 5- 6)

⁴²⁵ (Phillips & Hardy, 2002, p. 63)

⁴²⁶ (Phillips & Hardy, 2002).

During this research (October 2013 to September 2017), I looked at 1118 articles from the three major Malawian newspapers namely Nyasa Times online newspaper, Times Newspaper online, and Malawi Nation online. Nyasa Times is only an online newspaper, while Times and Malawi Nation newspapers also circulate as paper newspapers and are sold throughout the country. The latter two newspapers have higher commercial value which enables them to procure more sophisticated journalists. The content is well researched and offers good quality data, However, Nyasa Times plays a significant role because of its historical role as the first online newspaper in Malawi, and therefore popular with both residents and diaspora Malawians. It has significant influence in shaping public discourses and opinions. Due to the limitations of this thesis in terms of time and scope, I primarily used the three media sources to familiarise myself with the local debates. For example, it is only the Nyasa Times, which reported the same-sex wedding that took place in Blantyre before that of Chimbanga and Monjeza.⁴²⁷ The rich data provides an opportunity for a detailed content and context analysis in order to analyse how the narratives have shaped how the relevant issues are (mis)represented by the press.

Newspaper reports were critical for this research as they offered a snapshot of the broader media discourse about SOGI-based human rights in Malawi. Throughout my analysis, I was aware that news cannot be treated as verifiable facts, but rather as a sample of the local topical debates taking place in the country. I also exercised caution as peoples' narrative may have been misrepresented in the papers. However, the reports from newspapers served a critical purpose as the only accessible source to trace the public debates about homosexuality and SOGI-based human rights in Malawi. To verify credibility and accuracy of some relevant reports, I cross-checked with official reports such as court cases, civil society annual reports,

⁴²⁷ Supra note 808

parliamentary Hansards, official press statements by government, my local contact persons, and reports submitted by Malawi government and civil society organisations to international human rights mechanisms. Some of the issues were also corroborated by my research participants through their narratives on how some of the reported events or developments directly affected them. Unexpectedly in this study, queer Malawians invited me to their secret Facebook pages which are discreet and their membership is restricted to the queer community. I was included as an exceptional case. Access to the groups gave me unprecedented first-hand insight into discussions among queer Malawians, including their recollection of some of the events that they encountered. Such recollection helped me to corroborate data sources from media sources.

The court judgements collected for this research were particularly important in supporting my claim that the penal laws have primarily been used in cases involving acts of non-consensual same-sex acts, with an exception of the case of Chimbanga and Monjeza, resulting in the view by majority of Malawians that the laws are necessary to curb non-consensual same-sex acts.⁴²⁸ I have also drawn from key legal and policy documents including the constitution, acts of parliament, human rights treaties, the National AIDS Policy, state human rights report to regional and international human rights mechanisms (African Commission on Human and Peoples' Rights, and the United Nations UPR), and governmental and non-governmental documents (strategic plans, reports etc.). The documents reveal key discourses in the debate. Analysis of the local discourses have also enabled me to show that, contrary to popular belief that the establishment of the Centre for Development of People (CEDEP) in 2005 marked the first-ever birth of the queer Malawian movement focusing on

⁴²⁸ For example, see (Republic versus Steven Monjeza Soko and Tionge Chimbanga Kachepa, 2009)

advocating for SOGI-based human rights,⁴²⁹ newspaper sources have revealed that earlier movements existed as early as 1999. The landscape of civil society activism will be discussed in more in-depth in chapter 6.

3.2.2. Life Stories

Personal narratives of queer Malawians are without doubt absent in the public debates about SOGI-based human rights in Malawi so far. The only first-hand public narrative by a queer Malawian recorded in this research is that by Eric Sambisa who came out on national television in January 2016 and demanded that Malawians should give him his rights or just kill him.⁴³⁰ Only two publications discussing life stories of queer Malawians have been recorded in this research exclusively focusing on Malawi so far.⁴³¹ However, they were published from abroad, and sold at a price not affordable or accessible to most Malawians, resulting in not having wide readership among Malawians. The gap of first hand queer voices therefore demands a deliberate effort to document and tell more stories from their point of view.

Lived experiences of queer Malawians are central to the understanding of how the deficiency of human rights safeguards affect their human dignity as they carry out their ordinary daily undertakings. They are also central to the analysis of their perceptions about human rights beyond what is contained in legal instruments. It is against this background that Gready, for example, has proposed that human rights operate at two primary points of reference, the law

⁴²⁹ CEDEP was founded in 2005 and registered as a human rights organisation in 2006 with an objective to address the needs and challenges of sexual minority groups in Malawi in the context of human rights, health and social development. The organisation leads in the fight for LGBTIQ rights in Malawi. (The Other Foundation, 2016)

⁴³⁰ (Mhango, 2016), (Nyasa Times Reporter, 2016), (Sambisa, 2016)

⁴³¹ (Centre for Development of People, 2010) and (Xaba & Biruk, 2016)

itself and the stories behind it.⁴³² For this research, stories of coming out, injustices and resistance helps in the analysis of lived experiences in terms of how queer Malawians negotiate their claims for SOGI-based human rights.

Stories are central to social thought in several disciplines including anthropology, psychology, history, philosophy, psychoanalysis and economics.⁴³³ Plummer defines sexual stories as the personal sexual narratives of the intimate life focusing on the erotic, gendered and the relational.⁴³⁴ Such stories may include that of self-discovery of sexuality, sexual interests, relationships, dealing with secrecy, coming out and so on. These stories are usually those kept private and confidential. Stories have potential to remove abstractness of concepts (such as human rights and sexuality) by presenting actual lived experiences and context. Where the concepts and identities are contested (and indeed contestable), personal narrative offers the closest perspective based on lived experiences. They also help to capture first-hand emphasis, emotions and bodily expressions that may be obscured in second-hand written text. In this research, the narratives have potential to redefine concepts about sexuality and human rights, based on first-hand experiences of queer Malawians.

The flourishing of social media and digital data has introduced new modes of sharing sexual stories.⁴³⁵ All participants in this research had a mobile phone and access to the internet. In fact, they reported that the mobile phone was their lifeline in terms of accessing and sharing information, finding sexual partners and communicating with friends. While it was possible for me to communicate with the potential participants through the internet to ask for their

⁴³² (Gready, 2010)

⁴³³ (Plummer K. , 1995, p. 18)

⁴³⁴ (Plummer K. , 1995, p. 6)

⁴³⁵ (Plummer K. , 1995, p. 7).

stories, limitations of their internet access made face-to-face interviews the best option to document the stories. This option also enabled me to meet the participants and get their stories first hand, with an opportunity for me to observe them share their stories. Emotional expressions proved critical in demonstrating their emphasis or clarity at several points of the interview.

3.3. Profile of Research Participants

The field research visit took place from 14 October to 16 November 2014. At the time of departure, I had identified potential participants through which I would identify more by using snowball sampling. During the period, I conducted face-to-face semi-structured interviews with 44 queer Malawians. It is difficult to classify the gender identities of the research participants due to the ambiguity of gender expression and identification in the Malawian context. However, 35 of the participants were born male and legally identified as such, and 8 were born female. While the majority of the participants were born male, I am cautious to say that the research sample was predominantly male, as some of the participants who were born male do not identify as male. I however acknowledge that having more participants who were born female would have enriched the analysis, especially because research and activism about lesbians is marginalised in the country.⁴³⁶ The participants were aged between 19 and 51 years. They were of diverse economic, ethnic and professional backgrounds. In total, 38 of the interviews were done in the southern region, while 5 were done in south-eastern region.⁴³⁷ All interviews were one-on-one semi-structured interviews.

⁴³⁶ Research about HIV and AIDS in Malawi has focused on the vulnerability of MSM. All civil society organisations documented in this research are focused on MSM or transgender women. CEDEP's programmatic focus is MSM.

⁴³⁷ See appendix A5

The detailed profiles of the participants are found in Appendix A5 in terms of their general demographic identifiers (age, sex at birth, education and occupation). Details of all the participants have been anonymised.

3.4. Ethical consideration, Data Collection, Management and Processing

3.4.1. Ethical Considerations

Ethical research was a critical component of this research because the key method for this research involved field interviews of a vulnerable research population that is marginalised, and had potentially suffered serious human rights violations. To meet the requirements of ethical approval in accordance with the *Guidelines for Ethical Approval of Research Involving Human Participants* by University of Essex Social Sciences, Law and Management Faculty of Ethics Committee (FEC), I had to demonstrate that I had sufficient measures to ensure no harm to the participants when seeking or interviewing them.⁴³⁸ In line with the guidelines, I had to interview participants over 18 years old, ensure confidentiality and anonymity of their identities, ensure security of the data, and have a plan to mitigate any risks in the field.

Meeting such requirements was crucial as queer persons are widely considered as a vulnerable and hard-to-reach-population in Africa and Malawi.⁴³⁹ Participation in the research was voluntary and anonymity was guaranteed. Prior to every interview, I introduced myself and the

⁴³⁸ See Ethical Approval Form (Appendix A1)

⁴³⁹ (Malawi Government, 2015), and (National AIDS Commission, 2003)

research through a verbal briefing and an introduction note prepared prior to my departure to the field.⁴⁴⁰ I also had a detailed questionnaire to guide me in the semi-structured interviews.⁴⁴¹ The questionnaire served as a checklist to ensure that all intended issues were covered. The questionnaire covered issues such as the participant's biographical information, historical background, history of their sexuality, daily experiences, experiences of homophobia and human rights violations, how they deal with the violations, how they seek help, and any sentiments looking into the future. The questionnaire can be found in Appendix 2. As the interviews were semi-structured, the format was flexible, and the flow was guided by the stories that the participants wanted to tell. The interview durations varied, from at least one hour and with several of them taking much longer.

It was crucial to ensure safety during the interviews. Confidentiality and privacy of the participants were paramount to ensure their safety before, during and after the interviews. As a result, discreet communication with my contact person and the potential participants was done through word of mouth and telephone calls. I had concluded that mobile texts or emails had the potential of being shared or intercepted, resulting in disclosure of my interview sites or the identities of potential participants. I also ensured that my field research was obscured as much as possible, to avoid any scrutiny from authorities (such as police) who may have wished to interrupt my field research. Since all participants had to sign a consent form to accept being interviewed and allow me to record them, I arranged to store all documentation and audio recordings at a highly secure location where I stayed throughout my stay in Malawi. As someone researching a highly contentious issue, I was very much aware that I risked potential backlash from conservative groups (such as religious or traditional leaders) or state institutions (such as the police). As such I had to ensure safe movements as well as discreet

⁴⁴⁰ See Briefing Note (Appendix A2)

⁴⁴¹ See Field Questionnaire (Appendix A4)

activities during my field visit. I ensured to keep the objectives of my visit secret, except to very few confidants. I also kept in contact with a local lawyer to be on standby for assistance in case need arose should there have been any efforts by authorities to interrupt my field research. I was also in constant touch with CEDEP and CHRR,⁴⁴² who were available to give me logistical or other support based on their familiarity with the local context. I benefited a great deal from the support of my local contact person, who was member of the local queer community as well as a long-time community activist in the southern region.

In Malawi, ethical clearance for research is approved by the National Commission for Science and Technology (NCST), which was established under the Science and Technology Act of 2003 for the mandate to promote, support, coordinate and regulate research.⁴⁴³ However, NCST is well known for refusing to approve research about SOGI based human rights in Malawi, including previous applications by CEDEP. For example, CEDEP has previously reported unnecessary obstacles in their application of ethical approval for their past project aimed at documenting stories about queer Malawians in 2009.⁴⁴⁴ In addition, in 2009 during their research about HIV prevalence and prevention among MSM in Malawi done in 2009, persistent approval obstacles forced CEDEP to abandon clearance application with the commission and instead seek clearance from the Malawi College of Medicine Research Ethics Committee.⁴⁴⁵ Ethical approval by the University of Essex was the most practical and appropriate route for this research.

⁴⁴² CHRR is a lead human rights civil society organisation that was founded in 1995 to promote protection, promotion and consolidation of human right by empowering communities with awareness about human rights. (Centre for Human Rights and Rehabilitation (CHRR), 2011)

⁴⁴³ (NCST - National Commission for Science and Technology, 2017)

⁴⁴⁴ (Centre for Development of People, 2010)

⁴⁴⁵ (Wirtz & al, 2009, p. 8)

3.4.2. Sampling

Snowball sampling was the most feasible method for my field research for practical reasons. As a heterosexual Malawian researcher located in the United Kingdom, and with limited access to the local queer community, it was practical to make initial contact with a small group of people, through whom I could subsequently establish contact with others.⁴⁴⁶ Snowball sampling is challenging as those identified for interviewing are not representative of a whole population.⁴⁴⁷ It is also difficult to tell whether one has reached adequate number of research participants. In the case of Malawi, it is difficult to model a representative sample based on the total queer population in Malawi simply because there are no such estimates. As stated in the previous chapters, Malawi is yet to establish its same-sex categories and characteristics. While there has been an estimate of the MSM population, it cannot be cited as the population estimate of the entire non-heterosexual population. My logistical arrangements also influenced choice for snowball sampling. I had limited finances that only allowed me to stay in Malawi for six weeks.

When going into the field, I anticipated that my positionality as a heterosexual researcher and the homophobic environment in Malawi minimised my chances of securing interviews. However, I ended up conducting an overwhelming 44 interviews during the period. My experience in terms of ease of access to the queer population is similar to that of Moen who conducted an HIV-related qualitative study about same-sex attracted men in Dar es Salaam (Tanzania) and found that, contrary to the widely held belief that MSM are a hard to reach population, it was not difficult for him to identify and secure participants for his research.⁴⁴⁸ While it cannot be concluded that queer Africans are easy to find during research, both

⁴⁴⁶ (Bryman, *Social Research Methods* (4th Ed), 2012, p. 202)

⁴⁴⁷ (Bryman, *Social Research Methods* (4th Ed), 2012, p. *ibid*)

⁴⁴⁸ (Moen, Aggleton, Leshabari, & Middlethorpe, 2012)

experiences give hope that future similar research have prospects to access the otherwise considered hard-to-reach populations.

3.4.3. Experiences in the Field

3.4.3.1. The role of the gatekeeper

Access to the field is critical to the success of field research. It has been argued that researchers must pass through a metaphorical entrance gate to access field sites and participants. This gate is guarded by gatekeepers who are the initial contact persons for researchers. Gatekeepers are instrumental in guiding and supporting the researchers in navigating the field. Below I will concur with arguments that the process of navigating through this this metaphorical gate is complex and context specific.

Reflecting on her doctoral thesis ethnographic research exploring prostitution-related migration of women in contemporary Italy, Crowhurst has proposed that a mechanistic and instrumental model of gatekeeping, where the researcher negotiates with a gatekeeper to get past a metaphorical gate in order to access a research population, obscures more complex dynamics that makes it possible for the 'gates' to open in terms of the researcher's position in the field, relationships with other agents in the field, and decisions made while doing fieldwork.⁴⁴⁹ To Crowhurst, the process of gatekeeping is not static, disembodied or templated.⁴⁵⁰ She has proposed that dynamic encounters between

⁴⁴⁹ (Crowhurst, 2013)

⁴⁵⁰ (Crowhurst, 2013, pp. 471- 473)

gatekeepers, researchers and participants shapes and transforms the process of gaining access (to the field) and research as a whole.⁴⁵¹ During her field experience, her positionality as a white woman from a well-known university, and dealing with a specific (lower class) group of prostitutes eased access to the research participants.⁴⁵² In her view, her positionality led some of the participants to assume that she was entitled to do her research and that the entitlement took precedence over the participants' option to participate or not.⁴⁵³ In other words, she correctly found, it is not only the gatekeeper who allows access through this metaphorical gate.

Crowhurst's experience relates to how my positionality as a Malawian, heterosexual, human rights activist, coming from the United Kingdom, may have influenced some participants to feel obliged to participate in my interviews. Although when preparing to go to Malawi for fieldwork I felt that I needed an insider gatekeeper because my positionality as a heterosexual scholar coming from abroad made me an outsider to the local queer community, my contrasting positionality as a Malawian expert, affluent, and human rights activist may have resulted in many participants wanting to participate in my interviews to express their sentiments specifically to me for a number of reasons. Firstly, as a native Malawian with some human rights expertise, they felt that my familiarity with the local context made me an insider who had a better understanding of the issues as opposed to previous research which, they claimed, was mostly led by Western researchers. During the interviews, participants expressed excitement at speaking to a researcher who was a Malawian native, who was able to speak in Chichewa and share stories about local places and communities. They found me relatable as a fellow Malawian. Although I was also an

⁴⁵¹ (Crowhurst, 2013, p. Ibid)

⁴⁵² (Crowhurst, 2013, p. 472)

⁴⁵³ (Crowhurst, 2013, p. Ibid)

outsider being heterosexual, the participants felt that my sexuality made me an effective messenger of their stories to the heterosexual community. They felt that the heterosexual community were likely to take my analysis seriously as they would view me as not serving self-interests.

While the metaphorical gate has been most associated with the gatekeeper, in my case, the unexpected events also played a significant role in opening access to the field. My arrival in Malawi coincided an invitation to participate as an observer in an HIV and AIDS Prevention workshop for sexual minorities, hosted by CEDEP. During the workshop, I was introduced as a Malawian researcher and I was given the floor to explain my research and need to interview queer Malawians. Throughout the day-long workshop, most participants approached me and expressed interest to be interviewed. The workshop participants took my contact details and connected me to other peers who were not at the meeting. By the next day after the meeting, I had secured an overwhelming 31 participants. The workshop therefore became the most important 'gate' to access the participants. The workshop not only opened access to the geographical research site where the workshop took place, but also a symbolic co-option to the local queer community. For example, the participants decided to invite me to their secret WhatsApp and Facebook communities. In agreeing with Crowhurst that gatekeeping ought not be viewed in simplistic terms, I therefore go further to propose that gatekeeping is not embodied only in beings (i.e. the researcher, the gate keeper, the researched), but also in events which may open access to the field or participants.

3.4.3.2. A Reflexive account of my positionality in the field

In the earlier sections, I discussed briefly how my positionality as a heterosexual native and postgraduate researcher influenced the research process. In this section, I offer an additional account of how I dealt with my personal awareness of such positionality during fieldwork in Malawi.

It is now established that reflexivity is an important aspect of the qualitative research process,⁴⁵⁴ and particularly sexuality research.⁴⁵⁵ Reflexivity is when a researcher recognises and acknowledges that the research process is not value-free.⁴⁵⁶ Awareness of one's reflexive position in the research process is instrumental in the consideration of questions about bias or quality of a research.⁴⁵⁷ It is widely acknowledged within contemporary social research that knowledge cannot be truly independent from the researcher, the researched, and their contexts. The history of sexuality research in Africa reminds us that the majority of early research overlooked indigenous epistemologies about African sexualities because it was conducted by non-African researchers.⁴⁵⁸ Reflexivity in contemporary sexuality research about Africa is critical as it offers an opportunity to reconstruct research practice and epistemologies on local terms. However, this reconstruction must be exercised with caution not to unnecessarily deconstruct such previous knowledge or approaches by early colonial researchers. Total deconstruction or refusal of such knowledge and approaches is counterproductive to the further building of knowledge about African sexualities or SOGI-based human rights. While colonial

⁴⁵⁴ (Bryman, *Social Research Methods* (4th Ed), 2012, p. 39), (Berger, 2015, p. 219)

⁴⁵⁵ (Tamale, *Researching and theorizing sexualities in Africa*), (Tamale, *Researching and theorizing sexualities in Africa*)

⁴⁵⁶ (Bryman, *Social Research Methods* (4th Ed), 2012, p. 39)

⁴⁵⁷ (Berger, 2015)

⁴⁵⁸ (Tamale, *African Sexualities: A Reader*, 2011, p. 150), and (Murray & W, 1998). Also, refer to (Mbembe, 2001), (Said, 1979) and (de Sousa Santos, 2009)

researchers may have misinterpreted the richness of African same-sex sexualities based on their biases that same-sex conduct was digressive, they contributed to exposing to postcolonial Africa, the silenced and erased knowledge about the existence of same-sex sexualities on the continent.

There is a substantial literature on the influence of various characteristics of a researcher on the process of sexuality research. For example, broader questions about the relationship between a researcher's identity and knowledge production has raised a question about the epistemological implications of heterosexual researchers' engagement with queer scholarship.⁴⁵⁹ It has been proposed that in research involving LGB participants, 'insider status' when the researcher is also LGB, is beneficial.⁴⁶⁰ The claim is that a shared (sexuality) identity between the researcher and the researched results in better narratives from the researched, that are better interpreted by the researcher, and thus resulting in generation of better knowledge.⁴⁶¹ However, questions about stability and ambiguity of sexual identities have troubled the notion that sexual identity may be linearly related to knowledge,⁴⁶² or even that a same sexual identity between a researcher and the researched leads to better knowledge. First, the idea of shared sexuality oversimplifies the contextual particularity of sexual identities. First, based on my earlier arguments about the social construction of African sexualities, it cannot be assumed that being 'L, G, or B' in one country is an exact match in another context. Second, in practice, sexual identities intersect with other forms of identity. For example, one may not be heterosexual, but also share Christianity, Africanness, and education status with others who are not heterosexual. As such, an atheist gay man from the United Kingdom cannot be assumed to

⁴⁵⁹ (Allen, 2010)

⁴⁶⁰ (Allen, 2010, p. 151)

⁴⁶¹ (Allen, 2010, p. 151)

⁴⁶² (Allen, 2010, p. 161)

be the best at representation of experiences of an African and Christian MSM based in Malawi. The fluidity, ambiguity, temporarily of sexualities, as well as the free-will to signify the same does not guarantee that a research participant will narrow to sexuality as a primary factor for self-identification, or relationship with a researcher. As such, in an encounter where the researcher and research participants signify sexuality as the key factor for establishing relationship, perhaps a heterosexual researcher may be an outsider in a research about same-sex sexualities. However, there may be encounters where the researcher and researched do not share the same sexual identity, but signify other attributes for establishing a relationship e.g. religious affiliation, nationality or language. As such, being heterosexual and doing research about sexuality does not imply that one is an outsider, and even if one is assumed an outsider, it does not guarantee disadvantage in the research process.⁴⁶³

During my fieldwork, my participants seemed to identify with me primarily as a fellow Malawian native, who shared with them a history and language. It was exciting to them that they could switch between English and Chichewa to emphasise a point. They were also able to describe local practices, places and peoples with an understanding that I could relate with the local context. Specifically, they found me relatable as I also grew up in the southern region of the country, where the interviews took place. Similarly, I could also relate with the participants based on other similar commonalities. Except for one interview where a participant asked about my sexuality, my rapport with the research participants relied on other aspects of our identities beyond sexuality. In fact, a common understanding of context and local languages resulted in my better understanding of the information that I was receiving from the research participants. My interpretation of the

⁴⁶³ For previous scholarly debates about the insider and outsider positionality in qualitative research, please see: (Dwyer & Buckle, 2009), (Paechter, 2012), (Court & Abbas, 2013), (Bucerius, 2013)

received information would have been less accurate if we shared same sexual(ity) identity, while not sharing local knowledge in terms of language and context. This is similar to experiences encountered by Riessman in her interviews with women regarding separation and divorce.⁴⁶⁴ She found that as an Anglo interviewer, she found it easier to understand an Anglo participant than a Puerto Rican one, although she shared gender with both (the researcher and researched being women). The Puerto Rican participant's narrative included cultural themes which were unfamiliar to the Anglo interviewer, making it difficult for the interviewer to interpret such contextual narrative. My experience suggests that while sexual identity may be important, in contexts like that of my research, there are other characteristics through which a more meaningful relationship could be established between the researcher and the researched. In my experience during this research, the relationship between the researcher and the researched is more complex than simply sharing or differing in sexual identity.

While it may be established that a researcher does not need to be an 'insider' to facilitate an effective research process, familiarity with the issues affecting the participants may be crucial in conceptualising the research questions as well as facilitating or moderating the interview process.⁴⁶⁵ In my interviews, I felt lacking when research participants narrated the lifestyle of being MSM in Malawi. They were moderately surprised at how little I knew about their local cultures and practices. For example, nearly each participant had to take me through the coded language that queer Malawians use to identify each other in the public scene, or to communicate in a way that is disguised from the heterosexual community. I therefore acknowledge that my being heterosexual may have resulted me in not fully interrogating some issues only known to MSM persons. However, I would argue

⁴⁶⁴ (Riessman, 1987)

⁴⁶⁵ (Berger, 2015, p. 227)

that a gay man from the United Kingdom would have experienced a similar extent of unfamiliarity with the Malawian MSM context. This research is significant not only because I offer an analysis based on that 'sexual naivety,' but also because I managed to look at sexuality in the context of other broader aspects of life. Hopefully my experience in doing this research contributes to troubling and complicating an assumed linearity in the relationship between the researcher and the researched in relation to sexual identity. Based on my experience, sexual identity is not the sole axis of the researcher-researched relationship in research about human rights and same-sex intimacies in Malawi.

Although my experiences suggest that sexuality may be an important, but not the only significant mediating factor, it is also necessary to be aware that sexual identity has the potential to affect the interview process. Perceptions about my sexuality may have influenced the research participants' attitude towards me. For example, due to high negative attitudes towards homosexuality among Malawians,⁴⁶⁶ the participants may have opened up to me on the assumption that I may have been queer, but rather closeted. During the only time that a participant asked about my sexuality, Mussa asked me a direct question '*Ok, can we say that you are bisexual, gay?... or what?*'.⁴⁶⁷ I had to clarify that I am heterosexual. He was then curious about why I chose to research about human rights and same-sex intimacy in Malawi. To him, it was unimaginable for a heterosexual Malawians to 'waste' time hearing about the queer lifestyle. This curiosity suggested that the effect of sexual identity of the researcher must not be overlooked.

⁴⁶⁶ (Dulani, Boniface; Sambo, Gift; Dionne, Kim, Yi, 2016)

⁴⁶⁷ (Berger, 2015, p. *ibid*)

3.4.3.3. The role of Digital Technologies in research

The significance of Facebook and WhatsApp cannot be ignored as the future universe for social networking, and by extension an important research site.⁴⁶⁸ Social science researchers must not ignore the potential and relevance of digital platforms such as Facebook and WhatsApp in the 21st Century.⁴⁶⁹ Social media opens access to vast numbers of potential research participants while waiving constraints of having to be physically present in the field, travel funding limitations, and logistical constraints.⁴⁷⁰ Social media is increasingly becoming an important research methodology.⁴⁷¹

Social media is central to the lives of queer Malawians. All participants had a mobile phone and relied on Facebook or WhatsApp for connecting with others. Throughout my research, Facebook and WhatsApp served as an important tool to get news updates and connect with informants.⁴⁷² Facebook served an unexpected role in enabling me to gain more insight and familiarity with the Malawian context, without me physically living in Malawi for a longer period. As mentioned earlier in this chapter, since my fieldwork, I have had access to secret Facebook and WhatsApp groups of queer Malawians. New members are carefully vetted to ensure non-infiltration by or state agents. Through my membership, I had chance to experience living amidst queer Malawians and hear stories about their daily lives. I also had a rare opportunity to have insight into grassroots movement building by ordinary queer Malawians. These spaces offered me an opportunity to be in a new field site that was not planned for this research.

⁴⁶⁸ (Gauntlett, 1999)

⁴⁶⁹ (Murthy, 2008), (Wilson, Gosling, & Graham, 2012), (Baker, 2013)

⁴⁷⁰ (Piacenti, Rivas, & Garret, 2014), (Hallet & Barber, 2014)

⁴⁷¹ (Baker, 2013)

⁴⁷² (Lunnay, Borlagdan, McNaughton, & Ward, 2015)

It should however be noted that this unintended digital endeavour presented challenges. Access to the Facebook pages required investing a lot of time to navigate the vast amount of data. I spent at least 5 hours weekly participating on Facebook. It was important to remain an active member of the groups to reciprocate the gesture they extended to me by inviting me to their safe spaces. It also required me to answer members' questions about sexuality and human rights. It must be noted that availability of massive social media data presented a challenge in terms of structured selection of limited data for use in this study.⁴⁷³ However, the benefits outweighed the challenges by far, as they enhanced my familiarity with the queer context in Malawi.

3.4.3.4. Challenges in the field

In this research, safety and confidentiality were key ethical concerns. I managed to address anticipated safety issues by securing a safe space for interviews at a venue previously used for conferences and workshops by the queer Malawian community. It was a venue familiar to the research participants, and had been tested as a safe space for MSM. However, an unanticipated issue was that I was charged to use the venue, based on the rates applicable to CEDEP. I also incurred high costs in terms of calling participants to confirm or reschedule interviews.⁴⁷⁴ Furthermore, a dysfunctional and risky public transport system required me to use alternative and more expensive transport. My fieldwork costs were much higher than anticipated. This suggests the importance of securing adequate finances for venues, communication and transport for field research in Malawi.

⁴⁷³ (Rieder, Abdulla, Poell, & Zack, 2015)

⁴⁷⁴ Malawi has one of the highest mobile phone charges globally

Another unexpected ethical challenge during fieldwork was the demand for financial compensation by the research participants. I was informed by some of my participants that it was a common practice that they are paid for speaking to researchers. They therefore expected me to pay them for participating in my study. The positionality as a researcher coming from the United Kingdom became a disadvantage as they assumed I had brought money to pay participants. Payment to people for participating in research has raised ethical concerns in the research process.⁴⁷⁵ It has been argued that payments has the potential to coerce people in participating in the research.⁴⁷⁶ Such payments are viewed by some scholars as a constraint to people's exercise of freedom to participate in research.⁴⁷⁷ There are specific individuals who are vulnerable when paid to participate in research. For example, economically disadvantaged people are likely to accept payment to be interviewed because of their dire need for money rather than a willingness to be interviewed.⁴⁷⁸ Similarly, drug users have been found to be vulnerable to using the money for substance abuse if paid to participate in research.⁴⁷⁹

However, others have argued that it is acceptable to pay research participants to compensate for their participation or reimburse their expenses incurred for participating in research.⁴⁸⁰ Such payments are viewed as an advantage for enhancing recruitment of participants.⁴⁸¹ Reimbursement or compensation varies depending on ethical guidelines.⁴⁸²

⁴⁷⁵ (Wertheimer & Miller, 2008), (Fry, 2006)

⁴⁷⁶ (Wertheimer & Miller, 2008, p. 398)

⁴⁷⁷ (Ackerman, 1989, pp. 1-2)

⁴⁷⁸ (Ackerman, 1989, pp. 1-2), (stones & McMillan, 2010)

⁴⁷⁹ (Fry, 2006)

⁴⁸⁰ (Roche, King, Mohan, Gavin, & McNicholas, 2013)

⁴⁸¹ (Roche, King, Mohan, Gavin, & McNicholas, 2013)

⁴⁸² (Fry, 2006)

It can also take monetary or non-monetary forms, including other forms of payments such as food and a free service (especially in clinical trials).⁴⁸³ This dilemma of paying research participants during research has been documented in an American research project conducted in Malawi in 2008 in which Malawians were given two bars of soap as a token of thanks for participation in 25-page survey questionnaire in a longitudinal study of AIDS in Malawi.⁴⁸⁴ The 'token' was approved by the Malawi research ethics board as it was considered appropriate to express appreciation for participation in the research and non-coercive in terms of participants' participation.⁴⁸⁵ While the payment of soap was justified in this American study, and its motive may be justifiable,⁴⁸⁶ the repeated practice of paying research participants in Malawi has transformed research as a process in which participants expect a token.

In the case of Malawi, high unemployment rates and a culture of payment by international organisations doing research in Malawi has created an expectation that all research participation comes with financial compensation.⁴⁸⁷ There is therefore a risk that some people may become perpetual research participants with the aim of generating regular income. In other words, participating in research potentially becomes a job. It is therefore necessary to review the payment regime in Malawi to create a conducive environment that allows for voluntary unpaid participation in research. In my case, I mitigated this problem by clarifying that my research was voluntary.

⁴⁸³ (Ndebele, Mfutso-Bengo, & Mduleza, 2008)

⁴⁸⁴ (Biruk, 2017)

⁴⁸⁵ (Biruk, 2017, p. 365)

⁴⁸⁶ (Biruk, 2017, pp. 378-379)

⁴⁸⁷ Previous research about abuse of per diem in Africa and Malawi has suggested that per diems have been manipulated or abused as a form of supplementary income in government institutions. However, per diem culture extends to the non-governmental sector. According to my participants, participating in field research brings income to local communities through reimbursements of participation costs and per diem. For abuse of per diem in public service, see (Norad Evaluation Department, 2012) and (Nkamleu & Kamgnia, 2014)

3.5. Conclusion

In this chapter, I have stated that my research was qualitative, focusing on analysing the social reality about SOGI-based rights in Malawi, based on the experiences and perspective of the queer people. Specifically, I analyse the public discourse using media and other reports in order to identify the key issues in the highly contentious public debate. The bulk of the analysis draws from the life stories of 44 queer Malawians interviewed in Malawi in 2014. I discuss my ethical considerations in accordance with the *Guidelines for Ethical Approval of Research Involving Human Participants* by University of Essex Social Sciences, Law and Management Faculty of Ethics Committee (FEC). Using snowballing sampling as my approach to get research participants, I discussed the role of the gatekeeper and coincidental events that led me to accessing an overwhelming number of participants, contrary to my humble expectations when going into the field. I have reflected on my positionality as a straight and Malawian researcher, and how it influenced the research process. Although unexpected in my research, I note the significance of digital spaces and technologies in facilitating access to the field and research participants.

4. Coming Out in the Malawian Context

4.1. Introduction

In chapter 2, I have argued that both sexuality and human rights have local meanings which misrepresent SOGI-based human rights claims. I have implicated the word *mathanyula* as the source of such misrepresentation. Specifically, calls for SOGI-based human rights have been misconstrued to imply a ‘right to do mathanyula,’ associated with an imaginary right for adult men to molest underage boys. In the next two chapters, I discuss how participants interviewed in this research negotiate their existence in Malawian society. I focus on the process of coming out as the medium through which they reveal their same-sex sexual identity, which I argue is a prerequisite for claiming SOGI-based human rights.

Coming out is a subject of scholarly interest in sexuality studies. Coming out is a complex process in which moral, political, and pedagogical considerations are pursued with the ultimate aim of creating or revealing a sexual identity.⁴⁸⁸ Coming out carries different meanings and is influenced by competing discourses around identity and desire.⁴⁸⁹ Previous research include a study by Orne on participants who came out to their fathers, mothers and best friends in terms of how stigma around being LGB impacts individuals in terms of depression and low self-esteem.⁴⁹⁰ However, the process of coming out has not received sufficient scholarly attention in relation to Africa. So far, there is no study about coming out by queer persons in Malawi.⁴⁹¹ The insufficient specific studies about the coming out

⁴⁸⁸ (Rasmussen, 2004)

⁴⁸⁹ (Herman, 2005)

⁴⁹⁰ (Orne, 2011)

⁴⁹¹ In the case of Malawi, Kangaude, a renowned Malawian scholar, has used the coming out concept in reference to coming to terms with a heterosexual sexual orientation. Based on his own experiences undergoing puberty, he has argued that coming out must be viewed as gender neutral. There is no other study that has analysed the process in the context of same-sex sexuality (Sandfort, T; Simenel, S; Mwachiro, K; Reddy, V , 2015)

process in the African or Malawian context may be a result of competing priorities, as the focus has concentrated on SOGI-based violence or the impact of HIV and AIDS.

However, coming out is a relevant issue for the African context. For example, McCormick has argued that coming out must be considered the appropriate process to authenticate a homosexual identity in the South African context.⁴⁹² In 2014, Kenyan writer Binyavanga Wainaina raised global interest about coming out in the African context when he published his 'lost chapter' entitled 'I am a homosexual, mum' in which he came out as gay.⁴⁹³ African sexuality scholarship has overlooked the significance of coming out as an important part of the experience of being queer in Africa. If one must negotiate SOGI-based human rights, one must seek to be identified as a subject to whom entitlement to such rights apply.⁴⁹⁴ Coming out is a critical process in the reinvention of one's sexuality from heterosexuality to be identified as queer. Coming out may not have been a matter for scholarly interest among African scholars yet, but it is central in the understanding of how queer Africans or Malawians negotiate their sexual citizenship and rights thereof. Malawi is an important case study because of its contextual particularities discussed in chapters 1 and 2. In this chapter, I focus on the family as it is a central social institution in Malawi through which sexuality and intimacy is traditionally understood, experienced, and regulated.⁴⁹⁵

4.2. Institutions of Family and SOGI-based Rights

It is well established that families are a central social unit globally.⁴⁹⁶ Historically, the family is a key site where norms and roles about relationships, gender, reproduction, family and marriage are

⁴⁹² (McCormick, 2015)

⁴⁹³ (Wainaina, 2014)

⁴⁹⁴ (Weeks J. , Sexuality, 2010)

⁴⁹⁵ (Plummer K. , *Cosmopolitan Sexualities*, 2015, p. 50), (Seidman, Fischer, & Meeks, *Introducing the New Sexuality Studies*, 2007, pp. 3-5), (Weeks J. , *Sexuality*, 2010, p. 21). Also, see (Correa, Petchesky, & Parker, 2008, p. 128)

⁴⁹⁶ (Plummer K. , *Cosmopolitan Sexualities*, 2015, p. 50)

established.⁴⁹⁷ The family is a site where children acquire relevant traditions and are socialised to rules about permissible sexual conduct.⁴⁹⁸ Rules about permissible and non-permissible sexual conduct have correspondingly constructed what makes a good family.⁴⁹⁹ Early (Western) concept of sexual citizenship historically assumed the idea of the family as a basic unit of society comprising a monogamous heterosexual family, in which the couple is married and lived with their unmarried children.⁵⁰⁰ This idea of the good family enforces the rules about what makes a good man, good woman, good partner, good parent, or good child. It also defines what are permissible sexual practices, which is by implication, good sexual citizenship.⁵⁰¹

Several theories are useful in understanding how the family and marriage influence the enforcement of heterosexuality, thereby enforcing them as a basis for good sexual citizenship. First, Foucault's concept of family biopolitics suggests that there are a series of family practices and ideologies which regulate economic, productive and successful bodies.⁵⁰² Through family biopolitics, familiar heteronormativity enforces codes of practice that renders the body as a heterosexual site primarily aimed at procreation.⁵⁰³ Second, based on Foucault's idea of governmentality,⁵⁰⁴ the concept of family governmentality renders a subject's moral worth based on their compliance with the imperative to marry and procreate, which in turn acts as a tool for retaining the reputation and stature of the heterosexual family.⁵⁰⁵ In other words, the

⁴⁹⁷ (Seidman, Fischer, & Meeks, *Introducing the New Sexuality Studies*, 2007, p. 446)

⁴⁹⁸ (Seidman, Fischer, & Meeks, *Introducing the New Sexuality Studies*, 2007, p. *ibid*), (Weeks J. , *The Invention of Sexuality*, 2002), (Weeks J. , *Sexualities*, 2009)

⁴⁸¹ (Weeks J. , *Sexualities*, 2009)

⁵⁰⁰ (Kong T. S., *All about family: Intimate citizenship and family biopolitics*, 2010, p. 94)

⁵⁰¹ (Plummer K. , *Intimate Citizenship: Private Decisions and Public Dialogues*, 2003, p. 15), (Bell & Binnie, 2000, pp. 10-11)

⁵⁰² (Kong T. S., *All about family: Intimate citizenship and family biopolitics*, 2010, pp. 97-98)

⁵⁰³ (Kong T. S., *All about family: Intimate citizenship and family biopolitics*, 2010, p. 98)

⁵⁰⁴ (Foucault, *Governmentality, and Critique*, 2010)

⁵⁰⁵ (Kong T. S., *All about family: Intimate citizenship and family biopolitics*, 2010, p. 98)

heterosexual family is a site for enforcing heterosexuality and procreation as the minimum requirements of acceptable sexual citizenship.

However, although the institution of marriage and family are influential in enforcing heterosexuality, there is an ongoing tension when the heterosexual family is faced with a member who does not conform to the imperatives. The queer members must negotiate to overcome exclusion. Where they are rejected, others have opted to form a new relationship other than those based on 'blood' or 'marriage'.⁵⁰⁶ According to Weston, LGBT people have an option to create 'families-we-choose' comprising non-blood familial relations of friends, lovers and ex-lovers, as a result of rejection and exclusion from their 'families of origin'.⁵⁰⁷ Experiences of such exclusions and negotiation for inclusion vary. For example, in a study of 68 lesbian parents in two European countries, Sweden and Ireland, Ryan-Flood found that the relationship between Irish lesbians with their families of origin improved after the lesbians became parents.⁵⁰⁸ The arrival of a grandchild generated a new understanding of family ties with their otherwise rejected lesbian children, and in the process completely changing attitudes towards same-sex relationships.⁵⁰⁹

In a study of gay men in Hong Kong, Kong found that the men adopted coming-out practices as a measure to challenge heterosexist assumptions about family membership in Hong Kong society.⁵¹⁰ In an earlier study, he had found that older Hong Kong Chinese gay men had developed tactics navigating predominantly heterosexual spaces to resist traditional norms.⁵¹¹ Ireland and Hong Kong are relevant to this research because of their cultural emphasis on the centrality of the heterosexual family. They also both share history as former British colonies.

⁵⁰⁶ (Ryan-Flood R. , 2015). Also, see, (Weston, Families We Choose: Lesbian, Gays, Kinship, 1997) & (Kong T. S., All about family: Intimate citizenship and family biopolitics, 2010, pp. 108-109)

⁵⁰⁷ (Ryan-Flood R. , 2015, p. 174)

⁵⁰⁸ (Ryan-Flood R. , 2015, p. 177)

⁵⁰⁹ (Ryan-Flood R. , 2015, p. 178)

⁵¹⁰ (Kong T. S., All about family: Intimate citizenship and family biopolitics, 2010, pp. 93-96)

⁵¹¹ (Kong T. S., 2012)

The enforcement of heterosexual norms is also traced to the international human rights system.⁵¹² The institution of family is cited as the basic unit of society in article 16(3) of the UDHR,⁵¹³ article 23(1) of the ICCPR,⁵¹⁴ article 10(1) of the ICESCR,⁵¹⁵ and article 18(1) of the African Charter.⁵¹⁶ The right to marry is explicitly cited in article 16(1) and (2) of the UDHR,⁵¹⁷ and article 23(2) of the ICCPR.⁵¹⁸ The family or marriage cited in the human rights instruments did not intend to extend protections to non-heterosexual marriages or families at the time they were being drafted.⁵¹⁹ LGBT-rights movements globally have called for recognition of their rights to get married, form families and have children.⁵²⁰ Incrementally, such rights are being recognised in the Global North. Court decisions include legalising same-sex marriage include the historic case of Obergefell v. Hodges in 2015 when the US supreme court decided that the ban of same-sex marriage were unconstitutional.⁵²¹ Also in 2015 Ireland became the first country to legalise same-sex marriage by a popular vote.⁵²² In response, conservative states are increasingly using traditional values at the UN level to challenge any calls for the protection of SOGI-based human rights.⁵²³ While it is not within the scope of this research to look at the 'traditional values' debates, it is important to note that the family is also an important site through which SOGI-based rights are contested in the international human rights mechanisms.

⁵¹² (Plummer K. , *Cosmopolitan Sexualities*, 2015, p. 50)

⁵¹³ (Ghandhi, 2004, p. 24)

⁵¹⁴ (Ghandhi, 2004, p. 69)

⁵¹⁵ (Ghandhi, 2004, p. 83)

⁵¹⁶ (Ghandhi, 2004, p. 425)

⁵¹⁷ (Ghandhi, 2004, p. 69)

⁵¹⁸ (Ghandhi, 2004, p. 425)

⁵¹⁹ (Byrnes, 2013, p. 618)

⁵²⁰ (Plummer K. , *Cosmopolitan Sexualities*, 2015, pp. 50-52). Also, see (Plummer K. , *Intimate Citizenship: Private Decisions and Public Dialogues*, 2003, p. 34), (Roseneil, Sasha, Crowhurst, Isabel; Hellesund, Tone; Santos, Ana Cristina; Stoilova, Mariya , 2013)

⁵²¹ (Stewart-Winter & Timothy, 2015). It must be noted that the throughout this thesis, the US is sometimes cited in reference to the USA

⁵²² In the case of Africa, South Africa parliament passed a law allowing same-sex marriage in 2006

⁵²³ (Chase, 2016)

As discussed in chapter 2 on the Malawian context, the heterosexual family is the basic unit of the Malawian society, and the Marriage Act specifically excludes non-heterosexual gender identities as a way of enforcing heterosexual marriage.⁵²⁴ Any calls for protection of SOGI-based human rights have been perceived as a threat to the institutions of family and marriage.⁵²⁵ The two institutions are therefore important areas worth analysis in order to understand how they enforce the lack of protection for queer Malawians.

4.3. Relevance of Coming out in the Malawian context

Coming out emerged as a popular term in the 1960's and early 1970's during the emergence of the Gay Liberation Front in the United Kingdom.⁵²⁶ Coming out is a complex process where one establishes a sexual identity and claims the space to exercise sexual freedom. This process can take place in the private or public spheres. Coming out can be summarised as the process of telling others, whether in private or public that one is not heterosexual.⁵²⁷ It is an important aspect of one's construction of their sexuality.⁵²⁸ Plummer has identified coming out as a critical stage for one to be socialised as a homosexual.⁵²⁹ During the initial stage of *sensitisation*, an individual experiences the first conscious and semi-conscious awareness that one is potentially a homosexual.⁵³⁰ Sensitisation is followed by a process of *signification and disorientation* where an individual evaluates personal experiences against positive or negative reaction by society.⁵³¹ At this

⁵²⁴ Heterosexual marriages and family are diverse in Malawi. The most accepted form of marriage among Malawians is the monogamous heterosexual marriage. However, other parts of Malawi practice polygamy. Child marriages have been reported, and the Marriage Act has been passed to outlaw them. While some heterosexual marriages are not popular, communities tolerate them on the essentialist view that heterosexual relationships are natural. Non-heterosexual unions are singled out, at least in rhetoric, because of the view that they are unnatural and abominable.

⁵²⁵ For example, (Malawi E. C., 2016), (Malawi News Agency, 2015), (Muheya, 2016)

⁵²⁶ (Plummer K. , Telling Sexual Stories : Power, Change, and Social Worlds, 1995, p. 57)

⁵²⁷ (Weeks J. , Sexuality, 2010, p. 126), (Ryan, Legate, & Weinstein, 2015, p. 552)

⁵²⁸ (Plummer K. , Sexual Stigma: An Interactionist Account, 1975), (Weeks J. , Sexuality, 2010), (Weeks J. , Coming Out: Homosexual Politics in Britain, from the Nineteenth Century to the Present, 1977)

⁵²⁹ (Plummer K. , Symbolic Interactionism and the Forms of Homosexuality, 1996, pp. 70-81)

⁵³⁰ (Plummer K. , Symbolic Interactionism and the Forms of Homosexuality, 1996, p. 70)

⁵³¹ (Plummer K. , Symbolic Interactionism and the Forms of Homosexuality, 1996, p. 72)

stage, one becomes more self-aware of their sexuality and begins to make choices of how to approach the society in terms of secrecy or revelation. It is also at this stage where an individual begins to establish an identity. During *coming out*, an individual is 'reborn' as a homosexual to the community. He further unpacked coming out into four processes namely:

Coming out personally, in which a self-conversation emerges which clarifies who one is; *coming out privately*, in which the first steps are made to tell specific others- family, friends, work peers- in delimited spheres; *coming out publicly*, in which many others are now told the story, and indeed it may become public knowledge out of the self's own control; and finally *coming out politically*, in which the story is used very widely as a means of social change.⁵³²

The family home has been viewed as a private sphere in which a family and its offspring exercise rules about permissible and non-permissible behaviours.⁵³³ As such, *coming out personally* and *coming out privately* appears relevant when one is coming out in such private spaces. However, the Malawian family plays a dual private and public role. A Malawian family can be monogamous or polygamous. In a polygamous family, a husband may have more than one house in an arrangement where each wife is allocated a house. While the wives are restricted to live in their allocated house, children from any house can temporarily reside at any of the houses in order to live with their half-siblings. Whenever they temporarily reside elsewhere, they are subject to the rules of the host. In addition, Malawian extended families are closely knit so much that other homesteads may participate in setting and enforcing the rules of permissible and non-permissible sexualities. As a result, one may *come out publicly* or *come out politically* within the institution of the Malawian family.

⁵³² (Plummer K. , *Telling Sexual Stories : Power, Change, and Social Worlds*, 1995, pp. 57-58)

⁵³³ (Kong T. S., 2012), (Kong T. S., *All about family: Intimate citizenship and family biopolitics*, 2010)

For most participants in this research, coming out implied disclosing one's sexuality to family members. Implicitly, this process was preceded by *coming out personally*, an internal conversation where the participants discovered themselves as different and underwent an internal process to come to terms with their sexuality. However, coming out may also carry local meanings which do not relate at all to the meanings discussed so far. During my interview with Chataika, he understood coming out as being a first encounter in which a heterosexual person engages in same-sex sex.⁵³⁴ While having the first same-sex sexual encounter may have facilitated his *coming out personally*, his (mis)understanding of the English phrase is distinguishable from the conventional understanding described earlier in this chapter. This suggests that the term 'coming out' (as expressed in English) may be misunderstood among queer Malawians. This calls for extra attention to meanings when analysing the local debates about coming out in the Malawian context.

Before discussing the coming out stories, it should be noted that not all queer Malawians are able to come out of the closet.⁵³⁵ In Plummer's stages of the homosexual career, coming out is the final stage where an individual is reborn and begins to self-identify as a homosexual.⁵³⁶ However, he goes further to acknowledge that not all persons end up revealing their sexuality to the public. Out of the 44 participants interviewed in this research, only thirteen participants had ever revealed their sexuality beyond their queer network. Out of the 35 male participants interviewed in this research, only ten participants had come out to their family. Keeping queer sexuality secret is a preferable option for several reasons. Fear of negative public attitudes towards homosexuality was the main reason cited by the participants for why they opted to remain in the closet. Queer Malawians have previously reported suffering blackmail or extortion when their sexuality is

⁵³⁴ (Chataika, 2014)

⁵³⁵ Being in the closet has been described as the experience of living without disclosing one's sexual orientation or gender identity (Bocheneck & Brown, 2001, p. xiii). Also see (Plummer K. , *Symbolic Interactionism and the Forms of Homosexuality*, 1996)

⁵³⁶ (Plummer K. , *Symbolic Interactionism and the Forms of Homosexuality*, 1996, p. 78)

discovered.⁵³⁷ In addition, as stated earlier, all participants mentioned the arrest and conviction of Monjeza and Chimbalanga as significant event that made them feel that they would face persecution if discovered.

Other participants had specific grounds for remaining in the closet. For example, Mfulu, a senior civil servant who was previously married with children, opted to remain in the closet because he did not want to put his teaching profession into disrepute. He also feared that being discovered would lead to him losing his job. In addition, he had kept his identity secret to his family of origin as well as his wife in order to maintain social harmony within his clan, and to avoid backlash from his grandfather and parents. In that regard, he was careful to select discreet partners to maintain secrecy

Ah no, I myself am very selective. I don't do it with anybody. I don't want to (be outed) ... because am working as a civil servant. I don't want to be exposed... so I am selective with partners and venues. When doing this... when somebody is going (too public with the relationship) public, I say no, don't meet with me.⁵³⁸

This need for secrecy was shared by Temwa, who is a senior civil servant working as a teacher at a secondary school. He said that it was important to remain secret as Malawian teachers are expected to be heterosexual, and his coming out would bring the teaching profession into disrepute.⁵³⁹ Although he was not married, he insisted that he was 100% heterosexual whenever family and friends asked him why was not getting married at his age. Concerns by friends and family that one is not married is usually a tool for policing sexualities and enforcing heterosexual conformity in the African context.⁵⁴⁰ Mbumba, the oldest participant in this research, and Dzuwa, the youngest, opted to remain secretive about their sexuality because they felt that matters of non-marital sex and sexuality ought to be kept private in the Malawian context. I have stated

⁵³⁷ (Chibwezo, 2011)

⁵³⁸ (Mfulu, 2014)

⁵³⁹ (Temwa, 2014)

⁵⁴⁰ (Msibi T. , They are Worried about Me: I am also Worried, 2011)

earlier that matters of sex are shrouded in secrecy and silences in the African context.⁵⁴¹ Mbumba, who had known that he was queer since his early teenage years, ensured that his sexual relationships were not known to his parents, siblings and close friends. To him, any relationships outside marriage, whether heterosexual or not, were not for revealing to the public. Although he suspects that some of his friends and family may know about his sexuality, he was confident that his discipline about relationships had ensured that his sexuality is kept secret

I remember one time... my elder sister. It was on the phone anyway... she said... .. brother, what am hearing from people, if it's true, it's not good. Then I said... what is it, what are you hearing about me? ... she said what she was hearing... then I said, there isn't anything I can say, the people saying this about me maybe would be better placed to say the truth about me... I said I didn't know what she was talking about... then we closed the story... but I think they know.⁵⁴²

In the case of Dzuwa, he took pride in the fact that he had successfully maintained secrecy about his sexual life. When I asked whether anyone knew his sexuality, his answer was clear that it is impossible anyone to know:

No one would know. Even my friends, they don't know that I do these things... even my... my relatives, they don't know, not at all... (laughs)... I don't like talking about my secrets to people... I keep to myself, I keep my secrets well.⁵⁴³

The imperative of secrecy and privacy by Dzuwa, Mbumba and Mfulu renders them invisible, and stripped of their same-sex identity, which is necessary for claiming SOGI-based human rights. It should however be noted that while they opted to remain in the closet to avoid revealing their identities to family and friends, they were known members of clandestine queer communities. In public spaces, most of the participants presented themselves to the public as heterosexual in order to be accepted and feel safe. This is similar to the 'caleta', a term coined by del Aguilla in his ethnographic research on strategies by Peruvian immigrants in the US state of New York. In this

⁵⁴¹ (Tamale, African Sexualities: A Reader, 2011)

⁵⁴² (Mbumba, 2014)

⁵⁴³ (Dzuwa, 2014)

research, he found that the immigrants deployed different modes of coming out. For example, *Caleta* men would present themselves as heterosexual in public to maintain acceptance to the public, but live a homosexual identity privately.⁵⁴⁴ Other gay men who were studied lived a publicly gay life in New York, but would perform a *Caleta* identity when in the presence of family and friends back home in Lima (their city of origin). This strategy was viewed as a viable option to secure social acceptance.⁵⁴⁵

4.4. Coming out Stories

Experiences about coming out in the Malawian context are diverse. Some decide to come out when they are ready to confront the implications of revealing their sexuality to family and friends.⁵⁴⁶ Others are discovered and have to confront such implications unwillingly. In this chapter, I note the negative outcomes of coming out experienced by queer Malawians and discuss the human rights implications thereof. However, I also highlight that some queer Malawians have experienced positive outcomes. I have discussed coming out stories of the male and female participants separately to ensure that experiences by female participants receive necessary attention, since majority of previous research about Malawi have focused on MSM. It is important to mention there are no 'he' or 'she' pronouns in Chichewa language. As a result, it was a challenge to single out a preferred pronoun of the participants. While the pronouns below are my interpretation of the conversations in the interview, I caution that some may appear misaligned with the pronouns assigned in broader sexuality discourses. Such misalignment highlights the particularities of Malawian sexualities.

⁵⁴⁴ (Vasquez del Aguila, 2012, p. 210)

⁵⁴⁵ Previous research has shown that not being accepted has negative impact on mental health of queer citizens. E.g. (Ryan, Legate, & Weinstein, 2015)

⁵⁴⁶ (Vasquez del Aguila, 2012, p. 211)

4.4.1. Coming out by the female participants

Most women interviewed are vulnerable due to their poverty and low education status. It is therefore not surprising that out of the ten female participants interviewed, only three had revealed their sexuality ~~known~~ to their families. Only one had voluntarily disclosed her sexuality to her family.

Fear of social stigma, violence and persecution were also cited as the main reasons for remaining in the closet. The other women interviewed in this research, who opted to keep their sexuality secret, also cited that they opted for silence to avoid backlash from their families or local communities. For example, Wongani was the only university graduate among the women interviewed.⁵⁴⁷ She was working in a senior post at a prominent company and had advanced education qualifications. She had her own house and was living independently. She grew up in a family of a single mother who was prominent in the society. She knew that she had bisexual tendencies from the time she reached puberty. She has had sexual relationships with women prior to getting married to a man. When she got married she realised that she could not stand living with a man for the rest of her life. She got pregnant and gave birth to a son, and soon afterwards filed for divorce. Her secret reason for filing for divorce was that she failed to sustain sexual attraction to a man, and felt interested in women. However, despite her independence, she did not disclose her sexuality to her husband or family-of-origin. She has been asked by her friends and family-of-origin why she is has remained single after divorce, and she just says that she is waiting for the right partner. Consistent with the reasons cited in the earlier section, she finds that her remaining in the closet makes her an acceptable member of the community.

⁵⁴⁷ (Wongani, 2014)

Chintheya is the only female-born participant who voluntarily disclosed his sexuality to his family of origin.⁵⁴⁸ Born and raised in a Christian family of six siblings, Chintheya has been dressing and behaving as a man since a very young age. Since puberty, he has had relationships with women. At the time of the interview, he had a relationship with a woman, but lived alone. He came to our interview dressed as a typical Malawian man, in trouser and long shirt. During the interview, he explained that dressing as a man is the way he has always done since childhood:

It's the way I am. I am used to dressing like this. It's the way I have always dressed since young. Maybe in future I can change but that's the way I am used to... and I can't change.⁵⁴⁹

Chintheya described himself as a man, period. Due to his closeness with his mother, he was able to approach her and tell her plainly and straightforward 'mommy, I am lesbian'.⁵⁵⁰ Although the mother was disappointed, she gave him a lot of advice on how to 'convert' to heterosexuality. Although he initially made several attempts to change in an attempt to conform with societal norms, it failed. Since then, his mother regularly visits his house to pray for him so that he can convert to a woman, but the efforts have not succeeded. Chintheya has emphasised to his mother that even though he was born female, inside he is a man.⁵⁵¹ He has also disclosed his sexuality to his father and siblings so that they should know the truth. His father and siblings were disappointed as they did not expect to have someone like him their family. They initially accused him of plotting to embarrass the family, as well as for putting his interests over the family. They explicitly told him that they were not happy with his choices

⁵⁴⁸ (Chintheya, 2014)

⁵⁴⁹ (Chintheya, 2014)

⁵⁵⁰ (Chintheya, 2014)

⁵⁵¹ Our interview mixed Chichewa and English. As such, the pronouns (his, or her) are improvised in this analysis. In Chichewa, the pronouns are irrelevant as we address each other in neutral terms. It was irrelevant to consider whether to be addressed as 'he' or 'she' as such terms are unnecessary in Chichewa language.

and that they were frightened for him. In his response, he suggested to them that he should accept him as different in the same manner other Malawian families accept children with albinism. Fearing his safety, his mother advised him to relocate to Cape Town (South Africa), his mother's homeland, where at least being lesbian is legal. However, he did not relocate as it was too expensive for him to move to another country.

Although Chintheya's family-of-origin were shocked and disappointed with this disclosure, his voluntary disclosure was possible due to his closeness with his mother. Although his mother accepted him, the attempts to convert him using prayers suggest that she was still hoping to influence him to conform to heterosexual norms to avoid relocating to Cape Town. The high levels of religiosity in Malawian society has significant potential to influence families, including queer subjects, to view queer identities negatively, resulting in increased likelihood to accept religious rituals as a form of conversion therapy.⁵⁵²

Chintheya's extended local community, which is effectively his family, has accepted him as a man. At funerals, which is an important event where culture is performed and enforced, he is accepted as a man and is allowed to sit with men and perform duties only performed by men such as digging the grave and carrying the coffin. None of the community members have confronted him about his sexuality. However, he is unable to secure a job because every time he attends an interview, companies express shock at his dress code and behaviour. It can therefore be argued that his family and local community have allowed a trade-off by recognising Chintheya's claim of identity and conduct rights, by allowing him to publicly live as male and perform male functions. However, outside his community he is expected to abandon those already won rights if he has to claim any formal rights such as employment and

⁵⁵² (Tozer & Hayes, 2004)

economic activity. It can therefore be argued that securing some rights in his community does not guarantee enjoyment of formal SOGI-based rights as he has not attained a full status as male.

In another case, Shanu was born female and identifies as a man. He described himself as a lesbian, but also a trans-man. He started engaging in same-sex sexual relationships when he was at secondary school. Although he has never disclosed his sexuality to his family-of-origin, he believes that his parents and siblings suspect his same-sex sexuality since he visibly lives as a man. Originally from the central region, he had moved to the southern region to take up a job in the sports sector in the southern region. During his stay in the region, he started a relationship with a married woman. Six months into the relationship, the married woman's husband discovered them and assaulted Shanu. He was paraded before at a public market to out and embarrass him, and the public were cheering as they watched two men stripping his clothes off and beating him. He was later taken to an undisclosed location, where he was detained the whole day, and severely beaten while stripped naked. The men boasted that they would continue beating him like a man until he accepted that he was female. He could not go report the issue to police as he feared that the police would end up arresting her for not being heterosexual.

Although the violence experienced by Shanu emanated from a jealous husband who feared losing his wife to a lesbian, its public nature must be understood as a tool of re-establishing the hierarchy of masculinity over femininity.⁵⁵³ The concern by the husband and the cheering public was not only aimed at condemning 'homosexuality,' but also to reinforce a stereotype of what a Malawian woman ought to be, a man's woman. In South Africa, lesbians suffer the

⁵⁵³ (Action Aid, 2009)

horrific phenomena of ‘curative rape,’ a shocking phenomenon reported in South Africa, particularly in townships, where men gang rape lesbians as a form of punishment to cure them of their sexual orientation.⁵⁵⁴ But the humiliation was also meant to send a message to other lesbians in the community that they would suffer the same fate, especially if they interfered with the institution of heterosexual marriage and family. Her fear to approach Police, which has also been reported by others in Malawi, suggests that queer Malawians are unlikely to deploy article 15(2) of the Constitution by submitting their grievances to constitutional human rights bodies when their rights are violated.

Although another participant, Akuzike, identified to me as heterosexual, she also told me that she engages in sexual relations with both men and women.⁵⁵⁵ She has a daughter from a past relationship with a man. When her mother heard rumours that she was engaging in relationships with women, she got angry, shouted at her and vowed to disown her as her conduct made her unworthy of being a daughter. Her mother went further to take away Akuzike’s daughter and she has not accessed her daughter for a few years now. During the interview, her sadness, anger, despair and helplessness about not having custody of her daughter was clear, and she felt that there is nothing she could do to complain about the situation as authorities would dismiss her complaint as she did not conform to Malawian norms. She also felt that culturally her mother’s decision overrode hers. Unlike Chintheya’s mother who was kind and understanding, the actions by Akuzike’s mother suggest that homophobic parents are capable of taking extreme measures that strips their daughters of any rights such as dignity, liberty, and women’s rights.⁵⁵⁶

⁵⁵⁴ (Action Aid, 2009), (Mwambene, 2015), (Human Rights Watch, 2011)

⁵⁵⁵ (Akuzike, 2014)

⁵⁵⁶ E.g. Section 24 (111) of the Constitution states that (Women have a right to) ‘acquire and retain custody, guardianship and care of children and to have an equal right in the making of decisions that affect their upbringing.’

The above three stories indicate that Malawian women whose sexual orientation or gender identities do not conform with heterosexual norms continue to suffer human rights violations. The violations that they suffer occur at the informal level within the family systems, and at the formal level by virtue of not having readily available avenues for redress. As such, women who suffer SOGI-based violations suffer double vulnerability as they are also susceptible to suffer gender based discrimination and other violations generally suffered by Malawian women.⁵⁵⁷ Concerns about violence and discrimination related to women based on SOGI have been raised at reviews of Malawi before the UN human rights systems. At the two last Universal Periodic Reviews (2010 and 2015), states asked Malawi to take positive steps to review anti-gay laws to ensure protection of women from SOGI based violations.⁵⁵⁸ In 2015, during the review of Malawi at the Sixty-second session of the Committee on the Elimination of all forms of Discrimination against Women (CEDAW Committee), the Committee raised concerns about the lack of recognition of rights of bisexual, lesbian and transgender women and intersex persons. They asked Malawi to review section 20 of the Constitution to include sexual orientation as the grounds for prohibition of discrimination.⁵⁵⁹ The questions were raised after a coalition of civil society organisations raised concerns about criminalisation of same-sex conduct between females under the Penal Code, the exclusion of non-heterosexual relationships in the definition of marriage under the marriage act, and limited access to health services by lesbians.⁵⁶⁰ However, the concerns have received less attention as lesbian issues are

⁵⁵⁷ (Bisika, Ntata, & Konyani, 2007), (Mkandawire-Valhmu, et al., 2016), (Conroy, 2013), (Mellish, Settergren, & Sapuwa, 2015), (Chisala-Tempelhoff & Bakare, 2016)

⁵⁵⁸ (United Nations Human Rights Council (A/HRC/16/4), 2011, p. 8), (United Nations Human Rights Council (A/HRC/30/5), 2015, p. 8)

⁵⁵⁹ (Women, 2015, p. 2)

⁵⁶⁰ (Southern Africa Litigation Centre, 2015), (Women and Law in Southern Africa Research and Education Trust Malawi (WLSA-Malawi); Faculty of Law, Chancellor College, University of Malawi, 2015),

overlooked due to the focus on the vulnerability of MSM in the context of the HIV and AIDS response.⁵⁶¹

Based on my interviews, women experienced extreme forms of violence. It is worrisome that the violence perpetrated in public was tolerated and applauded by the public. The absence of narratives about the violations in previous research suggests the lack of research on issues affecting women based on sexual orientation and gender identity. The lack of attention by gender-focused civil society may suggest that sexual orientation and gender identity issues are not integrated as gender issues. I therefore recommend that future research and interventions must go beyond MSM and include issues affecting lesbians, bisexual women, transgender women, and intersex people.

4.4.2. Coming out by Malawian men

As mentioned earlier in this chapter, most of the male participants opted to keep their identities secret for fear of backlash. Previous research and NGO reports have shown that men who engage in same-sex behaviour experience human rights violations in Malawi.⁵⁶² Although I acknowledge the need to highlight the cases of homophobia about Africa or Malawi,⁵⁶³ existence of homophobia in Africa must not be hastily generalised as representative of the 2 billion citizens of the continent because there is no empirical evidence supporting that. While cases of serious homophobia have been recorded on the African continent, it does not imply

⁵⁶¹ (Matebeni, Reddy, Sandfort, & Southey-Swartz, 2013)

⁵⁶² For example; (Action Aid, 2009), (Civil Society Coalition on Human Rights and Constitutional Law, et al, 2014), (CEDEP & CHRR, Human Rights Violations on the Basis of Real or Perceived Sexual Orientation and Gender Identity in Malawi , 2014), (CEDEP & CHRR, Violence and Discrimination Based on Real or Perceived Sexual Orientation and Gender Identity in Malawi- Human Rights Violation Report 2015, 2016), (Carroll, Aengus, 2016), (Dulani, Boniface; Sambo, Gift; Dionne, Kim, Yi, 2016), (Price, 2010)

⁵⁶³ For example, Africa has been reported as the global homophobic hotspot: (Smith D. , 2014), (Dulani, Boniface; Sambo, Gift; Dionne, Kim, Yi, 2016)

that the entire African population is homophobic. In this regard, I begin this section by discussing positive stories of inclusion.

Tionge is a trans-woman who is out and lives publicly as a woman. Her parents divorced when she was young and she grew up with her father and step-mother. Her father passed away a few years ago. She initially came out to her step-mother, who is a nurse, when she visited the clinic where she works to seek help with an anal infection. It was the step-mother who became open first by telling her that she knew that the anal infection came from anal sex. Due to the good relationship between Tionge and her step-mother, it was easy to discuss her sexuality and they have had a good relationship as she has been accepted as a trans-woman.

We chat, we talk, and she is free with me. At the clinic, she told me not to do it until am healed. We have a great relationship...⁵⁶⁴

Despite her sexuality, she has maintained a good relationship with her siblings. While most siblings have been open to discuss her sexuality, others have opted not to. The silence can be interpreted to be part of the broader silences and secrecy about sex and sexuality in African and Malawian communities. It is equally difficult for most siblings to openly discuss (hetero)sexual issues. She ruled out any suggestion that the silence by some siblings imply unhappiness with her sexuality on the basis that they were able to co-exist without any problems.

My relationship is ok, even... because, like... even yesterday... My brother came to pick me up for a drink at (a local pub) ... He is just used to me because it's like... or when we go drinking people think it's my boyfriend. We are so free. They think we are gays dating. He doesn't care because he knows that this is just me. My other siblings... the relationship is ok... Maybe, I don't know, maybe they can't talk... but when am with them everything is ok... We don't talk, but there is only my younger sister, after that there are other sisters. She is the one who likes to ask me to know more about my sexuality... But she is free because she moves around a lot. Sometimes we meet in

⁵⁶⁴ (Tionge, Life Story Interview in Malawi, 2014)

clubs... (laughs)... when we are out, we let everybody do their own thing. Just like that.⁵⁶⁵

Although her immediate family has no problem with her sexuality, her uncle is opposed to her living as transgender. As a result, there is ongoing conflict between the uncle and Tionge's step-mother. The uncle accuses the step-mother for being too lenient on Tionge and in the process disrespecting the family. Unlike Chinteya who was accepted by her family and his immediate community, Tionge has been accepted as a woman beyond her family. For example, she has a retail shop in town where she sells male and female clothes. The shop is frequented by heterosexual patrons without any problems. She goes to public events as a woman. Her social media profiles are open to the public and contains pictures of her as a transwoman. In fact, her interactions with the public on social media are positive.

Being accepted as a trans-woman has increased her prospects of positive experiences in terms of rights such as dignity, liberty and health. However, the lack of legal recognition as a trans-woman and the existence of the Marriage Act that restrict recognition of her status as a trans-woman restricts her from claiming the same rights, as well as other broader rights, based on her sexual orientation and gender identity.

While previous relevant research about Malawi has found that Malawian men face stigma, discrimination, persecution and violence based on their sexual orientation and gender identity, there has been no focused discussion on the significance of the family in the construction of sexual citizenship and claim of SOGI-based human rights thereof. For example, Taonga has been accepted by his immediate family, but the fear of homophobia has resulted in the family

⁵⁶⁵ (Tionge, Life Story Interview in Malawi, 2014)

opting to keep it a secret from the public. Taonga engages in sexual relationships with other men but identifies as heterosexual. This is consistent most male queer Malawians who identify as MSM in Malawi. He is an only child to a single mother. Since a young boy, he stayed with his grandparents from the time his biological parents divorced. Upon reaching secondary school, he went back to live with his mother who had remarried. However, when he stayed with his grandparents, he knew that he preferred relationships with men, but he never told them because he felt that they would not handle the shock as they were old and conservative Christians. He was only forced to come out to his mother because her circle of friends was increasingly becoming suspicious of him. It was not difficult to disclose his sexuality because he enjoys a good relationship with her.

...I told her that she has a gay kid. Then I started crying, because I knew that if I said it in jovial mood, she will not be happy. I said I don't like being gay etc... She cried as well; and told me not to cry as am a human being and still her son. 'you are my son, it's not your fault. It may even be my fault that you are gay. I don't know whose fault, maybe your father.' So, that is when ... we are friends now. Because we have opened a lot. We were friends, we played like kids in the house, pillows etc. That's when she knew, she told me not to tell any other relatives. 'have understood you because you are my only son and I can't do otherwise, but if you tell someone else, they may not understand. It will be bad for you, because I would never hurt you...' ⁵⁶⁶

Since coming out, they have maintained a healthy relationship and his mother has accepted his sexuality. However, in the above narrative, the conversation between Taonga and his mother suggest that the family is opposed to homosexuality generally. This is revealed through Taonga's approach, which clearly indicated that his strategy for soliciting acceptance was to narrate his sexuality as something that he did not prefer, but was left with little choice. In response, his mother also interpreted his being gay as a fault that may have arisen from difficult familiar circumstances. Although in the end he has been accepted, it is little wonder that they opted to keep the news secret from the rest of the family and the general public due

⁵⁶⁶ (Taonga, 2014)

to fear that others may be homophobic. In this regard, although his mother knows his sexuality, he lives as a heterosexual except when he is in private spaces with same-sex partners, as a way to ensure that no one else knows his sexuality. This strategy of performing heterosexuality as a strategy to navigate homophobia and maintain harmony in the extended family within conservative cultures have been recorded among gay Asians living in Asian communities in the United States of America.⁵⁶⁷

Taonga's case has some similarities with that of Chifundo, who is in the age group of 26 to 30 years old.⁵⁶⁸ She was born male, and raised in the southern region, where she currently lives. Her father is a lawyer and her mother stays home as a house wife. She was raised in a privileged middle-class family with good income.

Chifundo lives as a woman and has sexual relationships with men. From a very young age, her parents knew that she was different. Her mother used to joke how she would let her be a girl if they were living in a Western country:

My mom used to say that if we were in the US... because my dad is a lawyer by profession, so he wanted to do his Masters in the US... So, he wanted all of us to go to the US where my mom would be working etc. ... so my mom was saying that if we go to the US, they should just change me into a woman.

To her, it was just like a joke, not from deep down the heart, just hilarious to her. She didn't realise that am gay. She just thought I was born affiliated to female clothing.⁵⁶⁹

To Chifundo's mother, as long as Chifundo acted different but did not claim to be queer, she was willing to accommodate her being feminine. When the parents discovered her first relationship with a man, her father became angry and started verbally attack her. However, her mother was more understanding and able to accommodate her.

⁵⁶⁷ (Han, Proctor, & Choi, 2014)

⁵⁶⁸ (Chifundo, 2014) (Chifundo, 2014)

⁵⁶⁹ (Chifundo, 2014) (Chifundo, 2014)

Hmmmm... By then everything was just normal. It was when they realised that am in love with a boy. It's when things changed. changed... .. I had difficult times. Everything changed, the treatment I was given by my relatives, they were hard on me. My brothers were allowed to drive a car, I wasn't allowed. If I drove a car, it means I stole the car. It's not like they were saying anything about this, but I think to them I wasn't making them happy anymore. The fact that I was gay and go out with a fellow man. I think that made my father not to love me. My mother tried a lot, of course being a human being sometimes she could be mad at me and shout at me, when I plait my hair, at first, they could just leave me, but later on after realising that I was sleeping with fellow boys they started denying me doing my hair. Refusing to give me money to do my hair, things like those... (My father) used to call me woman. Stupid woman, you are a woman. You are stupid. You can't have a girlfriend at that age, you are stupid. At one time, he chased me from home. Then I went to stay with the boyfriend.⁵⁷⁰

The troubles at home led Chifundo to move instead and live in a spare room of a business premise belonging to his cousin. The cousin also gave her a job as a marketing executive for her to earn a living. However, the cousin made it clear that he did not want Chikondi's homosexuality to be revealed at the office and proposed that she presents herself as a heterosexual male when working at the office. She was also ordered not to bring her boyfriends anywhere near the premises, nor engage in any relationship with anyone at the workplace.

When starting work, he told me to respect workmates, he should never hear that am asking colleagues out, or seducing workmates... I should be there to work, and when I want my things, I should do them outside the office... (he says that) it would ruin the company reputation that there are gays there. So, he has been backing me that am his brother and saying that no one would take care of me if I was evicted. It's his responsibility, instead of giving me handouts but make me work... I stay well, but sometimes they shout at me. If there are a lot of guys coming to the office... like right now am refused (one side is my room where I stay, the other side is a company) to bring any lovers to the compound. Some of them are just my friends, not even gay sometimes, not even bisexual, just a proper person, but to them they think (even my brother) think that it's my lovers. That's where I face problems... So, it's a tough life.⁵⁷¹

Taonga and Chifundo could be conventionally interpreted as transgender women. Their being accepted at familial level could be interpreted by the attitudes of some Malawian

⁵⁷⁰ (Chifundo, 2014) (Chifundo, 2014)

⁵⁷¹ (Chifundo, 2014) (Chifundo, 2014)

communities towards transgender women. In the case of Chimbalinga, who was arrested along with Steven for holding a traditional wedding ceremony in December 2009, the narratives by witnesses in their court case suggest that the families and communities were tolerant to 'aunt Tiwonge' until the moral panic arising from the case.⁵⁷² Transgender women are viewed as having less capacity to commit mathanyula (the capacity to molest young boys), and as such they are likely to be tolerated by their immediate communities. However, both Taonga and Chifundo are unable to claim a formal identity. They are therefore unable to claim full same-sex sexual citizenship or SOGI-based human rights.

Ntchayi is male and in the age group of 18- 25 years old. He is a third born child in a family of six siblings. He was born and raised in an eastern town of Malawi, where is currently working and residing. Unlike Chifundo or Taonga, he has a masculine appearance and openly lives as a gay man. He first voluntarily came out to his late mother because they had a close and open relationship. He felt that it was important for her to know about his sexuality as they did not have secrets with each other. He also felt that it was better for his mother to hear about his sexuality from him, as opposed to hearing rumours from others

Since she was my mom, hate it or like it, I told her that I was having a feeling that I wasn't interested in ladies but was attracted more towards men. She said ouch... and that it was a shame. Because she didn't take it... it was news to her and she was sad, she couldn't take it. Then... what happened was that she shouted at me, and afterwards, the other day she just said ok and that I have to be careful and not let others know that I was like that. I said it was fine. For her, she didn't ask too many questions. She just said its ok as I was her son. She just let it go like that. Then afterwards, she passed away... But then my sisters and my whole family were not aware that am gay. Its only her who knew, none of my family members. Up to when some guy posted on Facebook a list of gays here in Malawi. When that... they posted that on Facebook. It's when it became like known... to my family members.⁵⁷³

⁵⁷² (Republic versus Steven Monjeza Soko and Tionge Chimbalinga Kachepa, 2009, pp. 4-5)

⁵⁷³ (Ntchayi, 2014)

Although his siblings have been supportive when they discovered Ntchayi's sexuality, his uncle who is influential in the family has never been supportive. At one point, a list of gay Malawians was posted on social media and included his name. When his uncle heard of the news, he sanctioned him for a meeting and initiated a traditional process to expel him from the family. Although his immediate family continues to support him, he no longer talks with his uncle. Since his uncle is an influential member of the extended family, it is difficult for Ntchayi to fully participate at family events where his uncle is playing leading role. In cultures where the uncle is the head of the family, full membership of the family requires their endorsement. In Ntchayi's case, with his uncle's disapproval of his sexuality, his membership hangs in a balance even though his immediate family accepts him. In other words, even at the familiar level, he is unable to enjoy full rights.

Others experience total rejection by their families. Chikondi was born male and is in the age group of 18 to 25 years old. He was born and raised in the southern region. Although his self-description would fit as bisexual in Western contexts, he identified as MSM because he felt that category was less-known in the Malawian context and therefore not subject to the stigma received by common categories such as homosexual, gay and lesbian. His biological parents divorced when he was young and he grew up with a step-mother. He believes that his bad relationship with his father emanates from poor relations that he has experienced with the step-mother. As a result, he believes, his father had a harsh reaction when he discovered that he was not heterosexual. When his father discovered that he had same-sex tendencies, they had a bad falling out:

My father stopped sponsoring me when I was in upper high school. But it wasn't really because of... it was just mixed up because of the step mother and all that. They gay thing just added up for him to suspend all the help. So, it was, ah, after he stopped helping me, my uncle now took over and started giving me support and all that.... I was caught with someone in errr, so it just added to the anger that my family had on me. I tried to explain that no I wasn't doing that but it was.... I couldn't deny at some point.

So, I really miss the family thing, so I was just raised up with my uncle and it reached the time that my uncle wasn't even happy with me staying in his house, not because I was doing this scandal but when people out there were talking, it really affects errr not only me but everyone who is connected with me. So, the rumours which were going out made my uncle to even chase me out and I started staying with friends up to now...

The problem, he (my dad) didn't come directly to me to ask me. We don't, we don't have the relationship, like, we don't talk. So, he heard from someone and he didn't come to me to ask me or shout at me. He just asked people to come and ask me and tell me that he don't want to see me again. So, I just took what... I just took his decision.⁵⁷⁴

Although the discovery through a scandal and a poor relationship with his family escalated the tension around his being outed, the expulsion from the family home shows that the family has an informal capacity to take away important rights that the family, as an institution, is delegated to uphold.⁵⁷⁵ For example, being evicted from the parents' home stripped him of constitutional rights such as housing, privacy and dignity. Although his uncle temporarily accommodated him, community rumours about his sexuality led to another eviction. A queered interpretation of sections 22(1) and (2) of the Constitution suggests that Chikondi's father and uncle stripped him of the entitlement to belong to the natural and fundamental unity of the Malawian society whose membership ought to be protected by society and the state, and where the law extends protection from neglect and cruelty.⁵⁷⁶ So far, there is no case in Malawian courts where queer Malawians have challenged exclusion from their families of origin through actions such as eviction from family compounds or harassment.

⁵⁷⁴ (Chikondi, 2014) (Chikondi, 2014)

⁵⁷⁵ E.g. The preamble of the Convention on the Rights of the Child recognizes the family as an institution through which the well-being of its members is secured (Ghandhi, 2004)

⁵⁷⁶ Section 22 (1) and (2) of the Constitution reads:

22. - 1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

2. Each member of the family shall enjoy full and equal respect and shall be protected by law against all forms of neglect, cruelty or exploitation.

Social rejection based on sexual orientation and gender identity increases vulnerability to depression or self-harm.⁵⁷⁷ The expulsion from the family has also had a significant impact on Chikondi's life as he has lost every sense of belonging to his community. For example, as a result of becoming homeless and destitute, he started engaging in sex work through an organised ring of sex traffickers. According to him, the sex traffickers collect younger MSM (YMSM) and book them hotels in the main cities, at which Malawian men pay them (the traffickers) to have sex with the YMSM. The experiences have pushed him to consider committing suicide several times. He narrates the reasons why he has considered suicide:

I was thinking... my own family doesn't like me. I lost even some of my friends because they don't want to be (associated with me) ... you know. If I went... go to school, my... the story is about me. You know... people just say "you know, that one looks like gay". "Yes, he is gay, look"... you just feel like out of place and there is no safe space for you to live. So, I had that, I was thinking of that, because I had no one to talk to. Sometimes you even get discriminated by the... your own community... the gay community... among yourselves... they will discriminate you... you know... so it's really... it's a challenge... it's a big challenge to be gay.⁵⁷⁸

The desperation of queer Malawians received media attention when Eric Sambisa, a Malawian queer activist, who appeared on national television on 1 January 2016 to declare his sexuality and publicly demanded rights for all queer persons in Malawi.⁵⁷⁹ The psychological impact of denial of human rights, especially within the family, must be considered in future research.

Familiar arrangements regarding a non-heterosexual member may at times be influenced by the political role that the family plays in the community. Rumbani is in the age group of 31 to 40 years old. His physical appearance is masculine and heterosexual. He comes from a traditional royal family and his mother is a chief. He is heir to his mother's throne. As a young boy, his parents noticed that he had more interest in boys than girls. When his mother

⁵⁷⁷ (Polders, Nel, Kruger, & Wells, 2008)

⁵⁷⁸ (Chikondi, 2014) (Chikondi, 2014)

⁵⁷⁹ Supra note 430

discovered that he was engaging in sexual relationships with men as a young man, as chief she arranged a wife for him. The wife was arranged for him at a point where he had just moved to town to seek employment, while his mother was still staying at the village. He did not know the woman who was arranged for him to marry, but had to accept her to fulfil his role as heir to the throne.⁵⁸⁰ His role as heir required him to be heterosexual, be married and have children. After the wife was brought to him, he consulted his gay friends who told him that since he now had a wife, he could become bisexual by trying bisexuality relationships with both men and women. His friends told him that being "bi" implied that he could have sexual relationships with both men and women concurrently. In other words, how local queer community had reconstructed bisexuality to mean multiple concurrent partnerships. As such he has been having concurrent relationships with both men and women.

His multiple relationships resulted in a lot of conflicts with his wife. After negotiations, the wife was forced to accept the 'bi' arrangement in support of Rumbani's fulfilment of his royal duty by remaining married. Rumbani's wife must be understood as a victim of Rumbani's obligations as a member of a royal family. In this case, she is obliged to remain in the marriage regardless of her discontent with the oppressive marital arrangement.

Aaaah, but... yes... at the moment I think she is now used to it... because... she has seen a lot of things... I think she just accepted it all. At the moment, I just give her a bit of respect so that she does not compete too much with my gay partners... so at the moment she just resigned and accepted... she is now used and she just accepted it all.⁵⁸¹

This arranged marriage is a tool for enforcing heterosexuality and protecting the institution of the family as the basic unit of society.⁵⁸² Rumbani's family perpetrated an overlooked, but

⁵⁵⁵ (Rumbani, 2014)

⁵⁵⁶ (Rumbani, 2014)

⁵⁵⁷ (Rumbani, 2014)

⁵⁵⁸ (Rumbani, 2014)

⁵⁸² (Jaspal, 2014), (Boellstorff, *The Gay Archipelago : Sexuality and Nation in Indonesia*, 2005), (Boellstorff, *Gay and Lesbian Indonesians and the Idea of the Nation*, 2006),

serious, form of gender based violence on the wife who was forced to observe tradition by involuntarily remaining in an oppressive marriage in order to serve the interests of Rumbani and his family. Future research must examine the impact of homophobia on other members of heterosexual families, especially heterosexual spouses in marriages entered to disguise queer person's identities.

4.4.2.1. Do queer Malawians want gay marriage? Coming out as a gay married couple

Although conservative Malawians reject 'homosexuality' on the assumption that it will result in gay marriages, it is generally considered that queer Malawians are not demanding for the right to marry. This is because the fight for SOGI-based human rights in Malawi has focused on rights associated to HIV and AIDS services, and protection from violence and state persecution. However, during my fieldwork, I interviewed Nthombi and Ntchayi, who were both born male and were living as husband and wife. Their story brings a rarely recorded case of love, companionship, and a desire to have an equal right to marry.

I have already introduced Ntchayi earlier in this chapter.⁵⁸³ Nthombi is in the age group of 18- 25 years old. She grew in the southern region but now stays in the eastern region. She was born in a family of two boys. She is visibly feminine in appearance, with a soft voice and appearance conforming to a typical Malawian female. She works as a hair dresser in a local salon. She has voluntarily disclosed her sexuality to her sister, with whom she is close to and shares an open relationship. The sister has been supportive so far and the revelation has only made their relationship stronger. However, when her extended family realised that she was not interested in women, they 'bought' her a woman and arranged a

⁵⁸³ Supra note 573

marriage.⁵⁸⁴ They eventually had a child and the marriage ended soon after. He then moved to find work in town, leaving his daughter in the care of his parents. While in town, he met Ntchayi and fell in love.

Both Nthombi and Ntchayi had interest in entering a same-sex marriage.

I have wanted to get married to a man. There was never a chance. Legally there is no chance for that. And ... someday I had some counselling with a professional therapist.... hmmm... then he asked me a question; if there can be a chance for you to get married, how would you want it to happen. Would you get married to a lady or a man? If there was a chance for a man. Then I said yes (I would get married to a man), but it's not possible here in Malawi... because the law doesn't recognise that. Then he said fine... What if there happens to be a chance that you can stay married, can you do that? Then I said yes, that can happen, though not legal, but can do that. It's when he said that... then a couple of months ago... it's when Nthombi told me... we were like chatting. Then he said that the thing is not about getting married, but about staying married. People do get married, but are not really married in their heart. So, if you feel like you want this thing for real, we can do it. Then I said ok, let me think about it. Because by then we were not putting on this ring. The ring was different; it wasn't this one. I got this ring on his birthday, and it's blessed at church.⁵⁸⁵ Yeah... it was like... it's when he told me that we can be staying married... and live as a couple. We didn't go to register at church, the church can't accept, the government can't accept, it's just us. It's how we feel about ourselves. Because it's not proper to say you be staying there and I will be staying here. There are lots of temptations, and being... the feeling of not being accepted here in Malawi, you find that gay sex is casual here in Malawi. Because of the need for ... acceptance. There is no law that legalises or says yes... At least if it was passed that this is it... And at least it would have been easier. Yeah... Ok, we bought the rings at the church, and they were blessed there at the Catholic Church. I asked them to bless them.⁵⁸⁶

Uniquely, both families of Nthombi and Ntchayi have recognised them as a married couple.

They are both called by traditional titles assigned to in-laws in heterosexual couple. Their siblings call each other's partner 'alamu', meaning brother or sister in-law. Their parents call them either son in-law or daughter in-law. The recognition of their marriage by their immediate families is the most important form of recognition that they have secured. Thus,

⁵⁸⁴ In the southern region of Malawi, parents of an unmarried son can pay another family cattle to get their daughter's hand for marriage with the son. Sometimes the son and/or daughter enter the marriage involuntarily. In Nthombi's case, this was a forced marriage on both.

⁵⁸⁵ Here, it should be noted that their ring was not officially blessed by the Catholic church with the intention to endorse the same-sex marriage. The strong desire by the two to emulate a religious heterosexual wedding drove them to creatively request a priest to bless their rings, without disclosing that they were intended for same-sex marriage.

⁵⁸⁶ (Ntchayi, 2014)

their extended familiar community has opted not to intervene on the wishes of the immediate family. Borrowing from Ryan-Flood's analysis of Irish lesbians,⁵⁸⁷ and Kong's research on Hong Kong gay men,⁵⁸⁸ Nthombi and Ntchayi have informally secured both families-we-choose and families-of-origin. However, it should be noted that the lack of formal recognition of their union renders them unable to secure SOGI-based rights based on their same-sex identities. For example, they cannot get a marriage certificate and cannot legally claim a married marital status. This story signifies that the issue of same-sex marriage must not be dismissed as a non-issue in the Malawian context.

The story of Ntchayi and Nthombi suggests that same-sex marriage should not be excluded from the needs of queer Malawians. While other queer Malawians such as Mbumba disagree that the demand for marriage may be a step too far,⁵⁸⁹ the needs of those who wish to get married must not be dismissed on the basis of lack of consensus among queer Malawians.

4.5. Conclusion

In this chapter, I have drawn from Weeks' social construction theory to argue that family and kinship are the most basic and unchanging site for enforcing heterosexual norms in Malawi.⁵⁹⁰ It is also the site in which SOGI-based rights are negotiated, primarily based on inclusion and exclusion of familiar membership. Coming out is a critical process through which queer persons claim a non-heterosexual identity through which they are able to claim entitlement of SOGI-based human

⁵⁸⁷ (Ryan-Flood, 2009)

⁵⁸⁸ (Kong T. S., 2012), (Kong T. S., 2012)

⁵⁸⁹ (Mbumba, 2014)

⁵⁹⁰ (Weeks J. , Sexuality, 2010, pp. 20-21)

rights.⁵⁹¹ The stories that I have discussed in this chapter indicate that experiences and outcomes of coming out are diverse in the Malawian context. The focus on instances of stigma and discrimination in previous research and NGO reports have overlooked positive experiences experienced by some queer Malawians.⁵⁹² I have proposed that where one's same-sex sexual identity is revealed to society, the male participants whose sexual identities could otherwise be described as transgender, were more likely to be accepted by their communities. This is because they are viewed as having less capacity to 'commit' mathanyula (where mathanyula is understood as anal sexual penetration by an adult male on an underage boy). However, this should not be misinterpreted to imply that they do not experience other forms of stigma and discrimination based on their non-conformity as seen in the case of Tiwonge Chimbalanga.

I have noted that some families adopt harmful strategies of navigating homophobia, such as arranging a heterosexual marriage to disguise same-sex identity of their family members. Future research must investigate the negative impact of such arrangements on the unwilling (heterosexual) spouses. What is clear from the narratives is that without formal recognition of non-heterosexual sexual citizenship in terms of identity,⁵⁹³ one cannot fully claim SOGI-based human rights. Informal recognition at the family level does not guarantee entitlement of human rights in one's own right as a queer person. The case of Nthombi and Ntchayi's marriage problematises the prevailing local rhetoric that marriage is exclusively heterosexual in Malawi. Furthermore, it supports Amadiume's call for critical exploration of the complexity of African familiar culture, independent of the framing of dominant (western) sexuality discourse.⁵⁹⁴

⁵⁹¹ (Plummer K. , *Sexual Stigma: An Interactionist Account*, 1975), (Plummer K. , *Intimate Citizenship: Private Decisions and Public Dialogues*, 2003)

⁵⁹² The previous reports include (CEDEP & CHRR, *Human Rights Violations on the Basis of Real or Perceived Sexual Orientation and Gender Identity in Malawi* , 2014), (CEDEP & CHRR, *Violence and Discrimination Based on Real or Perceived Sexual Orientation and Gender Identity in Malawi- Human Rights Violation Report 2015, 2016*), (Baral, 2009), (Currier & McKay, *Pursuing social justice through public health: gender and sexual diversity activism in Malawi*, 2017),

⁵⁹³ (Bell & Binnie, 2000), (Plummer K. , *Intimate Citizenship: Private Decisions and Public Dialogues*, 2003), (Richardson D. , 2000), (Richardson D. , *Rethinking Sexual Citizenship*, 2015)

⁵⁹⁴ (Amadiume, 1987)

Importantly, this suggest that the issue of marriage between queer persons must not be dismissed as peripheral to the sexuality discourse in Malawi.

5. Social Regulation of Same-sex sexualities in Malawi

In the last chapter, I have argued that the family represents the basic and fundamental site at which sexuality is regulated, and through which SOGI-based human rights are negotiated in Malawi. It is also the site through which meanings about sexuality and human rights are constructed and learned. I also discussed coming out as a critical process through which one asserts a queer identity in order to demand SOGI-based human rights. I have stated that attaining recognition as queer is a prerequisite for claiming entitlement to such human rights. I found that while the limited recognition of family members as queer enable limited access to some rights within the familial spaces, they cannot freely and meaningfully enjoy full entitlement to SOGI-based human rights. Legal recognition of their queer identities is required as a prerequisite for enjoying Malawi's constitutional and international human rights obligations.

In this chapter, I focus on the regulation of sexualities and SOGI-based human rights in the public sphere with focus on the enforcement of heterosexual norms by public institutions and the broader society. There are numerous public institutions which act as important sites for negotiating sexual citizenship rights in Malawi, but three stand out namely, organised religion, law enforcement, and the public health system. First, organised religion deserves scholarly attention because it is the driver of Malawian moral standards. Religious beliefs among Malawian communities are perhaps the hardest to shift in terms of attitudes towards 'homosexuality'. Unlike culture which is more secularist Christianity and Islam are understood to be noncompromising when it comes to homosexuality. Second, police are the primary enforcers of the penal laws which are the source of persecution of queer persons in Malawi and the continent. As stated numerous times earlier in this research, the biggest fear for all the participants was arrests and harassment by the police. Third, due to the high negative impact of HIV and AIDS on MSM, it is now established that Malawians face obstacles in accessing relevant public health services as a result of their sexual orientation and gender identity. While there is considerable previous research that has implicated churches, the police and public health facilities as obstacles to

the access of SOGI-related human rights in Malawi,⁵⁹⁵ this chapter will contribute by bringing first hand stories of queer Malawians in terms of how they are impacted by each of the drivers. Just as in the last chapter, I will also discuss stories of inclusion of queer Malawians by the three institutions.

5.1. The role of organised religion

In Chapter 3, I stated that more than 90% of Malawians belong to either Christian or Muslim religions and that religious groups are very influential in guiding public opinion in the country.⁵⁹⁶ The church leads its membership in upholding negative sentiments about 'homosexuality.' A previous global survey has found that in countries where religion plays a significant role in peoples' lives, there is less acceptance of homosexuality.⁵⁹⁷ Christians and Muslims throughout Sub-Saharan Africa express strong opposition to homosexual behaviour.⁵⁹⁸ A research study in southern Africa, for example, has found that religion had an influence on negative attitudes and behaviour towards homosexuals and gender non-conforming people in South Africa.⁵⁹⁹ The high negative attitudes about homosexuality in Malawi are consistent with the continental and global overview. For example, in a study by CEDEP and CHRR on *Knowledge, Attitude, and Practices of Religious and Traditional Leaders Related to MSM and LGBTI in Malawi*, it was found that the majority of religious leaders were against MSM or LGBTI existing as members of their religious community.⁶⁰⁰ Some of the leaders interviewed called queer persons animals and abominable in the eyes of

⁵⁹⁵ (Baral, 2009), (Beyrer, et al., 2010), (CEDEP & CHRR, Human Rights Violations on the Basis of Real or Perceived Sexual Orientation and Gender Identity in Malawi, 2014), (CEDEP & CHRR, Violence and Discrimination Based on Real or Perceived Sexual Orientation and Gender Identity in Malawi- Human Rights Violation Report 2015, 2016), (Centre for the Development of People & AIDS Fondnet, 2012), (Carroll, Aengus, 2016), (Mwakasungula, 2013), (Wirtz, et al., 2014), (Trapence, et al., 2012), (Wirtz A. L., et al., 2013)

⁵⁹⁶ Supra note 209

⁵⁹⁷ (Pew Research Centre, 2013, pp. 4-5)

⁵⁹⁸ (Pew Research Centre, 2010, p. 16)

⁵⁹⁹ (The Other Foundation; Human Sciences Research Council, 2016, p. 58)

⁶⁰⁰ (Centre for Human Rights and Rehabilitation; Centre for Development of the People, 2013, p. 21)

God.⁶⁰¹ Out of the 200 participants interviewed in the research, 77% of the religious leaders were of the view that the law should punish and convict queer people.⁶⁰²

Religiosity among Africans is not unproblematic. Focus on those religious groups that are homophobic has tended to lead to overlooking the complex characteristic of African religious values beyond conservative elements of Christianity and Islam. Epprecht has rightly noted that Africa also includes secular, traditional and ancestral beliefs.⁶⁰³ Within the beliefs is the concept Ubuntu, a social philosophy aimed at honouring the dignity of an individual and maintaining mutual and interconnected relationships.⁶⁰⁴ It stems from a South African Nguni proverb '*Umunthu Ngumuntu Ngabantu*' which translates to '*A person is a person because of others*'.⁶⁰⁵ This concept brings humanity, humaneness, care for others, and responsibility for community, community relationships, and harmony with the cosmos. Ubuntu is therefore central to being in an African community and the foundation for social citizenship in Africa.

The concept of *Ubuntu* has different variations for different African communities, with each variation bringing with it different meaning.⁶⁰⁶ For example, in Malawi alone, the Chewa people call it *uMunthu*, Yawo people call it *bunhu*, and Zulu people call it *vhutu*.⁶⁰⁷ The centrality of Ubuntu philosophy in African and indeed Malawian society calls for rethinking of how it influences the application of Christian or Islamic belief systems. Christian beliefs are diverse and dynamic.⁶⁰⁸ For example, liberal churches are likely to be more tolerant towards queer persons than

⁶⁰¹ (Centre for Human Rights and Rehabilitation; Centre for Development of the People, 2013, p. Ibid)

⁶⁰² (Centre for Human Rights and Rehabilitation; Centre for Development of the People, 2013, p. 31)

⁶⁰³ (Epprecht M. , *Sexuality and Social Justice in Africa: Rethinking Homophobia and Forging Resistance*, 2013, p. 66)

⁶⁰⁴ (Nussbaum B. , 2003)

⁶⁰⁵ (Nussbaum B. , 2003)

⁶⁰⁶ (Tambulasi & Kayuni, 2005)

⁶⁰⁷ (Tambulasi & Kayuni, 2005)

⁶⁰⁸ (Epprecht M. , *Sexuality and Social Justice in Africa: Rethinking Homophobia and Forging Resistance*, 2013)

conservative ones. Similarly, some Africans are deeply religious while embracing the ethos of Ubuntu.⁶⁰⁹ It is therefore important not to be uncritical of the complexity or dynamics or homophobia within the religious belief systems among African or indeed Malawian societies. Any sweeping claims that religious beliefs are predominantly homophobic must be treated with caution. Similarly, that more than 90% of Malawians are religious needs further unpacking in order to understand how the beliefs therein facilitates homophobia.⁶¹⁰

What is clear about Africa is that leadership of conservative churches has been influential in pushing the anti-gay agenda.⁶¹¹ The most notable extreme taken by the faith community was the 'kill the gays' law passed in Uganda in 2009, which was sponsored by the US far right Christian conservatives.⁶¹² In Zambia, religious groups successfully campaigned against a United Nations' call for the recognition of 'LGBT rights,' citing that the calls were the work of the devil and signs of the end times.⁶¹³ Although the bible is cited as the authority from which rejection of homosexuality is based, there is a close linkage with the assumption that condemning homosexuality and homosexuals is necessary to protect African public morality.⁶¹⁴ The influence of the church in enforcing heterosexual norms must be viewed as a key driver to the informal and formal resistance to the protection of SOGI-based rights.⁶¹⁵

Since the case of Monjeza and Chimbalanga in 2009, local religious leaders have been at the forefront advocating for rejection of homosexuality. For example, in 2012, the Nkhoma Synod of

⁶⁰⁹ (Epprecht M. , *Sexuality and Social Justice in Africa: Rethinking Homophobia and Forging Resistance*, 2013, p. 67)

⁶¹⁰ (Dulani, Boniface; Sambo, Gift; Dionne, Kim, Yi, 2016)

⁶¹¹ (Thoreson, 2014)

⁶¹² (Kaoma, Kapya, 2012), (Kaoma, *Globalizing the Culture Wars U.S. CONSERVATIVES, AFRICAN CHURCHES, & HOMOPHOBIA*, 2009)

⁶¹³ (van Klinken A. S., 2013)

⁶¹⁴ (Phillips O. , 2004, p. 93), (van Kilnken, 2015), (van Kilnken, 2015)

⁶¹⁵ (Chitando & van Klinken, 2016)

the Church of Central African Presbyterians issued a pastoral letter in which they called for its members to fight for the elimination of homosexuality from Malawian society:

based on biblical truth the Synod condemns in its totality the practice of homosexuality. It is biblically and culturally an evil that dehumanizes people and provokes God's wrath. We advise our members to categorically refrain from such a practice and advocate its termination from our society. We stand in solidarity with the majority of Malawians who equally condemn the practice of homosexuality.⁶¹⁶

In the same year, the Malawi Council of Churches issued a communique at its annual general meeting in which they said that homosexual and sodomy cannot be an acceptable norm in Malawi society.⁶¹⁷ Defending their position, the communique cited biblical verses to argue that homosexuality and sodomy were biblically sinful, morally unhealthy and divinely against God's nature. They urged Malawi not to prioritise minority rights over all other rights that are in the interest of the majority population. In 2014 the Secretary General of the Muslims Association of Malawi proposed that queer persons should face death:

Although Malawi is regarded as a secular state but the country is blessed with God fearing citizens who can't afford to deviate from God's commandments for the sake of pleasing others who practice the act... Even animals like goats don't do this, what more with human beings like us who were blessed with wisdom by the Almighty God? The offenders need to be handed death penalty as a way of making sure that the issue is curbed.⁶¹⁸

In 2016 the Episcopal Conference of Malawi, the supreme body in Malawi's Catholic Church, issued a pastoral letter in which they expressed deep concern that there were campaigns for homosexual rights and homosexual union that were threatening the institutions of the family and marriage.⁶¹⁹ They also faulted the government for putting a moratorium on anti-gay laws, proposing that the government had bowed down to donors and betrayed Malawians instead. Also in 2016, the Evangelical Association of Malawi issued a widely-publicised press statement on same-sex marriages in which they called on the government not to bow down to alien practices that undermine Malawi's cultural values.⁶²⁰ They also called for the government to call for a national

⁶¹⁶ (Church of Central African Presbyterian- Nkhoma Synod, 2012)

⁶¹⁷ (Nyasa Times, 2012)

⁶¹⁸ (Malawi Muslim Association)

⁶¹⁹ (Episcopal Conference of Malawi, 2016)

⁶²⁰ (Evangelical Association of Malawi, 2015)

referendum on the issue, promising to be vigilant in resisting deviance in society. Knowing the political dividends of siding with religious groups, which command over 90% of the Malawian population, the current president Peter Mutharika opted to propose a national referendum to decide whether same-sex relations should be legal or not.⁶²¹ Prominent politicians have also rallied behind calls for rejection of homosexuality and their rights, including a former Minister of Justice⁶²² who led his party in rejecting President Joyce Banda's declaration of a moratorium of gay arrests and anti-gay laws in 2012.⁶²³ Religious leaders have also taken advantage of their access to the president to reiterate their rejection of homosexuality through public prayers or staging nationwide protests.⁶²⁴

The public campaign by the church to reject homosexuality or SOGI-based human rights sets the tone for the majority of Malawians. The message that homosexuality is sinful and punishable is reiterated at services in conservative churches nationwide. Chimwemwe is a member of the Adventist church. During Sunday prayers, the preacher at his church regularly preaches that homosexuality is sinful, and they are warned that God will burn them just as he did with the city of Sodom and Gomorrah. This messaging creates anxiety within him on top of the anxiety he has battled all his life to seek social acceptance. As a result, although he goes to church regularly, he does not feel welcome and deals with an internal conflict of whether he should continue to go to church to worship

Sometimes, because it is found that some of the preaching say things against us, calling us sinners, that we will be burnt in hell etc. So, I see that there are of course some conflicts... In myself, I just feel that this is normal to me, because I believe that I was born like that. There is no one who taught me or told me to be doing this. It just happens that when I see

⁶²¹ (Nyasa Times, 2015)

⁶²² (Nyasa Times, 2012)

⁶²³ President Joyce Banda was the interim president of Malawi from 2012 to 2014. During her first State of the Nation address to parliament, she announced suspension of sections 153, 156 and 137A of the Penal Code, pending appeal by parliament. Please read (Nyasa Times, 2012)

⁶²⁴ For example, please read:

(Nankhonya J. , 2016), (Chunga, 2016), (Chimjeka, 2016)

a guy I get feelings etc... there is no one who has sat me down and say; let's do this. I see that it's the thing that I was born with. So why should they preach against us?⁶²⁵

Similarly, Mfulu, who is a devoted Catholic member, felt that the contemporary priests focus much on attacking homosexuals than past priests used to. In this case, the priests are actively exercising agency to popularise the official church position on the issue, further constructing homosexuality as an unpreferable choice. As a result, Mfulu, who initially accepted his sexual difference, now views his sexuality as disorderly and in need of healing. He also stated that he feels guilty and prays that he should be forgiven by God one day, for being a sinner.

Yeah, I feel guilty conscience... Being a Christian, am a devout Christian, choir member, but I do that. What can I do? I was born like that. So, I still go to church. Maybe one-day God will purify if it's a sin, but its him who created me like that. I feel guilty conscience, but what can I do? Its him who created me like that... It's not, it's not... it's not a thing that is done by many people. It's like a disability, so that's why I feel guilty sometimes.⁶²⁶

The experiences by Chimwemwe and Mfulu suggest some religious leaders actively encourage punishing people based on their sexual orientation and gender identity through rhetoric. However, unlike the Christian churches, Sibusiso, the only Muslim participant in this research, expressed deep fear that his mosque may not only condemn queer persons during prayers as they had previously threatened to take action to punish its members who are found to be not conforming with heterosexuality.⁶²⁷ To him, there is no other sin which poses a bigger obstacle to his practising Islam. His fear was visible during the interview when he mentioned the possibility that the mosque leaders may punish him through corporal punishment or even death. Future research about SOGI-based violations in Malawi must investigate the impact of Islamic laws and practices on the welfare and inclusion of queer Muslim Malawians.

⁶²⁵ (Chimwemwe, 2014)

⁶²⁶ (Mfulu, 2014)

⁶²⁷ (Sibusiso, 2014)

For those who do not conform to heterosexuality and want to continue attending church as a full member, they are forced to give up their identity rights. For example, Masautso, who is a transgender woman still in the closet and a devoted member of the Evangelical church is forced to act like a heterosexual man when she goes to church. It is difficult for her to live two lives just because she wants to retain membership to his church.⁶²⁸

On this, every church condemns us. There is a problem... they are against our sexualities... Every church... I just go because just like everyone, I feel I have to pray. I just go so that I have a chance to pray. It's depressing especially on days when the message is against us, so I am disappointed when praying. But still I go. I just carry on like everyone else... I go there as a man. No one knows my sexuality, I don't think... Of course, there may be some people who may become suspicious of me but they can't come up because am not open to them.⁶²⁹

In the case of Rumbani, who also maintains strict 'discipline' at church, he opts not to approach anyone at church even if he sees anyone who may be gay. He fears that if he approaches anyone, it may result in him being outed.

I maintain my discipline so that no one should know who I really am. Because sometimes I see people who I know they are like me... from the way they look... but it's hard to approach them. I just hold myself back and that's difficult.⁶³⁰

For both Masautso and Rumbani, the church is a site which enforce them to remain in the closet for fear of exclusion or stigma. In the case of Chintheya, who lives as a man, reported that he stopped going to Anglican church because the church only allows women who wear dresses. Since he only wears male clothing, he is unable to attend church. The above experiences suggest that attending conservative churches is difficult for those whose nonconformity are more visible (e.g. transgender) as they have to make the effort to alter their appearance. The high levels of religiosity among Malawians suggest that organised religion plays a significant role in peoples' lives. As a result, rather than rejecting it as 'anti-gay', queer activists need to engage with Malawian queer people's desire to remain affiliated with congregations.

⁶²⁸ (Rich A. , 1980)

⁶²⁹ (Masautso, 2014) (Masautso, 2014)

⁶³⁰ (Rumbani, 2014)

In an effort to eliminate homosexuality, places of worship that follow end-time gospel regard homosexuality as a state of being possessed by the devil and therefore requiring a cure through repentance, prayer and exorcism.⁶³¹ Pentecostalism is particularly known for its uncompromising position towards non-conforming sexual orientation and gender identities.⁶³² Some participants reported that their congregations were encouraging their queer members to come out for the purpose of coercing them to undergo exorcism on belief that it would change them to heterosexuality. As in the case of Chintheya cited earlier, high religiosity in Malawian society increases the likelihood of queer persons accepting religious rituals aimed at converting them to heterosexuality.⁶³³ Chikondi and Temwa were convinced by their churches that they could be delivered from the devil that had casted homosexuality on them. Chifundo reported that his Pentecostal church has organized prayers for him to be converted to heterosexuality.

Errrm, the only church that I used to go other than my church, just visiting, because my sister in law is a pastor there. It's the church that they know, because my sister in law has prayed for me, she has taken me to church to pray for me so that I should change. So that's the only pastor who knew. They accepted me there, only that they were praying for me so that I should change... Counselling me, praying for me, yeah... " You are a man, you should find a woman. They read bible verses. Yeah'.⁶³⁴

Because of repeated messages against homosexuality and public announcements by the church that they could deliver queer people from being possessed by 'homosexuality, Temwa has developed self-stigma which makes him feel that he is possessed by the devil and has approached his church to seek deliverance so that he should be converted back to heterosexuality.

At church... mostly it was prayers and fasting. I even entered the 40 days of fasting. Of course, it wasn't 40 days continuous fasting. But we were eating between 4pm and midnight only. So, it was 40 days of fasting for me to change. Of course, it wasn't imposed, they were asking me on what they were trying. Because I was willing to change my sexual orientation, I was accepting. I used to believe that God changes people. They say God can change people, I believed that I can change. But after finishing the 40 days, deliverance prayers, counselling and a lot of things that were happening... Counselling, prayers, putting

⁶³¹ (Chitando & van Klinken, 2016, p. 62), (van Klinken A. , 2015), (Kaoma, Kapya, 2012)

⁶³² (Chitando & van Klinken, 2016, p. Ibid)

⁶³³ Supra note 552

⁶³⁴ (Chifundo, 2014) (Chifundo, 2014)

hands on me, anointing oil, holy deliverance water.... lots of prayers and happenings, you know Pentecostal churches, you know a lot of things happen, a lot of beliefs on how to free people. All that didn't work on me for me to change my sexual orientation. What became more difficult is that they were accusing me for refusing to be delivered... so I concluded that its either God is not there, or he doesn't answer. Maybe God doesn't want to answer me. So, I backtracked on such stuffs. Because I was feeling betrayed by God and the church. I was willing to change but there was no tangible change taking place. So, when people were mentioning the church and God, and connecting with sexuality, even now, I don't feel comfortable when people recommend church intervention. I see that it's something I have tried before, and if something that failed, then it failed.⁶³⁵

Temwa has also visited three more churches seeking deliverance, but all efforts have been futile.

The failure to be converted to heterosexuality as experienced by Temwa is supported by the report by ASSAf that conversion methods are false, it can also be added that conversion therapies violate the dignity of those subjected to it, and therefore a human rights violation.⁶³⁶

The feeling of being possessed by demons was also shared by Chikondi who attends the Pentecostal church. He has approached his church to seek deliverance from what he has grown to believe to be a devil living in his soul. During the interview, he showed signs of disillusion and belief that he was really possessed by the devil. However, in his case, disclosure of his sexuality to church elders resulted in them disclosing the information to some members of the church, leading to experiences of stigma by church members.

I have gone to churches and instead of people trying to help with me, to pray with me together, they in turn reveal and discriminate and you know, it's really a struggle, it's hard... and I feel churches, pastors and all religious people were supposed to promote love and unity to the whole society, they promote hatred.⁶³⁷

Spiritual conversion of homosexuality has been reported among American evangelist groups, and includes the infamous 2009 'Seminar on Exposing the Homosexuals' Agenda', which was held in Uganda by American Evangelists to promote Christianity's rejection of homosexuality in Uganda.⁶³⁸

⁶³⁵ (Temwa, 2014)

⁶³⁶ (Academy of Science of South Africa, 2015)

⁶³⁷ (Chikondi, 2014) (Chikondi, 2014)

⁶³⁸ (Kaoma, Conversion Therapy: A Bigger threat to Africa than Scott Lively, 2014)

At the conference, the presenters marketed conversion therapy as a successful strategy to eliminate homosexuality. Similar therapy programmes have been reported in Zambia and South Africa⁶³⁹. The essentialist idea about conversion has been dismissed by the Academy of Science of South Africa (ASSAf) who have advised that no evidence supports that same-sex orientation can be changed through 'conversion' or 'reparative' therapy and that such therapies were dangerous and conflicted medical ethics.⁶⁴⁰ While the report by ASSAf was in reference to medical conversion programmes, its findings are relevant to the religious rituals which have equal potential psychological impact on queer peoples. It is important that African states must outlawing such conversion programmes.

Although most the participants reported stigma and discrimination in relation to their religious community, there exist some churches in Malawi which are welcoming to members who are non-conforming. Tionge who is proudly out as a transgender woman is fully accepted by her church and goes to church as a woman.

At church, they know am (trans). A few us go to that church. Once they see us coming, they know we are gay and don't turn us back. We pray and go home... But maybe they talk among themselves but can't come to face us. We don't face any chipongwe.⁶⁴¹ I don't care, this is me. Nobody can change me.⁶⁴²

Similarly, Dimingu, who goes to the same church as Tionge, reported that he does not face any stigma at church.

There I face no discrimination, no problem... Maybe, because action speaks louder than words. So, I don't know, because nobody has asked me. But I go regularly, they know that am a member.⁶⁴³

It should however be emphasised that Tionge and Dimingu go to a contemporary liberal church whose majority membership youth and the preachers are open to a progressive interpretation of the Bible.

⁶³⁹ Kaoma, K (2004) Ibid

⁶⁴⁰ (Academy of Science of South Africa, 2015, p. 52)

⁶⁴¹ Chipongwe is the Chichewa translation for insult

⁶⁴² (Tionge, Life story Interview in Malawi, 2014) (Tionge, Life story Interview in Malawi, 2014)

⁶⁴³ (Dimingu, 2014)

The tolerance by such churches may be attributed to liberalism in the interpretation of the Holy Bible or the integration of the spirit of ubuntu among the practising members and its leadership. Research has also shown that younger people are likely to have more tolerant views about homosexuality than older ones.⁶⁴⁴ While a previous survey about attitudes towards homosexuality has shown that anti-gay sentiments equally exist across all ages in some African countries,⁶⁴⁵ younger Malawians would report more toleration towards non-conforming sexual orientation and gender identities in Malawi if the definition of 'homosexual' was clarified to exclude non-consensual same-sex conduct or sexual activities with minors. Previous research about Malawi has not looked at the potential positive role of liberal churches in facilitating the inclusion of queer Malawians and promotion of the recognition of their SOGI-based human rights. By embracing modernity and liberalism, such churches contradict the view that human rights are essentially incompatible with religion.⁶⁴⁶ In other words, such churches have the potential to reconstruct the understanding of human rights in relation to sexual orientation and gender identity in a manner that reconciles religious teaching and the need to protect everyone from discrimination. The positive experiences outlined also call for future research into the opportunities for inclusion within churches.

5.2. The role of law enforcement

Malawian police are known for using anti-gay penal laws to detain, convict, harass and blackmail queer persons in Malawi.⁶⁴⁷ Some of the most notable arrests in recent years include the arrest of Chimbalanga and Monjeza in December 2009, and the arrest of Kulemela and Gonani in December 2015. In both cases, police unprofessionally initiated inhumane anal examinations to be conducted on the accused as proof of homosexuality. Following the arrest of Monjeza and Chimbalanga,

⁶⁴⁴ (Pew Research Centre, 2013, p. 2)

⁶⁴⁵ (Pew Research Centre, 2013, p. 6)

⁶⁴⁶ (Fagan, 2017)

⁶⁴⁷ (Mwakasungula, 2013), (Price, 2010), (Ratele, 2014)

Police issued a public warning that they would arrest anyone supporting LGBT rights.⁶⁴⁸ In the case of Kulemela and Gonani, the tests included compulsory HIV testing, a malpractice that is discouraged in Southern Africa and declared unconstitutional in Malawi.⁶⁴⁹ Previous research about sexuality in Malawi has not provided first hand stories of queer Malawians' fears and experiences in relation to law enforcement officials. In this section, I argue that they continue to suffer at the hands of police, who prefer to use anti-gay laws to persecute queer Malawians while ignoring human rights obligations. I also present stories where some police officers have extended protection to queer persons.

All participants in this research cited the fear of the police as a major obstacle to their freedom to live as queer Malawians. Despite the moratorium on gay arrests in Malawi in 2012,⁶⁵⁰ Chiheni remained in the closet because he feared that police would still arrest him if they knew that he was queer. This fear existed because he had heard numerous times about many other queer Malawians who were detained and harassed by police in the period after the moratorium was declared.

I don't want anyone to know, because as of now, it's illegal in Malawi although they suspended arresting us. But it remains illegal and they arrest us whenever they want.⁶⁵¹

The continued existence of anti-gay provisions of the Penal Code serves as a tool that scares queer Malawians from living freely. The participants also reported that the risk of arrest does not only come as a result of police directly identifying those who are queer, but also by receiving tips from community members. Police are likely to arrest and harass queer persons based on a tip from community members to maintain the public impression that they are tough on homosexuality. For example, Senzo fails to attend any gathering of queer Malawians because he fears that police may

⁶⁴⁸ (Nyasa Times, 2010),

⁶⁴⁹ (Southern African Litigation Centre, 2015)

⁶⁵⁰ Supra note 623

⁶⁵¹ (Chiheni, 2014)

be tipped off regarding such gatherings, as it has been in a few past cases where people were rounded up and harassed or detained.

I can say that I hear of gay parties. Sometimes I go, but usually I turn back after already reaching the front door... we hear lgbt's being rounded up by police at a party... sometimes I fear that someone may tip the police... maybe a member (may tip police) out of malice. These days, with the free call line for Police... for emergency, it can happen that someone tip them. So, I fear. I haven't gone to the parties, but know of such parties. Have changed my mind upon reaching the door, cold feet and went back.⁶⁵²

The real force of sections 137A, 153 and 156 of the Penal Code lies in the potential for police to detain, arrest, harass, blackmail or even discipline queer persons.⁶⁵³ In addition, rhetoric by leading politicians, religious and traditional leaders, government officials and the public legitimise such potential as socially acceptable.⁶⁵⁴ Arbitrary actions by Police, despite the moratorium, suggest that they disregard government directives and abuse their authority. For example, Rumbani was beaten by members of his community based on accusations that he was queer.⁶⁵⁵ When he reported the matter to police, the case was registered but the police decided not to take any further action against the perpetrators because the complainant was allegedly homosexual queer person. The police concluded that the perpetrators of the beating must have had legitimate allegations, although Rumbani denied being queer when asked by the police officials.⁶⁵⁶ In the case of Ntchindi, one person who knew that he was queer confronted him at a shop and accused him of making sexual attempts on him. Although he denied the allegations, police who were passing by arrested him (Ntchindi) and locked him up for three days. They kept him for three days besides him repeatedly denying the allegations.

I just remember that I was at my friend's place, so I spoke to a friend and asked for Brandy. We went to town to the (local shop) ... when we went in a group of 3 or 4 people came in, so when going out one of them attacked me, saying we had previously met at (a local pub) and I opened his zip and sucked his dick. And I said "what"???. At the same time police was passing by, so my friends ran away into our car, leaving me alone with the guy. The police came and asked what was going on. The guy said I sucked his dick and he claimed to have reported to the police. The police asked him where said the alleged acts occurred,

⁶⁵² (Chandiwira, 2014)

⁶⁵³ (Parker, Petchesky, & Sember, 2007, p. 94)

⁶⁵⁴ (Human Rights Watch, 2003, p. 63)

⁶⁵⁵ (Rumbani, 2014)

⁶⁵⁶ (Rumbani, 2014)

and he mentioned Ndirande. He said it happened almost 4 months ago. You know how the police work, unprofessionally. The guy had lied that he had previously reported to police. It wasn't true. We went to Blantyre police and there they locked me up. I asked them why they were locking me up because if he had said that I touched his private parts... he is old, over 25, he had liberty to accept or refuse. You see, my voice didn't go far. They locked me up from Sunday and I left on Tuesday. They didn't charge me with anything because there was no evidence on anything.⁶⁵⁷

In previous research, Chibwezo has found that queer Malawians are falsely accused of making sexual advances in the hope that they will pay a ransom to settle the matter without any arrest by police.⁶⁵⁸ The arbitrary actions by police against requirements of the law indicate a disregard of the legal obligations of the police. In principle, Ntchindi has a right to approach the Malawi Human Rights Commission or the Office of the Ombudsman for redress in accordance with section 15(2) of the constitution. However, he felt that such institutions would not help someone who was queer.

In recent times, some police officers have become progressive by extending protection to queer Malawians. In another case, involving Ntchindi, police rescued him from a mob who attacked him after accusations regarding his sexuality. Patrol police rescued him and took him to the police station for his safety. This time around the police treated him as a victim

The police took me to Soche Police, and said they took me away because the crowd was too big, ... they told me that they had no evidence that I was gay because no one has complained. They said they took me away because it was possible that the crowd would have killed me. They told me to be very careful and choose carefully where to drink. If people know that am gay, I should avoid such places. It's better to go to a place where it's comfortable and safe. They said that they won't lock me up, but have just rescued me to keep me safe. They said it was up to me, and asked me to get transport to go home. I told them not to worry. I called someone to come pick me up... I was born in Malawi and will die in Malawi, and no one should intimidate me because my sexual orientation is gay, so no one can bar me from going to any place.⁶⁵⁹

⁶⁵⁷ (Ntchindi, 2014)

⁶⁵⁸ (Chibwezo, 2011)

⁶⁵⁹ (Ntchindi, 2014)

In February 2016, the locals press reported that police rescued a 19-year-old Malawian from mob justice after he was accused of being homosexual.⁶⁶⁰ He was also kept at a police station, as a victim, until tensions settled. Two months later, it was also reported in the press that police rescued a transgender woman sex worker from mob justice after one customer accused her of not disclosing her sexual identity prior to a sexual encounter.⁶⁶¹ The positive actions by some police officers have been attributed to the continued engagement between CEDEP and police aimed at training them on how to be responsive to homophobic violence. In the same year, CEDEP held a training workshop for police officers on SOGI-based human rights aimed at training police officers to become conversant with how to protect rights of queer persons.⁶⁶² The event was graced by the Inspector General of Malawi. While the police have a long way before fully guaranteeing extending full protections to queer persons, these stories suggest that they are taking steps to extend protections to queer persons. More training and engagement with the leadership of the police has potential to reconstruct queer Malawians, as citizens who deserve human rights protection and fair treatment just like any other citizen. Malawi's police programme should include explicit mention of strategies to enforce constitutional values related to protection and active promotion of SOGI-based human rights.

5.3. The role of public health systems

The public health system is an important site for the policing of sexuality and negotiating SOGI-based human rights in Malawi. In a first-ever study to investigate risk of HIV infection among MSM in Namibia, Botswana and Malawi published in 2009, it was found that MSM in Malawi were unlikely to disclose their sexuality to public health officials than in Namibia and Botswana.⁶⁶³ The

⁶⁶⁰ (Kampanikiza, 2016)

⁶⁶¹ (Khamula, 2016)

⁶⁶² (Nankhonya J. , 2017)

⁶⁶³ (Baral, 2009)

report highlighted human rights abuses experienced by the MSM including denial of access to housing, fear to approach health service facilities, fear to freely walk around, blackmail and extortion, and rape.⁶⁶⁴ In another first ever study of bisexual partnerships and bisexual concurrency among MSM in Malawi published in 2010, it was found that Malawian MSM had an HIV prevalence rate nearly twice the national prevalence.⁶⁶⁵ In the same year another study was released on stigma, health care access and HIV knowledge among MSM in Malawi, Namibia, and Botswana, it found that experiences of discrimination by health care service-providers led MSM to fear seeking health care services, resulting in Malawi being with the lowest rates of MSM seeking and utilising HIV and STI services besides having the highest rates of HIV infection among the three countries under study.⁶⁶⁶ A study of community leadership by men who have sex with men in the response to HIV found that the local context about gender, male sexuality and human rights influenced the type of interventions adopted MSM communities.⁶⁶⁷ In a 2014 study of the HIV prevalence and sociobehavioural characteristics among MSM across seven sites in Malawi, it was noted that criminalisation of same-sex conduct was a major legal and social obstacle to the identification of research respondents.⁶⁶⁸ The recommendations to Government in the study included the decriminalisation of same-sex conduct, addressing stigma and discrimination, and protection of the rights of MSM to access HIV services.⁶⁶⁹

In this section, I discuss first hand experiences of queer Malawians at health facilities to reiterate that they continue to face obstacles when seeking health-related services, thereby not freely enjoying their SOGI-related human rights, including the right to health. The majority of the participants who visited the public health facilities did so because of a sickness related to sexual health. This indicates the importance of considering SOGI-related rights from the health

⁶⁶⁴ (Baral, 2009)

⁶⁶⁵ (Beyrer, et al., 2010)

⁶⁶⁶ (Fay & al, 2010)

⁶⁶⁷ (Trapence, et al., 2012, p. 402)

⁶⁶⁸ (Wirtz A. , et al., 2014, p. 53)

⁶⁶⁹ (Wirtz A. , et al., 2014, p. 56)

perspective. For example, when Chifundo went to a public health clinic when she had developed a sexually transmitted infection, she reported that the clinical officers who were treating her went around the clinic to tell the rest of the staff that there was a queer patient who had come with an anal infection. On his way out upon receiving treatment, she found a lot of clinical staff at the exit door and they were all ridiculing her as she walked out.

At one time at BLM I was provoked, because the doctor shouted at me a lot when I honestly told him my problem. Unfortunately, the STD didn't even appear in the back, but in the front. But to get help I told him that I was having anal sex, a man 'slept' me but I had an STD at the front. He shouted at me and took me for an injection at the nurse's office. At the time, I was leaving the doctors place, he had already told all the clinic. And when leaving I found a crowd at the reception. People were looking and ridiculing and asking disrespectful questions.⁶⁷⁰

This case is important because although she accessed treatment, the right to health, the unfavourable environment in which she received treatment means that she would be hesitant to return to the clinic due to the bad attitude by the staff. As such, it can be concluded that he only enjoyed the right partially, and it is not guaranteed that he would seek such a right at this clinic in future. In other words, medical treatment is not enough, but also a favourable environment in which one receives such treatment. In another scenario, she would be forced to disguise her transgender identity to avoid ridicule, and in the process, lose her identity rights.

In the case of Musandide, he has opted not to go to public health facilities when he gets an anal infection to avoid the rude personnel. His fears are based on what he has heard about the bad experiences that his queer friends have experienced upon visiting public health facilities.

I have never gone to public clinics. I have had an anal infection, but I was afraid to go. I opted to go to a gay friend who gave me some medication... I was afraid that the doctors may speak very badly about me.⁶⁷¹

⁶⁷⁰ (Chifundo, 2014) (Chifundo, 2014)

⁶⁷¹ (Musandide, 2014)

Similarly, Chiheni reported that he could not go to the hospital with problems related to his sexuality because he has heard that sometimes they ask a queer patient to bring their partner, thereby putting them both at the risk of being outed or reported to police for arrest.

In terms of health. One can have STI's but not seek help because maybe they are told that if they won't bring their partner, they won't help you. I heard here from CEDEP meetings that others were asked to bring their partners.⁶⁷²

The poor treatment by public health personnel was also shared by Chataika, who specifically mentioned that at public health facilities they lose their freedom to be themselves, be accepted and be happy.

As opposed to fears from going to hospital with STD's for example... nurses will say a lot of things. I feel that freedoms... (if we were) accepted, we would have been very happy. To us it's a burden.⁶⁷³

As rightly observed by Thandika, the lack of free access to public health services risks putting queer Malawians at danger of poor health or even death. Rightly put, legal recognition as queer persons is an important factor to guarantee access to services, and by extension, the relevant SOGI-related human rights.

We are not recognised in this country, when we get sick we are abused at the hospitals.

The doctors ask too many questions, too much. If they saw that we are accepted... when we go with a problem I don't think they can ask a lot of questions... they would just say ok, go to that room, that's it. If we are still not accepted, we are at risk. We will just die because we are not receiving help.⁶⁷⁴

⁶⁷² (Chiheni, 2014)

⁶⁷³ (Chataika, 2014)

⁶⁷⁴ (Thandika, 2014)

One main reason that the public health facilities mistreat queer patients is because the health system itself is designed exclusively for heterosexual patients. The overall training and orientation of health personnel is tailored for heterosexual patients. It should also not be assumed that the health personnel are not immune to the high prevalence of religious indoctrination and homophobic attitudes. It is therefore critical that the government take deliberate steps to ensure that there are services targeting those who are not heterosexual. Chikondi observed that the current HIV and AIDS messaging that he frequently come across is mainly targeted at heterosexual communities.

Yes, errr... like in Malawi..... The... HIV messages are only targeted to one group that is the heterosexual society. There are a lot of people that don't know. There are a lot of people in the community that think sleeping with a man is safer than a girl. Those also should be targeted. The Government should target them. They should be... have that chance to, the right to health, they should have... even when they go to the hospital. Those banners that we see there at the hospital. They should also have that information about, what... homosexuality... like; if you sleep with a man you can also contract HIV. People don't know just because they don't know what their constitution say, talk about us. So, there is a lot of things going on that the Government should consider. They should treat us equally despite our differences. Yeah.⁶⁷⁵

It is important to point out that for the services that have extended beyond queer communities, the main focus have been on MSM. Chintheya expressed worry that there are no services that he knew of which were designed to accommodate lesbians or transgender men. In her case, she does not know of any MSM-focused clinics that extend outreach to lesbians. There is therefore a need to extend health services to all queer categories to ensure the broadest possible access to SOGI-based human rights.

⁶⁷⁵ (Chikondi, 2014) (Chikondi, 2014)

5.4. Conclusion

In this chapter, I have reiterated that organised religion, law enforcement, and the public health system are important public sites for regulating sexualities and negotiating SOGI-based human rights in the Malawian context. I have noted that while conservative religious groups support the criminalisation of homosexuality based on religious doctrines, there are a few liberal congregations that are increasingly accepting queer Malawians as members. I have suggested that such tolerance may be attributed to a liberal interpretation of biblical teachings and incorporation of ubuntu. There is need for further research on the best practices adopted by places of worship that have successfully included queer members of society. Similarly, while police continue to persecute and harass queer Malawians, some police personnel are becoming progressive in rescuing victims of mob violence. Increased engagement with leadership among the police has the potential to initiate new strategies for inclusion of queer persons as important citizens in need of protection. I have also proposed the need for extending access to public health services beyond MSM, to ensure that other queer categories (lesbian, bisexual and transgender) have equal access to health-related SOGI-based human rights.

6. Queering public spaces and Civil Society Organising in Malawi

In the first and second chapters I have argued that both human rights and sexuality are socially constructed, and that the two concepts carry locally-particular meanings that at times misrepresent

the intended meaning of SOGI based human rights. In the last two chapters, I have focused on discussing how sexualities are policed and regulated in private (the family) and public (organised religion, law enforcement and public health system) spheres in Malawi. I have argued that queer Malawians continue to suffer restriction from fully and meaningfully accessing their SOGI-based rights primarily because they are stripped of their identity, without which they cannot claim entitlement of human rights that correspond with their sexual orientation and gender identity. While there is some progress in terms of receiving an extent of protections, I have noted that claiming a queer identity is an indispensable prerequisite to claiming SOGI-based human rights. At the centre of the pursuit for sexual citizenship rights is the process of coming out, through which queer Malawians have deployed to disclose their identities. So far in the thesis, I have focused on the external factors, either in the private or public spheres, that either inhibit or facilitate respect and protection of SOGI-based human rights. However, there is a need to explore further how this coming out operates as a strategy for continued management of identities in response to contextual needs necessary for the claiming of relevant rights. The history of sexuality is not only about social control, but also that of resistance.⁶⁷⁶ In this chapter, I discuss how queer Malawians have resisted social control by claiming public and digital spaces, and LGBT-organising.

6.1. Queering public spaces in Malawi

In recent years, the issue of space has become an important subject in terms of its production of norms through which sexuality is constructed and regulated.⁶⁷⁷ Early work exploring the connections between geography and sexuality by Bell and Valentine looked at how heterosexuality was appropriated or resisted in Europe, America, Australasia, Africa and the Pacific.⁶⁷⁸ This early

⁶⁷⁶ Supra note 132

⁶⁷⁷ (Binnie & Valentine, *Geographies of Sexuality- a review of progress*, 1999), (Hubbard, *Sex Zones: Intimacy, Citizenship and Public Space*, 2001), (Lim, Browne, & Brown, 2007)

⁶⁷⁸ (Binnie & Valentine, *Geographies of Sexuality- a review of progress*, 1999)

body of work, in an emerging field of geographies of sexualities, focused on mapping gay spaces in urban setting as a method of showing how public spaces are constructed around rules which enforce monogamous, heterosexual, procreative sexualities, and in the process excluding any non-conforming sexual conduct.⁶⁷⁹ The connection between spaces, places and sexualities is important because ordinary people interact daily through the use of different types of places. In the last two chapters, regulation of sexualities, whether in private or public, takes place in sites such as the familiar home, the church, the pub, the police station, and the public health facility.

There are two roles of spaces that are relevant to this chapter. First, it is in such spaces that subjects construct their sexualities by imagining and executing how they identify themselves and how they (sexually) relate with others.⁶⁸⁰ Second, where it is anticipated or found that some subjects do not conform, various methods are deployed to institutionalise the spaces so that they exclude those who fail to abide by the heterosexual norms.⁶⁸¹ This institutionalisation through which heterosexual spaces are regulated may be formal or informal.⁶⁸² There are many actors who play a role in this institutionalisation. For example, in Hubbard's research on cities and sexualities, where he looks at the diverse landscape of the city in the shaping of new understanding of sexuality, he views formal actors such as city planners, governors, police and judicial officers as important players in normalisation or exclusion of specific sexual practices.⁶⁸³ At the informal level, as discussed earlier, family members, church leaders and community members may enforce norms through repetitive teaching or ridicule. In response, queer persons have developed tactics and strategies to 'queer' public spaces by asserting recognition of their queer identities and claiming

⁶⁷⁹ (Binnie & Valentine, *Geographies of Sexuality- a review of progress*, 1999, p. 176), (Bell & Binnie, 2004), (Hubbard, *Sex Zones: Intimacy, Citizenship and Public Space*, 2001)

⁶⁸⁰ (Lim, Browne, & Brown, 2007, p. 2)

⁶⁸¹ (Lim, Browne, & Brown, 2007, p. *ibid*)

⁶⁸² For example, see Browne, K (2009) *Geographies of Sexualities: Theory, Practices and Politics*. Also, see Bell, D (1998) *Mapping Desire: Geographies of Sexualities*, (Valentine, 2000)

⁶⁸³ (Hubbard, *Cities and sexualities*, 2012)

various rights.⁶⁸⁴ This tension between control and resistance suggest that space is an important element in the reproduction of sexual citizenship.⁶⁸⁵

Public spaces are constructed presupposing that its occupants are heterosexual. For example, Browne's research in Western England drew from experiences of 28 non-heterosexual women in restaurant spaces to examine how such heterosexual space 'othered' non-heterosexual women.⁶⁸⁶ Browne sought to explore the subtle operations of power between momentary enactments and more established manifestations in the hierarchisation of sexuality, in which heterosexuality was imposed as 'common sense' superior to nonheterosexuality. She examined the women's food and eating practices to investigate how such social and cultural practices (re)formed their identities.⁶⁸⁷ In her findings, the participants found the restaurants as heterosexual spaces, which made them feel out of place and uncomfortable.⁶⁸⁸ For example, the staff, patrons, and practices at the restaurants were trained to cater for heterosexual couples. In her conclusion, she found that more subtle exercises of power which are hard to recognise, are fluid and takes diverse forms, and are unnamed.⁶⁸⁹ It is these fluid powers that manifest heterosexuality in a disguised form to reproduce heterosexual norms so that they are taken as common sense.

The construction of heterosexual spaces is also found in non-Western contexts. Based on narratives of 15 older (60+) gay men in Hong Kong, Travis Kong examined the negotiation of same-sex intimacy of everyday lives in two spaces- parents' home and public toilets in the 1940s and

⁶⁸⁴ (Orne, 2011), (Hubbard, Cities and sexualities, 2012)

⁶⁸⁵ (Bell & Binnie, 2000), (Richardson D. , 2000)

⁶⁸⁶ (Browne K. , 2007) (Re)making the other, heterosexualising everyday space

⁶⁸⁷ (Browne K. , 2007, p. 1000)

⁶⁸⁸ (Browne K. , 2007)

⁶⁸⁹ (Browne K. , 2007, p. 1011)

1950s.⁶⁹⁰ The analysis drew from geographies of sexuality to analyse the changing nature of public/private and hetero/homo spaces, drawing a relationship between the use of space for same-sex intimacy and domination arising from British colonialism, post-colonialism, the economy and the family.⁶⁹¹ In his analysis, Kong noted that the Confucian patriarchal family system and British colonial laws were influential in the regulation of homosexuality in Hong Kong.⁶⁹² In the period under study, the family was a site for fostering heteronormative culture.⁶⁹³ Sex or sexuality was restricted to the familiar home.⁶⁹⁴ For most of the sexual encounters, the men devised ways to engage in same-sex intimacy outside the family home. Public toilets were the most common site for finding other gay men for sex.⁶⁹⁵ In these spaces, the gay men would signal each other codes and then arrange to engage in sexual intercourse in the private toilets. Kong noted that the public spaces were sites resistance to heterosexual norms.⁶⁹⁶

While the transgression of public and civic spaces to undermine notions of (hetero)sexual citizenship has not been the primary focus in research about homosexuality in Africa, records of colonial researchers documented African homosexuals occupying public spaces such as wedding ceremonies or local beer houses.⁶⁹⁷ Elder has investigated the regulation of homosexuality in the cities of apartheid South Africa,⁶⁹⁸ arguing that the apartheid state coded the apartheid subject in heterosexual terms. He noted that black workers' housing built by the apartheid state were designed on the assumption that they would be occupied by heterosexual families.⁶⁹⁹ He also argued that the state's racial segregation of cities through the Group Areas Act sought to control

⁶⁹⁰ (Kong T. S., 2012, p. 896)

⁶⁹¹ (Kong T. S., 2012, p. 897)

⁶⁹² (Kong T. S., 2012, pp. 900-901)

⁶⁹³ (Kong T. S., 2012, p. 902)

⁶⁹⁴ (Kong T. S., 2012, p. Ibid)

⁶⁹⁵ (Kong T. S., 2012, p. 904)

⁶⁹⁶ (Kong T. S., 2012, p. 899)

⁶⁹⁷ For example, (Murray & W, 1998)

⁶⁹⁸ (Elder, 1998)

⁶⁹⁹ (Elder, 1998, p. 154)

and regulate bodies.⁷⁰⁰ During that period, state officials had raised concerns about white homosexual groups who were living in groups in specific residential city blocks.⁷⁰¹ For example, the Report of the Select Committee on the Immorality Amendment Bill of 1968 (Republic of South Africa 1968) raised concerns that high urban densities had potential to cause homosexuality.⁷⁰² Elder's discussion draws an intersection between the body, cities and race, and highlight that the apartheid South African government was concerned that the white urban spaces in the city created opportunity for the rise of homosexuality. In other words, the urban public space was viewed as an important site to enforce heterosexual norms.

Other research about the use of space in Africa includes that by Visser who explored the emergence of Cape Town (South Africa) as a popular leisure destination for gay men.⁷⁰³ Specifically looking at the city's Waterkant area, he observed that although the city had specific places targeting gay clientele, the facilities at such sites were designed generically so that they do not differ from the heterosexual spaces in the rest of the city.⁷⁰⁴ As a result, increased mainstream tourism in these areas risked displacing its gay leisure appeal.⁷⁰⁵ Research in a semi-rural, low income South African community has found that young, coloured, self-identified gay men use their femininity as a strategy to subvert from dominant (heterosexual) norms and in the process reconstructing their community's ideas about gender.⁷⁰⁶ It cannot be missed in literature that the bulk of research on the use of space by queer people in Africa concentrates on South Africa.

⁷⁰⁰ (Elder, 1998, pp. 156-157)

⁷⁰¹ (Elder, 1998, p. 160)

⁷⁰² (Elder, 1998, p. 161)

⁷⁰³ (Visser, 2003)

⁷⁰⁴ (Visser, 2003, pp. 186-187)

⁷⁰⁵ (Visser, 2003, p. *ibid*)

⁷⁰⁶ (Rabie & Lesch, 2009)

While the tug of war in Malawian public spaces remain theoretically under-explored, my earlier discussion in this thesis suggest that the public scene is very much a site for reproduction of heterosexual norms and policing of any non-conforming behaviour. This is reflected in the arrest of Chimbalanga and Monjeza in 2015 for holding a public traditional wedding at a venue ordinarily viewed as heterosexual,⁷⁰⁷ and the violence and arrest of Gonani and Kulemela following their detention by neighbourhood watch guards in 2015 for walking together in a public road.⁷⁰⁸ As stated earlier, the arrest of Chimbalanga and Monjeza was the single most significant threat to their coming out or freely living publicly as queer. The overwhelming number of participants who were still in the closet are an indication that the public spaces are closed to queer Malawians. This include Rumbani who worried that he would never consider coming out or acting queer in public spaces because he feared suffering the same fate as Aunt Tiwo.⁷⁰⁹ In addition to fear of arrest, Chandiwira remained in the closet and did not think he would present himself as queer when in public spaces because he would feel ashamed for not conforming with the rest of the society.⁷¹⁰ The enforcement of public spaces as heterosexual, and the fear by queer subjects like Rumbani and Chandiwira, represents the subtle power that heterosexual spaces reproduce as a way of excluding free occupation by queer persons.⁷¹¹

I have mentioned earlier in this chapter that queer persons have responded to the restrictions that they experience in public spaces by deploying strategy to assert a presence, and in the process queering ordinarily heterosexual spaces.⁷¹² In the case of the Tonghzi in Hong Kong, coded language was used to communicate between each other to transmit messages carrying meanings

⁷⁰⁷ (Mwakasungula, 2013)

⁷⁰⁸ Gwede, Wanga (9 December 2015) Nyasa Times, Two men nabbed for “gay sex’ act charged in Malawi (accessed 30 December 2015)

⁷⁰⁹ Aunt Tiwo is the local nick name that Tiwonge Chimbalanga is known as in Malawi. (Rumbani, 2014)

⁷¹⁰ (Chandiwira, 2014)

⁷¹¹ Supra note 688

⁷¹² Supra note 684

only known to members of the queer community. Through this coded language, they could spot and negotiate for sex with potential partners without raising suspicion of anyone outside their community. For example, the Tongzhi used a word for a very common Chinese game to refer to sex: when one said 'playing mahjong' they meant 'having sex'.⁷¹³ Similarly, they used 'gardens' or 'fish ponds' to refer to the public toilets which they used to court each other to 'play mahjong'.⁷¹⁴

The most common word that all participants in this research shared was 'commodity,' which is used to label a person as queer.⁷¹⁵ This word was convenient for the queer community because it is commonly used by Malawian communities when they are referring to the ordinary supplies that they buy on a daily basis such as soap, tomatoes, soap or sugar. It is also a word used by most small-scale traders, who comprise a significant urban population. The word is also used by ordinary people when referring to their ordinary property such as a hoe, bicycle or harvest. The queer community use this word when they are in private or public as a way of introducing any new person as a member of the community. While others use the word to refer to potential sexual partners, the word is also used in non-sexualised form. Musandide explained that the word is important in everyday lives of queer Malawians.

'Commodity'... well, it is a word that we used to let each other know that a person is one of us. If someone says, 'I have brought a commodity', you know that the person is indeed one of us... It does not have to be a sexual partner, but just someone who also does these

⁷¹³ Majong is a tile game that originated in China, and in this case used as a coded word to refer to having sexual intercourse (Kong T. S., 2012, p. 903)

⁷¹⁴ (Kong T. S., 2012, p. Ibid)

⁷¹⁵ I have altered the actual Chichewa word that is used to protect the word from revelation to audiences who may arbitrarily out or harm the participants. It is my responsibility to ensure that the queer community continue to flourish and use their strategies to occupy public spaces. I have however chosen an alternative English word that offer the closest and safest word possible to signify the relevance of the word and the local meanings that make its disguise possible.

things like us. If you have fallen in love with the new person, maybe you can approach them to discuss.⁷¹⁶

According to Chikondi, who has travelled to neighbouring countries, this word is also used in Zimbabwe and Zambia by communities who speak Nyanja, a language very similar to Chichewa.⁷¹⁷ However, according to Chikondi, his experiences with the usage of the word in the neighbouring countries was that the queer communities there referred only to sex. If one asks for a commodity, it means they are looking for someone to have a quickie with.⁷¹⁸ The advantage with the word (in Malawi) was that one could use them even to attempt to open a conversation with someone they were not sure to be queer. For example, Tionge said that one could use the word in a bus to refer to a queer person as a 'commodity' and no one would even suspect.⁷¹⁹ Ntchindi narrated a story about meeting a new queer Malawian and introducing him as 'commodity' without the risk of public backlash.

I had a few friends with me, and I asked him if we could link up with my friends, he came, I told my friends in our own language that we use. I said guys 'this is another commodity'. My friends were surprised how I found that 'commodity'. I said that I had met the 'commodity' in town. The guy didn't even know what we meant. But from my experience, I felt that he was one of us. I asked him how many men he had ever slept with. He was surprised that I spotted him, I asked him to be open. I told him that the way he was also the way I was, just like the way all my friends there were... I also told him that I would introduce him to the club and help him not feel excluded anymore. Then he became open saying he had no boyfriend etc., so we became friends and started a relationship. Then we stayed in a relationship for maybe 2 months, then I introduced me to our community. And

⁷¹⁶ (Musandide, 2014)

⁷¹⁷ (Chikondi, 2014) (Chikondi, 2014)

⁷¹⁸ (Chataika, 2014)

⁷¹⁹ (Tionge, Life Story Interview in Malawi, 2014)

everybody I was telling them how I met him, he just passed me and I just noticed that he must have been one of us... Moti most of the time I go⁷²⁰. clubbing, or when am in town, I can see people and see that they must be gay or lesbian, I can tell...

Sometimes, the queer community use another word connoting 'village-member'. This word is used to introduce someone as 'one of us'. They would, for example, state that 'this is Alan and he also comes from our village'. In that case, everyone would know that the person being introduced was a member of the queer community. In other instances, the community members may ask if the new member is 'edible', to verify if it is permissible to ask for sex. The fact that the community freely use this coded language in public spaces without any backlash suggest that the language is secure enough to facilitate communication or sexual transactions. Chichewa can therefore be deployed as a tool not only to queer the language itself, but to queer restricted public spaces. The language has also been used as a tool to facilitate recognition of identity rights, but in a restricted manner where recognition is restricted to the queer community. Although the risk of potential stigma or violence is minimised by the usage of coded language through which the queer community occupy spaces, it must be emphasised that the lack of recognition by the rest of the community results in limited access to SOGI- based rights such as liberty (section 18), equality (section 20), freedom of association (section 32) and freedom of movement (section 39).⁷²¹ For example, if a group of three queer persons were using coded language to identify themselves and interact, as long as they are still in the closet, they cannot approach public health facility and openly claim access to a health service using the coded language.

Another way of occupying public spaces by the queer community is to organise gatherings in private residences or public venues. Organising of such parties is consistent with how queer

⁷²⁰ (Ntchindi, 2014)

⁷²¹ (Malawi Government, 2004)

communities celebrate and build solidarity in other parts of the world.⁷²² In addition to serving as a gathering for all queer community members, these spaces serve to reassure those who are new to the community, such as those who have just come out, have just relocated from the rural areas, or did not have other chances to meet other queer persons. Temwa moved from the rural areas to seek employment in town. For a while he did not meet any queer Malawians and felt alone. Once he met a queer member in his community, he was invited to a party organised by a local community based organisation.

there was the party, and it's where I met a group of gays for the first time, a group of people claiming to be gay. And they were genuine gays. It was mostly male gays, there were a lot of gay men there, some of them I had seen them around already, and that's where I met a lot of people from this group. Some were even wondering that I was also gay. It was a great time.... mixed feelings, like I should cry that there were people like me. And also, like I should laugh at seeing some gay folks, some people I was seeing in the streets and not even suspecting that they were gay. Yeah.⁷²³

Whist the party attended by Temwa queered a residential site, it may be deemed a safer and less-risky space as it is within the confines of a private residence. In the case of Uchizi, he was invited to a party organised by the queer community, but held at a popular local hotel that is open to the public. It is a venue common with government conferences during weekdays, and heterosexual weddings during weekends. According to Uchizi, the party did not hide that it was a queer event, based on how the patrons dressed and were behaving in the presence of hotel staff.

... he took me to a party at (a local) Hotel... when picking me up he told me that there was a party we could go. I asked what it was... he explained that it involves gay people. He

⁷²² (Kong T. S., 2012, p. 904), (Rabie & Lesch, 2009, p. 725)

⁷²³ (Temwa, 2014)

asked me to go see what happens there. We went, it's when I saw a lot of people. Then others started pursuing me, wanting me, saying am a new one etc...⁷²⁴

While such gatherings are safe spaces and may be reassuring to some, the fear of persecution or being outed remains a deterrent to some who may otherwise be interested. In other words, queering public spaces does not remove the perception of fear of homophobia. In the case of Lindiwe, he has not gathered enough courage to attend such public gatherings. In other words, although some public spaces are queered, the formal retention of the spaces as heterosexual instils a sense that the spaces are only queered artificially or temporarily and still subject to heterosexual policing and possible punishment.⁷²⁵

Public spaces also serve as erotic spaces where queer persons may experience sex. For example, the male participants recalled their senior secondary school days where it was common for boys living at all-male hostels to share beds at night to have sex. In such cases, two queer persons would arrange to be allocated the same room where they could cohabit, sleep on the same bed and have regular sex. However, such arrangements were kept secret from heterosexual pupils. Sometimes, they could engage in sex in public bathrooms

there are a lot of people, but we were doing in such a way that ... people should not know. Let's say... in (our school) it was very cold, so we didn't like bathing mornings but after classes when its warmer or at lunch. So, in the bathroom we could be us only. So, people didn't know, and people wouldn't find us. Or when going to bath, people would just say we are using same pale to bath. It was a private area also.⁷²⁶

⁷²⁴ (Uchizi, 2014)

⁷²⁵ Supra note 652

⁷²⁶ (Atupele, 2014)

For others, they were booking rooms at ordinary lodges to have sex. This arrangement was common among the male participants as most hotels had room hire facility where a guest could hire a room for only a few hours during the day. This type of booking is popular with heterosexual couples who want to have sex but have no alternative private spaces for it. It is also notoriously popular with married couples intending to cheat on their spouses during day-hours. Since the hotels which allowed such room hire were already open to deviant behaviour, they were unlikely to closely police two men booking a room. While this is not to suggest that such lodges endorse same-sex behaviour, it suggests that public heterosexual spaces which are less strict on morality have made it possible for queer Malawians to occupy with a lesser threat of surveillance and control. However, the queer participants reported that they ensure that they do not expose their intentions when booking such rooms. For example, only one goes to book to ensure that it is unclear that the next person coming to the room is a fellow man. Once in the room, they text their partners with details of the room number. Upon engaging in sexual intercourse, they also leave separately to avoid suspicion. With such arrangements, they successfully use the heterosexual spaces to have same-sex sex.

Although the majority of participants reported that the environment in the city was not friendly to queer persons, few participants reported that they have visited public spaces which are open to queer customers. For example, Musandide has visited several pubs and executive clubs which welcome them and allow them to publicly display intimacy without risking expulsion or violence.⁷²⁷ Queer people are also allowed to dance intimately at one local night club. At such places, queer people feel freer to negotiate for sex without the fear of public scrutiny. Chataika, who previously used to engage in same-sex sex work, has frequently gone to such night clubs to meet other men

⁷²⁷ (Musandide, 2014)

for sex.⁷²⁸ Conspicuously, most of the clientele are heterosexual men who are heterosexually married, but want to engage in same-sex sex.

some would wait for us to go to the dancefloor, and they would come... we also had our own techniques to cope people... Maybe dancing seductively, maybe caressing the guy's bellies, if they respond, it's a done deal. In the end, we would agree to go somewhere. Maybe we could end up in a car, maybe at a room... afterwards we exchange phone numbers and maybe meet again.⁷²⁹

Chataika has also found clients at some executive pubs and local hotels. In such spaces, it is an unspoken tradition that some rich men look for men to have sex with. This practice is consistent with MSM reported in HIV and AIDS literature, who are heterosexual married, refuse to be associated with queerness, but engage in sex with other men.⁷³⁰

... when we arrive (at the hotel's pub), people would wink at us, and then when we respond, they start buying us beer... I used to enact masculinity, but one of the friends was feminine and visibly gay. So, when we arrived, people would be interested in him. When we arrived, first thing we would go to the washroom, there we would stay there for a while. People who are interested would know and follow us there. So, because of how he looked, then they would throw a line. When they realise that am also like that, some would leave him and come to me. One person told me that at first, he didn't know that am gay. He told me the liked masculine gay men, and not the feminine-looking ones, and instead negotiated with me.⁷³¹

The gatherings so far discussed are exclusively organised for men. Chintheya and others (lesbians or transgender men) have organised their own private parties in order to mingle, dance and

⁷²⁸ (Chataika, 2014)

⁷²⁹ (Chataika, 2014)

⁷³⁰ Such research, previously cited in this thesis, include (Baral, 2009) and (Beyrer, et al., 2010)

⁷³¹ (Chataika, 2014)

discuss problems affecting them such as stigma and the impact of HIV and AIDS.⁷³² Unlike the gatherings organised for the men, the female participants reported that their gatherings were open to gay men in order to promote solidarity across different gender identities.

It can therefore be concluded that queer Malawians have managed to partially queer public spaces in Malawi by using strategies to create spatial heterotopias to evade the homo/hetero-sexual divide enforced by heteronormative rules and policing through shame, stigma, discrimination and police persecution.⁷³³ Nevertheless, how different spaces are queered vary depending on the extent to which the hosts of such spaces are accommodative to non-conformity, either through deliberate ignorance about the possibilities of queer behaviour (as in the case of booking the lodges for sex) or not actively surveying potential queer subjects (as in the case of landlords). However, this successful queering of public spaces such as pubs, hotels, hostels and dancehalls depends on the extent to which the owners of the premises are tolerant towards queer patrons. In the above cases, queer Malawians have collaborated with their hosts to create what Atkinson defines as multisexual, whose features comprise of diversity of preference, practice, orientation and choice, including the presence of homosexual relationships within or interspersed with otherwise heterosexual lifestyles.⁷³⁴ The spaces remain heterosexual only to the extent that the overall community maintain a utopian illusion that they are not concurrently being occupied by queer persons. However, because queer Malawians have to disguise their existence to occupy some public spaces, and that their participation in dedicated spaces (such as queer-friendly pubs) is at the private discretion of the owners implies that they are not able to fully claim their identity rights. The lack of identity based rights strips them of the prerequisite necessary for accessing SOGI-based human rights.

⁷³² (Chintheya, 2014)

⁷³³ (Kong T. S., 2012)

⁷³⁴ (Atkinson, 2010, p. 125)

6.2. The role of the internet in the lives of queer Malawians

The boom of the internet in the 1990s and the invention of the smart phone in the 2000s has revolutionised the modes of communication, social interaction, relationships and mobilisation.⁷³⁵ The emergence of popular social media platforms such as Facebook, Twitter, Viber and WhatsApp has connected people in ways unseen before in terms of social networking, and sharing of news and information.⁷³⁶ Facebook and WhatsApp boasts more than two billion monthly users globally , with more than half using it on daily basis. Dating sites like Grindr has over four million users from 192 countries, and with more than 10,000 new users on daily basis.⁷³⁷ Importantly, the internet has availed virtual private and public spaces to enable marginalised groups to explore and experience intimate lives. It has also enabled them to find and join online communities.⁷³⁸ Digital⁷³⁹ or internet⁷⁴⁰ sexualities are now an important aspect in the scholarship about sexuality. As aptly put by Plummer, the convergence of the world wide web with the computer, mobile phones, cameras, videos, scanners, televisions, webcam and screens have transformed sexuality by inventing multiple new digital intimacies that did not exist until the late twentieth century.⁷⁴¹

The digital sexualities transform our sexualities in at least five ways. First, they change how we gain information and knowledge about sexualities in all their diversities and forms across the world, from guidance pages on infertility (there are more than a million sites on sperm banks) to sites engaged in mail-order brides. Second, they use *social network sites* to create new possibilities for making new local and global sexual and intimate contacts (Grindr, a gay line...). Third, they make available a vast flow of sexual *representations* (the

⁷³⁵ (Gauntlett, 1999)

⁷³⁶ (Thompson C. , 2008)

⁷³⁷ (Roth, 2016, p. 437)

⁷³⁸ (Hertlein, Shadid, & Steelman, 2015)

⁷³⁹ For example, (Plummer K. , *Cosmopolitan Sexualities*, 2015)

⁷⁴⁰ (Browne & Brown, 2016)

⁷⁴¹ (Plummer K. , *Cosmopolitan Sexualities*, 2015, p. 48)

‘peoples’ pornography’) hitherto unavailable: every sexual fetish or curiosity can now develop its own complex imagery, and we can make it ourselves too- the new DIY/Gonzo porn: ‘The internet is for porn’, as the song in the musical *Avenue Q* goes. Fourth, they generate new *erotic embodiments*, making possible new eroticisms and providing actual direct physical sex contact through the technology itself, often through masturbation. Finally, digital sexualities can also make sex political, creating new global activisms around sexual politics, both conservative and radical. Much of this is achieved through the click of a google search- a *google sexualities*.⁷⁴²

The internet and other technologies have emerged as an important tool for experiencing sexual lives because of its virtual portability of the spaces they occupy. Because such spaces do not require physical presence, it is considered relatively safe, liberating and empowering space.⁷⁴³ For example, connecting on Facebook or Instagram among queer persons in a repressive environment like Malawi reduces the risk of physical violence from homophobes. However, others have argued that the cyberspace is also a place of cyberbullying and harassment.⁷⁴⁴

However, since the internet and technology is an important part in peoples’ everyday experiences, the interconnection between the virtual and physical lives must be viewed as an intertwined reality of twenty-first Century lives.⁷⁴⁵ For example, although not unproblematic, people who have social media presence also have physical lives whose aspects mirror each other. At times, for example, a queer person may be in the closet in physical spaces, but be out on the internet. The closet is not only a metaphor for physical spaces: the cyberspaces and digital technologies also contain spaces in which queer subjects remain secretive about their sexuality.⁷⁴⁶ The intertwining

⁷⁴² (Plummer K. , *Cosmopolitan Sexualities*, 2015, pp. 48-49)

⁷⁴³ (Browne & Brown, 2016, p. 354)

⁷⁴⁴ (Plummer K. , *Cosmopolitan Sexualities*, 2015), (Browne & Brown, 2016), (Tokunaga, 2010)

⁷⁴⁵ (Browne & Brown, 2016, p. *ibid*)

⁷⁴⁶ (Gorkemli, 2012)

between the physical, cyber and technological worlds, and the sexualities that it (re)produces must therefore be an integral aspect of researching about sexualities in the twenty-first century. Both the use and non-usage of virtual or technological realities are an important area of inquiry in the understanding of sexualities.

The lives of queer Africans on the internet (and through technologies) remain under-researched in an already under-researched discourse about African sexualities. However, the research done so far has found important issues. For example, in 2009, Prinsloo conducted a critical discourse analysis of the postings on the South African internet site *Gender Dynamix (GNX)* to analyse how transgender South Africans negotiated their sexed and gendered identities.⁷⁴⁷ Prinsloo found that internet technology and the GNX website played a significant role in the lives of the trans subjects studied, in challenging the sex and gender determinants as assigned to them at birth.⁷⁴⁸ In a study of representation of homosexuality in film and the internet in South Africa, Sonnekus explored how the tension between heterosexualised nationalist identities of white Afrikaners brought dilemmas to those who were nationalist but also engaged in sex with other men.⁷⁴⁹ Indirectly, the study explored the representation of how film characters creatively used of secrecy as a way of navigating through their same-sex sexual experiences and heterosexual normativity.⁷⁵⁰ The focus on South Africa in the above two studies may be because internet and technology consumption is higher among middle class South Africans than the majority of the rest of the African continent. However, it is important to note here that the issue of internet and technology use among queer Africans in the rest of the continent remains under-researched.

⁷⁴⁷ (Prinsloo, 2011)

⁷⁴⁸ (Prinsloo, 2011, p. 39)

⁷⁴⁹ (Sonnekus, 2013)

⁷⁵⁰ (Sonnekus, 2013)

Africa is an important subject and site worth studying because it has experienced a rapid internet penetration because of urbanisation, increase in mobile phone users, affordable smartphones and improved internet infrastructure (e.g. Wi-Fi, mobile broadband and optic fibre technology). However, the majority of Africa remains with limited access to the internet because of high internet data costs, and poor internet receptivity or limited wireless internet infrastructure in rural areas. According to the International Telecommunications Union (ITU), only 30% of the African population had access to mobile-cellular communication in Malawi in 2016. Those with mobile internet stood at 16.5% of the population, a rise from 6% in 2015.⁷⁵¹ Significantly, all participants in this research had a mobile phone and regular access to the internet as a medium of connecting with others, queer or heterosexual. All participants had access to WhatsApp and over 75% of the participants had at least one Facebook account. In the absence of internet access, text messaging was used as an alternative.

Facebook was the most preferable and popular method for communicating with other queer persons. It was also a popular method for communication in the rest of the (heterosexual) communities. Since most the participants were still in the closet, it was necessary for them to devise strategies to avoid being outed on Facebook. One way was to open two accounts: one which was used to connect with the heterosexual community, such as family and friends, while the other was dedicated to connecting with queer friends. To the heterosexual community, they presented themselves as heterosexual and did not reveal any information which associated themselves with sexual or gender non-conformity. On the other account, they profiled themselves as queer and would usually express availability for courtship. The account open to the heterosexual community can therefore be viewed as a digital closet discussed earlier in the study

⁷⁵¹ (Malawi Profile (Latest data available: 2016) , 2017), (The World Bank, 2016), (The World Bank, 2016)

by Gorkemli.⁷⁵² For example, Chiheni initially had one account which he was using to connect with all friends and family. It was only when he was introduced to the online queer communities that he blocked everyone from his account, and lied that his account had been hacked and he had decided to close it and open a new one.⁷⁵³ When he returned to Facebook, he opened two accounts, one of which was dedicated to those who did not know that he was queer and another which was open to the queer community only. That way, he remained in the closet but opened himself to a queer digital world. Ironically, he distinguished the two accounts through an interpretation that the one for the heterosexual community was real, while the one only dedicated to the queer community was fake. In other words, he perceived his deceptive heterosexual identity as his real-self, and disowned his real queer identity, albeit in the closet, as his fake-self. For example, on the queer Facebook account, he opted to put a disguised picture of himself and use a pseudonym and only reveal his full identity in private conversations. This dichotomous (mis)representation about himself represents the power of heterosexual normativity over non-conformity. The 'fake' account can be interpreted as a strategy to navigate through regulated heterosexual spaces. Pseudonymity in this case served as a method to control and manipulate their identity to avoid being outed.⁷⁵⁴ In this case, the digital spaces cannot be claimed to have fully broken the restrictions experienced by queer persons in the physical spaces.⁷⁵⁵

While most the participants remained closeted even in digital spaces, Nthombi, a transgender who lives publicly as a woman, openly identifies as queer on social media platforms. She has membership of both heterosexual and queer Malawians on her Facebook account. She is able to post updates about her identity and relationships, and does not encounter any backlash. Her experiences are similar to that of Tionge and Dimingu, who also live openly as queer and have an

⁷⁵² Supra note 746

⁷⁵³ (Chiheni, 2014)

⁷⁵⁴ (Phillips & David, 2002)

⁷⁵⁵ (Gorkemli, 2012)

open Facebook account. While the experiences of Nthombi, Dimingu and Tionge can be considered exceptional, their being accepted by the broader community suggest that some local communities are able to accommodate sexual difference. As a result, it opens room for recognition of non-conforming identities and a level of respect of their right to exist despite differences. However, as discussed earlier, an absence of legal recognition restricts them from accessing formal entitlement to SOGI-based human rights.

Facebook is increasingly becoming part of the journey towards what Plummer terms as a homosexual career by acting as a tool for connecting people to their local queer communities.⁷⁵⁶ When Chiheni reached puberty and became aware that he had same-sex feelings, he did not know about homosexuality and had not met anyone who was queer.⁷⁵⁷ After he opened a 'genuine' Facebook account,⁷⁵⁸ he searched key words such as 'gay Malawi', 'gays in Malawi', or 'Malawi Gay' and found groups which permitted him to join. It is through these initial contacts that he exchanged phone numbers to communicate on texts and WhatsApp as well. The virtual connections later allowed him to establish physical contact and have an opportunity to join the queer community's physical spaces. Facebook can be cited as a gateway to a 'digital homosexual career.'

The stories that I have discussed so far have focused on experiences within the urban spaces. The lack of studies focused on the use of technology and the internet in rural Malawi may be due to the absence of technology and internet infrastructure in the rural areas. However, studying the rural population in Malawi is important because, for example, nearly half of the participants studied in this research had migrated from rural areas in search for employment or higher

⁷⁵⁶ Supra note 529

⁷⁵⁷ (Chiheni, 2014)

⁷⁵⁸ Supra note 753

education. Interestingly, those who had arrived within three years of this study (between 2011 and 2014) reported that they started using their mobile handset and internet prior to migrating to the city. For example, when Nkululeko moved from the village to the city, he made initial contacts with the queer community after searching on Facebook.⁷⁵⁹ He managed to identify queer Malawians based on the (queer) stories that they were posting.

There are loads of friends I have met there (on Facebook). Then coming from the village, I met maybe three people who are new, I don't know them... met them on Facebook. When I arrived, I met them all... I met them all and slept with them...⁷⁶⁰

Similarly, at the time Sibusiso moved from the rural areas, he had never met anyone else who was queer like him.⁷⁶¹ Meeting others through Facebook enabled him to accept himself as normal as well as join the queer communities. Further, he learnt more about 'gay rights' through connections that he made with queer activists around the world. At the time of the interview, he had opened a page on Facebook where he shared global news about queer lives and SOGI persecution. By sharing such news, he could facilitate debates about topical human rights issues such as persecution of queer people in Uganda or South Africa. He had also teamed up with other queer members of his community to establish a community based queer organisation with the aim of mobilising activism online.⁷⁶²

The above experiences of queer Malawians show that the internet and digital technologies have empowered them to reconstruct their identities in digital or cyber form.⁷⁶³ In an environment where heterosexuality is enforced in the physical spaces, the virtual spaces have availed an

⁷⁵⁹ (Nkululeko, 2014)

⁷⁶⁰ (Nkululeko, 2014)

⁷⁶¹ (Sibusiso, 2014)

⁷⁶² (Sibusiso, 2014)

⁷⁶³ Supra note 743

alternative where they can establish dual presence as a matter of 'strategic outness' aimed at retaining communication with the heterosexual community while remaining in a digital closet, but also establish an alternative digital universe where their true identities can flourish and enable them to experience their sexualities digitally.⁷⁶⁴ However, the enforcement of heterosexual norms have led some to (mis)construct their queer identities as fake , and therefore inferior to their disguise as heterosexuals. In the process, they reproduce the prejudices that restrict them from freely exercising their queer identities.

The participants reported that internet platforms such as Facebook also presented a number of challenges besides being a useful tool for communication and socialising. For example, there was a risk of revealing their queer identities to undesired audiences such as homophobes or secret law enforcement officials. Several participants reported that they had connected with people who had ended being blackmailers who demanded money in order not to out them or report to police. This is consistent with cases of blackmail and extortion reported in Chibwezo's study which I have discussed in the last section.⁷⁶⁵ The participants also reported an incident where a hacker found conversations from a secret gay group and posted it on Facebook to out people. This incident led to a falling out between Ntchayi and his uncle.⁷⁶⁶

Others believed that anonymity led to them distrusting those who were anonymous, fearing that such people were not interested in stable and long-term relationships. In fact, several participants reported that anonymous persons who they had met online were only interested in risky and once-off sex. Lindiwe, for example, complained that he does not trust people he meets on

⁷⁶⁴ (Orne, 2011)

⁷⁶⁵ (Chibwezo, 2011)

⁷⁶⁶ (Ntchayi, 2014)

Facebook because all that they are interested in is fast and casual sex.⁷⁶⁷ Taonga reported that he opened his 'fake' account so that he could access easy sex.⁷⁶⁸ There is a need for an investigation on the relationship between online sexual behaviours and risky sexual behaviours among MSM Malawians that were found in previous studies about HIV and AIDS in Malawi.⁷⁶⁹

While the internet and other technologies have reconstructed virtual spaces to include queer identities and existence, they can also be limiting in terms of exercise of freedoms. It is only in exceptional circumstances that one freely reveals their identity to the general public in order to claim recognition as queer. This is reflected by the fact that majority of participants also had a 'fake' account through which to access the queer community but remain in the closet. Without claiming a queer identity, they are unable to exercise a queer sexual citizenship through which to claim identity, relationship and conduct rights.⁷⁷⁰ As a result, for example, they are unable to claim basic constitutional rights and freedoms such as dignity, equality, liberty in accordance with sections 18,19, and 20 of the constitution respectively.⁷⁷¹ Similarly, they are unable to claim similar rights (dignity, liberty and equality) in accordance with international human rights treaties such as ICCPR, CRC and ICESR.

6.3. Civil Society Organising

Local Human Rights Organisations (LHROs) are domestically headquartered and focused, organized, non-profit, and nongovernmental organization (NGO), whose stated goal is to promote one or more of

⁷⁶⁷ (Lindiwe, 2014)

⁷⁶⁸ (Taonga, 2014)

⁷⁶⁹ For example: (Wirtz & al, 2009)

⁷⁷⁰ (Richardson D. , 2000)

⁷⁷¹ (Malawi Government, 2004).

the principles articulated in the Universal Declaration of Human Rights (UDHR) and its associated treaties.⁷⁷² Civil society movements are crucial in the promotion of human rights at the local level.⁷⁷³ Although little is written about the organising of queer African people compared to the Europe or North America, the history of African queer movements is longer than ordinarily thought. For example, the Gay Association of South Africa was formed in South Africa in 1982, as a social movement for white and middle-class gay men.⁷⁷⁴ In 1986, Lesbian and Gays Against Oppression (LAGO) was also formed in Cape Town in South Africa, followed by the Gays and Lesbians of Witwatersrand (GLOW), also in South Africa in 1988, and the Organisation of Lesbian and Gay Activists (OLGA) in Cape Town.⁷⁷⁵ The latter organisations (LAGO and GALA) were concerned with political struggles for rights and welfare of queer people.⁷⁷⁶ De Vos has argued that it is the early queer movements in South Africa which influenced the inclusion of non-discrimination based on SOGI in South Africa's first democratic constitution, the only African constitution to explicitly do so thus far.⁷⁷⁷ The formation of the Treatment Action Campaign (TAC) in South Africa is connected to the death of Simon Nkoli, a South African gay rights activist who died of AIDS because he could not access treatment.⁷⁷⁸

The past decade has seen an emergence in organising among queer people in the rest of Africa organising themselves to resist persecution in a manner that slightly resembles the resistance in Europe and north America in the 1960s and 1970s, such as the uprising of the LGBT community after the raids at the Stonewall Inn in the Manhattan in New York city.⁷⁷⁹ The HIV and AIDS crisis has elevated interest in how the lack of prevention, treatment, care and support of men who have sex with

⁷⁷² (Ron & Crow, 2015, p. 189)

⁷⁷³ (Ron & Crow, 2015)

⁷⁷⁴ (de Vos, 2007, p. 435)

⁷⁷⁵ (de Vos, 2007, p. *ibid*)

⁷⁷⁶ (de Vos, 2007, p. *ibid*)

⁷⁷⁷ (de Vos, 2007, p. 438)

⁷⁷⁸ (Broqua C. , 2015, p. 65)

⁷⁷⁹ (Kaoma, Kapya, 2012), (Epprecht M. , *Sexuality and Social Justice in Africa: Rethinking Homophobia and Forging Resistance*, 2013), (Tamale, *African Sexualities: A Reader*, 2011), (Nyeck & Epprecht, 2013), (Currier & Thomann, *Gender and Sexual Diversity Organizing in Africa*, 2016),

men increases vulnerability of HIV infections to the population. Prominent in-country debates have triggered the coming out of movements and organisations supporting SOGI-based human rights in Africa including: the fight over the infamous anti-homosexuality bill in Uganda,⁷⁸⁰ the calls for recognition of gay rights in Zambia,⁷⁸¹ the surge of advocacy against 'curative' gang rape of lesbians in South Africa,⁷⁸² anti-gay rhetoric against a local LGBTIQ rights organisation by Mugabe in Zimbabwe,⁷⁸³ registration of a local LGBT rights organisation in Kenya,⁷⁸⁴ halting of HIV and AIDS services for MSM in Tanzania,⁷⁸⁵ and the arrest of Chimbalanga and Monjeza in Malawi.⁷⁸⁶ The diversely contextual responses have taken many forms including fighting anti-gay laws, advocating provision of HIV and AIDS responses, pride marches, fighting social stigma, and fighting for legal recognition through registration. African movements have increasingly forged solidarity to formally fight persecution on the continent, most notable actions including the African LGBT Manifesto in 2010 and the African statement to British government on aid conditionality.⁷⁸⁷

There is an increasing scholarly interest on how queer groups organise formally and informally in their fight against persecution, and for human rights, in Africa, and particularly in southern Africa.⁷⁸⁸ For example, Currier has looked at LGBT organising in South Africa and Namibia, focusing on the question of whether visibility is a measure of success of a queer movement.⁷⁸⁹ Her work contributed to the understanding that unlike their Western counterparts where coming out has been a central strategy in the operations of queer organisations, African queer organisations combine visibility and invisibility as

⁷⁸⁰ (Kaoma, *Globalizing the Culture Wars U.S. CONSERVATIVES, AFRICAN CHURCHES, & HOMOPHOBIA*, 2009)

⁷⁸¹ (van Klinken A. S., 2013)

⁷⁸² (Action Aid, 2009)

⁷⁸³ (Human Rights Watch, 2003)

⁷⁸⁴ (Human Rights Watch , 2015)

⁷⁸⁵ (Devex, 2017)

⁷⁸⁶ (Mwakasungula, 2013)

⁷⁸⁷ (Ekine & Abbas, 2013, pp. 52,92), (Currier & Cruz, *Civil Society and Sexual Struggles in Africa*, 2014)

⁷⁸⁸ (Currier, *Out in Africa: LGBT Organizing in Namibia and South Africa*, 2012), (Epprecht M. , *Sexuality and Social Justice in Africa: Rethinking Homophobia and Forging Resistance*, 2013), (Currier & Thomann, *Gender and Sexual Diversity Organizing in Africa*, 2016) (Currier, *Transgender Invisibility in Namibian and South African LGBT Organising*, 2015), (Currier & Cruz, *Civil Society and Sexual Struggles in Africa*, 2014), (Ekine & Abbas, 2013)

⁷⁸⁹ (Currier, *Out in Africa: LGBT Organizing in Namibia and South Africa*, 2012), (Munro, 2013)

strategies to balance raising issues publicly and protecting the identities vulnerable populations.⁷⁹⁰ Additionally, she noted that visibility of such organisations as Western funded rendered them vulnerable to the perception that they are driving an imperialist agenda.⁷⁹¹ Importantly, she noted that there was a tension between Western markers of sexualities and an apparent imperative among local queer movements to authenticate local queer identities as African. In the same light, she noted that funding and agenda by international organisations created local perceptions that the fight for SOGI-based rights was a foreign agenda. In her later work, she observed that transgenders were invisible in the queer movements in South Africa and Namibia due to invisibility and the unevenness in self-identification by those who may otherwise be considered as transgender.⁷⁹²

Based on my central proposition that the social construction of both sexuality and human rights are locally specific in the Malawi context, in this section I will discuss the past and present history of civil society organising with the aim of looking how such organising has contributed in the construction of the two concepts, as well as advancing SOGI-based human rights. I will pay attention on the focus of their work, models of intra and inter solidarity, successes and challenges, and the opportunities for the future.

6.3.1. History of Queer Movements in Malawi

According to the Non-Governmental Organisations Board of Malawi, Malawi has over 500 registered non-governmental organisations operating in the country.⁷⁹³ It is estimated that there are over 5000 unregistered NGOs in the country. Malawians have for long mobilised resistance against colonial rule, and established formal movements in the form of religious, traditional or political movements. It was however the advent of multiparty democracy in 1994

⁷⁹⁰ (Munro, 2013)

⁷⁹¹ (Munro, 2013)

⁷⁹² (Currier, Transgender Invisibility in Namibian and South African LGBT Organising, 2015)

⁷⁹³ (The Guardian Newspaper, 2015)

that opened room for civil society to freely organise in the fight for welfare and rights of Malawians.

While most research trace the emergence of queer movements to the HIV and AIDS crisis, and in particular the birth of CEDEP in 2005, historical sources suggest that queer Malawians have forged organised resistance for longer. As such, the focus on CEDEP in previous research about sexuality in Malawi has given the false impression that the queer movement in Malawi is recent. In this section, I argue that the history of movement building in the fight for SOGI-based rights dates earlier than establishment of CEDEP or the emergence of HIV and AIDS. This overlooked knowledge about queer movement building leads to an inadequate understanding of the organised resistance that queer Malawians have initiated since the advent of democracy. The local context and nature about the Malawian queer movement cannot be understood fully without acknowledging the long and rich history of organised resistance that is recorded, only in part, in historical records. CEDEP cannot be understood without an understanding of the history before it.

The earliest mention of a queer movement in Malawi documented in this research dates to 2000 when Behind the Mask,⁷⁹⁴ a media NGO aimed at publishing and disseminating SOGI-based human rights news about Africa reported about establishment of the National League for Democracy and Development (NLDD), a gay rights movement, in Blantyre.⁷⁹⁵ According to the report, the organisation had launched a pilot project to promote equality and civil rights in the country. NLDD was established with a mandate to address challenges and needs of minority groups in Malawi in the context of human rights, health and

⁷⁹⁴ (Behind the Mask, , 2000)

⁷⁹⁵ (Behind the Mask, 2000). The launch of NLDD is also cited by an information note by the Immigration and Refugee Board of Canada, published in 2002. For details see; (European Country of Origin Information Network, 2002)

development. The organisation was led by queer Malawians and had membership of an underground queer movement who were concerned with issues affecting them. Although not explicitly mentioned, the intended focus was on 'LGBT rights', and rights of prisoners and sex workers.⁷⁹⁶ Although there is not much information indicating its origins and specific objectives, its three areas of focus suggest that the movement associated itself with fighting to opening the space for excluded or dissident sexual communities.

In 2005, another movement emerged in Blantyre city and was initially called Gays and Lesbians Association of Malawi (GALA). However, it was renamed The Centre for the Development of People (CEDEP) because the founders resolved that the former name would hamper its chances for being formally registered by the Malawian government.⁷⁹⁷ CEDEP was registered in November 2006 under the Trustees Incorporation Act of 1962, as a human rights and HIV/AIDS organisation. Its generalist mandate, which did not explicitly state SOGI-based human rights, was a strategy to avoid problems with registration as a public trust, which requires an approval of a Minister of Justice.⁷⁹⁸ Over the years, CEDEP increasingly led advocacy for SOGI-based human rights with a focus on MSM in the HIV and AIDS response. However, it maintained a generalist mandate beyond SOGI-based human rights, is led by a person with a heterosexual identity, and does not operate as a queer-membership organisation.

Queer activism peaked momentum around 2007 due to the emergence of the HIV and AIDS crisis, when local researchers from the University of Malawi embarked on research about the impact of HIV on MSM. For example, Ntata and others conducted a research on the socio-demographic characteristics and sexual health related attitudes of MSM in Malawi. Published

⁷⁹⁶ Email communication with Gift Trapence, current Executive Director of CEDEP (13 September 2016)

⁷⁹⁷ Email communication with Gift Trapence, current Executive Director of CEDEP (13 September 2016)

⁷⁹⁸ Email communication with Mr Gift Trapence, CEDEP Executive Director (4 October 2015)

in 2008, it found that HIV intervention programmes were not reaching MSM due to the unfavourable social, political and legal environment.⁷⁹⁹ Around the same period, CEDEP also embarked on a first-ever collaborative study of 201 men who have sex with men (MSM) in Blantyre and Lilongwe to evaluate HIV risk status of MSM in Malawi.⁸⁰⁰ Published in 2009, the research found that MSM had an alarming HIV prevalence of 21.4%, twice the national rate.⁸⁰¹ They also found that 95% of the researched population did not know their HIV status.⁸⁰² Importantly, as the study by CEDEP was progressing, Gift Trapence, then Director of Operations of CEDEP, was invited to do a presentation about gay issues at a national HIV and AIDS research and best practices conference that took place from 27 to 29 July 2007.⁸⁰³ Trapence presented some evidence on knowledge, attitudes and practices of MSM in Malawi. He was later invited to present the same findings at the next national HIV and AIDS research and best practices conference that took place from 25 to 27 June 2008.⁸⁰⁴ These two presentations are the earliest-recorded invitations by the Malawi Government to a queer-focused civil society organisation, as indicated in the sources analysed in this study. While the presentations did not trigger controversy, it shows that there was a level of engagement between CEDEP and the government in the fight against HIV and AIDS. The engagement between government and CEDEP was in line with the objectives of the National HIV and AIDS Policy which had already recognised people engaging in same sex relations as an important group in the national response.⁸⁰⁵

⁷⁹⁹ (Ntata, Muula, & Siziya, Socio-demographic characteristics and sexual health related attitudes and practices of men having sex with men in central and southern Malawi., 2008, July)

⁸⁰⁰ (Wiltz, et al., 2013, p. 9)

⁸⁰¹ (Baral, 2009)

⁸⁰² (Baral, 2009)

⁸⁰³ (Mhlambiso, 2007)

⁸⁰⁴ (Trapence G. , 2008)

⁸⁰⁵ (National AIDS Commission, 2003)

In August 2008, a popular online newspaper reported breaking news that Malawi Gay Rights Movement (MAGRIM), a new gay rights movement, had been established in Blantyre city.⁸⁰⁶ At that time, MAGRIM was reported as the first-ever gay movement. This may be because CEDEP had a generalist mandate, and also because the news about the establishment of NLDD and GALA reported by Behind the Mask eight years earlier did not receive media attention locally. In September of the same year, the same online newspaper reported that MAGRIM had held a launching ceremony at a local hotel in Blantyre city.⁸⁰⁷ Importantly, the report quoted the spokesperson of MAGRIM who stated that the launching ceremony included an engagement ceremony by two same-sex Malawian lovers.

We have launched in style and had an official gay engagement of two boy lovers at the launch ceremony.⁸⁰⁸

This is the first report about a same-sex union reported in the Malawian press, unlike popularly reported that the first one reported in Malawi press was the wedding of Chimbanga and Monjeza in December 2009. According to my sources, the earlier engagement ceremony took place at a venue close to where Monjeza and Chimbanga wedded the following year. While this coincidence cannot confirm any association, the resemblance of the two events must not be ignored as a possible statement of resistance by the queer communities in Malawi. Future research must investigate any association of the two events, and the ways in which they deployed resistance to heteronormativity and traditional family arrangements in Malawi, but also the local community.⁸⁰⁹

In January 2009, CEDEP held its own workshop to disseminate findings from its collaborative research, in which it highlighted the alarming HIV prevalence rates among MSM.⁸¹⁰ The

⁸⁰⁶ (Nyasa Times, 2008)

⁸⁰⁷ (Nyasa Times, 2009)

⁸⁰⁸ (Nyasa Times, 2009)

⁸⁰⁹ (Fetner & Heath, 2015)

⁸¹⁰ (Kamba, 2009)

meeting was graced by members of the National AIDS Commission (NAC), the national coordinating body in the fight against HIV and AIDS and the implementer of the National AIDS Policy in Malawi. In April of the same year, CEDEP's final report from the collaborative MSM study was published in Malawi and widely publicised by CEDEP.⁸¹¹ This publication, and the national conference triggered medial interest on issues of homosexuality. The interest also triggered the scrutiny of activities about queer Malawians. As a result, on 30 July 2009 during the parliament sitting to pass the 2009/2010 budget, a debate emerged among parliamentarians who wanted to strengthen the regulation of homosexuality. During the heated debate, parliamentarians demanded that homosexuality should be put as a matter for national interest. Member of Parliament Edwin Banda proposed amendment of the constitution to include a new clause declaring Malawi as a God-fearing nation.⁸¹² In August 2009, the parliament eventually agreed to hold a vote aimed at amending the constitution to prohibit same-sex marriage.⁸¹³ However, the constitutional amendment never took place.

In September 2009, Principal Secretary for the Department of Nutrition and HIV/AIDS in the Office of the President and Cabinet, Dr Mary Shawa, spoke at a national HIV/AIDS conference in which she argued that Malawi must recognise rights of homosexuals for an effective HIV and AIDS response.⁸¹⁴ The statement by Shawa was reported as front-page news in the local press, thereby triggering public debate on whether Malawi should guarantee human rights for queer people even in the face of HIV and AIDS. Public backlash forced her to issue public statements retracting her earlier statement, emphasising that homosexuality was a crime in Malawi and what she had earlier proposed was not a priority issue for Malawi.⁸¹⁵ Three months later,

⁸¹¹ (Baral, 2009). It should be noted that the study was also concurrently conducted in Namibia and Botswana. The report is regional.

⁸¹² (Epprecht M. , Religion and Same-Sex Relations in Africa, 2012, p. 515)

⁸¹³ It should be noted that action was never taken to give the vote effect by initiating constitutional amendment, which requires a national referendum.

⁸¹⁴ (Mwakasungula, 2013, p. 374). Also, see (COC Netherlands; Global Forum on MSM and HIV, 2012)

⁸¹⁵ (Viljoen & Njau, Beyond the law: Multi-disciplinary perspectives on human rights, 2012, pp. 111-112)

Monjeza and Chimbalanga held their traditional wedding, resulting in the dramatic case that I have discussed in earlier chapters.

The above history indicates that queer Malawians were concerned about their rights prior to the emergence of the HIV and AIDS crisis or establishment of CEDEP. It also shows that they have a longer history of movement building, which pre-existed formal registration of any civil society organisation fighting for SOGI-based human rights.

6.3.2. Movement Building after the arrest of Chimbalanga and

Monjeza

It is without doubt that CEDEP is a key player in the fight for SOGI-related rights in Malawi, especially through its role in the fight for recognition of MSM in the HIV and AIDS response.⁸¹⁶ They were also instrumental in the support to Monjeza and Chimbalanga following their arrest and court case in 2009 and 2010 respectively.⁸¹⁷ All participants in this research reported that CEDEP was an important player in terms of promoting their rights in the country. For example, they cited the organisation outreach peer educators' programme, which trains queer community leaders in skills for teaching MSM about HIV and AIDS prevention, sexual health, and human rights. Chataika is a trained peer educator and has been instrumental as in facilitating community training activities on HIV and AIDS, and sexual health issues.⁸¹⁸ As a peer educator, he is also responsible for linking up queer persons in his community, as well as distributing lubricants and condoms.

⁸¹⁶ E.g. (Trapence, et al., 2012)

⁸¹⁷ E.g. (Mwakasungula, 2013)

⁸¹⁸ (Chataika, 2014)

CEDEP also is important because it is registered as a public trust and has financial resources to act as a convenor. For example, Chikondi has attended a CEDEP meeting which included participation of NAC, where she had a rare opportunity to speak about her sexuality and call for all Malawians to accept her as well as other queer Malawians as part of the Malawian community.⁸¹⁹

In addition to formal meetings, CEDEP is instrumental in organising get-together ceremonies where queer Malawians meet and socialise. Such get together are sometimes held in memory of those who have passed away, including those who had passed away due to HIV-related illness. CEDEP therefore has been instrumental in facilitating solidarity in the queer communities. It has also helped to mobilise the queer community on the internet. Initially CEDEP had a secret Facebook page called 'Bring2Life', aimed at facilitating social interaction and information sharing for the queer community. In exceptional circumstances, the group invited (heterosexual) allies to join the page. The page had approximately 200 members, which is the largest membership of an online group of queer Malawians that I am aware of. Because it was a digital space, which was considered safe from the dangers of physical violence, the discussions were full of robust debates about current issues. It was also a site for everyday gossip about relationships or events in the city. In other words, it was a meeting place for all queer persons.

Collaboration among likeminded Malawian organisations in the promotion of SOGI-based human rights can be traced to advocacy that emerged following the arrest of Chimbanga and Monjeza, when CEDEP collaborated with the Centre for Human Rights and Rehabilitation (CHRR), a leading human rights non-governmental organisation established in 1995 by former

⁸¹⁹ (Chikondi, 2014) (Chikondi, 2014)

students who had returned from exile at the dawn of multiparty democracy in Malawi.⁸²⁰ In response to the arrest of Monjeza and Chimalanga, in March 2010 CHRR and CEDEP co-hosted the first-ever national conference to initiate a dialogue on SOGI-based human rights and HIV and AIDS in Malawi. The conference was attended by religious leaders, academics, international organisations, civil society and some state institutions. The meeting resolved to establish a national task force on most at risk populations (MARPS Task Force).⁸²¹ The MARPS task force had an unprecedented diverse membership including religious leaders, civil society organisations and legal scholars. Although the government was also invited to the task force, they opted out. Because CEDEP and CHRR both have generalist mandates, they have been able to mobilise queer communities in the call for protection of SOGI-based human rights, while at the same time mobilising the wider population on broader public issues such as lack of service delivery, corruption and bad governance.⁸²²

The success story of the coalition between CEDEP and CHRR, and its MARPS task force, has led to several modalities for solidarity. For example, Malawian CSOs have established a Malawi Sexual and Reproductive Health Alliance (MSRHA), comprising six local NGOs working to advocate to acceptance of sexual diversity in the country.⁸²³ The other organisations in the alliance include Malawi Network of Religious Leaders Living with HIV and AIDS (MANERELA+)⁸²⁴ which is a membership network of religious leaders living with or affected with HIV and AIDS in Malawi, Peace and Justice Support Network (PEJUSUN) which is a coalition of Christian and Muslim stakeholders aimed at facilitating a religious discourse to address homophobia, and

⁸²⁰ (Centre for Human Rights and Rehabilitation, 2016)

⁸²¹ (Mwakasungula, 2013, pp. 370-373)

⁸²² (The Other Foundation, 2017)

⁸²³ (The Other Foundation, 2017, p. 38)

⁸²⁴ MANERELA+ is a membership network of religious leaders living with or personally affected by HIV and AIDS in Malawi. It works with women, men and youth in the faith community to reduce stigma, discrimination, silence and denial related to HIV and AIDS. It also initiates dialogue on contentious social issues, including issues about LGBTIQ rights (The Other Foundation, 2016, pp. 39-40)

the Civil Rights Advocacy Centre (CRAC) which is a generalist NGO promoting human rights and good governance in Malawi.⁸²⁵

6.3.3.Challenges to movement building

Based on its origins, CEDEP is principally SOGI-based rights organisation, which was registered with a general mandate to avoid its registration application from being rejected. However, it is peculiar that none of the key members of staff identify as queer. However, some participants in the research suggested that some of the staff may be in the closet.⁸²⁶ If the claim that there are some queer persons at CEDEP is true and nobody is proudly out, it would be difficult, for example, for CEDEP staff to advise others on how to come out to their families or the public. Furthermore, the lack of queer role models within the organisation makes the organisation vulnerable to rhetoric by conservative Malawians who claim that queer persons do not exist in Malawi.

Dependence of the organisations promoting SOGI-bases human rights on foreign donor funding has led conservative actors to label them as mercenaries promoting a foreign imperialist agenda aimed at promoting alien immorality in Malawi.⁸²⁷ The sentiments have also led conservative groups to develop negative attitudes towards specific international partners and donors who support the work of the organisations. Such negative opinions are a significant obstacle to fostering inter-movement solidarity in the advancement of SOGI-based human rights in Malawi. For example, many broader civil society organisations avoid working in solidarity with organisations who are sympathetic to SOGI-based rights, such as CEDEP, CHRR and MANERELA+, based on the claim that such solidarity triggers criticism from their

⁸²⁵ (The Other Foundation, 2017, pp. 38-40)

⁸²⁶ (Nthawi, 2014)

⁸²⁷ (Chanika, Lwanda, & Muula, 2013)

constituents and discredits their public standing in terms of their core objectives.⁸²⁸ Other organisations have refused to collaborate on SOGI-based rights on the basis of competing priorities and risk of violence or political persecution on activist individuals or their organisations.⁸²⁹ Although some individual activists in mainstream civil society organisations may be sympathetic towards SOGI-based human rights, they are non-committal to collaborate with organisations such as CEDEP, CHRR and MANERELA+ on SOGI-based rights initiatives.

The negative opinions have resulted in CEDEP, which remains the only organisation whose main objective is to advance SOGI-based rights, to change its strategy by increasingly speaking out on broader social justice issues than on issues of sexual orientation and gender identity.⁸³⁰ Crucially, Currier identified four economic, political, and structural factors that influenced CEDEP's shift namely, presence of political homophobia, availability of resources, international visibility of SOGI-based rights, and population density of queer movements.⁸³¹ For example, the increased public scrutiny of CEDEP due to its elevated status as an international player on SOGI-based human rights issues has influenced it to scale back in order to be viewed as an organisation with a general mandate. This approach reduces the risk of being stigmatised in terms of involvement in broader national advocacy efforts on issues such as the economy and other political struggles. In the case of CEDEP, it has metamorphosed a public health and social-justice advocacy to become what Currier calls a hybrid organisation.⁸³² CEDEP has managed to strategically reinvent itself in a manner that enables it to lead advocacy on SOGI-

⁸²⁸ (Currier, *Arrested Solidarity: Obstacles to Intermovement Support for LGBT Rights in Malawi*, 2014, p. 153)

⁸²⁹ (Currier, *Arrested Solidarity: Obstacles to Intermovement Support for LGBT Rights in Malawi*, 2014, pp. 157-159)

⁸³⁰ (Currier & McKay, *Pursuing social justice through public health: gender and sexual diversity activism in Malawi*, 2017)

⁸³¹ (Currier & McKay, *Pursuing social justice through public health: gender and sexual diversity activism in Malawi*, 2017)

⁸³² (Currier & McKay, *Pursuing social justice through public health: gender and sexual diversity activism in Malawi*, 2017)

based human rights while retaining its generalist role as a key player in broader struggles in Malawi.

CEDEP's positioning as the main organisation fighting for SOGI-based rights is further complicated because it is not a constituency based organisation with an accountability mechanism to the queer community. It has no formal members. Mfulu who was one of the founding members of MAGRIM and CEDEP expressed frustration at the hybridisation of the organisation, citing that the original aim of establishing the organisation was that it should exclusively focus on promoting rights and welfare of queer Malawians.⁸³³ To him, CEDEP had lost its original mandate to serve interests of queer persons first. According to him, most of the original members had lost faith in the direction CEDEP and there was nothing they could do because CEDEP does not report to a general assembly.

An unintended consequence of the new direction of CEDEP is that MAGRIM has re-emerged to fill the void being felt by queer Malawians like Mfulu. It has rebranded itself to become Activeus.⁸³⁴ Although not registered, Activeus operates as a constituency based community movement and receives minimal funding from an anonymous donor. However, similarly to CEDEP, none of the key members are out of the closet. Other new movements have also emerged to scramble to fill the void. This includes a group launched by queer Malawians in the southern region called Nyasa Rainbow Alliance (NRA). It is led by Eric Sambisa, who came out on national television on 1 January 2016, resulting in a politician calling for murder of queer persons in the country.⁸³⁵ NRA is not registered yet, but established as an openly queer-led alliance comprising queer constituents with a core objective to promote LGBTIQ rights in the

⁸³³ (Mfulu, 2014)

⁸³⁴ (Active Us, 2013)

⁸³⁵ Supra note 430

country.⁸³⁶ Although it is not yet fully operational, the director has spoken at a national health conference and participates at events openly as a queer Malawian. The organisation has also issued a statement condemning anti-gay rhetoric by an American homophobic pastor Anderson who wants to establish a church in the country.⁸³⁷ In 2016, Community Health Rights Advocacy (CHERA) was established as a community led organisation fighting against oppression of diverse key populations in Malawi, focusing on MSM and sex workers.⁸³⁸ Other new organisations focused on SOGI-based rights include MANGO Network, Ivy Foundation, and the Lesbian, Intersex, Transgender and other Extensions (LITE) Association.⁸³⁹ The boom of the organisations indicate a need for representation of the queer communities in Malawi. It remains to be seen how the new movements will collaborate with the established ones such as MANERELA+, PEJUSUN, CHRR and CEDEP.

It should however be noted that constituency-based models will face challenges in the Malawi context since the majority of their potential members remain in the closet. However, while queer Malawians may not want to make their sexuality as visible as is done in other Western contexts, their aspiration for a constituency-based model necessitates their representative organisations to 'come out' in their representation of queer constituencies.⁸⁴⁰ This may necessitate such an 'out' organisation to manage a membership of closeted members, and represent their needs in a manner that does not give away the identity of its constituents. A few participants in this research expressed an interest to play an active role as queer role models in the same manner pioneered by Sambisa in 2016. For example, Nganga stated that he was ready to play the role of goodwill ambassador for the queer community in Malawi.⁸⁴¹ In

⁸³⁶ National Rainbow Alliance (2016), Concept Note (unpublished)

⁸³⁷ Nyasa Rainbow Alliance, Petition against Pastor Steven Anderson's visit to Malawi (issued 26 January 2017)

⁸³⁸ Community Health Rights Advocacy (CHERA) Concept note (unpublished)

⁸³⁹ Petition to the Malawi Human Rights Commission on the public inquiry (2017, unpublished)

⁸⁴⁰ (Currier & McKay, Pursuing social justice through public health: gender and sexual diversity activism in Malawi, 2017)

⁸⁴¹ (Nganga, 2014)

that role, he would attend public meetings and events as an openly queer Malawian, as a strategy to change public misconceptions about queer people.⁸⁴²

The above discussion therefore shows that the landscape of the movement advancing SOGI-based rights focused is more complex than discussed in previous research. The rebranding of CEDEP as a generalist social justice organisation has created a void that has resulted in a boom of new organisations focused on SOGI based human rights. This will require rethinking on how SOGI-based advocacy will be coordinated in the future. However, constituency-based movements will face challenges because most queer Malawians remain closeted and unable to openly participate in activism (e.g. attending queer conferences, holding public resistance marches, or appear in a SOGI-based human rights advocacy poster). Future research must investigate the best models for effective advocacy and solidarity among organisations advancing SOGI-based human rights in Malawi.

Resistance to sexual oppression must be understood as contextual, fluid, and responsive to local circumstances. In recent work,⁸⁴³ *Kong et al* have traced four waves of Tongzhi resistance (against dominance) in Hong Kong. The first wave (1979 to 1991) focused on decriminalising colonial laws to give consenting adults a right to having sex in private.⁸⁴⁴ Since this was a fight for private autonomy, there was no fight for a public gay identity. The second wave (1991 to 1997) focused on building a visible Tongzhi gay identity and community.⁸⁴⁵ They were fighting to a distinct group in the Hong Kong community. The third wave (1997-2000s) began to build sexual citizenships by actively engaging in political activities aimed at fighting for equality and inclusion.⁸⁴⁶ This included establishment of movements and organisations, as well as

⁸⁴² (Nganga, 2014)

⁸⁴³ (Kong, Lau, & Li, *The Fourth Wave? A Critical Reflection on the Tongzhi Movement in Hong Kong*, 2015)

⁸⁴⁴ (Kong, Lau, & Li, *The Fourth Wave? A Critical Reflection on the Tongzhi Movement in Hong Kong*, 2015, p. 190)

⁸⁴⁵ (Kong, Lau, & Li, *The Fourth Wave? A Critical Reflection on the Tongzhi Movement in Hong Kong*, 2015, p. 192)

⁸⁴⁶ (Kong, Lau, & Li, *The Fourth Wave? A Critical Reflection on the Tongzhi Movement in Hong Kong*, 2015, p. 194)

performing public events such as pride parades. The authors see a fourth wave which has emerged from 2012 and has seen re-emergence of coming out politics by prominent public figures and further building of Tongzhi movement.⁸⁴⁷ Social movements, just like that of the Tongzhi, must be interpreted in relation to their specific socio-historical contexts. Malawi should therefore be understood to be undergoing a radical reformation of movement building, which in the end has potential to enhance coordination between queer movements and relevant organisations.

6.4. Conclusion

In this final analytical chapter, which is preceded by two chapters discussing obstacles that queer persons face in their pursuit of SOGI-based human rights in Malawi, I have discussed strategies that queer Malawians are deploying to claim their SOGI-based human rights. I have shown that they have deployed strategies to occupy physical and digital spaces through the use of coded language and creative usage of the spaces. However, I have argued that although their strategies enable them to claim the spaces to an extent, they fall short of claiming a full identity through which they can make SOGI-based claims in their own rights as queer persons.

I have also shown that Malawi has a history of queer movements which is more complex than discussed in previous research. There were organised movements before the establishment of CEDEP in 2005 or the emergence of the HIV and AIDS crisis. Since the arrest of Monjeza and Chimbalinga in 2009, CEDEP has increasingly collaborated with other organisations interested in the promotion of SOGI-based human rights. The strategic choices by CEDEP to adopt a generalist social justice mandate has created a gap in servicing the needs of queer Malawians, who aspire for a constituency based organisation solely focused on their cause. This has led to a rapid boom of

⁸⁴⁷ (Kong, Lau, & Li, *The Fourth Wave? A Critical Reflection on the Tongzhi Movement in Hong Kong*, 2015, p. 198)

other organisations working to create constituency based models. However, such new models will face challenges in representing and managing a constituency whose majority remains in the closet.

Concluding Remarks

People around the world continue to suffer human rights violations based on perceived or actual sexual orientation or gender identity.⁸⁴⁸ Malawi is one of the 32 African countries where same-sex acts

⁸⁴⁸ Supra note 12

or identities are against the law.⁸⁴⁹ Recent reports have shown that queer people in Malawi experience stigma, discrimination, exclusion and violence.⁸⁵⁰ All participants interviewed in this research reported experiencing stigma, discrimination and other human rights violations in their daily lives. The stories include that of Chifundo who became reluctant to visit public health facilities because personnel were ridiculing him,⁸⁵¹ Chikondi who became suicidal for being disowned by his father upon revelation of his sexuality,⁸⁵² Nganga who was beaten by a mob after revelation of his sexuality,⁸⁵³ Shanu who was stripped naked at a public market and severely beaten as a warning against lesbians engaging in same-sex intimacy,⁸⁵⁴ and Zithembe whose daughter was taken away from her because her family-of-origin disapproved of her being lesbian.⁸⁵⁵

Majority of the previous research about queer lives in Malawi has focused on quantitative and qualitative studies of the impact of HIV and AIDS on MSM, as part of the broader national AIDS response. The absence of studies of human rights violations against queer Malawians suggests that there is insufficient scholarly interest in studying SOGI-based human rights among Malawian human rights scholars.

The stories documented in this research also indicate that queer Malawians are demanding equal recognition and protection of their human rights. For example, Chifundo felt that queer Malawians deserve freedoms that any other person in Malawi deserves:

Freedoms and rights... (I want freedoms) so that we should just live the way we want, whether gay, whether not gay, everybody should have freedoms... I would have loved if people would just accept that everybody should live freely.⁸⁵⁶

⁸⁴⁹ Supra note 14

⁸⁵⁰ Supra note 28

⁸⁵¹ (Chifundo, 2014)

⁸⁵² (Chikondi, 2014)

⁸⁵³ (Nganga, 2014)

⁸⁵⁴ (Shanu, 2014)

⁸⁵⁵ (Zithembe, 2014)

⁸⁵⁶ (Chifundo, 2014)

Nganga felt that government has to recognise queer Malawians as human beings in order for the rest of society to follow suit to accept their equal entitlement to human rights.

On all our problems regarding human rights, we encounter because maybe government hasn't recognised us... if they recognised that we exist as human beings and part of society, society will protect us.⁸⁵⁷

Other participants were concerned with the lack of access to HIV prevention and AIDS treatment services, citing the need for health personnel to treat them humanely at public health clinics. The rights being demanded can be found in the constitution such as prohibition of discrimination (article 20(1)), freedom from torture or inhuman treatment (article 19(2)) and right to health (article 30(2)). However, realisation of such rights demands a favourable political environment to initiate interventions that answers to the human rights demands.

This research aimed at contributing knowledge towards realisation of such rights by studying the local context for the protection of human rights based on sexual orientation and gender identity in Malawi. Drawing from media discourses and the life stories of 44 queer Malawians, I have explored experiences of stigma, discrimination and exclusion that queer Malawians face in their daily lives.⁸⁵⁸ I have also explored the history of human rights and sexuality in Malawi to reveal how the local context influences localised terminology and meanings which guide how different actors negotiate between enforcement of heterosexual norms and queer resistance.⁸⁵⁹ I have also shared my methodology for field research in order to highlight the challenges and opportunities when researching hard-to-reach populations in Malawi.⁸⁶⁰ This section provides an overview of the study, policy and theoretical implications, and recommendation for future research.

⁸⁵⁷ (Nganga, 2014)

⁸⁵⁸ Chapters 4, 5 and 6

⁸⁵⁹ Chapter 2

⁸⁶⁰ Chapter 3

The Paradox of SOGI-based Human Rights in Malawi

In this research, I have drawn from human rights law and sociology with the aim of going beyond law to analyse how ordinary people and society negotiate SOGI-based human rights in their daily lives. Specifically, I have argued that sociology is an important discipline in the study of human rights generally, and SOGI-based human rights.⁸⁶¹ Such an approach was critical in this study to analyse how sexuality and human rights are understood in Malawi, and how such local understanding influence how SOGI-based human rights are negotiated in law or social practice. As the dire stories of the participants in this research have shown, communities have the potential to disregard the supremacy of constitutional values which prohibit discrimination and guarantees equal human rights protection for all persons in Malawi because of negative attitudes towards same-sex conduct. Such situation requires going beyond the law to analyse how the Malawian community applies their human rights values, whether they exist in law or social norms.

Malawi presents a paradox because human rights violations occur in a context where the country's domestic and international human rights obligations potentially offer adequate protection mechanisms.⁸⁶² Section 20(1) in the bill of rights of the republican constitution, which is the supreme law of the land, guarantees equal and effective protection against any form of discrimination.⁸⁶³ In principle therefore, everyone is entitled to the rights outlined in the constitution including right to life,⁸⁶⁴ right to liberty,⁸⁶⁵ right to freedom and security of person,⁸⁶⁶

⁸⁶¹ Supra note 93

⁸⁶² (Chirwa D. , 2011)

⁸⁶³ (Malawi Government, 2004)

⁸⁶⁴ Article 16

⁸⁶⁵ Article 18

⁸⁶⁶ Article 19(6)

right to personal privacy,⁸⁶⁷ right to education,⁸⁶⁸ and right to development.⁸⁶⁹ In addition, article 211(2) provides for makes the ICCPR, ICESCR, CEDAW, CRC and the ACHPR part of Malawi's domestic laws.⁸⁷⁰ ICCPR, ICESCR, CEDAW and CRC have been interpreted to extend human rights protections on the basis of sexual orientation or gender identity.⁸⁷¹ The applicability of international human rights instruments is also supported by decisions by domestic courts.⁸⁷² The necessity of protecting sexual minorities is supported by the National AIDS Policy, which recognise the critical need to facilitate a favourable legal environment for free access to relevant health services.⁸⁷³ However, contrary to the supreme law of the land and international human rights law, same-sex intimacy and identities are outlawed under sections 137A, 153 and 156 of the Penal Code, as well as the definition of sex in the Marriage Act. In practice therefore, the relevant provisions of the Penal Code and Marriage Act have been able to withstand the force of the Constitution which principally invalidates them.

My theoretical departure was that both sexuality and human rights are socially constructed, whose meanings are shaped by local terminology and histories.⁸⁷⁴ In other words, I have found that Malawi's history has shaped how its communities understand and respond to issues of sexuality and human rights. In this regard, I have proposed that the sustenance of the provisions of the Penal Code and Marriage act lies in some local meanings about sexuality and human rights which

⁸⁶⁷ Article 21

⁸⁶⁸ Article 25

⁸⁶⁹ Article 30

⁸⁷⁰ (Malawi Government, 2004)

⁸⁷¹ See section 2.2

⁸⁷² For example, (Chakufwa Tom Chihana versus The Republic, 1992), (Gable Masangano Versus The Attorney General, Minister of Home Affairs and Internal Security, Commissioner of Prisons, 2009, pp. 28-29)

⁸⁷³ Supra note 348

⁸⁷⁴ For example: (McIntosh, 1968), (Plummer K. , Symbolic Interactionism and the Forms of Homosexuality, 1996), (Weeks J. , Sexualities, 2009), (Plummer K. , Sexual Stigma: An Interactionist Account, 1975), (Plummer K. , Cosmopolitan Sexualities, 2015), (Weeks J. , Sexuality, 2010), (Weeks J. , What is a Sexual History?, 2016) (Gregg, Human Rights as Social Construction, 2012), and (Gregg, The human rights state: theoretical challenges, empirical deployments: reply to my critics, 2017),

create a perception that such outlawing is necessary. There is no Chichewa terminology for sexuality. However, *mathanyula*, the most common word used to refer to ‘homosexuality’, connotes anal sex between two men, which may also include the potential for an adult male to engage in sexual activities with young boys. Mathanyula is viewed as an alien practice imported from the West, and rarely imagined in the context of same-sex love or consensual adult intimacy. It is through such localised connotations that the acts are viewed as disgusting, and morally and religiously repugnant. Human rights are translated as *ufulu wa chibadwidwe wa munthu*.⁸⁷⁵ Ufulu connotes both rights and freedoms. As such, *Ufulu wa mathanyula* may also connote a freedom to conduct mathanyula, which may include freedom to engage in non-consensual intimacy or sexual activities with young boys. As a result, Malawians find it necessary to reject any calls for *ufulu wa mathanyula* if misunderstood as the freedom to engage in *mathanyula*. This viewpoint is also perpetrated by the fact that all cases recorded in Malawi’s courts, with the exception of the case of Monjeza and Chimalanga, are about non-consensual same-sex conduct, including cases of acts involving underage boys. To resolve the misunderstanding, I have proposed an epistemological shift that will clarify that SOGI-based human rights must be understood as the equal entitlement to Malawi’s domestic and international human rights obligations by queer Malawians (as opposed to being understood as a right to mathanyula).

Public rejection of mathanyula and any rights associated with it is based on a myth that it is a Western import aimed at corrupting Malawi’s moral values. In response, I have presented a comprehensive history that has shown that same-sex intimacy pre-existed colonialism. I have shown that early colonial administrators recorded accounts of same-sex intimacy among Nyasaland natives.⁸⁷⁶ Similar accounts are recorded about Malawian natives who migrated to

⁸⁷⁵ Supra note 386

⁸⁷⁶ E.g. (Johnston, 1897), (Duff & H, 1903)

neighbouring countries such as Zambia, Zimbabwe, South Africa and Botswana in search for work.⁸⁷⁷ The historical evidence suggest that same-sex intimacies pre-existed arrival of colonial settlers. Issues of 'homosexuality' or 'gay rights' did not receive much public attention until the traditional wedding of Monjeza and Chimbanga in December 2009. Significant earlier events that did not raise widespread moral panic include the adoption of a National AIDS Policy that included protections for people engaging in same-sex activities in 2003, the pardon of a British citizen who was convicted for crimes under section 153 of the Penal Code in the same year, and a debate on whether to recognise 'gay rights' during the constitutional review process in 2004.⁸⁷⁸ The interest by mainstream local media can be implicated in the moral panic that has brought closer scrutiny of queer persons and public rejection of SOGI-based human rights. Again, the rejection is predominantly about 'the right to mathanyula' and not entitlement to rights from the constitution and international human rights instruments.

In Chapter 3, I discussed my multi-methods research design that drew from discourse analysis of the local debates and analysis of life stories of 44 queer Malawians that I interviewed in Malawi in 2014. I have proposed multiple strategies for future researchers in terms of accessing queer populations, including identification of an 'insider' gatekeeper and engaging in local activities held by potential participants.⁸⁷⁹ Based on a reflexive account drawing on my positionality during fieldwork, I have proposed that not being a queer researcher does not guarantee a disadvantage when interviewing queer participants in Malawi, as a relationship between the researcher and researched may be facilitated by other intersecting identities e.g. being a native, being a Christian etc.⁸⁸⁰ I have also highlighted the opportunities that the internet and social media offer in establishing communication with research participants, and interaction with research sites. My

⁸⁷⁷ See section 2.2.1

⁸⁷⁸ See section 2.2.1.1.1

⁸⁷⁹ See section 3.4.3.1

⁸⁸⁰ See section 3.4.3.2

experiences in the field and indeed throughout this research confirms that a good research design is critical to successful future research about human rights and sexuality in Malawi.

Using coming out as a process towards claiming a same-sex sexual identity, in chapter 4 I have discussed experiences of how the research participants negotiated human rights claims in their daily lives. I have shown that the family represents the private sphere of Malawian society where heterosexual norms are taught and enforced. Coming out has diverse outcomes. The majority of the participants opt to remain in the closet for fear of stigma or social exclusion. This includes Rumbani and Chiheni who fears that if he came out he would suffer the same fate of being arrested and convicted like in the case of Chimbalanga or Monjeza.⁸⁸¹ The mere existence of anti-homosexuality laws is a deterrent to those who wish to come out. While many who come out are rejected, disowned by their families of origin, I have also noted that there are families that accept and coexist with their queer family members.⁸⁸² However, their claim for any SOGI-based human rights is limited because they are unable to secure formal recognition of their queer identities. As a result, they do not have full access to human rights as outlined in the constitution and relevant international human rights treaties. Only a few participants in this research had come out, which implies that the majority who have not come out are unable to demand human rights based on their same-sex sexual orientation or gender identity. The reasons for opting not to come out include the fear of stigma, discrimination and violence. The stories of acceptance of queer members of the community offers insight into best practices for facilitating this first phase towards recognition and respect of SOGI-based human rights. Although the issue of same-sex marriage is looked as peripheral in the local debates in Malawi, I have documented a case of a Malawian queer couple, Ntchayi and Nthombi, who were living as husband and wife. In their narrative, they

⁸⁸¹ See chapter 4

⁸⁸² Sections 4.4.1 and 4.4.2

are married and aspire equal entitlement to marriage. As Nthombi narrated in his interview that he always wanted to get married to a man.⁸⁸³ Their case suggest that the issue of same-sex marriage should not be dismissed altogether as an important issue around issues of same-sex intimacy in the Malawian context.⁸⁸⁴

In chapter 5 I have also discussed how same-sex intimacies are regulated in the public spheres of Malawian society. Specifically, I have shown that organised religion, law enforcement and public health facilities are institution which have significant influence in regulating sexualities in the public sphere. Since more than 90% of Malawians belong to religious denominations, religious leaders are influential in guiding public morality.⁸⁸⁵ As such, the pastoral letter by the Episcopal Conference of Malawi and the press statement by the Evangelical Association of Malawi in 2016 calling for government to reject homosexuality have far-reaching consequences in terms of setting the tone of negative public attitudes against homosexuality.⁸⁸⁶ This results in queer Malawians like Chimwemwe not feeling welcome to the faith community, which is a most important social institution in Malawian communities,⁸⁸⁷ or guilty feelings by Mfulu.⁸⁸⁸ Condemnation of 'homosexuality' by the church has therefore shaped the negative opinions among Malawians.

All participants interviewed in this research reported a fear of police arrest based on how the police treated Chimbanga and Monjeza following their wedding 2009. Rumbani who had reported about being beaten on allegations of homosexuality reported that police officials dismissed his case because it involved issues of homosexuality.⁸⁸⁹ Although in another instance

⁸⁸³ Supranote 586

⁸⁸⁴ Section 4.4.2.1

⁸⁸⁵ (National Statistics Office, 2011)

⁸⁸⁶ See chapter 5.1

⁸⁸⁷ Supranote 625

⁸⁸⁸ Supranote 626

⁸⁸⁹ Supranote 655

police had protected Nganga from a mob attack, it is important to note that police officials are not immune to the negative attitudes about homosexuality that are common in Malawian society. Such negative attitudes may result in them unfairly rejecting cases of violence based on sexual orientation and gender identity. Those who have approached public health facilities for treatment of STIs have reported that they are unlikely to approach the health facilities in the future due to bad treatment by health officials. Cases as the one reported by Chikondi earlier in this chapter were a common theme among the participants in this research. However, it must be noted there were also stories of inclusiveness and support from some churches and police officials. There is a need for further exploration regarding the strategies for inclusion by such institutions or personnel.

In the final chapter, I have discussed further how queer Malawians have asserted their claim for rights by queering public spaces and organising of movements. Using coded language and discreet occupation of public spaces, they have been able to navigate public spaces in a manner disguised from the general population as a strategy to navigate stigma or violence.⁸⁹⁰ The internet has offered them an alternative public space where they can manipulate their identities or create private spaces where they can share information, communicate, and seek relationships.⁸⁹¹ I have also discussed the long history of civil society organising by queer Malawians in pursuit of their SOGI-based human rights. Contrary to previous research which has highlighted CEDEP as the main player in the fight for SOGI-based human rights, I have shown the existence of other movements which are also doing significant work in the mobilisation of the queer community in fighting for rights. I have noted that constituency-based models of queer-focused civil society will face a challenge in managing a constituency which remain in the closet.

⁸⁹⁰ Section 6.1

⁸⁹¹ Section 6.2

Theoretical and policy Implications

This thesis challenges the premises through which the debates about 'homosexuality' and 'LGBT rights' have occurred in Malawi. It problematises the conventional understanding of 'homosexuality' and 'LGBT rights'. I have argued that the localised meanings of both sexuality and human rights have resulted in the misconstruction of what SOGI-based human rights ought to mean: equal entitlement of human rights in accordance with Malawi's domestic and international human rights obligations. If discussants in the debates cite different meanings about the 'human rights' that they are referring to, agreement and conclusions are unattainable. Specifically, if one is demanding for queer persons to have an equal entitlement to human rights in accordance to Malawi's domestic and international human rights obligations, it is fallacious to reject such rights on the understanding that the right being demanded are 'rights to mathanyula'.⁸⁹²

The diversity of sexual categories as narrated by the queer Malawians interviewed in this research further affirms my assertion that rejection of 'LGBT rights' in the Malawian context is based on an imagination of 'homosexuality' that distorts the diverse character of queer Malawians in a way that dehumanises them. A more obvious fact in this regard is that not all queer Malawians engage in 'mathanyula' as there exists female Malawians whose sexual preferences or gender identification do not conform to heterosexual norms. In fact, such female sexualities are more complex than imagined. For example, Tupochele who was born female identifies as heterosexual, was previously married to a man, but prefers and engages in same-sex relationships.⁸⁹³ Zithembe identifies as a lesbian but wonders whether she could be 'gay' as she has been able to bear a child

⁸⁹² Where mathanyula is understood as non-consensual same-sex sex or sexual activities between adult men and young boys

⁸⁹³ (Tupochele, 2014)

after a sexual relationship with a man.⁸⁹⁴ To her, bearing a child implies that she is not homosexual although she engages in same-sex intimacy. By implication, she does not perceive being lesbian as homosexual. On the other hand, Chinteya self-identify as a man. The male participants interviewed in this research were also diverse as some identified as gay men, some as heterosexual, some as transgender, some as women, and some as MSM. This calls for future research to further investigate the diversity of same-sex identities in Malawi as a way of further weakening the 'mathanyula' myths. Future research must also explore how such diversity of queer Malawians creates opportunity for framing human rights claims based on intersecting characteristics held by the different categories of queer Malawians. For example, how does exclusion of those queer Malawians who were born female from the myth of mathanyula offer opportunity for entitlement to rights that may benefit MSM?

Future theoretical or policy discussions must clarify concepts in order to recognise contextual meanings and clarify the substantive demands connoting SOGI-based human rights. If SOGI-based human rights is understood as an equal entitlement to such rights outlined in Malawi's constitution and the international human rights treaties that it is party to, the government must come to terms with to guarantee their recognition and protection. In other words, such recognition and protection are inescapable. International partners in the advocacy for SOGI-based rights must consider these contextual particularities when demanding Malawians to recognise and protect 'LGBT rights'.

In this research I have also challenged the myth that same-sex intimacy is a new phenomenon in Malawi. This includes an account of a colonial administrator who documented of the existence of

⁸⁹⁴ (Zithembe, 2014)

‘unnatural crimes’ along the lakeshore of Lake Malawi as early as 1903.⁸⁹⁵ The rich history discussed in this thesis demands deliberate effort to highlight that queer Malawians have always needed recognition and rights. While the impact of such global advocacy cannot be ignored, its absence does not imply that queer Malawians would not require human rights. In my discussion of the history of same-sex intimacies in Malawi, I have also noted the possibility that some negative attitudes about ‘homosexuality’ pre-existed colonialism.⁸⁹⁶ This challenges the prevailing view by notable scholars that homophobia in Africa is (exclusively) an import from the West. It is therefore crucial that local foundations of homophobia must not be overlooked as key drivers to current challenges in the advancement of SOGI-based human rights.

The continued suffering of human rights violations by queer Malawians demand enhanced intersectionality between research and policy interventions to address such violations. First, such interventions must facilitate that the Malawi government adheres to its legal obligations to extend human rights protection to queer persons. Second, government and non-governmental actors must facilitate a favourable social environment to mitigate the stigma and social exclusion that queer persons suffer at the community level. Future research must aim to establish the same-sex sexual categories that exist in Malawi. This will deepen the understanding of the needs of specific categories in order to tailor responses beyond MSM. In addition, there is need for research on the specific human rights claims that are required for different non-conforming categories. Such research would assist in identifying the legal obligations that Malawi has towards each of these categories. Specifically, deliberate focus should be made to investigate the situation of women, children, transgender and intersex persons. Importantly, there is a need to investigate the negative

⁸⁹⁵ Supranote 334

⁸⁹⁶ Supra note 334

impact of homophobia on queer persons in Malawi, with special focus on human trafficking, sex work, depression and suicide.

While some previous reports show that queer Malawians face stigma and discrimination, I have also presented stories which suggest that some communities are inclusive and recognise the need for protecting queer members of the society. There is need for more research to learn from best practices for the inclusion and protection of queer persons in Malawi.

The social attitudes about same-sex intimacy among Malawians are unknown due to lack of evidence. So far there is no research to nationally survey the attitudes of Malawians towards homosexuality or SOGI-based human rights.⁸⁹⁷ As a result, the state has defended its reservations about guaranteeing protections on the assumption that they are respecting the 'wishes of Malawians'.⁸⁹⁸ This position is fallacious until there is evidence to support or dispute it.

The role of the internet and digital technologies is an indispensable part of sexuality studies in the 21st Century. In this research I found that the internet and other technologies are a central tool among queer Malawians for experiencing sexual lives and negotiating human rights. All participants interviewed had a mobile phone as a tool for connecting with each other, sharing information to navigate stigma or violence, and negotiating sex. The rapid increase in internet access and use of mobile technologies in Malawi because of urbanisation suggests that the digital sphere will continue to be an important element of the lives of queer Malawians especially the youth. The critical knowledge gap about the lives of queer Malawians in the digital sphere needs urgent research on issues such as negotiating identities and experiencing intimacy. Future research

⁸⁹⁷ (The Other Foundation; Human Sciences Research Council, 2016)

⁸⁹⁸ Section 4.4.2.1

about LGBT organising in Malawi must consider the role of the internet and technology in mobilisation of advocacy in the fight for SOGI-based human rights.

Final Words

*Even the dogs may eat of the crumbs that fall from the rich man's table; and in these days, when the rich in knowledge eat such specialised food at such separate tables, only the dogs have a chance of a balanced diet.*⁸⁹⁹

This research is a contribution to a subject-matter that that enjoys little interest and popularity among African scholars in mainstream human rights research. It contributes to the new direction of human rights aimed at highlighting the complementarity of human rights law and sociology in interdisciplinary human rights scholarship.⁹⁰⁰ It brings closer theory and practice by saturating normative analysis of human rights and sexuality with real lived human stories with an aim to sparking real life conventional human rights studies.⁹⁰¹ It highlights an important point that beyond the law, it is worthwhile to understand how people use or misuse human rights norms as they negotiate human rights claims in their ordinary daily social transactions. It has innovated methods for researching hard-to-identify populations. Importantly, it is a call for an increased interest in SOGI-based human rights among African and Malawian scholars. The words of Sir Vickers quoted above aptly summarise my interdisciplinary journey in pursuit of a theory and practice of (SOGI-based) human rights.

I am not naïve about the challenges ahead. During the last days of my research, I excitedly attempted to explain my research to an African academic. The response was that my topic was not

⁸⁹⁹ Vickers, G (1968) *The Art of Judgement: A Study of Policy Making*, quoted in (Higgot, 1999)

⁹⁰⁰ (Hynes, Lamb, Short, & Waites, 2010)

⁹⁰¹ (Gready, 2010)

worthy academic inquiry. Such sentiments, which I have encountered throughout this project, only strengthen my resolve to strike further the interdisciplinary chords to further queer African discourses.

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In the matter of the Adoption of Children Act (CAP. 26:01) and In the matter of David Banda (a male infant), Adoption Cause No. 2 of 2006 (High Court of Malawi May 28, 2008)

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United Nations, General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women 28 (CEDAW/C/2010/47/CG.2)

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African Union. (1998). Protocol on the Establishment of an African Court on human and Peoples' Rights

African Union. (1990). African Charter on the Rights and Welfare of the Child

United Nations. (1948). Universal Declaration of Human Rights

United Nations (1966). International Covenant on Civil and Political Rights (ICCPR)

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African Commission on Human and Peoples' Rights. (2014). *Resolution: Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity*. Banjul: African Union

Appendix A1: Ethical Approval Form

Application for Ethical Approval of Research Involving Human Participants

This application form should be completed for any research involving human participants conducted in or by the University. 'Human participants' are defined as including living human beings, human beings who have recently died (cadavers, human remains and body parts), embryos and fetuses, human tissue and bodily fluids, and human data and records (such as, but not restricted to medical, genetic, financial, personnel, criminal or administrative records and test results including scholastic achievements). Research should not commence until written approval has been received (from Departmental Research Director, Faculty Ethics Committee (FEC) or the University's Ethics Committee). This should be borne in mind when setting a start date for the project.

Applications should be made on this form, and submitted electronically, to your Departmental Research Director. A signed copy of the form should also be submitted. Applications will be assessed by the Research Director in the first instance, and may then passed to the FEC, and then to the University's Ethics Committee. A copy of your research proposal and any necessary supporting documentation (e.g. consent form, recruiting materials, etc.) should also be attached to this form.

A full copy of the signed application will be retained by the department/school for 6 years following completion of the project. The signed application form cover sheet (two pages) will be sent to the Research Governance and Planning Manager in the REO as Secretary of the University's Ethics Committee.

1. Title of project: Sexuality and Human Rights in Malawi

2. The title of your project will be published in the minutes of the University Ethics Committee. If you object, then a reference number will be used in place of the title.

Do you object to the title of your project being published? Yes / No

3. This Project is: Staff Research Project Student Project

4. Principal Investigator(s) (students should also include the name of their supervisor):

Name:	Department:
Alan MSOSA	Human Rights Centre
Supervisor: Dr Roisin Ryan-Flood	

5. **Proposed start date:** September 2014

6. **Probable duration:** March 2015

7. Will this project be externally funded? Yes / No

If Yes,

8. What is the source of the funding?

Commonwealth Scholarship Scheme

9. If external approval for this research has been given, then only this cover sheet needs to be submitted

External ethics approval obtained (attach evidence of approval)

Yes / No

Declaration of Principal Investigator:

The information contained in this application, including any accompanying information, is, to the best of my knowledge, complete and correct. I/we have read the University's *Guidelines for Ethical Approval of Research Involving Human Participants* and accept responsibility for the conduct of the procedures set out in this application in accordance with the guidelines, the University's *Statement on Safeguarding Good Scientific Practice* and any other conditions laid down by the University's Ethics Committee. I/we have attempted to identify all risks related to the research that may arise in conducting this research and acknowledge my/our obligations and the rights of the participants.

Signature(s):

Name(s) in block capitals:ALAN MSOSA.....

Date:21 May 2014.....

Supervisor's recommendation (Student Projects only):

I recommend that this project falls under Annex B / should be referred to the FEC (delete as appropriate).

Supervisor's signature:

Outcome:

The Departmental Director of Research (DoR) has reviewed this project and considers the methodological/technical aspects of the proposal to be appropriate to the tasks proposed. The DoR considers that the investigator(s) has/have the necessary qualifications, experience and facilities to conduct the research set out in this application, and to deal with any emergencies and contingencies that may arise.

This application falls under Annex B and is approved on behalf of the FEC



This application is referred to the FEC because it does not fall under Annex B

This application is referred to the FEC because it requires independent scrutiny

Signature(s):

Name(s) in block capitals:

Department:

Date:

The application has been approved by the FEC

The application has not been approved by the FEC

The application is referred to the University Ethics Committee

Signature(s):

Name(s) in block capitals:

Faculty:

Date:

Details of the Project

1. **Brief outline of project** (This should include the purpose or objectives of the research, brief justification, and a summary of methods. It should be approx. 150 words in everyday language that is free from jargon).

This is a research on sexuality and human rights in Malawi, aimed at understanding how the issue of sexuality is shaping the understanding and implementation of human rights in the country. The research will involve analysis of relevant legal, policy and newspaper documents. It will also involve semi-structured interviews with selected participants to the research. This research will involve interviews with people who practice same-sex sexualities (people of Lesbian, Gay, Bisexual, and Transgender identities).

Participant Details

2. Will the research involve human participants? (indicate as appropriate)

Yes



No



3. Who are they and how will they be recruited? (If any recruiting materials are to be used, e.g. advertisement or letter of invitation, please provide copies).

Participation will be voluntary. I will brief two human rights organizations on the focus and purpose of my research, who will recommend a few potential participants for me to approach and request for participation. Those few participants will introduce me to other participants for their participation. The communications will mainly be verbal.

Will participants be paid or reimbursed?

No

4. Could participants be considered:

1. to be vulnerable (e.g. children, mentally-ill)? Yes / No

2. to feel obliged to take part in the research? Yes / No

If the answer to either of these is yes, please explain how the participants could be considered vulnerable and why vulnerable participants are necessary for the research.

Informed Consent

5. Will the participant's consent be obtained for involvement in the research orally or in writing?

(If in writing, please attach an example of written consent for approval):

Yes No

How will consent be obtained and recorded? If consent is not possible, explain why.

It will be obtained through the attached introduction note and consent form

Please attach a participant information sheet where appropriate.

Confidentiality / Anonymity

6. If the research generates personal data, describe the arrangements for maintaining anonymity and confidentiality or the reasons for not doing so.

The introductory note and consent form assures for participants of anonymity. Pseudonyms will be used for this research. Data that will be published will ensure protection of privacy and confidentiality. The research is not aimed at generating personal data to identify people's identities against issues being analysed.

Data Access, Storage and Security

7. Describe the arrangements for storing and maintaining the security of any personal data collected as part of the project. Please provide details of those who will have access to the data.

All recorded data; digital or physical, will be stored in a confidential location in a locked cabinet, with privy access to me only. All digital or electronic data will be stored in a password protected laptop, that will be locked in a cabinet when not in use. Pseudonyms and coded identification will ensure security and confidentiality of the participants.

It is a requirement of the Data Protection Act 1998 to ensure individuals are aware of how information about them will be managed. Please tick the box to confirm that participants will be informed of the data access, storage and security arrangements described above. If relevant, it is appropriate for this to be done via the participant information sheet

Further guidance about the collection of personal data for research purposes and compliance with the Data Protection Act can be accessed at the following weblink. Please tick the box to confirm that you have read this guidance
(http://www.essex.ac.uk/records_management/policies/data_protection_and_research.aspx)

Risk and Risk Management

8. Are there any potential risks (e.g. physical, psychological, social, legal or economic) to participants or subjects associated with the proposed research?

Yes

No

If Yes,

Please provide full details and explain what risk management procedures will be put in place to minimise the risks:

9. Are there any potential risks to researchers as a consequence of undertaking this proposal that are greater than those encountered in normal day-to-day life?

Yes **No**

If Yes,

Please provide full details and explain what risk management procedures will be put in place to minimise the risks:

10. Will the research involve individuals below the age of 18 or individuals of 18 years and over with a limited capacity to give informed consent?

Yes **No**

If Yes, a criminal records disclosure (CRB check) within the last three years is required.

Please provide details of the “clear disclosure”:

Date of disclosure:

Type of disclosure:
Organisation that requested disclosure:

11. Are there any other ethical issues that have not been addressed which you would wish to bring to the attention of the Faculty and/or University Ethics Committees

None anticipated or expected so far.

Appendix A2: Questionnaire

Field Research Guiding Interview Questions

Sexuality and Human Rights in Malawi

*Note to interviewer: Please use the **Introductory Note** to brief the interview participant on the research. This interview should be preceded by the participant filling the **Informed Consent Form**.*

Interview Code/ Number:.....

Participant Code/ Name:.....

Location:.....

Follow up Contact Details:.....

Date:.....

3. Personal History

- Date of birth
- Place of birth
- Early years at home
- Early school years
- Highest qualification
- Employment (or trade, business)
- Community or traditional status
- Religion
- Politics

- Family (married, kids)
- What he is mostly known as (or known for) in the community

4. Sexuality (Self- perception/explanation)

- Self-description of sexuality
- Self-understanding and explanation about own sexuality
- Why do you have this sexuality?
- Any (moral) value on the sexuality
- How important or significant is the sexuality in own life
- Relationship of sexuality with all other key aspects of life

5. Sexuality (perception/identity by others)

- Do others know about the sexuality (and who)?
- How do they describe the sexuality?
- How do they explain or understand the sexuality?
- Any (moral) value on the sexuality?
- What significance do they attribute sexuality over your other aspects of your life?
- How do they relate with your sexuality?

6. Dealing with sexuality (past and present)

- When did you discover your sexuality?
- How did you discover, what happened?
- How did you react to the discovery?
- Did anyone else know the discovery?
- If yes, how did they react?

- If not; why?
- How have you dealt with the sexuality since then?
- How do you enact or experience your sexuality?

7. Language about sexuality

- What language do you know as locally used to describe your sexuality (in local and foreign languages)?
- Do you know any other languages from the past, especially local ones?
- Who uses such language (only those with that sexuality, or also others)?
- Where is this language used (private, public, or in special places)?
- Is this language accepted or rejected? Why?
- How important or relevant is this language to your experiences of your sexuality?

8. Culture and sexuality

- Do you take your sexuality as part of your culture?
- Does the sexuality conflict with your culture, or local cultures that you know of?
- Which local cultures does the sexuality not conflict with?
- Do you know of any sexualities or related activities that are found in our culture? If yes, any conflict with the cultures?
- Is your sexuality new to your culture?

9. Sexuality in daily life

- What is your normal day like (weekdays and weekend)?

- How do you experience your sexuality in your daily life (significant part or not)?
- Does experience of sexuality conflict with normal everyday life?
- How and why?
- Do you interact with others with similar sexuality in daily life; how?

10. Spaces of enacting or experiencing sexuality

- Do you experience or enact your sexuality freely everywhere?
- If yes; what is the reaction from the people around you?
- If not; why?
- Where do you enact or experience (In hidden, discreet, or public spaces)?
- Do you experience along with others with similar sexualities, or with others with the majority sexuality?
- How do you enact or experience (what activities, or encounters)?
- What is the significance of such spaces?
- What are the challenges or risks?

11. Dealing with society

- How does society deal with your sexuality (community, people, individuals, governmental and non-governmental institutions)?
- How do you deal with their reactions or response?
- Do you think society is important or relevant to your experiencing of sexuality?
- Does society know the spaces explained in the last question?
- How do they react to such spaces?

12. Public needs and services

- What public services and needs are critical in relation with your sexuality?
- Do you access them? If yes, how (confidential, public, compulsory, by request?). If not, why not?
- Where do you access them?
- How do you deal with the service providers? What is their reaction?
- How do you get to know such services?

13. Citizenship (as a Malawian)

- How do you understand your citizenship as a Malawian?
- Do you believe that your sexuality is a significant quality of your identity as a Malawian (along with what other qualities)?
- Do you believe it is an indigenous quality (and give reasons)?
- Does your sexuality help to identify you as a Malawian (and give reasons)?
- How do you explain your sexuality as a Malawian citizen?
-

14. Human Rights Promotion and protection

- How do you understand human rights?
- How does one have human rights?
- Do you think you have human rights?
- What rights do you have?
- How about human rights related with your sexuality?
- Where can you find/get your human rights (policy, law, services, community, places, institutions)?
- What are the obstacles in having these human rights?

- How are these obstacles overcome?
- How can the obstacles be overcome?

15. Obstacles

- What obstacles do you face in your daily life?
- How are they faced? From whom?
- What is the impact of such obstacles?
- How do you overcome the obstacles?
- How can the obstacles be overcome?

16. Solutions/ Alternatives

- For the problems or issues cited above; what do you think are the solutions (by society, institutions, laws, policy, yourself, other people sharing similar sexuality)
- Do you see change in society?
- Do you want to see change (why)?

17. Any Other Input/ Comments

Appendix A3: Briefing Note

Introduction Note

Sexuality and Human Rights in Malawi

Alan Msosa is a PhD student at the University of Essex Human Rights Centre. He is currently undertaking field research on his research titled 'Sexuality and Human Rights in Malawi', as part of fulfilment of his studies.

The aim of this research is to analyse how the issue of sexuality has shaped the understanding and application of human rights in Malawi. This analysis will help in a critical analysis of how participants to this research relate issues of sexuality and human rights.

The research draws from issues about sexuality that have been presented in public documents such as newspapers, policy and legal documents, court cases, as well as local and international reports.

In addition to analysis of the above documents, this research will draw data from interviews with selected Malawians to record stories about their life and their views on the issue at hand. The interviews will be semi-structures, flexible and less formal. It is anticipated that up to 50 interviews will be conducted.

Subject to individual consent, the interviews will be recorded in digital media, to enable the researcher to go back to the conversations when analysing the data.

Subject to consent or permission, the recordings may also be used to publish a digital media report (in visual or verbal format).

Subject to consent or permission, the data may be used for other publications or presentations related to this research.

Upon request, the findings summary may be shared with the research participants.

This research will take place from September 2014 to March 2015, with possibility of follow up questions or short conversations within 12 months upon completion of the research.

For any questions and clarification; please contact Alan Msosa (amsosa@essex.ac.uk)(+44 75 7243 2255)

Appendix A4: Informed Consent Form

Informed Consent Form

Sexuality and Human Rights in Malawi

I hereby sign this informed consent form to confirm the following:

1. I permit recording, storage and usage of my personal data in accordance with the purposes communicated to me through the introduction letter to this research.
2. I permit for the data to be used for the academic purposes mentioned in the introduction letter
3. I have understood the purpose and intentions of this research.
4. I am giving this permission voluntarily, based on sufficient information.
5. I have received a copy of the introduction letter.

Consent

- I consent to being interviewed
- I consent for digital recording of my interview
- I choose to be anonymous in the interview

Digital Data

I consent for the digital media data to be used for report

I choose to remain anonymous in such a report

Publications

I consent for the data to be published or presented for related academic purposes

I choose to remain anonymous in such publications or presentation

Name.....

Date.....

Signature.....

Appendix A5: Profile of Field Research Participants

Name ⁹⁰²	Sex at birth	Age	Sexual Identity	Educational	Occupation	Interview dates	REMARKS
Ntchayi	Male	18-25	Gay man	Diploma	Work (private)	07-Nov-14	Identifies as a gay man. He works for a private entity. Currently co-habiting with Thombi as a married couple.
Musandide	Male	25-30	bisexual	MSCE	Unemployed	16-Oct-14	Identifies as heterosexual. Engages in sexual relationships with both men and women.
Mfulu	Male	40-50	bisexual	Diploma	Work (public)	04-Nov-14	Senior civil servant. Identifies as heterosexual (who also does 'these things'). Mature. Married to a woman and have children.
Chifundo	Male	25-30	Trans woman	Diploma		22-Oct-14	Identifies as a gay man, but my impression is that he would fit as a transgender as she lives as a woman. Comes from a middle-class family.
Pempho	Male	18-25	bisexual	MSCE	Work (private)	22-Oct-14	Identifies as heterosexual. Engages in sexual relationships with both men and women.
Chiheni	Male	18-25	Gay man	MSCE	Unemployed	17-Oct-14	Identifies as heterosexual, but has relationships with both men and women. Currently studying for a degree.

⁹⁰² All names have been anonymized

Dzuwa	Male	18-25	Gay man	None	Unemploy ed	04-Nov-14	The youngest participant in this research. Identifies as heterosexual, although he has only had relationships with men in his life. To him, having sexual relations with men is just exploratory, and will pass when he grows and finds a woman.
Masautso	Male	18-25	Gay man	MSCE	Merchand ise	16-Oct-14	Identifies as a gay man. However, he twisted his full name to coin a feminine name. He acknowledged that he sometimes feels feminine.
Mwale	Male	18-25	Gay man	None	Unemploy ed	05-Nov-14	Identifies as heterosexual. His attributes his engagement in same-sex as situational to being in an all-male boarding school. He is the only participants who referred to his experiences as mathanyula
Mwase	Male	18-25	Trans woman	Diplom a	Work (private)	15-Oct-14	His self-identification shifted between male and female throughout the interview. But he identifies as a gay man, and has relationships with both men and women.
Ntcholo	Male	30-40	Gay man	None	Work (private)	14-Oct-14	Identifies as a gay man. He is a community activist mobilising MSM in the HIV and AIDS response.
Chendayekh a	Male	18-25	Gay man	MSCE	Unemploy ed	15-Oct-14	Identifies as a gay man, but acknowledges that he is feminine and grooms as feminine (make-up etc.).

Chataika	Male	30-40	Gay man	None	Work (private)	17-Oct-14	Identifies as a gay man. However, he also identifies as heterosexual if he is in a relationship with a woman. He feels that he is transitioning into heterosexuality to fulfil his traditional duty of marrying a woman and bearing children.
Temwa	Male	30-40	Gay man	Degree	Work (public)	22-Oct-14	He is masculine and identifies as a gay man. He is a senior public servant.
Ntchindi	Male	40-50	Gay man	Degree	Unemploy ed	07-Nov-14	A senior public servant and community activist. He identifies as a gay man.
Asante	Male	30-40	Gay man	MSCE	Work (private)	14 October 2014	He is a community activist and identifies as a gay man.
Mbumba	Male	50-over	Gay man	MSCE	Unemploy ed	04-Nov-14	Oldest participant. Identifies as a gay man.
Sibusiso	Male	25-30	Gay man	MSCE	Unemploy ed	16-Oct-14	Community and online LGBT-rights activist. Identifies as a gay man.
Tionge	Male	25-30	Trans woman	None	Merchand ise	20-Sep-14	Lives as a woman, but identifies as a gay man (on the basis that he does not have a vagina). Can be identifies as a transgender woman in other contexts.
Dimingu	Male	25-30	Trans woman	None	Merchand ise	02-Nov-14	Identifies as a gay man, but can be identifies as a transgender woman in other contexts. He lives as a woman.

Vuto	Male	30-40	Gay man	Degree	Work (private)		Throughout the interview, his self-identification switched between heterosexual and a gay man. He said he did not know his sexuality.
Nthombi	Male	18-25	Trans woman	None	Work (private)	07-Nov-14	Identified as a gay man, but stated that to others he may be called transgender. Currently co-habiting with Ntchayi as a married couple.
Chimwewe	Male	18-25	Gay man	None	Unemployed	17-Oct-14	Identifies as heterosexual. Engages in sexual relationships with both men and women.
Rumbani	Male	30-40	Gay man	None	Work (private)	15-Oct-14	Throughout the interview, he was unsure whether he was gay or bisexual, but stated that he engages with both men and women. He has a wife and children.
Lindiwe	Male	30-40	Gay man	None	Business	20-Oct-14	Identifies as a gay man.
Mwale	Male	30-40	Gay man	MSCE	Unemployed	20-Oct-14	Identifies as a gay man. Also, a community LGBT-rights activist. Has had a few relationships with women in the past.
Phiri	Male	30-40	Gay man	MSCE	Business	04-Nov-14	Local celebrity. Identifies as heterosexual, and is married with children. However, he no longer has sexual relationship with the wife because he is unable to get aroused by women anymore.

Mafunase	Male	25-30	Trans woman	None	Unemployed	05-Nov-14	Was born heterosexual but according to him, sexual orientation switched at 12 years old. Identifies as a gay man, but would be classified as transgender in other contexts. Acknowledges that he lives as a woman.
Thandika	Male	30-40	Gay man	Diploma	Work (private)	17-Oct-14	Identifies as a gay man, but acknowledges that he lives as a woman. He can be identified as transgender in other contexts.
Taonga	Male	18-25	Gay man	MSCE	Unemployed	16-Oct-14	Identifies as a gay man. Currently doing college.
Chidongongo	Male	18-25	Gay man	None	Unemployed	07-Nov-14	Identifies as a gay man. Second-youngest participant.
Atupele	Male	18-25	Gay man	MSCE	Work (private)	22-Oct-14	Identifies as a gay man. Has had a relationship with a woman.
Chandiwira	Male	25-30	Trans woman	MSCE	Unemployed	15-Oct-14	Identifies as a gay man, but would be identified as a trans woman in other contexts.
Nkululeko	Male	25-30	Gay man	MSCE	Unemployed	20-Oct-14	Identifies as a gay man
Mwale	Male	18-25	Gay Man	None	Student	5-Nov-14	Identifies as a gay man. Currently doing secondary school.
Mboyi	Female	25-30	Lesbian	MSCE	Work (private)	06-Nov-14	Employed as a professional footballer. Identifies as a tomboy. Has

							relationships with both men and women.
Kaluso	Female	25-30	Lesbian		Unemployed	06-Nov-14	Identifies as male lesbian. Employed as a professional footballer.
Tupochele	Female	30-40	Lesbian		Unemployed	06-Nov-14	Identifies as heterosexual. Previously married to a man, but can also engage in sexual relationships with women.
Shanu	Female	25-30	Trans man		Unemployed	05-Nov-14	Identifies as a man. Engages in relationships with women.
Kutemwa	Female	18-25	Lesbian		Unemployed	05-Nov-14	Identifies as female, but acknowledges that she behaves like a tomboy. Engages in relationships with women.
Chintheya	Female	30-40	Lesbian	None	Unemployed	16-Oct-14	Identifies as (masculine) lesbian.
Wongani	Female	30-40	Lesbian	Degree	Work (private)	13-Nov-14	Only female participant who identifies as 'gay'. Previously married with a kid. However, has not engaged in same-sex sexual relationships since high school.

Zithembe	Female	18-25	Lesbian		Work (private)	06-Nov	Identified as lesbian. She has a child with a man. She however burst into uncontrollable laughter when reflecting whether she could be gay. She dismissed being gay on the basis that she had a child
Uchizi	Female	18-25	Lesbian		Unemployed	05-Nov-14	Identifies as lesbian, but has concurrent sexual relationships with men and women. Employed as a football player.
Akuzike	Female	18-25	Lesbian		Unemployed	06-Nov-14	Sex worker. Identifies as lesbian (as well) as she can have relationships with both men and women.

Appendix A6: African Commission on Human and Peoples' Rights, Resolution 275

Resolution on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity⁹⁰³

The African Commission on Human and Peoples' Rights (the African Commission), meeting at its 55th Ordinary Session held in Luanda, Angola, from 28 April to 12 May 2014:

Recalling that Article 2 of the African Charter on Human and Peoples' Rights (the African Charter) prohibits discrimination of the individual on the basis of distinctions of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status;

Further recalling that Article 3 of the African Charter entitles every individual to equal protection of the law;

Noting that Articles 4 and 5 of the African Charter entitle every individual to respect of their life and the integrity of their person, and prohibit torture and other cruel, inhuman and degrading treatment or punishment;

Alarmed that acts of violence, discrimination and other human rights violations continue to be committed on individuals in many parts of Africa because of their actual or imputed sexual orientation or gender identity;

Noting that such violence includes 'corrective' rape, physical assaults, torture, murder, arbitrary arrests, detentions, extra-judicial killings and executions, forced disappearances, extortion and blackmail;

⁹⁰³ Supra note 27

Further alarmed at the incidence of violence and human rights violations and abuses by State and non-State actors targeting human rights defenders and civil society organisations working on issues of sexual orientation or gender identity in Africa;

Deeply disturbed by the failure of law enforcement agencies to diligently investigate and prosecute perpetrators of violence and other human rights violations targeting persons on the basis of their imputed or real sexual orientation or gender identity;

1. **Condemns** the increasing incidence of violence and other human rights violations, including murder, rape, assault, arbitrary imprisonment and other forms of persecution of persons on the basis of their imputed or real sexual orientation or gender identity;
2. **Specifically condemns** the situation of systematic attacks by State and non-state actors against persons on the basis of their imputed or real sexual orientation or gender identity;
3. **Calls on** State Parties to ensure that human rights defenders work in an enabling environment that is free of stigma, reprisals or criminal prosecution as a result of their human rights protection activities, including the rights of sexual minorities; and
4. **Strongly urges** States to end all acts of violence and abuse, whether committed by State or non-state actors, including by enacting and effectively applying appropriate laws prohibiting and punishing all forms of violence including those targeting persons on the basis of their imputed or real sexual orientation or gender identities, ensuring proper investigation and diligent prosecution of perpetrators, and establishing judicial procedures responsive to the needs of victims.

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