

# LGBT Rights in Malawi: One Step Back, Two Steps Forward? The Case of *R v Steven Monjeza Soko and Tiwonge Chimbalanga Kachepa*

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## Abstract

In late 2009 two Malawians, a man and a transgender woman, united in an engagement ceremony. Police charged both under Malawi's anti-sodomy provisions. The case captured the nation's attention and drew scrutiny from foreign governments and human rights organizations. Several western nations threatened to withdraw aid unless the prosecution was discontinued. Nevertheless, the defendants were convicted and sentenced. Following a visit from the UN secretary general, Malawi's president pardoned the couple, but emphasized that the "two gay boys" had offended Malawi and its people. This article examines this case (*R v Soko and Kachepa*) and its impact on Malawi's LGBT rights movement. Using Thomas Stoddard's "rule-shifting, culture-shifting" paradigm, it considers the efficacy of international and domestic advocacy efforts and concludes that aid conditionality is, in many ways, counter productive. Conversely, multi-dimensional domestic advocacy is a promising strategy to change the relevant law and public attitudes associated with the Malawian LGBT community.

## Keywords

Malawi, human rights, advocacy, LGBT rights, "rule-shifting, culture-shifting"

## INTRODUCTION

*"Kali kokha nkanyama, tili awiri ntiwanthu."*

This phrase, in Malawi's native language, Chichewa, translates as: "[w]hen you are on your own you are as good as an animal of the wild; when there are two

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of you, you form a community.”<sup>1</sup> In December 2009, two people attempted to form a community by holding an engagement ceremony [*chinkhoswe*] in Blantyre, Malawi.<sup>2</sup> However, this union was not seen by Malawians as the forming of a community. Instead, the union divided the Malawian community, stirring wild reactions.

The two people were Steven Monjeza Soko, a man, and Tiwonge Chimbalanga Kachepa, a transgender woman. In December 2009, the couple shocked members of their community in Blantyre when they held a *chinkhoswe* at a small local lodge. During the ceremony, a journalist from a major national newspaper received word about what was transpiring and attended the event. The next morning, the newspaper published a salacious story of the two “gay lovebirds” on its front page and pointed out that homosexuality was a crime in Malawi.<sup>3</sup> The story led the Malawi police to investigate the matter. The next day, police charged Mr Soko and Mx Kachepa<sup>4</sup> with “buggery or having carnal knowledge of another” and an alternative charge of indecent practices, contrary to sections 153 and 156 of the Malawi Penal Code (the Penal Code). In the months that followed their arrests, Soko and Kachepa stood trial in the Chief Resident Magistrate’s Court, where Chief Resident Magistrate Usiwa-Usiwa (the Chief Magistrate) found them guilty and expressly made an example of them by imposing the maximum penalty of 14 years’ imprisonment with hard labour.<sup>5</sup> Within a few days of the sentencing, however, President Bingu wa Mutharika pardoned the two men and granted their unconditional release.<sup>6</sup>

Almost from the time of the arrests of the two defendants, the case became an international cause célèbre, as it shone a light on the division over sexuality between the West, where the lesbian, gay, bisexual and transgender (LGBT)

1 CE Oppenheim “Nelson Mandela and the power of *ubuntu*” (2012) 3/2 *Religions* 369 at 370.

2 The ceremony is known as a *chinkhoswe* in Malawi’s native Chichewa language.

3 M Gevisser “Love in exile” (27 November 2010) *The Guardian*, available at: <<http://www.theguardian.com/news/2014/nov/27/-sp-transgender-relationship-jail-exile-tiwonge-chimbalanga>> (last accessed 20 December 2014).

4 Mx is gaining prominence as a gender neutral honorific. See L-M Eleftheriou-Smith “Gender neutral honorific Mx ‘to be included’ in the Oxford English Dictionary alongside Mr, Ms, Mrs and Miss” (3 May 2015) *The Independent*, available at: <<http://www.independent.co.uk/news/uk/home-news/gender-neutral-honorific-mx-to-be-included-in-the-oxford-english-dictionary-alongside-mr-ms-and-mrs-and-miss-10222287.html>> (last accessed 12 July 2015). With no disrespect, this article refers to Mr Soko and Mx Kachepa as “Soko and Kachepa”.

5 *R v Steven Monjeza Soko and Tiwonge Chimbalanga Kachepa* [2010] MWHC 2 (Malawi Chief Resident Magistrate’s Court). As the court’s original judgment does not contain page or paragraph numbers, this article cites the case name without specific references.

6 B Bearak “Malawi president pardons gay couple” (29 May 2010) *The New York Times*, available at: <<http://www.nytimes.com/2010/05/30/world/africa/30malawi.html>> (last accessed 22 December 2014); id “Malawi President Mutharika announces release of gay defendants from jail” (30 May 2010) *YouTube*, available at: <[https://www.youtube.com/watch?v=rKHY3vfrU&feature=youtuve\\_gdata\\_player](https://www.youtube.com/watch?v=rKHY3vfrU&feature=youtuve_gdata_player)> (last accessed 22 December 2014).

movement has gained traction in recent decades, and Malawi, a nation where homosexuality is outlawed and considered by many Malawians to be morally reprehensible and “un-African”.<sup>7</sup> This article explores the LGBT rights movement in Malawi through the case of *R v Steven Monjeza Soko and Tiwonge Chimbalanga Kachepa (Soko and Kachepa)*.<sup>8</sup> It discusses the case’s impact on the LGBT movement, and the efficacy of international and domestic efforts to advocate for LGBT rights in Malawi. First, it considers the societal context that gave rise to the controversial trial and shaped events as they unfolded. Next it discusses how, in many ways, the case amounted to a setback for Malawi’s fledgling LGBT movement. In particular, it looks at how the Malawi government used the case as a vehicle to advance its fervent anti-homosexuality agenda. The article then examines subsequent international and domestic advocacy efforts to decriminalize homosexuality and obtain constitutional protection for Malawi’s LGBT community. It uses Professor Thomas Stoddard’s “rule-shifting, culture-shifting” paradigm to consider the efficacy of these efforts.<sup>9</sup> The conclusion is that, despite the negative impact that the case had on the LGBT movement and the questionable utility of the international pressure that followed, domestic advocacy shows promise as a vehicle for changing the legal framework and public attitudes toward homosexuality in Malawi. The article posits that one promising advocacy strategy is to adopt a long-term multi-dimensional approach that integrates more productive forms of international support. With this approach, it is possible to realize better protection for members of Malawi’s LGBT community.

## HOMOSEXUALITY IN MALAWI, BEFORE *SOKO and KACHEPA*

The case of *Soko and Kachepa* suggests that the Penal Code provisions outlawing sodomy are in step with prevailing social attitudes for the majority of the Malawian population. In the circumstances, it is informative to examine the societal context which led to the decision. In particular, tracing the historical development of the Malawian attitude towards homosexuality will, perhaps, better illuminate a decision which resulted in the harshest possible sentence being handed down to the defendants. This section of the article aims to provide the reader with background knowledge about Malawians’ attitudes to homosexuality, which will then inform an analysis of the setbacks caused by the case.

Malawi’s attitude to anti-homosexuality is deeply embedded in its society, and is attributable to the nation’s culture, religion and colonial history

7 N Alden Kahn-Fogel “Western universalism and African homosexualities” (2014) 15 *Oregon Review of International Law* 315, available at: <<http://papers.ssrn.com/abstract=2315312>> (last accessed 22 December 2014).

8 Above at note 5.

9 T Stoddard “Bleeding heart: Reflections on using the law to make social change” (1997) 72/5 *New York University Law Review* 966.

under British rule. Although Britain repealed its homosexuality laws in 1967,<sup>10</sup> Malawi's sodomy laws remained in force under its Penal Code,<sup>11</sup> despite being dormant in the decades that followed independence in 1964.

Following Malawi's independence from Britain, Dr Hastings Kamuzu Banda led Malawi under a brutal one party dictatorship, guided by his ruthlessness and puritanical beliefs as "life president".<sup>12</sup> Under Life President Banda's leadership, between 1964 and 1994, Malawi remained a highly conservative and oppressed society. Throughout this period, Life President Banda ruled through discipline and violence, stifling all perceived dissent.<sup>13</sup> Banda sustained the moral guide entrenched during colonial rule and made open discussion about certain matters, including sexuality, impossible.<sup>14</sup>

Since Life President Banda relinquished power, many advances in human rights have been achieved in Malawi. Malawi's Constitution of 1994 (the Constitution) enshrined a number of individual rights and protections.<sup>15</sup> However, communitarian values, a traditional conception of the family unit and conservative religious views, have continued to shape an environment

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10 Sexual Offences Act, 1967 (England). This repeal occurred in light of recommendations made in the Wolfenden Report. See Great Britain Committee on Homosexual Offences and Prostitution, *The Wolfenden Report: Report of the Committee on Homosexual Offences and Prostitution* (1957).

11 Sec 153 of Malawi's Penal Code reads: "Any person who (a) has carnal knowledge of any person against the order of nature; or (b) has carnal knowledge of an animal; or (c) permits a male person to have carnal knowledge of him or her against the order of nature, shall be guilty of a felony and shall be liable to imprisonment for fourteen years, with or without corporal punishment." Sec 156 of the code reads: "Any male person who, whether in public or private, commits any act of gross indecency with another male person, or procures another male person to commit any act of gross indecency with him, or attempts to procure the commission of any such act by any male person with himself or with another male person, whether in public or private, shall be guilty of a felony and shall be liable to imprisonment for five years, with or without corporal punishment."

12 After a few years in power, President Banda declared himself "life president": R Dowden "Obituary: Dr Hastings Banda" (27 November 1997) *The Independent*, available at: <<http://www.independent.co.uk/news/obituaries/obituary-dr-hastings-banda-1296534.html>> (last accessed 22 December 2014).

13 Non-compliance with the president's four cornerstones of unity, loyalty, obedience and discipline attracted the wrath of the ruling party's notorious youth wing and the police force: U Mwakasungula "The LGBT situation in Malawi: An activist perspective" in C Lennox and C Waites (eds) *Human Rights, Sexual Orientation and Gender Identity in The Commonwealth: Struggles for Decriminalisation and Change* (2013, Institute of Commonwealth Studies, School of Advanced Study, University of London) 359 at 359–60, available at: <<http://sas-space.sas.ac.uk/4814/>> (last accessed 19 December 2014).

14 Id at 360. President Banda outlawed many forms of personal expression and identity, such as long hair and short skirts: S Kachipande "Malawi: Why Malawi can't just legalise homosexuality" (13 December 2012) *All Africa*, available at: <<http://allafrica.com/stories/201212140674.html>> (last accessed 22 December 2014).

15 The Constitution has made advances in other areas, but has not recognized sexuality as an expressly protected category.

conducive to thwarting the establishment of rights and protection for sexual minorities.

With respect to religion, Malawi is considered by many to be a “God-fearing nation”.<sup>16</sup> The pervasive presence of the dominant religion of Christianity and, to a lesser extent, the Islamic faith has also contributed to anti-homosexuality in Malawi. Using sources such as the Old Testament, many church leaders teach their congregations that same sex activity is a sin and even satanic. Evangelical churches also promote a family model based on monogamy, marital fidelity, and respect for women and the nuclear family.<sup>17</sup>

It is evident that religious views inform the political discourse and various government initiatives in Malawi.<sup>18</sup> Religious organizations make up a powerful lobby group on matters of sexuality and morality, and exert considerable influence in the shaping of policy and legislation. Despite Malawi’s conservative past, in the mid-2000s, there began to be some signs of receptiveness to the idea that the LGBT community needed to be accepted and integrated in a more comprehensive strategy to combat the HIV/AIDS crisis. In 2006, three years before *Soko and Kachepa*, Dr Mary Shawa, principal secretary for HIV/AIDS in the Cabinet Office, stated on record that accepting the LGBT community was a vital step in the HIV/AIDS campaign.<sup>19</sup> These positive signs towards change and recognition of LGBT rights in Malawi came to a grinding halt with the advent of *Soko and Kachepa* in 2010, undoing the minor advances that had been made in the years preceding the case.

As in most of Africa, there is a widely held view in Malawi that homosexuality is alien to its culture, traditions and religious values.<sup>20</sup> In light of the myriad historical and social factors militating against acceptance of LGBT rights in Malawi, many Malawians have adopted the view that homosexuality is a western concept fostered by the decadence of the western secular state.<sup>21</sup> The

16 Mwakasungula “The LGBT situation”, above at note 13 at 366.

17 F Kerrigan “Getting to rights: The rights of lesbian, gay, bisexual, transgender and intersex persons in Africa” (2013) *The Danish Institute for Human Rights* at 38, available at: <<http://www.humanrights.dk/publications/getting-rights>> (last accessed 19 December 2014).

18 E Chanika, J Lwanda and A Muula “Gender, gays, and gain: The sexualised politics of donor aid in Malawi” (2013) 48/1 *Africa Spectrum* 89 at 90, referring to Nations Development Assistance Framework “Towards Vision 2020, United Nations development assistance program for poverty eradication in Malawi” (October 1998), in which the opening statement declares Malawi to be a “God-fearing nation”.

19 *Id* at 93.

20 Kachipande “Malawi”, above at note 14.

21 Nicholas Kahn-Fogel notes that some theorists assert that African views on homosexuality are more nuanced and argues that, while Africans predominantly reject western-inspired gay identity, they do not condemn same sex physical intimacy more broadly. However, he also notes that a great deal of African criticism of homosexuality has involved broad condemnation of same sex practices: Kahn-Fogel “Western universalism”, above at note 7 at 326, citing, for example, J Massad “Re-orienting desire: The gay international and the Arab world” (2002) 14/2 *Public Culture* 361.

“unAfricaness” of homosexuality is used to portray such practices as being a product of western influences that constitutes a “neo-colonial menace”.<sup>22</sup> This oft cited argument has been used to rationalize opposition to homosexuality across the continent.<sup>23</sup> There is some evidence that the embedded homogeneity of the anti-homosexuality culture is strongest in Malawi’s rural areas.<sup>24</sup> As Leckford Thoto, minister of information and civic affairs, said, “[t]hese immoral acts are not in our culture; they are coming from outside ... Otherwise, why is there all this interest from around the world? Why is money being sent?”<sup>25</sup>

### **SOKO AND KACHEPA: THE CASE AND ITS SETBACKS**

In 2010, the minor advances in Malawi’s LGBT cause came to a halt, after the court delivered the decision in *Soko and Kachepa*. From the outset, the case produced a number of setbacks for the LGBT movement in Malawi. Not only was the case manipulated by the Malawi government, in particular the president, to reiterate the “unAfricaness” of homosexuality (which in itself created setbacks to the LGBT movement), the case also proved destructive to the general and constitutional rights of the defendants, then members of the LGBT community, as well as future members.

The defendants’ liberties and rights were quelled throughout the trial process, including by the treatment they received during the investigation and a number of pre-trial applications. Upon their arrest on 28 December 2009, Soko and Kachepa were denied their liberty as they were remanded in custody. When the defendants appeared in court on 30 December 2009, Soko pleaded not guilty to the offences of buggery or carnal knowledge under section 153(a) of the Penal Code, whilst Kachepa pleaded not guilty to similar charges under section 153(c). The indictment also charged both in the alternative of having committed indecent practices under section 156. Both applied for bail. The Chief Magistrate denied the application, reasoning that the defendants should be remanded in the interests of their own security, since the case had attracted public interest locally and internationally.<sup>26</sup> The defendants subsequently

22 Ibid.

23 In apartheid South Africa during the 1980s, the African National Congress fought for racial liberalization, but used the rhetoric of the “unAfricaness of homosexuality” to oppose the struggle for gay equality. See Kerrigan “Getting to rights”, above at note 17 at 109, referring to <[http://www.petertatchell.net/LGBTI\\_rights/history/anc.htm](http://www.petertatchell.net/LGBTI_rights/history/anc.htm)> (last accessed 2 September 2016).

24 In interviewing various community members from northern rural Malawi on their views about homosexuality, Thomas McNamara noted that many perceived the defendants’ engagement as a product of democracy in which people do whatever they want: T McNamara “Not the Malawi of our parents: Attitudes toward homosexuality and perceived westernisation in northern Malawi” (2014) 73/1 *African Studies* 84 at 97.

25 B Bearak “Same-sex couple stir fears of a ‘gay agenda’” (13 February 2010) *The New York Times*, available at: <<http://www.nytimes.com/2010/02/14/world/africa/14malawi.html>> (last accessed 22 December 2014).

26 Mwakasungula “The LGBT situation”, above at note 13 at 364.

made a second application for bail. That, too, was denied. As such, they remained in custody for the five month period leading up to and throughout the trial. The defendants also made an application to the High Court to challenge the constitutionality of the charges. However, the chief justice of the High Court rejected efforts to have the matter certified as constitutional on the basis that the charges were criminal in nature and did not relate to constitutional matters.<sup>27</sup> By rejecting the defendants' applications, the judiciary arguably set a precedent that the Constitution does not and will not afford protection to sexual minorities charged with same sex related offences. Such was the case, despite the fact that section 20 of the Constitution prohibits discrimination against any persons on the basis of their "status or condition".<sup>28</sup> The denial of these pre-trial applications demonstrated the Malawian justice system's disregard for the rights and liberties of Soko and Kachepa, persons belonging to a minority group. Moreover, it is arguable that the treatment of Soko and Kachepa was a setback to the general LGBT movement, as it created an unwelcome precedent for how members of the community were likely to be treated by the justice system, if arrested for homosexual sodomy offences.

During the trial, evidence also emerged of how the defendants were treated during the investigation of the case. Several female witnesses, including Kachepa's boss at the lodge, testified that they had attended the *chinkhoswe*. However, at the time, they were under the impression that Kachepa was a woman. A day after the event, upon hearing that Kachepa was male, they went to her home to confront her. Several of the witnesses testified to being present when Kachepa voluntarily removed her clothes, at which time they observed her to have male genitalia. Dr Bonus Makanani, an obstetrician and gynaecologist, testified that he conducted a gender examination of Kachepa, at the request of police, and concluded that the patient presented as male. On the second issue, he stated that he could not make a finding on whether Kachepa had engaged in anal sex, as it was not within his area of expertise.<sup>29</sup>

Based on the evidence, the Chief Magistrate found both Soko and Kachepa guilty of "buggery or having carnal knowledge" and indecent practices.<sup>30</sup> The prosecutor sought a heavy sentence, as the gay defendants "had left a 'scar on morality' in the country and seemed to be proud of being gay".<sup>31</sup> In imposing the maximum sentence of 14 years of hard labour on the two defendants, the Chief Magistrate stated: "I shall pass a scaring sentence, so that the

27 Ibid.

28 The Constitution, sec 20.

29 *Soko and Kachepa*.

30 Ibid.

31 B Bearak "Gay couple convicted in Malawi" (18 May 2010) *The New York Times*, available at: <<http://www.nytimes.com/2010/05/19/world/africa/19malawi.html>> (last accessed 23 December 2014).



public [is] protected from others who may be tempted to emulate this horrendous example".<sup>32</sup> The Chief Magistrate added, "Malawi is not ready to see its sons getting married to other sons".<sup>33</sup>

It is thus apparent that the court treated the defendants in a manner that suggested sexual minorities do not enjoy the same basic rights and protections afforded to persons who come into conflict with the criminal law. The court denied the defendants' application to be released on bail, despite the fact that no-one claimed to be a victim and there was no evidence that the defendants presented a safety concern if released into the community. During the trial, the court paid no regard to the defendants' right to silence, as the Chief Magistrate admitted and weighed conscripted evidence as part of the prosecution's case. For example, the court heard evidence about Kachepa being forced to undergo a gender examination and assessment on whether she had engaged in anal sex. This type of evidence undermined the defendants' constitutional right to personal privacy,<sup>34</sup> the non-derogation with regard to the prohibition of torture and cruel, inhuman or degrading treatment or punishment,<sup>35</sup> the right to equality and recognition before the law,<sup>36</sup> and the right to freedom of conscience, belief, thought and religion.<sup>37</sup>

During sentencing, the court also paid no heed to the defendants' constitutional right to be imprisoned only "as a last resort and for the shortest period of time consistent with justice and the protection of the public".<sup>38</sup> Instead, the Chief Magistrate imposed the maximum sentence that would normally be reserved for a repeat offender whose recidivist tendencies have not been deterred by previous sentences. Given that the two defendants apparently had no prior related criminal records, it is difficult to discern how the Chief Magistrate arrived at such a result. The multitude of intrusions into the personal liberties of the defendants formed a sound warning of how the Malawian justice system was likely to treat members of the LGBT community. Indeed, that view was confirmed in the Chief Magistrate's sentencing remarks.<sup>39</sup>

Many foreign governments and human rights organizations quickly condemned the convictions and harsh sentences and urged the Malawi government to release Soko and Kachepa. In addition, UN Secretary General Ban

32 *Soko and Kachepa*; J Henley, X Rice and D Smith "Love in the dock" (22 May 2010) *The Guardian*, available at: <<http://www.theguardian.com/world/2010/may/22/malawian-gay-couple-jailed-14-years>> (last accessed 20 December 2014).

33 *Soko and Kachepa*.

34 The Constitution, sec 21.

35 *Id.*, sec 45(2)(b).

36 *Id.*, sec 45(2)(g).

37 *Id.*, sec 45(2)(h).

38 *Id.*, sec 42(g)(ii).

39 In his judgment, the chief magistrate stated: "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."



Ki-Moon paid an unexpected visit to Malawi, where he addressed Parliament and also met President Mutharika.<sup>40</sup> On 30 May 2010, President Mutharika held a press conference in which he declared that he had pardoned the defendants. The president indicated that his decision was based on humanitarian grounds. Though the secretary general flanked him during the press conference, the president did not temper his words, as he stated that the “two gay boys” had injured the traditional values of Malawian culture and what they did was a crime. “These boys committed a crime against our culture, our religion and our laws”, said the president.<sup>41</sup>

While many international and local LGBT rights organizations hailed the presidential pardon as a victory for LGBT rights, the case itself also constituted a substantial setback for the wider LGBT movement in Malawi for a number of reasons. First, the case caused the police to transform the sodomy provisions of the Penal Code into “potent instruments”.<sup>42</sup> Though the sodomy provisions had not been repealed in the 45 years since Malawi had gained its independence, they had hitherto rarely if ever been used and amounted to little more than relics of colonialism.<sup>43</sup> In this vein, the decision to prosecute the two defendants for engaging in sodomy was significant. Since the case commenced, police have charged other individuals with sodomy, as well as for posting LGBT related propaganda.<sup>44</sup>

Perhaps more significantly, however, the case gave the Malawian government a platform to promote a zero tolerance policy on homosexuality buoyed by a culture of homophobia. The president and other members of the government used the case to denounce homosexuality. President Mutharika called homosexuality “evil and bad before the eyes of God” and an act “we Malawians just do not do”.<sup>45</sup> He even went so far as to call the defendants lower than dogs and characterize them as insane.<sup>46</sup> The president also used the case to promote fears of poverty among women, as he asked who will

40 V Sohaili “Malawi: President pardons convicted same-sex couple” (2010) 15/1 *The HIV/AIDS Policy and Law Review* 15 at 15–16.

41 Bearak “Malawi President Mutharika”, above at note 6.

42 C Biruk “Aid for gays: The moral and the material in ‘African homophobia’ in post-2009 Malawi” (2014) 52/3 *The Journal of Modern African Studies* 447 at 462.

43 A Kretz “From kill the gays to kill the gay rights movement: The future of homosexuality legislation in Africa” (2013) 11/2 *Northwestern Journal of International Human Rights* 207 at 213; M Gevisser “Homosexuality and the battle for Africa’s soul” *The Mail & Guardian*, available at: <<http://mg.co.za/article/2010-06-04-homosexuality-and-the-battle-for-africas-soul/>> (last accessed 19 December 2014).

44 R Tenthani “Malawi: Police say man arrested in anti-gay sweep” (16 February 2010) *Edge Media Network*, available at: <<http://www.edgemedianetwork.com/news//102351>> (last accessed 22 December 2014).

45 B Bearak “Gay couple convicted in Malawi” (18 May 2010) *The New York Times*, available at: <[http://www.nytimes.com/2010/05/19/world/africa/19malawi.html?\\_r=0](http://www.nytimes.com/2010/05/19/world/africa/19malawi.html?_r=0)> (last accessed 4 September 2016).

46 Biruk “Aid for gays”, above at note 42 at 451.

marry them, if the men are marrying the men.<sup>47</sup> Indeed, as one commentator notes, “[a]lthough African homophobia is not a new discourse in south-central Africa, it did not meaningfully cohere in the Malawian cultural imagination until the 2009 gay engagement ceremony”.<sup>48</sup>

The case caused a major shift in the landscape, as any receptiveness to the LGBT movement that the government might have contemplated had completely vanished and been replaced by a hard-line position. Dr Shawa, who had previously been a voice in favour of the need to make the LGBT community part of Malawi’s HIV/AIDS initiative, reversed her position, indicating that the number of Malawians in the LGBT community is too small to require prioritization of the movement.<sup>49</sup>

It is reasonable to surmise that the potent combination of the government’s fervent anti-homosexuality message, the deprivation of rights at the pre-trial and investigative stages of the case and the public sentiment toward the case, had a chilling effect on the LGBT movement. Anyone considering engaging in such activity, let alone identifying as LGBT, would be dissuaded by the sanction of sentences on a par with or worse than many convictions for sexual assault and robbery.<sup>50</sup> In addition, the stigma that the government cultivated through its homophobic rhetoric and conceptualization of LGBT persons as outlaws, created a fertile climate for violence and vigilante justice toward anyone perceived as being a member of the LGBT community.

The government also exploited the facts of the case to obfuscate the LGBT movement’s less ambitious goal of decriminalization with the more controversial issue of gay marriage. The president and other anti-homosexuality proponents, such as the Malawi Council of Churches, played on this angle and the threat of gay marriage to traditional Malawian culture and family values. For the LGBT movement in Malawi, gay marriage had never been what the movement was about, as it sought incremental changes in the law to enable minority rights and protections for the LGBT community and to gain inclusion in the HIV / AIDS initiative.

By the end of 2010, the LGBT movement in Malawi was crying out for a form or forms of advocacy to repair the damage that *Soko and Kachepa* had

47 Chanika, Lwanda and Muula “Gender, gays, and gain”, above at note 18 at 99.

48 Biruk “Aid for gays”, above at note 42 at 451.

49 Mwakasungula “The LGBT situation”, above at note 13 at 374; see also Chanika, Lwanda and Muula “Gender, gays, and gain”, above at note 18 at 93.

50 See, for example, *State v Njolomole and Another* [2009] MWHC 51, in which the High Court of Malawi upheld a six year sentence for armed robbery, contrary to sec 301 of the Penal Code, on the basis that “although it is not adequate, it is not so grossly inadequate as to warrant interference”. In its decision, the High Court cited *R v Davie Brown Zaola* (confirmation case 276 of 1995), in which Mwaungulu J held that: “Where in an armed robbery guns are involved and actually used to intimidate a sentence of ten years imprisonment would be a good starting point, the sentence would be downgraded to reflect mitigating factors such as a plea or [sic] guilty or that this is the prisoner’s first offence”, available at: <<http://www.malawilii.org/mw/judgment/high-court-general-division/2009/51>> (last accessed 4 September 2015).

seemingly caused. For many, the case's influence on the LGBT movement was a negative one and it is difficult to see what, if any, positives can be drawn from the case. This article will now deal with these issues.

## ASSESSING THE CASE'S INFLUENCE ON THE LGBT MOVEMENT

### International pressure and aid conditionality

One form of advocacy, which emerged from the outset of the case, was pressure from the international community and the use of aid conditionality. The pressure that the international community placed on the Malawian government did very little to advance the LGBT movement and, in some ways, caused setbacks. As previously noted, the case garnered unprecedented international attention, in the form of condemnation and appeals for the unconditional release of the defendants. Almost from the time the police arrested and took the two defendants into custody, media reports spread across the globe. International LGBT and human rights organizations, civilians and celebrities all spoke out and urged or demanded that Malawian officials release the two defendants unconditionally.<sup>51</sup> These groups also pressured their own governments to act. Western governments, in turn, resorted to aid conditionality as a tactical mechanism to force the Malawian government to free the defendants and decriminalize homosexuality. The governments of the United Kingdom, the United States, Norway and Germany, as well as organizations such as the International Monetary Fund, the World Bank, Amnesty International and Human Rights Watch expressed their condemnation of the prosecution and threatened to cut off aid in the face of these human rights abuses.<sup>52</sup>

As the case progressed through Malawi's criminal justice system, western pressure persisted. Following sentencing, the United Kingdom proceeded to cut \$30 million in donor aid.<sup>53</sup> The United States reacted negatively and expressed the view that the criminalization of sexual orientation and gender identity amounted to a "step backward in the protection of human rights in Malawi".<sup>54</sup> The United Nations also spoke out against the situation in

51 Elton John wrote a letter as a friend to President Mutharika, asking him to show compassion. See E John "My friend, President Mutharika, show compassion" (29 May 2010) *The Guardian*, available at: <<http://www.theguardian.com/commentisfree/2010/may/29/aids-malawi-chimbalanga-monjeza>> (last accessed 22 December 2014).

52 C Caprio "Malawi: Gay couple found guilty" (19 May 2010) *Afronline*, available at: <<http://www.afronline.org/?p=5314#more-5314>> (last accessed 4 July 2015). In Scotland, 22 members of Parliament signed a motion to condemn the "homophobic arrests" of the two defendants; see A Amtaika "Community rights, individual rights, and toleration: A case study of the conviction of a gay couple in Malawi" (2013) 29/4 *Journal of Developing Societies* 405 at 425.

53 J Phillips "Tough love: Britain will cut aid to 'anti-gay' nations" (10 October 2011) *Time*, available at: <<http://newsfeed.time.com/2011/10/10/tough-love-britain-will-cut-aid-to-anti-gay-nations/>> (last accessed 22 December 2014).

54 Amtaika "Community rights", above at note 52 at 426.

Malawi, stating that the law dated back to the colonial era and demanded that the government repeal it, as well as the convictions.<sup>55</sup> International pressure culminated in the president announcing on 29 May 2010 that he was pardoning the defendants and directing that they be released forthwith.<sup>56</sup>

The threats and actions by western governments to withhold aid appear to have had mixed results. On the one hand the pressure provided a quick fix, as it appeared to play a key role in the presidential pardon and release of Soko and Kachepa. Many believe the president succumbed to the pressure because of Malawi's heavy reliance on international aid.<sup>57</sup> Nevertheless, the president's decision to grant clemency was hailed as a victory for LGBT rights in the "warm heart" of conservative Africa.<sup>58</sup> Indeed, it is difficult to deny the significance of the defendants' unconditional release shortly after receiving such harsh sentences.

On a macro level, however, one can make the case that aid conditionality has failed to have any sustainable impact on the advancement of LGBT rights in Malawi and has been counter productive to some extent. Western pressure led to a perception that, for many Malawians, pitted Malawi against the developed world. In this vein, it became about the West imposing its views on Malawi and perhaps even being the underlying influence that led to the defendants becoming publicly engaged in the first place. How else, Malawians asked, could "gayism" have crept into a place where it never before existed?<sup>59</sup> Thus, western pressure that Malawi accept its views on homosexuality seemed to dovetail with and reinforce the notion that homosexuality was a western practice and foreign to Malawi culture.<sup>60</sup>

The futility of international pressure and aid conditionality as a form of advocacy for advancing the LGBT movement in Malawi could also be seen during the president's announcement that he was pardoning the two "gay boys".<sup>61</sup> It was clear that international pressure had in no way shifted the president's position on homosexuality and he seemed to be issuing the pardons for economic reasons. While the president claimed that his decision was based on

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55 Ibid.

56 Bearak "Malawi President Mutharika", above at note 6.

57 F James "Malawi gay couple pardoned by nation's president" (29 May 2010) *National Public Radio*, available at: <[http://www.npr.org/blogs/thetwo-way/2010/05/malawi\\_gay\\_couple\\_pardoned\\_by.html](http://www.npr.org/blogs/thetwo-way/2010/05/malawi_gay_couple_pardoned_by.html)> (last accessed 22 December 2014).

58 In June 2011, British Prime Minister David Cameron announced to LGBT activists in London that he was proud of the pressure that his government had placed on President Mutharika: A Kretz "Aid conditionality as (partial) answer to antigay legislation: An analysis of British and American foreign aid policies designed to protect sexual minorities" (2013) 7 *Vienna Journal on International Constitutional Law* 476 at 488.

59 Bearak "Same-sex couple", above at note 25.

60 The belief that western appeals for homosexual rights represent merely the latest iteration of western cultural imperialism increases the likelihood of opposition in societies with histories of enduring colonial interference: Kahn-Fogel "Western universalism", above at note 7 at 327.

61 Bearak "Malawi President Mutharika", above at note 6.

humanitarian grounds, he blamed the two gays for causing “a great deal of stress” to the Malawi people and to the Malawi government and for “creating a situation in [the] country, which is unheard of”.<sup>62</sup> He cited three areas of concern, that the gays: violated and injured Malawi traditions and culture; challenged and caused stress to Malawi religious institutions; and violated the country’s laws.<sup>63</sup> Based on the president’s message, it appeared that international pressure had in no way impacted the Malawi government’s staunch opposition to LGBT rights and that he was making the concession in the interest of Malawi’s economic well-being.

Within months of the decision to pardon the couple, the ineffectiveness of western aid conditionality on the Malawi government became further apparent with Malawi’s decision to enact new anti-gay legislation.<sup>64</sup> In December 2010, the Malawi Parliament passed a bill to criminalize female same sex sexual acts, to which President Mutharika assented in January 2011.<sup>65</sup> As a result, under the new section 137(a) of the Penal Code, females are prohibited from engaging in same sex sexual activity and face a penalty of up to five years’ imprisonment for contravention.<sup>66</sup> Thus, the Malawi government created a further obstacle to the LGBT movement by enacting a new prohibition affecting female sexual minorities.

Perhaps the most glaring example of the ineffectiveness of aid conditionality can be seen in President Joyce Banda’s efforts to accommodate western donor nations, following President Mutharika’s unexpected death in 2012. President Banda inherited the leadership in the wake of President Mutharika’s second term, during which the Malawi economy had fallen into serious decline. Upon assuming power, President Banda announced in her state of the nation address her intent that Parliament repeal anti-homosexuality laws “as a matter of urgency”.<sup>67</sup> Arguably, President Banda took the step as part of a larger effort to stabilize the economy by appeasing donor nations and negotiating the return of aid that had been discontinued under President Mutharika’s leadership.<sup>68</sup> President Banda was applauded by international

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62 Ibid.

63 Ibid.

64 While it is difficult to prove with any degree of certainty, it seems plausible that the Malawi government’s decision to enact sec 137(a) of the Penal Code was a form of backlash to demonstrate that international pressure had no bearing on Malawian sovereignty and values.

65 International Commission of Jurists “Sex between women now a crime in Malawi: New law violates human rights obligations of Malawi” *Outright Action International* (8 February 2011), available at: <<http://iglhrc.org/content/sex-between-women-now-crime-malawi-new-law-violates-human-rights-obligations-malawi>> (last accessed 22 December 2014).

66 Ibid.

67 Kretz “From kill the gays”, above at note 43 at 224; “Malawi to overturn homosexual ban, Joyce Banda says” (18 May 2012) *BBC News*, available at: <<http://www.bbc.com/news/world-africa-18118350>> (last accessed 22 December 2014).

68 See discussion above about the cutbacks to aid donations from the United Kingdom and the United States.

organizations for her courage.<sup>69</sup> However, President Banda's declaration led to formidable domestic protest from religious and civil society organizations.<sup>70</sup> The pressure mounted quickly and, within just a few days, led her to reverse her position.<sup>71</sup> In doing so, President Banda explained that "Malawians are not ready" to live in a society where homosexuality is decriminalized. President Banda appealed to the international community to "allow each country to have that debate freely, without being pushed".<sup>72</sup>

In hindsight, *Soko and Kachepa* arguably demonstrates the limitations and perils of western aid conditionality on efforts to advance the LGBT movement in Malawi. The method seems to be a blunt instrument that does little to change embedded views and may even have led to resentment as a result of the neo-colonial undercurrents that resonated with the Malawian government and people. Indeed, the dangers associated with forcing change through aid conditionality are considerable. Such change is ostensibly alienating, lacking in legitimacy and hypocritical, to the extent that western democracies attempt to impose their own views and take the decision out of Malawians' hands. Aid conditionality also seems to have the greatest deleterious effect on those who need aid the most. The United Kingdom's decision to cut some of its aid, for example, left some 849 individuals accused of murder in Malawi without funding to have their trials.<sup>73</sup> As a result, they remained in custody with no trial dates scheduled for the foreseeable future.

Aid conditionality also did not stop Malawian authorities from prosecuting similar offences, as others have subsequently been arrested, charged and convicted since the defendants' release.<sup>74</sup> One individual was even arrested and charged for posting pro-LGBT information.<sup>75</sup> In short, international pressure and threats of aid conditionality, while ostensibly leading to the important step of obtaining the defendants' pardon and release, did little to change and possibly contributed to worsening the prevailing attitude relating to sexual minorities in Malawi. Moreover, international pressure presented a

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69 "Malawi: Courageous move to suspend anti-gay laws" (6 November 2012) *Human Rights Watch*, available at: <<http://www.hrw.org/news/2012/11/06/malawi-courageous-move-suspend-anti-gay-laws>> (last accessed 20 June 2015).

70 Kretz "From kill the gays", above at note 43 at 225.

71 Ibid. "Malawi to overturn", above at note 67, citing S Roberts "Malawi: President Joyce Banda U-turns on gay rights" (1 October 2012) *Pink News*, available at <<http://www.pinknews.co.uk/2012/10/01/malawi-president-joyce-banda-u-turns-on-gay-rights/>> (last accessed 22 December 2014).

72 Roberts "Malawi", *ibid.*

73 F Namangale "A suspect is innocent until proven guilty" (11 October 2014) *The Nation Online*, available at: <<http://mwnation.com/suspect-innocent-proven-guilty/>> (last accessed 22 December 2014).

74 C Stewart "3 in Malawi prisons await ruling on sodomy law" (16 June 2014) 76 *CRIMES*, available at: <<http://76crimes.com/2014/06/16/3-in-malawi-prisons-await-ruling-on-sodomy-law/>> (last accessed 22 December 2014).

75 Ibid.

virtually untenable approach to the recognition of LGBT rights, as it effectively required Malawi to employ undemocratic measures to fulfil western demands.

### Rule-shifting

Under Professor Thomas Stoddard's "rule-shifting, culture-shifting" paradigm, lawyers and activists can use the law to change the rules that govern society (rule-shifting) or, in some cases, use the law to change prevailing social attitudes on a given issue (culture-shifting). According to Professor Stoddard, the more traditional goals of lawmaking that can be achieved by rule-shifting include the creation of new rights and remedies for victims, as well as altering the conduct of government, citizens and private entities.<sup>76</sup>

A primary benefit of rule-shifting, in comparison to change prompted by aid conditionality, is that the change has greater perceived legitimacy because of the channels used to effect the change. Specifically, accomplishing change through judicial rulings or in the legislature is more likely to be accepted and adhered to by Malawians. It follows that rule-shifting is also positive in that any changes that are accomplished are more sustainable. That said, rule-shifting as a mechanism for change inherently suffers from its own set of limitations. As noted by Professor Stoddard, the type of changes achieved through rule-shifting may have a limited reach.<sup>77</sup> In a place like Malawi, where the population is largely rural based, such change can have even less impact. Moreover, the possibility of rule-shifting through the legislature seems remote at present, given the current homophobic climate in Malawi. Nevertheless, the decriminalization of homosexuality in Malawi through the judicial system would represent a pivotal gain for the LGBT movement, a gain that may eventually pave the way for further rule-shifting in the legislature.

While the LGBT movement failed to achieve any sustainable gains in *Soko and Kachepa*, the quest for rule-shifting continually appears to motivate domestic advocacy groups to pursue change by arguing the unconstitutionality of the sodomy laws. Of note, the Centre for Development of People (CEDEP), a small human rights advocacy organization born out of the need to fill major gaps in HIV service delivery, has been engaging in efforts to effect a rule-shift to advance LGBT rights.<sup>78</sup> In particular, CEDEP has led a sustained effort over the past few years for the Constitution to recognise the rights of sexual minorities.<sup>79</sup> At the risk of oversimplification, the argument appears to be that the Constitution provides a broad scope of protection against various forms of

76 Stoddard "Bleeding heart", above at note 9 at 972.

77 Id at 980–81.

78 The organization works on behalf of at-risk minority groups, including people in same sex relationships, sex workers and prisoners. See: <<http://www.cedepmalawi.org/media.html>> (last accessed 18 December 2014).

79 G Trapence "Malawi's Constitution clear on gay rights but politicians aren't" (17 November 2013) *Inter Press Service*, available at: <<http://www.ipsnews.net/2013/11/op-ed-malawis-constitution-clear-on-gay-rights-but-politicians-arent/>> (last accessed 22 December 2014).



discrimination and implicitly includes the category of sexual minorities. Under the heading “equality”, section 20 of the Constitution provides: “[d]iscrimination of persons in any form is prohibited and all persons are, under any law, guaranteed equal and effective protection against discrimination on grounds of race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, disability, property, birth or other status or condition.”<sup>80</sup>

As a matter of logic, the case for constitutional recognition and the concurrent invalidation of sodomy laws in the Penal Code is sound, as the open-ended text of section 20 provides the necessary semantics to enable a more expansive, but rational interpretation of the meaning of discrimination. Accordingly, if CEDEP and other like groups persist in their push to effect rule change by litigating the constitutionality of the sodomy laws, then there is a reasonable prospect for such change. A receptive judiciary may interpret the words “or other status or condition” to include protecting individuals from discrimination based on sexual orientation.

In the context of the situation in Malawi, domestic advocacy focusing on rule-shifting brings a number of advantages in comparison to international pressure and aid conditionality. A domestic advocacy organization such as CEDEP has particular advantages as the source of rule-shifting efforts because it is a local organization that is aware of the political and social nuances in respect of the LGBT movement in Malawi. Armed with “insider information”, an organization like CEDEP is well positioned to push for change because it is familiar with past and present litigation on the topic in Malawi and can make informed determinations about the suitability of a matter for impact litigation. As a local organization, headed by Malawians, it is also likely to carry far greater legitimacy in the eyes of Malawians than an international organization acting on its own or through foreign state intervention. Nevertheless, domestic rule-shifting efforts can be bolstered by support from the international community, which would foster a multi-layered advocacy approach.

The goal of rule-shifting to obtain constitutional protection for sexual minorities in Malawi presents a formidable challenge. In light of the conservative views and prevailing attitudes, it may take many years before a rule-shift can be achieved.<sup>81</sup> Moreover, the reality is that rule-shifting can work to the detriment of the LGBT movement. As a case in point, the Malawi government, under President Mutharika, used rule-shifting to pass section 137(a) of the

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80 The Constitution, sec 20.

81 Stoddard “Bleeding heart”, above at note 9 at 980–81. Professor Stoddard puts such efforts into context with his discussion of the efforts made by gays and lesbians to have a gay rights bill passed by New York City Council with respect to employment discrimination, among other things. In that situation, the group commenced their efforts to have the bill passed by the council in 1971. The council voted against the bill for 15 consecutive years until it was finally passed in 1986.

Penal Code, thereby outlawing further forms of same sex sexual activities in Malawi.<sup>82</sup>

Another challenge faced by the LGBT movement was the precedent set by the decision of the chief justice of the High Court to deny hearing Soko and Kachepea's application challenging the constitutionality of the sodomy laws. However, as Associate Professor Nan Hunter (as she then was) notes in her response to Professor Stoddard's article, strategically targeted, repeated efforts can lead to successful outcomes.<sup>83</sup> Thus, a multi-faceted, strategic and targeted advocacy movement, led by domestic advocacy groups, is central to a positive rule-shift to strike down the sodomy laws. The process would provide members of the LGBT community with relief from the threat of criminal prosecutions and the concomitant stigma relating to same sex sexual activity.

In recent years, the domestic advocacy movement in Malawi has engaged in a number of positive initiatives in an effort to produce a rule-shift to secure LGBT rights and protection. Domestic advocacy groups have pursued targeted, repeated efforts to secure basic rights for the Malawian LGBT community, such as providing litigation support to individuals facing criminal charges for consensual same sex activity, as well as holding preparatory workshops on how to use the courts to promote LGBT rights in Malawi.<sup>84</sup> During one such workshop, lawyers discussed the importance of using a constitutional lens to review laws and policies.<sup>85</sup> Through such efforts, advocacy groups are asserting a basis for including the LGBT community within Malawi's constitutional framework and placing the constitutionality of sodomy laws before the courts, where rule-shifting can be achieved.

In September 2013, the High Court conveyed to the nation for the first time that it was willing to consider the validity of arguments regarding the constitutionality of the sodomy provisions. The High Court took the unprecedented step of initiating proceedings to review the constitutionality of section 153(a) of the Penal Code, following the convictions of four Malawian males in the magistrate's court.<sup>86</sup> In giving notice in a national newspaper, the High Court invited all interested parties, including the Malawi Law Society, civil

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82 In recent months, the Malawi government has used legislation primarily geared toward addressing the long-standing issue of child brides as a vehicle to impose further restrictions on same sex relations. The Marriage Divorce and Family Relations Act 2015 limits marriage to "persons of the opposite sex". While the issue of legalizing same sex marriage has not been the primary focus of domestic advocacy organizations pursuing enhanced rights and protections for the LGBT minority, the new legislation defining marriage in this manner constitutes a further negative rule-shift.

83 N Hunter "Lawyering for social justice" (1997) 72/5 *New York University Law Review* 1009 at 1021.

84 "Lawyers in Malawi encourage law reform to promote the rights of LGBT" (26 June 2012) *Southern Africa Litigation Centre*, available at: <<http://www.southernafricalitigationcentre.org/2012/06/26/lawyers-in-malawi-encourage-law-reform-to-promote-the-rights-of-lgbt/>> (last accessed 7 November 2015).

85 Ibid.

86 R Lee "Malawi High Court to review sodomy laws" (4 November 2013) *Open Society*

rights organizations (local and international) and religious groupings, to apply to join the matter as *amici curiae* [friends of the court].<sup>87</sup> In response to the notice, a number of human rights organizations took the opportunity to file submissions.

Though the matter showed rule-shifting potential, the case stalled in the Malawi Supreme Court of Appeal (the Supreme Court). The attorney general initially objected in the High Court on the basis that the chief justice had not certified the proceedings as a constitutional matter, pursuant to section 9 of the Courts Act.<sup>88</sup> The High Court dismissed the objection and the attorney general appealed to the Supreme Court. It is understood that the Supreme Court had indicated that it was not in a position to examine the appeal in the absence of written reasons from the High Court.<sup>89</sup> After a lengthy delay and numerous requests by advocacy groups for the High Court to provide a record, Justice Mwaungulu provided a written ruling earlier this year in which he dismissed the attorney general's assertion that the chief justice needed to certify the proceedings before the High Court could have jurisdiction to deal with the constitutional question.<sup>90</sup> In addition to rejecting this argument, Mwaungulu J framed the substantive issue to be considered by the High Court succinctly, stating: "[in] the context of this matter, prohibiting or criminalizing the conduct in s. 153 of the Penal Code, even though deemed criminal, could be discriminatory based on sexual orientation or an invasion

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*Initiative for Southern Africa*, available at: <<http://www.osisa.org/lgbti/malawi/malawi-high-court-review-sodomy-laws>> (last accessed 6 November 2015).

- 87 Malawi Government in the High Court of Malawi, Principal Registry, notice of hearing "Confirmation case no 22 of 2011: *The Republic v Mussa Chiwisi* and confirmation case no 411 of 2011: *The Republic v Matthew Bellow* and confirmation case no 662 of 2011: *The Republic v Amon Champyuni*" (*Champyuni et al*) (11 September 2013), available at: <[http://www.osisa.org/sites/default/files/notice\\_of\\_hearing\\_high COURT\\_document.pdf](http://www.osisa.org/sites/default/files/notice_of_hearing_high COURT_document.pdf)> (last accessed 9 December 2015).
- 88 The attorney general relied on a procedural irregularity to obtain the stay, on the basis that the High Court had failed to have the chief justice certify the matter, pursuant to sec 9 of the Courts Act. Sec 9(2) and 9(3) of the Courts Act read: "(2) Every proceeding in the High Court and all business arising there out, if it expressly and substantively relates to, or concerns the interpretation or application of the provisions of the Constitution, shall be heard and disposed of by or before not less than three judges. (3) A certification by the Chief Justice that a proceeding is one which comes within the ambit of subsection (2) shall be conclusive evidence of that fact."
- 89 Correspondence from M Nkhata, associate professor of law, University of Malawi, counsel for *amici curiae* in *Champyuni et al* (14 November 2015) (copy on file with the author).
- 90 Principal Registry confirmation case nos 22, 411 and 662 of 2011: *The Republic v Mussa Chawisi, The Republic v Mathew Bello, The Republic v Amon Champyuni* (19 February 2016) (High Court), available at: <<http://www.southernafricallitigationcentre.org/1/wp-content/uploads/2016/04/Chawisi-and-others-v-Republic-Mwaungulu-Feb-2016.pdf>> (last accessed 15 September 2016).

of the right to privacy. Setting down the case for review would enable justification of these penal provisions or their being declared unconstitutional.”<sup>91</sup>

It is arguable that the High Court’s decision to initiate a constitutional review and Mwaungulu J’s recent reasons on certification represent progressive steps in the pursuit of a rule-shift concerning LGBT rights and protection. The High Court demonstrated, for the first time, a readiness to examine the constitutionality of the sodomy laws. With the issue of certification addressed and the matter remitted back to the High Court, the High Court is now in a position to deal with the constitutionality of section 153 of the Penal Code head on and will probably do so in the coming months when the matter is set down to be heard. In the meantime, the fates of the convicted individuals continue to hang in the balance.

The High Court’s decision to launch the proceedings suggests that targeted, repeated advocacy efforts by various domestic organizations have, to some degree, had an impact that has not previously occurred within Malawi’s justice system. As such, access to a rule-shifting platform, necessary for various advocacy organizations to present their arguments,<sup>92</sup> appears to be more proximate today than appeared to be the case in the aftermath of *Soko and Kachepea*, just a few years ago. Moreover, the manner in which the High Court chose to initiate the proceedings, by giving notice in a national newspaper, suggests that the awareness of any eventual rule-shift could have a wider reaching and more immediate impact, even in Malawi’s many rural areas.

Despite targeted, repeated advocacy efforts and signs of potential progress, other factors also impinge on the ability to achieve rule-shifting. Malawi’s current economic woes, for example, have provided difficult terrain for effective rule-shifting and contributed to substantial human rights violations. In 2014, empty government coffers resulted in Malawi court staff going on strike.<sup>93</sup> This caused the judicial system to grind to a halt, generating a huge backlog of cases and individuals awaiting their court proceedings.

In addition, deeply engrained religious and cultural attitudes among many Malawians continue to sustain an unfavourable environment for the pursuit of LGBT rights and protections. In the past year, such views have once again manifested themselves in the form of efforts towards negative rule-shifting. In February 2015, Malawi’s president signed into law the Marriage Divorce and Family Relations Act, which limits marriage in Malawi to “persons of

91 *Id* at 7–8.

92 See for example, the “Application for admission as *amicus curiae* by the Centre for Human Rights Education, Advice and Assistance (CHREAA)” in respect of *Champyuni et al* (8 November 2013) *Southern Africa Litigation Centre*, available at: <<http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2014/05/Application-CHREAA.pdf>> (last accessed 6 November 2015).

93 Y Msukwa “Support staff strike shuts down Malawi courts: Demand pay hike” (11 November 2014) *Malawi Nyasa Times*, available at: <<http://www.nyasatimes.com/support-staff-strike-shuts-down-malawi-courts-demand-pay-hike/>> (last accessed 13 September 2016).

the opposite sex”.<sup>94</sup> Moreover, the new law stipulates that a person’s sex is determined at birth. Consequently, this law expressly serves to exclude members of Malawi’s LGBT community from the institution of marriage. This negative rule-shift crystallizes into law the views of the many Malawians who opposed the attempt by Soko and Kachepa to enter into a union at their *chinkhoswe* in late 2009.

### Culture-shifting

Whilst rule-shifting is key to achieving crucial rights and protection for sexual minorities, changing the law will not guarantee any change in attitude among the Malawian people. Professor Stoddard asserts that law making also has the capacity for culture-shifting and, if done successfully, the law can be used to impart a new moral idea or standard and even lead to a change in cultural attitudes.<sup>95</sup> It is rare for lawmaking to lead to social change and it often only takes place at a “glacial pace”,<sup>96</sup> but change can be achieved under certain conditions.<sup>97</sup> Professor Stoddard asserts that lawmaking can transcend its traditional role of rule-shifting and take on a culture-shifting capacity when the change in question is profound, the public is aware of the change, the change is perceived as legitimate and there is continuous enforcement of the change.<sup>98</sup> Professor Hunter asserts that a fifth condition must also be present to achieve culture-shifting. She claims that there must also be “public engagement” in relation to the issue at hand.<sup>99</sup> As she states, “[b]y engagement I mean more than consciousness and more than passive support, even legitimacy. Unless there is significant public engagement in some form, beyond a small cadre of litigators or lobbyists, in the effort to change the law, there is no basis for culture-shifting”.<sup>100</sup>

Given the religious and cultural backdrop and related prevailing attitude in Malawi, the pursuit of culture-shifting presents a particularly ambitious and time consuming approach to change. Nevertheless, if true equality for sexual minorities is the end goal, it is a worthwhile pursuit. While Professor Stoddard is of the view that legal change through legislative action (as opposed to

94 E Perez “HRW welcomes Malawi marriage act” (17 April 2015) *The Jurist*, available at: <<http://jurist.org/paperchase/2015/04/hrw-welcomes-malawi-marriage-act.php>> (last accessed 9 December 2015).

95 Stoddard “Bleeding heart”, above at note 9 at 972.

96 Hunter “Lawyering for social justice”, above at note 83 at 1012.

97 In his article, Prof Stoddard identifies the United States Civil Rights Act of 1964 as an example of a law that caused a significant culture-shift. As he points out, the act changed the rules to ban discrimination and segregation on the basis of race, colour, religion or national origin. However, it also introduced a new model of conduct that overturned doctrines that had been embedded in American culture for centuries, such as black inferiority and “separate but equal” that preserved white privilege and perpetuated a stratified and unjust society: Stoddard “Bleeding heart”, above at note 9 at 978.

98 Ibid.

99 Hunter “Lawyering for social justice”, above at note 83 at 1019.

100 Ibid.

courtroom litigation) is more apt to achieve culture-shifting, Professor Hunter argues that both arenas reward repeat players.<sup>101</sup> This is potentially significant, as the current climate in the Malawi Parliament does not appear conducive to legislative change, even in a rule-shifting capacity.

While culture-shifting is the long term aim, there are a number of smaller gains that need to be made before lawmaking on such a profound scale can take place. Perhaps one of the most important steps is for the supporters of the LGBT movement to develop a more harmonious relationship with other human rights and civil society organizations that do not currently perceive LGBT rights as human rights and even see the quest for such rights as selfish.<sup>102</sup> One of the more dramatic displays of the gulf between the LGBT movement and other human rights organizations took place during a press conference in mid-May 2011.<sup>103</sup> Vince Mhone, the director of the Council of Non Governmental Organizations, took express steps to distance his umbrella group from CEDEP's efforts to advocate for LGBT rights.<sup>104</sup> Mhone called LGBT rights a "distraction from the many issues affecting the vast majority of Malawians".<sup>105</sup> CEDEP, however, has worked to build a coalition with other "like-minded actors".<sup>106</sup> By working towards a more collaborative relationship, it is conceivable that human rights advocates will accept the LGBT movement as being part of the human rights movement. Advocates will then be able to work collaboratively to achieve rights that will benefit all of the movement's members.<sup>107</sup>

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101 *Id* at 1020.

102 As with many historical equality based movements, there are often groups that do not see certain subgroups as worthy of support. This can be seen in the struggle for racial equality in apartheid South Africa during the 1980s when the African National Congress viewed sexual minorities as not deserving of social and legal equality. Similarly, the gay rights movement in the United States repeatedly excluded the transgender community from its initiatives as they considered it to be a "politically embarrassing subgroup": P Randolph Frye "Facing discrimination, organizing for freedom: The transgender community" in J D'Emilio, W Turner and U Vaid (eds) *Creating Change: Sexuality, Public Policy, and Civil Rights* (1st ed, 2000, Martin's Press) 451 at 460.

103 P Canning "Anti-gay backlash threatens aid and rights in Africa" (17 May 2011) *The Guardian*, available at: <<http://www.theguardian.com/global-development/poverty-matters/2011/may/17/homophobia-human-rights-malawi-uganda>> (last accessed 22 December 2014).

104 *Ibid*.

105 *Ibid*.

106 M Canavera "Picking up the pieces in Malawi" (6 June 2010) *Huffington Post*, available at: <[http://www.huffingtonpost.com/mark-canavera/picking-up-the-pieces-in\\_b\\_596371.html](http://www.huffingtonpost.com/mark-canavera/picking-up-the-pieces-in_b_596371.html)> (last accessed 23 December 2014).

107 For example, advocacy on the basis of the right to a fair trial is a common thread that applies to the vast majority of individuals in Malawi's criminal justice system, as most individuals charged with a criminal offence suffer from poverty and cannot afford a lawyer. Successful advocacy in this regard would have been crucial for Soko and Kachepe, who suffered prejudice at both the pre-trial and trial stages of their case. They were denied bail and had their rights to privacy and silence violated. These types of rights represent common ground for defendants, regardless of whether they fall into the

In addition to collaborating with external organizations, CEDEP has developed a three year multi-layered strategy that contains a number of culture-shifting advocacy tools.<sup>108</sup> One area that stands out is CEDEP's efforts to sensitize the media to LGBT issues, including television and radio outlets.<sup>109</sup> To this end, CEDEP has held a conference on the LGBT movement and provided education to the media about LGBT rights and the reasons for supporting their establishment in law. This seems to have led to more balanced reporting about LGBT related issues, as news articles now carry opposition views on a more consistent basis.<sup>110</sup>

CEDEP's director, Gift Trapance, has also written a series of newspaper articles about Malawians who are members of the LGBT community. In these articles, Trapance cultivates the humanity of the individuals he writes about and the reality that these people are more like others in the community than they are unlike.<sup>111</sup>

In addition to these initiatives, CEDEP and other LGBT supporters have continued to lobby the government for change and generate ongoing debate. Unfortunately, many politicians, including the current president, have taken the position that a referendum is the democratic way to resolve the issue.<sup>112</sup> This appears to be a political manoeuvre that avoids taking a hard-line position prone to damaging relationships with donor aid countries, while not offending various church organizations and their many constituents who oppose homosexuality. However, while a referendum provides a rule-shifting mechanism, it is likely to be an ineffective one, as it permits the majority's discriminatory views to act as a barrier to change. Accordingly, a referendum does not seem to be a viable option for positive rule-shifting, especially in the current climate, as it is highly unlikely that a majority of Malawians will vote to protect the rights of the "un-African", even "satanic" minority. In the circumstances, such a vote may undermine rule-shifting and culture-shifting advocacy efforts.

This analysis demonstrates that, despite many obstacles, domestic advocacy in the LGBT movement is promising, with CEDEP adopting a multi-layered advocacy approach in an effort to shift Malawian laws to benefit sexual

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LGBT, disabled, ethnic minority, indigent or other class of litigant. Hassan El Menyawi discusses the merits of advocating for privacy rights for all Egyptians to produce a culture that values privacy and thereby indirectly benefits gay men: H El Menyawi "Activism from the closet: Gay rights strategising in Egypt" (2006) 7/1 *Melbourne Journal of International Law* 28 at 47.

108 See Canavera "Picking up the pieces", above at note 106. CEDEP's plan focuses on training, capacity building and advocacy. CEDEP's strategy also incorporates international support as a key component in advancing the LGBT movement.

109 Ibid.

110 Mwakasungula "The LGBT situation", above at note 13 at 372.

111 Trapance "Malawi's Constitution clear", above at note 79.

112 Ibid.



minorities. With persistence, these efforts will ideally lead to a change in the cultural mindset of Malawians. Importantly, with CEDEP taking the lead, the push to shift laws and culture will carry greater legitimacy and ensure greater receptiveness.

## CONCLUSION

The case of *Soko and Kachepa* brought the rights of the LGBT minority out of the shadows and into the nation's conscience. The facts and timing of the case, however, made it an unsuccessful episode for LGBT rights in Malawi. The case led to a number of setbacks, not least of which was the government's use of the case to send a strong message to the community that portrayed homosexuality as evil, threatening traditional Malawian values and not to be tolerated. The government even engaged in undesirable rule-shifting, as it passed a law prohibiting same sex relations between women. In 2015, the government went even further, as it passed legislation that limits marriage to persons of the opposite sex and defines sex as that assigned at birth.

Although the case dealt a number of blows to the LGBT movement, it has also given rise to a number of positive steps in advocacy for the rights of sexual minorities in Malawi. While international pressure and aid conditionality did not appear to contribute to any sustained progress in relation to the LGBT movement, support from other nations can nonetheless provide invaluable assistance to a multi-layered domestic advocacy strategy. Viewed through this lens, *Soko and Kachepa* was not all about setbacks. Rather, with every "loss" in litigation, a "win" can be manufactured.<sup>113</sup> In this case, the "win" for the LGBT movement was raising the public awareness of the issue and allowing those involved in the movement to gather support and strive for change. As has been noted, since *Soko and Kachepa* a number of organizations have engaged in targeted, repeated efforts to achieve a rule-shift and better protection for Malawi's LGBT community, leading also to publication of a notice in a national newspaper which called for submissions on the constitutionality of Malawi's sodomy laws. Poised to deal squarely with the issue, the High Court provides a forum that will underpin any positive rule-shift with much needed legitimacy.

As discussed in this article, there are myriad reasons for the prevailing attitudes of anti-homosexuality in Malawi. In this type of environment, similar to that of many western states only one or two decades ago, the pursuit of culture-shifting activities and the achievement of an attitude of acceptance presents as a difficult task. Nevertheless, with time, energy and an effective multi-layered strategy, it is reasonable to posit that many of the desired rights, protection and even equality can be attained for sexual minorities in Malawi.

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113 D NeJaime "Winning through losing" (2010) 96 *Iowa Law Review* 941.