14

A Queer *Chinkhoswe*: Re-imagining the Customary in Malawi

Nigel Timothy Mpemba Patel

1 Introduction

In December 2009, the headline on the front-page of The Nation newspaper in Blantyre, Malawi, read "Gays Engage!" (Somanje 2009). Reporting on the *chinkhoswe,* a traditional Malawian matrimonial agreement ceremony,[1] held between Tiwonge Chimbalanga Kachepa (hereafter Tiwonge) and Steven Monjeza Soko (hereafter Steven), the story propelled queerness into the contemporary Malawian political arena. Subsequently, in the criminal case *of R v Steven Monjeza Soko and Tiwonge Chimbalanga Kachepa* (hereafter *R v Soko and Kachepa*) the couple were charged and convicted under provisions of the Penal Code: Steven for "buggery or having carnal knowledge of the second accused," and Tiwonge for "buggery or … permitting the first accused person to have carnal knowledge of him against the order of nature" (*R v Soko and Kachepa*, 2). In the alternative, they were both charged and convicted for "the offence of indecent practices between males" (ibid.).

[1] The Chichewa term *chinkhoswe* is often translated as an engagement ceremony as it sometimes is in the *R v Soko and Kachepa* judgment. However, the term 'engagement' often implies a later marriage ceremony. This is not always the case in the Malawian context and shows the difficulty with translation. The ceremony is in fact one form of a valid marriage that can be enter into. Thus, the translation I prefer is matrimonial agreement ceremony.

N. T. M. Patel (✉)
United Kingdom Supreme Court, Solicitor, UK
e-mail: nigeltpatel@gmail.com

G. B. Radics and P. Ciocchini (eds.), *Criminal Legalities and Minorities in the Global South*, Palgrave Socio-Legal Studies, https://doi.org/10.1007/978-3-031-17918-1_14

The maximum sentence of "14 years imprisonment with hard labour" was delivered for the main conviction of "buggery and permitting buggery" (ibid., 21). Re-reading the newspaper article now, I recall being troubled by how the press framed the story as a gay marriage between two men. I later came to understand why this was when I learnt that Tiwonge, who was assigned male at birth, identified and was largely socially accepted as a woman. Nonetheless, the events were a lesson in prejudice to queer[2] Malawi that our sexual and gender identities were condemned and acting upon them would criminalize us.

Reflecting on this moment a decade later, I realize that the *chinkhoswe,* beyond simply platforming queer life in Malawi, also positioned queerness in a direct relationship with local customs. Hence, this chapter will unpack the relationship between queerness within customs through the significant Malawian tradition of *chinkhoswe*. An analysis of the literature contextualises Steven and Tiwonge's *chinkhoswe*, giving rise to and framing the question: Where does the queer African appear, if at all, in the customary? (Hoad 2016, 1). This provides the basis of a critique of the *R v Soko and Kachepa* judgment. That is, it fails to take living customary law seriously and entrenches the narrative that queerness is 'un-African'. The chapter then considers an interview with Tiwonge which locates her as a queer African figure within custom, culture and traditional practice. In doing so, I hope to show the complexities and possibilities of overcoming criminal law through queering the customary.

The regulation and criminalization of queer Africans has occurred through law and politics in an international, national and customary context. These regimes address queerness in differing ways which create discourses that speak on, for and against queerness (Hoad 2016, 1). Steven and Tiwonge's *chinkhoswe* is a moment that highlights the tension between these differing regimes. This first section will firstly explore the historical place of queerness in Malawi, and then draw from the literature on Steven and Tiwonge's *chinkhoswe* in relation to anti-queer national legislation and international human rights law. The chapter then will engage in a discussion on the politics concerning queerness in Malawi through the customary practice of *chinkhoswe* by first examining the criminal law arguments deployed in *R v Soko and Kachepa*, and then the same event as experienced by Steven

[2] An umbrella term, not a closed list and not to be confused with a one-size-fits all idea. Often understood to mean those marginalized based on sex, sexuality and gender. Indicative of the diversity within sex, gender and sexuality and so operating to promote association between those who transgress cisnormativity and heteronormativity.

and Tiwonge (Kabwila 2013, 376). The chapter will demonstrate how the responses to Steven and Tiwonge's *chinkhoswe* are the product of the fraught history of queer genders and sexualities in Malawi. Accordingly, I suggest the *chinkhoswe* and surrounding events—dominantly represented as a moment of urgent crisis or the product of psychologized African homophobia—cannot be robustly understood without recognition of the historical impact of colonisation on gender and sexuality, and the criminalization of LGBT identities, in Malawi and the wider Africa.

2 A Queer Legal History of Malawi

The Republic of Malawi can be found in south-eastern Africa, comprising several Bantu ethnic groups, Asians and Europeans. As a British protectorate from 1891 to 1964, many of its laws, including the criminalization of same-sex activity (particularly between males), and more widely queerness in Malawi, was in its origin a result of British imposition. The first codification of colonial sodomy laws occurred during the British rule of India in 1825 (Kirby 2011). The Indian Penal Code (1860) which later spread to other British colonies criminalized a variety of sexual acts such as thigh sex, oral sex, anal sex or any form of intimacy that was not related to procreation. The ideology behind the punishment and stigmatization of queerness was based on Victorian interpretations of Christian morality, which condemned transgressive genders and sexualities (Browne 2017; Johnston 1987, 408). The colonial preoccupation with same-sex sex between males had a basis in anxieties that these acts undermined significant material interests of the colonies (Jeater 1993, 194–195). That is, the healthy male body, a central source for labour extraction for the colonial project, was threatened by the 'sodomite' (Biruk 2014; Epprecht 2013).

Queerness in Malawi did not however begin at colonisation, pre-colonial Malawi had a long history of queerness (Msibi 2011). The forceful colonial shaping of sexualities and genders should not result in the romanticisation of queerness in pre-Colonial Africa. Heteronormativity was still pervasive. Transgressive sexualities and genders were topics that were largely erased from the Malawian discourse. Colonialism supported and magnified this. The introduction of Victorian Christian morality further altered the gender and sexual practice of pre-colonial African societies. The laws in place during the colonial period, including the penal laws criminalizing male same-sex sex, remained in place after Malawi gained its independence in 1964 (Mwakasungula 2013). Along with these laws, the negative perceptions

towards queerness also persisted and continue to colour the dominant socio-political landscape (Mawerenga 2018; Msosa 2018; The Other Foundation 2019).

In post-colonial Malawi, queerness becomes more complicated. The case of *R v Soko and Kachepa* occurred in a historical context where queerness was largely erased. Thus, the public ceremony that the couple held incited and exposed the interaction between national, international, customary law and politics. National laws, rooted in colonialism, were used to prosecute the couple, and this section considers these laws and the national and governmental rhetoric surrounding them. In the international sphere, relevant human rights law on the issue and the international politics of donor funding are currently a key force shaping the ways queerness is perceived in Malawi. Much of the academic literature on Steven and Tiwonge's case is seen through an international lens. There are sufficiently fewer culturally focused sources on the queer *chinkhoswe*, and those that exist are often from traditional authorities and are largely dismissive of the act. There are however other sources that have begun to explore the relationship between the way queer people currently interact with African culture (Hoad 2016; Biruk 2014). These sources help to begin to locate the queer African in the customary.

At the national level, Malawi adopted a final Constitution with a Bill of Rights in 1995. Section 20(1) provides that:

> Discrimination of persons in any form is prohibited and all persons are, under any law, guaranteed equal and effective protection against discrimination on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, property, birth or other status. (Constitution of the Republic of Malawi 1995)

While gender or sexuality are not included, this is not a closed list. It is possible that their inclusion could be argued for under "other status". Despite this, Malawi's laws continue to persecute queerness. A violation of equal protection, section 153 of the Malawi Penal Code, which Tiwonge and Steven were convicted under, deals with "unnatural offences". It states that:

> Any person who—
> (a) has carnal knowledge of any person against the order of nature;
> (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. (Malawi Penal Code 1999, §153)

Furthermore, Section 156 deals with "indecent practices between males". It states that:

> Any male person who, whether in public or private, commits any act of gross indecency with another male person, or procures another male person to commit any act of gross indecency with him, or attempts to procure the commission of any such act by any male person with himself or with another male person, whether in public or private, shall be guilty of a felony and shall be liable to imprisonment for five years, with or without corporal punishment. (Malawi Penal Code 1999, §156)

Following the conviction of the couple under these laws, a series of comments from government officials condemned Tiwonge and Steven. The Deputy Minister of Information and Civic Education is noted as having said "that as far as the Malawi government was concerned there were only two homosexuals in Malawi namely Steven Monjeza and Tiwonge Chimbalanga" (Kumintengo 2012, 23). Disregarding the existence of queer Malawians, the words contribute to the historical project of queer erasure. It was also stated that "if there were any other homosexuals in country they were to come out in the open and face arrests" (ibid.). Following this, the Malawian Police Force embarked on a directive to arrest and prosecute queer people (Smith 2010).

The tactic of positioning queerness as foreign to Malawian culture was also being reproduced at the highest level of government. The president at the time, Bingu Wa Mutharika, stated that Tiwonge and Steven had "committed a crime against our culture, our religion and our laws" (Browne 2017, 10). Furthermore he "is on record to have vowed that under his leadership he would never legalise homosexuality" (Kumintengo 2012, 23). In line with his statements, the national movement was in fact regressive. Parliament further criminalized queerness in November 2010 by passing the Penal Code Amendment Bill which was then ratified by the president in January 2011 (McKay and Angotti 2016, 399). The amendment in the provision section 137(a) deals with "indecent practices between females". It states that:

> Any female person who, whether in public or private, commits any act of gross indecency with another female person, or procures another female person to commit any act of gross indecency with her, or attempts to procure the commission of any such act by any female person with herself or with another female person, whether in public or private, shall be guilty of an offence and shall be liable to imprisonment for five years. [Malawi Penal Code 1999, §137(a)]

The Malawian High Court announced a review on the constitutionality of the anti-queer laws in 2013, but there has been no decision on the issue since the initial announcement. In 2014, a moratorium on the anti-queer laws was announced by the government (US Department of State 2016). However, this moratorium was challenged by religious leaders and subsequently annulled by the Mzuzu High Court (UK Home Office 2017). Arrests of queer Malawians still continue to take place (Kalimira 2018). Additionally, the Marriage Divorce and Family Act (hereafter the MDFA Act) came into force in 2015. This Act recognizes the validity and equal status of civil marriages to customary marriages, religious marriages and marriages by repute or cohabitation. However, the capacity to enter a marriage is limited to "persons of the opposite sex" (MDFA 2015, §14). In a similarly reductionist move, sex is defined as being "in relation to the gender of a person, means the sex of that person at birth" (MDFA 2015, §2). This gender essentialist and homophobic law functions to keep marriage out of the reach of queer Malawians (Demone 2016, 384).

While changes to national law may highlight an increasingly anti-queer position, the place and perceptions of queerness in Malawi is also shaped by international action, through law and politics. Malawi is party to many international treaties that contain human rights provisions for protections of queer people.[3] However, these only go so far. Kabwila (2013, 376) states that the international human rights discourse is "imperial, parasitic and [one of] vulture character." While this is a severe critique, this position does raise a problem in the human rights narrative which "depicts an epochal contest pitting savages, on the one hand, against victims and saviours, on the other" (Mutua 2001, 201). In international law, discussions of human rights this can result in an essentialized reduction of Malawian culture as an anti-queer monolith. This feeds into the national narrative by masking queer voices that emanate from within the Malawian cultural discourse.

[3] These include the African Charter, United Nations Convention Against Torture, Convention on the Elimination of Discrimination Against Women, CRC, International Covenant on Civil and Political Rights (ICCPR), ICCPR Optional Protocol and International Covenant on Economic, Social and Cultural Rights.

Additionally, the linkage between human rights and international donor aid has contributed to framing the queer movement for freedom as a foreign agenda (Biruk 2014). This "can jeopardize increased awareness, education and information on LGBTI issues through constructive civil debate" (Browne 2017, 26). Aptly diagnosing the problem, Sharra (2012) writes that Western donors' "loud pronouncements have wrecked the chances of local ownership in the debate and created the appearance of a foreign agenda that is using the economic vulnerability of African governments and their over-dependence on aid to engage in what is being seen as cultural imperialism." In Malawi, these neo-colonial undercurrents contribute to the resentment towards queerness. This further casts the human rights discourse as an external intrusion and has a negative impact on the possibility for indigenous ownership of the queer movement.

Yet, signalling the importance of international action on the lives of queer Malawians, Tiwonge and Steven were pardoned by President Mutharika following an instructive visit by the UN Secretary General Ban Ki Moon (Biruk 2014, 449). The Malawian public's responses largely involved debates on whether the President was "correct 'to bow down to the West'" manipulating queerness into a proxy for issues of national sovereignty (ibid.).

3 Customary Laws and Chinkhoswe

The customary law in Malawi, whilst not homogenous, is largely matrilineal, as this system is applied in more geographical areas than the patrilineal system. Two central differences between the systems are that in a matrilineal system "when a man marries, he goes to live in the woman's village" and the children born to married women are affiliated to her and her village (Roberts 1964, 77; See also Mwabene 2005). However, in a patrilineal system the woman moves to the man's village and the children are affiliated to him. Neither of these is a strict practice; in each system parties can agree on variations or to depart from the custom depending on circumstances. The matrilineal system is the one under which Steven and Tiwonge had their *chinkhoswe* so I will only be considering this system. While matrilineal practices differ slightly across tribes, there are "common features in terms of conducting their marriages" (Mwabene 2005, 7).

It is also important to note the difference between official *customary law* and *living customary law*. Official customary law is customary law that has been codified (Grant 2006, 16). It is "the customary law captured in statute and precedent, and was directly influenced by … English legal principles."

(Himonga and Nhlapo 2014, 16). This form has largely been cast under colonial and patriarchal dominance (ibid.). Incorporated into statute and the system of precedent, the hybrid customary principles created under these oppressive systems are cemented in the official customary law. Conversely, the living customary law is flexible (Himonga and Bosch 2000). It is constituted by people's practices, "namely what they do and believe they ought to do as opposed to just what the state and courts believe they ought to do" (ibid., 319).

Under living customary law, there are generally five main requirements for a valid Malawian matrilineal customary marriage. The first requirement is capacity (Mwabene 2005, 10). This is largely centred on reaching adulthood, which is not attained at an exact age but rather after the completion of initiation. Secondly, the consent of the *ankhoswe* (marriage guardian)[4] "is essential for the validity of a person's marriage" (Mwabene 2005, 11).[5] This has been emphasised by the courts in *Manchichi v. Manuel* (Case No. 1 of 1979 N.T.A.C. [Malawi]) where the court found, "[w]e know that marriage is a social agreement between two persons, but in order that such marriage may acquire legal recognition under traditional customary law, the agreement must be sanctioned by the establishment of *chinkhoswe*." Thirdly, initiation—or having engaged in ceremonies that mark adulthood, such as circumcision for males, or virginity rituals for girls—is often a constitutive element of marriage capacity. However, at present, "this requirement is being disregarded" (Mwabene 2005, 13). The fourth requirement is "the acquisition of the right to cohabit" which arises from the consent of marriage guardians (ibid.). The fifth requirement is a marriage payment in the form of a chicken (ibid.). In addition to these requirements, there are common formalities that are often observed, whilst not essential, such as "the assent of parents and elders" (ibid.). Overall, the literature on customary marriages is largely in terms of cisgender heterosexual couples, but there is nothing to suggest that a marriage outside of this would not be valid.

Evident in the consideration of these requirements is the adaptability of living customary law. Embracing this dynamic nature, Steven and Tiwonge conducted a *chinkhoswe*. The living customary law provided them with the space to inhabit the customary. Despite this, the perception that queerness is foreign and corrupts the Malawian cultural fabric persists within the minds

[4] Known as *ankhoswe* in Chichewa also translates to marriage advocate for the *chinkhoswe*. Generally, the title given to the senior brother or maternal uncle of each spouse. See also BP Wanda (1988, 126–128).

[5] See also *Mbewe v Nyirenda* Civil Appeal No. 49 of 2003 HC (Mzuzu Registry) (Unreported) where Court noted marriage guardian was necessary requirement for valid customary marriage.

of many Malawians (Mwakasungula 2013, 359). Following the arrest of Tiwonge and Steven, like the government and religious leaders, traditional leaders also condemned queerness as un-Malawian (Malamba 2012, 39). In a study done by Malamba (2012), a focus group was held with four traditional leaders. Similarly to the state president, they all "agreed that same-sex relationships are alien to Malawian culture," speaking about queerness as a Western phenomenon (ibid.).[6] One traditional leader commenting "[t]his is not how we were taught by our parents to live. This is not part of our culture. These are things coming from the white people" (ibid.). Underlying this response is the idea that queerness in the post-colony should be rejected in the customary because queerness is racialized as exclusively within the paradigm of whiteness. Furthermore, entangled with the cultural rejection of queerness is religion. The colonial context produced a hybrid Christian customary. Thus, the position of institutions like the Malawi Council of Churches (MCC) who argue that queerness contradicts "Malawi's rich traditions, culture, and its spirituality as a God-fearing nation" fuels the abstraction of queerness from culture (Bvumbe 2011).

The rejection of queerness in Malawi on the basis of culture pervades all levels of Malawian society. Notably, those who use religion to argue that queerness is un-African from a cultural standpoint have been critiqued as being duplicitous. Mutua (2011, 460) points out that the imposition of religion, particularly Christianity, as a colonial tool to dominate Africans is often overlooked. Malawian culture is then paradoxically conceptualized as rejecting queerness on the basis of it being foreign, while Christianity is authentically embraced into its culture. Despite the fact that the notion of queerness as un-African is historically inaccurate, the inconsistency here shows that the rejection of queerness on a cultural basis is not logically based on it being alien. Furthermore, the hybridly Christian customary is a further indicator of the flexibility and adaptability of custom, culture and tradition. Mutua's critique also picks up on the traditional leaders "rush to talk about culture like it is a pure concept" (Kabwila 2013, 387). Traditional leaders, acting in a despotic fashion, essentialize Malawian cultural discourses. This contributes to state and religious sponsorship of queerphobia. This, in turn, feeds into the international narrative that depicts African culture monolithically. Thus, the grand effect is that queer cultural subjectivity is masked on an international, national and customary level.

[6] However, see also Msosa (2019). This study deals in part with traditional approaches to queer terminology. Msosa highlights that people expressed more tolerant views to queerness when indigenous language was used to discuss it.

4 The "Crime Against Malawian Culture": A Queer *Chinkhoswe*

Based on the legal and customary structure discussed earlier, the court in *R v Soko and Kachepa* judgment ruled that Steven and Tiwonge's *chinkhoswe* was a "crime against Malawian culture." While many scholars have focused on their analysis of the court's decision by interrogating its conflict with the Malawian Constitution and international law (Phooko 2011), my critique draws from Crystal Biruk (2014) and Neville Hoad's (2016) evaluations of the judgment, locating queerness within the customary. As will be discussed, the court in *R v Soko and Kachepa* positions itself as the sole authority on Malawian culture, and in the process fails to take customary law seriously. At the core of this is a tension between an official customary law approach to the law and a living customary approach to the law. The former manifests as a rigidly hierarchical approach to customary law which functions to preserves cisnormativity and heteronormativity, while the latter, the flexible approach, provides endless possibilities for queering.

Faced with the existence of queerness within custom, in the form of a perceived gay *chinkhoswe*, the court places itself as the guardian of Malawian culture. The court concludes, based solely on the prosecution's argument, that a matrimonial agreement "in a Malawian setting indeed takes place between a man and a woman" (*R v. Soko and Kachepa* 2010, 15). The judgment makes it clear that they view the traditional matrimonial agreement between Steven and Tiwonge as abhorrent (Kumintengo 2012). The irony in this case is that the two accused were largely recognized in the community as man and woman. Furthermore, the perception that the accused were both men conducting a gay marriage also emphasises how living, community recognized, customs provide a space for a queer challenge to formal Malawian criminal laws that have been politicized.

The court states that the queer *chinkhoswe* "transgresses the Malawian recognized standards of propriety since it does not recognize the living of a man with another as husband and wife" (*R v. Soko and Kachepa* 2010, 16). The court's interpretation of customary law here bypasses any consideration of the community who participated in the *chinkhoswe*. This is indicative of an attempt to appropriate the power to speak authoritatively on Malawian customary law. Rather than moving towards the plurality of authority that is associated to living customary law, the court's approach reinforces an interpretation of customary law that keeps it outside the reach of queer Malawians and the wider population. Not dissimilar to the traditional authorities, the court attempts to become a cultural despot.

This is further evident in the sentence that the court handed down. The judgement states that Malawian society is not "ready at this point in time to see sons getting married to other sons … or smile at her daughters marrying each other" (*R v. Soko and Kachepa* 2010, 23). The *chinkhoswe* is "not seen as simply a breach of the Penal Code, but termed … a 'crime against Malawi's culture'" (Price 2011, 553). Assuming the self-constructed role of cultural custodians, the court entrenches the idea that queerness is foreign to Malawian culture. The judgement in fact likens the couple's actions to the crime of hijacking. This culminates in what the judge refers to as a "scaring sentence" of the maximum fourteen years imprisonment with hard labour (*R v. Soko and Kachepa* 2010, 24). Queerness is made foreign to Malawian culture as it is cast as a corrupting influence on morality.

Despite dismissing the *chinkhoswe* as invalid, the judgement does however contain slight ambivalence to the possibility that the *chinkhoswe* was legitimately held under customary law. The court refers to the *chinkhoswe* ceremony as an "engagement or purported engagement" (*R v. Soko and Kachepa* 2010, 19). Furthermore, the defence, arguing for a mitigation of sentence, states that "sending them [the couple] to prison is like sending married people to prison" (*R v. Soko and Kachepa* 2010, 23). The court finds this argument "grossly wrong" for equating the queer *chinkhoswe*, monikered referred to as "a bizarre marriage", to the "normal practice of any other lawful marriage in Malawi" (ibid.). Despite this, these moments of ambivalence are signifiers of queer custom. They call us to ask what might have happened had the state not intervened (Hoad 2016, 10). The custom in this situation had provided for this "bizarre" re-imagining of cultural practice: a re-imagining which rendered culture incomprehensible to the courts who could not see the customs beyond the historical shackles of cisnormativity and heterosexuality.

Furthermore, in positioning itself as a cultural authority, the court does not take living custom seriously. The court never looked at whether the *chinkhoswe* could have been valid. The judgment fossilises the interpretation that customary law's exclusion of queerness is in line with the Penal Code's criminalisation of same-sex relations. Customary law is instrumentalized insofar as the *chinkhoswe* becomes solely a tool to determine whether the couple had anal sex. In a clear parallel to the colonial administration, there is a preoccupation with same-sex relations between perceived men, reducing the proliferations of queer cultural experiences down to the simple act of anal sex. Yet the court's approach—privileging official customary law—is troubled by Tiwonge's queering of gender (*R v. Soko and Kachepa* 2010, 9). This is particularly due to Tiwonge's cultural existence as a woman within

living custom where gender is not determined by the physical body. In using a medical examination of Tiwonge to determine her gender, the court places on a pedestal the sex-gender binary that queer Malawi subverts.

> Underlying the [witness] testimonies are hints that Tiwonge was a proper woman in many ways—attending church regularly and seeking to follow traditional womanly protocols for a proper engagement and marriage to Steven. Retrospectively, then, we might read the series of acts recalled during the trial—a pastor's agreement to take on a role as a traditional marriage counsellor (*ankhoswe*) to the couple when asked by Steven, the engagement photographer's willingness to serve as a marriage advocate for Tiwonge, the loaning of *zitenje* [traditional waxed cotton fabric] to Tiwonge by Flony, the admission of Tiwonge into a church congregation as a woman, and her employment in women's work at a lodge—as individual acts that accumulatively verified Tiwonge as a 'woman' in her community. Indeed, locally, Tiwonge was known by the nickname 'Auntie Tiwo'. (Biruk 2014, 458)

Inherent in the living customary law is the possibility for queer manifestation. This is not to say that living customary law is not laden with exclusionary sex, gender, and sexuality norms. Rather, living customary law allows these exclusionary norms to be contested in ways which can be productive to forming radical communal and relational conceptions of sex, gender, and sexuality that go beyond biological categories and determinism.

The mere inclusion of queerness in official customary law is not a desirable solution for queer equality. The possibility for queer people to utilize the changing living customary landscape is limited under official customary law. The attempt to codify, i.e. solidify, queerness, which by its nature is fluid, is futile. Codification will likely reinstate colonial and patriarchal principles within the relationships of queer Malawians. On the other hand, an approach to queer jurisprudence informed by the idea of living customary law allows for the creation of queer imaginaries that go beyond the present way in which we view relationships and ourselves.

5 It's Our Culture Too: Re-imagining the Customary

Despite the court asserting itself as an authority capable of "protecting" Malawian culture, this final section will explore the actual experience of Steven and Tiwonge's *chinkhoswe*, from the lenses of both personal and the

customary. Amid growing interest in and attention to how African experiences can challenge some of the assumptions of dominant Anglo-European queer theory (see Watson 2010), I decided to interview Tiwonge, who was largely objectified during the *chikhoswe* affair, rather than framed as a thinker and bearer of queer theory.[7] The in-depth interview was carried out face to face in Chichewa,[8] recorded and then transcribed and translated into English. The included selections from the interview are in no way a full representation of Tiwonge and her experiences. However, her narrative is a valuable account of the experiences and thoughts of a Malawian whose labour has contributed to the queering of the customary. The analysis of the qualitative interview with Tiwonge shows the agency that queer people can exercise in their occupation of the customary.

5.1 Pre-*chinkhoswe*

While this chapter focuses on the *chinkhoswe*, this should not be taken to reduce queer Malawian cultural existence to this sole tradition. Rather, the *chinkhoswe* has become the site of the main cultural contestations concerning queerness. In my general observations, the *chinkhoswe* is a tradition through which many Malawians view their and others' relationships to Malawian culture.

Importantly, Tiwonge's existence as a simultaneously cultural and queer figure extends well before the *chinkhoswe*. Tiwonge commented that when questioned about her gender, by people who perceived her as a man, she would explain to them that:

> In my village, I lived with my uncle, chief Chimbalanga. He saw that I was a girl. When people were rude to me, he told me not change anything about myself and that I was a girl from the home of the Chimbalangas.
>
> I am a woman, like any other woman, like your mother, your sister. I was born a girl, but I was bewitched.
>
> I am a woman like the wife you go home to every night.

[7] Steven, the other party to the *chinkhoswe*, passed away in 2012. The couple were no longer in a relationship at the time of his passing.

[8] The main language used in Malawi.

Tiwonge's recollections of all her responses to moments where her gender had been put under interrogation drew on culture and relationships. Echoing the witness statements in the *R v Soko and Kachepa* judgment, Tiwonge was culturally accepted as a woman. This upholds Oyewumi's (2002, 4) analysis that "in many African cultures … relationships have little to do with the nature of human bodies." That is, beyond the western system of biological determinism, Tiwonge's gender is culturally situated and affirmed by her membership in kinship structures.

The gendered affirmation Tiwonge experienced within the customary can perhaps explain her comfort to adapt cultural practices to suit her position in context of the *chinkhoswe*. This queer occupation destabilizes the traditional imperative towards biological family and reproductive futurity as the only legitimate framework to build worlds.

Despite the judgment referring to the *chinkhoswe* as a "bizarre" practice, the fact remains that queer Malawians have been privately having *chinkhoswes* (Gevisser 2014). The only difference with Steven and Tiwonge was that they had a public ceremony.

Having framed the focus of this chapter on culture, there are two things that I want to draw from Tiwonge's experience. Firstly, culture constitutes a site for resistance. This is denoted when Tiwonge points out in her interview that she had done nothing wrong culturally by having a *chinkhoswe*. This contests the idea put across by the court in the *R v Soko and Kachepa* judgment that the Penal Codes' criminalization of same-sex sex accords with custom. Instead, Tiwonge's account shows how custom is a potential source of defiance against laws crafted in the colonial period. Secondly, the police questioning of Tiwonge on whether the *chinkhoswe* was in fact staged for financial reward illustrates the potential negative effect of international aid on Malawian queer resistance. The politicization of donor aid in a Malawian cultural context robs queers of narratives that might centre their agency, rather than framing them as 'bought' by the West.

Building on this idea of resistance, Tiwonge presented a challenge to the Malawian or queer dichotomy.

> People have said that what I did was not Malawian, many people still speak about it today. They say that I am not Malawian because of the way I acted. I am from Malawi. I was born into the family of a chief, traditional authority Chimbalanga. I was born and bred in Malawi. Yes, people say a lot of things, but I am Malawian.

Tiwonge's assertion of ethnic belonging demonstrates the connections between Malawian culture and queerness. This offers a notable shift in the knowledge, views and discourses concerning queerness which helps to make connections with pre-colonial histories of queerness in Malawi.

Culture provides a powerful resource for queer people to assert their interests. Speaking on politics and culture, Tiwonge simultaneously claims her Malawianess and queerness. Culture is conceptualized as furthering a pluralist agenda, and in doing so, enables social change. Resisting the systematic silencing and denial of queerness that was instigated during colonisation, Tiwonge's cultural labour works to "unmute, unsee, and unlearn the outright erasure of multiple forms of evidence of queerness" (Nyanzi 2015, 134).

In my final interview with Tiwonge, she highlighted the importance of solidarity, both in an inter-queer sense and across differing cultures. This resonates with my definition of queer.[9] Making connections between the cultural experiences of people with transgressive sexes, sexualities or genders across Malawi and the wider Africa can expand the struggle against persecutory laws. This solidarity requires the building of relationships with people no matter how different we seem at the surface.

6 Conclusion

As in all cultures, there is an unmistakeable history of queerness in Malawian culture. The contemporary international, national and cultural systems that speak for and against queerness often cast or recast culture in confined ways that mask the complex relationship between culture and queerness. The *chinkhoswe* in many ways defines Malawian norms of gendered and sexual behaviour. Thus, while sexuality and gender imaginaries that implicate exclusionary norms are still at play in the queer *chinkhoswe,* it creates the possibility for queer Africans to begin to re-imagine the customary outside of heterosexual and cisgender norms. This possibility provides a mode for queers Africans to desire and resist in a way that furthers a queer African futurity.

Queerness and custom are both amorphous: the fluidity of queerness is complimented by the flexibility of living custom. In many ways "Queerness is not yet here. Queerness is an ideality … a structuring and educated mode

[9] See Footnote 2.

of desiring that allows us to see and feel beyond the quagmire of the present" (Muñoz 2009, 1). In a similar fashion, the *chinkhoswe* is a tradition that constitutes a possible future. It reveals the possibilities for the diverse queer community to further entwine queerness with culture. Thus, the queering of the *chinkhoswe* allows for us to "dream and enact new and better pleasures, other ways of being in the world, and ultimately new worlds" (ibid.).

Marriage has been roundly critiqued for being a cisnormative, heteronormative and patriarchal institution (Conrad and Nair 2010). This raises the valid concern: is a queer customary marriage possible at all? Or is what we have here, in Steven and Tiwonge's *chinkhoswe,* an African form of homonormativity and transnormativity? This chapter offers one explanation: when queerness is allowed to destabilize legal discourses and entrenched criminal laws centred around official interpretations of customary law, the cisnormative, heteronormative and patriarchal institution of marriage becomes challenged. Steven and Tiwonge's *chinkhoswe* configures living customs as a site of queer struggle. Recognizing the queerness in living customary law allows us to then celebrate this queer *chinkhoswe*, without making it the archetype of queerness. Under a living customary lens the queer *chinkhoswe* is just one of many articulations of queer Malawi. In other words, it only marks a moment in the development of a radical queer politics. A politics that is not just inclusionary of queerness under culture, as a form of tolerance, but one that reconfigures the ordinary. This *chinkhoswe* teaches us to look at queer lives first and hold culture accountable to what we need, rather than looking to culture to see how much of queer life can be fit into it.

This chapter presents a reading of queerness and culture in the Malawian locale, offering a "relational, historicized, and contextualized understanding" of queerness in Malawi (Spurlin 2001, 186). This provides the basis of a critique of the *R v Soko and Kachepa* judgment which highlights the importance of living custom for developing a flexible and non-prescriptive archive and future for queer Malawian culture.

Steven and Tiwonge's *chinkhoswe,* an example of living custom, provides an entry point into thinking about queerness in decolonised terms, a thinking "that neither follow[s] the prescriptive and [often] colonising human rights discourse" and troubles "the essentialism of Malawian culture" (Kabwila 2013, 376–377). I have argued that Steven and Tiwonge's *chinkhoswe* subverts the idea that queerness is un-African. Furthermore, the interview lifts the shadow cast by political and legal regimes to show that Tiwonge is a queer figure who exercises agency within the customary. Looking closely at the queer *chinkhoswe,* a decade after it happened, it serves as a reminder that the dichotomy between Malawian culture and queerness

is false; that is, one can embrace queerness and culture at the same time. This creates the possibility for queer Malawians and queer Africans to begin re-imagining the customary and our relationships to it.

Tiwonge Chimbalanga (Aunty T)
Image used with permission from Iranti-Org

References

Laws

Constitution of the Republic of Malawi, 1995.
Marriage, Divorce and Family Relations Act of 2015 (Malawi).
The Penal Code Amendment Act of 2011 (Malawi).
The Penal Code Chapter 7:01 of the Laws of Malawi [as amended to Act No. 8 of 1999].
The Indian Penal Code of 1860 (India).

International Instruments

UN Committee on Economic, Social and Cultural Rights, General comment no. 21, Right of everyone to take part in cultural life (art. 15, para. 1a of the Covenant on Economic, Social and Cultural Rights), 21 December 2009, E/C.12/GC/21.

Cases

Doreen Chikayera v Manuel Mteteka Civil Cause No. 70 of 2004, Mulunguzi Magistrate Court (Unreported).
Manchichi v. Manuel Civil Appeal Case No. 1 of 1979, N.T.A.C. (Unreported).
Mbewe v Nyirenda Civil Appeal No. 49 of 2003 HC (Mzuzu Registry) (Unreported).
R v Steven Monjeza Soko and Tiwonge Chimbalanga Kachepa 2010 MWHC 2 (Malawi Chief Resident Magistrate's Court).

Articles and Books

Biruk, Crystal. 2014. Aid for Gays': The Moral and the Material in 'African Homophobia' in Post-2009 Malawi. *The Journal of Modern African Studies* 52 (3): 447–473.
Browne, Philip. 2017. *Canaries in the Coal Mines: An Analysis of Spaces for LGBTI Activism in Malawi Country Report*. The Other Foundation.
Conrad, Ryan, and Yasmin Nair. 2010. *Against Equality: Queer Critiques of Gay Marriage*. Melbourne: Against Equality Press.

Demone, Bradley. 2016. LGBT Rights in Malawi: One Step Back, Two Steps Forward? The Case of *R v Steven Monjeza Soko and Tiwonge Chimbalanga Kachepa*. *Journal of African Law* 60 (3): 365–387.

Epprecht, Marc. 2013. *Hungochani: The History of a Dissident Sexuality in Southern Africa*. London: McGill-Queen's Press.

Gevisser, Mark. 2014. Love in Exile. *The Guardian*, November 27. https://www.theguardian.com/news/2014/nov/27/-sp-transgender-relationship-jail-exile-tiwonge-chimbalanga.

Grant, Evandé. 2006. Human Rights, Cultural Diversity and Customary Law in South Africa. *Journal of African Law* 50 (1): 2–23.

Himonga, Chuma, and Craig Bosch. 2000. The Application of African Customary Law under the Constitution of South Africa: Problems Solved or Just Beginning. *South African Law Journal* 117 (3): 306–341.

Himonga, Chuma, and Thanabantu Nhlapo. 2014. *African Customary Law in South Africa: Post Apartheid and Living Law Perspectives*. Cape Town: Oxford University Press Southern Africa.

Hoad, Neville. 2016. Queer Customs against the Law. *Research in African Literatures and Film* 47 (2): 1–19.

Jeater, Diana. 1993. *Marriage, Perversion and Power: The Construction of Moral Discourse in Southern Rhodesia, 1890–1920*. Oxford: Claredon Press.

Johnston, Sir Harry Hamilton. 1987. *British Central Africa: An Attempt to Give Some Account of a Portion of the Territories under British Influence North of the Zambesi*. London: Methuen.

Kabwila, Jessie. 2013. Seeing Beyond Colonial Binaries: Unpacking Malawi's Homosexuality Discourse. In *Queer African Reader*, ed. S. Ekine and H. Abbas, 376–392. Oxford: Pambazuka Press.

Kirby, Hon Michael. 2011. The Sodomy Offence: England's Least Lovely Criminal Law Export? *Journal of Commonwealth Criminal Law* 1: 1–33.

Kumintengo, Josephine Lucia. 2012. *The Narrow Road Towards a Possible Decriminalisation of Consensual Sodomy in Malawi*. PhD dissertation, University of Cape Town.

Malamba, Manuel. 2012. *The Controversy of Homosexuality: A Critical Look at the Issues That Make Legalizing Homosexuality in Malawi Difficult*. PhD dissertation, University of Gothenburg.

Mawerenga, Jones Hamburu. 2018. *The Homosexuality Debate in Malawi*. Mzuzu: Mzuni Press.

McKay, Tara, and Nicole Angotti. 2016. Ready Rhetorics: Political Homophobia and Activist Discourses in Malawi, Nigeria, and Uganda. *Qualitative Sociology* 39 (4): 397–420.

Msibi, Thabo. 2011. The Lies We Have Been Told: On (Homo) Sexuality in Africa. *Africa Today* 58 (1): 55–77.

Msosa, Alan. 2018. *Human Rights and Same-Sex Intimacies in Malawi*. PhD dissertation, University of Essex.

Msosa, Alan. 2019. *Under Wraps a Survey of Public Attitudes to Homosexuality and Gender Non-conformity in Malawi*. The Other Foundation.

Muñoz, José Esteban. 2009. *Cruising Utopia: The Then and There of Queer Futurity*. New York: New York University Press.

Mutua, Makau. 2001. Savages, Victims, and Saviors: The Metaphor of Human Rights. *Harvard International Law Journal* 42: 201–246.

Mutua, Makau. 2011. Sexual Orientation and Human Rights: Putting Homophobia on Trial. In *African Sexualities: A Reader*, ed. Sylvia Tamale, 452–462. Oxford: Pamabazuka Press.

Mwabene, Lea. 2005. Divorce in Matrilineal Customary Law Marriage in Malawi: A Comparative Analysis with the Patrilineal Customary Law Marriage in South Africa. PhD dissertation, University of Western Cape.

Mwakasungula, Undule. 2013. The LGBT Situation in Malawi: An Activist Perspective. In *Human Rights, Sexual Orientation and Gender Identity in the The Commonwealth: Struggles for Decriminalisation and Change*, ed. Lennox Corinne et al., 359–379. London: University of London Press.

Nyanzi, Stella. 2015. Knowledge Is Requisite Power: Making a Case for Queer African Scholarship. In *Boldly Queer: African Perspectives on Same-Sex Sexuality and Gender Diversity*, ed. Theo Sandfort et al., 125–135. Hague: HIVOS.

Oyewumi, Oyeronke. 2002. Conceptualizing Gender: The Eurocentric Foundations of Feminist Concepts and the Challenge of African Epistemologies. *Jenda: A Journal of Culture and African Women Studies* 2 (1): 1–9.

Phooko, Moses Retselisitsoe. 2011. Homosexuality and Privacy: Rep v Soko & Another under the Magnifying Glass. *Malawi Law Journal* 5 (1): 55–74.

Price, Louise. 2011. The Treatment of Homosexuality in the Malawian Justice System: *R v Steven Monjeza Soko and Tiwonge Chimbalanga Kachepa*. *African Human Rights Law Journal* 10 (2): 524–533.

Roberts, Simon. 1964. Matrilineal Family Law and Custom in Malawi: A Comparison of Two Systems. *Journal of African Law* 8 (2): 77–99.

Sharra, Steve. 2012. Debating Homosexuality and Human Rights in Malawi. https://wagingnonviolence.org/feature/debating-homosexuality-and-human-rights-in-malawi/. Accessed 10 May 2018.

Smith, David. 2010. Malawi Launches Operation against High-Profile Gay and Lesbian People. *The Guardian*, February 16. https://www.theguardian.com/world/2010/feb/16/malawi-operation-against-gays-lesbians.

Spurlin, William J. 2001. Broadening Postcolonial Studies/Decolonizing Queer Studies. In *Postcolonial, Queer: Theoretical Intersections*, ed. John C. Hawley, 185–205. Albany: State University of New York Press.

The Other Foundation. 2019. Under Wraps: A Survey of Public Attitudes to Homosexuality and Gender Non-conformity in Malawi. http://theotherfoundation.org/wp-content/uploads/2019/09/Other-Foundation-Malawi-Paper-v7.pdf. Accessed 1 Oct 2019.

United Kingdom Home Office. 2017. Country Policy and Information Note Malawi: Sexual orientation and gender identity. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/678301/Malawi_-_SOGI_-_CPIN_-_v3.0__February_2017_.pdf. Accessed 10 May 2018.

United States Department of State. 2016. Country Report on Human Rights Practices—Malawi 2015 (Section 6). http://www.state.gov/j/drl/rls/hrrpt/2015/af/252701.htm. Accessed 10 May 2018.

Wanda, Boyce P. 1988. Customary Family Law in Malawi: Adherence to Tradition and Adaptability to Change. *The Journal of Legal Pluralism and Unofficial Law* 20 (27): 126–128.

Watson, Patricia. 2010. *Queer Malawi: Untold Stories*. Johannesburg: Malawi's Centre for the Development of People (CEDEP) and Gay and Lesbian Memory in Action (GALA).

Newspapers

Bvumbe, Bishop Joseph. 2011. Statement by Lutheran chairman of the Malawi Council of Churches (MCC). *The Sunday Times*, February 20.

Kalimira, Samuel. 2018. Suspected Gay Arrested in Mzuzu. *The Daily Times*, April 25.

Somanje, Caroline. 2009. Gays Engage! *The Nation*, December 27.